NO. 18-7428

IN THE SUPREME COURT OF THE UNITED STATES

HARRY JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
Counsel of Record

Janine D. Robinson
Assistant Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
(850) 414-3300

COUNSEL FOR RESPONDENT

Capital Case

Questions Presented

I. Whether this Court should grant certiorari review of the Florida Supreme Court's decision that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively, where (1) the decision is based on adequate independent state grounds; (2) the issue presents no conflict between the decisions of other state courts of last resort or federal courts of appeal; (3) it does not conflict with this Court's precedent; and (4) no unresolved federal question is otherwise presented.

II. Whether this Court should grant certiorari review of the Florida Supreme Court's rejection of Jones' claims under *Caldwell v. Mississippi*, where (1) his death sentence does not violate *Caldwell*, the Fifth, Sixth, Eighth and Fourteenth Amendments; (2) the jury was not misled about its sentencing role, nor was the jury's sense of responsibility diminished; (3) the issue presents no conflict between the decisions of other state courts of last resort or federal courts of appeal; (4) it does not conflict with this Court's precedent; and (5) no unresolved federal question is otherwise presented.

TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS AND AUTHORITIES

Other Authorities

IN THE SUPREME COURT OF THE UNITED STATES
NO. 18-7428

HARRY JONES, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

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

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The Florida Supreme Court's decision petitioned for review appears as *Jones v. State*, 256 So. 3d 801 (Fla. 2018).

JURISDICTION

This Court's jurisdiction to review the final judgment of the Florida Supreme Court is authorized by 28 U.S.C. § 1257. However, the Florida Supreme Court's decision in this case is based on independent state grounds, does not implicate an important or unsettled question of federal law, does not conflict with another state court of last resort or a United States court of appeals, and does not conflict with relevant decisions of this Court. Therefore, this Court should decline to exercise jurisdiction as no unresolved federal question is raised. Sup. Ct. R. 10, 14(g)(i).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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.

The Eighth Amendment to the United States Constitution:

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

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.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Harry Jones was charged with first-degree murder, robbery, and grand theft of a motor vehicle in July 1991. The facts of the case are set forth in his direct appeal, *Jones v. State*, 648 So. 2d 669 (Fla. 1994) (rehearing denied). In sum, the victim, George Young, was at a liquor store when Jones entered the store with a friend, Timothy Hollis, who was intoxicated. Hollis appeared to get sick and Jones took him to the restroom. The victim later helped Jones take Hollis outside and then offered to drive the men home in Young's vehicle. Approximately one hour later, Young's truck was involved in an accident, with Jones as the only occupant. Young's body was found five days later, a victim of fresh-water drowning in an area witnesses stated Jones was previously seen. *Id.* at 672-73.

Jones' first trial resulted in a hung jury and mistrial but, was found guilty as charged in the second trial. *Jones*, 648 So. 2d at 672. The trial court sentenced Jones to death following the jury's recommendation of a death sentence by a 10-2 vote. Three aggravating factors ("aggravators") were found: (1) Jones was previously convicted of a prior violent felony; (2) the murder was committed while Jones was engaged in the commission of a robbery; and (3) the murder was especially heinous, atrocious, or cruel (HAC). *Id.* at 673; nn. 1, 2. The trial court found one statutory mitigating circumstance ("mitigator"), that Jones' capacity to appreciate the criminality of his conduct or to conform this conduct to the requirements of law was substantially impaired; and two nonstatutory mitigators (Jones suffered from a

traumatic childhood and had the love and support of his family). *Id.* at 673. The Florida Supreme Court affirmed Jones' conviction and death sentence on November 10, 1994. *Id.* (rehearing denied). His conviction and sentence became final when this Court denied certiorari. *Jones v. Florida*, 515 U.S. 1147 (1995).

Jones filed his initial motion for postconviction relief in 1997, but amended it five years later, in 2003. *Jones v. State*, 998 So. 2d 573 (Fla. 2008) (rehearing denied). Following an evidentiary hearing in 2004 on several of Jones' postconviction claims, the trial court denied his motion, which was upheld on appeal by the Florida Supreme Court. *Id.* at 579, 589.

Jones' original state habeas petition filed in 2007 claimed (1) Florida's capital sentencing scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002); and (2) Florida's standard penalty phase jury instructions shifted the burden of proof and diluted the jury's responsibility by labeling their sentencing verdict "advisory" and violative of the Sixth Amendment. *Jones*, 998 So. 2d at 589. The Florida Supreme Court denied the petition holding that *Ring* did not retroactively apply to Jones' conviction and death sentence, which occurred seven years prior to *Ring*. *Id.* Regarding Florida's penalty phase jury instructions and Jones' claim of "burden shifting," the Florida Supreme Court held that the claim was both procedurally barred and without merit. *Id.* Finally, as to Jones' challenge that the jury's responsibilities were diluted, the Florida Supreme Court found this claim was not only to be procedurally barred, but substantively rejected it stating, "[w]e have

consistently held that the standard penalty phase jury instructions fully advise the jury of the importance of its role, correctly state the law, do not denigrate the role of the jury, and do not violate *Caldwell v. Mississippi*, 472 U.S. 320 (1985). . . ." *Id.* at 590.

