CAPITAL CASE
No. 21-8042

In the Supreme Court of the United States

ETHERIA VERDELL JACKSON,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ASHLEY MOODY
Attorney General of Florida

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
Counsel of Record

CHARMAINE M. MILLSAPS
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
CAPITAL APPEALS
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3584
capapp@myfloridalegal.com

CAPITAL CASE

QUESTIONS PRESENTED

Whether this Court should grant review of a decision of the Florida Supreme Court which held that *Hurst v. Florida*, 577 U.S. 92 (2016), and *State v. Poole*, 297 So.3d 487 (Fla. 2020), *cert. denied*, *Poole v. Florida*, 141 S.Ct. 1051 (2021), did not apply retroactively to this case, as a matter of state law?

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OPINION BELOW

The Florida Supreme Court's opinion is reported at *Jackson v. State*, 335 So.3d 88 (Fla. 2022) (SC21-754).

JURISDICTION

On January 20, 2022, the Florida Supreme Court affirmed the trial court's denial of the successive postconviction motion. On February 3, 2022, Jackson filed a motion for rehearing in the Florida Supreme Court. On March 1, 2022, the Florida Supreme Court denied the rehearing. On May 31, 2022, Jackson filed a petition for writ of

certiorari in this Court. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d). Jurisdiction exists pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

The Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. VIII.

The Fourteenth Amendment of the United States Constitution, section one, which provides:

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

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Jackson was convicted of first-degree murder and sentenced to death. *Jackson v. State*, 530 So. 2d 269, 271 (Fla. 1988). Jackson murdered the owner of a store who had sold a washing machine to his girlfriend on an installment plan. *Jackson v. State*, 530 So.2d 269, 270 (Fla.1988). When the store owner came to her home to collect the monthly payment with a large sum of money to cash his customer's government checks, Jackson put a knife to the victim's neck and ordered his girlfriend to get the victim's keys and wallet. *Id.* at 270. Jackson choked the victim with a belt until he was unconscious. After the victim regained consciousness, Jackson beat him in the face and stabbed him seven times in the chest "causing massive internal bleeding." *Id.* at 270-71. They put the victim's body in the victim's car and Jackson drove the victim's car to another location and abandoned the car with the victim's body in it. *Id.* at 270. Her two children were home at the time of the robbery and murder. She reported the murder to the police a few days later and testified against him.

Jackson's conviction and death sentence became final in 1989, when this Court denied the petition from the direct appeal. *Jackson v. Florida*, 488 U.S. 1050 (1989).

Decades later, on January 25, 2021, Jackson, represented by Capital Collateral Regional Counsel - Middle (CCRC-M), filed a successive postconviction motion in the state trial court. The successive postconviction motion raised four claims based on *Hurst v. Florida*, 577 U.S. 92 (2016), and *State v. Poole*, 297 So.3d 487 (Fla. 2020), *cert. denied*, *Poole v. Florida*, 141 S.Ct. 1051 (2021). On February 10, 2021, the State filed an answer to the successive postconviction motion. On March 26, 2021, the state trial court summarily denied the successive postconviction motion as untimely. The state trial court also denied the motion on non-retroactivity grounds, concluding that *State v. Poole* did not apply retroactively to this case. The state postconviction court relied

on state retroactivity cases, such as *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), and *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017).

Jackson appealed the denial of his successive motion to the Florida Supreme Court. The Florida Supreme Court affirmed the trial court's summary denial of the successive postconviction motion. *Jackson v. State*, 335 So.3d 88 (Fla. 2022) (SC21-754). The Florida Supreme Court reasoned that *State v. Poole* did not apply retroactively to this case under state law citing *Randolph v. State*, 320 So.3d 629, 631 (Fla. 2021), *cert. denied*, *Randolph v. Florida*, 142 S.Ct. 905 (2022), and *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016)).

Jackson, represented by CCRC-M, then filed a petition for writ of certiorari in this Court from the Florida Supreme Court's decision. This is the State's brief in opposition.

REASON FOR DENYING THE WRIT

ISSUE I

Whether this Court should grant review of a decision of the Florida Supreme Court which held that *Hurst v. Florida*, 577 U.S. 92 (2016), and *State v. Poole*, 297 So.3d 487 (Fla. 2020), *cert. denied*, *Poole v. Florida*, 141 S.Ct. 1051 (2021), did not apply retroactively to this case under state law?

