No. 17-7758

IN THE

Supreme Court of the United States

ERIC SCOTT BRANCH,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

BRIEF OF *AMICI CURIAE* RETIRED FLORIDA JUDGES AND JURISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

The issue before the Court is the constitutionality of the unorthodox retroactivity rule fashioned by the Florida Supreme Court to implement this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Amici are retired judges and jurists who have served at various levels of the Florida judicial and legislative system. They include trial judges who have presided over capital cases, Justices of the Florida Supreme Court, and a Florida state legislator. Collectively, they have spent well over a century in public service, devoting time, effort, and in some instances their entire careers to the pursuit of justice in Florida's judicial system. They therefore have particular interest and expertise in the legal and practical ramifications of the Florida Supreme Court's treatment of *Hurst*.

Former Justice Rosemary Barkett served on the Florida Supreme Court between 1985 and 1994, during which she also held the position of Chief Justice from 1992 to 1994. Justice Barkett served on the 11th Circuit Court of Appeals between 1994 and 2013. She presently serves on the Iran-United States Claims Tribunal, The Hague. Before taking the Florida Supreme Court bench, Justice Barkett served in the Circuit Court for the 15th Judicial Circuit from 1979 to 1984, and as a judge in the Fourth District Court of Appeal between 1984 and 1985.

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[1] Pursuant to Supreme Court Rules 37.3(a) and 37.6, amici curiae certify that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that the parties have consented to the filing of this brief.

Former Justice Harry Lee Anstead served on the Florida Supreme Court from 1994 to 2009. Justice Anstead previously had served as a trial and appellate lawyer until 1977, when he became a judge in Florida's Fourth District Court of Appeal.

Former Justice Gerald Kogan served on the Florida Supreme Court from 1987 to 1998. Justice Kogan previously served as chief prosecutor of Miami-Dade County, Florida's Homicide and Capital Crimes Division and as a circuit judge in Florida's Eleventh Judicial Circuit.

Former Justice James E.C. Perry served on the Florida Supreme Court from 2009 to 2016 and served as both a circuit judge and Chief Judge in Florida's Eighteenth Judicial Circuit prior to his elevation. Justice Perry previously was in private practice at the law firm of Perry & Hicks, P.A., specializing in civil and business law.

Former Judge O.H. Eaton, Jr., served in Florida's Eighteenth Judicial Circuit from 1986 to 2010. Judge Eaton previously served as a captain in the U.S. Army in Vietnam and a prosecutor in Seminole County, Florida. He is considered a death-penalty expert and has taught judges across the country how to handle capital cases.

Former Judge Laura Melvin served in Florida's First Judicial Circuit from 1990 until 2000, during which time she presided over capital trials. Judge Melvin previously served as an Assistant State Attorney in the First Judicial Circuit and an Assistant Public Defender in the Fifth Judicial Circuit.

Talbot "Sandy" D'Alemberte served in the Florida House of Representatives from 1966 to 1972, where he was Chair of the House Judiciary Committee.

D'Alemberte served as Dean of the Florida State University Law school from 1984 to 1989, and President of Florida State University from 1994 to 2003.

SUMMARY OF ARGUMENT

Petitioner's execution is scheduled for February 22, 2018. He was denied relief below because of an unconstitutional retroactivity rule crafted by the Florida Supreme Court. The effect of this retroactivity rule is to deny him and approximately 160 other Death Row prisoners the benefits of this Court's ruling in *Hurst v. Florida*, 136 S. Ct. 616 (2016), which struck down Florida's capital sentencing statute. At the time that petitioner was sentenced to death, a Florida judge could impose the death penalty based on the advisory recommendation of a bare majority of the jury. In *Hurst*, this Court held that Florida's system of advisory jury death determinations violated the Sixth Amendment, which "requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.* at 619.

Like dozens of other death row prisoners, petitioner attacked his death sentence on several federal constitutional grounds, including based on *Hurst*. As in the other similar cases, the Florida Supreme Court ignored his arguments because it found that *Hurst* applied retroactively, but only for death sentences imposed after this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002).[2] Petitioner's sentence of death was imposed in 1994. To date, the Florida courts have

[2] In *Ring*, this Court found that the Arizona capital sentencing statute was unconstitutional because "it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." 536 U.S. at 609.

not identified *any* sound constitutional basis for the arbitrary line denying *Hurst's* retroactive application for pre-*Ring* cases. This troubling and arbitrary application of this Court's precedents calls for this Court's intervention.

