

**IN THE SUPREME COURT OF FLORIDA**

**ERIC SCOTT BRANCH,**

Appellant,

Case No. SC17-1509

v.

**DEATH WARRANT ISSUED**

**STATE OF FLORIDA,**

**EXECUTION SCHEDULED FOR  
FEBRUARY 22, 2018 AT 6:00 PM**

Appellee.

\_\_\_\_\_ /

**MOTION TO STAY EXECUTION PENDING FILING AND  
DISPOSITION OF PETITION FOR WRIT OF CERTIORARI  
IN THE SUPREME COURT OF THE UNITED STATES**

Appellant Eric Scott Branch moves to stay the execution of his death sentence, currently scheduled for February 22, 2018, at 6:00 p.m., pending the timely filing and disposition of a petition for a writ of certiorari in the United States Supreme Court, through which he will seek review of this Court’s January 22, 2018, decision affirming the denial of relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016).

Appellant’s certiorari petition will present important and unresolved federal constitutional questions arising from this Court’s unusual and, we submit, problematic partial retroactivity framework for *Hurst* claims. Under that framework, this Court applies *Hurst* retroactively and grants relief in many collateral-review cases, but refuses to apply *Hurst* retroactively to other prisoners, like Appellant, whose death sentences became final before the decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

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This Court should grant a stay of execution in Appellant's case to permit the United States Supreme Court to consider, in an untruncated manner, the important federal constitutional questions arising from this Court's approach now. Needless to say, the United States Supreme Court's docket will be inundated in the coming months with many certiorari petitions challenging this Court's *Ring*-based retroactivity cutoff for *Hurst* claims. A stay of execution by this Court here may also avoid needless last-minute stay litigation in this and other cases in the United States Supreme Court, and is consistent with the widely-accepted judicial policy that lower courts enter stays of their decisions pending review by a higher court.

**I. A stay should be granted to allow the United States Supreme Court to address the important and unresolved federal constitutional questions regarding this Court's *Hurst* retroactivity framework now, in Appellant's case, before the Supreme Court is inundated with scores of certiorari petitions raising similar issues in the coming months**

A wave of certiorari petitions, approximately 100, challenging this Court's *Hurst* retroactivity framework is set to flood the United States Supreme Court's docket shortly after Appellant's scheduled execution. This Court should grant a stay of execution here to allow the United States Supreme Court to address the important and unresolved federal constitutional questions regarding the *Ring*-based *Hurst* retroactivity cutoff created by this Court before the United States Supreme Court is inundated with these petitions in the coming months.

In 2017, this Court entered stays, followed by orders to show cause, in over 100 appeals and state habeas proceedings, including Appellant's, in which *Hurst* claims were raised in the context of death sentences that became final on direct appeal before *Ring*. See Exhibit 1 (attached). In January 2018, this Court embarked on the mass-denial of relief in those cases, including Appellant's, in summary opinions that cited *Hitchcock v. State*, 226 So. 3d 216 (2017). In these decisions, this Court reaffirmed its *Ring*-based retroactivity cutoff, and declined to specifically discuss federal constitutional law. In the last two weeks alone, this Court has denied *Hurst* relief in 67 such cases, with more opinions being released each day. See Exhibit 2 (attached).

These cases will begin reaching the United States Supreme Court through petitions for certiorari that, like Appellant's, will likely challenge the constitutionality of this Court's *Ring*-based retroactivity cutoff. See Sup. Ct. R. 13.1 (providing that certiorari petitions must be filed within 90 days of the judgment under review). Given the timing of Appellant's scheduled execution, his certiorari petition will likely be the first, or among the first, of these cases to reach the United States Supreme Court.

This Court's entry of a stay will not only reflect respect for the United States Supreme Court's docket, but will also further the interests of judicial efficiency in Florida's courts by promoting the prompt resolution of questions surrounding this

Court's handling of *Hurst* claims. Allowing the United States Supreme Court to address the constitutionality of this Court's *Hurst* retroactivity cutoff in an untruncated manner in Appellant's case will avoid prolonged uncertainty and injustice. Appellant would be remiss if he did not point out that there has been a history of prolonged uncertainty and injustice in Florida related to this Court's nine-year mishandling of claims under *Lockett v. Ohio*, 438 U.S. 586 (1978), *see Hitchcock v. Dugger*, 481 U.S. 393 (1987), 12-year mishandling of claims under *Atkins v. Virginia*, 536 U.S. 304 (2002), *see Hall v. Florida*, 134 S. Ct. 1986 (2014), and long history of mishandling jury-sentencing claims, *see Hurst*, 136 S. Ct. at 621.

