Case No. 18-5122

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS OVERTON

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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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

1. Whether certiorari review should be denied because the Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florida* and *Hurst v. State*, which 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*, does not violate the Equal Protection clause of the Fourteenth Amendment nor the Eighth Amendment's prohibition against cruel and unusual punishment?

2. Whether certiorari review should be denied because the Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florida* and *Hurst v. State*, which 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*, does not violate the Supremacy Clause?

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The decision of the Florida Supreme Court is reported at *Overton v. State*, 236 So. 3d 238(Fla. 2018).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on February 2, 2018. Petitioner sought an additional 60 days for filing of this Petition, which was granted up to July 2, 2018. Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257(a) and 2101(d). Respondent agrees that the statutory provisions set 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

The Supremacy Clause of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI cl. 2.

The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. VI.

The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. VIII.

> The Fourteenth Amendment to the United States Constitution:
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE AND FACTS

The Florida Supreme Court provided the following factual summary on direct appeal.

> On August 22, 1991, Susan Michelle MacIvor, age 29, and her husband, Michael MacIvor, age 30, were found murdered in their home in Tavernier Key. Susan was eight months pregnant at the time with the couple's first child...
>
> Concerned co-workers and a neighbor found their bodies the next morning inside the victims' two-story stilt-house located in a gated community adjacent to a private airstrip...
>
> In the living room, where Michael's body was found, investigators noted that his entire head had been taped with masking tape...When police removed the masking tape, they discovered that a sock had been placed over his eyes...Bruising on the neck area was also visible. The investigators surmised that a struggle had taken place because personal papers were scattered on the floor...
>
> Susan's completely naked body was found on top of a white comforter. Her ankles were tied together with a belt, several layers of masking tape and clothesline rope. Her wrists were also bound together with a belt. Two belts secured her bound wrists to her ankles. Around her neck was a garrote formed by using a necktie and a black sash, which was wrapped around her neck several times...under the comforter was her night shirt; the buttons had been torn off with such force that the button shanks had been separated from the buttons themselves. Near the night shirt were her panties which had been cut along each side in the hip area with a sharp instrument...officers found an address book with some pages partially torn out...

The investigators used a luma light to uncover what presumptively appeared to be seminal stains on Susan's pubic area, her buttocks, and the inside of her thighs...

The investigation next proceeded to a spare bedroom, which was then being renovated for use as a nursery for the baby. The sliding glass door in that room was also open. A ladder was found propped up against the balcony outside the nursery. Cut clothesline rope was hanging from the balcony ceiling, and outside the home, the phone wires had been recently cut with a sharp instrument...

As to Michael, the autopsy revealed that he suffered a severe blow to the back of the head. The external examination of Michael's neck revealed several bruises particularly around the larynx, along with ligature marks...The internal examination of Michael's neck confirmed that his larynx, as well as the hyoid bone and epiglottis, had been fractured. There was also bruising and an internal contusion indicative of a heavy blow to the back of the neck. The internal examination of the neck area revealed that the neck was unstable and dislocated at the fifth cervical vertebrae. There was also internal bleeding in the left shoulder, indicative of a severe blow to the area. Additionally, Michael had significant bruising in his abdominal area causing a contusion fairly deep within the abdomen. The doctor testified that the injury could have been inflicted by a strong kick to the area...

With respect to Susan...ligature marks around her neck indicated that she was moving against the ligature, thereby causing friction...more likely than not, a longer period of time passed before Susan lost consciousness once the ligature was applied. Her wrists also exhibited ligature marks and her hands were clenched. Moving down to her lower body, an abrasion to her vulva and several abrasions to her legs indicative of a struggle were found. The medical examiner concluded, based on the totality of the circumstances, that she had been sexually battered...

The medical examiner determined that Susan was approximately eight months pregnant at the time...The doctor determined that the baby would have been viable had he been born, and that he lived approximately thirty minutes after his mother died. The doctor testified that there was evidence that he tried to breath on his own...

At the time of the MacIvor murders, [Thomas] Overton worked at the Amoco gas station which was only a couple of minutes away from the MacIvor home. Janet Kerns, Susan's friend and fellow teacher, had been with Susan on several occasions when Susan pumped gas at that Amoco station...

In late 1996, Overton, then under surveillance, was arrested during a burglary in progress. Once in custody, officers asked him to provide a blood sample, which Overton refused. Days later, Overton asked correction officers for a razor, and one was provided. Overton removed the blade from the plastic razor using a wire from a ceiling vent, and made two cuts into his throat. The towel that was pressed against his throat to stop the bleeding was turned over to investigators by corrections

officers. Based on preliminary testing conducted on the blood from the towels, police obtained a court order to withdraw the defendant's blood for testing...

Dr. Pollock was able to compare the profile extracted from the stains in the bedding to a profile developed after extracting DNA from Overton's blood. After comparing both profiles at six different loci, there was an exact match at each locus. Dr. Pollock testified that the probability of finding an unrelated individual having the same profile was, conservatively, in excess of one in six billion Caucasians, African Americans and Hispanics.

In 1998, the cuttings from the bedding were submitted to yet another lab, the Bode Technology Group ("Bode")...The Bode lab conducted a different DNA test, known as short tandem repeat testing ("STR"), from that performed by the FDLE. Overton's DNA and that extracted from a stain at the scene matched at all twelve loci. These results were confirmed by a second analyst and a computer comparison analysis. Asked to describe the significance of the Bode lab findings, Dr. Bever testified that the likelihood of finding another individual whose DNA profile would match at twelve loci was 1 in 4 trillion Caucasians, 1 in 26 quadrillion African Americans and 1 in 15 trillion Hispanics.

In addition to the presentation of the DNA evidence, the State presented the testimony of two witnesses formerly incarcerated in the same facility with Overton. The first was William Guy Green, who testified that Overton had admitted to him that Overton had "done a burglary at a real exclusive, wealthy, wealthy area down in the Keys. The guy had his own airplane and a private airway and he could land his plane in his front yard." Overton further told Green that when he went into the house, he "started fighting with the lady," whom he later described as a "fat bitch," and that "she jumped on his back and he had to waste--waste somebody in the Keys." Green also testified that Overton stated that he had struggled with another person inside the house. Green further testified that Overton spoke to him about specific action he would take when he committed burglaries. Among these precautions were the cutting of phone lines before going into the house to stop victims from calling out or to stop automatic alarm systems; he would always wear gloves...

