

**CAPITAL CASE
No. 17-1706**

IN THE
Supreme Court of the United States

CARL PUIATTI,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

REPLY BRIEF

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INTRODUCTION

There is no dispute that the Constitution of the United States forbids the death sentence imposed on Petitioner Carl Puiatti. For decades, Puiatti challenged his sentence as unconstitutional, including because it violated the Sixth and Eighth Amendments. This Court and the Florida Supreme Court ultimately agreed, but the Florida Supreme Court held that it was too late for Puiatti. Fashioning an unprecedented rule of partial retroactivity, the Florida Supreme Court recognized that the rules announced in *Hurst v. Florida*, 136 S. Ct. 616 (2016) (“*Hurst I*”) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (“*Hurst II*”), were so fundamental that they justified upending the state’s interest in the finality of death sentences—but only for some. If a defendant, like Puiatti, had a sentence that became final before *Ring v. Arizona*, 536 U.S. 584 (2002), the fundamental rights recognized in the *Hurst* cases did not apply to him.

The State fails to offer any compelling reasons for this Court to deny review of this rule and the fundamental questions of federal constitutional law it implicates. The State’s primary response—that the decision rests on independent and adequate state-law grounds—is wrong. This Court already held in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), that it has jurisdiction to decide whether the Supremacy Clause requires the retroactive application of new substantive rules of federal law, like those announced in the *Hurst* cases. It is equally clear that

this Court has jurisdiction to decide whether a state law, like the Florida Supreme Court’s partial retroactivity rule, comports with the federal constitution. Moreover, the State’s attempt to explain why either of the questions presented are insignificant ignores, misrepresents and distorts the actual issues before this Court. In short, the State fails to show why these critical issues—raised here, and in *sixty-one* other pending petitions—do not deserve this Court’s attention.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE DECISION BELOW

The Petition raises two questions that arise solely under the federal constitution: (1) are the *Hurst* decisions substantive rules of federal constitutional law that must apply retroactively under the Supremacy Clause; and (2) does Florida’s partial retroactivity scheme violate the federal constitution. Nonetheless, the State asserts that this Court lacks jurisdiction to review either question because the decision below supposedly rests on an independent and adequate state-law ground. The State is wrong.

This Court has held that it “will not review a question of federal law decided by a state court if the decision of that court rests on a state-law ground that is independent of the federal question and adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). But a state court ruling is “independent” only when it has a state-law basis for the denial of a federal constitu-

tional claim that is separate from the “merits of the federal claim.” *Foster v. Chatman*, 136 S. Ct. 1737, 1745 (2016); *see also Florida v. Powell*, 559 U.S. 50, 56–59 (2010); *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983). And, a state-law ground is neither independent nor “adequate” to support a judgment when the claim is that the state law itself violates the federal constitution. *See Staub v. City of Baxley*, 355 U.S. 313, 318–19 (1958). In short, a state-law basis is independent and adequate only when this Court’s review would not affect the outcome—*i.e.*, “the same judgment would be rendered by the state court after [this Court] corrected its views of federal laws.” *Ake v. Oklahoma*, 470 U.S. 68, 74–75 (1985). A straightforward application of these principles makes clear that this Court has jurisdiction to consider the questions presented.

The first question presented is whether the Supremacy Clause of the federal constitution required the Florida Supreme Court to apply the *Hurst* decisions retroactively in state collateral-review proceedings. This Court held in *Montgomery* that it has jurisdiction to review this question. The Court explained that if “the Constitution establishes a rule and requires that the rule have retroactive application, then a state court’s refusal to give the rule retroactive effect is reviewable by this Court.” 136 S. Ct. at 727. This is so, the Court held, even if state law would not require retroactive application of the new rule. *See id.* at 729.

As in *Montgomery*, Puiatti alleges that the *Hurst* decisions “announced a substantive constitutional rule and that the [Florida] Supreme Court

erred by failing to recognize its retroactive effect.” *Id.* at 732. “This Court has jurisdiction to review that determination.” *Id.*¹ The Florida Supreme Court’s denial of retroactive application of the *Hurst* decisions under state law does not divest this Court of jurisdiction to resolve the question of federal constitutional law, as the State erroneously contends. Opp. 8–17.

The second question presented is whether the novel rule of partial retroactivity fashioned by the Florida Supreme Court is itself consistent with the federal constitution. The Florida Supreme Court’s state-law holding cannot be an independent and adequate ground when the pertinent challenge is that the state law itself violates the federal constitution. *See Xerox Corp. v. County of Harris*, 459 U.S. 145, 149 (1982). Indeed, this Court routinely reviews state-law rules, including those announced by state courts, for consistency with the federal constitution. *See, e.g., Hall v. Florida*, 134 S. Ct. 1986 (2014).

