No. _____

IN THE

Supreme Court of the United States

RANDALL SCOTT JONES,

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

DEATH PENALTY CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does the Florida Supreme Court's partial retroactivity formula, designed to limit the class of condemned prisoners obtaining a life-or-death jury determination pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), violate the Eighth and Fourteenth Amendments to the United States Constitution?

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

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner, Randall Scott Jones, 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.

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PETITION FOR A WRIT OF CERTIORARI

Randall Scott Jones respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court.

OPINIONS BELOW

This is a petition regarding the errors of the Florida Supreme Court in denying Mr. Jones's claim under *Hurst v. Florida*, 136 S. Ct. 616 (2016). The opinion at issue is reproduced at *Appendix A* and is reported at *Jones v. State*, 259 So. 3d 803 (Fla. 2018). The unpublished order denying Mr. Jones's *Hurst* claim from the Seventh Judicial Circuit Court in and for Putnam County is reproduced at *Appendix B*.

JURISDICTION

The opinion of the Florida Supreme Court was entered on December 13, 2018. *See Appendix A*. No motion for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY 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 of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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:

> [N]or shall any State deprive any person of life, liberty, or property, without

> due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

Section 921.141, Florida Statutes (1990), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—" provides, in relevant part:

> (2) ***ADVISORY SENTENCE*** BY THE JURY.—After hearing all the evidence, the jury shall deliberate and ***render an advisory sentence to the court***, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances existed as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
>
> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the ***recommendation of a majority of the jury***, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but ***if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based*** as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Fla. Stat. § 921.141 (1990) (emphasis added).

STATEMENT OF THE CASE

I. Introduction

Petitioner, 50-year-old Randall Scott Jones, has resided in solitary confinement on Florida's death row for over thirty years, despite the fact that 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). Although the Florida Supreme Court concluded that *Hurst* should apply retroactively to dozens of death sentences on collateral review, the Florida Supreme Court decided that *Hurst* should not apply to Mr. Jones's death sentence and dozens of others. This arbitrary decision is based solely on their death sentences becoming final on direct appeal prior to June 24, 2002, the date this Court decided *Ring v. Arizona,* 536 U.S. 584 (2002), invalidating Arizona's capital sentencing scheme. This unprecedented partial retroactivity cannot pass muster under the Eighth Amendment or Fourteenth Amendment.

Accordingly, this Petition arises from the Florida Supreme Court's arbitrary decision to institute this partial retroactivity and grant *Hurst* relief only to prisoners who received non-unanimous jury recommendations and whose death sentences became final post-*Ring*. Mr. Jones and other death row prisoners who also received a non-unanimous jury recommendation and did not receive the constitutional right to a jury determination of their death sentence are denied relief solely due to their death sentences becoming final too early, regardless of whether they previously preserved the issue. The Florida Supreme Court's *Ring*-based retroactivity cutoff prohibits a class of over 150 Florida prisoners from obtaining a jury determination of their death sentences, while requiring that the death sentences of another group of prisoners be vacated on collateral review so that they can receive a jury determination. As these prisoners are similarly situated in every respect other than the date their death sentences became final on direct appeal, this partial retroactivity is inconsistent with the Eighth Amendment's prohibition against the arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection and due process.

The Florida Supreme Court's bright-line retroactivity cutoff for *Hurst* claims is not unusual

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

Despite such a history, the Florida Supreme Court has refused to discuss in any meaningful way—in Mr. Jones's case or in any case—whether its *Ring*-based retroactivity cutoff for *Hurst* claims is inconsistent with the Eighth and Fourteenth Amendments. In addition, the Florida Supreme Court has crafted other problematic rules to further limit the reach of *Hurst* in Florida, including a per se harmless-error rule for prisoners whose advisory jury unanimously recommended the death penalty (*See Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016)), and rules barring relief for prisoners who waived a penalty phase jury or postconviction review prior to the decision in *Hurst* (*See Mullens v. State*, 197 So. 3d 16, 38-40 (Fla. 2016); *see also State v. Silvia*, 235 So. 3d 349, 352-53 (Fla. 2018)).

This Court should resolve the constitutional infirmities with the Florida Supreme Court's *Hurst* retroactivity cutoff. As Mr. Jones has zealously challenged the unconstitutionality of Florida's death penalty statute since 1988, his case highlights the injustice of Florida's current bright-line rule and provides the ideal vehicle for this Court to address Florida's partial

retroactivity scheme. Waiting—as the Court did before ending the Florida Supreme Court's unconstitutional practices in *Hall*, *Hitchcock*, and *Hurst*—would allow the execution of Mr. Jones and dozens of prisoners whose death sentences were obtained in violation of *Hurst*.

