NO. 18-5641

IN THE SUPREME COURT OF THE UNITED STATES

PRESSLEY BERNARD ALSTON,

Petitioner,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

[Capital Case]

Whether this Court should grant certiorari review where the enforceability of Alston's Durocher waiver and 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.

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OPINION BELOW

The Florida Supreme Court's decision appears as Alston v. State, 243 So. 3d 885 (Fla. 2018).

JURISDICTION

This Court's jurisdiction to review the final judgment of a state court of last resort is authorized by 28 U.S.C. § 1257. However, the Florida Supreme Court's decision in this case is based on adequate and independent state grounds and does not implicate an important or unsettled question of federal law, does not conflict with another state court of last resort or a United States court of appeals, and does not conflict with relevant decisions of this Court. Under United States Supreme Court Rule 10, this case is inappropriate for the exercise of this Court's

discretionary jurisdiction.

STATEMENT OF THE CASE AND FACTS

Pressley Alston was convicted of first-degree murder, armed robbery, and kidnapping in the Fourth Judicial Circuit Court in Florida. Alston v. State, 723 So. 2d 148 (Fla. 1998). In the penalty phase, the jury recommended a death sentence by a vote of nine to three. The trial court found five aggravating factors ("aggravators").[1] The Florida Supreme Court affirmed petitioner's conviction and death sentence on direct appeal on September 10, 1998. Id. (rehearing denied December 17, 1998). His conviction and sentence became final when the time for filing a writ of certiorari in the United States Supreme Court elapsed on March 17, 1999.

On July 1, 2002, Alston filed a pro se petition in the Florida Supreme Court asking to waive further postconviction appeals. Alston v. State, 894 So. 2d 46 (Fla. 2004). The Florida Supreme Court ordered the trial court to hold hearings to determine Alston's competency and whether he sought a waiver. Id. The trial court conducted an inquiry and determined that Alston did want to waive further postconviction appeals. The trial court had Drs. Umesh M. Mhatre, Wade Cooper Myers, and Robert M. Berland evaluate Alston and held an evidentiary hearing on the question of Alston's competency pursuant to Faretta v. California, 422 U.S. 806

[1] The five aggravators found in Alston's case were (1) Alston was convicted of three prior violent felonies; (2) the murder was committed during a robbery/kidnapping and for pecuniary gain; (3) the murder was committed to avoid a lawful arrest; (4) the murder was especially heinous, atrocious, or cruel (HAC); and (5) the murder was cold, calculated, and premeditated (CCP). The trial court did not find any statutory mitigating circumstances ("mitigators") and found four nonstatutory mitigators. Alston, 723 So. 2d at 153.

(1975). After considering the evaluation results and other evidence, the trial court found Alston competent.

On June 6, 2003, the trial court conducted a hearing to address Alston's waiver request, as required by Florida law. Fla. R. Crim. P. 3.851(i); Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993). The trial court informed Alston that he had the option to discharge counsel and represent himself pro se. (Appendix at 5). The court also explained that he had the option to waive his postconviction proceedings, saying,

> [b]ut if you waive your post-conviction proceedings, the court will not only discharge counsel, but will also enter an order dismissing with prejudice any motions that you have under rule 3.851 or any other post-conviction rules.
>
> Now, with prejudice means that you can never refile those matters, that once they are dismissed, they're over and all of your collateral remedies are foreclosed. Then it is logical to assume that if you do that, that ultimately the judgement of the law will be carried out and you will be put to death as ordered by this court.

(Appendix at 6-7).

Alston indicated repeatedly that he understood, stating "I would like to waive all collateral proceedings and post-conviction proceedings and have the judgement of the law carried out." (Appendix at 9). The court then permitted Alston's counsel to inquire of Alston, who examined him extensively on the consequences of the waiver. (Appendix at 17-29). During this inquiry, Alston confirmed his understanding that "I believe that there is no second step after I knowingly and intelligently and voluntarily waive all further appeals and collateral proceedings and post-conviction proceedings in this case." (Appendix at 20). Alston's counsel also

questioned Alston about waiving possible future claims.

> Q. Well, if I -- sorry to interrupt.
>
> If I advised you today, Mr. Alston, that it's my strong legal opinion that we would have a very good argument to file a fully pled and investigated 3.850 today despite the fact that it was not filed within the one-year period of your initial appeal, would that make a difference in any waiver that you intend to tell the judge you want to go with?
>
> A. No. My intentions are still the same.

(Appendix at 25).

