CASE NO. 18-6776

IN THE SUPREME COURT OF THE UNITED STATES

DUANE EUGENE OWEN,

***Petitioner*,**

vs.

STATE OF FLORIDA,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

ASHLEY BROOKE MOODY
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General

CELIA TERENZIO
Chief Assistant Attorney General
Counsel of Record
Office of the Attorney General
1515 N Flagler Dr. Suite 900
West Palm Beach, Florida 33401
Telephone: (561) 268-5315
Celia.Terenzio@myfloridalegal.com

COUNSEL FOR RESPONDENT

[Capital Case]

QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari review where the retroactive application of *Hurst v. Florida* and *Hurst v. State* is based on adequate independent state grounds, was constitutionally sound and does not otherwise raise an important federal question.

TABLE OF CONTENTS

TABLE OF CITATIONS

Federal Cases

State Cases

Statutes

Rules

CITATION TO OPINION BELOW

The opinion of the Florida Supreme Court is reported at *Owen v. State*, 247 So. 3d 394 (Fla. 2018).

JURISDICTION

The judgment of the Florida Supreme Court was entered on June 26, 2018 and the mandate issued July 12, 2018. Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE

Owen was tried and convicted for the first-degree murder of G.W.; burglary with a weapon; and sexual battery. Following the penalty phase presentation, the jury recommended death by a vote of 10-2. The trial court found the four following aggravators: "the defendant was previously convicted of another capital felony or felony involving the use of threat or violence to another person"; "the crime was committed while the defendant was engaged in a burglary and a sexual battery"; "the crime for which he is sentenced was especially wicked, evil,

atrocious and cruel"; "the crime was committed in a cold, calculated, and premediated manner". (ROA 4951-4954). Based on the weight and strength of the aggravators in comparison to the weak mitigation, the trial court sentenced Owen to death. *Owen v. State,* 596 So. 2d 985 (Fla. 1992). The Florida Supreme Court, on January 23, 1992 affirmed the convictions and death sentence, and rehearing was denied on April 1, 1992. *Owen, supra.* This Court denied *certiorari review* on October 13, 1992. *See Owen v. Florida*, 506 U.S. 924 (1992).

Since his 1992 direct appeal, Owen filed two motions for postconviction relief *See Owen v. State*, 773 So. 2d 510 (Fla. 1994) and *Owen v. State*, 854 So. 2d 182, 276 (Fla. 2004). Owen also filed a federal habeas petition, which was denied by the district court and the ruling was affirmed on May 18, 2009. *Owen v, Florida DOC*, 568 F.3d 894 (11th Cir. 2009). Lastly, Owen filed a second successive motion on January 6, 2017, raising a challenge to his capital sentence based on *Hurst v. Florida,* 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The trial court, relying on *Asay v. State,* 210 So. 3d 1 (Fla. 2016); *Hitchcock v. State,* 226 So. 3d 216 (Fla. 2017); and *Asay v. State,* 224 So. 3d 695 (Fla. 2017), found that because Owen's sentence was final in 1992, he was precluded from relying on either *Hurst* opinion for relief and the motion was summarily denied. That finding was upheld on appeal. *Owen v. State,* 247 So. 3d

394 (Fla. 2018). This petition follows.

REASONS FOR DENYING THE WRIT

Certiorari review should be denied because the Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florida* and *Hurst v. State* relies on state law that the *Hurst* cases are not retroactive to defendants whose death sentences were final when this Court decided *Ring v. Arizona*, the state court's ruling does not violate the Eighth or Fourteenth Amendments, does not conflict with any decision of this Court, nor involve an important, unsettled question of federal law.

