

DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

MATTHEW MARSHALL,

Petitioner,

vs.

STATE OF FLORIDA,

and

JULIE L. JONES, Secretary,
Fla. Dep't. of Corrections,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED – CAPITAL CASE

Matthew Marshall was sentenced to death by a Florida trial judge despite the jury's return of a life recommendation. As a result of this Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), and, more significantly, in light of the Florida Supreme Court's decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), it is undisputed between Mr. Marshall and the Respondents that a Florida judge can no longer override a jury's life recommendation. However, when Mr. Marshall sought the intervention of the Florida Supreme Court by way of an Eighth Amendment claim that his override death sentence is unconstitutional as contrary to the evolving standards of decency and the Eighth Amendment, the Florida Supreme Court did not address the issue despite the fact that Mr. Marshall stands as one of two inmates in Florida with death sentences imposed over a jury's life recommendation. In other words, the Florida Supreme Court buried its head in the sand.

This case thus gives rise to the following questions:

1. Now that it has been found unconstitutional for a Florida trial judge to override a jury life recommendation and impose a death sentence, does the execution of Mr. Marshall—who was sentenced to life by a jury in 1989—render his death sentence arbitrary, capricious, and contrary to the evolving standards of decency as embodied in the Eighth Amendment to the United States Constitution?
2. Did the Florida Supreme Court's failure to perform meaningful appellate review and address in any fashion Mr. Marshall's Eighth Amendment arguments itself violate the Eighth Amendment and Fourteenth Amendments?

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Petitioner, MATTHEW MARSHALL, is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue its writ of certiorari to review the decision of the Florida Supreme Court in *Marshall v. Jones*, 226 So. 3d 211 (Fla. 2017).

CITATION TO OPINIONS AND ORDERS BELOW

This proceeding was instituted as a result of a petition for writ of habeas corpus filed directly in the Florida Supreme Court. That petition was later amended and it is the amended petition that was addressed by the Florida Supreme Court.¹ The Florida Supreme Court's denial of relief by opinion dated May 4, 2017, is reported at *Marshall v. Jones*, 226 So. 3d 211 (Fla. 2017), and is Attachment A in the accompanying Appendix. A timely motion for rehearing was filed in the Florida Supreme Court, and was denied by that court on September 20, 2017. *See* Attachments B and C in the accompanying Appendix.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257. The Florida Supreme Court issued an opinion denying relief on May 4, 2017, and denied rehearing on September 20, 2017. Justice Thomas granted Petitioner an extension of time to February 17, 2018, in which to file a Petition for Writ of Certiorari. This Petition is timely.²

¹ The amended petition can be found as Attachment I to the Appendix that accompanies this Petition.

² February 17, 2018, fell on a Saturday, meaning that the Petition would be due on the following Monday, February 19, 2018. However, Monday, February 19, 2018, is President's Day, a federal holiday as recognized in Sup. Ct. Rule 30 (1) and 5 U.S.C. §6103. Thus the proper filing date is Tuesday, February 20, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides in relevant part:

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

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

No State shall . . . 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.

STATEMENT OF THE CASE AND RELEVANT FACTS

In February, 1989, Matthew Marshall was indicted for the first-degree murder of Jeffrey Henry, both of whom were incarcerated at the Martin Correctional Institution in Martin County, Florida. The indictment charged Mr. Marshall with only first-degree murder; no other felony was charged. Mr. Marshall's jury convicted him of first-degree murder and, after a penalty phase, recommended that he be sentenced to life imprisonment without the possibility of parole for 25 years.

In a document entitled "Findings of Fact by the Court," the trial court, pursuant to Florida's statutory procedure at the time, engaged in the process required in order to find the facts necessary to impose a death sentence. First, the trial court made factual findings that four (4) statutory aggravating circumstances had been

established beyond a reasonable doubt (R4084-85).³ Next, the trial court addressed the mitigating evidence presented, finding that some non-statutory mitigation had been established (R4085).⁴ Then the trial court next made findings with respect to whether “sufficient aggravating circumstances” existed to justify the imposition of the death penalty, concluding that sufficient aggravating circumstances did in fact exist in Mr. Marshall’s case (R4086). The trial court then found that there were “insufficient mitigating circumstances to outweigh the aggravating circumstances” (R4086), and determined that Mr. Marshall should be sentenced to death notwithstanding the recommended sentence of the jury of life imprisonment without the possibility of parole for 25 years.

