CAPITAL CASE

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN LOVEMAN REESE,

***Petitioner*,**

vs.

STATE OF FLORIDA,

***Respondent*.**

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

PETITION FOR A WRIT OF CERTIORARI

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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 Reese is in the latter cohort.

The questions he presents are 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]

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[1] The Court denied certiorari on this precise issue i*n Hitchcock v. Florida*, No. 17-6180; *Kelley v. Florida*, No. 17-1603; *Fotopoulos v. Florida*, No. 18-5060; *Owen v. Florida*, No. 18-6776; and *Shere v. Florida*, No. 18-7568*,* 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 12 - 13 *infra*. For the reasons stated at page 13 through page 20, paragraph 1 *infra,* counsel respectfully believes that the specific constitutional claims raised by the current Questions Presented nevertheless warrant fresh consideration.

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PETITION FOR WRIT OF CERTIORARI

John Loveman Reese 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 Fourth Judicial Circuit Court in and for Duval County, Florida denying that motion is unreported. It is reproduced in Appendix A. The Florida Supreme Court affirmed on January 4, 2019, in *Reese v. State*, 261 So. 3d 1246, an opinion reproduced in Appendix B.

JURISDICTION

The Florida Supreme Court's final judgment was entered on January 4, 2019. This Court has jurisdiction to review it under 28 U.S.C. § 1257(a).

CONSTITUTIONAL 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

1. Mr. Reese's crime, conviction and sentence; subsequent pre-Hurst proceedings

(a) The timeline

Mr. Reese was convicted on March 25, 1993, of first-degree murder, sexual battery with great force, and burglary with assault. (*Reese v. State*, 694 So. 2d 678, 680 (Fla. 1997); *Reese v. State*, 261 So. 3d 1246, 1246 (Fla. 2019).)

The conviction was affirmed in 1997 but the trial court's sentencing order was found deficient for failure to conduct an explicit analysis of the evidence in mitigation. (*Reese v. State*, 694 So. 2d 678 (Fla. 1997).) A new sentencing order was entered, but in 1999 the Florida Supreme Court again remanded, noting that "confusion has . . . arisen as to whether or not new hearings are required" in the case of such a reversal. (*Reese v. State*, 728 So. 2d 727, 728 (Fla. 1999).) It ordered the trial judge "to conduct a new hearing, giving both parties an opportunity to present argument and submit sentencing memoranda before determining an appropriate sentence." (*Id.*) It specifically commanded that "[n]o new evidence shall be introduced at the hearing." (*Id.*)

The trial judge re-imposed the death sentence and the Florida Supreme Court affirmed it on August 17, 2000. (*Reese v. State*, 768 So. 2d 1057 (Fla. 2000).) This Court denied certiorari on March 5, 2001. (*Reese v. Florida*, 532 U.S. 910 (2001).)

In 2009, the Florida Supreme Court affirmed the denial of Reese's initial motion for postconviction relief. (*Reese v. State*, 14 So. 3d 913 (Fla. 2009).)

(b) The evidence at trial; conviction and sentence

On January 28 or 29, 1992, Mr. Reese, at the age of twenty-seven,[2] raped and strangled Sharlene Austin. During the preceding two-and-a-half years, Ms. Austin had been best friends with a young woman named Jackie Grier, whom Reese had dated on and off for seven years. Reese was extremely possessive and disliked Austin because of the amount of time Grier spent with her. Mss. Grier and Austin had begun making trips to Georgia where, unknown to Reese, both had met new boyfriends. (*Reese v. State*, 694 So. 2d 678, 680 (Fla. 1997).)

Two days after they returned from the last trip, Ms. Grier phoned Ms. Austin and was unable to reach her. Concerned, she went to the Austin home with a neighbor and found Ms. Austin lying face down in the bedroom, covered with a sheet, strangled with an electrical extension cord that was doubled and wrapped around her neck twice with the ends pulled through the loop. (*Id.*)

Reese was questioned by police after his palm print was found on Austin's waterbed. He confessed to breaking into her home around noon on the 28th. He said he waited for her to return home because he wanted to talk to her about Grier; but when he saw Austin coming home from work, he got scared and hid in a closet. He said that after Austin went to sleep on the sofa, he came out of the closet but panicked when she started to move. He grabbed her around the neck from behind and dragged her into the bedroom. He then raped and strangled her. (*Id.*)

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[2] *See Reese v. State*, 14 So. 3d 913, 920 (Fla. 2009).

