NO. 18-34

In the Supreme Court of the United States

PABLO SAN MARTIN,
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

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Capital Case

Question Presented

Petitioner, Pablo San Martin, was found guilty of the first-degree murder of Raul Lopez, two counts of attempted first-degree murder with a firearm, one count of attempted robbery with a firearm, two counts of grand theft, and one count of unlawful possession of a firearm while engaged in a criminal offense and sentenced to death. San Martin's convictions and sentences became final upon this Court's denial of his petition for writ of certiorari on October 5th, 1998. Following this Court's decision in *Hurst v. Florida*, the Florida Supreme Court decided *Hurst v. State. Hurst v. Florida*, 136 S. Ct. 616 (2016); *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). There the Florida Supreme Court explained that in order for a defendant to be sentenced to death, the jury must find all the aggravating circumstances outweighed the mitigating circumstances and unanimously vote that the defendant receive the death penalty. Following *Hurst v. State,* the Supreme Court *Asay v. State* and *Mosley v. State,* which created a bright line retroactivity test where defendants whose sentences of death were finalized prior to this Court's 2002 *Ring v. Arizona* decision would not receive retroactive relief. *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); *Ring v. Arizona*, 536 U.S. 584 (2002). Petitioner's case falls in this category of defendants.

Petitioner sought postconviction relief through the Florida Supreme Court but was denied. Petitioner's petition seeking certiorari review gives rise to the following question presented:

Whether this Court should deny grant certiorari review where (1) the retroactive application of *Hurst v. Florida* and *Hurst v. State* is based on adequate independent state grounds and the issue presents no conflict between the decisions of other state courts of last resort or federal courts of appeal, does not conflict with this Court's precedent, and does not otherwise raise an important federal question; and (2) the retroactivity formula the Florida Supreme Court created following the *Hurst* decisions does not violate the Eighth or Fourteenth Amendments to the United States Constitutions where the Petitioner asserts he is entitled to *Hurst* relief under fundamental fairness as a result of *Mosley*?

Table of Contents

Question Presented i

Table of Contents iii

Table of Citations iv

Opinion Below 1

Jurisdiction 1

Statement of the Case and Facts 2

Reasons for Denying the Writ 6

This Court should deny certiorari review because the retroactivity of *Hurst v. Florida* and *Hurst v. State*, is a matter of state law that does not conflict with other state courts of last resort or federal appellate courts' interpretation of the Eighth and Fourteenth Amendments... 6

Conclusion 13

Table of Citations

Statutes

28 U.S.C. § 1257(a) 1

Federal Cases

Alleyne v. United States, 570 U.S. 99 (2013) 11

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 11

Apprendi v. New Jersey, 530 U.S. 466 (2000) 8

Cardinale v. Louisiana, 394 U.S. 437 (1969) 7

Danforth v. Minnesota, 552 U.S. 264, (2008) 6, 7

Dorsey v. United States, 567 U.S. 260 (2012) 9

Florida v. Powell, 559 U.S. 50 (2010) 7

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 7

Gonzalez v. Duenas-Alvarez, 549 U.S. 183 (2007) 10

Griffith v. Kentucky, 479 U.S. 314 (1987) 8

Hurst v. Florida, 136 S. Ct. 616 (2016), *cert. denied*, 137 S. Ct. 2161 (2017) 3

Kansas v. Carr, 136 S. Ct. 633 (2016) 11

Michigan v. Long, 463 U.S. 1032 (1983) 6, 7

Miller v. Alabama, 567 U.S. 460 (2012) 10

Montgomery v. Louisiana, 136 S. Ct. 718 (2016) 10

National Collegiate Athletic Assn. v. Smith, 525 U.S. 459 (1999) 10

Pennsylvania Dept. of Corr. v. Yeskey, 524 U.S. 206, 212-13 (1998) 10

Ring v. Arizona, 536 U.S. 584 (2002) 4

San Martin v. McNeil, 633 F.3d 1257 (11th Cir. 2011), *cert. denied*, 565 U.S. 843 (2011) 3

