No. _____

IN THE

Supreme Court of the United States

PRESSLEY BERNARD ALSTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does a state capital defendant's state-law waiver of state post-conviction review automatically and forever preclude the defendant from seeking relief for all federal constitutional violations subsequently recognized by this Court?

2. Does the partial retroactivity formula designed by the Florida Supreme Court to limit the class of condemned prisoners obtaining a life-or-death jury determination pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), violate the Eighth and Fourteenth Amendments to the United States Constitution?

3. Does the partial retroactivity formula employed for *Hurst* violations in Florida violate the Supremacy Clause of the United States Constitution in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)?

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Petitioner Pressley Bernard Alston, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court. Respondent, the State of Florida, was the appellee.

DECISION BELOW

The decision of the Florida Supreme Court is reported at 243 So. 3d 885 (Fla. 2018), and reprinted in the Appendix (App.) at 1a-4a.

JURISDICTION

The judgment of the Florida Supreme Court was entered on May 17, 2018. App. 1a-4a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

The Eighth Amendment provides:

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

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Introduction

No court or party disputes that Petitioner Pressley Alston's death sentence was obtained in violation of the United States Constitution for the reasons described in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Nevertheless, Petitioner's unconstitutional death sentence has not been vacated.

The Florida Supreme Court declined to grant relief for two reasons, both of which warrant certiorari review. First, the Florida Supreme Court wrongly

determined that Petitioner's general waiver of Florida state post-conviction review and appointed counsel in 2003—13 years before *Hurst* was decided—also constitutes a prospective and continuing waiver of all federal constitutional rights that have since been, or will ever be, recognized by this Court, including the right to penalty jury fact-finding recognized in *Hurst*. Second, the Florida Supreme Court wrongly held that while *Hurst* should apply retroactively to dozens of Florida death sentences on collateral review, it should not apply to dozens of others, including Petitioner's.

The Florida Supreme Court's waiver analysis violated the United States Constitution because a state post-conviction waiver cannot forever bar a defendant from challenging the federal constitutionality of the statute underlying his conviction or sentence. Such a rule would subvert the authority of the federal courts by immunizing state-court rulings on federal constitutional rights from federal-court review. A state defendant's decision not to pursue state post-conviction review in Florida cannot constitute a knowing and intelligent waiver of the federal constitutional right to penalty jury fact-finding recognized in *Hurst* more than a decade later. Under this Court's precedent, a state defendant cannot validly waive a federal constitutional right that was not recognized by the state courts at the time of the purported waiver. This Court should grant a writ of certiorari not only to correct the injustice of the Florida Supreme Court's erroneous application of a waiver analysis to Petitioner, but also to clarify that there can be no blanket prospective state-court waivers of all newly-recognized federal constitutional rights.

Certiorari is also appropriate because the Florida Supreme Court's partial retroactivity framework for *Hurst* claims is unconstitutional. Under that framework, *Hurst* is applied retroactively on collateral review, but only to prisoners whose death sentences became final on direct appeal after this Court invalidated Arizona's capital sentencing scheme more than 14 years before *Hurst* in *Ring v. Arizona*, 536 U.S. 584 (2002). The Florida Supreme Court's *Ring*-based retroactivity formula prohibits a class of more than 150 Florida prisoners from obtaining a jury determination of their death sentences, while requiring that the death sentences of another group of prisoners be vacated on collateral review so that they can receive a jury determination. The state court's formula is inconsistent with the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection. The Florida Supreme Court has refused to discuss these issues in any meaningful way.

Petitioner's case is an appropriate vehicle for this Court to address the Florida Supreme Court's unconstitutional post-conviction waiver and retroactivity bars to *Hurst* relief. Delaying review of these issues will allow further application of unconstitutional rules denying defendants access to the full and fair review of their death sentences the Constitution requires.

II. Factual and Procedural Background

A. Conviction, Death Sentence, and Direct Appeal

In 1995, Petitioner was convicted of murder and related crimes in a Florida court. Successive Post-Conviction Record on Appeal ("ROA") at 21. A penalty phase

was conducted pursuant to the Florida capital sentencing scheme in place at the time. *See Hurst v. Florida*, 136 S. Ct. 616, 620 (2016) (describing Florida's prior scheme). The jury "advise[d] and recommend[ed]" the death penalty by a vote of 9 to 3. ROA at 28. The "advisory" jury did not make findings of fact or otherwise specify the factual basis for its divided recommendation.

The trial judge, not the jury, then made the findings of fact required to impose a death sentence under Florida law. *See* Fla. Stat. § 921.141(3) (1992), *invalidated by Hurst*, 136 S. Ct. at 624. The judge found that five aggravating circumstances had been proven beyond a reasonable doubt during Petitioner's penalty phase, and that those five aggravating circumstances were sufficient for the death penalty and not outweighed by the mitigation. *Alston v. State*, 723 So. 2d 148, 153 (Fla. 1998).[1] Based on his fact-finding, the judge sentenced Petitioner to death. ROA at 28-37.

The Florida Supreme Court affirmed on direct appeal. *Alston v. State*, 723 So. 2d 148 (Fla. 1998), *cert. denied*, 555 U.S. 943 (2008).

B. State Waiver of Post-Conviction Proceedings

Petitioner's appointed state post-conviction counsel moved for a competency determination. The state circuit court, after reviewing the reports of three doctors,

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[1] The aggravating circumstances found by the judge were: (1) the defendant was convicted of three prior violent felonies; (2) the murder was committed during a robbery/kidnapping and for pecuniary gain; (3) the murder was committed for the purpose of avoiding a lawful arrest; (4) the murder was especially heinous, atrocious, or cruel; and (5) the murder was cold, calculated, and premeditated.

The mitigating circumstances found by the judge were that Petitioner: (1) had a horribly deprived and violent childhood; (2) cooperated with law enforcement; (3) has low intelligence and mental age; (4) has a bipolar disorder; and (5) has the ability to get along with people and treat them with respect.

found Petitioner incompetent to proceed. *Alston v. State*, 894 So. 2d 46, 48 (Fla. 2004). Thereafter, Petitioner filed a series of pro se motions. In 2002, Petitioner requested a hearing pursuant to *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993), which would determine whether Petitioner was competent to waive his state post-conviction appeals. *Id.* at 49. Petitioner was found competent and the *Durocher* hearing was held in 2003. *Id.* The circuit court concluded that Petitioner "knowingly, intelligently, and voluntarily" waived his right to state post-conviction proceedings. The court therefore dismissed Petitioner's pending state post-conviction motion and pro se motions, as well as his state-appointed counsel. *Id.*

After counsel appealed, Petitioner began filing pro se motions in the Florida Supreme Court, arguing that his statements at the *Durocher* hearing proved his innocence and urging that the Florida Supreme Court investigate his case. *Id.* Those pro se motions alleged, among other things, that the state attorney had drugged Petitioner, who now claimed to be an FBI agent, in a way that forced Petitioner to commit the capital offense. The Florida Supreme Court upheld the state circuit court's finding of competence and dismissal with prejudice of all of Petitioner's pending post-conviction motions and pleadings. *Id.* at 59.

