No. 17-_____

In the Supreme Court of the United States

PABLO SAN MARTIN,

Petitioner,

–v–

STATE OF FLORIDA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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**** CAPITAL CASE ****

QUESTION PRESENTED

Does the retroactivity formula created by the Florida Supreme Court pursuant to *Hurst v. Florida*, 136 S.Ct. 616 (2016) violate the Eight and Fourteenth Amendments to the United States Constitution.

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OPINIONS BELOW

The Florida's Supreme Court's decision in this case *San Martin v. State*, 237 So.3d 930 (Fla. 2018) and is reprinted in the Appendix (App.) at 1a. This was affirming the trial court's opinion denying Mr. San Martin's Successive Motion to Vacate Sentence and is reprinted in the Appendix (App.) at 2a

JURISDICTION

The judgment of the Florida Supreme Court was entered on February 28, 2018. App.1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSITUTIONAL PROVISIONS INVOLVED

- **U.S. Const. amend. VIII**

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

- **U.S. Const. amend. XIV**

  No State shall . . . the Due Process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The judgments and sentences under attack are as follows: Judgment of guilty for first degree murder.

On February 18, 1992, a grand jury sitting in Miami-Dade County indicted Mr. San Martin with one count of first degree murder. Mr. San Martin pled not guilty.

Mr. San Martin was tried for one court by a jury. The jury rendered a verdict of guilt on the charge of First Degree Murder on September 23, 1993.

After a penalty phase, the jury recommended death by a vote of 9 to 3 on November 4th, 1993.

The jury found Mr. San Martin guilty as charged on all counts and recommended the death penalty by a nine-to-three vote as to the first-degree murder conviction. The trial court found three aggravating circumstances beyond a reasonable doubt: (1) prior violent felony convictions; (2) the murder was committed during the course of an attempted robbery and for pecuniary gain; and (3) that the murder was committed in a cold, calculated, and premeditated manner (CCP). The court found no statutory mitigating circumstances and only one non-statutory mitigating circumstance, that being that Mr. San Martin was a good son, grandson, and brother, had found religion in jail, and displayed a good attitude during his incarceration. The court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Mr. San Martin to death on the first-degree murder

charge. The trial court imposed a death sentence on January 25th, 1994.

Mr. San Martin filed an appeal with the Florida Supreme Court. On Direct Appeal, Mr. San Martin raised sixteen (16) grounds.[1]

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[1] The grounds alleged were: (1) the jury was death-qualified and San Martin was denied individual sequestered voir dire of the prospective jurors; (2) the trial court denied San Martin's motion to sever his trial from codefendant Franqui which violated his Confrontation Clause rights because Franqui's confession incriminating San Martin was admitted into evidence at their joint trial; (3) the court admitted into evidence San Martin's and Franqui's statements to the police; (4) and (5) the evidence was insufficient to sustain the conviction for premeditated murder; (6) the prosecutor commented on San Martin's right to remain silent; (7) the general verdict form did not specify whether the jury found San Martin guilty of premeditated or felony murder; (8) San Martin was denied the use of experts at trial; (9) the State's mental health expert misstated the law relating to mitigating circumstances and the trial court erred in subsequently rejecting San Martin's claimed mitigating circumstances; (10) the trial court erred by instructing the jury on the CCP aggravating circumstance and by finding that CCP was applicable; (11) the trial court prohibited either argument or instruction to the jury regarding the potential imposition of consecutive sentences; (12) defense counsel was prohibited from fully cross-examining State witnesses who testified about San Martin's past convictions; (13) the trial court failed to instruct the jury as to specific non-statutory mitigating circumstances that San Martin claimed were applicable; (14) the death penalty statute and instructions unconstitutionally shift the burden to the defendant to prove that a death sentence is not warranted; (15) the death penalty statute is unconstitutional; (16) numerous instances of prosecutorial misconduct rendered the trial unfair; and (17) the trial court made reference to a separate, and at the time untried, charge against San Martin for the murder of a police officer. *San Martin v. State*, 705 So.2d 1337 (1997)