Schriro v. Summerlin, 542 U.S. 348 (2004) 8, 10

Street v. New York, 394 U.S. 576 (1969) 7

Teague v. Lane, 489 U.S. 288 (1989) 7

United States v. Abney, 812 F.3d 1079 (D.C. Cir. 2016) 9

Whorton v. Bockting, 549 U.S. 406 (2007) 8

State Cases

Asay v. State, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S.Ct. 41 (2017) 4, 7

Branch v. State, 234 So. 3d 548 (Fla. 2018), *cert. denied*, 138 S. Ct. 1164 (2018) 8

Cole v. State, 234 So. 3d 644 (Fla. 2018), *cert. denied*, No. 17-8540, 2018 WL 1876873 (U.S. June 18, 2018) 8

Falcon v. State, 162 So. 3d 954 (Fla. 2015) 10

Hannon v. State, 228 So. 3d 505 (Fla. 2017), *cert. denied*, 138 S. Ct. 441 (2017) 8

Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017) 9

Hurst v. State, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017) 3, 4, 6

Jones v. State, 234 So. 3d 545 (Fla. 2018), *cert. denied*, No. 17-8652, 2018 WL 1993786 (U.S. June 25, 2018) 8

Lambrix v. State, 227 So. 3d 112 (Fla. 2017), *cert. denied*, 138 S. Ct. 312 (2017) 8

Mosley v. State, 209 So. 3d 1248 (Fla. 2016) 4

San Martin v. State, 237 So. 3d 930 (Fla. 2018) 1, 5

San Martin v. State, 705 So. 2d 1337 (Fla. 1997), *cert. denied*, 525 U.S. 841 (1998) 2, 3, 9

San Martin v. State, 995 So. 2d 247 (Fla. 2008) 3

Smith v. State, 598 So. 2d 1063 (Fla. 1992) 8

State v. Horowitz, 191 So. 3d 429 (Fla. 2016) 6

Witt v. State, 387 So. 2d 922 (Fla. 1980) 7

Rules

Fla. R. Crim. P. 3.851(d)(1)(B) 3

Sup. Ct. R. 10 ..... 2, 11

Sup. Ct. R. 13.1 1

Sup. Ct. R. 14(g)(i) 2

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Opinion Below

The decision of the Florida Supreme Court appears as *San Martin v. State*, 237 So. 3d 930 (Fla. 2018).

Jurisdiction

The Florida Supreme Court issued its opinion affirming the summary denial of Petitioner's successive postconviction motion for relief on February 28, 2018. *San Martin*, 237 So. 3d 930.

Petitioner did not file a motion for rehearing. Petitioner's "Petition for Writ of Certiorari" was docketed in this Court on June 21, 2018. The Petition is timely filed before this Court. Sup. Ct. R. 13.1.

Pursuant to 28 U.S.C. § 1257(a), this Court has jurisdiction to review the decision of the Florida Supreme Court. However, Respondent submits that this Court should not exercise its jurisdiction as Petitioner fails to raise a novel question of federal law. The Florida Supreme Court's decision was based on independent and adequate state grounds and Petitioner has not raised a question of federal law. Sup. Ct. R. 14(g)(i). Furthermore, the Florida Supreme Court's decision does not conflict with the decision of another United States court of appeals, another state court of last resort, or with relevant decisions of this Court. Sup. Ct. R. 10. Accordingly, this Petition for a Writ of Certiorari should be denied. Sup. Ct. R. 10.

Statement of the Case and Facts

Petitioner, Pablo San Martin, was convicted of the first-degree murder of Raul Lopez, two counts of attempted first-degree murder with a firearm, one count of attempted robbery with a firearm, two counts of grand theft, and one count of unlawful possession of a firearm while engaged in a criminal offense and sentenced to death. *San Martin v. State*, 705 So. 2d 1337 (Fla. 1997), *cert. denied*, 525 U.S. 841 (1998). The facts established that San Martin, and codefendants Leonardo Franqui and Pablo Abreu, executed a planned robbery of the owner of a check

cashing business. *Id.* at 1341. The group followed the owner of the business in a stolen vehicle, blocked his vehicle in, and began discharging their firearms eventually hitting the victim, a friend of the owner of the check cashing business. *Id.*

