No. 18-6115
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2018

JOSE ANTONIO JIMENEZ,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

[Capital Case]

As re-stated by Respondent:

> Whether this Court should grant certiorari review where the retroactive application of *Hurst v. Florida* and *Hurst v. State* is based on adequate independent state grounds, does not violate Equal Protection or the Eighth Amendment, 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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CITATION TO OPINION BELOW

The decision which Petitioner seeks discretionary review of is *Jimenez v. State*, 247 So.3d 395 (Fla. 2018).

JURISDICTION

Petitioner, Jose Antonio Jimenez, is seeking jurisdiction pursuant to 28 U.S.C. § 1257. Respondent agrees that the 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 because Petitioner does not raise a novel question of federal law and the Florida Supreme Court's decision in this case is based on adequate and independent state grounds. 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.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI cl. 2.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. VI.

The Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. VIII.

The Fourteenth Amendment to the United States Constitution, section one, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE AND FACTS

Jimenez is in custody and under a sentence of death. He is subject to the lawful custody of the State of Florida pursuant to a valid judgement of guilt and a subsequent sentence of death entered on December 14, 1994, for first-degree murder. He was also convicted of armed burglary of a dwelling with assault. The Florida Supreme Court found the facts to be as follows:

> On October 2, 1992, Jimenez beat and stabbed to death sixty-three-year-old Phyllis Minas in her home. During the attack her neighbors heard her cry, "Oh God! Oh my God!" and tried to enter her apartment through the unlocked front door. Jimenez slammed the door shut, locked the locks on the door, and fled the apartment by exiting onto the bedroom balcony, crossing over to a neighbor's balcony and then dropping to the ground. Rescue workers arrived several minutes after Jimenez inflicted the wounds, and Minas was still alive. After changing his clothes and cleaning himself up, Jimenez spoke to neighbors in the hallway and asked one of them if he could use her telephone to call a cab.
>
> Jimenez's fingerprint matched the one lifted from the interior surface of the front door to Minas's apartment, and the police arrested him three days later at his parents' home in Miami Beach. In 1994, a jury found him guilty of first-degree murder and burglary of an occupied dwelling with an assault and battery and unanimously recommended the death sentence. The court followed the jury's recommendation, finding four aggravating circumstances, one statutory mitigating circumstance, and two nonstatutory mitigating circumstances.

Jimenez v. State, 703 So.2d 437 (Fla. 1997). After the jury's unanimous death recommendation, the court found four aggravating factors: that the defendant was previously convicted of another capital felony or felony involving the use or threat of violence; the murder was committed while Defendant was engaged in the

commission of a burglary of an occupied dwelling; the murder was committed while Defendant was on community control; and the murder was especially heinous, atrocious, or cruel (HAC). *Jimenez v. State*, 703 So.2d at n1. The trial court found one statutory mitigating factor, that the capacity of the Defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. The trial court found two non-statutory mitigating circumstances: Jimenez's potential for rehabilitation, to which the court attributed little weight, and his potential sentence (life with a twenty-five-year minimum mandatory, calculated by the Department as a ninety-nine-year sentence with a release date at age eighty-one) which the court gave great weight.

The Florida Supreme Court affirmed Jimenez's convictions and death sentence in *Jimenez v. State*, 703 So.2d 437 (Fla. 1997). His sentence became final on May 18, 1998, when the U.S. Supreme Court denied certiorari. *Jimenez v. Florida*, 523 U.S. 1123 (1998).

On February 1, 2000, Jimenez filed his initial motion for post-conviction relief. That motion was subsequently amended and denied by the state trial court on June 8, 2000. On September 26, 2001, the Florida Supreme Court affirmed the trial court's denial of relief in *Jimenez v. State,* 810 So.2d 511 (Fla. 2001), cert. denied, *Jimenez v. Florida*, 535 U.S. 1064 (2002). His state petition for writ of habeas corpus, filed in the Florida Supreme Court on December 11, 2002, was

denied in *Jimenez v. Crosby*, 861 So.2d 429 (Fla. 2003), on June 10, 2003. A second petition for writ of habeas corpus was filed in the Florida Supreme Court May 26, 2004. The Court denied relief in *Jimenez v. Crosby*, 905 So.2d 125 (Fla. 2005), on March 18, 2005.