In 2005 and 2007, Jones filed supplemental and successive postconviction motions challenging his conviction and sentence alleging newly discovered evidence and due process rights violation regarding the trial court's adoption of a State proposed order. The trial court summarily denied Jones' motions as untimely and without merit. *Jones v. State*, 53 So. 3d 230 (Fla. 2010). The Florida Supreme Court affirmed summary denial of the motions on the merits. *Id.*

In 2011, Jones filed an amended federal habeas petition with the United States District Court, Northern District of Florida raising ineffective assistance of counsel claims. *Jones v. Sec'y, Fla. Dept. of Corr.*, 834 F.3d 1299, 1305 (11th Cir. 2016). The District Court denied the petition and the United States Court of Appeals, Eleventh Circuit affirmed. *Id.* at 1323; Order Denying Petition October 1, 2013, 4:09-cv-0054-RH-CAS, *cert. denied*, *Jones v. Sec'y, Fla. Dept. of Corr.*, 137 S. Ct. 2245 (2017).

In 2016, Jones filed a successive habeas petition with the Florida Supreme Court following this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016) ("*Hurst v. Florida*"). *Jones v. State*, 256 So. 3d 801 (Fla. 2018). Jones argued the trial judge, rather than the jury made sufficient findings of aggravating circumstances. In *Hurst v. Florida*, this Court held that Florida's capital sentencing scheme was

unconstitutional pursuant to *Ring*'s determination that the Sixth Amendment requires a jury to find the existence of an aggravating circumstance which qualifies a defendant for a sentence of death. On remand in *Hurst v. State*, the Florida Supreme Court held that in capital cases, the jury must unanimously and expressly find that the aggravating factors 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 40 (Fla. 2016), *cert. denied*, *Florida v. Hurst*, 137 S. Ct. 2161 (2017).

Jones' habeas petition was denied on March 17, 2017, based on *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016) (holding *Hurst* does not apply retroactively to cases which became final prior to *Ring*), *cert. denied*, *Asay v. Florida*, 138 S. Ct. 41 (2017). *See Jones v. Jones*, SC16-607, 2017 WL 1034410 (Fla. Mar. 17, 2017).

While his successive state habeas petition was pending, Jones filed a successive postconviction motion in the trial court raising *Hurst*-related issues. *Jones*, 256 So. 3d at 802. The trial judge summarily denied the motion after the Florida Supreme Court denied the habeas petition and Jones appealed. *Id.*

During pendency of the appeal, the Florida Supreme Court ordered briefing by both parties addressing why the trial court's order denying Jones' *Hurst* claims should not be affirmed in light of its recent decision in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S. Ct. 513 (2017), as well as

briefing on non-*Hurst* issues. *Jones*, 256 So. 3d at 802. After reviewing each party's response, the Florida Supreme Court denied all relief in Jones' case, holding,

> In *Hitchcock*, we held that "our decision in [*Asay*] forecloses relief under *Hurst* for defendants whose convictions and sentences were final prior to [*Ring*]. . . . Thus, because his sentence became final prior to *Ring*, Jones is not entitled to *Hurst* relief. . . . Jones's claim that his death sentence violates [*Caldwell*] and the Eighth Amendment is foreclosed by our recent decision in *Reynolds v. State*, 251 So. 3d 811, 82543 [sic] ([Fla.] 2018), in which we held that "a *Caldwell* claim based on the rights announced in *Hurst* and *Hurst v. Florida* cannot be used to retroactively invalidate the jury instructions that were proper at the time under Florida law."

Id.[1] It is this decision by the Florida Supreme Court upon which the instant Petition is based. This is the State's Brief in Opposition.

REASONS FOR DENYING THE WRIT

Jones seeks certiorari review of the Florida Supreme Court's decision affirming the trial court's denial of his successive motion for postconviction relief and petition for writ of habeas corpus. The Petition is based on Jones' death sentence which became final pre-*Ring* and seeks this Court's intervention for denial of retroactive application of *Hurst v. Florida* and *Hurst v. State*. Jones claims violations of the Fifth Amendment's guarantee of fundamental fairness; the Sixth Amendment's guarantee that requisite statutory facts are found prior to the imposition of a death sentence; the Eighth Amendment's prohibition against arbitrary and capricious imposition of

[1] Jones raised the newly discovered evidence claim regarding state witness Kevin Prim in his postconviction motions and petitions dating back to 2003. This claim was consistently rejected by the trial court and on appeal, including the opinion which is the basis of this Petition. *See Jones*, 998 So. 2d at 578, n. 2; *Jones*, 53 So. 3d at 230. However, the Petition omits any discussion of this claim.

the death penalty through Florida's partial retroactivity analysis; and the Fourteenth Amendment's guarantee of equal protection. Petition at 13-26. However, Florida's retroactivity analysis is undisputedly a matter of state law and its retroactive application of *Hurst* to only post-*Ring* cases does not violate the Fifth, Sixth, Eighth, or Fourteenth Amendment. Second, Jones seeks review of his sentence as violative of *Caldwell*, alleging that the jury was misled and its role diminished. These issues have no merit and do not warrant review.

ISSUE I

WHETHER THIS COURT SHOULD GRANT REVIEW OF THE FLORIDA SUPREME COURT'S HOLDING THAT *HURST* DID NOT APPLY RETROACTIVELY TO JONES AND DOES NOT VIOLATE THE EIGHTH AMENDMENT.

There is no Basis for Certiorari Review of the Florida Supreme Court's Denial of Retroactive Application of *Hurst* to Petitioner.

