

No. 17-7869
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2017

MATTHEW MARSHALL,
Petitioner,

v.

STATE OF FLORIDA and
JULIE L. JONES, Fla. Dept. of Corrections,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FLORIDA SUPREME COURT'S DECISION TO APPLY ITS OWN RULING IN HURST V. STATE¹ ONLY TO CASES FINAL AFTER THIS COURT'S 2002 DECISION IN RING² WHERE THIS CASE PRESENTS NO FEDERAL QUESTION, AND THE ALLEGED CONSTITUTIONAL VIOLATION FAILS BECAUSE THIS COURT HAS NEVER HELD THAT THE EIGHTH AMENDMENT REQUIRES JURY SENTENCING, UNANIMOUS OR OTHERWISE, IN DEATH PENALTY CASES?

¹ Hurst v. State, 202 So. 3d 40 (Fla. 2016)

² Ring v. Arizona, 536 U.S. 584 (2002)

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CITATION TO OPINION BELOW

The decision of which Petitioner seeks discretionary review is reported as Marshall v. Jones, 226 So. 3d 211 (Fla. 2017).

JURISDICTION

Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues presented in this capital case involve the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

In December 1989, Petitioner, Matthew Marshall ("Marshall"), an inmate at the Martin Correctional Institute, in Martin County, Florida, was convicted of the first-degree murder of a fellow inmate, Jeffrey Henry. The jury recommended a sentence of life in prison. The trial court overrode the jury's recommendation and imposed a death sentence, finding it "so clear and convincing" that the mitigating circumstances did not outweigh the aggravating circumstances "that no reasonable person could differ." Marshall v. State, 604 So.2d 799, 802 (Fla. 1992). In aggravation, the trial judge found: (1) that the murder was committed by a person under sentence of imprisonment; (2) that Marshall was previously convicted of nine (9) violent felonies (kidnapping, sexual assault, and seven armed robberies with a gun); (3) that the murder was committed while Marshall was engaged in the

commission of or an attempt to commit a burglary; and (4) that the murder was especially heinous, atrocious, and cruel. In mitigation, the judge found that Marshall's behavior at trial was acceptable and that he entered prison at a young age.

The Florida Supreme Court affirmed the conviction and death sentence on direct appeal, outlining the facts of the murder as follows:

Marshall and the victim, Jeffrey Henry, were both incarcerated at the Martin Correction Institute on November 1, 1988, when witnesses heard muffled screams and moans emanating from Henry's cell and observed Marshall exiting the cell with what appeared to be blood on his chest and arms. Within a few minutes, Marshall reentered the cell, and similar noises were heard. After the cell became quiet, Marshall again emerged with blood on his person. Henry was found dead, lying in his cell face down with his hands bound behind his back and his sweat pants pulled down around his ankles to restrain his legs. Death was caused by blows to the back of his head.

Marshall was charged with first-degree murder. His defense at trial was that he killed Henry in self-defense. Marshall claimed that Henry was a "muscle man" for several inmates who operated a football pool. When Marshall tried to collect his winnings from the inmates, they told him to get the money from Henry. Marshall claims he entered Henry's cell only to collect his winnings but that Henry refused to pay, and that Henry then attacked him, so he fought back.

Marshall v. State, 604 So.2d at 802.

Regarding the override, the Court explained that pursuant to Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), a trial judge must follow a jury's recommendation of death unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Id. "Where the record contains no evidence supporting a life recommendation, the trial court does not err in declining

to follow that recommendation." Marshall, 604 So.2d at 806. Applying the law to Marshall's case, the Florida court concluded that the override sentence was proper:

In this case, the record contains insufficient evidence to reasonably support the jury's recommendation of life. Marshall's father was unable to attend the trial, but the defense and prosecution stipulated that he would have testified that Marshall did well in school until his early teens when his older brother influenced him to run the streets and break the law; that Marshall's mother did not discipline Marshall and allowed him to believe there would be no consequences for his behavior; and that Marshall's father loved him and requested a life sentence for his son. The trial court determined these facts were not mitigating, but did find Marshall's behavior at trial as well as his entering prison at a young age to be mitigating. We find no error in the court's assessment of this mitigation and conclude that it does not provide a reasonable basis for the jury's recommendation of life in this case. Even viewing this mitigation in the light most favorable to Marshall, it pales in significance when weighed against the four statutory aggravating circumstances, including Marshall's record of violent felonies consisting of kidnapping, sexual battery, and seven armed robberies.

