IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 17-862

JOHN CHRISTOPHER MARQUARD

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR ST. JOHNS COUNTY, STATE OF FLORIDA

RESPONSE TO ORDER TO SHOW CAUSE

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RESPONSE TO ORDER TO SHOW CAUSE

COMES NOW, Appellant, John Christopher Marquard, by and through undersigned counsel, responds to this Court's September 22, 2017 Order to Show Cause. The appellant was tasked to show cause why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). The appellant requests full briefing be permitted in this case due to the breadth and complexities of the issues presented and because Marquard's life is at stake.

INTRODUCTION

Marquard'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) ("*Hurst* I"), and this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) ("*Hurst* II"). But for the date of his crime, Marquard would be granted a new penalty phase proceeding under *Hurst*. The central issue at stake is whether this Court will continue to apply its unconstitutional "retroactivity cutoff" to deny Marquard *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) contrary to both state and federal law.

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*. This *Ring*-based cutoff is unconstitutional and should not be applied to Marquard. Denying Marquard *Hurst* relief because his sentence became final in 1994, rather than sometime after 2002, would violate the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Marquard is entitled to *Hurst* retroactivity as a matter of state and federal law.

Full briefing on the merits of Marquard's case is constitutionally required.[1] *Hitchcock* does not preclude *Hurst* relief. Marquard's case is distinguishable factually and in considerations, such as federal law principles, that have not yet been addressed by this Court.[2]

Therefore, because *Hurst* relief is available to Marquard under this Court's state law precedent in *James v. State*, and *Mosley v. State*, and under federal law principles, he must have the full opportunity to appeal from the lower court's denial of his successive rule 3.851 postconviction motion and be allowed full argument to

[1] Denying full appellate brief denies Marquard the right to habeas corpus, due process and access to the courts under the Florida Constitution. Article V Section 3(b)(1), provides that this Court "[s]hall hear appeals from final judgments of trial courts imposing the death penalty . . .", and Sub-Section 9 also provides that this Court, "May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge."

[2] In addition, there is a petition for a writ of certiorari pending in *Hitchcock* and this court should delay ruling on this case until the United States Supreme Court addresses the *Hitchcock* petition.

address why he entitled to relief under *Hurst* and its progeny and conduct a new sentencing proceeding.

Preliminary Statement Regarding References

References to the record on appeal are of the form (R. p. 123). All other references are self-explanatory or otherwise explained herein.

Relevant Procedural History

Marquard was found guilty and sentenced to death by a jury for first-degree murder and armed robbery with a deadly weapon. He was sentenced to death in 1994 under Florida's unconstitutional death penalty scheme, not recognized as such until 2016 in *Hurst* I and *Hurst* II.

Prior to trial, Marquard filed several motions attacking the Constitutionality of various aspects of Florida's capital sentencing scheme. Marquard filed a "Motion to Declare Section 921.141, Fla. Statutes Unconstitutional for Failure to Provide Jury Adequate Guidance in the Finding of Sentencing Circumstances, and to the Preclude Death Sentence" on July 13, 1992. (R. p. 115). He filed a "Motion for Statement of Particulars Re: Aggravating Circumstances." (R. p. 131). Marquard also filed a "Motion to Prohibit any Reference to the Advisory Role of the Jury at Sentencing" on July 24, 1992. (ROA. P. 134). The court entered an order denying all of the above-mentioned motions. (ROA. 136; 146).

Marquard directly appealed his judgment and sentence. Marquard again raised the *Hurst* regarding the constitutionality of Florida's death penalty scheme in his direct appeal. In the initial brief, Marquard referenced the filing of his pretrial motions by stating and reasserted his claim that "[a]pellant again . . . object[s] to the Standard Instructions and argues that the trial court's ruling [denying those motions] was contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments." *See* Appellant's Initial Brief, SC81-341, filed September 16, 1993, p. 77. This Court denied Marquard's claim in his direct appeal disputing the constitutionality of Florida's death penalty scheme in a footnote by simply stating this claim had no merit. *See Marquard v. State,* 641 So.2d 54, 58 n.4 (Fla. 1994).