Jones seeks certiorari review of the Florida Supreme Court's decision holding that *Hurst v. State* is not retroactive and did not violate the Eighth Amendment, based on its precedent in *Hitchcock*, "because [Jones'] sentence became final prior to *Ring*." *Jones*, 256 So. 3d at 802. However, the issue of partial retroactivity is solely a matter of state law and the Florida Supreme Court's decision is based upon adequate state grounds. This Court does not review decisions that are based solely on state law. No constitutional violations exist where Florida's retroactive application of *Hurst* applies to only post-*Ring* cases. This Court directly held that states are free to have their own tests for retroactivity which provide more relief and

include partial retroactivity. *Danforth v. Minnesota*, 552 U.S. 264 (2008) (recognizing that a state court's retroactivity determination is a matter of state law). The Florida Supreme Court's decision does not conflict with this Court's jurisprudence on retroactivity, nor with any other state court of last review, and is not in conflict with any federal appellate court. Thus, Jones' request for certiorari review should be denied.[2]

Aside from the question of retroactivity, certiorari would be inappropriate because there is no underlying federal constitutional error. *Hurst v. Florida* did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment.

Jones became eligible for a death sentence by virtue of his previous conviction for an unrelated violent felony, as well as "the automatic application of the 'during the course of a felony' aggravator" under Florida Statutes § 921.141(5)(b) in the

---

[2] 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., Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied, Hitchcock v. Florida*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), *cert. denied, Lambrix v. Florida*, 138 S. Ct. 312 (2017); *Branch v. State*, 234 So. 3d 548, 549 (Fla. 2018), *cert. denied, Branch v. Florida*, 138 S. Ct. 1164 (2018); *Jones v. State*, 234 So. 3d 545 (Fla. 2018), *cert. denied, Jones v. Florida*, 138 S. Ct. 2686 (2018); *Peterka v. State*, 237 So. 3d 903 (Fla. 2018), *cert. denied, Peterka v. Florida*, 139 S. Ct. 181 (2018); *Johnston v. State*, 246 So. 3d 266 (Fla. 2018), *cert. denied, Johnston v. Florida*, 139 S. Ct. 481 (2018); *Grim v. State*, 244 So. 3d 147 (Fla. 2018), *cert. denied, Grim v. Florida*, 139 S. Ct. 480 (2018); *Franklin v. State*, 236 So. 3d 989 (Fla. 2018), *cert. denied, Franklin v. Florida*, 139 S. Ct. 479 (2018); *Philmore v. State*, 234 So. 3d 567 (Fla. 2018), *cert. denied, Philmore v. Florida*, 139 S. Ct. 478 (2018); *Tanzi v. State*, 251 So. 3d 805 (Fla. 2018), *cert. denied, Tanzi v. Florida*, 139 S. Ct. 478 (2018); and *Guardado v. State*, 238 So. 3d 162 (Fla. 2018), *cert. denied, Guardado v. Florida*, 139 S. Ct. 477 (2018).

instant case. *Jones*, 648 So. 2d at 673, nn. 1, 2. The unanimous verdict by Jones' jury establishing his guilt of this contemporaneous crime (robbery), an aggravator under well-established Florida law, was clearly sufficient to meet the Sixth Amendment's fact-finding requirement. *See 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); *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) (rejecting a claim that the constitution requires a burden of proof on whether or not mitigating circumstances outweigh aggravating circumstances, noting that such a question is "mostly a question of mercy"). *See also State v. Mason*, 153 Ohio St. 3d 476, 483, 485 (Ohio 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principal offense and any aggravating circumstances" and that "weighing is not a fact-finding process subject to the Sixth Amendment."); *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."). Jones' previous violent felony conviction further satisfied the Sixth Amendment requirements in accordance with *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Thus, there was no *Hurst v. Florida* error in this case.

Additionally, *Hurst* is not retroactive under federal law. "*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, 358 (2004). Since *Hurst* is an extension of *Ring*, it is also not retroactive under federal law. *Hurst*, 136 S. Ct. at 622 ("As with *Ring*, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment."); *see also Lambrix v. Sec'y, Fla. Dept. of Corr.*, 872 F.3d 1170, 1182 (11th Cir. 2017) ("No U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable."), *cert. denied*, *Lambrix v. Jones*, 138 S. Ct. 312 (2017).

This Court does not review state court decisions that are based on adequate and independent state grounds. *See 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."). Since *Hurst* is not retroactive under federal law, the retroactive application of *Hurst* is solely based on a state test for retroactivity. Because the retroactive application of *Hurst* is based on adequate and independent state grounds, certiorari review should be denied.

The Florida Supreme Court first analyzed the retroactive application of *Hurst* in *Mosley v. State*, 209 So. 3d 1248, 1276-83 (Fla. 2016), and *Asay*, 210 So. 3d at 15-22. In *Mosley*, the Florida Supreme Court held that *Hurst* is retroactive to cases which became final after the June 24, 2002, decision in *Ring*. *Mosley*, 209 So. 3d at 1283. In determining whether *Hurst* should be retroactively applied to *Mosley*, the Florida Supreme Court conducted a *Witt* analysis which sets forth the state-based

test for retroactivity. *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 same day the Florida Supreme Court decided *Mosley*, it held in *Asay* that *Hurst* does not apply retroactively to cases which became final prior to *Ring*. *Asay*, 210 So. 3d at 22.

