No. _____

OCTOBER TERM 2017

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS OVERTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

CAPITAL CASE

MARIE LOUISE SAMUELS PARMER *
Special Assistant CCRC-South
Florida Bar No. 0005584

SCOTT GAVIN
Assistant CCRC-South
Fla. 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 Eighth and Fourteenth Amendments to the United States Constitution?

2. Does the Florida Supreme Court's formula for partial retroactivity of the *Hurst* opinions violate the Supremacy Clause of the United States Constitution pursuant to *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)?

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PARTIES TO THE PROCEEDINGS BELOW

The Petitioner, Thomas Overton, 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 Thomas Overton requests 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 *Overton v. State of Florida*, 236 So. 3d 238 (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 February 2, 2018. Counsel sought an additional 60 days for filing of this Petition, which was granted up to and including July 2, 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. Overton requests this 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. Overton presents a brief summary of the relevant facts below.

A. Introduction

This Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016) held that Florida's capital sentencing scheme violated the Sixth Amendment. Thereafter, on remand, the Florida Supreme Court announced its decision in *Hurst v. State*, 202 So. 3d 40 (2016), ruling that Florida's capital sentencing scheme also violated the Florida Constitution and the Eighth Amendment right to a unanimous jury determination as to a sentence of death.

Following those decisions, the Florida Supreme Court then engaged in a non-traditional approach to retroactivity, employing a partial retroactivity framework whereby the decisions in in *Hurst v. Florida* and *Hurst v. State* are applied retroactively on collateral review to only those prisoners whose sentences became final on direct appeal prior to this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). Mr. Overton's Petition arises from that non-traditional retroactivity approach

employed by the Florida Supreme Court and the subsequent decisions and case law which have accompanied that framework.

As it stands, the Florida Supreme Court's *Ring*-based cutoff approach to retroactive application of the *Hurst* decisions affords relief to those prisoners who sentences became final after this Court's decision in *Ring*, while denying relief to those whose sentences became final prior to the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This, despite the fact that *Apprendi* is unequivocally the foundation of this Court's decisions in both *Ring* and *Hurst v. Florida*. The result is that the Florida Supreme Court's partial retroactivity formula prohibits a group of more than 150 prisoners from obtaining a jury determination of their death sentences, while providing that the death sentences of other similarly situated prisoners be vacated on collateral review in order that they be provided that right. Such a framework is incompatible with the Eighth Amendment prohibition against the arbitrary and capricious imposition of the death penalty as well as the Equal Protection Clause of the Fourteenth Amendment.

To date, the Florida Supreme Court has failed to address in any meaningful way the constitutional implications which arise from its partial retroactivity approach under both the Eighth and Fourteenth Amendments. Most significantly, for petitioners such as Mr. Overton, the Florida Supreme Court has likewise failed to address the class of prisoners whose sentences became final during the post-*Apprendi* pre-*Ring* time period and how its *Ring*-based cutoff passes constitutional muster in

light of the fact that *Apprendi* and not *Ring* was the framework for its decision in *Hurst v. Florida*.

The constitutional infirmities which result from the Florida Supreme Court's partial retroactivity *Hurst* cutoff should be addressed by this Court in Mr. Overton's Petition. The unique circumstances of the timing of finality of Mr. Overton's sentence--***mere weeks*** before this Court's decision in *Ring v. Arizona*--provides this Court with both a glaring example of the arbitrariness which results in the application of Florida's bright-line rule of partial retroactivity and the perfect vehicle in which to rectify those infirmities.

B. Factual Procedural and Factual Background

Mr. Overton was indicted in December of 1996 with two counts of first degree murder, killing of an unborn child, burglary of a dwelling, and sexual battery involving serious bodily injury. (R. 8-15). Mr. Overton pled not guilty. A trial was held on January 11-22, 1999 and Mr. Overton was found guilty on all counts. (R. 4882-83). Mr. Overton's penalty phase was held on February 4, 1999 at which Mr. Overton refused counsel to present mitigating evidence. Following close of the state's presentation of evidence, the advisory jury returned recommendations of 9-3 and 8-4 imposing the death penalty. Thereafter, on February 22, 1999 a *Spencer*[1] hearing was held and Mr. Overton was sentenced to death. (R. 1190-1199).

