No. SC17-1073

IN THE SUPREME COURT OF THE UNITED STATES

JAMES MILTON DAILEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

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

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PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does the Florida Supreme Court's partial retroactivity decision, which limits the class of death-sentenced individuals entitled to a jury determination of their sentence pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), violate the Eighth and Fourteenth Amendments to the United States Constitution?

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

3. Does the Florida Supreme Court's holding that a *Hurst* error is *per se* harmless where a jury issues a generalized unanimous recommendation for death – after receiving instructions that the judge would make both the findings of facts necessary for a death sentence and render the final decision on the death penalty – contravene the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985)?

LIST OF PARTIES

All parties appear on the caption to the case on the cover page. Petitioner was the Appellant below. The State of Florida was the Appellee below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, James Milton Dailey, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Florida Supreme Court and address the important questions of federal constitutional law presented. This case presents a fundamental question concerning the Sixth Amendment right to a jury trial, the Due Process Clause requirement of proof beyond a reasonable doubt, and the Eighth Amendment need for a reliable capital sentencing determination.

CITATION TO OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at *Dailey v. State*, 247 So. 3d 390 (Fla. 2018) and reproduced at Appendix A. Petitioner did not file a Motion for Rehearing. The trial court's unpublished order denying Petitioner's successive motion for post-conviction relief is reproduced at Appendix B. A copy of Petitioner's successive post-conviction motion is reproduced at Appendix C and a copy of Petitioner's Motion for Rehearing filed in the circuit court is reproduced at Appendix D.

JURISDICTION

The opinion of the Florida Supreme Court was entered on June 26, 2018. A Motion for Rehearing was not filed. An application to extend the time for filing this Petition was granted and the time was extended until November 23, 2018. This Petition is timely filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. VI.

The Sixth Amendment to the Constitution of the United States

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. AMEND. VIII.

The Eighth Amendment to the Constitution of the United States

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

U.S. CONST. AMEND. XIV.

The Fourteenth Amendment to the Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner has been on Florida's death row for over 30 years. No court or party below disputes that his death sentence was obtained in violation of the United States Constitution for the reasons enunciated by this Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016). The Florida Supreme Court has declined to vacate Petitioner's unconstitutional death sentence only after a series of legal gymnastics involving an arbitrary retroactivity cut off and a bright-line harmless error rule in cases where a jury issues a unanimous and generalized recommendation.

Petitioner was tried by a jury and found guilty of one count of first degree murder. By a vote of twelve to zero, a jury returned a recommendation of death. Petitioner was ultimately sentenced to death on August 7, 1987. On November 14, 1991, the Florida Supreme Court affirmed the conviction, but vacated Petitioner's death sentence, because the trial court improperly instructed the jury on, and erroneously found, two aggravating circumstances: (1) "cold, calculated, and premeditated;" and (2) that the crime was committed to avoid arrest. *Dailey v.*

State, 594 So. 2d 254, 259 (Fla. 1991). The Florida Supreme Court held that neither aggravating circumstance applied to the case. *Id*. The Court also held that the trial court erred when it failed to assign any weight to numerous mitigating circumstances, and erroneously relied on evidence from another trial, evidence which was not introduced in the guilt or penalty phase of Petitioner's trial. *Id*. In addition to these errors, the Florida Supreme Court identified six other errors, but deemed them "harmless." *Id*.

On remand, the trial court, *without empaneling a new jury*, again sentenced Petitioner to death. The Florida Supreme Court affirmed. *Dailey v. State*, 659 So. 2d 246 (Fla. 1995). To be clear, Petitioner did not waive his right to a jury, and indeed specifically filed a motion to empanel a new jury and hold a new penalty phase. TR 2 2:207-09. This motion was denied by the trial court, and the denial was affirmed by the Florida Supreme Court. *Dailey*, 659 So. 2d at 247. Petitioner also asserted that "the jury recommendation of death was invalid and he was entitled to an entire new penalty phase trial before a new jury for two reasons: First, the original jury was given vague instructions on three aggravating circumstances (HAC, avoid arrest, and CCP); and second, the jury was instructed on two aggravating circumstances (avoid arrest and CCP) that were unsupported by the evidence and later struck by this Court." *Id*. In denying those claims, the Florida Supreme Court held, "[w]e will not presume that the jury relied on the infirm aggravating circumstances in recommending death under the circumstances of this case." *Id*. at 248. This Court denied certiorari on January 22, 1996. *Dailey v. Florida*, 516 U.S. 1095 (1996).

On March 28, 1997, Petitioner filed a motion to vacate judgment and sentence pursuant to Fla. R. Crim. P. 3.850. He filed amended motions on April 11, 1997, and November 12, 1999. Petitioner raised several claims in that motion relevant to this appeal including: the trial court committed fundamental error by instructing the jury regarding the aggravating factor of heinous,

atrocious, or cruel, and the jury instruction was unconstitutionally vague; Florida's capital sentencing statute is unconstitutional on its face; Dailey's penalty phase counsel was ineffective for failing to object to the penalty phase jury instructions which were incorrect under Florida law; and Dailey's counsel was ineffective for failing to object to comments, questions, and instructions that unconstitutionally and inaccurately diluted the jury's sense of responsibility towards sentencing. *Dailey*, 659 So. 2d at 247 n.4.

