No. _____

IN THE

Supreme Court of the United States

STEPHEN TODD BOOKER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does the partial retroactivity formula for *Hurst v. Florida*, 136 S. Ct. 616 (2016), claims designed by the Florida Supreme Court, as applied to a prisoner whose death sentence between *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), violate the Eighth and Fourteenth Amendments on arbitrariness and equal protection grounds?

2. Does the Constitution require the Florida Supreme Court to apply *Hurst* retroactively to all prisoners in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)?

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Petitioner Stephen Todd Booker, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court. Respondent, the State of Florida, was the appellee below.

DECISION BELOW

The decision of the Florida Supreme Court is reported at 252 So. 3d 723, and reprinted in the Appendix (App.) at 1a.

JURISDICTION

The judgment of the Florida Supreme Court was entered on August 30, 2018. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

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

The Eighth Amendment provides:

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

The Fourteenth Amendment provides, in relevant part:

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

STATEMENT OF THE CASE

I. Introduction

Petitioner, Stephen Todd Booker, remains on Florida's death row even though no court or party disputes that his death sentence was obtained in violation of the United States Constitution for the reasons described in *Hurst v. Florida*, 136 S. Ct. 616 (2016). The Florida Supreme Court declined to grant *Hurst* relief to Booker because it concluded that while *Hurst* should apply retroactively to dozens of death sentences that became final after *Ring v. Arizona*, 536 U.S. 584 (2002), *Hurst* should

not apply to Booker's death sentence or the handful of other Florida death sentences that became final between *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring*, even though the holding of *Apprendi* was the foundation for both *Ring* and *Hurst*.

If a simple retroactivity ruling was the only issue involved here, there might be no compelling reason for this Court's review. This Court has held that traditional retroactivity rules serve legitimate purposes despite some features of unequal treatment. But the formula for *Hurst* non-retroactivity devised by the Florida Supreme Court involves more: it denies *Hurst* retroactivity to all "post-*Apprendi*" death sentences, while granting *Hurst* retroactivity to all "post-*Ring*" sentences, in a manner 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.

Multiple Justices of this Court have already expressed concern that the Florida Supreme Court's treatment of some *Hurst* issues, particularly in the context of harmless error analysis, may violate the Eighth Amendment. *See, e.g., Reynolds v. Florida*, No. 18-5181, 2018 WL 5913358, *2 (Nov. 13, 2018) (Breyer, J., statement respecting the denial of certiorari). However, the Court has yet to recognize the Eighth and Fourteenth Amendment implications of the strict temporal cutoff the Florida Supreme Court has drawn in order to give the retroactive benefit of *Hurst* to some prisoners on collateral review but not others. The Court has also failed to acknowledge the material differences between the Florida capital sentencing scheme at issue in *Hurst*, and the Arizona scheme at issue in *Ring*, which calls for a different

retroactivity analysis in this case than the Court applied in *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). As this petition explains, whether *Hurst* retroactivity is *mandatory* is a separate and distinct question from whether the particular partial retroactivity cutoff line drawn by the Florida Supreme Court itself violates the Eighth Amendment on arbitrariness and equal protection grounds. Regardless of whether cases like *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), require states to apply *Hurst* retroactively, the non-traditional, *Ring*-based cutoff that the Florida Supreme Court has fashioned is independently problematic.

Booker's case presents another Eighth Amendment complication never before addressed by this Court: how the *Ring*-based cutoff can meet Eighth Amendment requirements when it denies relief to individuals whose cases were not final at the time of *Apprendi*, the entire basis for this Court's decision in *Ring*. This, too, is an independent Eighth Amendment question, apart from the general retroactivity question and the question of whether the Florida Supreme Court's partial-retroactivity scheme meets Eighth Amendment requirements. Even assuming the latter, the constitutionality of a partial-retroactivity scheme with a antecedent-precedent-based cutoff for relief, a third question with its own Eighth Amendment concerns exists: whether such a cutoff needs to have a relationship with the constitutional right it seeks to remedy. This independent Eighth Amendment question remains open in light of this Court's and the Florida Supreme Court's silence on cases that became final after *Apprendi*, but prior to this Court's ruling in *Ring*. This Court should use the present case to address these important questions.

Booker's request that this Court remedy the Florida Supreme Court's bright-line rule fits a familiar pattern. The Florida Supreme Court is often slow to give effect to this Court's death penalty jurisprudence. In *Hitchcock v. Dugger*, 481 U.S. 393 (1987), for example, this Court overturned the Florida Supreme Court's rule that prevented defendants whose jury had not been permitted to consider nonstatutory mitigating evidence from obtaining relief pursuant to *Lockett v. Ohio*, 438 U.S. 586 (1978). As another example, twelve years after this Court ruled in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment prohibits execution of the intellectually disabled, this Court ended the Florida Supreme Court's use of an unconstitutional bright-line IQ-cutoff test to deny *Atkins* claims. *See Hall v. Florida*, 134 S. Ct. 1986 (2014). This Court should now review the Florida Supreme Court's *Hurst* partial retroactivity rule.