The Florida Supreme Court affirmed Mr. Overton's convictions and sentence on direct appeal. *Overton v. State*, 801 So. 2d 877 (Fla. 2001). Rehearing was denied

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

on December 3, 2001, and the mandate issued the same day. Following the issuance of the mandate, Mr. Overton filed a Petition for Writ of Certiorari to this Court; his conviction and sentence became final upon this Court's denial on May 13, 2002. *Overton v. Florida*, 535 U. S. 1062 (2002). *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. Overton timely filed his initial Rule 3.851 Motion for Postconviction Relief on April 29, 2003. (PCR-1 534-607, 866). The State then filed a motion to strike the Rule 3.851 motion, which was granted by the court. Mr. Overton then filed a second amended motion for postconviction relief in October 2003. (PCR-1. 935-1110). On October 8, 2004 Mr. Overton filed a third amended rule 3.851 motion. (PCR-1. 2261-2338).

An evidentiary hearing was held on November 15-17, 2004. (PCT-1. Vol. 20-26 p. 1-929). The circuit court denied relief on January 14, 2005, and rehearing on March 21, 2005. (PCR-1. 2823-2948; 2958-60). Mr. Overton timely appealed. (PCR-1. 2975-76). Mr. Overton also subsequently timely filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court on May 8, 2006. In each of the briefs filed in his appeal, both his Initial Brief and his State Habeas, Mr. Overton raised claims challenging the constitutionality of his sentence of death under the Sixth, Eighth, and Fourteenth Amendments in light of this Court's decisions in both *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002).

During the pendency of his appeal in the Florida Supreme Court, Mr. Overton filed a successive motion for postconviction relief in the circuit court on June 16, 2006. (PCR-2. 1-106). Mr. Overton also filed a motion to relinquish jurisdiction which the Florida Supreme Court denied. (Supp. PCR-2. 37-49).

On November 29, 2007 the Florida Supreme Court affirmed the denial of Mr. Overton's motion for postconviction relief as well as his state habeas petition. *Overton v. State*, 976 So. 2d 536 (Fla. 2007). The Florida Supreme Court rejected his claims, finding that his claim regarding the retroactivity of *Ring* was precluded by the court's decision in *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005) and that his claim contending that Florida's capital sentencing scheme violated *Ring* and *Apprendi* was without merit based on its prior decisions in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) and *King v. Moore*, 831 So. 2d 55, 74 (Fla. 2002). Specifically, as to Mr. Overton's *Ring* claim, the court stated:

> Overton contends that his sentences of death must be vacated because Florida's capital sentencing scheme is a violation of both *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). The claim is without merit. This Court addressed the contention that Florida's capital sentencing scheme violates the United States Constitution under *Apprendi* and *Ring* in *Bottoson v. Moore*, 833 So.2d 693 (Fla.), cert. denied, 537 U.S. 1070, 123 S. Ct. 662, 154 L.Ed.2d 564 (2002), and *King v. Moore*, 831 So.2d 143 (Fla.), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), and denied relief. *See also Jones v. State*, 845 So.2d 55, 74 (Fla.2003). Overton is likewise not entitled to relief on this claim. Furthermore, one of the aggravating circumstances found by the trial court here was Overton's previous conviction of a violent felony, "a factor which under *Apprendi* and *Ring* need not be found by the jury." *Jones v. State*, 855 So.2d 611, 619 (Fla.2003); *see also Doorbal v. State*, 837 So.2d 940, 963 (Fla.) (rejecting the *Ring* claim where one of the aggravating circumstances found by the trial judge was defendant's prior conviction for a violent felony), cert. denied, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003). Finally,

> this Court has previously held that *Ring* and *Apprendi* cannot receive retroactive application. *See Johnson*, 904 So.2d at 412 (holding that *Ring* does not apply retroactively in Florida postconviction proceedings to cases that were final on direct review at the time of the *Ring* decision); *Hughes v. State*, 901 So.2d 837, 840 (Fla.2005) (holding that *Apprendi* does not apply retroactively in Florida postconviction proceedings to cases that were final on direct review at the time of the Apprendi decision).

