CASE NO. 15-6551

IN THE UNITED STATES SUPREME COURT

JERRY WILLIAM CORRELL,
*Petitioner,*

vs.

STATE OF FLORIDA,
*Respondent.*

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

# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EXECUTION SCHEDULED
October 29, 2015

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## QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

[Restated]

Whether this Court should grant certiorari to review the Florida Supreme Court's rejection of Petitioner's successive motion for postconviction relief, filed during an active death warrant, challenging the constitutionality of Florida's death penalty statute and the length of time the Petitioner has been on death row.

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## TABLE OF CITATIONS

**Cases**

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## CITATION TO OPINION BELOW

Petitioner seeks discretionary review of Correll v. State, ___ So. 3d ___, 2015 WL 5771838 (Fla. Oct. 2, 2015) (Pet. App. A).

## JURISDICTION

This Court's jurisdiction to review the final judgment of a state court is authorized by 28 U.S.C. § 1257. Jurisdiction is limited in this case, however, because Petitioner's first Question Presented was rejected below on state procedural grounds, and much of the argument in the petition was not presented to the Florida Supreme Court. Coleman v. Thompson, 501 U.S. 722, 729 (1991); Michigan v. Long, 463 U.S. 1032, 1041-42 (1983).

## CONSTITUTIONAL PROVISIONS INVOLVED

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

## STATEMENT OF THE CASE AND FACTS

Petitioner Jerry Correll killed his ex-wife, her sister and mother, and his own five-year-old daughter in 1985. All four victims were stabbed multiple times. In 1986, jurors convicted

him of four counts of first degree murder and recommended the death sentence for each victim. He was sentenced to death on each of the four murders on February 7, 1986.

The Florida Supreme Court upheld the convictions and sentences on direct appeal. Correll v. State, 523 So. 2d 562 (Fla.), cert. denied, 488 U.S. 871 (1988). Following the signing of Correll's first death warrant, state and federal collateral challenges were universally rejected. See Correll v. State, 558 So. 2d 422 (Fla. 1990); Correll v. State, 698 So. 2d 522 (Fla. 1997); Correll v. State, 880 So. 2d 1210 (Fla. 2004); Correll v. Secretary, Dept. of Corrections, 932 F.Supp.2d 1257 (M.D. Fla. 2013). On January 16, 2015, Governor Rick Scott signed Correll's second death warrant. Execution was scheduled for February 26, 2015.

On January 21, 2015, Correll sought public records and filed a successive motion for postconviction relief. Three claims were presented in the motion, challenging: (1) the constitutionality of Florida's death penalty scheme, which permits a death recommendation by a non-unanimous jury; (2) the length of time Correll has been on death row; and (3) the confidentiality afforded to execution team members under Florida law. Responses were filed and Correll's motions for records and for relief were summarily denied.

On Friday, January 23, 2015, this Court granted certiorari review of Warner v. Gross, 135 S. Ct. 1173 (2015), a case challenging Oklahoma's procedures for lethal injection based on the use of the drug midazolam hydrochloride for sedation. Based on the order accepting review, Correll filed a motion to stay his execution in the state circuit court. The motion was denied, and Correll filed a similar request in the Florida Supreme Court. At that time, Correll's appeal from the denial of his successive postconviction motion was pending, but no lethal injection challenge was presented in that motion and no substantive Eighth Amendment claim had been offered to the Florida Supreme Court. Accordingly, the Florida Supreme Court remanded jurisdiction to provide Correll the opportunity to raise a lethal injection challenge.

Correll filed another successive postconviction motion, asserting four claims related to Florida's use of midazolam as a sedative for execution: (1) the use of midazolam presents a constitutionally unacceptable risk of pain and suffering; (2) the standard applied by this Court in Baze v. Rees, 553 U.S. 35 (2008), does not apply in this case; (3) there is no requirement that defendants identify an available alternative in asserting an Eighth Amendment facial challenge to lethal injection as a method of execution; and (4) that Correll's personal history

presents a risk of paradoxical reaction to midazolam, rendering the protocol unconstitutional as applied to Correll. A response was filed and following a hearing for legal argument, Correll's motion was denied based on binding precedent from the Florida Supreme Court.

Following that ruling, the motion for stay of execution in the Florida Supreme Court was renewed. The Florida Supreme Court granted the motion, and a stay of execution was entered on February 17, 2015. When this Court subsequently upheld the use of midazolam on June 29, 2015, in Glossip v. Gross, 135 S. Ct. 2726 (2015), the Florida Supreme Court remanded Correll's case for an evidentiary hearing on his as-applied challenge to the use of midazolam in his execution.

