No. 18-6378

In the

Supreme Court of the United States

ROBERT IRA PEEDE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Florida

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In *Hurst v. Florida* ("*Hurst I*"), 136 S. Ct. 616 (2016), this Court held that Florida's capital sentencing scheme was inconsistent with *Ring v. Arizona*, 536 U.S. 584 (2002), and violated the Sixth Amendment because it allowed a judge, rather than a jury, to find the existence of an aggravating circumstance necessary to impose a death sentence. On remand, in *Hurst v. State* ("*Hurst II*"), 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court established three new rules of capital sentencing procedure not required by this Court's precedents. The Florida Supreme Court subsequently held that those rules do not apply retroactively to all cases, *see Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), but created an exception under state law for cases that became final on direct review after *Ring*, which was the doctrinal foundation of *Hurst I* and *Hurst II*, *see Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016).

The questions presented are:

1. Whether the Florida Supreme Court's retroactive application of the *Hurst* decisions in post-*Ring* cases is arbitrary and capricious in violation of the Eighth or Fourteenth Amendments to the United States Constitution.

2. Whether the *Hurst* decisions or recent amendments to Florida's capital sentencing scheme retroactively changed the elements of the capital murder offense of which Petitioner was convicted in 1984.

3. Whether the Governor's reassignment of Petitioner's case to a different State Attorney violated the Fifth, Eighth, or Fourteenth Amendments to the United States Constitution.

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STATEMENT

I. LEGAL BACKGROUND

A. This Court's pre-*Ring* approval of Florida's capital sentencing system

Under the statutory regime in place at the time of Petitioner's sentencing in 1984, a defendant convicted of a capital crime in Florida could be sentenced to death only if the trial judge found (1) that "sufficient aggravating circumstances existed to justify and authorize a death sentence," (2) that "the mitigating circumstances were insufficient to outweigh such aggravating circumstances," and (3) that "a sentence of death should be imposed." *Spaziano v. Florida*, 468 U.S. 447, 451-52 & n.4 (1984) (citing § 921.141(2)(b), (3)(b), Fla. Stat. (1983)). A sentencing jury would render an advisory verdict, but the judge would make the ultimate sentencing determination. *See id.* (citing § 921.141(3), Fla. Stat. (1983)). In a series of cases, this Court repeatedly approved Florida's hybrid sentencing regime, holding that it satisfied the requirements of the Sixth and Eighth Amendments. *See Hildwin v. Florida*, 490 U.S. 638 (1989); *Spaziano*, 468 U.S. at 447; *Proffitt v. Florida*, 428 U.S. 242, 247-60 (1976).

In *Apprendi v. New Jersey*, the Court held that the Sixth Amendment does not permit a defendant to be "expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone," even if the State characterizes the additional factual findings made by the judge as "sentencing factor[s]." 530 U.S. 466, 483, 492 (2000) (emphasis in original). In *Ring v. Arizona*,

the Court extended *Apprendi*, holding that, "[b]ecause Arizona's enumerated aggravating factors [necessary to impose a death sentence] operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." 536 U.S. 584, 609 (2002) (quoting *Apprendi*, 530 U.S. at 494 n.19). The Court overruled its previous decision in *Walton v. Arizona,* 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609.

Although *Ring* overruled *Walton*, both of those cases analyzed Arizona's capital procedures, which differ considerably from those of other states. Recognizing those differences, *Ring* left intact this Court's many previous decisions upholding other states' procedures. Notably, *Ring* acknowledged—but did not address—"hybrid" capital sentencing procedures, like Florida's, in which the judge decides the ultimate sentence but the jury has an advisory role. *See Ring*, 536 U.S. at 608 n.6. Accordingly, in the years following *Ring*, both the Florida Supreme Court and the Eleventh Circuit declined to extend *Ring* to Florida, reasoning that the lower courts were bound by this Court's pre-*Ring* decisions, all of which upheld Florida's capital sentencing scheme against challenges based on the Sixth and Eighth Amendments. *See*, *e.g.*, *Hurst v. State,* 147 So. 3d 435, 446 (Fla. 2014); *Evans v. Secretary, Fla. Dep't of Corrections*, 699 F.3d 1249, 1264-65 (11th Cir. 2012), *cert. denied*, *Evans v. Crews*, 569 U.S. 994 (2013).

For example, in *Hildwin*, decided before *Ring*, this Court had rejected a challenge to Florida's capital sentencing procedures, holding that the Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." 490 U.S. at 640-41. Because *Hildwin* was this Court's "last word in a Florida capital case on the constitutionality of that state's death sentencing procedures," and it is this Court's exclusive prerogative to overrule its own decisions, the Florida Supreme Court rejected the argument that "Florida's capital sentencing scheme is unconstitutional under *Ring*." *Hurst*, 147 So. 3d at 446-47 (citation and internal quotation marks omitted). The Eleventh Circuit did the same. *See Evans*, 699 F.3d at 1264 ("The problem with Evans' argument that *Ring*, which held that Arizona's judge-only capital sentencing procedure violated the Sixth Amendment, controls this case is the *Hildwin* decision in which the Supreme Court rejected that same contention.").

Shortly after this Court decided *Ring*, it held that *Ring* is not retroactive as a matter of federal law. *See Schriro v. Summerlin*, 542 U.S. 348, 353 (2004).

B. In *Hurst I*, this Court overruled aspects of its pre-*Ring* precedent concerning Florida's capital sentencing regime.

In *Hurst I*, this Court "granted certiorari to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*." 136 S. Ct. at 621 (citations omitted). The Court held that Florida's capital sentencing scheme suffered from the same Sixth Amendment infirmity as did Arizona's scheme

in *Ring*. *Id.* at 621-22. The Court therefore overruled its pre-*Ring* decisions upholding Florida's capital sentencing scheme to the extent they allowed a sentencing judge, rather than a jury, to find an aggravating circumstance necessary to impose the death penalty. *Id.* at 624.