Overton v. State, 976 So. 2d 536, 574-75 (Fla. 2007). The court denied rehearing on February 25, 2008. The mandate issued on March 12, 2008. (PCR. 63).

On October 5, 2001 the circuit court ordered the State to file an Answer to Mr. Overton's pending successive Rule 3.851 motion for postconviction relief. Following that order, the State filed its Answer conceding Mr. Overton was entitled to a hearing. (PCR-2. 201-205). The circuit court conducted an evidentiary hearing on January 24, 2012 (PCR-2. 1002-1206) and denied relief on April 10, 2012. (PCR-2. 802-815). Mr. Overton filed a motion for rehearing on May 1, 2012 which the circuit court denied.

Mr. Overton timely filed his notice of appeal to the Florida Supreme Court on May 25, 2012 (PCR-2. 858-59). The Florida Supreme Court affirmed the denial of postconviction relief, along with affirming the denial of a subsequent motion to compel DNA testing which Mr. Overton had filed on January 14, 2013. *Overton v. State*, 129 So. 3d 1069 (Fla. 2013). The court denied rehearing October 31, 2013.

On November 8, 2013 Mr. Overton filed a Petition for a Writ of Habeas Corpus in the United States District Court, Southern District of Florida. Case No.: 4:13-cv-10172-KMM. (DE 1). The District Court denied Mr. Overton's Petition on January 12, 2016, (DE 16), the same day this Court issued *Hurst. Overton v. Jones*, 155 F. Supp. 3d 1253 (S. D. Fla. 2016). Mr. Overton timely filed an application for certificate

of appealability to the Eleventh Circuit Court of Appeals. (DE 19). On February 10, 2016 Mr. Overton filed a motion to Alter and Amend Judgement. (DE 17). The following day, February 11, 2016 Mr. Overton filed a Notice of Appeal and a Motion for Certificate of Appealability. (DE 18, DE 19). Thereafter, on March 28, 2016 the District Court entered orders denying both Mr. Overton's Motion to Alter and Amend Judgement and his Motion for Certificate of Appealability. (DE 27, DE 28). The District entered final judgment that same day. (DE 29).

On April 20, 2016 Mr. Overton filed an application for Certificate of Appealability and Motion for Substitution of Counsel in the Eleventh Circuit Court of Appeals. On March 9, 2017 the Eleventh Circuit Court of Appeals granted the motion for substitution of counsel and appointed independent counsel to represent Mr. Overton in his appeal. Thereafter, in May 2018, independent counsel filed an Application for Certificate of Appealability in the Eleventh Circuit Court of Appeals. That application currently remains pending.

Subsequently, while the litigation of Mr. Overton's federal habeas petition remained pending in the Eleventh Circuit Court of Appeals, on January 1, 2017 Mr. Overton filed a Rule 3.851 successive motion for postconviction relief in the circuit court of the Sixteenth Judicial Circuit in and for Monroe County, Florida pursuant to the decisions in *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). On May 31, 2017 the circuit court summarily denied Mr. Overton's motion. Mr. Overton timely filed a notice of appeal to the Florida Supreme Court. Thereafter, on September 27, 2017 the Florida Supreme Court issued an order to

show cause directing Mr. Overton 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. Following Mr. Overton's briefing in response to the order to show cause, on February 2, 2018 the Florida Supreme Court denied relief. *Overton v. State*, 236 So. 3d 238 (Fla. 2018).

