DOCKET NO. 18-5065

IN THE SUPREME COURT OF THE UNITED STATES

MANUEL ANTONIO RODRIGUEZ,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

Petitioner was convicted and sentenced to death by a unanimous jury in 1997 for the 1984 murders of Bea Joseph, Sam Joseph, and Genevieve Abraham. Each victim died from gunshot wounds to the head, which were inflicted from shots fired at close range. The Josephs lived in the apartment in which they were found, and Abraham was visiting the Josephs at the time of the crimes. When Abraham was found, her wedding band, diamond watch, and diamond earrings were missing. Petitioner's sentence of death was final on October 2, 2000. Following this Court's decision in *Hurst v. Florida*[1], the Florida Supreme Court decided *Hurst v. State*[2], which held that in order for a defendant to be sentenced to death, the jury must find all the aggravating circumstances outweighed the mitigating circumstances and unanimously vote that the defendant receive the death penalty. Following *Hurst v. State*, the Supreme Court decided *Asay v. State*,[3] which created a bright line retroactivity test where defendants whose sentences of death were finalized prior to this Court's 2002 *Ring v. Arizona*[4] decision would not receive retroactive relief. Petitioner's case falls in this category of defendants.

Petitioner sought postconviction relief through the Florida Supreme Court but was denied. Petitioner's petition seeking certiorari review gives rise to the following question presented:

Whether certiorari review should be denied where (1) the Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florid*a and *Hurst v. State*, which relies on state law to provide that the *Hurst* cases are not retroactive to defendants whose death sentences were final when this Court decided *Ring v. Arizona*, does not violate the Eighth or Fourteenth Amendments; (2) the Florida Supreme Court's failure to give full retroactive effect to the *Hurst* decisions does not violate the Supremacy Clause; and (3) the Florida Supreme Court's decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law?

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[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016).
[2] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).
[3] *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017).
[4] *Ring v. Arizona*, 536 U.S. 584 (2002).

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the Florida Supreme Court:

1) Manuel Antonio Rodriguez, Petitioner in this Court, was the Appellant below.

2) Respondent, the State of Florida, was the Appellee below.

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The decision of the Florida Supreme Court is reported at *Rodriguez v. State*, 237 So. 3d 918 (Fla. 2018)

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on January 31, 2018. Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

Petitioner was convicted of the first-degree murder of Bea Joseph, the first-degree murder of Sam Joseph, the first-degree murder of Genevieve Abraham, and the armed burglary of the Josephs' apartment with an assault and was sentenced to death in 1997. *Rodriguez v. State*, 753 So. 2d 29, 35 (Fla. 2000). At the penalty phase proceeding, the State presented evidence that Petitioner had 71 prior violent felony convictions, which consisted of twenty-three convictions of armed robbery, seventeen for armed kidnapping, eight for aggravated assault with a firearm, numerous convictions for carrying a concealed weapon and possession of a firearm by a convicted felon, and the contemporaneous murders in this case. *Id.* at 33-35 (Fla. 2000). In addition, Petitioner was on probation and parole at the time of the murders. *Id.*

After the jury unanimously recommended the death penalty, the trial court followed the jury's recommendation and sentenced Petitioner to death on all counts. The court found the following six aggravating factors had been proved as to each murder: "(1) under a sentence of imprisonment-great weight; (2) prior violent felony, based on Petitioner's prior convictions and the contemporaneous murders of the other victims in this case-very great weight; (3) during the course of a burglary-great weight; (4) avoid arrest-great weight; (5) pecuniary gain-great weight; and (6) cold, calculated and premeditated (CCP)-great weight." *Id.* at 35. In mitigation, the trial court found: (1) Petitioner had suffered from some mental deficit-some weight; (2) Petitioner abused drugs-substantial weight; (3) Petitioner was a loving family

member-minimal weight; (4) Petitioner showed compassion for others-minimal weight; (5) Petitioner was under financial pressure-minimal weight; and (6) Petitioner had worked well in a family business-minimal weight. *Id.*

