NO. 17-9520

IN THE SUPREME COURT OF THE UNITED STATES

HARRY FRANKLIN PHILLIPS,

Petitioner,

v.

STATE OF FLORIDA,

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

Petitioner, Harry Franklin Phillips, was found guilty of the first-degree murder of Bjorn Svenson, a parole officer, and sentenced to death. This Court finalized Petitioner's sentence of death on October 5, 1996. Following this Court's decision in *Hurst v. Florida*,[1] the Florida Supreme Court decided *Hurst v. State*.[2] There the Florida Supreme Court explained that in order for a defendant to be sentenced to death, the jury must find all the aggravating circumstances outweighed the mitigating circumstances and unanimously vote that the defendant receive the death penalty. Following *Hurst v. State*, the Supreme Court decided *Asay v. State*,[3] and *Mosley v. State*,[4] which created a bright line retroactivity test where defendants whose sentences of death were finalized prior to this Court's 2002 *Ring v. Arizona*[5] decision would not receive retroactive relief. Petitioner's case falls in this category of defendants.

Petitioner sought post-conviction relief through the Florida Supreme Court but was denied. Petitioner's petition seeking certiorari review gives rise to the following 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 of law.

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[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016).
[2] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).
[3] *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017).
[4] *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016).
[5] *Ring v. Arizona*, 536 U.S. 584 (2002).

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Opinion Below

The decision of the Florida Supreme Court appears as *Phillips v. State*, 234 So. 3d 547 (Fla. 2018).

Jurisdiction

The Florida Supreme Court issued its opinion affirming the summary denial of Petitioner's successive postconviction motion for relief on January 22, 2018. Petitioner did not file a motion for rehearing. Petitioner's "Petition for Writ of Certiorari" was docketed in this Court on June 21, 2018. The Petition is timely filed before this Court. Sup. Ct. R. 13.1.

Pursuant to 28 U.S.C. § 1257(a), this Court has jurisdiction to review the

decision of the Florida Supreme Court. However, Respondent submits that this Court should not exercise its jurisdiction as Petitioner fails to raise a novel question of federal law. The Florida Supreme Court's decision was based on independent and adequate state grounds and Petitioner has not raised a question of federal law. Sup. Ct. R. 14(g)(i). Furthermore, the Florida Supreme Court's decision does not conflict with the decision of another United States court of appeals, another state court of last resort, or with relevant decisions of this Court. Sup. Ct. R. 10. Accordingly, this Petition for a Writ of Certiorari should be denied. *Id.*

Statement of the Case and Facts

Petitioner, Harry Franklin Phillips, was convicted of the first-degree murder of Bjorn Svenson, a parole officer. *Phillips v. State*, 476 So. 2d 194, 195 (Fla. 1985). The facts established that Svenson supervised Petitioner's probation, and that over the course of approximately two years, Svenson and Petitioner had repeated encounters over Petitioner's unauthorized contact with another probation officer. *Id.* at 196. Petitioner was sentenced to a twenty-month prison term after his parole was revoked. *Id.* Following his release, on August 24, 1982, Petitioner fired several rounds through the front window of a home occupied by two probation officers, but no one was injured. *Id.* A week after this incident, Petitioner shot and killed Svenson in the Parole and Probation building in Miami. *Id.* at 195.

The jury found Petitioner guilty as charged and recommended a sentence of death by a vote of seven to five. The Florida Supreme Court affirmed Petitioner's death sentence and conviction on direct appeal. *Id.* at 197. Petitioner then filed a

petition for writ of habeas corpus, which the Florida Supreme Court denied. *Phillips v. Dugger*, 515 So. 2d 227 (Fla. 1987). Petitioner also filed a 3.850 motion for postconviction relief, to which the trial court denied relief. On appeal, the Florida Supreme Court granted postconviction relief due to ineffective assistance of counsel, and mandated that a new sentencing phase be conducted. *Phillips v. State*, 608 So. 2d 778 (Fla. 1998).

