NO. 17-9564

IN THE SUPREME COURT OF THE UNITED STATES

ETHERIA VERDELL JACKSON,

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

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.

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Opinion Below

The decision of the Florida Supreme Court appears as *Jackson v. State*, 237 So. 3d 905 (Fla. 2018). The Florida Supreme Court's direct appeal decision appears as *Jackson v. State*, 530 So. 2d 269 (Fla. 1988), *cert. denied*, *Jackson v. Florida*, 488 U.S. 1050 (1989). The Florida Supreme Court's post-conviction decision appears as *Jackson v. State*, 633 So. 2d 1051 (Fla. 1993). The Eleventh Circuit's decisions appear as *Jackson v. Crosby*, 375 F.3d 1291 (11th Cir. 2004), and *Jackson v. Crosby*, 437 F. 3d 1290 (11th Cir. 2006), *cert. denied*, *Jackson v. McDonough*, 549 U.S. 908 (2006). The Florida Supreme Court's successive post-conviction decision appears as *Jackson v. State*, 50 So. 3d 1137 (Fla. 2010).

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, Etheria Jackson, was convicted of first-degree murder and sentenced to death. *Jackson*, 530 So. 2d at 270.

> Wendell and Linton Moody operated a retail furniture business in Jacksonville, Florida. To facilitate the collection of monthly installment payments, Linton obtained cash from the bank every month and then cashed customers' government checks, deducting their installment bills from the respective checks. On November 29, 1985, Linton cashed a check at the bank for $4,000. On December 2, Linton worked in the furniture store from 10:30 a.m. until early afternoon. The following day Linton failed to report for work and his brother filed a missing person report. On December 5, Officer Raymond Godbee discovered Linton's body rolled up in a carpet in the back of Linton's 1983 Chevrolet station wagon. Several pieces of evidence were discovered with the body, including the victim's brown briefcase and a calling card box. On the same day, Linda Riley, appellant's live-in girlfriend and the mother of one of appellant's children, reported Linton's murder to the police department. According to Linda Riley's

> trial testimony, she purchased a washing machine from Linton Moody on the installment plan. On December 3, 1985, Linton came to her home to collect the monthly payment. On this particular occasion, Riley's two children and the appellant were also present. Riley stated that after Linton cashed the check, he gave her a receipt. At this point, the appellant, Jackson, grabbed Moody and put a knife to his neck. Riley testified that appellant then forced Moody to the floor and directed her to remove his wallet and keys. As the sixty-four-year-old Moody begged for mercy, he was bound, gagged, and then choked with a belt until he was unconscious. After Moody regained consciousness, Jackson beat him in the face with a cast on his forearm and then straddled his body and repeatedly stabbed him in the chest. Jackson and Linda Riley then disposed of the body by rolling it up in a carpet and stuffing it in the back of the victim's car. The car was driven by Jackson to another location and abandoned, where it was later discovered by police. Riley also testified that after Jackson left with the body, he returned forty-five minutes later with two men, summoned Riley into the kitchen, and asked her to inject cocaine into his arm.

Id. Petitioner was found guilty of first-degree murder. *Id.* at 271. At sentencing, the jury was instructed that "[e]ach aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision." (Record at 1475). Further, the jury was instructed that they "should carefully weigh, sift, and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence." (Record at 1476). The jury recommended Petitioner be sentenced to death by a vote of seven-to-five. *Id.*

> The trial judge, in imposing the death sentence, found the following aggravating circumstances: (1) the murder was committed while the defendant was under sentence of imprisonment because he was on parole at the time of the killing; (2) the defendant was previously convicted of a felony involving the use or threat of violence to some person (armed robbery); (3) the murder was committed for financial gain; (4) the murder was especially wicked, evil, atrocious, or cruel;

> and (5) the murder was committed in a cold, calculated, and premeditated manner. The trial judge concluded that "no statutory or nonstatutory mitigating circumstances exist."

Id. at 272. On direct appeal, the Florida Supreme Court affirmed the conviction and sentence. *Id.* at 274.

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 in 1989. *Jackson*, 488 U.S. at 1050. 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 1989. Fla. R. Crim. P. 3.851(d)(1)(B).

