NO. 18-5078

IN THE SUPREME COURT OF THE UNITED STATES

BRUCE DOUGLAS PACE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

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Capital Case

Question Presented

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

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Opinion Below

The decision of the Florida Supreme Court appears as *Pace v. State*, 237 So. 3d 912 (Fla. 2018).

Jurisdiction

This Court's jurisdiction to review the final judgment of the Florida Supreme Court is authorized by 28 U.S.C. § 1257. However, because the Florida Supreme Court's decision in this case is based on adequate and independent state grounds, this Court should decline to exercise jurisdiction as no federal question is raised. 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. No compelling reasons exist in this case and this Petition for a writ of certiorari should be denied. Sup. Ct. R. 10.

Statement of the Case and Facts

Petitioner, Bruce Douglas Pace, was convicted of first-degree murder and armed robbery. *Pace v. State*, 596 So. 2d 1034 (Fla. 1992).

> The events in this case took place in November 1988 in and around Bagdad, Florida, a small town in Santa Rosa County. In the evening of November 4, 1988, Frankie Covington, the daughter-in-law of Floyd Covington, a taxicab driver, contacted the Santa Rosa County Sheriff's Office and reported Floyd Covington missing. Three days later, Sheriff's deputies found Covington's bloodstained taxicab in a wooded area near Bagdad. Bloodstain patterns indicated that a passenger shot Covington while Covington was sitting in the taxicab's driver's seat. On November 10, investigators found Covington's body in another wooded area approximately twelve miles from where the taxicab was located. Covington had been shot twice in the chest with a shotgun. A shotgun shell was found inside Covington's chest cavity, indicating that the shotgun had been fired at a very close range. The medical examiner's office fixed the time of death as sometime on November 4.
>
> On December 14, 1988, a Santa Rosa County grand jury returned a two-count indictment against Bruce Douglas Pace charging Pace with first-degree murder and armed robbery. At his arraignment, the Santa Rosa County Circuit Court declared Pace indigent and appointed two lawyers, Samuel Hall and Randall Etheridge, to represent him. Pace admitted to these attorneys that he killed Covington but, as was his right, he entered a plea of not guilty and stood trial before a jury. The State sought the death penalty.
>
> The trial began in the Santa Rosa County Circuit Court on August 23, 1989, before Judge Ben Gordon. The State presented evidence that Pace and Covington were close friends and saw each other almost daily. Pace was twenty-nine years old; Covington was seventy years old and on Social Security. Though they were not related, Covington was like an uncle to Pace.

Angela Pace, a cousin, testified that, on November 3, Pace told her that he was going to do something he "hated to do" because he needed money. Orestine Franklin, Pace's aunt, testified that she saw Pace driving Covington's taxicab the next day, November 4.

Michael Green, a childhood friend of Pace, testified that sometime during the day of November 5, he and Pace went to a wooded area adjacent to a vacant house to shoot squirrels with Pace's 12-gauge shotgun. Pace retrieved his shotgun from some shrubbery on the side of the vacant house; when they finished shooting, he left the shotgun on the front porch of the house.

Harvey Rich, Pace's stepfather, identified the shotgun as one owned by Pace's brother. Rich also testified that he found two shotgun shells in his front yard on the evening of November 5. These shells were identical to the shotgun shell found inside the victim's body.

After Rich identified the shotgun, he repeated a conversation he had with Pace on the morning of November 7. Pace lived with Rich and Pace's mother, Lillian Rich. On November 7, Pace, who had been away from the Rich home for several days, returned to the residence and told Rich that he was in trouble and needed to leave. When Rich sought an explanation, Pace related the following story. On the night of November 3, Covington drove Pace to Rich's house. After Covington dropped him off, Pace discovered that he had lost his house key, so he entered the house through an open window. When he went into his bedroom, someone choked him and he lost consciousness. He awoke in a wooded area several miles away, lying next to a shotgun and Covington's taxicab. When he noticed blood splattered about the cab, he took the shotgun and fled the scene. Harvey and Lillian Rich were at home at the time Pace claimed to have encountered the intruder in his bedroom. The prosecutor asked them whether they had later observed any signs of struggle in the house or in Pace's room. Both said that they had not.

In questioning Rich on cross-examination, Randall Etheridge, who served as lead defense counsel during the guilt phase of the trial, implied that an intruder could have been in the house and attacked Pace without awakening the Riches or leaving any signs of a scuffle. This questioning laid the groundwork for Etheridge's closing argument to the jury that someone other than Pace killed Covington.