At resentencing, the jury recommended death by vote of seven to five. *Phillips v. State*, 705 So. 2d 1320, 1321 (Fla. 1997). The trial court found the following aggravating factors: (1) Petitioner was on parole at the time of the murder; (2) Petitioner had prior convictions for violent crimes; (3) Petitioner murdered Svenson to disrupt or hinder law enforcement; and (4) the murder was cold, calculated, and premeditated. *Id.* Although the trial court found no statutory mitigating factors, it found the following mitigating circumstances applied: (1) Petitioner's low intelligence; (2) poor family history; and (3) abusive childhood and lack of proper guidance. *Id.* Subsequently, the trial court weighed the aggravating factors against the mitigating factors and sentenced Petitioner to death. *Id.* On appeal, the Florida Supreme Court affirmed Petitioner's sentence of death. *Id.* at 1323. Petitioner filed a petition for writ of certiorari to this Court, which was denied in 1998. *Phillips v. Florida*, 525 U.S. 880 (1998). Pursuant to Florida Rule of Criminal Procedure 3.851(d)(1)(B), Petitioner's sentence of death became final on October 5, 1996 following this Court's denial of the petition for writ of certiorari. *Id.*; Fla. R. Crim. P. 3.851(d)(1)(B).

The Florida Supreme Court's holding in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, *Hurst v. Florida*, 137 S. Ct. 2161 (2017), followed this Court's ruling in *Hurst v. Florida*, 136 S. Ct. 616 (2016), in requiring that aggravating circumstances be found by a jury beyond a reasonable doubt before a death sentence may be imposed. The Florida court then expanded this Court's ruling, requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that 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 at 57.[6]

Following *Hurst v. State*, the Florida Supreme Court decided *Mosley v. State*, which held that defendants whose sentence(s) of death were finalized after *Ring v. Arizona*, are entitled to *Hurst* relief. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016); *Ring v. Arizona*, 536 U.S. 584 (2002). On the same day, the Florida Supreme Court decided *Asay v. State*, which held that defendants whose sentences of death were finalized prior to *Ring v. Arizona* were not entitled to *Hurst* relief. *Asay v. State*, 210 So. 3d 1, 17-22 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 138 S.Ct. 41 (2017).

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[6] The dissent observed that "[n]either the Sixth Amendment nor *Hurst v. Florida* requires a jury to determine the sufficiency of the aggravation, the weight of the aggravation relative to any mitigating circumstances, or whether a death sentence should be imposed." *Hurst*, 202 So. 3d at 82 (Canady, J., dissenting).

On March 7, 2017, Petitioner filed a successive motion for postconviction relief in which he sought relief pursuant to *Hurst v. Florida* as applied through *Hurst v. State*. *Hurst v. Florida*, 136 S. Ct. 616; *Hurst v. State*, 202 So. 3d 40. Following the postconviction court's denial of relief, the Florida Supreme Court affirmed the denial of relief, holding that Petitioner's sentence of death was finalized four years prior to *Ring*, and thus Petitioner does not receive retroactive relief. *Phillips*, 234 So. 3d at 548. Petitioner then filed his Petition in this Court from the Florida Supreme Court's decision. This is the State's brief in opposition.

Reasons for Denying the Writ

This Court should deny Certiorari Review because the retroactivity of *Hurst v. Florida* and *Hurst v. State*, is a matter of state law that does not conflict with other state courts of last resort or federal appellate courts interpretation of the Eighth and Fourteenth Amendments.

Petitioner alleges that the Florida Supreme Court's decision in *Hurst v. State* unconstitutionally violates his Eighth and Fourteenth amendment rights because it created an arbitrary system of partial retroactivity to receive *Hurst* relief. This Court should not grant Petitioner certiorari review of his claims. The Florida Supreme Court's partial retroactivity analysis does not conflict with any decisions of other state courts, federal appellate courts, or this Court.

