Case No. 18-9366

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL T. RIVERA

Petitioner,

v.

STATE OF FLORIDA

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

Whether certiorari review should be denied where the retroactive application of *Hurst v. Florida* and *Hurst v. State* is based on adequate independent state grounds and when Petitioner has failed to establish that state and federal courts are in conflict or that this issue presents an important unsettled question of federal law that this court should resolve.

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CITATION TO OPINION BELOW

The decision of the Florida Supreme Court is reported at *Rivera v. State*, 260 So. 3d 920 (Fla. 2018).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on December 20, 2018. Petitioner sought an additional 60 days for filing of this Petition, which was granted to May 19, 2019. Petitioner filed the instant petition on May 20, 2019.

Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257. Respondent agrees that the statutory provisions set out the scope of this Court's certiorari jurisdiction but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction as the Florida Supreme Court's decision in this case is based on adequate and independent state grounds, thus no federal question is raised. Sup. Ct. R. 14(g)(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE AND FACTS

Petitioner, Michael Rivera, was found guilty and sentenced to death for the murder of S.J.[1] in 1986. The Florida Supreme Court provided the following factual summary of Rivera's conviction and sentence.

> Eleven-year-old S.J. left her Lauderdale Lakes home on bicycle at about 5:30 p.m. on January 30, 1986, to purchase poster board at a nearby shopping center. A cashier recalled having sold her a poster board between 6:30 and 7:00 p.m. When S.J. failed to return by

[1] Because the victim, S.J., was a minor, her name has been withheld and her initials are used (even within quoted material).

dusk, her mother began to search. At about 7:30 p.m. the mother encountered a Broward County Deputy Sheriff, who had S.J.'s bicycle in the trunk of his car. The deputy found the bicycle abandoned in a field alongside the shopping center. A police investigation ensued.

Police first connected Michael Rivera to S.J.'s murder through a complaint filed by Starr Peck, a Pompano Beach resident. She testified that she had received approximately thirty telephone calls during September 1985 from a man who identified himself as "Tony." He would discuss his sexual fantasies and describe the women's clothing he wore, such as pantyhose and one-piece body suit. She received the last telephone call from "Tony" after S.J.'s murder. Ms. Peck testified that he said he had "done something very terrible.... I'm sure you've heard about the girl S.J.... I killed her and I didn't mean to.... I had a notion to go out and expose myself. I saw this girl getting off her bike and I went up behind her." She testified that he had admitted putting ether over S.J. and dragging her into the back of the van where he sexually assaulted her. Rivera had been employed by Starr Peck, and she identified him as "Tony."

On February 13, Detectives Richard Scheff and Phillip Amabile of the Broward County Sheriff's Department took Rivera into custody on unrelated outstanding warrants and transported him to headquarters where they told him that they wanted to speak to him. Detective Scheff testified that Rivera responded, "If I talk to you guys, I'll spend the next 20 years in jail." After reading Rivera his Miranda rights,[n.2] Detective Scheff told Rivera that someone had advised them that Rivera had information about the disappearance of S.J. The detective testified that Rivera admitted making the obscene phone calls to Starr Peck but denied having abducted or murdered S.J.

> [n. 2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

In subsequent interviews, Rivera admitted that he liked exposing himself to girls between ten and twenty years of age. He preferred the Coral Springs area because its open fields reduced the likelihood of getting caught. He would often borrow a friend's van and commented that "every time I get in a vehicle, I do something terrible." Rivera then admitted to two incidents. In one, he said he had exposed himself to a girl pushing a bike. When asked what he did with her, Rivera replied: "Tom, I can't tell you. I don't want to go to jail. They'll kill me for what I've done." In the other, he said he had grabbed another young girl and pulled her into some bushes near a Coral Springs apartment complex.

S.J.'s body was discovered on February 14 in an open field in the city of Coral Springs, several miles from the site of the abduction. Dr. Ronald Keith Wright, a forensic pathologist, testified that most of the upper part of the body had decomposed and that the body was undergoing early skeletonization. The doctor concluded that death was a homicide caused by asphyxiation, which he attributed to ether or choking.

Dr. Wright observed that the body was completely clothed, although the jeans were unzipped and partially pulled down about the hips, and the panties were partially torn. Dr. Wright opined that this could be the result of the expansion of gasses during decomposition and not sexual molestation. He was unable to determine whether she was sexually assaulted. He discovered a bruise on the middle of the forehead that occurred before death, but he could not testify with certainty as to the cause. He also observed a broken fingernail on her right hand index finger, which he could not interpret as evidence of a struggle. Dr. Wright believed that the body was carried to the field and dumped, and at that time S.J. was either dead or unconscious.

