DOCKET NO. _____

OCTOBER TERM, 2018

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM LEE THOMPSON,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

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

CAPITAL CASE

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May 10, 2019

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 Thompson 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]

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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 23 - 24 *infra*. For the reasons stated at pages 24 - 30 *infra,* counsel respectfully believes that the specific constitutional claims raised by the current Questions Presented nevertheless warrant fresh consideration.

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The Petitioner, William Lee Thompson, an indigent, death-sentenced Florida Prisoner, was the Appellant in the Florida Supreme Court.

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

PETITION FOR WRIT OF CERTIORARI

William Lee Thompson 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 Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County denying that motion is unreported. It is reproduced in Appendix A. The Florida Supreme Court affirmed on January 7, 2019, in *Thompson v. State*, 261 So. 3d 1255 (Fla. 2019), an opinion reproduced in Appendix B.

JURISDICTION

The Florida Supreme Court's final judgment was entered on January 7, 2019. 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.

INTRODUCTION

Mr. Thompson's petition and others filed recently[2] present a common question with two important components.

Danforth v. Minnesota[3] recognized the freedom of a State to adopt rules of law that extend retroactive relief beyond that commanded by *Teague v. Lane*.[4] Is a state court's exercise of this freedom a mere "dispensing power"[5] that "'comes as an act of grace'"[6] or is it subject to "the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege'"[7]?

If the latter, does the Florida Supreme Court's announcement of a cutoff rule that is unprecedented and at odds with all normal principles of retroactivity law – denying relief under *Hurst v. State*[8] to an age cohort of death-sentenced inmates which is rationally *more* deserving of such relief than the later cohort to which the Florida Supreme Court extends *Hurst*'s benefits – so aberrant as to violate the federal constitutional guarantees of equal protection and of evenhanded, non-

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[2] *Duckett v. Florida*, No. 18-8683, filed March 28, 2019, seeking review of *Duckett v. State*, 260 So. 3d 230 (Fla. 2018); *Reese v. Florida*, No. ____, filed May 10, 2019, seeking review of *Reese v. State,* 261 So. 3d 1246 (Fla. 2019).

[3] 552 U.S. 264 (2008).

[4] 489 U.S. 288 (1989).

[5] *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935).

[6] *Jay v. Boyd*, 351 U.S. 345, 354 (1956).

[7] *Bell v. Burson*, 402 U.S. 535, 539 (1971).

[8] 202 So. 3d 40 (Fla. 2016).

capricious administration of the death penalty?

STATEMENT OF THE CASE

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

On April 14, 1976, Thompson and a codefendant, Rocco Surace, were indicted for the first-degree murder, kidnapping, and involuntary sexual battery of Sally Ivester. Thompson pleaded guilty but the Florida Supreme Court subsequently allowed him to withdraw his plea. On remand, he again pleaded guilty; a penalty-phase jury recommended the death penalty; the trial judge imposed a death sentence; [9] and the Florida Supreme Court affirmed in *Thompson v. State*, 389 So. 2d 197 (Fla. 1980). Numerous postconviction proceedings followed.[10]

In 1987, the Florida Supreme Court granted Thompson a penalty retrial because the trial judge at the preceding penalty-phase hearing had unconstitutionally restricted the presentation of evidence in mitigation.[11] This hearing, like its predecessors, was conducted under the procedure later condemned in *Hurst v. Florida.*[12] The outcome was, as reported by the Florida Supreme Court:

> The jury, by a vote of seven to five, recommended the imposition of the death penalty. The trial judge imposed the death sentence, finding four aggravating circumstances, specifically that: (1) the crime was committed while Thompson was engaged in the

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[9] *See Thompson v. State*, 619 So. 2d 261, 262 (Fla. 1993).

[10] They are recounted in *Thompson v. State*, 208 So. 3d 49, 51 - 58 (Fla. 2016). Only those presently relevant will be summarized here.

[11] *Thompson v. Dugger,* 515 So. 2d 173 (Fla.1987).

[12] 136 S. Ct. 616 (2016).

