

DOCKET NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

PAUL ANTHONY BROWN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

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QUESTIONS PRESENTED--CAPITAL CASE

1. Whether the Florida Supreme Court's partial retroactivity rule as to violations pursuant to *Hurst v. Florida*, which is based on an arbitrary cutoff date, violates the Eighth and Fourteenth Amendments to the United States Constitution?

2. Whether the evolving standards of decency require jury unanimity before the imposition of a death sentence?

3. Whether jury unanimity in a death penalty case, which the Florida Supreme Court recognizes as being compelled by the Eighth Amendment due to its enhanced reliability, can be subjected to an arbitrary cutoff date for the purpose of determining retroactivity?

4. Whether defendants sentenced to death prior to August 24, 2002, pursuant to Florida Statute §921.141, were convicted of capital murder subjecting them to the death penalty, or whether the fact that the jury did not unanimously find all of the elements required to convict of capital murder mandates that such defendants were only convicted of murder and are therefore ineligible for the death penalty?

5. Whether the elements of capital first degree murder must be found unanimously by a jury in order to render a valid death sentence?

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Petitioner, **PAUL ANTHONY BROWN**, is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue a writ of certiorari to review the decision of the Florida Supreme Court.

CITATION TO OPINION BELOW

The decision of the Florida Supreme Court in this cause appears as *Brown v. State*, 237 So. 3d 924 (Fla. 2018), and is attached to this petition as Appendix A.

STATEMENT OF JURISDICTION

The Florida Supreme Court entered its opinion on February 28, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257, with Petitioner having asserted in the state court below and asserting in this Court that the State of Florida has deprived him of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

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

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

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

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

STATEMENT OF THE CASE

A. Proceedings in Mr. Brown's Case

On April 6, 1993, Mr. Brown and Scott Jason McGuire were charged by indictment with the first degree murder of Roger Hensley on November 5, 1992. McGuire pled guilty to second degree murder in exchange for testifying against Mr. Brown and received a sentence of forty years in prison.

On October 14, 1996, Mr. Brown was tried for first degree murder. On October 18, 1996, the jury found him guilty as charged. Five days later, the jury unanimously recommended that Mr. Brown be sentenced to death and on November 7, 1996, the trial judge followed the jury's recommendation.

On direct appeal, the Florida Supreme Court affirmed Mr. Brown's conviction and sentence. *Brown v. State*, 721 So. 2d 274 (Fla. 1998). Mr. Brown filed a petition for writ of certiorari with this Court, which was denied on May 3, 1999. *Brown v. Florida*, 526 U.S. 1102 (1999).

On November 3, 2000, Mr. Brown filed a state motion for postconviction relief. Following an evidentiary hearing, Mr. Brown's motion was denied on April 30, 2001 (PCR. 421-55). Mr. Brown appealed, after which the Florida Supreme Court affirmed the denial of relief on April 24, 2003. *Brown v. State*, 846 So. 2d 1114 (Fla. 2003). Mr. Brown also filed a state habeas petition, which the Florida Supreme Court denied in the same

opinion.

On February 7, 2008, Mr. Brown filed a successive postconviction motion, asserting that a due process violation occurred due to the non-disclosure of the State's key witness' true identity at the time of Mr. Brown's trial and throughout his postconviction proceedings (PCR2. 745-51). The motion was summarily denied on May 7, 2008 (PCR2. 962). Thereafter, a divided Florida Supreme Court affirmed the summary denial on July 28, 2010. *See Brown v. State*, 41 So. 3d 116 (Fla. 2010). On February 22, 2011, this Court denied certiorari review. *Brown v. Florida*, 131 S.Ct. 1476 (2011).

On February 8, 2012, Mr. Brown filed a petition for writ of habeas corpus in the federal district court. On January 28, 2014, the district court entered an order dismissing Mr. Brown's petition on the basis that it was time-barred under the AEDPA.

On appeal, the Eleventh Circuit Court of Appeals granted Mr. Brown's motion to relinquish jurisdiction, and it remanded the case back to the district court "for Brown to have an opportunity to develop the factual record with respect to his equitable tolling claim." *See Brown v. Secretary, DOC, et al.*, No. 14-10810 (11th Cir. March 10, 2016).

Following the remand, the district court ordered supplemental briefing by both parties. Thereafter, on October 26, 2016, the district court issued an order denying Mr. Brown's

supplemental petition. Mr. Brown's case is currently pending on appeal.

