CASE NO. 18-5081

IN THE SUPREME COURT OF THE UNITED STATES

ALVIN LEROY MORTON,

***Petitioner*,**

vs.

STATE OF FLORIDA,

***Respondent*.**

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

RESPONDENT'S BRIEF IN OPPOSITION

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[Capital Case]

QUESTION PRESENTED FOR REVIEW

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

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The opinion of the Florida Supreme Court is reported at Morton v. State, 236 So. 3d 242 (Fla.), reh. stricken, 2018 WL 1052713 (Fla. Feb. 26, 2018).

JURISDICTION

The judgment of the Florida Supreme Court was entered on February 2, 2018. Morton's motion for rehearing was stricken and the mandate issued on February 26, 2018. Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

On February 4, 1992, Morton was indicted for the first-degree murders of John Bowers and Madeline Weisser in Pasco County, Florida. Morton was tried and convicted of the two brutal murders. The Florida Supreme Court provided a detailed factual summary in Morton's initial direct appeal opinion. Morton v.

State, 689 So. 2d 259, 260-261 (Fla. 1997). In its opinion, the court found the following facts:

> In the late evening of January 26 or early morning of January 27, 1992, appellant Alvin LeRoy Morton, accompanied by Bobby Garner and Tim Kane, forcibly entered the home of John Bowers and his mother Madeline Weisser. Two other individuals, Chris Walker and Mike Rodkey, went with them to the house but did not enter. Morton carried a shotgun and one of the others possessed a "Rambo" style knife. They began looking around the living room for something to take when Bowers and Weisser entered the room from another area of the house. Morton ordered the two of them to get down on the floor, and they complied. Bowers agreed to give them whatever they wanted and pleaded for his life but Morton replied that Bowers would call the cops. When Bowers insisted that he would not, Morton retorted, "That's what they all say," and shot Bowers in the back of the neck, killing him. Morton also attempted to shoot Weisser, but the gun jammed. He then tried to stab her, but when the knife would not penetrate, Garner stepped on the knife and pushed it in. Weisser ultimately was stabbed eight times in the back of the neck and her spinal cord was severed. Before leaving the scene, either Garner or Morton cut off one of Bowers' pinky fingers. They later showed it to their friend Jeff Madden.
>
> Acting on a tip, police and firefighters went to the victims' residence, where the mattresses had been set on fire, and discovered the bodies. Morton was later found hiding in the attic of his home. The murder weapons were discovered underneath Garner's mother's trailer. Morton later confessed to shooting Bowers and helping make the first cut on Weisser.

Morton v. State, 689 So. 2d 259, 260-261 (Fla. 1997).

On March 6, 1997, the Florida Supreme Court affirmed Morton's two first-degree murder convictions, but remanded for a new penalty phase because the prosecutor, according to the Court, extensively impeached witnesses with prior inconsistent

statements. Morton, 689 So. 2d at 261.

Following the new penalty phase, the jury again recommended death by an 11-1 majority for each murder and on March 1, 1999, the court sentenced Morton to death for both murders. Morton pursued a direct appeal after resentencing. The Florida Supreme Court affirmed the imposition of Morton's death sentences on direct appeal. Morton v. State, 789 So. 2d 324 (Fla. 2001).

The judgment and sentence became final on September 26, 2001. Fla. R. Crim. P. 3.851(d)(1)(B) (A judgment and sentence become final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed").

Following Morton's unsuccessful collateral attacks in state and federal court,[1] Morton filed the instant successive post-conviction motion pursuant to Florida Rule of Criminal Procedure 3.851 challenging his death sentence based on Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). On August 25, 2017, the circuit court summarily dismissed Morton's motion. (Pet. App. B).

[1] Morton subsequently sought post-conviction relief and habeas relief in state court. The Florida Supreme Court rejected his claims for relief. Morton v. State, 995 So. 2d 233 (Fla. 2008), cert. denied, 556 U.S.189 (2009). Morton also unsuccessfully sought federal habeas corpus relief. See Morton v. Secretary, Florida Dept. of Corrections, 684 F.3d 1157 (11th Cir. 2012) (affirming denial of federal habeas relief), cert. denied, 133 S. Ct. 1727 (2013).

