Case No. 18-5060

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

KONSTANTINOS FOTOPOULOS
Petitioner,

v.

STATE OF FLORIDA
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

Whether certiorari review should be denied because the Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florida* and *Hurst v. State*, which relies on state law to provide that the *Hurst* cases are not retroactive to defendants whose death sentences were final when this Court decided *Ring v. Arizona*, does not violate the Equal Protection clause of the Fourteenth Amendment nor the Eighth Amendment's prohibition against cruel and unusual punishment?

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The decision of the Florida Supreme Court is reported at *Fotopoulos v. State*, 237 So. 3d 911(Fla. 2018).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on January 29, 2018. Petitioner sought an additional 60 days for the filing of this Petition, which was granted up to June 28, 2018. Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257(a). Respondent agrees that the statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution:

> 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 defense.

U.S. Const. Amend. VI.

The Eighth Amendment to the United States Constitution:

> 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:

> 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 FACTS

On appeal from the denial of postconviction relief following an evidentiary hearing, the Florida Supreme Court found the following facts and procedural history:

> In 1989, Fotopoulos and Deidre Hunt, a woman with whom he was having an affair, went to an isolated rifle range with Kevin Ramsey. Ramsey was tied to a tree and, at the appellant's direction, was shot three times in the chest with a .22 rifle by Hunt. This portion of the shooting was videotaped by Fotopoulos. The taping of the events then stopped, and Fotopoulos shot Ramsey once in the head with an AK-47 assault rifle. Apparently, Ramsey was executed because he was attempting to blackmail Fotopoulos regarding alleged counterfeiting activities.
>
> The videotape of the Ramsey killing was then used by Fotopoulos to force Hunt to arrange the murder of Fotopoulos's wife, Lisa. After failing to arrange the hiring of someone to kill Mrs. Fotopoulos three times, Hunt was finally successful in enlisting Bryan Chase to carry out the murder for $5000. On November 4, 1989, Chase entered the Fotopoulos home and shot Lisa once in the head. The shot was not fatal. After Lisa had been shot, Fotopoulos shot Chase repeatedly, killing him.
>
> Fotopoulos and Hunt were eventually charged with two counts of first-degree murder, two counts of attempted first-degree murder, two counts of solicitation to

> commit first-degree murder, one count of conspiracy to commit first-degree murder, and one count of burglary of a dwelling while armed. Prior to testifying at Fotopoulos's trial, Hunt pled guilty to all charges and received two death sentences.
>
> At trial, the State introduced evidence to demonstrate that Fotopoulos was the mastermind behind the events resulting in the deaths of both Ramsey and Chase and the near death of Lisa Fotopoulos. Significantly, the State constantly maintained in this proceeding that Hunt was dominated by Fotopoulos. The appellant/petitioner testified in his own defense and asserted his innocence throughout the trial. The jury found Fotopoulos guilty of all charges and recommended that he be sentenced to death for the murders. The trial court followed the jury's recommendation and sentenced Fotopoulos to death.
>
> Fotopoulos asserted a total of sixteen claims in his direct appeal to this Court, all of which were rejected. *See Fotopoulos v. State*, 608 So.2d 784 (Fla. 1992).

Fotopoulos v. State, 838 So.2d 1122, 1125-26 (Fla. 2002). (Ms. Hunt was later resentenced to life. *See Hunt v. State*, 753 So. 2d 609 (Fla. 5th DCA 2000).

