NO. 18-5037

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD EUGENE HAMILTON,

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

PAMELA JO BONDI
ATTORNEY GENERAL OF FLORIDA

CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
*Counsel of Record

Jennifer L. Keegan
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
capapp@myfloridalegal.com
(850) 414-3300

COUNSEL FOR RESPONDENT

Capital Case

Question Presented

Whether this Court should grant certiorari review where the retroactive application of Hurst v. Florida and Hurst v. State is based on adequate independent state grounds and the issue presents no conflict between the decisions of other state courts of last resort or federal courts of appeal, does not conflict with this Court's precedent, and does not otherwise raise an important federal question.

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Opinion Below

The decision of the Florida Supreme Court appears as Hamilton v. State, 236 So. 3d 276 (Fla. 2018).

Jurisdiction

This Court's jurisdiction to review the final judgment of the Florida Supreme Court is authorized by 28 U.S.C. § 1257. However, the Florida Supreme Court's decision in this case is based on adequate and independent state grounds and 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. As such, this case is inappropriate

for the exercise of this Court's discretionary jurisdiction. U.S. Sup. Ct. R. 10.

Statement of the Case and Facts

Petitioner, Richard Eugene Hamilton, was convicted of committing the first-degree murder, sexual battery, robbery, and kidnapping of Carmen Gayheart, after he escaped from prison. The jury recommended death by a ten-to-two vote and the judge imposed a sentence of death based on six aggravating circumstances,[1] and five nonstatutory mitigating circumstances.[2]

Hamilton's conviction and sentence were affirmed on direct appeal by the Florida Supreme Court. Hamilton v. State, 703 So. 2d 1038 (Fla. 1997). Hamilton's conviction and sentence became final on June 26, 1998, when the United States Supreme Court denied certiorari review. Hamilton v. Florida, 524 U.S. 956 (1998). Following completion of his direct appeal, Hamilton filed his initial motion for postconviction relief. An evidentiary hearing was held, and the trial court ultimately denied his motion. Hamilton v. State, 875 So. 2d 586, 589 (Fla. 2004). The Florida Supreme Court affirmed the denial on appeal. Id.

On January 12, 2016, this Court issued its ruling in Hurst v. Florida, 136 S.Ct. 616 (2016). This Court held that Florida's capital sentencing scheme was unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002), ruling that the Sixth

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[1] Hamilton was (1) under sentence of imprisonment; (2) had been previously convicted of a violent felony; (3) the murder was committed in the course of a kidnapping, robbery, and sexual battery; (4) the murder was committed to avoid arrest; (5) the murder was especially heinous, atrocious or cruel; and (6) the murder was committed in a cold, calculated and premeditated manner.

[2] Hamilton was (1) raised in a drug-ridden, crime-infested neighborhood; (2) his mother was mentally ill; (3) suffered various childhood traumas; (4) had been gainfully employed and had good work

Amendment requires a jury to find the existence of an aggravator which qualifies a defendant for a sentence of death. On remand in Hurst v. State, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court held that in capital cases, the jury must unanimously and expressly make the following findings: 1) the aggravating factors were proven beyond a reasonable doubt; 2) the aggravating factors are sufficient to impose death; 3) the aggravating factors outweigh the mitigating circumstances; and 4) recommendation of a sentence of death.[3]

Following Hurst v. State, 202 So. 3d at 40, the Florida Supreme Court issued two initial opinions addressing the retroactive application of Hurst v. Florida and Hurst v. State to existing criminal cases. In Mosley v. State, 209 So. 3d 1248 (Fla. 2016), the Florida Supreme Court held that Hurst applies retroactively to cases which became final after the decision was issued in Ring on June 24, 2002. On the same day, the Florida Supreme Court issued Asay v. State (Asay V), 210 So. 3d 1 (Fla. 2016), holding that Hurst does not apply retroactively to cases which became final prior to Ring.

On June 6, 2016, Hamilton filed a petition for writ of habeas corpus before the Florida Supreme Court, seeking Hurst relief. The Florida Supreme Court denied Hamilton's petition, relying on Asay V. Hamilton v. Jones, No. SC16-984, 2017 WL 836807 (Fla. Mar. 3, 2017); see also Hamilton v. State, 236 So. 3d 276, 277

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habits; and (5) assisted police in locating the victim's body.

