NO. 18-5179

IN THE SUPREME COURT OF THE UNITED STATES

RONNIE JOHNSON,

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, Ronnie Johnson, was found guilty of two separate first-degree murder charges and sentenced to death on both. Petitioner's first death sentence became final on January 26, 1998 and his second death sentence became final on February 23, 1998.

Following the decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016) the Florida Supreme Court expanded this Court's narrow holding, and decided *Hurst v. State,* 202 So. 3d 40 (Fla. 2016). There, the Florida Supreme Court explained that in order for a defendant to be sentenced to death, the jury must find whether all the aggravating circumstances outweighed the mitigating circumstances and unanimously vote that the defendant receive the death penalty. After *Hurst v. State*, the Florida Supreme Court in *Asay v. State*, 210 So. 3d 1 (Fla. 2016) and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), created a bright line retroactivity test where defendants whose death sentences were finalized prior to this Court's *Ring v. Arizona,* 536 U.S. 584 (2002) 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 review where (1) the retroactive application of *Hurst v. Florida* and *Hurst v. State* is based on adequate independent state grounds and the issue presents no conflict between the decisions of other state courts of last resort or federal courts of appeal, does not conflict with this Court's precedent, and does not otherwise raise an important federal question; and (2) the retroactivity formula the Florida Supreme Court created following the *Hurst* decisions does not violate the Fifth, Sixth, Eighth or Fourteenth Amendments to the United States Constitutions.

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Opinion Below

The decision of the Florida Supreme Court appears as *Johnson v. State*, 240 So. 3d 630 (Fla. 2018).

Jurisdiction

The Florida Supreme Court issued its opinion affirming the summary denial of Petitioner's successive postconviction motion for relief on March 27, 2018. *Johnson v. State*, 240 So. 3d 630 (Fla. 2018) Petitioner's Petition for Writ of Certiorari was docketed in this Court on July 9, 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 and the Florida Supreme Court's decision was based on independent and adequate state grounds. 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

Tequila Larkins Murder

Petitioner, Ronnie Johnson, a hired hitman, was convicted of the first-degree murder of Tequila "Sugar Momma" Larkins. *Johnson v. State*, 696 So. 2d 326, 327-28 (Fla. 1997). The facts established that Petitioner went to a locked laundromat at around 9 P.M. and asked Larkins for change. *Id.* at 327. She allowed him inside at which point he started arguing and fighting with her, hitting her hard in the face. *Id.* Larkins fell and Petitioner got on top of her. He then pulled out a gun and shot her. *Id.* Petitioner had been paid "about $300 to $400" for the murder. *Id.* at 328. The jury found Petitioner guilty of first-degree murder. *Id.* at 329.

Following the guilt phase, the jury recommended death by a vote of nine to three. *Id.* The trial court found the following aggravating factors applied to Petitioner: (1) Petitioner had a previous conviction of a felony involving violence; (2) Petitioner knowingly created a great risk of death to other individuals; (3) the murder was committed while Petitioner was engaged in a burglary; (4) the murder was

committed for pecuniary gain; and (5) the murder was committed in a cold, calculated, and premeditated manner. *Id.* The trial court considered but rejected that the following two statutory mitigating circumstances applied: (1) "the murder was committed while the Petitioner was under the influence of extreme mental or emotional disturbance"; and (2) Petitioner's age at the time of the murder. *Id.* The trial court found that the following non-statutory mitigating factor applied: Petitioner "was a good friend and a caring family man." *Id.*

The trial court sentenced Petitioner to death. *Id.* On appeal, the Florida Supreme Court affirmed Petitioner's sentence of death. *Id.* at 334. Petitioner filed a petition for writ of certiorari to this Court, which was denied in 1998. *Johnson v. Florida*, 522 U.S. 1095 (1995). Under Florida Rule of Criminal Procedure 3.851(d)(1)(B), Petitioner's sentence of death became final on January 26, 1998, following this Court's denial of the petition for writ of certiorari. *Id.*

On March 1, 2001, Petitioner filed his first motion for postconviction relief, which he amended on January 18, 2002. *Johnson v. State*, 921 So. 2d 490 (Fla. 2005). The trial court denied all of petitioner's claims and the Florida Supreme Court affirmed the trial court's decision and denied Petitioner's petition for writ of habeas corpus. *Id.* at 499, 511.