The evidentiary hearing was conducted on August 19, 2015. Following the hearing, the court concluded that Correll had failed to meet his burden of establishing that he is sure or very likely to suffer needless pain and suffering due to the use of midazolam in Florida's protocol, and relief was denied. On October 2, 2015, the Florida Supreme Court affirmed, and vacated the stay of execution it had previously entered (Pet. App. A). Correll now seeks this Court's review of that opinion.

## REASONS FOR DENYING THE WRIT

I.

**Certiorari review must be denied because this Court does not have jurisdiction over arguments rejected below on state procedural grounds and new arguments not presented to the court below.**

Initially, this Court must determine the scope of any jurisdiction over this case. Correll's full round of state and federal collateral review of his judgments and sentences was completed in January, 2014, when this Court denied certiorari review of the denial of a certificate of appealability by the Eleventh Circuit Court of Appeals. Correll v. Crews, 134 S. Ct. 1024 (2014). Following the signing of his death warrant, Correll filed two successive postconviction motions. The opinion he wants this Court to review affirmed the denial of relief on both motions.

Under Florida law, motions for postconviction relief must be filed within one year of a defendant's conviction and sentence becoming final, or must meet one of three exceptions. See Fla. R. Crim. P. 3.851(d). An exception is permitted where a new constitutional right has been held to apply retroactively. Fla. R. Crim. P. 3.851(d)(2)(B). In Correll's case, finality occurred on October 3, 1988. Correll v. Florida, 488 U.S. 871 (1988). Correll's third and fourth successive motions were untimely, and did not identify any exception to excuse the late

filing under Rule 3.851.

This Court's jurisdiction is limited to only those federal constitutional issues which were presented and considered by the court below. Illinois v. Gates, 462 U.S. 213, 217-19 (1983); Webb v. Webb, 451 U.S. 493, 496-97 (1981). This principle restricts jurisdiction over this case in two separate ways.

First, there was an independent and adequate state procedural basis for the denial of relief as to his initial claim, which was identified and applied on appeal. The Florida Supreme Court expressly found Correll's claim premised on Ring v. Arizona, 536 U.S. 584 (2002), to be successive, since a Ring claim had been previously litigated in Correll's case. See Correll, 2015 WL 5771838 at *6 (Pet. App. A at 15); Correll v. State, 880 So. 2d 1210 (Fla. 2004). The court below did not rule on the merits of any Ring claim, noting only the successive nature of the claim and the lack of retroactivity of Ring (rendering Correll's motion untimely under Florida Rule of Criminal Procedure 3.851(d)(2)(B)). In light of this procedural ruling, this Court does not have jurisdiction over any claim premised on Ring. Coleman v. Thompson, 501 U.S. 722, 729 (1991); Michigan v. Long, 463 U.S. 1032, 1041-42 (1983).

In addition, and also with respect to Correll's current claim as to the constitutionality of Florida's death penalty,

the argument which Correll presents in his certiorari petition is a different argument than that presented below. To the extent that Correll's certiorari petition extends or expands his prior argument to the Florida Supreme Court, jurisdiction is lacking. Illinois v. Gates, 462 U.S. 213, 217-19 (1983); Webb v. Webb, 451 U.S. 493, 496-97 (1981). To the Florida Supreme Court, Correll asserted that Florida's use of a non-unanimous jury recommendation to support a judicial imposition of a death sentence violated the Eighth Amendment because it was inconsistent with the evolving standards of decency in a maturing society, citing Roper v. Simmons, 543 U.S. 551 (2005), and Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (Pet. App. II, pp. 25-34). In his certiorari petition, Correll has abandoned any reliance on the evolving standards of decency, and now premises his claim on the purported arbitrariness created by Florida's statute, citing Furman v. Georgia, 408 U.S. 238 (1972), and Hurst v. Florida, United States Supreme Court Case No. 14-7505 (certiorari review granted on March 9, 2015) (Petition, pp. 9-16).

Not only has the foundation for Correll's constitutional challenge changed, but his supporting argument is contrary to his claim as presented below. For example, his petition asserts that every jurisdiction other than Florida requires a unanimous

jury to make findings of eligibility for the death penalty (Petition, p. 10), while his brief below properly acknowledged that in Alabama, a jury recommendation of ten to two (as three of the death recommendations in Correll's case were) is sufficient to support a death sentence (Pet. App. II, pp. 28-29). The brief below also observes that in Delaware, a unanimous jury is required to find at least one aggravating factor before a death sentence is considered, while the Petition asserts - for the first time to any court - that the Constitution requires juries to make a specific finding that sufficient mitigation does not exist to outweigh the aggravating factors (Petition, p. 15). Also for the first time, the Petition cites and relies on Caldwell v. Mississippi, 472 U.S. 320 (1985) (Petition, pp. 14-15).[1]