The issues presented by the petition are of substantial importance to the administration of justice. Without immediate review, other similarly-situated Florida litigants will flood this Court (and then potentially the federal habeas courts) with petitions raising the same issues—all without benefit of a reasoned discussion from the Florida courts. The artificial retroactivity line drawn by the Florida Supreme Court is impermissible for a number of reasons. It does not serve the recognized purposes of retroactivity limitations; it is inconsistent with the mandates of this Court with respect to the States' obligations to structure their capital punishment systems in a culpability-based manner; and it is problematic under the Supremacy Clause. *See* U.S. Const. art. VI, cl. 2. Florida's rule also ignores the special nature of *Hurst* errors, which implicate the constitutional principles enunciated in *Caldwell v. Mississippi*, 472 U.S. 320 (1987), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993). *Caldwell* embodies the principle stated in Justice Breyer's concurring opinion in *Ring v. Arizona*, 536 U.S. at 619, that "the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death," and Justice Marshall's admonishment that a sentencer's understanding of his "awesome responsibility" in making a sentencing decision is indispensable to the Eighth Amendment's protection against cruel and unusual punishment. *Caldwell*, 472 U.S. at 341. *Sullivan*, in turn, stands for the proposition that the deficient jury instruction regarding the reasonable

doubt standard was so inimical to the Fifth and Sixth Amendments that it vitiates *all* the jury's findings. *Sullivan*, at 508 U.S. at 281. Both landmark decisions underscore the paramount importance and sanctity of the jury's decision-making role in capital cases.

For these reasons, it is likely that the controversy which forms the basis of petitioner's underlying claim will be addressed sooner or later. If it happens later, then significant and irreversible injustices will occur in the meantime. As it now acknowledges, the Florida Supreme Court was at least fourteen years too late in accepting the argument that the State's death penalty statute violated *Ring*.

The petition's constitutional arguments are compelling and urgent. Amici are concerned that the failure to grant relief now will result in the same widespread, irreparable injustices that many of them have lived through during their recent decades on the Florida bench. Amici urge this Court to heed the lessons of this painful history and not allow another chapter to be written. The petition for a writ of certiorari should be granted.

ARGUMENT

THE COURT SHOULD GRANT REVIEW OF THIS CAPITAL CASE TO ADDRESS THE FEDERAL CONSTITUTIONAL ARGUMENTS THAT THE FLORIDA SUPREME COURT HAS REPEATEDLY IGNORED

I. The Interests Of Sound Judicial Administration Favor Immediate Review

Following this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Florida Supreme Court's decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), numerous residents of Florida's Death

Row sought implementation of the Court's *Hurst* decision in the Florida courts.

In *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), the Florida Supreme Court determined as a matter of state law that *Hurst* would be applied retroactively only to those individuals whose convictions became final after June 24, 2002, the date that this Court announced its decision in *Ring*. *See id.* at 217; *see also Asay v. State*, 210 So. 3d 1, 15 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). This arbitrary cutoff would deny relief to approximately 165 individuals then on Death Row. *See* Pet. I.B.

In 2017, the Florida Supreme Court entered stays in over 100 capital proceedings, including the petitioner's, in which *Hurst* claims were raised. These stays were shortly followed by orders to show cause why the proceedings should not be dismissed in light of *Hitchcock*. In response, petitioner, like many similarly-situated litigants, argued that the *Hitchcock* rule violates the Eighth and Fourteenth Amendments and the Supremacy Clause. He urged the Florida Supreme Court to address those arguments.

It did not. Instead, in January 2018, the Florida Supreme Court embarked on the mass denial of relief in those cases, including petitioner's. It issued dozens of summary opinions that simply cited *Hitchcock*—an opinion which itself ignored the federal constitutional attack on its retroactivity rule. As the petition for a writ of certiorari notes, the Florida Supreme Court has so far disposed of more than 80 cases in this manner. *See* Pet. II.E.

