DOCKET NO. 18-5012

IN THE SUPREME COURT OF THE UNITED STATES

IAN DECO LIGHTBOURNE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

Whether certiorari review should be denied where (1) the Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florida* and *Hurst v. State*, which 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*, does not violate the Eighth or Fourteenth Amendments; (2) Florida's capital sentencing structure does not violate this Court's decision in *Caldwell v. Mississippi*, and (3) the Florida Supreme Court's decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law?

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CITATION TO OPINION BELOW

The decision of the Florida Supreme Court is reported at *Lightbourne v. State*, 235 So.3d 285 (Fla. 2018).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on January 26, 2018. (Pet. App. A). Petitioner asserts that this Court's jurisdiction is 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

Lightbourne was charged with the first-degree murder of Nancy O'Farrell in 1981. At trial the evidence showed that the offense occurred sometime between 5:30 p.m. on January 16, 1981, and 4:00 p.m. on January 17, 1981. *Lightbourne v. State*, 438 So. 2d 380, 384 (Fla. 1983). At the victim's home, a window screen had been cut and a window had been broken. *Id.* at 391. Lightbourne admitted to surprising the victim in her home, and forcing her to have sex with him "over and over." *Lightbourne v. State*, 742 So. 2d 238, 240 (Fla. 1999). Despite her begging him not to kill her, he shot her in the head because she could identify him. *Id.* Lightbourne then admitted that he took some of the victim's money, a necklace, and a small silver coin bank. 438 So.2d at 391.

The jury unanimously found Lightbourne guilty of first-degree murder under three alternate theories: premeditation, felony murder in the commission of a burglary, and felony murder in the commission of a sexual battery. *Lightbourne v. State*, 841 So. 2d 431, 433 (Fla. 2003). The jury recommended death and the trial court sentenced Lightbourne to death finding the murder was committed under the following five aggravating factors: (1) during commission of a burglary and a sexual battery; (2) for the purpose of avoiding arrest; (3) for pecuniary gain; (4) that the murder was heinous, atrocious, or cruel (HAC); and (5) was committed in a cold, calculated, and premeditated manner (CCP). *Id.* at 433-434.

For over three decades Lightbourne has since repeatedly and unsuccessfully challenged his conviction and sentence. *See Lightbourne v. Dugger*, 829 F.2d 1012

(11th Cir. 1987) (denying federal habeas relief); *Lightbourne v. State*, 644 So. 2d 54 (Fla. 1994) (affirming the denial of postconviction relief); *Lightbourne v. State*, 841 So.2d 431 (Fla. 2003) (affirming the denial of a postconviction motion); *Lightbourne v. Crosby*, 889 So.2d 71 (Fla. 2004) (denying a habeas petition); *Lightbourne v. State*, 956 So.2d 456 (Fla. 2007) (table) (affirming the denial of a fourth postconviction motion); *Lightbourne v. McCollum*, 969 So.2d 326 (Fla. 2007) (affirming the denial of relief for an All Writs Petition; *Lightbourne v. State*, 94 So.3d 501 (Fla. 2012) (affirming the denial of a successive motion to vacate conviction and sentence).

On January 11, 2017, Lightbourne filed a successive motion to vacate death sentence, and argued that his death sentence violates *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 209 So. 3d 40 (Fla. 2016). Lightbourne also raised retroactivity and Eighth Amendment Issues. On April 6, 2017, the trial court entered an order denying Lightbourne's successive motion to vacate his death sentence. Lightbourne appealed to this Court, and that appeal was initially stayed pending the ruling in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 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 Lightbourne 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:

> [W]e conclude that Lightbourne is not entitled to relief. Lightbourne was sentenced to death following a jury's recommendation for death by an unrecorded vote. *See Lightbourne v. State*, 438 So.2d 380, 391 (Fla. 1983). Lightbourne's sentence of death became final in 1984. *Lightbourne v. Florida*, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984). Thus, *Hurst* does not apply retroactively to Lightbourne's sentence of death. See *Hitchcock*, 226 So.3d at 217. Accordingly, we affirm the denial of Lightbourne's motion.

Lightbourne v. State, 235 So. 3d 285, 286 (Fla. 2018). Lightbourne now seeks certiorari review of the Florida Supreme Court's decision.

REASONS FOR DENYING THE WRIT

Certiorari review should be denied because (1) the Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florida* and *Hurst v. State*, which 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*, does not violate the Eighth or Fourteenth Amendments; (2) Florida's capital sentencing structure does not violate the legal principles of *Caldwell v. Mississippi*, and (3) the Florida Supreme Court's decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law.

Lightbourne requests this Court review the Florida Supreme Court's decision affirming the denial of his successive postconviction motion, arguing that the state court's holding with respect to retroactivity violates the Eighth and Fourteenth Amendments. He also argues that the jury being instructed that their verdict was a recommendation violates the Eighth Amendment.

