In the

Supreme Court of Florida

CASE NO.: SC17-1309

ROBERT CONSALVO, vs. STATE OF FLORIDA

Appellant Appellee(s)

APPELLANT'S RESPONSE TO SEPTEMBER 25, 2017, ORDER TO SHOW CAUSE

/S/ Ira W. Still, III

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INTRODUCTION

Florida imposed a death sentence on this appellant, OMAR BLANCO, pursuant to Florida's "hybrid" capital sentencing scheme that the Supreme Court of the U.S. determined violated the Sixth Amendment. See *Hurst v. Florida*, 136 S. Ct. 616 (2016). Appellant has been on death row for approximately 35-years. The two penalty phase hearings afforded to this appellant both followed the same historical Florida format that has been applied to all cases supporting the death penalty. There was no written penalty phase verdict in his case. That is clear because the structure of the penalty phase scheme hasn't changed since 1972 and it will continue to fail to meet the requirements of *Hurst v. Florida* in the future unless the penalty jury actually brings a written verdict.

1. Omar Blanco filed two claims in his successive petition for post-conviction relief. The first claim arises under to *Hall v. Florida*, 134 S. Ct. 1986 (2014) as Mr. Blanco has been intellectually disabled since early childhood onset. That claim is also on appeal to this Court under the same case number. That *Hall* claim is not affected by retroactivity under *Hitchcock* and, consequently has not been addressed in this response. As to that claim, appellant asks for full briefing and oral argument as to why appellant should not have an evidentiary hearing to prove his claim and make an adequate record for review.

2. Blanco's second claim arises under *Hurst v. Florida*. This claim is the one being addressed in this response. Before addressing the retroactivity issue, we are raising some very serious issues arising under *Hurst v. State*, including the constitutionality of the new death penalty act [§921.141, F.S. (2016)] for failing to require jury verdicts on aggravation and mitigation.

3. *Hurst v. State* problems have not been corrected but compounded in the new death penalty act. Judge functions in sentencing, such as studying the fact-verdicts of the jury and making the determination of the weighting process or "comparative analysis" and yet the jury was not required to bring a verdict. This is a due process violation as well, and these errors cannot be fairly corrected for this particular appellant who should be re-sentenced to life.

4. In that there is an on-going structural defect in Florida's death penalty scheme (no requirement of lawful jury verdict), this case is not final. Our arguments on retroactivity are placed, but Blanco should be re-sentenced to life.

REQUEST FOR FULL BRIEFING AND ORAL ARGUMENT

Appellant's claim, raised in appellant's successive petition for postconviction relief, arises under *Hurst v. Florida*, supra., and is the subject of appellant's response herein. Appellant requests that he be permitted to fully brief

and orally argue on these issues. On this claim, three important issues are presented:

(1) *Hurst v. State* formed the backdrop for the drafting of the new death penalty act (2016). Neither the Court nor the Legislature saw the necessity for requiring that the jury bring a written verdict following its deliberations on the penalty phase proceeding. It was not simply that the judge was determining the aggravators, it was necessitated because there was no **verdict.**

(2) Pursuant to *Hurst v. State*, supra., the Court fashioned what it termed the **"Hurst remedy"** [to-wit: If a defendant's direct appeal was not final before the date of decision in *Ring v. Arizona*, supra., and that the defendant had received a non-unanimous penalty phase advisory "verdict," he would be afforded a new penalty phase proceeding]. It was assumed that the Court's constructed **Hurst remedy** was a valid legal remedy that should be applied to redress a particular wrong. The new Florida death penalty statute did not correct the glaring *Hurst* errors. The penalty phase still has structural impediments and is unconstitutional. The only true **Hurst remedy** would be to apply *Hurst* to every inmate on death row as the due process analysis doesn't change and to give them all a life sentence. Any other contrived remedy will eventually display the rottenness of the Florida death penalty system. It is flawed in its structure, in its bare bones. No matter how

many Band-Aids they put on the advisory penalty concept, it will never be a real and viable solution for *Hurst v. Florida*, supra.

