SUPREME COURT OF THE UNITED STATES

MICHAEL GORDON REYNOLDS *v.* FLORIDA

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

No. 18–5181. Decided November 13, 2018

The petition for a writ of certiorari is denied.

Statement of JUSTICE BREYER respecting the denial of certiorari.

This case, along with 83 others in which the Court has denied certiorari in recent weeks, asks us to decide whether the Florida Supreme Court erred in its application of this Court's decision in *Hurst* v. *Florida*, 577 U. S. ___ (2016). In *Hurst*, this Court concluded that Florida's death penalty scheme violated the Constitution because it required a judge rather than a jury to find the aggravating circumstances necessary to impose a death sentence. The Florida Supreme Court now applies *Hurst* retroactively to capital defendants whose sentences became final after this Court's earlier decision in *Ring* v. *Arizona*, 536 U. S. 584 (2002), which similarly held that the death penalty scheme of a different State, Arizona, violated the Constitution because it required a judge rather than a jury to find the aggravating circumstances necessary to impose a death sentence. The Florida Supreme Court has declined, however, to apply *Hurst* retroactively to capital defendants whose sentences became final before *Ring*. *Hitchcock* v. *State*, 226 So. 3d 216, 217 (2017). As a result, capital defendants whose sentences became final before 2002 cannot prevail on a "*Hurst*-is-retroactive" claim.

Many of the Florida death penalty cases in which we have denied certiorari in recent weeks involve—directly or indirectly—three important issues regarding the death penalty as it is currently administered. *First*, these cases highlight what I have previously described as a serious flaw in the death penalty system: the unconscionably long

delays that capital defendants must endure as they await execution. Henry Sireci, the petitioner in one case we recently denied, was first sentenced to death in 1976. He has lived in prison under threat of execution for nearly 42 years. Unfortunately, Sireci is far from alone in having endured lengthy delays. The Court has recently denied petitions from at least 10 other capital defendants in Florida who have lived under a death sentence for more than 30 years, and from at least 50 other capital defendants who have lived under a death sentence for more than 20 years. I have previously written that lengthy delays—made inevitable by the Constitution's procedural protections for defendants facing execution—deepen the cruelty of the death penalty and undermine its penological rationale. *Glossip* v. *Gross*, 576 U. S. ___, ___ (2015) (dissenting opinion) (slip op., at 19); see *Dunn* v. *Madison*, 583 U. S. ___, ___ (2017) (concurring opinion) (slip op., at 2); *Smith* v. *Ryan*, 581 U. S. ___, ___ (2017) (statement respecting denial of certiorari) (slip op., at 1); *Sireci* v. *Florida*, 580 U. S. ___, ___ (2016) (opinion dissenting from denial of certiorari) (slip op., at 1). I remain of that view. However, because the petitioners in these cases did not squarely raise the delay issue, I do not vote to grant certiorari on that basis here.

Second, many of these cases raise the question whether the Constitution demands that *Hurst* be made retroactive to all cases on collateral review, not just to cases involving death sentences that became final after *Ring*. I believe the retroactivity analysis here is not significantly different from our analysis in *Schriro* v. *Summerlin*, 542 U. S. 348 (2004), where we held that *Ring* does not apply retroactively. Although I dissented in *Schriro*, I am bound by the majority's holding in that case. I therefore do not dissent on that ground here.

Third, several of the cases in which we deny certiorari today, including this one, indirectly raise the question

whether the Eighth Amendment requires a jury rather than a judge to make the ultimate decision to sentence a defendant to death. See *Guardado* v. *Florida*, No. 17–9284; *Philmore* v. *Florida*, No. 17–9556; *Tanzi* v. *Florida*, No. 18–5160; *Franklin* v. *Florida*, No. 18–5228; *Grim* v. *Florida*, No. 18–5518; *Johnston* v. *Florida*, No. 18–5793. In these cases, the Florida Supreme Court treated *Hurst* errors as harmless in significant part because the jury in each case unanimously recommended that the defendant be sentenced to death. The problem, however, is that the defendants in these cases were sentenced to death under a scheme that required the judge to make the ultimate decision to impose the death penalty, and in which the jury was repeatedly instructed that its recommended verdict would be advisory. As I have previously written, I believe that this scheme violates the Eighth Amendment. See *Middleton* v. *Florida*, 583 U. S. ___, ___ (2018) (opinion dissenting from denial of certiorari) (slip op., at 1); *Hurst*, *supra*, at ___ (opinion concurring in judgment) (slip op., at 1); *Ring*, *supra*, at 619 (same). Because juries are better suited than judges to "express the conscience of the community on the ultimate question of life or death," the Constitution demands that jurors make, and take responsibility for, the ultimate decision to impose a death sentence. *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 (1968).

Although these cases do not squarely present the general question whether the Eighth Amendment requires jury sentencing, they do present a closely related question: whether the Florida Supreme Court's harmless-error analysis violates the Eighth Amendment because it "rest[s] a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell* v. *Mississippi*, 472 U. S. 320, 328–329 (1985). For the reasons set out in JUSTICE SOTOMAYOR's dissent, *post*, at 3–7, I believe the Court

should grant certiorari on that question in an appropriate case. That said, I would not grant certiorari on that question here. In many of these cases, the Florida Supreme Court did not fully consider that question, or the defendants may not have properly raised it. That may ultimately impede, or at least complicate, our review.

Nonetheless, the three issues raised by these cases draw into focus a more basic point I made in *Schriro*: A death sentence should reflect a jury's "community-based judgment that the sentence constitutes proper retribution." 542 U. S., at 360 (dissenting opinion). It seems to me that the jurors in at least some of these cases might not have made a "community-based judgment" that a death sentence was "proper retribution" had they known at the time of sentencing (1) that the death penalty might not be administered for another 40 years or more; (2) that other defendants who were sentenced years later would be entitled to resentencing based on a later-discovered error, but that the defendants in question would not be entitled to the same remedy for roughly the same error; or (3) that the jury's death recommendation would be treated as if it were decisive, despite the judge's instruction that the jury's recommendation was merely advisory. Had jurors known about these issues at the time of sentencing, some might have hesitated before recommending a death sentence. At least a few might have recommended a life sentence instead. The result is that some defendants who have lived under threat of execution for decades might never have been sentenced to death in the first place.

The flaws in the current practice of capital punishment could often cast serious doubt on the death sentences imposed in these and other capital cases. Rather than attempting to address the flaws in piecemeal fashion, however, I remain of the view that "it would be wiser to reconsider the root cause of the problem—the constitutionality of the death penalty itself." *Madison*, *supra*, at ___ (BREYER, J., concurring) (slip op., at 3).