CAPITAL CASE

No. 17-9375

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD DAVID DILLBECK, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PAMELA JO BONDI
Attorney General of Florida

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
Counsel of Record

CHARMAINE M. MILLSAPS
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
CAPITAL APPEALS
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3584
(850) 487-0997 (FAX)
capapp@myfloridalegal.com

CAPITAL CASE

QUESTIONS 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), did not apply retroactively to Dillbeck as a matter of state law and rejecting the argument that its partial retroactivity analysis violates the Eighth Amendment?

II. Whether this Court should grant review of a decision of the Florida Supreme Court rejecting a claim that its partial retroactivity analysis violates the Supremacy Clause?

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

IN THE
SUPREME COURT OF THE UNITED STATES

No. 17-9375

DONALD DAVID DILLBECK, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The Florida Supreme Court's opinion is reported at *Dillbeck v. State*, 234 So.3d 558 (Fla. 2018) (SC17-847).

JURISDICTION

On January 24, 2018, the Florida Supreme Court affirmed the trial court's denial of the successive postconviction motion. On February 13, 2018, the Florida Supreme Court issued the mandate. On April 10, 2018, Dillbeck filed a motion for extension of time to file the petition for a writ of certiorari in this Court. On May 29, 2018, Dillbeck

filed the current petition. 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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, which 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.

U.S. Const. Art. VI cl. 2.

The Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

The Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. VIII.

The Fourteenth Amendment to 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.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On April 11, 1979, Dillbeck murdered a deputy in Lee County, Florida, when he was a juvenile. Dillbeck murdered Deputy Sheriff Lynn Hall by shooting him twice, once in the face and once in the back, with the deputy's own gun. (T. XIV 2195). Dillbeck was running from Indiana authorities when he shot the deputy. (T. XIV 2172-2173). Dillbeck entered a plea to first-degree murder and was sentenced to life in prison with the possibility of parole for the murder of the deputy.

Over a decade later, Dillbeck escaped from a work detail and murdered a woman while attempting to carjack her in the parking lot of the Tallahassee Mall. Dillbeck was convicted of first-degree murder, armed robbery, and armed burglary for that crime. Dillbeck was sentenced to death for the murder; to life for the armed robbery; and to another life for armed burglary. The two life sentences are consecutive sentences. *Dillbeck v. State*, 882 So.2d 969, 971 (Fla. 2004). The prior murder conviction for shooting the deputy was used as an aggravating circumstance in the capital case.

The Florida Supreme Court affirmed the convictions and death sentence. *Dillbeck v. State*, 643 So.2d 1027, 1028 (Fla.1994), *cert. denied, Dillbeck v. Florida*, 514 U.S. 1022 (1995). The Florida Supreme Court affirmed the trial court's denial of postconviction relief and denied the state habeas petition in the capital case. *Dillbeck v. State*, 882 So.2d 969 (Fla. 2004); *Dillbeck v. State*, 964 So.2d 95 (Fla. 2007).

The federal district court denied Dillbeck's federal habeas petition in the capital case years ago and the Eleventh Circuit denied a certificate of appealability. *Dillbeck v. McNeil*, 2010 WL 419401 (N.D. Fla. Jan. 29, 2010); *Dillbeck v. McNeil*, 10-11042-P (11th Cir.).

On March 28, 2014, Dillbeck, now represented by registry counsel Baya Harrison, filed a successive postconviction motion in state trial court raising three claims: 1) a

claim that trial counsel was ineffective during the penalty phase for presenting evidence of Dillbeck's lack of impulse control, his status as a model prisoner, and his prior bad acts; 2) trial court erred in finding the escape aggravator because the State did not prove that the primary motive for the killing was witness elimination; and 3) a claim of newly discovered evidence based on scientific studies regarding the effects of juvenile incarceration in adult prisons. The trial court summarily denied the successive postconviction motion.

The Florida Supreme Court affirmed the trial court's denial of the successive postconviction motion. *Dillbeck v. State*, 168 So.3d 224 (Fla. 2015) (SC14-1306). The Florida Supreme Court found the first two claims to be procedurally barred and the third claim to be "untimely and without merit."

On April 11, 2016, Dillbeck, represented by current registry counsel Baya Harrison, filed a second successive postconviction motion raising a Sixth Amendment right-to-a-jury-trial claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*). On January 23, 2017, Dillbeck filed an amended successive motion raising one claim based on *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*). The trial court summarily denied the second successive motion.

