DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

IAN DECO LIGHTBOURNE,
Petitioner

vs.

STATE OF FLORIDA,
Respondent.

On petition for a writ of certiorari to the Florida Supreme Court

PETITION FOR A WRIT OF CERTIORARI

SUZANNE MYERS KEFFER
Chief Assistant Capital Collateral Regional Counsel
Counsel of record

NICOLE M. NOËL
Assistant Capital Collateral Regional Counsel
Capital Collateral Regional Counsel-South
1 East Broward Boulevard, Suite 444
Fort Lauderdale, FL 33301
(954) 713-1284

QUESTION PRESENTED

CAPITAL CASE

Whether Florida's limited retroactive application of its Eighth Amendment decision in *Hurst v. State* violates the Eighth and Fourteenth Amendments because it arbitrarily uses as a cutoff date a 2002 decision that invalidated Arizona's capital sentencing scheme under the Sixth Amendment, and results in the disparate treatment of similarly situated individuals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PETITION FOR WRIT OF CERTIORARI

Ian Deco Lightbourne respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court.

OPINIONS BELOW

The Florida Supreme Court's postconviction opinion at issue in this petition is reported as *Lightbourne v. State*, 235 So. 3d 285 (Fla. 2018). Pet. App. A. The postconviction court's order denying relief is unreported and is referenced as *State v. Lightbourne*, Order, Case No. 1981-CF-170-A-W (Fla. 5th Jud. Cir. April 6, 2017). Pet. App. B.

JURISDICTION

The Florida Supreme Court affirmed the denial of Lightbourne's postconviction motion on January 26, 2018. On April 20, 2018, Justice Thomas granted Lightbourne's application to extend the time for filing a petition for writ of certiorari to June 25, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition presents violations of the Eighth and Fourteenth Amendments to the United States Constitution.

INTRODUCTION

In 1972, this Court held that the death penalty was unconstitutional because "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed." *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring). As Justice Marshall put it, the question is "not whether we condone rape or murder, for surely we do not; it is whether capital punishment is 'a punishment no longer consistent with our own self-respect' and, therefore, violative of the Eighth Amendment." *Id.* at 315. (Marshall, J., concurring).

This Court's capital jurisprudence since *Furman* has reflected the reality that "death is different," "unique in its severity and irrevocability," and cannot be "inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 187-88 (1976). Therefore, reliability is paramount. Because "the penalty of death is qualitatively different from a sentence of imprisonment, . . . there is a corresponding difference in the need for reliability" in capital cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *See also Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (there is a "qualitative difference" between death and other penalties requiring "a greater degree of reliability when the death sentence is imposed").

In 2002, this Court held that Arizona's death penalty scheme violated the Sixth Amendment. *Ring v. Arizona*, 536 U.S. 584 (2002). The Florida Supreme Court refused to apply *Ring* in Florida for fourteen years, during which time it approved the executions of forty-one people. Then, in 2016, this Court held that

Ring does apply in Florida, and struck down Florida's capital punishment scheme because it violated the Sixth Amendment. *Hurst v. Florida*, 136 S. Ct. 616 (2016).

On remand, the Florida Supreme Court held that the critical findings of fact that allowed for consideration of the death penalty—the existence of aggravators sufficient to outweigh the mitigators—must be found by a jury, and that the Eighth Amendment requires those findings to be made unanimously and beyond a reasonable doubt. *Hurst v. State*, 202 So. 3d 40, 58 (2016). The court also held that the Eighth Amendment demands that a jury's ultimate sentencing recommendation must be unanimous. *Id.* at 59. The court explained that unanimity is required because it provides "the highest degree of reliability in meeting . . . constitutional requirements in the capital sentencing process." *Id.* at 60. Unanimity also ensures that Florida's capital sentencing laws "keep pace with 'evolving standards of decency.'" *Id.*, quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

In other words, unanimity keeps the death penalty (for those states that still use it) consistent with our own self-respect.

But instead of applying *Hurst v. State* retroactively to all inmates sentenced to death under Florida's unconstitutional scheme, the Florida Supreme Court "tumble[d] down the dizzying rabbit hole of untenable line drawing." *Asay v. State*, 210 So. 3d 1, 30 (Fla. 2016) (Lewis, J., concurring in result). In two cases issued on the same day, the Florida Supreme Court held that prisoners whose death sentences became final after *Ring* issued on June 24, 2002 would receive the benefit of *Hurst v. State*. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). Those whose

sentences became final before June 24, 2002 would not. *Asay*, 210 So. 3d at 11.

