DOCKET NO. 18-6877

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD EARL SHERE, Jr.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

Whether certiorari review should be denied where (1) 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 Eighth or Fourteenth Amendments; (2) Florida's capital sentencing structure does not violate this Court's decision in *Caldwell v. Mississippi*, and (3) the Florida Supreme Court's decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law?

TABLE OF CONTENTS

Contents

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

CITATION TO OPINION BELOW

The decision of the Florida Supreme Court is not reported, but can be found at *Shere v. State*, No. SC17-1703, 2018 WL 4346801, (Fla. Aug. 31, 2018).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on August 31, 2018. (Pet. App. A). Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257(a). Respondent agrees that this 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

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE

Richard Shere was charged with the 1987 murder of Drew Snyder. Snyder had been reported missing, and the police investigation quickly led them to Shere. *Shere v. State*, 579 So.2d 86, 88 (Fla. 1991). Shere waived his *Miranda*[1] rights, gave several statements, and led detectives to various scenes involving the murder. *Id.* According to Shere, on December 24, 1987, Shere's later codefendant, Bruce "Brewster" Demo, told Shere that the victim, Snyder, was going to inform the police about Shere's and Demo's theft of air conditioners. *Id.* The next day, Demo called Shere and said he was thinking about killing Snyder, and threatened to kill Shere if he didn't help. *Id.* Shere went to Demo's house where Demo loaded a shovel into Shere's car, and the two drank beers and smoke marijuana into the early hours before convincing Snyder to go rabbit hunting. *Id.*

Shere told police that at some point in the hunt he placed his rifle on the roof of the car so he could relieve himself. *Id.* While he was doing that, Demo grabbed the weapon and Shere heard a gunshot. *Id.* Shere dropped to the ground, hearing Snyder say, "Oh, my God, Brewster," followed by several more shots. *Id.* When he got up, he saw Snyder still breathing in the back of the car, and said they should take Snyder to the hospital. *Id.* Instead, Demo took out a pistol and shot Snyder in the forehead, and then pulled Snyder out of the car to also shoot him in the chest. *Id.* Shere said they drove Snyder's body a short distance and Demo forced him to dig a hole and bury the body. *Id.* Shere then returned home, when he cleaned up and

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

burned his bloodied backseat *Id.* Later, at Demo's suggestion, Shere and his girlfriend Heidi Greulich went to Snyder's house, gathered some of his belongings, and dumped them in another city hoping to leave the impression that Snyder had left town. *Id.*

Demo gave a different account to the detectives. In his version, Demo, not Shere, was the one who had turned his back to relieve himself, when he heard Shere fire the first shots. *Id.* at 89. Demo turned and saw Shere fire through the rear car window five or six times. *Id.* Shere then pointed the gun at Demo and ordered him to finish off Snyder. *Id.* Demo shot Snyder twice in the head and once in the heart. *Id.* He said he made Shere dig the grave because he was upset by what Shere had done. *Id.* Greulich also gave a statement to police wherein she revealed that Shere had told her that he alone had killed Snyder. *Id.* A friend of Shere's, Ray Pruden, testified that one night after Christmas, Shere told Pruden that he had shot Snyder to death ten or fifteen times while rabbit hunting. *Id.* Medical testimony showed that Snyder had been shot ten times. *Id.*

The jury found Shere guilty and recommended a death sentence by a vote of seven to five. *Id.* The judge found three aggravating factors: 1) the murder was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws by eliminating a witness; 2) the murder was especially evil, wicked, atrocious, or cruel; and 3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. *Id.* In

mitigation, the court said "that it considered numerous possible mitigating circumstances, rejected some, and found that 'the aggravating circumstances far outweighed the mitigating circumstances.'" *Id.* The judge followed the jury's recommendation and sentenced Shere to death. *Id.*

Although the Florida Supreme Court struck especially heinous, atrocious, or cruel aggravator, they upheld his convictions and sentence. *Id.* at 97. Shere's sentence became final in 1991. He has spent the past nearly three decades unsuccessfully challenging his conviction and sentence. *See*, *Shere v. State*, 742 So.2d 215 (Fla. 1999) (affirming denial of postconviction relief); *Shere v. Moore*, 830 So.2d 56 (Fla. 2002) (denial of a petition for writ of habeas corpus); *Shere v. Secretary, Department of Correction*, 537 F.3d 1304 (11th Cir. 2008) (affirming the district court's denial of a petition for a writ of habeas corpus); *Shere v. State*, 91 So.3d 133 (Table) (Fla. 2012) (affirming denial of postconviction relief); *Shere v. State*, 2016 WL 3450466 (Fla. 2016) (affirming denial of postconviction relief); *Shere v. State*, 2018 WL 4293400 (Fla. 2018) (affirming denial of postconviction relief).