As will be shown, nothing about the Florida Supreme Court's retroactivity decision is inconsistent with the United States Constitution. Lightbourne does not provide any "compelling" reason for this Court to review his case. U.S. Sup. Ct. R. 10. Indeed, Lightbourne cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision in *Lightbourne v. State*, 235 So. 3d 285, in which the court determined that Lightbourne was not entitled to relief because *Hurst v. State* was not retroactive to his death sentence. Nothing presented in the petition justifies the exercise of this Court's certiorari jurisdiction.

I. The Florida Court's Ruling on Retroactivity Does Not Violate Equal Protection or the Eighth Amendment.

The Florida Supreme Court's holding in *Hurst v. State* followed this Court's

ruling in *Hurst v. Florida* in requiring that aggravating circumstances be found by a jury beyond a reasonable doubt before a death sentence may be imposed. The Florida court then expanded this Court's ruling, requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 57. In *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), the Florida Supreme Court ruled that, as a matter of state law, *Hurst v. State* is not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *See also Mosley v. State*, 209 So. 3d 1248, 1272-73 (Fla. 2016) (holding that, as a matter of state law, *Hurst v. State* does apply retroactively to defendants whose sentences were not yet final when this Court issued *Ring*). Florida's partial retroactive application of *Hurst v. State* is not constitutionally unsound and does not otherwise present a matter that merits the exercise of this Court's certiorari jurisdiction.

This Court has held that, in general, a state court's retroactivity determinations are a matter of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264 (2008). State courts may fashion their own retroactivity

tests, including partial retroactivity tests. A state supreme court is free to employ a partial retroactivity approach without violating the federal constitution under *Danforth*. The state retroactivity doctrine employed by the Florida Supreme Court did not violate federal retroactivity standards. The court's expansion of *Hurst v. Florida* in *Hurst v. State* is applicable only to defendants in Florida, and, consequently, subject to retroactivity analysis under state law as set forth in *Witt v. State*, 387 So. 2d 922 (Fla.), *cert. denied*, 449 U.S. 1067 (1980). *See Asay*, 210 So. 3d at 15 (noting that Florida's *Witt* analysis for retroactivity provides "more expansive retroactivity standards" than the federal standards articulated in *Teague v. Lane*, 489 U.S. 288 (1989) (emphasis in original; citation omitted).

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); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). *See also 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); *Street v. New York*, 394 U.S. 576, 581-82 (1969) (same). 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).

Florida's retroactivity analysis is a matter of state law. This fact alone

militates against the grant of certiorari in this case. It should also be noted 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); *Jones v. State*, 234 So.3d 545 (Fla.), *cert. denied*, --- S. Ct. ----, 2018 WL 1993786; *Zack v. State*, 228 So. 3d 41 (Fla.), *cert. denied*, --- S. Ct. ----, 2018 WL 1367892; *Cole v. State*, 234 So.3d 644 (Fla.), *cert. denied*, --- S. Ct. ----, 2018 WL 1876873.

Lightbourne argues that the Florida Supreme Court's partial retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* violates the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment. He also claims that the sentencing procedure used in his case violates this Court's ruling in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), because the jury was instructed that its death recommendation was advisory. The Florida Supreme Court's retroactivity ruling is not contrary to federal law. It does not conflict with precedent from this Court or from any appellate court. *Caldwell* does not provide an avenue for relief. Certiorari review is unnecessary.

New rules of law such as the rule announced in *Hurst v. Florida* do not

usually apply to cases that are final. *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (explaining the normal rule of nonretroactivity and holding the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), was not retroactive). Additionally, the general rule is one of nonretroactivity for cases on collateral review, with narrow exceptions. *See Teague v. Lane*, 489 U.S. 288, 307 (1989) (observing that there were only two narrow exceptions to the general rule of nonretroactivity for cases on collateral review). Furthermore, certain matters are not retroactive at all. *Hurst v. Florida* was based on this Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002), which in turn was based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court has held that "*Ring* announced a new **procedural rule** that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (emphasis added).

In *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), this Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Under this "pipeline" concept, only those cases still pending direct review or not yet final would receive the benefit from alleged *Hurst* error. Retroactivity under *Griffith* depends on the date of the finality of the direct appeal. Under *Teague,* if a case is final on direct review, the defendant will not receive the benefit of the new rule unless one of the narrow exceptions announced in *Teague* applies. Again, finality is the critical

date-based test under *Teague.* There is nothing about Florida's decision providing partial retroactivity to *Hurst v. Florida* and *Hurst v. State* that is contrary to this Court's retroactivity jurisprudence.

Moreover, if partial retroactivity violated the United States Constitution or this Court's retroactivity jurisprudence, this Court would not have given partial retroactive effect to a change in the penal law in *Dorsey v. United States*, 567 U.S. 260 (2012). In *Dorsey*, this Court held that the Fair Sentencing Act was partially retroactive in that it would apply to those offenders who committed applicable offenses prior to the effective date of the act, but who were sentenced after that date. *Id.* at 273. *See United States v. Abney*, 812 F.3d 1079, 1097-98 (D.C. Cir. 2016) (noting that prior to the decision in *Dorsey*, this Court had not held a change in a criminal penalty to be partially retroactive).