Correll's brief to the Florida Supreme Court expressly described a Ring challenge as being a "different context" than the jury unanimity argument Correll was offering (Pet. App. II,

[1] Although Correll claims to have "consistently challenged his sentence" on both Sixth and Eighth Amendment grounds, the constitutional claim he presented below asserted only that a lack of unanimity violated the Eighth Amendment because it was inconsistent with the evolving standards of decency in today's society. He did not cite Caldwell in his postconviction motion or in his Florida Supreme Court brief, where he relied on Sixth Amendment cases as providing support in a "different context" (Pet. App. II, pp. 30-34).

p. 30). Yet in the petition, the Ring case is front and center with its own subclaim, as Correll asks this Court to "accept the invitation" extended by the Florida Supreme Court in 2002 to address the impact of Ring in Florida (Petition, p. 12). Clearly, the argument that Correll now offers to this Court is much different than the claim as presented below.

And the reason that a different argument has been provided is fairly obvious: when Correll sought relief in state court due to the lack of jury unanimity in his jury recommendations, this Court had not yet accepted certiorari review in Hurst. Now that many other courts have granted stays in capital cases throughout the state while this Court considers Hurst, Correll wants to align his argument with that in Hurst simply to avoid execution. But because Correll has changed both the foundation and the specifics of his constitutional claim as to jury unanimity, this Court does not have jurisdiction to consider the issue, since, as offered here, it was not presented below. Illinois v. Gates, 462 U.S. 213, 217-19 (1983); Webb v. Webb, 451 U.S. 493, 496-97 (1981). Accordingly, certiorari review over Correll's first Question Presented must be denied as jurisdiction fails.

II.

**Certiorari review should be denied because Petitioner has not established any conflict among courts or presented an unsettled question of federal law.**

With regard to both Questions Presented in the petition, Correll has not shown that his case falls under any of the provisions of Rule 10 governing certiorari review or is otherwise appropriate 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).

As to Correll's claim that the Constitution requires a unanimous jury verdict in capital sentencing proceedings, Correll asserts that he has presented the same claim as is currently pending before this Court in Hurst v. Florida, 135 S.

Ct. 1531 (2015), implying that his case should also be reviewed. However, Hurst is not a comparable case, procedurally or factually. Procedurally, Hurst was sentenced to death in August, 2012, and that sentence, and the underlying conviction supporting it, are not yet final. Correll's convictions and sentences were final many years ago, and in fact even his authorized collateral litigation concluded in 2014. Factually, 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 agravating factor. See Hurst v. State, 147 So. 3d 435, 446 (Fla. 2014). Correll was convicted at trial by a unanimous jury of four counts of first degree murder. His death sentences are properly supported by these separate, contemporaneous convictions, as found by the sentencing judge.

Both Hurst and Correll invoke Ring v. Arizona, 536 U.S. 584 (2002), as supporting a Sixth or Eighth Amendment right to unanimous jury findings as to sentencing 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 Correll's case, a unanimous jury convicted him of several murders, and based on these convictions, he was indisputably eligible for his death sentences. Thus, his eligibility for a death sentence is supported by unanimous jury findings.

Correll does not identify any legal conflict or unsettled issue of law to warrant this Court's review. His claim of conflict with Ring is defeated by the existence of prior violent felony convictions in his case. 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 does 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).

With regard to Correll's second issue, claiming that the length of time he has spent on death row violates the Eighth

Amendment, again no conflict with any court or unsettled issue of law has been offered. Correll has failed to cite a single court which agrees with his position. Opinions of dissenting justices do not amount to legal conflict so as to compel review. This claim has been repeatedly rejected, so the law is well-settled, and no reasonable basis for reconsideration of the issue is provided in Correll's petition.

Accordingly, Rule 10 has not been satisfied, and certiorari review must be denied.

## III.

**Certiorari review should be denied because the rulings entered below were correct.**

Finally, there is no basis for certiorari review as the opinion below properly considered and resolved the federal constitutional claims as presented to the Florida Supreme Court.

### A. Unanimous jury for sentencing recommendation

As noted above, Correll had prior violent felony convictions, distinguishing his case from Hurst and Ring. In light of these convictions, Correll entered the penalty phase death eligible, since this Court has repeatedly recognized that the existence of a prior felony conviction obviates the need for further jury fact-finding. 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 does 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). In light of Correll's contemporaneous convictions which rendered him death eligible in the guilt phase, there is no basis to conclude that Correll's case could be impacted by the future Hurst decision. While there may be an unsettled issue of law as to the validity of Florida's death penalty where a death sentence is not supported by any aggravating factors found by a unanimous jury, that issue is not present in this case, and does not compel review here.

