No. _____

OCTOBER TERM 2017

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN FOSTER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

CAPITAL CASE

SCOTT GAVIN *
Assistant CCRC-South
Florida Bar No. 0058651
CCRC-South
1 EAST BROWARD BLVD. SUITE 444
FORT LAUDERDALE, FL 33301
(954) 713-1284

* *Counsel of Record*

CAPITAL CASE

QUESTION PRESENTED

1. Does the Florida Supreme Court's partial retroactivity approach providing for relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) to death sentenced prisoners whose sentences became final after *Ring v. Arizona*, 536 U.S. 584 (2002) but excluding relief for those who death sentences became final during the time period between *Apprendi v. New Jersey,* 530 U.S. 466 (2000) and *Ring*, violate the violate the Eighth and Fourteenth Amendments to the United States Constitution?

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The Petitioner, Kevin Foster, 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 A WRIT OF CERTIORARI

Petitioner Kevin Foster 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 *Foster v. State of Florida,* 235 So. 3d 294 (Fla. 2018), is attached as "Attachment A" to this Petition. 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.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Mr. Foster 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 (Fla. 2016). Mr. Foster will present a brief summary of the relevant facts pertinent to the issue below.

A. Factual Procedural and Factual Background

Mr. Foster was indicted on May 21, 1996 with one count of first degree murder. Mr. Foster pled not guilty. A trial was held on March 3-11, 1998 and Mr. Foster was found guilty. (R. 1059). Mr. Foster's penalty phase was held on April 9, 1998 with the advisory jury returning a 9-3 recommendation imposing the death penalty. Thereafter, a *Spencer*[1] hearing was held, and on May 28, 1998 Mr. Foster was sentenced to death. The trial court found two aggravators: the capital felony was committed for the purposes of avoiding or preventing lawful arrest or affecting an escape from custody and the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Fla. Stat. § 921.141 (5)(e) and (i) (1997). The trial court rejected all 23 of the mitigators presented by the defense, including the only statutory mitigator: Mr. Foster was 18

[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

at the time of the crime. Fla. Stat. § 921.141(6)(h) (1997). Based on the judge's fact finding, Mr. Foster was sentenced to death. (R. 1503-06).

Mr. Foster's convictions and sentence were affirmed by the Florida Supreme Court on direct appeal. *Foster v. State*, 778 So. 2d 906 (Fla. 2000). Rehearing was denied on January 22, 2001, and his conviction and sentence became final upon expiration of the 90-day time period in which to file a Petition for Writ of Certiorari to this Court on April 22, 2001. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 (1987) (finality occurs when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied").

Mr. Foster timely filed his initial Rule 3.850 Motion for Postconviction Relief on September 27, 2001. (PC-R. 57-123). An Amended Motion for Postconviction relief was filed on May 21, 2010. (PC-R. 1022-1320). The postconviction court summarily denied all claims except Mr. Foster's claim alleging ineffective assistance of counsel at the penalty phase. (PC-R. 1477-78). An evidentiary hearing was held on April 26-29, 2011. Following the evidentiary hearing Mr. Foster's post-conviction claims were denied on July 5, 2011 (PCR. 3674-4004). Rehearing was denied on July 22, 2011 (PC-R. 4005-4205).

Mr. Foster timely appealed to the Florida Supreme Court on August 25, 2011. (PC-R. 4363-64). On October 17, 2013, the Florida Supreme Court affirmed the circuit court's denial of postconviction relief. *Foster v. State*, 132 So. 3d 40 (Fla. 2013).

Rehearing was denied on January 31, 2014. The mandate issued on February 17, 2014.

On October 16, 2014 Mr. Foster filed a Petition for a Writ of Habeas Corpus Relief in the United States District Court, Middle District of Florida. Approximately one year later, Mr. Foster filed his Reply to Respondent's Answer on October 15, 2015. Mr. Foster's habeas petition currently remains pending.[2]

While Mr. Foster's habeas petition remained pending in the United States District Court, on February 18, 2016 Mr. Foster filed a Successive Motion for Postconviction Relief pursuant to Rule 3.851 in the Twentieth Judicial Circuit, in and for Lee County, Florida. The successive motion was based upon this Court's ruling in *Hurst v. Florida*, 136 S. Ct. 616 (2016). That same day Mr. Foster filed a motion to stay the proceedings in federal district court so that he be provided the opportunity to fully litigate his successive motion for postconviction relief in circuit court. The Middle District Court granted Mr. Foster's motion for stay.