> commission of the crime of sexual battery; (2) the crime was committed for financial gain; (3) the crime was especially heinous, atrocious, or cruel; and (4) the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial judge expressly rejected, in detail, each of the mitigating circumstances, including that Thompson lacked the capacity to appreciate the criminality of his conduct. The trial judge noted in this regard that, although Thompson's IQ score was in the dull-normal range, there was evidence that Thompson functioned on a higher level. The trial judge concluded that "the aggravating factors in this case far outweigh[ed] any possible mitigating circumstances.[13]

The Florida Supreme Court affirmed this death sentence – the one currently in issue – in 1993 in *Thompson v. State*, 619 So. 2d 261 (Fla.1993).

The offenses committed by Thompson and Surace against Ms. Iverson were brutal, hideous, and revolting. In an effort to coerce her to obtain money from her parents, they tortured her interminably, abused her sexually, and subjected her to a barrage of humiliation and degradation – a crime out of nightmare.[14] Nonetheless, there was significant mitigating evidence regarding the then 24-year-old[15] Thompson's mental limitations and life history[16] and, although the sentencing judge found it all unconvincing,[17] the jury recommended a capital sentence only by the slimmest possible margin: 7 - 5.

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[13] *Thompson v. State*, 619 So. 2d 261, 264 (Fla.1993).

[14] *See Thompson v. State*, 389 So. 2d 197, 198 (Fla. 1980).

[15] *See Thompson v. State*, 208 So. 3d 49 (Fla. 2016).

[16] *See Thompson v. State*, 619 So. 2d 261, 264 (Fla. 1993).

[17] *See id.*

2. The proceedings and rulings below

After this Court decided *Hurst v. Florida*, Mr. Thompson filed a successive motion to vacate his death sentence under Florida Criminal Procedure Rule 3.851 (Florida's standard postconviction procedure in death cases).[18] As subsequently amended,[19] the motion stated:

> The issue is whether this Court – and the Florida Supreme Court – should continue to apply the unconstitutional 'retroactivity cutoff' to deny Mr. Thompson *Hurst* relief on the ground that his sentence did not become final at least one day after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002). Mr. Thompson asserts that the *Mosley-Asay* dividing line[20] violates the Fourteenth Amendment's requirement of equal protection of the laws and the prohibition against arbitrary and capricious application of the death penalty embodied in the Eighth and Fourteenth Amendments.[21]

The Circuit Court denied these claims and the motion on July 20, 2018 on authority

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[18] Successive Motion to Vacate Sentence of Death with Special Request for Leave to Amend, Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, Case No. 76-3350B, efiled January 10, 2017.

[19] *See* Amended Successive Motion to Vacate Sentence of Death with Special Request for Leave to Amend, Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, Case No. 76-3350B, efiled November 21, 2017.

[20] See pages 9 - 10 *infra*, explaining the reference to the *Mosley-Asay* dividing line. (Footnote added in this petition.)

[21] Amended Successive Motion to Vacate Sentence of Death with Special Request for Leave to Amend, Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, Case No. 76-3350B, efiled November 21, 2017, at page 9. The issue was argued as follows (*id*. at page 10): "To deny Mr. Thompson retroactive relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), on the ground that his death sentence became final before June 24, 2002 under the decisions in *Asay* and *Mosley*, while granting retroactive *Hurst* relief to inmates whose death sentences became final after June 24, 2002 violates Mr. Thompson's right to Equal Protection of the Laws under the Fourteenth Amendment to the Constitution of the United States (*e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against arbitrary infliction of the punishment of death under the Eighth Amendment to the Constitution of the United States (*e.g.*, *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam))."

of *Hannon v. State*, 228 So. 3d 505 (Fla. 2017),[22] and cognate cases.[23]

Mr. Thompson appealed to the Florida Supreme Court. That court stayed briefing of the appeal pending its consideration of *Hitchcock v. State*[24] and then, after deciding *Hitchcock*, issued an order to Mr. Thompson 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*."[25] In response, Mr. Thompson submitted that:

