CAPITAL CASE

NO. 18-8683

IN THE SUPREME COURT OF THE UNITED STATES

JAMES AREN DUCKETT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MARY ELIZABETH WELLS*
Law Office of M.E. Wells
623 Grant Street, S.E.
Atlanta, Georgia 30312-3240
T: (404) 408-2180
mewells27@comcast.net
**Counsel of Record*

BRITTNEY LACY
Capital Collateral Regional Counsel
1 E. Broward Blvd, Suite 444
Ft. Lauderdale, Florida 33301-1806
T: (954) 713-1284
lacyb@ccsr.state.fl.us

COUNSEL FOR PETITIONER

CAPITAL CASE

QUESTIONS PRESENTED

In *Hurst v. Florida* this Court struck down Florida's longstanding capital-sentencing procedures because they authorized a judge, rather than a jury, to make factual findings that were the necessary precondition for a death sentence. On remand, the Florida Supreme Court held, as a state constitutional consequence, that a death verdict cannot be rendered without unanimous jury findings that at least one aggravating circumstance exists and that the sum of aggravation is sufficient to outweigh any mitigating circumstances and to warrant death.

The Florida Supreme Court then held that it would apply both the federal and state jury-trial rights retroactively to inmates whose death sentences had not become final as of June 24, 2002 (the date of *Ring v. Arizona*, precursor of *Hurst*) but that it would deny relief to inmates whose death sentences were final on that date. Petitioner Duckett is in the latter cohort.

The question he presents is whether the Fourteenth Amendment's guarantee of Equal Protection and the Eighth Amendment's prohibition of capricious capital sentencing impose limits upon a state court's power to declare unconventional rules of retroactivity, and whether those limits were transgressed here.[1]

---

[1] The Court denied certiorari on this precise issue in *Hitchcock v. Florida*, No. 17-6180; *Kelley v. Florida*, No. 17-1603; *Fotopoulos v. Florida*, No. 18-5060; and *Owen v. Florida*, No. 18-6776, and it has denied certiorari in numerous other cases filed by death-row inmates affected by the Florida Supreme Court's choice of June 24, 2002 as the cutoff date for retroactive relief under *Hurst*. See pages 16 - 17 *infra*. For the reasons stated at pages 17 - 24 *infra*, counsel respectfully believes that the specific constitutional claims raised by the current Questions Presented nevertheless warrant fresh consideration.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Cases

State Court Cases

Other Cases

Federal Statutes

State Statutes And Rules

Other

IN THE

SUPREME COURT OF THE UNITED STATES

No. 18-_____

JAMES AREN DUCKETT,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

James Aren Duckett respectfully petitions for a writ of certiorari to review a judgment of the Supreme Court of Florida.

OPINIONS AND ORDERS BELOW

This proceeding was instituted as a successive motion for postconviction relief under Florida. Rule Crim. Pro. 3.851. The opinion of the Fifth Judicial Circuit Court in and for Lake County, Florida, denying that motion is unreported. It is reproduced in Appendix A. The Florida Supreme Court affirmed on December 28, 2018, in *Duckett v. State*, 44 Fla. L. Weekly S56, 260 So.3d 230 (Fla. 2018) an opinion reproduced in Appendix B. Other pertinent opinions are *Duckett v. State*, 568 So.2d 891 (Fla. 1990) (affirming Mr. Duckett's conviction and death sentence on direct

appeal), and *Duckett v. State*, 918 So.2d 224 (Fla. 2005) (affirming the denial of an earlier postconviction motion raising *Brady*[2] and recantation claims, among others).

JURISDICTION

The Florida Supreme Court's final judgment was entered on December 28, 2018. This Court has jurisdiction to review it under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

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

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent 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.

STATEMENT OF THE CASE

*I. The crime; Mr. Duckett's conviction and sentence; subsequent pre-*Hurst *proceedings*

A. As the case appeared at trial and on direct appeal

In a 1988 trial, James Aren Duckett was convicted of the murder of 11-year-old Teresa McAbee, whose body had been found sexually assaulted, strangled, and drowned on May 12, 1987. The identity of Mr. Duckett as the perpetrator of this crime was strongly contested both at trial and in postconviction evidentiary proceedings.

---

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

Some events on the evening before the killing were not in dispute.[3] James Duckett was a serving police officer in the city of Mascotte and was the only officer on patrol from 7:00 p.m. on May 11 to 7:00 a.m. on May 12. Between 10:00 and 10:30 p.m. on the 11th, Teresa McAbee left a convenience store a short distance from her home and began talking with a sixteen-year-old Mexican boy, who was doing laundry next door. The two walked to the convenience store's dumpster and talked for about twenty minutes. Mr. Duckett entered the store and asked the clerk Teresa's name and age. After being told that she was between ten and thirteen years old, Mr. Duckett indicated that he was going to check on her. Mr. Duckett exited the store and walked toward the dumpster, where he located Teresa and the boy. He talked with them and, speaking as a police officer, he instructed Teresa to return home. The boy returned to the laundromat to wait for his uncle. He testified that Mr. Duckett and Teresa were standing near Mr. Duckett's patrol car when the uncle arrived. Mr. Duckett then asked the uncle his nephew's age and suggested that the uncle talk to his nephew[4] while Mr. Duckett spoke with Teresa. Mr. Duckett escorted Teresa into the passenger's side of the patrol car, shut the door, and then went around and entered the driver's side door. (*Duckett v. State*, 568 So.2d 891, 892 (Fla. 1990).)[5]

---

[3] *See generally Duckett v. State*, 918 So. 2d 224 (Fla. 2005).

[4] Duckett said that he did not like the 16-year-old hanging out with the pre-teen Teresa behind a dumpster at that time of night and he told the uncle to speak to his nephew about this. (Record on Appeal (*hereinafter* ROA) 638, 1686).

[5] Duckett testified that he explained to Teresa that she should not be at the store at that time of night (Mascotte had a curfew) and that he told her she needed to go home. (ROA 1687.) He made notes of the interview in his police notebook. (Post-conviction Record on Appeal 1 (*hereinafter* PCR1), D. Ex. 16).

At about 11:00 p.m., Teresa's mother walked to the convenience store to find her daughter. The clerk told her that Mr. Duckett may have taken Teresa to the police station. Mrs. McAbee left the store and spent about an hour with her sister driving around Mascotte looking for the girl. Seeing no police car, she drove to the Mascotte police station and found no one there. She then drove on to the Groveland police station and told an officer that she wanted to report her daughter missing. The officer told her that he would contact a Mascotte officer to meet her at the Mascotte police station. Mrs. McAbee returned to the Mascotte station, where Mr. Duckett arrived after fifteen or twenty minutes and told her that he had spoken with Teresa at the store; that Teresa had been in his police car; and that he had directed her to return home. Mrs. McAbee filed a missing person report with Mr. Duckett. Mr. Duckett then went to the McAbee residence to get a picture of Teresa. He called the police chief to tell him of the missing person report and advised the chief that he had made a flyer and did not need any help in the matter. Mr. Duckett then returned to the convenience store with a flyer. (ROA 892.) He asked the clerk to leave the flyer on the counter and ask people about it. (ROA 722.) Mr. Duckett took the flyers to two other convenience stores for posting. The clerk at one of those stores testified that, although the police usually drove by every forty-five minutes to an hour, Mr. Duckett drove by at 9:30 p.m. and did not come again until he brought the flyer later that evening. A tape of Mr. Duckett's radio calls indicated none between 10:50 p.m. and 12:10 a.m. At 1:15 a.m., Mr. Duckett went to the uncle's house to question his nephew about Teresa. At around 3:00 a.m., he

returned to Mrs. McAbee's home to report that Teresa had not yet been located. (568 So.2d at 892.)

Whatever else transpired between approximately 10:30 p.m. on May 11 and the following morning has been in dispute ever since. The prosecution's version of the relevant events is that Mr. Duckett drove Teresa to a lake less than mile from the convenience store, raped and strangled her, and dumped her in the lake. Mr. Duckett's version is that after talking with him in the car, Teresa left to walk to her home which was less than 400 feet behind the Circle K (ROA 513, 896); that he resumed his patrol and never saw her again; that his next contact with the case came when he responded to the request from Groveland to interview her mother; and, that he never assaulted Teresa or drove to the lake that night. (568 So. 2d at 893.)

The prosecution's case identifying Mr. Duckett as Teresa's killer was "based on circumstantial evidence." (*Id.* at 893). As the Florida Supreme Court analyzed that evidence on direct appeal:

(1) Mr. Duckett's and Teresa's fingerprints were discovered commingled on the hood of Mr. Duckett's patrol car. Teresa's prints indicated that she had been sitting backwards on the hood and had scooted up the car. (*Id.* at 893.) The 16-year-old boy's uncle testified that he never saw Teresa touch the hood of Mr. Duckett's car while he was observing them at the convenience store. (*Id.* at 892.)

