NO. 17-9386

IN THE SUPREME COURT OF THE UNITED STATES

DONALD BRADLEY,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

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Capital Case

Question Presented

Whether this Court should grant certiorari review where the retroactive application of *Hurst v. Florida* and *Hurst v. State* is based on adequate independent state grounds and the issue presents no conflict between the decisions of other state courts of last resort or federal courts of appeal, does not conflict with this Court's precedent, and does not otherwise raise an important federal question?

Table of Contents

Table of Citations

Cases

Other Authorities

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Opinion Below

The decision of the Florida Supreme Court appears as *Bradley v. Jones*, 238 So. 3d 95 (Fla. 2018).

Jurisdiction

This Court's jurisdiction to review the final judgment of the Florida Supreme Court is authorized by 28 U.S.C. § 1257. However, because the Florida Supreme Court's decision in this case is based on adequate and independent state grounds, this Court should decline to exercise jurisdiction as no federal question is raised. Sup. Ct. R. 14(g)(i). Additionally, the Florida Supreme Court's decision does not implicate an important or unsettled question of federal law, does not conflict with

another state court of last resort or a United States court of appeals, and does not conflict with relevant decisions of this Court. Sup. Ct. R. 10. No compelling reasons exist in this case and this Petition for a writ of certiorari should be denied. Sup. Ct. R. 10.

Statement of the Case and Facts

Petitioner, Donald Bradley, was convicted of the first-degree murder of Jack Jones and sentenced to death. *Bradley v. State*, 787 So. 2d 732, 734 (Fla. 2001). The facts demonstrate that

> Bradley had a landscaping business and Mrs. Jones prepared his tax returns. On October 31, 1995, at the request of Mrs. Jones, Bradley took two of his employees, Brian McWhite and Patrick McWhite, teenage brothers, and Michael Clark, a sometime employee, and set out to retrieve a diamond ring Mr. Jones had given his teenage lover. Once they arrived at the teenager's apartment, however, she refused to open the door. Frustrated, Bradley directed the employees to break the teenager's car windows.
>
> Mrs. Jones then decided to have Bradley assault Mr. Jones, and Bradley and Mrs. Jones agreed on a plan to make the assault look like a burglary of the Joneses' house. On November 7, 1995, at about 8 p.m., Bradley picked up the McWhite brothers and, while at the McWhite brothers' house, Bradley directed Patrick McWhite to pick up a large "zulu war stick" to use on Mr. Jones. The McWhite brothers both testified they agreed to help beat Mr. Jones for a hundred dollars each, but that Bradley never mentioned killing Jones. They also testified to numerous telephone conversations Bradley had with Mrs. Jones immediately before and after the home invasion.
>
> As planned, the McWhite brothers, gloved and ski-masked, entered the Joneses' home through the front door, while Bradley entered through a side door in order to obtain a gun Mrs. Jones told him was kept by Mr. Jones in the kitchen. Mr. and Mrs. Jones were watching television, and when Mr. Jones noticed the McWhite brothers, he immediately told them to get out of his home. When they refused, he started fighting with them.

> Thereafter, as described by the McWhite brothers, Bradley administered a brutal and methodical beating to Mr. Jones with the "war stick" and the gun. During the beating, Bradley and one of the McWhite brothers duct-taped Mr. Jones's hands and feet and dragged him to another room, and Bradley continued the beating. At one point, Bradley attempted to shoot Mr. Jones in the head, but the gun malfunctioned. Patrick McWhite testified that Mr. Jones continually begged Bradley to stop the beating, while Brian testified that he too asked Bradley to stop, but Bradley refused. Meanwhile, Mrs. Jones calmly watched the whole episode, and Bradley later duct-taped her hands to make it look like she was a victim. The "burglars" also removed some items of personal property from the house. After they left the house Bradley told the McWhite brothers that he thought he killed Jones. Indeed, Jones died as a result of the beating.