The jury heard testimony from several of Rivera's fellow inmates. Frank Zuccarello testified that Rivera admitted that he had choked another child, Jennifer Goetz, in the same way he had choked S.J.; that Rivera said he had tried to kill Jennifer but was frightened away; and that Rivera said he had taken S.J. to the field where she screamed and resisted, and he choked her to death after things got out of hand. Rivera also admitted that he told Starr Peck that he had murdered S.J., saying that confiding in her was the biggest mistake of his life. William Moyer testified that Rivera had stated to him: "You know, Bill, I didn't do it, but Tony did it." He later overheard Rivera call Starr Peck and identify himself as "Tony." Peter Salerno testified that Rivera told him: "I didn't mean to kill the little S.J. girl. I just wanted to look at her and play with her."

A manager of a Plantation restaurant testified that he had received over two hundred telephone calls during a two-year period from an anonymous male caller. On February 7, the Friday before S.J. body was discovered, the caller identified himself as "Tony" and said that he "had that S.J. girl" while wearing pantyhose, and that he had put an ether rag over her face.

The jury returned a verdict of guilty as charged.

During the penalty phase, the state introduced evidence of prior convictions. [n3] Rivera introduced the testimony of his sisters, Elisa and Miriam, through whom the jury learned that Rivera was himself the victim of child molestation. Rivera's present girlfriend testified that she had no concerns about leaving him with her children. Rivera's former girlfriend was allowed to testify under an alias. She expressed the opinion that Rivera had two personalities. Through Michael he demonstrated a good side and through "Tony" he exposed his dark side which compelled him to do terrible things.

> [n3] On November 6, 1986, Rivera was convicted of attempted first-degree murder, kidnapping, aggravated child abuse, and aggravated battery. The state conceded that those crimes were on appeal. However, there were other felonies involving the use or threat of violence of which Rivera stood convicted and which were not on appeal. They include the October 1980 crimes of burglary with intent to commit battery and of indecent assault on a female child under the age of fourteen.

Dr. Patsy Ceros-Livingston, a clinical psychologist, interviewed Rivera in jail. She diagnosed Rivera as having a borderline personality disorder, which is characterized by impulsivity, a pattern of unstable and intense interpersonal relationships, lack of control of anger, identity disturbance, affective instability, intolerance of being alone, and physically self-damaging acts. The doctor also diagnosed exhibitionism, voyeurism, and transvestism.

Dr. Ceros-Livingston opined that Rivera acted under extreme duress and that he had some special compulsive characteristics that substantially impaired his capacity to appreciate the criminality of his conduct or to conform this conduct to the requirement of the law.

The jury unanimously recommended the death penalty. The trial judge found four aggravating circumstances, [n4] one statutory mitigating circumstance, [n5] and no nonstatutory mitigating circumstances.

> [n4] § 921.141(5)(b), (d), (h), (i), Fla. Stat. (1985) (previous conviction of felony involving the threat or use of violence; murder committed during the commission of an enumerated felony; murder especially heinous, atrocious, or cruel; and murder committed in a cold, calculated, and premeditated manner).

> [n5] § 921.141(6)(b), Fla. Stat. (1985) (defendant under the influence of extreme mental or emotional disturbance).

Rivera v. State, 561 So. 2d (Fla. 1990), 537-38.

The Florida Supreme Court affirmed Rivera's judgment and sentence in its opinion released on April 19, 1990. *Id.* Rivera's conviction and sentence became final on September 22, 1990 when he failed to petition this Court for certiorari review. *See* Fla. R. Crim. P. 3.851(d).