The second informant to testify was James Zientek, who met Overton at the Monroe County Jail in May 1997... Overton told Zientek that he had met Susan at the Amoco gas station where he worked...according to Zientek, Overton retrieved Susan's address from either a check or a credit card receipt...

Overton told Zientek...[o]ne of the first things Overton completed when he arrived was the cutting of phone wires. He then positioned a ladder against the balcony that surrounded the house, but in the process of moving the ladder, he made a noise. A light in the house came on which caused him to wait outside for approximately twenty minutes before ascending the ladder. Once he reached the balcony, Overton

cut some clothesline, "popped" the sliding glass door to the spare bedroom and gained entry into the home...Overton then approached Michael from behind and "slammed him in the back of the head" with a pipe he had found at the house. Zientek testified that "the blow to the head with the pipe didn't immediately knock him out. There was a struggle and Mr. Overton knocked him out with his fist." While Overton was attempting to restrain Michael, Susan ran out of the bedroom screaming. He chased her back into the bedroom and temporarily restrained her, using articles he found inside the bedroom to bind her...

At that point, Overton became "concerned about the male just being temporarily knocked out. He knew that he wasn't dead." He then proceeded to place a sock over Michael's eyes and covered his face with masking tape...he went back into the master bedroom and raped Susan. When he had completed his attack, Overton said he strangled her because he "doesn't leave any witnesses." He also stated that either in the process, or after completing the strangulation, Overton noticed motion in her stomach, placed his hand over it, and felt the fetus move.

Overton then returned to the living room area "where the male was apparently just becoming conscious." Overton then kicked Michael in the abdominal area and proceeded to strangle him with "some kind of cord." Overton "made it very clear that he doesn't leave witnesses."...Overton further stated that he "confuse[d] the crime scene" and ripped pages from the address book in the bedroom because he believed it would lead the police to think that the attacker wanted to remove the assailant's name from the phone book. Overton also told Zientek that he took things "nobody would realize were gone." The only item which neither law enforcement officers nor the families were able to account for were several pictures that Susan had taken that weekend of her pregnant stomach. Overton essentially concluded by informing Zientek that he entered the house with the intent to rape Susan...

The primary thrust of the defense in the case was centered upon a theme that law enforcement officers, Detective Visco in particular, had planted Overton's semen in the bedding, which was essential to the prosecution. The defense theorized that Detective Visco obtained the defendant's sperm from Overton's one-time girlfriend, Lorna Swaybe, transported the sample in a condom, and placed it on the bedding...

At the conclusion of the guilt phase proceedings, the jury found Overton guilty of the first-degree murders of Susan and Michael MacIvor. The jury also returned guilty verdicts as to the charges of killing an unborn child, burglary, and sexual battery...

The defendant declined to present any evidence in mitigation of the death penalty and unequivocally stated on several occasions that he did not want his attorneys to present any mitigating evidence, nor would he permit them to make any arguments on his behalf. After concluding the penalty phase deliberations, the jury recommended imposition of the death penalty by a vote of nine to three as related

> to the death of Susan, and as to Michael MacIvor, the jury recommendation favored the death penalty by a vote of eight to four.
>
> The trial court found the following aggravators as to both victims: (1) the crimes were heinous, atrocious and cruel ("HAC"); (2) the murders were committed in a cold, calculated and premeditated manner ("CCP"); (3) the defendant has been previously convicted of another offense involving the use of violence (contemporaneous murder); (4) the murders occurred during the commission of a sexual battery and burglary; and (5) the murders were committed in an attempt to avoid arrest.
>
> With regard to mitigation...The judge concluded that nothing in the defendant's background could be classified as a statutory mitigating circumstance. As to nonstatutory mitigators, the court found that the defendant would be incarcerated for the rest of his life with no danger of committing any other violent acts, but gave this factor little weight. The court also recognized the defendant's courtroom demeanor and behavior as a nonstatutory mitigating factor, and accorded it some weight...
>
> [T]he judge imposed the death penalty upon Overton for the murders of Susan and Michael MacIvor. As to the other offenses, Overton was sentenced to 15 years for the killing of an unborn child and to two terms of life imprisonment for the burglary and sexual battery.

Overton v. State, 801 So.2d 877, 881-89 (Fla. 2001).

Thereafter, on March 4, 2002, Petitioner filed a Petition for Writ of Certiorari which this Court denied On May 13, 2002. *Overton v. Florida*, 535 U.S. 1062 (2002).

Petitioner filed multiple motions for postconviction relief. The Florida Supreme Court affirmed the denials of relief. *Overton v. State*, 976 So. 2d 536 (Fla. 2007) and *Overton v. State*, 129 So. 3d 1069 (Fla. 2013).

Petitioner then filed a petition for habeas corpus on November 8, 2013. On January 12, 2016, the petition was denied as untimely as well as on the merits and a Certificate of Appealability was also denied. Petitioner's counsel then filed an application with the Eleventh Circuit Court of Appeals for conflict-free counsel.

Also on January 12, 2016, this Court decided *Hurst v. Florida*, 136 S.Ct. 616 (2016), which declared that a jury, not a judge, must make the factual determination of the existence of an aggravating factor in order for the death penalty to be a permissible sentence and remanded the case back to the Florida Supreme Court to conduct a harmless error analysis. On remand, on October 14, 2016, the Florida Supreme Court issued *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), which used state law to further expand the requirements for the death penalty to be a permissible sentence in Florida.

Petitioner's counsel then filed a motion to stay proceedings in the Eleventh Circuit Court of Appeals while he litigated in the state courts the issue of whether *Hurst v. Florida* and *Hurst v. State* applied to Petitioner. That stay was granted.

On January 11, 2017, Petitioner filed in the state courts a successive 3.851 based on *Hurst* which was denied by the postconviction trial court on May 31, 2017. A motion for rehearing was denied and Petitioner filed a notice of appeal.

