No. _____

IN THE

Supreme Court of the United States

TERENCE VALENTINE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

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CAPITAL CASE

QUESTION PRESENTED

Whether a waiver to an advisory, non-unanimous jury verdict lacking in any fact finding requirement under a death penalty scheme later determined to be unconstitutional by this Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016) because the scheme denied a capital defendant the right to jury fact-finding, and subsequent statutory law added the requirement of a unanimous jury verdict, can be knowing and voluntary?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner, Terence Valentine, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court. Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI

Terence Valentine respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court.

OPINIONS BELOW

This is a petition regarding the errors of the Florida Supreme Court in denying Mr. Valentine's claim that he could not have knowingly waived his right to unanimous fact-finding by a penalty phase jury when the Florida death penalty scheme was unconstitutional as decided by this court in *Hurst v. Florida*, 136 S. Ct. 616 (2016). The opinion at issue is reproduced at *Appendix A* and is reported at *Valentine v. State*, 296 So. 3d 375 (Fla. 2020). The unpublished order denying Mr. Valentine's successive motion to vacate death sentence issued by the Thirteenth Judicial Circuit Court in and for Hillsborough County Florida is reproduced at *Appendix B*.

JURISDICTION

The opinion of the Florida Supreme Court was entered on June 4, 2020. *See Appendix A*. No motion for rehearing was filed. On March 19, 2020, this Court extended the time to file any petition for certiorari to 150 days. As such, Mr. Valentine's petition is due on or before November 1, 2020[1]. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides:

> 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 defence.

[1] November 1, 2020 is a Sunday.

The Eighth Amendment provides:

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

The Fourteenth Amendment provides, in relevant part:

> 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.

Section 921.141, Florida Statutes (2000), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—" provides, in relevant part:

> (2) ***ADVISORY SENTENCE*** BY THE JURY.—After hearing all the evidence, the jury shall deliberate and ***render an advisory sentence to the court***, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
>
> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the ***recommendation of a majority of the jury***, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but ***if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based*** as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Fla. Stat. § 921.141 (2000) (emphasis added).

STATEMENT OF THE CASE

I. Introduction

Petitioner, Terence Valentine, waived his right to a non-unanimous, advisory jury recommendation as delineated by a death penalty scheme that this Court determined violated the

United States Constitution for the reasons described in *Hurst v. Florida*, 136 S. Ct. 616 (2016). The Florida Supreme Court determined that Valentine waived any claim to *Hurst* relief because Valentine waived his right to a non-unanimous, advisory jury recommendation. The Florida Supreme Court's determination that *Hurst* cannot apply to capital defendants who waived only a right to a non-unanimous, advisory jury recommendation, cannot pass muster under the Sixth, Eighth, or Fourteenth Amendments.

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 different classes of condemned prisoners.

This Petition arises from the Florida Supreme Court's arbitrary decision to institute this partial application and deny *Hurst* relief to prisoners who waived their right to a non-unanimous jury recommendation, even when the defendant's waiver was not knowing and voluntary. These death row prisoners, such as Mr. Valentine, were not given and thus could have not waived their constitutional right to a unanimous jury determination of their death sentence. Whereas other

Florida death row prisoners, whose sentences became final post-*Ring and* those who elected to endure the unconstitutional process of receiving an advisory jury recommendation, were granted a constitutional resentencing or given a life sentence in light of *Hurst*. The Florida Supreme Court's arbitrary application of *Hurst* prohibits a class of Florida prisoners from obtaining jury fact-finding and determination of their death sentences and makes a sweeping determination that a capital defendant's waiver to a flimsy, unconstitutional jury right acts as a broad waiver to a meaningful, constitutional jury determination. This determination is inconsistent with the Eighth Amendment's prohibition against the arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection and due process when waiving a constitutional right. This Court should resolve the constitutional infirmities with the Florida Supreme Court's application of *Hurst*. As Mr. Valentine challenged the unconstitutionality of Florida's death penalty statute and had his challenges repeatedly denied, his case, like so many others, evinces ongoing inequities and injustice of Florida's widely criticized, outlier death penalty scheme. This cases presents a clear path for this Court to address Florida's arbitrary and unjust decisions denying relief to capital defendants who waived a toothless right to a nonunanimous advisory jury recommendation.

