# THE RETROACTIVITY OF *HURST V. FLORIDA*, 136 S. CT. 616 (2016) TO DEATH-SENTENCED PRISONERS ON COLLATERAL REVIEW

Angela J. Rollins* & Billy H. Nolas**

## I. INTRODUCTION

In *Apprendi v. New Jersey*, the United States Supreme Court established that any finding that increases a defendant's potential maximum sentence is an element of the offense that must be presented to the jury and proved beyond a reasonable doubt.[1] Applying that concept in *Hurst v. Florida*, the Supreme Court found Florida's death-sentencing scheme, which required a judge rather than a jury to make the ultimate factual findings to impose a death sentence, unconstitutional.[2] The Court held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."[3]

*Hurst* left no indication as to whether its holding applies retroactively to death-sentenced individuals seeking post-conviction relief. In federal-habeas review and some states' post-conviction review processes, this inquiry centers on applying the federal retroactivity analysis announced in *Teague v. Lane*.[4] In *Schriro v. Summerlin*, the Supreme Court, applying *Teague*, found that *Ring v. Arizona*,[5] often considered *Hurst*'s predecessor case, was not retroactive on collateral review.[6] *Summerlin*, however, does not settle the matter of *Hurst*'s retroactivity for a few reasons. First, *Hurst*'s holding included a proof-beyond-a-reasonable-doubt issue that was not present in *Summerlin*,[7] and the Supreme Court has traditionally given

* Attorney, Capital Habeas Unit, Office of the Federal Public Defender for the Northern District of Florida. Former law clerk to the Honorable Harris Hartz of the United States Court of Appeals for the Tenth Circuit, the Honorable Staci M. Yandle of the United States District Court for the Southern District of Illinois, and the Honorable J. Phil Gilbert of the United States District Court for the Southern District of Illinois.

** Chief, Capital Habeas Unit, Office of the Federal Public Defender for the Northern District of Florida.

1. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); *see also* Ring v. Arizona, 536 U.S. 584, 609 (2002); Blakely v. Washington, 542 U.S. 296, 301 (2004); United States v. Booker, 543 U.S. 220, 244 (2005); Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013).
2. Hurst v. Florida, 136 S. Ct. 616, 619 (2016).
3. *Id.*
4. *See generally* Teague v. Lane, 489 U.S. 288 (1989).
5. *See generally Ring*, 536 U.S. at 609.
6. Schriro v. Summerlin, 542 U.S. 348, 352 (2004).
7. *See id.* at 351 n.1 ("Because Arizona law already required aggravating factors to be proved beyond a reasonable doubt, that aspect of *Apprendi* was not at issue.") (internal citations omitted).

retroactive application to pre-*Teague* proof-beyond-a-reasonable-doubt cases.[8] Second, state courts, even those that look to *Teague* for their retroactivity analyses, are not bound by the federal courts' decisions interpreting *Teague* and are therefore not bound by the jury-trial retroactivity portion of *Summerlin*.[9] Third, the Court's application of *Teague* to *Miller v. Alabama*[10] in *Montgomery v. Louisiana*[11] indicates that the Supreme Court's reluctance to hold cases retroactive under *Teague* may be eroding or that the Court is considering retroactivity under a contextual approach.

This Article argues that *Hurst* is retroactive under *Teague* to all death-sentenced prisoners seeking post-conviction relief. Section I examines *Hurst*'s predecessor cases: *Apprendi* and *Ring*. Section II examines Florida's death-sentencing scheme and the U.S. Supreme Court's decision in *Hurst*. Section III applies the *Teague* analysis to *Hurst* and shows *Hurst* is retroactive on collateral review under a traditional *Teague* analysis. Recent Supreme Court precedent, however, indicates that the Court's reluctance to hold new rules retroactive under *Teague* is eroding or the Court is recognizing "constitutional difference" in its analysis.

## II. BACKGROUND

*Hurst* finds its modern roots, for the most part, in *Apprendi*. There, the Court held that any fact that increases a sentence above the statutory maximum must be found by a jury beyond a reasonable doubt.[12] Applying *Apprendi*, the Supreme Court in *Ring* determined that Arizona's death-sentencing statute was unconstitutional because judges—not jurors—made the ultimate factual findings required to impose a death sentence.[13] A review of *Apprendi* and *Ring* follows.

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8. *See* Ivan V. v. City of New York, 407 U.S. 203, 205 (1972); Hankerson v. North Carolina, 432 U.S. 233, 242 (1977).
9. Danforth v. Minnesota, 552 U.S. 264, 280–81 (2008).
> [T]he *Teague* rule of nonretroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings. It was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own [s]tate's convictions.

*Id.*; *see also* Casiano v. Comm'r of Corr., 115 A.3d 1031, 1038 (Conn. 2015).
10. *See generally* 132 S. Ct. 2455 (2012) (prohibiting mandatory life-without-parole sentences for juveniles).
11. *See generally* 136 S. Ct. 718 (2016) (holding *Miller v. Alabama* retroactive).
12. 530 U.S. 466, 490 (2000).
13. 536 U.S. 584, 609 (2002).

A. *Apprendi v. New Jersey*

Before *Apprendi*, jurisdictions were free to define which facts that increased a sentence were elements of the offense and which facts that increased a sentence were sentencing factors.[14] Only elements of a crime were required to be pleaded in the indictment and proved to a jury beyond a reasonable doubt.[15] Sentencing factors, however, could increase a defendant's sentence above the statutory maximum without the jury finding those facts beyond a reasonable doubt.[16] That was the case in *Apprendi*.

In *Apprendi*, the defendant pleaded guilty to two counts of possession of a firearm, each count carrying a statutory punishment of five to ten years' imprisonment.[17] At sentencing, the court found by a preponderance of the evidence "that the crime was motivated by a racial bias" and sentenced the defendant to twelve years' imprisonment—two years above the statutory maximum.[18]

The defendant argued that his sentence violated the Due Process Clause of the U.S. Constitution because the finding that increased his sentence above the statutory maximum was not proved to a jury beyond a reasonable doubt.[19] The Supreme Court agreed, holding that the Fifth Amendment due-process right and the Sixth Amendment jury-trial right require that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[20] As Justice Scalia noted in his concurrence, the Sixth Amendment right to a jury "has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury."[21]

14. *See* Luis E. Chiesa, *When an Offense is Not an Offense: Rethinking the Supreme Court's Reasonable Doubt Jurisprudence*, 44 CREIGHTON L. REV. 647, 666 (2011).
15. Hamling v. United States, 418 U.S. 87, 117 (1974) (stating that an indictment must charge all elements of the offense); Patterson v. New York, 432 U.S. 197, 210 (1977) ("[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged . . . .").
16. *Apprendi*, 530 U.S. at 492 (noting that McMillan v. Pennsylvania, 477 U.S. 79 (1986), held that "the legislature can authorize a judge to find a traditional sentencing factor on the basis of a preponderance of the evidence . . .").
17. *See id.* at 466.
18. *Id.* at 471.
19. *See id.*
20. *Id.* at 490.
21. *See id.* at 499 (Scalia, J., concurring).

B. *Ring v. Arizona* and the Former Arizona Death-Sentencing Scheme

*Apprendi* resulted in numerous sentencing changes, including requirements that facts that increase mandatory-minimum sentences[22] and facts that increase fines[23] be submitted to a jury. In *Ring*, the Supreme Court applied *Apprendi*'s holding to findings of fact that increased the defendant's sentence from life imprisonment to death.[24] In doing so, it found Arizona's capital-sentencing scheme unconstitutional.[25] The Court stated: "Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[26] A summary of *Ring* follows.

An Arizona jury found Timothy Ring guilty of felony murder.[27] The Arizona death-penalty statute provided that the statutory maximum sentence for felony murder was life imprisonment, "unless further findings were made."[28] In particular, Arizona's first-degree murder statute provided: "First degree murder . . . is punishable by death or life imprisonment as provided by § 13-703."[29] Before imposing a death sentence, section 13-703 required the judge to "conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances . . . for the purpose of determining the sentence to be imposed."[30] The statute further provided: "The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state."[31] After the sentencing hearing, the statute directed the judge to find aggravating and mitigating circumstances.[32] A defendant could only be sentenced to death if the judge found at least one aggravating circumstance beyond a

22. Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013).

> Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury.