The State rested its case on August 25. Pace rested his case moments later without calling any witnesses. After closing argument and receipt

of the court's instructions, the jury retired to deliberate. Two hours later, the jury returned a verdict of guilty on both counts of the indictment.

In the penalty phase, which began the next day, the State introduced, as an exhibit, a certified copy of a judgment of the Santa Rosa County Circuit Court dated December 4, 1981, adjudging Pace guilty of strong-arm robbery and sentencing him to prison for fifteen years. Robert Mann, a probation officer for the State of Florida, testified that Pace was on parole at the time of the Covington murder. Pace had been released from prison on August 20, 1986.

Samuel Hall, lead defense counsel for Pace in the penalty phase, called five witnesses. Santa Rosa County corrections officer Paul Campbell testified that Pace was a model prisoner, "extremely cooperative," "respectful," and gave no trouble. Hurley Manning, Pace's high school football coach, testified that Pace was hard working and the "type of kid that you would like to have in the program." Robert Settles, Pace's high school shop teacher who, after leaving teaching, had opened a truss manufacturing business and hired Pace to cut trusses, testified that Pace had been a master sawman with great potential but had not always been reliable. Evelyn Rich, Pace's aunt, testified that Pace was a "loving, caring person" who came from a good, supportive family. Finally, Pace's mother Lillian Rich pleaded compassionately for her son's life. She described how he worked to support the family when he was just thirteen years old after his stepfather left the home. She also testified that Pace suffered a head injury as a young child that rendered him unconscious.

In closing argument, the prosecutor argued that five aggravated circumstances dictated a death penalty verdict: (1) Pace was on parole at the time of the murder; (2) Pace had been previously convicted of a violent felony; (3) he committed the murder during a robbery; (4) Pace committed the crime to avoid arrest; and (5) he committed the murder for financial gain. Hall, in response, argued that the prosecutor had exaggerated the aggravating circumstances. He urged the jury to have mercy on Pace because Pace was a human being and a good person with a good heart.

The jury recommended by a vote of seven to five that Pace be sentenced to death. The trial court followed the jury's recommendation and, on November 16, 1989, sentenced Pace to death for first-degree murder and fifteen years imprisonment for the armed robbery charge. The court found three aggravating circumstances: (1) Pace was on parole at the

> time of the murder; (2) Pace had been previously convicted of a violent felony; and (3) the murder was committed during the course of a robbery. The court found no mitigating circumstances.

Pace v. McNeil, 556 F.3d 1211, 1212-15 (11th Cir. 2009).

The judgment and sentence became final upon denial of certiorari by the United States Supreme Court on October 5, 1992. *Pace v. Florida*, 506 U.S. 885 (1992); Fla. R. Crim. P. 3.851(d)(1)(B) (A judgment and sentence become final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.").

The Florida Supreme Court affirmed the denial of Petitioner's postconviction motion. *Pace v. State*, 854 So. 2d 167 (Fla. 2003) (*cert. denied, Pace v. Florida*, 540 U.S. 1153 (2004)). Petitioner sought a writ of habeas corpus in federal court, which was denied. The Eleventh Circuit Court of Appeals affirmed the denial of Petitioner's writ of habeas corpus. *Pace*, 556 F.3d 1211 (*cert. denied, Pace v. McNeil*, 130 S.Ct. 190 (2009)).

In *Hurst v. Florida*, this Court held that Florida's capital sentencing scheme was unconstitutional pursuant to *Ring*'s[1] determination that the Sixth Amendment requires a jury to find the existence of an aggravating circumstance which qualifies a defendant for a sentence of death. *Hurst v. Florida*, 136 S.Ct. 616 (2016). On remand in *Hurst v. State*, the Florida Supreme Court held that in capital cases, the jury must unanimously and expressly find that the aggravating factors were proven beyond a

[1] *Ring v. Arizona*, 536 U.S. 584 (2002).

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.[2] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied, Florida v. Hurst*, 137 S.Ct. 2161 (2017).

In *Mosley*, the Florida Supreme Court held that *Hurst* applies retroactively to cases which became final after the decision was issued in *Ring* on June 24, 2002. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). On the same day in *Asay*, the Florida Supreme Court held that *Hurst* does not apply retroactively to cases which became final prior to *Ring*. *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), *cert. denied, Asay v. Florida*, 138 S.Ct. 41 (2017).