C. Federal Habeas Proceedings

In 2004, Petitioner filed a pro se petition for writ of habeas corpus under 28 U.S.C. 2254. The United States District Court for the Middle District of Florida appointed counsel and granted leave to amend. *Alston v. Dep't of Corrs.*, No. 3:04-cv-257, ECF No. 1 (M.D. Fla. Apr. 5, 2004); *id.*, ECF No. 30. In 2009, the district court

denied the amended § 2254 petition on the merits. *Id.*, ECF No. 99. The Eleventh Circuit affirmed. *Alston v. Dep't of Corrs.*, 610 F.3d 1318, 1328-29 (11th Cir. 2010).

D. *Hurst* Litigation

In January 2017, Petitioner sought to vindicate his federal constitutional *Hurst* rights by filing a state post-conviction motion. The state circuit court denied relief based on the Florida Supreme Court's decision in *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), which held that *Hurst* applies retroactively on collateral review under state law, but not to prisoners whose death sentences became final on direct appeal before *Ring v. Arizona*, 536 U.S. 584 (2000), was decided on June 24, 2002. The state court did not address Petitioner's argument that a *Ring*-based retroactivity cutoff violates the Eighth and Fourteenth Amendments, nor did it discuss whether Petitioner's waiver of state post-conviction proceedings constituted a prospective waiver of his rights under *Hurst*. *See* App. 1a-4a.

In June 2017, the Florida Supreme Court stayed Petitioner's appeal of the trial court's *Hurst* ruling and accompanying Petitioner's state habeas petition[2] pending the disposition of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), another appeal from the denial of *Hurst* relief in a "pre-*Ring*" death sentence case. In *Hitchcock*, the Florida Supreme Court summarily upheld its *Ring*-based retroactivity cutoff for *Hurst* claims, citing its prior decisions in *Asay* and *Mosley v. State*, 209 So. 3d 1248

[2] Due to ambiguity regarding the proper procedural vessel for raising a *Hurst* claim, out of an abundance of caution, Petitioner's claim was raised by counsel in both a successive state post-conviction motion and a state habeas corpus petition.

(Fla. 2016), that had established the *Ring*-based cutoff, but declining to address any of the appellant's federal constitutional arguments. *Id.* at 217.

The Florida Supreme Court thereafter ordered Petitioner to show cause why the denial of *Hurst* relief in his case should not be summarily affirmed in light of *Hitchcock* and the *Ring*-based retroactivity cutoff. App. 12a-14a. Petitioner responded that the cutoff violates the United States Constitution. He asserted that by denying *Hurst* retroactivity to him and other "pre-*Ring*" defendants, while applying *Hurst* retroactively to "post-*Ring*" defendants, the Florida Supreme Court violated the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection. Petitioner further argued that, given the substantive nature of the rules involved, the Supremacy Clause of the Constitution requires the Florida Supreme Court to apply those rules retroactively to all defendants, not merely some defendants, in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and other precedent. App. 18a-41a.

E. Florida Supreme Court's Initial Decision and Recall of Mandate

On January 22, 2018, the Florida Supreme Court issued an opinion summarily affirming the denial of *Hurst* relief based on its *Ring*-based retroactivity cutoff given that Petitioner's death sentence became final in 1998. However, the Florida Supreme Court subsequently recalled the mandate and ordered Petitioner to show cause why, in light of the Florida Supreme Court's then-recent decision in *State v. Silvia*, 235 So.

3d 349 (Fla. 2018), *Hurst* relief was not also precluded in his case based on his waiver of state post-conviction proceedings in 2003. App. 15a-17a.

In *Silvia*, the defendant's death sentence, rendered following a divided advisory jury recommendation of death, became final nearly nine years after *Ring*. *Silvia*, 235 So. 3d at 350. In his pre-*Hurst* direct appeal, Mr. Silvia argued that Florida's capital sentencing scheme was unconstitutional under *Ring*. That claim was denied and his death sentence was affirmed in 2011. In 2012, Mr. Silvia waived his right to post-conviction proceedings and appointed counsel. *Id.* But in 2016, after *Hurst* was decided, he filed a post-conviction motion seeking to vacate his death sentence under his federal constitutional *Hurst* rights. The state circuit court granted a new penalty phase under *Hurst*. On appeal by the State, the Florida Supreme Court ruled that Mr. Silvia was not entitled to *Hurst* relief due to his state post-conviction waiver, which the court deemed a prospective and continuing waiver of all federal constitutional rights that have been recognized since the waiver or will ever be recognized in the future. *Id*. at 351-52.

In response to the Florida Supreme Court's post-*Silvia* show cause order in his *Hurst* litigation, Petitioner responded *Silvia* violates the federal constitution because a state post-conviction waiver cannot forever bar a defendant from challenging the federal constitutionality of the statute underlying his conviction or sentence. Such a rule would subvert the authority of the federal courts by immunizing state-court rulings on federal constitutional rights from federal-court review. A state defendant's decision not to pursue state post-conviction review in Florida cannot constitute a

knowing and intelligent waiver of the federal constitutional right to penalty jury fact-finding recognized in *Hurst* more than a decade later. Under this Court's precedent, a state defendant cannot validly waive a federal constitutional right that was not recognized by the state courts at the time of the purported waiver.

Petitioner also argued that his case is factually distinguishable from Mr. Silvia's based on the lack of clarity in Petitioner's waiver as compared to Silvia's and that, unlike Petitioner, Mr. Silvia was aware of the *Ring* issue at the time of his waiver, having raised it in the trial court and on direct appeal.

On May 17, 2018, the Florida Supreme Court withdrew its January 2018 opinion denying Petitioner *Hurst* relief on retroactivity grounds alone, and substituted an opinion denying relief on retroactivity and waiver grounds under *Silvia*. The Florida Supreme Court's brief opinion contained only this analysis:

> After reviewing Alston's responses to the orders to show cause, as well as the State's arguments in reply, we conclude that Alston's valid waiver of postconviction proceedings and counsel in 2003 precludes him from claiming a right to relief under *Hurst*. *See Silvia*, 239 So. 3d 349; *Alston v. State*, 894 So. 2d 46 (Fla. 2004). Moreover, Alston's sentence of death became final in 1999. *Alston v. State*, 723 So. 2d 148 (Fla. 1998). Thus, even if Alston's postconviction waiver did not preclude him from raising a *Hurst* claim, *Hurst* would not apply retroactively to Alston's sentence of death. *See Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the circuit court's denial of relief and deny Alston's habeas petition.

