No. 17-1603

In the
Supreme Court of the United States

WILLIAM HAROLD KELLEY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

In *Hurst v. Florida* ("*Hurst I*"), 136 S. Ct. 616 (2016), this Court held that Florida's capital sentencing scheme was inconsistent with *Ring v. Arizona*, 536 U.S. 584 (2002), and violated the Sixth Amendment because it allowed a judge, rather than a jury, to find the existence of an aggravating circumstance necessary to impose a death sentence. On remand, in *Hurst v. State* ("*Hurst II*"), 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court established three new rules of capital sentencing procedure not required by this Court's precedents. The Florida Supreme Court subsequently held that those rules do not apply retroactively to all cases, *see Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), but created an exception under state law for cases that became final on direct review after *Ring*, which was the doctrinal foundation of *Hurst I* and *Hurst II*, *see Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016).

The question presented is whether the Florida Supreme Court's retroactive application of *Hurst II* in post-*Ring* cases is arbitrary and capricious in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the Florida Supreme Court:

1) William Harold Kelley, petitioner in this Court, was the appellant below.

2) The State of Florida, respondent in this Court, was the appellee below.

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I. LEGAL BACKGROUND

A. This Court's Pre-*Ring* Approval Of Florida's Capital Sentencing System

Under the statutory regime in place at the time of Petitioner's sentencing in 1984, a defendant convicted of a capital crime in Florida could be sentenced to death only if the trial judge found both (1) the existence of at least one statutorily enumerated aggravating circumstance, and (2) that the aggravating circumstances outweighed the mitigating circumstances. *Spaziano v. Florida*, 468 U.S. 447, 451–52 & n.4 (1984) (citing § 921.141(2)(b), (3)(b), Fla. Stat. (1983)). A sentencing jury would render an advisory verdict, but the judge would make the ultimate sentencing determination. *See id.* (citing § 921.141(3), Fla. Stat. (1983)). This Court upheld that regime as constitutional, including under the Sixth Amendment. *See Hildwin v. Florida*, 490 U.S. 638 (1989); *Spaziano*, 468 U.S. at 447.

In *Apprendi v. New Jersey*, the Court held that the Sixth Amendment does not permit a defendant to be "expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone," even if the State characterizes the additional factual findings made by the judge as "sentencing factor[s]." 530 U.S. 466, 483, 492 (2000) (emphasis in original). In *Ring*, the Court extended *Apprendi*, holding that, "[b]ecause Arizona's enumerated aggravating factors [necessary to impose a death sentence] operate as 'the functional

equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." 536 U.S. 584, 609 (2002) (quoting *Apprendi*, 530 U.S. at 494 n.19). The Court overruled its previous decision in *Walton v. Arizona,* 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609.

Although *Ring* overruled *Walton*, both of those cases analyzed Arizona's capital procedures, which differ considerably from those of other states. Recognizing those differences, *Ring* left intact this Court's many previous decisions upholding other states' procedures. Notably, *Ring* acknowledged—but did not address—"hybrid" capital sentencing procedures, like Florida's, in which the judge decides the ultimate sentence but the jury has an advisory role. *See Ring*, 536 U.S. at 608 n.6. Accordingly, in the years following *Ring*, both the Florida Supreme Court and the Eleventh Circuit declined to extend *Ring* to Florida, reasoning that the lower courts were bound by this Court's pre-*Ring* decisions, all of which upheld Florida's capital sentencing scheme against Sixth Amendment attack. *See*, *e.g.*, *Hurst v. State,* 147 So. 3d 435, 446 (Fla. 2014); *Evans v. Secretary, Fla. Dep't of Corrections*, 699 F.3d 1249, 1264–65 (11th Cir. 2012), *cert. denied*, *Evans v. Crews*, 569 U.S. 994 (2013).

