No. _____

IN THE

Supreme Court of the United States

DONALD DAVID DILLBECK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

BILLY H. NOLAS
Counsel of Record
SEAN T. GUNN
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818
billy_nolas@fd.org
sean_gunn@fd.org

CAPITAL CASE

QUESTIONS PRESENTED

1. Does the June 24, 2002, retroactivity cutoff line invented by the Florida Supreme Court, which denies collateral relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), to more than one hundred death-sentenced Florida prisoners, while granting collateral *Hurst* relief to more than one hundred other Florida prisoners, violate the Eighth and Fourteenth Amendments to the United States Constitution?

2. Does the partial retroactivity formula employed for *Hurst* violations in Florida violate the Supremacy Clause of the United States Constitution in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)?

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

PARTIES TO THE PROCEEDINGS

Petitioner Donald David Dillbeck, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court.

Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

DECISION BELOW

The decision of the Florida Supreme Court is reported at 234 So. 3d 558, and reprinted in the Appendix (App.) at 1a.

JURISDICTION

The judgment of the Florida Supreme Court was entered on January 24, 2018. App. 1a. On April 23, 2018, Justice Thomas extended the time to file this certiorari petition to June 8, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

The Eighth Amendment provides:

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

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Introduction

Petitioner Donald David Dillbeck remains on Florida's death row even though no court or party disputes that his death sentence was obtained in violation of the United States Constitution for the reasons described in *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, based on a retroactivity cutoff line drawn at June 24, 2002.

If a simple retroactivity ruling was the only thing involved here, there might be no reason for this Court's intervention. This Court has explained that traditional retroactivity rules serve legitimate purposes despite some features of unequal treatment that are inherent in any cutoff. Petitioner does not ask the Court to revisit this feature of American law; rather, he seeks review of whether the Florida Supreme Court's unusual partial retroactivity formula oversteps constitutional boundaries.

Under the Florida Supreme Court's rule, *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, more than 14 years before *Hurst*, 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 that the death sentences of another group of prisoners be vacated on collateral review so that they can receive a jury determination. The 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 whether its *Ring*-based retroactivity cutoff for *Hurst* claims is inconsistent with the Eighth and Fourteenth Amendments. And the court has crafted other problematic rules to further limit the reach of *Hurst* in Florida, including a per se harmless-error rule for prisoners whose advisory penalty juries unanimously recommended the death penalty, and rules barring relief for prisoners who waived post-conviction review prior to the decision in *Hurst*. *See* App. 81a-88a.

This Court should address the constitutionality of the Florida Supreme Court's *Ring*-based retroactivity cutoff for *Hurst* claims. Waiting years or decades—as the Court did before ending the Florida Supreme Court's unconstitutional practices in *Hall*, *Hitchcock*, and *Hurst*—would allow for the execution of Petitioner and dozens of prisoners whose death sentences were obtained in violation of *Hurst*, while dozens of other prisoners who were sentenced in violation of *Hurst* and whose sentences are also "final" for traditional retroactivity purposes, are granted collateral relief.

II. Factual and Procedural Background

A. Conviction, Death Sentence, and Direct Appeal

In 1991, Petitioner was convicted of murder and related crimes in a Florida court. *See Dillbeck v. State*, 643 So. 2d 1027 (Fla. 1994). A penalty phase was conducted pursuant to the Florida capital sentencing scheme in place at the time. *See Hurst*, 136 S. Ct. at 620 (describing Florida's prior scheme). The "advisory" jury recommended the death penalty by a bare-majority vote of 7 to 5. The jury did not make findings of fact or specify the basis for its recommendation.

The trial judge, not the jury, then made the findings of fact required to impose a death sentence under Florida law. *See* Fla. Stat. § 921.141(3) (1992), *invalidated by Hurst*, 136 S. Ct. at 624. The judge found that five aggravating circumstances had been proven beyond a reasonable doubt, and that those aggravators were both "sufficient" for the death penalty and not outweighed by the mitigation. Based on his fact-finding, the judge sentenced Petitioner to death. *See Dillbeck*, 643 So. 2d at 1028 n.1.[1] The Florida Supreme Court affirmed. *Id.* at 1031.

---

[1] The aggravating circumstances found by the judge were that Petitioner was under sentence of imprisonment and had previously been convicted of another capital felony, the murder was committed during the course of a robbery and burglary, the murder was committed for the purpose of avoiding arrest or effecting escape, and the murder was especially heinous, atrocious, or cruel. *Id.*

The mitigating circumstances found by the judge included that Petitioner was substantially impaired at the time of the offense; had an abused childhood, fetal alcohol effect, and treatable mental illness; was sent to a violent prison at an early age; exhibited good behavior, had a loving family, and expressed remorse. *Id.* at n.2.