This Court has generally held that matters of retroactivity deal with state law, not the federal constitution. *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) ("finality of state convictions is a state interest, not a federal one. It is a matter that States should be free to evaluate, and weigh the importance of...."); *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."). Because the Florida Supreme Court decided *Hurst v. State* on adequate and independent state grounds, it did not impede the province of this Court. *Hurst*, 202 So. 3d at 57 (citing *State v. Horowitz*, 191 So. 3d 429, 438 (Fla. 2016) ("we have the duty to independently examine and determine questions of state law so long as we do not run afoul of federal constitutional protections....")).

This Court also provides in *Danforth* that "the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law." *Danforth*, 552 U.S. at 288. States are required to meet, but can exceed the minimum requirements for relief that federal law requires, including creating their own full and partial retroactivity tests. *Id.* The Florida Supreme Court followed *Danforth* in *Asay*, when it created a state retroactivity analysis pursuant to *Witt v. State*, 387 So. 2d 922 (Fla. 1980), that made *Hurst v. State* applicable only to Florida defendants. *See Asay*, 210 So. 3d at 15 (concluding that *Witt*'s retroactivity analysis provides "**more expansive retroactivity standards**" than the federal standards set forth in *Teague v. Lane*, 489 U.S. 288 (1989) (emphasis in original; citation omitted)).

This Court has recognized that its "jurisdiction fails" in cases where the state court rests its judgment on non-federal grounds and those grounds are also an adequate basis for the ruling on independent federal grounds. *See Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Long*, 463 U.S. at 1038 (1983); *see also, Cardinale*

v. Louisiana, 394 U.S. 437, 438 (1969) (holding that this Court does not have jurisdiction to review a state court decision on certiorari review unless a federal question is raised and decided in the state court below); *Street v. New York*, 394 U.S. 576, 581-82 (1969). This Court will not conduct a certiorari review where a state court's decision is based on independent state law. *Florida v. Powell*, 559 U.S. 50, 57 (2010).

New rules of law are typically applied only to cases that have not been finalized. *Whorton v. Bockting*, 549 U.S. 406 (2007); *Griffith v. Kentucky*, 479 U.S. 314 (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…."); *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992) (adopting *Griffith* to the decisions of Florida courts). Retroactivity under *Griffith* is thus dependent on the date of finality of the direct appeal of a case. Even then, *Hurst v. Florida* relies on *Ring*,[7] which this Court went on to explain that *Ring* "announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004).

Following *Asay*, this Court has refused to grant certiorari review to petitioners whose sentences of death were finalized prior to *Ring*. *See Jones v. State*, 234 So. 3d 545 (Fla. 2018), *cert. denied*, *Jones v. Florida*, No. 17-8652, 2018 WL 1993786, at *1 (U.S. June 25, 2018); *Cole v. State*, 234 So. 3d 644 (Fla. 2018), *cert. denied*, *Cole v.*

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[7] *Ring* followed from *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Florida, No. 17-8540, 2018 WL 1876873, at *1 (U.S. June 18, 2018); *see also Branch v. State*, 234 So. 3d 548 (Fla. 2018), *cert. denied*, *Branch v. Florida*, 138 S. Ct. 1164 (2018); *Hannon v. State*, 228 So. 3d 505 (Fla. 2017), *cert. denied*, *Hannon v. Florida*, 138 S. Ct. 441 (2017); *Lambrix v. State*, 227 So. 3d 112 (Fla. 2017), *cert. denied*, *Lambrix v. Florida*, 138 S. Ct. 312 (2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S. Ct. 513 (2017). Because Petitioner is a similarly situated individual, this Court should deny his petition.

Petitioner is not entitled to *Hurst* relief because his sentence of death was finalized prior to *Ring*. *Phillips*, 525 U.S. at 880 (denying certiorari review). This Court should not grant certiorari review because state law has dictated that cases, like Petitioner's, that were finalized prior to *Ring* are not entitled to *Hurst* retroactivity relief. (Petition at 14-15).

