CASE NO. 18-5648

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY LAMARCA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

PAMELA JO BONDI
Attorney General of Florida

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
**Counsel of Record*

SCOTT A. BROWNE
Chief Assistant Attorney General
Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Carolyn.Snurkowski@myfloridalegal.com
Scott.Browne@myfloridalegal.com
E-Service: capapp@myfloridalegal.com

Counsel for Respondent

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?

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

CITATION TO OPINION BELOW

The opinion of the Florida Supreme Court is reported at LaMarca v. State, 237 So. 3d 914 (Fla. 2018), reh. stricken, 2018 WL 1052736 (Feb. 26, 2018).

JURISDICTION

The judgment of the Florida Supreme Court was entered on January 30, 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

The Pinellas County Grand Jury indicted Petitioner, Anthony LaMarca, on January 24, 1996, for the first-degree, premeditated murder of Kevin Flynn on December 2, 1995. (R1/8). LaMarca was tried by jury on November 3-6, 1997. (R24/1-R31/1156). The jury found LaMarca guilty of first-degree murder as charged. (R15/2876; R31/1267). The court entered a judgment of guilt on November 6, 1997.

The penalty phase of the trial was conducted before the jury on November 20, 1997. (R32/1). The jury recommended death by a vote of 11 to 1. (R16/2916; R32/1430). The court held a sentencing hearing on December 19, 1997 (R33/12-37) and subsequently sentenced LaMarca to death. (R16/3024-32; R23/3466-75). On March 8, 2001, the Florida Supreme Court affirmed LaMarca's conviction and sentence. LaMarca v. State, 785 So. 2d 1209 (Fla.), cert. denied, 534 U.S. 925 (2001).

Petitioner's judgment and sentence became final upon denial of certiorari on October 1, 2001. LaMarca v. Florida, 534 U.S. 925 (2001); 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").

In upholding the conviction and death sentence, the Florida Supreme Court set forth the following factual summary:

> The State presented the following evidence. James Hughes testified that prior to the murder appellant told him he was going to kill the victim. Hughes asked why and appellant replied, "I'm gonna kill him."
>
> On December 2, 1995, at approximately 4:30 p.m., the victim and Tonya Flynn, his wife, went to a neighborhood bar. Appellant, Tonya's father, was also at the bar and asked Tonya if he could borrow her car. The victim offered to drive appellant home and they left at approximately 7:45 p.m.
>
> Appellant returned to the bar alone at approximately 8:30 and told Tonya that she had to drive to Hudson County to pick up the victim. After arriving at their destination, appellant raped Tonya in an otherwise unoccupied house. Tonya subsequently called the police, who began to look for appellant. Deputy Sean Kennedy testified that he saw appellant walking along a road, appellant dropped objects he was carrying, and he ran away. Detective Jeffrey Good arrived at appellant=s trailer at 2:15 a.m. on December 3. Good looked through the bedroom window and saw the victim's body. He entered and saw bullet casings on the floor, blood in the living room, kitchen, and hall, and the body in the bedroom.
>
> Stephanie Parker testified that on the night in question she heard a car drive up, she looked out her window, and she saw appellant and another man walking from the car to the front door of appellant's trailer. They appeared to be arguing because of their hand gestures. Parker stated that she then fell asleep and her father subsequently awakened her at the behest of the police.
>
> Later that morning, appellant arrived at the home of Jeremy Smith, who testified that appellant said: "I did it. I killed him." Smith asked who he killed and appellant said "Kevin." Appellant said that he killed Kevin in a trailer, that it really "sucked," but that he had to do it.