B. State and Federal Collateral Proceedings

In state post-conviction proceedings, Petitioner argued, among other things, that Florida's death penalty scheme was unconstitutional under *Ring*. The Florida Supreme Court rejected that argument and affirmed the denial of post-conviction relief. *See Dillbeck v. State*, 882 So. 2d 969, 970 (Fla. 2004); *see also Dillbeck v. State*, 964 So. 2d 95, 97 (2007). Petitioner's successive post-conviction motions were also unsuccessful. *See Dillbeck*, 964 So. 2 95; *Dillbeck v. State*, 168 So. 3d 224 (Fla. 2015).

In 2010, Petitioner's federal habeas petition was denied on the merits, including his claim regarding the constitutionality of Florida's capital sentence scheme under *Ring*, by the United States District for the Northern District of Florida. *Dillbeck v. McNeil*, 2010 WL 419401 (N.D. Fla. Jan. 29, 2010). The United States Court of Appeals for the Eleventh Circuit ordered a limited remand for the district court to consider the impact of *Holland v. Florida*, 560 U.S. 631 (2010), on Petitioner's case, but later denied a certificate of appealability after the district court concluded that *Holland* did not apply. *See Dillbeck v. McNeil*, 11th Cir. No. 10-11042.

C. *Hurst* Litigation

In April 2016, Petitioner filed a motion in state court for post-conviction relief under *Hurst*. The state court denied relief based on the Florida Supreme Court's decisions in *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), and *Mosley v. State*, 29 So. 3d 1248, 1274 (Fla. 2016), which together held that *Hurst* applies retroactively on collateral review, but only to prisoners whose death sentences became final on direct appeal after *Ring* was decided on June 24, 2002. The state court did not address

Petitioner's argument that a *Ring*-based retroactivity cutoff violates the Eighth and Fourteenth Amendments. *See* App. 9a-10a.

In June 2017, the Florida Supreme Court stayed Petitioner's appeal of the trial court's *Hurst* ruling pending the disposition of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), another appeal from the denial of *Hurst* relief in a "pre-*Ring*" death sentence case. In *Hitchcock*, the Florida Supreme Court summarily upheld its *Ring*-based retroactivity cutoff for *Hurst* claims, citing its prior decisions in *Asay* and *Mosley* that had established the *Ring*-based cutoff, and declining to address any of the appellant's federal constitutional arguments. *Id.* at 217.

The Florida Supreme Court thereafter ordered Petitioner to show cause why the denial of *Hurst* relief in his case should not be summarily affirmed in light of *Hitchcock* and the *Ring*-based retroactivity cutoff. App. 5a-6a. Petitioner responded that the cutoff violates the Eighth and Fourteenth Amendments. He asserted that by denying *Hurst* retroactivity to him and other "pre-*Ring*" defendants, while applying *Hurst* retroactively to "post-*Ring*" defendants, the Florida Supreme Court violated the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection. Petitioner further argued that given the substantive nature of the rules involved, the Supremacy Clause of the United States Constitution requires the Florida Supreme Court to apply those rules retroactively to all defendants, not merely some defendants, in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and other precedent. App. 11a-31a, 48a-58a.

D. Decision Below

On January 24, 2018, the Florida Supreme Court issued an opinion summarily affirming the denial of *Hurst* relief. App. 1a-4a; *Dillbeck v. State*, 234 So. 3d 558 (Fla. 2018). The Florida Supreme Court's brief opinion contained the following analysis:

> After reviewing Dillbeck's response to the order to show cause, as well as the State's arguments in reply, we conclude that Dillbeck is not entitled to relief. Dillbeck was sentenced to death following a jury's recommendation for death by a vote of eight to four. *Dillbeck v. State*, 643 So. 2d 1027, 1028 (Fla. 1994). Dillbeck's sentence of death became final in 1995. *Dillbeck v. Florida*, 514 U.S. 1022 (1995). Thus, *Hurst* does not apply retroactively to Dillbeck's sentence of death. *See Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the denial of Dillbeck's motion.

App. 3a; *Dillbeck* 234 So. 3d at 559 The opinion did not discuss any of Petitioner's federal constitutional arguments.[2]

Justice Pariente concurred in the result, based on the precedential nature of *Hitchcock*, but noted that she continued to adhere to the views expressed in her dissenting opinion in *Hitchcock*, in which she described the Court's *Ring*-based cutoff for *Hurst* retroactivity as unconstitutional. *Id.*; *see also Hitchcock*, 226 So. 3d at 220-23 (Pariente, J., dissenting).

---

[2] Between January 22 and February 2, 2018, the Florida Supreme Court issued nearly identical summary opinions in dozens of other *Hurst* appeals and state habeas corpus proceedings involving "pre-*Ring*" death sentences. These cases followed roughly the same path as Petitioner's, beginning with an order to show cause why *Hurst* relief should not be denied in light of *Hitchcock*. *See* App. 69a-73a (listing Florida Supreme Court opinions issued between January 22 and February 2, 2018, denying *Hurst* relief in *Hitchcock* show-cause cases).

