IN THE SUPREME COURT OF FLORIDA

ERNEST D. SUGGS,

Appellant/Petitioner,
v.

CASE NOS.: SC17-1225; SC16-1066

STATE OF FLORIDA and JULIE L. JONES, ETC.

Appellee/Respondent.

_____/

RESPONSE TO ORDER TO SHOW CAUSE

The Appellant/Petitioner, ERNEST D. SUGGS, by and through undersigned counsel, hereby responds to this Court's Order to Show Cause why the trial court's order should not be affirmed and rehearing should not be denied in light of this Court's decision in Hitchcock v. State, SC17-445. In support thereof, Mr. Suggs states:

INTRODUCTION

Mr. Suggs' death sentence was imposed pursuant to a capital sentencing scheme that has since been 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). Mr. Suggs' sentence became "final" in 1995, prior to the United States Supreme Court decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002). The issue in this case is whether this Court's approach to limited retroactivity to deny Mr. Suggs Hurst relief on the ground that his sentence became final prior to the 2002 decision in Ring is

constitutional in light of Hurst v. Florida, Hurst v. State, Florida law, and federal law.

This Court has already granted Hurst relief as a matter of state law in dozens of collateral-review cases where the defendant's sentence became final after Ring. But this 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. The Ring-based cutoff is unconstitutional and should not be applied to Mr. Suggs. Denying Mr. Suggs Hurst relief because his sentence became final after 1995, rather than some date between 2002 and 2016, would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Mr. Suggs is entitled to Hurst retroactivity as a matter of state and federal law.

Relief should not be denied here in light of Hitchcock. Mr. Suggs notes that there is still a petition for writ of certiorari still pending in Hitchcock v. Florida, (No. 17-6180). Moreover, the issues raised in Mr. Suggs' appeal and his petition for habeas relief were not addressed in this Court's decision in Hitchcock v. State.

REQUEST FOR ORAL ARGUMENT

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

Depriving Mr. Suggs 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). Due process does not permit Mr. Suggs to be foreclosed by the decision rendered in Hitchcock v. State, Case No. SC17-445 (Fla. 2016). Mr. Suggs deserves an individualized appellate review of his sentence.

ARGUMENT

I. Due Process does not permit Mr. Suggs to be foreclosed by the decision rendered in Hitchcock v. State.

Mr. Suggs is exercising a substantive right to appeal the denial of his successive Rule 3.851 motion See Fla. Stat. § 924.066 (2016); Fla.R.App.Pro. 9.140(b)(1)(D). Because he has been provided this substantive right, Mr. Suggs' right to appeal is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Evitts v. Lucy, 469 U.S. 387, 393 (1985) ("if a State has created appellate courts as 'an integral part of the … system for finally adjudicating the guilt or innocence of a defendant,' Griffin v. Illinois, 351 U.S. at 18, 76 S.Ct., at 590, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.").

In a capital case in which a death sentence has been imposed, courts are required to go further when considering challenges to the death sentence. The Eighth Amendment requires more due to a special need for reliability. Johnson v. Mississippi, 486 U.S. 578, 584 (1988). The process by which the Court has directed

Mr. Suggs to proceed in his appeal, indicates its intention on binding Mr. Suggs to the outcome rendered in Hitchcock's appeal, regardless of the fact that the record on appeal in each case is distinct and separate from one another. The fact that this Court has *sua sponte* issued identical orders, in numerous other cases, employing the same truncated procedure it does here, reflects baseless prejudgment of the appeals and their scope. Mr. Suggs deserves an individualized appellate process.

"The death penalty is the gravest sentence our society may impose. Persons facing the most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." Hall v. Florida, 134 S.Ct. 1986, 2001 (2014). Yet, Mr. Suggs is being denied that opportunity by this Court's attempt to confine him to the outcome in Hitchcock without first providing a fair opportunity of his own to demonstrate how the record and facts in his particular case prohibit his execution. Moreover, in denying relief in Hitchcock, this Court relied upon Asay v. State for the determination that Hurst was not retroactive to cases final before Ring v. Arizona. Hitchcock v. State, Case No. SC17-445 at *2-3.

This Court did so despite the fact that the opinion in Asay was not premised upon, nor did it even address, the holding in Hurst v. State, 202 So.3d 40 (Fla. 2016). Furthermore, Asay was not given the opportunity to argue that he should be given the benefit of Hurst v. Florida by way of fundamental fairness, as recognized in Mosley v. State, 209 So.3d 1248 (Fla. 2016). It is in that regard that this Court must acknowledge that the holding in Asay, and this Court's reliance upon that holding in Hitchcock, does not foreclose the availability of Hurst relief to Mr. Suggs.

II. Mr. Suggs' death sentence violates Hurst v. Florida and Hurst v. State, and the error is not harmless.

Mr. Suggs 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. 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. In Mosley v. State, this Court noted that the unanimity requirement in Hurst v. State carried with it "heightened protection" for a capital defendant. Id., 209 So. 3d at 1278. This Court stated in Mosley that Hurst v. State had "emphasized the critical importance of a unanimous verdict." Id.

Mr. Suggs' jury recommended the death penalty by a vote of 7 to 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.[1]

[1] See, e.g., Bailey v. Jones, No. SC17-433, 2017 WL 2874121, at *1 (Fla. July 6, 2017)(11-2 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).

