

NO. 18-5376
IN THE SUPREME COURT OF THE UNITED STATES

MARK ALLEN GERALDS,
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

Whether this Court should grant certiorari review where 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.

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Opinion Below

The decision of the Florida Supreme Court appears as *Geralds v. State*, 237 So. 3d 923 (Fla. 2018).

Jurisdiction

This Court's jurisdiction to review the final judgment of the Florida Supreme Court is authorized by 28 U.S.C. § 1257. However, because the Florida Supreme Court's decision in this case is based on adequate and independent state grounds, this Court should decline to exercise jurisdiction as no federal question is raised. Sup. Ct. R. 14(g)(i). Additionally, the Florida Supreme Court's decision does not implicate an important or unsettled question of federal law, does not conflict with another state

court of last resort or a United States court of appeals, and does not conflict with relevant decisions of this Court. Sup. Ct. R. 10. No compelling reasons exist in this case and this Petition for a writ of certiorari should be denied. Sup. Ct. R. 10.

Statement of the Case and Facts

On February 1, 1989, Bart Pettibone returned home from school to find his mother, Tressa Pettibone, stabbed and beaten to death. *Geralds v. State*, 601 So. 2d 1157, 1158 (Fla. 1992).

There were two stab wounds on the right side of Tressa Pettibone's neck and one fatal stab wound on the left side. The wounds were consistent with a knife found in the kitchen sink. The medical examiner found a number of bruises and abrasions on the head, face, chest, and abdomen of the victim caused by some form of blunt trauma. The examiner also determined that the victim's wrists had been bound with a plastic tie for at least twenty minutes prior to her death.

Blythe Pettibone, the victim's daughter, testified that several items of jewelry were missing from the home. Among these were a herringbone chain necklace and a pair of red-framed Bucci sunglasses. Kevin Pettibone, the victim's husband, testified that his wife's Mercedes automobile was missing. The automobile was later found in the parking lot of a nearby school. Cash in the amount of \$7,000 hidden in the house was not taken.

Mark Geralds was a carpenter who had worked on the remodeling of the Pettibones's house. About one week prior to the murder, Tressa Pettibone and her children encountered Geralds in a shopping mall. Tressa Pettibone mentioned that her husband was out of town on business. Later, Geralds approached Bart at the video arcade. He asked when Bart's father would be back in town and when Bart and his sister left for and returned from school during the day.

Other circumstantial evidence linked Geralds to the crime: (1) at 2:00 p.m. on February 1, 1989, Geralds pawned a gold herringbone chain necklace. Serology testing revealed a stain on the necklace to be blood compatible with the victim's blood type and inconsistent with Geralds's; (2) Douglas Freeman, Geralds's grandfather, testified that on occasion

Geralds would come by his house to take a shower. Freeman testified that Geralds came by at 11:30 a.m. on February 1, 1989, and asked to shower because he had been working on a fiberglass boat, a reason he had given in the past. When he left, Geralds stated that he was taking a pair of sunglasses to some friends; (3) Vickey Ward testified that Geralds gave her a pair of red Bucci sunglasses in late January or early February, 1989; (4) a pair of Nike shoes was seized from Geralds's residence. Evidence indicated that they could have made the tracks on the floor in the Pettibone house; (5) the plastic tie recovered from the victim's wrist matched the ties found in Geralds's car.

The jury found Geralds guilty of first-degree murder, armed robbery, burglary of a dwelling, and theft of an automobile. The jury recommended death for the homicide. The court concurred, finding no statutory or nonstatutory mitigating factors and four aggravating circumstances: (1) the homicide occurred during a burglary; (2) the homicide was committed to avoid arrest; (3) the homicide was especially heinous, atrocious, or cruel; and (4) the homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The court sentenced Geralds as a habitual felony offender for the noncapital felonies.