Appellant's case is an ideal vehicle for the resolution of these federal constitutional issues, given his preservation of a broad range of federal arguments in both the circuit court and this Court. The United States Supreme Court should be afforded a meaningful opportunity to decide whether to address *Hurst* retroactivity issues in his case without the time constraints of an impending execution. A stay entered by this Court at this juncture will avoid needless last-minute stay litigation in the United States Supreme Court.

The interests of justice favor granting Appellant a stay of execution pending the filing and disposition of his certiorari petition. At some point, the United States Supreme Court will review this Court's *Hurst* retroactivity framework. If that review occurs after Appellant's execution, and the United States Supreme Court

invalidates this Court's retroactivity cutoff, the injustice in Appellant's case will be irreparable.

This Court should not wait for the United States Supreme Court to grant a stay. Widely-accepted judicial policy and respect for efficiency in the appellate process favor the entry of stays pending appeal by the lower court in the first instance, not the reviewing court. That is why the United States Supreme Court's rules provide that "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate courts below." Sup Ct. R. 23.3. The Federal Rules of Appellate Procedure similarly provide that applications for a stay pending appeal must always be made initially in the lower court. Fed. R. App. P. 8.

The United States Supreme Court's preference for the entry of stays of execution by the lower courts cases is reflected in the deference the Court affords to such stays. *See, e.g., Barefoot v. Estelle*, 463 U.S. 80, 895-96 (1983); *Dugger v. Johnson*, 485 U.S. 945, 947 (1988) (O'Connor, J., concurring).

In the past, this Court has stayed executions to allow the United States Supreme Court to resolve important federal constitutional questions without the time constraints of an impending execution, and without burdening Supreme Court with unnecessary and last-minute stay litigation. *See, e.g., Correll v. State*, No. SC15-147, Order at 5 (Feb. 27, 2015) (LaBarga, C.J., concurring in stay of execution) ("[A]

stay pending determination of the issue in the United States Supreme Court will not prejudice the State and, more importantly, will ensure that Florida does not risk an unconstitutional execution, a risk that would threaten the viability of Florida's entire death penalty scheme.”), motion to vacate stay denied sub nom., *Florida v. Correll*, No. 14A875, 135 S. Ct. 1491 (mem.) (Feb. 25, 2015).

**II. There is a significant possibility that the United States Supreme Court will grant review of the important and unresolved federal constitutional questions regarding this Court's *Hurst* retroactivity framework in Appellant's certiorari petition**

There is a significant chance that the United States Supreme Court will grant review of the important federal constitutional questions arising from this Court's *Hurst* retroactivity framework in Appellant's certiorari petition. *See Barefoot*, 463 U.S. at 895-96. This makes a stay of execution from this Court appropriate. *Chavez v. State*, 132 So. 3d 826, 832 (Fla. 2014).

Appellant's certiorari petition will present questions as to whether this Court's *Ring*-based retroactivity cutoff violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Specifically, Appellant will argue that by denying *Hurst* retroactivity to him and other “pre-*Ring*” defendants, while applying *Hurst* retroactively to other “post-*Ring*” defendants, this Court created a scheme that violated the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty, and the Fourteenth Amendment's guarantee of equal protection and due process, because the effect of

the Court's line-drawing is to deny *Hurst* relief to precisely the class of death row defendants for whom relief makes the most sense. Appellant will show that this Court's retroactivity cutoff involves a level of arbitrariness that runs far beyond that tolerated by standard-fare retroactivity rules.

Appellant also intends to argue that because the United States Supreme Court's decision in *Hurst v. Florida* and this Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), announced substantive constitutional rules, the Supremacy Clause of the United States Constitution requires this Court to apply those rules retroactively on collateral review to all defendants, not merely some defendants. *See, e.g., Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

Appellant presented these arguments to this Court, but the Court did not meaningfully grapple with them.

These federal constitutional arguments will provide substantial grounds for the United States Supreme Court to grant a writ of certiorari and address this Court's January 22, 2018, decision in Appellant's case. A stay of execution by this Court pending certiorari review should be granted.

### **III. The equities of Appellant's case make a stay of execution particularly appropriate**

The equities of Appellant's case make a stay of execution pending the filing and disposition of a certiorari petition especially appropriate. In addition to *Hurst*, Appellant has substantial unresolved constitutional litigation pending in a Florida

circuit court, which may ultimately come before this Court and the United States Supreme Court, requiring review that should not have to occur in the truncated period before his scheduled execution.

