

IN THE SUPREME COURT OF FLORIDA

ERIC SCOTT BRANCH,
Appellant,

v.

Case No. SC17-1509

STATE OF FLORIDA,
Appellee.

_____ /

RESPONSE TO ORDER TO SHOW CAUSE

Branch, ERIC SCOTT BRANCH, responds to this Court's Order to Show Cause why the trial court's order should not be affirmed in light of this Court's holding in *Hitchcock v. State*, SC17-445 issued on September 22, 2017. In support thereof, Branch states:

Branch's death sentence was imposed pursuant to a capital sentencing scheme that was ruled unconstitutional by the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Branch's sentence became "final" in 1997. The issue in this case is whether this Court's "retroactivity cutoff" denying Branch *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) is constitutional in light of *Hurst v. State*, *Hurst v. Florida*, Florida state law, and federal law.

This Court has already applied *Hurst* retroactively as a matter of state law in dozens of collateral-review cases where the defendant's sentence became final after *Ring*. But the Court has also created a state-law cutoff at the date *Ring* was

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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 Branch. Denying Branch *Hurst* relief because his sentence became final in 1997, rather than some date between 2002 and 2016, would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution. Branch is entitled to *Hurst* retroactivity as a matter of state and federal law.¹

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This appeal presents an important issue of first impression: whether federal 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. Branch respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Branch also requests that the Court permit full briefing in this case in accord with the normal, untruncated rules of appellate practice.

Depriving Branch the opportunity for full briefing in this case would constitute an arbitrary deprivation of the vested state right to a mandatory plenary appeal in capital cases. *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015) (“[T]his Court has a mandatory obligation to review all death penalty cases to ensure that the death sentence is imposed in accordance with constitutional and statutory directives.”); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks*

¹ Relief should not be denied here in light of *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). Branch notes that there is a petition for a writ of certiorari pending in *Hitchcock* (No. 17-6180).

v. Oklahoma, 447 U.S. 343 (1980). Due process does not permit Branch to be foreclosed by the decision rendered in *Hitchcock v. State*, Case No. SC17-445 (Fla. 2016). Branch deserves an individualized appellate review of his sentence.

ARGUMENT

I. Due process does not permit Branch to be foreclosed by *Hitchcock v. State*

Branch's substantive right to appeal the denial of his successive 3.851 motion is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See Evitts v. Lucy*, 469 U.S. 387, 393 (1985). In a capital case in which a death sentence has been imposed, the Eighth Amendment requires a special need for reliability. *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case.") The process by which the Court has directed Branch to proceed in his appeal indicates its intention on binding him to the outcome rendered in Hitchcock's appeal, regardless of the fact the record on appeal in each case is unique. The fact that this Court has *sua sponte* issued identical orders in numerous other cases utilizing the same truncated procedure it does here, reflects baseless prejudgment of the appeals and their scope. Branch deserves an individualized appellate process.

In *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014), the United States Supreme Court declared "[t]he death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." This Court's attempt to limit Branch's

review on appeal to the outcome of *Hitchcock* denies him the opportunity to demonstrate how the record and facts in his unique 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*. It is in this 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 Branch.

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

Branch was sentenced to death pursuant to a capital sentencing scheme deemed unconstitutional by the United States Supreme Court in *Hurst v. Florida* because it violated the Sixth Amendment as 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. The Court also noted that, even if the jury unanimously finds that each of the required elements is satisfied, the jury is not required to recommend the death penalty, and the judge is not required to sentence the defendant to death. *Id.* at 57-58. 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.*

Branch’s pre-*Hurst* jury recommended the death penalty by a vote of 10-2. 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. *See Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017). This Court has declined to apply the harmless error doctrine in every case where the pre-*Hurst* jury’s recommendation was not unanimous.²

