CASE NO. 18-5084

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL BURNS,

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, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017) 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 Burns v. State, 234 So. 3d 555 (Fla. 2018).

JURISDICTION

The judgment of the Florida Supreme Court was entered on January 23, 2018 and the mandate issued February 8, 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 AND FACTS

Daniel Burns was convicted of the first-degree murder of Florida Highway Patrol Trooper Jeffrey Young and sentenced to death. The facts of this case are recited in the Florida Supreme Court's direct appeal opinion:

> According to testimony at trial, the victim, Jeff Young, a Florida Highway Patrol Trooper, stopped an automobile with Michigan tags that was being driven north on Interstate 75 by Burns. According to Burns' passenger, Samuel Williams, he and Burns were returning to Detroit from Fort Myers. Prior to making the trip, Williams overheard Burns say that he was going to make a couple of trips to Florida to purchase about $10,000 worth of cocaine. According to Williams, Trooper Young approached the car after pulling them over and asked Burns and Williams for identification. He then returned to the patrol car to use the radio. The highway patrol dispatcher testified that Trooper Young requested a registration check on the Michigan tag and a wanted persons' check. Williams further testified that Young returned to the vehicle and asked to search it. After searching the passenger compartment, Young asked to search the trunk, which Burns voluntarily opened. According to Williams, Burns and Trooper Young began to struggle after the officer found what "look[ed] like cocaine" in a bank bag that was in the trunk.
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> Several passersby who witnessed the struggle testified at the trial. According to those witnesses, the struggle continued until the two ended up in a water-filled ditch. At this point, Burns gained possession of Trooper Young's revolver. Passersby who had returned to assist the officer testified that Young, who was attempting to rise out of the water, warned them to stay away and said, "He's got my gun." Young told Burns, "You can go," and, "You don't have to do this." According to testimony of these witnesses, Burns stood over Trooper Young, who had his hands raised, held the gun in both hands, and fired one shot. According to the medical examiner, the shot struck the officer's wedding ring and grazed his finger before entering his head through his upper lip, killing him. After telling Williams to leave with the vehicle, Burns fled the scene on foot. By the time a fellow trooper arrived to assist Young, he was lying in the water-filled ditch, dead. His shirt had been ripped exposing his bulletproof vest.

Burns v. State, 609 So. 2d 600, 602-03 (Fla. 1992). Burns was apprehended later the night of the murder. A subsequent search of the vehicle, found abandoned the next day, revealed over 300 grams of cocaine in bags found under the spare tire in the trunk. Burns' fingerprints were recovered from one of these bags. Cocaine and documents with Burns' name on them were also found in the bank bag, which had been left on the ground at the scene of the murder.

On appeal, Burns' sentence was vacated, and a new penalty phase proceeding was granted. Burns v. State, 609 So. 2d 600 (Fla. 1992). After the jury unanimously (12-0) recommended a death sentence, Burns was resentenced to death in 1994. The trial court found three aggravators: (1) the victim was engaged in the performance of his official duties as a highway patrol trooper when murdered by Burns; (2) the murder was committed to avoid arrest or to effect an escape from the victim's custody for the crime of cocaine trafficking; and (3) the murder was committed to disrupt the lawful exercise of any governmental function or the enforcement of laws by the victim relating to cocaine trafficking. Burns v. State, 699 So. 2d 646, 648 (Fla. 1997), cert. denied, 522 U.S. 1121 (1998). The Florida Supreme Court affirmed his sentence, which became final when this Court denied certiorari review on February 23, 1998. Burns v. State, 699 So. 2d 646 (Fla. 1997), cert. denied, 522 U.S. 1121 (1998).

Burns' collateral challenges have consistently been rejected. See Burns v. State, 944 So. 2d 234 (Fla. 2006); Burns v. State, 3 So. 3d 316 (Fla. 2009); Burns v. Secretary, Fla. Dept. of Corrections, 720 F.3d 1296 (11th Cir. 2013), cert. denied, 134 S. Ct. 1936 (2014).

On January 9, 2017, Burns filed a successive 3.851 postconviction motion in the state trial court raising a claim 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 March 21, 2017, the trial

court denied the successive postconviction motion, citing Asay v. State, 210 So. 3d 1 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017). Burns then appealed the denial of his successive postconviction Hurst motion to the Florida Supreme Court. On June 6, 2017, the Florida Supreme Court stayed Burns' appeal pending the outcome of Hitchcock v. State, 226 So. 3d 216 (Fla.), cert. denied, 138 S. Ct. 512 (2017).