Id. at 1158-59. On appeal, the Florida Supreme Court upheld the convictions, but ordered a new penalty phase. *Id.* at 1164. At the resentencing, the jury unanimously recommended death. *Geralds v. State*, 674 So. 2d 96 (Fla. 1996). The Florida Supreme Court upheld the new sentence. *Id.* The United States Supreme Court denied certiorari on October 7, 1996. *Geralds v. Florida*, 519 U.S. 891 (1996). In September 1997, Geralds filed his first postconviction motion, raising 26 claims. *Geralds v. State*, 111 So. 3d 778 (Fla. 2010).

In February 2003, after a *Huff* hearing, the circuit court summarily denied claims 1, 3, 4 (in part), 5, 7, 8 (in part), 9, 10, 11 (in part), 12 (in part), and 13-26. An evidentiary hearing was granted on claims 2, 4 (in part), 6, 8 (in part), 11 (in part) and 12 (in part). Geralds filed a supplement to his postconviction motion in July 2004, and a second supplement in July 2005. Both supplements were summarily denied. In January 2006, after evidentiary hearings, the circuit court filed a final

order denying Gerald's postconviction motion.

Id. at 785-86. The Florida Supreme Court upheld the trial court's denial of the claims.

Id. at 810.

On April 18, 2016, Petitioner filed a petition for habeas corpus, seeking relief under *Hurst v. Florida*, 136 S.Ct. 616 (2016). On May 18, 2017, counsel for Petitioner filed a successive motion raising claims based on the decision in *Hurst*, in the trial court.¹

On March 10, 2017, the Florida Supreme Court entered an order, finding that Appellant was not entitled to relief pursuant to the holding in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), that *Hurst v. Florida* does not apply retroactively to capital defendants whose sentences were final prior to the decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *Gerald's v. Jones*, No. SC16-659, 2017 WL 944236 (Fla. Mar. 10, 2017).²

On September 5, 2017, the trial court judge entered an order, denying the

¹ Petitioner raised five claims under *Hurst*. Petitioner argues that (1) his death sentence violates the Sixth Amendment right to a jury trial under *Hurst v. Florida* and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016); (2) his death sentence violates the Eighth Amendment and that the jury was not properly instructed that their recommendation must be unanimous; (3) the Florida Supreme Court's partial retroactivity violates the Eighth Amendment; (4) Petitioner's claims of due process and *Strickland v. Washington*, 466 U.S. 668 (1984), must be reevaluated in light of the new law that would govern at resentencing; and (5) the law signed by Governor Scott requiring unanimous jury recommendations should be applied to Appellant.

² In the order, the Florida Supreme Court found that Petitioner is not entitled to relief pursuant to the holding in *Asay v. State*, that *Hurst v. Florida* does not apply retroactively to capital defendants whose sentences were final before *Ring* was decided.

successive motion without conducting an evidentiary hearing.

On October 2, 2017, Appellant filed with the Florida Supreme Court a notice of appeal for the denial of a successive postconviction motion for relief under *Hurst v. Florida*. On August 10, 2017, the Florida Supreme Court affirmed the conviction and sentence in *Hitchcock* in accordance with this Court's decision in *Asay. Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017); *Asay v. State*, 210 So. 3d 1 (Fla. 2016). On October 27, 2017, the Florida Supreme Court issued an order for Petitioner to show cause as to "why the trial court's order should not be denied in light of this Court's decision [in] *Hitchcock v. State*, SC17-455." On February 28, 2018, the Florida Supreme Court held that Petitioner is not entitled to relief under *Hurst* and denied his appeal. *Geralds*, 237 So. 3d at 924.

In *Hurst v. Florida*, this Court held that Florida's capital sentencing scheme was unconstitutional pursuant to *Ring's* determination that the Sixth Amendment requires a jury to find the existence of an aggravating circumstance which qualifies a defendant for a sentence of death. *Hurst v. Florida*, 136 S.Ct. 616. On remand in *Hurst v. State*, the Florida Supreme Court held that in capital cases, the jury must unanimously and expressly find that the aggravating factors 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 40 (Fla. 2016), *cert. denied, Florida v. Hurst*, 137 S.Ct. 2161 (2017).

