DOCKET NO. 18-5088

IN THE SUPREME COURT OF THE UNITED STATES

EMANUEL JOHNSON,

***Petitioner*,**

vs.

STATE OF FLORIDA,

***Respondent*.**

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

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

Emanuel Johnson was convicted of killing 73-year-old Iris White; her body, unclothed from the waist down and found in her own bed, had been stabbed 24 times. Within a few months Johnson was also found guilty in the unrelated murder of Jackie McCahon, who was killed on the sidewalk outside her home. Ms. McCahon had been stabbed 19 times. Both convictions were affirmed on review and became final in 1996.

Johnson sought relief after this Court determined in Hurst v. Florida, 136 S. Ct. 616 (2016) that Florida's capital sentencing procedure was infirm. On remand from Hurst, the Florida Supreme Court made substantial procedural changes, but concluded that state precedent governing retroactivity required that the changes apply only to those capital defendants whose cases were not final when Ring v. Arizona, 536 U.S. 584 (2002) was rendered. Because both of Johnson's cases were final in 1996, his bid for relief failed as a matter of state law. Johnson's request for certiorari review of the Florida Supreme Court's rejection of his claim gives rise to the following questions:

> Whether the Florida Supreme Court's application of state law that resulted in a decision to limit retroactive application of Florida's amended

procedural rules complies with the Eighth and Fourteenth Amendments, and

Whether the Supremacy Clause applies so as to prevent Florida, as a matter of state law, from giving limited retroactive application to its recently amended sentencing procedures.

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PARTIES TO THE PROCEEDINGS

The following were parties in the proceedings below:

1) Emanuel Johnson, Petitioner in this Court, was the appellant below.

2) The State of Florida, Respondent in this Court, was the appellee below.

CITATION TO OPINION BELOW

The published opinion of the Florida Supreme Court is reported at Johnson v. State, 236 So. 3d 232 (Fla. 2018).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on February 2, 2018. (Pet. App. H). Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

Petitioner, Emanuel Johnson, was convicted of first-degree murder for the unrelated murders of Iris White and Jackie McCahon. The following facts are drawn from the Florida Supreme Court's opinion affirming Johnson's postconviction appeal:

> We have for review Emanuel Johnson's appeals of the circuit court's order denying his motions filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. See art. V, § 3(b)(1), Fla. Const.
>
> Johnson's motions sought relief pursuant to the United States Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), and our decision on remand in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). This Court stayed Johnson's appeals pending the disposition of Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, No. 17-6180, 2017 WL 4355572 (U.S. Dec. 4, 2017). After this Court decided Hitchcock, Johnson responded to this Court's orders to show cause arguing why Hitchcock should not be dispositive in his cases.
>
> After reviewing Johnson's responses to the order to show cause, as well as the State's arguments in reply, we conclude that Johnson is not entitled to relief. Johnson was sentenced to death for the murder of Iris White following a jury's recommendation for death by a vote of eight to four. Johnson v. State, 660 So. 2d 637, 641 (Fla. 1995). Johnson was also sentenced to death for the murder of Jackie McCahon following a jury's recommendation for death by a vote of ten to two. Johnson v. State, 660 So. 2d 648, 652 (Fla. 1995). Both of Johnson's sentences of death became final in 1996. Johnson v. Florida, 116 S. Ct. 1550, 1550 (1996); Johnson v. Florida, 116 S. Ct. 1550, 1551 (1996). Thus, Hurst does not apply retroactively to Johnson's sentences of death. See Hitchcock, 226 So. 3d at 217. Accordingly, we affirm the denial of Johnson's motions.

Johnson v. State, 236 So. 3d 232 (Fla. 2018).

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

REASONS FOR DENYING THE WRIT

Shortly after this Court issued Hurst v. Florida,[1] the Florida Supreme Court made significant changes to its sentencing procedures in capital cases. In addition to addressing the shortcomings identified by this Court in Hurst, Florida also required that all new death sentences be supported by a jury's unanimous recommendation as to sentence. Not surprisingly, a large number of already death-sentenced inmates sought relief and raised every conceivable argument in an effort to persuade the court to grant new sentencing trials. The Florida Supreme Court ultimately determined that relief would be given only to those defendants whose cases were final *after* this Court's decision in Ring v. Arizona[2] was rendered. Johnson's postconviction challenge was rejected because his case was final in 1996.