II. Factual and Procedural Background

A. Trial and Direct Appeal

Mr. Jones was indicted by the Grand Jury for the Seventh Judicial Circuit Court in and for Putnam County, Florida on August 28, 1987 for two counts of first-degree murder, armed robbery, burglary of a conveyance while armed and/or with assault, shooting or throwing a deadly missile into an occupied vehicle, second-degree grand theft, and sexual battery on July 27, 1987. The guilt phase of Mr. Jones's trial began on March 22, 1988, and the jury found him guilty on all counts, except for second-degree grand theft, on March 24, 1988. Prior to the penalty phase of his trial, Mr. Jones began to challenge the constitutionality of Florida's death penalty scheme.[1] On March 25, 1988, Mr. Jones filed a motion to require the jury to use a special verdict form to unanimously determine the existence of the aggravating circumstances set forth in Fla. Stat. § 921.141, due to the Fifth, Sixth, and Fourteenth Amendments requiring the jury to be the fact finders as to the aggravators because the aggravators are essential elements of the offense. *See Appendix F*. However, the trial court denied the motion. Immediately prior to the penalty phase, trial counsel for Mr. Jones also argued that the jury instructions did not comport with *Caldwell*[2] because the instructions minimized the importance of the jury's role in sentencing, but the trial court also denied that motion. The penalty phase of Mr. Jones's trial was held on March 28, 1988, and the

[1] This same sentencing scheme was held to be unconstitutional by this Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016).

[2] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

jury recommended the death penalty as their advisory sentence by a ***vote of 11 to 1*** the same day.

As an 11-1 recommendation was sufficient to impose the death penalty in Florida until 2016, the court went on to make the findings of fact required to impose a death sentence under Florida law, not the jury. *See Jones v. State*, 569 So. 2d 1234, 1236-37 (Fla. 1990); *see Appendix C*; *see also* Fla. Stat. § 921.141(3) (1987), *invalidated by Hurst*, 136 S. Ct. at 624. On May 3, 1988, after independently finding and weighing the aggravators and mitigators, the trial court sentenced Mr. Jones to death for both counts. The jury did not make any findings of fact or otherwise specify the factual basis for its recommendation of advisory sentence. Mr. Jones appealed his judgment and sentences to the Florida Supreme Court. The Florida Supreme Court denied Mr. Jones's claims "that section 921.141(2), Florida Statutes (1987), and the federal constitution require jurors to use a special verdict form and to unanimously agree upon the existence of the specific aggravating factors applicable in each case" and "that the death penalty statute is unconstitutional because it is arbitrarily applied." *Jones*, 569 So. 2d at 1238. Mr. Jones's convictions for first-degree murder and the convictions for armed robbery, burglary of a conveyance, and shooting into an occupied vehicle were affirmed, but the conviction for sexual battery was reversed. *Id*. at 1241. In addition, the Florida Supreme Court vacated Mr. Jones's sentences of death and granted Mr. Jones a new penalty phase for cumulative errors affecting the penalty phase. *Id*. at 1235, 1240-41; *see Appendix C*.

Prior to his new penalty phase trial, on March 7, 1991, Mr. Jones filed motions challenging the constitutionality of Florida's death penalty statute, requesting that the jury use a special verdict form specifying which aggravating circumstances and which statutory and non-statutory mitigating circumstances were found unanimously, and in light of *Caldwell*, requesting prohibition of any reference to the jury's advisory role. *See Appendix G, H, and I*. The trial court denied all of

the motions and Mr. Jones's new penalty phase took place on March 12-13, 1991. On March 13, 1991, the jury recommended an advisory sentence of death by a ***vote of 10-2***. Not only was the advisory recommendation not unanimous, but Mr. Jones received one less vote for the death penalty than during his previous penalty phase. Mr. Jones was again sentenced to death on May 28, 1991.

After his resentencing, Mr. Jones again appealed his sentences to the Florida Supreme Court, who denied all grounds in a 5-2 decision on December 17, 1992 and denied rehearing on February 17, 1993. *See Jones v. State,* 612 So. 2d 1370 (Fla. 1992); *see Appendix D*. Justices Barkett and Kogan dissented as to the death sentences and would have remanded for a new sentencing determination. Notably, Mr. Jones again challenged "the constitutionality of Florida's death penalty statute and not requiring jurors to use a special verdict form," but the Florida Supreme Court once again denied the claims. *Id.* at 1373. Mr. Jones's petition for a writ of certiorari was denied by this Court on October 4, 1993. *Jones v. Florida,* 510 U.S. 836 (1993).