C. In *Hurst II*, the Florida Supreme Court created three new rules of capital sentencing procedure.

On remand, the Florida Supreme Court addressed "the effect of" *Hurst I* "on capital sentencing in Florida, as well as on issues raised by Hurst and other issues of import to [the] Court." *Hurst II*, 202 So. 3d at 44. Three of the court's rulings extended this Court's decision in *Hurst I*.

First, the Florida Supreme Court held that the Sixth Amendment to the United States Constitution gives defendants the right to have a jury make *normative judgments* required by state law before a defendant may be sentenced to death—not merely the right to have a jury make *factual findings* necessary to establish the existence of at least one statutorily required aggravating factor. In particular, the Florida Supreme Court held that a jury must find "that the aggravating factors are sufficient to impose death" and "that the aggravating factors outweigh the mitigating circumstances," and must also "recommend a sentence of death." *Hurst II*, 202 So. 3d at 57.

Second, as a matter of state law, the Florida Supreme Court held that a jury must make all these findings unanimously. *Id.* at 53-54, 57. The court was

"mindful that a plurality of the United States Supreme Court, in a noncapital case, decided that unanimous jury verdicts are not required in all cases under the Sixth Amendment." *Id.* at 57 (citing *Apodaca v. Oregon*, 406 U.S. 404 (1972)). But "in interpreting the Florida Constitution and the rights afforded to persons within this State," the Florida Supreme Court decided to "affor[d] criminal defendants" more protection "than that mandated by the federal Constitution." *Id.*

Third, the Florida Supreme Court "conclude[d] that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment" to the United States Constitution. *Id.* at 59. As the court saw it, this Court had "not ruled on whether unanimity is required in the jury's advisory verdict in capital cases." *Id.* In the majority's view, however, "the foundational precept of the Eighth Amendment"—that is, "the principle that death is different"—"calls for unanimity in any death recommendation that results in a sentence of death." *Id.*

The State filed a petition for a writ of certiorari challenging *Hurst II*'s federal law holdings. Specifically, the State sought review of whether the Sixth Amendment requires that a jury make determinations that are required by statute but are not factual in nature, and whether the Eighth Amendment requires jury sentencing in capital cases. Petition for Writ of Certiorari, *Florida v. Hurst*, 137 S. Ct. 2161 (2017) (No. 16-998), 2017 WL 656209 at *i. While the State's petition was pending, the Florida Legislature amended the State's capital sentencing

statutes to bring them into compliance with the Florida Supreme Court's holdings in *Hurst II*. Ch. 2017-1, Laws of Fla. (Mar. 13, 2017). This Court subsequently denied the State's petition. *Florida v. Hurst*, 137 S. Ct. 2161, 2161 (2017).

D. The Florida Supreme Court made the *Hurst* decisions retroactive, as a matter of state law, to sentences that were not yet final when *Ring* was decided.

In *Asay v. State*, the Florida Supreme Court addressed whether *Hurst I* should apply retroactively to a sentence that became final before this Court's ruling in *Ring*. 210 So. 3d 1, 11 (Fla. 2016). As a threshold matter, *Asay* acknowledged this Court's decision that *Ring*, which formed the doctrinal foundation of *Hurst I*, does not apply retroactively because it "was not a substantive change to the law, but rather a 'prototypical procedural rul[e].'" *Asay*, 210 So. 3d at 15 (quoting *Summerlin*, 542 U.S. at 353). Because that decision "derive[d] from the much narrower *Teague* test, which utilizes completely different factors from Florida's [retroactivity] test" set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), however, the Florida Supreme Court proceeded to consider whether *Hurst I* should apply retroactively as a matter of state law. *Asay*, 210 So. 3d at 15.

After considering the factors applicable under state law, the Florida Supreme Court held that *Hurst I* "should not be applied retroactively to [cases] in which the death sentence became final before the issuance of *Ring*." *Asay*, 210 So. 3d. at 22. The court concluded that those factors "weigh[ed] against applying *Hurst* [*I*] retroactively to *all* death case

litigation in Florida," but "limit[ed] [its] holding to this context because the balance of factors may change significantly for cases decided after the United States Supreme Court decided *Ring*" in 2002. *Id.* (emphasis added).

In *Mosley v. State*, the Florida Supreme Court addressed the question it had reserved in *Asay*—whether the *Hurst* decisions should apply retroactively to death sentences that became final after *Ring*. 209 So. 3d 1248, 1274 (Fla. 2016). The court concluded that capital defendants falling into this category should enjoy the benefit of the *Hurst* decisions because, "[f]or fourteen years after *Ring*, until the United States Supreme Court decided *Hurst* [*I*], Florida's capital defendants attempted to seek relief based on *Ring*, both in this Court and the United States Supreme Court." *Id.* at 1275. Capital defendants were nevertheless denied the benefit of *Ring* because that decision had "specifically overruled *Walton v. Arizona*, but failed to address the constitutionality of Florida's capital sentencing scheme by not discussing *Hildwin* or *Spaziano*, thereby leaving those decisions intact to support an argument that Florida's capital sentencing scheme remained valid." *Id.* at 1279 (citing *Ring*, 536 U.S. at 603). The Florida Supreme Court continued to give *Hildwin* and *Spaziano* full effect until this Court decided *Hurst I* in 2016 and overruled those decisions in pertinent part.