Florida's decision to grant limited retroactivity based on the date *Ring* issued—or any date—injects arbitrariness into Florida's capital sentencing scheme. Finality dates often turn on random occurrences like delays in the clerk's transmittal of the direct appeal record to the Florida Supreme Court, or whether direct appeal counsel sought extensions of time to file a brief, or whether counsel chose to file a cert petition in this Court or sought an extension to file one. Another arbitrary factor affecting whether a prisoner gets relief is whether relief was granted somewhere along the way. Some prisoners whose cases date back to the 1980s will receive the benefit of *Hurst v. State*, while others whose cases are just as old will not. *See, e.g.*, *Johnson v. State*, 205 So. 3d 1285, 1285 (Fla. 2016) (granting a new sentencing under *Hurst* to a defendant whose three homicides occurred in 1981, but who was granted relief on a third successive postconviction motion in 2010).

Finally, and most importantly, Florida is denying the benefit of *Hurst v. State*—an Eighth Amendment decision—to one group of individuals and not another, based on the date *Ring*—a Sixth Amendment decision—issued. These random distinctions between those who will receive the benefit of *Hurst v. State* and those who will not can only be described as arbitrary and capricious.

Limited retroactivity also violates the Fourteenth Amendment. Because both groups were sentenced under the same unconstitutional scheme, Florida's refusal to make *Hurst v. State* fully retroactive results in unequal treatment of similarly

situated prisoners. *See Desist v. United States*, 394 U.S. 244, 258-259 (1969) (Harlan, J., dissenting) ("[W]hen another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law.").

Florida's limited retroactivity ensures an unreliable and arbitrary death penalty system that treats similarly situated individuals differently in violation of the Eighth and Fourteenth Amendments.

STATEMENT OF THE CASE AND FACTS

Ian Deco Lightbourne was convicted of first degree murder in 1981. He was sentenced to death based on the recommendation of a jury whose vote was never recorded, and the judge alone made the requisite findings of fact to allow for the imposition of a death sentence.

At his trial, after Lightbourne's motion to suppress his statements was denied, prosecutors introduced the testimony of Theodore Chavers, a jailhouse informant whom the police placed in Lightbourne's cell and told to "keep his ears open." After providing Lightbourne's statements to the police, Chavers received two hundred dollars in cash from the Marion County Sheriff's Department and was released nineteen days early. *Lightbourne v. State*, 438 So. 2d 380, 386 (Fla. 1983).

Throughout the trial, the jurors were repeatedly instructed that the judge, not the jury, made the ultimate sentencing decision, and that their recommendation

was merely advisory. The jurors were also repeatedly told that their sentencing vote did not need to be unanimous, and that a mere majority of seven was sufficient.

The jury found Lightbourne guilty as charged. After a penalty phase that lasted less than two hours, the jury recommended a sentence of death after deliberating for one hour and five minutes about whether Lightbourne should live or die. As instructed, the jury did not make any factual findings regarding aggravating or mitigating circumstances.

Postconviction investigation later revealed that a wealth of mitigating information was available but not presented to Lightbourne's jury at trial. His mother, two of his brothers, and four of his sisters could have testified regarding his poverty-stricken childhood and his exemplary traits as an adolescent, young child, and teenager. Lightbourne's pastor and school vice-principal would have testified that Lightbourne was physically abused by his brother, Stan. Thirteen additional affidavits from friends and acquaintances were submitted in postconviction on Lightbourne's behalf, and fifty-three people from his township in the Bahamas signed a letter in support of him. But the jury that recommended death heard none of it, and neither did the judge who sentenced him.

The judge immediately made written findings of fact and imposed a death sentence. Although the jury had been instructed on nine aggravating circumstances, the judge found that only five had been proven beyond a reasonable doubt: (1) that the crime was committed during the course of a robbery; (2) the crime was committed to avoid arrest; (3) the crime was committed for pecuniary gain; (4) the

crime was heinous, atrocious, and cruel; and (5) the crime was committed in a cold, calculated, and premeditated manner. *Lightbourne*, 438 So. 2d at 390-91. The judge found two statutory mitigators: (1) Lightbourne had no significant criminal history; and (2) Lightbourne was only twenty-one years old at the time of the crime. *Id.* at 390.