Petitioner Jackson seeks review of the Florida Supreme Court's decision that *Hurst v. Florida*, 577 U.S. 92 (2016), and *State v. Poole*, 297 So.3d 487 (Fla. 2020), *cert. denied, Poole v. Florida*, 141 S.Ct. 1051 (2021), did not apply retroactively to this case, as a matter of state law. This Court does not review state law determinations of retroactivity under *Danforth v. Minnesota*, 552 U.S. 264 (2008). Furthermore, there is no conflict between this Court's decision in *McKinney v. Arizona*, 140 S.Ct. 702 (2020), which held *Hurst v. Florida* was not retroactive and the Florida Supreme Court's decision that *Hurst v. Florida* and *State v. Poole* do not apply retroactively. Once a court determines that a case does not apply retroactively that ends the analysis and renders all other related issues the functional equivalent of moot. The entire petition should be denied on the basis of non-retroactivity alone. Alternatively, on the merits, *Hurst v. Florida* does not apply to this case under *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Jackson entered a guilty plea to the prior conviction used as an aggravating factor. Neither *Hurst v. Florida* nor *State v. Poole* apply to this case. All the claims raised in the petition fail both on non-retroactivity grounds and on the merits. This Court should deny review of the petition.

The Florida Supreme Court's decision in this case

On appeal to the Florida Supreme Court, Jackson argued that *State v. Poole*, 297 So.3d 487 (Fla. 2020), which held a capital jury "must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt," should be applied

retroactively to him. *Jackson v. State*, 335 So.3d 88, 89 (Fla. 2022). The Florida Supreme Court acknowledged that the jury's recommendation in Jackson's case was not unanimous but noted that his "death sentence became final in 1989." *Id.* at 89 (citing *Jackson v. Florida*, 488 U.S. 1050 (1989)). The Florida Supreme Court then explained that because Jackson's death sentence became final prior to the decision in *Ring v. Arizona,* 536 U.S. 584 (2002), *State v. Poole* did not apply retroactively to him. *Id.* at 89 (citing *Randolph v. State*, 320 So.3d 629, 631 (Fla. 2021), *cert. denied*, *Randolph v. Florida*, 142 S.Ct. 905 (2022) (No. 21-6387),[1] and *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016)).

In a footnote, the Florida Supreme Court also found the *State v. Poole* claim to be procedurally barred because he "raised essentially the same arguments" in the 2021 successive motion that he had raised in the 2017 successive motion. *Jackson*, 335 So.3d at 89, n.2. Additionally, the Florida Supreme Court rejected both the Eighth Amendment and Fourteenth Amendment due process claims. *Id.* at 89. The Florida Supreme Court affirmed the state postconviction court's summary denial of the successive postconviction motion. *Id.* at 90.

Threshold issue of retroactivity

The retroactivity of *Hurst v. Florida* is a threshold issue. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (stating that *Teague v. Lane*, 489 U.S. 288 (1989), is a threshold question in every habeas case); *Horn v. Banks*, 536 U.S. 266, 272 (2002) (explaining that a habeas court must conduct a threshold retroactivity analysis when the issue is properly raised by the state). It is, however, an issue that this Court has already addressed. *Hurst v. Florida* is not retroactive under this Court's existing precedent.

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[1] The petition in *Randolph v. Florida* raised somewhat similar *Hurst/State v. Poole* claims to the claims being raised in this petition.

McKinney v. Arizona, 140 S.Ct. 702, 708 (2020) ("*Ring* and *Hurst* do not apply retroactively on collateral review," citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004)). Jackson's death sentence became final in 1989, many years before *Hurst v. Florida* was decided in 2016. *Jackson v. State*, 237 So.3d 905, 906 (Fla. 2018) (noting his sentence become final in 1989, citing *Jackson v. Florida*, 488 U.S. 1050 (1989)). While opposing counsel ignores the threshold *Teague* issue in the petition, this Court will not ignore the primary place of retroactivity under its precedent.

Opposing counsel insists that "federal law" requires that *State v. Poole* be applied retroactively to him, despite this Court's holding that *Hurst v. Florida* is not retroactive in *McKinney*. Pet at 10. But, as the Eleventh Circuit has explained, while states are free to fashion their own retroactivity tests as a matter of state law, those tests do not "displace *Teague* on the federal stage." *Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1332 (11th Cir. 2019). There is no federal law other than *Teague*. As the saying goes, petitioner cannot get there from here. There is no federal principle that requires the federal courts to make the state apply a case retroactively that they themselves would not apply retroactively.