The Florida Supreme Court affirmed the trial court's summary denial of the successive motion holding that *Hurst* was not retroactively applicable to Dillbeck. *Dillbeck v. State*, 234 So.3d 558 (Fla. 2018) (SC17-847). The Florida Supreme Court explained that because Dillbeck's death sentence became final in 1995, *Hurst* did not apply to him. *Id.* at 559. The Florida Supreme Court concluded that their prior decision in *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, 138 S.Ct. 513 (2017), was dispositive.

Dillbeck then filed a petition for a writ of certiorari in this Court from the Florida Supreme Court's opinion raising two claims regarding the retroactivity of *Hurst*. This is the State's brief in opposition.

REASONS 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), DID NOT APPLY RETROACTIVELY TO DILLBECK AS A MATTER OF STATE LAW AND REJECTING THE ARGUMENT THAT ITS PARTIAL RETROACTIVITY ANALYSIS VIOLATES THE EIGHTH AMENDMENT?

Petitioner Dillbeck seeks review of the Florida Supreme Court's decision holding that *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), did not apply retroactively to him and rejecting an Eighth Amendment challenge to its established partial retroactivity analysis. But the issue of partial retroactivity is solely a matter of state law. This Court does not review decisions that are based solely on state law. Alternatively, there is no conflict. There is no conflict between this Court's retroactivity jurisprudence and the Florida Supreme Court's decision. This Court directly held in *Danforth v. Minnesota*, 552 U.S. 264 (2008), that states are free to have their own tests for retroactivity which provide more relief and that includes partial retroactivity. 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 Eleventh Circuit has rejected an Eighth Amendment challenge to the Florida Supreme Court's partial retroactivity analysis. Opposing counsel cites no federal circuit court case or state supreme court case holding that partial retroactivity violates the Eighth Amendment. Because the petition presents an issue of state law over which there is no conflict, this Court should deny review of this claim.

The Florida Supreme Court's decision in this case

Dillbeck appealed the state trial court's denial of his successive postconviction motion to the Florida Supreme Court. The Florida Supreme Court affirmed the trial

court's denial of the successive motion holding that *Hurst* was not retroactively applicable to Dillbeck. *Dillbeck v. State*, 234 So.3d 558 (Fla. 2018) (SC17-847). The Florida Supreme Court explained that because Dillbeck's death sentence became final in 1995, *Hurst* did not apply to him. *Id.* at 559. The Florida Supreme Court concluded that their prior decision in *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, 138 S.Ct. 513 (2017), was dispositive. So, the Florida Supreme Court denied relief in this case based on its existing precedent regarding partial retroactivity analysis.

The Florida Supreme Court's partial retroactivity analysis

The Florida Supreme Court established its partial retroactivity analysis in two companion cases. In *Asay v. State*, 210 So.3d 1,15-22 (Fla. 2016), *cert. denied, Asay v. Florida*, 138 S.Ct. 41 (2017) (No. 16-9033), the Florida Supreme Court held that *Hurst v. State* would not be retroactively applied to capital cases that were final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided in 2002. 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 *Asay* explicitly stated that, despite the federal courts' use of *Teague v. Lane*, 489 U.S. 288 (1989), to determine retroactivity, "this Court would continue to apply our longstanding *Witt* analysis, which provides more expansive retroactivity standards than those adopted in *Teague*." *Asay*, 210 So.3d at 15. The Florida Supreme Court discussed the first prong of the *Witt* test for five paragraphs. *Asay*, 210 So.3d at 17-18. The Florida Supreme Court then discussed the second prong of the *Witt* test for six paragraphs. *Id.* at 18-20. The Florida Supreme Court then discussed the third prong of the *Witt* test for three more paragraphs. *Id.* at 20-22.

And, in the companion case of *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), the Florida Supreme Court held that *Hurst v. State* would be retroactively applied to

capital cases that were not final when *Ring* was decided in 2002. 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 1274-83.

The Florida Supreme Court then again reaffirmed their decision denying all retroactive relief to cases that were final before *Ring* in *Hitchcock v. State*, 226 So.3d 216, 217 (Fla. 2017) (stating: "our decision in *Asay* forecloses relief"), *cert. denied*, 138 S.Ct. 513 (2017) (No. 17-6180). The Florida Supreme Court in *Hitchcock* rejected Eighth Amendment, equal protection, and due process challenges to its prior holding in *Asay*. *Hitchcock*, 226 So.3d at 217 (explaining that although Hitchcock referenced "various constitutional provisions as a basis for arguments that *Hurst v. State*" entitled him to a new sentencing proceeding, "these are nothing more than arguments that *Hurst v. State* should be applied retroactively").

