CAPITAL CASE

No. 18-8052

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL DUANE ZACK, III *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether this Court should grant review of a decision of the Florida Supreme Court holding that its prior decision in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), did not apply retroactively to petitioner as a matter of state law and rejecting the argument that its partial retroactivity analysis violates the Eighth Amendment?

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OPINION BELOW

The Florida Supreme Court's opinion is reported at *Zack v. State*, __ So.3d __, 43 Fla. L. Weekly S429, 2018 WL 4784204 (Fla. Oct. 4, 2018) (SC18-243).

JURISDICTION

On October 4, 2018, the Florida Supreme Court affirmed the trial court's denial of the successive postconviction motion. No motion for rehearing was filed in the Florida Supreme Court. On December 6, 2018, Zack, represented by Capital Collateral Regional Counsel - North (CCRC-N), filed a motion for extension of time to file the petition for a writ of certiorari in this Court which this Court granted. On February

15, 2019, Zack then filed the current petition. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d). Jurisdiction exists pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

The Eighth Amendment to the United States Constitution, which provides:

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

U.S. Const. Amend. VIII.

The Fourteenth Amendment to the United States Constitution, section one, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Facts of the crime

The Florida Supreme Court described the facts of the murder in its direct appeal opinion:

> Although the murder of Smith took place on June 13, 1996, the chain of events which culminated in this murder began on June 4, 1996, when Edith Pope (Pope), a bartender in Tallahassee, lent her car to Zack. In the weeks prior, Zack had come to Pope's bar on a regular basis. He generally nursed one or two beers and talked with Pope; she never saw him intoxicated. He told her that he had witnessed his sister murder his mother with an axe. As a result, Pope felt sorry for Zack, and she began to give him odd jobs around the bar. When Zack's girlfriend called the bar on June 4 to advise him that he was being evicted from her apartment, Pope lent Zack her red Honda automobile to pick up his belongings. Zack never returned.
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> From Tallahassee, Zack drove to Panama City where he met Bobby Chandler (Chandler) at a local pub. Over the next several days, Zack frequented the pub daily and befriended Chandler. Chandler, who owned a construction subcontracting business, hired Zack to work in his construction business. When Chandler discovered that Zack was living out of a car (the red Honda), he invited Zack to live with him temporarily. On the second night at Chandler's, Zack woke up screaming following a nightmare. Chandler heard Zack groan words which sounded like "stop" or "don't." Although Chandler questioned him, Zack would not discuss the nightmare. Two nights later, on June 11, 1996, Zack left Chandler's during the night, stealing a rifle, a handgun, and forty-two dollars from Chandler's wallet. Zack drove to Niceville, and on the morning of June 12, 1996, pawned the guns for $225.
>
> From Niceville, Zack traveled to Okaloosa County and stopped at yet another bar. At this bar, Zack was sitting alone drinking a beer when he was approached by Laura Rosillo (Rosillo). The two left the bar in the red Honda and drove to the beach, reportedly to use drugs Zack said he possessed. Once on the beach, Zack attacked Rosillo and beat her while they were still in the Honda. He then pulled Rosillo from the car and beat her head against one of the tires. Rosillo's tube top was torn and hanging off her hips. Her spandex pants were pulled down around her right ankle. The evidence suggests she was sexually assaulted; however, the sperm found in Rosillo's body could not be matched to Zack. He then strangled her, dragged her body behind a sand dune, kicked dirt over her face, and departed.
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> Zack's next stop on this crime-riddled journey was Dirty Joe's bar located near the beach in Pensacola. He arrived there on the afternoon of June 13, 1996, and met the decedent, Ravonne Smith. Throughout the afternoon, Smith, a bar employee, and Zack sat together in the bar talking and playing pool or darts. The bar was not very busy, so Smith spent most of her time with Zack. Both bar employees and patrons testified that Zack did not ingest any significant amount of alcohol and that he did not appear to be intoxicated. In the late afternoon, Smith contacted her friend Russell Williams (Williams) and invited him to the bar because she was lonely. Williams arrived at the bar around 5:30

p.m. Prior to leaving the bar around 7 p.m., Smith called her live-in boyfriend, Danny Schaffer, and told him she was working late. Smith, Williams, and Zack then left the bar and drove to the beach where they shared a marijuana cigarette supplied by Zack. Afterwards, they returned to the bar and Williams departed. Zack and Smith left the bar together sometime around 8 p.m. and eventually arrived at the house Smith shared with her boyfriend.

Forensic evidence indicates that immediately upon entering the house Zack hit Smith with a beer bottle causing shards of glass and blood to spray onto the living room love seat and two drops of blood to spray onto the interior doorframe. Zack pursued Smith down the hall to the master bedroom leaving a trail of blood. Once in the bedroom Zack sexually assaulted Smith as she lay bleeding on the bed. Following the attack Smith managed to escape to the empty guest bedroom across the hall. Zack pursued her and beat her head against the bedroom's wooden floor. Once he incapacitated Smith, Zack went to the kitchen where he got an oyster knife. He returned to the guest bedroom where Smith lay and stabbed her in the chest four times with the knife. The four wounds were close together in the center of Smith's chest. Zack went back to the kitchen, cleaned the knife, put it away, and washed the blood from his hands. He then went back to the master bedroom, placed Smith's bloody shirt and shorts in her dresser drawer, stole a television, a VCR, and Smith's purse, and placed the stolen items in Smith's car.

