IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-_____
LOWER TRIBUNAL NO. 16-1992-CF-13193

TONEY DERON DAVIS,

Petitioner,

vs.

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

Respondent.

On Appeal from the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida

Honorable Judge Henry E. Davis
Judge of the Circuit Court, Division CR-E

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This petition for a writ of habeas corpus calls on this Court to review the constitutionality of a death sentence in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Under those decisions, Petitioner Toney Deron Davis' death sentence violates the United States and Florida Constitutions and should be vacated.

The *Hurst* decisions are retroactive to Petitioner because United States Supreme Court precedent provides that substantive constitutional rules must be applied retroactively by both federal and state courts, regardless of when a criminal conviction and sentence became final on direct appeal. The failure to do so here would violate the Eighth and Fourteenth Amendment prohibition against arbitrary and capricious death sentences and the Fourteenth Amendment's guarantee of equal protection and due process. In addition, the *Hurst* error in Petitioner's case cannot be ruled harmless beyond a reasonable under this Court's clear precedent because the jury in Petitioner's case recommended a death sentence by a non-unanimous vote of 11-1.

As a preliminary matter, Petitioner filed a notice of appeal of the denial of his first successive 3.851 motion in February 2016, less than a month after *Hurst v. Florida* was decided. *Davis v. State*, SC16-264. During that appeal, this Court

permitted Petitioner to provide briefing on the application of *Hurst v. Florida* to his case. Petitioner also filed a second successive 3.851 motion raising *Hurst* before the trial court on January 12, 2017. This Court denied Petitioner's appeal in SC16-264 on February 7, and the trial court followed suit on February 17, denying Petitioner's Hurst 3.851. However, the issue presented in the *Hurst* briefing in SC16-264 and the 3.851 motion concerned *Hurst* retroactivity only under state law. This Court has not addressed *Hurst* retroactivity under federal law in this or any other case, so the following petition is not duplicative of any prior *Hurst* litigation in this case.

Accordingly, Petitioner respectfully requests that this Court grant a writ of habeas corpus under the *Hurst* and *Montgomery* decisions, vacate his death sentence, and remand for a new penalty phase.

REQUEST FOR ORAL ARGUMENT

This Court has not yet decided the issue of federal retroactivity in *Hurst* cases. Petitioner respectfully requests oral argument so that Petitioner's counsel may address this important area of law. Oral argument will benefit this Court.

JURISDICTION

This Court has original jurisdiction to grant Petitioner a writ of habeas corpus under Article I, Section 13, and Article V, Section 3(b)(9) of the Florida Constitution. This proceeding is also authorized by Florida Rules of Appellate

Procedure 9.030(a)(3). This petition complies with the Rule 9.100(a) requirements.

BACKGROUND

Petitioner was convicted of murder in the Circuit Court of the Fourth Judicial Circuit, in and for Duval County in 1995. In various pre-trial motions, he raised unsuccessful challenges to the constitutionality of Florida's capital sentencing scheme, including the advisory nature of the jury and the court's ability to make a sentencing decision independent of the jury. *See State v. Davis*, Duval Co. No. 92-13193CF (motions filed November 21, 1994).

At the penalty phase, the State presented evidence of one aggravating circumstance to the jury: the capital felony was committed while the defendant was engaged in a contemporaneous felony. *See Davis v. State*, 703 So. 2d 1055, 1060 (Fla. 1997). At the conclusion of the penalty phase, the court instructed Petitioner's "advisory" sentencing jury as follows:

> The punishment for this crime is either death or life imprisonment without the possibility of parole for twenty-five (25) years. The final decision as to what punishment shall be imposed rests solely with the judge of this Court; however, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

Id. (Tr. June 13, 1995).

After deliberating, the jury, by a vote of 11-1, returned a generalized advisory recommendation to impose the death penalty. The jury's verdict stated, in full:

> A MAJORITY OF THE JURY, BY A VOTE OF 11 TO 1, ADVISE AND RECOMMEND TO THE COURT THAT IT IMPOSE THE DEATH PENALTY UPON TONEY DAVIS.

Id. (Verdict filed June 13, 1995.) The verdict form did not contain any findings of fact or specify the basis for the jury's non-unanimous recommendation. The jury was then discharged.

The court thereafter invited both the defense and the State to submit sentencing memoranda. The State's sentencing memorandum, ***for the first time*****, included the heinous, atrocious, and cruel aggravator, *id.* (State's Sentencing Memo filed June 28, 1995), despite the fact that it had not presented this aggravator to the jury**. The court, not the jury, then made the critical findings of fact required to impose a sentence of death under Florida law. The court found that the following aggravating factors had been proven beyond a reasonable doubt: (1) that the murder was committed during the course of a sexual battery; and (2) that the murder was heinous, atrocious, and cruel ("HAC"). *Davis*, 703 So. 2d at 1057. The court, not the jury, then found beyond a reasonable doubt that those aggravating factors were "sufficient" to impose the death penalty, and that the

aggravators were not outweighed by the mitigation.[1] Based upon this fact-finding, the court sentenced Petitioner to death. *Davis*, No. 92-13193CF (Judgment filed July 18, 1995).