B. Postconviction

Mr. Jones continued to litigate the constitutionality of Florida's death penalty scheme in his postconviction appeals. Mr. Jones's initial postconviction motion to vacate judgment of convictions and sentences was denied by the circuit court and appealed to the Florida Supreme Court, which denied relief on all claims. *See Jones v. State*, 845 So. 2d 55 (Fla. 2003); *see Appendix E*. Among the claims denied by the Florida Supreme Court were Mr. Jones's claims that "the penalty phase jury instructions impermissibly diminished the jury's role," "the penalty phase jury instructions impermissibly shifted the burden to Jones to prove that death was not the appropriate penalty, and trial counsel was ineffective in litigating the issue," "the trial judge improperly delegated his sentencing authority to the State," and " Florida's death penalty statute is

unconstitutional." *See id*. at 62 n.5. Mr. Jones argued in his state habeas petition that his death sentence was unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), but the Florida Supreme Court denied relief. *See id* at 74; *see also Appendix E*. Notably, Chief Justice Anstead specially concurred to state that he did not concur in the majority's discussion of the *Ring* decision. *Id*. Both the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit denied Mr. Jones relief on his federal habeas petition. *See Jones v. Sec'y, Dept. of Corr.*, 644 F.3d 1206 (11th Cir. 2011).

C. *Hurst* Litigation and Decision Below

On January 12, 2016, this Court issued its opinion in *Hurst v. Florida,* striking down Florida's longstanding capital-sentencing procedures[3] because the statute authorized a judge, rather than a jury, to make the factual findings necessary to impose a death sentence. On remand, the Florida Supreme Court held, as a state constitutional consequence, that a verdict for death could not be rendered without unanimous jury findings of at least one aggravating circumstance and that the finding that the sum of aggravation is sufficient to outweigh any mitigating circumstances and to warrant death. *See Hurst v. State,* 202 So. 3d 40 (2016). *Hurst* followed *Ring* in subjecting the capital sentencing process to *Apprendi*'s Sixth Amendment requirement that all facts necessary for criminal sentencing enhancement must be found by a jury. The Florida Supreme Court then addressed the question of the retroactive application of the federal constitutional rule of *Hurst* to Florida's approximately 380 condemned inmates. Applying Florida's retroactivity doctrines, the Florida Supreme Court held in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) that inmates whose death sentences were not yet final on June 24, 2002 (the date *Ring* was decided) were entitled to

[3] Florida's capital sentencing procedure outlined in Fla. Stat. § 921.141 which had been in effect (with minor changes, irrelevant to these questions presented) since 1972.

resentencing under *Hurst.* Further, in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), the Florida Supreme Court held that inmates like Mr. Jones, whose death sentences became final on direct appeal before June 24, 2002, were not entitled to resentencing.

After the decisions in *Hurst v. Florida*, *Hurst v. State*, and *Mosley v. State* were rendered, Mr. Jones filed a successive motion to vacate his sentences of death pursuant to Florida Rule of Criminal Procedure 3.851 on January 10, 2017. After a case management conference, the postconviction court denied Mr. Jones *Hurst* relief by order rendered on May 15, 2017. *Appendix B.* Mr. Jones appealed the denial of his successive motion to vacate his sentence of death to the Florida Supreme Court.

Thereafter the Florida Supreme Court issued an order directing Mr. Jones to show cause as to why the lower court's order should not be affirmed in light of the court's decision in *Hitchcock v. State.*[4] *See Appendix J.* In *Hitchcock*, pursuant to its decision in *Asay*, the Florida Supreme Court denied *Hurst* relief to all defendants whose death sentences were final on direct appeal prior to June 24, 2002, when *Ring* was decided by this Court, and declined to address the appellant's federal constitutional arguments. *See id.* at 217.[5] Mr. Jones argued in his response that the Florida

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[4] 226 So. 3d 216 (Fla. 2017) (Pariente, J., dissenting; Lewis, J., concurring in the result), *cert. denied sub nom. Hitchcock v. Florida,* 138 S. Ct. 513 (2017).

[5] Justice Lewis wrote the following powerful concurrence:

> [T]he Court's retroactivity decision today eschews that intention. Further, it illuminates Justice Harlan's famous critique of *Linkletter* [*v. Walker*, 381 U.S. 618 (1965)]:
>
> > Simply fishing one case from the stream of appellate review ... and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute[s] an indefensible departure from this model of judicial review.
>
> *Williams v. United States*, 401 U.S. 667, 679, 91 S.Ct. 1171, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in part and dissenting in part). However, that is how the majority opinion draws its determinative, albeit arbitrary, line. As a result, Florida will treat similarly situated defendants differently—here, the difference

Supreme Court's retroactivity cutoff violated the Eighth and Fourteenth Amendments, as well as the Supremacy Clause.

