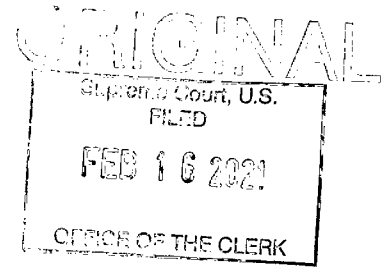


No. 20-7347



IN THE
SUPREME COURT OF THE UNITED STATES

WARREN TARVER
Petitioner

VS.

STATE OF FLORIDA
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

WHETHER IT IS A VIOLATION OF DUE PROCESS OF LAW TO DETAIN A PERSON UNDER THE AUTHORITY OF A STATUTE THAT CLASSIFIES THE OFFENSE A CAPITAL FELONY WHERE THE DEATH PENALTY HAS BEEN FOUND BY THE UNITED STATES SUPREME COURT TO BE UNCONSTITUTIONAL AS PUNISHMENT FOR THE OFFENSE?

WHETHER THE FLORIDA LEGISLATURE HAS THE POWER TO STATUTORILY CLASSIFY A CRIMINAL OFFENSE AS A CAPITAL FELONY WHERE DOING SO CONFLICTS WITH THE CONSTITUTIONAL STANDARDS SET BY THE UNITED STATES SUPREME COURT?

WHETHER THE UNITED STATES SUPREME COURT MAY REQUIRE STATE COURTS TO FOLLOW STATE LAWS UNDER FEDERALISM AS A MATTER OF DUE PROCESS?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner, Warren Tarver, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits of this case is unpublished but may be viewed in the Appendix at Appendix A (PCA decision affirming order contained in Appendix B).

STATEMENT OF THE BASIS FOR JURISDICTION

The case now before this Court is concerning the question of whether it is a violation of due process of law for a legislature to classify a criminal offense a capital felony, prescribe capital punishment for the offense and detain a person under this authority where the United States Supreme Court has previously found that a capital offense is one that is punishable by death and where it subsequently found that it is unconstitutional to punish the offense in question by death. This claim was first decided in the Fifteenth Judicial Circuit Court, Palm Beach County, Florida on November 25, 2019. A timely motion for rehearing was submitted on December 5, 2019, and was denied on December 9, 2019.

The court of last resort in the state of Florida is the Florida Supreme Court. Petitioner presented the instant claim in the Florida Supreme Court on September 8, 2020, in a petition

for writ of habeas corpus. However, on October 28, 2020, the court denied the petition as successive pursuant to *Jenkins v Wainwright*, 322 So.2d 477,478(Fla. 1975) (declaring that once a petitioner seeks relief in a particular court by means of a petition for extraordinary writ, he has picked his forum and is not entitled to a second or third opportunity for the same relief by the same writ in a different court), also stipulating that no motion for rehearing would be entertained by the court, notwithstanding the most current findings held in *State v McBride*, 848 So.2d 287,291(Fla. 2003), which found that to prevent a manifest injustice and a denial of due process, relief may be afforded even to a litigant raising a successive claim, and also *Baker v State*, 878 So.2d 1236,1246(Fla. 2004) ([t]his Court will, of course, remain alert to claims of manifest injustice).

Wherefore, pursuant to 28 U.S.C. §1251(b)(2), §1257(a), ORDER: SUPREME COURT OF THE UNITED STATES, 2020 U.S. LEXIS 1643, and Supreme Court Rule 13.3, this Court has jurisdiction to review this pleading.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV, Section 1

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

FEDERAL STATUTES

28 U.S.C. §1251

- (b) The Supreme Court shall have original but not exclusive jurisdiction of:
 - (2) All controversies between the United States and a State.

28 U.S.C. §1257

- (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATE STATUTES

§79.01 Application and writ. -- When any person detained in custody, whether charged with a criminal offense or not, applies to the Supreme Court or any justice thereof, or to any circuit judge for a writ of habeas corpus and shows by affidavit or evidence probable cause to believe that he or she is detained without lawful authority, the court, justice, or judge to whom such application is made shall grant the writ forthwith, against the person in whose custody the applicant is detained and returnable immediately before any of the courts, justices, or judges as the writ directs.

§79.09 Filing of papers. -- Before a circuit judge, the petition and the papers shall be filed with the clerk of the circuit court of the county in which the prisoner is detained. Before the other courts, justices or judges, the papers shall be filed with the clerk of the court on which the justice or judge sits.

§775.082 (1), Florida Statutes (1993):

A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and:

- (a) If convicted of murder in the first degree or of a capital felony under s. 790.161, shall be ineligible for parole, or
- (b) If convicted of any other capital felony, shall be required to serve no less than 25 years before becoming eligible for parole.

§794.011(2) (a), Florida Statutes (1993):

A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony, punishable as provided in ss. 775.082 and 921.141.

STATEMENT OF THE CASE

On August 8, 1995, Petitioner, Warren Tarver was charged by information in the Seventeenth Judicial Circuit Court, Broward County, Florida, with five counts of sexual battery pursuant to §794.011(2)(a), Florida Statutes, which is classified a capital felony offense. See Appendix D, Ex-II. On December 4, 1997, Tarver was convicted at trial by a six person jury and thereafter sentenced on January 9, 1998, to life in prison pursuant to §775.082(1), Florida Statutes, which is the capital felony sentencing statute in Florida. See Appendix D, Ex-III.

On November 14, 2019, Tarver submitted a petition for writ of habeas corpus, pursuant to §79.01 and §79.09, Florida Statutes, in the Fifteenth Judicial Circuit Court, Palm Beach County, Florida, claiming that he is being detained under the authority of a constitutionally defective statute where the classification and prescribed punishment for the offense is invalid. See Appendix D. On November 25, 2019, the court denied the petition finding the felony classification of the offense to be valid. See Appendix B, page 2.