Since "finality of state 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. *Danforth*, 552 U.S. at 280-81 (emphasis in original); *Teague v. Lane*, 489 U.S. 288 (1989); *see also 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 those we have laid down and to apply those standards in a boarder range of cases than is required by this [Court].").

As *Ring* and by extension *Hurst*, have been held not to be retroactive under federal law, Florida has implemented a test which provides relief to a *broader class of individuals* by applying a *Witt* analysis, instead of *Teague*, for determining the retroactivity of *Hurst*. *See Schriro*, 542 U.S. at 258 (holding that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review"); *see also Lambrix*, 872 F.3d at 1182-83.

The Florida Supreme Court determined that all three *Witt* factors weighed in favor of retroactive application of *Hurst* 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."[3] *Id.* at 1283. Thus, the Florida Supreme Court held *Hurst* to be retroactive to *Mosley*, whose case became final in 2009, which is post-*Ring*. *Id.*

Conversely, applying the *Witt* analysis in *Asay*, the Florida Supreme Court held that *Hurst* is not retroactive to any case in which the death sentence was final pre-*Ring*. *Mosley*, 209 So. 3d at 1283. 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). However, 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* to pre-*Ring* cases. *Id.* at 20-22. Relating to 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

[3] Under this rationale, it would not make sense to grant relief only to those who raise *Ring* claims in the 14 years between *Ring* and *Hurst,* as this would encourage frivolous claims in the hope that subsequent vindication could provide a basis of relief for a future change in the law. Nor should a defendant who failed to raise a claim that appeared to be well settled against him/her be punished for not raising what he/she believed to be a frivolous claim.

the constitutionality of Florida's death penalty scheme based on the decisions of the United States Supreme Court. This factor weighs heavily against retroactive application of *Hurst v. Florida* to this pre-*Ring* case." *Id.* at 20. Relating 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 *Hurst* was not retroactive to Asay since the judgment and sentence became final in 1991, pre-*Ring*. *Id.* at 8, 20.

Since *Asay*, the Florida Supreme Court has continued to apply *Hurst* retroactively to all post-*Ring* cases and declined to apply *Hurst* retroactively to all pre-*Ring* cases. *See e.g.*, *Hitchcock*, *supra*; *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), *cert. denied*, *Lambrix v. Florida*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017), *cert. denied*, *Hannon v. Florida*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548, 549 (Fla. 2018), *cert. denied*, *Branch v. Florida*, 138 S. Ct. 1164 (2018). This distinction among cases which were final pre-*Ring* versus cases which were final post-*Ring*, is neither arbitrary nor capricious.

In the traditional sense, new rules are applied retroactively only to cases which 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"); *Smith v. State*, 598 So.

2d 1063, 1066 (Fla. 1992) (applying *Griffith* to Florida defendants); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context). Under this "pipeline" concept, *Hurst* would only apply to the cases which were not yet final on the date of the decision in *Hurst*. This type of traditional retroactivity can depend on a score of random factors having nothing to do with the offender or the offense, such as trial scheduling and docketing on appeal.

Even under the "pipeline" concept, cases whose direct appeal were decided on the same day might have their judgment and sentence become final on either side of the line for retroactivity. Additionally, under the "pipeline" concept, "old" cases where the judgment and/or sentence has been overturned will receive the benefit of new law as they are no longer final. Yet, this Court recognizes this type of traditional retroactivity as proper and not violative of the Eighth or Fourteenth Amendment.

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 *Hurst* decision date. In moving the line of retroactive application back to *Ring*,[4] 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*, defendants should not be penalized for time that it took for this determination to be made official in *Hurst*.

---

[4] Though *Apprendi* served as a precursor to *Ring*, this Court distinguished capital cases from its holding in *Apprendi* and thus *Ring* is the appropriate demarcation for retroactive application to capital cases. *Asay*, 210 So. 3d at 19; *Apprendi v. New Jersey*, 530 U.S. 466, 496 (2000).

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 F. S. 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 treated alike."). Unquestionably, extending relief to more individual 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 or Fourteenth Amendment. Thus, just like the more traditional application of retroactivity, the *Ring* based cutoff for the retroactive application of *Hurst* is not in violation of the Eighth or Fourteenth Amendment.

Jones argues that the Florida Supreme Court is being unfair in selectively applying *Hurst* to "similarly situated" defendants, namely those who "were free of the shackles of finality." (Petition at 16). However, in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), similar Equal Protection claims were rejected. *See also Lambrix*, 872 F.3d at 1183; *Dobbert v. Florida*, 432 U.S. 282, 301 (1977). These claims were based on the two-category division of pre-*Furman* cases; those who were subject to the new statute because they had not yet been tried and those whose cases were commuted because they were already final. *Dobbert*, 432 U.S. at 288, 301. This Court

held that defendants who had yet to be tried and sentenced were "not similarly situated to those whose sentences were commuted. He was neither tried nor sentenced prior to Furman, as were they. . . ." *Id.* at 301.

Just as with the categorization of cases after *Furman*, post-*Hurst*, "Florida obviously had to draw the line at some point." *Dobbert*, 432 U.S. at 301. As such, Jones is not similarly situated to those who are receiving a new sentencing phase pursuant to *Hurst* as his judgment was final pre-*Ring*. The Florida Supreme Court's determination of the retroactive application of *Hurst* under *Witt* is based on adequate and independent state grounds and is not violative of federal law or this Court's precedent. Thus, certiorari review should be denied.