On December 13, 2018, the Florida Supreme Court denied Mr. Jones *Hurst* relief. *See Jones*, 259 So. 3d 803; *see Appendix A.* In affirming the lower court's denial, the Florida Supreme Court held as follows:

> After reviewing Jones's response to the order to show cause, as well as the State's arguments in reply, we conclude that Jones is not entitled to relief. Jones was convicted of two counts of first-degree murder and sentenced to death on both counts following the jury's recommendation for death for both murders by a vote of 10-2. Jones's sentences of death became final in 1993. *Jones v. Florida*, 510 U.S. 836 (1993). Thus, *Hurst* does not apply retroactively to Jones's sentences of death. *See Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the postconviction court's order denying relief.

*Id.*at 804 (footnote omitted). The opinion did not discuss any of the federal constitutional arguments raised by Mr. Jones. This ruling is before this Court for review.

> between life and death—for potentially the simple reason of one defendant's docket delay. Vindication of these constitutional rights cannot be reduced to either fatal or fortuitous accidents of timing.
>
> Every *pre-Ring* defendant has been found by a jury to have wrongfully murdered his or her victim. There may be defendants that properly preserved challenges to their unconstitutional sentences through trial and direct appeal, but this Court now limits the application of *Hurst,* which may result in the State wrongfully executing those defendants. It seems axiomatic that "two wrongs don't make a right"; yet, this Court essentially condones that outcome with its very limited interpretation of *Hurst's* retroactivity and application.

Hitchcock, 226 So. 3d at 219-20 (Lewis. J., concurring in the result) (internal citation added). Justice Pariente also wrote an equally strong dissent as to the partial retroactive application of *Hurst* in Florida.

REASONS FOR GRANTING THE WRIT

I. The Florida Supreme Court's *Ring*-Based Cutoff Formula Violates the Eighth Amendment's Prohibition Against Arbitrary and Capricious Capital Punishment and the Fourteenth Amendment's Guarantee of Equal Protection.

A. Traditional Retroactivity Rules Can Serve Legitimate Purposes, but the Eighth and Fourteenth Amendments Impose Boundaries in Capital Cases.

Courts are bound by constitutional restraints when creating rules regarding retroactivity. In capital cases, the Eighth and Fourteenth Amendments impose boundaries on a state court's application of untraditional 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 had the occasion to address a partial retroactivity scheme because such schemes are not the norm, but the proposition that states do not enjoy free reign to draw temporal retroactivity cutoffs at ***any*** point in time emanates logically from the Court's Eighth and Fourteenth Amendment jurisprudence.

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

The Eighth Amendment prohibition against arbitrariness and capriciousness in capital cases refined this Court's Fourteenth Amendment precedents holding that equal protection is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). A state does not have unfettered discretion to create different classes of condemned prisoners.

This Court has recognized that traditional retroactivity rules, which deny the benefit of new constitutional decisions to prisoners whose cases have already become final on direct review, can serve legitimate purposes, including protecting states' interests in the finality of criminal convictions. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 309 (1989). These rules are a pragmatic necessity of the judicial process and are accepted as constitutional despite some features of unequal treatment. This Petition does not ask the Court to revisit that settled feature of American law because the Florida Supreme Court did not simply apply a traditional retroactivity rule here. On the contrary, it created a decidedly unprecedented and problematic retroactivity scheme.

B. The Florida Supreme Court's *Hurst* Retroactivity Cutoff at *Ring* Does Not Involve the Traditional Retroactivity Rules Addressed by This Court's *Teague* and Related Jurisprudence.

The unusual partial retroactivity rule applied by the Florida Supreme Court in Mr. Jones's case and other *Hurst* cases is very different from the traditional 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); *see also Teague*, 489 U.S. at 304-07. This Court's modern approach to determining whether the United States Constitution requires retroactivity is premised on that assumption. *See, e.g.*, *Montgomery*, 136 S. Ct. at 725 ("In the wake of *Miller* [*v. Alabama*, 567 U.S. 460 (2012)], the question has arisen whether its holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided.").

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

and sentence became final on direct review. *See id.* at 268-69 ("[T]he Minnesota court correctly concluded that federal law does not *require* state courts to apply the holding in *Crawford* [*v. Washington,* 541 U.S. 36 (2004)] 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).

This Court has not yet addressed 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; however, other similarly situated prisoners are denied relief on collateral review. The Florida Supreme Court's retroactivity formula for *Hurst* errors imposed an unprecedented partial retroactivity scheme.

