DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

MANUEL ANTONIO RODRIGUEZ,
Petitioner

vs.

STATE OF FLORIDA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

CAPITAL CASE

1. Whether the Florida Supreme Court's per se harmless-error rule, which deems *Hurst* errors harmless in every case in which the defendant's pre-*Hurst* advisory jury unanimously recommended death, contravenes the Eighth Amendment under *Furman v. Georgia*, 408 U.S. 238 (1972) and *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

2. Whether the Florida Supreme Court's decision to allow only limited retroactivity of its Eighth Amendment holding in *Hurst v. State* violates the Eighth and Fourteenth Amendments because it arbitrarily allows a death sentence to stand, resulting in the arbitrary and capricious execution of capital defendant and the disparate treatment of equally culpable individuals.

3. Whether the limited retroactivity formula employed for *Hurst* errors in Florida violates the Supremacy Clause of the United States Constitution in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

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The Petitioner, Manuel Antonio Rodriguez, a 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 WRIT OF CERTIORARI

Petitioner Manuel Antonio Rodriguez respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court.

CITATIONS TO OPINIONS BELOW

The Florida Supreme Court's postconviction opinion at issue in this petition is reported as *Rodriguez v. State*, 237 So. 3d 918 (Fla. 2018). Pet. App. A. The postconviction court's order denying relief is unreported and is referenced as *State v. Rodriguez, Order*, Case No. F93-25817B (Fla. 11th Jud. Cir. May 4, 2017). Pet. App. B.

STATEMENT OF JURISDICTION

The Florida Supreme Court affirmed the trial court's denial of Rodriguez's postconviction motion on January 31, 2018. Pet. App. A. On April 23, 2018, Justice Thomas extended the time to file this petition to June 30, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides:

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

The Fourteenth Amendment provides, in relevant 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). Since *Furman*, this Court's capital jurisprudence has reflected the reality that "death is different" and cannot be "inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 187-88 (1976). 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"). Accordingly, reliability is paramount.

In 2002, this Court determined that Arizona's death penalty scheme violated the Sixth Amendment because the judge, rather than the jury, found the existence of aggravating factors that made the defendant eligible for the death penalty. *Ring v. Arizona*, 536 U.S. 584 (2002). The Florida Supreme Court refused to apply *Ring* in Florida for fourteen years resulting in the executions of forty-one people. Then, in 2016, this Court applied *Ring* to Florida and declared Florida's capital sentencing scheme unconstitutional under the Sixth Amendment. *Hurst v. Florida*, 136 S. Ct. 616 (2016). On remand, the Florida Supreme Court applied *Hurst v. Florida* to hold

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 further, that under Florida's jurisprudence and Eighth Amendment principles, those jury findings must be unanimous and beyond a reasonable doubt.

Thereafter, in two decisions issued on the same day—*Mosely v. State*, 209 So. 3d 1248 (Fla. 2016), and *Asay v. State*, 210 So. 3d 1 (Fla. 2016)—the Florida Supreme Court addressed the retroactivity of the *Hurst* decisions. Unlike a traditional retroactivity analysis, however, the Florida Supreme Court did not decide whether the *Hurst v. Florida* decision should or should not be applied retroactively to all prisoners whose death sentences became final before those decisions invalidated the scheme under which they were sentenced. Instead, the Florida Supreme Court addressed only the Sixth Amendment issue decided in *Hurst v. Florida* and, in that context, divided those prisoners into two classes based solely on the date their sentences became final. The Florida Supreme Court determined that this Court's decision in *Ring* invalidating Arizona's sentencing scheme was the cut-off, and did not consider the Eighth Amendment issue that required jury findings as to all the elements as determined in *Hurst v. State*.

In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), 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. Florida*. Those whose sentences became final before June 24, 2002 would not. *See Asay,* 210 So. 3d at 11. The court

did not address the fact that pre-*Ring* inmates also were sentenced to death under a process no longer considered acceptable under the Eighth Amendment as determined in *Hurst v. State.*

The Florida Supreme Court's *Ring*-based formula allows a class of more than 150 Florida prisoners to have their judge-only death sentences stand, while requiring that the death sentences of another group of prisoners be vacated on collateral review so that they can receive a jury determination. This cutoff is inconsistent with the Eighth Amendment's prohibition against the arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection.

The Florida Supreme Court's bright-line retroactivity cutoff for *Hurst* claims is not unusual for that court. This Court has, on several occasions, overturned various bright-line tests that were devised by the Florida Supreme Court. For example, twelve years after this Court ruled in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment prohibits the execution of the intellectually disabled, this Court ended the Florida Supreme Court's use of an unconstitutional bright-line IQ-cutoff test to deny *Atkins* claims. *See Hall v. Florida*, 134 S. Ct. 1986 (2014); *see also*, *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (overturning Florida's bright-line rule barring relief in cases where the jury was not instructed that it could consider non-statutory mitigating evidence).