The circuit court held a case management conference on Mr. Foster's Rule 3.851 successive motion on April 4, 2016. Following that hearing, the circuit court denied relief, but in doing so found Mr. Foster's motion "premature and insufficient," and dismissing it without prejudice to Mr. Foster to file another motion "after the Florida Supreme Court decision in *Hurst* issues." Thereafter Mr. Foster re-filed his

[2] During the time period Mr. Foster's habeas petition has remained pending, Mr. Foster has filed, and been granted, stays of his petition while he has litigated the availability of relief pursuant to the *Hurst* decisions in the Florida courts. (DE 49, 61).

successive motion for postconviction relief on January 12, 2017. The circuit court then held another case management conference on March 14, 2017. Following that hearing the circuit court denied relief on April 21, 2017. Mr. Foster timely appealed to the Florida Supreme Court on June 15, 2017.

On September 25, 2017 the Florida Supreme Court issued an order to show cause directing Mr. Foster to submit briefing addressing the application of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017) to his case and argument as to why it should not control the outcome of his appeal. Mr. Foster then submitted his Initial Brief to the Florida Supreme Court on October 16, 2017 and a Reply Brief on November 6, 2017. In doing so, Mr. Foster argued to the Florida Supreme Court that the *Ring*-based retroactivity cutoff violates the Eighth and Fourteenth Amendments. Mr. Foster argued that denying relief to him, and defendants who fall between this Court's decisions in *Apprendi v. New Jersey* and *Ring v. Arizona*, was improper where the constitutional underpinnings for the Court's decision in *Ring* were predicated upon the holding in *Apprendi*. On January 29, 2018 the Florida Supreme Court denied Mr. Foster's appeal. *Foster v. State*, 235 So. 3d 294 (Fla. 2018). In doing so, the Florida Supreme Court provided the following analysis:

> After reviewing Foster's response to the order to show cause, as well as the State's arguments in reply, we conclude that Foster is not entitled to relief. Foster was sentenced to death following a jury's recommendation for death by a vote of nine to three, and his sentence of death became final in 2001. Foster v. State, 778 So.2d 906, 912 (Fla. 2000). Thus, Hurst does not apply retroactively to Foster's sentence of death. See Hitchcock, 226 So.3d at 217. Accordingly, we affirm the denial of Foster's motion.

Foster v. State, 235 So. 3d 294, 295 (Fla. 2018). The mandate issued on February 14, 2018.

Following issuance of the mandate, on April 16, 2018 Mr. Foster filed an Application for Sixty Day Extension Of Time In Which to File Petition For Writ Of Certiorari To the Florida Supreme Court. Justice Thomas granted Mr. Foster's request for a sixty-day extension of time, providing up to and including June 28, 2018 for Mr. Foster to file his Petition for Writ of Certiorari. This Petition follows.

REASONS FOR GRANTING THE WRIT

THE FLORIDA SUPREME COURT'S *RING*-BASED CUTOFF FOR PURPOSES OF RETROACTIVE APPLICATION OF *HURST* RELIEF VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS, PARTICULALRY AS APPLIED TO THE CLASS OF CAPITAL DEFENDANTS WHOSE SENTENCES FALL BETWEEN THE POST-*APPRENDI* PRE-*RING* CATEGORY

A. Introduction

This Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016) held Florida's capital sentencing scheme was unconstitutional under the Sixth Amendment where it permitted a judge, and not a jury, to make the requisite findings of fact necessary for the imposition of death. Following remand to the Florida Supreme Court, in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court, pursuant to *Hurst v. Florida*, held that the Sixth Amendment required the existence of aggravating factors necessary for the imposition of death must be found by a jury, and also that under Florida's jurisprudence and the Eighth Amendment, those findings were required to be unanimous.

