No. _____

OCTOBER TERM 2018

IN THE SUPREME COURT OF THE UNITED STATES

BILLY LEON KEARSE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

CAPITAL CASE

PAUL KALIL
Counsel of Record
Fla. Bar No. 174114
Assistant CCRC–South
Capital Collateral Regional Counsel – South
1 East Broward Blvd, Suite 444
Fort Lauderdale, FL 33301
Tel. (954) 713–1284
kalilp@ccsr.state.fl.us

January 25, 2019

CAPITAL CASE

QUESTIONS PRESENTED

1. Does the Florida Supreme Court's partial retroactivity approach providing for relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) to death-sentenced prisoners whose sentences became final after *Ring v. Arizona*, 536 U.S. 584 (2002) but excluding from relief those whose death sentences became final during the time period between *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring*, violate the Eighth and Fourteenth Amendments to the United States Constitution?

2. Does the Florida Supreme Court's formula for partial retroactivity of the *Hurst* opinions violate the Supremacy Clause of the United States Constitution pursuant to *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)?

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Petitioner Billy Leon Kearse, a death–sentenced Florida prisoner, was the appellant in the Florida Supreme Court.

Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Billy Leon Kearse prays that a Writ of Certiorari issue to review the opinion of the Florida Supreme Court.

CITATIONS TO OPINION BELOW

The opinion of the Florida Supreme Court affirming the denial of relief, which is the subject of this Petition, is reported as *Kearse v. State*, 252 So. 3d 693 (Fla. 2018), and is attached to this petition as "Appendix A." The unreported circuit court order denying Mr. Kearse's successive motion for postconviction relief is attached to this petition as "Appendix B." The opinion affirming Mr. Kearse's sentence of death on direct appeal is reported as *Kearse v. State*, 770 So.2d 1119 (2000), and is attached hereto as "Appendix C." The opinion affirming Mr. Kearse's convictions, vacating his sentence of death, and remanding for a new penalty phase is reported as *Kearse v. State*, 662 So. 2d 677 (Fla. 1995), and is attached hereto as "Appendix D."

STATEMENT OF JURISDICTION

The Florida Supreme Court issued its decision affirming the denial of Mr. Kearse's postconviction motion on August 30, 2018. On November 16, 2018, Counsel submitted an application for a sixty-day extension of time in which to file this petition. Justice Thomas granted Counsel's application on November 20, 2018, extending the time in which to file up to and including January 27, 2019. Thus, this petition is timely filed. Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. §§ 1257(a) and 2101(d).

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 . . . 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

I. Introduction

On January 12, 2016, this Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), declared Florida's capital sentencing scheme unconstitutional and violative of the Sixth Amendment right to a jury trial because it permitted a judge—not a jury—to make the requisite findings of fact necessary for the imposition of death. Thereafter on remand, the Florida Supreme Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), construed this Court's *Hurst v. Florida* decision to require that unanimous findings of fact be made by a jury before a death sentence can be imposed. Specifically, the court held that:

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

Hurst v. State, 202 So. 3d at 57. Notably, the court also concluded that the Eighth Amendment requires a unanimous jury verdict prior to the imposition of a death sentence. *Id.* at 59.

In the aftermath of those decisions, the Florida Supreme Court then engaged in a nontraditional approach to retroactivity, instituting a bright-line cutoff to determine which capital defendants would benefit from them. Through this framework, the court determined that only those capital defendants whose sentences became final after this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), on

June 24, 2002, would be entitled to retroactive relief. Thus, as it stands, the Florida Supreme Court's *Ring*-based cutoff approach to retroactive application of the *Hurst* decisions denies relief not only to those capital defendants with pre-*Ring* finality dates, but also to those whose sentences became final in the time period between this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring*—despite the fact that *Apprendi* is unequivocally the foundation of both *Ring* and *Hurst v. Florida*. Such a framework is incompatible with the Eighth Amendment prohibition against the arbitrary and capricious imposition of the death penalty, as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

To date, the Florida Supreme Court has failed to address in any meaningful way the constitutional implications arising from its partial retroactivity approach under both the Eighth and Fourteenth Amendments. Most significantly, for petitioners like Mr. Kearse, the court has likewise failed to address the class of capital defendants whose sentences became final during the post-*Apprendi* pre-*Ring* time period and how its *Ring*-based cutoff passes constitutional muster in light of the fact that *Apprendi*—not *Ring*—was the basis for this Court's decision in *Hurst v. Florida*.

This Court should now resolve the constitutional infirmities within the Florida Supreme Court's partial retroactivity approach to *Hurst* relief. The case of Billy Leon Kearse, whose sentence became final prior to this Court's decision in *Ring* but after this Court's decision in *Apprendi*, provides an appropriate vehicle to do so.

II. Relevant Facts and Procedural History[1]

The Circuit Court for the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, entered the judgment of conviction and sentences of death at issue in this petition. In October of 1991, a jury found Mr. Kearse guilty of first-degree murder of Police Officer Danny Parrish and robbery with a firearm. (R1. 1864-65). The evidence presented at trial established that Mr. Kearse had just picked up a pizza and was returning home with his girlfriend to eat it with friends when Officer Parrish pulled him over for driving the wrong way down a one-way street. *Kearse v. State*, 770 So.2d 1119, 1136 (2000) (Anstead, J., dissenting.)[2] Mr. Kearse was unable to produce a driver's license and instead gave Officer Parrish several alias names that did not match any driver's license history. *Kearse v. State*, 662 So. 2d 677, 680 (1995). Officer Parrish then ordered Mr. Kearse out of the car, and while Officer Parrish was attempting to handcuff him, a scuffle ensued. In a panic, Mr. Kearse grabbed Officer's Parrish's weapon and fired several shots, killing the officer. *Id.*

After a penalty phase proceeding, the jury recommended death by a vote of eleven-to-one. (R1. 2361, 2367, 2671). The court followed the jury's advisory recommendation and sentenced Mr. Kearse to death. (R1. 2423, 2713-32). On direct

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[1] In addition to the proceedings detailed here, Mr. Kearse filed successive postconviction motions challenging Florida's lethal injection protocols and alleging newly discovered evidence that are not germane to this Petition. *See Kearse v. State*, 11 So. 3d 355 (Fla. 2009) (unpublished table disposition); *Kearse v. State*, 75 So. 3d 1244 (Fla. 2011) (unpublished table disposition).