On direct appeal, the Florida Supreme Court, in a 4-3 decision, affirmed Mr. Marshall’s conviction for first-degree murder and the trial court’s override of the jury’s life recommendation. *Marshall v. State*, 604 So. 2d 799 (Fla. 1992) (Attachment

³ The court found the following aggravating circumstances: that Mr. Marshall was under a sentence of imprisonment (the murder in the instant case occurred while Mr. Marshall was serving that sentence); that Mr. Marshall had been previously convicted of nine (9) prior crimes involving the use of or threat of violence to the person (the felonies for which Mr. Marshall was sentenced and was serving prison time when the killing occurred); the capital felony was committed while Mr. Marshall was engaged in the commission of or an attempt to commit a burglary (the burglary being the entry by Mr. Marshall into the prison cell of the victim but which had not been charged in the indictment); and that the crime was especially heinous, atrocious, and cruel (R4084-85).

⁴ The trial court first addressed the evidence that Mr. Marshall’s older brother influenced him and led him astray, and that his mother also failed to adequately discipline him, finding that these facts were “not mitigating circumstances” (R4086). The court did find as mitigating that Mr. Marshall’s behavior at trial was acceptable, and that Mr. Marshall entered prison at a young age (*Id.*).

D in Appendix).⁵

Mr. Marshall then sought postconviction relief pursuant to Fla. R. Crim. P. 3.850. Following a limited evidentiary hearing, the circuit court denied relief and, on appeal, the Florida Supreme Court affirmed on all but one claim, a jury misconduct claim that it remanded for an evidentiary hearing. *Marshall v. State*, 854 So. 2d 1235 (Fla. 2003) (Attachment E in Appendix). After the evidentiary hearing, the circuit court denied relief and, on appeal, the Florida Supreme Court affirmed. *Marshall v. State*, 976 So. 2d 1071 (Fla. 2007) (Attachment G in Appendix). Mr. Marshall also filed directly in the Florida Supreme Court a petition for writ of habeas corpus, which addressed the applicability and effect of *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), on his override death sentence. The Florida Supreme Court denied habeas relief by a vote of 5-2. *Marshall v. Crosby*, 911 So. 2d 1129 (Fla. 2005) (Attachment F in Appendix).

Mr. Marshall thereupon sought relief in the federal courts by filing a petition for writ of habeas corpus was filed in the United States District Court for the Southern District of Florida. That petition was denied, and the Eleventh Circuit Court of Appeals affirmed the denial. *Marshall v. Sec’y Fla. Dep’t of Corrections*, 610

⁵ The Florida Supreme Court’s majority opinion concluded that there was no reasonable basis for the jury’s life recommendation. *Marshall*, 604 So. 2d at 805-06. The three dissenting justices disagreed, determining that there *was* mitigating evidence in the record that could have persuaded a reasonable juror to vote for a life sentence; moreover, the dissent concluded it was “also likely that the jury rejected some of the aggravators found by the judge or assigned them minimal weight.” *Id.* at 807 (Barkett, C.J., concurring in part and dissenting in part) (citing *Hallman v. State*, 560 So. 2d 223 (Fla. 1990)).

F.3d 576 (11th Cir. 2010), *cert denied sub nom Marshall v. Buss*, 563 U.S. 906 (2011) (Attachment H to Appendix).