The Florida Supreme Court affirmed Lightbourne's conviction and death sentence. *Lightbourne*, 438 So. 2d at 391. However, Justice Overton dissented and would have granted a new trial based on the State's violation of *United States v. Henry*, 447 U.S. 264 (1980):

> I reluctantly dissent because I find the recent United States Supreme Court decision in *United States v. Henry*, 447 U.S. 264 (1980), mandates a reversal under the circumstances of this case. A jailhouse informer was placed in a cell adjacent to appellant's and was requested to keep his ears open. The investigating officer understood that the informant expected something in return for his information, and the informant was paid two hundred dollars in cash, in addition to being released nineteen days early in return for his services. These factors make the informant an agent of the state under the dictates of *Henry*, which requires suppression of the statements made by the appellant to the informant in the absence of Miranda warnings. I find we have no choice but to grant a new trial.

Id. at 392 (Overton, J., dissenting). This Court denied certiorari. *Lightbourne v. Florida*, 465 U.S. 1051 (1984).

On May 9, 1985, the governor signed a death warrant setting Lightbourne's execution for the week of May 29-June 4, 1985. Lightbourne did not have counsel and remained without counsel until May 22, 1985. On May 31, Lightbourne filed a

motion to vacate his judgment and sentence under Florida Rule of Criminal Procedure 3.850, which the trial court treated as both a motion for a stay of execution and a motion for postconviction relief. *Lightbourne v. State*, 471 So. 2d 27, 27 (Fla. 1985). The Florida Supreme Court affirmed the trial court's summary denial of relief, with three justices dissenting. *Id.* at 29.

Lightbourne filed a habeas petition in federal district court along with a motion for a stay of execution on June 3, 1985. That same day, the district court granted the stay to review Lightbourne's petition. On August 20, 1986, the court denied the petition and dissolved the stay. The Eleventh Circuit Court of Appeals affirmed the denial of relief on September 17, 1986, over the ardent dissent of Judge Anderson, who, like Justice Overton, found that the *Henry* violation required resentencing:

> [T]he error is not harmless with regard to sentencing. Chavers' testimony contained the only direct evidence of oral sexual assault on the victim as well as the only graphic descriptions of the sexual attack and comments by the defendant about the victim's anatomy. Since this evidence would support the existence of an aggravating circumstance, and since it was likely to have been influential with the jury on the sentencing issue, I cannot conclude that the testimony was harmless with regard to sentencing.

Lightbourne v. Dugger, 829 F.2d 1012, 1035 (11th Cir. 1987) (Anderson, J., concurring in part and dissenting in part).

On January 6, 1989, the governor signed a second death warrant and an execution date was set for February 1, 1989. On January 27, 1989, Lightbourne filed a motion for stay of execution and a habeas petition in the Florida Supreme

Court, where he raised, among other claims, a challenge to his death sentence based on *Caldwell v. Mississippi*, 472 U.S. 320 (1985), arguing that the prosecutor's arguments and judicial instructions unconstitutionally diminished the jury's role in violation of the Eighth Amendment. *Caldwell* did not exist at the time of Lightbourne's trial and direct appeal, but Lightbourne raised the claim at his first opportunity. *See McCorquodale v. Kemp*, 829 F.2d 1035, 1036-37 (11th Cir. 1987) (*Caldwell* represents "new law" requiring merits review in successive federal habeas action involving petitioner whose first petition was filed before issuance of *Caldwell* opinion).

On January 30, 1989, Lightbourne filed a Rule 3.850 motion to vacate in circuit court, alleging a violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). Lightbourne asserted that jailhouse informants Theodore Chavers and Theophilus Carson (whose real name was James Gallman) acted as state agents when they obtained statements from Lightbourne that were used against him at trial. Not only was Chavers a state agent, but he had also lied about Lightbourne's alleged statements to curry favor with the State in exchange for help with his many charges, several of which were dropped. Lightbourne also asserted that Carson had worked for the State too, and that Lightbourne had never admitted killing the victim to either of them, but that the State made Carson testify that he did at trial.

The Florida Supreme Court granted the stay on January 31, 1989, and on July 20, the Florida Supreme Court remanded the case for an evidentiary hearing

on Lightbourne's *Brady/Giglio* claim and denied his remaining claims, including the *Caldwell* claim. *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989).

The circuit court held evidentiary hearings in 1990 and 1991. Counsel was unable to locate Carson for the hearings despite diligently searching for him, and the circuit court denied relief in a three-page order on June 12, 1992. The Florida Supreme Court affirmed. *Lightbourne v. State*, 644 So. 2d 54 (Fla. 1994). This Court denied certiorari. *Lightbourne v. Florida*, 514 U.S. 1038 (1995).