On January 23, 2017, Mr. Brown filed a successive postconviction motion based on this Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), and the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (PC-R3. 62-104). The state circuit court denied the motion on October 30, 2017 (PC-R3. 333-341). A notice of appeal was filed on November 17, 2017 (PC-R3. 342-343).

Prior to Mr. Borwn's appeal, on August 10, 2017, the Florida Supreme Court issued its decision in *Hitchcock*, stating that "[w]e have consistently applied our decision in *Asay*, denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)." *Hitchcock*, 226 So. 3d at 2017.

On January 4, 2018, the Florida Supreme Court issued an order directing Mr. Brown to show cause "why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, SC17-445."

On January 24, 2018, Mr. Brown filed his response to the show cause order. After responsive pleadings were filed, the Florida Supreme Court on February 28, 2018, issued its opinion

affirming the denial of Mr. Brown's postconviction motion. The Florida Supreme Court stated: "Brown was sentenced to death following a jury's unanimous recommendation for death. Brown v. State, 721 So. 2d 274, 276-277 (Fla. 1998). Brown's sentence of death became final in 1999. Brown v. Florida, 526 U.S. 1102 (1999). Thus, Hurst does not apply retroactively to Brown's sentence of death. See Hitchcock, 226 So. 3d at 217." Brown v. State, 237 So. 3d 924, 925 (Fla. 2018).

B. The Relevant Legal Landscape

In 2002, this Court decided *Ring v. Arizona*, holding that under the Sixth Amendment, a defendant has the right to have a jury determine the existence of aggravating factors necessary for the imposition of the death penalty. 536 U.S. 584, 609 (2002). This Court, however, did not comment on Florida's similar capital sentencing scheme. It left intact its prior decisions expressly upholding that scheme, and denied post-*Ring* petitions for certiorari raising the *Ring* issue.

After *Ring*, the Florida Supreme Court also denied relief in cases raising *Ring*-based challenges, following the principle that it is for this Court to overrule its own decisions. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002).

In 2016, in *Hurst v. Florida*, this Court declared Florida's then-existing capital sentencing scheme, codified at section 921.141, Florida Statutes (2010), unconstitutional because the

“[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury’s mere recommendation is not enough.” 136 S.Ct. at 619. This Court determined that “[t]he analysis the *Ring* Court applied to Arizona’s sentencing scheme applies equally to Florida’s” death penalty. *Id.* at 621-22.

On remand, in *Hurst v. State*, the Florida Supreme Court applied *Hurst v. Florida* and Florida law to hold:

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

202 So. 3d at 44. The court also expressly grounded its decision on the Eighth Amendment:

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

Id.

Thereafter, in two decisions issued on the same day – *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Mosley v. State*, 209 So.

3d 1248 (Fla. 2016) – the Florida Supreme Court addressed the retroactivity of the *Hurst* decisions.¹ Unlike a traditional retroactivity analysis, however, the Florida Supreme Court did not decide whether the *Hurst v. Florida* decision should or should not be applied retroactively to all prisoners whose death sentences became final before those decisions invalidated the scheme under which they were sentenced.

Instead, the Florida Supreme Court addressed only the Sixth Amendment issue decided in *Hurst v. Florida* and in that context divided those prisoners into two classes based entirely on the date their sentences became final relative to this Court's 2002 decision in *Ring* invalidating Arizona's sentencing scheme, not relative to the *Hurst v. Florida* decision itself and not considering the Eighth Amendment issue that required jury findings as to all of the elements in *Hurst v. State*. In *Asay*, the court held that *Hurst v. Florida* does not apply retroactively to Florida prisoners whose death sentences became final on direct review before *Ring*. *Asay*, 210 So. 3d at 21-22. In *Mosley*, the court held that *Hurst v. Florida* does apply retroactively to prisoners whose death sentences became final after *Ring*. *Mosley*, 209 So. 3d at 1283.

¹Florida's retroactivity analysis is still guided by this Court's pre-*Teague* three-factor analysis derived from *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). See *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980).

The Florida Supreme Court asserted that *Ring* was an appropriate cut-off date for retroactivity of *Hurst v. Florida* because Florida's capital sentencing scheme was not unconstitutional before *Ring*, but that the "calculus" of the constitutionality of Florida's scheme changed with *Ring*, rendering that scheme "essentially" unconstitutional. *Id.* at 1280-81.