Despite this history, the Florida Supreme Court has refused to address whether its *Ring*-based retroactivity cutoff for *Hurst* claims is consistent with the

Eighth and Fourteenth Amendments. Instead, the court has continued to craft other problematic rules to further limit the reach of *Hurst* in Florida. *See, e.g., Mullens v. State*, 197 So. 3d 16 (Fla. 2016) (establishing per se harmless-error rule barring relief for prisoners who waived postconviction review prior to *Hurst*); *see also*, *Davis v. State*, 207 So. 142 (Fla. 2016) (establishing per se harmless-error rule for prisoners whose advisory jury unanimously recommended the death penalty).

Among the Florida Supreme Court's rules, one provides that if a defendant's pre-*Hurst* advisory jury voted to recommend death by a majority vote—i.e., a margin between 7 to 5 and 11 to 1—the *Hurst* error is not harmless and the death sentence must be vacated. But if the defendant's pre-*Hurst* advisory jury recommended death by a vote of 12 to 0, the *Hurst* error is automatically deemed harmless and the Florida Supreme Court upholds the defendant's death sentence. Mr. Rodriguez's case falls in the latter. Although the Florida Supreme Court has mentioned additional factors in the course of rendering a harmless error decision, the court has never held a *Hurst* violation harmful in a case with a unanimous advisory jury recommendation; and the court has never held a *Hurst* violation harmless in a split-vote advisory jury case. The vote of the pre-*Hurst* advisory jury is always the dispositive factor.

The Florida Supreme Court's mechanical application of per se harmless-error rules to uphold dozens of death sentences is based on the very mechanism—an "advisory" jury recommendation devoid of any jury fact-finding—that this Court held was unconstitutional in *Hurst*. Moreover, the court's *Ring*-based dividing line

separating those who are to receive the retroactive benefit of the *Hurst* decisions from those who will not, operates much like the bright-line IQ-cutoff test that was deemed unconstitutional by this Court in *Hall v. Florida*. As all of this illustrates, the Florida Supreme Court's bright-line rules have once again opened the door to arbitrariness infecting Florida's death penalty system in violation of the Eighth and Fourteenth Amendments.

STATEMENT OF THE CASE AND FACTS

In 1996, Manuel Antonio Rodriguez was convicted of three counts of first degree murder and was sentenced to death by the trial court following the jury's unanimous and generalized recommendation of death. While it is indisputable that Mr. Rodriguez's death sentences were obtained in violation of the U.S. Constitution for the reasons enunciated in *Hurst v. Florida*, the Florida Supreme Court has declined to vacate Rodriguez's unconstitutional death sentences due to its arbitrary bright-line rules.

Mr. Rodriguez was indicted along with his co-defendant Luis Rodriguez on September 15, 1993, for three counts of first-degree murder and armed burglary with assault that occurred on December 4, 1984. Law enforcement officers were unable to solve these crimes until 1992 when Rafael Lopez, Luis Rodriguez's brother-in-law, contacted police hoping to get reward money that had been offered for information on the murders. Based on the information from Lopez, police contacted Luis who implicated Mr. Rodriguez. Mr. Rodriguez pled not guilty and has always maintained his innocence. However, his codefendant, Luis, was allowed

to plead guilty to a lesser charge of second-degree murder in exchange for his testimony at Mr. Rodriguez's trial.

Throughout the voir dire process, prospective jurors were repeatedly told by the parties and the court that their sentencing role was merely advisory and that they would be asked to return a non-binding recommendation: "if a person is found guilty you would then go to the second phase where you as a juror would make an individual vote—recommendation. It's just a recommendation, it's not the actual sentence. Only the judge can impose the actual sentence" (T/661).[1] The court clarified numerous times, "if you notice I used the word recommendation regarding the sentence that would be imposed. You the jury do not sentence the defendant, I do" (T/628, 1222-23, 1120); "The only person who decides what the actual penalty would be is the Court" (T/1381-82); "Do you understand that it would be the Court that would actually impose the sentence? The jury recommends what the sentence is but the Judge actually imposes the sentence" (T/1226); *See also*, T/674, T/679, T/1236.

Some jurors expressed dismay at having to be responsible for putting someone to death. One venire member admitted "it would be very difficult" to do the sentencing because in his view he would be "actually sentencing [the defendant] to the same thing he did to those three people" (T/662). The prosecutor reassured him, "[i]n actuality as the judge has already said the Judge does the sentencing" (T/662).

[1] T/__ refers to the page number of the trial transcript.

