No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

ERIC SCOTT BRANCH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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APPLICATION FOR A STAY OF EXECUTION

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
THURSDAY, FEBRUARY 22, 2018, AT 6:00 P.M.

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

The State of Florida has scheduled the execution of Petitioner, Eric Scott Branch, for **February 22, 2018, at 6:00 p.m.** Petitioner requests a stay of execution pending the consideration and disposition of the petition for a writ of certiorari that he is filing simultaneously with this application.[1]

[1] Petitioner requests expedited consideration of the petition. *See* Petition at 1 n.1.

I. The Accompanying Petition for a Writ of Certiorari Presents Issues Sufficiently Meritorious for the Grant of Review

Petitioner's execution is scheduled to proceed even though no court or party disputed below that his death sentence was obtained in violation of the United States Constitution under *Hurst v. Florida*, 136 S. Ct. 616 (2016). The Florida Supreme Court declined to grant relief because it concluded that while *Hurst* should apply retroactively to dozens of death sentences on collateral review, it should not apply to Petitioner's death sentence or dozens of others on collateral review. *Branch v. State*, No. SC17-1509, 2018 WL 495024 (Fla. Jan. 22, 2018) (attached).

Of course, this Court has held that traditional retroactivity rules serve legitimate purposes despite some features of unequal treatment. Petitioner does not ask the Court to revisit this feature of American law.

However, as the petition explains, the rule of non-retroactivity formulated by the Florida Supreme Court involves more. The Florida Supreme Court has devised an unusual partial retroactivity scheme for *Hurst* claims whereby *Hurst* is applied retroactively on collateral review, but only to prisoners whose death sentences became "final" on direct appeal after this Court invalidated Arizona's capital sentencing scheme in *Ring v. Arizona*, 536 U.S. 584 (2002). The Florida Supreme Court's *Ring*-based formula prohibits a class of more than 150 Florida prisoners from obtaining a jury determination of their death sentences, while requiring the death sentences of another group of prisoners to be vacated on collateral review so that they can receive a jury determination. *See* Appendix to Petition ("Pet. App.") 81a-88a. As the petition for a writ of certiorari describes, the state court's formula is inconsistent

with the Eighth Amendment's prohibition against the arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection.

The Florida Supreme Court's bright-line retroactivity cutoff for *Hurst* claims fits a historical pattern for that court. This Court has overturned similar bright-line tests devised by the Florida Supreme Court because they failed to give effect to this Court's death penalty jurisprudence. Nine years after this Court decided in *Lockett v. Ohio*, 438 U.S. 586 (1978), that mitigating evidence should not be confined to a statutory list, this Court overturned the Florida Supreme Court's bright-line rule barring relief in Florida cases where the jury was not instructed that it could consider non-statutory mitigating evidence. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987). Twelve years after this Court ruled in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment prohibits execution of the intellectually disabled, this Court ended the Florida Supreme Court's use of an unconstitutional bright-line IQ-cutoff test to deny *Atkins* claims. *See Hall v. Florida*, 134 S. Ct. 1986 (2014).

Despite this history, the Florida Supreme Court has refused to discuss in any meaningful way—in any case—whether its *Ring*-based retroactivity cutoff for *Hurst* claims is inconsistent with the Eighth and Fourteenth Amendments.[2]

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[2] In contrast to the court's majority, several members of the Florida Supreme Court have explained that the cutoff does not survive scrutiny. In *Asay*, Justice Pariente wrote: "The majority's conclusion results in an unintended arbitrariness as to who receives relief . . . . To avoid such arbitrariness and to ensure uniformity and fundamental fairness in Florida's capital sentencing . . . *Hurst* should be applied retroactively to all death sentences." *Asay v. State*, 210 So. 3d 1, 36 (Fla. 2016) (Pariente, J., concurring in part and dissenting in part). Justice Perry was blunter:

The accompanying petition presents issues that are sufficiently meritorious for the grant of certiorari review. *See Barefoot v. Estelle*, 463 U.S. 880, 895-96 (1983). This Court should stay Petitioner's execution and address the constitutionality of the Florida Supreme Court's *Ring*-based retroactivity cutoff for *Hurst* claims now. Waiting—as the Court did before ending the Florida Supreme Court's unconstitutional practices in *Hall*, *Hitchcock*, and *Hurst*—would allow the execution of Petitioner and dozens of prisoners whose death sentences were obtained in violation of *Hurst*, while dozens of other prisoners whose sentences are also "final" for retroactivity purposes, and who were similarly sentenced in violation of *Hurst*, are granted collateral relief.