In the wake of its decision in *Hurst v. State*, the Florida Supreme Court then employed a non-traditional approach of partial retroactivity, to determine a bright-line cutoff for those capital defendants who would receive the benefit of the *Hurst* decisions. In doing so, the Florida Supreme Court determined that only those capital defendants whose sentences had become final after the decision in *Ring v. Arizona*, 536 U.S. 584 (2002) would be entitled to the benefit of the *Hurst* decisions. By making this distinction, however, the Florida Supreme Court created an unworkable framework which served to disparately treat similarly situated death sentenced prisoners, all of whom had been convicted and sentenced to death under the same unconstitutional sentencing scheme invalidated by this Court in *Hurst*. Despite that fact, the Florida Supreme Court has continued to maintain its approach of partial retroactive application of the *Hurst* decisions to capital defendants and denied relief to those whose convictions and sentence became final prior to this Court's decision in *Ring*.

It is based upon the disparate treatment engendered by the Florida Supreme Court's partial retroactivity ruling that this Petition arises. Despite having been sentenced to death under the same unconstitutional sentencing scheme as that which was identified by this Court in *Hurst v. Florida*, Petitioner was denied relief by the Florida Supreme Court. Specifically, the Florida Supreme Court failed to grant relief to Petitioner, or any other similarly situated death sentenced prisoner, whose sentences became final in the short time period between this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584

(2002). The Florida Supreme Court's partial retroactivity framework, denying *Hurst* retroactivity to all death sentences decided between *Apprendi* and *Ring*, even though *Apprendi* was the foundation for both this Court's decision in *Ring*, and subsequently *Hurst*, is in error. Moreover, it is inconsistent with the Eighth Amendment's prohibition against the arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's Equal Protection Clause.

Where the state seeks to impose a sentence of death, the Eighth Amendment requires that it must be applied consistently, or not at all. *Furman v. Georgia*, 408 U.S. 238, 309-310 (1972). By denying *Hurst* relief to Mr. Foster and other similarly situated prisoners whose sentences became final after the decision in *Apprendi* but before *Ring*, the Florida Supreme Court has acted in a manner that is both cruel and unusual and prohibited by the Eighth Amendment. The Florida Supreme Court's retroactivity cutoff at *Ring* injects a level of arbitrariness that far exceeds that which is permissible under the principles set forth in this Court's traditional retroactivity jurisprudence. The Florida Supreme Court's bright-line retroactivity cutoff for *Hurst* claims presents this Court with yet another in a long line of occasions where capital punishment has been applied arbitrarily and capriciously in Florida. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987) (overturning Florida's bright-line rule barring relief in Florida cases where the jury was not instructed it could consider non-statutory mitigating evidence in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978); *see also Hall v. Florida*, 134 S. Ct. 1986 (2014) (finding Florida's use of a bright-line IQ testing cutoff for purposes of determining intellectual disability violated *Atkins v. Virginia*,

536 U.S. 304 (2002). In implementing a partial retroactivity approach to the availability of *Hurst* relief to only those prisoners who sentences of death became final after *Ring*, the Florida Supreme Court has created a framework that raises grave concerns as to the arbitrariness and cruelty with which Florida imposes the death penalty on capital defendants.

This Court should now resolve the constitutional infirmities within the Florida Supreme Court's partial retroactivity approach to *Hurst* relief. Mr. Foster's case, who became final prior to this Court's decision in *Ring*, but after this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), provides an appropriate vehicle for this Court to address the Florida Supreme Court's partial retroactivity framework and resolve this matter now.

B. Relevant Decisional Framework

In *Ring v. Arizona*, 536 U.S. 584 (2002) this Court held that under the Sixth Amendment a defendant has the right to a jury determination of each fact necessary to establish the aggravating circumstances necessary for the imposition of a sentence of death. This Court's *Ring* decision, however, was confined to a review of Arizona's death penalty statute and did not comment at large on every individual state death penalty scheme. Specifically, this Court did not address Florida's capital sentencing scheme and did not engage post-*Ring* in certiorari review of petitions raising *Ring*-based claims with respect to Florida's system.