[3] The dissent observed that "[n]either the Sixth Amendment nor Hurst v. Florida requires a jury to determine the sufficiency of the aggravation, the weight of the aggravation relative to any mitigating circumstances, or whether a death sentence should be imposed." Hurst, 202 So. 3d at 82 (Canady, J.,

(Fla. 2018).

On August 24, 2016, while Hamilton's petition for writ of habeas corpus was still pending before the Florida Supreme Court, Hamilton filed a successive postconviction motion in the trial court, claiming that his death sentence is unconstitutional under Hurst, and that alleged institutional failures entitle him to a postconviction proceeding. The trial court ultimately denied Hamilton's motion without an evidentiary hearing, holding, "untimely as it was submitted eighteen years after the mandate issued and that none of the three articulated exceptions [in rule 3.851] apply." Hamilton v. State, 236 So. 3d at 278.

While Hamilton's appeal[4] of the trial court's order was pending, the Florida Supreme Court reaffirmed its prior Hurst retroactivity rulings in Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), in accordance with Asay V. The Florida Supreme Court ultimately denied Hamilton's appeal, affirming the trial court's finding that Hamilton's postconviction motion was untimely, and holding that Hitchcock precluded retroactive application of Hurst relief to Hamilton's case. Hamilton v. State, 236 So. 3d at 278-79. Hamilton now seeks certiorari review of the Florida Supreme Court's ruling.

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dissenting).

[4] Hamilton raised four claims on appeal: (1) the trial court erred in summarily denying Hamilton's successive postconviction motion as procedurally barred; (2) the trial court erred in summarily denying Hamilton's claim of the institutional failure of the trial court, the state, and the Florida Supreme Court; (3) the trial court erred in denying Hamilton's motions for additional public records; and (4) the trial court erred in summarily denying Hamilton's Hurst claim.

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 Hamilton's Case

Hamilton seeks certiorari review of the Florida Supreme Court's decision holding that Hurst is not retroactive to Hamilton because his case became final in 1998, prior to the issuance of Ring. See Hamilton, 524 U.S. at 956. The Petition alleges that the Florida Supreme Court's refusal to retroactively apply Hurst to cases that were final before Ring was decided is in violation of the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection. (Petition at 2). However, the Florida Supreme Court's retroactive application of Hurst to only post-Ring cases does not violate the Eighth or Fourteenth Amendment. Further, the Florida Supreme Court's denial of retroactive application to Hamilton's case is based on adequate and independent state grounds, is not in conflict with any other state court of last resort, and is not in conflict with any federal appellate court. This decision is also not in conflict with this Court's jurisprudence on retroactivity. As Hamilton provides no grounds to justify certiorari review, Hamilton's petition should be denied.[5] U.S. Sup. Ct. R. 10.

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[5] This Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of Hurst v. State. 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 (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 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) (holding that, "[r]espect 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"). This Court has held that Ring is not retroactive under federal law in Schriro v. Summerlin, 542 U.S. 348, 358 (2004), and it follows that Hurst is likewise not retroactive under federal law.[6] See Lambrix v. Sec'y, Fla. Dep't of Corr., 872 F.3d 1170, 1182 (11th Cir. 2017) (in denying the defendant's claim seeking retroactive application of Hurst, the court noted that no U.S. Supreme Court opinion holds Hurst to be retroactive). Since Hurst is not retroactive under federal law, the Florida Supreme Court's retroactive application of Hurst is solely based on a state test for retroactivity.

Florida has implemented a test which provides relief to a broader class of individuals in applying Florida's Witt[7] test instead of Teague v. Lane[8] for determining the retroactivity of Hurst. Because the retroactive application of Hurst is based on an adequate and independent state ground, certiorari review should be

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[6] See discussion of Hurst retroactivity, infra, pages 12-18.

[7] Witt v. State, 387 So. 2d 922 (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)).