Johnson advances two claims in support of his quest for certiorari review. First, he contends that the Florida Supreme Court's decision to limit retroactivity based on whether an inmate's case was final before or after a specific date violates the Eighth and Fourteenth Amendments. Second, Johnson contends that the lower court's retroactivity ruling violates the

[1] Hurst v. Florida, 136 S. Ct. 616 (2016).

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

Supremacy Clause and Montgomery v. Louisiana, 136 S. Ct. 718 (2016). Because Florida's retroactivity determination was based on an application of Florida Supreme Court precedent, there is no reason for this Court to consider granting review.

First of all, the Florida Supreme Court's retroactivity decision is wholly consistent with the United States Constitution. Johnson fails to identify any compelling reason for this Court to review his case. Sup. Ct. R. 10. Indeed, Johnson cites no decision from this or any appellate court that conflicts with the Florida Supreme Court's decision in Johnson v. State, 236 So. 3d 232 (Fla. 2018). Nothing presented in Johnson's petition justifies the exercise of this Court's certiorari jurisdiction.

I. The Florida Court's Ruling on Retroactivity Does Not Violate Equal Protection or the Eighth Amendment.

The Florida Supreme Court's holding in Hurst v. State[3] followed this Court's ruling in Hurst v. Florida in requiring the aggravating circumstances to be found by a jury beyond a reasonable doubt before a death sentence may be imposed. The Florida court went even further and developed a number of other changes not mentioned in Hurst v. Florida. Florida also now requires that "before the trial judge may consider imposing a

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

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.

In Asay v. State, 210 So. 3d 1, 22 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017), the Florida Supreme Court ruled that, as a matter of state law, Hurst v. State is not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in Ring v. Arizona, 536 U.S. 584 (2002). See also Mosley v. State, 209 So. 3d 1248, 1272-73 (Fla. 2016) (holding that, as a matter of state law, Hurst v. State does not apply retroactively to defendants whose sentences were not yet final when this Court issued Ring). Florida's decision to grant limited retroactive application of Hurst v. State is not constitutionally unsound and does not otherwise present a matter that merits the exercise of this Court's certiorari jurisdiction.

This Court has held that, in general, a state court's retroactivity determinations are a matter of state law, not federal constitutional law. Danforth v. Minnesota, 552 U.S. 264

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

This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Michigan v. Long, 463 U.S. 1032, 1038 (1983). See also Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a

federal question was raised and decided in the state court below); Street v. New York, 394 U.S. 576, 581-82 (1969) (same). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." Florida v. Powell, 559 U.S. 50, 57 (2010).

Florida's retroactivity analysis is a matter of state law. This fact alone militates against the grant of certiorari in this case. It should also be noted that this Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of Hurst v. State. See, e.g., Asay v. State, 210 So. 3d 1 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017); Hitchcock v. State, 226 So. 3d 216 (Fla.), cert. denied, 138 S. Ct. 513 (2017); Lambrix v. State, 227 So. 3d 112 (Fla.), cert. denied, 138 S. Ct. 312 (2017); Hannon v. State, 228 So. 3d 505 (Fla.), cert. denied, 138 S. Ct. 441 (2017); Branch v. State, 234 So. 3d 548 (Fla.), cert. denied, 138 S. Ct. 1164 (2018); Cole v. State, 234 So. 3d 644 (Fla.), cert. denied, 2018 WL 1876873 (June 18, 2018); Kaczmar v. State, 228 So. 3d 1 (Fla. 2017), cert. denied, 2018 WL 3013960 (June 18, 2018); Zack, III, 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).