Jimenez also filed his initial federal petition for writ of habeas corpus in the U.S. District Court for the Southern District of Florida on January 20, 2004 and amended it on April 27, 2005. The federal district court dismissed his petition and then denied the amended petition on January 30, 2006. A second federal habeas petition was filed *pro se* on February 28, 2005 and was denied on March 1, 2006. Jimenez sought certificates of appealability [COA] in his 2006 litigation and the Eleventh Circuit Court of Appeals denied the COAs in *Jimenez v. Fla. Dept. of Corrections*, 481 F.3d 1337 (11th Cir. 2007), cert. denied, *Jimenez v. McDonough*, 552 U.S. 1029 (2007).

During that same time-period, Jimenez returned to the state trial court and filed a successive Rule 3.850 motion for post-conviction relief on April 28, 2005. The trial court denied relief on September 15, 2005, and the Florida Supreme Court affirmed the trial court's denial of relief in *Jimenez v. State*, 997 So.2d 1056 [Fla. 2008), cert. denied, *Jimenez v. Florida*, 557 U.S. 925 (2009).

On November 29, 2010, Jimenez filed another successive motion for post-conviction relief. That motion was denied February 11, 2011. He filed another

successive motion in the trial court on March 20, 2013. That motion was denied on April 24, 2014, and the appeal that followed in the Florida Supreme Court was affirmed in *Jimenez v. State*, 153 So.3d 906 [Fla. 2014), cert. denied, *Jimenez v. Florida*, 135 S.Ct. 1712 (2015).

Jimenez sought further successive review in the federal district court in a Rule 60(b) motion (Fed R.Civ.P. 60(b)), filed May 16, 2014. The federal district court denied the motion June 12, 2014. Jimenez then filed a motion to alter or amend the judgement denying his 60(b) motion, which was denied July 29, 2014, and on August 29, 2014, sought a COA from the district court. On October 28, 2014, the district court denied the COA. He filed his request for a COA in the Eleventh Circuit Court of Appeals on November 17, 2014. That Court denied the COA request May 29, 2015. His certiorari petition to the United States Supreme Court was denied on February 27, 2017, in *Jimenez v. Jones*, 137 S.Ct. 1220 (2017).

On January 11, 2017 (amended November 3, 2017), Jimenez filed a *Hurst v. State*, 202 So.3d 40, 60 (Fla. 2016), claim in the trial court. Relief was denied on November 16, 2017. An appeal followed in the Florida Supreme Court, which affirmed the trial court's denial of relief on June 28, 2018. A rehearing motion was filed July 13, 2018, which the Florida Supreme Court struck on July 18, 2018.

On July 18, 2018, Governor Scott signed a death warrant for Jimenez's

execution. The following day, the Florida Supreme Court issued a scheduling Order directing that "[t]he proceedings pending in the trial court, if any, shall be completed and orders entered by 3:00 p.m., Tuesday, July 31, 2018."

On July 20, 2018, Jimenez through his collateral counsel filed demands for additional public records. On July 23, 2018 the lower court held a hearing regarding those requests. Jimenez then filed his successive motion for post-conviction relief on July 24, 2018 and the State responded. The circuit court held a case management hearing on July 26, 2018.

Jimenez then filed a rule 3.800(a) motion to correct his burglary sentence on July 29, 2018. The circuit court denied the motion on July 30, 2018. Jimenez filed a motion for rehearing on July 31, 2018, which was denied. The circuit court denied relief on the post-conviction motion on that same day. Jimenez filed a timely notice of appeal to the Florida Supreme Court. The parties completed the briefing. The Florida Supreme Court issued a stay of execution on August 10, 2018 but lifted it on October 4, 2018 when it denied the appeal.

