CASE NO. 18-5415

IN THE SUPREME COURT OF THE UNITED STATES

LOUIS B. GASKIN,

***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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[Capital Case]

QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari review where the retroactive application of *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) 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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The opinion of the Florida Supreme Court is reported at *Gaskin v. State*, 237 So. 3d 928 (Fla. 2018).

JURISDICTION

The judgment of the Florida Supreme Court was entered on January 31, 2018 and the mandate issued February 26, 2018. Petitioner invokes the jurisdiction of this Court 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

Louis B. Gaskin was charged by indictment on March 27, 1990, with two counts of first-degree murder (victims Robert and Georgette Sturmfels), two counts of attempted first-degree murder with a firearm (victims Joseph and Mary Rector), two counts of armed robbery with a firearm, and two counts of burglary of a dwelling with a firearm. The case proceeded to trial and Gaskin was convicted on all counts. On June 19, 1990, Gaskin was sentenced to death for the murders of Robert and Georgette Sturmfels. On the non-capital offenses, Gaskin was sentenced to two

thirty-year terms and three terms of natural life ordered to run consecutive to one another. Pursuant to a stipulation, the case was remanded to vacate the consecutive thirty-year sentences for imposition of consecutive life sentences on counts V and IX. Subsequently, Gaskin pled guilty to the murder of Charles Miller. *Id.*

In upholding the convictions and death sentences, the Florida Supreme Court set forth the following summary of the facts:

> The convictions arise from events occurring on the night of December 20, 1989, when Gaskin drove from Bunnell to Palm Coast and spotted a light in the house of the victims, Robert and Georgette Sturmfels. Gaskin parked his car in the woods and, with a loaded gun, approached the house. Through a window he saw the Sturmfels sitting in their den. After circling the house a number of times, Gaskin shot Mr. Sturmfels twice through the window. As Mrs. Sturmfels rose to leave the room, Gaskin shot her and then shot Mr. Sturmfels a third time. Mrs. Sturmfels crawled into the hallway, and Gaskin pursued her around the house until he saw her through the door and shot her again. Gaskin then pulled out a screen, broke the window, and entered the home. He fired one more bullet into each of the Sturmfels' heads and covered the bodies with blankets. Gaskin then went through the house taking lamps, video cassette recorders, some cash, and jewelry.
>
> Gaskin then proceeded to the home of Joseph and Mary Rector, whom he again spied through a window sitting in their den. While Gaskin cut their phone lines, the Rectors went to bed and turned out the lights. In an effort to roust Mr. Rector, Gaskin threw a log and some rocks at the house. When Mr. Rector rose to investigate, Gaskin shot him from outside the house. The Rectors managed to get to their car and drive to the hospital in spite of additional shots fired at their car as they sped away. Gaskin then burglarized the house.
>
> Gaskin's involvement in the shootings was brought to the attention of the authorities by Alfonso Golden, cousin of Gaskin's

> girlfriend. The night of the murders, Gaskin had appeared at Golden's home and asked to leave some "Christmas presents." Gaskin told Golden that he had "jacked" the presents and left the victims "stiff." Golden learned of the robberies and murders after watching the news and called the authorities to report what he knew. The property that had been left with Golden was subsequently identified as belonging to the Sturmfels.
>
> Gaskin was arrested on December 30, and a search of Gaskin's home produced more of the stolen items. After signing a rights-waiver form, Gaskin confessed to the crimes and directed the authorities to further evidence of the crime in a nearby canal.

Gaskin v. State, 591 So. 2d 917, 918 (Fla. 1991).

After hearing all of the evidence of aggravation and mitigation, the jury recommended the death sentence by a vote of eight to four. The trial court found the following aggravating circumstances: (1) both murders were committed in a cold, calculated, and premeditated manner; (2) Gaskin had previously been convicted of another capital offense or of a felony involving the use or threat of violence; and (3) that the murders were committed while the defendant was engaged in the commission of a robbery or burglary. Additionally, the trial court found that the murder of Georgette Sturmfels was especially wicked, evil, atrocious, or cruel. The court found in mitigation of both murders that (1) the murders were committed while Gaskin was under the influence of extreme mental or emotional disturbance; and (2) that Gaskin had a deprived childhood. *Gaskin*, 591 So. 2d at 919 (footnotes omitted). The trial court followed the recommendation of the jury and sentenced Gaskin to

death.