Id. at 734-35. "Bradley was convicted of first-degree murder, burglary, and conspiracy to commit murder." *Id.* at 736. At sentencing, the jury recommended death by a vote of ten to two. *Id.* at 738.

> The trial court found four aggravating circumstances: (1) the capital felony was especially heinous, atrocious or cruel (HAC); (2) the murder was committed in a cold, calculated and premeditated manner (CCP); (3) the capital felony was committed for pecuniary gain; and (4) the capital felony was committed while engaged in the commission of the crime of burglary. The trial court found two statutory mitigating circumstances, but gave very little weight to both: (1) the defendant had no significant history of prior criminal activity and (2) the age of the defendant at the time of the crime. The trial court also found and gave "some weight" to certain nonstatutory mitigating circumstances: (1) Bradley overcame a chaotic childhood and dysfunctional family life to make real achievements in his own life, including establishing loving relationships in his family and reestablishing a relationship with his father; (2) he had been a good provider and father for his present wife and his children; (3) he loved his family and was loved by them; (4) he maintained a good employment record; (5) he was helpful to other people inside and outside his family; and (6) he showed sincere religious faith.

Bradley v. State, 33 So. 3d 664, 669 n.4 (Fla. 2010). The Florida Supreme Court

denied Petitioner's claims on direct appeal and affirmed the convictions and sentence of death. *Bradley*, 787 So. 2d at 747.

After the Florida Supreme Court denied his claims on direct appeal, Petitioner filed a petition for a writ of certiorari to this Court, which was denied November 26, 2001. *Bradley v. Florida*, 122 S. Ct. 632 (2001). Under Florida law, Petitioner's judgment and sentence became final upon this Court's disposition of the petition for a writ of certiorari, which occurred in 2001. Fla. R. Crim. P. 3.851(d)(1)(B).

In his post-conviction proceedings, Petitioner raised multiple claims including that Florida's capital sentencing procedures were unconstitutional pursuant to *Ring* and *Apprendi*. *Bradley*, 33 So. 3d at 670 n.6; *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Florida Supreme Court affirmed the denial of Petitioner's post-conviction claims. *Bradley*, 33 So. 3d at 685.

Petitioner filed a federal petition for a writ of habeas corpus raising five claims. *Bradley v. Sec'y, Fla. Dep't of Corr.*, no.: 3:10-cv-1078-J-32JRK, 2014 WL 970033 (M.D. Fla. Mar. 12, 2014). The district court denied the Petition and denied a certificate of appealability. *Id.* at *31-32.

In *Hurst v. Florida*, this Court held that Florida's capital sentencing scheme was unconstitutional pursuant to *Ring*'s determination that the Sixth Amendment requires a jury to find the existence of an aggravating circumstance which qualifies a defendant for a sentence of death. *Hurst v. Florida*, 136 S. Ct. 616 (2016). On

remand in *Hurst v. State*, the Florida Supreme Court held that in capital cases, the jury must unanimously and expressly find that the aggravating factors were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death. *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, *Florida v. Hurst*, 137 S. Ct. 2161 (2017).

In *Mosley*, the Florida Supreme Court held that *Hurst* applies retroactively to cases which became final after the decision was issued in *Ring* on June 24, 2002. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). On the same day in *Asay*, the Florida Supreme Court held that *Hurst* does not apply retroactively to cases which became final prior to *Ring*. *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 138 S. Ct. 41 (2017).

Shortly after the *Hurst* decisions, Petitioner raised a claim asserting that he should be entitled to relief pursuant to *Hurst*. Since Petitioner's case became final in 2001, the Florida Supreme Court denied Petitioner's claim that *Hurst* should apply retroactively to him. *Bradley*, 238 So. 3d at 96. Petitioner then filed a petition for a writ of certiorari in this Court from the Florida Supreme Court's decision. This is the State's brief in opposition.