Mr. Marquard filed a successive motion to vacate his death sentence in the court based on *Hurst I* and *Hurst II*. The circuit court denied this motion. Marquard filed a timely appeal of that denial. This Court responded to the filing of the notice of appeal with the September 22, 2017 Order to Show Cause. Marquard's response follows.

Request for Oral Argument and Full Briefing

This appeal addresses whether federal and state law requires this Court to reconsider the constitutionality of Florida's partial retroactivity doctrine as first found in *Asay v. State* and *Mosley v. State*, and most recently reaffirmed in *Hitchcock v. State*. 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 accordance with the normal, untruncated rules of appellate practice.[3]

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 ("[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 .S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

ARGUMENT

The Florida Supreme Court has created two types of defendants on death row: those entitled to the retroactive application of the 5th, 6th, 8th, and 14th amendments

[3] The Florida Rules of Appellate Procedure details the "Procedures for Review in Death Penalty Cases" in Rule 9.142. Rule 9.142(a)(2) provides, "[o]n appeals from orders ruling on applications for relief under Florida Rule of Criminal Procedure 3.851 or 3.853, and on resentencing matters, the schedules set forth in rule 9.140(g) will control." Rule 9.140(g)(1) requires appointed counsel to file an Anders brief and further briefing if the Court finds "an arguable issue . . ." *See* Rule 9.140(g)(2). Florida Rule of Criminal Procedure 3.851 states:

Any party may appeal a final order entered on a defendant's motion for rule 3.851 relief by filing a notice of appeal with the clerk of the lower tribunal within 30 days of the rendition of the order to be reviewed. Pursuant to the procedures outlined in Florida Rule of Appellate Procedure 9.142, a defendant under sentence of death may petition for a belated appeal.

of the Florida and United States Constitution and those who are not. Mr. Marquard is in the latter category, the one to whom the Constitution, it seems, does not extend.

The question of whether *Hurst* relief extends retroactively to Marquard is not merely a question of guilt or innocence, but a question of life or death. *See Asay v. State*, 210 So. 3d 1, 33 (Fla. 2016) (Pariente, J., *concurring in part* and *dissenting in part*). To deny Marquard retroactive relief under *Hurst* I and *Hurst* II on the ground that his death sentence became final before June 24, 2002, under the decisions in *Asay v. State*, 210 So.3d 1 (Fla. 2016), while granting retroactive *Hurst* relief to inmates whose death sentences had not become final on June 24, 2002, under the decision in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), violates Mr. Marquard's right to Equal Protection of the Laws under the Fourteenth Amendment to the Constitution of the United States (e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against arbitrary infliction of the punishment of death under the Eighth Amendment to the Constitution of the United States (e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinosa v. Florida*, 505 .S. 1079 (1992) (per curiam)).

Additionally, this Court's precedent in *James v. State*, 615 So. 2d 668, 669 (Fla. 1993), extends retroactive *Hurst* relief to Marquard. The factual situation of Marquard's case is immediately distinguishable from *Hitchcock* under fundamental fairness principles. *See Mosley v.* State, 209 So. 3d 1248, 1274 (Fla. 2016).

I. Fundamental fairness mandates that *Hurst* relief extend to Marquard. His case is distinguishable from Hitchock because he raised has been challenging the constitutionality of Florida's death penalty scheme from his earliest opportunity.

If this Court elects to continue the unconstitutional practice of partial retroactivity, individuals like Marquard who preserved the substance of *Hurst* issues prior to *Hurst*, *Ring*, or *Apprendi*, should receive the retroactive benefit of *Hurst* under this Court's "fundamental fairness" doctrine. *See James v. State*, 615 So. 2d at 669 (Fla. 1993). "[F]undamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence." *Mosley v. State*, 209 So. 3d at 1274 (Fla. 2016). This fundamental fairness doctrine was cited by the majority opinion in *Mosley* and inexplicably never addressed again in any of the subsequent cases dealing with the retroactive application of *Hurst*.

Recently in *Hitchcock*, Justice Lewis stated that this Court should "entertain *Hurst* claims for those defendants who properly presented and preserved the substance of the issue, even before Ring arrived." *See Hitchcock v. State*, 2017 WL 3431500, at *2 (Lewis, J., concurring). Justice Lewis stressed that the majority was incorrect in limiting *Hurst* relief even to those defendants whom, prior to *Ring*, asserted, presented and preserved challenges to the lack of jury factfinding and unanimity in Florida's capital sentencing procedure at the trial level and on direct appeal, the underlying gravamen of this entire issue." *Id*.