(3) That the decision in *Hurst v. State* was skewed to some degree should have become obvious from the results of cases such as Blanco. His direct appeal became final before the arbitrary cut-off date selected as the date *Ring* was decided. Therefore, it appears that Consalvo is one the Court will not permit to have his due process violations redressed by adequate Court remedy.

The retroactivity analysis for Consalvo is discussed. The Court selected and imposed a bright line cut-off date that lined up with the decision date for the *Ring v. Arizona*, supra. That this was an arbitrary and capricious cut-off date is readily shown by the equal protection violation that surfaces immediately giving rise to another constitutional right violation under the Eighth and Fourteenth Amendments. The Florida Legislature did not make any structural change to the former penalty phase, other that requiring a death advisement to be based on a unanimous jury finding. The due process analysis under the 1982 penalty phase statute and the 2016 statute [*Hurst*] would render the same conclusion. Without any structural change in the flawed statutes, *Hurst* applies identically to all death-row inmates. The Court itself carved out a classification among death-sentenced defendants who received non-unanimous advisories by the jury. Those defendants whose sentences were final prior to *Ring* would get no relief from the Court while

those defendants whose sentences were final after *Ring* would be granted relief. There is no rational basis to support the classifications made by the Court. Therefore, appellant's Equal Protection rights have been violated.

ARGUMENT

Cause Issue #1: Appellant's death-sentence violates *Hurst v. Florida*; and the error is not harmless.

A. Florida's death penalty scheme contained two structural errors:

The base structure of Florida's death penalty scheme has not changed from its inception up to *Hurst v. Florida*, supra. The Florida Supreme Court [hereinafter Court] acknowledges that the base structure of the penalty phase proceeding has not changed since 1972. See *Hurst v. State*, supra. Likewise, notwithstanding Florida's current death penalty scheme, the base structure of the scheme has still never changed and its intrinsic flaws cannot be fixed for appellant's case. The penalty phase jury is not required to bring a true written verdict that will be part of the record of the case.

The Supreme Court of the United States [hereinafter Supreme Court] entered its decision on 1/12/2016, in the monumental case of *Hurst v. Florida*, 136 S. Ct. 616 (2016). The holding is set forth below (at p. 624):

> The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base

> Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

The Supreme Court stated its holding in three other separate places within its opinion. The intentional reiteration indicates its essential importance to constitutional law. At p. 619, the Supreme Court stated:

> We **hold** this (Florida's) sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough. [emphasis added]

At p. 621, the Supreme Court stated:

> We granted certiorari to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*…(citations not shown]. We **hold** that it does, and reverse [emphasis added]

And again at p. 622, the Supreme Court reiterated:

> In light of *Ring*, we **hold** that Hurst's sentence violates the Sixth Amendment. [emphasis added]

The question of how the Supreme Court would define what it called "Florida's sentencing scheme" [used as a repeating phrase; see pp. 621 and 624] led off the decision, at p. 619:

> A Florida jury convicted Timothy Lee Hurst of murdering his co-worker, Cynthia Harrison. A penalty-phase jury recommended that Hurst's judge impose a death sentence. Notwithstanding this recommendation, Florida law required the judge to hold a separate hearing

> and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. The judge so found and sentenced Hurst to death.

It should be noted that the Florida penalty phase proceeding was termed a "hybrid" death penalty system by the Supreme Court (at p. 620): "The additional sentencing proceeding Florida employs is a 'hybrid' proceeding in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determinations. *Ring v. Arizona*, supra."

B. Determining a true solution to *Hurst*:

In order to accurately review the current law in light of *Hurst v. Florida*, supra., it is helpful to determine the logical solution, that would be a member of the *Hurst* solution set. Thereafter, other solutions (perhaps even more accurate can be determined).

