No. 17-9548
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2017

CHADWICK WILLACY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

[Capital Case]

As re-stated by Respondent:

> 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, does not violate Equal Protection or the Eighth Amendment, 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

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CITATION TO OPINION BELOW

The decision which Petitioner seeks discretionary review of is *Willacy v. State*, 238 So.3d 100 (Fla. 2018).

JURISDICTION

Petitioner, Chadwick Willacy, is seeking jurisdiction pursuant to 28 U.S.C. § 1257. Respondent agrees that the statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction because the Florida Supreme Court's decision in this case is based on adequate and independent state grounds. 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.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI cl. 2.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. VI.

The Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. VIII.

The Fourteenth Amendment to the United States Constitution, section one, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE AND FACTS

The Florida Supreme Court reviewed Willacy's case three times on appeal. *See Willacy v. State*, 640 So.2d 1079 (Fla. 1994)(hereinafter *Willacy I*), *Willacy v. State*, 696 So. 2d 693 (Fla. 1997) (hereinafter *Willacy II*), and *Willacy v. State*, 967

So. 2d 131, (Fla. 2007) (hereinafter *Willacy III*). The Florida Supreme Court summarized the factual and procedural history below in *Willacy III* as follows:

> On September 5, 1990, Marlys Sather returned home unexpectedly to find Willacy, her next-door neighbor, burglarizing her house. Willacy bludgeoned Sather and bound her ankles with wire and duct tape. He choked and strangled her with a cord with a force so intense that a portion of her skull was dislodged. Willacy then obtained Sather's ATM pin number, her ATM card, and the keys to her car; drove to her bank; and withdrew money out of her account. Willacy hid Sather's car around the block while he made trips to and from the house. He placed stolen items on Sather's porch for later retrieval, took a significant amount of property from Sather's house to his house, and then drove the car to Lynbrook Plaza where he left it and jogged back to Sather's home. Upon his return, Willacy disabled the smoke detectors, doused Sather with gasoline he had taken from the garage, placed a fan from the guest room at her feet to provide more oxygen for the fire, and struck several matches as he set her on fire.
>
> When Sather failed to return to work after lunch, her employer notified the Sather family of her absence. Sather's son-in-law went to her home and found shotgun and several electronic items lying on the back porch. Inside the home, he found Sather's body. Medical testimony established that her death was caused by inhalation of smoke from her burning body.
>
> Law enforcement officers conducted an investigation into Sather's murder, uncovering a large amount of evidence linking Willacy to the murder. Willacy's fingerprints were found on the fan at Sather's feet, the gas can, and a tape rewinder at Sather's house. Witnesses reported seeing a man matching Willacy's description near Sather's house and driving Sather's car on the day of the murder. Further, Willacy's girlfriend, Marisa Walcott, telephoned law enforcement officers after discovering a woman's check register in Willacy's wastebasket. Law enforcement officers recognized the check register as belonging to Sather and subsequently arrested Willacy. While executing a search warrant on Willacy's home, law enforcement agents uncovered some of Sather's property, as well

as several articles of clothing containing blood consistent with Sather's blood type.

Willacy was charged by indictment with first-degree premeditated murder, burglary, robbery, and arson. Judge Theron Yawn presided over the trial. On October 17, 1991, the jury convicted Willacy on all four counts. Following the penalty phase, the jury recommended death by a vote of nine to three, and Judge Yawn sentenced Willacy to death.FN2

> FN2. Judge Yawn found four aggravating factors: the murder was committed (1) while engaged in the commission of arson; (2) for pecuniary gain; (3) in an especially heinous, atrocious, or cruel manner; and (4) to avoid arrest. The sole statutory mitigating factor was Willacy's lack of prior criminal activity, and the two nonstatutory mitigating factors were Willacy's history of nonviolence and his attempts at self-improvement while in jail.

