No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL LEE ROBINSON,

***Petitioner*,**

vs.

STATE OF FLORIDA,

Respondent

On Petition for a Writ of Certiorari to the Florida Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Can a defendant in a state capital sentencing proceeding voluntarily, knowingly, and intelligently waive a federal constitutional right that was both unknown to the defendant and unrecognized by the state courts at the time of the purported waiver?

2. Does a Florida capital defendant's waiver of an advisory penalty jury prior to *Hurst v. Florida*, 136 S. Ct. 616 (2016), impose a prospective waiver of the defendant's constitutional right to penalty-jury fact-finding under *Hurst*?

LIST OF PARTIES

All parties appear on the caption to the case on the cover page. Petitioner was the Appellant below. The State of Florida was the Appellee below.

CITATIONS

Citations shall be as follows: The record on appeal from Petitioner's first trial proceedings shall be referred to as "TR1" followed by the appropriate volume and page numbers. The record on appeal from Petitioner's second trial proceedings shall be referred to as "TR2" followed by the appropriate volume and page numbers. The postconviction record on appeal shall be referred to as "PC" followed by the appropriate volume and page numbers. The record on appeal for the successive postconviction motion is comprised of one volume and shall be referred to as "R" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael Lee Robinson, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Florida Supreme Court and address the important questions of federal constitutional law presented. This case presents a fundamental question concerning the Sixth Amendment right to a jury trial, the Due Process Clause requirement of proof beyond a reasonable doubt, and the Eighth Amendment need for a reliable capital sentencing determination.

CITATION TO OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at *Robinson v. State*, 260 So. 3d 1011 (Fla. 2018) and reproduced at Appendix A. Petitioner did not file a Motion for Rehearing. The trial court's unpublished order denying Petitioner's successive motion for post-conviction relief is reproduced at Appendix B. A copy of Petitioner's successive post-conviction motion is reproduced at Appendix D and a copy of Petitioner's Motion for Rehearing filed in the circuit court is reproduced at Appendix E.

JURISDICTION

The opinion of the Florida Supreme Court was entered on December 20, 2018. A Motion for Rehearing was not filed. An application to extend the time for filing this Petition was granted and the time was extended until May 19, 2019. This Petition is timely filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. VI.

The Sixth Amendment to the Constitution of the United States

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. AMEND. VIII.

The Eighth Amendment to the Constitution of the United States

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

U.S. CONST. AMEND. XIV.

The Fourteenth Amendment to the Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. INTRODUCTION

In *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), this Court reaffirmed that a state defendant cannot validly waive a federal constitutional right that was unknown to the defendant and not recognized by the state courts at the time of the purported waiver. *Halbert* was an application of this Court's longstanding precedent regarding waivers of federal constitutional rights, which requires that, in order for such waivers to be valid, they must be voluntary, knowing, and intelligent, and the record in the specific case must establish an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

At issue in this petition is whether the Florida Supreme Court's automatic waiver rule for claims under *Hurst v. Florida*, 136 S. Ct. 616 (2016)—which holds that an entire class of Florida defendants automatically and prospectively waived a federal constitutional right at the penalty phase of their capital trials, even though that right was not known to the defendants or recognized

by Florida's courts at the time of the purported waivers—violates *Halbert* and related decisions of this Court.

At its September 24, 2018 Conference, this Court considered certiorari petitions addressing at least three categories of capital cases the Florida Supreme Court has targeted for the automatic denial of *Hurst* relief. In the "harmless error" category, certiorari petitions address the Florida Supreme Court's per se denial of *Hurst* relief in all cases where the defendant's pre-*Hurst* advisory jury voted unanimously, rather than by a majority, to recommend the death penalty to the judge. In the "retroactivity" category, certiorari petitions challenge the Florida Supreme Court's unusual rule applying *Hurst* retroactively on collateral review, but only to death sentences that became final after *Ring v. Arizona*, 536 U.S. 584 (2002).

This petition addresses a third category of cases the Florida Supreme Court holds must automatically be denied *Hurst* relief: those cases where the defendant, following the guilt phase of his pre-*Hurst* trial, elected to forgo an "advisory jury" for the penalty phase. The Florida Supreme Court's automatic *Hurst* waiver rule holds that, in declining an advisory jury under Florida's pre-*Hurst* law, a defendant thereby prospectively waived his right to penalty-jury fact-finding under *Hurst*, even though that right was not recognized by Florida's courts at the time of trial. The Florida Supreme Court applies this rule without considering whether the circumstances surrounding a particular defendant's decision to decline an advisory jury would render it unjust to deny him the right to pursue *Hurst* relief. Under the state court's rule, no Florida defendant who declined a pre-*Hurst* advisory jury has ever had, or will ever have, the opportunity for resentencing with a constitutional jury.

Petitioner's case addresses two categories – retroactivity and – waivers of advisory juries. This Court should accept jurisdiction to resolve both unconstitutional holdings simultaneously.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. TRIAL COURT PROCEEDINGS

On January 23, 1995, Petitioner pled guilty to first-degree murder and waived a penalty phase jury. The trial court imposed a sentence of death on April 12, 1995. Petitioner asked for the death penalty and requested that no mitigating factors be considered by the trial court. On appeal, the Florida Supreme Court vacated his sentence and remanded the case because "the trial court failed to consider and weigh evidence of substantial mitigation found in the record." *Robinson v. State*, 684 So. 2d 175, 176 (Fla. 1996). This substantial mitigating evidence included: Petitioner's two psychiatric and clinical evaluations; his history of various psychological "disturbances"; a "lifelong history of apparent mental health problems;" and Petitioner's mental functioning which may have been impaired due to several brain injuries. *Id*. at 179-80.

In its opinion, the Florida Supreme Court remanded the case "to the trial court to conduct a new penalty phase hearing before the judge alone." *Id*. at 180. The Florida Supreme Court did not remand for a mere reweighing under *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), which would not have granted Petitioner the same rights as do plenary sentencing proceedings. Rather, the Florida Supreme Court remanded for a new, plenary penalty phase hearing.

B. SECOND TRIAL COURT PROCEEDINGS

Upon remand, Petitioner attempted to withdraw his guilty plea, but trial counsel's oral motion to withdraw the plea was denied. The State argued at the new penalty phase that it did not have to again prove any aggravation because this was merely an opportunity for the defense to put on mitigating evidence and for the trial court to reweigh all of the aggravation and mitigation. In opposition, trial counsel argued that the State had to again prove any aggravating factors beyond a reasonable doubt because the new penalty phase "is not a rubber stamping, this is a new hearing."

Prior to the start of the new penalty phase, there was no plea colloquy or any questioning of Petitioner regarding whether or not he still wished to waive a penalty phase jury. The trial court sentenced Petitioner to death, without the benefit of a jury, in violation of his Sixth Amendment right, on August 15, 1997.