Although acknowledging that it had failed to recognize that unconstitutionality until this Court's decision in *Hurst v. Florida*, the Florida Supreme Court laid the blame on this Court for the improper Florida death sentences imposed after *Ring*:

Defendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring* **should not suffer due to the United States Supreme Court's fourteen-year delay in applying Ring to Florida**. In other words, defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring* **should not be penalized for the United States Supreme Court's delay in explicitly making this determination**.

Mosley, 209 So. 3d at 1283 (emphasis added).

Stating that "[c]onsiderations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases,'" the Florida Supreme Court held that post-*Ring* inmates would receive the benefit of the decision in *Hurst v. Florida*. *Id.* (citations omitted). The court did not address the fact that

pre-*Ring* inmates also were sentenced to death under a process no longer considered acceptable under the Eighth Amendment, upon which *Hurst v. State* rests.

In contrast to the Florida Supreme Court's majority, several justices of the court believed the chosen cutoff does not survive scrutiny. In *Asay*, Justice Pariente wrote: "The 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).

Justice Perry was even more blunt: "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 groups of similarly situated persons." *Id.* at 37 (Perry, J., dissenting). Justice Perry correctly predicted: "[T]here will be situations where persons who committed equally violent felonies and whose death sentences became final days apart will be treated differently without justification" *Id.* at 38.

Thereafter, in *Hitchcock*, Justice Lewis complained that the court's majority was "tumbl[ing] down the dizzying rabbit hole of untenable line drawing" 226 So. 3d at 218 (Lewis, J.,

concurring in the result).

After reaffirming the *Ring* dividing line cutoff in *Hitchcock*, 226 So. 3d at 217, the Florida Supreme Court summarily denied *Hurst v. Florida* **and** *Hurst v. State* relief in numerous “pre-*Ring*” cases, including Mr. Brown’s. In none of its decisions has the Florida Supreme Court made more than fleeting remarks about whether its framework is consistent with the United States Constitution. *See, e.g., Asay v. State*, 224 So. 3d 695, 702-03 (Fla. 2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017); *Hitchcock*, 226 So. 3d at 217.

Shortly thereafter, in *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017), the Florida Supreme Court stated that this Court had “impliedly approved” its *Ring*-based retroactivity cutoff for *Hurst* claims by denying a writ of certiorari in *Asay v. Florida*, 138 S.Ct. 41 (2017). But as this Court has often stated, the denial of a writ of certiorari “imports no expression of opinion on the merits of the case” *See, e.g., Teague v. Lane*, 489 U.S. 288, 296 (1989) (internal quotation marks omitted).

Two other decisions bear mentioning: On March 8, 2018, the Florida Supreme Court issued its opinion in *Victorino v. State*, 241 So. 3d 48 (Fla. 2018). There, the court ruled:

For a criminal law to be ex post facto it must be retrospective, that is, it must apply to events that occurred before its enactment; and it must alter the definition of criminal conduct or increase the penalty by which a crime is punishable. *Lynce v. Mathis*, 519

U.S. 433, 441, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997). Florida's new capital sentencing scheme, **which requires the jury to unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that sufficient aggravating factors exist to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death before the trial judge may consider imposing a sentence of death**, see § 921.141(2), Fla. Stat. (2017), neither alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable.

Victorino, 241 So. 3d at 50 (emphasis added).

This was in accord with the Florida Supreme Court's decision in *Kirkman v. State*, where the court explained:

During the pendency of Kirkman's appeal, on remand in *Hurst*, this Court held that:

before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, **unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death**.

Hurst, 202 So.3d at 57.

233 So. 3d 456, 471-72 (Fla. 2018) (emphasis added).

Victorino was also in accord with the Florida Supreme Court's decision in *Perry v. State*, 210 So. 3d 630 (Fla. 2016). There, the court wrote:

we construe section 921.141(2) (b) 2. to require the penalty phase jury to unanimously find beyond a reasonable doubt that each aggravating factor exists, **that sufficient aggravating factors exist to impose**

death, and that they outweigh the mitigating circumstances found to exist.

Perry, 210 So. 3d at 639 (emphasis added). The court explained that this meant that:

to increase the penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that **the aggravating factors are sufficient to warrant a sentence of death, that the aggravating factors outweigh the mitigating circumstances**, and must unanimously recommend a sentence of death.

Perry, 210 So. 3d at 640 (emphasis added). The Florida Supreme Court further explained that these factual findings necessary to authorize a death sentence had long been required:

It has always been that death can be imposed only when the aggravating factors outweigh the mitigating circumstances, rather than the opposite.

Id. at 637.