After the Florida Supreme Court decided Hitchcock v. State, 226 So. 3d 216 (Fla.), cert. denied, 138 S. Ct. 513 (2017), it issued an order to show cause directing Morton to show why Hitchcock should not be dispositive in his case. In Hitchcock, the Florida Supreme Court reaffirmed its previous holding in Asay v. State, 210 So. 3d 1 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017), ruling that Hurst v. Florida as interpreted by Hurst v. State is not retroactive to defendants whose death sentences were final when this Court decided Ring v. Arizona, 536 U.S. 584 (2002). The Florida Supreme Court affirmed the lower court's denial of relief, finding "Hurst does not apply retroactively to Morton's sentences of death." (citation omitted). (Pet. App. A2).

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

REASONS FOR DENYING THE WRIT

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

Petitioner seeks review the Florida Supreme Court's decision affirming the denial of his successive post-conviction motion and claims that the state court's holding with respect to the retroactive application of Hurst provides this Court a vehicle to address structural error in Florida's capital sentencing scheme. Petitioner's attempts to portray this as something more than a state law retroactivity ruling are not persuasive and do not merit exercise of this Court's certiorari jurisdiction. Indeed, Petitioner largely ignores the question of retroactivity and instead argues his claims as if his case were on review from a direct appeal, not as a long final post-conviction case. The critical issue in this case is retroactivity, and Petitioner almost completely ignores the basis for the state court ruling below.

The Florida Supreme Court's denial of the retroactive application of Hurst to Petitioner's case is based on adequate and independent state grounds, is not in conflict with any other state court of last review, and is not in conflict with any

federal appellate court. This decision is also not in conflict with this Court's jurisprudence on retroactivity, nor does it violate the Eighth and Fourteenth Amendments. Thus, because Petitioner has not provided any "compelling" reason for this Court to review his case, certiorari review should be denied. See Sup. Ct. R. 10.

Respondent would initially note that this Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of Hurst v. State. See, e.g., Asay v. State, 210 So. 3d 1 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017); Hitchcock v. State, 226 So. 3d 216 (Fla.), cert. denied, 138 S. Ct. 513 (2017); Lambrix v. State, 227 So. 3d 112 (Fla.), cert. denied, 138 S. Ct. 312 (2017); Hannon v. State, 228 So. 3d 505 (Fla.), cert. denied, 138 S. Ct. 441 (2017); Branch v. State, 234 So. 3d 548 (Fla.), cert. denied, 138 S. Ct. 1164 (2018); Cole v. State, 234 So. 3d 644 (Fla.), cert. denied, 17-8540, 2018 WL 1876873 (June 18, 2018); Kaczmar v. State, 228 So. 3d 1 (Fla. 2017), cert. denied, 138 S. Ct. 1973 (2018); Zack v. State, 228 So. 3d 41 (Fla. 2017), cert. denied, 17-8134, 2018 WL 1367892 (June 18, 2018). Petitioner offers no persuasive, much less compelling reasons, for this Court to grant review of his case.

I. There Is No Underlying Constitutional Violation

Aside from the question of retroactivity, certiorari would be inappropriate in this case because there is no underlying federal constitutional error as Hurst v. Florida did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. The unanimous verdict by Morton's jury establishing his guilt of qualifying contemporaneous felonies, including a contemporaneous murder, was clearly sufficient to meet the Sixth Amendment's factfinding requirement, and he was properly rendered eligible for a death sentence at that point.[2] See Jenkins v. Hutton, 137 S. Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty); 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)).

