No. SC17-1001

IN THE

Supreme Court of Florida

PAUL ALFRED BROWN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
Lower Tribunal No. 86-CF-4084-A

APPELLANT'S RESPONSE TO SEPTEMBER 27, 2017 ORDER TO SHOW CAUSE

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PRELIMINARY STATEMENT

Appellant, Paul Alfred Brown ("Brown"), is currently incarcerated at Union Correctional Institution, 25636 NE SR-16, Raiford, Florida 32083, under a sentence of death. Page references to the record on appeal are designated with "R" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

The death sentence of Appellant, Brown, was imposed after a 7-5 jury recommendation pursuant to a capital sentencing scheme that was ruled unconstitutional by the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). But for the date his sentence became final, Brown would be one of the many death row prisoners in Florida who have been granted new penalty phase proceedings.[1]

The issue left at least partially unresolved in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017), is whether this Court will continue to apply its unconstitutional "retroactivity cutoff" to deny *Hurst* relief to Brown on the ground that his sentence did not become final at least one day after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

This Court has already applied *Hurst* retroactively as a matter of state law and granted relief in numerous collateral-review cases where the defendant's sentence became final after *Ring*. However, this Court has never addressed *Hurst* retroactivity as a matter of federal law. Instead, the Court has consistently applied a state-law cutoff at the date *Ring* was decided—June 24, 2002—to deny relief in dozens of other collateral review cases. *See Asay v. State*, 210 So. 3d 1 (Fla. 2016). Brown

[1] In fact, in a fair number of those cases, the State has opted not to seek the death penalty, and the individuals have subsequently been sentenced to life. *See* Emilia L. Carr, John M. Buzia, Arthur Barnhill, III, Richard T. Robards, and Maurice L. Floyd.

maintains that those cases were wrongly decided on both state and federal grounds. The *Ring*-based cutoff is unconstitutional and should not be applied to Brown. Denying Brown *Hurst* relief because his sentence became final in 1990, rather than some date between 2002 and 2016, is a violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Brown is entitled to *Hurst* retroactivity as a matter of federal law and *Hitchcock*[2] should not deny Brown relief.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This appeal addresses whether federal law requires this Court to extend *Hurst* retroactivity to death sentences that became final prior to *Ring*, rather than arbitrarily granting *Hurst* relief solely to post-*Ring* death sentences. Brown respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Brown also respectfully requests that the Court permit full briefing in this case in accord with the normal, untruncated rules of appellate practice.

Brown's life is at stake and depriving Brown of his opportunity for full briefing in this case would constitute an arbitrary deprivation of the vested state right to a mandatory plenary appeal in capital cases. *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015) ("[T]his Court has a mandatory obligation to review all death penalty cases to ensure that the death sentence is imposed in accordance with constitutional

[2] Brown notes that a petition for a writ of certiorari is pending in *Hitchcock* (No. 17-6180).

and statutory directives."); *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

RELEVANT PROCEDURAL HISTORY AND FACTS

Brown has challenged the constitutionality of Florida's death penalty scheme since 1986. As such, Brown has properly preserved his claims. Prior to his trial, Brown filed a Motion for Statement of Aggravating Circumstances and *three* motions to declare Fla. Stat. § 921.141 unconstitutional. R8/842-50. After his trial in 1987, but prior to sentencing, Brown filed *another* motion to declare Florida's death penalty unconstitutional as applied, arguing that only requiring seven votes for a death recommendation was unconstitutional. R8/897-900.

On direct appeal, Brown argued that a bare majority jury recommendation was unconstitutional and that the trial court erred in denying a requested jury instruction[3] on the role of the jury based on *Caldwell*,[4] but in a 5-2 decision, this Court affirmed Brown's convictions and sentences of death. *Brown v. State*, 565 So. 2d 304 (Fla. 1990). Two members of the Court dissented to Brown's sentence. The United States Supreme Court denied certiorari on November 26, 1990. *Brown v. Florida,* 498 U.S. 992 (1990).