The likely impact of these events on the judicial system is clear. Most if not all of the rejected litigants will file petitions for a writ of certiorari in this Court.

If denied, and if they are not executed in the interim, most if not all of them will launch federal habeas corpus proceedings. In those proceedings, the federal courts will not have the benefit of state court adjudication and therefore will be required to conduct *de novo* review. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011); *Cone v. Bell*, 556 U.S. 449, 472 (2009); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

By granting a writ of certiorari, this Court can resolve important questions of federal constitutional law before this wave of cases embarks on a haphazard course of federal collateral review. The interests of sound and orderly judicial administration therefore favor immediate review.

II. The Questions Presented By The Petition Are Worthy Of Review

The Florida Supreme Court's failure to address petitioner's constitutional claims is particularly troubling because the Florida court's retroactivity decisions cannot be squared with long-established principles of this Court's jurisprudence.

Amici fully appreciate the concerns that have led this Court to uphold as permissible certain state limitations on the retroactivity of new constitutional rules of criminal procedure. Those limitations serve the State's interests in not upsetting, years later, decisions that were correct when made. Retroactivity limits also allow state courts to avoid repetitive litigation of previously-rejected claims.

But States must abide by other constitutional constraints. First, "[n]ew substantive rules generally apply retroactively." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016) (quoting *Schriro v. Summerlin*, 542

U.S. 348, 351 (2004)); *see Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016). And, "new 'watershed rules of criminal procedure,' that 'implicat[e] the fundamental fairness and accuracy of the criminal proceeding,' will also have retroactive effect." *Welch*, 136 S. Ct. at 1264 (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990)).[3]

Here, the Florida Supreme Court devised an arbitrary and unsupportable cutoff point for the retroactive application of *Hurst* that violates Equal Protection and the Eighth Amendment.

The substantive dimensions of the *Hurst* rule further aggravate the constitutional injury. In urging this Court to consider whether Florida has transgressed those boundaries here, amici are mindful of the special context in which *Hurst* claims necessarily arise. Any case involving *Hurst* error necessarily also impinges upon the constitutional rights enunciated in *Caldwell v. Mississippi*, 472 U.S. 320 (1987), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Both decisions underscore the importance of protecting the individual's constitutional rights through the preservation of the jury's decision-making role. As a result, this case raises important constitutional questions that warrant this Court's review.

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[3] Procedural rules "regulate only the manner of determining the defendant's culpability" and alter "the range of permissible methods for determining whether a defendant's conduct is punishable." *Welch*, 136 S. Ct. at 1265 (quoting *Schriro*, 542 U.S. at 353).

A. Florida's Retroactivity Line Is Too Crude to Satisfy the Constitution

1. Florida's *Hurst* Retroactivity Line Fails to Satisfy the Eighth Amendment

"[I]f 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." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *see also Furman v. Georgia*, 408 U.S. 238 (1972); *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). This bedrock Eighth Amendment principle, by which all state rules of law governing capital punishment must be judged, is designed to ensure that the death penalty is predictably inflicted only on the most morally culpable criminals.

Amici recognize that certain retroactivity limits promote interests of finality. Such limits, however, should not serve to arbitrarily deny certain defendants the benefit of a new constitutional principle that impinges directly on their rights. Putting aside arguments with respect to whether the rule announced in *Hurst* is procedural or substantive in nature, the Eighth Amendment mandates that the death penalty be meaningfully related to culpability and cannot be applied arbitrarily.

But in this instance, the Florida Supreme Court's novel decision to adopt a retroactivity cutoff date that includes only a subset of sentences that became final on direct review before *Hurst* has exacerbated the injustice beyond tolerable Eighth Amendment limits. *See* Pet. I.C.1. (providing numerous examples).

Worse, the temporal cut-off is often inversely connected to culpability because it disproportionately singles out for the denial of relief many cases that would not be thought death-worthy today. *See* Pet. I.C.2. The likelihood of a different result from a jury today is heightened in a case like petitioner's, where the advisory jury recommendation was divided.