In January, 2016, this Court decided *Hurst v. Florida*, 136 S.Ct. 616 (2016), in which this Court struck down, on Sixth Amendment grounds, the then-extant Florida capital sentencing scheme which required a judge, not the jury, to find the facts necessary for a defendant to be found guilty of capital first-degree murder in Florida and thus eligible for the death penalty. *Id.* at 51. On remand from this Court, the Florida Supreme Court issued its opinion in *Hurst v. State*, 202 So. 2d 40 (Fla. 2016), *cert. denied sub nom Florida v. Hurst*, 137 S.Ct. 2161 (2017), in which that court first noted this Court's conclusion in *Hurst v. Florida* "that Florida's capital sentencing scheme violated this [Sixth Amendment] guarantee of the right to a jury trial on all elements of the crime of capital murder." *Id.* at 51. The Florida Supreme Court went on to hold that, under the Florida Constitution, Florida juries must be unanimous in determining a defendant's guilt of first-degree capital murder and thus the defendant's eligibility for a death sentence. *Hurst v. State*, 202 So. 3d at 59 ("we conclude that under the commandments of *Hurst v. Florida*, Florida's state constitutional right to trial by jury, and our Florida jurisprudence, the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed"). And in light of this Court's decision in *Hurst v. Florida*, the Florida Supreme Court noted that its decision in *Tedder v. State*, 322 So. 2d 908 (Fla. 1975), had been

abrogated. *Hurst*, 202 So. 3d at 44.⁶

In addition to addressing the Sixth Amendment issues arising from this Court’s remand in the wake of *Hurst v. Florida*, the Florida Supreme Court also addressed the Eighth Amendment implications of its holdings regarding juror unanimity. It concluded that “[i]n addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida’s right to trial by jury, we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment.” *Hurst v. State*, 202 So. 3d at 59. The Florida Supreme Court observed that, in accordance with the “evolving standards of decency” embodied in the Eighth Amendment, a unanimity requirement will “ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation.” *Id.* at 60. Because “Florida has been a clear outlier” in not previously requiring unanimity by jurors tasked with the determination of finding the facts necessary for a defendant to be eligible for a death sentence, the Florida Supreme Court boasted that, as a result of its ruling, “Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of society reflected in all these states and with federal law.” *Id.* at 61. The Florida Supreme Court also expressed its continued confidence

⁶ In *Tedder*, the Florida Supreme Court held that it would only sustain a death sentence imposed by a judge over a life recommendation by a jury if the facts suggesting a sentence of death were “so clear and convincing that virtually no reasonable person could differ.” *Tedder*, 322 So. 2d at 910. The *Tedder* standard has been described as a “significant safeguard” against the wanton and freakish imposition of the death penalty in Florida. *Spaziano v. Florida*, 468 U.S. 447 (1984).

that “jurors will, in good faith, follow the law as it is explained to them.” *Id.* at 63.

In the wake of *Hurst v. Florida* and *Hurst v. State*, Mr. Marshall invoked the Florida Supreme Court’s jurisdiction in order to challenge his override death sentence on a variety of constitutional grounds (Attachment I to Appendix). For example, Mr. Marshall contended that this Court’s decision in *Hurst v. Florida* and the Florida Supreme Court’s decision in *Hurst v. State* should, under state and federal retroactivity standards, be applied retroactively to his specific case which involved a jury recommendation of life imprisonment and the trial judge’s override of same, and that the court must undertake a retroactivity analysis that is specific to override cases because the effect on the administration of justice would be different in override cases (Attachment I at 23-28).⁷ He also contended that the Florida Supreme Court’s

⁷ While Mr. Marshall’s petition was pending, the Florida Supreme Court issued two intervening decisions addressing the retroactivity of *Hurst v. Florida*. See *Asay v. State*, 210 So. 3d 1 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). In *Asay*, the Florida Supreme Court conducted a retroactivity analysis of *Hurst v. Florida*’s Sixth Amendment holding under its standard set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *Asay*, 201 So. 3d at 15 *et seq.* The court re-examined the retroactivity analysis it had performed subsequent to the decision in *Ring v. Arizona*, 536 U.S. 584 (2002), and held that while the purpose of the Sixth Amendment holding in *Hurst v. Florida* weighed in favor of its retroactive application to 1991—when *Asay*’s conviction became final on direct appeal—making it fully retroactive would be too burdensome on the administration of justice and affect too many Florida capital cases. *Asay*, 210 So. 3d at 17-22. In the second retroactivity case, *Mosley*, the Florida Supreme Court performed a separate *Witt* analysis to post-*Ring* cases and held that the *Witt* test *did* warrant retroactive application of *Hurst v. Florida* but only to defendants whose sentence became final after *Ring* was decided. *Mosley*, 209 So. 3d at 1274. In conducting this separate *Witt* analysis, the Florida Supreme Court determined that retroactive application of *Hurst v. Florida* to post-*Ring* cases was required notwithstanding the burden such application would have on the administration of justice. *Id.* at 1280-82. Separate and apart from the *Witt* determination, the Florida Supreme Court also determined that “fundamental fairness” warranted retroactive application of *Hurst v. Florida* to *Mosley* because