Gaskin's convictions and death sentences were affirmed on direct appeal. *Gaskin v. State*, 591 So. 2d 917 (Fla. 1991). Gaskin filed a petition for writ of certiorari to this Court which was granted June 29, 1992, remanding his case to the Florida Supreme Court for further consideration in light of *Espinosa v. Florida*, 505 U.S. 1079 (1992), *reh'g denied*, 505 U.S. 1244 (1992). Following remand, the Florida Supreme Court affirmed Gaskin's sentences on March 18, 1993. *Gaskin v. State*, 615 So. 2d 679 (Fla. 1993). The judgment and sentences became final October 12, 1993. *Gaskin v. Florida*, 510 U.S. 925 (1993); Fla. R. Crim. P. 3.851(d)(1)(B) (A judgment and sentence become final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed").

On June 13, 2002, the Florida Supreme Court affirmed the denial of post-conviction relief in *Gaskin v. State*, 822 So. 2d 1243 (Fla. 2002). Gaskin's subsequent collateral challenges have been rejected. *Gaskin v. State*, 218 So. 3d 399 (Fla.) (affirming summary denial of post-conviction motion alleging an improper "doubling" of aggravating circumstances and explaining that any *Hurst* error did not require resentencing in this case because that case is not retroactive to cases that were final when *Ring* was decided), *cert. denied,* 138 S. Ct. 471 (2017). Federal habeas relief has also been denied. *Gaskin v. Secretary, Dept. of Corr.*, 494 F.3d 997

(11th Cir. 2007).

On August 12, 2014, the Honorable J. David Walsh issued a corrected judgment and sentence vacating the duplicative convictions for felony murder on counts II and IV of Gaskin's convictions. On May 6, 2015, Gaskin filed a successive rule 3.851 motion for postconviction relief, alleging an improper "doubling" of aggravating circumstances. The State filed its response to Gaskin's motion for postconviction relief on May 21, 2015. Following a case management hearing and supplemental argument from both parties, the trial court denied relief in a corrected order issued August 6, 2015. Following briefing in the Florida Supreme Court, the court issued an opinion affirming the summary denial of relief and decided that any *Hurst* error did not require resentencing in this case because that case is not retroactive to cases that were final when *Ring v. Arizona*, 536 U.S. 584 (2002) was decided. *Gaskin v. State*, 218 So. 3d 399, 401 (Fla.), *cert denied,* 138 S. Ct. 471 (2017).

Following Gaskin's unsuccessful collateral attacks in state and federal court, Gaskin filed the instant successive post-conviction motion pursuant to Florida Rule of Criminal Procedure 3.851 challenging his death sentence based on *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). On October 12, 2017, the circuit court summarily

denied Gaskin's motion. (Petition App. A).

After Gaskin appealed the denial of his successive motion for post-conviction relief, the Florida Supreme Court issued an order to show cause directing Gaskin to show why *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017) should not be dispositive in his case. 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), ruling that *Hurst v. Florida* as interpreted by *Hurst v. State* is not retroactive to defendants whose death sentences were final when this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). The Florida Supreme Court affirmed the lower court's denial of relief, finding "*Hurst* does not apply retroactively to Gaskin's sentence of death." *Gaskin*, 237 So. 3d at 929.

Gaskin now seeks certiorari review of the Florida Supreme Court's decision.

REASONS FOR DENYING THE WRIT

Certiorari review should be denied because the Florida Supreme Court's ruling on the retroactivity of *Hurst* 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*, and the court's ruling does not violate the Eighth or Fourteenth Amendments and does not conflict with any decision of this Court or involve an important, unsettled question of federal law.