The State has an obligation to avoid capricious application of the death penalty. The Eighth Amendment therefore does not allow what happened here.

2. Florida's *Hurst* Retroactivity Line Does Not Comport with the Equal Protection Clause

Capital defendants have a fundamental right to a reliable determination of their sentences. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Hence, when a State draws a line between those capital defendants who will receive the benefit of rules designed to enhance the quality of decision-making by a penalty-phase jury and those who will not, the State's justification for that line must satisfy strict scrutiny. *See, e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (applying "strict scrutiny" and invalidating Oklahoma sterilization law for applying to some theft offenses and not others because "the law lays an unequal hand on those who have committed intrinsically the same quality of offense"); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (invalidating promiscuity law applicable to interracial couples, but not others); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) (equal protection violation in distinction between married and unmarried people). Far from meeting that standard, the line drawn by Florida in this case would not survive rational basis review.

Retroactivity doctrines curtailing the availability of post-conviction relief inherently mean that some people will not benefit from favorable developments in the law because they were right too soon. The state interests supporting those doctrines center upon conserving judicial resources by leaving undisturbed rulings that were correct when made and avoiding repetitive litigation. To meet even the most relaxed equal-protection scrutiny, the retroactivity lines a State draws must have a rationally articulable connection to those objectives. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973). The line drawn below is entirely arbitrary with no rational connection to state interests.

One salient example illustrates the point. In 2006, four years after *Ring* was decided, the Florida Supreme Court rendered a post-conviction decision in *Nixon v. State*, 932 So. 2d 1009, 1024 (Fla. 2006), that discussed and rejected on the merits Mr. Nixon's position that *Ring* applied to Florida. Mr. Nixon (whose advisory jury, like the one in this case, had split 10-2) was right. The decision was wrong on the day it was made, as the Florida Supreme Court now acknowledges. But, under the rule adopted below, Mr. Nixon would be denied relief because his direct appeal, which did not involve the *Ring* issue in any way, ended before *Ring* was decided. *See Nixon v. Florida*, 502 U.S. 854 (1991) (denying certiorari). Many other petitioners, including Mr. Branch, are in the same position. *See, e.g., Miller v. State*, 926 So. 2d 1243, 1259 (Fla. 2006); *Branch v. State*, 952 So. 2d 470, 474 n.1 (Fla. 2006); *Bates v. State*, 3 So. 3d 1091, 1105 n.14 (Fla. 2009); *Bradley v. State*, 33 So. 3d 664, 670 n.6 (Fla. 2010).

Because the Florida Supreme Court never addressed the Equal Protection claim petitioner asserted below, the State has never been required to provide a coherent explanation of the nexus between the retroactivity line it has drawn and its legitimate interests. Nor could the State provide such an explanation. The first question presented therefore merits review.

B. The Supremacy Clause Bars Florida's Retroactivity Line

In any event, the Supremacy Clause does not permit the States to limit in any respect the retroactive effect of substantive constitutional rules. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016) ("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."). Petitioner asserted below that, for this reason, no state-created retroactivity doctrine could foreclose his *Hurst* claim.

The Florida Supreme Court ignored that claim as well, and it is another important question presented by the present petition. *See* Pet. II. The question naturally has special significance for petitioner and capital prisoners in Florida and other States whose systems are subject to challenge under *Hurst*. But the Supremacy Clause question has broader importance for state justice systems generally. State courts and state legislatures need to know when they are or are not free to curtail the assertion of constitutional claims on retroactivity grounds. Resolving the question whether *Hurst* is substantive or procedural will advance that interest and promote certainty in resolution of similar claims.

C. Florida's Retroactivity Line Requires Special Scrutiny Because of the Particular Nature of *Hurst* Error

The two questions presented have heightened importance because, in any case involving *Hurst* error, the constitutional principles enunciated in *Caldwell v. Mississippi*, 472 U.S. 320 (1987), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), are impinged (even if not strictly violated). Under those circumstances, the Court should give the line drawn by the State particularly close examination. *See Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

1. *Hurst* Errors Necessarily Implicate *Caldwell* Concerns

In *Caldwell*, the penalty-phase jury did not receive an accurate description of its role in the sentencing process because the prosecutor suggested that the jury's decision to impose the death penalty would not be final, but instead would be subject to appellate court review. 472 U.S. at 328-29. This Court found that the prosecutor's remarks "led [the jury] to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Id.* at 329. This Court concluded that, because it could not be ascertained whether the remarks had any effect on the jury's sentencing decision, the jury's decision did not meet the Eighth Amendment's standards of reliability. *Id.* at 341.

