

No. _____

In the Supreme Court of the United States

SONNY RAY JEFFRIES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

DEATH PENALTY CASE

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CAPITAL CASE

QUESTION PRESENTED

Whether the Florida Supreme Court's "retroactivity cutoff" for *Hurst v. Florida*, 136 S.Ct. 616 (2016) can be applied to deny Mr. Jeffries *Hurst* relief on the ground that his sentence did not become final at least one day after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002), even though the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) was the basis for both *Ring* and *Hurst*.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Mr. Jeffries was the Appellant below. The State of Florida was the Appellee below.

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PETITION FOR WRIT OF CERTIORARI

Sonny Ray Jeffries respectfully petitions for a writ of certiorari to review the errors in judgment of the Florida Supreme Court.

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at *Jeffries v. State*, 235 So. 3d 283 (Fla. 2018) and reproduced at Appendix A. The trial court's unpublished order denying Mr. Jeffries' successive motion for postconviction relief is reproduced at Appendix B.

JURISDICTION

The opinion of the Florida Supreme Court was entered on January 26, 2018. Appendix A. No motion for rehearing was filed. On April 13, 2018, Justice Thomas granted an extension of time to file a petition for certiorari to June 25, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury'

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:

[N]or shall any state deprive any person of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

I. Introduction

Petitioner's death sentence was imposed after an eleven to one jury recommendation pursuant to the capital sentencing scheme that was ruled unconstitutional in *Hurst*. *Hurst v. Florida*, 136 S.Ct. 616 (2016). Petitioner's sentence became "final" on January 7, 2002, after this Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Yet the Florida Supreme Court has consistently denied the retroactive application of *Hurst* to defendants whose death sentences were final when this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). *See Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). A core issue in this case is whether the Florida Supreme Court can constitutionally apply its "retroactivity cutoff" to deny Petitioner *Hurst* relief on the ground that his sentence did not become final at least one day after the 2002 decision in *Ring*, even though the rule announced in *Apprendi* was the basis for both *Ring* and *Hurst*.

II. Factual and Procedural Background

A. Trial and Direct Appeal

Petitioner was indicted by the Grand Jury for the Ninth Judicial Circuit, Orange County Florida, on October 18, 1993, for premeditated first-degree murder, armed robbery, and armed burglary of Wilma Martin on August 20 or 21, 1993. The trial court committed Petitioner to the Department of Health and Rehabilitative Services (HRS) on several occasions prior to his trial because he was found incompetent to stand trial. During his commitment, HRS received an order from the trial court to administer psychotropic drugs to the Petitioner involuntarily. It was not until April 20 through 23, 1998, before Petitioner was tried by jury in Orange County, Florida. On April 23, 1998, the jury found Petitioner guilty of first-degree murder and armed robbery as charged and not guilty of armed burglary.

On July 13, 1998, the circuit court, sua sponte, set a hearing on Petitioner's request to appoint new counsel. On August 14, 1998, the circuit court conducted a hearing on Petitioner's motion to proceed pro se. During this hearing defense counsel presented the court with an affidavit signed by Dr. Brad Fisher questioning the competency of Petitioner to waive counsel. On August 28, 1998, the Court held a *Faretta*¹ hearing and found Petitioner competent to waive his right to counsel for the penalty phase hearing. The court appointed stand-by counsel.

Petitioner represented himself at the penalty phase hearing, which was held on September 8 through 9, 1998, with the assistance of stand-by counsel. After the presentation of all testimony and evidence, Petitioner waived closing argument. The jury recommended that the court impose death for the first-degree murder of Wilma Martin by a vote of eleven to one. After the jury's recommendation, the trial court adjudicated the Petitioner guilty on counts one and two of the indictment and Petitioner requested that counsel be reappointed. On October 15, 1998, the trial court denied Petitioner's request to be designated as co-counsel and held the *Spencer*² hearing. Defense counsel represented Petitioner at the *Spencer* hearing. On January 22, 1999, the trial court sentenced Petitioner to death for the first-degree murder of Wilma Martin and to life in prison on count two, armed robbery.