On direct appeal, Petitioner challenged the trial court's denial of his counsel's oral motion to withdraw his guilty plea. *Robinson v. State*, 761 So. 2d 269, 273-74 (Fla. 1999). The Florida Supreme Court denied his appeal and affirmed his conviction and sentence. *Id*. at 274-75, 279. The Supreme Court of the United States denied certiorari on April 3, 2000. *Robinson v. Florida*, 529 U.S. 1057 (2000).

C. POSTCONVICTION PROCEEDINGS

On February 21, 2001, Petitioner filed a Motion to Vacate Judgment and Sentence pursuant to Florida Rule of Criminal Procedure 3.850. Petitioner filed his final amended Rule 3.850 motion on October 10, 2001. Without the benefit of *Ring* or *Hurst*, Petitioner challenged Florida's capital sentencing scheme based on similar principles enunciated in those cases. He also argued that he did not "voluntarily, knowingly, and intelligently waive his right to a capital sentencing jury, and the trial court's inquiry on the purported waiver was constitutionally inadequate."

An evidentiary hearing was conducted on January 29-30, 2003. A final order denying relief was issued on May 15, 2003.

On appeal in his state habeas petition, Petitioner argued: (1) the Florida Supreme Court's decision on direct appeal precluding him from seeking a penalty phase jury was error, and appellate counsel unreasonably failed to bring this matter to the court's attention, thereby rendering ineffective assistance of counsel; and (2) Florida's capital sentencing statute violates *Ring v. Arizona*, 536 U.S. 584 (2002). *See* Petition for Writ of Habeas Corpus Case No. SC04-772. The

Florida Supreme Court affirmed the denial of his 3.850 Motion and denied his state habeas petition. *Robinson v. State*, 913 So. 2d 514 (Fla. 2005).

On September 18, 2017, Petitioner filed a successive motion to vacate his death sentence in the circuit court based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *See* Appendix D. The circuit court denied Petitioner's motion. *See* Appendix B. Petitioner filed a motion for rehearing on April 26, 2017, which was denied on May 12, 2017. *See* Appendix C & E. Petitioner filed a timely appeal on June 7, 2017. *See* Appendix F.

In Petitioner's brief, appealing the denial of his successive motion for post-conviction relief, Petitioner asserted that he never waived his right a penalty phase jury, and even if he had done so, he could not validly waive a right that was unconstitutionally withheld from him. Petitioner argued that denying him the benefits of *Hurst* would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The Florida Supreme Court denied Petitioner's appeal on December 20, 2018. *See* Appendix A.

As this petition explains, the Florida Supreme Court's decision should be reversed as contravening *Halbert* and related "constitutional waiver" decisions of this Court. This Court's intervention is necessary here not only to correct the violation of Petitioner's constitutional rights, but also to prevent the Florida Supreme Court from continuing to apply per se *Hurst* waivers to every Florida defendant who declined an advisory jury before *Hurst*. This Court should also grant review to reaffirm, for the state and federal courts that have expressed confusion over the issue, that *Halbert* meant what it said: a state court is prohibited from holding that a defendant waived a federal constitutional right that was not known to the defendant or recognized by the state courts at the time of the purported waiver.

REASONS FOR GRANTING THE WRIT

I. The Florida Supreme Court's Application of its *Hurst* Waiver Rule to Petitioner Ignored Evidence That Petitioner Never Validly Waived His Right To a Penalty Phase Jury.

A. The Florida Supreme Court's holding is factually inaccurate.

In applying its automatic *Hurst* waiver rule to Petitioner, the Florida Supreme Court concluded that Petitioner's claim that he never waived his right to a penalty jury "is procedurally barred because it could and should have been raised on direct appeal." *Robinson*, 260 So. 3d at 1015. This holding is error because Petitioner filed an ineffective assistance of appellate counsel claim against his direct appeal counsel for failing to raise this issue as a claim in his appeal. Petitioner properly preserved this claim in his state habeas petition arguing that appellate counsel unreasonably failed to challenge the Florida Supreme Court's opinion precluding Petitioner from seeking a jury during his second penalty phase. *See* Petition for Writ of Habeas Corpus Florida Supreme Court Case No. SC04-772; *see also Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000) (state habeas petition is the proper vehicle to advance claims of ineffective assistance of appellate counsel). The Florida Supreme Court denied this claim holding "Robinson claims that this Court erred in precluding Robinson from seeking a penalty phase jury. We reject this claim on the merits." *Robinson*, 913 So. 2d at 528. Thus, Petitioner did preserve the issue, and the Florida Supreme Court incorrectly denied his claim based on its prior erroneous interpretation of *Ring*.

B. The Florida Supreme Court's holding failed to address key issues.

The court's opinion also did not address whether Petitioner ever constitutionally waived his right to a jury, or whether the Florida Supreme Court's decision remanding the case "to the trial court to conduct a new penalty phase hearing before the judge alone" (*Robinson*, 684 So. 2d at 180) was constitutional.

When waiving a vital constitutional right such as the right to counsel, the right to a jury trial, the right to a jury sentencing, and the right to testify, it is clear that pains must be made to ensure an unequivocal waiver of the right. The individual must be fully informed as to all of the dangers and disadvantages of waiving that right. There was no such inquiry in Petitioner's colloquy during his first trial. Nor did Petitioner ever knowingly, voluntarily and intelligently waive his right to a second penalty phase jury. Instead, the Florida Supreme Court remanded his case for a new penalty phase "before the judge alone" (*Id*. at 180), in violation of Petitioner's Sixth Amendment right.

During Petitioner's first trial, the trial court conducted a limited colloquy as to Petitioner's guilty plea but never conducted a colloquy as to his waiving a penalty phase jury. (TR1 1:5-36, 41-42). The only questioning regarding Petitioner waiving his right to a penalty phase jury by the trial court was as follows:

Court:	Are the defense and the state waiving any jury for the penalty phase?
Mr. Culhan:	The Florida Supreme Court has recently said the State has nothing to say about that.
Court:	Then the defense?
Mr. Irwin:	We would be waiving the jury for the penalty phase, judge.
Court:	Have you talked to him about that?
Mr. Irwin:	Yes, we have.
Defendant:	I have stated that earlier.
Court:	You don't want a jury for the penalty phase?
Defendant:	I don't feel I need it. I think if you – contingent on - can you return a penalty phase of death by that?
Court:	I've done it before.
Defendant:	That is what I have been advised by my attorneys. So yes, I waive my right to a jury to the sentencing.
Court:	To recommend a sentence?
Defendant:	That is correct.
	*****
Court:	Mr. Robinson has already pled to first degree murder and I understand he did not want to have a jury for the recommendation. Is that still the case?
Mr. Irwin:	That's correct, your honor.

