NO. 18-6175

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR TONY JONES,

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

Petitioner, Victor Tony Jones, was found guilty of first-degree murders of Matilda Nestor, Jacob Nestor, two counts of armed robbery, and possession of a firearm by a convicted felon. Petitioner's sentence of death was finalized on October 2, 1995. Following this Court's decision in *Hurst v. Florida*, the Florida Supreme Court decided *Hurst v. State*. *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). There, the Florida Supreme Court explained that in order for a defendant to be sentenced to death, the jury must find all the aggravating circumstances outweighed the mitigating circumstances and unanimously vote that the defendant receive the death penalty. Following *Hurst v. State*, the Supreme Court decided *Asay v. State*, and *Mosley v. State*, which created a bright-line retroactivity test where defendants whose sentences of death were finalized prior to this Court's 2002 *Ring v. Arizona* decision would not receive retroactive relief. *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); *Ring v. Arizona*, 536 U.S. 584 (2002). Petitioner's case falls in this category of defendants.

Petitioner sought postconviction relief through the Florida Supreme Court but was denied. Petitioner's petition seeking certiorari review gives rise to the following question presented:

Whether this Court should deny certiorari to review the Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florida* and *Hurst v. State*, where the issue of retroactivity was decided as an issue of state law in a decision that does not conflict with any of this Court's precedent and which does not present a significant or unsettled issue of constitutional law worth certiorari review.

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Opinion Below

The decision of the Florida Supreme Court appears as *Jones v. State*, 241 So. 3d 65 (Fla. 2018).

Jurisdiction

The Florida Supreme Court issued its opinion affirming the summary denial of Petitioner's successive postconviction motion for relief on May 2, 2018. *Jones v. State*, 241 So. 3d 65 (Fla. 2018). Petitioner's "Petition for Writ of Certiorari" was docketed in this Court on September 28, 2018 after Petitioner was granted an extension from this Court. The Petition is timely filed before this Court. Sup. Ct. R. 13.1.

Pursuant to 28 U.S.C. § 1257(a), this Court has jurisdiction to review the decision of the Florida Supreme Court. However, Respondent submits that this Court should not exercise its jurisdiction, as Petitioner fails to raise a novel question of federal law. The Florida Supreme Court's decision was based on independent and adequate state grounds and Petitioner has not raised a question of federal law. Sup. Ct. R. 14(g)(i). Additionally, because the Florida Supreme Court's decision does not conflict with the decision of another United States court of appeals, another state court of last resort, or with relevant decisions of this Court, this Petition should be denied. Sup. Ct. R. 10.

Statement of the Case and Facts

Petitioner was charged with (1) the first-degree murder of Matilda Nestor, (2) the first-degree murder of Jacob Nestor, (3) the armed robbery of Matilda Nestor, (4) the armed robbery of Jacob Nestor, and (5) the possession of a firearm by a convicted felon. *Jones v. State*, 652 So. 2d 346, 348 (Fla. 1995). The crimes were committed on December 19, 1990. *Id.* Evidence at trial established that Petitioner, who worked for the Nestors, stabbed Mrs. Nestor once to the base of her neck, which severed her aorta, and stabbed Mr. Nestor once in the chest, which entered his heart. *Id.* Mr. Nestor fled to his office, where he removed the knife from his chest, drew his pistol and shot at the Petitioner, striking him in the forehead. *Id.* There was no money or valuables found on the victims, nor in Mrs. Nestor's purse which was next to Petitioner. *Id.* The evidence showed Mr. Nestor's body was rolled over, so his valuables could be removed from his pockets. *Id.*

Following a jury trial, Petitioner was convicted on all counts. *Id.* Petitioner's jury recommended a death sentence for the murder of Mrs. Nestor by a 10-2 vote and by unanimous vote for the murder of Mr. Nestor. *Id.* The trial court followed the jury's recommendation and sentenced Petitioner to death. *Id.*

The Florida Supreme Court affirmed Petitioner's convictions and sentences on direct appeal and his case became final when this Court denied his petition for writ of certiorari on October 2, 1995. *Jones v. Florida*, 516 U.S. 875 (1995). On March 27, 1997, Petitioner filed a shell motion for postconviction relief. Subsequently, Jones filed an amended motion for postconviction relief, raising 22 claims, including claims that counsel had been ineffective for failing to present a voluntary intoxication defense, for failing to investigate and present mitigation and for failing to litigate his competency to stand trial properly. *Jones v. State*, 855 So. 2d 611, 614-15 (Fla. 2003).

