NO. 18-5437

IN THE SUPREME COURT OF THE UNITED STATES

GARY RICHARD WHITTON,

*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 where (1) no federal question is presented; (2) the jury was properly advised on its advisory role according to local law and the importance of its responsibility was not diminished; (3) the error reviewed was state based, not structural in nature; and (4) this case presents no important or unsettled question of law worthy of this Court's certiorari review.

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## Opinions Below

The decision of the Florida Supreme Court appears as *Whitton v. State*, 238 So. 3d 724 (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

Petitioner, Gary Whitton, was convicted of first-degree murder and robbery. *Whitton v. State*, 649 So. 2d 861 (Fla. 1994). The facts are contained in the direct appeal to the Florida Supreme Court:

> The evidence presented at trial revealed that Whitton and James S. Mauldin met each other in March 1989, while receiving alcohol treatment at a halfway house in Pensacola. After leaving the halfway house, they continued to see each other at occasional Alcoholics Anonymous meetings. On October 6, 1990, Mauldin arrived at Whitton's Pensacola home in a taxicab. Whitton then gave Mauldin a ride to the halfway house where they originally met. On Sunday October 7, an intoxicated Mauldin returned to Whitton's home. He stayed with Whitton that day, as well as Monday, October 8.
>
> On October 8, Whitton drove Mauldin to a bank in Destin so Mauldin could withdraw some money. The two men went to Mauldin's bank in Destin rather than a bank in Pensacola because Mauldin had lost his passbook and he believed he needed it to withdraw money from a bank other than his own. Mauldin's bank was closed when the two men arrived, but they returned to the bank on October 9. Upon their arrival, a teller told Mauldin he could not make a withdrawal without his passbook. Upset by this information, Mauldin closed his account and obtained $1135.88 in cash. Whitton assisted Mauldin in completing the transaction because Mauldin, who was apparently intoxicated, was unable to complete it himself.
>
> Whitton then took Mauldin to a motel in Destin at Mauldin's request. Whitton completed the motel registration forms due to Mauldin's intoxication, but provided the motel clerk with false information about his own vehicle's license plate number. The motel clerk noticed the discrepancy and put Whitton's correct license plate number on the form. Whitton then assisted Mauldin to his room and left the motel sometime before noon.
>
> Whitton originally told investigators that he did not revisit Mauldin that night. He later admitted returning to the motel and stated that he did

so to tell Mauldin his mother was looking for him. Whitton claimed Mauldin was dead when he arrived and that he remained in the room for only a few moments. The motel clerk, however, testified that he saw Whitton's car arrive at approximately 10:30 p.m. that night and leave at around 12:30 a.m.

The same motel clerk discovered Mauldin's body the next day. An officer called to the scene testified that Mauldin's pockets had been turned inside out and that no money, other than a few coins, remained in the room. The officer testified that the blood found throughout the room made it appear as though a struggle had taken place. Blood spatter evidence confirmed the officer's conclusion. An expert in bloodstain analysis testified that the initial bloodshed began on the south bed, then continued to the foot of that bed, then to the floor between the beds, and finally ended between the north bed and north wall.

An autopsy revealed that Mauldin sustained numerous injuries during the attack which caused his death. Mauldin's skull was fractured and he suffered stab wounds to his shoulder, cheek, neck, scalp, and back. In addition, Mauldin sustained three fatal stab wounds to the heart. The medical examiner testified that these wounds prevented Mauldin's heart from beating properly and, consequently, caused his death. The medical examiner also testified that Mauldin had wounds to his arms and hands consistent with his attempting to defend himself. Accordingly, the medical examiner concluded that Mauldin was conscious during the attack, although a blood alcohol test indicated Mauldin's blood alcohol level was .34 at the time of death.

The correct license plate number ascertained by the alert motel clerk led the police to Whitton's home. At approximately 1:30 a.m. on October 11, several officers knocked on Whitton's door after observing his car parked outside the house. Whitton invited the officers inside. Although the officers explained that Whitton was not under arrest and that he was not required to answer their questions, Whitton agreed to talk with them. After about twenty minutes, during which Whitton changed from his night clothes, he also agreed to accompany the officers to the police station. At the police station, several officers continued questioning Whitton regarding Mauldin's death until he invoked his right to remain silent.

A subsequent search of Whitton's home revealed a pair of boots stained with blood matching Mauldin's blood type. A search of his car revealed blood stains matching Mauldin's blood type, as well as receipts indicating that Whitton paid several overdue bills on October 10. In

> addition, a receipt indicating that Whitton obtained a car wash on October 10 at 2:37 a.m. was found in his car. Consequently, Whitton was charged with first-degree murder and robbery.
>
> While incarcerated and awaiting trial, Whitton confessed to another inmate that he went back to the motel the night Mauldin was murdered to get the money Mauldin had withdrawn from the bank, that a fight ensued, and that he stabbed and killed Mauldin. Whitton told the inmate he had to commit the murder in order to prevent Mauldin from testifying against him in any parole violation proceeding that might occur as a result of the robbery. This confession was overheard by a third inmate and both inmates testified at Whitton's murder trial. A jury found Whitton guilty of murder and robbery.