Following this Court's ruling in *Hurst v. Florida*, 136 S. Ct. 616 (2016) (herein *Hurst I)*, requiring that aggravating circumstances be found by a jury beyond a reasonable doubt before a death sentence may be imposed, the Florida Supreme Court rendered *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (herein *Hurst II*), *cert. denied*, 137 S. Ct. 2161 (2017). In *Hurst II,* the Florida Supreme Court expanded *Hurst I*, by requiring that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst II*, 202

So. 3d at 57. The Florida Supreme Court then determined that *Hurst I* and *Hurst II* are not retroactive to those capital cases that were final on direct appeal prior to this Court decision in *Ring v. Arizona,* 536 U.S. 584 (2002). *See Asay v. State,* 210 So. 3d 1 (Fla. 2016); *Hitchcock v. State,* 226 So. 3d 216 (Fla. 2017); *Asay v. State,* 224 So. 3d 695 (Fla. 2017). Because Petitioner's case was final in 1992, he was foreclosed from seeking relief under *Hurst I* and *Hurst II. See Owen v. State,* 247 So. 3d 394 (Fla. 2018). Owen now seeks review of that decision claiming that the state court's holding with respect to the retroactive application of *Hurst I* and *Hurst II* violates the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection.

Significantly, Owen does not allege that the Florida Supreme Court's decision conflicts with a decision from any other state court of last review, nor does he allege that the decision conflicts with any federal appellate court. To the contrary, Owen admits that the retroactivity analysis herein on its face is proper. (*See* Petition at 6.) Instead, the pith of his argument is that the Florida Supreme Court's retroactivity analysis was unconstitutionally arbitrary and capricious because Owen, and all other pre-*Ring* capital defendants, "deserve" retroactive application of *Hurst I* and *Hurst II.* He argues that pre-*Ring* defendants, like

himself, have "suffered" long enough on death row, and they have demonstrated an ability to adjust to a prison environment. (*See* Petition at 17-18.) He further speculates that when pre-*Ring* cases are viewed "generically" rather than individually on a case by case basis, one can assume, "that some inmates condemned to die before *Ring* would receive less then capital sentences today." (*See Id.* at 20.) In other words, Owen believes that pre-*Ring* defendants have earned the right to obtain the benefit of *Hurst II* because odds are that some of these defendants would receive life sentences if their sentencing hearings were conducted today pursuant to the new procedures announced in *Hurst II.*

Owen's arguments are not supported by fact and more importantly they are not supported by any legal precedent or authority that would justify federal review by this Court. In short, review must be denied as the retroactivity analysis conducted by the Florida Supreme Court in *Hurst II* is based on adequate and independent state grounds. And, as detailed more fully below, the analysis was constitutionally sound and does not implicate any violation of the Eighth or Fourteenth Amendments. As such, Petitioner has failed to provide any "compelling" reason for this Court to review his case. *See* Sup. Ct. R. 10.

The dispositive and fatal procedural impediment to Owen's request for review is the fact that the Florida Supreme Court's determination of the retroactive

application of *Hurst II* under the "state law *Witt* standard" is based on adequate and independent state grounds and is not violative of federal law or this Court's precedent. *See Danforth v. Minnesota*, 552 U.S. 264 (2008) (recognizing that a state court's retroactivity determination is a matter of state law rather than federal law). 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); *see also Michigan v. Long,* 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."); *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). 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); *Long*, 463 U.S. at 1041. Because the Florida Supreme Court's retroactive application of *Hurst I* and *Hurst II* is based on adequate and independent state

grounds, certiorari review should be denied. Owen never addresses this fatal flaw in his request for federal review.

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 II See, e.g., Asay, supra*; *Hitchcock, supra*; *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*, 17-8540, 138 S. Ct. 2657 (2018); *Kaczmar v. State,* 228 So. 3d 1 (Fla. 2017), *cert. denied*, 138 S. Ct. 1973 (2018); *Zack v. State*, 228 So. 3d 41 (Fla. 2017), *cert. denied*, 138 S. Ct. 2653 (2018). Petitioner offers no persuasive, much less compelling reasons, for this Court to reverse course and grant review of his case.