The Florida Supreme Court has also denied relief in several capital cases based on its partial retroactivity analysis and this Court has denied review of those cases. *Lambrix v. State*, 227 So.3d 112 (Fla. 2017) (denying Eighth Amendment, due process, and equal protection challenges to partial retroactivity citing *Hitchcock* and *Asay VI*), *cert. denied*, *Lambrix v. Florida*, 138 S.Ct. 312 (2017) (No. 17-6222); *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); *Cole v. State*, 234 So.3d 644, 645 (Fla. 2018) (explaining that because Cole's death sentence became final in 1998, "*Hurst* does not apply retroactively" citing *Hitchcock*, 226 So.3d at 217), *cert. denied*, *Cole v. Florida*, 2018 WL 1876873 (June 18, 2018) (No. 17-8540). The Florida Supreme Court has consistently followed its partial retroactivity analysis in capital cases including in this particular case.

The issue is a matter of state law

Partial retroactivity analysis is solely a matter of state law. This Court does not review decisions by state courts that are matters of state law. *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.

Directly to the point, this Court has specifically held that state courts are entitled to make retroactivity determinations as a matter of state law. In *Danforth v. Minnesota*, 552 U.S. 264 (2008), this Court held that states were not required to apply the federal test for retroactivity of *Teague v. Lane*, 489 U.S. 288 (1989), even when the state courts were determining the retroactivity of a case based on a federal constitutional right. Instead, state courts are free to retroactively apply a case more broadly than the federal courts would. The Minnesota Supreme Court, determining the retroactivity of *Crawford v. Washington*, 541 U.S. 36 (2004), held that state courts were bound by *Teague* and were not free to apply a broader retroactivity test but this Court reversed. The *Danforth* Court observed that the "finality of state convictions is a state interest, not a federal one." *Danforth*, 552 U.S. at 280. Finality is a matter that states should be "free to evaluate and weigh the importance of." *Id.* The *Danforth* Court reasoned that states should be "free to give its citizens the benefit of our rule in any fashion that does not offend federal law." *Id.* The remedy a state court chooses to provide its citizens "is primarily a question of state law." *Id.* at 288. This Court also observed, in rejecting any argument that uniformity in retroactivity is necessary, that "nonuniformity" is "an unavoidable reality in a federalist system of government." *Id.*

at 280. The High Court noted 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).

Under *Danforth*, a state court may make retroactivity determinations that are solely a matter of state law. The Florida Supreme Court's partial retroactivity analysis is based on the state retroactivity test of *Witt*, not the federal retroactivity test of *Teague*. The Florida Supreme Court did not employ a *Teague* analysis in either *Asay* or *Mosley*. Instead, in both cases, the Florida Supreme Court invoked state retroactivity tests. The Florida Supreme Court, using a state test for retroactivity, gave both *Hurst v. Florida* and *Hurst v. State* broader retroactive application than a *Teague* analysis would do. When the *Danforth* Court spoke of state courts being free to choose the "degree of retroactivity" that includes partial retroactivity analysis. And that is exactly what the Florida Supreme Court did in *Asay*, *Hitchcock*, and this case.

Furthermore, the Florida Supreme Court's partial retroactivity analysis was determining the retroactivity of its decision in *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), not merely the retroactivity of this Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*). There are significant differences between this Court's holding in *Hurst v. Florida* and the Florida Supreme Court's holding in *Hurst v. State*. This Court's holding in *Hurst v. Florida* was limited to the Sixth Amendment and jury findings regarding aggravating circumstances. *Hurst v. Florida*, 136 S.Ct. at 624 (holding "Florida's sentencing scheme, which required the judge alone to find the existence of an ***aggravating circumstance***, is therefore unconstitutional") (emphasis added). Indeed, under this Court's view, there was no violation of the Sixth Amendment right-to-a-jury-trial in this case at all.[1] But the Florida Supreme Court