In 1994, Lightbourne's postconviction counsel located Carson and obtained a sworn affidavit from him stating that he had lied at Lightbourne's trial based on information the police fed to him. He also stated that the police had threatened him and promised him a deal in exchange for his cooperation. Lightbourne filed a third Rule 3.850 motion requesting another evidentiary hearing, and the circuit court held hearings on October 23 and 24, 1995. On February 23, 1996, Lightbourne filed a motion to reopen the hearing to present the testimony of Larry Emanuel, another inmate who was incarcerated with Lightbourne prior to trial who was solicited by police to testify against Lightbourne, as well as a motion to disqualify the prosecutor. The circuit court denied relief on June 19, 1996.

On appeal, the Florida Supreme Court remanded "for an evidentiary hearing as to Emanuel's testimony and for the trial court to consider the cumulative effect of the post-trial evidence in evaluating the reliability and veracity of Chavers' and Carson's trial testimony in determining whether a new penalty phase is required." *Lightbourne v. State*, 742 So. 2d 238 (Fla. 1999). After yet another evidentiary

hearing, the circuit court denied relief, and the Florida Supreme Court affirmed. *Lightbourne v. State*, 841 So. 2d 431 (Fla. 2003). This Court denied certiorari. *Lightbourne v. Florida*, 540 U.S. 1006 (2003).

In 2003, Lightbourne filed a successive habeas petition in the Florida Supreme Court challenging his death sentence under *Ring*, arguing that Florida's capital sentencing procedures violated his Sixth Amendment right to have a unanimous jury find all of the elements necessary to find him guilty of capital first degree murder and thus eligible for a death sentence. The Florida Supreme Court denied the petition without issuing an opinion, but indicated on its docket that the petition was denied based on *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) and *King v. Moore*, 831 So. 2d 143 (Fla. 2002). *See* Florida Supreme Court Docket, Case No. SC03-1058, *available at* http://onlinedocketssc.flcourts.org/DocketResults/LTCases?CaseNumber=1058&CaseYear=2003. This Court denied certiorari. *Lightbourne v. Crosby*, 545 U.S. 1120 (2005).

In 2006, Lightbourne filed a successive Rule 3.851 motion challenging Florida's lethal injection procedure and statute after the botched execution of Angel Diaz, which was denied. The Florida Supreme Court affirmed. *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007). This Court denied certiorari. *Lightbourne v. McCollum*, 553 U.S. 1059 (2008). In 2010, Lightbourne filed another successive Rule 3.851 motion based on *Porter v. McCollum*, 558 U.S. 30 (2009), which was denied. The Florida Supreme Court affirmed. *See Lightbourne v. State*, 94 So. 3d 501 (Fla. 2012).

In 2016, this Court declared Florida's capital sentencing scheme unconstitutional because "[t]he Sixth Amendment 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." *Hurst v. Florida*, 136 S. Ct. at 619. This Court held that "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's" death penalty." *Id.* at 621-22.

On remand, the Florida Supreme Court held:

> [T]he Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances.

Hurst v. State, 202 So. 3d at 44. The court specifically based its decision on the Eighth Amendment:

> We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

Id.

Two months later, in two opinions issued on the same day, the Florida

Supreme Court addressed the retroactivity of the *Hurst* decisions. Rather than applying them retroactively to every Florida prisoner who was sentenced to death under the same unconstitutional scheme, the court instead decided that the *Hurst* decisions should apply retroactively only to those whose death sentences became final after *Ring*, a Sixth Amendment case. *Mosley*, 209 So. 3d at 1283. And in *Asay*, the court decided that the *Hurst* decisions should not apply to those whose sentences became final before *Ring*. *Asay*, 210 So. 3d at 21-22. The court did not address the fact that all of Florida's condemned prisoners were sentenced to death under a process no longer considered acceptable under the **Eighth** Amendment, and thus no longer "consistent with our own self-respect." *See Furman*, 408 U.S. at 315 (Marshall, J., concurring).

The Florida Supreme Court was sharply divided, with several justices expressing grave concerns that limited retroactivity would result in arbitrariness. Justice Perry lamented 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." *Asay*, 210 So. 3d at 37 (Perry, J., dissenting). Justice Perry correctly predicted that "there 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.* at 38.