Irrespective of the procedural deficiency detailed above, Owen loses on the merits as well because the Florida Supreme Court's analysis is constitutionally sound. To put the Florida Supreme Court's analysis in context, this Court has previously determined that *Ring*, and by extension *Hurst I* has been held not to be retroactive under federal law. *See Schriro v. Summerlin,* 542 U.S. 348, 358 (2004) (holding that pursuant to *Teague,* "Ring announced a new procedural rule that

does not apply retroactively to cases already final on direct review"); *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 872 F.3d 1170, 1182-83 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 312 (2017) (noting that "[n]o U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable"). *Cf. Whorton v. Bockting,* 549 U.S. 406, 416 (2007) (applying the normal rule of non-retroactivity leads to conclusion that *Crawford v. Washington,* is not retroactive). Therefore, based on this Court's current precedent, Owen cannot possibly claim he is constitutionally entitled to application of the *Hurst* decisions.[1]

To make matters worse for Owen, is the fact that Florida has implemented a test which provides relief to a **broader** class of individuals in applying *Witt* instead of *Teague* for determining the retroactivity of *Hurst. See Asay* 210 So. 3d at 15(noting Florida's *Witt* analysis for retroactivity provides, "*more expansive retroactivity standard" than the federal standards articulated in* Teague v. Lane*) (emphasis in original). See also Danforth, supra,* 552 U.S. at 280-81 *(emphasis in original)*; *Teague v. Lane*, 489 U.S. 288 (1989)(explaining that "finality of state

[1] Lower federal courts have had little trouble determining that *Hurst I*, like *Ring*, is not retroactive at all under *Teague. See Lambrix v. Sec'y, Fla. Dep't of Corr.,* 851 F.3d 1158, 1165 n.2 (11th Cir. 2017) ("under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review"), *cert. denied*, 138 S. Ct. 217 (2017); *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a *Hurst v. Florida* claim concluding that *Hurst v. Florida* did not apply retroactively).

convictions is a *state* interest, not a federal one," states are permitted to implement standards for retroactivity that grant "relief to a broader class of individuals than is required by *Teague*," which provides the federal test for retroactivity); *Johnson v. New Jersey*, 384 U.S. 719, 733 (1966) ("Of course, States are still entirely free to effectuate under their own law stricter standards than we have laid down and to apply those standards in a broader range of cases than is required by this [Court]."). Consequently, Owen's general "unfairness" challenge to the state court's retroactivity test, a test that is more generous than its federal counterpart is completely futile. Unquestionably, extending relief to more individuals, defendants who would not receive the benefit of a new rule under the pipeline concept because their cases were already final when *Hurst I* was decided, cannot violate the Eighth or Fourteenth Amendment.

A review of the Florida Supreme Court's analysis reveals a very thoughtful and rational determination. The state's highest court analyzed the retroactive application of *Hurst II* in *Mosley v. State,* 209 So. 3d 1248, 1276-83 (Fla. 2016), and *Asay, supra* 210 So. 3d at 15-22. As noted above, in determining whether *Hurst II* should be retroactively applied to Mosley, the Florida Supreme Court conducted a "*Witt* analysis", the state-based test for retroactivity. *See Witt v. State*,

387 So. 2d 922, 926 (Fla. 1980) (determining whether a new rule should be applied retroactively by analyzing the purpose of the new rule, extent of reliance on the old rule, and the effect of retroactive application on the administration of justice) (citing *Stovall v. Denno*, 388 U.S. 293, 297 (1967); *Linkletter v. Walker*, 381 U.S. 618 (1965)).

The Florida Supreme Court determined that all three *Witt* factors weighed in favor of retroactive application of *Hurst II* to cases which became final post-*Ring*. *Mosley*, 209 So. 3d at 1276-83. The court concluded that "defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring* should not be penalized for the United States Supreme Court's delay in explicitly making this determination."[2] *Id.* at 1283. The only difference between this more traditional type of retroactivity and the retroactivity implemented by the Florida Supreme Court is that it stems from the date of the decision in *Ring* rather than from the date of the decision in *Hurst I*. In moving the line of retroactive

