IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 17-920

SONNY RAY JEFFRIES

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

RESPONSE TO ORDER TO SHOW CAUSE

MARIA CHRISTINE PERINETTI
FLORIDA BAR NUMBER 013837
EMAIL: PERINETTI@CCMR.STATE.FL.US
RAHEELA AHMED
FLORIDA BAR NUMBER 0713457
EMAIL: AHMED@CCMR.STATE.FL.US
LISA MARIE BORT
FLORIDA BAR NUMBER 119074
EMAIL: BORT@CCMR.STATE.FL.US
LAW OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL - MIDDLE REGION
12937 NORTH TELECOM PARKWAY
TEMPLE TERRACE, FLORIDA 33637
TELEPHONE: (813) 558-1600
SECONDARY EMAIL: SUPPORT@CCMR.STATE.FL.US

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INTRODUCTION

The death sentence of Sonny Ray Jeffries was imposed after an 11-1 jury recommendation pursuant to a capital sentencing scheme that was ruled unconstitutional by the U.S. Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Mr. Jeffries' sentence became "final" on January 7, 2002, after the U.S. Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). A core issue in this case is whether this Court should apply its "retroactivity cutoff" to deny Mr. Jeffries *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), even though the rule announced in *Apprendi* was the basis for both *Ring* and *Hurst*.

The issue left at least partially unresolved in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017), is whether this Court will continue to apply its unconstitutional "retroactivity cutoff" to deny Mr. Jeffries *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 in dozens of collateral-review cases where the defendant's sentence became final after *Ring*. But the Court has also created a state-law cutoff at the date *Ring* was

decided—June 24, 2002—to deny relief in dozens of other collateral-review cases. There are 22 Florida cases without penalty-phase waivers and with non-unanimous jury recommendations that became "final" during the two-year period between *Apprendi* and *Ring*. This Court has never specifically addressed this "*Apprendi* gap" in any case, not even in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). Nor has the Court directly addressed the constitutionality of denying *Hurst* retroactivity as a matter of federal law, in *Hitchcock* or any other case.

Relief should not be denied here in light of *Hitchcock*. Appellant notes that there is a petition for a writ of certiorari pending in *Hitchcock* (No. 17-6180).

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This case presents an important issue of first impression: whether federal law requires this Court to extend *Hurst* retroactivity to death sentences that became final after *Apprendi* but before *Ring*, rather than cabining *Hurst* relief to post-*Ring* death sentences. Mr. Jeffries respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320. Mr. Jeffries also requests that the Court permit full briefing in this case in accord with the normal, untruncated rules of appellate practice.

Depriving Mr. Jeffries 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. Mr. Jeffries' death sentence violates *Hurst*, and the error is not "harmless"

Mr. Jeffries was sentenced to death pursuant to an unconstitutional Florida capital sentencing scheme. 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. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify the death penalty; and (3) whether those aggravators outweighed the mitigation. Under Florida's unconstitutional scheme, an "advisory" jury rendered a generalized recommendation for life or death by a majority vote, without specifying the factual basis for the recommendation, and then the sentencing judge alone, notwithstanding the jury's recommendation, conducted the fact-finding. *Id.* at 622. In striking down that scheme, the Court held that the jury, not the judge, must make the findings of fact required to impose death. *Id.*

On remand, this Court applied the holding of *Hurst v. Florida*, and further held that the Eighth Amendment requires *unanimous* jury fact-finding as to each of the required elements, and also a unanimous recommendation by the jury to impose the death penalty. *Hurst v. State*, 202 So. 3d at 53-59. The Court also noted that even if the jury unanimously finds that each of the required elements is satisfied, the jury is not required to recommend the death penalty and the judge is not required to sentence the defendant to death. *Id.* at 57-58.

Mr. Jeffries' 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 Mr. Jeffries to death. The record does not reveal whether Mr. Jeffries' jurors unanimously agreed that any particular aggravating factor had been proven beyond a reasonable doubt, or unanimously agreed that the aggravators were sufficient for death, or unanimously agreed that the aggravators outweighed the mitigation. But the record *is* clear that Mr. Jeffries' jurors were not unanimous as to whether the death penalty should even be recommended to the court.

Mr. Jeffries' 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.[1]

II. This Court's "retroactivity cutoff" at *Ring* is unconstitutional and should not be applied to Mr. Jeffries' post-*Apprendi* death sentence

Beginning with *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), 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*. But the Court has created a state-law cutoff at the date *Ring* was decided—June 24, 2002—to deny relief in dozens of other collateral-review cases.

Mr. Jeffries' death sentence became final during the two-year period between *Apprendi* and *Ring*. The Court has never specifically addressed this "*Apprendi* gap" in its state-law retroactivity precedent, not even in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). Moreover, the Court has not addressed the denial of *Hurst* retroactivity to post-*Apprendi* death sentences (or *any* pre-*Ring* sentences) as a matter of federal law.

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[1] *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); *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).