In *Mosley*, the Florida Supreme Court held that *Hurst* applies retroactively to

cases which became final after the decision was issued in *Ring* on June 24, 2002. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). On the same day in *Asay*, the Florida Supreme Court held that *Hurst* does not apply retroactively to cases which became final prior to *Ring*. *Asay*, 210 So. 3d at 22, *cert. denied*, *Asay v. Florida*, 138 S.Ct. 41 (2017).

Shortly after the *Hurst* decisions, Petitioner raised a claim asserting that he should be entitled to relief pursuant to *Hurst*. Since Petitioner's case became final in 1996, the Florida Supreme Court denied Petitioner's claim that *Hurst* should apply retroactively to him. *Geralds*, 237 So. 3d at 924. Petitioner then filed a petition for a writ of certiorari in this Court from the Florida Supreme Court's decision. This is the State's brief in opposition.

Reasons for Denying the Writ

There is no Basis for Certiorari Review of the Florida Supreme Court's Denial of Retroactive Application of *Hurst* to Petitioner.

Petitioner seeks certiorari review of the Florida Supreme Court's decision holding that *Hurst* is not retroactive to Petitioner because his case became final pre-*Ring* in 1996. *Geralds*, 237 So. 3d at 924. The Petition alleges that the Florida Supreme Court's refusal to retroactively apply *Hurst* to pre-*Ring* cases is in violation of the Fifth Amendment's guarantee of fundamental fairness, the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty, and the Fourteenth Amendment's guarantee of equal protection. (Petition at 13-18). However, the Florida Supreme Court's retroactive application of *Hurst* to only

post-*Ring* cases does not violate the Fifth, Eighth, or Fourteenth Amendment. Further, the Florida Supreme Court's denial of retroactive application to Petitioner 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. This decision is also not in conflict with this Court's jurisprudence on retroactivity. Thus, Petitioner's request for certiorari review should be denied.³

Aside from the question of retroactivity, certiorari would be inappropriate because there is no underlying federal constitutional error. *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. Petitioner became eligible for a death sentence by virtue of his guilt phase conviction for three contemporaneous felonies, armed robbery, burglary of a dwelling, and theft of an automobile. *Geralds*, 601 So. 2d at 1159; *see also Jackson v. State*, 213 So. 3d 754, 787 (Fla. 2017), *citing Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The unanimous verdict by Petitioner's jury establishing his guilt of

³ 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., 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, 645 (Fla. 2018), *cert. denied, Cole v. Florida*, No. 17-8540, 2018 WL 1876873 (June 18, 2018); *Jones v. State*, 234 So. 3d 545 (Fla. 2018), *cert. denied, Jones v. Florida*, No. 17-8652, 2018 WL 1993786 (June 25, 2018).

these contemporaneous crimes established an aggravator under well-established Florida law.⁴ These convictions were clearly sufficient to meet the Sixth Amendment’s factfinding requirement. *See 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); *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016) (rejecting a claim that the constitution requires a burden of proof on whether or not mitigating circumstances outweigh aggravating circumstances, noting that such a question is “mostly a question of mercy”). *See also State v. Mason*, 2018 WL 1872180, *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.”); *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.”). Thus, there was no *Hurst v. Florida* error in Petitioner’s case.

Additionally, *Hurst* is not retroactive under federal law. “*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct

⁴ See Florida Statute § 921.141 (6)(d) (qualifying contemporaneous felony aggravators).

review.” *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). Since *Hurst* is an extension of *Ring*, it is also not retroactive under federal law. *Hurst*, 136 S.Ct. at 662 (“As with *Ring*, a judge increased Hurst’s authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst’s sentence violates the Sixth Amendment.”); see also *Lambrix v. Sec’y, Fla. Dep’t of Corr.*, 872 F.3d 1170, 1182-83 (11th Cir. 2017), cert. denied, *Lambrix v. Jones*, 138 S.Ct. 312 (2017) (“No U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable.”). 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* is not retroactive under federal law, the retroactive application of *Hurst* is solely based on a state test for retroactivity. Because the retroactive application of *Hurst* is based on adequate and independent state grounds, certiorari review should be denied.