REASONS FOR GRANTING THE WRIT

I. The Florida Supreme Court's *Ring*-Cutoff Formula Violates the Eighth Amendment's Prohibition Against Arbitrary and Capricious Capital Punishment and the Fourteenth Amendment's Guarantee of Equal Protection

A. Traditional Non-Retroactivity Rules Can Serve Legitimate Purposes, but the Eighth and Fourteenth Amendments Impose Boundaries in Capital Cases

This Court has recognized that traditional non-retroactivity rules, which deny the benefit of new constitutional decisions to prisoners whose cases have already become final on direct review, can serve legitimate purposes, including protecting states' interests in the finality of criminal convictions. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 309 (1989). These rules are a pragmatic necessity of the judicial process and are accepted as constitutional despite some features of unequal treatment. This Petition does not ask the Court to revisit that settled feature of American law.

But in creating such rules, courts are bound by constitutional restraints. In capital cases, the Eighth and Fourteenth Amendments impose boundaries on a state court's application of untraditional non-retroactivity rules, such as those that fix retroactivity cutoffs at points in time other than the date of the new constitutional ruling. For instance, a state rule that a constitutional decision rendered by this Court in 2018 is only retroactive to prisoners whose death sentences became final after the last turn of the century would intuitively raise suspicions of unconstitutional arbitrariness. This Court has not had occasion to address a partial retroactivity scheme because such schemes are not the norm, but the proposition that states do

not enjoy free reign to draw temporal retroactivity cutoffs at *any* point in time emanates logically from the Court's Eighth and Fourteenth Amendment rulings.

In *Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), this Court described the now-familiar idea 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." *Godfrey*, 446 U.S. at 428. This Court's Eighth Amendment decisions have "insist[ed] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008).

The Eighth Amendment prohibition against arbitrariness and capriciousness in capital cases refined this Court's Fourteenth Amendment precedents holding that equal protection is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). A state does not have unfettered discretion to create classes of condemned prisoners.

The Florida Supreme Court did not simply apply a traditional retroactivity rule here. On the contrary, it crafted a decidedly untraditional and troublesome non-retroactivity scheme.

B. The Florida Supreme Court's *Hurst* Retroactivity Cutoff at *Ring* Involves Something Other Than the Traditional Non-Retroactivity Rules Addressed by This Court's *Teague* and Related Jurisprudence

The unusual non-retroactivity rule applied by the Florida Supreme Court in this and other *Hurst* cases involves something very different than the traditional non-retroactivity rules addressed in this Court's precedents. This Court has long understood the question of retroactivity to arise in particular cases *at the same point in time*: when the defendant's conviction or sentence becomes "final" upon the conclusion of direct review. *See, e.g.*, *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987); *Teague*, 489 U.S. at 304-07. The Court's modern approach to determining whether retroactivity is required by the United States Constitution is premised on that assumption. *See, e.g.*, *Montgomery*, 136 S. Ct. at 725 ("In the wake of *Miller*, the question has arisen whether its holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided.").

The Court's decision in *Danforth v. Minnesota*, 552 U.S. 264 (2006), which held that states may apply constitutional rules retroactively even when the United States Constitution does not compel them to do so, also assumed a definition of retroactivity based on the date that a conviction and sentence became final on direct review. *See id.* at 268-69 ("[T]he Minnesota court correctly concluded that federal law does not *require* state courts to apply the holding in *Crawford* to cases that were final when that case was decided . . . . [and] we granted certiorari to consider whether *Teague* or any other federal rule of law *prohibits* them from doing so.") (emphasis in original).

None of this Court's precedents address the novel concept of "partial retroactivity," whereby a new constitutional ruling of the Court may be available on collateral review to *some* prisoners whose convictions and sentences have already become final, but not to all prisoners on collateral review. However, the Florida Supreme Court's retroactivity formula for *Hurst* errors imposed such a partial retroactivity scheme.

In two separate decisions issued on the same day—*Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016)—the Florida Supreme Court addressed the retroactivity of this Court's decision in *Hurst v. Florida*, as well as the Florida Supreme Court's own decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), under Florida's state retroactivity test.[3] But unlike the traditional retroactivity analysis contemplated by this Court's precedents, the Florida Supreme Court did not simply decide whether the *Hurst* decisions should be applied retroactively to all prisoners whose death sentences became final before *Hurst*.

Instead, the Florida Supreme Court divided those prisoners into two classes based on the date their sentences became final relative to this Court's June 24, 2002, decision in *Ring*, which was issued nearly 14 years before *Hurst*. In *Asay*, the court held that the *Hurst* decisions do not apply retroactively to Florida prisoners whose death sentences became final on direct review before *Ring*. *Asay*, 210 So. 3d at 21-

[3] Florida's retroactivity analysis is still guided by this Court's pre-*Teague* three-factor analysis derived from *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). *See Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980) (adopting *Stovall*/*Linkletter* factors).