Because, in the Florida Supreme Court's view, *Hurst I* made clear that "Florida's capital sentencing statute was unconstitutional from the time that the United States Supreme Court decided *Ring*," *id.* at

1281, "[f]undamental fairness" compelled the court to hold, as a matter of state law, that "[d]efendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring*" should benefit from the *Hurst* decisions, *id.* at 1283. The court therefore ruled that the *Hurst* decisions apply to capital defendants whose death sentences had not yet become final on direct appeal when *Ring* was decided. *Id.*

II. PROCEDURAL BACKGROUND

A. Not long after being released from prison for a prior murder conviction, Petitioner Robert Ira Peede was convicted of first-degree murder and sentenced to death for stabbing and killing his estranged wife in the back seat of her Buick. *Peede v. State*, 474 So. 2d 808, 810 (Fla. 1985). The jury recommended the death penalty by a vote of eleven to one. Pet. 3. The judge followed the jury's recommendation and sentenced him to death, finding three aggravating factors and one mitigating circumstance.[1] Peede did not contend either at trial or on direct appeal that his sentence was unconstitutional because the jury did not unanimously recommend a death sentence or because the jury did not unanimously find that the aggravators outweighed the mitigators. His sentence became final in 1986. *See Peede v. Florida*, 477 U.S. 909 (1986); Fla. R. Crim. P. 3.851(d)(1)(B).

In 1988, Peede filed a motion for postconviction relief under Fla. R. Crim. P. 3.850. *Peede v. State*, 748

[1] The Florida Supreme Court later found that one of the three aggravator findings was error, but the court held that the error was harmless. *See Peede v. State*, 474 So. 2d 808 (Fla. 1985).

So. 2d 253, 255 (Fla. 1999). The trial court granted a concurrently filed stay motion, staying his execution indefinitely and scheduling an evidentiary hearing on some of the claims raised in his motion, including his competency to stand trial, the adequacy of his psychiatric evaluation, ineffective assistance of counsel, and an alleged *Brady* violation. *Id.* That hearing "apparently never took place." *Id.* Peede filed an amended motion in 1995; the trial court denied all relief; and the Florida Supreme Court affirmed in part, reversed in part, and remanded for an evidentiary hearing. *Id.* at 259. After conducting that hearing, the trial court denied relief and the Florida Supreme Court affirmed. *Peede v. State*, 955 So. 2d 480 (Fla. 2007), *cert. denied*, 552 U.S. 1044 (2007).

In 2010, Peede filed a successive motion under Florida R. Crim. P. 3.851 to vacate the judgment of conviction and sentence. The trial court denied relief, and the Florida Supreme Court affirmed. *Peede v. State*, 94 So. 3d 500 (Fla. 2012), *cert. denied*, 133 S. Ct. 864 (2013).

While his successive motion was pending, Peede filed a petition for a writ of habeas corpus in federal court. The district court denied most of Peede's claims, but granted relief as to his claim alleging ineffective assistance of counsel during the penalty phase. On appeal, however, the Eleventh Circuit reversed, and this Court denied Peede's petition for certiorari. *Peede v. Attorney Gen., Fla.*, 715 F. App'x 923, 924 (11th Cir. 2017), *cert. denied sub nom. Peede v. Jones*, 138 S. Ct. 2360 (June 25, 2018).

B. Before March 2017, Peede's case had been assigned to the State Attorney for Florida's Ninth

Judicial Circuit, Aramis Ayala. During a March 15, 2017 press conference, however, Ayala announced that she would "not be seeking [the] death penalty in the cases handled in [her] office." *Ayala v. Scott*, 224 So. 3d 755, 756 (Fla. 2017). Ayala indicated her intent to implement a blanket policy of refusing to seek the death penalty in any eligible case. *Id.*

Exercising his authority as Florida's chief executive officer under Article IV, section 1(a) of Florida's Constitution to "take care that the laws be faithfully executed," Governor Rick Scott issued a series of executive orders reassigning the prosecution of death-penalty eligible cases pending in the Ninth Judicial Circuit to Brad King, State Attorney for Florida's Fifth Judicial Circuit. *E.g.*, Florida Executive Order 17-91 (Apr. 3, 2017) (reassigning Peede's case). Those orders were issued pursuant to Governor Scott's authority under § 27.14(1), Florida Statutes, to assign state attorneys to other circuits "if, for any . . . good and sufficient reason, the Governor determines that the ends of justice would be best served."

Ayala unsuccessfully sought a stay of the reassignment orders in the Ninth Judicial Circuit. She then filed a petition for a writ of quo warranto challenging the Governor's authority to reassign the cases at issue. *Ayala*, 224 So. 3d at 757. The Florida Supreme Court denied the writ, holding that "the executive orders reassigning the death-penalty eligible cases in the Ninth [Judicial] Circuit to King f[e]ll well 'within the bounds' of the Governor's 'broad authority.'" *Id.* at 758 (quoting *Finch v. Fitzpatrick*, 254 So. 2d 203, 204 (Fla. 1971)). As the court

explained, the Governor's orders merely "guarantee[d] that the death penalty—while never mandatory—remain[ed] an option in the death-penalty eligible cases in the Ninth [Judicial] Circuit, but le[ft] it up to King, as the assigned state attorney, to determine whether to seek the death penalty on a case-by-case basis." *Id.* at 759.[2]

C. In 2017, after his case was reassigned to State Attorney King, Peede filed another postconviction motion under Florida R. Crim. P. 3.851, seeking relief under *Hurst I* and *Hurst II* and arguing that removing State Attorney Aramis Ayala from his case violated his right to due process, equal protection, and the Eighth Amendment. The trial court denied relief on all of his claims, explaining that they were "untimely, procedurally barred, and cannot be applied retroactively." Order, *State of Florida v. Peede*, No. 1983-CF-001682-A-O, Div. 11, at *2 (Fla. 9th Jud. Cir. Aug. 14, 2017).