For example, in *Hildwin v. Florida*, decided before *Ring*, this Court had rejected a challenge to Florida's capital sentencing procedures, holding that the Sixth Amendment "does not require that the specific

findings authorizing the imposition of the sentence of death be made by the jury." 490 U.S. at 640–41. Because *Hildwin* was this Court's "last word in a Florida capital case on the constitutionality of that state's death sentencing procedures," and it is this Court's exclusive prerogative to overrule its own decisions, the Florida Supreme Court rejected the argument that "Florida's capital sentencing scheme is unconstitutional under *Ring*." *Hurst*, 147 So. 3d at 446–47 (citation and internal quotation marks omitted). The Eleventh Circuit did the same. *See Evans*, 699 F.3d at 1264 ("The problem with Evans' argument that *Ring*, which held that Arizona's judge-only capital sentencing procedure violated the Sixth Amendment, controls this case is the *Hildwin* decision in which the Supreme Court rejected that same contention.").

Shortly after this Court decided *Ring*, it held that *Ring* is not retroactive as a matter of federal law. *See Schriro v. Summerlin*, 542 U.S. 348, 353 (2004).

B. In *Hurst I*, This Court Overruled Aspects Of Its Pre-*Ring* Jurisprudence Concerning Florida's Capital Sentencing Regime.

In *Hurst I*, this Court "granted certiorari to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*." 136 S. Ct. at 621 (citations omitted). The Court held that Florida's capital sentencing scheme suffered from the same Sixth Amendment infirmity as did Arizona's scheme in *Ring*. *Id.* at 621–22. The Court therefore expressly overruled its pre-*Ring* decisions upholding Florida's

capital sentencing scheme to the extent they allowed a sentencing judge, rather than a jury, to find an aggravating circumstance necessary to impose the death penalty. *Id.* at 624.

C. In *Hurst II*, The Florida Supreme Court Created Three New Rules Of Capital Sentencing Procedure.

On remand, the Florida Supreme Court addressed "the effect of" *Hurst I* "on capital sentencing in Florida, as well as on issues raised by Hurst and other issues of import to [the] Court." *Hurst II*, 202 So. 3d at 44. Three of the court's rulings extended *Hurst I*.

First, the Florida Supreme Court held that the Sixth Amendment to the United States Constitution gives defendants the right to have a jury make *every* determination required by state law before being sentenced to death—not merely the right to have a jury find the fact of an "aggravating circumstance," as required by *Hurst I*. Under Florida law, those determinations include not only "[t]he existence of the aggravating factors proven beyond a reasonable doubt," but also "that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." *Hurst II*, 202 So. 3d at 53.

Second, as a matter of state law, the Florida Supreme Court held that a jury must make all these findings unanimously. *Id.* at 53–54, 57. The court was "mindful that a plurality of the United States Supreme Court, in a noncapital case, decided that unanimous jury verdicts are not required in all cases

under the Sixth Amendment." *Id.* at 57 (citing *Apodaca v. Oregon*, 406 U.S. 404 (1972)). But "in interpreting the Florida Constitution and the rights afforded to persons within this State," the Florida Supreme Court decided to "afford[] criminal defendants" more protection "than that mandated by the federal Constitution." *Id.*

Third, the Florida Supreme Court "conclude[d] that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment" to the United States Constitution. *Id.* at 59. As the court saw it, this Court had "not ruled on whether unanimity is required in the jury's advisory verdict in capital cases." *Id.* In the majority's view, however, "the foundational precept of the Eighth Amendment"—that is, "the principle that death is different"—"calls for unanimity in any death recommendation that results in a sentence of death." *Id.*

The State filed a petition for a writ of certiorari challenging *Hurst II*'s federal law holdings. Specifically, the State sought review of whether the Sixth Amendment requires that a jury make determinations that are required by statute but are not factual in nature, and whether the Eighth Amendment requires jury sentencing in capital cases. Petition for Writ of Certiorari, *Florida v. Hurst*, 137 S. Ct. 2161 (2017) (No. 16-998), 2017 WL 656209 at *i. The Court denied the petition. *Florida v. Hurst*, 137 S. Ct. 2161, 2161 (2017).