Following *Ring*, the Florida Supreme Court did not grant relief in cases raising *Ring*-based challenges. The Florida Supreme Court repeatedly held fast to the

determination that it was not that court's province to determine the constitutionality of its prior precedents upholding the constitutionality of its death penalty statutory sentencing scheme. *See e.g.*, *King v. Moore*, 831 So. 2d 143 (Fla. 2002); *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002).

Roughly fourteen years later, in *Hurst v. Florida*, this Court declared Florida's capital sentencing scheme, Fla. Stat. 921.141, unconstitutional. In striking down Florida's capital sentencing scheme, this Court determined that Florida's statute violated the Sixth Amendment right to a jury determination of every fact necessary to impose a sentence of death. *Hurst*, 136 S. Ct. at 619. In doing so, this Court noted that its prior decision in *Ring* applied with equal force to Florida's capital sentencing scheme. *Id.* at 621-22. This Court then remanded *Hurst* to the Florida Supreme Court.

On remand, in *Hurst v. State*, the Florida Supreme Court determined that Mr. *Hurst* was entitled to relief on two grounds: 1) under the Sixth Amendment right to a jury finding of every fact necessary to impose a sentence of death; and 2) under the Eighth Amendment, and the Florida Constitution requirement for unanimity in jury verdicts, that in order to impose a sentence of death a jury's recommendation must be unanimous. *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016). In extending this Court's holding in *Hurst v. Florida* to provide for juror unanimity, the Florida Supreme Court noted it was doing so in light of the recognition of the need for heightened reliability in capital cases. *Id.* at 59; citing *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988).

Following its decision in *Hurst v. State*, the Florida Supreme Court issued its opinions in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) and *Asay v. State*, 210 So. 3d 1 (Fla. 2016) The Florida Supreme Court's opinions in both cases, issued the same day, addressed the retroactivity of the *Hurst* decisions under its *Witt* analysis.[3] The Court's decisions in *Mosley* and *Asay* divided capital defendants in two classes for purpose of eligibility of retroactive application of *Hurst*: to those whose cases became final prior to this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002) and those whose cases became final after. *Mosley*, 209 So. 3d at 1283; *Asay*, 210 So. 3d at 21-22. In determining the decision in *Ring* as the appropriate cut-off date for retroactivity purposes, the Florida Supreme Court predicated its reasoning on the basis that it was not until *Hurst v. Florida* that this Court ultimately made the determination that *Ring* was applicable to Florida's capital sentencing scheme. *Mosley*, 209 So. 3d at 1283. The Florida Supreme Court did not address the issue as to whether those defendants who were sentenced to death under Florida's unconstitutional sentencing pre-*Ring* violated the Eighth Amendment under its holding in *Hurst v. State*.[4]

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[3] *See Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980) (applying the pre-*Teague* three factor analysis found in *Linkletter v. Walker*, 381 U.S. 618 (1965) and *Stovall v. Deno*, 388 U.S. 293 (1967).

[4] Despite failing to address the Eighth Amendment implications of imposing a partial retroactivity approach, both Justice Pariente and Justice Lewis writing in dissent noted the inherent Eighth Amendment implications of creating such an approach, arguing that doing so violated notions of fundamental fairness and the Eighth Amendment's prohibition against the arbitrary and capricious imposition of the death penalty to similarly situated defendants. *Asay*, 210 So. 3d at 36 (Pariente, J., concurring in part and dissenting in part); *Asay*, 210 So. 3d at 37-38. (Perry, J., dissenting).

After its decisions in *Asay* and *Mosley*, the Florida Supreme Court reaffirmed its partial retroactivity approach of the *Hurst* decisions and its line drawing at the June 24th, 2002 *Ring* decision in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). Following its decision in *Hitchcock*, the Florida Supreme Court then summarily denied relief in a number of pre-*Ring* cases, including Mr. Foster's, engaging in a truncated show cause process on appeal. In doing so, the Florida Supreme Court has failed to date to engage in any analysis as to the constitutionality of its partial retroactive application of the *Hurst* decisions under the Eighth Amendment.

