

DOCKET NO. 18-9356 & 18A1200

CAPITAL CASE

IN THE UNITED STATES SUPREME COURT

ROBERT JOE LONG,

Petitioner,

vs.

MARK S. INCH,

Secretary, Florida Department of Corrections,

Respondent.

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

EXECUTION SCHEDULED

May 23, 2019

RESPONDENT'S BRIEF IN OPPOSITION AND
RESPONSE IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

ASHLEY MOODY
ATTORNEY GENERAL

STEPHEN D. AKE*
Senior Assistant Attorney General
Florida Bar No. 014087
*Counsel of Record

CHRISTINA Z. PACHECO
Assistant Attorney General
Florida Bar No. 71300

Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
stephen.ake@myfloridalegal.com
christina.pacheco@myfloridalegal.com
E-Service: capapp@myfloridalegal.com

COUNSEL FOR RESPONDENT

On August 7, 2012, Petitioner filed an initial brief in the Florida Supreme Court appealing the state circuit court's denial of his initial postconviction motion. Although Florida's rules of procedure mandate that a petition for writ of habeas corpus be filed simultaneously with the initial brief, Long did not file a habeas petition at that time. Rather, Long waited almost seven years before filing a petition for writ of habeas corpus raising meritless claims in an eleventh-hour attempt to delay his scheduled execution. Long's dilatory tactics give rise to the following question:

QUESTION PRESENTED FOR REVIEW

[Capital Case]

Whether this Court should grant certiorari review of the Florida Supreme Court's decision denying Petitioner's untimely habeas petition as procedurally barred when the denial was based on adequate and independent state law procedural grounds?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF CITATIONS.....	iv
CITATION TO OPINION BELOW.....	1
STATEMENT OF JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE AND FACTS.....	2
REASONS FOR DENYING THE WRIT.....	6
THERE IS NO BASIS FOR CERTIORARI REVIEW WHEN THE FLORIDA SUPREME COURT APPLIED WELL ESTABLISHED STATE PROCEDURAL RULES IN DENYING PETITIONER'S UNTIMELY HABEAS CORPUS PETITION.	
DENIAL OF STAY.....	14
CONCLUSION.....	15

TABLE OF CITATIONS

Cases

<u>Atkins v. Virginia</u> , 536 U.S. 304 (2002)	10, 11, 12
<u>Brown v. Ohio</u> , 432 U.S. 161 (1977)	12
<u>Bucklew v. Precythe</u> , 139 S. Ct. 1112 (2019)	14
<u>Cardinale v. Louisiana</u> , 394 U.S. 437 (1969)	8
<u>Coleman v. Thompson</u> , 501 U.S. 722 (1991)	6
<u>Florida v. Powell</u> , 559 U.S. 50 (2010)	6
<u>Ford v. State</u> , 168 So. 3d 224 (Fla. 2015) (table)	7
<u>Fox Film Corp. v. Muller</u> , 296 U.S. 207 (1935)	6
<u>Griffin v. McCollum</u> , 22 So. 3d 67 (Fla. 2009) (table)	7
<u>Herb v. Pitcairn</u> , 324 U.S. 117 (1945)	8
<u>Hill v. McDonough</u> , 547 U.S. 573 (2006)	14
<u>Hurst v. Florida</u> , 136 S. Ct. 616 (2016)	4
<u>Hurst v. State</u> , 202 So. 3d 40 (Fla. 2016), <u>cert. denied</u> , 137 S. Ct. 2161 (2017)	4
<u>Long v. Inch</u> , Case No. SC19-752, 2019 WL 2066964 (Fla. May 10, 2019)	1, 5