On August 10, 2017, the Florida Supreme Court issued *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), reiterating that *Hurst* relief would not be available to those whose cases were final prior to the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002). On September 27, 2017, the Florida Supreme Court then issued an order requiring Petitioner to show cause why the postconviction trial court's denial of the successive 3.851 should not be affirmed in light of *Hitchcock*. Petitioner filed his response on October 17, 2017. The State replied on October 31, 2017. Petitioner filed a response to the State's reply on November 13, 2017. On February 2, 2018, the Florida Supreme Court affirmed the denial of Petitioner's *Hurst* claim; this decision is the subject of the instant

petition for a writ of certiorari.[1] Petitioner now seeks certiorari review of the Florida Supreme Court's decision. This is the State's brief in opposition.

REASONS FOR DENYING THE WRIT

ISSUE I

CERTORARI REVIEW SHOULD BE DENIED BECAUSE THE FLORIDA SUPREME COURT'S RULING ON THE RETROACTIVITY OF *HURST V. FLORIDA* AND *HURST V. STATE*, WHICH 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*, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Petitioner seeks review of the Florida Supreme Court's decision holding that *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), did not apply retroactively to him and rejecting an Eighth Amendment challenge to its established partial retroactivity analysis. The issue of partial retroactivity is solely a matter of state law. This Court does not review decisions that are based solely on state law. Further, there is no conflict between this Court's retroactivity jurisprudence and the Florida Supreme Court's decision. This Court directly held in *Danforth v. Minnesota*, 552 U.S. 264 (2008), that states are free to have their own tests for retroactivity which provide more relief and that includes partial retroactivity. There is also no conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court. The Eleventh

[1] Though not relevant to the instant motion, for completeness, the State would note that on February 7, 2018, Petitioner notified the Eleventh Circuit Court of Appeals of the resolution in the state courts of his *Hurst* claim. The Eleventh Circuit then ordered Petitioner's conflict-free counsel to file a new Application for Certificate of Appealability which was filed on May 29, 2018. The State filed its opposition to the motion on June 28, 2018, and the parties are currently awaiting a decision from the Eleventh Circuit regarding the Certificate of Appealability.

Circuit has rejected an Eighth Amendment challenge to the Florida Supreme Court's partial retroactivity analysis. Opposing counsel cites no federal circuit court case or state supreme court case holding that partial retroactivity violates the Eighth Amendment. Since the petition presents an issue of state law over which there is no conflict, this Court should deny review of this claim.

The Florida Supreme Court ruling was based on state law

Petitioner appealed the state trial court's denial of his successive postconviction motion to the Florida Supreme Court. Petitioner argued that the Florida Supreme Court's partial retroactivity analysis violated the Eighth Amendment because it was arbitrary. The Florida Supreme Court affirmed the trial court's denial of the successive motion. *Overton v. State*, 236 So. 3d 238 (Fla. 2018). The Florida Supreme Court explained that *Hurst* did not apply retroactively to Petitioner because his death sentence became final on May 13, 2002, prior to the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002). The Florida Supreme Court cited to and based its decision on *Hitchcock v. State*, 226 So.3d 216, 217 (Fla. 2017), *cert. denied*, 138 S.Ct. 513 (2017), denying relief in this case based on its own existing precedent regarding partial retroactivity.

The Florida Supreme Court established its partial retroactivity analysis in two companion cases. In *Asay v. State*, 210 So.3d 1,15-22 (Fla. 2016), *cert. denied, Asay v.Florida*, 138 S.Ct. 41 (2017), the Florida Supreme Court held that *Hurst v. State* would not be retroactively applied to capital cases that were final before *Ring v. Arizona* was decided on June 24, 2002. The Florida Supreme Court in *Asay* relied on the state test for retroactivity found in *Witt v. State*, 387 So.2d 922 (1980). *See Asay*, 210 So.3d at 15-22. The Florida Supreme Court in *Asay* explicitly stated that, despite the federal courts' use of *Teague v. Lane*, 489 U.S. 288 (1989), to determine retroactivity, "this Court would continue to apply our longstanding *Witt* analysis, which provides more expansive retroactivity standards than those adopted in *Teague*." *Asay*, 210 So.3d at 15. The

Florida Supreme Court discussed the prongs of the *Witt* test for fourteen paragraphs. *Asay*, 210 So.3d at 17-22.

Further, in the companion case of *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), the Florida Supreme Court held that *Hurst v. State* would be retroactively applied to capital cases that were not final when *Ring* was decided on June 24, 2002. The Florida Supreme Court in *Mosley* relied on two state tests for retroactivity, that of *James v. State*, 615 So.2d 668 (Fla. 1993), and *Witt*. *See Mosley*, 209 So.3d at 1274-83.

The Florida Supreme Court then reaffirmed their decision denying all retroactive relief to cases that were final before *Ring* in *Hitchcock v. State*, 226 So.3d 216, 217 (Fla. 2017) (stating: "our decision in *Asay* forecloses relief"), *cert. denied*, 138 S.Ct. 513 (2017). The Florida Supreme Court in *Hitchcock* rejected Eighth Amendment, equal protection, and due process challenges to its prior holding in *Asay*. *Hitchcock*, 226 So.3d at 217 (explaining that although Hitchcock referenced "various constitutional provisions as a basis for arguments that *Hurst v. State*" entitled him to a new sentencing proceeding, "these are nothing more than arguments that *Hurst v. State* should be applied retroactively").

The Florida Supreme Court has denied relief in capital cases based on its partial retroactivity analysis and this Court has denied review of those cases. *Lambrix v. State*, 227 So.3d 112 (Fla. 2017) (denying Eighth Amendment, due process, and equal protection challenges to partial retroactivity citing *Hitchcock* and *Asay VI*), *cert. denied*, *Lambrix v. Florida*, 138 S.Ct. 312 (2017); *Hannon v. State*, 228 So.3d 505, 512 (Fla. 2017) (stating: "we have consistently held that *Hurst* is not retroactive prior to June 24, 2002"), *cert. denied*, *Hannon v. Florida*, 138 S.Ct. 441 (2017); *Cole v. State*, 234 So.3d 644, 645 (Fla. 2018) (explaining that because Cole's death sentence became final in 1998, "*Hurst* does not apply retroactively" citing *Hitchcock*, 226 So.3d

at 217), *cert. denied*, *Cole v. Florida*, 2018 WL 1876873 (June 18, 2018) (No. 17-8540). The Florida Supreme Court has consistently followed its partial retroactivity analysis in capital cases including in this particular case. Petitioner offers no persuasive, much less compelling reasons, for this Court to grant review of his case.