[1] The trial court found five aggravating circumstances: 1) under sentence of imprisonment; 2) previously been convicted of another capital felony; 3) the murder

greatly expanded this Court's *Hurst v. Florida* decision in its *Hurst v. State* decision to require factual findings in addition to the aggravating circumstances and to include a requirement of jury unanimity. This Court would have to rule on the retroactivity of those additional aspects of *Hurst v. State* if it grants the petition. This Court would have to address the retroactivity of jury findings of the sufficiency of the aggravating circumstances; jury findings of mitigation; and jury findings of weighing, all of which the Florida Supreme Court required in its *Hurst v. State* decision.[2] Basically, this

---

was committed during the course of a robbery and burglary; 4) committed to avoid arrest or effect escape; and 5) especially heinous, atrocious, or cruel (HAC). *Dillbeck*, 643 So.2d at 1028, n.1. But the jury had convicted Dillbeck of armed robbery and armed burglary, as well as murder. So, the jury found the felony murder aggravating circumstance during the guilt phase. *Jenkins v. Hutton*, 137 S.Ct. 1769, 1771 (2017) (noting that the jury had found the existence of two aggravating circumstances during the guilt phase by convicting Hutton of aggravated murder and that "each of those findings rendered Hutton eligible for the death penalty"). Furthermore, both the under-sentence-of-imprisonment aggravator and the prior-violent-felony aggravator are recidivist aggravators, that do not have to be found by the jury under *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). So, three of the five aggravating circumstances were either found by the jury during the guilt phase or do not have to be found by the jury. Under this Court's reasoning in *Hutton* and *Almendarez-Torres*, there was no *Hurst v. Florida* error in this case in the first place.

[2] While the Florida Supreme Court believes that the jury must make additional findings regarding mitigation and weighing, that is not this Court's view. This Court has observed that "weighing is not an end; it is merely a means to reaching a decision." *Kansas v. Marsh*, 548 U.S. 163, 179 (2006). This Court's view is that neither mitigating circumstance nor weighing must be found by a jury. This Court does not view mitigation or weighing as factual findings at all. This Court's view is that only aggravating circumstances must be found by the jury because those are the only true factual determinations in capital sentencing. This Court has explained that aggravating circumstances are "purely factual determinations," but that mitigating circumstances, while often having a factual component, are "largely a judgment call (or perhaps a value call)." *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016). This Court noted that the mitigating circumstance of mercy, "simply is ***not*** a factual determination." *Id.* at 643 (emphasis added). The *Carr* Court explained that "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy" and that it would mean "nothing" to tell the jury that the

Court would have to decide the retroactivity of jury sentencing, which is what the Florida Supreme Court required in *Hurst v. State*, when this Court does not think that the Sixth Amendment or the Eighth Amendment requires jury sentencing in the first place. This Court would also have to address the retroactivity of unanimity under the Eighth Amendment which this Court never addressed in *Hurst v. Florida*.

Opposing counsel totally ignores these numerous differences between *Hurst v. Florida* and *Hurst v. State* and the problems those differences present in his petition. But this Court would have to address those differences if it were to grant the petition. These differences present what is, in effect, numerous threshold issues. This Court does not normally grant review of cases with threshold issues, much less numerous threshold issues. *Cf. Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27 (1993) (dismissing the writ of certiorari as improvidently granted when there was a threshold issue).

The Florida Supreme Court decided the retroactivity of *Hurst v. State* as a matter of state law and therefore, the Florida Supreme Court's decision is not subject to review by this Court. On this basis alone, review of this issue should be denied.

No conflict with this Court's retroactivity jurisprudence

Alternatively, there is no conflict between the Florida Supreme Court's decision in this case and this Court's retroactivity jurisprudence. See Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). 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

---

defendants "must deserve mercy beyond a reasonable doubt." *Id.* at 642.

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* is not retroactive.

The Florida Supreme Court's decisions in *Asay*, *Hitchcock*, and this case do not conflict with either this Court's decision in *Danforth* or this Court's decision in *Summerlin*.

