DOCKET NO. 18-5091

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN DON FOSTER,

***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]

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 decision of the Florida Supreme Court is reported at Foster v. State, 235 So. 3d 294 (Fla. 2018).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on January 29, 2018. Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

In 1998, Kevin Don Foster was convicted of the first-degree murder of Mark Schwebes and sentenced to death. The following factual background was taken from the Florida Supreme Court's opinion affirming Foster's conviction and death sentence.

> The evidence presented at trial established that in early April of 1996, a few teenagers organized a group called the "Lords of Chaos." The original membership of the group was made up of Foster, Peter Magnotti and Christopher Black, the latter two of whom were attending Riverdale High School ("Riverdale") at the time. Foster, the leader of the Lords of Chaos, was not a student. The group eventually grew to later include, among other Riverdale students, Derek Shields, Christopher Burnett, Thomas Torrone, Bradley Young and Russell Ballard as additional members. Each member of the Lords of Chaos had a secret code name. Foster's code name was "God." The avowed purpose of the group was to create disorder in the Fort Myers community through a host of criminal acts.
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> On April 30, 1996, consistent with its purpose, the group decided to vandalize Riverdale and set its auditorium on fire. Foster, Black, and Torrone entered Riverdale and stole some staplers, canned goods, and a fire extinguisher to enable them to break the auditorium windows. Leading the group, Foster carried a gasoline can to start the fire in the auditorium while the other group members, Shields, Young, Burnett, Magnotti, and Ballard, kept watch outside.
>
> The execution of the vandalism was interrupted at around 9:30 p.m., when, to the teenagers' surprise, Riverdale's band teacher, Mark Schwebes, drove up to the auditorium on his way from a school function nearby. Upon seeing the teacher, Foster ran, but Black and Torrone were confronted by Schwebes who seized the stolen items from them. Schwebes told them that he would contact Riverdale's campus police the next day and report the incident. Schwebes then left to have dinner with a friend, David Adkins.[FN1]

FN1. Adkins testified that he saw Schwebes' vehicle parked at the spot where Black and Torrone were caught by Schwebes at about 9:30 p.m. He also saw someone running from the general location of Schwebes' vehicle.

When Black and Torrone rejoined the others, Black declared that Schwebes "has got to die," to which Foster replied that it could be done and that if Black could not do it, he would do it himself. Foster was apparently concerned that the arrest of Black and Torrone would lead to the exposure of the group and their criminal activities.

Subsequently, Black suggested that they follow Schwebes and make the killing look like a robbery. However, upon further discussion, the group decided to go to Schwebes' home and kill him there instead. Foster then told the group that he would go home and get his gun. They obtained Schwebes' address and telephone number through a telephone information assistance operator, and confirmed this information by calling and identifying Schwebes' voice on his answering machine. They then went to Foster's home where they obtained a map to confirm the exact location of Schwebes' address, and procured gloves and ski masks in preparation for the killing. Foster decided to use his shotgun in the killing, and replaced the standard birdshot with #1 buckshot, a more deadly ammunition. The group also retrieved a license tag they had stolen earlier to use during the crime.

Black, Shields, Magnotti, and Foster agreed to participate in the murder, and at 11:30 p.m., drove to Schwebes' home. Shields agreed to knock at the door and for Black to drive. When the group finally arrived there, Foster and Shields walked up to Schwebes' door, and as Shields knocked, Foster hid with the shotgun. As soon as Schwebes opened the door, Shields got out of the way, Foster stepped in front of Schwebes and shot him in the face. As Schwebes' body was convulsing on the ground, Foster shot him once more.

Although there were no other eyewitnesses, two of

Schwebes' neighbors heard the shots and a car as it left the scene.[FN2] Paramedics arrived at the scene almost immediately and declared Schwebes dead. The medical examiner confirmed that Schwebes died of shotgun wounds to his head and pelvis, and that Schwebes would have died immediately from the shot to the face.

> FN2. The two witnesses testified to hearing a car with a loud muffler leaving immediately after the two shots. Shields' car had a bad muffler. One testified to seeing a car driving away.

On the way to Foster's home after the killing, the group stopped to remove the stolen tag, and Foster wiped off the tag to remove any fingerprints before discarding it. Once home, the four of them got into a "group hug" as Foster congratulated them for successfully sticking to the plan. Foster then called Burnett and Torrone and boasted about how he blew off part of Schwebes' face and to watch for it in the news. The next day, on May 1, 1996, while at Young's apartment, the six o'clock news reported the murder, and Foster continuously laughed, hollered, and bragged about it. Young testified that Foster said that he looked Schwebes right in the eyes before shooting him in the face and then watched as this "red cloud" flowed out of his face.