Opposing counsel incorrectly characterizes *Hurst v. Florida* and *State v. Poole* as substantive rules, despite this Court's characterization of the rule as procedural only. Pet. at 10. This Court has stated that the rule is "properly classified as procedural," explaining that rules that allocate decision making "are prototypical procedural rules." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (holding *Ring v. Arizona* was not retroactive under *Teague*); *McKinney*, 140 S.Ct. at 708 ("*Ring* and *Hurst* do not apply retroactively on collateral review," citing *Summerlin*, 542 U.S. at 358).

Opposing counsel relies on *Montgomery v. Louisiana*, 577 U.S. 190 (2016). But *McKinney* trumps *Montgomery* because it is directly on point and is a more recent case. Furthermore, this Court disapproved of *Montgomery*'s blurring of the line between

substantive and procedural rules in *Jones v. Mississippi*, 141 S.Ct. 1307 (2021). The *Jones* Court noted that, despite the rule at issue, in fact, being procedural, the *Montgomery* Court had held that the rule was substantive for retroactivity purposes. *Jones*, 141 S.Ct. at 1317. In a footnote, the *Jones* Court explained that *Montgomery* was "in tension" with the Court's other retroactivity precedent and it is those precedents, "not *Montgomery*," that "must" guide the determination of whether a rule is substantive or procedural . *Jones*, 141 S.Ct. at 1317 n.4. Regardless of a state's test for retroactivity, the federal test for retroactivity remains *Teague* and under *Teague*, neither *Hurst v. Florida* nor *State v. Poole* are retroactive.

Retroactivity is not just the mandatory beginning of the analysis, it is often the end of the analysis as well. If a court determines that a case is not retroactive, that determination ends all analysis. *Beard v. Banks*, 542 U.S. 406, 410 n.2 (2004) (refusing to address the merits once the determination of non-retroactivity was made); *Knight*, 936 F.3d at 1333 (stating that "if a constitutional claim is *Teague*-barred, we do not reach its merits" citing *Banks*, 542 U.S. at 410 n.2). Recently, the Eleventh Circuit stated they were "unable" to reach the issue of Alabama's use of a purely advisory jury in a capital case because *Hurst v. Florida* does not apply retroactively under *Teague*. *Miller v. Comm'r, Ala. Dep't of Corr.*, 826 Fed. Appx. 743, 749 (11th Cir. 2020) (citing *Knight* and *McKinney*), *cert. denied*, *Miller v. Dunn*, 142 S.Ct. 123 (2021) (No. 20-7592).[2] *McKinney* both begins and ends the analysis in this case.

Once a court determines that the new case does not apply retroactively, that determination renders all other associated issues the functional equivalent of moot. Because *Hurst v. Florida* does not apply to this case, none of the issues being raised in the petition, which all relate to *Hurst v. Florida*, are properly before this Court.

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[2] The petition in *Miller v. Dunn* raised somewhat similar *Hurst/State v. Poole* claims to the claims that are being raised in this petition.

Petitioner raises a Sixth Amendment unanimity issue, an Eighth Amendment lack-of-jury-finding issue and a due process elements issue but none of those issues are reachable in light of the non-retroactivity determination. This Court does not grant review of issues that will have no impact on the outcome of the case. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (stating that certiorari should not be granted when the issue is only academic); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (stating this Court's power is the power "to correct wrong judgments, not to revise opinions" and explaining, if the same judgment would be rendered by the state court after we corrected its views of federal laws, that review would be nothing more than an advisory opinion). The entire petition should be denied on the basis of non-retroactivity alone.

