DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

---

NORBERTO PIETRI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

---

---

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

---

CAPITAL CASE

---

WILLIAM M. HENNIS III
Litigation Director CCRC-South
Florida Bar No. 0066850

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL
COUNSEL
1 East Broward Blvd., Suite 444
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR PETITIONER

## QUESTIONS PRESENTED

1. Does the Florida Supreme Court's determination that the jury findings required by *Hurst v. Florida* and *Hurst v. State* enhance the reliability of decisions to impose death, but can only be retroactively applied to cases in which a death sentence was final after June 24, 2002 violate Due Process, the Eighth Amendment, and the Equal Protection Clause of the Fourteenth Amendment?

2. Does the Florida Supreme Court's partial retroactivity analysis concerning *Hurst* violations violate the Supremacy Clause of the United States Constitution in light of this Court's holdings in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**



**Constitutional Provisions**

## CITATION TO OPINIONS AND ORDERS BELOW

This proceeding was instituted as a successive motion for postconviction relief under Florida Rule Crim. P. 3.851. The Florida Supreme Court affirmed the lower court's summary denial on February 2, 2018 in *Pietri v. State*, 236 So. 3d 235 (Fla. 2018), which is attached to this petition as Appendix A. The May 17, 2017 order of the Circuit Court in and for Palm Beach County denying Mr. Pietri's successive motion is unreported. It is reproduced in Appendix B. The Florida Supreme Court Order to Show Cause issued on September 25, 2017 is Appendix C. The Appellant's October 31, 2017 Response to the Order to Show Cause is attached as Appendix D. The State's November 7, 2017 Reply to Appellant's order to Show Cause is attached as Appendix E. The November 17, 2017 Reply to the State's Reply to Response is attached as Appendix F.

## STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257. The Florida Supreme Court issued an opinion denying collateral relief on February 2, 2018, and indicated that any motion for rehearing containing reargument would be stricken.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

The Eighth Amendment to the Constitution of the United States provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

### I. Introduction

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court struck down Florida's capital sentencing procedures because those procedures authorized a judge, rather than a jury, to make the factual findings necessary for a death sentence. In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court held that in order for a capital penalty phase jury to return a death recommendation that gives the sentencing judge the power and authority to impose a death sentence, the jurors must have unanimously found all facts necessary to impose a sentence of death and unanimously agreed to the recommendation. "In requiring jury unanimity in [the statutorily required fact] findings and in [the jury's] final recommendation if death is to be imposed, [the Florida Supreme Court was] cognizant of significant benefits that will further the administration of justice." 202 So. 3d at 58.

Following *Hurst v. State*, the Florida Supreme Court issued a series of cases holding that while the unanimity requirement in *Hurst v. State* was retroactively applicable to cases in which death sentences were not final on June 24, 2002, when *Ring v. Arizona*, 536 U.S. 584 (2002) issued, it was not retroactively applicable to cases in which death sentences were final prior to June 24, 2002.

### II. Factual and Procedural Background

In 1990, Norberto Pietri was convicted of first degree premeditated murder in addition to fourteen other counts. *See Pietri v. State*, 644 So. 2d 1347 (Fla. 1994). He was sentenced to death on March 15, 1990, after a non-unanimous advisory jury recommended death by an 8 to 4 vote. The penalty phase commenced on February 22,

1990 and concluded the following morning on February 23, 1990. At this second phase, the State presented only one witness: a deputy clerk who testified as to Mr. Pietri's criminal record. In contrast, defense counsel presented the testimony of several family members who testified to Mr. Pietri's impoverished upbringing and cocaine addiction. Two experts testified to the ramifications of Mr. Pietri's upbringing and cocaine addition, both stating that Mr. Pietri's cocaine addiction would significantly impair his judgment. Despite the presentation of mitigating evidence, the penalty-phase jury was not instructed on any statutory mitigators. Instead, the jury was instructed to consider six aggravating factors and told to make an advisory sentencing recommendation of either life or death "based upon [its] determination as to whether sufficient aggravating circumstances exist[ed] to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist[ed] to outweigh any aggravating circumstances found to exist."

