No. 17-7758

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC SCOTT BRANCH, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

I. Whether this Court should grant review of a decision of the Florida Supreme Court holding that *Hurst v. State*, 202 So.3d 40 (Fla. 2016), was not retroactive as to Branch under state law?

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OPINION BELOW

The Florida Supreme Court's opinion is reported at *Branch v. State*, __ So.3d __, 43 Fla. L. Weekly S21, 2018 WL 495024 (Fla. Jan. 22, 2018) (SC17-1509).

JURISDICTION

The opinion affirming the summary denial of the state successive postconviction motion was issued on January 22, 2018. Branch filed a petition for writ of certiorari on February 12, 2018. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(c). Jurisdiction exists pursuant to 28 U.S.C. § 1257(a). This Court, however, does not exercise that jurisdiction to review issues that are solely a matter of state law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Art. VI, cl. 2.

> The Fifth Amendment of the United States Constitution, which provides: No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

U.S. Const. Amend. V.

> The Sixth Amendment to the United States Constitution, which provides:
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> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . .

U.S. Const. Amend. VI.

> The Eighth Amendment to the United States Constitution, which provides:
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> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. VIII.

The Fourteenth Amendment of the United States Constitution, section one, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.[1]

[1] Actually, none of these federal constitutional provisions are involved because the question presented regarding partial retroactivity is solely a matter of state law.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Branch was convicted and sentenced to death for the murder of a young college student, "whom he robbed and savagely beat and stomped and strangled and sexually assaulted and then left her nude body in the woods." *Branch v. Sec'y, Fla. Dept. of Corr.*, 638 F.3d 1353, 1353 (11th Cir. 2011); *see generally Branch v. McDonough*, 779 F.Supp.2d 1309, 1313-16 (N.D. Fla. 2010) (detailing the facts of the crime).

Branch had been improperly released from prison for sexual battery of a 14-year-old girl. He joined his cousin in Panama City, Florida, in a Pontiac Bonneville. Once in Panama City, Branch raped another woman. *Branch v. State*, 671 So.2d 224 (Fla. 1st DCA 1996), *affirmed*, 684 So.2d 195 (Fla. 1996) (affirming a Bay County conviction and sentence for sexual battery).

Branch spent the weekend prior to the murder on the campus of the University of West Florida in Pensacola, spending Sunday night in the dorm room of a student, Melissa. On Monday, January 11, 1993, Branch, who was worried that law enforcement was looking for him either for the recent rape or on an Indiana warrant and could trace him via the Pontiac Bonneville, drove the Bonneville to the Pensacola airport, parked it, and took a taxi back to campus.

Shortly after 8:20 p.m., Branch kidnapped a young female college student from a remote parking lot on campus to steal her car. Branch savagely beat her. The medical examiner, who had conducted thousands of autopsies, testified that he will always remember this one because of the extent of her injuries. The medical examiner testified at trial, that out of more than three thousand autopsies which he has performed, this "one will stand out in his mind as a result of the brutality of the injuries." *Branch v. State*, SC18-190 (Fla. Feb. 15, 2018) (quoting the trial court's sentencing order). Branch stomped; strangled; and sexually assaulted her with a tree branch. He left her nude body in the nearby woods after covering her with leaves and

debris. Branch then stole her red Toyota Celica with a black antenna and broken left taillight. Branch then returned to the dorm room. Melissa noticed that Branch had a cut on his hand.

The next day, Branch drove back to Panama City and then to Bowling Green, Kentucky, in the victim's red Toyota. He called his grandfather in Indiana to come pick him up. The victim's car was recovered shortly afterward in a parking lot in Bowling Green.

After arriving in Indiana and speaking with a lawyer, Branch turned himself in. The booking officer who took Branch's fingerprints noticed he had a cut on his hand. *see generally Branch v. McDonough*, 779 F.Supp.2d 1309, 1313-16 (N.D. Fla. 2010) (detailing the facts of the crime).

Judge Edward Phillips Nickinson III, presided at the trial. The prosecution presented DNA evidence consisting of the victim's blood located on boots and socks in Branch's Pontiac Bonneville. The bloodstains matched the victim's DNA profile "conservatively" at one in 9 million. (T. Vol. III 519). The jury convicted Branch of first-degree murder, sexual battery, and grand theft. Branch testified at the guilt phase admitting that he stole the victim's car. His story was that, while he helped an "other Eric" carry the victim into the woods, it was the "other Eric" who beat and murdered her.

The jury recommended a death sentence by a vote of ten to two. The judge found three aggravators: 1) the murder was committed in the course of a sexual battery; 2) prior violent felony based on an Indiana rape conviction;[2] and 3) the murder was

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[2] The Indiana rape conviction, not the Florida rape conviction, was used as the basis for the prior violent felony aggravator. *Branch v. State*, 685 So.2d 1250, 1253 (Fla. 1996) (finding the remainder of Branch's claims in the direct appeal to be "without merit"); *Branch v. State*, 952 So.2d 470, 482 (Fla. 2006) (rejecting a claim of ineffectiveness of appellate counsel for raising but not adequately briefing the issue of

especially heinous, atrocious, or cruel. The trial court found several nonstatutory mitigating circumstances, including: remorse; unstable childhood; positive personality traits; and acceptable conduct at trial. The trial court sentenced Branch to death.

In the direct appeal to the Florida Supreme Court, Branch raised nine issues. *Branch v. State*, 685 So.2d 1250, 1252, n.3 (Fla. 1996) (listing the nine issues in a footnote).[3] The Florida Supreme Court affirmed the convictions and death sentence. *Branch v. State*, 685 So.2d 1250 (Fla. 1996).

