CASE NO. 18-5042

IN THE SUPREME COURT OF THE UNITED STATES

JACK RILEA SLINEY,

***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 Sliney v. State, 235 So. 3d 310 (Fla. 2018).

JURISDICTION

The judgment of the Florida Supreme Court was entered on January 31, 2018 and the mandate issued February 16, 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

The Charlotte County Grand Jury indicted Jack Rilea Sliney, and co-defendant, Keith Wittemen, Jr., on September 3, 1992, each for one count of first-degree premeditated murder, one count of first-degree felony murder and one count of robbery with a deadly weapon. (R1/4-5).

The cause was tried before a jury from September 27 to October 1, 1993. (R4-R12). Sliney was found guilty as charged. The Florida Supreme Court set forth the following factual summary

of the trial:

> The victim in this case, George Blumberg, and his wife, Marilyn Blumberg, owned and operated a pawn shop. On June 18, 1992, Marilyn drove to the pawn shop after unsuccessfully attempting to contact George by phone. When she entered the shop, she noticed that the jewelry cases were empty and askew. She then stepped behind the store counter and saw George lying face down in the bathroom with scissors protruding from his neck. A hammer lay on the floor next to him. Marilyn called 911 and told the operator that she thought someone had held up the shop and killed her husband.
>
> A crime-scene analyst who later arrived at the scene found, in addition to the hammer located next to the victim, parts of a camera lens both behind the toilet and in the bathroom wastepaper basket. The analyst also found traces of blood and hair in the bathroom sink. The only relevant fingerprint found in the shop belonged to codefendant Keith Witteman.
>
> During an autopsy of the victim, the medical examiner found various injuries on the victim's face; three crescent-shaped lacerations on his head; three stab wounds in his neck, one of which still contained a pair of scissors; a number of broken ribs; and a fractured backbone. The medical examiner opined that the facial injuries occurred first and were caused by blunt trauma. When asked whether the camera lens found at the scene could have caused some of the victim's facial injuries, the medical examiner responded affirmatively. The stab wounds, the medical examiner testified, were inflicted subsequent to the facial injuries and were followed by the three blows to the head. The medical examiner confirmed that the three crescent-shaped lacerations found on the victim's head were consistent with the end of the hammer found at the scene. Finally, the medical examiner opined that the broken ribs and backbone were the last injuries the victim sustained and that the cause of these injuries was most likely pressure applied to the victim's back as he lay on the ground.
>
> The day after the murder, Kenneth Dale Dobbins came forward indicating that he might have seen George Blumberg's assailants. Dobbins had been in the pawn shop on June 18, 1992, and prior to his departure, he saw two young men enter the shop. The two men

approached George and began discussing a piece of jewelry that they apparently had discussed with him on a prior occasion.

Dobbins saw the face of one of the men as the two walked past him. Based on the description Dobbins gave, investigators drew and circulated a composite of the suspect. One officer thought his stepdaughter's boyfriend, Thaddeus Capeles, might recognize the suspect because Capeles and the suspect appeared to be close in age. The officer showed Capeles the composite as well as a picture of a gun that had been taken from the Blumbergs' pawn shop. Capeles did not immediately recognize the person in the composite but later contacted the officer with what he believed to be pertinent information. Capeles told the officer that when he visited the Club Manta Ray, Jack Sliney, who managed the teen club, asked him whether he was interested in purchasing a gun. He thought the gun Sliney showed him looked somewhat like the one in the picture the officer had shown him.

The officer arranged a meeting between Capeles and Carey Twardzik, an investigator in the Blumberg case. During that meeting, Capeles agreed to assist with the investigation. At Twardzik's direction, Capeles arranged a controlled buy of the gun Sliney had shown him. His conversations with Sliney, both on the phone and at the time he purchased the gun, were recorded and later played to the jury. After discovering that the serial number on the gun matched the number on a firearms register from the Blumbergs' pawn shop, investigators asked Capeles to arrange a second controlled buy of some other guns Sliney mentioned during his most recent conversation with Capeles. Capeles' conversations with Sliney regarding the second sale, like the conversations surrounding the initial sale, were recorded and later played to the jury. As with the first sale, the serial numbers on the guns Capeles obtained matched the numbers on the firearms register obtained from the Blumbergs' shop. At trial, Marilyn Blumberg identified the guns Sliney sold to Capeles and confirmed that they were present in the pawn shop the day prior to the murder.