(2) A technician for the sheriff's department and a prosecution expert witness found that tire tracks at the murder scene were consistent with those of a

Mascotte police car. The local tire center had not sold any of those particular tires during its nine years of existence. However, evidence revealed that the vehicle which left the impressions had driven through a mudhole; no evidence was presented that Mr. Duckett had cleaned his vehicle; and no debris from the scene was found in or on his vehicle. Evidence was also presented that Mr. Duckett was neat and clean later that night, as if he had just come on duty. (*Id.* at 893.)

(3) An FBI agent, Michael Malone, testified as an expert witness for the prosecution that there was a high degree of probability a pubic hair found in Teresa's underpants was Mr. Duckett's. The hair had been submitted to the FBI in a third attempt to link it to Mr. Duckett after expert consultants at two earlier forensic agencies[6] found it insufficient to support this conclusion. (*Id.* at 893.)[7] Blood was found on Teresa's underpants but not in or about Mr. Duckett's patrol car. (*Id.* at 892-893.)

(4) Two young women testified to sexual encounters with Mr. Duckett. (a) Shelby Dow, "a petite nineteen-year-old," said that in either January or February, 1987, she ran into Mr. Duckett while she was attempting to find her boyfriend. He told her that he was also searching for her boyfriend and he offered to drive her in his patrol car. While in the car, Mr. Duckett placed his hand on her shoulder and attempted to kiss her. She refused to kiss him; he desisted; she got out of the car. (*Id.* at 893.) (b) Linda Upshaw, "a petite eighteen-year-old," said that on May 1,

---

[6] The Florida Department of Law Enforcement Crime Lab and Lifecodes.

[7] See the last paragraph of footnote 63 *infra*.

1987, Mr. Duckett picked her up while she was walking along the highway. He drove her to a remote area in an orange grove, parked the car, placed his hand on her breast, and attempted to kiss her. She refused to kiss him; he desisted; and he drove her to where she requested. (*Id.*)[8]

In addition, Grace Gwendolyn Gurley testified for the prosecution that she and two other people were together outside the convenience store on the night of May 11, and that Mr. Duckett called her and her companions and Teresa and "some Spanish boys" to the police car and told them all to go home because it was past curfew. Instead, Gurley testified that she hid on a path near the store. When she saw Mr. Duckett leave, she testified that she returned and saw a police car parked near the dumpster with its headlights off. Teresa was still at the store. Mr. Duckett called Teresa and "told her to come here." Teresa walked toward the police car; Gurley retreated to the bushes so that the officer would not see her; she heard a door shut. When she looked out, she could not see Teresa. The police car backed up and started to drive away. Gurley testified that she saw two people inside the car, "[o]ne was the driver, was the big man, and a small person." Gurley could not describe the small person with any more detail. (*Duckett v. State*, 918 So.2d 224, 232 (Fla. 2005).)

Gurley acknowledged that she had been convicted of three felonies.[9] She

---

[8] The prosecution also presented the testimony of a third young woman that she twice met voluntarily with Duckett and performed oral sex on him. (*Id.* at 893.) The Florida Supreme Court on direct appeal held that this evidence was inadmissible but that the error in its admission was harmless. (*Id.* at 895.)

[9] It was while she was in jail on a probation-violation charge that she saw a TV report about Duckett's arrest. She then told a jail officer that she knew Officer Duckett. Her original statement

admitted that she lied in telling the police that she did not know the name of one of her two companions and about the fact that the girl had gone home earlier in the night. She testified that she did not receive any type of deal in exchange for her testimony. (*Id.*)

Mr. Duckett took the stand in his defense and testified that after questioning Teresa and her sixteen-year-old male companion outside the convenience store, he placed Teresa in his patrol car while he spoke with the boy's uncle about the situation and said he did not like it. (*Duckett v. State*, 568 So.2d 891, 893 (Fla. 1990)). The uncle and some other men, who had driven up while Mr. Duckett was talking with the two young people, departed with the nephew. Mr. Duckett obtained more information from Teresa and told her to go home. She got out of the patrol car and walked away in front of the store. Mr. Duckett did not see her thereafter. (568 So.2d at 893-894.) Defense witnesses outside the convenience store also testified that, after Teresa left, Mr. Duckett drove off alone in the opposite direction. (ROA 1656.)

He testified that he next returned to the police station for a short while, went to a convenience store for coffee, and resumed his patrol. After receiving a call from the Groveland police officer to whom Teresa's mother had reported her missing, Mr. Duckett returned to Mascotte station and spoke with Mrs. McAbee. He later visited the uncle's home to ask some questions about the girl, drove to the McAbee home to

---

did not indicate that she had been present at the convenience-store scene on May 11, but after numerous later interviews with police and prosecutors she developed the version of events to which she testified at trial. (PCR1 981-86; PCR1 D.Ex. 4 (Sworn deposition of Gwen Gurley, 8/3/89), pp. 7-8.)

get a picture of Teresa, returned to city hall, called the police chief, and told him he was going to make a poster and contact all the stores. Regarding Teresa's fingerprints on the hood of his car, he explained that it was possible that she sat on the hood when he was at the convenience store. He denied any involvement with the other two women. (568 So.2d at 894.)

B. The findings of the jury, the trial judge, and the Florida Supreme Court on direct review

The jury found Mr. Duckett guilty of sexual battery and first-degree murder. A penalty hearing was then conducted under the procedure later held unconstitutional in *Hurst v. Florida*.[10] The state presented no additional evidence. Mr. Duckett took the stand again and also presented testimony by his brother, his wife, and a family friend to the effect that he was of good character and peaceable background. By an eight-to-four vote, the jury recommended a death sentence. The trial judge found two aggravating circumstances (that the murder was committed during a sexual battery, and that it was especially heinous, atrocious, or cruel) and one statutory mitigating circumstance (Duckett had no significant history of prior criminal activity). He found that Mr. Duckett's family background and education constituted nonstatutory mitigating evidence. Concluding that the aggravating circumstances outweighed the mitigating circumstances, he sentenced Mr. Duckett to death on the murder charge. (*Id.* at 894.)

---

[10] 136 S. Ct. 616 (2016).

The Florida Supreme Court affirmed on September 6, 1990,[11] and no review was sought in this Court.

*C. Pre-*Hurst *postconviction proceedings*

Mr. Duckett filed an initial postconviction motion in 1992. As amended in 1994, it was the subject of several evidentiary hearings before being denied by the Lake County Circuit Court on August 10, 2001. The Florida Supreme Court affirmed on October 6, 2005 in *Duckett v. State*, 918 So.2d 224, rejecting the following claims, *inter alia*:

(1) *Recantation by Grace Gwendolyn Gurley and Related* Brady[12] *and* Alcorta[13] *Claims.* In posttrial defense interviews and a deposition, Gurley recanted her trial testimony, saying that she was not at the convenience store on the night of the murder; she was told by police what she should say at trial; and she received special treatment in jail because of her cooperation. *(Id.* at 233.)[14] Then she recanted portions of her recantation, stating that she *was* at the store on the night of the murder and *did* see a police car leave with a passenger. *(Id.)*[15] Called to

---

[11] *Duckett v. State,* 568 So.2d 891.

[12] *Brady v. Maryland*, 373 U.S. 83 (1963).

[13] *Alcorta v. Texas*, 355 U.S. 28 (1957).

[14] In a sworn deposition after the trial, Gurley informed Mr. Duckett's trial counsel that she had agreed to lie at trial because the prosecution team told her that she would not do as much time if she cooperated with them. They then took her to the crime scene and drilled her on details: where she had been; where the patrol car was parked; what she would say that she had seen. (PCR1. 983-86, D.Ex. 4 at 14, 19).

[15] Although Gurley purportedly backed off of her sworn deposition recantation of her trial testimony when she spoke to a state investigator after trial, she has repeatedly admitted to lying in her trial both before and after she swore in the deposition that she lied at trial. Gurley admitted that she lied

testify at the postconviction hearing, she claimed the Fifth Amendment privilege and refused to answer any questions concerning that night. (PCR1 at 1299). Without resolving which of Gurley's statements were untrue, and without discussing the *Brady* and *Alcorta* issues raised by the way in which her trial testimony was prepared by police and prosecutors, the Florida Supreme Court held that because she would refuse to testify at a new trial, "the purported change in her testimony would be unlikely to result in a different verdict" (*id.* at 233), and that its "confidence in the verdict is not undermined if Gurley's testimony is removed . . . . Sufficient additional circumstantial evidence exists in this case so that a new trial would not produce a different verdict." (*Id.*)

(2) Brady *claims concerning the hair evidence.* "Duckett claims that the State should have disclosed information contained in a *1997* Department of Justice report indicating that . . . [its FBI hair-analysis expert witness] had testified falsely in a court proceeding in 1985. However, this 1997 report did not exist when Duckett was tried in 1988 or when we affirmed his conviction and sentence in 1990. Duckett fails to establish that the State 'either willfully or inadvertently' suppressed the information." (*Id.* at 235; original emphasis.)