---

[2] Of course, the gap between this Court's rulings in *Ring* and *Hurst I* may be fairly explained by the fact that the Florida Supreme Court properly recognized, in the State's view, that a prior violent felony or contemporaneous felony conviction took the case out of the purview of *Ring*. *See Ellerbee v. State*, 87 So. 3d 730, 747 (Fla. 2012) ("This Court has consistently held that a defendant is not entitled to relief under *Ring* if he is convicted of murder committed during the commission of a felony, or otherwise where the jury of necessity has unanimously made the findings of fact that support an aggravator.") (string citations omitted). *Hurst v. Florida* presented this Court with a rare "pure" *Ring* case, that is a case where there was no aggravator supported either by a contemporaneous felony conviction or prior violent felony. Accordingly, this Court's opinion in *Hurst I* should have been read by the Florida Supreme Court following remand as a straight forward application of *Ring* under the facts presented.

application back to *Ring*, the Florida Supreme Court reasoned that because Florida's death penalty sentencing scheme should have been recognized as unconstitutional upon the issuance of the decision in *Ring*, defendants should not be penalized for time that it took for this determination to be made official in *Hurst I.* Thus, the Florida Supreme Court held *Hurst II t*o be retroactive to Mosley, whose case became final in 2009, which is post-*Ring. Id.* In *Mosley*, the Court held that *Hurst II* is retroactive to cases which became final after this Court's decision in *Ring v. Arizona,* 536 U.S. 584 (2002), on June 24, 2002. *Mosley*, 209 So. 3d at 1283. [3]

Certainly, the Florida Supreme Court has demonstrated "some ground of difference that rationally explains the different treatment" between pre-*Ring* and post-*Ring* cases. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *see also Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (To satisfy the requirements of the Fourteenth Amendment, "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be

[3] In spite of Owen's challenge herein, ironically Florida is a clear outlier for giving **any** retroactive effect to an *Apprendi/Ring* based error. As explained by the Eighth Circuit in *Walker v. United States*, 810 F.3d 568, 575 (8th Cir. 2016), the consensus of judicial opinion flies squarely in the face of giving any retroactive effect to an *Apprendi* based error. *Apprendi's* rule "recharacterizing certain facts as offense elements that were previously thought to be sentencing

treated alike."). Thus, just like the more traditional application of retroactivity, the *Ring*-based cutoff for the retroactive application of *Hurst I* is not in violation of the Eighth or Fourteenth Amendment. The retroactivity ruling made in this case does not conflict with any of this Court's precedent or present this Court with a significant or important unsettled question of law. Accordingly, certiorari should be denied.

Conversely, applying the *Witt* analysis in *Asay, supra*, the Florida Supreme Court held that *Hurst II* is not retroactive to any case in which the death sentence was final pre-*Ring*. The court specifically noted that *Witt* "provides *more expansive retroactivity standards* than those adopted in *Teague.*" *Asay*, 210 So. 3d at 15 *(emphasis in original)* (quoting *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005)). The court determined that prongs two and three of the *Witt* test, reliance on the old rule and effect on the administration of justice, weighed heavily against the retroactive application of *Hurst II* to pre-*Ring* cases. *Asay*, 210 So. 2d at 20-22. As related to the reliance on the old rule, the court noted "the State of Florida in prosecuting these crimes, and the families of the victims, had extensively relied on the constitutionality of Florida's death penalty scheme based on the decisions of the United States Supreme Court. This factor weighs heavily against retroactive

---

factors" does not lay "anywhere near that central core of fundamental rules that are absolutely

application of *Hurst I* to this pre-*Ring* case." *Id.* at 20. With respect to the effect on the administration of justice, the court noted that resentencing is expensive and time consuming and that the interests of finality weighed heavily against retroactive application. *Id.* at 21-22. Thus, the Florida Supreme Court held that both *Hurst I* and *II* were not retroactive to Asay because his judgment and sentence became final in 1991, pre-*Ring*. *Id.* at 8, 20.

Since *Asay,* the Florida Supreme Court has continued to apply *Hurst II* retroactively to all post-*Ring* cases and declined to apply it retroactively to all pre-*Ring* cases. *See Hitchcock, supra*; *Lambrix, supra; Hannon, supra; Branch, supra.* Contrary to Petitioner's argument, the distinction between cases which were final pre-*Ring* versus cases which were final post-*Ring* is neither arbitrary nor capricious.