Following a limited evidentiary hearing, the postconviction court denied relief on March 8, 2001. Petitioner appealed the denial of his motion to the Florida Supreme Court, raising five issues. *Id.* Petitioner also filed a petition for writ of habeas corpus. *Id.* at 619. The Florida Supreme Court affirmed the denial of the motion for postconviction relief and denied habeas relief. *Id.*

Thereafter, Petitioner filed a successive motion for postconviction relief claiming to be intellectually disabled and entitled to relief under *Atkins v. Virginia*, 536 U.S. 304 (2002). The circuit court summarily denied Petitioner's successive postconviction motion; however, on May 27, 2005, the Florida Supreme Court

remanded for an evidentiary hearing on Petitioner's intellectual disability claim.

Following that evidentiary hearing, the lower court denied Petitioner's motion and Petitioner appealed the denial of his motion to the Florida Supreme Court. On May 24, 2007, the Florida Supreme Court affirmed the denial of the second successive motion for postconviction relief, agreeing that Petitioner failed to prove any of the elements of intellectual disability. *Jones v. State*, 966 So. 2d 319, 330 (Fla. 2007)

On November 6, 2007, Petitioner filed a federal habeas petition in the Southern District of Florida, raising 26 claims, including claims that he was intellectually disabled. *Jones v. McNeil*, 776 F. Supp. 2d 1323, 1338 n. 7 (S.D. Fla. 2011). On March 7, 2011, the district court denied the petition, finding the intellectual disability claims meritless. *Id.* at 1371-75. Petitioner attempted to appeal the denial but was denied leave to do so. He sought certiorari, insisting that his intellectual disability claims were meritorious, which was denied. *Jones v. Florida Dep't of Corr.*, 568 U.S. 873 (2012).

On November 29, 2010, Petitioner filed a third motion for postconviction relief, raising a claim that *Porter v. McCollum*, 558 U.S. 30 (2009), constituted a retroactive change in law that required reconsider of the denial his prior postconviction claims. The postconviction court summarily denied the motion on February 2, 2011, finding that *Porter* was not a change in law, that it would not be retroactive even if it was and that it would not apply. Petitioner appealed the denial of the motion to this Court, which summarily affirmed the denial on April 26, 2012.

Jones v. State, 93 So. 3d 178 (Fla. 2012).

On September 30, 2013, Petitioner filed a fourth motion for postconviction relief. (PCR4. 48) In this motion, Petitioner suggests that he was somehow being denied due process in clemency proceedings because he had yet to be appointed clemency counsel. The lower court summarily denied that motion and Petitioner initially appealed the denial. However, on January 13, 2014, Petitioner filed a notice of voluntary dismissal of that appeal, and as a result, the Florida Supreme Court dismissed the appeal on February 10, 2014. *Jones v. State*, 135 So. 3d 287 (Fla. 2014).

Petitioner filed his fifth successive motion for postconviction relief on May 26, 2015, asserting that *Hall v. Florida*, 134 S. Ct. 1986 (2014), was a fundamental change in law that should be applied retroactively. After the lower postconviction court summarily denied this motion, Petitioner appealed to the Florida Supreme Court, who affirmed the denial on September 28, 2017. *Jones v. State*, 231 So. 3d 374, 376 (Fla. 2017), *reh'g denied*, No. SC15-1549, 2017 WL 6604265 (Fla. Dec. 27, 2017).

On October 13, 2017, Petitioner filed his sixth postconviction motion for relief pursuant to this Court's in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Florida Supreme Court's decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). On January 10, 2018, the postconviction court summarily denied Petitioner's motion. Petitioner appealed to the Florida Supreme Court.

On March 2, 2018, pursuant to the Florida Supreme Court's decision in *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017), the Florida Supreme Court issued an order to show cause, which asked Petitioner to respond why *Hitchcock* should not be dispositive in this case. In *Hitchcock*, the Florida Supreme Court reaffirmed its previous holding in *Asay v. State* that *Hurst v. Florida*, as interpreted by *Hurst v. State*, is not retroactive to defendants whose death sentences were final when this Court decided *Ring v. Arizona*[1]. 226 So. 3d at 217.