[2] As the three dissenters pointed out, "Importantly, there is no evidence that Kearse set out that night intending to commit any crime, let alone murder." *Kearse v. State*, 770 So.2d at 1136 (Anstead, J., dissenting.)

appeal, the Florida Supreme Court affirmed Mr. Kearse's conviction. *Kearse v. State*, 662 So. 2d 677 (Fla. 1995). However, because it found errors relating to the penalty phase jury instructions and the improper doubling of aggravating circumstances, the court vacated Mr. Kearse's death sentence and remanded for resentencing. *Id.* at 680.

Mr. Kearse's second penalty phase proceeding was held before a new jury. The trial judge instructed the jury that the "[f]inal decision as to what punishment shall be imposed rests solely with the . . . Court; however, the law requires that you, the Jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant." (R2 T. 1137-38). At the close of the evidence, the judge instructed the jury on four aggravating circumstances: (1) the crime was committed while the Defendant was engaged in the commission or flight after committing or attempting to commit a crime of robbery; (2) the crime was committed for the purpose of avoiding a lawful arrest or effecting an escape from custody; (3) the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; and (4) the victim was a law enforcement officer engaged in the performance of his official duties. (R2 T. 2685-86). The jury was further instructed on four mitigating circumstances to consider: (1) the crime was committed while Defendant was under the influence of extreme mental or emotional disturbance; (2) the capacity of the Defendant to conform his conduct to the requirements of the law was substantially impaired; (3) the age of the Defendant at the time of the crime; and (4) any other aspect of the Defendant's character or record in any other circumstance of the offense. (R2 T. 2687).

Before sending the jury out to deliberate, the court reiterated, "As you've been told, [the] final decision as to what punishment shall be imposed is the responsibility of the judge." (R2 T. 2684). The court further stated, "In these proceedings, it is not necessary that the advisory sentence of the Jury be unanimous." (R2 T. 2691). Nonetheless, the jury—without making any factual findings—returned a recommendation of death by a vote of twelve-to-zero. (R2 T. 2695).

The court once again sentenced Mr. Kearse to death. (R2 T. 2713-23). In imposing the death sentence, the judge alone made findings regarding the existence and weight of two aggravators: (1) the murder was committed during a robbery; and (2) the murder was committed to avoid arrest and hinder law enforcement and the victim was a law enforcement officer engaged in performance of his official duties (merged into one factor). (R2 T. 2714-17) The judge found one statutory mitigating factor to exist, the Defendant's age at the time of the offense, to which he gave "some but not much weight." (R2 T. 2719). Of the forty proposed non-statutory mitigating factors, the judge only found two: (1) "[Mr. Kearse's] behavior at trial was acceptable;" and (2) Mr. Kearse had a "difficult childhood and his psychological and emotional condition because of it." (R2 T. 2721-22).

On direct appeal, the Florida Supreme Court upheld the death sentence by the narrowest of margins—four-to-three. *Kearse v. State*, 770 So. 2d 1110 (Fla. 2000). Three members of the Florida Supreme Court expressed "several concerns with the majority's treatment of the issues, and especially with the conclusion that this is one of the most aggravated and least mitigated murders requiring that the eighteen-year-

old defendant be executed." *Id.* at 1135 (Anstead, J., dissenting).

Mr. Kearse timely filed a Petition for Writ of Certiorari in this Court. His sentence of death became final upon this Court's denial of his petition on March 26, 2001. *Kearse v. Florida*, 532 U.S. 945 (2001); *see also Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) (explaining that a conviction and sentence become final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari [has] elapsed or a petition for certiorari [is] finally denied").

Mr. Kearse sought postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851, raising several claims including a claim that Florida's death penalty scheme violated *Ring v. Arizona*. (PCR1. 1458-1572). The circuit court denied relief as to all claims. (PCR1. 5703-40). Mr. Kearse appealed the denial of postconviction relief and simultaneously filed a Petition for a Writ of Habeas Corpus in the Florida Supreme Court also alleging, *inter alia*, that Florida's death penalty scheme was unconstitutional under *Ring*. The Florida Supreme Court affirmed the denial of Mr. Kearse's motion for postconviction relief and denied his habeas petition. *Kearse v. State*, 969 So. 2d 976 (Fla. 2007).

Mr. Kearse sought habeas corpus relief in the United States District Court, Southern District of Florida, which was denied. *Kearse v. Secretary*, Case 2:09-cv-14240-WJZ (S.D. Fla. Sept. 1, 2015). Mr. Kearse's motion for a Certificate of Appealability is pending in the Eleventh Circuit Court of Appeals, *Kearse v. Secretary*, Case No. 15-15228-P.

On February 23, 2016, Mr. Kearse filed a successive Motion to Vacate pursuant to Rule 3.851 premised on this Court's opinion in *Hurst v. Florida*. (PCR4. 18-53). After the State responded and the circuit court conducted a case management conference, the court dismissed the motion "without prejudice to timely refile the claim if *Hurst* is later held to apply retroactively to the specific circumstances of [Mr. Kearse's] conviction and sentence." (PCR4. 132).