The Florida Supreme Court has refused to discuss in any meaningful way whether its *Ring*-based retroactivity cutoff for *Hurst* claims complies with the Eighth and Fourteenth Amendments, particularly as applied to post-*Apprendi* death sentences like Booker's. The state court has failed to acknowledge that *Apprendi* had just as much, if not more, influence on this Court's holding in *Hurst* as *Ring* did.

This Court should consider the constitutionality of the Florida Supreme Court's *Ring*-based retroactivity cutoff for *Hurst* claims now. Booker's death sentence, which became final between *Apprendi* and *Ring*, provides a particularly appropriate vehicle for this Court to address the Florida Supreme Court's problematic partial retroactivity scheme. Waiting to address the state court's scheme—as the Court did

before eventually ending the Florida Supreme Court's unconstitutional practices in *Hall*, *Hitchcock*, and *Hurst*—could potentially allow the execution of dozens of prisoners whose death sentences were obtained in violation of *Hurst*, while dozens of other prisoners whose sentences are also "final" for retroactivity purposes, and who were similarly sentenced in violation of *Hurst*, are granted collateral relief.

II. Factual and Procedural Background[1]

A. Investigation and Arrest of Stephen Booker

On the afternoon of November 9, 1977, an elderly woman named Lorine Harmon was found by her neighbors stabbed to death in her home in Gainesville, Florida. R. 221, 228; *Booker v. State*, 397 So. 2d 910, 912 (Fla. 1981). The neighbors called the police, who arrived at approximately 3:20 p.m. R. 222, 231.

Shortly before the phone call from Ms. Harmon's neighbors, police also received an anonymous call reporting that there was "a dead body" at a location in Gainesville. R. 344, 346. Police determined this was an "unidentified male subject," and never discovered the identity of the caller. R. 346. According to the police, the call caused them to believe that the anonymous caller was a suspect to this crime, and to focus their investigation on a "black subject." R. 343-44.

After arriving at Ms. Harmon's home, police secured and processed the crime scene. R. 233-34; 236-76 (Testimony of Officer Charles David Smith); 277-300 (Testimony of Officer Tom L. Terry). Fingerprints were recovered from the interior of

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[1] The abbreviation "R." will be used to refer to the record on appeal as compiled for Booker's first direct appeal in *Booker v. State*, 397 So. 2d 910 (Fla. 1981).

the bedroom closet door, the trim of a doorway, around the bedroom window, and on a box within the home. R. 284-294. Soil samples were recovered from outside of the bedroom window, and a plaster cast was made of three impressions in a sandy area around the window. R. 297-98. Police speculated that the bedroom window in Ms. Harmon's home was the "probable point of entry," and that this sandy impression was made by "a thick rubber shoe like a cement finisher wears." R. 336.

The following day, on November 10, 1977, the police were searching for "a black male subject wearing" thick-soled shoes in relation to Ms. Harmon's murder. R. 343. In the afternoon, police went to "a local hangout for transients and local winoes [sic] and drinking." R. 335. The officer on scene noticed Stephen Booker, a black man, "in the company of eight or nine individuals," several of which were other black males. R. 335. The officer said his "attention was drawn to [Booker] because he didn't fit the general appearance of the people he was with. [He was] [v]ery clean cut, neat in appearance, and appeared to be well groomed as compared to the other people." R. 335. Booker was also "wearing a pair of tan shoes that were approximately ankle height, and [they] had a thick rubber sole." R. 335-36. The officer asked Booker for identification, and Booker produced military discharge papers and told the officer he was staying at the Alcothon House because he struggled with alcohol. R.344-45.

The officer who had first approached Booker then left, and called another officer about Booker. R. 349. The two officers then approached Booker again, and asked him to go to the police station and be fingerprinted. R. 350. Booker agreed to do so, and the officers transported him to the station. R. 350-51. After his fingerprints

were obtained, they dropped him back off on the street. R. 352. During the ride back from the police station, the officers told Booker that if he "found something out" about the murder, they would "make it worth his while." R. 356. Later that evening, the police department identified the fingerprints found in Ms. Harmon's apartment as Stephen Booker's, and placed him under arrest. R. 353.

The police then transported Booker again to the police station, and Booker was read his *Miranda* rights. R. 359. Booker signed a statement to that effect. R. 360. He also signed a form indicating that he waived his right to an attorney, gave consent to the police to search his person, and specifically to gather hair samples from his person. R. 365, 366. When he was brought into the police department, he was described as "coherent" and having "use of all his normal faculties." R. 361.

When the interview began at 10:00 p.m. on November 10, 1977, Booker was described as "normal" and "coherent." R. 367-68. Detective Price first showed Booker a photo of Ms. Harmon's home, and asked him if he'd ever been into the residence before. R. 368-69. Booker denied that he had, but said that he thought he had been to the home to trim shrubbery on one occasion. R. 368. After that, however, Booker began speaking "in a whispered manner," and "had taken on a characteristic where he described Steve as a third person." R. 374-75. Booker described himself as a demon named Aniel. R. 375. Booker would alternate between speaking as "Aniel," and speaking as "Stephen." R. 376. Detective Price stated that prior to becoming Aniel, he would "chant" for "perhaps ten seconds" or longer, his eyes would become glassy, and then he would clench his teeth. R. 377. Price said that "[a]t the time he was in

the character of Aniel his teeth were clenched tightly until they would crack," and that he could hear Booker's teeth "crunch." R. 376. While he was gritting his teeth, Booker would "whisper through his teeth" and then later "would revert back to normal conversation." R. 376. When Price would ask questions directly about Aniel, Booker would "burst into tears and cry," and then he would "laugh," and become calm again. R. 378. When Detective Price transported Booker to the jail, he told Booker, "You have never told me yet whether Steve killed the old lady." Booker responded, "God, damn right. God, damn right he did." R. 374, 379. Booker then "bit at" Price immediately afterward, cried, and then went to sleep. R. 379-380.