And, prior to its decision in *Victorino*, on February 22, 2018, the Florida Supreme Court issued its opinion in *Williams v. State*, So. 3d , 2018 WL 1007810 (Fla. Feb. 22, 2018). There, the court wrote: "**any fact that increases the statutory maximum sentence is an 'element' of the offense** to be found by a jury."

Id. at *4 (emphasis added). The Florida Supreme Court further explained that the decision in *Alleyne v. United States*, 570 U.S. 99, 108 (2013), required elements to "be submitted to a jury and **found beyond a reasonable doubt.**" *Williams*, 2018 WL 1007810 at *5 (emphasis added).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER THE FLORIDA SUPREME COURT'S PARTIAL RETROACTIVITY ANALYSIS AS TO THE APPLICATION OF *HURST v. FLORIDA* COMPLIES WITH THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Sixth Amendment right enunciated in *Hurst v. Florida* and found applicable to Florida's capital sentencing scheme guarantees that all facts that are statutorily necessary before a judge is authorized to impose death are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial. *Hurst v. Florida* held, "Florida's capital sentencing scheme violates the Sixth Amendment" It invalidated Fla. Stat. §§ 921.141(2) and (3) as unconstitutional. Under those provisions, a defendant who had been convicted of a capital felony could be sentenced to death only after the sentencing judge entered written fact findings that: 1) sufficient aggravating circumstances existed that justify the imposition a death sentence, and 2) insufficient mitigating circumstances existed to outweigh the aggravating circumstances. *Hurst v. Florida*, 136 S.Ct. at 620-21. *Hurst v. Florida* found Florida's sentencing scheme unconstitutional because "Florida does not require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these facts." *Id.* at 622.

On remand, the Florida Supreme Court held in *Hurst v. State*

that *Hurst v. Florida* means "that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 57.

Hurst v. Florida changed Florida law and established that capital defendants had a constitutional right to a jury that finds the facts statutorily necessary to authorize a judge to impose a death sentence.

In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2017), the Florida Supreme Court determined that *Hurst v. Florida* and *Hurst v. State* constituted a change in Florida law that was to be applied retroactively to Mosley and required the court to grant postconviction relief, vacate Mosley's death sentence and remand for a resentencing. As the court in *Mosley* observed: "it is undeniable that *Hurst v. Florida* changed the calculus of the constitutionality of capital sentencing in this State." *Id.* at 1281.

However, the same day that the Florida Supreme Court decided *Mosley*, the court also decided *Asay v. State*, 210 So. 3d 1 (Fla. 2016). The court in *Mosley* noted that *Asay* had not extended the

benefit of the change in the law created by *Hurst v. Florida* to Asay. See *Asay*, 210 So. 3d at 11 ("we conclude that *Hurst* should not be applied retroactively to Asay's case"); *Id.* ("When considering the three factors of the *Stovall/Linkletter* test together, we conclude that they weigh against applying *Hurst* retroactively to all death case litigation in Florida").

The obscene dichotomy drawn by the Florida Supreme Court in determining that *Hurst v. Florida* is partially retroactive does not comport with uniformity or fairness. Indeed, the logic of *Griffith v. Kentucky*, 479 U.S. 314, 327-28 (1987), is applicable:

Justice POWELL has pointed out that it "hardly comports with the ideal of 'administration of justice with an even hand,' " when "one chance beneficiary-the lucky individual whose case was chosen as the occasion for announcing the new principle-enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine." *Hankerson v. North Carolina*, 432 U.S. 233, 247, 97 S.Ct. 2339, 2347, 53 L.Ed.2d 306 (1977) (opinion concurring in judgment), quoting *Desist v. United States*, 394 U.S., at 255, 89 S.Ct., at 1037 (Douglas, J., dissenting). See also *Michigan v. Payne*, 412 U.S. 47, 60, 93 S.Ct. 1966, 1973, 36 L.Ed.2d 736 (1973) (MARSHALL, J., dissenting) ("Different treatment of two cases is justified under our Constitution only when the cases differ in some respect relevant to the different treatment"). **The fact that the new rule may constitute a clear break with the past has no bearing on the actual inequity that results" when only one of many similarly situated defendants receives the benefit of the new rule.** *United States v. Johnson*, 457 U.S., at 556, n. 16, 102 S.Ct., at 2590, n. 16 (emphasis omitted).