In two separate decisions issued on the same day—*Asay*, 210 So. 3d 1, and *Mosley,* 209 So. 3d 1248—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, under Florida's state retroactivity test.[6] However, unlike the traditional retroactivity analysis contemplated by this Court's precedents, the Florida Supreme Court did not simply decide whether the *Hurst* decisions should be applied retroactively to all prisoners whose death sentences became final before *Hurst*. Instead, the Florida Supreme Court divided those prisoners into two classes based on the date their sentences became final relative to this Court's June 24, 2002 decision in *Ring*, which was issued nearly fourteen years before *Hurst*. In *Asay*, the Florida Supreme Court held that the *Hurst* decisions do not apply retroactively to Florida prisoners whose

[6] 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).

death sentences became final on direct review before the date this Court decided *Ring*. *Asay*, 210 So. 3d at 21-22. In *Mosley*, the Florida Supreme Court held that the *Hurst* decisions applied retroactively solely to prisoners whose death sentences became final after the date of the *Ring* decision. *Mosley*, 209 So. 3d at 1283.

The Florida Supreme Court offered a narrative-based justification for this partial retroactivity framework, explaining that pre-*Ring* retroactivity was inappropriate because Florida's capital sentencing scheme was not unconstitutional before this Court decided *Ring*, but that post-*Ring* retroactivity was appropriate because the state's statute became unconstitutional as of the date of *Ring*.[7] However, the *Hurst v. State* opinion was grounded on both the Sixth and Eighth Amendments, whereas *Ring* only addressed Arizona's capital sentencing scheme and the opinion was grounded solely on the Sixth Amendment.

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

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

Mosley, 209 So. 3d at 1283 (emphasis added). The Florida Supreme Court went on to deprive pre-*Ring* prisoners such as Mr. Jones, whose cases are indistinguishable and were also sentenced under

[7] As described later, none of the Florida Supreme Court's *Hurst* cases have discussed *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the decision that formed the basis for both *Ring* and *Hurst*.

an unconstitutional process, of their life and liberty.

Since *Asay* and *Mosley*, the Florida Supreme Court has uniformly applied its *Hurst* retroactivity cutoff. In collateral-review cases, the Florida Supreme Court has granted the jury determinations required by *Hurst* to dozens of post-*Ring* prisoners whose death sentences became final before *Hurst.* However, due to the Florida Supreme Court's *Ring*-based retroactivity cutoff, dozens more pre-*Ring* prisoners are denied access to the jury determination *Hurst* found constitutionally required.

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

This is troubling enough, but as the next section of this Petition explains, the Florida Supreme Court's *Ring*-based scheme of partial retroactivity for *Hurst* claims involves more than the type of tolerable arbitrariness that is innate to traditional retroactivity rules.

C. The Florida Supreme Court's *Hurst* Retroactivity Cutoff at *Ring* Exceeds Eighth and Fourteenth Amendment Limits.

1. The *Ring*-Based Cutoff Creates More Arbitrary and Unequal Results Than Traditional Retroactivity Decisions.

The Florida Supreme Court's *Hurst* retroactivity cutoff at the date of the *Ring* decision involves a degree of arbitrariness that far exceeds the level justified by traditional retroactivity jurisprudence.

As an initial matter, the Florida Supreme Court's rationale is open to question. 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. However, 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 it was recognized as such in *Hurst*, not *Ring*.

The Florida Supreme Court's approach raises serious questions about line-drawing at a prior point in time. There will always be earlier precedents of this Court upon which a new constitutional ruling builds. The foundational precedent for both *Ring* and *Hurst* was this Court's decision in *Apprendi*, 530 U.S. at 466. As *Hurst* recognizes, it was *Apprendi*, not *Ring*, which first explained that the Sixth Amendment requires any fact-finding that increases a defendant's maximum sentence to be found by a jury beyond a reasonable doubt. *Hurst*, 136 S. Ct. at 621. The arbitrary cutoff is problematic regardless of what other date is chosen, however, the Florida Supreme Court has never explained why it drew a line at *Ring* as opposed to *Apprendi*.

The effect of the cutoff also does not meet its aim. The Florida Supreme Court's rationale for drawing a retroactivity line at *Ring* is undercut by the fact that the court grants relief to prisoners

who failed to raise any constitutional challenge to Florida's unconstitutional sentencing scheme, either before or after *Ring*, while simultaneously denying *Hurst* relief to prisoners like Mr. Jones whose sentences became final before *Ring*, but who correctly, albeit unsuccessfully, challenged Florida's unconstitutional sentencing scheme.[8] In a non-arbitrary scheme, if prisoners whose sentences became final after *Ring* deserve *Hurst* relief because Florida's death penalty scheme has been unconstitutional since *Ring*, then prisoners who actually challenged Florida's scheme on *Ring*-like grounds would also receive relief. However, as it stands, none of these pre-*Ring* prisoners can access *Hurst* relief regardless of whether they challenged the constitutionality of Florida's death penalty scheme as Mr. Jones did, because they fall on the wrong side of the Florida Supreme Court's bright-line retroactivity cutoff.[9]

The Florida Supreme Court's rule also does not reliably separate Florida's death row into meaningful pre-*Ring* and post-*Ring* categories. In practice, as Mr. Jones explained to the Florida Supreme Court, the date of a particular Florida death sentence's finality on direct appeal in relation to the June 24, 2002 decision in *Ring* can depend on a score of random factors having nothing to do with the offender or the offense. Those factors could include: 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

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[8] *See, e.g.*, *Miller v. State*, 926 So. 2d 1243, 1259 (Fla. 2006); *Nixon v. State*, 932 So. 2d 1009, 1024 (Fla. 2006); *Bates v. State*, 3 So. 3d 1091, 1106 n.14 (Fla. 2009); *Bradley v. State*, 33 So. 3d 664, 670 n.6 (Fla. 2010).

