FLORIDA SUPREME COURT
500 South Duval Street
Tallahassee, Florida 32399

CASE NO.: SC17-1711
L.T. NO.: 16-1992-CF-13193

TONEY DERON DAVIS v. **STATE OF FLORIDA**

Petitioner. Respondent.

PETITIONER'S RESPONSE TO THIS COURT'S SEPTEMBER 27, 2017 HITCHCOCK SHOW CAUSE ORDER

INTRODUCTION

At 10:13 p.m. on Friday, September 22, 2017, Petitioner filed a petition for writ of habeas corpus. By Wednesday, September 27, 2017, this Court had already issued a show cause order in Petitioner's case, ordering Petitioner to explain why, in twenty pages or less, that his "habeas corpus should not be denied in light of this Court's decision Hitchcock v. State, SC17-445."

Hitchcock answered none of the relevant arguments presented in Mr. Davis' habeas petition, as a brief overview of the *Hitchcock* and *Asay* decisions makes evident. As this Court has never ruled upon Mr. Davis' substantive arguments, it would be a violation of his constitutional rights for this Court to limit his appellate rights by denying his petition upon a decision of no precedential value for the arguments that Davis has presented.

HITCHCOCK/ASAY

In *Hitchcock*, the majority wrote: "Although Hitchcock references various constitutional provisions as a basis for arguments that Hurst v. State should entitle him to a new sentencing proceeding, these are nothing more than arguments that Hurst v. State should be applied retroactively to his sentence, which became final prior to Ring. As such, these arguments were rejected when we decided Asay. *Hitchcock*, 2017 WL 3431500, at *2. But, as Justice Pariente pointed out in her dissent, "[t]his Court did not in Asay, however, discuss the new right announced by this Court in Hurst to a unanimous recommendation for death under the Eighth Amendment. . . . Therefore, Asay does not foreclose relief in this case, as the majority opinion assumes without explanation." *Id.*, at *4 (Pariente, J., dissenting). In *Asay v. State*, 210 So. 3d 1, 14 (Fla. 2016), this Court acknowledged that the U.S. Supreme Court in *Hurst v. Florida* did not address "whether Florida's sentencing scheme violated the Eighth Amendment." The entirety of the Court's analysis in Asay hinged on whether *Hurst v. Florida*, 136 S. Ct. 616 (2016) should apply retroactively to *Asay*. *See id.* at 15. *Hurst v. Florida* is a Sixth Amendment case. The Sixth Amendment rights addressed in *Hurst v. Florida* have nothing to do with the substantive Eighth Amendment rights addressed in *Hurst v. State*.

The *Asay* majority acknowledged that "*Hurst v. Florida* derives from *Ring* [*v. Arizona*, 536 U.S. 584 (2002)]," 210 So. 3d at 15, and ultimately concluded that

Hurst v. Florida should not apply retroactively under *Witt v. State*, 387 So. 2d 922 (Fla. 1980) to people whose convictions were final before *Ring*. But as this Court also recognized in *Asay*, *Hurst v. Florida* did not address the question of whether Florida's scheme violated the Eighth Amendment. *Id.* at 14 (emphasis added). Thus, although this Court decided in *Asay* that *Hurst v. Florida* should not apply to pre-*Ring* individuals, *Asay* did not foreclose Eighth Amendment relief under *Hurst v. State*. In *Hitchcock*, the Court declined to analyze the other "various constitutional provisions" cited by Hitchcock, and those issues were not decided in *Hitchcock*. 2017 WL 3431500, at *2.

