IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 17-686

ROBERT TREASE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE

I. Request for oral argument and full briefing

This appeal present important issues: whether federal law requires this Court to extend *Hurst* retroactivity to death sentences that became final before *Ring v. Arizona*, rather than cabining *Hurst* relief to post-*Ring* death sentences. Appellant respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Appellant also requests that the Court permit full briefing in this case in accord with the normal, un-truncated rules of appellate practice.[1] This Court's Order that "Appellant shall show cause . . . why the trial

[1] Depriving Appellant full briefing would constitute an arbitrary deprivation of the vested state right to a mandatory plenary appeal in capital cases. *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015) ("[T]his Court has a mandatory obligation to review

Court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, No. SC17-445," should be withdrawn. Appellant was not a party to that action and it would violate the Eighth and Fourteenth Amendments to restrict him to the arguments and the rulings made in *Hitchcock*.

II. Appellant's death sentence violates *Hurst*

Appellant was sentenced to death pursuant to an unconstitutional Florida capital sentencing scheme. As discussed *infra*, 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. 616, 620-22 (2016). 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.*

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all death penalty cases to ensure that the death sentence is imposed in accordance with constitutional and statutory directives."); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

at 622. In striking down that scheme, the Supreme Court held that the jury, not the judge, must make the findings 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.

Appellant'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 generalized recommendation for death. More specifically, the jurors, who were repeatedly told that the judge was the sentencer and that only their "recommendation" or "opinion" on sentencing was being sought, recommended the death penalty by a non-unanimous 11-1 vote. The trial court alone found the following statutory aggravating factors: (1) previous violent felonies against persons; and that the murder was committed (2) while engaged in a burglary or robbery, (3) to avoid arrest, and (4) for pecuniary gain; and (5) the

murder was heinous, atrocious or cruel. The trial court found three nonstatutory mitigating factors and assigned weight to each factor: (1) Trease's abuse as a child– "considerable" weight; (2) Trease adjusted well to incarceration and helped prevent an inmate suicide–"little or no" weight; and (3) Siegel's (the co-defendant's) disparate sentence–"little" weight. The trial court – making the findings necessary for a sentence of death--imposed a sentence of death. The judgment was affirmed, *Trease v. State*, 768 So.2d 1050 (Fla. 2000), and was final before the United States Supreme Court's decision in *Ring v. Arizona*.

In January, 2017, Defendant filed a motion for post-conviction relief based upon *Hurst v. Florida*, *Hurst v. State*, and other claims. The lower court denied relief (*see* Appendix 1) based solely on this Court's non-retroactivity holding announced in *Asay v. State*, discussed *infra*. This appeal followed.

III. It would violate the Eighth and Fourteenth Amendments to deny Appellant the benefit of the *Hurst* decision

Hurst (decided on January 12, 2016) had followed *Ring v. Arizona*[2] (decided on June 24, 2002) in subjecting the capital sentencing process to the Sixth Amendment requirement of *Apprendi v. New Jersey*[3] (decided on June 26, 2000) that all facts necessary for criminal sentencing enhancement must be found by a

[2] *Ring v. Arizona*, 536 U.S. 584 (2002).
[3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

jury. Applying Florida's retroactivity doctrines, this Court held in *Mosley v. State*[4] that inmates whose death sentences were not yet final on June 24, 2002 were entitled to resentencing under *Hurst*. It held in *Asay v. State*[5] that inmates whose death sentences became final before June 24, 2002 were not entitled to resentencing.

On remand from *Hurst v. Florida,*[6] this Court had implemented the Sixth Amendment ruling by interpreting its state constitution and statute as requiring that a jury's death verdict must rest upon findings that include the sufficiency of aggravation and its preponderance over mitigation, so that a death sentence should be recommended; and it held that these findings must be unanimous.[7] In *Hitchcock*, this Court held that these state-law rights—as well as the federal Sixth Amendment jury-trial right—would be vouchsafed retroactively to the *Mosley* cohort but denied to the *Asay* cohort.[8]

This case arises at the intersection of two principles that have become central fixtures of the United States Supreme Court's jurisprudence over the past four and a half decades. The first principle, emanating from *Furman v. Georgia*,

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[4] *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016).
[5] *Asay v. State*, 210 So. 3d 1 (Fla. 2016).
[6] *Hurst v. Florida*, 136 S. Ct. 616 (2016).
[7] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).
[8] *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017).

408 U.S. 238 (1972) and *Godfrey v. Georgia*, 446 U.S. 420 (1980), is that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty," *id*. at 428. Succinctly put, this principle "insist[s] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). The Eighth Amendment's concern against capriciousness in capital cases refines the older, settled precept that Equal Protection of the Laws is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

The second principle, originating in *Linkletter v. Walker*, 381 U.S. 618 (1965), and later refined in *Teague v. Lane*, 489 U.S. 288 (1989), recognizes the pragmatic necessity for the Court to evolve constitutional protections prospectively without undue cost to the finality of preexisting judgments. This need has driven acceptance of various rules of non-retroactivity, all of which necessarily accept the level of arbitrariness that is inherent in the drawing of temporal lines.