We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review

or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past. (Emphasis added). "[S]elective application of new rules violates the principle of treating similarly situated defendants the same." *Id.* at 323. While Mr. Brown's death sentence was final when *Hurst v. Florida* issued, numerous other capital defendants' death sentences had been final, including Hurst's, when good fortune and good timing meant that at the moment that *Hurst v. Florida* issued, those defendants were free of the shackles of finality.²

Moreover, in *Hurst v. State*, the Florida Supreme Court noted that "[i]n requiring jury unanimity in [the statutorily required fact] findings and in [the jury's] final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice." 202 So. 3d at 58. *Hurst v. State* specifically noted 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." *Id.* at 59. The new Florida

²In *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980), the Florida Supreme Court noted that the Eighth Amendment required extra weight to be given to "individual fairness because of the possible imposition of a penalty as unredeeming as death." In a footnote, the court wrote: "It bears mention that the constitutionality of Florida's capital sentencing procedures, s 921.141, Florida Statutes (1979), is **contingent upon this Court's role of reviewing each case to ensure uniformity in the imposition of the death penalty.**" *Id.* at 926 n.7 (emphasis added).

law enhances and promotes the reliability of death sentences that juries unanimously authorize. Implicit in the holding that unanimity promotes reliable death sentences is the acknowledgment that non-unanimous death sentences are less reliable. Clearly, uniformity and fairness require that Mr. Brown be given the benefit of *Hurst v. Florida* and the resulting new Florida law. After all, "death is a different kind of punishment from any other that may be imposed in this country," and "[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice" *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

In addition, this Court has previously addressed situations where the death penalty is imposed arbitrarily and capriciously, as is the case here. In *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972), this Court found that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); see also *Furman*, 408 U.S. at 239-40. Because of the recognition that "the penalty of death is qualitatively different from a sentence of imprisonment, however long * * * there is a corresponding difference in the need for reliability" in capital cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (finding there is a "qualitative

difference" between death and other penalties requiring "a greater degree of reliability when the death sentence is imposed"); *Gregg v. Georgia*, 428 U.S. 153, 187-88 (1976) (stating that "death is different in kind" and as a punishment is "unique in its severity and irrevocability"); *Furman*, 408 U.S. at 238 (Brennan, J., concurring) ("Death is a unique punishment in the United States.").

Following this Court's decision in *Hurst v. Florida*, the Florida Supreme repudiated the binary approach to retroactivity set forth in *Witt* and the *Stoval/Linkletter* standard that was adopted in *Witt*. The Florida Supreme Court's decisions in *Asay* and *Mosley* have opened the door to arbitrariness infecting Florida's death penalty system in violation of the Eighth Amendment. Certiorari review is warranted.

II. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER THE FLORIDA SUPREME COURT'S PARTIAL RETROACTIVITY ANALYSIS AS TO THE APPLICATION OF *HURST v. STATE* COMPLIES WITH THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In *Hurst v. State*, the Florida Supreme Court ruled that on the basis of the Eighth Amendment and on the basis of the Florida Constitution, the evolving standards of decency now require jury "unanimity in a recommendation of death in order for death to be considered and imposed". 202 So. 3d at 61. This unanimity requirement was not derived from *Hurst v. Florida* itself nor the Sixth Amendment, but from the Florida Constitution and from the

Eighth Amendment. In light of the ruling in *Hurst v. State*, Mr. Brown's death sentence stands in violation of both the Florida Constitution and the Eighth Amendment.

In *Mosley*, 209 So. 3d at 1273-74, the Florida Supreme Court observed that in *Hurst v. State*, "**we held, based on Florida's independent constitutional right to trial by jury that, in order for the trial court to impose a sentence of death, the jury's recommendation for a sentence of death must be unanimous.**"

(Emphasis added). The requirement that the jury's death recommendation had to be unanimous in order for it to authorize a death sentence was not contained in *Hurst v. Florida*. As the Florida Supreme Court explained in *Hurst v. State*, the unanimity requirement arose when the mandate of *Hurst v. Florida* intersected with Florida law: "We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense." 202 So. 3d at 44. Thus, *Hurst v. State* was broader in scope than *Hurst v. Florida*. This was because *Hurst v. Florida* meant the statutory facts necessary to authorize a death sentence were elements of capital murder. In turn, this meant that the Florida Constitution requirement that the jury must unanimously find the elements of a crime offense was applicable:

We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements that must be found unanimously by the jury. Thus, we hold that in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge.