In Hitchcock, the Florida Supreme Court reaffirmed its previous holding in Asay v. State, 210 So. 3d 1 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017), in which it held that Hurst v. Florida as interpreted by Hurst v. State is not retroactive to defendants whose death sentences were final when this Court decided Ring v. Arizona, 536 U.S. 584 (2002). After the court decided Hitchcock, it issued an order to show cause directing Burns 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 Burns' sentence of death that became final in 1998. Burns v. State, 234 So. 3d 555 (Fla. 2018). The mandate issued February 8, 2018.

Burns 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 requests that this Court review the Florida Supreme Court's decision affirming the denial of his successive postconviction motion and claims that the state court's holding with respect to the retroactive application of Hurst violates the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection. However, the Florida Supreme Court's denial of the retroactive application of Hurst to Petitioner's case is based on adequate and independent state grounds, is not in conflict with any other state court of last review, and is not in conflict with any federal appellate court. This decision is also not in conflict with this Court's jurisprudence on retroactivity, nor does it violate the Eighth and Fourteenth Amendments. Thus, because Burns has not provided any "compelling" reason for this Court to review his case, certiorari review should be denied. See Sup. Ct. R. 10.

Respondent would further note that this Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of Hurst v. State. See, e.g., Asay v. State, 210 So. 3d 1 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017); Hitchcock v. State, 226 So. 3d 216 (Fla.), cert. denied, 138 S. Ct. 513 (2017); Lambrix v. State, 227 So. 3d 112 (Fla.), cert. denied, 138 S. Ct. 312 (2017); Hannon v. State, 228 So. 3d 505 (Fla.), cert. denied, 138 S. Ct. 441 (2017); Branch v. State, 234 So. 3d 548 (Fla.), cert. denied, 138 S. Ct.

1164 (2018); Cole v. State, 234 So. 3d 644 (Fla.), cert. denied, 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, 2018 WL 1367892 (June 18, 2018); Jones v. State, 234 So. 3d 545 (Fla.), cert. denied, 2018 WL 1993786 (June 25, 2018).

I. 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 Supreme Court then expanded this Court's ruling, requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." Hurst v. State, 202 So. 3d at 57.

The Florida Supreme Court first analyzed the retroactive application of Hurst in Mosley v. State, 209 So. 3d 1248, 1276-83 (Fla. 2016), and Asay v. State, 210 So. 3d 1, 15-22 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017). In Mosley, the Florida Supreme Court held that Hurst is retroactive to cases which became final after this Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), on June 24, 2002. Mosley, 209 So. 3d at 1283. In determining whether Hurst should be retroactively applied to Mosley, the Florida Supreme Court conducted a Witt analysis, the

state based test for retroactivity. See Witt v. State, 387 So. 2d 922, 926 (Fla. 1980) (determining whether a new rule should be applied retroactively by analyzing the purpose of the new rule, extent of reliance on the old rule, and the effect of retroactive 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. Dept. of Corr., 872 F.3d 1170, 1182-83 (11th Cir.), 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. 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."[1] Id. at 1283. Thus, the Florida Supreme Court held Hurst to be retroactive to Mosley, whose case became final in 2009, which is post-Ring. Id.

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

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

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.), 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.[2]

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

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defendant's sentence, thereby causing an unnecessarily dramatic and costly impact to the State's capital sentencing system.

[2] Federal courts have had little trouble determining that Hurst, like Ring, is not retroactive at all under Teague. See Lambrix v. Sec'y, Fla. Dept. of Corr., 851 F.3d 1158, 1165 n.2 (11th Cir.), cert. denied, 138 S. Ct. 217 (2017) ("under federal law Hurst, like Ring, is not retroactively applicable on collateral review") Ybarra v. Filson, 869 F.3d 1016, 1032-33 (9th Cir. 2017)

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

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(denying permission to file a successive habeas petition raising a Hurst v. Florida claim

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."); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." Florida v. Powell, 559 U.S. 50, 57 (2010); Long, 463 U.S. at 1041. Because the Florida Supreme Court's retroactive application of Hurst in Petitioner's case is based on adequate and independent state grounds, certiorari review should be denied.