During the night, Zack drove Smith's car to the area where the red Honda was parked. He removed the license plate and several personal items from the Honda then moved it to a nearby lot. Zack returned to Panama City in Smith's car and attempted to pawn the television and VCR. Suspecting the merchandise was stolen, the shop owners asked for identification and told Zack they had to check on the merchandise. Zack fled the store and abandoned Smith's car behind a local restaurant. Zack was apprehended after he had spent several days hiding in an empty house.

After he was arrested, Zack ***confessed*** to the Smith murder and to the Pope and Chandler thefts. Zack claimed he and Smith had consensual sex and that she thereafter made a comment regarding his mother's murder. The comment enraged him, and he attacked her. Zack contended the fight began in the hallway, not immediately upon entering the house. He said he grabbed a knife in self-defense, believing Smith left the master bedroom to get a gun from the guest bedroom.

Zack v. State, 753 So.2d 9, 13-14 (Fla. 2000) (emphasis added).

Procedural history

On September 15, 1997, a jury convicted Zack of the first-degree murder of Smith; robbery with a firearm; and sexual battery. After the penalty phase hearing, the jury recommended a sentence of death by a vote of eleven to one. *Zack v. State*, 228 So.3d 41, 44 (Fla. 2017).

On November 14, 1997, the trial court sentenced Zack to death. *Zack*, 228 So.3d at 44. The trial court found six aggravating circumstances: 1) the defendant was convicted of a capital felony while under a sentence of felony probation; 2) the crime was committed in conjunction with a robbery, sexual battery, or burglary; 3) the defendant committed the crime to avoid lawful arrest; 4) the defendant committed the crime for financial gain; 5) the crime was especially heinous, atrocious, and cruel; and 6) the crime was committed in a cold, calculated, and premeditated manner.[1] The trial court found four mitigating circumstances which were entitled to little weight: 1) the defendant committed the crime while under an extreme mental or emotional disturbance; 2) the defendant was acting under extreme duress; 3) the defendant lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law; and 4) nonstatutory mitigating factors of remorse, voluntary confession, and good conduct while incarcerated. Zack's age of 27 years old was not considered a mitigating factor. *Zack*, 753 So.2d at 12-13.

On direct appeal to the Florida Supreme Court, Zack raised twelve issues. *Zack*, 753 So.2d at 16, n.5 (listing the issues in a footnote); *see also Zack*, 228 So.3d at 44-45

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[1] The Florida Supreme Court struck both the under-a-sentence-of-felony-probation aggravator and the avoid arrest aggravator on appeal. So, four aggravating circumstances remain: 1) the crime was committed in conjunction with a robbery, sexual battery, or burglary; 2) the defendant committed the crime for financial gain; 3) the crime was especially heinous, atrocious, and cruel; and 4) the crime was committed in a cold, calculated, and premeditated manner.

(listing the issues in a footnote).[2] The Florida Supreme Court affirmed the three convictions and the death sentence. *Zack*, 753 So.2d at 26.

Zack filed a petition for writ of certiorari arguing that the admission of victim impact evidence violated the Eighth Amendment and due process. On October 2, 2000, the United States Supreme Court denied certiorari review. *Zack v. Florida*, 531 U.S. 858 (2000).

On December 26, 2001, Zack filed a motion for postconviction relief in the state trial court. *Zack v. Tucker*, 704 F.3d 917, 918 (11th Cir. 2013) (en banc). On October 18, 2002, Zack filed an amended 3.851 postconviction motion in the trial court raising six claims. *Zack*, 228 So.3d at 45. While Zack's initial postconviction motion was pending in the state trial court, the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the execution of an intellectually disabled person is cruel and unusual punishment in violation of the Eighth Amendment. On July 14, 2003, the state trial court denied the initial rule 3.851 postconviction. *Id.* at 45.

Zack appealed the denial of postconviction motion to the Florida Supreme Court. *Zack v. State*, 911 So.2d 1190 (Fla. 2005). Zack raised six issues in his postconviction

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[2] The twelve issues were: 1) the court erred in admitting *Williams v. State*, 110 So.2d 654 (Fla. 1959), rule evidence; 2) the court erred in denying a motion for judgment of acquittal on the sexual battery charge; 3) the trial court erred in denying the motion for judgment of acquittal on the robbery charge; 4) the trial court erred in instructing the jury on felony murder based upon a burglary; 5) the sentencing order failed to consider all of the mitigating evidence presented; 6) the trial court erred in finding that the murder was committed to avoid or prevent a lawful arrest; 7) the trial court erred in finding that the murder was committed in a cold, calculated, and premeditated manner; 8) the trial court erred in using victim impact evidence; 9) the trial court erred in admitting the rebuttal evidence from Candice Fletcher; 10) the trial court erred by failing to give Zack's proposed instruction on the role of sympathy; 11) the trial court erred in retroactively applying the aggravating factor of a murder committed while on felony probation; and 12) the trial court erred in refusing to admit a family photo during the penalty phase.

appeal. *Zack*, 911 So.2d at 1197.[3] The Florida Supreme Court affirmed the denial of postconviction relief.

Zack also filed a state habeas petition in the Florida Supreme Court. *Zack v. State*, 911 So.2d 1190, 1203 (Fla. 2005). Zack raised six claims in his state habeas petition.[4] The Florida Supreme Court denied the state habeas petition.