II. If This Court Declines to Address the Florida Supreme Court's Retroactivity Cutoff in This Case, the Court's Docket Will Be Inundated With Dozens of Certiorari Petitions Raising This Issue, as a Result of the Florida Supreme Court's Recent Summary Dispositions in 80 Cases

If this Court declines to address the Florida Supreme Court's retroactivity cutoff in this case, this Court's docket will be inundated with dozens of certiorari petitions raising this issue as a result of the Florida Supreme Court's recent summary dispositions in 80 cases.

"In my opinion, the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two grounds of similarly situated persons." *Id.* at 37 (Perry, J., dissenting). Justice Perry correctly predicted: "[T]here will be situations where persons who committed equally violent felonies and whose death sentences became final days apart will be treated differently without justification." *Id.* And in *Hitchcock*, Justice Lewis noted that the Court's majority was "tumbl[ing] down the dizzying rabbit hole of untenable line drawing." *Hitchcock v. State*, 226 So. 3d 216, 218 (Fla. 2017) (Lewis, J., concurring in the result).

In 2017, the Florida Supreme Court entered orders to show cause in nearly 100 appeals and state habeas corpus proceedings, including Petitioner's, in which *Hurst* claims were raised in the context of death sentences that became final on direct appeal before *Ring*. In January 2018, the Florida Supreme Court embarked on the mass-denial of relief in those cases, including Petitioner's, based on its *Hurst* retroactivity cutoff at *Ring*. In 80 nearly-identical summary opinions, the Florida Supreme Court reaffirmed its formula and declined to specifically discuss the federal constitutional legal issues raised. *See* Pet. App. 89a-93 (listing cases).

These cases will start reaching this Court through petitions for certiorari that likely will challenge the constitutionality of the Florida Supreme Court's formula. The Court should not wait for the coming flood of certiorari petitions, as none of those other cases will provide a better vehicle than Petitioner's to decide these important constitutional questions, and as Petitioner should not be executed until this Court rules on these questions.

III. Petitioner Sought a Stay from the Florida Supreme Court Pending the Disposition of his Petition for a Writ of Certiorari, but the Florida Supreme Court Denied a Stay

Petitioner sought a stay from the Florida Supreme Court pending the filing and disposition of his petition for a writ of certiorari. *See* Sup Ct. R. 23.3. Petitioner argued that the issues presented in his petition were meritorious and appropriate for resolution now—before dozens of similar petitions flood this Court's docket—and further explained that lower courts should ordinarily enter stays pending certiorari review in the interests of judicial efficiency and to avoid unnecessary last-minute stay

litigation in this Court. Pet. App. 13a-22a. Respondent opposed the motion, arguing that this Court "is quite capable of entering a stay of execution if [it] think[s] one is necessary." *Id.* at 23a-29a.

On February 6, 2018, the Florida Supreme Court summarily denied a stay of execution. *Id.* at 5a-6a.

IV. Conclusion

For the foregoing reasons, Petitioner respectfully requests that this Court stay his execution and grant his petition for a writ of certiorari to address the important constitutional questions raised in this case.

Respectfully submitted,

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Supreme Court of Florida

No. SC17-1509

ERIC SCOTT BRANCH,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[January 22, 2018]

PER CURIAM.

We have for review Eric Scott Branch's appeal of the circuit court's order denying Branch's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. See art. V, § 3(b)(1), Fla. Const.

Branch's motion sought relief pursuant to the United States Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), and our decision on remand in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). This Court stayed Branch's appeal pending the disposition of Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017). After this

Court decided Hitchcock, Branch responded to this Court's order to show cause arguing why Hitchcock should not be dispositive in this case.

After reviewing Branch's response to the order to show cause, as well as the State's arguments in reply, we conclude that Branch is not entitled to relief. Branch was sentenced to death following a jury's recommendation for death by a vote of ten to two. Branch v. State, 685 So. 2d 1250, 1252 (Fla. 1996). Branch's sentence of death became final in 1997. Branch v. Florida, 520 U.S. 1218 (1997). Thus, Hurst does not apply retroactively to Branch's sentence of death. See Hitchcock, 226 So. 3d at 217. Accordingly, we affirm the denial of Branch's motion.

The Court having carefully considered all arguments raised by Branch, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

LABARGA, C.J., and QUINCE, POLSTON, and LAWSON, JJ., concur.
PARIENTE, J., concurs in result with an opinion.
LEWIS and CANADY, JJ., concur in result.

PARIENTE, J., concurring in result.

I concur in result because I recognize that this Court's opinion in Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

An Appeal from the Circuit Court in and for Escambia County, Edward Phillips Nickinson III, Judge - Case No. 171993CF000870XXXAXX

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