The Florida Supreme Court's fashioning of a non-traditional approach to retroactivity, holding that the decisions in both *Hurst* cases apply only to those cases that became final after this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), cannot withstand scrutiny under this Court's Eighth and Fourteenth Amendment jurisprudence. As such, certiorari to the Florida Supreme Court is warranted.

C. The Florida Supreme Court's partial retroactivity cutoff violates the Eighth Amendment prohibition against arbitrary and capricious imposition of capital punishment and the Fourteenth Amendment's Guarantee of Equal Protection

This Court has on many occasions recognized the constitutionality of non-traditional retroactivity rules that deny defendants the benefit of decisions announcing new constitutional rules. In doing so, this Court has found justification in the denial of those new rules of law to defendants whose cases had become final on direct review prior to their announcement by acknowledging that doing so serves a legitimate purpose of ensuring state's interests in the finality of criminal convictions. *See e.g., Teague v. Lane*, 489 U.S. 288, 309 (1989). Such rules are born of the

pragmatic necessity inherent in the judicial process and have been determined by this Court to be constitutional despite the fact that in some instances they result in unequal and disparate treatment.

Those rules, however, are still bound by constitutional restraints. In capital cases, the Eighth Amendment requires that States must administer the death penalty in a way that can rationally distinguish between for whom death is an appropriate sentence and those for whom it is not. *Spaziano v. Florida*, 468 U.S. 447, 460 (1984). Where the death penalty is imposed in a wantonly and freakishly manner, such that it is arbitrary and capricious, it violates the Eighth Amendment prohibition on cruel and unusual punishment. *Furman v. Georgia*, 408 U.S. 238, 310 (1972). Post-*Furman,* this Court has repeatedly held that the Eighth Amendment requires consistency and uniformity in the application of death sentences for purposes of ensuring reliability and fundamental fairness. *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). This heightened need for reliability stems from the gravity and finality which accompanies a death sentence and the understanding that "death is different." *See McClesky v. Kemp* 481 U.S. 279 (1987). Moreover, the Fourteenth Amendment right to equal protection also requires that the law treat similarly those defendants who have committed the same quality of offense. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) States do not have unfettered discretion to arbitrarily create classes of condemned prisoners.

The Florida Supreme Court opinions in *Asay* and *Mosley* creating a partial retroactivity approach to application of the *Hurst* decisions, offends those constitutional restraints. In creating a dividing line for retroactive application of the *Hurst* decisions at the date of the decision in *Ring*, the Florida Supreme Court has provided no justifiable basis for doing so which does not run afoul of the Eighth and Fourteenth Amendments. In fashioning its partial retroactivity approach, the Florida Supreme Court has drawn an arbitrary line that results in the granting of relief under the *Hurst* decisions to some death sentenced inmates with longstanding final convictions, while also denying retroactive relief to others whose convictions are equally longstanding. Such disparate outcomes of similarly situated prisoners is not only arbitrary and in violation of the Equal Protection Clause of the Fourteenth Amendment but also offensive to the notions underpinning the Eighth Amendment's prohibition against cruel and unusual punishment.

While there will always be earlier precedents by this Court upon which new constitutional rulings build and subsequently, the need to draw lines in time from which to impose those new rules of law, the Florida Supreme Court's approach of partial retroactivity of the *Hurst* decisions raises serious issues. The manner in which the Florida Supreme Court has fashioned its approach to retroactivity of the *Hurst* decisions raises a degree of arbitrariness that exceeds the levels permissible by this Court's retroactivity jurisprudence.