On December 1, 2004, Zack filed a successive postconviction motion in state court raising an intellectual disability claim based on *Atkins*. *Zack*, 228 So.3d at 45. The state trial court summarily denied the motion finding, after a review of the expert trial testimony, that Zack's I.Q. was not near the required statutory figure of 70 in order to establish intellectual disability. The Florida Supreme Court affirmed the trial court's denial by order. In its order, the Florida Supreme Court relied on *Cherry v. State*, 781 So.2d 1040 (Fla. 2000), and held that "Zack has not provided any new evidence of

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[3] The six issue were: 1) trial counsel was ineffective for failing to challenge the DNA testimony presented by the State; 2) that counsel was ineffective because he failed to prepare Zack to testify at trial; 3) that counsel was ineffective because he made prejudicial remarks to the jury in the opening statement and closing argument; 4) that the trial court erred in summarily denying claims raised in his motion for postconviction relief involving Zack's right to a *Frye* hearing and the constitutionality of the death sentence under *Atkins*; 6) that Florida's capital sentencing scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002); and 7) that collateral counsel was ineffective. *Zack*, 911 So.2d at 1197.

[4] The six issues were: 1) appellate counsel was ineffective for failing to raise a claim regarding the State's racially motivated peremptory challenge during jury selection; 2) appellate counsel should have argued that the prosecutor made impermissible argument to the jury; 3) that the State introduced nonstatutory aggravating factors; 4) that appellate counsel was ineffective for failing to raise a claim on appeal regarding prejudicial and gruesome crime scene photos; 5) that the trial court erred in admitting evidence of other crimes; and 6) that appellate counsel was ineffective in failing to raise on appeal the claim that the trial court erroneously admitted irrelevant and prejudicial evidence.

[intellectual disability] and previous evidence demonstrates that his I.Q. was well above the statutory figure of 70 or below." *Id.* at 45-46.[5]

On March 4, 2005, Zack filed a successive habeas petition in the Florida Supreme Court raising a claim based on *Crawford v. Washington*, 541 U.S. 36 (2004). On October 6, 2005, the Florida Supreme Court denied the petition. *Zack v. Crosby*, 918 So.2d 240 (Fla. 2005).

On September 28, 2005, Zack filed his federal habeas petition which included a claim of intellectual disability under *Atkins*. *See Zack v. Crosby*, 607 F.Supp.2d 1291 (N.D. Fla. 2008); (Doc. #1 in case no. 3:05-cv-369-RH). On November 17, 2008, the federal district court dismissed all but one claim in the federal habeas petition as untimely. On March 26, 2009, the federal district court denied the *Atkins* claims on the merits. *Zack v. Tucker*, 704 F.3d 917, 919 (11th Cir. 2013) (en banc); *see also Zack*, 228 So.3d at 45.

The Eleventh Circuit, in an en banc opinion, affirmed the dismissal of the remaining claims in federal habeas petition as untimely. *Zack v. Tucker*, 704 F.3d 917 (11th Cir. 2013).[6]

On October 7, 2013, the United States Supreme Court denied certiorari review of the Eleventh Circuit's en banc decision. *Zack v. Crews*, 571 U.S. 863 (2013).

On August 25, 2014, Zack filed a rule 60(b)(6) motion to reopen his closed federal habeas case based on *Holland v. Florida*, 560 U.S. 631 (2010). On September 4, 2014,

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[5] The Florida Supreme Court's order is also available online at: http://www.floridasupremecourt.org/clerk/disposition/2007/9/05-963.pdf

[6] Glenn Arnold was state postconviction counsel when the federal deadline was missed. On November 2003, Linda McDermott was retained as state postconviction counsel to replace Mr. Arnold in the Florida Supreme Court for the postconviction appeal and she handled the case in state and federal courts until January 27, 2015, when the trial court granted her motion to withdraw and then appointed Capital Collateral Regional Counsel - North (CCRC-N) as state postconviction counsel.

the district court denied the motion to reopen. On January 12, 2018, the Eleventh Circuit affirmed the district court's denial of the 60(b)(6) motion. *Zack v. Sec'y, Fla. Dept. of Corr.*, 721 Fed.Appx. 918 (11th Cir. Jan. 12, 2018) (No. 14-14998-P).

Zack then filed a petition for a writ of certiorari in this Court from the Eleventh Circuit's opinion in this Court, which this Court denied on October 9, 2018. *Zack v. Jones*, 139 S.Ct. 322 (2018) (No. 17-9549).

On May 26, 2015, Zack filed a second successive postconviction motion in state trial court raising a claim of intellectual disability based on *Hall v. Florida*, 134 S.Ct. 1986 (2014). *See Zack*, 228 So.3d at 46. On July 8, 2015, the trial court summarily denied the *Hall* claim.

Zack appealed the summary denial of his *Hall* claim to the Florida Supreme Court. Zack argued that the court erred in summarily denying the claim without an evidentiary hearing on his intellectual disability claim and denying the claim on the basis that Zack's I.Q. was too high for an *Atkins* claim. *Zack*, 228 So.3d at 46. The Florida Supreme Court affirmed the denial of the *Hall* claim.