The United States Supreme Court has struck a balance between the two principles by honoring the second even when its application results in the execution of an inmate whose death sentence became final before the date of an authoritative ruling establishing that the procedures used in his or her case were constitutionally defective. *E.g.*, *Beard v. Banks*, 542 U.S. 406 (2004). If nothing more were involved here, that balance would be decisive. But this Court's post-*Hurst* retroactivity rulings do involve more. They inaugurate a kind and degree of capriciousness that far exceeds the level justified by normal non-retroactivity jurisprudence.

To see why this is so, one needs only consider the ways in which Florida's pre-*Ring* condemned inmates do and do not differ from their post-*Ring* peers: What the two cohorts have in common is that both were sentenced to die under a procedure that allowed death sentences to be predicated upon factual findings not tested by a jury trial—a procedure finally invalidated in *Hurst* although it had been thought constitutionally unassailable under decisions of this Court stretching back a third of a century.[9]

The ways in which the two cohorts differ are more complex. Notably:

[9] *See Spaziano v. Florida*, 468 U.S. 447 (1984); *Hildwin v. Florida*, 490 U.S. 638 (1989); and *Bottoson v. Florida,* 537 U.S. 1070 (2002) (denying certiorari to review *Bottoson v. Moore,* 833 So.2d 693 (Fla. 2002)).

(A) Inmates whose death sentences became final before June 24, 2002 have been on Death Row longer than their post-*Ring* counterparts. They have demonstrated over a longer time that they are capable of adjusting to that environment and continuing to live without endangering any valid interest of the State.

(B) Inmates whose death sentences became final before June 24, 2002 have undergone the suffering chronicled in, *e.g.*, *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, [1993] 1 Zimb. L.R. 239, 240, 269(S) (Aug. 4, 1999), and most recently by Justice Breyer, dissenting from the denial of certiorari in *Sireci v. Florida*, 137 S. Ct. 470 (2016), longer than their post-*Ring* counterparts. "This Court, speaking of a period of *four weeks,* not 40 years, once said that a prisoner's uncertainty before execution is 'one of the most horrible feelings to which he can be subjected.'" *Id.* at 470. "At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes." *Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 462 (1999) (Justice Breyer, dissenting from the denial of certiorari).

(C) Inmates whose death sentences became final before June 24, 2002 are more likely than their post-*Ring* counterparts to have been given those sentences

under standards that would not produce a capital sentence—or even a capital prosecution—under the conventions of decency prevailing today. In the generation since *Ring* was decided, prosecutors and juries have been increasingly unlikely to seek and impose death sentences. Thus, we can be sure that a significant number of cases which terminated in a death verdict before *Ring* would not be thought death-worthy by 2017 standards. We cannot say which specific cases would or would not; but it is plain generically that some inmates condemned to die before *Ring* would receive less than capital sentences today.

(D) Inmates whose death sentences became final before June 24, 2002 are more likely than their post-*Ring* counterparts to have received those sentences in trials involving problematic factfinding. The past two decades have witnessed a broad-spectrum recognition of the unreliability of numerous kinds of evidence—flawed forensic-science theories and practices, hazardous eyewitness identification testimony, and so forth—that was accepted without question in pre-*Ring* capital trials. Doubts that would cloud today's capital prosecutions and cause today's prosecutors and juries to hesitate to seek or impose a death sentence were unrecognized in the pre-*Ring* era. Evidence which led to confident convictions and hence to unhesitating death sentences a couple of decades ago would have substantially less convincing power to prosecutors and juries today.

Concededly, penalty retrials in the older cases would also pose greater difficulties for the prosecution because of the greater likelihood of evidence loss over time. But the prosecution's case for death in a penalty trial seldom depends on the kinds of evidentiary detail that are required to achieve conviction at the guilt-stage trial; transcript material from the guilt-stage trial will remain available to the prosecutors in all cases in which they opt to seek a death sentence through a penalty retrial; it is a commonplace of capital sentencing practice everywhere that prosecutors often rest their case for death entirely or almost entirely on their guilt-phase evidence, leaving the penalty trial as a locus primarily for defense mitigation. And even if a prosecutor does opt to seek a penalty retrial and fails to obtain a new death sentence, the bottom-line consequence is that the inmate will continue to be incarcerated for life. That is a substantially less troubling outcome than the prospect of outright acquittals in guilt-or-innocence retrials involving years-old evidence that concerned the Court in *Linkletter* and *Teague*.