D. The Florida Supreme Court Allowed Post-*Ring* Capital Defendants To Benefit From *Hurst II*.

Meanwhile, the Florida courts continued to assess the effect of *Hurst I*. In *Asay*, the Florida Supreme Court addressed whether *Hurst I* should apply retroactively. 210 So. 3d at 11. As a threshold matter, *Asay* acknowledged this Court's decision that *Ring*, which formed the doctrinal foundation of *Hurst I*, does not apply retroactively because it "was not a substantive change to the law, but rather a 'prototypical procedural rule[].'" *Asay*, 210 So. 3d at 15 (quoting *Summerlin*, 542 U.S. at 353). Because that decision "derive[d] from the much narrower *Teague* test, which utilizes completely different factors from Florida's [retroactivity] test," set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), however, the Florida Supreme Court proceeded to consider whether *Hurst I* should apply retroactively as a matter of state law. *Asay*, 210 So. 3d at 15.

After considering the factors applicable under state law, the Florida Supreme Court held that *Hurst I* "should not be applied retroactively to [cases] in which the death sentence became final before the issuance of *Ring*." *Asay*, 210 So. 2d. at 22. The court concluded that those factors "weigh[ed] against applying *Hurst* [*I*] retroactively to *all* death case litigation in Florida," but "limit[ed] [its] holding to this context because the balance of factors may change significantly for cases decided after the United States Supreme Court decided *Ring*" in 2002. *Id.* (emphasis added).

In *Mosley v. State*, the Florida Supreme Court addressed the question it had reserved in *Asay*—whether *Hurst I* should apply retroactively to death sentences that became final after *Ring*. 209 So. 3d 1248, 1274 (Fla. 2016). The court concluded that capital defendants falling into this category should enjoy the benefit of *Hurst II* because, "[f]or fourteen years after *Ring*, until the United States Supreme Court decided *Hurst* [*I*], Florida's capital defendants attempted to seek relief based on *Ring*, both in this Court and the United States Supreme Court." *Id.* at 1275. Capital defendants were nevertheless denied the benefit of *Ring* because that decision had "specifically overruled *Walton v. Arizona*, but failed to address the constitutionality of Florida's capital sentencing scheme by not discussing *Hildwin* or *Spaziano*, thereby leaving those decisions intact to support an argument that Florida's capital sentencing scheme remained valid." *Id.* at 1279 (citing *Ring*, 536 U.S. at 603). The Florida Supreme Court continued to give *Hildwin* and *Spaziano* full effect until this Court decided *Hurst I* in 2016 and overruled those decisions in pertinent part.

Because, in the Florida Supreme Court's view, *Hurst I* made clear that "Florida's capital sentencing statute was unconstitutional from the time that the United States Supreme Court decided *Ring*," *id.* at 1281, "[f]undamental fairness" compelled the court to hold, as a matter of state law, that "[d]efendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring*" should benefit from *Hurst I*, *id.* at 1283. The court therefore ruled that *Hurst I* applies to capital defendants whose death sentences had not yet become

final on direct appeal when *Ring* was decided. *Id.* Moreover, *Mosley* held that *Hurst II*'s holdings, which built upon *Hurst I*, apply retroactively to post-*Ring* cases. *Id.*

II. PROCEEDINGS IN THIS CASE

In 1984, Petitioner was convicted and sentenced to death for first-degree murder based on a murder-for-hire theory. *Kelley v. State*, 486 So. 2d 578, 579–80 (Fla. 1986). The jury unanimously found Petitioner guilty. Following the penalty phase, the jury recommended a sentence of death by a vote of eight to three. *Id.* The trial court then found three statutory aggravating circumstances: (1) "prior conviction of a violent felony"; (2) "homicide committed for pecuniary gain"; and (3) "homicide committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." *Id.* at 580. Consistent with the jury's recommendation, the court imposed a sentence of death. In 1986, the Florida Supreme Court upheld Petitioner's conviction and sentence on direct appeal, *id.* at 585–86, and this Court denied certiorari, *Kelley v. Florida*, 479 U.S. 871 (1986).