App. 3a-4a; *Alston v. State*, 243 So. 3d 885, 886 (Fla. 2018).

REASONS FOR GRANTING THE WRIT

I. This Court Should Review the Florida Supreme Court's *Silvia* Rule that a State Post-Conviction Waiver Automatically Waives all Future Federal Constitutional Review

Petitioner was sentenced to death without a jury having made the necessary findings for a death sentence. Nevertheless, the Florida Supreme Court denied *Hurst* relief on the ground that he had waived his federal constitutional *Hurst* rights because, long before *Hurst* was decided, he waived a materially different state-law right to post-conviction review of his death sentence. This Court should grant certiorari review and hold that a state post-conviction waiver cannot forever bar a defendant from challenging the federal constitutionality of the statute underlying his conviction or sentence. This Court's intervention is warranted not only to correct the injustice of the Florida Supreme Court's erroneous application of a waiver analysis to Petitioner, but also to clarify that there can be no blanket prospective state-court waivers of all newly-recognized federal constitutional rights.

The Florida Supreme Court's holding in *Silvia*—that a capital defendant's state-law waiver of state post-conviction review forever precludes that defendant from ever litigating subsequently-recognized federal constitutional rights—conflicts with this Court's well-established waiver jurisprudence, which requires the State to bear the burden of demonstrating that a waiver of a federal constitutional right is "knowing, intelligent, and voluntary." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The ruling also conflicts with decisions of this Court holding that waivers are rights-specific, and that one cannot knowingly waive a right that does not exist.

As this Court stated in *Zerbst*, "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights[,] and . . . [the Court does] 'not presume acquiescence in the loss of fundamental rights.'" 304 U.S. at 464 & nn.12–13 (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)); *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937) ("We do not presume acquiescence in the loss of fundamental rights."). A waiver requires "an intentional relinquishment or abandonment of a *known* right or privilege." *Zerbst*, 304 U.S. at 464 (emphasis added). To be valid, a waiver "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

Applying these principles, this Court has rejected the argument that a litigant can knowingly and intelligently waive a right not yet recognized. In *Halbert v. Michigan*, 545 U.S. 605 (2005), for example, this Court addressed whether the Due Process and Equal Protection Clauses of the Fourteenth Amendment "require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier" appellate review of their convictions. 545 U.S. at 609-10. After holding that the Fourteenth Amendment requires such appointment, the Court considered the State's argument that, regardless of the constitutional claim, the petitioner himself was not entitled to relief because he had waived the "constitutionally-guaranteed right to appointed counsel . . . by entering a plea of *nolo contendere*." *Id.* at 623. The Court rejected that argument, reasoning that "[a]t the time he entered

his plea, Halbert, in common with other defendants convicted on their pleas, had no recognized right to appointed appellate counsel he could elect to forego." *Id.*

Similarly, in *Smith v. Yeager*, 393 U.S. 122 (1968), a state prisoner attacking his conviction via federal habeas was denied an evidentiary hearing in the district court. The denial was based on a finding that his counsel had previously waived any right to a hearing in the course of a prior habeas petition attacking the same conviction. The prior waiver, however, occurred *before* this Court had issued a decision expanding "the availability of evidentiary hearings in habeas corpus proceedings, and ma[king] mandatory much of what had previously been within the broad discretion of the District Court." *Id.* at 125 (citing *Townsend v. Sain*, 372 U.S. 293, 310, 312 (1963)). Citing *Zerbst*, the Court held that it would not presume that counsel "intentionally relinquished a known right or privilege . . . when the right or privilege was of doubtful existence at the time of the supposed waiver." *Id.* at 126.

The Florida Supreme Court's *Silvia* rule, both facially and as applied in Petitioner's case, conflicts with *Zerbst* and *Smith* by holding that defendants like Petitioner waived their *Hurst* rights before those rights existed. As in *Halbert*, 545 U.S. at 623, at the time of his pre-*Hurst* trial, Petitioner "had no recognized right . . . he could elect to forgo."

The Florida Supreme Court's decision also conflicts with the decisions of other courts holding that defendants cannot knowingly waive rights that do not exist at the time they execute a waiver. *See, e.g.*, *Malvo v. Mathena*, 254 F. Supp. 3d 820, 833-34 (E.D. Va. 2017) (holding that because *Miller v. Alabama*, 567 U.S. 460 (2012), had not

yet been decided at the time of petitioner's guilty plea, he would not have received notice of his Eighth Amendment right announced in *Miller*, and therefore he could not possibly have knowingly waived this right), *aff'd* 893 F.3d 265 (4th Cir. 2018); *People v. Bilings*, 770 N.W. 3d 893 (Mich. App. 2009) (holding indigent defendants could not have knowingly and intelligently waived their *Halbert* rights because they could not have clearly understood they had the *Halbert* rights before that decision).[3]

In addition, the decision below contravenes this Court's precedents holding that the waiver of one right does not somehow implicitly waive a distinct right. In *Blackledge v. Perry*, 417 U.S. 21 (1974), for example, the defendant pleaded guilty to a felony assault indictment, and then pursued habeas relief from that conviction, arguing that the State had vindictively increased his original misdemeanor assault charge to a felony assault indictment. This Court rejected the State's argument that the guilty plea waived this claim. The Court held that a vindictive prosecution claim implicates the "very power of the State" to prosecute, stating a due process claim against being "hauled into court." *Id.* at 30-31. The right against vindictive prosecution, the Court reasoned, is therefore distinct from the trial and related rights that one waives as part of a guilty plea. *Id.*

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[3] The Florida Supreme Court's decision is also in tension with decisions of federal courts of appeals and state high courts that have held that *Miranda* waivers are insufficiently knowing where police have failed to provide the standard *Miranda* warning. *See, e.g.*, *United States v. Wysinger*, 683 F.3d 784, 793-805 (7th Cir. 2012); *Hart v. Attorney Gen. of State of Fla.*, 323 F.3d 884, 894 (11th Cir. 2003). Petitioner's waiver was similarly not knowing because he did not have accurate information about the right he was purportedly waiving.