The police found Foster's shotgun, a ski mask, gloves, and a newspaper clipping of the murder in the trunk of Magnotti's car. According to Burnett, he was directed by Foster to put those items in Magnotti's trunk. Foster's fingerprint was found on the shotgun, the latex gloves, and the newspaper. Burnett and Magnotti's prints were also found on the newspaper.

Foster's mother, Ruby Foster ("Ms. Foster"), testified on direct examination that Foster called her from home at around 4:30 p.m. on the day of the murder. When she got home that night, at 9 p.m., Foster was there. She later left the house at about 9:45 p.m., but found Foster home when she returned a little past 11 p.m. She made another trip to the Circle K store and returned at about 11:20 p.m. once

> again to find Foster where she left him. On cross-examination, however, Ms. Foster admitted that she merely assumed that Foster was at home when he called her. Additionally, all the participants in the conspiracy and the murder testified that when they met at Foster's home on the night of the murder, no one was in the home and Foster had to disable the alarm apparatus upon entering.
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> All the members of the Lords of Chaos who participated in the murder and the conspiracy cooperated with the State through various plea agreements [FN3] and testified to the above facts at trial against Foster with regard to the make-up of the group, Foster's leadership role in the group, criminal acts committed by the group prior to the murder, and his leadership and mastermind role in the conspiracy and the ensuing murder. Foster was convicted for the murder of Schwebes.
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> > FN3. Pursuant to plea agreements with the State which required truthful testimony against Foster, the group members were sentenced as follows: Black and Shields were sentenced to life without the possibility of parole; Magnotti was sentenced to thirty-two years' imprisonment; Burnett was sentenced to two years in county jail for non-homicidal offenses; Torrone was sentenced to one year in county jail, ten years probation, one hundred hours of community service and restitution. As to the other members, the record does not indicate whether there was any plea agreement or any jail or prison sentences.

Foster v. State, 778 So. 2d 906, 909-11 (Fla. 2000).

At the penalty phase, the jury recommended that Foster be sentenced to death by a nine-to-three vote. The trial court followed the jury's recommendation and sentenced Foster to death after finding two aggravating factors: (1) the capital felony

was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; and (2) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Id. at 911-12.

After the Florida Supreme Court issued its opinion affirming Foster's judgment and death sentence, Foster filed a motion for rehearing. The Florida Supreme Court denied the motion on January 22, 2001. Foster did not seek certiorari review in this Court, so his conviction and sentence became final on April 22, 2001.

On September 27, 2001, Foster filed his initial state postconviction motion, and filed an amended motion in 2010. The court conducted an evidentiary hearing, and on July 6, 2011, issued an order denying postconviction relief. Foster appealed this ruling to the Florida Supreme Court, and the court affirmed the denial of relief. Foster v. State, 132 So. 3d 40 (Fla. 2013).

On February 18, 2016, Foster filed a successive postconviction motion seeking relief pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016). The court denied the motion as "premature and insufficient," without prejudice to file another motion after the Florida Supreme Court determined whether Hurst

was retroactive. On January 12, 2017, Foster filed a second successive postconviction motion seeking relief based on Hurst. The court denied the motion, and Foster appealed to the Florida Supreme Court. On June 21, 2017, the Florida Supreme Court stayed Foster's appeal pending the outcome of Hitchcock v. State, 226 So. 3d 216 (Fla.), cert. denied, 138 S. Ct. 512 (2017).

In Hitchcock, the Florida Supreme Court reaffirmed its previous holding in Asay 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 Foster to show why Hitchcock should not be dispositive in his case. Following briefing, the Florida Supreme Court affirmed the lower court's denial of relief, finding that Hurst does not apply retroactively to Foster's sentence of death that became final in 2001. Foster v. State, 235 So. 3d 294 (Fla. 2018).

Foster 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.