On direct appeal, Petitioner argued that the trial court erred in considering the HAC aggravator because it had not been presented to the jury. *Davis*, 703 So. 2d at 1060. This Court denied Petitioner's claim, in part because it found "that it is not error for a judge to consider and find an aggravator that was not presented to or found by the jury." *Id.* at 1061. This Court further explained, "'The trial judge, however, is not limited in sentencing to consideration of only that material put before the jury, is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence.'" *Id.* (quoting *Engle v. State*, 438 So. 2d 803, 813 (Fla. 1983). This Court affirmed Petitioner's conviction and sentence, *id.* at 1062, and subsequently affirmed the denial of Petitioner's initial Florida Rule of Criminal Procedure 3.851 motion. *Davis v. State*, 136 So. 3d 1169 (Fla. 2014).

Petitioner then filed federal habeas corpus relief in the United States District Court for the Northern District of Florida. *Davis v. Sec'y*, No. 3:14-cv-01200, ECF No. 1 (M.D. Fla. Oct. 2, 2014). Those proceedings are pending.

[1] The mitigation the court found included that Petitioner was a good child, attended church, has talent as a musician, writes poetry, and participated in sports. *Davis*, 703 So. 2d at 1057.

On October 8, 2014, Davis filed his first successive postconviction motion with the state trial court, alleging newly discovered evidence related to both the guilt and penalty phases of his trial. The trial court summarily denied said motion on July 2, 2015, which Davis appealed. In the briefing of that appeal, Davis requested and was granted on May 25, 2016, the opportunity to provide briefing as to the application of *Hurst v. Florida* to his case. This Court denied that appeal on February 7, 2017, holding that this Court's decision in *Asay v. State* on the application of Florida's retroactivity doctrine under *Witt* foreclosed relief for Davis.

On January 12, 2017, Davis filed his second successive postconviction motion with the trial court, raising *Hurst v. Florida* and *Hurst v. State*. The trial court summarily denied the motion on February 17, 2017, based on this Court's decision ten days earlier applying *Asay* in Davis' appeal.

ARGUMENT

MR. DAVIS IS ENTITLED TO HAVE *HURST V. FLORIDA* AND *HURST V. STATE* APPLIED RETROACTIVELY TO VACATE HIS UNCONSTITUTIONAL DEATH SENTENCE, PURSUANT TO *MONTGOMERY V. LOUISIANA*

I. Petitioner's death sentence violates *Hurst v. Florida* and *Hurst v. State*

Petitioner's death sentence violates *Hurst v. Florida* and *Hurst v. State*. In *Hurst v. Florida*, the United States Supreme Court held that Florida's capital sentencing 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. Florida's unconstitutional scheme first required an advisory jury to render a generalized sentencing recommendation for life or death by a majority vote, without specifying the factual basis for the recommendation, and then empowered the sentencing judge alone, notwithstanding the jury's recommendation, to conduct the required fact-finding. *Id.* at 622. The Court held that before making its recommendation, the jury, not the judge, must make the findings of fact required to impose the death penalty under Florida law. *Id.*

In *Hurst v. State*, this Court held that the Eighth Amendment also requires *unanimous* jury fact-finding as to (1) which aggravating factors were proven, (2) whether those aggravators were "sufficient" to impose the death penalty, and (3) whether those aggravators outweighed the mitigation. 202 So. 3d at 53-59.[2] This Court made clear that each of those determinations are "elements" that must be found by a unanimous jury beyond a reasonable doubt. *Id.* at 57; *see also Jones v. State*, 212 So. 3d 321, 343 (Fla. 2017). In addition to rendering unanimous findings on each of those elements, the jury must also unanimously recommend the death penalty before a death sentence may be imposed. *Hurst v. State*, 202 So. 3d at 57 ("[B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death."). The Court further cautioned that, even if the jury unanimously found that each of the

[2] As this Court correctly noted in *Hurst v. State*, "in interpreting the Florida Constitution and the rights afforded to persons within this State, this Court may require more protection be afforded to criminal defendants than that mandated by the federal Constitution." 202 So. 3d at 57. This Court's unanimity holding was consistent with the constitutional "evolving standards of decency," *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), which have led to a national consensus that death sentences may be imposed only upon unanimous jury verdicts.

elements required to impose the death penalty was satisfied, the jury was not required to recommend the death penalty. *Id.* at 57-58 ("We equally emphasize that . . . we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds the aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.").

As to harmless error analysis, the burden is on the State to prove, beyond a reasonable doubt, that the *Hurst* error did not impact the sentence. *Id.* at 67-68. Where the State is unable to make that showing, relief is appropriate.[3]

Petitioner's jury was never asked to make unanimous findings on any of the elements required to impose a death sentence under Florida law. Instead, after being instructed that its verdict was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, Petitioner's jury rendered only a non-unanimous, generalized advisory recommendation to impose the death penalty. The record does not reveal whether the jurors unanimously agreed that the single offered aggravating factor was proven beyond a reasonable doubt, or unanimously agreed that that aggravator was sufficient to impose the death

[3] As explored further in section II, *infra*, this Court declined to rule that the error in Mr. Hurst's case was harmless beyond a reasonable doubt because the court found no reliable way to determine "what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt," or "how many jurors have found the aggravation sufficient for death," or "if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances." *Id.* at 68.

penalty, or unanimously agreed that the aggravator outweighed the mitigation. However, the record is clear that Petitioner's jurors were *not* unanimous as to whether the death penalty should even be recommended to the court.

The *Hurst* error is even more apparent here, where the State provided the additional HAC aggravating circumstance, an aggravator that had not been presented to the jury, to the trial court in its post-penalty phase sentencing memorandum. The court then considered and found the HAC aggravator, as it was included in the court's sentencing order as a basis for its decision to impose death. Thus, the problem here was not just the court considering the jury's recommendation based on a weighing process that used the same factors in making the ultimate decision; instead, *the court based its sentencing decision on an aggravating factor never reviewed by any jury*.