---

at trial to a boyfriend in 1988 or 1989 (PCR1. 1359); in a taped interview with trial counsel's investigator in June of 1989 (PCR1. 981); in the sworn deposition with trial counsel and his investigator in August of 1989 (PCR1 983-86, D.Ex. 4); to a friend post-trial (PCR1. 1341); to a post-conviction investigator in October of 1991 (PCR1 1346-47); to the same investigator and her husband in November of 1992 at which time she signed a sworn affidavit (PCR1 1350-51, 1353), and in three different interviews with three other post-conviction investigators in August of 1997 and 1998 (PCR1 1314, 1322, 1650). Additionally, the woman with Gurley on the night in question does not back up Gurley's version of events and states that Gurley asked her to go along with her version of events so that she could get out of prison early (PCR1 1324-31).

(3) *Ineffective assistance claims relating to the tire-track evidence.* "Duckett alleges that [his trial] counsel was ineffective for failing to investigate the origin of the tires and the tire tracks at the crime scene, failing to present a forensic expert, and failing to impeach the State's witness about the tires. Duckett's conclusory arguments on this issue are legally insufficient and fail to present a proper basis for relief." (*Id.*)[16]

(4) *Ineffective assistance claims relating to counsel's failure to develop expert good-character evidence in mitigation.* "Duckett also alleges that trial counsel was ineffective for failing to obtain and present psychological testing at the penalty phase. . . . ¶ Duckett's claim is essentially that a mental health expert should have been presented to reinforce the idea that he does *not* have mental health problems or sadistic tendencies. Such an expert would merely have provided cumulative evidence to that already presented at the penalty phase through the testimony of Duckett and his friends and family. Duckett fails to establish deficient performance or prejudice on this claim." (*Id.* at 237; original emphasis.)

---

[16] Compare Mr. Duckett's argument on this point: "Also, the evidence at trial was that these tire tracks were consistent with Goodyear Eagle M & S tires, a tire allegedly not commonly sold in the state. Had counsel for the defense investigated he would have discovered that the Jeep Cherokee, a vehicle which is common in central Florida, comes equipped with these tires from the factory." Amended Initial Brief of Appellant, *Duckett v. State*, Florida Supreme Court No. 01-2149, page 54.

The Florida Supreme Court did not address Mr. Duckett's additional argument that "[d]efense counsel failed to present an expert" to rebut the state's interpretation of the evidence that Teresa's fingerprints were on the hood of the police car. "Fingerprint expert Mervin Smith was available to counter the state's erroneous arguments concerning the fingerprints. . . . [record citation omitted]. A crime scene analyst could have also provided information that would have allowed counsel to effectively negate the state's arguments." (*Id.* at page 55.)

III. The proceedings and rulings below

After this Court decided *Hurst v. Florida*, Mr. Duckett filed a successive motion to vacate his death sentence under Florida Criminal Procedure Rule 3.851 (Florida's standard postconviction procedure in death cases). The motion argued that, as a matter of fundamental fairness under state retroactivity law, the rulings in *Hurst v. Florida* and *Hurst v. State*[17] should be applied to grant him relief. (Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence with Special Request for Evidentiary Hearing and Leave to Amend, Fifth Judicial Circuit Court Nos. 87-1347CF and 88-0262 CF, January 12, 2017, pages 13 - 30.) A denial of retroactive relief in his case, he contended, "VIOLATES HURST v. STATE, . . . AND THE EIGHTH AND FOURTEENTH AMENDMENTS." (*Id.* at 39, Point II caption.) Specifically, he asserted that "THE RETROACTIVITY RULINGS IN ASAY V. STATE AND MOSLEY V. STATE THAT SEEMINGLY PERMIT PARTIAL RETROACTIVITY AND/OR CATEGORY BY CATEGORY AND/OR CASE BY CASE RETROACTIVITY OF NEW LAW IN DEATH PENALTY PROCEEDINGS INJECTS ARBITRARINESS INTO THE FLORIDA'S CAPITAL SENTENCE SCHEME THAT VIOLATES THE EIGHTH AMENDMENT PRINCIPLES OF *FURMAN V. GEORGIA*." (*Id.* at 51, Point III caption.)[18]

---

[17] 202 So.3d 40 (Fla. 2016).

[18] "The decisions in *Asay* and *Mosley* have opened the door to arbitrariness infecting Florida's death penalty system in violation of the Eighth Amendment." (*Id.* at 59.)

The Circuit Court denied the motion on July 18, 2018, ruling that the claim that "the retroactivity rulings in *Asay* and *Mosley* inject arbitrariness into Florida's capital sentencing scheme thereby violating the Eighth Amendment principles enunciated in *Furman*" is "without merit," having been rejected in *Lambrix v. State*, 227 So.3d 112 (Fla. 2017).[19] (Order on Defendant's Successive Motion, Fifth Judicial Circuit Court in and for Lake County, Florida, Nos. 87-CF-1347(01) and 88-CF-0262, July 18, 2018, unnumbered ninth and tenth pages.)

Mr. Duckett appealed to the Florida Supreme Court. That court stayed briefing of the appeal pending its consideration of *Hitchcock v. State*[20] and then, after deciding *Hitchcock*, issued an order to Mr. Duckett to show cause why the denial of his Rule 3.851 motion should not be affirmed "in light of this Court's decision in *Hitchcock v. State.*" (*Duckett v. State,* Florida Supreme Court No. SC18-1190, Order, September 20, 2018, page 1.) In response, Mr. Duckett submitted that: "At issue here is whether the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Eighth Amendment, and/or the Florida Constitution are violated when the State of Florida changes the elements of the highest degree of

---

[19] Lambrix argued to the Florida Supreme Court, *inter alia*, that "(3) his death sentences violate the Eighth Amendment; and (4) this Court's decisions regarding the retroactivity of Hurst v. Florida and Hurst violate equal protection." *Lambrix v. State*, 227 So.3d 112, 113 (2017). In response, the Florida Supreme Court ruled that: "To the extent Lambrix now raises additional claims to relief based on the rights announced in Hurst . . . – including arguments based on the Eighth Amendment to the United States Constitution, denial of due process and equal protection based on the arbitrariness of this Court's retroactivity decisions in Asay V and (Fla. 2016) . . . – we reject these arguments based on our recent opinions in Hitchcock v. State, 226 So.3d 216, 2017 WL 3431500 (Fla. Aug. 10, 2017), and Asay v. State (Asay VI), 224 So.3d 695, 2017 WL 3472836 (Fla. Aug. 14, 2017)." (227 So.3d at 113.)

[20] Subsequently decided as *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017).

murder, which is punishable by death, and applies those changes in substantive law retrospectively to . . . [inmates in the *Mosley* cohort], but not to Mr. Duckett." (Corrected Response to Order to Show Cause, *Duckett v. State,* Florida Supreme Court No. SC18-1190, November 26, 2018, page 17.) The State filed a reply to Mr. Duckett's response, urging that *Hitchcock* was indeed controlling, because "[h]ere, just as was presented in *Hitchcock,* Duckett raises various constitutional provisions to argue *Hurst* should be applied retroactively to him. He claims that denying him retroactive application of *Hurst* violates the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution as he was not provided Due Process and Equal Protection." (State's Reply to September 20, 2018 Order to Show Cause [sic],[21] *Duckett v. State,* Florida Supreme Court No. SC18-1190, October 24, 2018, page 11.)

On December 28, 2018, the Florida Supreme Court affirmed the denial of Mr. Duckett's 3.851 motion, holding that "*Hurst* does not apply retroactively to Duckett's sentence of death. *See Hitchcock*, 226 So. 3d at 217 . . . ." (*Duckett v. State*, 44 Fla. L. Weekly S56, 260 So.3d 230, 230-231 (Fla. 2018).)

[21] This filing is a reply to Mr. Duckett's response to the OSC originally filed on October 19, 2018 and later superseded, with leave of court, by the Corrected Response filed on November 26. The initial and corrected responses were substantively identical; the only correction was the redacting of two irrelevant lines of text inadvertently included in the earlier filing.