On January 12, 2017, Mr. Kearse filed a successive Rule. 3.851 Motion to Vacate raising claims related to *Hurst v. Florida*; *Perry v. State*, 210 So. 3d 630 (Fla. 2016); and *Hurst v. State*. (PCR4. 134-215). That motion was dismissed on procedural grounds.

On November 29, 2017, Mr. Kearse timely filed a second successive Rule 3.851 motion challenging his death sentence on the basis of *Hurst v. Florida* and *Hurst v. State.* That motion included an additional claim relating to Florida Statute Chapter 2017-1, which was enacted earlier that year. (PCR5. 26-82). The circuit court conducted a case management conference and issued an order the same day "adopt[ing] the State's reasoning in finding *Hurst* does not apply retroactively to [Mr. Kearse's] case which became final before *Ring v. Arizona* . . . was decided on June 24, 2002." (PCR5. 110). The circuit court further found that "even if *Hurst* did apply retroactively, [Mr. Kearse] is not entitled to relief due to a unanimous jury recommendation for a death sentence." (PCR5. 110). Following the subsequent denial of his Motion for Rehearing, Mr. Kearse timely filed a notice of appeal to the Florida Supreme Court. (PCR5. 125-26).

On appeal, rather than allowing full briefing on the merits, the Florida Supreme Court issued an unorthodox order on April 27, 2018, demanding that Mr. Kearse "show cause" why the circuit court's order should not be affirmed in light of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017).[3] Mr. Kearse submitted his response to the order on May 17, 2018, and a reply brief on June 11, 2018. In doing so, he first argued that the court's "show cause" proceeding violated his right to appeal the denial of postconviction relief and to be meaningfully heard because "[t]he death penalty is the gravest sentence our society may impose," and "[p]ersons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 572 U.S. 701, 724 (2014). Further, he noted that full briefing was warranted because the issues he was raising were *not* the same ones raised by Mr. Hitchcock, so *Hitchcock v. State* could not dictate the outcome of his appeal. Denying him the opportunity to fully present and argue his claims did not comport with due process.

Addressing the actual merits of his claims, Mr. Kearse argued that the court's *Ring*-based retroactivity cutoff violates the Eighth and Fourteenth Amendments. Specifically, Mr. Kearse argued that denying relief to capital defendants like him whose convictions and sentences became final between this Court's decisions in *Apprendi* and *Ring* was improper where the constitutional underpinnings for this Court's decision in *Ring* were predicated upon the holding in *Apprendi*. Additionally,

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[3] In *Hitchcock*, the Florida Supreme Court adhered to its bright-line ruling in *Asay v.* State, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 71 (2017), and affirmed the denial of *Hurst* relief in another pre-*Ring* capital case.

Mr. Kearse further argued that because the *Hurst* decisions announced substantive constitutional rules of law, the Supremacy Clause required the Florida Supreme Court to apply those substantive rules retroactively to his case on collateral review. Finally, Mr. Kearse argued that even though his resentencing jury returned a twelve-to-zero recommendation of death, any potential "*Hurst* error" in his case could not be deemed "harmless" beyond a reasonable doubt.

On August 30, 2018, the Florida Supreme Court denied Mr. Kearse's appeal. *Kearse v. State*, 252 So. 3d 693 (Fla. 2018). The court's analysis was limited to the following:

> After reviewing Kearse's response to the order to show cause, as well as the State's arguments in reply, we conclude that Kearse is not entitled to relief. Kearse was sentenced to death following a jury's unanimous recommendation for death. *Kearse v. State*, 770 So. 2d 1119, 1123 (Fla. 2000). His sentence of death became final in 2001. *Kearse v. Florida*, 532 U.S. 945 (2001). Thus, *Hurst* does not apply retroactively to Kearse's sentence of death. *See Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the denial of Kearse's motion.

Id. at 694. The court's opinion did not address any of Mr. Kearse's federal constitutional arguments or his arguments related to the post-*Apprendi* pre-*Ring* class of prisoners being denied *Hurst* relief.

Justice Pariente concurred in result because the *Hitchcock* decision is now final; however, she wrote separately to express her view "that *Hurst* should apply retroactively to cases like Kearse's." *Id.* at 694-95 (Pariente, J., concurring in result). She also emphasized Justice Anstead's conclusion in his dissenting opinion on direct appeal from Mr. Kearse's resentencing—joined by Justice Shaw and Justice Pariente

herself—that "'this case is clearly not one of the most aggravated, least mitigated of first-degree murders.'" *Id.* at 695 (quoting *Kearse v. State*, 660 So. 2d at 1136 (Anstead, J., dissenting)). "Regardless of whether *Hurst* applies retroactively to Kearse's case, Justice Anstead's conclusion 'that this is clearly not a death case' is significant." *Id.* (quoting *Kearse v. State*, 770 So. 2d at 1136 (Anstead, J., dissenting).

No rehearing motion was allowed, and the mandate issued on September 17, 2018. On November 16, 2018, Mr. Kearse filed an Application for Sixty-Day Extension of Time in Which to File Petition for Writ of Certiorari to the Florida Supreme Court. Justice Thomas granted Mr. Kearse's application, extending the time in which to file this petition up to and including January 27, 2019. This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Florida Supreme Court's Retroactivity Cutoff of *Hurst* Relief at *Ring v. Arizona* Violates the Eighth and Fourteenth Amendments, Particularly as Applied to the Class of Capital Defendants Whose Sentences Fall Within the Post-*Apprendi* Pre-*Ring* Category.

This Court should grant a writ of certiorari to address whether the Florida Supreme Court's retroactivity cutoff of *Hurst* relief at *Ring v. Arizona*, 530 U.S. 584 (2002), violates the Eighth and Fourteenth Amendments, particularly as applied to the class of capital defendants whose sentences became final in the time period between this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring*.

