CASE NO. 18-6843

IN THE SUPREME COURT OF THE UNITED STATES

JAMES MILTON DAILEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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[CAPITAL CASE]

QUESTIONS PRESENTED FOR REVIEW

I. Whether, following *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court's application of state law that resulted in a decision that limited the retroactive application of Florida's amended procedural rules complies with the Eighth and Fourteenth Amendments.

II. Whether the Supremacy Clause applies to prevent Florida, as a matter of state law, from giving limited retroactive application to its recently amended sentencing procedures.

III. Whether this Court should accept review of Dailey's claim——that was never presented to, or addressed by, the Florida Supreme Court——that the Florida Supreme Court's harmless-error analysis violates *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

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The opinion of the Florida Supreme Court is reported at *Dailey v. State*, 247 So. 3d 390 (Fla. 2018).

JURISDICTION

The judgment of the Florida Supreme Court was entered on June 26, 2018, and the mandate issued July 12, 2018. Petitioner, James Milton Dailey, invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257. While this statutory provision sets out the scope of this Court's certiorari jurisdiction, it is Respondent's position that this case is inappropriate for the exercise of this Court's discretionary jurisdiction. The Florida Supreme Court's opinion does not involve an important or unsettled question of federal law, nor does it conflict with the decision of another state court of last resort, a United States court of appeals, or this Court. Sup. Ct. R. 10. The Florida Supreme Court's decision in this case is based on adequate and independent state grounds, and thus, there is no compelling reason to grant Petitioner's petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be

> bound thereby, and Thing in the Constitution or laws of any State to the Contrary notwithstanding.

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

The Sixth Amendment to the United States Constitution:

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

U.S. Const. Amend. VI.

The Eighth Amendment to the United States Constitution:

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

U.S. Const. Amend. VIII.

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

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

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE AND FACTS

Petitioner, James Dailey, is under a sentence of death for the 1985 murder of a fourteen-year-old victim, S.B. *Dailey v. State*, 594 So. 2d 254, 255 (Fla. 1991). S.B.'s nude body was found floating in the water in the early hours of the morning after she had been out with Dailey. *Id.* She had been stabbed, strangled, and drowned. *Id.*

Dailey was sentenced after a jury unanimously recommended a sentence of death. *Dailey*, 594 So. 2d at 256. The trial court found the following circumstances in aggravation: previous conviction of a violent felon, commission during a sexual battery, commission to avoid arrest, the murder was especially heinous, atrocious, or cruel ("HAC"), and the murder was committed in a cold, calculated, and premeditated manner ("CCP"). Dailey requested the death penalty at sentencing, and the court complied by following the recommendation of the unanimous jury after finding the five aggravating factors and no mitigation. *Dailey*, 594 So. 2d at 256.

Dailey appealed his conviction and sentence to the Florida Supreme Court, and the court affirmed Dailey's first-degree murder conviction but reversed his sentence of death and remanded for resentencing. *Dailey v. State*, 594 So. 2d 254 (Fla. 1991). The court found error in the trial judge's finding of the avoid

arrest and CCP aggravators, the judge's failure to consider mitigating factors presented by Dailey, and the judge's improper consideration of evidence presented at the codefendant's trial. *Id.* at 259.

As a result, the case was remanded, and Dailey was resentenced to death by the trial judge. *Dailey v. State*, 659 So. 2d 246, 247 (Fla. 1995). The judge found the following three aggravating circumstances: (1) prior violent felony conviction; (2) murder during the course of a sexual battery; and (3) HAC, and the judge found numerous mitigating circumstances. *Id.* The Florida Supreme Court affirmed Dailey's sentence of death. *Id.* at 248. Dailey's sentence became final when this Court denied certiorari review of his case January 22, 1996. *Dailey v. Florida*, 516 U.S. 1095 (1996).

The denial of his initial postconviction motion was subsequently affirmed by the Florida Supreme Court. *Dailey v. State*, 965 So. 2d 38 (Fla. 2007). Dailey filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, in United States District Court, Middle District of Florida, and his claims were either dismissed or denied. *Dailey v. Sec'y*, 2008 WL 4470016, at *1 (M.D. Fla. Sept. 30, 2008); *Dailey v. Sec'y, Florida Dept. of Corr.*, 2011 WL 1230812, at *32 (M.D. Fla. Apr. 1, 2011), *amended in part, vacated in part,* 2012 WL 1069224 (M.D.

