ORIGINAL

No. _____

OCTOBER TERM 2018

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY MUNGIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

1. Whether the Florida Supreme Court's application of only partial retroactivity of *Hurst v. State* and *Hurst v. Florida* violates the Eighth and Fourteenth Amendments because it arbitrarily uses as the cutoff point for retroactivity an earlier decision invalidating Arizona's capital sentencing scheme under the Sixth Amendment, and results in the disparate treatment of similarly situated individuals.

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The Petitioner, Anthony Mungin, an indigent, death-sentenced Florida prisoner, was the Appellant in the Florida Supreme Court.

The Respondent, the State of Florida, was the Appellee in the state court proceedings.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Mungin prays that a Writ of Certiorari issue to review the opinion of the Florida Supreme Court.

CITATIONS TO OPINION BELOW

The opinion of the Florida Supreme Court in this cause, reported as *Mungin v. State*, 259 So.3d 716 (2018), is attached as to this Petition as "Attachment A." The order denying successive motion for postconviction relief in the circuit court is non-published and attached as "Attachment B."

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257(a) and 2101 (d). The Florida Supreme Court issued its decision on November 15, 2018. Petitioner thereafter sought rehearing, which was denied on January 11, 2019 ("Attachment C"). This petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in pertinent part:

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

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

In 1972, this Court held that the death penalty was unconstitutional because "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed." *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring). As Justice Marshall viewed it, the question is "not whether we condone rape or murder, for surely we do not; it is whether capital punishment is 'a punishment no longer consistent with our own self-respect' and, therefore, violative of the Eighth Amendment." *Id.* at 315. (Marshall, J., concurring).

This Court's capital jurisprudence since *Furman* has reflected the reality that "death is different," "unique in its severity and irrevocability," and cannot be "inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 187-88 (1976). Therefore, reliability is paramount. Because "the penalty of death is qualitatively different from a sentence of imprisonment, . . . there is a corresponding difference in the need for reliability" in capital cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *See also Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (there is a "qualitative difference" between death and other penalties requiring "a greater degree of reliability when the death sentence is imposed").

In 2002, this Court held that Arizona's death penalty scheme violated the Sixth Amendment. *Ring v. Arizona*, 536 U.S. 584 (2002). The Florida Supreme Court refused to apply *Ring* in Florida for fourteen years, during which time it approved the executions of forty-one people. Then, in 2016, this Court held that *Ring* does apply in

Florida, and struck down Florida's capital punishment scheme because it violated the Sixth Amendment. *Hurst v. Florida*, 136 S. Ct. 616 (2016).

On remand from this Court in the wake of *Hurst v. Florida*, the Florida Supreme Court held that the critical findings of fact that allowed for consideration of the death penalty—the existence of aggravators sufficient to outweigh the mitigators—must be found by a jury, and that the Eighth Amendment requires those findings to be made unanimously and beyond a reasonable doubt. *Hurst v. State*, 202 So. 3d 40, 58 (2016). The court also held that the Eighth Amendment demands that a jury's ultimate sentencing recommendation must be unanimous. *Id.* at 59. The court explained that unanimity is required because it provides "the highest degree of reliability in meeting . . . constitutional requirements in the capital sentencing process." *Id.* at 60. Unanimity also ensures that Florida's capital sentencing laws "keep pace with 'evolving standards of decency.'" *Id.*, quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

But instead of applying the *Hurst* decisions retroactively to all inmates sentenced to death under Florida's unconstitutional scheme, the Florida Supreme Court "tumble[d] down the dizzying rabbit hole of untenable line drawing." *Asay v. State*, 210 So. 3d 1, 30 (Fla. 2016) (Lewis, J., concurring in result). In two cases issued on the same day, the Florida Supreme Court held that prisoners whose death sentences became final after *Ring* issued on June 24, 2002 would receive the benefit of *Hurst v. Florida*. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). Those whose sentences became final before June 24, 2002 would not. *Asay*, 210 So. 3d at 11.

Florida's decision to grant limited retroactivity based on the date *Ring* issued—or any date—injects untenable arbitrariness into Florida's capital sentencing scheme. Finality dates often turn on random occurrences like delays in the clerk's transmittal of the direct appeal record to the Florida Supreme Court, or whether direct appeal counsel sought extensions of time to file a brief, or whether counsel chose to file a certiorari petition in this Court or sought an extension to file one. Another arbitrary factor affecting whether a prisoner gets relief is whether relief was granted somewhere along the way. Some prisoners whose cases date back to the 1980s will receive the benefit of *Hurst* while others whose cases are just as old will not. *See, e.g.*, *Johnson v. State*, 205 So. 3d 1285, 1285 (Fla. 2016) (granting a new sentencing under *Hurst* to a defendant whose three homicides occurred in 1981, but who was granted relief on a third successive postconviction motion in 2010).