Under those instructions, the jury returned a verdict form simply indicating that it recommended and advised, by an 8 to four 4 vote, that the court impose the death penalty on Mr. Pietri. The jury did not make any written factual findings regarding either aggravating or mitigating circumstances. (R. 3099-3102, 3680).[1]

Before the sentencing hearing, Pietri's counsel filed a "Motion to Declare Unconstitutional the Treatment of an 8-4 Verdict as a Death Recommendation" (R. 3700-03). The motion alleged: (1) the jury was misled and may have been swayed by

[1] The trial record on direct appeal is referenced herein as (R. _____).

the inflated number of aggravating circumstances[2]; and (2) the Sixth and Eighth Amendment are violated because a non-unanimous recommendation diminishes the reliability of the jury's verdict.[3] This motion was denied.

On March 15, 1990, the judge made written findings of fact. For his written sentencing order, the court adopted the State's memorandum of law finding four of the six aggravating circumstances upon which the jury had been instructed: (1) the murder was committed while under the sentence of imprisonment; (2) the murder was committed while Pietri was fleeing after committing a burglary; (3) cold, calculated, and premeditated manner (CCP); and (4) the murder was committed to avoid arrest, to disrupt or hinder the lawful enforcement of laws, and the victim was a law enforcement officer performing his official duties. In finding the fourth aggravator, the judge merged three of the six aggravators upon which the jury had been instructed because Florida law required treating those three aggravators as a single aggravating factor. The judge found no mitigating factors, statutory or otherwise. Based upon his fact-finding, the judge determined that the aggravating circumstances substantially outweighed the mitigating circumstances and sentenced Mr. Pietri to death.

On direct appeal, Pietri challenged the trial court's denial of his motion to

---

[2] The State conceded that the three aggravating circumstances of: (1) capital felony committed for the purpose of avoiding arrest; (2) capital felony committed to disrupt or hinder law enforcement; and (3) the victim was a law enforcement officer, can only be considered as a single aggravating factor.

[3] Defense counsel also argued "the unanimity requirement of so many other states is stark evidence of the constitutional invalidity of the death recommendation here" (R. 3703).

declare a non-unanimous death recommendation unconstitutional noting, "[i]f a less than "substantial majority verdict is unreliable for imposing a punishment less than death, it logically follows that such a verdict should not be relied upon for imposing a sentence of death." Mr. Pietri also challenged the trial courts denial of his motion requesting a special instruction relating to the jury's ability to extend mercy to Mr. Pietri notwithstanding any "findings" it may have made with regard to the aggravating circumstances, their sufficiency, and whether the aggravating circumstances outweighed the mitigating circumstances.

The Florida Supreme Court affirmed Pietri's death sentence but determined the trial court erred in finding the aggravating circumstance of CCP. *Pietri v. State*, 644 So. 2d 1347 (Fla. 1994). After striking CCP, the court held the error was harmless in light of the three other aggravating factors and absence of mitigation. *Id.* This Court denied certiorari. *Pietri v. Florida*, 515 U.S. 1147 (1995).

On March 3, 2000, Mr. Pietri filed a motion to vacate his judgment and sentence pursuant to Fla. R. Crim. P. 3.850. The trial court granted a limited evidentiary hearing, then denied all relief in a one-page order, stating simply that "[a] copy of the State's [post-evidentiary hearing memorandum] is incorporated by reference and made a part of the record." *Pietri v. State*, 885 So. 2d 245, 251 (Fla. 2004) (quoting trial court order).

Mr. Pietri appealed the order and also filed a petition for writ of habeas corpus in the Florida Supreme Court. It argued in pertinent part that (1) *Ring v. Arizona*, 122 S. Ct. 2428 (2002) required specific factual findings by the jury to determine

death eligibility; (2) aggravating factors are equivalent to elements of an offense; (3) the jury was not instructed that these aggravating factors must be proven beyond a reasonable doubt and that (4) *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) are violated when a jury decides death eligibility and recommends death by a mere majority; and (5) his death sentence violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985) because the jury was told that its recommendation was merely advisory and that responsibility for determining the appropriateness of a death sentence rested with the judge, not the jury. *See Pietri v. State*, 885 So. 2d. 245, 276 (Fla. 2004). The Florida Supreme Court rejected all of Pietri's claims and affirmed the denial of post-conviction relief. *Id.*

