IN THE SUPREME COURT OF FLORIDA

WILLIAM EARL SWEET,

Appellant,

v.

STATE OF FLORIDA,

Appellee,

_____/

CASE NUMBER SC17-699

LOWER TRIBUNAL NO. 1991-CF-002899

APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE

I. Request for oral argument and full briefing

Appellant, William E. Sweet, is an innocent man who has lived in solitary confinement on death row for close to twenty years, after a trial rife with problematic fact-finding, constitutional error, and a nonunanimous general jury verdict. Federal law requires this Court to entertain every argument in support of extending *Hurst* retroactivity to death sentences that became final before *Ring v. Arizona*, 536 U.S. 584 (2002).[1] Mr. Sweet requests full briefing and oral argument on this and his related claims pursuant to Fla. R. App. P. 9.320.

The Order to Show Cause should be withdrawn and a full briefing schedule should be entered in this case because Mr. Sweet was not a party to the *Hitchcock*

[1] *See* Petition for Writ of Certiorari, *Hitchcock v. Florida*, No. 17-6180 (2017).

case and it would violate the Sixth, Eighth and Fourteenth Amendments to arbitrarily apply the *Hitchcock* holding to Mr. Sweet's case. "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). *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015) ("[T]his Court has a mandatory obligation to review all death penalty cases to ensure that the death sentence is imposed in accordance with constitutional and statutory directives."); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).[2]

In *Hurst v. Florida*, the United States Supreme Court held that Florida's statutory death penalty 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

[2] Note that Mr. Sweet's case will be before the Court on additional matters relating to the appeal of his Sixth Successive Motion for Post-Conviction Relief in short order as a notice of appeal was filed on October 27, 2017.

the sentencing judge alone, notwithstanding the jury's recommendation, conducted the fact-finding. *Id.* 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 analyzed *Hurst v. Florida* and held that the Eighth Amendment requires unanimous jury fact-finding as to each of the required elements and 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.

Mr. Sweet's jury was never asked to make unanimous findings of fact as to any of the required elements of his death sentence. 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. The record does not reveal whether Mr. Sweet's jurors unanimously agreed that any aggravating factor had been proven beyond a reasonable doubt, unanimously agreed that the aggravators were sufficient for death, or unanimously agreed that the aggravators outweighed the mitigation. In Mr. Sweet's case, two jurors did not vote for death and any jury findings that aggravators outweighed mitigators would have been tainted with ineffective

assistance of counsel given that defense counsel presented and questioned the only mitigation witness without meeting her or preparing for her testimony in "any way, shape or form." R8/1463-64.

II. It Violates the Eighth and Fourteenth Amendments to Deny Mr. Sweet the Benefit of the *Hurst* Decision

Hurst followed *Ring* in subjecting the capital sentencing process to the Sixth Amendment requirement of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that all facts necessary for criminal sentencing enhancements must be found by a jury. Applying Florida's retroactivity doctrines, this Court held that inmates whose death sentences were not final on June 24, 2002 were entitled to resentencing under *Hurst* and that inmates whose death sentences became final before June 24, 2002 were not entitled to resentencing. *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); *Asay v. State*, 210 So. 3d 1 (Fla. 2016).

On remand from *Hurst*, this Court had implemented the Sixth Amendment ruling by interpreting the state constitution and statute as requiring a jury's death verdict to rest upon findings that include the sufficiency of aggravation and preponderance over mitigation, so that a death sentence should be recommended; and it held that these findings must be unanimous. *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *See Hurst v. Florida*, 136 S. Ct. 616 (2016). In *Hitchcock*, this Court held these state-law rights—as well as the federal Sixth Amendment jury-trial right—would be applied retroactively to the *Mosley* cohort but denied to the *Asay* cohort.

Hitchcock v. State, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). The lives of as many as 164 Florida citizens, including Mr. Sweet, may hang on the Court's interpretation.

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*, 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." *Godfrey*, 446 U.S. 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. 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 all of Florida's death row inmates have in common is that they were all sentenced 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. *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* review of *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002)). Mr. Sweet continually challenged his conviction under *Ring* since 2002, unlucky as he was, to be sentenced in 1991, decades before this Court would recognize these 6th Amendment protections.

There are other critical inequalities in the treatment of Florida's Death Row inmates:

(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. 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 *Ring* are more likely than their post-*Ring* counterparts to have received those sentences in trials involving problematic fact-finding. 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—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. 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.