Finally, and most importantly, Florida is denying the benefit of *Hurst v. State*—an Eighth Amendment decision—to one group of individuals and not another, based on the date *Ring*—a Sixth Amendment decision—issued. These random distinctions between those who will receive the benefit of *Hurst v. State* and those who will not can only be described as arbitrary and capricious.

Limited retroactivity also violates the Fourteenth Amendment. Because both groups were sentenced under the same unconstitutional scheme, Florida's refusal to make *Hurst v. State* fully retroactive results in unequal treatment of similarly situated prisoners. *See Desist v. United States*, 394 U.S. 244, 258-259 (1969) (Harlan, J., dissenting) ("[W]hen another similarly situated defendant comes before us, we

must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law.").

Florida's limited retroactivity ensures an unreliable and arbitrary death penalty system that treats similarly situated individuals differently in violation of the Eighth and Fourteenth Amendments.

In this Petition Mr. Mungin is requesting the Court grant certiorari to review the decision of the Florida Supreme Court rejecting his claim that his sentence of death is unconstitutional pursuant to this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016) and the Florida Supreme Court's subsequent decision in *Hurst v. State*, 202 So. 3d 40 (2016).

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

A. Trial and Penalty Phase

Mr. Mungin was charged by general indictment filed March 26, 1992, with the 1990 first-degree murder of Betty Jean Woods in Jacksonville, Florida (R1).[1] The guilt

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[1]The following abbreviations will be utilized to cite to the record in this cause, with appropriate page numbers following the abbreviations:

"R___." - Record on direct appeal to the Florida Supreme Court;

"T___." - Trial and sentencing transcripts;

"PCR__." - Record in first postconviction appeal;

"Supp. PCR.___" - Supplemental Record in first postconviction appeal;

"2PCR ___" - Record on appeal of summary denial of second postconviction motion.

phase was conducted from January 25, 1993, through January 28, 1993, and resulted in a general verdict of guilty of first-degree murder (R342; T1057).

Prior to trial, Mr. Mungin's defense counsel filed a series of motions challenging the constitutionality of Florida's capital sentencing scheme. He filed a "Motion to Prohibit Misleading References to the Advisory Role of the Jury at Sentencing," arguing, *inter alia*, that, in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), this Court held that it violated the Eighth Amendment to "rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere" (R24). The motion further argued that "[r]eferences to the advisory role of the jury would deny Defendant due process of law and a fair trial pursuant to Article I, Sections 9, 16, and 17 of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendment to the United States Constitution" (*Id.*). Mr. Mungin later requested a special penalty phase jury instruction because "the standard instruction does not properly explain the role of the jury" and "diminish[es] the jury's sense of responsibility" in violation of *Caldwell* (R333). A further special instruction was requested that would give the jurors the opportunity to consider mercy to Mr. Mungin (R347).

Mr. Mungin also filed a motion entitled "Motion to Declare Section 921.141 Florida Statutes Unconstitutional as Applied Because of Arbitrariness in Jury Overrides and Sentencing" (R58). In this motion, Mr. Mungin contended, *inter alia*, that the this Court's upholding of Florida's capital sentencing statute in *Proffitt v.*

Florida, 428 U.S. 242 (1976), rested primarily on two Florida Supreme Cases: *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), and *Tedder v. State*, 322 So. 2d 908 (Fla. 1975) (R58), but that contrary to this Court's view in *Proffitt*, "the sentencing process in Florida is far from `informed, focused, guided, and objective' and the court's review process, in the years since *Proffitt*, has not assured 'consistency, fairness, and rationality in the evenhanded operation of state law'" (R59).[2] The motion went on to detail that it was "understood" that a Florida penalty phase jury "would retain authority to recommend mercy" but nonetheless provided the trial judge with the "ultimate sentencing authority" and thus the ability override a jury recommendation of life (R59-60). It further argued that "[u]nless the Court begins to require the State to list the specific aggravating circumstances it will rely upon to seek the death penalty and until the Court requires a special verdict form wherein the jury states the circumstances it relied upon to render its advisory opinion and until judges are required to meticulously detail the mitigation that was considered, there can only be arbitrary death sentences in Florida" (R81). Further, the motion argued

> In Florida, a jury is not required to set forth the basis for its recommendation; that is, the jury does not list the aggravating and mitigating circumstances considered in reaching its verdict. A better practice would be to require a special verdict form, a listing of the factors taken into consideration, thus providing the Court with a more concise and informed advisory opinion. However, the current practice is to guess at the basis for the jury's verdict. . . . Complicating the process even further is the decision that the State need not set forth the aggravating circumstances it will rely upon when seeking the death

[2] *Tedder* has now been abrogated by the Florida Supreme Court. *See Hurst v. State*, 202 So.3d 40 (Fla. 2016).