Petitioner appealed to the Florida Supreme Court, which affirmed his convictions and sentences. *Id.* Petitioner's initial petition for writ of certiorari to this Court was denied and his sentence became final on October 2, 2000. *Rodriguez v. Florida*, 531 U.S. 859 (2000). Petitioner then sought postconviction relief, and the Florida Supreme Court affirmed the postconviction court's denial of his motions. *See Rodriguez v. State*, 39 So. 3d 275, 282-83 (Fla. 2010). Subsequently, Petitioner sought federal habeas relief, which was denied by the federal district court and affirmed on appeal. *Rodriguez v. Buss*, 2011 WL 1827899 (S.D. Fla., May 12, 2011). *Rodriguez v. Sec'y, Florida Dept. of Corrections*, 756 F.3d 1277 (11th Cir. 2014). Petitioner sought certiorari review of that decision, which was denied on March 30, 2015. *Rodriguez v. Jones*, 135 S. Ct. 1707 (2015).

On January 10, 2017, Petitioner filed a second successive motion for postconviction relief raising claims for relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), as interpreted in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). On May 4, 2017, the postconviction court denied Petitioner's successive motion for postconviction relief holding that because his sentence was finalized prior to *Ring v. Arizona*, 536 U.S. 584 (2002), the postconviction court was bound by the Florida Supreme Court's decision in *Asay v. State,* 210 So. 3d 1 (Fla. 2016)*, cert. denied*, 138

S. Ct. 41 (2017). On June 29, 2017, Petitioner appealed the postconviction court's decision to the Florida Supreme Court, and on July 12, 2017, the court stayed Petitioner'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*, 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*. After the court decided *Hitchcock*, it issued an order to show cause on September 25, 2017 directing Petitioner 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* does not apply retroactively to Petitioner's sentence of death that became final in 2000. *Rodriguez v. State*, 237 So. 3d 918 (Fla. 2018).

Petitioner now seeks certiorari review of the Florida Supreme Court's decision. This brief in opposition follows.

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 requests this Court review the Florida Supreme Court's decision affirming the denial of his successive postconviction motion, arguing that the state court's holding with respect to retroactivity violates the Eighth and Fourteenth Amendments. He also urges that the Florida Supreme Court's decision not to give full retroactive effect to the *Hurst* cases violates the Supremacy Clause pursuant to *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

As will be shown, nothing about the Florida Supreme Court's retroactivity decision is inconsistent with the United States Constitution. Petitioner does not provide any "compelling" reason for this Court to review his case. *See* Sup. Ct. R. 10. Indeed, Petitioner cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision in *Rodriguez v. State*, 237 So. 3d 918 (Fla. 2018), in which the court determined that Petitioner was not entitled to relief because *Hurst v. State* was not retroactive to his death sentence. Nothing presented in the petition justifies the exercise of this Court's certiorari jurisdiction.

The Florida Court's Ruling On Retroactivity Does Not Violate Equal Protection Or The Eighth Amendment.

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

ruling in *Hurst v. Florida*, in requiring the aggravating circumstances to 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."[5] *Hurst*, 202 So. 3d at 57.

In *Asay*, 210 So. 3d at 22, the Florida Supreme Court ruled that, as a matter of state law, *Hurst v. State* is not retroactive to any case in which the death

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[5] While the Florida Supreme Court requires these additional findings, under this Court's jurisprudence, there was no Sixth Amendment error in this case. Petitioner's contemporaneous murder convictions and prior violent felonies constituted aggravators under well-established Florida law. Consequently, unlike *Hurst*, Petitioner's eligibility for a death sentence was supported by jury findings. *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)); *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). 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.[5] *See e.g. State v. Mason*, ___ N.E.3d ___, 2018 WL 1872180, *5-6 (Ohio, April 18, 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citation omitted)

sentence was final prior to the June 24, 2002, decision in *Ring*. *See also Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) (holding that, as a matter of state law, *Hurst v. State* does not apply retroactively to defendants whose sentences were not yet final when this Court issued *Ring*). Florida's partial retroactive application of *Hurst v. State* is not constitutionally unsound and does not otherwise present a matter that merits the exercise of this Court's certiorari jurisdiction.