Fla. Mar. 29, 2012).

Dailey's successive motion for postconviction relief filed in state court sought relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), as interpreted in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). The postconviction court denied relief, and on appeal, the Florida Supreme Court issued an order directing Dailey to show cause why the court's decision in *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 512 (2017), should not be dispositive in Dailey's case. In *Hitchcock*, the Florida Supreme Court reaffirmed its previous holding in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), in which it held that *Hurst v. Florida* as interpreted by *Hurst v. State* is not retroactive to defendants whose death sentences were final when this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). Following briefing, the Florida Supreme Court ultimately affirmed the lower court's denial of relief, finding that *Hurst v. State* does not apply retroactively to Dailey's sentence of death that became final in 1996. *Dailey v. State*, 247 So. 3d 390, 390-91 (Fla. 2018).

Dailey also filed a second successive motion for postconviction relief in state court that was denied. The appeal is currently pending before the Florida Supreme Court. (*Dailey v.*

State, SC 18-557).

Dailey now seeks certiorari review of the Florida Supreme Court's decision denying *Hurst v. State* relief.

REASONS FOR DENYING THE WRIT

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE THE FLORIDA SUPREME COURT'S RULING ON THE RETROACTIVITY OF *HURST V. FLORIDA*, 136 S. Ct. 616 (2016), AND *HURST V. STATE*, 202 So. 3d 40 (FLA. 2016), 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*, 536 U.S. 584 (2002), AND THE COURT'S RULING DOES NOT VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENTS OR THIS COURT'S RULING IN *CALDWELL*, NOR DOES IT CONFLICT WITH ANY DECISION OF THIS COURT OR INVOLVE AN IMPORTANT, UNSETTLED QUESTION OF FEDERAL LAW.

Petitioner Dailey seeks certiorari review of the Florida Supreme Court's opinion denying retroactive application of *Hurst v. State,* which expands this Court's ruling in *Hurst v. Florida*, to his sentence of death. The Florida Supreme Court's denial of the retroactive application of *Hurst* relief to Dailey's case is based on adequate and independent state grounds; it is not in conflict with any other state court of last review; and it is not in conflict with any federal appellate court. The decision is also not in conflict with this Court's jurisprudence on retroactivity, nor does it violate the Eighth or Fourteenth Amendments. Dailey has not provided any "compelling" reason for this Court to review his case. Therefore, certiorari review should be denied. *See* Sup. Ct. R. 10.

Respondent further notes that this Court has repeatedly denied certiorari to review the Florida Supreme Court's

retroactivity decisions following the issuance of *Hurst v. State*. *See, e.g., Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112 (Fla.), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505 (Fla.), *cert. denied*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548 (Fla.), *cert. denied*, 138 S. Ct. 1164 (2018); *Cole v. State*, 234 So. 3d 644 (Fla.), *cert. denied*, 2018 WL 1876873 (June 18, 2018); *Kaczmar v. State*, 228 So. 3d 1 (Fla. 2017), *cert. denied*, 2018 WL 3013960 (June 18, 2018); *Zack v. State*, 228 So. 3d 41 (Fla. 2017), *cert. denied*, 2018 WL 1367892 (June 18, 2018); *Jones v. State*, 234 So. 3d 545 (Fla.), *cert. denied*, 2018 WL 1993786 (June 25, 2018); *Jennings v. State*, 237 So. 3d 909 (Fla.), *cert. denied*, 139 S. Ct. 207 (2018); *Johnston v. State*, 246 So. 3d 266 (Fla.), *cert. denied*, 2018 WL 4191002 (U.S. Nov. 13, 2018). Certiorari should similarly be denied in this case.

I. The Florida Supreme Court's Ruling On Retroactivity Does Not Violate The Eighth or Fourteenth Amendments.

The Florida Supreme Court's holding in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017), followed this Court's ruling in *Hurst v. Florida* 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 went even further and developed a number of other changes not mentioned in *Hurst v. Florida*. Florida also now requires that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 57.

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, *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 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 decision to grant limited retroactive application of *Hurst v. State* is not constitutionally unsound and does not otherwise present a matter that merits the exercise of this Court's certiorari jurisdiction.