Hurst is Not Retroactive Under Federal Law Because it Invoked a Procedural Change, Not a Substantive Change.

Jones also argues that *Hurst* provided a substantive change in the law, rather than a procedural change and therefore should be afforded full retroactive application under federal law. In support, Jones analogizes *Hurst* to this Court's holding in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and commentary on *Miller v. Alabama*, 567 U.S. 460, n. 4 (2012) (prohibition on mandatory life sentences without parole for juvenile offenders announced a new substantive rule). Petition at 25-26.

In *Montgomery*, this Court found the change was substantive because "it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status.'" *Montgomery*, 136 S. Ct. at 734, *quoting Penry*, 492 U.S. at 330; *Summerlin*, 542 U.S. at 352. The change was found to be retroactive because

the rule "necessarily carr[ies] a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him." *Id.* Unlike *Montgomery*, however, *Hurst* did not "conflate[ ] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the *manner of determining* the defendant's culpability.'" *Id.* at 734-35, *quoting*, *Summerlin*, 542 U.S. at 353 (emphasis in original). Thus, *Hurst* is distinguishable from *Montgomery*.

Hurst, like *Ring*, was a procedural change, not substantive one. *See Summerlin*, 542 U.S. at 358 ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review."). Like *Ring*, *Hurst* is not retroactive under federal law. *See also Lambrix*, 872 F.3d at 1182, *supra; Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (holding that "*Hurst* does not apply retroactively to cases on collateral review"); *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (noting that this Court had not made *Hurst* retroactive to cases on collateral review); *In re Jones*, 847 F.3d 1293, 1295 (10th Cir. 2017) ("the Supreme Court has not held that *Hurst* announced a substantive rule").

Unlike the change in *Montgomery*, *Hurst* is procedural. In *Hurst* the same class of defendants committing the same range of conduct face the same punishment. Further, unlike the now unavailable penalty in *Montgomery*, the death penalty can still be imposed under the law after *Hurst*. Instead, *Hurst*, like *Ring*, merely "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts

bearing on punishment." *Summerlin*, 542 U.S. at 353. Thus, *Hurst* is a procedural change and not retroactive under federal law.

Jones argues that the Florida Supreme Court's imposition of the unanimity requirement in *Hurst v. State* causes all non-unanimous verdicts to be violative of the Eighth Amendment and that "evolving standards of decency" and "enhanced reliability and confidence in the result" necessitate unanimous recommendations in all death penalty cases. Petition at 21-23. On the contrary, the Florida Supreme Court's imposition of the unanimity requirements in *Hurst v. State* is purely a matter of state law, is not a substantive change, and did not cause death sentences imposed pre-*Ring* to be in violation of the Eighth Amendment.

To the extent Jones 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"). This Court has not 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.

The Eighth Amendment requires capital punishment to be limited "to those who commit a 'narrow category of the most serious crimes' and whose extreme

culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005), *quoting Atkins v. Virginia*, 536 U.S. 304, 319 (2002). As such, the death penalty is limited to a specific category of crimes and "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Id.* In finding Florida's death penalty unconstitutional, this Court did not invalidate Florida's statutory scheme based on Eighth Amendment narrowing concerns. Implicit in the holding of *Hurst v. Florida* was that Florida's statutory scheme sufficiently narrowed and was in compliance with the Eighth Amendment.

However, many states also add protections that go above and beyond the requirements of the Eighth Amendment. Often times, these additional state-based requirements are forward-looking in anticipation of evolving standards of decency to ensure that their capital sentencing schemes will remain constitutionally valid in the future. These additional protections are based on adequate and independent state grounds. For example, after this Court's *Furman* decision, many states redrafted their capital sentencing statutes adding a statutory requirement to review whether a capital "sentence is disproportionate to that imposed in similar cases" to "avoid arbitrary and inconsistent results." *Pulley v. Harris*, 465 U.S. 37, 44 (1984); *Furman*, 408 U.S. 238. As this Court noted, "[p]roportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required." *Pulley*, 465 U.S. at 50.

Much like the addition of proportionality review, the Florida Supreme Court's *Hurst v. State* requirement of unanimous jury findings and recommendations during capital sentencing procedures is an additional safeguard that is beyond the requirements of the Eighth Amendment. *Hurst*, 202 So. 3d at 61 ("Florida's capital sentencing law will comport with these Eighth Amendment *principles* in order to more surely protect the rights of defendants guaranteed by the Florida and United States Constitutions.") (emphasis added). Because these are additional safeguards premised on the principles of, but not necessitated by, the Eighth Amendment, they are state requirements and thus based on adequate and independent state grounds. *Id.* at 62 (noting that the unanimity requirements are forward looking and will "dispel most, if not all, doubts about the future validity and long-term viability of the death penalty in Florida").

The Florida Supreme Court's determination of the retroactive application of *Hurst* under *Witt* is based on adequate and independent state grounds and is not violative of federal law or this Court's precedent. *Hurst* did not announce a substantive change in the law and is not retroactive under federal law. Thus, there is no violation of federal law and certiorari review should be denied.

Florida's Amended Death Penalty Statute is Not Retroactive and Does Not Invalidate Any Prior Conviction.