The wisdom of the vast majority of courts in failing to include weighing as an "element" in capital cases is evident by Petitioner's complaint that the trial judge failed to find and

weigh one of his proposed mitigators. (Petition at 8). That proposed mitigator — curiously not identified in the Petition - was Antisocial Personality Disorder. Morton v. State, 789 So. 2d 324, 330 (Fla. 2001). The relative value of such 'mitigation' would seem to be very much subjective.[3] See 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.");

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

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

[3] Of course, while successfully arguing on direct appeal that the trial court failed to find and weigh his Antisocial Personality Disorder as mitigation, Petitioner subsequently faulted defense counsel in post-conviction for presenting such evidence. See Morton v. Sec'y, Florida Dept. of Corr., 684 F.3d 1157, 1168 (11th Cir. 2012) (holding "[t]hat a diagnosis of antisocial personality disorder has negative characteristics or presents a double-edged sword renders it uniquely a matter of trial strategy that a defense lawyer may, or may not, decide to present as mitigating evidence.").

"weighing is not a factfinding process subject to the Sixth Amendment.") (string citations omitted); Underwood v. Royal, __ F.3d ___, 2018 WL 3215764, *23-*24 (10th Cir. July 2, 2018) (holding that the Court's decision in Hurst v. Florida was limited to aggravating circumstances and did not extend to mitigating circumstances or weighing); United States v. Sampson, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); United States v. Purkey, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); State v. Gales, 658 N.W.2d 604, 628-29 (Neb. 2003) ("[W]e do not read either Apprendi or Ring to require that the determination of mitigating circumstances, the balancing function, or proportionality review to be undertaken by a jury"). The findings required by the Florida Supreme Court following remand in Hurst v. State involving the weighing and selection of a defendant's sentence are not required by the Sixth Amendment. See, e.g., McGirth v. State, 209 So. 3d 1146, 1164 (Fla. 2017). Thus, there was no Sixth Amendment error in this case.

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

The Florida Supreme Court's holding in Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017), followed this Court's ruling in Hurst v. Florida, 136 S. Ct. 616 (2016), in requiring that aggravating circumstances be found by a jury beyond a reasonable doubt before a death sentence may be imposed. The Florida court then expanded this Court's ruling, requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." Hurst v. State, 202 So. 3d at 57.[4]

The Florida Supreme Court first analyzed the retroactive application of Hurst in Mosley v. State, 209 So. 3d 1248, 1276-83 (Fla. 2016), and Asay v. State, 210 So. 3d 1, 15-22 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017). In Mosley, the Florida Supreme Court held that Hurst is retroactive to cases which

[4] 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).

became final after this Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), on June 24, 2002. Mosley, 209 So. 3d at 1283. In determining whether Hurst should be retroactively applied to Mosley, the Florida Supreme Court conducted a Witt analysis, the state-based test for retroactivity. See Witt v. State, 387 So. 2d 922, 926 (Fla. 1980) (determining whether a new rule should be applied retroactively by analyzing the purpose of the new rule, extent of reliance on the old rule, and the effect of retroactive application on the administration of justice) (citing Stovall v. Denno, 388 U.S. 293, 297 (1967); Linkletter v. Walker, 381 U.S. 618 (1965)). Since "finality of state convictions is a *state* interest, not a federal one," states are permitted to implement standards for retroactivity that grant "relief to a broader class of individuals than is required by Teague," which provides the federal test for retroactivity. Danforth v. Minnesota, 552 U.S. 264, 280-81 (2008) (emphasis in original); Teague v. Lane, 489 U.S. 288 (1989); see also Johnson v. New Jersey, 384 U.S. 719, 733 (1966) ("Of course, States are still entirely free to effectuate under their own law stricter standards than we have laid down and to apply those standards in a boarder range of cases than is required by this [Court]."). As Ring, and by extension Hurst, has been held not to be retroactive under federal law, Florida has implemented a test which provides relief to a broader class of individuals in applying Witt instead of

Teague for determining the retroactivity of Hurst. See Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (holding that "Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review"); Lambrix v. Sec'y, Fla. Dep't of Corr., 872 F.3d 1170, 1182-83 (11th Cir. 2017), cert. denied, 138 S. Ct. 312 (2017) (noting that "[n]o U.S. Supreme Court decision holds that its Hurst decision is retroactively applicable").