Branch then filed a petition for writ of certiorari in the United States Supreme Court. On May 12, 1997, the United States Supreme Court denied review. *Branch v. Florida*, 520 U.S. 1218 (1997).

On May 7, 1998, Branch filed a shell motion for postconviction relief in state trial court and then on April 1, 2003, he filed a second amended motion, raising fourteen claims. *Branch v. State*, 952 So.2d 470, 474, n.1 (Fla. 2006) (listing the claims raised in the amended 3.851 motion).[4] The trial judge, Judge Nickinson, also presided over

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the admissibility of the Indiana conviction).

[3] The nine issues were: 1) failure to grant a continuance; 2) failure to conduct a hearing into counsel's competence; 3) failure to give a requested instruction on circumstantial evidence; 4) insufficient evidence; 5) comment on right to silence; 6) photo of the victim; 7) failure to give a requested instruction defining mitigating circumstances; 8) evidence of another crime; and 9) victim impact evidence.

[4] The fourteen claims were: 1) ineffective assistance of trial counsel at the guilt phase and violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972); 2) ineffective assistance of trial counsel during the penalty phase and violations of *Brady* and *Giglio*; 3) newly discovered evidence shows that the jury and trial court considered a nonstatutory aggravating circumstance of an improper prior violent felony; 4) counsel was ineffective for failing to obtain an adequate mental health evaluation; 5) postconviction counsel was unconstitutionally hindered because of the rules prohibiting counsel from interviewing jurors; 6) jury instructions diluted the jury's sense of overall responsibility in Florida's death penalty scheme; 7) Florida's death penalty sentencing scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002); 8) unconstitutionality of execution by electrocution and lethal injection; 9)

the state postconviction proceedings. The trial court held an evidentiary hearing on three claims. Two defense mental health experts testified at the state evidentiary hearing. Dr. James Larson, who had been hired by trial counsel as a confidential mental health expert before trial, but who was not presented at the penalty phase because his testimony would not be "helpful," testified during the postconviction evidentiary hearing. *Branch*, 952 So.2d at 478 (stating that "Dr. Larson's evaluation was not helpful to the defense"). And state postconviction counsel Michael Reiter also presented Dr. Henry L. Dee at the evidentiary hearing to support the claim of ineffectiveness for failing to obtain an adequate mental health evaluation. *Id.* (noting much of the proposed mitigation presented at the evidentiary hearing either was "not credible or would actually have been harmful to the defendant's case"). Dr. Dee's deposition was taken before the evidentiary hearing and was filed with the trial court. Dr. Dee testified during the deposition that Branch's full scale IQ was 115. The trial court denied the motion following the evidentiary hearing.

In his postconviction appeal to the Florida Supreme Court, Branch raised nine issues.[5] *Branch v. State*, 952 So.2d 470, 474 (Fla. 2006). Branch also filed a state

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defendant may become mentally incompetent by the time of his execution; 10) felony underlying felony murder was an automatic aggravating circumstance; 11) improper direct appeal and ineffective assistance of appellate counsel; 12) public records are being withheld; 13) Florida's capital punishment statute is unconstitutional because it fails to prevent the arbitrary imposition of the death penalty; and 14) cumulative error.

[5] The nine issues were: 1) trial counsel was ineffective for failing to file a motion to suppress the items taken from the Pontiac; 2) trial counsel was ineffective for failing to investigate and present sufficient mitigation evidence during the penalty phase; 3) trial counsel was ineffective for failing to hire experts; 4) trial counsel was ineffective for failing to object to the introduction of the abstract of judgment during the penalty phase; 5) trial counsel was ineffective for failing to impeach witnesses; 6) trial counsel was ineffective for failing to investigate for the guilt phase; 7) trial counsel was ineffective for failing to object at the guilt and penalty phases; 8) Branch's Indiana

habeas petition raising four claims of ineffectiveness of appellate counsel.[6] *Branch*, 952 So.2d at 481. The Florida Supreme Court affirmed the trial court's denial of the postconviction motion and denied the state habeas petition.

On March 28, 2007, Branch, represented by Michael Reiter, filed a 132-page habeas petition in federal court, raising seven issues.[7] *Branch v. McDonough*, 4:06-cv-00486-RH (Doc. #7). The district court denied the federal habeas petition but granted a certificate of appealability on one issue. *Branch v. McDonough*, 779

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conviction was not a felony under Florida law in order to establish the prior violent felony aggravating circumstance; and 9) Branch was entitled to relief based on cumulative error.

[6] The four claims of ineffectiveness of appellate counsel were: 1) failing to argue that the Indiana conviction was not a felony under Florida law and the inadmissibility of the abstract of judgment; 2) failing to raise on appeal the trial court's error in admitting into evidence DNA probability statistics without conducting a proper *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), hearing; 3) failing to raise the issue of the trial court's order denying the defense's request for a recess; and 4) failing to argue that the trial court had failed to conduct a proper *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973), inquiry.

