No. 18-8090

In the Supreme Court of the United States

EDWARD J. ZAKRZEWSKI, JR., *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 the issue of whether its prior decision in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), applied retroactively to petitioner was procedurally barred from review in state court, which is solely a matter of state law, that does not conflict with any precedent of this Court or any precedent of any federal court of appeals or state supreme court.

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OPINION BELOW

The Florida Supreme Court's opinion is reported at *Zakrzewski v. State*, 254 So.3d 324 (Fla. 2018) (SC18-646).

JURISDICTION

On September 20, 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 17, 2018, Zakrzewski, represented by registry counsel Martin J. McClain, 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

19, 2019, Zakrzewski then filed this 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, § 1.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Zakrzewski murdered his wife, who wanted a divorce, by hitting her in the head multiple times with a crowbar; strangling her with a rope; and finally striking her with a machete that he had purchased earlier that day. *Zakrzewski v. State*, 717 So.2d 488, 490-91 (Fla. 1998). He also murdered his seven-year-old son and his five-year-old daughter with the machete. *Id.* Both children had defensive wounds. *Id.* He pled guilty to three counts of first-degree murder. *Id.* at 490. After the penalty phase, while the jury recommended a death sentence for the murder of his wife and his son, the jury recommended a life sentence for the murder of his daughter but the trial court overrode the jury's recommendation of life and imposed a death sentences for her murder as well. *Id.* at 491. The trial court found three aggravating factors: 1) the defendant was previously convicted of other capital offenses based on the contemporaneous murders; 2) the murders were committed in a cold, calculated, and premeditated manner (CCP); and 3) the murders were committed in an especially heinous, atrocious, or cruel manner (HAC). *Id.* The Florida Supreme Court struck the finding of the HAC aggravator as to the wife but still found the death sentence proportionate for her murder based on the two remaining aggravators. *Id.* at 492, 494. The Florida Supreme Court on appeal concluded "that the trial court did not err in overriding the jury's recommendation of life for the murder of Anna." *Id.* at 494. The Florida Supreme Court affirmed Zakrzewski's convictions and three death sentences for the murders of his wife and two young children. *Id.* at 495.

On January 25, 1999, Zakrzewski's three death sentences became final when this Court denied his petition for writ of certiorari. *Zakrzewski v. Florida*, 525 U.S. 1126 (1999).

Zakrzewski then engaged in extensive postconviction litigation in both state and federal courts, including in this Court, over the next two decades. *Zakrzewski v. State*, 866 So.2d 688 (Fla. 2003) (affirming the denial of the initial postconviction motion);

Zakrzewski v. State, 13 So.3d 1057 (Fla. 2009) (affirming the denial of the first successive postconviction motion) (unpublished); *Zakrzewski v. State*, 115 So.3d 1004 (Fla. 2012) (affirming the denial of the second successive postconviction motion) (unpublished); *Zakrzewski v. State*, 147 So.3d 531 (Fla. 2014) (affirming the denial of the third successive postconviction motion) (unpublished), *cert. denied*, *Zakrzewski v. Florida*, 135 S.Ct. 1558 (2015); *Zakrzewski v. McDonough*, 455 F.3d 1254 (11th Cir. 2006) (affirming the denial of the initial federal habeas petition), *cert. denied*, 549 U.S. 1349 (2007); *Zakrzewski v. McDonough*, 490 F.3d 1264 (11th Cir. 2007) (vacating and remanding the denial of motion filed under Fed.R.Civ.P. 60(b)); *Zakrzewski v. McDonough*, 2007 WL 2827735 (N.D.Fla. Sept. 26, 2007) (denying rule 60(b) motion again); *Zakrzewski v. McNeil*, 573 F.3d 1210 (11th Cir. 2009) (affirming the denial of the rule 60(b) motion), *cert. denied*, 560 U.S. 956 (2010).

