No. SC17-1399

IN THE

Supreme Court of Florida

ERNEST WHITFIELD

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

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INTRODUCTION

There is no dispute Mr. Whitfield's death sentence was imposed pursuant to a capital sentencing scheme that was subsequently 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). The issue in this case is whether this Court will continue to apply its unconstitutional "retroactivity cutoff" to deny Mr. Whitfield *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).

The Court has consistently applied a state-law cutoff at the date *Ring* was decided—June 24, 2002—to deny relief in dozens of other collateral review cases. This *Ring*-based cutoff is unconstitutional and violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and should not be applied to Mr. Whitfield. Mr. Whitfield is entitled to *Hurst* retroactivity as a matter of federal law. Mr. Whitfield appropriately preserved this issue prior to trial and in collateral proceedings upon the issuance of *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

This Court should not affirm the circuit court's order in light of *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). A petition for a writ of certiorari is pending in *Hitchcock*.[Case No. 17-6180] This Court should wait for the United States Supreme Court to address the *Hitchcock* petition before deciding this case.

REQUEST FOR ORAL ARGUMENT AND COMPLETE BRIEFING

Appellant respectfully requests oral argument pursuant to Fla. R. App. P. 9.320. Mr. Whitfield respectfully request the Court permit full briefing in this case in accord with the normal, untruncated rules of appellate procedure

ARGUMENT

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

Mr. Whitfield was sentenced to death pursuant to a Florida scheme that has been ruled unconstitutional by the United States Supreme Court and this Court. In *Hurst v. Florida*, the 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 death by only 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.

The Court held that the jury, not the judge, must make the findings required to impose the death penalty. *Id.*

On remand in *Hurst v. State*, this Court held that the Eighth Amendment requires *unanimous* jury fact-finding as to each of the required elements. 202 So. 3d at 53-59. In addition to rendering unanimous findings on each element, this Court emphasized that Florida law required the jury also unanimously recommend the death penalty before a death sentence may be imposed. *Id.* at 57. The Court also noted that, even if the jury unanimously found that each of the required elements was satisfied, the jury was not required to recommend the death penalty, and the judge was not required to sentence the defendant to death. *Id.* at 57-58.

Mr. Whitfield's jury was never asked to make unanimous findings of fact as to any of the 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 Appellant to death. The record does not reveal whether the jurors unanimously agreed that any particular aggravating factor was proven beyond a reasonable doubt, or unanimously agreed that those aggravators were sufficient for the death penalty, or unanimously agreed that those aggravators outweighed the mitigation. The jury returned a vote for death by the slimmest of margins.

The "harmless error" doctrine does not apply to the *Hurst* error in Mr. Whitfield's case because his pre-*Hurst* 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.").[1]

To the extent the aggravator of a prior violent felony applied to Mr. Whitfield, a contemporaneous felony, the judge's finding of that aggravator does not render the *Hurst* error harmless. Even if the jury would have surely found that aggravator, Florida law does not authorize death sentences based on the mere existence of at least one aggravator. As noted above, Florida law requires fact-finding as to the existence of aggravators *and* the "sufficiency" of those 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

[1] *See, e.g.*, *Bailey v. Jones*, No. SC17-433, 2017 WL 2874121, at *1 (Fla. July 6, 2017) (11-1 jury vote); *Hertz v. Jones*, 218 So. 3d 428, 431-32 (Fla. 2017) (10-2 jury vote); *Hernandez v. Jones*, 217 So. 3d 1032, 1033 (Fla. 2017) (11-1 jury vote); *Caylor v. State*, 218 So. 3d 416, 425 (Fla. 2017) (8-4 jury vote); *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017) (11-1 jury vote); *McMillian v. State*, 214 So. 3d 1274, 1289 (Fla. 2017) (10-2 jury vote); *Durousseau v. State*, 218 So. 3d 405, 414-15 (Fla. Jan. 31, 2017) (10-2 jury vote).