Eighth Amendment holding in *Hurst v. State* was substantive and thus fully retroactive under *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) (Attachment I at 29-30), and that his override death sentence contravened the evolving standards of decency” embodied in the Eighth Amendment (Attachment I at 35-40).⁸ Mr. Marshall stands as *one of two* persons on Florida’s death row who remain there despite a jury recommendation of life imprisonment.⁹

On May 4, 2017, the Florida Supreme Court issued an opinion denying Mr. Marshall’s habeas corpus petition, relying only on the determination it had made in non-override cases that *Hurst v. Florida* was not retroactive to cases where the sentence became final before *Ring v. Arizona*:

Petitioner Matthew Marshall has filed a petition for writ of habeas corpus, challenging the constitutionality of his death sentence, which was based upon a judicial override. *See Marshall v. State*, 604 So. 2d 799, 802 (Fla. 1992). . . . Because Marshall’s death sentence became final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided, he is not entitled to relief. *See Asay v. State*, 210 So. 3d 1 (Fla. 2016). Accordingly, we deny the petition.

Marshall v. Jones, 226 So. 3d at 211.

Mosley had raised a *Ring* claim “at his first opportunity and was then rejected at every turn.” *Mosley*, 209 So. 3d at 1275.

⁸ Mr. Marshall’s state habeas petition advanced additional arguments in favor of the imposition of a life sentence; those arguments are not germane to the issues presented herein.

⁹ William Zeigler is the other Florida inmate on Florida’s death row as the result of an override death sentence. *See Zeigler v. State*, 580 So. 2d 127 (Fla. 1991). A third inmate, Edward Zakrzweski, has three death sentences, one of which was imposed over a jury’s life recommendation; the jury recommended death for the other two murders. *See Zakrzweski v. State*, 717 So. 2d 488 (Fla. 1998).

Chief Justice Labarga dissented, writing that “Marshall’s death sentence, which based upon a judicial override, constitutes an injustice that should be remedied.” *Id.* at 211 (Labarga, C.J., dissenting). Justice Barbara Pariente joined in Chief Justice Labarga’s dissenting opinion. *Id.* A timely motion for rehearing was filed and subsequently denied without further explanation (Attachments B, C to Appendix).

REASONS FOR GRANTING THE WRIT

“[W]hen a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful.”¹⁰

Matthew Marshall stands as one of only two Florida inmates with death sentences imposed notwithstanding a jury recommendation of life. There is no dispute between Matthew Marshall and the Respondents that a death sentence imposed over a jury recommendation of life is no longer lawful in Florida. The Respondents themselves, in litigating Mr. Marshall’s case in the Florida Supreme Court, have explicitly taken that position (Attachment J at 9) (“the State agrees that a judge can no longer override the jury’s recommendation . . .”). In its Brief before this Court’s decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), the State of Florida told this Court in 2015 that “overrides are essentially nonexistent in Florida.” *See* Br. Of Respondent, *Hurst v. Florida*, reported at 2015 WL 4607695 at *26 n.9.¹¹ The State

¹⁰ *Montgomery v. Louisiana*, 136 S.Ct. 718, 729-30 (2016).