Aside from the question of retroactivity, certiorari would be inappropriate in this case because there is no underlying federal constitutional error as *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 prior violent felony convictions. See *Alleyne v. United States*, 570 U.S. 99, 111 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)); *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.").

Petitioner also makes two attempts at raising unrelated claims to *Hurst* in his Petition. First, Petitioner alleges that excluding him from receiving *Hurst* relief is as arbitrary as a court setting an IQ cutoff score to meet intellectual disability. Petition at 10. However, the constitutional analyses for intellectual disability and retroactivity are two very different concepts that are incomparable. The change in law brought about by *Hall v. Florida*, 134 S. Ct. 1986 (2014), was a substantive change in the law as a whole category of defendants—those with intellectual disability—are exempt from the death penalty. *Hurst*, by contrast, was a procedural change in the law pursuant to the Florida Supreme Court's *Witt* retroactively analysis in *Asay*, and not a change in federal law. *Asay*, 210 So. 3d at 15-17. *Asay* does not address claims of intellectual disability. *Id.* at 20-22. Moreover, there is no language in *Hurst v. Florida* nor *Hurst v. State* that grants Petitioner the ability to raise a previously litigated intellectual disability claim. Petitioner did not raise this claim in his 3.851 *Hurst* claim, but in an independent 3.851 motion for postconviction relief that is currently pending before the Florida Supreme Court.[8] Accordingly, this is an independent reason why this Court should deny certiorari review.

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[8]In fact, Petitioner has already presented such a claim in trial court and cannot drag claims that have not been finalized in state court nor have any relation with a *Hurst v. State* claim into this Petition. Petitioner subsequently filed a Rule 3.851 motion for postconviction relief in trial court asserting that he is intellectually disabled. On June 14, 2018, the postconviction court denied Petitioner's claim of intellectual disability. On July 11, 2018, Petitioner filed a Notice of Appeal before the Florida Supreme Court on his intellectual disability case. *See* Appendix A; Appendix B.

Second, Petitioner asserts that the new jury unanimity requirements impact the prejudice prong of his previously litigated *Strickland v. Washington*, *Giglio v. United States*, and *Brady v. Maryland*, claims because he would allegedly be more likely to receive a life sentence. *Strickland v. Washington*, 466 U.S. 668 (1984); *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963). However, this argument is not applicable to Petitioner's case as he must preliminarily be entitled to receive *Hurst* relief to be able to revisit these already litigated claims. Consequently, this Court would have to decide the retroactivity question, before even reaching the *Strickland*, *Giglio*, and *Brady* claims. Even if Petitioner were to relitigate his *Strickland* claim, he is not entitled to relief because the prejudice standard requires a showing that a defendant was prejudiced by his counsel's errors or that the prosecutor failed to produce evidence favorable to the defendant, not a Sixth Amendment fact-finding error or a Fourteenth Amendment Due Process claim. *Strickland*, 466 U.S. at 695.

Last, Petitioner alleges that the trial court used an improper sentencing procedure by telling the jury that their recommendation was advisory, in violation of the Eighth Amendment and *Caldwell v. Mississippi*, 472 U.S. 320 (1985). However, this case would be a uniquely inappropriate vehicle for certiorari because this is a postconviction case and this Court would have to address retroactivity before even reaching the underlying jury instruction issue. Moreover, there was no *Caldwell* error in this case.

To demonstrate a *Caldwell* violation, a petitioner must demonstrate that the

trial court made comments or gave instructions that "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). This Court has clarified it will grant *Caldwell* relief only to "certain types of comment-those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden v. Wainwright*, 477 U.S. 168, 183 n. 15 (1986). While *Hurst v. State* made unanimous jury recommendations of death a requirement in cases that were finalized post-*Ring*, Florida courts have and continue to inform juries that they can only recommend death as the judge is the ultimate arbiter of whether an individual receives the death penalty. Section 921.141(2)(c) of the Florida Statutes notes that if a jury unanimously votes for death, "the **jury's recommendation to the court shall** be a sentence of death." Fla. Stat. § 921.141(2)(c) (2017). However, the language of the statute does **not** remove the judge as the ultimate decider of whether the death penalty is imposed. In fact, it is wholly possible that a judge could give a defendant life in prison even though a jury unanimously voted for the death penalty.

