**CASE NO. 18-5054**

**IN THE SUPREME COURT OF THE UNITED STATES**

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**BRANDY BAIN JENNINGS,**

***Petitioner*,**

**vs.**

**STATE OF FLORIDA,**

***Respondent*.**

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

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# RESPONDENT'S BRIEF IN OPPOSITION


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**[Capital Case]**

## QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari review where the retroactive application of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), 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 *Jennings v. State*, 237 So. 3d 909 (Fla. 2018).

## JURISDICTION

The Florida Supreme Court entered judgment on January 29, 2018. Petitioner asserts that this Court has jurisdiction under 28 U.S.C. § 1257 (a). Respondent agrees that the 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 because the Florida Supreme Court's decision in this case is based on adequate and independent state grounds. Sup. Ct. R. 14(g)(i). Additionally, the Florida Supreme Court's decision 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. Sup. Ct. R. 10.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

## STATEMENT OF THE CASE AND FACTS

Petitioner, Brandy Bain Jennings, was convicted of robbery and first-degree murder of Dorothy Siddle, Jason Wiggins, and Vickie Smith. *Jennings v. State*, 718 So. 2d 144, 145 (Fla. 1998).

The victims were employees of a Cracker Barrel restaurant where Jennings had previously worked. *Id*. Early in the morning of November 15, 1995, Jennings and his younger friend Charles Graves entered the restaurant while the victims prepared for the workday. *Id.* They forced the victims into a freezer, where Jennings killed all three by slashing their throats with his knife. *Id*. Jennings and Graves took money and absconded. They were ultimately arrested in Las Vegas. *Id. at 146.*

The jury recommended three sentences of death by a ten-to-two vote for each murder conviction. *Jennings*, 718 So. 2d at 147. In sentencing Jennings to three sentences of death, the trial court found the following aggravating circumstances: (1) the murders were committed during a robbery; (2) the murders were committed to avoid arrest; and (3) the murders were cold, calculated, and premeditated ("CCP"). *Id*. Jennings was also sentenced to fifteen years of prison for the robbery. *Id*. at 145.

Jennings's sentences became final when this Court denied certiorari review of his case June 24, 1999. *Jennings v. Florida*, 527 U.S. 1042 (1999). The denial of his initial postconviction motion was subsequently affirmed by the Florida Supreme Court. *Jennings v. State*, 123 So. 3d 1101 (Fla. 2013). Jennings's first successive motion to vacate was denied April 19, 2016, and was not appealed. Jennings currently has a petition for writ of habeas corpus pending in the United States District Court for the

Middle District of Florida, Case No. 2:13-cv-00751-SPC-MRM, which has been stayed pending resolution of his state court proceedings.

Jennings also filed a second successive postconviction motion in state court seeking relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), as interpreted in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). After the postconviction court denied relief, the Florida Supreme Court stayed Jennings's appeal pending the outcome of *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 512 (2017).

In *Hitchcock*, the Florida Supreme Court reaffirmed its previous holding in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), in which it held that *Hurst v. Florida* as interpreted by *Hurst v. State* is not retroactive to defendants whose death sentences were final when this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). After the court decided *Hitchcock*, it issued an order directing Jennings to show why *Hitchcock* should not be dispositive in his case. Following briefing, the Florida Supreme Court ultimately affirmed the lower court's denial of relief, finding that *Hurst v. State* does not apply retroactively to Jennings's sentences of death that became final in 1999. *Jennings v. State*, 237 So. 3d 909, 910 (Fla. 2018).

Jennings 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 V. FLORIDA*, 136 S. Ct. 616 (2016), *AND HURST V. STATE*, 202 So. 3d 40 (Fla. 2016), 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*, 536 U.S. 584 (2002), 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 Jennings seeks certiorari review of the Florida Supreme Court's opinion denying retroactive application of *Hurst v. State* to Petitioner's death sentences. The Florida Supreme Court's denial of the retroactive application of *Hurst* relief to Petitioner's case is based on adequate and independent state grounds; it is not in conflict with any other state court of last review; and it is not in conflict with any federal appellate court. The decision is also not in conflict with this Court's jurisprudence on retroactivity, nor does it violate the Eighth, Fourteenth, or Sixth Amendment. Jennings has not provided any "compelling" reason for this Court to review his case. Therefore, certiorari review should be denied. *See* Sup. Ct. R. 10.

Respondent further notes that this Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of *Hurst v. State*.