Shortly after the second gun transaction, several officers arrested Sliney. The arrest occurred after Sliney left the Club Manta Ray, sometime between 1 and 1:45 a.m. At the time of the arrest, codefendant Keith

Witteman and a female were also in Sliney's truck. Despite the testimony of several defense witnesses to the contrary, the arresting officers testified that Sliney did not appear to be drunk or to have any difficulty in following the instructions they gave him.

Following the arrest, Sliney was taken to the sheriff's department. Officer Twardzik read Sliney his *Miranda* [FN1] rights, and Sliney thereafter indicated that he wanted to talk. He gave both written and taped statements in which he confessed to the murder. In his taped statement which was played to the jury, Sliney told the officers that shortly after he and Keith Witteman entered the shop, they began arguing with George Blumberg about the price of a necklace Sliney wanted to buy. According to Sliney, Witteman pressured him to hit Blumberg. Sliney grabbed Blumberg, and Blumberg fell face down on the bathroom floor. Sliney fell on top of Blumberg. Sliney then turned to Witteman and asked him what to do. Witteman responded, "You have to kill him now," and began taking things from the display cases and placing them in a bag. Thereafter, Sliney recalled hitting Blumberg in the head with a camera lens that Sliney took from the counter and stabbing Blumberg with a pair of scissors that Sliney obtained from a drawer. Sliney was somewhat uncertain of the order in which he inflicted these injuries. Next, he recalled removing a hammer from the same drawer in which the scissors were located and hitting Blumberg on the head with it several times.

> [FN1] *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

Sliney left Blumberg on the floor. He washed his hands in the bathroom sink, and then he and Witteman left the shop. According to Sliney, Witteman, in addition to taking merchandise from the shop, took money from the register and the shop keys from Blumberg's pocket. He used the keys to lock the door as the two exited the shop.

Before returning home, [FN2] Sliney and Witteman disposed of several incriminating items and transferred the jewelry they obtained from the shop, as well as a .41 caliber revolver, [FN3] into a gym bag. Sliney put the bag in a trunk in his bedroom. Officers conducting a search of Sliney's home later found the gym bag containing the jewelry and gun.

[FN2] Both Sliney and Witteman lived with Sliney's parents.

[FN3] This gun was not listed on the firearm register found in the Blumbergs' shop.

In addition to recounting the circumstances surrounding the murder, Sliney told the officers that he had been in the pawn shop prior to the murder. He said, however, that he did not decide to kill Blumberg before entering the shop or at the time he and Blumberg were arguing. Rather, he told them that he did not think about killing Blumberg until Witteman said, "We can't just leave now. Somebody will find out or something. We got to kill him."

Prior to trial, Sliney moved to suppress the statements he made to the law enforcement officers. He alleged that the statements were involuntary and thus inadmissible. The trial court denied the motion. At trial, Sliney presented several witnesses to the jury in support of his position that his confession was untrustworthy. Sliney also testified on his own behalf. His testimony was inconsistent with the statements he made to law enforcement officers. He testified that it was actually Witteman who murdered Blumberg. Sliney told the jury that he paid for the necklace he was looking at before he began arguing with Blumberg over the price. During the argument he grabbed Blumberg, and Blumberg fell to the floor. When he saw that Blumberg was bleeding, he left the shop. He lay down in his truck because the sight of the blood made him sick. Several minutes later, Witteman came out to the truck. He removed a pair of weight lifting gloves from Sliney's gym bag and then went back into the shop. When Witteman exited the shop again he had with him a gun and a pillow case full of things. Sliney explained that he did not go to the police when he discovered that Blumberg was dead because Witteman threatened to harm his family.