REASONS WHY THE WRIT SHOULD BE DENIED

CLAIM I

CLAIM I – CERTIORARI REVIEW SHOULD BE DENIED BECAUSE (1) THE FLORIDA SUPREME COURT'S RULING ON THE RETROACTIVITY OF *HURST V. FLORIDA* AND *HURST V. STATE*, WHICH RELIES ON STATE LAW TO PROVIDE THAT THE *HURST* CASES ARE NOT RETROACTIVE TO DEFENDANTS WHOSE DEATH SENTENCES WERE FINAL WHEN THIS COURT DECIDED *RING V. ARIZONA*, DOES NOT VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENTS; AND (2) THE FLORIDA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT OR INVOLVE AN IMPORTANT, UNSETTLED QUESTION OF FEDERAL LAW.

Petitioner requests that this Court review the Florida Supreme Court's decision affirming the denial of his successive post-conviction motion, arguing that the state court's holding regarding retroactivity violates his due process rights under the Eighth and Fourteenth Amendments. 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. As will be shown, nothing about the Florida Supreme Court's retroactivity decision is inconsistent with the United States Constitution. Petitioner does not provide any compelling reason for this Court to review his case. Sup. Ct. R. 10. Indeed, Petitioner cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision in *Jimenez*, 247 So.3d 395, in which the

court determined that Petitioner was not entitled to relief because *Hurst v. State* was not retroactive to his death sentence. As no compelling reason for review has been offered by Petitioner, certiorari should be denied.

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., Jones v. State*, 234 So. 3d 545 (Fla. 2018), *cert. denied*, No. 17-8652, 2018 WL 1993786, at *1 (U.S. June 25, 2018); *Cole v. State*, 234 So. 3d 644 (Fla. 2018), *cert. denied,* No. 17-8540, 2018 WL 1876873, at *1 (U.S. June 18, 2018); *Branch v. State*, 234 So. 3d 548 (Fla. 2018), *cert. denied*, 138 S. Ct. 1164 (2018); *Willacy v. State*, 238 So. 3d 100, 101 (Fla. 2018), cert. denied 128 S.Ct. 1665 (2018); *Hannon v. State*, 228 So. 3d 505 (Fla. 2017), *cert. denied*, 138 S. Ct. 441 (2017); *Lambrix v. State*, 227 So. 3d 112 (Fla. 2017), *cert. denied*, 138 S. Ct. 312 (2017); *Hitchcock v. State*, 226 So. 3d 216, *cert. denied*, 138 S. Ct. 513; *Asay v. State*, 210 So. 3d 1, *cert. denied*, 138 S. Ct. 41.

Petitioner's argument that *Hurst* identified the "elements" required to convict him of capital murder is just another attack on Florida's retroactivity decision.

Petitioner contends that the Florida Supreme Court created a new substantive rule in *Hurst v. State* which must be applied retroactively to all cases in which alleged *Hurst* error occurred. Petitioner insists that *Hurst* identified the statutory elements that had to have been proven beyond a reasonable doubt, which

causes a substantive change, making *Hurst* retroactive under federal law. *Hurst* did not announce a substantive change in the law and is not retroactive under federal law. Petitioner's arguments do not identify any federal or state court conflict and, instead, amount to his general disagreement with how Florida has elected to apply its own death penalty laws. This is just another attempt at claiming a Sixth Amendment violation and amounts to yet another endeavor to urge universal retroactivity of the *Hurst* decisions.

Florida was not required to grant retroactive application of *Hurst v. Florida* to all death sentenced murderers regardless of the date their convictions and sentences became final. This Court's ruling in *Hurst v. Florida* was a narrow one: "Florida's sentencing scheme, which required the judge alone to **find the existence of an aggravating circumstance**, is . . . unconstitutional." *Hurst v. Florida*, 136 S. Ct. at 624 (emphasis added). However, *Hurst*, like *Ring*, was a procedural change, not a substantive one. *See Schriro* v. *Summerlin*, 542 U.S. 348, 358 (2004) ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review."). In response, Florida adopted **new procedural requirements** that, among other things, mandated that all factual findings necessary to impose death be found by a unanimous jury. The Florida Supreme Court's interpretation of *Hurst v. Florida* in *Hurst v. State* greatly expanded that procedural rule. Nevertheless, it remained a procedural rule and not a "definition"

of Florida's death penalty statute. The range of conduct punished by death in Florida remains the same.