Mr. Overton then submitted his Initial Brief to the Florida Supreme Court on October 17, 2017 and a Reply Brief on November 13, 2017. In doing so, Mr. Overton argued to the Florida Supreme Court that the *Ring*-based retroactivity cutoff violates the Eighth and Fourteenth Amendments. Mr. Overton 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*. Additionally, Mr. Overton further argued that because the *Hurst* decisions announced substantive constitutional rules of law, the Supremacy Clause required the Florida Supreme Court to apply those substantive rules retroactively to his case on collateral review. Last, Mr. Overton argued that any potential "*Hurst*-error" in his case could not be deemed "harmless" beyond a reasonable doubt given his non-unanimous jury recommendations of 9-3 and 8-4.

On February 2, 2018 the Florida Supreme Court denied Mr. Overton's appeal. *Overton v. State*, 236 So. 3d 238 (Fla. 2018). In doing so, the Florida Supreme Court provided the following analysis:

> After reviewing Overton's response to the order to show cause, as well as the State's arguments in reply, we

> conclude that Overton is not entitled to relief. After a jury convicted Overton of two counts of first degree murder, he was sentenced to death on both counts following a jury recommendation for death by a vote of nine to three on one count and a vote of eight to four on another count. Overton v. State, 801 So. 2d 877, 888-89 (Fla. 2001). Overton's sentences of death became final in 2002. Overton v. Florida, 535 U.S. 1062 (2002). Thus, Hurst does not apply retroactively to Overton's sentences of death. See Hitchcock, 226 So.3d at 217. Accordingly, we affirm the denial of Overton's motion.

Overton, 236 So. 3d at 239. The Florida Supreme Court's opinion did not address any of Mr. Overton's federal constitutional arguments or his arguments related to the post-*Apprendi* pre-*Ring* class of prisoners being denied *Hurst* relief. The mandate issued on February 26, 2018.

Following issuance of the mandate, on April 18, 2018 Mr. Overton 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. Overton's request for a sixty-day extension of time, providing up to and including June 2, 2018 for Mr. Overton to file his Petition for Writ of Certiorari. This Petition follows.

REASONS FOR GRANTING THE WRIT

I. THE FLORIDA SUPREME COURT'S RETROACTIVITY CUTOFF OF *HURST* RELIEF AT *RING V. ARIZONA* 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

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 repeatedly failed to grant relief in cases raising *Ring*-based challenges. The Florida Supreme Court 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, 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. *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.

Following remand to the Florida Supreme Court, in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court held that the Sixth Amendment required that the existence of aggravating factors necessary for the imposition of death must be found by a jury, and also that under Florida's Constitution and the Eighth Amendment, , 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).

In the wake of 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.[2] In both cases the Florida Supreme Court 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. The Court's decisions in *Mosley* and *Asay* divided

[2] *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).

capital defendants in two classes for purpose of eligibility of retroactive application of *Hurst*-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*.[3]

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

[3] 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).

any analysis as to the constitutionality of its partial retroactive application of the *Hurst* decisions under the Eighth Amendment.

In crafting this non-traditional approach to retroactivity, however, the Florida Supreme Court has 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*, Mr. Overton 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.

The Eighth Amendment requires that the death penalty must be applied consistently, or not at all. *Furman v. Georgia*, 408 U.S. 238, 309-310 (1972). By denying *Hurst* relief to Mr. Overton 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 case 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 arbitrary and capricious approach 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. Overton's case, which 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. As such, certiorari to the Florida Supreme Court is warranted.

B. The Florida Supreme Court's partial retroactivity cutoff violates the Eighth Amendment prohibition against arbitrary and capricious imposition of capital punishment

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 a 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 wanton and freakish 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. Overton'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. Overton, whose sentence became final mere weeks prior to the issuance of *Ring*, are arbitrarily denied *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.

Further underscoring the arbitrariness which results from the Florida Supreme Court's partial retroactivity approach is 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.