In support of the death sentence, the trial court found the following two aggravators: (1) that the murder was committed by a person engaged in the commission of a robbery and (2) the murder was especially heinous, atrocious, and cruel (HAC). *See Jeffries v. State*, 797 So. 2d 573, 576 (Fla. 2001). The trial court found the following mitigators: (1) defendant's capacity to appreciate the criminality of his conduct was impaired; (2) codefendant Harry Thomas, who was equally culpable, pled to second-degree murder and was sentenced to twenty years; (3) the

¹ *Faretta v. California*, 422 U.S. 806 (1975).

defendant has a long history of emotional and mental problems; (4) the defendant has a long history of drug and alcohol abuse; (5) the defendant has attempted suicide; and (6) the State offered the defendant a plea of life in prison. *See id.* The Supreme Court of Florida denied all of these grounds and affirmed Petitioner's convictions and sentences. *See Id.* Petitioner did not seek certiorari before this Court.

B. Postconviction

On November 26, 2002, Petitioner was found temporarily incompetent to proceed. On December 2, 2002, Petitioner filed an original Motion to Vacate Judgment and Sentence. No evidentiary hearings on the postconviction motion were scheduled due to the extended competency proceedings. The postconviction court conducted competency hearings in 2005, and on December 15, 2005, issued an Order Finding Defendant Competent. On January 26, 2006, Petitioner sought review of this non-final order. On January 24, 2007, the Florida Supreme Court denied Petitioner's motion for stay and dismissed his petition to review the order, without prejudice to raise it on direct appeal. Petitioner subsequently filed an Amended Motion to Vacate Judgment of Conviction and Sentence on February 17, 2006, which was dismissed on April 13, 2006 because it was not under oath; a Motion to Determine Competency on June 9, 2006, which was denied on April 2, 2007; and another Amended Motion to Vacate Judgment of Conviction and Sentence on June 9, 2009, which was dismissed on March 28, 2007 because it was not under oath. On December 6, 2007, the postconviction court issued a Status Order, in which is stated that "[t]he record in the above-styled case is devoid of any new Rule 3.851 Motion signed by Mr. Jeffries, or any other new pleading" and that "there are no legal matters or challenges currently pending before the Court." In July 2008, the postconviction court issued a written "Response" in

² *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

response to postconviction counsel's telephonic request for a Final Order that is able to be appealed to the Florida Supreme Court. The court stated in its response that "[t]he December 6, 2007 Order was not intended to be a Final Order to dispose of a pending Motion or claim for relief. It was entered for the sole purpose of clarifying that there were no such pending motions. No relief was denied and accordingly, there was nothing to appeal."

C. Motion Seeking *Hurst* Relief

On January 9, 2017, Petitioner filed a Successive Motion to Vacate Death Sentence pursuant to Florida Rule of Criminal Procedure 3.851 seeking *Hurst* relief. The circuit court issued a Final Order Denying Defendant's Successive Motion to Vacate Death Sentence on March 28, 2017. Appendix B. A Notice of Appeal was timely filed on April 27, 2017. On June 20, 2017, the Florida Supreme Court issued an order directing the Appellant to "show cause on or before Monday, October 16, 2017, why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, SC17-445."

On appeal, the Florida Supreme Court affirmed the denial of Petitioner's motion and found that *Hurst* does not apply retroactively to his sentence of death, which became final in January of 2002. *See Jeffries*, 235 So. 3d 283.

REASONS FOR GRANTING THE WRIT

I. Petitioner's death sentence violates *Hurst*, and the error is not "harmless".

Petitioner was sentenced to death pursuant to an unconstitutional Florida capital sentencing scheme. In *Hurst v. Florida*, this Court held that Florida's scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. *See* 136 S. Ct. at 620-22. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those

aggravators were “sufficient” to justify the death penalty; and (3) whether those aggravators outweighed the mitigation. *See id.* Under Florida’s unconstitutional scheme, an “advisory” jury rendered a generalized recommendation for life or death by a majority vote, without specifying the factual basis for the recommendation, and then the sentencing judge alone, notwithstanding the jury’s recommendation, conducted the fact-finding. *See id.* at 622. In striking down that scheme, the Court held that the jury, not the judge, must make the findings of fact required to impose death. *See id.*

On remand, the Florida Supreme Court applied the holding of *Hurst v. Florida*, and further held that the Eighth Amendment requires *unanimous* jury fact-finding as to each of the required elements, and also a unanimous recommendation by the jury to impose the death penalty. *Hurst v. State*, 202 So. 3d 40, 53-59 (Fla. 2016). The Florida Supreme Court also noted that even if the jury unanimously finds that each of the required elements is satisfied, the jury is not required to recommend the death penalty and the judge is not required to sentence the defendant to death. *See id.* at 57-58.