On May 17, 1993, this Court denied certiorari, *Fotopoulos v. Florida*, 508 U.S. 924 (1993) and Petitioner's case became final.[1] Following the denial of certiorari, Petitioner unsuccessfully sought collateral relief from both the state and federal courts. *See Fotopoulos v. State,* 741 So.2d 1135 (Fla. 1999) (affirming the denial of relief on certain claims, but

[1] Pursuant to Rule 3.851(d)(1)(B), Fla. R. Crim. P. 3.851, a judgment and sentence become final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."

remanding for consideration of others); *Fotopoulos v. State*, 838 So.2d 1122, 1125-26 (Fla. 2002)(affirming the denial of postconviction relief); *Fotopoulos v. Sec'y, Dept. of Corr.*, 516 F.3d 1229, 1235 (11th Cir. 2008) (reversing federal district court's granting of habeas relief and finding that Florida Supreme Court's resolution of the constitutional claims was not contrary to or an unreasonable application of United States Supreme Court precedent). Petitioner filed for a writ of certiorari which this Court denied. *Fotopoulos v. McNeil*, 555 U.S. 899, 129 S.Ct 217 (2008).

On January 12, 2016, this Court decided *Hurst v. Florida*, 136 S.Ct. 616 (2016), which declared that a jury, not a judge, must make the factual determination of the existence of an aggravating factor in order for the death penalty to be a permissible sentence and remanded the case back to the Florida Supreme Court to conduct a harmless error analysis. On remand, on October 14, 2016, the Florida Supreme Court issued *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), which used state law to further expand the requirements for the death penalty to be a permissible sentence in Florida.

On January 10, 2017, Petitioner filed a successive Rule 3.851 motion seeking relief pursuant to *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). Relief was denied by the postconviction trial court

(Petitioner's Appendix A) and Petitioner appealed.

On August 10, 2017, the Florida Supreme Court issued *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), reiterating that *Hurst* relief would not be available to those whose cases were final prior to the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002).

On September 27, 2017, the Florida Supreme Court then issued an order requiring Petitioner to show cause why the postconviction trial court's denial of the successive 3.851 should not be affirmed in light of *Hitchcock*. Petitioner filed his response on October 17, 2017. Two days later, the State filed its reply. Petitioner filed his response to the state's reply on November 13, 2017. On January 29, 2018, the Florida Supreme Court affirmed the denial of relief; this decision is the subject of the instant petition for a writ of certiorari. Petitioner now seeks certiorari review of the Florida Supreme Court's decision. This is the State's brief in opposition.

REASONS FOR DENYING THE WRIT

> Certiorari review should be denied because the Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florida* and *Hurst v. State*, which relies on state law to provide that the *Hurst* cases are not retroactive to defendants whose death sentences were final when this Court decided *Ring v. Arizona*, does not violate the Equal Protection clause of the Fourteenth Amendment nor the Eighth Amendment's prohibition against cruel and unusual punishment.

Though Fotopoulos' petition is a convoluted emotional argument devoid of much legal analysis, the State has done its best to pull out the sparsely argued legal questions from the submitted pages. Petitioner seems to seek 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. 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. Further, 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. There is also no 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. Since 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 ruling was based on state law

Petitioner appealed the state trial court's denial of his successive postconviction motion to the Florida Supreme Court. Petitioner argued that the Florida Supreme Court's partial retroactivity analysis violated the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. The Florida Supreme Court affirmed the trial court's denial of the successive motion. *Fotopoulos v. State*, 237 So. 3d 911(Fla. 2018). The Florida Supreme Court explained that *Hurst* did not apply retroactively to Petitioner because his death sentence became final on May 17, 1993, almost a decade prior to the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002). The Florida Supreme Court cited to and based its decision on *Hitchcock v. State*, 226 So.3d 216, 217 (Fla. 2017), *cert. denied*, 138 S.Ct. 513 (2017), denying relief in this case based on its own existing precedent regarding partial retroactivity.

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), the Florida Supreme Court held that *Hurst v. State* would not be retroactively applied to capital cases that were final before *Ring v. Arizona* was decided on June 24, 2002.

The Florida Supreme Court in *Asay* relied on the state test for retroactivity found in *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 prongs of the *Witt* test for fourteen paragraphs. *Asay*, 210 So.3d at 17-22.

Further, 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 on June 24, 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 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). 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 denied relief in 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); *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); *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. Petitioner offers no persuasive, much less compelling, reasons for this Court to grant review of his case.