On direct appeal, this Court affirmed the conviction and sentence. *San Martin v. State*, 705 So.2d 1337 (Fla. 1998). The Florida Supreme Court ruled as to the different grounds: (1) that the issue had not been preserved below and further found no merit on the issue; (2) The Court found the error harmless beyond a reasonable doubt; (3) found that the trial's court ruling on the confession should be upheld; (4) & (5) the Court found no merits; The court found regarding issue VI that testimony about Petitioner's refusal to have his confession recorded did not amount to a comment on silence; (7) The court found that there was no requirement for a special verdict regarding the theory of first degree murder; (8) The Court determined that there was no abuse of discretion; (9) through 13 the court found that any error in the admission of the rebuttal testimony was invited by the defense, that the trial court had properly found the aggravators and rejected the mitigators based on competent substantial evidence, that the trial court had not abused its discretion regarding the admissibility of evidence at the penalty phase and that the jury instruction on nonstatutory mitigation was proper. *Id.* at 1347-50. Regarding the issues concerning alleged burden shifting and the State's comments, the court found that they were unpreserved and without merit. *Id.* at 1350. The Court also determined that the trial court erred in discussing the disparity in roles in another case where Mr. San Martin had been tried in discussing Abreu's life sentence but found that error harmless.

On October 4th, 1999, Mr. San Martin filed a motion to vacate judgment of conviction and sentence with special request for leave to amend. Mr. San Martin filed a contemporaneous motion for continuance of

deadline for filing his post-conviction relief motion. Mr. San Martin then filed a motion to disqualify the sitting judge. He supplemented this motion on April 18, 2000. The Court recused itself at the May 25th, 2000, hearing, due to the specific allegations that the prosecutor in the case, Ms. Millian, had threatened or coerced a witness into testifying falsely.

The Court held the *Huff* hearing on January 7th, 2002, wherein it denied 28 of the 30 claims of error presented in Mr. San Martin's amended motion. The Court granted an evidentiary hearing as to claims IV, V, and VI. The hearings were held on December 18th, 2002, and February 4, 2003.

Subsequent to the hearings, Defendant filed his notice of appeal as to the denial of his motion for post-conviction relief. San Martin appealed the denial of claim 5 after an evidentiary hearing, and the summary denial of claims 3, 9, 10, 11, 12, 17, 25, and 29. Claim five dealt with the allegation of the use of perjured testimony by the government. The Supreme Court of Florida found that even if the inconsistency was false, there was no reasonable possibility that it court had affected the proceedings. As to the balance of the claims, the court found that only two, 3 and 9 had not been waived or insufficiently plead. As to claim 3, the court found no prejudice and the confidence in the outcome was not undermined. As to Claim 9, the Court found that San Martin had not established prejudice. The Court entered its opinion on August 28th, 2008, affirming the Court below.

On December 18, 2008, Mr. San Martin filed a Writ in Federal Court, case number 08-23497-CIV-Huck. Mr. San Martin raised five claims, with sub-claims. The

claims were I, actual innocence, II Denial of reliable adversarial testing at the guilt phase, III denial of effective assistance of counsel at the penalty phase, IV Denial of a full and faith hearing in State Court claims, and V the Florida death penalty scheme is unconstitutional.

On August 14th, 2009, the circuit court denied the Writ of Habeas Corpus as filed untimely. The Court issued a certificate of appealability on September 9th, 2009. San Martin filed an Appeal on November 20th, 2009. It raised two issues: Where the Clerk of Courts for the Florida Supreme Court fails to Docket and notify the parties of the receipt of the Mandate from the U.S. Supreme Court, the lower Court should hold an evidentiary hearing to determine whether that delay ultimately resulted in the untimely filing of the Habeas Corpus petition; and where a Writ of Habeas Corpus petition is untimely filed because the petitioner did not receive actual notice of a U.S. Supreme Court order triggering the commencement of the one-year limitation set forth in 28 U.S.C. § 2244(d)(1)(A) until that order was docketed two weeks later with the state supreme court, the district court should apply equitable tolling to account for that delay where such equitable tolling would allow the petition to be heard on its merits. On February 23, 2011, the United States Court of Appeal for the Eleventh Circuit entered an order affirming the lower Court's ruling.