Petitioner did not claim on direct appeal that a jury, rather than the judge, should have made the determinations required by state law, much less that a jury should have made those determinations and imposed the sentence itself unanimously. Indeed, it appears that Petitioner made his Sixth Amendment argument for the first time in 2003, in one of many unsuccessful petitions for post-conviction relief. *See* Petition for Writ of Habeas Corpus, *Kelley v. Crosby*,

874 So. 2d 1192 (Fla. 2004) (No. SC 03-1903), 2003 WL 23306615, at *4, *15–*17.[1] After *Hurst I* and *Hurst II*, Petitioner filed a petition seeking relief based on those decisions. The Florida Supreme Court denied relief because Petitioner's claim was foreclosed by *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 512 (2017), which reaffirmed that *Hurst I* "should not be applied retroactively" to cases like Petitioner's, "in which the death sentence became final before the issuance of *Ring*." *Asay*, 210 So. 3d at 22; *see* Pet. App'x at 1a–2a. Petitioner now asks this Court to review that denial of relief.

[1] *See also Kelley v. State*, 569 So. 2d 754 (Fla. 1990); *Kelley v. Dugger*, 597 So. 2d 262 (Fla. 1992) (denying state habeas petition); *Secretary, DOC v. Kelley*, 377 F.3d 1317 (11th Cir. 2004) (reversing grant of federal habeas petition); *Kelley v. State*, 933 So. 2d 521 (Fla. 2006) (rejecting interlocutory DNA appeal); *Kelley v. State*, 974 So. 2d 1047 (Fla. 2007) (affirming denial of motion for DNA testing); *Kelley v. State*, 3 So. 3d 970 (Fla. 2009) (rejecting appeal from denial of successive motion for postconviction relief and denying state habeas petition).

REASONS FOR DENYING THE PETITION

Petitioner claims that the retroactive application of *Hurst II* to post-*Ring* cases violates the Eighth and Fourteenth Amendments because the date of this Court's decision in *Ring* is an arbitrary and capricious cutoff. This Court has recently and repeatedly denied certiorari as to precisely that question. *See, e.g.*, *Hitchcock*, 226 So. 3d at 216, *cert. denied*, 138 S. Ct. 513 (2017); *Branch v. State*, 234 So. 3d 548 (Fla.), *cert. denied*, 138 S. Ct. 1164 (2018); *Cole v. State*, 234 So. 3d 644 (Fla.), *cert. denied*, — S. Ct. —, 2018 WL 1876873 (June 18, 2018); *Jones v. State*, 234 So. 3d 545 (Fla.), *cert. denied*, 2018 WL 1993786 (June 25, 2018). Petitioner offers no persuasive reason why his case in particular warrants this Court's review. First and foremost, there is no split of authority and Petitioner presents a question of significance only to a narrow category of defendants in just a single state. Moreover, this case is a poor vehicle by which to resolve the question presented because even if it were resolved in Petitioner's favor, he would not be entitled to relief. Finally, this Court should deny the Petition because the Florida Supreme Court's retroactivity cutoff, which provides *greater* protection to capital defendants than that required by the United States Constitution, is entirely consistent with the Eighth and Fourteenth Amendments.

I. THIS CASE PRESENTS NEITHER A SPLIT OF AUTHORITY NOR AN EXCEPTIONALLY IMPORTANT QUESTION.

A. There Is No Split Of Authority.

Petitioner makes no contention that there is a split of authority among the federal Courts of Appeals or

state courts of last resort. Nor could he. The question presented depends on the unique interplay between *Florida's* capital sentencing procedures, *Florida* law concerning the retroactivity of procedural rules, and the unique history of *Ring* as it pertains to *Florida*. *See supra* pp. 6–8.