Appellant has presented to the circuit court evidence of a new medical, scientific consensus regarding his cognitive underdevelopment at the age of 21, when the offense occurred, which renders Appellant the equivalent of a juvenile who should be afforded the Eighth Amendment protections articulated in *Roper v. Simmons*, 543 U.S. 551 (2005). Appellant's circuit-court pleading is supported by nearly 800 pages of exhibits, including scientific evidence, reports by medical professionals, and witness declarations showing the underdevelopment of Appellant's brain into his early twenties. These exhibits also chronicle the horrific conditions of Appellant's upbringing, which included prolonged neglect, abandonment, and emotional and physical abuse, including gang-rape. The State has neither challenged the validity of Appellant's proffer nor the expert conclusions that the scientific consensus was not previously available.

This case has real considerations favoring a stay and untruncated review by this Court and the United States Supreme Court. A stay of execution from this Court pending the filing and disposition of a petition for a writ of certiorari on the *Hurst* issue therefore is especially appropriate.



#### IV. Conclusion

This Court should stay Appellant’s execution pending the filing and disposition of a petition for a writ of certiorari in the United States Supreme Court.

Respectfully submitted,

/s/ Stacy Biggart

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*Counsel for Appellant Eric Branch*

#### **CERTIFICATE OF SERVICE**

On January 31, 2018, this motion was served via the e-portal to Assistant Attorney General Charmaine Millsaps at charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com; and Billy Nolas, Chief of the Capital Habeas Unit of the Office of the Public Defender for the Northern District of Florida, at billy\_nolas@fd.org.

/s/ Stacy Biggart  
Stacy Biggart

## EXHIBIT 1

In 2017, the Florida Supreme Court entered stays, followed by orders to show cause, in the following 104 appeals and state habeas proceedings in which *Hurst* claims were raised in the context of death sentences that became final on direct appeal before *Ring*.

	<b>Defendant</b>	<b>Florida Supreme Court</b>
1	Alston (Pressley)	SC17-499
2	Alston (Pressley)	SC17-983
3	Anderson	SC17-884
4	Archer	SC16-2111
5	Atwater	SC17-926
6	Bates (Kayle)	SC17-850
7	Bates (Kayle)	SC17-1224
8	Beasley	SC17-566
9	Bell	SC17-1045
10	Blanco	SC17-330
11	Booker	SC17-1205
12	Bowles	SC17-1754
13	Bradley	SC17-1219
14	Branch	SC17-1509
15	Brown	SC17-1001
16	Burns	SC17-726
16	Clark	SC17-587
18	Cole	SC17-737
19	Consalvo	SC17-1309
20	Damren	SC17-1080
21	Davis (Mark)	SC17-1259
22	Davis (Toney)	SC17-1711
23	Derrick	SC17-1242
24	Dillbeck	SC17-847
25	Evans	SC17-869
26	Finney	SC17-985
27	Ford (James)	SC17-859
28	Ford (James)	SC16-706
29	Foster (Kevin)	SC17-1141
30	Foster (Charles K.)	SC17-1383
31	Fotopoulos	SC17-971

32	Gamble	SC17-1101
33	Gonzalez	SC17-1499
34	Gordon	SC17-1133
35	Griffin	SC17-1306
36	Gudinas	SC17-919
37	Hamilton	SC17-42
38	Hannon	SC17-1618
39	Hartley	SC17-899
40	Harvey	SC17-790
41	Heath	SC17-1808
42	Hodges	SC17-1586
43	Jackson	SC17-703
44	Jeffries	SC17-920
45	Jennings	SC17-500
46	Johnson (Emanuel)	SC17-1401
47	Johnson (Emanuel)	SC17-1402
48	Johnson (Ronnie)	SC17-1480
49	Johnson (Ronnie)	SC17-1484
50	Jones (Marvin)	SC17-497
51	Jones (Harry)	SC17-1385
52	Kelley	SC17-830
53	Kokal	SC17-807
54	Krawczuk	SC17-1142
55	Lawrence	SC17-1442
56	Lamarca	SC17-1179
57	Lightbourne	SC17-837
58	Long	SC17-942
59	Lucas	SC17-589
60	Mansfield	SC17-690
61	Marquard	SC17-862
62	Melton	SC17-1147
63	Mendoza	SC17-1324
64	Miller	SC17-1211
65	Morris	SC17-873
66	Morton	SC17-1715
67	Mungin	SC17-815
68	Nelson	SC17-939
69	Occhicone	SC17-1112
70	Overton	SC17-1435