The Florida Supreme Court determined that all three Witt factors weighed in favor of retroactive application of Hurst to cases which became final post-Ring.[5] 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."[6] Id. at 1283. Thus, the Florida Supreme Court

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

[6] Of course, the gap between this Court's rulings in Ring and Hurst may be fairly explained by the fact that the Florida Supreme Court properly recognized, in the State's view, that a prior violent felony or contemporaneous felony conviction took the case out of the purview of Ring. See Ellerbee v. State, 87 So. 3d 730, 747 (Fla. 2012) ("This Court has consistently held that a defendant is not entitled to relief under Ring if he is convicted of murder committed during the commission of a felony,

held Hurst to be retroactive to Mosley, whose case became final in 2009, which is post-Ring. Id.

Conversely, applying the Witt analysis in Asay v. State, 210 So. 3d 1, 22 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017), the Florida Supreme Court held that Hurst is not retroactive to any case in which the death sentence was final pre-Ring. The court specifically noted that Witt "provides *more expansive retroactivity standards* than those adopted in Teague." Asay, 210 So. 3d at 15 (emphasis in original) (quoting Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005)). The court determined that prongs two and three of the Witt test, reliance on the old rule and effect on the administration of justice, weighed heavily against the retroactive application of Hurst to pre-Ring cases. Asay, 210 So. 2d at 20-22. As related to the reliance on the old rule, the court noted "the State of Florida in prosecuting these crimes, and the families of the victims, had extensively relied on the constitutionality of Florida's death penalty scheme based on the decisions of the United States Supreme Court. This factor weighs heavily against retroactive application of Hurst v. Florida to this pre-Ring case." Id. at 20. With respect to the

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or otherwise where the jury of necessity has unanimously made the findings of fact that support an aggravator.") (string citations omitted). Hurst v. Florida presented this Court with a rare "pure" Ring case, that is a case where there was no aggravator supported either by a contemporaneous felony conviction or prior violent felony.

effect on the administration of justice, the court noted that resentencing is expensive and time consuming and that the interests of finality weighed heavily against retroactive application. Id. at 21-22. Thus, the Florida Supreme Court held that Hurst was not retroactive to Asay since his judgment and sentence became final in 1991, pre-Ring. Id. at 8, 20.

Since Asay, the Florida Supreme Court has continued to apply Hurst retroactively to all post-Ring cases and declined to apply Hurst retroactively to all pre-Ring cases. See Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017); Lambrix v. State, 227 So. 3d 112, 113 (Fla. 2017), cert. denied, 138 S. Ct. 312 (2017); Hannon v. State, 228 So. 3d 505, 513 (Fla. 2017), cert. denied, 138 S. Ct. 441 (2017); Branch v. State, 234 So. 3d 548, 549 (Fla. 2018), cert. denied, 138 S. Ct. 1164 (2018). This distinction between cases which were final pre-Ring versus cases which were final post-Ring is neither arbitrary nor capricious.[7]

In the traditional sense, new rules are applied retroactively only to cases which are not yet final. See Griffith

[7] Federal courts have had little trouble determining that Hurst, like Ring, is not retroactive at all under Teague. See Lambrix v. Sec'y, Fla. Dep't of Corr., 851 F.3d 1158, 1165 n.2 (11th Cir. 2017) ("under federal law Hurst, like Ring, is not retroactively applicable on collateral review"), cert. denied, 138 S. Ct. 217 (2017); Ybarra v. Filson, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a Hurst v. Florida claim concluding that Hurst v. Florida did not apply retroactively).

v. Kentucky, 479 U.S. 314, 328 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"); Penry v. Lynaugh, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context). Under this "pipeline" concept, Hurst would only apply to the cases which were not yet final on the date of the decision in Hurst. Even under the "pipeline" concept, cases whose direct appeal was decided on the same day might have their judgment and sentence become final on either side of the line for retroactivity. Additionally, under the "pipeline" concept, "old" cases where the judgment and/or sentence has been overturned will receive the benefit of new law as they are no longer final. Yet, this Court recognizes this type of traditional retroactivity as proper and not violative of the Eighth or Fourteenth Amendment.