*Id.*

23. S. Union Co. v. United States, 132 S. Ct. 2344, 2349 (2012) (extending *Apprendi* to criminal fines).
24. Ring v. Arizona, 536 U.S. 584, 589 (2002).
25. *Id.* at 609.
26. *Id.* at 589.
27. *See id.* at 591–92.
28. *Id.* at 592.
29. *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-1105(C) (2001)).
30. *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-703(C) (2001)).
31. *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-703(C) (2001)).
32. *Id.*

reasonable doubt[33] and that "there [were] no mitigating circumstances sufficiently substantial to call for leniency."[34]

Although there was no testimony at trial indicating Ring was a major participant in the murder,[35] a co-defendant testified at the sentencing that Ring was a leader in the crime and fired the shot that killed the victim.[36] Based on that testimony, the judge found that Ring murdered the victim and was a major participant in the robbery.[37] The judge then considered the aggravating and mitigating circumstances.[38] The judge found two aggravating circumstances beyond a reasonable doubt: (1) "Ring committed the offense in expectation of receiving something of 'pecuniary value,'" and (2) Ring committed the offense "in an especially heinous, cruel or depraved manner."[39] The judge found only one non-statutory mitigating circumstance: "Ring's 'minimal' criminal record."[40] That mitigating circumstance did not "call for leniency," and the judge sentenced Ring to death.[41]

Citing *Apprendi*, Ring contended that Arizona's death-penalty statute was unconstitutional because it required the judge, not the jury, to find the facts necessary to impose a death sentence.[42] The Supreme Court agreed that Arizona's death-penalty scheme violated the Sixth Amendment right to a jury trial.[43] The Court noted that the maximum punishment Ring could have received, absent the judge's finding of at least one aggravating circumstance beyond a reasonable doubt, was life imprisonment.[44] Under the reasoning of *Apprendi*, however, a *jury* must find any fact that increases the sentence to which a defendant is exposed.[45] Moreover, "[b]ecause Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury."[46]

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33. *Id.* at 597 (quoting State v. Ring, 25 P.3d 1139, 1151 (Ariz. 2001)).
34. *Id.* at 593 (quoting ARIZ. REV. STAT. ANN. § 13-703(F) (2001)).
35. *See id*. at 592; Tison v. Arizona, 481 U.S. 137, 157–58 (1987). The Eighth Amendment permits execution of a felony-murder defendant only when a defendant killed, attempted to kill, or was a major participant in the felony that demonstrated "reckless indifference to human life." *Id.*
36. *See Ring*, 536 U.S. at 593.
37. *See id.* at 594.
38. *See id.*
39. *Id.* at 594–95 (internal quotation marks omitted).
40. *Id.* at 595.
41. *Id.* (internal quotation marks omitted).
42. *Id.*
43. *Id.* at 609.
44. *See id.* at 597.
45. *Id.* at 603.
46. *Id.* at 609 (internal citations and quotation marks omitted).

## III. *HURST V. FLORIDA* AND FLORIDA'S DEATH-SENTENCING SCHEME

Sixteen years after *Apprendi* and fourteen years after *Ring*, the Supreme Court found Florida's death-penalty scheme unconstitutional because a judge, rather than the jury, made the factual findings that subjected a defendant to a death sentence.[47] The facts of *Hurst* follow.

On May 2, 1998, Cynthia Harrison was murdered at the Popeye's restaurant where she was employed.[48] She was discovered in the freezer with her hands bound behind her back and tape over her mouth, and she had incurred "at least sixty slash and stab wounds to her face, neck, back, torso, and arms."[49] Timothy Lee Hurst, a co-worker, was convicted of the murder in a Florida state court, and the judge sentenced him to death.[50] On direct appeal, the Florida Supreme Court affirmed his conviction and death sentence.[51] In state post-conviction proceedings, the Florida Supreme Court granted penalty-phase relief, finding that Hurst's counsel was ineffective for failing to properly investigate and present mitigation evidence of his intellectual disability.[52] At resentencing, the jury recommended death by a seven-to-five vote,[53] and the judge once again imposed a death sentence.[54]

Under Florida law, life imprisonment was the maximum sentence a capital felon could receive based on a conviction alone.[55] "A person who has been convicted of a capital felony shall be punished by death" only after an additional sentencing proceeding "results in findings by the court that such person shall be punished by death."[56] Florida statutes outlined this proceeding. First, an evidentiary hearing was held before the jury.[57] Thereafter, the jury recommended a life or death sentence to the court without providing a factual basis for the recommendation.[58] The court then determined and weighed the aggravating and mitigating factors.[59] Notwithstanding the jury's recommendation, the judge ultimately made the

47. Hurst v. Florida, 136 S. Ct. 616, 619 (2016).
48. *See* Hurst v. State, 18 So. 3d 975, 984–85 (Fla. 2009).
49. *Id.*
50. *See id.* at 984.
51. Hurst v. State, 819 So. 2d 689, 692 (Fla. 2002).
52. *Hurst*, 18 So. 3d at 1008.
53. "Of the thirty-one states that still had the death penalty at the time of *Hurst v. Florida*, twenty-eight states required a unanimous vote of twelve jurors with respect to the final verdict or recommendation, making Florida, Alabama, and Delaware glaring outliers." Hurst v. State, 202 So. 3d 40, 72 (Fla. 2016).
54. Hurst v. State, 147 So. 3d 435, 440 (Fla. 2014), *rev'd*, 136 S. Ct. 616 (2016).
55. FLA. STAT. § 775.082(1) (2010).
56. *Id.*
57. § 921.141(1) (2010).
58. § 921.141(2).
59. § 921.141(3).

decision to impose a sentence of life imprisonment or death.[60] Under this scheme, "the judge must give the jury recommendation great weight," but "the sentencing order must reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors."[61]

Relying on *Ring*, Hurst argued on appeal to the Florida Supreme Court that his death sentence was unconstitutional "because the advisory jury in the penalty phase was not required to find specific facts as to the aggravating factors, and . . . the jury was not required to make a unanimous recommendation as to the sentence."[62] The Florida Supreme Court rejected Hurst's claim, noting that Florida "precedent has repeatedly held that *Ring* does not require the jury to make specific findings of the aggravators or to make a unanimous jury recommendation as to sentence."[63] Relying on the Supreme Court's pre-*Ring* decision, *Hildwin v. Florida*,[64] where the Court found Florida's capital-sentencing scheme constitutional, the Florida Supreme Court declared: "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."[65]

The Supreme Court reversed, holding Florida's capital-sentencing scheme unconstitutional.[66] "The Sixth Amendment," the Court explained, "requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough."[67] The Court remanded the case to the state court to determine whether the error was harmless.[68]

On remand, the Florida Supreme Court determined that under the United States and Florida Constitution, the right to a jury trial required that the jury make all factual findings *unanimously*.[69] The court expanded on the Supreme Court's holding, resting its decision on the Eighth Amendment, as well as the Sixth Amendment:

> [T]he foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death. That foundational precept is the principle that death is different. This means

60. *Id.*
61. Hurst v. Florida, 136 S. Ct. 616, 620 (2016) (internal quotation marks omitted).
62. Hurst v. State, 147 So. 3d 435, 445 (Fla. 2014).
63. *Id.* at 445–46 (citing Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002) (both holding that *Ring* does not apply to Florida's capital sentencing scheme)).
64. *See generally* 490 U.S. 638 (1989).
65. *Hurst*, 147 So. 3d at 446 (quoting Hildwin v. Florida, 490 U.S. 638, 640–41 (1989)).
66. *Hurst*, 136 S. Ct. at 619.
67. *Id.*
68. *Id.* at 624.
69. Hurst v. State, 202 So. 3d 40, 53–54 (Fla. 2016) (finding an unanimity requirement for *every* fact necessary to impose a sentence of death compelled by the jury-trial right and the Eighth Amendment evolving standards of decency).

> that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders.[70]

The Florida Supreme Court also found that the *Hurst* error was subject to harmless-error review and concluded that the error in Hurst's case was not harmless beyond a reasonable doubt.[71] The court explained that the burden is on the state, "as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for the imposition of the death penalty did not contribute to [the defendant]'s death sentence."[72]

Since the Supreme Court decided *Hurst*, Delaware and Alabama have considered its applicability to their death-sentencing schemes. In *Rauf v. State*, the Delaware Supreme Court held that Delaware's death-sentencing scheme was unconstitutional under *Hurst*.[73] Like Florida, Delaware's death-penalty statute provided that a jury make a sentencing recommendation of death or life imprisonment to the judge.[74] The judge, however, was not bound by the jury's recommendation.[75] Also, like Florida, the Delaware jury was not required to find an aggravating circumstance unanimously and beyond a reasonable doubt or that the aggravating circumstances outweighed the mitigating circumstances.[76] The

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70. *Id.* at 59–60.
71. *Id.* at 67–68.
72. *Id.*
73. 145 A.3d 430 (Del. 2016).
74. 11 DEL. CODE ANN. tit. 11, § 4209(d)(1) (2013).