22. In *Mosley*, the court held that the *Hurst* decisions do apply retroactively to prisoners whose death sentences became final after *Ring*. *Mosley*, 209 So. 3d at 1283.

The Florida Supreme Court offered a narrative-based justification for this partial retroactivity framework, explaining that "pre-*Ring*" retroactivity was inappropriate because Florida's capital sentencing scheme was not unconstitutional before this Court decided *Ring*, but that "post-*Ring*" retroactivity was appropriate because the state's statute became unconstitutional as of the time of *Ring*.[4]

Although acknowledging that it had failed to recognize that unconstitutionality until this Court's decision in *Hurst*, the Florida Supreme Court laid the blame on this Court for the improper Florida death sentences imposed after *Ring*:

> Defendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring should not suffer due to the United States Supreme Court's fourteen-year delay in applying Ring to Florida*. In other words, defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring should not be penalized for the United States Supreme Court's delay in explicitly making this determination*. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Witt*, 387 So.2d at 925. Thus, Mosley, whose sentence was final in 2009, falls into the category of defendants who should receive the benefit of *Hurst*.

Mosley, 209 So. 3d at 1283 (emphasis added).

---

[4] As described later, none of the Florida Supreme Court's *Hurst* cases have discussed *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the decision that formed the basis for both *Ring* and *Hurst*.

Since *Asay* and *Mosley*, the Florida Supreme Court has uniformly applied its *Hurst* retroactivity cutoff. In collateral-review cases, the Florida Supreme Court has granted the jury determinations required by *Hurst* to dozens of "post-*Ring*" prisoners whose death sentences became final before *Hurst*. But, because of the Florida Supreme Court's *Ring*-based retroactivity cutoff, dozens more "pre-*Ring*" prisoners are denied access to the jury determination *Hurst* found constitutionally required. *See* App. 81a-88a.

Recently, after reaffirming the *Ring* cutoff in *Hitchcock v. State*, 226 So. 3d at 217, the Florida Supreme Court summarily denied *Hurst* relief in 80 "pre-*Ring*" cases, including Petitioner's, in just two weeks. Many of these litigants have pressed the Florida Supreme Court to recognize the constitutional infirmities of its partial retroactivity doctrine, but in none of its decisions has the Florida Supreme Court made more than fleeting remarks about whether its framework is consistent with the United States Constitution. *See, e.g.*, *Asay v. State*, 224 So. 3d 695, 702-03 (Fla. 2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017); *Hitchcock*, 226 So. 3d at 217. In *Hannon v. State*, the Florida Supreme Court stated that this Court had "impliedly approved" its *Ring*-based retroactivity cutoff for *Hurst* claims by denying a writ of certiorari in *Asay v. Florida*, 138 S. Ct. 41 (2017). *Hannon*, 228 So. 3d at 513; *but see Teague*, 489 U.S. at 296 ("As we have often stated, the denial of a writ of certiorari imports no expression of opinion upon the merits of the case.") (internal quotation omitted).

As the next section of this Petition explains, the Florida Supreme Court's *Ring*-based scheme of partial retroactivity for *Hurst* claims involves more than the type of tolerable arbitrariness that is innate to traditional non-retroactivity rules.

C. The Florida Supreme Court's *Hurst* Retroactivity Cutoff at *Ring* Exceeds Eighth and Fourteenth Amendment Limits

1. The *Ring*-Based Cutoff Creates More Arbitrary and Unequal Results than Traditional Retroactivity Decisions

The Florida Supreme Court's *Hurst* retroactivity cutoff at *Ring* involves a kind and degree of arbitrariness that far exceeds the level justified by traditional retroactivity jurisprudence.

As an initial matter, the Florida Supreme Court's rationale is open to question. The court described its rationale as follows: "Because Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst* retroactively to that time," but not before then. *Mosley*, 209 So. 3d at 1280. But Florida's capital sentencing scheme did not become unconstitutional when *Ring* was decided—*Ring* recognized that Arizona's capital sentencing scheme was unconstitutional. Florida's capital sentencing statute was always unconstitutional, and it was recognized as such in *Hurst*, not *Ring*.

The Florida Supreme Court's approach raises serious questions about line-drawing at a prior point in time. There will always be earlier precedents of this Court upon which a new constitutional ruling builds.[5]

---

[5] The foundational precedent for both *Ring* and *Hurst* was the Court's decision in *Apprendi*, 530 U.S. at 466. As *Hurst* recognizes, it was *Apprendi*, not *Ring*, which first explained that the Sixth Amendment requires any fact-finding that increases a