[7] The seven issues were: 1) ineffective assistance of counsel in (a) not filing a motion to suppress the evidence seized from the Pontiac, (b) not hiring a blood-spatter expert, (c) not hiring a forensic pathologist to rebut the medical examiner's testimony about the stick found in the victim's vagina and the effect of the ligature found around her neck, (d) insufficiently investigating and presenting evidence in mitigation, and (e) not challenging on direct appeal the admission of DNA evidence; 2) the state trial court's failure to conduct a hearing on Mr. Branch's attorney's competence; 3) the state trial court's refusal to continue the trial; 4) the prosecutor's references to Mr. Branch's failure to disclose the "other Eric" story prior to the trial; 5) the state trial court's refusal to give a requested jury instruction further defining the term "mitigation"; 6) the admission, during the penalty phase, of evidence of Mr. Branch's sexual-battery conviction in Indiana, without a showing that it was a crime of violence and a felony as required for use as an aggravating circumstance under the Florida death-penalty statute; and 7) the State's failure to provide additional postconviction resources to hire additional postconviction experts.

F.Supp.2d 1309 (N.D. Fla. 2010) (detailing the facts and denying the federal habeas petition).

The Eleventh Circuit rejected the *Doyle v. Ohio*, 426 U.S. 610 (1976), claim and affirmed the federal district court's denial of habeas relief. *Branch v. Sec'y, Fla. Dept. of Corr.*, 638 F.3d 1353 (11th Cir. 2011).

On October 19, 2011, Branch filed a petition for writ of certiorari in the United States Supreme Court from the Eleventh Circuit opinion, raising two issues: 1) whether there is a right of self-representation in a federal habeas appeal and 2) the *Doyle* issue. The United States Supreme Court denied certiorari review. *Branch v. Tucker*, 565 U.S. 1248 (2012) (No. 11-8117).

On December 7, 2012, Branch filed a *pro se* motion for DNA testing. Branch sought DNA testing of a towel in Melissa's dorm room; a brochure that may have belonged to Eric St. Pierre, who Branch asserted was the "other Eric"; hair found in the Pontiac Bonneville; the victim's shoelaces; and a stocking used to choke the victim (actually a sock). Branch also sought a court order for DNA samples from Eric St. Pierre in Maine. Prior state postconviction counsel, registry counsel Michael Reiter, was replaced by Capital Collateral Regional Counsel - North (CCRC-N), as state postconviction counsel of record.

On March 19, 2015, CCRC-N counsel adopted the *pro se* motion for DNA testing. The State filed an answer to the DNA motion objecting the DNA testing of the towel and pointing out the DNA evidence tying Branch to the murder. At trial, the prosecution established that a sock, found in the Pontiac Bonneville that Branch had been driving and then abandoned in the Pensacola airport parking lot, had bloodstains matching the victim's DNA profile at one in 9 million. (T. Vol. III 519).

On July 1, 2015, the trial court denied the motion. The trial court noted that the towel and the stocking had been previously DNA tested and the results were admitted

at the 2004 postconviction evidentiary hearing as Exhibits B & C. The DNA testing performed by the Florida Department of Law Enforcement (FDLE) on the victim's sock showed only her DNA. The trial court noted that the towel was not involved in the murder or located at the crime scene. The trial court ruled there was an insufficient nexus between the towel and the issues in the case. The trial court found the motion for DNA insufficient because Branch failed to explain how the DNA results would show he was not present at the crime scene.

The Florida Supreme Court affirmed the denial of the motion for DNA testing concluding that Branch had "failed to demonstrate a nexus between the potential results of DNA testing on each piece of evidence and the issues in the case, or how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence." *Branch v. State*, 2016 WL 4182823 (Fla. Aug. 8, 2016) (SC15-1869).

On April 2, 2014, Branch, represented by S. Douglas Knox of Quarles & Brady, filed a 42 U.S.C. § 1983 action in federal district court challenging the registry statute on two equal protection grounds. The district court dismissed the § 1983 action on statute of limitations grounds. Following oral argument, the Eleventh Circuit affirmed the dismissal. *Branch v. Sec'y, Fla. Dept. of Corr.*, 608 Fed. Appx. 912 (11th Cir. 2015).

On June 30, 2016, Branch, represented by CCRC-N, filed a successive postconviction motion raising a claim that his death sentence violated the right to jury trial established in *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*). On April 3, 2017, Branch filed an amended motion. On July 12, 2017, the trial court denied summarily the *Hurst* claim concluding that *Hurst* did not retroactively apply to Branch citing *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016).

The Florida Supreme Court affirmed the trial court's denial of the *Hurst* claim. *Branch v. State*, 2018 WL 495024 (Fla. Jan. 22, 2018) (SC17-1509).

On January 18, 2018, the Governor of Florida signed a death warrant scheduling the execution in this case for Thursday, February 22, 2018.

On February 12, 2018, Branch then filed a petition for writ of certiorari in this Court from the Florida Supreme Court's opinion. This is the State's brief in opposition.

REASON FOR DENYING THE WRIT

ISSUE I

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT *HURST V. STATE*, 202 So.3d 40 (FLA. 2016), WAS NOT RETROACTIVE AS TO BRANCH UNDER STATE LAW?

Petitioner Branch asserts that the Florida Supreme Court's partial retroactivity analysis violates the Eighth Amendment and the Supremacy Clause. He claims that both *Hurst v. Florida*, and *Hurst v. State*, must be fully retroactive to all capital cases. But the issue is solely a matter of independent state law. The Florida Supreme Court's decision was based on the state test for retroactivity. Furthermore, there is no conflict between the Florida Supreme Court's decision and this Court's jurisprudence on retroactivity. Indeed, the Florida Supreme Court's decision granting partial retroactivity provides greater relief than this Court's own decisions would. Nor is there any conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court. The only circuit court to have reached the issue, the Eleventh Circuit, has held that *Hurst v. Florida* is not retroactive and that the Florida Supreme Court's partial retroactivity does not violate the federal constitution. The Eleventh Circuit agrees with the Florida Supreme Court. Additionally, neither the Eighth Amendment nor the Supremacy Clause are involved. Neither speak to retroactivity analysis. This Court should deny review of this state law claim.

