NO. 18-5174

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL ALLEN GRIFFIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

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Capital Case
Question Presented

Petitioner, Michael Allen Griffin, was found guilty of the first-degree murder of a law enforcement officer, attempted first degree murder of a law enforcement officer, burglary, two counts of grand theft, and one count of unlawful possession of a firearm by a convicted felon, and sentenced to death. Petitioner's sentence of death was finalized on March 6, 1995. Following this Court's decision in *Hurst v. Florida*,[1] the Florida Supreme Court decided *Hurst v. State.*[2] There the Florida Supreme Court explained that in order for a defendant to be sentenced to death, the jury must find all the aggravating circumstances outweighed the mitigating circumstances and unanimously vote that the defendant receive the death penalty. Following *Hurst v. State*, the Supreme Court *Asay v. State*,[3] and *Mosley v. State*,[4] which created a bright line retroactivity test where defendants whose sentences of death were finalized prior to this Court's 2002 *Ring v. Arizona*[5] decision would not receive retroactive relief. Petitioner's case falls in this category of defendants.

Petitioner sought post-conviction relief through the Florida Supreme Court but was denied. Petitioner's petition seeking certiorari review gives rise to the following question presented:

Whether this Court should deny certiorari to review the Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florida* and *Hurst v. State*, where the issue of retroactivity was decided as an issue of state law in a decision that does not conflict with any of this Court's precedent and which does not present a significant or unsettled issue of constitutional law worth of certiorari review.

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[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016).
[2] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).
[3] *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017).
[4] *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016).
[5] *Ring v. Arizona*, 536 U.S. 584 (2002).

Table of Contents

Table of Citations

Statutes

Federal Cases

State Cases

Rules

Other Authorities

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Opinion Below

The decision of the Florida Supreme Court appears as *Griffin v. State*, 236 So. 3d 237 (Fla. 2018).

Jurisdiction

The Florida Supreme Court issued its opinion affirming the summary denial of Petitioner's successive postconviction motion for relief on February 2, 2018. *Griffin v. State*, 236 So. 3d 237 (Fla. 2018). Petitioner filed a motion for rehearing and the Florida Supreme Court struck it. *Griffin v. State*, No. SC17-1306, 2018 WL 1052750, at *1 (Fla. Feb. 26, 2018). Petitioner's "Petition for Writ of Certiorari" was docketed in this Court on July 2, 2018. The Petition is timely filed before this Court. Sup. Ct.

R. 13.1.

Pursuant to 28 U.S.C. § 1257(a), this Court has jurisdiction to review the decision of the Florida Supreme Court. However, Respondent submits that this Court should not exercise its jurisdiction as Petitioner fails to raise a novel question of federal law. The Florida Supreme Court's decision was based on independent and adequate state grounds and Petitioner has not raised a question of federal law. Sup. Ct. R. 14(g)(i). Additionally, because the Florida Supreme Court's decision does not conflict with the decision of another United States court of appeals, another state court of last resort, or with relevant decisions of this Court, this Petition should be denied. Sup. Ct. R. 10.

Statement of the Case and Facts

Petitioner, Michael Allen Griffin, was convicted of the first-degree murder of a law enforcement officer, attempted first degree murder of a law enforcement officer, burglary, two counts of grand theft, and one count of unlawful possession of a firearm by a convicted felon. *Griffin v. State*, 639 So. 2d 966, 967-68 (Fla. 1994), *cert. denied*, 514 U.S. 1005 (1995). The facts established that Petitioner and his co-defendants burglarized a hotel room and stole a cellular phone and purse. *Id.* After leaving the hotel in a stolen car, a police car with Officers Martin and Crespo pulled the group over, at which point Petitioner began shooting at the police officers, killing Officer Martin. *Id.* At his jury trial, the jury convicted Petitioner guilty on all counts. *Id.* at 968.