Following Rivera's unsuccessful appeals in state court,[2] Rivera filed a second successive postconviction motion pursuant to Florida Rule of Criminal Procedure 3.851 challenging his conviction and death sentence based on *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). In addition to claiming his death sentence was invalid, Rivera argued that the denial of his motion to exceed the page limit denied him equal protection; that the post-conviction court's failure to hold a case management conference denied him due process; and that his previously denied claim of newly discovered DNA evidence was revived based on the necessity of reliable death sentences.[3]

The circuit court summarily denied Rivera's motion, and Rivera appealed to the Florida Supreme Court. On December 20, 2018, the Florida Supreme Court affirmed the lower court's order denying relief and stated in relevant part:

> Rivera attempts to circumvent our decision on the retroactivity of *Hurst* by dubbing the death penalty statute as substantive, rather than procedural. In doing so, Rivera cites to *Fiore* and *In re Winship* in support of his argument that *Hurst* relief should be applied retroactively because the substantive aggravators were present in the statute since its creation, thus warranting full retroactive application

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[2] *See Rivera v. State*, 187 So. 3d 822 (Fla. 2015); *Rivera v. State*, 995 So. 2d 191 (Fla. 2008); *Rivera v. State*, 859 So. 2d 495 (Fla. 2003); *Rivera v. State*, 717 So. 2d 477 (Fla. 1998); and *Rivera v. State*, 561 So. 2d 536 (Fla. 1990).

[3] Rivera first made this claim in his second postconviction motion in 1999. This claim was denied because the new evidence was not of the nature where it would produce an acquittal on retrial. *Rivera*, 187 So. 3d at 841.

> of *Hurst*. These arguments, however, are "nothing more than arguments that *Hurst v. State* should be applied retroactively to [Rivera's] sentence which became final prior to *Ring*. As such, these arguments were rejected when [this Court] decided *Asay*." *Hitchcock*, 226 So. 3d at 217. Therefore, we conclude that this claim is meritless, based on our clear and repeated precedent on the retroactive application of *Hurst*.

Rivera v. State, 260 So. 3d. 920, 927 (Fla. 2018). When addressing why Rivera did not meet the criteria for retroactivity, the court relied on its decision in *Foster v. State*, 258 So. 3d 1248 (Fla. 2018), *petition for cert. filed*, (U.S. May 10, 2019) (No. 18-9252), stating:

> [T]he *Hurst* penalty phase findings are not elements of the capital felony of first-degree murder. Rather, they are findings required of a jury: (1) *before* the court can impose the death penalty for first-degree murder. And (2) only after a conviction or adjudication of guilt for first-degree murder has occurred. Thus, Foster's jury did find all of the elements necessary to convict him of the capital felony of first-degree murder–during the guilt phase...
>
> *Id.*, 258 So. 3d at 1252. Our reasoning in *Foster* applies with equal force in Rivera's case. The jury unanimously convicted Rivera of first-degree murder during his guilt phase trial. *Rivera I*, 561 So. 2d at 537. This first-degree murder conviction is separate from the death penalty that may later be imposed after the penalty phase – albeit a necessary prerequisite to that imposition. *See* § 921.141(1), Fla. Stat. (2018). Therefore, we conclude, as we did in *Foster*, that Rivera's due process argument fails. *See Foster*, 258 So. 3d at 1252-53.
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> Moreover, in *Asay*, we made it clear that *Hurst* would not be applied retroactively to death defendants whose cases became final before *Ring*. 210 So. 3d at 22.

Rivera v. State, 260 So. 3d at 927-28.

Rivera now seeks certiorari review of the Florida Supreme Court's decision.

REASON FOR DENYING THE WRIT

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE THE FLORIDA SUPREME COURT'S RULING ON THE RETROACTIVITY OF *HURST V. FLORIDA* AND *HURST V. STATE*, WHICH RELIES SOLELY ON STATE LAW TO PROVIDE THAT THE *HURST* CASES ARE NOT RETROACTIVE TO DEFENDANTS WHOSE DEATH SENTENCES WERE FINAL WHEN THIS COURT DECIDED *RING V. ARIZONA*, VIOLATES NEITHER THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT NOR THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioner seeks review of the Florida Supreme Court's decision affirming the denial of his second successive postconviction motion. The Florida Supreme Court rejected Rivera's claim that he was entitled to retroactive relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016) as interpreted in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). Also rejected were Rivera's Eighth and Fourteenth Amendment challenges to *Hurst's* established partial retroactivity analysis. The issue of partial retroactivity was based on adequate and independent state grounds. This Court does not review decisions that are based solely on state law. Further, there is no conflict between this Court's retroactivity jurisprudence and the Florida Supreme Court's decision. 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. There is also no conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court. This Court has rejected both Eighth and Fourteenth Amendment challenges 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 or Fourteenth Amendments. As Rivera lacks each of the above criteria, this Court should find he has not provided any "compelling" reason for granting certiorari review. *See* Sup. Ct. R. 10.

