

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 17-884**

RICHARD HAROLD ANDERSON

Appellant,

v.

STATE OF FLORIDA

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH
JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, STATE
OF FLORIDA**

RESPONSE TO ORDER TO SHOW CAUSE

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PRELIMINARY STATEMENT

This is an appeal of the circuit court’s denial of Appellant’s successive motion for post-conviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

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 1991, 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.

CITATIONS

Citations shall be as follows: The record on appeal from Appellant’s trial proceedings shall be referred to as “TR” followed by the appropriate volume and page numbers. The post-conviction record on appeal shall be referred to as “PC” followed by the appropriate volume and page numbers. The record on appeal for the successive post-conviction motion is comprised of one volume and shall be referred to as “R” followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

All emphasis is supplied unless otherwise noted.

REQUEST FOR ORAL ARGUMENT

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).

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STATEMENT OF THE CASE

Relevant Procedural History and Facts

Appellant was tried by a jury and found guilty of one count of first degree murder. Prior to the start of his penalty phase trial, Appellant waived his right to have trial counsel present any mitigating evidence to the jury. By a vote of eleven to one, a jury returned a recommendation of death. Appellant was ultimately sentenced to death on February 26, 1987. This Court affirmed the conviction and sentence of death. See *Anderson v. State*, 574 So. 2d 87, 89 (Fla. 1991).

Appellant filed a motion for postconviction relief pursuant to Fl. R. Crim. P. 3850 on October 12, 1992. Appellant raised a *Caldwell*¹ claim in his initial post-conviction motions arguing that instructing the jury that its role was merely advisory and that because the final sentencing decision as to what punishment would be imposed rested solely with the judge, his sentence was in violation of the Eighth Amendment. A final order denying relief was issued on August 25, 2000. This Court affirmed the denial of his 3.850 Motion. *Anderson v. State*, 822 So. 2d 1261 (Fla. 2002).

Appellant filed a successive motion to vacate his death sentence in the circuit court based on *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). R. 59-88. The circuit court denied Appellant's motion. R. 140-46. Appellant filed this timely appeal on May 12, 2017.

¹ *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

ARGUMENT

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

Appellant was sentenced to death pursuant to a Florida scheme that has been ruled unconstitutional by the United States Supreme Court and this Court. In *Hurst v. Florida*, the U.S. Supreme Court held that Florida's scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. 136 S. Ct. at 620-22.

On remand in *Hurst v. State*, 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. 202 So. 3d at 53-59. In addition, the Court 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 non-unanimous, generalized recommendation that the judge sentence Appellant to death. The record does not reveal whether Appellant's jurors unanimously agreed that any particular 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. But, the record is clear that Appellant's jurors were not unanimous as to whether the death penalty should even be recommended to the court even though Appellant waived his right to have trial counsel present any mitigating evidence to the jury.

The "harmless error" doctrine does not apply to the *Hurst* error in Appellant's case because his pre-*Hurst* jury recommended the death penalty by a vote of 11 to 1. This Court's precedent makes clear that *Hurst* errors are not harmless where the defendant's pre-*Hurst* jury recommended death by a non-unanimous vote. *Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017) ("[I]n cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless."). This Court has declined to apply the harmless error doctrine in every case where the pre-*Hurst* jury's recommendation was not unanimous.²

The judge's finding of the prior violent felony aggravator does not render the *Hurst* error harmless. Even if the jury would have found the same aggravators, Florida law does not authorize death sentences based on the mere existence of an aggravator. As noted above, Florida law requires fact-finding as to both the existence of aggravators

² See, e.g., *Bailey v. Jones*, No. SC17-433, 2017 WL 2874121, at *1 (Fla. July 6, 2017) (11-1 jury vote); *Hertz v. Jones*, 218 So. 3d 428, 431-32 (Fla. 2017) (10-2 jury vote); *Hernandez v. Jones*, 217 So. 3d 1032, 1033 (Fla. 2017) (11-1 jury vote); *Caylor v. State*, 218 So. 3d 416, 425 (Fla. 2017) (8-4 jury vote); *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017) (11-1 jury vote); *McMillian v. State*, 214 So. 3d 1274, 1289 (Fla. 2017) (10-2 jury vote); *Durousseau v. State*, 218 So. 3d 405, 414-15 (Fla. Jan. 31, 2017) (10-2 jury vote).

and the “sufficiency” of the particular aggravators to warrant imposition of the death penalty. There is no way to conclude whether the jury would have made the same sufficiency determination as the judge. That is why this Court has consistently rejected the idea that a judge’s finding of prior-conviction aggravators is relevant in the harmless-error analysis of *Hurst* claims, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g., Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting “the State’s contention that Franklin’s prior convictions for other violent felonies insulate Franklin’s death sentence from *Ring* and *Hurst*”).³

II. 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

³ Moreover, although this Court’s state-law precedent is sufficient to resolve any harmless-error inquiry in this case, it should be noted that the United States Constitution precludes application of the harmless error doctrine because any attempt to discern what a jury in a constitutional proceeding would have decided would be impermissibly speculative. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (explaining that a jury’s belief about its role in death sentencing can materially affect its decision-making); *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993) (foreclosing application of the harmless-error doctrine to deny relief based on jury decisions not comporting with Sixth Amendment requirements).