Willacy appealed to this Court but subsequently moved for temporary relinquishment of jurisdiction in order for the trial court to hold an evidentiary hearing on his motion for a new trial. In his motion for a new trial, Willacy claimed that juror Clark, the foreman of Willacy's trial in 1991, was under prosecution for grand theft. Jurisdiction was relinquished and on October 12, 1992, Judge Yawn conducted a hearing on Willacy's motion. Among the witnesses at the hearing, the court heard testimony from Willacy's trial counsel, the prosecutors in his case, and juror Clark. The prosecutors testified that they became aware of Clark's status during Willacy's trial and immediately informed Willacy's trial counsel. Willacy's trial counsel denied receiving this information during trial. Following the hearing, Judge Yawn issued an order denying Willacy's motion for a new trial, finding that the State informed Willacy's trial counsel of Clark's status during trial.

During oral argument on direct appeal, the parties thoroughly debated the issue of juror Clark's eligibility.FN3 Willacy's counsel asserted that Clark was under prosecution and, therefore,

statutorily ineligible to serve as a juror until he entered into a pretrial intervention (PTI) agreement. According to Willacy's counsel, because Clark did not sign a PTI contract until after Willacy's trial, Clark was disqualified. The State countered that Clark was eligible to serve because he was approved for PTI prior to Willacy's trial. Alternatively, the State argued that because Willacy's trial counsel failed to object to Clark during trial, the matter was waived. This Court affirmed the convictions but vacated the death sentence and remanded the case for a new penalty phase based on Willacy's claim that the trial court did not give defense counsel an opportunity to rehabilitate a juror who said she was opposed to the death penalty. Willacy I, 640 So. 2d at 1082. As to the controversy regarding juror Clark, this Court held:

> FN3. The eight issues raised on direct appeal were: (1) the court committed reversible error when it refused the defense an opportunity to rehabilitate a prospective juror; (2) a prospective juror was improperly challenged based on his race; (3) the jury foreman was ineligible to serve; (4) the court improperly found that Willacy's statements were voluntarily made; (5) the killing was not committed to avoid arrest; (6) the killing was not heinous, atrocious, or cruel; (7) the court improperly weighed the mitigating and aggravating factors; and (8) death is an inappropriate penalty. Willacy I, 640 So. 2d at 1081 n. 2.
>
> Since Clark was not under prosecution, Willacy's motion for a new trial was properly denied. Moreover, during the trial the State informed Willacy's counsel of Clark's status and his counsel voiced no objection. By failing to make a timely objection, Willacy waived the claim he now seeks to assert. We affirm the trial court's decision. *Willacy I*, 640 So. 2d at 1083.

At resentencing, Willacy was represented by new counsel and Judge Yawn again presided. The State presented evidence of the crime and testimony of Sather's son and two daughters. Willacy presented the testimony of relatives and friends. The court followed the jury's

eleven-to-one recommendation and sentenced Willacy to death, finding five aggravating factors,FN4 no statutory mitigating factors, and thirty-one nonstatutory mitigating factors of little weight.FN5 On direct appeal after resentencing, Willacy raised eleven issues.FN6 This Court denied each of those claims and affirmed Willacy's death sentence. *Willacy II*, 696 So. 2d at 694.

> FN4. The five aggravating factors were: (1) the murder was committed in the course of a felony; (2) the murder was committed to avoid lawful arrest; (3) the murder was committed for pecuniary gain; (4) the murder was especially heinous, atrocious, or cruel (HAC); and (5) the murder was committed in a cold, calculated, and premeditated manner (CCP).

> FN5. The nonstatutory mitigating factors were that Willacy (1)-(3) exhibited kindness, compassion, and concern for others; (4) enjoyed the love and affection of his family; (5)-(6) enjoyed the respect and admiration of his peers and his family; (7) demonstrated a desire and a willingness to help others; (8)-(9) was a leader and a role model to his peers; (10) maintained strong ties to his family; (11) exhibited appropriate demeanor and behavior during the resentencing hearing; (12) exhibited love for his family; (13)-(14) was a good and loyal friend and a good and obedient son; (15) was unselfish; (16) contributed to the lives of others; (17) showed the proper respect for his elders; (18)-(19) demonstrated honesty and responsibility; (20)was a hard worker; and (21) voluntarily sought help for his drug problem. While in school, Willacy (22) enjoyed the respect and confidence of his teachers and coaches; (23) did not experience any academic or disciplinary problems; (24) was a disciplined and dedicated member of his high school track team; (25) demonstrated a willingness to help his teammates and otherwise be a team player; (26) was the captain of his high school track team and enjoyed numerous honors in connection with his talents as a runner; (27) had no

history of previous violent conduct; and (28) had a good upbringing without serious disciplinary problems. Judge Yawn also considered (29)-(30) any other aspect of Willacy's character or background; and (31) any other factor deemed appropriate.