Later, when Detective Price returned to the jail to speak with Booker, Booker asked to speak with him in private, and asked him how he "discovered the name Aniel." R. 380. It seemed that Booker had no memory of speaking as Aniel, or speaking to Detective Price about Aniel. R. 380-81. Price believed in every instance that he spoke with Booker, that he was being sincere, both as himself and as Aniel. R. 381. Price spoke to Booker several times after this occasion, and Booker reverted back into Aniel periodically then as well. R. 382-83. Price said that he noticed when he spoke to Booker that when he spoke as Aniel, "the diction was controlled, accurate, precise" and that when he spoke as "Stephen Booker it was black dialect." R. 383.

B. Trial, Conviction, and Death Sentence

Booker proceeded on an insanity defense at his murder trial. R. 203-04. On June 21, 1978, the jury found Booker guilty on all counts. R. 574. A penalty phase was conducted pursuant to the Florida capital sentencing scheme in place at the time.

See Hurst v. Florida, 136 S. Ct. 616, 620 (2016) (describing Florida's prior scheme). The penalty phase was conducted on June 21, 1978, and lasted one day. The only person who testified for the defense was Booker himself. The "advisory" jury recommended death by a vote of 9 to 3. The jury did not make findings of fact or otherwise specify the factual basis for its recommendation.

The trial judge, not the jury, then made the findings of fact required to impose a death sentence under Florida law. *See* Fla. Stat. § 921.141(3) (1992), *invalidated by Hurst*, 136 S. Ct. at 624. The judge found no mitigating circumstances and three aggravating circumstances, including: (1) Booker previously was convicted of a felony involving the use of threat of violence to another; (2) the murder was committed during the commission of a sexual battery and burglary; and (3) the murder was heinous, atrocious and cruel. The judge found that the aggravators were "sufficient" for the death penalty and not outweighed by mitigation. Based on his fact-finding, the judge sentenced Booker to death. *Booker v. State*, 397 So. 2d at 916-18.

C. Initial Appeals and Resentencing

Booker's conviction and death sentence were affirmed by the Florida Supreme Court on direct appeal. *Booker v. State*, 397 So. 2d 910 (Fla. 1981). Booker filed several state postconviction motions and petitions, many of which were under a signed death warrant, and all of which were denied. *See Booker v. State*, 413 So. 2d 756 (Fla. 1982); *Booker v. State*, 441 So. 2d 148 (Fla. 1983); *Booker v. State*, 503 So. 2d 888 (Fla. 1987); *Booker v. State*, 520 So. 2d 246 (Fla. 1988).

The United States District Court for the Northern District of Florida subsequently granted a writ of habeas corpus as to Booker's death sentence in light of *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and remanded to the state court for resentencing. The United States Court of Appeals for the Eleventh Circuit affirmed. *Booker v. Dugger*, 922 F. 2d 633, 634 (11th Cir. 1991).

In 1998, a new penalty phase hearing was conducted, pursuant to the same Florida capital sentencing scheme as Booker's initial proceeding. The advisory jury recommended death by a vote of eight to four. *Booker v. State*, 773 So. 2d 1079, 1086 (Fla. 2000). The court, not the jury, then made the findings of fact required to impose a sentence of death under Florida law. The court found that the following aggravating factors had been proven beyond a reasonable doubt: (1) the offense was committed while Booker was under a sentence of imprisonment; (2) Booker had a prior felony conviction; (3) Booker was committing contemporaneous felonies; and (4) the offense was especially heinous, atrocious, or cruel. *See id.* at 17. The court, not the jury, found beyond a reasonable doubt that those aggravating factors were "sufficient" to impose the death penalty and were not outweighed by ten mitigating factors.[2] Based on its fact finding, the court sentenced Booker to death. *See id.* at 18.

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[2] The mitigation the court found included that Booker: (1) was under the influence of extreme mental emotional disturbances; (2) had substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law; (3) was sexually abused as a child; (4) was physically abused as a child; (5) was verbally abused as a child; (6) had an inconsistent family life; (7) had his education interrupted repeatedly; (8) suffered from alcohol and drug abuse; (9) while in prison, substantially improved his ability to be a productive citizen and made valuable creative contributions to American literature; (10) demonstrated

D. Death Sentence Finality Relative to *Apprendi* and *Ring*

During the pendency of Booker's direct appeal, this Court decided *Apprendi*, which held that, under the Sixth Amendment, any fact that increases the penalty beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, 530 U.S. at 90. Subsequent to *Apprendi*, the Florida Supreme Court affirmed Booker's death sentence. *Booker*, 773 So. 2d at 1083. The sentence became "final" on May 14, 2001, when this Court denied a writ of certiorari. *Booker v. Florida*, 532 U.S. 1033 (2001). Thirteen months later, this Court decided *Ring*, which held that Arizona's capital sentencing scheme violated the Sixth Amendment in light of *Apprendi*. *Ring*, 536 U.S. at 609.