Similarly, in *Menna v. New York*, 423 U.S. 61, 63 & n.2 (1975) (per curiam), the Court held that the rights waived as part of a guilty plea did not include the right protected by the Double Jeopardy Clause not to be charged twice. The latter guarantee, the Court reasoned, is distinct from the rights a person waives by agreeing he committed the illegal acts the prosecution has charged. And most recently, in *Class v. United States*, 138 S. Ct. 798, 804-805 (2018), this Court held that the express waiver of rights that are part of a guilty plea do not amount to a valid waiver of the distinct right to challenge the constitutionality of the statute of conviction. Absent an express waiver to prospective constitutional challenges, the defendant cannot be said to have waived those rights. *Id*. at 806-07. *See also Sause v. Bauer*, 138 S. Ct. 2561, 2563 (2018) (finding "petitioner's choice to abandon her Fourth Amendment claim on appeal did not obviate the need to address" her First Amendment claim).

In all of these cases, the Court rejected claims that the waiver of some rights implied a waiver of a distinct constitutional right. The Florida Supreme Court's conflation of Petitioner's waiver of his statutory right to state post-conviction review with a prospective waiver of the distinct federal constitutional right announced in *Hurst* conflicts with these decisions. *Cf. Tisnado v. United States*, 547 F.2d 452, 460 (9th Cir. 1976) ("[I]t does not necessarily follow that petitioner's waiver of a known state [constitutional] right in 1954 can be said to constitute a knowing waiver of a similar, but then as yet unknown, federal right.") (citing *Zerbst*, 304 U.S. at 464).[4]

[4] In the speedy-trial context in particular, appellate courts finding waiver of statutory trial rights routinely review their non-waived federal constitutional counterparts. *See, e.g., United States v. Tigano*, 880 F.3d 602, 617 (2d Cir. 2018)

The flip side of the rule that the waiver of one right (be it state-law based or under the federal constitution) does not constitute the waiver of a distinct constitutional right is the rule that assertion of state-law claims in state courts, even if related to federal constitutional claims, does not preserve the federal claims for review. *See Duncan v. Henry*, 513 U.S. 364, 366 (1995) ("Respondent did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourth Amendment."). If a state-law objection is insufficient to afford a court an opportunity to pass upon and correct a federal error, then a state-law waiver surely must be insufficient evidence under *Zerbst* on which to find a defendant's knowing and intelligent waiver of a distinct federal constitutional right.[5]

(holding that "a defendant may waive his statutory right to a speedy trial by failing to formally raise it, but not his constitutional right") (citing *Barker v. Wingo*, 407 U.S. 514, 529-30 (1972)); *State v. O'Neal*, 203 P. 3d 135, 140 (N.M. App. 2008) (finding waiver of statutory six-month speedy-trial clock did not amount to knowing, voluntary, and intelligent waiver of constitutional speedy trial right, and reviewing constitutional claim on merits); *State v. Bridgeford*, 903 N.W. 2d 22, 28 (Neb. 2017) (finding both defendants "permanently waived their statutory right to a speedy trial" but addressing federal speedy trial claim on the merits); *McGhee v. State*, 657 So. 2d 799, 805 (Miss. 1995) (finding waiver in part of statutory speedy trial claim, but addressing merits of constitutional speedy trial claim).

[5] State high courts similarly reject state-law trial objections as sufficient to preserve federal constitutional claims for appellate review. *See, e.g.*, *People v. Valdez*, 281 P. 3d 924, 966 (Ca. 2012) ("Defendant argues the prosecution's use of the challenged gang-related evidence violated not only his statutory rights, but also his constitutional rights to due process, a fair trial, and a reliable determination of guilt and penalty. He failed to assert these constitutional objections at trial."); *Brown v. State*, 755 So. 2d 616, 622-23 (Fla. 2002) (holding appellant's claim that jury instruction was unconstitutionally vague was not preserved for appellate review by counsel's state-law objections); *Lucio v. State*, 351 S.W. 3d 878, 909 (Tex. Crim. App. 2011) (finding defendant's "objections in no way alerted the trial court to any claim

The statutory right to continued state post-conviction proceedings on pre-filed claims that Petitioner waived in 2003 is not the functional equivalent of the Sixth Amendment right recognized in *Hurst*. To have a jury find all the facts necessary to impose the death sentence is critically different from having a judge review specifically listed claims of error. At the time of Petitioner's sentencing, the only jury right he was aware of was the right to an advisory jury sentencing recommendation —not the right to have the jury find all facts necessary to impose a death sentence.

By holding that any Florida state post-conviction waiver precludes all future federal constitutional review, the Florida Supreme Court's *Silvia* rule effectively removes the federal courts as the final arbiters of federal constitutional claims, and usurps the federal judiciary's independence. These actions by the Florida Supreme Court stand counter to the most basic tenets of federalism, and deny defendants who have given state waivers from their constitutional rights to due process, access to the courts, and equal protection. Additionally, the Florida Supreme Court's refusal to entertain or even examine on the merits a new federal constitutional claim in such cases, based solely on a state waiver, frustrates federal habeas review, because 28 U.S.C. § 2254(d)'s exhaustion rule requires defendants to seek a merits ruling on a federal claim in state court prior to raising the claim in federal court.

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that the State's use of this information violated her Sixth Amendment right to counsel, her Sixth Amendment right to confront the witnesses against her or any other of her constitutional rights").

The Florida Supreme Court's *Silvia* rule poses federal constitutional questions of extraordinary consequence. Waivers are an integral part of the civil and criminal legal system, and questions of whether a waiver is knowing arise in thousands of cases every year. In capital cases, waivers can carry grave consequences. The very concept of waiver requires that an individual make an informed, autonomous, and free choice to surrender a right. A waiver is a choice, and this Court has long held that the validity of this choice turns on the exercise of an informed and free judgment. That is why the Court has long required that waivers of constitutional rights must be knowing, intelligent, and voluntary, and will not be presumed. If the courts have held that the right does not exist, the individual cannot be assumed to "know" that it does. And absent knowledge that the right exists, a waiver cannot be a truly informed and autonomous decision. The Florida Supreme Court's rule undermines these principles and continues to result in the unjust denial of federal constitutional review in numerous capital cases in Florida. This Court should intervene to address the rule now in order to prevent the Florida Supreme Court from continuing to apply its unconstitutional rule to preclude the Sixth Amendment review *Hurst* requires.

