DOCKET NO. 18-6735

IN THE SUPREME COURT OF THE UNITED STATES

PERRY ALEXANDER TAYLOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

1. Whether certiorari review should be granted where (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 United States Constitution; and (2) the Florida Supreme Court's decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law?

2. Whether certiorari review should be granted where (1) a state court determination of retroactivity is based on state law; and (2) there is no conflict among state or federal court with regard to whether *Hurst v. Florida* or *Hurst v. State* should be applied retroactively least to this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985)?

3. Whether this Court should grant certiorari to review fact and case specific findings involving principles the settlement of which is not of importance to the public as opposed to the parties?

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The decision of the Florida Supreme Court is reported at *Taylor v. State*, 246 So. 3d 231 (Fla. 2018).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on July 5, 2018. (Pet. App. C). Petitioner asserts that this Court's jurisdiction is 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 facts of this case are set forth in the Florida Supreme Court's opinion affirming Taylor's conviction, but reversing for a new penalty phase. *Taylor v. State*, 583 So. 2d 323 (Fla. 1991):

> Taylor was charged with the murder and sexual battery of Geraldine Birch whose severely beaten body was found in a dugout at a little league baseball field. Shoe prints matching Taylor's shoes were found at the scene. Taylor confessed to killing Birch but claimed that the sexual contact was consensual and that the beating from which she died was done in a rage without premeditation. Taylor testified that on the night of the killing, he was standing with a small group of people when Birch walked up. She talked briefly with others in the group and then all but Taylor and a friend walked off. Taylor testified that as he began to walk away, Birch called to him and told him she was trying to get to Sulphur Springs. He told her he did not have a car. She then offered sex in exchange for cocaine and money. Taylor agreed to give her ten dollars in exchange for sex, and the two of them went to the dugout.
>
> Taylor testified that when he and Birch reached the dugout they attempted to have vaginal intercourse for less than a minute. She ended the attempt at intercourse and began performing oral sex on him. According to Taylor, he complained that her teeth were irritating him and attempted to pull away. She bit down on his penis. He choked her in an attempt to get her to release him. After he succeeded in getting her to release her bite, he struck and kicked her several times in anger.

In his direct appeal, the state court addressed Taylor's argument that the trial court should have granted a judgment of acquittal. The Florida Supreme Court detailed the nature and

number of the victim's injuries.

> To prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. Further, to establish premeditation by circumstantial evidence, the state's evidence must be inconsistent with every other reasonable inference. The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is to be decided by the jury. *Cochran v. State*, 547 So. 2d 928, 930 (Fla. 1989). However, the jury need not believe the defense version of facts on which the state has produced conflicting evidence. *Id.* On the question of lack of consent, even accepting Taylor's assertion that the victim initially agreed to have sex with him, the medical examiner's testimony contradicted Taylor's version of what happened in the dugout. According to Taylor, he had vaginal intercourse with the victim for less than a minute without full penetration. He testified that she then indicated that she did not want to have intercourse and began performing oral sex on him. The medical examiner testified that the extensive injuries to the interior and exterior of the victim's vagina were caused by a hand or object other than a penis inserted into the vagina. Given the evidence conflicting with Taylor's version of events, the jury reasonably could have rejected his testimony as untruthful. *Cochran*, 547 So. 2d at 930.
>
> Further, the jury reasonably could have rejected as untruthful Taylor's testimony that he beat the victim in a rage after she injured him. Although Taylor claimed that the victim bit his penis, an examination did not reveal injuries consistent with a bite. According to Taylor, even after he sufficiently incapacitated the victim by choking her so that she released her bite on him, he continued to beat and kick her. The medical examiner testified that the victim sustained a minimum of ten massive blows to her head, neck, chest, and abdomen. Virtually all of her internal organs were damaged. Her brain was bleeding. Her larynx was fractured. Her heart was torn. Her liver was reduced to pulp. Her kidneys and intestines were torn from their attachments. Her lungs were bruised and torn. Nearly all of the ribs on both sides

> were broken. Her spleen was torn. She had a bite mark on her arm and patches of her hair were torn off. Her face, chest, and stomach were scraped and bruised. Although Taylor denied dragging the victim, evidence showed that she had been dragged from one end of the dugout to the other. The evidence was sufficient to submit the question of premeditation to the jury.