*See, e.g., Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112 (Fla.), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505 (Fla.), *cert. denied*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548 (Fla.), *cert. denied*, 138 S. Ct. 1164 (2018); *Cole v. State*, 234 So. 3d 644 (Fla.), *cert. denied*, 2018 WL 1876873 (June 18, 2018); *Kaczmar v. State*, 228 So. 3d 1 (Fla. 2017), *cert. denied,* 2018 WL 3013960 (June 18, 2018); *Zack v. State*, 228 So. 3d 41 (Fla. 2017), *cert. denied*, 2018 WL 1367892 (June 18, 2018); *Jones v. State*, 234 So. 3d 545 (Fla.), *cert. denied*, 2018 WL 1993786 (June 25, 2018).

**The Florida Court's Ruling On The Retroactivity Of Hurst Is A Matter Of State Law.**

The Florida Supreme Court's holding in *Hurst v. State* followed this Court's ruling in *Hurst v. Florida* in requiring that aggravating circumstances be found by a jury beyond a reasonable doubt before a death sentence may be imposed. The Florida Supreme Court then expanded this Court's ruling, requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously

find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State,* 202 So. 3d at 57.

The court subsequently analyzed the retroactive application of *Hurst* in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and *Asay v. State*, 210 So. 3d 1 (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 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 an analaysis under *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980), which is the state-based test for retroactivity. *Witt*, 387 So. 2d at 926 (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).

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 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, 258 (2004) (holding that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review"); *Lambrix v. Sec'y, Fla. Dept. of Corr.*, 872 F.3d 1170, 1182-83 (11th Cir.), *cert. denied*, *Lambrix v. Jones*, 138 S. Ct. 312 (2017) (noting that "[n]o U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable").

The Florida Supreme Court determined that all three *Witt* factors weighed in favor of retroactive application of *Hurst* to cases which became final post-*Ring*. *Mosley*, 209 So. 3d at 1276-83. The Court concluded that "defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring* should not be penalized for the United States Supreme Court's delay in explicitly making this determination." *Id*. at 1283. Thus, the Florida Supreme Court held *Hurst* to be retroactive to *Mosley*, whose case became final in

2009, after the *Ring* decision. *Id*.

Conversely, applying the *Witt* analysis in *Asay*, the Florida Supreme Court held that *Hurst* is not retroactive to any case in which the death sentence was final prior to *Ring*. *Mosley*, 209 So. 3d at 1283. The court specifically noted that *Witt* "provides *more expansive retroactivity standards* than those adoped in *Teague*." *Asay*, 210 So. 3d at 15 (emphasis in original), *quoting Johnson*, 904 So. 2d at 409. However, 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. The court noted that "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. As related to the effect on the administration of justice, the court noted that resentencing is expensive and time consuming and that the interests of finality weighed heavily against retroactive application. *Id*. at 21-22. Thus, the Florida Supreme Court held that *Hurst* was not retroactive to *Asay* since the judgment and sentence became final in 1991, prior to *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.), *cert. denied*, *Hitchcock v. Florida*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla.), *cert. denied*, *Lambrix v. Florida*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla.), *cert. denied*, *Hannon v. Florida*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548, 549 (Fla.), *cert. denied*, *Branch v. Florida*, 138 S. Ct. 1164 (2018).

While Jennings seeks certiorari review of the Florida Supreme Court's utilization of partial retroactivity and its refusal to apply *Hurst* retroactively to his case, this case is not a proper vehicle for certiorari review. Notably, Florida's partial retroactive application of *Hurst* is based on state law, not federal law. This Court has generally held that a state court's retroactivity determinations are a matter of state law rather than federal constitutional law. *Danforth v. Minnesota,* 552 U.S. 264 (2008). State courts may fashion their own retroactivity tests, including partial retroactivity tests. A state supreme court is free to employ a partial retroactivity approach without violating the federal constitution under *Danforth*.

The state retroactivity doctrine employed by the Florida Supreme Court did not violate federal retroactivity standards. The court's expansion of *Hurst v. Florida* in *Hurst v. State* is applicable only to defendants in Florida, and, consequently, subject to retroactivity analysis under state law as set forth in *Witt. Asay,* 210 So. 3d at 15. This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983); *see also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); *Street v. New York*, 394 U.S. 576, 581-82 (1969).

If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010). Florida's retroactivity analysis is a matter of state law. This fact alone militates against the grant of certiorari in this case.