The State's decision to add an aggravating factor when asking the judge to impose a death sentence shows that the "advisory" jury recommendation was just that; there was no need to add another aggravating circumstance if the judge was required to follow the jury's 11-1 vote for death. This error was further exacerbated by the fact-intensive nature of the HAC aggravator and the great weight that it often carries in the weighing process. *See Jackson v. State*, 213 So. 3d 754, 788 (Fla. 2017) (explaining the HAC aggravator is "heavily fact-dependent"); *Perez v. State*, 919 So. 2d 347, 382 (Fla. 2005) (declining to find

harmless error when the judge and jury erroneously considered the HAC aggravator because of the "significant weight [it] has historically been accorded"). In contrast, the jury here considered only the contemporaneous felony aggravator, which it had already found in the guilt phase. Thus, the jury did not undergo much fact-finding at all when reviewing the aggravating factor before it, while the trial judge conducted the more extensive fact-finding necessary for the HAC aggravator.

Accordingly, Petitioner's death sentence violates the Sixth and Eighth Amendments in light of *Hurst v. Florida* and *Hurst v. State*.

The *Hurst* decisions should be applied retroactively to Petitioner. As explained in more detail in section III, *infra*, the *Hurst* decisions are retroactive to Petitioner as a matter of federal law.

II. The *Hurst* error in Petitioner's case was not harmless in light of the non-unanimous jury recommendation

Because Petitioner's death sentence violates *Hurst v. Florida* and *Hurst v. State*, and those decisions are retroactive to him under federal law, *see* section III, *infra*, Petitioner should be granted relief from his death sentence unless the State can prove that the *Hurst* error in his case was "harmless beyond a reasonable doubt." *Hurst v. State*, 202 So. 3d at 68. In the *Hurst* context, this Court has defined "harmless beyond a reasonable doubt" as "no reasonable probability that the error contributed to the sentence." *Id.* The "State bears an extremely heavy

burden" in this context. *Id.* at 68. This Court has noted that the State's ability to meet its burden of proving that a *Hurst* error was harmless is "rare." *King v. State*, 211 So. 3d 866, 890 (Fla. 2017).

In *Dubose v. State*, the Court made it clear that "in cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless." 210 So. 3d 641, 657 (Fla. 2017). The *Hurst* error in Petitioner's case is not harmless because his advisory jury recommended the death penalty by a non-unanimous vote of 11-1. The Court has now granted relief in over forty non-unanimous-recommendation cases.[4]

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[4] *See, e.g.*, *Bailey v. Jones*, No. SC17-433, 2017 WL 2874121, at *1 (Fla. July 6, 2017) (11-1 jury vote); *Peterson v. State*, 221 So. 3d 571, 575 (Fla. 2017) (7-5 jury vote); *Bargo v. State*, 221 So. 3d 562, 568 (Fla. 2017) (10-2 jury vote); *Sexton v. State*, 221 So. 3d 547, 559 (Fla. 2017) (10-2 jury vote); *Cole v. State*, 221 So. 3d 534, 545 (Fla. 2017) (9-3 jury vote); *Williams v. State*, No. SC13-1472, 2017 WL 2806711, at *12 (Fla. June 29, 2017) (10-2 jury vote); *Bevel v. State*, 221 So. 3d 1165 (Fla. 2017) (8-4 jury vote); *Hall v. State*, 219 So. 3d 783, 789 (Fla. 2017) (8-4 jury vote); *Braddy v. State*, 219 So. 3d 803, 826-27 (Fla. 2017) (11-1 jury vote); *Okafor v. State*, No. SC15-2136, 2017 WL 2481266, at *6 (Fla. June 8, 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); *Snelgrove v. State*, 217 So. 3d 992, 1003 (Fla. 2017) (8-4 jury votes); *Serrano v. State*, Nos. SC15–258 & SC15–2005, 2017 WL 1954980, at *15 (Fla. May 11, 2017) (9-3 jury votes); *Pasha v. State*, No. SC13–1551, 2017 WL 1954975, at *3 (Fla. May 11, 2017) (11-1 jury votes); *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017) (11-1 jury vote); *Hampton v. State*, 219 So. 3d 760, 782 (Fla. 2017) (9-3 jury vote); *Altersberger v. State*, 216 So. 3d 621, 629 (Fla. 2017) (9-3 jury vote); *Banks v. Jones*, 219 So. 3d 19, 32-33 (Fla. 2017) (10-2 jury vote); *Brookins v. State*, No. SC14-418, 2017 WL 1409664, at *7 (Fla. Apr. 13, 2017) (10-2 jury vote); *McMillian v. State*, 214 So. 3d 1274, 1289 (Fla. 2017) (10-2 jury vote); *Robards v. State*, 214 So. 3d 568, 576

The idea *Hurst* errors cannot be harmless in non-unanimous recommendation cases is a logical extension of *Hurst v. State*, where this Court emphasized that Florida's courts may not speculate whether, absent the *Hurst* error, the jury would have unanimously found beyond a reasonable doubt that (1) the aggravating factors were proven, (2) the aggravators were sufficient to impose the death penalty, and (3) the aggravators were not outweighed by the mitigation. *See Hurst v. State*, 202 So. 3d at 69. As this Court cautioned, engaging in such