Court: Mr. Robinson, is that true? You don't want a jury?
Defendant: Yes, ma'am, that's correct.
Court: And have you talked to your lawyers about that again and you still think that that's the way you want to go, without a jury?
Defendant: Yes, ma'am. They came to the jail yesterday and interviewed me and we discussed it and that's correct, I still wish to go without a jury.

(TR1 1:32-33, 41-42).

It cannot be said that the above colloquy demonstrated that Petitioner was "made aware of the dangers and disadvantages of [waiving a jury], so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta v. California*, 422 U.S. 806, 835-36 (1975) (internal citations omitted).

The importance of a thorough colloquy is especially evident now in our post-*Hurst* landscape. The meager questioning done by the trial court in Petitioner's case composes less than four pages of the transcript and is not the unequivocal waiver of a right after having been informed as to all of the dangers and disadvantages of waiving that right.

Second, after the Florida Supreme Court vacated and remanded Petitioner's case for a new penalty phase, *he never waived his right to a penalty phase jury because the Florida Supreme Court withheld this right in violation of the Sixth Amendment*, and neither trial counsel nor the trial court ever asked Petitioner on the record whether he wanted a penalty phase jury. Petitioner maintains that the Florida Supreme Court, when it vacated his original death sentence, remanded his case for a new, plenary penalty phase proceeding rather than a mere reweighing of the aggravating and mitigating circumstances. Trial counsel argued at the second penalty phase that the State had to again prove any aggravating factors beyond a reasonable doubt because the new penalty phase "is not a rubber stamping, [that] this is a *new hearing*." (TR2 2:20-21, 25) (emphasis added). Petitioner was entitled to a penalty phase jury or to again be informed of the dangers and disadvantages of waiving a jury. Petitioner was not given that option.

In this case, the trial court clearly had discretion over what new sentence to impose on Petitioner and was under no obligation to impose the death penalty again. Further, the new penalty phase involved additional considerations and involved more sentencing discretion than the first penalty phase. The Florida Supreme Court made clear on remand that the trial court must take into consideration the wealth of mitigating evidence in Petitioner's case which it ignored the first time. In addition, during the second penalty phase, Petitioner allowed his trial counsel to present a plethora of new mitigating evidence which was not previously presented. Thus, his new penalty phase was a completely new proceeding and the failure to empanel a penalty phase jury, or perform the required colloquy to see if Petitioner still wanted to waive his right to a jury, was a violation of Petitioner's Sixth Amendment rights.

Petitioner had the right to decide anew whether or not he wished to have a penalty phase jury and/or to knowingly, voluntarily, and intelligently waive that right. Petitioner was given no such choice, despite the fact that, as the Florida Supreme Court noted in the appeal from the resentencing, Petitioner had "changed his mind and no longer wish[ed] to die." *Robinson v. State*, 761 So. 2d 269, 275 n.5 (Fla. 1999).

The Florida Supreme Court's holding that Petitioner's new penalty phase hearing be before "the judge alone," *Robinson*, 684 So. 2d at 180, violated Petitioner's Sixth Amendment right to a jury, and this violation cannot now be used to preclude *Hurst* relief. The Florida Supreme Court's opinion remanding the case should not have placed any restrictions on Petitioner's ability, at the resentencing, to invoke his right, or waive his right, to a jury at resentencing. The right to have his resentencing proceeding conducted before a jury and not a judge, is one of the most fundamental rights afforded a criminal defendant under the Sixth Amendment. *See e.g.*, *Ring v. Arizona*, 536 U.S. 584 (2002). "The jury trial provisions in the Federal and State Constitutions

reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Thus, the Sixth Amendment reflects "[t]he deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement." *Id*. As the Supreme Court emphasized in *Sullivan v. Louisiana*, the "most important element" of the Sixth Amendment is "the right to have a jury, rather than a judge, reach the requisite finding of guilty." 508 U.S. 275, 277 (1993) (citation omitted).

Because Petitioner never waived his right to a penalty jury and since it was the Florida Supreme Court's unconstitutional pre-*Hurst* decision on appeal that unduly restricted Petitioner's ability to seek a jury determination at the penalty phase, he is entitled to *Hurst* relief.

II. The Florida Supreme Court's Automatic Waiver Rule for *Hurst* Claims violates the United States Constitution.

The Florida Supreme Court's automatic waiver rule for *Hurst* claims violates the United States Constitution. On its face, the Florida Supreme Court's per se rule is unconstitutional because it holds that an entire class of capital defendants prospectively waived a federal constitutional right that was unknown to the defendants and not recognized by Florida's courts at the time of the purported waivers. As applied to Petitioner specifically, the rule violates this Court's precedent by relying solely on Petitioner's non-waiver of his right to an "advisory jury" for the penalty phase under Florida's unconstitutional capital sentencing scheme.

This Court's intervention is necessary not only to correct the violation of Petitioner's constitutional rights, but also to prevent the Florida Supreme Court from continuing to apply per se *Hurst* waivers to every Florida defendant who declined an advisory jury before *Hurst*. This Court should also grant review to reaffirm, for the state and federal courts that have expressed confusion over the issue, that *Halbert* meant what it said: a state court is prohibited from holding

that a defendant waived a federal constitutional right that was not known to the defendant or recognized by the state courts at the time of the purported waiver.

A. The Florida Supreme Court's *Hurst* Waiver Rule Must Comply with this Court's Precedents Addressing Waivers of Federal Constitutional Rights.

1. Whether a Defendant Waived a Federal Constitutional Right is a Federal Question Controlled by Federal Law.

Although the Florida Supreme Court articulates its automatic *Hurst* waiver rule as a matter of state law, because that rule addresses the waiver of federal constitutional rights, the rule must comply with the minimum federal constitutional standards described in this Court's precedents. The Florida Supreme Court's automatic waiver rule for *Hurst* claims provides that Petitioner and other Florida defendants prospectively waived their Sixth Amendment rights during their pre-*Hurst* trial. The question of a defendant's waiver of a Sixth Amendment right, or any "federally guaranteed right is, of course, a federal question controlled by federal law." *Brookhart v. Janis*, 86 S. Ct. 1245, 1247 (1966); *see also Boykin v. Alabama*, 395 U.S. 238, 242 (1969) ("The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards.").

2. In Order for the State to Overcome the Presumption Against Waiver, the Record Must Establish an Intentional Relinquishment of a Known Federal Constitutional Right.

This Court enforces a presumption against finding that a criminal defendant waived a federal constitutional right. State courts must "indulge in every reasonable presumption against waiver." *Brewer v. Williams*, 430 U.S. 387, 404 (1977); *see also Ohio Bell Telephone Co. v. Public Util. Comm'n of Ohio*, 301 U.S. 292, 307 (1937) ("[We] do not presume acquiescence in the loss of fundamental rights.").