In urging that the Florida Supreme Court’s decision rests on an independent and adequate state ground, the State nowhere acknowledges that

¹ *Danforth v. Minnesota*, 552 U.S. 264 (2008), on which the State relies (Opp. 9), is inapposite. As *Montgomery* explained, *Danforth* held only that nothing “prevent[s] States from providing greater relief in their own collateral review courts.” 136 S. Ct. at 729. *Danforth* thus “left open” the question whether the Supremacy Clause requires state courts to give retroactive effect to new substantive rules, even if the state’s own rules would not do so. *Id.* *Montgomery* resolved that question in favor of jurisdiction.

Montgomery arises in exactly the same posture as this case. Nor does the State explain why this Court lacks jurisdiction to decide whether state law is inconsistent with the federal constitution. Instead, the State addresses strawmen. For example, it contends (Opp. 16–17, 21) that this Court lacks jurisdiction to review whether the Florida Supreme Court properly applied Florida law. But the questions presented here turn on whether the Florida Supreme Court’s decision is consistent with *federal* law.

Likewise, the State’s contention that the Florida Supreme Court did not decide the federal issues presented (*see* Opp. 16–17), is wrong. Puiatti clearly raised the same federal constitutional issues it presents here to the Florida courts. *See* Pet. App. 13a–15a. The Florida Supreme Court decided them, albeit without any reasoning. Pet. App. 2a. (The court “carefully considered all arguments raised by Puiatti.”).

II. THE QUESTIONS PRESENTED ARE OF FUNDAMENTAL IMPORTANCE

A. The *Hurst* Decisions Are Substantive and Apply Retroactively Under Federal Law

Petitioner asked this Court to review the fundamentally important, life-or-death question whether the *Hurst* decisions—including the Florida Supreme Court’s ruling in *Hurst II* that the Eighth Amendment requires unanimous jury fact-finding to impose a death sentence—are substantive rules that should be held retroactive to all cases under federal

law. In response, the State ignores central aspects of this question and distorts others, failing to demonstrate why this Court should decline to decide this important question.

First, the State ignores critical differences between the *Hurst* decisions and *Ring*—chief among them, the Florida Supreme Court’s Eighth Amendment holding in *Hurst II*. As Puiatti explained, the *Hurst* decisions, which decide issues *Ring* never considered, are substantive because the decisions meaningfully narrowed the class of defendants eligible for the death penalty; specifically, they prohibit the State from imposing a death sentence on anything less than the unanimous recommendation of a jury. *See* Pet. 18–20. In other words, *Hurst II* made clear that the only defendants *eligible* for the death penalty are those whom a jury has unanimously concluded committed the most aggravated murders with the least mitigation. That is a substantive change. And, indeed, most telling of all, the State does not actually challenge this point. The State nowhere explains why the *Hurst II* rules are not substantive.

Instead, the State suggests that the Court already decided the question in *Schriro v. Summerlin*, 542 U.S. 348 (2004). Not so. *Summerlin* held only that *Ring* would not be applied retroactively. The Court had no occasion in *Summerlin* to consider whether the rules announced in the *Hurst* cases, in particular *Hurst II*’s jury unanimity holding, are substantive rules. Nor are any of the other cases the State cites (at Opp. 18) dispositive of this issue. These lower-court decisions never considered the

Florida Supreme Court’s Eighth Amendment holding in *Hurst II*. In any event, the decisions stand at most for the proposition that this Court has yet to decide whether the *Hurst* decisions apply retroactively. This Court should do so now.

Second, rather than squarely confront the question presented, the State distorts it. The actual question presented is whether a state court must apply federal retroactivity principles to new substantive rules of federal constitutional law, including substantive rules announced by its own courts. So, when the Florida Supreme Court decides (as it did here) that the *federal* constitution imposes certain substantive rules, the question is whether Florida courts must follow federal retroactivity principles in determining the application of that rule to already final cases—just as *Montgomery* instructs state courts to do.

Rather than address this question, the State addresses a different one. The State contends that Puiatti asks this Court to require all fifty states to adopt the same substantive rules of federal constitutional law announced by other state courts. But that is not what the Petition suggests, nor does it logically follow from the question actually presented. As the State observes (Opp. 20), states are “free to announce more stringent requirements for criminal defendants than are constitutionally required by this Court.” And no one contends that one state is constitutionally bound to follow another state’s pronouncements. But when a state court announces a new rule of *federal* constitutional law—as it is

clearly empowered to do²—federal retroactivity principles should also apply to the application of that rule in that state (and that state alone).