The effect of the cutoff also does not meet its aim. The Florida Supreme Court's rationale for drawing a retroactivity line at *Ring* is undercut by the court's denial of *Hurst* relief to prisoners whose sentences became final before *Ring* but who correctly but unsuccessfully challenged Florida's unconstitutional sentencing scheme after *Ring*,[6] while granting relief to prisoners who failed to raise any challenge, either before or after *Ring*. If prisoners whose sentences became final after *Ring* are deserving of *Hurst* relief because Florida's scheme has been unconstitutional since *Ring*, then prisoners who actually challenged Florida's scheme after *Ring* would also receive relief in a non-arbitrary scheme. Petitioner's case is in this category. *See Dillbeck*, 882 So. 2d at 970; *Dillbeck*, 964 So. 2d at 97; *Dillbeck*, 2010 WL 419401 at *3. But, as it stands, none of these prisoners can access *Hurst* relief because they fall on the wrong side of the Florida Supreme Court's bright-line retroactivity cutoff.[7]

The Florida Supreme Court's rule also does not reliably separate Florida's death row into meaningful pre-*Ring* and post-*Ring* categories. In practice, as Petitioner explained to the Florida Supreme Court, the date of a particular Florida death sentence's finality on direct appeal in relation to the June 24, 2002, decision in

---

defendant's maximum sentence to be found by a jury beyond a reasonable doubt. *Hurst*, 136 S. Ct. at 621. However, the Florida Supreme Court has never explained why it drew a line at *Ring* as opposed to *Apprendi*.

[6] *See, e.g.*, *Miller v. State*, 926 So. 2d 1243, 1259 (Fla. 2006); *Nixon v. State*, 932 So. 2d 1009, 1024 (Fla. 2006); *Bates v. State*, 3 So. 3d 1091, 1106 n.14 (Fla. 2009); *Bradley v. State*, 33 So. 3d 664, 670 n.6 (Fla. 2010).

[7] In dissent in *Hitchcock*, 226 So. 3d at 218-20, Justice Lewis noted that this inconsistency should cause the court to abandon the bright-line *Ring* cutoff and grant *Hurst* relief to prisoners who preserved challenges to their unconstitutional sentences.

Ring can depend on a score of random factors having nothing to do with the offender or the offense: whether there were delays in a clerk's transmitting the direct appeal record to the Florida Supreme Court; whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with the Florida Supreme Court's summer recess; how long the assigned Justice took to draft the opinion for release; whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener's error necessitating issuance of a corrected opinion; whether counsel chose to file a petition for a writ of certiorari in this Court or sought an extension to file such a petition; how long a certiorari petition remained pending in this Court; and so on. *See* App. 39a.

In one example, the Florida Supreme Court affirmed Gary Bowles's and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173, 1184 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both prisoners petitioned for a writ of certiorari in this Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). The Florida Supreme Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47. However, Mr. Bowles, whose case was decided on direct appeal on *the same day* as Mr. Card's,

falls on the other side of the Florida Supreme Court's current retroactivity cutoff. His *Hurst* claim was summarily denied by the Florida Supreme Court the same week as Petitioner's. *Bowles v. State*, 235 So. 3d 292 (Fla. 2018).

Another arbitrary factor affecting whether a defendant receives *Hurst* relief under the Florida Supreme Court's date-of-*Ring* retroactivity approach includes whether a resentencing was granted because of an unrelated error. Under the current retroactivity rule, "older" cases dating back to the 1980s with a post-*Ring* resentencing qualify for *Hurst* relief, while other less "old" cases do not. *See, e.g.*, *Johnson v. State*, 205 So. 3d 1285, 1285 (Fla. 2016) (granting *Hurst* relief to a defendant whose crime occurred in 1981 but who was granted relief on a third successive post-conviction motion in 2010, years after the *Ring* decision); *cf. Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (granting *Hurst* relief in a case where the crime occurred in the late 1990s, but interlocutory appeals resulted in a 10-year delay before the trial). Under the Florida Supreme Court's approach, a defendant who was originally sentenced to death before Petitioner, but who was later resentenced to death after *Ring*, would receive *Hurst* relief while Petitioner does not.

The *Ring*-based cutoff not only infects the system with arbitrariness, but it also raises concerns under the Fourteenth Amendment's Equal Protection Clause. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture differently without "some ground of difference that rationally explains the different treatment." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). When two classes are created to receive different treatment, as the Florida Supreme Court has done

here, the question is "whether there is some ground of difference that rationally explains the different treatment . . . ." *Id.*; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g., Skinner*, 316 U.S. at 541. When a state draws a line between those capital defendants who will receive the benefit of a fundamental right afforded to every defendant in America—decision-making by a jury—and those who will not be provided that right, the justification for that line must satisfy strict scrutiny. The Florida Supreme Court's rule falls short of that demanding standard.

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*, 210 So. 3d at 36 (Pariente, J., concurring in part and dissenting in part). Justice Perry was blunter: "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*, 226 So. 3d at 218 (Lewis, J., concurring in the result).

