CASE NO. 18-9464

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES FINNEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

ASHLEY MOODY
Attorney General of Florida

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
Florida Bar No. 158541
**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
Carolyn.Snurkowski@myfloridalegal.com
Christina.Pacheco@myfloridalegal.com
E-Service: capapp@myfloridalegal.com

Counsel for Respondent

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Whether this Court should grant review of a decision of the Florida Supreme Court finding Petitioner's successive *Hurst v. State,* 202 So. 3d 40 (Fla. 2016), claim procedurally barred and also meritless because Florida law does not recognize the heightened crime of "capital first-degree murder," when the court's decision was based entirely on state law, and it does not conflict with any precedent of this Court or any precedent of any federal court of appeals or state supreme court?

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

CITATION TO OPINION BELOW

The opinion of the Florida Supreme Court is reported at *Finney v. State*, 260 So. 3d 231 (Fla. 2018).

JURISDICTION

The judgment of the Florida Supreme Court was entered on December 28, 2018, and the mandate issued January 17, 2019. Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257(a) and 2101(d). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent respectfully submits that there are no constitutional provisions involved in this case, as the Florida Supreme Court's opinion at issue is based solely on state law.

STATEMENT OF THE CASE AND FACTS

Petitioner, Charles W. Finney, was convicted of armed robbery, dealing in stolen property, and first-degree murder of Sandra Sutherland. *Finney v. State*, 660 So. 2d 674, 678-79 (Fla. 1995). Sutherland was found in the bedroom of her apartment bound, gagged, and stabbed to death. *Finney*, 660 So. 2d at 678. The apartment had been ransacked, and her missing VCR was pawned that day by Finney, who lived in the same apartment complex and claimed to have been home sick all day. *Id.* Finney's fingerprints were on the pawn ticket and the VCR he pawned, as well as a lid for face cream and a piece of paper, which were on the victim's nightstand next to her body. *Id.*

Following the penalty phase of trial, the jury recommended death by a vote of nine to three. In sentencing Finney to death, the trial court found the following aggravating circumstances: (1) Finney had previously been convicted of a violent felony; (2) the murder was committed for pecuniary gain; and (3) the murder was especially heinous, atrocious or cruel. *Id.* at 679. The Florida Supreme Court affirmed Finney's convictions and sentences. *Finney*, 660 So. 2d at 685. Finney's death sentence became final when this Court denied certiorari review of his case January 22, 1996. *Finney v. Florida*, 516 U.S. 1096 (1996).

His collateral challenges have been universally rejected. *See Finney v. State*, 831 So. 2d 651 (Fla. 2002) (affirming denial of initial postconviction motion and denying state habeas petition); *Finney v. State*, 907 So. 2d 1170 (Fla. 2005) (affirming denial of successive postconviction motion); *Finney v. McDonough*, 2006 WL 2024456 (M.D. Fla. July 17, 2006) (denying federal petition for writ of habeas corpus); *Finney v. McDonough*, 551 U.S. 1118 (2007) (denying certiorari review of Eleventh Circuit order denying certificate of appealability from denial of habeas petition); *Finney v. State*, 18 So. 3d 527 (Fla. 2009) (affirming denial of second successive postconviction motion); *Finney v. State*, 91 So. 3d 781 (Fla. 2012) (affirming denial of third successive postconviction motion); *Finney v. State*, 192 So. 3d 36 (Fla. 2015) (affirming denial of fourth successive postconviction motion); *Finney v. State*, 235 So. 3d 279 (Fla.), *cert. denied*, 139 S. Ct. 197 (2018) (affirming denial of fifth successive postconviction motion).

In Finney's fifth successive motion, he sought relief pursuant to this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Florida Supreme Court's decision in *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016). The Florida Supreme Court found that Finney was not entitled to retroactive relief of its *Hurst* decision. *Finney v. State*, 235 So. 3d 279, 280 (Fla. 2018).