[8] Teague v. Lane, 489 U.S. 288 (1989).

denied.[9]

The Florida Supreme Court first analyzed the retroactive application of Hurst in Mosley, 209 So. 3d at 1276-83, and Asay V, 210 So. 3d at 15-22. In Mosley, the Florida Supreme Court held that Hurst is retroactive to cases which became final after the June 24, 2002, decision in Ring. Mosley, 209 So. 3d at 1283. In determining whether Hurst should be retroactively applied to Mosley, the Florida Supreme Court conducted a Witt analysis, which is Florida's test for retroactivity. In Danforth v. Minnesota, 552 U.S. 264, 280-81 (2008), this Court held that the finality of state convictions is a state interest rather than a federal one. Thus, states may implement standards for retroactivity that grant relief to a greater class of individuals than what is required by Teague. See also Johnson v. New Jersey, 384 U.S. 719, 733 (1966) (holding that, "[s]tates are still entirely free to effectuate under their own law stricter standards than those we have laid down and to apply those standards in a broader range of cases than is required by this decision").

The Florida Supreme Court held that all the Witt factors favored retroactive application of Hurst in cases which became final post-Ring. Mosley, 209 So. 3d at

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[9] Aside from the question of retroactivity, certiorari would be inappropriate as there is no Sixth Amendment error in Hamilton's case. Hamilton became eligible for a death sentence upon the jury's unanimous guilt finding for robbery, kidnapping, and sexual battery, which satisfied the contemporaneous violent felony aggravating factor in his case. Hamilton, 703 So. 2d at 1038; 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). Furthermore, Hamilton's three prior violent felony convictions exempt him from a finding of Hurst error. See Apprendi v. New Jersey, 530 U.S. 466 (2000) (noting that defendants with prior convictions that satisfy a sentencing aggravator exempt the case from the requirement for jury findings) (relying on Almendarez-Torres v. United States, 523 U.S. 224 (1998)).

1276-83. The court concluded that "defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by Ring should not be penalized for the United States Supreme Court's delay in explicitly making this determination." Id. at 1283. Thus, the Florida Supreme Court held that Hurst was retroactive to Mosley's post-Ring case, which became final in 2009. Id.

Conversely, applying the Witt analysis in Asay V, 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 V, 210 So. 3d at 15 (emphasis in original) (quoting Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005)). However, the court determined that the amount of reliance on the old rule, and the effect retroactivity would have on the administration of justice, weighed heavily against the retroactive application of Hurst to pre-Ring cases. Asay V, 210 So. 2d at 20-22. The court noted that the state and the families of the victims relied heavily on the constitutionality of Florida's death penalty scheme based on the U.S. Supreme Court's decisions. Id. at 20. The court further concluded that resentencing is expensive and time consuming and that the state's interest in finality weighed heavily against retroactive application. Id. at 21-22. Thus, the Florida Supreme Court held that Hurst was not retroactive to Asay's case since the judgment and sentence became final in 1991, prior to Ring. Id. at 8, 20.

Asay V and Mosley together provide a clear rationale for the Florida Supreme Court's Ring-based retroactivity cutoff. Hamilton suggests the retroactive

application of Hurst is arbitrary when not applied to defendants who raised unsuccessful Ring claims. (Petition at 15). His argument misapprehends a primary purpose of the Ring-based retroactivity cutoff, which is to avoid penalizing those defendants who would have been entitled to Ring relief if Ring had been applied to Florida's sentencing scheme at the time Ring was decided. See Mosley, 209 So. 3d at 1283. As Hamilton's case was final in 1998,[10] he would not have been entitled to relief under Ring if it had been applied to Florida's sentencing scheme at the time it was decided in 2002. The Florida Supreme Court's denial of Hurst relief in Hamilton's case is consistent with its stated objectives and has been consistently applied by the Court since the rule was announced. Since Asay V, and Mosley, 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); Lambrix v. State, 227 So. 3d 112 (Fla. 2017); Hannon v. State, 228 So. 3d 505 (Fla. 2017); Branch v. State, 234 So. 3d 548 (Fla. 2018). This distinction between cases which were final pre-Ring versus cases which were final post-Ring is neither arbitrary nor capricious.

New rules are primarily 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

[10] Hamilton, 524 U.S. at 956.

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 (1989) (holding finality concerns in retroactivity are applicable in the capital context). Under this "pipeline" concept, Hurst would only apply to the cases which were not yet final on the date of the decision in Hurst. This type of traditional retroactivity can be affected by numerous factors that have nothing to do with the defendant, such as trial scheduling or the speed at which an appellate court issues its opinion. Yet, this Court recognizes this type of traditional retroactivity as proper and does not violate the Eighth or Fourteenth Amendment.