The jury found Mr. Rodriguez guilty as charged on October 24, 1996 (R/ 867-87).[2]

Prior to the penalty phase, Mr. Rodriguez's counsel requested special instructions relating to the jury's ability to extend mercy to Mr. Rodriguez notwithstanding any "findings" it may have made with regard to the aggravating circumstances, their sufficiency, and whether the aggravating circumstances outweighed the mitigating circumstances. The requested instruction provided, *inter alia*, "if the evidence taken as a whole causes you to conclude that mercy is appropriate, that can be weighed as a mitigating circumstance to warrant a life sentence recommendation" (R/1285). This request was denied by the trial court and therefore the jurors were never informed of their ability to dispense mercy to Mr. Rodriguez irrespective of their ultimate advisory recommendation. In fact, the prosecutor emphasized during voir dire, "[t]he only thing you can't do really is use sympathy alone…you don't use sympathy to decide" (R/1453).

At the beginning of the penalty phase the court again reminded the jurors that the "final decision as to what punishment shall be imposed rests solely with me as the judge of this Court" (T/3530). During closing argument at the penalty phase, the State reiterated that the judge, not the jury, would be doing the sentencing:

> MR. LAESER: Objection, Your Honor. The **jurors are not doing the sentencing.** Counsel said "if you sentenced."
>
> THE COURT: Sustained.

(T/4305) (emphasis added). The court instructed the jury on six aggravating factors (T/4308-11), but included an instruction to avoid impermissible doubling of

[2] R/__ refers to the page number of the record on appeal transmitted to the Florida Supreme Court.

aggravators.[3] The court then instructed the jury it could consider three statutory mitigating circumstances: (1) the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance (2) the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and his participation was relatively minor (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (T/4312). Following these instructions, the jury was told to make an advisory sentencing recommendation of either life or death "based upon [its] determination as to whether sufficient aggravating circumstances exist[ed] to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist[ed] to outweigh any aggravating circumstances found to exist."

After an hour and twenty minutes of deliberation, the jury returned a verdict form simply indicating that it recommended and advised, by a 12-0 vote, that the court impose the death penalty on Mr. Rodriguez. Pet. App. C. The jury did not make any written factual findings regarding aggravating or mitigating circumstances or otherwise specify the factual basis for its recommendation.

On January 31, 1997, the judge, following the jury's recommendation, made the written findings of fact required to impose a death sentence under Florida law.

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[3] The court instructed: "If you find that the murder was committed for financial gain and if you find that the murder was committed during the course of a burglary, then you must determine whether both aggravating circumstances are supported by the same aspect of the offense. If both aggravating circumstances are supported by the same aspect, then you must consider the two factors as one factor" (T/4309-10).

Despite instructing the jury to avoid impermissibly doubling 1) pecuniary gain; and 2) committed in the course of an armed burglary, the judge herself failed to merge the two aggravators as required by Florida law. Instead, the judge found all six aggravators had been proven beyond a reasonable doubt. The judge explained that she did not need to merge the two aggravators because "the State also proved beyond a reasonable doubt that all three homicides were committed while the Defendant was also engaged in the commission of a robbery." *See* Pet. App. D. By basing the existence of pecuniary gain on the "robbery which also took place during the commission of [the] capital felonies," the judge was able to give both aggravating circumstances great weight. *Id.* According to the judge, this additional crime of robbery—which was not charged in the indictment[4] nor considered by the jury—was proven beyond a reasonable doubt.

The judge also considered the three statutory mitigating circumstances upon which the jury had been instructed and noted the wealth of evidence presented on Rodriguez's mental health. Regarding the defendant's ability to conform his conduct to the requirements of the law, the court acknowledged that one could argue Rodriguez was substantially impaired, but nevertheless rejected the statutory mitigator. The court ultimately concluded that none of the statutory mitigating circumstances applied, but the court did find a few non-statutory mitigating circumstances, including: 1) the defendant suffers from a major mental illness; and

[4] In fact, defense counsel filed a Motion to Strike/Dismiss the allegations of robbery and/or burglary that supported the felony murder theory. Both the State and defense counsel agreed that the statute of limitations for robbery had expired and the defendant was not indicted for robbery. *See* R/45-46, R/70-211.

2) the defendant has a history of drug abuse.

Based upon her independent fact-finding, the judge determined the aggravating circumstances substantially outweighed the mitigating circumstances and sentenced Mr. Rodriguez to death.