> If a jury has been impaneled and if the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section has been found beyond a reasonable doubt by the jury, the Court, after considering the findings and recommendations of the jury and without hearing or reviewing any additional evidence, shall impose a sentence of death if the Court finds by a preponderance of the evidence . . . that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist.

*Id.*

75. *Id.*

> The jury's recommendation concerning whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist shall be given such consideration as deemed appropriate by the Court in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender as found to exist by the Court. The jury's recommendation shall not be binding upon the Court.

*Id.*

76. § 4209(c)(3)(b)(2).

> The jury shall report to the Court by the number of the affirmative and negative votes its recommendation on the question as to whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the character

Delaware Supreme Court found the death-sentencing provisions violated the Sixth Amendment of the U.S. Constitution.[77]

The Alabama Supreme Court, on the other hand, found in *In re Bohannon* that *Hurst* did not render Alabama's death-sentencing scheme unconstitutional.[78] The court reasoned: "Because in Alabama a jury, not a judge, makes the finding of the existence of an aggravating circumstance that makes a capital defendant eligible for a sentence of death, Alabama's capital-sentencing scheme is not unconstitutional on this basis."[79] Contrary to the Florida and Delaware Supreme Courts, the Alabama Supreme Court interpreted *Ring* and *Hurst* as requiring "*only* that the jury find the existence of the aggravating factor that makes a defendant death-eligible."[80] The court did not require the jury to weigh the aggravating and mitigating factors.[81] The Alabama Supreme Court, therefore, concluded that Alabama's requirement that the judge, not the jury, make "an independent determination that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances found to exist" was consistent with *Hurst*.[82] Finally, the fact that Alabama capital juries are instructed that their sentences are merely advisory, the court reasoned, is consistent with *Hurst*, because "the finding required by *Hurst* to be made by the jury, i.e., the existence of the aggravating factor that makes a defendant death-eligible, is indeed made by the jury, not the judge, in Alabama."[83]

## IV. *HURST* RETROACTIVITY ANALYSIS

The Supreme Court left it to the lower courts to determine whether *Hurst* is retroactive and to what extent it is retroactive. This Section considers *Hurst*'s retroactivity and concludes that *Hurst* is retroactive on post-conviction review to *all* defendants.

### A. Retroactivity Overview

Either a state or federal court may declare *Hurst* retroactive on collateral review. On federal-habeas review, federal courts employ the retroactivity test set forth in *Teague* to determine *Hurst*'s retroactivity.

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> and propensities of the offender, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.

*Id.*

77. *Rauf*, 145 A.3d at 430.
78. Bohannon v. State, No. 1150640, 2016 WL 5817692, at *5 (Ala. 2016).
79. *Id.* at *6.
80 *Id.* at *5 (emphasis added).
81. *Id.*
82. *Id.* at *6.
83. *Id.* at *7.

Although some state courts also use the *Teague* test, they are not bound to employ that test. For instance, the Florida Supreme Court recently reaffirmed *Witt v. State*,[84] the case establishing Florida's retroactivity test.[85] Under *Witt*, Florida courts give retroactive application to decisions that are favorable to criminal defendants provided that the decisions (1) emanate from the U.S. Supreme Court, (2) are constitutional in nature, and (3) constitute "a development of fundamental significance."[86] Delaware and Alabama, on the other hand, apply *Teague*.[87] Even those states that employ the *Teague* test may interpret *Teague* more broadly than the federal courts.[88] Although state courts may give broader relief than a federal *Teague* analysis would provide, they are not free to deny retroactive application of a substantive rule.[89]

The Delaware Supreme Court applied *Hurst* retroactively to all death-sentenced prisoners under its *Teague*-like retroactivity test and automatically imposed life sentences.[90] The Florida Supreme Court, on the other hand, afforded retroactivity of *Hurst* under its *Witt* retroactivity analysis to defendants whose sentences were final after *Ring*, subject to harmless-error analysis and resentencing.[91] It also suggested it would afford retroactivity to pre-*Ring* defendants under a fundamental-fairness test.[92] The Florida Supreme Court, however, has not considered federal retroactivity under *Teague*. This Article focuses on the federal *Teague* retroactivity test.

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84. 387 So. 2d 922 (Fla. 1980).

85. *See* Falcon v. State, 162 So. 3d 954, 960 (Fla. 2015) (holding that *Miller v. Alabama*, 132 S. Ct. 2455 (2012), is retroactive).

86. *Witt*, 387 So. 2d at 931.

87. *See* Casiano v. Comm'r of Corr., 115 A.3d 1031, 1037 (Conn. 2015) (finding *Miller* a watershed rule of criminal procedure that is retroactive under *Teague*); *Ex parte* Williams, 183 So. 3d 220, 224-31 (Ala. 2015) (finding *Miller* not retroactive under *Teague*), *abrogated by* Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

88. *See Casiano*, 115 A.3d at 1038 ("[A]lthough this court concluded that we will apply the *Teague* framework, we did so with the caveat that, while federal decisions applying *Teague* may be instructive, this court will not be bound by those decisions in any particular case, but will conduct an independent analysis and application of *Teague*.") (internal quotation marks omitted).

89. *Montgomery*, 136 S. Ct. at 729.

90. Powell v. Delaware, No. 310,2016, 2016 WL 7243546, at *5 (Del. Dec. 15, 2016).

91. *Mosley v. State*, No. SC14-436, 2016 WL 7406506, at *25 (Fla. Dec. 22, 2016). Defendants whose sentences became final after *Ring* "fall[] within the category of defendants who should receive the benefit of *Hurst*." *Id.* Partial retroactivity is a novel approach, and it may violate equal protection. *See Yick Wo v. Hopkins*, 118 U.S. 356, 367–68 (1886) (Equal protection requires "that, in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."). Indeed, death sentences will be enforced, not by the date on which the defendant committed the crime, but on the arbitrary date on which the sentence became final. *See Mosley*, 2016 WL 7406506, at *25.

92. *See Mosley*, 2016 WL 7406506, at *19. A pre-*Ring* defendant is entitled to retroactive application of *Hurst* if he raised a Sixth Amendment claim "at his first opportunity and was then rejected at every turn." *Id.*

*1.* Teague v. Lane *Overview*

Justice O'Connor's plurality opinion in *Teague* held, subject to two exceptions, that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[93] Even if the new rule fits into one of the two *Teague* exceptions, it "is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive" either expressly or through a logical conclusion drawn from multiple cases.[94]

Under the first *Teague* exception, courts must give retroactive effect to new substantive rules of constitutional law.[95] Substantive rules place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."[96] New substantive rules "apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him."[97] For example, in *Welch v. United States*[98] the Supreme Court held *Johnson v. United States*,[99] which invalidated the residual clause of the Armed Career Criminal Act as unconstitutionally vague, retroactive because it announced a substantive rule.[100] The Court stated: "*Johnson* affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied."[101]

Under the second *Teague* exception, courts must give retroactive effect to "watershed rules of criminal procedure" that implicate "the fundamental fairness of the trial."[102] These rules "raise the possibility that someone convicted with the use of the invalidated procedure might have been acquitted otherwise."[103] "That a new procedural rule is fundamental in some abstract sense is not enough; the rules must be one without which the likelihood of an accurate conviction is *seriously* diminished."[104] Since *Teague's* inception, the Supreme Court has yet to find a watershed rule of

93. Teague v. Lane, 489 U.S. 288, 310 (1989).
94. Tyler v. Cain, 533 U.S. 656, 663 (2001).
95. *Teague*, 489 U.S. at 311; *but see* Montgomery v. Louisiana, 136 S. Ct. 718, 728 (2016) ("*Teague* describes new substantive rules as an exception to the bar on retroactive application of procedural rules, this Court has recognized that substantive rules are more accurately characterized as not subject to the bar.") (internal ellipsis and quotation marks omitted).
96. *Teague*, 489 U.S. at 311 (internal quotation marks omitted).
97. *See* Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (internal quotation marks omitted).
98. 136 S. Ct. 1257 (2016).
99. 135 S. Ct. 2551 (2015).
100. *See Welch*, 136 S. Ct. at 1265.
101. *Id.*
102. Teague v. Lane, 489 U.S. 288, 310 (1989).
103. Schriro v. Summerlin, 542 U.S. 348, 352 (2004).
104. *Id.* (internal quotation marks omitted).