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[3] "The requested instruction reads as follows: "The fact that your recommendation is advisory does not relieve you of your solemn responsibility[,] for the Court is required to and will give great weight and serious consideration to your verdict in imposing sentence."' *Brown v. State*, 565 So. 2d 304, 308 n.9 (Fla. 1990).
[4] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

In addition, Brown raised an *Apprendi*[5] claim in his state habeas petition. *Brown v. Moore*, 800 So. 2d 223, 224–25 (Fla. 2001). Brown also raised the *Apprendi/Ring* issue in his federal habeas petition. *Brown v. Sec'y, Dept. of Corr.*, 8:01-CV-2374-T-23TGW, 2009 WL 4349320, at *41-44 (M.D. Fla. Nov. 25, 2009).

ARGUMENT

I. This Court's "retroactivity cutoff" at *Ring* is unconstitutional and should not be applied to Brown.

As will be discussed further below, to deny Brown retroactive relief under *Hurst v. Florida*, 136 S.Ct. 616 (2016), on the ground that his death sentence became final before June 24, 2002 under the decision in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), while granting retroactive *Hurst* relief to inmates whose death sentences were not final on June 24, 2002 under the decision in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), violates Brown's right to Equal Protection of the Laws under the Fourteenth Amendment to the Constitution of the United States (*e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against arbitrary infliction of the punishment of death under the Eighth Amendment to the Constitution of the United States (*e.g.*, *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam)).

As a matter of state law, this Court has applied *Hurst* retroactively and granted

[5] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

relief where the defendant's sentence became final after the date *Ring* was decided– June 24, 2002. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). The Court recently reaffirmed its retroactivity cutoff in *Hitchcock.* However, even in *Hitchcock* this Court has never addressed *Hurst* retroactivity as a matter of federal law. This Court is bound by the federal constitution; therefore, it has the obligation to address Brown's federal retroactivity arguments. *See Testa v. Katt*, 330 U.S. 386, 392-93 (1947) (state courts must entertain federal claims in the absence of a "valid excuse").

This Court's current *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Brown the same *Hurst* relief being granted in scores of materially indistinguishable collateral cases. Denying Brown *Hurst* retroactivity because his death sentence became final in 1990, while affording retroactivity to similarly-situated defendants whose sentences became final between 2002 and 2016, some solely due to resentencing, would violate the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty, as well as the Fourteenth Amendment's guarantee of equal protection and due process.

A. This Court's retroactivity cutoff violates the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty.

It has long been established that the death penalty cannot "be imposed under sentencing procedures that create[] a substantial risk that it would be inflicted in an

arbitrary or capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman v. Georgia*, 408 U.S. 238, 310 (1972) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.") (Stewart, J., concurring). This Court's current *Hurst* retroactivity cutoff results in arbitrary and capricious denials of relief to similarly situated capital defendants.

The bright line cutoff for *Hurst* retroactivity established by this Court has created demonstrably arbitrary results. Experience has already shown the arbitrary results inherent in this Court's application of the *Ring*-based retroactivity cutoff. The date of a particular death sentence's finality on direct appeal in relation to the June 24, 2002 decision in *Ring* has at times depended on whether there were delays in transmitting the record on appeal to this Court for the direct appeal;[6] whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with this Court's summer recess; how long the assigned Justice of this Court took to submit the opinion for release;[7] whether a rehearing motion was filed and whether

[6] *See, e.g.*, *Lugo v. State*, 845 So. 2d 74 (Fla. 2003) (two-year delay between the time defense counsel filed a notice of appeal and the record on appeal being transmitted to this Court, almost certainly resulting in the direct appeal being decided post-*Ring*).
[7] *Compare Booker v. State*, 773 So. 2d 1079 (Fla. 2017) (this Court's opinion issued within one year after all briefs had been submitted, before *Ring*), *with Hall v. State*, 201 So. 3d 628 (Fla. 2016) (opinion issued twenty-three months after the last brief was submitted). If this Court had taken the same amount of time to decide *Booker* as it did *Hall*, Mr. Booker's death sentence would have become final after *Ring*.

an extension was sought; whether there was a scrivener's error necessitating issuance of a corrected opinion; whether counsel chose to file a petition for a writ of certiorari in the United States Supreme Court or sought an extension to file such a petition; and how long a certiorari petition remained pending in the United States Supreme Court.