Thereafter, Petitioner filed an appeal of the denial of his post-conviction motion and a petition for writ of habeas corpus in the Florida Supreme Court, both of which were denied. *Jackson*, 633 So. 2d at 1055. Petitioner also filed a successive post-conviction motion which was denied. *Jackson*, 50 So. 3d at 1137.

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); *Ring v. Arizona*, 536 U.S. 584 (2002). 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 1989, the Florida Supreme Court denied Petitioner's claim that *Hurst* should apply retroactively to him. *Jackson*, 237 So. 3d at 906. Petitioner then filed this 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 1989. *Jackson*, 237 So. 3d at 906. 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, the Fourteenth Amendment's guarantee of equal protection, and conflicts with binding precedent of this Court. 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. Thus, Petitioner's request for certiorari review should be denied.[1]

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

[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 (June 18, 2018); *Jones v. State*, 234 So. 3d 545 (Fla. 2018), *cert. denied, Jones v. Florida*, no. 17-8652, 2018 WL 1993786 (June 25, 2018).

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 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

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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 prior violent felony conviction. *See Jackson v. State*, 213 So. 3d 754, 787 (Fla. 2017), *citing Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The unanimous jury verdict establishing his guilt for armed robbery, 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."). As Petitioner does not allege a failure of the jury to find at least one aggravating factor beyond a reasonable doubt, he does not raise a federal question.

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 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

[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

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, 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). 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 and are still in the direct appeal pipeline. *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. 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

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

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 25). 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. 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.[4] 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*,[5] the Florida Supreme

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[4] Petitioner uses the example of *Johnson* and *Calloway*. (Petition at 25-26). 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 Appellant'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.

[5] Appellant 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 24); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). 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

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

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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. 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. Thus, the Florida Supreme Court has provided a non-arbitrary explanation for drawing the line of retroactivity at *Ring* rather than *Apprendi*.

[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 Light of *Hurst*, available at https://deathpenaltyinfo.org/node/6790 (last visited July 23, 2018).

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 *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 Jury Instructions Properly Advised the Jury of Its Role Under Florida Law and Did Not Diminish the Importance of the Jury's Responsibility in Violation of *Caldwell*.

In addition to arguing for retroactive application of *Hurst* to his case, Petitioner argues that "especially in these 'older cases,' the advisory jury scheme invalidated by Hurst implicated systematic violations of *Caldwell*." (Petition at 29). 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 claims. Aside from the separate question of the retroactivity, it is clear that there was not a *Caldwell* violation as Petitioner's jury was properly instructed under local law and the instructions did not diminish the jury's sense of responsibility. Thus, certiorari review should be denied.

Petitioner argues that older cases, like Petitioner's, deserve retroactive application of *Hurst* because "the advisory jury scheme invalidated by *Hurst* implicated systematic violations of *Caldwell*." (Petition at 29); *Caldwell v. Mississippi*, 472 U.S. 320 (1985). However, the Florida Supreme Court has repeatedly rejected challenges to the standard jury instructions in death penalty cases pursuant to *Caldwell*. *Hall v. State*, 212 So. 3d 1001, 1032-33 (Fla. 2017).

These claims are rejected because the jury was properly instructed on its role as defined by local law. Further, the seriousness of the jury's role is no way diminished by these instructions. Thus, there was no *Caldwell* violation in this case and Petitioner's claim is meritless and not appropriate for certiorari review.

"To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989); *see also Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). In *Caldwell*, the prosecutor made "focused, unambiguous, and strong" remarks which misled the jury into believing the responsibility for sentencing lay elsewhere. *Caldwell*, 472 U.S. at 340. The comments included "your decision is not the final decision" and "[y]our job is reviewable" and that defense was "insinuating that your decision is the final decision." *Id.* at 325-26.

"This Court has repeatedly said that under the Eighth Amendment, 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" *Caldwell*, 472 U.S. at 329 (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983)). The problem with the argument by the prosecutor in *Caldwell* was that it presented "an intolerable danger that the jury will in fact choose to minimize the importance of its role" and thus be in contravention of the requirements of the Eighth Amendment. *Id.* at 333. However, "'the infirmity identified in *Caldwell* is simply absent' in a case where 'the jury was not affirmatively misled regarding its role in the sentencing process.'" *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir.