Following issuance of this Court's decision in *Hurst v. Florida*, the Florida Supreme Court held that *Hurst v. Florida* would apply to those sentences which were final after this Court's decision in *Ring*. In *Asay*, 210 So. 3d at 22, the Florida Supreme Court ruled that, as a matter of state law, *Hurst v. State* is not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in *Ring*. *See also Mosley*, 209 So. 3d at 1272-73 (holding that, as a matter of state law, *Hurst v. State* does not apply retroactively to defendants whose sentences were not yet final when this Court issued *Ring*).

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

210 So. 3d at 15 (noting that Florida's *Witt* analysis for retroactivity provides "more expansive retroactivity standards" than the federal standards articulated in *Teague v. Lane*, 489 U.S. 288 (1989)) (emphasis in original; citation omitted).

This Court has repeatedly recognized that where a state court judgement rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983); *see also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); *Street v. New York*, 394 U.S. 576, 581-82 (1969). 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).

The question of *Hurst* retroactivity as related to Petitioner's post-conviction claim was entirely a matter of state law. This fact alone militates against the grant of certiorari in this case. The Florida Supreme Court, following its now established precedent in *Asay*, rejected Petitioner's claim because his convictions and sentences became final prior to this Court's decision in *Ring*. This determination concerns only state law and is outside the scope of certiorari jurisdiction of this Court. *See, e.g., Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (noting that

"whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern []" and that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.").

When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal law is limited. This Court has held that new rules of criminal law will apply retroactively only if they fit within one of two narrow exceptions. Those exceptions are: (1) a substantive rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or if it prohibits a certain category of punishment for a class of defendants because of their status or offense"; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Teague*, 498 U.S. at 310-13; *Penry v. Lynaugh*, 492 U.S. 302 (1989) (abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002)); *Butler v. McKellar*, 494 U.S. 407 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990). Moreover, certain matters are not retroactive at all.

Despite the Florida Supreme Court's clear mandate, Petitioner suggests that the Florida court created a new substantive rule in *Hurst v. State* which must, pursuant to *Bousley v. United States*, 523 U.S. 614 (1998), be applied retroactively to all cases in which alleged *Hurst* error occurred. A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa. *See id.* at 620-621. Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him. *Id.* at 620 (quoting *Davis v. United States*, 417 U.S. 333 (1974)). But that is not what *Hurst* has done.

Petitioner's reliance on *Bousley* for this proposition is misplaced. There, this Court "decid[ed] the meaning of a criminal statute enacted by Congress." *Id.* at 620. Concluding that a *Teague* analysis was not necessary under that circumstance, this Court held that an individual who pled guilty to violating 18 U.S.C. § 924(c)(1), based upon the prior interpretation of "using" a firearm is entitled to have the conviction set aside if he or she was actually innocent of the crime as it was subsequently defined by this Court. *Id.* By contrast, as explained herein, *Hurst v. Florida* announced a new procedural rule.

Florida's new capital sentencing scheme, which requires the jury to unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that sufficient aggravating factors exist to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death before the trial judge may consider imposing a sentence of death, *see* Fla. Stat. § 921.141(2) (2017), neither alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable. *Victorino v. State*, 241 So. 3d 48 (Fla. 2018). These additional requirements imposed by *Hurst v. State* are not "elements" of a capital offense, contrary to Petitioner's argument. 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.

Petitioner's reliance on *Fiore v. White* is also misplaced. *Fiore v. White*, 531 U.S. 225, 228-29 (2001) (noting that the case did not focus on the issue of retroactivity, but instead whether Pennsylvania could convict an individual without proving the elements of a crime beyond a reasonable doubt). However, *Hurst* is distinguishable because it did not address the proof-beyond-a-reasonable-doubt standard.