Florida's death penalty statute, Fla. Stat. § 921.141, was amended after and comports with the decisions in *Hurst v. Florida* and *Hurst v. State*. Neither *Hurst* nor the new statute create a new crime with new elements. The same conduct

remains prohibited. Only the process by which the sentence is determined has been altered. No substantive change has occurred which makes *Hurst* retroactive under federal law. Thus, there is no basis for which certiorari review should be granted and this Petition should be denied.

Generally, there is a presumption against retroactive application of statutes absent an express statement of legislative intent. *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 195 (Fla. 2011). There is no express statement that the Florida legislature intended Chapter 2017-1 to be applied retroactively. Thus, this presumption cannot be rebutted. *See also* Florida Senate Bill Analysis and Fiscal Impact Statement, SB 280, Feb. 21, 2017 at 6-7 (this Court's retroactive application to post-*Ring* decisions will "significantly increase both the workload and associated costs of public defender offices for several years to come"). Further, this Court has expressly stated,

> [N]o U.S. Supreme Court decision holds that the failure of a state legislature to make revisions in a capital sentencing statute retroactively applicable to all of those who have been sentenced to death before the effective date of the new statute violates the Equal Protection Clause, the Due Process Clause, or the Eighth Amendment.

Lambrix, 872 F.3d at 1183.

Since the Florida legislature did not express an intent for the statute to be retroactive, it is not retroactive to cases which were final prior to enactment of the new statute. Jones' conviction and sentence became final June 19, 1995, and he has not received a new guilt or penalty phase since that time. Thus, the 2017 enactment

of changes to the capital sentencing statute would not be applicable to Jones' case unless he was to receive a new guilt and/or penalty phase.

The changes to Florida's death penalty statute were made in the aftermath of *Hurst* and implement the changes from *Hurst*. The changes include requiring a unanimous jury vote for a recommendation of death instead of a majority vote, requiring specific findings from the jury regarding the existence and sufficiency of the aggravation and the weighing of aggravation against mitigation, and disallowing judicial override of a jury's recommendation of life. As discussed above, these are procedural changes not substantive ones.

These changes to the sentencing procedure did not create a new offense or add new elements as Jones suggests. Petition at 28-29. The class of persons who are death eligible and the range of conduct which causes those defendants to be death eligible did not change. The aggravating factors necessary to qualify a defendant as eligible for the death penalty were not changed. In fact, the specific aggravators used in Petitioner's case had been in place since at least 1987. The only changes made were the requirement of specific jury findings of unanimity for the existence and sufficiency of the aggravating factors and that they outweigh mitigation, and for a death recommendation.

Jones also argues that two of the elements identified in *Hurst v. State* were not found proven beyond a reasonable doubt in his case, "sufficiency of the aggravators and whether they outweigh the mitigators." Petition at 29. The only

requirements of proof beyond a reasonable doubt are the elements for a finding of guilt for first-degree murder and that the aggravating factors were proven. Fla. Stat. § 921.141(2)(a) (2017) ("the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor . . ."). The standard of proof for guilt has long been proof beyond a reasonable doubt and was at Jones' trial. *See Miles v. United States*, 103 U.S. 304, 312 (1880). Likewise, the standard of proof for proving aggravating factors was beyond a reasonable doubt at Jones' trial. *See Floyd v. State*, 497 So. 2d 1211, 1214-15 (Fla. 1986); *Zeigler v. State*, 580 So. 2d 127, 129 (Fla. 1991). Thus, all elements which required findings beyond a reasonable doubt were in fact found beyond a reasonable doubt at Petitioner's trial.

The requirement that aggravators be sufficient and outweigh mitigation has long been a requirement of Florida law. "The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances." *Parker v. Dugger*, 498 U.S. 308, 313 (1991); *citing* Fla. Stat. § 921.141(3) (1985). The 2017 change to the statute merely requires that the jury make these findings unanimously in order for the defendant to be eligible to receive a death sentence. As to the finding that an aggravating circumstance is sufficient, *Hurst* did not ascribe a standard of proof. *Hurst*, 202 So. 3d at 54. The Eighth Amendment requires that "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Roper*, 543 U.S. at 568. The State of

Florida has enumerated 16 aggravating factors in the statute. Fla. Stat. § 921.141(6). These aggravating factors have been deemed sufficient to impose the death penalty by virtue of their inclusion in the statute. Any one of these aggravating factors is sufficient to cause a defendant to be eligible to receive a sentence of death. Thus, if one of these enumerated aggravating factors has been proven beyond a reasonable doubt, any Eighth Amendment concerns have been satisfied. However, the weight that a juror gives to the aggravator based on the evidence is not something that can be defined by a beyond-a-reasonable-doubt standard.

Hurst did not ascribe a standard of proof to the finding that the aggravation outweighs the mitigation. *Hurst*, 202 So. 3d at 54. This Court has specifically held that the beyond-a-reasonable-doubt standard for finding that the aggravation outweighs mitigation is not required under federal law. *See Kansas v. Marsh*, 548 U.S. 163, 164 (2006) ("Weighing is not an end, but a means to reaching a decision."); *Tuilaepa v. California*, 512 U.S. 967, 979 (1994) ("A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision."); *Kansas*, 136 S. Ct. at 642 ("[T]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt."). The weight that a juror gives to the aggravation as compared to the weight given to mitigation is also not something that can be defined by a beyond-a-reasonable-doubt standard.