II. Factual and Procedural Background

A. Trial and Direct Appeal

The State of Florida charged Mr. Valentine by indictment on September 21, 1988 with Count One, Burglary-Armed, F.S. 810.02, a first degree felony; Count Two, Kidnapping, F.S. 787.01 (1)(A)(3), a first degree felony; Count Three, Kidnapping, F.S. 787.01 (1)(A)(3), a first degree felony; Count Four, Grand theft-Second Degree, F.S. 812.014 (2)(B), a second degree felony; Count Five, First Degree Murder, F.S. 782.04, a capital felony; and Count Six, Attempted Murder-

First Degree, F.S. 782.04 and F.S. 777.04, a first degree felony.

Mr. Valentine has maintained his innocence for more than 30 years, and asserted the affirmative defense of alibi at all three of his trials. In each trial, he presented the testimony of multiple alibi witnesses who unequivocally testified that they saw Mr. Valentine in Costa Rica on September 9, 1988 (the day of the crime) at a party celebrating what is a national holiday in Costa Rica, Children's Day. Mr. Valentine's first trial in January of 1990 resulted in a mistrial after the jury was unable to reach a verdict after more than ten hours of deliberation.

At his second trial in March of 1990, two critical new pieces of evidence were presented to the jury. First, Detective Jorge Fernandez testified falsely that Mr. Valentine had initially told law enforcement that he was in a Costa Rican jail at the time of the crime. The State used this evidence to discredit Mr. Valentine's alibi at trial that he was in Costa Rica at a party for Children's Day. However, it later came to light that Detective Fernandez's testimony was false, and he admitted as much in the third trial. Second, the State was allowed to play a November 7, 1988 recorded phone call which contained irrelevant and prejudicial information. The Florida Supreme Court would later hold those portions of the call to be inadmissible. However, with these two additional pieces of improper/false information, the jury at Mr. Valentine's second trial deliberated for just a little over an hour before finding Mr. Valentine guilty as charged on all counts. Mr. Valentine's penalty phase jury returned an advisory recommendation for the death penalty by a vote of 10-2. *Valentine v. State*, 616 So.2d 971 (Fla. 1993).

After reversal by the Florida Supreme Court for the trial court's failure to require the State to give racially neutral explanations for peremptory strikes, the State of Florida brought Mr. Valentine to trial for a third time. *Valentine v. State*, 616 So.2d 971 (Fla. 1993). As noted above, the Florida Supreme Court also instructed the trial court to disallow the prejudicial information

contained in the November 7, 1988 recorded phone call. *Id*. at 974.

At the third trial, again Mr. Valentine's defense was that he was in Costa Rica on the day of the crime and he presented nine alibi witnesses who testified they saw him at a party for Children's Day. Most of the nine witnesses had not testified in the prior two trials, and two of the witnesses testified he stayed at their house on September 6-7, 1988. In addition to the alibi testimony, trial counsel argued that Livia Romero had a motive to falsely identify Mr. Valentine as her attacker. Romero, who at all relevant times was still legally married to Mr. Valentine, and was never legally married to Ferdinand Porche, stood to gain half of Mr. Valentine's assets if he was incarcerated for these crimes. After about five hours of deliberations, Mr. Valentine was again convicted on all counts. Immediately following this conviction at his third trial, Mr. Valentine waived his right to a non-unanimous, advisory jury sentence and presented mitigating evidence directly to the judge. The trial court sentenced Mr. Valentine to death on September 30, 1994. The trial court alone made the findings of fact required to impose a death sentence under Florida law and, after finding and weighing the aggravators and mitigators, the trial court sentenced Mr. Valentine to death.