Certiorari review would also be inappropriate in this case because, assuming for a moment any Hurst error can be discerned from this record, 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 jury recommended death 12-0

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concluding that Hurst v. Florida did not apply retroactively).

for Burns' murder of a law enforcement officer. Even in post-Ring cases, the Florida Supreme Court has repeatedly affirmed death sentences on the basis of harmless error where the jury recommended death unanimously. 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 argument that his sentence somehow violates the Eighth Amendment is plainly meritless. 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 maintains that fairness and uniformity require that Hurst be retroactively applied to all cases. Contrary to his argument, 'fairness' does not provide a mechanism for vacating his death sentence. What fairness calls for, is that the State not bear the time and expense of conducting another penalty phase and victim's family not be forced to endure another proceeding simply because the law has changed since Burns was sentenced. State v. Towery, 64 P.3d 828, 835-36 (Ariz. 2003) ("[c]onducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice" and would be inconstant with the Court's duty to protect victims' rights under the Arizona Constitution). Petitioner's fairness argument rings hollow against the interests of the State, which prosecuted him in good faith under the law existing at the time of his trial, the concept of finality, and the interests of the victims' family members.

As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." Braxton v. United States, 500 U.S. 344, 347 (1991); see also Sup. Ct. R. 10 (b) (listing conflict among state supreme courts as a consideration in the decision to grant review). 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.

II. The Florida Supreme Court's Application of Hurst's Retroactivity Does Not Violate the Supremacy Clause of the United States Constitution

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 Montgomery v. Louisiana, 136 S. Ct. 718 (2016). Petition at 10-12. However, Hurst, like Ring, was a procedural change, not a substantive one. See Schriro v. Summerlin, 542 U.S. 348, 358 (2004) ("Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review."). Thus, like Ring, Hurst is not retroactive under federal law. See Lambrix v. Secretary, Fla. Dept. of Corr., 872 F.3d 1170, 1182-83 (11th Cir. 2017), cert. denied, 138 S. Ct. 312 (2017) ("No U.S. Supreme Court decision holds that its Hurst decision is retroactively applicable."); 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"). Thus, neither Ring nor Hurst are retroactive under federal law.

In support of his argument that Hurst was a substantive rather than a procedural change, Petitioner analogizes Hurst to Miller v. Alabama, 567 U.S. 460 (2012). Petition at 10-11. In Miller, this Court found the imposition of mandatory sentences of life without parole on juveniles a violation of the Eighth Amendment and a substantive change because "it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status' — that is, juvenile offenders whose crime reflects irreparable corruption" Montgomery, 136 S. Ct. at 734 (quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989)). As such, the rule in Miller announced a substantive rule which was held to retroactive "because it 'necessarily carr[ies] a significant risk that a defendant' – here, the vast majority of juvenile offenders — 'faces a punishment that the law cannot impose upon him.'" Montgomery, 136 S. Ct. at 734 (quoting Summerlin, 542 U.S. at 352). However, Hurst is distinguishable from Miller.

Unlike Miller, 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 Miller, 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 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 also relies on Welch v. United States, 136 S. Ct. 1257 (2016), to argue that the Eighth Amendment unanimity requirement announced in Hurst v. State was a substantive change

and is retroactive under federal law. Petition at 13. Welch does not distinguish itself from Summerlin, but instead quotes Summerlin to describe the distinctions between a substantive and a procedural change. Id. at 1265. The Welch court found that the rule in Johnson was substantive because it altered the class of people affected by the law. Id. at 1265. In explaining how the rule in Johnson was not procedural, this Court 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". Here, the new rule allocated the decision-making authority to determine aggravators from the judge to the jury. Based on this Court's precedent, there can be no doubt that the rule in Hurst v. Florida was a procedural rule. Further, in Welch, this Court found that striking down the residual clause of the Armed Career Criminal Act in Johnson caused a substantive change because "the same person engaging in the same conduct is no longer subject to the Act." Id.; Johnson v. United States, 135 S. Ct. 2551 (2015). Therefore, Hurst is factually distinguishable from Welch.