Id. at 53–54. The Florida Supreme Court acknowledged that the unanimity requirement had not been found by this Court to be mandated by the Sixth Amendment, but that it arose from the Florida Constitution:

We are mindful that a plurality of the United States Supreme Court, in a non-capital case, decided that unanimous jury verdicts are not required in all cases under the Sixth Amendment to the United States Constitution. See *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) (plurality opinion). **However, this Court, in interpreting the Florida Constitution and the rights afforded to persons within this State, may require more protection be afforded criminal defendants than that mandated by the federal Constitution.** This is especially true, we believe, in cases where, as here, Florida has a longstanding history requiring unanimous jury verdicts as to the elements of a crime.

202 So. 3d at 57 (emphasis added) (footnote omitted). The Florida Supreme Court then explained the benefit to the administration of justice that its holding would provide would mean more reliable death sentences:

In requiring jury unanimity in these findings and in its final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice. Supreme Court Justice

Anthony Kennedy, while a judge on the Ninth Circuit Court of Appeals, noted the salutary benefits of the unanimity requirement on jury deliberations as follows:

The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which **gives particular significance and conclusiveness to the jury's verdict.**

United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir.1978). That court further noted that "**[b]oth the defendant and society can place special confidence in a unanimous verdict.**" *Id.* Comparing the unanimous jury requirement to the requirement for proof beyond a reasonable doubt, the Fifth Circuit Court of Appeals stated, "**the unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'**" *United States v. Gipson*, 553 F.2d 453, 457 (5th Cir.1977).

202 So. 3d at 58 (emphasis added). Thus, the ruling that the Florida Constitution required juror unanimity when returning a death recommendation was bottomed on enhanced reliability and confidence in the result. *Id.* at 59 (juror unanimity "will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty").³ Replacing

³In *Hurst v. State*, the Florida Supreme Court observed that studies comparing majority rule juries to those required to return a unanimous verdict showed enhanced reliability in unanimous verdicts. 202 So. 2d at 58 ("it has been found based on data that 'behavior in juries asked to reach a unanimous verdict is more thorough and grave than in majority-rule juries, and that

a majority vote verdict with a requirement that the jury must be unanimous when returning a death recommendation is markedly different than switching from a judge to jury as the finder of fact. See *Schrivo v. Summerlin*, 542 U.S. 348, 356 (2004) ("When so many presumably reasonable minds continue to disagree over whether juries are better factfinders at all, we cannot confidently say that judicial factfinding seriously diminishes accuracy."). The change mandated by *Hurst v. State* was specifically found to improve accuracy, unlike the change in Arizona procedure that resulted from the decision in *Ring v. Arizona*.

The Florida Supreme Court in *Hurst v. State* then alternatively found that a unanimous jury's death recommendation was also required under the Eighth Amendment.

In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to trial by jury, we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment.

Hurst v. State, 202 So. 3d at 59. The Florida Supreme Court in *Hurst v. State* observed:

the former were more likely than the latter jurors to agree on the issues underlying their verdict. Majority jurors had a relatively negative view of their fellow jurors' openmindedness and persuasiveness.'") (Emphasis added); *Id.* ("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; and jurors operating under majority rule **express less confidence in the justness of their decisions.**") (Emphasis added).

If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Id. at 60. In *Hurst v. State*, the Florida Supreme Court found that under the Eighth Amendment and the Florida Constitution, the evolving standards of decency now require jury "unanimity in a recommendation of death in order for death to be considered and imposed". *Id.* at 61. Quoting this Court, *Hurst v. State* noted, "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Id.* Then, from a review of the capital sentencing laws throughout the United States, *Hurst v. State* found that a national consensus reflecting society's evolving standards of decency was apparent:

The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances.

Id. Accordingly, the court in *Hurst v. State* concluded:

the United States and Florida Constitutions, as well as the administration of justice, are implemented by requiring unanimity in jury verdicts recommending death as a penalty before such a penalty may be imposed.

Id. at 63. The Eighth Amendment holding in *Hurst v. State* turned upon both 1) a finding of a consensus reflecting the evolving

standards of decency that now precluded the execution of a defendant without a jury's unanimous death recommendation, and 2) the enhanced reliability that would result from no longer allowing a jury's death recommendation to be returned without juror unanimity.

What constitutes cruel and unusual punishment under the Eighth Amendment turns upon considerations of the "evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man The Amendment must draw its meaning from the evolving standards that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311-12 (internal quotation marks omitted). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Furman*, 408 U.S. at 382 (Burger, C. J., dissenting)."*Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008).

According to *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty phase jury has voted unanimously in favor of the imposition of death. This Court has explained that the "near-uniform judgment of the Nation

provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The near-uniform judgment of the states is that only a defendant who a jury unanimously concluded should be sentenced to death can receive a death sentence.