Furthermore, defense counsel's argument composed largely of a negative characterization of the victim does not provide a reasonable basis for the jury's life recommendation. Moreover, contrary to Marshall's assertion, the facts surrounding the murder do not suggest that the murder was committed in self defense or in a fit of rage. The witnesses heard muffled screams and moans emanating from the victim's cell and observed Marshall leaving the cell with what appeared to be blood on his chest and arms. Within a few minutes, Marshall reentered the cell and similar noises were again heard. The victim was found lying face down with his hands bound behind his back and his ankles were restrained. The victim received no less than twenty-five separate wounds and blood was sprayed and splattered about the cell. Death was caused by blows to the back of his head. Nothing in these facts supports the notion that Marshall acted in self defense or that he simply killed the victim in the heat of a fight. We thus conclude that the trial court did not abuse its discretion in finding the facts supporting the death sentence to be "so clear and convincing that no reasonable person could differ." *See Tedder*, 322 So. 2d at 910.

Id. at 806. The court denied rehearing on September 28, 1992 and the United States Supreme Court denied certiorari review on May 17, 1993. Marshall v. Florida, 508 U.S. 915 (1993).

In August 1994, Marshall filed an initial 3.850 motion for post-conviction relief and, thereafter, on January 29, 1999, filed an amended motion. Marshall v. State, 854 So.2d 1235, 1239 (Fla. 2003). The trial court granted an evidentiary hearing on four (4) issues and summarily denied the remaining claims. Among the issues summarily denied was Marshall's claim that the jury override resulted in an arbitrary, capricious, and unreliable death sentence. After a three-day evidentiary hearing, held August 23-26, 1999, the trial court denied all relief. Marshall appealed to the Florida Supreme Court. On June 12, 2003, that court affirmed the denial of all but one issue which it remanded for a limited evidentiary hearing. Marshall, 854 So.2d at 1253.

While the appeal was pending, Marshall had also filed, on February, 22, 2002, a petition for writ of habeas corpus, raising three claims, including one alleging the trial judge's override of the jury's life recommendation violated the Constitution pursuant to the United States Supreme Court's opinions in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002), and that the standard for jury override cases announced in Tedder, 322 So. 2d 908 was arbitrarily applied in Marshall's case.

The Florida Supreme Court rejected Marshall's claim that Apprendi/Ring invalidated his override, stating:

In over fifty cases since *Ring*'s release, we have rejected *Ring* claims. Although we have not addressed *Ring*'s application in the context of a jury override verdict, our previous conclusions with regard to *Ring* claims preclude Marshall from being granted relief on his claim. First, as our plurality opinion noted in *Bottoson*, "the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century." *Bottoson*, 833 So. 2d at 695 & n.4 (Fla. 2002)(listing as examples *Hildwin v. Florida*, 490 U.S. 638, 104 L. Ed. 2d 728, 109 S. Ct. 2055 (1989), *Spaziano v. Florida*, 468 U.S. 447, 82 L. Ed. 2d 340, 104 S. Ct. 3154 (1984), *Barclay v. Florida*, 463 U.S. 939, 77 L. Ed. 2d 1134, 103 S. Ct. 3418 (1983), and *Proffitt v. Florida*, 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976)). In fact, the United States Supreme Court expressly upheld the jury override aspect of Florida's sentencing scheme. See *Spaziano*, 468 U.S. at 466 ("We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case."). *Spaziano* remains good law, and as was noted in the *Bottoson* plurality opinion, despite any tension between *Spaziano* and *Ring*, this Court relies on the United States Supreme Court's admonition that lower courts should "follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Bottoson*, 833 So. 2d at 695 (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989)). Second, *Ring* did not alter the express exemption in *Apprendi* that prior convictions are exempt from the Sixth Amendment requirements announced in the two cases. See *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). We have repeatedly relied on the presence of the prior violent felony aggravating circumstance when denying *Ring* claims. In the instant case, one of Marshall's aggravating circumstances was that he had been previously convicted of nine violent felonies. Therefore, even if *Ring* were to call Florida's jury override procedures into question, Marshall's nine prior violent felonies are an aggravating circumstance that takes his sentence outside the scope of *Ring*'s requirements.