REASONS FOR GRANTING THE WRIT

A. The issue mis-presented

The Florida Supreme Court's 2016 decision to deny *Hurst*-based relief to inmates whose death sentences became final before June 24, 2002 while granting such relief to those whose death sentences became final after that date generated a flurry of *cert.* petitions from among the 129 inmates in the former group (hereafter, "pre-mid02 inmates"). Those petitions have been consistently denied, including four that raised the identical Questions Presented that Mr. Duckett now raises,[22] at least ten raising closely similar questions (albeit presented with a different focus)[23] and many others that challenged the mid-2002 cutoff line as unconstitutional on

---

[22] Petition for certiorari, *Hitchcock v. Florida*, No. 17-6180 (cert. denied December 4, 2017); Petition for certiorari, *Kelley v. Florida*, No. 17-1603 (cert. denied October 1, 2018); Petition for certiorari, *Fotopoulos v. Florida*, No. 18-5060 (cert. denied October 1, 2018); Petition for certiorari, *Owen v. Florida*, No. 18-6776 (cert. denied February 19, 2019).

[23] Petition for certiorari, *Branch v. Florida*, No. 17-175, pages 16-18 (cert. denied February 22, 2018, the day of Mr. Branch's execution) (a petition that contains some aspects of Mr. Duckett's contentions but also argues along the lines summarized at pages 21 - 22 *infra*, (1) invoking *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), to characterize *Hurst*-based jury-trial rights as substantive and (2) relying heavily on the disparate treatment of specific inmates whose *Teague* dates were fortuitously advanced or delayed by the differing pace of postconviction proceedings in their cases); Petition for certiorari, *Dillbeck v. Florida*, No. 17-9375, pages 15 - 17, 24 - 30 (cert. denied October 1, 2018) (same); Petition for certiorari, *Bradley v. Jones*, No. 17-9386, pages 16 - 18, 25 - 32 (cert. denied October 1, 2018) (same); Petition for certiorari, *Foster v. Florida*, No. 18-5091, pages 16 - 17, 25 - 31 (cert. denied October 1, 2018) (same); Petition for certiorari, *Hamilton v. Florida*, No. 18-5037, pages 16 - 18, 25 - 31 (cert. denied October 1, 2018) (same); Petition for certiorari, *Bates v. Florida*, No. 17-9161, pages 9 - 35 (cert. denied October 1, 2018) (same); Petition for certiorari, *Miller v. Jones*, No. 17-9314, pages 9 - 33 (cert. denied October 1, 2018) (same); *Booker v. Jones*, No. 17-9360, pages 14 - 37 (cert. denied October 1, 2018) (same); Petition for certiorari, *Bowles v. Florida*, No. 17-9348, pages 9 - 32 (cert. denied October 1, 2018) (same); Petition for certiorari, *Stephens v. Florida*, No. 17-9243, pages 10 - 34 (cert. denied October 1, 2018) (same).

grounds distinct from Mr. Duckett's although somewhat resembling his.[24] So why revisit the issue now, apart from the consideration that 123 lives still depend on it?

Justice Breyer's November 13, 2018 statement respecting the denial of certiorari in *Reynolds v. Florida*[25] illuminates the primary reason. Justice Breyer writes:

> "[M]any of these cases raise the question whether the Constitution demands that *Hurst* be made retroactive to all cases on collateral review, not just to cases involving death sentences that became final after *Ring*. I believe the retroactivity analysis here is not significantly different from our analysis in *Schriro v. Summerlin*, 542 U. S. 348 (2004), where we held that *Ring* does not apply retroactively."[26]

Summerlin undoubtedly erects a high bar for any challenges to the Florida Supreme Court's handling of retroactivity issues in the wake of *Hurst*. But the bar is not insurmountable. It has come to be viewed as insurmountable only because of the way in which those challenges were presented to this Court in the earliest *cert.* petitions seeking review of the mid-2002 retroactivity cutoff line.

The first such case was *Lambrix v. Florida*, No. 17-6290.[27] Scheduled for execution on October 5, 2017, Lambrix filed his *cert.* petition on that very day; it

---

[24] The *Lambrix* and *Hannon* petitions discussed between the last paragraph on this page and page 21 *infra* are illustrative of this category.

[25] 139 S. Ct. 27 (2018).

[26] *Id.* at 28.

[27] Mark Asay, a pre-mid-02 inmate and the one in whose case the Florida Supreme Court initially drew the June 24, 2002 line, had been executed on August 24, 2017, but his *cert.* petition, No. 16-9033 (denied the same day), raised only issues under *Brady v. Maryland*, 373 U.S. 83 (1963). A *cert.* petition in *Gaskin v. Florida*, No.17-5669, had been filed on August 15, 2017, but was not conferenced until November 27, 2017, when it was denied. That petition urged both that the Florida Supreme Court's retroactivity cutoff date was arbitrary, in violation of Equal Protection and Due Process (Petition for certiorari, *Gaskin v. Florida*, No.17-5669, pages 28 - 32) and that the *Hurst* rulings were retroactive under the "federal retroactivity standards" of *Montgomery v. Louisiana*, 136

was denied that day; he was executed that night. The petition raised four Questions Presented, two of which challenged the June 24, 2002 cutoff as arbitrary, in violation of Equal Protection and Due Process. The gist of the inequality/arbitrariness argument was that, because postconviction proceedings in different Florida cases had progressed at differing paces, three inmates convicted of chronologically earlier murders than Lambrix's had been granted *Hurst* relief which Lambrix was denied.[28] Because it is *always* true that different postconviction proceedings evolve on differing timelines, Lambrix's reasoning simply challenged

---

S. Ct. 718 (2016), and *Welch v. United States*, 136 S. Ct. 1257 (2016). (*Gaskin* petition, No.17-5669, pages 32 - 38.) The *Montgomery* analysis sought to evade *Summerlin* by characterizing *Hurst* untenably as "substantive." The Equal-Protection/Due-Process point did offer the instructive observation that "Mr. Gaskin's case shows how leaving behind the pre-*Ring* cases is also contrary to evolving standards of decency because those fortunate to obtain a retrial will have a jury that will consider all available mitigation under a constitutional standard that favors the defendant. With the evolving standards of decency, society and trial counsel's understanding of mitigation have evolved. Since Mr. Gaskin's first trial, society has gained an understanding of how the brain develops, the effects of trauma during development, the infirmities of youth and neuropsychological impulsivity. This Court has provided a stream of cases that required previously-discounted mitigation to be considered and in some cases act as a bar to execution." But that point was buried in a broad, general attack on the arbitrariness of nonretroactivity generally – an attack which offered no coherent reason for stopping short of overruling *Summerlin*. (*See, e.g., Gaskin* petition, No.17-5669, at page 30: "If the retroactivity split based on *Ring* stands, Florida no longer has narrowed the death penalty to the most aggravated and least mitigated cases. The *Ring* split has left individuals with a death sentence because a court never found sufficient constitutional error to grant a post-*Ring* resentencing or because their case simply became final before *Ring*. There is nothing about the crime or the individual that maintains the pre-*Ring* defendants' condemned status. The *Ring*-split retroactivity is arbitrary and capricious because there is no meaningful distinction based on the culpability or severity of offense, rather, it is based on the mere date *Ring* was issued. Those fortunate enough to obtain a new penalty phase before a jury will have fuller and greater consideration of their mitigation.")

[28] "Lambrix has been denied the benefit of *Hurst v. State*. While his crime was subsequent to the murders for which White, Card, and Parker were convicted, and his conviction became final after theirs, Lambrix has been denied the benefit of *Hurst v. State* simply because his death sentence was final in 1986. . . . ¶ "The only distinction between Lambrix's case and those of White, Card, and Parker is that later as a matter of luck and timing [they] received resentencings to determine the sentence to be imposed for murders committed before the ones Lambrix was convicted of having committed. That distinction rests entirely on arbitrary factors like luck and happenstance that is unconnected to the crime of [sic] the defendant's character." Petition for Certiorari, *Lambrix v. Florida*, No. 17-6290, pages 14 - 15.

the "arbitrariness" that is inherent in *any* retroactivity cutoff line and thus amounted to a direct attack on *Teague v. Lane,*[29] as well as *Summerlin.*

The second *cert.* petition challenging the mid-2002 retroactivity cutoff line was *Hannon v. Florida*, No. 17-6650. Scheduled for execution on November 8, 2017, Hannon filed his *cert.* petition and an application for a stay on November 2; both were denied on the 8th and he was executed that night. Hannon's seven-page Question Presented ended with a three-point summary that included challenges to Florida's June 24, 2002 retroactivity cutoff date as violating the Eighth Amendment and Due Process and Equal Protection.[30] The Eighth Amendment argument, which centered on the greater reliability of unanimous jury verdicts (required by *State v. Hurst*) over pre-*Hurst* non-unanimous jury verdicts, was given pride of place[31] and dealt with the retroactivity problem by characterizing jury unanimity (implausibly) as a "substantive" right[32] – hence a right required to be given fully retroactive effect

---

[29] 489 U.S. 288 (1989).