In one striking example, this Court affirmed Gary Bowles' and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both inmates petitioned for a writ of certiorari in the United States Supreme Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* applied retroactively to him because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47. However, Mr. Bowles, whose case was decided on direct appeal on *the same day* as Mr. Card's, falls on the other side of this Court's current retroactivity cutoff.[8]

[8] Adding to the "fatal or fortuitous accidents of timing", Mr. Card's Petition for Writ of Certiorari was actually docketed 28 days before Mr. Bowles' Petition and was scheduled to go to conference first. However, for reasons unknown, Mr. Card's

Moreover, under the Court's current approach, "older" cases dating back to the 1980s with a post-*Ring* resentencing are subject to *Hurst*, while other less "old" cases are not. *See, e.g.*, *Johnson v. State*, 205 So. 3d 1285, 1285 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was granted relief on a third successive post-conviction motion in 2010, years after the *Ring* decision); *Card*, 219 So. 3d at 47 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was afforded relief on a second successive post-conviction motion in 2002; *cf. Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (granting *Hurst* relief in a case where the crime occurred in the late 1990s, but interlocutory appeals resulted in a ten-year delay before the trial). Under this Court's arbitrary approach, a defendant originally sentenced to death before Brown, but later resentenced to death after *Ring*, would receive *Hurst* relief and Brown would not, solely because Brown's trial and representation did not have issues substantial enough to warrant a new penalty phase.

Even if this Court were to maintain its unconstitutional retroactivity "cutoff" at *Ring*, individuals who preserved the substance of the *Hurst* decisions before *Hurst*

Petition was redistributed to a later conference, thus placing his denial within the *Ring* cut-off. Compare *Card v. Florida*, Case No. 01-9152, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/01-9152.htm (last visited Oct. 17, 2017), with *Bowles v. Florida*, Case No. 01-9716, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/01-9716.htm (last visited Oct. 17, 2017).

should receive the retroactive benefit of *Hurst* under this Court's "fundamental fairness" doctrine, which the Court has previously applied in other contexts, *see, e.g.*, *James v. State*, 615 So. 2d 668, 669 (Fla. 1993), and which the Court has applied once in the *Hurst* context, *see Mosley*, 209 So. 3d at 1274, but inexplicably never addressed since. Justice Lewis recently endorsed this preservation approach in *Hitchcock*. *See* 2017 WL 3431500, at *2 (Lewis, J., concurring) (stating that the Court should "simply entertain *Hurst* claims for those defendants who properly presented and preserved the substance of the issue, even before *Ring* arrived."). As noted above, Brown's trial and appellate counsel challenged the constitutionality of Florida's death penalty statute and preserved claims under both *Apprendi* and *Ring*.

B. This Court's retroactivity cutoff violates the Fourteenth Amendment's guarantee of equal protection and due process.

This Court's retroactivity cutoff violates the Fourteenth Amendment's guarantee of equal protection and due process. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture—on collateral review—differently without "some ground of difference that rationally explains the different treatment." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). When two classes are created to receive different treatment by a state actor like this Court, the question becomes "whether there is some ground of difference that rationally explains the different treatment . . . ." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *see also McLaughlin*, 379 U.S. at 191. The Fourteenth Amendment requires that distinctions in state

criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Capital defendants have a fundamental right to a reliable determination of their sentences. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). This Court's *Hurst* retroactivity cutoff lacks a rational connection to any legitimate state interest. *See Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