This Court has held that, in general, a state court's retroactivity determinations are a matter of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264 (2008). State courts may fashion their own retroactivity tests, including partial retroactivity tests. A state supreme court is free to employ a partial retroactivity approach without violating the federal constitution under *Danforth*. Thus, the state retroactivity doctrine employed by the Florida Supreme Court did not violate federal retroactivity standards. The Florida Supreme Court's expansion of *Hurst v. Florida* in *Hurst v. State* is applicable only to defendants in Florida, and, consequently, subject to retroactivity analysis under state law as set forth in *Witt v. State*, 387 So. 2d 922 (Fla), *cert. denied*, 449 U.S. 1067 (1980). *See Asay*, 210 So. 3d at 15 (noting that Florida's *Witt* analysis for retroactivity "provides *more expansive retroactivity standards*" than the federal standards articulated in *Teague v. Lane*, 489 U.S. 288 (1989)) (emphasis in original; citation omitted).

This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for

the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983); *see also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); *Street v. New York*, 394 U.S. 576, 581-82 (1969) (same). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010).

Florida's retroactivity analysis is a matter of state law. This fact alone militates against the grant of certiorari in this case. It should also be noted that this Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of *Hurst v. State*. *See*, *e.g.*, *Jones v. State*, 234 So. 3d 545 (Fla. 2018), *cert. denied*, 17-8652, 2018 WL 1993786, at *1 (June 25, 2018); *Cole v. State*, 234 So. 3d 644 (Fla. 2018), *cert. denied*, No. 17-8540, 2018 WL 1876873, at *1 (June 18, 2018); *Zack v. State*, 228 So. 3d 41 (Fla. 2017), *cert. denied*, 17-8134, 2018 WL 1367892, at *1 (June 18, 2018); *Branch v. State*, 234 So. 3d 548 (Fla. 2018), *cert. denied*, 138 S. Ct. 1164 (2018); *Kaczmar v. State*, 228 So. 3d 1 (Fla. 2017), *cert. denied*, 138 S. Ct. 1973 (2018); *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017); *Hannon v. State*, 228 So. 3d 505 (Fla. 2017), *cert. denied*, 138 S. Ct. 441 (2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112 (Fla.

2017), *cert. denied*, 138 S. Ct. 312 (2017).

Petitioner argues that the Florida Supreme Court's partial retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* violates the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Conversely, the Florida Supreme Court's retroactivity ruling is not contrary to federal law and does not conflict with this Court's precedent.

New rules of law such as the rule announced in *Hurst v. Florida* do not usually apply to cases that are final. *See Whorton v. Bockting*, 549 U.S. 406, 407 (2007) (explaining the normal rule of nonretroactivity and holding the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), was not retroactive). Additionally, the general rule is one of nonretroactivity for cases on collateral review, with narrow exceptions. *See Teague v. Lane*, 489 U.S. 288, 307 (1989) (observing that there were only two narrow exceptions to the general rule of nonretroactivity for cases on collateral review). Furthermore, certain matters are not retroactive at all. *Hurst v. Florida* was based on this Court's holding in *Ring v. Arizona*, which in turn was based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court has held that "*Ring* announced a new *procedural rule* that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (emphasis added).

In *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), this Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all

cases, state or federal, pending direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Under this "pipeline" concept, only those cases still pending direct review or not yet final would receive the benefit from alleged *Hurst* error. Retroactivity under *Griffith* depends on the date of the finality of the direct appeal. Under *Teague*, if a case is final on direct review, the defendant will not receive the benefit of the new rule unless one of the narrow exceptions announced in *Teague* applies. Again, finality is the critical date-based test under *Teague*. There is nothing about Florida's decision providing partial retroactivity to *Hurst v. Florida* and *Hurst v. State* that is contrary to this Court's retroactivity jurisprudence.

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

Any retroactive application of a new development in the law under any analysis will mean that some cases will get the benefit of a new development, while

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

Petitioner's argument for a violation of the Equal Protection Clause fares no better than his Eighth Amendment argument. See Petition at 24-27. 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 "'Discriminatory purpose' . . . implies more than intent as violation or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 298.