The circuit court denied the Motion after a limited evidentiary hearing. Petitioner appealed and filed a petition for state habeas relief to the Florida Supreme Court. In his state habeas, Petitioner argued that his sentence violated *Ring v. Arizona*, 536 U.S. 584 (2002). *Dailey v. State*, 965 So. 2d 38, 48-49 (Fla. 2007). The Florida Supreme Court affirmed the denial of his 3.850 Motion and denied his state habeas petition. *Id*.

Petitioner filed a successive motion to vacate his death sentence in the circuit court based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *See* Appendix C. The circuit court denied Petitioner's motion. *See* Appendix B. Petitioner filed a motion for rehearing on April 26, 2017, which was denied on May 12, 2017. *See* Appendix D. Petitioner filed a timely appeal on June 7, 2017. *See* Appendix E.

Thereafter, on June 21, 2017, Petitioner filed a second successive motion to vacate his judgment and sentence based on newly discovered evidence of actual innocence. That same day, Petitioner filed a Motion to Relinquish Jurisdiction with the Florida Supreme Court which was granted on September 14, 2017. At the conclusion of those proceedings, the Florida Supreme Court issued an order to show cause on April 13, 2018, as to why the trial court's denial of Petitioner's *Hurst* claim should not be affirmed in light of *Hitchcock v. State*, SC17-445.

In Petitioner's brief, appealing the denial of his successive motion for post-conviction

relief, Petitioner asserted that denying him the benefits of *Hurst* would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The Florida Supreme Court denied Petitioner's appeal on June 26, 2018. *See* Appendix A. The opinion denying Petitioner's relief was among the first of eighty (80) virtually identical opinions that were released by the Florida Supreme Court. There was no individual analysis conducted.

The Florida Supreme Court's *Ring*-based cut-off prohibits a class of more than 150 Florida prisoners from exercising their Sixth Amendment right to have a jury determine if death is the appropriate sentence, while requiring that the death sentences of another similarly situated group of prisoners be vacated on collateral review so that they can receive a jury determination. This cut-off is inconsistent with the Eighth Amendment's prohibition against the arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection.

The Florida Supreme Court's bright-line retroactivity cutoff for *Hurst* claims is not unusual for that court. This Court has, on several occasions, overturned various lines devised by the Florida Supreme Court because the state court failed to give effect to this Court's death penalty jurisprudence. For example, after this Court decided *Lockett v. Ohio*, 438 U.S. 586 (1978), ruling that mitigating evidence should not be confined to a statutory list, this Court overturned the Florida Supreme Court's bright-line rule barring relief in Florida cases where the jury was not instructed that it could consider non-statutory mitigating evidence. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987). More recently, after this Court ruled in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment prohibits the execution of the intellectually disabled, this Court overturned the Florida Supreme Court's use of an unconstitutional bright-line IQ-cutoff score to deny *Atkins* claims. *See Hall v. Florida*, 134 S. Ct. 1986 (2014).

Despite such a history, the Florida Supreme Court has refused to discuss in any meaningful way—in Petitioner's case or in any case—whether its *Ring*-based retroactivity cutoff for *Hurst* claims is inconsistent with the Eighth and Fourteenth Amendments. In addition, the court has crafted other problematic rules to further limit the reach of *Hurst* in Florida, including a *per se* harmless-error rule for prisoners whose advisory penalty phase jury unanimously recommended the death penalty, and rules barring relief for prisoners who waived post-conviction review prior to the decision in *Hurst*. Petitioner's case illustrates two of those problematic rules – arbitrary retroactivity and the *per se* harmless error rule because of his unanimous generalized recommendation.

Thus, Petitioner's case is the perfect vehicle for this Court to resolve the constitutional infirmities with the Florida Supreme Court's *Hurst* jurisprudence. Waiting—as the Court did before ending the Florida Supreme Court's unconstitutional practices in *Hall*, *Hitchcock*, and *Hurst*—would allow the execution of Petitioner and dozens of prisoners whose death sentences were obtained in violation of *Hurst*.

REASONS FOR GRANTING THE WRIT

I. The Florida Supreme Court's *Ring*-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.

This Court has recognized that traditional non-retroactivity rules, which deny the benefit of new constitutional decisions to prisoners whose cases have already become final on direct review, can serve legitimate purposes, including protecting states' interests in the finality of criminal convictions. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 309 (1989). These rules are a

pragmatic necessity of the judicial process and are accepted as constitutional despite some features of unequal treatment. Petitioner does not ask the Court to revisit that settled feature of American law.

But in creating such rules, courts are bound by constitutional restraints. In capital cases, the Eighth and Fourteenth Amendments limit 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. For instance, a state rule that a constitutional decision rendered by this Court in 2018 is only retroactive to prisoners whose death sentences became final after the last turn of the century would intuitively raise suspicions of unconstitutional arbitrariness. 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 temporal retroactivity cutoffs at *any* point in time emanates logically from the Court's Eighth and Fourteenth Amendment rulings.