[9] In dissent in *Hitchcock*, 226 So. 3d at 218-20, Justice Lewis noted that this inconsistency should cause the Florida Supreme Court to abandon the bright-line *Ring* cutoff and grant *Hurst* relief to prisoners who preserved challenges to their unconstitutional sentences. As Mr. Jones has challenged the constitutionality of Fla. Stat. § 921.141 since 1988, he fits squarely in that class of prisoners.

release; whether a rehearing motion was filed and whether an extension was sought; 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 in this Court.

In one striking example, the Florida Supreme Court affirmed the unrelated death sentences of Gary Bowles and James Card in separate opinions issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173, 1184 (Fla. 2001); *see also 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 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' sentence became final seven 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.[10] As such, 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

[10] Adding to the "fatal or fortuitous accidents of timing", Mr. Card's Petition for a Writ of Certiorari was actually docketed 28 days before Mr. Bowles' Petition and was scheduled to go to conference first. However, Mr. Card's Petition was redistributed to a later conference, thus placing his denial after the date this Court decided *Ring*. Compare *Card v. Florida*, Case No. 01-9152, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/01-9152.htm (last visited February 19, 2019), with *Bowles v. Florida*, Case No. 01-9716, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/01-9716.htm (last visited February 19, 2019).

Florida Supreme Court's date-of-*Ring* partial retroactivity approach includes whether a resentencing was granted due to 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 ten year delay before the trial). Under the Florida Supreme Court's approach, a defendant who was originally sentenced to death before Mr. Jones, but who was later resentenced to death after *Ring*, receives *Hurst* relief while Mr. Jones does not because his resentencing took place prior to *Ring*.

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 arbitrary bright-line 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 partial retroactivity rule falls short of that demanding standard.

In contrast to the Florida Supreme Court's majority, several members of the court have explained that the retroactivity 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 even more blunt: "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.* In *Hitchcock*, Justice Lewis noted that the Florida Supreme Court's majority was "tumbl[ing] down the dizzying rabbit hole of untenable line drawing." *Hitchcock*, 226 So. 3d at 218 (Lewis, J., concurring in the result).

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

Florida's arbitrary retroactivity cutoff forecloses *Hurst* relief to the class of death-sentenced prisoners who are the most deserving of relief. 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 exceptionally unreasonable.

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.[11]

In addition, Florida prisoners sentenced to death prior to *Ring* are more likely than post-*Ring* prisoners to have received their death sentences in trials that involved problematic fact-finding. The decades following Mr. Jones's conviction 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 were widely accepted in pre-*Ring* capital trials.[12] Forensic disciplines that were once considered sound fell under deep suspicion following numerous exonerations.[13]

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[11] *See, e.g.*, Death Penalty Information Center, *The Death Penalty in 2018: Year End Report*, at 3, https://deathpenaltyinfo.org/documents/2018YrEnd.pdf (last visited Feburary 19, 2019) ("Domestically, the October 2018 Gallup poll on capital punishment found that fewer than half of Americans (49%) now believe the death penalty is "applied fairly"–the lowest level since Gallup began asking that question in 2000. Overall support for the death penalty was essentially unchanged from 2017's 45-year low. The poll found that 56% of Americans said they support capital punishment and 41% said they oppose it. Gallup's 2018 numbers were similar to the results of a June 2018 Pew Research Center Poll, which reported that just under 54% of Americans support the death penalty, with 39% opposed.")

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 2018, there were 42. Death Penalty Information Center, *Facts About the Death Penalty* (updated February 11, 2019), at 3, https://deathpenaltyinfo.org/documents/FactSheet.pdf.

[12] *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).

[13] *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

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.[14] Prior to *Ring*, it was especially prevalent in Florida to provide limited information to juries. This practice was certainly common in 1991 when Mr. Jones was resentenced.[15] The capital defense

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(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), 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.").

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

[15] *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

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.[16] As a result, since 1973, Florida has had 28 exonerations—more than any other state—all but six of which involved convictions and death sentences imposed before 2002.[17] As for mitigating evidence, Florida's statute did not even include the "catch-all" statutory language until 1996.[18]

The "advisory" jury instructions were also so confusing that jurors consistently reported that they did not understand their role.[19] If the advisory jury did recommend life, judges—who

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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.