The court ultimately determined that Alston was competent to waive further appeals, and that his waiver was knowing, voluntary, and intelligent. The trial court discharged Alston's postconviction counsel and dismissed all motions and petitions on postconviction relief with prejudice pursuant to Durocher, 623 So. 2d at 482. Alston, 894 So. 2d at 58. In an opinion released October 14, 2004, following an extensive review of the trial court proceedings, the Florida Supreme Court found that Dr. Mhatre's reports and testimony, the Florida Department of Corrections (DOC) reports, and the testimony by DOC personnel support the trial court's conclusion that Alston is competent to proceed. Id. at 56-59. The Florida Supreme Court subsequently upheld the trial court's Durocher proceeding and the trial court's finding that "Alston had knowingly, intelligently, and voluntarily waived his rights to postconviction counsel and relief." Id. at 47. In October 2004, counsel was appointed to represent Alston in any state clemency proceedings.

On January 3, 2017, Alston filed a successive postconviction motion in the

trial court seeking Hurst[2] relief. Following the denial of that motion, Alston filed an appeal and a petition for writ of habeas corpus in the Florida Supreme Court seeking Hurst relief. The Florida Supreme Court denied relief in the appeal and the habeas petition on January 22, 2018, holding that Alston was not entitled to Hurst relief because his case became final in 1999 and Hurst was not retroactive to his case. The Florida Supreme Court then withdrew the mandate and issued an order to show cause "why this Court's Opinion in this case should not be vacated and why Appellant's/Petitioner's postconviction waiver does not preclude him from claiming a right to relief under Hurst v. State."

On May 17, 2018, after reviewing each party's response to its order, the Florida Supreme Court denied all relief in Alston's case. The court relied on State v. Silvia, 235 So. 3d 349 (Fla. 2018), to conclude that Alston's valid waiver of postconviction proceedings and counsel precluded review of his Hurst claim. The court further ruled that even if Alston's waiver did not preclude his claim, Hurst did not apply retroactively to his case. Alston, 243 So. 3d at 886. Alston now seeks review of that ruling.

[2] Hurst v. Florida, 136 S.Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016).

REASONS FOR DENYING THE WRIT

I. There is No Basis for Certiorari Review of the Florida Supreme Court's Ruling that Alston Made a Knowing, Intelligent, Voluntary Waiver which Precluded Hurst Relief.

Alston seeks certiorari review of the Florida Supreme Court's decision that Alston's knowing, intelligent, and voluntary waiver of his postconviction litigation was sufficient to bar consideration of a subsequent claim seeking Hurst relief. (Petition at 10). Alston argues that his waiver should not preclude his Hurst claim because 1) a waiver cannot apply to rights that had not yet been recognized at the time of the waiver, 2) his waiver was limited to the claims in his then-pending postconviction trial court motion, and 3) enforcing his waiver is unfair in his case because he did not know about the existence of Ring v. Arizona[3] at the time of his waiver. Alston's argument hinges on a misunderstanding of this Court's waiver jurisprudence and a disagreement with the Florida Supreme Court's factual findings. The ruling below is based on an adequate, independent state ground and this claim is a poor vehicle for certiorari review because a ruling on Alston's waiver claim would not affect the outcome of his case. The Florida Supreme Court's ruling is not in conflict with this Court's precedent, nor the precedent of any federal appellate court or state court of last resort, and factual disputes are an inadequate basis for certiorari review. As Alston provides no grounds to justify certiorari review, Alston's petition should be denied.

This Court should not grant certiorari review in this case because the ruling

[3] Ring v. Arizona, 536 U.S. 584 (2002).

below is based on an independent and adequate state-law ground. See Michigan v. Long, 463 U.S. 1032, 1040 (1983) (holding that, "[r]espect 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"). Rule 3.851, Florida Rule of Criminal Procedure, provides a procedural avenue for a defendant to file and litigate postconviction claims attacking a conviction and sentence. The Rule also provides a mechanism for a defendant to waive the right to state postconviction litigation. Rule 3.851(i), Fla. R. Crim. P. In Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993), the Florida Supreme Court recognized that a capital defendant may waive the statutory right to postconviction litigation and postconviction counsel if the defendant was competent and provided a knowing, voluntary waiver. More recently, State v. Silvia, 235 So. 3d 349 (Fla. 2018), held that a defendant's Durocher waiver barred him from later seeking Hurst relief, even though Hurst had not been issued when he entered his waiver.

Alston's Durocher waiver of his postconviction proceedings was a waiver of his state right to postconviction litigation. Such a waiver is entirely a creation of state law, and it bars him from litigating any postconviction claim in state court. Because the Florida Supreme Court's ruling below is based on an independent and adequate state-law ground, certiorari review should be denied.