The Florida Supreme Court affirmed. As to the *Hurst* issues, the court held that the trial court properly denied Peede's motion because "[h]is sentence of death became final in 1986" and, "[t]hus, *Hurst* does not apply retroactively to Peede's sentence of death." *Peede v. State*, 249 So. 3d 1181, 1182 (Fla.

[2] Ayala also filed a federal lawsuit in the Middle District of Florida, raising federal challenges to the reassignment orders. *Ayala v. Scott*, No. 6:17-cv-649, ECF 1 (M.D. Fla. Apr. 11, 2017). On Ayala's request, the court stayed the case pending the state litigation. Order, ECF No. 21 (M.D. Fla. May 4, 2017). One week after the Florida Supreme Court denied her petition for a writ of quo warranto, Ayala voluntarily dismissed her federal lawsuit. Notice, ECF No. 24 (M.D. Fla. Sept. 7, 2017).

2018) (citing *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, --- U.S. ---, 137 S. Ct. 2161 (2017)). As for Peede's claim regarding the reassignment of his case from State Attorney Ayala to State Attorney Brad King, the court "conclude[d] that th[e] issue [i]s moot" because, following the Eleventh Circuit's reversal of the district court's grant of federal habeas relief, he was not entitled to a new penalty phase. *Id.* at 1182 n.1.

REASONS FOR DENYING THE PETITION

I. THIS CASE PRESENTS NEITHER A SPLIT OF AUTHORITY NOR AN EXCEPTIONALLY IMPORTANT QUESTION.

A. No split of authority exists.

Petitioner does not contend that there is a split of authority among the federal Courts of Appeals or state courts of last resort. Nor could he. The questions presented depend on the unique interplay between Florida's capital sentencing procedures, Florida law concerning the retroactivity of procedural rules, and the unique history of *Ring* as it pertains to Florida.

Petitioner does not suggest otherwise. He identifies no other state with capital sentencing procedures that (1) this Court upheld against pre-*Ring* Sixth Amendment challenges, (2) the lower courts continued to uphold post-*Ring*, (3) were ultimately struck down by this Court, and, accordingly, (4) could conceivably give rise to the partial retroactivity decision that Petitioner claims is constitutionally objectionable. Petitioner points only to general fairness principles and the well-established but generic principle that "[t]he fact that [a] 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." Pet. 19 (quoting *United States v. Johnson*, 457 U.S. 537, 556 n.16 (1982)). But Petitioner identifies no case, and the State is aware of none, applying these general principles to the issue of "partial retroactivity" as a matter of state law.

B. The question presented is not exceptionally important.

For much the same reason that there is no split of authority, the question presented is not one of exceptional importance. The answer to that question goes to the availability of post-conviction relief in only one state in the country. Indeed, even in Florida, the issue bears on only one subcategory of pending capital cases—specifically, those involving death sentences that became final on direct review before June 24, 2002, when this Court decided *Ring*. For all capital cases that became or will become final after *Ring*, the Florida Supreme Court requires, as a matter of state law, retroactive application of *Hurst II*. *See Mosley*, 209 So. 3d at 1283.

Moreover, *all* retroactivity decisions, including those of this Court, need to draw a line somewhere, and this Court has long held that such line-drawing serves legitimate purposes even though it inevitably denies some category of litigants the benefits that might flow from giving retroactive effect to a new constitutional rule. In particular, as the Florida Supreme Court agreed in *Asay*, retroactivity cutoffs serve the important state interest in finality of convictions, and "an absence of finality casts a cloud of tentativeness over the criminal justice system,

benefiting neither the person convicted nor society as a whole." 210 So. 3d at 16 (quoting *Witt*, 387 So. 2d at 925).

In any event, by allowing defendants who had been denied prospective application of *Ring* to benefit from that decision and its progeny as a matter of "fundamental fairness" under state law, the Florida Supreme Court afforded *greater* protection than that required by the United States Constitution, not less. Thus, the petition does not present a question sufficiently important to warrant this Court's review.

II. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Petitioner also contends that he is entitled to resentencing because *Hurst II* is retroactive. But it is not retroactive under federal law, and it is not retroactive to his case under state law.

1. As a threshold matter, Petitioner cannot be entitled to retroactive application of *Hurst II* under federal law unless that decision was correct. For the reasons set out below, the Florida Supreme Court's Sixth and Eighth Amendment holdings conflict with, rather than emanate from, this Court's precedents. In addition, neither party has asked this Court to review the correctness of those holdings in the context of this case; this Court has not yet considered those holdings; and this Court should not be asked to inquire into the *retroactivity* of *Hurst II* without first having an opportunity to assess the *correctness* of that decision.

Hurst II's Sixth and Eighth Amendment holdings—respectively, that a death sentence may not be imposed unless a jury (1) makes all determinations

required by statute, and (2) unanimously recommends a sentence of death—cannot be reconciled with portions of *Spaziano* that remain good law. In *Spaziano*, the trial judge imposed a sentence of death after making the determinations required by statute, including that (1) "sufficient aggravating circumstances existed to justify and authorize a death sentence," (2) "the mitigating circumstances were insufficient to outweigh such aggravating circumstances," and (3) "a sentence of death should be imposed," *Spaziano*, 468 U.S. at 451-52. This Court held that Spaziano's sentence did not violate the Sixth Amendment, *id.* at 458-65, even though the jury did not make any of those findings, *id.* at 451-52 (citing § 921.141, Fla. Stat.). The Court also addressed whether Florida's capital sentencing scheme "violate[d] the Eighth Amendment's proscription against 'cruel and unusual punishments'" by "allowing a judge to override a jury's recommendation of life." *Id.* at 457. The Court rejected that argument, holding that "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed." *Id.* at 465; *see id.* at 462-63 ("[T]he purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge.").

