No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 2017

GARY RICHARD WHITTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

MARK E. OLIVE
Counsel of Record
Law Offices of Mark E. Olive, P.A.
320 W. Jefferson Street
Tallahassee, Florida 32301
(850) 212-7276
meolive@aol.com

BILLY H NOLAS
SEAN T. GUNN
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818
billy_nolas@fd.org
sean_gunn@fd.org

Capital Case

Questions Presented

In *Hurst v. Florida* this Court struck down Florida's longstanding capital-sentencing procedures because they authorized a judge, rather than a jury, to make factual findings that were the necessary precondition for a death sentence. On remand, the Florida Supreme Court held, as a state constitutional consequence, that a death verdict could not be rendered without unanimous jury findings of at least one aggravating circumstance and that the sum of aggravation is sufficient to outweigh any mitigating circumstances and to warrant death.

The Florida Supreme Court then held that it would apply both the federal and state jury-trial rights retroactively to inmates whose death sentences had not become final as of June 24, 2002 (the date of *Ring v. Arizona*, precursor to *Hurst*) but that it would deny relief to inmates whose death sentences were final on that date. Petitioner is in the latter cohort.

The questions he presents are:

1. whether the Fourteenth Amendment's guarantee of Equal Protection and the Eighth Amendment's prohibition of capricious capital sentencing impose limits upon a state court's power to declare unconventional rules of retroactivity, and whether those limits were transgressed here.

2. whether it violates the Eighth and Fourteenth Amendments for a Florida capital sentencing jury to be told their decision is merely advisory.

LIST OF PARTIES

All parties appear in the caption on the cover page.

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DECISION BELOW

The decision of the Florida Supreme Court is reported at 238 So. 3d 724 (2018), and reprinted in the Appendix (App.) at 1.

JURISDICTION

The judgment of the Florida Supreme Court was entered on January 31, 2018. App. 1. Rehearing was denied March 13, 2018. 2018 WL 1284509 (App. 2). On June 6, 2018, Justice Thomas extended the time to file this certiorari petition to July 26, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

The Eighth Amendment provides:

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

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Introduction

Petitioner's death sentence is unconstitutional under this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). The Florida Supreme Court ignored this fundamental federal constitutional defect in Petitioner's case, concluding while *Hurst* should apply retroactively to dozens of death sentences on collateral review, it should

not apply to Mr. Whitton's death sentence based on a retroactivity cutoff line of June 24, 2002. In doing so, the Florida Supreme Court applied *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016).

II. Procedural History

In 1990, Petitioner was convicted of murder in the Circuit Court, First Judicial Circuit, Walton County, Florida. The "advisory" jury unanimously recommended the death penalty. The court, not the jury, then made the findings of fact required to impose a death sentence under Florida law. The court found the following aggravating factors had been proven beyond a reasonable doubt: (1) Petitioner committed the offense while on parole; (2) Petitioner was previously convicted of another violent felony; (3) the offense was committed to avoid arrest; (4) the offense was committed for pecuniary gain; and (5) the crime was heinous, atrocious, or cruel. The court, not the jury, then found beyond a reasonable doubt those aggravators were "sufficient" to impose the death penalty and the aggravators were not outweighed by the mitigation. Based upon its fact-finding, the court sentenced Petitioner to death.[1]

[1] As depicted in the Florida Supreme Court's direct appeal opinion in Petitioner's case, his crime involved the killing of a friend in a motel room:

> An autopsy revealed that [the victim] sustained numerous injuries during the attack which caused his death. [The victim's] skull was fractured and he suffered stab wounds to his shoulder, cheek, neck, scalp, and back. In addition, [the victim] sustained three fatal stab wounds to the heart. The medical examiner testified that these wounds prevented [the victim's] heart from beating properly and, consequently, caused his death. The medical examiner also testified that [the victim] had wounds to his arms and hands consistent with his attempting to defend himself. Accordingly, the medical examiner concluded that [the

The Florida Supreme Court affirmed. *Whitton v. State*, 649 So. 2d 861 (Fla. 1994), and later affirmed the denial of Petitioner's initial Fla.R.Crim.P., Rule 3.851 motion for post-conviction relief, *Whitton v. State*, 161 So. 3d 314 (Fla. 2014). In 2015, Petitioner filed an initial petition for federal habeas corpus relief in the United States District Court for the Northern District of Florida. *Whitton v. Jones*, No. 4:15-cv-200-RH, ECF No. 6 (N.D. Fla. Apr. 22, 2015).[2]