> this Court's creation of an arbitrary retroactivity cut-off date unconstitutionally forecloses Mr. Thompson's right to relief. This Court's rulings in *Asay* and *Mosley*, granting retroactive *Hurst* relief only to inmates whose death sentences became final after June 24, 2002, violates Mr. Thompson's right to Equal Protection of the Laws under the Fourteenth Amendment and his right against arbitrary infliction of the death penalty under the Eighth Amendment of the U.S. Constitution.[26]

He concluded the briefing of the point by elaborating it in an argument that does not materially differ from page 14, paragraph 3 through page 21, paragraph 1 of the present petition.[27]

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[22] *Hannon* is discussed at pages 26 - 28 *infra.*

[23] Order Denying Successive Motion for Postconviction Relief, Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, Case No. F76-3350B, Appendix A *infra*, page A-_.

[24] Subsequently decided as *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). *Hitchcock* is summarized at page 10 *infra.*

[25] Order of November 6, 2017, *Thompson v. Florida*, Florida Supreme Court Case No. SC18-1435, page 1.

[26] [Appellant's] Response to Order to Show Cause, *Thompson v. Florida*, Florida Supreme Court Case No. SC18-1435, e-filed December 4, 2018, page 7.

[27] Reply to State's Reply to Appellant's Response to Order to Show Cause, *State v. Thompson*, Florida Supreme Court Case No. SC18-1435, e-filed December 31, 2018, pages 1 - 9.

On January 7, 2019, the Florida Supreme Court affirmed the denial of Mr. Thompson's 3.851 motion, holding that "Thompson's sentence of death became final in 1993. . . . Thus, *Hurst* does not apply retroactively to Thompson's sentence of death. *See Hitchcock*, 226 So. 3d at 217 . . . ."[28]

3. The context of these rulings

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 ordered that Timothy Hurst be given a new sentencing trial. *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). It took the occasion for a fresh look at the statute in the light of Florida's own constitution and historic practices, and it undertook to correct two deficiencies that this Court had not found it necessary to reach.

First, informed by *Hurst v. Florida* that "the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury . . . must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty,"[29] the court considered what exactly those facts are:

> These necessary facts include, of course, each aggravating factor that the jury finds to have been proven beyond a reasonable doubt. However, the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury. . . . [U]nder Florida law, "The death penalty may be imposed only where *sufficient*

[28] *Thompson v. State*, 44 Fla. L. Weekly S111, 2019 WL 116850 (Fla. 2019), at *1; Appendix B, page B-_.

[29] 202 So. 3d at 53. *Hitchcock* is summarized at page 10 *infra*.

> *aggravating circumstances* exist that *outweigh* mitigating circumstances." . . . Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.[30]

Second, because "Florida has a longstanding history requiring unanimous jury verdicts as to the elements of a crime,"[31] the court concluded that "in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge."[32]

> Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.[33]
>
> In requiring jury unanimity in these findings and in its final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the

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[30] *Id*. (Florida Supreme Court's emphasis).

[31] *Id*. at 57. The history is detailed in *id*. at 55 - 57.

[32] *Id*. at 54 (Florida Supreme Court's emphasis).

[33] *Id*. at 57. The Florida Legislature subsequently amended the State's capital-sentencing statute to embody these requirements. 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.

> administration of justice. . . . "[B]oth the defendant and society can place special confidence in a unanimous verdict."[34]
>
> . . . We also note that the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.[35]

[reader alert][36]

The Florida Supreme Court then addressed the question of the retroactive application of the new federal and state constitutional rules to the State's approximately 380 condemned inmates. *Hurst v. Florida* (decided by this Court on January 12, 2016) had followed *Ring v. Arizona*[37] (decided on June 24, 2002) in subjecting the capital sentencing process to the Sixth Amendment requirement of *Apprendi v. New Jersey*[38] (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*[39] that

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[34] *Id*. at 58.

[35] *Id*. at 59.

[36] 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 14, paragraph 1 *infra* are virtually identical to page 25 through page 27, paragraph 2 and footnote 49 in *Duckett*; that page 14, paragraph 3 through page 21, paragraph 1 herein are virtually identical to page 28, paragraph 2 through page 34 in *Duckett*; that page 21, paragraph 2 through page 22 herein are closely similar to page 22, paragraph 3 through page 23 in *Duckett*; and that page 23, paragraph 2 through page 30, paragraph 1 herein are virtually identical to page 16 through page 22, paragraph 2 in *Duckett*.