Johnson argues that the Florida Supreme Court's decision to limit application of Hurst v. Florida as interpreted in Hurst v. State violates the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment. He also claims that the sentencing procedure used in his case violates this Court's ruling in Caldwell v. Mississippi, 472 U.S. 320 (1985), because the jury was instructed that its death recommendation was advisory. The Florida Supreme Court's retroactivity ruling is not contrary to federal law. It does not conflict with precedent from this Court or from any appellate court. Caldwell does not provide an avenue for relief. Certiorari review is unnecessary.

New rules of law such as the rule announced in Hurst v. Florida do not usually apply to cases that are final. See Whorton v. Bockting, 549 U.S. 406, 407 (2007) (explaining the normal rule of nonretroactivity and holding the decision in Crawford v. Washington, 541 U.S. 36 (2004), was not retroactive). Additionally, the general rule is one of nonretroactivity for cases on collateral review, with narrow exceptions. See Teague v. Lane, 489 U.S. 288, 307 (1989) (observing that there were only two narrow exceptions to the general rule of nonretroactivity for cases on collateral review). Furthermore, certain matters are not retroactive at all. Hurst v. Florida was based on this Court's holding in Ring

v. Arizona, 536 U.S. 584 (2002), which in turn was based on Apprendi v. New Jersey, 530 U.S. 466 (2000). This Court has held that "Ring announced a new **procedural rule** that does not apply retroactively to cases already final on direct review." Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (emphasis added).

In Griffith v. Kentucky, 479 U.S. 314, 328 (1987), this Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Under this "pipeline" concept, only those cases still pending direct review or not yet final would receive the benefit from alleged Hurst error. Retroactivity under Griffith depends on the date of the finality of the direct appeal. Under Teague, if a case is final on direct review, the defendant will not receive the benefit of the new rule unless one of the narrow exceptions announced in Teague applies. Again, finality is the critical date-based test under Teague. There is nothing about Florida's decision providing partial retroactivity to Hurst v. Florida and Hurst v. State that is contrary to this Court's retroactivity jurisprudence.

Moreover, if partial retroactivity violated the United States Constitution or this Court's retroactivity jurisprudence,

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

Any retroactive application of a new development in the law under any analysis will mean that some cases will get the benefit of a new development, while other cases will not, depending on a date. Drawing a line between newer cases that will receive benefit of a new development in the law and older final cases that will not is part and parcel of the landscape of any retroactivity analysis. That some cases will be treated differently from others based on the age of the case is not arbitrary and capricious, as Johnson contends; it is simply a fact inherent in any retroactivity analysis.

Johnson's argument for a violation of the Equal Protection Clause fares no better than his Eighth Amendment argument. A criminal defendant challenging the State's application of

capital punishment must show intentional discrimination to prove an equal protection violation. McCleskey v. Kemp, 481 U.S. 279, 292 (1987) A "`[d]iscriminatory purpose' . . . implies more than intent as violation or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Id. at 298.

The Florida court's partial retroactivity ruling was based on the date of the Ring decision, not based on a purposeful intent to deprive pre-Ring death sentenced defendants in general, and Johnson in particular, relief under Hurst v. State. The Florida Supreme Court has been entirely consistent in denying Hurst relief to those defendants whose convictions and sentences were final when Ring was issued in 2002. Johnson is being treated exactly the same as similarly situated murderers. Consequently, his equal protection argument is plainly meritless.

Additionally, in Beck v. Washington, 369 U.S. 541 (1962), this Court refused to find constitutional error in the alleged misapplication of Washington law by Washington courts: "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity

from judicial error. . . .' Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." Id. at 554-55 (citation omitted).

Johnson's attempt to tie his Equal Protection argument to Caldwell v. Mississippi, 472 U.S. 320 (1985), fails. First, the decision in Caldwell did not interpret the Equal Protection Clause. There, this Court found that a prosecutor's comments diminishing the jury's sense of responsibility to determining the appropriateness of a death sentence was "inconsistent with the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" Caldwell, 472 U.S. at 323 (citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976)). Second, there was no Caldwell error in this case. 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). Johnson's jury was properly instructed on its role based on the state law existing at the time of his trial. See Reynolds v. State, ___ So. 3d ___, 2018 WL 1633075, *9 (Fla. April 5, 2018) (explaining that under Romano, the Florida standard jury instruction at issue "cannot be invalidated retroactively prior to Ring simply because a trial court failed to employ its

divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts").