Reasons for Denying the Writ

There is no Basis for Certiorari Review of the Florida Supreme Court's Denial of Retroactive Application of *Hurst* to Petitioner

Petitioner seeks certiorari review of the Florida Supreme Court's decision holding that *Hurst* is not retroactive to Petitioner because his case became final pre-*Ring* in 2001. *Bradley*, 238 So. 3d at 96. The Petition alleges that the Florida Supreme Court's refusal to retroactively apply *Hurst* to pre-*Ring* cases is in violation of the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection. (Petition at 2). However, the Florida Supreme Court's retroactive application of *Hurst* to only post-*Ring* cases does not violate the Eighth or Fourteenth Amendment. Further, the Florida Supreme Court's denial of retroactive application to Petitioner is based on adequate and independent state grounds, is not in conflict with any other state court of last review, and is not in conflict with any federal appellate court. This decision is also not in conflict with this Court's jurisprudence on retroactivity. Thus, Petitioner's request for certiorari review should be denied.[1]

This Court does not review state court decisions that are based on adequate

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[1] This Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of *Hurst v. State*. *See, e.g., Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied, Hitchcock v. Florida*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), *cert. denied, Lambrix v. Florida*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017), *cert. denied, Hannon v. Florida*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548, 549 (Fla. 2018), *cert. denied, Branch v. Florida*, 138 S. Ct. 1164 (2018); *Cole v. State*, 234 So. 3d 644, 645 (Fla. 2018), *cert. denied, Cole v. Florida*, no. 17-8540, 2018 WL 1876873 (Jun. 18, 2018).

and independent state grounds. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("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."). Since *Hurst* is not retroactive under federal law, the retroactive application of *Hurst* is solely based on a state test for retroactivity. Because the retroactive application of *Hurst* is based on adequate and independent state grounds, certiorari review should be denied.[2]

The Florida Supreme Court first analyzed the retroactive application of *Hurst* in *Mosley* and *Asay*. *Mosley*, 209 So. 3d at 1276-83; *Asay*, 210 So. 3d at 15-22. In *Mosley*, the Florida Supreme Court held that *Hurst* is retroactive to cases which became final after the June 24, 2002, decision in *Ring*. *Mosley*, 209 So. 3d at 1283. In determining whether *Hurst* should be retroactively applied to *Mosley*, the Florida Supreme Court conducted a *Witt* analysis, the state based test for

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[2] Aside from the question of retroactivity, certiorari would be inappropriate because there is no underlying federal constitutional error. *Hurst v. Florida* did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. Petitioner became eligible for a death sentence by virtue of his guilt phase conviction for a contemporaneous violent felony, attempted first-degree murder. The unanimous verdict by Petitioner's jury establishing his guilt of this contemporaneous crime, an aggravator under well-established Florida law, was clearly sufficient to meet the Sixth Amendment's fact-finding requirement. *See Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017) (noting that 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); *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) (rejecting a claim that the constitution requires a burden of proof on whether or not mitigating circumstances outweigh aggravating circumstances, noting that such a question is "mostly a question of mercy"). *See also State v. Mason*, 2018 WL 1872180, *5-6 (Ohio 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 principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment."); *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.").

retroactivity. *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980) (determining whether a new rule should be applied retroactively by analyzing the purpose of the new rule, extent of reliance on the old rule, and the effect of retroactive application on the administration of justice) (citing *Stovall v. Denno*, 388 U.S. 293, 297 (1967); *Linkletter v. Walker*, 381 U.S. 618 (1965)). Since "finality of state convictions is a *state* interest, not a federal one," states are permitted to implement standards for retroactivity that grant "relief to a broader class of individuals than is required by *Teague*," which provides the federal test for retroactivity. *Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008) (emphasis in original); *Teague v. Lane*, 489 U.S. 288 (1989); *see also Johnson v. New Jersey*, 384 U.S. 719, 733 (1966) ("Of course, States are still entirely free to effectuate under their own law stricter standards than we have laid down and to apply those standards in a boarder range of cases than is required by this [Court]."). As *Ring*, and by extension *Hurst*, has been held not to be retroactive under federal law, Florida has implemented a test which provides relief to a broader class of individuals in applying *Witt* instead of *Teague* for determining the retroactivity of *Hurst*. *See Schriro v. Summerlin*, 542 U.S. 348, 258 (2004) (holding that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review"); *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 872 F.3d 1170, 1182-83 (11th Cir. 2017), *cert. denied*, *Lambrix v. Jones*, 138 S. Ct. 312 (2017) (noting that "[n]o U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable").