E. State and Federal Collateral Proceedings

After his resentencing, Booker unsuccessfully sought state post-conviction relief. *Booker v. State*, 969 So. 2d 186 (Fla. 2007). Likewise, his federal habeas petition was denied. *Booker v. Sec'y*, 684 F.3d 1121 (11th Cir. 2012).

F. *Hurst* Litigation and Decision Below

In June 2016, Booker filed a state postconviction motion under Fla. R. Crim. P. 3.851 in the Alachua County Circuit Court, seeking relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016). The trial court denied Booker's motion in March 2018. *See* App. 58a.

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remorse and attempted to atone for his crime; and (11) was honorably discharged from the U.S. Army.

On March 7, 2018, the Florida Supreme Court issued an order to show cause why Booker's appeal should not be dismissed in light of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), another appeal from the denial of *Hurst* relief in a "pre-*Ring*" death sentence case. In *Hitchcock*, the Florida Supreme Court summarily upheld its *Ring*-based retroactivity cutoff for *Hurst* claims, citing its prior decisions in *Asay* and *Mosley* that had established the *Ring*-based cutoff, and declined to address any of the appellant's federal constitutional arguments. *Hitchcock,* 226 So. 3d at 217. Although Mr. Hitchcock's death sentence, like Booker's, became final between *Apprendi* and *Ring*, the Florida Supreme Court did not address in *Hitchcock* whether its *Ring*-based retroactivity cutoff for *Hurst* claims was constitutional as applied to post-*Apprendi* death sentences, despite Mr. Hitchcock pressing that issue.

Booker argued that, as applied to his post-*Apprendi* death sentence, the Florida Supreme Court's *Hurst* retroactivity cutoff was unconstitutional under the Eighth and Fourteenth Amendments. App. 11a-20a. Booker further argued that given the substantive nature of the rules involved, the Supremacy Clause of the United States Constitution requires the Florida Supreme Court to apply those rules retroactively to all defendants, not merely some, in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and other precedent. App. 20a-25a.

On August 30, 2018, the Florida Supreme Court issued an opinion summarily denying Booker's R. 3.851 appeal. The court's brief order stated that Booker's arguments challenging the constitutionality of the *Ring* cutoff were procedurally

barred because they had already been addressed in a separate state habeas proceeding in his case,[3] and were in any event meritless for the reasons in *Hitchcock*. App. 2a; *Booker v. State*, 252 So. 3d 723 (Fla. 2018).

The Florida Supreme Court did not discuss Booker's federal constitutional arguments or acknowledge Booker's status as a "post-*Apprendi*" prisoner.

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, Particularly as Applied to Post-*Apprendi* Death Sentences

A. This Case Asks a Distinct Retroactivity Question From *Summerlin*: Not Whether *Teague* Retroactivity Should be Afforded in a Federal Habeas Case, But Whether a State-Law Partial Retroactivity Cutoff Violates the Eighth and Fourteenth Amendments

Justice Breyer, in a recent statement respecting the denial of certiorari in *Reynolds v. Florida*, expressed a mistaken belief that *Hurst* retroactivity analysis is not significantly different from the Court's analysis in *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004), which concluded that *Ring* need not be applied retroactively on federal habeas review. *See Reynolds*, No. 18-5181, 2018 WL 5913358, *1. However, Justice Breyer and this Court have yet to recognize the significant differences

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[3] On June 27, 2017, Booker filed a state petition for writ of habeas corpus in the Florida Supreme Court, likewise for relief under *Hurst,* which was denied on January 30, 2018. *See Booker v. Jones*, 235 So. 3d 298 (Fla. 2018). On June 11, 2018, Booker filed a petition for a writ of certiorari with this Court. *See Booker v. Julie L. Jones, Sec'y, Dep't of Corr.*, 2018 WL3009229, No. 17-9360 (June 11, 2018). This Court denied review on October 1, 2018. *Id*. As will be explained below, the Florida Supreme Court's procedural bar ruling in the denial of Booker's R. 3.851 appeal does not present a barrier to granting certiorari review now.

between the analysis of whether *Ring* must be applied retroactively on federal habeas review, and the questions presented here, including whether the particular partial retroactivity cutoff line designed by the Florida Supreme Court to deny *Hurst* relief to dozens of Florida prisoners runs afoul of the Constitution's prohibition against arbitrary and capricious capital punishment and guarantee of equal protection.

The Eighth Amendment's prohibition against the arbitrary and capricious imposition of the death penalty has never before been addressed with respect to a state-law partial retroactivity scheme, such as the one crafted by the Florida Supreme Court for claims under *Hurst*. This Eighth Amendment inquiry is separate and distinct from the question of whether the Constitution requires the retroactive application of *Hurst* by state courts as a substantive federal constitutional decision.