> Appellant testified in his defense and pursued the theory that Tonya killed her husband. He also denied making incriminating statements.
>
> During the penalty phase, appellant waived his right to counsel and elected to represent himself with the appointed public defender acting as standby counsel. Appellant rested his case without testifying or presenting any mitigating evidence, although standby counsel proffered mitigating evidence she could have presented.
>
> The trial court found one aggravating factor-prior convictions for violent felonies based on appellant's 1984 convictions for kidnapping and attempted sexual battery. The trial court found that appellant knowingly and voluntarily waived his right to present mitigating evidence. The court recognized that it had to give good faith consideration to any mitigation in the record and specifically considered the following factors: (1) insufficient evidence that appellant was subject to extreme mental or emotional disturbances; (2) appellant's age-forty-was not mitigating; (3) appellant was drinking and angry at his daughter on the day of the offense, but the circumstance was unestablished; (4) insufficient evidence of appellant's work record; (5) appellant was generally well-behaved at trial-very little weight; and (6) appellant suffered from drug and alcohol abuse and psychological problems-very little weight. The court ruled that the proffered evidence could not be considered in mitigation.

LaMarca, 785 So. 2d at 1211-1212.

LaMarca filed his Motion to Vacate Judgment and Sentence pursuant to Florida Rule of Criminal Procedure 3.850 on October 2, 2002 and raised twenty-three claims. The trial court held an evidentiary hearing on LaMarca's motion and ultimately denied relief. The Florida Supreme Court affirmed the circuit court's order denying LaMarca post-conviction relief and also denied

LaMarca's state habeas petition in an opinion issued on April 20, 2006. LaMarca v. State, 931 So. 2d 838 (Fla. 2006).

LaMarca filed a Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida on June 22, 2006, followed by a second and third amended petition. Following a response by the State, the Petition was denied on August 26, 2008. LaMarca v. Secretary, 2008 WL 3983124 (M.D. Fla. Aug 26, 2008). LaMarca appealed the denial of his federal habeas petition to the U.S. Eleventh Circuit Court of Appeals and filed an Application for a Certificate of Appealability, which was denied May 19, 2009. LaMarca v. Secretary, Dept. of Corrections, 568 F.3d 929 (11th Cir.), cert. denied, 558 U.S. 1053 (2009).

On January 10, 2017, LaMarca filed a successive post-conviction motion seeking relief pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). After the post-conviction court denied relief, the Florida Supreme Court stayed LaMarca's appeal pending the outcome of Hitchcock v. State, 226 So. 3d 216 (Fla.), cert. denied, 138 S. Ct. 513 (2017).

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

decided Ring v. Arizona, 536 U.S. 584 (2002). After the court decided Hitchcock, it issued an order to show cause directing LaMarca to show why Hitchcock should not be dispositive in his case. Following briefing, the Florida Supreme Court ultimately affirmed the lower court's denial of relief, finding:

> [W]e conclude that Lamarca is not entitled to relief. Lamarca was sentenced to death following a jury's recommendation for death by a vote of eleven to one. LaMarca v. State, 785 So. 2d 1209, 1211 (Fla. 2001). Lamarca's sentence of death became final in 2001. LaMarca v. Florida, 534 U.S. 925 (2001). Thus, Hurst does not apply retroactively to Lamarca's sentence of death. See Hitchcock, 226 So. 3d at 217. Accordingly, we affirm the denial of Lamarca's motion.

(Pet. App. A). LaMarca 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 seeks review of the Florida Supreme Court's decision affirming the denial of his successive post-conviction motion 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, 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 initially notes 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, 138 S. Ct. 2657 (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, 138 S. Ct. 2653 (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. Petitioner possessed prior violent felony convictions for attempted sexual battery and kidnapping. These prior convictions constituted an aggravator

under well-established Florida law.[1] This was clearly sufficient to meet the Sixth Amendment's fact-finding requirement. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); Alleyne v. United States, 570 U.S. 99, 111 n.1 (2013) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in Almendarez-Torres v. United States, 523 U.S. 224 (1998)).