Petitioner does not suggest otherwise. He identifies no other state with capital sentencing procedures that (1) this Court upheld against pre-*Ring* Sixth Amendment challenges, (2) the lower courts continued to uphold post-*Ring*, (3) were ultimately struck down by this Court, and, accordingly, (4) could conceivably give rise to the partial retroactivity decision that Petitioner claims is constitutionally objectionable. Petitioner points only to general equal-protection principles and the well-established but generic rule that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Pet. at 19 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)). But Petitioner identifies no case, and the State is aware of none, applying these general principles to the issue of "partial retroactivity" as a matter of state law.

B. The Question Presented Is Not Exceptionally Important.

For much the same reason that there is no split of authority, the question presented is not one of exceptional importance. The answer to that question goes to the availability of post-conviction relief in only one state in the country. Indeed, even in Florida, the issue bears on only one

subcategory of capital cases—specifically, those involving death sentences that became final on direct review before June 24, 2002, when this Court decided *Ring*, and that have not yet been carried out. For all capital cases that became or will become final after *Ring*, the Florida Supreme Court requires, as a matter of state law, retroactive application of *Hurst II*. *See Mosley*, 209 So. 3d at 1283.

Petitioner suggests that the question presented is important because "the cutoff date chosen by the court . . . increases the probability that death will be imposed on the prisoners least deserving of death and with more compelling cases for relief." Pet. at 4. This is so, Petitioner claims, because "inmates whose death sentences became final before *Ring* are more likely than their post-*Ring* counterparts to have been sentenced under standards and practices in death penalty cases that would not support a capital sentence today." *Id.* But *all* retroactivity decisions, including those of this Court, need to draw a line somewhere, and as Petitioner acknowledges, this Court has long "held that traditional retroactivity rules serve legitimate purposes despite the degree of unequal treatment inherent in denying retroactive effect to any new constitutional rule." Pet. at 3. In particular, as the Florida Supreme Court agreed in *Asay*, retroactivity cutoffs serve the important state interest in finality of convictions, and "an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole." 210 So. 3d at 16 (quoting *Witt*, 387 So. 2d at 925).

In any event, nothing in the Florida Supreme Court's decisions in *Asay* and *Mosley* "increases the probability that death will be imposed" on *any* defendant, let alone those "least deserving of death." The opposite is true. As discussed more fully below, *Hurst II* is not retroactive as a matter of federal law. *See infra* p. 17–18. Thus, by allowing defendants who had been denied prospective application of *Ring* to benefit from that decision and its progeny as a matter of "fundamental fairness" under state law, the Florida Supreme Court afforded *greater* protection than that required by the United States Constitution, not less. Petitioner does not contend that federal law gives him a right to retroactive application of *Hurst I* or *Hurst II*, and his contention that Florida law unfairly affords *other* capital defendants certain protections to which they are not entitled as a matter of federal law—*i.e.*, those who fall into the discrete and dwindling category of capital defendants whose sentences became final between this Court's decisions in *Ring* and *Hurst I*—does not present a question sufficiently important to warrant this Court's review.

II. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Petitioner does not contend that the Florida Supreme Court was required, as a matter of either federal or state law, to apply *Hurst II* retroactively to all cases. To the contrary, he agrees that, had the court applied *Hurst II* only prospectively, "nothing might seem amiss, since [the United States Supreme Court] has held that traditional retroactivity rules serve legitimate purposes despite the degree of unequal treatment inherent in denying retroactive effect to any new constitutional rule." Pet. at 3. Petitioner objects only that the Florida Supreme

Court's "'partial retroactivity' approach results in unequal treatment of," in his view, "similarly affected Death Row inmates with equally final sentences." Pet. at 4. This case is a poor vehicle by which to address that issue because, should this Court agree with Petitioner, he nevertheless would be entitled to re-sentencing only if this Court also decides that *Hurst II* is fully retroactive as a matter of either federal or state law. For the reasons that follow, it is not.

1. As a threshold matter, Petitioner cannot be entitled to retroactive application of *Hurst II* unless that decision was correct. For the reasons set out below, the Florida Supreme Court's Sixth and Eighth Amendment holdings conflict with, rather than emanate from, this Court's precedents. More importantly for present purposes, neither party has asked this Court to review the correctness of those holdings in the context of this case; this Court has not yet considered those holdings; and this Court should not be asked to inquire into the *retroactivity* of *Hurst II* without first having an opportunity to assess the *correctness* of that decision.