Florida's retroactivity test, announced in *Witt v. State,* 387 So. 2d 922, 926 (Fla. 1980), provides relief to a broader class of individuals than does *Teague v. Lane,* 489 U.S. 288 (1989) and Florida has, as a matter of state law, granted limited retroactivity to this Court's decision in *Hurst v. Florida*. Significantly, Florida's partial retroactive application of *Hurst v. Florida* is based on state law.

This Court has generally held that a state court's retroactivity determinations are a matter of state law rather than 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*. *Asay,* 210 So. 3d at 15. This Court has repeatedly recognized that its jurisdiction "fails" where a state court judgment rests on adequate and independent state law grounds. *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). Florida's retroactivity analysis is a matter of state law, and this Court should not exercise its judicial discretion in granting review.

Dailey specifically argues that the Florida Supreme Court's utilization of partial retroactivity is arbitrary and violative of the Eighth Amendment. Without citing to any authority, Dailey suggests that retroactivity rulings that "fix retroactivity cutoff at points in time other than the date of the new constitutional ruling" are limited by both the Eighth and Fourteenth Amendments. Petition at 7. Dailey's argument theorizes that a state court ruling that draws a temporal retroactivity cutoff "at any point" would be arbitrary, and thus he appears to conclude that anything other than traditional retroactivity rules are constitutional. Petition at 7. Not only is Dailey's argument unsupported, but it improperly characterizes the Florida Supreme Court's retroactivity ruling as one based on a random cutoff date

for retroactivity. The use of the date of the *Ring* opinion as a cutoff date for retroactivity is in no way random.

Significantly, if the Florida Supreme Court would have applied the traditional "pipeline" concept of retroactivity to make *Hurst* applicable only to cases that were not yet final on the date of the *Hurst v. Florida* decision, Dailey certainly would not be entitled to relief. The difference between the 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 v. Florida*. While Dailey complains that *Ring* relates only to Arizona's capital sentencing scheme, rather than Florida's, his argument misses the significance of the *Ring* decision to Florida. In moving the line of retroactive application back to *Ring*, the Florida Supreme Court reasoned that since Florida's death penalty sentencing scheme should have been recognized as unconstitutional upon the issuance of the decision in *Ring*, capital defendants should not be penalized for time that it took for that determination to be made official in *Hurst v. Florida*.

Extending relief to more defendants who would not receive the benefit of a new rule because their cases were already final when *Hurst* was decided does not violate the Eighth Amendment. The

Florida Supreme Court's decision was well supported under state law on retroactivity, and it has been consistently and uniformly applied to all defendants whose sentences were final when the *Ring* decision was issued. The *Ring*-based cutoff for the retroactive application of *Hurst* is in no way arbitrary like Dailey contends.

Dailey cites to many factors, such as delays in transmitting the appellate record or the granting of extensions of time for appellate briefs, that allegedly create arbitrary results as to whether a defendant receives *Hurst* relief. Petition at 13. Thus, he argues that basing retroactivity analysis on court dates is intrinsically arbitrary. Dailey's logic for this argument fails because all modern retroactivity tests depend on dates of finality.

Traditionally, new rules are applied retroactively only to cases that are not yet final. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"). *Griffith*, therefore, depends on the date of finality of the direct appeal. Under Dailey's argument, this traditional concept of retroactivity would be considered arbitrary if one defendant with delays in his case receives the

benefit of a new rule because his case is not yet final, while another defendant without delays in his case does not receive that same benefit because his case became final before the other defendant's case with delays. Even a retroactive application of a new development in the law under the traditional analysis will mean that some cases will get the benefit of a new development while other cases will not, depending on a date.

Additionally, the current federal test for retroactivity in the postconviction context, *Teague*, also depends on a date. If a case is final on direct review, the defendant will not receive the benefit of the new rule unless one of the exceptions to *Teague* applies. The Florida Supreme Court's line drawing based on a date is no more arbitrary than this Court's line drawing in *Griffith* or *Teague*.