Finally, we have recently held in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005) that we will not apply *Ring* retroactively in post-conviction cases even assuming it affected Florida law.

Marshall v. Crosby, 911 So.2d 1129, 1134-35 (Fla. 2005).

The court also rejected Marshall's claim that Tedder, was arbitrarily applied in this case based on language found in Keen v. State, 775 So. 2d 263 (Fla. 2000).

In rejecting that argument, the court stated:

In *Tedder*, this Court held that "in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder*, 322 So. 2d at 910. More recently, this Court in *Keen* reiterated the proper analysis for a *Tedder* inquiry: "The singular focus of a *Tedder* inquiry is whether there is 'a reasonable basis in the record to support the jury's recommendation of life,' rather than the weighing process which a judge conducts after a death recommendation." *Keen*, 775 So. 2d at 283-84 (citation omitted). The Court further explained that "the jury's life recommendation changes the analytical dynamic and magnifies the ultimate effect of mitigation on the defendant's sentence." *Id.* at 285.

In *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001), this Court rejected an argument similar to the one currently raised by Marshall. In so doing, this Court stated:

While conceding that *Keen* is not new law, Mills nonetheless argues that *Keen*'s application of *Tedder* constitutes a new standard by which jury override cases are reviewed. *Keen* is not a major constitutional change or jurisprudential upheaval of the law as it was espoused in *Tedder*. *Keen* offers no new or different standard for considering jury overrides on appeal. Thus, we disagree with Mills' contention that *Keen* offers a new standard of law and we reject the contention that *Keen* was anything more than an application of our long-standing *Tedder* analysis.

Tedder is the seminal case in Florida on jury overrides and remains so after *Keen*. *Tedder* was applied to this case. *Keen* provides no basis for our reconsideration of this issue.

Marshall, 911 So.2d at 1136, citing Mills v. Moore, 786 So. 2d 532, 539-40 (Fla. 2001). Noting that it had already reviewed the propriety of the override under the Tedder standard on direct appeal, the court quoted extensively from its direct appeal opinion, setting forth its analysis under the Tedder standard. Accordingly, the court held, "as in *Mills*, this claim provides no basis for relief."

On February 9, 2006 Marshall filed a petition for writ of certiorari to the United States Supreme Court, raising the three issues he had in his state habeas petition. The Court denied the petition on May 15, 2006. Marshall v. McDonough, 547 U.S. 1143, 126 S.Ct. 2059 (2006).

Marshall litigated the remanded issue but the trial court denied relief on September 28, 2005. Marshall then appealed that denial to the Florida Supreme Court, which affirmed the trial court's denial of Marshall's 3.851 motions. Marshall v. State, 976 So. 2d 1071 (Fla. 2007). The court then denied rehearing. Marshall v. State, 2008 Fla. LEXIS 381 (Fla. Feb. 29, 2008). The mandate issued on March 17, 2008.

Marshall filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 on February 27, 2009. The district court denied that petition on September 21, 2009. Marshall then filed a certificate of appealability ("COA"). That court granted the

COA on the issue of whether Marshall's death sentence violates the Eighth and Fourteenth Amendments based on a jury override which was arbitrary and capricious in light of Tedder v. State, 322 So.2d 908 (Fla. 1975). Marshall next filed with the federal district court a motion to expand the Certificate of Appealability on November 16, 2009. The court denied that motion on February 5, 2010.