III. This Court’s “retroactivity cutoff” at *Ring* is unconstitutional and should not be applied to Branch

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

² *See, e.g., Bailey v. Jones*, No. SC17-433, 2017 WL 2874121, at *1 (Fla. July 6, 2017) (11-1 jury vote); *Hertz v. Jones*, 218 So. 3d 428, 431-32 (Fla. 2017) (10-2 jury vote); *Hernandez v. Jones*, 217 So. 3d 1032, 1033 (Fla. 2017) (11-1 jury vote); *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017) (11-1 jury vote); *McMillian v. State*, 214 So. 3d 1274, 1289 (Fla. 2017) (10-2 jury vote). Moreover, although this Court’s state-law precedent is sufficient to resolve any harmless-error inquiry in this case, the United States Constitution would also prohibit a denial of relief based on the harmless error doctrine because any attempt to discern what a jury in a constitutional proceeding would have decided—based solely on the pre-*Hurst* jury’s advisory recommendation—would violate the Sixth and Eighth Amendments. *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).

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). The Court’s arbitrary cutoff violates the Florida Constitution and the Eighth and Fourteenth Amendments of the United States Constitution. The Court has not addressed in any case whether this retroactivity cutoff at *Ring* is constitutional as a matter of federal law.

Denying Branch *Hurst* retroactivity because his death sentence became final in 1997, 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. *Hurst* is retroactive to Branch under the fundamental fairness doctrine

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 Branch, 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.”). Branch urges that the Court allow him to brief this aspect of his case in an untruncated fashion.

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. Florida* 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 Branch’s direct appeal was pre-*Ring*, he attempted to challenge Florida’s unconstitutional capital sentencing statute before both the *Ring*

and *Hurst* decisions. Before trial, Branch filed pretrial motions raising *Ring* and *Hurst*-like challenges to the operation of Florida’s “advisory” capital-sentencing jury system, including under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and *Maynard v. Cartwright*, 486 U.S. 356 (1988), and also challenged Florida’s lack of a unanimous verdict on all the elements required to impose death as unconstitutional. (R. 77-90). After *Ring* but before *Hurst*, Branch filed a 3.850 motion specifically raising claims under *Ring* and *Caldwell*, and further arguing that Florida’s capital sentencing scheme allowing for a non-unanimous recommendation was unconstitutional. (PCR. 698-718). Under the rationale of *Mosley*, these circumstances provide a sufficient basis to apply the *Hurst* decisions retroactively to Branch, 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 Branch, but who was later resentenced to death after *Ring*, would receive *Hurst* relief and Branch 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 Branch 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 Branch 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 factfinding, 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.”).³

³ The recent ruling of an Eleventh Circuit panel in *Lambrix v. Sec’y*, No. 17-14413, 2017 WL 4416205 (11th Cir. Oct. 5, 2017), does not negate Branch’s arguments. First, *Lambrix* was decided in the context of the current federal habeas statute, which dramatically curtails review: “A state court’s decision rises to the level of an unreasonable application of federal law only where the ruling is objectively unreasonable, not merely wrong; even clear error will not suffice.” *Id.* at *8 (internal quotation marks omitted). In contrast, this Court’s application of federal constitutional protections is not circumscribed, as this Court noted in the *Hurst* context in *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016) (“[W]e hold that the Supreme Court’s decision in *Hurst v. Florida* requires that all critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury We also hold . . . under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury’s recommended sentence must be unanimous”). Second, *Lambrix* dealt with an idiosyncratic issue—the “retroactivity” of Florida’s new capital sentencing statute. *Lambrix* did not argue, as Branch does here, for the retroactivity of the constitutional rules arising from the *Hurst* decisions. Third, the Eleventh Circuit did not address the specific arguments about federal retroactivity that are raised here. Fourth, almost needless to say, an Eleventh Circuit panel decision has no precedential value in this forum.

C. This Court has an obligation to address Branch’s federal retroactivity arguments

Because this Court is bound by the federal constitution, it has the obligation to address Branch’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 *Hurst v. Florida*, *Hurst v. State*, Florida state law, and federal law require the *Hurst* decisions to be applied retroactively to Branch, vacate Branch’s 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 electronically served via the e-portal to Assistant Attorney General Lisa Hopkins at lisa.hopkins@myfloridalegal.com and capapp@myfloridalegal.com.

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