Therefore, *Hitchcock* has no precedential value and does not foreclose relief. It is axiomatic that "[t]o be of value as a precedent, the questions raised by the pleadings and adjudicated in the case cited as a precedent must be in point with those presented in the case at bar." *Twyman v. Roell*, 166 So. 215, 217 (Fla. 1936). In other words, "no decision is authority on any question not raised and considered, although it may be involved in the facts of the case." *State v. Du Bose*, 128 So. 4, 6 (Fla. 1930). Florida courts have held that where an "issue was not presented to the court, and . . . was not decided by the court," then the decision issued by that court is not binding on lower courts on that issue. *Speedway SuperAmerica, LLC v. Tropic Enters., Inc.*, 966 So. 2d 1, 3 (Fla. 2d DCA 2007); *see also Benson v. Norwegian Cruise Line Ltd.*, 859 So. 2d 1213, 1218 (Fla. 3d DCA 2003) (rejecting

argument that two cases were binding precedent and must be followed because "neither of these cases decided the point now before us"). Because *Asay* is silent on the issue of whether Florida's scheme violates the Eighth Amendment under *Hurst v. State*, and *Hitchcock* merely cites to *Asay*, stare decisis does not apply and *Hitchcock* is not binding precedent on issues not raised or decided in *Asay*. Furthermore, this Court has recognized that stare decisis is not immutable, and may yield if there has been an error in legal analysis. *See Brown v. Nagelhout*, 84 So.3d 304, 309 (Fla. 2012).

Hitchcock, for which a petition for certiorari is pending before the U.S. Supreme Court, is both unsound in principle and unworkable in practice. *Hitchcock* is unsound in principle because it cites to *Asay* for the proposition that neither *Hurst* decision should apply to Hitchcock retroactively, when *Asay* only addressed the Sixth Amendment implications of *Hurst v. Florida*. And it is unworkable in practice because each appeal raises unique issues, and due process requires a full consideration of those issues in each individual appeal. This Court has created an unworkable practice by attempting to dispose of dozens of cases under *Hitchcock* without further analysis.

Mr. Davis' habeas petition challenges this Court's retroactivity decision on several bases. First, Mr. Davis argues that under federal retroactivity analysis, as applied to the states through *Montgomery v. Louisiana*, *Hurst v. Florida* and

Hurst v. State establish new substantive constitutional rights. Second, Mr. Davis argues that the current position of this Court, that retroactivity only reaches back to cases that became final at least one day after *Ring*, violates the following constitutional rights of Mr. Davis: (a) the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty, and (b) the Fourteenth Amendment's guarantee of equal protection and due process. The arguments asserted in appealing to these "various constitutional provisions" are fundamental and deserve a full briefing and hearing before this Court, as well as written analysis as to their merit, which they have not yet received from this Court in any case.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This case 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 only post-*Ring* death sentences. Petitioner respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Petitioner also requests that the Court permit full review in this case in accord with the normal, untruncated habeas rules.

Mr. Davis is exercising a substantive right to petition this Court for habeas relief. *See* Fla. R. App. P. 9.100(a); Art. 1, Sec. 13, Fla. Const. His habeas petition presents issues which concern the continued viability and constitutionality of Mr.

Davis' death sentence. The Florida Constitution guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const. Pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. Because he has been provided this substantive right, Mr. Davis's right to litigate his habeas petition is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Evitts v. Lucy*, 469 U.S. 387, 393 (1985) ("if a State has created appellate courts as "an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S. at 18, 76 S.Ct., at 590, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.").

In a capital case in which a death sentence has been imposed, courts are required to go further when considering challenges to the death sentence. The Eighth Amendment requires more due to a special need for reliability. *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The 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 Mr. Davis to proceed in his appeal, indicates its intention on binding Mr. Davis to the outcome rendered in Hitchcock's appeal, regardless of the fact the record on appeal in each case is distinct and separate from one another.

The fact that this Court has *sua sponte* issued identical orders, in numerous other cases, employing the same truncated procedure it does here, reflects a prejudgment of the appeals and their scope. Mr. Davis deserves an individualized appellate process, particularly because *Hitchcock* did not raise the same issues at stake here.