Taylor, 583 So. 2d at 328-29

Prior to his second penalty phase, Taylor filed two pretrial motions related to the jury's role in sentencing. First, he alleged that death recommendations based on less than a "substantial majority" violate due process and the Eighth Amendment. Taylor cited *Johnson v. Louisiana*, 406 U.S. 356 (1972) (holding that a 9-3 guilty verdict is not unconstitutional). Additionally, Taylor filed a pretrial motion alleging Florida's death penalty is unconstitutional because it failed to provide the jury with adequate guidance as to the finding of aggravating and mitigating circumstances. Specifically, the motion alleged there was no guidance as to the standard of proof or number of votes necessary for mitigating circumstances. Further, Taylor argued the statute violated due process because it does not require a "substantial majority" of the jury to recommend death and that it did not adequately guide the jury such that all jurors may not agree beyond a reasonable doubt as to any one aggravating circumstance. The Florida Supreme Court rejected these arguments. *Taylor v. State*, 638 So.

2d 30 n4 (Fla. 1994).

Taylor filed his initial postconviction motion and the state supreme court affirmed its denial in 2009. Taylor alleged newly discovered evidence in the form of the medical examiners alleged "recantation" of his trial testimony. The court affirmed the denial of this claim agreeing with the postconviction court that Dr. Miller had not, in fact, recanted his trial testimony. Further, the court stated:

> Additionally, we note the jury was not instructed to and did not differentiate between first-degree premeditated murder and first-degree felony murder in determining Taylor's guilt. There is no indication that Taylor was convicted of first-degree murder predicated solely upon the felony of sexual battery. This Court previously detailed the massive injuries sustained by the victim to support the State's alternative theories of premeditation and felony murder:
>
> [T]he jury reasonably could have rejected as untruthful Taylor's testimony that he beat the victim in a rage after she injured him. Although Taylor claimed that the victim bit his penis, an examination did not reveal injuries consistent with a bite. According to Taylor, even after he sufficiently incapacitated the victim by choking her so that she released her bite on him, he continued to beat and kick her. The medical examiner testified that the victim sustained a minimum of ten massive blows to her head, neck, chest, and abdomen. Virtually all of her internal organs were damaged. Her brain was bleeding. Her larynx was fractured. Her heart was torn. Her liver was reduced to pulp. Her kidneys and intestines were torn from their attachments. Her lungs were bruised and torn. Nearly all of the ribs on both sides were broken. Her spleen was torn. She had a bite mark on her arm and patches of her hair were torn off. Her face, chest, and stomach were scraped and bruised.

> Although Taylor denied dragging the victim, evidence showed that she had been dragged from one end of the dugout to the other. The evidence was sufficient to submit the question of premeditation to the jury. (citation omitted).
>
> Accordingly, even if Dr. Miller's alleged change in testimony were considered sufficient to call into question Taylor's sexual battery conviction, it would not be sufficient to outweigh the evidence that Taylor committed premeditated murder or to cast doubt on his conviction for first-degree murder based upon premeditation. Ultimately, then, even if we were to construe Dr. Miller's testimony at the evidentiary hearing the way Taylor seeks, there remains an abundance of evidence the jury could have used to convict Taylor of premeditated first-degree murder. Hence, we conclude the trial court did not err in denying this claim.

Taylor v. State, 3 So. 3d 986, 993-94 (Fla. 2009).

Taylor filed a petition for writ of habeas corpus in the Middle District of Florida. *Taylor v. Sec'y, Dept. of Corr.*, 8:10-CV-382-T-30AEP, 2011 WL 2160341 (M.D. Fla. June 1, 2011). In it he raised, among other things, an argument that he was wrongfully convicted of sexual battery; therefore, he was wrongfully convicted of felony murder and the finding that the murder was committed during the course of a felony was erroneous. He pointed to Dr. Miller's alleged recantation to support these arguments. The district court rejected both claims.

The Eleventh Circuit Court of Appeals denied a certificate of appealability on all but two claims. *Taylor v. Sec'y, Florida*

Dept. of Corr., 760 F. 3d 1284 (11th Cir. 2014). Taylor filed a petition for certiorari in this Court arguing the Eleventh Circuit Court of Appeals erred in denying a certificate of appealability on his *Batson v. Kentucky, 476 U.S. 79 (1986)* claim. Additionally, noting that *Hurst v. Florida,* 136 S. Ct. 616 (2016) was then pending before this Court, Taylor for the first time raised a true *Ring v. Arizona,* 536 U.S. 584 (2002) claim. He argued that he should be entitled to any remedy arising from this Court's yet-to-be issued opinion in *Hurst v. Florida*. This court did not issue the writ. *Taylor v. Florida,* 135 S. Ct. 2323 (2015).