In *Hurst I*, this Court "overrule[d] *Spaziano* and *Hildwin* in relevant part." 136 S. Ct. at 623. The Court carefully circumscribed its decision, overruling those cases only "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Id.* at 624. Accordingly, *Hurst I* left

intact *Spaziano*'s holdings that the Sixth Amendment allowed the sentencing judge to determine that (1) "the mitigating circumstances were insufficient to outweigh such aggravating circumstances," and (2) "a sentence of death should be imposed." 468 U.S. at 451-52, 458-65.

That distinction makes sense. Unlike the existence of an aggravating circumstance, those determinations are not factual. *Ring* and *Hurst I* are both derived from *Apprendi*, in which this Court held that, with one exception not relevant here, "any *fact* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added). This Court recently clarified in *Kansas v. Carr*, what is, and what is not, a "fact" in the capital sentencing context. 136 S. Ct. 633, 642 (2016). The *existence* of an aggravating factor is "a purely factual determination." *Id.* "Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not." *Id.* In any event, "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained." *Id.* "It would mean nothing . . . to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it." *Id.* Accordingly, a jury must find the existence of an aggravating factor, *Hurst I*, 136 S. Ct. at 623-24, but a judge may determine that "the mitigating circumstances were insufficient to outweigh such aggravating

circumstances," and that "a sentence of death should be imposed," *Spaziano*, 468 U.S. at 451-52.

Nor did *Hurst I* overrule *Spaziano*'s Eighth Amendment holding—that "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed." *Id.* at 465. Accordingly, "[a]ny argument that the Constitution requires that a jury impose the sentence of death . . . has been soundly rejected by prior decisions of this Court." *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990). And because the Eighth Amendment does not require that death sentences be imposed by a jury, it certainly does not require them to be imposed *unanimously* by a jury. *See Spaziano*, 468 U.S. at 465; *Proffitt*, 428 U.S. at 252 (plurality opinion) (explaining that, although "jury sentencing in a capital case can perform an important societal function," this Court "has never suggested that jury sentencing is constitutionally required" in such cases); *id.* at 260-61 (White, J., concurring in the judgment).[3]

In any event, this case is not a good vehicle for addressing whether *Hurst I* applies retroactively to sentences that became final before *Ring* because—even if it does—any such holding would not help Petitioner. Petitioner's death sentence is supported by the prior violent felony aggravator (prior convictions for second-degree murder involving the use of a

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[3] *See also State v. Mata*, 745 N.W.2d 229, 252 (Neb. 2008) ("We conclude that the Eighth Amendment similarly does not require jury sentencing."); *Ex parte Taylor*, 808 So. 2d 1215, 1217-18 (Ala. 2001); *State v. Cobb*, 743 A.2d 1, 99 (Conn. 1999); *State v. Gillies*, 691 P.2d 655, 659 (Ariz. 1984); *State v. Sivak*, 674 P.2d 396, 399 (Idaho 1983).

firearm and assault with a deadly weapon), and this Court's ruling in *Hurst I* did not disturb prior precedent holding that the fact of a prior conviction need not be submitted to a jury. *See Apprendi*, 530 U.S. at 490; *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). In other words, even assuming *Hurst I* applies retroactively to Petitioner's case, the trial court did not violate the Sixth Amendment insofar as it found that Petitioner's prior violent felony convictions render him statutorily eligible for the death penalty under Florida law. Accordingly, there is no underlying constitutional error under this Court's precedent.

Because *Hurst II*'s Sixth and Eighth Amendment holdings are foreclosed by this Court's precedents, federal law cannot require them to be applied retroactively to any cases. Thus, even if this Court agrees that the retroactivity cutoff established by the Florida Supreme Court is arbitrary and capricious, Petitioner would not be entitled to the relief he seeks. The Petition should therefore be denied.

2. Moreover, even if *Hurst II* were correct, it still would not be retroactive as a matter of federal law. This Court held in *Summerlin* that *Ring* is not retroactive. 542 U.S. at 358. *Hurst I* merely applied *Ring* to Florida's capital sentencing procedures, and *Hurst II*, in turn, built upon *Hurst I* by creating additional, related procedural requirements: A jury must make *all* determinations required by state law in order for the death penalty to be imposed, and any death sentence recommended by the jury must also be

unanimous. *Hurst II*, 202 So. 3d at 53-54, 59. Like *Ring* itself, these requirements merely "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death" and therefore are "prototypical procedural rules" not retroactive as a matter of federal law. *Summerlin*, 542 U.S. at 353. Petitioner does not argue otherwise. He therefore is not entitled to demand retroactive application of *Hurst II* as a matter of federal law.

3. Nor is *Hurst II* retroactive as a matter of state law. The Florida Supreme Court has already rejected the retroactive application of *Hurst I*, the foundation of *Hurst II*, "to all death case litigation in Florida," *Asay*, 210 So. 3d. at 22, and Petitioner does not ask this Court to pass on that state-law ruling. Nor does he offer any basis for predicting that the Florida Supreme Court would change its mind and make *Hurst II* retroactive "to all" death penalty cases, as a matter of state law, if Petitioner were to prevail on the claims at issue here, *see id.*

Finally, in the direct appeal from his sentence, Petitioner did not claim that he was entitled to have a jury determine that mitigating factors outweighed aggravating circumstances and that death was the appropriate sentence; and still less did he claim that a jury was required to make those determinations unanimously. Assuming *arguendo* that *Hurst II* should be applied retroactively to pre-*Ring* cases in which such claims were properly preserved, Petitioner makes no showing that any such retroactivity ruling would apply to his own case. *Cf. Asay*, 210 So. 3d at 30 (Lewis, J., concurring in the result) (concluding that Asay was "not entitled to relief" because "Asay did not

raise a Sixth Amendment challenge prior to the case named *Ring* arriving" in 2002).