The Florida Supreme Court decision was based on state law

Petitioner appealed the state trial court's denial of his successive postconviction motion to the Florida Supreme Court. Petitioner argued that the Florida Supreme Court's partial retroactivity analysis violated the Eighth and Fourteenth Amendments because it was arbitrary. The Florida Supreme Court affirmed the trial court's denial of the successive motion, *Rivera v. State*, 260 So. 3d 920 (Fla. 2018), and noted: "The instant successive motion for postconviction relief is entirely based on Rivera's supposed entitlement to relief under *Hurst*. Because Rivera's conviction and sentence were final long before *Ring* was issued, our precedent makes it clear that he is not entitled to any *Hurst* relief." The Florida Supreme Court cited to and based its decision on *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017), denying relief in this case based on its own existing precedent regarding partial retroactivity.

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*, 138 S. Ct. 41 (2017), 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 on June 24, 2002. In reaching that conclusion in *Asay,* the court relied on the state test for retroactivity found in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *See Asay*, 210 So. 3d at 15-22. It 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 engaged in a comprehensive discussion on each prong of the *Witt* test, ultimately concluding that *Hurst* was not retroactive. *Asay*, 210 So. 3d at 17-22.

Further, 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 on June 24, 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 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). The Florida Supreme Court in *Hitchcock* rejected Eighth Amendment, equal protection, and due process challenges to its prior holding 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 denied relief in multiple capital cases based on its partial retroactivity analysis and this Court has consistently denied review of those matters. *See, e.g.*, *Asay v. State*, 210 So. 3d. 1 (Fla. 2016) (holding *Hurst v. Florida,* though invalidating Florida's capital sentencing scheme, did not apply to cases already final at the time of *Ring v. Arizona*), *cert. denied*, 138 S. Ct. 41 (2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017) (rejecting a Sixth Amendment claim and reiterating that *Hurst* will not be applied retroactively to sentences final prior to *Ring*), *cert. denied*, 138 S. Ct. 513 (2017); *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*, 138 S. Ct. 312 (2017); *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, 138 S. Ct. 441 (2017); *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*, 138 S. Ct. 2657 (2018). The Florida Supreme Court has consistently followed its partial retroactivity analysis in capital cases, including Rivera's. Petitioner offers neither a persuasive nor compelling reason for this Court to grant review of his case.

A 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.

Directly to the point, 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. In fact, when the Minnesota Supreme Court, in 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, 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. This 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).

The Florida Supreme Court's partial retroactivity analysis is based on the state retroactivity test of *Witt*, not the federal retroactivity test of *Teague*. In both *Asay* and *Mosley*, the Florida Supreme Court, using *Witt*, gave both *Hurst v. Florida* and *Hurst v. State* broader retroactive application than a *Teague* analysis would. When the *Danforth* Court spoke of state courts being free to choose the "degree of retroactivity" that will apply, it certainly includes a partial retroactivity analysis. That is exactly what the Florida Supreme Court did in *Asay*, *Hitchcock*, and now in this case. Moreover, if partial retroactivity violated the United States Constitution or this Court's retroactivity jurisprudence, this Court would not have given partial retroactive effect to a change in the penal law in *Dorsey v. United States*, 567 U.S. 260 (2012). In *Dorsey*, this Court held that the Fair Sentencing Act was partially retroactive in that it would apply to those offenders who committed applicable offenses prior to the effective date of the act, but who were sentenced after that date. *Id.* at 273. *See United States v. Abney*, 812 F. 3d 1079, 1097-98 (D.C. Cir. 2016) (noting that prior to the decision in *Dorsey*, Court had not held a change in criminal penalty to be partially retroactive).

Furthermore, the Florida Supreme Court's partial retroactivity analysis was determining the retroactivity of its own decision of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), not merely the retroactivity of this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). 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, Rivera may not allege any violation of the Sixth Amendment right to a jury trial because one of the aggravating circumstances found by the judge - murder committed while engaged in an enumerated felony - was also found by the jury during the guilt phase. *See 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"). Additionally, Rivera conceded not only to the above aggravator, but also to the "previous felony" finding. Because the statute requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Rivera's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict, the argument that Rivera may not be sentenced to death is specious.