In the decades following that decision, the Florida Supreme Court rejected numerous *Caldwell* challenges to Florida's pre-*Hurst* jury instructions. Beginning in *Pope v. Wainwright*, 496 So. 2d 798 (Fla. 1986), the Florida Supreme Court refused to apply *Caldwell* on the theory that, unlike the Mississippi

scheme at issue in *Caldwell*, Florida's instructions accurately described the jury's "merely" advisory nature: "[I]n Florida it is the trial judge who is the ultimate sentencer," and the jury "is merely advisory." *Id.* at 805. The court found "nothing erroneous about informing the jury of the limits of its sentencing responsibility" for the valid purpose of "reliev[ing] some of the anxiety felt by jurors impaneled in a first-degree murder trial." *Ibid.* The court therefore held that its advisory jury instructions complied with *Caldwell* and accurately described a constitutionally-valid scheme. *Ibid. Cf. Caldwell*, 472 U.S. at 335-36 (expressing views of four Justices that capital sentencing jury may not be given instructions diminishing its sense of responsibility regardless of whether description of state procedures is accurate).

In *Combs v. State*, 525 So. 2d 853, 856 (Fla. 1988), the Florida Supreme Court reaffirmed that Florida's advisory jury scheme complied with *Caldwell*. The Florida Supreme Court further noted that it was "deeply disturbed" by decisions of the United States Court of Appeals for the Eleventh Circuit, in cases like *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), and *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988) (en banc), which had expressed doubts as to whether Florida's scheme complied with *Caldwell*. For years after *Pope* and *Combs*, the Florida Supreme Court continued to reject *Caldwell* challenges to Florida's advisory jury instructions. *See, e.g.*, *Davis v. State*, 136 So. 3d 1169, 1201 (Fla. 2014). *Cf. Truehill v. Florida*, 138 S. Ct. 3 (2017) (Sotomayor, J., dissenting from the denial of certiorari) ("Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme,

where the court was the final decision-maker and the sentencer—not the jury.").

Replicating the practice followed in essentially all of Florida's pre-*Hurst* cases (including the 165 or so denied relief as a result of the retroactivity rule validated below), the jurors in petitioner's case were repeatedly told that their recommendation was advisory and the final sentencing decision rested solely with the judge. From the very outset of the penalty phase, during the *voir dire* process, the advisory jurors were informed by the prosecutor that "[t]he ultimate sentence is the responsibility of the Court." Voir Dire Tr. 49. During closing arguments, the prosecutor reiterated the judge's role as the final decision-maker, telling the jury to "*recommend* to the Judge that he impose the death penalty on Eric Branch." Penalty Tr. 1019 (emphasis added). The advisory jury repeatedly received the same message in the jury instructions. *See, e.g.*, *id.* at 1026 ("[T]he final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to . . . render to the Court an advisory sentence."); *ibid.* ("[I]t is now your duty to advise the court as to what punishment should be imposed on the defendant."). Petitioner's jurors recommended death with those remarks and instructions in mind. Those remarks and instructions informed the advisory jury "that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere" and therefore violated the *Caldwell* rule. 472 U.S. at 328-29.

Even if these facts do not independently give rise to a *Caldwell* claim, they at least heighten the importance of the first question presented in this case. Without the weight of ultimate responsibility, an advi-

sory jury recommended that the State put petitioner to death. The trial court then made findings that resulted in its imposition of a capital sentence that is unconstitutional under *Hurst*. It would be aberrant and unjust to allow this thoroughly-defective death sentence stand simply because it became final on direct review before *Ring*.

2. *Hurst* Errors Necessarily Implicate *Sullivan* Concerns

Similar considerations apply to the second question presented by the petition.

