Ring and *Hurst* Retroactivity: Deconstructing Divergent Doctrines

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ABSTRACT

The U.S. Supreme Court's opinions in Ring v. Arizona *(2002) and* Hurst v. Florida *(2016) are two critical parts of the jurisprudence related to capital defendants' right to trial by jury under the Sixth Amendment to the U.S. Constitution. Each clarified capital defendants' rights under the Sixth Amendment. While the new rules announced in* Ring *and* Hurst *seemed clear at the time, courts have grappled with how to apply them for years—in part, whether the new rules apply retroactively to defendants whose capital sentences were final when the opinions were issued. As this article explains, courts have reached divergent conclusions on whether the new rules announced in* Ring *and* Hurst *apply retroactively. This article attempts to unravel the confusion surrounding the retroactivity of these landmark decisions.*

Ultimately, this article explains that the case law regarding the retroactive application of Ring *was mostly consistent. A close examination of the case law reveals that the confusion arose after the U.S. Supreme Court decided* Hurst*. This article identifies four points of confusion that arose surrounding the retroactivity of* Ring *and* Hurst*: (1) Was* Hurst *a direct result of* Ring*?; If so, should it apply retroactively?; (2) What role did the Eighth Amendment play in both* Ring *and* Hurst*?; (3) Why did some courts reach divergent conclusions on* Hurst *retroactivity even in applying the same federal standard?; (4) Does the Florida Supreme Court's invention of partial retroactivity for* Hurst *make sense? By exploring and explaining these sources of confusion, this article aims to help clarify the broader landscape of modern capital sentencing jurisprudence. Further, this article explains that the resolution to such uncertainty likely lies in the U.S. Supreme Court clarifying the distinction between the roles of the Sixth and Eighth Amendments in capital sentencing.*

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I. INTRODUCTION

When the U.S. Supreme Court decided *Hurst v. Florida* in 2016,[1] it answered a question that had been debated for fourteen years: does Florida's capital sentencing statute violate capital defendants' Sixth Amendment right to a trial by jury under the U.S. Supreme Court's 2002 decision in *Ring v. Arizona*?[2] In *Ring*, the Court held that the Sixth Amendment entitles capital defendants to a jury determination of the facts necessary to impose a sentence of death.[3] Meanwhile Florida's capital sentencing statute permitted a judge, rather than a jury, to find the aggravating factors required to impose the death penalty, so long as a jury recommended a death sentence by a majority vote of 7-5. Thus, in *Hurst*, the U.S. Supreme Court held that Florida's statute was unconstitutional because a jury's advisory recommendation is insufficient to satisfy the Sixth Amendment right to a trial by jury. The jury, not the judge, must make all of the required findings to sentence a defendant to death.[4]

Although the *Hurst* opinion focused on Florida's capital sentencing statute, it had national significance. *Hurst* built on the discussion surrounding capital defendants' right to trial by jury under the Sixth Amendment. After *Hurst*, states across the country were forced to, again, review their capital sentencing procedures to determine whether they complied with the Sixth Amendment. For example, Alabama determined its statute passed constitutional muster, while Delaware determined its did not.

While the U.S. Supreme Court aimed to clarify capital defendants' rights under the Sixth Amendment in *Hurst*, the decision might have caused more confusion than clarity. This article focuses on the confusion that arose surrounding the retroactivity of *Hurst*, which was not isolated in Florida. Similar to how courts reacted after *Ring*, courts across the country have grappled with this issue since 2016. In doing so, they reached different

[1] Hurst v. Florida, 577 U.S. 92 (2016). The U.S. Supreme Court is often referenced as the "Supreme Court" or "Court."

[2] U.S. CONST. amend. VI.

[3] Ring v. Arizona, 536 U.S. 583 (2002).

[4] *Hurst*, 577 U.S. at 97–99.

conclusions by applying different frameworks and relying upon different theories.

The case law surrounding the retroactivity of *Hurst* is almost impossible to follow. This article helps to trace the source of the doctrinal chaos surrounding the retroactivity of *Hurst* and *Ring*. In doing so, it identifies four points that led to the confusion. As the discussion outlines, the ideal solution is likely for the U.S. Supreme Court to clarify; however, retroactivity jurisprudence places the analysis squarely within the jurisdiction of the states, which essentially forecloses the Supreme Court from doing so.

By way of background, Part I briefly reviews the Supreme Court's decisions in *Ring* and *Hurst* as well as how state supreme courts interpreted *Hurst* and applied it to their respective states' capital sentencing schemes.[5] Part II canvasses the theory of retroactivity and relevant standards courts across the country apply in analyzing whether a new rule applies retroactively. Part III reviews the approaches courts took in addressing the retroactivity of *Ring*. This part shows that, altogether, the decisions regarding the retroactivity of *Ring* were consistent. Part IV explains the different approaches courts have taken in answering whether *Hurst* applies retroactively. Unlike the analyses regarding the retroactivity of *Ring*, this part shows that analyses regarding the retroactivity of *Hurst* varied greatly. Digesting the information from Parts III and IV, Part V identifies four points that likely led to the confusion surrounding the retroactivity of *Ring* and *Hurst*. By doing so, this article provides an explanation for a very confusing and entangled area of decades of jurisprudence that has affected the lives of hundreds, if not thousands, of capital defendants.

Finally, Part VI explains that a resolution to this uncertainty is for the U.S. Supreme Court to outline the distinct roles of the Sixth and Eighth Amendments in the capital sentencing context. While such clarification is unlikely to be given on *Hurst* at this juncture, especially considering that the litigation related to the retroactivity of *Hurst* is essentially complete, it is almost certain that *Hurst* is not the last decision of its kind to cause a paradigm shift in the states that continue to employ capital sentencing. For instance, the U.S. Supreme Court's 2022 decision in *Shinn v. Ramirez* significantly altered how capital defendants' federal habeas claims may be litigated, severely narrowing capital defendants' rights on postconviction.[6]

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[5] Hurst v. State, 202 So. 3d 40 (Fla. 2016) ("*Hurst II*"). At times, where appropriate, *Hurst II* and *Hurst v. Florida* are referenced collectively as "*Hurst*."

[6] *See generally* Shinn v. Ramirez, 141 S. Ct. 2228 (2022); *Shinn v. Ramirez*, 136 HARV. L. REV. 400 (Nov. 10, 2022).

II. REVIEWING THE U.S. SUPREME COURT'S SIXTH AMENDMENT OPINIONS IN *RING V. ARIZONA* AND *HURST V. FLORIDA*

Even as societal support for capital punishment continues to decline and more states move toward abolition,[7] capital sentencing and executions continue in several jurisdictions.[8] During the Trump administration, the federal government restarted executions—conducting in 2020 more executions than all the states combined.[9] In July 2021, the Biden administration announced that it would halt federal executions while the Justice Department reviews its policies and procedures. However, the announcement does not eliminate the federal death penalty.[10]

As long as states and the federal government maintain capital punishment,[11] the Sixth Amendment provides crucial protections to capital defendants.[12] This article focuses on the Sixth Amendment's guarantee of a trial by jury.[13] As Section A below explains, the U.S. Supreme Court clarified in *Ring* that capital defendants have the right to a jury's finding of

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[7] *See, e.g.*, Ronald J. Tabak, *Capital Punishment*, *in* THE STATE OF CRIMINAL JUSTICE 2020, AM. BAR ASS'N 217, 217–18 (2020) (reviewing the decline in societal support for the death penalty); *id.* at 219–21, 223–26 (explaining states' move toward abolition); *see, e.g.*, 2021 V.A. H.B. 2263.

[8] Tabak, *supra* note 7, at 226–27 ("As in other recent years, new death sentences were geographically concentrated."); *id.* at 229 (explaining that the same is true for executions). In 2020, the Florida Supreme Court reversed its decision on remand from *Hurst v. Florida*, setting the stage for the Legislature to make it easier for defendants to be sentence to death. *See Florida Supreme Court "Recedes" From Major Death Penalty Decision Creating Uncertainty About Status of Dozens of Cases*, AM. BAR ASS'N (Mar. 10, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/spring/florida-supreme-court-state-v-poole (explaining the Florida Supreme Court's decision in *State v. Poole*, which receded from *Hurst v. State*, and made it easier to obtain a sentence of death) [hereinafter *Florida Supreme Court Major Decision*]. In 2022, 18 executions were completed in 6 states. *Outcomes of Death Warrants in 2022*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/outcomes-of-death-warrants-in-2022 (last visited Jan. 16, 2023). Even more are scheduled for 2023. *Upcoming Executions*, DEATH PENALTY INFO. CTR. (last updated Jan. 14, 2023), https://deathpenaltyinfo.org/executions/upcoming-executions.

[9] *See Executions Overview*, DEATH PENALTY INFO. CTR. (last visited Oct. 12, 2022, 2:25 PM), https://deathpenaltyinfo.org/executions/executions-overview; *see also* Tabak, *supra* note 7, at 236.

[10] Michael Balsamo, Colleen Long & Michael Tarm, *Federal Executions Halted: Garland Orders Protocols Reviewed*, AP NEWS (Jul. 1, 2021), https://apnews.com/article/joe-biden-executions-government-and-politics-9daf230ef2257b901cb0dfeeeb60be44 ("It does not "end [the] use [of executions] and keeps the door open for another administration to simply restart them. It also doesn't stop federal prosecutors from seeking the death penalty . . . .").

[11] As of August 14, 2020, 27 states and the federal government maintain the death penalty. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (Aug. 14, 2020), https://files.deathpenaltyinfo.org/documents/pdf/FactSheet.f1597410707.pdf.

[12] U.S. CONST. amend. VI; *see, e.g.*, Rauf v. State, 145 A.3d 430 (Del. 2016) (Strine, C.J., concurring). For more discussion on the protections afforded by the Sixth Amendment and *Hurst v. Florida*, *see generally, e.g.*, Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing in* Hurst, 66 UCLA L. REV. 448 (2019); Melanie Kalmanson, *Somewhere Between Death Row and Death Watch: The Procedural Trap Capital Defendants Face in Raising Execution-Related Claims*, 5 U. PA. J. L. & PUB. AFF. 413 (2020); Melanie Kalmanson, *Storm of the Decade: The Aftermath of* Hurst v. Florida & *Why the Storm Is Likely to Continue*, 74 U. MIAMI L. REV. CAVEAT 37 (2020); Melanie Kalmanson, *The Difference of One Vote or One Day: Reviewing the Demographics of Florida's Death Row After* Hurst v. Florida, 74 U. MIAMI L. REV. 990 (2020).

[13] *See generally* Hurst v. Florida, 577 U.S. 92 (2016).

each element of their crimes beyond a reasonable doubt, thereby barring judges from unilaterally sentencing defendants to death.[14] Then, in 2016, the U.S. Supreme Court held in *Hurst v. Florida* that, for the reasons explained in *Ring*, Florida's capital sentencing scheme violated the Sixth Amendment for failing to require a jury's finding of each element necessary to impose a sentence of death.[15]

Although *Hurst v. Florida* did explain that Florida's capital sentencing scheme was unconstitutional, the opinion left many questions unanswered. For example, what factual findings did the Court deem necessary to sentence a defendant to death? Does the decision's invalidation of Florida's capital sentencing scheme apply retroactively to defendants whose sentences, which were imposed under the unconstitutional statute, were already final? Is a *Hurst* error capable of harmless error?[16] After *Hurst v. Florida*, state supreme courts were left to read between the lines as to how the decision applied to the capital sentencing scheme in each court's respective jurisdiction. Section B explains state supreme court interpretations of *Hurst v. Florida*.

A. From Ring v. Arizona *to* Hurst v. Florida

In *Ring v. Arizona*, the U.S. Supreme Court held a jury, not a judge, must find the aggravating factors necessary to impose the death penalty. Because Arizona's procedures permitted a judge to find these aggravating factors, the Court declared Arizona's statute unconstitutional. The Court arrived at this holding by applying its reasoning from *Apprendi v. New Jersey* to capital defendants.

The *Apprendi* Court held two years before *Ring* that if a defendant's sentence may be increased by aggravating factors, then it must be a jury, not a judge, that finds each of these factors. If a judge made the finding, it would violate the defendant's Sixth Amendment right to a trial by jury.[17] According to the *Apprendi* Court, a defendant's punishment must be based on facts reflected in the jury verdict.[18]

In *Ring*, the Court addressed whether *Apprendi*'s rule—requiring juries to find aggravating factors—applied to capital defendants. Answering that question in the affirmative,[19] the Court declared Arizona's capital

[14] *See generally* Ring v. Arizona, 536 U.S. 583 (2002).
[15] *See generally Hurst*, 577 U.S. 92.
[16] *See generally* Kalmanson, *Storm of the Decade*, *supra* note 12.
[17] Apprendi v. New Jersey, 530 U.S. 466, 477 (2000).
[18] *Id.* at 483 (explaining a defendant may not be "[exposed] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone") (emphasis omitted).
[19] *Ring*, 536 U.S. at 587.

sentencing statute unconstitutional because it permitted judges to perform the fact finding that must be performed by the jury.[20]

On the heels of the Court's decision in *Ring*, several states revised their capital sentencing statutes in an effort to better comply with the mandates of the Sixth Amendment.[21] Other states abolished the death penalty altogether.[22] However, some states did not see a need for any change, determining that their capital sentencing schemes were not affected by *Ring*.[23]

For example, Florida—or at least a majority of the Supreme Court of Florida—determined Florida's capital sentencing scheme was sufficiently distinguishable from Arizona's and therefore remained constitutional.[24] As a result, Florida continued sentencing defendants to death under its pre-*Ring* capital sentencing statute, which required only a bare majority of the twelve-member jury to recommend death. In making that recommendation, the jury was not required to make any of the other findings necessary for the death penalty, such as the existence of one or more aggravating factors, that the aggravating factors were sufficient to sentence the defendant to death, or that the aggravating factors outweigh the mitigating circumstances. Those findings would be made by the judge.