On May 20th, 2011, Mr. San Martin filed a Petition for Writ of Certiorari with the U.S. Supreme Court. The Petition was denied on October 3rd, 2011.

On Jan 12, 2016, the U.S. Supreme Court issued its decision in the case of *Hurst v. Florida*, 136 S.Ct.

616 (2016). On December 22nd, 2016, the Florida Supreme Court issued its decision in the case of *Mosley v. State*, 209 So.3d 1248 (Fla. 2016).

On August 23, 2017, Mr. San Martin filed his *Hurst/Mosley* petition in the Miami Dade County Circurt Court. On August 30th, the trial court entered a denial without a hearing. On September 21st, 2017, Mr. San Martin filed a notice of appeal of the denial. The Florida Supreme Court entered a *Per Curiam* denial of February 28th, 2018. This Writ follows.

STATEMENT OF FACTS

Below is the Florida Supreme Court's summary of the fact of the case.

Danilo Cabanas Sr., and his son Danilo Cabanas, Jr., operated a check-cashing business in Medley, Florida. On Fridays, Cabanas Sr. would pick up cash from his bank for the business. After Cabanas Sr. was robbed during one of his bank trips, his son and a friend, Raul Lopez, regularly accompanied him to the bank. On Friday, December 6, 1991, the trio left the bank with $25,000 in cash. The Cabanases rode together in a Chevrolet Blazer driven by the son; Lopez followed in his Ford pickup truck. As the trio drove alongside the Palmetto Expressway, their vehicles were "boxed in" at an intersection by two Chevrolet Suburbans. Two masked men exited from the front Suburban and began shooting at the Cabanases. When Cabanas Sr. returned fire, the assailants returned to

their vehicles and fled. Cabanas Jr. also saw one masked person exit the rear Suburban.

Following this exchange of gunfire, Lopez was found outside his vehicle with a bullet wound in his chest. He was transported to the hospital, but died shortly thereafter. The Suburbans driven by the masked men were found abandoned. It was subsequently determined that both vehicles had been stolen. The Suburbans suffered bullet damage, including thirteen bullet holes in one vehicle. The Cabanases' Blazer was also riddled with ten bullet holes.

San Martin's confession and a subsequent statement, in which he told the police where he had disposed of the weapons used in the incident, were admitted at trial. San Martin refused to allow either statement to be recorded stenographically, but did sign a waiver of his Miranda rights and orally confessed to the crime. San Martin admitted his involvement in the incident and recounted the details of the plan and how it was executed. He explained that Fernando Fernandez had told him and Franqui about Cabanas's check cashing business several months before this incident and that they had planned the robbery by watching Cabanas to learn his routine. He also explained how they used the stolen Suburbans to "box in" the victims at an intersection: San Martin and Abreu drove in front of the Cabanases' Blazer and Franqui pulled alongside the Blazer in the second Suburban so that the Cabanases could not escape. He also recounted that a brown pickup driven by Cabanas's "bodyguard" drove up behind the Blazer. San Martin stated that he exited the passenger side of the first Suburban armed with a 9mm semiautomatic pistol and

that Abreu exited the driver side armed with a "small machine gun." San Martin admitted that he initiated the robbery attempt by telling the occupants of the Blazer not to move and that he shot at the Blazer when the driver fired at them. However, he denied firing at Lopez's pickup. San Martin also detailed Franqui's role in the planning and execution of the crime. He placed Franqui in proximity to Lopez's pickup, but could not tell if Franqui fired his gun during the incident. San Martin initially claimed that he had thrown the weapons used in the incident off a Miami Beach bridge, but in a subsequent statement admitted that he had thrown the weapons into a river near his home and drew a map detailing the location. Two weapons, a 9mm semiautomatic pistol and a .357 revolver, were later recovered from that location by a police diver. San Martin did not testify at trial, but his oral confession and subsequent statement about the guns were admitted into evidence. Franqui's formal written confession was also admitted at trial, over San Martin's objection. Franqui initially denied any knowledge of the Lopez shooting, but confessed when confronted with photographs of the bank and the Suburbans. Franqui recounted the same details of the planning and execution of the crime that San Martin had detailed. Franqui admitted that he had a .357 or .38 revolver. He also stated that San Martin's 9mm semiautomatic jammed at times and that Abreu carried a Tech–9 9mm semiautomatic which resembles a small machine gun. Franqui claimed that he returned fire in Lopez's direction after Lopez opened fire on him. A police firearms expert testified that the bullet recovered from Lopez's body was consistent with the .357 revolver used by Franqui during