Mr. Overton presents exactly with this scenario. By way of example, Carlton Francis was sentenced to death in October of 1998, before the state circuit court sentenced Mr. Overton to death. However, through random luck, the Florida Supreme Court did not issue its mandate on Francis's case until Feb. 11, 2002, *Francis v. State*, SC60-94385, and this Court did not deny Francis' Petition for a Writ of Certiorari until Dec. 16, 2002, placing Mr. Francis squarely within the Florida Supreme Court's *Ring* retroactive period. The only distinction between the two cases is happenstance as to timing – a constitutionally impermissible factor upon which to determine whether a sentence of death obtained under an unconstitutional statute can stand.

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 both enhance the reliability of death sentences while avoiding results which were arbitrary and capricious. "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. Overton's death sentence lacks the heightened reliability demanded by the Eighth Amendment. His jury's vote was 9-3 and 8-4 respectively, all of which was rendered without the benefit of any mitigation whatsoever. A 9-3 and 8-4 advisory recommendation after the lack of any mitigation presentation and egregious shortcomings by trial counsel in challenging the State's evidence at guilt phase, particularly the DNA evidence used to implicate Mr. Overton, cannot be considered reliable. The Florida Supreme Court noted in *Mosley v. State,* 209 So. 3d 1248 (Fla. 2016) that the *Witt*[4] analysis in the context of *Hurst v. State*

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

requires courts to consider the need to cure "individual injustice." The layers of unreliability and errors which permeate the record at Mr. Overton's penalty phase and throughout his entire trial demonstrate an individual injustice in need of a cure.

Moreover, also recognized by the Florida Supreme Court in *Hurst v. State* is that evolving standards of decency require unanimous recommendations. That recognition is borne out of the understanding that unanimity is yet another way to safeguard against the arbitrary and capricious imposition of death:

> 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*, 567 U.S. 460 (2012) (holding retroactive a case which held that mandatory sentences of life without parole for juveniles are unconstitutional); *Atkins v. Virginia*, 536 U.S. 304 (2002).

In Mr. Overton's case the record from trial establishes that that reliability for purposes of the Eighth Amendment was absent. Mr. Overton's jury was repeatedly instructed that its penalty phase verdict was merely advisory and only needed to be returned by a majority vote. (R. 4999, 5002-008, 5011-13). This despite the fact that this Court's precedent has long held that the Eighth Amendment requires that jurors

must feel the weight of their sentencing responsibility. As this 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).[5] 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. Overton'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. Overton's jury's non-unanimous 9-3 and 8-4 advisory recommendation simply "does not meet the standard of reliability that the Eighth Amendment requires." *Id.* at 341.

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[5] 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).

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 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. Overton. Under the Florida Supreme Court's partial retroactivity framework employing a *Ring* cutoff, prisoners such as Mr. Overton 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.

C. The Florida Supreme Court's partial retroactivity cutoff at *Ring* exceeds the limits of the guarantees of Equal Protection and Due Process under the Fourteenth Amendment

The arbitrariness with which the *Ring*-based cutoff infects Florida's capital sentencing system also violates the Equal Protection Clause and Due Process 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). Capital defendants have a fundamental right to a reliable determination of their sentences. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). 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 to unanimous fact finding by a jury-and those who will not be provided that right, the justification for that line drawing must survive strict scrutiny.

Under the Fourteenth Amendment, the denial of the benefit of Florida's new post-*Hurst* capital sentencing statute to "pre-*Ring*" prisoners like Mr. Overton also violates his rights to due process. This is because once a state requires certain

sentencing procedures, it creates a liberty interest in those procedures which are protected and guaranteed by the Fourteenth Amendment. *See, e.g. Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (due process interest in state created right to direct appeal); *Ford v. Wainwright*, 447 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (liberty interest in meaningful state proceedings to adjudicate competency to be executed.) While the right to a particular procedure may be created by state law, the subsequent violation of that right implicates federal constitutional concerns. See Evitts, 469 U.S. at 393 (state procedures employed "as an 'an integral part of the ...system for finally adjudicating the guilt or innocence of a defendant;" must comport with due process). It has been repeatedly acknowledged that state created death penalty procedures vest life and liberty interests in capital defendants that are protected by due process. *See, e.g. Ohio Adult Parole Authority*, 523 US. 272, 288-289 (1998); *see also Ford*, 477 U.S. at 427-31 (O'Connor, J., concurring).