Sliney v. State, 699 So. 2d 662, 664-66 (Fla. 1997).

During the penalty phase which was held on October 4 and December 10, 1993, defense counsel presented the testimony of a number of family members, teachers, and friends of Sliney. (R12;

R13). Judge Pellecchia ordered a presentence investigation and scheduled sentencing for February 10, 1994. At Sliney's sentencing, the trial judge followed the jury's seven to five death recommendation and also imposed an upward departure sentence of life on the robbery count. (R2/221-228; 235-240; R3/462-480).

As aggravation in Sliney's case, the trial court found that: 1) the murder was committed while Sliney was engaged in or was an accomplice in the commission of a robbery; and 2) the murder was committed for the purpose of avoiding or preventing a lawful arrest. In mitigation, the trial court found the statutory factors of: 1) no significant prior criminal history (substantial weight); 2) youthful age (little weight). As to non-statutory mitigators, the trial court found: 1) good prisoner (some weight); 2) politeness (little weight); 3) good neighbor (little weight); 4) caring person (little weight); 5) good school record (little weight); and 6) gainful employment (little weight). (R2/221-227; R3/462-480).

Further, the trial court rejected Sliney's request to consider his confession as a mitigating factor because Sliney had claimed that the confession was involuntary. And, finally, the trial court found that co-defendant Wittemen's life sentence for the same offenses was not a mitigating factor in Sliney's case because the two defendants were not equally culpable. (R2/221-227).

The Florida Supreme Court affirmed Sliney's convictions and sentences on direct appeal. Sliney v. State, 699 So. 2d 662 (Fla. 1997). The judgment and sentence became final upon denial of certiorari by this Court on February 23, 1998. Sliney v. Florida, 522 U.S. 1129 (1998); 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 Sliney's unsuccessful collateral attacks in state and federal court,[1] Sliney filed the instant successive post-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 April 11, 2017, the circuit court summarily denied Sliney's motion and denied rehearing April 26, 2017. After the post-conviction court denied relief (Pet. App. B), the Florida Supreme Court stayed Sliney's appeal pending the outcome of Hitchcock v. State, 226 So. 3d 216 (Fla.), cert. denied, 138 S. Ct. 513 (2017).

[1] The circuit court's order denying Sliney post-conviction relief was affirmed on appeal to the Florida Supreme Court on November 9, 2006. Sliney v. State, 944 So. 2d 270 (Fla. 2006). Sliney unsuccessfully sought federal habeas relief. Sliney v. Secretary, DOC, 2010 WL 3768373 (M.D. Fla. Sept. 24, 2010). The Eleventh Circuit Court of Appeals denied Sliney's Application for a Certificate of Appealability on December 21, 2010. Sliney v. Secretary, Dep't of Corrections, Case No. 10-14965-P (11th Cir. Dec. 21, 2010).

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 Sliney 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 Sliney's sentence of death." (citation omitted). (Pet. App. A2).

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

REASONS FOR DENYING THE WRIT

Certiorari review should be denied because the Florida Supreme Court's ruling on the retroactivity of Hurst relies on state law to provide that the Hurst cases are not retroactive to defendants whose death sentences were final when this Court decided Ring v. Arizona, and the court's ruling does not violate the Eighth or Fourteenth Amendments and does not conflict with any decision of this Court or involve an important, unsettled question of federal law.

Petitioner 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. The unanimous verdict by Sliney's jury establishing his guilt of a contemporaneous armed robbery was clearly sufficient to meet the Sixth Amendment's factfinding requirement, and he was properly rendered eligible for a death sentence at that point. Petitioner's contemporaneous

armed robbery conviction, an aggravator under well-established Florida law, was sufficient to meet the Sixth Amendment's fact-finding requirement under this Court's precedent.[2] See Jenkins v. Hutton, 137 S. Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty); Kansas v. Carr, 136 S. Ct. 633, 642 (2016) (rejecting a claim that the Constitution requires a burden of proof on whether or not mitigating circumstances outweigh aggravating circumstances, noting that such a question is "mostly a question of mercy."); Alleyne v. United States, 570 U.S. 99, 111 n.1 (2013) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in Almendarez-Torres v. United States, 523 U.S. 224 (1998)).