2. The *Ring*-Based Cutoff Denies *Hurst* Relief to the Most Deserving Class of Death-Sentenced Florida Prisoners

The cutoff forecloses *Hurst* relief to the class of death-sentenced prisoners for whom relief makes the most sense. In fact, several features common to Florida's "pre-*Ring*" death row population compel the conclusion that denying *Hurst* relief in their cases, while affording *Hurst* relief to their "post-*Ring*" counterparts, is especially perverse.

Florida prisoners who were tried for capital murder before *Ring* are more likely to have been sentenced to death by a system that would not produce a capital sentence—or sometimes even a capital prosecution—today. Since *Ring* was decided, as public support for the death penalty has waned, prosecutors have been increasingly unlikely to seek and juries increasingly unlikely to impose death sentences.[8]

---

[8] *See, e.g.*, Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades*, PEW RESEARCH CENTER, Sep. 29, 2016, *available at* http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four decades/ ("Only about half of Americans (49%) now favor the death penalty for people convicted of murder, while 42% oppose it. Support has dropped 7 percentage points since March 2015, from 56%.

The number of death sentences imposed in the United States has been in steep decline in the last two decades. In 1998, there were 295 death sentences imposed in the United States; in 2002, there were 166; in 2017 there were 39. Death Penalty Information Center, *Facts About the Death Penalty* (updated December 2017), at 3, *available at* https://deathpenaltyinfo.org/documents/FactSheet.pdf.

Florida prisoners who were sentenced to death before *Ring* are also more likely than post-*Ring* prisoners to have received those death sentences in trials that involved problematic fact-finding. The past two decades have witnessed broad recognition of the unreliability of numerous kinds of evidence—flawed forensic-science theories and practices, hazardous eyewitness identification testimony, and so forth—that was widely accepted in pre-*Ring* capital trials.[9] Forensic disciplines that were once considered sound fell under deep suspicion following numerous exonerations.[10]

---

[9] *See, e.g.*, Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods" (2016) (Report of the President's Counsel of Advisors on Science and Technology), *available at* https://fdprc.capdefnet.org/sites/cdn_fdprc/files/Assets/public/other_useful_information/forensic_information/pcast_forensic_science_report_final.pdf (evaluating and explaining the procedures of the various forensic science disciplines, including (1) DNA analysis of single-source and simple-mixture samples, (2) DNA analysis of complex-mixture samples, (3) bite-marks, (4) latent fingerprints, (5) firearms identification, (6) footwear analysis, and (7) hair analysis, and the varying degrees, or lack, of accuracy and reliability of these disciplines).

[10] *See, e.g.*, Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 166 (2007) ("The most recent study of 200 DNA exonerations found that forensic evidence (present in 57% of the cases) was the second leading type of evidence (after eyewitness identifications at 79%) used in wrongful conviction cases. Pre-DNA serology of blood and semen evidence was the most commonly used forensic technique (79 cases). Next came hair evidence (43 cases), soil comparison (5 cases), DNA tests (3 cases), bite mark evidence (3 cases), fingerprint evidence (2 cases), dog scent identification (2 cases), spectrographic voice evidence (1 case), shoe prints (1 case), and fiber comparison (1 case)."); COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSICS SCIENCES COMMUNITY, NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, at 4 (2009), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf ("[Scientific advances] have revealed that, in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and

Post-*Ring* sentencing juries are more fully informed of the defendant's entire mitigating history than juries in the pre-*Ring* period. The American Bar Association ("ABA") guideline requiring a capital mitigation specialist for the defense was not even promulgated until 2003.[11] Limited information being provided to juries was especially endemic to Florida in the era before *Ring* was decided.[12] The capital defense bar in Florida, as a result of various funding crises and the inadequate screening mechanism for lawyers on the list of those available to be appointed in

---

testimony derived from imperfect testing and analysis. Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.").

[11] ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases (Rev. Ed. Feb., 2003), Guidelines 4.1(A)(1) and 10.4(C)(2), 31 HOFSTRA L. REV. 913, 952, 999-1000 (2003). S*ee also* Supplementary Guidelines for the Mitigation of Defense Teams in Death Penalty Cases, Guideline 5.1(B), (C), 36 HOFSTRA L. REV. 677 (2008); Craig M. Cooley, *Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists,* 30 OKLA. CITY U. L. REV. 23 (2005); Mark Olive, Russell Stetler, *Using the Supplementary Guideline for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction*, 30 HOFSTRA L. REV. 1067 (2008).