Mr. Pietri petitioned the United States District Court for the Southern District of Florida for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court denied relief on April 18, 2008. *Pietri v. Florida Dept. of Corrs., et al.*, 2008 WL 1805483 (S.D. Fla. April 18, 2008). An appeal was taken to the United States Court of Appeals for the Eleventh Circuit, which subsequently denied relief. *Pietri v. Florida Dept. of Corrs., et al.*, 641 F.3d 1276 (11th Cir. 2011). *cert. denied*, *Pietri v. Tucker*, 132 S. Ct. 1551 (2012).

### III. *Hurst* Litigation and the Decision of the Florida Supreme Court

On January 10, 2017, Mr. Pietri filed a successive motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.851. (C-PCR. at 8-37).[4] It

[4] The Corrected Record on Appeal on the *Hurst* litigation below was filed on October 13, 2017 and is abbreviated herein as (C-PCR. __).

moved the trial court to set aside his death sentence in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016):

> Here, Defendant's death sentence violates both the Sixth and Eighth Amendments in light of *Hurst v. Florida* and *Hurst v. State*. Defendant's death sentence violates the Sixth Amendment because the trial judge, not the jury, made the findings of fact necessary for imposition of a death sentence (a sentence that was not authorized by Defendant's murder conviction alone). After the jury made a general recommendation to impose the death penalty without specifying the basis for its recommendation, the trial judge found as fact that (1) specific aggravating circumstances had been proven beyond a reasonable doubt, (2) those particular aggravating circumstances were sufficient in the context of Defendant's case to impose the death penalty, and (3) the aggravating circumstances were not outweighed by the mitigating circumstances. Defendant's death sentence also violates the Eighth Amendment in light of both *Hurst v. State*'s clear edict that a jury must vote unanimously for the death penalty (Defendant's jury voted by a majority of 8-4), and the "evolving standards of decency," *see Atkins v. Virginia*, 536 U.S. 304, 312 (2002), that have led to a national consensus that death sentences should only be imposed after unanimous jury verdicts.

(C-PCR. at 13) (Fla. R. Crim. P. 3.851 Motion). Mr. Pietri also asserted that both *Hurst* decisions should be applied retroactively to him under state and federal law. In the motion Mr. Pietri also emphasized the arbitrariness of using a bright-line cutoff at the date of the *Ring* decision as the dividing line for relief between indistinguishable cases. Pietri additionally sought to include a claim premised upon Chapter 2017-1 of the Laws of Florida, where the legislature confirmed the Florida Supreme Court's statutory construction of Fla. Stat. § 921.141, but the trial court denied his motion to amend.

On May 17, 2017, the trial court denied Mr. Pietri's motion. Pietri timely

appealed to the Florida Supreme Court. On July 12, 2017, Mr. Pietri's appeal was stayed pending the disposition of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), another appeal from the denial of *Hurst* relief in a pre-*Ring* death sentence case. On August 10, 2017, the Florida Supreme Court denied relief in *Hitchcock*. Thereafter the Florida Supreme Court subsequently ordered Mr. Pietri and dozens of other appellants to show cause as to why they should not be denied *Hurst* relief in light of *Hitchcock* and the *Ring*-based retroactivity cutoff. In response, Mr. Pietri distinguished his case from *Hitchcock*, pointing out that the focus of Mr. Hitchcock's argument was solely *Hurst v. Florida* and the Sixth Amendment. Pietri explained that his claim is based upon *Hurst v. State* and his right to a life sentence unless a properly-instructed jury unanimously recommends a death sentence. And as the Florida Supreme Court itself recognized in *Hurst v. State*, this right does not arise from the Sixth Amendment, *Hurst v. Florida* or *Ring v. Arizona*, rather it is a right emanating from the Florida Constitution and the Eighth Amendment.