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 here. On the contrary, it crafted a decidedly untraditional and troublesome partial-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 unusual non-retroactivity rule applied by the Florida Supreme Court in this and other *Hurst* cases involves something very different than the traditional non-retroactivity rules addressed in this Court's precedents. This Court has long understood the question of retroactivity to arise 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*, 489 U.S. at 304-07. The Court's modern approach to determining whether retroactivity is required by the United States Constitution is premised on that assumption. *See, e.g.*, *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016) ("In the wake of *Miller*[1], 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 ("[T]he Minnesota court correctly concluded that federal law does not *require* state courts to apply the holding in *Crawford*[2] to cases

[1] *Miller v. Alabama*, 567 U.S. 460 (2012).
[2] *Crawford v. Washington*, 541 U.S. 36 (2004).

that were final when that case was decided . . . [and] we granted certiorari to consider whether *Teague* or any other federal rule of law *prohibits* them from doing so.") (emphasis in original).

None of this Court's precedents address the novel 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.[3]

Unlike the traditional retroactivity analysis contemplated by this Court's precedents, the Florida Supreme Court did not simply decide whether the *Hurst* decisions should be applied retroactively to all prisoners whose death sentences became final before *Hurst*. Instead, the Florida Supreme Court divided those prisoners into two classes based on the date their sentences became final relative to this Court's June 24, 2002, decision in *Ring*, which was issued nearly fourteen years before *Hurst*. In *Asay*, the court held that the *Hurst* decisions do not apply retroactively to Florida prisoners whose death sentences became final on direct review before *Ring*. *Asay*, 210 So. 3d at 21-22. In *Mosley*, the court held that the *Hurst* decisions do apply retroactively to prisoners whose death sentences became final after *Ring*. *Mosley*, 209 So. 3d at 1283.

[3] 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).

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*.

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

> Defendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring should not suffer due to the United States Supreme Court's fourteen-year delay in applying Ring to Florida*. In other words, defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring should not be penalized for the United States Supreme Court's delay in explicitly making this determination*. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Witt*, 387 So.2d at 925. Thus, Mosley, whose sentence was final in 2009, falls into the category of defendants who should receive the benefit of *Hurst*.

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

Since *Asay* and *Mosley*, the Florida Supreme Court has uniformly applied its arbitrary *Hurst* retroactivity cutoff granting relief to some collateral defendants while denying relief to other similarly situated defendants. The Florida Supreme Court has granted *Hurst* relief to dozens of "post-*Ring*" prisoners whose death sentences became final after 2002 but before *Hurst*, while simultaneously denying *Hurst* relief to dozens more "pre-*Ring*" prisoners whose sentences became final before 2002. Nonetheless, both sets of prisoners were sentenced under the same exact statute which denied them access to the jury determinations *Hurst* held to be constitutionally required before Florida could impose a sentence of death.

Recently, after reaffirming the *Ring* cutoff in *Hitchcock v. State*, 226 So. 3d 216, 217, (Fla. 2017) the Florida Supreme Court summarily denied *Hurst* relief in 80 "pre-*Ring*" cases, including Petitioner's, in just two weeks. Many of these litigants have pressed the Florida Supreme Court to recognize the constitutional infirmities of its partial retroactivity doctrine, but in none of its decisions has the Florida Supreme Court made more than fleeting remarks about whether its framework is consistent with the United States Constitution. *See, e.g.*, *Asay v. State*, 224 So. 3d 695, 702-03 (Fla. 2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017); *Hitchcock*, 226 So. 3d at 217. In *Hannon v. State*, the Florida Supreme Court stated that this Court had "impliedly approved" its *Ring*-based retroactivity cutoff for *Hurst* claims by denying a writ of certiorari in *Asay v. Florida*, 138 S. Ct. 41 (2017). *Hannon*, 228 So. 3d at 513; *but see Teague*, 489 U.S. at 296 ("As we have often stated, the denial of a writ of certiorari imports no expression of opinion upon the merits of the case.") (internal quotation omitted).

As the next section of this Petition explains, the Florida Supreme Court's *Ring*-based scheme of partial retroactivity for *Hurst* claims involves more than the kind of tolerable arbitrariness that is present in traditional non-retroactivity rules.

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 questionable. 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. The court's flawed logic fails to recognize that 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 has always been unconstitutional, and it was recognized as such 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.[4]

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* and who correctly, but unsuccessfully, challenged Florida's unconstitutional sentencing scheme after *Ring*,[5] while granting relief to prisoners who failed to raise any challenge, either before or after *Ring*.

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

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[4] The Florida Supreme Court has never explained why it drew the retroactivity line at *Ring* as opposed to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The foundational precedent for both *Ring* and *Hurst* was the Court's decision in *Apprendi*. 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.

[5] *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).

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 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; whether counsel chose to file a petition for a writ of certiorari in this Court or sought an extension to file such a petition; how long a certiorari petition remained pending in this Court; and so on.