Capital defendants in Florida and a minority of the Supreme Court of Florida were not convinced that Florida's capital sentencing scheme remained constitutional after *Ring*. Capital defendants in Florida continued to argue for years—as they had even before *Ring*—that their death sentences violated the Sixth Amendment, as explained in *Ring*.[25] Justices on the Supreme Court of Florida agreed and continued to write dissenting opinions documenting their positions.

After fourteen years of post-*Ring* debate, the U.S. Supreme Court finally weighed in. The U.S. Supreme Court's January 2016 decision in *Hurst v. Florida* finally addressed whether Florida's capital sentencing scheme violated the Sixth Amendment in light of *Ring*.[26] The Court held that, for the same reasons the Court invalidated Arizona's capital sentencing scheme in *Ring*,[27] Florida's capital sentencing scheme violated the Sixth

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[20] *Id.* at 609.

[21] *See U.S. Supreme Court: Ring v. Arizona*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/u-s-supreme-court-ring-v-arizona (last visited Oct. 29, 2022, 11:22 AM).

[22] *See id.*

[23] *See id.*

[24] *See id. See generally* Bottoson v. State, 813 So. 2d 31 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002).

[25] *See, e.g.*, Gaskin v. State, 218 So. 3d 399, 402 (Fla. 2017) (Pariente, J., concurring in part and dissenting in part) ("I would at least apply *Hurst* to Gaskin because he, through his attorneys, challenged the constitutionality of Florida's capital sentencing statute at trial in 1990 and, again, on direct appeal in 1991."); Mosley v. State, 209 So. 3d 1248, 1275 (Fla. 2016) (explaining Mosley had argued that Florida's capital sentencing scheme was unconstitutional).

[26] Hurst v. Florida, 577 U.S. 92 (2016).

[27] Ring v. Arizona, 536 U.S. 583 (2002).

Amendment. Specifically, the statute did not require the jury to make the necessary findings to sentence the defendant to death, and the jury's advisory verdict was insufficient to pass muster under the Sixth Amendment.[28]

B. State Supreme Courts' Interpretations of Hurst v. Florida

Despite addressing the long-term debate regarding the viability of Florida's capital sentencing scheme in light of *Ring*, the Supreme Court's opinion in *Hurst v. Florida* left a lot unanswered. For Florida specifically, the opinion was unclear as to what its holding meant for Florida and its almost 400 defendants awaiting execution on death row.[29] Rather than answering the specifics, the Court remanded the case to the Supreme Court of Florida for further review.

Similarly, other states across the country that also maintained the death penalty—and, more specifically, capital sentencing statues that did not require a jury's unanimous recommendation for death—were left to wonder how *Hurst v. Florida* applied to their capital sentencing schemes. At the time *Hurst v. Florida* was decided, Delaware and Alabama were the only other two states in the entire country—alongside Florida—that did not require a jury's unanimous recommendation for death. This section reviews, chronologically, how the state supreme courts in Delaware, Alabama, and Florida, respectively, applied *Hurst v. Florida* to their capital sentencing procedures.

Essentially, the question for each court was: to satisfy the post-*Ring* and post-*Hurst* mandates of the Sixth Amendment, what findings must be made by the jury instead of the judge? The discussion below shows that the courts chose one of two options. Option one is what this article will reference as "the minimalist option": a jury need only find the existence of one aggravating factor, which is what makes the defendant eligible for the death penalty. Option two is what this article will reference as "the comprehensive option": a jury must make every finding necessary to reach a sentence of death, including the relative weight of aggravating and mitigating factors.

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[28] *See Hurst*, 577 U.S. at 99.

[29] For a thorough discussion of the questions left unanswered in *Hurst v. Florida*, especially the Eighth Amendment concerns, *see generally* Craig Trocino & Chance Meyer, Hurst v. Florida*'s Ha'p'orth of Tar: The Need to Revisit* Caldwell, Clemons, *and* Proffitt, 70 U. MIAMI L. REV. 1118 (2016).

1. The Delaware Supreme Court Invalidates Delaware's Capital Sentencing Scheme

Similar to Florida, Delaware also reviewed its capital sentencing scheme after *Ring* and determined that it passed constitutional muster.[30] But that changed after *Hurst*.

In August 2016, while the Florida Supreme Court's decision on remand from *Hurst v. Florida* was pending, the Delaware Supreme Court decided *Rauf v. Delaware*.[31] In *Rauf*, the Delaware Supreme Court reviewed five certified questions of law related to the application of *Hurst v. Florida* to Delaware's capital sentencing scheme.[32] In other words, the Court reviewed whether Delaware's capital sentencing scheme could withstand constitutional scrutiny—specifically under the Sixth Amendment—in light of *Hurst v. Florida*.[33] The per curiam opinion was very short, merely setting forth "succinct answers" to the certified questions, while the Justices then independently explained their reasoning for joining the opinion.[34]

In pertinent part, the majority held that Delaware's capital sentencing scheme was unconstitutional because it allowed the judge, independent of the jury, to "find the existence of 'any aggravating circumstance,' statutory or non-statutory, that has been alleged by the State for weighing in the selection phase of a capital sentencing proceeding."[35] The Court held that, instead, the Sixth Amendment requires that such findings be made unanimously by the jury beyond a reasonable doubt.[36] Further, the Court held that the Sixth Amendment requires the jury, not the judge, "to find that the aggravating circumstances found to exist outweigh the mitigating circumstances."[37] Under Delaware's capital sentencing scheme, that "is the critical finding upon which the sentencing judge 'shall impose a sentence of death.'"[38]

Chief Justice Strine's concurring opinion, in which the other members of the majority joined, explained that invalidating Delaware's capital sentencing scheme was necessary "if the core reasoning of *Hurst* is that a jury, rather than a judge must make all the factual findings 'necessary' for a defendant to receive a death sentence."[39] As to the "necessary" factual findings, Chief Justice Strine explained that a jury's unanimous recommendation for death was not enough.[40]

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[30] *See generally* Brice v. State, 815 A.2d 314 (Del. 2003).
[31] Rauf v. State, 145 A.3d 430 (Del. 2016).
[32] *Id.* at 433–34.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 433
[36] *Id.* at 434
[37] *Id.*
[38] *Id.*
[39] *Id.* at 435 (Strine, C.J., concurring).
[40] *Id.*

> To sentence a defendant to death, the sentencing authority must consider all relevant factors bearing on whether the defendant should live or die, weigh those factors rationally against each other, and make an ultimate determination of whether the defendant should die or receive a comparatively more merciful sentence, typically life in prison. *The option for the sentencing authority to give a prison sentence, rather than a death sentence, must always exist.*[41]

In other words, the Delaware Supreme Court took the comprehensive approach to interpreting *Hurst v. Florida*.

2. Alabama's Capital Sentencing Scheme Passes Constitutional Muster

In September 2016, the Alabama Supreme Court took the approach opposite to Delaware in deciding *Bohannon v. State*.[42] Selecting the minimalist option, the *Bohannon* Court followed its prior decisions in *Ex parte Waldrop* and *Ex parte McNabb* to hold that all the U.S. Supreme Court's Sixth Amendment jurisprudence—including *Hurst*—requires "that the jury unanimously find beyond a reasonable doubt the existence of at least one aggravating circumstance that would make the defendant eligible for a death sentence."[43]

As to the jury's process of weighing the aggravation and mitigation, the Alabama Supreme Court held in *Waldrop* that the process "is not a factual determination or an element of an offense."[44] Nor is it "susceptible to any quantum of proof."[45] In *Bohannon*, the Court clarified that "*Hurst* does not address" the weighing process and does not "suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment."[46]

Regarding Alabama's capital sentencing scheme, the *Bohannon* Court determined it passed constitutional muster under the Sixth Amendment even after *Hurst* because "a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible."[47]

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[41] *Id.* (emphasis added).
[42] *See ex parte* Bohannon v. State, 222 So. 3d 525 (Ala. 2016).
[43] *Id.* at 528.
[44] *Id.* at 530.
[45] *Id.*
[46] *Id.* at 532.
[47] *Id.*

3. The Supreme Court of Florida's Decision on Remand in Hurst II

Two months after *Rauf*, approximately one week after *Bohannon*, and almost a year after *Hurst v. Florida*, the Supreme Court of Florida decided *Hurst v. State* on remand ("*Hurst II*").[48] *Hurst II* addressed several questions left unanswered by the Supreme Court's opinion in *Hurst v. Florida*.[49]

Most pertinent here, the Court determined that *Hurst v. Florida* required "that all the critical findings necessary . . . must be found unanimously by the jury" before the trial court may consider imposing a sentence of death.[50] The Supreme Court of Florida explained that, under Florida's capital sentencing statute, those findings "include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances."[51] In other words, *Hurst II* took the comprehensive approach to implementing *Hurst v. Florida*—consistent with how the Delaware Supreme Court applied *Hurst* to Delaware's capital sentencing scheme in *Rauf*.

Further, although the U.S. Supreme Court's decision in *Hurst v. Florida* relied exclusively on the Sixth Amendment, the Florida Supreme Court based its decision on Florida's independent constitutional right to jury trial and the Eighth Amendment to the U.S. Constitution. In doing so, the Florida Supreme Court held "that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous."[52]

Hurst forced a paradigm shift in Florida's capital sentencing scheme.[53] To maintain capital punishment after *Hurst*, the Florida Legislature was forced to revise Florida's capital sentencing scheme.[54] The new statute had to require that the twelve-member jury unanimously make each finding of fact necessary to impose a sentence of death *and*

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[48] Hurst v. State, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017).

[49] For more thorough discussion of the Florida Supreme Court's decision in *Hurst II* and framework created as a result thereof, *see generally* Kalmanson, *Storm of the Decade*, *supra* note 12.

[50] *Hurst*, 202 So. 3d at 44.

[51] *Id.*

[52] *Id.* In his dissenting opinion, joined by Justice Polston, Justice Canady disagreed with the majority's broadening of the discussion in *Hurst II* to include the Eighth Amendment and Florida's independent right to trial by jury. *See id.* at 80–82 (Canady, J., dissenting). Justice Pariente responded to these concerns in her concurring opinion. *Id.* at 74–75 (Pariente, J., concurring).

[53] *See generally* Kalmanson, *Storm of the Decade*, *supra* note 12.

[54] For more explanation on this, *see generally id.* Also, to review litigation regarding the statute that the Florida Legislature enacted between *Hurst v. Florida* and *Hurst II* that was ultimately invalidated, *see generally* Evans v. State, 213 So. 3d 856 (Fla. 2017) (per curiam), *receding in part from* Perry v. State, 210 So. 3d 630 (Fla. 2016) (invalidating the statute the Florida Legislature enacted after *Hurst*).

unanimously recommend a sentence of death.[55] Without the jury's unanimous recommendation for a sentence of death, the trial judge could not impose a sentence of death.[56]

The background above explained *Ring*, *Hurst*, and the implications *Hurst* had on Delaware, Alabama, and Florida. These decisions and related state-court decisions made clear that juries, not judges, must find aggravating factors necessary to impose the death penalty. In some instances, courts have required juries to also weigh the aggravating factors against the mitigation. A sentencing procedure that permitted the judge, rather than the jury, to make factual findings necessary to impose a sentence of death. If so, the statute fails to satisfy the demands of the Sixth Amendment. After these decisions, courts were faced with how to apply the new rules to those who were already sentenced to death in the state. What about death sentences that were imposed under prior, unconstitutional procedures? Should courts retroactively apply *Ring* and *Hurst* to death sentences that were imposed and made final under procedures that would now be considered unconstitutional? The next section discusses how courts across the country addressed the retroactivity of both *Ring* and *Hurst*.

III. BACKGROUND ON RETROACTIVITY

Retroactivity is the principle that a new rule applies to an old proceeding. If the law changes between an original hearing and the hearing's subsequent review, a party may claim the new law should apply to the original hearing retroactively. In other words, retroactivity is the principle that a new rule—usually in the form of a constitutional pronouncement from the U.S. Supreme Court—applies to cases that have already been decided.

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[55] *Evans*, 213 So. 3d at 858. This remains true in Florida based on the post-*Hurst* statute. FLA. STAT. § 921.141 (2019). However, in early 2020, the Florida Supreme Court decided *State v. Poole*, 297 So. 3d 487, 491 (Fla. 2020), which receded from *Hurst II*, and determined that the only necessary jury finding is that the State proved the existence of one aggravating factor beyond a reasonable doubt—switching to the minimalist option. For more information on *Poole*, *see* Hannah L. Gorman & Margot Ravenscroft, *Hurricane Florida: The Hot and Cold Fronts of America's Most Active Death Row*, 51 COLUM. HUM. RTS. L. REV. 935, 954–57 (2020); *see also, e.g.*, *Florida Supreme Court Major Decision*, *supra* note 8. Shortly after *Poole*, the U.S. Supreme Court decided *McKinney v. Arizona*, 140 S. Ct. 702 (2020), which essentially affirmed the Supreme Court of Florida's explanation of *Hurst v. Florida* in *Poole*. *Compare McKinney*, 140 S. Ct. at 707–09, *with Poole*, 297 So. 3d 487. Although *McKinney* and *Poole* are significant to the discussion of *Hurst* and the Sixth Amendment jurisprudence regarding the meaning of the right to trial by jury, it does not affect the discussion here regarding retroactivity and how courts addressed the retroactivity of *Hurst v. Florida*. The retroactivity decisions discussed herein had been decided and applied to the defendants on Florida's death row before *Poole* was decided.