The Florida Supreme Court's decisions

Branch argued in the Florida Supreme Court that this Court's decision in *Hurst v. Florida*, and the Florida Supreme Court's decision on remand in *Hurst v. State*, should be applied retroactively to him.

The Florida Supreme Court rejected the claim, reasoning:

> Branch's motion sought relief pursuant to the United States Supreme Court's decision in *Hurst v. Florida*, _ U.S. _, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and our decision on remand in *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), *cert. denied*, __ U.S. __, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). This Court stayed Branch's appeal pending the disposition of *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, __ U.S. __, 138 S.Ct. 513, __ L.Ed.2d __ (2017). After this Court decided *Hitchcock*, Branch responded to this Court's order to show cause arguing why *Hitchcock* should not be dispositive in this case.
>
> After reviewing Branch's response to the order to show cause, as well as the State's arguments in reply, we conclude that Branch is not entitled to relief. Branch was sentenced to death following a jury's recommendation for death by a vote of ten to two. *Branch v. State*, 685 So.2d 1250, 1252 (Fla. 1996). Branch's sentence of death became final in 1997. *Branch v. Florida*, 520 U.S. 1218, 117 S.Ct. 1709, 137 L.Ed.2d 833 (1997). Thus, *Hurst* does not apply retroactively to Branch's sentence of death. *See Hitchcock*, 226 So.3d at 217. Accordingly, we affirm the denial of Branch's motion.

Branch v. State, 43 Fla. L. Weekly S21 (Fla. Jan. 22, 2018).

The Florida Supreme Court's decision in this case was based on its prior ruling in *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S.Ct. 513 (2017) (No. 17-6180). *Hitchcock*, in turn, was based on the Florida Supreme Court's prior decision in *Asay v. State*, 210 So.3d 1 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 138 S.Ct. 41 (2017) (No. 16-9033). *See Hitchcock*, 226 So.3d at 217 (stating: "our decision in *Asay* forecloses relief").

In *Asay v. State*, 210 So.3d 1 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 138 S. Ct. 41 (2017), and *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), the Florida Supreme Court created a partial retroactivity analysis. In these two cases, the Florida Supreme Court held that their prior decision in *Hurst v. State* was retroactive as to cases where the death sentence was not final before *Ring v. Arizona*, 536 U.S. 584 (2002), but was not retroactive as the cases where the death sentence was final before *Ring*. *See Hannon v. State*, 228 So.3d 505, 512 (Fla. 2017) (stating: "we have consistently held that *Hurst* is not retroactive prior to June 24, 2002"), *cert. denied, Hannon v. Florida*, 138 S.Ct. 441 (2017) (No. 17-6650); *Hannon v. Sec'y Dept. of Corr.*, 2017 WL 5177614 (11th Cir.

Nov. 8, 2017) (observing that *Hurst* is "not retroactive to him under the Florida Supreme Court's decision in *Asay*").

The Florida Supreme Court in *Asay* relied on the state test for retroactivity of *Witt v. State*, 387 So.2d 922 (1980). *See Asay*, 210 So.3d at 15-22. The Florida Supreme Court in *Mosley* relied on two state tests for retroactivity, that of *James v. State*, 615 So.2d 668 (Fla. 1993), and *Witt*. *See Mosley*, 209 So.3d at 1274-1283.

In his petition, Branch attacks the Florida Supreme Court's holding in this case and in *Asay* on Eighth Amendment and Supremacy Clause grounds.[8]

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[8] It is not clear whether Branch's claim is limited to a claim that *Hurst v. State* must be retroactively applied under the federal constitution or includes *Hurst v. Florida*, too. There are significant differences between the holding of this Court in *Hurst v. Florida* and the holding of the Florida Supreme Court in *Hurst v. State*. The most obvious difference is that this Court declined to address the Eighth Amendment unanimity argument in *Hurst v. Florida*; whereas, the Florida Supreme Court held that the Eighth Amendment requires unanimity as both a matter of federal constitutional law and state constitutional law. *Hurst v. State*, 202 So.3d 40, 44 (Fla. 2016) (holding that "in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous"). Furthermore, the Florida Supreme Court's decision required additional factual findings by the jury regarding sufficient aggravating circumstances, mitigation, as well as weighing; whereas, this Court's decision was limited to factual findings by the jury regarding the aggravating circumstances only.

Matter of state law

This Court lacks the authority to consider this claim. This Court does not review claims that are based on independent state law grounds. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (explaining that respect for the "independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground" for the decision). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010); *Long*, 463 U.S. at 1041. This Court has observed that it is "fundamental" that state courts "be left free and unfettered by us" in interpreting their own state constitutions and state laws. *Powell*, 559 U.S. at 56.

The Florida Supreme Court's decisions were based on independent state law. They were based on the state test for retroactivity. In the lead case of *Asay*, the Florida Supreme Court invoked the state test for retroactivity of *Witt v. State*, 387 So.2d 922 (Fla. 1980). In *Asay*, the Florida Supreme Court analyzed its prior decision in *Hurst v. State*, using the *Witt* test, at great length. *Asay*, 210 So.3d at 15-22 (explicitly and repeatedly citing *Witt* as the basis for the retroactivity analysis).