<u>Long v. State</u> , 118 So. 3d 798 (Fla. 2013)	3
<u>Long v. State</u> , 183 So. 3d 342 (Fla. 2016)	4
<u>Long v. State</u> , 235 So. 3d 293 (Fla.), <u>cert. denied</u> , 139 S. Ct. 162 (2018)	4
<u>Long v. State</u> , 529 So. 2d 286 (Fla. 1988)	2
<u>Long v. State</u> , 610 So. 2d 1268 (Fla. 1992), <u>cert. denied</u> , 510 U.S. 832 (1993)	2, 10
<u>Long v. State</u> , Case No. SC19-726, 2019 WL 2150942 (Fla. May 17, 2019), <u>pet. for writ of certiorari filed</u> , Case No. 18-9358	5, 8
<u>Michigan v. Long</u> , 463 U.S. 1032 (1983)	6
<u>Nelson v. Campbell</u> , 541 U.S. 637 (2004)	14
<u>Parker v. Dugger</u> , 550 So. 2d 459 (Fla. 1989)	7
<u>Price v. Dunn</u> , 587 U.S. ___, 2019 WL 2078104 (May 13, 2019)	15
<u>Roper v. Simmons</u> , 543 U.S. 551 (2005)	10, 12
<u>Sattazahn v. Pennsylvania</u> , 537 U.S. 101 (2003)	13
<u>Street v. New York</u> , 394 U.S. 576 (1969)	8

Other Authorities

§ 775.082(1), Fla. Stat. (1989).....	13
28 U.S.C. § 1257.....	1
Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5)	11
Fla. R. Crim. P. 3.851(d)(3) (2018).....	3, 7
Sup. Ct. R. 10.....	1

CITATION TO OPINION BELOW

The opinion from the Florida Supreme Court is unreported but is available at Long v. Inch, Case No. SC19-752, 2019 WL 2066964 (Fla. May 10, 2019).

STATEMENT OF JURISDICTION

Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257. Respondent agrees that the statutory provision sets out the scope of this Court's certiorari jurisdiction. However, this case is inappropriate for the exercise of this Court's discretionary jurisdiction because the Florida Supreme Court's decision is based entirely on adequate and independent state procedural grounds, does not implicate an important or unsettled question of federal law, nor does it conflict with another state court of last resort, a United States court of appeals, or any relevant decisions of this Court. Sup. Ct. R. 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE AND FACTS

Petitioner, Robert Joe Long, is in custody of the Florida Department of Corrections and under a lawful sentence of death. On September 23, 1985, Petitioner, Robert Joe Long, entered into a plea agreement with the State and pleaded guilty to the first-degree murder of Michelle Simms, along with seven additional counts of first-degree murder, numerous sexual battery and kidnapping counts, and a violation of probation. Following a penalty phase in July 1986, Long was sentenced to death for the murder of Michelle Simms. On direct appeal, the Florida Supreme Court affirmed the convictions and all sentences except for the death sentence, which the court vacated and remanded for a new sentencing proceeding. Long v. State, 529 So. 2d 286 (Fla. 1988).

Long unsuccessfully sought to withdraw his guilty plea prior to the resentencing proceeding in 1989. Thereafter, a unanimous jury recommended the death penalty and the trial court followed the recommendation and imposed a death sentence. The Florida Supreme Court affirmed Long's death sentence on appeal. Long v. State, 610 So. 2d 1268 (Fla. 1992), cert. denied, 510 U.S. 832 (1993).

Long filed his initial postconviction motion in state circuit court in 1994, and following a 2003 amendment, the court

conducted an evidentiary hearing. On November 28, 2011, the circuit court denied Long's motion. Long appealed this decision to the Florida Supreme Court, but did not file a petition for writ of habeas corpus simultaneously with his initial brief. See Florida Rule of Criminal Procedure 3.851(d)(3) (stating that "[a]ll petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, including petitions for writ of habeas corpus, shall be filed simultaneously with the initial brief filed on behalf of the death-sentenced defendant in the appeal of the circuit court's order on the initial motion for postconviction relief filed under this rule."). The Florida Supreme Court affirmed the denial of Long's initial postconviction motion on appeal. Long v. State, 118 So. 3d 798 (Fla. 2013).