II. Certiorari Review is Also Warranted Because the Florida Supreme Court's Application of its Unconstitutional *Silvia* Rule to Deny *Hurst* Relief Was Particularly Unjust in Petitioner's Case

Certiorari review is also warranted because the Florida Supreme Court's application of its unconstitutional *Silvia* rule to deny *Hurst* relief was particularly unjust in Petitioner's case. As Petitioner argued to the Florida Supreme Court, even if the *Silvia* rule—that defendants who waived state post-conviction review before

Hurst also prospectively waived their subsequently-recognized *Hurst* rights—was constitutional in some cases like Mr. Silvia's, it cannot be constitutionally applied to those, like Petitioner, who did not know about *Ring* at the time of their state waiver.

Unlike Petitioner, Mr. Silvia knew that his state post-conviction waiver would preclude him from raising in state court a federal claim for relief based on the reasoning in *Ring*. Mr. Silvia had raised the *Ring* issue at the trial court level and on direct appeal. When he subsequently and uncontestably waived state post-conviction review, Mr. Silvia indicated that he knew that by waiving arguments regarding the constitutional defect in Florida's capital sentencing scheme made apparent in *Ring*. Petitioner's state post-conviction waiver, however, occurred in the midst of prolonged competency litigation. Petitioner's case became final on direct appeal prior to *Ring* in 1999. Petitioner filed numerous pleadings in the trial court and Florida Supreme Court, seeking to end his state court collateral proceedings based on the mistaken belief that his state collateral rights had ended or, because of various issues, continued state court litigation would procedurally bar him from challenging his convictions in federal court. App. 43a-102a. These pleadings led to a competency challenge in 2000, which led to a finding of incompetence from 2001 until 2003, when, despite a split in opinions amongst experts, the trial court found Petitioner to be competent. The Florida Supreme Court even ordered additional briefing *sua sponte* after the 3.850 waiver based on Petitioner's pro se pleadings. *Alston v. State*, 894 So. 2d 641 (Fla. 2004).

Petitioner's waiver also occurred after a shell motion had been filed on his behalf, so if one assumes he was competent, one must also assume he knew exactly which claims he was waiving (the claims in the shell motion). During the *Durocher* hearing, the trial court advised Petitioner that waiving his post-conviction proceedings would result in dismissal with prejudice of his currently pending claims. App. 64a, 93a-94a. These claims did not include the *Ring* issue that led to *Hurst*, and Petitioner was not instructed that he would not be able to file later motions regarding different, new claims.

The decision in *Silvia* that a waiver of post-conviction rights precludes a claim of *Hurst* relief, if constitutional at all, may only be applied under the narrow factual circumstances in *Silvia*: (1) when a post-conviction waiver occurs prior to filing any state post-conviction motion, which necessarily contemplates the waiver of future claims; and (2) at the time of the waiver, the defendant knew about the *Ring* issue.

The state circuit court's colloquy with Petitioner regarding his state post-conviction waiver was directed at his already-filed shell motion and the claims presented therein. The plain language used by the court was that the already-filed motion would be dismissed and the issues in that motion could not be brought before the courts again. There was no warning by either the court or the Attorney General's statements that future motions would be prohibited even if they relied upon different grounds than those presented in the shell motion. Indeed, the trial court told Petitioner that a dismissal with prejudice would not bar him from reasserting his rights under extraordinary circumstances. *See Fahy v. Horn*, 516 F.3d 169, 186-87

(3d Cir. 2008) (warning against precluding federal habeas review due to a state-court waiver "when we are not convinced that the defendant was aware of the nature and scope of those rights . . . What we have before us is a record of equivocation. It does not support an enforceable waiver, which would deny [Petitioner] federal review of his claims"). And, unlike in *Silvia*, at the time of the filing of Petitioner's shell motion and throughout the period of Petitioner's incompetency, *Ring* had not issued. Unlike Mr. Silvia, Petitioner had no knowledge of *Ring* at the time of his state post-conviction waiver.

The only possibly valid basis to apply the state court's *Silvia* rule is missing in this case. The Florida Supreme Court's application of the rule here violated Petitioner's equal protection and due process rights, and resulted in the arbitrary and capricious upholding of Petitioner's death sentence. *Silvia* cannot be used as a valid basis to deny Petitioner from claiming a right to relief under *Hurst*.

This case presents an ideal opportunity to address the unconstitutionality of the *Silvia* rule, as both a facial and as-applied matter. Petitioner, after a long period of incompetence, waived only a state statutory right to review of his previously-raised state post-conviction claims, not his federal constitutional right, later recognized in *Hurst* to have the jury decide all facts necessary to the imposition of a death sentence. Petitioner could not have knowingly and intelligently waived his right to future, not-yet-established federal constitutional claims. At no time was Petitioner made aware of a right to have a jury find all requisite elements for his death sentence.

This Court should grant a writ of certiorari and ultimately hold that the Florida Supreme Court's *Silvia* rule, both on its face and as applied to Petitioner's case, violates the United States Constitution.

III. The Florida Supreme Court's *Ring*-Based Retroactivity Cutoff Violates the Eighth Amendment's Prohibition Against Arbitrary and Capricious Capital Punishment and the Fourteenth Amendment's Guarantee of Equal Protection

A. Traditional Non-Retroactivity Rules Can Serve Legitimate Purposes, but the Eighth and Fourteenth Amendments Impose Boundaries in Capital Cases

Traditional non-retroactivity rules, which deny the benefit of new constitutional decisions to prisoners whose cases have already become final on direct review, are a pragmatic necessity of the judicial process and are accepted as constitutional despite some features of unequal treatment. But in creating such rules, courts are bound by constitutional restraints. In capital cases, the Eighth and Fourteenth Amendments impose boundaries on a state court's application of untraditional non-retroactivity rules, such as those that fix retroactivity cutoffs at points in time other than the date of the new constitutional ruling. This Court has not had occasion to address a partial retroactivity scheme because such schemes are not the norm, but the proposition that states do not enjoy free reign to draw arbitrary temporal retroactivity cutoffs at *any* point in time emanates logically from the Court's Eighth and Fourteenth Amendment jurisprudence.

In *Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), this Court described the now-familiar idea that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply

its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428. This Court's Eighth Amendment decisions have "insist[ed] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008).

The Eighth Amendment prohibition against arbitrariness and capriciousness in capital cases refined this Court's Fourteenth Amendment precedents holding that equal protection is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). A state does not have unfettered discretion to create classes of condemned prisoners.

The Florida Supreme Court did not simply apply a traditional retroactivity rule to Petitioner's case. On the contrary, it crafted a decidedly untraditional and troublesome non-retroactivity scheme.