Lee Arthur Lawrence Murder

Petitioner was convicted of the first-degree murder of Lee Arthur Lawrence, attempted first-degree murder of Bernard Williams, and aggravated assault in the shooting towards Josia Dukes, a bystander during the shooting. *Johnson v. State*, 696 So. 2d 317, 319-20 (Fla. 1997). The facts established that Petitioner was at a grocery store when the victim and owner of the store went outside to the parking lot with another individual Bernard Williams. *Id.* at 319. Once outside, David Ingraham opened fire at Williams and Lawrence who both fell to the floor. *Id.* After the shooting began, Petitioner left the store and went outside and started firing his gun at Lawrence. *Id.* While Williams survived the shooting, Lawrence did not. *Id.* Petitioner stated that he was offered $1,500 to target the victim because of his anti-drug efforts in the community. *Id.* At his jury trial, the jury convicted Petitioner on all counts. *Id.* at 320.

Following the guilt phase, the jury recommended death for Petitioner, by a vote of seven to five. *Id.* The trial court found the following aggravating factors applied to Petitioner: (1) Petitioner had a previous conviction of a felony involving violence; (2) Petitioner knowingly created a great risk of death to other individuals; (3) the murder was committed for pecuniary gain; and (5) the murder was committed in a cold, calculated, and premeditated manner. *Id.* The trial court considered but rejected that the following two statutory mitigating circumstances applied: (1) "the murder was committed while the Petitioner was under the influence of extreme mental or emotional disturbance"; and (2) Petitioner's age at the time of the murder. *Id.* The

trial court found that the following non-statutory mitigating factor applied: Petitioner "was a good friend and a caring family man." *Id.*

The trial court also sentenced Petitioner to death. *Id.* On appeal, the Florida Supreme Court affirmed Petitioner's sentence of death. *Id.* at 326. Petitioner filed a petition for writ of certiorari to this Court, which was denied in 1998. *Johnson v. Florida*, 522 U.S. 1120 (1995). Under Florida Rule of Criminal Procedure 3.851(d)(1)(B), Petitioner's sentence of death became final on February 23, 1998, following this Court's denial of the petition for writ of certiorari. *Id.*; Fla. R. Crim. P. 3.851(d)(1)(B).

On March 1, 2001, Petitioner filed his first motion for postconviction relief, which he amended on January 18, 2002. *Johnson v. State*, 903 So. 2d 888, 892 (Fla. 2005), *cert. denied*, 546 U.S. 1064 (2005). The trial court denied all the Petitioner's claims and the Florida Supreme Court affirmed the trial court's decision, denied Petitioner's petition for writ of habeas corpus, and this Court denied certiorari review. *Id.* at 901, *cert. denied*, 546 U.S. 1064 (2005).

2007 Consolidated Petitions for Writ of Habeas Corpus

Following the Florida Supreme Court's denial of his petition for writ of habeas corpus, the Eleventh Circuit Court of Appeals consolidated Petitioner's cases and affirmed the denial of his petition for writ of habeas corpus in both of his cases. *Johnson v. Florida Dep't of Corr.*, 513 F.3d 1328, 1336 (11th Cir. 2008), *cert. denied*, 555 U.S. 851 (2008).

2011 Motions to Set Aside Judgment

Petitioner filed motions to set aside judgments pursuant to Federal Rule of Civil Procedure 60(b) in each of his cases. The United States South District Court of Florida denied the motions. *Johnson v. Buss*, No. 05-CIV-23292, 2011 WL 2652313, at **1, 4 (S.D. Fla. July 6, 2011); *Johnson v. Buss*, No. 05-CIV-23292, 2011 WL 2652157, at **1, 4 (S.D. Fla. July 6, 2011).