Following his state court proceedings, Long sought relief by filing a petition for writ of habeas corpus in federal court. The United States District Court, Middle District of Florida, denied Long's habeas petition on August 30, 2016, and the Eleventh Circuit Court of Appeals denied a certificate of appealability on January 4, 2017.

On September 9, 2014, during the pendency of his federal habeas proceedings, Long again returned to the state circuit court and filed a successive postconviction motion based on

alleged newly discovered evidence, which the court summarily denied. This ruling was affirmed by the Florida Supreme Court. Long v. State, 183 So. 3d 342 (Fla. 2016).

On January 3, 2017, Long filed a second successive motion for postconviction relief raising claims for relief pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). The circuit court summarily denied Long's motion and Long appealed. The Florida Supreme Court affirmed the summary denial of relief, finding that Hurst did not apply retroactively to Long's sentence of death that became final in 1993. Long v. State, 235 So. 3d 293 (Fla.), cert. denied, 139 S. Ct. 162 (2018).

On April 23, 2019, Governor Ron DeSantis signed Long's death warrant, and his execution is scheduled for May 23, 2019, at 6:00 p.m. On April 29, 2019, Long filed his third successive motion for postconviction relief raising six claims. After reviewing the State's response and conducting a case management conference, the postconviction court summarily denied all of Long's claims with the exception of Claim 2(a); Long's as-applied challenge to Florida's lethal injection protocol. After conducting an evidentiary hearing, the court entered an order denying relief on all of Long's claim.

Long appealed the state court's ruling to the Florida Supreme Court.¹ He also filed a state habeas petition in the Florida Supreme Court. On May 10, 2019, the Florida Supreme Court dismissed Long's habeas petition "because all of Long's claims are procedurally barred." Long v. Inch, Case No. SC19-752, 2019 WL 2066964 (Fla. May 10, 2019).

On May 20, 2019, Long filed a petition for writ of certiorari in this Court from the Florida Supreme Court's order denying his state habeas petition. This is the State's brief in opposition.

¹ The Florida Supreme Court affirmed the denial of Long's third successive postconviction motion. Long v. State, Case No. SC19-726, 2019 WL 2150942 (Fla. May 17, 2019), pet. for writ of certiorari filed, Case No. 18-9358.

REASONS FOR DENYING THE WRIT

THERE IS NO BASIS FOR CERTIORARI REVIEW WHEN THE FLORIDA SUPREME COURT APPLIED WELL ESTABLISHED STATE PROCEDURAL RULES IN DENYING PETITIONER'S UNTIMELY HABEAS CORPUS PETITION.

Petitioner Long seeks this Court's review of the Florida Supreme Court's opinion denying his untimely petition for writ of habeas corpus as procedurally barred. However, Long has failed to establish any compelling reason for this Court to review his two meritless constitutional claims when the state court found the claims procedurally barred based on an independent and adequate state law ground.

This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Michigan v. Long, 463 U.S. 1032, 1038, 1041-42 (1983); Coleman v. Thompson, 501 U.S. 722, 729 (1991). 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).

In this case, the two claims presented were rejected by the Florida Supreme Court based upon well settled state law grounds and rules of procedure. Petitioner's argument that the state procedural rules are "inadequate" to foreclose this Court's

review is unavailing. Florida Rule of Criminal Procedure 3.851(d)(3) mandates that all petitions for writ of habeas corpus "shall" be filed simultaneously with the initial brief in the appeal from the circuit court's order on a capital defendant's *initial* motion for postconviction relief. Fla. R. Crim. P. 3.851(d)(3) (2018). The Florida Supreme Court has consistently held that this rule is mandatory and "there are no exceptions to untimely filed habeas petitions." Griffin v. McCollum, 22 So. 3d 67 (Fla. 2009) (table); see also Ford v. State, 168 So. 3d 224 (Fla. 2015) (table) (rejecting defendant's "invitation to establish an exception allowing a defendant to file a habeas petition for the first time in a successive postconviction proceeding"); Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989) ("[H]abeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial.").

