Old Rule, Partially Retroactive, and No Remedy: Why *Hurst* Won't Help Many on Florida's Death Row

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For almost fourteen years, courts and capital defendants have wanted an answer to the question the Supreme Court recently took up: "Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002)."[1] In *Hurst v. Florida* the Supreme Court held that Florida's capital punishment scheme is unconstitutional because judges, not juries, decide whether the facts establish aggravating and mitigating factors.[2] In the interim, Florida has violated the rights of every capital defendant brought to trial.

Although some current inmates will be affected, this landmark ruling is not likely to open any floodgates of litigation that will empty Florida's death row.[3] Inmates whose sentences are not "final"—that is, whose sentences have not been affirmed at the highest level of direct review[4]—should be entitled to resentencing.[5] The situation is much less clear for inmates who have proceeded to post-conviction review, and the final outcome depends heavily on how Florida courts and legislators will react. Unfortunately for inmates on death row, neither case law nor political expediency weighs in favor of relief in Florida's courts. Federal courts, however, are insulated from political pressure and well placed to address the unconstitutional sentences imposed in Florida after *Ring* was decided. Granting relief to these defendants accords with the role of the federal courts in enforcing constitutional guarantees, especially where Florida violated the rights of capital defendants for more than a decade.

Due to the intricacies of federal habeas procedure, whether individual defendants obtain relief in federal court will depend on how long their cases have taken to resolve. Under federal retroactivity law *Hurst* will not extend beyond defendants whose federal habeas petitions are currently pending or on appeal. For those who have already completed a full round of habeas review, *Hurst* came too late. Additionally, some defendants with pending cases are unlikely to obtain relief because counsel for these petitioners did not include a *Ring* claim in the initial petition, and now any *Hurst* claim is time-barred. Thus, federal rights are unenforceable in federal court. It will be up to Florida to extend *Hurst* any further.

I. The Substance: from *Apprendi* to *Hurst*

It would be most difficult to describe *Hurst* as a break from precedent. It was settled long ago that in a jury trial, every element of the crime must be found by the jury beyond a reasonable doubt.[6] In 2000, the Supreme Court decided *Apprendi v. New Jersey*, which extended this principle to all facts necessary to impose a greater sentence—for example, stiffer sentences when an offense is committed as a hate crime.[7] *Ring v. Arizona* then applied this principle to death penalty cases.[8] In *Ring*, the defendant was sentenced under Arizona's procedure, which allowed the judge to impose the death sentence for felony murder if the judge finds that aggravating circumstances exist. The judge sentenced Ring to death after finding that he was "the one who shot and killed" the victim, and otherwise a "major participant" in the crime who displayed a "reckless indifference to human life."[9] The Court held that because "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury."[10]

Florida's capital sentencing differed in only one respect: the guilt phase jury also sat in the penalty phase and rendered an advisory verdict before the judge pronounced the sentence.[11] The jurors were instructed that they could not return a recommendation of death unless they found the presence of an aggravating factor beyond a reasonable doubt, and the aggravating factors outweighed any mitigation.[12] However, the jury's ultimate recommendation was merely a "head count"; there were no findings as to which aggravators each juror believed the state had proved. Florida law requires that the recommendation receive "great weight," but also clearly provides that the final decision be made according to the judge's "independent judgment about the existence of aggravating and mitigating factors."[13]

In Hurst's case, the state sought to prove two aggravating circumstances. Although a bare seven-juror majority recommended death, it was not clear whether the majority agreed that the murder was "heinous, atrocious, or cruel," or that it occurred during a robbery, or both.[14] Ultimately the judge found that both aggravators were present and sentenced Hurst to death, giving "great weight" to the jury recommendation per Florida law. Of course, even if none of the jurors had recommended death, Florida's statutory scheme would have permitted the judge to find that both

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aggravators existed, weigh them against the mitigating evidence, and impose a capital sentence.

Reversing, the Supreme Court observed that "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's."[15] When affirming the schemes in 1990, the Court had observed that any distinction between the two schemes was "immaterial" for the purposes of the right to a jury trial: "'It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's finding of fact with respect to sentencing issues than does a trial judge in Arizona.'"[16] Therefore the *Hurst* Court concluded, "As with Ring, a judge increased Hurst's authorized sentence based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment."[17]

If this analysis seems simple, that's because it is. The Supreme Court considered the issue straightforward enough to be decided in barely ten pages. The only hard question is why it took so long. After all, the Florida Supreme Court had relied heavily on pre-*Ring* cases, which upheld Florida's capital punishment procedure.[18] These cases, however, depended on the conclusion that "'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'"[19] With palpable impatience, the *Hurst* Court declared that the cases were "wrong, and irreconcilable with *Apprendi*."[20]

The Eleventh Circuit had also refused to recognize that the earlier cases could not survive *Apprendi*: In *Evans v. Secretary* it took the position that despite *Ring*'s clear mandate, it could not act unless and until the Supreme Court itself applied *Ring* to overrule the pre-*Ring* cases, upholding an identical challenge against Florida's capital sentencing scheme.[21] *Ring* addressed Arizona without mentioning Florida. Therefore, the decision only undercut the reasoning of the prior cases. Reversing the district court's grant of habeas relief, the Eleventh Circuit concluded "the most that [could] be said . . . is that [*Ring*]'s reasoning arguably conflicts with the [1989] *Hildwin* decision, and it arguably was implicitly overruled."[22] Mr. Evans sought further review, but the Supreme Court did not grant certiorari.