The Florida Supreme Court first analyzed the retroactive application of *Hurst* in *Mosley* and *Asay*. *Mosley*, 209 So. 3d at 1276-83; *Asay*, 210 So. 3d at 15-22. In *Mosley*, the Florida Supreme Court held that *Hurst* is retroactive to cases which became final after the June 24, 2002, decision in *Ring*. *Mosley*, 209 So. 3d at 1283. In determining whether *Hurst* should be retroactively applied to *Mosley*, the Florida Supreme Court conducted a *Witt* analysis, the state based test for retroactivity. *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980) (determining whether a new rule should be

applied retroactively by analyzing the purpose of the new rule, extent of reliance on the old rule, and the effect of retroactive application on the administration of justice) (citing *Stovall v. Denno*, 388 U.S. 293, 297 (1967); *Linkletter v. Walker*, 381 U.S. 618 (1965)). Since “finality of state convictions is a *state* interest, not a federal one,” states are permitted to implement standards for retroactivity that grant “relief to a broader class of individuals than is required by *Teague*,” which provides the federal test for retroactivity. *Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008) (emphasis in original); *Teague v. Lane*, 489 U.S. 288 (1989); see also *Johnson v. New Jersey*, 384 U.S. 719, 733 (1966) (“Of course, States are still entirely free to effectuate under their own law stricter standards than we have laid down and to apply those standards in a boarder range of cases than is required by this [Court].”). As *Ring*, and by extension *Hurst*, has been held not to be retroactive under federal law, Florida has implemented a test which provides relief to a broader class of individuals in applying *Witt* instead of *Teague* for determining the retroactivity of *Hurst*. See *Schriro*, 542 U.S. at 258 (holding that “*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review”); *Lambrix*, 872 F.3d 1170, 1182-83 (noting that “[n]o U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable”).

The Florida Supreme Court determined that all three *Witt* factors weighed in favor of retroactive application of *Hurst* to cases which became final post-*Ring*. *Mosley*, 209 So. 3d at 1276-83. The Court concluded that “defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by

Rings should not be penalized for the United States Supreme Court's delay in explicitly making this determination."⁵ *Id.* at 1283. Thus, the Florida Supreme Court held *Hurst* to be retroactive to *Mosley*, whose case became final in 2009, which is post-*Ring*. *Id.*

Conversely, applying the *Witt* analysis in *Asay*, the Florida Supreme Court held that *Hurst* is not retroactive to any case in which the death sentence was final pre-*Ring*. *Mosley*, 209 So. 3d at 1283. The Court specifically noted that *Witt* "provides more expansive retroactivity standards than those adopted in *Teague*." *Asay*, 210 So. 3d at 15 (emphasis in original), quoting *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005). However, the Court determined that prongs two and three of the *Witt* test, reliance on the old rule and effect on the administration of justice, weighed heavily against the retroactive application of *Hurst* to pre-*Ring* cases. *Asay*, 210 So. 2d at 20-22. As related to the reliance on the old rule, the Court noted "the State of Florida in prosecuting these crimes, and the families of the victims, had extensively relied on the constitutionality of Florida's death penalty scheme based on the decisions of the United States Supreme Court. This factor weighs heavily against retroactive application of *Hurst v. Florida* to this pre-*Ring* case." *Id.* at 20. As related to the effect

⁵ Under this rationale, it would not make sense to only grant relief to those who continued to raise *Ring* in the 14 years between *Ring* and *Hurst* as this would encourage the filing of frivolous claims in the hope that subsequent vindication could provide a basis of relief for a future change in the law. Nor should a defendant who failed to raise a claim that appeared to be well settled against him/her be punished for not raising what he/she believed to be a frivolous claim.

on the administration of justice, the Court noted that resentencing is expensive and time consuming and that the interests of finality weighed heavily against retroactive application. *Id.* at 21-22. Thus, the Florida Supreme Court held that *Hurst* was not retroactive to *Asay* since the judgment and sentence became final in 1991, pre-*Ring*. *Id.* at 8, 20.