71	Pace	SC17-1021
72	Peterka (Daniel)	SC17-593
73	Peterka (Daniel)	SC17-1003
74	Phillips	SC17-984
75	Pietri	SC17-1281
76	Puiatti	SC17-552
77	Reed	SC17-896
78	Rhodes	SC17-628
79	Rodriguez	SC17-1268
80	Rogers	SC17-945
81	Rose	SC17-878
82	Shere	SC17-1703
83	Sireci	SC17-1143
84	Sliney	SC17-1074
85	Sochor	SC17-929
86	Spencer	SC17-1269
87	Stein	SC17-1547
88	Stephens (Jason)	SC17-820
89	Stephens (Jason)	SC17-1204
80	Stewart	SC17-889
91	Suggs (Ernest)	SC16-1066
92	Suggs (Ernest)	SC17-1225
93	Sweet	SC17-699
94	Taylor	SC17-818
95	Thomas	SC17-809
96	Trease	SC17-686
97	Trepal	SC17-892
98	Trotter	SC17-950
99	Walls	SC17-959
100	Walton	SC17-1083
101	Willacy	SC17-1605
102	Whitfield	SC17-1399
103	Whitton	SC17-1118
104	Windom	SC17-902

## EXHIBIT 2

In January 2018, the Florida Supreme Court summarily denied *Hurst* relief in the following 67 cases based on the retroactivity cutoff at *Ring*, which the Court had reaffirmed in *Hitchcock v. State*, 226 So. 3d 216 (2017). More opinions are expected in February 2018. See Exhibit 1.

1. *Walls v. State*, No. SC17-959, 2018 WL 494655 (Fla. Jan. 22, 2018)
2. *Suggs v. State*, Nos. SC17-1225, SC16-1066, 2018 WL 494652 (Fla. Jan. 22, 2018)
3. *Stephens v. State*, Nos. SC17-820, SC17-1204, 2018 WL 494426 (Fla. Jan. 22, 2018)
4. *Phillips v. State*, No. SC17-984, 2018 WL 494656 (Fla. Jan. 22, 2018)
5. *Peterka v. State*, Nos. SC17-593, SC17-1003, 2018 WL 494425 (Fla. Jan. 22, 2018)
6. *Jones v. State*, No. SC17-497, 2018 WL 494465 (Fla. Jan. 22, 2018)
7. *Bradley v. Jones*, No. SC17-1219, 2018 WL 494464 (Fla. Jan. 22, 2018)
8. *Bates v. State*, Nos. SC17-850, SC17-1224, 2018 WL 494751 (Fla. Jan. 22, 2018)
9. *Alston v. State*, Nos. SC17-499, SC17-983, 2018 WL 494427 (Fla. Jan. 22, 2018)
10. *Atwater v. State*, No. SC17-926, 2018 WL 507357 (Fla. Jan. 23, 2018)
11. *Beasley v. State*, No. SC17-566, 2018 WL 507583 (Fla. Jan. 23, 2018)
12. *Burns v. State*, No. SC17-726, 2018 WL 507585 (Fla. Jan. 23, 2018)
13. *Clark v. State*, No. SC17-587, 2018 WL 507355 (Fla. Jan. 23, 2018)
14. *Cole v. State*, No. SC17-737, 2018 WL 507429 (Fla. Jan. 23, 2018)
15. *Ford v. State*, Nos. SC17-859, SC16-706, 2018 WL 507356 (Fla. Jan. 23, 2018)
16. *Puiatti v. State*, No. SC17-552, 2018 WL 507580 (Fla. Jan. 23, 2018)
17. *Rhodes v. State*, No. SC17-628, 2018 WL 507584 (Fla. Jan. 23, 2018)
18. *Willacy v. State*, No. SC17-1605, 2018 WL 507578 (Fla. Jan. 23, 2018)
19. *Windom v. State*, No. SC17-902, 2018 WL 507630 (Fla. Jan. 23, 2018)