> penalty. Although there is a requirement that an aggravating circumstance be proven beyond a reasonable doubt, there is no way of knowing whether the aggravating circumstance relied on by the jury was in fact one actually relied on by the State, or whether evidence was even presented supporting a particular circumstance. There can be no doubt that the trial court engages in a guessing game when it attempts to determine the basis for the jury's verdict.

(R81). The motion concluded by arguing that "[a]s long as such ambiguity in sentencing exists, the sentencing process in Florida will remain arbitrary and capricious and a violation of constitutional law" (R82).

In yet another pretrial motion entitled "Motion for Statement of Aggravating Circumstances," Mr. Mungin moved the trial court for an order compelling the State to provide the defense "with the precise grounds on which the State seeks the death penalty in this case" (R93). Absent such notification, Mr. Mungin contended that any resulting death sentence would violate the Fifth, Sixth, and Eighth Amendments to the United States Constitution, as well as Article I, Sections 9, 15, and 16 of the Florida Constitution (*Id.*).

In another pretrial motion entitled "Motion to Dismiss and to Declare Sections 782.04 and 921.141 Florida Statutes, Unconstitutional For a Variety of Reasons," Mr. Mungin raised a further series of constitutional challenges to Florida's capital sentencing scheme. For example, the motion argued that the Indictment did not properly charge a capital offense in violation of the federal and Florida constitutions (R97-98). The motion further argued that "Section 921.141 does not require the State to prove beyond a reasonable doubt that the statutory aggravating factors in subsection (5) outweigh the mitigating circumstances listed in subsection (6) in each

particular case," thus violation of the Florida and federal constitutions because "[t]he instruction given to the jury to weigh the aggravating and mitigating circumstances in arriving at their recommendation to the court gives the jury inadequate guidance" and the "right to the reasonable doubt standard applies equally to the ultimate determination of whether [the defendant] lives or dies as to the determination of his guilt or innocence" (R99). Further, the motion argued that "[t]e presumption in favor of death created by the establishment of only one single aggravating circumstance has the result of imposing upon the defendant the burden of establishing why he should live" and violates the Fifth, Sixth, Eighth, and Fourteenth Amendments along with the corresponding provisions of the Florida constitution (R104).

The motion also contended "Section 921.141, Florida Statutes, is unconstitutional on its face because a jury recommendation of life imprisonment need not be followed by the trial judge" (R105-06), and that while a majority of states with the death penalty "have made a jury life verdict binding . . . even if one juror refuses to vote for death," Florida's statute "only requires a majority recommendation from the jury and permits the judge to overrule it" (R107). The motion argued that Section 921.141 was unconstitutional on its face "because the jury recommendation need not be unanimous, thereby depriving the defendant of the rights to due process and to a unanimous jury verdict, in violation of Article I, Sections 9, 16, and 22 of the Florida Constitution, and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution" (R108). The motion argued that "[t]he death penalty in Florida is unconstitutional because upon conviction of the defendant the jury is not required to

list the specific aggravating circumstances they have found beyond a reasonable doubt when they recommend the death penalty. In that situation the trial judge is deprived of the opportunity to know what aggravating circumstances the jury found and what aggravating circumstances the jury did not find" (*Id.*). This results in violations of the Florida and federal constitutions "and the holdings of the Florida Supreme Court that uphold the constitutionality of the application of the death penalty in this state" (*Id.*). Finally, the motion argued that the Florida statute was unconstitutional because "it permits the trial judge to consider aggravating circumstances in imposing the death sentence that the advisory jury may not have considered, or that the jury may have decided did not exist. Furthermore, Section 921.141, Florida Statutes, permits the trial judge to find that aggravating circumstances outweigh any mitigating circumstances despite a jury recommendation of life imprisonment" (R109).

Following the guilt phase, a penalty phase was conducted, the judge having denied the pretrial motions filed by Mr. Mungin challenging the Florida death penalty scheme on a number of federal and state constitutional grounds, and also rejecting the requested penalty phase jury instructions.