Today, we know that the Eleventh Circuit was wrong about the constitutional issue in *Evans*. Nevertheless, Mr. Evans will not have any federal remedy for the violation of his right to a jury determination that he deserved to die. This is not because Mr. Evans doesn't receive the benefit of the new law. The *Hurst* holding applies to him as his conviction became final on October 15, 2002, more than three months after *Ring* was decided.[23] What follows is an explanation of why federal courts cannot provide any remedy for inmates like Mr. Evans, leaving enforcement of his federal constitutional rights in the hands of Florida courts.

II. Habeas Procedure Part 1: Federal retroactivity in the abstract

First, not every death row inmate has a federal claim because *Hurst*'s holding is limited temporally. For every inmate to receive the benefit of *Hurst*, federal courts would have to apply it fully retroactively. *Hurst* cannot meet the strict criteria for new, retroactive rules of law. *Hurst* can, however, apply to defendants whose cases were decided after *Ring*.

The first inquiry in the federal retroactivity analysis is whether the *Hurst* Court announced a "new rule." "Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review."[24] Although generally the new rule inquiry is framed as though almost every decision must create a new rule,[25] it is also established that a decision "does *not* announce a new rule, [when] it '[is] merely an application of the principle that governed' a prior decision to a different set of facts."[26]

Because Florida's sentencing scheme was not materially different from Arizona's, *Hurst* is simply a straightforward application of *Ring*'s unequivocal command that "[c]apital defendants, no less than noncapital defendants, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[27] That should make *Hurst* an old rule, which means at least some Florida inmates condemned to death have a federal right to a jury determination of their death eligibility. However, that right will not extend further back than whatever "new rule" *Hurst* relies on. Therefore, it is not a new rule to anyone whose conviction and sentence became final after June 24, 2002.

The "old rule" approach appears to be the only realistic way for any capital inmates to get the benefit of *Hurst* after direct appeal. If the rule in *Hurst* is completely "new" and not retroactive, only inmates whose convictions are not final can invoke it.

Applying new rules begins with a procedural/substantive inquiry that basically decides the issue. If a new rule is procedural, it will only be applied retroactively if it is also a "watershed rule of criminal procedure," such as the right to counsel itself.[28] The Supreme Court has never found a new watershed rule of criminal procedure.

Moreover, the Supreme Court already decided that *Ring* was a new procedural rule that did not apply retroactively to cases final on direct review in *Schriro v. Summerlin*.[29] In *Schriro*, the petitioner was sentenced to death in 1981 under the Arizona procedures the Court had declared unconstitutional. *Ring*'s requirement that juries, not judges, find death-eligible aggravating circumstances was a new rule of criminal procedure, and therefore subject to the retroactivity analysis set forth in *Teague*.[30] The Court found that, although juries might be more accurate finders of fact than judges, no evidence unequivocally showed that judicial factfinding "so 'seriously diminishe[d]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach."[31] Therefore, "*Ring* announced a new

procedural rule that does not apply retroactively to cases already final on direct review."[32] *Hurst* is really just *Ring* applied to a slightly different set of facts; it is therefore difficult to see how *Hurst* could be retroactive if *Ring* was not.

To summarize: I predict that *Hurst* will be considered an old rule, because it is an extremely straightforward application of *Ring*. Therefore, it will apply retroactively on collateral review to all defendants entitled to the new rule announced in *Ring*, because their convictions were not yet final on direct review. Those whose direct appeals ended before *Ring* was decided will have no right to invoke a *Hurst* claim—they have no *Hurst* rights.

The following section explains why many death row inmates who have *Hurst* rights will have no federal remedy for Florida's refusal to apply *Ring*.

III. Habeas Procedure Part 2: Procedural bars for the wrong kind of retroactivity

Hurst is retroactive in some sense, but not as a new, retroactive rule of criminal procedure pursuant to *Teague*. Instead, it is merely an old rule, applicable to defendants who should have gotten the benefit of *Ring* because their convictions became final after June 24, 2002. This means that *Hurst* claims are not exempt from the procedural bars of timeliness and successiveness. Unless a *Ring* claim was raised in an initial, timely petition that is currently pending in the federal courts, *Hurst* cannot be invoked in federal habeas proceedings. Because *Hurst* is not a new, retroactive rule of criminal procedure, federal courts will lack jurisdiction over second petitions, and amendments to existing petitions will be untimely.

Defendants who have already had a full round of federal habeas review face the bar on second or successive petitions. Unfortunately, any claim presented in a prior petition *must* be dismissed, even if it was wrongly decided.[33] There is no remedy when courts simply get it wrong the first time.[34]

Petitioners who omitted a *Ring* claim in their first petition are no better off. Second petitions can raise new claims, but only when "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."[35] This language is drawn straight from *Teague* and requires the Supreme Court to decide a new rule is retroactive under that analysis. *Hurst* is either an old rule or not retroactive, thus the filing of a second or successive petition will not be permitted.