The Florida Supreme Court determined that all three *Witt* factors weighed in

favor of retroactive application of *Hurst* to cases which became final post-*Ring*. *Mosley*, 209 So. 3d at 1276-83. The Court concluded that "defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring* should not be penalized for the United States Supreme Court's delay in explicitly making this determination."[3] *Id.* at 1283. Thus, the Florida Supreme Court held *Hurst* to be retroactive to *Mosley*, whose case became final in 2009, which is post-*Ring*. *Id.*

Conversely, applying the *Witt* analysis in *Asay*, the Florida Supreme Court held that *Hurst* is not retroactive to any case in which the death sentence was final pre-*Ring*. *Mosley*, 209 So. 3d at 1283. The Court specifically noted that *Witt* "provides *more expansive retroactivity standards* than those adoped in *Teague*." *Asay*, 210 So. 3d at 15 (emphasis in original) (quoting *Johnson*, 904 So. 2d at 409). However, the Court determined that prongs two and three of the *Witt* test, reliance on the old rule and effect on the administration of justice, weighed heavily against the retroactive application of *Hurst* to pre-*Ring* cases. *Asay*, 210 So. 2d at 20-22. As related to the reliance on the old rule, the Court noted "the State of Florida in prosecuting these crimes, and the families of the victims, had extensively relied on the constitutionality of Florida's death penalty scheme based on the decisions of the United States Supreme Court. This factor weighs heavily against retroactive

[3] Under this rationale, it would not make sense only to grant relief to those who continued to raise *Ring* in the 14 years between *Ring* and *Hurst* as this would encourage the filing of frivolous claims in the hope that subsequent vindication could provide a basis of relief for a future change in the law. Nor should a defendant who failed to raise a claim that appeared to be well settled against him/her

application of *Hurst v. Florida* to this pre-*Ring* case." *Id.* at 20. As related to the effect on the administration of justice, the Court noted that resentencing is expensive and time consuming and that the interests of finality weighed heavily against retroactive application. *Id.* at 21-22. Thus, the Florida Supreme Court held that *Hurst* was not retroactive to *Asay* since the judgment and sentence became final in 1991, pre-*Ring*. *Id.* at 8, 20.

Since *Asay*, the Florida Supreme Court has continued to apply *Hurst* retroactively to all post-*Ring* cases and declined to apply *Hurst* retroactively to all pre-*Ring* cases. *See Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), *cert. denied*, *Lambrix v. Florida*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017), *cert. denied*, *Hannon v. Florida*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548, 549 (Fla. 2018), *cert. denied*, *Branch v. Florida*, 138 S. Ct. 1164 (2018). This distinction between cases which were final pre-*Ring* versus cases which were final post-*Ring* is neither arbitrary nor capricious.

In the traditional sense, new rules are applied retroactively only to cases which are not yet final. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"); *Smith v.*

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be punished for not raising what he/she believed to be a frivolous claim.

State, 598 So. 2d 1063, 1066 (Fla. 1992) (applying *Griffith* to Florida defendants); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context). Under this "pipeline" concept, *Hurst* would only apply to the cases which were not yet final on the date of the decision in *Hurst*. This type of traditional retroactivity "can depend on a score of random factors having nothing to do with the offender or the offense," such as trial scheduling, docketing on appeal, etc. (Petition at 16). Even under the "pipeline" concept, cases whose direct appeal was decided on the same day might have their judgment and sentence become final on either side of the line for retroactivity, such as Petitioner's example of *Bowles* and *Card*. *Bowles v. State*, 804 So. 3d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613 (Fla. 2001).[4] Additionally, under the "pipeline" concept, "old" cases where the judgment and/or sentence has been overturned will receive the benefit of new law as they are no longer final.[5] Yet, this Court recognizes this type of traditional retroactivity as proper and not violative of the Eighth or Fourteenth Amendment.