Moreover, if partial retroactivity violated the United States Constitution or this Court's retroactivity jurisprudence, this Court would not have given partial retroactive effect to a change in the penal law in *Dorsey v. United States*, 567 U.S. 260 (2012). In *Dorsey*, this Court held that the Fair Sentencing Act was partially retroactive in that it would apply to those offenders who committed applicable offenses prior to the effective date of the act, but who were sentenced after that date. *Id.* at 273. *See United States v. Abney*, 812 F.3d 1079, 1097-98 (D.C. Cir. 2016) (noting that prior to the decision in

Dorsey, this Court had not held a change in a criminal penalty to be partially retroactive).

Inherent in the concept of non-retroactivity is that some cases will get the benefit of a new development, while other cases will not, depending on the date. 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. This is not arbitrary and capricious in violation of the Eighth Amendment; it is simply a fact inherent in any retroactivity analysis.

Dailey's Equal Protection Clause argument fares no better than his Eighth Amendment argument. Dailey's main complaint is that the Florida Supreme Court's distinction between "pre-*Ring*" and "post-*Ring*" defendants effectively created two "classes" of defendants in violation of the Fourteenth Amendment. Petition at 9 and 14. However, as this Court stated in *Beck v. Washington*, 369 U.S. 541 (1962), "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).

For a violation of the Equal Protection Clause to be established, a criminal defendant challenging the state's application of capital punishment must show intentional discrimination. *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 Supreme Court's 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 Dailey 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. Dailey is being treated exactly the same as similarly situated murderers. Consequently, his equal protection argument is entirely meritless.

Dailey's attempt to tie his equal protection argument to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), fails. The decision in *Caldwell* did not interpret the Equal Protection Clause. In *Caldwell*, this Court found that a prosecutor's comments

diminishing the jury's sense of responsibility to determining the appropriateness of a death sentence was "inconsistent with the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell*, 472 U.S. at 323 (*citing Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). As will be addressed in more detail under the third question presented, there was no *Caldwell* error in this case where Dailey's jury was properly instructed on its role based on the state law existing at the time of his trial.

Lastly, Dailey's assertion that it is uncontested that his death sentence violates the Constitution under *Hurst v. Florida* is patently wrong. Petition at 2. Dailey's prior violent felony conviction established beyond a reasonable doubt the existence of sufficient aggravation under Florida law. *See Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000); *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). *See also Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death

penalty). This Court's ruling in *Hurst v. Florida* did not change the recidivism exception articulated in *Apprendi* and *Ring*.

Dailey's references to the fact that the trial judge resentenced him to death after correcting the sentencing order further do not render his sentence violative of the Sixth Amendment. Lower courts have almost uniformly held that a judge may perform the "weighing" of factors to arrive at an appropriate sentence without violating the Sixth Amendment. *See, e.g., United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *Waldrop v. Comm'r, Alabama Dept. of Corr.*, 711 Fed. Appx. 900 (11th Cir. 2017) (unpublished) (rejecting *Hurst* claim and explaining "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict.") (citation omitted). While the Florida Supreme Court now requires specific jury findings involving the weighing and selection of a defendant's sentence, those findings

are not required by the Sixth Amendment. *See, e.g.*, *McGirth v. State*, 209 So. 3d 1146, 1164 (Fla. 2017).

To the extent that Dailey suggests that jury sentencing is now required under federal law, this is not the case. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed.") (emphasis in original); *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding that the Constitution does not prohibit the trial judge from "impos[ing] a capital sentence"). No case from this Court has mandated jury sentencing in a capital case, and such a holding would require reading a mandate into the Constitution that is simply not there. The Constitution provides a right to trial by jury, not to sentencing by jury.

Accordingly, there is no underlying constitutional error in this case. There is also no conflict between the Florida Supreme Court's decision and this Court's Sixth Amendment, Eighth Amendment, 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. Certiorari review should be denied.

II. The Florida Supreme Court's Failure to Apply Full Retroactive Effect to the *Hurst* Decisions Does Not Violate the Supremacy Clause.

Dailey next contends that the Florida Supreme Court's failure to apply full retroactivity to *Hurst v. Florida* and *Hurst v. State* violates the Supremacy Clause. Dailey asserts that the Florida Supreme Court created a new substantive rule in *Hurst v. State* which must, pursuant to *Montgomery v. Louisiana,* 136 S. Ct. 718 (2016), be applied retroactively to all cases in which alleged *Hurst* errors occurred. Dailey's reliance on *Montgomery* for this proposition is misplaced.