Moreover, the Circuit Courts must quickly—within 30 days—deny permission to file a successive petition until the Supreme Court itself acts.[36] Incongruously, the statute of limitations for any such claim would be the date *Hurst* was decided, not the future date on which retroactivity is decided. Therefore any Supreme Court decision may come too late, as the Court itself has observed.[37]

Unfortunately, research shows there are inmates on Florida's death row who have forfeited their rights to make a *Hurst* claim by not raising it in the initial petition. *Hurst* applies to their cases, but the one-year statute of limitations will preclude amendment.[38] An exception exists for new precedent; however, the limitations period restarts on "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."[39] Lower courts can decide the retroactivity issue for this exception,[40] but they apply this exception only to new, watershed rules of criminal law,[41] despite the reference to a newly recognized right instead of a new rule of constitutional law.[42] Although many attorneys brought *Ring* claims, unfortunately some attorneys have failed to do so in the initial habeas petition.[43] Equitable tolling exists,[44] but is granted only in exceptional circumstances, such as gross negligence.[45]

The doctrine of exhaustion generally requires that any claim for relief be properly presented to state courts first and decided on the merits.[46] Florida law provides for procedural bars similar to those in federal habeas, and therefore petitioners may not be able to bring them in Florida courts (as discussed in more detail in the following section).[47] These petitioners have procedurally defaulted their *Hurst* claims. However, two exceptions might apply. Procedural default can be forgiven when a petitioner's post-conviction attorney renders ineffective assistance of counsel by failing to raise a claim.[48] Most attorneys would agree that failing to raise the *Ring* issue in a capital case would be deficient performance.[49] However, as state and federal courts had directly rejected any *Ring* challenge, habeas courts may arrive at a different conclusion.[50]

The second exception recognizes that when a new rule is novel, good cause for not raising the rule may exist. However, as *Hurst* is an "old rule" application of *Ring*, which was commonly raised in Florida capital litigation for over a decade, it would be difficult to say that *Hurst* was "so novel that its legal basis was not reasonably available to counsel."[51]

IV. Habeas Procedure Part 3: Who wins on the merits? A return to retroactivity and a reliance on the Supreme Court to expound on *Hurst* on direct review

The nuances of federal habeas procedure infect even the substantive question. 28 U.S.C. § 2254(d) governs the review of state court merits decisions. For questions of law, the petitioner must show that "the adjudication of the claim resulted in a decision that was contrary to, or involved in unreasonable application of, clearly established federal law, as determined by the Supreme Court of United States." That is, the state court's decision must not be only wrong, but unreasonably wrong based on the record before it.[52] Unsurprisingly, jurists and commentators have observed that the § 2254(d)(1) inquiry "largely overlaps with the inquiry under *Teague* of whether a decision was '*dictated* by precedent.'"[53] When § 2254(d)(1) deference applies, no relief can be granted unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with the Court's precedents."[54]

Fortunately for defendants, § 2254(d)(1) deference is not likely to apply. Petitioners are well placed to argue that state decisions finding Florida's capital punishment procedures were "'objectively unreasonable'" because they "'unreasonably fail[ed] to extend a clearly established legal principle to a new context'" by holding *Ring* was inapplicable in Florida,[55] or because Florida's capital punishment scheme was materially indistinguishable from Arizona's.[56] Where the governing law (i.e., *Ring*) was not even applied, federal review ought to be *de novo*, and federal courts should decide the constitutional issue rather than the reasonableness of the decision.[57] Additionally, only Supreme Court decisions are relevant;[58] this may help *Hurst* petitioners, as the State cannot rely on the Eleventh Circuit's decision that *Ring* did not invalidate Florida's capital sentencing scheme.

Unfortunately for petitioners, a wrinkle exists: many defendants were sentenced to death after a jury unanimously found the aggravating factor that the murder was committed in the course of another crime.[59] Other defendants were sentenced based on prior convictions,[60] which need not be found by a jury.[61] *Ring* did not hold that the jury must make the ultimate decision, nor did it hold that each aggravator must be found by a jury.[62] *Ring* deals with death eligibility only. Thus, it is more difficult (but certainly not impossible) to conclude that state courts acted unreasonably by failing to extend *Ring* to defendants who became death-eligible based on prior convictions. Moreover, *Ring* errors are subject to harmless error analysis, which gives condemned defendants another way to lose.[63] Nevertheless, unless convictions of another crime were the only aggravator presented, the error should be considered plain enough and prejudicial enough to warrant relief.