the attempted robbery. The expert also stated that a bullet recovered from the passenger mirror of one of the Suburbans and a bullet found in the hood of the Blazer was definitely fired from the same gun as the Lopez bullet. However, due to the rust on the .357 recovered from the river, the expert could not rule out the possibility that all three bullets had been fired from another .357 revolver. *Id.* at 1341-42.

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

As this Court ruled in *Godfrey v. Georgia*, 446 U.S. 420 (1980), "the Eighth and Fourteenth Amendments to the United States Constitution mandate 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.

A. The Results of the Florida Supreme Court's *Hurst* Retroactivity Decision Is Arbitrary and Capricious in Practice

In its decision of *Asay v. State*, 210 So.3d 1 (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), using Florida's three-factor analysis derived from *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965).

The Florida Supreme Court, relying on the reliance on the old rule and on the effect on the administration of justice prongs, ruled that those cases where the sentences became final prior to this Court's June 24, 2002, decision in *Ring v. Arizona*, 536 U.S. 584 (2002) would not receive relief under *Hurst.* Mr. San Martin finds himself in that category.

The Florida Supreme Court's rationale, however, fails to address the question here presented: If Florida's capital sentencing was in 2002, and Appellant had his post-conviction relief pending before the Florida trial court, and appeals thereafter, shouldn't appellant's preserved objection be now sustained? The fact is that Florida's capital sentencing scheme did not "become" unconstitutional when *Ring* was decided—it was always unconstitutional, but that fact lingered beyond the grasp of the Florida Supreme Court.

The arbitrariness of Florida Supreme Court's rule, in practice, is laid bare by the results in two unrelated cases: Gary Bowles and James Card. The Supreme Court of Florida affirmed the two death sentences on the same daythe 11th of October 2001 in separate opinions. *See Bowles v. State*, 804 So.2d 1173 (Fla. 2001); *Card v. State*, 803 So.2d 613, 617 (Fla. 2001).

By chance, by luck, by the flow of paperwork, Mr. Card's sentence became final four days after *Ring* was decided. Mr. Bowles's sentence became final seven days before *Ring* was decided. Following its rule, the

Supreme Court of Florida granted *Hurst* relief to Mr. Card, but not to Mr. Bowles. This is arbitrary.

B The Florida Supreme Court's *Mosley* Decision Requires That *Hurst* Be Applied Retroactively in the Case at Bar

How the Florida Supreme Court squares this application to its own rationale in *Mosley* defies explanation. In *Mosley*, the Florida Supreme Court ruled that because "because *Mosley* raised a *Ring* claim at his first opportunity and was then rejected at every turn, we conclude that fundamental fairness requires the retroactive application of *Hurst*, which defined the effect of *Hurst v. Florida*, to Mosley." *Mosley* at 1275.

As several members of the Florida Supreme Court have pointed out in their dissents, this bright line cutoff cannot be explained. As Justice Pariente wrote in *Asay*: "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). In fact, Justice Pariente made it clear that "fundamental fairness" requires the retroactive application of *Hurst* to all capital defendants in Florida. *Asay*, 210 So.3d at 36 (Pariente, J., concurring in part and dissenting in part)

Justice Perry's dissent was more clear and direct when it clearly stated that " . . . 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 groups of similarly situated persons." *Id.* at 37 (Perry, J., dissenting). 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.

CONCLUSION

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

Respectfully submitted,

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