In further attempting to avoid this question, the State suggests that *Hurst II*'s decision somehow did not rest on the Eighth Amendment. That contention is easily put to rest. Indeed, the passage from *Hurst II* that the State relies on expressly applies “Eighth Amendment principles” to reach its result. See *Hurst II*, 202 So. 3d at 61. Other passages from the opinion equally make clear the Eighth Amendment basis for the Florida Supreme Court’s decision. See, e.g., *id.* at 59 (“[W]e conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment.”); *id.* at 60 (the “requirement that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment.”).

The State also distorts the core holding of *Hurst II*. Puiatti does not suggest, as the State claims (Opp. 23), that “jury sentencing is now required under federal law.” Instead, as the *Hurst* decisions explained, the Sixth Amendment requires juries to make the *findings* necessary to impose a death sentence (see *Hurst I*, 136 S. Ct. at 624); and the Eighth Amendment requires those findings to be

² See Pet. 23–24; see also *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 431 (1982) (“Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.”).

unanimous (*see Hurst II*, 202 So. 3d at 59). Puiatti is not asking this Court to “mandate[] jury sentencing in a capital case.” Opp. 24. The question is solely whether rules of constitutional law—*already announced* by this Court and the Florida Supreme Court—are substantive and should apply to final sentences.

Third, the State’s contention that Puiatti’s death sentence “was imposed in accordance with all applicable constitutional principles at the time it was imposed” is beside the point. Opp. 24. As the Court explained in *Montgomery*, “a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced.” *Montgomery*, 136 S. Ct. at 731.

B. The Florida Supreme Court’s Partial Retroactivity Rule Violates the Eighth and Fourteenth Amendments.

This Court also should consider the significant question whether Florida’s unprecedented partial retroactivity rule—in which the *Hurst* decisions apply to some already-final decisions, but not all—is consistent with the constitutional prohibitions on arbitrary death sentences. The State concedes the core showing of why this question demands this Court’s attention. The State admits that the Florida Supreme Court’s partial retroactivity rule is novel—distinct from “traditional” rules that apply either to all final sentences or to none. Opp. 12. And, the State admits that its partial retroactivity rule

results in arbitrary applications of constitutional imperatives. As if to illustrate Puiatti’s point, the State suggests that the reason that one defendant was able to avail himself of significant constitutional rights in *Card v. Jones*, 219 So. 3d 47 (Fla. 2017), but another defendant could not in *Bowles v. State*, 235 So. 3d 292 (Fla. 2018)—*even though their cases were decided on the same day*—is the wholly random fact that the mandate took longer to issue in one case than the other. Opp. 12 n.5.³ This alone demonstrates that the Florida Supreme Court’s rule produces entirely arbitrary results.

The State asserts (Opp. 16) that there is a “non-arbitrary explanation for drawing the line of retroactivity at *Ring*” and that extending the retroactive application to only some defendants and not all “cannot violate the Eighth or Fourteenth Amendment.” But the most the State says is that it was not until *Ring* that the underpinnings of Florida’s capital sentencing scheme became constitutionally questionable. *Id.* at 15–16. Still, after *Ring*, Florida courts continued to impose death sentences based on the flawed sentencing scheme, and the Florida Supreme Court continued to affirm them. In other words, the post-*Ring* sentences that are now susceptible to challenge under the *Hurst* cases are no

³ The State also affirms (Opp. 13) Puiatti’s showing that certain defendants, including the defendant in *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016), receive the benefit of the *Hurst* decisions even though they committed their crimes years before Puiatti’s case.

less final than the pre-*Ring* sentences excluded from *Hurst*'s constitutional protections.

Indeed, as Puiatti argued, the constitutional infirmity of the Florida Supreme Court's partial retroactivity rule arises precisely because both pre- and post-*Ring* defendants are similarly situated in the finality of their sentences. Yet, the Florida Supreme Court abandoned traditional retroactivity principles that made the finality the touchstone. Instead, it held that, for one class of defendants, the state's interest in finality was outweighed by the fundamental importance of the rights recognized in the *Hurst* cases. But, the court held, the same rights were insufficient to outweigh the state's interest in finality for a second class of defendants with equally final sentences as the first. That is exactly the type of arbitrary decisionmaking that the Eighth and Fourteenth Amendments cannot tolerate in capital cases.

III. RESPONDENT DOES NOT DISPUTE THE NEED FOR THIS COURT TO DECIDE THE RETROACTIVITY OF THE *HURST* DECISIONS

The State does not dispute the need for this Court to consider these significant questions of constitutional law. When Puiatti filed this Petition, there were already at least nineteen other petitions pending before this Court presenting these same important questions. There are now at least *sixty-one*. More are likely to follow. Indeed, a January 2017 study estimated that at least 201 Florida death row inmates (including at least 134 whom judges

sentenced to death after juries had returned non-unanimous sentencing recommendations) have sentences rendered unconstitutional by the *Hurst* cases. See Michael Radelet & G. Ben Cohen, “The Predictable Disarray: Ignoring the Jury in Florida Death Penalty Cases,” (2017), <https://ssrn.com/abstract=2906342>.