criminal procedure.[105] Justice Harlan, however, suggested that the right to counsel is an example.[106] The Connecticut Supreme Court, employing a *Teague* analysis, found that the rule from *Miller*—that a juvenile must receive an individualized sentencing procedure prior to imposition of a life sentence without parole—was retroactive as a watershed rule of criminal procedure.[107]

*2.* Ring *Retroactivity*

Courts have applied *Teague* to *Hurst*'s predecessor opinions: *Ring* and *Apprendi*. In *Summerlin*, a five-to-four decision written by Justice Scalia, the Court determined that *Ring* was not retroactive on collateral review.[108] First, the Court considered whether the rule was procedural or substantive and concluded that it was procedural.[109] *Ring*'s holding, the Court noted, "did not alter the range of conduct Arizona law subjected to the death penalty. It could not have; it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize."[110] The Court continued: "Instead, *Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment."[111]

Next, the Court considered whether *Ring* fell under the exception for "watershed rules of criminal procedure."[112] The respondent argued that *Ring* implicated "the fundamental fairness and accuracy of the criminal proceeding" because "juries are more accurate factfinders" than judges.[113] Using the language from *Teague*, the Court framed the question as "whether judicial factfinding so '*seriously* diminishes' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach."[114] The Court concluded that it did not: "The evidence is simply too equivocal to support that conclusion."[115] In particular, the Court noted: "for every argument why juries are more accurate factfinders, there is another why they are less accurate."[116] In *DeStefano v. Woods*,[117] a pre-*Teague*

105. *See* Casiano v. Comm'r of Corr., 115 A.3d 1031, 1038 (Conn. 2015).
106. *See Teague*, 489 U.S. at 311; *see also* Beth Caldwell, Miller v. Alabama *as a Watershed Procedural Rule: The Case for Retroactivity*, 10 HARV. L. & POL'Y REV. S1, S3 (2016).
107. *Casiano*, 115 A.3d at 1041.
108. *Summerlin*, 542 U.S. at 358.
109. *Id.* at 353.
110. *Id.*
111. *Id.*
112. *Id.* at 355.
113. *Id.*
114. *Id.* at 355–56 (quoting Teague v. Lane, 489 U.S. 288, 312–13 (1989)) (internal brackets omitted).
115. *Id.* at 356.
116. *Id.*

case, the Court declined to apply retroactively *Duncan v. Louisiana*,[118] wherein the Court applied the Sixth Amendment jury-trial right to the States.[119] In *DeStefano*, the Court reasoned:

> [A]lthough the right to jury trial generally tends to prevent arbitrariness and repressions, we would not assert that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.[120]

The Court found this reasoning equally applicable to the retroactivity of *Ring*: "If under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be."[121]

Justices Stevens, Souter, and Ginsburg joined Justice Breyer in dissent.[122] The dissent concluded that *Ring*'s rule amounted to a watershed rule of criminal procedure subject to retroactive application.[123] The dissent noted that the majority had conceded the first part of the watershed-rule inquiry—that *Ring*'s holding is "implicit in the concept of ordered liberty."[124] The majority, the dissent contended, came to the wrong conclusion in the second part of the inquiry—whether the rule announced in *Ring* is "central to an accurate determination that death is a legally appropriate punishment."[125] The dissent began by explaining that "the Eighth Amendment demands the use of a jury in capital sentencing because a death sentence must reflect a community-based judgment that the sentence constitutes proper retribution."[126] The dissenting Justices then reasoned that "the right to have jury sentencing in the capital context is both a fundamental aspect of constitutional liberty and also significantly more likely to produce an assessment of whether death is the appropriate punishment."[127]

The dissent was critical of the majority's conclusion that *Ring* did not satisfy "*Teague*'s accuracy-enhancing requirement" and its reliance on *DeStefano*.[128] First, the dissent noted that finding many aggravators

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117. *See generally* 392 U.S. 631 (1968).
118. *See generally* 391 U.S. 145 (1968).
119. *Summerlin*, 542 U.S. at 356–57.
120. *Id.* at 357 (citing *DeStefano*, 392 U.S. at 633–34) (internal brackets, ellipses, and quotation marks omitted).
121. *Id.* at 357.
122. *Id.* at 358 (Breyer, J., dissenting).
123. *Id.* at 358–59.
124. *Id.* at 359 (internal quotation marks omitted).
125. *Id.* (internal quotation marks omitted).
126. *Id.* at 360.
127. *Id.*
128. *Id.* at 361.

involves more than mere fact-finding.[129] Rather, the factfinder must make "death-related, community-based value judgments."[130] For instance, a jury is better equipped to assess the heinous, atrocious, or cruel aggravator because it "require[s] reference to community-based standards, standards that incorporate values."[131] Second, one of *Teague*'s underlying values, "the legal system's commitment to equal justice—i.e., to assuring a uniformity of ultimate treatment among prisoners," counsels in favor of applying *Ring* retroactively.[132] The dissent also noted that "the Eighth Amendment requires a greater degree of accuracy" in capital cases than in non-capital cases.[133] The value of sentencing uniformity would be undermined if some capital defendants received new, constitutional sentencing proceedings, while others did not.[134] Finally, *DeStefano*, the dissent contended, did not support the majority's position because *DeStefano* was decided under the old retroactivity analysis from *Linkletter v. Walker*.[135] *Linkletter* considered: "(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."[136] Had the retroactivity of *Ring* been considered under the *DeStefano* factors, the dissent contended, *Ring* would apply retroactively.[137]

*3.* Apprendi *Retroactivity Decisions*

The Supreme Court has not considered the retroactivity of *Apprendi's* proof-beyond-a-reasonable-doubt concept in a death-penalty case since *Apprendi*. Some appellate courts, however, have considered the proof-beyond-a-reasonable-doubt concept and declined to give it retroactive application. In *Hughes v. United States*, the Ninth Circuit addressed the concept when it declined to give retroactive application to *Alleyne v. United States*,[138] wherein the Supreme Court held any fact that increases a

129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 362.
133. *Id.* (quoting Gilmore v. Taylor, 508 U.S. 333, 342 (1993)).
134. *Id.* at 363 ("Is treatment 'uniform' when two offenders each have been sentenced to death through the use of procedures that we now know violate the Constitution-but one is allowed to go to his death while the other receives a new, constitutionally proper sentencing proceeding?").
135. *Id.* at 365 (citing Linkletter v. Walker, 381 U.S. 618 (1965)).
136. *Id.* (quoting DeStefano v. Woods, 392 U.S. 631, 633 (1968)).
137. *Id.* at 366.
138. Alleyne v. United States, 133 S. Ct. 2151 (2013).

mandatory minimum must be submitted to a jury.[139] The court noted that to warrant retroactive application, the Supreme Court must have made *Alleyne* retroactive "either expressly or through the combination of the holdings from multiple cases."[140] The Supreme Court, it noted, had not expressly given retroactive effect to *Alleyne*.[141]

The Ninth Circuit next concluded that *Alleyne* was not retroactive through a combination of holdings.[142] It disposed of *Alleyne* as being substantive, citing to Justice Sotomayor's concurring opinion in *Alleyne* that "procedural rules [were] at issue that do not govern primary conduct."[143] The *Hughes* petitioner, citing to *Ivan V. v. City of New York* and *Hankerson v. North Carolina*, argued that *Alleyne* should be given retroactive application because the Supreme Court had "made all new reasonable-doubt rules completely retroactive, and *Alleyne* is a new reasonable-doubt rule."[144] The court rejected this argument, finding the petitioner "fail[ed] because he ha[d] not cleared the high bar that the Supreme Court precedent 'necessarily dictate[s]' the retroactivity of *Alleyne*."[145] First, after noting that no court had given retroactive effect to *Apprendi*, it reasoned that if *Apprendi* does not apply retroactively then a case extending *Apprendi* cannot apply retroactively.[146] Second, it concluded *Alleyne* was not a watershed rule of criminal procedure because other courts had found neither *Alleyne* nor *Apprendi* to be watershed and "the accuracy of the verdict was not substantially undermined" in this case.[147]

Other circuits have applied similar reasoning.[148] In *United States v. Sanders*, the Fourth Circuit characterized the *Apprendi* rule as procedural "because it dictates what fact-finding procedures must be employed to ensure a fair trial."[149] It then found *Apprendi* was not a retroactive procedural rule because (1) "*Apprendi* did not place drug conspiracies beyond the scope of the state's authority to proscribe," and (2) the jury-trial right and the right to have factual findings that increase a sentence be found beyond a reasonable doubt "are not the types of watershed rules implicating