[37] 536 U.S. 584 (2002).

[38] 530 U.S. 466 (2000) .

[39] 209 So. 3d 1248 (Fla. 2016).

inmates whose death sentences were not yet final on June 24, 2002 were entitled to resentencing under *Hurst v. Florida* and *Hurst v. State* (decided by the Florida Supreme Court on October 14, 2016 on remand from *Hurst v. Florida*). It held in *Asay v. State*[40] that inmates whose death sentences became final before June 24, 2002 were not entitled to resentencing. In *Hitchcock* v. State[41] the court reiterated that the *Hurst*-based state and federal constitutional jury-trial rights would be vouchsafed retroactively to the *Mosley* cohort but denied to the *Asay* cohort.[42] Based on Florida Department of Corrections data[43] (and putting aside some 94 cases in which *Hurst* relief might be denied under Florida Supreme Court decisions not presently relevant[44]), the *Mosley-Asay* dividing line would grant *Hurst*-based relief to 152 condemned inmates and deny it to 129.[45]

The *Mosley* and *Asay* opinions are remarkable, not only in their unprecedent result – a retroactivity line that predates by a dozen years the decisions it purports

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[40] 210 So. 3d 1 (Fla. 2016).

[41] 226 So. 3d 216 (Fla. 2017.)

[42] 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).

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

[44] 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.

[45] 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.

to implement – but also in their reasoning. *Inter alia:*

(1) In *Mosley*, the court articulates two state-law tests for retroactivity: a "fundamental fairness" test deriving from *James v. State*[46] and a three-factor test deriving from *Witt v. State*.[47] Considering the *James* test first, it "conclude[s] that fundamental fairness requires the retroactive application of *Hurst* [*v. State*], which defined the effect of *Hurst v. Florida*, to Mosley."[48] It then reaches the same result independently under *Witt*.[49] Bafflingly, the 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.[50]

(2) Florida's *Witt* test closely resembles this Court's pre-*Teague* formula in *Linkletter v. Walker*[51] and *Stovall v. Denno*.[52] It considers three factors. In

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[46] 615 So. 2d 668 (Fla. 1993).

[47] 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).

[48] 209 So. 2d at 1275.

[49] *Id*. at 1276 - 1283.

[50] Justice Lewis, in a concurring opinion which argues that "the majority opinion has incorrectly limited the retroactive application of *Hurst* by barring relief to even those defendants who, prior to *Ring*, had properly asserted, presented, and preserved challenges to the lack of jury factfinding and unanimity in Florida's capital sentencing procedure at the trial level and on direct appeal" (210 So. 3d at 30), does cite *James* (*id*. at 30 - 31). His concurrence is based on Asay's failure to preserve any such claims.

[51] 381 U.S. 618 (1965).

[52] 388 U.S. 293 (1967).

discussing the first factor, "Purpose of the New Rule,"[53] the *Mosley* court concludes that it "weighs heavily in favor of retroactive application."[54] The *Asay* opinion, discussing the selfsame 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."[55]

(3) The second *Witt* factor is "Reliance on the Old Rule."[56] Analyzing this factor in *Mosley*, the court says it "weighs in favor of granting retroactive relief to the point of the issuance of *Ring*"[57] "[b]ecause Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002."[58] In *Asay*, the second *Witt* factor "weighs heavily against retroactive application of *Hurst v. Florida* to this pre-*Ring* case"[59] 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."[60] Notably: (a) The figure "386" includes both the *Mosley* and the *Asay* cohorts; 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

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[53] *Mosley v. State*, 209 So. 3d at 1277.

[54] *Id*. at 1278.

[55] *Asay v. State*, 210 So. 3d at 10.

[56] *Mosley v. State*, 209 So. 3d at 1278.

[57] *Id.* at 1281.

[58] *Id.* at 1280.

[59] *Asay v. State*, 210 So. 3d at 12.