Since *Asay*, the Florida Supreme Court has continued to apply *Hurst* retroactively to all post-*Ring* cases and declined to apply *Hurst* retroactively to all pre-*Ring* cases. *See, e.g., 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). This distinction between cases which were final pre-*Ring* versus cases which were final post-*Ring* is neither arbitrary nor capricious.

In the traditional sense, new rules are applied retroactively only to cases which are not yet final. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (“a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past”); *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 only apply to the

cases which were not yet final on the date of the decision in *Hurst*. This type of traditional retroactivity can depend on a score of random factors having nothing to do with the offender or the offense, such as trial scheduling, docketing on appeal, etc. Even under the “pipeline” concept, cases whose direct appeal was decided on the same day might have their judgment and sentence become final on either side of the line for retroactivity. Additionally, under the “pipeline” concept, “old” cases where the judgment and/or sentence has been overturned will receive the benefit of new law as they are no longer final. Yet, this Court recognizes this type of traditional retroactivity as proper and not violative of the Eighth or Fourteenth Amendment.

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*. In moving the line of retroactive application back to *Ring*,⁶ 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*. Certainly, the Florida Supreme Court has demonstrated “some ground of difference that rationally explains the different treatment” between pre-*Ring* and

⁶ Though *Apprendi* served as a precursor to *Ring*, this Court distinguished capital cases from its holding in *Apprendi* and thus *Ring* is the appropriate demarcation for retroactive application to capital cases. *Asay*, 210 So. 3d at 19; *Apprendi v. New Jersey*, 530 U.S. 466, 496 (2000).

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.”). Unquestionably, extending relief to more individuals,⁷ defendants who would not receive the benefit of a new rule because their cases were already final when *Hurst* was decided, does not violate the Eighth or Fourteenth Amendment. Thus, just like the more traditional application of retroactivity, the *Ring* based cutoff for the retroactive application of *Hurst* is not in violation of the Eighth or Fourteenth Amendment.

Petitioner argues that the Florida Supreme Court is being unfair in selectively applying *Hurst* to “similarly situated” defendants, namely those who “were free of the shackles of finality.” (Petition at 16). However, in the wake of *Furman*, similar Equal Protection claims were rejected. See *Lambrix*, 872 F.3d at 1183; *Dobbert v. Florida*, 432 U.S. 282, 301 (1977); *Furman v. Georgia*, 408 U.S. 238 (1972). These claims were based on the two-category division of pre-*Furman* cases; those who were subject to the new statute because they had not yet been tried and those whose cases were

⁷ Approximately 150 defendants whose convictions became final post-*Ring* are being re-sentenced pursuant to *Hurst*. Death Penalty Information Center, Florida Death-Penalty Appeals Decided in Light of *Hurst*, available at <https://deathpenaltyinfo.org/node/6790> (last visited Aug. 1, 2018).

commuted because they were already final. *Dobbert*, 432 U.S. at 288, 301. This Court held that defendants who had yet to be tried and sentenced were “not similarly situated to those whose sentences were commuted. He was neither tried nor sentenced prior to *Furman*, as were they. . . .” *Id.* at 301. Just as with the categorization of cases after *Furman*, post-*Hurst*, “Florida obviously had to draw the line at some point.” *Id.* As such, Petitioner is not similarly situated to those who are receiving a new sentencing phase pursuant to *Hurst* as his judgment was final pre-*Ring*.

Finally, certiorari review would also be inappropriate because, assuming for a moment any *Hurst* error can be discerned from this record, such error would be clearly harmless. *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 and affirmed by the Florida Supreme Court on appeal were uncontestable (as unanimously found by the jury at the guilt phase of this case) or supported by overwhelming evidence. In addition, the jury unanimously recommended death. 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”).

The Florida Supreme Court's determination of the retroactive application of *Hurst* under *Witt* is based on adequate and independent state grounds and is not violative of federal law or this Court's precedent. Thus, certiorari review should be denied.