On May 2, 2016, Zakrzewski, represented by registry counsel Martin J. McClain, filed a successive state habeas petition in the Florida Supreme Court raising a claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*). On February 8, 2017, Zakrzewski filed an amended habeas petition in the Florida Supreme Court raising a claim based on *Hurst v. Florida*, and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*). On February 13, 2017, the Florida Supreme Court ordered the State to respond to the amended habeas petition. The Florida Supreme Court ordered briefing regarding whether the normal rule of non-retroactivity for older cases established in *Asay v. State*, 210 So.3d 1 (Fla. 2016), has an exception for override cases and, if so, whether that exception applied to Zakrzewski, who, in addition to having one death sentence based on an override, had two death sentences that were not based on overrides. *Asay*, 210 So.3d at 29 & n.19 (Labarga, C.J., concurring) (expressing the view that *Asay* does not apply to those defendants whose death sentences were "solely" the result of a judicial override, but, noting in a footnote that two of Zakrzewski's death sentences were not overrides and therefore, "Zakrzewski is not subject to execution

purely by virtue of the actions of a judge"). On March 21, 2017, the State filed a response to the state habeas petition in the Florida Supreme Court. On March 30, 2017, registry counsel filed a reply.

On May 25, 2017, the Florida Supreme Court denied the state habeas petition. *Zakrzewski v. Jones*, 221 So.3d 1159 (Fla. 2017) (SC16-729). The Florida Supreme Court rejected the *Hurst* claims, stating: "Zakrzewski's sentences became final in 1999 when the United States Supreme Court denied his petition for certiorari review. Thus, Zakrzewski is not entitled to *Hurst* relief, and we deny his petition for writ of habeas corpus." *Id.* The Florida Supreme Court, relying on its previous decision in *Marshall v. Jones*, 226 So.3d 211 (Fla. 2017), concluded that death sentences based on overrides "did not warrant an exception to the retroactivity analysis in *Asay*." *Zakrzewski*, 221 So.3d at 1159. The Florida Supreme Court affirmed all three death sentences including the death sentence based on an override.

Opposing counsel filed a motion for rehearing. On July 18, 2017, the Florida Supreme Court denied the motion for rehearing. *Zakrzewski v. Jones*, 2017 WL 3027224 (Fla. July 18, 2017).

On January 12, 2017, registry counsel McClain, despite having the same claim pending in the Florida Supreme Court, filed a successive rule 3.851 postconviction motion in the state trial court raising four claims based on *Hurst v. Florida* and *Hurst v. State*. Registry counsel then filed an amended motion in the state trial court raising a fifth claim. The trial court summarily denied the successive postconviction motion. The trial court noted that all five claims raised in the successive postconviction motion relied on *Hurst* and ruled that *Hurst* did not apply retroactively to Zakrzewski. The trial court explained that because Zakrzewski's sentence became final prior to the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002), "it appears that Defendant is not entitled to relief," citing *Asay v. State*, 210 So.3d 1 (Fla. 2016), and *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017).

Zakrzewski then appealed the denial of the postconviction motion to the Florida Supreme Court. On June 18, 2018, the Florida Supreme Court issued an order to show cause why *Hitchcock* did not control. Following limited briefing, the Florida Supreme Court affirmed the state trial court's denial of the successive motion. *Zakrzewski v. State*, 254 So.3d 324 (Fla. 2018) (SC18-646). The Florida Supreme Court held that the appeal was procedurally barred because Zakrzewski had previously raised the same claim regarding the retroactivity of *Hurst v. State* in a state habeas petition, which the Florida Supreme Court had denied. *Zakrzewski*, 254 So.3d at 324-25.

Zakrzewski, represented by registry counsel McClain, 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* and due process. This is the State's brief in opposition.

REASONS FOR DENYING THE PETITION

ISSUE I

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT THE ISSUE OF WHETHER ITS PRIOR DECISION IN *HURST V. STATE*, 202 SO.3D 40 (FLA. 2016), APPLIED RETROACTIVELY TO PETITIONER WAS PROCEDURALLY BARRED FROM REVIEW IN STATE COURT, WHICH IS SOLELY A MATTER OF STATE LAW, THAT DOES NOT CONFLICT WITH ANY PRECEDENT OF THIS COURT OR ANY PRECEDENT OF ANY FEDERAL COURT OF APPEALS OR STATE SUPREME COURT.