Petitioner's *Caldwell* claim presents an inappropriate vehicle for this Court's certiorari review for several reasons. First, Petitioner cannot get around the fact that his case was finalized prior to *Ring* as a method of arguing *Caldwell* relief. The Florida Supreme Court has already weighed on the application of *Caldwell* to *Hurst*, stating "there cannot be a pre–*Ring*, *Hurst*–induced *Caldwell* challenge to Standard Jury Instruction 7.11 because the instruction clearly did not mislead jurors as to their responsibility under the law…." *Reynolds v. State*, No. SC17-793, 2018 WL 1633075,

at *1, *9 (Fla. Apr. 5, 2018). The Florida Supreme Court noted that a *Hurst* based *Caldwell* claim "cannot be more retroactive than *Hurst* because the rights announced in *Hurst* serve as a basis" for a *Caldwell* claim. *Id.* at 10. This is to say that if the rights were not retroactive prior to *Ring*, a pre-*Ring* claim alleging those same rights is meritless because a trial court cannot "guess at completely unforeseen changes in the law by later appellate courts." *Id.* at **9-10.

Second, the Florida Supreme Court previously barred Petitioner's *Caldwell* claim as he did not object to the trial court's comments at the time they were made, nor did he make a *Caldwell* claim on direct appeal. *Phillips*, 515 So. 2d at 227. To reiterate *Reynolds*, this Court should not grant Petitioner certiorari review because neither *Hurst v. Florida* or *Hurst v. State* grant him the ability to relitigate already finalized claims considering that his case was finalized prior to *Ring*. *Reynolds*, 2018 WL 1633075, at **9-10. Considering the trial court properly instructed the jury that a majority vote was needed to recommend death, there was no error by the trial court when it later sentenced Petitioner to death following the jury's recommendation.

Third, nothing in Petitioner's claim demonstrates a conflict between the Florida Supreme Court's decision and any decision of this Court. There is also no conflict between the Florida Supreme Court and the high courts of other states or federal appellate courts. On the contrary, this Court has decided two similar *Caldwell* issues in *Cole* and *Jones*. *Cole*, 2018 WL 1876873, at *1; *Jones*, 2018 WL 1993786, at *1.

Accordingly, this Court should deny Petitioner's request for certiorari review

because the Florida Supreme Court's application in *Hurst v. State* is based on adequate and independent state grounds and does not violate Petitioner's Eighth or Fourteenth Amendment rights.

Hurst v. State does not violate the Supremacy Clause of the United States as it was not a substantive change in the law granting pre-_Ring_ petitioners full retroactive _Hurst_ relief.

Petitioner's final argument alleges that *Hurst v. State* created substantive, and not procedural, changes in the law that should grant him fully retroactive relief under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). This argument does not hold weight as *Hurst v. State* is based on *Ring*, which this Court found created a procedural and not a substantive change of law. *See Schriro*, 542 U.S. at 358 ("*Ring* announced a new **procedural** rule that **does not apply retroactively** to cases already final on direct review.") (emphasis added). Because *Hurst v. State* is an extension of *Ring*, it follows that it is also a procedural change of law and not a substantive change. This Court has already rejected other petitioners' arguments that *Hurst v. Florida* and *Hurst v. State* grant a petitioner federal retroactive relief. *Jones*, 2018 WL 1993786, at *1; *see also Lambrix v. Sec'y, Fla. Dep't of Corr.*, 872 F.3d 1170, 1182 (11th Cir. 2017) ("No U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable."); *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017); *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.").