Following the guilt phase, the jury recommended the death penalty to

Petitioner by a vote of ten to two. *Id.* The trial court found the following aggravating factors applied to Petitioner: (1) Petitioner had a previous conviction of a felony involving violence (the attempted murder of Officer Crespo); (2) Officer Martin's murder was committed while Petitioner was engaged in the commission of a burglary; (3) the purpose of Officer Martin's murder was to avoid or prevent Petitioner's arrest; (4) Officer Martin's murder was cold, calculated, and premeditated. *Id.* The trial court found the following mitigating circumstances applied: (1) Petitioner was twenty years old at the time of the crimes; (2) Petitioner showed remorse; (3) Petitioner had a traumatic childhood; and (4) Petitioner had a learning disability. *Id.* The trial court weighed the aggravating factors against the mitigating factors and sentenced Petitioner to death. *Id.* On appeal, the Florida Supreme Court affirmed Petitioner's sentence of death. *Id.* at 972. Petitioner filed a petition for writ of certiorari to this Court, which was denied in 1995. *Id.*, *cert. denied*, 514 U.S. 1005. Under Florida Rule of Criminal Procedure 3.851(d)(1)(B), Petitioner's sentence of death became final on March 6, 1995, following this Court's denial of the petition for writ of certiorari. *Id.*

Petitioner continued seeking relief from his conviction and sentence through postconviction litigation. *Griffin v. State*, 866 So. 2d 1 (Fla. 2003), *cert. denied*, 543 U.S. 962 (2004) (affirming denial of first motion for postconviction relief); *Griffin v. State*, 992 So. 2d 819 (Fla. 2008) (affirming denial of second motion for postconviction relief); *Griffin v. Tucker*, 566 U.S. 1014 (2012) (affirming denial of certiorari review for denial of a motion for certificate of appealability); *Griffin v. Sec'y, Florida Dept. of Corr.*, 787 F.3d 1086 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 825 (2016) (affirming

denial of reconsidering of denial of certificate of appealability).

On January 12, 2017, Petitioner filed a successive motion for postconviction relief in which he sought relief pursuant to *Hurst v. Florida* as applied through *Hurst v. State*. *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, *Florida v. Hurst*, 137 S. Ct. 2161 (2017).

The Florida Supreme Court's holding in *Hurst v. State*, followed this Court's ruling in *Hurst v. Florida*, 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*, 202 So. 3d at 57.[6]

Following *Hurst v. State*, the Florida Supreme Court decided *Mosley v. State*, which held that defendants whose sentence(s) of death were finalized after *Ring v. Arizona*, are entitled to *Hurst* relief. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla.

[6] The dissent observed that "[n]either the Sixth Amendment nor *Hurst v. Florida* requires a jury to determine the sufficiency of the aggravation, the weight of the aggravation relative to any mitigating circumstances, or whether a death sentence should be imposed." *Hurst*, 202 So. 3d at 82 (Canady, J., dissenting).

2016); *Ring v. Arizona*, 536 U.S. 584 (2002). On the same day, the Florida Supreme Court decided *Asay v. State*, which held that defendants whose sentences of death were finalized prior to *Ring v. Arizona* were not entitled to *Hurst* relief. *Asay v. State*, 210 So. 3d 1, 17-22 (Fla. 2016), *cert. denied*, 138 S.Ct. 41 (2017).

In *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), cert. denied, 138 S. Ct. 513 (2017), the Florida Supreme Court reaffirmed its previous holding in *Asay*, 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*. After the court decided *Hitchcock*, it issued an order to show cause on September 25, 2017 directing Petitioner to show why *Hitchcock* should not be dispositive in his case.

Following the postconviction court's denial of relief, the Florida Supreme Court affirmed the denial of relief, holding that Petitioner's sentence of death was finalized six years prior to *Ring*, and thus Petitioner does not receive retroactive relief. *Griffin*, 236 So. 3d at 238. Petitioner then filed his Petition in this Court from the Florida Supreme Court's decision. This is the State's brief in opposition.

Reasons for Denying the Writ

Certiorari review should be denied because (1) 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 Eighth or Fourteenth Amendments; and (2) the Florida Supreme Court's decision does not conflict with any decisions of this Court or involve an important, unsettled question of federal law.

Petitioner requests that this Court review the Florida Supreme Court's decision affirming the denial of his successive postconviction motion, arguing that the state court's holding with respect to retroactivity violates his Due Process Rights under the Eighth and Fourteenth Amendments. However, the Florida Supreme Court's denial of the retroactive application of *Hurst* to Petitioner's case is based on adequate and independent state grounds, is not in conflict with any other state court of last review and is not in conflict with any federal appellate court. As will be shown, nothing about the Florida Supreme Court's retroactivity decision is inconsistent with the United States Constitution. Petitioner does not provide any "compelling" reason for this Court to review his case. Sup. Ct. R. 10. Indeed, Petitioner cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision in *Griffin*, 236 So. 3d 237 (Fla. 2018), in which the court determined that Petitioner was not entitled to relief because *Hurst v. State* was not retroactive to his death sentence. As no compelling reason for review has been offered by Petitioner, certiorari should be denied.