[30] Petition for certiorari, *Hannon v. Florida*, No. 17-6650, pages vi - vii:

> "1. Given the Florida Supreme Court's determination that jury unanimity will enhance the reliability under the Eighth Amendment of decisions to impose death and should be retroactively applied in some capital cases, is the refusal to retroactively apply the requirement of juror unanimity to cases in which a death sentence was final before June 24, 2002 a violation of the Eighth Amendment?
>
> "2. Whether Due Process and the Equal Protection Clause of the Fourteenth Amendment is offended by the Florida Supreme Court's decision in *Hurst v. State* to retroactively apply the unanimity requirement only to those death sentences that were not final on June 24, 2002, while denying the benefit of the unanimity requirement as to death sentences that were final before June 24, 2002?"

[31] *See id.* at pages 15 - 23.

[32] *Id.* at page 20: "The Florida Supreme Court made a substantive change when it required unanimity because of the special need for reliability in a capital case and to insure that death sentences are not imposed in an arbitrary fashion. In this regard, society has greater confidence in

despite *Teague*.[33] But no attempt was made to address *Summerlin* (which, of course, had held the right to jury trial procedural for *Teague* purposes); the only references to arbitrariness or Equal Protection in the Reasons section of the petition were two conclusory sentences at the tag-end of the petition; and these sentences said nothing about how or why the mid-2002 cutoff is more unequal or arbitrary than any other nonretroactivity rule[34]

Both *Lambrix* and *Hannon* were thrust upon this Court at the eleventh hour and were required to be considered under the time pressures of impending executions.[35] These are not circumstances conducive to a thorough examination of

---

those death sentences. But the manner in which this change has been extended retroactively to some death sentenced individuals but not others arbitrarily leaves intact death sentences recognized as lacking reliability."

[33] *Id.* at page 20: "Enhancement of reliability warrants retroactive application of new substantive rules. *See Desist v. United States*, 394 U.S. at 262 (Harlan, J., dissenting) ('constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied')."

[34] *Hannon* petition, No. 17-6650, at pages 23 - 24: "This Court should consider whether the execution of Mr. Hannon constitutes cruel and unusual punishment in violation of the Eighth Amendment where Florida law no longer permits a death sentence to be imposed unless the jury unanimously consents, where Mr. Hannon's jury did not unanimously find the required facts to impose a death sentence, and where the jury instructions improperly diminished the jury's sense of responsibility. This Court should consider whether denying Mr. Hannon the benefit of *Hurst v. State* demonstrates a level of capriciousness and inequality so as to violate the Equal Protection Clause. This Court should consider whether carrying out Mr. Hannon's execution in spite of the recognized risk of unreliability constitutes the arbitrary exercise of governmental power that violates the Due Process Clause."

[35] To add to the Court's time-pressure problem, Lambrix also filed a *cert.* petition in a federal habeas proceeding in which he argued that Florida statutory amendments of 2016 and 2017 granting capital defendants essentially the same jury-trial rights that had been declared on federal and state constitutional grounds in *Hurst v. Florida* and in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), were being applied arbitrarily because the Florida courts were denying them any retroactive application although they were "substantive." Petition for certiorari, *Lambrix v. Secretary, Department of Corrections, and Florida Attorney General*, No. 17-5539, page ii: "The State of Florida has therefore applied a new substantive statute in a non-sensical, uneven, and arbitary manner. Consequently, Petitioner's right to Due Process and Equal Protection under the Fourteenth Amendment and the right to be free from cruel and unusual punishment under the Eighth Amendment are at stake." On October 3, 2017, Lambrix applied for a stay of execution in this pending federal case; the application was referred to the Court on October 5 (the day of his scheduled execution) and was denied the same

issues which surface only briefly and without any real supporting reasoning or explanation in a *cert.* petition. Lambrix and Hannon tossed a few references to Equal Protection and arbitrariness into arguments which ran on at length about the harms worked by nonretroactivity generally but never undertook to explain why Florida's unique, unorthodox mid-2002 retroactivity cutoff was any *more* arbitrary than any other nonretroactivity line. The first *cert.* petition to attempt this explanation was conferenced on December 1, 2017,[36] three weeks after Hannon's execution. By that time, it is unsurprising that the Florida retroactivity problem had taken on the air of a futile challenge to *Teague* and *Summerlin* at best, or a doctrinally unsupportable Hail Mary at worst.

Subsequent *cert.* petitions only added to this inescapable miasma in which the very real difference between *Summerlin*-style retroactivity and Florida's mid-2002 cutoff line was obscured. For the most part, these petitions (1) argued that *Hurst*-based jury-trial rights were "substantive" within *Montgomery v. Louisiana,*[37] and (2) made the same arbitrariness argument that Lambrix had expounded, based

---

day and at the same time that his petition from the Florida Supreme Court was denied. *Lambrix v. Secretary, Department of Corrections, and Florida Attorney General,* Nos. 17A368 and 17A380. As in *Hannon,* Lambrix's "substantive" formula evoked straightforward *Teague* analysis and equally straightforward *Summerlin* rejection. Hannon also sought *cert.* in a federal habeas proceeding, making an argument similar to Lambrix's based on the 2016 - 2017 statutory amendments and adding the question "Whether reasonable jurists could differ whether the retrospective application of Chapter 2017-1 to some homicides committed prior to its enactment but not others violates the United States Supreme Court's precedents concerning due process, equal protection, and the right to be free from the arbitrary imposition of death and *Furman v. Georgia,* 408 U.S. 238 (1972) . . . ." Petition for certiorari, *Hannon v. Jones,* No. 17-6651, page ii. This petition was filed on November 8, 2017 (the day of Hannon's scheduled execution) and denied the same day.

[36] *Hitchcock v. Florida,* No. 17-6180.

[37] 136 S. Ct. 718 (2016).

on the brute fact that postconviction proceedings move at different speeds in different cases, resulting in some post-mid02 inmates getting *Hurst* relief although their crimes predated those of some pre-mid02 inmates who were denied the same relief,[38] or (3) commingled the preceding two jaded arguments with the one that Mr. Duckett now presents.[39] No harried reader of this swarm of petitions could escape the impression that there was nothing more or less going on in Florida than a wholesale defense effort to unseat *Summerlin* if not *Teague* itself.

But, with respect, that's a misimpression. Petitioner Duckett's Questions Presented accept *Teague* and *Summerlin* as unchallenged givens. If the Florida Supreme Court had done nothing more in 2016 than to declare all *Hurst*-based relief unavailable in cases final before *Hurst v. Florida* (decided January 12, 2016), *Summerlin* would state the controlling federal constitutional rule and end the matter. Instead, the Florida Supreme Court devised a very different sort of nonretroactivity rule – one that is manifestly less reasoned and more capricious than any nonretroactivity rule recognized by any court in any criminal or even civil context from *Sunburst*[40] on down. Pages 29 - 35 *infra* explain why this is so.

Still, one may reasonably ask, don't we have the federal constitutional equivalent of a no-harm/no-foul situation here? If the Florida Supreme Court could have denied retroactive application of the *Hurst* rulings to all cases final before

---

[38] *See, e.g.*, Petition for certiorari, *Griffin v. Florida*, No. 18-5174 (cert. denied October 1, 2018). *And see* the *Gaskin* petition discussed in note 27 *supra*.

[39] *See, e.g.*, the petitions in *Bates v. Florida*, *Miller v. Jones*, *Booker v. Jones*, *Bowles v. Florida*, and *Stephens v. Florida* cited in footnote 23 *supra*, at the respective pages indicated there.

[40] *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932).

January 12, 2016, how can inmates whose *Teague* date preceded June 24, 2002 be heard to complain that they were unconstitutionally disadvantaged by being denied relief which that court gratuitously offered in post-June-24-2002 cases? To state this question is not to answer it; and the Court should receive full merits briefing and argument before answering it. The ostensible gratuity of the Florida Supreme Court's granting of *Hurst*-based relief to that one-third of the State's death-row population whose finality date falls after June 24, 2002 is a relevant but hardly decisive factor in the federal constitutional calculus. For even if state retroactivity law is not federally compulsory, it *is* law, not a mere act of beneficence. The denial of rights recognized by state law cannot be rationally defended on the ground that their allowance to some (while they are denied to others) is pure *noblesse oblige*. After all, the day has long since passed when limitations upon state-law grants of benefits were deemed immune from scrutiny for compatibility with basic federal constitutional guarantees. *See, e.g., Sherbert v. Verner*, 374 U.S. 398 (1963); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Evitts v. Lucey*, 469 U.S. 387 (1985). "[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham v. Richardson*, 403 U.S. 365, 374 (1971).[41]

[41] *See also Bell v. Burson*, 402 U.S. 535, 539 (1971): "This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.'"