Hurst II's Sixth and Eighth Amendment holdings—respectively, that a death sentence may not be imposed unless a jury (1) makes all determinations required by statute, and (2) unanimously recommends a sentence of death—cannot be reconciled with portions of *Spaziano* that remain good law. In *Spaziano*, the trial judge imposed a sentence of death after making the determinations required by statute, including (1) that "sufficient aggravating circumstances existed to justify and authorize a death sentence," (2) that "the mitigating circumstances were

insufficient to outweigh such aggravating circumstances," and (3) that "a sentence of death should be imposed," *Spaziano*, 468 U.S. at 451–52. This Court held that Spaziano's sentence did not violate the Sixth Amendment, *id.* at 458–65, even though the jury did not make any of those findings, *id.* at 451–52 (citing § 921.141, Fla. Stat.). The Court also addressed whether Florida's capital sentencing scheme "violate[d] the Eighth Amendment's proscription against 'cruel and unusual punishments'" by "allowing a judge to override a jury's recommendation of life." *Id.* at 457. The Court rejected that argument, holding that "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed." *Id.* at 465; *see id.* at 462–63 ("[T]he purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge.").

In *Hurst I*, this Court "overrule[d] *Spaziano* and *Hildwin* in relevant part." 136 S. Ct. at 623. The Court carefully circumscribed its decision, overruling those cases only "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Id.* at 624. Accordingly, *Hurst I* left intact *Spaziano*'s holdings that the Sixth Amendment allowed the sentencing judge to determine (1) that "the mitigating circumstances were insufficient to outweigh such aggravating circumstances," and (2) that "a sentence of death should be imposed." 468 U.S. at 451–52, 458–65.

That distinction makes sense. Unlike the existence of an aggravating circumstance, those determinations are not factual. *Ring* and *Hurst I* are both derived from *Apprendi*, in which this Court held that, with one exception not relevant here, "any *fact* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added). This Court recently clarified in *Kansas v. Carr*, what is, and what is not, a "fact" in the capital sentencing context. 136 S. Ct. 633, 642 (2016). The *existence* of an aggravating factor is "a purely factual determination." *Id.* "Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not." *Id.* In any event, "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained." *Id.* Thus, "[i]t would mean nothing . . . to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it." *Id.* Accordingly, a jury must find the existence of an aggravating factor, *Hurst I*, 136 S. Ct. at 623–24, but a judge may determine that "the mitigating circumstances were insufficient to outweigh such aggravating circumstances," and that "a sentence of death should be imposed," *Spaziano*, 468 U.S. at 451–52.

Nor did *Hurst I* overrule *Spaziano*'s Eighth Amendment holding—that "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed." *Id.* at 465. Accordingly, "[a]ny argument

that the Constitution requires that a jury impose the sentence of death . . . has been soundly rejected by prior decisions of this Court." *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990). And because the Eighth Amendment does not require that death sentences be imposed by a jury, it certainly does not require them to be imposed *unanimously* by a jury. *See Spaziano*, 468 U.S. at 465; *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality opinion) (explaining that, although "jury sentencing in a capital case can perform an important societal function," this Court "has never suggested that jury sentencing is constitutionally required" in such cases); *id.* at 260–61 (White, J., concurring in the judgment).[2]

Because *Hurst II*'s Sixth and Eighth Amendment holdings are foreclosed by this Court's precedents, federal law cannot require them to be applied retroactively to any cases. Thus, even if this Court agrees that the retroactivity cutoff established by the Florida Supreme Court is arbitrary and capricious (and as shown below, it should not), Petitioner would not be entitled to the relief he seeks. The Petition should therefore be denied.