Owen's complaint is nothing more than dissatisfaction with the outcome of the state court's retroactivity analysis, as he has not presented any legitimate argument regarding the process itself. Any retroactive application of a new development in the law under any analysis will mean some cases will get the benefit of a new development, while others will not, depending on a date.[4]

---

necessary to insure a fair trial."

[4] This partial retroactivity as applied by the Florida Supreme Court for *Hurst II,* is constitutionally permissible. *See Dorsey v. United States,* 567 U.S. 260 (2012) (upholding as

Drawing a line between newer cases that will receive the 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 others based on the age of the case. This is not arbitrary and capricious nor a violation of the Eighth Amendment; it is simply a fact inherent in the retroactivity analysis and does not form a basis for federal review.

Next, Owen makes a very cursory and boiler plate claim that precluding application of *Hurst II* to himself and all other pre-*Ring* defendants, violates the Equal Protection Clause. Owen is wrong. "The Equal Protection Clause of the Fourteenth Amendment 'is essentially a direction that all persons similarly situated should be treated alike.'" *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). 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 criminal defendant alleging an equal protection violation must prove the existence of purposeful discrimination"). A "'[d]iscriminatory purpose' ... implies more than intent as volition or intent as

---

constitutional the partial retroactivity of the new Fair Sentencing Act premised on whether a defendant was sentenced prior to or subsequent to the act).

awareness of consequences. It implies that the decisionmaker, in this case a state legislature, 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." *McCleskey*, 481 U.S. at 298. Here, Petitioner is being treated exactly the same as similarly situated murderers.

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 defendants in general, and Owen specifically, relief under *Hurst II*. The Florida Supreme Court has been consistent in denying *Hurst* relief to those defendants whose convictions and sentences were final when *Ring* was issued in 2002. Owen is being treated the same as similarly situated capital defendants. Hence, his equal protection argument fails and certiorari should be denied. *Cf. Beck v. Washington*, 369 U.S. 541 (1962)(explaining that alleged misapplication of Washington law by Washington courts is not a constitutional error: "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . .' Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Id.* at 554-55) (citation omitted).

Equally without merit is his claim that pre-*Ring* capital sentences emanated from a process that was unreliable and fret with fact-finding problems which can only lead to the conclusion that his sentence was the result of chance. (*See* Petition at 22). Again, Petitioner's argument is not based on fact or law. Owen's death sentence is neither unfair nor unreliable because the judge imposed the sentence in accordance with the law existing at the time of his trial. Owen cannot establish that his sentencing procedure was less accurate than future sentencing procedures employing the new standards announced in *Hurst I* or *Hurst II.* Just like *Ring* did not enhance the fairness or efficiency of death penalty procedures, neither does *Hurst I* nor *Hurst II.* As this Court has explained, "for every argument why juries are more accurate factfinders, there is another why they are less accurate." *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004). Thus, because the accuracy of his death sentence is not at issue, fairness does not demand retroactive application of *Hurst I.*

Certainly, other than speculation, Owen has neither identified nor established any particular lack of reliability in the proceedings used to impose his death sentence. And, multiple courts including this Court have explicitly rejected this argument. *See Hughes v. State,* 901 So. 2d 837, 844 (Fla. 2005) (holding that *Apprendi* is not retroactive and noting that "neither the accuracy of convictions

nor of sentences imposed and final before *Apprendi* issued is seriously impugned"; *Rhoades v. State,* 233 P. 3d 61, 70-71 (2010) (holding that *Ring* is not retroactive after conducting its own independent *Teague* analysis and observing, as this Court did in *Summerlin*, that there is debate as to whether juries or judges are the better fact-finders and that it could not say "confidently" that judicial factfinding "seriously diminishes accuracy.")