* * *

For the reasons set out above, Petitioner does not show that the novel constitutional rulings he seeks would affect the outcome of his own case. Absent such a showing, the assertion that other capital defendants are unfairly receiving protections to which they are purportedly not entitled does not provide a basis for granting certiorari in this case.

III. THE FLORIDA SUPREME COURT'S RETROACTIVITY DECISION IS ENTIRELY CONSISTENT WITH THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner contends that the Florida Supreme Court's decisions in *Asay* and *Mosley* violate the United States Constitution insofar as they held that *Hurst II* "[s]elective[ly] appl[ies]" to "similarly situated defendants." Pet. 20. This Court has previously denied certiorari in many cases presenting this same issue. *See, e.g.*, *Alston v. Florida*, No. 18-5641 (Oct. 29, 2018); *Lamarca v. Florida*, No. 18-5648 (Oct. 29, 2018); *Brown v. Florida*, No. 18-5352 (Oct. 9, 2018); *Geralds v. Florida*, No. 18-5376 (Oct. 9, 2018); *Gaskin v. Florida*, No. 18-5415 (Oct. 9, 2018); *Pope v. Florida*, No. 18-5402 (Oct. 9, 2018); *Whitton v. Florida*, No. 18-5437 (Oct. 9, 2018); *Kelley v. Florida*, No. 17-1603 (Oct. 1, 2018); *Martin v. Florida*, No. 18-34 (Oct. 1, 2018); *Barwick v. Florida*, No. 18-5354 (Oct. 1, 2018); *Pace v. Florida*, No. 18-5078 (Oct. 1, 2018); *Hamilton v. Florida*, No. 18-5037 (Oct. 1, 2018); *Jackson v. Florida*, No. 17-9564 (Oct. 1, 2018); *Kokal*

v. Florida, No. 17-9536 (Oct. 1, 2018); *Melton v. Florida*, No. 17-9555 (Oct. 1, 2018); *Stein v. Florida*, No. 17-9545 (Oct. 1, 2018); *Hartley v. Florida*, No. 17-9498 (Oct. 1, 2018); *Walls v. Florida*, No. 17-9510 (Oct. 1, 2018); *Peterka v. Florida*, No. 17-9496 (Oct. 1, 2018).

Petitioner's claim fails on the merits. While *Ring* does not apply retroactively, *Summerlin*, 542 U.S. at 353, it does apply *prospectively*, like any other procedural rule. Thus, while *Ring* did not apply to inmates whose sentences became final before it was decided, *Ring* ordinarily would have applied to those whose sentences had not yet become final. Nevertheless, as discussed below, for fourteen years capital defendants in Florida were denied the prospective application of *Ring*. The Florida Supreme Court's decision in *Mosley* simply remedied that perceived shortcoming.

In *Asay*, the court acknowledged this Court's decision that *Ring*, the doctrinal foundation of *Hurst I*, is not retroactive as a matter of federal law because it "was not a substantive change to the law, but rather a 'prototypical procedural rule.'" 210 So. 3d at 15 (citations omitted). The court then considered the question of retroactivity as a matter of state law and determined that the relevant factors "weigh[ed] against applying *Hurst* [*I*] retroactively to *all* death case litigation in Florida," but "limit[ed] [its] holding . . . because the balance of factors may change significantly for cases decided after the United States Supreme Court decided *Ring*." *Id.* at 22. In *Mosley*, the court addressed the question reserved in *Asay* and created an exception for death sentences that became final on direct appeal after *Ring*, because Florida law

required that exception as a matter of "fundamental fairness." 209 So. 3d at 1283.

Petitioner claims that the line drawn by *Asay* and *Mosley* is "arbitrary and capricious" and therefore violates the Eighth and Fourteenth Amendments. Pet. 21. To the contrary, the court's decision was a rational exercise of its constitutional authority under Florida law to provide greater protection for the rights of capital defendants than that required by federal law. *See Danforth v. Minnesota*, 552 U.S. 264, 282 (2008) ("*Teague* . . . does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*.").

Although, as discussed above, the Florida Supreme Court was not required to apply *Hurst II* retroactively at all, the court was free, "in interpreting the Florida Constitution and the rights afforded to persons within this State, [to] require more protection be afforded criminal defendants than that mandated by the federal Constitution." *Mosley*, 209 So. 3d at 1278; *see, e.g.*, *California v. Ramos*, 463 U.S. 992, 1014 (1983) ("States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."); *Danforth*, 552 U.S. at 282. The court did just that, ruling that "fundamental fairness" justified retroactive application of *Hurst II* to cases not yet final when this Court decided *Ring*. *Mosley*, 209 So. 3d at 1283.

Nor was the line drawn by the Florida Supreme Court "arbitrary and capricious." Pet. 21. As the court explained in *Mosley*, "[f]or fourteen years after *Ring*, until the United States Supreme Court decided *Hurst*

[*I*], Florida's capital defendants attempted to seek relief based on *Ring*, both in this Court and the United States Supreme Court." 209 So. 3d at 1275. Those defendants were rebuffed because *Ring* did not address hybrid capital sentencing procedures and left intact this Court's pre-*Ring* decisions specifically upholding the constitutionality of Florida's capital sentencing procedures. *Id.* at 1279. The Florida Supreme Court had "doubt" about the continued viability of those decisions in light of *Ring*, but adhered to them because it was solely "within the purview of the United States Supreme Court to overrule" its own precedents. *Id.* at 1279-80. This Court did just that in *Hurst I*, giving capital defendants in Florida the benefit of *Ring*. Because *Hurst I*, as the Florida Supreme Court saw it, made clear that "Florida's capital sentencing statute was unconstitutional from the time that the United States Supreme Court decided *Ring*," *id.* at 1281, the court held as a matter of state law that "[d]efendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring* should not suffer due to the" delay "in applying *Ring* to Florida," *id.* at 1283.