On June 21, 2016, Zack filed a petition for writ of habeas corpus in the Florida Supreme Court raising a claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*). On June 15, 2017, the Florida Supreme Court denied the habeas petition. *Zack v. Jones*, 228 So.3d 41 (Fla. 2017) (SC16-1090). The Florida Supreme Court concluded that Zack was not entitled to any *Hurst* relief "because *Hurst* does not apply retroactively to cases that were final before *Ring* was decided" citing *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016). *See Zack*, 228 So.3d at 47-48. On June 30, 2017, Zack filed a motion for rehearing. On October 12, 2017, the Florida Supreme Court denied the rehearing.

Zack then filed a petition for writ of certiorari of his *Hall* intellectual disability claim in this Court. This Court denied review on June 18, 2018. *Zack v. Florida*, 138 S.Ct. 2653 (2018) (No. 17-8134).

Procedural history of current *Hurst* litigation

On January 11, 2017, Zack, represented by Capital Collateral Regional Counsel - North (CCRC-N), filed a successive postconviction motion raising five claims based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), in the state trial court. On February 3, 2017, the State filed an answer to the successive postconviction motion, asserting that *Hurst* did not apply retroactively to him because his sentence was final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided. On January 16, 2018, the trial court summarily denied the successive postconviction motion. The trial court explained that each of the five claims depended on the retroactive application of the *Hurst* decisions but concluded that *Hurst* did not apply retroactively to Zack, citing *Asay v. State*, 210 So.3d 1 (Fla. 2016). The trial court noted that it was "uncontested" that Zack's sentence was final before *Ring* was decided.

Zack then appealed the denial of his successive postconviction motion to the Florida Supreme Court. The Florida Supreme Court affirmed, concluding that *Hurst* did not apply retroactively to Zack. *Zack v. State*, __ So.3d __, 43 Fla. L. Weekly S429, 2018 WL 4784204 (Fla. Oct. 4, 2018).

Zack, represented by CCRC-N, then filed a petition for a writ of certiorari in this Court from the Florida Supreme Court's opinion raising a claim regarding the retroactivity of *Hurst*. This is the State's brief in opposition.

REASONS FOR DENYING THE WRIT

ISSUE I

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT ITS PRIOR DECISION IN *HURST V. STATE*, 202 SO.3D 40 (FLA. 2016), DID NOT APPLY RETROACTIVELY TO PETITIONER AS A MATTER OF STATE LAW AND REJECTING THE ARGUMENT THAT ITS PARTIAL RETROACTIVITY ANALYSIS VIOLATES THE EIGHTH AMENDMENT?

Petitioner Zack seeks review of the Florida Supreme Court's decision holding that *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), did not apply retroactively to him and rejecting an Eighth Amendment challenge to its established partial retroactivity analysis. But the issue of partial retroactivity is solely a matter of state law. This Court does not review decisions that are based solely on state law. Alternatively, even if the issue were a matter of federal law, review should be denied because there is no conflict. There is no conflict between this Court's retroactivity jurisprudence and the Florida Supreme Court's partial retroactivity analysis. This Court directly held in *Danforth v. Minnesota*, 552 U.S. 264 (2008), that states are free to have their own tests for retroactivity which provide more relief and that reasoning includes partial retroactivity analysis. Nor is there any conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court. The Eleventh Circuit has rejected an Eighth Amendment challenge to the Florida Supreme Court's partial retroactivity analysis. Opposing counsel cites no federal circuit court case or state supreme court case holding that partial retroactivity violates the Eighth Amendment. Because the petition presents an issue of state law over which there is no conflict, this Court should deny review of this claim.

The Florida Supreme Court's decision in this case

Zack appealed the state trial court's denial of his successive postconviction motion to the Florida Supreme Court. The Florida Supreme Court affirmed the trial court's

denial of the successive motion holding that *Hurst* was not retroactively applicable to him. *Zack v. State*, __ So.3d __, 43 Fla. L. Weekly S429, 2018 WL 4784204 (Fla. Oct. 4, 2018). The Florida Supreme Court explained that because Zack's death sentence became final on October 2, 2000, when the United States Supreme Court denied certiorari review in the direct appeal, *Hurst* did not apply to him. *Zack*, 2018 WL 4784204 at *1 (citing *Zack v. Florida*, 531 U.S. 858 (2000)). The Florida Supreme Court concluded that Zack was not entitled to relief citing its prior decisions in *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, 138 S.Ct. 513 (2017); *Asay v. State*, 224 So.3d 695, 703 (Fla. 2017); and *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016). *Zack*, 2018 WL 4784204 at *2. So, the Florida Supreme Court denied relief in this case based on its existing precedent regarding partial retroactivity analysis.

The Florida Supreme Court's partial retroactivity analysis

The Florida Supreme Court established its partial retroactivity analysis in two companion cases. In *Asay v. State*, 210 So.3d 1,15-22 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 138 S.Ct. 41 (2017) (No. 16-9033), the Florida Supreme Court held that *Hurst v. State* would not be retroactively applied to capital cases that were final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided in 2002. The Florida Supreme Court in *Asay* relied on the state test for retroactivity of *Witt v. State*, 387 So.2d 922 (Fla. 1980). *See Asay*, 210 So.3d at 15-22. The Florida Supreme Court in *Asay* explicitly stated that, despite the federal courts' use of *Teague v. Lane*, 489 U.S. 288 (1989), to determine retroactivity, "this Court would continue to apply our longstanding *Witt* analysis, which provides more expansive retroactivity standards than those adopted in *Teague*." *Asay*, 210 So.3d at 15. The Florida Supreme Court discussed the first prong of the *Witt* test for five paragraphs. *Asay*, 210 So.3d at 17-18. The Florida Supreme Court then discussed the second prong of the *Witt* test for six paragraphs. *Id.*

at 18-20. The Florida Supreme Court then discussed the third prong of the *Witt* test for three more paragraphs. *Id.* at 20-22.