The rationale provided by the Florida Supreme Court as to why it determined *Ring* as the cut-off point for retroactivity does nothing to justify its arbitrariness. In

attempting to explain its reasoning for imposing *Ring* as the cutoff, the Florida Supreme Court held in *Mosley* that "[b]ecause Florida's capital sentencing statue has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst* retroactively to that time" *Mosley,* 209 So. 3d at 1280. That reasoning, however, is flawed. The Florida Supreme Court's analysis overlooks that this Court's decision in *Ring* did not invalidate Florida's capital sentencing scheme but rather Arizona's. While this Court's opinion in *Ring* made note of, and comparison between, Florida and Arizona's capital sentencing scheme, its opinion did nothing either explicitly or impliedly to render Florida's scheme unconstitutional. Such a rationale also overlooks that Florida's capital sentencing scheme was unconstitutional even before *Ring,* given that the Sixth Amendment requirement of a jury fact-finding of each fact necessary for the imposition of death had always applied with full force even before this Court's decision in *Ring.* This Court's decision in *Ring* did not create that right but rather recognized that Arizona's capital sentencing scheme had failed to provide for it.

The purported justification provided by the Florida Supreme Court does nothing to establish a rational basis to explain why *Ring* serves as the cutoff date for purposes of retroactive application of the *Hurst* decisions or how it aids in the fair application of the death penalty under Florida's capital sentencing scheme. Most critically, it does nothing to address the arbitrariness which results in providing the benefit of the *Hurst* decisions to some death sentenced inmates and not others where there are no other meaningful differences other than the date of finality of their

conviction and sentence. Such a lack of justification is especially troublesome when also considering the fact that every death sentenced prisoner in Florida was sentenced under the same unconstitutional sentencing scheme.

Florida's capital sentencing scheme did not become unconstitutional when *Ring* was decided. This Court's decision in *Hurst v. Florida* makes abundantly clear that it was always unconstitutional, regardless of the date of the decision in *Ring*. That is precisely the point the Florida Supreme Court fails to acknowledge. The Florida Supreme Court, likewise, has failed to acknowledge that the foundational precedent for both *Ring* and *Hurst v. Florida* was this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court's decision in *Ring* itself stated that it was *Apprendi*, not *Ring*, which recognized and explained that the Sixth Amendment requires a finding of fact, beyond a reasonable doubt, by a jury for any element of an offense which increases a defendant's maximum sentence. *Hurst*, 136 S. Ct. at 621. This Court's decision in *Ring* did not announce that rule. Rather instead, it merely applied its holding in *Apprendi* to conclude that Ring's sentence of death, under Arizona's capital sentencing scheme, violated his right to a jury determination of the requisite facts because a judge's findings had been responsible for exposing him to a greater punishment than that which was authorized by the jury's verdict. *Hurst*, 136 S. Ct. at 621.

This Court's decision in *Hurst v. Florida* was an extension of that rule of law. It extended that analysis to Florida's capital sentencing scheme and just as this Court had done in *Ring*, this Court in *Hurst v. Florida* applied *Apprendi's* holding to

Florida's capital sentencing scheme and determined it to be unconstitutional. In doing so, this Court stated:

> *Spaziano* [*v. Florida*, 468 U.S. 447 (1984),] and *Hildwin* [*v. Florida*, 490 U.S. 638 (1989), summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.' *Hildwin*, 490 U.S. at 640-41. *Their conclusion was wrong, and irreconcilable with Apprendi.* Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre-*Apprendi* decision-*Walton* [*v. Arizona*], 497 U.S. 639 (1990)-could not 'survive the reasoning of *Apprendi*.' [*Ring*,] 536 U.S. at 603.

Hurst v. Florida, 136 S. Ct. at 623 (emphasis added). This Court's decision in *Hurst v. Florida* makes clear that its prior holding in *Ring* relied on *Apprendi* and the holding in that case clarifying the constitutional guarantees in capital cases. Thus, regardless of the fact that Mr. Foster's case became final prior to *Ring*, that date of finality should not dictate his entitlement to relief under *Hurst* where the underpinnings of this Court's holding in that case derive from *Apprendi*, not *Ring*. Yet, under the Florida Supreme Court's partial retroactivity rationale, petitioners like Mr. Foster are arbitrarily being left out in the cold from *Hurst* relief despite the fact *Apprendi* is the foundational framework and not *Ring*. Absent any explanation for this entirely arbitrary line-drawing, the Florida Supreme Court's partial retroactivity approach violates the Eighth Amendment.

