No. SC17-1211

IN THE
Supreme Court of Florida

DAVID MILLER, JR.,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

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INTRODUCTION

Petitioner's death sentence was imposed pursuant to a sentencing scheme that was ruled unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). His sentence became "final" in 2001, after the United States Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). A core issue in this case is whether this Court should apply its "retroactivity cutoff" to deny Petitioner *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), even though the rule announced in *Apprendi* was the basis for both *Ring* and *Hurst*.

This Court has already applied *Hurst* retroactively as a matter of state law in dozens of collateral-review cases where the defendant's sentence became final after *Ring*. But the Court has also created a state-law cutoff at the date *Ring* was decided—June 24, 2002—to deny relief in dozens of other collateral-review cases. There are 22 Florida cases without penalty-phase waivers and with non-unanimous jury recommendations that became "final" during the two-year period between *Apprendi* and *Ring*. This Court has never specifically addressed this "*Apprendi* gap" in any case, not even in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). Nor has the Court directly addressed the constitutionality of

denying *Hurst* retroactivity as a matter of federal law, in *Hitchcock* or any other case.[1]

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This case presents an important issue of first impression: whether federal law requires this Court to extend *Hurst* retroactivity to death sentences that became final after *Apprendi* but before *Ring*, rather than cabining *Hurst* relief to post-*Ring* death sentences. Petitioner respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Petitioner also requests that the Court permit full review in this case in accord with the normal, untruncated habeas and briefing rules.

Depriving Petitioner the opportunity for full merits review would constitute an arbitrary deprivation of the vested right to habeas corpus review under Article I, § 13, and Article V, § 3(b)(9), of the Florida Constitution. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

ARGUMENT

I. Petitioner's death sentence violates *Hurst*, and the error is not "harmless"

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[1] Relief should not be denied here in light of *Hitchcock*. Petitioner notes that there is a petition for a writ of certiorari pending in *Hitchcock* (No. 17-6180).

[2] *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

Petitioner was sentenced to death pursuant to an unconstitutional Florida capital sentencing scheme. 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. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify the death penalty; and (3) whether those aggravators outweighed the mitigation. Under Florida's unconstitutional scheme, an "advisory" jury rendered a generalized recommendation for life or death by a majority vote, without specifying the factual basis for the recommendation, and then the sentencing judge alone, notwithstanding the jury's recommendation, conducted the fact-finding. *Id.* at 622. In striking down that scheme, the Court held that the jury, not the judge, must make the findings of fact required to impose death. *Id.*

On remand, 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 to impose the death penalty. *Hurst v. State*, 202 So. 3d at 53-59. The Court also noted that even if the jury unanimously finds that each of the required elements is

satisfied, the jury is not required to recommend the death penalty and the judge is not required to sentence the defendant to death. *Id.* at 57-58.

Petitioner'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 Petitioner to death. The record does not reveal whether Petitioner's jurors unanimously agreed that any particular aggravating factor had been proven beyond a reasonable doubt, or unanimously agreed that the aggravators were sufficient for death, or unanimously agreed that the aggravators outweighed the mitigation. But the record *is* clear that Petitioner's jurors were not unanimous as to whether the death penalty should even be recommended to the court.

Petitioner's pre-*Hurst* jury recommended the death penalty by a vote of 7-5. 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.").

This Court has declined to apply the harmless error doctrine in every case where the pre-*Hurst* jury's recommendation was not unanimous.[2]

To the extent any of the aggravators applied to Petitioner were based on prior convictions, the judge's finding of such aggravators does not render the *Hurst* error harmless. Even if the jury would have found the same aggravators, Florida law does not authorize death sentences based on the mere existence of an aggravator. As noted above, Florida law requires fact-finding as to both the existence of aggravators *and* the "sufficiency" of the particular aggravators to warrant imposition of the death penalty. There is no way to conclude whether the jury would have made the same sufficiency determination as the judge. That is why 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*").[3]

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[2] *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); *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017) (11-1 jury vote); *McMillian v. State*, 214 So. 3d 1274, 1289 (Fla. 2017) (10-2 jury vote).

[3] Moreover, although this Court's state-law precedent is sufficient to resolve any harmless-error inquiry in this case, the United States Constitution would also

that his sentence became final after *Apprendi*, which was the constitutional basis for both *Ring* and *Hurst*. Denying Petitioner *Hurst* retroactivity because his death sentence became final after *Apprendi* in 2001, 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 *Ring*-based retroactivity cutoff is unconstitutional as applied to post-*Apprendi* death sentences because *Apprendi* was the constitutional basis for both *Ring* and *Hurst*

This Court's *Ring*-based retroactivity cutoff is unconstitutional as applied to Petitioner's post-*Apprendi* death sentence because the rule announced in *Apprendi* was the constitutional basis for both *Ring* and *Hurst*. It was *Apprendi*, not *Ring*, which first explained that the Sixth Amendment requires that any finding that increases a defendant's maximum sentence is an element of the offense that must be found by a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490. Indeed, as the United States Supreme Court stated in *Hurst*, *Ring* applied *Apprendi*'s analysis to conclude that Mr. Ring's death sentence violated the Sixth Amendment. *See* 136 S. Ct. at 621. Just as *Ring* applied *Apprendi*'s principles to Arizona's capital sentencing scheme, *Hurst* applied *Apprendi*'s principles to Florida's scheme.