The only difference between this more traditional type of retroactivity and the retroactivity implemented by the Florida Supreme Court is that it stems from the date of the decision in Ring rather than from the date of the decision in Hurst. 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 alike."). Unquestionably, extending relief to more individuals, defendants who would not receive the benefit of a new rule under the pipeline concept because their cases were already final when Hurst was decided, cannot violate the Eighth or Fourteenth Amendment. Thus, just like the more traditional application of retroactivity, the Ring-based cutoff for the retroactive application of Hurst is not in violation of the Eighth or Fourteenth Amendment.

The Florida Supreme Court's determination of the retroactive application of Hurst under the state law Witt standard is based on adequate and independent state grounds and is not violative of federal law or this Court's precedent. This Court has repeatedly recognized that where a state court judgment rests on non-federal

grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); see also Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."). Because the Florida Supreme Court's retroactive application of Hurst in Petitioner's case is based on adequate and independent state grounds, certiorari review should be denied.

III. Petitioner's Structural Error And Eighth Amendment Claims Are Clearly Meritless And Offer This Court No Conflict Or Unsettled Claim Of Constitutional Law Which Would Merit Review

Petitioner's argument that the error in this case was structural or involved a substantive, not a procedural change in the law is plainly without merit. According to this Court, the right to a jury trial is a procedural right. This Court specifically observed in a retroactivity case, that "Ring's holding is properly classified as procedural" because the Sixth Amendment's jury-trial guarantee "has nothing to do with the range of conduct a State may criminalize." Summerlin, 542 U.S. at 353 (emphasis added). The Summerlin Court, which held that Ring was not retroactive, explained that rules that allocate decision

making authority between the judge and the jury "are prototypical procedural rules." Id. (emphasis added). This Court noted that it had classified the right to a jury trial as procedural "in numerous other contexts." Id. at 353-54 (citing numerous cases).

Furthermore, both the majority opinion and the concurring opinion in Alleyne v. United States, 570 U.S. 99 (2013), classified the right to a jury trial regarding facts required to impose a minimum mandatory sentence as procedural. Alleyne, 570 U.S. at 116 n.5 ("the force of stare decisis is at its nadir in cases concerning procedural rules . . ."") (emphasis added); Alleyne, 570 U.S. at 119 (Sotomayor, J., concurring) ("when procedural rules are at issue . . ."") (emphasis added). This Court's opinion in Alleyne, like this Court's opinion in Hurst v. Florida itself, was explicitly based on Apprendi v. New Jersey, 530 U.S. 466 (2000). The Alleyne majority and the Alleyne concurrence both characterized that Apprendi-based right as procedural. This Court views Apprendi and all its progeny, including Hurst v. Florida, as procedural, not substantive. See also Montgomery v. Louisiana, 136 S. Ct. 718, 730 (2016) (citing Summerlin and characterizing Ring as a procedural rule designed to enhance the accuracy of a conviction or sentence). While opposing counsel may view the right to a jury trial as substantive, this Court has repeatedly classified it as procedural and in very similar context to Hurst. There is no

conflict between this Court's jurisprudence and the Florida Supreme Court's decision.

Petitioner's appeal to this Court to grant review of the alleged "structural error" in his case also ignores the predicate question of retroactivity. This is a post-conviction, not a direct appeal case. Aside from the question of retroactivity, in Washington v. Recuenco, 548 U.S. 212 (2006), this Court made clear that the judge rather than the jury determining an element of the crime in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000), was not structural error. This Court explained again that it is the "rare" error that is structural. Recuenco, 548 U.S. at 218. The Recuenco Court once again followed the "strong presumption" that "if a criminal defendant had counsel and was tried by an impartial adjudicator," any error from such a trial was subject to harmless error analysis. Id. (quoting Neder, 527 U.S. at 8).

Petitioner relies on Sullivan v. Louisiana, 508 U.S. 275 (1993), as the basis for his structural error argument. However, the Neder Court itself distinguished the beyond-a-reasonable-doubt standard of proof problem presented by Sullivan from the error of judge-made findings problem presented by Neder. Neder v. United States, 527 U.S. 1, 10-12 (1999). The Neder Court explained that, while a flaw in the reasonable doubt instruction infects all of the jury findings, but a judge making the findings

instead of the jury does not. Id. at 11 (emphasis in original). Furthermore, the Neder "strong presumption" that any error is subject to harmless error applies here because Petitioner had counsel and was tried by an impartial jury and an impartial judge.