Now that we know Florida's system in unconstitutional, an older decision might also help current death row inmates who have a procedural vehicle. Given that Florida's model jury instructions explicitly advise jurors that their role is advisory only, these convictions might also run afoul of the older rule in *Caldwell v. Mississippi* that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe the responsibility for the appropriateness of the defendant's death rests elsewhere."[64] Florida juries make recommendations that must then be given "great weight"; however, juries were only advised of the "great weight" afforded their decision if mitigation evidence was presented, and only after the instructions were amended in 2009.[65] Florida's jury instructions may have violated *Caldwell*; as the Supreme Court noted in *Hurst*, Florida had not seen a life-to-death sentence judicial override for more than fifteen years, lending credence to the idea that the jury was in fact the sentencer.[66] On the other hand, if the judge is considered to be the actual sentencer, the need to give "great weight" to the jury recommendation could conceivably diminish judicial responsibility as well, even though the (elected) state judges are explicitly told that "the sentencing order must 'reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors.'"[67] Now—since *Ring*—that it is clear that the jury must find facts, the *Caldwell* violations become impossible to ignore.

So, federal courts should decide that every Florida death row inmate to whom *Ring* applies and who raised a *Ring* claim in state court suffers from a conviction that is the result of an unreasonable failure to apply *Ring* in Florida. Because Florida forfeited its right to deferential review under § 2254(d)(1) by ignoring *Ring*, review should be *de novo*, giving intermediate federal courts the right to determine the contours of *Hurst*, albeit subject to the requirement that no "new rule" be announced that runs afoul of *Teague*.[68] Unanswered questions include (and of course are not limited to): whether aggravating factors must be found unanimously; whether the trial court can consider aggravating factors not found by the jury after the jury finds a threshold aggravator; whether the jury must make the ultimate decision on whether the death penalty is imposed; and, whether the jury must be informed that a finding of guilt on an unsevered offense could render the defendant death-eligible.[69]

These questions likely cannot be answered on federal habeas review. *Teague* applies to any "result not *dictated by* precedent existing at the time the defendant's conviction became final."[70] The Supreme Court's gloss on that interpretation gives recalcitrant states a very powerful tool to limit cases to their exact facts.[71] Some opinions have gone so far as to classify as "new" decisions that resolve any issue "susceptible to debate among reasonable minds."[72] *Ring* merely followed *Apprendi*'s general rule that "jury tradition that is an indispensable part of our criminal justice system" applied to elements that increase the statutory range.[73] That tradition does not include the requirement of unanimity,[74] and no clear precedent exists on the other issues. Where *Teague* precludes announcing a new rule, § 2254(d)(1) deference would certainly preclude granting relief on it. Only the Supreme Court has jurisdiction over state criminal cases that extends beyond federal habeas corpus; it is the only Court that can answer these questions.[75] In the meantime, the mere fact that a question exists as to whether a right exists likely means the remedy does not.

V. Will Florida Fix Its Own Mistakes?

The Florida legislature has changed the capital punishment scheme, but has not addressed those currently under a sentence of death.[76] Absent some *ad hoc* legislative fix, legal developments in Florida probably will not render federal habeas irrelevant.[77]

Unlike most other jurisdictions, Florida does not use the federal standard articulated in *Teague v. Lane*[78] to determine whether defendants get the benefit of cases decided after they are sentenced. Florida applies the arguably more favorable *Witt* standard,[79] as federal law permits.[80] Under the *Witt* standard, a change in procedural law does not apply retroactively unless it is constitutional in nature, emanates from the supreme courts of Florida or the United States, and "constitutes a development of fundamental significance."[81]

Unfortunately, the difference is probably only theoretical, as the Florida Supreme Court has already refused to apply *Ring* retroactively.[82] It reasoned that the purpose of the rule was not to promote fairness or accuracy; that the 367 defendants on death row demonstrate the great extent to which Florida had relied on pre-*Ring* jurisprudence; and, that the administration of justice would be compromised because the difficulty of conducting resentencing in older cases would actually undermine the perception of fairness and finality.[83] *Hurst* is no different substantively than *Ring*.

In federal court, it is relevant that Florida ignored *Ring* for so long because the "old rule" exception protects defendants against flagrant violations of their rights. Florida, however, has no analogue to the federal "old rule" doctrine that would apply *Hurst* to cases currently pending on post-conviction review. In this respect it differs from Alabama and Delaware,[84] the two jurisdictions most obviously affected by *Hurst*, both of which apply *Teague*. This is not to say that Florida must take a narrower view of the effect of Supreme Court precedent—in fact, the Florida Supreme Court appeared to believe that any new rule invalidating capital punishment in Florida would start with *Apprendi* in 2000 rather than *Ring* in 2002.[85] Nevertheless, it has refused to apply *Ring* retroactively. In any event, it is difficult to imagine a state court holding that a Supreme Court decision directly overruling its precedents could be an "old rule." This would be to admit that for years, the state simply got an easy question horribly wrong. Therefore, death row inmates with state post-conviction motions currently pending may have to wait until federal habeas to get relief.

At least one example of a legislative fix exists. An enlightened approach would be to follow Utah's lead and create a procedural vehicle that applies whenever "the petitioner can prove entitlement to relief under a rule announced by the United States Supreme Court . . . after conviction and sentence became final on direct appeal," and "the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final."[86] This statute admirably addresses the problems of retroactive old rules without any remedy; it would also function well in federal habeas proceedings, to ensure that defendants in states who do not faithfully apply Supreme Court's precedents do not slip through the cracks forever.