[16] 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).

[17] Death Penalty Information Center, *Innocence Database*, *available at* https://deathpenaltyinfo.org/innocence?inno_name=&exonerated=&state_innocence=8&race=All&dna=All.

[18] ABA Florida Report at 16, citing 1996 Fla. Laws ch. 290, § 5; 1996 Fla. Laws ch. 96-302, Fla. Stat. 921.141(6)(h) (1996).

[19] 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.").

must run for election and reelection in Florida—could impose the death penalty anyway.[20] In fact, relying on the *Ring*-based cutoff, the Florida Supreme Court has summarily denied *Hurst* relief where the defendant was sentenced to death by a judge "overriding" a jury's recommendation of a life sentence. *See Marshall v. Jones*, 226 So. 3d 211 (Fla. 2017).

Notably, the advisory jury scheme invalidated by *Hurst* implicated systematic violations of *Caldwell v. Mississippi*, 472 U.S. 320 (1985).[21] *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, 277-79 (1993) (emphasizing that harmless-error review looks

[20] *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.").

[21] The Florida Supreme Court finally explored the issue in *Reynolds v. State*, 251 So. 3d 811 (Fla. 2018). However, Mr. Jones still maintains that the jury instructions themselves do create a constitutional error because section 921.141, Florida Statutes was deemed unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Accurately instructing the jury on an unconstitutional law is still unconstitutional. Mr. Jones maintains that the Florida Supreme Court's repeated treatment of these accurately instructed, yet unconstitutional, jury ***recommendations*** as "binding" and as "the necessary factual finding that *Ring* requires" is also unconstitutional. *Hurst*, 136 S. Ct. at 622.

to the basis on which the jury actually rested its verdict and before a reviewing court may apply harmless error analysis, there must be a valid jury verdict, grounded in the proof-beyond-a-reasonable-doubt standard).

Further, prisoners such as 50-year-old Mr. Jones, whose death sentences became final before *Ring* was decided in 2002 have been incarcerated on death row longer than prisoners sentenced after that date. Mr. Jones has been on death row for over thirty years. 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), these prisoners have demonstrated over a longer period of 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 retroactivity rule for *Hurst* claims involves a level of arbitrariness and inequality that is hard to reconcile with the Eighth and Fourteenth Amendments.

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

In *Montgomery*, 136 S. Ct. at 731-32, this Court held that the Supremacy Clause of the United States Constitution requires state courts to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis. In that case, a Louisiana state prisoner filed a claim in state court seeking retroactive application of the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding

that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The state court denied the prisoner's claim on the ground that *Miller* was not retroactive as a matter of state retroactivity law. *Montgomery*, 136 S. Ct. at 727. This Court reversed, holding that because the *Miller* rule was substantive as a matter of federal law, the state court was obligated to apply it retroactively. *See id.* at 732-34.

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

Importantly for purposes of *Hurst* retroactivity analysis, this Court found the *Miller* rule substantive in *Montgomery* even though the rule had "a procedural component." *Id.* at 734. *Miller* did "not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* [*v. Simmons,* 543 U.S. 551 (2005)] or *Graham* [*v. Florida*, 560 U.S. 48, 54 (2010)]." *Miller*, 567 U.S. at 483. Instead, "it mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* Despite *Miller*'s "procedural" requirements, the Court in *Montgomery* warned against "conflat[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the *manner of determining* the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353

(2004)) (first alteration added). Instead, the Court explained, "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," and that the necessary procedures do not "transform substantive rules into procedural ones." *Id.* at 735. In *Miller*, the decision "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*." *Id.* at 734.

As *Hurst v. Florida* explained, under Florida law, the factual predicates necessary for the imposition of a death sentence were: (1) the existence of particular aggravating circumstances; (2) that those particular aggravating circumstances were "sufficient" to justify the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst* held that those determinations must be made by juries. These decisions are equally as substantive as whether a juvenile is incorrigible. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule). Thus, in *Montgomery*, these requirements amounted to an "instance[ ] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish." *Id.* at 735.

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

Hurst v. State held not only that the requisite jury findings must be made beyond a

reasonable doubt, but also that juror unanimity is necessary for compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders and that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." 202 So. 3d at 60-61. The function of the unanimity rule is to ensure that Florida's death-sentencing scheme complies with the Eighth Amendment and to "achieve the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law." *Id.* As a matter of federal retroactivity law, this is also substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"). Even though the subject concerns the method by which a jury makes its decision, it remains substantive. *See Montgomery*, 136 S. Ct. at 735 (noting that a state's ability to determine the method of enforcing constitutional rule does not convert a rule from substantive to procedural).