And, in the companion case of *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), the Florida Supreme Court held that *Hurst v. State* would be retroactively applied to capital cases that were not final when *Ring* was decided in 2002. The Florida Supreme Court in *Mosley* relied on two state tests for retroactivity, that of *James v. State*, 615 So.2d 668 (Fla. 1993), and *Witt*. *See Mosley*, 209 So.3d at 1274-83.

The Florida Supreme Court then again reaffirmed their decision denying all retroactive relief to cases that were final before *Ring* in *Hitchcock v. State*, 226 So.3d 216, 217 (Fla. 2017) (stating: "our decision in *Asay* forecloses relief"), *cert. denied*, 138 S.Ct. 513 (2017) (No. 17-6180). The Florida Supreme Court in *Hitchcock* rejected Eighth Amendment, equal protection, and due process challenges to its partial retroactivity analysis in *Asay*. *Hitchcock*, 226 So.3d at 217 (explaining that although Hitchcock referenced "various constitutional provisions as a basis for arguments that *Hurst v. State*" entitled him to a new sentencing proceeding, "these are nothing more than arguments that *Hurst v. State* should be applied retroactively").

The Florida Supreme Court has also denied relief in several capital cases based on its partial retroactivity analysis and this Court has denied review of those cases. *Lambrix v. State*, 227 So.3d 112 (Fla. 2017) (denying Eighth Amendment, due process, and equal protection challenges to partial retroactivity citing *Hitchcock* and *Asay VI*), *cert. denied*, *Lambrix v. Florida*, 138 S.Ct. 312 (2017) (No. 17-6222); *Hannon v. State*, 228 So.3d 505, 512 (Fla. 2017) (stating: "we have consistently held that *Hurst* is not retroactive prior to June 24, 2002"), *cert. denied*, *Hannon v. Florida*, 138 S.Ct. 441 (2017) (No. 17-6650); *Cole v. State*, 234 So.3d 644, 645 (Fla. 2018) (explaining that because Cole's death sentence became final in 1998, "*Hurst* does not apply retroactively" citing *Hitchcock*, 226 So.3d at 217), *cert. denied*, *Cole v. Florida*, 138

S.Ct. 2657 (2018) (No. 17-8540). The Florida Supreme Court has consistently followed its partial retroactivity analysis in capital cases including in this particular case.

The issue is a matter of state law

Partial retroactivity analysis is solely a matter of state law. This Court does not review decisions by state courts that are matters of state law. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (explaining that respect for the "independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground" for the decision). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010); *Long*, 463 U.S. at 1041.

This Court has specifically held that state courts are entitled to make retroactivity determinations as a matter of state law. In *Danforth v. Minnesota*, 552 U.S. 264 (2008), this Court held that states were not required to apply the federal test for retroactivity of *Teague v. Lane*, 489 U.S. 288 (1989), even when the state courts were determining the retroactivity of a case based on a federal constitutional right. Instead, state courts are free to retroactively apply a case more broadly than the federal courts would. The Minnesota Supreme Court, determining the retroactivity of *Crawford v. Washington*, 541 U.S. 36 (2004), held that state courts were bound by *Teague* and were not free to apply a broader retroactivity test but this Court reversed. The *Danforth* Court observed that the "finality of state convictions is a state interest, not a federal one." *Danforth*, 552 U.S. at 280. Finality is a matter that states should be "free to evaluate and weigh the importance of." *Id.* The *Danforth* Court reasoned that states should be "free to give its citizens the benefit of our rule in any fashion that does not offend federal law." *Id.* The remedy a state court chooses to provide its citizens "is primarily a question of state law." *Id.* at 288. This Court also observed, in rejecting

any argument that uniformity in retroactivity is necessary, that "nonuniformity" is "an unavoidable reality in a federalist system of government." *Id.* at 280. The High Court noted that states "are free to choose the ***degree*** of retroactivity . . . so long as the state gives federal constitutional rights at least as broad a scope as the United States Supreme Court requires." *Id.* at 276 (emphasis added).

Under *Danforth*, a state court may make retroactivity determinations that are solely a matter of state law. The Florida Supreme Court's partial retroactivity analysis is based on the state retroactivity test of *Witt*, not the federal retroactivity test of *Teague*. The Florida Supreme Court did not employ a *Teague* analysis in either *Asay* or *Mosley*. Instead, in both cases, the Florida Supreme Court invoked state retroactivity tests. The Florida Supreme Court, using a state test for retroactivity, gave both *Hurst v. Florida* and *Hurst v. State* broader retroactive application than a *Teague* analysis would do. When the *Danforth* Court spoke of state courts being free to choose the "degree of retroactivity" that includes partial retroactivity analysis. And that is exactly what the Florida Supreme Court did in *Asay*, *Hitchcock*, and this case.

