NO. 17-9570

IN THE SUPREME COURT OF THE UNITED STATES

MARK ALLEN DAVIS,

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 deny 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 *Davis v. State*, 235 So. 3d 295 (Fla. 2018).

Jurisdiction

The Florida Supreme Court's decision was made on January 29, 2018. 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, Mark Davis, was convicted of the first-degree murder of Orville Landis, robbery, and grand theft, and the jury recommended death by a vote of eight to four. *Davis v. State*, 586 So. 2d 1038, 1039 (Fla. 1991). The trial judge followed the recommendation and sentenced Petitioner to death. *Id.* The trial judge found four aggravating factors: the capital felony was committed while under sentence of imprisonment; Petitioner had previously been convicted of a capital offense or felony involving the use or threat of violence; the murder was heinous, atrocious, or cruel; and the murder was cold, calculated, and premeditated. *Id.* at 1040. The Florida Supreme Court denied Petitioner's claims on direct appeal and affirmed the convictions and sentence of death. *Id.* at 1042

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 granted and the case was remanded in 1992. *Davis v. Florida*, 112 S.Ct. 3021 (1992). On remand, Petitioner's conviction and sentence were again upheld. *Davis v. State*, 620 So. 2d 152, 153 (Fla. 1993). Petitioner filed another petition for a writ of certiorari to this Court, which was denied. *Davis v. Florida*, 114 S.Ct. 1205 (1994). 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 1994. Fla. R. Crim. P. 3.851(d)(1)(B).

Davis continued to seek relief from his conviction and sentence through postconviction litigation. *See Davis v. State*, 928 So. 2d 1089 (Fla. 2005) (affirming denial of postconviction relief motion); *Davis v. State*, Case No. SC06-394 (June 9, 2006) (denying habeas relief); *Davis v. State*, 26 So. 3d 519 (Fla. 2009) (affirming denial of postconviction relief based on newly discovered evidence) *Davis v. State*, 94 So. 3d 500 (Fla. 2012) (affirming denial of relief on a successive postconviction motion).

On January 2, 2017, Petitioner filed a successive Rule 3.851 motion based on this Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), and the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The state circuit court denied the motion on May 8, 2017. Petitioner filed a motion for rehearing, which was denied on June 1, 2017. A notice of appeal was filed on June 30, 2017. On July 10, 2017, the Florida Supreme Court *sua sponte* issued an order staying the appeal pending the disposition of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017).

On August 10, 2017, the Florida Supreme Court issued its decision in *Hitchcock*, stating that "[w]e have consistently applied our decision in *Asay*, denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)."

Hitchcock, 226 So. 3d at 2017.

On September 25, 2017, the Florida Supreme Court issued an order directing Petitioner to show cause "why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, SC17-445." On October 23, 2017, Petitioner filed his response to the show cause order. After responsive pleadings were filed, the Florida Supreme Court on January 29, 2018, issued its opinion affirming the denial of Petitioner's postconviction motion. The Florida Supreme Court stated that *Hurst* does not apply retroactively to Petitioner's sentence of death because it was final in 1994. *Davis v. State*, 235 So. 3d 295, 296 (Fla. 2018). Petitioner then filed a petition for a writ of certiorari in this Court from the Florida Supreme Court's decision. This is the State's brief in opposition.

Reasons for Denying the Writ

There is no Basis for Certiorari Review of the Florida Supreme Court's Denial of Retroactive Application of *Hurst* to Petitioner Because There are Adequate Independent State Grounds for Denial

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 1994. 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 arbitary and capracious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection. However, the Florida Supreme Court's retroactive application of *Hurst* to only post-*Ring* cases does not violate the Eighth or Fourteenth Amendments. Further, the Florida

Supreme Court's denial of retroative application to Petitioner is based on adequate and independent state grounds, is not in conflict with any other state court of last review, and is not in conflict with any federal appellate court. This decision is also not in conflict with this Court's jurisprudence on retroactivity. Thus, Petitioner's request for certiorari review should be denied.[1]

This Court does not review state court decisions that are based on adequate and independent state grounds. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."). Since *Hurst* is not retroactive under federal law, the retroactive application of *Hurst* is solely based on a state test for retroactivity. Because the retroactive application of *Hurst* is based on adequate and independent state grounds, certiorari review should be denied.

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

[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., See Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S.Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), *cert. denied*, *Lambrix v. Florida*, 138 S.Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017), *cert. denied*, *Hannon v. Florida*, 138 S.Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548, 549 (Fla. 2018), *cert. denied*, *Branch v. Florida*, 138 S.Ct. 1164 (2018).

Florida Supreme Court conducted a *Witt* analaysis, 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 *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."[2] *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. 3d 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

[2] Under this rationale, it would not make sense to only grant relief to those who continued to raise *Ring* in the 14 years between the *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

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 the judgment and sentence became final in 1991, pre-*Ring*. *Id.* at 8, 20.