Additionally, this Court recently denied a petition for a writ of certiorari raising this exact same claim regarding the Eighth Amendment prohibiting partial retroactivity analysis in a death warrant case. *Branch v. Florida*, 138 S.Ct. 1164 (No. 17-7758). And, this Court very recently denied a petition raising that exact same issue in another Florida capital case. *Jones v. Florida*, 2018 WL 1993786 (June 25, 2018) (No. 17-8652).[3]

---

[3] There are numerous other petitions raising these exact two claims pending before this Court. *Bates v. Florida*, No. 17-9161 (briefing completed but no conference date); *Bell v. Florida*, No. 17-9361 (brief in opposition filed but no conference date); *Bradley v. Florida*, No. 17-9386 (scheduled for conference on Sept. 24, 2018); *Heath v. Florida*, No. 17-9475 (briefing completed but no conference date); *Miller v. Florida*, No. 17-9314 (scheduled for conference on Sept. 24, 2018).

There is no conflict between the Florida Supreme Court's decision and this Court's jurisprudence regarding retroactivity.[4] Because there is no conflict with this Court, review should be denied.

No conflict with any federal appellate court or state supreme court

There is no conflict between the Florida Supreme Court decision in this case and 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 federal appellate courts and state supreme

---

[4] And this Court would have to recede from both *Danforth* and *Summerlin* to grant Dillbeck any relief. Additionally, this Court would not only have to recede from *Danforth* but it would have to recede in a manner that not even the dissent in *Danforth* advocated. To adopt opposing counsel's position, this Court would have to hold that state courts are required to follow *Teague* even if the underlying case was not from this Court. The dissent in *Danforth* limited the mandatory use of *Teague* to when the underlying case was from this Court, not when the underlying case was from the state court or when the state court expanded one of this Court's cases, such as the Florida Supreme Court did in *Hurst v. State*. The two *Danforth* dissenters were at pains to disclaim any argument that state courts were required to adopt a *Teague* retroactivity analysis if the underlying case was a state law case. *Danforth*, 552 U.S. at 295 (Roberts, C.J., dissenting) (explaining states can give greater substantive protection under their own laws and can give whatever retroactive effect to those laws they wish). But, even if this Court was willingly to overrule *Danforth* and require that *Teague* be used in all situations, Dillbeck would still receive no relief because under a *Teague* analysis, *Hurst* is not retroactive at all under *Summerlin*. Overruling both *Danforth* and *Summerlin* is necessary for Dillbeck to receive any relief.

Yet, the petition does not even acknowledge that this Court would be required to overrule both of these cases. While the petition mentions both *Danforth* and *Summerlin* in passing, the petition does not acknowledge that the position it is advocating is inconsistent with the actual holdings, as well as the reasoning, of both cases.

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) (denying permission to file a successive habeas petition raising a *Hurst v. Florida* claim concluding that *Hurst v. Florida* did not apply retroactively).

The Eleventh Circuit has also directly addressed argument that the Florida Supreme Court's partial retroactivity analysis violates the Eighth Amendment. The Eleventh Circuit held that the "Florida Supreme Court's ruling—that *Hurst* is not retroactively applicable to Lambrix — is fully in accord with the U.S. Supreme Court's precedent in *Ring* and *Schriro*." *Lambrix v. Sec'y, Fla. Dept. of Corr.*, 872 F.3d 1170, 1182-83 (11th Cir. 2017), *cert. denied, Lambrix v. Jones*, 138 S.Ct. 312 (2017) (No. 17-6290). As the Eleventh Circuit observed regarding the Florida Supreme Court's refusal to apply *Hurst v. State* retroactively to capital defendants whose cases were final before *Ring*, those "defendants who were convicted before *Ring* were treated differently too by the Supreme Court." *Lambrix*, 872 F.3d at 1182. There is no conflict with any federal appellate court.

There is no conflict with any state supreme court either. Contrary to opposing counsel's assertion, the Delaware Supreme Court's decision in *Powell v. Delaware*, 153 A.3d 69 (Del. 2016), is not a basis to establish conflict among the state supreme courts. Pet. at 30. 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*, it did so as a matter

of state law. Under *Danforth*, each state is permitted to apply cases as broadly as they choose. The conflict between state courts of last resort must be about federal law. The Florida Supreme Court's decision does not conflict with the Delaware Supreme Court's decision.

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. Because there is no conflict, review should be denied.

Partial retroactivity and the Eighth Amendment

Dillbeck insists that the Florida Supreme Court's partial retroactivity analysis is arbitrary in violation of the Eighth Amendment. He seems to be arguing that basing retroactivity analysis 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 cutoff date is part of the pipeline doctrine first established in *Griffith v. Kentucky*, 479 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. While the Florida Supreme Court's partial retroactivity test also depends on a date, the Florida Supreme Court's line drawing based on a date is no more arbitrary than this Court's in *Griffith* or *Teague*. Neither *Griffith* nor *Teague* nor *Asay* violates the Eighth Amendment.