To deny Brown "relief when other similarly situated defendants have been granted relief amounts to a denial of due process." *Hitchcock*, 2017 WL 3431500, at *3 (Pariente, J., dissenting). Denying the benefit of Florida's new post-*Hurst* capital sentencing statute to "pre-*Ring*" defendants like Brown violates the Fourteenth Amendment because once a state requires certain sentencing procedures, it creates Fourteenth Amendment life and liberty interests in those procedures. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (due process interest in state created right to direct appeal); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (liberty interest in state-created sentencing procedures); *Ford v. Wainwright*, 447 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (liberty interest in meaningful state proceedings to adjudicate competency to be executed); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-89 (1998) (O'Connor, J., with Souter, Ginsburg, & Breyer, JJ., concurring) (life interest in state-created right to capital clemency proceedings). "Considerations of fairness and uniformity make it very 'difficult to justify depriving

a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases.'" *Falcon v. State*, 162 So. 3d 954, 962 (Fla. 2015) (quoting *Witt v. State*, 387 So. 2d 922, 929 (Fla.1980)).

Although the right to the particular procedure is established by state law, the violation of the life and liberty interest it creates is governed by *federal* constitutional law. *See id.* at 347; *Ford*, 477 U.S. 399, 428-29 (O'Connor, J., concurring), *Evitts*, 469 U.S. at 393 (state procedures employed "as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant'" must comport with due process). Instead, defendants have "a substantial and legitimate expectation that [they] will be deprived of [their] liberty only to the extent determined by the jury in the exercise of its discretion . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Hicks*, 447 U.S. at 346 (O'Connor, J., concurring). Courts have found in a variety of contexts that state-created death penalty procedures vest in a capital defendant life and liberty interests that are protected by due process. *See. e.g.*, *Ohio Adult Parole Authority*, 523 U.S. at 272; *Ford*, 477 U.S. at 427-31 (O'Connor, J., concurring). In *Hicks*, the Supreme Court held that the trial court's failure to instruct the jury that it had the option to impose an alternative sentence violated the state-created liberty interest (and federal due process) in having the jury select his sentence from the full range of alternatives available under state law. 477 U.S. at 343.

C. Brown's death sentence also violates the Eighth Amendment.

This Court held in *Hurst v. State* that there is an Eighth Amendment right to have a jury unanimously recommend a death sentence before a death sentence is permissible. *Hurst v. State*, 202 So. 3d at 59 ("we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment."). The right to a unanimous jury recommendation of death requires full retroactivity and anything less is unreliable and violates the Eighth Amendment.[9]

II. Because the *Hurst* decisions announced substantive constitutional rules, the Supremacy Clause of the United States Constitution requires state courts to apply those rules retroactively to all cases on collateral review.

A. The Supremacy Clause requires state courts to apply substantive constitutional rules retroactively to all cases on collateral review.

In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), the United States Supreme Court held that the Supremacy Clause of the Constitution requires state

[9] *See Lambrix v. State*, No. SC17-1687, 2017 WL 4320637, at *2 (Fla. Sept. 29, 2017) (Pariente, J., dissenting) ("As I stated in *Hitchcock*, "[f]or the same reasons I conclude that the right announced in *Hurst* under the right to jury trial (Sixth Amendment and article I, section 22, of the Florida Constitution) requires full retroactivity, I would conclude that the right to a unanimous jury recommendation of death announced in *Hurst* under the Eighth Amendment requires full retroactivity." *Id.* at *4. "Reliability is the linchpin of Eighth Amendment jurisprudence, and a death sentence imposed without a unanimous jury verdict for death is inherently unreliable." *Id.* at *3. The statute under which Lambrix was sentenced, which only required that a bare majority of the twelve-member jury recommend a sentence of death, was unconstitutional, and therefore unreliable, under both the Sixth and Eighth Amendments.").

courts to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis.