**The Florida Supreme Court's Ruling On Retroactivity Does Not Violate The Eighth Amendment.**

Jennings argues that the Florida Supreme Court's utilization of partial retroactivity is arbitrary and violative of the Eighth Amendment. Jennings specifically claims that using the *Ring* decision date as a cutoff point for retroactivity creates arbitrary results because capital defendants each encounter different delays throughout their proceedings before their case is considered final. Thus, he essentially argues that basing retroactivity analysis on court dates is itself arbitrary. However, all modern retroactivity tests depend on dates of finality.

Traditionally, new rules are applied retroactively only to cases that 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"). *Griffith*, therefore, depends on the date of finality of the direct appeal. Under Jennings's argument, this traditional "pipeline" concept for retroactivity would be considered arbitrary if one defendant with delays in his case receives the benefit of a new rule because his case is not yet final, while another defendant without delays in his case does not receive that same benefit because his case became final

before the other defendant's case with delays. Even a retroactive application of a new development in the law under the traditional analysis will mean that some cases will get the benefit of a new development while other cases will not, depending on a date.

Additionally, the current federal test for retroactivity in the postconviction context, *Teague*, also depends on a date. If a case is final on direct review, the defendant will not receive benefit of the new rule unless one of the exceptions to *Teague* applies. The Florida Supreme Court's line drawing based on a date is no more arbitrary than this Court's line drawing in *Griffith* or *Teague*.

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

Moreover, under the "pipeline" concept, *Hurst* would only apply to the cases that were not yet final on the date of the

decision in *Hurst*; and Jennings certainly would not fit into that category. The difference between the more traditional type of retroactivity and the retroactivity implemented by the Florida Supreme Court is that it stems from the date of the decision in *Ring* rather than from the date of the decision in *Hurst*. In moving the line of retroactive application back to *Ring*, the Florida Supreme Court reasoned that since Florida's death penalty sentencing scheme should have been recognized as unconstitutional upon the issuance of the decision in *Ring*, defendants should not be penalized for time that it took for that determination to be made official in *Hurst*.

Extending relief to more defendants 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 Amendment. The Florida Supreme Court's *Asay* decision was well supported under state law on retroactivity, and it has been consistently applied to all pre-*Ring* defendants. Therefore, the *Ring*-based cutoff for the retroactive application of *Hurst* is not arbitrary like Jennings contends.

Jennings also argues that his death sentences violate the Eighth Amendment because they are not based on unanimous jury recommendations. This argument is entirely without merit. While Jennings seems to imply that this Court has held that the Eighth Amendment mandates unanimous jury recommendations, this Court has

never held as such. Even the Florida Supreme Court plainly acknowledged in its *Hurst v. State* opinion that this Court "has not ruled on whether unanimity is required" in capital cases. *Hurst*, 202 So. 3d at 59.

To the extent that Petitioner may be suggesting 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."); *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.

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 sentences were imposed in accordance with all applicable constitutional principles at the time it was imposed. Petitioner's death sentences are neither unfair nor unreliable because the judge imposed the sentences in accordance with the law existing at the time of his trial. Jennings 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).

Other than speculation, Jennings has neither identified nor established any particular lack of reliability in the proceedings used to impose his death sentences. *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).

Finally, Jennings complains that the sentencing procedure used in his case violated the Eighth Amendment under this Court's ruling in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), because the jury was given instructions informing that its death recommendation was merely advisory. This matter does not merit this Court's review. 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 also 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").

Here, Jennings's jury was properly instructed on its role based on the law existing at the time of his trial. Jennings's jury was informed that it needed to determine whether sufficient aggravating factors existed and, if so, whether the aggravation outweighed the mitigation before the death penalty could be imposed. His jury was also informed that its recommendation would

be given "great weight and deference" by the trial court. The instructions to the jury were certainly proper based on the law at that time. *See Reynolds v. State*, 2018 WL 1633075, *9 (Fla. April 5, 2018) (explaining that under *Romano*, the Florida standard jury instruction at issue "cannot be invalidated retroactively prior to *Ring* simply because a trial court failed to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts"). Accordingly, there was no *Caldwell* violation, and for all the foregoing reasons, certiorari review should be denied.

**The Florida Supreme Court's Application Of Partial Retroactivity Does Not Violate The Equal Protection Clause.**

Lastly, Petitioner contends that it is a Fourteenth Amendment violation to deny retroactive application of *Hurst* to him and other pre-*Ring* inmates, while granting it to post-*Ring* inmates. A criminal defendant challenging the State's application of capital punishment must show intentional discrimination to prove an equal protection violation. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). A "'[d]iscriminatory purpose' . . . implies more than intent as violation or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id*. at 298.