On February 2, 2000, the Florida Supreme Court affirmed Rodriguez's convictions and sentences, even though the court found a number of errors: 1) the comments on Rodriguez's refusal to answer questions was improper but harmless, 2) the Detective's comments about Rodriguez's alias and ID number was improper but harmless, 3) and the prosecutor's introduction of hearsay testimony through the Detective regarding another inmate's claim that Rodriguez faked his mental illness was an improper violation of Rodriguez's Sixth Amendment right to confrontation but the error was harmless. *Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000). The Florida Supreme Court also determined that the trial court had impermissibly doubled aggravators but again found the error harmless, "given the five remaining **valid** aggravating circumstances." *Id.* at 46, (emphasis added). On October 2, 2000, this Court denied certiorari. *Antonio Rodriguez v. Florida*, 531 U.S. 859 (2000).

On April 16, 2004, Rodriguez filed his amended motion to vacate his judgment and sentence under Florida Rule of Criminal Procedure 3.850. The trial court granted a limited evidentiary hearing on 6 sub-issues of claim I relating to errors at the guilt phase. Following the evidentiary hearing, the trial court summarily denied the remaining claims.

Rodriguez appealed the denial to the Florida Supreme Court on May 15,

2005. He also timely filed a petition for writ of habeas corpus raising nine claims with the Florida Supreme Court on July 12, 2007. While the appeal was pending, Rodriguez filed a successive Fla. R. Crim. Pro. 3.851 motion, alleging among other things, that his convictions are materially unreliable because no adversarial testing occurred due to the cumulative effects of ineffective assistance of counsel, the withholding by the state of material exculpatory or impeachment evidence, and the existence of newly discovered evidence. Following oral argument on his appeal of his initial 3.851 motion, the Florida Supreme Court relinquished jurisdiction for further evidentiary proceedings on his successive motion. *Rodriguez v. State*, No. SC05-859 & SC07-1314 (Fla. April 30, 2008). A second limited evidentiary hearing was held and the trial court entered an order denying relief on October 6, 2008.

The Florida Supreme Court affirmed the denial of Rodriguez's appeal but found that the State violated *Brady* by failing to disclose two letters containing potential impeachment evidence relating to the co-defendant, Luis. The court "strongly condemn[ed]" the prosecutor's failure to turn over the letters, calling his explanation "disingenuous," but nonetheless found the violation harmless. As to Rodriguez's *Brady*/*Giglio* claims involving his co-defendant, Luis, and his brother, Isidoro, and the impeachment of the State's jailhouse informant, Alejandro Lago, the court found that Rodriguez could not show prejudice. *See Rodriguez v. State*, 39 So. 3d 275 (Fla. 2010).

Rodriguez timely filed a habeas petition in the United States District Court for the Southern District of Florida on July 26, 2010. The district court denied relief.

The United States Court of Appeals for the Eleventh Circuit affirmed. *Rodriguez v. Secretary, Fla. Dept. of Corr.*, 756 F. 3d 1277 (11th Cir. 2014). This Court denied certiorari on March 30, 2015. *Rodriguez v. Jones*, 135 S.Ct. 1707 (2015).

On May 22, 2015, Mr. Rodriguez filed a successive motion pursuant to Fla. R. Crim. Pro 3.851 and 3.203 alleging that his death sentences were unconstitutional pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Hall v. Florida*, 134 S. Ct. 1986 (2014). The postconviction court summarily denied his claim and the Florida Supreme Court affirmed the denial, finding that Rodriguez's application was "time-barred." *Rodriguez v. State,* 2016 WL 4194776 (Fla. Aug. 9, 2016), re'hrng denied, October 21, 2016.

On January 10, 2017, Rodriguez filed a successive motion for postconviction relief based on *Hurst v. Florida* and *Hurst v. State*. He argued that his death sentences must be vacated because a judge, and not the jury, made the necessary factual findings to subject him to a death sentence. Rodriguez asserted that verdicts that lack the necessary factual findings, and that emanate from jurors who have been unconstitutionally instructed that mercy can plan no role in their decision-making and that the responsibility for whether the defendant lives or dies rests with someone else, necessarily carry with them a lack of reliability and impermissible likelihood that the decision to impose death was made arbitrarily in violation of the Eighth Amendment. Rodriguez additionally argued 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.

Rodriguez also argued that limited retroactivity violates both the state and federal constitutions.

On May 4, 2017, the trial court denied Rodriguez's motion finding that the Florida Supreme Court's bright-line rules in *Asay v. State* and *Davis v. State* precluded relief. Pet. App. B. Rodriguez timely appealed to the Florida Supreme Court and his appeal was stayed pending the disposition of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), another appeal from the denial of *Hurst* relief in a pre-*Ring* death sentence case. On August 10, 2017, the Florida Supreme Court denied relief in *Hitchcock*. Thereafter, the Florida Supreme Court directed Rodriguez to proceed pursuant to an unorthodox truncated "show cause" procedure and submit briefing as to why the court's order should not be affirmed in light of *Hitchcock v. State*.