The jury found Petitioner guilty as charged and recommended a sentence of death by a vote of nine to three. *Id.* at 1342. The trial court found three aggravating factors beyond a reasonable doubt: (1) prior violent felony convictions; (2) the murder occurred during the course of an attempted robbery for pecuniary gain; and (3) the murder was cold, calculated, and premeditated. *Id.* The trial court found no statutory mitigating circumstances and one nonstatutory mitigating circumstance. *Id.* The trial court determined that the aggravating circumstances outweighed the mitigating circumstances and sentenced Petitioner to death. *Id.*

The Florida Supreme Court affirmed Petitioner's sentence of death and conviction on direct appeal. *Id.* at 1351. Petitioner then filed a petition for a writ of certiorari to this Court, which was denied in 1998. *Id.*, *cert. denied*, 525 U.S. 841 (1998). Pursuant to Florida Rule of Criminal Procedure 3.851(d)(1)(B), Petitioner's sentence of death became final on October 5, 1998 following this Court's denial of the petition for writ of certiorari. *Id.*; Fla. R. Crim. P. 3.851(d)(1)(B).

In October 1999, Petitioner filed a shell postconviction motion that he amended in April 2000, raising thirty claims. *San Martin v. State*, 995 So. 2d 247, 251 (Fla. 2008). The trial court denied relief and Florida Supreme Court affirmed. *Id.* at 262, 265. The Eleventh Circuit Court of Appeals affirmed the denial

of his petition for writ of habeas corpus. *San Martin v. McNeil*, 633 F.3d 1257 (11th Cir. 2011), *cert. denied*, 565 U.S. 843 (2011).

On August 7, 2017, Petitioner filed a successive motion for postconviction relief in which he sought relief pursuant to *Hurst v. State*. *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). The Florida Supreme Court's holding in *Hurst v. State* followed this Court's ruling in *Hurst v. Florida*, 136 S. Ct. 616 (2016), *cert. denied*, 137 S. Ct. 2161 (2017), in requiring that aggravating circumstances be found by a jury beyond a reasonable doubt before a death sentence may be imposed. The Florida court then expanded this Court's ruling, requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 57.[1]

Following *Hurst v. State*, the Florida Supreme Court decided *Mosley v. State*, which held that defendants whose sentence(s) of death were finalized

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[1] The dissent observed that "[n]either the Sixth Amendment nor *Hurst v. Florida* requires a jury to determine the sufficiency of the aggravation, the weight of the aggravation relative to any mitigating circumstances, or whether a death sentence should be imposed." *Hurst*, 202 So. 3d at 82 (Canady, J., dissenting).

after *Ring v. Arizona*, are entitled to *Hurst* relief. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016); *Ring v. Arizona*, 536 U.S. 584 (2002). On the same day, the Florida Supreme Court decided *Asay v. State*, which held that defendants whose sentences of death were finalized prior to *Ring v. Arizona* were not entitled to *Hurst* relief. *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S.Ct. 41 (2017).

Following the postconviction court's denial of relief, the Florida Supreme Court affirmed the denial of relief holding that Appellant's sentence of death was finalized four years prior to *Ring*, meaning that Petitioner's case does not fall in the category of individuals who receive retroactive *Hurst* relief. *San Martin*, 237 So. 3d 930. Petitioner then filed his Petition for a Writ of Certiorari in this Court from the Florida Supreme Court's decision. This is the State's brief in opposition.

Reasons for Denying the Writ

This Court should deny certiorari review because the retroactivity of *Hurst v. Florida* and *Hurst v. State*, is a matter of state law that does not conflict with other state courts of last resort or federal appellate courts' interpretation of the Eighth and Fourteenth Amendments.

Petitioner alleges that the Florida Supreme Court's decision in *San Martin v. State* and *Asay v. State* unconstitutionally violates his Eighth and Fourteenth amendment rights because it created an arbitrary system of partial retroactivity to receive *Hurst* relief. This Court should not grant Petitioner certiorari review of his claims. The Florida Supreme Court's partial retroactivity analysis does not conflict with any decisions of other state courts, federal appellate courts, or this Court.