Any retroactive application of a new development in the law under any analysis will mean that some cases will get the benefit of a new development, while other cases will not, depending on a date. Drawing a line between newer cases that will receive benefit of a new development in the law and older final cases that will not receive the benefit is part and parcel of the landscape of any retroactivity analysis. It is simply part of the retroactivity paradigm that some cases will be treated differently than other cases based on the age of the case. This is not arbitrary and capricious in violation of the Eighth Amendment; it is simply a fact inherent in any retroactivity analysis.

Lightbourne's argument for a violation of the Equal Protection Clause fares no better than his Eighth Amendment argument. 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 defendants in general, and Lightbourne in particular, relief under *Hurst v. State*. The Florida Supreme Court has been entirely consistent in denying *Hurst* relief to those defendants whose convictions and sentences were final when *Ring* was issued in 2002. Lightbourne is being treated exactly the same as similarly situated murderers. Consequently, Lightbourne's equal protection argument is plainly meritless.

Additionally, in *Beck v. Washington*, 369 U.S. 541 (1962), this Court refused to find constitutional error in the alleged misapplication of Washington law by Washington courts: "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . .' Were it otherwise, every alleged misapplication of state law would

constitute a federal constitutional question." *Id.* at 554-55 (citation omitted).

II. The jury instructions in Lightbourne's case do not violate this Court's ruling in *Caldwell v. Mississippi*

Lightbourne's attempt to tie his Equal Protection argument to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), fails. First, the decision in *Caldwell* did not interpret the Equal Protection Clause. There, this Court found that a prosecutor's comments diminishing the jury's sense of responsibility for determining the appropriateness of a death sentence was "inconsistent with the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell*, 472 U.S. at 323 (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). Second, there was no *Caldwell* error in this case. To establish constitutional error under *Caldwell*, a defendant must show that the comments or instructions to the jury "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). Lightbourne's jury was properly instructed on its role based on the state law existing at the time of his trial. *See Reynolds v. State*, ___ So. 3d ___, 2018 WL 1633075, *9 (Fla. April 5, 2018) (explaining that under *Romano*, the Florida standard jury instruction at issue "cannot be invalidated retroactively prior to *Ring* simply because a trial court failed to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts").

Lightbourne's jury was properly informed that it needed to determine whether sufficient aggravating factors existed and, if so, whether the aggravation

outweighed the mitigation before the death penalty could be imposed. His jury was also informed that its recommendation would be given "great weight" by the trial court. (Resp. App. A). A Florida jury's decision regarding a death sentence was, and still remains, an advisory recommendation. *See Dugger v. Adams*, 489 U.S. 401 (1989). *See also* § 921.141(2)(c), Fla. Stat. (2017) (providing that "[i]f a unanimous jury determines that the defendant should be sentenced to death, the jury's **recommendation** to the court shall be a sentence of death") (emphasis added). Thus, there was no violation of *Caldwell* because there were no comments or instructions to the jury that "improperly described the role assigned to the jury by local law." *Romano*, 512 U.S. at 9. Lightbourne's jury was accurately advised that its decision was an advisory recommendation that would be accorded "great weight."

This case would be a uniquely inappropriate vehicle for certiorari because this is a postconviction case and this Court would have to address retroactivity before even reaching the underlying jury instruction issue.

Furthermore, to the extent his petition suggests a Sixth Amendment violation occurred, Lightbourne's jury was given the opportunity to make specific findings, and unanimously found the existence of two aggravating factors: that the murder was committed in the course of a sexual battery, and that the murder was committed in the course of a burglary. *Lightbourne v. State*, 841 So. 2d 431, 433 (Fla. 2003); *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *See also 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). This Court's ruling in *Hurst v. Florida* did not change the recidivism exception articulated in *Apprendi* and *Ring*.

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.[1] 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). There was no Sixth Amendment error in this case.[2]

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[1] *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 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").

[2] *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 were either uncontestable or

To the extent Lightbourne 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.

In sum, there is no conflict between the Florida Supreme Court's decision and this Court's Sixth Amendment, Eighth Amendment or Fourteenth Amendment jurisprudence. Nor is there any conflict between the Florida Supreme Court's decision and this Court's decision in *Caldwell v. Mississippi*. Finally, there is no underlying constitutional error under the facts of this case. Certiorari review should be denied.

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well-established by overwhelming evidence.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 30th 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 email and U.S. mail to: Suzanne Myers Keffer, Chief Assistant Capital Collateral Regional Counsel – South District, and Nicole M. Noel, Assistant Capital Collateral Regional Counsel – South District, 1 East Broward Blvd. Suite 444, Fort Lauderdale, Florida 33301, keffers@ccsr.state.fl.us.

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