A 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. In fact, when the Minnesota Supreme Court, in 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, 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. This 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. When the *Danforth* Court spoke of state courts being free to choose the "degree of retroactivity" that will apply, that certainly includes a partial retroactivity analysis. 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 own decision of *Hurst v. State*, 202 So.3d 40 (Fla. 2016), not merely the retroactivity of this Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016). 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 because aggravating circumstances that were found by the judge were also found by the jury during the guilt phase. (With respect to the murder of victim Ramsey, prior violent felony-

the contemporaneous conviction for the murder of victim Chase. With respect to the murder of victim Chase, prior violent felony- the contemporaneous conviction for the murder of victim Ramsey, and during the course of a felony- the contemporaneous burglary.) See *Jenkins v. Hutton*, 137 S.Ct. 1769, 1771 (2017) which noted 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". Under this Court's reasoning in *Hutton*, there was no *Hurst v. Florida* error in this case. The Florida Supreme Court greatly expanded this Court's *Hurst v. Florida* decision in its *Hurst v. State* decision to require factual findings in addition to the existence of an aggravating circumstance and to include a requirement of jury unanimity under the Eighth Amendment. This Court would have to rule on the retroactivity of those additional aspects of *Hurst v. State* if it grants Fotopoulos' petition. This Court would also have to address the retroactivity of jury findings regarding the sufficiency of the aggravating circumstances, jury findings regarding mitigation, and jury findings weighing the aggravation and mitigation, all of which the Florida Supreme Court required in its *Hurst v. State* decision. While the Florida Supreme Court believes that the jury must make additional

findings regarding mitigation and weighing, that is not this Court's view.[2]

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 circumstances 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. Moreover, 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***

[2] Lower courts have almost uniformly held that a judge may perform the "weighing" of factors to arrive at an appropriate sentence without violating the Sixth Amendment. See *State v. Mason*, ___ N.E.3d ____, 2018 WL 1872180 at *5-6 (Ohio Apr. 18, 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citations omitted); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *State v. Gales*, 658 N.W.2d 604, 628-29 (Neb. 2003) ("[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review are to be undertaken by a jury").

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 defendants "must deserve mercy beyond a reasonable doubt." *Id.* at 642. Basically, this 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. This Court would have to address those differences if it were to grant the writ.

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 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 same issue regarding the Eighth Amendment prohibiting a partial retroactivity analysis in a death warrant case. *Branch v. Florida*, 138 S.Ct. 1164 (2018). This Court also very recently denied a petition raising that same issue in another Florida capital case. *Jones v. Florida*, 2018 WL 1993786 (June 25, 2018) (No. 17-8652).

There is no conflict between the Florida Supreme Court's decision and this Court's jurisprudence regarding retroactivity and this Court would have to recede from both *Danforth* and *Summerlin* to grant 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. 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 in the situation of *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). Even if this Court was willing to overrule *Danforth* and require that *Teague* be used in all situations, Petitioner would still receive no relief because even pursuant to a *Teague* analysis, *Hurst* is not retroactive under *Summerlin*. Overruling both *Danforth* and *Summerlin* would be necessary for Petitioner to receive relief. Yet, the petition does not even mention *Danforth* nor *Summerlin* nor acknowledge that the position it is advocating is inconsistent with the actual holdings, as well as the reasoning, of both cases.

No conflict with federal appellate courts/state supreme courts

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 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 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 the argument that the Florida Supreme Court's partial retroactivity analysis violates the Eighth Amendment and held 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 simply is no conflict between the Florida Supreme Court's decision and

that of any federal circuit court of appeals nor any state supreme court.

Hurst does not provide a basis to relitigate previously presented claims

Fotopoulos uses the majority of his petition to claim that it is unfair for Petitioner to be denied relief because his counsel was ineffective for choosing not to challenge a perceived inconsistency between the State's argument in Hunt's trial and the State's argument in Fotopoulos' trial regarding Fotopoulos' domination over Ms. Hunt. Fotopoulos claims that said error was exacerbated by the fact that Ms. Hunt was originally sentenced to death, which was made known to his jury, but she was later successful in obtaining resentencing after which she was sentenced to life.