139. Hughes v. United States, 770 F.3d 814 (9th Cir. 2014). In *Alleyne*, applying *Apprendi*, the Court held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to a jury." *Alleyne*, 133 S. Ct. at 2155.
140. *Hughes*, 770 F.3d at 817.
141. *Id.*
142. *Id.*
143. *Id.* (quoting *Alleyne*, 133 S. Ct. at 2164 (Sotomayor, J., concurring)).
144. *Id.* at 817–18 ("Multiple cases can render a new rule retroactive only if the holdings in those cases *necessarily dictate* retroactivity of the new rule." (internal quotation marks omitted)).
145. *Id.* at 818 (quoting Tyler v. Cain, 533 U.S. 656, 666 (2001)).
146. *Id.*
147. *Id.* at 819.
148. *See, e.g.*, Walker v. United States, 810 F.3d 568, 573–75 (8th Cir. 2016).
149. 247 F.3d 139, 147 (4th Cir. 2001).

fundamental fairness."[150] The court cited to *Neder v. United States*,[151] and described the rule as one "which merely shifts the fact-finding duties from an impartial judge to a jury [and, therefore,] clearly does not fall within the scope of the second *Teague* exception."[152]

B. The *Hurst* Retroactivity Analysis

*Hurst* is distinguishable from the foregoing cases and can fit within the *Teague* analysis as either a substantive rule or watershed rule of criminal procedure. Further, *Summerlin* and the lower court rulings on *Apprendi*'s retroactivity do not control the *Hurst* retroactivity analysis. In particular, *Summerlin* does not dictate *Hurst*'s retroactivity because: (1) there are fundamental differences between the death-penalty statutes at issue, and (2) it did not address the proof-beyond-a-reasonable-doubt requirement at issue in *Hurst*. The lower-court *Apprendi* retroactivity decisions do not squarely address the retroactivity of the proof-beyond-a-reasonable-doubt aspect of *Apprendi* and are contrary to Supreme Court proof-beyond-a-reasonable-doubt precedent. Finally, a recent precedent indicates a shift in the Supreme Court's *Teague* analysis.

*1.* Summerlin *and Circuit Court Cases Considering* Apprendi *Do Not Inform the* Hurst *Retroactivity Analysis*

*Summerlin* and the lower court cases that consider *Apprendi* are not dispositive of the *Hurst* retroactivity analysis. First, as the U.S. District Court for the Northern District of Florida noted, *Summerlin* "did not address the requirement for [the jury to find aggravating circumstances based on] proof beyond a reasonable doubt."[153] Indeed, *Ring* itself was limited to the jury-trial right.[154] As *Summerlin* acknowledged, Arizona law already required that any aggravating circumstance be proved beyond a reasonable doubt.[155] The Florida capital-sentencing scheme, however, did not require that all factual findings necessary for imposition of the death penalty be proved beyond a reasonable doubt.[156]

150. *Id.* at 148.
151. 527 U.S. 1, 10 (1999) (holding that the failure to submit an element of the offense to the jury was subject to harmless-error review).
152. *Sanders*, 247 F.3d at 148.
153. Guardado v. Jones, 4:15cv256-RH, 2016 WL 3039840, at *2 (N.D. Fla. May 27, 2016).
154. Ring v. Arizona, 536 U.S. 584, 588 (2002) ("This case concerns the Sixth Amendment right to a jury in capital prosecutions.").
155. Schriro v. Summerlin, 542 U.S. 348, 351 n.1 (2004) ("Because Arizona law already required aggravating factors to be proved beyond a reasonable doubt, that aspect of *Apprendi* was not at issue.").
156. *See* Hurst v. Florida, 136 S. Ct. 616, 622 (2016) ("The trial court *alone* must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there insufficient mitigating

Second, although *Hurst* and *Ring* are both based on the reasoning of *Apprendi*, they are not interchangeable because of fundamental differences between the Arizona statute at issue in *Ring* and the Florida statute at issue in *Hurst*. The Arizona death-sentencing scheme at issue in *Ring* required the judge to find only one aggravating circumstance before imposing the death penalty.[157] The Florida capital-sentencing law, on the other hand, required not only that the judge find an aggravating factor, but also that the judge make the factual determinations that "*sufficient* aggravating circumstances exist" to impose a death sentence and that "there are *insufficient* mitigating circumstances to outweigh the aggravating circumstances."[158]

Third, the Supreme Court has not yet addressed *Apprendi*'s reasonable-doubt component, and the lower court opinions are not persuasive. The lower court cases, for the most part, found that *Apprendi* did not announce a substantive rule because (1) the Supreme Court has not yet declared *Apprendi* retroactive, and (2) they have not fully grappled with the proof-beyond-a-reasonable-doubt requirement at issue in *Hurst*. Further, the courts' watershed-procedural rule reasoning does not settle *Hurst*. For instance, the Ninth Circuit in *Sanders* cited to the Supreme Court's decision in *Neder* to support its reasoning; *Neder*, however, did not have a proof-beyond-a-reasonable-doubt component.[159]

*2.* Hurst's *Proof-Beyond-a-Reasonable-Doubt Aspect is a Substantive Rule*

Like the rule in *Miller*,[160] *Hurst*'s rule has characteristics of both a substantive and procedural rule.[161] Under its substantive portion, *Hurst* prohibits the imposition of the death penalty on a class of individuals—those whose crimes do not fall within the narrow category of those for which death is an appropriate punishment.[162]

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circumstances to outweigh the aggravating circumstances.'" (quoting FLA. STAT. § 921.141(3) (2010))).

157. *Ring*, 536 U.S. at 604 (citing ARIZ. REV. STAT. ANN. §§ 13-1105(C), 13-703 (2001)).

158. FLA. STAT. § 921.141(3) (2010) (emphasis added).

159. *See* Neder v. United States, 527 U.S. 1, 9 (1999) (noting that the defendant was tried "under the correct standard of proof").

160. Miller v. Alabama, 132 S. Ct. 2455 (2012); *see also* Casiano v. Comm'r of Corr., 115 A.3d 1031, 1039 (Conn. 2015) ("Many courts have recognized that it is difficult to categorize *Miller* as either substantive or procedural, as its holding has characteristics of both types of rules.").

161. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 735 (2016) ("There are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish.").

162. *See id.* at 732 ("A substantive rule . . . prohibits a certain category of punishment for a class of defendants because of their status or offense." (internal quotation marks omitted)).

The proof-beyond-a-reasonable-doubt standard is a hallmark of our criminal justice system.[163]

> The demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, though its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.[164]

The Supreme Court has recognized that "the reliance on the 'reasonable doubt' standard among common-law jurisdictions reflects a profound judgment about the way in which law should be enforced and justice administered."[165]

The Supreme Court has explained that the proof-beyond-a-reasonable-doubt requirement is essential to preventing erroneous convictions:

> Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.[166]

The Supreme Court has not yet applied the *Teague* analysis to a proof-beyond-a-reasonable-doubt issue. The courts, however, can look to pre-*Teague* retroactivity decisions for guidance. Indeed, the Supreme Court relied on *DeStefano v. Woods*—a pre-*Teague* case—when it concluded that the jury-trial right at issue in *Ring* was not retroactive.[167] Recognizing the

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163. Henry D. Gabriel & Katherine A. Barski, *Reasonable Doubt Jury Instructions: The Supreme Court Struggles to Live by its Principles*, 11 ST. JOHN'S J. LEGAL COMMENT. 73, 73 (1995).
> The 'beyond a reasonable doubt' standard plays a vital role in the American scheme of criminal procedure. A common aphorism states that it is better to have ten guilty people go free than to have one innocent person erroneously convicted. This intrinsic societal belief has been encapsulated in the requirement that a criminal defendant be found guilty beyond a reasonable doubt to be convicted.

*Id.* (internal quotation marks omitted).

164. Apprendi v. New Jersey, 530 U.S. 466, 478 (2000) (quoting C. MCCORMICK, EVIDENCE § 321, pp. 681–82 (1954)) (internal brackets and quotation marks omitted).

165. *Id.* (internal brackets and quotation marks omitted).