The *Ring*-based retroactivity cutoff violates the U.S. Constitution and should not be applied to deny Mr. Jeffries the same *Hurst* relief being granted in scores of materially indistinguishable collateral cases, particularly given that his sentence became final after *Apprendi*, which was the constitutional basis for both *Ring* and *Hurst*. Denying Mr. Jeffries *Hurst* retroactivity because his death sentence became final before *Ring* in 2002, while affording retroactivity to similarly-situated defendants who were sentenced (or resentenced) between June 24, 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 *Ring*-based retroactivity cutoff is unconstitutional as applied to post-*Apprendi* death sentences because *Apprendi* was the constitutional basis for both *Ring* and *Hurst*

This Court's *Ring*-based retroactivity cutoff is unconstitutional as applied to Mr. Jeffries' post-*Apprendi* death sentence because the rule announced in *Apprendi* was the constitutional basis for both *Ring* and *Hurst*. It was *Apprendi*, not *Ring*, which first explained that the Sixth Amendment requires that any finding that increases a defendant's maximum sentence is an element of the offense that must be found by a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490. Indeed, as the U.S. Supreme Court stated in *Hurst*, *Ring* applied *Apprendi*'s analysis to conclude that Mr. Ring's death sentence violated the Sixth Amendment. *See* 136 S.

Ct. at 621. Just as *Ring* applied *Apprendi*'s principles to Arizona's capital sentencing scheme, *Hurst* applied *Apprendi*'s principles to Florida's scheme.

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. In overruling its pre-*Apprendi* precedent approving of Florida's scheme—*Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989)—*Hurst* stated that those decisions were "irreconcilable with *Apprendi*," and drew an analogy to *Ring*'s overruling of pre-*Apprendi* precedent approving of Arizona's scheme—*Walton v. Arizona*, 497 U.S. 639 (1990)—which also could not "survive the reasoning of *Apprendi*." *Hurst*, 136 S. Ct. at 623. Thus, both *Ring* and *Hurst* make clear that their operative constitutional holdings derived directly from *Apprendi*.

This Court has consistently understood that the Sixth Amendment rule applied in *Ring* and *Hurst* derived from *Apprendi*. In *Mosley*, this Court observed that *Ring* was an application of *Apprendi*. *See* 209 So. 3d at 1279-80 (explaining that in *Ring* the Court "applied its reasoning from *Apprendi*."). This was not a new observation; over many years, this Court acknowledged that *Ring* merely applied the *Apprendi* rule, and that *Ring* broke no new ground of its own. *See, e.g., Johnson v. State*, 904 So. 2d 400, 405-06 (Fla. 2005) (explaining that "*Ring* was not a sudden or unforeseeable development in constitutional law; rather, it was an evolutionary

refinement in capital jurisprudence," in that "[t]he Supreme Court merely applied the reasoning of another case, *Apprendi*.") (internal quotation omitted).

Notably, in the period between *Apprendi* and *Ring*, this Court rejected challenges to Florida's capital sentencing scheme under *Apprendi* not because the Court did not yet believe *Apprendi* was applicable in the death penalty context, but instead, because the U.S. Supreme Court had upheld Florida's death penalty against constitutional challenge notwithstanding *Apprendi*. *See, e.g.*, *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001). This Court rejected challenges to Florida's death-sentencing scheme on the same basis after *Apprendi* as it did after *Ring*: the U.S. Supreme Court had approved of Florida's scheme. *Compare Mills*, 786 So. 2d at 532 (holding that *Apprendi* did not apply because Florida's scheme had been upheld by the U.S. Supreme Court), *with Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (holding that *Ring* did not apply because Florida's scheme had previously been upheld by the U.S. Supreme Court and citing *Mills*), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002) (same).

In light of *Apprendi*'s fundamental importance to both *Ring* and *Hurst*, it would violate the federal constitutional prohibition against the arbitrary and capricious imposition of the death penalty, as well as the constitutional guarantees of equal protection and due process, to extend *Hurst* retroactivity to 14 years of post-*Ring* death sentences while denying *Hurst* retroactivity to the small number of

individuals like Mr. Jeffries whose death sentences were finalized in the two years between *Apprendi* and *Ring*. Moreover, as discussed below, federal law prohibits a retroactivity "cutoff" at *Ring*, and requires that the *Hurst* decisions apply retroactively to all cases on collateral review, including post-*Apprendi* cases.

B. This Court's retroactivity cutoff violates the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty

This Court's retroactivity cutoff violates the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty. 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.

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;[2] 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;[3] 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.

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

[2] *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*).
[3] *Compare Booker v. State*, 773 So. 2d 1079 (Fla. 2000) (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 23 months after the last brief submitted).