Petitioner Zakrzewski seeks review of the Florida Supreme Court's decision holding that the appeal of the claim of whether its prior decision *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), applied retroactively to him, was procedurally barred because he had recently raised the same claim in a state habeas petition which the Florida Supreme Court had denied. This Court should not grant review of an issue that is procedurally barred by the law-of-the-case doctrine. But, even ignoring the procedural bar, the underlying issue of partial retroactivity analysis 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 includes partial retroactivity. 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 a due process and 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 Due Process Clause or the Eighth Amendment. Furthermore, while the Florida Supreme Court requires additional jury findings, that does not turn those

additional findings regarding mitigating circumstances and weighing into elements, just as the Florida Supreme Court has recently held and as the actual text of Florida's new death penalty statute provides. Because the petition presents an issue that is procedurally barred and is a matter 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

Zakrzewski appealed the state trial court's denial of his successive postconviction motion raising *Hurst* claims to the Florida Supreme Court. The Florida Supreme Court affirmed the trial court's summary denial of the successive motion. *Zakrzewski v. State*, 254 So.3d 324 (Fla. 2018). The Florida Supreme Court noted that Zakrzewski had previously raised the same *Hurst* claims in a state habeas petition filed in the Florida Supreme Court in *Zakrzewski v. Jones*, 221 So.3d 1159 (Fla. 2017), which he was now raising for a second time as an appeal from the state trial court's denial of a postconviction motion. The Florida Supreme Court then held that the appeal was procedurally barred because he had previously raised the same *Hurst* claims in a state habeas petition. *Zakrzewski*, 254 So.3d at 324-25.[1]

Procedurally barred by the law-of-the-case doctrine

The Florida Supreme Court concluded that the issue of the retroactivity of its own prior decision in *Hurst v. State* was procedurally barred. All of the claims were procedurally barred by the law-of-the-case doctrine because Zakrzewski had raised the same retroactivity issue previously in a state habeas petition which the Florida

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[1] One Justice concurred in the result. *Zakrzewski*, 254 So.3d at 325 (Pariente, J., concurring). The sole concurrence focused on the jury override aspect of the case (one of Zakrzewski's three death sentences involved a jury override; the other two death sentences did not involve an override).

Supreme Court had denied.

This Court does not grant review of procedurally barred claims. Opposing counsel cites to no case where this Court has granted review of an underlying issue of retroactivity where that underlying issue was barred by the law-of-the-case doctrine. This Court granting review would encourage the capital defense bar to engage in repetitive and dilatory state litigation. It would encourage capital defendants to split their claims into two or more claims and raise one claim in a state habeas petition in the state appellate court and then raise another version of the same claim in a postconviction motion in the state trial court, just as Zakrzewski did with his retroactivity claim in this case. Review should be denied on the basis of the procedural bar alone.

The Florida Supreme Court's partial retroactivity analysis

Even ignoring the procedural bar, this Court should not grant review of the underlying issue of 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 (emphasis in original). The Florida Supreme Court discussed the first prong of the *Witt* test for five paragraphs. *Id.* 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*, *Hitchcock v. Florida*, 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 prior holding in *Asay*. The *Hitchcock* Court explained 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." *Id.* at 217.

The Florida Supreme Court has also denied relief in several capital cases based on its partial retroactivity analysis and this Court has denied certiorari 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 *Asay* and *Hitchcock*), *cert. denied*, *Lambrix v. Florida*, 138 S.Ct. 312 (2017) (No. 17-6222); *Hannon v. State*, 228 So.3d 505, 513 (Fla. 2017) (stating that the court has "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*), *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.

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 (emphasis in original). 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* and *Hitchcock*.

Furthermore, the Florida Supreme Court's partial retroactivity analysis was determining the retroactivity of its own decision in *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), not merely the retroactivity of this Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*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. The trial court found three aggravating factors: 1) the defendant was previously convicted of other capital offenses based on the contemporaneous murders; 2) the murders were committed in a cold, calculated, and premeditated manner (CCP); and 3) the murders were committed in an especially heinous, atrocious, or cruel manner (HAC). *Zakrzewski*, 717 So.2d at 491. But one of the aggravating factors, the aggravator of previously convicted of other capital offenses based on the contemporaneous murders, was stipulated to by the defendant when he entered a guilty plea to three counts of first-degree murder. *Id.* at 490. Zakrzewski waived any right to a jury trial regarding that aggravator by entering a guilty plea to all three murders. *Shepard v. United States*, 544 U.S. 13, 24 (2005) (noting that a defendant waives his right to jury findings under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), by entering a plea to the specific counts and specific facts); *cf. Jenkins v. Hutton*, 137 S.Ct. 1769, 1772 (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 by the plea colloquy before the penalty phase began. Under this Court's reasoning in *Shepard* and *Hutton*, there was no *Hurst v. Florida* error in this case in the first place. Under this Court's precedent, there was no underlying constitutional error in this case.