Notably, the Court thought that the issue presented in *Danforth v. Minnesota*[42] – whether States are free to prescribe retroactivity rules that are less stringent than *Teague*'s – was worthy of certiorari review. It answered that question in the affirmative. No less important, in the wake of *Danforth*, is the question whether there are any Equal Protection or Due Process constraints upon a State's exercise of that freedom when the rules it prescribes are aberrant. This question stands at the heart of Mr. Duckett's case.

B. The real issue

1. In context

In *Hurst v. Florida*, this Court invalidated Florida's capital sentencing procedure which had been in effect (with minor, presently irrelevant changes) since December 8, 1972. On remand, the Florida Supreme Court held that Timothy Hurst was entitled to a new sentencing trial.[43] It ordered two additional state constitutional sentencing reforms (described on page 27 *infra*), and the Florida Legislature subsequently amended the State's capital-sentencing statute (in ways presently irrelevant).[44]

---

[42] 552 U.S. 264 (2008).

[43] *Hurst v. State*, 202 So.3d 40 (Fla. 2016).

[44] As amended on March 7, 2016 and again effective March 13, 2017, Fla. Stat. § 921.141 provides that a capital sentence may be imposed only after a unanimous jury has found at least one aggravating circumstance and has unanimously recommended a death sentence based upon findings that there exist sufficient aggravating circumstances to warrant death and to outweigh any mitigating circumstances found.

The Florida Supreme Court then addressed the question of the retroactive application of the federal constitutional rule of *Hurst v. Florida* to the State's approximately 380 condemned inmates. *Hurst* (decided on January 12, 2016) had followed *Ring v. Arizona*[45] (decided on June 24, 2002) in subjecting the capital sentencing process to the Sixth Amendment requirement of *Apprendi v. New Jersey*[46] (decided on June 26, 2000) that all facts necessary for criminal sentencing enhancement must be found by a jury.

Applying state retroactivity doctrines, the Florida Supreme Court held in *Mosley v. State*[47] that inmates whose death sentences were not final on June 24, 2002 were entitled to *Hurst*-based relief. It held in *Asay v. State*[48] that inmates whose death sentences became final before that date were not entitled to relief.[49]

---

[45] 536 U.S. 584 (2002).

[46] 530 U.S. 466 (2000).

[47] 209 So.3d 1248 (Fla. 2016).

[48] 210 So.3d 1 (Fla. 2016).

[49] A comparison of the reasoning of the Florida Supreme Court in *Mosley* and *Asay* is puzzling:

(1) In *Mosley*, the court articulates two state-law tests for retroactivity: a "fundamental fairness" test deriving from *James v. State*, 615 So.2d 668 (Fla. 1993) and a three-factor test deriving from *Witt v. State*, 387 So.2d 922 (Fla. 1980). The relationship between the two tests is not clear: at one point the *Mosley* opinion appears to treat *Witt* as refining the *James* test (*Witt* "involves a more in-depth consideration of how to analyze when fairness must yield to finality based on changes in the law" [209 So.3d at 1276]), but at another point it says that "[t]his Court has previously held that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty" (209 So.3d at 1274-1275). What *is* clear is that the Florida Supreme Court found *Hurst* retroactive under *James* (*id* at 1275) independently of its alternative finding of retroactivity under *Witt* (*id.* at 1276 - 1283). But, baffingly, the same court's *Asay* opinion makes no reference at all to the *James* test: *James* is not discussed or even cited, and its omission is unexplained.

(2) Florida's *Witt* test closely resembles this Court's pre-*Teague* formula in *Linkletter v. Walker*, 381 U.S. 618 (1965), and *Stovall v. Denno*, 388 U.S. 293 (1967) It considers three factors. In discussing the first factor, "Purpose of the New Rule" (209 So.3d at 1277), the *Mosley* court concludes that it "weighs heavily in favor of retroactive application" (209 So.3d at 1278). The *Asay* opinion, discussing

Based on Florida Department of Corrections data[50] (and putting aside some 94 cases in which *Hurst* relief might be denied under Florida Supreme Court decisions

---

the same factor – and describing the "purpose" of *Hurst* no differently than does the *Mosley* opinion – concludes rather more modestly that this factor "weighs in favor of applying *Hurst v. Florida* retroactively" (210 So.3d at 10).

(3) The second *Witt* factor is "Reliance on the Old Rule" (*Mosley* 209 So.3d at 1278). Analyzing this factor in *Mosley* the court says it "weighs in favor of granting retroactive relief to the point of the issuance of *Ring* (209 So.3d at 1281) "[b]ecause Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002" (209 So.3d at 1280). In *Asay*, the second *Witt* factor "weighs heavily against retroactive application of *Hurst v. Florida* to this pre-*Ring* case" (210 So.3d at 12) because "this Court's reliance on the old rule has spanned decades' worth of capital cases, with 386 inmates currently residing on death row and 92 executions carried out since 1976" (*id.*). Notably: (a) The figure "386" includes *both* the *Mosley* and the *Asay* cohorts. Thus, the court invokes as a reliance concern in *Asay* the 152 cases in which it held retroactive relief appropriate in *Mosley*, plus another 94 cases in which it would deny retroactive relief on harmless-error grounds (see note 51 *infra*). And (b) The *Asay* court mentions in an introductory historical passage that it had rejected a *Ring* claim – the same claim that prevailed in *Hurst v. Florida* – in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002). But it omits any discussion of *Bottoson* in its reliance analysis and thus does not explain why Florida prosecutors and courts were less entitled to rely on the constitutionality of Florida's unchanged statutory sentencing scheme after *Ring* (and *Bottoson*) than before.

(4) The third *Witt* factor is "Effect on the Administration of Justice" (*Mosley*, 209 So.3d at 1281). In its analysis of this factor, the *Mosley* court says that "[h]olding *Hurst* retroactive to when the United States Supreme Court decided *Ring* would not destroy the stability of the law, nor would it render punishments uncertain and ineffectual" (209 So.3d at 1281): "[H]olding *Hurst* retroactive would only affect the sentences of capital defendants. Further, in addition to the fact that convictions will not be disturbed, not every defendant to whom *Hurst* applies will ultimately receive relief." (209 So.3d at 1282.) The *Asay* court, in contrast, concludes that the "Effect" factor "weighs heavily against applying *Hurst v. Florida* retroactively to Asay." (210 So.3d at 13.) It says nothing about the considerations that "convictions will not be disturbed" and that "not every defendant . . . will ultimately receive relief" since some defendants waived jury trial and others will be unable to establish that *Hurst* error was prejudicial (*see Mosley*, 209 So.3d at 1282).

[50] See Appendices C and D *infra*.

not presently relevant[51]), the *Mosley-Asay* dividing line would grant *Hurst*-based relief to 152 condemned inmates and deny it to 129.[52]

On remand from *Hurst v. Florida,* the Florida Supreme Court had added two state constitutional supplements to the Sixth Amendment jury-trial right recognized by this Court. It ruled that a jury's death verdict must rest upon findings that include the sufficiency of aggravation and its preponderance over mitigation, so that a death sentence should be recommended; and it held that these findings must be unanimous.[53] In *Hitchcock* v. State[54] the court held that these state-law rights – as well as the federal Sixth Amendment jury-trial right – would be vouchsafed retroactively to the *Mosley* cohort but denied to the *Asay* cohort.[55] Again, 129 Florida condemned inmates were denied relief granted retroactively to 152.

Mr. Duckett's petition questions the consistency of the *Mosley-Asay* dividing line with the Fourteenth Amendment's requirement of equal protection of the laws[56]

---

[51] The Florida Supreme Court has denied *Hurst* relief on harmless-error grounds in cases in which a capital defendant waived either jury trial at the penalty stage or postconviction proceedings, and in cases in which a jury recommendation of death was unanimous. The Florida Center for Capital Representation's data suggest that 25 cases may fall in the former category, 69 in the latter. Because nothing in the present case has any implications for these rulings of the Florida Supreme Court or *vice versa*, the 94 affected cases are best put aside for present purposes.

