

CASE NO. 15-6430

IN THE UNITED STATES SUPREME COURT

DELMER SMITH,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

Whether this Court should grant certiorari review to consider Petitioner's claim asserting that Florida's death penalty statute violates Petitioner's constitutional rights as set forth in Ring v. Arizona, 536 U.S. 584 (2002), and Apprendi v. New Jersey, 530 U.S. 446 (2000).

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CITATION TO OPINION BELOW

The decision of the Florida Supreme Court is reported at Smith v. State, 170 So. 3d 745 (Fla. 2015).

JURISDICTION

This Court's jurisdiction to review the final judgment of a state court is authorized by 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The issue presented in this capital case involves the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Petitioner Delmer Smith was convicted of the first-degree murder of Mrs. Kathleen Briles and sentenced to death. Mrs. Briles was brutally killed during a home invasion on August 3, 2009. She was accosted outside of her house after returning from an afternoon trip to the grocery store, then taken inside her home, where she was bound, gagged, and beaten. She died due to blows received from having a 23-pound antique sewing machine repeatedly dropped on her head.

Shortly thereafter, Smith was in possession of several unique collectibles and items of jewelry stolen from the Briles home at the time of the murder. His cell phone records reflected that he was in the area of the Briles' home at the time of the murder. He was known to routinely carry a black backpack with a ski mask, gloves, and a roll of gray duct tape in it. Following his arrest, he made several phone calls to a friend, urging her to secure a duffle bag from storage and hide it in her attic. However, she provided the bag to law enforcement officers and several items from the Briles' residence were inside of a lock box in the bag. A cellmate of Smith's testified that Smith wanted him to relay a threat to another inmate who was cooperating with the State in its prosecution against Smith.

At a penalty phase following Smith's conviction, the State presented evidence that Smith had convictions in 1991 and 1995

for robberies. Smith was on probation for the 1995 bank robbery conviction when he killed Mrs. Briles. He had been released from federal prison in September, 2008. Additionally, the jury heard that Smith had been convicted of another home invasion that occurred in March, 2009, several months before the Briles' murder, and Smith had worn a mask and gloves, tied up the victim, and threatened to kill her.

In mitigation, Smith presented two nieces who testified that Smith had helped them and provided guidance. He also presented testimony from a psychologist who discussed Smith's background and personality disorders and opined that Smith was under the influence of an extreme mental or emotional disturbance and that Smith's ability to follow the law was impaired. The State presented a psychiatrist who disagreed with some of the psychologist's conclusions and diagnosed Smith with antisocial personality disorder. The jury recommended that the trial court impose a sentence of death by a vote of twelve to zero.

At a subsequent hearing before the trial judge only, both Smith and the State presented additional testimony about Smith's mental functioning based on neuroimaging test results. On May 28, 2013, the court followed the jury's unanimous recommendation and sentenced Smith to death for Mrs. Briles' murder. The court found five aggravating factors: Smith was on felony probation; Smith had prior violent felony convictions; the murder was committed in

the course of a burglary; the murder was committed for pecuniary gain; and the murder was especially heinous, atrocious or cruel. The court gave moderate weight to the felony probation aggravator, noting the short amount of time that elapsed between Smith's release from prison and Mrs. Briles' murder, which was less than a year. The court gave great weight to the prior violent felony conviction aggravator, based on the 1991 and 1995 convictions. The court noted that while Smith had been convicted of armed home invasion and armed kidnapping for the Sarasota offenses committed in March, 2009, those convictions were still on direct appeal; accordingly, while he would give great weight to this circumstance "in the event the conviction is upheld on appeal," he independently assigned great weight to this circumstance based solely on the earlier convictions.¹

The court rejected the statutory mitigating circumstances related to Smith's mental health, expressly finding the State witnesses on this point to be more credible. The court observed that Smith's behavior "on the day of the murder and the days after appears cold, calculated, rational, and goal-directed."

The court made the following findings as to the nonstatutory mitigating factors asserted by the defense: (1) traumatic brain injury and frontal lobe damage, rejected as not established; (2) Intermittent Explosive Order, given moderate weight; (3) loving

¹ Smith's Sarasota convictions have since been affirmed. Smith v. State, 147 So. 3d 997 (Fla. 2d DCA 2014).

relationship with nieces, given little weight; (4) physical, emotional, and sexual abuse as a child, given little weight; (5) acute academic failure and Attention Deficit Disorder, given significant weight; (6) remorse, rejected as not established; (7) good conduct while in custody, given moderate weight; and (8) the time the jury deliberated on penalty, rejected as not established with the court noting that the three hours before returning a recommendation was indicative of thoughtful deliberation. The court concluded that the four statutory aggravators (since two were merged) "overwhelm" the five nonstatutory mitigators found to exist, and sentenced Smith to death.

The Florida Supreme Court affirmed the convictions and Smith now seeks this Court's review of that decision.