This is not to suggest that this would be the only possible solution:

- Two separate trials: Guilt and Mitigation
- Guilt Trial: Try all issues for which the standard is "beyond reasonable doubt." Special interrogatory verdicts would apply to each aggravator. Once rendered, the jury's written verdict, including findings, are now part of the Record of the case.
- Mitigation Trial: Try all issues for which the standard is "preponderance of the evidence." Like a civil trial, the jury will determine which Mitigators, as selected and presented by the Defense (along with

special interrogatory verdict questions), have been sufficiently proven to the legal standard for that proceeding. It would generate a verdict. Once rendered, the jury's written verdict, including findings, are now part of the Record of the case. At this point the jury's service is completed.

- Sentencing: The trial court takes both written lawful verdicts and does his "comparative analysis" between the "apples and oranges" of guilt and mitigation.

The guilt phase jury is required to bring a verdict at the conclusion of the case. The burden of proof is beyond reasonable doubt. In Florida, the jury is not required to render a true verdict for the penalty phase. All it is asked to do is to make a mere recommendation, an advisement to the trial court [an advisory verdict]. In the Florida statutory scheme, the jury is not required to "find each fact necessary to impose a sentence of death" which is clearly in violation of *Hurst v. Florida*, supra., [*Hurst* at p. 619]. Requiring jury verdicts for guilt and mitigation would go a long way to advance the concept of *finality of judgments*.

C. There is more than one structural defect in Florida's death penalty scheme

This defect in the Florida death penalty scheme has historically been built into the scheme itself. The bare bones structure of the historical penalty phase proceeding actually had two structural defects according to *Hurst v. Florida*, supra.

First, the trial judge was required to determine if any aggravators were proven beyond a reasonable doubt and he did the comparative analysis (without

any true verdict on mitigation). Due process requires that "the jury, not a judge, find each fact necessary to impose a sentence of death." [*Hurst v. Florida*, at 619]. Turning the focus on the functions of judge and jury was one aspect of *Hurst v. Florida*, supra., and the new death penalty law has not altered or cured this structural defect.

Second, if the jury is not required to bring a true verdict for the penalty proceeding, then the jury cannot be said to have determined at least one aggravator beyond reasonable double. In cases that have a split decision (such as this case), there can be no argument favoring the proof of at least one aggravator beyond a reasonable doubt. No aggravator was proven by verdict in appellant's case. That part of the Record cannot now be undone. In order to base appellant's death sentence upon at least one aggravator, the trial judge found the existence of the aggravator. He was able to make his decision even though the jury had not rendered a lawful verdict. This violates due process in the structure of the death penalty act. This is contrary to the holding in *Hurst v. Florida*, supra., requiring that appellant be re-sentenced to life.

Any fact that qualifies a capital defendant for a sentence of death must be found by the jury. See *Hurst v. Florida*, supra. Certainly, any aggravator would have to be determined by the jury in a true verdict, lawfully rendered. This should

hold true for both aggravators and mitigators. Both impact upon the trial court's decision of whether or not this particular case should enhance the penalty to death.

Both of these are structural defects in the death penalty scheme and are both subject to scrutiny under *Hurst v. Florida*, supra. The trial court function in Florida was addressed in *Hurst v. State*, supra. There the Court sought, among other things, to direct the legislature on drafting the 2016 law. Unfortunately, the second structural defect of the jury not being required to render an itemized verdict on both aggravators and mitigators. This glaring error still remains unaddressed by *Hurst v. State*. It is still a violation of the Sixth Amendment. Until this error is addressed and corrected, the new Florida Act is unconstitutional under *Hurst v. Florida*, supra. Appellant should be resentenced to life.

Cause Issue #2: Appellant's death-sentence violates *Hurst v. State*, notwithstanding that opinion has caused anomalous results in cases currently being litigated.