[52] There are now 123. Messrs. Asay, Lambrix, and Branch have been executed; Dean Kilgore died on death row of natural causes; Roger Cherry and Ted Herring have had their death sentences reduced to life on grounds unrelated to any *Hurst* issue.

[53] *Hurst v. State*, 202 So.3d 40, 51 - 59 (Fla. 2016)

[54] 226 So. 3d 216 (Fla. 2017).

[55] Following *Hitchcock*, Asay's reiterated invocation of the federal and state constitutional jury-trial rights was rejected in *Asay v. State*, 224 So.3d 695 (Fla. 2017).

[56] *See, e.g., Yick Wo v. Hopkins* 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

and the prohibition of capricious capital punishment embodied in the Eighth and Fourteenth Amendments.[57] He contends that neither the federal nor the state rights to jury findings as the necessary predicate for a death sentence can be temporally parceled in this extraordinary manner.[58]

2. In substance

This case arises at the intersection of two principles that have become central fixtures of the Court's jurisprudence over the past four and a half decades.

The first principle, emanating from *Furman v. Georgia*, 408 U.S. 238 (1972) and *Godfrey v. Georgia*, 446 U.S. 420 (1980), is 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" (*id.* at 428). Succinctly put, this principle "insist[s] 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's concern against capriciousness in capital cases refines the older, settled precept that Equal Protection of the Laws 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

---

[57] *See, e.g., Godfrey v. Georgia* 446 U.S. 420 (1980); *Espinosa v. Florida* 505 U.S. 1079 (1992) (*per curiam*); *Johnson v. Mississippi*, 486 U.S. 578, 584 - 585, 587 (1988).

[58] Mr. Duckett challenges the *Mosley-Asay* divide as applied to either (1) the Sixth Amendment jury-trial right recognized in *Hurst v. Florida* or (2) the state constitutional rights recognized by the Florida Supreme Court on remand. Issues 1 and 2 are distinct but overlapping. To keep this *cert.* petition succinct, counsel here concentrates on the area of overlap and does not develop issues 1 and 2 separately.

a uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

The second principle, originating in *Linkletter v. Walker*, 381 U.S. 618 (1965) and later refined in *Teague v. Lane*, 489 U.S. 288 (1989) recognizes the pragmatic necessity for the Court to evolve constitutional protections prospectively without undue cost to the finality of preexisting judgments. This need has driven acceptance of various rules of nonretroactivity, all of which necessarily accept the level of arbitrariness that is inherent in the drawing of temporal lines.

The Court has struck a balance between the two principles by honoring the second even when its application results in the execution of an inmate whose death sentence became final before the date of an authoritative ruling establishing that the procedures used in his or her case were constitutionally defective. *E.g.*, *Beard v. Banks*, 542 U.S. 406 (2004). If nothing more were involved here, that balance would be decisive. But the Florida Supreme Court's post-*Hurst* retroactivity rulings do involve more. They inaugurate a kind and degree of capriciousness that far exceeds the level justified by normal nonretroactivity jurisprudence.

To see why this is so, one needs only consider the ways in which Florida's pre-*Ring* condemned inmates do and do not differ from their post-*Ring* peers:

What the two cohorts have in common is that both were sentenced to die under a procedure that allowed death sentences to be predicated upon factual findings not tested by a jury trial – a procedure finally invalidated in *Hurst*

although it had been thought constitutionally unassailable under decisions of this Court stretching back a third of a century.[59]

The ways in which the two cohorts differ are more complex. Notably:

(A) Inmates whose death sentences became final before June 24, 2002 have been on Death Row longer than their post-*Ring* counterparts. They have demonstrated over a longer time that they are capable of adjusting to that environment and continuing to live without endangering any valid interest of the State.

(B) Inmates whose death sentences became final before June 24, 2002 have undergone the suffering chronicled in, *e.g.*, *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, [1993] 1 Zimb. L.R. 239, 240, 269(S) (Aug. 4, 1999) and by Justice Breyer, dissenting from the denial of certiorari in *Sireci v. Florida*, 137 S. Ct. 470 (2016) longer than their post-*Ring* counterparts.[60] "This Court, speaking of a period of *four weeks,* not 40 years, once said that a prisoner's uncertainty before execution is 'one of the most horrible feelings to which he can be subjected.'" *Id.* at 470. "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*, 528 U.S. 990 [120 S. Ct. 459,

---

[59] *See Spaziano v. Florida*, 468 U.S. 447 (1984); *Hildwin v. Florida*, 490 U.S. 638 (1989); and *Bottoson v. Florida*, 537 U.S. 1070 (2002) (denying certiorari to review *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002)).

[60] *See also, e.g., Soering v. United Kingdom and Germany*, 11 EHRR 439 (European Ct. Human Rts, Series A, Vol. 161, July 7, 1989); *Pratt v. Johnson*, [1994] 2 A.C. 1; *State v. Makwanyane & Mchunu*, 16 HRLJ 154 (Const'l. Ct. S. Africa 1995) (opinion of Justice Madala, ¶ [247]).

462] (1999) (Justice Breyer, dissenting from the denial of certiorari). Justice Breyer has concluded that protracted death-row incarceration alone is a matter of significant constitutional concern.[61] The concern can only be intensified when a rule of nonretroactivity categorically denies relief to a class of inmates *because* they have endured for sixteen and a half years or more awaiting execution.

(C) Inmates whose death sentences became final before June 24, 2002 are more likely than their post-*Ring* counterparts to have been given those sentences under standards that would not produce a capital sentence – or even a capital prosecution – under the conventions of decency prevailing today. In the generation since *Ring* was decided, prosecutors and juries have been increasingly unlikely to seek and impose death sentences.[62] Thus, we can be sure that a significant number

---

[61] Although "lengthy delays [of pre-execution confinement on death row] are made inevitable by the Constitution's procedural protections for defendants facing execution [ ], [they] deepen the cruelty of the death penalty and undermine its penological rationale." *Reynolds v. Florida*, 139 S. Ct. 27, 28 (2018) (statement of Justice Breyer respecting the denial of *certiorari*.)

[62] *See, e.g.*, BRANDON L. GARRETT, END OF ITS ROPE 79 - 80 and figure 4.1 (Harvard University Press 2017); DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2016: YEAR END REPORT 2 - 5 (2016); DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2018: YEAR END REPORT 1 - 5 (2018).

A significant factor in the decreasing willingness of juries to impose death sentences has been the development of a professional corps of capital mitigation specialists – experts focused and trained specifically to assist in the penalty phase of capital trials. This subspecialty has burgeoned as a unique field of expertise since the turn of the century. *See, e.g.*, Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 Hofstra L. Rev. 1161 (2018); EDWARD MONAHAN & JAMES CLARK, eds., TELL THE CLIENT'S STORY: MITIGATION IN CRIMINAL AND DEATH PENALTY CASES (2017); 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); Russell Stetler, *Why Capital Cases Require Mitigation Specialists*, 3:3 INDIGENT DEFENSE 1 (National Legal Aid and Defender Association, July/August 1999 *available at* https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/why-mit-specs.authcheckdam.pdf; Jeffrey Toobin, *Annals of the Law: The Mitigator*, THE NEW YORKER, May 9, 2011, pp. 32 - 39. It is fair to say that capital sentencing trials conducted since 2000, when this Court put the legal community on notice regarding the vital importance of developing mitigating

of cases which terminated in a death verdict before *Ring* would not be thought death-worthy by 2019 standards. We cannot say which specific cases would or would not; but it is plain generically – and even more plain in cases where the jury was sharply divided in its penalty recommendation, as it was (8 to 4) in Mr. Duckett's case – that some inmates condemned to die before *Ring* would receive less than capital sentences today.

---

evidence (*see Williams v. Taylor*, 529 U.S. 362 (2000), have been far more likely to present a full picture of relevant sentencing information than pre-*Williams* trials. The explicit requirement that a mitigation specialist be included in capital defense teams was added to the ABA Guidelines in 2003. *See* American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003 revision), Guidelines 4.(A)(1) and 10.4(C)(2)(a), 31 Hofstra L. Rev. 913, 952, 999 - 1000 (2003) *and see id.* at 959 - 960. Since that time, the collection and presentation of mitigating evidence in capital cases has been increasingly professionalized. *See, e.g., Supplementary Guidelines for the Mitigation of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev 677 (2008).