166. Speiser v. Randall, 357 U.S. 513, 525–26 (1958).

167. Schriro v. Summerlin, 542 U.S. 348, 357 (2004) ("If under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be.").

fundamental importance of the burden of proof, the Supreme Court has given retroactive effect to the pre-*Teague* proof-beyond-a-reasonable doubt cases that it has considered. As those cases elucidate, proof-beyond-a-reasonable-doubt rules are substantive under *Teague* because they "carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him."[168]

First, in *Ivan V. v. City of New York*, the Supreme Court applied retroactively the rule announced in *In re Winship*,[169] that juveniles must be afforded the proof-beyond-a-reasonable doubt standard at the adjudicatory stage.[170] *Ivan V.* applied the three-part balancing test from *Linkletter v. Walker*, the pre-*Teague* test, to determine retroactivity.[171] The Court noted: "Where the major purpose of a new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect."[172]

Second, in *Hankerson v. North Carolina*,[173] the Supreme Court gave retroactive application to the *Mullaney v. Wilbur*[174] rule, requiring the prosecution to prove each element of a crime beyond a reasonable doubt.[175] At issue in *Mullaney* was Maine's murder statute that provided: "[w]homever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life."[176] The trial court, however, instructed the jury that "if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation."[177] The defendant, therefore, was required to carry the burden of persuasion if he contended that he acted

168. *See id.* at 352 (internal quotation marks omitted).
169. *In re* Winship, 397 U.S. 358 (1970).
170. Ivan V. v. City of New York, 407 U.S. 203, 203-04 (1972).
171. Linkletter v. Walker, 381 U.S. 618, 636 (1965) ("[W]e must look to the purpose of the [new] rule; the reliance placed upon the [previous] doctrine; and the effect on the administration of justice of a retrospective application of [the new rule]."); *see also* Tiffani N. Darden, *Juvenile Justice's Second Chance: Untangling the Retroactive Application of* Miller v. Alabama *Under the* Teague *Doctrine*, 42 AM. J. CRIM. L. 1, 1 (2014) ("[T]he *Teague* test sought to clarify its predecessor, *Linkletter v. Walker*, and to create consistent guidelines for applying new rules to post-conviction appellants.").
172. *Ivan V.*, 407 U.S. at 204 (quoting Williams v. United States, 401 U.S. 646, 653 (1971)).
173. 432 U.S. 233 (1977).
174. 421 U.S. 684 (1975).
175. *Id.* at 704.
176. *Id.* at 686 n.3.
177. *Id.* at 686.

"in the heat of passion on sudden provocation," rather than with malice, an element of the offense.[178]

Citing to *Winship*, the Court noted that "[t]he result, in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous murder conviction."[179] The *Hankerson* Court found *Ivan V.* controlling on the issue of *Mullaney*'s retroactivity:

> In *Mullaney v. Wilbur*, as in *In re Winship*, the Court held that due process requires the States in some circumstances to apply the reasonable-doubt standard of proof rather than some lesser standard under which an accused would more easily lose his liberty. In *Mullaney*, as in *Winship*, the rule was designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that "substantially impairs the truth-finding function."[180]

The Court noted:

> [W]e have never deviated from the rule stated in *Ivan V.* that where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule is given complete retroactive effect.[181]

*Ivan V.* and *Hankerson* are precedent that proof-beyond-a-reasonable-doubt rules apply retroactively. Further, their analyses explain why *Hurst*'s proof-beyond-a-reasonable-doubt aspect fits within *Teague*'s definition of a retroactive substantive rule. Indeed, the Court has explained that the absence of proof beyond a reasonable doubt "necessarily carr[ies] a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him."[182] As the Supreme Court made clear in both cases, the proof-beyond-a-reasonable-doubt requirement is essential to the fact-finding process and, in the death-penalty context, ensures that only defendants who commit the worst of the worst murders receive the unique sentence of death.[183] Further,

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178. *Id.*
179. *Id.* at 701.
180. Hankerson v. North Carolina, 432 U.S. 233, 242 (1977) (quoting Ivan V. v. City of New York, 407 U.S. 203, 205 (1972)).
181. *Id.* at 243 (internal quotation marks omitted).
182. *See* Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (internal quotation marks omitted).
183. *See* Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008) (The Eighth Amendment "requires that use of the death penalty be restrained. The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst crimes and limited in its application.").

the case for retroactively applying *Hurst*'s proof-beyond-a-reasonable-doubt component is even stronger than the rules of *Ivan V.* and *Hankerson* because the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."[184]

*3.* Hurst *Announced a Watershed Rule of Criminal Procedure*

Although *Hurst*'s rule is substantive, it also contains a procedural aspect. Even if a court characterized *Hurst* as only procedural, *Hurst* would warrant retroactive application as a watershed rule of criminal procedure. Although the Supreme Court has yet to declare a rule of criminal procedure a watershed rule since *Teague*'s inception, it has suggested the right to counsel is such a rule.[185] Justice Harlan, whose reasoning the *Teague* court adopted, reasoned procedural rules should be held retroactive because "in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction."[186]

First, although the Supreme Court has never held a procedural rule to be watershed under *Teague*, it is important to note that the four dissenting justices in *Summerlin* found that *Ring* announced a watershed rule of criminal procedure where only the jury-trial right was at issue.[187] Accordingly, the Court has expressed its willingness to give retroactive application to procedural rules, at least in the death-penalty context.

Second, *Hurst* provides a stronger case than *Ring* for the retroactive application of a procedural rule. In *Summerlin*, the majority reasoned that *Ring* did not announce a watershed procedural rule because the evidence did not indicate that judicial fact-finding was any less accurate than jury fact-finding.[188] The dissenting Justices argued that *Ring* was procedural because the Eighth Amendment jury-trial right was "central to an accurate determination that death is a legally appropriate punishment" because "a death sentence must reflect a community-based judgment that the sentence constitutes proper retribution."[189] In *Hurst*, however, the proof-beyond-a reasonable-doubt standard, in addition to jury fact-finding, is at issue. Therefore, in determining whether the *Hurst* procedural rule is retroactive,

184. *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978).
185. Teague v. Lane, 489 U.S. 288, 311 (1989).
186. *Id.* (quoting Mackey v. United States, 401 U.S. 667, 693–94 (1971)).
187. Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (Breyer, J., dissenting). Justices Breyer, Stevens, Souter, and Ginsburg agreed that the jury-trial right at issue in *Ring* announce a watershed rule of criminal procedure. *Id.*
188 *Id.* at 355–57.
189. *Id.* at 359, 360.

courts must ask whether the proof-beyond-a-reasonable-doubt standard is "central to an accurate determination that death is a legally appropriate punishment."[190] The Supreme Court has already answered that question in the affirmative. In *Winship*, the Supreme Court

> expressly held that the reasonable-doubt standard is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law. To this end, the reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue[191]

Because of the essential difference in the standards of proof before and after *Hurst*, sentencing individuals to death based upon factual findings that have not been found beyond a reasonable doubt is just as unfair as failing to provide counsel to an indigent defendant. Further, our "growth in social capacity"[192] has recognized that "death is different"[193] and should only be applied in the worst of the worst cases. This is evidenced by the line of Supreme Court decisions indicating that our standards of decency have evolved to no longer permit the execution of the intellectually disabled,[194] juveniles,[195] or those convicted of crimes other than murder.[196]

### *4. The Reluctance to Hold Rules Retroactive Under* Teague *is Eroding*

Prior to *Montgomery*, the *Teague* analysis was often not favorable to criminal defendants. Recent developments, however, indicate that the Supreme Court's reluctance to hold rules retroactive under *Teague* may be eroding.

One reason the Supreme Court may be changing course is because *Teague* has proved to be unreliable. The U.S. Constitution does not speak to retroactivity.[197] Until the 1965 decision of *Linkletter v. Walker*,[198] all

190. *Id.* at 359 (internal quotation marks omitted).
191. *See* Ivan V. v. City of New York, 407 U.S. 203, 204-05 (1972).
192. *Id.*
193. Gregg v. Georgia, 428 U.S. 153, 188 (1976).
194. Atkins v. Virginia, 536 U.S. 304, 321 (2002).
195. Roper v. Simmons, 543 U.S. 551, 568 (2005).
196. *See* Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) ("The Court further has held that the death penalty can be disproportionate to the crime itself where the crime did not result, or was not intended to result, in death of the victim.").
197. *See* Linkletter v. Walker, 381 U.S. 618, 629 (1965).
198. 381 U.S. 618 (1965).

Supreme Court decisions applied retroactively.[199] In *Linkletter*, the Court changed course and stated that retroactivity depended on: (1) the purpose of the rule, (2) the reliance on the rule, and (3) "the effect on the administrative of justice of a retrospective application" of the new rule.[200] The *Linkletter* rule, however, proved to be unworkable[201] because it led to inconsistent results: "[I]t has been used to limit application of certain rules to cases on direct review, other new rules only to the defendants in the cases announcing such rules, and still other new rules to cases in which trials have not yet commenced."[202] Twenty-five years after *Linkletter*, the Court "modified" the retroactivity analysis and announced the *Teague* rule.[203] After twenty-six years of applying *Teague*, we see the same inconsistent results produced by *Linkletter*.