Justice Pariente wrote, "The majority's conclusion results in an unintended arbitrariness as to who receives relief depending on when the defendant was

sentenced or, in some cases, resentenced." *Asay,* 210 So. 3d at 36 (Pariente, J., concurring in part and dissenting in part). "To avoid such arbitrariness," she continued, "*Hurst* should be applied retroactively to all death sentences." *Id.*

Justice Lewis agreed, warning that the majority had "tumbled down the dizzying rabbit hole of untenable line drawing" by splitting death row into two groups. *Asay,* 210 So. 3d at 30 (Lewis, J., concurring in result). He continued:

> As Justice Perry noted in his dissent, there is no salient difference between June 23 and June 24, 2002—the days before and after the case name *Ring* arrived. See Perry, J., dissenting op. at 38. However, that is where the majority opinion draws its determinative, **albeit arbitrary**, line. As a result, Florida will treat similarly situated defendants differently—here, the difference between life and death—for potentially the simple reason of one defendant's docket delay. Vindication of these constitutional rights cannot be reduced to either fatal or fortuitous accidents of timing.

Id. at 31 (emphasis added).

Justice Canady wrote:

> Based on an indefensible misreading of *Hurst v. Florida* and a retroactivity analysis that leaves the *Witt* framework in tatters, the majority unjustifiably plunges the administration of the death penalty in Florida into turmoil that will undoubtedly extend for years. I strongly dissent from this badly flawed decision.

Mosley, 209 So. 3d at 1291 (Canady, J., concurring in part, dissenting in part)

On January 11, 2017, Lightbourne filed a successive motion for postconviction relief based on *Hurst v. Florida* and *Hurst v. State.* He argued that his death sentence must be vacated because a judge, and not the jury, made the necessary factual findings to subject him to a death sentence, and because the jury's

recommendation in favor of death was unrecorded and unknown. He asserted that the *Hurst* decisions should apply retroactively to him under state and federal law, specifically invoking the Sixth, Eighth, and Fourteenth Amendments to the U.S Constitution. Lightbourne also argued that limited retroactivity violates both the state and federal constitutions.

The circuit court summarily denied Lightbourne's motion on April 6, 2017. Pet. App. B. Lightbourne appealed to the Florida Supreme Court, and his appeal was stayed pending the resolution of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). On August 10, 2017, the Florida Supreme Court denied relief in *Hitchcock*:

> Although Hitchcock references various constitutional provisions as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*. As such, these arguments were rejected when we decided *Asay*.

Id. at 217. Justice Pariente dissented, pointing out that the court "did not in *Asay*, however, discuss the new right announced by this Court in *Hurst* to a unanimous recommendation for death under the Eighth Amendment . . . . Therefore, *Asay* does not foreclose relief in this case, as the majority opinion assumes without explanation." *Id.* at 220. (Pariente, J., dissenting).

The Florida Supreme Court prohibited Lightbourne from appealing the circuit court's denial of his motion. Rather than allowing him to fully brief his arguments, the court denied his right to appeal and ordered him to "show cause" why the circuit court's denial of his motion should not be affirmed in light of

Hitchcock. Lightbourne responded that as a preliminary matter, the Florida Supreme Court's denial of full appellate review violated due process and the Eighth Amendment, given that this Court relies on the capital appeals process to ensure that the death penalty "will not be imposed in an arbitrary or capricious manner," and "to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system . . . ." *See Proffitt v. Florida*, 428 U.S. 242, 252-53 (1976)

Lightbourne then argued that although *Asay* held that *Hurst v. Florida* should not apply to the "pre-*Ring*" group, *Asay* did not foreclose Eighth Amendment relief under *Hurst v. State*, nor did *Hitchcock*. In fact, the *Asay* court acknowledged that *Hurst v. Florida* emanates from the **Sixth** Amendment. *Asay*, 210 So. 3d at 11 (emphasis added). The court also recognized that *Hurst v. Florida* "did not address whether Florida's sentencing scheme violates the Eighth Amendment." *Id.* at 15.

On January 26, 2018, the Florida Supreme Court affirmed the trial court's denial of relief, holding that because Lightbourne's death sentence became final in 1984, "*Hurst* does not apply retroactively to [his] sentence of death. *See Hitchcock*, 226 So. 3d at 217." *Lightbourne v. State*, 235 So. 3d 285, 286 (Fla. 2018), Pet. App. A.

REASONS FOR GRANTING THE PETITION

The Florida Supreme Court's limited retroactivity rule violates the Eighth Amendment because it ensures that the death penalty will be arbitrarily and capriciously inflicted.