Johnson's juries were properly informed that they needed to determine whether sufficient aggravating factors existed and, if so, whether the aggravation outweighed the mitigation before the death penalty could be imposed. His juries were also informed that while it was their duty to advise the court, the final sentencing determination would be made by the trial judge. (Resp. App. A and App. B). A Florida jury's decision regarding a death sentence was, and still remains, an advisory recommendation. See Dugger v. Adams, 489 U.S. 410 (1989). See also § 921.141(2)(c), Fla. Stat. (2017) (providing that "[i]f a unanimous jury determines that the defendant should be sentenced to death, the jury's **recommendation** to the court shall be a sentence of death") (emphasis added). Thus, there was no violation of Caldwell because there were no comments or instructions to the juries that "improperly described the role assigned to the jury by local law." Romano, 512 U.S. at 9. Johnson's juries were accurately advised that their decision was an advisory recommendation that would be accorded "great weight." (Resp. App. A and App. B).

This case would be a fundamentally inappropriate vehicle for certiorari review; because this is a postconviction case,

this Court would have to address retroactivity before even reaching the underlying jury instruction issue.

Furthermore, to the extent his petition suggests a Sixth Amendment violation occurred, Johnson's double murder convictions establish beyond a reasonable doubt the existence of sufficient aggravating factors under Florida law. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); Alleyne v. United States, 570 U.S. 99, 111 n.1 (2013) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in Almendarez-Torres v. United States, 523 U.S. 224 (1998)). See also Jenkins v. Hutton, 137 S. Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty). This Court's ruling in Hurst v. Florida did not change the recidivism exception articulated in Apprendi and Ring.

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.[4] The findings

[4] State v. Mason, ___ N.E.3d ___, 2018 WL 1872180, *5-6 (Ohio, April 18, 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating

required by the Florida Supreme Court following remand in Hurst v. State involving the weighing and selection of a defendant's sentence are not required by the Sixth Amendment. See, e.g., McGirth v. State, 209 So. 3d 1146, 1164 (Fla. 2017). There was no Sixth Amendment error in this case.[5]

To the extent Johnson 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

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circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citation omitted); United States v. Sampson, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); United States v. Purkey, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); Waldrop v. Comm'r, Alabama Dept. of Corr., 711 Fed. Appx. 900 (11th Cir. 2017) (unpublished) (rejecting Hurst claim and explaining "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict.") (citation omitted); 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").

[5] Hurst errors are subject to harmless error analysis. See Hurst v. Florida, 136 S. Ct. at 624. See also Chapman v. California, 386 U.S. 18, 23-24 (1967). Here, the aggravating circumstances found by the trial court were either uncontestable or well-established by overwhelming evidence.

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.

In sum, there is no conflict between the Florida Supreme Court's decision and this Court's Sixth Amendment, Eighth Amendment or Fourteenth Amendment jurisprudence. Nor is there any conflict between the Florida Supreme Court's decision and that of any other federal appellate or state supreme court. Finally, there is no underlying constitutional error under the facts of this case. Certiorari review should be denied.

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

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

which alleged Hurst error occurred.

Johnson's reliance on Montgomery for this proposition is misplaced. In Montgomery, Louisiana ruled that this Court's decision in Miller v. Alabama, 567 U.S. 460 (2012), which held that a juvenile could not be sentenced to mandatory life in prison without the possibility of parole, did not apply retroactively. Montgomery, 136 S. Ct. at 727. This Court reversed Louisiana's holding because Miller "announced a substantive rule of constitutional law." Id. at 734. The rule in Miller was substantive rather than procedural because it placed a particular punishment beyond the State's power to impose. See Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (defining a substantive rule as a new rule that places "particular conduct or persons" "beyond the State's power to punish"). In other words, Miller categorically prevented the State from imposing a mandatory life sentence on anyone who was a juvenile when he or she committed a crime. Id. Therefore, because Miller was a substantive rule, it applied retroactively regardless of when a qualifying defendant's conviction became final. Montgomery, 136 S. Ct. at 729 ("The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.").