Furthermore, the Florida Supreme Court's partial retroactivity analysis was determining the retroactivity of its own decision in *Hurst v. State*, not merely the retroactivity of this Court's decision in *Hurst v. Florida*. There are significant differences between this Court's holding in *Hurst v. Florida* and the Florida Supreme Court's holding in *Hurst v. State*. This Court's holding in *Hurst v. Florida* was limited to the Sixth Amendment and jury findings regarding aggravating circumstances. *Hurst v. Florida*, 136 S.Ct. at 624 (holding "Florida's sentencing scheme, which required the judge alone to find the existence of an ***aggravating circumstance***, is therefore

unconstitutional") (emphasis added). Indeed, under this Court's view, there was no violation of the Sixth Amendment right-to-a-jury-trial in this case at all.[7]

But the Florida Supreme Court greatly expanded this Court's *Hurst v. Florida* decision in its *Hurst v. State* decision to require factual findings in addition to an aggravating circumstance and to include a requirement of jury unanimity. This Court would have to rule on the retroactivity of those additional aspects of *Hurst v. State* if it grants the petition. This Court would have to address the retroactivity of jury findings of the sufficiency of the aggravating circumstances; jury findings of mitigation; and jury findings of weighing, all of which the Florida Supreme Court required in its *Hurst v. State* decision.[8] Basically, this Court would have to decide the retroactivity

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[7] The Florida Supreme Court struck both the under-a-sentence-of-felony-probation aggravator and the avoid arrest aggravator in the direct appeal. So, four aggravating circumstances remain: 1) the crime was committed in conjunction with a robbery, sexual battery, or burglary; 2) the defendant committed the crime for financial gain; 3) the crime was especially heinous, atrocious, and cruel (HAC); and 4) the crime was committed in a cold, calculated, and premeditated manner (CCP). *Zack*, 753 So.2d at 25-26. But one of the aggravating factors, the felony murder aggravating circumstance, in effect, was found by the jury in the guilt phase when they convicted Zack of sexual battery and robbery, as well as murder. Those guilt phase jury findings combined are a jury finding of the felony murder aggravator. *Jenkins v. Hutton*, 137 S.Ct. 1769, 1771 (2017) (noting that the jury had found the existence of two aggravating circumstances during the guilt phase by convicting Hutton of aggravated murder and that "each of those findings rendered Hutton eligible for the death penalty"). So, *Hurst v. Florida's* requirement that the jury find an aggravating factor was satisfied before the penalty phase began. Under this Court's reasoning in *Hutton*, there was no *Hurst v. Florida* error in this case in the first place.

[8] While the Florida Supreme Court believes that the jury must make additional findings regarding mitigation and weighing, that is not this Court's view. This Court has observed that "weighing is not an end; it is merely a means to reaching a decision." *Kansas v. Marsh*, 548 U.S. 163, 179 (2006). This Court's view is that neither mitigating circumstance nor weighing must be found by a jury. This Court does not view mitigation or weighing as factual findings at all. This Court's view is that only aggravating circumstances must be found by the jury because those are the only true factual determinations in capital sentencing. This Court has explained that aggravating circumstances are "purely factual determinations," but that mitigating

of jury sentencing, which is what the Florida Supreme Court required in *Hurst v. State*, when this Court does not think that the Sixth Amendment or the Eighth Amendment requires jury sentencing in the first place. This Court would also have to address the retroactivity of unanimity under the Eighth Amendment which this Court never addressed in *Hurst v. Florida*.[9]

Opposing counsel totally ignores these numerous differences between *Hurst v. Florida* and *Hurst v. State* and the problems those differences present in his petition. But this Court would have to address those differences if it were to grant the petition. These differences present what is, in effect, numerous threshold issues. This Court does not normally grant review of cases with threshold issues, much less numerous threshold issues. *Cf. Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27 (1993) (dismissing the writ of certiorari as improvidently granted when there was a threshold issue); *Medellin v. Dretke*, 544 U.S. 660, 662 (2005) (dismissing the writ of certiorari as improvidently granted, in part, because there were a number of legal "hurdles" to the issue presented in the petition).

The Florida Supreme Court decided the retroactivity of *Hurst v. State* as a matter of state law and therefore, the Florida Supreme Court's decision is not subject to review by this Court. On this basis alone, review of this issue should be denied.

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circumstances, while often having a factual component, are "largely a judgment call (or perhaps a value call)." *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016). This Court noted that the mitigating circumstance of mercy, "simply is ***not*** a factual determination." *Id.* at 643 (emphasis added). The *Carr* Court explained that "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy" and that it would mean "nothing" to tell the jury that the defendants "must deserve mercy beyond a reasonable doubt." *Id.* at 642.

[9] The issue of unanimity is currently pending in this Court but in a direct appeal case. *Ramos v. Louisiana*, 2019 WL 1231752 (Mar. 18, 2019) (No. 18-5924) (granting certiorari review of the issue of non-unanimous guilty verdicts in a non-capital case).