A. Introduction

In *Ring*, this Court held that a defendant has a Sixth Amendment right to a jury determination of each fact necessary to establish the existence of an aggravating

circumstance before a death sentence can be imposed. 530 U.S. at 609. However, *Ring* was confined to a review of Arizona's death penalty statute and did not comment at large on the constitutionality of every individual state's death penalty scheme—including Florida's. Moreover, following its decision in *Ring*, this Court declined to engage in certiorari review of any petitions from capital defendants raising *Ring*-based claims with respect to Florida's system. Likewise, the Florida Supreme Court repeatedly denied relief in cases raising *Ring*-based challenges, steadfastly clinging to its determination that it was not within its province to evaluate its own prior precedents upholding the constitutionality of Florida's death penalty scheme. *See, e.g.*, *King v. Moore*, 831 So. 2d 143 (Fla. 2002); *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002).

Roughly fourteen years later, this Court in *Hurst v. Florida* held that Florida's capital sentencing scheme was unconstitutional under the Sixth Amendment because it permitted a judge—not a jury—to make the requisite findings of fact necessary for the imposition of death. 136 S. Ct. 616, 619 (2016) (noting that "[a] jury's mere recommendation is not enough"). In doing so, this Court stated that its prior decision in *Ring* applied with equal force to Florida's capital sentencing scheme. *Id.* at 621-22. Because Florida could not impose death based on judicial fact finding, this Court then remanded to the Florida Supreme Court for further proceedings not inconsistent with its opinion. *Id.* at 624.

On remand, the Florida Supreme Court construed this Court's decision in *Hurst v. Florida* to mean "that all the critical findings necessary before the trial court

may consider imposing a sentence of death must be found unanimously by [a] jury." *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016). The court also held that "based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, . . . in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous." *Id.* In extending this Court's holding in *Hurst v. Florida* to provide for juror unanimity, the Florida Supreme Court noted that it was doing so in light of the recognized need for heightened reliability in capital cases because "death is different." *Id.* at 59.

Following *Hurst v. State*, the Florida Supreme Court issued decisions in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and *Asay v. State*, 210 So. 3d 1 (Fla. 2016), addressing the issue of whether the *Hurst* decisions would apply retroactively. In both *Mosley* and *Asay*, the court examined the retroactivity question under its *Witt* analysis[4] and subsequently crafted a nontraditional approach utilizing a bright-line cutoff date. As a result, the Florida Supreme Court divided capital defendants into two classes—those whose cases became final prior to this Court's decision in *Ring* and those whose cases became final after *Ring*. *Mosley*, 209 So. 3d at 1283; *Asay*, 210 So. 3d at 21-22. In deciding that *Ring* would be the appropriate cutoff date, the Florida Supreme Court reasoned that it was not until *Hurst v. Florida* that this Court ultimately determined that *Ring* was applicable to Florida's capital sentencing

[4] *See Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980) (applying the pre-*Teague* three-factor analysis found in *Linkletter v. Walker*, 381 U.S. 618 (1965), and *Stovall v. Deno*, 388 U.S. 293 (1967)).

scheme. *Mosley*, 209 So. 3d at 1238. However, the Florida Supreme Court did not address the issue as to whether the sentences of those defendants who were sentenced to death under Florida's unconstitutional sentencing scheme pre-*Ring* violated the Eighth Amendment under its holding in *Hurst v. State*.[5]

After its decisions in *Asay* and *Mosley*, the Florida Supreme Court reaffirmed its partial retroactivity approach to the *Hurst* decisions and its utilization of the June 24, 2002, *Ring* decision as the cutoff date. *See Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). Following its decision in *Hitchcock*, the Florida Supreme Court summarily denied relief in a number of pre-*Ring* cases, including Mr. Kearse's, after engaging in a truncated show-cause process on appeal. By doing so, the Florida Supreme Court has failed to conduct any analysis concerning the constitutionality of its partial retroactivity approach to the *Hurst* decisions under the Eighth Amendment.

Moreover, through adopting a nontraditional approach to retroactivity, the Florida Supreme Court has crafted a system that disparately treats similarly situated death-sentenced prisoners—all of whom were convicted and sentenced under the same unconstitutional capital sentencing scheme invalidated by this Court in *Hurst v. Florida*. Despite this fact, the Florida Supreme Court has held steadfast in

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[5] Despite failing to address the Eighth Amendment implications of imposing a partial retroactivity approach, both Justice Pariente and Justice Perry writing in dissent noted the inherent Eighth Amendment implications of creating such an approach, arguing that doing so violated notions of fundamental fairness and the Eighth Amendment's prohibition against the arbitrary and capricious imposition of the death penalty to similarly situated defendants. *Asay*, 210 So. 3d at 36 (Pariente, J., concurring in part and dissenting in part); *Asay*, 210 So. 3d at 37-38 (Perry, J., dissenting).

its partial retroactivity approach and routinely denied relief to every capital defendant in Florida with a pre-*Ring* finality date.

Mr. Kearse's petition arises from this nontraditional retroactivity approach that the Florida Supreme Court has employed because even though he was sentenced to death under the same unconstitutional sentencing scheme that was at issue in *Hurst v. Florida*, he was denied relief by the Florida Supreme Court. Specifically, the Florida Supreme Court has failed to grant relief to Mr. Kearse—or any other similarly situated death-sentenced prisoner—whose sentence became final in the short time period between this Court's decisions in *Apprendi* and *Ring*. The Florida Supreme Court's partial retroactivity framework that denies *Hurst* relief to all death sentences decided between *Apprendi* and *Ring*—even though *Apprendi* was the foundation for this Court's decision in *Ring* and subsequently *Hurst*—is in error. Furthermore, it is inconsistent with the Eighth Amendment's prohibition against the arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's Equal Protection and Due Process Clauses.