On February 2, 2018, without any discussion of Mr. Pietri's individual claims, the Florida Supreme Court denied relief on the basis of *Hitchcock v. State*. *See Pietri v. State*, 236 So. 3d 235, 236 (Fla. 2018):

> After reviewing Pietri's response to the order to show cause, as well as the State's arguments in reply, we conclude that Pietri is not entitled to relief. Pietri was sentenced to death following a jury's recommendation for death by a vote of eight to four. *Pietri v. State*, 644 So. 2d 1347, 1349 (Fla. 1997). Pietri's sentence of death became final in 1995. *Pietri v. Florida*, 515 U.S. 1147 (1995). Thus, *Hurst* does not apply retroactively to Pietri's sentence of death. *See Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the denial of Pietri's motion. The Court having

> carefully considered all arguments raised by Pietri, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

No motion for rehearing was filed. On April 23, 2018, Justice Thomas granted Mr. Pietri's April 18, 2018 Application for a sixty-day extension of time to July 2, 2018 to file his petition for writ of certiorari. This petition is timely filed.

## REASONS FOR GRANTING THE WRIT

### I. Arbitrary reliability and partial retroactivity

The Florida Supreme Court created an arbitrary bright-line cutoff, set at June 24, 2002, in its *Mosley* and *Asay* decisions. This cutoff is so arbitrary as to violate the Eighth Amendment principles enunciated by this Court in *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman*, this Court found that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman*, 408 U.S. at 239-40. In separating those who are to receive the retroactive benefit of *Hurst v. Florida* and/or *Hurst v. State* from those who will not based on the Sixth Amendment decision in *Ring v. Arizona,* the line drawn operates much the same as the IQ score of 70 cutoff at issue in *Hall v. Florida*, 134 S. Ct. 1986 (2014).

In *Hurst v. Florida* this Court declared that the Sixth Amendment right to a jury trial applied to those statutorily defined facts that were necessary to authorize a death sentence. As a result, the Florida Supreme Court had to reassess Florida's capital sentencing scheme, not just what findings had been statutorily mandated as necessary to authorize a death sentence, but what was required of the jury for a

reliable sentencing determination after *Hurst v. Florida* struck Florida's capital sentencing scheme as unconstitutional. *See Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case.").

On remand, in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court ruled that in a Florida capital case, the jury's sentencing recommendation at the penalty phase had to be returned unanimously. Recognizing that the role the jury had previously played was inadequate to insure a reliable, non-arbitrary result, the Florida Supreme Court identified each of the necessary components of a jury's unanimous death recommendation:

> We hold that in addition to **unanimously finding the existence of any aggravating factor**, the jury must also **unanimously find that the aggravating factors are sufficient for the imposition of death** and **unanimously find that the aggravating factors outweigh the mitigation** before a sentence of death may be considered by the judge. * * * As we explain, we also find that in order for a death sentence to be imposed, **the jury's recommendation for death must be unanimous.** This recommendation is tantamount to the jury's verdict in the sentencing phase of trial; and historically, and **under explicit Florida law, jury verdicts are required to be unanimous.**

*Hurst v. State*, 202 So. 3d at 54 (emphasis added).

The Florida Supreme Court also specifically detailed why the administration of justice warranted the unanimity requirement:

> In requiring jury unanimity in these findings and in its final recommendation if death is to be imposed, we are

> cognizant of significant benefits that will further the administration of justice.

*Hurst v. State*, 202 So. 3d at 58. Reliance was placed on decisions from other courts regarding the value of unanimity to the deliberative process, which allowed society to have confidence in the jury's fact-finding and research studies regarding the positive effect the unanimity requirement had on a jury's deliberations. According to *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty phase jury has voted unanimously in favor of the imposition of death.

The Eighth Amendment requires that a death sentence carry extra reliability in order to insure that it is not imposed arbitrarily. Heightened reliability in capital cases is a core value of the Eighth Amendment and *Furman v. Georgia*, 408 U.S. 238 (1972). The need for enhanced reliability in capital sentencing procedures has long been established as a requirement under the Eighth Amendment. *See Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.").