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.

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 more lax in capital cases, not that there should be automatic and full retroactivity in all capital cases as Dillbeck asserts. Opposing counsel's position that there should be full retroactivity is even more extreme than the position rejected by this Court in *Penry*. Finality simply 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. Whereas, this Court, following its *Summerlin* precedent, would deny every Florida capital defendant retroactive relief, the Florida Supreme Court, following its *Asay* and *Hitchcock* precedent, has granted over a hundred Florida capital defendants retroactive relief. What Dillbeck is arguing is that, while this Court itself would not grant any capital defendant retroactive relief, the Florida Supreme Court is somehow constitutionally required to grant even more retroactive relief than

its current partial retroactivity analysis does. But, if the Eighth Amendment applied to retroactivity analysis in this manner, it would require this Court to grant relief too.

The Eighth Amendment does not require full retroactivity of every capital case and does not condemn partial retroactivity. The core of opposing counsel's argument is that the novelty of the Florida Supreme Court's partial retroactivity analysis automatically violates the Eighth Amendment. But novelty is not inherently constitutionally suspect. Originality does not violate the federal constitution.

The issue of partial retroactivity is a matter of state law and which does not conflict with this Court's decisions or that of any other appellate court. There is no basis for granting certiorari review of this issue.

ISSUE II

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE FLORIDA SUPREME COURT REJECTING A CLAIM THAT ITS PARTIAL RETROACTIVITY ANALYSIS VIOLATES THE SUPREMACY CLAUSE?

Petitioner Dillbeck seeks review of the Florida Supreme Court's decision rejecting a claim that *Hurst* must be applied retroactively under the Supremacy Clause. He asserts that *Hurst* is a substantive change in the law relying on *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). The issue, however, is a matter of state law, not a matter regarding the Supremacy Clause. Contrary to opposing counsel's assertion, *Hurst* is a procedural change not a substantive change. This Court in *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004), explained that rules that allocate decision making authority between the judge and the jury are "prototypical procedural rules." *Hurst* is not substantive, according to this Court. There is no conflict between this Court's decisions and the Florida Supreme Court's decision in this case. 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 Circuit Court that has addressed this particular issue has held that *Hurst* is not substantive. This Court should deny review of this claim.

The Florida Supreme Court's decision in this case

Dillbeck raised this Supremacy Clause argument in his brief to the Florida Supreme Court. The Florida Supreme Court, however, did not specifically address the Supremacy Clause argument in its opinion in this case. *Dillbeck v. State*, 234 So.3d 558 (Fla. 2018) (SC17-847).

The issue is a matter of state law

Again, the retroactivity of *Hurst* is a matter of state law. This Court rejected a Supremacy Clause argument regarding retroactivity in *Danforth v. Minnesota*, 552 U.S. 264, 289 (2008). Opposing counsel may not turn a state law matter into a federal constitutional matter merely by incanting the Supremacy Clause.

No conflict with this Court's jurisprudence

There is no conflict between the Florida Supreme Court's decision in this case and this Court's decision in *Montgomery*. See Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). Opposing counsel, relying on *Montgomery*, 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. 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 right-to-a-jury-trial "has nothing to do with the range of conduct a State may criminalize." *Summerlin*, 542 U.S. at 353 (emphasis added). The *Summerlin* Court, which held that *Ring* was not retroactive, explained that rules that allocate decision making authority between the judge and the jury "are prototypical ***procedural*** rules." *Id.* (emphasis added). This Court noted that it had classified the right-to-a-jury-trial as procedural "in numerous other contexts." *Id.* at 353-54 (citing numerous cases).

Furthermore, both the majority opinion and the concurring opinion in *Alleyne v. United States*, 570 U.S. 99 (2013), classified the right-to-a-jury-trial regarding facts required to impose a minimum mandatory sentence as procedural. *Alleyne*, 570 U.S.

at 116, n.5 ("the force of *stare decisis* is at its nadir in cases concerning ***procedural*** rules . . .") (emphasis added); *Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring) ("when ***procedural*** rules are at issue . . .") (emphasis added). This Court's opinion in *Alleyne*, like this Court's opinion in *Hurst v. Florida* itself, was explicitly based on *Apprendi*. Both *Alleyne* and *Hurst* are the offspring of *Apprendi*. The *Alleyne* majority and the *Alleyne* concurrence both characterized that *Apprendi*-based right as procedural. This Court views *Apprendi* and all its offspring, including *Hurst v. Florida*, as procedural, not substantive.