Additionally, this Court "has not ruled on whether unanimity is required" in capital cases. *Hurst*, 202 So. 3d at 59; *see also Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). As this Court noted, "holding that *because [a State]* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive." *Summerlin*, 542 U.S. at 354 (emphasis in original). Thus, *Hurst v. State*'s requirement that the jury make specific factual findings before the imposition of the death penalty is procedural.

In support of his argument that *Hurst* should be retroactive under the federal *Teague* standard as a substantive change because it "addressed the proof-beyond-a-reasonable-doubt standard," Jones relies upon *In re Winship*, 397 U.S. 358 (1970); *Fiore v. White*, 531 U.S. 225 (2001). Petition at 28, 29. However, *Hurst* is distinguishable from these cases. *In re Winship* required that the proof-beyond-a-reasonable-doubt standard be afforded to juveniles "during the adjudicatory stage of a delinquency proceeding. . . ." *In re Winship*, 397 U.S. at 368. *Hurst* did not alter the burden of proof during the adjudication phase in finding a defendant guilty of first-degree murder. In *Fiore*, this Court held that the Federal Due Process Clause was violated when an individual was convicted of a crime despite his conduct not being prohibited by the criminal statute, and thus every element of the crime had not been proven beyond a reasonable doubt. *Fiore*, 531 U.S. at 228. As was true in *Hurst*

and here, Petitioner's conduct is clearly in violation of the criminal statute and by virtue of his conviction for first-degree murder, every element of the crime was proven beyond a reasonable doubt. As discussed previously, *Hurst* did not alter the burden of proof. Thus, neither *Fiore* nor *In re Winship* is applicable to the discussion of the retroactive application of *Hurst*.

No substantive change has occurred which makes Fla. Stat. § 921.141 or *Hurst* retroactive under federal law. Moreover, the Petition does not provide any compelling reason for this Court to review his case, it fails to cite any decision from this or any appellate court which conflicts with the Florida Supreme Court's decision and has failed to raise an important federal question where independent state grounds exist. Thus, there is no basis for which certiorari review should be granted. Thus, this Petition should be denied.

ISSUE II

WHETHER THIS COURT SHOULD GRANT REVIEW OF THE FLORIDA SUPREME COURT'S DECISION THAT JONES' SENTENCE DOES NOT VIOLATE *CALDWELL V. MISSISSIPPI*, OR THE EIGHTH AMENDMENT.[5]

Jones also seeks review of the Florida Supreme Court's denial of his "*Hurst*-induced" *Caldwell* claim, based upon its recent plurality decision in *Reynolds v. State*, 251 So. 3d 811, 828 (Fla. 2018), *cert. denied*, *Reynolds v. Florida*, 139 S. Ct. 27 (2018), discussed *infra*. Jones' argues that his death sentence violates *Caldwell* and the Eighth Amendment because the jury's sentencing recommendation was referred to as "advisory" and the jury's "sense of responsibility at the penalty phase was inaccurately diminished." Petition at 29, 33. These claims have no merit.

Certiorari review should be denied as (1) the Petition does not present a *Caldwell* error as Jones' jury was properly instructed and its role was not diminished; (2) no unresolved federal question has been presented; (3) there is no conflict between the Florida Supreme Court's decision and this Court's Eighth Amendment jurisprudence of *Caldwell* and its progeny; and (4) there are no conflicts between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court. *See Rockford Life Ins. Co. v. Ill. Dept. of Revenue*, 482 U.S. 182,

---

[5] The Petition's Questions Presented mentioned the Sixth Amendment regarding the *Caldwell* claim, but did not include argument in support. Nonetheless, no Sixth Amendment violation exists as *Hurst* did not require jury sentencing. Rather, *Hurst v. Florida* was a Sixth Amendment case which applied *Ring* to Florida's sentencing scheme and did not address the process of weighing aggravating and mitigating circumstances or suggest a jury process to satisfy the Sixth Amendment. As shown above, Jones' jury was clearly instructed that aggravators must be proven beyond a reasonable doubt.

184, n. 3 (1987). Further, this is essentially a factual dispute, not befitting review by this Court. *See United States v. Johnston*, 268 U.S. 220 (1925) (denying certiorari to review evidence or discuss specific facts).

Jones' Death Sentence Comports with *Caldwell As* the Jury Was Not Misled About Its Role, Was Informed that Their Advisory Recommendation Would be Given "Great Weight" by the Trial Court, and Its Sense of Responsibility Was Not Diminished

Jones argues that the jury was "repeatedly told they were simply recommending an advisory sentence to the trial judge," tantamount to constitutional and *Caldwell* violations. Petition at 29. This is a misleading statement of fact because the jury was also repeatedly instructed on the importance of their role in this case and that great weight would be given to their recommendation.

In order to establish a *Caldwell* violation, a "'defendant necessarily must show that the remarks to the jury improperly describe the role assigned to the jury by local law.'" *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) *quoting Dugger v. Adams*, 489 U.S. 401, 407 (1989). The fact that Jones' jury was told their sentencing recommendation was advisory does not provide the impetus for review by this Court.

In denying Jones' *Caldwell* claim, the Florida Supreme Court held,

> Jones's claim that his death sentence violates *Caldwell* . . . , and the Eighth Amendment is foreclosed by our recent decision in *Reynolds* . . . , in which we held that "a *Caldwell* claim based on the rights announced in *Hurst* and *Hurst v. Florida* cannot be used to retroactively invalidate the jury instructions that were proper at the time under Florida law."