In 2016 Taylor again raised the issue of Dr. Miller's alleged recantation in a successive postconviction motion. Taylor attached an affidavit from Dr. Miller to the successive postconviction motion wherein Dr. Miller expressed regret for his choice of words when he said that the chances of the toe of Taylor's shoe penetrating the victim's vagina as he kicked her was a "one in a million shot." Taylor later amended his successive postconviction motion to include *Hurst*-related claims.

Additionally, during the litigation of his successive postconviction motion, Taylor sought to present testimony of Dr. Harvey Moore, Ph.D. to support his *Caldwell v. Mississippi,* 472

U.S. 320 (1985) claim. After allowing Taylor to proffer Dr. Moore's testimony, the postconviction court granted the State's motion to strike Taylor's witness and exhibit list. Thereafter, the postconviction court summarily denied all claims. *Accordingly, it is inappropriate for Taylor to include in this petition Dr. Moore's testimony, reports, opinions, or conclusions.*

In affirming the denial of postconviction relief, the Florida Supreme Court rejected Taylor's argument that the state and federal courts refusal to recognize that the medical examiner's testimony materially changed was "newly discovered evidence." The Florida Supreme Court found the claim "both untimely and without merit." The court found the claim did not satisfy Florida Rule of Criminal Procedure 3.851's time limitation or its exception. The rule requires a motion for postconviction relief to be filed within one year after the judgment and sentence become final unless "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2)(A). The court also determined, as it had done previously, that Dr. Miller's testimony had not materially changed.

The court also rejected Taylor's various *Hurst*-related

claims holding: ". . . we explained that *Hurst* does not apply retroactively to death sentences that became final prior to the issuance of *Ring* based upon our earlier decision in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). *See Hitchcock*, 226 So.3d at 217. Because Taylor's sentence became final in 1994, Hurst does not apply to him, and we decline to extend the retroactivity of *Hurst* to the date of *Caldwell*. Moreover, in *Reynolds v. State*, --- So.3d ----, ----, 43 Fla. L. Weekly S163, S167 (Fla. Apr. 5, 2018) (plurality opinion), we concluded that pre-*Ring Hurst*-induced *Caldwell* challenges are without merit." *Taylor*, 246 So. 3d at 240.

REASONS FOR DENYING THE WRIT

Taylor's Petition presents yet another instance in which a death-sentenced Florida murderer who was denied retroactive application of this Court's decision in *Hurst v. Florida*, and the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017), seeks this Court's declaration that *Hurst v. State* is retroactive on collateral review. Florida's retroactivity analysis, however, is a matter of state law. This fact alone militates against the grant of certiorari in this case. Indeed, 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); *Jones v. State*, 234 So. 3d 545 (Fla.),

cert. denied, 138 S. Ct. 2686 (2018).

Nevertheless, as the others have done before him, Taylor attempts to apply a constitutional veneer to his argument for review of the state court's retroactivity decision, asserting that the Constitution demands either full retroactive application of *Hurst v. Florida* and *Hurst v. State*; or, at least retroactive application to the date of this Court's *Caldwell* decision.. As will be shown, nothing about the Florida Supreme Court's retroactivity decision is inconsistent with the United States Constitution. Taylor does not provide any "compelling" reason for this Court to review his case. U.S. Sup. Ct. R. 10. Taylor cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's holding he is not entitled to relief because *Hurst v. State* was not retroactive to his death sentence. Nothing presented in the petition justifies the exercise of this Court's certiorari jurisdiction.

Additionally, Taylor seeks this Court's review regarding case specific factual findings related to the alleged recantation of the medical examiner's testimony. The law is well-settled that this Court does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Accordingly, Taylor's

request for certiorari review must be rejected.

ISSUE I

THE FLORIDA COURT'S RULING ON THE RETROACTIVITY OF *HURST V. FLORIDA* AND *HURST V. STATE* IS A MATTER OF STATE LAW THAT DOES NOT VIOLATE THE UNITED STATES CONSTITUTION.