Respondent would further note that this Court has repeatedly denied certiorari

to review the Florida Supreme Court's retroactivity decisions following the issuance of *Hurst v. State*. *See*, *e.g.*, *Jones v. State*, 234 So. 3d 545 (Fla. 2018), *cert. denied*, No. 17-8652, 2018 WL 1993786, at *1 (U.S. June 25, 2018); *Cole v. State*, 234 So. 3d 644 (Fla. 2018), *cert. denied,* No. 17-8540, 2018 WL 1876873, at *1 (U.S. June 18, 2018); *Branch v. State*, 234 So. 3d 548 (Fla. 2018), *cert. denied*, 138 S. Ct. 1164 (2018); *Hannon v. State*, 228 So. 3d 505 (Fla. 2017), *cert. denied*, 138 S. Ct. 441 (2017); *Lambrix v. State*, 227 So. 3d 112 (Fla. 2017), *cert. denied*, 138 S. Ct. 312 (2017); *Hitchcock*, 226 So. 3d 216, *cert. denied*, 138 S. Ct. 513; *Asay*, 210 So. 3d 1, *cert. denied*, 138 S. Ct. 41.

Petitioner's Argument That Hurst Identified the "Elements" Required to Conviction Him of Capital Murder Is Just Another Attack on Florida's Retroactivity Decision.

Petitioner contends that the Florida Supreme Court created a new substantive rule in *Hurst v. State* which must be applied retroactively to all cases in which alleged *Hurst* error occurred. Petitioner insists that *Hurst* identified the statutory elements that had to have been proven beyond a reasonable doubt, which causes a substantive change, making *Hurst* retroactive under federal law. *Hurst* did not announce a substantive change in the law and is not retroactive under federal law. Petitioner's arguments do not identify any federal or state court conflict, and instead amount to his general disagreement with how Florida has elected to apply its own death penalty laws. This is just another attempt at claiming a Sixth Amendment violation and amounts to yet another endeavor to urge universal retroactivity of the *Hurst* decisions.

Florida was not required to grant retroactive application of *Hurst v. Florida* to all death sentenced murderers regardless of the date their convictions and sentences became final. This Court's ruling in *Hurst v. Florida* was a narrow one: "Florida's sentencing scheme, which required the judge alone to **find the existence of an aggravating circumstance**, is . . . unconstitutional." *Hurst v. Florida*, 136 S. Ct. at 624 (emphasis added). However, *Hurst*, like *Ring*, was a procedural change, not a substantive one. *See Schriro* v. *Summerlin*, 542 U.S. 348, 358 (2004) ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review."). In response, Florida adopted **new procedural requirements** that, among other things, mandated that all factual findings necessary to impose death be found by a unanimous jury. The Florida Supreme Court's interpretation of *Hurst v. Florida* in *Hurst v. State* greatly expanded that procedural rule. Nevertheless, it remained a procedural rule and not a "definition" of Florida's death penalty statute. The range of conduct punished by death in Florida remains the same.

Following issuance of this Court's decision in *Hurst v. Florida*, the Florida Supreme Court held that *Hurst v. Florida* would apply to those sentences which were final after this Court's decision in *Ring*. In *Asay*, 210 So. 3d at 22, the Florida Supreme Court ruled that, as a matter of state law, *Hurst v. State* is not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in *Ring*. *See also Mosley*, 209 So. 3d at 1272-73 (holding that, as a matter of state law, *Hurst v. State* does not apply retroactively to defendants whose sentences were

not yet final when this Court issued *Ring*).

This Court has held that, in general, a state court's retroactivity determinations are a matter of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264 (2008). State courts may fashion their own retroactivity tests, including partial retroactivity tests. A state supreme court is free to employ a partial retroactivity approach without violating the federal constitution under *Danforth*. The state retroactivity doctrine employed by the Florida Supreme Court did not violate federal retroactivity standards. The court's expansion of *Hurst v. Florida* in *Hurst v. State* is applicable only to defendants in Florida, and, consequently, subject to retroactivity analysis under state law as set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), *cert. denied*, 449 U.S. 1067 (1980). *See Asay*, 210 So. 3d at 15 (noting that Florida's *Witt* analysis for retroactivity provides "more expansive retroactivity standards" than the federal standards articulated in *Teague v. Lane*, 489 U.S. 288 (1989)) (emphasis in original; citation omitted).