In *James*, the defendant raised a claim regarding Florida's instruction on the heinous, atrocious, or cruel aggravator during trial and again on appeal. Later, the United States Supreme Court found the instruction constitutionally inadequate. Because James objected to the instruction at trial, and again argued against the instruction on appeal, this Court determined it would be "[un]fair to deprive him of the [ruling]." *James v. State*, 615 So. 2d at 669. "[B]ecause James had raised the exact claim that was validated by the United States Supreme Court in *Espinosa*, 'it would not be fair to deprive him of the *Espinosa* ruling.'" *See Mosley*, 209 So. 3d at 1275.

This concept was reiterated in *Mosley*: "[C]ertain decisions should be given retroactive effect on the basis of fundamental fairness, such as *James v. State*." The *Mosely* opinion differentiated retroactivity based on fundamental fairness from retroactivity under the *Witt v. State* factors. *See Mosley*, 209 So. 3d at 1274. This Court in *Mosley* even recognized that *Hurst* relief "concerns a decision of greater fundamental importance than was at issue in *James*." *Id*. at 1275.

As noted above, Marquard argued about the constitutionality of Florida's death sentence on several occasions throughout the pendency of his case. He raised three motions at the first possible opportunity at the trial level. His motions substantively alleged the issued addressed and decided in both *Hurst* I and *Hurst* II.

For example, in Marquard's July 9, 1992, pre-trial motion, he argued Florida's death penalty statute was unconstitutional because it failed to: "provide adequate guidance to the jury at the finding of aggravating and mitigating circumstances"; "provide[] . . . guidance as to how the jury is to go about determining the existence of the sentencing factors or about how it is to go about weighing them"; "state whether the jurors must find individual sentencing factors unanimously"; "establish [a] standard of proof regarding mitigating circumstances." The motion concluded, "[h]ence the statute is unconstitutional for failure to give the jury adequate guidance in finding and weighing the aggravating and mitigating circumstances." (R. p. 115-116).

In his July 22, 1992, motion, Marquard raised a *Caldwell* claim arguing that the jury should not hear any reference to their "advisory" role during sentencing. The motion cited *Caldwell* for the proposition that "[i]t is unconstitutionally impermissible to rest a death sentence on a determination made by a sentence who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere" (R. p. 134); *see also Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 2638 (1985). Thus, Marquard argued, reference to the advisory role of the jury during his trial would violate Article I Section 2, 9, 16, 17, and 22 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution. (R. p. 134-135). Both the July 9th and the July 22nd motions were denied by the trial court.

On direct appeal, he again raised these issues, even going so far as to address the filing and substance of the pretrial motions. Like Mosley, whose *Ring* claim was summarily rejected with no explanation as 'without merit', Marquard's claim regarding the constitutionality of Florida's death penalty scheme on his direct appeal similarly was not addressed in the opinion. Instead, it was relegated to a footnote that stated simply, "Issue 12 (no merit)." *See Marquard*, 641 So. 2d at 58 n. 4.

Marquard is entitled to the retroactive application of *Hurst* because fundamental fairness mandates it: he has effectively argued the "underlying gravamen" of *Hurst* I and II from his earliest possible opportunity at trial and later preserved the issue on appeal. Like *James* and *Mosley*, Marquard cannot be deprived of the *Hurst* rulings because he raised the exact claims not once, but several times during different stages of the litigation and is entitled to have his constitutional challenge heard. Thus, unlike *Hitcock*, whom first raised the *Hurst* issue in a postconvction motion, Marquard is one of the defendants whom properly preserved challenges to their unconstitutional sentences through trial and direct appeal to whom *Hurst* relief may not be limited, regardless of the date his judgment and sentence became final.

II. Precluding Hurst relief to Marquard is an unequal application of the law and results in an arbitrary and capricious death sentence in violation of the Eighth and Fourteenth Amendments.