He testified at the guilt phase of his trial,

> "detailing an intensely troubled childhood and his emotional relationship with Grier. He claimed to have killed Austin out of panicked emotion. Grier also testified. She claimed that Reese never liked Austin, and said that she (Grier) had in fact broken up with Reese before Austin was killed. Two detectives testified that Reese responded 'yes' when he was asked if he had decided to hurt the victim while waiting for her to come home." (*Id*. at 680.)

Mr. Reese's penalty trial was conducted under the procedure later condemned in *Hurst v. Florida*.[3]

> "[T]he state presented no additional evidence; Reese called several family members, former teachers, and a psychologist. The jury recommended the death penalty by a vote of eight to four. The judge found three aggravators: cold, calculated, and premeditated ('CCP'); heinous, atrocious, or cruel ('HAC'); and committed in the course of a sexual battery and a burglary. He found one nonstatutory mitigator – no significant criminal history – but found that the mitigator, along with other proposed nonstatutory mitigation, was of minimal or no value. He accepted the jury's recommendation and imposed the death penalty." (*Reese v. State*, 694 So. 2d 678, 680 (Fla. 1997).)

(c) The re-sentencing and finalization of a death sentence

Following the non-evidentiary resentencing hearing held in 1999, the trial court again sentenced Mr. Reese to death. Its amended sentencing order found three aggravating circumstances: (1) the homicide was committed during a burglary and sexual battery; (2) the homicide was heinous, atrocious, or cruel; and (3) the homicide was committed in a cold, calculated, and premeditated manner. The court found no statutory mitigating circumstances. It found but discounted seven nonstatutory mitigators: (1) good jail record (minimal weight); (2) positive character traits

[3] 136 S. Ct. 616 (2016).

(minimal weight); (3) defendant's support of Jackie Grier and her children (very little weight); (4) his possessive relationship with Jackie Grier (minimal weight); (5) emotional immaturity (little weight); (6) possible use of drugs and alcohol around the time of the murder (little weight); and (7) lack of a significant criminal record (very slight weight). The court rejected several proposed nonstatutory mitigators, including "emotional or mental impairment at the time of the murder." (*Reese v. State*, 768 So. 2d 1057, 1058 (Fla. 2000).)

On direct appeal, the Florida Supreme Court found that "[t]he record supports the trial court's conclusion that the mitigators either had not been established or were entitled to minimal, little, very little, or very slight weight" (*id.* at 1059) and affirmed the sentence of death (*id.* at 1060).

*(d) The pre-*Hurst *postconviction proceeding*

The principal focus of Mr. Reese's initial Rule 3.581 proceeding – adjudicated in 2009 – was trial counsel's failure to develop and present significant mental-health evidence in mitigation at the 1993 penalty trial. The Florida Supreme Court's opinion rejecting claims of ineffective assistance in this regard is sufficiently relevant to Mr. Reese's present petition to require extensive quotation.

> ". . . Appellant argues that counsel failed to present evidence that appellant was under the influence of an extreme mental or emotional disturbance at the time of the crime – a statutory mitigator. . . . This claim rests largely on the assertion that counsel did not request that his mental health expert conduct neuropsychological testing – testing which would have shown that appellant had frontal lobe impairment.
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> . . . . . .
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> "First, . . . counsel did . . . present . . . evidence of appellant's

mental or emotional distress at the time of the crime . . . . Trial counsel had appellant examined by Dr. Harry Krop, who interviewed appellant and others, reviewed relevant records, including trial-related material, and conducted psychological testing. He testified at length during the penalty phase, outlining appellant's biography and explaining all the factors affecting his psychological profile. During his testimony, trial counsel asked him specifically to address appellant's mental and emotional state at the time of the murder. Although Dr. Krop stated that appellant knew right from wrong, Krop concluded that 'when you look at all factors combined, that [have] accumulated, hurt, frustration feelings, he felt desperate to stay in the relationship, coupled with some fear and anxiety that were occurring at the time of the incident, plus the effects of cocaine and alcohol . . . his mental state was seriously impaired at the time of the offense.'

"Second, appellant has not demonstrated that counsel was ineffective in failing to request that Dr. Krop conduct neuropsychological testing. Appellant's trial counsel testified at the evidentiary hearing that he was not aware of any reason to request additional testing. Had such testing been recommended, counsel stated that he would have had the doctor conduct the tests. Dr. Krop had interviewed appellant and others, reviewed related records, and conducted psychological testing on appellant in preparation for the penalty phase. He testified at the evidentiary hearing that he did not conduct any neuropsychological testing at that time, finding such testing unwarranted. There was no indication of possible brain damage. Krop further testified, however, that in hindsight he should have conducted such tests. In connection with the postconviction proceedings, Krop did conduct neuropsychological testing of appellant. Krop testified at the evidentiary hearing that the results indicated appellant had frontal lobe impairment, which affects impulse control and problem solving.