As stated in Rule 10 of the Rules of the Supreme Court of the United States certiorari review "will be granted only for compelling reasons." Additionally, consideration of a decision by a state court of last resort should involve an "important question of federal law that has not been, but should be, resolved by this Court" or should involve cases that decide a federal question in a way that conflicts with other state high courts or federal courts of appeal. Cases that do not divide the federal or state courts or that do not present important, unsettled questions of federal law usually do not merit certiorari review. *Rockford Life Insurance Co. v. Illinois Dept. of Revenue*, 482 U.S. 182, 184, n. 3 (1987); *Braxton v. United States*, 500 U.S. 344, 348 (1991).

The Florida Supreme Court's holding in *Hurst v. State* followed this Court's ruling in *Hurst v. Florida* in requiring the aggravating circumstances to 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 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.[1]

In *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), the Florida Supreme Court ruled that, as a matter of state law, the *Hurst* decisions are not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *See also Mosley v. State*, 209 So. 3d 1248, 1272-73 (Fla. 2016) (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*). Florida's partial retroactive application of the *Hurst* decisions is not constitutionally unsound and does not otherwise present a

[1] 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).

matter that merits the exercise of this Court's certiorari jurisdiction.

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). 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).

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) (same). 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).

Any retroactive application of a new development in the law under any analysis will mean that some cases will get the benefit of a new development, while other cases will not. Drawing a line between newer cases that will receive benefit of a new development in the law and older final cases that will not receive the benefit is part and parcel of the landscape of any retroactivity analysis. It is simply part of the retroactivity paradigm that some cases will be treated differently than other cases based on the age of the case. This is not arbitrary and capricious in violation of the Eighth Amendment; it is simply a fact inherent in any retroactivity analysis.

Taylor's suggestion that Florida's retroactivity ruling violates the Equal Protection Clause is also unpersuasive. A criminal defendant challenging the State's application of capital punishment must show intentional discrimination to prove

an equal protection violation. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). A "`[d]iscriminatory purpose' . . . implies more than intent as violation or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 298.

The Florida court's partial retroactivity ruling was based on the date of the *Ring* decision, not based on a purposeful intent to deprive pre-*Ring* death-sentenced murderers in general, and Taylor in particular, relief under *Hurst v. State*. The Florida Supreme Court has been entirely consistent in denying *Hurst* relief to those defendants whose convictions and sentences were final when *Ring* was issued in 2002. Taylor is being treated exactly the same as similarly situated death-sentenced murderers.

Simply stated, this Court's ruling in *Hurst v. Florida* applied *Ring v. Arizona* to Florida's death penalty procedure. "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). As *Hurst v. Florida* was merely an application of the holding in *Ring* to Florida's death penalty procedure, it stands to reason that under this Court's

retroactivity jurisprudence, *Hurst v. Florida* extends no further than does *Ring*. That is, *Hurst v. Florida*, like *Ring*, "announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro*, 542 U.S. at 352. That the Florida court decided to apply state law as set forth in *Witt*, to extend *Hurst* relief to all post-*Ring* death-sentenced murderers is constitutionally immaterial and provides no basis for the exercise of this Court's certiorari jurisdiction. If this Court were to require complete conformity with its jurisprudence on this issue no Florida death-sentenced inmate would be entitled to retroactive application of *Hurst*.

Moreover, in *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court's holding was clear. "Florida's sentencing scheme, which required the judge alone to find the existence of an *aggravating circumstance*" violated the Sixth Amendment's right to a jury trial. *Hurst*, 136 S. Ct. at 624 (emphasis added). There is no *Hurst v. Florida* error, as defined by this Court, in Taylor's case.

Taylor's jury found him guilty of sexual battery beyond a reasonable doubt and unanimously. That finding has been affirmed repeatedly. Consequently, Taylor's death sentence satisfies the requirements of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring*, and *Hurst v. Florida*. *See also Jenkins v. Hutton*, 137 S.

Ct. 1769, 1772 (2017) (noting Hutton's guilt-phase jury necessarily found the existence of aggravating factors.) *Waldrop v. Comm'r, Alabama Dept. of Corr.*, 711 Fed. Appx. 900 (11th Cir. 2017) (unpublished) (In rejecting a *Hurst* claim the court explained: "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.")

