IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-818

STEVEN TAYLOR,

Petitioner,

v.

JULIE L. JONES,
Secretary, Florida Department of Corrections,

Respondent.

RESPONSE TO ORDER TO SHOW CAUSE

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INTRODUCTION

Appellant's death sentence was imposed pursuant to a capital sentencing scheme that was ruled unconstitutional by the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The issue in this case is whether this Court will continue to apply its unconstitutional "retroactivity cutoff" to deny Appellant *Hurst* relief on the ground that his sentence did not become final at least one day after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

This Court has already 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 never addressed *Hurst* retroactivity as a matter of federal law, and the Court has consistently applied a state-law cutoff at the date *Ring* was decided—June 24, 2002—to deny relief in dozens of other collateral review cases. The *Ring*-based cutoff is unconstitutional and should not be applied to Appellant. Denying Appellant *Hurst* relief because his sentence became final in 1998, rather than some date between 2002 and 2016, would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellant is entitled to *Hurst* retroactivity as a matter of federal law.

The circuit court's order should not be affirmed in light of *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). There is a petition for a writ of certiorari pending in *Hitchcock* (No. 17-6180). The Court should wait for the Supreme Court to address the petition before deciding Appellant's case.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This appeal presents an important issue of first impression: whether federal law requires this Court to extend *Hurst* retroactivity to death sentences that became final before *Ring*, rather than cabining *Hurst* relief to only 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, untruncated rules of appellate practice.

Depriving Appellant the opportunity for full briefing in this case would constitute an arbitrary deprivation of the vested state right to a mandatory plenary appeal in capital cases. *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015) ("[T]his Court has a mandatory obligation to review all death penalty cases to ensure that the death sentence is imposed in accordance with constitutional and statutory directives."); *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

ARGUMENT

I. This Court's "retroactivity cutoff" at Ring is unconstitutional and should not be applied to Appellant

This Court has already 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*. *See, e.g.*, *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). But the Court has never addressed *Hurst* retroactivity as a matter of federal law, and the Court has consistently applied a state-law "cutoff" at the date *Ring* was decided— June 24, 2002— to deny relief in dozens of other collateral cases. *See, e.g.*, *Asay v. State*, 210 So. 3d 1 (Fla. 2016). The Court recently reaffirmed its retroactivity cutoff in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017).

This Court's current *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Appellant the same *Hurst* relief being granted in scores of materially indistinguishable collateral cases. Denying Appellant *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

It has long been established that the death penalty cannot "be imposed under sentencing procedures that create[s] 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).

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;[1] whether direct appeal counsel sought

[1] *See, e.g.*, *Lugo v. State*, 845 So. 2d 74 (Fla. 2003) (two-year delay between the time defense counsel filed a notice of appeal and the record on appeal being transmitted to this Court, almost certainly resulting in the direct appeal being decided post-*Ring*).

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;[2] 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' and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both inmates petitioned for a writ of certiorari in the United States Supreme Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven (7) days before *Ring* was

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[2] *Compare Booker v. State*, 773 So. 2d 1079 (Fla. 2017) (this Court's opinion issued within one year after all briefs had been submitted, before *Ring*), *with Hall v. State*, 201 So. 3d 628 (Fla. 2016) (opinion issued twenty-three months after the last brief was submitted). If this Court had taken the same amount of time to decide *Booker* as it did *Hall*, Mr. Booker's death sentence would have become final after *Ring*.

decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47.

However, Mr. Bowles, whose case was decided on direct appeal on *the same day* as Mr. Card's, falls on the other side of this Court's current retroactivity cutoff.

Under this Court's approach, a defendant who was originally sentenced to death before Appellant, but who was later resentenced to death after *Ring*, would receive *Hurst* relief and Appellant 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, like Appellant, will be denied the benefit of *Hurst* because the Court addressed the issue in a post-conviction rather than a direct appeal posture.