Following the evidence presented at the penalty phase and prior to their deliberations, the jurors were told by the trial court's instructions that it was their job to "advise" the court as to what punishment should be imposed on Mr. Mungin and that they were merely to render an "advisory sentence based upon [their] determination as to whether sufficient aggravating circumstances exist to justify the

imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist" (R378). The jury was never instructed (as the defense had requested it be) that it could consider mercy as a basis for rejecting the death penalty and that no juror was compelled or required to vote for the death penalty even if they found sufficient aggravating circumstances that outweighed the mitigating circumstances.

The jury returned with an "Advisory Sentence" that "a majority of the jury advise and recommend to the court that it impose the death penalty upon the Defendant, Anthony Mungin, by a vote of 7 to 5" (R382). Subsequent to the sentence, Mr. Mungin filed a Motion for a New Trial in which he argued, *inter alia*, that a new proceeding was warranted due to the improper denial of the motions with respect to the constitutionality of Florida's death penalty scheme and the denial of the requested jury instructions during the penalty phase (R383-92). The motion for new trial was denied (R394).

The trial judge made his own findings and sentenced Mr. Mungin to death (R395-400; T1291-92). In imposing the death penalty, the trial judge found two aggravating factors: (1) Mr. Mungin had previously been convicted of a felony involving the use or threat of violence to another person; and (2) Mr. Mungin committed the capital felony during a robbery or robbery attempt and committed the capital felony for pecuniary gain. Regarding statutory mitigation, the judge found Mr. Mungin's age of twenty-four was entitled to no weight in mitigation (R398-99).

The evidence of non-statutory mitigation fell into two categories, and was dealt

with by the sentencing judge in that way. The first category is evidence from relatives and others who knew Mr. Mungin personally. That unrefuted evidence included: Mr. Mungin only saw his mother once or twice a year since he was five years old. He was brought up by his grandparents in a remote area with no children near his age, and he was not allowed to bring children home. He was an honest, helpful, quiet, respectful, obedient, well-behaved child. In high school, he was not violent or aggressive and got along with everybody. As a member of the school's wrestling team, he had to have aggressiveness coached into him. He showed dedication and a willingness to work for success against the odds, by his efforts as an undersized even for his weight class wrestler. He showed dedication, honesty, and trustworthiness, as well as hard work, in his position as football team manager. Two of the witnesses to Mr. Mungin's good character were law enforcement officers. When Mr. Mungin's girlfriend got pregnant in 1985, he asked her to marry him. Even though she refused, he supported her and the baby for a year after the baby was born in 1986; thus he provided support until he was about twenty-one years old.

In the sentencing order, the judge's sole acknowledgment of this first category of mitigating evidence was the statement that testimony was offered of "numerous witnesses including family members, friends, former schoolmates, and teachers, who stated that they knew the Defendant through his high school years" (R399). These witnesses said much more than that they knew Mr. Mungin, yet the order did not refer to the substance of any of this evidence, and did not explicitly find this mitigation to exist or not to exist. Instead, the judge stated: "But, most of these

witnesses had had little or no contact with Defendant since he was 18 years old and the defendant was 24 years old at the time of the commission of this offense. Consequently, the Court attaches *no significance or value* to this evidence" (R399) (emphasis added).

The second category of mitigating evidence dealt with Mr. Mungin's use of drugs and adjustment to prison. Dr. Krop testified that Mr. Mungin had been abusing cocaine and alcohol extensively since he was eighteen or twenty, and that his crimes were probably motivated by the need to support his drug habit. The evidence also showed that Mr. Mungin had complied with prison rules and was amenable to rehabilitation and to functioning in an open prison population without disciplinary violations or violence. The evidence showed that Mr. Mungin did not have an antisocial personality or any other psychological disorder that would prevent rehabilitation.

The sentencing order acknowledged the testimony that Mr. Mungin was not anti-social and could be rehabilitated, but focused on the psychological testimony that ruled out insanity and ruled out the statutory mental mitigating factors. The order stated that minimal weight was attached to this evidence. The order did not refer to Mr. Mungin's ability to function in prison, however, and the sentencing order totally ignored the testimony about Mr. Mungin's cocaine and alcohol abuse.

Mr. Mungin appealed to the Florida Supreme Court. The court affirmed Mr. Mungin's conviction and death sentence over the dissent of Justice Anstead. *Mungin v. State*, 689 So. 2d 1026 (Fla. 1995), *cert. denied*, 522 U.S. 833 (1997) [hereinafter

Mungin I]. On direct appeal, Mr. Mungin challenged, *inter alia*, the constitutionality of his death sentence, reasserting the denial of his pretrial motions, including but not limited to the motion that the Florida death penalty statute was unconstitutional "because the jury's death recommendation was based on a bare seven-to-five majority." Initial Brief, *Mungin v. State*, 1994 WL 16013567 at *96-97. The Florida Supreme Court rejected Mr. Mungin's challenges. *Mungin I* at 1032.