"'. . . '[t]his Court has established that defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire.'

" . . . Krop testified that his new neuropsychological testing indicated that appellant had frontal lobe impairment, which affects impulse control and judgment. He said that he could not diagnose appellant with brain damage. Further, Krop said that this new finding would have had little effect on his penalty-phase testimony. Based on this neuropsychological factor, Krop said that he would have opined that

this impairment made appellant's 'serious emotional disturbance' at the time of the crime 'more extreme.' Appellant presented another expert at the evidentiary hearing, Dr. Miller, who interviewed appellant and reviewed Krop's testing results. He agreed that those test results indicated frontal lobe impairment. Accordingly, at best, the evidence shows that appellant had a frontal lobe impairment affecting his impulse control that constituted an additional factor to be considered in relation to his emotional or mental disturbance at the time of the crime. However, even this conclusion was disputed in the postconviction proceedings by Dr. Tannahill Glen, the State's expert, who independently tested appellant. She testified at the evidentiary hearing that although appellant had a personality disorder not otherwise specified (NOS), the neuropsychological tests did not indicate that appellant had a frontal lobe impairment. Further, the State's radiologist testified that appellant's MRI was normal.

"Our review of the record indicates that extensive testimony regarding appellant's psychological profile and the factors affecting his mental and emotional state were presented in the penalty phase. The testimony and conclusions provided by appellant's expert witness at the postconviction evidentiary hearing were largely cumulative of that testimony. Coupled with this fact and in light of the facts of this crime, the new determination that appellant has frontal lobe impairment that affects his impulse control is not a significant addition to Dr. Krop's testimony at the penalty phase cited above." (*Reese v. State*, 14 So. 3d 913, 916 - 919 (Fla. 2009).)

2. The proceedings and rulings below

On July 7, 2017, Mr. Reese filed a second Rule 3.851 motion, contending that his death sentence should be vacated pursuant to *Hurst v. Florida*[4] and *Hurst v. State.*[5] The Circuit Court denied relief and Mr. Reese appealed.

On January 4, 2019, the Florida Supreme Court affirmed, rejecting Mr. Reese's pertinent claims as follows:

". . . [B]ecause Reese's sentence became final prior to the issuance of *Ring*, he is not entitled to relief under *Hurst* and *Hurst v. Florida.*

[4] 136 S. Ct. 616 (2016).

[5] 202 So. 3d 40 (Fla. 2016).

> "Nor is Reese entitled to relief on his other claims. Reese first asserts that our retroactivity scheme runs afoul of the Fourteenth Amendment's Equal Protection Clause. However, in *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), we rejected the claim that our 'decisions regarding the retroactivity of *Hurst v. Florida* and *Hurst* violate equal protection.' Similarly without merit is Reese's contention that the retroactivity cutoff at *Ring* cannot withstand Eighth Amendment scrutiny because it results in arbitrary and capricious imposition of the death penalty. This 'argument is not novel and has been previously rejected by this Court.' *Asay v. State*, 224 So. 3d 695, 703 (Fla. 2017)." (*Reese v. State*, 261 So. 3d 1246, 1246-47 (Fla. 2019).)

3. The context of these rulings [reader alert][6]

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.[7] It ordered two additional state constitutional sentencing reforms (described on page 11 *infra*), and the Florida Legislature later amended the State's capital-sentencing statute (in ways presently irrelevant).[8]

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

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[6] For the convenience of readers who are familiar with the petition for certiorari in *Duckett v. Florida*, No. 18-8683, filed March 28, 2019, it should be noted that the following pages through page 11 are virtually identical to the parallel text at page 24, paragraph 2 through page 28, paragraph 1 in *Duckett*; page 12 through page 20, paragraph 1 herein are virtually identical to the parallel text at page 16 through page 24, paragraph 1 in *Duckett*; and page 20, paragraph 2 through page 27, paragraph 2 herein are virtually identical to the parallel text at page 28, paragraph 2 through page 35 in *Duckett*.