Petitioner uses *Montgomery* and its progeny case *Miller v. Alabama*, 567 U.S. 460 (2012), to assert that *Hurst v. State* also constituted a substantive rather than a procedural change in the law. Petition at 23-24. In citing to *Miller*, Petitioner argues that *Montgomery* warned against "conflat[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regular[s] only the manner of determining the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 734-35 (quoting *Schriro*, 542 U.S. at 353) (emphasis added); Petition at 23. This Court found *Miller* was 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 granted juvenile defendants relief because they fell into a category of offenders who faced punishment that the law could not impose upon them. *Montgomery*, 136 S. Ct. 734 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989); *Schriro*, 542 U.S. at 352)).

In differentiating *Miller*, *Hurst v. State* elaborated on the heightened need for accuracy in convicting and sentencing defendants by ensuring that a jury finds all the aggravating factors outweigh the mitigating factors, and unanimously vote for the death penalty. *Hurst*, 202 So. 3d at 57; *see also Montgomery*, 136 S. Ct. at 730 ("Procedural rules . . . are designed to enhance the accuracy of a conviction or sentence by regulating 'the manner of determining the defendant's culpability.'") (emphasis in original; quoting *Schriro*, 542 U.S. at 353)). *Hurst v. State* follows from *Ring* in that it 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." *Schriro*, 542 U.S. at 353. Accordingly, the death penalty is still a viable form of punishment unlike a mandatory life sentence without parole for juvenile offenders in *Miller*. Accordingly, this Court should deny Petitioner certiorari review because *Hurst v. State* is procedural and not substantive.

Petitioner's argument that *Welch v. United States*, 136 S. Ct. 1257 (2016), applies because the Eighth Amendment unanimity requirement in *Hurst v. State* created a substantive change is similarly flawed. Petition at 24-26. In *Welch*, this Court noted a substantive change of law occurred when this Court struck down the residual clause of the Armed Career Criminal Act in *Johnson v. United States*, 135 S. Ct. 2551 (2015), because "the same person engaging in the same conduct is no longer subject to the Act." *Welch*, 135 S. Ct. at 1265. Notably, *Welch* quotes and does not distinguish *Summerlin* to define the difference between a substantive and a procedural change. *Id.*

To distinguish *Welch*, following *Hurst v. State,* Florida's death sentencing scheme applies to the same conduct and defendants as it did before. *Hurst v. State* held 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 [sic], and expresses the values of the community as they currently relate to the imposition of death as a penalty." *Hurst*, 202 So. 3d at 60. This is a significant difference from *Welch* as the only change is the manner of determining a defendant's sentence; *Hurst v. State* did not change the

range of conduct nor the class of persons affected.

Hurst v. State's requirement that the jury make specific factual findings before a sentence of death is imposed is also procedural as this Court "has not ruled on whether unanimity is required" in death penalty cases. *Hurst*, 202 So. 3d at 59; *see also Hurst*, 136 S. Ct. at 622 (limiting the ruling on aggravating circumstances); *Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed."); *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). This Court has already held "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." *Schriro*, 542 U.S. at 354. This reinforces the conclusion that *Hurst v. State* is procedural and not substantive.

Petitioner lastly argues that Hurst "addressed the proof-beyond-a-reasonable-doubt standard" which he alleges makes *Hurst* substantive and retroactively applicable to him under *Teague*. Petition at 26-28. In support of this argument, Petitioner cites to *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972), and *Powell v. Delaware*, 153 A.3d 69 (Del. 2016). Petition at 27-28. In *Ivan V.*, this Court gave full retroactive effect to *In re Winship*, which required that the proof-beyond-a-reasonable-doubt standard be given to juvenile defendants. *Ivan V.*, 407 U.S. 203-04; *In re Winship*, 397 U.S. 358 (1970).