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 the aggravating circumstances and to include a requirement of jury unanimity. The Florida Supreme Court required 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." *Hurst*, 202 So.3d at 57. 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.[2] This Court would also have to address the retroactivity of the Florida Supreme Court's unanimity requirement, which this Court never addressed in *Hurst v. Florida*.[3] This Court would have to rule on the retroactivity of those additional aspects of *Hurst v. State* if it grants the petition.

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

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[2] 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 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.

[3] The issue of unanimity is currently pending in this Court but in non-capital, direct appeal case. *Ramos v. Louisiana*, 2019 WL 1231752 (Mar. 18, 2019) (No. 18-5924).

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). So, aside from the clear procedural bar, these additional questions render this case an inappropriate vehicle for certiorari review.

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 the underlying issue of partial retroactivity should be denied.

No conflict with this Court's retroactivity jurisprudence

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

Petitioner does not acknowledge that the position he is advocating is inconsistent with the actual holdings, as well as the reasoning, of both *Danforth* and *Summerlin*. The petition ignores *Danforth* and only cites *Summerlin* for another

proposition of law. This Court would have to recede from both *Danforth* and *Summerlin* to grant Zakrzewski any relief but 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 willing to overrule *Danforth* and require that *Teague* be used in all situations, Zakrzewski 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 Zakrzewski to receive any relief.

Opposing counsel's reliance on *Fiore v. White*, 531 U.S. 225 (2001), to establish conflict with this Court is misplaced. Pet. at 24. *Fiore* concerned inconsistent state court appellate decisions of two co-defendants who were tried together and who both raised the same issue in the state appellate court. One of the two co-defendants remained in prison after the state appellate court denied review of his case but the other co-defendant was discharged after full review by that same appellate court. Here, there is no co-defendant and nothing remotely resembling the *Fiore* situation occurred on appeal of this case. Moreover, *Danforth* was decided after *Fiore* and the

Danforth Court never discussed, or even cited, *Fiore*. Opposing counsel may view *Danforth* and *Fiore* as being in some kind of tension or conflict but this Court does not. *Danforth* concerned retroactivity and whether states are free to make state law decisions regarding retroactivity; *Fiore* does not. *Danforth* is directly on point; *Fiore* is not.

Additionally, this Court has denied a petition for a writ of certiorari raising a claim that the Florida Supreme Court partial retroactivity analysis violates the Eighth Amendment in a death warrant case. *Branch v. Florida*, 138 S.Ct. 1164 (2018) (No. 17-7758). And, this Court has recently denied several other petitions in Florida capital cases raising the same type of challenges to the Florida Supreme Court's partial retroactivity analysis. *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* and *Hitchcock* 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 partial retroactivity analysis and this Court's retroactivity jurisprudence. 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's partial retroactivity analysis 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) ("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 partial retroactivity analysis does not conflict with the Delaware Supreme Court's decision.

There is no conflict between the Florida Supreme Court's partial retroactivity analysis 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 due process

Zakrzewski insists that the Florida Supreme Court's partial retroactivity analysis violates due process and is arbitrary in violation of the Eighth Amendment. To the extent he is arguing that basing retroactivity analysis on a date is, itself, arbitrary, all modern retroactivity tests depend on dates of finality. Both federal and state courts have retroactivity doctrines that depend on dates. For example, a cutoff date is part of the pipeline doctrine first established by this Court in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The *Griffith* Court created the pipeline concept by holding that all new developments in 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. And the 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 is no more arbitrary than this Court's line-drawing in *Griffith* or *Teague*. 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. Neither *Griffith* nor *Teague* nor *Asay* violates the due process clause or the Eighth Amendment.