No conflict with this Court's retroactivity jurisprudence

Alternatively, there is no conflict between the Florida Supreme Court's decision in this case and this Court's retroactivity jurisprudence. See Sup. Ct. R. 10© (listing conflict with this Court as a consideration in the decision to grant review). This Court has held that Sixth Amendment right-to-a-jury-trial decisions are not retroactive. *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (holding that *Ring* was not retroactive using the federal test of *Teague*); *DeStefano v. Woods*, 392 U.S. 631 (1968) (holding that a Sixth Amendment right-to-a-jury-trial decision in an earlier case was not retroactive). The *Summerlin* Court reasoned that "if under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be." *Summerlin*, 542 U.S. at 357. Following this Court's logic in *Summerlin*, *Hurst v. Florida* is not retroactive either.

While the petition mentions both *Danforth* and *Summerlin* in passing, the petition does not acknowledge that the position it is advocating is inconsistent with the actual holdings, as well as the reasoning, of both cases.

And this Court would have to recede from both *Danforth* and *Summerlin* to grant Zack any relief. The petition does not even acknowledge that this Court would be required to overrule both of these cases. Indeed, this Court would not only have to recede from *Danforth* but it would have to recede in a manner that not even the dissent in *Danforth* advocated. To adopt opposing counsel's position, this Court would have to hold that state courts are required to follow *Teague* even if the underlying case was not from this Court. The dissent in *Danforth* limited the mandatory use of *Teague* to when the underlying case was from this Court, not when the underlying case was from the state court or when the state court expanded one of this Court's cases, such as the Florida Supreme Court did in *Hurst v. State*. The two *Danforth* dissenters were at pains to disclaim any argument that state courts were required to adopt a *Teague* retroactivity analysis if the underlying case was a state law case. *Danforth*, 552 U.S.

at 295 (Roberts, C.J., dissenting) (explaining states can give greater substantive protection under their own laws and can give whatever retroactive effect to those laws they wish). And, even if this Court was willingly to overrule *Danforth* and require that *Teague* be used in all situations, Zack would still receive no relief because under a *Teague* analysis, *Hurst* is not retroactive at all under *Summerlin*. Overruling both *Danforth* and *Summerlin* is necessary for Zack to receive any relief.

Additionally, this Court has denied a petition for a writ of certiorari raising this exact same claim regarding the Eighth Amendment prohibiting partial retroactivity analysis in a death warrant case. *Branch v. Florida*, 138 S.Ct. 1164 (2018) (No. 17-7758). And, this Court has recently denied other petitions in other Florida capital cases raising this exact same issue. *See, e.g., Jones v. Florida*, 138 S.Ct. 2686 (2018) (No. 17-8652); *Bates v. Florida*, 139 S.Ct. 124 (2018) (No. 17-9161); *Dillbeck v. Florida*, 139 S.Ct. 162 (2018) (No. 17-9375); *Foster v. Florida*, 139 S.Ct. 163 (2018) (No. 17-9389); *Lawrence v. Florida*, 139 S.Ct. 170 (2018) (No. 17-9431).

The Florida Supreme Court's decisions in *Asay*, *Hitchcock*, and this case do not conflict with either this Court's decision in *Danforth* or this Court's decision in *Summerlin*. There is no conflict between the Florida Supreme Court's decision and this Court's jurisprudence regarding retroactivity. Because there is no conflict with this Court, review should be denied.

No conflict with any federal appellate court or state supreme court

There is no conflict between the Florida Supreme Court decision in this case and that of any federal appellate court or state supreme court either. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme

courts as a consideration in the decision to grant review). In the absence of such conflict, certiorari is rarely warranted.

The Eleventh Circuit has held that *Hurst v. Florida* is not retroactive at all. *Lambrix v. Sec'y, Fla. Dept. of Corr.*, 851 F.3d 1158, 1165, n.2 (11th Cir. 2017) (*Lambrix V*) ("under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review"), *cert. denied, Lambrix v. Jones*, 138 S.Ct. 217 (2017) (No. 17-5153). The Ninth Circuit has also held that *Hurst v. Florida* is not retroactive. *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a *Hurst v. Florida* claim concluding that *Hurst v. Florida* did not apply retroactively). No federal appellate court has held to the contrary. There is no conflict in the federal circuit courts of appeal regarding the retroactivity of *Hurst v. Florida.*

The Eleventh Circuit has also directly addressed argument that the Florida Supreme Court's partial retroactivity analysis violates the Eighth Amendment. The Eleventh Circuit held that the "Florida Supreme Court's ruling — that *Hurst* is not retroactively applicable to Lambrix — is fully in accord with the U.S. Supreme Court's precedent in *Ring* and *Schriro.*" *Lambrix v. Sec'y, Fla. Dept. of Corr.*, 872 F.3d 1170, 1182-83 (11th Cir. 2017), *cert. denied, Lambrix v. Jones*, 138 S.Ct. 312 (2017) (No. 17-6290). As the Eleventh Circuit observed regarding the Florida Supreme Court's refusal to apply *Hurst v. State* retroactively to capital defendants whose cases were final before *Ring*, those "defendants who were convicted before *Ring* were treated differently too by the Supreme Court." *Lambrix*, 872 F.3d at 1182. There is no conflict with any federal appellate court.

There is no conflict with any state supreme court either. The Delaware Supreme Court's decision in *Powell v. Delaware*, 153 A.3d 69 (Del. 2016), is not a basis to establish conflict among the state supreme courts. While the Delaware Supreme Court held that its prior decision in *Rauf v. State*, 145 A.3d 430 (Del. 2016), was fully

retroactive in *Powell*, it did so as a matter of state law. Under *Danforth*, each state is permitted to apply cases as broadly as they choose. The conflict between state courts of last resort must be about federal law. The Florida Supreme Court's decision does not conflict with the Delaware Supreme Court's decision.