Petitioner’s jury was never asked to make unanimous findings of fact as to any of the required elements. Instead, after being instructed that its decision was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, the jury rendered a non-unanimous, generalized recommendation that the judge sentence Petitioner to death. The record does not reveal whether Petitioner’s jurors unanimously agreed that any particular aggravating factor had been proven beyond a reasonable doubt, or unanimously agreed that the aggravators were sufficient for death, or unanimously agreed that the aggravators outweighed the mitigation. However, the record is clear that Petitioner’s jurors were not unanimous as to whether the death penalty should even be *recommended* to the court.

Petitioner's pre-*Hurst* jury recommended the death penalty by a vote of eleven to one. Florida Supreme Court precedent makes clear that *Hurst* errors are not harmless where the defendant's pre-*Hurst* jury recommended death by a non-unanimous vote. *See Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017) (“[I]n cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless.”). The Florida Supreme Court has declined to apply the harmless error doctrine in every case where the pre-*Hurst* jury's recommendation was not unanimous.³

II. The Florida Supreme Court's “retroactivity cutoff” at *Ring* is unconstitutional and should not be applied to Petitioner's post-*Apprendi* death sentence.

Beginning with *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), the Florida Supreme Court applied *Hurst* retroactively as a matter of state law and granted relief in dozens of collateral-review cases where the defendant's sentence became final after *Ring*. However, the Florida Supreme Court has created a state-law cutoff at the date *Ring* was decided - June 24, 2002 - to deny relief in dozens of other collateral-review cases.

Petitioner's death sentence became final on January 7, 2002, during the two-year period between *Apprendi* and *Ring*. The Florida Supreme Court has never specifically addressed this “*Apprendi* gap” in its state-law retroactivity precedent. The *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Petitioner the same *Hurst* relief being granted in scores of materially indistinguishable collateral cases, particularly given that his sentence became final after *Apprendi*, which was the constitutional basis for both *Ring* and *Hurst*. Denying Petitioner *Hurst* retroactivity because his death sentence became final

³ *See, e.g., Bailey v. Jones*, 225 So. 3d 776, 777 (Fla. 2017) (11-1 jury vote); *Hertz v. Jones*, 218 So. 3d 428, 431-32 (Fla. 2017) (10-2 jury vote); *Hernandez v. Jones*, 217 So. 3d 1032, 1033 (Fla. 2017) (11-1 jury vote); *Card v. Jones*, 219 So. 3d 47, 48 (Fla. 2017) (11-1 jury vote); *McMillian v. State*, 214 So. 3d 1274, 1289 (Fla. 2017) (10-2 jury vote).

before *Ring* in 2002, while affording retroactivity to similarly-situated defendants who were sentenced (or resentenced) between June 24, 2002 and 2016, would violate the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty, as well as the Fourteenth Amendment's guarantee of equal protection and due process.

A. The Florida Supreme Court's *Ring*-based retroactivity cutoff is unconstitutional as applied to post-*Apprendi* death sentences because *Apprendi* was the constitutional basis for both *Ring* and *Hurst*.

The Florida Supreme Court's *Ring*-based retroactivity cutoff is unconstitutional as applied to Petitioner's post-*Apprendi* death sentence because the rule announced in *Apprendi* was the constitutional basis for both *Ring* and *Hurst*. It was *Apprendi*, not *Ring*, which first explained that the Sixth Amendment requires that any finding that increases a defendant's maximum sentence is an element of the offense that must be found by a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490. Indeed, as this Court stated in *Hurst*, *Ring* applied *Apprendi*'s analysis to conclude that Mr. Ring's death sentence violated the Sixth Amendment. *See* 136 S. Ct. at 621. Just as *Ring* applied *Apprendi*'s principles to Arizona's capital sentencing scheme, *Hurst* applied *Apprendi*'s principles to Florida's scheme.

In *Hurst*, this Court repeatedly stated that Florida's scheme was incompatible with "*Apprendi*'s rule," of which *Ring* was an application. 136 S. Ct. at 621. In overruling its pre-*Apprendi* precedent approving of Florida's scheme - *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989) - *Hurst* stated that those decisions were "irreconcilable with *Apprendi*," and drew an analogy to *Ring*'s overruling of pre-*Apprendi* precedent approving of Arizona's scheme - *Walton v. Arizona*, 497 U.S. 639 (1990) - which also could not "survive the reasoning of *Apprendi*." *Hurst*, 136 S. Ct. at 623. Thus, both *Ring* and *Hurst* make clear that their operative constitutional holdings derived directly from *Apprendi*.