Implicit in the Florida Supreme Court's recognition that requiring juror unanimity enhances the reliability of a decision imposing death is an acknowledgment that death sentences imposed without such a requirement are less reliable, and thus, do not carry the heightened reliability required under the Eighth Amendment. While the Florida Supreme Court in *Hurst v. State* found non-unanimous death recommendations were lacking in reliability, the level of

unreliability is compounded in some cases by matters and issues that increase the unreliability of a particular death sentence. For example, in holding that requiring unanimity would produce more reliable death sentences, the Florida Supreme Court acknowledged that death sentences imposed without the unanimous support of a jury lacked the requisite reliability:

> After our more recent decision in *Hurst*, 202 So. 3d 40, where we determined that a reliable penalty phase proceeding requires that "the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed," 202 So. 3d at 59, we must consider whether the unpresented mitigation evidence would have swayed one juror to make "a critical difference." *Phillips*, 608 So. 2d at 783.

*Bevel v. State*, 221 So. 3d 1168, 1182 (Fla. 2017).

In *Mosley v. State*, the Florida Supreme Court noted that the unanimity requirement in *Hurst v. State* carried with it "heightened protection" for a capital defendant. *Id.*, 209 So. 3d at 1278. The Florida Supreme Court also stated in *Mosley* that *Hurst v. State* had "emphasized the critical importance of a unanimous verdict." *Id.* The Court added:

> In this case, where the rule announced is of such fundamental importance, the interests of fairness and "cur[ing] **individual injustice**" compel retroactive application of *Hurs*t despite the impact it will have on the administration of justice. *State v. Glenn*, 558 So.2d 4, 8 (Fla. 1990).

*Mosley v. State*, 209 So. 3d 1248, 1282 (Fla. 2016) (emphasis added). *Hurst v. State* recognized that a non-unanimous recommendation, like the one that occurred in Mr. Pietri's sentencing, lacks the heightened reliability demanded by the Eighth

Amendment. *See Hurst v. State*, 202 So. 3d at 59 ("the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.").

Throughout his appellate and collateral proceedings, Mr. Pietri has pointed to numerous ways in which his sentence lacks the heightened reliability demanded by the Eighth Amendment. For example, the previous rejection of Mr. Pietri's postconviction *Strickland* claims was based on the failure to show prejudice, defined as the reasonable likelihood that six jurors would vote for a life sentence. However, this definition no longer comports with the law. Post-*Hurst* Florida law now provides that if only one juror votes for a life sentence, a life sentence must be imposed. *Strickland* and *Brady* prejudice analysis requires a determination of whether confidence in the reliability of the outcome –the imposition of a death sentence – is undermined by the evidence the jury did not hear due to the *Strickland* and/or *Brady* violations. The new Florida law should be part of the evaluation of whether confidence in the reliability of the outcome is undermined without reference to an arbitrary cut-off date based on *Ring v. Arizona*.

Given that Mr. Pietri's sentencing jury recommended death by an 8 to 4 majority, and in light of the evidence developed in collateral proceedings that would be admissible, Mr. Pietri would certainly receive a sentence of less than death. Due to the arbitrary line the Florida Supreme Court has drawn in the course of deciding *Mosley* and *Asay*, Mr. Pietri's death sentence is inherently more unreliable.

Individuals in Mr. Pietri's shoes, those with pre-*Ring* death sentences, are

more likely to have had proceedings layered in error to the extent that the cumulative unreliability overcomes the interests the State may have in finality. Although the State's interest in finality increases the older the case is, older cases will often have greater unreliability due to advances in science and improvements in the quality of representation in capital cases over time. Mr. Pietri belongs to a class of inmates who are most likely to be deserving of relief from their unconstitutional non-unanimous "death recommendation" death sentences.

Death sentences imposed after a jury did not return unanimous findings on all facts necessary to impose a sentence of death before June 24, 2002, are just as unreliable as similar death sentences imposed after June 24, 2002. The older the death sentence, the more likely it is to be unreliable. The Florida Supreme Court made a substantive change when it required unanimity in *Hurst v. State* because of the special need for reliability in a capital case and to insure that death sentences are not imposed in an arbitrary fashion. But the manner in which this change has been extended retroactively to some death sentenced individuals but not others arbitrarily leaves intact death sentences recognized as lacking reliability.