As this Court has held, states are free to have different retroactivity tests than the federal test for retroactivity established in *Teague v. Lane*, 489 U.S. 288 (1989). *Danforth v. Minnesota*, 552 U.S. 264 (2008). The *Danforth* Court held that states are not required to adopt *Teague*. *Id.* at 266. The High Court noted that the Oregon Supreme Court correctly stated that states "are free to choose the ***degree*** of retroactivity" . . . , "so long as the state gives federal constitutional rights at least as broad a scope as the United States Supreme Court requires." *Id.* at 276 (emphasis added). This Court concluded that "the remedy a state court chooses to provide its

citizens for violations of the Federal Constitution is primarily ***a question of state law.***" *Id.* at 288 (emphasis added).

Under *Danforth*, states are free to have a broader retroactivity test; they just may not have a narrower test. *Montgomery v. Louisiana*, 136 S.Ct. 718, 729 (2016) (explaining that the federal constitution requires state courts to give retroactive effect to new substantive rules). Florida's test for retroactivity is broader than the federal test. *Asay*, 210 So.3d at 15 (citing *Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005)); *Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005) (rejecting the use of the federal test of *Teague* to determine retroactivity, and continuing to apply "our longstanding *Witt* analysis, which provides more expansive retroactivity standards than those adopted in *Teague*"). Because the state test for retroactivity is broader and provides more relief than *Teague*, the retroactivity of the Florida Supreme Court's decisions is solely a matter of state law. Florida is entitled to adopt a partial retroactivity analysis in cases where there would be no retroactivity under the federal test of *Teague*.

The Florida Supreme Court may hold that *Hurst v. State* is not retroactive as to cases where the sentence was final before *Ring*, just as they did in *Asay* and *Hitchcock*. When the *Danforth* Court spoke of state courts being free to choose the "degree of retroactivity" that includes partial retroactivity. Partial retroactivity is solely a matter of state law.

Opposing counsel, in his petition, asserts that this Court's decision in *Danforth* assumed a date of finality based on when the sentence became final. Pet. at 11. But none of this Court's reasoning in *Danforth* was based on dates. It was based on this Court's respect for state courts' independence and their dual sovereignty. Furthermore, the Florida Supreme Court's partial retroactivity analysis also depends on the date the sentence became final — before or after *Ring*. *Danforth* cannot be distinguished on this basis and its holding cannot be so lightly brushed aside.

Under *Danforth*, the issue being raised is solely a matter of state law. Partial retroactivity is solely a matter of state law and this Court does not review state law matters. On this basis alone, review should be denied.

No conflict with this Court's retroactivity jurisprudence

There is no conflict between the Florida Supreme Court's decision in this case and this Court's decisions regarding retroactivity. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). Not only has this Court held that states may employ their own retroactivity tests provided that their tests grant at least as much relief as *Teague*, but this Court's own retroactivity analysis under *Teague* would not grant any retroactive relief to any capital defendant.

This Court has held that Sixth Amendment right-to-a-jury trial decisions are not retroactive. *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (holding that *Ring* was not retroactive using the federal test of *Teague*); *DeStefano v. Woods*, 392 U.S. 631 (1968) (holding that a Sixth Amendment right-to-a-jury-trial decision in an earlier case was not retroactive). The *Summerlin* Court reasoned that "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." *Summerlin*, 542 U.S. at 357.

Under this Court's logic in *Summerlin*, *Hurst v. Florida* would not be retroactive. Under this Court's view, *Hurst v. Florida* would not be retroactively applied to any capital defendant in Florida or any other state for that matter. The Florida Supreme Court's partial retroactivity analysis provides more relief than this Court's analysis does.

The Florida Supreme Court's decisions in this case and *Asay* does not conflict with either this Court's decision in *Danforth* or this Court's decision in *Summerlin*. There is no conflict between the Florida Supreme Court and this Court.

No conflict with any federal appellate court or state supreme court

Not only is there no conflict with this Court, there is no conflict with that of any federal appellate court or state supreme court either. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among state supreme courts as a consideration in the decision to grant review). In the absence of such conflict, certiorari is rarely warranted.

The Eleventh Circuit has held that *Hurst v. Florida* is not retroactive at all. *Lambrix v. Sec'y, Fla. Dept. of Corr.*, 851 F.3d 1158, 1165, n.2 (11th Cir. 2017) (*Lambrix V*) ("under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review"), *cert. denied, Lambrix v. Jones,* 138 S.Ct. 217 (2017) (No. 17-5153).

The Ninth Circuit has also held that *Hurst v. Florida* is not retroactive. *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017). The Ninth Circuit denied permission to file a successive habeas petition raising a *Hurst v. Florida* claim concluding that *Hurst v. Florida* did not apply retroactively. Indeed, Ybarra made the same argument regarding the *Hurst v. Florida* decision being substantive that Branch is making in this petition. The Ninth Circuit disagreed, concluding that *Hurst v. Florida* was not a substantive rule because it did not "decriminalize" any conduct or place any conduct "beyond the scope of the state's authority to proscribe." *Ybarra*, 869 F.3d at 1032. Ybarra also argued the *Hurst v. Florida* should be applied retroactively because it involved the standard of proof citing *Ivan V. v. City of New York*, 407 U.S. 203 (1972), just as Branch does in his petition. The Ninth Circuit rejected that argument too, reasoning that even if *Hurst v. Florida* extends the reasonable-doubt standard to the

weighing determination, it does not redefine capital murder. *Ybarra*, 869 F.3d at 1032.[9] The Ninth Circuit also observed that because neither *Ring* nor *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applied retroactively, "we fail to see why *Hurst* would apply retroactively." *Id.* at 1033. There is no conflict among the federal appellate courts regarding the retroactivity of *Hurst v. Florida* at present and it is unlikely that one will ever develop in the future in light of this Court's holding in *Summerlin*.

