IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 17-1143

HENRY P. SIRECI

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

RESPONSE TO ORDER TO SHOW CAUSE

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INTRODUCTION

For over 40 years, Mr. Sireci has maintained his innocence for his 1976 felony murder conviction and subsequent death sentence after a resentencing in 1990. The death sentence on Mr. Sireci was imposed after a non-unanimous 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 of his crime, Mr. Sireci would be one of the many death row prisoners in Florida who have been granted new penalty phase proceedings.

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 Mr. Sireci *Hurst* relief 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*. Mr. Sireci asserts that this Court's *Mosley*[1]*-Asay*[2] dividing line violates the Fourteenth Amendment's requirement of equal protection of the

[1] 209 So. 3d 1248 (Fla. 2016)
[2] 210 So.3d 1 (Fla. 2016)

laws and the prohibition of capricious capital punishment embodied in the Eighth and Fourteenth Amendments. Neither the federal nor the state rights to jury findings as the necessary predicate for a death sentence should be split in this extraordinary manner.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This appeal addresses whether state and/or federal law requires this Court to extend *Hurst* retroactivity to death sentences that became final before *Ring*, rather than limiting *Hurst* relief to only post-*Ring* death sentences. Mr. Sireci respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Mr. Sireci also requests that the Court permit full briefing in this case in accord with the normal, untruncated rules of appellate practice.[3]

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[3] The Florida Constitution references the right to appeal and habeas corpus in a number of provisions.

Under the Florida Constitution, Article I, Section 13, provides,

> The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.

Under the Florida Constitution, Article I Section 21, provides,

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Article V Section 3(b)(1), goes on to provide that this Court "Shall hear appeals from final judgments of trial courts imposing the death penalty . . .." Sub-Section 9 also provides that this Court, "May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any

Depriving Mr. Sireci the 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 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

Mr. Sireci's trial counsel extensively challenged the constitutionality of Florida's death penalty scheme prior to his 1990 resentencing. Tr. Vol. XXIV, p. 2880-2883; Vol. XXV, 2913-3011; Vol. XVI, p. 3240-41. The motions filed included, but were not limited to, a "*Caldwell* Motion to Prohibit any Reference to

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judge thereof, or any circuit judge." Moreover, in the context of an appeal as a matter of right, the United States Supreme Court held in *Anders v. State of Cal*., 386 U.S. 738,87 S. Ct. 1396 (1967) that,

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae.

Anders v. State of Cal., 386 U.S. 738, 744 (1967). Denying full briefing denies Mr. Sireci the opportunity have "an active advocate" plead his case. It is also an additional violation of the right to Due Process and Equal Protection under the Florida and United States Constitution, and a violation of the right to seek habeas corpus. This Court has long held that due process requires an individual determination in a case.

Advisory Role of the Jury in Sentencing" and a "Motion for Special Verdict Form," which requested that the jury be required to express their factual findings regarding mitigation and aggravation. On direct appeal, Mr. Sireci challenged the denial of these motions, and specifically argued that the jury's death penalty recommendation was unconstitutionally unreliable and that section 921.141, Florida Statutes (1987) was unconstitutional on its face and as applied. This Court denied all of Mr. Sireci's claims. *State v. Sireci*, 587 So. 2d 450 (Fla. 1991), *cert. denied Sireci v. Florida*, 503 US 946 (1992). Later, in a state habeas petition, Mr. Sireci argued that the Florida death penalty statute was unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Sireci v. Moore*, 825 So. 2d 882 (Fla. 2002).

Mr. Sireci also filed a 3.853 Motion for DNA testing in which he swore that he was actually innocent and sought to test the evidence against him. The courts denied Mr. Sireci the opportunity to test the evidence against him. *Sireci v. State*, 908 So. 2d 321 (Fla. 2005).

In April of 2014, Mr. Sireci filed a Successive Motion to Vacate based on newly discovered evidence that the State presented false expert testimony at his 1976 trial regarding microscopic hair comparison evidence purportedly linking Mr. Sireci to the crime scene. The circuit court summarily denied that motion and this Court affirmed. *Sireci v. State*, 192 So.3d 42 (Fla. 2015) (unpublished)(cert denied, *Sireci v. Florida*, 137 S.Ct. 470 (2016)).

ARGUMENT

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

As will be discussed further below, to deny Mr. Sireci 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 decisions in *Asay v. State*, 210 So.3d 1 (Fla. 2016), while granting retroactive *Hurst* relief to inmates whose death sentences had not become final on June 24, 2002 under the decision in *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), violates Mr. Sireci'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)).

This Court has already applied *Hurst* retroactively as a matter of state law and granted relief in dozens of collateral-review cases where the defendant's sentence became final after *Ring*. *See, e.g.*, *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). But the Court has never addressed *Hurst* retroactivity as a matter of federal law, and 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 cases. *See, e.g.*, *Asay v.*

State, 210 So. 3d 1 (Fla. 2016). The Court recently reaffirmed its retroactivity cutoff in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017).

This Court's current *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Mr. Sireci the same *Hurst* relief being granted in scores of materially indistinguishable collateral cases. Denying Mr. Sireci *Hurst* retroactivity because his death sentence became final in 1992, while affording retroactivity to similarly-situated defendants who were sentenced (or resentenced) between 2002 and 2016, 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.

While retroactivity principles always involve some level of arbitrariness and the need to draw temporal lines, this Court's post-*Hurst* retroactivity rulings have injected a degree of capriciousness that far exceeds the level justified by normal non-retroactivity jurisprudence, such that it rises to a violation of the Eighth Amendment and Equal Protection.