1997) (quoting *Romano*, 512 U.S. at 9).

In Petitioner's case, the jury was not affirmatively misled. The jury was instructed of its role as assigned by local law. *Davis*, 119 F.3d at 1482; *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); *Kaczmar v. Florida*, 138 S. Ct. 1973 (2018). The jury was told that its role was advisory in nature. (Record at 1472-73, 76). Since under Florida law, the judge remains the final sentencing authority, a jury's recommendation of death is in fact "advisory." Thus, characterizing the jury's recommendation as "advisory" is an accurate description of the role assigned to the jury by Florida law. Additionally, Petitioner's jury was specifically instructed about the "gravity" of its decision and that "human life is at stake." (Record at 1476). There was no diminishment of the jury's sense of responsibility in recommending a death sentence in Petitioner's case. Thus, there was no *Caldwell* violation in Petitioner's case.

Additionally, the Florida Supreme Court has explicitly rejected *Caldwell* attacks on Florida's standard penalty phase jury instructions in the wake of *Hurst*. *See 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). The Florida Supreme Court pointed out the absurdity of the "*Hurst*-induced *Caldwell*" claims:

> as the argument goes, even pre-*Ring* juries were being misled as to their responsibility in sentencing notwithstanding the fact that such a responsibility did not exist then and does not exist retroactively. This

> is the exact unwieldiness of *Caldwell* that *Romano* averts. Either juries were being misled or they were not. We conclude that they were not.

Reynolds, 2018 WL 1633075 at *12.

Further, this Court has never held that the Eighth Amendment requires the jury to impose a death sentence. *Proffitt v. Florida*, 428 U.S. 242, 252 (1976). While a plurality of this Court acknowledged "jury sentencing in a capital case can perform an important societal function," this Court "has never suggested that jury sentencing is constitutionally required" in such cases. *Id.* The Eighth Amendment requires capital punishment to be limited "to those who commit a 'narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). As such, the Eighth Amendment requires the death penalty to be limited to a specific category of crimes and "[s]tates must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Roper*, 543 U.S. at 568. In finding Florida's death penalty unconstitutional, this Court did not invalidate Florida's statutory scheme based on Eighth Amendment narrowing concerns. Implicit in the holding of *Hurst v. Florida* was that Florida's statutory scheme sufficiently narrowed and was in compliance with the Eighth Amendment. The Eighth Amendment does not require that a jury be the final sentencing authority. Petitioner's argument that his Eighth Amendment rights were violated by his jury's advisory recommendation is not supported by this Court's precedent.

Petitioner's jury was properly instructed of its role under Florida law. The instructions in Petitioner's case in no way diminished the jury's actual responsibilities in the sentencing process. Because Petitioner's jury was properly instructed of its role in sentencing according to Florida law, the jury instructions in Petitioner's case did not violate *Caldwell* and certiorari review should be denied.

Hurst Error is Neither Substantive Nor Structural and is Not Retroactive Under Federal Law.

In addition to arguing for retroactive application of *Hurst* to his case, Petitioner argues that "the Florida Supreme Court's decision undermines multiple federal constitutional rights and conflicts with binding precedent of this court." (Petition at 7). Aside from the separate question of the retroactivity, it is clear that there was not any structural error based on a failure to instruct on beyond a reasonable doubt standard or a unanimous verdict. Additionally, the specific provisions that Petitioner is attacking are a result of *Hurst v. State* not *Hurst v. Florida* and are based on adequate and independent state grounds. Thus, review should be denied.

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 10). 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*, 543 U.S. at 568. 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 *Fiore*. (Petition at 10); *Fiore v. White*, 531 U.S. 225 (2001). However, *Hurst* is distinguishable from this case. In *Fiore*, this Court held that the Federal Due Process Clause was violated when an individual was convicted of a crime despite his conduct not being prohibited by the criminal statute, and thus every element of the crime had not been proven beyond a reasonable doubt. *Fiore*, 531 U.S. at 228. As was true in *Hurst* and here, Petitioner's conduct is clearly in violation of the criminal statute and by virtue of his conviction for first-degree murder, every element of the crime was proven beyond a reasonable doubt. As discussed previously, *Hurst* did not alter the burden of proof. Thus, *Fiore* is not applicable to the discussion of the retroactive application of *Hurst*. No substantive change has occurred which makes *Hurst* retroactive under federal law. Thus, there is no basis for which certiorari review should be granted and this Petition should be denied.

