CASE NO. 17-9588

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES W. FINNEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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[Capital Case]

QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari review where the retroactive application of *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017) 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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The opinion of the Florida Supreme Court is reported at *Finney v. State*, 235 So. 3d 279 (Fla. 2018).

JURISDICTION

The judgment of the Florida Supreme Court was entered on January 26, 2018 and the mandate issued February 13, 2018. Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257(a). Respondent agrees that this 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.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE AND FACTS

Petitioner Finney was convicted of armed robbery, dealing in stolen property, and the first-degree murder of Sandra Sutherland in 1992. The facts of this case are recited in the Florida Supreme Court's direct appeal opinion:

> According to the testimony at trial, Sandra Sutherland was discovered stabbed to death in her apartment shortly after 2 p.m. on January 16, 1991. The victim was found lying face down on her bed. Her ankles and wrists were tied and she had been gagged. On a nightstand near the bed was an open jar of face cream. The lid was lying next to the jar. The victim's bedroom had been ransacked, the contents of her purse had been dumped on the floor, and her VCR was missing.
>
> According to the medical examiner the cause of death was multiple stab wounds to the back. Of the thirteen stab wounds, all but one penetrated the lungs causing bleeding and loss of oxygen, ultimately resulting in death. No bruises or other trauma was observed.
>
> Numerous fingerprints were gathered from the victim's apartment, including prints from a piece of paper with German writing and from the jar on the nightstand. Fingerprints also were taken from the missing VCR, which was located at a local pawn shop. Pawn shop records indicated that the VCR was brought in on

January 16 at 1:42 p.m. by Charles W. Finney for a loan of thirty dollars. Finney's fingerprints matched prints taken from the pawn ticket, the VCR, the jar lid, and the paper with German writing.

After it was determined that Finney had pawned the victim's VCR, Detective Bell of the Tampa Police Department interviewed Finney on the afternoon of January 30, 1991. Finney told Bell that he knew the victim due to the fact that they had lived near each other in the same apartment complex. Finney told Bell that he had seen the victim twice since she moved to another apartment in the complex. Once, he had talked to her about putting a screened porch on the back of her new apartment and then about two months prior to the murder he talked to her by the mailboxes at the complex. When asked about his whereabouts on the day of the murder, Finney told Detective Bell that he was home sick all day and never left his apartment. Upon being confronted with the fact that he had pawned the victim's VCR, Finney told the detective he found it near the dumpster when he took out the garbage and then pawned it.

Finney called a witness who testified that the day before the murder he saw the victim arguing with a white male near the mailboxes at the apartment complex. Another defense witness testified that around 10 a.m. on the day of the murder, he saw William Kunkle, who worked as a carpenter at the apartment complex, come out of the victim's apartment. According to the witness, when Kunkle saw him, Kunkle came out of the door very quickly, locked the door with a key, and walked around the corner. The witness's girlfriend offered similar testimony as to Kunkle's conduct. In rebuttal, Kunkle testified that on January 16 he worked in the building next door to Ms. Sutherland's apartment, but had not been in her apartment that day. He denied ever having any conversation or interaction with the victim. The fingerprint examiner also testified during rebuttal that Kunkle's fingerprints did not match those found in the victim's apartment.

The defense sought to recall the medical examiner, Dr. Diggs, to testify that the crime scene was consistent with both a consensual sexual bondage situation and a situation where the victim consented to being bound and gagged out of fear. The State objected to the testimony as speculative. During proffer, Dr. Diggs told the court that whether a bondage situation was consensual was not something that a medical examiner would typically testify about or try to determine. The trial judge disallowed any testimony about the circumstances being consistent with sexual bondage, but allowed Dr. Diggs to testify concerning the probable positions of the victim and of the attacker and about the fact that there were no defensive wounds or other signs of a struggle.

Finney took the stand in his own defense. He testified that he had lived near Ms. Sutherland in the same apartment complex until she moved about eight months prior to the murder. A couple of months after she moved, Ms. Sutherland talked to him about screening in the patio of her new apartment. At that time, she handed him a piece of paper to write down measurements but took the paper back. Finney testified that he returned about a week or two later but Ms. Sutherland had decided not to screen the patio. On that occasion he was in the victim's apartment, helped her move boxes and took various items out of the boxes. According to Finney the

> last time he saw Ms. Sutherland was a day or two before the murder. She was coming out of her apartment early one morning. She came over to his car and they talked. He further testified that he found the VCR near the dumpsters at the complex and had pawned it the same day for pocket cash. He stated that he did not steal the VCR and that he did not kill Ms. Sutherland.

Finney v. State, 660 So. 2d 674, 678-79 (Fla. 1995), *cert. denied*, 516 U.S. 1096 (1996).