The Florida Supreme Court's partial retroactivity scheme introduces several individual Eighth Amendment questions not present in *Ring* or *Summerlin*. Initially, this is not a federal habeas case governed by the retroactivity strictures of *Teague v. Lane*, 489 U.S. 288, 309 (1989), but rather a state-court case where a retroactivity cutoff line is alleged to have been drawn in violation of the federal Constitution. Moreover, the Arizona and Florida capital sentencing schemes at issue in *Ring* and *Hurst* differ in a critical respect: Florida's scheme required a judge, rather than a jury, to make findings of fact not only as to aggravating factors, as Arizona's scheme did, but also as to two other statutory elements: whether the particular aggravators were "sufficient" to justify the death penalty, and whether the aggravation was outweighed by the mitigation in the case. As explained in this petition, the Florida

scheme's additional "sufficiency" requirement is an important complication to the Eighth Amendment inquiry as compared with *Ring* and *Summerlin*.

Further, the Florida Supreme Court's partial retroactivity scheme raises two distinct questions that were not present before this Court in *Summerlin*: first, whether the Eighth Amendment is violated by a state-law based partial retroactivity scheme that draws its cutoff at a decision other than that which declare the scheme unconstitutional, and second, whether the Florida Supreme Court's scheme independently violates the Eighth Amendment by imposing such a cutoff at *Ring* rather than its predicate, *Apprendi,* in cases such as this one. These are two separate Eighth Amendment questions, distinct from issues concerning the general retroactivity of *Hurst* as a substantive constitutional decision, and unique from any of the issues present in Arizona's capital sentencing scheme or retroactivity question analysis. In the present case, Booker's Eighth and Fourteenth Amendment rights have been violated by the Florida Supreme Court's unusual *Ring*-based cutoff, in ways in which this Court and no other court has ever addressed.

B. The Eighth and Fourteenth Amendments Impose Boundaries on State-Law Non-Retroactivity Rules 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.

But in creating such rules, courts are bound by constitutional restraints. In capital cases, the Eighth and Fourteenth Amendments impose boundaries on a state court's application of untraditional non-retroactivity rules, such as those that fix retroactivity cutoffs at points in time other than the date of the new constitutional ruling. 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 in even-numbered years would intuitively raise suspicions of unconstitutional arbitrariness. This Court has not had an 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 jurisprudence.

In *Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), this Court described the now-familiar idea that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428. This Court's Eighth Amendment decisions have "insist[ed] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008).

The Eighth Amendment prohibition against arbitrariness and capriciousness in capital cases refined this Court's Fourteenth Amendment precedents holding that equal protection is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the

other" to a harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). A state does not have unfettered discretion to create classes of condemned prisoners. The Florida Supreme Court did not simply apply a traditional retroactivity rule here. On the contrary, it crafted a decidedly untraditional and troublesome non-retroactivity scheme, particularly with respect to post-*Apprendi* death sentences like Booker's.

C. The Florida Supreme Court's *Hurst* Retroactivity Cutoff at *Ring* is Not a Traditional Non-Retroactivity Rule

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*, 136 S. Ct. at 725 ("In the wake of *Miller*, the question has arisen whether its holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided.").

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

id. at 268-69 ("[T]he Minnesota court correctly concluded that federal law does not *require* state courts to apply the holding in *Crawford* to cases 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. However, the Florida Supreme Court's retroactivity formula for *Hurst* errors imposed such a partial retroactivity scheme.

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.[4] But 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*.

[4] 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).

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 14 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.

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 *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 *Hurst* retroactivity cutoff. In collateral-review cases, the Florida Supreme Court has granted the jury determinations required by *Hurst* to dozens of "post-*Ring*" prisoners whose death sentences became final before *Hurst*. But, because of the Florida Supreme Court's *Ring*-based retroactivity cutoff, dozens more "pre-*Ring*" prisoners—including those like Booker, whose sentences became final between *Apprendi* and *Ring*—are denied access to the jury determination *Hurst* requires.

Dozens of 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. This Court should grant review now because the Florida Supreme Court's *Ring*-based scheme of partial retroactivity for *Hurst* claims involves more than the type of tolerable arbitrariness that is innate to traditional non-retroactivity rules, particularly with respect to post-*Apprendi* death sentences.

D. The Florida Supreme Court's *Hurst* Retroactivity Cutoff at *Ring* Exceeds Constitutional Limits, Particularly as Applied to Post-*Apprendi* Death Sentences

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.

1. The *Ring*-Based Cutoff Ignores the Handful of Defendants Like Booker, Whose Convictions Became Final After this Court Announced in *Apprendi* that a Jury Must Make the Fact-Finding Necessary to Enhance a Sentence

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. In explaining why it selected *Ring* as the determinant case for retroactivity, the court described its rationale as follows: "Because Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst* retroactively to that time," but not before then. *Mosley*, 209 So. 3d at 1280. But Florida's capital sentencing scheme did not become unconstitutional when *Ring* was decided—*Ring* recognized that Arizona's capital sentencing scheme was unconstitutional. Florida's capital sentencing statute was always unconstitutional, and this Court acknowledged this in *Hurst*, not *Ring*.