In *Furman*, this Court held that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be

inflicted in an arbitrary and capricious manner." *Gregg*, 428 U.S. at 188; *see also Furman*, 408 U.S. at 239-40. The finality of a death sentence on direct appeal is inherently arbitrary. Finality can depend on whether there were delays in transmitting the record on appeal[1]; whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with the Court's summer recess; whether an extension was sought for rehearing and whether such a motion was filed; whether counsel chose to file a cert petition in this Court or sought an extension to do so; and how long a certiorari petition was pending.

This inherent arbitrariness is exemplified by two unrelated cases. The Florida Supreme Court affirmed Gary Bowles's and James Card's death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both men petitioned this Court for a writ of certiorari. Card's sentence became final four days after *Ring* was decided—on June 28, 2002—when this Court denied his cert petition. *Card v. Florida*, 536 U.S. 963 (2002). However, Bowles's sentence became final seven 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 Card a new sentencing proceeding, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card v. Jones*, 219 So. 3d 47, 47 (2017). However, Bowles, whose direct appeal

[1] *See e.g., Lugo v. State*, 845 So. 2d 74 (Fla. 2003) (two-year delay between the time defense counsel filed a notice of appeal and the record on appeal being transmitted to this Court almost certainly resulted in the direct appeal being decided post-*Ring*).

was decided **the same day** as Card's, falls on the other side of Florida's limited retroactivity cutoff and will not receive the benefit of the *Hurst* decisions.

There are also cases where a capital defendant's death sentence was vacated in collateral proceedings, a resentencing was ordered, and another death sentence was imposed that was pending on appeal when *Hurst v. Florida* issued, or who received new trials on crimes that pre-dated *Ring* by decades.[2] Those people will receive the benefit of the *Hurst* decisions simply because their death sentence was not "final" when *Hurst* issued. There can be no other word to describe such disparate outcomes but arbitrary. To deny Lightbourne the retroactive application of the *Hurst* decisions because his death sentence became final before June 24, 2002 while granting retroactive *Hurst* relief to inmates whose death sentences were not final on June 24, 2002 violates Lightbourne's right to be free from arbitrary infliction of the death penalty under the Eighth Amendment.

Lightbourne also challenged his death sentence based on *Hurst v. State*'s holding that a death sentence flowing from a non-unanimous death recommendation lacks reliability and violates the Eighth Amendment. *Hurst v. State* established a presumption of a life sentence that is the equivalent of the guilt phase presumption of innocence, which cannot be overcome unless the jury

---

[2] *See, e.g., Armstrong v. State*, 211 So. 3d 864 (Fla. 2017) (resentencing ordered where conviction was final in 1995 for a 1990 homicide); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (resentencing ordered where conviction was final in 1993 for three 1981 homicides); *Hardwick v. Sec'y, Fla. Dept. of Corr.*, 803 F. 3d 541 (11th Cir. 2015) (resentencing ordered where conviction was final in 1988 for a 1984 homicide); *Dougan v. State*, 202 So. 3d 363 (Fla. 2016) (*Hurst* will govern at defendant's retrial on a 1974 homicide); *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014) (defendant awaiting retrial for a 1985 homicide at which *Hurst* will govern).

unanimously makes the requisite findings beyond a reasonable doubt and unanimously recommends a death sentence. This Court recognized that the requirement that the jury must unanimously recommend death before the presumption of a life sentence can be overcome does not arise from the Sixth Amendment, or from *Hurst v. Florida*, or from *Ring*. This right emanates from the Eighth Amendment.

"Reliability is the linchpin of Eighth Amendment jurisprudence, and a death sentence imposed without a unanimous jury verdict for death is inherently unreliable." *Hitchcock*, 226 So. 3d at 220 (Pariente, J., dissenting). The requirement that the jury unanimously vote in favor of a death recommendation is necessary to enhance the reliability of death sentences. "A reliable penalty phase proceeding requires that the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed." *Hurst v. State*, 202 So. 3d at 59.

The Florida Supreme Court recognized the need for heightened reliability in capital cases. *Id.* ("We also note that the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.). *See Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case."). In *Mosley*, the Florida Supreme Court noted that

the unanimity requirement in *Hurst v. State* carried with it the "heightened protection" necessary for a capital defendant. 209 So. 3d at 1278. The court also noted that *Hurst v. State* had "emphasized the critical importance of a unanimous verdict." *Id.*

Lightbourne's death sentence lacks the heightened reliability demanded by the Eighth Amendment. His jury's vote was never recorded, and we can never know what it was. His penalty phase—if it can be called that—lasted less than two hours. The jury began penalty deliberations at 10:53 a.m. and returned a recommendation at 11:58 a.m., a mere hour and five minutes later. As the Florida Supreme Court recognized, "juries not required to reach unanimity tend to take less time deliberating and cease deliberating when the required majority vote is achieved rather than attempting to obtain full consensus . . . ." *Hurst v. State*, 202 So. 3d at 58.