In other words, although framed in terms of retroactivity analysis under state law, *Mosley* simply remedied the Florida Supreme Court's inability, until *Hurst I*, to apply *Ring* prospectively like any other decision of this Court. According to Petitioner, this rationale "ignores the fact that the court also used *Ring* as the partial retroactivity cutoff for its own *Hurst II* decision based on Eighth Amendment requirements, which manifestly was *not* prefigured by *Ring*." Pet 21. Not so. That ruling turned as much on

Ring as the court's Sixth Amendment holding. Having held for the first time, in light of *Hurst I*, that capital defendants in Florida may not be sentenced to death unless all determinations required by state law are made by a jury, the court turned its attention to derivative questions about the jury's role in the sentencing process, including whether a jury must "unanimously recommend a sentence of death." *Hurst II*, 202 So. 3d at 58.

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The Florida Supreme Court did not violate the Eighth or Fourteenth Amendments insofar as it declined to require, as a matter of state law, retroactive application of the *Hurst* decisions to cases in which the sentence became final prior to this Court's decision in *Ring*.

IV. PETITIONER'S CLAIMS RELATING TO THE CAPITAL MURDER STATUTE AND ELEMENTS DO NOT WARRANT REVIEW.

Petitioner also asks this Court to decide whether the *Hurst* decisions or the recent amendments to Florida's capital sentencing procedures changed the elements of capital murder such that he was not convicted—in 1984—of capital murder under state law. This Court has repeatedly refused to review that question by denying petitions presenting the issue in the precise fashion that Petitioner does. *See*, *e.g.*, *Lamarca v. Florida*, No. 18-5648 (Oct. 29, 2018); *Geralds v. Florida*, No. 18-5376 (Oct. 9, 2018); *Brown v. Florida*, No. 18-5352 (Oct. 9, 2018); *Barwick v. Florida*, No. 18-5354 (Oct. 1, 2018); *Derrick v. Florida*, No. 18-5051 (Oct. 1, 2018); *Hodges v. Florida*, No. 17-

9573 (Oct. 1, 2018); *Davis v. Florida*, No. 17-9570 (Oct. 1, 2018); *Kokal v. Florida*, No. 17-9536 (Oct. 1, 2018); *Melton v. Florida*, No. 17-9555 (Oct. 1, 2018); *Willacy v. Florida*, No. 17-9548 (Oct. 1, 2018); *Stein v. Florida*, No. 17-9545 (Oct. 1, 2018); *Hartley v. Florida*, No. 17-9498 (Oct. 1, 2018); *Peterka v. Florida*, No. 17-9496 (Oct. 1, 2018); *Clark v. Florida*, No. 17-9492 (Oct. 1, 2018). Petitioner identifies no change in circumstance or basis for granting this particular case to resolve the issue that this Court has previously declined to review.

As was argued in those previous petitions, Petitioner contends that because the aggravators in his case were found by a judge, not a jury, "the jury did not unanimously find all of the elements required to convict of capital murder." Pet. 32. Petitioner is incorrect. Petitioner contends that two of the elements identified in *Hurst II* were not found proven beyond a reasonable doubt in his case: "sufficiency of the aggravators and whether they outweigh the mitigators." (Pet. 35). But under the capital murder statute that existed when Petitioner was convicted, neither was an element that was required to be found beyond a reasonable doubt by the jury.

Petitioner's theory is nothing more than another attempt to apply *Hurst* retroactively. But *Hurst I* is not retroactive under federal law, and *Hurst II* is not retroactive under state law to Petitioner's case. *See Teague v. Lane*, 489 U.S. 288, 307 (1989); *Summerlin*, 542 U.S. at 353; *Asay*, 210 So. 3d at 22. Arguing that aggravating factors were actually elements of capital murder when Petitioner was convicted—despite the then-applicable statutory text—is simply an

argument that *Hurst* retroactively requires proof of those aggravators beyond a reasonable doubt.

Although Florida's death penalty statute, § 921.141, Florida Statutes, was amended after, and in connection with, the decisions in *Hurst I* and *Hurst II*, neither *Hurst* nor the new statute created a new crime with new elements. Only the process by which the sentence is determined has been altered. And because the amended statute does not apply retroactively to Petitioner's conviction, Petitioner's argument fails.

The procedural changes to Florida's death penalty statute include requiring a unanimous jury vote for a recommendation of death instead of a majority vote, requiring specific findings from the jury regarding the existence and sufficiency of the aggravation and the weighing of aggravation against mitigation, and disallowing judicial override of a jury's recommendation of life. The class of persons who are death eligible and the range of conduct which causes those defendants to be death eligible did not change. The aggravating factors necessary to qualify a defendant as eligible for the death penalty were not changed. The only changes made were the requirement of specific jury findings of unanimity for the existence and sufficiency of the aggravating factors and that they outweigh mitigation, and for a death recommendation.

A presumption against retroactive application of statutes applies absent an express statement of legislative intent. *Fla. Ins. Guar. Assn, Inc. v. Devon Neighborhood Assn, Inc.*, 67 So. 3d 187, 195 (Fla. 2011). The Florida Legislature did not make any

express statement that it intended chapter 2017-1 to be applied retroactively, and thus the presumption cannot be rebutted. *See also* Senate Bill Analysis & Fiscal Impact Statement, SB 280, at 6-7 (Feb. 21, 2017) (noting that retroactive application would "significantly increase both the workload and associated costs of public defender offices for several years to come").