Marshall then appealed that denial to the Eleventh Circuit Court of Appeals. On June 28, 2010 the Eleventh Circuit affirmed the denial of the petition. Marshall v. Secretary, Florida Dept. of Corrections, 610 F.3d 576 (11th Cir. 2010).

After Hurst v. Florida, 136 S.Ct. 616 (2016) and Hurst v. State, 202 So.3d 40 (2016), Marshall filed another state petition for habeas corpus arguing that those decisions were retroactive to him and that the Florida Supreme Court's Eighth Amendment analysis was a substantive change in the law and was thus retroactive on that basis as well. The Florida Supreme Court held that the Hurst cases were not retroactive to Marshall since his case was final before the issuance of Ring v. Arizona, 536 U.S. 584 (2002). Marshall v. Jones, 226 So.3d at 211.

REASONS FOR DENYING THE WRIT

THE FLORIDA SUPREME COURT'S DECISION TO APPLY ITS OWN RULING IN HURST V. STATE³ ONLY TO CASES FINAL AFTER THIS COURT'S 2002 DECISION IN RING⁴ DOES NOT PRESENT A FEDERAL QUESTION, AND HIS ALLEGED CONSTITUTIONAL VIOLATION FAILS BECAUSE THIS COURT HAS NEVER HELD THAT THE EIGHTH AMENDMENT REQUIRES JURY SENTENCING, UNANIMOUS, OR OTHERWISE, IN DEATH PENALTY CASES.

Marshall contends that his death sentence, the product of a judicial override of a jury's life recommendation, is unconstitutional under the Hurst decisions since no jury found the necessary aggravating factors. He also appears to argue that the override itself is unconstitutional under the Eighth Amendment due to evolving standards of decency. He argues that the Florida Supreme Court did not address his Eighth Amendment claims when it found Hurst v. State not retroactive to his case, thereby creating another Eighth Amendment violation. As argued below, the Florida Supreme Court's determination that Hurst v. State is retroactive to cases final after the Ring decision but not to those final before it is based solely upon state law. This Court does not intervene in matters of state law. Further, there is no conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court. Certiorari should be denied.

³ Hurst v. State, 202 So. 3d 40 (Fla. 2016)

⁴ Ring v. Arizona, 536 U.S. 584 (2002)

Marshall's death sentence satisfies *Hurst v. Florida*.

Marshall does not provide any “compelling” reason for this Court to review his case. U.S. Sup. Ct. R. 10. Indeed, Petitioner cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court’s decision in this case.

Marshall asserts the State’s argument that he entered the penalty phase death eligible by virtue of his prior convictions, has “been proven wrong” by this Court’s decision in Hurst v. Florida. (Petition at 10-11 n. 12). This is incorrect. Marshall’s nine prior violent felonies establish beyond a reasonable doubt the existence of the prior violent or capital felony conviction aggravator.⁵ *See* § 921.141(6)(b), Fla. Stat. (2017); *See also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”) (emphasis added); Alleyne v. United States, 133 S. Ct. 2151, 2160 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)). *See also Jenkins v. Hutton*, ____ U.S. ____, 137 S. Ct. 1769, 1772 (2017) (noting that

⁵ As noted by the Florida Supreme Court, “Marshall had a ‘record of violent felonies consisting of kidnapping, sexual battery, and seven armed robberies.’” Marshall, 226 So. 3d at 212 n.1, reh’g denied, SC16-779, 2017 WL 4161243 (Fla. Sept. 20, 2017).

the jury’s findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty). This Court’s ruling in Hurst v. Florida did not change the recidivism exception articulated in Apprendi and Ring v. Arizona, 536 U.S. 584, 609 (2002) (extending the holding in Apprendi to capital cases and holding that when “enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ the Sixth Amendment requires that they be found by a jury”) (internal citation omitted).