The Florida Supreme Court's Hurst retroactivity calculation differs from traditional retroactivity calculations only in that the determinative date stems from the date Ring was decided rather than the date Hurst was decided. In moving the line of retroactive application back to Ring,[11] 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 the time that elapsed before this determination was formalized 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

[11] Though Apprendi, 530 U.S. at 466, served as a precursor to Ring, this Court distinguished capital cases from its holding in Apprendi and thus Ring is the appropriate demarcation for retroactive

Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (to satisfy 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"). Extending relief to more individuals,[12] 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 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.

Hamilton's Petition further alleges that the Florida Supreme Court's Ring retroactivity cutoff denies relief to the most deserving capital prisoners. (Petition at 19). Hamilton argues that older capital cases were more likely to contain errors, including untimely filed federal habeas petitions. (Petition at 22-23). Hamilton concludes that these errors provide him and other similarly situated defendants special entitlement to retroactive application of Hurst. (Petition at 19-25).

Hamilton's argument seeks a dramatic reversal of this Court's longstanding precedent of favoring newer cases over older ones when considering retroactivity questions and asks this Court to favor decades-old cases in applying Hurst retroactively. Procedural avenues are available to capital prisoners in Florida to

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application to capital cases. Asay V, 210 So. 3d at 19.

[12] Approximately 150 defendants whose convictions became final post-Ring are being resentenced pursuant to Hurst. Death Penalty Information Center, *Florida Death-Penalty Appeals Decided in Light of Hurst*, available at https://deathpenaltyinfo.org/Hurst_Cases_Reviewed (last visited July 5,

challenge errors they discover and failing to prevail on those claims does not justify retroactive application of Hurst. Furthermore, any error in filing Hamilton's federal habeas petition is relevant to litigating procedural bars applicable to that habeas petition but is not at all relevant to a retroactivity analysis. Allegations that some unrelated error exists at another stage in Hamilton's case does not, by itself, entitle Hamilton or any other defendant to retroactive Hurst relief. Notably, Hamilton fails to cite a single case which would demonstrate otherwise.

The Florida Supreme Court's refusal to retroactively apply Hurst to Hamilton's case is based on an adequate and independent state ground and does not violate 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

Hamilton relies on Montgomery v. Louisiana, 136 S.Ct. 718 (2016), to assert that Hurst created a substantive change in the law and thus should be afforded full retroactive application under federal law. (Petition at 25-28). Contrary to Hamilton's assertion, Hurst is merely a procedural change. In Schriro, 542 U.S. at 353, this Court explained that rules that allocate decision making authority between the judge and the jury are procedural rules. There is no conflict between the Florida Supreme Court's decision in Hamilton's case and this Court's precedent nor the precedent of any other federal appellate court or state supreme court.

2018).

Certiorari review should be denied.

New rules of law, such as the rule announced in Hurst v. Florida, do not normally apply to cases that are final. See Whorton v. Bockting, 549 U.S. 406, 416 (2007) (explaining the normal rule of nonretroactivity and holding that 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 was based on this Court's holding in Ring, which in turn was based on Apprendi v. New Jersey, 530 U.S. 466 (2000). In Schriro, 542 U.S. at 358, this Court held that Ring established a procedural change in the law and was not to be applied to cases that were already final. As Hurst is an extension of Ring to Florida's capital sentencing scheme, Hurst is also 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 retroactively to cases that are already final); In re Coley, 871 F.3d 455, 457 (6th Cir. 2017) (noting this Court has not made Hurst retroactive to cases on collateral review); In re Jones, 847 F.3d 1293, 1295 (10th Cir. 2017) (holding this Court has not found that Hurst created a substantive rule).

Hamilton attempts to analogize Hurst to Miller v. Alabama, 567 U.S. 460

(2012), arguing that Hurst "conflates a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the *manner of determining* the defendant's culpability.'" Montgomery, 136 S.Ct. at 734-35 (quoting Schriro, 542 U.S. at 353) (emphasis in original). (Petition at 26). Hamilton's argument overlooks the reason this Court held Miller retroactive. Miller "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status' — that is juvenile offenders." Montgomery, 136 S.Ct. at 734 (quoting Penry, 492 U.S. at 330). Thus, Miller was held retroactive because it placed the punishment of life in prison without parole beyond the state's power to impose for a class of defendants; juvenile offenders faced a sentence that cannot be applied to them.