Here, Petitioner failed to file a habeas petition at the time of his appeal on his *initial* postconviction proceeding in 2012, but rather, waited seven years until the appeal from his *third* successive postconviction motion to file a habeas petition. Because the Florida Supreme Court's denial of his petition as procedurally barred is based on adequate and

independent state law procedural grounds, this Court should decline to exercise its discretionary jurisdiction to consider the questions presented in his petition. See Herb v. Pitcairn, 324 U.S. 117, 125 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds").

Even if this Court were to examine Long's procedurally barred claims, it would not entitle him to certiorari review as any federal claim addressed or discussed by this Court on certiorari review would amount to nothing more than an advisory opinion. See Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); Street v. New York, 394 U.S. 576, 581-82 (1969) (same). The Florida Supreme Court did not address the merits of Long's constitutional questions in the instant case.² Accordingly, this

² Long presented an Eighth Amendment claim regarding his alleged severe mental condition in his third successive postconviction motion filed after the signing of his death warrant and the Florida Supreme Court affirmed the summary denial of this claim on appeal, see Long v. State, Case No. SC19-726, 2019 WL 2150942 at *6 (Fla. May 17, 2019), but Long has not sought certiorari review of the court's ruling as to that claim. See Long v. Florida, Case No. 18-9358 (pet. for writ of certiorari filed May 20, 2019).

Court lacks certiorari jurisdiction and Long's petition should be denied.

Respondent submits that even if this Court were to review the merits of Long's procedurally barred claims, he cannot demonstrate a compelling reason for this Court to exercise its certiorari jurisdiction. In his first claim, Petitioner alleges that the Eighth Amendment and evolving standards of decency preclude his execution because of his alleged severe traumatic brain damage and mental illness. This claim lacks merit, both factually and legally. While Long presented evidence at his sentencing hearing that he suffered brain injuries and suffers from some degree of mental illness, the record does not support a conclusion that he has a "severe" condition.

During the death warrant proceedings in the state court, the State accepted for the sole purpose of litigating Long's successive postconviction motion that he had previously presented evidence in support of his alleged brain damage and temporal lobe epilepsy at his penalty phase. However, the State notes that the evidence surrounding these conditions, as well as his alleged mental illnesses, was in conflict as the State introduced testimony from an expert psychiatrist, Dr. Sprehe, at Long's sentencing proceeding that Long did not suffer from brain damage that would affect his mental capability, was in total

control at the time of the murder, had an antisocial personality, was not a sexual sadist but raped women for sexual satisfaction, and neither of Florida's statutory mental mitigating factors applied in his case. The sentencing court further noted "the deliberate steps [Long] took to accomplish his nefarious scheme of seeking out, abducting, sexually battering and then killing" the victim in this case and recognized that Long's admission that he would not have committed this crime had he encountered a police officer prior to the murder lessen the impact of the mitigating factors when balanced against the substantial aggravation in this case. Long v. State, 610 So. 2d 1268, 1273 (Fla. 1992). Thus, any contention that Long has a "severe" mental illness is factually incorrect.

Finally, Long's contention that evolving standards of decency preclude the execution of the mentally ill is without merit. While this Court has ruled that the Eighth Amendment prohibits the execution of intellectually disabled defendants, Atkins v. Virginia, 536 U.S. 304 (2002), and juveniles, Roper v. Simmons, 543 U.S. 551 (2005), this Court has not extended these decisions to those suffering from severe mental illness, let alone some lesser degree of mental illness like in the instant case.

In Atkins, this Court prohibited the execution of persons suffering from intellectual disability and based its decision on: (1) a growing consensus among the state legislatures to prohibit execution for people with intellectual disability; (2) the ability to scientifically determine who in fact is intellectually disabled for purposes of the rule; and (3) the evolving standards of decency within society showing the execution of a person with intellectual disability serves neither the retribution or deterrence aspect of the criminal justice system.