Foster's petition presents yet another instance in which a death-sentenced Florida murderer who was denied the retroactive application of this Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), and the Florida Supreme Court's decision in Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017), seeks this Court's declaration that Hurst v. State is retroactive on collateral review. Florida's retroactivity analysis, however, is a matter of state law. This fact alone militates against the grant of certiorari in this case. Indeed, 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); Kaczmar v. State, 228 So. 3d 1 (Fla. 2017), cert. denied, 138 S. Ct. 1973 (2018); Cole v. State, 234 So. 3d 644 (Fla.), cert. denied, 17-8540, 2018 WL 1876873 (June 18, 2018); Zack v. State, 228 So. 3d 41 (Fla. 2017), cert. denied, 17-8134, 2018 WL 1367892 (June 18, 2018); Jones v. State, 234 So. 3d 545 (Fla.), cert. denied, 17-8652, 2018 WL 1993786 (June 25, 2018).

Nevertheless, as the others have done before him, Foster attempts to apply a constitutional veneer to his argument for review of the state court's retroactivity decision, asserting that the Constitution demands full retroactive application of Hurst v. Florida and Hurst v. State. As will be shown, nothing about the Florida Supreme Court's retroactivity decision is inconsistent with the United States Constitution. Foster does not provide any "compelling" reason for this Court to review his case. U.S. Sup. Ct. R. 10. Foster cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision in Foster v. State, 235 So. 3d 294 (Fla. 2018), in which the court determined that Foster was not entitled to relief because Hurst v. State was not retroactive to his death sentence. Nothing presented in the petition justifies the exercise of this Court's certiorari jurisdiction.

I. The Florida Court's Ruling on the Retroactivity of Hurst v. Florida and Hurst v. State is a Matter of State Law.

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.

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. Secretary, 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. 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." 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 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.

While Foster seeks certiorari review of the Florida Supreme Court's utilization of partial retroactivity and its refusal to apply Hurst retroactively to his case, this case is not a proper vehicle for certiorari review. Notably, Florida's partial retroactive application of Hurst is based on state law, not federal law. This Court has generally held that a state court's retroactivity determinations are a matter of state law rather than 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 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). 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.

II. The Florida Supreme Court's Ruling on Retroactivity Does Not Violate the Eighth Amendment.

Foster argues that the Florida Supreme Court's utilization of partial retroactivity is arbitrary and violative of the Eighth Amendment. Foster specifically claims that using the Ring decision date as a cutoff point for retroactivity creates arbitrary results because capital defendants each encounter different delays throughout their proceedings before their case is considered final. Thus, he essentially argues that basing retroactivity analysis on court dates is itself arbitrary. However, all modern retroactivity tests depend on dates of finality.

Traditionally, new rules are applied retroactively only to cases that 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"). Griffith, therefore, depends on the date of finality of the direct appeal. Under Foster's argument, this traditional "pipeline" concept for retroactivity would be considered arbitrary if one defendant with delays in his case receives the benefit of a new rule because his case is not yet final, while another defendant without delays in his case does not receive that same benefit because his case became final

before the other defendant's case with delays. Even a retroactive application of a new development in the law under the traditional analysis will mean that some cases will get the benefit of a new development while other cases will not, depending on a date.

Additionally, the current federal test for retroactivity in the postconviction context, Teague, also depends on a date. If a case is final on direct review, the defendant will not receive the benefit of the new rule unless one of the exceptions to Teague applies. The Florida Supreme Court's line drawing based on a date is no more arbitrary than this Court's line drawing in Griffith or Teague.

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

Moreover, under the "pipeline" concept, Hurst would only apply to the cases that were not yet final on the date of the decision in Hurst, and Foster certainly would not fit into that category. The difference between the 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 that determination to be made official in Hurst.

Extending relief to more defendants who would not receive the benefit of a new rule because their cases were already final when Hurst was decided does not violate the Eighth Amendment. The Florida Supreme Court's Asay decision was well supported under state law on retroactivity, and it has been consistently applied to all pre-Ring defendants. Therefore, the Ring-based cutoff for the retroactive application of Hurst is not arbitrary like Foster contends.

Foster also argues that his death sentence violates the Eighth Amendment because it is not based on a unanimous jury

recommendation. This argument is entirely without merit. While Foster seems to imply that this Court has held that the Eighth Amendment mandates unanimous jury recommendations, this Court has never held as such. Even the Florida Supreme Court plainly acknowledged in its Hurst v. State opinion that this Court "has not ruled on whether unanimity is required" in capital cases. Hurst, 202 So. 3d at 59.

To the extent that Petitioner may be suggesting 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."); Harris v. Alabama, 513 U.S. 504, 515 (1995) (holding that the Constitution does not prohibit the trial judge from "impos[ing] a capital sentence"). No case from this Court has mandated jury sentencing in a capital case, and such a holding would require reading a mandate into the Constitution that is simply not there. The Constitution provides a right to trial by jury, not to sentencing by jury.