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 afforded to every defendant in America—decision-making by a jury—and those who will not be provided that right, 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 more direct: "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 Florida Supreme Court's *Ring*-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.[6]

Post-*Ring* sentencing juries are more fully informed of the defendant's entire mitigating history than juries in the pre-*Ring* period. Providing limited information to juries was especially

[6] *See, e.g.*, Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades*, PEW RESEARCH CENTER, Sep. 29, 2016, *available at* http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four decades/ ("Only about half of Americans (49%) now favor the death penalty for people convicted of murder, while 42% oppose it. Support has dropped 7 percentage points since March 2015, from 56%.
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 December 2017),at 3, *available at* https://deathpenaltyinfo.org/documents/FactSheet.pdf.

endemic to Florida in the era before *Ring* was decided.[7] In addition, as for mitigating evidence, Florida's statute did not even include the "catch-all mitigator" statutory language until 1996.[8]

Florida's pre-*Hurst* "advisory" jury instructions, which were used in Petitioner's penalty phase, were also so confusing that jurors consistently reported that they did not understand their role.[9] If the advisory jury did recommend life, judges—who must run for election and reelection in Florida—could impose the death penalty anyway.[10] In fact, relying on their arbitrary pre-*Ring*

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[7] *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 462 page report concludes that Florida leads the nation in death-row exonerations, inadequate compensation for conflict trial counsel in death penalty cases, lack of qualified and properly monitored capital collateral registry counsel, inadequate compensation for capital collateral registry attorneys, significant juror confusion, lack of unanimity in jury's sentencing decision, the practice of judicial override, lack of transparency in the clemency process, racial disparities in capital sentencing, 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.

[8] 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).

[9] 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.").

[10] *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

cutoff, the Florida Supreme Court summarily denied *Hurst* relief to a defendant who was sentenced to death after a judge "overrode" a jury's recommendation of life. *See Marshall v. Jones*, 226 So. 3d 211 (Fla. 2017).

Furthermore, especially in these "older cases," the advisory jury scheme invalidated by *Hurst* implicated systematic violations of *Caldwell v. Mississippi*, 472 U.S. 320 (1987); *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).

Lastly, it is also important 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.,

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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.").

dissenting from the denial of certiorari). Petitioner has been on death row for 30 years, almost half of his life, and has adjusted without endangering himself, other inmates, or prison staff.

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.

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

In *Montgomery*, 136 S. Ct. at 731-32, 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. *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. *Id*. 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*[11] or *Graham*.[12]" *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 this Court explained in *Hurst v. Florida*, under Florida law, the factual predicates necessary for the imposition of a death sentence are: (1) the existence of particular aggravating circumstances; (2) that those particular aggravating circumstances are "sufficient" to justify the

[11] *Roper v. Simmons*, 543 U.S. 551 (2005).
[12] *Graham v. Florida*, 560 U.S. 48 (2010).

death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. This Court held in *Hurst* that those determinations must be made by juries. These decisions are as substantive as whether a juvenile is incorrigible. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule). Thus, as in *Montgomery*, these requirements amounted 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.

After remand, the Florida Supreme Court described substantive provisions it found to be required by the Eighth Amendment. *Hurst v. State*, 202 So. 3d at 48-69. Those provisions represent the Florida Supreme Court's view on the substantive requirements of the United States Constitution when it adjudicated Petitioner's case in the proceedings below.

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 Eighth Amendment and to "achieve the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law." *Id.* As a matter of federal retroactivity law, whether a state's death penalty scheme complies with the Constitution 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 Court emphasized that its determination whether a constitutional rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function," *i.e.*, whether the new rule alters only the procedures used to obtain the conviction, or alters instead the class of persons the law punishes. *Id.* at 1266.

The same reasoning applies 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, *see Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes."), and *Montgomery* requires the states to impose them 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.").[13]

"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.

III. The Florida Supreme Court's *Per Se* Harmless-Error Rule for *Hurst* Violations Contravenes the Eighth Amendment Under *Caldwell*.

This Court should grant a writ of certiorari to address whether the Florida Supreme Court's *per se* harmless-error rule for *Hurst* violations contravenes the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985).[14] This question is not only a life-or-death matter for Petitioner, but also impacts dozens of other prisoners on Florida's death row whose death sentences were obtained in violation of *Hurst* and who nevertheless remain subject to execution based solely on

[13] 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").

[14] Petitioner squarely raised this issue in both the state circuit court and the Florida Supreme Court (*See* App. C-E), however, the Florida Supreme Court disposed of Petitioner's case on retroactivity grounds alone. If this Court agrees that their partial retroactivity decision violates the Constitution and remands the case back to the Florida Supreme Court, it is clear that the Florida Supreme Court would deny relief based on their *per se* harmless error rule, and Petitioner would be back before this Court. As such, it is a wiser use of judicial resources for this Court to address both of these issues now.

the vote cast by their pre-*Hurst* "advisory" jury—a jury whose sense of responsibility for a death sentence was systemically diminished. On three occasions, Justices of this Court have called for review of this *Hurst-Caldwell* issue. *See Guardado v. Jones*, 138 S. Ct. 1131 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *Middleton v. Florida*, 138 S. Ct. 829 (2018) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari); *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari). This Court should resolve the matter now.