Since the only aggravator found by the trial court was supported by prior violent felony convictions, there was no Hurst/Ring error in this case. This Court's ruling in Hurst v. Florida did not change the recidivism exception articulated in Apprendi and Ring.[2] Nor has this Court required the weighing of aggravation and mitigation to be part of the sentence eligibility determination that must be conducted by the jury. See, e.g., 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,

---

[1] On February 16, 1984, LaMarca entered the ladies' room at the Aventura Mall in Dade County and assaulted a woman who was inside the restroom. LaMarca held a large knife against the victim's throat, forced her into a bathroom stall, threatened to kill her if she made a sound, pulled off her pants and underwear, and attempted to rape her. When the victim tried to scream, LaMarca choked her. Fortunately, LaMarca's attack was interrupted when another woman came upon the scene and screamed for help. Although he tried to flee, LaMarca was captured at the scene and convicted at trial of kidnapping and attempted sexual battery.

[2] § 921.141(6), Florida Statutes (listing prior violent felony as an aggravator under Florida law).

noting that such a question is "mostly a question of mercy."); Kansas v. Marsh, 548 U.S. 163, 164 (2006) ("Weighing is not an end, but a means to reaching a decision.").

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 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. Since there was no underlying constitutional violation, certiorari review of the Florida Supreme Court's retroactivity decision would for all practical purposes represent an advisory opinion. Certiorari review should be denied.

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

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.[3]

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 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.

[3] 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).

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.[4] Mosley, 209 So. 3d at 1276-

[4] 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."

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."[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 v. State, 210 So. 3d 1, 22 (Fla. 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)). As related to the reliance on the old rule, the court noted "the State of Florida in

[5] 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.

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.

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 the retroactivity analysis are applicable in the capital context). Indeed, while Petitioner cites Griffith (Petition at 16), in support of his claim of entitlement to retroactive application of Hurst, he fails to recognize that this Court's ruling in that case extends only to "pipeline" cases. 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 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, 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 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.

Not surprisingly, Petitioner asserts that the Florida Supreme Court should have drawn the line of retroactivity back to Apprendi, not Ring. (Petition at 15). However, his assertion that the Florida Supreme Court ignored Apprendi in determining where to draw the retroactivity line is incorrect. To the contrary, in explaining why retroactivity was based on Ring, as opposed to Apprendi, the Florida Supreme Court explained 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).

Petitioner also apparently contends that some combination of Hurst and subsequent developments in state law actually resulted in a substantive change in the law and thus should be afforded full retroactive application. 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.[6] 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").

[6] The decision in Hurst is based on an entire line of jurisprudence which courts have almost universally held not to have retroactive application. See DeStefano v. Woods, 392 U.S. 631 (1968) (*per curiam*) (holding the Court's decision in Duncan v. Louisiana, which held that the right to a jury trial extended to the States was not retroactive); McCoy v. United States, 266 F.3d 1245, 1255, 1259 (11th Cir. 2001) (holding Apprendi not retroactive under Teague, and acknowledging that every federal circuit to consider the issue reached the same conclusion); Varela v. United States, 400 F.3d 864, 866-67 (11th Cir. 2005) (explaining that Supreme Court decisions, such as Ring, Blakely, and Booker, applying Apprendi's "prototypical procedural rule" in various contexts are not retroactive).

In support of his argument that Hurst was a substantive rather than a procedural change, Petitioner analogizes Hurst to Montgomery v. Louisiana, 136 S. Ct. 718 (2016). (Petition at 28). 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 easily 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.[7]

III. The Florida Supreme Court's Retroactivity Ruling Does Not Violate The Eighth Amendment

Finally, 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. This argument too relies upon an initial finding of retroactivity for state changes in the law made by the Florida Supreme Court following Hurst. However, the Florida Supreme Court's imposition of the unanimity requirement 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

[7] To the extent Petitioner suggests a violation of the Equal Protection Clause, such an argument 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). Here, Petitioner is being treated exactly the same as similarly situated murderers whose sentences were final pre-Ring.

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. Petitioner's death sentence was imposed in accordance with all applicable constitutional principles at the time it was imposed.