The Eighth Amendment requires that the death penalty be applied consistently or not at all. *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972). By denying *Hurst* relief to Mr. Kearse and other similarly situated capital defendants whose death sentences became final after this Court's decision in *Apprendi* but before *Ring*, the Florida Supreme Court has acted in a manner that is both cruel and unusual and prohibited by the Eighth Amendment. The court's retroactivity cutoff at *Ring* also injects a level of arbitrariness far exceeding that which is permissible under the

principles set forth in this Court's traditional retroactivity jurisprudence.

The Florida Supreme Court's bright-line retroactivity cutoff for *Hurst* claims presents this Court with yet another case where capital punishment is being applied in an arbitrary and capricious manner in Florida. *See, e.g.*, *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (overturning Florida's bright-line rule barring relief in Florida cases where the jury was not instructed that it could consider non-statutory mitigating evidence in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978)); *Hall v. Florida*, 572 U.S. 701 (2014) (finding Florida's use of a bright-line IQ testing cutoff for purposes of determining intellectual disability violated *Atkins v. Virginia*, 536 U.S. 204 (2002)). In implementing a partial retroactivity approach to the availability of *Hurst* relief, the Florida Supreme Court has once again created a framework that raises grave concerns as to the arbitrary and capricious manner with which the State of Florida imposes the death penalty. This Court should grant certiorari review to address the constitutional ramifications stemming from the Florida Supreme Court's partial retroactivity approach before any more executions take place.

B. The Florida Supreme Court's partial retroactivity approach violates the Eighth Amendment prohibition against the arbitrary and capricious imposition of capital punishment.

This Court has on many occasions upheld nontraditional retroactivity rules that deny defendants the benefit of decisions announcing new constitutional rules of law because doing so serves the legitimate purpose of protecting a state's interest in the finality of criminal convictions. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 309 (1989). Such rules are born of the pragmatic necessity inherent in the judicial process, and this Court has found them constitutional despite the fact that in some instances they

result in unequal and disparate treatment. However, those rules are still bound by constitutional restraints.

In capital cases, the Eighth Amendment demands that states must administer the death penalty in a manner capable of rationally distinguishing between those for whom death is an appropriate sentence and those for whom it is not. *Spaziano v. Florida*, 468 U.S. 447, 460 (1984), *overruled on other grounds by Hurst v. Florida*, 136 S. Ct. 616 (2016). Where the death penalty is "so wantonly and so freakishly imposed" such that it is arbitrary and capricious, it violates the Eighth Amendment's prohibition against cruel and unusual punishment. *Furman*, 408 U.S. at 310 (Stewart, J., concurring). Post-*Furman*, this Court has repeatedly held that the Eighth Amendment requires consistency and uniformity in the application of death sentences for the purposes of ensuring reliability and fundamental fairness. *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). This heightened need for reliability stems from the gravity and finality that accompanies a death sentence and the understanding that "death is different." *McClesky v. Kemp*, 481 U.S. 279 (1987). Moreover, the Fourteenth Amendment right to equal protection also requires that the law treat similarly those defendants who have committed the same quality of offense. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). States do not have unfettered discretion to arbitrarily create classes of condemned prisoners.

The Florida Supreme Court's decisions in *Asay* and *Mosley* creating a partial retroactivity approach to *Hurst* relief offend those constitutional restraints. Through

instituting a rigid dividing line for retroactive application of the *Hurst* decisions at the date of this Court's decision in *Ring*, the Florida Supreme Court has proffered no justifiable explanation that does not contravene the Eighth and Fourteenth Amendments. Moreover, in fashioning its partial retroactivity framework, the court has created a system under which it is retroactively granting *Hurst* relief to some death-sentenced inmates with longstanding final convictions, while also denying retroactive relief to others whose convictions are equally longstanding.[6] Such disparate treatment of similarly situated prisoners completely ignores this Court's mandate in *Griffith v. Kentucky* that justice should be administered with an even hand. 479 U.S. 314, 327-28 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state, or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."). It also infects Florida's death penalty regime with an intolerable degree of arbitrariness far exceeding the level permitted by this Court's retroactivity jurisprudence.[7]

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[6] *See, e.g.*, *Taylor v. State*, No. SC18-520, 2018 WL 6695985, at *11-12 (Fla. Dec. 20, 2018) (Pariente, J., concurring in result) (discussing how "Taylor's case is a clear example of the unconstitutional arbitrariness caused by the bright line [the Florida Supreme Court] created for *Hurst* retroactivity" because Taylor and his codefendant were both convicted of first-degree murder and sentenced to death based on non-unanimous jury recommendations for the same 1990 homicide but only his codefendant will receive a new penalty phase).

[7] *See Desist v. United States*, 394 U.S. 244, 258-259 (1969) (Harlan, J., dissenting) ("When another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly

The rationale provided by the Florida Supreme Court as to why it selected *Ring* at the cutoff point for retroactivity does nothing to justify its arbitrariness. In attempting to explain its choice, the court reasoned in *Mosley* that "[b]ecause Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst* retroactively to that time. 209 So. 3d at 1280. That explanation, however, is flawed because the Florida Supreme Court overlooks the fact that *Ring* did not invalidate Florida's capital sentencing scheme—it solely invalidated Arizona's. While this Court did make note of and comparisons to Florida's capital sentencing scheme in *Ring*, that opinion neither explicitly nor implicitly rendered Florida's capital sentencing scheme unconstitutional. Such a rationale also fails to comprehend that Florida's capital sentencing scheme was unconstitutional even before *Ring* because the Sixth Amendment requirement that a jury find each fact necessary to impose death always existed. *Ring* did not create that right but rather recognized that Arizona's capital sentencing scheme had failed to provide for it.