The Eleventh Circuit has also rejected the exact claim raised in the petition regarding partial retroactivity. The Eleventh Circuit rejected constitutional attacks on the Florida Supreme Court's partial retroactivity analysis. The Eleventh Circuit concluded that the Florida Supreme Court's ruling that *Hurst v. State* was not retroactively applicable to cases final before *Ring* does not violate the federal constitution. In *Lambrix v. Sec'y, Fla. Dept. of Corr.*, 872 F.3d 1170 (11th Cir. 2017) (*Lambrix VI*), *cert. denied*, *Lambrix v. Jones*, 138 S.Ct. 312 (2017) (No. 17-6290), the Eleventh Circuit rejected a series of constitutional attacks on the Florida Supreme Court's rulings in *Asay* and *Hitchcock*. Lambrix contended that his federal due process,

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[9] Neither *Hurst v. Florida* nor *Hurst v. State* involved the standard of proof. The issue in *Hurst v. Florida* was who decides — the judge versus the jury — not the standard of proof. This Court in *Hurst v. Florida* did not extend the standard of proof to weighing. Weighing was not at issue in Hurst v. Florida. This Court's decision was limited to factual findings regarding aggravating circumstances. Indeed, after this Court decided *Hurst v. Florida*, it decided the case of *Kansas v. Carr*, 136 S.Ct. 633 (2016), in which this Court rejected any notion that weighing is even a fact to which any standard of proof applies. This Court in *Carr* noted that while aggravating factors are "purely factual determination"; in contrast, whether mitigation exists is "largely a judgment call (or perhaps a value call)." The *Carr* Court explained that the ultimate question of whether mitigating circumstances outweigh aggravating circumstances, i.e., weighing, is mostly "a question of mercy." The concept of a standard of proof does not apply to non-facts, such as mercy.

Nor is the new unanimity requirement established by the Florida Supreme Court in *Hurst v. State*, the equivalent of a standard of proof. They are two very different concepts. The "retroactivity" of the beyond-a-reasonable-doubt standard of proof is a non-issue in this case and all other Florida capital cases as well.

equal protection, and Eighth Amendment rights were violated by the state court's failure to give full retroactive effect to *Hurst v. State*. *Id.* at 1178. The Eleventh Circuit noted that "this Court already indicated that *Hurst* is not retroactively applicable on collateral review under federal law, and we hold here that no reasonable jurist would find that issue debatable." *Id.* at 1182. The Eleventh Circuit noted that the United States Supreme Court held that *Ring* does not apply retroactively to cases on collateral review in *Summerlin*. *Id.* The Eleventh Circuit concluded that the Florida Supreme Court's ruling that *Hurst v. State* was not retroactively applicable to be "fully in accord" with this Court's "precedent in *Ring* and *Schriro*." *Id.* at 1182-83. The Eleventh Circuit then denied a certificate of appealability (COA) on the issue. *Id.* at 1183. And the Eleventh Circuit concluded with the statement that "the Florida courts' rejection of Lambrix's constitutional claim was not contrary to nor an unreasonable application of a holding of a Supreme Court decision." *Id.*

The Eleventh Circuit agrees with the Florida Supreme Court that the partial retroactivity analysis the Florida Supreme Court established in *Asay* does not violate due process, equal protection, or the Eighth Amendment. *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017) (rejecting the claims that the partial retroactivity established in *Asay* violates the Eighth Amendment, due process or equal protection based on an assertion of arbitrariness), *cert. denied*, *Lambrix v. Florida*, 138 S.Ct. 312 (2017) (No. 17-6222). So, there is no conflict between the Florida Supreme Court and the one federal circuit to have directly addressed the claim presented in the petition that partial retroactivity violates the federal constitution.

There is no conflict between the Florida Supreme Court and the Delaware Supreme Court either. Pet. at 31. While the Delaware Supreme Court held that its prior decision in *Rauf v. State*, 145 A.3d 430 (Del. 2016), was fully retroactive in *Powell v. Delaware*, 153 A.3d 69 (Del. 2016), it did so as a matter of state law. Under *Danforth*,

each state is permitted to apply its own decisions as broadly as they choose. Moreover, the Delaware case involved a standard of proof issue that the Florida cases did not. *Powell*, 153 A.3d at 73-74. Unless two cases involve the same issues, the two cases cannot conflict.[10]

There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals or that of any state supreme court. The lack of conflict is a second reason to deny the petition.

The Eighth Amendment and arbitrariness

Branch insists that the Florida Supreme Court's partial retroactivity analysis is arbitrary in violation of the Eighth Amendment. It is not.