Marquard was sentenced to death under an unconstitutional death penalty scheme. 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). After *Mosley* determined that *Hurst* was retroactively available to some cases on collateral review, this Court is prohibited from arbitrarily limiting that retroactivity under the United States and Florida Constitutions. Reliance on a cut-off date for a question of life or death results in an arbitrary and capricious application of the law and *Furman v. Georgia*, 408 U.S. 238 (1972), recognized that the Eighth Amendment precludes the arbitrary infliction of death as a sentence.

Partial retroactivity is fraught with issues of arbitrariness. As already recognized, "[u]ndoubtedly, there will be situations where person who committed equally violent felonies and whose death sentences became final days apart will be treated differently without justification from this Court." *See Asay* at 38 (Perry, J., dissent). The date of a particular death sentence's finality on direct appeal in relation to Ring's June 24, 2002, decision—and thus whether a defendant is extended retroactive *Hurst* relief—has in practice depended on whether there were delays in

transmitting the record on appeal to this Court for the direct appeal[4]; 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[5]; 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 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. "Considerations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases." *Falcon v. State*, 162 So. 3d 965, 962 (quoting *Witt v. State*, 387 So. 2d 922, 929 (Fla. 1980)).

The Eighth Amendment precludes the arbitrary infliction of a death sentence. 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*

[4] *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).
[5] *Compare Booker v. State*, 773 So. 2d 1079 (Fla. 207) (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*.

v. Georgia, 428 U.S. 153, 188 (1976); *see also Furman v. Georgia*, 408 U.S. at 310 ("[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.) However, the concept of partial retroactivity *ensures* unequal and arbitrary application of the right to be constitutionally tried and sentenced to death. If Hurst is applicable retroactively, that is the end of the line. This novel concept of partial retroactivity has proven in practice to ensure unequal and inconsistent results. This is impermissible in any context, but especially when talking about issues that are a matter of life or death. Pre-*Ring* defendants do not differ from post-*Ring* defendants: both were sentenced under the same unconstitutional scheme.

III. 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. Distinctions in state criminal laws that impinge on fundamental rights must be strictly scrutinized. *See e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535,541 (1942). The *Ring* cutoff treats death-sentenced prisoners in the same posture—on collateral review— differently without "sound ground of difference that rationally explains the different treatment." *McLaughlin v. Florida*, 379 .S. 184, 191 (1964).

When two classes of similarly situation individuals are treated differently by a state actor, the question becomes "whether there is some ground of difference that rationally explains the different treatment . . ." *Eisenstadt v. Baird*, 405 .S. 438, 447 (1972); *see also McLaughlin*, 379 U.S. at 191. Distinctions in state criminal laws that impinge on fundamental rights must be strictly scrutinized. *See e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535,541 (1942).

The denial of *Hurst* relief to pre-*Ring* defendants like Marquard violates the Fourteenth Amendment because once a state requires certain sentencing procedures, it creates a Fourteenth Amendment life and liberty interest in those procedures.[6] Thus, defendants are entitled to equal treatment under the fourteenth amendment regarding those rights as required by due process. Marquard and other similarly situated inmates are entitled to equal application of the law. Partial retroactivity fails to ensure the uniformity required by the constitution and thus, violates the Fifth and

[6] *See e.g*., *Evitts v. Lucey*, 469 U.S. 387, 393 (1985); (due process interest in state created right to direct appeal); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (liberty interest in state-created sentencing procedures); *Ford v. Wainwright*, 447 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (liberty interest in meaningful state proceedings to adjudicate competency to be executed); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-89 (1998) (O'Connor, J., with Souter, Ginsburg, & Breyer, JJ., concurring) (life interest in state-created right to capital clemency proceedings). 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).

Fourteenth Amendments without any real or rational purpose for the different treatment.

IV. Marquard is entitled to the retroactive application of *Hurst* relief under federal law.

This Court has analyzed and *applied* Hurst retroactivity only as a matter of State law and has not addressed *Hurst* retroactivity as a matter of federal law. This Court has consistently applied a state-law cutoff at the date *Ring* was decided —June 24, 2002—to deny relief in dozens other collateral review cases. Because the Hurst decisions announced substantive Constitutional rules, the Supremacy Clause requires this Court to apply those rules retroactively to all cases on collateral review. Because this Court is bound by the federal constitution, it has the obligation to address 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").