Mr. Valentine timely appealed. Mr. Valentine raised the following claims on direct appeal arguing that the trial court erred by (1) finding that the husband and wife privilege did not bar Romero's testimony about Porche's murder; (2) denying Valentine's motion to suppress post-arrest statements that Valentine had made to the police; (3) denying Valentine's motion to strike testimony by the state's footprint expert on the ground that the testimony was too speculative; (4) declining Valentine's motion to appoint a jury selection expert; (5) not allowing Valentine to have the concluding argument before the jury even though Valentine had presented alibi witnesses during his defense; (6) giving the jury the standard jury instruction on reasonable doubt; (7)

convicting Valentine of attempted first-degree murder because the conviction could rest on attempted felony murder, which is a nonexistent offense; (8) finding the murder to have been cold, calculated, and premeditated; and (9) failing to find several mitigators. The Florida Supreme Court denied all of his claims. The Florida Supreme Court reversed the conviction for attempted first-degree murder and vacated the sentence, however, the court affirmed the remaining convictions and sentences, including the sentence of death. *Valentine v. State*, 688 So.2d 313 (Fla. 1996), cert. denied, 522 U.S. 830, 118 S.Ct. 95, 139 L. Ed. 2d 51 (1997). Mr. Valentine's case became final in 1997 upon the denial of certiorari.

B. Postconviction

Mr. Valentine timely pursued his rights to collaterally challenge his convictions and sentence of death. Mr. Valentine filed a motion for post-conviction relief. After an evidentiary hearing, the claims were denied by the circuit court. Mr. Valentine filed a timely appeal, and the denial of relief was affirmed by the Florida Supreme Court. *Valentine v. State*, 98 So. 3d 44, 51 (Fla. 2012).

Mr. Valentine timely filed a petition for writ of habeas corpus with the federal district court. *Valentine v. Secretary*, Dept. of Corr., 8:13-cv-30-T-23TBM. That case is stayed pending the resolution and exhaustion of Mr. Valentine's First and Second Successive 3.851 Motions[2].

C. *Hurst* Litigation and Decision Below

On January 12, 2016, this Court issued its opinion in *Hurst v. Florida,* striking down

[2] Mr. Valentine has a Second Successive 3.851 Motion pending in the Florida state courts which alleges that newly discovered evidence of a January 30, 2020 affidavit by eyewitness Terry Spain, who was never called to testify at any of Mr. Valentine's three trials, would probably produce an acquittal of the crime or of the death penalty. The affidavit detailed that Spain had seen a white male (Mr. Valentine is a Costa Rican National and person of color) at the scene of the crime and further asserted that the State secreted Mr. Spain in a hotel room during one of Mr. Valentine's trials (presumably so he could not be called to testify by the defense) and gave him $300.

Florida's longstanding capital-sentencing procedures[3] because the statute authorized a judge, rather than a jury, to make the factual findings necessary to impose a death sentence. On remand, the Florida Supreme Court held that a verdict for death could not be rendered without unanimous jury findings of at least one aggravating circumstance and a unanimous finding that the aggravation is sufficient to outweigh any mitigating circumstances and to warrant death. *See Hurst v. State,* 202 So. 3d 40 (2016), *overruled in relevant part by Poole v. State*. – So. 3d --, 2020 Westlaw 370302 (Fla. 2020). *Hurst* followed *Ring* in subjecting the capital sentencing process to *Apprendi*'s Sixth Amendment requirement that all facts necessary for criminal sentencing enhancement must be found by a jury. The Florida Supreme Court then addressed the question of the retroactive application of the federal constitutional rule of *Hurst* to Florida's approximately 380 condemned inmates. Applying Florida's retroactivity doctrines, the Florida Supreme Court held in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) that inmates whose death sentences were final on or after June 24, 2002 (the date *Ring* was decided) were entitled to resentencing under *Hurst.* However, inmates, like Mr. Valentine, whose death sentences were final before June 24, 2002 were not entitled to resentencing under *Hurst*. *Asay v. State*, 210 So.3d 1 (Fla. 2016). The Florida Supreme Court further determined that even those defendants whose cases were final after *Ring,* but who waived their right to a non-unanimous advisory jury, did not qualify for *Hurst* relief.