In *Hurst v. State*, 202 So. 3d 40 (Fla., 2016), the Florida Supreme Court reviewed how the case had progressed to the Supreme Court and quoted its holding from *Hurst v. Florida*, 136 S. Ct. at 619:

> Upon review, the Supreme Court reversed our decision in *Hurst v. State* and held, for the first time that Florida's capital sentencing scheme was unconstitutional to the extent it failed to require the jury, rather than the judge, to find the facts necessary to impose the death sentence—the jury's advisory recommendation for death was "not enough."

As noted by the highlighted phrases, the Court inserted additional information into the expressed holding of the Supreme Court. This can be readily seen by comparing the quoted holding below:

> We hold this (Florida's) sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough. [*Hurst v. Florida*, at 619]

In light of the structural due process problems with Florida's death penalty scheme over the years, and with *Hurst v. Florida*, supra., requiring a **jury verdict** in the penalty proceeding, *Hurst v. State*, supra., was deficient in that it did not require a written jury verdict indicating findings on aggravators and mitigators. Florida historically has not required a true written verdict. This is a defect in appellant's case that cannot be cured. Mr. Consalvo must be re-sentenced to life.

The Court [p. 44] held:

> As we will explain, we **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 reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of the criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each

> aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors **outweigh** the mitigating circumstances. We also **hold** based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence must be unanimous. [emphasis added]

It can be readily seen that the Court added to the *Hurst v. Florida*, supra., holding. The Court introduced the requirement of "weights" when it spoke about the jury being required to find "that the aggravating factors **outweigh** the mitigating circumstances." [at p. 44]. This caused a subtle miscue. According to the Court in *Hurst v. State*, the jury should find weights. According to the Supreme Court in *Hurst v. Florida*, it is the trial judge who performs that task. The trial judge must make the comparative analysis between the proved aggravators and proved mitigators in forming the sentencing decision.

The Supreme Court did not address the procedures and safeguards necessary for adversarially testing the "comparative analysis" or "weights." The Supreme Court addressed the function of the penalty phase jury to bring a true verdict of "each fact necessary to impose a sentence of death." *Hurst v. Florida* at 619. The holding in *Hurst v. Florida*, supra., requires a jury verdict. The Supreme Court held, at 624:

> The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a **jury's verdict**, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional. [emphasis added]

The jury needs to determine the factual issues and bring a true verdict. Even the incredible Florida jury system cannot adequately train ordinary jurors to compare apples and oranges, but it can have the jury bring a verdict on factual issues. The comparative analysis process is better left to the trial judges whose decision will rest upon **verdicts**. *Hurst v. Florida*, supra., did not address this.

The Court introduced the requirement for unanimous jury advisory sentence in *Hurst v. State*, supra. This was not part of the decision in *Hurst v.* Florida. The decision in *Hurst v. Florida*, supra., was strictly limited to the findings or verdicts of the jury. *Hurst v. State*, supra., went far beyond *Hurst v. Florida*, supra. It failed to follow the very limited structural due process analysis of *Hurst v. Florida*.

A structure with a defect will always remain a structure with a defect until it is fixed. Florida substituted one form of due process violation for another in its new death penalty act. It did not create a prospective solution to the entire problem. Rather it tried only to fix the leaks in the old and failed system. It is not only the death penalty law that must go, a new model must be designed that complies with *Hurst v. Florida*, supra.

Cause Issue #3: *Hitchcock* does not preclude relief for Consalvo; nor is he barred by "retroactivity" and by setting up an arbitrary cut-off date under *Ring*, the Court has violated the appellant's equal protection and due process rights under the Eighth and Fourteenth Amendments.

Hitchcock's death sentence became final before *Ring v. Arizona*, supra., as did Consalvo. The Court affirmed the trial court's denial of relief pursuant to *Asay v. State* [Asay V], 210 So. 3d 1 (Fla., 2016), and held: "Hitchcock is among those defendants whose death sentences were final before *Ring*, and his arguments do not compel departing from our precedent. [*Hitchcock;* at p. 3]. Appellant began his postconviction appeals during the years that *Walton v. Arizona*, 110 S. Ct. 3047 (1990) controlled. *Walton* ruled that there was no Sixth Amendment due process violation. Appellant was precluded from litigating on that issue until *Ring* extended *Aprendi* to capital cases which was after 2002. Thus, the door was shut before *Ring* such that due process claims were not viable and there was no remedy for the wrong of violating appellant's fundamental right to due process and fair trial.