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(Fla. 2017) (7-5 jury vote); *Heyne v. State*, 214 So. 3d 640, 648 (Fla. 2017) (10-2 jury vote); *Newberry v. State*, 214 So. 3d 562, 568 (Fla. 2017) (8-4 jury vote); *Abdool v. State*, 220 So. 3d 1106, 1116 (Fla. 2017) (10-2 jury vote); *Guzman v. State*, 214 So. 3d 625, 639–40 (Fla. 2017) (7-5 jury vote); *White v. State*, 214 So. 3d 541, 549–50 (Fla. 2017) (8-4 jury vote); *Bradley v. State*, 214 So. 3d 648, 657 (Fla. 2017) (10-2 jury vote); *Orme v. State*, 214 So. 3d 1269, 1273–74 (Fla. 2017) (11-1 jury vote); *Brooks v. Jones*, No. SC16–532, 2017 WL 944235, at *1 (Fla. Mar. 10, 2017) (9-3 and 11-1 jury votes); *Deviney v. State*, 213 So. 3d 794, 799–800 (Fla. 2017) (8-4 jury vote); *Baker v. State*, 214 So. 3d 530, 536 (Fla. 2017) (9-3 jury vote); *Jackson v. State*, No. 213 So. 3d 754, 783–93, (Fla. 2017) (11-1 jury vote); *Hodges v. State*, 213 So. 3d 863, 880–81 (Fla. 2017) (10-2 jury vote); *Smith v. State*, 213 So. 3d 722, 744 (Fla. 2017) (10-2 and 9-3 jury votes); *Ault v. State*, 213 So. 3d 670, 679–80 (Fla. 2017) (9-3 and 10-2 jury votes); *Johnson v. State*, 205 So. 3d 1285, 1290-91 (Fla. 2016) (11-1 jury vote); *McGirth v. State*, 209 So. 3d 1146, 1164 (Fla. 2017) (11-1 jury vote); *Durousseau v. State*, 218 So. 3d 405, 414-15 (Fla. Jan. 31, 2017) (10-2 jury vote); *Kopsho v. State*, 209 So. 3d 568, 570 (Fla. 2017) (10-2 jury vote); *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (9-3 jury vote); *Hojan v. State*, 212 So. 3d 982, 1000 (Fla. 2017) (9-3 jury vote); *Armstrong v. State*, 211 So. 3d 864, 865 (Fla. 2016) (9-3 jury vote); *Williams v. State*, 209 So. 3d 543, 566 (Fla. Dec. 22, 2016) (9-3 jury vote); *Simmons v. State*, 207 So. 3d 860 (Fla. 2016) (8-4 jury vote); *Mosley v. State*, 209 So. 3d 1248, 1283–84 (Fla. 2016); *Dubose*, 210 So. 3d at 657 (8-4 jury vote); *Anderson v. State*, 220 So. 3d 1133, 1150 (Fla. 2017) (8-4 jury vote); *Calloway v. State*, 210 So. 3d 1160, 1200 (Fla. 2017) (7-5 jury vote); *Hurst v. State*, 202 So. 3d at 69 (7-5 jury vote).

speculation "would be contrary to our clear precedent governing harmless error review." *Id.*; *see also Mosley*, 209 So. 3d at 1284. The reasoning the Court applied in *Hurst v. State* applies in Petitioner's case:

> Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

202 So. 3d at 68.

To the extent the State may argue that the *Hurst* error is rendered harmless by the fact that, among the aggravators applied to Petitioner, were those based on contemporaneous and/or prior felony convictions, this Court has rejected the idea that a judge's finding of such aggravators is relevant in harmless-error analysis of *Hurst* claims, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g.*, *Franklin,* 209 So. 3d at 1248 (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*"); *McGirth v. State*, 209 So. 3d 1146, 1164 (Fla. 2017) (contemporaneous felony); *Mosley*, 209 So. 3d at 1284 (contemporaneous felony); *Armstrong*, 211 So. 3d at 865 (prior violent felony); *Calloway*, 210 So. 3d at 1200 (prior violent felony); *Durousseau*, 218 So. 3d at 414 (prior violent felony); *Simmons*, 207 So. 3d at 861 (prior violent felony); *Williams*, 209 So. 3d at 567 (prior violent and contemporaneous felonies).

For the foregoing reasons, the *Hurst* error is not harmless.[5]

III. The *Hurst* decisions apply retroactively to Petitioner under federal law

The Supremacy Clause of the United States Constitution requires this Court to apply *Hurst* retroactively in this case. Although states may grant broader retrospective relief when reviewing their own state convictions, *see, e.g*, *Danforth v. Minnesota*, 552 U.S. 264, 277, 280–82 (2008), states may not grant partial retroactivity, which applies to only some similarly situated prisoners on collateral review but denies relief to others, where federal retroactivity law requires that a constitutional rule be retroactively applied generally. Thus, while Florida may maintain its own state retroactivity doctrines, the United States Constitution sets a retroactivity "floor" to which all state retroactivity determinations must adhere. Under federal principles, *Hurst v. Florida* and *Hurst v. State* should be applied retroactively to Petitioner and other similarly situated prisoners without regard to when their death sentences became final on direct appeal. The failure to recognize Petitioner's right to *Hurst* retroactivity under federal law would violate the Constitution and cannot be squared with the Eighth Amendment prohibition

[5] If this Court for some reason diverges from its precedent establishing that all *Hurst* errors in non-unanimous-recommendation cases are not harmless, any doubts as to whether the *Hurst* error in Petitioner's case was harmless should be resolved only after a remand for an evidentiary proceeding, at which counsel can develop evidence regarding the impact of the error, particularly as it relates to the effect on defense counsel's strategy, challenges to the aggravation, and presentation of mitigation.

against the arbitrary and capricious imposition of death sentences or the Fourteenth Amendment's rights to equal protection and due process.