[56] Kalmanson, *Storm of the Decade*, *supra* note 12, at 42. After *Hurst II*, Alabama was the only state in the country that allowed a jury to sentence someone to death without a jury's unanimous recommendation for death, or by judicial override. *See, e.g.*, *Alabama Supreme Court Rules that Death Penalty Statute Is Still Valid*, EQUAL JUST. INITIATIVE (Sept. 30, 2016), https://eji.org/news/alabama-supreme-court-rules-death-penalty-statute-still-valid/. That remains true as of January 16, 2023, despite the Florida Supreme Court's decision in *Poole*; however, some expect the Florida Legislature to propose amendments to Florida's capital sentencing scheme in future legislative sessions.

In the context of capital sentencing, retroactivity would mean a new rule applies to a defendant's sentence of death that has already become final and is pending on collateral review.[57] While a new rule automatically applies prospectively[58]—*i.e.*, to defendants' sentences of death pending on direct appeal—a court must determine that a rule is retroactive for it to apply to a sentence that has already become final. Thus, whether a rule applies retroactively is a threshold question. If a rule does not apply retroactively, then the parties are precluded from reviewing the merits of the constitutional issue raised by the rule.[59] The capital sentencing rules announced in *Ring* and *Hurst v. Florida* raised such constitutional issues, but the question of retroactivity created a confusing barrier to reviewing the merits of claims for relief under those decisions. The following subsections explain the retroactivity questions asked at the federal and state levels.

In the context of capital sentencing, many capital defendants were convicted and sentenced under the laws that were ultimately invalidated by the Supreme Court in *Ring* and *Hurst v. Florida*. While numerous defendants raised claims that the new holdings should apply to the defendant's sentence, the threshold question was whether to apply the new holdings retroactively. As to what standard applies in addressing retroactivity, courts generally either (A) follow the federal *Teague* standard for determining retroactivity, or (B) craft their own retroactivity standards, often derived from federal retroactivity doctrine. In light of these different approaches, federal and state courts now apply different standards for determining the retroactivity of landmark U.S. Supreme Court rulings. These different standards are explained below.

A. The Federal Retroactivity Standard

At the federal level, the standard for determining whether a new rule applies retroactively comes from the Supreme Court's 1989 decision in *Teague v. Lane*.[60] Under the *Teague* analysis, a court may only give retroactive application to a new constitutional rule for criminal proceedings if the rule is (1) a substantive rule of due process, or (2) a watershed rule of criminal procedure.[61]

Beginning with *Fay v. Noia*[62] in 1962 and leading to *Teague* in 1989, the Supreme Court developed and tested a retroactivity standard that weighs

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[57] For a review of the capital appellate process, *see generally* Kalmanson, *Somewhere Between Death Row and Death Watch*, *supra* note 12.

[58] *See* Bowen v. United States, 422 U.S. 916, 921 (1975) ("It is true that this Court has suggested that Art. III is the primary impetus for applying new constitutional doctrines in cases that establish them for the first time." (citing Stovall v. Denno, 388 U.S. 293, 301 (1967))).

[59] *See id.* at 916.

[60] *See generally* Teague v. Lane, 489 U.S. 288 (1989).

[61] *Id.* at 311.

[62] *See generally* Fay v. Noia, 372 U.S. 391 (1963).

due process against finality. On one hand, due process concerns weigh in favor of allowing defendants to raise and litigate claims regardless of whether their sentence has already been finalized. On the other hand, courts', states', and victims' interest in finality weighs in favor of placing time-limits on defendants raising new claims.

The evolution of the federal retroactivity doctrine, from *Fay* to *Teague*, helps explain the various decisions courts have made regarding *Ring* and *Hurst* retroactivity. The Supreme Court first addressed retroactive application of new constitutional rules in *Fay*, in which the Court reviewed a habeas ruling.[63]

At trial, the defendant in *Fay*, Noia, was convicted based on his signed confession. Noia unsuccessfully pled that the confession was coerced and therefore unlawful.[64] After Noia failed to appeal his state conviction, separate legal proceedings for his co-defendants resulted in their release, finding that their confessions were coerced in violation of the Fourteenth Amendment.[65] Discovering this development, Noia filed for an appeal in federal court, on the grounds that his confession was also coerced in violation of the Fourteenth Amendment.[66] The Supreme Court held that Noia could be granted relief, despite his failure to pursue the remedy not available to him when he first applied for relief.[67] As the Court later stated in *Desist v. United States*, "[f]or the first time, it was there held that . . . a habeas petitioner could successfully attack his conviction collaterally despite the fact that the 'new' rule had not even been suggested in the original proceedings."[68]

The *Fay* Court, balancing due process against the prior decision's finality, determined it would retroactively apply legal developments that did not apply at the time of the original trial.[69] Because the Court was acknowledging this power of federal courts for the first time, the decision did not itself provide a standard for giving retroactive application to new rules.[70] Nonetheless, *Fay* did open the door for habeas petitioners to claim that constitutional rules that develop post-conviction should apply to their original proceedings.[71] It opened the door for questioning, many years later, whether *Ring* and *Hurst* could apply retroactively.

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[63] *Id.* at 394.
[64] *Id.*
[65] *Id.* at 395.
[66] *Id.* at 396.
[67] *Id.* at 398–99.
[68] Desist v. United States, 394 U.S. 244, 261 (1969).
[69] *Fay*, 372 U.S. at 424 ("[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied . . . .").
[70] *Id.* at 398–99.
[71] This decision did not go uncontested. Justices Harlan, Clark, and Stewart dissented, arguing federalism principles required the Court to respect the state court conviction that rested on adequate state

Three years after *Fay*, amidst rapid development in the criminal field, the Court faced another question of retroactivity.[72] This time, the Court offered the first federal retroactivity standard for evaluating whether new rules should apply to criminal cases on collateral appeal.[73] In *Linkletter v. Walker*, the Court reviewed a habeas ruling that occurred prior to legal developments that excluded illegally seized evidence.[74] The *Linkletter* Court could either apply the new rule to the recorded trial proceedings and exclude illegally seized evidence, or decline to apply the new rule and permit the use of illegally seized evidence. The Court created the following standard to decide whether to apply the new rule retroactively, a standard it clarified two years later in *Stovall v. Denno*: (1) look to the purpose of the new rule, (2) consider law enforcement's reliance on the old rule, and (3) evaluate what effect a retroactive application of the new rule would have on the administration of justice.[75]

The *Linkletter-Stovall* standard began a uniform approach to handling the tension between due process and finality that kept reappearing after the *Fay* decision.[76] It reflected a desire by the Court to limit the effect of "fundamentally unsound" constitutional decisions, particularly during a time of fast-moving innovation in criminal law.[77] However, as the consequences of this standard unfolded, Justice Harlan began to express his discontent.[78] To Justice Harlan, the *Linkletter-Stovall* standard led to broad judicial discretion[79] and produced excessive variation in rules.[80] These apprehensions eventually became the basis for subsequent retroactivity decisions.[81]

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grounds. *Id.* at 448 (Harlan, J., dissenting); *see also Desist*, 394 U.S. at 262 (Harlan, J., dissenting) ("I continue to believe that *Noia* . . . constitutes an indefensible departure both from the historical principles which defined the scope of the 'Great Writ' and from the principles of federalism . . . .").

[72] Linkletter v. Walker, 381 U.S. 618, 619–20 (1965).

[73] *Id.* at 636.

[74] Mapp v. Ohio, 367 U.S. 643 (1961).

[75] *Linkletter*, 381 U.S. at 636 ("In short, we must look to the purpose of the *Mapp* rule; the reliance placed upon the *Wolf* doctrine; and the effect on the administration of justice of a retrospective application of *Mapp*."); *see also* Stovall v. Denno, 388 U.S. 293, 297 (1967) ("The criteria guiding the resolution of the [retroactivity] question implicates (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.").

[76] After *Stovall*, courts began calling the standard first announced in *Linkletter* the *Linkletter-Stovall* standard. *E.g.*, Mosley v. State, 209 So. 3d 1248, 1277–82 (Fla. 2016).

[77] Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., dissenting).

[78] Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting); *see Mackey*, 401 U.S. at 677; *see also* William W. Berry III, *Normative Retroactivity*, 19 U. PA. J. CONST. L. 485, 499–500 (2016) (discussing Justice Harlan's criticism of the *Linkletter* test).

[79] *Mackey*, 401 U.S. at 677.

[80] *Desist*, 394 U.S. at 256–57; *see* Berry, *supra* note 78, at 499–500 (discussing Justice Harlan's criticism of the *Linkletter* test).

[81] *See* Griffith v. Kentucky, 479 U.S. 314, 321–22 (1987); *see also* United States v. Johnson, 457 U.S. 537, 554 (1982).

The Supreme Court adopted Justice Harlan's ideas on retroactivity in *Teague v. Lane*, creating the current federal retroactivity standard.[82] Addressing Justice Harlan's apprehensions, the *Teague* standard aims to limit discretion and thereby ensure more uniformity. The Court designed the *Teague* standard to presume non-retroactivity unless the rule in question falls under one of two exceptions.[83] By creating this presumption, the Court indicated its general preference for a judgment's finality over its responsiveness to post-conviction legal developments.

While the *Teague* standard presumes non-retroactivity, its exceptions acknowledge clear instances where finality should give way to due process. One scholar has characterized this double exception framework as a "substance-procedure dichotomy."[84] The first of two exceptions is for rules that place certain conduct beyond the State's power to punish by death.[85] This exception reflects historical uses of the writ of habeas corpus.[86] The second exception is for "watershed rules of criminal procedure," or those rules that "implicate the fundamental fairness of the trial."[87] This exception commissions a core function of habeas corpus: "to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted . . . ."[88] In practice, "the Court's determination of whether a new rule is substantive or procedural becomes paramount" in the retroactivity framework.[89]

By outlining a presumption of non-retroactivity and two exceptions, the *Teague* Court intended to create a more workable and consistent approach to retroactivity. Since then, scholars have debated the merits of the *Teague* retroactivity standard.[90] In practice, confusion surrounding retroactivity persisted after *Teague*.[91]

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[82] Teague v. Lane, 489 U.S. 288, 310 (1989); *see, e.g.*, Berry, *supra* note 78, at 500.

[83] *Teague*, 489 U.S. at 310 ("Unless they fall within one of Justice Harlan's suggested exceptions to this general rule . . . new rules [of criminal procedure] will not be applicable to those cases that have become final before the new rules were announced.").

[84] Berry, *supra* note 78, at 502.

[85] *Teague*, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1989)) (exempting rules placing "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe . . . ."); *e.g.*, Penry v. Lynaugh, 492 U.S. 302, 329–30 (1989) (offering, as an example of a rule that would fit under *Teague's* first exception, a rule that prohibits imposing the death penalty on defendants because of their status).

[86] *Mackey*, 401 U.S. at 692–93.

[87] *Teague*, at 311–12; *e.g.*, Saffle v. Parks, 494 U.S. 484, 495 (1963) (illustrating *Teague*'s second exception with the rule that a defendant has the right to be represented by counsel in all criminal trials for serious offenses).

[88] *Teague*, 489 U.S. at 312 (quoting Desist v. United States, 394 U.S. 244, 262 (1969)).

[89] Berry, *supra* note 78, at 502.

[90] *See generally, e.g., id.* at 491 (proposing an alternative framework for retroactivity that "relate[s] directly to the normative impact of the new rule on [previous] guilt and sentencing determinations").

[91] *See, e.g., id.* at 505 ("While the substance-procedure dichotomy may be clear at the margins, in practice it creates significant doctrinal confusion and disparities in lower courts such that the Supreme Court must determine the retroactivity question.").

While federal courts are bound by the U.S. Supreme Court's decision in *Teague*, state courts are not likewise bound to follow the *Teague* standard for retroactivity.[92] Rather, as the next section explains, states are at liberty to define their own retroactivity standards. Unsurprisingly, a review of state and federal rulings displays disparate sets of retroactivity standards that non-uniformly utilize the principles identified in *Fay*, *Linkletter*, *Stovall*, and *Teague*. This state survey presents a history of retroactivity principles that leaves an unclear how courts should handle landmark cases like *Ring* and *Hurst v. Florida*.

B. State-Specific Retroactivity Standards

As in many other areas of the law, state courts are not bound by the federal *Teague* standard, and instead may implement their own standards for deciding questions of retroactivity.[93] Because states are at liberty to stray from the federal standard, state-specific retroactivity standards may be broader than the federal retroactivity standard and may vary greatly across states.[94] Nevertheless, as this section explains, state courts have largely based their retroactivity standards on federal retroactivity doctrine, specifically on principles named in *Linkletter*, *Stovall*, and *Teague*.[95]

Although the frameworks may appear different, the state standards generally fall in two categories: (1) standards based on *Teague* and (2) standards based on *Linkletter* and *Stovall*. States in the "*Teague* category" also include states that have not developed a unique retroactivity standard but have expressly reserved the right to depart from *Teague*.[96] As one scholar put it, "[m]ost states use *Teague* as a nonbinding standard."[97]

Florida falls in the second category. Florida's retroactivity standard comes from the Florida Supreme Court's decision in *Witt v. State*[98] and is broader than *Teague*.[99] The *Witt* standard presents a three-prong test under which "a change in the law does not apply retroactively 'unless the change (a) emanates from [the Supreme Court of Florida] or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a

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[92] *E.g.*, Danforth v. Minnesota, 522 U.S. 264, 277–80 (2008) (explaining states may enact stricter standards than those laid down by the U.S. Supreme Court).

[93] *E.g.*, Knight v. Fla. Dep't Corr., 936 F.3d 1322, 1332 (11th Cir. 2019).

[94] *E.g.*, *id.*

[95] *See, e.g.*, Ruthanne M. Deutsch, *Federalizing Retroactivity Rules: The Unrealized Promise of* Danforth v. Minnesota, 44 FLA. ST. U. L. REV. 53, 71 (2016) (discussing similarly how states have implemented *Teague* in state-specific retroactivity analyses).