To overcome the default presumption that a federal constitutional right has *not* been waived, the record must establish "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Whether such a relinquishment or abandonment has occurred depends "in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id*.

The State bears the burden of establishing, based on the record in each case, that a defendant's waiver of the Sixth Amendment's jury-trial right was made voluntarily, knowingly, and intelligently, and "with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970); *see also Johnson v. Ohio*, 419 U.S. 924, 925 (1974). The Court has declined to prescribe formulaic criteria for voluntary, knowing, and intelligent waivers, in order to allow for individualized, record-based determinations in each case. *See Iowa v. Tovar*, 541 U.S. 77, 88 (2004).[1] However, the Court has made clear that, unless the constitutional right being waived was adequately explained to the defendant by the court, there can be no voluntary, knowing, and intelligent waiver. *See Dickerson v. United States*, 530 U.S. 428, 442 (2000).

An indeterminate record means no valid waiver. Where the record does not establish a valid waiver, courts may not infer one. *Boykin*, 395 U.S. at 243 ("We cannot presume a waiver . . . from a silent record."); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962) ("Presuming a waiver from a silent record is impermissible.").

[1] This Court has applied the same waiver standard in other contexts where the State bears the burden of showing that a valid waiver. *See Minnick v. Mississippi*, 498 U.S. 146, 159-60 (1990) (Scalia, J., dissenting) (collecting cases).

3. A State Defendant Cannot Validly Waive a Federal Constitutional Right that Was Unknown to the Defendant and Not Recognized by the State Courts at the Time of the Purported Waiver.

In *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), this Court reaffirmed that a defendant cannot voluntarily, knowingly, and intelligently waive a federal constitutional right that was not recognized by the state courts at the time of the purported waiver. In *Halbert*, this Court rejected the state of Michigan's argument that a defendant's nolo contendere plea constituted a prospective waiver of his later-recognized constitutional right to the appointment of first-tier appellate counsel. Mr. Halbert's plea could not serve as a waiver of his federal rights, this Court explained, because there was "no recognized right to appointed appellate counsel he could elect to forgo" in the state of Michigan at the time of the purported waiver (the nolo contendere plea). *Id.* Moreover, this Court ruled, because "the trial court did not tell Halbert, simply and directly" that he was waiving a federal constitutional right that was not yet recognized, the waiver could not have been knowing and intelligent. *Id.*

Halbert was an application of this Court's longstanding precedent regarding waivers of federal constitutional rights, as described above. *See, e.g.*, *Johnson*, 419 U.S. at 925 ("The accused can only waive a *known* right") (emphasis in original). Because the record in *Halbert* did not reflect an "intentional relinquishment of a known right," *Zerbst*, 304 U.S. at 464, this Court concluded that its default presumption against Mr. Halbert's waiver of his constitutional right was not overcome. Indeed, as *Halbert* recognized, it is difficult to conceive how a defendant could voluntarily, knowingly, and intelligently waive a right that was unknown to him and unrecognized by the state courts at the time of the plea. *See Halbert*, 545 U.S. at 623. As this Court made clear even before *Halbert*, unless the constitutional right being waived was adequately explained to the

defendant by the court, there can be no voluntary, knowing, and intelligent waiver. *See Dickerson*, 530 U.S. at 442.

B. The Florida Supreme Court's *Hurst* Waiver Rule Violates this Court's Precedents.

1. The Florida Supreme Court's Rule Ignores the Default Presumption Against Waiver, Precludes Individualized Review of the Record, and Relieves the State of its Burden.

The Florida Supreme Court's rule ignores the presumption that a defendant's federal constitutional rights have *not* been waived, absent case-specific evidence otherwise, and forecloses individualized review of whether there was "an *intentional* relinquishment or abandonment of a *known* right or privilege." *Zerbst*, 304 U.S. at 464. The Florida Supreme Court's rule operates mechanically, rather than individually, to impose prospective *Hurst* waivers on *every* Florida defendant who elected to forego an advisory jury recommendation. There is no examination, beyond the advisory jury waiver, of whether the defendant voluntarily, knowingly, and intelligently waived, on a purely prospective basis, the right to penalty-jury fact-finding later recognized by *Hurst*. The state court's rule does not "depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* By its very nature, the Florida Supreme Court's per se *Hurst* waiver rule does not allow Florida's courts to "indulge in every reasonable presumption against waiver." *Brewer*, 430 U.S. at 404.

Under the state court's rule, no Florida defendant who declined a pre-*Hurst* advisory jury has ever had, or will ever have, the opportunity for resentencing with a constitutional jury. *See, e.g.*, *Hutchinson v. State*, 243 So. 3d 880, 884 (Fla. 2018); *Rodgers v. State*, 242 So. 3d 276, 277 (Fla. 2018); *State v. Silvia*, 235 So. 3d 349, 350-51 (Fla. 2018); *Allred v. State*, 230 So. 3d 412, 413 (Fla. 2017); *Dessaure v. State*, 230 So. 3d 411, 412 (Fla. 2017); *Twilegar v. State*, 228 So. 3d

550, 551 (Fla. 2017); *Covington v. State*, 228 So. 3d 49, 69 (Fla. 2017); *Wright v. State*, 213 So. 3d 881, 902-03 (Fla. 2017); *Davis v. State*, 207 So. 3d 177, 211-12 (Fla. 2016); *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016); *Mullens v. State*, 197 So. 3d 16, 38-40 (Fla. 2016).

The Florida Supreme Court's automatic *Hurst* waiver rule effectively relieves the State of Florida of its burden to establish, based on the record in each case, that a defendant's waiver of the right to penalty-jury fact-finding was made voluntarily, knowingly, and intelligently, *see Johnson*, 419 U.S. at 925, and "with sufficient awareness of the relevant circumstances and likely consequences," *Brady*, 397 U.S. at 748. Instead, Florida's courts impermissibly "presume a waiver . . . from a silent record" in every case where an advisory jury was waived. *Boykin*, 395 U.S. at 243; *see also Carnley*, 369 U.S. at 516. The Florida Supreme Court presumes these waivers without analyzing whether the record reflects that the federal constitutional right being waived was adequately explained to the defendant. *See Dickerson*, 530 U.S. at 442. In Petitioner's case, the Florida Supreme Court refused to even consider evidence Petitioner did not waive his right to an advisory jury for his second penalty phase. Such a per se approach to federal constitutional waivers in Petitioner's and other *Hurst* cases effectively leaves the State of Florida with no burden at all.

2. The Florida Supreme Court's Rule Violates *Halbert* and this Court's Other Decisions Prohibiting State Courts From Finding a Waiver of a Federal Constitutional Right that was Unknown to the Defendant and Not Recognized by the State Courts at the Time of the Purported Waiver.