REASONS FOR DENYING THE WRIT

Petitioner seeks certiorari review of the Florida Supreme Court's decision in Smith v. State, 170 So. 3d 745 (Fla. 2015), which upheld the imposition of his death sentence despite Smith's claim that Florida's death penalty statute is unconstitutional. However, the decision below does not conflict with any other court decision, and does not decide any important, unsettled question of federal law. Accordingly, certiorari review must be denied.

Certiorari review should be denied because (1) Petitioner has not established conflict among courts or presented an unsettled question of federal law and (2) the Florida Supreme Court correctly denied Petitioner's claims.

Review should not be granted in this case, as Smith has not shown that his case falls under any of the provisions of Rule 10 governing certiorari review or is otherwise appropriate for review. Moreover, the Florida Supreme Court's ruling to reject this claim was properly entered and provides no basis for review.

Rule 10 of the Rules of the Supreme Court of the United States identifies the relevant considerations in determining the propriety of certiorari review. Noting review is only granted for "compelling reasons," the Rule indicates consideration of a decision by a state court of last resort should involve an unresolved question of federal law or a conflict among higher

courts. Although the failure to meet the considerations in Rule 10 is not controlling, this Court has noted that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review. Rockford Life Insurance Co. v. Illinois Dept. of Revenue, 482 U.S. 182, 184, n. 3 (1987).

No conflict or unsettled question of federal law is presented in Smith's petition. Smith suggests that the resolution of his claim below conflicts with Ring v. Arizona, 536 U.S. 584 (2002), and observes that this Court has accepted review of the issue in Hurst v. Florida, 135 S. Ct. 1531 (2015). However, the facts of his case are readily distinguishable from Ring and Hurst. As acknowledged in the petition, Smith's death sentence is supported by a unanimous jury recommendation for death as well as the existence of prior violent felony convictions. In the Ring case, there was no jury participation in the sentencing phase at all, and in Hurst the recommendation was not unanimous and there were no prior convictions to support the death sentence. Accordingly, this case is not governed by Ring or Hurst.

Ring itself recognizes the critical distinction of an enhanced sentence supported by a prior conviction. See Almendarez-Torres v. United States, 523 U.S. 224 (1998) (permitting judge to impose higher sentence based on prior conviction); Ring, 536 U.S. at 598 n.4 (noting Ring did not

challenge Almendarez-Torres, "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"); Alleyne v. United States, 133 S. Ct. 2151, 2160 n.1 (2013) (affirming Almendarez-Torres provides valid exception for prior convictions). Hurst was convicted only of first-degree murder, and his death sentence is not supported by any prior convictions or an express jury verdict from the guilt phase finding facts constituting an aggravating factor. See Hurst v. State, 147 So. 3d 435, 446 (Fla. 2014). Thus, this case is not inconsistent with either Ring or Hurst and does not conflict with any other case.

Both Hurst and Smith invoke Ring v. Arizona, 536 U.S. 584 (2002), as supporting a Sixth or Eighth Amendment right to a unanimous sentencing jury in capital cases. However, Ring does not hold that there is a constitutional right to any jury sentencing. Id., at 612. To the contrary, Ring requires a jury to find whether a defendant is eligible for the death penalty upon conviction for first-degree murder. In Florida, a defendant is eligible for a capital sentence if at least one aggravating factor applied to the case. See Ault v. State, 53 So. 3d 175, 205 (Fla. 2010); Zommer v. State, 31 So. 3d 733, 752-54 (Fla. 2010); State v. Steele, 921 So. 2d 538, 540 (Fla. 2005). In Smith's case, his prior convictions render him indisputably eligible for his death sentences.

Smith insists that the reliance on the unanimous jury recommendation and the existence of prior violent felony convictions to defeat his Ring claim is inadequate because it fails to take into account the statutory scheme, which does not require a unanimous jury or a prior conviction for imposition of a death sentence. This argument is essentially an admission that any constitutional flaw in the statute does not affect the integrity of Smith's death sentence. Accordingly, review should be denied.

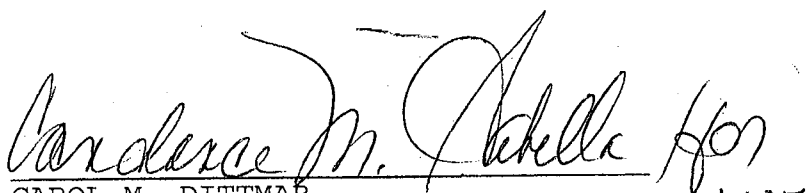
This Court has consistently held that it does not review questions that do not affect the outcome of the matter before it. See Coleman v. Thompson, 501 U.S. 722, 730 (1991). In this case, any opinion from this Court in the instant case would be merely advisory. Even if this Court holds in Hurst that a unanimous jury must find aggravating factors, Smith's sentence is constitutional because it is supported by a unanimous jury recommendation. As the outcome in this case would not change under any scenario, certiorari review should be denied.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail to Julius Aulisio, Assistant Public Defender, Public Defenders Office, Tenth Judicial Circuit, P.O. Box 9000-Drawer PD, Bartow, Florida 33831, jaulisio@pd10.org, mjudino@pd10.state.fl.us, on this 2nd day of November, 2015. I further certify that all parties required to be served have been served.

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