Branch seems to be arguing that retroactivity analysis based on court dates is itself arbitrary. But all modern retroactivity tests depend on dates of finality. Both federal and state courts have retroactivity doctrines that depend on dates. For example, a cut-off date is part of the pipeline doctrine first established in *Griffith v. Kentucky*, 479

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[10] And *Ivan V. v. City of New York*, 407 U.S. 203 (1972), is irrelevant to any retroactivity analysis in Florida. If a rule of law it not new, there is no retroactivity analysis required. *Butler v. McKellar*, 494 U.S. 407, 412 (1990) (defining a "new rule" for purpose of retroactivity as one that "breaks new ground or imposes a new obligation," such as a decision that explicitly overrules an earlier holding). Florida's standard of proof for aggravating circumstances is not new. Florida law has required that the State prove aggravators at the beyond-a-reasonable-doubt standard of proof for over three decades. *Williams v. State*, 37 So.3d 187, 194-95 (Fla. 2010) (stating that the State has the burden to prove beyond a reasonable doubt each and every aggravating circumstance); *Aguirre-Jarquin v. State*, 9 So.3d 593, 607 (Fla. 2009) (explaining that the State must prove the existence of an aggravator beyond a reasonable doubt citing *Parker v. State*, 873 So.2d 270, 286 (Fla. 2004)); *cf. Floyd v. State*, 497 So.2d 1211, 1214 (Fla. 1986) (striking an aggravator that was not proven "beyond a reasonable doubt"). Proving aggravators beyond a reasonable doubt is not new in Florida. The "retroactivity" of the beyond-a-reasonable-doubt standard of proof is a non-issue in this case and all other Florida capital cases as well.

U.S. 314, 328 (1987). The *Griffith* Court created the pipeline concept by holding that all new developments in the criminal law must be applied retrospectively to all cases, state or federal, that are pending on direct review. *Griffith* depends on the date of finality of the direct appeal. The current federal test for retroactivity in the postconviction context, *Teague*, also depends on a date. If a case is final on direct review, the defendant will not receive benefit of the new rule unless one of the exceptions to *Teague* applies.

The Florida Supreme Court's partial retroactivity test also depends on a date. The critical date under *Asay* is whether the sentence was final before or after *Ring*. The Florida Supreme Court's line drawing based on a date is no more arbitrary than this Court's in *Griffith*.

Inherent in the concept of non-retroactivity is that some cases will get the benefit of a new development, while other cases will not, depending on a date. Drawing a line between newer cases that will receive benefit of a new development in the law and older final cases that will not receive benefit of the new development is part and parcel of the landscape of retroactivity analysis. It is simply part of the retroactivity paradigm that some cases will be treated differently than other cases based on the age of the case. Neither *Griffith* nor *Teague* nor *Asay* violates the Eighth Amendment.

The Florida Supreme Court's decision in *Asay* is no more arbitrary than this Court's in *Griffith* and neither violate the Eighth Amendment.

The only way to ensure complete uniformity is to abolish the retroactivity doctrine all together and hold all significant changes in the law will apply to all cases no matter how old the case, which would negate all finality. If opposing counsel's view was adopted by courts, with every new development in the law, a capital defendant would get a new trial or a new penalty phase *ad infinitum*. Such a policy would, of course, result in endless new trials and endless new penalty phases. Given that the litigation

in capital cases span decades, there would never be any finality in capital cases if such a position was adopted. And, as this Court has explained, finality is the overriding concern in any retroactivity analysis. *Penry v. Lynaugh*, 492 U.S. 302, 312 (1989). The *Penry* Court considered and rejected a claim that the test for retroactivity in capital cases should be different because the overriding concern of finality that underlies retroactivity is just as "applicable in the capital sentencing context." *Id.* at 314. Penry argued that the test for retroactivity should be laxer in capital cases, not that there should be automatic and full retroactivity in all capital cases. Opposing counsel's position that there should be automatic retroactivity as to all capital cases is even more extreme than the position rejected by this Court in *Penry*. Finality trumps uniformity in the retroactivity realm.

Furthermore, the Florida Supreme Court's partial retroactivity analysis provides more relief than this Court's retroactivity analysis does. The Florida Supreme Court has already granted more capital defendants retroactive relief than this Court would under a *Teague* analysis. What Branch is arguing is that, while this Court itself would not grant any capital defendant retroactive relief, the Florida Supreme Court is somehow constitutionally required under the Eighth Amendment to grant even more retroactive relief than its current partial retroactivity analysis requires. To state that proposition is to rebut it.

The Eighth Amendment does not require full retroactivity and does not condemn partial retroactivity.[11]

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[11] Nor does *Caldwell v. Mississippi*, 472 U.S. 320 (1985), advance Branch's Eighth Amendment position, as amici curiae suggest. There was no *Caldwell* violation. To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law. *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994); *see also Dugger v. Adams*, 489 U.S. 401 (1989). Even today, under Florida's new death penalty statute, the judge remains the final sentencer in Florida and a jury recommendation of death in Florida is just that — a

recommendation. The Florida's new death penalty statute refers to the jury's vote as a "recommendation." Ch. 2017–1, § 1, Laws of Fla. ("If a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death."); *see also In re Standard Criminal Jury Instructions in Capital Cases*, 214 So.3d 1236, 1238, n.4 (Fla. 2017) (Lawson, J., concurring) (stating: "the jury's verdict is only a recommendation"). A Florida trial court, while bound by the jury's findings of no aggravation, is still free to reject the jury's death recommendation of death and impose a life sentence. And such a decision is not even appeable under double jeopardy. *Williams v. State*, 595 So.2d 936 (Fla. 1992) (holding that the Double Jeopardy Clause prohibits a new penalty phase where the judge had imposed a life sentence at the first penalty phase citing *Brown v. State*, 521 So.2d 110 (Fla. 1988)); *State v. Ballard*, 956 So.2d 470, 475 (Fla. 2d DCA 2007) (Villanti, J., concurring) (noting a judge's decision to override a jury's recommendation of death is not appealable). The jury's recommendation in Florida was, and remains, "advisory."