Further, under this Court's reasoning in *Hutton*, there was no *Hurst v. Florida* error in this case. 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 existence of an aggravating

circumstance and to include a requirement of jury unanimity under Florida's Constitution.[4] While the Florida Supreme Court believes that the jury must make additional findings regarding mitigation and weighing, that is not this Court's view.[5]

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 circumstances nor weighing must be found by a jury. In fact, this Court does not view mitigation or weighing as factual findings at all. Rather, it 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

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[4] Although the Florida Supreme Court was mindful of Eighth Amendment concerns, its decisions in *Lambrix* and *Hitchcock* make it clear there is no Eighth Amendment violation. *Lambrix v. State*, 227 So. 3d 112 (Fla. 2017); *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017).

[5] Lower courts have almost uniformly held that a judge may perform the "weighing" of factors to arrive at an appropriate sentence without violating the Sixth Amendment. See *State v. Mason*, 108 N.E. 3d 56, 62-63 (Ohio 2018)("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.")(string citations omitted); *United States v. Sampson*, 486 F. 3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F. 3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *State v. Gales*, 658 N.W. 2d 604, 628-29 (Neb. 2003) ("[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review to be undertaken by a jury").

"nothing" to tell the jury that the defendants "must deserve mercy beyond a reasonable doubt." *Id.* at 642.

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.[6]

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(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.

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[6] Certiorari review would also be inappropriate in this case because, assuming for a moment any *Hurst* error can be discerned from this record, such error would be clearly harmless. *See Hurst v. Florida*, 136 S. Ct. at 624 (remanding to state court for a harmless error determination). Here, the aggravating circumstances found by the trial court and affirmed by the Florida Supreme Court on appeal were either well supported by the evidence or uncontestable (as unanimously found by the jury at the guilt phase of this case). The jury also unanimously recommended death. Even in cases unlike this one, post-*Ring*, the Florida Supreme Court has repeatedly affirmed death sentences on the basis of harmless error where the jury recommended death unanimously. *See Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016), *cert. denied*, 137 S. Ct. 2218 (2017) (a jury's unanimous recommendation "allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors.").

Under this Court's logic in *Summerlin*, *Hurst v. Florida* is not retroactive. 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*.

Because there is no conflict between the Florida Supreme Court's decision and this Court's jurisprudence regarding retroactivity means this Court would have to recede from both *Danforth* and *Summerlin* to grant any relief. Additionally, there would have to be not only a retreat from *Danforth* but it would have to do so in a manner that not even the dissent in *Danforth* advocated. In adopting Rivera'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 in the situation of *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). Even if this Court was willing to overrule *Danforth* and require that *Teague* be used in all situations, Petitioner would still receive no relief because even pursuant to a *Teague* analysis, *Hurst* is not retroactive under *Summerlin*. Overruling both *Danforth* and *Summerlin* would be necessary for Petitioner to receive relief. Yet, the petition does not even acknowledge that this Court would be required to overrule both of these cases. While the petition mentions *Summerlin*, *Danforth* is completely ignored. Further, there is no acknowledgement that the position Rivera is advocating is inconsistent with the actual holdings, as well as the reasoning, of both cases.

No conflict with federal appellate courts or state supreme courts

The decision in this case is not in conflict with that of any federal appellate court or state supreme court. 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 Ninth Circuit has rejected an argument that *Hurst v. Florida* was a substantive change that must be applied retroactively. *Ybarra v. Filson*, 869 F. 3d 1016, 1032-33 (9th Cir. 2017). Ybarra made much the same argument regarding the *Hurst v. Florida* decision being substantive as Petitioner does here. The Ninth Circuit disagreed, concluding that *Hurst v. Florida* was not a substantive rule because it did not "decriminalize" any conduct or place any conduct "beyond the scope of the state's authority to proscribe." *Ybarra*, 869 F. 3d at 1032. Therefore, the only federal appellate court to have directly addressed the substantive versus procedural issue regarding *Hurst* does not conflict, but agrees, with the Florida Supreme Court's decision in this case.

The Eleventh Circuit has directly addressed the assertion that the Florida Supreme Court's partial retroactivity analysis violates the Eighth Amendment and held 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.