The Florida Supreme Court has consistently understood that the Sixth Amendment rule applied in *Ring* and *Hurst* derived from *Apprendi*. In *Mosley*, the Florida Supreme Court observed that *Ring* was an application of *Apprendi*. See 209 So. 3d at 1279-80 (explaining that in *Ring* the court “applied its reasoning from *Apprendi*.”). This was not a new observation; over many years, the Florida Supreme Court acknowledged that *Ring* merely applied the *Apprendi* rule, and that *Ring* broke no new ground of its own. See, e.g., *Johnson v. State*, 904 So. 2d 400, 405-06 (Fla. 2005) (explaining that “*Ring* was not a sudden or unforeseeable development in constitutional law; rather, it was an evolutionary refinement in capital jurisprudence,” in that “[t]he Supreme Court merely applied the reasoning of another case, *Apprendi*.”) (internal quotation omitted).

Notably, in the period between *Apprendi* and *Ring*, the Florida Supreme Court rejected challenges to Florida’s capital sentencing scheme under *Apprendi* at least in part because this Court upheld Florida’s death penalty against constitutional challenge notwithstanding *Apprendi*. See, e.g., *Mills v. Moore*, 786 So. 2d 532, 536-37 (Fla. 2001). The Florida Supreme Court rejected challenges to Florida’s death-sentencing scheme on the same basis after *Apprendi* as it did after *Ring* because the U.S. Supreme Court had not overturned Florida’s capital sentencing scheme. Compare *Mills*, 786 So. 2d 532 (holding that “[b]ecause *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either), with *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002)⁴ (holding that *Ring* did not apply because Florida’s scheme had previously been upheld by the U.S. Supreme Court and citing *Mills*), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002) (same).

⁴ *abrogated by Hurst*, 136 S. Ct. 616.

In light of *Apprendi*'s fundamental importance to both *Ring* and *Hurst*, it would violate the federal constitutional prohibition against the arbitrary and capricious imposition of the death penalty, as well as the constitutional guarantees of equal protection and due process, to extend *Hurst* retroactivity to fourteen years of post-*Ring* death sentences while denying *Hurst* retroactivity to the small number of individuals like Petitioner whose death sentences were finalized in the two years between *Apprendi* and *Ring*. Moreover, as discussed below, federal law prohibits a retroactivity "cutoff" at *Ring*, and requires that the *Hurst* decisions apply retroactively to all cases on collateral review, including post-*Apprendi* cases.

B. The Florida Supreme Court's retroactivity cutoff violates the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty.

The Florida Supreme Court's retroactivity cutoff violates the Eighth and Fourteenth Amendments' prohibition against arbitrary and capricious imposition of the death penalty. The death penalty cannot "be imposed under sentencing procedures that create[] a substantial risk that it would be inflicted in an arbitrary or capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman v. Georgia*, 408 U.S. 238, 310 (1972) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.") (Stewart, J., concurring). In other words, the death penalty cannot be imposed in certain cases in an arbitrary way that is comparable to being "struck by lightning." *Furman*, 408 U.S. at 308.

Experience has already shown the arbitrary results inherent in the Florida Supreme Court's application of the *Ring*-based retroactivity cutoff. The date of a particular death sentence's finality on direct appeal in relation to the June 24, 2002 decision in *Ring* - and thus whether the Florida Supreme Court has held *Hurst* retroactive based on its bright-line cutoff -

has at times depended on whether there were delays in transmitting the record on appeal to the Florida Supreme Court for the direct appeal;⁵ whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with this Court's summer recess; how long the assigned justice of the Florida Supreme took to submit the opinion for release;⁶ 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; and how long a certiorari petition remained pending in this Court.

In one striking example, the Florida Supreme Court affirmed Gary Bowles' and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both inmates petitioned for a writ of certiorari in this Court. Mr. Card's sentence became final four days after *Ring* was decided - on June 28, 2002 - when his certiorari petition was denied. *See Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven days before *Ring* was decided - on June 17, 2002 - when his certiorari petition was denied. *See Bowles v. Florida*, 536 U.S. 930 (2002). The Florida Supreme Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47. However, Mr. Bowles, whose case was decided on direct appeal on *the same day* as Mr. Card's, falls on the other side of this Court's current

⁵ *See, e.g., Lugo v. State*, 845 So. 2d 74 (Fla. 2003) (two-year delay between the time defense counsel filed a notice of appeal and the record on appeal being transmitted to the Florida Supreme Court, almost certainly resulting in the direct appeal being decided post-*Ring*).