Alston's claim is an inadequate vehicle for certiorari review because any adjudication of the merits of his waiver claim would have no impact on his access to

Hurst relief, nor the outcome of his case. The heart of Alston's claim is that he is entitled to Hurst relief, and would be able to avail himself of such relief if not for the Florida Supreme Court's ruling that his Durocher waiver barred consideration of his Hurst claim. Ultimately, Alston is not entitled to Hurst relief because Hurst is not retroactive to his case. Infra, pages 15-25. Alston will not be entitled to Hurst relief regardless of this Court's disposition of Alston's waiver claim. Article III, section 2 of the United States Constitution restricts federal court jurisdiction to "cases" and "controversies." It follows that invoking this Court's jurisdiction to review a claim that is not "likely to be redressed by a favorable judicial decision," would be improper. Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990). Certiorari review should be denied in this case because addressing the merits of Alston's waiver claim will have no impact on the outcome of his case.

This Court should not grant certiorari review because the Florida Supreme Court's ruling below does not raise an unsettled constitutional question and does not conflict with any ruling of a state court of last resort, this Court, or another federal court. Rule 10 of the Rules of the Supreme Court of the United States identifies the relevant considerations in granting certiorari review of a ruling of a state court of last resort. Noting review is only granted for "compelling reasons," the Rule states review is appropriate where the ruling decides an important, unsettled constitutional question, or where the ruling decides an important constitutional question in conflict with this Court, a United States court of appeals, or another state court of last resort. Review is not appropriate, however, to address factual

disputes. United States v. Johnston, 268 U.S. 220, 227 (1925) (holding, this Court does not grant a certiorari "to review evidence and discuss specific facts").

This Court's established waiver jurisprudence upholds waivers in the face of subsequent changes in the law and does not conflict with the Florida Supreme Court's ruling below. This Court has long held that any waiver must be knowing, intelligent, and voluntary. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938). However, the validity of the waiver is judged by the law that existed at the time of the waiver and cannot be undermined by a future change in the law. In McMann v. Richardson, 397 U.S. 759, 773-74 (1970), the defendant claimed his guilty plea was involuntary when a new decision on coerced confessions was issued by this Court. This Court rejected his argument, holding that when a defendant waives his jury trial right, "he does so under the law then existing." Id., 397 U.S. at 774. Even if the defendant would have pleaded differently had the later change in the law been in effect at the time of his plea, "he is bound by his plea." Id.; see also Brady v. United States, 397 U.S. 742, 757 (1970) (rejecting an attempt to vacate a plea based partially on a statute that was later declared unconstitutional because defendant's failure to anticipate a change in the law "does not impugn the truth or reliability of his plea"); United States v. Ruiz, 536 U.S. 622, 630 (2002) (noting that the Constitution does not require a defendant to have complete knowledge of relevant circumstances when entering a waiver, including anticipating a relevant change in the law). The validity of Alston's waiver of his postconviction litigation is based on

the law as it existed at the time and is not undermined by subsequent changes in the law.

Alston strains to find conflict with the Florida Supreme Court's ruling and the rulings of other courts by arguing that Alston's Durocher waiver was not a knowing waiver of Hurst relief because the right did not exist when he entered his waiver. (Petition at 10-11). However, Alston's waiver acted to waive an *existing* right to postconviction litigation, much like the guilty plea in Richardson was a waiver of an existing right to a jury trial. 397 U.S. 761-64. The subsequent change in the law that created a new claim for the Richardson defendants to raise at the trial they waived did not invalidate their waivers because the waiver of a jury trial acts as a waiver of the potential claims they could raise at that jury trial. Id. at 766-68. Alston's waiver of postconviction litigation similarly acted to waive the potential claims he could raise during such litigation. Therefore, Alston's argument that his waiver was not knowing fails because his waiver applied to an existing right to postconviction litigation, and necessarily any potential claims that could be raised at that time or in the future.

Alston's reliance on Halbert v. Michigan, 545 U.S. 605 (2005), and Smith v. Yeager, 393 U.S. 122 (1968), to argue that Alston did not knowingly waive his Hurst claim is misplaced. (Petition at 11-12). Neither Halbert nor Smith conflicts with Richardson, Brady, or Ruiz, and the waivers in Halbert and Smith are readily distinguishable from Alston's Durocher waiver. Halbert held that the Equal Protection and Due Process clauses required appointment of appellate counsel for

defendants seeking first-tier review of a conviction based on a plea. The state argued that Halbert waived the newly-recognized right to appellate counsel by entering a no contest plea, but the Halbert Court disagreed, holding that because the right to counsel did not exist when Halbert entered his plea, he could not waive it. In Smith, the issue was whether a claim was procedurally barred in a successive federal habeas proceeding because it likely could have been proven at an evidentiary hearing during the litigation of the initial habeas petition. The District Court found the issue procedurally barred because Smith elected not to seek an evidentiary hearing to prove this claim during his initial habeas litigation, even though such hearing was unlikely to be granted under the law existing at the time. The Smith Court's primary concern was whether Smith abused the writ by not seeking an evidentiary hearing at a previous stage. The court ultimately concluded that Smith's claim should not be barred for failing to prove a claim at an evidentiary hearing to which he had no right.