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[4] Though both *Bowles* and *Card* were both decided on October 11, 2001, in *Bowles*, the rehearing was denied and the Mandate was issued January 10, 2002, but in *Card*, the rehearing was denied and the Mandate was issued December 20, 2001.

[5] Petitioner uses the example of *Johnson* and *Calloway*. Although *Johnson* originally became final February 21, 1984, subsequent litigation led to a new trial being granted in 1987 and the death sentences being vacated in 2010. *Johnson v. Florida*, 465 U.S. 1051 (1984); *Johnson v. Wainwright*, 498 So. 2d 938, 939 (Fla. 1986); *Johnson v. State*, 44 So. 3d 51, 74 (Fla. 2010). After a new penalty phase in 2013, Johnson's case was pending direct appeal when *Hurst* was decided. *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016). As such, though Johnson's crime occurred in the 1980s, he receives the benefit of *Hurst* because his judgment and sentence were not final pre-*Hurst*. Similarly, in *Calloway*, although the crime occurred in 1997, the trial was not completed until 2009 and dwe's judgment and sentence were not final when *Hurst* was issued. *Calloway v. State*, 210 So. 3d 1160, 1200 (Fla. 2017). These two scenarios would both receive the benefit of *Hurst* under the "pipeline" concept.

The only difference between this more traditional type of retroactivity and the retroactivity implemented by the Florida Supreme Court is that it stems from the date of the decision in *Ring* rather than from the date of the decision in *Hurst*. In moving the line of retroactive application back to *Ring*, the Florida Supreme Court reasoned that since Florida's death penalty sentencing scheme should have been recognized as unconstitutional upon the issuance of the decision in *Ring*, defendants should not be penalized for time that it took for this determination to be made official in *Hurst*. Certainly, the Florida Supreme Court has demonstrated "some ground of difference that rationally explains the different treatment" between pre-*Ring* and post-*Ring* cases. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *see also Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (To satisfy the requirements of the Fourteenth Amendment, "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."). Unquestionably, extending relief to more individuals,[6] defendants who would not receive the benefit of a new rule under the pipeline concept because their cases were already final when *Hurst* was decided, cannot violate the Eighth or Fourteenth Amendment. Thus, just like the more traditional application of retroactivity, the *Ring* based cutoff for the retroactive application of *Hurst* is not in violation of the Eighth or Fourteenth Amendment.

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[6] Approximately 150 defendants whose convictions became final post-*Ring* are being re-sentenced pursuant to *Hurst*. Death Penalty Information Center, Florida Death-Penalty Appeals Decided in

Petitioner argues that the Florida Supreme Court has not provided a non-arbitrary explanation for drawing the line at *Ring* instead of at *Apprendi*. (Petition at 16). However, the Florida Supreme Court did in fact discuss their rationale in *Asay* and *Mosley*. *Asay*, 210 So. 3d at 19; *Mosley*, 209 So. 3d at 1279. The Court concluded that "while the reasoning of *Apprendi* appeared to challenge the underlying prior reasoning of *Walton* and similar cases, the United States Supreme Court expressly excluded death penalty cases from its holding." *Asay*, 210 So. 3d at 19 (citing *Apprendi*, 530 U.S. at 496); *Mosley*, 209 So. 3d at 1279 n.17 (citing *Apprendi*, 530 U.S. at 497); *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled by Ring*, 536 U.S. at 589. Though *Apprendi* served as a precursor to *Ring*, this Court specifically distinguished capital cases from its holding in *Apprendi*. *Apprendi*, 530 U.S. at 496. It was not until *Ring* that this Court determined that "*Apprendi*'s reasoning is irreconcilable with *Walton*'s holding." *Ring*, 536 U.S. at 589. Thus, as the Florida Supreme Court reasoned, *Ring* is the appropriate demarcation for retroactive application to capital cases, not *Apprendi*. *Asay*, 210 So. 3d at 19. Though Petitioner argues that *Apprendi* should be the delineation point for retroactivity rather than *Ring*, the Florida Supreme Court specifically declined to extend retroactive application of *Hurst* to cases which became final post-*Apprendi* but pre-*Ring*. The Court's rationale is derived directly from *Apprendi*: "this Court has previously considered and rejected the argument that the principles guiding our