Petitioner argues that once the Florida Supreme Court announced a unanimity requirement for capital defendants in Florida[8], that "new" constitutional requirement constitutes an

[8] Such a requirement was imposed by the Florida Supreme Court, in the State's view, on slim to non-existent state or federal constitutional grounds. It would seem that the decision as to

enforceable federal constitutional right in this Court. (Petition at 20-23). While perhaps an interesting proposition, this is a clearly misguided view of the law. States are free to announce more stringent requirements for criminal defendants than are constitutionally required by this Court. If this Court were to go down the rabbit trail as Petitioner suggests, all fifty states could effectively announce new constitutional rules and requirements that would apply to every other state through this Court as the enforcement mechanism. Such a system is not demanded by the constitution and would prove fantastically unworkable. In Beck v. Washington, 369 U.S. 541 (1962), this Court refused to find constitutional error in the alleged misapplication of Washington law by Washington courts: "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . .' Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." Id. at 554-55 (citation omitted). See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (emphasizing that "it is not the province of a federal

---

whether or not to require a unanimous jury recommendation was a matter reserved for the state legislature, not the court. See Perry v. State, 210 So. 3d 630, 641 (Fla. 2016) (Canady, J., dissenting) ("The Legislature's work in enacting the new statute reflects careful attention to the holding of Hurst v. Florida, which does not require jury sentencing. In rejecting the new statute, the majority has 'fundamentally misapprehend[ed] and misuse[d] Hurst v. Florida[]'") (citing and quoting from the dissent in Hurst, 202 So. 3d at 77).

habeas court to reexamine state-court determinations on state-law questions[] . . ." and that "a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.") (citing 28 U.S.C. § 2241; and Rose v. Hodges, 423 U.S. 19, 21 (1975) (*per curiam*)).

States are free to add rules or procedures that go above and beyond the requirements of the Eighth Amendment. These additional procedural requirements 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 v. Georgia, 408 U.S. 238 (1972). 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 step beyond what the Eighth Amendment requires. 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). These requirements are based upon independent state law 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").

Perhaps standing out among a basket of generally unimpressive arguments for reversal of the decision below is Petitioner's claim that since his jury recommendation was 11-1 in favor of the death penalty he is in a protected "class" for which society has deemed ineligible for the death penalty. (Petition at 27). However, Petitioner is plainly not in a protected class. He committed first-degree murder and he is not ineligible for the death penalty by virtue of age or intellectual disability. Petitioner is clearly not in a protected class.[9]

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. Petitioner cannot establish

---

[9] This was simply not a close case as evidenced by the jury's near unanimous 11-1 death recommendation. Indeed, since the instructions at the time of trial placed no consequence on a less than majority life recommendation, the jury need not even continue its deliberation after the first vote. All jurors, including the one that did not vote for a death sentence, would be aware that the recommendation on that vote would be death. Obviously, it is quite a different dynamic entirely to instruct the jury that a death sentence requires a unanimous vote.

that his sentencing procedure was less accurate than future sentencing procedures employing the new standards announced in Hurst v. State, 202 So. 3d 40 (Fla. 2016). 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.

Because the Florida Supreme Court's retroactive application of Hurst in Petitioner's case is based on adequate and

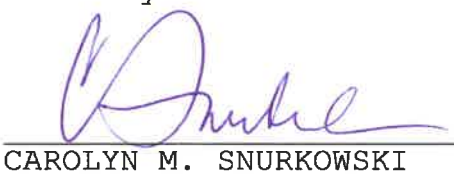
independent state grounds and does not involve an important, unsettled question of federal law, certiorari review should be denied.

CONCLUSION

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

Respectfully submitted,

PAMELA JO BONDI
Attorney General of Florida



CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
*Counsel of Record

SCOTT A. BROWNE
Chief Assistant Attorney General
Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Carolyn.Snurkowski@myfloridalegal.com
Scott.Browne@myfloridalegal.com
E-Service: capapp@myfloridalegal.com

Counsel for Respondent