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

Johnson cites to Welch v. United States, 136 S. Ct. 1257 (2016), in support of his argument. This Court in Welch did not, however, overrule Schriro. Indeed, the Welch decision supports the determination that the new Hurst rule is procedural"

> "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." Schriro, 542 U.S. at 353, 124 S. Ct. 2519. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.*, at 351-352, 124 S. Ct. 2519 (citation omitted); See Montgomery, supra, at ----, 136 S. Ct. at 728. Procedural rules, by contrast, "regulate only the manner of determining the defendant's culpability." Schriro, 542 U.S. at 353, 124 S. Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." Ibid. "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.*, at 352, 124 S. Ct. 2519.

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

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

In sum, the questions Johnson presents do not offer any matter which comes within the parameters of Rule 10 of the Rules

of the United States Supreme Court. He does not identify any direct conflict with this Court or other courts, nor does he offer any unresolved, pressing federal question. He challenges only the application of this Court's well-established principles to the Florida Supreme Court's decision. As Johnson does not demonstrate any compelling reasons for this Court to exercise its certiorari jurisdiction under Rule 10, this Court should deny the petition.

CONCLUSION

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

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 1st day of August, 2018, a true and correct copy of the foregoing has been submitted using the Electronic Filing System. I further certify that a copy has been sent by U.S. mail to: Margaret S. Russell and Julie A. Morley, Assistants CCRC-M, Law Office of the Capital Collateral Regional Counsel-Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637.

s/ Scott A. Browne
COUNSEL FOR RESPONDENT

APPENDIX A

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT, IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA, Plaintiff vs. EMANUEL JOHNSON, Defendant.	Case No. 88-3198 and 88-3199

Sarasota, FLorida

May 30, 1991

VOLUME THREE - BIFURCATED TRIAL

The above-entitled cause continued and concluded in trial before the Honorable ANDREW D. OWENS, JR., a Circuit Court Judge, and a jury at the Sarasota County Courthouse, when were present the following parties:

On behalf of the State:	On behalf of the Defense:
EARL MORELAND, Esq., State Attorney DENISE NALES, Esq., and DAVID DENNEY, Esq., Assistant State Attorneys	ELLIOTT METCALFE, Esq., Public Defender TOBEY C. HOCKETT, Esq., and ADAM TEBRUGGE, Esq., Assistant Public Defenders

006075

THE COURT: Thank you, Mr. Tebrugge.

CHARGE OF THE COURT (10:20 a.m.)

THE COURT: Ladies and gentlemen, I, too, wish to thank each of you very much for all of your cooperation and consideration that you have shown to the Court, the State, and to Mr. Johnson.

We are all very fortunate to have twelve individuals such as yourself who are willing to make the sacrifice and serve as jurors, and we all very much appreciate that.

At this time, I am going to review with you the instructions. I would ask you to follow along with me as I read the instructions.

Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree.

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge.

However, it is your duty to follow the law that will now been given you by this Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to

justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and the evidence that has now been received or been presented to you in these proceedings.

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

One, the defendant has been previously convicted of a felony involving the use or threat of violence to some person.

The crimes of attempt to commit murder in the first degree with a weapon, burglary of a dwelling while armed with a dangerous weapon, robbery while armed with a dangerous weapon.

Robbery and burglary of an occupied structure are felonies involving the use or threat of violence to another person.

Two, the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of burglary which was committed for financial gain.

006106

Three, the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.

Heinous menas extremely wicked or shockingly eveil.

Atrocious means outraageously wicked and vile.

Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.

The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional facts that show the crime was conscienceless or pityless and was unnecessarily torturous to the victim.

If you find the aggravating circumstances do not justify the death peanlty, your advisory sentence should be one of life imprisonment without the possibility of parole for 25 years.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

Among the mitigating circumstances you may consider if established by the evidence are:

One, the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional distu[illegible]ce.