B. The Florida Supreme Court's *Hurst* Retroactivity Cutoff at *Ring* Involves Something Other Than the Traditional Non-Retroactivity Rules Addressed by This Court's *Teague* and Related Jurisprudence

The non-retroactivity rule applied below differs from traditional non-retroactivity rules addressed in this Court's precedents. The question of retroactivity arises in particular cases *at the same point in time*: when the defendant's conviction or sentence becomes "final" upon the conclusion of direct review. *See, e.g.*, *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987); *Teague v. Lane*, 489 U.S. 288, 304-07 (1989). *See also*, *Montgomery*, 136 S. Ct. at 725 ("In the wake of *Miller*, the question has arisen

whether its holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided.").

The Court's decision in *Danforth v. Minnesota*, 552 U.S. 264 (2006), which held that states may apply constitutional rules retroactively even when the United States Constitution does not compel them to do so, also assumed a definition of retroactivity based on the date that a conviction and sentence became final on direct review. *See id.* at 268-69.

None of this Court's precedents address the Florida Supreme Court's concept of "partial retroactivity," whereby a new constitutional ruling of the Court may be available on collateral review to *some* prisoners whose convictions and sentences have already become final, but not to all prisoners on collateral review.

In two separate 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 this Court's decision in *Hurst v. Florida*, as well as the Florida Supreme Court's own decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), under Florida's state retroactivity test.[6] The Florida Supreme Court divided prisoners into two classes based on the date their sentences became final relative to this Court's June 24, 2002, decision in *Ring*. In *Asay*, the court held that the *Hurst* decisions do not apply retroactively to Florida prisoners whose death

[6] Florida'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) (adopting *Stovall*/*Linkletter* factors).

sentences became final on direct review before *Ring*. *Asay*, 210 So. 3d at 21-22. In *Mosley*, the court held that the *Hurst* decisions do apply retroactively to prisoners whose death sentences became final after *Ring*. *Mosley*, 209 So. 3d at 1283.

The Florida Supreme Court offered a narrative-based justification for this partial retroactivity framework, explaining that "pre-*Ring*" retroactivity was inappropriate because Florida's capital sentencing scheme was not unconstitutional before this Court decided *Ring*, but that "post-*Ring*" retroactivity was appropriate because the state's statute became unconstitutional as of the time of *Ring*. *Mosley*, 209 So. 3d at 1283 (emphasis added).

Since *Asay* and *Mosley*, the Florida Supreme Court has mechanically applied its *Hurst* retroactivity cutoff. In collateral-review cases, the Florida Supreme Court has granted the jury determinations required by *Hurst* to dozens of "post-*Ring*" prisoners whose death sentences became final before *Hurst*. But, because of the Florida Supreme Court's *Ring*-based retroactivity cutoff, dozens more "pre-*Ring*" prisoners are denied access to the jury determination *Hurst* found constitutionally required. At no point has the Florida Supreme Court made more than fleeting remarks about whether its framework is consistent with the United States Constitution.

C. The Florida Supreme Court's *Hurst* Retroactivity Cutoff at *Ring* Exceeds Eighth and Fourteenth Amendment Limits

1. The *Ring*-Based Cutoff Creates More Arbitrary and Unequal Results than Traditional Retroactivity Decisions

The Florida Supreme Court's *Hurst* retroactivity cutoff at *Ring* involves a kind and degree of arbitrariness that far exceeds the level justified by traditional retroactivity jurisprudence.

As an initial matter, the Florida Supreme Court's rationale is open to question. The court described its rationale as follows: "Because Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst* retroactively to that time," but not before then. *Mosley*, 209 So. 3d at 1280. But Florida's capital sentencing scheme did not become unconstitutional when *Ring* was decided—*Ring* recognized that Arizona's capital sentencing scheme was unconstitutional. Florida's capital sentencing statute was always unconstitutional. This was recognized in *Hurst*, not *Ring*.

The Florida Supreme Court's approach raises serious questions about line-drawing at a prior point in time. There will always be earlier precedents of this Court upon which a new constitutional ruling builds.[7]

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[7] The foundational precedent for both *Ring* and *Hurst* was the Court's decision in *Apprendi*, 530 U.S. at 466. As *Hurst* recognizes, it was *Apprendi*, not *Ring*, which first explained that the Sixth Amendment requires any fact-finding that increases a defendant's maximum sentence to be found by a jury beyond a reasonable doubt. *Hurst*, 136 S. Ct. at 621. However, the Florida Supreme Court has never explained why it drew a line at *Ring* as opposed to *Apprendi*.

The effect of the cutoff also does not meet its aim. The Florida Supreme Court's rationale for drawing a retroactivity line at *Ring* is undercut by the court's denial of *Hurst* relief to prisoners whose sentences became final before *Ring* but who correctly but unsuccessfully challenged Florida's unconstitutional sentencing scheme after *Ring*,[8] while granting relief to prisoners who failed to raise any challenge, either before or after *Ring*. If prisoners whose sentences became final after *Ring* are deserving of *Hurst* relief because Florida's scheme has been unconstitutional since *Ring*, then prisoners who actually challenged Florida's scheme after *Ring* would also receive relief in a non-arbitrary scheme. But, as it stands, none of these prisoners can access *Hurst* relief because they fall on the wrong side of the Florida Supreme Court's bright-line retroactivity cutoff.[9]

The Florida Supreme Court's rule also does not reliably separate Florida's death row into meaningful pre-*Ring* and post-*Ring* categories. In practice, as Petitioner explained to the Florida Supreme Court, the date of a particular Florida death sentence's finality on direct appeal in relation to the June 24, 2002, decision in *Ring* can depend on a score of random factors having nothing to do with the offender or the offense: whether there were delays in a clerk's transmitting the direct appeal

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[8] *See, e.g.*, *Miller v. State*, 926 So. 2d 1243, 1259 (Fla. 2006); *Nixon v. State*, 932 So. 2d 1009, 1024 (Fla. 2006); *Bates v. State*, 3 So. 3d 1091, 1106 n.14 (Fla. 2009); *Bradley v. State*, 33 So. 3d 664, 670 n.6 (Fla. 2010).

[9] In dissent in *Hitchcock*, 226 So. 3d at 218-20, Justice Lewis noted that this inconsistency should cause the court to abandon the bright-line *Ring* cutoff and grant *Hurst* relief to prisoners who preserved challenges to their unconstitutional sentences.

record to the Florida Supreme Court; whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with the Florida Supreme Court's summer recess; how long the assigned Justice took to draft the opinion for release; whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener's error necessitating issuance of a corrected opinion; how long a certiorari petition remained pending in this Court, if filed at all; and so on.