The Florida Supreme Court's *Hurst* wavier rule directly contravenes this Court's ruling in *Halbert* and earlier decisions that a state criminal defendant cannot voluntarily, knowingly, and intelligently waive a federal constitutional right that was not recognized by the state courts at the time of the purported waiver. *See Halbert*, 545 U.S. at 623; *see also Zerbst*, 304 U.S. at 464 (holding that defendants can only validly waive *known* constitutional rights). The Florida Supreme

Court's rule provides, without individualized review, that defendants automatically and prospectively waived their constitutional right to penalty-jury fact-finding if, before that right was even known to them or recognized by Florida's courts, the defendants declined an advisory penalty jury under Florida's prior scheme.

In Petitioner's case, the Florida Supreme Court held that his waiver of an advisory jury, *twenty-one years* before the right to penalty-jury fact-finding was recognized in Florida, meant that Petitioner had also voluntarily, knowingly, and intelligently waived the right to the penalty-jury fact-finding later described in *Hurst*. That must be wrong under *Halbert* because, at the time of Petitioner's advisory jury decision, there was "no recognized right" to penalty-jury fact-finding in Florida that Petitioner "could elect to forgo." *Halbert*, 545 U.S. at 623. The Florida Supreme Court went even further to hold that its decision to remand the case for a new penalty phase "before the judge alone" also did not deny Petitioner his right a penalty phase jury even though Petitioner had "changed his mind and no longer wish[ed] to die," *Robinson*, 761 So. 2d at 275 n.5, and despite the fact that Petitioner neither requested to, nor did in fact waive, his right to a new penalty phase jury. How could petitioner "elect to forgo" any right if he was never given the option?

Moreover, contrary to *Halbert* and other decisions of this Court, the Florida Supreme Court held that Petitioner had waived his *Hurst* rights even though, at the time of his decision to forgo an advisory jury, he was not informed, "simply and directly," by the court that he was giving up the right to have a jury render the penalty fact-finding. *See Halbert*, 545 U.S. at 623; *Dickerson*, 530 U.S. at 442. Petitioner could not have been so informed because Florida's courts recognized no such right.

Rejecting Petitioner's argument that its *Hurst* waiver rule was contrary to *Halbert*, the Florida Supreme Court unreasonably explained that Petitioner "made a valid waiver" of jury

factfinding. *Robinson*, 260 So. 3d at 1016. The court failed to recognize that, even though it may be true that "the right to a jury trial was well recognized before *Hurst*," the right to *penalty jury fact-finding*—the federal constitutional *Hurst* right that Petitioner was held to have waived—was not recognized in Florida's courts until after *Hurst*. Under the Florida Supreme Court's logic, because the most basic constitutional right to a jury trial was recognized in Florida at the time of a defendant's capital penalty phase, the defendant's waiver of any federal constitutional right associated that penalty phase—even the waiver of an unconstitutional feature like Florida's advisory jury—constituted a waiver of *every* federal constitutional right relating to the capital penalty phase that may one day be addressed by this Court. That sort of waiver analysis is irreconcilable with *Halbert*.

Hurst did not create a "new" right to a jury trial distinct from the pre-*Hurst* right—it was this Court that held in *Hurst* that Florida's scheme systematically denied capital defendants of their constitutional jury-trial rights by allocating the fact-finding decision-making at the penalty phase to the judge, rather than to the jury. As *Hurst* makes clear, at the time of Petitioner's waiver, Florida law did not recognize the right to jury fact-finding at the penalty phase. So, at that time, Petitioner could only waive the right to an advisory jury that would make a generalized recommendation to the judge. Under *Halbert*, he could not have waived a right to jury fact-finding that was not recognized at the time.

The Florida Supreme Court made the same mistake in originally articulating its automatic *Hurst* waiver rule in *Mullens v. State*, when it explained that to allow defendants who declined an advisory penalty jury to present *Hurst* claims "would encourage capital defendants to abuse the judicial process by waiving the right to jury sentencing and claiming reversible error upon a judicial sentence of death." 197 So. 3d 16, 40 (Fla. 2016) (citations omitted). It was inconsistent

with *Hurst* for the Florida Supreme Court in *Mullens* to equate a pre-*Hurst* waiver of an advisory jury with "waiving the right to jury sentencing." *Hurst* makes clear that Florida's advisory jury scheme violated the Sixth Amendment.[2]

The recent decision in *Class v. United States*, 138 S. Ct. 798 (2018), deepens the conflict between the Florida Supreme Court's rule and this Court's constitutional waiver precedents. In *Class*, the Court held that a guilty plea and related "waivers" do not, by themselves, bar a criminal defendant "from challenging the constitutionality of the statute of conviction on direct appeal." *Id.* at 803. *Class* rejected the argument that the defendant had "expressly waived" his right to appeal "constitutional" issues because the judge informed the defendant that he "was giving up his right to appeal his conviction." *Id.* at 806-07 (internal brackets and quotation marks omitted). The Court noted that the plea agreement did "not expressly refer to a waiver of the appeal right here at issue." *Id.* at 807. Absent an express waiver of prospective constitutional challenges, the Court explained, the defendant cannot be said to have waived those rights. Just as in *Class*, Petitioner's waiver of an advisory jury does not forever bar him from raising constitutional claims arising under this Court's decision in *Hurst*, which found the advisory jury mechanism that Petitioner decided to forego unconstitutional. Petitioner is no less entitled to assert his constitutional right to jury

[2] There are more reasons to doubt the Florida Supreme Court's original rationale in *Mullens* for creating its automatic *Hurst* waiver rule. For example, *Mullens* cites cases from other jurisdictions to show that "[o]ther states have reached similar conclusions in the context of capital sentencing. In states where defendants who pleaded guilty to capital offenses automatically proceeded to judicial sentencing, courts have held that *Ring* did not invalidate their guilty plea and associated waiver of jury factfinding." *Mullens*, 197 So. 3d at 38. But, in most of those cases, the defendants, unlike Petitioner and other Florida defendants, already had state rights to jury fact-finding at sentencing that they had explicitly waived. *See, e.g.*, *State ex rel. Taylor v. Steele*, 341 S.W.3d 634 (Mo. 2011); *State v. Piper*, 709 N.W.2d 783, 805 (S.D. 2006); *State v. Downs*, 604 S.E.2d 377, 380 (S.C. 2004); *Lewis v. Wheeler*, 609 F.3d 291 (4th Cir. 2010); *Colwell v. State*, 59 P.3d 463, 473 (Nev. 2002).

fact-finding at a penalty phase than defendants who elected to present their case to an advisory jury under the pre-*Hurst* scheme.