The Florida Supreme Court's *Ring* cutoff fails to acknowledge that the foundational precedent for both *Ring* and *Hurst* was this Court's decision in *Apprendi*, 530 U.S. at 466. As *Hurst* recognizes, it was *Apprendi*, not *Ring*, which first explained that the Sixth Amendment requires any fact-finding that increases a defendant's maximum sentence to be found by a jury beyond a reasonable doubt. *Hurst*, 136 S. Ct. at 621. In *Ring*, this Court applied *Apprendi*'s analysis to conclude that Ring's death sentence violated his right to a jury trial because the judge's fact finding "exposed Ring to a greater punishment than that authorized by the jury's guilty verdict." *Hurst v. Florida*, 136 S. Ct. at 621.

Later, in *Hurst v. Florida*, this Court extended the *Apprendi* analysis to Florida's sentencing scheme. *Hurst v. Florida*, 136 S. Ct. at 622. Just as *Ring* had applied *Apprendi*'s principles to Arizona's unconstitutional capital sentencing scheme, *Hurst* applied *Apprendi*'s principles to Florida's unconstitutional capital sentencing scheme. In *Ring*, the United States Supreme Court overturned pre-*Apprendi* precedent that previously found Arizona's capital scheme constitutional. *Ring*, 536 U.S. at 609. Then, in *Hurst*, the Supreme Court applied the exact same rationale to Florida's capital sentencing scheme and overturned pre-*Apprendi* precedent finding Florida's capital scheme constitutional. *See Hurst v. Florida*, 136 S. Ct. at 623. It explained:

> *Spaziano* [*v. Florida*, 468 U.S. 447 (1984),] and *Hildwin* [*v. Florida*, 490 U.S. 638 (1989),] summarized earlier precedent to conclude that 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.' *Hildwin*, 490 U.S. at 640-41. *Their conclusion was wrong, and irreconcilable with Apprendi.* Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre-*Apprendi* decision—*Walton* [*v. Arizona*], 497 U.S. 639 (1990)—could not 'survive the reasoning of *Apprendi*.' [*Ring*,] 536 U.S. at 603.

Hurst, 136 S. Ct. at 623 (emphasis added). Thus, *Ring* had relied on *Apprendi* to clarify these constitutional guarantees in capital cases, and the same was true in *Hurst*. Rather than a linear line from *Apprendi* to *Ring* to *Hurst*, *Ring* and *Hurst* both derive from *Apprendi*.

Booker's death sentence became final after this Court decided *Apprendi*-the inexorable basis for *Ring* and *Hurst*. Yet, under the Florida Supreme Court's *Ring* cutoff, those like Booker are being left out of *Hurst*'s application of *Apprendi* to

Florida's capital sentencing scheme. To date, the Florida Supreme Court has never explained why it drew a line at *Ring* as opposed to *Apprendi*. Without a non-arbitrary explanation for that line, the Florida Supreme Court's *Hurst* retroactivity formula cannot be squared with the Eighth Amendment.

2. The *Ring*-Based Cutoff Creates More Arbitrary and Unequal Results than Traditional Retroactivity Decisions, Particularly for Post-*Apprendi* Death Sentences

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 Booker explained to the Florida Supreme Court, the date of a particular Florida death sentence's finality on direct appeal in relation to the June 24, 2002, decision in *Ring* can depend on a score of random factors having nothing to do with the offender or the offense: whether there were delays in a clerk 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. *See* App. 15-16a.

In one notable example, the Florida Supreme Court affirmed Gary Bowles's and James Card's unrelated death sentences in separate opinions that were issued

on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173, 1184 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both prisoners petitioned for a writ of certiorari in this Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). The Florida Supreme Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47. However, Mr. Bowles, whose case was decided on direct appeal on *the same day* as Mr. Card's, falls on the other side of the Florida Supreme Court's current retroactivity cutoff. His *Hurst* claim was summarily denied by the Florida Supreme Court the same week as Booker's. *Bowles v. State*, 235 So. 3d 292 (Fla. 2018).

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

occurred in the late 1990s, but interlocutory appeals resulted in a 10-year delay before the trial). Under the Florida Supreme Court's approach, a defendant who was originally sentenced to death before Booker, but who was later resentenced to death after *Ring*, would receive *Hurst* relief while Booker 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, which treats differently various defendants whose convictions were final after *Apprendi*, falls short of that demanding standard.

In contrast to the court's majority, several members of the Florida Supreme Court have explained that the cutoff does not survive scrutiny. In *Asay*, Justice

Pariente wrote: "The majority's conclusion results in an unintended arbitrariness as to who receives relief . . . . To avoid such arbitrariness and to ensure uniformity and fundamental fairness in Florida's capital sentencing . . . *Hurst* should be applied retroactively to all death sentences." *Asay*, 210 So. 3d at 36 (Pariente, J., concurring in part and dissenting in part). Justice Perry was blunter: "In my opinion, the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two grounds of similarly situated persons." *Id.* at 37 (Perry, J., dissenting). Justice Perry correctly predicted: "[T]here will be situations where persons who committed equally violent felonies and whose death sentences became final days apart will be treated differently without justification." *Id.* And in *Hitchcock*, Justice Lewis noted that the Court's majority was "tumbl[ing] down the dizzying rabbit hole of untenable line drawing." *Hitchcock*, 226 So. 3d at 218 (Lewis, J., concurring in the result).