VI. Conclusion

No complicated analysis is required to conclude that *Hurst* applies to all capital defendants whose cases are not yet "final"—that is, those whose cases the U.S. Supreme Court has not yet considered or rejected. *Hurst*, a straightforward application of existing precedent, is an "old rule" for the purposes of federal retroactivity, and therefore applies to anyone who was entitled to the benefit of the "new rule" announced in *Ring*—that is, anyone whose conviction was not final when *Ring* was decided on June 24, 2002.

Nevertheless, many of these defendants will have no procedural vehicle for federal habeas relief. Petitioners whose initial federal habeas petition was decided will not be able to file a second petition to raise the *Hurst* claim. Unfortunately, even heartbreakingly, defendants with an initial petition pending will not be able to amend to raise a *Hurst* claim if they did not raise it initially, and those who did not raise it in their first state post-conviction petition may not be able to now. Due to the perhaps-unanticipated consequences of the poorly written[87] federal habeas statute, Florida's fourteen years of blatant disregard for *Ring*[88] could go uncorrected for many defendants.

Notes

* J.D., Vanderbilt, 2007. As always, thanks to Professor Nancy King for the incomparable instruction in postconviction procedure. Special thanks to Florida's capital defense community, whose comments and insights were a great help.

1 Hurst v. Florida, 135 S. Ct. 1531 (2015).

2 *Ring*, 577 U.S. __, No. 14-7505 (Jan. 12, 2016).

3 Changes in the law that might be retroactive tend to bring "floodgates" rhetoric. *See, e.g.*, Adam Liptak, *Fearing Deluge of Litigation, Supreme Court Works the Floodgates*, N.Y. Times, March 4, 2013, *available at* http://www.nytimes.com/2013/03/05/us/supreme-court-justices-worry-about-a-flood-of-cases.html?_r=0.

4 Linkletter v. Walker, 381 U. S. 618, 622 n. 5 (1965) ("By final, we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed.").

5 Lawhorn v. Allen, 519 F.3d 1272, 1289 (11th Cir. 2008) (holding that state court committed constitutional error by failing to revisit claim where case was decided after state supreme court affirmed conviction but before conviction became final by expiration of time to petition U.S. Supreme Court for certiorari).

6 *Apprendi*, 530 U.S. at 477 (citing cases).

7 *Id.* at 494 n. 19 (describing similar sentencing enhancements as the "functional equivalent" of an element of the offense).

8 Ring v. Arizona, 536 U.S. 584 (2002).

9 *Id.* at 592–95.

10 *Id.* at 609 (*quoting* Apprendi v. New Jersey, 530 U.S. 466, 494 n. 1 (2000)).

11 *Hurst*, slip op. at 2–3.

12 *Id.*, slip op. at 2 (Alito, J., dissenting (*citing* Fla. Stat. § 921.141)).

13 *Id.* at 3 (Sotomayor, J., majority) (*citing*, respectively, Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (*per curiam*); Blackwelder v. State, 851 So. 2d 650, 653 (Fla. 2003) (*per curiam*)).

14 *Id.* at 3–6.

15 *Id.* at 5.

16 *Id.* at 6 (*quoting* Walton v. Arizona, 497 U.S. 639, 649 (1990)).

17 *Id.* at 6.

18 Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2005) (applying federal doctrine of Supreme Court supremacy to itself; noting prior holding that "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions" (*quoting* Rodriguez De Quijas v. Shearson/American Express, 490 U.S. 477 (1989)).

19 *Hurst*, slip. op. at 9 (*quoting* Hildwin v. Florida, 490 U.S. 638 (1989)).

20 *Id.* at 9.