This Court denied certiorari review. *Finney v. Florida*, 139 S. Ct. 197 (2018).

The instant case involves Finney's sixth successive motion for postconviction relief. In this motion, Finney also sought relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). The Florida Supreme Court affirmed the circuit court's denial of relief. *Finney v. State*, 260 So. 3d 231 (Fla. 2018). The court specifically found that Finney's claim was procedurally barred, given the court's prior denial of Finney's postconviction appeal raising similar claims. *Finney*, 260 So. 3d at 231.

Finney 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 correctly determined, as a matter of state law, that Petitioner's claim is procedurally barred, and that Petitioner is not entitled to relief pursuant to *Hurst v. Florida* and *Hurst v. State*.

Petitioner Finney seeks certiorari review of the Florida Supreme Court's opinion finding that Finney is not entitled to *Hurst* relief because his claim is procedurally barred and meritless. Finney claims that his death sentence is unconstitutional because the jury did not find the elements of "capital first-degree murder." He specifically alleges that the

Florida Supreme Court's *Hurst* decision along with the revised state statute codifying *Hurst*, created "a higher degree of murder," and that his sentence violates the Due Process Clause and the Eighth Amendment because the jury did not find him guilty of the "additional elements" of "capital first-degree murder."

This Court should deny certiorari review because the Florida Supreme Court's opinion is grounded entirely on state law. The Florida Supreme Court determined that relief was not warranted due to a procedural bar based on state law, and the court alternatively rejected Finney's claim because Florida law does not recognize a separate crime of "capital first-degree murder." The Florida Supreme Court's decision interpreting its own previous holding in *Hurst* as well as the statute codifying *Hurst* does not involve any valid Due Process Clause or Eighth Amendment claim. Instead, this is solely a state-law issue.

The Florida Supreme Court's denial of relief is based on adequate and independent state law grounds, and this case does not present a fairly debatable or important unsettled question of constitutional law for this Court's review. *See* Sup. Ct. Rule 10 and *Rockford Life Insurance Co. v. Illinois Department of Revenue*, 482 U.S. 182, 184, n.3 (1987). Finney has not provided any "compelling" reason for this Court to review his case. Accordingly, certiorari should be denied.

Respondent further notes that this Court has previously denied certiorari review of the Florida Supreme Court's opinion rejecting retroactive application of *Hurst* to Finney's death sentence that was final before *Ring v. Arizona*, 536 U.S. 584 (2002). *Finney v. State*, 235 So. 3d 279 (Fla.), *cert. denied*, 139 S. Ct. 197 (2018). This Court has also repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of *Hurst v. State*. *See, e.g., Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112 (Fla.), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505 (Fla.), *cert. denied*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548 (Fla.), *cert. denied*, 138 S. Ct. 1164 (2018); *Cole v. State*, 234 So. 3d 644 (Fla.), *cert. denied*, 138 S. Ct. 2657 (2018); *Kaczmar v. State*, 228 So. 3d 1 (Fla. 2017), *cert. denied*, 138 S. Ct. 1973 (2018); *Zack v. State*, 228 So. 3d 41 (Fla. 2017), *cert. denied*, 138 S. Ct. 2653 (2018); *Jones v. State*, 234 So. 3d 545 (Fla.), *cert. denied*, 138 S. Ct. 2686 (2018); and *Jennings v. State*, 237 So. 3d 909 (Fla.), *cert. denied*, 139 S. Ct. 207 (2018).

Lastly, this Court has denied certiorari review of another case in which the defendant similarly raised a "capital first-degree murder" argument. *Zakrzweski v. State*, 254 So. 3d 324

(2018), *cert. denied*, 2019 WL 2078132, at *1 (May 13, 2019). Finney's new claim in his petition is just another variation of his previous argument that he is entitled to *Hurst* relief. For all these reasons, this Court should not exercise certiorari review.