In a similar vein, Alston relies on Malvo v. Mathena, 254 F.Supp. 3d 820 (E.D. Va. 2017), and People v. Billings, 770 N.W. 2d 893 (Mich. App. 2009), which again, address issues irrelevant to Alston's case. Each case raises the question of whether a defendant can knowingly waive an unknown right, which is irrelevant in Alston's case because his waiver applied to his known right to postconviction litigation. Additionally, Malvo is further distinguishable because the ruling turned on the defects in the scope of Malvo's waiver. The Court addressed whether Malvo

waived a Miller[4] claim by entering a plea prior to the issuance of Miller that explicitly described all the rights being waived. The Court concluded that although a plea certainly could waive a defendant's future Miller claim, it did not in this case because the agreed boundaries of the plea agreement did not contemplate the possibility of this future claim. Malvo's case would have arrived at the same conclusion as the Court did in Richardson, 397 U.S. at 776-78, supra, page 9, if not for the specific terms of his waiver.

Halbert, Smith, Malvo, and Billings do not conflict with the ruling below because Alston's waiver applied to the known, well-established right to postconviction litigation. Alston's argument misses the distinction between waiver of a singular unknown right and waiver of a known right to a broad procedural scheme, such as postconviction litigation. Additionally, the holding in Smith was driven by the complexities of the procedural bars existing in successive federal habeas litigation, and Malvo was driven by the defects in the scope of Malvo's waiver. These factors are absent in Alston's case. Alston's argument that his waiver was not knowing fails because his waiver applied to his existing right to postconviction litigation, and necessarily any potential claims that could be raised in postconviction litigation at that time or in the future.

Alston further argues he did not knowingly waive Hurst relief because he only waived a state right. He argues that the waiver of a state right cannot implicitly waive a distinct Constitutional right. (Petition at 14). This argument fails because the enforceability of Alston's waiver does not turn on whether he waived a

[4] Miller v. Alabama, 567 U.S. 460 (2012).

Constitutional or a state right. Even if Alston's Hurst claim has a Constitutional foundation, that does not impair Alston's waiver of postconviction litigation because the postconviction proceedings Alston is seeking only exist as a matter of state right. Murray v. Giarratano, 492 U.S. 1, 8 (1989) (citing Pennsylvania v. Finley, 481 U.S. 551, 556-57 (1987)). If a defendant raises a Constitutional claim in a state proceeding, that does not then transform access to the state proceeding into a Constitutional right. Such a result would eviscerate the finality of nearly every guilty plea or Durocher waiver. Alston's waiver applies to the entire procedural mechanism of state postconviction litigation, and necessarily waives utilizing that procedural mechanism to address any current or future claim.

Alston's reliance on Blackledge v. Perry, 417 U.S. 21 (1974), Menna v. New York, 423 U.S. 61 (1975), and Class v. United States, 138 S.Ct. 798 (2018), are readily distinguishable from Alston's case because each case involved claims that would implicate "the very power of the State" to prosecute the defendants. Blackledge, 417 U.S. at 30. Blackledge concerned a vindictive prosecution claim, Menna involved a Due Process claim, and Class involved a facial constitutional challenge to the statute under which the defendant was convicted. Blackledge, 417 U.S. at 23-25; Menna, 423 U.S. at 62-63; Class, 138 S.Ct. at 801-02. These cases are inapplicable to Alston's case because Hurst only applies to Florida's procedural mechanism for determining the sentence in a capital case. A Hurst claim does not implicate the power of the state to prosecute Alston but rather, the procedure for sentencing him.

Alston presents a factual argument that he did not know about Ring v. Arizona, 536 U.S. 584 (2002), the precursor to Hurst, when he entered his Durocher waiver in 2003. Because Hurst was an extension of Ring to Florida's sentencing scheme, he argues that he could not have knowingly waived Hurst since he did not know about Ring when he entered his Durocher waiver. (Petition at 18). The facts of Alston's case refute his argument.

This Court issued its Ring opinion on June 24, 2002. Ring, 536 U.S. at 584. Alston filed his pro se motion seeking to waive his postconviction litigation shortly after on July 1, 2002. Alston, 894 So. 2d at 46. Alston's hearing to address his Durocher waiver was held on June 6, 2003, nearly a year after Ring was issued. Alston knew or had every opportunity to know that Ring had been issued when he waived his postconviction proceedings.

