No. _____

OCTOBER TERM 2017

IN THE SUPREME COURT OF THE UNITED STATES

BRANDY BAIN JENNINGS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

1. Whether the Florida Supreme Court's application of only partial retroactivity of *Hurst v. State* and *Hurst v. Florida* violates the Eighth and Fourteenth Amendments because it arbitrarily uses as the cutoff point for retroactivity an earlier decision invalidating Arizona's capital sentencing scheme under the Sixth Amendment, and results in the disparate treatment of similarly situated individuals.

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PARTIES TO THE PROCEEDINGS BELOW

The Petitioner, Brandy Bain Jennings, an indigent, death-sentenced Florida prisoner, was the Appellant in the Florida Supreme Court.

The Respondent, the State of Florida, was the Appellee in the state court proceedings.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Brandy Bain Jennings prays that a Writ of Certiorari issue to review the opinion of the Florida Supreme Court.

CITATIONS TO OPINION BELOW

The opinion of the Florida Supreme Court in this cause, reported as *Jennings v. State*, 237 So.3d 909 (2018), is attached as to this Petition as “Attachment A.” The order denying successive motion for postconviction relief in the circuit court is non-published and attached as “Attachment B.”

STATEMENT OF JURISDICTION

Petitioner invokes this Court’s jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257(a) and 2101 (d). The Florida Supreme Court issued its decision on January 29, 2018. Counsel sought an additional 60 days for filing of this Petition, which was granted up to and including June 28, 2018. This petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in pertinent part:

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

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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).

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.

In this Petition Mr. Jennings is requesting the Court grant certiorari to review the decision of the Florida Supreme Court rejecting his claim that his sentence of death is unconstitutional pursuant to this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016) and the Florida Supreme Court's subsequent decision in *Hurst v. State*, 202 So. 3d 40 (2016).

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

On December 20, 1995, Brandy Bain Jennings and co-defendant Charles Jason Graves were each indicted on three counts of premeditated murder and one count of robbery in Collier County, Florida. Mr. Jennings and Mr. Graves plead not guilty and were tried by separate juries.

Potential jurors in Mr. Jennings's case were told that they would be asked to "render an advisory opinion as to what you feel the appropriate penalty should be." In response to a potential juror's question, the court explained "[i]f we were to get into a punishment phase in this case, the verdict does not have to be unanimous on the record. As to life or death in prison. It could be split, it could be any combination of 12 votes. The judge makes the ultimate and passes the ultimate sentence." One juror

who admitted she would have a hard time deciding the possible penalty was asked

> [B]ut knowing that the death penalty is not going to require a unanimous vote, and I'm ultimately going to assess it or not assess it, in the event there were a guilty verdict – but I guess what I need to know from you is whether you could return a guilty verdict it you thought that was the proper result?

At the outset of the penalty phase, the court again reiterated that the jury would be asked to render an advisory opinion. Although the court did note it would give the opinion deference, the jury was instructed that "[t]he final decision as to what punishment shall be imposed rests solely with the judge of this court."

Mr. Jennings's penalty phase lasted less than one day.[1] The jury recommended death for each murder count by a vote of 10-to-2. The circuit court made findings as to aggravators and mitigators and sentenced Mr. Jennings to death on each count. The Florida Supreme Court affirmed the convictions and sentences on direct appeal. *Jennings v. State*, 718 So. 2d 144 (Fla. 1998), cert. denied, *Jennings v. Florida*, 119 S. Ct. 2407 (1999).

Mr. Jennings timely filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851, which he subsequently amended. After a limited evidentiary hearing, the trial court denied relief as to all claims. Mr. Jennings appealed to the Florida Supreme Court which affirmed the denial of postconviction relief. *Jennings v. State*, 123 So. 3d 1101 (2013). Mr. Jennings also sought a writ of habeas corpus in the Florida Supreme Court which was denied. *Id.*

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[1] On the eve of Mr. Grave's penalty phase, the State elected to waive death and Mr. Graves received life sentences.

Mr. Jennings timely filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida on October 17, 2013. That petition is pending. *Jennings v. Secretary*, Case No. 2:13-cv-751-FtM-38DNF.

On February 22, 2016, Mr. Jennings filed a successive motion to vacate pursuant to Florida Rule of Criminal Procedure 3.851 premised on this Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016). The trial court denied Mr. Jennings's successive motion as premature and insufficient, without prejudice for Mr. Jennings to file another motion after the Florida Supreme Court issued a ruling on remand in *Hurst*.

Mr. Jennings again filed for Rule 3.851 relief on January 12, 2017, raising three separate claims challenging his death sentences. Claim I rested on the Sixth Amendment and the decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Claim II rested on the Eighth Amendment and the Florida Constitution, which were the basis for the Florida Supreme Court's ruling in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) that before a death sentence could be authorized the jury must first return a unanimous death recommendation. Claim III asserted that the rejection of Mr. Jennings's previously presented *Strickland v. Washington* claims was rendered constitutionally unreliable because *Hurst v.* State, 202 So. 3d 40 (Fla. 2016) and *Perry v. State*, 210 So. 3d 630 (Fla. 2016) together gave him a retrospective right to a life sentence that can only be overcome if a jury returns a unanimous death recommendation.

The trial court denied relief as to all claims. Mr. Jennings timely appealed to

the Florida Supreme Court. In a truncated "show cause" proceeding, without the benefit of full briefing or argument, the Florida Supreme Court affirmed the denial of postconviction relief on January 29, 2018. *Jennings v. State*, 237 So. 3d 909 (Fla. 2018). The Florida Supreme Court refused to consider rehearing and the Mandate issued on February 28, 2018.

Mr. Jennings's requested a sixty-day extension of time to file this Petition, which was granted up to and including June 28, 2018. This Petition is timely filed.

REASONS FOR GRANTING THE PETITION

1. 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[2]; 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

[2] *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*).

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 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.[3] Those people will

[3] *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

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 Mr. Jennings 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 Mr. Jennings's right to be free from arbitrary infliction of the death penalty under the Eighth Amendment.

Mr. Jennings 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 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

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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).

unreliable." *Hitchcock v. State*, 226 So. 3d 216, 220 (Fla. 2017) (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.*

Mr. Jennings's death sentence lacks the heightened reliability demanded by the Eighth Amendment. His penalty phase lasted less than one day. The jury began penalty deliberations at 12:29 p.m. and returned a recommendation at 2:34 p.m., a

mere hour and thirty-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. A jury "recommendation" resulting from such a proceeding cannot 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, 2016. The Florida Supreme Court denied Asay's motion for supplemental briefing on March 29, 2016. 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*, before 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*. 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, despite Asay having never presented those arguments.

Additionally, Mr. Jennings'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 v. Mississippi*, "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. 320, 328-29 (1985). *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.

Mr. Jennings'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. Mr. Jennings's jury's 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.

2. 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 Mr. Jennings's right to equal protection of the law.

Like most prisoners who were sentenced to death before *Ring* issued, Mr. Jennings was sentenced to death under standards that would not produce a death sentence today. Florida's limited retroactivity rule denies relief to people like Mr. Jennings, 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.

Respectfully submitted,

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