"This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task," and has found unconstitutional under the Eighth Amendment comments that "minimize the jury's sense of responsibility for determining the appropriateness of death." *Caldwell*, 472 U.S. at 341. Under *Caldwell*, the Florida Supreme Court's *per se* harmless-error rule for *Hurst* claims violates the Eighth Amendment by relying entirely on an advisory jury recommendation that was rendered by jurors whose sense of responsibility for a death sentence was diminished by the trial court's repeated instructions that the jury's role was merely advisory.

In *Caldwell*, a Mississippi penalty-phase jury did not receive an accurate description of its role in the sentencing process due to the prosecutor's suggestion that the jury's decision to impose the death penalty would not be final because an appellate court would review the sentence. *Id.* at 328-29. This Court found that the prosecutor's remarks impermissibly "led [the jury] to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Id.* at 329. The Court concluded that, because it could not be ascertained that the remarks had no effect on the jury's sentencing decision, the jury's decision did not meet the Eighth Amendment's standards of reliability. *Id.* at 341. Accordingly, *Caldwell* held the following: under

the Eighth Amendment, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere." *Id.* at 328-29.

In the decades between *Caldwell* and *Hurst*, the Florida Supreme Court rejected numerous *Caldwell*-based challenges to Florida's pre-*Hurst* jury instructions. Beginning in *Pope v. Wainwright*, 496 So. 2d 798 (Fla. 1986), the Florida Supreme Court dismissed the relevance of *Caldwell* on the theory that, unlike with the Mississippi scheme at issue in *Caldwell*, Florida's instructions accurately described the jury's "merely" advisory nature: "[I]n Florida it is the trial judge who is the ultimate sentencer," and the jury "is merely advisory." *Id.* at 805. The Florida Supreme Court, finding "nothing erroneous about informing the jury of the limits of its sentencing responsibility," so as to "relieve some of the anxiety felt by jurors impaneled in a first-degree murder trial," held that its advisory jury instructions complied with *Caldwell* and accurately described a constitutionally valid scheme. *Id.*

In *Combs v. State*, 525 So. 2d 853, 856 (Fla. 1998), the Florida Supreme Court reaffirmed its holding in *Pope* that Florida's advisory jury scheme complied with *Caldwell*. The Florida Supreme Court further noted that it was "deeply disturbed" by decisions of the United States Court of Appeals for the Eleventh Circuit, in cases like *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), and *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988) (en banc), which had expressed doubts as to whether Florida's scheme complied with *Caldwell*. For years after *Pope* and *Combs*, the Florida Supreme Court continued to reject *Caldwell* challenges to Florida's advisory jury instructions. *See, e.g.*, *Davis v. State*, 136 So. 3d 1169, 1201 (Fla. 2014).

Hurst caused a rupture to the Florida Supreme Court's *Caldwell* precedent. In light of *Hurst*, the rationale underlying the Florida Supreme Court's prior rejection of *Caldwell*

challenges—that Florida's "advisory" jury scheme was constitutionally valid—has evaporated. That is because *Hurst* held that Florida's capital sentencing scheme was *not* constitutional, and that juries in that scheme were *not* afforded their constitutionally required role as fact-finders. Given *Hurst*, it is now clear that Florida's advisory juries were misinformed as to their constitutionally required role in determining a death sentence. The juries were unconstitutionally told that they need not make the critical findings of fact in order for a death sentence to be imposed. The pre-*Hurst* jury instructions thereby "improperly described the role assigned to the jury," in violation of *Caldwell*. *Dugger v. Adams*, 489 U.S. 401, 408 (1989).

As a result, *Hurst* cases shed new light on Eighth Amendment violations of *Caldwell* that should have been addressed by the Florida Supreme Court in Petitioner's case but were not. The only document returned by the jury was an advisory recommendation that death should be imposed. Although the recommendation was unanimous, it reflects nothing about the jury's findings leading to the final vote. A unanimous recommendation does not necessarily mean that the other findings leading to the recommendation were unanimous. It could well mean that after the other findings were made by a majority vote, jurors in the minority acceded to the majority's findings. It could also mean that the vote on the aggravators was split 6-6, and that there was no unanimous finding on a single aggravator. The unanimous vote could also mean the jurors did not attend to the gravity of their task, as they were repeatedly told their verdict was only advisory, and that the judge would make the final determination.

The prosecutor in this case explicitly told the jury "shortly you will go back and deliberate concerning your recommendation of the appropriate sentence for James Dailey in this case." App. G., p. 828. He further told them "your vote must be by a majority in order to recommend death." *Id*. at p. 842. In fact, no less than 18 times during the State's closing argument and the jury

instructions, the jury was told their verdict was merely "advisory" or was just a "recommendation" and that they were not responsible. *See* Appendix G.