[12] *See*, *e.g.*, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE FLORIDA DEATH PENALTY ASSESSMENT REPORT, AN ANALYSIS OF FLORIDA'S DEATH PENALTY LAWS, PROCEDURES, AND PRACTICES, American Bar Association (2006) [herein "ABA Florida Report"]. The 462 page report concludes that Florida leads the nation in death-row exonerations, inadequate compensation for conflict trial counsel in death penalty cases, lack of qualified and properly monitored capital collateral registry counsel, inadequate compensation for capital collateral registry attorneys, significant juror confusion, lack of unanimity in jury's sentencing decision, the practice of judicial override, lack of transparency in the clemency process, racial disparities in capital sentencing, geographic disparities in capital sentencing, and death sentences imposed on people with severe mental disability. *Id.* at iv-ix. The report also "caution[s] that their harms are cumulative." *Id.* at iii.

capital cases, produced what former Chief Justice of the Florida Supreme Court Gerald Kogan described as "some of the worst lawyering" he had ever seen.[13] As a result, since 1976, Florida has had 27 exonerations—more than any other state—all but five of which involved convictions and death sentences imposed before 2002.[14] And as for mitigating evidence, Florida's statute did not even include the "catch-all" statutory language until 1996.[15]

The "advisory" jury instructions were also so confusing that jurors consistently reported that they did not understand their role.[16] If the advisory jury did recommend life, judges—who must run for election and reelection in Florida—could

---

[13] Death Penalty Information Center, *New Voices: Former FL Supreme Court Judge Says Capital Punishment System is Broken*, *available at https://deathpenaltyinfo.org/new-voices-former-fl-supreme-court-judge-says-capital-punishment-system-broken* (citing G. Kogan, *Florida's Justice System Fails on Many Fronts*, St. Petersburg Times, July 1, 2008.

[14] Death Penalty Information Center, *Florida Fact Sheet*, *available at* https://deathpenaltyinfo.org/innocence?inno_name=&exonerated=&state_innocence=8&race=All&dna=All.

[15] ABA Florida Report at 16, citing 1996 Fla. Laws ch. 290, § 5; 1996 Fla. Laws ch. 96-302, Fla. Stat. 921.141(6)(h) (1996).

[16] The ABA found one of the areas in need of most reform in Florida capital cases was significant juror confusion. ABA Florida Report at vi ("In one study over 35 percent of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt. The same study also found that over 36 percent of interviewed Florida capital jurors incorrectly believed that they were *required* to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt, and 25.2 percent believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a legitimate aggravating circumstance under Florida law.").

impose the death penalty anyway.[17] In fact, relying on the cutoff, the Florida Supreme Court has summarily denied *Hurst* relief where the defendant was sentenced to death by a judge "overriding" a jury's recommendation of life. *See Marshall v. Jones*, 226 So. 3d 211 (Fla. 2017).

And, especially in these "older cases," the advisory jury scheme invalidated by *Hurst* implicated systematic violations of *Caldwell v. Mississippi*, 472 U.S. 320 (1987). *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."). In contrast to post-*Ring* cases, the pre-*Ring* cases did not include more modern instructions leaning towards a "verdict" recognizable to the Sixth Amendment. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993).

---

[17] *See* ABA Florida Report at vii ("Between 1972 and 1979, 166 of the 857 first time death sentences imposed (or 19.4 percent) involved a judicial override of a jury's recommendation of life imprisonment without the possibility of parole . . . . Not only does judicial override open up an additional window of opportunity for bias—as stated in 1991 by the Florida Supreme Court's Racial and Ethnic Bias Commission but it also affects jurors' sentencing deliberations and decisions. A recent study of death penalty cases in Florida and nationwide found: (1) that when deciding whether to override a jury's recommendation for a life sentence without the possibility of parole, trial judges take into account the potential "repercussions of an unpopular decision in a capital case," which encourages judges in judicial override states to override jury recommendations of life, "especially so in the run up to judicial elections;" and (2) that the practice of judicial override makes jurors feel less personally responsible for the sentencing decision, resulting in shorter sentencing deliberations and less disagreement among jurors.").

It is also important that that prisoners whose death sentences became final before *Ring* was decided in 2002 have been incarcerated on death row longer than prisoners sentenced after that date. Notwithstanding the well-documented hardships of Florida's death row, *see, e.g.*, *Sireci v. Florida*, 137 S. Ct. 470 (2016) (Breyer, J., dissenting from the denial of certiorari), they have demonstrated over a longer time that they are capable of adjusting to a prison environment and living without endangering any valid interest of the state. "At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes." *Knight v. Florida*, 120 S. Ct. 459, 462 (1999) (Breyer, J., dissenting from the denial of certiorari).

Taken together, these considerations show that the Florida Supreme Court's partial non-retroactivity rule for *Hurst* claims involves a level of arbitrariness and inequality that is hard to reconcile with the Eighth and Fourteenth Amendments.

II. The Partial Retroactivity Formula Employed for *Hurst* Violations in Florida Violates the Supremacy Clause of the United States Constitution, Which Requires Florida's Courts to Apply *Hurst* Retroactively to All Death-Sentenced Prisoners

In *Montgomery*, 136 S. Ct. at 731-32, this Court held that the Supremacy Clause of the United States Constitution requires state courts to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis. In that case, a Louisiana state prisoner filed a claim in state court seeking retroactive application of the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth

Amendment). The state court denied the prisoner's claim on the ground that *Miller* was not retroactive as a matter of state retroactivity law. *Montgomery*, 136 S. Ct. at 727. This Court reversed, holding that because the *Miller* rule was substantive as a matter of federal law, the state court was obligated to apply it retroactively. *See id.* at 732-34.