21 Evans v. Sec'y, Fla. Dep't of Corr., 699 F.3d 1249, 1263-65 (11th Cir. 2012).

[22] *Id.* at 1262.
[23] Evans v. Florida, 537 U.S. 951 (2002) (denying certiorari).
[24] Whorton v. Bockting, 549 U.S. 406, 416 (2007).
[25] Lambrix v.Singletary, 520 U.S. 518, 527–528 (1997) (explaining that a rule is new unless it would be "apparent to all reasonable jurists.").
[26] Chaidez v. United States, 133 S. Ct. 1103, 1107 (2013) (citations omitted).
[27] Ring v. Arizona, 536 U.S. 584, 588 (2002).
[28] Whorton v. Bockting, 549 U.S. 406, 418–21 (2007).
[29] *Schriro*, 542 U.S. 348 (2004).
[30] *Id*. at 353.
[31] *Id.* at 355–56 (*quoting Teague v. Lane,* 489 U.S. 288, 312–13 (1989).
[32] *Id.* at 358.
[33] 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.").
[34] Gray Proctor & Nancy King, "Post-*Padilla*: Padilla's Puzzles for Review in State and Federal Courts," 23 Fed. Sent'g Rep. 239, 242 (Feb. 2011) ("What of the petitioner whose claim was properly raised in the first petition, only to be rejected in violation of *Padilla*? In this situation, the federal statute bars relief. . . . ").
[35] 28 U.S.C. § 2244(b)(2)(A).
[36] 28 U.S.C. § 2244(b)(3).
[37] Dodd v. United States, 545 U.S. 353, 363–66 (2005) (Stevens, J., dissenting); Tyler v. Cain, 533 U.S. 656, 676–77 (2001) (Breyer, J. dissenting, joined by Stevens, Souter, Ginsberg)
[38] Mayle v. Felix, 545 U.S. 644, 650 (2005) ("An amended habeas petition, we hold, does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth.").
[39] 28 U.S.C. § 2244(d)(1)(C).
[40] Dodd v. United States, 365 F.3d 1273, 1278, 1280–81 (11th Cir. 2004), *aff'd* 545 U.S. 353 (2006).
[41] Figuereo-Sanchez v. United States, 678 F.3d 1203, 1207 (11th Cir. 2012); Rojas v. United States, No. 11-62267-CIV, 2012 U.S. Dist. LEXIS 110348, at *22–23 (S.D. Fla. July 16, 2012); *see also* Perez v. State, 816 N.W.2d 354, 361 (Iowa 2012) (citing cases).
[42] In the context of federal review of federal convictions, the "new right" language can be understood to include statutory rights, which were not intended to be the basis of a second or successive motion but do extend the limitations period. *Prost v. Anderson*, 636 F.3d 578, 585 (10th Cir. 2011). No such distinction would be important for state prisoners, whose convictions cannot be invalidated by decisions interpreting federal criminal statutes. *United States v. Swinton*, 333 F.3d 481, 487 (3d Cir. 2003) (observing in context of similar limitation on federal post-conviction review that "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion';" concluding that requirement of Supreme Court decision does not apply to statute of limitations decisions (quoting *Duncan v. Walker*, 533 U.S. 167, 173 (2001))).
[43] Information on this issue from PACER is on file with the author, who calculates that at least ten petitioners whose convictions became final after *Ring* was decided did not raise *Ring* claims in their habeas petitions. This may be a function of the unfortunate inconsistency of death row representation in Florida, which led to the creation of a specialized capital habeas unit in the office of the Federal Public Defender for the Northern District of Florida. *See Lugo v. Sec'y, Dep't of Corr.*, 750 F.3d 1198 (11th Cir. 2014) (Martin, J., concurring) (demonstrating that counsel for more than 8% of Florida's death row population forfeited their clients' right to federal habeas review by filing after the statute of limitations elapsed).
[44] Holland v. Florida, 130 S. Ct. 2549 (2010).
[45] Downs v. McNeil, 520 F.3d 1311, 1323 (11th Cir. 2008) (granting equitable tolling where "counsel's alleged behavior ran the gamut from acts of mere negligence to acts of gross negligence to acts of outright willful deceit").
[46] 28 U.S.C. § 2254(b).
[47] Fla. R. Crim. P. 3.851(e)(2) ("A claim raised in a successive motion shall be dismissed if the trial court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits . . . ").
[48] Edwards v. Carpenter, 529 U.S. 446 (2000) (direct review); Martinez v. Ryan, 123 S. Ct. 1309 (2012) (post-conviction counsel). It is unclear whether the *Martinez* doctrine could be applied to excuse petitioners from the *Edwards* requirement that, to serve as good cause for failure to raise below, claims of ineffective assistance of counsel on direct review must themselves be raised on collateral review in state court. One expects courts to balk at extending *Martinez*. *Hamm v. Comm'r, Ala. Dep't of Corr.*, 620 F. App'x 752, 784 (11th Cir. 2015) ("Until the Supreme Court instructs otherwise, we are constrained to respect the explicitly limited holding of *Martinez* and the narrow construction our opinions have given that decision."). The 10-petitioner figure discussed above did not include any attempt to determine whether a *Hurst* claim would be procedurally defaulted.
[49] Because an attorney cannot raise a claim of ineffective assistance against him- or herself, this exception further illustrates the usefulness of specialized federal capital habeas units. *Juniper v. Davis*, 737 F.3d 288 (4th Cir. 2013) (holding that capital habeas petitioners, entitled to appointment of counsel, must also be appointed independent counsel to search for *Martinez*-based claims if the federal habeas attorney also represented the petitioner in state post-conviction proceedings); see also Devon Lash, *Giving Meaning to Meaningful Enough*, 82 Fordham L. Rev. 1855 (March 2014); Lawrence Kornreich & Alexander Platt, *The Temptation of* Martinez v. Ryan*: Legal Ethics for the Habeas Bar*," 8 Crim. L. Brief 1, 4–5 (Fall 2012) (illustrating ethical issues and concluding that "After *Martinez*, when a lawyer fails to completely raise a possible ineffective-assistance-of-counsel claim on first-tier collateral proceedings . . . she has an ethical obligation to bring in outside counsel to review the record below and advise her client regarding the merits of such a claim. And, if her client chooses to go forward with the *Martinez* claim, he must use new counsel to do so.").
[50] Pimental v. Fla. Dep't of Corr., 560 F. App'x 942, 944 (11th Cir. 2014) ("To provide effective representation, lawyers are not required to 'make arguments based on predictions of how the law may develop.'" (*quoting* Spaziano v. Singletary, 36 F.3d 1028, 1039 (11th Cir. 1994))).
[51] Reed v. Ross, 468 U.S. 1, 16 (1984)
[52] Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011) (holding that federal courts cannot rely on evidence subsequently adduced in federal habeas proceedings to evaluate reasonableness of legal conclusions).
[53] Chaidez v. United States, 133 S. Ct. 1103, 1115 (2013) (Sotomayor, J., dissenting)**;** *see also* Jason Zarrow & William Milliken, *The Retroactivity of Substantive Rules to Cases on Collateral Review and the AEDPA, with a Special Focus on* Miller v. Louisiana," 48 Ind. L. Rev. 931, 935 (2015); (arguing that AEDPA cannot be read to preclude retroactive application and de novo consideration of new substantive rules); Christopher Bryant, *Retroactive Application of "New Rules" and the*