2017 3.851 Motions for *Hurst* Relief

On January 12, 2017, Petitioner filed successive motions for postconviction relief in the 11th Judicial Circuit Court for both of his cases 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*, 137 S. Ct. 2161 (2017). On June 5, 2017, the 11th Judicial Circuit Court denied relief in each case. The Supreme Court of Florida stayed his appeals pending the disposition of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017).

After the court decided *Hitchcock*, the Florida Supreme Court issued an order to show cause on September 27, 2017, directing Petitioner to show why *Hitchcock* should not be dispositive in his case. The Florida Supreme Court affirmed the denial of relief, finding both of Petitioner's death sentences final in 1998, and that *Hurst v. State* did not apply retroactively to his death sentence. *Johnson*, 240 So. 3d at 631. Petitioner 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

This Court should deny Certiorari Review because retroactivity of *Hurst v. Florida* and *Hurst v. State*, is a matter of state law that does not conflict with other state courts of last resort or federal appellate courts, does not raise a compelling federal question or conflict with the Fifth, Sixth, Eighth and Fourteenth Amendments.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. A petition for certiorari is rarely granted when the asserted error is misapplication of properly stated rule of law. *Id.* A certiorari petition should be denied review where it is based on independent and adequate state grounds, there is no conflict with state or federal courts and there is no compelling basis.

Petitioner's basis for review by this Court is to determine whether the Florida Supreme Court's grant of partial retroactivity to its decision in *Hurst v. State*, violates the Fifth, Sixth, Eighth and Fourteenth Amendments. However, Petitioner's basis for certiorari is like many other cases that this court has already denied review. *See, e.g., Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), *cert. denied*, *Lambrix v. Florida*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017), *cert. denied*, *Hannon v. Florida*, 138 S.Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548, 549 (Fla. 2018), *cert. denied*, *Branch v. Florida*, 138 S.Ct. 1164 (2018), *Cole v. State*, 234 So. 3d 644 (Fla.), *cert. denied*, 17-8540, 2018 WL 1876873 (June 18, 2018); *Kaczmar v. State*, 228 So. 3d 1 (Fla. 2017), *cert. denied*, 17-8148, 2018 WL 3013960

(June 18, 2018); *Zack v. State*, 228 So. 3d 41 (Fla. 2017), *cert. denied*, 17-8134, 2018 WL 1367892 (June 18, 2018). His petition for review should be denied because Florida's decision on partial retroactivity is purely a matter of state law and does not violate any constitutional provisions.

Johnson's petition for writ of certiorari should be denied because this Court does not review state court decisions that are based on adequate and independent state grounds. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."). Since *Hurst v. Florida* is not retroactive under federal law, the retroactive application of *Hurst v. State* is solely based on a state test for retroactivity. Because the retroactive application of *Hurst v. State* is based on adequate and independent state ground, certiorari review should be denied.

This Court has held that, in general, a state court's retroactivity determinations are a matter of state law, not federal constitutional law. *See generally*, *Danforth v. Minnesota*, 552 U.S. 264 (2008). State courts may fashion their own retroactivity tests, including partial retroactivity tests. A state supreme court is free to employ a partial retroactivity approach without violating the federal constitution under *Danforth*. The state retroactivity doctrine employed by the Florida Supreme Court did not violate federal retroactivity standards. The court's expansion of *Hurst v. Florida* in *Hurst v. State* is applicable only to defendants in Florida, and, consequently, subject to retroactivity analysis under state law as set forth in *Witt v.*

State, 387 So. 2d 922 (Fla.), *cert. denied*, 449 U.S. 1067 (1980); *See also 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 and where those 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 Florida Supreme Court first analyzed the retroactive application of *Hurst v. State* in *Mosley* and *Asay*. *Mosley v. State*, 209 So. 3d 1248, 1274-83 (2016); *Asay*, 210 So. 3d at 15-22. In *Mosley*, the Florida Supreme Court held that *Hurst v. State* is retroactive to cases which became final after the June 24, 2002, decision in *Ring v. Arizona,* 536 U.S. 584 (2002). *Mosley*, 209 So. 3d at 1283. In determining whether *Hurst v. State* should be retroactively applied to *Mosley*, the Florida Supreme Court conducted a *Witt* analysis, the state-based test for retroactivity. *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980); *Linkletter v. Walker*, 381 U.S. 618 (1965)). Conversely,

applying the *Witt* analysis in *Asay*, the Florida Supreme Court held that *Hurst v. State* is not retroactive to any case in which the death sentence was final pre-*Ring*. *Asay*, 210 So. 3d 1 at 22.