The unpredictable results of *Teague* and the Supreme Court's changing retroactivity analysis are reflected in the 2016 decision of *Montgomery*.[204] In *Montgomery*, the Supreme Court gave retroactive effect to *Miller v. Alabama*'s,[205] holding that mandatory life-without-parole sentences for juvenile homicide defendants violated the Eighth Amendment's cruel-and-unusual-punishment prohibition.[206] The Court reasoned that *Miller* announced a substantive rule.[207] The Court reiterated that "a procedural rule regulates only the *manner of determining* the defendant's culpability," and "a substantive rule . . . forbids criminal punishment of certain primary conduct or prohibits a certain category of punishment for a class of defendants because of their status or offense."[208] It noted that the Court had recently found that certain punishments are disproportionate under the Eighth Amendment when applied to juveniles.[209] "Protection against disproportionate punishment," the Court explained, "is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence."[210]

The Court noted that *Miller's* rule "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole;

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199. *See* Paul J. Heald, *Retroactivity, Capital Sentencing, and the Jurisdictional Contours of Habeas Corpus*, 42 ALA. L. REV. 1273, 1276 (1991).
200. *Linkletter*, 381 U.S. at 636.
201. *See* Heald, *supra* note 199, at 1276.
202. Teague v. Lane, 489 U.S. 288, 302 (1989).
203. *Id*. at 301.
204. Montgomery v. Louisiana, 136 S. Ct. 718 (2016).
205. 132 S. Ct. 2455 (2012).
206. *Montgomery*, 136 S. Ct. at 736.
207. *Id.* at 732.
208. *Id.* (internal citations and quotation marks omitted).
209. *Id*. at 732–33 (citing Graham v. Florida, 560 U.S. 48 (2010) (finding the life-without-parole sentence for juveniles a disproportionate sentence); Roper v. Simmons, 543 U.S. 551 (2005) (finding capital punishment for juveniles a disproportionate punishment)).
210. *Id.*

it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'"[211]

> Because *Miller* determined that sentencing a child to life without parole is excessive for all but "the rare juvenile offender whose crime reflects irreparable corruption," it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth.[212]

Therefore, the Court reasoned, *Miller* announced a substantive rule of law that must be applied retroactively because "it 'necessarily carr[ies] a significant risk that a defendant'—here, the vast majority of juvenile offenders—'faces a punishment that the law cannot impose upon him.'"[213]

*Montgomery*'s *Teague* analysis, however, was not obvious to the lower courts. In fact, the lower courts came to every possible conclusion when considering *Miller*'s retroactivity.[214] Several lower courts found *Miller* was a non-retroactive procedural rule.[215] For instance, in *Martin v. Symmes*, the Eighth Circuit found that *Miller* had established a procedural rule: "The Court eliminated *mandatory* life sentences without parole for juvenile homicide defendants; it did not eliminate those *sentences* . . . ."[216] The court, therefore, reasoned that the defendant "does not face a punishment that the law cannot impose on him."[217] It then rejected the argument that *Miller* was a watershed rule of criminal procedure because "[i]t does not constitute a previously unrecognized bedrock procedural element that is essential to the fairness of proceeding" and "the absence of *Miller* [does not] seriously diminish the likelihood of an accurate *conviction*."[218] The Fourth Circuit in *Johnson v. Ponton* relied on similar reasoning when it found *Miller* was not retroactive and went as far as to

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211. *Id.* at 734.
212. *Id.*
213. *Id.*
214. Five state high courts held that *Miller* was not retroactive. *Ex parte* Williams, 183 So. 3d 220, 224–31 (Ala. 2015); People v. Carp, 852 N.W.2d 801, 832 (Mich. 2014); State v. Tate, 130 So. 3d 829, 841 (La. 2013); Commonwealth v. Cunningham, 81 A.3d 1, 10 (Pa. 2013); Chambers v. State, 831 N.W.2d 311, 331 (Minn. 2013). Ten state high courts found *Miller* was retroactive. Falcon v. State, 162 So. 3d 954, 956 (Fla. 2015); Aiken v. Byars, 765 S.E.2d 572, 578 (S.C. 2014); State v. Mares, 335 P.3d 487, 508 (Wyo. 2014); Petition of State, 103 A.3d 227, 236 (N.H. 2014); People v. Davis, 6 N.E.3d 709, 722–23 (Ill. 2014); *Ex parte* Maxwell, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014); State v. Mantich, 842 N.W.2d 716, 731 (Neb. 2014); Diatchencko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 281 (Mass. 2013); State v. Ragland, 836 N.W.2d 107, 117 (Iowa 2013); Jones v. State, 122 So.3d 698, 703 (Miss. 2013).
215. *See* Darden, *supra* note 171, at 3.
216. 782 F.3d 939, 942 (2015), *abrogated by* Montgomery v. Louisiana, 136 S. Ct. 718 (2016).
217. *Id.* at 943.
218. *Id.* (internal quotation marks omitted).

say: "The Supreme Court was clear in *Miller* that it was announcing a procedural, rather than substantive rule."[219]

Other courts applying *Teague* found *Miller* retroactive as a substantive rule. The South Carolina Supreme Court did so because "[t]he rule plainly excludes a certain class of defendants—juveniles—from specific punishment—life without parole absent individualized considerations of youth."[220] The Illinois Supreme Court explained:

> While [*Miller*] does not forbid a sentence of life imprisonment without parole for a minor, it does require Illinois courts to hold a sentencing hearing for every minor convicted of first degree murder at which a sentence other than natural life imprisonment must be available for consideration. *Miller* mandates a sentencing range broader than that provided by statute for a minor convicted of first degree murder who could otherwise receive only natural life imprisonment.[221]

The Connecticut Supreme Court found *Miller* retroactive as a watershed procedural rule.[222] The court did, however, acknowledge that it "remain[ed] free to apply the *Teague* analysis more liberally than the United States Supreme Court would otherwise apply it where a particular state interest is better served by a broader retroactivity ruling."[223] The court noted that "[m]any courts have recognized that it is difficult to categorize *Miller* as either substantive or procedural, as its holding has characteristics of both types of rules."[224] It concluded that *Miller* was "more properly characterized as a procedural, rather than a substantive, rule."[225] "[A] rule is procedural," the court noted, "when it affects how and under what framework a punishment may be imposed but leaves intact the state's fundamental legal authority to seek the imposition of the punishment on a defendant currently subject to the punishment."[226] The court reasoned: "*Miller* did not eliminate the power of a state to impose a punishment of life imprisonment without the possibility of parole. Rather, it required that a sentencing authority follow a certain process before imposing that sentence."[227]

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219. 780 F.3d 219, 225 (4th Cir. 2015).
220. Aiken v. Byars, 765 S.E.2d 572, 541 (S.C. 2014).
221. People v. Davis, 2014 IL 115595, ¶ 39, 6 N.E.3d 709, 722 (Ill. 2014) (quoting People v. Morfin, 2012 IL App (1st) 103568, ¶ 56, 981 N.E.2d 1010, 1022).
222. Casiano v. Comm'r of Corr., 115 A.3d 1031, 1037 (Conn. 2015); *see* Darden, *supra* note 171, at 16; *see also* Caldwell, *supra* note 106, at S1.
223. *Casiano*, 115 A.3d at 1038 (internal quotation marks omitted).
224. *Id.* at 1039.
225. *Id.* at 1040–41.
226. *Id.* at 1041.
227. *Id.*

These varying interpretations of *Teague*'s application by both federal and state court jurists produced the same undesirable results as the *Linkletter* test—some juvenile offenders, based solely on the jurisdiction in which they committed their crime, were afforded relief, while other similarly-situated juveniles had to wait for the Supreme Court to declare *Miller* retroactive.