⁶ Compare *Booker v. State*, 773 So. 2d 1079 (Fla. 2000) (this Court's opinion issued within one year after all briefs had been submitted, before *Ring*), with *Hall v. State*, 201 So. 3d 628 (Fla. 2016) (opinion issued twenty-three months after the last brief submitted).

retroactivity cutoff and, as such, the Florida Supreme Court held that *Ring* does not apply retroactively to his sentence of death. *See Bowles v. State*, 235 So. 3d 292 (Fla. 2018).

Other arbitrary factors affecting whether a defendant receives *Hurst* relief under the Florida Supreme Court's date-of-*Ring*-based retroactivity approach include whether a resentencing was granted because of an unrelated error. Under the Florida Supreme Court's current approach, "older" cases dating back to the 1980s with a post-*Ring* resentencing are subject to *Hurst*, while other less "old" cases are 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 was granted relief on a third successive postconviction motion in 2010, years after the *Ring* decision); *Card*, 219 So. 3d at 47 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was afforded relief on a second successive postconviction motion in 2002 - just four days after *Ring* was decided); *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 ten 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 and *Petitioner* would not.

Moreover, under the Florida Supreme Court's current rule, some litigants whose *Ring* claims were wrongly rejected on the merits during the 2002-2016 period will be denied the benefit of *Hurst* because the Florida Supreme Court addressed the issue in postconviction rather than a direct appeal posture. *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).

In the case at hand, Petitioner did not file a petition for writ of certiorari following his direct appeal, and therefore his case became final on January 7, 2002, ninety days after his motion for rehearing was denied by this Court. If Petitioner's appellate counsel had filed a petition for writ of certiorari in this Court, there is a substantial likelihood that his case would have become final after June 24, 2002, and he would be eligible for *Hurst* relief under the Florida Supreme Court's current case law.

C. The Florida Supreme Court's retroactivity cutoff violates the Fourteenth Amendment's guarantee of equal protection and due process.

The Florida Supreme Court's retroactivity cutoff violates the Fourteenth Amendment's guarantee of equal protection and due process. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture—on collateral review—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 by a state actor like the Florida Supreme Court the question becomes “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 v. Oklahoma*, 316 U.S. 535, 541 (1942). Capital defendants have a fundamental right to a reliable determination of their sentences. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). When a state draws a line between those capital defendants who will receive the benefit of the rules designed to enhance the quality of decision-making by a penalty-phase jury, and those who will not, the State's justification for that line must satisfy strict scrutiny. Far from meeting strict scrutiny, the Florida Supreme Court's *Hurst* retroactivity cutoff lacks even a rational connection

to any legitimate state interest. *See U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973).

As a due process matter, denying the benefit of Florida's new post-*Hurst* capital sentencing statute to "pre-*Ring*" defendants like Petitioner violates the Fourteenth Amendment because once a state requires certain sentencing procedures, it creates Fourteenth Amendment life and liberty interests in those procedures. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (due process interest in state created right to direct appeal); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (liberty interest in state-created sentencing procedures); *Ford v. Wainwright*, 447 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (liberty interest in meaningful state proceedings to adjudicate competency to be executed); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-89 (1998) (O'Connor, J., with Souter, Ginsburg, & Breyer, JJ., concurring) (life interest in state-created right to capital clemency proceedings).

Although the right to the particular procedure is established by state law, the violation of the life and liberty interest it creates is governed by *federal* constitutional law. *See Hicks*, 447 U.S. at 347; *Ford*, 477 U.S. 399, 428-29 (O'Connor, J., concurring); *Evitts*, 469 U.S. at 393 (state procedures employed "as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant'" must comport with due process). Instead, defendants have "a substantial and legitimate expectation that [they] will be deprived of [their] liberty only to the extent determined by the jury in the exercise of its discretion . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Hicks*, 447 U.S. at 347 (O'Connor, J., concurring). Courts have found in a variety of contexts that state-created death penalty procedures vest in a capital defendant life and liberty interests that are protected by due process. *See, e.g., Ohio Adult Parole Authority*, 523 U.S. at 272; *Ford*, 477 U.S.

at 427-31 (O'Connor, J., concurring). In *Hicks*, this Court held that the trial court's failure to instruct the jury that it had the option to impose an alternative sentence violated the state-created liberty interest (and federal due process) in having the jury select his sentence from the full range of alternatives available under state law. 477 U.S. at 343.