[60] *Id.*

in which it would deny retroactive relief on harmless-error grounds.[61] And: (b) The *Asay* court mentions in an introductory historical passage that it had rejected a *Ring* claim – the identical claim that prevailed in *Hurst v. Florida* – in *Bottoson v. Moore*.[62] But it does not discuss *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."[63] 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."[64] "[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."[65] The *Asay* court, in contrast, concludes that the "Effect" factor "weighs heavily against applying *Hurst v. Florida* retroactively to Asay."[66] It says nothing about the considerations that

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[61] See note 44 *supra*.

[62] 833 So. 2d 693 (Fla. 2002).

[63] *Mosley v. State*, 209 So. 3d at 1281.

[64] *Id.*

[65] *Id.* at 1282.

[66] *Asay v. State*, 210 So. 3d at 13.

"convictions will not be disturbed" and that "not every defendant . . . will ultimately receive relief" inasmuch as some defendants waived jury trial and others will be unable to establish that *Hurst* error was prejudicial.[67]

To be sure, "this Court reviews judgments, not opinions."[68] But, as it has often recognized, visibly strained reasoning is the first long step and a strong symptom of a decision heading for an unreasonable result.[69] And the strain in the *Asay-Mosley* opinions is more than mildly manifest.

REASONS FOR GRANTING THE WRIT

I. The constitutional issue presented is substantial and difficult

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).[70] The Eighth Amendment's concern against

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[67] *Mosley v. State*, 209 So. 3d at 1282.

[68] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

[69] *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).

[70] *See also, e.g., Johnson v. Mississippi*, 486 U.S. 578, 584 - 585, 587 (1988); *Maynard v.*

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 uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

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 non-retroactivity, 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 non-retroactivity jurisprudence.

To see why this is so, one needs only consider the ways in which Florida's pre-

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Cartwright, 486 U.S. 356, 361 - 364 (1988); *Espinosa v. Florida*, 505 U.S. 1079, 1081 (1992) (per curiam).

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.[71]

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.[72] "This Court, speaking of a period of *four weeks,* not 40 years, once said that a prisoner's

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[71] *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)).

[72] *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]).

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, 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.[73] 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.[74] Thus, we can be sure that a significant number

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[73] 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).

[74] *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 &

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

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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 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.

was almost evenly divided in its penalty recommendation, as it was 7 to 5 in Mr. Thompson's case – that some inmates condemned to die before *Ring* would receive less than capital sentences today.

(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.[75] Doubts that would cloud today's capital prosecutions and cause today's prosecutors and juries to hesitate to seek or impose a death sentence were

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[75] *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); 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/; **Error! Main Document Only.***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/*.

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 does opt to seek a penalty retrial[76] 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

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

class of cases in which relief makes the most sense is irremediably perverse. This Court should consider whether it rises to a degree of capriciousness and inequality that violates the Eighth Amendment and Equal Protection respectively.

II. Does Teague v. Lane[77] *make the whole matter inconsequential?*

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 simply followed *Teague* and 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 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

[77] 489 U.S. 288 (1989).

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).

So, no, if the rule of *Teague* has any bearing on this case, it is to make the issue which Mr. Thompson presents more consequential. To treat *Teague*'s potential applicability here as releasing the Florida Supreme Court from the obligation to conform its retroactivity rulings to the Eighth and Fourteenth Amendments is to treat *Danforth v. Minnesota*[78] as the license for a *sui generis* exemption of state retroactivity law from federal constitutional control. Plainly, *Danforth* – a straightforward application of the general principle that the States are free to create procedural protections for criminal defendants which are more exacting than the federal[79] – can't be read as having any such purpose or effect.

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[78] 552 U.S. 264 (2008).

[79] *See id*. at 276 - 277: "Notably, the Oregon Supreme Court decided to give retroactive effect to *Escobedo* [*v. Illinois*, 378 U.S. 478 (1964)] despite our holding in *Johnson* [*v. New Jersey*, 384 U.S. 719 (1966)]. In *State v. Fair* . . . , the Oregon court noted that it was continuing to apply *Escobedo* retroactively and correctly stated that 'we are free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires.' . . . In so holding, the Oregon court cited our language in *Johnson* that "'States are still entirely free to effectuate under their own law stricter standards than those we have laid down and to apply those standards in a broader range of cases than is required by this decision.'" . . . (quoting *Johnson,* 384 U.S., at 733 . . .)."