The Florida court's partial retroactivity ruling was based on the date of the *Ring* decision, not based on a purposeful intent to deprive pre-*Ring* death sentenced defendants in general, and Petitioner in particular, relief under *Hurst v. State*. The Florida Supreme Court has been entirely consistent in denying *Hurst* relief to those defendants whose convictions and sentences were final when *Ring* was issued in

2002. Petitioner is being treated exactly the same as similarly situated murderers. Consequently, Petitioner's equal protection claim presents an inappropriate vehicle for this Court's certiorari review.

Additionally, in *Beck v. Washington*, 369 U.S. 541 (1962), this Court refused to find constitutional error in the alleged misapplication of Washington law by Washington courts: "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . .' Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Id.* at 554-55 (citation omitted) (emphasizing that Florida's retroactivity decision is a matter of state law and does not violate the constitution).

Therefore, Florida's retroactivity decision is a matter of state law and does not violate the Constitution. As such, Petitioner's claim fails.

Florida's Harmless Error Analysis As To Alleged Hurst Errors Does Not Violate The Eighth Fourteenth Amendments Or This Court's Rulings In *Caldwell V. Mississippi* And *Furman V. Georgia*.

Petitioner claims that Florida's harmless error analysis when reviewing a purported *Hurst* claim violates his constitutional rights and this Court's ruling in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) and *Furman v. Georgia*, 408 U.S. 238 (1972), because the Florida Supreme Court allegedly does not take the whole record into consideration when a *Hurst* error is asserted unanimous recommendation cases; thus, the Florida Supreme Court's harmless error analysis is "automatic and mechanical". *See* Petition at 16-18. Specifically, Petitioner claims that because the

jury was instructed that its death recommendation was advisory, there may still be harmful error because a unanimous recommendation does not reveal whether the jury "unanimously agreed that any particular aggravating factor had been proven beyond a reasonable doubt…"; *See* Petition at 18. However, Petitioner's attempt to tie a purported Eighth Amendment and Fourteenth Amendment argument to show *Caldwell* has been violated does not provide an avenue for relief where he is not even entitled to retroactive relief under *Hurst*. Therefore, certiorari review is unnecessary.

Under *Hurst v. State*, a jury must recommend by unanimous vote before the judge can implement a death sentence to the defendant. However, Florida courts have and continue to inform juries that they can only recommend death, as the judge is the ultimate arbiter of whether an individual receives the death penalty. Section 921.141(2)(c) of the Florida Statutes notes that if a jury unanimously votes for death, "the **jury's recommendation to the court shall** be a sentence of death." Fla. Stat. § 921.141(2)(c) (2017). The language of the statute does **not** remove the judge as the ultimate decider of whether the death penalty is imposed. In fact, it is wholly possible that a judge could give a defendant life in prison even though a jury unanimously voted for the death penalty. *See Hurst*, 202 So. 3d at 56 (finding this Court's constructions in *Furman v. Georgia* and its progeny cases are clear that "individualized sentencing is required in which the discretion of the jury and the judge in imposing the death penalty will be narrowly channeled, and in which the

circumstances of the offense, the character and record of the defendant, and any evidence of mitigation that may provide a basis for a sentence less than death must be a part of the sentencing decision." (citation omitted)).

Accordingly, as preliminary matter, Petitioner cannot get around the fact that his case was finalized prior to *Ring*, and he is not entitled to receive retroactive relief under *Hurst* to suggest he is eligible for *Caldwell* relief. The Florida Supreme Court has already weighed on the application of *Caldwell* to *Hurst*, stating that a *Hurst* based *Caldwell* claim "cannot be more retroactive than *Hurst* because the rights announced in *Hurst* serve as a basis" for a *Caldwell* claim. *Reynolds v. State*, No. SC17-793, 2018 WL 1633075, at *10 (Fla. Apr. 5, 2018). This is to say that if the rights were not retroactive prior to *Ring*, a pre-*Ring* claim alleging those same rights is meritless because a trial court cannot "guess at completely unforeseen changes in the law by later appellate courts." *Id.* at **9-10. Thus, this case would be a uniquely inappropriate vehicle for certiorari because this is a postconviction case and this Court would have to address retroactivity before even reaching the underlying jury instruction issue that was analyzed in *Caldwell*.