In July 2016, Petitioner filed a successive Rule 3.851 motion in the lower trial court, seeking relief in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and later, by order of the court, filed an amended motion. The state post-conviction court denied relief, writing:

> The Supreme Court of Florida has held that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to any death sentence that became final prior to the issuance of the United States Supreme Court's June 24, 2002 opinion of *Ring v. Arizona*, 536 U.S. 584 (2002). *See Asay v. State*, 210 So. 3d 1 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). Defendant's case became final in 1995, well before *Ring* was decided in 2002. Defendant is not entitled to relief under any of his current arguments as each depends on retroactive application of the *Hurst* decisions. To the extent Defendant claims that the denial of retroactivity to pre-*Ring* defendants is unconstitutional as it constitutes "partial retroactivity" this Court is compelled to follow the rulings entered by the Florida Supreme Court. App. 3, at 3a.

> victim] was conscious during the attack, although a blood alcohol test indicated [the victim's] blood alcohol level was .34 at the time of death.

Whitton v. State, 649 So. 2d 861, 863 (Fla. 1994).

[2] On February 17, 2017, the federal court ordered those habeas proceedings held in abeyance until Defendant's state-court *Hurst* litigation is complete.

The Florida Supreme Court affirmed the circuit court based solely upon *Mosley* and *Asay*.

REASONS FOR GRANTING THE WRIT

I. The Florida Supreme Court's Arbitrary Creation of Two Classes of Death Sentenced Inmates – Those Whose Unconstitutional Sentences are Vacated for Re-Sentencing and Those Whose Identically Unconstitutional Death Sentences are Not – is Contrary to This Court's Controlling Precedents

This case arises at the intersection of two principles that have become central fixtures of the Court's jurisprudence over the past four and a half decades.

The first principle, emanating from *Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), is that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty" (*id.* at 428). Succinctly put, this principle "insist[s] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). The Eighth Amendment's concern against capriciousness in capital cases refines the older, settled precept that Equal Protection of the Laws is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and…[subjects] one and not the other" to a uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

The second principle, originating in *Linkletter v. Walker*, 381 U.S. 618 (1965), and later refined in *Teague v. Lane*, 489 U.S. 288 (1989), recognizes the pragmatic

necessity for the Court to evolve constitutional protections prospectively without undue cost to the finality of preexisting judgments. This need has driven acceptance of various rules of non-retroactivity, all of which necessarily accept the level of arbitrariness that is inherent in the drawing of temporal lines.

The Court has struck a balance between the two principles by honoring the second even when its application results in the execution of an inmate whose death sentence became final before the date of an authoritative ruling establishing that the procedures used in his or her case were constitutionally defective. *E.g. Beard v. Banks*, 542 U.S. 406 (2004). If nothing more were involved here, that balance would be decisive. But the Florida Supreme Court's post-*Hurst* retroactivity rulings do involve more. They inaugurate a kind and degree of capriciousness that far exceeds the level justified by normal non-retroactivity jurisprudence.

To see why this is so, one needs only consider the ways in which Florida's pre-*Ring* condemned inmates do and do not differ from their post-*Ring* peers:

What the two cohorts have in common is that both were sentenced to die under a procedure that allowed death sentences to be predicated upon factual findings not tested by a jury trial – a procedure finally invalidated in *Hurst* although it had been thought constitutionally unassailable under decisions of this Court stretching back a third of a century.[3]

The ways in which the two cohorts differ are more complex. Notably:

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[3] See *Spaziano v. Florida*, 468 U.S. 447 (1984); *Hildwin v. Florida*, 490 U.S. 638 (1989); and *Bottoson v. Florida*, 537 U.S. 1070 (2002) (denying certiorari to review *Bottoson v. Moore*, 833 So. 3d 693 (Fla. 2002)).

(A) Inmates whose death sentences became final before June 24, 2002 have been on Death Row longer than their post-*Ring* counterparts. They have demonstrated over a longer time that they are capable of adjusting to that environment and continuing to live without endangering any valid interest of the State.