On January 6, 2017, Shere filed a successive motion to vacate death sentence, and argued that his death sentence violates *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 209 So. 3d 40 (Fla. 2016). Shere also raised retroactivity and Eighth Amendment Issues. On August 22, 2017, the trial court entered an order denying Shere's successive motion to vacate his death sentence. Sheer appealed to the Florida Supreme Court, and on October 13, 2017, that court issued an order to

show cause why the trial court's order should not be affirmed in light of the court's decision in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017).

In *Hitchcock*, the Florida Supreme Court reaffirmed its previous holding in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), in which it held that *Hurst v. Florida* as interpreted by *Hurst v. State* is not retroactive to defendants whose death sentences were final when this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). Following briefing in Shere's case, the Florida Supreme Court ultimately affirmed the lower court's denial of relief, finding:

> After reviewing Shere's response to the order to show cause and the State's arguments in reply, we conclude that Shere is not entitled to relief. Shere was sentenced to death following a jury's recommendation of death by a vote of seven to five. *Shere v. State*, 579 So. 2d 86, 89 (Fla. 1991), *reh'g denied* (Fla. April 4, 1991). His sentence became final in 1991. *Id.* Therefore, *Hurst* does not apply retroactively to Shere's death sentence. *See Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the denial of Shere's motion. No rehearing will be entertained.

Shere v. State, No. SC17-1703, 2018 WL 4346801, 1* (Fla. Aug. 31, 2018). Shere now seeks certiorari review of the Florida Supreme Court's decision.

REASONS FOR DENYING THE WRIT

Certiorari review should be denied because (1) 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 Eighth or Fourteenth Amendments; (2) Florida's capital sentencing structure does not violate the legal principles of Caldwell v. Mississippi, and (3) the Florida Supreme Court's decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law.

Shere requests this Court review the Florida Supreme Court's decision affirming the denial of his successive postconviction motion, arguing that the state court's holding with respect to retroactivity violates the Eighth and Fourteenth Amendments. He also argues that the jury being instructed that their verdict was a recommendation violates the Eighth Amendment.

As will be shown, nothing about the Florida Supreme Court's retroactivity decision is inconsistent with the United States Constitution. Shere does not provide any "compelling" reason for this Court to review his case. U.S. Sup. Ct. R. 10. Indeed, Shere cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision below, in which the court determined that Shere was not entitled to relief because *Hurst v. State* was not retroactive to his death sentence. Nothing presented in the petition justifies the exercise of this Court's certiorari jurisdiction.

I. The Florida Court's Ruling on Retroactivity Does Not Violate Equal Protection or the Eighth Amendment.

The Florida Supreme Court's holding in *Hurst v. State* followed this Court's

ruling in *Hurst v. Florida* in requiring that aggravating circumstances be found by a jury beyond a reasonable doubt before a death sentence may be imposed. The Florida court then expanded this Court's ruling, requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death."[2] *Hurst v. State*, 202 So. 3d at 57. In *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), the Florida Supreme Court ruled that, as a matter of state law, *Hurst v. State* is not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *See also Mosley v. State*, 209 So. 3d 1248, 1272-73 (Fla. 2016) (holding that, as a matter of state law, *Hurst v. State* does apply retroactively to defendants whose sentences were not yet final when this Court issued *Ring*). Florida's partial

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[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 e.g. State v. Mason*, ___ N.E.3d ___, 2018 WL 1872180, *5-6 (Ohio, April 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 citation omitted); *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 to be undertaken by a jury").

retroactive application of *Hurst v. State* is not constitutionally unsound and does not otherwise present a matter that merits the exercise of this Court's certiorari jurisdiction.