In *Caldwell*, this Court found that a prosecutor's comments diminishing the jury's sense of responsibility to determining the appropriateness of a death sentence was "inconsistent with the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell*, 472 U.S. at 323 (citing *Woodson v. North Carolina*, 428 U.S. 280, 305

(1976)). To establish constitutional error, 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). Contrary to Petitioner's argument, the jury was properly instructed on its role based on the state law existing at the time of his trial. *See Reynolds v. State*, ___ So. 3d ___, No. SC17-793, 2018 WL 1633075, at **1, 9 (Fla. Apr. 5, 2018) (explaining that under *Romano*, the Florida standard jury instruction "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").

Thus, assuming for a moment any *Hurst* error can be discerned from this record, certiorari review would be inappropriate because such error would be clearly harmless. *Hurst* errors are subject to harmless error analysis. *See Hurst v. Florida*, 136 S. Ct. at 624; *see also Chapman v. California*, 386 U.S. 18, 23-24 (1967). Here, the aggravating circumstances found by the trial court and affirmed by the Florida Supreme Court on appeal were uncontestable (as unanimously found by the jury at the guilt phase of this case) and the jury recommended death 12-0. *See Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016), *cert. denied*, 137 S. Ct. 2218 (2017) (a jury's unanimous recommendation "allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors."). Petitioner's allegation that the rationale in *Davis* has created a *per se* automatic and mechanical harmless error

analysis is conclusively stated without **any** legal support; in fact, as Petitioner concedes, the court still reviews factors, including whether the jury unanimously recommended a death sentence. Therefore, it is misguided to assume that the Florida Supreme Court does not review the record in 12-0 recommendation cases.

To the extent his petition suggests a constitutional violation occurred because the jury did not expressly write down what specific aggravating factors it found, Petitioner's commission of the murder, along with his four contemporaneous convictions which included armed burglary, as well as the finding of 71 prior violent felony convictions, established beyond a reasonable doubt the existence of at least two of the six aggravating factors. *See Apprendi*, 530 U.S. at 490; *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*. Thus, while Petitioner alleges that the judge's order misstating that Petitioner was engaged in the commission of a robbery somehow casts doubt on the validity of what the jury in fact found, it is also noteworthy that the jury in its verdict form unanimously and expressly found him guilty beyond a reasonable doubt of four

concurrent felonies. *See* Pet. App. C.

Moreover, Petitioner's jury was in fact properly instructed. A Florida jury's decision regarding a death sentence was, **and remains, an advisory recommendation**. *See Dugger v. Adams*, 489 U.S. 410 (1989); *see also* § 921.141(2)(c), Fla. Stat. (2017) (providing that "[i]f a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death") (emphasis added). Thus, there was no violation of *Caldwell* because there were no comments or instructions to the jury that "improperly described the role assigned to the jury by local law." *Romano*, 512 U.S. at 9. Petitioner's jury was accurately advised that its decision was an advisory recommendation that would be accorded "great weight." The jury was also 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. Therefore, Petitioner's argument fails.

In sum, there is no conflict between the Florida Supreme Court's decision and this Court's Eighth Amendment or Equal Protection Clause jurisprudence. Nothing in Petitioner's claim demonstrates a conflict between the Florida Supreme Court's decision and any decision of this Court. There is also no conflict between the Florida Supreme Court and the high courts of other states or federal appellate courts. On the contrary, this Court has denied petitions concerning two similar *Caldwell* issues in *Cole* and *Jones*. *Cole*, 2018 WL 1876873, at *1; *Jones*, 2018 WL 1993786, at *1.

Accordingly, this Court should deny Petitioner's request for certiorari review because the Florida Supreme Court's application in *Hurst v. State* is based on adequate and independent state grounds and does not violate Petitioner's Eighth or Fourteenth Amendment rights.

The Florida Supreme Court's Failure To Apply Full Retroactive Effect To The Hurst Decisions Does Not Violate The Supremacy Clause.

