CASE NO. 18-5352

IN THE SUPREME COURT OF THE UNITED STATES

PAUL ANTHONY BROWN,

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]

Whether certiorari review should be denied where (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 United States Constitution; and (2) the Florida Supreme Court's decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law?

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The decision of the Florida Supreme Court is reported at *Brown v. State*, 237 So. 3d 924 (Fla. 2018).

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

Brown was convicted of the first-degree murder of Roger Hensley. On November 5, 1992, Brown and a codefendant, Scott McGuire, met Hensley at a bar. *Brown v. State*, 721 So.2d 274, 275 (Fla. 1998). On the way to Hensley's apartment, Brown drew a gun behind Hensley and whispered to McGuire, "how would you like to do it?" *Id.* at 276. At Hensley's apartment, after sharing a beer, Brown repeatedly stabbed Hensley as the victim struggled to fend him off. *Id.* at 276. He slit Hensley's throat and then stole what little money Hensley had and took his car. *Id.* at 276. The jury convicted him for both theories of first-degree felony murder and first-degree premeditated murder. *Id.* at 276. The jury gave a unanimous recommendation for death of twelve to zero. *Id.* at 277. In following the jury's recommendation, the trial court found four aggravating factors: (1) defendant was previously convicted of a felony involving the use or threat of violence to some person (assault with intent to commit armed robbery); (2) the murder was committed while engaged in the commission of a felony (robbery and burglary) and the murder was committed for financial gain, merged; (3) the murder was heinous, atrocious, or cruel (HAC); and (4) the murder was cold, calculated, and premeditated (CCP). *Id.* at 277, n.4. On direct appeal the Florida Supreme Court upheld his conviction and

sentence. *Id.* at 283. This Court denied Brown's petition for writ of certiorari on May 3, 1999, which is when his death sentence became final. *Brown v. Florida*, 526 U.S. 1102 (1999).

Brown continued to seek relief from his conviction and sentence through postconviction litigation. *See Brown v. State*, 846 So.2d 1114 (Fla. 2003) (affirming the denial of postconviction relief and denying state habeas relief); *Brown v. State*, 41 So.3d 116 (Fla. 2010) *cert. denied,* 131 S.Ct 1476 (2011) (affirming the summary denial of postconviction relief).

On January 23, 2017, Brown filed a successive postconviction motion seeking relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). After the postconviction court denied relief, the Florida Supreme Court issued an order to show cause why the postconviction court's decision should not be affirmed pursuant to the Florida Supreme Court's recent holding in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017).

In *Hitchcock*, the Florida Supreme Court reaffirmed its previous holding in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), in which it held that *Hurst v. Florida* as interpreted in *Hurst v. State* is not retroactive to defendants whose death sentences were final when this Court

decided *Ring v. Arizona*, 536 U.S. 584 (2002). Following briefing, the Florida Supreme Court ultimately affirmed the lower court's denial of relief, finding:

> [W]e conclude that Brown is not entitled to relief. Brown was sentenced to death following a jury's unanimous recommendation for death. *Brown v. State*, 721 So.2d 274, 276-77 (Fla. 1998). Brown's sentence of death became final in 1999. *Brown v. Florida*, 526 U.S. 1102, 119 S.Ct. 1582, 143 L.Ed.2d 677 (1999). Thus, *Hurst* does not apply retroactively to Brown's sentence of death. *See Hitchcock*, 226 So.3d at 217. Accordingly, we affirm the denial of Brown's motion.

(Pet. App. A) (footnote omitted). Brown now seeks certiorari review of the Florida Supreme Court's decision.

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 UNITED STATES CONSTITUTION; AND (2) THE FLORIDA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR INVOLVE AN IMPORTANT, UNSETTLED QUESTION OF FEDERAL LAW.

Brown's Petition presents yet another instance in which a death-sentenced Florida murderer who was denied retroactive application of this Court's decision in *Hurst v. Florida*, and the Florida Supreme Court's decision in *Hurst v. State*, seeks this Court's declaration that *Hurst v. State* is retroactive on collateral review. Florida's retroactivity analysis, however, is a matter of state law. This fact alone militates against the grant of certiorari in this case. Indeed, this Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of *Hurst v. State*. *See, e.g., Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112 (Fla. 2018), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505 (Fla. 2018), *cert. denied*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548

(Fla. 2018), *cert. denied*, 138 S. Ct. 1164 (2018); *Cole v. State*, 234 So. 3d 644 (Fla. 2018), 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, III, v. State*, 228 So. 3d 41 (Fla. 2017), cert. denied, 17-8134, 2018 WL 1367892 (June 18, 2018); *Jones v. State*, 234 So. 3d 545 (Fla), *cert. denied*, 17-8652 (June 25, 2018).