"The 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." *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014). Yet, Mr. Davis is being denied that opportunity by this Court's attempt to confine him to the outcome in *Hitchcock* without first providing a fair opportunity of his own to demonstrate how the record and facts in his particular case prohibit his execution. Moreover, in denying relief in *Hitchcock,* this Court relied upon *Asay v. State* for the determination that *Hurst* was not retroactive to cases final before *Ring v. Arizona*. *Hitchcock v. State*, Case No. SC17-445 at *2-3. This Court did so despite the fact that the opinion in *Asay* was not premised upon, nor did it even address, the holding in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

It is in that regard that this Court must acknowledge that the holding in *Asay,* and this Court's reliance upon that holding in *Hitchcock,* does not foreclose the availability of *Hurst* relief to Mr. Davis. *Hurst v. Florida* was a momentous shift in United States Supreme Court's jurisprudence in the manner which it recognized that Florida's capital sentencing scheme violated the Sixth Amendment where it

did not require the jury to make the requisite findings of fact necessary to impose a sentence of death. However, its most important role was to serve as the catalyst for this Court's decision in *Hurst v. State*.

Depriving Petitioner the opportunity for full merits review would constitute an arbitrary deprivation of the vested state right to habeas corpus review under Article I, § 13, and Article V, § 3(b)(9), of the Florida Constitution. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

In this case, the initial habeas petition thoroughly addressed this Court's question in its show cause order, including why the *Hurst* decisions are substantive new rules that apply retroactively under federal law and how the current *Ring*-based cutoff violates the federal guarantee of equal protection and due process. The petition also explained that this Court's failure to address federal retroactivity in this or any other case precluded this Court from relying on its recent, state-law-based *Hurst* jurisprudence to deny Petitioner's claims, which were based in federal retroactivity law. Petitioner submits a condensed version of those argument below, but requests that this Court address the arguments from his habeas petition in full.

RELEVANT PROCEDURAL HISTORY

The penalty phase of Davis' case was conducted pursuant to the former version of F.S. 921.141, which the U.S. Supreme Court in *Hurst v. Florida* in January of 2016 held to be unconstitutional. The single aggravating factor that was submitted to the jury was that the crime was committed in the course of a sexual battery or an attempt to commit sexual battery. *Davis I*, 703 So. 2d at 1060. The jury was instructed that its verdict was merely advisory to the trial court. *Davis II*, 136 So. 3d at 1201. The jury deliberated for only thirty-four minutes and returned a recommendation of death by an 11-1 vote. (32 R 1143.)

The trial judge set a sentencing hearing for June 28, 1995, and told each side they could present sentencing memoranda prior to the hearing. (32 R 1147, 1148.) The judge instructed each side that they would be able to "present any matters that you think are relevant to sentencing." (32 R 1148.) The State filed its sentencing memorandum on June 27, 1995 – the day before the hearing – ***and for the first time*** **referenced a second aggravating circumstance – heinous, atrocious and cruel ("HAC")**. (3 R 404-408.) The State then argued HAC to the judge at the hearing, **and the judge considered and found HAC and the contemporaneous sexual battery to be proven by the State beyond a reasonable doubt**. Davis I, 703 So. 2d at 1060. The trial court determined that both aggravators had been proven, weighed them against the mitigation offered by Davis, and sentenced him

to death. Id. at 1060.

Davis raised eight claims on direct appeal. Id. at 1057-58. Davis argued in Claim V of the appeal that the trial court erred in finding HAC, when that aggravator had not been submitted to the jury. Davis asserted, "Here, the record establishes that the court neither instructed the jury that it could consider HAC and the State neither presented nor argued that particular aggravating circumstance but moreover, the court's instructions specifically took consideration of HAC from the purview of the jury by its specific instruction that the only aggravating circumstance it could consider was death during the course of sexual battery." (Direct Appeal IB 27 (emphasis added).)

This Court denied relief on all claims on November 6, 1997. *Davis I*, 703 So. 2d at 1062. As to Claim V, this Court rejected the claim as not being sufficiently preserved at the trial level and denied it on the merits as well, relying on pre-Ring caselaw. Id. at 1060-61 (citing "*Hoffman v. State*, 474 So. 2d 1178 (Fla. 1985) (court's finding of HAC was not error even though jury was not instructed on it); *Fitzpatrick v. State*, 437 So. 2d 1072, 1078 (Fla. 1983) (finding of previous conviction of violent felony was proper even though jury was not instructed on it.); *Engle v. State*, 438 So. 2d 803, 813 (Fla. 1983) . . . ").