[96] *See, e.g.*, Powell v. State, 153 A.3d 69, 72 (Del. 2016); Beach v. State, 348 P.3d 629, 636 (Mont. 2015); State v. Mantich, 842 N.W.2d 716, 724 (Neb. 2014); *see also, e.g.*, Deutsch, *supra* note 95.

[97] Deutsch, *supra* note 95.

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

[99] Knight v. Fla. Dep't Corr., 936 F.3d 1322, 1332–33 (11th Cir. 2019).

development of fundamental significance.'"[100] The third prong of the *Witt* standard uses principles from the federal *Teague* and *Linkletter-Stovall* standards.[101] While *Witt* is broader than *Teague* and, therefore, arguably more defendant-friendly, some have argued that the test is "'malleable,' 'nebulous,' and hindered by its indeterminacy."[102]

Similar to Florida, courts in Alaska, Michigan, and Missouri have also developed state-specific retroactivity standards that utilize principles from Supreme Court rulings. The Alaska Supreme Court has adopted the old *Linkletter-Stovall* standard as its retroactivity standard despite the Supreme Court abandoning it.[103] Michigan and Missouri have likewise chosen to continue using the *Linkletter-Stovall* standard.[104]

These diverging retroactivity standards become important when reviewing jurisprudence regarding the retroactivity of *Hurst* and *Ring*, as discussed in Parts III–V below.

IV. HOW COURTS ADDRESSED THE RETROACTIVITY OF *RING*

Ring casts doubt on the constitutionality of death sentences across the country. As defendants subsequently challenged their sentences, which were already final, the question for courts was whether to apply the rule announced in *Ring* retroactively. For each defendant, retroactive application of *Ring* meant the opportunity for a new, constitutional sentencing proceeding and another chance at a sentence lesser than death.

To determine whether *Ring* applied retroactively, as explained above, courts across the country used either (A) the federal *Teague* standard or (B) a state-specific standard. Section A below explains the decisions in which courts applied the retroactivity standards and principles pronounced by the U.S. Supreme Court. Federal courts were bound to follow the Supreme Court's decisions regarding the retroactivity of *Ring*, which meant applying *Teague—i.e.*, presuming no retroactivity and confirming whether one of the two exceptions applied. In addition, many state courts, although

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[100] Mosley v. State, 209 So. 3d 1248, 1276 (Fla. 2016) (quoting Witt v. State, 387 So. 2d 922, 931 (Fla. 1980)); *see* Recent Case, Asay v. State: *Florida Supreme Court Denies Retroactive Application of* Hurst v. Florida *to Pre-*Ring *Cases*, 130 HARV. L. REV. 2251, 2253 (2016) (footnotes omitted).

[101] *Mosley*, 209 So. 3d at 1276–77 (quoting *Witt*, 387 So. 2d at 931) ("To be a 'development of fundamental significance,' the change in law must 'place beyond the authority of the state the power to regulate certain conduct or impose certain penalties,' or alternatively, be 'of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test' from *Stovall* and *Linkletter*. . . ."); *see* Recent Case, *supra* note 100.

[102] Recent Case, *supra* note 100, at 2254 (footnotes omitted).

[103] Judd v. State, 482 P.2d 273, 277–78 (Alaska 1971).

[104] People v. Maxson, 759 N.W.2d 817, 822 (Mich. 2008); State v. Whitfield, 107 S.W.3d 253, 268 (Mo. 2003).

not bound to follow the Supreme Court's decisions, chose to do so.[105] Thus, federal courts and many state courts declined to apply *Ring* retroactively.

Section B below explains the decisions in which state courts utilized broader standards than those created by the U.S. Supreme Court's standard set forth in *Teague*. Although these courts framed their standards differently, they all based their analyses on the abandoned federal standard announced in *Linkletter* and *Stovall*. The *Linkletter-Stovall* analysis inherently leads to state-specific results, yet most states confronted with the question still decided that *Ring* did not apply retroactively. The exception to this is Missouri, whose supreme court found that *Ring* applied retroactively to at least five cases.

This state survey of *Ring* retroactivity shows that courts across the country have generally been consistent in declining to apply *Ring* retroactively. This consistency may be attributed to the Supreme Court deciding the question for all federal courts and state courts that adopted the *Teague* standard,[106] and the remaining state courts' adherence to *Linkletter-Stovall* principles. This is a helpful contrast to courts' inconsistency on deciding whether *Hurst v. Florida* is retroactive, a question on which the Supreme Court provided less guidance.

A. Analyses Under Teague v. Lane

Courts applying the federal *Teague* standard for the retroactivity of *Ring* reached fairly consistent conclusions. This consistency seems to be a result of the Supreme Court's ruling in *Schriro v. Summerlin*, which federal courts and many state courts followed in addressing this issue.[107]

In *Summerlin*, the Supreme Court addressed the retroactivity of *Ring*.[108] Under the *Teague* standard, *Ring* would not apply retroactively unless the Court found that *Ring* met one of *Teague*'s exceptions: (1) a rule that places certain conduct beyond the power of the state to punish by death, or (2) watershed rules of criminal procedure implicating the fundamental fairness of the trial.[109] First, the *Summerlin* Court held that *Ring* did not fall under *Teague*'s first exception, for *Ring* had everything to do with the Sixth Amendment's right to trial by jury and nothing to do with the range of conduct a state may criminalize. Second, the Court held that *Ring*'s decision to send certain questions to the jury rather than the judge is not a watershed

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[105] *Cf.* Deutsch, *supra* note 95, at 71 ("[E]ven when states explicitly recognize *Teague* as nonbinding, anchoring effects induce states to follow the Supreme Court's lead in most cases."); *id.* at 73 ("Given the heaviness of *Teague*'s shadow, it is much less likely for states to grant retroactive relief for a new federal rule after the Supreme Court has already denied retroactive relief under *Teague*.").

[106] *See* Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (holding that *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review).

[107] *Id.* at 358; *see* Deutsch, *supra* note 95, at 72–73 (discussing this phenomena).

[108] *Schriro*, 542 U.S. at 349–51.

[109] *Id.* at 351–52.

rule of criminal procedure because there is no clear conclusion that juries are more accurate factfinders than judges.[110] Given the Court's determination that *Ring* did not fall within either of *Teague*'s exceptions to non-retroactivity, the *Summerlin* Court held *Ring* does not apply retroactively to cases already made final.[111]

Thereafter, any state court following the *Teague* standard need only adopt the Supreme Court's analysis in *Summerlin* as its own to reach this conclusion and, therefore, consistent outcomes. Indeed, many state courts faced with the issue of whether to apply *Ring* retroactively adopted the Supreme Court's analysis in *Summerlin* and declined to apply *Ring*.[112]

B. Analyses Under State Standards

While many state courts followed *Summerlin*, some state courts applied their own state-specific standards (based on *Teague* or *Linkletter-Stovall*, as discussed above) in analyzing whether *Ring* should apply retroactively. In doing so, state courts were surprisingly consistent. In fact, only one state determined *Ring* applied retroactively.[113] Otherwise, even state courts applying their own state-specific standards decided, consistent with the Supreme Court's decision in *Summerlin*, that *Ring* does not apply retroactively.

As explained in Part II.C, state courts generally took two approaches in addressing *Ring* retroactivity: (1) adopt the current federal standard under *Teague*, or (2) use a state-specific standard, which often mimics the abandoned federal *Linkletter-Stovall* standard. State courts that followed *Summerlin* fall under the first category, discussed above.[114] Also in the first category are states like Arizona, which adopted the federal *Teague* standard but performed its own analysis to determine whether to apply *Ring* retroactively.[115] Similar to the Supreme Court's explanation in *Summerlin*, the Arizona Supreme Court began by presuming *Ring* does not apply retroactively and then determined *Ring* did not meet either of *Teague*'s exceptions.[116]

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[110] *Id.* at 355–57.

[111] *Id.* at 358.

[112] *E.g.*, Wilson v. State, 911 So. 2d 40, 46 (Ala. Crim. App. 2005); Lambert v. State, 825 N.E.2d 1261, 1267 (Ind. 2005); State v. Synoracki, 126 P.3d 1121, 1123–24 (Kan. 2006); Bowling v. Commonwealth, 163 S.W.3d 361, 378–79 (Ky. 2005); State v. Tate, 130 So. 3d 829, 835 (La. 2013); State v. Lotter, 917 N.W.2d 850, 864 (Neb. 2018); Commonwealth v. Bracey, 986 A.2d 128, 141–42 (Pa. 2009); Moeller v. Weber, 689 N.W.2d 1, 19 (S.D. 2004); State v. Gomez, 163 S.W.3d 632, 651 (Tenn. 2005).

[113] State v. Whitfield, 107 S.W.3d 253, 256 (Mo. 2003).

[114] *See, e.g.*, *Lotter*, 917 N.W.2d at 864.

[115] State v. Towery, 64 P.3d 828, 831–36 (Ariz. 2003); *see also* Rhoades v. State, 233 P.3d 61, 64–68 (Idaho 2010) (requiring that Idaho courts independently review requests for retroactive application of newly announced principles of law under the *Teague* standard).

[116] *Towery*, 64 P.3d at 830, 835.

The second category of states includes Florida and Missouri, both of which applied their own retroactivity standards derived from federal retroactivity doctrine. The Florida Supreme Court adopted a unique standard in *Witt*, described above in Section II.B. The Missouri Supreme Court, in *State v. Whitfield*, adopted the abandoned federal standard from *Linkletter-Stovall*.[117] Despite both states using tests that were broader than *Teague* and drew on *Linkletter-Stovall*, they came to different conclusions regarding *Ring* retroactivity.

Their different conclusions can be explained by noticing that their tests rely on state-specific facts. For example, prong three of the *Witt* test and factor three of the *Linkletter-Stovall* test both ask what effect a retroactive application of the new rule would have on the administration of justice. In Florida, applying *Ring* retroactively would require reconsideration of hundreds of cases.[118] On the other hand, in Missouri, applying *Ring* retroactively would require reconsideration of only five cases.[119] Accordingly, Florida and Missouri reached different outcomes in determining the retroactivity of *Ring*.

The Florida Supreme Court's decision on *Ring* retroactivity was consistent with the conclusion reached by courts following the federal analysis. In *Johnson v. State*, the Florida Supreme Court evaluated *Ring* under its state-specific retroactivity standard from *Witt*, and held that *Ring* did "not apply retroactively to defendants whose convictions already were final when that decision was rendered."[120] Notably, though, some Justices on the Court did not agree that *Witt* was the proper test for retroactivity.[121] Justice Cantero's concurring opinion, joined by Justices Wells and Bell, argued that *Witt* was outdated and, instead, that *Teague* provided the proper framework.[122]

On the other hand, Missouri reached a decision on *Ring* retroactivity that differed from Florida's and all other states' decisions. In *Whitfield*, the Missouri Supreme Court evaluated *Ring* under the *Linkletter-Stovall* standard.[123] First, it stated that prong one, the purpose of *Ring*, was not a "sufficient basis in itself" to require retroactive application.[124] Then it argued

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[117] *Whitfield*, 107 S.W.3d at 268.

[118] Johnson v. State, 904 So. 2d 400, 411 (Fla. 2005) (per curiam) ("The retroactive application of *Ring* in Florida would require reconsideration of hundreds of cases to determine whether a new penalty phase is warranted.").

[119] State v. Whitfield, 107 S.W.3d 253, 269 (Mo. 2003).

[120] *Johnson*, 904 So. 2d at 405.

[121] *Id.* at 413 (Cantero, J., concurring).

[122] *Id.*

[123] *Whitfield*, 107 S.W.3d at 268 ("Applying the analysis set out in *Linkletter-Stovall* here, this Court must consider (1) the purpose to be served by the new rule, (2) the extent of reliance by law enforcement on the old rule, and (3) the effect on the administration of justice of retroactive application of the new standards.").

[124] *Id.* (drawing on the U.S. Supreme Court's reasoning in *DeStefano v. Woods*, 392 U.S. 631, 633–34 (1968) (per curiam)).

that prong two, the extent of reliance on the old rule, and prong three, the effect of retroactive application on the administration of justice, both favored retroactivity. In Missouri, juries had almost always made the decision of whether to apply the death penalty.[125] Moreover, there were only five cases in which the judge made the required factual findings and imposed the death penalty.[126] In turn, the Missouri Supreme Court applied *Ring* retroactively and found the defendant's sentence in violation of his right "to be sentenced on determinations made by a jury."[127] With its decision in *Whitfield*, Missouri became the only state to apply *Ring* retroactively. The *Ring* retroactivity decisions in Florida and Missouri represent the state-specific approach to *Ring* retroactivity. The other approach was to follow *Teague* and the Supreme Court's decision in *Summerlin*. Across both approaches, almost all courts decided that *Ring* should not apply retroactively. State courts following *Teague* did not apply *Ring* retroactively. Apart from courts in Missouri, neither did state courts following state-specific standards.

1. Summary of Analyses of Ring *Retroactivity*

The table below summarizes the cases regarding *Ring* retroactivity canvassed above in this part:

Table 1 Summary of Cases Analyzing Retroactivity of Ring

Jurisdiction	**Case**	**Retroactivity Standard**	**Conclusion**
U.S. Supreme Court	*Schriro v. Summerlin*, 542 U.S. 348 (2004).	*Teague*	Not retroactive
Alabama	*Wilson v. State*, 911 So. 2d 40 (Ala. 2005).	*Teague*	Not retroactive

[125] *Id.* at 268 (noting that juries do not apply the death penalty "in those few cases" in which a verdict could not be reached).

[126] *Id.* at 269 ("[T]he effect of application of *Ring* to cases on collateral review will not cause dislocation of the judicial or prosecutorial system. This Court's preliminary review of its records has identified only five potential cases.").

[127] *Id.* at 271.