Just a few weeks after deciding Hurst, this Court wrote that whether aggravating factors outweigh mitigating circumstances is not a factual question. This Court explained that “the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy.” Kansas v. Carr, 136 S. Ct. 633, 642 (2016). Because this is not a factual question, the Court reasoned that “[i]t would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it.” Id. See Alleyne v. United States, 570 U.S. 99, 115-16 (2013) (the Court explained that “[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime.”); Jenkins v. Hutton, 582 U.S. ___, 137 S. Ct. 1769 (2017) (confirming the

constitutionality of an Ohio death sentence based on a jury's guilt-phase determination of facts).

Lower courts have almost uniformly held that a judge may perform the “weighing” of factors and arrive at an appropriate sentence without violating the Sixth Amendment.⁶ The findings required by the Florida Supreme Court following remand in Hurst involving the weighing and selection of the Defendant's sentence, see e.g. McGirth v. State, 209 So. 3d 1146, 1164 (Fla. 2017), are not required by the Sixth Amendment. There was no Sixth Amendment error in this case.⁷

⁶ State v. Mason, 2018 WL 1872180, *5, 6 (Oh. Apr. 18, 2018) (“Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principal offense and any aggravating circumstances” and that “weighing is not a factfinding process subject to the Sixth Amendment.”) (string citations omitted); United States v. Sampson, 486 F.3d 13, 32 (1st Cir. 2007) (“As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found.”); United States v. Purkey, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as “the lens through which the jury must focus the facts that it has found” to reach its individualized determination); Waldrop v. Comm’r, Alabama Dep’t of Corr., 15-10881, 2017 WL 4271115, at *20 (11th Cir. Sept. 26, 2017) (unpublished) (In rejecting a Hurst claim the Court explained: “Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop’s case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict. See § 13A-5-45(e).”); State v. Gales, 658 N.W.2d 604, 628–29 (Neb. 2003) (“[W]e do not read either Apprendi or Ring to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury”)

⁷ Even if the recidivist exception did not apply, Hurst errors are subject to harmless error analysis. See Hurst v. Florida, 136 S. Ct. at 624; See also Chapman v. California, 386 U.S. 18, 23-24 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Here, the aggravators found by the trial court were either uncontestable,

The Florida Supreme Court’s retroactivity analysis is a matter of state law over which this Court has no jurisdiction

Marshall argues that his judicial override sentence must be reversed because post-Hurst, an override sentence is not valid under the Eighth Amendment. However, Marshall largely ignores the basis for the Florida Supreme Court ruling below, retroactivity. Putting aside the fact that Hurst addressed the Sixth Amendment, not the Eighth, his argument in this respect is nothing more than an argument that every defendant is entitled to any subsequent development in the law. Not only is this position legally untenable, but this Court has held that, in general, 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, without violating the federal constitution under Danforth. 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); Michigan v. Long, 463 U.S. 1032, 1041 (1983). This Court has observed that it is “fundamental” that state courts “be left free and unfettered by us” in interpreting their own state constitutions and state laws. Powell, 559 U.S. at 56.

(under sentence of imprisonment, prior violent felony), or well established by overwhelming evidence (heinous atrocious and cruel, burglary).

Florida was not required to grant retroactive application of Hurst v. Florida to all death sentenced murderers, including those whose sentences were the result of a judicial override, regardless of the date their convictions and sentences became final. Following issuance of this Court's decision in Hurst v. Florida, the Florida Supreme Court held that Hurst v. Florida would apply to those death sentences which were final after this Court's decision in Ring. This determination concerns only state law and is outside the scope of certiorari jurisdiction of this Court. See e.g. Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (noting that "whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern []" and that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."). Consequently, the constitutional pretensions of Marshall's claim before this Court are limited or non-existent. Under the Florida Supreme Court controlling precedent of Asay v. State, 210 So. 3d 1 (Fla. 2016), Hurst v. Florida is not retroactive as to Marshall's sentence.

On remand from this Court, instead of just addressing whether the error was harmless in Hurst's case, the Florida Supreme Court expanded this Court's Hurst v. Florida decision in two significant ways. First, the Florida Supreme Court held that not only is the existence of an aggravating factor a matter for jury factfinding, but so is the relative weight of the aggravating factors and mitigating circumstances.