Nevertheless, as the others have done before him, Brown attempts to apply a constitutional veneer to his argument for review of the state court's retroactivity decision, asserting that the Constitution demands full retroactive application of *Hurst v. Florida* and *Hurst v. State*. As will be shown, nothing about the Florida Supreme Court's retroactivity decision is inconsistent with the United States Constitution. Brown does not provide any "compelling" reason for this Court to review his case. U.S. Sup. Ct. R. 10. Brown cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision in *Brown v. State*, 237 So. 3d 924 (Fla. 2018), in which the court determined that Brown was not entitled to relief because *Hurst v. State* was not retroactive to his death sentence. Nothing presented in the petition justifies the exercise of this Court's certiorari jurisdiction.

I. The Florida Court's Ruling on the Retroactivity of *Hurst v. Florida* and *Hurst v. State* Is a Matter of State Law That Does Not Violate the United States Constitution.

The Florida Supreme Court's holding in *Hurst v. State* followed this Court's ruling in *Hurst v. Florida* in requiring the aggravating circumstances to be found by a jury beyond a reasonable doubt before a death sentence may be imposed. The Florida court 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 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.[1]

In *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), the Florida Supreme Court ruled that, as a matter of state law, the *Hurst* decisions are not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in *Ring v. Arizona*, 536

[1] 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).

U.S. 584 (2002). *See also Mosley v. State*, 209 So. 3d 1248, 1272-73 (Fla. 2016) (holding that, as a matter of state law, *Hurst v. State* does not apply retroactively to defendants whose sentences were not yet final when this Court issued *Ring*). Florida's partial retroactive application of the *Hurst* decisions is not constitutionally unsound and does not otherwise present a matter that merits the exercise of this Court's certiorari jurisdiction.

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

retroactivity standards" than the federal standards articulated in *Teague v. Lane*, 489 U.S. 288 (1989)) (emphasis in original; citation omitted).

This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). *See also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); *Street v. New York*, 394 U.S. 576, 581-82 (1969) (same). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010).

New rules of law such as the rule announced in *Hurst v. Florida* do not usually apply to cases that are final, as Brown'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 Brown'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). *Hurst v. Florida* was based on this Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002), which in turn was based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court has held that "*Ring* announced a new **procedural rule that does not apply retroactively to cases already final on direct review.**" *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (emphasis added).

In an attempt to convince this Court that Florida's partial retroactivity of the *Hurst* cases is an "obscene dichotomy," (Pet. at 16), Brown quotes extensively from this Court's decision in *Griffith v. Kentucky*, 479 U.S. 314 (1987). *Griffith* is completely inapplicable to Brown' case. There, this Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, **pending direct review or not yet final**, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id.* at 328 (emphasis added). Under the "pipeline" concept set forth in *Griffith*, only those cases still pending direct review or not yet final would receive the benefit from alleged *Hurst* error. Brown's case was final in 1999.

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

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

fact inherent in any retroactivity analysis.

Brown's suggestion that Florida's retroactivity ruling violates the Equal Protection Clause is also unpersuasive. A criminal defendant challenging the State's application of capital punishment must show intentional discrimination to prove an equal protection violation. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). A "`[d]iscriminatory purpose' . . . implies more than intent as violation or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 298.

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

Simply stated, this Court's ruling in *Hurst v. Florida* applied *Ring v. Arizona* to Florida's death penalty procedure.

"*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro*, 542 U.S. at 352. As *Hurst v. Florida* was merely an application of the holding in *Ring* to Florida's death penalty procedure, it stands to reason that under this Court's retroactivity jurisprudence, *Hurst v. Florida* extends no further than does *Ring*. That is, *Hurst v. Florida*, like *Ring*, "announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro*, 542 U.S. at 352. That the Florida court decided to apply state law as set forth in *Witt*, to extend *Hurst* relief to all post-*Ring* death-sentenced murderers is constitutionally immaterial and provides no basis for the exercise of this Court's certiorari jurisdiction.

Brown relies on *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), to argue that *Hurst* should be applied retroactively to all cases in which alleged *Hurst* error occurred. In so doing, Brown fails to distinguish between substantive and procedural changes in the law. In *Montgomery*, Louisiana ruled that this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which held that a juvenile could not be sentenced to mandatory life in prison without the possibility of parole, did not apply retroactively. *Montgomery*, 136 S. Ct. at 727. This Court reversed Louisiana's holding because *Miller* "announced a

substantive rule of constitutional law." *Id.* at 734. The rule announced in *Miller* was substantive rather than procedural because it placed a particular punishment beyond the State's power to impose. *See Schriro*, 542 U.S. at 352 (defining a substantive rule as a new rule that places "particular conduct or persons" "beyond the State's power to punish"). In other words, *Miller* categorically prevented the State from imposing a mandatory life sentence on anyone who was a juvenile when he or she committed a crime. *Id.* Therefore, because *Miller* was a new substantive rule, it applied retroactively regardless of when a qualifying defendant's conviction became final. *Montgomery*, 136 S. Ct. at 729 ("The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.").