B. Postconviction

On September 17, 1998, Mr. Mungin, through state-appointed counsel, filed a Rule 3.850 motion for postconviction relief (Supp. PCR3-44). After several changes of counsel, Mr. Mungin filed a consolidated amended Rule 3.850 motion containing seventeen (17) numbered claims for relief (PCR1-76). The State filed a response to this motion (PCR79-105). An evidentiary hearing was granted two claims (PCR108-09).

On June 24, 2003, Mr. Mungin filed two supplemental claims to his consolidated Rule 3.850 motion, one alleging a *Brady* violation and the other raising a Sixth Amendment violation in light of *Ring v. Arizona*, 536 U.S. 584 (2002) (PCR110-11). The trial court refused to entertain the *Brady* claim (PCR227-29); as to the *Ring* claim, the lower court indicated that it would not address it until the parties had "benefit of more information" from the United States Supreme Court and the Florida Supreme Court (PCR229-30).

The evidentiary hearing was conducted by the lower court on June 25 and 26, 2002. Following the evidentiary hearing, post-hearing memoranda were submitted by the parties (PCR116-151; 152-73; 175-79). Relief was denied by order entered

signed on March 18, 2003, and filed with the clerk on March 21, 2003 (PCR203-09). Timely notice of appeal was entered to the Florida Supreme Court (PCR210-11).

In the Florida Supreme Court, Mr. Mungin also filed a petition for habeas corpus relief. Mr. Mungin raised a claim under *Ring v. Arizona*, arguing, in a claim that was entitled that Florida's capital sentencing procedure deprived him of his Sixth Amendment rights to notice and to a jury trial and of his right to Due Process" Amended Petition for Writ of Habeas Corpus, *Mungin v. Crosby*, Case No. SC03-1774 (emphasis added).

Following briefing and oral argument, the Florida Supreme Court affirmed the denial of Rule 3.850 relief and also denied Mr. Mungin's petition for state habeas corpus relief. *Mungin v. State*, 932 So. 2d 986 (Fla. 2006) [hereinafter *Mungin II*]. Regarding Mr. Mungin's claim under *Ring v. Arizona*, the court ruled: "Mungin acknowledges that this Court has repeatedly rejected claims for relief under *Ring*, and states that he raises the claim only to preserve it for federal review. Moreover, as the State notes, this Court has now expressly held that does not apply retroactively. See *Johnson v. State*, 904 So.2d 400, 412 (Fla. 2005). Accordingly, we deny this claim for relief." 932 So. 2d at 1003. A timely motion for rehearing was filed and denied on June 13, 2006, and mandate issued by the Florida Supreme Court on June 29, 2006.

Mr. Mungin thereafter timely filed a federal habeas corpus petition pursuant to 28 U.S.C. §2254. While that petition was pending, Mr. Mungin filed a new Rule 3.851 motion in the circuit court in and for Duval County, Florida (2PCR1-75). The

motion, raising two claims relating to the reliability of the guilt phase of his capital trial. The lower court summarily denied the motion (2PCR130-140). Mr. Mungin timely filed a notice of appeal to the Florida Supreme Court. On October 27, 2011, the Florida Supreme Court issued its decision in *Mungin v. State*, 79 So. 3d 726 (Fla. 2011) [hereinafter Mungin III]. The court reversed the lower court's summary denial and ordered an evidentiary hearing on Mr. Mungin's claims.

On remand, the evidentiary hearing took place on February 3, 2012 (3PCR 94-256). On March 21, 2012, the lower court entered its order denying relief to Mr. Mungin (3PCR 82-89). Mr. Mungin timely filed a notice of appeal (3PCR 90-91). On appeal, the Florida Supreme Court affirmed the denial of relief. *Mungin v. State*, 141 So. 3d 138 (Fla. 2013).

Subsequently, Mr. Mungin returned to federal court, where he amended his habeas corpus petition with the new claims arising out of state court. That petition remains in abatement pending the *Hurst*-related litigating ongoing in the Florida state courts.