***Hurst* is Not Retroactive Under Federal Law Because It Invoked a Procedural, Not a Substantive, Change.**

Petitioner also argues that *Hurst* provided a substantive change in the law and thus should be afforded full retroactive application under federal law pursuant to *Montgomery*. (Petition at 27); *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). However, *Hurst*, like *Ring*, was a procedural change, not substantive one. *See Summerlin*, 542 U.S. at 358 (“*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.”). Like *Ring*, *Hurst* is not retroactive under federal law. *See Lambrix*, 872 F.3d at 1182 (“No U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable.”); *see also 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); *In re Jones*, 847 F.3d 1293, 1295 (10th Cir. 2017) (“the Supreme Court has not held that *Hurst* announced a substantive rule”).

In support of his argument that *Hurst* was a substantive rather than a procedural change, Petitioner analogizes *Hurst* to *Montgomery*. (Petition at 27); *Miller v. Alabama*, 567 U.S. 460 (2012). In *Montgomery* this Court found the change

was substantive because “it rendered life without parole an unconstitutional penalty for ‘a class of defendants because of their status’ — that is juvenile offenders . . .” and retroactive because “the vast majority of juvenile offenders — “faces a punishment that the law cannot impose upon him.”” *Montgomery*, 136 S.Ct. at 734, quoting *Penry*, 492 U.S. at 330; *Summerlin*, 542 U.S. at 352. However, unlike in *Montgomery*, the Court in *Hurst* did not “conflate[] a procedural requirement necessary to implement a substantive guarantee with a rule that ‘regulate[s] only the *manner of determining* the defendant’s culpability.” *Montgomery*, 136 S.Ct. at 734-35, quoting *Summerlin*, 542 U.S. at 353 (emphasis in original). Thus, *Hurst* is distinguishable from *Montgomery*.

Unlike the change in *Montgomery*, *Hurst* is procedural. In *Hurst* the same class of defendants committing the same range of conduct face the same punishment. Further, unlike the now unavailable penalty in *Montgomery*, the death penalty can still be imposed under the law after *Hurst*. Instead, *Hurst*, like *Ring*, merely “altered the range of permissible methods for determining whether a defendant’s conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment.” *Summerlin*, 542 U.S. at 353. Thus, *Hurst* is a procedural change and not retroactive under federal law.

Petitioner argues that the Florida Supreme Court’s imposition of the unanimity requirement in *Hurst v. State* causes all non-unanimous verdicts to be violative of the Eighth Amendment and that “evolving standards of decency” and “enhanced reliability and confidence in the result” necessitate unanimous

recommendations in all death penalty cases. (Petition at 21-22, 24). However, the Florida Supreme Court's imposition of the unanimity requirements in *Hurst v. State* is purely a matter of state law, is not a substantive change, and did not cause death sentences imposed pre-*Ring* to be in violation of the Eighth Amendment.

To the extent Petitioner 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 factor 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.

The Eighth Amendment requires capital punishment to be limited “to those who commit a ‘narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” *Roper v. Simmons*, 543 U.S. 551, 568 (2005), *quoting Atkins v. Virginia*, 536 U.S. 304, 319 (2002). As such, the death penalty is limited to a specific category of crimes and “States must give narrow and precise definition to the aggravating factors that can result in a capital sentence.” *Roper*, 543 U.S. at 568. In finding Florida’s death penalty unconstitutional, this Court did not invalidate Florida’s statutory scheme based on Eighth Amendment

narrowing concerns. Implicit in the holding of *Hurst v. Florida* was that Florida's statutory scheme sufficiently narrowed and was in compliance with the Eighth Amendment.