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

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

Florida prisoners who were tried for capital murder before *Ring* are more likely to have been sentenced to death by a system that would not produce a capital sentence—or sometimes even a capital prosecution—today. Since *Ring* was decided,

as public support for the death penalty has waned, prosecutors have been increasingly unlikely to seek and juries increasingly unlikely to impose death sentences.[5]

Florida prisoners who were sentenced to death before *Ring* are also more likely than post-*Ring* prisoners to have received those death sentences in trials that involved problematic fact-finding. The past two decades have witnessed broad recognition of the unreliability of numerous kinds of evidence—flawed forensic-science theories and practices, hazardous eyewitness identification testimony, and so forth—that was widely accepted in pre-*Ring* capital trials.[6] Forensic disciplines that

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[5] *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.

[6] *See, e.g.*, Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods" (2016) (Report of the President's Counsel of Advisors on Science and Technology), *available at* https://fdprc.capdefnet.org/sites/cdn_fdprc/files/Assets/public/other_useful_information/forensic_information/pcast_forensic_science_report_final.pdf (evaluating and explaining the procedures of the various forensic science disciplines, including (1) DNA analysis of single-source and simple-mixture samples, (2) DNA analysis of complex-mixture samples, (3) bite-marks, (4) latent fingerprints, (5) firearms identification, (6) footwear analysis, and (7) hair analysis, and the varying degrees, or lack, of accuracy and reliability of these disciplines).

were once considered sound fell under deep suspicion following numerous exonerations.[7]

Post-*Ring* sentencing juries are more fully informed of the defendant's entire mitigating history than juries in the pre-*Ring* period. The American Bar Association ("ABA") guideline requiring a capital mitigation specialist for the defense was not even promulgated until 2003.[8] Limited information being provided to juries was

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[7] *See, e.g.*, Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 166 (2007) ("The most recent study of 200 DNA exonerations found that forensic evidence (present in 57% of the cases) was the second leading type of evidence (after eyewitness identifications at 79%) used in wrongful conviction cases. Pre-DNA serology of blood and semen evidence was the most commonly used forensic technique (79 cases). Next came hair evidence (43 cases), soil comparison (5 cases), DNA tests (3 cases), bite mark evidence (3 cases), fingerprint evidence (2 cases), dog scent identification (2 cases), spectrographic voice evidence (1 case), shoe prints (1 case), and fiber comparison (1 case)."); COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSICS SCIENCES COMMUNITY, NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, at 4 (2009), *available at* https://www.ncjrs.gov /pdffiles1/nij/grants/228091.pdf ("[Scientific advances] have revealed that, in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.").

[8] ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases (Rev. Ed. Feb., 2003), Guidelines 4.1(A)(1) and 10.4(C)(2), 31 HOFSTRA L. REV. 913, 952, 999-1000 (2003). S*ee also* Supplementary Guidelines for the Mitigation of Defense Teams in Death Penalty Cases, Guideline 5.1(B), (C), 36 HOFSTRA L. REV. 677 (2008); Craig M. Cooley, *Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists,* 30 OKLA. CITY U. L. REV. 23 (2005); Mark Olive, Russell Stetler, *Using the Supplementary Guideline for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction*, 30 HOFSTRA L. REV. 1067 (2008).

especially endemic to Florida in the era before *Ring* was decided.[9] The capital defense bar in Florida, as a result of various funding crises and the inadequate screening mechanism for lawyers on the list of those available to be appointed in capital cases, produced what former Chief Justice of the Florida Supreme Court Gerald Kogan described as "some of the worst lawyering" he had ever seen.[10] As a result of the poor lawyering in Florida, since 1976, Florida has had 27 exonerations—more than any other state—all but five of which involved convictions and death sentences imposed before 2002.[11] Florida did not have minimal standards for capital defense counsel until 1999—after Booker's trial and the trials of almost every other Booker being

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[9] *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.

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

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

denied *Hurst* relief.[12] And as for mitigating evidence, Florida's statute did not even include the "catch-all" statutory language until 1996.[13]

The "advisory" jury instructions were also so confusing that jurors consistently reported that they did not understand their role.[14] If the advisory jury did recommend life, judges—who must run for election and reelection in Florida—could impose the death penalty anyway.[15] In fact, relying on the cutoff, the Florida

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[12] *See In re Amendment to Fla. Rules of Criminal Procedure – Rule 3.112 Minimum Standards for Attorneys in Capital Cases*, 759 So. 2d 610 (Fla. 1999).

[13] 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).

[14] 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.").

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

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

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

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

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sentencing decision, resulting in shorter sentencing deliberations and less disagreement among jurors.").

punishment's basic retributive or deterrent purposes." *Knight v. Florida*, 120 S. Ct. 459, 462 (1999) (Breyer, J., dissenting from the denial of certiorari).