Petitioner's argument that he was denied his right to have a jury find beyond a reasonable doubt the "critical elements" that subjected him to the death penalty (Petition at 8, 9), is plainly meritless. His argument ignores Florida's longstanding practice of using the beyond-a-reasonable-doubt standard of proof for proving aggravating factors in Florida. Florida law has required that the State prove aggravators at the beyond-a-reasonable-doubt standard of proof for over three decades. Williams v. State, 37 So. 3d 187, 194-95 (Fla. 2010) (stating that the State has the burden to prove beyond a reasonable doubt each and every aggravating circumstance); Aguirre-Jarquin v. State, 9 So. 3d 593, 607 (Fla. 2009) (explaining that the State must prove the existence of an aggravator beyond a reasonable doubt citing Parker v. State, 873 So. 2d 270, 286 (Fla. 2004)). Therefore, the "retroactivity" of the beyond-a-reasonable-doubt standard of proof is a non-issue in this case and every other Florida capital case as well. See Fla. Std. J. Inst. (Crim.) 7.11; Finney v. State, 660 So. 2d 674, 680 (Fla. 1995). Hurst did nothing to change this standard. Furthermore, neither Hurst v. Florida nor

Hurst v. State changed the standard of proof as to any required finding in Florida's capital sentencing proceedings. Rather, both Hurst v. Florida and Hurst v. State addressed who makes the findings — the jury versus the judge — not what standard of proof is used.[8]

The Florida Supreme Court's imposition of the unanimity requirement in Hurst v. State is purely a matter of state law, is not a substantive change, and did not cause death sentences imposed pre-Ring to be in violation of the Eighth Amendment. The Eighth Amendment requires capital punishment to be limited "to those who commit a 'narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" Roper v. Simmons, 543 U.S. 551, 568 (2005) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)). As such, the death penalty is limited to a specific category of crimes and "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." Roper, 543 U.S. at 568. Petitioner's death sentence was imposed in accordance

[8] In Ybarra v. Filson, 869 F.3d 1016 (9th Cir. 2017) the Ninth Circuit rejected a similar argument to that which Petitioner makes in this Court. The Ninth circuit reasoned that even if Hurst v. Florida extended the beyond-a-reasonable-doubt standard of proof to the weighing determinations, it did not redefine capital murder and therefore, Hurst v. Florida was not required to be applied retroactively.

with all applicable constitutional principles at the time it was imposed.[9]

Petitioner's argument that his sentence violates the Eighth Amendment (Petition at 9) is also meritless. Petitioner is attempting to conflate and co-mingle the Sixth and Eighth Amendments to divine some new constitutional right applicable to his case. Aside from the obvious issue of retroactivity which would have to be reached before this Court could even entertain his argument, his arguments are not persuasive.

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[9] Moreover, assuming any Hurst error can be discerned in this case, the error would be harmless. See Hurst v. Florida, 136 S. Ct. at 624 (remanding for a harmless error review). Here, Petitioner's violent felony convictions for murder, robbery and burglary [an aggravator under well-established Florida law] were unanimously found by the jury. This was a heavily aggravated home invasion double homicide case with multiple aggravators applicable for each murder. As noted by the Florida Supreme Court:

> The trial court's sentencing order details the cold and cruel manner in which the murders were carried out. Several days before the murder, Morton discussed with various people his intention of killing someone. He proceeded to arm himself with a sawed-off shotgun and break into Bowers and Weisser's home while being careful to conceal the gun in a towel, put the getaway bikes in a nearby bush, and wear gloves to avoid leaving fingerprints. Morton then shot Bowers after he pleaded for his life and attempted to shoot Weisser. However, when the gun jammed, he stabbed her in the neck with a Rambo-style knife; in total, Weisser was stabbed eight times. The stabbing was so brutal that it severed her spinal cord, which was deemed to be one of the causes of death.