Furthermore, this Court has never overturned, and has repeatedly reaffirmed, *Apprendi*'s recidivism exception, relying on the holding of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). There, this Court stated that a prior conviction does not require additional fact-finding by a subsequent jury. *See James v. United States*, 550 U.S. 192, 214 n.8 (2007) (noting that prior convictions need not be treated as an element of the offense for Sixth Amendment purposes.); *See also Cunningham v. California*, 549 U.S. 270 (2007) (noting *Apprendi's* recidivism exception); *Jones v. United States*, 526 U.S. 227, 249 (1999) (explaining that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees"). Taylor was convicted of sexual battery in 1982. That conviction was used as

an aggravator in imposing the death sentence. *Taylor*, 246 So. 3d at 241 n6 (Canady, J. specially concurring). Therefore, there is not error as contemplated by this Court's jurisprudence.

In conclusion, there is no conflict between the Florida Supreme Court's retroactivity decision and this Court's Fifth, Sixth, Eighth or Fourteenth Amendment jurisprudence. Nor is there any conflict between the Florida Supreme Court's decision and that of any other federal appellate or state supreme court. Finally, there is no underlying constitutional error under the facts of this case. Certiorari review should be denied.

ISSUE II

THERE IS NO COMPELLING REASON FOR THIS COURT TO REVIEW THE FLORIDA SUPREME COURT'S STATE-LAW BASED CONCLUSION THAT *HURST V. STATE* AND *HURST V. FLORIDA* IS NOT RETROACTIVE TO THE DATE OF THIS COURT'S *CALDWELL V. MISSISSIPPI* DECISION.

Taylor's certiorari petition invites this Court to engage in a fact-specific review of his rejected *Caldwell* claim. In his successive postconviction motion in state court, Taylor sought to present testimony of Dr. Harvey Moore, Ph.D. to support his *Caldwell v. Mississippi* claim. After allowing Taylor to proffer Dr. Moore's testimony, the postconviction court granted the State's motion to strike Taylor's witness and exhibit list. Thereafter, the postconviction court summarily denied all claims. *Accordingly, it is inappropriate for Taylor to include*

in this petition Dr. Moore's testimony, reports, opinions, or conclusions.

Further, Taylor's argument is based on state-law based retroactivity of *Hurst v. Florida* and *Hurst v. State* and this Court's decision in *Caldwell*. This Court has never held that *Hurst v. Florida*, which is based nearly entirely on the Sixth Amendment, is retroactive. Indeed, this Court has already stated that neither *Ring* nor *Apprendi v. New Jersey,* 530 U.S. 466 (2000), which are precursors of *Hurst*, are retroactive. *Schriro*, 542 U.S. 348; *See also Blakely v. Washington*, 542 U.S. 296, 323 (2004) (stating "*Ring* (and *a fortiori Apprendi*) does not apply retroactively . . . .").

Therefore, pursuant to this Court's jurisprudence, there can be no federally based "*Hurst*-induced *Caldwell* claims." The fact that a state court has held, as a matter of state law, that a decision of this Court and a later related state supreme court decision are partially retroactive, does not provide a basis for this Court to address tangentially related constitutional claims. This Court has repeatedly recognized that where a state court judgment rests on adequate and independent state law grounds, the Court's jurisdiction fails. *Fox Film Corporation v. Muller*, 296 U.S. at 210; *Michigan v. Long*, 463 U.S. at 1038. *Florida v. Powell*, 559 U.S. at 57 (stating that if a state

court's decision is based on separate state law, this Court "of course, will not undertake to review the decision.") Indeed, this Court has already denied certiorari in cases alleging similar "*Hurst*-induced *Caldwell* claims." *See Kaczmar v. Florida*, 138 S. Ct. 1973 (2018); *Reynolds v. Florida*, 139 S. Ct. 27 (2018).

This Court's decision in *Caldwell*, as elucidated in *Romano v. Oklahoma*, 512 U.S. 1 (1994), is straightforward. A capital penalty-phase jury should not be *misled* regarding the role it plays in the sentencing process; and the jury's responsibility in determining an appropriate sentence should not be *diminished*. A *Caldwell* error, therefore, has two interrelated components. First, a jury must be misled by jury instructions, prosecutor argument, or judicial comments. Second, they must be misled in a way that diminished their role in the process. Taylor's jury was properly instructed regarding its role in the sentencing process according to state law as it existed at the time of his penalty phase.