The Florida Supreme Court's purported justification does nothing to explain how using *Ring* as the cutoff point aids in the fair application of the death penalty under Florida's capital sentencing scheme. Most critically, it does nothing to address the arbitrariness that results from providing the benefit of the *Hurst* decisions to some death-sentenced inmates but not to others when there are no meaningful

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situated defendants those who along will receive the benefit of a 'new' rule of constitutional law.").

differences other than the dates their convictions and sentences became final. Such a lack of justification is especially troublesome when also considering the fact that every death-sentenced prisoner in Florida was sentenced under the same unconstitutional sentencing scheme.

As noted above, Florida's capital sentencing scheme did not become unconstitutional when *Ring* was decided. This Court's decision in *Hurst v. Florida* made abundantly clear that it was always unconstitutional—regardless of *Ring's* decision date. That is precisely the point that the Florida Supreme Court fails to acknowledge. Likewise, the court has failed to acknowledge that the foundational precedent for both *Ring* and *Hurst* was this Court's decision in *Apprendi*. This Court expressly stated in *Hurst* itself that it was *Apprendi*—not *Ring*—that recognized that the Sixth Amendment requires a finding of fact, beyond a reasonable doubt, by a jury of any element of an offense that increases a defendant's maximum sentence. *Hurst v. Florida*, 136 S. Ct. at 621. Thus, this Court's decision in *Ring* did not announce that rule. Rather, this Court in *Ring* merely applied its holding in *Apprendi* to conclude that Mr. Ring's sentence of death under Arizona's capital sentencing scheme violated his Sixth Amendment rights because a judge's findings had been responsible for exposing him to a greater punishment than that which was authorized by the jury's verdict. *See id.*

This Court's decision in *Hurst v. Florida* was simply an extension of that rule of law because just as this Court did in *Ring*, it applied its holding in *Apprendi* to Florida's capital sentencing scheme and found it unconstitutional. In doing so, this

Court stated:

> *Spaziano* [*v. Florida*, 468 U.S. 447 (1984),] and *Hildwin* [*v. Florida*, 409 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 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.

Id. at 623 (emphasis added). Thus, this Court's decision in *Hurst v. Florida* made clear that its prior holding in *Ring* relied on *Apprendi* when clarifying the constitutional guarantees in capital cases. Consequently, regardless of the fact that Mr. Kearse's case became final prior to *Ring*, that date of finality should not dictate his entitlement to relief under *Hurst* where the underpinnings of this Court's holding in *Hurst* derive from *Apprendi*—not *Ring*. Yet, under the Florida Supreme Court's partial retroactivity framework, petitioners like Mr. Kearse are arbitrarily being denied *Hurst* relief. Absent any explanation for this arbitrary line drawing, the Florida Supreme Court's approach violates the Eighth Amendment.

Further underscoring the arbitrariness that results from the Florida Supreme Court's partial retroactivity approach is the recognition that the date of finality of a particular capital defendant's sentence is dependent upon a number of variable factors that are entirely random and not uniform. Experience has already shown that one's finality date in relation to this Court's decision in *Ring* has at times depended on whether there were delays in transmitting the record on appeal to the Florida

Supreme Court;[8] whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with the court's summer recess; how long the assigned Justice took to submit the opinion for release;[9] whether an extension was sought for a rehearing motion and whether such 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; and how long a certiorari petition remained pending before this Court. Given these entirely random factors, a system that applies *Hurst* retroactively to some similarly situated capital defendants but not others cannot be described as anything but arbitrary.

Finally, the Florida Supreme Court's rationale utterly ignores the fact that its decision in *Hurst v. State*—unlike this Court's decision in *Ring*—was based upon the Eighth Amendment; thus, it is impossible for *Ring*, which was predicated upon the Sixth Amendment, to have prefigured that case. Moreover, "[r]eliability is the linchpin of Eighth Amendment jurisprudence," *Hitchcock*, 226 So. 3d at 220 (Pariente, J., dissenting), and "[a] reliable penalty phase proceeding requires that 'the penalty phase jury must be unanimous in making the critical findings and

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[8] *See, e.g., Lugo v. State*, 845 So. 2d 74 (Fla. 2003) (two-year delay between the time defense counsel filed a notice of appeal and the record on appeal being transmitted to the Florida Supreme Court, almost certainly resulting in the direct appeal being decided post-*Ring*).

[9] *Compare Booker v. State*, 773 So. 2d 1079 (Fla. 2000) (opinion issued within one year after briefing completed before *Ring*), *with Hall v. State*, 201 So. 3d 628 (Fla. 2016) (opinion issued twenty-three months after the last brief was submitted).

recommendation that are necessary before a sentence of death may be considered by the judge or imposed." *Hurst v. State*, 202 So. 3d at 59. *See Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (White, J., concurring in judgment) (quoting *Gardner v. Florida*, 430 U.S. 349, 363-64 (1977)) ("The fundamental respect for unanimity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case.").

Hurst v. State therefore demonstrates that Mr. Kearse's death sentence lacks the heightened reliability demanded by the Eighth Amendment. Although Mr. Kearse's resentencing jury voted twelve-to-zero in favor of death, the jury did not return a verdict making any actual findings of fact. Thus, "[e]ven though the jury unanimously recommended the death penalty, whether the jury unanimously found each aggravating factor remains unknown." *Truehill v. State*, 211 So. 3d 930, 961 (Fla. 2017) (Quince, J., dissenting). Further, a final twelve-to-zero 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. *See Wood v. State*, 209 So. 3d 1217 (Fla. 2017). *Hurst v. State* made exactly this point:

> Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

202 So. 3d at 69.

A unanimous recommendation could also mean the jurors did not attend to the gravity of their task since they were instructed that the judge could impose death regardless of what they recommended. As this Court explained in *Caldwell v. Mississippi*, jurors must feel the full weight of their responsibility of sentencing an individual to death. 472 U.S. 320, 341 (1985) ("This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'"). In Mr. Kearse's case, the trial court repeatedly instructed the jury that its role was merely advisory, that it would only be giving a "recommendation" as to the sentence, and that the final decision as to punishment "rest[ed] solely with the . . . [c]ourt." (R2 T. 1137-38). These instructions were repeated throughout the trial by the court and the prosecutor.