As explained in *Hurst v. State*, the benefit of the new substantive rules is enhanced reliability. Enhancement of reliability warrants retroactive application of new substantive rules. *See Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting) ("constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied"). The changes mandated by *Hurst v. State* were specifically found to improve accuracy. The difference between an

advisory death recommendation by an 8 to 4 majority vote, as in Mr. Pietri's case, to the necessity of a unanimous death recommendation before a death sentence is authorized is analogous to the difference between requiring proof by a preponderance of the evidence and requiring proof beyond a reasonable doubt.

Mr. Pietri's jury made no findings at all regarding the elements necessary to allow for the imposition of a death sentence. The jury failed to find unanimously and expressly that all the aggravating factors were proven beyond a reasonable doubt, to unanimously find that the aggravators were sufficient to impose death, and unanimously find that the aggravators outweighed the mitigators. *Hurst v. State* made just this point:

> Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

202 So. 3d at 69.

Mr. Pietri's jury was repeatedly misinformed as to its responsibility in the sentencing process and counsel argued in his 2003 state habeas petition that "Were this Court to now conclude that Mr. Pietri's death sentence rests on findings made by the jury after they were told that Florida law clearly provided that a death sentence would not rest on their recommendation, it would establish that Mr. Pietri's death

sentence was imposed in violation of *Caldwell*."[5] Under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), even a unanimous jury verdict in favor of a death sentence violates the Eighth Amendment if the jury was not correctly instructed as to its sentencing responsibility.

In *Caldwell*, this Court held it is constitutionally impermissible to rest a death sentence on a determination made by a jury that was "led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29.[6] As this Court explained in *Caldwell*, "there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Id.* at 330. The jury's 8-4

---

[5] State habeas petition at 24.

[6] The Florida Supreme Court has previously rejected *Caldwell* challenges including Mr. Pietri's in his state habeas petition in 2003 in the context of the pre-*Hurst* sentencing scheme. Recently a dissent to the denial of certiorari by three justices of this Court in *Truehill v. Florida*, 138 S. Ct. 3 (2017) noted that "capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address." (Sotomayor, J., dissenting, joined by Breyer and Ginsburg, JJ.) In response the Florida Supreme Court rejected any review through the lens of *Hurst* litigation. *See Reynolds v. State*, ---So. 3d--- 2018 WL 1633075 at *9 (Fla. April 5, 2018) ("[T]here cannot be a pre–*Ring*, *Hurst*–induced *Caldwell* challenge to Standard Jury Instruction 7.11 because the instruction clearly did not mislead jurors as to their responsibility under the law; therefore, there was no *Caldwell* violation. *See Romano*, 512 U.S. at 9, 114 S.Ct. 2004. The Standard Jury Instruction cannot be invalidated retroactively prior to *Ring* simply because a trial court failed to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts."); *but see Reynolds v. State*, 2018 WL 1633075, at *15-*17 (Pariente, J. dissenting). The Florida Supreme Court points responsibility for its failure to find *Caldwell* violations on this Court's holdings.

recommendation for death is incurably unreliable.

If a bias in favor of a death recommendation increases when the jury's sense of responsibility is diminished, removing the basis for that bias increases the likelihood that additional jurors will vote for a life sentence. The likelihood increases even more when the jury receives accurate instructions as to each juror's power and authority to dispense mercy and preclude a death sentence.

Because the jury's sense of responsibility was improperly diminished in *Caldwell*, this Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.").

Mr. Pietri's case exemplifies the presumption of *Caldwell* error where his jury received inaccurate instructions as to their ultimate responsibility during sentencing and as to their power to dispense mercy and preclude a death sentence. The jury in Mr. Pietri's case was precluded from instruction about exercising mercy and was instructed that its recommendation was advisory and could be returned on the basis of a simple majority vote, thus, the weight of the sentencing decision was taken off the jury's shoulders and the proceeding all but insured an unreliable result.