On December 21, 2017, Valentine 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), arguing that the Eighth Amendment right to a unanimous sentencing jury verdict rendered his sentence of death unconstitutional. (The motion is reproduced at Appendix E). The

[3] Florida's capital sentencing procedure outlined in Fla. Stat. § 921.141 which had been in effect (with minor changes, irrelevant to this question presented) since 1972.

State filed a response and the court conducted a case management hearing, after which the lower court denied relief. (The Order denying relief is reproduced at Appendix B). Valentine filed a timely motion for rehearing on May 7, 2018, which was denied on June 4, 2018. (The motion for rehearing is reproduced at Appendix C; the Order denying is reproduced at Appendix D).

Mr. Valentine timely appealed the denial of his successive motion to vacate his sentence of death to the Florida Supreme Court. On June 4, 2020, the Florida Supreme Court affirmed the denial of Mr. Valentine's successive motion. In affirming the lower court's denial, the Florida Supreme Court held that "the trial court properly denied Valentine *Hurst* relief because he waived his right to a penalty phase jury. *See Twilegar v. State*, 228 So. 3d 550, 551 (Fla. 2017) ("[T]he *Hurst* decisions do not apply to defendants like Twilegar who waived a penalty phase jury.")." *Valentine v. State*, 296 So. 3d 375, 376 (Fla. 2020); *See also* Appendix A.

This ruling is before this Court for review.

REASONS FOR GRANTING THE WRIT

I. Mr. Valentine's waiver of his right to a penalty phase jury could not have been knowing and voluntary as Florida's death penalty scheme of seating an "advisory" jury but requiring the judge not the jury to make the factual findings necessary for the imposition of death was unconstitutional and violated Valentine's rights under the Eighth and Fourteenth Amendments.

Mr. Valentine's death sentence is unconstitutional under *Hurst* and the Eighth, and Fourteenth Amendments because Valentine could not knowingly have waived his right to a unanimous jury verdict.

This Court should grant Valentine's Petition because Valentine could not waive an Eighth Amendment right to unanimous jury sentencing which had not yet been recognized by the courts. *Halbert v. Michigan*, 545 U.S. 605, 623 (2005); *see also Management Health Systems, Inc. v. Access Therapies, Inc.*, No. 10-61792-CIV, 2010 WL 5572832 (S.D. Fla. Dec. 8, 2010) ("It is

axiomatic that a party cannot waive a right that it does not yet have.") *Cruz v. Lowe's Home Centers, Inc.*, No. 8:09-cv-1030-T-30MAP, 2009 WL 2180489, at *3 (M.D. Fla. Jul. 21, 2009) (same); *cf. Menna v. New York*, 423 U.S. 61 (1975) (guilty pleas do not "inevitably waive all antecedent constitutional violations" and a defendant can still raise claims that "stand in the way of conviction [even] if factual guilt is validly established").

In *Halbert*, this Court held that where the appellate court considers the merits of the claim in ruling a motion for leave to appeal, a defendant has a constitutional right to appointed counsel in filing the motion for leave to appeal. 545 U.S. at 618-19. Michigan argued that even if the defendant had a constitutional right to appointed counsel he had waived that right when he pled *nolo contendere*. *Id.* at 623. The Supreme Court found, however, that the defendant did not waive his right to counsel because he "had no recognized right to appointed appellate counsel he could elect to forgo." *Id.*