A partial retroactivity analysis is solely a matter of state law. This Court does not review decisions by state courts that are matters of state law. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (explaining that 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" for the decision). 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.

Directly to the point, this Court has specifically held that state courts are entitled to make retroactivity determinations as a matter of state law. In *Danforth v. Minnesota*, 552 U.S. 264 (2008), this Court held that states were not required to apply the federal test for retroactivity of *Teague v. Lane*, 489 U.S. 288 (1989), even when the state courts were determining the retroactivity of a case based on a federal constitutional right. Instead, state courts are free to retroactively apply a case more broadly than the federal courts would. In fact, when the Minnesota Supreme Court, in determining the retroactivity of *Crawford v. Washington*, 541 U.S. 36 (2004), held that state courts were bound by *Teague* and were not free to apply a broader retroactivity test, this Court reversed. The *Danforth* Court observed that the "finality of state convictions is a state interest, not a federal one." *Danforth*, 552 U.S. at 280. Finality is a matter that states should be "free to evaluate and weigh the importance of." *Id.* The *Danforth* Court reasoned that states should be "free to give its citizens the benefit of our rule in any fashion that does not offend federal law." *Id.* The remedy a

state court chooses to provide its citizens "is primarily a question of state law." *Id.* at 288. This Court also observed, in rejecting any argument that uniformity in retroactivity is necessary, that "nonuniformity" is "an unavoidable reality in a federalist system of government." *Id.* at 280. This Court noted that states "are free to choose the ***degree*** of retroactivity...so long as the state gives federal constitutional rights at least as broad a scope as the United States Supreme Court requires." *Id.* at 276 (emphasis added).

Under *Danforth*, a state court may make retroactivity determinations that are solely a matter of state law. The Florida Supreme Court's partial retroactivity analysis is based on the state retroactivity test of *Witt*, not the federal retroactivity test of *Teague*. The Florida Supreme Court did not employ a *Teague* analysis in either *Asay* or *Mosley*. Instead, in both cases, the Florida Supreme Court invoked state retroactivity tests. The Florida Supreme Court, using a state test for retroactivity, gave both *Hurst v. Florida* and *Hurst v. State* broader retroactive application than a *Teague* analysis would. When the *Danforth* Court spoke of state courts being free to choose the "degree of retroactivity" that will apply, that certainly includes a partial retroactivity analysis. That is exactly what the Florida Supreme Court did in *Asay*, *Hitchcock*, and this case.

Furthermore, the Florida Supreme Court's partial retroactivity analysis was determining the retroactivity of its own decision of *Hurst v. State*, 202 So.3d 40 (Fla. 2016), not merely the retroactivity of this Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016). There are significant differences between this Court's holding in *Hurst v. Florida* and the Florida Supreme Court's holding in *Hurst v. State*. This Court's holding in *Hurst v. Florida* was limited to the Sixth Amendment and jury findings regarding aggravating circumstances. *Hurst v. Florida*, 136 S.Ct. at 624 (holding "Florida's sentencing scheme, which required the judge alone to find the **existence** of an ***aggravating circumstance***, is therefore unconstitutional") (emphasis added). Indeed, under

this Court's view, there was no violation of the Sixth Amendment right to a jury trial in this case at all because two of the aggravating circumstances that were found by the judge (prior violent felony- the contemporaneous murder- and during the course of a felony- the contemporaneous sexual battery and burglary) were also found by the jury during the guilt phase. See *Jenkins v. Hutton*, 137 S.Ct. 1769, 1771 (2017) which noted that the jury had found the existence of two aggravating circumstances during the guilt phase by convicting Hutton of aggravated murder and that "each of those findings rendered Hutton eligible for the death penalty". Under this Court's reasoning in *Hutton*, there was no *Hurst v. Florida* error in this case. The Florida Supreme Court greatly expanded this Court's *Hurst v. Florida* decision in its *Hurst v. State* decision to require factual findings in addition to the existence of an aggravating circumstance and to include a requirement of jury unanimity under the Eighth Amendment. This Court would have to rule on the retroactivity of those additional aspects of *Hurst v. State* if it grants Overton's petition. This Court would also have to address the retroactivity of jury findings regarding the sufficiency of the aggravating circumstances, jury findings regarding mitigation, and jury findings weighing the aggravation and mitigation, all of which the Florida Supreme Court required in its *Hurst v. State* decision. While the Florida Supreme Court believes that the jury must make additional findings regarding mitigation and weighing, that is not this Court's view.[2]

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[2] 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 (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)

This Court has observed that "weighing is not an end; it is merely a means to reaching a decision." *Kansas v. Marsh*, 548 U.S. 163, 179 (2006). This Court's view is that neither mitigating circumstances nor weighing must be found by a jury. This Court does not view mitigation or weighing as factual findings at all. This Court's view is that only aggravating circumstances must be found by the jury because those are the only true factual determinations in capital sentencing. This Court has explained that aggravating circumstances are "purely factual determinations," but that mitigating circumstances, while often having a factual component, are "largely a judgment call (or perhaps a value call)." *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016). This Court noted that the mitigating circumstance of mercy, "simply is ***not*** a factual determination." *Id.* at 643 (emphasis added). The *Carr* Court explained that "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy" and that it would mean "nothing" to tell the jury that the defendants "must deserve mercy beyond a reasonable doubt." *Id.* at 642. Basically, this Court would have to decide the retroactivity of jury sentencing (which is what the Florida Supreme Court required in *Hurst v. State*) when this Court does not think that the Sixth Amendment or the Eighth Amendment requires jury sentencing in the first place. This Court would also have to address the retroactivity of unanimity under the Eighth Amendment which this Court never addressed in *Hurst v. Florida*. Opposing counsel totally ignores these numerous differences between *Hurst v. Florida* and *Hurst v. State* and the problems those differences present in his petition. This Court would have to address those differences if it were to grant the writ.

These differences present what is, in effect, numerous threshold issues. This Court does not normally grant review of cases with threshold issues, much less numerous threshold issues. *Cf.*

("[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").

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) (dismissing the writ of certiorari as improvidently granted when there was a threshold issue).

The Florida Supreme Court decided the retroactivity of *Hurst v. State* as a matter of state law and therefore, the Florida Supreme Court's decision is not subject to review by this Court. On this basis alone, review of this issue should be denied.