Arizona	*State v. Towery*, 64 P.3d 828 (Ariz. 2003).	*Teague*	Not retroactive
Colorado	*People v. Johnson*, 142, P.3d 722 (Colo. 2006).	*Teague*	Not retroactive
Florida	*Johnson v. State*, 904 So. 2d 400 (Fla. 2005).	State-specific	Not retroactive
Idaho	*Rhoades v. State*, 233 P.3d 61 (Idaho 2010).	*Teague*	Not retroactive
Indiana	*Lambert v. State*, 825 N.E.2d 1261, 1267 (Ind. 2005).	*Teague*	Not retroactive
Kansas	*State v. Synoracki*, 126 P.3d 1121, 1123–24 (Kan. 2006).	*Teague*	Not retroactive
Kentucky	*Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky. 2005).	*Teague*	Not retroactive
Louisiana	*State v. Tate*, 130 So. 3d 829, 835 (La. 2013).	*Teague*	Not retroactive

Missouri	*State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003).	State-specific	Retroactive
Nebraska	*State v. Lotter*, 917 N.W.2d 850, 864 (Neb. 2018).	*Teague*	Not retroactive
Nevada	*Colwell v. State*, 59 P.3d 463, 473 (Nev. 2002).	*Teague*	Not retroactive
Pennsylvania	*Commonwealth v. Bracey*, 986 A.2d 128 (Pa. 2009).	*Teague*	Not retroactive
South Dakota	*Moeller v. Weber*, 689 N.W.2d 1 (S.D. 2004).	*Teague*	Not retroactive
Tennessee	*State v. Gomez*, 163 S.W.3d 632, 652 (Tenn. 2005).	*Teague*	Not retroactive
Texas	*Ex parte Briseno*, 135 S.W.3d 1, 9 (Tex. Crim. App. 2004).	*Teague*	Not retroactive

All things considered, the retroactivity analyses of *Ring* were fairly consistent across-the-board. On the other hand, the retroactivity analyses of *Hurst v. Florida* were inconsistent; Part IV below explains the different *Hurst v. Florida* retroactivity analyses and the points on which courts diverged.

V. COMPETING ANALYSES ON THE RETROACTIVITY OF *HURST*

One of the questions *Hurst v. Florida* left unanswered was whether the Court's decision applied retroactively. Section A below explains how, in addressing the retroactivity of *Hurst*, the Supreme Court of Florida created the concept of partial retroactivity. Then, Section B reviews the decisions in which courts—both state and federal—applied *Teague* to determine whether *Hurst* should apply retroactively, explaining that, unlike the decisions applying *Teague* with respect to *Ring*, these decisions reached essentially opposite conclusions.

A. Partial Retroactivity in Florida

Shortly after issuing *Hurst II*, the Supreme Court of Florida began to address the question of retroactivity. Ultimately, the Court answered this question in two decisions—*Asay v. State*[128] and *Mosley v. State*[129]—which, as discussed in Sub-Section 1 below, relied on Sixth Amendment jurisprudence to hold that *Hurst* applied retroactively only to defendants whose sentences of death became final after June 24, 2002, the day the Supreme Court decided *Ring*. Later, as Sub-Section 2 explains, the Supreme Court of Florida relied upon *Asay* and *Mosley* to hold in *Hitchcock* that the same partial retroactivity framework applies to the Eighth Amendment rights announced in *Hurst II*. This partial retroactivity framework essentially split Florida's death row in half.[130]

1. Retroactivity of the Sixth Amendment Rights Announced in Hurst v. Florida *and* Hurst II

A few months after deciding *Hurst II*, the Florida Supreme Court addressed the retroactivity of *Hurst* in two decisions issued the same day. First, in *Asay*, the Supreme Court of Florida applied its state-specific retroactivity standard from *Witt* and held *Hurst* did not apply retroactively to Asay's sentence of death, which became final in 1991—before *Ring*.[131] Essentially, the Court reasoned that it had not held *Ring* retroactive, and since *Hurst* was a product of *Ring*, the right announced in *Hurst* did not apply to any cases decided before *Ring*.[132]

The Court's application of *Witt* was consistent with *Johnson*. However, the Supreme Court of Florida distanced itself from *Johnson*, explaining that the *Witt* analysis in *Johnson* was based on the Court's

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[128] Asay v. State, 210 So. 3d 1 (Fla. 2016) (per curiam).
[129] Mosley v. State, 209 So. 3d 1248 (Fla. 2016) (per curiam).
[130] *See* Kalmanson, *The Difference of One Vote or One Day*, *supra* note 12, at 997.
[131] *See generally Asay*, 210 So. 3d 1.
[132] *See* Recent Case, *supra* note 100. *See generally Asay*, 210 So. 3d 1.

understanding at that time that Florida's capital sentencing scheme withstood constitutional scrutiny after *Ring*, which, of course, *Hurst v. Florida* clarified was inaccurate.[133] Thus, the Court determined it had to "reconsider its prior decision in *Johnson*."[134]

Revisiting the *Witt* analysis, the Court found that *Hurst* satisfied the first two elements of the *Witt* standard because it "emanate[d] from the United States Supreme Court and is constitutional in nature."[135] Then, turning to the third prong, the Court first found that the purpose of the rule—protecting the Sixth Amendment's right to trial by jury—weighed in favor of retroactivity.[136] Next, as to reliance on the old rule, which the Court found to be the "most important factor," the Court explained it had relied heavily on pre-*Ring* jurisprudence.[137] Such reliance, the Court determined, weighed "heavily against" retroactively applying *Hurst* to pre-*Ring* cases.[138]

Finally, as to the effect on the administration of justice, the Court explained that 386 defendants were awaiting execution on Florida's death row when *Asay* was decided.[139] This was similar to when *Johnson* was decided—when approximately 367 defendants were on Florida's death row. Due to the large number of defendants on death row, the Court determined that the effect retroactivity would have on the effective administration of justice weighed heavily against applying *Hurst* retroactively to all defendants on death row.[140] In other words, the Court determined that granting retroactivity to all defendants on Florida's death row at the time would have a significant effect on the administration of justice.[141] Thus, the Court held, because the source of the right announced in *Hurst* was a result of *Ring*, which did not apply retroactively, the furthest "back" the right could extend was the day *Ring* was decided.[142]

Second, in *Mosley*, the Supreme Court of Florida addressed the other half of the question: what about sentences that became final after *Ring*? There, the Court relied on two theories to hold that *Hurst* applied retroactively to Mosley's sentence, which had become final *after* the Supreme Court decided *Ring*.[143] Based on principles of fundamental fairness, the Court determined *Hurst* applied retroactively to Mosley because he had "raised a *Ring* claim at his first opportunity and was then

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[133] *Asay*, 210 So. 3d at 15–16.
[134] *Id.* at 16.
[135] Mosley v. State, 209 So. 3d 1248, 1276 (Fla. 2016) (per curiam).
[136] Recent Case, *supra* note 100, at 2253.
[137] *Asay*, 210 So. 3d at 18, 20.
[138] *Id.* at 20.
[139] *Id.*
[140] *Id.* at 18, 20.
[141] *Id.*
[142] *Id.* at 22.
[143] *See* Mosley v. State, 209 So. 3d 1248, 1283 (Fla. 2016) (per curiam).

rejected at every turn . . . ."[144] In other words, Mosley had preserved the *Hurst* argument and was, therefore, entitled to the benefit of the new rule.[145]

Then, after relying on *Asay* as to why *Johnson* was incorrect, the Court proceeded to conduct a *Witt* retroactivity analysis in Mosley's case.[146] As in *Asay*, the analysis turned on the third prong of the *Witt* standard, which the Court determined "turn[ed] entirely on whether the new rule, here *Hurst v. Florida*, is a 'development of fundamental significance.'" [147] To constitute a "development of fundamental significance," the Court explained, "the change in law must 'place beyond the authority of the state the power to regulate certain conduct or impose certain penalties,' or alternatively, be 'of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*.'"[148] As to *Hurst*, the Could concluded: "*Hurst v. Florida*, as interpreted by this Court in *Hurst*, falls within the category of cases that are of "sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test" from *Stovall* and *Linkletter* . . . ."[149]

The "three-fold test of *Stovall* and *Linkletter*," the Court said, is to "determine where finality yields to fairness based on a change in the law."[150] Proceeding through this test, the Court determined:

> (1) "The purpose of the new rule announced in *Hurst* is to ensure that capital defendants' foundational right to a trial by jury—the only right protected in both the body of the United States Constitution and the Bill of Rights and then, independently, in the Florida Constitution—. . . is preserved within Florida's capital sentencing scheme."[151] Additionally, the Court determined that purpose weighed heavily in favor of retroactivity.[152]
>
> (2) The old rule in this case was that the right announced in *Ring* did not apply to Florida's death penalty statute.[153] Since *Ring*, Florida Courts, including the Supreme Court of Florida, relied "in good faith on precedent supporting the validity of Florida's capital sentencing scheme, despite doubt about its constitutionality."[154] "Because Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst*, retroactively to that time."[155]

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[144] *Id.* at 1275 (citing James v. State, 615 So. 2d 668, 669 (Fla. 1993)).
[145] *Id.*
[146] *Id.* at 1276.
[147] *Id.* (quoting Witt v. State, 387 So. 2d 922, 931 (Fla. 1980)).
[148] *Id.* at 1276–77 (quoting *Witt*, 387 So. 2d at 929).
[149] *Id.* at 1277.
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.* at 1278.
[154] *Id.*
[155] *Id.*

> (3) As to the effect on the administration of justice, "any decision to give retroactive effect" to a new rule "will have some impact on the administration of justice," but "[h]olding *Hurst* retroactive to when the United States Supreme Court decided *Ring* would not destroy the stability of the law, nor would it render punishments uncertain and ineffectual."[156]

Based on these findings, the Court concluded *Hurst* should apply retroactively to sentences like Mosley's that became final after *Ring* because, in essence, those sentences were unconstitutional all along—it just took the U.S. Supreme Court fourteen years to say so:

> Defendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring* should not suffer due to the United States Supreme Court's fourteen-year delay in applying *Ring* to Florida. In other words, defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring* should not be penalized for the United States Supreme Court's delay in explicitly making this determination. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.[157]

Applying *Hurst* retroactively to Mosley's sentence, the Court did not make clear which of the two theories was the Court's primary reason for doing so.[158] Nor did the Court ever clarify which theory was the Court's primary reasoning for applying *Hurst* retroactively to post-*Ring* sentences in any other case. However, reading the case law holistically, it appears that the latter theory was the Court's primary reasoning for its retroactivity decision because it is the reason mentioned in all of the cases; whereas, the former is only mentioned in some cases.[159]

With its decisions in *Asay* and *Mosley*, the Supreme Court of Florida "split the baby" on retroactivity and drew a bright line on a figurative calendar through June 24, 2002, the day the U.S. Supreme Court decided *Ring*.[160] On one side of the line were sentences of death that became final

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[156] *Id.* at 1281.

[157] *Id.* at 1283 (quoting Witt v. State, 387 So. 2d 922, 925 (Fla. 1980)).

[158] *See generally id.*

[159] *See, e.g.*, Hojan v. State, 212 So. 3d 982, 999–1000 (Fla. 2017).

[160] Between *Hurst II* and January 2019, the Supreme Court of Florida experienced a sea change. *See* Kalmanson, *Storm of the Decade*, *supra* note 12, at 58–61. In the spring of 2019, it looked like the

before that date, to which *Hurst* did not apply retroactively.[161] As a result, the Supreme Court of Florida denied numerous defendants the opportunity to raise a *Hurst*-related claim because of this decision.[162]

On the other side of the line were sentences of death that became final after that day, to which *Hurst* did apply retroactively. Those defendants were eligible for *Hurst* relief if they could prove that the *Hurst* error in their case was not harmless beyond a reasonable doubt.[163] Practically, this split Florida death row almost in half, making approximately 55.4% of defendants on Florida's death row at the time eligible for *Hurst* relief—subject to harmless error review—because either *Hurst* applied retroactively to their sentences (44.6%), or their sentences had not yet become final (10.8%).[164] The other 44.6% of defendants were not eligible for *Hurst* relief because their sentences were too old for *Hurst* to apply retroactively to their sentences.[165]

2. Retroactivity of the Eighth Amendment Rights Announced in Hurst II

At first blush, *Asay* and *Mosley* appeared to answer the question of *Hurst* retroactivity in Florida. But upon further review, it became clear that *Asay* and *Mosley* were incomplete. They addressed only the Sixth Amendment rights at issue in *Hurst v. Florida* and *Hurst II*. They did not address the retroactivity of the Eighth Amendment rights the Supreme Court

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Court's decisions in *Asay* and *Mosley* were vulnerable to rescission in *Owen v. State*. *See id.* at 64–65; *see also* Gorman & Ravenscroft, *supra* note 55, at 973–74. The "new" Court expressed dissatisfaction with the "old" Court's analysis on *Hurst* retroactivity when it issued an order in *Owen* asking the parties to brief the Court on the validity of *Asay* and *Mosley* (the "Order"). *See* Gorman & Ravencroft, *supra* note 55, at 961. In theory, the Order could mean the Court intended to explore both whether *Hurst* should be fully retroactive (overturning *Asay*) and whether *Hurst* should not be retroactive at all (overturning *Mosley*). *See id.* at 961, 973. However, a close review of the Order and indications at oral argument after the Order suggests the Court's true intention was to explore only the latter—rescinding *Mosley* such that *Hurst* does not apply retroactively to any defendants on Florida's death row. *See id.* Notwithstanding, the Court ultimately did not address the issue of retroactivity in its decision in *Owen* and, instead, relied on the Court's decision in *Poole*, which changed the Court's interpretation of *Hurst v. Florida*. *Owen v. State*, 304 So. 3d 239, 241–43 (Fla. 2020) (per curiam).

[161] *See generally* Asay v. State, 210 So. 3d 1 (Fla. 2016) (per curiam).