At bottom, there is a fundamental unfairness in the disparity of results produced by the Florida Supreme Court's rule. Under Florida's prior, unconstitutional scheme, the trial judge was solely responsible for the penalty fact-finding in *every* Florida death case, regardless of whether there was an advisory jury present and regardless of what the advisory jury recommended to the judge. Regardless of if Petitioner declined an advisory jury for his penalty phase, Petitioner's penalty-phase fact-finding unfolded no differently than pre-*Hurst* defendants who decided not to decline an advisory jury. Whether or not a defendant declined an advisory jury recommendation, the judge conducted each of the necessary findings of fact alone and made the final sentencing determination in every Florida case. The Florida Supreme Court's rule effectively rewards pre-*Hurst* defendants who embraced the advisory jury mechanism, while punishing those who declined it. Petitioner and similar Florida defendants should not be punished for choosing to decline an advisory jury that was unconstitutional in the first place.

A Florida defendant's pre-*Hurst* decision to decline an advisory jury involved giving up only the right to a jury that would make an advisory, generalized recommendation to the judge by a majority vote. At the time of his decision to decline an advisory jury, Petitioner could only have validly waived his right to a generalized, majority-vote jury recommendation, not the right to binding jury fact-finding. Today, as the result of *Hurst*, the right to binding jury fact-finding in Florida capital sentencing has been recognized, and the Florida Supreme Court has made that right retroactive on collateral review to cases in the same posture as Petitioner's. *See Mosley*, 209 So.

3d 1248 at 1276. Under *Halbert*, the Florida Supreme Court cannot selectively withdraw that right under a waiver analysis.[3]

3. The Florida Supreme Court's Rule is Symptomatic of a Broader Confusion Over *Halbert*.

The Florida Supreme Court's *Hurst* waiver rule is symptomatic of a broader confusion regarding *Halbert* and federal constitutional waiver analysis that should be resolved by this Court. Although the Florida Supreme Court's *Hurst* waiver rule is sui generis—applying to dozens of death row prisoners but only within Florida—nationwide, state and federal courts have also expressed confusion over the meaning and application of *Halbert*. *See, e.g.*, *United States v. Simpson*, 430 F.3d 1177, 1194 (D.C. Cir. 2005) (Silberman, J., concurring) (concluding that *Halbert* draws the "considered views of eight circuit courts" into question); *United States v. Burns*, 433 F.3d 442, 448-49 (5th Cir. 2005) (discussing uncertainty over whether *Halbert* addresses both implicit and explicit waivers); *United States v. Magouirk*, 468 F.3d 943, 948-50 (6th Cir. 2006) (same); *Nunley v. Bowersox*, 784 F.3d 468, 470 (8th Cir. 2015) (grappling with the intersection of *Halbert* and the retroactivity of the underlying federal constitutional right); *State v. Nunley*, 341

[3] One might take the view that, although the Florida Supreme Court was free to make *Hurst* retroactive on collateral review to individuals like Petitioner, *see Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008), it was not required to do so, and therefore even the separate preclusion of *Hurst* relief on waiver grounds provides no basis for federal constitutional review. But this would require abandonment of the federalist principles underlying *Danforth*. Even when state retroactivity law is arguably not federally required, a state's denial of rights recognized by that law cannot be constitutionally sustained where it is based upon a concept of "waiver" that cuts against *Halbert*, *Zerbst*, and other foundational precedents of this Court. After all, the time 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.*, *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).

S.W. 611, 632 (Mo. 2011) (Stith, J., concurring in part and dissenting in part) (arguing that the majority opinion adopted Justice Thomas's dissent in *Halbert* rather than *Halbert*'s holding).

The Florida Supreme Court's automatic *Hurst* waiver rule is perhaps the most pernicious example of courts' general confusion over *Halbert*—but it has dire consequences for dozens of individuals who remain on Florida's death due solely to the Florida Supreme Court's waiver analysis. This Court should grant a writ of certiorari in Petitioner's case to reaffirm that *Halbert* meant what it said: a state court is prohibited from holding that a defendant waived a federal constitutional right that was not known to the defendant or recognized by the state courts at the time of the purported waiver.

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

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

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

But in creating such rules, courts are bound by constitutional restraints. In capital cases, the Eighth and Fourteenth Amendments limit a state court's application of untraditional non-retroactivity rules, such as those that fix retroactivity cutoffs at points in time other than the date

of the new constitutional ruling. For instance, a state rule that a constitutional decision rendered by this Court in 2018 is only retroactive to prisoners whose death sentences became final after the last turn of the century would intuitively raise suspicions of unconstitutional arbitrariness. This Court has not had occasion to address a partial retroactivity scheme because such schemes are not the norm, but the proposition that states do not enjoy free reign to draw temporal retroactivity cutoffs at *any* point in time emanates logically from the Court's Eighth and Fourteenth Amendment rulings.

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

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

The Florida Supreme Court did not simply apply a traditional retroactivity rule here. On the contrary, it crafted a decidedly untraditional and troublesome partial-retroactivity scheme.

B. The Florida Supreme Court's *Hurst* Retroactivity Cutoff at *Ring* Involves Something Other Than the Traditional Non-Retroactivity Rules Addressed by This Court's *Teague* and Related Jurisprudence.

The unusual non-retroactivity rule applied by the Florida Supreme Court in this and other *Hurst* cases involves something very different than the traditional non-retroactivity rules addressed in this Court's precedents. This Court has long understood the question of retroactivity to arise in particular cases *at the same point in time*: when the defendant's conviction or sentence becomes "final" upon the conclusion of direct review. *See, e.g.*, *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987); *Teague*, 489 U.S. at 304-07. The Court's modern approach to determining whether retroactivity is required by the United States Constitution is premised on that assumption. *See, e.g.*, *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016) ("In the wake of *Miller*[4], the question has arisen whether its holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided.").

The Court's decision in *Danforth v. Minnesota*, 552 U.S. 264 (2006), which held that states may apply constitutional rules retroactively even when the United States Constitution does not compel them to do so, also assumed a definition of retroactivity based on the date that a conviction and sentence became final on direct review. *See id.* at 268-69 ("[T]he Minnesota court correctly concluded that federal law does not *require* state courts to apply the holding in *Crawford*[5] to cases that were final when that case was decided . . . [and] we granted certiorari to consider whether *Teague* or any other federal rule of law *prohibits* them from doing so.") (emphasis in original).

None of this Court's precedents address the novel concept of "partial retroactivity," whereby a new constitutional ruling of the Court may be available on collateral review to *some*

[4] *Miller v. Alabama,* 567 U.S. 460 (2012).
[5] *Crawford v. Washington,* 541 U.S. 36 (2004).

prisoners whose convictions and sentences have already become final, but not to all prisoners on collateral review.