However, many states also add protections that go above and beyond the requirements of the Eighth Amendment. Often times, these additional state-based requirements are forward looking in anticipation of evolving standards of decency to ensure that their capital sentencing schemes will remain constitutionally valid in the future. These additional protections are based on adequate and independent state grounds. For example, in the wake of *Furman*, many states in redrafting their capital sentencing statutes added a statutory requirement to review whether a capital "sentence is disproportionate to that imposed in similar cases" to "avoid arbitrary and inconsistent results." *Pulley v. Harris*, 465 U.S. 37, 44 (1984); *Furman*, 408 U.S. at 238. As this Court noted, "[p]roportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required." *Pulley*, 465 U.S. at 50.

Like with the addition of proportionality review, the Florida Supreme Court's *Hurst v. State* requirement of unanimous jury findings and recommendations during capital sentencing procedures is an additional safeguard that is beyond the requirements of the Eighth Amendment. *Hurst*, 202 So. 3d at 61 ("Florida's capital sentencing law will comport with these Eighth Amendment principles in order to more surely protect the rights of defendants guaranteed by the Florida and United States Constitutions.") (emphasis added). Because these are additional safeguards

that are premised on the principles of but not necessitated by the Eighth Amendment, they are state requirements and thus based on adequate and independent state grounds. *Id.* at 62 (noting that the unanimity requirements are forward looking and will “dispel most, if not all, doubts about the future validity and long-term viability of the death penalty in Florida”).

The Florida Supreme Court’s determination of the retroactive application of *Hurst* under *Witt* is based on adequate and independent state grounds and is not violative of federal law or this Court’s precedent. *Hurst* did not announce a substantive change in the law and is not retroactive under federal law. Thus, there is no violation of federal law and certiorari review should be denied.

Florida’s Amended Death Penalty Statute is Also Not Retroactive Nor Does it Invalidate Any Prior Conviction.

Florida’s death penalty statute, Fla. Stat. § 921.141, was amended after, and in comport with, the decisions in *Hurst v. Florida* and *Hurst v. State*. Neither *Hurst* nor the new statute create a new crime with new elements. The same conduct remains prohibited. Only the process by which the sentence is determined has been altered. No substantive change has occurred which makes *Hurst* retroactive under federal law. Thus, there is no basis for which certiorari review should be granted. Consequently, this Petition should be denied.

In general, there is a presumption against retroactive application of statutes absent an express statement of legislative intent. *Fla. Ins. Guar. Ass’n, Inc. v. Devon Neighborhood Ass’n, Inc.*, 67 So. 3d 187, 195 (Fla. 2011). There is no express

statement that the legislature intended that chapter 2017-1 be applied retroactively, and thus this presumption cannot be rebutted. *See also* Senate Bill Analysis and Fiscal Impact Statement, SB 280, Feb. 21, 2017, at 6-7 (noting that this Court's retroactive application to post-*Ring* decisions will "significantly increase both the workload and associated costs of public defender offices for several years to come").

Further,

no U.S. Supreme Court decision holds that the failure of a state legislature to make revisions in a capital sentencing statute retroactively applicable to all of those who have been sentenced to death before the effective date of the new statute violates the Equal Protection Clause, the Due Process Clause, or the Eighth Amendment.

Lambrix, 872 F.3d at 1183.

Since the legislature did not express an intent for the statute to be retroactive, it is not retroactive to cases which were final prior to enactment of the new statute. Petitioner's judgment became final in 1996 and he has not received a new guilt or penalty phase since that time. Thus, the 2017 enactment of changes to the capital sentencing statute would not be applicable to Petitioner's case unless Petitioner were to receive a new guilt and/or penalty phase.

The changes to Florida's death penalty statute were made in the aftermath of *Hurst* and implement the changes from *Hurst*. The changes include requiring a unanimous jury vote for a recommendation of death instead of a majority vote, requiring specific findings from the jury regarding the existence and sufficiency of the aggravation and the weighing of aggravation against mitigation, and disallowing judicial override of a jury's recommendation of life. As discussed above, these are

procedural changes, not substantive ones.