There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals or that of any state supreme court. Because there is no conflict, review should be denied.

Partial retroactivity and the Eighth Amendment

Zack insists that the Florida Supreme Court's partial retroactivity analysis is arbitrary in violation of the Eighth Amendment. He seems to be arguing that basing retroactivity analysis on dates is, itself, arbitrary. But all modern retroactivity tests depend on dates of finality. Inherent in the concept of non-retroactivity is that some cases will get the benefit of a new development, while other cases will not, depending on a date. Drawing a line between newer cases that will receive benefit of a new development in the law and older final cases that will not receive benefit of the new development is part and parcel of the landscape of 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.

Federal courts also have retroactivity doctrines that depend on dates. For example, a cutoff date is part of the pipeline doctrine first established in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The *Griffith* Court created the pipeline concept by holding that all new developments in the criminal law must be applied retrospectively to all cases, state or federal, that are pending on direct review. *Griffith* depends on the date of finality of the direct appeal. The current federal test for retroactivity in the postconviction context, *Teague*, also depends on a date. If a case is final on direct review, the defendant will not receive benefit of the new rule unless one of the

exceptions to *Teague* applies. While the Florida Supreme Court's partial retroactivity analysis also depends on a date, the Florida Supreme Court's line drawing based on a date in *Asay*, *Hitchcock*, and this case is no more arbitrary than this Court's in *Griffith* or *Teague*. Neither *Griffith* nor *Teague* nor *Asay* violates the Eighth Amendment. Retroactivity analysis based on dates is not unconstitutional.

Additionally, as this Court has explained, finality is the overriding concern in any retroactivity analysis. *Penry v. Lynaugh*, 492 U.S. 302, 312 (1989). The *Penry* Court considered and rejected a claim that the test for retroactivity in capital cases should be different because the overriding concern of finality that underlies retroactivity is just as "applicable in the capital sentencing context." *Id.* at 314. Penry argued that the test for retroactivity should be more lax in capital cases, not that there should be automatic and full retroactivity in all capital cases as opposing counsel here asserts. Opposing counsel's position that there should be full retroactivity is even more extreme than the position rejected by this Court in *Penry*. Finality simply trumps uniformity in the retroactivity realm.

Zack argues that because his case become final after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was decided that his case is somehow special. Pet. at 21. He argues that support for the death penalty has waned and prosecutors seek the death penalty less often now than they did in earlier decades but none of that matters to a proper retroactivity analysis. Furthermore, the *Apprendi* Court explicitly excluded capital cases and reaffirmed *Walton v. Arizona*, 497 U.S. 639, 647-49 (1990). *Apprendi*, 530 U.S. at 496-97. It was not until *Ring* that this Court applied its new Sixth Amendment jurisprudence to capital cases and overruled *Walton*. *Ring*, 536 U.S. at 589. It would make little sense to date the cut-off for partial retroactivity analysis in capital cases from the date of a case that excluded capital cases. The Florida Supreme Court, recognizing that this Court expressly excluded death penalty cases from its holding in *Apprendi*, has explicitly rejected the argument that *Apprendi* should be the dividing

line. *Asay*, 210 So.3d at 19. It is perfectly rational to establish the dividing line at *Ring* rather than *Apprendi*, given that *Ring* was the first time this Court applied its new Sixth Amendment jurisprudence to capital cases. There is nothing arbitrary about such a demarcation. And that demarcation does not violate the Eighth Amendment.

Furthermore, the Florida Supreme Court's partial retroactivity analysis provides more relief than this Court's retroactivity analysis does. The Florida Supreme Court has already granted more capital defendants retroactive relief than this Court would under a *Teague* analysis. This Court, following its *Summerlin* precedent, would deny every Florida capital defendant any retroactive relief, but the Florida Supreme Court, following its *Asay* and *Hitchcock* precedent, has granted over a hundred Florida capital defendants retroactive relief. What opposing counsel is arguing is that, while this Court itself would not grant any capital defendant retroactive relief, the Florida Supreme Court is somehow constitutionally required to grant even more retroactive relief than its current partial retroactivity analysis does which is much more than this Court does. Opposing counsel's position is that the Eighth Amendment requires that state courts do what federal courts are not required to do themselves. The federal courts do not apply *Ring* or *Hurst v. Florida* retroactively. Yet opposing counsel insists that the federal constitution requires the Florida Supreme Court to apply these same decisions retroactively. The end result of adopting opposing counsel's view would be that *Hurst* would be required, under the federal constitution, to be applied retroactively in the state courts but not in the federal courts. Opposing counsel's view is not tenable as a matter of either law or logic.

The Eighth Amendment does not require full retroactivity of every capital case and does not condemn partial retroactivity. The true core of opposing counsel's argument is that the novelty of the Florida Supreme Court's partial retroactivity analysis automatically violates the Eighth Amendment. Pet. at 12. But novelty is not

inherently constitutionally suspect. Originality does not, in and of itself, violate the federal constitution.

The issue of partial retroactivity is a matter of state law which does not conflict with this Court's decisions or that of any other appellate court. Therefore, there is no basis for granting certiorari review of this issue.

Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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