Lower courts too have almost uniformly held that a judge may perform the "weighing" of factors to arrive at an appropriate sentence without violating the Sixth Amendment. See State v. Mason, ___ N.E.3d ____, 2018 WL 1872180 at *5-6 (Ohio Apr. 18, 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that

[2] § 921.141(6)(d) (listing murder committed in the course of an armed robbery as an aggravator).

"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.[3]

The Florida Supreme Court first analyzed the retroactive application of Hurst in Mosley v. State, 209 So. 3d 1248, 1276-83 (Fla. 2016), and Asay v. State, 210 So. 3d 1, 15-22 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017). In Mosley, the Florida Supreme Court held that Hurst is retroactive to cases which became final after this Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), on June 24, 2002. Mosley, 209 So. 3d at 1283. In determining whether Hurst should be retroactively applied to Mosley, the Florida Supreme Court conducted a Witt analysis, the state-based test for retroactivity. See Witt v. State, 387 So. 2d 922, 926 (Fla. 1980) (determining whether a new rule should be applied retroactively by analyzing the purpose of the new rule, extent of reliance on the old rule, and the effect of retroactive

[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., dissenting).

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.[4] 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."[5] Id. at 1283. Thus, the Florida Supreme Court held Hurst to be retroactive to Mosley, whose case became final in 2009, which is post-Ring. Id.

Conversely, applying the Witt analysis in Asay v. State, 210 So. 3d 1, 22 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017), the Florida Supreme Court held that Hurst is not retroactive to any

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[4] 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."

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

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.[6]

In the traditional sense, new rules are applied retroactively only to cases which are not yet final. See Griffith v. Kentucky, 479 U.S. 314, 328 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"); Penry v. Lynaugh, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context). Under this "pipeline" concept, Hurst would only apply to the cases which were not yet final on the date of the decision in Hurst. Even under the "pipeline" concept, cases whose direct appeal was

[6] 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).

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.[7] In moving the line of retroactive application back to Ring, the Florida Supreme Court reasoned that since Florida's death penalty sentencing scheme should have been recognized as unconstitutional

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[7] Petitioner incorrectly states that the Florida Supreme Court "has never explained why it drew a line at Ring as opposed to Apprendi[.]" (Petition at 14 n.8); 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.

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.[8]

[8] Moreover, Hurst errors are subject to harmless error analysis. See Hurst v. Florida, 136 S. Ct. at 624. See also Chapman v. California, 386 U.S. 18, 23-24 (1967). Here, one aggravating circumstance **was found unanimously by the jury:** the contemporaneous violent felony conviction for robbery. See Sliney v. State, 699 So. 2d 662, 664-66 (Fla. 1997). Additionally, the

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.

Petitioner's argument that his sentence somehow violates the Eighth Amendment is plainly meritless. To the extent Petitioner

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other aggravating circumstance found by the trial court (avoiding arrest) was well-established by overwhelming evidence (notably, Sliney's confession acknowledges that he and Witteman discussed that they could not leave the victim alive). No reasonable jury would have failed to find the existence of the aggravators under the circumstances of this case. See, e.g., Jenkins v. Hutton, 137 S. Ct. 1769, 1772 (2017).

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.[9]

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 retroactivity before even reaching the underlying jury

[9] 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 18 n.13). The ultimate safeguard against such alleged juror 'confusion' would seem to be judicial sentencing in capital cases.

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. His jury was informed that its recommendation would be given "great weight" by the trial court and that only in "rare circumstances" would the court "impose a sentence other than what you recommend." (R1/193; Pet. App. F). 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 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 27th 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, 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.

s/ Scott A. Browne
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