Antiterrorism and Effective Death Penalty Act," 70 Geo. Wash. L. Rev. 1, 48 (2002) ("When a habeas petitioner identifies a Supreme Court ruling issued before his conviction became final and argues that the principle underlying that decision also undermines his conviction, the petitioner asserts that the state court decision affirming his conviction 'was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States.'").

54 Anderson v. Sec'y, Fla. Dep't of Corr., 752 F.3d 881, 903 (11th Cir. 2014) (*quoting* Harrington v. Richter, __ U.S. __, 131 S. Ct. 770, 786 (2011)); *see also* Loggins v. Thomas, 654 F.3d 1204, 1220 (11th Cir. 2011) (explaining that as long as "some fairminded jurists could agree with the state court decision, although others might disagree, federal habeas relief must be denied.").

55 Gore v. Sec'y for the Dep't of Corr., 492 F.3d 1273, 1293 (11th Cir. 2007) (*quoting* Dingle v. Sec'y for Dep't of Corr., 480 F.3d 1092, 1098 (11th Cir. 2007); Williams v. Taylor, 529 U.S. 362, 407 (2000) (O'Connor, J., for the majority)).

56 The "contrary to" prong of § 2254(d) is satisfied "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000); *see generally* Ponticelli v. Sec'y, Fla. Dep't of Corr., 690 F.3d 1271, 1291 (11th Cir. 2012)

57 Romine v. Head, 253 F.3d 1349, 1365 (11th Cir. 2001) (reviewing de novo where "there is grave doubt about whether the state court applied the correct rule of governing federal law").

58 *See* Marshall v. Rodgers, 133 S. Ct. 1446, 1450–51 (2013) (explaining that United States Courts cannot "canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to [the Supreme] Court, be accepted as correct").

59 Middleton v. State, 40 Fla. L. Weekly S574 (Fla. October 22, 2015) (observing that "this Court has rejected *Ring* challenges where the trial court has found as an aggravating circumstance that the crime was committed in the course of a felony or the defendant has a prior violent felony conviction as both aggravators involve facts that were already submitted to a jury and thus are in compliance with *Ring*").

60 Kimbrough v. State, 886 So. 2d 965, 984 (Fla. 2004) (reasoning that "one of the aggravators in this case was a prior conviction for 'burglary of a dwelling with a battery therein' and sexual battery. The prior violent felony aggravator alone clearly satisfies the mandates of the United States and Florida Constitutions.").

61 Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (holding that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.").

62 *See also Hurst*, slip. op. at 1 ("The Sixth Amendment requires a jury, not a judge, to find each fact *necessary* to impose a sentence of death"), 10 ("Florida's sentencing scheme, which required the judge alone to find the existence of *an* aggravating circumstance, is therefore unconstitutional.") (emphases added).

63 State v. Lehr, 227 Ariz. 140, 154, 254 P.3d 379, 393 (2011). The *Hurst* Court itself remanded for a determination of harmlessness.

64 *Caldwell*, 472 U.S. 320, 328 (1985).

65 Fla. Std. Jur. Inst. 7.11; *In re Std. Jury Instructions in Crim. Cases—Report No. 2005-2*, 22 So. 3d 17, 21 (Fla. 2009) ("we have included a directive to caution judges that this 'great weight' instruction should be given only in cases where mitigation was in fact presented to the jury.").

66 *Hurst*, Alito J., dissenting, slip op. at 3 (Alito, J., dissenting).

67 *Id.* (*quoting* Blackwelder v. State, 851 So. 2d 650, 653 (Fla. 2003)).

68 Lockhart v. Fretwell, 506 U.S. 364, 372, (1993) ("*Teague* stands for the proposition that new constitutional rules of criminal procedure will not be announced or applied on collateral review.").

69 These issues could also impact Delaware, which made changes to its procedure in the wake of *Ring*. *Brice v. State*, 815 A.2d 314, 320 (Del. 2003) ("In response to the *Ring* decision, the General Assembly . . . transformed the jury's role, at the so-called narrowing phase, from one that was advisory under the 1991 version of Section 4209 into one that is now determinative as to the existence of any statutory aggravating circumstances. S.B. 449, Synopsis. ("This Act will bar the Court from imposing a death sentence unless a jury (unless waived by the parties) first determines unanimously and beyond a reasonable doubt that at least one statutory aggravating circumstance exists."). The final sentencing decision, however, remains with the judge.").