Since "finality of state convictions is a *state* interest, not a federal one," states are permitted to implement standards for retroactivity that grant "relief to a broader class of individuals than is required by *Teague*," which provides the federal test for retroactivity. *See Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008) (emphasis in original); *Teague v. Lane*, 489 U.S. 288 (1989); *see also Johnson v. New Jersey*, 384 U.S. 719, 733 (1966) ("Of course, States are still entirely free to effectuate under their own law stricter standards than we have laid down and to apply those standards in a boarder range of cases than is required by this [Court]."). These decisions in *Asay* and *Mosley*, are based on independent and adequate state grounds, not in conflict with the constitution or another state's court of last resort, and thus, provide no basis for review of Johnson's petition by this Court.

Next, Petitioner's claim that partial retroactivity violates the Eighth Amendment also fails when he states, "[t]here is no justification for drawing a black line above which constitutional violations are corrected, and below which they are not." (Pet. Br. at 32).

New rules of law such as the rule announced in *Hurst v. Florida* do not usually apply to cases that are final, as Petitioner's case assuredly is. *See Whorton v. Bockting*, 549 U.S. 406, 407 (2007) (explaining the normal rule of nonretroactivity and holding the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), was not

retroactive). Additionally, the general rule is one of nonretroactivity for cases on collateral review, with narrow exceptions not applicable to Petitioner's case. *See Teague v. Lane*, 489 U.S. 288, 307 (1989) (observing that there were only two narrow exceptions to the general rule of nonretroactivity for cases on collateral review); *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (holding that "*Hurst* does not apply retroactively to cases on collateral review"); *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (noting that this Court had not made *Hurst* retroactive to cases on collateral review); *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"); *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992) (applying *Griffith* to Florida defendants); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context). Under this "pipeline" concept, *Hurst* would apply only to the cases which were not yet final on the date of the decision in *Hurst*. Yet, this Court recognizes this type of traditional retroactivity as proper and not violative of the Eighth or Fourteenth Amendments.

The only difference between this more traditional type of retroactivity and the retroactivity implemented by the Florida Supreme Court is that it stems from the date of the decision in *Ring* rather than from the date of the decision in *Hurst v. Florida*.

In moving the line of retroactive application back to *Ring*, the Florida Supreme

Court reasoned that since Florida's death penalty sentencing scheme should have been recognized as unconstitutional upon the issuance of the decision in *Ring*, defendants should not be penalized for time that it took for this determination to be made official in *Hurst v. Florida*. Though *Apprendi* served as a precursor to *Ring*, this Court distinguished capital cases from its holding in *Apprendi,* and thus, according to the Florida Supreme Court, *Ring* is the appropriate demarcation for retroactive application to capital cases. *See Mosely v. State*, 209 So. 3d 1248, 1283 (2016); *Apprendi v. New Jersey*, 530 U.S. 466, 496 (2000).

Undoubtedly, the Florida Supreme Court has demonstrated "some ground of difference that rationally explains the different treatment" between pre-*Ring* and post-*Ring* cases. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *see also Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (To satisfy the requirements of the Fourteenth Amendment, "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.").

Additionally, in *Hurst v. Florida,* like *Ring*, a procedural change was made, not substantive one. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review."). Thus, like *Ring*, *Hurst v. Florida* is not retroactive under federal law. *See Lambrix v. Sec'y, Fla. Dep't of Corr.*, 872 F.3d 1170, 1182-83 (11th Cir. 2017)("No U.S. Supreme Court decision holds that its *Hurst* decision is

retroactively applicable."); *In re Jones*, 847 F.3d 1293, 1295 (10th Cir. 2017) ("the Supreme Court has not held that *Hurst* announced a substantive rule"); *Summerlin*, 542 U.S. at 353 (2004)("a rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes…rules that regulate only the *manner of determining* the defendant's culpability are procedural.)(emphasis in original).