In the instant case, none of these factors have been met as there is no growing consensus among state legislatures prohibiting the execution of severely mentally ill defendants. Long's discussion of legislation that has been "introduced" to various state legislative bodies is not indicative of legislation actually being enacted into law. Additionally, unlike intellectual disability which is clearly defined by the American Association on Mental Retardation and the American Psychiatric Association, Atkins, 536 U.S. at 308, n.3, there is no scientific consensus as to what constitutes "severe mental illness" as it encompasses a multitude of diagnoses within the relevant mental health community. See generally Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5).

Finally, Long has not presented any evidence which shows that society's evolving standards of decency find the execution of a person with mental illness to be morally repugnant. Because Long has offered no compelling reason for this Court to extend its holding in Atkins or Roper, this Court should deny certiorari review.

Similarly, Long's second claim presented in his petition for writ of certiorari is meritless and does not warrant much discussion. Long argues that his death sentence violates the Fifth Amendment's double jeopardy protections because he has served an alternative sentence of life without the possibility of parole for twenty-five years.

This Court has stated that the Double Jeopardy Clause affords a defendant three basic protections: "'[It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" Brown v. Ohio, 432 U.S. 161, 165 (1977) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). Long claims that the third interest is implicated in his case because he has allegedly served multiple punishments for the same offense. According to Long's theory, the fact that he has been imprisoned for over twenty-five years equates to a

finding that he has endured multiple punishments because Florida law allowed for two possible sentences when he was convicted of first-degree murder: life in prison without the possibility of parole or death. See § 775.082(1), Fla. Stat. (1989).

Petitioner's argument is clearly without merit as there has been no double jeopardy violation in this case. Following his guilty plea in 1985 and a resentencing hearing in 1989, Petitioner was sentenced to the statutory maximum sentence for first-degree murder in Florida - death. Long has not been acquitted of the death penalty in any subsequent judicial proceeding. See Sattazahn v. Pennsylvania, 537 U.S. 101, 109 (2003) (observing that the "touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'") (citation omitted). Petitioner was not given the alternate sentence of life in prison without the possibility of parole for twenty-five years and the fact that he has served over twenty-five years in prison does not equate to a finding that he has received multiple punishments for the same offense. Petitioner has failed to cite to a single case applying his theory of a double jeopardy violation to the facts of his case.

In sum, Petitioner's untimely habeas petition was properly denied on the basis of independent state law and procedural

grounds. Additionally, the Florida Supreme Court's opinion never addressed the meritless constitutional claims raised in the petition. For these reasons, this Court should decline to exercise its certiorari jurisdiction.

DENIAL OF STAY

"[A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." Hill v. McDonough, 547 U.S. 573, 583-84 (2006). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." Bucklew v. Precythe, 139 S. Ct. 1112, 1133 (2019) (quoting Hill, 547 U.S. at 584). "Given the State's significant interest in enforcing its criminal judgments there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." Nelson v. Campbell, 541 U.S. 637, 650 (2004) (internal citations omitted).

Here, Long's attempt to litigate his procedurally barred, meritless claims in this Court only days before his execution is done purely for the purposes of delay and he should not be rewarded for his dilatory litigation strategy. See Price v.

Dunn, 587 U.S. ___, 2019 WL 2078104 at *4 (May 13, 2019) (Thomas, J., concurring in the denial of certiorari) (noting that seeking a stay shortly before a scheduled execution "only encourages the proliferation of dilatory litigation strategies that we have recently and repeatedly sought to discourage"). Long's request to stay his case is entirely meritless, and a swift denial is appropriate.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari and the application for stay of execution.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ Stephen D. Ake
STEPHEN D. AKE*
Senior Assistant Attorney General
Florida Bar No. 014087
*Counsel of Record

CHRISTINA Z. PACHECO
Assistant Attorney General
Florida Bar No. 71300

Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
stephen.ake@myfloridalegal.com
christina.pacheco@myfloridalegal.com
E-Service: capapp@myfloridalegal.com
COUNSEL FOR RESPONDENT