The likelihood of one or more jurors voting for a life sentence increases when the jury is told that it must unanimously recommend death, that the judge cannot override the jury's recommendation for life, and that each juror has the ability to preclude a death sentence simply by refusing to agree to a death recommendation. *See Caldwell*, 472 U.S. at 330 ("In the capital sentencing context, there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."). Mr. Kearse's jury did not make any findings of fact at all regarding the elements necessary to allow for the imposition of a death

sentence. Further, even if a properly instructed jury made the requisite findings unanimously to allow for a death sentence, one juror may have precluded the imposition of a death sentence simply by voting for mercy.

As the Florida Supreme Court indicated in *Mosley*, the *Witt*[10] analysis in the context of *Hurst v. State* requires courts to consider the need to cure "individual injustice." The layers of unreliability and errors that permeate the record at Mr. Kearse's penalty phase and throughout his entire trial demonstrate an individual injustice in need of a cure. Furthermore, the fact that multiple members of the Florida Supreme Court have consistently recognized that "'this case is clearly not one of the most aggravated, least mitigated of first-degree murders'" is of paramount significance. *Kearse v. State*, 252 So. 3d 693, 695 (Fla. 2018) (Pariente, J., concurring in result) (quoting *Kearse v. State*, 770 660 So. 2d 1119, 1136 (Fla. 2000) (Anstead, J., dissenting)). Recognition that "this case is clearly not a death case" should warrant relief. *Kearse v. State*, 770 So. 2d at 1136 (Anstead, J., dissenting).

To date, the Florida Supreme Court has never provided an explanation as to why it drew a line at *Ring* instead of *Apprendi* for the purpose of retroactive application of the *Hurst* decisions. Nevertheless, under the court's partial retroactivity framework, prisoners like Mr. Kearse are being arbitrarily left out of *Hurst's* application of *Apprendi* to Florida's capital sentencing scheme. Absent an explanation from the court that is not arbitrary, Florida's partial retroactivity approach cannot be squared with the Eighth Amendment.

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[10] *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980).

C. The Florida Supreme Court's partial retroactivity cutoff at *Ring* exceeds the limits of the rights guaranteed by the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

The arbitrariness with which the *Ring*-based cutoff infects Florida's capital sentencing scheme also violates both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. The Florida Supreme Court's explanation for its partial retroactivity framework does not provide any justifiable basis for separating Florida's death-sentenced prisoners into pre-*Ring* and post-*Ring* categories. 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." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). Under the Fourteenth Amendment, state laws that impinge upon fundamental rights must be reviewed under strict scrutiny. *See, e.g.*, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (applying strict scrutiny and invalidating Oklahoma's sterilization law for applying to some theft offenses and not others because "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 uniquely harsh form of punishment).

This Court's jurisprudence is clear that capital defendants have a fundamental right to a reliable determination of their sentences. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Thus, when a state draws a line between those capital defendants who will receive the benefit of a fundamental right afforded to every defendant—specifically the right to unanimous fact finding by a jury—and those who will not be

provided that right, the justification for that line drawing must survive strict scrutiny. The denial of retroactive application of the *Hurst* decisions to Mr. Kearse on the ground that his sentence became final prior to the June 24, 2002, decision in *Ring* falls well short of that threshold and thereby violates his right to equal protection of the law. The equal protection violation is even more apparent here where Mr. Kearse's death sentence became final in the short time period between this Court's decisions in *Apprendi* and *Ring*.

Additionally, the denial of the benefit of Florida's new post-*Hurst* capital sentencing scheme to "pre-*Ring*" prisoners like Mr. Kearse simultaneously violates his right to due process. This is because once a state requires certain sentencing procedures, it creates a liberty interest in those procedures that is protected and guaranteed by the Fourteenth Amendment. *See, e.g.*, *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (recognizing a due process interest in a state-created right to direct appeal); *Ford v. Wainwright*, 447 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (recognizing a liberty interest in meaningful state proceedings to adjudicate competency to be executed). While the right to a particular procedure may be created by state law, the subsequent violation of that right implicates federal constitutional concerns. *See Evitts*, 469 U.S. at 393 (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (noting that state-created procedure that are considered "'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,'" must comport with due process). Moreover, it has been repeatedly acknowledged that state-created death penalty procedures vest life and liberty interests in capital defendants that are

protected by due process. *See, e.g.*, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288-89 (1998); *see also Ford*, 477 U.S. at 427-31 (O'Connor, J., concurring).

That the Florida Supreme Court's partial retroactivity approach raises serious concerns about its constitutionality has not been lost on that court's members. Several members of the court have even acknowledged that partial retroactivity does not survive strict scrutiny. For instance, Justice Pariente noted in *Asay* that:

> The majority's conclusion results in an unintended arbitrariness as to who receives relief depending on when the defendant was sentenced, or in some cases, resentenced . . . 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.

210 So. 3d at 36 (Pariente, J., concurring in part and dissenting in part). Similarly, Justice Perry also came to the conclusion in *Asay* that "the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two groups of similarly situated persons." *Id.* at 37 (Perry, J., dissenting). Justice Perry additionally correctly recognized that as a result of partial retroactive application, there will be defendants who committed equally violent crimes, but whose death sentences became final mere days apart, and they will be treated differently without any justification. *Id.* Because even members of the Florida Supreme Court maintain strong reservations as to the disparate treatment resulting from partial retroactive application of the *Hurst* decisions, certiorari review is warranted.