Moreover, that the Florida Supreme Court's partial retroactivity approach is entirely arbitrary and without justification is further underscored by the recognition that the date of finality of a particular defendant's sentence is dependent on a number

of variable factors which are entirely random and not uniform. Delays in production of the record on appeal to the Florida Supreme Court, possible issues with re-scheduling of dates due to conflicts of appointed counsel, requests for extension of time to file briefing, the length of time a case remained at the Florida Supreme Court before an opinion issued, and whether a motion to file a rehearing was sought or not, are to name but a few. Such an arbitrary cut-off period also fails to acknowledge the disparate treatment which results from those individuals who may have committed crimes long before other capital defendants who miss the *Ring* cut-off date and but for the fact that they were granted re-sentencing or some other form of relief, will receive the benefit of the *Hurst* decisions because their case was not final at the time of the *Ring* decision.

Finally, and significantly, the Florida Supreme Court's rationale ignores entirely that its decision in *Hurst v. State*, unlike this Court's decision in *Ring*, was not based upon the Sixth Amendment but rather the Eighth Amendment, thus making it impossible for *Ring* to have prefigured the ruling in that case. "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 before a death sentence is authorized was embraced as a way 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 court also 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.").

Hurst v. State demonstrates that Mr. Foster's death sentence lacks the heightened reliability demanded by the Eighth Amendment. His jury's vote was 9-3 even in spite of the absence of any compelling mitigation evidence beyond counsel's "good guy" approach to mitigation and the failure to present compelling evidence of the statutory mitigator that he was 18 at the time of the crime. The jury's 9-3 vote further underscores the concerns noted by the Florida Supreme Court in *Hurst v. State* that "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 9-3 advisory recommendation after such a paltry presentation of mitigating evidence by counsel at penalty phase cannot possibly be considered reliable. As indicated in *Mosley v. State,* 209 So. 3d 1248 (Fla. 2016), the *Witt*[5] analysis in the context of *Hurst v. State* requires courts to consider the need to cure "individual injustice." The layers

[5] *Witt v. State*, 387 So. 2d 922, 925 (Fla.1980).

of unreliability and errors in Mr. Foster's penalty phase demonstrate an individual injustice in need of a cure.

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, 78 S. Ct. 590, 2 L.Ed.2d 630 (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.").

Hurst v. State, 202 So. 3d at 60. Such Eighth Amendment protections are generally understood to be retroactive. *See, e.g., Miller v. Alabama*, 132 S. Ct. 2455 (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).

Additionally, the 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 that jurors must feel the weight of their sentencing responsibility. As the U.S. Supreme Court explained in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), "it is not 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." *See also Blackwell v. State*, 79 So. 731, 736 (Fla. 1918).[6] 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. Foster's jurors were not told that their vote had to be unanimous, and that their decision 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. Foster's jury's non-unanimous 9-3 advisory recommendation simply "does not meet the standard of reliability that the Eighth Amendment requires." *Id.* at 341.

The issue of whether *Hurst v. State*'s right to a unanimous jury recommendation should be retroactively applied has never been addressed by the Florida Supreme Court. To date, the Florida Supreme Court has never provided an explanation as to why it drew a line at *Ring* instead of *Apprendi*. As Justice Pariente noted in *Hitchcock*, "[t]his Court did not in *Asay*, however, discuss the new right

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[6] The Florida Supreme Court has previously rejected *Caldwell* challenges in the context of the prior sentencing scheme, where the judge was the final decision-maker, not the jury. But three Justices of this Court have dissented from the denial of certiorari in two capital cases because the Florida Supreme Court's rationale for denying *Caldwell* claims has been undermined by *Hurst v. Florida*, and would grant certiorari to address this "potentially meritorious Eighth Amendment challenge." *Truehill v. Florida*, 138 S. Ct. 3, 4 (Oct. 16, 2017) (Sotomayor, J., dissenting).