Like his post-*Ring* counterparts, Mr. Sireci was sentenced to death under a procedure that allowed factual findings to be made by a judge instead of a jury. However, unlike the majority of his post-*Ring* counterparts, Sireci has demonstrated over a long period of time that he is capable of adjusting to live without endangering any valid interest of the state. Mr. Sireci "has lived in prison under threat of execution for 40 years." *Sireci v. Florida*, 137 S. Ct. 470, 196 L. Ed. 2d 484 (2016)(Justice Breyer, dissenting from the denial of certiorari). As such, he has already been punished more severely and for longer than his post-*Ring* counterparts. "This Court, speaking of a period of *four weeks*, not 40 years, once said that a prisoner's uncertainty before execution is 'one of the most horrible feelings to which he can be subjected." *Id*. at 470(emphasis in original).

Finally, Mr. Sireci, more so than the majority of his post-*Ring* counterparts, was subjected to a trial and sentencing that that involved problematic and unreliable fact-finding. Since his 1976 conviction and 1990 death sentence, the advent of DNA testing and improved forensic science significantly undermines the validity of his

original conviction and sentence. As noted above, Mr. Sireci has repeatedly been denied DNA testing by the courts. Further, just within the last few years it has been established that flawed microscopic hair analysis, the lynchpin of the State's case against Mr. Sireci, is inherently unreliable. In fact, the hair evidence linking Mr. Sireci to the crime scene has never been subjected to DNA testing.

Taken together, these considerations make it plain that this Court's *Mosley-Asay* dividing line involves a level of arbitrariness that is not constitutionally tolerable. For example, the arbitrary results of this Court's bright-line cutoff has at times depended on whether there were delays in transmitting the record on appeal to this Court for the direct appeal;[4] 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;[5] whether an extension was sought for a rehearing motion and whether such a motion was filed; 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

[4] *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*).
[5] *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*.

States Supreme Court or sought an extension to file such a petition; and how long a certiorari petition remained pending in the 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* was retroactive 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.[6]

[6] Adding to the "fatal or fortuitous accidents of timing" as described by Justice Lewis, 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 Petition was redistributed to a later conference, thus placing his denial within the *Ring* cut-off. Compare *Card v. Florida*, Case No. 01-9152, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/01-9152.htm with *Bowles v. Florida*, Case No. 01-9716, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/01-9716.htm (last visited October 3, 2017).

Even if this Court were to maintain its unconstitutional retroactivity "cutoff" at *Ring*, individuals who preserved the substance of the *Hurst* decisions before *Hurst* 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, Mr. Sireci's trial and appellate counsel extensively raised and preserved *Ring*-like challenges.

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).

As a due process matter, denying the benefit of Florida's new post-*Hurst* capital sentencing statute to "pre-*Ring*" defendants like Mr. Sireci 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).

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. Sireci's death sentence also violates the Eighth Amendment.

This Court held in *Hurst v. State* that enhanced reliability required by the Eighth Amendment in capital cases requires a jury to unanimously find all facts

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.[7]

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.

[7] Drawing a line at June 24, 2002 is just as arbitrary and imprecise as the bright line cutoff at issue in *Hall v. Florida*, 134 S. Ct. at 2001. When the United States Supreme Court declared that cutoff unconstitutional, those death sentenced individuals with IQ scores above 70 were found to be entitled to a case by case determination of whether the Eighth Amendment precludes their execution. The unreliability of the proceedings giving rise to Mr. Sireci's death sentence compounds the unreliability of his death recommendation. *See Lambrix v. State*, No. SC17-1687, 2017 WL 4320637, at *2 (Fla. Sept. 29, 2017)(Pariente, J., dissenting)("As I stated in Hitchcock, "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.).

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 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.

Importantly 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," *id.* at 735, and that the necessary procedures do not "transform substantive rules into procedural ones," *id.* 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 Sireci under the Supremacy Clause.

The *Hurst* decisions announced substantive rules that must be applied retroactively to Sireci 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 that 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.* As a matter of federal retroactivity law, the rule is therefore 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).

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 on 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.[8] This Court must address Sireci's federal retroactivity arguments.[9]

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[8] *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 *Teague*-like 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.").

[9] Because this Court is bound by the federal constitution, it has the obligation to address Sireci'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"); *Martin v. Hunter's Lessee*, 14 U.S. 304, 340-42 (1816). This requires full briefing and oral argument. The federal constitutional issues were raised to this Court in *Hitchcock*, but this Court ignored them. To dismiss this appeal on the basis of *Hitchcock* would be to compound that error.

III. Sireci's death sentence violates *Hurst*, and the error is not "harmless."[10]

Mr. Sireci was sentenced to death pursuant to a Florida scheme that has been ruled unconstitutional by 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.

Mr. Sireci'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 advisory, 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 Mr. Sireci to 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

[10] 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 v. Mississippi*, 472 U.S. 320, 328-29 (1985) (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).

a non-unanimous recommendation of death, the *Hurst* error is not harmless.").[11] Mr. Sireci's jury recommended death by a vote of 11-1.

To the extent any of the aggravators applied to Mr. Sireci 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 apply the *Hurst* decisions retroactively to Mr. Sireci, vacate his death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

[11] *See, e.g.*, *Bailey v. Jones*, No. SC17-433, 2017 WL 2874121, at *1 (Fla. July 6, 2017) (11-1 jury vote); *Hertz v. Jones*, 218 So. 3d 428, 431-32 (Fla. 2017) (10-2 jury vote); *Hernandez v. Jones*, 217 So. 3d 1032, 1033 (Fla. 2017) (11-1 jury vote); *Caylor v. State*, 218 So. 3d 416, 425 (Fla. 2017) (8-4 jury vote); *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017) (11-1 jury vote)

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Scott Browne, scott.browne@myfloridalegal.com and capapp@myfloridalegal.com, on this 16th day of October, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Response to Order to Show Cause, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100**.**

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