Petitioner is merely repackaging a claim that Certiorari was denied on a decade ago when this Court denied Fotopoulos' previous petition for a writ of certiorari. *Fotopoulos v. McNeil*, 555 U.S. 899, 129 S.Ct 217 (2008). However, acknowledging that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case", *United States v. Carver*, 260 U.S. 482, 490; 43 S.Ct. 181 (1923), this claim will be addressed herein as it relates to *Hurst*.

Fotopoulos had petitioned this court for a writ because the Eleventh Circuit reversed the district court's grant of relief based on petitioner's claim of a due process violation and

ineffective assistance of counsel for counsel choosing not to challenge a perceived inconsistency between the State's argument in Hunt's trial and the State's argument in Fotopoulos' trial regarding whether Ms. Hunt's actions were a result of Fotopoulos' domination over her. In reversing the district court, the Eleventh Circuit stated:

> A review of [defense counsel] Corrente's entire testimony [during a postconviction evidentiary hearing], instead of the snippet relied upon by the district court, amply supports the finding of the Supreme Court of Florida that Corrente made a strategic decision…[Further,] the domination theory of the State was not necessarily inconsistent with the theory advanced in Hunt's sentencing proceeding…The Supreme Court of Florida reasonably concluded that Corrente's strategic decision was not deficient performance…Even if we were to assume that Corrente's assistance was deficient, Fotopoulos has not established that he was prejudiced…Fotopoulos does not dispute that he was the "prime motivator" and "bore prime responsibility" for two murders and the attempted murder of his wife…The district court concluded that the use by the State of inconsistent theories was prosecutorial misconduct that "amounted to a due process violation."…This analysis is contrary to our precedents…as Justice Thomas explained in his concurrence in *Bradshaw*, "[the Supreme] Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories."

Fotopoulos v. Secretary, Dept. of Corr., 516 F. 3d 1229 (11th Cir. 2008); *cert. denied Fotopoulos v. McNeil*, 555 U.S. 899, 129 S.Ct 217 (2008). Petitioner now, under the guise of *Hurst*, seeks to relitigate the same claim previously presented to this Court. However, as *Hurst* is not retroactive under Federal law, *Hurst*

cannot be a basis to do so. As noted in the preceding paragraphs, 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* is not retroactive.

Partial retroactivity does not violate the Eighth Amendment

As for the remainder of Petitioner's 'fairness' argument, Petitioner seems to be arguing that basing a retroactivity analysis on court dates is itself arbitrary. Petitioner insists that the Florida Supreme Court's partial retroactivity analysis is arbitrary in violation of the Eighth Amendment. However, 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 the 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* violate 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 the benefit of a new development in the law and older final cases that will not receive the benefit of the new development is part and parcel of the landscape of a 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. 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 relaxed in capital cases, not that there should be automatic and full retroactivity in all capital cases. 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 one hundred Florida capital defendants retroactive relief. What Petitioner is essentially 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. If the Eighth Amendment applied to

a retroactivity analysis in this manner, it would require this Court to always grant full retroactivity, which is clearly not required.

There is no conflict between the Florida Supreme Court and this Court's decisions nor that of any other appellate court nor any state court of last resort regarding *Hurst* or retroactivity. The issue is a matter of state law. 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,

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CERTIFICATE OF SERVICE

I, LISA-MARIE LERNER, A MEMBER OF THE BAR OF THIS COURT, HEREBY CERTIFY that, on this 24th day of July 2018, a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT has been submitted using the electronic filing system. I further certify that a copy has been sent by email and by U.S. mail to James Driscoll, Jr., Capital Collateral Regional Counsel, 12973 N. Telecom Parkway, Temple Terrace, FL 33637, phone: 813-558-1600; email driscoll@ccmr.state.fl.us.

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