Shortly after the *Hurst* decisions, Petitioner raised a claim asserting that he should be entitled to relief pursuant to *Hurst*. Since Petitioner's case became final in 1992, the Florida Supreme Court denied Petitioner's claim that *Hurst* should apply retroactively to him. *Pace*, 237 So. 3d at 913. Petitioner then filed a petition for a writ of certiorari in this Court from the Florida Supreme Court's decision. This is the State's brief in opposition.

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[2] 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).

Reasons for Denying the Writ

There is no Basis for Certiorari Review of the Florida Supreme Court's Denial of Retroactive Application of *Hurst* to Petitioner.

Petitioner seeks certiorari review of the Florida Supreme Court's decision holding that *Hurst* is not retroactive to Petitioner because his case became final pre-*Ring* in 1992. *Pace*, 237 So. 3d at 913. The Petition alleges that the Florida Supreme Court's refusal to retroactively apply *Hurst* to pre-*Ring* cases is in violation of the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection. (Petition at 2-4). However, the Florida Supreme Court's retroactive application of *Hurst* to only post-*Ring* cases does not violate the Eighth or Fourteenth Amendment. Further, the Florida Supreme Court's denial of retroactive application to Petitioner 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. Thus, Petitioner's request for certiorari review should be denied.[3]

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[3] 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., Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S.Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), *cert. denied*, *Lambrix v. Florida*, 138 S.Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017), *cert. denied*, *Hannon v. Florida*, 138 S.Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548, 549 (Fla. 2018), *cert. denied*, *Branch v. Florida*, 138 S.Ct. 1164 (2018); *Cole v. State*, 234 So. 3d 644 (Fla. 2018), *cert. denied*, 17-8540, 2018 WL 1876873 (June 18, 2018); *Kaczmar v. State*, 228 So. 3d 1 (Fla. 2017), *cert. denied*, 17-8148, 2018 WL 3013960 (June 18, 2018); *Zack, III v. State*, 228 So. 3d 41 (Fla. 2017), *cert. denied*, 17-8134,

This Court does not review state court decisions that are based on adequate and independent state grounds. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("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."). Since *Hurst* is not retroactive under federal law, the retroactive application of *Hurst* is solely based on a state test for retroactivity. Because the retroactive application of *Hurst* is based on adequate and independent state grounds, certiorari review should be denied.[4]

The Florida Supreme Court first analyzed the retroactive application of *Hurst*

2018 WL 1367892 (June 18, 2018).

[4] Aside from the question of retroactivity, certiorari would be inappropriate because there is no underlying federal constitutional error. *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. Petitioner became eligible for a death sentence by virtue of his guilt phase conviction for the contemporaneous violent felony of armed robbery. The unanimous verdict by Petitioner's jury establishing his guilt of this contemporaneous crime, an aggravator under well-established Florida law, was clearly sufficient to meet the Sixth Amendment's factfinding requirement. *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"). *See also 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."); *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.").

in *Mosley* and *Asay*. *Mosley*, 209 So. 3d at 1276-83; *Asay*, 210 So. 3d at 15-22. In *Mosley*, the Florida Supreme Court held that *Hurst* is retroactive to cases which became final after the June 24, 2002, decision in *Ring*. *Mosley*, 209 So. 3d at 1283. In determining whether *Hurst* should be retroactively applied to *Mosley*, the Florida Supreme Court conducted a *Witt* analysis, the state-based test for retroactivity. *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 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, 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.*

Dep't of Corr., 872 F.3d 1170, 1182-83 (11th Cir. 2017), *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."[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*, the Florida Supreme Court held that *Hurst* is not retroactive to any case in which the death sentence was final pre-*Ring*. *Mosley*, 209 So. 3d at 1283. The Court specifically noted that *Witt* "provides *more expansive retroactivity standards* than those adoped in *Teague*." *Asay*, 210 So. 3d at 15 (emphasis in original) (quoting *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005)). However, the Court determined that prongs two and three of the *Witt* test,

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[5] Under this rationale, it would not make sense only to grant relief to those who continued to raise *Ring* in the 14 years between *Ring* and *Hurst* as this would encourage the filing of frivolous claims in the hope that subsequent vindication could provide a basis of relief for a future change in the law. Nor should a defendant who failed to raise a claim that appeared to be well settled against him/her be punished for not raising what he/she believed to be a frivolous claim.