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

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

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

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 apply only to the cases which were not yet final on the date of the decision in *Hurst*. This type of traditional retroactivity "can depend on a score of random factors having nothing to do with the offender or the offense," such as trial scheduling, docketing on appeal, etc. (Petition at 16). Yet, this Court recognizes this type of traditional retroactivity as proper and not violative of the Eighth or Fourteenth Amendments.

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*. 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[3], defendants who would not receive the benefit of a new rule because their cases were already final when *Hurst* was decided, does not violate the Eighth or Fourteenth Amendments. 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 Amendments.

Davis' suggestion that Florida's retroactivity ruling violates the Equal Protection Clause is also unpersuasive. A criminal defendant challenging the State's application of capital punishment must show intentional discrimination to prove an equal protection violation. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). A "'[d]iscriminatory purpose' . . . implies more than intent as violation or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 298.

The Florida court's partial retroactivity ruling was based on the date of the *Ring* decision, not based on a purposeful intent to deprive pre-*Ring* death-sentenced murderers in general, and Davis in particular, relief under *Hurst v. State*. The Florida Supreme Court has been entirely consistent in denying *Hurst* relief to those

[3] Approximately 154 defendants whose convictions became final post-*Ring* are being re-sentenced pursuant to *Hurst*. Death Penalty Information Center, Florida Death-Penalty Appeals Decided in

defendants whose convictions and sentences were final when *Ring* was issued in 2002. Davis is being treated exactly the same as similarly situated death-sentenced murderers.

Simply stated, this Court's ruling in *Hurst v. Florida* applied *Ring v. Arizona* to Florida's death penalty procedure. "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro*, 542 U.S. at 352. As *Hurst v. Florida* was merely an application of the holding in *Ring* to Florida's death penalty procedure, it stands to reason that under this Court's retroactivity jurisprudence, *Hurst v. Florida* extends no further than does *Ring*. That is, *Hurst v. Florida*, like *Ring*, "announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro*, 542 U.S. at 352. That the Florida court decided to apply state law as set forth in *Witt*, to extend *Hurst* relief to all post-*Ring* death-sentenced murderers is constitutionally immaterial and provides no basis for the exercise of this Court's certiorari jurisdiction.

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

The Florida Supreme Court's Application of Retroactivity Does Not Violate the Supremacy Clause of the United States Constitution

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Light of Hurst, available at https://deathpenaltyinfo.org/node/6790 (last visited July 16, 2018).

Petitioner also argues that *Hurst v. State* provided a substantive change in the law and thus should be afforded full retroactive application under federal law pursuant to *Montgomery*. *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). However, *Hurst,* like *Ring*, was a procedural change, not a substantive one. *See Summerlin*, 542 U.S. at 358 ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review."). Thus, like *Ring*, *Hurst* is not retroactive under federal law. *See Lambrix*, 872 F.3d at 1182 ("No U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable."); *see also Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (holding that "*Hurst* does not apply retroatively to cases on collateral review"); *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (noting that this Court had not made *Hurst* retroative to cases on collateral review); *In re Jones*, 847 F.3d 1293, 1295 (10th Cir. 2017) ("the Supreme Court has not held that *Hurst* announced a substantive rule").

Petitioner claims that *Hurst* is a substantive rule and created a protected class of defendants: those who received non-unanimous jury recommendations. Therefore, according to Petitioner, these defendants are protected from execution by the Eighth Amendment. However, *Hurst* is procedural. In *Hurst* the same class of defendants committing the same range of conduct face the same punishment as they did before and after Hurst was decided. The death penalty can still be imposed on individuals who committed the conduct Petitioner did after *Hurst*. *Hurst* is not like cases such as *Graham* and *Roper*, which made certain punishments illegal for

particular classes of individuals related to their status or conduct. *See Graham v. Florida*, 560 U.S. 48, 82 (2010) (Prohibiting the imposition of life without parole on juvenile offenders who did not commit a homicide); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (Prohibiting the imposition of the death penalty on defendants who committed homicides as juveniles). Instead, *Hurst*, like *Ring*, merely "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." *Summerlin*, 542 U.S. at 353. The analysis for jurors did not change; it merely increased the number needed to agree from seven to twelve. Thus, *Hurst* is a procedural change and not retroactive under federal law.

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

Lastly, Petitioner argues that *Hurst* addressed the proof-beyond-a-reasonable-doubt standard which causes a substantive change and that makes *Hurst* retroactive under federal law. However, *Hurst* did not address the proof-

beyond-a-reasonable-doubt standard. The standard of proof for proving aggravating factors in Florida has been beyond a reasonable doubt long before *Hurst* was decided. *See* Fla. Std. J. Inst. (Crim.) 7.11; *Floyd v. State*, 497 So. 2d 1211, 1214-15 (Fla. 1986); *Zeigler v. State*, 580 So. 2d 127, 129 (Fla. 1991); *Finney v. State*, 660 So. 2d 674, 680 (Fla. 1995).