(B) Inmates whose death sentences became final before June 24, 2002 have undergone the suffering chronicled in, *e.g.*, *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, [1993] 1 Zimb. L.R. 239, 240, 269(S) (Aug. 4, 1999), and by Justice Breyer, dissenting from the denial of certiorari in, for example, *Sireci v. Florida*, 137 S. Ct. 470 (2016), longer than their post-*Ring* counterparts. "This Court, speaking of a period of *four weeks*, not 40 years, once said that a prisoner's uncertainty before execution is 'one of the most horrible feelings to which he can be subjected.'" *Id*. at 470. "At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes." *Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 462 (1999) (Justice Breyer, dissenting from the denial of certiorari).

(C) Inmates whose death sentences became final before June 24, 2002 are more likely than their post-*Ring* counterparts to have been given those sentences under standards that would not produce a capital sentence – or even a capital prosecution – under the conventions of decency prevailing today. In the generation since *Ring* was decided, prosecutors and juries have been increasingly unlikely to seek and

impose death sentences.[4] Doubts that would cloud today's capital prosecutions and cause today's prosecutors and juries to hesitate to seek or impose a death sentence were unrecognized in the pre-*Ring* era. Thus, we can be sure that a significant number of cases which terminated in a death verdict before *Ring* would not be thought death-worthy by 2018 standards. We cannot say which specific cases would or would not; but it is plain generically that some inmates condemned to die before *Ring* would receive less than capital sentences today.

(D) Inmates whose death sentences became final before June 24, 2002 are more Likely than their post-*Ring* counterparts to have received those sentences in trials involving problematic fact-finding. The past two decades have witnessed a broad-spectrum recognition of the unreliability of numerous kinds of evidence – flawed forensic-science theories and practices, hazardous eyewitness identification testimony, and so forth – that was accepted without question in pre-*Ring* capital trials.[5] Evidence which led to confident convictions and hence to unhesitating death

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[4] See, *e.g.*, BRANDON L. GARRETT, END OF ITS ROPE 79-80 and figure 4.1 (Harvard University Press 2017); DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2016: YEAR END REPORT 2 – 5 (2016); Death Penalty Information Center, *Facts About the Death Penalty* (updated July 18, 2018), p. 3, *available at https://deathpenaltyinfo.org/documents/FactSheet.pdf*.

[5] See EXECUTIVE OFFICE OF THE PRESIDENT, REPORT TO THE PRESIDENT: FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016) (REPORT OF THE PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY [September 2016], *available at* https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf), supplemented by a January 16, 2017 Addendum, *available at* https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensics_addendum_finalv2.pdf); COMMITTEE ON IDENTIFYING THE NEEDS OF THE

sentences a couple of decades ago would have substantially less convincing power to prosecutors and juries today. Concededly, penalty retrials in the older cases would also pose greater difficulties for the prosecution because of the greater likelihood for evidence loss over time. But the prosecution's case for death in a penalty trial seldom depends on the kinds of evidentiary details that are required to achieve conviction at the guilt-stage trial; transcript material from the guilt-stage trial will remain available to the prosecutors in all cases in which they opt to seek a death sentence through a penalty retrial; it is a commonplace of capital sentencing practice everywhere that prosecutors often rest their case for death entirely or almost entirely on their guilt-phase evidence, leaving the penalty trial as a *locus* primarily for defense mitigation. And even if a prosecutor does opt to seek a penalty retrial[6] and fails to obtain a new death sentence, the bottom-line consequence is that the inmate will continue to be incarcerated for life. That is a substantially less troubling outcome than the prospect of outright acquittals in guilt-or-innocence retrials involving years-old evidence that concerned the Court in *Linkletter* and *Teague*.

Taken together, considerations (A) through (D) make it plain that the particular application of non-retroactivity resulting from the Florida Supreme

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FORENSIC SCIENCES COMMUNITY, NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf; ERIN E. MURPHY, INSIDE THE CELL: THE DARK SIDE OF FORENSIC DNA (2015); Jessica D. Gabel & Margaret D. Wilkinson, "Good" Science Gone Bad: How the Criminal Justice System Can Redress the Impact of Flawed Forensics, 59 STINGS L.J. 1001 (2008).

[6] But see the preceding point (C).