Contrary to what amici curiae implies, the Eleventh Circuit has consistently rejected *Caldwell* challenges to the Florida's jury instructions in capital cases in the years since *Romano*. As the Eleventh Circuit has explained, the "infirmity identified in *Caldwell* is simply absent" in a case where "the jury was not affirmatively misled regarding its role in the sentencing process." *Davis v. Singletary*, 119 F.3d 1471, 1481-82 (11th Cir. 1997) (quoting *Romano*, 512 U.S. at 9). The Eleventh Circuit concluded "the references to and descriptions of the jury's sentencing verdict in this case as an advisory one, as a recommendation to the judge, and of the judge as the final sentencing authority are not error under *Caldwell*." *Davis*, 119 F.3d d at 1482. "Those references and descriptions are not error, because they accurately characterize the jury's and judge's sentencing roles under Florida law." *Id. see also Provenzano v. Singletary*, 148 F.3d 1327, 1334 (11th Cir. 1998) (recognizing the limitations on prior Eleventh Circuit *Caldwell* cases which had "to be read" in light of the Supreme Court's subsequent decisions in *Romano* and *Dugger*); *Johnston v. Singletary*, 162 F.3d 630, 642-44 (11th Cir. 1998) (rejecting both a straight *Caldwell* claim and an ineffectiveness claim based on *Caldwell* as being "without merit"); *Belcher v. Sec'y, Fla. Dept. of Corr.*, 427 Fed. Appx. 692, 695 (11th Cir. 2011) (rejecting a claim of ineffective assistance of counsel for failing to make a *Caldwell* objection because Florida "treats the jury's verdict as advisory," therefore, the "remarks made by the prosecutor, viewed in context, accurately portrayed the relationship between the judge and jury and did not denigrate the jury's role in the proceedings" citing *Davis*).

And *Caldwell* is not retroactive anyway. *Sawyer v. Smith*, 497 U.S. 227 (1990) (holding *Caldwell* was not retroactive under *Teague*).

Only one Justice has expressed the view that *Caldwell* is an issue in Florida capital cases. *Truehill v. Florida*, 138 S.Ct. 3 (2017) (Sotomayor, J., dissenting from the denial of certiorari) (advocating that the Florida Supreme Court revisit its precedent rejecting *Caldwell* challenges to the use of the term "advisory" to describe

The Supremacy Clause and *Montgomery*

Opposing counsel, relying on *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), insists that a new substantive rule of constitutional law is involved and therefore, the Supremacy Clause requires that *Hurst* be applied retroactively. Opposing counsel insists that *Hurst* is retroactive under federal law because, he claims, the right to a jury trial is a substantive right.

It is not. The right to a jury trial is procedural, not substantive. According to this Court, the right to a jury trial is a procedural right. This Court specifically observed in a retroactivity case that "*Ring*'s holding is properly classified as ***procedural***' because the Sixth Amendment's jury-trial guarantee "has nothing to do with the range of conduct a State may criminalize." *Summerlin*, 542 U.S. at 353 (emphasis added). The *Summerlin* Court explained that rules that allocate decision making authority between the judge and the jury "are prototypical procedural rules." *Id.* The Supreme Court noted that they had classified the right to a jury trial as procedural "in numerous other contexts." *Id.* at 353-54 (citing numerous cases). The *Montgomery* Court characterized the right as procedural too. *Montgomery*, 136 S.Ct. at 730 (citing *Summerlin* and characterizing *Ring* as a procedural rule designed to enhance the accuracy of a conviction or sentence). While opposing counsel may view the right to a jury trial as substantive, this Court has repeatedly classified it as procedural and in very similar situations. So, *Hurst* is not substantive under *Montgomery*.

Furthermore, *Montgomery* did not overrule *Summerlin*. Indeed, the *Montgomery* Court relied upon *Summerlin* at a couple of points in its discussion. *Montgomery*, 136 S.Ct. at 723, 728.

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the jury's recommendation in the wake of *Hurst*). But *Truehill* was a direct appeal case which means that retroactivity was not at issue, not a case that was final decades ago, as this case is. The retroactivity of any new rule regarding *Caldwell* as applied to Florida law would be a threshold issue in this case.

Opposing counsel's reliance on *Welch v. United States*, 136 S.Ct. 1257 (2016), is even more misplaced. *Welch* concerned the retroactivity of a statutory interpretation case, not the Sixth Amendment right-to-a-jury-trial case. *Welch* involved a federal criminal statute, not the federal constitution. And *Welch* certainly did not overrule *Summerlin* or *DeStefano*.

Opposing counsel does not cite any case holding that, or even hinting in passing, that partial retroactivity is a violation of the Eighth Amendment or the Supremacy Clause. Neither the Eighth Amendment nor the Supremacy Clause are involved.

What is involved is finality. There is one basic premise underlying all retroactivity analysis that both this Court and the Florida Supreme Court agree upon and that is the importance of finality in any retroactivity analysis. The Florida Supreme Court in *Asay* noted "there is an important consideration regarding the impact a new sentencing proceeding would have on the victims' families and their need for finality." *Asay*, 210 So.3d at 22. This Court has also noted that finality is the overriding concern in any retroactivity analysis including in capital cases. *Penry*, 492 U.S. 302. As the *Penry* Court observed, the overriding concern of finality that underlies retroactivity is just as "applicable in the capital sentencing context." *Id.* at 314. Adopting a rule that states may not use partial retroactivity would not only be totally inconsistent with this Court's decisions in *Danforth* and *Summerlin*, but it would force states forego any measure of finality.

This claim is solely a matter of state law which is not reviewable by this Court and which there is no conflict regarding. There is no basis for granting certiorari review of this issue. This Court should deny the entire petition.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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