II. The Florida Supreme Court's Partial Retroactivity Approach Violates the Supremacy Clause of the United States Constitution.

In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), this Court declared that the Supremacy Clause of the United States Constitution requires state courts to apply substantive constitutional rules retroactively as a matter of federal law, notwithstanding any separate state-law analysis. *See id.* at 729 ("[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). Consequently, it is clear that "[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, [s]tates cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id.* at 731-32.

When analyzing whether a new rule is substantive or procedural, this Court has held that it is imperative to consider "the function of the rule. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). In *Welch*, this Court addressed the retroactivity of the constitutional rule it articulated in *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015), invalidating a federal statute that allowed sentencing enhancement. *Johnson*, 135 S. Ct. at 2556. *Welch* held that *Johnson*'s rule 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. In its analysis, this 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,"—whether the new rule alters only the procedures used to obtain the conviction or instead alters the class of persons the law punishes. *Id.* at 1266.

This Court's reasoning in *Welch* applies in the *Hurst* context. In *Hurst v. State*, the new Eighth Amendment rule at issue requires the jury to unanimously make three findings beyond a reasonable doubt: (1) the existence of each aggravating circumstance; (2) the aggravating circumstances found are together "sufficient" to justify imposition of the death penalty; and (3) the particular aggravating circumstances found collectively outweigh the mitigation presented in the case. 202 So. 3d at 57. Upon examining the function of the unanimity rule, its substantive nature is apparent from the court's ensuing explanation that unanimity is necessary to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders and to ensure that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Id.* at 60-61. According to the Florida Supreme Court, the function of the unanimity goal is also to ensure that Florida's death-sentencing scheme complies with the Eighth Amendment and "achieve[s] 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, the rule is therefore substantive because its very purpose is to exclude certain individuals from the class of first-degree murders upon which the State may impose death.

Also instructive in this context is *Montgomery v. Louisiana*, in which this Court analyzed the rule it announced in *Miller v. Alabama*, 567 U.S. 460 (2012)[11], and found it to be substantive even though it had a procedural component to it. *Montgomery*, 136 S. Ct. 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 sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* Despite *Miller's* "procedural" requirements, this Court in its analysis in *Montgomery* explicitly cautioned against "conflate[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulates only the manner of determining the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 734-35 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). Specifically, this Court noted that "[t]here are instances in which a substantive change in law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish." *Id.* at 735. Those 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 *Roper* and *Graham*." *Id.* at 734.

[11] In *Miller*, this Court held that the imposition of mandatory sentences of life without parole for juveniles violates the Eighth Amendment.

Hurst v. Florida explained that under Florida law, there are three factual predicates necessary for the imposition of a death sentence that must be found by a jury: (1) the existence of particular aggravating circumstances; (2) the particular aggravating circumstances found are "sufficient" to justify the death penalty; and (3) the particular aggravating circumstances together outweigh the mitigation in the case. Those decisions are no less substantive than the decision as to whether a juvenile is incorrigible. *See id.* (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 in the *Hurst* context amount to an "instance[] in which a substantive change in law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish." *Id.* at 735. Any attempt to distinguish between the rules in these cases is a matter of semantics and an attempt to elevate form over substance.

This Court's decision in *Schriro v. Summerlin*, 542 U.S. 348, 384 (2004), does not undermine the retroactive application of the *Hurst* decisions. *Summerlin*, which declined to apply *Ring* retroactively in a federal case, is not dispositive of the retroactivity question in the *Hurst* context. *Summerlin* did not involve the review of a death penalty statute like Florida's, which required the jury to not only conduct fact finding regarding the existence of aggravators, but also as to whether the aggravators found to exist were sufficient to impose death. Most significantly, this Court noted in *Summerlin* that if the Court itself decided to make "a certain fact essential to the

death penalty," that change in law "would be substantive." *Id.* at 354. *Hurst v. Florida* embodied such a change where this Court found it 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 citations omitted). Moreover, *Hurst*, unlike *Ring*, also addressed the proof beyond a reasonable doubt standard that this Court has always held to be substantive in nature. *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").

Consequently, Mr. Kearse has a federal right to retroactivity of the *Hurst* decisions. As illustrated above, where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state postconviction court to apply it retroactively. *See Montgomery*, 136 S. Ct. at 731-32. Therefore, because the outcome-determinative constitutional rights articulated in *Hurst v. Florida* and *Hurst v. State* are substantive, the Florida Supreme Court cannot foreclose their retroactive application to Mr. Kearse's case. This Court should grant

Mr. Kearse's petition to rectify the Florida Supreme Court's infringement of Mr. Kearse's constitutional rights.

CONCLUSION

The Florida Supreme Court has repeatedly held that *Hurst v. Florida* and *Hurst v. State* apply retroactively. However, rather than retroactively apply those decisions evenly to all capital defendants who were previously sentenced under Florida's unconstitutional scheme, the Florida Supreme Court has crafted an unworkable rule of partial retroactivity that does not comport with the Eighth Amendment prohibition against the arbitrary imposition of the death penalty or the Fourteenth Amendment rights to Due Process and Equal Protection. Moreover, the Florida Supreme Court's approach equally offends the Supremacy Clause of the United States Constitution since the Hurst decisions constitute substantive changes in law that require retroactive application.

As such, this Court should grant Mr. Kearse's Petition for a Writ of Certiorari and review the Florida Supreme Court's decision.

Respectfully submitted,

PAUL KALIL
Counsel of Record
Florida Bar No. 174114
Assistant CCRC–South
Capital Collateral Regional Counsel – South
1 East Broward Boulevard, Suite 444
Fort Lauderdale, Florida 33301
(954) 713–1284
kalilp@ccsr.state.fl.us

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