In *Montgomery,* Louisiana ruled that this Court's decision in *Miller v. Alabama,* 567 U.S. 460 (2012), which held that a juvenile could not be sentenced to mandatory life in prison without the possibility of parole, did not apply retroactively. *Montgomery,* 136 S. Ct. at 727. This Court reversed Louisiana's holding because *Miller* "announced a substantive rule of constitutional law." *Id.* at 734. The rule in *Miller* was substantive rather than procedural because it placed a particular punishment beyond the State's power to impose. *See Schriro v. Summerlin,* 542 U.S. 348, 352 (2004) (defining a substantive rule as a new rule that places "particular conduct or persons" "beyond the State's power to punish"). In other words, *Miller* categorically prevented the State from imposing a mandatory life

sentence on anyone who was a juvenile when he or she committed a crime. *Id.* Therefore, because *Miller* was a substantive rule, it applied retroactively regardless of when a qualifying defendant's conviction became final. *Montgomery*, 136 S. Ct. at 729 ("The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.").

Unlike the ruling in *Miller*, the rulings in *Hurst v. Florida* and *Hurst v. State* were procedural, not substantive. *See Montgomery*, 136 S. Ct. at 730 ("Procedural rules . . . are designed to enhance the accuracy of a conviction or sentence by regulating 'the manner of determining the defendant's culpability.'") (quoting *Schriro*, 542 U.S. at 353). *See also Schriro*, 542 U.S. at 352 ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.").

While Dailey cites to *Welch v. United States*, 136 S. Ct. 1257 (2016), in support of his argument, this Court in *Welch* did not overrule *Schriro*. Indeed, the *Welch* decision supports the determination that the new *Hurst* rule is procedural. The *Welch* Court found that the rule in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which "changed the substantive reach of the Armed

Career Criminal Act," was a substantive, rather than procedural, change because it altered the class of people affected by the law. *Welch*, 136 S. Ct. at 1265. In explaining how the rule in *Johnson* was not procedural, this Court in *Welch* stated, "[i]t did not, for example, allocate decision making authority between judge and jury, *ibid*, or regulate the evidence that the court could consider in making its decision." *Welch*, 136 S. Ct. at 1265 (citation omitted).

Here, the new rule announced in *Hurst v. Florida*, and expanded in *Hurst v. State*, allocated the authority to make certain capital sentencing decisions from the judge to the jury. This is precisely how this Court in *Welch* defined a procedural change. Based on this Court's precedent, there can be no doubt that the *Hurst* rule is a procedural rule. Accordingly, the Supremacy Clause does not require that Florida give full (or indeed any) retroactive effect on collateral review to the rule announced in *Hurst v. Florida* or *Hurst v. State*.

III. Dailey Seeks Review on a *Caldwell* Question Not Presented by This Case.

Dailey's final argument includes a *Caldwell* challenge, and Dailey specifically argues that the Florida Supreme Court's harmless-error analysis of *Hurst* violations violates *Caldwell*. Dailey urges this Court to grant a writ of certiorari to address whether the Florida Supreme Court's "per se harmless-error rule

for *Hurst* violations" violates the Eighth Amendment under *Caldwell*. Petition at 23. In a footnote, Dailey claims that he squarely raised this issue in both state circuit court and the Florida Supreme Court (Petition at 23); however, this exact issue was never presented to the Florida Supreme Court.

Moreover, the Florida Supreme Court's opinion at issue never addressed its harmless-error analysis in the context of *Caldwell*, because the court found that *Hurst* was not retroactive to Dailey.[1] Thus, the Florida Supreme Court did not rule on the specific question presented to this Court. Accordingly, this case is not a suitable vehicle for this Court's review of whether the Florida Supreme Court's harmless-error application violates *Caldwell*. Sup. Ct. R. 10; *see also Wilson v. Cook*, 327 U.S. 474, 481 (1946) ("As the record does not show that the plaintiffs presented for decision to the state Supreme Court any federal question, they have no appeal to this Court unless the opinion of the state Supreme Court shows that that court ruled on the validity of a state statute under the laws and Constitution of the United States.").