No conflict with this Court's retroactivity jurisprudence

Alternatively, there is no conflict between the Florida Supreme Court's decision in this case and this Court's retroactivity jurisprudence. See Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). This Court has held that Sixth Amendment right-to-a-jury trial decisions are not retroactive. *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (holding that *Ring* was not retroactive using the federal test of *Teague*); *DeStefano v. Woods*, 392 U.S. 631 (1968) (holding that a Sixth Amendment right-to-a-jury-trial decision in an earlier case was not retroactive). The *Summerlin* Court reasoned that "if under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be." *Summerlin*, 542 U.S. at 357.

Under this Court's logic in *Summerlin*, *Hurst v. Florida* is not retroactive. The Florida Supreme Court's decisions in *Asay*, *Hitchcock*, and this case do not conflict with either this Court's decision in *Danforth* or this Court's decision in *Summerlin*.

Additionally, this Court recently denied a petition for a writ of certiorari raising this same issue regarding the Eighth Amendment prohibiting a partial retroactivity analysis in a death warrant case. *Branch v. Florida*, 138 S.Ct. 1164 (2018). This Court also very recently denied a petition raising that same issue in another Florida capital case. *Jones v. Florida*, 2018 WL 1993786 (June 25, 2018) (No. 17-8652).

There is no conflict between the Florida Supreme Court's decision and this Court's jurisprudence regarding retroactivity and this Court would have to recede from both *Danforth* and *Summerlin* to grant any relief. Additionally, this Court would not only have to recede from *Danforth* but it would have to recede in a manner that not even the dissent in *Danforth* advocated. To adopt opposing counsel's position, this Court would have to hold that state courts are required to follow *Teague* even if the underlying case was not from this Court. The dissent in *Danforth* limited the mandatory use of *Teague* to when the underlying case was from this Court, not when the underlying case was from the state court or when the state court expanded one of this Court's cases, such as in the situation of *Hurst v. State*. The two *Danforth* dissenters were at pains to disclaim any argument that state courts were required to adopt a *Teague* retroactivity analysis if the underlying case was a state law case. *Danforth*, 552 U.S. at 295 (Roberts, C.J., dissenting) (explaining states can give greater substantive protection under their own laws and can give whatever retroactive effect to those laws they wish). Even if this Court was willing to overrule *Danforth* and require that *Teague* be used in all situations, Petitioner would still receive no relief because even pursuant to a *Teague* analysis, *Hurst* is not retroactive under *Summerlin*. Overruling both *Danforth* and *Summerlin* would be necessary for Petitioner to receive relief. Yet, the petition does not even acknowledge that this Court would be required to overrule both of these cases. While the petition mentions *Summerlin*, the petition does not even mention *Danforth* nor acknowledge that the position it is advocating is inconsistent with the actual holdings, as well as the reasoning, of both cases.

No conflict with federal appellate courts/state supreme courts

There is no conflict with that of any federal appellate court or state supreme court either. 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 federal appellate courts and state supreme courts as a consideration in the decision to grant review). In the absence of such conflict, certiorari is rarely warranted.

The Eleventh Circuit has held that *Hurst v. Florida* is not retroactive at all. *Lambrix v. Sec'y, Fla. Dept. of Corr.*, 851 F.3d 1158, 1165, n.2 (11th Cir. 2017) (*Lambrix V*) ("under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review"), *cert. denied*, *Lambrix v. Jones*, 138 S.Ct. 217 (2017) (No. 17-5153). The Ninth Circuit has also held that *Hurst v. Florida* is not retroactive. *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a *Hurst v. Florida* claim concluding that *Hurst v. Florida* did not apply retroactively).

The Eleventh Circuit has also directly addressed the argument that the Florida Supreme Court's partial retroactivity analysis violates the Eighth Amendment and held the "Florida Supreme Court's ruling—that *Hurst* is not retroactively applicable to Lambrix — is fully in accord with the U.S. Supreme Court's precedent in *Ring* and *Schriro*." *Lambrix v. Sec'y, Fla. Dept. of Corr.*, 872 F.3d 1170, 1182-83 (11th Cir. 2017), *cert. denied*, *Lambrix v. Jones*, 138 S.Ct. 312 (2017) (No. 17-6290). As the Eleventh Circuit observed regarding the Florida Supreme Court's refusal to apply *Hurst v. State* retroactively to capital defendants whose cases were final before *Ring*, those "defendants who were convicted before *Ring* were treated differently too by the Supreme Court." *Lambrix*, 872 F.3d at 1182. There simply is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals nor any state supreme court.

Partial retroactivity does not violate the Eighth Amendment

Petitioner insists that the Florida Supreme Court's partial retroactivity analysis is arbitrary in violation of the Eighth Amendment. Overton seems to be arguing that basing a retroactivity analysis on court dates is itself arbitrary. However, all modern retroactivity tests depend on dates of finality. Both federal and state courts have retroactivity doctrines that depend on dates. For example, a cutoff date is part of the pipeline doctrine first established in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The *Griffith* Court created the pipeline concept by holding that all new developments in the criminal law must be applied retrospectively to all cases, state or federal, that are pending on direct review. *Griffith* depends on the date of finality of the direct appeal. 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. While the Florida Supreme Court's partial retroactivity test also depends on a date, the Florida Supreme Court's line drawing based on a date is no more arbitrary than this Court's in *Griffith* or *Teague*. Neither *Griffith* nor *Teague* nor *Asay* violate the Eighth Amendment.

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 a 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 of the new development is part and parcel of the landscape of a retroactivity analysis. It is simply part of the retroactivity paradigm that some cases will be treated differently than other cases based on the age of the case. As this Court has explained, finality is the overriding concern in any retroactivity analysis. *Penry v. Lynaugh*, 492 U.S. 302, 312 (1989). The *Penry* Court considered and rejected a claim that the test for retroactivity in capital cases should be

different because the overriding concern of finality that underlies retroactivity is just as "applicable in the capital sentencing context." *Id.* at 314. Penry argued that the test for retroactivity should be more relaxed in capital cases, not that there should be automatic and full retroactivity in all capital cases. Finality trumps uniformity in the retroactivity realm.