A. The *Hurst* decisions announced a substantive new rule that must apply retroactively

The Supremacy Clause of the United States Constitution requires state post-conviction courts to apply "substantive" constitutional rules retroactively. As explained by the United States Supreme Court in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), "Where state collateral 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. This federal constitutional requirement applies even where a state supreme court has a separate retroactivity doctrine. *See id.* The *Hurst* decisions announced a substantive new rule that must apply retroactively under federal law. This requirement includes cases on collateral review in state court.

1. Substantive new rules apply retroactively, even when they have procedural components

Petitioner's federal right to *Hurst* retroactivity, even in a state proceeding, is highlighted by the United States Supreme Court's recent decision in *Montgomery*. In that case, a Louisiana defendant initiated a state post-conviction proceeding seeking retroactive application of *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding imposition of mandatory sentences of life without parole on juveniles

violates Eighth Amendment). The Louisiana Supreme Court held that *Miller* was not retroactive under its state retroactivity doctrines. *Montgomery*, 136 S. Ct. at 727. The United States Supreme Court reversed, holding that, notwithstanding the state court's determinations under its state retroactivity doctrines, the *Miller* rule was substantive and therefore the federal Constitution required it to be applied retroactively on state post-conviction review. *Id.* at 732-34.

In *Montgomery*, the Supreme Court found the *Miller* decision substantive even though it 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.

The substantive nature of some procedural changes was further illustrated in *Welch v. United States*, 136 S. Ct. 1257 (2016). In that case, 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 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).

2. The *Hurst* decisions announced a substantive new rule that must apply retroactively

Like both *Montgomery* and *Welch*, the *Hurst* decisions are substantive rules that must apply retroactively and cannot be denied on state retroactivity grounds. As in *Miller*, the *Hurst* decisions involved substantive rights that necessitated certain procedures. Florida's capital sentencing scheme stems from the well-established principles in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), that the class of offenders to whom the death penalty may be applied should be narrowed, and that those making the decision must be directed to reduce the risk of arbitrary sentencing. *Id.* at 189. Indeed, "[s]ince *Gregg*, [the Supreme Court's] jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). Florida's attempt to comply with *Furman* and *Gregg* resulted in the former system, where a jury issued an advisory opinion using a general verdict form to list any aggravating factors found and a breakdown of the jury's vote for death, with the judge making the ultimate

sentencing decision. In finding Florida's capital sentencing statute unconstitutional, the Supreme Court announced new rules protecting the substantive rights afforded by *Furman* and *Gregg*, but which required procedural changes in order to preserve those rights.

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 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 rulings within the meaning 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.").

The logic supporting *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 the federal habeas context under the federal retroactivity test articulated in *Teague v. Lane*, 489 U.S. 288 (1989). *Ring* involved the narrow holding that because the existence of at least one aggravating factor was required to impose a death sentence, this made such a finding an "element" that must be found by a jury rather than a judge. *Ring*, 536 U.S. at 608. *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 the fact-finding as to whether the aggravators were *sufficient* to impose death and the ultimate decision

whether a defendant should receive a life or death sentence. The *Summerlin* Court 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 Supreme Court has always regarded such 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.").

This Court has already acknowledged that following *Hurst v. Florida*, juries must find the existence of aggravating factors, "that the aggravating factors are sufficient[,] . . . and that the aggravating factors outweigh the mitigating circumstances" beyond a reasonable doubt. *Hurst v. State*, 202 So. 2d at 44. Other courts have already found this additional requirement to distinguish *Hurst* from

Ring. Federal judges in Florida have recognized the impact of the beyond-a-reasonable-doubt standard on the federal retroactivity of *Hurst*. *See, e.g.*, *Guardado v. Jones*, No. 4:15-cv-256 (N.D. Fla. May 27, 2016) (explaining that *Hurst* may be retroactive as a matter of federal law because "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive.") (citing *Ivan V.*, 407 U.S. at 205). After *Hurst*, the Supreme Court of Delaware found the Delaware death penalty statute, where the judge made independent findings and weighed aggravating and mitigating circumstances, unconstitutional. *Rauf v. Delaware*, 145 A. 3d 430, 433-34 (Del. 2016). Under the former statute, Delaware required juries to find at least one aggravating circumstance beyond a reasonable doubt before a defendant was eligible for a death sentence. *Id.* Once the jury did so, however, the trial judge made additional factual findings authorizing a death sentence. *Id.* The statute provided: "the Court . . . shall impose a sentence of death if the Court finds by a preponderance of the evidence . . . that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist." *Id.* at 433 n.3. The Delaware Supreme Court found that this weighing process was essential to the sentence and therefore must be made by a jury beyond a reasonable doubt. *Id.* at 434.

Finally, following *Hurst*, the Florida Supreme Court found that the Eighth Amendment requires these decisions by the jury to be unanimous. This additional

requirement also renders *Hurst* substantive. While *Ring* and *Summerlin* only reviewed the Sixth Amendment right to have a jury determine the existence of aggravating factors, Arizona already required jury unanimity in its decisions. Here, this Court specifically addressed the Eighth Amendment right to jury unanimity. The United States Supreme Court has found such a requirement substantive in the past. *See Brown v. Louisiana*, 447 U.S. 323, 334 (1980) (finding the decision in *Burch v. Louisiana*, 441 U.S. 130 (1979), which required unanimity in six-person juries for nonpetty criminal offenses, retroactive).