Even if this question had been addressed by the court below,

[1] Justice Pariente's concurring opinion addressed harmless error, but it did not do so in the context of *Caldwell* or the Eighth Amendment; and the majority opinion never made a harmless-error determination because it found that *Hurst* did not retroactively apply to Dailey's sentence of death. *Dailey*, 247 So. 3d 390, 391-92.

it would have no impact on Dailey's case because, as demonstrated above, *Hurst* is not retroactive to Dailey's case, and the Florida Supreme Court's retroactivity ruling is based on state law. Furthermore, review would not be appropriate because the Florida Supreme Court's decisions on harmless error are based on adequate and independent state law grounds, rather than federal law. As this Court has found, the issue of harmless-error analysis is ordinarily left to the state courts. *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016); *Ring*, 536 U.S., at 609, n. 7.

While the Florida Supreme Court has regularly found *Hurst* errors harmless in cases with unanimous jury recommendations and harmful in cases with non-unanimous recommendations, the court has not employed a *per se* rule, as Dailey contends. Instead, the court looks at the entire record before it, including the jury instructions, the aggravation and mitigation presented, and whether aggravating factors were stricken on appeal. As the court has explained, "a unanimous recommendation is not sufficient alone; rather, it 'begins a foundation for us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors.'" *Reynolds v. State*, 251 So. 3d 811, 816 (Fla.), *cert. denied*, 139 S. Ct. 27 (2018) (internal citations omitted). Thus, a unanimous recommendation is only part of the

court's consideration, it is not a *per se* rule for finding harmless error.

In fact, the concurring opinion in Dailey's case below belies Dailey's own argument that the Florida Supreme Court has a *per se* harmless-error rule for *Hurst* violations in cases with unanimous recommendations. If *Hurst* would have been retroactive to Dailey's case, Justice Pariente would have found the *Hurst* error harmful, despite Dailey's unanimous jury recommendation, based on the court's striking of two aggravating factors on direct appeal, *Dailey*, 247 So. 3d at 391. Dailey's contention that the Florida Supreme Court's harmless-error analysis relies solely on the unanimous recommendation is simply wrong.

Next, Dailey alleges that *Caldwell* was violated in his case because his jury was told that its determination was merely a recommendation. While Dailey alleges that his jury was "misinformed" as to its role during sentencing (Petition at 26), the jury in Dailey's case was in no way misinformed. Dailey's jury was properly instructed on its role based on the law existing at the time of his trial.

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); *see also Darden*

v. Wainwright, 477 U.S. 168, 183 n.15 (1986) (rejecting a *Caldwell* attack, explaining that "*Caldwell* is 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"). Here, Dailey's jury was properly instructed according to the state law at that time. *See Reynolds v. State*, 251 So. 3d 811, 823 (Fla. 2018) (explaining that under *Romano*, the Florida standard jury instruction "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.").

Members of Dailey's jury were properly informed that they needed to determine whether sufficient aggravating circumstances existed that would justify the imposition of the death penalty and, if so, whether the aggravation outweighed the mitigation before the death penalty could be imposed. They were instructed that if they found the aggravating circumstances did not justify the death penalty, their advisory sentence must be life in prison. Jury members were also told that it was their duty to advise the court, but that the final sentencing determination would be made by the trial judge.

Notably, a Florida jury's decision regarding a death sentence was, and still remains, an advisory recommendation. *See*

Dugger v. Adams, 489 U.S. 410 (1989). *See also* § 921.141(2)(c), Fla. Stat. (2018) (providing that "[i]f a unanimous jury determines that the defendant should be sentenced to death, the jury's **recommendation** to the court shall be a sentence of death") (emphasis added). Accordingly, there was no violation of *Caldwell* because there were no comments or instructions to the jury in Dailey's case that "improperly described the role assigned to the jury by local law." *Romano*, 512 U.S. at 9.

In sum, the Florida Supreme Court's determination of the retroactive application of *Hurst v. Florida* as applied in *Hurst v. State* under *Witt* is based on an independent state ground and is not violative of federal law or this Court's precedent. Dailey's sentence of death does not violate the Eighth or Fourteenth Amendments, and the retroactivity ruling below does not present this Court with a significant or important unsettled question of law. Additionally, *Caldwell* was not violated below, and Dailey's specific *Caldwell*/harmless-error argument was never presented and ruled upon by the court below. Dailey has failed to present any compelling reason for this Court to exercise its discretionary certiorari jurisdiction.

CONCLUSION

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

Respectfully submitted,

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