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

Importantly for purposes of *Hurst* retroactivity analysis, this Court found the *Miller* rule substantive in *Montgomery* even though the rule had "a procedural component." *Id.* at 734. *Miller* did "not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* or *Graham*." *Miller*, 567 U.S. at 483. Instead, "it mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* Despite *Miller*'s "procedural" requirements, the Court in *Montgomery* warned against "conflat[ing] a procedural requirement

necessary to implement a substantive guarantee with a rule that 'regulate[s] only the *manner of determining* the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (first alteration added). Instead, the Court explained, "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," *id.* at 735, and that the necessary procedures do not "transform substantive rules into procedural ones," *id.* In *Miller*, the decision "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*." *Id.* at 734.

As *Hurst v. Florida* explained, under Florida law, the factual predicates necessary for the imposition of a death sentence were: (1) the existence of particular aggravating circumstances; (2) that those particular aggravating circumstances were "sufficient" to justify the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst* held that those determinations must be made by juries. These decisions are as substantive as whether a juvenile is incorrigible. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule). Thus, in *Montgomery*, these requirements amounted to an "instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish." *Id.* at 735.

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

Hurst v. State held not only that the requisite jury findings must be made beyond a reasonable doubt, but also that juror unanimity is necessary for compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders and that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Hurst v. State*, 202 So. 3d at 60-61. The function of the unanimity rule is to ensure that Florida's death-sentencing scheme complies with the Eighth Amendment and to "achieve the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law." *Id.* As a matter of federal retroactivity law, this is also substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"). And it remains substantive even though the subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (noting that state's ability to determine the method of enforcing constitutional rule does not convert a rule from substantive to procedural).

In *Welch*, the Court addressed the retroactivity of the constitutional rule articulated in *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). In *Johnson*, the Court held that a federal statute that allowed sentencing enhancement was unconstitutional. *Id.* at 2556. *Welch* held that *Johnson*'s ruling was substantive because it "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied"—therefore it must be applied retroactively. *Welch*, 136 S. Ct. at 1265. The Court emphasized that its determination whether a constitutional rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function," i.e., whether the new rule alters only the procedures used to obtain the conviction, or alters instead the class of persons the law punishes. *Id.* at 1266.

The same reasoning applies in the *Hurst* context. The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt and the Eighth Amendment requirement of jury unanimity in fact-finding are substantive constitutional rules as a matter of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on" the judge-sentencing scheme. *Id.* The "unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh

the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*," *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the very purpose of the rules is to place certain individuals beyond the state's power to punish by death. Such rules are substantive, *see Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes."), and *Montgomery* requires the states to impose them retroactively.

Hurst retroactivity is not undermined by *Summerlin*, 542 U.S. at 364, where this Court held that *Ring* was not retroactive in a federal habeas case. In *Ring*, the Arizona statute permitted a death sentence to be imposed upon a finding of fact that at least one aggravating factor existed. *Summerlin* did not review a statute, like Florida's, that required the jury not only to conduct the fact-finding regarding the aggravators, but also fact-finding on whether the aggravators were *sufficient* to impose death and whether the death penalty was an appropriate sentence. *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred in *Hurst* where this Court held that it was unconstitutional for a judge alone to find that "sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal citation omitted).

Moreover, *Hurst,* unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and this Court has always regarded proof-beyond-a-reasonable-doubt decisions as substantive. *See, e.g.*, *Ivan V. v. City of New*

York, 407 U.S. 203, 205 (1972) (explaining that "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect."); *see also Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware's state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof.").[18]

"Under the Supremacy Clause of the Constitution . . . . [w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Montgomery*, 136 S. Ct. at 731-32. Because the outcome-determinative constitutional rights articulated in *Hurst v. Florida* and *Hurst v. State* are substantive, the Florida Supreme Court was not at liberty to foreclose their retroactive application in Petitioner's case.

CONCLUSION

This Court should grant a writ of certiorari to review the decision below.

---

[18] A federal district judge in Florida, citing *Ivan*, has already observed the distinction between the holding of *Summerlin* and the retroactivity of *Hurst* arising from the beyond-a-reasonable-doubt standard. *See Guardado v. Jones*, No. 4:15-cv-256 (N.D. Fla. May 27, 2016) (explaining that *Hurst* federal retroactivity is possible despite *Summerlin* because *Summerlin* "did not address the requirement for proof beyond a reasonable doubt," and "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive").

Respectfully submitted,

/s/ BILLY H. NOLAS
BILLY H. NOLAS
Counsel of Record
SEAN T. GUNN
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818
billy_nolas@fd.org
sean_gunn@fd.org

MAY 2018