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. 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, 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, Hitchcock v. Florida*, 138 S.Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), *cert. denied, Lambrix v. Florida*, 138 S.Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017), *cert. denied, Hannon v. Florida*, 138 S.Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548, 549 (Fla. 2018), *cert. denied, Branch v. Florida*, 138 S.Ct. 1164 (2018). This distinction between cases which were final pre-*Ring* versus cases which were final post-*Ring* is neither arbitrary nor capricious.

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"); *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992) (applying *Griffith* to Florida defendants); *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*. This type of traditional retroactivity can depend on different factors, such as "delays in the clerk's transmittal of the direct appeal record to the Florida Supreme Court, or whether direct appeal counsel sought extensions of time to file a brief"; etc. (Petition at 3). Even under the "pipeline" concept, cases whose direct appeal was decided on the same day might have their judgment and sentence become final on either side of the line for retroactivity, such as Petitioner's example of *Bowles* and *Card*. *Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613 (Fla. 2001).[6] 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.[7] Yet,

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[6] Though both *Bowles* and *Card* were both decided on October 11, 2001, in *Bowles*, the rehearing was denied and the Mandate was issued January 10, 2002, but in *Card*, the rehearing was denied and the Mandate was issued December 20, 2001.

[7] Petitioner uses the example of *Johnson* and *Calloway*. Although *Johnson* originally became final February 21, 1984, subsequent litigation led to a new trial being granted in 1987 and the 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.*

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*. 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 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

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State, 44 So. 3d 51, 74 (Fla. 2010). After a new penalty phase in 2013, Johnson's case was pending direct appeal when *Hurst* was decided. *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016). As such, though Johnson's crime occurred in the 1980s, he receives the benefit of *Hurst* because his judgment and sentence were not final pre-*Hurst*. Similarly, in *Calloway*, although the crime occurred in 1997, the trial was not completed until 2009 and Petitioner's judgment and sentence were not final when *Hurst* was issued. *Calloway v. State*, 210 So. 3d 1160, 1200 (Fla. 2017). These two scenarios would both receive the benefit of *Hurst* under the "pipeline" concept.

alike."). Unquestionably, extending relief to more individuals,[8] 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 also attempts to raise a *Caldwell* claim in this section. (Petition at 13-14); *Caldwell v. Mississippi*, 472 U.S. 320 (1987). As this claim was not raised below,[9] it is not properly before this Court. *See Adams v. Robertson*, 520 U.S. 83, 86-87 (1997) ("we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court"); *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (This Court does not ordinarily review a claim not presented to the court below.); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (This Court sits as a "court of final review and not first view."). In addition to not being properly presented below, this Court would first have to resolve the retroactivity question before even addressing any claimed violation of *Caldwell.*

In order to establish constitutional error under *Caldwell*, a defendant must

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[8] Approximately 150 defendants whose convictions became final post-*Ring* are being re-sentenced pursuant to *Hurst*. Death Penalty Information Center, Florida Death-Penalty Appeals Decided in Light of *Hurst*, available at https://deathpenaltyinfo.org/node/6790 (last visited July 9, 2018).

[9] Petitioner cited *Caldwell* in passing in his Response to the Florida Supreme Court's Order to Show Cause as an argument as to why he believes the State could not prove any *Hurst* error in this case was harmless beyond a reasonable doubt.

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). Since the jury in this case was unquestionably properly informed of its role in sentencing Petitioner at the time of trial, this claim lacks merit. *See Truehill v. Florida*, 138 S.Ct. 3 (2017); *Middleton v. Florida*, 138 S.Ct. 829 (2018); *Guardado v. Jones*, 138 S.Ct. 1131 (2018). Therefore, there was no *Caldwell* violation.

The Florida Supreme Court's determination of the retroactive application of *Hurst* under *Witt* is based on an adequate and independent state ground and is not violative of federal law or this Court's precedent. Thus, certiorari review should be denied.

Hurst is Not Retroactive Under Federal Law Because It Invoked a Procedural, Not a Substantive, Change.