Davis timely filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 on May 3, 1999. (14 PCR 2558.) He filed an

amended 3.851 motion on May 6, 2004 and a "Third Motion, as Amended" on July 27, 2006. Within these motions, Davis alleged 14 claims with numerous sub-claims, including claim twelve that "Davis was denied a reliable sentencing when the jury's role was diminished in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), and claim thirteen that "Davis was denied a reliable sentencing when the jury's role was diminished in violation of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)." *Davis II,* 136 So. 3d at 1183.

ARGUMENT

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

Petitioner was sentenced to death pursuant to an unconstitutional Florida capital sentencing scheme. In *Hurst v. Florida*, the United States Supreme Court held that Florida's scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. 136 S. Ct. at 620-22. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify the death penalty; and (3) whether those aggravators outweighed the mitigation. Under Florida's unconstitutional scheme, an "advisory" jury rendered a generalized recommendation for life or death by a

majority vote, without specifying the factual basis for the recommendation, and then the sentencing judge alone, notwithstanding the jury's recommendation, conducted the fact-finding. *Id.* at 622. In striking down that scheme, the Court held that the jury, not the judge, must make the findings of fact required to impose death. *Id.*

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.

Davis's jury was never asked to make unanimous findings of fact as to any of the required elements. Instead, after being instructed that its decision was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, the jury rendered a non-unanimous, generalized recommendation that the judge sentenced Davis to death. The record does not reveal whether Davis's jurors unanimously agreed that any particular aggravating factor had been proven beyond a reasonable doubt, or unanimously agreed that the aggravators were sufficient for death, or unanimously agreed that the aggravators outweighed

the mitigation. But the record *is* clear that Davis's jurors were not unanimous as to whether the death penalty should even be recommended to the court.

Davis's pre-*Hurst* jury recommended the death penalty by a vote of 11-1. This Court's precedent makes clear that *Hurst* errors are not harmless where the defendant's pre-*Hurst* jury recommended death by a non-unanimous vote. *Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017) ("[I]n cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless."). This Court has declined to apply the harmless error doctrine in every case where the pre-*Hurst* jury's recommendation was not unanimous.[1]

To the extent any of the aggravators applied to Davis were based on prior convictions, the judge's finding of such aggravators does not render the *Hurst* error harmless. Even if the jury would have found the same aggravators, Florida law does not authorize death sentences based on the mere existence of an aggravator. As noted above, Florida law requires fact-finding as to both the existence of aggravators *and* the "sufficiency" of the particular aggravators to warrant imposition of the death penalty. There is no way to conclude whether the jury would have made the same sufficiency determination as the judge. That is why this Court has consistently rejected the idea that a judge's finding of prior-conviction

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

aggravators is relevant in the harmless-error analysis of *Hurst* claims, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g.*, *Franklin v. State,* 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst*").[2]

Further, Davis' jury was instructed that its recommendation would only be advisory, so it did not feel the full burden of its decision in recommending death for Davis, which *Hurst* found to be a critical flaw in Florida's death penalty scheme. Thus, the jury instructions in this case also violated the Eighth Amendment, as set forth in *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) ("This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort

[2] 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).

had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.").

As recognized by the three dissenting votes on the U.S. Supreme Court to Monday's denial of certiorari in the cases of *Truehill* and *Oliver*:

> At least twice now, capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address. Specifically, those capital defendants, petitioners here, argue that the jury instructions in their cases impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory. "This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task," and we have thus found unconstitutional under the Eighth Amendment comments that "minimize the jury's sense of responsibility for determining the appropriateness of death." *Caldwell* v. *Mississippi*, 472 U. S. 320, 341 (1985).
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> Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where "the court [was] the final decision-maker and the sentencer—not the jury." *Combs* v. *State*, 525 So.2d 853, 857 (1988). In *Hurst* v. *Florida*, 577 U. S. ___, ___(2016) (slip op., at 10), however, we held that process, "which required the judge alone to find the existence of an aggravating circumstance," to be unconstitutional.
>
> With the rationale underlying its previous rejection of the *Caldwell* challenge now undermined by this Court in *Hurst*, petitioners ask that the Florida Supreme Court revisit the question. The Florida Supreme Court, however, did not address that Eighth Amendment challenge.