While Mr. Brown received a unanimous recommendation of death by the jury in the instant case, the jury was not properly instructed; therefore Mr. Brown's sentence cannot stand. In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), this Court found that a unanimous jury verdict in favor of a death sentence violates the Eighth Amendment if the jury was not correctly instructed as to its sentencing responsibility. According to the Court, diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as 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.").⁴

⁴In *Caldwell*, the prosecutor stated in his argument before the jury: "Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable." *Id.* at 325.

If a bias in favor a death recommendation increases when the jury's sense of responsibility is diminished, removing the basis for that bias increases the likelihood that one or more jurors will vote for a life sentence. The likelihood increases even more when the jury receives accurate instruction as to each juror's power and authority to dispense mercy and preclude a death sentence. In this regard, the context of the prosecutor's improper argument in *Caldwell* is important. The prosecutor was responding to and trying to blunt defense counsel's assertion that the sentencing decision rested with the jury and that it could choose mercy:

I implore you to exercise your prerogative to spare the life of Bobby Caldwell.... I'm sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution.... You are the judges and you will have to decide his fate. It is an awesome responsibility, I know—an awesome responsibility.

Caldwell, 472 U.S. at 324.

Mr. Brown's jury was not advised of each jurors' authority to dispense mercy. Indeed, the State informed the jury otherwise, arguing that it should not consider sympathy or mercy in accordance with its oath. And the trial court instructed the jury that the sentence it recommended must be based upon the facts as it found them from the evidence and the law.

The circumstances under which Mr. Brown's jury returned its 12-0 death recommendation shows that it cannot now be viewed as a valid unanimous verdict or that the *Hurst* error was harmless without violating the Eighth Amendment. "Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'" *Caldwell*, 472 U.S. at 331. The advisory recommendation simply "does not meet the standard of reliability that the Eighth Amendment requires." *Id.* at 341.

Thus, the Court cannot rely on the jury's death recommendation in Mr. Brown's case as showing either that he was not deprived of his Eighth Amendment right to require a unanimous jury's death recommendation or that the violation of the right was harmless. To do so would violate the Eighth Amendment because the advisory verdict was not returned in proceedings compliant with the Eighth Amendment. *Caldwell*, 472 U.S. at 332 ("The death sentence that would emerge from such a sentencing proceeding would simply not represent a decision that the State had demonstrated the appropriateness of the defendant's death.").

In *Hurst v. Florida*, this Court warned against using what was an advisory verdict to conclude that the findings necessary

to authorize the imposition a death sentence had been made by the jury:

"[T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Hurst v. Florida, 136 S. Ct. at 622. An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation and the juror's inability to be merciful based upon sympathy) cannot be used as a substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004 (1983) ("Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed.").

The purpose of the ruling in *Hurst v. State* was to enhance the reliability of a death recommendation. Enhancement of reliability also warrants retroactive application of *Hurst v. State*, including a properly instructed jury, to Mr. Brown. See *Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting) ("The greatly expanded writ of habeas corpus seems at the present time to serve two principal functions. [Citations] First, it seeks to assure that no man has been incarcerated under

a procedure which creates an impermissibly large risk that the innocent will be convicted. **It follows from this that all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas.**") (Emphasis added).⁵

The retroactivity analysis of new law under the Eighth Amendment is different than the analysis under the Sixth Amendment. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016), this Court wrote:

A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees.

Accordingly, a new substantive rule under the Eighth Amendment must be applied retroactively:

A substantive rule, in contrast, forbids "criminal punishment of certain primary conduct" or prohibits "a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S., at 330, 109 S.Ct. 2934; see also *Schriro*, *supra*, at 353, 124 S.Ct. 2519 (A substantive rule

⁵See *United States v. Johnson*, 457 U.S. 537, 548 (1982) ("We now agree with Justice Harlan that "'[r]etroactivity' must be rethought," *Desist v. United States*, 394 U.S., at 258, 89 S.Ct., at 1038 (dissenting opinion). We therefore examine the circumstances of this case to determine whether it presents a retroactivity question clearly controlled by past precedents, and if not, whether application of the Harlan approach would resolve the retroactivity issue presented in a principled and equitable manner.").

"alters the range of conduct or the class of persons that the law punishes"). Under this standard, and for the reasons explained below, *Miller* announced a substantive rule that is retroactive in cases on collateral review.

Montgomery, 136 S. Ct. at 732.