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." *Hitchcock*, 226 So. 3d at 220. (Pariente, J. dissenting). Yet since its decisions in *Asay* and *Mosley*, the Florida Supreme Court has repeatedly applied its partial retroactivity cutoff and granted the right to a unanimous jury determination constitutionally required by *Hurst v. State* to post-*Ring* prisoners whose death sentences became final before *Hurst* but denied relief to those prisoners whose sentences became final between *Apprendi* and *Ring*, like Mr. Foster. Under the Florida Supreme Court's partial retroactivity framework employing a *Ring* cutoff, prisoners such as Mr. Foster are being arbitrarily left out of *Hurst's* application of *Apprendi* to Florida's capital sentencing scheme. Absent an explanation by the Florida Supreme Court which is non-arbitrary, the court's partial retroactivity approach cannot be squared with the Eighth Amendment.

D. The Florida Supreme Court's partial retroactivity cutoff at *Ring* exceeds the limits of the Equal Protection Clause of the Fourteenth Amendment

The arbitrariness with which the *Ring*-based cutoff infects Florida's capital sentencing system also violates the Equal Protection Clause under the Fourteenth Amendment. The Florida Supreme Court's basis for partial retroactivity provides no justifiable or reliable basis for separating Florida's death sentenced defendants into

pre-*Ring* and post-*Ring* categories. When two classes are created to receive different treatment, as the Florida Supreme Court has done here, the question is "whether there is some ground of difference that rationally explains the different treatment..." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). Under the Fourteenth Amendment, state laws that impinge upon fundamental rights must be reviewed under strict scrutiny. *See, e.g., Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). When a state draws a line between those capital defendants who will receive the benefit of a fundamental right afforded to every defendant-i.e. the right tounanimous fact finding by a jury-and those who will not be provided that right, the justification for that line drawing must survive strict scrutiny. The denial of retroactive application of the *Hurst* decisions to Mr. Foster on the grounds that his sentence became final prior to the June 24, 2002 decision in *Ring* falls well short of those standards and violates his right to equal protection of the law. This is particularly true in a case such as Mr. Foster's' where this Court's decision in *Apprendi* was rendered ten months prior to his sentence becoming final in 2001.

That the Florida Supreme Court's approach of partial retroactivity raises serious concerns about its constitutionality has not been lost on the court's members. Several members of the Florida Supreme Court have even acknowledged that partial retroactivity does not survive scrutiny. Justice Pariente noted in *Asay* that "[t]he majority's conclusion results in an unintended arbitrariness as to who receives relief...To avoid such arbitrariness and to ensure uniformity and fundamental

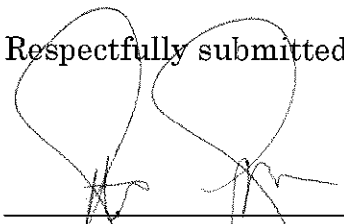
fairness in Florida's capital sentencing... *Hurst* should be applied retroactively to all death sentences." *Asay*, 210 So. 3d at 36. (Pariente, J., concurring in part and dissenting in part). Similarly, Justice Perry also noted in *Asay*: "In my opinion the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two grounds of similarly situated persons." *Asay*, 210 So. 3d at 37 (Perry, J., dissenting). Justice Perry also correctly pointed out that the result of partial retroactive application would be that there would be defendants who committed equally violent crimes but whose death sentences became final mere days apart and will be treated differently without any justification. *Id.* As those quotes illustrate, even members of the Florida Supreme Court maintain strong reservations as to the disparate treatment which results from partial retroactive application of the *Hurst* decisions.

CONCLUSION

Florida Supreme Court jurisprudence has repeatedly held that *Hurst v. Florida* and *Hurst v. State* apply retroactively. However, rather than apply retroactive application of those decisions consistently and evenly to all those defendants previously sentenced under Florida's unconstitutional sentencing scheme, the Florida Supreme Court has crafted an unworkable and arbitrary rule of partial retroactivity which does not comport with the Eighth Amendment prohibition against the arbitrary imposition of the death penalty and the Fourteenth Amendment right to Due Process and Equal Protection.

As such, for the above stated reasons, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari to review the Florida Supreme Court decision.

Respectfully submitted,



SCOTT GAVIN
LAW OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL – SOUTH
1 EAST BROWARD BOULEVARD, SUITE 444
FORT LAUDERDALE, FL 33301
(954) 713-1284

* Counsel of Record

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