The Florida Supreme Court's holding in *Mullens*[4] is contrary to *Halbert*. *Mullens* holds that there is no *Hurst* error where the defendant waived a jury recommendation at sentencing. *Mullens*, 197 So. 3d at 39. Prior to *Hurst*, however, a Florida defendant could not have waived *Hurst*-required jury factfinding and unanimity because that right was not yet recognized by the courts. The pre-*Hurst* defendant could only waive the right to a jury recommendation of life or death. At the time of Valentine's death sentencing, before *Hurst*, Florida's unconstitutional capital-sentencing scheme permitted only the judge, not the jury, to find facts that would expose a defendant to a death sentence and allowed a jury advisory recommendation of death on a simple majority verdict. Valentine, therefore, waived only the right to a jury recommendation, not to his then-unrecognized constitutional right to jury factfinding and unanimity that could result in his

[4] *Mullens v. State*, 197 So. 3d 16 (Fla. 2016).

exposure to a death sentence. Under *Halbert*, Valentine could not have waived his right to jury factfinding.

Even if this Court concludes that a pre-*Hurst* defendant could waive *Hurst* relief, Valentine's waiver was not knowing, voluntary, and intelligent, *Mullens*, 197 So. 3d at 39(waiver of jury sentencing must be "knowingly, voluntarily, and intelligently made"); *Trease v. State*, 41 So. 3d 119, 123 (Fla. 2010) (waiver of post-conviction counsel and post-conviction proceedings must be "knowing, intelligent, and voluntary"), because it did not consider the possibility that Florida's death-sentencing scheme would be found unconstitutional, *see Rodgers v. Jones*, 3:15-cv-507-RH, ECF No. 15 (N.D. Fla. Aug. 24, 2016) (federal district court order noting Defendant's waiver was pre-*Hurst* and did not address "the possibility that the entire Florida sentencing scheme would be held unconstitutional").

Whether Mr. Valentine waived his constitutional rights as defined in *Hurst* is a question of federal law. "The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law." *Brookhart v. Janis*, 384 U.S. 1, 4 (1966). "There is a presumption against the waiver of constitutional rights" and "it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege'" for a waiver to be proper. *Id*. (citations omitted). However, if an ***appropriate*** waiver is procured, a defendant may waive his Sixth Amendment fundamental right to a jury trial and consent to judicial fact-finding. *See Blakely v. Washington*, 542 U.S. 296, 310 (2004). A defendant's relinquishment of a constitutional right must be clear and unequivocal. *See Faretta v. California*, 422 U.S. 806, 835 (1975). Further,

> [a]n appropriate oral colloquy will focus a defendant's attention on the value of a jury trial and should make a defendant aware of the likely consequences of the waiver. If the defendant has been advised by counsel about the advantages and disadvantages of a jury trial, then the colloquy will serve to verify the defendant's

understanding of the waiver.

Tucker v. State, 559 So. 2d 218, 220 (Fla. 1990), *approved sub nom. Johnson v. State*, 994 So. 2d 960 (Fla. 2008). Accordingly, "an oral waiver, which is preceded by a proper colloquy during which the trial judge focuses on the value of a jury trial and provides a full explanation of the consequences of a waiver is necessary to constitute a sufficient waiver." *Johnson*, 994 So. 2d at 963 (citation omitted).

Mr. Valentine's waiver was inadequate, and not knowing or voluntary. It came immediately following five hour deliberations after a heavily contested guilt phase, where Mr. Valentine steadfastly maintained his innocence. The trial judge did not fully explain the consequences to Mr. Valentine or verify his understanding of the advantages and disadvantages to waiving a jury. Further, the waiver was expressly that of an advisory jury verdict and there was no discussion of the right to a unanimous determination for death. Consequently, Mr. Valentine's jury waiver is invalid.