III. But what about all those cert. denials?

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"). As noted on Mr. Thompson's Questions Presented page, *supra*, those petitions have been consistently denied, including five that raised the identical Questions Presented he now raises,[80] at least ten raising closely similar questions (albeit presented with a different focus)[81] and many others that challenged the mid-2002 cutoff line as unconstitutional on grounds distinct from Mr. Thompson's although somewhat resembling his.[82] So why revisit the issue now,

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[80] 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).

[81] 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. Thompson's contentions but also argues along the lines summarized at pages 28 - 29 *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).

[82] The *Lambrix* and *Hannon* petitions discussed from the bottom of this page through page 28 *infra* are illustrative of this category.

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*[83] 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.[84]

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. [85] Scheduled for

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[83] 139 S. Ct. 27 (2018).

[84] *Id.* at 28.

[85] 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 S. Ct. 718 (2016), and *Welch v. United States*, 136 S. Ct. 1257 (2016) (*Gaskin* petition, No.17-5669, pages 32 - 38). The Equal-Protection/Due-Process point observed 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

execution on October 5, 2017, Lambrix filed his cert. petition on that very day; it 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.[86] Because it is *always* true that different postconviction proceedings evolve on differing timelines, Lambrix's reasoning challenged the "arbitrariness" that is inherent in *any* retroactivity cutoff line and thus could have been construed as a direct attack on *Teague v. Lane,*[87] 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

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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."

[86] "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.

[87] 489 U.S. 288 (1989).

were denied on the 8th and he was executed that night. Hannon's 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.[88] 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 and dealt with the retroactivity problem by characterizing jury unanimity as a "substantive" right[89] – hence a right required to be given fully retroactive effect despite *Teague*.[90] The only references to arbitrariness or Equal Protection in the Reasons section of the petition were two

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[88] 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?

[89] *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 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."

[90] *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')."

sentences at the end which did not squarely call upon this Court to address Equal Protection. [91]

Both *Lambrix* and *Hannon* were presented to this Court under the time pressures of impending executions. These circumstances are not conducive to a thorough examination of issues. Lambrix and Hannon referenced Equal Protection and arbitrariness but did not explain in the same manner as here, where there are no time constraints due to a pending execution, 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,[92] three weeks after Hannon's execution.

Subsequent cert. petitions did not squarely raise, as here, the very real difference between *Summerlin*-style retroactivity and Florida's mid-2002 cutoff line. For the most part, these petitions (1) argued that *Hurst*-based jury-trial rights were "substantive" within *Montgomery v. Louisiana*,[93] and (2) made the same or similar arbitrariness argument that Lambrix had expounded, based on the brute fact that postconviction proceedings move at different speeds in different cases, resulting in

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[91] *Id*. 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."

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

[93] 136 S. Ct. 718 (2016).

some post-mid02 inmates getting *Hurst* relief although their crimes predated those of some pre-mid02 inmates who were denied the same relief,[94] or (3) commingled the preceding two arguments with the one that Mr. Thompson now presents.[95] These petitions, rightly or wrongly, may have been perceived as an effort to unseat *Summerlin* and perhaps even *Teague.*

Petitioner Thompson's Questions Presented, however, 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*[96] on down.

With respect, Mr. Thompson submits that in the welter of post-*Hurst* cases in which cert. petitions bearing on the *Asay-Mosley* divide have been denied, the substantial Equal Protection and Eighth Amendment/arbitrariness claims that he raises were not presented to the Court in a manner likely to assure the consideration they deserve.

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[94] *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 85 *supra.*

[95] *See*, *e.g.,* the petitions in *Bates v. Florida*, *Miller v. Jones, Booker v. Jones*, *Bowles v. Florida*, and *Stephens v. Florida*, cited in note 81 *supra*, at the respective pages indicated there.

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

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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