FN6. The eleven issues Willacy raised on direct appeal after resentencing were: (1) the denial of Willacy's motion for recusal of the judge; (2) the admission of inflammatory evidence; (3) the finding that the murder was heinous, atrocious, or cruel (HAC); (4) the finding that the murder was committed to evade arrest; (5) the finding that the murder was committed for pecuniary gain; (6) the finding that the murder was committed in a cold, calculated, and premeditated manner (CCP); (7) the proportionality of the death sentence; (8) the admission of victim impact evidence; (9) the refusal to strike jurors for cause; (10) cumulative error; and (11) the constitutionality of the death penalty statute.

On May 11, 1998, Willacy filed a motion to vacate judgment of conviction and sentence pursuant to Florida Rule of Criminal Procedure 3.850 with special request for leave to amend. On March 18, 2002, Willacy filed an amended motion for postconviction relief in which he raised thirty-one issues. Seventeen of Willacy's claims were summarily denied by order on September 24, 2003.FN7 An evidentiary hearing was granted on Willacy's remaining fourteen claims.FN8 The evidentiary hearing was held on December 3 through 5 and 19, 2003, and February 16, 2004. On November 23, 2004, the trial court issued an order denying the remaining fourteen claims. Willacy timely filed this appeal.

FN7. Willacy's claims that were summarily denied included: (3) Willacy was denied a fair trial due to the State's failure to inform the court of juror Clark's statutory ineligibility; (4) counsel was ineffective for waiving the appointment of independent counsel to litigate the facts and circumstances regarding juror Clark's pending felony charges; (5) counsel was

ineffective for failing to fully present to the trial court during the hearing on October 12, 1992, all aspects of the pretrial intervention program and juror Clark's status as pending prosecution at the time of his jury service; (6) counsel was ineffective for failing to object to juror Clark's ineligibility to serve as a juror; (8) the trial court applied an incorrect standard of review or law in denying Willacy's motion for a new trial; (9) Willacy was denied a fair trial due to juror misconduct; (11) counsel was ineffective for failing to timely move to disqualify Judge Yawn from presiding over the second penalty phase proceeding; (12) the trial court erred by failing to follow the procedure outlined in *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), in resentencing Willacy in 1995; (14) jurors were not sworn prior to voir dire in the original trial as required by Florida Rule of Criminal Procedure 3.300(a); (15) counsel was ineffective for failure to object to the trial court's failure to swear the jury prior to voir dire in the original trial; (16) the trial court erred in concluding that there was probable cause for Willacy's arrest and search of his home; (20) the trial court erred in failing to properly instruct the jury during the 1995 penalty phase proceeding on the distinction between regular premeditation and the higher standard of cold, calculated, and premeditated murder; (26) the indictment violated the Sixth Amendment and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because it failed to include aggravating circumstances; (27) Florida's death penalty statute is unconstitutional under the Sixth Amendment and *Apprendi* because the jury was not instructed that they must unanimously find beyond a reasonable doubt any aggravating circumstance; (28) the trial court's failure to instruct the jury that they must unanimously find that the aggravating circumstances outweigh the mitigating circumstances in order to recommend a death sentence violated the Sixth Amendment and *Apprendi*; (29) the trial court's

failure to require a unanimous binding jury verdict as to the death penalty was unconstitutional under Apprendi; (30) lethal injection and Florida's procedures implementing lethal injection constitute cruel or unusual punishment in violation of the Eighth Amendment and article I, section 17 of the Florida Constitution.