Morton, 995 So. 2d at 243-44. No reasonable jury would have failed to find the existence of each of the aggravators under the circumstances of this case. See, e.g., Jenkins v. Hutton, 137 S. Ct. 1769, 1772 (2017).

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

Petitioner's death sentence is neither unfair nor unreliable because the judge imposed the sentence in accordance with the law existing at the time of his trial. Petitioner cannot establish that his sentencing procedure was less accurate than future sentencing procedures employing the new standards announced in Hurst v. State, 202 So. 3d 40 (Fla. 2016). Certainly, other than speculation, Petitioner has neither identified nor established any particular lack of reliability in the proceedings used to impose his death sentence. See Hughes v. State, 901 So. 2d 837, 844 (Fla. 2005) (holding that Apprendi is not retroactive and noting that "neither the accuracy of convictions nor of sentences

imposed and final before Apprendi issued is seriously impugned"; Rhoades v. State, 233 P. 3d 61, 70-71 (2010) (holding that Ring is not retroactive after conducting its own independent Teague analysis and observing, as this Court did in Summerlin, that there is debate as to whether juries or judges are the better fact-finders and that it could not say "confidently" that judicial factfinding "seriously diminishes accuracy.") Just like Ring did not enhance the fairness or efficiency of death penalty procedures, neither does Hurst. As this Court has explained, "for every argument why juries are more accurate factfinders, there is another why they are less accurate." Schriro v. Summerlin, 542 U.S. 348, 356 (2004). Thus, because the accuracy of Petitioner's death sentence is not at issue, fairness does not demand retroactive application of Hurst.

Finally, Petitioner complains that the sentencing procedure used in his case violated this Court's ruling in Caldwell v. Mississippi, 472 U.S. 320 (1985), because the jury was given instructions that informed the jury its death recommendation was merely advisory. However, this case would be a uniquely inappropriate vehicle for certiorari because this is a post-conviction case and this Court would have to address retroactivity before even reaching the underlying jury instruction issue. This matter does not merit this Court's review.

Aside from the question of retroactivity, it is clear there was no Caldwell violation in this case. In order to establish constitutional error under Caldwell, a defendant must show that the comments or instructions to the jury "improperly described the role assigned to the jury by local law." Romano v. Oklahoma, 512 U.S. 1, 9 (1994). See Reynolds v. State, ___ So. 3d ___, 2018 WL 1633075, *9 (Fla. Apr. 5, 2018) (explaining that under Romano, the Florida standard jury instruction at issue "cannot be invalidated retroactively prior to Ring simply because a trial court failed to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts").

Petitioner's jury was properly instructed on its role based on the law existing at the time of his trial. His jury was informed that its recommendation would be given "great weight" by the trial court and that only in "rare circumstances" would the court "impose a sentence other than what you recommend." (R1/193; Pet. App. F). Entitlement to relief under Caldwell requires that the prosecutor, judge, or jury instructions misrepresent the jury's role in sentencing. Darden v. Wainwright, 477 U.S. 168, 183 n.15 (1986) (rejecting a Caldwell attack, explaining that "Caldwell is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should

for the sentencing decision"). A Florida jury's decision regarding a death sentence was, and still remains, an advisory recommendation; therefore, there was no violation of Caldwell. See Dugger v. Adams, 489 U.S. 401 (1989). Petitioner's jury was accurately advised that its decision was an advisory recommendation that would be accorded "great weight." Opposing counsel cites to no federal circuit court case or state supreme court case holding that there is a Caldwell violation based on jury instructions referring to the jury's recommendation regarding sentencing as a recommendation or as advisory when it is an advisory recommendation under state law.

In conclusion, the Florida Supreme Court's determination of the retroactive application of Hurst under Witt v. State, 387 So. 2d 922 (Fla. 1980), is based on an independent state ground and is not violative of federal law or this Court's precedent. Hurst did not announce a substantive change in the law and is not retroactive under federal law. Nothing in the petition justifies the exercise of this Court's certiorari jurisdiction.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court DENY the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 1st 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: Julissa R. Fontán, Assistant CCRC, Law Office of the Capital Collateral Regional Counsel, Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, fontan@ccmr.state.fl.us. All parties required to be served have been served.

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