Another significant factor appears to be that public support for the death penalty is waning. *Compare* Alan Judd, "Poll: Most Favor New Execution Method" *Gainesville Sun*, February 18, 1998, p. 1 ("Asked whether convicted murderers should be put to death or sentenced to life in prison, 68 percent chose execution. Twenty-four percent preferred life prison terms, while 8 percent offered no opinion.") *with* Craig Haney, "Column: Floridians prefer life without parole over capital punishment for murderers," *Tampa Bay Times*, Tuesday, August 16, 2016, 3:46 p.m., *available at http://www.tampabay.com/opinion/columns/column-floridians-prefer-life-without-parole-over-capital-punishment-for/2289719* (In "a recent poll of a representative group of nearly 500 jury-eligible Floridians. . . . when respondents are asked to choose between the two legally available options – the death penalty and life in prison without parole – Floridians clearly favor, by a strong majority (57.7 percent to 43.3 percent), life imprisonment without parole over death. The overall preference was true across racial groups, genders, educational levels and religious affiliation.") Although direct comparison of these 1998 and 2016 poll results is not possible because the 1998 report does not specify either the precise nature of the population sampled or the exact form of the question asked, the general trend suggested by the two polls is consistent with the evolution of popular opinion regarding the death penalty reflected in national polling and other indicia. *See* Death Penalty – Gallup Historical Trends – Gallup.com, *available at* http://www.gallup.com/poll/1606/death-penalty.aspx (between 1985 and 2001, the median percentage of the population favoring death was 54.5 %; the median percentage of the population favoring LWOP was 36 %; between 2006 and 2014, the median percentage favoring death was 49%; the median percentage favoring LWOP was 46 %); *Glossip v. Gross*, 135 S. Ct. 2726, 2772 - 2775 (2015) (Justice Breyer, joined by Justice Ginsburg, dissenting), citing, *e.g.*, Reid Wilson, "Support for Death Penalty Still High, But Down," *Washington Post*, GovBeat, June 5, 2014, online at www.washingtonpost.com/blogs/govbeat/wp/2014/06/05/support-for-death-penalty-still-high-but-down.

(D) Inmates whose death sentences became final before June 24, 2002 are more likely than their post-*Ring* counterparts to have received those sentences in trials involving problematic fact finding. The past two decades have witnessed a broad-spectrum recognition of the unreliability of numerous kinds of evidence – flawed forensic-science theories and practices, hazardous eyewitness identification testimony, and so forth – that was accepted without question in pre-*Ring* capital trials.[63] Doubts that would cloud today's capital prosecutions and cause today's

---

[63] *See* EXECUTIVE OFFICE OF THE PRESIDENT, REPORT TO THE PRESIDENT: FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016) (REPORT OF THE PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY [September 2016]), *available at* https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf), supplemented by a January 16, 2017 Addendum, *available at* https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensics_addendum_finalv2.pdf) [hereafter "PCAST"]; COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY, NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf [hereafter "NRC"]; ERIN E. MURPHY, INSIDE THE CELL: THE DARK SIDE OF FORENSIC DNA (2015); Jessica D. Gabel & Margaret D. Wilkinson, *"Good" Science Gone Bad: How the Criminal Justice System Can Redress the Impact of Flawed Forensics*, 59 Hastings L. J. 1001 (2008); Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C.L. Rev. 163 (2007); Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 Tex. L. Rev. 1051 (2013); Simon A. Cole, *Response: Forensic Science Reform: Out of the Laboratory and into the Crime Scene*, 91 Tex. L. Rev. SEE ALSO 123 (2013); Michael Shermer, *Can We Trust Crime Forensics?*, SCIENTIFIC AMERICAN, September 1, 2015, *available at* http://www.scientificamerican.com/article/can-we-trust-crime-forensics/; *2016 Flawed Forensics and Innocence Symposium*, 119 W. Va. L. Rev. 519 (2016); Aliza B. Kaplan & Janis C. Puracal, *It's Not a Match: Why the Law Can't Let Go of Junk Science*, 81 Albany L. Rev. 895 (2017-18); Alex Kozinski, *Rejecting Voodoo Science in the Courtroom*, WALL STREET JOURNAL, September 19, 2016, *available at* https://www.wsj.com/articles/rejecting-voodoo-science-in-the-courtroom-1474328199. *And see*, illustratively, *William Dillon, available at* https://www.innocenceproject.org/cases/william-dillon/.

In particular, "PCAST . . . [found] that, based on their methodology and results, the papers described in the DOJ supporting document do not provide a scientific basis for concluding that microscopic hair examination is a valid and reliable process." (PCAST 120.) The detailed study of the field by the National Research Council in 2009 thoroughly documents this negative appraisal (see NRC 155 - 161), concluding (at 161): "The committee found no scientific support for the use of hair comparisons for individualization in the absence of nuclear DNA." *And see* Federal Bureau of Investigation, *FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of [Pre-2000] Cases in Ongoing Review*, April 20, 2015, available at https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-

prosecutors and juries to hesitate to seek or impose a death sentence were unrecognized in the pre-*Ring* era. Evidence which led to confident convictions and hence to unhesitating death sentences a couple of decades ago would have substantially less convincing power to prosecutors and juries today.[64] Mr. Duckett's case – tried largely upon undiscriminating prosecution forensics, including non-DNA hair analysis which is now widely understood to have no claim at all to scientific validity[65] – strikingly illustrates this concern.

Taken together, considerations (A) through (D) make it plain that the peculiar form of nonretroactivity presented by the *Mosley-Asay* divide produces a level of lethal arbitrariness and inequality that runs far beyond anything involved in standard-fare *Linkletter* or *Teague* rulings. Its denial of relief in precisely the class of cases in which relief makes the most sense is altogether perverse. Nothing in the Florida Supreme Court's *Asay* or *Mosley* opinions provides a single plausible – or even coherent – justification for such an anomalous outcome. See note 49

---

contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review ("All but two of 28 FBI examiners provided testimony that contained erroneous statements or authored lab reports with such statements."); *e.g., United States v. Ausby*, ___ F.3d ___ (D.C. Cir. 2019) [2019 WL 984112, March 1, 2019].

[64] Concededly, penalty retrials in the older cases would also pose greater difficulties for the prosecution because of the greater likelihood of evidence loss over time. But the prosecution's case for death in a penalty trial seldom depends upon the kinds of evidentiary detail that are required to achieve conviction at the guilt-trial stage. Transcript material from guilt trials will remain available to prosecutors in all cases in which they opt to seek a death sentence through a penalty retrial; and it is a commonplace of capital sentencing practice that – as was the case at Mr. Duckett's trial – prosecutors base their argument for death entirely or almost entirely on their guilt-phase evidence, leaving the penalty trial as a *locus* primarily for defense mitigation. Moreover, even if a prosecutor does opt to seek a penalty retrial and fails to obtain a new death sentence, the bottom-line consequence is that the inmate will continue to be incarcerated for life. That is a substantially less troubling outcome than the prospect of outright acquittals in guilt-or-innocence retrials involving years-old evidence that concerned the Court in *Linkletter* and *Teague*.

[65] See the last paragraph of footnote 63 *supra*.

supra. To the contrary, those opinions display the kind of self-contradictory, contrived reasoning which this Court ordinarily views as the telltale run-up to an unreasonable result.[66]

[66] *See, e.g., Lafler v. Cooper*, 566 U.S. 156, 173 (2012); *Porter v. McCollum*, 558 U.S. 30, 42-44 (2009); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 256-260 (2007); *Miller-El v. Cockrell*, 537 U.S. 322, 344 (2003).

CONCLUSION

The issue presented here continues to be literally vital not only for Mr. Duckett but for 122 other Florida condemned inmates. Counsel are advised that petitions for certiorari will be soon be filed in *Reese v. State*, 2019 WL 99118 (Fla. 2019), and *Thompson v. State*, 2019 WL 116580 (Fla. 2019), raising the identical issue. A grant of review in Mr. Duckett's case will enable this Court to give their common claim the plenary attention it deserves.

Respectfully submitted,

Mary Elizabeth Wells
Law Office of M.E. Wells
623 Grant Street SE
Atlanta, Georgia 30312-3146
T: (404) 408-2180
mewells27@comcast.net
Florida Bar No. 0866067

BRITTNEY LACY
Capital Collateral Regional Counsel
1 E. Broward Blvd, Suite 444
Ft. Lauderdale, FL 33301-1806
T: (954) 713-1284
lacyb@ccsr.state.fl.us
Florida Bar No. 116001

IN THE

SUPREME COURT OF THE UNITED STATES

No. 18-8683

JAMES AREN DUCKETT,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing pleading upon counsel for Respondent by mail, first class postage prepaid, at the following address:

Leslie T. Campbell
Senior Asst. Attorney General
Office of the Attorney General
1515 N. Flagler Drive – Suite 900
West Palm Beach, Florida 33410

Dated this the 28th day of March, 2019.

Counsel for Mr. Duckett