Even if Alston had not known about Ring at the time of his waiver, he made it clear at his Durocher hearing that he would still want to waive his postconviction proceedings regardless of any new claims his attorney could raise. During the hearing, Alston's defense attorney asked him if he would change his mind about the waiver if they could file new postconviction claims. Alston responded, "No. My intentions are still the same." (Appendix at 25). Alston knew or should have known about Ring when he entered his waiver. Moreover, Alston's colloquy demonstrates that he unreservedly waived all of the postconviction claims pending before the trial court as well as any possible future claims. There is no question that Alston's Durocher waiver was knowing.

The ruling below is based on an adequate, independent state ground and this case is a poor vehicle for certiorari review because a ruling on Alston's waiver claim would not affect the outcome of his case. The Florida Supreme Court's ruling is not in conflict with this Court's precedent, nor the precedent of any federal appellate court or state court of last resort, and Alston's factual disputes are an inadequate basis for certiorari review. As Alston provides no grounds to justify certiorari review, his petition should be denied.

II. There is No Basis for Certiorari Review of the Florida Supreme Court's Denial of Retroactive Application of Hurst to Alston's case.

Alston seeks certiorari review of the Florida Supreme Court's decision that Hurst is not retroactive to Alston's case because his case became final in 1999, prior to the issuance of Ring. See Alston, 723 So. 2d at 148 (rehearing denied Dec. 17, 1998). The Petition alleges that the Florida Supreme Court's refusal to retroactively apply Hurst to cases that were final before Ring was decided is arbitrary and capricious under the Eighth Amendment and violates the Fourteenth Amendment's guarantee of equal protection. (Petition at 21). However, the Florida Supreme Court's denial of retroactive application to Alston's case is based on adequate and independent state grounds, is not in conflict with any other state court of last resort, and is not in conflict with any federal appellate court. The decision below is not in conflict with this Court's jurisprudence on retroactivity nor does it violate the Eighth or Fourteenth Amendments. As Alston provides no grounds to justify certiorari review, his petition should be denied. U.S. Sup. Ct. R. 10.

As explained supra, page 7, this Court does not review state court decisions that are based on adequate and independent state grounds. Michigan, 463 U.S. at 1040. This Court has held that Ring is not retroactive under federal law in Schriro v. Summerlin, 542 U.S. 348, 358 (2004). As Hurst is an extension of Ring to Florida's capital sentencing scheme, it follows that Hurst is likewise not retroactive under federal law. See Lambrix v. Sec'y, Fla. Dep't of Corr., 872 F.3d 1170, 1182 (11th Cir. 2017) (in denying the defendant's claim seeking retroactive application of Hurst, the court noted that no U.S. Supreme Court opinion holds Hurst to be retroactive). As Hurst is not retroactive under federal law, the Florida Supreme Court's retroactive application of Hurst is based on a state test for retroactivity.

Florida has implemented a test which provides relief to a broader class of individuals in applying Florida's Witt[5] test instead of Teague v. Lane, 489 U.S. 288 (1989), for determining the retroactivity of Hurst. Certiorari review should be denied because the retroactive application of Hurst is based on an adequate and independent state ground.

The Florida Supreme Court first analyzed the retroactive application of Hurst in Mosley v. State, 209 So. 3d 1248, 1276-83 (Fla. 2016), and Asay v. State, 210 So. 3d 1, 15-22 (Fla. 2016). In Mosley, the Florida Supreme Court held that Hurst is retroactive to cases which became final after the June 24, 2002, decision in Ring. 209 So. 3d at 1283. In reaching its conclusion, the Mosley court conducted a Witt analysis, which is Florida's retroactivity test. This Court has held that the finality of state convictions is a state interest rather than a federal one. Danforth v.

Minnesota, 552 U.S. 264 (2008). Thus, states may implement standards for retroactivity that grant relief to a greater class of individuals than what is required by Teague. Johnson v. New Jersey, 384 U.S. 719, 733 (1966) (states may "effectuate under their own law stricter standards than those we have laid down and to apply those standards in a broader range of cases than is required by this decision").

Mosley held that the Witt test favored retroactive application of Hurst in cases which became final post-Ring. The court concluded that "defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by Ring should not be penalized for the United States Supreme Court's delay in explicitly making this determination." Mosley, 209 So. 3d at 1276-83. Thus, Hurst was retroactive to Mosley's post-Ring case, which became final in 2009. Id.