As related to the finding that aggravation is sufficient, *Hurst* did not ascribe a standard of proof. *Hurst*, 202 So. 3d at 54. The Eighth Amendment requires that "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Roper v. Simmons*, 543 U.S. 551, 568 (2005). The State of Florida has a list of 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.

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

Davis' Argument That His Jury Did Not Unanimously Find All "Elements" Required to Convict Him of Capital Murder Is Just Another Attack on Florida's Retroactivity Decision.

Davis insists that this Court must "resolve the issue of whether postconviction defendants sentenced pursuant to Florida Statute § 921.141 were convicted of capital murder subjecting them to the death penalty or whether the fact that the jury did not unanimously find all of the elements required to convict of

capital murder mandates that postconviction defendants, like Davis, were only convicted of murder and are ineligible for the death penalty." (Pet. at 30). This is just another way of claiming a Sixth Amendment violation and amounts to yet another attempt to urge universal retroactivity of the *Hurst* decisions. As discussed above, however, *Hurst v. Florida* is not retroactive under federal law, and *Hurst v. State* is not retroactive under state law to cases that were final prior to the decision in *Ring v. Arizona*. *Teague v. Lane*, 489 U.S. 288, 307 (1989), *Schriro v. Summerlin*, 542 U.S. 348 (2004), *Asay v. State*, 210 So. 3d 1 (Fla. 2016). Notably, even the right to a jury trial itself is not so fundamental as to require retroactive application. *DeStefano v. Woods*, 392 U.S. 631, 633-34 (1968).

Furthermore, this Court's ruling in *Hurst v. Florida* was a narrow one: "Florida's sentencing scheme, which required the judge alone to **find the existence of an aggravating circumstance**, is . . . unconstitutional." *Hurst v. Florida*, 136 S. Ct. at 624 (emphasis added). The Florida Supreme Court expanded that narrow Sixth Amendment holding by 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. These additional requirements imposed by *Hurst v. State* are not "elements" of a capital offense, contrary to Davis argument. This Court in *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. In *Kansas v. Carr*, 136 S. Ct. 633 (2016), decided just eight days after this Court issued *Hurst v. Florida*, this Court emphasized:

> Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course, the 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, or must more-likely-than-not deserve it. . . . In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

Carr, 136 S. Ct. at 642.

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.[4] The findings required by the Florida Supreme Court following

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[4] *State v. Mason*, ___ N.E.3d ___, 2018 WL 1872180, *5-6 (Ohio, April 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 citation 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); *Waldrop v. Comm'r, Alabama Dept. of Corr.*, 2017 WL 4271115, *20 (11th Cir. Sept. 26, 2017) (unpublished) (rejecting *Hurst* claim and explaining "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict.") (citation

remand in *Hurst v. State* involving the weighing and selection of a defendant's sentence are not required by the Sixth Amendment.

To the extent Davis 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 circumstance 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 Constitution provides a right to **trial** by jury, not to **sentencing** by jury.

Moreover, *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, one aggravating circumstance **was found unanimously by the jury**: that Davis had previously been convicted of a capital offense or felony involving the use or threat of violence. The jury found this aggravator when they convicted him of the contemporaneous violent felony of robbery. *See Knight v. State*, 746 So. 2d 423, 434 (Fla. 1998). Additionally, the other aggravating circumstances found by the

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omitted); *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").

trial court were either uncontestable or well-established by overwhelming evidence. *See Davis v. State*, 586 So. 2d 1038, 1040 (Fla. 1991), and *Davis v. State*, 620 So. 2d 152, 152 (Fla. 1993). No reasonable jury would have failed to find the existence of the four aggravators under the circumstances of this case. *See, e.g., Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017).

Conclusion

The Florida Supreme Court's decision to not retroactively apply *Hurst* to Davis does not violate the Supremacy Clause and was decided on adequate independent state grounds. There was no Sixth Amendment violation as *Hurst* created a procedural rule, not a substantive one, and regardless Davis' conviction for a contemporaneous violent felony means a jury already unanimously found an aggravating factor. Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,
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COUNSEL FOR RESPONDENT

NO. 17-9570

IN THE SUPREME COURT OF THE UNITED STATES

MARK ALLEN DAVIS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

Certificate of Service

I, Scott A. Browne, a member of the Bar of this Court, hereby certify that on this 25th day of July 2018, a copy of the Respondent's Brief in Opposition in the above entitled case was furnished by email and United States mail, postage prepaid, to Linda McDermott Esq., Counsel for Petitioner, 20301 Grande Oak Blvd. Suite 118-61, Estero, Florida 33928.

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