In two separate decisions issued on the same day—*Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016)—the Florida Supreme Court addressed the retroactivity of this Court's decision in *Hurst v. Florida*, as well as the Florida Supreme Court's own decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), under Florida's state retroactivity test.[6]

Unlike the traditional retroactivity analysis contemplated by this Court's precedents, the Florida Supreme Court did not simply decide whether the *Hurst* decisions should be applied retroactively to all prisoners whose death sentences became final before *Hurst*. Instead, the Florida Supreme Court divided those prisoners into two classes based on the date their sentences became final relative to this Court's June 24, 2002, decision in *Ring*, which was issued nearly fourteen years before *Hurst*. In *Asay*, the court held that the *Hurst* decisions do not apply retroactively to Florida prisoners whose death sentences became final on direct review before *Ring*. *Asay*, 210 So. 3d at 21-22. In *Mosley*, the court held that the *Hurst* decisions do apply retroactively to prisoners whose death sentences became final after *Ring*. *Mosley*, 209 So. 3d at 1283.

The Florida Supreme Court offered a narrative-based justification for this partial retroactivity framework, explaining that "pre-*Ring*" retroactivity was inappropriate because Florida's capital sentencing scheme was not unconstitutional before this Court decided *Ring*, but

[6] Florida's retroactivity analysis is still guided by this Court's pre-*Teague* three-factor analysis derived from *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). *See Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980) (adopting *Stovall*/*Linkletter* factors).

that "post-*Ring*" retroactivity was appropriate because the state's statute became unconstitutional as of the time of *Ring*.

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

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

Mosley, 209 So. 3d at 1283 (emphasis added).

Since *Asay* and *Mosley*, the Florida Supreme Court has uniformly applied its arbitrary *Hurst* retroactivity cutoff granting relief to some collateral defendants while denying relief to other similarly situated defendants. The Florida Supreme Court has granted *Hurst* relief to dozens of "post-*Ring*" prisoners whose death sentences became final after 2002 but before *Hurst*, while simultaneously denying *Hurst* relief to dozens more "pre-*Ring*" prisoners whose sentences became final before 2002. Nonetheless, both sets of prisoners were sentenced under the same exact statute which denied them access to the jury determinations *Hurst* held to be constitutionally required before Florida could impose a sentence of death.

Recently, after reaffirming the *Ring* cutoff in *Hitchcock v. State*, 226 So. 3d 216, 217, (Fla. 2017) the Florida Supreme Court summarily denied *Hurst* relief in 80 "pre-*Ring*" cases, including Petitioner's, in just two weeks. Many of these litigants have pressed the Florida Supreme Court

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

As the next section of this Petition explains, the Florida Supreme Court's *Ring*-based scheme of partial retroactivity for *Hurst* claims involves more than the kind of tolerable arbitrariness that is present in traditional non-retroactivity rules.

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

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

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

As an initial matter, the Florida Supreme Court's rationale is questionable. The court described its rationale as follows: "Because Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst* retroactively to that time," but not before then. *Mosley*, 209 So. 3d at 1280. The court's flawed logic fails to recognize that Florida's capital sentencing scheme did not become unconstitutional when *Ring*

was decided—*Ring* recognized that Arizona's capital sentencing scheme was unconstitutional. Florida's capital sentencing statute has always been unconstitutional, and it was recognized as such in *Hurst*, not *Ring*.

The Florida Supreme Court's approach raises serious questions about line-drawing at a prior point in time. There will always be earlier precedents of this Court upon which a new constitutional ruling builds.[7]

The effect of the cutoff also does not meet its aim. The Florida Supreme Court's rationale for drawing a retroactivity line at *Ring* is undercut by the court's denial of *Hurst* relief to prisoners whose sentences became final before *Ring* and who correctly, but unsuccessfully, challenged Florida's unconstitutional sentencing scheme after *Ring*,[8] while granting relief to prisoners who failed to raise any challenge, either before or after *Ring*.

The Florida Supreme Court's rule also does not reliably separate Florida's death row into meaningful pre-*Ring* and post-*Ring* categories. In practice, the date of a particular Florida death sentence's finality on direct appeal in relation to the June 24, 2002, decision in *Ring* can depend on a score of random factors having nothing to do with the offender or the offense: whether there were delays in a clerk's transmitting the direct appeal record to the Florida Supreme Court; whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with the

[7] The Florida Supreme Court has never explained why it drew the retroactivity line at *Ring* as opposed to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The foundational precedent for both *Ring* and *Hurst* was the Court's decision in *Apprendi*. As *Hurst* recognizes, it was *Apprendi*, not *Ring*, which first explained that the Sixth Amendment requires any fact-finding that increases a defendant's maximum sentence to be found by a jury beyond a reasonable doubt. *Hurst*, 136 S. Ct. at 621.

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

Florida Supreme Court's summer recess; how long the assigned Justice took to draft the opinion for release; whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener's error necessitating issuance of a corrected opinion; whether counsel chose to file a petition for a writ of certiorari in this Court or sought an extension to file such a petition; how long a certiorari petition remained pending in this Court; and so on.

Another arbitrary factor affecting whether a defendant receives *Hurst* relief under the Florida Supreme Court's date-of-*Ring* retroactivity approach includes whether a resentencing was granted because of an unrelated error. Under the current retroactivity rule, "older" cases dating back to the 1980s with a post-*Ring* resentencing qualify for *Hurst* relief, while other less "old" cases do not. *See, e.g.*, *Johnson v. State*, 205 So. 3d 1285, 1285 (Fla. 2016) (granting *Hurst* relief to a defendant whose crime occurred in 1981 but who was granted relief on a third successive post-conviction motion in 2010, years after the *Ring* decision); *cf. Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (granting *Hurst* relief in a case where the crime occurred in the late 1990s, but interlocutory appeals resulted in a 10-year delay before the trial). Under the Florida Supreme Court's approach, a defendant who was originally sentenced to death before Petitioner, but who was later resentenced to death after *Ring*, would receive *Hurst* relief while Petitioner does not.

The *Ring*-based cutoff not only infects the system with arbitrariness, but it also raises concerns under the Fourteenth Amendment's Equal Protection Clause. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture differently without "some ground of difference that rationally explains the different treatment." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). When two classes are created to receive different treatment, as the Florida Supreme Court has done here, the question is "whether there is some ground of difference that rationally explains the different treatment . . . " *Id.*; *see also McLaughlin v. Florida*, 379 U.S. 184,

191 (1964). The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g., Skinner*, 316 U.S. at 541. When a state draws a line between those capital defendants who will receive the benefit of a fundamental right afforded to every defendant in America—decision-making by a jury—and those who will not be provided that right, the justification for that line must satisfy strict scrutiny. The Florida Supreme Court's rule falls short of that demanding standard.