As previously explained in the prior section, the Florida Supreme Court's partial retroactivity ruling was based on the date of the *Ring* decision; it was not based on a purposeful intent to deprive pre-*Ring* death sentenced defendants, like Jennings, relief under *Hurst v. State*. The Florida Supreme Court merely moved the retroactive application of *Hurst* back to *Ring* so that capital defendants would not be penalized for the delay it took to determine that Florida's capital sentencing scheme was unconstitutional. *See Mosley v. State*, 209 So. 3d 1248, 1281 (Fla. 2016) ("We now know after *Hurst v. Florida* that Florida's capital sentencing statute was unconstitutional from the time that the United States Supreme Court decided *Ring*.") The court explained that "[b]ecause Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst*, retroactively to that time." *Id*. at 1280. The Florida Supreme Court has certainly 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.").

The Florida Supreme Court has been entirely consistent in denying *Hurst* relief to those defendants whose convictions and sentences were final when *Ring* was issued in 2002. Jennings is being treated exactly the same as similarly situated murderers. Consequently, Jennings's equal protection argument is meritless.

**Any Possible *Hurst* Error Was Clearly Harmless Based These Facts.**

Finally, certiorari review would also be inappropriate in this case because, assuming any *Hurst* error can be discerned from this record, any such error would be clearly harmless. *Hurst* errors are subject to harmless error review. *See Hurst v. Florida*, 136 S. Ct. at 624; *see also Chapman v. California*, 386 U.S. 18, 23-24 (1967). There is no doubt that the jury would have found existence of the same aggravating circumstances relied upon by the trial judge in imposing the death sentences in this case.

First, Jennings's contemporaneous robbery conviction established beyond a reasonable doubt the existence of an aggravating factor. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Alleyne v. United States*, 570 U.S. 99, 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). Given that Jennings had committed a total of three murders, the other murder convictions could have also rendered Jennings eligible for each sentence of death. § 921.141 (6)(b), Fla. Stat.

Additionally, the remaining aggravating circumstances of CCP and avoiding arrest that were found by the trial court and affirmed by the Florida Supreme Court on appeal were established by overwhelming evidence. Considering all of Jennings's statements, including his confessions to the robbery, his partial confessions to the murders, and as his statements regarding robberies and the importance of witness elimination in general, coupled with the physical evidence in the case linking Jennings to the crimes, the CCP and avoiding arrest aggravators are not subject to any reasonable dispute under the facts of this case. *See Jennings v. State*, 718 So. 2d 144, 146 (Fla. 1998)(addressing Jennings's admissions and statements during various interviews, including Jennings's admission to planning the robbery; his admission to wearing gloves during the robbery and using a knife to tape the victims hands; his admission that his foot slipped in blood by the dead bodies in the freezer; and his directing the police to a canal where they could find evidence of the crimes--

which they did).

This Court's decision in *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.[1] *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

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[1] 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*, 2018 WL 1872180, *5-6 (Ohio, Apr. 18, 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citation omitted); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *Waldrop v. Comm'r, Alabama Dept. of Corr.*, 711 Fed. Appx. 900 (11th Cir. 2017) (unpublished) (rejecting *Hurst* claim and explaining "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict.") (citation omitted). The findings required by the Florida Supreme Court following remand in *Hurst v. State* involving the weighing and selection of a defendant's sentence are not required by the Sixth Amendment. *See, e.g., McGirth v. State*, 209 So. 3d 1146, 1164 (Fla. 2017). There was no Sixth Amendment error in this case.

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)). Any constitutional error in this case was clearly harmless on these facts. Accordingly, certiorari review should be denied.

## CONCLUSION

In sum, the Florida Supreme Court's determination of the retroactive application of *Hurst* under *Witt* is based on an independent state ground and is not violative of federal law or this Court's precedent. Jennings's sentences of death do not violate the Sixth, Eighth, or Fourteenth Amendments, and the retroactivity ruling below does not present this Court with a significant or important unsettled question of law. Nothing in the petition justifies the exercise of this Court's certiorari jurisdiction. Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on this 18th 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: Paul Kalil, Assistant CCRC-South, Capital Collateral Regional Counsel-South, One East Broward Boulevard, Suite 444, Fort Lauderdale, Florida 33301, **kalilp@ccsr.state.fl.us**. All parties required to be served have been served.

/s/ Christina Pacheco
CHRISTINA PACHECO
Counsel for Respondent