Additionally, it must be noted that the Florida Supreme Court has previously found **in this case** *Ring* was satisfied where aggravating factors were established by prior violent felonies and contemporaneous felonies. *Owen*, 854 So. 2d 182 at 192. That finding is still good law as even after *Hurst I* and *Hurst II,* the Florida Supreme Court has reaffirmed that analysis. *See King v. State*, 211 So. 3d 891 (Fla. Jan. 2017)(recognizing that prior/simultaneous conviction which forms the basis of subsequent aggravator insulates death sentence from *Ring* claim under *Almendarez-Torres.*). The Florida Supreme Court continued to uphold this exception to *Ring* stating unless and until this Court states otherwise. *King, supra* at 891 n. 7.

Finally, Owen presents a cursory one paragraph argument that the sentencing procedure used in his case violated this Court's ruling in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), because the jury was given instructions that

informed the jury its death recommendation was merely advisory. However, this case would be a uniquely inappropriate vehicle for certiorari because this is a post-conviction case and this Court would have to address retroactivity before even reaching the underlying jury instruction issue. This matter does not merit this Court's review.

Aside from the question of retroactivity, it is clear there was no *Caldwell* violation in this case. In order to establish constitutional error under *Caldwell*, a defendant must show that the comments or instructions to the jury "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994).

Owen's jury was properly instructed on its role based on the law existing at the time of his trial. It would have been impossible for the jury to have been instructed in accordance with a constitutional change in the law that occurred decades after the trial. *See Reynolds v. State*, 251 So. 3d 811 (Fla. 2018) (explaining that under *Romano,* the Florida standard jury instruction at issue "cannot be invalidated retroactively prior to *Ring* simply because a trial court failed to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts").

Owen's jury was informed that its recommendation would be given "great weight" by the trial court and that only in "rare circumstances" would the court "impose a sentence other than what you recommend." (ROA 6982-6991). This claim, similar to all of his other claims, is based on pure speculation. There is nothing in the record to support the proposition that the jury's sentencing responsibility was diminished. The jury knew and understood their great responsibility in reviewing the evidence and rendering a sentencing recommendation. (ROA 4345-4346). There was no improper or incorrect statement regarding the jury's role in this case. Because entitlement to relief under *Caldwell* requires that the prosecutor, judge, or jury instructions misrepresent the jury's role in sentencing, relief herein must be denied. *See Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986) (rejecting a *Caldwell* attack, explaining that "*Caldwell i*s relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision"). The Florida Supreme Court's decision to summarily deny relief without comment is not contrary to *Caldwell* and does not presents this Court with a basis for review.

Regardless of application of *Hurst I* or *Hurst II,* a Florida jury's decision regarding a death sentence was, and still remains, an advisory recommendation;

therefore, there was no violation of *Caldwell. See Dugger v. Adams*, 489 U.S. 401 (1989). Because Owen's jury was accurately advised that its decision was an advisory recommendation that would be accorded "great weight," there is no basis for review.

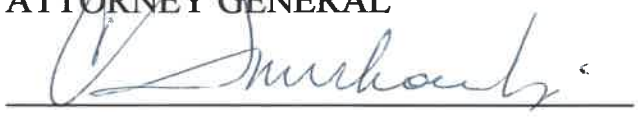
In conclusion, the Florida Supreme Court's determination of the retroactive application of *Hurst I* and *Hurst II* under *Witt v. State,* 387 So. 2d 922 (Fla. 1980), is based on an independent state ground and is not violative of federal law or this Court's precedent. *Hurst I* did not announce a substantive change in the law and is not retroactive under federal law. Nothing in the petition justifies the exercise of this Court's certiorari jurisdiction.

CONCLUSION

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

Respectfully submitted,

ASHLEY BROOKE MOODY
ATTORNEY GENERAL



CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General

CELIA TERENZIO
Chief Assistant Attorney General
**Counsel of Record*
Florida Bar No. 0656879
Office of the Attorney General
1515 N. Flagler Dr Suite 900
West Palm Beach, Florida 33401
Telephone: (561) 268-5315
Celia.Terenzio@myfloridalegal.com
E-Service: capapp@myfloridalegal.com

COUNSEL FOR RESPONDENT