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

II. In Addition to Violating the Eighth and Fourteenth Amendments on Arbitrariness and Equal Protection Grounds, the Florida Supreme Court's Retroactivity Cutoff is Also Invalid Because the Constitution Requires Substantive Decisions to Be Applied By State Courts Retroactively to All Prisoners

In addition to violating the Eighth and Fourteenth Amendments on arbitrariness and equal protection grounds, the Florida Supreme Court's retroactivity cutoff is also invalid because the Constitution requires substantive decisions like *Hurst* to be applied by state courts to all prisoners on collateral review. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), this Court held that the Supremacy Clause of the United States Constitution requires state courts to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis.

In *Montgomery*, a Louisiana state prisoner filed a claim in state court seeking retroactive application of the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The state court denied the prisoner's claim on the ground that *Miller* was not retroactive as a matter of state retroactivity law. *Montgomery*, 136 S. Ct. at 727. This Court reversed, holding that because the

Miller rule was substantive as a matter of federal law, the state court was obligated to apply it retroactively. *See id.* at 732-34.

Montgomery clarified that the Supremacy Clause requires state courts to apply substantive rules retroactively notwithstanding the result under a state-law analysis. *Montgomery*, 136 S. Ct. at 728-29 ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, *the Constitution* requires state collateral review courts to give retroactive effect to that rule.") (emphasis added). Thus, *Montgomery* held, "[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id.* at 731-32.

Importantly for purposes of *Hurst* retroactivity analysis, this Court found the *Miller* rule substantive in *Montgomery* even though the rule had "a procedural component." *Id.* at 734. *Miller* did "not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* or *Graham*." *Miller*, 567 U.S. at 483. Instead, "it mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* Despite *Miller*'s "procedural" requirements, the Court in *Montgomery* warned against "conflat[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the *manner of determining* the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (first alteration added).

Instead, the Court explained, "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," *Id.* at 735, and that the necessary procedures do not "transform substantive rules into procedural ones," *Id.* In *Miller*, the decision "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*." *Id.* at 734.

As *Hurst v. Florida* explained, under Florida law, the factual predicates necessary for the imposition of a death sentence were: (1) the existence of particular aggravating circumstances; (2) that those particular aggravating circumstances were "sufficient" to justify the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst* held that those determinations must be made by juries. These decisions are 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, 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 Booker'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, this is also substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"). And it remains substantive even though the subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (noting that state's ability to determine the method of enforcing constitutional rule does not convert a rule from substantive to procedural).

In *Welch*, the Court addressed the retroactivity of the constitutional rule articulated in *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). In *Johnson*, the Court held that a federal statute that allowed sentencing enhancement was unconstitutional. *Id.* at 2556. *Welch* held that *Johnson*'s ruling was substantive

because it "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied"—therefore it must be applied retroactively. *Welch*, 136 S. Ct. at 1265. The 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 *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), 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.").[16]

"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 Booker's case.

III. This Case is an Appropriate Vehicle to Address Florida's Partial Retroactivity Scheme Despite the Florida Supreme Court's Mixed Procedural and Merits Ruling Below

Booker's case is an appropriate vehicle for this Court to address the Florida Supreme Court's partial retroactivity scheme despite the Florida Supreme Court's mixed procedural and merits ruling below. The Florida Supreme Court's opinion below stated that Booker's challenge to the retroactivity cutoff was procedurally

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[16] 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").

barred by the Florida Supreme Court's earlier decision in Booker's separate state habeas proceeding. *Booker v. State*, 252 So. 3d 723, 723 (Fla. 2018). The Florida Supreme Court's opinion also referred back to the merits, stating that "all of Booker's claims depend on the retroactive application of *Hurst*, to which we have held he is not entitled." *Id.*

To the extent that a procedural bar was applied, that ruling is insufficient by itself to prevent this Court's review. This Court lacks jurisdiction to review a federal claim on appeal from a state court judgment only "if that judgment rests on a state law ground that is *both* 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Foster v. Chatman*, 136 S. Ct. 1737, 1745 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)) (emphasis added). The Florida Supreme Court's decision in this case is not "independent," because the prior decision which purportedly created the procedural bar would clearly be invalidated by a decision by this Court holding Florida's partial retroactivity scheme unconstitutional. Moreover, the Florida Supreme Court's decision is not "adequate" to preclude federal review because the procedural-bar rule that was applied is not regularly followed. *Compare, e.g., Geralds v. Jones*, 2017 WL 944236, *1 (Fla. Mar. 10, 2017) (denying Geralds's state habeas petition on *Hurst* on the merits), *with Geralds v. State*, 237 So. 3d 923, 924 (Fla. 2018) (denying Geralds's R. 3.851 motion appeal on *Hurst* on the merits).

The dispositive issue in this case is the constitutionality of the Florida Supreme Court's partial retroactivity cutoff for *Hurst* claims, which the Florida

Supreme Court, in the decision below, again defended on the merits under its *Hitchcock* law. Notwithstanding the Florida Supreme Court's additional procedural bar ruling, this Court should grant a writ of certiorari in Booker's case to decide whether the partial retroactivity scheme itself is constitutionally valid. A ruling for Booker—and dozens of other "pre-*Ring*" Florida prisoners—on that issue will obviate any obstacles presented by the procedural component of the decision below.

CONCLUSION

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

Respectfully submitted,

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