*Id.* at 862-64.

After the penalty phase, the jury unanimously recommended death and the trial judge sentenced Appellant to death for the murder conviction and to a consecutive nine-year sentence for the robbery conviction. *Whitton*, 649 So. 2d at 864.

> The trial judge followed the jury's recommendation and sentenced Whitton to death for the murder conviction and to a consecutive nine-year sentence for the robbery conviction. In support of the death penalty the judge found five aggravating factors: (1) Whitton committed the crime while on parole for a 1981 armed robbery conviction; (2) Whitton was previously convicted of another felony involving the use or threat of violence; (3) the crime was committed to avoid arrest; (4) the crime was committed for pecuniary gain; and (5) the crime was heinous, atrocious, or cruel. The judge also found a number of nonstatutory mitigating factors but determined they did not outweigh the aggravating factors.

*Id.* The Florida Supreme Court affirmed the conviction and sentences on appeal. *Id.* at 867.

The judgment and sentence became final upon denial of certiorari by the United States Supreme Court on October 2, 1995. *Whitton v. Florida*, 116 S.Ct. 106 (1995); 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."). The Florida Supreme Court affirmed the denial of Petitioner's postconviction motion. *Whitton v. State*, 161 So. 3d 314 (Fla. 2014).

On June 8, 2017, Petitioner 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 June 15, 2017, the Florida Supreme Court stayed the appeal pending the disposition of *Hitchcock*. On August 10, 2017, the Florida Supreme Court affirmed the conviction and sentence in *Hitchcock* in accordance with the Court's decision in *Asay*. *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017); *Asay v. State*, 210 So. 3d 1 (Fla. 2016). On September 25, 2017, the 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*, SC17-445." After the responses had been filed, the Florida Supreme Court held that Petitioner was not entitled to relief and denied his appeal. *Whitton*, 238 So. 3d at 725. This appeal followed.

## 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 1995. *Whitton*, 238 So. 3d at 725. The Petition alleges that the Florida Supreme Court's refusal to retroactively apply *Hurst* to pre-*Ring* cases creates two classes of inmates and 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 4-8). 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.[1]

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 the contemporaneous felony of robbery. *Whitton*, 649 So. 2d at 862-64; *see also Jackson v. State*, 213 So. 3d 754, 787 (Fla. 2017), *citing Almendarez-*

[1] This Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *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).

*Torres v. United States*, 523 U.S. 224 (1998). The unanimous verdict by Petitioner's jury establishing his guilt of this contemporaneous crime established an aggravator under well-established Florida law.[2] This conviction was 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.

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[2] See Florida Statute § 921.141 (6)(d) (qualifying contemporaneous felony aggravators).

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 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 v. Florida*, 136 S.Ct. 616, 662 (2016) ("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 v. State*, 209 So. 3d 1248, 1276-83 (Fla. 2016); *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 applied retroactively 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 *Ring* should not be penalized for the United States Supreme Court's delay in explicitly making this determination."[3] *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.*

Petitioner discusses four ways in which defendants whose sentences were final prior to the decision in *Ring* differ from those whose sentences were final after the decision in *Ring* and appears to argue that the partial retroactivity of *Hurst* is unconstitutional under *Teague*. (Petition at 5-8). The Florida Supreme Court has noted three essential considerations in determining whether a new rule of law should be applied retroactively under Florida law: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." *Witt*, 387 So. 2d at 926. *See also Stovall*, 388 U.S. at 297; *Linkletter*, 381 U.S. 618; *Brewer v. State*, 264 So. 2d 833, 834 (Fla. 1972); *State v. Steinhauer*, 216 So. 2d 214, 219 (Fla. 1968), *cert. denied*, 398 U.S. 914 (1970). The test for retroactivity takes into consideration the procedural

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[3] 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.

posture of a case to determine if that case is to get the benefit of a new rule of law. Petitioner's "considerations" are not relevant for determining whether a case is entitled to relief under *Hurst*.[4]

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 adoped 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 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

[4] Petitioner's "considerations" are based on speculation about how a case would be presented if it were to go to trial today under the new law, whether a defendant would receive a sentence of death at a resentencing, and how a defendant would behave if placed in different conditions in prison.

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*,[5] 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 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

[5] 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).

object of the legislation, so that all persons similarly circumstanced shall be treated alike."). Unquestionably, extending relief to more individuals,[6] 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.

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, despite being instructed that the recommendation did not have to be unanimous. (Record at 2250). 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

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[6] 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).

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.