The Eighth Amendment requires capital punishment to be limited "to those who commit a 'narrow category of the most serious crimes' and whose extreme culpability makes them 'the

most deserving of execution.'" Roper v. Simmons, 543 U.S. 551, 568 (2005) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)). As such, the death penalty is limited to a specific category of crimes and "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." Roper, 543 U.S. at 568. Petitioner's death sentence was imposed in accordance with all applicable constitutional principles at the time it was imposed. 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. Foster 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).

Other than speculation, Foster 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).

Finally, Foster complains that the sentencing procedure used in his case violated the Eighth Amendment under this Court's ruling in Caldwell v. Mississippi, 472 U.S. 320 (1985), because the jury was given instructions informing that its death recommendation was merely advisory. This matter does not merit this Court's review. 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 also 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").

Here, Foster's jury was properly instructed on its role based on the law existing at the time of his trial. Foster's jury was informed that it needed to determine whether sufficient aggravating factors existed and, if so, whether the aggravation outweighed the mitigation before the death penalty could be imposed. His jury was also informed that its recommendation would be given "great weight" by the trial court. The instructions to the jury were certainly proper based on the law at that time. See Reynolds v. State, 43 Fla. L. Weekly S163, *9, 2018 WL 1633075 (Fla. April 5, 2018) (explaining that under Romano v. Oklahoma, 512 U.S. 1(1994), the Florida standard jury instructions 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"). Accordingly, there was no Caldwell violation, and for all the foregoing reasons, certiorari review should be denied.

III. The Florida Supreme Court's Application of Partial Retroactivity Does Not Violate the Equal Protection Clause.

Lastly, Petitioner contends that it is a Fourteenth Amendment violation to deny retroactive application of Hurst to

him and other pre-Ring inmates, while granting it to post-Ring inmates. 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.

As previously explained in the prior section, the Florida Supreme Court's partial retroactivity ruling was based on the date of the Ring decision; it was not based on a purposeful intent to deprive pre-Ring death sentenced defendants, like Foster, relief under Hurst v. State. The Florida Supreme Court merely moved the retroactive application of Hurst back to Ring so that capital defendants would not be penalized for the delay it took to determine that Florida's capital sentencing scheme was unconstitutional. See Mosley v. State, 209 So. 3d 1248, 1281 (Fla. 2016) ("We now know after Hurst v. Florida that Florida's capital sentencing statute was unconstitutional from the time that the United States Supreme Court decided Ring.") The court explained that "[b]ecause Florida's capital sentencing statute

has essentially been unconstitutional since Ring in 2002, fairness strongly favors applying Hurst, retroactively to that time." Id. at 1280. The Florida Supreme Court has certainly 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.").

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. Foster is being treated exactly the same as similarly situated murderers. Consequently, Foster's equal protection argument is meritless.

IV. Any Possible Hurst Error was Clearly Harmless Based on the Facts of Petitioner's Case.

Finally, certiorari review would also be inappropriate in this case because, assuming any Hurst error can be discerned from this record, any such error would clearly be harmless. Hurst errors are subject to harmless error review. See Hurst v.

Florida, 136 S. Ct. at 624; see also Chapman v. California, 386 U.S. 18, 23-24 (1967). There is no doubt that the jury would have found the existence of the same two aggravating circumstances relied upon by the trial judge in imposing the death sentences in this case. The aggravating circumstances of CCP and avoiding arrest which were found by the trial court and affirmed by the Florida Supreme Court on appeal were established by overwhelming evidence. See Foster, 778 So. 2d at 918-21 (noting that Foster and his friends clearly committed the murder for the purpose of avoiding arrest for their prior crimes and the evidence strongly supported the finding of CCP because the ruthless, execution-style murder was carefully planned).

This Court's decision in 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.[1] See Kansas v. Carr, 136

[1] 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 "weighing is not a factfinding process subject to the Sixth Amendment.") (string citations 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

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."). Any constitutional error in this case was clearly harmless on these facts. Accordingly, certiorari review should be denied.

(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).

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 25th 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 by U.S. mail to: Scott Gavin, The Law Office of the Capital Collateral, Regional Counsel - South, 1 East Broward Blvd., Suite 444, Fort Lauderdale, FL 33301.

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