Conversely, applying the Witt analysis in Asay, the Florida Supreme Court held that Hurst is not retroactive to cases in which the death sentence was final pre-Ring. The court specifically noted that Witt "provides *more expansive retroactivity standards* than those adopted in Teague." Asay, 210 So. 3d at 15 (emphasis in original) (quoting Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005)). However, the court determined that the amount of reliance on the old rule, and the effect retroactivity would have on the administration of justice, weighed heavily against applying Hurst to pre-Ring cases. Asay, 210 So. 2d at 20-22. Asay noted that the state and the victims' families relied heavily on the constitutionality of Florida's death penalty scheme based on the U.S. Supreme Court's decisions. Id. at 20. Resentencing is expensive and time consuming and the state's interest in

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[5] Witt v. State, 837 So. 2d 922 (Fla. 1980).

finality weighed heavily against retroactive application. Id. at 21-22. Thus, the Florida Supreme Court held that Hurst was not retroactive to Asay's case since the judgment and sentence became final in 1991, prior to Ring. Id. at 8, 20.

Asay and Mosley clearly explain the Florida Supreme Court's rationale for the Ring-based retroactivity cutoff. Alston claims this cutoff is arbitrary and results in unequal sentences in similar cases. (Petition at 25). His argument misapprehends a primary purpose of the Ring-based retroactivity cutoff, which is to avoid penalizing those defendants who would have been entitled to Ring relief if Ring had been applied to Florida's sentencing scheme at the time Ring was decided. See Mosley, 209 So. 3d at 1283. In moving the line of retroactive application back to Ring, Florida's retroactive application of Hurst exceeds what is constitutionally required and expands the class of defendants who can benefit from Hurst.

As Alston's case was final in 1999, he would not have been entitled to Ring relief if Ring had applied to Florida law when it was decided in 2002. The denial of Hurst relief in Alston's case is consistent with its stated objectives and has been applied consistently in other cases. Following Asay and Mosley, the Florida Supreme Court has applied Hurst retroactively to all post-Ring cases and declined to apply Hurst retroactively to all pre-Ring cases.[6] This distinction between cases which were final pre-Ring versus cases which were final post-Ring is neither arbitrary nor capricious.

The differing outcomes between pre-Ring and post-Ring cases do not make

[6] Hitchcock v. State, 226 So. 3d 216 (Fla. 2017); Lambrix v. State, 227 So. 3d 112 (Fla. 2017); Branch v. State, 234 So. 3d 548 (Fla. 2018).

the Hurst retroactivity cutoff unconstitutional under the Eighth or Fourteenth Amendments. New rules are primarily applied only to cases which are not yet final. Griffith v. Kentucky, 479 U.S. 314, 328 (1987); Penry v. Lynaugh, 492 U.S. 302 (1989). Under this "pipeline" concept, Hurst would only apply to cases not yet final on the date Hurst was issued. The case-by-case outcome resulting from this traditional application of retroactivity can be affected by numerous factors that have nothing to do with the defendant or the crime, such as trial scheduling or the speed at which an appellate court issues its opinion. Yet, this Court recognizes that traditional retroactivity does not violate the Eighth or Fourteenth Amendment.

Florida's Hurst retroactivity calculation differs from traditional retroactivity only in that the determinative date stems from the date Ring was decided rather than the date Hurst was decided. Certainly, the Florida Supreme Court has demonstrated "some ground of difference that rationally explains the different treatment" between pre-Ring and post-Ring cases. Eisenstadt v. Baird, 405 U.S. 438, 447 (1972). Much like the more traditional application of retroactivity, the Ring-based cutoff for the retroactive application of Hurst does not violate the Eighth or Fourteenth Amendment.

Alston's Petition further alleges that Florida's Ring retroactivity cutoff denies relief to the most deserving capital prisoners. (Petition at 30). Alston argues that older capital cases were more likely to contain errors, older jury instructions contained Caldwell v. Mississippi, 472 U.S. 320 (1987),[7] errors, and generally were

[7] Alston makes the passing assertion that jury instructions in "older cases" violated Caldwell v. Mississippi, 472 U.S. 320 (1987). Florida's standard jury instructions in place at the time of Alston's

more likely to result in a death sentence. Alston concludes that these errors provide him and other similarly situated defendants special entitlement to retroactive application of Hurst. (Petition at 30-35).

Alston's argument seeks a dramatic reversal of this Court's longstanding precedent of favoring newer cases over older ones when considering retroactivity questions and asks this Court to favor decades-old cases in applying Hurst retroactively. Procedural avenues are available to capital prisoners in Florida to challenge errors they discover and failing to prevail on those claims does not justify retroactive application of Hurst. Allegations that some unrelated error exists at another stage in Alston's case does not, by itself, entitle him or any other defendant to retroactive Hurst relief. Notably, Alston fails to cite a single case which would demonstrate otherwise. The Florida Supreme Court's refusal to retroactively apply Hurst to Alston's case is based on an adequate and independent state ground and does not violate federal law or this Court's precedent. Thus, certiorari review should be denied.