Furthermore, the Florida Supreme Court's partial retroactivity analysis provides more relief than this Court's retroactivity analysis does. The Florida Supreme Court has already granted more capital defendants retroactive relief than this Court would under a *Teague* analysis. Whereas, this Court, following its *Summerlin* precedent, would deny every Florida capital defendant retroactive relief, the Florida Supreme Court, following its *Asay* and *Hitchcock* precedent, has granted over one hundred Florida capital defendants retroactive relief. What Petitioner is essentially arguing is that, while this Court itself would not grant any capital defendant retroactive relief, the Florida Supreme Court is somehow constitutionally required to grant even more retroactive relief than its current partial retroactivity analysis does. If the Eighth Amendment applied to a retroactivity analysis in this manner, it would require this Court to always grant full retroactivity, which is clearly not required.

Apprendi does not need to be the starting line for retroactivity

Opposing counsel also asserts that even if partial retroactivity is proper, the Eighth Amendment somehow requires the Florida Supreme Court to draw the dividing line for its partial retroactivity analysis further back in time. Specifically, Petitioner asserts that the Eighth Amendment requires any partial retroactivity analysis extend back to when *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was decided rather than beginning when *Ring* was decided. However, in *Apprendi* this Court explicitly excluded capital cases from its reach and reaffirmed *Walton v. Arizona*, 497 U.S. 639, 647-49 (1990). *Apprendi*, 530 U.S. at 496-97. It was not until *Ring* that

this Court applied its new Sixth Amendment jurisprudence to capital cases and overruled *Walton*. *Ring*, 536 U.S. at 589. The Florida Supreme Court, recognizing that this Court expressly excluded death penalty cases from its holding in *Apprendi*, rejected the argument that *Apprendi* should be the dividing line. *Asay*, 210 So.3d at 19. It would make little sense to date the cut-off for the partial retroactivity analysis in capital cases the date of a case that excluded capital cases from its reach. It is perfectly rational to establish the dividing line at *Ring* rather than *Apprendi* given the limitations in *Apprendi* itself. There is nothing arbitrary about such a demarcation and that demarcation does not violate the Eighth Amendment. The issue of partial retroactivity is a matter of state law and one which does not conflict with this Court's decisions nor that of any other appellate court. There is no basis for granting certiorari review.

Caldwell and the Eighth Amendment

Petitioner further complains that the sentencing procedure used in his case violated the Eighth Amendment and this Court's ruling in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), because the jury was given instructions that informed the jury its death recommendation was merely advisory. This matter does not merit this Court's review. Petitioner's jury was properly instructed on its role based on the law existing at the time of his trial. This case would be a uniquely inappropriate vehicle for certiorari because this is a postconviction case and this Court would have to address retroactivity before even reaching the underlying jury instruction issue.[3]

To the extent Petitioner suggests that jury sentencing is now required under federal law,

[3] Respondent is cognizant of Justice Sotomayor's dissent from the denial of certiorari in *Middleton v. Florida*, 138 S. Ct. 829 (2018), where she criticized the Florida Supreme Court for not addressing *Caldwell* claims in cases where *Hurst* was applicable under state law, unlike here due to non-retroactivity. The Florida Supreme Court has now, however, explicitly rejected *Caldwell* attacks on Florida's standard penalty phase jury instructions in the wake of *Hurst*. *Reynolds v. State*, ___ So. 3d ___, 2018 WL 1633075 (Fla. April 5, 2018); *Johnson v. State*, ___ So. 3d ___, 2018 WL 1633043 (Fla. April 5, 2018) (citing *Reynolds* in rejecting *Caldwell* claim).

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 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 requirement into the Constitution that is simply not there. The Constitution provides a right to **trial** by jury, not to **sentencing** by jury.

There is no conflict between the Florida Supreme Court's decision and this Court's Eighth Amendment jurisprudence set forth in *Caldwell* and its progeny. Nor is there any conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court. Finally, there is no underlying constitutional error under the facts of this case. Petitioner'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. *See In re Standard Jury Inst. In Criminal Cases*, 678 So. 2d 1224 (Fla. 1996). In order to establish a *Caldwell* violation, Petitioner must show that the remarks to the jury improperly described the role assigned to the jury by local law. *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). A Florida jury's decision regarding a death sentence was, and still remains, an advisory recommendation; therefore, there was no violation of *Caldwell*. *See Dugger v. Adams*, 489 U.S. 401 (1989). Entitlement to relief under *Caldwell* requires that the jury instructions, prosecutor, or judge, misrepresent the jury's role in sentencing. *Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986) (rejecting a *Caldwell* attack, explaining that "*Caldwell* is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision"). Petitioner's jury was

accurately advised that its decision was an advisory recommendation.[4]

Because the Florida Supreme Court's decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law, this Court should decline to exercise its certiorari jurisdiction in the instant case.

ISSUE II

CERTORARI REVIEW SHOULD BE DENIED BECAUSE THE FLORIDA SUPREME COURT'S RULING ON THE RETROACTIVITY OF *HURST V. FLORIDA* AND *HURST V. STATE*, WHICH 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*, DOES NOT VIOLATE THE SUPREMACY CLAUSE.

Petitioner seeks review of the Florida Supreme Court's decision rejecting a claim that *Hurst* must be applied retroactively under the Supremacy Clause. The issue is a matter of state law, not a matter regarding the Supremacy Clause. Petitioner asserts that *Hurst* is a substantive change in the law relying on *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). Contrary to opposing counsel's assertion, *Hurst* is a procedural change not a substantive change. This Court in *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004), explained that rules that allocate decision making authority between the judge and the jury are "prototypical procedural rules." *Hurst* is not substantive,

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[4] Even today, under Florida's new death penalty statute, the judge remains the final sentencer in Florida. A jury's recommendation of death in Florida is just that—a recommendation. Florida's new death penalty statute refers to the jury's vote as a "recommendation." § 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). *See also In re Standard Jury Instructions in Capital Cases*, 214 So. 3d 1236, 1238 N.4 (Fla. 2017) (Lawson, J., concurring) (stating that "the jury's verdict is only a recommendation"). A Florida trial court, while bound by the jury's findings of no aggravation and a recommendation of a life sentence, is not bound by a jury's recommendation of a death sentence. A judge is still free to reject the jury's death recommendation and impose a life sentence.

according to this Court. There is no conflict between the Florida Supreme Court's decision in this case and this Court's jurisprudence. Nor is there any conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court. The circuit court that addressed this particular issue held that *Hurst* is not substantive and this Court rejected a Supremacy Clause argument regarding retroactivity in *Danforth v. Minnesota*, 552 U.S. 264, 289 (2008). Opposing counsel may not turn a state law matter into a federal constitutional matter merely by incanting the Supremacy Clause.