In *Montgomery*, a Louisiana state prisoner filed a claim in state court seeking retroactive application of the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The state court denied the prisoner's claim on the ground that *Miller* was not retroactive as a matter of state retroactivity law. *Montgomery*, 136 S. Ct. at 727. The United States Supreme Court reversed, holding that because the *Miller* rule was substantive as a matter of federal law, the state court was obligated to apply it retroactively. *See id.* at 732-34.

Montgomery clarified that the Supremacy Clause requires state courts to apply substantive rules retroactively, notwithstanding state-law analysis. *Montgomery*, 136 S. Ct. at 728-29 ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, *the Constitution* requires state collateral review courts to give retroactive effect to that rule.") (emphasis added). Thus, *Montgomery* held, "[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id.* at 731-32.

Of note for purposes of *Hurst* retroactivity analysis, the Supreme Court found the *Miller* rule substantive in *Montgomery* even though the rule had "a procedural

component." *Id.* at 734. *Miller* did "not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* or *Graham*." *Miller*, 132 S. Ct. at 2471. Instead, "it mandate[d] only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* Despite *Miller*'s procedural mandates, the Court in *Montgomery* warned against "conflat[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the *manner of determining* the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (first alteration added). Instead, the Court explained, "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," and that the necessary procedures do not "transform substantive rules into procedural ones," *Id.* at 735. In *Miller*, the decision "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*." *Id.* at 734.

B. The *Hurst* decisions announced substantive rules that must be applied retroactively to Brown under the Supremacy Clause.

The *Hurst* decisions announced substantive rules that must be applied retroactively to Brown by this Court under the Supremacy Clause. At least two substantive rules were established by *Hurst v. Florida* and *Hurst v. State*.

First, a Sixth Amendment rule was established requiring that a jury find as fact: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are "sufficient" to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Each of those findings is required to be made by the jury beyond a reasonable doubt. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule). As in *Montgomery*, these requirements amounted to an "instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish." *Id.* at 735.

Second, an Eighth Amendment rule was established which requires those three beyond-a-reasonable-doubt findings to be made unanimously by the jury. The substantive nature of the unanimity rule is apparent from this Court's explanation in *Hurst v. State* that unanimity (1) is necessary to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders, and (2) ensures that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Hurst v. State*, 202 So. 3d at 60-61. The function of the unanimity rule is to ensure

that Florida's death-sentencing scheme complies with the Eighth Amendment and to "achieve the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law." *Id.* Therefore, as a matter of federal retroactivity law, the rule is substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"). This is true even though the rule's subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (noting that state's ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).[10]

The same reasoning applies in the *Hurst* context. The Sixth Amendment

[10]In *Welch*, the Court held that *Johnson*'s ruling was substantive because it "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied"—therefore it must be applied retroactively. *Welch*, 136 S. Ct. at 1265. The Court emphasized that its determination whether a constitutional rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function," i.e., whether the new rule alters only the procedures used to obtain the conviction, or alters instead the class of persons the law punishes. *Id.* at 1266. In *Welch*, the Court pointed out that, "[a]fter *Johnson*, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence." *Id.* Thus, "*Johnson* establishes, in other words, that even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause." *Id.* "It follows," the Court held, "that *Johnson* is a substantive decision." *Id.* (internal quotation omitted).

requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rules as a matter of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on" the judge-sentencing scheme. *Id.* And in the context of a *Welch* analysis, the "unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*," *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the new law by necessity places certain individuals beyond the state's power to impose a death sentence. The decision in *Welch* makes it clear that a substantive rule, rather than a procedural rule, resulted from the *Hurst* decisions. *See Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes.").