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Light of *Hurst*, available at https://deathpenaltyinfo.org/node/6790 (last visited June 18, 2018).

decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." *Apprendi*, 530 U.S. at 496 (citing *Walton*, 497 U.S. at 647-49). Thus, the Florida Supreme Court has provided a non-arbitrary explanation for drawing the line of retroactivity at *Ring* rather than *Apprendi*.

Petitioner also attempts to raise a *Caldwell* claim in this section. (Petition at 24-25); *Caldwell v. Mississippi*, 472 U.S. 320 (1985). As this claim was not raised below,[7] it is not properly before this Court. *See Adams v. Robertson*, 520 U.S. 83, 86-87 (1997) ("we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court"); *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (This Court does not ordinarily review a claim not presented to the court below.); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (This Court sits as a "court of final review and not first view."). Moreover, because this is a post-conviction case, this Court would first need to address and resolve the issue of retroactivity before even reaching the merits of Petitioner's jury instruction claim.

Aside from the separate question of retroactivity, it is clear that there was no *Caldwell* violation in this case. [8] In order to establish constitutional error under

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[7] Petitioner cited *Caldwell* in passing in his Response to the Florida Supreme Court's Order to Show Cause as an argument as to why he believes the State could not prove any *Hurst* error in this case was harmless beyond a reasonable doubt.

[8] The Florida Supreme Court has explicitly rejected *Caldwell* attacks on Florida's standard penalty

Caldwell, a defendant must show that the comments or instructions to the jury "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). Since the jury in this case was unquestionably properly informed of its role in sentencing Petitioner at the time of trial, this claim lacks merit. *See Truehill v. Florida*, 138 S. Ct. 3 (2017); *Middleton v. Florida*, 138 S. Ct. 829 (2018); *Guardado v. Jones*, 138 S. Ct. 1131 (2018). Therefore, there was no *Caldwell* violation.

Additionally, Petitioner raised a *Caldwell* claim during post-conviction, which was rejected. *Bradley*, 33 So. 3d at 670 n.6. Re-raising the claim is barred by law of the case doctrine and/or collateral estoppel. *See Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001) ("law of the case requires that questions of law actually decided on appeal must govern the case" throughout the subsequent proceedings); *Zeigler v. State*, 116 So. 3d 255, 258 (Fla. 2013) ("In Florida, collateral estoppel prevents the same parties from relitigating issues that have already been fully litigated and determined.").

The Florida Supreme Court's determination of the retroactive application of *Hurst* under *Witt* is based on adequate and independent state grounds and is not violative of federal law or this Court's precedent. Thus, certiorari review should be denied.

The Florida Supreme Court's Application of Retroactivity Does Not

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phase jury instructions in the wake of *Hurst*. *Reynolds v. State*, No. SC17-793, 2018 WL 1633075 (Fla. Apr. 5, 2018); *Johnson v. State*, No. SC17-1678, 2018 WL 1633043 (Fla. Apr. 5, 2018) (citing *Reynolds* in rejecting *Caldwell* claim).