No conflict with this Court's jurisprudence

There is no conflict between the Florida Supreme Court's decision in this case and this Court's decision in *Montgomery*. See Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). Opposing counsel, relying on *Montgomery*, insists that a new substantive rule of constitutional law is involved and therefore, the Supremacy Clause requires that *Hurst* be applied retroactively. Opposing counsel insists that *Hurst* is retroactive under federal law because the right to a jury trial is a substantive right. This is not correct. The right to a jury trial is procedural, not substantive. This Court specifically observed in a retroactivity case, that "*Ring*'s holding is properly classified as ***procedural***" because the Sixth Amendment's right to a jury trial "has nothing to do with the range of conduct a State may criminalize." *Summerlin*, 542 U.S. at 353 (emphasis added). The *Summerlin* Court, which held that *Ring* was not retroactive, explained that rules that allocate decision making authority between the judge and the jury "are prototypical ***procedural*** rules." *Id.* (emphasis added). This Court noted that it had classified the right to a jury trial as procedural "in numerous other contexts." *Id.* at 353-54 (citing numerous cases).

Furthermore, both the majority opinion and the concurring opinion in *Alleyne v. United States*, 570 U.S. 99 (2013), classified as procedural the right to a jury trial on the facts required to impose a minimum mandatory sentence. *Alleyne*, 570 U.S. at 116, n.5 ("the force of *stare decisis* is at its nadir in cases concerning ***procedural*** rules . . .") (emphasis added); *Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring) ("when ***procedural*** rules are at issue . . .") (emphasis added). This Court's opinion in *Alleyne*, like this Court's opinion in *Hurst v. Florida* itself, was explicitly based on *Apprendi*. Both *Alleyne* and *Hurst* are the offspring of *Apprendi*. The *Alleyne* majority and the *Alleyne* concurrence both characterized that *Apprendi*-based right as procedural. This Court views *Apprendi* and all its offspring, including *Hurst v. Florida*, as procedural, not substantive. It should be noted that even the *Montgomery* Court characterized the right as procedural. *Montgomery*, 136 S.Ct. at 730 (citing *Summerlin* and characterizing *Ring* as a procedural rule designed to enhance the accuracy of a conviction or sentence). *Montgomery* certainly did not overrule *Summerlin*. Indeed, the *Montgomery* Court relied upon *Summerlin* at points in its discussion. *Montgomery*, 136 S.Ct. at 723, 728. While opposing counsel may view the right to a jury trial as substantive, this Court has repeatedly classified it as procedural and in very similar context to *Hurst*.

In support of the argument that *Hurst* was a substantive rather than procedural change, Petitioner analogizes *Hurst* to *Miller v. Alabama*, 567 U.S. 460 (2012). In *Miller*, this Court found that the imposition of mandatory sentences of life without parole on juveniles was a violation of the Eighth Amendment and that this change was 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)). The rule in *Miller* announced a substantive rule which was held 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.

Opposing counsel also attempts to rely on a statement in *Welch v. United States*, 136 S.Ct. 1257, 1264 (2016), to claim that *Hurst* is a substantive change. However, *Welch* concerned the retroactivity of a statutory interpretation case, not a Sixth Amendment right to a jury trial case. *Welch* involved a federal criminal statute, not the federal constitution. The *Welch* Court did not overrule *Summerlin* or *DeStefano*. Indeed, the *Welch* Court cited and quoted *Summerlin* repeatedly. *Welch*, 136 S.Ct. at 1264-65. Under this Court's existing precedent of *Summerlin*, *Hurst* is not a substantive change and does not apply retroactively.

Additionally, this Court recently denied a petition for a writ of certiorari raising this same issue regarding the retroactivity of *Hurst* based on *Montgomery* and the Supremacy Clause in a death warrant case. *Branch v. Florida*, 138 S.Ct. 1164 (No. 17-7758). This Court also recently denied a petition raising that same Supremacy Clause argument in another Florida capital case. *Jones v. Florida*, 2018 WL 1993786 (June 25, 2018) (No. 17-8652).

The Florida Supreme Court's decision in this case does not conflict with this Court's decision in *Montgomery* or the Supremacy Clause. There is no conflict between this Court's jurisprudence and the Florida Supreme Court's decision.

No conflict with federal appellate courts/state supreme courts

The decision in this case is not in conflict with that of any federal appellate court or state supreme court. 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 federal appellate courts and state supreme courts as a consideration in the decision to grant review). In the absence of such conflict, certiorari is rarely warranted.

The Ninth Circuit has rejected an argument that *Hurst v. Florida* was a substantive change that must be applied retroactively. *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017). Ybarra made much the same argument regarding the *Hurst v. Florida* decision being substantive as Petitioner does here. The Ninth Circuit disagreed, concluding that *Hurst v. Florida* was not a substantive rule because it did not "decriminalize" any conduct or place any conduct "beyond the scope of the state's authority to proscribe." *Ybarra*, 869 F.3d at 1032. Therefore, the only federal appellate court to have directly addressed the substantive versus procedural issue regarding *Hurst* does not conflict, but agrees, with the Florida Supreme Court's decision in this case.

In the context of a successive habeas petition, the Tenth Circuit has rejected an argument that *Hurst v. Florida* was a substantive change that was required to be applied retroactively. *In re Jones*, 847 F.3d 1293 (10th Cir. 2017). The Tenth Circuit denied authorization to file a successive habeas petition noting that this Court has not held *Hurst* to be retroactive as required by *Tyler v.*

Cain, 533 U.S. 656, 663 (2001). The Sixth Circuit has also denied authorization to file a successive habeas petition that asserted that *Hurst v. Florida* was retroactive. *In re Coley*, 871 F.3d 455 (6th Cir. 2017). The Florida Supreme Court's decision does not conflict with either of these circuit courts' holdings. Opposing counsel cites to no federal circuit court case or state supreme court case that holds partial retroactivity violates the Supremacy Clause. There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals nor any state court of last resort.