Former jurists of the Florida Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and Florida’s trial courts, as well as respected legal academics, have also urged this Court to address the important federal constitutional issues raised by here. See, e.g., Brief for Amicus Curiae, Retired Florida Judges and Jurists, *Branch v. Florida*, 138 S. Ct. 1164 (2018); see also Petition for Writ of Certiorari, *Kelley v. Florida*, Case No. 17-1603, 2018 WL 2412330 (U.S. May 25, 2018).

IV. THE *HURST* ERROR HERE WAS NOT HARMLESS

The State contends that the *Hurst* errors here were harmless. Opp. 26. There is no reason for the Court to reach this question. Rather, as the Court has explained, the “Court normally leaves it to state courts to consider whether an error is harmless.” *Hurst I*, 136 S. Ct. at 624. Nor is any decision on harmlessness ripe for this Court’s review. The Florida courts here specifically declined to consider whether the *Hurst* errors were harmless. See Pet. App. 15a (“[T]he court need not address whether the *Hurst* error in this case was harmless.”).

Nonetheless, as the lower court here observed, the Florida Supreme Court has yet to find harmless error in a non-unanimous recommendation case like Puiatti's. Pet. App. 15a; *see also State v. Smith*, No. SC17-1542, 2018 WL 1631093, at *2 & n.3 (Fla. Apr. 5, 2018) (*Hurst* error not harmless when "the jury did not make the requisite factual findings and did not unanimously recommend a sentence of death," citing post-*Hurst* cases).

CONCLUSION

For the foregoing reasons, as well as those in the Petition, this Court should grant a writ of certiorari to the Florida Supreme Court.

Respectfully submitted,

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ADDENDUM

The following petitions for certiorari filed in this Court present these same questions.

- *Atwater v. Florida*, No. 17-9499
- *Bates v. Florida*, No. 17-9161
- *Bell v. Florida*, No. 17-9361
- *Booker v. Jones*, No. 17-9360
- *Bowles v. Florida*, No. 17-9348
- *Bradley v. Jones*, No. 17-9386
- *Brown v. Jones*, No. 17-8989
- *Burns v. Florida*, No. 18-5084
- *Clark v. Florida*, No. 17-9492
- *Damren v. Florida*, No. 17-9493
- *Davis v. Florida*, No. 17-9570
- *Davis v. Jones*, No. 17-9435
- *Derrick v. Florida*, No. 18-5051
- *Dillbeck v. Florida*, No. 17-9375
- *Evans v. Florida*, No. 17-8923
- *Finney v. Jones*, No. 17-9588
- *Foster v. Florida*, No. 17-9389
- *K. Foster v. Florida*, No. 18-5091
- *Fotopoulos v. Florida*, No. 18-5060
- *Gamble v. Florida*, No. 17-9587

- *Gonzalez v. Florida*, No. 17-9575
- *Griffin v. Florida*, No. 18-5174
- *Guardado v. Florida*, No. 17-9284
- *Hamilton v. Florida*, No. 18-5037
- *Hartley v. Florida*, No. 17-9498
- *Hodges v. Florida*, No. 17-9573
- *Jackson v. Florida*, No. 17-9564
- *Jeffries v. Florida*, No. 17-9329
- *Johnson v. Florida*, No. 18-5088
- *R. Johnson v. Florida*, No. 18-5179
- *Jones v. Florida*, No. 17-8652
- *Kelley v. Florida*, No. 17-1603
- *Kokal v. Florida*, No. 17-9536
- *Kokal v. Jones*, No. 18-5330
- *Lawrence v. Florida*, No. 17-9431
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- *Long v. Florida*, No. 17-9380
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- *Morris v. Florida*, No. 17-9552
- *Morton v. Florida*, No. 18-5081

- *Nelson v. Florida*, No. 17-9325
- *Occhicone v. Florida*, No. 17-9497
- *Overton v. Florida*, No. 18-5122
- *Pace v. Florida*, No. 18-5078
- *Peterka v. Florida*, No. 17-9496
- *Phillips v. Florida*, No. 17-9520
- *Pietri v. Florida*, No. 18-5124
- *Rhodes v. Florida*, No. 17-9204
- *Rodriguez v. Florida*, No. 18-5065
- *Sireci v. Florida*, No. 18-5040
- *Sliney v. Jones*, No. 18-5042
- *Stein v. Florida*, No. 17-9545
- *Stephens v. Florida*, No. 17-9234
- *Suggs v. Florida*, No. 17-9173
- *Walls v. Florida*, No. 17-9510
- *Whitfield v. Florida*, No. 17-8724
- *Willacy v. Florida*, No. 17-9548
- *Windom v. Florida*, No. 17-9439