Court's *Mosley-Asay* divide involves a level of caprice that runs far beyond that tolerated by standard-fare *Linkletter* or *Teague* rulings. Its denial of relief in precisely the class of cases in which relief makes the most sense is irremediably perverse. This Court should consider whether it rises to a degree of capriciousness and inequality that violates the Eighth Amendment and Equal Protection respectively.

II. The Jurors Were Informed That Their Only Function was to Advise the Court About a Sentence, in Violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985)

The advisory jury's recommendation of a death sentence was unconstitutional. It cannot be known what the jurors would have found if tasked with making the critical findings of fact given the principles articulated in *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell*, the Court held that a capital sentence is invalid if it was imposed by a jury that believed that the ultimate responsibility for determining the appropriateness of a death sentence rested elsewhere and not with the jury. *Id*. at 328-29. The Court explained that it "has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its truly awesome responsibility, and that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere." *Id*. at 328-29, 341 (internal quotation omitted).

Petitioner's jury was told its role in sentencing was diminished when the trial court instructed it that its sentence was advisory.[7] Given the jurors' knowledge that they were not ultimately responsible for the imposition of Petitioner's death sentence, we cannot be certain that the jury would have made the same unanimous *recommendation* without the *Hurst* error. As Justice Sotomayer has pointed out:

> Like a number of other capital defendants in Florida, petitioner Leo Louis Kaczmar has raised an important Eighth Amendment challenge to his death sentence that went unaddressed by the Florida Supreme Court. Specifically, he argues that the jury instructions in his case impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death, in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). I have thrice dissented from this Court's unwillingness to intervene in the face of the Florida Supreme Court's failure to address this important question. See *Guardado v. Florida*, 584 U.S. ___, ___ (2018); *Middleton v. Florida*, 583 U.S. ___, ___ (2018); *Truehill v. Florida*, 583 U.S. ___, ___ (2017). Recently, "[i]n light of the dissenting opinions to the denial of certiorari," the Florida Supreme Court in another capital case finally set out to "explicitly address" the *Caldwell* claim. *Reynolds v. State*, ___ So. 3d ___, n. 8, 2018 WL 1633075, *5, n. 8 (Apr. 5, 2018) (*per curiam*). The resulting opinion, however, gathered the support only of a plurality, so the issue remains without definitive resolution by the Florida Supreme Court. Thus, for the reasons previously stated in *Truehill*, *Middleton*, and *Guardado*, I again respectfully dissent from the denial of certiorari.

Kaczmar v. Florida, No. 17-8148 (June 18, 2018). This precise *Caldwell* issue is presented front and center by Petitioner's case.

Moreover, the jury's consideration of the mitigation in Petitioner's case may have been significantly impacted by the jury's knowledge that it was not ultimately responsible for the sentence. In a constitutional proceeding, where the jury was

[7] For example, the jury was told: "the final decision as to what punishment shall be imposed is the responsibility of the Judge." (R. 2245-46).

properly apprised of its role as fact-finder, the jury may have afforded greater weight to the mitigation in Petitioner's case. As such, it cannot be concluded that a jury would have unanimously found or rejected any specific mitigators in a constitutional proceeding. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about a jury's vote). In Petitioner's case, the court found the following mitigating factors: (1) Defendant suffered a deprived childhood and poor upbringing; (2) Defendant was abused as a child; (3) Defendant was abused by his two alcoholic parents; (4) Defendant was a hard worker when employed; (5) Defendant shows potential for rehabilitation; (6) Defendant had performed various humanitarian deeds; (7) Defendant was an alcoholic; (8) Defendant had an unstable personality consistent with alcoholism and child abuse; and (9) Defendant is a human being and child of God. Given this mitigation, there is a reasonable probability that at least some jurors in a constitutional proceeding, having been properly advised of their role as fact-finder in deciding whether to sentence Petitioner to death, would have decided that the death penalty should not be imposed.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

/s/ MARK E. OLIVE
MARK E. OLIVE
Counsel of Record
Law Offices of Mark E. Olive, P.A.
320 W. Jefferson Street
Tallahassee, Florida 32301
(850) 212-7276
meolive@aol.com

/s/ BILLY H. NOLAS
BILLY H. NOLAS
SEAN T. GUNN
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 N. Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818
billy_nolas@fd.org
sean_gunn@fd.org