B. The retroactivity line drawn at *Ring* is inconsistent with federal law and violates constitutional mandates under the Eighth and Fourteenth Amendments

The arbitrary retroactivity line drawn at *Ring* is inconsistent with federal law and violates constitutional mandates under the Eighth and Fourteenth Amendments. Traditionally, federal law accepts only a binary approach to retroactivity analysis. In contrast, a framework that allows state courts to select which capital cases on collateral review can receive the retroactive benefit of a constitutional rule of law and which will not, based on the sentence's temporal relation to some precedent that came before the constitutional rule was announced, violates the United States Constitution. Under federal law, there is no such thing as partial retroactivity in collateral review cases.

Here, for purposes of federal law, Petitioner's right to *Hurst* retroactivity should not be impacted by the date his death sentence became final relative to *Ring* or any other antecedent case. Allowing a defendant's eligibility for *Hurst* relief to depend on when the conviction and sentence became final in relation to *Ring* violates the Eighth Amendment's requirement of culpability-related decision-making in capital cases. Instead, it leads to the arbitrary imposition of death sentences, which violates the Eighth and Fourteenth Amendments' prohibition against imposing death sentences in an arbitrary and capricious manner, the Fourteenth Amendment's guarantee of equal protection, and the Fourteenth Amendment right to due process before taking away the liberty interests defendants have in their own lives.

1. The current *Ring*-based retroactivity line violates the Eighth and Fourteenth Amendment prohibition against imposing death sentences in an arbitrary and capricious manner

The current *Ring*-based retroactivity line violates the Eighth and Fourteenth Amendment prohibition against imposing death sentences in an arbitrary and capricious manner. 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*, 428 U.S. at 188; *see also Furman*, 408 U.S. at 310 ("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). Accordingly, it is constitutionally mandated that the death penalty is imposed in a way that is not comparable to being struck by lightning. *See id.* at 309 (Stewart, J., concurring).

The categorization of cases into pre-*Ring* and post-*Ring* postures has resulted in such arbitrariness. For example, cases that were final slightly before the United States Supreme Court decided *Ring* but after it had already found that any element that increases a defendant's exposure to a higher sentence must be found by a jury, *see Apprendi v. New Jersey*, 530 U.S. 466 (2000), would be denied relief. *See, e.g.*, *Morris v. State*, 811 So. 2d 661 (Fla. 2002) (certiorari denied on May 22, 2002, just a month before *Ring* was decided). Some of these decisions were based on the completely arbitrary timing of the United States Supreme Court's decision on the petition for writ of certiorari. For example, the Florida Supreme Court denied direct appeal relief in *Card v. State*, 803 So. 2d 613 (Fla. 2001), and *Bowles v. State*, 804 So. 2d 1173 (Fla. 2001), on the exact same day. Card's lawyers filed a certiorari petition, which was denied *four days* after the decision in *Ring*. He has since obtained *Hurst* relief. *See Card v. Jones*, No. SC17-453, 2017 WL 1743835, at *1 (Fla. May 4, 2017). The cert petition in *Bowles*, on the other hand, was denied one week earlier than the decision in *Ring*. *See Bowles v. Florida*, 536 U.S. 930 (2002). It is illogical that one of these men

will now get a new sentencing hearing that comports with *Hurst*'s requirements while the other, who had an equally flawed penalty phase, will not get that same relief. Other factors affecting whether a defendant would get *Hurst* relief based on a *Ring*-based retroactivity test include whether another error had resulted in re-sentencing in prior proceedings, so that older cases dating back to the 1980s have now been pushed post-*Ring*, *see, e.g.*, *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (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); cases that had unforeseeable delays in getting the record on appeal prepared, *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*); any interlocutory appeals that occurred prior to or during the trial, resulting in a sentencing phase years after the crime, *see, e.g.*, *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); and this Court taking longer to decide certain cases than others after briefing and oral argument, *compare Booker v. State*, 773 So. 2d 1079 (Fla. 2017) (this Court issued opinion within one year after all briefs had been submitted, and the decision came down in between *Apprendi* and *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 post-*Ring*.

Thus, the suggestion that a defendant's entitlement to *Hurst* relief relies solely on whether or not his conviction was final before or after *Ring* leads to multiple determinations that are purely arbitrary and have nothing to do with culpability or the individual characteristics of the crime or the defendant. Rather, whether or not a petitioner on collateral review receives a new sentencing phase under *Hurst* is as random as being "struck by lightning." *See Furman*, at 408 U.S. at 309 (Stewart, J., concurring). This is just the "arbitrary and capricious manner" of imposing death sentences that the United States Supreme Court long ago prohibited.

2. The current *Ring*-based retroactivity line violates the Fourteenth Amendment's right to equal protection and due process in capital sentencing

The current *Ring*-based retroactivity line violates the Fourteenth Amendment's right to equal protection and due process in capital sentencing. By basing retroactivity on when a conviction and sentence became final in relation to *Ring*, defendants in the same posture–that is, on collateral review–are being treated

differently by this Court. This violates the Fourteenth Amendment's guarantee of equal protection under the law and due process rights.