Two, the age of the defendant at the time of the crime.

Three, any other aspect of the defendant's character or record, and any other circumstance of the offense.

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

If one or more aggravating circumstances are established, you should consider all of the evidence tending to establish one or more mitigating circumstance and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant.

If you are reasonable convinced that a mitigating circumstance exists, you may consider it as established.

The sentence that you recommend to this Court must be based upon the facts as you find them from the evidence and the law.

You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on those considerations.

In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous.

The fact that the determination of whether you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.

Before your ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

If a majority of the jury determine that Emanuel Johnson should be sentenced to death, your advisory sentence will be a majority of the jury by a vote of, and you fill in the actual vote, advise and recommend to the Court that it impose the death penalty upon Emanuel Johnson.

On the other hand, if by six or more votes, the jury determines that Emanuel Johnson should not be sentenced to death, your advisory sentence will be the jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Emanuel Johnson without possibility of parole for 25 years.

You will now retire to consider your recommendation.

When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your Foreman, Mr.

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Pompano, and reutnred to the Court.

And we have the verdict form for the penalty phase, and it's just as explained in these instructions, and once you have reached your decision, either, one, we recommend the defendant be sentenced to life imprisonment without the possibility of parole for 25 years, or, two, we recommend by a vote of, and you fill in the blank, that the defendant be sentenced to death. It's then dated and signed by Mr. Pompano, the Foreperson.

One thing that's very important is that during this penalty phase, you should not consider anything that I may very said or done throughout this trial that would in any way make you think that I preferred one penalty over another.

Likewise, your feelings concerning the attorneys, whether you felt that I got mad at one of the attorneys or liked one of the attorneys more than another, none of that should have any basis or should not be considered by you in any manner whatsoever in reaching this decision during the penalty phase.

Again, thank you.

If you would like drinks or cokes, the Bailiff will be available. There's no way of knowing how long this will take.

If it goes into the lunch hour, we'll be glad to

furnish you with lunch.

The evidence, if there is any particular evidence that you would like to view, it will all be available here for your viewing.

Thank you, ladies and gentlemen.

(Whereupon, the jury retired for deliberation at 10:30.)

(AT THE BENCH)

MR. TEBRUGGE: Your Honor, I got the impression that the Court was not going to submit the penalty phase mitigation evidence to the jury.

THE COURT: I'm sorry. No; I was going to send it.

I am going to send back the penalty phase and I really meant to limit it to the guilt or innocence phase, but you are right, I did not. That was my intention. I apologize.

Wait a minute, what are we sending back?

MR. MORELAND: I think any of it's available to them.

THE COURT: I was going to send back to them the penalty phase and let them request the other.

MR. TEBRUGGE: I would request if we're going to send back any evidence at all, we need to send it all back.

MR. MORELAND: I think that's wrong, Judge, but my

APPENDIX B

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT, IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA, Plaintiff, VS. EMANUEL JOHNSON, Defendant.	CASE NOS. 88-3198, 88-3199 88-3200, 88-3202 88-3246, 88-3438

Sarasota, Florida
June 18, 1991

The above-entitled cause came on for penalty phase hearing before the Honorable Andrew Owens, Jr., at the Sarasota County Courthouse, when were present the following parties:

On behalf of the State:
Earl Moreland, Esq.,
State Attorney
Dennis Nales, Esq.,
Assistant State Attorney

On behalf of the Defense:
Tobey Hockett, Esq.,
Adam Tebrugge, Esq.,
Assistant Public Defenders

I N D E X

THE COURT: Ladies and gentlemen, again I want to thank you all for your cooperation and attention throughout this trial.

At this time I'm now going to review with you the appropriate instructions for the penalty proceedings.

Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for the crime of murder in the first degree.

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of myself. However, it is your duty to follow the law that will now be given you by this Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and the evidence that has been presented to you in these proceedings.

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

(1) The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of armed burglary, which was committed for financial gain.

(2) The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.

"Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.

The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show the crime was conscienceless or pitiless or was unnecessarily torturous to the victim.