This Court has generally held that matters of retroactivity deal with state law, not the federal constitution. *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) ("finality of state convictions is a state interest, not a federal one. It is a matter that States should be free to evaluate, and weigh the importance of...."); *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("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."). Florida's retroactivity decision is a

matter of state law, which provides no basis for the exercise of this Court's certiorari jurisdiction. *Hurst*, 202 So. 3d at 57 (citing *State v. Horowitz*, 191 So. 3d 429, 438 (Fla. 2016) ("we have the duty to independently examine and determine questions of state law so long as we do not run afoul of federal constitutional protections....")).

This Court also provides in *Danforth* that "the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law." *Danforth*, 552 U.S. at 288. States are required to meet but can exceed the minimum requirements for relief that federal law requires, including creating their own full and partial retroactivity tests. *Id.* The Florida Supreme Court followed *Danforth* in *Asay*, when it created a state retroactivity analysis pursuant to *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *See Asay*, 210 So. 3d at 15 (concluding that *Witt*'s retroactivity analysis provides "more expansive retroactivity standards" than the federal standards set forth in *Teague v. Lane*, 489 U.S. 288 (1989) (emphasis in original; citation omitted)).

This Court has recognized that its "jurisdiction fails" in cases where the state court rests its judgment on non-federal grounds and those grounds are also an adequate basis for the ruling on independent non-federal grounds. *See Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Long*, 463 U.S. at 1038 (1983); *see also*, *Cardinale v. Louisiana*, 394 U.S. 437 (1969) (holding that this Court does not have jurisdiction to review a state court decision on certiorari review unless a federal question is raised and decided in the state court below); *Street v. New York*, 394 U.S. 576,

581-82 (1969). This Court will not conduct a certiorari review where a state court's decision is based on independent state law. *Florida v. Powell*, 559 U.S. 50, 57 (2010).

Petitioner makes two arguments alleging why he is entitled to retroactive Hurst relief: (1) partial retroactivity violates the Eighth Amendment because it is arbitrary; and (2) in any event, he should receive the benefit of *Hurst* because his postconviction case was still pending in 2002 when *Ring* was decided. Neither argument serves as an appropriate vehicle for this Court's certiorari review.

New rules of law are typically applied only to cases that have not been finalized. *Whorton v. Bockting*, 549 U.S. 406 (2007); *Griffith v. Kentucky*, 479 U.S. 314 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final...."); *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992) (adopting *Griffith* to the decisions of Florida courts). Retroactivity under *Griffith* is thus dependent on the date of finality of the direct appeal of a case. Even then, *Hurst v. Florida* relies on *Ring*,[2] which "announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348 (2004).

Following *Asay*, this Court has refused to grant certiorari review to petitioners whose sentences of death were finalized prior to *Ring*. *See Jones v. State*, 234 So. 3d 545 (Fla. 2018), *cert. denied*, No. 17-8652,

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[2] *Ring* followed from *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

2018 WL 1993786, at *1 (U.S. June 25, 2018); *Cole v. State*, 234 So. 3d 644 (Fla. 2018), *cert. denied*, No. 17-8540, 2018 WL 1876873 (U.S. June 18, 2018); *see also Branch v. State*, 234 So. 3d 548 (Fla. 2018), *cert. denied*, 138 S. Ct. 1164 (2018); *Hannon v. State*, 228 So. 3d 505 (Fla. 2017), *cert. denied*, 138 S. Ct. 441 (2017); *Lambrix v. State*, 227 So. 3d 112 (Fla. 2017), *cert. denied*, 138 S. Ct. 312 (2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017). Because Petitioner is a similarly situated individual, this Court should deny his petition.

Additionally, if partial retroactivity were "arbitrary or capricious", this Court would not have given partial retroactive effect to a change in the penal law in *Dorsey v. United States*, 567 U.S. 260 (2012). Petition at 11. In *Dorsey*, this Court held that the Fair Sentencing Act was partially retroactive as it applied to those offenders who committed applicable offenses before the effective date of the act, but who were sentenced following that date. *Dorsey*, 567 U.S. at 273; *see also United States v. Abney*, 812 F.3d 1079 (D.C. Cir. 2016) (explaining that before *Dorsey*, this Court did not hold a change in criminal penalty as partially retroactive).