FN8. These claims all pertained to the ineffectiveness of trial counsel: (1) failure to raise an independent act defense; (2) failure to investigate potentially exculpatory evidence; (7) failure to inquire of juror Clark during voir dire regarding his eligibility to serve; (10) failure to prepare fully and adequately for trial by retaining a fingerprint or crime scene expert; (13) failure to seek to disqualify the trial judge based on the trial court's use of a sentencing order which had been prepared prior to the *Spencer* hearing; (17) failure to object to evidence introduced at trial; (18) failure to request a jury instruction on felony murder and the law of principals; (19) failure to request an *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), jury instruction; (21) failure to present evidence of a statutory mitigating circumstance pursuant to section 921.141(6)(f), Florida Statutes (Supp.1990); (22) failure to present statutory mitigating circumstances pursuant to section 921.141(6)(b), Florida Statutes (Supp.1990); (23) failure to present statutory mitigating circumstances pursuant to section 921.141(6)(h), Florida Statutes (Supp.1990); (24) failure to present mental health testimony to rebut the State's claim that the murder was committed in a cold, calculated, and premeditated manner; (25) waiver of the presentencing investigation report; and (31) cumulative error.

II. 3.850 MOTION FOR POSTCONVICTION RELIEF

Willacy appeals the denial of his motion for postconviction relief, raising seven issues: (1) the trial court erred in denying an evidentiary hearing on claims 4, 6, and 15 of his motion for postconviction relief; (2) counsel was ineffective for failing to assert the independent act defense; (3) counsel was ineffective for failing to move to recuse the trial judge at the resentencing proceeding; (4) counsel was ineffective for failing to investigate and present evidence of statutory and nonstatutory mitigating factors; (5) counsel was ineffective for failing to inquire regarding juror Clark's status; (6) the trial court erred in failing to retroactively apply this Court's decision in *Lowrey v. State*, 705 So. 2d 1367 (Fla. 1998); and (7) the trial court erred in denying Willacy's motion for postconviction DNA testing.

. . . .

III. PETITION FOR WRIT OF HABEAS CORPUS

In his petition for writ of habeas corpus, Willacy raises seven issues: (1) appellate counsel was ineffective for failing to raise on direct appeal lack of probable cause to arrest Willacy or to search Willacy's residence; (2) Willacy was denied his constitutional right to a fair trial by having a juror who was pending prosecution serve as the foreman on his jury; (3) appellate counsel was ineffective for failing to raise on direct appeal the fundamental error resulting from the trial court's failure to swear prospective jurors; (4) appellate counsel was ineffective for failing to argue that the jury was improperly instructed as to the aggravating circumstance of cold, calculated, and premeditated (CCP); (5) Willacy was sentenced to death in violation of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); (6) death by lethal injection violates article I, section 17 of the Florida Constitution and the Eighth Amendment of the United States Constitution; and (7) Willacy's Eighth Amendment right against cruel and unusual punishment may be violated as he may be incompetent at the time of execution. Issues (2), (5), (6), and (7) are either without merit or not yet ripe for review and need not be discussed in detail.FN14

> FN14. Because this Court determined on direct appeal that juror Clark was eligible to serve on Willacy's jury, issue (2) is without merit. Issue (3) is essentially the same as claim 15 of Willacy's motion for postconviction relief and was already disposed of above. Willacy's *Ring* claim fails because Ring does not apply retroactively. *See Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); *Johnson v. State*, 904 So.2d 400 (Fla. 2005). Also without merit is Willacy's claim challenging Florida's procedure of execution by lethal injection. *See Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000). Finally, Willacy's claim that he may be incompetent at the time of execution is not yet ripe for review. *See Robinson v. State*, 913 So. 2d 514, 524 n. 9 (Fla. 2005).

Willacy III, 967 So. 2d 135-138, 145-146.

Willacy also filed a successive state habeas petition on September 29, 2009 which was denied by the Florida Supreme Court on March 19, 2010.