III. This Court's "retroactivity cutoff" at Ring is unconstitutional and should not be applied to Mr. Suggs.

Beginning with Mosley v. State, 209 So. 3d 1248 (Fla. 2016), this Court has 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. But the Court has created a state-law cutoff at the date Ring was decided—June 24, 2002—to deny relief in dozens of other collateral-review cases. The Court recently reaffirmed its retroactivity cutoff in Hitchcock v. State, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). This Court's arbitrary cutoff violates the Florida Constitution and the Eighth and Fourteenth Amendments of the United States Constitution.

Denying Hurst relief to Mr. Suggs because his death sentence became final in 1995, while affording retroactivity to similarly-situated defendants who were sentenced (or resentenced) between 2002 and 2016, would violate the Florida Constitution under Hurst v. State, 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. Mr. Suggs is entitled to retroactive application of Hurst on the basis of fundamental fairness.

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 Mr. Suggs, 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.").

In Mosley, this Court focused its fundamental fairness analysis on whether it would be unfair to bar Mr. Mosley from seeking Hurst relief, regardless of when his sentence became final, by virtue of the fact that he had previously attempted to challenge Florida's unconstitutional sentencing scheme and was "rejected at every turn" under the Florida Supreme Court's flawed pre-Hurst law. Id. at 1275. In assessing fundamental fairness, this Court explained that an important inquiry is whether the defendant unsuccessfully attempted to raise a challenge to Florida's capital sentencing scheme before Hurst v. Florida and Hurst v. State were decided. See id. at 1275. If Mosley had raised such a challenge, this Court reasoned, it would be fundamentally unfair to prohibit him from seeking post-conviction relief under Hurst, given that he had accurately anticipated the fatal defects in Florida's capital sentencing scheme even before they were recognized in the Hurst decisions. See id. This Court emphasized that ensuring fundamental fairness in assessing retroactivity outweighed any State's interest in finality of death sentences. Id. ("In this instance…the interests of finality must yield to fundamental fairness.").

Here, as in Mosley, the Hurst decisions are retroactive under the fundamental fairness doctrine. Although Mr. Suggs' case was pre-Ring, he attempted to challenge

Florida's unconstitutional capital sentencing statute before both the Ring and Hurst decisions. Before trial, Mr. Suggs filed pretrial motions raising Ring and Hurst-like challenges to the operation of Florida's "advisory" capital-sentencing jury system under Caldwell v. Mississippi, 472 U.S. 320 (1985), and also challenged Florida's lack of a unanimous verdict on all the elements required to impose death as unconstitutional. (R. 90-104). In his direct appeal brief, Mr. Suggs challenged the penalty-phase jury instructions based on the reasonable doubt standard. In his postconviction proceedings, Mr. Suggs continued to raise such challenges to his death sentence. In his Second Amended Motion to Vacate Convictions and Sentences, which was filed pre-Ring, he raised state and federal constitutional challenges to Florida's capital sentencing scheme under Espinosa v. Florida, 505 U.S. 1079 (1993). Following the United States Supreme Court's decision in Ring, Mr. Suggs filed a Petition for Writ of Habeas Corpus in this Court based upon that decision. He was denied at every turn. Under the rationale of Mosley, these circumstances provide a sufficient basis to apply the Hurst decisions retroactively to Mr. Suggs, regardless of the fact that his sentence became final before the issuance of Ring. See Mosley, 209 So. 3d at 1276 n.-13.

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 ten-year delay before the trial). Under this Court's approach, a defendant who was originally sentenced to death before Mr.

Suggs, but who was later resentenced to death after Ring, would receive Hurst relief and Mr. Suggs 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).

Making Hurst retroactive to only post-Ring sentences also unfairly denies Hurst access to defendants who were sentenced between Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring. The fundamental unfairness of that result is stark given that the Supreme Court made clear in Ring that its decision flowed directly from Apprendi. See Ring, 536 U.S. at 588-89. And in Hurst v. Florida, 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. This Court itself has acknowledged that Ring was an application of Apprendi. See Mosley, 209 So. 3d at 1279-80. This Court's drawing of its retroactivity cutoff at Ring instead of Apprendi represents the sort of capriciousness that is inconsistent with the Eighth Amendment.

C. 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 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 Mr. Suggs 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 346. 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. 447 U.S. at 343.

IV. 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 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, 567 U.S. at 483. 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)). 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. Miller "bar[red] life without parole . . . . 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 Mr. Suggs 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 beyond a reasonable doubt: (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. 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. 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).

The United States Supreme Court's decision in Welch is illustrative of the substantive nature of Hurst. In Welch, the Court addressed the retroactivity of the

constitutional rule articulated in Johnson v. United States, 135 S. Ct. 2551, 2560 (2015). In Johnson, the Court held that a federal statute that allowed sentencing enhancement was unconstitutional. Id. at 2556. Welch 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).

The same reasoning applies in the Hurst context. 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. 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 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 Summerlin, 542 U.S. at 364, 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 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. 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.").

C. This Court has an obligation to address Mr. Suggs' federal retroactivity arguments.

Because this Court is bound by the federal constitution, it has the obligation to address Mr. Suggs' federal retroactivity arguments. See Testa v. Katt, 330 U.S. 386, 392-93 (1947). The federal constitutional issues were raised to this Court in Hitchcock, but this Court ignored them. Dismissing this appeal on the basis of Hitchcock would compound that error.

CONCLUSION

This Court should hold that Florida state law and federal law require that Hurst v. Florida and Hurst v. State apply retroactively to Mr. Suggs, vacate Mr. Suggs' death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2017, the foregoing was delivered via electronic service to all counsel of record.

/s/ Dawn B. Macready
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