An unrecorded vote for a death recommendation obtained from one hour of deliberation after a two-hour penalty phase cannot possibly be considered reliable.

Moreover, *Hurst v. State* recognized that evolving standards of decency require unanimous recommendations:

> Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (holding that the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a

maturing society.").

202 So. 3d at 60. Such Eighth Amendment protections are generally understood to be retroactive. *See, e.g., Miller v. Alabama*, 567 U.S. 460 (2012) (holding retroactive a case which held that mandatory sentences of life without parole for juveniles are unconstitutional); *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting the execution of intellectually disabled individuals).

The Florida Supreme Court continues to deny important Eighth Amendment claims by citing *Asay* and *Hitchcock*, but as Justice Pariente recognized in her *Hitchcock* dissent:

> **This Court did not in *Asay*, however, discuss the new right announced by this Court in *Hurst* [*v. State*] to a unanimous recommendation for death under the Eighth Amendment.** Indeed, although the right to a unanimous jury recommendation for death may exist under both the Sixth and Eighth Amendments, the retroactivity analysis, which is based on the purpose of the new rule and reliance on the old rule, is undoubtedly different in each context. Therefore, *Asay* does not foreclose relief in this case, as the majority opinion assumes without explanation.

226 So. 3d at 220 (Pariente, J., dissenting) (emphasis added). The Florida Supreme Court has yet to address Eighth Amendment claims in any meaningful way, sidestepping the issue by citing other cases—*Asay* and *Hitchcock*—where it failed to address those arguments.

Mark James Asay never made a claim under the Eighth Amendment and Hurst v. State. After *Hurst v. Florida* issued on January 12, 2016, he challenged his death sentence in a postconviction motion filed in late January 2016, arguing that

under *Witt v. State*, 387 So.2d 922 (Fla. 1980), the Florida Supreme Court should retroactively apply *Hurst v. Florida* to his case. Briefing was completed on February 23, 2016, and oral argument was held on March 2. The Florida Supreme Court denied Asay's motion for supplemental briefing on March 29. Other than two pro se pleadings filed in May 2016, Asay filed nothing further.

Hurst v. State issued on October 14, 2016. Asay filed nothing after the issuance of *Hurst v. State*, and then the Florida Supreme Court issued its decision in *Asay* on December 22. Asay did not present any arguments or constitutional claims based on *Hurst v. State*. Asay did not present an argument that his death sentences violated the Eighth Amendment based on *Hurst v. State*. Asay made no arguments regarding the retroactivity of *Hurst v. State*. And yet, in *Hitchcock*, the Florida Supreme Court stated that Hitchcock's "various constitutional" arguments "were rejected when we decided *Asay*." *Hitchcock*, 226 So. 3d at 217. But Asay never presented those arguments and they were not before the court.

Additionally, Lightbourne's jury was repeatedly instructed that its penalty phase verdict was merely advisory and only needed to be returned by a majority vote. However, the Eighth Amendment requires jurors to feel the weight of their sentencing responsibility in capital cases. As this Court explained in *Caldwell*, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29. *See also Blackwell v. State*, 79 So. 731, 736 (Fla. 1918). Diminishing an individual

juror's sense of responsibility for the imposition of a death sentence creates a "bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Caldwell*, 472 U.S. at 330.

Lightbourne's jurors were told that the judge would make the final sentencing decision, and that their "recommendation" was merely advisory. The jurors were not told that their vote had to be unanimous, or that their recommendation was binding on the sentencing judge. The jurors were not advised of each juror's authority to dispense mercy. The jury was never instructed that it could still recommend life as an expression of mercy, or that they were "neither compelled nor required" to vote for death even if it determined that there were sufficient aggravating circumstances that outweighed the mitigating circumstances. Lightbourne's jury's unrecorded advisory recommendation simply "does not meet the standard of reliability that the Eighth Amendment requires." *Id.* at 341.