The *Montgomery* Court characterized the right-to-a-jury-trial 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). *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. This Court has repeatedly classified it as procedural and in very similar context to *Hurst*. The right-to-a-jury-trial is procedural, not substantive. So, under this Court's existing precedent, *Hurst* is not substantive and does not apply retroactively.

Opposing counsel also relies on a statement in *Welch v. United States*, 136 S.Ct. 1257, 1264 (2016), that substantive changes generally apply retroactively. But *Welch* concerned the retroactivity of a statutory interpretation case, not a Sixth Amendment right-to-a-jury-trial case. *Welch* involved a federal criminal statute, not the federal constitution. The *Welch* Court certainly did not overrule *Summerlin* or *DeStefano*. Indeed, the *Welch* Court cited and quoted *Summerlin* repeatedly. *Welch*, 136 S.Ct. at 1264-65.

Additionally, this Court recently denied a petition for a writ of certiorari raising this same issue regarding the retroactivity of *Hurst* based on *Montgomery* and the Supremacy Clause in a death warrant case. *Branch v. Florida*, 138 S.Ct. 1164 (No. 17-

7758). And, this Court very recently denied a petition raising that same Supremacy Clause issue in another Florida capital case. *Jones v. Florida*, 2018 WL 1993786 (June 25, 2018) (No. 17-8652).

The Florida Supreme Court's decision in this case does not conflict with this Court's decision in *Montgomery* or the Supremacy Clause. There is no conflict between this Court's jurisprudence and the Florida Supreme Court's decision. Because there is no conflict with this Court, review should be denied.

No conflict with any federal appellate court or state supreme court

There is also no conflict with any federal appellate court or state supreme court. 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 federal appellate courts and state supreme courts as a consideration in the decision to grant review). In the absence of such conflict, certiorari is rarely warranted.

The Ninth Circuit has rejected the argument that *Hurst v. Florida* was a substantive change that must be applied retroactively. *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017). Ybarra made much the same argument regarding the *Hurst v. Florida* decision being substantive as Dillbeck does 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. So, the only federal appellate

court to have directly addressed the substantive versus procedural issue regarding *Hurst* does not conflict with the Florida Supreme Court's decision in this case.[5]

Opposing counsel cites to no federal circuit court case or state supreme court case holding partial retroactivity analysis violates the Supremacy Clause. 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 court of last resort. Because there is no conflict among the appellate courts, review should be denied.

The Supremacy Clause

Under the Supremacy Clause, States retain "substantial leeway" to establish the contours of their judicial systems, provided they do not "nullify a federal right or cause of action." *Haywood v. Drown*, 556 U.S. 729, 736 (2009). The Supremacy Clause, however, is not an independent source of law. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S.Ct. 1378 (2015).

Opposing counsel's position is that the Supremacy Clause requires that state courts do what federal courts are not required to do themselves. The federal courts do not apply *Apprendi*, *Ring*, or *Hurst* retroactively. Yet opposing counsel insists that the federal constitution requires state courts to apply these same decisions retroactively. The end result of adopting opposing counsel's view would be that *Hurst* would be

---

[5] The Tenth Circuit has rejected an argument that *Hurst v. Florida* was a substantive change that was required to be applied retroactively in the context of a successive habeas petition. *In re Jones*, 847 F.3d 1293 (10th Cir. 2017). The Tenth Circuit denied authorization to file a successive habeas petition noting that this Court has not held *Hurst* to be retroactive as required by *Tyler v. Cain*, 533 U.S. 656, 663 (2001). The Sixth Circuit has also denied authorization to file a successive habeas petition which asserted that *Hurst v. Florida* was retroactive. *In re Coley*, 871 F.3d 455 (6th Cir. 2017). The Florida Supreme Court's decision does not conflict with either of these two circuit courts' holdings.

required, under the federal constitution, to be applied retroactively in the state courts but not in the federal courts. The Supremacy Clause simply does not work that way. The Supremacy Clause requires that state courts, in certain areas, do the same as federal courts. It never requires that state courts do more than the federal courts. If the federal constitution requires something, it requires both the federal and state courts to do that something. But, if the federal constitution does not require the federal courts to do something, then the state courts are also free to not to do so. So, if the federal constitution does not require federal courts to apply any of these decisions retroactively, then the Supremacy Clause does not require Florida courts to apply any of these decisions retroactively either. Opposing counsel's view of the Supremacy Clause is not tenable as a matter of either law or logic.