In *Welch*, this Court addressed the retroactivity of the constitutional rule articulated in *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). In *Johnson*, the Court held that a federal statute that allowed sentencing enhancement was unconstitutional. *Id.* at 2556. *Welch* held that *Johnson*'s ruling was substantive because it "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied"—therefore it must be applied retroactively. *Welch*, 136 S. Ct. at 1265. The Court emphasized that its determination whether a constitutional rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function," i.e., whether the new rule alters only the procedures used to obtain the conviction, or instead alters the class of persons the law

punishes. *Id.* at 1266.

The same reasoning applies in the *Hurst* context. The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt and the Eighth Amendment requirement of jury unanimity in fact-finding are substantive constitutional rules as a matter of federal law because they place certain murders "beyond the State's power to punish" with a sentence of death. *Welch*, 136 S. Ct. at 1265. Following the *Hurst* decisions, "[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on" the judge-sentencing scheme. *Id.* The "unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help ***narrow the class of murderers subject to capital punishment***." *Hurst*, 202 So. 3d at 60 (emphasis added). Accordingly, the very purpose of the rules are to place certain individuals beyond the state's power to punish by death. Therefore, such rules are substantive, *see Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes."), and *Montgomery* requires the states to impose them retroactively.

Hurst retroactivity is not undermined by *Summerlin*, where this Court held that *Ring* was not retroactive in a federal habeas case. 542 U.S. at 364. In *Ring*, the Arizona statute permitted a death sentence to be imposed upon a finding of fact that at least one aggravating factor existed. *Summerlin* did not review a statute, like Florida's, that required the jury not only to conduct the fact-finding regarding the aggravators, but also fact-finding on whether the aggravators were ***sufficient*** to impose death, and whether the death penalty was an appropriate sentence. *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred in *Hurst* where this Court held that it was unconstitutional for a judge alone to find that "sufficient aggravating factors exist

and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal citation omitted).

Moreover, *Hurst,* unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and this Court has always regarded proof-beyond-a-reasonable-doubt decisions as substantive. *See, e.g.*, *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (explaining that "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect."); *see also Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware's state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof.").[22]

"Under the Supremacy Clause of the Constitution . . . . [w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Montgomery*, 136 S. Ct. at 731-32. Because the outcome-determinative constitutional rights articulated in *Hurst v. Florida* and *Hurst v. State* are substantive, the Florida Supreme Court was not at liberty to foreclose their retroactive application in Mr. Jones's case.

III. Petitioner's Case is an Ideal Vehicle for Addressing the Constitutionality of the Florida Supreme Court's *Hurst* Retroactivity Cutoff.

[22] A federal district judge in Florida, citing *Ivan*, has already observed the distinction between the holding of *Summerlin* and the retroactivity of *Hurst* arising from the beyond-a-reasonable-doubt standard. *See Guardado v. Jones*, 4:15CV256-RH, 2016 WL 3039840, at *2 (N.D. Fla. May 27, 2016) (explaining that *Hurst* federal retroactivity is possible despite *Summerlin* because *Summerlin* "did not address the requirement for proof beyond a reasonable doubt," and "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive").

The facts of Mr. Jones's case and its procedural history make it an ideal vehicle for granting a writ of certiorari to resolve these important questions presented. Mr. Jones has tirelessly challenged the constitutionality of Florida's death penalty scheme for thirty years. Although Mr. Jones raised these arguments prior to both of his penalty phase trials, properly preserved his arguments on appeal, and *Hurst* has finally declared Fla. Stat. § 921.141 unconstitutional, Mr. Jones is still being denied his right to a jury making the findings of fact to determine whether he should be sentenced to death, solely based on an arbitrary cutoff date.

In 1988, Mr. Jones received an 11-1 advisory recommendation for death. At his new penalty phase in 1991, he only received a 10-2 advisory recommendation. As Mr. Jones did not receive a unanimous jury recommendation at either of his trials decades ago, it is exceptionally unlikely that a jury today would unanimously sentence him to death due to all of the advancements in mitigation, science, and the standard of care in capital cases. Accordingly, Mr. Jones is highly prejudiced by Florida's lack of full retroactive application of the *Hurst* constitutional rulings.

Since 1988, Mr. Jones has argued that the United States Constitution required that the ***jury*** unanimously determine the existence of any aggravating circumstances and that Florida's jury instructions violated *Caldwell* by minimizing the importance of the jury's role. It is arbitrary and capricious to deny *Hurst* relief to Mr. Jones, but grant relief to other similarly situated prisoners on death row, some of whom did not even raise these arguments.

CONCLUSION

For all of these reasons, the Court should grant the petition for a writ of certiorari and order further briefing or vacate and remand this case to the Florida Supreme Court.

Respectfully submitted,

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