Taken together, considerations (A) through (D) make it plain that the particular application of non-retroactivity resulting from the this Court's *Mosley-Asay* divide involves a level of caprice that runs far beyond that tolerated by standard-fare *Linkletter* or *Teague* rulings. Its denial of relief in precisely the class of cases in which relief makes the most sense is irremediably perverse. This

degree of capriciousness and inequality violates the Eighth Amendment and Equal Protection.

IV. Because the *Hurst* decisions announced substantive constitutional Rules, the Supremacy Clause of the United States Constitution requires state courts to apply those rules retroactively to all cases on collateral review

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. The Court explained that "*the Constitution* requires state collateral review courts to give retroactive effect to that

rule," *id.* at 728-29 (emphasis added), and that, "[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. The *Montgomery* Court found the *Miller* rule substantive 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.

The *Hurst* decisions announced substantive rules that must be applied retroactively to Appellant by this Court under the Supremacy Clause. At least two substantive rules were established by *Hurst v. Florida* and *Hurst v. State*. First, a Sixth Amendment rule was established requiring that a jury find as fact 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 substantive. *See Montgomery*, 136 S. Ct. at 734 (holding 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 the elements to be found 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 (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 rules

as a matter of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on" the judge-sentencing scheme. *Id.* 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. Thus, 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. *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 death 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 proof-beyond-a-reasonable-doubt decisions are substantive. *See, e.g.*, *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).

V. The Constitutional violations were not harmless

These constitutional violations cannot be shown by the state to be harmless beyond a reasonable doubt. First, in order to prevail the state must show beyond a reasonable doubt that not one properly instructed juror would have voted for life. Second, the state must show beyond a reasonable doubt that every juror would find the existence of each aggravating factor, that the aggravating factors are sufficient, that the aggravating factors outweigh the mitigating circumstances, and that death was the appropriate punishment. Third, jurors must be correctly instructed as to their sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Hurst v. Florida*, the Court wrote that "[t]he State cannot now

treat the advisory recommendation by the jury as a necessary factual finding that *Ring* requires." 136 S. Ct. at 622. Individual jurors must know that they each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. Mr. Trease's jury was told the exact opposite–that Mr. Trease could be sentenced to death regardless of the jury's recommendation. "Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." *Caldwell*, 472 U.S. at 341; *see also id*. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.").

Johnson v. State, 205 So. 3d 1285, 1288-89 (Fla. 2016), also illustrates that the constitutional violations were not harmless. In *Johnson*, the jury recommended three death sentences by votes of 11 to 1. *There were three victims in Johnson, as opposed to one here*. The trial court found three aggravating factors in the deaths of victims Evans and Beasley, including the cold, calculated and premeditated aggravator, and two aggravating factors in the death of victim

Burnham. *Id*. at 1288 & n.1. The trial court also found three statutory and ten nonstatutory mitigating circumstances. *Id*. at 1289 & nn.2,3. The trial court gave most of the mitigating factors slight or very slight weight. *Id*. In addressing whether the *Hurst* error was harmless, the Florida Supreme Court first rejected "the State's contention that Johnson's contemporaneous convictions for other violent felonies insulate Johnson's death sentences from *Ring* and *Hurst v. Florida*." *Id*. at 1289. The court found the case "obviously include[s] substantial aggravation." *Id*. at 1290. However, the court also found that the evidence of mitigation was extensive and compelling. *Id*. Based on "a nonunanimous jury recommendation and a substantial volume of mitigation evidence," the court could not conclude "'beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency.'" *Id*. at 1291 (quoting *State v. Ring*, 65 P.3d 915, 946 (Ariz. 2003)).[10]

[10]Substantial mitigating evidence was introduced in Mr. Trease's case. First–Mr. Trease and his siblings were raised in terrifying and torturous conditions. *See* Initial Brief of Appellant, Florida Supreme Court, No. 89,961, pp. 25-29. The trial court found that Mr. Trease was abused as a child on occasions too numerous to recount and gave that mitigation considerable weight. Mr. Trease adjusted well to incarcerations and saved an inmate from suicide. And Mr. Trease's co-defendant received a disparate sentence in return for her testimony. The state cannot prove beyond a reasonable doubt that no juror would have voted for a life sentence under these circumstances.

Having prior convictions also cannot render the constitutional violations here harmless beyond a reasonable doubt. In *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016), the Court wrote that, as here, "the jury that recommended death did not find the facts necessary to sentence him to death" because the jury returned a non-unanimous recommendation. The Court rejected "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*." *Id*.

VI. Conclusion

This Court should hold that federal law requires the *Hurst* decisions to be applied retroactively to Appellant. His sentence is unconstitutional, the constitutional violations were not harmless, and arbitrarily denying him *Hurst* relief is itself unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of October, 2017, I electronically filed the foregoing by using the CM/ECF system which will send a notice of electronic filing to Stephen D. Ake, 2507 E. Frontage Rd., Suite 200, Tampa, Florida, 33607-7013, and e-mail Stephen.Ake@myfloridalegal.com.

/s/Mark Olive

Mark E. Olive