It is constitutionally impermissible to execute a person whose death sentence was imposed in proceedings now recognized as producing constitutionally unreliable results. This is what the Florida Supreme Court is unprepared to face in both its

*Hurst* and *Caldwell* analyses. This Court should consider whether the death sentence imposed on Mr. Pietri constitutes cruel and unusual punishment in violation of the Eighth Amendment where Florida law no longer permits a death sentence to be imposed unless the jury unanimously consents, where Mr. Pietri's jury did not unanimously find the required facts to impose a death sentence, and where the jury instructions improperly diminished the jury's sense of responsibility.

This Court should also consider whether denying Mr. Pietri the benefit of *Hurst v. Florida* and *Hurst v. State* demonstrates a level of capriciousness and inequality so as to violate the Equal Protection Clause. And this Court should consider whether allowing Mr. Pietri's death penalty sentence to stand in spite of the recognized risk of unreliability constitutes the arbitrary exercise of governmental power that violates the Due Process Clause.

## II. Other retroactivity issues and the Supremacy Clause

In his circuit court pleading below, Mr. Pietri pled that as a matter of federal law in light of this Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Florida courts should reject the notion of "partial retroactivity," which violates the United States and Florida Constitutions.

> In analyzing the retroactivity of the *Hurst* decisions under this state's retroactivity doctrines, this Court should recognize that Defendant has a federal right to retroactivity as highlighted by the United States Supreme Court's recent decision in *Montgomery*. Where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively. *See Montgomery*, 136 S. Ct. at 731-32 ("Where 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."). In *Montgomery*, the Defendant initiated a state post-conviction proceeding seeking retroactive application of *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding imposition of mandatory sentences of life without parole on juveniles violates Eighth Amendment). The Louisiana Supreme Court (in contrast to what this Court did in *Falcon v. State,* 162 So. 3d 954 (Fla. 2015)) held that *Miller* was not retroactive under its state retroactivity tests. The United States Supreme Court reversed, holding that Louisiana could not bar retroactivity under its state doctrines because the *Miller* rule was substantive and therefore Louisiana was obligated under the federal Constitution to apply it retroactively on state post-conviction review.

The *Hurst* decisions announced substantive rules that under the Federal Constitution may not be denied to Florida defendants on state retroactivity grounds. In *Hurst v. State*, the Court announced two substantive rules. First, the Court held that the Sixth Amendment requires that a jury decide whether the aggravating factors have been proven beyond a reasonable doubt, whether they are sufficient to impose the death penalty, and whether they are outweighed by the mitigating factors. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a particular juvenile is or is not a person "whose crimes reflect the transient immaturity of youth" is substantive, not procedural). Indeed, the United States Supreme Court has consistently applied proof-beyond-a-reasonable-doubt rules retroactively to *all* defendants. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).

Second, the Court held that the Eighth Amendment requires the jury's fact-finding during the penalty phase to be unanimous. The Court explained that the unanimity rule is required to implement the constitutional mandate that the death penalty be reserved for a narrow class of the worst offenders, and assures that the 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 ("By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important

> goal of bringing its capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law."); *see also Perry v. State*, 2016 WL 6036982, at *7 ("We also held [in *Hurst*] that, based on Florida's requirement for unanimity in jury verdicts and on the Eighth Amendment to the United States Constitution, a jury's ultimate recommendation of the death sentence must be unanimous."). As the Court made clear, the function of the unanimity rule is to ensure that Florida's overall capital system complies with the Eighth Amendment. *See id.* at *47-48. That makes the rule substantive, *see Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"), even though its subject has to do with the method by which a jury makes decisions. *See Montgomery*, 136 S. Ct. at 735 (noting that existence of state flexibility in determining method by which to enforce constitutional rule does not convert substantive rule into procedural one).
>
> Because the rules announced in the *Hurst* decisions are substantive within the meaning of federal law, this Court has a duty under the federal Constitution to apply them retroactively to Defendant under Florida's retroactivity doctrines.

(C-PCR at 29-31) (Fla. R. Crim. P. 3.851 Motion) (fn. 9 omitted concerning *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004)).