2. Moreover, even if *Hurst II* were correct, it still would not be retroactive as a matter of federal law. This court held in *Summerlin* that *Ring* is not

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[2] *See also State v. Mata*, 745 N.W.2d 229, 252 (Neb. 2008) ("We conclude that the Eighth Amendment similarly does not require jury sentencing."); *Ex parte Taylor*, 808 So. 2d 1215, 1217–18 (Ala. 2001); *State v. Cobb*, 743 A.2d 1, 99 (Conn. 1999); *State v. Gillies*, 691 P.2d 655, 659 (Ariz. 1984); *State v. Sivak*, 674 P.2d 396, 399 (Idaho 1983).

retroactive. 542 U.S. at 358. *Hurst I* merely applied *Ring* to Florida's capital sentencing procedures, and *Hurst II*, in turn, built upon *Hurst I* by creating additional, related procedural requirements: A jury must make *all* determinations required by state law in order for the death penalty to be imposed, and any death sentence recommended by the jury must also be unanimous. *Hurst II*, 202 So. 3d at 53–54, 59. Like *Ring* itself, these requirements merely "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death" and therefore are "prototypical procedural rules" not retroactive as a matter of federal law. *Summerlin*, 542 U.S. at 353. Petitioner does not suggest otherwise. He therefore is not entitled to demand retroactive application *of Hurst II* as a matter of federal law.

3. Nor is *Hurst II* retroactive as a matter of state law. The Florida Supreme Court has already rejected the retroactive application of *Hurst I*, the foundation of *Hurst II*, "to all death case litigation in Florida," *Asay*, 210 So. 3d. at 22, and Petitioner does not ask this Court to pass on that state-law ruling. Nor does he offer any basis for predicting that the Florida Supreme Court would change its mind and make *Hurst II* retroactive "to all" death penalty cases, as a matter of state law, if Petitioner were to prevail on the claims at issue here, *see id.*

Finally, in the direct appeal from his sentence, Petitioner did not claim that he was entitled to have a jury determine that mitigating factors outweighed aggravating circumstances and that death was the appropriate sentence; and still less did he claim that a jury was required to make those determinations

unanimously. Assuming *arguendo* that *Hurst II* should be applied retroactively to pre-*Ring* cases in which such claims were properly preserved, Petitioner makes no showing that any such retroactivity ruling would apply to his own case. *Cf. Asay*, 210 So. 3d at 30 (Lewis, J., concurring in the result) (concluding that Asay was "not entitled to relief" because "Asay did not raise a Sixth Amendment challenge prior to the case named *Ring* arriving" in 2002).

* * *

For the reasons set out above, Petitioner does not show that the novel constitutional rulings he seeks would affect the outcome of his own case. Absent some such showing, the assertion that other capital defendants are unfairly receiving protections to which they are not entitled does not provide a basis for granting certiorari in this case.

III. THE FLORIDA SUPREME COURT'S RETROACTIVITY DECISION IS ENTIRELY CONSISTENT WITH THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner characterizes the Florida Supreme Court's decisions in *Asay* and *Mosley* as holding that *Hurst II* "had to be applied retroactively, but then applied retroactivity in a disparate fashion to similarly situated inmates on Death Row." Pet. 18. That is incorrect. While *Ring* does not apply retroactively, *Summerlin*, 542 U.S. at 353, it does apply *prospectively*, like any other procedural rule. Thus, while *Ring* did not apply to inmates whose sentences became final before it was decided, *Ring*

ordinarily would have applied to those whose sentences had *not* yet become final. Nevertheless, as discussed below, for fourteen years capital defendants in Florida were denied the prospective application of *Ring*. The Florida Supreme Court's decision in *Mosley* simply remedied that shortcoming.