[162] *See, e.g.*, Stein v. Jones, No. SC16–621, 2017 WL 836806 (Fla. Mar. 3, 2017); Hamilton v. Jones, No. SC16–984 2017 WL 836807 (Fla. Mar. 3, 2017).

[163] *See generally* Bevel v. State, 221 So. 3d 1168 (Fla. 2017) (per curiam) (reversing and remanding for a new penalty phase because of *Hurst*); Hertz v. Jones, 218 So. 3d 428 (Fla. 2017) (per curiam) (same). For more on *Hurst* harmless error, *see* Kalmanson, *Storm of the Decade*, *supra* note 12, at 45–47. However, as explained in *supra* note 55, the analysis for harmless error changed in 2020 after the Supreme Court of Florida decided *Poole*.

[164] Kalmanson, *The Difference of One Vote or One Day*, *supra* note 12, at 1028.

[165] *Id.*; *see* Gorman & Ravenscroft, *supra* note 55, at 973 (explaining similar statistics); *Florida Supreme Court: More Than 200 Prisoners Unconstitutionally Sentenced to Death May Get New Sentencing Hearing*, DEATH PENALTY INFO. CTR. (Dec. 22, 2016), https://deathpenaltyinfo.org/news/florida-supreme-court-more-than-200-prisoners-unconstitutionally-sentenced-to-death-may-get-new-sentencing-hearing.

of Florida discussed in its decision in *Hurst II*, which were not discussed in the U.S. Supreme Court's decision in *Hurst v. Florida*.

Inevitably, several defendants raised this issue. Almost a year after *Asay* and *Mosley*, the Supreme Court of Florida addressed this lingering question in *Hitchcock v. State*, which was designated as the "lead" case for this issue.[166] Relying on *Asay*, the Court held that the Eighth Amendment rights announced in *Hurst II*—like the Sixth Amendment rights—did not apply retroactively to defendants whose sentences of death became final before *Ring*.[167] In doing so, the Court recycled its *Witt* analysis from *Asay* to deny retroactivity of the Eighth Amendment rights announced in *Hurst II* to sentences that became final before *Ring*—which, of course, was a decision based on the Sixth Amendment.[168]

B. Split Analyses Under Teague v. Lane

This section reviews courts' analyses of the retroactivity of *Hurst* under the *Teague* standard.[169] This section shows that, unlike the outcome of these analyses regarding *Ring*, courts reached varied conclusions. First, the Supreme Court of Delaware determined that *Rauf* (the Delaware Supreme Court's decision applying *Hurst v. Florida* to Delaware's capital sentencing scheme, as described above) was retroactive to all defendants on Delaware's death row.[170] Shortly thereafter, separate opinions from the Supreme Court of Florida's decisions regarding the retroactivity of *Hurst* argued *Teague*, rather than *Witt*, was the proper standard and, under the *Teague* analysis, *Hurst* is not retroactive.[171] Then, years later, the Eleventh Circuit Court of Appeals held *Hurst* was not retroactive under *Teague*, at least in federal habeas proceedings.[172]

1. Full Retroactivity in Delaware

About a week before the Supreme Court of Florida issued *Asay* and *Mosley*, the Delaware Supreme Court issued its decision in *Powell v. State*. In *Powell*, the Delaware Supreme Court applied *Teague* in determining

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[166] Hitchcock v. State, 226 So. 3d 216, 217 (Fla. 2017) (per curiam).

[167] *Id.*

[168] *Id.*; *see* Kalmanson, *Storm of the Decade*, *supra* note 12.

[169] For an academic article that was written before the first decision on this topic, arguing that *Hurst* should be retroactive under Teague v. Lane, 489 U.S. 288, 310 (1989), *see generally* Angela J. Rollins & Billy H. Nolas, *The Retroactivity of* Hurst v. Florida, *136 S. Ct. 616 (2016) to Death-Sentenced Prisoners on Collateral Review*, 41 S. ILL. UNIV. L. J. 181 (2017).

[170] *See generally* Powell v. Delaware, 153 A.3d 69 (Del. 2016) (per curiam).

[171] Asay v. State, 210 So. 3d 1, 29–30 (Fla. 2016) (Polston, J., concurring) (agreeing that *Hurst* is not retroactive to pre-*Ring* cases but stating that *Teague* "is the proper and applicable test"); *see* Mosley v. State, 209 So. 3d 1248, 1286–87 (Fla. 2016) (Canady, J., dissenting) (arguing *Hurst* should not be retroactive under *Witt*).

[172] Knight v. Fla. Dep't Corr., 936 F.3d 1322, 1328 (11th Cir. 2019).

whether *Hurst v. Florida*, as the Delaware Supreme Court interpreted it in *Rauf*, was retroactive. But, the Court explained, it viewed the issue as "a matter of Delaware law" and, therefore, the Court was not strictly bound by federal precedent.[173] Instead, the Court looked to how Delaware courts had interpreted *Teague* in the past.[174]

Applying *Teague*, the Delaware Supreme Court determined that the State's reliance on *Schriro v. Summerlin* to argue that *Hurst*/*Rauf* is not retroactive was misplaced because, while *Ring* and *Hurst* "did not address the burden of proof" issue—*i.e.*, the burden of proof by which juries must make the necessary findings—the Court's decision in *Rauf* did.[175] Therefore, *Rauf*, unlike *Ring* and *Hurst*, "involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof."[176]

As a result, the Court determined *Rauf* fell "squarely within the second exception set forth in *Teague* requiring retroactive application of 'new rules' of criminal procedure 'without which the likelihood of an accurate [sentence] is seriously diminished.'"[177] Determining *Rauf* must apply retroactively, the Court relied on the U.S. Supreme Court's ruling in *Ivan V. v. City of New York*,[178] in which the Court held that the new rule announced in *In re Winship*[179] applied retroactively. In *Ivan V.*, the U.S. Supreme Court wrote: "[T]he major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* 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."[180] Analogizing "[t]he change in the burden of proof in *Winship* that was ruled retroactive in *Ivan V.*" to "the change in the burden of proof that occurred in *Rauf*,"[181] the *Powell* Court determined *Rauf* "constitute[d] a new watershed procedural rule of criminal procedure that must be applied retroactively in Delaware."[182]

2. Separate Opinions on the Supreme Court of Florida

Concurring with the Supreme Court of Florida's decision in *Asay*, Justice Polston explained that while he agreed "*Hurst v. Florida* is not

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[173] *Powell*, 153 A.3d at 72–73, 72 nn.18–19.
[174] *Id.*
[175] *Id.* at 73–74 (footnotes omitted).
[176] *Id.* at 74.
[177] *Id.*
[178] Ivan V. v. City of New York, 407 U.S. 203, 204–05 (1972) (per curiam).
[179] In re Winship, 397 U.S. 358, 359, 364–65, 368 (1970).
[180] *Ivan V.*, 407 U.S. at 205.
[181] *Powell*, 153 A.3d 69 at 76.
[182] *Id.* (noting that this conclusion was consistent with how the Court addressed the existing death sentences in the State after *Furman v. Georgia*, 408 U.S. 238 (1972), which held that imposition carrying out of death penalty in cases before court violated the Eighth and Fourteenth Amendments, when Delaware's death row prisoners' sentences were vacated).

retroactive to pre-*Ring* cases under" *Witt*, he believed that the *Teague* standard "is the proper and applicable test."[183] Similarly, in *Mosley*, Justice Canady wrote a concurring in part and dissenting in part opinion, joined by Justice Polston, which noted that he agreed with Justice Polston that the *Teague* framework is "more workable than *Witt*."[184] Justice Canady explained that he viewed *Johnson* as controlling and felt the majority's "wave-of-the-hand" to *Johnson* was no way to "treat a carefully reasoned precedent."[185]

Notwithstanding, Justice Canady determined that analyzing the issue "under *Witt* [was] sufficient to resolve the retroactivity issue."[186] Even applying *Witt*, Justice Canady argued, *Hurst* should not be retroactive.[187] Justice Canady argued that the analysis of *Hurst* retroactivity necessarily flowed from the analysis of *Ring* retroactivity, which flowed from the retroactivity of *Apprendi*[188]—as the Court had explained in *Johnson*. Justice Canady argued *Hurst* was, like *Ring*, an "evolutionary refinement" that ascended from *Apprendi* and was not justification for retroactivity.[189] In other words, because the Court had determined that neither *Ring* nor *Apprendi* were retroactive, Justice Canady argued that the decision in *Mosley* was inconsistent and out of place. In both of those prior decisions, the Court had determined that the decisions did not "cast serious doubt on the veracity or integrity" of the underlying decisions and, therefore, did not warrant retroactive relief.[190] Justice Canady felt the majority failed to make the same consideration in *Mosley*, which was required under *Witt*.[191] Essentially, Justice Canady felt the majority disregarded the elements of the *Witt* framework and improperly broadened retroactivity.[192]

Justice Canady further disagreed with the Court's alternative theory for granting retroactivity in Mosley's case based on fundamental fairness, writing that it was inconsistent "with the balancing process required by *Witt*."[193] Justice Canady explained that he disagreed with the entire premise of *James* and argued that the decision should be abrogated because it "ignored existing precedent"—namely *Witt*—and itself was incoherent.[194]

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[183] Asay v. State, 210 So. 3d 1, 29–30 (Fla. 2016) (Polston, J., concurring).

[184] Mosley v. State, 209 So. 3d 1248, 1288 n. 28 (Fla. 2016) (Canady, J., concurring in part and dissenting in part).

[185] *Id.* at 1285.

[186] *Id.* at 1288 n. 28.

[187] *Id.* at 1285.

[188] In *Hughes v. State*, 901 So. 2d 837, 838, 846, 848 (Fla. 2005), the Court determined *Apprendi* was not retroactive.

[189] Mosley v. State, 209 So. 3d 1248, 1287 (Fla. 2016).

[190] *Id.* at 1286–88 (quoting *Witt*, 287 So. 2d at 929).

[191] *Id.* at 1289.

[192] *Id.* at 1290.

[193] *Id.* at 1291.

[194] *Id.*

In conclusion, Justice Canady wrote that the majority's decision in *Mosley* "unjustifiably plunges the administration of the death penalty in Florida into turmoil that will undoubtedly extend for years."[195] Whether it was *Mosley* that caused it or not, Justice Canady eerily foreshadowed the future of Florida's death penalty.

3. No Retroactivity Under U.S. Court of Appeals for the Eleventh Circuit's Decision in Knight

Several years after *Hurst v. Florida*, *Hurst II*, *Asay*/*Mosley*, and *Rauf*/*Powell*, the Eleventh Circuit became the first federal court to address the retroactivity of *Hurst* for federal habeas proceedings.[196] Although the Florida Supreme Court had addressed the retroactivity of *Hurst* for state postconviction proceedings in *Asay* and *Mosley* and filtered through the hundreds of post-*Hurst* requests for relief, parts of which were based on retroactivity, this was the first time a federal court analyzed the retroactivity of *Hurst*.[197] This makes sense because by this time most of the death penalty cases across the country were centralized in states within the Eleventh Circuit's jurisdiction.

Before delving into the analysis of whether *Hurst* is retroactive, the Court explained why it could not "simply accept the Florida Supreme Court's decision to apply *Hurst* retroactively to Knight . . ., as Knight urge[d]" the Court to do.[198] State-specific standards could not "displace *Teague* on the federal stage." The Court explained that when states "choose to apply new rules of constitutional procedure that are not retroactive under *Teague* in federal courts," they do not misconstrue *Teague* but, rather, "develop[] *state* law to govern retroactivity in state postconviction proceedings."[199] That, the Eleventh Circuit said, is what the Florida Supreme Court did in *Mosley*.[200]

As to the federal courts, the Eleventh Circuit explained, it was "bound to follow *Teague*'s retroactivity principles" regardless of the

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[195] *Id.*

[196] Knight v. Fla. Dep't Corr., 936 F.3d 1322 (11th Cir. 2019).

[197] *Id.* at 1332. The Eleventh Circuit dipped its toe in the rough waters of *Hurst* retroactivity in *Lambrix v. Secretary, Florida Department of Corrections*, 851 F.3d 1158, 1165 n.2 (11th Cir. 2017), noting that "under federal law Hurst, like Ring, is not retroactively applicable on collateral review." In *Knight*, the Court noted that "*Hurst* would not apply retroactively to a petitioner whose convictions became final long before the Supreme Court decided *Ring* . . . and even before *Apprendi*." *Knight*, 936 F.3d at n.2. This was the first time the Court "was . . . squarely presented" with the question of the retroactivity of *Hurst* under *Teague*. *Id.*

[198] *Id.* at 1331–32.

[199] *Id.* at 1332.

[200] *Id.*

applicable state court's decision in collateral proceedings.[201] For federal habeas cases, "*Teague* retroactivity is a 'threshold question . . . .'"[202]

The Eleventh Circuit's decision in *Knight v. Florida Department of Corrections* was similar to the approach Justices Canady and Polston advocated for in their separate opinions years before—applying *Teague* to *Hurst* and finding that it does not apply retroactively. But the nuances of the Eleventh Circuit's decision are significant. Applying *Teague*, the Eleventh Circuit determined *Hurst* did not apply retroactively to federal habeas proceedings because "*Ring* did not dictate the Supreme Court's later invalidation of Florida's death penalty sentencing scheme in *Hurst*."[203] In other words, the Eleventh Circuit determined *Hurst* was a new rule and not merely an extension or product of *Ring*. The Court explained that the *Hurst* conclusion was not "apparent to all reasonable jurists" at the time Knight's sentence became final—as illustrated by even that Court's own jurists determining Florida's capital sentencing scheme passed muster under *Ring*.[204] Of course, the Eleventh Circuit's determination that *Hurst* was not the product of *Ring* is at odds with how the Supreme Court of Florida characterized *Hurst* in conducting its *Witt* analysis in *Mosley*.