And, 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 criminal and capital cases as opposing counsel here asserts. Opposing counsel's due process argument is that all criminal defendants in a state must be granted retroactive benefit of any new decisions, regardless of the date of finality. 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. Due process does not mandate full retroactivity of all criminal decisions.

Elements of capital murder

Opposing counsel insists that the Florida Supreme Court's requiring these additional jury findings in *Hurst v. State* means that all those additional findings, beyond the one aggravating factor, automatically become elements of capital murder. This is ***not*** true by definition. Elements are facts proven by prosecution beyond a reasonable doubt that increase or aggravate the penalty. That is the dictionary definition of an element and the constitutional definition of an element. BLACK'S LAW DICTIONARY 520 (6th ed. 1990) (elements of crime); *United States v. O'Brien*, 560 U.S. 218, 224 (2010) (contrasting elements of a crime which are facts that the prosecution

must prove to a jury beyond a reasonable doubt with sentencing factors which may be found by a judge by a preponderance of the evidence). But mitigating circumstances and weighing do not meet any part of the definition of an element. Mitigation and weighing are not facts at all. *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016) (explaining that aggravating factors are "purely factual determinations," but that mitigating circumstances, while often having a factual component, are "largely a judgment call (or perhaps a value call)" and weighing is mostly "a question of mercy"). And mitigating circumstances, which must be found before any weighing can be done, are not elements because mitigation is proven by the defense, not the prosecution, and at a much lower standard of proof than the elements. *Ault v. State*, 53 So.3d 175, 186 (Fla. 2010) (noting that mitigating circumstances are proven at the "greater weight of the evidence" standard of proof quoting *Coday v. State*, 946 So.2d 988, 1003 (Fla. 2006)). And, of course, mitigating circumstances ***decrease*** the penalty, if found, rather than increase the penalty. It is only facts that increase or aggravate a sentence that are elements that must be found by the jury beyond a reasonable doubt, according to this Court's Sixth Amendment jurisprudence. *Alleyne v. United States*, 570 U.S. 99 (2013) (holding that any fact that increases the mandatory minimum sentence for a crime is an element that must be found by the jury). The Florida Supreme Court may mandate that the jury make additional findings regarding mitigating circumstances and weighing but that does not turn either mitigating circumstances or weighing into elements.

Nor is it true as a matter of Florida law that the additional findings beyond the aggravating factors are elements. Both Florida caselaw and Florida statutes declare that the additional findings are not elements. The Florida Supreme Court recently specifically held that the additional findings are ***not*** elements. *Foster v. State*, 258 So.3d 1248, 1251-53 (Fla. 2018) (rejecting a due process and Eighth Amendment argument that the additional findings required by Florida's new death penalty statute

were elements and specifically holding the additional jury findings required "are not elements of the capital felony of first-degree murder"). The Florida Supreme Court has clarified that the additional findings required by its prior decision in *Hurst v. State* are not elements. Opposing counsel's definition of elements of capital murder is also directly contrary to the actual text of Florida's new death penalty statute. Florida's new death penalty statute provides that a defendant becomes eligible for a death sentence upon a conviction for first-degree murder and the finding of "at least one aggravating factor." § 921.141(2)(a), Fla. Stat. (2018) (providing: "After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6)."). The new death penalty statute additionally provides that if the jury, "does not unanimously find at least one aggravating factor, the defendant is ***ineligible*** for a sentence of death." § 921.141(2)(b)(1), Fla. Stat. (2018) (emphasis added). The new death penalty statute also provides that if the jury, "unanimously finds at least one aggravating factor, the defendant is ***eligible*** for a sentence of death." § 921.141(2)(b)(2), Fla. Stat. (2018) (emphasis added). Aggravating factors are the only elements in Florida and it is a jury finding of "at least one aggravating factor" that makes the defendant eligible for death, according to the text of Florida's death penalty statute. None of the additional findings are elements; rather, they are selection factors.

All of opposing counsel's argument regarding the demands of due process and the importance of substantive versus procedural differences in retroactivity analysis depend on this mischaracterization of the additional findings required by *Hurst v. State* as elements. The additional findings simply are not elements and opposing counsel's entire argument collapses because they are not.

The issue in this case is procedurally barred and the underlying issue of the Florida Supreme Court's partial retroactivity analysis 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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