In *Asay*, the court acknowledged this Court's decision that *Ring*, the doctrinal foundation of *Hurst I*, is not retroactive as a matter of federal law because it "was not a substantive change to the law, but rather a 'prototypical procedural rule.'" 210 So. 3d at 15 (citations omitted). The court then considered the question of retroactivity as a matter of state law and determined that the factors "weigh[ed] against applying *Hurst* [*I*] retroactively to *all* death case litigation in Florida," but "limit[ed] [its] holding . . . because the balance of factors may change significantly for cases decided after the United States Supreme Court decided *Ring*." *Id.* at 22. In *Mosley*, the court addressed the question reserved in *Asay* and created an exception for death sentences that became final on direct appeal after *Ring*, because Florida law required that exception as a matter of "fundamental fairness." 209 So. 3d at 1283.

Petitioner nevertheless claims that the line drawn by *Asay* and *Mosley* is "arbitrary and capricious" and therefore violates the Eighth and Fourteenth Amendments. Pet. at 19. Specifically, Petitioner objects that the Florida Supreme Court chose a "dividing line" other than "the fact of finality with respect to" *Hurst II*. *Id.* To the contrary, the court's decision was a rational exercise of its constitutional authority under Florida law to provide greater

protection for the rights of capital defendants than that required by federal law. *See Danforth v. Minnesota*, 552 U.S. 264, 282 (2008) ("*Teague* . . . does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*.").

Although, as discussed above, the Florida Supreme Court was not required to apply *Hurst II* retroactively at all, the court was free, "in interpreting the Florida Constitution and the rights afforded to persons within this State, [to] require more protection be afforded criminal defendants than that mandated by the federal Constitution." *Mosley*, 209 So. 3d at 1278; *see also*, *e.g.*, *California v. Ramos*, 463 U.S. 992, 1014 (1983) ("States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."); *Danforth*, 552 U.S. at 282. The court did just that, ruling that "fundamental fairness" justified retroactive application of *Hurst II* to cases not yet final when this Court decided *Ring*. *Mosley*, 209 So. 3d at 1283.

Nor was the line drawn by the Florida Supreme Court "arbitrary and capricious." Pet. 19. As the court explained in *Mosley*, "[f]or fourteen years after *Ring*, until the United States Supreme Court decided *Hurst* [*I*], Florida's capital defendants attempted to seek relief based on *Ring*, both in this Court and the United States Supreme Court." 209 So. 3d at 1275. Those defendants were rebuffed because *Ring* did not address hybrid capital sentencing procedures and left intact this Court's pre-*Ring* decisions specifically upholding the constitutionality of Florida's capital

sentencing procedures. *Id.* at 1279. The Florida Supreme Court had "doubt" about the continued viability of those decisions in light of *Ring*, but adhered to them because it was solely "within the purview of the United States Supreme Court to overrule" its own precedents. *Id.* at 1279–80. This Court did just that in *Hurst I*, giving capital defendants in Florida the full benefit of *Ring*. Because *Hurst I*, as the Florida Supreme Court saw it, made clear that "Florida's capital sentencing statute was unconstitutional from the time that the United States Supreme Court decided *Ring*," *id.* at 1281, the court held as a matter of state law that "[d]efendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring* should not suffer due to the" delay "in applying *Ring* to Florida," *id.* at 1283.

In other words, although framed in terms of retroactivity analysis under state law, *Mosley* simply remedied the Florida Supreme Court's inability, until *Hurst I*, to apply *Ring* prospectively like any other decision of this Court. According to Petitioner, this rationale "ignores the fact that the court also used *Ring* as the partial retroactivity cutoff for its own *Hurst II* decision based on Eighth Amendment requirements, which manifestly was *not* prefigured by *Ring*." Pet 21. Not so. That ruling turned as much on *Ring* as the court's Sixth Amendment holding. Having held for the first time, in light of *Hurst I*, that capital defendants in Florida may not be sentenced to death unless all determinations required by state law are made by a jury, the court turned its attention to derivative questions about the jury's role in the sentencing process, including whether a jury must

"unanimously recommend a sentence of death." *Hurst II*, 202 So. 3d at 58.

* * *

The Florida Supreme Court did not violate the Eighth or Fourteenth Amendments insofar as it declined to apply *Hurst II* retroactively to cases in which the sentence became final prior to this Court's decision in *Ring*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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