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

[8] 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.

approximately 380 condemned inmates. *Hurst* (decided on January 12, 2016) had followed *Ring v. Arizona*[9] (decided on June 24, 2002) in subjecting the capital sentencing process to the Sixth Amendment requirement of *Apprendi v. New Jersey*[10] (decided on June 26, 2000) that all facts necessary for criminal sentencing enhancement must be found by a jury.

Applying Florida's retroactivity doctrines, the Florida Supreme Court held in *Mosley v. State*[11] that inmates whose death sentences were not yet final on June 24, 2002 were entitled to resentencing under *Hurst*. It held in *Asay v. State*[12] that inmates whose death sentences became final before June 24, 2002 were not entitled to resentencing.[13]

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[9] 536 U.S. 584 (2002).

[10] 530 U.S. 466 (2000).

[11] 209 So. 3d 1248 (Fla. 2016).

[12] 210 So. 3d 1 (Fla. 2016).

[13] 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 the same factor – and describing the "purpose" of *Hurst* no differently than does the *Mosley* opinion –

Based on Florida Department of Corrections data[14] (and putting aside some 94 cases in which *Hurst* relief might be denied under Florida Supreme Court decisions not presently relevant[15]), the *Mosley-Asay* dividing line would grant *Hurst*-based relief to 151 condemned inmates and deny it to 129.[16]

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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 151 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 15 *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).

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

[15] 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.

[16] 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.

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.[17] In *Hitchcock v. State*[18] 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.[19] Again, 129 Florida condemned inmates were denied relief granted retroactively to 151.

Mr. Reese's petition questions the consistency of the *Mosley-Asay* dividing line with the Fourteenth Amendment's requirement of equal protection of the laws[20] and the prohibition of capricious capital punishment embodied in the Eighth and Fourteenth Amendments.[21] 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.[22]

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

[18] 226 So. 3d 216 (Fla. 2017).

[19] 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).

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

[21] *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).

[22] Mr. Reese 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

REASONS FOR GRANTING THE WRIT

1. Why now? The issue previously 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 five that raised the identical Questions Presented that Mr. Reese now raises,[23] at least ten raising closely similar questions (albeit presented with a different focus)[24] and many others that challenged the mid-2002 cutoff line as unconstitutional on grounds

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succinct, counsel here concentrates on the area of overlap and does not develop issues 1 and 2 separately.

[23] 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); Petition for certiorari, *Shere v. Florida*, No. 18-7568 (cert. denied April 1, 2019).

[24] 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. Reese's contentions but also argues along the lines summarized at pages 17-18 *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).

distinct from Mr. Reese's although somewhat resembling his.[25] 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*[26] 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."[27]

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.[28] Scheduled for execution on October 5, 2017, Lambrix filed his cert. petition on that very day; it was

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[25] The *Lambrix* and *Hannon* petitions discussed at pages 13 - 17 *infra* are illustrative of this category.

[26] 139 S. Ct. 27 (2018).

[27] *Id.* at 28.

[28] Mark Asay, a pre-mid02 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 S. Ct. 718 (2016), and

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.[29] Because it is *always* true that different postconviction proceedings evolve on differing timelines, Lambrix's reasoning simply challenged the "arbitrariness" that is inherent

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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.")

[29] "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.

in *any* retroactivity cutoff line and thus amounted to a direct attack on *Teague v. Lane,*[30] 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 Equal Protection and Due Process.[31] The Eighth Amendment argument, which centered on the greater reliability of unanimous jury verdicts (required by *Hurst v. State*) over pre-*Hurst* non-unanimous jury verdicts, was given pride of place[32] and dealt with the retroactivity problem by characterizing jury unanimity (implausibly) as a "substantive" right[33] – hence a right required to be given fully retroactive effect

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[30] 489 U.S. 288 (1989).

[31] 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?"

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

[33] *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 those death

despite *Teague*.[34] 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.[35]

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.[36] These are not circumstances conducive to a thorough examination of

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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."

[34] *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')."

[35] *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."

[36] 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 day and at the same time that his petition from the Florida Supreme Court was denied. *Lambrix v. Secretary,*

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,[37] 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*,[38] and (2) made the same arbitrariness argument that Lambrix had expounded, based on the brute fact that postconviction proceedings move at different speeds in different cases,

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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.

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

[38] 136 S. Ct. 718 (2016).

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[39] or (3) commingled the preceding two jaded arguments with the one that Mr. Reese now presents.[40] 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 Reese'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*[41] on down. Pages 22 - 28 *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 January 12, 2016, how can inmates whose *Teague* date preceded June 24, 2002 be

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[39] *See*, *e.g.,* Petition for certiorari, *Griffin v. Florida*, No. 18-5174.