In *Hurst*, the Court repeatedly stated that Florida's scheme was incompatible with "*Apprendi*'s rule," of which *Ring* was an application. 136 S. Ct. at 621. In overruling its pre-*Apprendi* precedent approving of Florida's scheme—*Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989)—*Hurst* stated that those decisions were "irreconcilable with *Apprendi*," and drew an analogy to *Ring*'s overruling of pre-*Apprendi* precedent approving of Arizona's scheme—*Walton v. Arizona*, 497 U.S. 639 (1990)—which also could not "survive the reasoning of *Apprendi*." *Hurst*, 136 S. Ct. at 623. Thus, both *Ring* and *Hurst* make clear that their operative constitutional holdings derived directly from *Apprendi*.

This Court has consistently understood that the Sixth Amendment rule applied in *Ring* and *Hurst* derived from *Apprendi*. In *Mosley*, this Court observed that *Ring* was an application of *Apprendi*. *See* 209 So. 3d at 1279-80 (explaining that in *Ring* the Court "applied its reasoning from *Apprendi*."). This was not a new observation; over many years, this Court acknowledged that *Ring* merely applied the *Apprendi* rule, and that *Ring* broke no new ground of its own. *See, e.g.*, *Johnson v. State*, 904 So. 2d 400, 405-06 (Fla. 2005) (explaining that "*Ring* was not a sudden or unforeseeable development in constitutional law; rather, it was an evolutionary refinement in capital jurisprudence," in that "[t]he Supreme Court

merely applied the reasoning of another case, *Apprendi*.") (internal quotation omitted).

Notably, in the period between *Apprendi* and *Ring*, this Court rejected challenges to Florida's capital sentencing scheme under *Apprendi* not because the Court did not yet believe *Apprendi* was applicable in the death penalty context, but instead, because the United States Supreme Court had upheld Florida's death penalty against constitutional challenge notwithstanding *Apprendi*. *See, e.g.*, *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001). This Court rejected challenges to Florida's death-sentencing scheme on the same basis after *Apprendi* as it did after *Ring*: the United States Supreme Court had approved of Florida's scheme. *Compare Mills*, 786 So. 2d at 532 (holding that *Apprendi* did not apply because Florida's scheme had been upheld by the United States Supreme Court), *with Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (holding that *Ring* did not apply because Florida's scheme had previously been upheld by the United States Supreme Court and citing *Mills*), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002) (same).

In light of *Apprendi*'s fundamental importance to both *Ring* and *Hurst*, it would violate the federal constitutional prohibition against the arbitrary and capricious imposition of the death penalty, as well as the constitutional guarantees of equal protection and due process, to extend *Hurst* retroactivity to 14 years of post-*Ring* death sentences while denying *Hurst* retroactivity to the small number of

individuals like Petitioner whose death sentences were finalized in the two years between *Apprendi* and *Ring*. Moreover, as discussed below, federal law prohibits a retroactivity "cutoff" at *Ring*, and requires that the *Hurst* decisions apply retroactively to all cases on collateral review, including post-*Apprendi* cases.

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

This Court's retroactivity cutoff violates the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty. 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). In other words, the death penalty cannot be imposed in a way that is comparable to being "struck by lightning." *Furman*, 408 U.S. at 308.

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*—and thus whether this Court has held *Hurst* retroactive based on its 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; 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; 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 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's and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613 (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). Mr. Bowles's sentence, however, 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. Mr. Bowles, on the other hand, whose case was decided on direct appeal on *the same day* as Mr. Card's, and who filed his certiorari petition in the Supreme Court *after* Mr. Card, now finds himself on the pre-*Ring* side of this Court's current retroactivity cutoff.

Other arbitrary factors affecting whether a defendant receives *Hurst* relief under this Court's date-of-*Ring*-based retroactivity approach include whether a resentencing was granted. 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—just four days after *Ring* was decided); *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 10-year delay before the trial). Under this Court's approach, a defendant who was originally sentenced to death before Petitioner, but who was later resentenced to death after *Ring*, would receive *Hurst* relief and Petitioner would not.