Matter of state law

Because the new rule is not retroactive under *Teague*, all that remains is a matter of state law. In this case, the Florida Supreme Court cited two state law cases in support of its rejection of the claims on retroactivity grounds. *Jackson*, 335 So.3d at 89 (citing *Randolph v. State*, 320 So.3d 629, 631 (Fla. 2021), *cert. denied*, *Randolph v. Florida*, 142 S.Ct. 905 (2022) (No. 21-6387), and *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016)). The Florida Supreme Court denied the claim, based, in large part, on a determination of non-retroactivity, which was based on the state law test for retroactivity of *Witt v. State*, 387 So.2d 922 (Fla. 1980). In *Asay v. State*, 210 So.3d 1,15-22 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 138 S.Ct. 41 (2017), the Florida Supreme Court held that *Hurst v. State*, 202 So.3d 40 (Fla. 2016), would not be retroactively applied to capital cases that were final before *Ring v. Arizona* was decided in 2002. The Florida Supreme Court, in *Asay*, explicitly stated that, despite the federal courts' use of *Teague* to determine retroactivity, the Florida Supreme 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.

After this Court's recent decision in *Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021), abolishing the watershed procedural exception to *Teague*, any state court's decision regarding the retroactivity of a new procedural rule is necessarily solely a matter of state law which is unreviewable under *Danforth v. Minnesota*, 552 U.S. 264 (2008). There is no federal question regarding retroactivity because the Florida Supreme Court decided that *State v. Poole* did not apply retroactively as a matter of state retroactivity law. And this Court does not review matters of state law. *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (noting that this Court lacks jurisdiction to review a state court judgment if that judgment rests on state law citing *Harris v. Reed*, 489 U.S. 255, 260 (1989)). Petitioner ultimately is seeking review of a state supreme court's determination of non-retroactivity that is purely a matter of state law.

Improper relitigation

Petitioner has improperly engaged in piecemeal litigation of his *Hurst v. Florida* claim. In 2017, Jackson filed a successive postconviction motion raising a *Hurst* claim in a Florida trial court, which the state trial court denied. The Florida Supreme Court affirmed the denial of *Hurst* relief on non-retroactivity grounds. *Jackson v. State*, 237 So.3d 905, 906 (Fla. 2018) (noting Jackson's sentence become final in 1989 and denying relief, relying on their prior decision in *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, 138 S.Ct. 513 (2017) (No. 17-6180)).

Then, in 2021, Jackson filed yet another successive postconviction motion again raising a *Hurst/State v. Poole* claim in a Florida trial court, which the state trial court again denied. And the Florida Supreme Court denied the claim once again on non-

retroactivity grounds. *Jackson v. State*, 335 So.3d 88 (Fla. 2022). In a footnote, the Florida Supreme Court also found the Sixth Amendment claim to be procedurally barred because he "raised essentially the same arguments" in the 2021 successive motion that he had previously raised in the 2017 successive motion. *Id.* at 89, n.2.[3]

The Florida Supreme Court's determination that the claim was procedurally barred is an adequate and independent state law ground precluding this Court's review. *Michigan v. Long*, 463 U.S. 1032, 1039-41 (1983) (stating that if "the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision"). This Court's jurisdiction "fails" if the non-federal ground is independent and adequate to support the judgment. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)).

This improper relitigation extends to this Court as well. Jackson previously sought review in this Court of the Florida Supreme Court's prior decision denying him *Hurst* relief based on non-retroactivity grounds. *Jackson v. Florida*, 139 S. Ct. 193 (2018) (No. 17-9564). He is reraising the same claim again asserting the federal constitution somehow requires that *Hurst v. Florida* be applied retroactively in Florida, despite this Court's holding to the contrary in *McKinney*. Jackson already raised that issue in his prior petition. This Court should not prolong this capital case by entertaining such in

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[3] The Florida Supreme Court receding from *Hurst v. State*, 202 So.3d 40 (Fla. 2016), in *State v. Poole* is no excuse for the relitigation. The Florida Supreme Court significantly narrowed its prior holding in *Hurst v. State* in *State v. Poole*. When a case overrules a prior case in a manner that narrows the old case's holding, the new case is even less likely to be retroactive than the original case. *State v. Poole* was not going to be applied retroactively to cases where *Hurst v. State* had not been applied retroactively. Indeed, the two dissenting justices in the case that first established the partial retroactivity of *Hurst v. Florida* who took the view that all that was required by *Hurst v. Florida* was the finding of one aggravating factor, which ultimately became the holding in *State v. Poole*, also took the view that *Hurst v. State* should not be applied retroactively at all. *Mosley v. State*, 209 So.3d 1248, 1285 (Fla. 2016) (Canady, J., dissenting). Since the broader holding of *Hurst v. State* did not apply to Jackson, it was obvious the much narrower holding of *State v. Poole* would not apply to him either.

seriam petitions. *Cf. Shoop v. Twyford*, 142 S.Ct. 2037 (2022) (stating a federal court may never needlessly prolong a habeas case, given the "need to promote the finality of state convictions" quoting *Shinn v. Ramirez*, 142 S.Ct. 1718, 1739 (2022)); *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019) (stating that federal courts can and should protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion). The successive petition for certiorari review should also be denied as improper relitigation.