On May 2 ,2018, the Florida Supreme Court affirmed the denial of relief, holding that Petitioner is not entitled to retroactive relief. *Jones v. State,* 241 So. 3d 65 (Fla. 2018). Petitioner then filed his Petition in this Court from the Florida Supreme Court's decision. This is the State's brief in opposition.

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[1] 536 U.S. 584 (2002)

Reasons for Denying the Writ

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 postconviction motion, arguing that the state court's holding with respect to 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. Moreover, 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 *Jones v. State,* 241 So. 3d 65 (Fla. 2018), 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.), *cert. denied,* No. 17-8540, 2018 WL 1876873, at *1 (U.S. June 18, 2018); *Branch v. State*, 234 So. 3d 548 (Fla.), *cert. denied*, 138 S. Ct. 1164 (2018); *Hannon v. State*, 228 So. 3d 505 (Fla.), *cert. denied*, 138 S. Ct. 441 (2017); *Lambrix v. State*, 227 So. 3d 112 (Fla.), *cert. denied*, 138 S. Ct. 312 (2017); *Hitchcock*, 226 So. 3d 216, *cert. denied*, 138 S. Ct. 513; *Asay*, 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*, 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*. 210 So. 3d at 22; *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, subject to retroactivity analysis under state law as set forth in *Witt v. State*, 387 So. 2d 922 (Fla.), *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).

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. Therefore, Petitioner's assertion that chapter 2017-1 (which codifies the holding in *Hurst*) must be considered a substantive rule fails.

This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *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 postconviction 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)). However, 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.

Additionally, 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). *Hurst* is readily distinguishable from *Fiore* 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.[2]

While Petitioner may view the right to a jury trial as substantive, this Court has repeatedly classified it as procedural and in a 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 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

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[2] Furthermore, the Ninth Circuit Court of Appeals 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.

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.

Accordingly, Petitioner's argument that the failure to receive the benefit of the retroactive application of Chapter 2017-1 Laws of Florida will amount to a deprivation of his rights under the Equal Protection Clause and Due Process Clause of the Fourteenth and Eighth Amendments is without merit. *See* Petition at 5-7. Petitioner's claim primarily hinges on his assertion that he is being treated differently that James Armando Card, who will get the benefit of the revised statute at his new penalty phase.

In *Card v. Jones*, 210 So. 3d 47, 48 (Fla. 2017), the Florida Supreme Court held:

> Card's sentence of death, which his penalty phase jury recommended by a vote of eleven to one, became final when the United States Supreme Court denied Card's petition for writ of certiorari on June 28, 2002. *See Card v. State*, 803 So. 2d 613 (F la 2001), *cert. denied Card v. Florida*, 536 U.S. 963, 122 S. Ct. 2673, 153 L.Ed.2d 845 (2002); *see also* Fla. R. Crim. Pro. 3.851 (d) (1) (B). We have held that Hurst applies retroactively to "defendants whose sentences became final after the United States Supreme Court issued its opinion in *Ring* [*v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed.2d 566 (2002)]." *Mosely v. State*, 209 So. 3d 1248, 1276 (Fla. 2016). Thus, *Hurst* applies retroactively to Card, whose sentence became final four days after the United States Supreme Court issued its opinion in *Ring*.

Id. (emphasis added). Regardless of when Card's murder took place, his death sentence was final after *Ring* was decided. Petitioner's death sentences were final before *Ring* was decided. Petitioner and Card are not similarly situated; therefore, Petitioner has no change of success on the merits of his claim. *See, e.g., City of Cleburne, Tex. V. Clerburne Living Center*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws,' which is essential a direction that all persons similarly situated should be treated alike.") (quoting *Plyler v. Doe,* 457 U.S. 202, 216 (1982)). Moreover, other defendants in Petitioner's situation have made this exact argument, and this Court has refused to grant certiorari. *See e.g.,* Brief for Petitioner at 13-21, *Hannon v. Florida*, 138 S. Ct. 441 (2017) (No. 17-6650, 17A491) (denying certiorari review).

The Florida Supreme Court has been entirely consistent in deny *Hurst* relief to those defendants whose convictions and sentences were final when *Ring* was issued in 2002. Additionally, the Florida Supreme Court has been entirely consistent in the prospective application of the 2017-1 statute as well. It applies only to those defendants who face sentencing after its enactment. Petitioner is being treated exactly the same as similarly situated murderers.

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.

Conclusion

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

Respectfully submitted,
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