Violate the Supremacy Clause of the United States Constitution

Petitioner also argues that *Hurst* provided a substantive change in the law and thus should be afforded full retroactive application under federal law pursuant to *Montgomery*. (Petition at 26-27); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). However, *Hurst*, like *Ring*, was a procedural change, not substantive one. *See Summerlin*, 542 U.S. at 358 ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review."). Thus, like *Ring*, *Hurst* is not retroactive under federal law. *See Lambrix*, 872 F.3d at 1182 ("No U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable."); *see also Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (holding that "*Hurst* does not apply retroactively to cases on collateral review"); *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (noting that this Court had not made *Hurst* retroactive to cases on collateral review); *In re Jones*, 847 F.3d 1293, 1295 (10th Cir. 2017) ("the Supreme Court has not held that *Hurst* announced a substantive rule"). Thus, neither *Ring* nor *Hurst* are retroactive under federal law.

In support of his argument that *Hurst* was a substantive rather than a procedural change, Petitioner analogizes *Hurst* to *Miller*. (Petition at 26-28); *Miller v. Alabama*, 567 U.S. 460 (2012). Petitioner argues that like *Miller*, *Hurst* "conflates a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the *manner of determining* the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 734-35 (quoting *Summerlin*, 542 U.S. at 353) (emphasis in original). But this Court found *Miller* to be a

substantive change because "it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status' — that is juvenile offenders . . ." and *Miller* to be retroactive because "the vast majority of juvenile offenders — "'faces a punishment that the law cannot impose upon him.'"" *Montgomery*, 136 S. Ct. at 734 (quoting *Penry*, 492 U.S. at 330); *Summerlin*, 542 U.S. at 352. However, *Hurst* is distinguishable from *Miller*.

Unlike *Miller*, *Hurst* is procedural. In *Hurst* the same class of defendants committing the same range of conduct face the same punishment. Further, unlike the now unavailable penalty in *Miller*, the death penalty can still be imposed under the law after *Hurst*. Instead, *Hurst*, like *Ring*, merely "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." *Summerlin*, 542 U.S. at 353. Thus, *Hurst* is a procedural change and not retroactive under federal law.

Petitioner next relies on *Welch* to argue that the Eighth Amendment unanimity requirement announced in *Hurst v. State* was a substantive change and is retroactive under federal law. (Petition at 29-31); *Welch v. United States*, 136 S. Ct. 1257 (2016). *Welch* does not distinguish itself from *Summerlin*, but instead quotes *Summerlin* to describe the distinctions between a substantive and a procedural change. *Id.* at 1265. In *Welch*, this Court found that striking down the residual clause of the Armed Career Criminal Act in *Johnson* caused a substantive change because "the same person engaging in the same conduct is no longer subject

to the Act." *Id.*; *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Hurst* is distinguishable from *Welch*.

Unlike *Welch*, after *Hurst*, Florida's death penalty sentencing scheme still applies to the same persons engaging in the same conduct. In *Hurst v. State*, the Florida Supreme Court explained that the "requirement that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment even more significantly, and expresses the values of the community as they currently relate to imposition of death as a penalty." *Hurst*, 202 So. 3d at 60. Again, this is an alteration in the procedure necessary to obtain a death sentence. Neither the range of conduct nor the class of persons has been altered. The only change is the manner of determining a defendant's sentence. Thus, *Ring* and *Hurst* announced a procedural change, not a substantive one.

Additionally, this Court "has not ruled on whether unanimity is required" in capital cases. *Hurst*, 202 So. 3d at 59; *see also Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). As this Court noted, "holding that *because [a State]* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive." *Summerlin*, 542 U.S. at 354. Thus, *Hurst v. State*'s requirement that the jury make specific factual findings before the imposition of the death penalty is procedural.

Lastly, Petitioner argues that *Hurst* "addressed the proof-beyond-a-reasonable-doubt standard," which causes a substantive change and that makes *Hurst* retroactive under federal law. (Petition at 31). However, *Hurst* did not address the proof-beyond-a-reasonable-doubt standard. The standard of proof for proving aggravating factors in Florida has been beyond a reasonable doubt long before *Hurst* was decided. *See* Fla. Std. J. Inst. (Crim.) 7.11; *Floyd v. State*, 497 So. 2d 1211, 1214-15 (Fla. 1986); *Zeigler v. State*, 580 So. 2d 127, 129 (Fla. 1991); *Finney v. State*, 660 So. 2d 674, 680 (Fla. 1995).