With respect to weighing, Alabama's scheme is practically equivalent to Florida's because the judge has override authority. Nathan Forrester, *Two Views on the Impact of* Ring v. Arizona *on Capital Sentencing: Judge Versus Jury: The Continuing Validity of Alabama's Capital Sentencing Regime after* Ring v. Arizona," 54 Ala. L. Rev. 1157, 1184 (discussing final role of judge as factfinder and ultimate sentence in Alabama's scheme). Unlike Florida, however, Alabama judges routinely override recommendations that the defendant be sentenced to life in prison. *Woodward v. Alabama*, 134 S. Ct. 405, 408 (2013) (graph depicting Alabama's 27 life-to-death overrides since 2000).

70 *Teague*, 489 U.S. 288, 301 (1989).

71 Linda Meyer, *"Nothing We Say Matters": Teague and New Rules*, 61 U. Chi. L. Rev. 423, 423 (1994) (stating that *Teague* rules "wear[] away the power of precedent itself, stripping prior cases of all persuasive force beyond their particular factual contexts"); Eliot F. Krieger, *The Court Declines in Fairness—Teague v. Lane, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989)*, 25 Harv. C.R.-C.L. L. Rev. 164, 182 (1990) ("Frank Teague is not the only loser. The *Teague* bar may effectively slam the door on most federal review of state criminal cases and permanently stunt the evolution of constitutional jurisprudence.").

72 Dell v. Netherland, 521 U.S. 151, 160 (1997) (*quoting* Butler v. McKellar, 494 U.S. 407, 415 (1990)); *see also* Beard v. Banks, 542 U.S. 406, 413 (2004) (applying *Teague* and stating that the issue is whether, at the time of the conviction, the "unlawfulness of [defendant's] conviction was apparent to all reasonable jurists").

73 *Apprendi*, 530 U.S. 466, 497 (2000)).

74 Albicker v. Ryan, No. CV 05-8310-SVW(E), 2009 U.S. Dist. LEXIS 127238, at *20 (C.D. Cal. July 28, 2009) (citing cases).

75 Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After* Teague v. Lane, 69 N.C. L. Rev. 371, 418 (1991) ("There is much concern that *Teague* will eviscerate federal habeas corpus and rob the lower federal courts of their proper function of providing as of right review for all federal constitutional issues in criminal cases, substituting discretionary Supreme Court review, and, in the process, retarding the articulation of federal rights."). Hughes v. State, 901 So. 2d 837, 862 (Fla. 2005).

76 House Bill 7101, signed by Governor Scott on March, requires that each aggravating factor be found unanimously by a jury, and any death recommendation agreed to by at least ten jurors.

77 The Florida Supreme Court has ordered supplemental briefing on *Hurst* in three cases set for oral argument February 2, 2016: *Lambrix v. Jones*, SC16-56 (stay of execution); *Knight v. Jones*, SC15-1233 (post-conviction, two unanimous death recommendations with two and three aggravators); and *State v. Bright*, SC14-1701 (appeal of post-conviction grant of resentencing, 8-4 jury death recommendation).

[78] *Teague*, 489 U.S. 288 (1989).

[79] Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005) (observing that the *Witt* standard "provides more expansive retroactivity standards than those adopted in *Teague*").

[80] Danforth v. Minnesota, 552 U.S. 264 (2008). Although state courts must apply new substantive rules retroactive, the status of procedural rules is not clear. Montgomery v. Alabama, No. 14-280, slip op. at 8 (U.S. Jan. 25, 2016) ("[T]he constitutional status of *Teague's* exception for watershed rules of procedure need not be addressed here.").

[81] Witt v. State, 387 So. 2d 922, 931 (Fla. 1980)

[82] *Johnson*, 904 So. 2d at 407; *compare* State v. Whitfield, 107 S. W.3d 253, 265–70 (Mo. 2003) (non-*Teague* jurisdiction applying *Ring* retroactively).

[83] *Johnson*, at 409–10.

[84] Richardson v. State, 3 A.3d 233, 238 (Del. 2010); *Ex parte Harris*, 947 So. 2d 1139, 1143–47 (Ala. 2006).

[85] *Johnson*, 904 So. 2d at 405 ("*Ring* was not a sudden or unforeseeable development in constitutional law; rather, it was 'an evolutionary refinement in capital jurisprudence.'" (quoting *Monlyn v. State*, 894 So. 2d 832 (Fla. 2004))).

[86] Utah Code Ann. § 78B-9-104 (2)(f).

[87] Lindh v. Murphy, 521 U.S. 320, 336 (1997) (observing that "in a world of silk purses and pigs' ears, the [AEDPA] is not a silk purse of the art of statutory drafting. . . .").

[88] Sam Kamin, *The Supreme Court Strikes Down Florida's Blatantly Unconstitutional Capital Scheme*, Jan. 15, 2016, *available at* https://casetext.com/posts/the-supreme-court-strikes-down-floridas-blatantly-unconstitutional-capital-scheme.