This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983); *see also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); *Street v. New York*, 394 U.S. 576, 581-82 (1969) (same). If a state court's decision is based on separate state

law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010).

The question of *Hurst* retroactivity as related to Petitioner's post-conviction claim was entirely a matter of state law. This fact alone militates against the grant of certiorari in this case. The Florida Supreme Court, following its now established precedent in *Asay*, rejected Petitioner's claim because his convictions and sentences became final prior to this Court's decision in *Ring*. This determination concerns only state law and is outside the scope of certiorari jurisdiction of this Court. *See*, *e.g.*, *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (noting that "whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern []" and that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.").

When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal law is limited. This Court has held that new rules of criminal law will apply retroactively only if they fit within one of two narrow exceptions. Those exceptions are: (1) a substantive rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or if it prohibits a certain category of punishment for a class of defendants because of their

status or offense"; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Teague*, 498 U.S. at 310-13; *Penry v. Lynaugh*, 492 U.S. 302 (1989) (abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002)); *Butler v. McKellar*, 494 U.S. 407 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990). Moreover, certain matters are not retroactive at all.

Despite the Florida Supreme Court's clear mandate, Petitioner suggests that the Florida court created a new substantive rule in *Hurst v. State* which must, pursuant to *Bousley v. United States*, 523 U.S. 614 (1998), be applied retroactively to all cases in which alleged *Hurst* error occurred. A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa. *See id.* at 620-621. Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him. *Id.* at 620 (quoting *Davis v. United States*, 417 U.S. 333 (1974)). But that is not what *Hurst* has done.

Petitioner's reliance on *Bousley* for this proposition is misplaced. There, this Court "decid[ed] the meaning of a criminal statute enacted by Congress." *Id.* at 620. Concluding that a *Teague* analysis was not necessary under that circumstance, this Court held that an individual who pled guilty to violating 18 U.S.C. § 924(c)(1), based upon the prior interpretation of "using" a firearm is entitled to have the conviction

set aside if he or she was actually innocent of the crime as it was subsequently defined by this Court. *Id.* By contrast, as explained herein, *Hurst v. Florida* announced a new procedural rule.

Florida's new capital sentencing scheme, which requires the jury to unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that sufficient aggravating factors exist to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death before the trial judge may consider imposing a sentence of death, *see* Fla. Stat. § 921.141(2) (2017), neither alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable. *Victorino v. State*, 241 So. 3d 48 (Fla. 2018). These additional requirements imposed by *Hurst v. State* are not "elements" of a capital offense, contrary to Petitioner's argument. 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.

In further support of his argument that *Hurst* was a substantive rather than a procedural change, Petitioner relies upon *Fiore v. White*. *Fiore v. White*, 531 U.S. 225 (2001). However, *Hurst* is distinguishable because it did not address the proof-beyond-a-reasonable-doubt standard.

If a rule of law it 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). Florida's standard of proof for aggravating circumstances is not new. *See* Fla. Std. J. Inst. (Crim.) 7.11; *Floyd v. State*, 497 So. 2d 1211, 1214-15 (Fla. 1986); *Zeigler v. State*, 580 So. 2d 127, 129 (Fla. 1991); *Finney v. State*, 660 So. 2d 674, 680 (Fla. 1995). 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*, 497 So. 2d at 1214 (striking an aggravator that was not proven "beyond a reasonable doubt"). Proving aggravators beyond a reasonable doubt is not new in Florida, thus *Fiore* is not analogous to *Hurst* and irrelevant in Florida.

Nor did Hurst truly involve the standard of proof. The issue in *Hurst v. Florida* was who finds the existence of an aggravator — the judge versus the jury — not the standard of proof. The new unanimity requirement established by the Florida Supreme Court in *Hurst* is also not the equivalent of a standard of proof. They are two very different concepts. The "retroactivity" of the beyond-a reasonable-doubt standard of proof is a non-issue in this case and all other Florida capital cases as well. *Hurst* did not alter the burden of proof as aggravating circumstances have long been required to be proven beyond a reasonable doubt in Florida.