In one striking example, the Florida Supreme Court affirmed Gary Bowles's and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173, 1184 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both prisoners petitioned for a writ of certiorari in this Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). The Florida Supreme Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card v. Jones*, 219 So. 3d 47 (Fla. 2017). However, Mr. Bowles, whose case was decided on direct appeal on *the same day* as Mr. Card's, falls on the other side of the Florida Supreme Court's current retroactivity cutoff. His *Hurst* claim was summarily denied by the Florida Supreme

Court in the same two-week period as Petitioner's. *Bowles v. State*, 235 So. 3d 292 (Fla. 2018).

Another arbitrary factor affecting whether a defendant receives *Hurst* relief under the Florida Supreme Court's date-of-*Ring* retroactivity approach includes whether a resentencing was granted because of an unrelated error. Under the current retroactivity rule, "older" cases dating back to the 1980s with a post-*Ring* resentencing qualify for *Hurst* relief, while other less "old" cases do not. *See, e.g.*, *Johnson v. State*, 205 So. 3d 1285, 1285 (Fla. 2016) (granting *Hurst* relief to a defendant whose crime occurred in 1981 but who was granted relief on a third successive post-conviction motion in 2010, years after the *Ring* decision); *cf. Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (granting *Hurst* relief in a case where the crime occurred in the late 1990s, but interlocutory appeals resulted in a 10-year delay before the trial). Under the Florida Supreme Court's approach, a defendant who was originally sentenced to death before Petitioner, but who was later resentenced to death after *Ring*, would receive *Hurst* relief while Petitioner does not.

The *Ring*-based cutoff not only infects the system with arbitrariness, but it also raises concerns under the Fourteenth Amendment's Equal Protection Clause. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture differently without "some ground of difference that rationally explains the different treatment." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). 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 . . . ." *Id.*; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g., Skinner*, 316 U.S. at 541. When a state draws a line between those capital defendants who will receive the benefit of a fundamental right to jury decision-making, the justification for that line must satisfy strict scrutiny. The Florida Supreme Court's rule falls short of that demanding standard.

In contrast to the court's majority, several members of the Florida Supreme Court have explained that the 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 blunter: "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." *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.* And in *Hitchcock*, Justice Lewis noted that the Court's majority was "tumbl[ing] down the dizzying rabbit hole of untenable line drawing." *Hitchcock*, 226 So. 3d at 218 (Lewis, J., concurring in the result).

2. The *Ring*-Based Cutoff Denies *Hurst* Relief to the Most Deserving Class of Death-Sentenced Florida Prisoners

The cutoff forecloses *Hurst* relief to the class of death-sentenced prisoners for whom relief makes the most sense. In fact, several features common to Florida's "pre-*Ring*" death row population compel the conclusion that denying *Hurst* relief in their cases, while affording *Hurst* relief to their "post-*Ring*" counterparts, is especially perverse.

Florida prisoners who were tried for capital murder before *Ring* are more likely to have been sentenced to death by a system that would not produce a capital sentence—or sometimes even a capital prosecution—today. Since *Ring* was decided, as public support for the death penalty has waned, prosecutors have been increasingly unlikely to seek and juries increasingly unlikely to impose death sentences.[10]

Florida prisoners who were sentenced to death before *Ring* are also more likely than post-*Ring* prisoners to have received those death sentences in trials that involved problematic fact-finding. The past two decades have witnessed broad recognition of the unreliability of numerous kinds of evidence—flawed forensic-science theories and practices, hazardous eyewitness identification testimony, and so

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[10] The number of death sentences imposed in the United States has been in steep decline in the last two decades. In 1998, there were 295 death sentences imposed in the United States; in 2002, there were 166; in 2017 there were 39. Death Penalty Information Center, *Facts About the Death Penalty* (updated August 2018), at 3, *available at* https://deathpenaltyinfo.org/documents/FactSheet.pdf.

forth—that was widely accepted in pre-*Ring* capital trials.[11] Forensic disciplines that were once considered sound fell under deep suspicion following numerous exonerations.[12]

Post-*Ring* sentencing juries are more fully informed of the defendant's entire mitigating history than juries in the pre-*Ring* period. The American Bar Association ("ABA") guideline requiring a capital mitigation specialist for the defense was not even promulgated until 2003.[13] Limited information being provided to juries was

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[11] *See, e.g.*, Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods" (2016) (Report of the President's Counsel of Advisors on Science and Technology), *available at* https://fdprc.capdefnet.org/sites/cdn_fdprc/files/Assets/public/other_useful_information/forensic_information/pcast_forensic_science_report_final.pdf (evaluating and explaining the procedures of the various forensic science disciplines common to capital trials, and the varying degrees, or lack, of accuracy and reliability of these disciplines).

[12] *See, e.g.*, Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 166 (2007) ("The most recent study of 200 DNA exonerations found that forensic evidence (present in 57% of the cases) was the second leading type of evidence (after eyewitness identifications at 79%) used in wrongful conviction cases; COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSICS SCIENCES COMMUNITY, NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, at 4 (2009), *available at* https://www.ncjrs.gov /pdffiles1/nij/grants/228091.pdf ("[Scientific advances] have revealed that, in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people.").

[13] ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases (Rev. Ed. Feb., 2003), Guidelines 4.1(A)(1) and 10.4(C)(2), 31 HOFSTRA L. REV. 913, 952, 999-1000 (2003). S*ee also* Supplementary Guidelines for the Mitigation of Defense Teams in Death Penalty Cases, Guideline 5.1(B), (C), 36 HOFSTRA L. REV. 677 (2008); Craig M. Cooley, *Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists,* 30 OKLA. CITY U. L. REV. 23 (2005); Mark Olive, Russell Stetler, *Using the*

especially endemic to Florida in the era before *Ring* was decided.[14] The capital defense bar in Florida, as a result of various funding crises and the inadequate screening mechanism for lawyers on the list of those available to be appointed in capital cases, produced what former Chief Justice of the Florida Supreme Court Gerald Kogan described as "some of the worst lawyering" he had ever seen.[15] As a result, since 1976, Florida has had 27 exonerations—more than any other state—all but five of which involved convictions and death sentences imposed before 2002.[16]

Supplementary Guideline for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction, 30 HOFSTRA L. REV. 1067 (2008).

[14] *See*, *e.g.*, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE FLORIDA DEATH PENALTY ASSESSMENT REPORT, AN ANALYSIS OF FLORIDA'S DEATH PENALTY LAWS, PROCEDURES, AND PRACTICES, American Bar Association (2006) [herein "ABA Florida Report"]. The report concludes that Florida leads the nation in death-row exonerations, inadequate compensation for conflict trial counsel in capital cases, lack of qualified and properly monitored capital collateral registry counsel and inadequate compensation for them, significant juror confusion, lack of unanimity in jury's sentencing decision, the practice of judicial override, lack of transparency in the clemency process, racial and geographic disparities in capital sentencing, and death sentences imposed on people with severe mental disability. *Id*. at iv-ix. The report also "caution[s] that their harms are cumulative." *Id*. at iii.