III. Because the *Hurst* decisions announced substantive constitutional rules, the Supremacy Clause of the United States Constitution requires state courts to apply those rules retroactively to all cases on collateral review.

This Court held in *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), that the Supremacy Clause of the Constitution requires state courts to apply “substantive” constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis. *Id.* at 728-29 (“[W]hen a new substantive rule of constitutional law controls the outcome of a case, *the Constitution* requires state collateral review courts to give retroactive effect to that rule.”) (emphasis added). Thus, *Montgomery* held, “[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.” *Id.* at 731-32.

Importantly, *Montgomery* found the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment), substantive even though the *Miller* rule had “a procedural component.” *Id.* at 734. The *Montgomery* Court explained that “[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish,” *Id.* at 735, and that the necessary procedures do not “transform substantive rules into procedural ones,” *Id.*

A. The *Hurst* decisions announced substantive rules that must be applied retroactively to Petitioner under the Supremacy Clause.

The *Hurst* decisions announced substantive rules that must be applied retroactively to Petitioner by the Florida Supreme Court under the Supremacy Clause. First, a Sixth Amendment rule was established requiring that a jury find as fact: (1) each aggravating circumstance; (2) that those aggravators together are “sufficient” to justify imposition of the death penalty; and (3) that those aggravators together outweigh the mitigation in the case. *See Hurst*, 202 So. 3d at 53-59. Each of those findings is required to be made by the jury beyond a reasonable doubt. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person “whose crimes reflect the transient immaturity of youth” is a substantive, not procedural, rule). As in *Montgomery*, these requirements amounted to an “instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish.” *Id.* at 735.

Second, an Eighth Amendment rule was established that requires those three beyond-a-reasonable-doubt findings to be made unanimously by the jury. The substantive nature of the unanimity rule is apparent from the Florida Supreme Court’s explanation in *Hurst v. State* that unanimity (1) is necessary to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders, and (2) ensures that the sentencing determination “expresses the values of the community as they currently relate to the imposition of the death penalty.” *Hurst*, 202 So. 3d at 60-61. The function of the unanimity rule is to ensure that Florida’s death-sentencing scheme complies with the Eighth Amendment and to “achieve the important goal of bringing [Florida’s] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law.”

Id. The rule is therefore substantive as a matter of federal retroactivity law. See *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (“[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule”). This is true even though the rule’s subject concerns the method by which a jury makes its decision. See *Montgomery*, 136 S. Ct. at 735 (noting that state’s ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).

The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rules as a matter of federal law because they place certain murders “beyond the State’s power to punish,” with a sentence of death. Following the *Hurst* decisions, “[e]ven the use of impeccable fact-finding procedures could not legitimate a sentence based on” the judge-sentencing scheme. *Welch*, 136 S. Ct. at 1265. The “unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*,” *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the new law by necessity places certain individuals beyond the state’s power to impose a death sentence. Thus, a substantive rule, rather than a procedural rule, resulted from the *Hurst* decisions. See *Welch*, 136 S. Ct. at 1264-65 (a substantive rule “alters...the class of persons that the law punishes.”).

Hurst retroactivity is not undermined by *Schriro v. Summerlin*, 542 U.S. 348,364 (2004), where this Court held that *Ring* was not retroactive in a federal habeas case. *Summerlin* did not review a statute, like Florida’s, that required the jury not only to conduct the fact-finding regarding the aggravators, but also as to whether the aggravators were *sufficient* to impose death

and whether death was an appropriate sentence. *Summerlin* acknowledged that if the Court itself “[made] a certain fact essential to the death penalty . . . [the change] would be substantive.” 542 U.S. at 354. Such a change occurred in *Hurst* where, for the first time, the Court found it unconstitutional for a judge alone to find that “sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” 136 S. Ct. at 622 (internal citation omitted).

Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and this Court has always regarded proof-beyond-a-reasonable-doubt decisions as substantive. See, e.g., *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (explaining that “the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect.”); *Powell v. Delaware*, 153 A. 3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware’s state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* “only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof.”).

CONCLUSION

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

Respectfully submitted,

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6/8/18

Dated