This Court has held that, in general, a state court's retroactivity determinations are a matter of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264 (2008). State courts may fashion their own retroactivity tests, including partial retroactivity tests. A state supreme court is free to employ a partial retroactivity approach without violating the federal constitution under *Danforth*. The state retroactivity doctrine employed by the Florida Supreme Court did not violate federal retroactivity standards. The court's expansion of *Hurst v. Florida* in *Hurst v. State* is applicable only to defendants in Florida, and, consequently, subject to retroactivity analysis under state law as set forth in *Witt v. State*, 387 So. 2d 922 (Fla.), *cert. denied*, 449 U.S. 1067 (1980). *See Asay*, 210 So. 3d at 15 (noting that Florida's *Witt* analysis for retroactivity provides "more expansive retroactivity standards" than the federal standards articulated in *Teague v. Lane*, 489 U.S. 288 (1989) (emphasis in original; citation omitted).

This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). *See also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that

this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); *Street v. New York*, 394 U.S. 576, 581-82 (1969) (same). 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).

Florida's retroactivity analysis is a matter of state law. This fact alone militates against the grant of certiorari in this case. It should also be noted that this Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of *Hurst v. State*. *See, e.g., Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), *cert. denied, Lambrix v. Florida*, 138 S. Ct. 312 (2017); *Hannon v. State,* 228 So. 3d 505, 513 (Fla. 2017), *cert. denied, Hannon v. Florida,* 138 S. Ct. 441 (2017); *Branch v. State,* 234 So. 3d 548, 549 (Fla. 2018), *cert. denied, Branch v. Florida,* 138 S. Ct. 1164 (2018); *Cole v. State,* 234 So. 3d 644 (Fla.), *cert. denied, Cole v. Florida, 138 S. Ct. 2657 (2018); Kaczmar v. State,* 228 So. 3d 1 (Fla. 2017), *cert. denied, Kaczmar v. Florida*, 138 S. Ct. 1973 (2018); *Zack, III, v. State,* 228 So. 3d 41 (Fla. 2017), *cert. denied, Zack, III, v. Florida,* 138 S. Ct. 2653 (2018). Shere argues that the Florida Supreme Court's partial retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* violates the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment. He also claims that

the sentencing procedure used in his case violates this Court's ruling in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), because the jury was instructed that its death recommendation was advisory. The Florida Supreme Court's retroactivity ruling is not contrary to federal law. It does not conflict with precedent from this Court or from any appellate court. *Caldwell* does not provide an avenue for relief. Certiorari review is unnecessary.

New rules of law such as the rule announced in *Hurst v. Florida* do not usually apply to cases that are final. *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (explaining the normal rule of nonretroactivity and holding the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), was not retroactive). Additionally, the general rule is one of nonretroactivity for cases on collateral review, with narrow exceptions. *See Teague v. Lane*, 489 U.S. 288, 307 (1989) (observing that there were only two narrow exceptions to the general rule of nonretroactivity for cases on collateral review). Furthermore, certain matters are not retroactive at all. *Hurst v. Florida* was based on this Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002), which in turn was based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court has held that "*Ring* announced a new **procedural rule** that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (emphasis added).

In *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), this Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all

cases, state or federal, pending direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Under this "pipeline" concept, only those cases still pending direct review or not yet final would receive the benefit from alleged *Hurst* error. Retroactivity under *Griffith* depends on the date of the finality of the direct appeal. Under *Teague,* if a case is final on direct review, the defendant will not receive the benefit of the new rule unless one of the narrow exceptions announced in *Teague* applies. Again, finality is the critical date-based test under *Teague.* There is nothing about Florida's decision providing partial retroactivity to *Hurst v. Florida* and *Hurst v. State* that is contrary to this Court's retroactivity jurisprudence.

Moreover, if partial retroactivity violated the United States Constitution or this Court's retroactivity jurisprudence, this Court would not have given partial retroactive effect to a change in the penal law in *Dorsey v. United States*, 567 U.S. 260 (2012). In *Dorsey*, this Court held that the Fair Sentencing Act was partially retroactive in that it would apply to those offenders who committed applicable offenses prior to the effective date of the act, but who were sentenced after that date. *Id.* at 273. *See United States v. Abney*, 812 F.3d 1079, 1097-98 (D.C. Cir. 2016) (noting that prior to the decision in *Dorsey*, this Court had not held a change in a criminal penalty to be partially retroactive).

Any retroactive application of a new development in the law under any analysis will mean that some cases will get the benefit of a new development, while

other cases will not, depending on a date. Drawing a line between newer cases that will receive benefit of a new development in the law and older final cases that will not receive the benefit is part and parcel of the landscape of any retroactivity analysis. It is simply part of the retroactivity paradigm that some cases will be treated differently than other cases based on the age of the case. This is not arbitrary and capricious in violation of the Eighth Amendment; it is simply a fact inherent in any retroactivity analysis.