Next, Petitioner argues that because the jury failed to return a unanimous

verdict in his case, his sentence is in violation of the Eighth Amendment. (Petition at 11-12).[7] However, this Court has never held that the Eighth Amendment requires the jury's final recommendation in a capital case to be unanimous. *See, e.g., Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). Further, this Court has never held that the Eighth Amendment requires the jury to impose a death sentence. *Proffitt v. Florida*, 428 U.S. 242, 252 (1976). While a plurality of this Court acknowledged "jury sentencing in a capital case can perform an important societal function," this Court "has never suggested that jury sentencing is constitutionally required" in such cases. *Id.* To the extent Petitioner suggests that jury sentencing is now required under federal law, this is not the case. See *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.") (emphasis in original); *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding that the Constitution does not prohibit the trial judge from "impos[ing] a capital sentence"). No case from this Court has mandated jury sentencing in a capital case, and such a holding would require reading a mandate into the Constitution that is simply not there. The

[7] Despite Petitioner's assertion that juries are increasingly unlikely to impose death sentences, Petitioner fails to acknowledge two recent cases which are in direct contradiction to his assertion. In *Deviney*, the original jury recommended death 8-4 after being instructed pre-*Hurst*. *Deviney v. State*, 213 So. 3d 794, 795 (2017). Deviney was granted a new penalty phase and the post-*Hurst* jury made a unanimous jury recommendation of death. *Deviney v. State*, no. SC17-2231. Similarly, in *Bright*, the pre-*Hurst* jury recommended death 8-4. *State v. Bright*, 200 So. 3d 710, 720 (2016). Bright was granted a new penalty phase and the post-*Hurst* jury made a unanimous jury recommendation of death. *Bright v. State*, no. SC17-2244. In both of these cases, the jury went from being barely over a majority to unanimity when instructed under the new statute.

Constitution provides a right to trial by jury, not to sentencing by jury. Thus, Petitioner's argument that his Eighth Amendment rights were violated by his jury's recommendation is not supported by this Court's precedent. Further, the unanimity requirement of *Hurst v. State* stems from adequate and independent state grounds and thus certiorari review is not warranted.

Many states also add protections that go above and beyond the requirements of the Eighth Amendment. Often times, these additional state-based requirements are forward looking in anticipation of evolving standards of decency to ensure that their capital sentencing schemes will remain constitutionally valid in the future. These additional protections are based on adequate and independent state grounds. For example, in the wake of *Furman*, many states in redrafting their capital sentencing statutes added a statutory requirement to review whether a capital "sentence is disproportionate to that imposed in similar cases" to "avoid arbitrary and inconsistent results." *Pulley v. Harris*, 465 U.S. 37, 44 (1984); *Furman v. Georgia*, 408 U.S. 238 (1972). As this Court noted, "[p]roportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required." *Pulley*, 465 U.S. at 50.

Like with the addition of proportionality review, the Florida Supreme Court's *Hurst v. State* requirement of unanimous jury findings and recommendations during capital sentencing procedures is an additional safeguard that is beyond the requirements of the Eighth Amendment. *Hurst*, 202 So. 3d at 61 ("Florida's capital

sentencing law will comport with these Eighth Amendment principles in order to more surely protect the rights of defendants guaranteed by the Florida and United States Constitutions.") (emphasis added). Because these are additional safeguards that are premised on the principles of but not necessitated by the Eighth Amendment, they are state requirements and thus based on adequate and independent state grounds. *Id.* at 62 (noting that the unanimity requirements are forward looking and will "dispel most, if not all, doubts about the future validity and long-term viability of the death penalty in Florida").

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. The holding in *Hurst v. State* did not cause the error to be considered structural in nature. Thus, there is no violation of federal law and certiorari review should be denied.

Conclusion

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

Respectfully submitted,
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