Prior to Willacy's September 29, 2009, successive state habeas petition, Willacy had filed a federal habeas petition in the United States District Court, Middle District of Florida on April 22, 2008. Willacy's federal habeas petition was held in abeyance while the district court allowed him to exhaust additional constitutional claims in state court. After the resolution of his successive state habeas petition, Willacy filed an amended federal habeas petition on June 16, 2013. On July 18, 2014, the district court issued an order denying the amended petition and declined to issue a certificate of appealability ("COA"). Willacy filed a motion to alter or amend judgement and/or for

reconsideration of the denial of a COA on August 14, 2014. The district court denied Willacy's motion, but the Eleventh Circuit granted a COA as to three issues. That court later denied relief on September 19, 2017. This Court denied certiorari on April 10, 2018.

After this Court issued *Hurst v. Florida*, 136 S.Ct. 616 (2016), Willacy filed a successive post-conviction motion based on that decision as well as on *Hurst v. State*, 202 So.3d 40 (Fla. 2016). The state circuit court denied the motion on August 1, 2017.

Willacy appealed to the Florida Supreme Court which denied it on January 23, 2018, stating:

> After reviewing Willacy's response to the order to show cause, as well as the State's arguments in reply, we conclude that Willacy is not entitled to relief. Willacy was sentenced to death following a jury's recommendation for death by a vote of eleven to one. *Willacy v. State*, 696 So.2d 693, 694 (Fla. 1997). Willacy's sentence of death became final in 1997. *Willacy v. Florida*, 522 U.S. 970, 118 S.Ct. 419, 139 L.Ed.2d 321 (1997). Thus, *Hurst* does not apply retroactively to Willacy's sentence of death. *See Hitchcock*, 226 So.3d at 217. Accordingly, we affirm the denial of Willacy's motion.

Willacy v. State, 238 So. 3d 100, 101 (Fla. 2018), reh'g stricken, No. SC17-1605, 2018 WL 1004640 (Fla. Feb. 22, 2018).

REASONS WHY THE WRIT SHOULD BE DENIED

CLAIM I

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE THE FLORIDA SUPREME COURT'S RULING ON THE RETROACTIVITY OF *HURST* RELIES ON STATE LAW TO PROVIDE THAT THE *HURST* CASES ARE NOT RETROACTIVE TO DEFENDANTS WHOSE DEATH SENTENCES WERE FINAL WHEN THIS COURT DECIDED *RING V. ARIZONA*, AND THE COURT'S RULING DOES NOT VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENTS AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR INVOLVE AN IMPORTANT, UNSETTLED QUESTION OF FEDERAL LAW.

Petitioner requests that this Court review the Florida Supreme Court's decision affirming the denial of his successive postconviction motion and claims that the state court's holding with respect to the retroactive application of *Hurst* violates the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection. However, the Florida Supreme Court's denial of the retroactive application of *Hurst* to Petitioner's case 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, nor does it violate the Eighth and Fourteenth Amendments. This Court directly held in *Danforth v. Minnesota*, 552 U.S. 264 (2008), that states are free to have their own tests for retroactivity which provide more relief and that includes partial retroactivity. Thus, because Willacy

has not provided any "compelling" reason for this Court to review his case, certiorari review should be denied. *See* Sup. Ct. R. 10.

Respondent would further note that 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., Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112 (Fla.), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505 (Fla.), *cert. denied*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548 (Fla.), *cert. denied*, 138 S. Ct. 1164 (2018); *Cole v. State*, 234 So. 3d 644 (Fla.), *cert. denied*, 17-8540, 2018 WL 1876873 (June 18, 2018); *Kaczmar v. State*, 228 So. 3d 1 (Fla. 2017), *cert. denied*, 17-8148, 2018 WL 3013960 (June 18, 2018); *Zack v. State*, 228 So. 3d 41 (Fla. 2017), *cert. denied*, 17-8134, 2018 WL 1367892 (June 18, 2018).

A. There Is No Underlying Sixth Amendment Violation.

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 guilt phase convictions for three contemporaneous felonies – burglary, robbery,

and arson. The unanimous verdicts by Petitioner's jury establishing his guilt of these contemporaneous crimes, 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."); *Alleyne v. United States*, 133 S. Ct. 2151, 2160 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)).