Hurst retroactivity is not undermined by *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), where the United States Supreme Court held that *Ring* was not retroactive in a federal habeas case. In *Ring*, the Arizona statute permitted a death sentence to be imposed by a finding of fact that at least one aggravating factor existed. *Summerlin* did not review a statute, like Florida's, that required the jury not only to conduct the

fact-finding regarding the aggravators, but also as to whether the aggravators were *sufficient* to impose death and whether the death penalty was an appropriate sentence. *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred in *Hurst* where, for the first time, the Court found it unconstitutional for a judge alone to find that "sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal citation omitted).

Moreover, *Hurst,* unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the United States Supreme Court has always regarded proof-beyond-a-reasonable-doubt decisions as substantive. *See, e.g.*, *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (explaining that "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect."); *Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware's state retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof.").

III. Brown's death sentence violates *Hurst*, and the error is not "harmless".[11]

Brown was sentenced to death pursuant to a Florida scheme that has been ruled unconstitutional by both the United States Supreme Court and this Court. In *Hurst v. Florida*, the United States Supreme Court held that Florida's scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. 136 S. Ct. at 620-22.

On remand in *Hurst v. State*, this Court applied the holding of *Hurst v. Florida*, and further held that the Eighth Amendment requires *unanimous* jury fact-finding as to each of the required elements, and also a *unanimous* recommendation by the jury in order to impose the death penalty. 202 So. 3d at 53-59.

During the penalty phase, Brown's jury was never asked to make unanimous findings of fact as to any of the required elements. Instead, after being instructed that its decision was an advisory recommendation and that the ultimate responsibility for imposing a death sentence rested with the judge, the jury rendered a non-unanimous, generalized recommendation that the judge sentence Brown to

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[11] Although this Court's state-law precedent is sufficient to resolve any harmless-error inquiry in this case, it should be noted that the United States Constitution precludes application of the harmless error doctrine because any attempt to discern what a jury in a constitutional proceeding would have decided would be impermissibly speculative. *See, e.g.*, *Caldwell*, 472 U.S. at 328-29 (explaining that a jury's belief about its role in death sentencing can materially affect its decision-making); *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993) (foreclosing application of the harmless-error doctrine to deny relief based on jury decisions not comporting with Sixth Amendment requirements).

death. This Court's precedent makes clear that *Hurst* errors are not harmless where the defendant's pre-*Hurst* jury recommended death by a non-unanimous vote. *Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017) ("[I]n cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless.").[12]

To the extent the aggravators applied to Brown were based on contemporaneous convictions, the judge's finding of such aggravators does not render the *Hurst* error harmless. This Court has consistently rejected the idea that a judge's finding of prior-conviction aggravators is relevant in the harmless-error analysis of *Hurst* claims, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g., Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst*").

CONCLUSION

This Court should hold that federal law requires the *Hurst* decisions to be applied retroactively to Brown, vacate his death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

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[12] This Court has declined to find harmless error in every case where the pre-*Hurst* jury's recommendation was not unanimous. *See, e.g Calloway v. State*, 210 So. 2d 1160 (Fla. 2017) (7-5 jury vote); *Guzman v. State*, 214 So. 3d 625 (Fla. 2017) (7-5 jury vote); *Robards v. State*, 214 So. 3d 568 (Fla. 2017) (7-5 jury vote); and *Peterson v. State*, 221 So. 3d 571 (Fla. 2017) (7-5 jury vote).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the PDF copy of the foregoing document has been transmitted to this Court through the Florida Courts E-Filing Portal on this 17th day of October, 2017.

WE HEREBY FURTHER CERTIFY that a true copy of the foregoing was served via electronic mail to **Stephen D. Ake**, Assistant Attorney General, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607-7013, at Stephen.Ake@myfloridalegal.com and capapp@myfloridalegal.com on this 17th day of October, 2017.

WE HEREBY FURTHER CERTIFY that a copy of the foregoing was mailed to **Paul Alfred Brown**, DOC# 019762, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083, on or about this 17th day of October, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY, pursuant to Fla. R. App. P. 9.210, that the foregoing document was generated in Times New Roman fourteen-point font.

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