On January 12, 2017, Mr. Mungin filed a Rule 3.851 motion in the circuit court for the Fourth Judicial Circuit, in and for Duval County, Florida (3PCR 1-70). The motion raised four separate claims challenging his death sentences. Claim I rested on the Sixth Amendment and the decision in *Hurst v. Florida* (3PCR 21-36). Claim II rested on the Eighth Amendment and the Florida Constitution, which were the bases for the Florida Supreme Court's ruling in *Hurst v. State* that before a death sentence could be authorized the jury must first return a unanimous death recommendation

(3PCR 36-50). Claim III was premised upon the arbitrariness of the distinction the Florida Supreme Court drew in *Mosley v. State* and *Asay v. State*, between cases in which a death sentence was final before June 24, 2002, and cases in which the death sentence became final after June 24, 2002. Mr. Mungin argued, *inter alia*, that the arbitrariness of the distinction meant that his death sentence stood in violation of *Furman v. Georgia* (3PCR 51-61). Claim IV asserted that the rejection of Mr. Mungin's previously presented newly discovered evidence, *Brady/Giglio* and *Strickland* claims was rendered constitutionally unreliable because *Hurst v. State* gave him a retrospective right to a life sentence that can only be overcome if a jury returns a unanimous death recommendation.

Without conducting a case management hearing or ordering a response from the State, the circuit court denied 3.851 relief on February 28, 2017 (3PCR 76-80), and denied Mr. Mungin's motion for rehearing on March 28, 2017 (3 PCR 100-102). Mr. Mungin filed his notice of appeal on April 25, 2017 (3PCR 103-04). Following a truncated appellate briefing process never before utilized by the Florida Supreme Court in capital cases, the Court denied relief on November 15, 2018 (Attachment A), and denied rehearing on December 11, 2018 (Attachment C).

This timely Petition follows.[3]

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[3] Mr. Mungin currently also has an appeal pending in the Florida Supreme Court relating to new allegations of *Brady* and *Giglio* violations, as well as newly discovered evidence. The briefing has been submitted and Mr. Mungin is awaiting a ruling on his appeal as of the date of the filing of this Petition. *See Mungin v. State*, Fla. Sup. Ct. Case No. SC18-635.

REASONS FOR GRANTING THE PETITION

1. The Florida Supreme Court's limited retroactivity rule violates the Eighth Amendment because it ensures that the death penalty will be arbitrarily and capriciously inflicted.

In *Furman*, this Court held that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg*, 428 U.S. at 188; *see also Furman*, 408 U.S. at 239-40. The finality of a death sentence on direct appeal is inherently arbitrary. Finality can depend on whether there were delays in transmitting the record on appeal[4]; whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with a court's summer recess; whether an extension was sought for rehearing and whether such a motion was filed; whether counsel chose to file a certiorari petition in this Court or sought an extension to do so; and how long a certiorari petition was pending.

This inherent arbitrariness is exemplified by two unrelated cases. The Florida Supreme Court affirmed Gary Bowles's and James Card's death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both men petitioned this Court for a writ of certiorari. Card's sentence became final four days after *Ring* was decided—on June 28, 2002—when this Court denied his certiorari

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

petition. *Card v. Florida*, 536 U.S. 963 (2002). However, Bowles's 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 Card a new sentencing proceeding, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card v. Jones*, 219 So. 3d 47, 47 (2017). However, Bowles, whose direct appeal was decided **the same day** as Card's, falls on the other side of Florida's limited retroactivity cutoff and will not receive the benefit of the *Hurst* decisions.

There are also cases where a capital defendant's death sentence was vacated in collateral proceedings, a resentencing was ordered, and another death sentence was imposed that was pending on appeal when *Hurst v. Florida* issued, or who received new trials on crimes that pre-dated *Ring* by decades.[5] Those people will receive the benefit of the *Hurst* decisions simply because their death sentence was not "final" when *Hurst* issued. There can be no other word to describe such disparate outcomes but arbitrary. To deny Mr. Mungin the retroactive application of the *Hurst* decisions because his death sentence became final before June 24, 2002 while granting retroactive *Hurst* relief to inmates whose death sentences were not final on

[5] *See, e.g., Armstrong v. State*, 211 So. 3d 864 (Fla. 2017) (resentencing ordered where conviction was final in 1995 for a 1990 homicide); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (resentencing ordered where conviction was final in 1993 for three 1981 homicides); *Hardwick v. Sec'y, Fla. Dept. of Corr.*, 803 F. 3d 541 (11th Cir. 2015) (resentencing ordered where conviction was final in 1988 for a 1984 homicide); *Dougan v. State*, 202 So. 3d 363 (Fla. 2016) (*Hurst* will govern at defendant's retrial on a 1974 homicide); *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014) (defendant awaiting retrial for a 1985 homicide at which *Hurst* will govern).

June 24, 2002 violates Mr. Mungin's right to be free from arbitrary infliction of the death penalty under the Eighth Amendment.