Where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively notwithstanding any separate state-law retroactivity analysis. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016).

In *Montgomery*, a Louisiana state prisoner filed a claim in state court seeking retroactive application of the rule announced in *Miller v. Alabama*, 567 .S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The claim was denied by the State court

on retroactivity grounds: it found that *Miller* was not retroactive under state law. *See Montgomery*, 136 St. Ct. at 727. The United States Supreme Court reversed, finding that because the *Miller* rule was substantive under federal law, the state court was obligated to give it retroactive application. *See Id*. at 732-34.

In addition to the substantive nature of these rules, the United States Supreme Court has always regarded proof beyond a reasonable doubts rules to be substantive. *See Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972); *see also Guardado v. Jones*, No. 4:15-CV-256 (N.D. Fla. May 27, 2016) (explaining that *Hurst* may be retroactive as a matter of federal law because "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive.").

This Court has instructed that the function of a rule be used to determine whether it is substantive or procedural. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). In *Welch*, the Court addressed the retroactivity of the constitutional rule articulated in *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015), and held that *Johnson's* ruling was substantive because it "affected the reach of the underlying statute rather than the judicial procedures by which the state is applied."-therefore it must be applied retroactively." *Id*. 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.

Federal law requires this Court apply *Hurst* I and II retroactively to all death-sentenced prisoners. *Hurst* announced two substantive rules that federal law requires be retroactively applied to Marquard: (1) The Sixth Amendment requirement that a jury decide whether the aggravating factors that have been proven beyond a reasonable doubt and are sufficient to warrant the death penalty and that jurors weigh these aggravating factors and find beyond a reasonable doubt that aggravators outweigh the mitigating circumstances to justify imposition of the death penalty; and (2) The Eighth Amendment requirement that all the evidence presented be unanimously agreed upon by jurors as sufficient to justify death. These rules are substantive because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. C. at 1265. "Even the use of impeccable fact-finding procedures could not legitimate a sentence base of" Florida's former judge-determinative sentencing scheme.

The function of the unanimity rule is to ensure that Florida's death-sentencing scheme complies with the Eighth Amendment and works 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."

Hurst II, 202 So. 3d at 60-61. Additionally, the "unanimous finding of aggravating factors [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.Thus, as a matter of federal retroactivity law, this makes the rule substantive under *Welch* because it changes the class of persons that the state has the ability to punish with a death sentence: only those whom juries have unanimously agreed death is appropriate after weighing and finding unanimously the aggravating factors outweigh any mitigation.

The substantive nature of the Hurst rules are not undermined by *Summerlin*, which held that *Ring* was not retroactive in the federal habeas context under the federal retroactivity test articulated in *Teague v. Lane*, 489 .S. 288 (1989). *Hurst*, unlike *Summerlin*, addressed the proof beyond a reasonable doubt standard in addition to the right to a jury trial. *See Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding Hurst retroactive under Delaware's state Teague-based retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility and not the applicable burden of proof.") Even though the rule's subject concerns the method by which a jury makes a decision it is still substantive and thus, retroactive.

Partial retroactivity is inconsistent with federal law, which traditionally accepts only a binary approach to retroactivity analysis. The Constitution is violated by a framework that allows a State to arbitrarily choose which capital cases on collateral review receive the retroactive benefit of relief from an unconstitutional death penalty scheme. Retroactive means retroactive to all.

CONCLUSION

Marquard should be permitted full access to this Court in the form of a full brief to address the substance of his *Hurst* claims and oral argument. Marquard moves this Court to review the lower court's decision summarily denying relief and remand for a full determination of the claims on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of October 2017, I electronically filed the foregoing Initial Brief with the Clerk of the Circuit Court by using the Florida Courts e-portal filing system which will send a notice of electronic filing to the following, Assistant State Attorney, CalhounR@sao7.org , Stacey Kircher Assistant Attorney General, Stacey.Kircher@myfloridalegal.com CapApp@myfloridalegal.com I further certify that a copy has been furnished by U.S. Mail to, John Marquard: DOC# 122995, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

/s/ Adriana C. Corso
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