On January 31, 2018, without any discussion of Rodriguez's individual claims, the Florida Supreme Court denied relief, holding that because Rodriguez's death sentences became final in 2000, "Hurst does not apply retroactively to [his] sentences of death. See Hitchcock, 226 So. 3d. at 217." *Rodriguez v. State*, 237 So. 3d 918, 919 (Fla. 2018), Pet. App. A.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Florida Supreme Court's bright-line rule for pre-*Hurst* unanimous recommendations fails to meet the standard of reliability that the Eighth Amendment requires.

In *Hurst v. Florida*, this Court made clear that Florida's death penalty scheme was indistinguishable from Arizona's in two respects: First, as with *Ring*, in *Hurst*, the judge increased Hurst's authorized punishment based on his

independent fact-finding; and two, in both cases, the trial court had no jury findings on which to rely. *See Hurst v. Florida*, 136 S. Ct. at 621-22. As a result, on remand, the Florida Supreme Court had to reassess Florida's capital sentencing scheme—not just what findings had been statutorily mandated as necessary to authorize a death sentence—but what was required of the jury to insure a reliable sentencing determination. Recognizing that the role the jury had previously played was inadequate to insure a reliable, non-arbitrary result, the Florida Supreme Court held:

> Thus, we hold that in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge. This holding is founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven; and **it gives effect to our precedent that the "final decision in the weighing process must be supported by 'sufficient competent evidence in the record.'"** *Hurst v. State*, 202 So. 3d at 54 (emphasis added) (citations and footnote omitted).

The Florida Supreme Court went on to conclude that in addition to the requirements of unanimity that flow from the Sixth Amendment, the Eighth Amendment likewise calls for juror unanimity because "death is different." *Id.* at 59. The court opined the unanimity requirement would bring Florida's capital sentencing scheme in compliance with the constitutional requirement that the death penalty be applied narrowly to the most aggravated and least mitigated of murders. The court found that, unanimous jury sentences, "when made **in**

conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process." *Id.* at 60 (emphasis added).

The court's opinion acknowledges that verdicts issued by jurors who are not instructed that their verdict must be unanimous and who do not make the requisite factual findings, necessarily carry with them a lack of reliability and the impermissible likelihood that the decision to impose death was made arbitrarily and wantonly in violation of the Eighth Amendment. And while the court declared Florida's new law would promote reliable death sentences and "ensure that capital sentencing decisions rest on the individualized inquiry contemplated in *Gregg*," the court subsequently crafted bright-line rules that functionally preclude such individualized review. *Hurst*, 202 So. 3d at 60.

This Court's precedents establish that a state court's harmless-error review, particularly in a capital case, cannot be "automatic and mechanical," *Barclay v. Florida*, 463 U.S. 939 (1983), must include consideration of the whole record, *see Rose v. Clark*, 478 U.S. 570, 583 (1986), and must be accompanied by "a detailed explanation based on the record," *Clemons v. Mississippi*, 494 U.S. 738, 740 (1990). Accordingly, courts are forbidden from applying "harmless-error analysis in an automatic or mechanical fashion" in a capital case. *Id.* at 753. Yet in *Davis v. State*, 207 So. 142 (Fla. 2016), the Florida Supreme Court crafted a per se rule that automatically deems *Hurst* errors harmless in every case where the advisory jury unanimously recommended death. By not allowing for meaningful review of the

actual record, the Florida Supreme Court is failing "to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty." *Hurst*, 202 So. 3d at 59.

In the dozens of *Hurst* cases it has reviewed, the Florida Supreme Court has never held a *Hurst* violation harmful in a case with a unanimous advisory jury recommendation. And although the court has mentioned factors other than the vote itself in the course of its harmless-error rulings, the vote is always the dispositive factor. As a result of this per se practice, the Florida Supreme Court has refused to entertain individualized, record-based arguments in cases like Mr. Rodriguez's where a Florida jury operating under Florida's unconstitutional pre-*Hurst* system reached a unanimous death recommendation.

This Court's decisions require that harmless-error analysis include an actual assessment of the whole record but the Florida Supreme Court's per se rule functionally bars such review. In the course of *Hurst* litigation, Mr. Rodriguez made several detailed, record-based arguments regarding the impact of the *Hurst* error on his death sentences. He argued that the unreliability of the proceedings giving rise to his death sentences is clear on the face of the record—his jury was never asked to make unanimous findings of fact as to any of the required elements, and was expressly told that they were not ultimately responsible for their decision and that mercy could play no role in their decision. In accord with what is now clearly recognized as an unconstitutional practice, and after being unconstitutionally advised, the jury rendered a generalized recommendation for death. *See* Pet. App.