Because the procedural amendments to the death penalty statute do not apply retroactively under federal or state law, Petitioner is incorrect in arguing that he was not convicted of capital murder in 1984. The jury found each of the elements of the then-applicable statute existed beyond a reasonable doubt; the 2017 amendments did not retroactively change the elements of capital murder in 1984; and neither *Hurst* decision did so either because neither applies retroactively to Petitioner's case. In any event, this Court has recently and repeatedly denied review in other cases raising the same issue, and Petitioner offers no good reason for treating his case differently.

V. PETITIONER'S CLAIM REGARDING THE REASSIGNMENT OF THE STATE ATTORNEY IS MOOT, MERITLESS, AND OTHERWISE NOT CERTWORTHY.

Petitioner asks this Court to review the Florida Supreme Court's denial of Petitioner's claim that "Governor Scott's reassignment of Peede's case from State Attorney Aramis Ayala to State Attorney Brad King violate[d] Peede's rights to due process and equal protection and injects arbitrariness into his capital proceedings in violation of the Eighth Amendment to the United States Constitution." *Peede v. State*, 249

So. 3d 1181, 1182 n.1 (Fla. 2018); *see* Pet. 35-37. That issue does not warrant this Court's review. The Florida Supreme Court properly rejected Petitioner's claim as moot. Petitioner's claim is also meritless. And Petitioner has not made any showing of a conflict or that the issue is sufficiently important to warrant this Court's review.

A. Petitioner's claim regarding the State Attorney's reassignment is moot.

The Florida Supreme Court correctly concluded that "this issue is moot because the United States Circuit Court of Appeals for the Eleventh Circuit reversed the United States District Court for the Middle District of Florida's granting a new penalty phase, and [this Court] denied certiorari review." *Peede*, 249 So. 3d at 1182 n.1 (citing *Peede v. Attorney General*, 715 Fed. App'x 923, 924 (11th Cir. 2017), *cert. denied, Peede v. Jones*, --- U.S. ---, 138 S. Ct. 2360 (2018)). Because Petitioner is not entitled to any new penalty phase at which a prosecutor might conceivably seek something other than a death sentence, whether the case is handled by any particular State Attorney cannot affect the outcome here. Even if Ms. Ayala were still assigned to his case, Petitioner recognizes that he "and his counsel have no information that Ms. Ayala would move to vacate his death sentence and have him sentenced to life." Pet. 36.

B. Even if it were not moot, Petitioner's claim regarding the State Attorney's designation would not warrant review.

Even if Petitioner were entitled to a new penalty phase, his claim regarding which State Attorney is assigned to his case is meritless. It is undisputed that state law, as authoritatively construed by the Florida Supreme Court, authorized the Governor to reassign Petitioner's case to a different State Attorney. *See Ayala*, 224 So. 3d at 757-58 (holding that "the executive orders reassigning the death-penalty eligible cases in the Ninth Circuit to King f[e]ll well 'within the bounds' of the Governor's 'broad authority'") (quoting *Finch v. Fitzpatrick*, 254 So. 2d 203, 204-05 (Fla. 1971)); *see* Art. IV, § 1, Fla. Const.; § 27.14, Fla. Stat. (addressing the Governor's authority under Florida law to appoint a prosecutor from another circuit).[4]

Petitioner makes a passing reference to the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, Pet. 35; but he does not cite any case holding that those provisions establish a federal right to have a particular State Attorney handle a state criminal prosecution or respond to a state prisoner's motion for post-conviction relief.

It is not persuasive to contend that the Governor's reassignment of Petitioner's case to a different State

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[4] To the extent that the Petition could be construed to challenge the Florida Supreme Court's interpretation of state law, any such claim would fall outside the scope of this Court's jurisdiction and would not, in any event, implicate an important issue of federal law warranting this Court's review.

Attorney gives rise to the "arbitrary and capricious infliction of the death penalty" in violation of the Federal Constitution. *See* Pet. 36 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)). If anything, the order transferring Petitioner's case to a different State Attorney helped to *avoid* arbitrariness in the enforcement of state law. As the Florida Supreme Court explained, the challenged reassignments "ensure the faithful execution of Florida law by guaranteeing that the death penalty—while never mandatory—remains an option in the death-penalty eligible cases in the Ninth Circuit," while "leaving it up to King, as the assigned state attorney, to determine whether to seek the death penalty on a case-by-case basis." *Ayala*, 224 So. 3d at 759.

Assuming *arguendo* that Petitioner's claim is debatable on the merits, Petitioner fails to show that his challenge to the Governor's reassignment of his case warrants this Court's review. Petitioner does not point to any split in the lower courts on the novel federal-law issue he raises. Nor does he argue that the issue—which arose because the State's Governor exercised a reassignment authority conferred by § 27.14, Florida Statutes—is likely to arise in other states. In addition, the Florida Supreme Court did not pass on the merits of Petitioner's federal-law challenge, and this Court should have the benefit of a fully reasoned lower court decision before it steps in to resolve the issue.

In sum, Petitioner raises a novel constitutional issue that is already moot, that is not recurring or of nationwide importance, and on which no split exists; Petitioner cites no authority, from this or any other

Court, holding or suggesting that the Governor violated the Federal Constitution by invoking a state law expressly authorizing the reassignment of certain state cases to a different State Attorney; and the Florida Supreme Court has held, as a matter of state law, that the challenged reassignment falls well within the scope of the Governor's broad discretion. This Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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