Petitioner Gaskin's convictions and resulting death sentences for the brutal murders of Robert and Georgette Sturmfels became final following certiorari review in 1993. *Gaskin v. State*, 615 So. 2d 679 (Fla. 1993). His convictions and resulting death sentences have withstood nearly twenty-five years of challenges since that time.[1] Petitioner seeks review of the Florida Supreme Court's decision affirming the denial of his successive post-conviction motion[2] and claims that the state court's holding with respect to the retroactive application of *Hurst* violates the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection. However,

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[1] Notably, Gaskin's convictions were final before this Court issued *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[2] While Respondent agrees that the Florida Supreme Court correctly found that Gaskin is not entitled to *Hurst* relief because his sentence was final in 1993, Respondent maintains that the *Hurst* issue presently before this Court had already been decided by the Florida Supreme Court, in *Gaskin v. State*, 218 So. 3d 399 (Fla. 2017), *cert denied* 138 S. Ct. 471 (2017), and was barred by res judicata and the law of the case doctrine.

the Florida Supreme Court's denial of the retroactive application of *Hurst* to Petitioner's case is based on adequate and independent state grounds, is not in conflict with any other state court of last review, and is not in conflict with any federal appellate court. This decision is also not in conflict with this Court's jurisprudence on retroactivity, nor does it violate the Eighth and Fourteenth Amendments. Thus, because Petitioner has not provided any "compelling" reason for this Court to review his case, certiorari review should be denied. *See* Sup. Ct. R. 10.

Respondent would further note that this Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of *Hurst v. State*. *See, e.g.*, *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.), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505 (Fla.), *cert. denied*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548 (Fla.), *cert. denied*, 138 S. Ct. 1164 (2018); *Cole v. State*, 234 So. 3d 644 (Fla.), *cert. denied*, 2018 WL 1876873 (June 18, 2018); *Kaczmar v. State*, 228 So. 3d 1 (Fla. 2017), *cert. denied*, 138 S. Ct. 1973 (2018); *Zack v. State*, 228 So. 3d 41 (Fla. 2017), *cert. denied*, 2018 WL 1367892 (June 18, 2018). Petitioner offers no persuasive, much less compelling reasons, for this Court

to grant review of his case.

I. There Is No Underlying Constitutional Violation

Aside from the question of retroactivity, certiorari would be inappropriate in this case because there is no underlying federal constitutional error as *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. The unanimous verdict by Petitioner's jury establishing his guilt of his contemporaneous murder and robbery, an aggravator under well-established Florida law, was clearly sufficient to meet the Sixth Amendment's fact-finding requirement. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *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."); *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)); *Lowenfield v. Phelps*,

484 U.S. 231, 244-45 (1988) ("The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase"). This Court's ruling in *Hurst v. Florida* did not change the recidivism exception articulated in *Apprendi* and *Ring*.[3]

Lower courts have almost uniformly held that a judge may perform the "weighing" of factors to arrive at an appropriate sentence without violating the Sixth Amendment. *See State v. Mason*, ___ N.E.3d ____, 2018 WL 1872180 at *5-6 (Ohio Apr. 18, 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citations omitted); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury

[3] § 921.141(6), Florida Statutes (listing prior violent felony as an aggravator under Florida law).

must focus the facts that it has found" to reach its individualized determination); *State v. Gales*, 658 N.W.2d 604, 628-29 (Neb. 2003) ("[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"). The findings required by the Florida Supreme Court following remand in *Hurst v. State* involving the weighing and selection of a defendant's sentence are not required by the Sixth Amendment. *See, e.g., McGirth v. State*, 209 So. 3d 1146, 1164 (Fla. 2017). Thus, there was no Sixth Amendment error in this case.