If a rule of law it not new, there is no retroactivity analysis required. *Butler v. McKellar*, 494 U.S. 407, 412 (1990) (defining a "new rule" for purpose of retroactivity as one that "breaks new ground or imposes a new obligation," such as a decision that explicitly overrules an earlier holding). Florida's standard of proof for aggravating circumstances is not new. *See* Fla. Std. J. Inst. (Crim.) 7.11; *Floyd v. State*, 497 So. 2d 1211, 1214-15 (Fla. 1986); *Zeigler v. State*, 580 So. 2d 127, 129 (Fla. 1991); *Finney v. State*, 660 So. 2d 674, 680 (Fla. 1995). Florida law has required that the State prove aggravators at the beyond-a-reasonable-doubt standard of proof for over three decades. *Williams v. State*, 37 So. 3d 187, 194-95 (Fla. 2010) (stating that the State has the burden to prove beyond a reasonable doubt each and every aggravating circumstance); *Aguirre-Jarquin v. State*, 9 So. 3d 593, 607 (Fla. 2009) (explaining that the State must prove the existence of an aggravator beyond a reasonable doubt citing *Parker v. State*, 873 So. 2d 270, 286 (Fla. 2004)); *cf. Floyd*, 497 So. 2d at 1214 (striking an aggravator that was not proven "beyond a reasonable doubt"). Proving aggravators beyond a reasonable doubt is not new in Florida, thus *Fiore* is not analogous to *Hurst* and irrelevant in Florida.

Nor did *Hurst* truly involve the standard of proof. The issue in *Hurst v. Florida* was who finds the existence of an aggravator — the judge versus the jury — not the standard of proof. The new unanimity requirement established by the

Florida Supreme Court in *Hurst* is also not the equivalent of a standard of proof. They are two very different concepts. The "retroactivity" of the beyond-a reasonable-doubt standard of proof is a non-issue in this case and all other Florida capital cases as well. *Hurst* did not alter the burden of proof as aggravating circumstances have long been required to be proven beyond a reasonable doubt in Florida.

As related to the finding that aggravation is sufficient, *Hurst* did not ascribe a standard of proof. *Hurst*, 202 So. 3d at 54. The Eighth Amendment requires that "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Roper v. Simmons*, 543 U.S. 551, 568 (2005). Florida's aggravating factors are enumerated in section 921.141(6) of the Florida Statutes. *See* Fla. Stat. § 921.141(6) (2017). These aggravating factors have been deemed sufficient to impose the death penalty by virtue of their inclusion in the statute. Any one of these aggravating factors is sufficient to cause a defendant to be eligible to receive a sentence of death. However, the weight that a juror gives to the aggravator based on the evidence is not something that can be defined by a beyond-a-reasonable-doubt standard.

As related to the finding that the aggravation outweighs the mitigation, *Hurst* did not ascribe a standard of proof. *Hurst*, 202 So. 3d at 54. This Court has specifically held that the beyond-a-reasonable-doubt standard for finding that the

aggravation outweighs mitigation is not required under federal law. *See Kansas v. Marsh*, 548 U.S. 163, 164 (2006) ("Weighing is not an end, but a means to reaching a decision."); *Tuilaepa v. California*, 512 U.S. 967, 979 (1994) ("A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision."); *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) ("[T]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt."). The weight that a juror gives to the aggravation as compared to the weight given to mitigation is also not something that can be defined by a beyond-a-reasonable-doubt standard.[1]

While Petitioner may view the right to a jury trial as substantive, this Court has repeatedly classified it as procedural and in very similar context to *Hurst*. As this Court noted, "holding that because [a State] has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as this Court's

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[1] Furthermore, the Ninth Circuit has rejected this exact argument. *Ybarra v. Filson*, 869 F.3d 1016 (9th Cir. 2017). Ybarra also argued that *Hurst v. Florida* should be applied retroactively because it involved the standard of proof citing *Jackson v. Virginia*, 443 U.S. 307, 316 (1979), just as Petitioner does in his petition. *Ybarra*, 869 F.3d at 1032-33. The Ninth Circuit rejected that argument, reasoning that even if *Hurst v. Florida* extended the beyond-a-reasonable-doubt standard of proof to the weighing determinations, it did not redefine capital murder and, therefore, *Hurst v. Florida* was not required to be applied retroactively. *Id.* at 1032. Based on this Court's jurisprudence, it is clear that the only factual finding necessary to impose the death penalty is a conviction for murder plus the addition of an aggravating factor. Finding additional aggravators does not expose the defendant to any higher or additional penalty, nor does the weighing of aggravation and mitigation.

making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive." *Summerlin*, 542 U.S. at 354. Thus, *Hurst v. State*'s requirement that the jury make specific factual findings before the imposition of the death penalty is procedural.