(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 was 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. *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 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 10-year delay before the trial). Under this Court's approach, a defendant who was originally sentenced to death before Mr. Jeffries, but who was

later resentenced to death after *Ring*, would receive *Hurst* relief and Mr. Jeffries 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 will be denied the benefit of *Hurst* because the Court addressed the issue in a post-conviction rather than a direct appeal posture. *See, e.g.*, *Miller v. State*, 926 So. 2d 1243, 1259 (Fla. 2006); *Nixon v. State*, 932 So. 2d 1009, 1024 (Fla. 2006); *Bates v. State*, 3 So. 3d 1091, 1106 n.14 (Fla. 2009); *Bradley v. State*, 33 So. 3d 664, 670 n.6 (Fla. 2010).

In the case at hand, Mr. Jeffries did not file a petition for writ of certiorari following his direct appeal, and therefore his case became final on January 7, 2002, ninety days after his motion for rehearing was denied by this Court. If Jeffries' appellate counsel had filed a petition for writ of certiorari in the U.S. Supreme Court, there is a substantial likelihood that his case would have become final after June 24, 2002, and he would be eligible for *Hurst* relief under this Court's current case law.

C. 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." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). 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 . . . ." *Id.*; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). 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 cutoff lacks even a rational connection to any legitimate state interest. *See Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

As a due process matter, denying the benefit of Florida's new post-*Hurst* capital sentencing statute to "pre-*Ring*" defendants like Mr. Jeffries 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) (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 Hicks*, 447 U.S. 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 347 (O'Connor, J., concurring). Courts have found in a variety of contexts that state-created death 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. Because the *Hurst* decisions announced substantive constitutional rules, the Supremacy Clause of the U.S. Constitution requires state courts to apply those rules retroactively to all cases on collateral review

The U.S. Supreme Court held in *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), 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. *Id.* 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, *Montgomery* found 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), substantive even though the *Miller* rule had "a procedural component." *Id.* at 734. The *Montgomery* Court explained that "[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.*

A. The *Hurst* decisions announced substantive rules that must be applied retroactively to Mr. Jeffries under the Supremacy Clause

The *Hurst* decisions announced substantive rules that must be applied retroactively to Mr. Jeffries by this Court under the Supremacy Clause. First, a Sixth Amendment rule was established requiring that a jury find as fact: (1) each aggravating circumstance; (2) that those aggravators together are "sufficient" to justify imposition of the death penalty; and (3) that those aggravators 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.* The rule is therefore substantive as a matter of federal retroactivity law. *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 Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rules as a matter of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable factfinding procedures could not legitimate

a sentence based on" the judge-sentencing scheme. *Id.* The "unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*," *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the new law by necessity places certain individuals beyond the state's power to impose a death sentence. Thus, a substantive rule, rather than a procedural rule, resulted from the *Hurst* decisions. *See Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes.").

Hurst retroactivity is not undermined by *Summerlin*, 542 U.S. at 364, where the U.S. Supreme Court held that *Ring* was not retroactive in a federal habeas case. *Summerlin* did not review a statute, like Florida's, that required the jury not only to conduct the fact-finding regarding the aggravators, but also as to whether the aggravators were *sufficient* to impose death and whether death was an appropriate sentence. *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred in *Hurst* where, for the first time, the Court found it unconstitutional for a judge alone to find that "sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal citation omitted).

Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the U.S. 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.").

B. This Court has an obligation to address Mr. Jeffries' federal retroactivity arguments

Because this Court is bound by the federal constitution, it has the obligation to address Mr. Jeffries' 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.

CONCLUSION

This Court should hold that the *Hurst* decisions must be applied retroactively to Mr. Jeffries' post-*Apprendi* death sentence, vacate Mr. Jeffries' death sentence, and remand to the circuit court for a new penalty phase or imposition of a life sentence.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this 16th day of October, 2017.

WE HEREBY FURTHER CERTIFY that a true copy of the foregoing was served via electronic mail to Stephen D. Ake, Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013, at stephen.ake@myfloridalegal.com and capapp@myfloridalegal.com on this 16th day of October, 2017.

WE HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to Sonny Ray Jeffries, DOC # X18736, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083, on this 16th day of October, 2017.

/s/Maria Christine Perinetti
Maria Christine Perinetti
Assistant CCRC
Florida Bar Number 0013837
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/Raheela Ahmed
Raheela Ahmed
Assistant CCRC
Florida Bar Number 0713457
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/Lisa Marie Bort
Lisa Marie Bort
Assistant CCRC
Florida Bar Number 119074
Email: bort@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway
Temple Terrace, Florida 33637-0907
Tel: (813) 558-1600
Fax: (813) 558-1601 or (813) 558-1602

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

We 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. 9.210 (a) (2).

/s/Maria Christine Perinetti
Maria Christine Perinetti
Assistant CCRC
Florida Bar Number 0013837
Email: perinetti@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/Raheela Ahmed
Raheela Ahmed
Assistant CCRC
Florida Bar Number 0713457
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

/s/Lisa Marie Bort
Lisa Marie Bort
Assistant CCRC
Florida Bar Number 119074
Email: bort@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

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Counsel for Appellant