20. *Dillbeck v. State*, No. SC17-847, 2018 WL 522421 (Fla. Jan. 24, 2018)
21. *Evans v. State*, No. SC17-869, 2018 WL 524796 (Fla. Jan. 24, 2018)
22. *Jackson v. State*, No. SC17-704, 2018 WL 525292 (Fla. Jan. 24, 2018)
23. *Kokal v. State*, No. SC17-807, 2018 WL 525295 (Fla. Jan. 24, 2018)
24. *Lucas v. State*, No. SC17-589, 2018 WL 525289 (Fla. Jan. 24, 2018)
25. *Marquard v. State*, No. SC17-862, 2018 WL 524794 (Fla. Jan. 24, 2018)
26. *Sweet v. State*, No. SC17-699, 2018 WL 524789 (Fla. Jan. 24, 2018)
27. *Taylor v. State*, No. SC17-818, 2018 WL 525307 (Fla. Jan. 24, 2018)
28. *Thomas v. State*, No. SC17-809, 2018 WL 524791 (Fla. Jan. 24, 2018)
29. *Trease v. State*, No. SC17-686, 2018 WL 524786 (Fla. Jan. 24, 2018)
30. *Anderson v. State*, No. SC17-884, 2018 WL 560624 (Fla. Jan. 26, 2018)
31. *Finney v. State*, No. SC17-985, 2018 WL 563999 (Fla. Jan. 26, 2018)
32. *Hartley v. State*, No. SC17-899, 2018 WL 563828 (Fla. Jan. 26, 2018)
33. *Jeffries v. State*, No. SC17-920, 2018 WL 564138 (Fla. Jan. 26, 2018)
34. *Kelley v. State*, No. SC17-830, 2018 WL 564132 (Fla. Jan. 26, 2018)
35. *Lightbourne v. State*, No. SC17-837, 2018 WL 564150 (Fla. Jan. 26, 2018)
36. *Morris v. State*, No. SC17-873, 2018 WL 563957 (Fla. Jan. 26, 2018)
37. *Stewart v. State*, No. SC17-889, 2018 WL 564136 (Fla. Jan. 26, 2018)
38. *Trepal v. State*, No. SC17-892, 2018 WL 564137 (Fla. Jan. 26, 2018)
39. *Trotter v. State*, No. SC17-950, 2018 WL 564139 (Fla. Jan. 26, 2018)
40. *Bell v. State*, No. SC17-1045, 2018 WL 577718 (Fla. Jan. 29, 2018)
41. *Bowles v. State*, No. SC17-1754, 2018 WL 579107 (Fla. Jan. 29, 2018)
42. *Brown v. State*, No. SC17-1001, 2018 WL 578945 (Fla. Jan. 29, 2018)

43. *Davis v. State*, No. SC17-1259, 2018 WL 579768 (Fla. Jan. 29, 2018)
44. *Foster v. State*, No. SC17-1141, 2018 WL 79756 (Fla. Jan. 29, 2018)
45. *Fotopoulos v. State*, No. SC17-971, 2018 WL 579814 (Fla. Jan. 29, 2018)
46. *Gamble v. State*, No. SC17-1101, 2018 WL 578716 (Fla. Jan. 29, 2018)
47. *Jennings v. State*, No. SC17-938, 2018 WL 579800 (Fla. Jan. 29, 2018)
48. *Long v. State*, No. SC17-942, 2018 WL 579113 (Fla. Jan. 29, 2018)
49. *Booker v. Jones*, No. SC17-1205, 2018 WL 615082 (Fla. Jan. 30, 2018)
50. *Davis v. Jones*, No. SC17-1711, 2018 WL 618411 (Fla. Jan. 30, 2018)
51. *Gudinas v. State*, No. SC17-919, 2018 WL 618595 (Fla. Jan. 30, 2018)
52. *Lamarca v. State*, No. SC17-1179, 2018 WL 618728 (Fla. Jan. 30, 2018)
53. *Mendoza v. State*, No. SC17-1324, 2018 WL 618592 (Fla. Jan. 30, 2018)
54. *Occhicone v. State*, No. SC17-1112, 2018 WL 618409 (Fla. Jan. 30, 2018)
55. *Pace v. State*, No. SC17-1021, 2018 WL 618590 (Fla. Jan. 30, 2018)
56. *Rogers v. State*, No. SC17-945, 2018 WL 618700 (Fla. Jan. 30, 2018)
57. *Sochor v. State*, No. SC17-1343, 2018 WL 618698 (Fla. Jan. 30, 2018)
58. *Whitfield v. State*, No. SC17-1399, 2018 WL 615022 (Fla. Jan. 30, 2018)
59. *Consalvo v. State*, No. SC17-1309, slip op. (Fla. Jan. 31, 2018)
60. *Gordon v. State*, No. SC17-1133, slip op. (Fla. Jan. 31, 2018)
61. *Krawczuk v. State*, No. SC17-1142, slip op. (Fla. Jan. 31, 2018)
62. *Miller v. Jones*, No. SC17-1211, slip op. (Fla. Jan. 31, 2018)
63. *Nelson v. State*, No. SC17-939, slip op. (Fla. Jan. 31, 2018)
64. *Rodriguez v. State*, No. SC17-1268, slip op. (Fla. Jan. 31, 2018)
65. *Sireci v. State*, No. SC17-1143, slip op. (Fla. Jan. 31, 2018)

66. *Sliney v. State*, No. SC17-1547, slip op. (Fla. Jan. 31, 2018)
67. *Whitton v. State*, No. SC17-1118, slip op. (Fla. Jan. 31, 2018)