II. The Florida Court's Ruling On The Retroactivity Of *Hurst* Is Not Unconstitutional

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. The Florida Supreme Court's holding in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017), followed this Court's ruling in *Hurst v. Florida*, 136 S. Ct. 616 (2016), in requiring that aggravating circumstances be found by a jury beyond a reasonable doubt before

a death sentence may be imposed. The Florida court then expanded this Court's ruling, requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 57.[4]

The Florida Supreme Court first analyzed the retroactive application of *Hurst* in *Mosley v. State*, 209 So. 3d 1248, 1276-83 (Fla. 2016), and *Asay v. State*, 210 So. 3d 1, 15-22 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017). In *Mosley*, the Florida Supreme Court held that *Hurst* is retroactive to cases which became final after this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), on June 24, 2002. *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. *See 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

[4] 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).

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 v. Summerlin*, 542 U.S. 348, 358 (2004) (holding that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review"); *Lambrix v. Sec'y, Fla. Dept. of Corr.*, 872 F.3d 1170, 1182-83 (11th Cir.), *cert. denied*, 138 S. Ct. 312 (2017) (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*.[5] *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 *Ring* should not be penalized for the United States Supreme Court's delay in explicitly making this determination."[6] *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 v. State*, 210 So. 3d 1, 22 (Fla.

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[5] Florida is a clear outlier for giving *any* retroactive effect to an *Apprendi/Ring* based error. As explained by the Eighth Circuit in *Walker v. United States*, 810 F.3d 568, 575 (8th Cir. 2016), the consensus of judicial opinion flies squarely in the face of giving any retroactive effect to an *Apprendi* based error. *Apprendi*'s rule "recharacterizing certain facts as offense elements that were previously thought to be sentencing factors" does not lay "anywhere near that central core of fundamental rules that are absolutely necessary to insure a fair trial."

[6] Of course, the gap between this Court's rulings in *Ring* and *Hurst* may be fairly explained by the fact that the Florida Supreme Court properly recognized, in the State's view, that a prior violent felony or contemporaneous felony conviction took the case out of the purview of *Ring*. *See Ellerbee v. State*, 87 So. 3d 730, 747 (Fla. 2012) ("This Court has consistently held that a defendant is not entitled to relief under *Ring* if he is convicted of murder committed during the commission of a felony, or otherwise where the jury of necessity has unanimously made the findings of fact that support an aggravator.") (string citations omitted). *Hurst v. Florida* presented this Court with a rare "pure" *Ring* case, that is a case where there was no aggravator supported either by a contemporaneous felony conviction or prior violent felony.

2016), *cert. denied*, 138 S. Ct. 41 (2017), the Florida Supreme Court held that *Hurst* is not retroactive to any case in which the death sentence was final pre-*Ring*. 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)). 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. With respect to the effect 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 his 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 Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla.), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla.), *cert. denied,* 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548, 549 (Fla.), *cert. denied*, 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.[7]

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"); *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*. Even under the "pipeline" concept, cases whose direct appeal was decided on the same day might

[7] Federal courts have had little trouble determining that *Hurst*, like *Ring*, is not retroactive at all under *Teague. See Lambrix v. Sec'y, Fla. Dept. of Corr.*, 851 F.3d 1158, 1165 n.2 (11th Cir.), *cert. denied*, 138 S. Ct. 217 (2017) ("under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review"); *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a *Hurst v. Florida* claim concluding that *Hurst v. Florida* did not apply retroactively).

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*, [8] rather than from the date of the decision in *Hurst*. 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

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[8] In explaining why retroactivity was based on *Ring*, as opposed to *Apprendi*, the Florida Supreme Court concluded that "while the reasoning of *Apprendi* appeared to challenge the underlying prior reasoning of *Walton* and similar cases, the United States Supreme Court expressly excluded death penalty cases from its holding." *Asay*, 210 So. 3d at 19 (citing *Apprendi,* 530 U.S. at 496); *Mosley,* 209 So. 3d at 1279, n.17 (citing *Apprendi*, 530 U.S. at 497); *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled by Ring,* 536 U.S. at 589. Though *Apprendi* served as a precursor to *Ring,* this Court specifically distinguished capital cases from its holding in *Apprendi. Apprendi*, 530 U.S. at 496. It was not until *Ring* that this Court determined that "*Apprendi*'s reasoning is irreconcilable with *Walton*'s holding." *Ring*, 536 U.S. at 589. Thus, as the Florida Supreme Court reasoned, *Ring* is the appropriate demarcation for retroactive application to capital cases, *not Apprendi. Asay*, 210 So. 3d at 19. (emphasis added).