(3) The defendant has been previously convicted of another capital offense or a felony involving the use or threat of violence to some person.

The crime of first degree murder is a capital felony. The crimes of armed burglary, attempt to commit murder in the first degree with a weapon, burglary of a dwelling while armed with a dangerous weapon, robbery while armed with a deadly weapon, robbery, burglary of an occupied structure, are felonies involving the use or threat of violence to another person.

If you find the aggravating circumstances do not justify the death penalty your advisory sentence should be one of life imprisonment without possibility of parole for 25 years.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

Among the mitigating circumstances you may consider if established by the evidence are:

(1) The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

(2) The age of the defendant at the time of the crime.

(3) Mitigating circumstances are not limited to the foregoing listed circumstances and may include any other aspect of the defendant's character or record or any other circumstance of the offense.

Each such circumstance must be considered as a separate mitigating circumstance.

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating circumstances are established you should

consider all the evidence tending to establish one or more mitigating circumstances and give the evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists you may consider it as established.

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based on these considerations.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

The fact that the determination of whether you recommend a sentence of death or a sentence of life imprisorment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake and bring to bear your best judgment in reaching your advisory sentence.

If a majority of the jury determine that Emanuel Johnson should be sentenced to death your advisory sentence would be: A majority of the jury by a vote of, and you fill in the actual vote, how many were for and how many were opposed, advise and recommend to the Court that it impose the death penalty upon Emanuel Johnson.

On the other hand, if by six or more votes the jury determines that Emanuel Johnson should not be sentenced to death, your advisory sentence will be: The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Emanuel Johnson without possibility of parole for 25 years.

You will now retire to consider your recommendation. When you have reached an advisory sentence in conformity with these instructions, the form of recommendation should be signed by Mr. Tegge, the foreperson, and returned to the Court.

And you'll be presented with the form for your verdict. And again, it has the two possibilities. Mr. Tegge would date it, and today's date is the 18th of June, and he would sign this.

One, we recommend, and you check only one of these, recommend the defendant be sentenced to life imprisonment without possibility of parole for 25 years. If that's your sentence that's simply checked, dated and signed by

Mr. Tegge.

Number two, we recommend by a vote of, and you have to enter the actual vote, that the defendant be sentenced to death.

If that's your selection you mark two, enter the actual vote in the blank. It's then dated and signed by Mr. Tegge.

One last aspect, and that is that it's important for you to understand that any actions that I may have taken during this trial, anything that I may have said, if I fussed at the attorneys, if I overruled or sustained an objection, you should take none of that to in any way make you feel that I recommend or prefer one penalty over another. This is a decision that you make free from anything that I may have said or done throughout this trial that would make you think that I preferred one penalty over another.

At this time the bailiff will take you to the jury holding room. Initially we'll bring in to you all the evidence that's been presented in this penalty phase, together with the verdict form. Very shortly we will bring in to you the evidence that was presented in the guilt phase of this trial in the event that you wish to review any of that evidence.

If you would like anything to drink, sodas, coffee,

any snacks at this time, if you would please let the bailiff know. Again, I would ask you not to ask the bailiff any questions. I know that Lorraine would certainly do an excellent job in answering those, but she's precluded from answering questions, so it's not that she wishes to be rude in any manner whatsoever. If you have a question if you would please submit it in writing. Mr. Tegge can write it out, or anyone else can, and submit it to the Court, and at that time we could answer it as we feel appropriate. Thank you.

(Whereupon, the jury was excused from the courtroom. The time is 10:38 a.m.)

THE BAILIFF: Jury's secured.

THE COURT: Thank you.

We need to next very quickly go over the evidence.

THE BAILIFF: Penalty phase evidence.

THE COURT: Why don't you take those back and as quickly as we do the other we'll bring that back.

THE BAILIFF: Yes, sir.

THE COURT: Now, depending on how long they stay, if it rolls around to lunch time we'll of course feed them.

THE BAILIFF: Okay.

THE COURT: That's all they wanted was coffee?

THE BAILIFF: Yeah, just coffee and donuts and