Alston relies on Montgomery v. Louisiana, 136 S.Ct. 718 (2016), to assert that Hurst created a substantive change in the law and thus should be afforded full retroactive application under the Constitution. (Petition at 35-36). Contrary to Alston's assertion, Hurst is merely a procedural change. In Schriro, 542 U.S. at 353,

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trial did not violate Caldwell because they accurately described the role of the jury under the law at the time. Romano v. Oklahoma, 512 U.S. 1, 9 (1994). Alston's jury was provided standard jury instructions, which emphasized the gravity of the jury's role, warning against "act[ing] hastily or without due regard to the gravity of these proceedings." (Record Vol. II at 482). The jury was also instructed to "carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence." Id.

this Court explained that rules that allocate decision making authority between the judge and the jury are procedural rules. There is no conflict between the decision below and this Court's precedent nor the precedent of any other federal appellate court or state court of last resort. Certiorari review should be denied.

New rules of law, such as the rule announced in Hurst v. Florida, do not normally apply to cases that are final. Whorton v. Bockting, 549 U.S. 406, 416 (2007). The general rule is one of nonretroactivity for cases on collateral review, unless the new rule is a substantive Constitutional rule or a watershed rule of criminal procedure. Teague, 489 U.S. at 307, 310. The Constitution does not compel retroactive application of Hurst because it is neither a substantive Constitutional rule nor a watershed rule of criminal procedure.

Hurst was an extension of Ring to Florida's capital sentencing scheme. Ring, in turn, was based on Apprendi v. New Jersey, 530 U.S. 466 (2000). In Schriro, 542 U.S. at 358, this Court held that Ring established a procedural change in the law and was not retroactive to cases that were final. As Hurst is merely an extension of Ring, Hurst is also not retroactive under federal law. Lambrix, 872 F.3d at 1182 ("No U.S. Supreme Court decision holds that its Hurst decision is retroactively applicable."); In re Coley, 871 F.3d 455, 457 (6th Cir. 2017) (noting this Court has not made Hurst retroactive to cases on collateral review); In re Jones, 847 F.3d 1293, 1295 (10th Cir. 2017) (holding this Court has not found that Hurst created a substantive rule).

Alston attempts to analogize Hurst to Miller v. Alabama, 567 U.S. 460

(2012), arguing that Hurst "conflat[es] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the *manner of determining* the defendant's culpability.'" Montgomery, 136 S.Ct. at 734-35 (quoting Schriro, 542 U.S. at 353) (emphasis in original). (Petition at 36). Alston's argument overlooks the reason this Court held Miller retroactive. Miller "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status' — that is juvenile offenders." Montgomery, 136 S.Ct. at 734 (quoting Penry, 492 U.S. at 330). Thus, Miller was held retroactive because it placed the punishment of mandatory life in prison without parole beyond the state's power to impose for a class of defendants; juvenile offenders faced a sentence that now cannot be applied to them.

Conversely, the same class of defendants committing the same conduct still face the same punishment following Hurst. While mandatory life imprisonment without parole can no longer be imposed on juveniles following Miller, the death penalty can still be imposed following Hurst. This distinction strikes at the heart of what makes a new rule substantive. Hurst is a procedural change because it merely "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." Schriro, 542 U.S. at 353.

Alston next relies on Welch v. United States, 136 S.Ct. 1257 (2016), to argue that the Eighth Amendment unanimity requirement announced in Hurst v. State was a substantive change in the law. (Petition at 37). However, the Welch decision

undermines Alston's assertion that Hurst alters the class of persons the law punishes, and instead, supports the determination that Hurst is procedural:

> "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." Schriro, 542 U.S. at 353, 124 S.Ct. 2519. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." Id., at 351-352, 124 S.Ct. 2519 (citation omitted); see Montgomery, supra, at ___, 136 S.Ct. at 728. Procedural rules, by contrast, "regulate only the manner of determining the defendant's culpability." Schriro, 542 U.S., at 353, 124 S.Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." Ibid. "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." Id., at 352, 124 S.Ct. 2519.

Welch, 136 S.Ct. at 1264-65 (emphasis in original).

The Welch Court found that the rule in Johnson v. United States, 135 S.Ct. 2551 (2015), which "changed the substantive reach of the Armed Career Criminal Act," was a substantive change because it altered the class of people affected by the law. Welch, 136 S.Ct. at 1265. In explaining how the rule in Johnson was not procedural, the Welch Court stated, "[i]t did not, for example, 'allocate decision making authority' between judge and jury, ibid., or regulate the evidence that the court could consider in making its decision." Id. (citation omitted).

