CASE NO. 18-5040

IN THE SUPREME COURT OF THE UNITED STATES

HENRY PERRY SIRECI,

***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 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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The opinion of the Florida Supreme Court is reported at Sireci v. State, 237 So. 3d 916 (Fla.), rehearing stricken, 2018 WL 1052680 (Fla. Feb. 26, 2018).

JURISDICTION

The judgment of the Florida Supreme Court was entered on January 31, 2018 and the mandate issued February 26, 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

In 1976, Henry Perry Sireci was convicted of the brutal first-degree murder of Howard Poteet. The trial judge, the Honorable Maurice M. Paul, followed the jury's recommendation and imposed a sentence of death. The Florida Supreme Court affirmed Sireci's conviction and sentence on direct appeal. Sireci v. State, 399 So. 2d 964 (Fla. 1981). On May 17, 1982, this Court denied certiorari. Sireci v. Florida, 456 U.S. 984 (1982).

Sireci subsequently unsuccessfully sought post-conviction relief in the trial court pursuant to Florida Rule of Criminal Procedure 3.850, and that decision was affirmed on appeal. Sireci v. State, 469 So. 2d 119 (Fla. 1985), cert. denied, 478 U.S. 1010 (1986).

On September 19, 1986, the Governor signed a death warrant for Henry Sireci, prompting the filing of a second motion for post-conviction relief. A limited evidentiary hearing on this post-conviction motion was granted by the Ninth Judicial Circuit Court, and the State unsuccessfully appealed. State v. Sireci, 502 So. 2d 1221 (Fla. 1987).

The trial court held an evidentiary hearing on Sireci's second 3.850 motion and ultimately ordered a new sentencing hearing on grounds that two court-appointed psychiatrists conducted incompetent evaluations at the time of the original trial. At the conclusion of the evidentiary hearing, a new penalty phase was granted, and this decision was affirmed on appeal. State v. Sireci, 536 So. 2d 231 (Fla. 1988). Upon resentencing, the jury recommended the death penalty by a vote of eleven to one and the Ninth Judicial Circuit Court again imposed the death penalty. The trial court found five aggravating circumstances: 1) the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence (a prior murder and an earlier robbery); 2) the murder

was committed during a robbery and for pecuniary gain; 3) the murder was committed for the purpose of avoiding or preventing a lawful arrest by eliminating a witness; 4) the murder was especially heinous, atrocious, or cruel; and 5) the murder was cold, calculated, and premeditated. The court found non-statutory mitigating circumstances (abusive childhood, brain damage) but no statutory mitigating circumstances. Sireci v. State, 587 So. 2d 450, 452 n.1 (Fla. 1991).

Sireci pursued a direct appeal of the resentencing hearing. The Florida Supreme Court affirmed imposition of the death sentence on direct appeal. Sireci v. State, 587 So. 2d 450 (Fla. 1991). The judgment and sentence became final upon denial of certiorari by this Court on March 23, 1992. Sireci v. Florida, 503 U.S. 946 (1992); Fla. R. Crim. P. 3.851(d)(1)(B) (A judgment and sentence become final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed").

Following Sireci's unsuccessful collateral attacks in state and federal court,[1] Sireci filed the instant successive post-

[1] On September 7, 2000, the Florida Supreme Court affirmed the lower court's denial of post-conviction relief in Sireci v. State, 773 So. 2d 34 (Fla. 2000). Sireci's subsequent collateral challenges have been rejected. See Sireci v. Moore, 825 So. 2d 882 (Fla. 2002) (denial of state petition for writ of habeas corpus); Sireci v. State, 908 So. 2d 321, 325 (Fla.) (affirming denial of Rule 3.853 motion for post-conviction DNA testing), cert. denied, 546 U.S. 1077 (2005); Sireci v. State, 192 So. 3d 42 (Table) (Fla. 2015) (affirming denial of post-conviction motion asserting claim of newly discovered evidence based upon

conviction motion pursuant to Florida Rule of Criminal Procedure 3.851 challenging his death sentence 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 May 22, 2017, the circuit court summarily denied Sireci's motion. After the post-conviction court denied relief (Pet. App. B), the Florida Supreme Court stayed Sireci's appeal pending the outcome of Hitchcock v. State, 226 So. 3d 216 (Fla.), cert. denied, 138 S. Ct. 513 (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), ruling 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 Sireci to show why Hitchcock should not be dispositive in his case. The Florida Supreme Court affirmed the lower court's denial of relief, finding "Hurst does not apply retroactively to Sireci's sentence of death." (citation omitted). (Pet. App. A2).