Petitioner also argues that *Hurst* provided a substantive change in the law and thus should be afforded full retroactive application under federal law pursuant to *Miller*. (Petition at 11); *Miller v. Alabama*, 567 U.S. 460 (2012). However, *Hurst*, like *Ring*, was a procedural change, not substantive one. *See Summerlin*, 542 U.S. at 358 ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review."). Like *Ring*, *Hurst* is not retroactive under federal law. *See Lambrix*, 872 F.3d at 1182 ("No U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable."); *see also Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (holding that "*Hurst* does not apply retroactively to cases on collateral review"); *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (noting that this

Court had not made *Hurst* retroactive to cases on collateral review); *In re Jones*, 847 F.3d 1293, 1295 (10th Cir. 2017) ("the Supreme Court has not held that *Hurst* announced a substantive rule").

In *Montgomery*,[10] this Court found the change, a prohibition against mandatory life sentences without parole for juvenile offenders, was substantive because "it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status' — that is juvenile offenders . . ." and retroactive because "the vast majority of juvenile offenders — "'faces a punishment that the law cannot impose upon him.'"" *Montgomery*, 136 S.Ct. at 734, *quoting Penry*, 492 U.S. at 330; *Summerlin*, 542 U.S. at 352. However, unlike in *Montgomery*, the Court in *Hurst* did not "conflate[ ] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the *manner of determining* the defendant's culpability.'" *Montgomery*, 136 S.Ct. at 734-35, *quoting Summerlin*, 542 U.S. at 353 (emphasis in original). Thus, *Hurst* is distinguishable from *Montgomery*.

Unlike the change in *Montgomery*, *Hurst* is procedural. In *Hurst* the same class of defendants committing the same range of conduct face the same punishment. Further, unlike the now unavailable penalty in *Montgomery*, the death penalty can still be imposed under the law after *Hurst*. Instead, *Hurst*, like *Ring*, merely "altered the range of permissible methods for determining whether a defendant's conduct is

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[10] *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." *Summerlin*, 542 U.S. at 353. Thus, *Hurst* is a procedural change and not retroactive under federal law.

Petitioner argues 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 and that "evolving standards of decency" and "enhanced reliability and confidence in the result" necessitate unanimous recommendations in all death penalty cases. (Petition at 11). However, the Florida Supreme Court's imposition of the unanimity requirements 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.

To the extent Petitioner suggests that jury sentencing is now required under federal law, this is not the case. See *Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed.") (emphasis in original); *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding that the Constitution does not prohibit the trial judge from "impos[ing] a capital sentence"). No case from this Court has mandated jury sentencing in a capital case, and such a holding would require reading a mandate into the Constitution that is simply not there. The Constitution provides a right to trial by jury, not to sentencing by jury.

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. In finding Florida's death penalty unconstitutional, this Court did not invalidate Florida's statutory scheme based on Eighth Amendment narrowing concerns. Implicit in the holding of *Hurst v. Florida* was that Florida's statutory scheme sufficiently narrowed and was in compliance with the Eighth Amendment.

However, many states also add protections that go above and beyond the requirements of the Eighth Amendment. Often times, these additional state based requirements are forward looking in anticipation of evolving standards of decency to ensure that their capital sentencing schemes will remain constitutionally valid in the future. These additional protections are based on adequate and independent state grounds. For example, in the wake of *Furman*, many states in redrafting their capital sentencing statutes added a statutory requirement to review whether a capital "sentence is disproportionate to that imposed in similar cases" to "avoid arbitrary and inconsistent results." *Pulley v. Harris*, 465 U.S. 37, 44 (1984); *Furman v. Georgia*, 408 U.S. 238 (1972). As this Court noted, "[p]roportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required." *Pulley*, 465 U.S.

at 50.

Like with the addition of proportionality review, the Florida Supreme Court's *Hurst v. State* requirement of unanimous jury findings and recommendations during capital sentencing procedures is an additional safeguard beyond what is required by the Eighth Amendment. *Hurst*, 202 So. 3d at 61 ("Florida's capital sentencing law will comport with these Eighth Amendment **principles** in order to more surely protect the rights of defendants guaranteed by the Florida and United States Constitutions.") (emphasis added). Because these are additional safeguards that are premised on the principles of but not necessitated by the Eighth Amendment, they are state requirements and thus based on adequate and independent state grounds. *Id.* at 62 (noting that the unanimity requirements are forward looking and will "dispel most, if not all, doubts about the future validity and long-term viability of the death penalty in Florida").

The Florida Supreme Court's determination of the retroactive application of *Hurst* under *Witt* is based on adequate and independent state grounds 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. Thus, there is no violation of federal law and certiorari review should be denied.

Conclusion

Respondent respectfully submits that this Petition for a writ of certiorari should be denied.

Respectfully submitted,
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