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 1991, 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[] a substantial risk that it would be inflicted in an arbitrary or capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman v. Georgia*, 408 U.S. 238, 310 (1972) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.") (Stewart, J., concurring). In other words, the death penalty cannot be imposed in certain cases in a way that is comparable to being "struck by lightning." *Furman*, 408 U.S. at 308. This

Court's current *Hurst* retroactivity cutoff results in arbitrary and capricious denials of relief.

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;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 a writ of certiorari in the U.S. Supreme Court or sought an extension to file such a petition; and how long a certiorari petition remained pending in the Supreme Court.

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. 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*.

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 U.S. 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 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.

Other arbitrary factors affecting whether a defendant receives *Hurst* relief under this Court’s date-of-*Ring*-based retroactivity approach include whether a resentencing based on relief granted because of an unrelated error. Under the Court’s current approach, “older” cases dating back to the 1980s with a post-*Ring* resentencing are subject to *Hurst*, while other less “old” cases are not.⁶ Under this Court’s approach, a

⁶ *See, e.g., Johnson v. State*, 205 So. 3d 1285, 1285 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was granted relief on a third successive post-conviction motion in 2010, years after the *Ring* decision); *Card*, 219 So. 3d at 47 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was afforded

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.⁷

Additionally, the State cannot show that Appellant's case is more aggravated and less mitigated than any post-*Ring* capital case. Thus far, this Court has reversed at least twelve death sentences where the defendants also had jury recommendation(s) of 11-1.⁸ Of those twelve reversals, five defendants had multiple first degree murder convictions while Appellant only had one.⁹ And, James Card's death sentence, wherein

relief on a second successive post-conviction motion in 2002—just four days after *Ring* was decided); *cf. Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (granting *Hurst* relief in a case where the crime occurred in the late 1990s, but interlocutory appeals resulted in a ten-year delay before the trial).

⁷ Even if this Court were to maintain its unconstitutional retroactivity “cutoff” at *Ring*, individuals who preserved the substance of the *Hurst* decisions before *Hurst* should receive the retroactive benefit of *Hurst* under this Court's “fundamental fairness” doctrine, which the Court has previously applied in other contexts, *see, e.g., James v. State*, 615 So. 2d 668, 669 (Fla. 1993), and which the Court has applied once in the *Hurst* context, *see Mosley*, 209 So. 3d at 1274, but inexplicably never addressed since. Justice Lewis recently endorsed this preservation approach in *Hitchcock*. *See* 2017 WL 3431500, at *2 (Lewis, J., concurring) (stating that the Court should “simply entertain *Hurst* claims for those defendants who properly presented and preserved the substance of the issue, even before *Ring* arrived.”).

⁸ *Johnson v. State*, 205 So.3d 1285 (Fla. 2016); *McGirth v. State*, 209 So.3d 1146 (Fla. 2017); *Brooks v. Jones*, -- So. 3d -- 2017 WL 944235 (Fla. Mar. 10, 2017); *Jackson v. State*, 213 So.3d 754 (Fla. 2017); *Orme v. State*, 214 So.3d 1269 (Fla. 2017); *Card v. State*, 219 So.3d 47 (Fla. 2017); *Pasha v. State*, --- So.3d --- 2017 WL 1954975 (Fla. May 11, 2017); *Okafor v. State*, --- So.3d ----2017 WL 2481266 (Fla. June 8, 2017); *Hall v. State*, 219 So.3d 783 (Fla. 2017); *Braddy v. State*, 219 So.3d 803 (Fla. 2017); *Bailey v. State*, --- So.3d ----2017 WL 2874121 (Fla. July 6, 2017); and *Dennis v. State*, -- So. 3d. -- 2017 WL 2888700 (Fla. July 7, 2017).

⁹ *Johnson v. State*, 205 So.3d 1285 (Fla. 2016); *Brooks v. Jones*, -- So. 3d -- 2017 WL 944235 (Fla. Mar. 10, 2017); *Pasha v. State*, --- So.3d --- 2017 WL 1954975 (Fla. May 11, 2017); *Okafor v. State*, --- So.3d ----2017 WL 2481266 (Fla. June 8, 2017); *Hall v.*

the jury also recommended death by a vote of 11-1, became final only “**four days** after the U.S. Supreme Court issued its opinion in *Ring*.” *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017).

There is no material difference between Appellant’s case and Mr. Card’s case other than four calendar days. The constitutional protections afforded to every capital defendant cannot be based on a roll of the dice or arbitrary line drawing. “[A]ny line drawing in the retroactive application of *Hurst* to capital defendants results in an unintended arbitrariness as to who receives relief.” *Hitchcock v State*, No. SC17-445, 2017 WL 3431500 *4 (Fla. August 10, 2017)(Pariente dissenting). This arbitrariness cannot withstand constitutional muster because “applying decisions of fundamental constitutional significance retroactively to defendants in similar circumstances is essential to ‘ensuring fairness and uniformity in individual adjudications.’” *Asay*, 210 So.3d at 32 (Pariente dissenting).