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 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, defendants who would not receive the benefit of a new rule under the pipeline concept because their cases were already final when *Hurst* was decided, cannot 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 uses the case of convicted murderer Armstrong as an example of such allegedly arbitrary application of the Florida Supreme Court's retroactivity test. (Petition at 25). While Armstrong's case originally became final in 1995, subsequent litigation led to a new sentencing hearing being granted in 2003, and he was resentenced to death in 2007, which became final in 2011. *Armstrong v. State*, 642

So. 2d 730 (Fla. 1994), *cert denied*, 514 U.S. 1085 (1995); *Armstrong v. State*, 862 So. 2d 705 (Fla. 2003); *Armstrong v. State*, 73 So. 3d 155 (Fla. 2011), *cert denied,* 567 U.S. 907 (2012). As such, although Armstrong's crimes occurred in 1990, he was resentenced in 2007; therefore, he received the benefit of *Hurst* because his sentence was not final pre-*Ring,* unlike Gaskin's sentence which was final in 1993. *See Armstrong v. State*, 211 So. 3d 864 (Fla. 2017). The result in *Armstrong* does not in any way suggest that Florida's retroactivity test is either unfair or unconstitutionally arbitrary.

Petitioner's death sentence is neither unfair nor unreliable because the judge imposed the sentence in accordance with the law existing at the time of his trial. Certainly, other than speculation, Petitioner has neither identified nor established any particular lack of reliability in the proceedings used to impose his death sentence. *See Hughes v. State*, 901 So. 2d 837, 844 (Fla. 2005) (holding that *Apprendi* is not retroactive and noting that "neither the accuracy of convictions nor of sentences imposed and final before *Apprendi* issued is seriously impugned"; *Rhoades v. State*, 233 P.3d 61, 70-71 (2010) (holding that *Ring* is not retroactive after conducting its own independent *Teague* analysis and observing, as this Court did in *Summerlin*, that there is debate as to whether juries or judges are the better fact-finders and that it could not say "confidently" that judicial factfinding "seriously

diminishes accuracy.") Just like *Ring* did not enhance the fairness or efficiency of death penalty procedures, neither does *Hurst.* As this Court has explained, "for every argument why juries are more accurate factfinders, there is another why they are less accurate." *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004). Thus, because the accuracy of Petitioner's death sentence is not at issue, fairness does not demand retroactive application of *Hurst.*

Petitioner's contention that his death sentences violate the Equal Protection Clause is plainly without merit. "The Equal Protection Clause of the Fourteenth Amendment 'is essentially a direction that all persons similarly situated should be treated alike.'" *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). 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 criminal defendant alleging an equal protection violation must prove the existence of purposeful discrimination"). A "'[d]iscriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, 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." *McCleskey*, 481 U.S. at 298. Here,

Petitioner is being treated exactly the same as similarly situated murderers whose sentences were final pre-*Ring*. Therefore, there is no valid equal protection claim.

The Florida Supreme Court's determination of the retroactive application of *Hurst* under the state law *Witt* standard is based on adequate and independent state grounds and is not violative of federal law or this Court's precedent. 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); *see also 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."); *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). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010); *Long*, 463 U.S. at 1041. Because the Florida Supreme Court's retroactive application of *Hurst* in Petitioner's case is based on adequate and independent state grounds and does not involve an

important, unsettled question of federal law, certiorari review should be denied.