The Florida Supreme Court's Opinion is Based on Adequate and Independent State Law

Under Florida law, successive motions for postconviction relief are subject to well-established limitations. *See, e.g.* Fla. R. Crim. P. 3.851(d)(2). "Claims raised and rejected in prior postconviction proceedings are procedurally barred from being relitigated in a successive motion." *Hendrix v. State*, 136 So. 3d 1122, 1125 (Fla. 2014).

The current case involves Finney's *sixth* successive motion for postconviction relief. Notably, in his *fifth* successive motion, he claimed entitlement to relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *Perry v. State*, 210 So. 3d 630 (Fla. 2016), *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and the enactment of chapter 2016-13, Laws of Florida. The state postconviction court denied Finney's fifth successive motion, and the Florida Supreme Court affirmed the denial of relief. *Finney*, 235 So. 3d 279, 280 (Fla. 2018). The Florida Supreme Court specifically found that Finney's sentence of death became final in 1996, and therefore, *Hurst* does

not apply retroactively to his sentence. *Id.*

Finney then filed his sixth successive motion requesting relief pursuant to *Hurst v. State*, *Mosley v. State*, and chapter 2017-1, Laws of Florida. The postconviction court denied relief, specifically finding that Finney was presenting yet another *Hurst* claim despite his assertion that it was not a *Hurst* claim. The Florida Supreme Court affirmed the denial of relief and also found that Finney's motion sought relief pursuant to *Hurst v. Florida* and *Hurst v. State*. Given its previous denial of *Hurst* relief, the Florida Supreme Court concluded that its "prior denial of Finney's postconviction appeal raising similar claims is a procedural bar to the claim at issue in this appeal[.]" *Finney*, 260 So. 3d at 231. Thus, the Florida Supreme Court found Finney's claim procedurally barred, and the procedural bar was based on state law. 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).

This Court has long recognized that jurisdiction does not lie to review decisions from state courts that rest on adequate and independent state law grounds. *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *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"). Florida's procedural bar to re-litigation of the same or similar claims in a successive state postconviction motion is a matter of state law. This fact alone militates against the granting of certiorari in this case.

Likewise, the Florida Supreme Court's rejection of Finney's "capital first-degree murder" argument is also a ruling based on state law. Even Finney concedes that this is a state-law issue, as his petition alleges the claim was based on "the interpretation/clarification of Florida's substantive criminal law." Petition at 19. The crux of Finney's argument is based on his own interpretation of Florida law following the Florida Supreme Court's *Hurst* opinion. His interpretation, however, has been rejected by the Florida Supreme Court. *See Finney*, 260 So. 3d at 231; *see also Foster v. State*, 258 So. 3d 1248, 1251-52 (Fla. 2018) (explaining why the defendant's "elements of 'capital first-degree murder'" argument derived from *Hurst* and the legislation implementing *Hurst* "has no merit").

In order for this Court to review Finney's petition, this Court would have to interpret state law that involves no federal question. It would be an improper exercise of this Court's jurisdiction to review a non-federal ground, based solely on state law, that the Florida Supreme Court relied upon in rendering its 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). As this Court has explained, "[w]hen this Court reviews a state court decision on direct review pursuant to 28 U.S.C. § 1257, it is reviewing the *judgment*; if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). Given that the opinion is based on state procedural grounds as well as the state court's interpretation of its own state-court ruling in *Hurst*, this Court should not grant certiorari review.

Further, to the extent that Finney is again asking for *Hurst* to be retroactively applied to his death sentence that has been in effect since 1996, the Florida Supreme Court's retroactivity ruling is also a matter of state law. This Court has held that a state court's retroactivity determinations are a matter of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264 (2008). State courts may fashion their own retroactivity tests, including partial retroactivity tests. A state supreme court is welcome to employ a partial retroactivity approach without violating the federal constitution under *Danforth*.