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the unsound or over stated significance of hair comparison testimony introduced during his trial), cert. denied, 137 S. Ct. 470 (2016). Federal habeas relief has also been denied. The Eleventh Circuit Court of Appeals affirmed the district court's denial of Sireci's petition for writ of habeas corpus on December 21, 2010. Sireci v. Attorney General, 406 Fed. Appx. 348 (11th Cir. 2010) (unpublished), cert. denied, 565 U.S. 870 (2011).

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

RELEVANT FACTS

In affirming Sireci's conviction and death sentence on direct appeal, the Florida Supreme Court provided the following factual summary:

> The defendant, Sireci, went to a used car lot, entered the office, and discussed buying a car with the victim Poteet, the owner of a car lot. Defendant argues that the purpose of his visit was to take some keys from the rack so that he could come back later and steal an automobile. The state argues that defendant went to the used car lot for the purpose of robbing the owner at that time.
>
> The defendant was armed with a wrench and a knife. A struggle ensued. The victim suffered multiple stab wounds, lacerations, and abrasions. An external examination of the body revealed a total of fifty-five stab wounds, all located on the chest, back, head, and extremities. The stab wounds evoked massive external and internal hemorrhages which were the cause of death. The neck was slit.
>
> The defendant told his girlfriend, Barbara Perkins, that he was talking to the victim about a car, then he hit the victim in the head with the wrench. When the man turned around, the defendant asked where the money was, but the man wouldn't tell the defendant, so he stabbed him. The defendant told Perkins that he killed Poteet. He admitted taking the wallet from the victim.
>
> Harvey Woodall, defendant's cellmate when he was arrested in Illinois, testified that the defendant had described the manner in which he killed the victim. According to Woodall's testimony, the defendant hit the victim with a wrench, then a fight ensued in which the windows were broken, and the defendant stabbed the man over sixty times. The defendant stated that he wasn't going to leave any witnesses to testify against him and that he knew the man was dead when he left. The

> defendant told Woodall he got around $150.00 plus credit cards.
>
> The defendant also described the crime to Bonnie Arnold. According to Arnold, the defendant stated that the car lot owner and he were talking about selling the defendant a car, when the defendant hit the victim with a tire tool. A fight began and the defendant stabbed the victim. The defendant told Arnold that he was going in to steal some car keys and then come back later to steal a car.
>
> The defendant told David Wilson, his brother-in-law, that he killed the victim with a five or six-inch knife and took credit cards from the victim.

Sireci v. State, 399 So. 2d 964 (Fla. 1981).

While Sireci notes that he has always maintained his innocence in this case (Petition at 3), the record reflects that Sireci's identity as Mr. Poteet's murderer was never genuinely in doubt. Identity is simply not an issue in this case. As the Florida Supreme Court noted in affirming the denial of Sireci's previous motion for post-conviction relief: "An independent review of the record indicates that, in total, seven different people testified that appellant confessed to them that he had murdered Howard Poteet." Sireci, 773 So. 2d at 42-43. "Specifically, the following people testified that Sireci admitted killing Mr. Poteet: (1) Barbara Perkins--girlfriend; (2) Donald Holtzinger--cell mate; (3) Peter Sireci--brother; (4) Harvey Woodall--cell mate; (5) Bonnie Lee Arnold--friend; (6)

David Wilson--brother in law[2]; (7) Gary Arbisi--detective." Id. at 43 n.16. "Those confessions were all consistent, detailed accounts of the murder." Id. at 43. The Florida Supreme Court reached a similar conclusion in affirming the denial of post-conviction DNA testing in this case. Sireci, 908 So. 2d at 325 ("Finally, we conclude that, in light of the other evidence of guilt, there is no reasonable probability that Sireci would have been acquitted or received a lesser sentence if the State had not introduced into evidence the hair on Poteet's sock. As we have noted, seven witnesses testified that Sireci admitted to them that he killed Poteet. We find no error in this regard.") (citations omitted). Indeed, **even at trial** the identity of Sireci as the person who killed Mr. Poteet was not in dispute. Defense counsel argued the State had not proved first-degree murder, but conceded that Sireci was guilty of third-degree murder. (T4/702-12).

Given these facts, Sireci's belated and completely unsupported attempt to cast doubt upon his state court conviction is not only irrelevant to the narrow legal issue presently before this Court, but it is factually unsound. Similarly, it is unclear

[2] The trial court allowed into evidence testimony from another former cell mate [Holtzinger] concerning an attempt by Sireci to eliminate his former brother-in-law Wilson as a witness. "The defendant told Holtzinger that the purpose of eliminating Wilson and preventing him from testifying was to discredit the testimony of witness Perkins, thereby avoiding a conviction." Sireci, 399 So. 2d at 968.

why Sireci refers to prior state court litigation surrounding the hair comparison testimony admitted at his trial. Such 'facts' are plainly irrelevant to the question of retroactivity which was the issue decided in state court below and the claim upon which Sireci now seeks review. Moreover, Petitioner's facts are materially incomplete as they relate to the hair comparison testimony admitted at trial and the State's failure to allow DNA testing on the hair found on the victim's sock.