Mr. Mungin also challenged his death sentence based on *Hurst v. State*'s holding that a death sentence flowing from a non-unanimous death recommendation lacks reliability and violates the Eighth Amendment. *Hurst v. State* established a presumption of a life sentence that is the equivalent of the guilt phase presumption of innocence, which cannot be overcome unless the jury unanimously makes the requisite findings beyond a reasonable doubt and unanimously recommends a death sentence. The recognition that the requirement that the jury must unanimously recommend death before the presumption of a life sentence can be overcome does not arise from the Sixth Amendment, or from *Hurst v. Florida*, or from *Ring*. This right emanates from the Eighth Amendment.

"Reliability is the linchpin of Eighth Amendment jurisprudence, and a death sentence imposed without a unanimous jury verdict for death is inherently unreliable." *Hitchcock v. State*, 226 So. 3d 216, 220 (Fla. 2017) (Pariente, J., dissenting). The requirement that the jury unanimously vote in favor of a death recommendation is necessary to enhance the reliability of death sentences. "A reliable penalty phase proceeding requires that the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed." *Hurst v. State*, 202 So. 3d at 59.

The Florida Supreme Court has recognized the need for heightened reliability

in capital cases. *Id.* ("We also note that the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.). *See also Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case."). In *Mosley*, the Florida Supreme Court noted that the unanimity requirement in *Hurst v. State* carried with it the "heightened protection" necessary for a capital defendant. 209 So. 3d at 1278. The court also noted that *Hurst v. State* had "emphasized the critical importance of a unanimous verdict." *Id.*

Mr. Mungin's death sentence lacks the heightened reliability demanded by the Eighth Amendment. As the Florida Supreme Court recognized, "juries not required to reach unanimity tend to take less time deliberating and cease deliberating when the required majority vote is achieved rather than attempting to obtain full consensus . . . ." *Hurst v. State*, 202 So. 3d at 58. A jury "recommendation" resulting from such a proceeding cannot be considered "reliable."

Moreover, *Hurst v. State* recognized that evolving standards of decency require unanimous recommendations:

> Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace

> with "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (holding that the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

202 So. 3d at 60. Such Eighth Amendment protections are generally understood to be retroactive. *See, e.g., Miller v. Alabama*, 567 U.S. 460 (2012) (holding retroactive a case which held that mandatory sentences of life without parole for juveniles are unconstitutional); *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting the execution of intellectually disabled individuals).

The Florida Supreme Court continues to deny important Eighth Amendment claims by citing *Asay* and *Hitchcock*, but as Justice Pariente recognized in her *Hitchcock* dissent:

> **This Court did not in *Asay*, however, discuss the new right announced by this Court in *Hurst* [*v. State*] to a unanimous recommendation for death under the Eighth Amendment.** Indeed, although the right to a unanimous jury recommendation for death may exist under both the Sixth and Eighth Amendments, the retroactivity analysis, which is based on the purpose of the new rule and reliance on the old rule, is undoubtedly different in each context. Therefore, *Asay* does not foreclose relief in this case, as the majority opinion assumes without explanation.

226 So. 3d at 220 (Pariente, J., dissenting) (emphasis added). The Florida Supreme Court has yet to address Eighth Amendment claims in any meaningful way, sidestepping the issue by citing other cases—*Asay* and *Hitchcock*—where it failed to address those arguments.

Mark James Asay never made a claim under the Eighth Amendment and *Hurst v. State*. After *Hurst v. Florida* issued on January 12, 2016, he challenged his

death sentence in a postconviction motion filed in late January 2016, arguing that under *Witt v. State*, 387 So.2d 922 (Fla. 1980), the Florida Supreme Court should retroactively apply *Hurst v. Florida* to his case. Briefing was completed on February 23, 2016, and oral argument was held on March 2, 2016. The Florida Supreme Court denied Asay's motion for supplemental briefing on March 29, 2016. Other than two *pro se* pleadings filed in May 2016, Asay filed nothing further.

Hurst v. State issued on October 14, 2016. Asay filed nothing after the issuance of *Hurst v. State*, before the Florida Supreme Court issued its decision in *Asay* on December 22. Asay did not present any arguments or constitutional claims based on *Hurst v. State*. Asay did not present an argument that his death sentences violated the Eighth Amendment based on *Hurst v. State*. Asay made no arguments regarding the retroactivity of *Hurst v. State*. Yet, in *Hitchcock*, the Florida Supreme Court stated that Hitchcock's "various constitutional" arguments "were rejected when we decided *Asay*." *Hitchcock*, 226 So. 3d at 217, despite Asay having never presented those arguments.