Truehill v. Florida, 16-9448; *Oliver v. Florida*, 17-5083 (Justice Sotomayor, with

whom Justice Ginsburg and Justice Breyer join, dissenting from the denial of certiorari).

II. 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 Petitioner under the Supremacy Clause

The *Hurst* decisions announced substantive rules that this Court must apply retroactively to Petitioner under the Supremacy Clause. At least two substantive rules were established by *Hurst v. Florida* and *Hurst v. State*. First, a Sixth Amendment rule was established requiring that a jury find as fact beyond a reasonable doubt: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are "sufficient" to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule). As in *Montgomery*, these requirements amounted to an "instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish." *Id.* at 735.

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

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

constitutional rule articulated in *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). In *Johnson*, the Court held that a federal statute that allowed sentencing enhancement was unconstitutional. *Id.* at 2556. *Welch* held that *Johnson*'s ruling was substantive because it "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied"—therefore it must be applied retroactively. *Welch*, 136 S. Ct. at 1265. The Court emphasized that its determination whether a constitutional rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function," i.e., whether the new rule alters only the procedures used to obtain the conviction, or alters instead the class of persons the law punishes. *Id.* at 1266. In *Welch*, the Court pointed out that, "[a]fter *Johnson*, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence." *Id.* Thus, "*Johnson* establishes, in other words, that even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause." *Id.* "It follows," the Court held, "that *Johnson* is a substantive decision." *Id.* (internal quotation omitted).

The same reasoning applies in the *Hurst* context. The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a

reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rules as a matter of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. 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 Petitioner'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

C. This Court has an obligation to address Petitioner's federal retroactivity arguments

Because this Court is bound by the federal constitution, it has the obligation to address Petitioner'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.

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

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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 Petitioner 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.

Beginning with *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), this Court has applied *Hurst* retroactively as a matter of state law and granted relief in dozens of collateral-review cases where the defendant's sentence became final after *Ring*. But the Court has created a state-law cutoff at the date *Ring* was decided—June 24, 2002—to deny relief in dozens of other collateral-review cases. The Court recently reaffirmed its retroactivity cutoff in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). The Court has not addressed in any case whether this retroactivity cutoff at *Ring* is constitutional as a matter of federal law.

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

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

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. *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. *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); *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 Davis, but who was later resentenced to death after *Ring*, would receive *Hurst* relief and Davis 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).[4]

[4] 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 Petitioner, 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."). Petitioner urges that the Court allow him to brief this aspect of his case in an untruncated fashion.

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.

B. This Court's retroactivity cutoff violates the Eighth Amendment's guarantee of reliability in capital sentencing

Hurst v. State was premised upon this Court's interpretation of what the Florida Constitution and the national consensus required under the Eighth Amendment to ensure reliability of death sentences. In *Hurst v. State* this Court held that it is reliability that is the touchstone of the Eighth Amendment in capital cases. And it is the need for reliability that led to this Court's decision in *Hurst v. State*, requiring unanimity under the Eighth Amendment and the Florida Constitution. That decision by necessity inherently implied this Court acknowledged the constitutional requirement for reliability in a death sentence and

recognized the need for enhancing reliability in Florida under its capital sentencing statute. This Court's opinion in its simplest terms is the acknowledgement that cases in which unanimity was not required are inherently less reliable and carry with that lack of reliability the impermissible likelihood that the decision to impose death was made arbitrarily and wantonly in violation of the Eighth Amendment. *See Furman v. Georgia;* 408 U.S. 238 (1972); *Gregg v. Georgia, 428 U.S. 153 (1976)*. Thus, it is within that context that the proper basis for Mr. Davis's argument against this Court's approach to limited retroactive application of *Hurst* in both *Asay* and *Hitchcock* is properly understood. This Court's continued reliance on *Asay* to repeatedly reject *Hurst* claims similar to Mr. Davis's will amount to the denial of due process and a fair opportunity to challenge his sentences of death.