Petitioner is not entitled to *Hurst* relief because his sentence of death was finalized prior to *Ring*. *San Martin*, 705 So. 2d 1337, *cert. denied*, 525 U.S. 841 (1998). Petitioner alleges that he should be receive retroactive *Hurst* relief because his postconviction claim was pending when *Ring* was decided. (Petition at 10-11). However, retroactivity is a matter of state law, and Florida decided that the cut-off for retroactivity of *Hurst v. State* was this Court's decision

in *Ring*. Petitioner's sentence was finalized prior to *Ring*. Thus, as a matter of state law, Petitioner is not entitled to retroactive application of *Hurst* on collateral review. Accordingly, this Court should deny certiorari review.

Lastly, Petitioner claims that *Mosley* requires that the holdings in *Hurst v. Florida* and *Hurst v. State* be applied retroactively to his case. His claim is based on the concept of fundamental fairness articulated in *Mosley*. This claim does not merit this Court's discretionary review. Petitioner did not raise this claim below, instead arguing that he should receive retroactive relief based on *Falcon v. State*, 162 So. 3d 954 (Fla. 2015), and *Miller v. Alabama*, 567 U.S. 460 (2012).[3] Therefore, this Court will "decline to reach [such a claim] in the first instance" where the lower court has not considered the claim. *See Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 194 (2007); *see also National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459 (1999) ("[W]e do not decide in the first instance issues not decided below."); *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (same).

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[3] *Miller* announced a new substantive rule of law by placing a particular punishment (mandatory life in prison without the possibility of parole for juvenile offenders) beyond the State's power to impose. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 729, 734 (2016) (holding that because *Miller* announced a new substantive rule of constitutional law, "the Constitution requires state collateral review courts to give retroactive effect to that rule"). *See also Schriro v. Summerlin*, 542 U.S. at 352 (defining a substantive rule as a new rule that places "particular conduct or persons" "beyond the State's power to punish").

Even then, *Mosley*, like *Asay*, relied on state law, which created a cut-off for individuals who would receive *Hurst* relief. 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 the benefit is part and parcel of the landscape of any 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. This is not arbitrary and capricious in violation of the Eighth Amendment; it is simply a fact inherent in any retroactivity analysis.

The Florida Supreme Court's partial retroactivity ruling was based on the date of the *Ring* decision, not based on a purposeful intent to deprive pre-*Ring* death sentenced defendants in general, and Petitioner in particular, relief under *Hurst v. State*. The Florida Supreme Court has been entirely consistent in denying *Hurst* relief to those defendants whose convictions and sentences were final when *Ring* was issued in 2002. Petitioner is being treated the same as similarly situated defendants. Accordingly, Petitioner's fundamental fairness claim is not an appropriate vehicle for this Court's certiorari review.

Aside from the question of retroactivity, certiorari would be inappropriate in this case because there is no underlying federal constitutional error as *Hurst v. Florida* did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. Petitioner became eligible for a death sentence by virtue of his prior violent felony convictions. See

Alleyne v. United States, 570 U.S. 99, 111 n.1 (2013) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)); *Kansas v. Carr*, 136 S. Ct. 633 (2016) (rejecting a claim that the Constitution requires a burden of proof on whether or not mitigating circumstances outweigh aggravating circumstances, noting that such a question is "mostly a question of mercy.").

The questions Petitioner presents do not offer any matter which comes within the parameters of Rule 10 of the Rules of the United States Supreme Court. Sup. Ct. R. 10. Petitioner does not identify any direct conflict with this Court, federal appellate courts, or state supreme courts, nor does he offer any unresolved, pressing federal question. He challenges only the application of this Court's well-established principles to the Florida Supreme Court's decision. As Petitioner does not demonstrate any compelling reasons for this Court to exercise its certiorari jurisdiction under Rule 10, this Court should deny the petition.

Conclusion

Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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