On December 5, 2019, Tarver filed a timely motion for rehearing pointing out that the defining element for classification of the offense is nonexistent and that, as a result, the statute may not serve as a basis for administering the prescribed punishment. See Appendix E. On December 13, 2019, the court denied the motion for rehearing finding that "the constitutional availability of the death penalty does not determine whether or not a crime is classified as a capital felony" and thereby justifies the classification of the offense. See Appendix C, page 2.

After filing a timely notice of appeal, Tarver submitted his appellate brief in the Fourth District Court of Appeal, State of Florida, on February 20, 2020. See Appendix F. On June 25, 2020, a PCA decision was rendered by the court. See Appendix A.

On July 6, 2020, Tarver submitted a timely motion for rehearing seeking clarification where it appeared that the court may have overlooked a point of law relevant to the gist of the claim where a PCA decision did not address this point of law affirmatively. See Appendix G. On August 4, 2020, the Fourth District Court of Appeal denied the motion for rehearing without comment or expressed reasoning for the issuance of its PCA decision. See Appendix A.

Because PCA decisions may not be brought before the Florida Supreme Court for review, on September 8, 2020, Petitioner presented the claim before the Florida Supreme Court (the court of last resort in Florida) in a successive petition for writ of habeas corpus to be reviewed. This filing was predicted upon the findings held in *Baker v State*, 878 So.2d 1236, 1246(Fla. 2004) ([t]his Court will, of course, remain alert to claims of manifest injustice) and *State v McBride*, 848 So.2d 287,291(Fla. 20003) (to prevent a manifest injustice and a denial of due process, relief may be afforded even to a litigant raising a successive claim). However, on October 28, 2020, the petition was denied based on a finding previously held in *Jenkins v. Wainwright*, 322 So.2d 477,478(Fla. 1975), "declaring that once a petitioner seeks relief in a particular court by means of a petition for extraordinary writ, he has picked his forum and is not entitled to a second or third opportunity for the same relief by the same writ in a different court."

Now, Tarver respectfully presents the matter before this Court for review.

REASONS FOR GRANTING THE PETITION

This pro se issue, which Tarver respectfully brings before this Honorable Court, is predicated upon a finding held by this Court in *Coker v Georgia*, 433 U.S. 584,(1977), cited in *Buford v State*, 403 So.2d 943,950-951(Fla. 1981). In *Coker*, as cited in *Buford*, it was found that it is unconstitutional to impose the penalty of death upon a person convicted of sexual battery. However, it was not definitively found in *Coker* whether sexual battery may retain the pre- existing capital felony classification of the offense. As a result, the Florida Legislature did not amend the pre-existing "capital felony" classification of §794.011(2)(a) in lieu of the court's finding held in *Buford*.

Here, Tarver submits that he should be granted relief because the offense does not meet the necessary requirement to be classified a capital felony and therefore may not serve as a basis for charging, trying, or imposing sentence upon the offense, which is a violation of his right to due process of law. In *Fitzpatrick v United States*, 178 U.S. 304,307, 44 L.Ed. 1078, 1080(1900), and *Rakes v United States*, 212 U.S. 55, 57, 53 L.Ed. 401,402(1909), this Court found that the possibility of punishment by death is the defining element which classifies a criminal offense as a capital crime. "The test is not the punishment which is imposed, but that which may be imposed under the statute." Since this Court and the Florida Supreme Court has found that sexual battery (§794.011(2)(a)) is not punishable by death, it stands to reason that the offense cannot be classified as a capital felony. See also *Mills v Moore*, 786 So.2d 532,538(Fla.2001). "Therefore, a 'capital felony' is by definition a felony that may be punished by death."

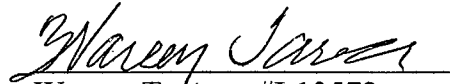
In addition, there are prejudicial factors that also exist as reasons for granting relief. For one, though the offense is classified a capital felony, the courts in Florida will not charge §794.011(2)(a) by indictment before a Grand Jury and will not try the offense by a twelve person jury, which is the required procedure in Florida for "capital" cases. Notwithstanding this practice, sentencing for 794.011(2)(a) is imposed under the authority of Florida's "capital" felony sentencing scheme, which prescribes life in prison as an alternative to the prescribed punishment of death and leaves no discretion with the trial court on how it may impose sentence. If the offense was properly classified, the trial court would be empowered to consider mitigating factors during sentencing and impose a sentence which range from a term of years not to exceed 40 years in prison or impose the maximum penalty of life in prison.

Finally, this issue should have been viewed by the Florida Supreme Court, which ultimately denied the claim citing *Jenkins v Wainwright*, 332 So.2d 477(Fla. 1975), finding that the relief in a particular court by means of a petition for extraordinary writ is not entitled to the same relief by the same writ in a different court. Based upon the more current findings held in *State v McBride*, 884 So.2d 287,291(Fla. 2003) and *Baker v State*, 878 So.2d 1236,1246(Fla. 2004), such a filing could be reviewed by the Florida Supreme Court as the court of last resort to prevent a manifest injustice. As such, Petitioner questions whether this Court may require the Florida Supreme Court to comply with the findings held in *Baker* and *McBride*.

CONCLUSION

Wherefore, Tarver respectfully prays that his petition will reach review by a panel of this Court for adequate resolution.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Warren Tarver", is written over a horizontal line.

Warren Tarver - #L13572

Pro Se

February 10, 2021