Second, the court held that jury sentencing recommendations must be unanimous. Hurst v. State, 202 So. 3d 40 (Fla. 2016). The Florida Supreme Court's decision in this regard is only applicable to defendants in Florida, and, consequently, is subject to retroactivity analysis under Witt v. State, 387 So. 2d 922 (Fla. 1980). Under Witt, the Florida Supreme Court retroactively applied its decision to death sentences which were made final after this Court's decision in Ring. Consistent with Apprendi and Ring, Hurst v. Florida is not retroactive under federal law. Hurst v. State is retroactive under state law only and only to the extent articulated by the State's high court. This state law determination is outside the scope of certiorari jurisdiction of this Court. Florida's test for retroactivity is broader than the federal test. Asay, 210 So.3d at 15 (citing Johnson v. State, 904 So.2d 400, 409 (Fla. 2005)); Johnson v. State, 904 So.2d 400, 409 (Fla. 2005) (rejecting the use of the federal test of Teague to determine retroactivity, and continuing to apply "our longstanding Witt analysis, which provides more expansive retroactivity standards than those adopted in Teague"). Because the state test for retroactivity is broader and provides more relief than Teague, the retroactivity of the Florida Supreme Court's decisions is solely a matter of state law. Florida is entitled to adopt a partial retroactivity analysis in cases where there would be no retroactivity under the federal test of Teague.

This Court lacks the authority to consider this claim. This Court does not review claims that are based on independent state law grounds. Michigan v. Long,

463 U.S. 1032, 1040 (1983) (explaining that respect for the “independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court’s refusal to decide cases where there is an adequate and independent state ground” for the decision). Accordingly, this Court should decline certiorari review.

Hurst v. Florida is not retroactive under federal law.

Again, aside from the separate issue of retroactivity under state law, there is no conflict among courts applying Hurst under the US constitution. When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. Griffith v. Kentucky, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. This Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions.⁸ Schriro v. Summerlin, 542 U.S. 348, 351 (2004).

⁸ Those exceptions are: (1) a substantive rule that “places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or if it prohibits a certain category of punishment for a class of defendants because of their status or offense”; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. Teague v. Lane, 498 U.S. 288, 310–13 (1989); Penry v. Lynaugh, 492 U.S. 302 (1989) (abrogated on other grounds

In Schriro v. Summerlin, this Court directly addressed whether its decision in Ring v. Arizona was retroactive. Summerlin, 542 U.S. at 349. The Court held the decision in Ring was procedural and non-retroactive. Id. at 353. This was because Ring only “altered the range of permissible methods for determining whether a defendant’s conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment.” Id. The Court concluded its opinion stating: “The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment’s guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review.” Summerlin, 542 U.S. at 358.

Ring did not create a new constitutional right. That right was created by the Sixth Amendment guaranteeing the right to a jury trial.⁹ If Ring was not retroactive,

by Atkins v. Virginia, 536 U.S. 304 (2002); Butler v. McKellar, 494 U.S. 407 (1990); Saffle v. Parks, 494 U.S. 484 (1990)).

⁹ The right to a jury trial was extended to the States in Duncan v. Louisiana, 391 U.S. 145 (1968). But, in DeStefano v. Woods, 392 U.S. 631 (1968) (*per curiam*), the Court declined to apply the holding of Duncan retroactively. Appendi merely