As related to the finding that aggravation is sufficient, *Hurst* did not ascribe a standard of proof. *Hurst*, 202 So. 3d at 54. The Eighth Amendment requires that "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Roper v. Simmons*, 543 U.S. 551, 568 (2005). The State of Florida has a list of sixteen aggravating factors enumerated in the statute. Fla. Stat. § 921.141(6). These aggravating factors have been deemed sufficient to impose the death penalty by virtue of their inclusion in the statute. Any one of these aggravating factors is sufficient to cause a defendant to be eligible to receive a sentence of death. Thus, if one of these enumerated aggravating factors has been proven beyond a reasonable doubt, any Eighth Amendment concerns have been satisfied. However, the weight that a juror gives to the aggravator based on the evidence is not something that can be defined by a beyond-a-reasonable-doubt standard.

As related to the finding that the aggravation outweighs the mitigation,

Hurst did not ascribe a standard of proof. *Hurst*, 202 So. 3d at 54. This Court has specifically held that the beyond-a-reasonable-doubt standard for finding that the aggravation outweighs mitigation is not required under federal law. *See Kansas v. Marsh*, 548 U.S. 163, 164 (2006) ("Weighing is not an end, but a means to reaching a decision."); *Tuilaepa v. California*, 512 U.S. 967, 979 (1994) ("A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision."); *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) ("[T]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt."). The weight that a juror gives to the aggravation as compared to the weight given to mitigation is also not something that can be defined by a beyond-a-reasonable-doubt standard.

In support of his argument that *Hurst* should be retroactive under the federal *Teague* standard as a substantive change because it "addressed the proof-beyond-a-reasonable-doubt standard," Petitioner relies upon *Ivan V.* and *Powell*. (Petition at 31-32); *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972); *Powell v. Delaware*, 153 A.3d 69 (Del. 2016). However, *Hurst* is distinguishable from these cases because it did not address the proof-beyond-a-reasonable-doubt standard.

In *Ivan V.*, the holding of *In re Winship* which required that the proof-beyond-a-reasonable-doubt standard be afforded to juveniles was given full retroactive effect. *Ivan V.*, 407 U.S. at 203-04; *In re Winship*, 397 U.S. 358 (1970).

As previously discussed, *Hurst* did not alter the burden of proof as aggravating circumstances have long been required to be proven beyond a reasonable doubt in Florida. Thus, *Ivan V.* is not analogous to *Hurst*.

In *Powell*, the Delaware Supreme Court agreed that "neither *Ring* nor *Hurst* involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof." *Powell*, 153 A.3d at 74. The Delaware Supreme Court used this fact to distinguish *Hurst* from Delaware's "watershed ruling" in *Rauf* which was the basis for Delaware to find that *Rauf* retroactively applied to *Powell* under *Teague*. *Powell*, 153 A.3d at 74; *Rauf v. State*, 145 A.3d 430 (Del. 2016). Thus, *Powell* applies Delaware specific law and is not in conflict with the Florida Supreme Court's determination of the retroactive application of *Hurst*. As Florida's and Delaware's death penalty statutes are different, an interpretation by the Supreme Court of Delaware that *Hurst* should be given full retroactive effect is not in conflict with the decision of the Florida Supreme Court. As only Delaware's case law calls for the retroactive application of *Hurst* beyond *Ring*, there is no conflict between the Florida Supreme Court's retroactive application and any other state court of last resort.

The Florida Supreme Court's determination of the retroactive application of *Hurst* under *Witt* is based on adequate and independent state grounds and is not violative of federal law or this Court's precedent. *Hurst* did not announce a substantive change in the law and is not retroactive under federal law. Thus, there is no violation of the Supremacy Clause and certiorari review should be denied.

Conclusion

Respondent respectfully submits that this Petition for a writ of certiorari should be denied.

Respectfully submitted,
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