4. Summary of Analyses of Hurst *Retroactivity*

The table below summarizes the cases regarding *Hurst* retroactivity canvassed above in this part:

Table 2 Summary of Cases Addressing the Retroactivity of Hurst

Jurisdiction	**Case**	**Retroactivity Standard**	**Conclusion**
Delaware	*Powell v. Delaware*, 153 A.3d 69 (Del. 2016).	*Teague*	Retroactive

[201] *Id.* at 1333.
[202] *Id.* (quoting Caspari v. Bohlen, 510 U.S. 383, 389 (1994)).
[203] *Id.* at 1335.
[204] *Id.*

Florida	*Asay v. State*, 210 So. 3d 1 (Fla. 2016).	State-specific	No retroactivity before *Ring* for Sixth Amendment rights
Florida	*Mosley v. State*, 209 So. 3d 1248, 1290–91 (Fla. 2016	State-specific	Retroactive after *Ring* for Sixth Amendment rights
Florida	*Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017).	State-specific	Partial retroactivity for Eighth Amendment rights, as explained in *Asay*/*Mosley*
Eleventh Circuit Court of Appeals	*Knight v. Florida Department of Corrections*, 936 F.3d 1322 (11th Cir. 2019).	*Teague*	Not retroactive

VI. IDENTIFYING AND UNRAVELING SOURCES OF CONFUSION

The confusion surrounding the retroactivity of *Ring v. Arizona* and *Hurst v. Florida* is the quintessential Gordian Knot.[205] Attempting to disentangle the divergent doctrine that has developed in this area, this part identifies four points that likely caused the confusion: (A) it was unclear from the beginning whether *Hurst v. Florida* was a direct result of *Ring v. Arizona* and, if so, there was an absence of guidance regarding retroactivity;

[205] *See* Evan Andrews, *What Was the Gordian Knot*, HISTORY, https://www.history.com/news/what-was-the-gordian-knot (last updated Aug. 29, 2018).

(B) the role of the Eighth Amendment in the *Hurst*/*Ring* context has never been properly defined; (C) although courts consistently applied *Teague* to deciding *Ring* retroactivity, that consistency ended when it came to applying *Teague* to *Hurst*; and (D) the Supreme Court of Florida introduced the concept of partial retroactivity.

Of course, the obvious answer is that the Court weighs in as to the appropriate standard that should apply when courts analyze whether *Hurst* applies retroactively—*i.e.*, whether courts must or may apply *Teague* to such analysis. Absent such explicit clarity, this part identifies the sources of the confusion plaguing the lower courts' retroactivity jurisprudence and what judges might do to resolve it.

A. The Ambiguous Relationship Between Ring *and* Hurst

The relationship between *Ring* and *Hurst* has generated some of the confusion that bogs down related retroactivity analyses. On one hand, the *Hurst* decision itself connects the two opinions, stating: "The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's."[206] Likewise, on remand in *Hurst II*, the Supreme Court of Florida carried that forward, stating: "Against this backdrop of decisions implementing the guarantees of the Sixth Amendment in *Apprendi*, *Ring*, and *Blakely*, the Supreme Court issues its opinion in *Hurst v. Florida*, holding that Florida's capital sentencing scheme violated the Sixth Amendment and the principles announced in *Ring* by committing to the judge, and not to the jury, the factfinding necessary for imposition of the death penalty."[207] *Hurst v. Florida* overruled the Supreme Court of Florida's earlier decisions determining *Ring* did not apply to Florida's capital sentencing statute—to indicate the Court got it wrong fourteen years prior.[208] In fact, one of the Court's theories regarding the retroactivity of *Hurst*—the preservation theory—turned on whether the defendant had raised a *Ring* claim that would have been successful after *Hurst* (as discussed below).[209]

On the other hand, in *Knight*, the Eleventh Circuit determined that *Ring* did not dictate the result in *Hurst.* For the Eleventh Circuit's *Teague* analysis in *King*, it was insufficient that *Hurst* was "within the logical compass of" or even "controlled by" *Ring*. In determining that *Hurst* was not a direct result of *Ring*, the Court relied on (1) the *Ring* Court's acknowledgment of differences in Florida's capital sentencing scheme at the time,[210] (2) the "obvious pains" the Supreme Court of Florida took to

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[206] Hurst v. Florida, 577 U.S. 92, 98 (2016).

[207] Hurst v. State, 202 So. 3d 40, 50 (Fla. 2016).

[208] *See* Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002); King v. Moore, 831 So. 2d 143, 151–52 (Fla. 2002).

[209] *See* Mosley v. State, 209 So. 3d 1248, 1275 (Fla. 2016) (per curiam).

[210] Knight v. Fla. Dep't Corr., 936 F.3d 1322, 1335 (11th Cir. 2019).

distinguish Florida's capital sentencing scheme from Arizona's to salvage its capital sentencing scheme after *Ring*,[211] and (3) the fact that the *Ring* Court did not address *Spaziano* and *Hildwin*, which upheld Florida's capital sentencing scheme.[212] The Court also noted Justice Alito's dissenting opinion in *Hurst* in which he noted again the differences between Arizona's sentencing statute at issue in *Ring* and Florida's at issue in *Hurst*—which had been in place since *Ring*.[213]

The Eleventh Circuit further explained that the outcome of *Hurst* was not "apparent to all reasonable jurists" at the time *Ring* was decided.[214] In fact, the Court noted that jurists on the Eleventh Circuit were within the group of jurists to which that question was unclear.[215] Thus, the Eleventh Circuit determined *Hurst* was a *new* rule—independent of *Ring*.[216]

Of course, the Supreme Court of Florida essentially found the opposite in *Asay* and *Mosley* and the Justices on the Supreme Court of Florida who dissented in 2002 would argue it *was* clear then. The Eleventh Circuit went on to determine *Hurst* did not fall within either of *Teague*'s exceptions to justify retroactivity.

While the *Knight* Court's determination that *Hurst* was a *new* rule was in stark contrast to the Supreme Court of Florida's determination in *Asay* and *Mosley*, it was not completely inconsistent with the Delaware Supreme Court's analysis in *Powell*. In *Powell*, the Supreme Court of Delaware similarly determined there was a *new* aspect to *Hurst* that was not present in *Ring*, as discussed above. The difference between *Knight* and *Powell*, though, was that the Eleventh Circuit determined *Hurst* did not fall within either of the *Teague* exceptions to warrant retroactivity. While the obvious distinction is that *Powell* was based on a Delaware-specific interpretation of *Teague*, that does not seem sufficient to reconcile these two opinions, which reach essentially opposite conclusions.

After all of these decisions, in *McKinney v. Arizona*, the U.S. Supreme Court stated that *Hurst v. Florida* "applied *Ring* and decided that Florida's capital sentencing scheme" violated the Sixth Amendment.[217] This seems to suggest that *Hurst* was *not* a new rule but, rather, the Court merely applying the same rule from *Ring* to Florida—as the Supreme Court of Florida viewed it. However, the Supreme Court has not provided guidance as to retroactivity.

To avoid this confusion, the *Hurst* Court could have further clarified the relationship between *Hurst* and *Ring*, perhaps indicating whether it

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[211] *Id.*
[212] *Id.* at 1336.
[213] *Id.* at 1335–36 (quoting Hurst v. Florida, 577 U.S. 92, 104 (2016) (Alito, J., dissenting)).
[214] *Id.* at 1335.
[215] *Id.*
[216] *Id.* at 1336.
[217] *McKinney* also indicated that the Court adopted the narrow reading of *Hurst v. Florida* on the merits.

viewed *Hurst* as a decision that should have been made at the time *Ring* was decided—or to have applied since *Ring*. This seems analogous to the Court indicating, in overturning precedent, that a decision was wrong the day it was decided—*i.e.*, Florida's capital sentencing scheme was also unconstitutional the day *Ring* was decided. It is possible that *McKinney*, had it been decided sooner, would have affected retroactivity analyses like the Eleventh Circuit's in *Knight*. However, retroactivity was essentially "set in stone" by the time *McKinney* was decided.

B. Unclear Role of the Eighth Amendment in the Ring/Hurst *Discussion*

To say the Eighth Amendment has been lost in translation in the mess of *Hurst v. Florida* and its progeny would be an understatement.[218] First, the Supreme Court heard briefing and argument regarding the effect of the Eighth Amendment on the issue in *Hurst v. Florida* but, in its decision, addressed only the Sixth Amendment—against dissent.[219]

Likewise, while the Supreme Court of Florida's decision on remand in *Hurst II* was pending, scholars contemplated the effect of the Eighth Amendment on the impending discussions. For example, Professors Trocino and Meyer's article "Hurst v. Florida *Ha'p'orth of Tar: The Need to Revisit* Caldwell, Clemons, *and* Proffitt" focused explicitly on the Eighth Amendment and strongly urged the Supreme Court of Florida to address the Eighth Amendment in its decision on remand.[220]

In addressing *Hurst* on remand and its fallout, the Florida Supreme Court did not do much by way of clarification as to the Eighth Amendment's role in the *Hurst* discussion. On remand, the Supreme Court of Florida attempted to include the Eighth Amendment in *Hurst II* in holding that the jury's recommendation for death must be unanimous. Ultimately, however the court failed to follow through with properly analyzing the effect of this distinct amendment in other discussions—including, pertinent here, retroactivity.[221]

Rather, seemingly fatigued by the carousel of unanswered questions and confusing analyses, the Court either conflated the Eighth and Sixth Amendments for purposes of answering post-*Hurst* questions or excluded the Eighth Amendment completely. Most significantly, in *Hitchcock*, the Court denied retroactivity of the Eighth Amendment right discussed in *Hurst*

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[218] *See generally* Trocino & Meyer, *supra* note 29.

[219] *See* Hurst v. Florida, 577 U.S. 92 (2016) (Breyer, J., concurring); Reply Brief for Petitioner, *Hurst*, 577 U.S. 92 (No. 14-7505) 2015 WL 5138584 (U.S. 2015); Brief for Respondent, *Hurst*, 577 U.S. 92 (No. 14-7505) 2015 WL 4607695 (U.S. 2015); Brief for Respondent, *Hurst*, 577 U.S. 92 (No. 14-7505) 2015 WL 6865696 (U.S. 2015).

[220] *See generally* Trocino & Meyer, *supra* note 29.

[221] As explained *supra*, the Court did not address the retroactivity of the Eighth Amendment rights in *Hurst II* until *Hitchcock* and, in doing so, applied the Court's Sixth Amendment analysis.

II based on the Sixth Amendment discussion in *Asay*.[222] In doing so, the Court conflated the Eighth and Sixth Amendments by applying the Court's *Witt* analysis in *Asay*, which was based on Sixth Amendment jurisprudence, to deny retroactivity of the Eighth Amendment right in *Hitchcock*. Had the Court separately analyzed the retroactivity of the Eighth Amendment, the Court's analysis likely would have been different.

Further, in analyzing various aspects of *Hurst*, the Court excluded the Eighth Amendment from the discussion. As Justice Sotomayor noted in her dissenting opinion from the Court's denial of the petition for a writ of certiorari (joined by Justices Ginsburg and Breyer) in *Truehill v. Florida*, the Supreme Court of Florida failed to address the effect of *Caldwell v. Mississippi* on the *Hurst* analysis, which defendants raised numerous times.[223] It was not until the Florida Supreme Court's decision in *Reynolds v. State*—almost two years after *Hurst II*—that the Court addressed *Caldwell*, in a seemingly *post hoc* analysis.[224]

Distinguishing the Sixth and Eighth Amendments in the capital sentencing context remains an important area of jurisprudence that could benefit from clarification—as discussed further below.

C. Inconsistent Application of Teague *to Retroactivity of* Hurst

Another area of confusion is the inconsistent application of *Teague* in the context of *Hurst* retroactivity, in contrast to its consistent application in the context of *Ring* retroactivity. Delaware's decision in *Powell* seems to be the turning point here.

Consider the *Teague* cases as two groups: (1) cases addressing *Ring* retroactivity, and (2) cases addressing *Hurst* retroactivity. In the first group, all of the cases reached the same conclusion: *Ring* does not apply retroactively. However, in the second group, the cases are inconsistent. In *Powell*, the Delaware Supreme Court applied *Teague* and determined that *Hurst* applied retroactively. But, in *Knight*, the Eleventh Circuit Court of Appeals applied *Teague* and determined that *Hurst* did not apply retroactively. Of course, *Knight* was consistent with all of the *Teague*-based decisions regarding *Ring* retroactivity, as well as the separate opinions from the Supreme Court of Florida arguing that *Teague* was the proper standard but, regardless, *Hurst* was not retroactive.

The procedural posture seems to be the key to distinguishing *Knight* and *Powell*. The analysis in *Knight* seemed specific to the federal habeas corpus context in which it was decided. It had to be because, otherwise, it would have completely contradicted the retroactivity decisions from the

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[222] *See generally* Hitchcock v. State, 226 So. 3d 216 (Fla. 2017) (per curiam).

[223] Truehill v. Florida, 138 S. Ct. 3, 3–4 (2017) (Sotomayor, J., dissenting).

[224] Reynolds v. State, 251 So. 3d 811, 818 (Fla. 2018). *But see id.* at 831–32 (Pariente, J., dissenting).

Supreme Court of Florida that applied to defendants whose cases would also be reviewed by the Eleventh Circuit. But is that enough to explain away two courts reaching opposite conclusions on whether *Hurst* applies retroactively under *Teague*?

Moreover, if *Hurst* is a direct result of *Ring*, the second group of cases should be consistent with the first group. However, *Powell* (in the second group) is inconsistent with the outcome in the first group.

Jurisprudentially, this inconsistency undermines the stability of the *Teague* standard, which seemed to be the stronghold of the *Ring* retroactivity analysis. Or was the source of consistency for *Ring* retroactivity merely that the U.S. Supreme Court decided the question in *Shriro* and, thereby, provided guidance? If so, only the U.S. Supreme Court can resolve the confusion.