Mr. Davis challenges his death sentence on the basis of the conclusion in *Hurst v. State* that a death sentence flowing from a death recommendation in which the jury was not required to return a unanimous verdict on all findings of fact lacks reliability. This is a much different and stronger argument in support of retroactivity under *Hurst v. State* than the one made by Mr. Hitchcock. The Eighth Amendment requires that a death sentence carry extra reliability in order to insure that it was not imposed arbitrarily. Heightened reliability in capital cases is a core value of the Eighth Amendment and *Furman v. Georgia*.

In *Hurst v. State*, this Court held that enhanced reliability warranted the requirement that a death recommendation be returned by a unanimous jury. In doing so, the Court effectively recognized that a death sentence without the unanimous consent of the jury was lacking in reliability and thus did not carry the heightened reliability required by the Eighth Amendment. In that context, this Court's decisions in *Mosley* and *Asay* established a bright line cutoff as to the date at which the State's interest in finality trumped the interests of fairness and curing individual injustice, such a bright line cutoff violated the Eighth Amendment principle set forth in *Hall v. Florida*. Mr. Hitchcock did not make this argument as to the retroactive benefit of *Hurst v. State* being arbitrarily limited by a bright line cutoff in violation of the Eighth Amendment, nor has this Court addressed this issue.

While this Court in *Hurst v. State* found non-unanimous death recommendations were lacking in reliability, the level of unreliability is obviously compounded in some cases by matters and issues that increase the unreliability of a particular death sentence. Just as there were death sentenced individuals on the wrong side of the 70 IQ score cutoff who were likely intellectually disabled and erroneously under sentence of death as discussed in *Hall*, there are individuals with pre-*Ring* death sentences that are founded upon proceedings layered in error to the

extent that the cumulative unreliability overcomes any interests the State may have in finality.

Additionally, it is important to also note that while the State's interest in finality increases the older the case is, older cases will often have greater unreliability due to advances in science and improvements in the quality of representation in capital cases over time. This is especially accurate in Mr. Davis's case where he has raised claims in postconviction challenging the reliability of the forensic evidence at trial and the ineffective assistance counsel at both guilt and penalty phase. On appeal from denial of those claims by the circuit court, this Court determined that Mr. Davis was incapable of establishing prejudice at penalty phase given the "substantial aggravation" in the case and the "brutal and disturbing nature" of the murders. *Davis v. State*, 940 So. 2d 1109, 1137-38 (Fla. 2006). That finding was premised upon this Court's understanding that a jury's advisory recommendation would not be altered in favor of life unless six jurors would have been convinced to vote in favor of life--a standard which, of course, has since been rejected by this Court in *Bevel v. State*, __ So. 3d __, 2017 WL 2590702 (Fla. June 15, 2017).

As such, death sentences imposed after a jury did not return unanimous findings on all facts necessary to impose a sentence of death before June 24, 2002, are just as unreliable as similar death sentences imposed after June 24, 2002. The

older the death sentence, the more likely it is as to the unreliability of the death sentence due to the less reliable scientific methodology the further back in time the death sentence was imposed.

Drawing a line at June 24, 2002 is just as arbitrary and imprecise as the bright line cutoff at issue in *Hall v. Florida*, 134 S. Ct. at 2001 ("A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability."). When the United States Supreme Court declared that cutoff unconstitutional, those death sentenced individuals with IQ scores above 70 were found to be entitled to a case by case determination of whether the Eighth Amendment precludes their execution. The unreliability of the proceedings giving rise to Mr. Davis's death sentence compounds the unreliability of his death recommendation. A recommendation that was returned by a jury unaware of its sentencing responsibility, as recognized in *Hurst v. State*, to such an extent that the interests of fairness outweigh the State's interest in finality in his case.

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

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

CONCLUSION

This Court should find that *Hitchcock* is not binding on any of the issues raised by Davis in his habeas petition, hold full briefing on these arguments, and ultimately conclude that federal law requires the *Hurst* decisions to be applied retroactively to Davis, vacate his 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 Jennifer Keegan at jennifer.keegan@myfloridalegal.com and capapp@myfloridalegal.com.

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