Lower courts have almost uniformly held that a judge may perform the "weighing" of factors to arrive at an appropriate sentence without violating the Sixth Amendment. *See State v. Mason,* ___ *N.E.3d* ____, 2018 WL 1872180 at *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.") (string citations omitted); *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."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *State v. Gales*, 658 N.W.2d 604, 628-29 (Neb. 2003) ("[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review to be undertaken by a jury"). The findings required by the Florida Supreme Court following remand in *Hurst v. State* involving the weighing and selection of a defendant's sentence are not required by the Sixth Amendment. *See, e.g.*, *McGirth v. State*, 209 So. 3d 1146, 1164 (Fla. 2017). Thus, there was no Sixth Amendment error in this case.[1]

B. The Florida Court's Ruling on the Retroactivity of *Hurst* is Not Unconstitutional.

The Florida Supreme Court's holding in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 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

[1] Even if there were Sixth Amendment error, it would be harmless beyond a reasonable doubt in this case as *Hurst* errors are subject to harmless error analysis. *See Hurst v. Florida*, 136 S. Ct. at 624; *see also Chapman v. California*, 386 U.S. 18, 23-24 (1967). Here, the two aggravators found by the trial court were either uncontestable (as unanimously found by the jury at the guilt phase in the case of the armed robbery conviction) or established by overwhelming evidence given the brutal nature of the murder and the finding of the HAC aggravator.

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.

The Florida Supreme Court first analyzed the retroactive application of *Hurst* in *Mosley v. State*, 209 So. 3d 1248, 1276-83 (Fla. 2016), and *Asay v. State*, 210 So. 3d 1, 15-22 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017). In *Mosley*, the Florida Supreme Court held that *Hurst* is retroactive to cases which became final after this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), on June 24, 2002. *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 retroactivity. *See 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, 358 (2004) (holding that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review"); *Lambrix v. Secretary, Fla. Dep't of Corr.*, 872 F.3d 1170, 1182-83 (11th Cir. 2017), *cert. denied*, 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." *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 v. State*, 210 So. 3d 1, 22 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), the Florida Supreme Court held that *Hurst* is not retroactive to any case in which the death sentence was final pre-*Ring*. The court specifically noted that *Witt* "provides *more expansive retroactivity standards* than those adopted in *Teague*." Asay, 210 So. 3d at 15 (emphasis in original) (quoting *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005)). 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 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 his judgement 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*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017), *cert. denied*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548, 549 (Fla. 2018), *cert. denied*, 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"); *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*.

Even under the "pipeline" concept, cases whose direct appeal was decided on the same day might have their judgement and sentence become final on either side of the line for retroactivity. Additionally, under the "pipeline" concept, "old" cases where the judgement and/or sentence has been overturned will receive the benefit of new law as they are no longer final. Yet, this Court recognizes this type of traditional retroactivity as proper and not violative of the Eighth or Fourteenth Amendment.

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, 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.

The Florida Supreme Court's determination of the retroactive application of *Hurst* under the state law *Witt* standard is based on adequate and independent state grounds and is not violative of federal law or this Court's precedent. This Court has repeatedly recognized that where a state court judgement rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *see also 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."); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal

question was raised and decided in the state court below). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010); *Long*, 463 U.S. at 1041. Because the Florida Supreme Court's retroactive application of *Hurst* in Petitioner's case is based on adequate and independent state grounds, certiorari review should be denied.

CLAIM II

THE FLORIDA SUPREME COURT'S DETERMINATION THAT *HURST* IS NOT RETROACTIVE IS A MATTER OF STATE LAW AND DOES NOT VIOLATE THE EIGHTH AMENDMENT AS APPLIED TO WILLACY.