¹¹ The Respondents’ Brief actually referred to Mr. Marshall as being one of three Florida death row inmates sentenced over a jury recommendation of life. 2015 WL 4607695 at *26 n.9. It remarked, however, that Mr. Marshall “entered the penalty

observed that no Florida judge has overridden a jury's life recommendation since 1999. *Id.* (citing *Woodward v. Alabama*, 134 S.Ct. 405, 408 (2013) (Sotomayor, dissenting from denial of certiorari)). The Respondents also told the Florida Supreme Court that after *Hurst v. Florida* the override provision of Florida's capital sentencing statute was unconstitutional. *See* Transcript of Oral Argument, *Asay v. State*, Nos. SC16,102 & 16,223).¹² No Florida inmate whose death sentence was imposed over a jury recommendation of life has been executed since Bernard Bolender was executed in 1995.¹³

Despite the uniform consensus that Mr. Marshall's death sentence—the product of a judicial override—is now unconstitutional, the Florida Supreme Court determined that, for reasons having nothing to do with the crime for which Mr. Marshall was convicted, Mr. Marshall is disentitled to the benefit of this Court's decision in *Hurst v. Florida* or of its own decision in *Hurst v. State*, 202 So. 2d 40 (Fla. 2016). Its decision rested on the notion that Mr. Marshall's sentence was final in 1992, well before the arbitrary date selected by the Florida Supreme Court as the benchmark for the grant or denial of relief—that date being June 24, 2002, when this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). *See Marshall v. Jones*, 226 So. 3d

phase already death eligible" due to prior convictions. *Id.* This position, however, has been proven wrong by this Court in *Hurst v. Florida* and by the Florida Supreme Court's subsequent decision in *Hurst v. State*, 202 So. 2d 40 (Fla. 2016).

¹² This transcript as well as the video of the oral argument can be accessed at the Florida Supreme Court's website (www.floridasupremecourt.org).

¹³ *See Bolender v. State*, 658 So. 2d 82 (Fla. 1995).

211 (Fla. 2017). However, in reaching its bald conclusion that is bankrupt of any underlying explanation or analysis, the Florida Supreme Court never addressed Mr. Marshall's Eighth Amendment argument that his override death sentence violates the Eighth Amendment and its prohibition on cruel and unusual punishment. This issue was squarely presented to it in Mr. Marshall's pleadings. In seeking rehearing, Mr. Marshall also pointed out to the Florida Supreme Court that it had not even addressed most of his constitutional claims, including his claim that his override death sentence violates the Eighth Amendment (Attachment B at 4-5). In response, the Florida Supreme Court issued a one sentence denial of rehearing, again failing to address any of Mr. Marshall's arguments.

At this time, Mr. Marshall prays that this Court will grant certiorari to the Florida Supreme Court so that the "injustice" about which Chief Justice Labarga wrote in reference to this case, can be remedied. *Marshall*, 226 So. 3d at 211 (Labarga, C.J., dissenting) ("Marshall's death sentence, which was based upon a judicial override, constitutes an injustice that should be remedied").¹⁴

¹⁴ Chief Justice Labarga has not been alone in questioning the validity of Mr. Marshall's override death sentence and in calling for its reversal. On Mr. Marshall's direct appeal, three dissenting justices concluded that a reasonable basis existed for the jury's life recommendation and that therefore the override was improper. *Marshall v. State*, 604 So. 2d 799, 806-07 (Barkett, C.J., concurring in part and dissenting in part). Among the reasons for upholding the jury's life recommendation, the dissent noted that it was likely that "the jury rejected some of the aggravators found by the judge or assigned them minimal weight." *Id.* at 608. In Mr. Marshall's first state habeas proceeding, Justices Pariente and Anstead dissented from the affirmance of the override death sentence. *Marshall v. Crosby*, 911 So. 2d 1071, 1140, 1142 (Fla. 2007). And in the litigation below in this proceeding, Justice Pariente joined in Chief Justice Labarga's dissenting opinion.