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*, 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 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." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). When two classes are created to receive different treatment by a state actor like this Court, the question becomes "whether there is some ground of difference that rationally explains the different treatment . . . ." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *see also McLaughlin*, 379 U.S. at 191. The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). 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 (1973).

As a due process matter, denying the benefit of Florida's new post-*Hurst* capital sentencing statute to "pre-*Ring*" defendants like Appellant 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)

Although the right to the particular procedure is established by state law, the violation of the life and liberty interest it creates is governed by *federal* constitutional law. *See id.* at 347; *Ford*, 477 U.S. 399, 428-29 (O'Connor, J., concurring), *Evitts*, 469 U.S. at 393 (state procedures employed "as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant'" must comport with due process). Instead, defendants have "a substantial and legitimate expectation that [they] will be deprived of [their] liberty only to the extent determined by the jury in the exercise of its discretion . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Hicks*, 447 U.S. at 346 (O'Connor, J., concurring).

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*, 132 S. Ct. at 2471. Instead, "it mandate[d] only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* Despite *Miller*'s procedural mandates, the Court in *Montgomery* warned against "conflat[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the *manner of determining* the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (first alteration added). Instead, the Court explained, "[t]here are instances in which a substantive change

in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," *id.* at 735, and that the necessary procedures do not "transform substantive rules into procedural ones," *id.* In *Miller*, the decision "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*." *Id.* at 734.

B. The *Hurst* decisions announced substantive rules that must be applied retroactively to Appellant under the Supremacy Clause

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: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are "sufficient" to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Each of those findings is required to be made by the jury beyond a reasonable doubt. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person "whose crimes reflect the

transient immaturity of youth" is a substantive, not procedural, rule). As in *Montgomery*, these requirements amounted to an "instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish." *Id.* at 735.

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

considering the function of the rule"). This is true even though the rule's subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (noting that state's ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).

The 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. In *Welch*, the Court held that *Johnson*'s ruling was substantive because it "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied"—therefore it must be applied retroactively. *Welch*, 136 S. Ct. at 1265. The Court emphasized that its determination whether a constitutional rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function," i.e., whether the new rule alters only the procedures used to obtain the conviction, or alters instead the class of persons the law punishes. *Id.* at 1266. In *Welch*, the Court pointed out that, "[a]fter *Johnson*, the same person engaging in

the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence." *Id.* Thus, "*Johnson* establishes, in other words, that even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause." *Id.* "It follows," the Court held, "that *Johnson* is a substantive decision." *Id.* (internal quotation omitted).

The same reasoning applies in the *Hurst* context. The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in factfinding, are substantive constitutional rules as a matter of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on" the judge-sentencing scheme. *Id.* And in the context of a *Welch* analysis, the "unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*," *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the new law by necessity places certain individuals

beyond the state's power to impose a death sentence. The decision in *Welch* makes clear that a substantive rule, rather than a procedural rule, resulted from the *Hurst* decisions. *See Welch*, 136 S. Ct. at 126465 (a substantive rule "alters . . . the class of persons that the law punishes.").

Hurst retroactivity is not undermined by *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), where the United States Supreme Court held that *Ring* was not retroactive in 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.").

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

Because this Court is bound by the federal constitution, it has the obligation to address Appellant'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. To dismiss this appeal on the basis of *Hitchcock* would compound that error.

III. Manifest injustice and Equal Protection dictate that this Court apply to Appellant the same due process and equal protection as received by his co-defendant.

Gerald Murray (Appellant's co-defendant) was granted a new penalty phase trial by the Circuit Court (1992 CF 3708) as a result of *Hurst*. The State appealed and Murray's case is presently on appeal before this Court – SC17-707.

In *Proffitt v. Florida*, 428 U.S. 242 251, 96 S.Ct. 2960, 49 L.Ed.2d 913 (197), the Court stated:

> Florida like its Georgia counterpart considers its function to be to "(guarantee) that the (aggravating and mitigating) reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . .

The idea that one co-defendant should receive the same treatment as his co-defendant has been fostered in Florida decisions. In *Johnson v. State*, 2017 WL 3616438 (Fla. 4th DCA, August 23, 2017) the appellate court held:

> This Court has "inherent authority to grant a writ of habeas corpus to avoid incongruous and manifestly unfair results." *Stephens v. State*, 974 So. 2d 455, 457 (Fla. 2d DCA 2008). Relief may be granted even on a successive petition or claim where failing to do so would result in manifest injustice. *Figueroa v. State*, 84 So. 3d 1158, 1162 (Fla. 2d DCA 2012); *Stephens*, 974 So. 2d at 457.
>
> Disparate treatment of similarly situated co-defendants can result in manifest injustice, warranting habeas relief. *See, e.g., McKay v. State*, 988 So. 2d 51 (Fla. 3d DCA 2008) (granting relief on an untimely

> petition alleging ineffective assistance of appellate counsel, where a co-defendant's convictions were vacated on the same issue); *see also Haager v. State*, 36 So. 3d 883 (Fla. 2d DCA 2010) (reversing a sentence on appeal from the denial of a postconviction motion, finding that failure to do so would result in manifest injustice where the same relief was granted to a co-defendant and others); *Harris v. State*, 12 So. 3d 764, 765 (Fla. 3d DCA 2008) (recognizing that "disparate treatment of co-defendants can result in manifest injustice," although "inconsistent decisions in separate, unrelated cases do not constitute disparate treatment"). To give relief to one co-defendant but deny another co-defendant the same relief under virtually identical circumstances "is a manifest injustice that does not promote-in fact, it corrodes-uniformity in the decisions of this court." *Stephens*, 974 So. 2d at 457.

Ray v. State, 755 So.2d 604 (Fla. 2000).

> Ray challenges the proportionality of the sentence of death under the facts and circumstances of this case. We agree and vacate the death sentence. It has long been established that equally culpable codefendants should receive equal punishment. *See Jennings v. State,* 718 So.2d 144 (Fla.1998); *Scott v. Dugger,* 604 So.2d 465 (Fla.1992). Where a more culpable codefendant receives a life sentence, a sentence of death should not be imposed on the less culpable defendant. *See, e.g., Hazen v. State,* 700 So.2d 1207 (Fla.1997); *Slater v. State,* 316 So.2d 539 (Fla.1975).

Appellant contends that denying Appellant a new penalty phase because his case was final before Ring, and allowing his co-defendant – Murray a new penalty phase would amount to manifest injustice and a violation of equal protection.

If this Court relies upon its prior rulings, Murray will receive the benefit of his fourth penalty trial requiring a

unanimous vote of death pursuant to Hurst because he escaped from jail and obtained three reversals from his previous trials. Murray's previous juries voted eleven to one, twelve zero, and eleven to one for death. Four aggravators were found and little or no mitigation was presented to the jury in his last trial.

In contrast, Taylor went to trial once and received a ten to two recommendation for death. Three aggravators were found and there was substantial mitigation. Taylor's case was not sent back for a new trial, even though the evidence in his case was practically identical to the evidence in Murray's case.

The State might argue that Gerald Murray has not received a life sentence as of yet, and therefore no disparate treatment has occurred. While true at this time, it is plausible that Taylor could be executed before Murray's new jury does not unanimously recommend death. If that turns out to be the case, a tragedy would occur. The only fair and just result in Taylor's case is to remand for a new penalty phase so that he receives the same procedural safeguards that his co-defendant has received.

CONCLUSION

This Court should hold that federal law requires the *Hurst* decisions to be applied retroactively to Appellant, vacate

Appellant's death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

relief by ordering a new penalty phase trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic service to: jennifer.donahue@myfloridalegal.com, Jennifer Donahue, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050, on this 16th day of October, 2017.

CERTIFICATE OF FONT

This is to certify that this Response has been reproduced in a 12-point Courier type, a font that is not proportionately spaced.

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