To deny Appellant retroactive relief under *Hurst v. Florida*, 136 S.Ct. 616 (2016), 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 Appellant’s right to Equal Protection of the Laws under the Fourteenth Amendment to the Constitution

State, 219 So.3d 783 (Fla. 2017); *Braddy v. State*, 219 So.3d 803 (Fla. 2017); and *Dennis v. State*, -- So. 3d. -- 2017 WL 2888700 (Fla. July 7, 2017).

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 U.S. 1079 (1992) (per curiam)).

Furthermore, Appellant's death sentence was imposed without a unanimous jury verdict for death. This Court held in *Hurst v. State* that there is an Eighth Amendment right to have a jury unanimously recommend a death sentence before a death sentence is permissible. *Hurst v. State*, 202 So. 3d at 59 (“we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment.”). The right to a unanimous jury recommendation of death requires full retroactivity and anything less results in an unreliable sentence which violates the Eighth Amendment¹⁰.

¹⁰ Drawing a line at June 24, 2002, is just as arbitrary and imprecise as the bright line IQ score cutoff at issue in *Hall v. Florida*, 134 S. Ct. at 2001. When the United States Supreme Court declared that cutoff unconstitutional, those death sentenced individuals with IQ scores above 70 were found to be entitled to a case by case determination of whether the Eighth Amendment precludes their execution. The unreliability of the proceedings giving rise to Mr. Sireci's death sentence compounds the unreliability of his death recommendation. *See Lambrix v. State*, No. SC17-1687, 2017 WL 4320637, at *2 (Fla. Sept. 29, 2017)(Pariente, J., dissenting)(“As I stated in *Hitchcock*, ‘[f]or the same reasons I conclude that the right announced in *Hurst* under the right to jury trial (Sixth Amendment and article I, section 22, of the Florida Constitution) requires full retroactivity, I would conclude that the right to a unanimous jury recommendation of death announced in *Hurst* under the Eighth Amendment requires full retroactivity...Reliability is the linchpin of Eighth Amendment jurisprudence, and a death sentence imposed without a unanimous jury verdict for death is inherently

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). Capital defendants have a fundamental right to a reliable determination of their sentences. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). When a state draws a line between those capital defendants who will receive the benefit of the rules designed to enhance the quality of decision-making by a penalty-phase jury, and those who will not, the State’s justification for that line must satisfy strict scrutiny. Far from meeting strict scrutiny, this Court’s *Hurst* retroactivity

unreliable.’ The statute under which Lambrix was sentenced, which only required that a bare majority of the twelve-member jury recommend a sentence of death, was unconstitutional, and therefore unreliable, under both the Sixth and Eighth Amendments.”)

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.¹¹

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). Courts have found in a variety of contexts that state-created death

¹¹ *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).

penalty procedures vest in a capital defendant life and liberty interests that are protected by due process. *See. e.g., Ohio Adult Parole Authority*, 523 U.S. at 272; *Ford*, 477 U.S. at 427-31 (O'Connor, J., concurring). In *Hicks*, the Supreme Court held that the trial court's failure to instruct the jury that it had the option to impose an alternative sentence violated the state-created liberty interest (and federal due process) in having the jury select his sentence from the full range of alternatives available under state law. 477 U.S. at 343.

III. This Court's *Hurst* decisions violates *Caldwell*.

Appellant's jury was repeatedly told its recommendation was advisory only. In order to treat a jury's advisory recommendation as binding, the jury must be correctly instructed as to its sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This means that post-*Hurst* the individual jurors must know that the 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. Thus, "the jury instructions in [Appellant's] case[s] impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory." *Truehill v. Florida*, 583 U.S. ___ at *1 (Sotomayor dissent)¹².

¹² "Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where the court was the final decision-maker and the sentencer—not the jury. In *Hurst v. Florida*, 577 U. S. ___, ___ (2016) (slip op., at 10), however, we

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

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 U.S. 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 U.S. 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

held that process which required the judge alone to find the existence of an aggravating circumstance to be unconstitutional.” *Id.* at *2 (internal citations omitted).

outcome of a case, *the Constitution* requires state collateral review courts to give retroactive effect to that rule.”). 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). 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 U.S. 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, i.e., the new law by necessity places certain individuals beyond the state’s power to impose a death sentence. The decision in *Welch* makes clear that a substantive rule, rather than a procedural rule, resulted from the *Hurst* decisions. *See Welch*, 136 S. Ct. at 1264-65 (a substantive rule “alters . . . the class of persons that the law punishes.”).

Hurst retroactivity is not undermined by *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), where the U.S. 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 by 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 U.S. Supreme Court has always regarded proof-beyond-a-reasonable-doubt decisions as substantive.¹³

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 be to compound that error.

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.

¹³ *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972); *Powell v. Delaware*, 153 A.3d 69 (Del. 2016).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Christina Pacheco, Christina.Pacheco@myfloridalegal.com & cappapp@myfloridalegal.com; on this 16th day of October, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Response to Order to Show Cause, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100.

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