then Hurst cannot be retroactive as Hurst is merely an application of Ring to Florida. In fact, the decision in Hurst is based on an entire line of jurisprudence, none of which has ever been held to be retroactive. See DeStefano v. Woods, 392 U.S. 631 (1968) (*per curiam*) (holding the Court’s decision in Duncan v. Louisiana, which guaranteed the right to a jury trial to the States was not retroactive); McCoy v. United States, 266 F.3d 1245, 1255, 1259 (11th Cir. 2001) (holding Appendi not retroactive under Teague, and acknowledging that every federal circuit to consider the issue reached the same conclusion); Varela v. United States, 400 F.3d 864, 866–67 (11th Cir.2005) (explaining that Supreme Court decisions, such as Ring, Blakely, and Booker, applying Appendi’s “prototypical procedural rule” in various contexts are not retroactive); Crayton v. United States, 799 F.3d 623, 624-25 (7th Cir. 2015) cert. denied, 136 S. Ct. 424 (2015) (holding that Alleyne v. United States, 570 U.S. ___, ___, 133 S. Ct. 2151, 2156 (2013), which extended Appendi from maximum to minimum sentences, did not, like Appendi or Ring, apply retroactively). Since this Court has expressly found that Ring was not retroactive, Hurst v. Florida, which applied Ring to invalidate Florida’s statute, is also not retroactive. There is no conflict among federal courts on this issue. See e.g. Lambrix v. Sec’y, Fla. Dept. of Corr., 851 F.3d 1158, 1165, n.2 (11th Cir. 2017) (Lambrix V) (“under federal

extended the right to a jury trial to the sentencing phase, when the State sought to increase the maximum possible punishment. Appendi, 530 U.S. at 494.

law Hurst, like Ring, is not retroactively applicable on collateral review”), cert. denied, Lambrix v. Jones, 138 S.Ct. 217 (2017) (No. 17-5153); Ybarra v. Filson, 869 F.3d 1016, 1032-33 (9th Cir. 2017)(denying permission to file a successive habeas petition raising a Hurst v. Florida claim concluding that Hurst v. Florida did not apply retroactively).

As this Court has observed, a principal purpose for certiorari jurisdiction “is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.” Braxton v. United States, 500 U.S. 344, 347 (1991); see also Sup. Ct. R. 10(b) (listing conflict among state supreme courts as a consideration in the decision to grant review). Certiorari review should be denied because there is no conflict between the Florida Supreme Court’s decision and that of any other federal appellate court or state supreme court.

The Florida Supreme Court’s retroactivity decisions do not render pre-Ring death sentences unreliable, nor does it require judicial sentencing

Marshall argues that the Florida Supreme Court’s decision violates the Eighth Amendment because, in his view, factual determinations not made by a jury are unreliable or unfair. Essentially he asks this Court to overrule Harris v. Alabama, 513 U.S. 504 (1995) in this long final case. Harris held Alabama’s capital sentencing statute to be constitutional, even though it allowed for judicial sentencing. This case comes to the Court in a uniquely problematic procedural posture, which would require the Court to consider issues of state post-conviction

procedural law and the retroactivity of any potential decision. Moreover, the sentencing judge in this case imposed a death sentence based in part on Marshall's prior violent felony convictions. And he did so based on considerations of consistency and proportionality that underscore why judges are the usual parties charged with imposing sentences in other areas of the law. Nothing about that process is inconsistent with the Constitution. The petition for writ of certiorari should be denied.

Furthermore, this Court refused to consider that very issue of the judicial override in Marshall's prior petition of certiorari to this Court. Marshall v. McDonough, 547 U.S. 1143, 126 S.Ct. 2059 (2006) (SC05-9181). The Florida Supreme Court's reasoning in this case is in harmony with this Court's case law. As noted above, this Court has recently reaffirmed the validity of judicial sentencing in death cases as long as the jury makes the factual findings on the existence of the aggravators. Kansas v. Carr, 136 S. Ct. 633, 642 (2016).

Weighing aggravating and mitigating circumstances in a death penalty case is no different in kind than weighing "the nature and circumstances of the offense and the history and characteristics of the defendant" in a non-capital case. 18 U.S.C. § 3553. The Constitution provides the right to a trial by jury, not a sentencing by jury.

This Court has not issued an interpretation of the Eighth Amendment saying that a judge's override of a jury recommendation constitutes cruel and unusual

punishment. Hurst v. Florida only addressed the Sixth Amendment. Hurst did not overrule Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154 (1984), in its entirety. Instead, the Court held: “The decisions [in Spaziano and Hildwin] are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury’s factfinding, that is necessary for imposition of the death penalty.” Hurst, 136 S. Ct. at 624.