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

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 has put itself in the untenable position of off-handedly saying which capital defendant should live and which should die, without any rational basis for doing so. The Court recently reaffirmed its retroactivity cutoff in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). The Court has failed to address whether this retroactivity cutoff at *Ring* is constitutional as a matter of federal law.

B. This Court's retroactivity cutoff violates the Eighth and Fourteenth Amendments' 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 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 Appellant 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.

The *Ring*-based retroactivity cutoff violates the Constitution. It should not be applied to deny appellant the same *Hurst* remedy that is being given to many other death-row inmates simply because of some date contrivance. Of all of the death-sentenced defendants, the Court selected approximately half to get life and forced the other half take the constitutionally infirm and unsupported death penalty. Is this a reliable way of determining eligibility for death? Denying

appellant *Hurst* retroactivity because his death sentence became final before 2002, 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. See *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ['…sentencing procedures that create a substantial risk that it would be inflicted in an arbitrary or capricious manner" cannot stand.] See *Furman v. Georgia*, 408 U.S. 238, 310 (1972) [death penalty cannot be imposed in a way that is comparable to being "struck by lightning"]

Florida would never acknowledge the efficacy of *Ring*. But *Ring* reached back to *Apprendi* and extended that case to capital cases. But let's not lose sight that during the years from 1990 up to 2002 [*Ring*], under *Walton v. Arizona*, 110 S. Ct. 3047 (1990), the Supreme Court made it clear that the Florida death penalty scheme did not violate the Sixth Amendment. During that period of time, the pre-*Ring* collateral appellants were precluded from bringing such arguments. What the Supreme Court barred, should not now lock the door as due process was violated without Consalvo and the cutoff occurred notwithstanding the law barring any such argument. Prevented by *Walton* from 1990 to 2002, and then prevented by Florida's belief that *Ring* doesn't apply to Florida because Arizona's sentencing

scheme was different than Florida until 2016, the *Hurst v. Florida* and Consalvo's timely filing of his *Hurst* claim. What more could possibly stand in Mr. Consalvo's way to fairness in the sentencing process. Whatever the proper remedy for violating the fundamental right to due process, Mr. Consalvo deserves that.

Whenever two classes are carved out that will receive different treatment by the state action (Court decision on fundamental rights), 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). The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Capital defendants have a fundamental right to reliable determination of their sentences. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Here the state drew a line between death-sentenced inmates who possess a non-unanimous penalty advisory recommendation but whose cases were final by a certain selected date and those who cases were not then final. The Court (state) has carved out this classification of inmates for the sole purpose "there must be finality of judgments" and has no rational state purpose to do so. If the state claims that there is a rational basis, that must sustain strict scrutiny. This Court's

C. The Supremacy Clause of the Constitution requires state courts to apply substantive constitutional rules retroactively to all cases on collateral review.

Montgomery v. Louisiana, 136 S. Ct. 718 (2016) [state courts are required to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law]; *Welch v. U.S.*, 136 S. Ct. 1257 (2016) [to determine whether a new rule is substantive or procedural, consider the function of the rule; here the rule was substantive].

This Court has an obligation to address appellant's federal retroactivity arguments. Because this Court is bound by the federal constitution, it has the obligation to address Appellant'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 in the present context requires full briefing and oral argument. 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 federal law requires the *Hurst* decisions to be applied retroactively to appellant, vacate appellant's death sentence, and remand to the circuit court. Appellant should be resentenced to life.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion was E-Filed with the Clerk of the Florida Supreme Court and simultaneously E-Served to the below-listed counsel, this 12th day of October 2017:

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