No. _____

IN THE

Supreme Court of the United States

MICHAEL DUANE ZACK, III,

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

QUESTION 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 was final 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?

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Petitioner Michael Duane Zack, III, 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 *Zack v. State*, No. 18-243, 2018 WL 4784204 (Oct. 4, 2018), and is attached in the Appendix (App.) at 1.

JURISDICTION

The judgment of the Florida Supreme Court was entered on October 4, 2018. On December 11, 2018, Justice Thomas granted an extension of time to file a petition for certiorari to February 18, 2019. 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, Michael Duane Zack, III, 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 Zack

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 Zack'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*, 139 S.Ct. 27 (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.

Zack's case presents an 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 an 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.

Zack'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 Zack'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. Zack'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.

II. Factual and Procedural Background[1]

A. Trial, Conviction, and Death Sentence of Michael Zack

Zack was indicted on June 25, 1996, for one count of first-degree murder for the death of Ravonne Kennedy Smith, one count of robbery, and one count of sexual battery. (R. 1-3). Zack pled not guilty to the charges.

[1] The abbreviation "T." will be used to refer to Zack's trial, and "R." will be used to refer to the record on appeal as compiled for Zack's direct appeal in *Zack v. State*, 753 So. 2d 9 (Fla. 2000).

Zack's capital trial commenced on September 8, 1997 and lasted approximately six days. (T. 1-1522). His trial attorney argued that Zack did not have the level of intent required for first degree premeditated murder. (T. 197). In support of this defense, Zack argued: his high level of intoxication on the day of the murder; the chaotic and disorganized crime scene; Zack's brain damage caused by fetal alcohol syndrome and alcohol poisoning at the age of three; and his posttraumatic stress disorder and chronic depression which originated from childhood abuse and torture at the hands of his stepfather, coupled with his mother's axe murder (T. 1418-42).

On September 15, 1997, the jury returned guilty verdicts on all of the charges. (T. 1521-22; R. 419-20).

Zack's penalty phase was then 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 began on October 14, 1997, and lasted approximately four days, whereby the defense presented additional evidence, including: Zack's brain damage and dysfunction; his mental health diagnoses; his history of substance abuse; and the ongoing physical, mental, and sexual abuse he suffered as a child. (T. 1588-2117). The "advisory" jury recommended death by a vote of 11 to 1. (T. 2117; R. 792). The jury did not make findings of fact or otherwise specify the factual basis for its recommendation.

On November 24, 1997, the trial court sentenced Zack to death for one count of first degree murder. (R. 852-75; T. 2117). The trial judge, not the jury, 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 six aggravating factors and gave them all great weight, including: (1) the murder was committed while Zack had been previously convicted of a felony and was under sentence of felony probation; (2) the murder was committed while Zack was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit the crime of robbery or sexual battery or burglary; (3) the murder was committed for the purpose of avoiding or preventing a lawful arrest or detention for the crimes for which he was ultimately convicted; (4) the murder was committed for financial gain; (5) the murder was especially heinous, atrocious, and cruel; and (6) the murder was committed in a cold, calculated, and premeditated manner. (R. 853-54; 860-66; 873).

Despite the mitigating evidence offered by Zack, the judge found only four mitigating factors, including: (1) the crime was committed while Zack was under the influence of extreme mental or emotional disturbance; (2) Zack did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law; (3) Zack acted under extreme duress; and (4) the non-statutory mitigating factors of remorse, voluntary confession, and good conduct while incarcerated. The trial court found that these mitigating circumstances were entitled to very little weight. (R. 854-55; 866-73).

The trial court further found that the aggravators were "sufficient" for the death penalty and not outweighed by mitigation. Based on his fact-finding, the judge sentenced Zack to death. (R. 855-56; 873).

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

Zack's conviction and death sentence were affirmed by the Florida Supreme Court on direct appeal on January 6, 2000. *Zack v. State*, 753 So. 2d 9 (Fla. 2000).

Subsequently, on June 26, 2000, 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. *Apprendi*, 530 U.S. at 90.

Zack's death sentence became "final" on October 2, 2000 – after *Apprendi* was decided – when this Court denied certiorari review. *Zack v. Florida*, 531 U.S. 858 (2000).

Less than two years later, on June 24, 2002, 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.

C. State and Federal Collateral Proceedings

After his sentencing, Zack unsuccessfully sought state postconviction relief. *See Zack v. State*, 911 So. 2d 1190 (Fla. 2005); *Zack v. Crosby*, 918 So. 2d 240 (Fla. 2005); *Zack v. State*, 228 So.3d 41 (Fla. 2017); *Zack v. Florida*, 138 S.Ct. 2653 (2018).