Spaziano challenged Florida’s capital sentencing scheme on both Sixth and Eighth Amendment grounds and the Court addressed both. Noting that since petitioner’s “fundamental premise is that the capital sentencing decision is one that, in all cases, should be made by a jury,” the Court went on to say:

In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Spaziano, 468 U.S. at 458, 464, 104 S. Ct. at 3164. On the Eighth Amendment challenge, the Court stated:

The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws. “Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment” is violated by a challenged practice. *See Enmund v. Florida*, 458 U.S. 782, 797, 102 S.Ct. 3368, 3376, 73 L.Ed.2d 1140

(1982); *Coker v. Georgia*, 433 U.S. 584, 597, 97 S.Ct. 2861, 2868, 53 L.Ed.2d 982 (1977) (plurality opinion).

Id. No case from this Court has mandated jury sentencing in a capital case---and such a holding would require reading a requirement into the constitution that is simply not there.

Marshall also argues that a judicial override sentence is so rare in Florida, that his sentence must be considered cruel and unusual. Marshall asserts that the Florida Supreme Court gave short shrift to his arguments and failed in its “obligation” to meaningfully review his constitutional arguments. (Petition at 17). However, in deciding the lead retroactivity case, Asay, the Florida Supreme Court carefully and thoroughly analyzed the retroactivity question. The court recognized the importance of finality and difficulties in having to conduct multi-day penalty phase trials long after the original trial and penalty phase had been conducted. The court also noted “there is an important consideration regarding the impact a new sentencing proceeding would have on the victims’ families and their need for finality.” Asay, 210 So. 3d at 22.

Marshall argues that the failure to employ a full retroactive application of Hurst v. Florida and Hurst v. State means that death sentences for an override, like Marshall’s, are less reliable and more arbitrary. This claim should be rejected because it is based entirely on speculation. There is nothing inherently unreliable about judicial factual determinations. A significant part of the jury’s responsibility

is to ensure the fairness of the resulting process, rather than reliability of verdict. See Duncan v. Louisiana, 391 U.S. 145, 155-156 (1968); Singer v. United States, 380 U.S. 24, 35 (1965). Significantly, even after this Court applied the Sixth Amendment right to jury trial to the states, the right was not granted retroactively as there was no question that the respective outcomes in criminal cases tried before the court were reliable. Destefano v. Woods, 392 U.S. 631 (1968).

Indeed, if consistency is the goal on capital sentencing, this Court has indicated that judicial sentencing may yield more consistent results, perhaps because of judges' greater experience with analogous cases. Proffitt v. Florida, 428 U.S. 242, 252 (1976). It is not a foregone conclusion, therefore, that a defendant's sentence is less reliable merely because the sentencing procedure in effect at the time permitted the trial judge to make the sentencing decision. Marshall certainly has not established that his proceedings were so unreliable that he was punished for conduct the law does not reach. Marshall was serving a life sentence when he brutally murdered another inmate. His death sentence is neither unfair nor unreliable because the judge imposed the sentence in accordance with the law existing at the time of his trial.

Finally, the Florida legislature modified Florida law so that judges no longer have the authority to sentence defendants to death without a unanimous jury vote in support of that sentence. Fla. Stat. § 921.141. That law does not apply retroactively

but it does resolve the issue of a judicial override in the future. The Court should not expend its resources on evaluating whether to overrule an existing precedent when, even if it did so, its decision would not have any prospective effect.

CONCLUSION

Based upon the foregoing arguments and authorities, the petition for writ of certiorari should be denied.

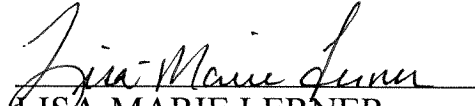
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically served on Todd Scher at Tscher@msn.com, 1 East Broward Blvd, Suite 444, Ft. Lauderdale, FL 33301 on this 7th of May, 2018.


LISA-MARIE LERNER