As related to the finding that aggravation is sufficient, *Hurst* did not ascribe a standard of proof. *Hurst*, 202 So. 3d at 54. The Eighth Amendment requires that "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Roper v. Simmons*, 543 U.S. 551, 568 (2005). Florida's aggravating factors are enumerated in section 921.141(6) of the Florida Statutes. *See* Fla. Stat. § 921.141(6) (2017). These aggravating factors have been deemed sufficient to impose the death penalty by virtue of their inclusion in the statute. Any one of these aggravating factors is sufficient to cause a defendant to be eligible to receive a sentence of death. However, the weight that a juror gives to the aggravator based on the evidence is not something that can be defined by a beyond-a-reasonable-doubt standard.

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

reasonable doubt."). The weight that a juror gives to the aggravation as compared to the weight given to mitigation is also not something that can be defined by a beyond-a-reasonable-doubt standard.[7]

While Petitioner 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*. As this Court noted, "holding that because [a State] has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as this Court's making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive." *Summerlin*, 542 U.S. at 354. Thus, *Hurst v. State*'s requirement that the jury make specific factual findings before the imposition of the death penalty is procedural.

Welch v. United States, 136 S. Ct. 1257, 1264 (2016) does not distinguish itself from *Summerlin*, but instead quotes *Summerlin* to describe the distinctions between a substantive and a procedural change. *Id.* at 1265. In explaining how the rule in

[7] Furthermore, the Ninth Circuit has rejected this exact argument. *Ybarra v. Filson*, 869 F.3d 1016 (9th Cir. 2017). Ybarra also argued that *Hurst v. Florida* should be applied retroactively because it involved the standard of proof citing *Jackson v. Virginia*, 443 U.S. 307, 316 (1979), just as Petitioner does in his petition. *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. Based on this Court's jurisprudence, it is clear that the only factual finding necessary to impose the death penalty is a conviction for murder plus the addition of an aggravating factor. Finding additional aggravators does not expose the defendant to any higher or additional penalty. Nor does the weighing of aggravation and mitigation.

Johnson was not procedural, the *Welch* court stated, "[i]t did not, for example, 'allocate decision making authority' between judge and jury, ibid., or regulate the evidence that the court could consider in making its decision." *Id.* Florida's new *Hurst* rule, however, did allocate the decision-making authority by assigning the duty to determine aggravating factors, formerly the responsibility of the sentencing judge, to the jury. Unlike *Welch*, after *Hurst*, Florida's death penalty sentencing scheme still applies to the same persons engaging in the same conduct.

Furthermore, both the majority opinion and the concurring opinion in *Alleyne v. United States*, 570 U.S. 99 (2013), which Petitioner relies on for support, classified the right to a jury trial regarding facts required to impose a minimum mandatory sentence as procedural. *Alleyne*, 570 U.S. at 116, n.5 ("the force of stare decisis is at its nadir in cases concerning procedural rules . . .") (emphasis added); *Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring) ("when procedural rules are at issue . . .") (emphasis added). This Court's opinion in *Alleyne*, like this Court's opinion in *Hurst v. Florida* itself, was explicitly based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). 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.

Aside from the question of retroactivity, certiorari review would also be inappropriate in this case because there was no underlying Sixth Amendment violation. Here, a unanimous jury convicted Petitioner of first-degree murder of a

law enforcement officer, attempted first degree murder of a law enforcement officer, burglary, two counts of grand theft, and one count of unlawful possession of a firearm by a convicted felon. 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.[8] 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). There was no Sixth Amendment error in this case.

In sum, the question Petitioner presents does not offer any matter which comes within the parameters of Rule 10 of the Rules of the United States Supreme Court.

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[8] *State v. Mason*, No. 2017-0200, 2018 WL 1872180, at *1, 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 citation omitted); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *Waldrop v. Comm'r, Alabama Dept. of Corr.*, 711 Fed. Appx. 900, 922-23 (11th Cir. 2017) (unpublished) (rejecting *Hurst* claim and explaining "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict.") (citation omitted); *State v. Gales*, 658 N.W.2d 604, 628-29 (Neb. 2003) ("[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review to be undertaken by a jury.").

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

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Conclusion

Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,
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COUNSEL FOR RESPONDENT

NO. 18-5174

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL ALLEN GRIFFIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

Certificate of Service

I, Scott A. Browne, a member of the Bar of this Court, hereby certify that on this 3rd day of August 2018, a copy of the Respondent's Brief in Opposition has been submitted using the Electronic Filing System. I further certify that a copy has been sent by United States mail to: Martin J. McClain, McClain & McDermott, P.A., 141 N.E. 30th Street, Wilton Manors, Florida 33334.

s/ Scott A. Browne
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