Following a penalty phase, the jury recommended death by a vote of nine to three. The trial court found three aggravating factors,[1] and followed the recommendation and imposed a sentence of death on November 10, 1992. On direct appeal, the Florida Supreme Court affirmed Finney's convictions and sentences. Finney's death sentence became final on January 22, 1996, when this Court denied his petition for writ of certiorari. *Finney v. Florida*, 516 U.S. 10 (1996).

Additionally, Finney's collateral challenges have been universally rejected. *See Finney v. State*, 831 So. 2d 651 (Fla. 2002) (affirming denial of initial postconviction motion and denying state habeas petition); *Finney v. State*, 907 So. 2d 1170 (Fla. 2005) (affirming denial of successive postconviction motion); *Finney v. McDonough*, 2006 WL 2024456 (M.D. Fla. July 17, 2006) (denying federal petition for writ of habeas corpus); *Finney v. McDonough*, 551 U.S. 1118 (2007) (denying certiorari review of Eleventh Circuit order denying certificate of appealability from denial of habeas petition); *Finney v. State*, 18 So. 3d 527 (Fla. 2009) (affirming denial of second successive postconviction motion); *Finney v. State*, 91 So. 3d 781 (Fla. 2012) (affirming denial of third successive postconviction motion); *Finney v. State*, 192 So. 3d 36 (Fla. 2015) (affirming denial of fourth successive postconviction motion).

On January 11, 2017, Finney filed a successive 3.851 postconviction motion in the state

[1] 1) Finney previously had been convicted of a violent felony; 2) the murder was committed for pecuniary gain; and 3) the murder was especially heinous, atrocious or cruel. *Finney*, 660 So. 2d at 679.

trial court raising a claim based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). On April 27, 2017, the trial court denied the successive postconviction motion, citing *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017). On June 6, 2017, the Florida Supreme Court stayed Finney's appeal pending the outcome of *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 512 (2017).

In *Hitchcock*, the Florida Supreme Court reaffirmed its previous holding in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), in which it held that *Hurst v. Florida* as interpreted by *Hurst v. State* is not retroactive to defendants whose death sentences were final when this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). After the court decided *Hitchcock*, it issued an order to show cause directing Finney to show why *Hitchcock* should not be dispositive in his case. Following briefing, the Florida Supreme Court ultimately affirmed the lower court's denial of relief, finding that *Hurst* does not apply retroactively to Finney's sentence of death that became final in 1996. *Finney v. State*, 235 So. 3d 279 (Fla. 2018).

Finney now seeks certiorari review of the Florida Supreme Court's decision.

REASONS FOR DENYING THE WRIT

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. Thus, because Finney 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*, 2018 WL 1876873 (June 18, 2018); *Kaczmar v. State*, 228 So. 3d 1 (Fla. 2017), *cert. denied*, 138 S. Ct. 1973 (2018); *Zack v. State*, 228 So. 3d 41 (Fla.

2017), *cert. denied*, 2018 WL 1367892 (June 18, 2018); *Jones v. State*, 234 So. 3d 545 (Fla.), *cert. denied*, 2018 WL 1993786 (June 25, 2018).

I. 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 murder and armed robbery. The unanimous verdict by Petitioner's jury establishing his guilt of his contemporaneous 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."); *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)); *Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988) ("The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase").

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.[2]

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

[2] 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 three aggravators found by the trial court were either uncontestable (as unanimously found by the jury at the guilt phase in the case of the contemporaneous armed robbery) or established by overwhelming evidence given the facts surrounding the murder (HAC) and that the murder was committed was committed for pecuniary gain.

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 imposed. However, this Court "has not ruled on whether unanimity is required" in capital cases. *Hurst*, 202 So. 3d at 59; *see also Ring v. Arizona*, 536 U.S. 584, 612 (2002) (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); *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." *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004). Thus, *Hurst v. State*'s requirement that the jury make specific factual findings before the imposition of the death penalty is procedural.

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. Sec'y, Fla. Dept. of Corr.*, 872 F.3d 1170, 1182-83 (11th Cir.), *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."[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 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

[3] Of course, the gap between this Court's rulings in *Ring* and *Hurst* may be fairly explained by the fact that the Florida Supreme Court properly recognized, in the State's view, that a prior violent felony or contemporaneous felony conviction took the case out of the purview of *Ring*. *See Ellerbee v. State*, 87 So. 3d 730, 747 (Fla. 2012) ("This Court has consistently held that a defendant is not entitled to relief under *Ring* if he is convicted of murder committed during the commission of a felony, or otherwise where the jury of necessity has unanimously made the findings of fact that support an aggravator.") (string citations omitted). *Hurst v. Florida* presented this Court with a rare "pure" *Ring* case, that is a case where there was no aggravator supported either by a contemporaneous felony conviction or prior violent felony. Accordingly, this Court's opinion in *Hurst* should have been read by the Florida Supreme Court following remand as a straight forward application of *Ring* under the facts presented. However, a majority of the Florida Supreme Court interpreted this Court's decision in *Hurst* to include weighing and selection of the defendant's sentence, thereby causing an unnecessarily dramatic and costly impact to the State's capital sentencing system.