Petitioner seeks review of the Florida Supreme Court's decision rejecting a claim that *Hurst* must be applied retroactively since the Florida Supreme Court referenced the Eighth Amendment when it ruled that a death recommendation be unanimous under the Florida Constitution, arguing that a death sentence from a nonunanimous recommendation constitutes cruel and unusual punishment. The State contends that *Hurst v. State* could not announce an Eighth Amendment basis for declaring Florida's sentencing scheme unconstitutional and any dicta in that opinion regarding a such a basis does not make it retroactive to Willacy. Willacy asserts that *Hurst* is a substantive change in the law relying on *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). Again, the issue is a matter of state law and does not create a new substantive federal Eighth Amendment law. Contrary to

opposing counsel's assertion, *Hurst* is a procedural change not a substantive change. This Court in *Schriro v. Summerlin,* 542 U.S. 348, 353 (2004), explained that rules that allocate decision making authority between the judge and the jury are "prototypical procedural rules." *Hurst* is not substantive, according to this Court. There is no conflict between this Court's decisions and the Florida Supreme Court's decision in this case. Nor is there any conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court. This Court should deny review of this claim.

Initially, under the state constitution, the Florida Supreme Court does not have the power to sketch out its own determinations on what is in violation of the Eighth Amendment. The Florida Constitution states:

> The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.

Fla. Const. art. I, § 17. The Florida Supreme Court is bound by the Conformity Clause of the Florida Constitution to construe the state prohibition against cruel and unusual punishment consistently with pronouncements by the United States Supreme Court. *Correll v. State*, 184 So.3d 478 (2015), certiorari denied 193 L.Ed.2d 307, 2015 WL 6111441. *See also Valle v. State*, 70 So.3d 530 (2011),

certiorari denied 132 S.Ct. 1, 564 U.S. 1067, 180 L.Ed.2d 940 (In accordance with the Florida Constitution, the Florida Supreme Court is bound by the precedent of the United States Supreme Court regarding challenges to Florida's chosen method of execution.). The Supreme Court has held that the death penalty does not violate the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, (1976).

The Supreme Court has not issued an interpretation to the Eighth Amendment saying that a non-unanimous jury death recommendation constitutes cruel and unusual punishment. *Hurst v. Florida* only addressed the Sixth Amendment. *Hurst* did not overrule *Spaziano v. Florida,* 468 U.S. 447, 104 S. Ct. 3154 (1984), in its entirety. Instead, the Court held: "The decisions [in Spaziano and Hildwin] are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Hurst*, 136 S. Ct. at 624.

Spaziano challenged Florida's capital sentencing scheme on both Sixth and Eighth Amendment grounds and the Court addressed both. Noting that since petitioner's "fundamental premise is that the capital sentencing decision is one that, in all cases, should be made by a jury," the Court went on to say:

> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Spaziano, 468 U.S. at 458, 464, 104 S. Ct. at 3164. On the Eighth Amendment challenge, the Court stated:

> The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws. "Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment" is violated by a challenged practice. *See Enmund v. Florida*, 458 U.S. 782, 797, 102 S.Ct. 3368, 3376, 73 L.Ed.2d 1140 (1982); Coker v. Georgia, 433 U.S. 584, 597, 97 S.Ct. 2861, 2868, 53 L.Ed.2d 982 (1977) (plurality opinion).

Id. No case has held that Florida's sentencing scheme violates the Eighth Amendment. The Supreme Court addressed a similar issue in *Harris v. Alabama*, 513 U.S. 504 (1995), and held that Alabama's capital sentencing scheme was consistent with the Eighth Amendment. The Harris Court explained that "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence." Id. at 515.

Further, the Eighth Amendment provides a poor vehicle through which to determine whether there is a constitutional right to jury sentencing in capital cases. In *Coker v. Georgia*, 433 U.S. 584 (1977), *Roper v. Simmons*, 543 U.S. 551 (2005), and similar cases, the Supreme Court found that "capital punishment—though not unconstitutional per se—is categorically too harsh a penalty to apply to certain types of crimes and certain classes of offenders." *Graham v. Florida*, 560

U.S. 48, 100 (2010) (Thomas, J., dissenting). As the Court explained in Graham, "[t]he classification" it uses under the Eighth Amendment "consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender." Id. at 60. This framework does not fit Willacy's challenge to judicial sentencing.