**B. Length of Time on Death Row**

Correll also claims that the length of time he has spent on death row amounts to cruel and unusual punishment, requiring a reduction of his sentence. Once again, this claim has been repeatedly rejected, and no basis for reconsideration has been offered. Knight v. Florida, 528 U.S. 990 (1999); Elledge v. Florida, 525 U.S. 944 (1998); Lackey v. Texas, 514 U.S. 1045

(1995). And while the denial of certiorari may not carry precedential value, surely the fact that this Court has repeatedly declined opportunities to address the issue further is a reflection that no constitutional violation occurs when inmates spend decades on death row. See Muhammad v. State, 132 So. 3d 176, 206-07 (Fla. 2013), cert. denied, 134 S. Ct. 894 (2014); Carroll v. State, 114 So. 3d 883, 889 (Fla.), cert. denied, 133 S. Ct. 2762 (2013); Pardo v. State, 108 So. 3d 558, 569 (Fla.), cert. denied, 133 S. Ct. 815 (2012); Ferguson v. State, 101 So. 3d 362, 366-67 (Fla.), cert. denied, 133 S. Ct. 497 (2012); Gore v. State, 91 So. 3d 769, 780 (Fla.), cert. denied, 132 S. Ct. 1904 (2012); Valle v. State, 70 So. 3d 530, 552 (Fla.), cert. denied, 132 S. Ct. 1 (2011); Tompkins v. State, 994 So. 2d 1072, 1085 (Fla. 2008), cert. denied, 555 U.S. 1161 (2009). Correll acknowledges that the last ten inmates executed in Florida spent an average of almost 25 years on death row before execution (Petition, p. 17). That fact alone reflects that, unfortunately, spending nearly thirty years on death row is not unusual, and no violation of the Eighth Amendment can be found on this basis.

Nor can Correll's extended time on death row be considered cruel. While he complains about "being taunted with death for nearly three decades," which he characterizes as "intense

psychological suffering," the fact is that very few people in the world have the knowledge of when they will die, and death could come for any of us at any moment. Correll's own uncertainty and lack of knowledge as to the date of his death is no basis for the finding of a constitutional violation.

However, the State of Florida agrees with Correll that unconscionable delay routinely occurs in capital cases. This Court does not have jurisdiction to mandate an evidentiary hearing on the issue, as the petition requests, since that demand was never made below to the Florida Supreme Court. But the State of Florida has no objection to this Court using whatever supervisory powers may be available to encourage or require federal district judges to give priority to capital cases, to expedite the rulings on federal habeas petitions, and to avoid entering stays and administratively closing cases unnecessarily. As Appendix UU to the petition reveals, district courts do not hesitate to bring capital habeas petitions to a standstill if this Court accepts review in a case with a similar issue. Many habeas proceedings are currently stayed, often without even a request by the petitioner, pending this Court's opinion in Hurst.[2] The propriety of such stays must be questioned

[2] In one egregious example, a stay was entered based on Hurst, *sua sponte*, where the defendant waived his right to have a jury at his penalty phase. See Valentine v. Secretary, Dept. of

in light of the fact that most, if not all, of the currently-stayed petitions were filed after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA], and under Greene v. Fisher, 132 S. Ct. 38, 44 (2011), the district courts cannot even consider the application of the future Hurst decision in ruling on the petition.

In this case, Correll's too-long-on-death-row claim is particularly offensive, since the state courts fully authorized Correll's execution when it was initially scheduled in 1990. Correll's federal habeas petition was filed in 1990, before the enactment of AEDPA, and was not denied until 2013. It would be patently unfair to consider this claim in such a context, where the primary reason for the delay is in no way attributable to the State of Florida. Rather than granting his request for a hearing, which would simply require him to spend even more time uncomfortably on death row, this Court should simply deny review and allow the State of Florida to carry out the sentence imposed on him in 1986.

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Corrections, United States District Court Case No. 8:13-cv-30-T-23TBM; Valentine v. State, 688 So. 2d 313, 315 (Fla. 1996) (noting that on remand, Valentine "waived the jury advisory sentence and presented mitigating evidence directly to the judge").

## CONCLUSION

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

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of October, 2015, a true and correct copy of the foregoing has been furnished by electronic transmission to **Maria C. Perinetti**, **Raheela Ahmed**, **Donna E. Venable** and **Maria E. DeLiberato**, Assistants CCRC, Law Office of the Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, **perinetti@ccmr.state.fl.us, ahmed@ccmr.state.fl.us, venable@ccmr.state.fl.us, deliberato@ccmr.state.fl.us** [and] **support@ccmr.state.fl.us.** I further certify that all parties required to be served have been served.

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