Zack's federal habeas petition and subsequent appeals have all been denied as well. *See Zack v. Crosby*, 607 F.Supp. 2d 1291 (N.D. Fla. 2008); *Zack v. Tucker*, 666

F.3d 1265 (11th Cir. 2012); *Zack v. Tucker*, 678 F.3d 1203 (11th Cir. 2012); *Zack v. Tucker*, 704 F.3d 917 (11th Cir. 2013); *Zack v. Crews*, 571 U.S. 863 (2013); *Zack v. Sec'y, Florida Dept. of Corr.*, 721 Fed. Appx. 918 (11th Cir. 2018); *Zack v. Jones*, 139 S.Ct. 322 (2018).

D. *Hurst* Litigation and Decision Below

On January 11, 2017, Zack filed a state postconviction motion under Fla. R. Crim. P. 3.851 in the Escambia County Circuit Court, seeking relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016). In this motion, Zack argued that he was entitled to *Hurst* relief, and noted that the result in *Hurst* was premised upon *Apprendi*; that it was an application of *Apprendi* to Florida's capital sentencing statute. The trial court summarily denied Zack's motion on January 16, 2018.

Zack filed a timely appeal, again arguing that he should receive *Hurst* relief under *Apprendi*. On October 4, 2018, the Florida Supreme Court issued an opinion, affirming the circuit court's order denying Zack's claims. *Zack v. State*, No. 18-243, 2018 WL 4784204 (Oct. 4, 2018). The Court's opinion stated that "as a matter of law, Zack is not entitled to relief." *Id.*, at *2.

In support of this decision, the Florida Supreme Court cited in part to *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017). Although Mr. Hitchcock's death sentence, like Zack'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. Likewise, the Florida Supreme Court failed to address Zack'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*, 139 S.Ct. at 27.

However, Justice Breyer and this Court have yet to recognize the significant differences 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 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*. 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 has 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*. 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, Zack'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. *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. This Court has not addressed 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 just *any* point in time emanates logically from the Court's Eighth and Fourteenth Amendment jurisprudence.

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 Zack'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 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.[2] But unlike the traditional retroactivity analysis contemplated by this Court's precedents, the Florida Supreme Court divided death row 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

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[2] 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).

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 justified 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*.

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, and 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 Zack, 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 Zack, 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. 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.

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*.

Zack's death sentence became final after this Court decided *Apprendi*. Yet, under the Florida Supreme Court's *Ring* cutoff, those like Zack 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, 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.

In one notable example, the Florida Supreme Court affirmed Gary Bowles' and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173, 1184 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both prisoners petitioned for a writ of certiorari in this Court. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven

(7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). The Florida Supreme Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card v. Jones*, 219 So. 3d 47 (Fla. 2017). However, Mr. Bowles, whose case was decided on direct appeal on *the same day* as Mr. Card's, falls on the other side of the Florida Supreme Court's current retroactivity cutoff. His *Hurst* claim was summarily denied by the Florida Supreme Court. *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 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 Zack, but who was later resentenced to death after *Ring*, would receive *Hurst* relief while Zack 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.[3]

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.[4] Forensic disciplines that

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[3] *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.

[4] *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 have been widely discredited following numerous exonerations.[5]

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.[6] Limited information being provided to juries was

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[5] *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.").

[6] 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). *See 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.[7] 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.[8] As a result of the poor lawyering, Florida has had 27 exonerations since 1976—more than any other state—all but five of which involved convictions and death sentences imposed before 2002.[9] Florida did not have minimal standards for capital defense counsel until 1999—after

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[7] *See, e.g.*, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE FLORIDA DEATH PENALTY ASSESSMENT REPORT, AN ANALYSIS OF FLORIDA'S DEATH PENALTY LAWS, PROCEDURES, AND PRACTICES, American Bar Association (2006) [herein "ABA Florida Report"]. The 462 page report concludes that Florida leads the nation in death-row exonerations, inadequate compensation for conflict trial counsel in death penalty cases, lack of qualified and properly monitored capital collateral registry counsel, inadequate compensation for capital collateral registry attorneys, significant juror confusion, lack of unanimity in jury's sentencing decision, the practice of judicial override, lack of transparency in the clemency process, racial disparities in capital sentencing, geographic disparities in capital sentencing, and death sentences imposed on people with severe mental disability. *Id.* at iv-ix. The report also "caution[s] that their harms are cumulative." *Id.* at iii.

[8] 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.

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

Zack's trial and the trials of almost every other death row prisoner being denied *Hurst* relief.[10]

The "advisory" jury instructions were also so confusing that jurors consistently reported that they did not understand their role.[11] If the advisory jury recommended life, judges—who must run for election and reelection in Florida—could impose the death penalty anyway.[12] In fact, the Florida Supreme Court has relied on the cutoff and summarily denied *Hurst* relief where the defendant was sentenced to death by a

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10 *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).

11 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.").

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

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).

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

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

CONCLUSION

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

Respectfully submitted,

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