The U.S. Supreme Court itself disagrees on the application of *Teague.* That disagreement is clear in *Summerlin* where the Court found that *Ring* announced a non-retroactive procedural rule, while the four dissenting Justices found that *Ring* announced a retroactive watershed rule of criminal procedure. It is also apparent in *Montgomery* where six Justices found that *Miller* announced a retroactive substantive rule, and the three dissenting Justices found it announced a non-retroactive procedural rule.[228]

As the courts' application of the *Teague*-retroactivity test to the rules of *Miller* and *Ring* show, the *Teague* test provides the same inconsistent and unfair results that *Linkletter* provided.[229] As the Court did with *Linkletter*, it is time to rethink the value of *Teague*.[230] Based on its recent retroactivity analysis in *Montgomery*, the Court may be doing so. As the lower courts' analyses demonstrate, the Supreme Court could have easily found that *Miller* did not establish a substantive rule. Indeed, the language of *Teague* itself declared that substantive rules place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."[231] *Miller*, however, clearly did not forbid *all* juvenile life-without-parole sentences.[232] Therefore, its willingness to find *Miller* retroactive indicates a loosening of its traditionally strict interpretation of *Teague* and indicates that the rule in *Hurst* will be afforded the same retroactive application as *Miller*.

The Supreme Court's willingness to afford retroactivity to *Hurst* is further supported by its recent action in several Alabama cases. In *Johnson v. Alabama*, the Court granted a *Hurst*-based petition for rehearing in a case where the certiorari petition had not made a *Hurst* or *Ring* argument, vacated the state court's judgment, and remanded to the state court for

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228. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 743 (2016) (Scalia, J., dissenting).

229. *See* Darden, *supra* note 171, at 36.

230. *See* Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting) ("I can no longer, however, remain content with the doctrinal confusion that has characterized our efforts to apply the basic *Linkletter* principle. 'Retroactivity' must be rethought.").

231 Teague v. Lane, 489 U.S. 288, 307 (1989) (internal quotation marks omitted).

232. *See Montgomery*, 136 S. Ct. at 738 (Scalia, J., dissenting).

> The problem is that *Miller* stated, quite clearly, precisely the opposite: "Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentence *follow a certain process*—considering an offender's youth and attendant characteristics—before imposing a particular penalty."

*Id.* at 743 (quoting Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012)).

further consideration in light of *Hurst*.[233] The Court followed that approach in other cases.[234] Subsequent to those Supreme Court remand orders, the Alabama Supreme Court made clear, in an order entered on September 30, 2016, that it would not give *Hurst* retroactive application under state law when it found its death-penalty statute constitutional under *Hurst*.[235] Three days later, the Supreme Court granted certiorari in yet another Alabama case that raised neither *Ring* nor *Hurst* in direct appeal, vacated the judgment, and remanded the case to the Alabama courts "for further consideration in light of *Hurst* . . . ."[236] The U.S. Supreme Court, therefore, has provided an indication that it will find *Hurst* retroactive.

*5. Death is Different*

Although *Montgomery* indicated that the Supreme Court's reluctance to declare rules retroactive under *Teague* may be eroding, it is possible that the Supreme Court's liberal *Teague* analysis in *Montgomery* was based on the constitutional difference between juvenile and adult offenders.[237] Soon after *Teague*'s adoption, Professor Paul Heald suggested that *Teague* is a "categorical rule" that the Supreme Court applies in a "contextually sensitive manner."[238] Under this approach, the Court weighs the state's interests against the defendant's interests by considering a variety of factors, such as: imprisonment under an unconstitutional law, novelty of a constitutional claim, failure of state court process, actual innocence of the petitioner, and the pro se status of a petitioner.[239]

Professor Heald explained why "death is different" for purposes of retroactivity:

> The state's interest in the finality of a petitioner's conviction for murder is greater than its interest in the capital sentence he has received. Several of the factors relevant to the state's finality interest relating to the conviction are diminished or nonexistent when consideration is focused upon the death sentence. For example, the relevance of the "re-education function" of criminal law is non-existent when the state seeks to take the life of rather than rehabilitate the convict. The "general need for repose" is also substantially satisfied when the defendant has been taken permanently off the streets. Finally, concerns about the reliability of factual

233. 136 S. Ct. 1837 (2016).
234. *See* Wimbley v. Alabama, 136 S. Ct. 2387 (2016); Kirksey v. Alabama, 136 S. Ct. 2409 (2016); Russell v. Alabama, 137 S. Ct. 158 (2016).
235. Bohannon v. State, 1150640, 2016 WL 5817692, at *5-6 (Ala. 2016).
236. *Russell*, 137 S. Ct. at 158.
237. *See* Darden, *supra* note 171, at 36 ("The court must recognize that juveniles are constitutionally different and fundamental fairness requires retroactive application [of *Miller*].").
238. Heald, *supra* note 199, at 1307.
239. *Id.* at 1307–08.

> determinations are diminished when only the sentence attacked is made on collateral review. Clearly, the question at issue is whether the petitioner deserves to die. The crucial facts do not generally involve dimly remembered eyewitness accounts or forgotten testimony (unlike the guilt/innocence determination). Unlike a redetermination of guilt, the trial transcript is fully available. The defendant's character is primarily at issue; character evidence is not so subject to the vicissitudes of time.[240]

Before the Supreme Court decided *Montgomery*, Professor Tiffani Darden argued that *Miller*'s retroactivity should be considered under the contextual approach.[241] She noted that, starting with *Roper v. Simmons*,[242] "the Supreme Court began to lay the groundwork for distinguishing juvenile and adult offenders."[243] In *Miller*, the Supreme Court "reiterated the thought that juvenile sentencing should consider the offender's 'lessened culpability' and greater 'capacity for change.'"[244] "Contextual sensitivity," Darden noted, "seems most fitting for the *Miller* opinion and its retroactive application to habeas petitioners."[245]

*Montgomery* was replete with considerations relevant under a contextual approach to retroactivity. The Supreme Court emphasized the maxim that "children are constitutionally different from adults for the purposes of sentencing."[246] The Court continued with an analysis reminiscent of Professor Heald's explanation for why death is different under a contextual approach:

> *Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "unfortunate yet transient immaturity." Because *Miller* determined that sentencing a child to life without parole is excessive for all but "the rare juvenile offender whose crime reflects irreparable corruption," it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offender whose crimes reflect

240. *Id.* at 1320.
241. Darden, *supra* note 171, at 33.
242. 543 U.S. 551 (2005) (holding that the death penalty for juveniles is prohibited by the Eighth Amendment).
243. *See* Darden, *supra* note 171, at 34.
244. *Id.* at 36 (quoting Miller v. Alabama, 132 S. Ct. 2455, 2461 (2012)).
245. *See* Darden, *supra* note 171, at 33.
246. Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016).

> the transient immaturity of youth. As a result, *Miller* announced a substantive rule of constitutional law.[247]

This contextual approach to retroactivity in the juvenile context is equally applicable to a *Teague* analysis of death-penalty rules.[248] The Supreme Court has consistently stated that "death is a different kind of punishment from any other that may be imposed in this country," and "[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice . . . ."[249] Particularly relevant to a proof-beyond-a-reasonable-doubt decision like *Hurst*, the Supreme Court has noted: "We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."[250] Therefore, like rules applying to juveniles in *Montgomery*, death-penalty rules are deserving of a broader *Teague* application.

## V. CONCLUSION

Supreme Court precedent provides multiple approaches under which *Hurst* could be found retroactive on collateral review. Not only does the Court's proof-beyond-a-reasonable-doubt precedent provide for *Hurst*'s retroactivity, but its recent retroactivity analysis in *Montgomery* indicates the Court is either willing to apply a more liberal application of *Teague* or to recognize "constitutional difference" in its analysis. In any event, death-sentenced inmates sentenced under death-penalty schemes like Florida's, where the findings necessary for imposition of the death penalty are not found beyond a reasonable doubt, should be afforded relief on collateral review. Indeed, the reasonable-doubt standard "provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law."[251] The *Hurst* rule, therefore, is precisely the type of rule the *Teague* court envisioned would be applied

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247. *Id.* at 734.

248. *See* Heald, *supra* note 199, at 1320 ("The fact that death is different, and has been treated so by the Court for the last twenty-five years, is clearly relevant to the habeas balance." (internal quotation marks omitted)); *see also* Matthew R. Doherty, *The Reluctance Towards Retroactivity: The Retroactive Application of Laws in Death Penalty Collateral Review Cases*, 39 VAL. U. L. REV. 445, 446 (2004) ("If one can accept the premise that the penalty of death is different from all other penological remedies, it follows that the way retroactivity is used in capital cases must also be different.").

249. Gardner v. Florida, 430 U.S. 349, 357–58 (1977); *see also* Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("[T]he penalty of death is qualitatively different from any other sentence.") (internal quotation marks omitted).

250. *See Lockett*, 438 U.S. at 604.

251. Ivan v. City of New York, 407 U.S. 203, 204 (1972).

retroactively, and the Court should not tolerate the possibility of executing someone who has not been found beyond a reasonable doubt to have committed one of the worst of the worst murders.