The denial of retroactive application of the *Hurst* decisions to Mr. Overton on the grounds that his sentence became final prior to the June 24, 2002 decision in *Ring* falls well short of these standards and violates his right to due process and equal protection of the law. This is particularly true in a case such as Mr. Overton's' where this Court's decision in *Apprendi* was rendered *mere weeks* 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.

II. THE FLORIDA SUPREME COURT'S PARTIAL RETROACTIVITY APPROACH VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

This Court has previously held that the Supremacy Clause of the United States Constitution requires courts to apply substantive rules of law retroactively to all cases on collateral review. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), this Court held that the Supremacy Clause requires state courts to apply substantive constitutional rules retroactively as a matter of federal law, notwithstanding any

separate state-law retroactivity analysis. *Montgomery* clarified that the Supremacy Clause requires state courts to apply substantive rules retroactively notwithstanding the result under a state-law analysis. *Montgomery*, 136 S. Ct. 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). This Court's holding in *Montgomery* made clear that states cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of a prisoner's collateral challenge to the lawfulness of their confinement. *Id.* at 731-32.

For practical purposes, this Court's ruling in *Montgomery* is instructive with respect to the issue of *Hurst* retroactivity analysis. This Court's holding in *Montgomery*, subsequently applying the rule announced *Miller v. Alabama*, 567 U.S. 460 (2012)[6], found that the *Miller* rule was substantive even despite the fact that it had a procedural component to it. *Id.* at 734. Most significantly, despite the fact *Miller's* holding was based on a procedural mandate, this Court in *Montgomery* cautioned against conflating a procedural requirement necessary to implement a substantive guarantee with a rule that regulates only the manner of determining the defendant's culpability." *Montgomery*, 136 S. Ct. at 734. This Court noted that "[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

[6] In *Miller* this Court held that the imposition of mandatory sentences of life without parole in juveniles violates the Eighth Amendment.

whom the law may no longer punish." *Id.* at 735. Those necessary procedures do not "transform substantive rules into procedural ones." *Id.*

This Court's holding in *Miller*, and subsequently *Montgomery*, are instructive within the context of *Hurst* retroactivity analysis. The *Hurst* decisions announced substantive rules that must be applied retroactively to Mr. Overton under the Supremacy Clause. *Hurst v. Florida* made clear that there are three factual predicates that must be determined and accompany a death sentence: (1) the existence of particular aggravating circumstances; (2) that those particular aggravating circumstances were "sufficient" to justify the death penalty; and (3) that those particular aggravating circumstances outweigh the mitigation in the case. The *Hurst* [*v. Florida*] decision made explicitly clear that those determinations must be made by the jury. Just as the decision as to whether a juvenile is incorrigible, and thus eligible to be sentenced to life without parole, is substantive, so too is the determination as to whether a defendant is eligible for death. *See Montgomery*, 136 S. Ct. at 734. Any attempt to distinguish between the two is a matter of semantics and an attempt to elevate form over substance.

The Florida Supreme Court's subsequent decision in *Hurst v. State* described the substantive provisions it found to be required by the Eighth Amendment. *Hurst v. State*, 202 So. 3d at 48-69. *Hurst v. State* announced a substantive rule that the requisite findings for a determination of eligibility for death must be made by a jury, beyond a reasonable doubt, and that those determinations must be unanimous. The Florida Supreme Court based that determination on the requirement, under the

Eighth Amendment, that the death penalty must be narrowly applied to only the worst offenders and that the sentencing determination must express the values of the community with respect to the death penalty. *Hurst v. State*, 202 So. 3d at 60-61. The Florida Supreme Court's opinion was explicit in holding that the purpose of the unanimity rule was to ensure that Florida's capital sentencing scheme complied 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 reflect in [the majority of death penalty] states and with federal law." *Id.* That finding is inherently a matter of substantive law for purposes of federal retroactivity. *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."). As this Court explained in *Welch*, the determination of 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. *Id.* at 1266.