Welch v. United States, 136 S. Ct. 1257, 1264 (2016) does not distinguish itself from *Summerlin*, but instead quotes *Summerlin* to describe the distinctions between a substantive and a procedural change. *Id.* at 1265. In explaining how the rule in *Johnson* was not procedural, the *Welch* court stated, "[i]t did not, for example, 'allocate decision making authority' between judge and jury, *ibid.*, or regulate the evidence that the court could consider in making its decision." *Id.* Florida's new *Hurst* rule, however, did allocate the decision-making authority by assigning the duty to determine aggravating factors, formerly the responsibility of the sentencing judge, to the jury. Unlike *Welch*, after *Hurst*, Florida's death penalty sentencing scheme still applies to the same persons engaging in the same conduct.

Furthermore, both the majority opinion and the concurring opinion in *Alleyne v. United States*, 570 U.S. 99 (2013), which Petitioner relies on for support, classified the right to a jury trial regarding facts required to impose a minimum mandatory sentence as procedural. *Alleyne*, 570 U.S. at 116, n.5 ("the force of *stare decisis* is at its nadir in cases concerning procedural rules . . .") (emphasis

added); *Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring) ("when procedural rules are at issue . . .") (emphasis added). This Court's opinion in *Alleyne*, like this Court's opinion in *Hurst v. Florida* itself, was explicitly based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Both *Alleyne* and *Hurst* are the offspring of *Apprendi*. The *Alleyne* majority and the *Alleyne* concurrence both characterized that *Apprendi*-based right as procedural. This Court views *Apprendi* and all its offspring, including *Hurst v. Florida*, as procedural, not substantive.

Aside from the question of retroactivity, certiorari review would also be inappropriate in this case because there was no underlying Sixth Amendment violation. Here, a unanimous jury convicted Petitioner of first-degree murder and armed burglary. 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.[2] The findings required by the Florida Supreme

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[2] *State v. Mason*, No. 2017-0200, 2018 WL 1872180, at *1, 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 citation omitted); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *Waldrop v. Comm'r, Alabama Dept. of Corr.*, 711 Fed. Appx. 900, 922-23 (11th Cir. 2017) (unpublished) (rejecting *Hurst* claim and explaining "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict.") (citation omitted); *State v. Gales*, 658 N.W.2d 604, 628-29 (Neb. 2003) ("[W]e do not read either *Apprendi* or *Ring*

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). More importantly, where a unanimous jury recommendation for death is found, there is no issue of harmless error.[3] *Hannon*, 228 So. 3d at 513 (Fla. 2017), *cert. denied*, 138 S. Ct. 441 (2017) (Hannon's jury unanimously recommended death). There was no Sixth Amendment error in this case.

In sum, the question Petitioner presents does not offer any matter which comes within the parameters of Rule 10 of the Rules of the United States Supreme Court. Petitioner does not identify any direct conflict with this Court or other courts, nor does he offer any unresolved, pressing federal question. He challenges only the application of this Court's well-established principles to the Florida Supreme Court's decision. As Petitioner does not demonstrate any compelling reasons for this Court to exercise its certiorari jurisdiction under Rule 10, this Court should deny the petition.

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to require that the determination of mitigating circumstances, the balancing function, or proportionality review to be undertaken by a jury.").

[3] Assuming for a moment that *Hurst* was retroactive, Petitioner would not be entitled to relief in this case. Given the strong evidence supporting each aggravator and the unanimous jury recommendation for death, any *Hurst* error would clearly be harmless. Even in cases unlike this one, post-*Ring*, the Florida Supreme Court has repeatedly affirmed death sentences on the basis of harmless error where the jury recommended death unanimously. See *Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016), cert. denied, 137 S. Ct. 2218 (2017) (a jury's unanimous recommendation "allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors.").

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

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