Since *Asay*, Florida continues to ignore Eighth Amendment challenges based on *Asay* and *Hitchcock*, where the issues were never raised. Three Justices of this Court have recognized that "capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that [this Court] has failed to address." *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Sotomayor, J., joined by Ginsburg, J., and Breyer, J., dissenting from the denial of certiorari). *See also*; *Middleton v. Florida*, 138 S. Ct. 829 (2018) (Sotomayor, J., joined by Ginsburg, J., and Breyer, J., dissenting from the denial of certiorari); *Guardado v. Jones*, 138 S.

Ct. 1131 (2018) (Sotomayor, J., dissenting from the denial of certiorari).

The Florida Supreme Court's failure to address these important Eighth Amendment claims continues, as Justice Sotomayor recognized most recently in *Kaczmar v. Florida*, 2018 WL 3013960 (U.S. June 18, 2018) (Sotomayor, J., dissenting). Justice Sotomayor pointed out that although the Florida Supreme Court recently "set out to 'explicitly address' the *Caldwell* claim" in *Reynolds v. State*, 2018 WL 1633075 (Fla. Apr. 5, 2018), the issue remains unresolved because the opinion "gathered the support only of a plurality, so the issue remains without definitive resolution by the Florida Supreme Court." *Id.*, at *1. As Justice Sotomayor wrote, "the stakes in capital cases are too high to ignore such constitutional challenges." *Truehill*, 138 S. Ct. at 4.

The Florida Supreme Court's limited retroactivity rule violates the Equal Protection Clause of the Fourteenth Amendment because it ensures the disparate treatment of similarly situated individuals.

Florida's decision to apply the *Hurst* decisions only to the "post-*Ring*" group of death row inmates results in the unequal treatment of prisoners who were all sentenced to death under the same unconstitutional scheme. Even worse, the "pre-*Ring*" group is much more likely to have been convicted and sentenced to death under procedures that would not pass constitutional muster today.

This Court has previously grappled with the question of whether a different retroactivity rule should apply when a new rule is a "clear break" from the past. The Court made it clear that "selective application of new rules violates the principle of treating similarly situated defendants the same." *Griffith v. Kentucky*, 479 U.S. 314,

323 (1987). The Court also noted: "The fact that the new rule may constitute a clear break with the past has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule." *Id.* at 327-28.

In *Griffith*, the Court adopted the logic of Justice Harlan's dissent in *Desist v. United States*, 394 U.S. 244, 258-59 (1969) (Harlan, J., dissenting):

> We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. **We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a "new" rule of constitutional law.**

(emphasis added). That is precisely the problem with Florida's limited retroactivity rule: similarly situated defendants, all of whom were sentenced to death under the same unconstitutional scheme, will receive different treatment. The Fourteenth Amendment is offended when "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 uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). Florida's limited retroactivity rule violates Lightbourne's right to equal protection of the law.

State and federal judges have expressed serious concerns about the validity of Lightbourne's conviction since 1983. His penalty phase was an outright travesty, lasting less than two hours. His trial counsel utterly failed to investigate and

present compelling, available mitigating evidence. Lightbourne's jurors were repeatedly told that the responsibility for sentencing resided with the judge, not them. The jury was instructed on nine aggravators, even though only five were eventually found to have been proven. And the jury's recommendation in favor of death was never recorded, so we do not know whether they recommended death by a unanimous vote, or only a bare majority.

Like most prisoners who were sentenced to death before *Ring* issued, Lightbourne was sentenced to death under standards that would not produce a death sentence today. Florida's limited retroactivity rule denies relief to people like Lightbourne, whose death sentence is far less reliable than most prisoners that were sentenced after *Ring*. Florida's limited retroactivity rule creates a level of arbitrariness, unreliability, and inequality that offends both the Eighth and Fourteenth Amendments.

CONCLUSION

By applying the *Hurst* decisions to some Florida prisoners and not others when all were sentenced to death under the same unconstitutional scheme, the Florida Supreme Court has crafted a rule that ensures that the death penalty will be applied arbitrarily and capriciously, that Florida citizens with unreliable death sentences will be executed, and that similarly situated prisoners will be treated differently, in violation of the Eighth and Fourteenth Amendments.

This Court should grant certiorari.

Respectfully submitted,

SUZANNE MYERS KEFFER
Chief Assistant Capital Collateral
Regional Counsel
Counsel of record

NICOLE M. NOËL
Assistant Capital Collateral
Regional Counsel
CCRC-SOUTH
1 East Broward Boulevard, Suite 444
Fort Lauderdale, FL 33301
(954) 713-1284
(954) 713-1299 (fax)
COUNSEL FOR LIGHTBOURNE

June 22, 2018