[15] Death Penalty Information Center, *New Voices: Former FL Supreme Court Judge Says Capital Punishment System is Broken*, *available at https://deathpenaltyinfo.org/new-voices-former-fl-supreme-court-judge-says-capital-punishment-system-broken* (citing G. Kogan, *Florida's Justice System Fails on Many Fronts*, St. Petersburg Times, July 1, 2008.

[16] Death Penalty Information Center, *Florida Fact Sheet*, *available at* https://deathpenaltyinfo.org/innocence?inno_name=&exonerated=&state_innocence=8&race=All&dna=All.

And as for mitigating evidence, Florida's statute did not even include the "catch-all" statutory language until 1996.[17]

The "advisory" jury instructions were also so confusing that jurors consistently reported that they did not understand their role.[18] If the advisory jury did recommend life, judges—who must run for election and reelection in Florida—could impose the death penalty anyway.[19] In fact, relying on the cutoff, the Florida Supreme Court has summarily denied *Hurst* relief where the defendant was

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[17] ABA Florida Report at 16, citing 1996 Fla. Laws ch. 290, § 5; 1996 Fla. Laws ch. 96-302, Fla. Stat. 921.141(6)(h) (1996).

[18] The ABA found one of the areas in need of most reform in Florida capital cases was significant juror confusion. ABA Florida Report at vi ("In one study over 35 percent of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt. The same study also found that over 36 percent of interviewed Florida capital jurors incorrectly believed that they were *required* to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt, and 25.2 percent believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a legitimate aggravating circumstance under Florida law.").

[19] *See* ABA Florida Report at vii ("Between 1972 and 1979, 166 of the 857 first time death sentences imposed (or 19.4 percent) involved a judicial override of a jury's recommendation of life imprisonment without the possibility of parole . . . . Not only does judicial override open up an additional window of opportunity for bias—as stated in 1991 by the Florida Supreme Court's Racial and Ethnic Bias Commission but it also affects jurors' sentencing deliberations and decisions. A recent study of death penalty cases in Florida and nationwide found: (1) that when deciding whether to override a jury's recommendation for a life sentence without the possibility of parole, trial judges take into account the potential "repercussions of an unpopular decision in a capital case," which encourages judges in judicial override states to override jury recommendations of life, "especially so in the run up to judicial elections;" and (2) that the practice of judicial override makes jurors feel less personally responsible for the sentencing decision, resulting in shorter sentencing deliberations and less disagreement among jurors.").

sentenced to death by a judge "overriding" a jury's recommendation of life. *See Marshall v. Jones*, 226 So. 3d 211 (Fla. 2017).

And, especially in these "older cases," the advisory jury scheme invalidated by *Hurst* implicated systematic violations of *Caldwell v. Mississippi*, 472 U.S. 320 (1987). *Cf. Truehill v. Florida*, 138 S. Ct. 3 (2017) (Sotomayor, J., dissenting from the denial of certiorari) ("Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where the court was the final decision-maker and the sentencer—not the jury."). In contrast to post-*Ring* cases, the pre-*Ring* cases did not include more modern instructions leaning towards a "verdict" recognizable to the Sixth Amendment. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993).

We should also bear in mind that prisoners whose death sentences became final before *Ring* was decided in 2002 have been incarcerated on death row longer than prisoners sentenced after that date. Notwithstanding the well-documented hardships of Florida's death row, *see, e.g.*, *Sireci v. Florida*, 137 S. Ct. 470 (2016) (Breyer, J., dissenting from the denial of certiorari), they have demonstrated over a longer time that they are capable of adjusting to a prison environment and living without endangering any valid interest of the state. "At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes." *Knight v. Florida*, 120 S. Ct. 459, 462 (1999) (Breyer, J., dissenting from the denial of certiorari).

Taken together, these considerations show that the Florida Supreme Court's partial non-retroactivity rule for *Hurst* claims involves a level of arbitrariness and inequality that is hard to reconcile with the Eighth and Fourteenth Amendments.

IV. The Partial Retroactivity Formula Employed for *Hurst* Violations in Florida Violates the Supremacy Clause of the United States Constitution Under *Montgomery*, Which Requires Florida's Courts to Apply *Hurst* Retroactively to All Death-Sentenced Prisoners

In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), this Court held that the Supremacy Clause of the United States Constitution requires state courts to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis. In that case, a Louisiana state prisoner filed a claim in state court seeking retroactive application of the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The state court denied the prisoner's claim on the ground that *Miller* was not retroactive as a matter of state retroactivity law. *Montgomery*, 136 S. Ct. at 727. This Court reversed, holding that because the *Miller* rule was substantive as a matter of federal law, the state court was obligated to apply it retroactively. *See id.* at 732-34.

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).

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

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

As *Hurst v. Florida* explained, under Florida law, the factual predicates necessary for the imposition of a death sentence were: (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 together outweigh the mitigation in the case. *Hurst* held that those determinations must be made by juries. These decisions are substantive. Thus, they amount to an "instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish." *Id.* at 735.

On remand, *Hurst v. State* held not only that the requisite jury findings must be made beyond a reasonable doubt, but also that juror unanimity is necessary for compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders and that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Hurst v. State*, 202 So. 3d at 60-61. The function of the unanimity rule is to ensure that Florida's death-sentencing scheme complies with the federal constitution. *Id.* As a matter of federal retroactivity law, this is also substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"). And it remains substantive even though the subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (noting that

state's ability to determine the method of enforcing constitutional rule does not convert a rule from substantive to procedural).

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

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

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

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

and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof.").[20]

"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 was not at liberty to foreclose their retroactive application in Petitioner's case.

CONCLUSION

This Court should grant a writ of certiorari to review the decision below.

[20] A federal district judge in Florida, citing *Ivan*, has already observed the distinction between the holding of *Summerlin* and the retroactivity of *Hurst* arising from the beyond-a-reasonable-doubt standard. *See Guardado v. Jones*, No. 4:15-cv-256 (N.D. Fla. May 27, 2016) (explaining that *Hurst* federal retroactivity is possible despite *Summerlin* because *Summerlin* "did not address the requirement for proof beyond a reasonable doubt," and "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive").

Respectfully submitted,

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