D. Supreme Court of Florida's Novel Partial Retroactivity in Deciding Hurst *Retroactivity*

Sorting out the issues with *Teague* would not have fixed the issue in Florida, where the Court applied state-specific case law in analyzing *Hurst* retroactivity. Not only that, but the way the Supreme Court of Florida approached *Hurst* retroactivity was novel. As this section explains, the Court (1) presented alternative theories of retroactivity, and (2) invented partial retroactivity.

First, as explained above, the Supreme Court of Florida's decision in *Mosley* presented two alternative theories of retroactivity, both of which could independently support the Court's decision.[225] In addition to determining that *Hurst* should apply retroactively to post-*Ring* sentences under *Witt*, the Court also determined that Mosley should receive retroactive application of *Hurst* based on a fundamental fairness theory because he had preserved a *Hurst*-like argument.[226] Although based on completely different logic not tied to *Ring*, the Court determined the fundamental fairness theory, like the *Witt* analysis, applied only to defendants whose sentences became final after *Ring*.[227] For example, defendants like Louis Gaskin and Michael Lambrix, who had also preserved the argument but whose sentences became final before *Ring*, did not receive the benefit of the Court's fundamental fairness theory.[228]

In presenting these two theories, the Court failed to designate one as the Court's primary reasoning for its holding.[229] While case law suggests

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[225] *See generally* Mosley v. State, 209 So. 3d 1248 (Fla. 2016).
[226] *See generally id.*
[227] *See generally id.*
[228] *See generally* Lambrix v. State, 217 So. 3d 977 (Fla. 2017); Gaskin v. State, 218 So. 3d 399 (Fla. 2017).
[229] *See generally Mosley*, 209 So. 3d 1248.

that the *Witt* analysis was the Court's primary reasoning,[230] the interaction between the two Court's alternative theories for retroactivity no doubt contributed to the confusion surrounding *Hurst* retroactivity.

To minimize confusion here, the obvious solution would have been for the Supreme Court of Florida to have relied upon only one theory to reach its retroactivity holding. Based on the suggestion in the Court's case law after *Asay* and *Mosley* as well as the way the Court has analyzed retroactivity in the past, it seems the primary theory was *Witt* rather than fundamental fairness.

Outside of that, if the Court determined that both theories were necessary for its holding in *Mosley*, the Court could have designated one theory as the primary reasoning for reaching its holding—i.e., designating the other as a form of dicta. That would have at least signaled to counsel and other courts—either trial courts or courts reviewing this issue in the future—which theory the Court relied upon more in reaching its holding.

Second, the Florida Supreme Court's determination that *Hurst* applied retroactively to only a portion of Florida's death row undoubtedly created confusion. Through *Asay* and *Mosley*, the Florida Supreme Court essentially invented the concept of partial retroactivity.[231] Considering the Court's reasoning for doing so, the new concept of partial retroactivity seems to be a product of compromise between (a) the Court being uncomfortable with granting full retroactivity in light of the fact that the Court denied retroactivity of *Ring* and (b) the Court's acknowledgement of the significance of *Hurst*, which weighed in favor of granting retroactivity.

The obvious solution here seems to lie in absoluteness. Consistent with decades of retroactivity case law, the Supreme Court of Florida could have held that *Hurst v. Florida* was either fully retroactive or not retroactive at all, as the Court did after *Ring* and as other courts that reviewed the retroactivity of *Ring* and *Hurst* did. Had the Court done so, it is likely that the additional litigation surrounding *Hitchcock* would have been avoided because the pre-*Ring* defendants would not have been left wondering why they were left without retroactivity based on a seemingly arbitrary deadline.

Absent guidance at the outset to *prevent* confusion, the Court could have also attempted to provide guidance *after Hurst* once confusion had begun. Instead, after *Hurst*, the Supreme Court did not provide any further guidance. Until *McKinney v. Arizona* almost four years later, the Court seemed to avoid any post-*Hurst* issues, including whether Florida could execute defendants whose sentences had not been reviewed in light of *Hurst* because their sentences were not entitled to retroactive application of *Hurst* based on *Asay*. Even against strong dissents, the Court denied petition after

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[230] *See, e.g.*, Gregory v. State, 224 So. 3d 719, 738 (Fla. 2017).

[231] *See generally* Asay v. State, 210 So. 3d 1 (Fla. 2016); Mosley v. State, 209 So. 3d 1248 (Fla. 2016).

petition.[232] Indeed, Florida has conducted seven executions since *Hurst*. All of the executed defendants were executed based on pre-*Ring* sentences that were not entitled to the retroactive application of *Hurst* under *Asay*:

Name	**Date of Offense**[233]	**Date Sentence Became Final**[234]	**Date of Execution**[235]
Mark Asay	March 12, 1964	October 7, 1991	August 24, 2017
Michael Lambrix	March 29, 1960	1986	October 5, 2017
Patrick Hannon	October 24, 1964	February 21, 1995	November 8, 2017
Eric Branch	February 7, 1971	1997	February 22, 2018
Jose Jimenez	October 12, 1963	1998	December 13, 2018
Robert Long	October 14, 1953	1993	May 23, 2019
Gary Bowles	January 25, 1962	June 17, 2002	August 22, 2019

[232] *See, e.g.*, Middleton v. Florida, 138 S. Ct. 829 (2018) (Breyer, J., dissenting); *id.* at 829–30 (Sotomayor, J., dissenting); Truehill v. Florida, 138 S. Ct. 3, 3–4 (Sotomayor, J., dissenting).

[233] *Execution List: 1976-Present*, FLA. DEP'T CORR., http://www.dc.state.fl.us/ci/execlist.html.

[234] Bowles v. State, 276 So. 3d 791 (Fla. 2019); Long v. State, 235 So. 3d 293, 294 (Fla. 2018); Jimenez v. State, 265 So. 3d 462, 469 (Fla. 2018); Branch v. State, 234 So. 3d 548, 549 (Fla. 2018); Hannon v. State, 228 So. 3d 505, 507 (Fla. 2017) (per curiam); Lambrix v. State, 217 So. 3d 977, 980 (Fla. 2017); Asay v. State, 210 So. 3d 1, 39 (Fla. 2016).

[235] *Execution List*, *supra* note 233.

Notwithstanding the Court's avid avoidance of reviewing *Hurst*-related cases, specific circumstances likely contributed to the Supreme Court's lack of guidance on the retroactivity of *Hurst*. To the extent the Court had any interest in affecting the Supreme Court of Florida's decisions in *Asay* and *Mosley*, the fact that the Supreme Court of Florida relied on state law in deciding those cases likely made it more difficult. Had the Florida Supreme Court applied *Teague* in addressing the retroactivity question, the Supreme Court may have been more inclined to accept certiorari.

VII. RESOLVING THE CONFUSION BY DELINEATING THE ROLES OF THE SIXTH AND EIGHTH AMENDMENTS

As discussed throughout this article, the confusion that surrounded the retroactivity of *Ring* and, even more so, *Hurst*, affected hundreds of capital appeals. More importantly, it left the lives of those on death row hanging in the balance. Ultimately, resolving this confusion is in the purview of the courts, both in hindsight and prospectively; and, doing so seems to lie in the clearer demarcation between the Sixth and Eighth Amendments.

In hindsight, confusion could have been avoided if the courts had more clearly distinguished between the Sixth and Eighth Amendments in the *Hurst* conversation. The Supreme Court of Florida could have course-corrected a few times. First, the Court could have fully explained the Eighth Amendment argument in *Hurst II* and how the Eighth Amendment interacted with the Sixth Amendment in supporting the Court's holding.

Then, the Court could have carried forward such demarcation between the Sixth and Eighth Amendments in formulating its harmless error standard and in analyzing the retroactivity of *Hurst*. Instead, when deciding *Asay*, the Court ignored the Eighth Amendment.

Third, the Court could have addressed retroactivity of the Eighth Amendment right discussed in *Hurst II* separate from the Sixth Amendment rights on the front-end when presented with the question of the retroactivity of *Hurst* in *Asay* and *Mosley*. The analysis likely would have been wholly different considering *Ring* is not the source of the Eighth Amendment rights discussed in *Hurst II* and, therefore, would likely not be the basis for any turning point in the retroactivity analysis.

Absent that, when the issue arose in *Hitchcock*, the Court could have performed the retroactivity analysis anew on Eighth Amendment grounds rather than merely applying its Sixth Amendment analysis to the Eighth Amendment discussion from *Hurst II*. Of course, that would have caused a tidal wave of litigation from defendants who were denied Sixth Amendment retroactivity based on *Asay*. (But *Hitchcock* ultimately caused that effect anyway.)

Had it done so, it is likely the Court would have reached a different conclusion on the retroactivity of the Eighth Amendment rights discussed in

Hurst II, as the line of demarcation for retroactivity that the Court defined in *Asay* (i.e., the day on which the U.S. Supreme Court decided *Ring*) would not apply. Therefore, more defendants would have been entitled to retroactive relief under the Eighth Amendment rights in *Hurst II*.

Barring self-correction by the Supreme Court of Florida, the U.S. Supreme Court could have granted certiorari to clarify confusion. While the Court understandably would not want to insert itself in the Florida Supreme Court's application of the state-specific *Witt* standard, granting certiorari from the Supreme Court of Florida's decision in *Hitchcock* could have been an opportunity for the Court to make the necessary and important clarification that the Sixth Amendment is separate and distinct from the Eighth Amendment, including, and especially, in the capital sentencing context. Such clarification would have likely affected the Eleventh Circuit's decision in *Knight*, in which the Eleventh Circuit grappled with the vague language of the U.S. Supreme Court's opinion in *Hurst*, and which ultimately created differing conclusions on the retroactivity of *Hurst* under the *Teague* analysis.

Albeit, such clarification never came. The proper role of the Eighth Amendment in the *Hurst* discussion—and the capital sentencing process more broadly—remains ambiguous. Of course, this creates fodder for future confusion.

It is almost certain that *Hurst* is not the last decision to create a paradigm shift in capital sentencing before abolition—which seems to be the ultimate resting point for capital sentencing.[236] As in the past leading up to the modern-day framework, future decisions are likely to be grounded in either the Sixth or Eighth Amendment.[237] Most basically, decisions about *who* can be sentenced to death are likely to be based in the Eighth Amendment; and, decisions about *how* defendants are sentenced to death are likely to be based in the Sixth Amendment. However, courts have conflated these two theories and bases for decisions for decades—which has contributed to confusion in several areas, including in the retroactivity context. Thus, the Court would be well-served to properly distinguish between the Sixth and Eighth Amendment in reaching each such decision. If both the Sixth and Eighth Amendments are involved, the Court would be well-served to define the boundaries of each Amendment's role in the discussion. Doing so would aid courts in analyzing the new rules for purposes of determining retroactivity and, therefore, avoid confusion like the uncertainty that surrounds the retroactivity of *Hurst*.

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[236] *See generally* Melanie Kalmanson, *Steps Toward Abolishing Capital Punishment: Incrementalism in the American Death Penalty*, 28 WM. & MARY BILL RTS. J. 587 (2020) (arguing that the path toward abolition resembles incrementalism).

[237] *See generally id.*

VIII. CONCLUSION

The U.S. Supreme Court's decisions in *Ring v. Arizona* and *Hurst v. Florida* significantly improved capital defendants' right to a trial by jury under the Sixth Amendment. So long as capital sentencing remains a viable punishment in the United States, cases like *Ring* and *Hurst* will undoubtedly continue emanating from the U.S. Supreme Court—or, worse, cases restricting capital defendants' rights. Indeed, several such decisions have been decided since *Hurst*.[238]

Despite the substantive "wins" for capital defendants in *Ring* and *Hurst*, applying these two decisions to capital defendants whose sentences were already final when the decisions were issued created confusion and roadblocks to relief. As this article explained, the jurisprudence surrounding the retroactivity of *Hurst* and *Ring* is the quintessential Gordian Knot. At their essence, decisions regarding the retroactivity of *Ring* were ultimately consistent; courts that applied the *Teague* standard concluded, consistent with the U.S. Supreme Court's decision in *Shriro v. Summerlin*, that *Ring* was not retroactive.

However, decisions surrounding the retroactivity of *Hurst* are inconsistent and difficult to reconcile. While the debate of *Hurst* retroactivity seems to be settled, this article disentangled this confusing area of jurisprudence to hopefully provide guidance for similar issues that arise the future. This article identified four points that led to the confusion in determining the retroactivity of *Hurst*: (1) it was unclear from the beginning whether *Hurst v. Florida* was a direct result of *Ring v. Arizona* and, if so, the U.S. Supreme Court did not provide guidance regarding retroactivity; (2) the role of the Eighth Amendment in the *Hurst*/*Ring* context has never been properly defined; (3) although courts consistently applied *Teague* to *Ring* retroactivity, courts applying *Teague* to the retroactivity of *Hurst* have reached different conclusions; and (4) in analyzing the retroactivity of *Hurst*, the Supreme Court of Florida introduced the concept of partial retroactivity, which added uncertainty to retroactivity jurisprudence. In many instances, the retroactivity determination could mean the difference between life or death.

There clearly remains room for improvement in this area. As this article explained, capital jurisprudence would greatly benefit from clarification by the U.S. Supreme Court as to the proper distinction between the Sixth and Eighth Amendments in the capital sentencing process. This entangled area of decades of jurisprudence has affected the lives of hundreds, if not thousands, of capital defendants. As long as capital sentencing remains viable in any jurisdiction, it is imperative that defendants' constitutional rights are honored throughout the sentencing

[238] *See generally, e.g.*, Shinn v. Ramirez, 141 S. Ct. 2228 (2022).

process and such rights are not jeopardized due to inconsistent and imprecise analyses.