First, treating similarly situated petitioners on collateral review differently is a violation of equal protection. "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and [imposes a specific sentence] on one and not the other, it has made as an invidious [*sic*] discrimination as if it had selected a particular race or nationality for oppressive treatment." *Skinner v. Oklahoma*, 316 U.S. 535, 542 (1942). Accordingly, the equal protection clause of the Fourteenth Amendment "den[ies] to State the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). When two classes of people are created by statute, the question becomes "whether there is some ground of difference that rationally explains the different treatment . . . ." *Id.*; *see also McLaughlin v. Florida*, 379 U.S. 184, 1919 (1964) ("The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose").

Here, no such reason exists. The classification of pre- and post-*Ring* defendants on collateral review was created by this Court. Their death sentences were all imposed under a statute that has always been unconstitutional. *See*

Montgomery, 136 S. Ct. at 731 ("A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional."). However, the *Ring*-based retroactivity line treats these similarly situated petitioners on collateral review differently without "some ground of difference that rationally explains the different treatment." *See McLaughlin*, 379 U.S. at 1919. This violates the equal protection rights for those who, like Petitioner, had the misfortune of receiving a death sentence after a constitutionally unsound penalty phase simply because that penalty phase pre-dated *Ring*. *See Griffith v. Kentucky*, 479 U.S. 314, 327-28 (1987) ("The fact that the new rule may constitute a clear break with the past has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule.").

This Court has provided no sensible reason for granting a new penalty phase to some petitioners while excluding others. The purported reason is that the rule in *Hurst* stemmed from the United States Supreme Court's decision in *Ring*. In truth, however, *Hurst* extended the right to a jury determination on each element of a crime or sentencing determination that was afforded in *Apprendi*, 530 U.S. at 466, to Florida's sentencing scheme. Just as *Ring* had applied *Apprendi*'s principles to Arizona's unconstitutional capital sentencing scheme, *Hurst* applied *Apprendi*'s principles to Florida's unconstitutional capital sentencing scheme. In *Ring*, the

United States Supreme Court had overturned pre-*Apprendi* precedent that had previously found Arizona's capital scheme constitutional. *Ring*, 536 U.S. at 609. Then, in *Hurst*, the Supreme Court applied the *exact same rationale* to Florida's capital sentencing scheme and overturned pre-*Apprendi* precedent finding Florida's capital scheme constitutional. *See Hurst*, 136 S. Ct. at 623.

Yet, because of the arbitrary *Ring*-based retroactivity line, petitioners whose sentences were final after *Apprendi* but only a year or two prior to *Ring* have been denied relief. *Compare Hitchcock v. State*, No. SC17-445, 2017 WL 3431500, at *1 (Fla. Aug. 10, 2017) (denying relief to a petitioner whose sentence was final after *Apprendi* but less than two years before *Ring*), *with Card*, 219 So. 3d 47, 48 (granting relief to a petitioner whose sentence was final four days after *Ring*). As previously explained, *see* Part III.B.1, *supra*, the dates when these sentences became final, for both pre- and post-*Apprendi* petitioners, were often for completely arbitrary reasons. While Florida's capital statute was always unconstitutional, *see Montgomery*, 136 S. Ct. at 731, this Court has created an arbitrary line for deciding which petitioners on collateral review now get a new constitutionally-sound penalty phase in violation of the Fourteenth Amendment. As the United States Supreme Court has explained, "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." *Skinner*, 316 U.S. at 542.

Furthermore, denying some petitioners a new penalty phase that comports with Florida's new sentencing statute violates due process. Once a state requires certain sentencing procedures, it creates Fourteenth Amendment life and liberty interests in those procedures. *See 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); *id.*at 1254-55 (Stevens, J., concurring).

"Where . . . a state has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law." *Hicks*, 447 U.S. at 346. 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 id.* 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). Accordingly, 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. *E.g.*, *Ohio Adult Parole Authority*, 523 U.S. at 272; *Ford*, 477 U.S. at 427-31 (O'Connor, J., concurring). For example, 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 thus federal due process) in having the jury select his sentence from the full range of alternatives available under state law. 477 U.S. at 343.

Under Florida's current statute, juries must make the sentencing decision unanimously, and they must find each "element" for a death sentence beyond a reasonable doubt. Fla. Stat. 921.141. While *Hurst v. State* announced for the first time that death sentences in Florida can only be obtained after a unanimous jury vote for death, *see Hurst*, 202 So. 3d at 54, it is now Florida law that juries must unanimously vote for death in order for a death sentence to be imposed. *See* Fla. Stat. 921.141. Florida law requiring these procedures vested in defendants a constitutionally protected life and liberty interest in a sentencing proceeding in

compliance with those requirements. *Hicks*, 447 U.S. at 346 (federal due process interest in adherence to mandated sentencing procedures). Had Petitioner been sentenced under the current statute, the jury would have been properly instructed that it was actually making the decision to impose death, not just an "advisory" opinion. The only aggravating circumstances factored into the decision would have been those presented to the jury, with no opportunity for the State to add any additional factors later. Petitioner would have been entitled to a unanimous decision on which aggravating and mitigating factors existed, whether there were sufficient aggravating factors to warrant a death sentence, and the ultimate choice in sentence. If only one juror, after weighing the aggravating and mitigating evidence in this case, decided that Petitioner should be sentenced to life without the possibility of parole instead of death, the court would have been required to impose a life sentence. Fla. Stat. 921.141. Here, of course, one juror did make such a decision. Under the new sentencing law, Petitioner never could have been sentenced to death.