A. The Florida Supreme Court’s Eighth Amendment holding in *Hurst v. State* applies retroactively to Mr. Marshall.

In *Hurst v. State*, the Florida Supreme Court looked to, *inter alia*, the Eighth Amendment and this Court’s jurisprudence on the “evolving standards of decency” standard when holding that juror unanimity in any recommended verdict resulting in a death sentence was required under the Eighth Amendment. *Hurst v. State*, 202 So. 3d at 59-62. The court noted that its Eighth Amendment rule served to not only narrow the class of murderers subject to the death penalty but “*even more significantly, . . . expresses the values of the community as they currently relate to imposition of death as a penalty.*” *Id.* at 60 (emphasis added). It noted that “[t]he ‘evolving standards’ test considers whether punishments that were within the power of the state to impose at the time, but have since come to be viewed as unconstitutional, should be prohibited on constitutional grounds.” *Hurst*, 202 So. 3d at 60 (citing *Montgomery v. Louisiana*, 136 S.Ct. 718, 742 (2016)). It further recognized the “evolving standards test helps to ensure that ‘the State’s power to punish is exercised within the limits of civilized standards,’” *Hurst*, 202 So. 3d at 60 (citing *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976)), emphasizing that a capital jury “can do little more—and must do nothing less—than express the conscious of the community on the ultimate question of life or death.” (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)).

The Eighth Amendment “evolving standards” test is equally applicable to judicial overrides. In Florida there is now a consensus against—indeed a constitutional and statutory prohibition on—juror override death sentences. Mr.

Marshall's jury made the determination that he was not guilty of capital murder, rejected a death sentence, and voted for a life sentence. But the judge overrode that recommendation. While it was "within the power of the state to impose" a death sentence notwithstanding a jury vote for life in 1989, such a punishment has "since come to be viewed as unconstitutional" and thus "prohibited on constitutional grounds." *Hurst*, 202 So. 3d at 60-6 (citing *Montgomery v. Louisiana*, 136 S.Ct. 718, 742 (2016)). Just as Florida has been a "clear outlier" in refusing to require unanimity for the juror death recommendation, *Hurst*, 202 So. 3d at 61, so too has it been a "clear outlier" until now with regard to jury overrides. The unconstitutional practice of jury overrides has finally been relegated to the dustbin of history. But what happens to Matthew Marshall?

The Eighth Amendment's prohibition on cruel and unusual punishment "[d]raws it meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This means that "resort to the [death] penalty must be reserved for the worst of crimes and limited in its instances of application." *Kennedy v. Louisiana*, 554 U.S. 407, 446-47 (2008). The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures" as well as "state practice." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302 (1989)). See also *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (finding "objective indicia of society's standards" are "expressed in legislative enactments and state practice"). In light of the fact that not one state with active death penalty statutes permits a judge

to impose a death sentence after a jury vote for life, judicial overrides are inconsistent with societal values.

Not only is the override anathema to the evolving standards of decency; in Mr. Marshall's case, the combined effect of recent events (most significantly this Court's ruling in *Hurst v. Florida* and the Florida Supreme Court's ruling in *Hurst v. State*) had unquestionably "place[d] certain criminal laws and punishments altogether beyond the State's power to impose." *Montgomery*, 136 S.Ct. at 729. Florida still intends to carry out Mr. Marshall's death sentence notwithstanding the jury recommendation of life. But "when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful." *Id.* at 729-30. The Eighth Amendment consensus against the judicial override death sentence is unquestionably a substantive rule of constitutional law,¹⁵ and "the Constitution requires state collateral review courts to give retroactive effect to that rule." *Montgomery*, 136 S.Ct. at 729; *see also id.* ("States are required as a constitutional matter to give retroactive effect to new substantive or watershed procedural rules").

"[O]ne of the most important functions any jury can perform in [a capital case] is to maintain a link between contemporary community values and the penal

¹⁵ The Court looks to the "function of the rule" in analyzing whether a new rule is substantive or procedural. *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016). As noted earlier, the Florida Supreme Court acknowledged that the "most significant" purpose of its new Eighth Amendment rule was to allow a Florida capital jury to "*express[] the values of the community as they currently relate to imposition of death as a penalty.*" *Hurst*, 202 So. 3d at 60 (emphasis added).

system—a link without which the determination of punishment would hardly reflect ‘the evolving standards of decency that mark the progress of a maturing society.’” *Witherspoon*, 391 U.S. at 519 n.15 (quoting *Trop*); see also *Atkins*, 492 U.S. at 323-24 (Rehnquist, C.J., dissenting) (“[T]he actions of sentencing juries, though entitled to less weight than legislative judgments, is a significant and reliable objective index of contemporary values . . .”). By abolishing the judicial override, Florida has sought to strengthen that link and prevent the imposition of a trial judge’s actions between the Eighth Amendment’s view toward evolving standards and the fundamental expression of those standards by community members. The life recommendation returned by Mr. Marshall’s jury was an expression of the community values of Martin County, Florida, and, under the Eighth Amendment, should be respected.