Conversely, following Hurst, the same class of defendants committing the same range of conduct still face the same punishment. While mandatory life imprisonment without parole can no longer be imposed on juveniles following Miller, the death penalty can still be imposed following Hurst. Ultimately, Hurst is a procedural change because it 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." Schriro, 542 U.S. at 353.

Hamilton next relies on Welch v. United States, 136 S.Ct. 1257 (2016), to

argue that the Eighth Amendment unanimity requirement[13] announced in Hurst v. State was a substantive change and is retroactive under federal law. (Petition at 28-29). However, the Welch decision undermines Hamilton's assertion that Hurst "alters ... the class of persons the law punishes," (Petition at 29), and instead, supports the determination that the Hurst rule is procedural:

> "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." Schriro, 542 U.S. at 353, 124 S.Ct. 2519. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." Id., at 351-352, 124 S.Ct. 2519 (citation omitted); see Montgomery, supra, at ___, 136 S.Ct. at 728. Procedural rules, by contrast, "regulate only the *manner of determining* the defendant's culpability." Schriro, 542 U.S., at 353, 124 S.Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." Ibid. "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." Id., at 352, 124 S.Ct. 2519.

Welch, 136 S.Ct. at 1264-65 (emphasis in original).

The Welch Court found that the rule in Johnson v. United States, 135 S.Ct. 2551 (2015), which "changed the substantive reach of the Armed Career Criminal Act," was a substantive, rather than procedural, change because it altered the class of people affected by the law. Welch, 136 S.Ct. at 1265. In explaining how the rule

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[13] The Florida Supreme Court noted that 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). As this Court recognized, "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.

in Johnson was not procedural, the Welch Court stated, "[i]t did not, for example, 'allocate decision making authority' between judge and jury, ibid, or regulate the evidence that the court could consider in making its decision." Id. (citation omitted).

Here, the new rule announced in Hurst v. State allocated the decision-making authority to determine capital sentencing from the judge to the jury, which is precisely how the Welch Court defined a procedural change. As this Court noted in Schriro, "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, 542 U.S. at 354. Based on this Court's precedent, there can be no doubt that the Hurst rule is a procedural rule. Aside from the separate issue of retroactivity under state law, there is no conflict among courts applying Hurst under the United States Constitution.

Hamilton relies on Ivan V. v. City of New York, 407 U.S. 203 (1972), and Powell v. Delaware, 153 A. 3d 69 (Del. 2016), to argue that Hurst is substantive because it "addressed the proof-beyond-a-reasonable-doubt standard." (Petition at 30). His argument ignores Florida's longstanding practice of using the beyond-a-reasonable-doubt standard of proof for proving aggravating factors in Florida. See Fla. Std. J. Inst. (Crim.) 7.11; Finney v. State, 660 So. 2d 674, 680 (Fla. 1995); Floyd v. State, 497 So. 2d 1211, 1214-15 (Fla. 1986). Hurst did nothing to change this standard. Furthermore, neither Hurst v. Florida nor Hurst v. State changed the standard of proof as to any required finding in Florida's capital sentencing

proceedings. Rather, both Hurst v. Florida and Hurst v. State addressed who makes the findings — the jury versus the judge — not what standard of proof is used.

This Court has explained that weighing in capital cases does not even involve a standard of proof. This Court decided Kansas v. Carr, 136 S.Ct. 633, 642 (2016), after Hurst v. Florida, and rejected an argument that the Eighth Amendment required the jury be told that mitigating circumstances did not have to be proven beyond a reasonable doubt. This Court expressed some doubt as to whether it was even possible to apply a standard of proof to mitigation. This Court explained that mitigation was not purely a factual determination but was largely "a judgment call" and that weighing the aggravating circumstances against the mitigating circumstances was "mostly a question of mercy." Id. This Court observed that it would mean "nothing" to tell the jury that the defendants "must deserve mercy beyond a reasonable doubt." Id. Standards of proof do not apply to judgment calls, value calls, or questions of mercy.