Moreover, under the Court's current rule, some litigants whose *Ring* claims were wrongly rejected on the merits during the 2002-2016 period will be denied the benefit of *Hurst* because the Court addressed the issue in a post-conviction rather than a direct appeal posture. *See, e.g.*, *Miller v. State*, 926 So. 2d 1243, 1259 (Fla. 2006); *Nixon v. State*, 932 So. 2d 1009, 1024 (Fla. 2006); *Bates v. State*, 3 So. 3d 1091, 1106 n.14 (Fla. 2009); *Bradley v. State*, 33 So. 3d 664, 670 n.6 (Fla. 2010).[4]

C. 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." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). When two classes are

[4] Even if this Court were to maintain its unconstitutional retroactivity "cutoff" at *Ring*, individuals who preserved the substance of the *Hurst* decisions before *Hurst*, such as Petitioner, 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."). Petitioner urges that the Court allow him to brief this aspect of his case in an untruncated fashion.

created to receive different treatment by a state actor like this Court, the question is whether there is a rational basis for the different treatment. *Id.*; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights 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). When a state draws a line between defendants who will receive the benefit of the rules designed to enhance the quality of decision-making by a penalty-phase jury, and those who will not, the state's justification for that line must satisfy strict scrutiny. Far from meeting strict scrutiny, this Court's *Hurst* retroactivity cutoff lacks even a rational connection to any legitimate state interest. *See Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

As a due process matter, denying *Hurst* retroactivity to "pre-*Ring*" defendants like Petitioner 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*, 447 U.S. at 346 (liberty interest in state-created sentencing procedures); *Ford v. Wainwright*, 477 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (liberty interest in

meaningful state competency proceedings); *Ohio Adult Parole Auth. 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 Hicks*, 447 U.S. at 347; *Ford*, 477 U.S. at 399, 428-29; *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). 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 347. 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 Auth.*, 523 U.S. at 272; *Ford*, 477 U.S. at 427-31. 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.

III. 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

As Petitioner argued in the pending habeas petition filed in this Court on June 28, 2017, the United States Supreme Court held in *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), 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.[5] *Id.* 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, *Montgomery* found 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), substantive even though the *Miller* rule had "a procedural component." *Id.* at 734. The

[5] In Compliance with this Court's page-length limit, Petitioner provides only a summary of his previous *Montgomery* arguments here. Petitioner's more expansive *Montgomery* arguments appear at pages 19-21 of the Petition.

Montgomery Court explained that "[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.*

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

The *Hurst* decisions announced substantive rules that this Court must apply retroactively to Petitioner under the Supremacy Clause. First, a Sixth Amendment rule was established requiring that a jury find as fact beyond a reasonable doubt: (1) each aggravating circumstance; (2) that those aggravators together are "sufficient" to justify imposition of the death penalty; and (3) that those aggravators together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. 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." 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.* The rule is therefore substantive as a matter of federal retroactivity law. *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).

The Sixth Amendment 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.* 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. Thus, 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 *Summerlin*, 542 U.S. at 364, where the United States Supreme Court held that *Ring* was not retroactive in a federal habeas case. *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 death 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); *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.").[6]

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[6] The recent ruling of an Eleventh Circuit panel in *Lambrix v. Sec'y*, No. 17-14413, 2017 WL 4416205 (11th Cir. Oct. 5, 2017), does not negate Petitioner's arguments. First, *Lambrix* was decided in the context of the current federal habeas statute, which dramatically curtails review: "A state court's decision rises to the level of an unreasonable application of federal law only where the ruling is objectively unreasonable, not merely wrong; even clear error will not suffice." *Id.* at *8 (internal quotation marks omitted). In contrast, this Court's application of federal constitutional protections is not circumscribed, as this Court noted in the *Hurst* context in *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016) ("[W]e hold that the Supreme Court's decision in *Hurst v. Florida* requires that all critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury . . . . We also hold . . . under the Eighth Amendment to the United States Constitution, that in order for the trial court to

B. This Court has an obligation to address Petitioner's federal retroactivity arguments

Because this Court is bound by the federal constitution, it has the obligation to address Petitioner'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). Addressing those claims meaningfully requires full briefing and oral argument. The federal constitutional issues were raised in *Hitchcock*, but this Court ignored them. Dismissing this appeal based on *Hitchcock* would compound that error.

CONCLUSION

This Court should hold that the *Hurst* decisions must be applied retroactively to Petitioner's post-*Apprendi* death sentence, vacate Petitioner's death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

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impose a sentence of death, the jury's recommended sentence must be unanimous"). Second, *Lambrix* dealt with an idiosyncratic issue—the "retroactivity" of Florida's new capital sentencing statute. Lambrix did not argue, as Petitioner does here, for the retroactivity of the constitutional rules arising from the *Hurst* decisions. Third, the Eleventh Circuit did not address the specific arguments about federal retroactivity that are raised here. Fourth, almost needless to say, an Eleventh Circuit panel decision has no precedential value in this forum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2017, the foregoing was electronically served via the e-portal to Assistant Attorney General Jennifer A. Donahue at jennifer.donahue@myfloridalegal.com and capapp@myfloridalegal.com.

/s/ Christopher J. Anderson
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