These changes to the sentencing procedure did not create a new offense as Petitioner argues. (Petition at 28-31). The class of persons who are death eligible and the range of conduct which causes those defendants to be death eligible did not change. The aggravating factors necessary to qualify a defendant as eligible for the death penalty were not changed. In fact, the specific aggravators used in Petitioner's case had been in place since at least 1987. The only changes made were the requirement of specific jury findings of unanimity for the existence and sufficiency of the aggravating factors and that they outweigh mitigation, and for a death recommendation.

Petitioner also argues that two of the elements identified in *Hurst v. State* were not found proven beyond a reasonable doubt in his case, "sufficiency of the aggravators and whether they outweigh the mitigators." (Petition at 31). However, the only requirements of proof beyond a reasonable doubt are the elements for a finding of guilt for first-degree murder and that the aggravating factors were proven. Fla. Stat. § 921.141(2)(a) (2017) ("the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor . . ."). The standard of proof for guilt has long been proof beyond a reasonable doubt, and certainly was at Petitioner's trial. *See Miles v. United States*, 103 U.S. 304, 312 (1880). Similarly, the standard of proof for proving aggravating factors was beyond a reasonable doubt at Petitioner's trial. *See 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). Thus, all elements which required findings beyond a reasonable doubt were in fact found beyond a reasonable doubt at Petitioner's trial.

Similarly, the requirement that aggravators be sufficient and outweigh mitigation has long been a requirement of Florida law. "The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances." *Parker v. Dugger*, 498 U.S. 308, 313 (1991); *citing* Fla. Stat. § 921.141(3) (1985). The 2017 change to the statute merely requires that the jury make these findings unanimously in order for the defendant to be eligible to receive a death sentence.

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*, 543 U.S. at 568. The State of Florida has a list of 16 aggravating factors enumerated in the statute. Fla. Stat. § 921.141(6). 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. Thus, if one of these enumerated aggravating factors has been proven beyond a reasonable doubt, any Eighth Amendment concerns have been satisfied. 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.”); *Carr*, 136 S.Ct. at 642 (“[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.

Additionally, this Court “has not ruled on whether unanimity is required” in capital cases. *Hurst*, 202 So. 3d at 59; *see also Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). 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 (emphasis in original). Thus, *Hurst v. State’s* requirement that the jury make specific factual findings before the imposition of the death penalty is procedural.

In support of his argument that *Hurst* should be retroactive under the federal

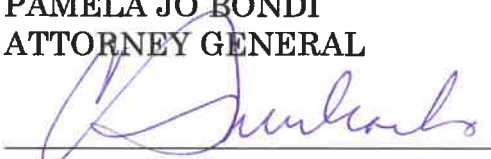
Teague standard as a substantive change because it “addressed the proof-beyond-a-reasonable-doubt standard,” Petitioner relies upon *In re Winship* and *Fiore*. (Petition at 30-31); *In re Winship*, 397 U.S. 358 (1970); *Fiore v. White*, 531 U.S. 225 (2001). However, *Hurst* is distinguishable from these cases. *In re Winship* required that the proof-beyond-a-reasonable-doubt standard be afforded to juveniles “during the adjudicatory stage of a delinquency proceeding. . . .” *In re Winship*, 397 U.S. at 368. *Hurst* did not alter the burden of proof during the adjudication phase in finding a defendant guilty of first-degree murder. In *Fiore*, this Court held that the Federal Due Process Clause was violated when an individual was convicted of a crime despite his conduct not being prohibited by the criminal statute, and thus every element of the crime had not been proven beyond a reasonable doubt. *Fiore*, 531 U.S. at 228. As was true in *Hurst* and here, Petitioner’s conduct is clearly in violation of the criminal statute and by virtue of his conviction for first-degree murder, every element of the crime was proven beyond a reasonable doubt. As discussed previously, *Hurst* did not alter the burden of proof. Thus, neither *Fiore* nor *In re Winship* is applicable to the discussion of the retroactive application of *Hurst*.

No substantive change has occurred which makes Fla. Stat. § 921.141 or *Hurst* retroactive under federal law. Thus, there is no basis for which certiorari review should be granted. Consequently, this Petition should be denied.

Conclusion

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

Respectfully submitted,
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