In contrast to the court's majority, several members of the Florida Supreme Court have explained that the cutoff does not survive scrutiny. In *Asay*, Justice Pariente wrote: "The majority's conclusion results in an unintended arbitrariness as to who receives relief . . . . To avoid such arbitrariness and to ensure uniformity and fundamental fairness in Florida's capital sentencing . . . *Hurst* should be applied retroactively to all death sentences." *Asay*, 210 So. 3d at 36 (Pariente, J., concurring in part and dissenting in part). Justice Perry was more direct: "In my opinion, the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two grounds of similarly situated persons." *Id.* at 37 (Perry, J., dissenting). Justice Perry correctly predicted: "[T]here will be situations where persons who committed equally violent felonies and whose death sentences became final days apart will be treated differently without justification." *Id.* And in *Hitchcock*, Justice Lewis noted that the Court's majority was "tumbl[ing] down the dizzying rabbit hole of untenable line drawing." *Hitchcock*, 226 So. 3d at 218 (Lewis, J., concurring in the result).

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

The Florida Supreme Court's *Ring*-cutoff forecloses *Hurst* relief to the class of death-sentenced prisoners for whom relief makes the most sense. In fact, several features common to

Florida's "pre-*Ring*" death row population compel the conclusion that denying *Hurst* relief in their cases, while affording *Hurst* relief to their "post-*Ring*" counterparts, is especially perverse.

Florida prisoners who were tried for capital murder before *Ring* are more likely to have been sentenced to death by a system that would not produce a capital sentence—or sometimes even a capital prosecution—today. Since *Ring* was decided, as public support for the death penalty has waned, prosecutors have been increasingly unlikely to seek, and juries increasingly unlikely to impose, death sentences.[9]

Post-*Ring* sentencing juries are more fully informed of the defendant's entire mitigating history than juries in the pre-*Ring* period. Providing limited information to juries was especially

[9] *See, e.g.*, Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades*, PEW RESEARCH CENTER, Sep. 29, 2016, *available at* http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four decades/ ("Only about half of Americans (49%) now favor the death penalty for people convicted of murder, while 42% oppose it. Support has dropped 7 percentage points since March 2015, from 56%.
The number of death sentences imposed in the United States has been in steep decline in the last two decades. In 1998, there were 295 death sentences imposed in the United States; in 2002, there were 166; in 2017 there were 39. Death Penalty Information Center, *Facts About the Death Penalty* (updated December 2017),at 3, *available at* https://deathpenaltyinfo.org/documents/FactSheet.pdf.

endemic to Florida in the era before *Ring* was decided.[10] In addition, as for mitigating evidence, Florida's statute did not even include the "catch-all mitigator" statutory language until 1996.[11]

Florida's pre-*Hurst* "advisory" jury instructions, which were used in Petitioner's penalty phase, were also so confusing that jurors consistently reported that they did not understand their role.[12] If the advisory jury did recommend life, judges—who must run for election and reelection in Florida—could impose the death penalty anyway.[13] In fact, relying on their arbitrary pre-*Ring*

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[10] *See*, *e.g.*, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE FLORIDA DEATH PENALTY ASSESSMENT REPORT, AN ANALYSIS OF FLORIDA'S DEATH PENALTY LAWS, PROCEDURES, AND PRACTICES, American Bar Association (2006) [herein "ABA Florida Report"]. The 462 page report concludes that Florida leads the nation in death-row exonerations, inadequate compensation for conflict trial counsel in death penalty cases, lack of qualified and properly monitored capital collateral registry counsel, inadequate compensation for capital collateral registry attorneys, significant juror confusion, lack of unanimity in jury's sentencing decision, the practice of judicial override, lack of transparency in the clemency process, racial disparities in capital sentencing, geographic disparities in capital sentencing, and death sentences imposed on people with severe mental disability. *Id*. at iv-ix. The report also "caution[s] that their harms are cumulative." *Id*. at iii.

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

[12] The ABA found one of the areas in need of most reform in Florida capital cases was significant juror confusion. ABA Florida Report at vi ("In one study over 35 percent of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt. The same study also found that over 36 percent of interviewed Florida capital jurors incorrectly believed that they were *required* to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt, and 25.2 percent believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a legitimate aggravating circumstance under Florida law.").

[13] *See* ABA Florida Report at vii ("Between 1972 and 1979, 166 of the 857 first time death sentences imposed (or 19.4 percent) involved a judicial override of a jury's recommendation of life imprisonment without the possibility of parole . . . . Not only does judicial override open up an additional window of opportunity for bias—as stated in 1991 by the Florida Supreme Court's Racial and Ethnic Bias Commission but it also affects jurors' sentencing deliberations and decisions. A recent study of death penalty cases in Florida and nationwide found: (1) that when deciding whether to override a jury's recommendation for a life sentence without the possibility of parole, trial judges take into account the potential "repercussions of an unpopular decision in a capital case," which encourages judges in judicial override states to override jury recommendations of life, "especially so in the run up to judicial elections;" and (2) that the practice

cutoff, the Florida Supreme Court summarily denied *Hurst* relief to a defendant who was sentenced to death after a judge "overrode" a jury's recommendation of life. *See Marshall v. Jones*, 226 So. 3d 211 (Fla. 2017).

Furthermore, especially in these "older cases," the advisory jury scheme invalidated by *Hurst* implicated systematic violations of *Caldwell v. Mississippi*, 472 U.S. 320 (1987); *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Sotomayor, J., dissenting from the denial of certiorari) ("Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where the court was the final decision-maker and the sentencer—not the jury."). In contrast to post-*Ring* cases, the pre-*Ring* cases did not include more modern instructions leaning towards a "verdict" recognizable to the Sixth Amendment. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993).

Lastly, it is also important that prisoners whose death sentences became final before *Ring* was decided in 2002 have been incarcerated on death row longer than prisoners sentenced after that date. Notwithstanding the well-documented hardships of Florida's death row, *see, e.g.*, *Sireci v. Florida*, 137 S. Ct. 470 (2016) (Breyer, J., dissenting from the denial of certiorari), they have demonstrated over a longer time that they are capable of adjusting to a prison environment and living without endangering any valid interest of the state. "At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes." *Knight v. Florida*, 120 S. Ct. 459, 462 (1999) (Breyer, J., dissenting from the denial of certiorari). Petitioner has been on death row for 20 years, and has adjusted without endangering himself, other inmates, or prison staff.

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of judicial override makes jurors feel less personally responsible for the sentencing decision, resulting in shorter sentencing deliberations and less disagreement among jurors.").

Taken together, these considerations show that the Florida Supreme Court's partial non-retroactivity rule for *Hurst* claims involves a level of arbitrariness and inequality that is hard to reconcile with the Eighth and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, Petitioner's respectfully requests that this Court grant the petition for writ of certiorari to review the judgment of the Florida Supreme Court.

Respectfully submitted,

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