Notwithstanding the insufficient waiver, Mr. Valentine cannot waive a constitutional right that was wrongfully not afforded to him. A defendant cannot waive a right not yet recognized by the courts. *Halbert v. Michigan*, 545 U.S. 605, 623 (2005); *see also Mgmt. Health Sys., Inc. v. Access Therapies, Inc.*, 10-61792-CIV, 2010 WL 5572832 (S.D. Fla. Dec. 8, 2010), *report and recommendation adopted*, 10-61792-CIV, 2011 WL 98320 (S.D. Fla. Jan. 12, 2011) ("It is axiomatic that a party cannot waive a right that it does not yet have."). At the time of Mr. Valentine's sentencing, Florida's unconstitutional capital sentencing scheme permitted only the judge, not the jury, to find facts determining whether a defendant would be sentenced to death. Unanimous jury fact-finding was a right not yet recognized by Florida courts; therefore, Mr. Valentine could only waive the right to bare majority jury recommendation of life or death.

As Mr. Valentine only waived an advisory jury recommendation, his waiver was not knowing, voluntary, and intelligent. Thus, Mr. Valentine's colloquy and waiver cannot be considered appropriate or unequivocal.

As evidenced by Mr. Valentine's *Ring*-like motions to declare Florida's death penalty sentencing scheme unconstitutional, Valentine ***never*** waived the protections and rights provided for post-*Ring* capital defendants under *Hurst*.

Further, the Eighth Amendment requires narrowing the class of murderers subject to capital punishment and juror unanimity serves that function. A Florida capital defendant's life no longer lies in the hands of a judge or a bare majority; it lies in the hands of twelve individuals. Now a defendant can only receive a death sentence if the jury unanimously concludes the defendant should be sentenced to death. Fla. Stat. 921.141 (2018). As a result, Florida capital defendants who have had one or more jurors vote in favor of a life sentence are no longer eligible to receive a death sentence and cannot be executed under the Eighth Amendment. *Id*.

The jury's role in determining death-eligibility in Florida is no longer advisory and as contemplated in *Caldwell v. Mississippi*, the jury now properly makes the ultimate decision of whether the defendant's life will be spared. *See* 472 U.S. 320, 328–29, 341 (1985). Now that a unanimous jury is required to sentence a defendant to death, the conversations and assessments between trial counsel and defendants change dramatically. The new constitutional sentencing scheme enacted by the Florida Legislature after *Hurst* also changes the harmlessness analysis because the landscape of *voir dire* and death qualification, pretrial motions, opening and closing arguments, investigation and presentation of evidence in mitigation of a death sentence, challenging and arguing against evidence in aggravation, and jury instructions have changed to afford a constitutional trial. Each juror will now be instructed that they individually carry the

immense responsibility of whether a death sentence was authorized or a life sentence was mandated. These are all important details to consider when making a decision to waive a jury or to advise a client to waive. Based on evolving standards of decency and the use of post-*Hurst* interrogatory verdict forms that lead the jury through the deliberation process step-by-step, it is even less likely Valentine would receive a unanimous verdict if resentenced. *See* FL ST CR JURY INST 3.12(e). Indeed, at his second trial, two of Mr. Valentine's jurors recommended a life sentence. Under today's scheme, the trial court would have been required to sentence Mr. Valentine to life.

In light of *Hurst*, Mr. Valentine's death sentences stand in violation of the Eighth, and Fourteenth Amendments. Thus, the *Hurst* error in Valentine's case warrants relief.

II. 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*[5], 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*[6] 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*

[5] *Miller v. Alabama,* 567 U.S. 460 (2012).
[6] *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.[7]

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

[7] 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.

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.[8]

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

[8] 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.

Florida's unconstitutional sentencing scheme after *Ring*,[9] 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 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

[9] *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).

(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.

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

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 continuously incarcerated and/or on

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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.").

death row for more than 30 years, and has adjusted without endangering himself, other inmates, or prison staff.

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 all of these reasons, the Court should grant the petition for a writ of certiorari and order further briefing or vacate and remand this case to the Florida Supreme Court.

Respectfully submitted,

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