Sireci asserts that in seeking a consent agreement from the State to conduct DNA testing of various items, the State refused to allow certain evidence to be tested, including hair collected from Mr. Poteet's sock - - the hair that allegedly tied Mr. Sireci to the scene of the crime. (Petition at 5). This is an inaccurate account of the proceedings below and in particular, of the consent agreement. In the consent agreement entered into in 2010, Sireci, notably, **did not** seek DNA testing of the hair found on Mr. Poteet's sock. (V1/28-29). That agreement also included the stipulation that Sireci would not seek additional DNA testing in either state or federal court. (V1/29). Only after the agreed upon testing had been conducted did Sireci, through the Innocence Project, request testing of the hair located on Mr. Poteet's sock in a letter sent to the State Attorney's Office.[3]

[3] The State acknowledges that Sireci did seek DNA testing of the hair on the sock in his earlier Rule 3.853 motion. See Sireci, 908 So. 2d at 325. However, Sireci inexplicably failed to seek testing of the hair in the subsequent consent agreement.

Notably, the Florida Supreme Court affirmed the denial of Sireci's successive motion for post-conviction relief, Sireci v. State, 192 So. 3d 42 (Fla. 2015), based upon the allegedly misleading hair comparison testimony presented at this trial and this Court subsequently denied certiorari of that ruling. Sireci v. Florida, 137 S. Ct. 470 (2016).

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 seeks review the Florida Supreme Court's decision affirming the denial of his successive post-conviction 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 Petitioner 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, 17-8540, 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, 17-8134, 2018 WL 1367892 (June 18, 2018). Petitioner offers no persuasive, much less compelling reasons, for this Court to grant review of his case.

I. There Is No Underlying Constitutional 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. In aggravation in this case, the trial court found that Petitioner was previously convicted of another capital felony or a felony involving the use or threat of violence (a prior murder and an earlier robbery). See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); 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)). 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.[4]

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

[4] § 921.141(6) (listing prior violent felony as an aggravator under Florida law).

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.

II. The Florida Court's Ruling On The Retroactivity Of Hurst Is Not Unconstitutional.

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. 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.[5]

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

[5] 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., dissenting).

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. Dep't of Corr., 872 F.3d 1170, 1182-83 (11th Cir. 2017), 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.[6] 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."[7] 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

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[6] Florida is a clear outlier for giving **any** retroactive effect to an Apprendi/Ring based error. As explained by the Eighth Circuit in Walker v. United States, 810 F.3d 568, 575 (8th Cir. 2016), the consensus of judicial opinion flies squarely in the face of giving any retroactive effect to an Apprendi based error. Apprendi's rule "recharacterizing certain facts as offense elements that were previously thought to be sentencing factors" does not lay "anywhere near that central core of fundamental rules that are absolutely necessary to insure a fair trial."

[7] 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.

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 States Supreme Court. This factor weighs heavily against retroactive application of Hurst v. Florida to this pre-Ring case." Id. at 20. With respect 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.[8]

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

[8] Federal courts have had little trouble determining that Hurst, like Ring, is not retroactive at all under Teague. See Lambrix v. Sec'y, Fla. Dep't of Corr., 851 F.3d 1158, 1165 n.2 (11th Cir. 2017) ("under federal law Hurst, like Ring, is not retroactively applicable on collateral review"), cert. denied, 138 S. Ct. 217 (2017); 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).

"pipeline" concept, Hurst would only apply to the 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.[9] In

[9] Petitioner incorrectly states that the Florida Supreme Court "has never explained why it drew a line at Ring as opposed to Apprendi[.]" (Petition at 13 n.6); Apprendi v. New Jersey, 530 U.S. 466 (2000). However, the Florida Supreme Court did in fact discuss their rationale in Asay and Mosley. Asay, 210 So. 3d at 19; Mosley, 209 So. 3d at 1279. The Court concluded that "while the reasoning of Apprendi appeared to challenge the underlying prior reasoning of Walton and similar cases, the United States Supreme Court expressly excluded death penalty cases from its holding." Asay, 210 So. 3d at 19 (citing Apprendi, 530 U.S. at 496); Mosley, 209 So. 3d at 1279 n.17 (citing Apprendi, 530 U.S. at 497); Walton v. Arizona, 497 U.S. 639 (1990), *overruled by* Ring, 536 U.S. at 589. Though Apprendi served as a precursor to Ring, this Court specifically distinguished capital cases from its holding in Apprendi. Apprendi, 530 U.S. at 496. It was not until Ring that this Court determined that "Apprendi's reasoning is irreconcilable with Walton's holding." Ring, 536 U.S. at 589. Thus, as the Florida Supreme Court reasoned, Ring is the appropriate demarcation for retroactive application to capital cases, not Apprendi. Asay, 210 So. 3d at 19.