After *Hurst v. State,* the same class of defendants committing the same range of conduct face the same punishment. The death penalty can still be imposed under the law after *Hurst v. Florida and Hurst v. State. Hurst v. Florida*, 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, just like the more traditional application of retroactivity, the *Ring*-based cutoff for the retroactive application of *Hurst v. Florida* or *Hurst v. State,* is not in violation of the Eighth Amendment or any other constitutional provision.

Petitioner further claims that, pursuant to *Hurst v. Florida*, the Sixth Amendment requires a unanimous jury recommendation before a sentence of death may be imposed. He avers that his death sentence, based on a non-unanimous majority death recommendation, is unreliable in violation of the Eighth Amendment. (Pet. Br. At 32). However, there is no Sixth or Eighth Amendment violation. Petitioner's contemporaneous conviction for burglary in the Larkins case, and the prior violent felony aggravators found in both the Larkins and the Lawrence cases,

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

To the extent Johnson suggests that jury sentencing is now required under federal law, this is not the case. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating circumstance existed.") (emphasis in original); *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding that the Constitution does not prohibit the trial judge from "impos[ing] a capital sentence"). No case from this Court has mandated jury sentencing in a capital case, and such a holding would require reading a mandate into the Constitution that is simply not there. The Constitution provides a right to *trial* by jury, not to *sentencing* by jury.

Petitioner also complains his juries were improperly instructed, "that they needed to find the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt to recommend death. But it was the judge

who was the ultimate sentencer." (Pet. Br. 30). The judge has always been charged with the responsibility of sentencing, both before and after *Hurst v. Florida* and by extension, *Hurst v. State*.

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). The Florida Supreme Court expanded that narrow Sixth Amendment holding by adding that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 57. This Court in *Hurst v. Florida* did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment.

In *Kansas v. Carr*, 136 S. Ct. 633 (2016), decided just eight days after this Court issued *Hurst v. Florida*, this Court emphasized:

> Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course, the 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, or must more-likely-than-not deserve it. . . . In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case

law is designed to achieve.

Carr, 136 S. Ct. at 642.

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.[1] 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.

Finally, to the degree that Petitioner suggests that *Caldwell* was violated with his juries' instructions, he is incorrect. Johnson's juries were properly instructed on their role based on the state law existing at the time of his trial. *See Reynolds v. State*, ___ So. 3d ___, 2018 WL 1633075, *9 (Fla. April 5, 2018) (explaining that under

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[1] *State v. Mason*, ___ N.E.3d ___, 2018 WL 1872180, *5-6 (Ohio, April 18, 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating 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.*, 2017 WL 4271115, *20 (11th Cir. Sept. 26, 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").

Romano, the Florida standard jury instruction at issue "cannot be invalidated retroactively prior to *Ring* simply because a trial court failed to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts"). Johnson's juries were properly informed that they needed to determine whether sufficient aggravating factors existed and, if so, whether the aggravation outweighed the mitigation before the death penalty could be imposed. They were also told, "[b]efore your ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence." Thus, Johnson's juries were accurately instructed it was their duty to advise the court as to what punishment should be imposed.

This Court held in *Duggar v. Adams*, 489 U.S. 401 (1989), "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Adams*, 489 U.S. at 407-08. "[I]f the challenged instructions accurately described the role of the jury under state law, there is no basis for a *Caldwell* claim." *Id.* at 407. Here, Johnson's juries were accurately advised about their responsibility, and thus, there is no *Caldwell* violation.

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

Conclusion

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

Respectfully submitted,
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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 7th 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: Charles G. White, Esq., 1031 Ives Dairy Road, Suite 228, Miami, Florida 33179.

s/ Scott A. Browne
COUNSEL FOR RESPONDENT