C. Although the recommendation was unanimous, it does not reveal whether Mr. Rodriguez's jurors unanimously agreed that any particular aggravating factor had been proven beyond a reasonable doubt, or unanimously agreed that the aggravators were sufficient for death, or unanimously agreed that the aggravators outweighed the mitigation. However, the sentencing order does reveal that there is a reasonable probability that individual jurors based their overall recommendation for death on a different underlying calculus.

On direct appeal, the Florida Supreme Court ruled that the trial court had impermissibly doubled two aggravating factors, but found the error harmless in light of the "five remaining valid aggravators." *Rodriguez v. State*, 753 So. 2d at 46. During *Hurst* litigation, Mr. Rodriguez raised this issue alleging that it further undermines the reliability of his sentence as the sentencing order reflects that the jury itself could not have reached the same underlying calculus as the judge had reached. Not only did the judge specifically instruct the jury to avoid doubling the exact aggravators[5] that she failed to merge in her sentencing order, but more importantly, her reasoning reveals that she independently charged Mr. Rodriguez with an additional crime: robbery.

The sentencing order reflects that the judge justified keeping both aggravating factors separate by independently finding that "the State also proved beyond a reasonable doubt that all three homicides were committed while the

[5] The court instructed, "if both aggravating circumstances [pecuniary gain and committed in the course of a burglary] are supported by the same aspect of the offense, then you must consider the two factors as one factor" (T/4309-10).

defendant was **also engaged in the commission of a robbery**." *See* Pet. App. D. Ironically, at a pre-trial hearing regarding that particular count (count IV) of the indictment, the judge determined that Mr. Rodriguez had only been charged with burglary and that a robbery charge was inapplicable due to the statute of limitations. While this error was remarkably deemed harmless pre-*Hurst*, in a post-*Hurst* world, it calls into question the validity of the remaining aggravating factors, as well as their sufficiency and the constitutionality of Mr. Rodriguez's sentences of death.

The uncertainty as to what the advisory jury would have decided if tasked with making the critical findings of fact takes on additional significance in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell*, a Mississippi penalty phase jury did not receive an accurate description of its role in the sentencing process due to the prosecutor's suggestion that the jury's decision to impose the death penalty would not be final because an appellate court would review the sentence. *Id.* at 328-29. This Court concluded that, because it could not be ascertained that the remarks had no effect on the jury's sentencing decision, the jury's unanimous decision did not meet the Eighth Amendment's standards of reliability. *Id.* at 341.

The Florida Supreme Court's total reliance on the pre-*Hurst* advisory jury's unanimous recommendation, without considering other factors such as the jury's diminished sense of responsibility for the death sentence, violates *Caldwell* as well as the Eighth Amendment. Mr. Rodriguez's advisory jurors were led to believe that

their role in sentencing was minimal when they were repeatedly instructed by the court that their recommendation was advisory and that the final sentencing decision rested solely with the judge. Given that the jury was led to believe it was not ultimately responsible for the imposition of Rodriguez's death sentence, the Florida Supreme Court's per se rule cannot be squared with the Eighth Amendment.

Under *Caldwell*, this Court cannot be certain beyond a reasonable doubt that Mr. Rodriguez's jury would have made the same unanimous recommendation absent the *Hurst* error. Indeed, as discussed above, a review of Mr. Rodriguez's actual record reveals the advisory jury could not have found all six aggravating factors proven beyond a reasonable doubt as the judge did. Had the jury been properly apprised of its fact-finding role, there is a reasonable likelihood that a single juror would have afforded greater weight to Mr. Rodriguez's mitigation or may have found an aggravating factor unproven. As such, this Court cannot conclude that a jury would have unanimously found or rejected any specific mitigators in a constitutional proceeding. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding in mitigation context Eighth Amendment is violated when there is uncertainty about jury's vote).

Moreover, this Court cannot be certain that one of the jurors if properly instructed, would have declined to exercise mercy. As the Florida Supreme Court observed in *Hurst v. State*, each Florida juror in a capital case has the right to

recommend a life sentence irrespective of finding all of the critical facts necessary to impose a death sentence. Prior to the penalty phase, Mr. Rodriguez requested an instruction to inform the jury of its ability to dispense mercy, but his request was denied. *See* R/1285; R/1453. Thus, not only were Mr. Rodriguez's jurors not properly informed of their actual responsibility in violation of *Caldwell* but they were also not informed of their ability to dispense mercy. As a result of Mr. Rodriguez's unanimous advisory recommendation and pre-*Ring* status, the Florida Supreme Court refused to address this claim.