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*").[2]

II. This Court's retroactivity cutoff at the date of *Ring* is unconstitutional and should not be applied to deny Appellant *Hurst* relief

This Court has already applied *Hurst* retroactively as a matter of state law and granted relief in dozens of collateral-review cases where the defendant's sentence became final after *Ring*. *See, e.g.*, *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). But the Court has never addressed *Hurst* retroactivity as a matter of federal law, and the Court has consistently applied a state-law "cutoff" at the date *Ring* was decided—June 24, 2002—to deny relief in dozens other collateral review cases. *See, e.g.*, *Asay v. State*, 210 So. 3d 1 (Fla. 2016). The Court recently

[2] Moreover, although this Court's state-law precedent is sufficient to resolve any harmless-error inquiry in this case, it should be noted that the United States Constitution precludes application of the harmless error doctrine here because any attempt to discern what a jury in a constitutional proceeding would have decided would be impermissibly speculative. *See, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (explaining that a jury's belief about its role in death sentencing can materially affect its decision-making); *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993) (foreclosing application of the harmless-error doctrine to deny relief based on jury decisions not comporting with Sixth Amendment requirements).

reaffirmed this retroactivity cutoff in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017).

This Court's current *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Appellant the same *Hurst* relief being granted in scores of other collateral-review cases. Denying Mr. Whitfiled *Hurst* retroactivity solely because his death sentence became final in 1998, while affording retroactivity to similarly-situated defendants who were sentenced (or resentenced) between 2002 and 2016, would violate the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty, as well as the Fourteenth Amendment's guarantee of equal protection and due process.

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

It has long been established that the death penalty cannot "be imposed under sentencing procedures that create a substantial risk that it would be inflicted in an arbitrary or capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman v. Georgia*, 408 U.S. 238, 310 (1972) ("the 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 certain cases but not others in a way that is comparable to being "struck by lightning." *Furman*, 408 U.S. at 308. Here, this Court's current retroactivity cutoff results in arbitrary and capricious denials of *Hurst* relief. Experience has already shown the arbitrary results inherent in this Court's application of the *Ring*-based retroactivity cutoff. For instance, 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;[3] 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 draft the opinion;[4] whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener's error so that the Court had to issue a corrected opinion; whether counsel chose to file a petition for a writ of

[3] *See, e.g.*, *Lugo v. State*, 845 So. 2d 74 (Fla. 2003) (two-year delay between the time defense filed a notice of appeal and the record on appeal getting submitted to this Court, almost certainly causing Lugo's direct appeal being decided post-*Ring*)[Docket].

[4] *Compare dockets for: Booker v. State*, 773 So. 2d 1079 (Fla. 2000) (this Court issued opinion within one year after all briefs had been submitted, and the decision came down just before *Ring*), *with Hall v. State*, 201 So. 3d 628 (Fla. 2016) (this Court released its opinion twenty-three months after the last brief was submitted). If this Court had taken the same amount of time to decide *Booker* as it did *Hall*, Booker's conviction would have been final after *Ring* and he would be afforded *Hurst* relief.

certiorari in the United States Supreme Court or sought an extension to file such a petition, or how long that petition remained pending in the Supreme Court.

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

There are other arbitrary factors affecting whether a defendant receives *Hurst* relief under this Court's date-of-*Ring*-based retroactivity approach, such as whether a resentencing was held or other intervening factors. In Florida today, even "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 sentenced to death years before Mr. Whitfield was tried, but who later obtained relief and was resentenced to death after *Ring*, would receive *Hurst* relief and Mr. Whitfield would not.

Mr. Whitfield objected on *Ring* based grounds pre-trial. He thus preserved *Ring* claims, even without using the name *Ring* and he objected again immediately again in collateral proceedings after *Apprendi* issued. Denying relief to those defendants who properly preserved this claim, albeit prior to the existence of *Ring* and *Apprendi* is particularly egregious affront to the Eighth and Fourteenth Amendments.

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

This Court's retroactivity cutoff violates the Fourteenth Amendment's

guarantees of equal protection and due process. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture—that is, 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 becomes "whether there is some ground of difference that rationally explains the different treatment . . . ." *Id., see also McLaughlin*, 379 U.S.184, 191 (1964). The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. Here, this Court's *Hurst* retroactivity cutoff does not have sufficient rationality to justify treating "pre-*Ring*" and "post-*Ring*" collateral litigants differently. This Court's *Hurst* retroactivity cutoff fails the strict scrutiny test.