The Florida Supreme Court's total reliance on the advisory jury's recommendation, without considering the jury's diminished sense of responsibility for the death sentence, violates *Caldwell*.[15] Petitioner's advisory jurors were led to believe that their role in sentencing was diminished when jurors were repeatedly instructed by the court that their recommendation was advisory only and that the final sentencing decision rested solely with the judge. Given that the jury was led to believe it was not ultimately responsible for the imposition of Petitioner's death sentence, the Florida Supreme Court's *per se* rule cannot be squared with the Eighth Amendment. Under *Caldwell*, no court can be certain beyond a reasonable doubt that a jury would have made the same unanimous *recommendation* absent the *Hurst* error. A court certainly cannot be sure beyond a reasonable doubt that a jury who properly grasped its critical role in determining a death sentence, would have unanimously found all of the elements for the death penalty satisfied in this case. Indeed, a jury that properly understood the gravity of its fact-finding role could have been substantially affected by the extensive mitigation in Petitioner's case.

Additionally, the Florida Supreme Court's rule does not allow for meaningful consideration of the actual record. The *per se* rule cannot permissibly predict that a jury with full awareness of the gravity of its role in the capital sentencing process would have unanimously found or rejected any specific mitigators in a proceeding comporting with constitutional requirements. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988) (holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about jury's vote); *McKoy*

[15] Indeed, the post-*Hurst* capital jury instructions removed all instances of "advisory" or "recommend." The jury is now explicitly told that they are issuing a "verdict", which is a final and binding decision. *See* Appendix I.

v. North Carolina, 494 U.S. 433, 444 (1990) (same). The Florida Supreme Court's failure to consider Petitioner's mitigation in its harmless-error analysis is also inconsistent with *Parker v. Dugger*, where this Court rejected the state supreme court's cursory harmless-error analysis in jury-override cases. 498 U.S. 308, 320 (1991) ("What the Florida Supreme Court could not do, but what it did, was to ignore evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings.").

The Florida Supreme Court's application of its *per se* rule is also at odds with federal appeals court decisions holding that *Caldwell* violations must be assessed in light of the entire record. *See, e.g.*, *Cordova v. Collens*, 953 F.2d 167, 173 (5th Cir. 1992); *Rodden v. Delo*, 143 F.3d 441, 445 (8th Cir. 1998); *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997); *Mann*, 844 F.3d 1446. In contrast to these federal decisions, the Florida Supreme Court's *per se* rule disallows meaningful consideration of factors relevant to an actual *Caldwell* analysis. For example, in this case, the fact that the advisory jury was informed of its diminished role from the trial judge, rather than only the prosecutor as in *Caldwell*, strengthens the case for finding an Eighth Amendment violation. Arguments by prosecutors are "likely to be viewed as the statements of advocates," whereas jury instructions are likely "viewed as definitive and binding statements of the law." *Boyde v. California*, 494 U.S. 370, 384 (1990). As this Court has recognized, "[t]he influence of the trial judge on the jury is necessarily and properly of great weight, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946).

This Court's rationale for the rule announced in *Caldwell*, as it related to improper comments by a prosecutor, also supports applying this holding to Florida's pre-*Hurst* advisory jury

instructions. *See generally* Craig Trocino & Chance Meyer, *Hurst v. Florida's Ha'p'orth of Tar: The Need to Revisit Caldwell, Clemons, and Proffitt*, 70 U. Miami L. Rev. 1118, 1139-43 (2016).

First, *Caldwell* reasoned that encouraging juries to rely on future appellate court review deprived the defendant of a fair sentencing because it encouraged the jury not to worry about the "intangibles" of the human being before them, but instead, to rest assured in the fact that some higher court would consider those factors for them. *Caldwell*, 472 U.S. at 330-31 "This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed [those] compassionate or mitigating factors stemming from the diverse frailties of humankind. When we held that a defendant has a constitutional right to the consideration of such factors…we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses." *Id*. (internal citations omitted).

This same concern applies here, where Petitioner's jury was not required to make the findings of fact required to impose a death sentence and learned the ultimate life-or-death decision would be made by the judge. Petitioner's jury was instructed "[a]s you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge." App. H, p. 2. The verdict form itself says "[a] majority of the jury, by a vote of 12-0 advise and recommend to the court that it impose the death penalty upon James Dailey." Id. at p. 6. They were encouraged not to worry about the individual attributes of James Dailey because they were not going to sentence James Dailey – the court was. Nor were they required to make the findings of fact necessary for the trial court to impose a death sentence. Instead, Petitioner's jury was told *ad nauseam* that its job was merely to "advise" or "recommend" a sentence to the court.

Second, *Caldwell* reasoned that a jury's desire to sentence harshly in order to "send a message," rather than to impose a sentence proportional to the crime, "might make a jury very receptive to a prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal." *Id.* at 331. In Florida too, pre-*Hurst* advisory juries were likely receptive to assurances that jurors were not responsible for fact-finding, and that the judge would ultimately be responsible for finding the elements necessary for a death sentence.