The state circuit court order denying relief failed to make mention of *Montgomery*, or federal retroactivity, and relied on the Florida Supreme Court's opinion in *Asay v. State* for the denial of retroactive application of *Hurst v. State* in Mr. Pietri's case. On appeal, the Florida Supreme Court issued an order on September 25, 2017 requiring that "Appellant shall show cause on or before Monday, October 16, 2017, why the trial court's order should not be affirmed in light of this Court's decision *Hitchcock v. State*., SC17-445. The response shall be limited to no more than 20

pages."

The *Hitchcock* opinion made no mention of *Montgomery*, and due to the limitations on Mr. Pietri's response, the *Montgomery* argument concerning federal retroactivity was noted only by reference to the argument below; "Mr. Pietri argued [in his Fla. R. Crim. P. 3.851 motion] both *Hurs*t decisions should apply retroactively under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), the equitable fundamental fairness doctrine, and **as a matter of federal law**." Response to Order to Show Cause at 4-5. (Appendix C) (emphasis added)

In *Montgomery*, 136 S. Ct. at 731-32, this Court held that the Supremacy Clause of the United States Constitution requires the state courts to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis. In that case, a Louisiana state prisoner filed a claim in state court seeking the 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. This 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 v. Louisiana* clarified that the Supremacy Clause requires state courts to apply substantive rules retroactively notwithstanding the result under a

state-law analysis. *Montgomery*, 136 S. Ct. at 728-29 ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, *the Constitution* requires state collateral review courts to give retroactive effect to that rule.") (emphasis added). Thus, *Montgomery* held, "[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id.* at 731-32.

Importantly for purposes of *Hurst* retroactivity analysis, this 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*, 567 U.S. at 483. Instead, "it mandate[d] only that a sentence follow a certain process – considering an offender's youth and attendant characteristics – before imposing a particular penalty." *Id.* Despite *Miller's* "procedural" requirements, 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). 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.

*Hurst v. Florida* explained that under Florida law, the factual predicates necessary for the imposition of a death sentences were: (1) the existences of particular aggravating circumstances; (2) that those particular aggravating circumstances were "sufficient" to justify the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst* held that those determinations must be made by juries. Those decisions are as substantive as whether a juvenile is incorrigible. *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). Thus, 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.

After remand, the Florida Supreme Court described substantive provisions it found to be required by the Eighth Amendment. *Hurst v. State*, 202 So. 3d at 48-69. Those provisions represent the Florida Supreme Court's view on the substantive requirements of the United States Constitution when it adjudicated Mr. Pietri's case in the proceedings below.

*Hurst v. State* held not only that the requisite jury findings must be made beyond a reasonable doubt, but also that juror unanimity is necessary for compliance

with the constitutional requirement that the death penalty be applied narrowly to the worst offenders and 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 insure 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, this is also substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"). And it remains substantive even though the subject concerns the method by which the jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (noting that state's ability to determine the method of enforcing constitutional rule does not convert a rule from substantive to procedural).

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. *Welch* 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.

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 that 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 very purpose of the rules is to place certain individuals beyond the state's power to punish by death. Such rules are substantive, *see Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes."). and *Montgomery* requires the states to impose them retroactively.

*Hurst* retroactivity is not undermined by *Summerlin*, 542 U.S. at 364, where this Court held that *Ring* was not retroactive in a federal habeas case. In *Ring*, the

Arizona statute permitted a death sentence to be imposed upon 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 fact-finding on 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 this Court held that it was 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 this 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."); *see also 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").

"Under the Supremacy Clause of the Constitution . . . . [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." *Montgomery*, 136 S. Ct. at 731-32. Because the outcome-determinative rights articulated in *Hurst v. Florida* and *Hurst v. State* are substantive, the Florida Supreme Court was not at liberty to foreclose the retroactive application to Mr. Pietri's case.

## CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Florida Supreme Court in this case.

Respectfully submitted,

_____
WILLIAM M. HENNIS III
Fla. Bar No. 0066850
Litigation Director
Capital Collateral Regional Counsel-South
1 East Broward Blvd, Suite 444
Fort Lauderdale, FL 33301
P: (954) 713-1284
F: (954) 713-1299

COUNSEL FOR PETITIONER