Here, the new rule announced in Hurst v. State allocated the decision-making authority to determine capital sentencing from the judge to the jury, which is precisely how the Welch Court defined a procedural change. As this Court noted in Schriro, requiring a jury to find a fact "*because [a state]* has made a certain fact

essential to the death penalty ... is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive." Schriro, 542 U.S. at 354 (emphasis in original). Based on this Court's precedent, there is no doubt that the Hurst rule is a procedural rule.

Alston relies on Ivan V. v. City of New York, 407 U.S. 203 (1972), and Powell v. Delaware, 153 A. 3d 69 (Del. 2016), to argue that Hurst is substantive because it changed the proof-beyond-a-reasonable-doubt standard. (Petition at 39). He ignores Florida's longstanding practice of using the beyond-a-reasonable-doubt standard of proof for proving aggravating factors in Florida. See Fla. Std. J. Inst. (Crim.) 7.11; Finney v. State, 660 So. 2d 674, 680 (Fla. 1995). Hurst did not change this standard. Furthermore, neither Hurst v. Florida nor Hurst v. State changed the standard of proof for any required finding in Florida's capital sentencing proceedings. Rather, both Hurst v. Florida and Hurst v. State addressed who makes the findings — the jury versus the judge — not what standard of proof is used.

This Court has explained that weighing in capital cases does not even involve a standard of proof. This Court decided Kansas v. Carr, 136 S.Ct. 633, 642 (2016), after Hurst v. Florida, and rejected an argument that the Eighth Amendment required the jury be told that mitigating circumstances did not have to be proven beyond a reasonable doubt. This Court expressed some doubt as to whether it was even possible to apply a standard of proof to mitigation because such determinations are largely "a judgment call" and weighing the aggravating circumstances against the mitigating circumstances is "mostly a question of mercy."

Id. It would be meaningless to tell the jury that the defendants "must deserve mercy beyond a reasonable doubt." Id. Standards of proof do not apply to judgment calls, value calls, or questions of mercy.

Furthermore, the Delaware Supreme Court's Powell opinion is readily distinguishable from the Florida Supreme Court's decision below because Powell was addressing a Delaware-specific standard of proof issue that does not apply to Florida's partial retroactivity cases. 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," while Delaware's law at the time did not. Id. As Florida's and Delaware's death penalty statutes are different, an interpretation by the Supreme Court of Delaware that Hurst should be given full retroactive effect is not in conflict with the decision below. 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.

Hurst establishes a procedural rule and is not retroactive under this Court's precedent. The Florida Supreme Court's refusal to retroactively apply Hurst to Alston's case is based on an adequate and independent state ground and does not violate federal law or this Court's precedent. As such, certiorari review should be denied.

Aside from the significant barriers to relief presented by waiver and retroactivity in this case, certiorari would also be inappropriate because there is no underlying federal constitutional error. 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. The unanimous verdict by Alston's jury establishing his guilt of a contemporaneous armed robbery and kidnapping established the contemporaneous violent felony aggravator under well-established Florida law.[8] This was clearly sufficient to meet the Sixth Amendment's fact-finding requirement pursuant to this Court's decisions in Ring and Hurst. See Apprendi, 530 U.S. at 490; Jenkins v. Hutton, 137 S.Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty); Carr, 136 S.Ct. at 642 (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").

An additional aggravator found by the trial court, the prior violent felony aggravator, was supported by Alston's three prior violent felony convictions.[9] 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)); Lowenfield v. Phelps, 484 U.S. 231, 244-45 (1988) ("The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling

[8] § 921.141 (5)(d), Fla. Stat. (1995) (listing capital felony committed during the course of an enumerated felony as an aggravator).

[9] § 921.141(5)(b), Fla. Stat. (1995) (listing prior violent felony as an aggravator).

the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase").

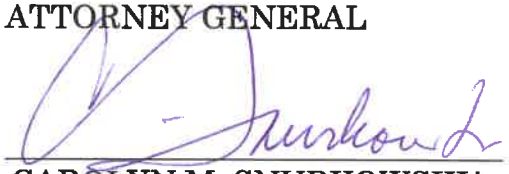
This Court's ruling in Hurst v. Florida did not change the recidivism exception articulated in Apprendi and Ring. Consequently, Alston's eligibility for the death penalty under Florida law was clearly established. As there is no underlying constitutional error presented under the facts of this case, certiorari review should be denied.

The ruling below is based on adequate independent state-law 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. Furthermore, there is no underlying Sixth Amendment error in this case. Certiorari review should be denied.

CONCLUSION

Respondent respectfully requests the petition for writ of certiorari be denied.

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL



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