In the context of a successive habeas petition, the Tenth Circuit has rejected an argument that *Hurst v. Florida* was a substantive change that was required to be applied retroactively. *In re Jones*, 847 F. 3d 1293 (10th Cir. 2017). The Tenth Circuit denied authorization to file a successive habeas petition noting that this Court has not held *Hurst* to be retroactive as required by *Tyler v. Cain*, 533 U.S. 656, 663 (2001). The Sixth Circuit has also denied authorization to file a successive habeas petition that asserted that *Hurst v. Florida* was retroactive. *In re Coley*, 871 F. 3d 455 (6th Cir. 2017). The Florida Supreme Court's decision does not conflict with either of these circuit courts' holdings. Opposing counsel cites to no federal circuit court case or state supreme court case that holds partial retroactivity violates due process. There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals nor any state court of last resort.

Partial retroactivity does not violate the Eighth Amendment

Petitioner insists that the Florida Supreme Court's partial retroactivity analysis is arbitrary in violation of the Eighth Amendment. Rivera seems to be arguing that basing a retroactivity analysis on a specific court date is what makes the ruling arbitrary. In reality, using a date for retroactivity is the opposite of arbitrary, considering there is nothing random or haphazard in the reasoning the court used to choose the date after which retroactivity would be applied. Further, 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 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 the benefit of the new rule unless one of the exceptions to *Teague* applies. The Florida Supreme Court's line drawing based on a date is no more arbitrary than this Court's in *Griffith* or *Teague*. Neither *Griffith* nor *Teague* violate the Eighth Amendment.

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 the benefit of a new development in the law and older final cases that will not receive the benefit of the new development is a necessary factor in the backdrop of a retroactivity analysis. It is simply part of the retroactivity paradigm that some cases will be treated differently than other cases based on the age and posture of the case. 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 relaxed in capital cases, not that there should be automatic and full retroactivity in all capital cases. Finality trumps uniformity in the retroactivity arena. Furthermore, as noted, the Florida Supreme Court's partial retroactivity analysis provides more relief than this Court's retroactivity analysis does under *Teague* and *Summerlin*. In fact, under *Summerlin*, every Florida capital defendant whose case was final before January 12, 2016 would be denied relief.

Rivera also seems to assert that even if partial retroactivity is proper, the Eighth Amendment somehow requires the Florida Supreme Court to draw the dividing line for its partial

retroactivity analysis based on when the underlying crime was committed. Understandably, this has the possibility of being fruitful for Petitioner, but Rivera offers no formula for how this should be accomplished nor why the current scheme is not acceptable. Rivera's only point on this issue seems to be that some cases where the crime pre-dated his received *Hurst* relief, thus he deserves the same. Rivera attempts to draw a comparison with *Card v. Jones*, 219 So. 3d 47 (Fla. 2018), but this case offers no support. Indeed, Jones's death sentence was ultimately reduced to life in prison after he was granted a new sentencing hearing in light of *Hurst v. State;* however, this rehearing was granted in part because the original jury did not return a unanimous sentence of death. Unlike *Card*, Rivera's jury voted unanimously that the death sentence be imposed for his crime vitiating any value the *Card* opinion may have carried. In fact, considering how inapposite the procedural facts are, it seems the only reason for Rivera's attempted reliance on *Card* is that it has the outcome Rivera desires – a vacated death sentence for a crime that pre-dated his own. Rivera does not suggest a date that would be appropriate for retroactivity to apply, instead he seems only to put forward a case with no analytical value simply because that defendant was relieved of his death sentence for a crime committed prior to when Rivera committed his crime on January 30, 1986; a date, that ironically, seems quite arbitrary.

Fiore does not support Rivera's due process claim

Rivera also claims that *Hurst* must be applied retroactively under the Due Process Clause. Petitioner asserts that *Fiore v. White*, 531 U.S. 225 (2001), is the inexplicable vehicle to carry this claim. This assertion seems to be based largely on the fact that the word "retroactive" appears in the decision. Rivera argues that *Fiore* somehow requires this Court to once again, despite a long line of precedent to the contrary, undertake an analysis of whether a discrete decision is substantive or procedural. Despite the mention of retroactivity, even a cursory look at *Fiore* offers no support

to Rivera's petition. In fact, the basic tenant of *Fiore* was that Fiore "could not have been guilty of the crime for which he was convicted." *Fiore*, 227-228. The *Fiore* discussion continued in *Bunkely v. Florida*, 538 U.S. 835, 840 - 41 (2003), again with the determination that retroactivity was not the issue, instead focusing on whether Bunkley's conviction violated due process if the State could not prove each of the elements beyond a reasonable doubt. *Id.* at 840-841. *Fiore* is inapplicable here as that defendant was convicted of a crime for which the state could not prove an essential element. Conversely, Rivera was found guilty of first-degree murder after the state proved each of the required elements. *Hurst* merely established a procedural change in sentencing. Procedural changes are applicable only to pending prosecutions.