By relying solely on the jury's unanimous recommendation, the Florida Supreme Court's per se rule also fails to account for any of the errors previously identified by the court on direct appeal and in postconviction. On direct appeal, the Florida Supreme Court determined the references to collateral crimes were erroneously admitted and found that the prosecution introduced improper hearsay evidence in violation of the Confrontation Clause of the Sixth Amendment but found those violations to be harmless. *Rodriguez*, 753 So. 2d at 43-45. In postconviction proceedings, the court determined that the State withheld *Brady* material and "strongly condemn[ed]" the State's conduct, but found Mr. Rodriguez could not demonstrate prejudice. *Rodriguez v. State*, 39 So. 3d 275, 287 (Fla. 2010).

It is true that the Florida Supreme Court has previously addressed these issues and found the individual errors were harmless beyond a reasonable doubt or as to the *Brady*[6] and *Strickland*[7] claims, the court's confidence in the reliability of

[6] *Brady v. Maryland*, 373 U.S. 83 (1963).

the outcome was not undermined. But this review was conducted with the understanding that the jury's advisory death recommendation would not have changed unless six jurors would have been convinced to vote in favor of a life recommendation and without acknowledging that the Florida death penalty scheme was unconstitutional. In *Bevel v. State*, the Florida Supreme Court stated that a proper prejudice analysis after *Hurst v. State* considers whether the unpresented evidence "would have swayed one juror to make a 'critical difference.'" 221 So. 3d 1168, 1182 (Fla. 2017). When cumulative consideration is given to all of the withheld *Brady* material and to the errors recognized on direct appeal, this Court cannot be certain that one properly-instructed juror would not have been swayed to vote in favor of a life sentence.

Accordingly, the vote of a defendant's pre-*Hurst* advisory jury cannot by itself resolve a proper harmless-error inquiry. The fact that an advisory jury unanimously recommended the death penalty does not establish that the same jury would have made, or an average rational jury would make, the same specific findings of fact to support a death sentence in a constitutional proceeding. In *Hurst v. Florida*, this Court ruled that "the State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires," yet this is exactly what the Florida Supreme Court has done. *Hurst*, 136 S. Ct. at 622.

Instead of providing the individualized review that the Constitution requires, the Florida Supreme Court's arbitrary bright-line rules bar even the consideration

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[7] *Strickland v. Washington*, 466 U.S. 668 (1984).

of Mr. Rodriguez's arguments. Mr. Rodriguez sits on death row today while dozens of other Florida prisoners—some of whom were sentenced before him, some of whom were sentenced after him, and many of whom committed murders that were equally if not more aggravated than his crime—have been granted resentencings under *Hurst*. Because there is no culpability related distinctions to justify this disparity of results, the Florida Supreme Court's per se rule violates the Eighth Amendment.

II. The Florida Supreme Court's *Ring*-based dividing line created an unprecedented rule of limited retroactivity that offends the Eighth and Fourteenth Amendments.

The Florida Supreme Court determined that its Eighth Amendment holding in *Hurst v. State* had to be applied retroactively, but then adopted a bright-line rule limiting its applicability to cases which became final after June 24, 2002, the decision date of *Ring*. Even though *Ring* was decided solely on Sixth Amendment grounds and involved Arizona's capital sentencing scheme, the Florida Supreme Court determined that individuals with final sentences prior to *Ring*, would be denied the benefit of both the Sixth and Eighth Amendment holdings from the *Hurst* rulings.

This Court has recognized that traditional non-retroactivity rules, which deny the benefit of new constitutional decisions to prisoners whose cases have already become final on direct review, can serve legitimate purposes, including protecting states' interests in the finality of criminal convictions. *See e.g.*, *Teague v. Lane*, 489 U.S. 288 (1989). Mr. Rodriguez acknowledges that these rules are a pragmatic necessity of the judicial process, and he does not seek to upset them.

However, here, the Florida Supreme Court did not apply traditional non-retroactivity rules—it did not choose a determinative dividing line using the fact of finality with respect to the decision announcing the new constitutional rule. Instead, the court crafted together an arbitrary rule granting retroactive relief to many death-sentenced inmates with longstanding final convictions and sentences, while at the same time denying retroactive relief to many other death-sentenced inmates who also have longstanding final convictions and sentences.

The result is not merely a disparate treatment of similarly situated inmates on death row—it's much worse. By denying relief to the very class of inmates most likely to be deserving of relief from their unconstitutional sentences, the *Ring*-based cutoff amplifies the risk that the death penalty will be imposed in a way comparable to being "struck by lightning." *Furman*, 408 U.S. at 308.

Experience has already shown the arbitrary results inherent in the Florida Supreme Court's application of the *Ring*-based retroactivity cutoff. The date of a particular death sentence's finality on direct appeal in relation to the June 24, 2002 decision in *Ring*—and thus whether the court has held *Hurst* retroactive based on its bright-line cutoff—has at times depended on whether there were delays in transmitting the record on appeal;[8] whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with the court's summer recess;

[8] *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 the Florida Supreme Court, almost certainly resulting in the direct appeal being decided post-*Ring*).

how long the assigned Justice of this court took to submit the opinion for release;[9] whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener's error necessitating issuance of a corrected opinion; whether counsel chose to file a petition for a writ of certiorari in this Court or sought an extension to file such a petition; and how long a certiorari petition remained pending in this Court.