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 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*, 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.[4]

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

[4] Federal courts have had little trouble determining that *Hurst*, like *Ring*, is not retroactive at all under *Teague*. *See Lambrix v. Sec'y, Fla. Dept. of Corr.*, 851 F.3d 1158, 1165 n.2 (11th Cir. 2017) *cert. denied*, 138 S. Ct. 217 (2017); ("under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review"), *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a *Hurst v. Florida* claim concluding that *Hurst v. Florida* did not apply retroactively).

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 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. 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 judgment 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.

Certiorari review would also be inappropriate in this case because, assuming for a moment any *Hurst* error can be discerned from this record, such error would be harmless. *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 aggravating circumstances found by the trial court[5] and affirmed by the Florida Supreme Court on appeal either were uncontestable, as

[5] 1) Finney previously had been convicted of a violent felony; 2) the murder was committed for pecuniary gain; and 3) the murder was especially heinous, atrocious or cruel. *Finney*, 660 So. 2d at 679.

unanimously found by the jury at the guilt phase of this case or established by overwhelming evidence.

III. The Florida Court's Ruling on the Retroactivity of *Hurst* does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

Petitioner's suggestion that his sentence violates the Equal Protection Clause is plainly without merit. "The Equal Protection Clause of the Fourteenth Amendment 'is essentially a direction that all persons similarly situated should be treated alike.'" *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). 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 criminal defendant alleging an equal protection violation must prove the existence of purposeful discrimination"). A "'[d]iscriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, 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." *McCleskey*, 481 U.S. at 298. Here, Petitioner is being treated exactly the same as similarly situated murderers.

Petitioner's argument that his sentence somehow violates the Eighth Amendment is plainly meritless. 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 Constitution provides a right to **trial** by jury, not to **sentencing** by jury.

Petitioner's death sentence is neither unfair nor unreliable because the judge imposed the sentence in accordance with the law existing at the time of his trial. Petitioner cannot establish that his sentencing procedure was less accurate than future sentencing procedures employing the new standards announced in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Certainly, other than speculation, Petitioner has neither identified nor established any particular lack of reliability in the proceedings used to impose his death sentence. *See Hughes v. State*, 901 So. 2d 837, 844 (Fla. 2005) (holding that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) is not retroactive and noting that "neither the accuracy of convictions nor of sentences imposed and final before *Apprendi* issued is seriously impugned"); *Rhoades v. State*, 233 P.3d 61, 70-71 (2010) (holding that *Ring* is not retroactive after conducting its own independent *Teague* analysis and observing, as this Court did in *Summerlin*, that there is debate as to whether juries or judges are the better fact-finders and that it could not say "confidently" that judicial factfinding "seriously diminishes accuracy"). Just like *Ring* did not enhance the fairness or efficiency of death penalty procedures, neither does *Hurst.* As this Court has explained, "for every argument why juries are more accurate factfinders, there is another why they are less accurate." *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004). Thus, because the accuracy of Petitioner's death sentence is not at issue, fairness does not demand retroactive application of *Hurst.*

Finally, Petitioner maintains that fairness and uniformity require that *Hurst* be retroactively applied to all cases. Contrary to his argument, 'fairness' does not provide a mechanism for vacating his death sentence. What fairness calls for, is that the State not bear the time and expense of conducting another penalty phase and victim's family not be forced to endure another proceeding simply because the law has changed since Finney was sentenced. *State v. Towery*, 64 P.3d 828,

835-36 (Ariz. 2003) ("[c]onducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice" and would be inconsistent with the Court's duty to protect victims' rights under the Arizona Constitution). Petitioner's fairness argument rings hollow against the interests of the State, which prosecuted him in good faith under the law existing at the time of his trial, the concept of finality, and the interests of the victims' family members.

As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10 (b) (listing conflict among state supreme courts as a consideration in the decision to grant review). The Florida Supreme Court's determination of the retroactive application of *Hurst* under *Witt v. State,* 387 So. 2d 922 (Fla. 1980), 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. Nothing in the petition justifies the exercise of this Court's certiorari jurisdiction.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court DENY the petition for writ of certiorari.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of July, 2018, a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION has been submitted using the Electronic Filing System. I further certify that a copy has been sent by U.S. mail to: Suzanne Myers Keffer, Chief Assistant CCRC, Capital Collateral Regional Counsel-South, One East Broward Boulevard, Suite 444, Fort Lauderdale, Florida 33301, **keffers@ccsr.state.fl.us**. All parties required to be served have been served.

/s/ Lisa Martin
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