The failure to give Petitioner a new penalty phase that comports with federal constitutional law, as provided in both *Hurst* decisions, was "an arbitrary disregard of the petitioner's right to liberty [and] is a denial of due process of law." *Hicks*, 447 U.S. at 346.

3. This Court's holding in *Hitchcock v. State* and *Asay v. State* do not undermine Petitioner's right to *Hurst* retroactivity under federal law.

This Court's holding in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017), and *Asay v. State*, Nos. SC17-1400 & SC17-1429, 2017 WL 3472836 (Fla. Aug. 14, 2017), do not undermine Petitioner's right to *Hurst* retroactivity under federal law. Petitioner has asserted that *Hurst* requires unanimous jury determinations for each element required to impose a death sentence, and that these determinations must be made beyond a reasonable doubt. Because of these new requirements announced by *Hurst*, federal law mandates that the *Hurst* decisions created a substantive right that must apply retroactively, and that the failure to do so violates the Eighth and Fourteenth Amendment prohibition against arbitrary and capricious imposition of the death sentence and the Fourteenth Amendment right to equal protection and due process. *Asay* and *Hitchcock* do not apply to Petitioner's arguments because neither case presented these arguments.

Asay raised four claims: (1) that the failure to require a unanimous jury decision violated the Eight Amendment's requirement for reliability in capital sentencing; (2) that Florida's statutory amendment requiring unanimity is a substantive right that applies retroactively under the Fourteenth Amendment; (3) that the lack of unanimity in Asay's sentencing hearing violated the Eighth

Amendment; and (4) that the failure to extend the same Sixth Amendment right announced by *Hurst v. Florida* that has been extended to other death row prisoners violates Fourteenth Amendment equal protection. *See Asay v. Jones*, Nos. SC17-1400 & SC17-1429, 2017 WL 3472836, Brief of Petitioner. In denying Asay's petition, this Court explained that Asay's arguments were based on the new 2017-1 statute and its jury unanimity requirement in capital sentencing. *Asay v. Jones*, 2017 WL 3472836, at *12. Thus, the arguments in *Asay* are not the same as Petitioner's federal retroactivity arguments. Petitioner goes further and asserts that the burden of proof requirement in combination with the unanimity requirement created a new substantive right that must apply retroactively under federal law.

Furthermore, while Petitioner does raise an equal protection claim, it is wholly distinguishable from Asay's. Asay suggests that the *Fourteenth* Amendment equal protection guarantee requires that *Hurst*'s Sixth Amendment right to jury sentencing should apply to all death row prisoners in Florida. Here, Petitioner posits that the *Eighth and Fourteenth* Amendments prohibit the arbitrary and capricious imposition of death sentences, *see 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). Petitioner also argues that the partial retroactivity caused by a strict *Ring* cut-off violates the

Fourteenth Amendment due process and equal protection requirements. While *Asay* included arguments about federal law, it focused exclusively on federal constitutional law as it pertains to jury unanimity and the arbitrariness of the Florida Supreme Court's application of the new jury unanimity statute. *Asay* did not include any arguments that the *Hurst* decisions announced substantive rules that must apply retroactively under federal law, or that the failure to apply the *Hurst* decisions in their entirety retroactively violated due process rights or the ban against arbitrary capital sentencing.

Hitchcock is also distinguishable. First, the procedural posture of *Hitchcock* prevented the Florida Supreme Court from fully addressing federal retroactivity. As the State pointed out in its *Hitchcock* response, Hitchcock failed to preserve the federal retroactivity issue for appeal. *See Hitchcock v. State*, 2017 WL 3431500, State's Response at 8 n.2 ("Appellant's [*Hurst* retroactivity] argument was not presented to the trial court below for its consideration."). While the Florida Supreme Court did not specifically address this default, its opinion relied on the original *Asay v. State* opinion, which did not contain any arguments pertaining to federal retroactivity law. *See Asay*, 210 So. 3d 1 (Fla. 2016). Indeed, the whole purpose for the August 2017 *Asay* appeal of his successive 3.851 petition is that Asay had not previously raised retroactivity under federal law, and he had addressed *Hurst v. Florida* but not *Hurst v. State*. It is clear from this Court's

complete silence on Hitchcock's federal retroactivity arguments that such arguments were not available for review in that case. The Court's reliance on the first *Asay* opinion in *Hitchcock*, which in turn provided the basis of its decision in the second *Asay* opinion, prevented this Court from addressing the question of retroactivity under federal constitutional law. Because the decisions in *Asay* and *Hitchcock* were based almost entirely on state law arguments, and to the extent that any federal arguments were made they are distinguishable from Petitioner's, *Hitchcock* and *Asay* bear no authority on the law of this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that, in light of the federal law requiring retroactive application of *Hurst*, this Court grant a writ of habeas corpus, vacate his death sentence, and remand for a new penalty phase.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the instant brief has been served to the Office of the Attorney General via eportal to capapp@myfloridalegal and to Assistant Attorney General Jennifer Keegan via the e-portal to Jennifer.Keegan@myfloridalegal.com this 22nd day of September, 2017.

/s/ Rick Sichta_____
A T T O R N E Y

CERTIFICATE OF COMPLIANCE AS TO FONT

I **HEREBY CERTIFY** that this brief is submitted by Appellant, using Times New Roman, 14-point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure Rule 9.210(a)(2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

/s/ Rick Sichta_____
A T T O R N E Y