Contrary to Rivera's claim, *Hurst* remains a procedural change and not a substantive one. In *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004), this Court explained that rules allocating decision making authority between the judge and the jury are "prototypical procedural rules." There is no conflict between the Florida Supreme Court's decision in this case and this Court's jurisprudence. Nor is there any conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court. Rivera may not turn a state law matter into a federal constitutional issue merely by invoking the Due Process Clause.

The Florida Supreme Court's decision in this case does not conflict with this Court's decisions, nor does it violate the Due Process Clause.

Fiore does not supply a conflict with this Court's jurisprudence

Rivera, relying on a reference to retroactivity found in *Fiore*, insists that due process requires this Court to determine 1) if a new rule is substantive in nature, and 2) if it is, when each individual state is required to apply it retroactively. Not only is this an unworkable suggestion, it is an attempt to end-run the fact that this issue has already been decided; *Hurst* is neither

substantive, nor retroactive to cases final prior to *Ring*. Despite this, Rivera continues to insist there is a question as to whether *Hurst* is retroactive under federal law because it announced a new interpretation of a state statute. This Court specifically observed in a retroactivity case, that "*Ring*'s holding is properly classified as ***procedural***" because the Sixth Amendment's right to a jury trial "has nothing to do with the range of conduct a State may criminalize." *Summerlin*, 542 U.S. at 353 (emphasis added). The *Summerlin* Court, which held that *Ring* was not retroactive, explained that rules that allocate decision making authority between the judge and the jury "are prototypical ***procedural*** rules." *Id.* (emphasis added).

Furthermore, both the majority opinion and the concurring opinion in *Alleyne v. United States*, 570 U.S. 99 (2013), classified as procedural the right to a jury trial on the facts required to impose a minimum mandatory sentence. *Alleyne*, 570 U.S. at 116, n.5 ("the force of *stare decisis* is at its nadir in cases concerning ***procedural*** rules . . .") (emphasis added); *Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring) ("when ***procedural*** rules are at issue . . .") (emphasis added). This Court's opinion in *Alleyne*, like this Court's opinion in *Hurst v. Florida* itself, was explicitly based on *Apprendi v. New Jersey, 530 U.S. 466 (2000)*. Both *Alleyne* and *Hurst* are the offspring of *Apprendi*. The *Alleyne* majority and the *Alleyne* concurrence both characterized that *Apprendi*-based right as procedural. This Court views *Apprendi* and all its offspring, including *Hurst v. Florida*, as procedural, not substantive. It should be noted that even *Montgomery v. Louisana,* 136 S. Ct. 718 (2016) despite finding Montgomery qualified for retroactive relief, characterized the right as procedural. *Id.* at 723 (citing *Summerlin* and characterizing *Ring* as a procedural rule designed to enhance the accuracy of a conviction or sentence). *Montgomery* certainly did not overrule *Summerlin*. Indeed, the *Montgomery* Court relied upon *Summerlin* at points in its discussion. *Montgomery*, 136 S. Ct. at 723, 728.

Rivera attempts to further his argument that *Hurst* was a substantive rather than a procedural change, by focusing on the dicta in *Bunkley* which speaks to the requirement that the State prove each element of the crime beyond a reasonable doubt. Rivera supports his claim by continuing the untenable argument that *Hurst* changed the elements of capital murder. It did not. This argument is not based on current decisions, and instead focuses on an outdated statement which has since been clarified. "[T]he *Hurst* penalty phase findings are not elements of the capital felony of first-degree murder." *Foster v. State*, 258 So. 3d 1248 (Fla. 2018).

To further explain why *Hurst* is procedural, the same class of defendants committing the same range of conduct face the same punishment. *Hurst*, like *Ring*, merely "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." *Summerlin*, 542 U.S. at 353. Thus, *Hurst* is a procedural change and not retroactive under federal law.

CONCLUSION

There is no conflict between the Florida Supreme Court and this Court's decisions nor that of any other appellate court nor any state court of last resort regarding *Hurst* or retroactivity. The issue is a matter of state law that is procedural, not substantive and involves neither the Eighth nor the Fourteenth Amendments. There is no basis for granting certiorari review of this issue. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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