**The Jury Instructions Properly Advised the Jury of Its Role Under Florida Law and Did Not Diminish the Importance of the Jury's Responsibility in Violation of *Caldwell*.**

Petitioner argues that there was a *Caldwell* violation in his case because the jury was instructed that it was recommending the imposition of the death penalty to the judge. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). This case is an inappropriate vehicle for certiorari as this is a postconviction case and this Court would have to address retroactivity before even reaching the underlying jury instruction issue. The Florida Supreme Court has repeatedly rejected challenges to the standard jury instructions in death penalty cases pursuant to *Caldwell*. *Hall v. State*, 212 So. 3d 1001, 1032-33 (Fla. 2017). These claims are rejected because the jury was properly instructed on its role as defined by local law. Further, the seriousness of the jury's role is no way diminished by these instructions. Thus, Petitioner's claim is meritless and not appropriate for certiorari review.

"To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law."

*Dugger v. Adams*, 489 U.S. 401, 407 (1989); *see also Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). In *Caldwell*, the prosecutor made "focused, unambiguous, and strong" remarks which misled the jury into believing the responsibility for sentencing lay elsewhere. *Caldwell*, 472 U.S. at 340. The comments included "your decision is not the final decision" and "[y]our job is reviewable" and that defense was "insinuating that your decision is the final decision." *Id.* at 325-26.

"This Court has repeatedly said that under the Eighth Amendment, 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" *Caldwell*, 472 U.S. at 329 (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983)). The problem with the argument by the prosecutor in *Caldwell* was that it presented "an intolerable danger that the jury will in fact choose to minimize the importance of its role" and thus be in contravention of the requirements of the Eighth Amendment. *Caldwell*, 472 U.S. at 333. However, "'the infirmity identified in *Caldwell* is simply absent' in a case where 'the jury was not affirmatively misled regarding its role in the sentencing process.'" *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997) (quoting *Romano*, 512 U.S. at 9).

In Petitioner's case, the jury was not affirmatively misled. The jury was instructed of its role as assigned by local law. *Davis*, 119 F.3d at 1482; *see Truehill v. Florida*, 138 S.Ct. 3 (2017); *Middleton v. Florida*, 138 S.Ct. 829 (2018); *Guardado v. Jones*, 138 S.Ct. 1131 (2018); *Kaczmar v. Florida*, 138 S.Ct. 1973 (2018). The jury was told that its role was advisory in nature. (Record at 2246). Since under Florida law,

the judge remains the final sentencing authority, a jury's recommendation of death is in fact "advisory." Thus, characterizing the jury's recommendation as "advisory" is an accurate description of the role assigned to the jury by Florida law. Additionally, Petitioner's jury was specifically instructed about the "gravity" of its decision and that "human life is at stake." (Record at 2250). There was no diminishment of the jury's sense of responsibility in recommending a death sentence in Petitioner's case. Thus, there was no *Caldwell* violation in Petitioner's case.

Additionally, the Florida Supreme Court has explicitly rejected *Caldwell* attacks on Florida's standard penalty phase jury instructions in the wake of *Hurst*. *See Reynolds v. State*, No. SC17-793, 2018 WL 1633075 (Fla. Apr. 5, 2018); *Johnson v. State*, No. SC17-1678, 2018 WL 1633043 (Fla. Apr. 5, 2018) (citing *Reynolds* in rejecting *Caldwell* claim). The Florida Supreme Court pointed out the absurdity of the "*Hurst*-induced *Caldwell*' claims:

> as the argument goes, even pre-*Ring* juries were being misled as to their responsibility in sentencing notwithstanding the fact that such a responsibility did not exist then and does not exist retroactively. This is the exact unwieldiness of *Caldwell* that *Romano* averts. Either juries were being misled or they were not. We conclude that they were not.

*Reynolds*, 2018 WL 1633075 at *12.

Further, this Court has never held that the Eighth Amendment requires the jury to impose a death sentence. *Proffitt v. Florida*, 428 U.S. 242, 252 (1976). While a plurality of this Court acknowledged "jury sentencing in a capital case can perform an important societal function," this Court "has never suggested that jury sentencing is constitutionally required" in such cases. *Id.* The Eighth Amendment requires

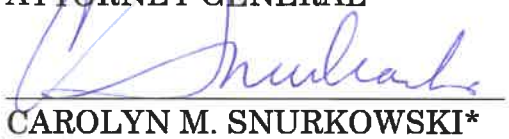
capital punishment to be limited "to those who commit a 'narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). As such, the Eighth Amendment requires the death penalty to be 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." *Id.* However, the Eighth Amendment does not require that a jury be the final sentencing authority. Petitioner's argument that his Eighth Amendment rights were violated by his jury's unanimous recommendation is not supported by this Court's precedent.

Petitioner's jury was properly instructed of its role under Florida law. The instructions in Petitioner's case in no way diminished the jury's actual responsibilities in the sentencing process. Because Petitioner's jury was properly instructed of its role in sentencing according to Florida law, the jury instructions in Petitioner's case did not violate *Caldwell* and certiorari review should be denied.

## Conclusion

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

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL



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