B. The Florida Supreme Court averts its eyes.

Despite the voluminous briefing undertaken by the parties in connection with the state habeas proceedings initiated by Mr. Marshall, the Florida Supreme Court utterly, completely, and unquestionably failed to address Mr. Marshall’s Eighth Amendment arguments. After the court issued its conclusory decision holding that Mr. Marshall was not entitled to the benefit of *Hurst v. Florida* because of the date of finality of his sentence, Mr. Marshall sought rehearing. He beseeched the court to address his claims. He told the Florida Supreme Court that his Eighth Amendment claim had nothing at all to do with *Hurst v. Florida* or the Sixth Amendment. All he received from the court was a one sentence denial of rehearing. The manner in which the Florida Supreme Court “reviewed” Mr. Marshall’s case itself violated the Eighth

and Fourteenth Amendments and certiorari review is warranted.

Mr. Marshall's case is an unfortunate example of yet another occasion where the Florida Supreme Court has failed in its obligation to review (much less meaningfully review) important constitutional arguments regarding the imposition of capital punishment. And this Court has, over the years, not hesitated to step in to not only address the Florida Supreme Court's failure to address constitutional errors presented to it, but also, at times, to cure these errors.

For example, in *Parker v. Dugger*, 498 U.S. 308, 320 (1991), this Court's criticism of the Florida Supreme Court was blunt: "The Florida Supreme Court did not conduct an independent review here. In fact, there is a sense in which the court did not review Parker's sentence at all." In *Sochor v. Florida*, 504 U.S. 527 (1992), this Court remarked that it was "far from apparent" that the Florida Supreme Court had performed the requisite harmless error analysis in Mr. Sochor's appeal, criticizing the court for "allusions by citation" rather than a plain statement that it had performed harmless error analysis. *Id.* at 540. In *Porter v. McCollum*, 558 U.S. 30 (2009), this Court determined that the Florida Supreme Court acted "unreasonably" in analyzing a claim of ineffective assistance of counsel, noting (as it had in *Parker v. Dugger*), that the court had failed to properly review the record and thus had improperly discounted "to irrelevance" mitigation that had been presented in Porter's case. And just recently, three Justices on this Court chastised the Florida Supreme Court for again failing in its responsibility to address constitutional claims in capital cases:

At least twice now, capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address.

Truehill v. Florida, 138 S.Ct. 3 (2017) (Sotomayor, with whom Justice Ginsburg and Justice Breyer join, dissenting from the denial of certiorari).

In 1976, this Court upheld the constitutionality of Florida's death penalty scheme devised in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972). *See Proffitt v. Florida*, 428 U.S. 242 (1976). In reassuring itself that Florida's scheme passed constitutional muster, the Court placed great reliance on "Florida's appellate review system," by which the Florida Supreme Court independently reviews each and every capital case. *Id.* 253. It was this promise of meaningful appellate review by the Florida Supreme Court that gave this Court confidence that the death penalty would not be imposed in an arbitrary or capricious manner in the State of Florida.

It appears that this Court's confidence was misplaced, as recent cases, including Mr. Marshall's own case, exemplify. The Florida Supreme Court's failure to review Mr. Marshall's constitutional arguments, much less analyze them, violates the letter and spirit of *Proffitt* and the Eighth and Fourteenth Amendments. *See Griffin v. Illinois*, 351 U.S. 12 (1956) (Due Process and Equal Protection clauses of the Fourteenth Amendment apply to appellate review).

This Court should grant certiorari review to analyze not only Mr. Marshall's substantive constitutional Eighth Amendment claims but also the constitutional concerns that inhere in the Florida Supreme Court's refusal to even address Mr. Marshall's arguments.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Florida Supreme Court in this case.

Respectfully submitted,

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