No conflict with this Court's retroactivity jurisprudence

There is no conflict between this Court's decision in *McKinney v. Arizona*, 140 S.Ct. 702, 708 (2020), and the Florida Supreme Court's decision in this case regarding retroactivity. See Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). While this Court employed the federal retroactivity test of *Teague* in *McKinney* and the Florida Supreme Court employed the state retroactivity test of *Witt* in this case, both courts reached the same conclusion. This Court held that *Hurst v. Florida* was not retroactive in *McKinney* and the Florida Supreme Court held that *State v. Poole* was not retroactive to this case. Opposing counsel is literally arguing that, while this Court itself would not apply *Hurst v. Florida* retroactively to this case, this Court is somehow required to direct Florida courts to apply *Hurst* and *State v. Poole* retroactively. Such a proposition rebuts itself. There is no conflict between this Court's retroactivity jurisprudence and the Florida Supreme Court's decision in this case.

No conflict with any federal appellate court

There is no conflict with any federal circuit court regarding retroactivity. 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). In the absence of such conflict, certiorari is rarely warranted.

The few federal circuits courts that reached the issue of the retroactivity of *Hurst v. Florida*, before this Court's decision in *McKinney*, determined that *Hurst v. Florida* was not retroactive. *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1165, n.2 (11th Cir. 2017); *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017); *Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1334-37 (11th Cir. 2019). The federal circuit courts, since this Court's decision in *McKinney*, of course, follow *McKinney*. *Miller v. Comm'r, Ala. Dep't of Corr.*, 826 Fed. Appx. 743, 749 (11th Cir. 2020) (concluding *Hurst v. Florida* did not apply retroactively citing *McKinney* and *Knight*), *cert. denied, Miller v. Dunn*, 142 S.Ct. 123 (2021). There is no conflict between any federal circuit court of appeals regarding retroactivity and the Florida Supreme Court's decision in this case.[4]

The *Almendarez-Torres* exception

There is an alternative ground which also renders all of the issues raised in the petition the functional equivalent of moot. *Hurst v. Florida* does not apply to this case under the exception for prior convictions established in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

There are two recidivist aggravating factors present in this case. *Jackson v. State*, 530 So.2d 269, 272 (Fla. 1988) (noting the trial court found five aggravating factors

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[4] Because states are free to have their own tests for retroactivity under *Danforth*, any possible differences among state courts of last resort regarding the retroactivity of *Hurst v. Florida* is not a basis for this Court to grant a petition for certiorari. Nor does the petition argue any conflict among the state supreme courts as a basis for this Court granting review. *See, e.g., State v. Poyson*, 250 Ariz. 48, 52, 475 P.3d 293, 297 (2020) (holding *Hurst v. Florida* was not retroactive citing *McKinney*), *cert. denied*, 142 S.Ct. 138 (2021).

including the under-sentence-of-imprisonment aggravator because Jackson was on parole at the time of the murder and the prior violent felony aggravator based on his prior conviction for armed robbery). Jackson was eligible for a death sentence upon his conviction for first-degree murder in this case due to his prior conviction for armed robbery. Jackson was eligible for a death sentence at the close of the guilt phase before the penalty phase started. Normally, a capital jury would be required to find at least one aggravating factor for a capital defendant to be eligible for a death sentence under *McKinney*. But in this case, no additional findings by the jury regarding any aggravator were required under the *Almendarez-Torres* exception. *Hurst v. Florida* does not apply to this case at all.

While the validity of the *Almendarez-Torres* exception has been questioned,[5] the exception is perfectly valid as applied to prior convictions that are the result of a guilty plea. As the *Apprendi* Court itself observed, Almendarez-Torres himself had admitted to the three prior convictions, so that no right to a jury trial or contested issue of fact was before the Court when it was deciding the *Almendarez-Torres* case. *Apprendi*, 530 U.S. at 488.