Based on the foregoing, Mr. Brown submits that his death sentence stands in violation of the Eighth Amendment. Certiorari review is warranted.

III. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER POSTCONVICTION DEFENDANTS SENTENCED PURSUANT TO FLORIDA STATUTE §921.141 WERE CONVICTED OF CAPITAL MURDER SUBJECTING THEM TO THE DEATH PENALTY OR WHETHER THE FACT THAT THE JURY DID NOT UNANIMOUSLY FIND ALL OF THE ELEMENTS REQUIRED TO CONVICT OF CAPITAL MURDER MANDATES THAT POSTCONVICTION DEFENDANTS, LIKE MR. BROWN, WERE ONLY CONVICTED OF MURDER AND ARE INELIGIBLE FOR THE DEATH PENALTY.

In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court identified the facts or elements necessary to increase the authorized punishment to the death penalty, a matter that is clearly substantive. "[A]ny 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Alleyne v. United States*, 133 S.Ct. 2151, 2160 (2013). "Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment." *Id.* at 2161. A court decision identifying the elements of a statutorily defined criminal offense constitutes substantive law that dates back to the

enactment of the statute. *Bousley v. United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part) ("This case does not raise any question concerning the possible retroactive application of a new rule of law, *cf. Teague v. Lane*, 489 U.S. 288 (1989), because our decision in *Bailey v. United States*, 516 U.S. 137 (1995), did not change the law. It merely explained what § 924(c) had meant ever since the statute was enacted. The fact that a number of Courts of Appeals had construed the statute differently is of no greater legal significance than the fact that 42 U.S.C. § 1981 had been consistently misconstrued prior to our decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)."). "A judicial construction of a statute is an authoritative statement of what the statute meant **before as well as after the decision** of the case giving rise to that construction." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) (emphasis added).

Thus, while *Hurst v. State* has generally been cited for its ruling pursuant to the Florida Constitution and the Eighth Amendment that a "death recommendation" must be returned by a unanimous jury in order to authorize the imposition of a death sentence⁶, there is another aspect to *Hurst v. State*, i.e. the

⁶In *Hitchcock*, 226 So. 3d at 217, the Florida Supreme Court addressed the constitutional ruling of *Hurst v. State* requiring a "death recommendation" to be returned by a unanimous jury and indicated that it would not be applied in cases in which the

judicial construction of § 921.141, Fla. Stat.

As explained in *Hurst v. State*, the Florida Supreme Court held that the statutorily defined facts necessary to increase the range of punishment to include death were elements to be proven by the State "**to essentially convict a defendant of capital murder.**" *Id.* at 53-54 (emphasis added). The elements of capital first degree murder include: 1) the presence of aggravating factors as statutorily defined, 2) a finding of fact that sufficient aggravating factors exist to justify a death sentence, and 3) a finding that the aggravating factors outweigh any mitigating factors. See *Id.* at 53 ("As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308 (1991), under Florida law, 'The death penalty may be imposed only where **sufficient aggravating circumstances** exist that **outweigh** mitigating circumstances.' *Id.* at 313 (emphasis added) (quoting § 921.141(3), Fla. Stat. (1985)).").

Indeed, on March 13, 2017, the Florida Legislature confirmed the Florida Supreme Court's statutory construction when Chapter 2017-1 of the Laws of Florida was enacted. As such, under *Fiore v. White*, 531 U.S. 225 (2001), the elements of capital first degree murder identified in *Hurst v. State* and confirmed in Chapter 2017-1 as substantive law date to the statutory

death sentence became final prior to June 24, 2002.

enactment. See *State v. Dixon*, 283 So. 2d 1 (Fla. 1973).

And, this Court has held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of **every fact** necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). See *Patterson v. New York*, 432 U.S. 197, 215 (1977) ("a State must prove every ingredient of an offense beyond a reasonable doubt, and [] it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (since the jury may have read the instruction as relieving the State of proving an element beyond a reasonable doubt, defendant was denied "his right to the due process of law").

The sufficiency of the aggravators and whether they outweigh the mitigators were both identified in *Hurst v. State* as elements necessary "**to essentially convict a defendant of capital murder.**" *Hurst v. State*, 202 So. 3d at 53-54 (emphasis added). Yet, in Mr. Brown's case, neither was found to have been proven beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Florida Supreme Court in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by electronic service to Marilyn Muir Beccue, Office of the Attorney General, 3507 East Frontage Rd, Suite 200, Tampa, FL 33607-7013, on this 16th day of July, 2018.

/s/. Linda McDermott
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