Finally, aside from the questions of retroactivity and procedural bar, certiorari would be inappropriate in this case

because there is no underlying federal constitutional error. *Hurst v. Florida* did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment.[1] Finney became eligible for a death sentence by virtue of his prior violent felony convictions. *See Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)); *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").

Because the Florida Supreme Court's judgment rests on non-federal grounds which are an adequate basis for the ruling independent of any federal grounds, this Court's "jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Michigan v. Long*, 463 U.S.

---

[1]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).

1032, 1038, 1041-42 (1983).

There is No Crime of "Capital First-Degree Murder" in the State of Florida.

Finney's contention that Florida law has somehow transformed the additional jury findings required by *Hurst* into elements of the heightened crime of "capital first-degree murder" is patently false. The Florida Supreme Court has held that the additional jury findings are **not** elements. *Foster,* 258 So. 3d at 1251-53 (specifically holding the additional jury findings required "are not elements of the capital felony of first-degree murder"). Rather than these findings being elements of a crime, they are merely findings that a jury must make "(1) before a court can impose the death penalty for first-degree murder, and (2) only after a conviction or adjudication of guilty for first-degree murder has occurred." *Id.*

Florida's death penalty statute further disproves Finney's "capital first-degree murder" argument. Florida's 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). The statute additionally 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). However, 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). A jury's finding of "at least one aggravating factor" makes the defendant eligible for death. § 921.141(2)(a), Fla. Stat. (2018).

There is no crime of capital first-degree murder in Florida. *Foster*, 258 So. 3d at 1251. Rather, first-degree murder is a capital felony, a crime in which a sentence of death is a possible, but not certain, result. *Foster*, 258 So. 3d at 1252. Florida requires that the elements of first-degree murder are unanimously found by the jury, and Finney's jury did unanmiously find all of the elements to convict him of the capital felony of first-degree murder. This non-federal issue involves the mere interpretation of state law, and Finney has failed to present any federal claim warranting this Court's review.

Finney's argument that the Due Process Clause and the Eighth Amendment are implicated is based solely on his mischaractizeration that the additional findings required by *Hurst* are elements. Elements are facts proven by the prosecution beyond a reasonable doubt that increase or aggravate the penalty. Black's Law Dictionary (10th ed. 2014) (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). 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 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").

Moreover, mitigation is proven by the defense, not the prosecution, and mitigation requires a much lower standard of proof. *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). On top of that, mitigating circumstances, if found, decrease the penalty, rather than increase it. Therefore, mitigating circumstances could not possibly be considered elements. It is only facts that increase or aggravate a sentence that are elements that must be found by the jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99 (2013). Finney has not shown any Eighth Amendment or due process violation. In fact, his petition has not even raised a federal issue for this Court to review.

The Florida Supreme Court denied relief based on a state procedural bar, the court's partial retroactivity analysis, which is a matter of state law, and the state court's interpretation of its *Hurst* opinion and the state's death-penalty statute. The opinion involves no federal question warranting this Court's review, nor does the court's opinion conflict with this Court's decisions or the decisions of any other appellate court. Therefore, there is no basis for granting certiorari review.

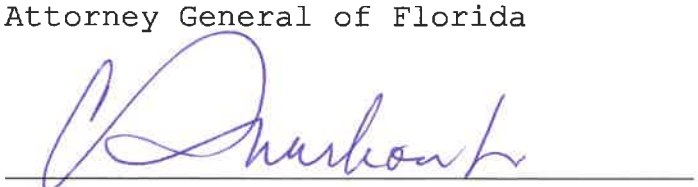
Accordingly, this Court should deny Finney's petition.

CONCLUSION

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

Respectfully submitted,

ASHLEY MOODY
Attorney General of Florida



CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
**Counsel of Record*

CHRISTINA Z. PACHECO
Assistant Attorney General
Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Carolyn.Snurkowski@myfloridalegal.com
Christina.Pacheco@myfloridalegal.com
E-Service: capapp@myfloridalegal.com
Counsel for Respondent