Jackson entered a guilty plea to the prior armed robbery conviction. (T. Vol. XVIII 1249). A guilty plea is more than a waiver of all jury trial rights; it is an open admission of guilt to the crime, made under oath. *Class v. United States*, 138 S. Ct. 798, 810 (2018) (stating a guilty plea encompasses all legal and factual concessions

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[5] Justice Thomas' objection to the *Almendarez-Torres* exception is based on historical practice, which required the prosecution to reprove any prior conviction. *Apprendi v. New Jersey*, 530 U.S. 466, 518-21 (2000) (Thomas, J., concurring). But pleas were quite rare at common law. Plea agreements are a relatively modern phenomenon to which that historical criticism does not apply. As this Court has observed, it was only in the last half of the twentieth century that plea deals "become a visible practice." *Blackledge v. Allison*, 431 U.S. 63, 76 (1977). Indeed, it was not until this Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971), that the legitimacy of plea agreements was recognized. *Allison*, 431 U.S. at 76. In the first part of the twentieth century, plea agreements were a "sub rosa" practice "shrouded in secrecy" that were often "concealed" by all involved, including the judge. *Id.* at 76.

necessary to the conviction and explaining a plea of guilty "is more than a confession" . . . "it is itself a conviction" quoting *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)); *Blackledge v. Allison*, 431 U.S. 63, 74 (1977) (noting a plea constitutes a formidable barrier in subsequent collateral proceedings because solemn declarations in open court carry a strong presumption of verity). A guilty plea surrenders all defenses and all rights. *Class*, 138 S.Ct. at 810. A guilty plea to the prior conviction precludes a Sixth Amendment jury trial claim based on *Apprendi* or any of its progeny, such as *Hurst v. Florida*. A defendant who enters a guilty plea to the prior conviction waives any jury trial rights under *Apprendi* and he waives those rights permanently. *Cf. Shepard v. United States*, 544 U.S. 13, 24-25 (2005); *id.* at 26-27 (Thomas, J., concurring) (explaining that *Apprendi* and its progeny prohibit judges from raising a defendant's sentence beyond the sentence that could have been imposed based on the "facts found by the jury or admitted by the defendant").

A criminal defendant should not be able to resurrect his previously waived Sixth Amendment jury trial rights by committing another crime. The concept of unwaiver-by-subsequent-criminal-conduct is not one this Court should entertain and especially not when the subsequent criminal conduct is a murder. Furthermore, allowing a defendant to resurrect his previously waived jury rights means the State or Commonwealth loses the benefit of its bargain, if the plea was a result of a plea agreement. *United States v. Edgell*, 914 F.3d 281, 287 (4th Cir. 2019) (noting courts often employ traditional principles of contract law as a guide to enforcing plea agreements, under which "each party is entitled to receive the benefit of his bargain"). Many times the benefits the defendant received from the plea bargain, before reoffending, such as probation or parole, are not recoupable. And the prosecution would be placed in the position of having to prove a crime that it may have entered a generous plea agreement including dropping other charges in the first place to avoid

having to prove the crime. And in the case of a fast track plea, the prosecution may never have collected the evidence in the first place based on the early plea agreement, thereby reducing the prosecution's chance of proving the prior crime, due to the uncollected, and perhaps now stale, evidence. *Cf. United States v. Ruiz*, 536 U.S. 622, 625 (2002) (noting the prosecution offered the defendant a "fast track" plea bargain in exchange for a downward departure sentencing recommendation that included the waiver of the right to disclosure of information under *Brady v. Maryland*, 373 U.S. 83 (1963)).

A prior conviction based on a guilt plea should forever preclude any defendant from asserting any rights under *Apprendi* or *Hurst v. Florida*. The *Almendarez-Torres* exception remains valid, at least, as applied to any prior conviction involving a guilty plea.

The entire petition is meritless under the *Almendarez-Torres* exception as well as being *Teague*-barred. There is no basis for granting certiorari review of this case.

Accordingly, this Court should deny the petition.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

Carolyn M. Snurkowski
Associate Deputy Attorney General
Counsel of Record

Charmaine Millsaps
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
CAPITAL APPEALS
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3584
(850) 487-0997 (FAX)
email: capapp@myfloridalegal.com
charmaine.millsaps@myfloridalegal.com