Additionally, Mr. Mungin's jury was repeatedly instructed that its penalty phase verdict was merely advisory and only needed to be returned by a majority vote. However, the Eighth Amendment requires jurors to feel the weight of their sentencing responsibility in capital cases. As this Court explained in *Caldwell v. Mississippi*, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472

U.S. 320, 328-29 (1985). *See also Blackwell v. State*, 79 So. 731, 736 (Fla. 1918). Diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a "bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Caldwell*, 472 U.S. at 330.

Mr. Mungin's jurors were told that the judge would make the final sentencing decision, and that their "recommendation" was merely advisory. The jurors were not told that their vote had to be unanimous, or that their recommendation was binding on the sentencing judge. The jurors were not advised of each juror's authority to dispense mercy. The jury was never instructed that it could still recommend life as an expression of mercy, or that they were "neither compelled nor required" to vote for death even if it determined that there were sufficient aggravating circumstances that outweighed the mitigating circumstances. Mr. Mungin's jury's advisory recommendation simply "does not meet the standard of reliability that the Eighth Amendment requires." *Id.* at 341.

Since *Asay*, Florida continues to ignore Eighth Amendment challenges based on *Asay* and *Hitchcock*, where the issues were never raised. Justices of this Court have recognized that "capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that [this Court] has failed to address." *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Sotomayor, J., joined by Ginsburg, J., and Breyer, J., dissenting from the denial of certiorari). *See also*; *Middleton v. Florida,* 138 S. Ct. 829 (2018) (Sotomayor, J., joined by Ginsburg, J., and Breyer, J.,

dissenting from the denial of certiorari); *Guardado v. Jones*, 138 S. Ct. 1131 (2018) (Sotomayor, J., dissenting from the denial of certiorari).

The Florida Supreme Court's failure to address these important Eighth Amendment claims continues, as Justice Sotomayor recognized most recently in *Kaczmar v. Florida*, 2018 WL 3013960 (U.S. June 18, 2018) (Sotomayor, J., dissenting). Justice Sotomayor pointed out that although the Florida Supreme Court recently "set out to 'explicitly address' the *Caldwell* claim" in *Reynolds v. State*, 2018 WL 1633075 (Fla. Apr. 5, 2018), the issue remains unresolved because the opinion "gathered the support only of a plurality, so the issue remains without definitive resolution by the Florida Supreme Court." *Id.*, at *1. As Justice Sotomayor wrote, "the stakes in capital cases are too high to ignore such constitutional challenges." *Truehill*, 138 S. Ct. at 4.

2. The Florida Supreme Court's limited retroactivity rule violates the Equal Protection Clause of the Fourteenth Amendment because it ensures the disparate treatment of similarly situated individuals.

Florida's decision to apply the *Hurst* decisions only to the "post-*Ring*" group of death row inmates results in the unequal treatment of prisoners who were all sentenced to death under the same unconstitutional scheme. Even worse, the "pre-*Ring*" group is much more likely to have been convicted and sentenced to death under procedures that would not pass constitutional muster today.

This Court has previously grappled with the question of whether a different retroactivity rule should apply when a new rule is a "clear break" from the past. The Court made it clear that "selective application of new rules violates the principle of

treating similarly situated defendants the same." *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). The Court also noted: "The fact that the new rule may constitute a clear break with the past has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule." *Id.* at 327-28.

In *Griffith*, the Court adopted the logic of Justice Harlan's dissent in *Desist v. United States*, 394 U.S. 244, 258-59 (1969) (Harlan, J., dissenting):

> We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. **We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a "new" rule of constitutional law.**

(emphasis added). That is precisely the problem with Florida's limited retroactivity rule: similarly situated defendants, all of whom were sentenced to death under the same unconstitutional scheme, will receive different treatment. The Fourteenth Amendment is offended when "the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). Florida's limited retroactivity rule violates Mr. Mungin's right to equal protection of the law.

Like most prisoners who were sentenced to death before *Ring* issued, Mr. Mungin was sentenced to death under standards that would not produce a death

sentence today. Florida's limited retroactivity rule denies relief to people like Mr. Mungin, whose death sentence is far less reliable than most prisoners that were sentenced after *Ring*. Florida's limited retroactivity rule creates a level of arbitrariness, unreliability, and inequality that offends both the Eighth and Fourteenth Amendments.

CONCLUSION

By applying the *Hurst* decisions to some Florida prisoners and not others when all were sentenced to death under the same unconstitutional scheme, the Florida Supreme Court has crafted a rule that ensures that the death penalty will be applied arbitrarily and capriciously, that Florida citizens with unreliable death sentences will be executed, and that similarly situated prisoners will be treated differently, in violation of the Eighth and Fourteenth Amendments. Mr. Mungin respectfully asks this Court to grant certiorari to the Florida Supreme Court.

Respectfully submitted,

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ATTACHMENT A