[40] *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 24 *supra*, at the respective pages indicated there.

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

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).[42]

[42] *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*[43] – 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. Reese's case.

2. The real issue raised

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 a

[43] 552 U.S. 264 (2008).

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.[44]

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 most recently by Justice Breyer, dissenting from the denial of certiorari in *Sireci v. Florida*, 137 S. Ct. 470 (2016), longer than their post-*Ring* counterparts.[45] "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,

[44] *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)).

[45] *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. 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.[46] Thus, we can be sure that a significant number 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 starkly divided in its penalty recommendation, as it was (8 to 4) in Mr. Reese's case – that some inmates condemned to die before *Ring* would receive less than capital sentences today.

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

[46] *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).

capital trials. This subspecialty has burgeoned as a unique field of expertise since the turn of the century. 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).[47] 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 evidence,[48] have been far more likely to present a full picture of relevant sentencing information than pre-2000 trials. The explicit requirement that a mitigation specialist be included in capital defense teams was added to the ABA Guidelines in 2003.[49] Since that time, the collection and presentation of mitigating evidence in capital cases has been increasingly professionalized.[50] A capital penalty trial like Mr. Reese's – in which competent defense counsel failed to investigate, document, and

[47] *See also*, *e.g.*, 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.

[48] *See Williams v. Taylor*, 529 U.S. 362 (2000). *See also Wiggins v. Smith*, 539 U.S. 510 (2003); *Porter v. McCollum*, 558 U.S. 30, 40 (2009).

[49] 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.

[50] *See Supplementary Guidelines for the Mitigation of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008).

present readily available neuropsychological testimony regarding his client's severe mental disability – would be a gross anomaly today.[51]

(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 factfinding. 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.[52] Doubts that would cloud today's capital prosecutions and cause today's

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[51] Another significant factor in the declining incidence of capital sentences 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.

[52] *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_

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. 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 on the kinds of evidentiary detail that are required to achieve conviction at the guilt-stage trial; transcript material from the guilt-stage trial will remain available to the prosecutors in all cases in which they opt to seek a death sentence through a penalty retrial; it is a commonplace of capital sentencing practice everywhere that prosecutors often rest their case for death entirely or almost entirely on their guilt-phase evidence, leaving the penalty trial as a *locus* primarily for defense mitigation. And even if a prosecutor

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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); 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; 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/*.

does opt to seek a penalty retrial[53] 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*.

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 13 *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.[54]

CONCLUSION

If the Florida Supreme Court had arbitrarily chosen Valentine's Day, 2000 as the cutoff date for retroactive *Hurst* relief, would not certiorari be warranted to measure this choice against the ordinary Equal Protection and Eighth Amendment standards of fairness and rationality?

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[53] But see the preceding point (C).

[54] *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).

The present case can be distinguished from that extravagant hypothetical only because the cutoff date which the Florida Supreme Court did choose – June 24, 2002 – is the date when *Ring v. Arizona* was decided. But despite its intuitive appeal, this is a distinction without a difference. Historically, *Ring*'s decision date has no genuine bearing on Florida law or its federal constitutionality. On October 24, 2002, in *Bottoson v. Moore*, 833 So. 2d 693, the Florida Supreme Court itself held that *Ring* did not apply to Florida's capital sentencing procedure. Before and after *Bottoson*, Florida practice and the Florida courts' determination that it was constitutionally permissible remained exactly the same. Then, fourteen years later, the *Asay* and *Mosley* opinions abruptly declared that June 24, 2002 was a date of unique, critical importance because on that day Florida prosecutors and judges suddenly lost the reliance interest they had previously possessed in the State's unchanged pre-*Ring*/post-*Ring* sentencing practice.[55] This revisionist declaration defies both reality and rationality.

So, does anything in *Asay* or *Mosley* justify the taking of one hundred and twenty-three human lives under federal constitutional principles which "insist upon general rules that ensure consistency in determining who receives a death sentence?"[56] Certiorari should be granted to decide that important question.[57]

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[55] See footnote 13, paragraph (3) *supra.*

[56] *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008).

[57] Petitions for certiorari raising the same Questions Presented as Mr. Reese's are pending in *Duckett v. Florida*, No. 18-8683, filed March 28, 2019, seeking review of *Duckett v. State*, 260 So. 3d 230 (Fla. 2018), and in *Thompson v. Florida*, No. _____, filed May 10, 2019, seeking review of *Thompson v. State*, 261 So. 3d 125 (Fla. 2019).

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