Third, *Caldwell* reasoned that a jury may get the impression from comments about appellate review that only a death sentence would trigger exacting appellate scrutiny of the whole case. *Id.* at 332. This same concern applies to Florida's pre-*Hurst* juries, which would have been more inclined to recommend death in order to trigger the trial judge's full exercise of her sentencing discretion.

Finally, *Caldwell* reasoned that where a jury is divided on the proper sentence, jurors who favor death may be susceptible to using the prosecutor's characterization of the jury's diminished role as an argument to convince the jurors who favor life to defer to a death recommendation. *Id.* at 333. "Indeed, one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in." *Id.* The same concern is valid here, where advisory jurors who favored a death recommendation may have asked jurors who favored life to change their votes to death, given that the judge would ultimately conduct the fact-finding regardless of the recommendation.

Empirical research supports the notion that Florida's advisory juries were imbued with a diminished sense of responsibility for the imposition of death sentences before *Hurst*. *See, e.g.*, William J. Bowers, *The Decision Maker Matters: An Empirical Examination of the Way the Role*

of the Judge and Jury Influence Death Penalty Decision-Making, 63 Wash. & Lee L. Rev. 931, 954-62 (2006). Interviews with Florida jurors conducted through the Capital Jury Project ("CJP") yielded narrative accounts highlighting the detrimental impact of Florida's pre-*Hurst* instructions on jurors' sense of their sentencing role. *See id.* at 961-62. Florida jurors relayed to researchers their understanding that "[w]e don't really make the final decision . . . we would give our opinion but the choice would be up to the judge." *Id.* at 961. One Florida juror told CJP researchers that "the fact that you could make a recommendation, that you didn't make a yes or no, that someone else would make the decision, I think that let us feel off the hook." *Id.* The same juror noted that he found the pre-*Hurst* sentencing process to be "not as traumatic as deciding [the defendant's] guilt because we would take the steps, make a recommendation, and the judge would make the final choice." *Id.* As another Florida juror said approvingly of Florida's pre-*Hurst* advisory jury instructions, "I didn't want this on my conscience." *Id.*

This Court should grant a writ of certiorari and address the Florida Supreme Court's unconstitutional harmless-error rule in light of *Caldwell*. Ultimately, this Court should instruct the Florida Supreme Court to meaningfully consider whether the rationale underlying its pre-*Hurst* decisions rejecting *Caldwell* challenges to Florida's capital scheme, including *Pope*, *Combs*, and subsequent decisions, have any continuing validity in light of *Hurst*.[16]

[16] After affirming the denial of *Hurst* relief in Petitioner's case, the Florida Supreme Court decided *Reynolds v. State*, 251 So. 3d 811 (Fla. 2018), and attempted in that decision to discuss *Caldwell*, although the discussion was deeply flawed. In *Reynolds*, the Florida Supreme Court doubled-down on its pre-*Hurst* decisions regarding the applicability of *Caldwell* to Florida's capital sentencing scheme. The court wrote that, under *Romano v. Oklahoma*, 512 U.S. 1 (1994), *Hurst* has no bearing on whether *Caldwell* was violated in any case because Florida's pre-*Hurst* jury instructions accurately described Florida's capital sentencing scheme at the time. *Reynolds*, 251 So. 3d at 823-27. This fails to address the fact that Florida's prior scheme was *not* constitutional before *Hurst*, and this makes *Romano* inapplicable.

The state court's decision in *Reynolds*—which represents an attempt to rebuke the concerns expressed by Justices Sotomayor, Ginsburg, and Breyer in *Guardado*, 138 S. Ct. 1131, *Middleton*,

Further, the Florida Supreme Court's *per se* harmless error rule fails to ensure sufficient reliability in the death penalty as required by the Eighth Amendment. In order to determine whether there is a "reasonable possibility" that a *Hurst* error contributed to a death sentence, *see Chapman v. California*, 386 U.S. 18, 23 (1986), a reliable harmless-error analysis must begin with what this Court held in *Hurst* a jury must do for a Florida death sentence to be constitutional. The Court ruled the Sixth Amendment requires juries to make the findings of fact regarding the elements necessary for a death sentence under Florida law: (1) the aggravating circumstances that had been proven beyond a reasonable doubt; (2) the aggravating circumstances were together "sufficient" to justify the death penalty beyond a reasonable doubt; and (3) the aggravating circumstances outweighed the mitigation evidence beyond a reasonable doubt. *See* 136 S. Ct. at 620-22.[17]

The second and third elements cut against the harmless-error analysis contemplated in Justice Alito's dissent in *Hurst*. Justice Alito stated that he would hold the *Hurst* error harmless because the evidence supported the trial judge's finding of "at least one aggravating factor." *Id.* at 626 (Alito, J., dissenting). But, as the Florida Supreme Court recognized in *Hurst v. State*, 202 So. 3d at 68, unlike the Arizona capital sentencing scheme at issue in *Ring*, Florida's scheme required fact-finding as to the aggravators *and their sufficiency to warrant the death penalty*. The

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138 S. Ct. 829, and *Truehill*, 138 S. Ct. 3— provides an additional justification for the grant of certiorari review in Petitioner's case on the question of *Caldwell*'s applicability to pre-*Hurst* death sentences. *See also Kaczmar v. Florida*, 138 S. Ct. 1973 (2018) (Sotomayor, J., dissenting) ("The Resulting opinion, however, gathered only the support of a plurality, so the issue remains without definitive resolution by the Florida Supreme Court.")