Petitioner contends that the Florida Supreme Court's failure to apply full retroactivity to *Hurst v. Florida* and *Hurst v. State* violates the Supremacy Clause. In doing so, he asserts that the Florida court created a new substantive rule in *Hurst v. State* which must, pursuant to *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), be applied retroactively to all cases in which alleged *Hurst* error occurred.

Petitioner's reliance on *Montgomery* for this proposition is misplaced. In *Montgomery*, Louisiana ruled that this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which held that a juvenile could not be sentenced to mandatory life in prison without the possibility of parole, did not apply retroactively. *Montgomery*, 136 S. Ct. at 727. This Court reversed Louisiana's holding because *Miller* "announced a substantive rule of constitutional law." *Id.* at 734. The rule in *Miller* was substantive rather than procedural because it placed a particular punishment beyond the State's power to impose. *See Schriro*, 542 U.S. at 352 (defining a substantive rule as a new rule that places "particular conduct or persons" "beyond the State's power to punish"). In other words, *Miller* categorically prevented the State from imposing a mandatory life sentence on anyone who was a juvenile when

he or she committed a crime. *Id.* Therefore, because *Miller* was a substantive rule, it applied retroactively regardless of when a qualifying defendant's conviction became final. *Montgomery*, 136 S. Ct. at 729 (holding that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.").

Unlike the ruling in *Miller*, the rulings in *Hurst v. Florida* and *Hurst v. State* were procedural, not substantive. *See Montgomery*, 136 S. Ct. at 730 ("Procedural rules . . . are designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'") (emphasis in original; quoting *Schriro*, 542 U.S. at 353). *See also Schriro*, 542 U.S. at 352 ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.").

Petitioner cites to *Welch v. United States*, 136 S. Ct. 1257 (2016), in support of his argument but misstates its impact. *See* Petition at 30. This Court in *Welch* did not overrule *Schriro*. Indeed, the *Welch* decision supports Respondent's position that the determination of the new *Hurst* rule is considered procedural:

> "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353, 124 S. Ct. 2519. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." Id., at 351-352, 124 S. Ct. 2519 (citation omitted); *See Montgomery*, *supra*, at ----, 136 S. Ct. at 728. Procedural rules, by contrast, "regulate only the manner of determining the defendant's culpability." *Schriro*, 542 U.S. at 353, 124 S. Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable."

> *Ibid.* "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.,* at 352, 124 S. Ct. 2519.

Welch, 136 S. Ct. at 1264-65. The *Welch* Court found that the rule in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which "changed the substantive reach of the Armed Career Criminal Act," was a substantive, rather than procedural, change because it altered the class of people affected by the law. *Welch*, 136 S. Ct. at 1265. In explaining how the rule in *Johnson* was not procedural, this Court in *Welch* stated, "[i]t did not, for example, allocate decision making authority between judge and jury, *ibid*, or regulate the evidence that the court could consider in making its decision." *Welch*, 136 S. Ct. at 1265 (citation omitted).

Here, the new rule announced in *Hurst v. Florida*, and expanded in *Hurst v. State*, allocated the authority to make certain capital sentencing decisions from the judge to the jury. This is precisely how this Court in *Welch* defined a procedural change. Based on this Court's precedent, there can be no doubt that the *Hurst* rule is a procedural rule. Accordingly, the Supremacy Clause does not require that Florida give full (or indeed *any*) retroactive effect on collateral review to the rule announced in *Hurst v. Florida* or *Hurst v. State*.

In sum, the questions Petitioner presents do not offer any matter which comes within the parameters of Rule 10 of the Rules of the United States Supreme Court. Petitioner does not identify any direct conflict with this Court or other courts, nor does he offer any unresolved, pressing federal question. He challenges

only the application of this Court's well-established principles to the Florida Supreme Court's decision. As Petitioner does not demonstrate any compelling reasons for this Court to exercise its certiorari jurisdiction under Rule 10, this Court should deny the petition.

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 2nd day of August 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: Marie-Louise Samuels Parmer, Special Assistant CCRC, Office of the Capital Collateral Regional Counsel – South, 1 East Broward Boulevard, Suite 444, Fort Lauderdale, Florida 33301, marie@samuelsparmerlaw.com.

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