Under a proper view of the Supremacy Clause, this Court would have to recede from *Summerlin* and hold that *Apprendi*, *Ring*, and *Hurst* must be retroactively applied in both state and federal courts. Indeed, this Court would have to recede from both *Danforth* and *Summerlin* to grant Dillbeck any relief. Yet, the petition does not even acknowledge that this Court would be required to overrule both of these cases. While the petition mentions both *Danforth* and *Summerlin* in passing, the petition does not acknowledge that the position it is advocating is inconsistent with the actual holdings of both cases.

The standard of proof and retroactivity

Dillbeck also argues that *Hurst* must be applied retroactively because it involved the beyond-a-reasonable-doubt standard of proof relying on *Ivan V. v. City of New York*, 407 U.S. 203 (1972). But neither *Hurst v. Florida* nor *Hurst v. State* involved the standard of proof. Rather, both *Hurst v. Florida* and *Hurst v. State* involved who decides — the jury versus the judge — not at what standard of proof.

Furthermore, this Court has explained that weighing in capital cases does not even involve a standard of proof. This Court, in *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016), a case that was decided after *Hurst v. Florida*, rejected a standard of proof argument in capital cases. Carr argued that the Eighth Amendment requires the jury be told that mitigating circumstances did not have to be proven beyond a reasonable doubt. This Court in *Carr* expressed doubt as to whether it was even possible to apply a standard of proof to mitigation. This Court explained that mitigation was not purely a factual determination. Rather, mitigation was largely "a judgment call or perhaps a value call" and that weighing the aggravating circumstances against the mitigating circumstances was "mostly a question of mercy." This Court observed that it would mean "nothing" to tell the jury that the defendants "must deserve mercy beyond a reasonable doubt." *Id.* at 642. Standards of proof do not apply to judgment calls, value calls, or questions of mercy. For that reason, standards of proof do not apply to mitigating circumstances or weighing. Standards of proof only apply to aggravating circumstances.

Contrary to opposing counsel's argument, *Ivan V.* is irrelevant to any retroactivity analysis in Florida. If a rule of law is 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). There is no retroactivity analysis required when dealing with old rules. Florida's standard of proof for aggravating circumstances is not new; rather, it is well-established law. 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. Therefore, the "retroactivity" of the beyond-a-reasonable-doubt standard of proof is a not an issue in this case or in any other Florida capital case. *Ivan V.* is irrelevant in Florida.

Furthermore, the Ninth Circuit has rejected this exact argument. *Ybarra v. Filson*, 869 F.3d 1016 (9th Cir. 2017). 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 Dillbeck does in his petition. *Ybarra*, 869 F.3d at 1032-33. The Ninth Circuit rejected that argument, reasoning that even if *Hurst v. Florida* extended the beyond-a-reasonable-doubt standard of proof to the weighing determinations, it did not redefine capital murder and therefore, *Hurst v. Florida* was not required to be applied retroactively. *Id.* at 1032.

Nor does the Florida Supreme Court's decision in this case conflict with the Delaware Supreme Court's decision in *Powell v. Delaware*, 153 A.3d 69 (Del. 2016), regarding the standard of proof issue. Pet. at 34. *Powell* involved a standard of proof issue that Florida's partial retroactivity cases did not. *Powell,* 153 A.3d at 73-74. The Delaware Supreme Court itself recognized the distinction noting that Florida "already required proof beyond a reasonable doubt." *Id.* Unless two cases involve the same issues, the two cases cannot conflict. There is no conflict between the Florida Supreme Court and that of any other state court of last resort regarding *Hurst*, the standard of proof, and retroactivity.

The issue of retroactivity is a matter of state law that does not involve the Supremacy Clause. There is no basis for granting certiorari review of this issue.

Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

Carolyn M. Snurkowski
Associate Deputy Attorney General
Counsel of Record

Charmaine Millsaps
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
CAPITAL APPEALS
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3584
(850) 487-0997 (FAX)
email: capapp@myfloridalegal.com
charmaine.millsaps@myfloridalegal.com