Furthermore, the Delaware Supreme Court's Powell opinion is readily distinguishable from the Florida Supreme Court's decision in this case because Powell was addressing a Delaware-specific standard of proof issue that does not apply to Florida's partial retroactivity cases. Powell, 153 A.3d at 73-74. The Delaware Supreme Court itself recognized the distinction, noting that Florida "already required proof beyond a reasonable doubt," while Delaware's law at the time did not. Id. As Florida's and Delaware's death penalty statutes are different, an interpretation by the Supreme Court of Delaware that Hurst should be given full

retroactive effect is not in conflict with the decision of the Florida Supreme Court. There is no conflict between the Florida Supreme Court and that of any other state court of last resort regarding Hurst, the standard of proof, and retroactivity.

Hurst establishes a procedural rule and is not retroactive under this Court's precedent. The Florida Supreme Court's refusal to retroactively apply Hurst to Hamilton's case is based on an adequate and independent state ground and does not violate federal law or this Court's precedent. Certiorari review should be denied.

The Florida Supreme Court's Findings that Florida Capital Sentencing Jury Instructions Comply with Caldwell v. Mississippi is Not Undermined by Hurst

Hamilton claims the jury instructions in his case violate Caldwell, 472 U.S. at 320, seemingly because Hurst now requires that the jury's verdict is binding on the court instead of advisory. (Petition at 33-34). Hamilton's claim does not warrant certiorari review because Hurst has not undermined the jury's role of providing an advisory verdict, and no Caldwell error exists in his case. The Florida Supreme Court's continuing practice of finding that Florida's standard jury instructions do not violate Caldwell does not violate federal law or this Court's precedent, nor is it in conflict with another state court of last resort. Certiorari review should be denied.

Firstly, Hurst does not call into question Florida's practice of using advisory verdicts in capital sentencing proceedings. Rather, Hurst extends the requirement announced in Ring that the jury must find the existence of each fact necessary to impose a death sentence. Hurst, 136 S.Ct. at 618, 622. Hurst does not compel jury

sentencing, as Hamilton appears to suggest. See Ring, 536 U.S. at 612 (Scalia, J., concurring) (noting that Ring "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). No case from this Court has mandated jury sentencing in a capital case, and such a holding would require reading a requirement into the Constitution that is simply not there. The Constitution provides a right to trial by jury, not to sentencing by jury.

Secondly, Hamilton is unable to 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). Hamilton's jury was properly instructed on the gravity of their role in providing an advisory verdict based on the law existing at the time of his trial. § 921.141(2), Fla. Stat. (1995). The jury was told that their sentencing recommendation was advisory. (Record Vol. 16 at 2140). Since Florida law assigns the judge to be the final sentencing authority, a jury's recommendation of death is in fact "advisory." Additionally, Hamilton's jury was specifically warned against "act[ing] hastily or without due regard to the gravity of these proceedings." (Record Vol. 16 at 2145). The jury was also instructed to "carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgement in reaching your advisory sentence." (Record Vol. 16 at 2145-46). There was no diminishment of the jury's sense of responsibility in recommending a death sentence in Hamilton's case.

Florida law continues to describe the role of a jury in a capital sentencing

proceeding as advisory, just as it did at the time of Hamilton's trial in 1995. Florida law entrusts trial courts with the authority to depart downward from a jury recommendation of death when the trial court finds it appropriate to do so, and such a practice comports with Hurst. § 921.141(2), Fla. Stat. (2018). Even if Florida law no longer permitted advisory verdicts, such a procedural change would certainly not throw open the door to retroactive application of Hurst for every defendant who had been sentenced under a different procedural scheme.

Florida's practice of instructing juries that their sentence recommendation is advisory does not violate Hurst or Caldwell. The Florida Supreme Court's rejection of Hamilton's Caldwell claim does not violate federal law or this Court's precedent, nor does it conflict with another state court of last resort. Certiorari review should be denied.

Conclusion

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

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
Florida Bar No. 158541
*Counsel of Record

Jennifer L. Keegan
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
capapp@myfloridalegal.com
(850) 414-3300

COUNSEL FOR RESPONDENT