The Supremacy Clause

Under the Supremacy Clause, States retain "substantial leeway" to establish the contours of their judicial systems, provided they do not "nullify a federal right or cause of action." *Haywood v. Drown*, 556 U.S. 729, 736 (2009). The Supremacy Clause, however, is not an independent source of law. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S.Ct. 1378 (2015). The federal courts do not apply *Apprendi*, *Ring*, or *Hurst* retroactively. Yet opposing counsel insists that the federal constitution requires state courts to apply these same decisions retroactively. The end result of adopting opposing counsel's view, would be that *Hurst* would be required, under the federal constitution, to be applied retroactively in the state courts but not in the federal courts. The Supremacy Clause simply does not work that way. The Supremacy Clause requires that state courts, in certain areas, do the same as federal courts. It never requires that state courts do more than the federal courts. If the federal constitution does not require federal courts to apply any of these decisions retroactively, then the Supremacy Clause does not require Florida courts to apply any of these decisions retroactively. Opposing counsel's view of the Supremacy Clause is not tenable as a matter of either law or logic. See *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (emphasizing that "it is not the province of a federal habeas court to reexamine state-court

determinations on state-law questions[] . . ." and that "a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.") (citing 28 U.S.C. § 2241; and *Rose v. Hodges*, 423 U.S. 19, 21 (1975) (per curiam)). Under a proper view of the Supremacy Clause, this Court would have to recede from *Summerlin* and hold that *Apprendi*, *Ring*, and *Hurst* must be retroactively applied in both state and federal courts. Indeed, this Court would have to recede from both *Danforth* and *Summerlin* to grant any relief. Yet, the petition does not even acknowledge that this Court would be required to overrule both of these cases. While the petition mentions *Summerlin*, the petition does not even mention *Danforth* and does not acknowledge that the position it is advocating is inconsistent with the holdings of both cases.

The standard of proof and retroactivity

Petitioner argues that *Hurst* must be applied retroactively because it involved the beyond-a-reasonable-doubt standard of proof relying on *Ivan V. v. City of New York*, 407 U.S. 203 (1972). However, neither *Hurst v. Florida* nor *Hurst v. State* involved the standard of proof. Rather, both *Hurst v. Florida* and *Hurst v. State* involved who decides if an aggravating circumstance exists — the jury versus the judge — not at what standard of proof the decision is made. Furthermore, this Court has explained that weighing in capital cases does not involve a standard of proof. This Court, in *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016), a case that was decided after *Hurst v. Florida*, rejected an argument that the Eighth Amendment required that the jury be told that mitigating circumstances did not have to be proven beyond a reasonable doubt. In *Carr,* this Court expressed doubt as to whether it was even possible to apply a standard of proof to mitigation. This Court explained that mitigation was not purely a factual determination. Rather, mitigation was largely "a judgment call or perhaps a value call" and that weighing the aggravating circumstances against the mitigating circumstances was "mostly a question of mercy." This Court observed that it would

mean "nothing" to tell the jury that the defendants "must deserve mercy beyond a reasonable doubt." *Id.* at 642. Standards of proof do not apply to judgment calls, value calls, or questions of mercy. Even if a standard of proof could be applied to weighing, *Hurst* would still not be required to be applied retroactively to Florida capital cases. *Ivan V.* is irrelevant to any retroactivity analysis in Florida.

If a rule of law is not new, there is no retroactivity analysis required. *Butler v. McKellar*, 494 U.S. 407, 412 (1990) (defining a "new rule" for purpose of retroactivity as one that "breaks new ground or imposes a new obligation," such as a decision that explicitly overrules an earlier holding). There is no retroactivity analysis required when dealing with old rules. Florida's standard of proof for aggravating circumstances is not new; it is old well-established law. Florida law has required that the State prove aggravators at the beyond-a-reasonable-doubt standard of proof for over three decades. *Williams v. State*, 37 So.3d 187, 194-95 (Fla. 2010) (stating that the State has the burden to prove beyond a reasonable doubt each and every aggravating circumstance); *Aguirre-Jarquin v. State*, 9 So.3d 593, 607 (Fla. 2009) (explaining that the State must prove the existence of an aggravator beyond a reasonable doubt citing *Parker v. State*, 873 So.2d 270, 286(Fla. 2004)); *cf. Floyd v. State*, 497 So.2d 1211, 1214 (Fla. 1986) (striking an aggravator that was not proven "beyond a reasonable doubt"). Proving aggravators beyond a reasonable doubt is not new in Florida. Therefore, the "retroactivity" of the beyond-a-reasonable-doubt standard of proof is a non-issue in this case and every other Florida capital case as well. *Ivan V.* is irrelevant in Florida.

Furthermore, the Ninth Circuit has rejected this exact argument. *Ybarra v. Filson*, 869 F.3d 1016 (9th Cir. 2017). Ybarra argued *Hurst v. Florida* should be applied retroactively because it involved the standard of proof citing *Ivan V. v. City of New York*, 407 U.S. 203 (1972), just as Petitioner does here. *Ybarra*, 869 F.3d at 1032-33. The Ninth Circuit rejected that argument,

reasoning that even if *Hurst v. Florida* extended the beyond-a-reasonable-doubt standard of proof to the weighing determinations, it did not redefine capital murder and therefore, *Hurst v. Florida* was not required to be applied retroactively. *Id.* at 1032.

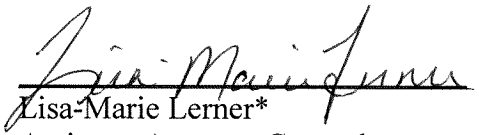
There is no conflict between the Florida Supreme Court and this Court's decisions nor that of any other appellate court nor any state court of last resort regarding *Hurst*, the standard of proof, or retroactivity. The issue is a matter of state law that is procedural, not substantive and does not involve the Supremacy Clause or the standard of proof. There is no basis for granting certiorari review of this issue. Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL



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COUNSEL FOR RESPONDENT

Case No.: 18-5122

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS OVERTON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I, Lisa-Marie Lerner, a member of the Bar of this Court, hereby certifies that on July 27, 2018, a copy of the Brief for Respondent in Opposition in the above entitled case was furnished by United States mail, postage prepaid, to Marie Louise Samuels Parmer, Esq., CCRC – South, 1 East Broward Street, Suite 444, Fort Lauderdale, FL 33301, and via electronic filing system to, parmerm@ccsr.state.fl.us, counsel for Petitioner herein. I further certify that all parties required to be served have been served.

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