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court unanimously held, in an opinion by Justice Scalia, that even though the jury had rendered a decision on each element of the offense, the trial court's improper instruction on the beyond-a-reasonable-doubt standard "vitiate[d] *all* the jury's findings." *Id.* at 281 (emphasis in original). This defect meant that, for purposes of harmless-error review, "there has been no jury verdict within the meaning of the Sixth Amendment." *Ibid.* Florida's pre-*Hurst* advisory jury recommendations therefore are not verdicts under the Sixth Amendment any more than the nugatory jury findings in *Sullivan* because the jury did not find *any* of the requisite facts needed to support a death sentence.[4]

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[4] Recognizing well before *Hurst* the constitutional significance of those errors, Amicus Justice Anstead authored opinions in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (concurring in result only), and dissenting in *Duest v. State*, 855 So. 2d 33 (Fla. 2003). In each, Justice Anstead was critical of the Florida Supreme Court's failure at the time to incorporate this Court's teachings in *Ring* into the Florida Death Penalty Scheme. *See Bottoson*, 833 So. 2d at 710 ("As noted earlier, the plurality opinion has

As this Court held in *Hurst*, Florida juries were unconstitutionally instructed that it was the trial judge's duty, not the jury's, to make the factual findings that state law required for a death sentence. Under state law, those findings included whether the aggravating factors that had been proven beyond a reasonable doubt were sufficient in themselves to warrant the death penalty and, if so, whether those factors outweighed the mitigating circumstances beyond a reasonable doubt. *See Hurst v. State*, 202 So. 3d at 44.

As in *Sullivan*, petitioner received the death sentence without any supporting jury findings within the meaning of the Sixth Amendment. Accordingly, as in *Sullivan*, petitioner's death sentence is substantively infirm and not merely the byproduct of a procedural error. These problems underscore why review is warranted here.

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chosen to retreat to the 'safe harbor' of prior United States Supreme Court decisions upholding Florida's death penalty scheme. That may well be the 'safe' option since it will require the Supreme Court to act affirmatively to explain its prior holdings in light of *Apprendi* and *Ring*. However, when one examines the holdings of *Ring* and *Apprendi* and applies them in a straightforward manner to a Florida scheme that requires findings of fact by a judge and not a jury, it is apparent that the harbor may not be all that safe."); *Duest*, 855 So. 2d at 57 ("I continue to view *Ring* as the most significant death penalty decision from the U.S. Supreme Court in the past thirty years and believe we, like the Arizona Supreme Court, are honor bound to apply *Ring*'s interpretation of the requirements of the Sixth Amendment to Florida's death penalty scheme.").

III. To Avoid Repeating The Injustices Of The Past, The Questions Presented By The Petition Should Be Decided Sooner Rather Than Later

The petition's constitutional arguments are both compelling and urgent. Amici are concerned that the failure to grant relief now will inflict the same widespread, irreparable injustices that many of them have lived through during their recent decades on the Florida bench.

Nine years after this Court decided in *Lockett v. Ohio*, 438 U.S. 586 (1978), that mitigating circumstances could not be confined to a statutory list, this Court unanimously overturned the Florida Supreme Court's bright-line rule barring relief in cases where the jury was not instructed that it could consider non-statutory mitigating evidence. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987) (Justice Scalia writing for unanimous Court); *see also* 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 2073 n.50 (6th ed. 2011) (estimating that thirteen inmates who had presented the issue to this Court were executed before *certiorari* was granted). 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-score test to deny *Atkins* claims. *See Hall v. Florida*, 134 S. Ct. 1986 (2014). And, of course, the present situation arises because *Hurst* came 14 years after this Court held in *Ring v. Arizona*, 536 U.S. 584 (2002), that a jury—not a judge—must conduct the fact-finding underlying a death sentence. *See Hurst*, 136 S. Ct. at 619.

In the nearly decade and a half between *Ring* and *Hurst*, the Florida Supreme Court repeatedly rejected *Ring* claims. By the time *Hurst* was decided, hundreds of inmates – alive and dead – had been subjected to the unconstitutional procedure. Full retroactive application of this ruling should not wait any longer.

CONCLUSION

Amici therefore ask this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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