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.

Petitioner uses the case of convicted murderer Johnson as an example of such allegedly arbitrary application of the Florida

Supreme Court's retroactivity test. (Petition at 15). While Johnson's case originally became final on February 21, 1984, subsequent litigation led to a new trial being granted in 1987 and his death sentences being vacated in 2010. Johnson v. Florida, 465 U.S. 1051 (1984); Johnson v. Wainwright, 498 So. 2d 938, 939 (Fla. 1986); Johnson v. State, 44 So. 3d 51, 74 (Fla. 2010). After a new penalty phase in 2013, Johnson's case was pending on direct appeal when Hurst was decided. Johnson v. State, 205 So. 3d 1285 (Fla. 2016). As such, although Johnson's crime occurred in the 1980s, he received the benefit of Hurst because his judgment and sentence were not final pre-Hurst. The result in Johnson does not in any way suggest that Florida's retroactivity test is either unfair or unconstitutionally arbitrary.

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.

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.

Finally, Petitioner's argument that the Florida Supreme Court's imposition of the unanimity requirement in Hurst v. State causes all non-unanimous verdicts to be violative of the Eighth Amendment is plainly without merit. The Florida Supreme Court's imposition of the unanimity requirement in Hurst v. State is purely a matter of state law, is not a substantive change, and did not cause death sentences imposed pre-Ring to be in violation of the Eighth Amendment.

The Eighth Amendment requires capital punishment to be limited "to those who commit a 'narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" Roper v. Simmons, 543 U.S. 551, 568 (2005) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)). As such, the death penalty is limited to a specific category of crimes and "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." Roper, 543 U.S. at 568. Petitioner's death

sentence was imposed in accordance with all applicable constitutional principles at the time it was imposed.[10]

The retroactivity ruling below does not conflict with any of this Court's precedent or present this Court with a significant or important unsettled question of law. Accordingly, certiorari should be denied.

Petitioner's argument that he was denied his right to have a jury find beyond a reasonable doubt the "critical elements" that subjected him to the death penalty, is plainly meritless. 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.

[10] Moreover, Hurst errors are subject to harmless error analysis. See Hurst v. Florida, 136 S. Ct. at 624. See also Chapman v. California, 386 U.S. 18, 23-24 (1967). Here, the aggravating circumstances either relied upon prior violent felonies or were established by overwhelming evidence. There is no reason to believe the jury would view the evidence any differently than the trial judge in this heavily aggravated case.

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 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.[11]

Finally, Petitioner complains that the sentencing procedure used in his case violated this Court's ruling in Caldwell v. Mississippi, 472 U.S. 320 (1985), because the jury was given instructions that informed the jury its death recommendation was merely advisory. However, this case would be a uniquely inappropriate vehicle for certiorari because this is a post-conviction case and this Court would have to address

[11] Curiously, while espousing the virtues of jury sentencing, Petitioner at the same time cites an out of date ABA report on juror confusion relating to capital sentencing. (Petition at 16 n.11). The ultimate safeguard against such alleged juror 'confusion' would seem to be judicial sentencing in capital cases.

retroactivity before even reaching the underlying jury instruction issue. This matter does not merit this Court's review.

Aside from the question of retroactivity, it is clear there was no Caldwell violation in this case. In order 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). See Reynolds v. State, ___ So. 3d ___, 2018 WL 1633075, *9 (Fla. Apr. 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").

Petitioner's jury was properly instructed on its role based on the law existing at the time of his trial.[12] Entitlement to relief under Caldwell requires that the prosecutor, judge, or jury instructions misrepresent the jury's role in sentencing. Darden v. Wainwright, 477 U.S. 168, 183 n.15 (1986) (rejecting a

[12] The jury was advised that although its role was advisory they should "carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgement in reaching your advisory sentence." (Resentencing Transcript: V17/2551). The trial court's instructions were accurately reflected the law existing at the time of Sireci's resentencing trial.

Caldwell attack, explaining that "Caldwell is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision"). A Florida jury's decision regarding a death sentence was, and still remains, an advisory recommendation; therefore, there was no violation of Caldwell. See Dugger v. Adams, 489 U.S. 401 (1989). Petitioner's jury was accurately advised that its decision was an advisory recommendation that would be accorded "great weight." The Florida Supreme Court's decision is not contrary to Caldwell and presents this Court with no conflict of law among either state or federal courts.

In conclusion, 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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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 U.S. mail to: Maria E. DeLiberato, Assistant CCRC-M, Law Office of the Capital Collateral Regional Counsel, Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, deliberato@ccmr.state.fl.us. All parties required to be served have been served.

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