Taylor again asks this Court to intervene in state law and force the Florida Supreme Court to hold that *Hurst v. State* is retroactive to at least this Court's decision in *Caldwell v. Mississippi*. This is well outside of this Court's certiorari review. Nothing about the Florida Supreme Court's retroactivity

decision is inconsistent with the United States Constitution. Taylor does not provide any compelling reason for this Court to review his case. U.S. Sup. Ct. R. 10. He cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision that he is not entitled to relief because *Hurst v. State* was not retroactive to his death sentence. Nothing presented in the petition justifies the exercise of this Court's certiorari jurisdiction.

Furthermore, federal courts, have consistently rejected *Caldwell* challenges to Florida's jury instructions in capital cases in the years since *Romano v. Oklahoma*, 512 U.S. 1 (1994). As the Eleventh Circuit has explained, the infirmity identified in *Caldwell* is "simply absent" in a case where "the jury was not affirmatively misled regarding its role in the sentencing process." *Davis v. Singletary*, 119 F.3d 1471, 1481-82 (11th Cir. 1997) (*quoting Romano*, 512 U.S. at 9); *See also Johnston v. Singletary*, 162 F.3d 630, 642-44 (11th Cir. 1998); *Belcher v. Sec'y, Fla. Dept. of Corr.*, 427 Fed. Appx. 692, 695 (11th Cir. 2011). While these cases were decided before *Hurst v. Florida* nothing in *Hurst v. Florida* impacts any of the Eleventh Circuit's analysis in these cases.

Other federal circuit courts have also held that the use of the words "advisory" or "recommendation" does not violate

Caldwell when it accurately reflects state law. *Lorraine v. Coyle*, 291 F.3d 416, 446 (6th Cir. 2002); *Bowling v. Parker*, 344 F.3d 487, 514-15 (6th Cir. 2003); *Fleenor v. Anderson*, 171 F.3d 1096, 1098-99 (7th Cir. 1999); *Wilson v. Sirmons*, 536 F.3d 1064, 1121 (10th Cir. 2008).

Taylor cites to no federal circuit court case or state supreme court case holding to the contrary. There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals or that of any state supreme court. Therefore, this Court should deny review of this issue.

ISSUE III

TAYLOR ASKS THIS COURT TO GRANT CERTIORARI RELIEF TO ADDRESS CASE SPECIFIC FACTS THAT HE CONTESTS AND THAT DO NOT INVOLVE PRINCIPLES IMPORTANT TO THE PUBLIC AS OPPOSED TO THE PARTIES.

Taylor seeks this Court's review regarding case specific factual findings related to the alleged recantation of the medical examiner's testimony. The law is well-settled that this Court does not grant certiorari "to review evidence and discuss specific facts." *Johnston*, 268 U.S. at 227. This Court is "consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349

U.S. 70, 79, 75 S. Ct. 614 (1955). Accordingly, Taylor's request for certiorari review must be rejected.

State and federal courts have rejected Taylor's arguments that the medical examiner recanted his testimony. State and federal courts have also rejected Taylor's arguments that the alleged recantation is newly discovered evidence. Finally, state and federal courts have rejected Taylor's argument that the alleged recantation would have changed the results of his trial. The Florida Supreme Court specifically noted that the evidence presented by the state supported both felony murder and premeditated murder theories. These findings are not plainly erroneous. *Kyles v. Whitley*, 514 U.S. 419, 456 (1995) *citing Jones*, 268 U.S. at 227 (Scalia, Kennedy, Thomas J. dissenting) ("The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally [i.e., except in cases of the plainest error] be denied."). Taylor does not present this Court with any compelling reason to deviate from its longstanding precedent of rejecting party-specific, fact-bound claims of error.

Additionally, in affirming the denial of Taylor's successive postconviction motion, the Florida Supreme Court rejected this claim based on a state law time bar. Therefore,

the decision is based on an adequate and independent state law basis. As such, this Court's jurisdiction fails. *Fox Film Corp.* 296 U.S. at 210; *Long*, 463 U.S. at 1038. This Court should not grant certiorari review.

CONCLUSION

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

Respectfully submitted,

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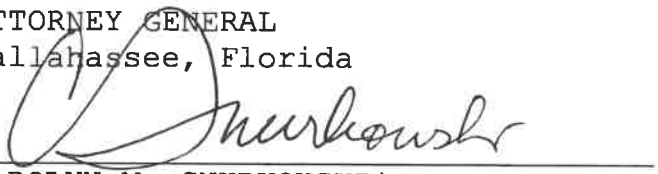

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