This arbitrariness is best 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 (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 certiorari 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*, 219 So. 3d at 47. 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.

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[9] *Compare Booker v. State*, 773 So. 2d 1079 (Fla. 2000) (opinion issued within one year after briefing completed, before *Ring*), *with Hall v. State*, 201 So. 3d 628 (Fla. 2016) (opinion issued twenty-three months after the last brief was submitted).

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.[10] 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.

In *Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), this Court described the now familiar idea that "if a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428. This principle "insist[s] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008).

Florida's decision to apply the *Hurst* rulings only to the post-*Ring* group of death row inmates results in the unequal treatment of prisoners who were sentenced to death under the same unconstitutional scheme. This Court has made clear that "selective application of new rules violates the principle of treating

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[10] *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).

similarly situated defendants the same." *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). Yet this is precisely the problem that has occurred under Florida's limited retroactivity rule. Under the Fourteenth Amendment, the right to equal protection of the laws is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). Florida's limited retroactivity rule violates Mr. Rodriguez's right to equal protection of the law.

Like most prisoners who were sentenced to death before *Ring* issued, Rodriguez 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. Rodriguez, 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.

III. Florida's Limited Retroactivity Formula Employed for *Hurst* Violations Violates the Supremacy Clause of the United States Constitution.

In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), this Court held that the Supremacy Clause of the United States Constitution requires state courts to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis. *Id.* at 728-29 ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, *the Constitution* requires state collateral review courts to give

retroactive effect to that rule.") (emphasis added). Thus, *Montgomery* held, "[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id.* at 731-32

Importantly for purposes of *Hurst* retroactivity analysis, this Court found the *Miller* rule substantive in *Montgomery* even though the rule had "a procedural component." *Id.* at 734. *Miller* did "not categorically bar a penalty for a class of offenders or type of crime – as, for example, [the Court] did in *Roper* or *Graham*." *Miller v. Alabama*, 567 U.S. 460, 483 (2012). Instead, "it mandate[d] only that a sentence follow a certain process – considering an offender's youth and attendant characteristics – before imposing a particular penalty." *Id.* Despite *Miller's* "procedural" requirements, the Court in *Montgomery* warned against "conflat[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the manner of determining the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (first alteration added). The Court explained, "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," *id.* at 735, and that the necessary procedures do not "transform substantive rules into procedural ones," *id.* In *Miller*, the decision "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes

reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*." *Id.* at 734.

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

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

Hurst v. State held not only that the requisite jury findings must be made beyond a reasonable doubt, but also that juror unanimity is necessary for

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

In *Welch*, the Court addressed the retroactivity of the constitutional rule articulated in *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). In *Johnson*, the Court held that a federal statute that allowed sentencing enhancement was unconstitutional. *Id.* at 2556. *Welch* held that *Johnson's* ruling was substantive because it "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied" – therefore it must be applied retroactively. *Welch*, 136 S. Ct. at 1265. The Court emphasized that its

determination whether a constitutional rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function," i.e., whether the new rule alters only the procedures used to obtain the conviction, or alters, instead, the class of persons the law punishes. *Id.* at 1266.

The same reasoning applies in the *Hurst* context. The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt and that the Eighth Amendment requirement of jury unanimity in fact-finding are substantive constitutional rules as a matter of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on "the judge-sentencing scheme. *Id.* The "unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*," *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the very purpose of the rules is to place certain individuals beyond the state's power to punish by death. Such rules are substantive, *see Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes.") and *Montgomery* requires the states to impose them retroactively.

Hurst retroactivity is not undermined by *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), where this Court held that *Ring* was not retroactive in a federal habeas case. In *Ring*, the Arizona statute permitted a death sentence to be imposed upon a finding of fact that at least one aggravating factor existed. *Summerlin* did not review a statute, like Florida's, that required the jury not only to conduct the fact-finding regarding the aggravators, but also fact-finding on whether the aggravators were sufficient to impose death and whether the death penalty was an appropriate sentence. *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred in *Hurst* where this Court held that it was unconstitutional for a judge alone to find that "sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal citation omitted).

Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a reasonable-doubt standard in addition to the jury trial right, and this Court has always regarded proof-beyond-a reasonable-doubt decisions as substantive. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (explaining that "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect."); *see also Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware's state *Teague*-like retroactivity doctrine

and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof").

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

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 rules that ensure 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,

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