III. The *Hurst* Decisions Announced Substantive Constitutional Rules and 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," and that the necessary procedures do not "transform substantive rules into procedural ones," *Id.* at 735.

The *Hurst* decisions announced substantive rules that must be applied retroactively to Mr. Sweet 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 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 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 fact-finding 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).[3]

The "harmless error" doctrine does not preclude *Hurst* relief in this case, notwithstanding the pre-*Hurst* jury's unanimous recommendation to sentence Mr. Sweet to death. This Court's per se rule that *Hurst* errors are harmless in every case where the pre-*Hurst* jury unanimously recommended death, *see, e.g.*, *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), violates the United States Constitution. Mr. Sweet's jury made only a *recommendation* to impose the death penalty, without making any findings of fact as to any of the elements required for a death sentence under Florida law.[4] This Court cannot reliably infer that a jury would have unanimously found all the requisite elements for a death sentence. *See Hall v. State*,

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[3] *Hurst* errors should be deemed "structural" and not subject to harmlessness review. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991). The Sixth Amendment error identified in *Hurst*—stripping the capital jury of its constitutional fact-finding role—represents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. *Hurst* errors "infect the entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and "deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist, *Neder v. United States*, 527 U.S. 1, 8-9 (1999).

[4] In addition, the Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution as well as the Florida Constitution may dictate the retroactive application of Florida's new death penalty statute. *See* Fla. Stat. § 921.141 (2017).

212 So. 3d 1001, 1037 (Quince, J., dissenting).

This uncertainty as to what the advisory jury would have decided if tasked with making the critical findings of fact takes on additional significance in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (holding that a death sentence is invalid if imposed by a jury that believed the ultimate responsibility for determining the appropriateness of a death sentence rested elsewhere). Mr. Sweet's jury was led to believe that its role was diminished when the court instructed that the jury's role was advisory, and that the judge would ultimately determine the sentence. In light of *Caldwell*, this Court cannot even be certain that the jury would have made the same recommendation without the *Hurst* error, and thus cannot be certain that the jury would have unanimously found the required elements beyond a reasonable doubt. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990). See *Boyde v. California*, 494 U.S. 370, 380 (1990) (the proper standard is whether there is a "reasonable likelihood" that the jury was impeded from consideration of constitutionally relevant evidence).

The jury's unanimous recommendation also does not account for the possibility that the sentencing court may have exercised its discretion to impose a life sentence if the court had been bound by the *jury's* findings on each of the elements required for a death sentence, rather than the court's own findings on those elements. *See Hurst v. State*, 202 So. 3d at 57 (noting that nothing in *Hurst* has

diminished "the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life."); Fla. Stat. § 921.141(3)(2) (2017) (Florida's capital sentencing statute provides an opt-out provision for the court, which may impose a sentence of life imprisonment without the possibility of parole despite unanimous death verdict).

As a matter of federal constitutional law, any reliance on the jury's recommendation in denying *Hurst* relief on harmless error grounds would contravene the Sixth Amendment in light of *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasizing that "harmless-error review looks, we have said, to the basis on which the jury *actually rested* its verdict."). In Mr. Sweet's case, there was no constitutionally valid jury verdict containing the findings of fact required to impose a death sentence. *Sullivan* requires that, before a reviewing court may apply harmless error analysis, there must be a valid jury verdict, grounded in the proof-beyond-a-reasonable-doubt standard. In Mr. Sweet's case, any reliance on his advisory jury's recommendation would constitute a violation of the Sixth Amendment.

In addition, the Due Process Clause of the Fourteenth Amendment requires that the State must prove each element beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364. This requirement attaches to any factual finding necessitated by the Sixth Amendment. In *Sullivan*, the Court observed that "the Fifth Amendment

requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." 508 U.S. at 278. "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt . . . . In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Id.* This requirement is incorporated into the *Hurst* line of cases, beginning with *Apprendi*, 530 U.S. at 476 ("[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). Florida's pre-*Hurst* jury determinations, including the advisory recommendation in Mr. Sweet's case, did not incorporate the beyond-a-reasonable-doubt standard.

IV. Conclusion

This Court should hold that federal law requires the *Hurst* decisions to be applied retroactively to Mr. Sweet and remand for a hearing concerning the effect of the error on counsel, or a new penalty phase, and/or imposition of a life sentence after full briefing and oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of October 2017, the foregoing was electronically served via the e-portal to Assistant Attorney General Lisa Hopkins at lisa.hopkins@myfloridalegal.com and capapp@myfloridalegal.com.

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