This Court's reasoning in *Welch* applies with equal force in the *Hurst* context. The Sixth Amendment requirement that each element of a Florida death sentence must be found by a jury beyond a reasonable doubt and the Eighth Amendment requirement of jury unanimity in fact-finding are substantive constitutional rules of law for purposes of federal retroactivity because they place certain first degree murders beyond the State's power to punish with a sentence of death. *Welch*, 136 S. Ct. at 1265. The Florida Supreme Court held that its decision in *Hurst v. State*

announcing the unanimity requirement was based upon the understanding that requiring unanimous findings as to both the aggravating and mitigating factors was to ensure reliability and help "narrow the class of murders subject to capital punishment." *Hurst*, 202 So. 3d at 60. The very purpose of that rule is intended upon placing certain individuals beyond the power of the state to punish by a sentence of death. Thus, it is inherently substantive. *See Welch*, 136 S. Ct. at 1264-65.

This Court's decision in *Schiro v. Summerlin*, 542 U.S. 348, 364 (2004) does not undermine the retroactive application of the *Hurst* decisions. This Court's decision in *Summerlin*, finding *Ring* not to be retroactive in a federal case, is not dispositive of the retroactivity of the *Hurst* decisions. *Summerlin* did not involve review of a death penalty statute such as Florida's that required the jury to not only conduct fact finding regarding the existence of aggravators but also fact finding as to the existence of aggravators and whether they were sufficient to impose death. Most significantly, this Court noted in *Summerlin* that if the Court "[made] a certain fact essential to the death penalty...[the change] would be substantive." 542 U.S. at 354. Such a decision occurred in *Hurst v. Florida* where this Court found it 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 which this Court has always held to be decisions which are substantive in nature. *See 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 s thus to be given complete retroactive effect.").

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 constitutional rights articulated in *Hurst v. Florida* and *Hurst v. State* are substantive, the Florida Supreme Court cannot foreclose their retroactive application to Mr. Overton's case.

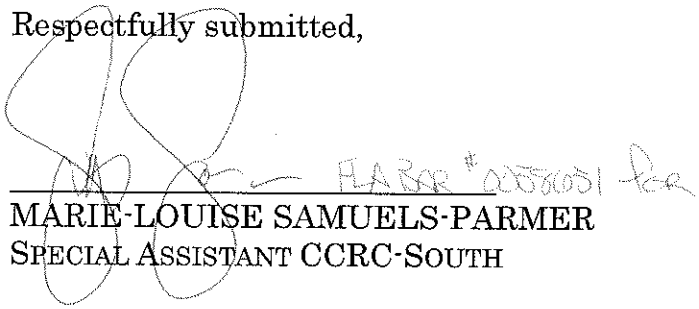
CONCLUSION

The Florida Supreme Court has repeatedly held that *Hurst v. Florida* and *Hurst v. State* apply retroactively. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); *Asay v. State*, 210 So. 3d 1 (Fla. 2016.);*Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). But, rather than apply retroactive application of those decisions consistently and evenly to all prisoners previously sentenced under Florida's unconstitutional death 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. Moreover, the Florida Supreme Court's implementation of a partial retroactivity approach equally

offends the Supremacy Clause where the *Hurst* decisions constitute substantive law requiring retroactive application.

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,



MARIE-LOUISE SAMUELS-PARMER
SPECIAL ASSISTANT CCRC-SOUTH

SCOTT GAVIN
ASSISTANT CCRC-SOUTH
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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