Unlike Welch, after Hurst, Florida's death penalty sentencing scheme still applies to the same persons engaging in the same conduct. In Hurst v. State, the Florida Supreme Court explained that the "requirement that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment even more significantly, and expresses the values of the community as they currently relate to imposition of death as a penalty." Hurst, 202 So. 3d at 60. Again, this is an alteration in the procedure necessary to obtain a death sentence. Neither the range of conduct nor the class of persons has been altered. The only change is the manner of determining a defendant's sentence. Thus, Ring and Hurst announced a procedural change, not a substantive one.

Additionally, this Court "has not ruled on whether unanimity is required" in capital cases. Hurst, 202 So. 3d at 59; see also 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); Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972). As this Court noted, "holding that because [a State] has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as this Court's making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive." Summerlin, 542 U.S. at 354. Thus, Hurst v. State's requirement that the jury make specific factual findings before the imposition of the death penalty is procedural.

Lastly, Petitioner argues that Hurst "addressed the proof-beyond-a-reasonable-doubt standard," which causes a substantive change and that makes Hurst retroactive under federal law. However, Hurst did not address the proof-beyond-a-reasonable-doubt standard. The standard of proof for proving aggravating factors in Florida has been beyond a reasonable doubt long before Hurst was decided. See Fla. Std. J. Inst. (Crim.) 7.11; Floyd v. State, 497 So. 2d 1211, 1214-15 (Fla. 1986); Zeigler v. State, 580 So. 2d 127, 129 (Fla. 1991); Finney v. State, 660 So. 2d 674, 680 (Fla. 1995).

As related to the finding that aggravation is sufficient, Hurst did not ascribe a standard of proof. Hurst, 202 So. 3d at 54. The Eighth Amendment requires that "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." Roper v. Simmons, 543 U.S. 551, 568 (2005). The State of Florida has a list of sixteen aggravating factors enumerated in the statute. See Fla. Stat. § 921.141(6). These aggravating factors have been

deemed sufficient to impose the death penalty by virtue of their inclusion in the statute. Any one of these aggravating factors is sufficient to cause a defendant to be eligible to receive a sentence of death. Thus, if one of these enumerated aggravating factors has been proven beyond a reasonable doubt, any Eighth Amendment concerns have been satisfied. However, the weight that a juror gives to the aggravator based on the evidence is not something that can be defined by a beyond-a-reasonable-doubt standard.

As related to the finding that the aggravation outweighs the mitigation, Hurst did not ascribe a standard of proof. Hurst, 202 So. 3d at 54. This Court has specifically held that the beyond-a-reasonable-doubt standard for finding that the aggravation outweighs mitigation is not required under federal law. See Kansas v. Marsh, 548 U.S. 163, 164 (2006) ("Weighing is not an end, but a means to reaching a decision."); Tuilaepa v. California, 512 U.S. 967, 979 (1994) ("A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision."); Kansas v. Carr, 136 S. Ct. 633, 642 (2016) ("[T]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt."). The weight that a juror gives to the aggravation as compared to the weight given to mitigation is also not something that can be defined by a beyond-a-reasonable-doubt standard.

In support of his argument that Hurst should be retroactive under the federal Teague standard as a substantive change because it "addressed the proof-beyond-a-reasonable-doubt standard," Petitioner relies upon Ivan V. v. City of New York, 407 U.S. 203, 205 (1972). However, Hurst is distinguishable from Ivan V. because it did not address the proof-beyond-a-

reasonable-doubt standard. In Ivan V., the holding of In re Winship which required that the proof-beyond-a-reasonable-doubt standard be afforded to juveniles was given full retroactive effect. Ivan V., 407 U.S. at 203-04; In re Winship, 397 U.S. 358 (1970). As previously discussed, Hurst did not alter the burden of proof as aggravating circumstances have long been required to be proven beyond a reasonable doubt in Florida. Thus, Ivan V. is not analogous to Hurst.

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 the Supremacy Clause and certiorari review should be denied.

CONCLUSION

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

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 24th day of July, 2018, a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION has been submitted using the Electronic Filing System. I further certify that a copy has been sent electronically and by U.S. mail to: Margaret S. Russell, Counsel of Record, Julie A. Morley and Mark S. Gruber, Law Office of the Capital Collateral Regional Counsel-Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, **russell@ccmr.state.fl.us**, and **morley@ccmr.state.fl.us** **gruber@ccmr.state.fl.us** and **support@ccmr.state.fl.us**. All parties required to be served have been served.

/s/ Lisa Martin
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