As a due process matter, denying the benefits of Florida's new post-*Hurst* capital sentencing statute to "pre-*Ring*" defendants like Mr. Whitfield violates the Fourteenth Amendment because once a state requires certain sentencing procedures, it creates Fourteenth Amendment life and liberty interests in those procedures. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (due process interest in state created right to direct appeal); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (liberty interest in state-created sentencing procedures); *Ford v. Wainwright*, 447 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (liberty

interest in meaningful state proceedings to adjudicate competency to be executed); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-89 (1998) (O'Connor, J., with Souter, Ginsburg, & Breyer, JJ., concurring) (life interest in state-created right to capital clemency proceedings).

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

interest (and federal due process) in having the jury select his sentence from the full range of alternatives available under state law. 447 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

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 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. *Id*. at 728-

720 ('[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, the State cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id*. at 731-32.

Importantly for purposes of *Hurst* retroactivity analysis, the Supreme Court found the *Miller* rule substantive in *Montgomery* even though the rule had "a procedural component." *Id.* at 734. *Miller* did "not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* or *Graham*." *Miller*, 132 S. Ct. at 2471. Instead, "it mandate[d] only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* Despite *Miller*'s procedural mandates, the Court in *Montgomery* warned against "conflat[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the *manner of determining* the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (first alteration added). Instead, the Court explained, "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law

may no longer punish," *id.* at 735, and that the necessary procedures do not "transform substantive rules into procedural ones," *id.* In *Miller*, the decision "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*." *Id.* at 734.

B. The *Hurst* decisions announced substantive rules that must be applied retroactively to Appellant under federal law

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

First, a Sixth Amendment rule was established requiring that a jury find as fact: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are "sufficient" to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Each of those findings is required to be made by the jury beyond a reasonable doubt. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule). As in *Montgomery*, these requirements amounted to an "instance[] in which a substantive change in the

law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish." *Id.* at 735.

Second, an Eighth Amendment rule was established that requires those three beyond-a reasonable-doubt findings to be made unanimously by the jury. The substantive nature of the unanimity rule is apparent from this Court's explanation in *Hurst v. State* that unanimity (1) is necessary to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders, and (2) ensures that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Hurst v. State*, 202 So. 3d at 60-61. The function of the unanimity rule is to ensure that Florida's death-sentencing scheme complies with the Eighth Amendment and to "achieve the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law." *Id.* As a matter of federal retroactivity law, the rule is therefore substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"). This is true even though the rule's subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (noting that state's ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).

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. In *Welch*, the Court held that *Johnson*'s ruling was substantive because it "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied"—therefore it must be applied retroactively. *Welch*, 136 S. Ct. at 1265. The Court emphasized that its determination whether a constitutional rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function—that is whether it alters only the procedures used to obtain the conviction, or alters instead the range of conduct or class of persons that 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 fact-finding 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 fact-finding procedures could not legitimatize 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 *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), where the United States Supreme Court held that *Ring* was not retroactive in a federal habeas case. In *Ring*, the Arizona statute permitted a death

sentence to imposed by only 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 circumstance to outweigh the aggravating circumstances." 136 S.Ct. at 622.

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 … was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, … 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 Appellant's federal retroactivity arguments in addition to any state-law analysis

Because this Court is bound by the federal constitution it has an obligation to address Mr. Whitfield'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").

Addressing these claims meaningfully requires this Court to reconsider *Hitchcock.* This Court should address the federal constitutional issues presented in this case, as well as *Hitchcock.* To dismiss this appeal based on *Hitchcock* will only compound that error.

CONCLUSION

This Court should hold federal law requires the *Hurst* decisions are retroactive to Mr. Whitfield, vacate his death sentence, and remand to the circuit court for a new penalty phase or life sentence.

Respectfully submitted,

/s/ Robert A. Norgard
ROBERT A. NORGARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing Response to Court's Order Dated September 22, 2017 has been served electronically via the eportal to the Office of the Attorney General, Capapp@myfloridalegal.com this **17th** day of October, 2017.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style font used in the preparation of this Response is New Times Roman 14 point in compliance with Fla. R. App. P.9.210.

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