[17]Applying this Court's decision on remand, the Florida Supreme Court held, in *Hurst v. State*, that the Eighth Amendment also requires Florida juries to render unanimous findings of fact on each element and that those findings must precede a unanimous overall death recommendation. *See* 202 So. 3d at 53-59.

fact that sufficient evidence exists to prove at least one aggravator to the jury is not enough to conclude that a *Hurst* error is harmless. *See id.* at 53 n.7. And, in any event, this Court has made clear that the State does not meet its harmless-error burden in a capital sentencing case merely by showing that evidence in the record is sufficient to support a death sentence. *See Satterwhite v. Texas*, 486 U.S. 249, 258 (1988). "[W]hat is important is an *individualized determination*," given the well-established Eighth Amendment requirement of individualized sentencing in capital cases. *Clemons v. Mississippi*, 494 U.S. 738, 753 (1990) (emphasis added).

Accordingly, the vote of a defendant's pre-*Hurst* advisory jury cannot by itself resolve a proper harmless-error inquiry. The fact that an advisory jury unanimously *recommended* the death penalty does not establish that the same jury would have made, or an average rational jury would make, the three specific findings of fact to support a death sentence in a constitutional proceeding.

Indeed, prior to *Hurst*, the Florida Supreme Court recognized the ambiguity inherent in Florida's advisory jury recommendations. In 2009, the Florida Supreme Court considered mandating interrogatory advisory jury recommendations in death penalty cases, but declined to do so. *See In re Standard Jury Instructions*, 22 So. 3d 17 (Fla. 2009). Justice Pariente's concurrence in that decision observed:

> The jury recommendation does not contain any interrogatories setting forth which aggravating factors were found, and by what vote; how the jury weighed the various aggravating and mitigating circumstances; and, of course, no will ever know if one, more than one, any or all of the jurors agreed on any of the aggravating and mitigating circumstances. It is possible, in a case such as this one, where several aggravating circumstances are submitted, that none of them received a majority vote.

Id. at 26. The same is true of Petitioner's jury recommendation.

Even if, speculatively, the jury made all the necessary findings, the same sentence would not necessarily have followed. Jury findings in a constitutional proceeding may have yielded a lesser number of aggravators than the judge's findings. Jury findings may have yielded different

"sufficiency" and "insufficiency" determinations than those made by the judge. The jury may have made different findings regarding the weight of the aggravating or mitigating circumstances. And the judge, with findings from a properly instructed jury, might have exercised his sentencing discretion differently. *See Hurst v. State*, 202 So. 3d at 57 (noting that nothing in *Hurst* has diminished "the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life").

Moreover, in a constitutional proceeding where the jury was instructed that its findings of fact would be binding on the trial court in the ultimate decision whether to impose a death sentence, a jury may have considered the evidence more carefully, and given the mitigation more weight. This idea, explored further above, is at the heart of this Court's decision in *Caldwell*.[18]

Constitutional harmless error analysis requires that the State bear the burden of dispelling these possibilities beyond a reasonable doubt. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("[T]here is a . . . need for reliability in the determination that death is the appropriate punishment *in a specific case*."). The Florida Supreme Court's *per se* harmless error rule automatically relieves the State of its burden. This violates the requirement for heightened reliability in death sentencing and allows for impermissible "unguided speculation." *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1987); *see also Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)

[18] As is made clear from trial counsel's affidavits in the state court record below, Defense counsel's approach would also have been different absent the *Hurst* error. Counsel would have conducted his voir dire questioning of prospective jurors differently had they known that only one juror needed to be convinced, as to only one of the elements, in order to avoid a death sentence. Counsel would have presented evidence diminishing the aggravation differently had they known that the jury, rather than the judge, was required to unanimously find that each aggravating circumstance had been proven beyond a reasonable doubt and that the aggravating circumstances were together sufficient to justify the death penalty. Counsel's thinking and advice to the client on how to proceed would have been altered had they known that the jury would be instructed that it could recommend a life sentence even if it had unanimously agreed that all of the other elements for a death sentence were satisfied.

("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids arbitrary and capricious infliction of the death penalty.").

Instead of providing for the tailored harmless-error review the Constitution requires, the Florida Supreme Court has adopted a *per se* approach that works a fundamental injustice on Petitioner and others in his position. Petitioner sits on death row today while dozens of other Florida prisoners—some of whom were sentenced before him, some of whom were sentenced after him, and many of whom committed murders, including multiple murders and other offenses involving more aggravating circumstances than his crime—have been granted resentencings under *Hurst*. Because no culpability related distinctions can justify this disparity of results, the rule that produced it violates the Eighth Amendment.

CONCLUSION

For the foregoing reasons, Petitioner's respectfully requests that this Court grant the petition for writ of certiorari to review the judgment of the Florida Supreme Court.

Respectfully submitted,

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