Shere's argument for a violation of the Equal Protection Clause fares no better than his Eighth Amendment argument. A criminal defendant challenging the State's application of capital punishment must show intentional discrimination to prove an equal protection violation. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). A "'[d]iscriminatory purpose' . . . implies more than intent as violation or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 298.

The Florida court's retroactivity ruling was based on the date of the *Ring* decision, not based on a purposeful intent to deprive pre-*Ring* death sentenced defendants in general, and Shere in particular, relief under *Hurst v. State*. The Florida Supreme Court has been entirely consistent in denying *Hurst* relief to those defendants whose convictions and sentences were final when *Ring* was issued in 2002. Shere is being treated exactly the same as similarly situated murderers.

Consequently, Shere's equal protection argument is plainly meritless.

Additionally, in *Beck v. Washington*, 369 U.S. 541 (1962), this Court refused to find constitutional error in the alleged misapplication of Washington law by Washington courts: "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error.' . . . Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Id.* at 554-55 (citation omitted).

Finally, Shere suggests that *Hurst* should be applied retroactively to pre-*Ring* defendants because they have suffered on death row for a long period of time, changes in technology and litigation practices could provide them more robust mitigation presentations, and they were "unfortunate" enough to receive a constitutionally sound trial the first time around. He points to no legal precedent to support these arguments, and relies largely on speculation on how the outcome of crimes that were tried decades ago would be tried now. It defies logic that the same exhaustive appeals process that has allowed Shere to remain on death row for so long without being executed should also be the mechanism that permits him a new penalty phase hearing twenty-seven years after the original one.

II. The jury instructions in Shere's case do not violate this Court's ruling in *Caldwell v. Mississippi*

Shere's attempt to tie his Equal Protection argument to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), fails. First, the decision in *Caldwell* did not interpret the Equal Protection Clause. There, this Court found that a prosecutor's

comments diminishing the jury's sense of responsibility for determining the appropriateness of a death sentence was "inconsistent with the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell*, 472 U.S. at 323 (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). Second, there was no *Caldwell* error in this case. To establish constitutional error under *Caldwell*, a defendant must show that the comments or instructions to the jury "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). Shere's jury was properly instructed on its role based on the state law existing at the time of his trial. *See Reynolds v. State*, 251 So.3d 811, (Fla. 2018) (explaining that under *Romano*, the Florida standard jury instruction at issue "cannot be invalidated retroactively prior to *Ring* simply because a trial court failed to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts").

Shere's jury was properly informed that it needed to determine whether sufficient aggravating factors existed and, if so, whether the aggravation outweighed the mitigation before the death penalty could be imposed. His jury was also informed that its recommendation would be given "great weight" by the trial court. (Resp. App. A). A Florida jury's decision regarding a death sentence was, and still remains, an advisory recommendation. *See Dugger v. Adams*, 489 U.S. 401 (1989). *See also* § 921.141(2)(c), Fla. Stat. (2017) (providing that "[i]f a unanimous

jury determines that the defendant should be sentenced to death, the jury's **recommendation** to the court shall be a sentence of death") (emphasis added). Thus, there was no violation of *Caldwell* because there were no comments or instructions to the jury that "improperly described the role assigned to the jury by local law." *Romano*, 512 U.S. at 9. Shere's jury was accurately advised that its decision was an advisory recommendation that would be accorded "great weight." This case would be a uniquely inappropriate vehicle for certiorari because this is a postconviction case and this Court would have to address retroactivity before even reaching the underlying jury instruction issue.

To the extent Shere suggests that jury sentencing is now required under federal law, this is not the case. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed.") (emphasis in original); *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding that the Constitution does not prohibit the trial judge from "impos[ing] a capital sentence"). No case from this Court has mandated jury sentencing in a capital case, and such a holding would require reading a mandate into the Constitution that is simply not there. The Constitution provides a right to **trial** by jury, not to **sentencing** by jury.

In sum, there is no conflict between the Florida Supreme Court's decision and this Court's Sixth Amendment, Eighth Amendment or Fourteenth Amendment

jurisprudence. Nor is there any conflict between the Florida Supreme Court's decision and this Court's decision in *Caldwell v. Mississippi*. Certiorari review should be denied.

CONCLUSION

Based on the foregoing, Respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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