Willacy does not fall within either of the subsets recognized by this Court's Eighth Amendment jurisprudence. He was convicted of capital murder, a crime for which the death penalty is constitutionally permissible. Consequently, a consideration of the nature of his offense is inapposite. And, unlike age or mental status, a jury's nonbinding recommendation is not an objective "characteristic of the offender." Rather, the jury's recommendation reflects its subjective opinion regarding the appropriate sentence based on the limited evidence available to it. Thus, Willacy's argument does not fall within the second classification of cases.

Finally, this Court has never held that a death sentence is constitutional only with a unanimous jury recommendation. In fact, in *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628 (1972) and *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620 (1972) this Court held that non-unanimous jury verdicts in criminal cases were constitutional. The Florida Supreme Court's decision in this case is not in conflict

with either this Court's or any other jurisdiction's decisions. This writ must be denied.

CLAIM III

THERE IS NO CRIME OF CAPITAL MURDER IN FLORIDA LAW AND THE MATTER IS PURELY ONE OF STATE LAW.

In his final issue, Willacy asserts *Hurst v. State* created a new crime of capital murder separate and apart from first degree murder in Florida by requiring the jury to make unanimously the required findings of the aggravators and the mitigators and then weighing the two in coming to a recommendation of punishment. That is an incorrect interpretation of *Hurst* and Florida law.

In holding that it was the jury's role to make the required findings and weigh the mitigators and aggravators in the penalty phase, the Florida Supreme Court analogized those factors to elements of a crime. The fact that the Court analogized a critical sentencing factual finding with an element did not turn the sentencing factor into an actual element of the crime. While each of the three sentencing factors are now required findings, it is not logical or appropriate to equate them with the actual elements of an offense. Statutory elements are what provide notice to citizens defining criminal offenses, thus, they cannot be re-defined based on the nature of the case at issue-- which is what occurs with each defendant's various aggravators and mitigators. Labeling sentencing factors as "elements" of capital murder is a misperception and not supported by the *Hurst* cases, or any case.

Willacy asserts that *Alleyne v. United States*, 133 S.Ct. 2151 (2013), held that the facts necessary to increase the authorized punishment to include death are elements of a new or separate offense. *Alleyne* does no such thing. *Alleyne* held that any facts that increase the mandatory minimum sentence for an offense must be submitted to the jury and found beyond a reasonable doubt because "the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty." *Alleyne*, 133 S. Ct. at 2151, 2155, 2161 n.2. This Court explained "this is distinct from factfinding used to guide judicial discretion in selecting a punishment within limits fixed by law." *Id.* "While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing." *Id.* at 2161, n.2. Again, the generic use of the word "element" in those discussions does not turn a jury's factual finding into an element of the offense itself. In a first-degree murder charge, the elements include facts like a person is dead and the criminal cause of death.

This Court recognized this distinction in *Ring* when it stated that aggravators "operate as the functional equivalent of an element of a greater offense." *Ring*, 536 U.S. at 609 (emphasis added). Ring did not elevate the statutory aggravating circumstances into elements of a crime, nor did it create a new crime. *Schriro v.*

Summerlin, 542 U.S. 348, 354-55 (2004). Further, the current Florida statute similarly does not convert the sentencing factors into elements of the crime. The writ should be denied.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

PAMELA JO BONDI
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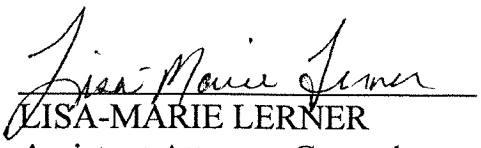

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No. 17-9548
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2017

CHADWICK WILLACY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

CERTIFICATE OF SERVICE I, Lisa-Marie Lerner, a member of the Bar of this Court, hereby certifies that on July 25th, 2018, a copy of the Brief for Respondent in Opposition in the above entitled case was furnished by United States mail, postage prepaid, to Linda McDermott, Esq., McClain & McDermott, 20301 Grande Oak Blvd., Suite 116-61, Estero, Florida 33928, and via electronic filing system to, lindammcdermott@msn.com, counsel for Petitioner herein. I further certify that all parties required to be served have been served.

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