Unlike the ruling in *Miller*, the rulings in *Hurst v. Florida* and *Hurst v. State*, were procedural, not substantive. *See Montgomery*, 136 S. Ct. at 730 ("Procedural rules . . . are designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'") (emphasis in original; quoting *Schriro*, 542 U.S. at 353). As this Court explained in *Welch v. United States*, 136 S. Ct. 1257 (2016):

> Procedural rules . . . "regulate only the manner of determining the defendant's culpability." *Schriro*, 542 U.S. at 353, 124 S. Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." *Ibid.* "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.*, at 352, 124 S. Ct. 2519.

Welch, 136 S. Ct. at 1265.

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

Here, the new rule announced in *Hurst v. Florida*, and expanded in *Hurst v. State*, allocated the authority to make certain capital sentencing decisions from the judge to the jury. This is precisely how this Court in *Welch* defined a procedural change. Based on this Court's precedent, there can be no doubt that the *Hurst* rule is a procedural rule. Accordingly, the

Florida court was not required to give **any** retroactive effect on collateral review to the rule announced in *Hurst v. Florida* or *Hurst v. State*.

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

II. Brown's Argument That His Jury Did Not Unanimously Find All "Elements" Required to Convict Him of Capital Murder Is Just Another Attack on Florida's Retroactivity Decision.

Brown insists that this Court must "resolve the issue of whether postconviction defendants sentenced pursuant to Florida Statute § 921.141 were convicted of capital murder subjecting them to the death penalty or whether the fact that the jury did not unanimously find all of the elements required to convict of capital murder mandates that postconviction defendants, like Mr. Brown, were only convicted of murder and are ineligible for the death penalty." (Pet. at 31). This is just another way of claiming a Sixth Amendment violation and amounts to yet another attempt to urge universal retroactivity of the *Hurst* decisions.

As discussed above, however, *Hurst v. Florida* is not retroactive under federal law, and *Hurst v. State* is not retroactive under state law to cases that were final prior to the decision in *Ring v. Arizona*. *Teague v. Lane*, 489 U.S. 288, 307 (1989), *Schriro v. Summerlin*, 542 U.S. 348 (2004), *Asay v. State*, 210 So. 3d 1 (Fla. 2016). Notably, even the right to a jury trial itself is not so fundamental as to require retroactive application. *DeStefano v. Woods*, 392 U.S. 631, 633-34 (1968).

Under this Court's precedent, there was no underlying Sixth Amendment error in this case. Brown's prior violent felony conviction for assault with intent to commit armed robbery established an aggravator under well established Florida law. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). Pursuant to the Court's Sixth Amendment jurisprudence, once the state establishes the existence of an aggravating circumstance, the defendant becomes eligible for an enhanced sentence of death and the jury need not make any additional "factual" findings. *See Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) ("That is to say, for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of

'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances': Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death. Accordingly, we held that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt.") (citing *Ring v. Arizona*, 536 U.S. 584, 608-09 (2002)). There was no *Hurst/Ring* error in this case because the weighing decision is not a fact-based eligibility determination.

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 requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend

a sentence of death." *Hurst v. State*, 202 So. 3d at 57. These additional requirements imposed by *Hurst v. State* are not "elements" of a capital offense, contrary to Brown's argument.[2] 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.

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[2] Brown's reliance on *Bousley v. United States*, 523 U.S. 614 (1998), 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. 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.

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.[3] 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.

To the extent Brown 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

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[3] *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").

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.

Moreover, *Hurst* errors are subject to harmless error analysis. *See Hurst v. Florida*, 136 S. Ct. at 624. *See also Chapman v. California*, 386 U.S. 18, 23-24 (1967). Here, the aggravating circumstances found by the trial court were either uncontestable or well-established by overwhelming evidence.[4] *Brown*, 721 So. 2d at 277-81. No reasonable jury would have failed to find the existence of the four aggravators under the circumstances of this case. *See, e.g., Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017). In fact, Brown's jury did unanimously

[4]Even in cases unlike this one, post-*Ring*, the Florida Supreme Court has repeatedly affirmed death sentences on the basis of harmless error where the jury recommended death unanimously. See *Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016), cert. denied, 137 S. Ct. 2218 (2017) (a jury's unanimous recommendation "allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors.").

find one of the aggravating factors when they found him guilty under the theory of first-degree felony murder.

In sum, the questions Brown presents do not offer any matter which comes within the parameters of Rule 10 of the Rules of the United States Supreme Court. Brown 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 Brown does not demonstrate any compelling reasons for this Court to exercise its certiorari jurisdiction under Rule 10, this Court should deny the petition.

CONCLUSION

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

Respectfully submitted,

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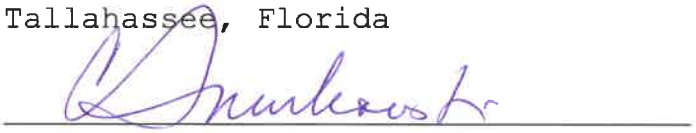

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