Hurst v. State is distinguishable from *Ivan V.* for three reasons. First, *Hurst v. State* did not address the proof-beyond-a-reasonable-doubt standard. In fact, *Hurst v. State* did not change the standard and the standard to prove aggravating factors remains the same (reasonable doubt) prior to the decision in *Hurst v. State*. *See* Fla. Std. J. Inst. (Crim.) 7.11; *Finney v. State*, 660 So. 2d 674, 680 (Fla. 1995); *Zeigler v. State*, 580 So. 2d 127, 129 (Fla. 1991); *Floyd v. State*, 497 So. 2d 1211, 1214-15 (Fla. 1986).

Second, *Hurst v. State* did not ascribe a standard of proof to the sufficiency of finding an aggravating factor. *Hurst*, 202 So. 3d at 54. This Court has interpreted the Eighth Amendment as requiring States to "give [a] narrow and precise definition to the aggravating factors that can result in a capital sentence." *Roper v. Simmons*, 543 U.S. 551, 568 (2005). Under Florida law, the aggravating factors are enumerated in section 921.141(6) of the Florida Statutes. Fla. Stat. § 921.141(6) (2017). The aggravating factors are sufficient to impose a death sentence because of their inclusion in the statute and a finding of only one is necessary for a defendant to receive a sentence of death. *Id.* Petitioner cannot claim an Eighth Amendment concern because Florida law has always required, just as the jury was instructed in Petitioner's case, that a jury is required to find the aggravating circumstances beyond a reasonable doubt.

Third, *Hurst v. State* did not ascribe a standard of proof requiring that the aggravating factors outweigh the mitigating factors. *Hurst*, 202 So. 3d at 54. The weight a juror attributes to the aggravating factors compared to the weight he or she

attributes to the mitigating factors cannot be defined by a beyond-a-reasonable-doubt standard. Even then, this Court has repeatedly held that federal law does not require a beyond-a-reasonable-doubt standard to find that aggravating factors must outweigh mitigating factors. See *Carr*, 136 S. Ct. at 642 ("[T]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which. . . is not strained. It would mean nothing . . . to tell the jury that the defendants must deserve mercy beyond a reasonable doubt."); *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 sentence need not be instructed how to weigh any particular fact in the capital sentencing decision."). Because *Hurst v. State* did not alter the burden of proving aggravating factors in capital cases and the burden has and remains beyond a reasonable doubt, *Ivan V.* is not applicable to Petitioner's case.

Powell is also distinguishable from *Hurst v. State*. 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. Delaware, unlike Florida, did not require that an aggravating circumstance be proven beyond a reasonable doubt. *Id.* The Delaware Supreme Court used this to distinguish *Hurst* from Delaware's "watershed ruling" in *Rauf*, which was the basis for Delaware to find *Rauf* applied retroactively to *Powell* under *Teague*. *Id.* at 74; *Rauf v. State*, 145 A.3d 430 (Del. 2016). Because *Powell* applies Delaware specific law and both states death penalty schemes are different, *Powell*

does not conflict with the Florida Supreme Court's determination of retroactive application in *Hurst v. State*. Accordingly, Petitioner cannot claim that there is a conflict between other state courts of last resort.

The retroactive application of *Hurst v. State* under *Witt* is based on independent state grounds and does not violate federal law or this Court's precedent. *Hurst v. State* created a procedural and not a substantive rule of law that does not entitle Petitioner to retroactive relief. Because there is no violation of the Supremacy clause, this Court should deny certiorari review.

Conclusion

Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,
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NO. 17-9520

IN THE SUPREME COURT OF THE UNITED STATES

HARRY FRANKLIN PHILLIPS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

Certificate of Service

I, Scott A. Browne a member of the Bar of this Court, hereby certify that on this 24th day of July 2018, a copy of the Respondent's Brief in Opposition has been submitted using the Electronic Filing System. I further certify that a copy has been sent by United States mail to: William M. Hennis, III, Litigation Director, Capital Collateral Regional Counsel-South, 1 East Broward Boulevard, Suite 444, Fort Lauderdale, Florida 33301.

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