III. Petitioner's capital sentences were final in 1993.

Apart from challenges to Florida's *Hurst* retroactivity decision, Petitioner contends that he is entitled to *Hurst* relief because his sentences were final in 2014. Initially, Gaskin was convicted and sentenced to four death sentences for the murders of the two victims, Robert and Georgette Sturmfels: the murder of each victim was charged under both a premeditated theory and a felony murder theory. However, the Florida Supreme Court ruled that it was impermissible to sentence Gaskin to death twice for a singular victim's homicide. *Gaskin v. State*, 591 So. 2d 917 (Fla. 1991). Petitioner asserts that his sentences only became final when the state trial court, leaving the two *premeditated murder* sentences untouched, vacated his two *felony murder* convictions and sentences (one for each victim), in 2014. (Petition, p. 23) However, Gaskin presents no law to support that conclusory argument. In fact, Petitioner's argument, that the ministerial correction of his sentences determined the date of finality, is contrary to Florida law:

> Under Florida law, it is appellate court action-i.e., the issuance of the mandate-that returns jurisdiction to the trial court. Speaking of cases pending before it, the Supreme Court of Florida explained this process:
>
> If no writ of certiorari is filed with the United States Supreme Court, as in the case at bar, the judgment and sentence become final when direct review proceedings are completed *and* jurisdiction to entertain the motion for postconviction relief returns to the trial court. Until this

> Court issues its mandate, the trial court has no jurisdiction to consider a motion to vacate filed pursuant to Rule 3.850. Therefore, in cases where no writ of certiorari is filed with the United States Supreme Court, the two-year period for filing a motion pursuant to rule 3.850 commences when this Court issues mandate.
>
> *Huff v. State,* 569 So. 2d 1247, 1250 (Fla. 1990) (citing *Scull v. State,* 569 So. 2d 1251 (Fla. 1990)). Mr. Anton would have us regard the trial court's action in correcting the judgment as an extension of the "direct review proceedings." This suggestion is ill-founded because the trial court does not participate in the "review" of its own decisions. On the contrary, "[t]he appellate process is completed on the date the mandate is issued." *McCuiston v. State*, 507 So. 2d 1185, 1186 (Fla. 2d DCA 1987) (citing *Thibodeau v. Sarasota Mem'l Hosp.*, 449 So. 2d 297, 298 (Fla. 1st DCA 1984)); *see also Beaty v. State,* 701 So. 2d 856, 857 (Fla. 1997) ("[T]he district court of appeal's opinion became final when no petition for rehearing was filed within fifteen days, and the two-year period for filing a motion for postconviction relief began to run upon the issuance of that court's mandate.").

Anton v. State, 976 So. 2d 6, 8-9 (Fla. 2d DCA 2008) (emphasis added). The trial court did not have the discretion to alter the valid premeditated murder sentences because they were final under Florida law. *Fasenmyer v. State*, 457 So. 2d 1361, 1366 (Fla. 1984):

> We conclude that the concept of aggregate sentencing on interdependent offenses as it relates to a trial judge's desire to effect the original sentencing plan does not justify modification, on remand after appeal, of sentences on convictions not challenged on appeal or disturbed by the appellate court.

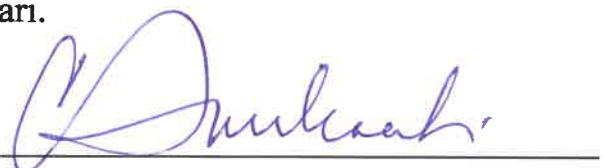
Petitioner's capital sentences were final in 1993: the two *premeditated first-degree murder* convictions and resulting death sentences were left untouched by the

vacatur of the two *felony murder* convictions. In fact, in denying *Hurst* relief, the Florida Supreme Court made an *explicit* finding that Petitioner's sentences were final in 1993. *Gaskin*, 237 So. 3d at 929. Since Gaskin's sentences were final prior to the decision in *Ring*, under Florida law, he is not entitled to resentencing.

Finally, Respondent notes that this Court has already declined jurisdiction to review Gaskin's *Hurst* claim. *See Gaskin v. State*, 218 So. 3d 399 (Fla. 2017), *cert denied* 138 S. Ct. 471 (2017). The denial of *Hurst* relief to Gaskin, because his sentences were final in 1993, is based on adequate and independent state grounds. Nothing in the petition justifies the exercise of this Court's certiorari jurisdiction.

CONCLUSION

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



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