Jones, 256 So. 3d at 802. The Florida Supreme Court's recent decision in *Reynolds* was a case of first impression on "*Hurst*-induced *Caldwell* claims" and upon which

Jones' decision is based. In *Reynolds*, the Florida Supreme Court held (1) there is no *Caldwell* violation where the jury was not misled about its sentencing role; (2) referring to jury recommendations as "advisory" does not constitute *Caldwell* error in pre-*Ring* cases; (3) Florida's standard jury instructions do not violate *Caldwell*; and (4) "[a]s a practical matter, a *Hurst*-induced *Caldwell* claim cannot be more retroactive than *Hurst*." *Reynolds*, 251 So. 3d at 822-23. As referenced at n. 7, *infra*, this Court recently denied certiorari with extensive commentary which is apropos in this case.

Jones' states in his Petition, "[i]t should also be noted that the instructions provided prior to deliberating did not inform the jury that their recommendation was entitled to great weight." Petition at 30. While this statement may be *technically correct,* Jones' statement is by no means accurate. The trial excerpts provided below, clearly and unequivocally show that Jones' jury was fully informed of its important responsibility and repeatedly instructed that even though it was "advisory," their sentencing recommendation would be given "great weight" by the trial court. Not only was Jones' jury properly instructed based upon the law existing at the time, a fact acknowledged in the Petition at 32, the trial record demonstrates that the trial judge, as well as the prosecutor consistently emphasized the importance of the jury's role, instead of diminishing it.

More than once, Jones' jury (1) was specifically instructed of their responsibility in the capital case; and (2) their sentencing recommendation would be

given "great weight" by the trial judge. The following are examples of the deliberate exchanges with and instructions to the jury throughout Jones' trial regarding their duty, responsibility and crucial role in the penalty phase proceedings.

The trial court first addressed the jury panel prior to jury selection instructing,

> Should the accused be found guilty of a capital felony . . . a second phase addressed to what type of penalty the jury will recommend to the Court will be commenced. Although the verdict of the penalty jury is advisory in nature and not binding upon the Court, *the jury recommendation is given great weight and deference* when the Court determines what punishment is appropriate.

Appendix, R. 10 (emphasis added). During jury voir dire, the state prosecutor reinforced the trial judge's statement to the prospective jurors stating,

> In a second phase . . . [t]he jury is going to be asked to make a recommendation for sentence to the Court. *That recommendation is not binding but is given great weight and consideration by the Court* in deciding what sentence should be imposed.

Appendix, R. 61 (emphasis added). The State reiterated the trial court's statement that, although the jury's recommended sentence is not binding, it "is *given great weight and deference by the Court.*" Appendix, R. 136-37 (emphasis added).

Upon commencement of the penalty phase, the trial judge once again discussed the jury's role as to the "great weight" their advisory sentence would be given stating,

> Your advisory sentence as to what sentence should be imposed on this Defendant is *entitled by law and will be given great weight by this Court* in determining what sentence to impose in this case.

Appendix, R. 949 (emphasis added). The trial judge continued, amplifying the jury's role in that "[i]t is only under *rare circumstances* that this Court impose a sentence

other than what you recommend." *Id.* (emphasis added). Following Jones' guilty verdict and during the State's closing argument in the penalty phase, the prosecutor addressed the jury as to the general importance of its role stating,

> In this decision today, you represent more than your own personal interest. You are all each one of you here as a *representative of the community*, the community we all live in. . . . "The State has the burden of *proving aggravators beyond a reasonable doubt.*"

Appendix, R. 975 and 981 (emphasis added). At the close of penalty phase, the trial judge also addressed the jury regarding the importance and significance of its role stating,

> Members of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of murder in the first degree. . . . Before you ballot you should carefully weigh, sift and consider the evidence and all of it, *realizing that a human life is at stake. . . .*

Appendix, R. 996-97; 999-1000 (emphasis added).[6]

The Petition cites *Blackwell v. State*, 79 So. 731, 736 (Fla. 1918), as authority regarding remarks by a prosecutor "as to the existence of a Supreme Court to correct any error that might be made at trial. . . ." Petition at 33. Unlike *Blackwell*, however,

---

[6] Justice Thomas' concurrence in *Reynolds*, 139 S. Ct. 27 (2018), respecting denial of certiorari, applies well to Jones' petition. Justice Thomas observed,

> Justice Breyer worries that the jurors here "might not have made a 'community-based judgment' that a death sentence was 'proper retribution.'". Contrary to Justice BREYER's suggestion that the jury did not feel an adequate sense of "responsibility" for its recommendation . . . , the jury was instructed that a "'human life is at stake.'". . .

Id. at 30, 32 (Thomas, J., concurring). As illustrated herein, both the trial judge and prosecutor in Jones' case clearly and unequivocally addressed the jurors on both of these concerns.

the assistant state attorney in Jones' case came nowhere near suggesting to the jury that an appellate court could remedy any error which occurred at trial. No suggestion of appellate court remedies was made before Jones' jury. On the contrary, the prosecutor forth-rightly reinforced the jury's responsibility and findings which were to be made, and arguably bolstered the jury's role.

Even under Florida's 2017 post-*Hurst v. Florida* revised death penalty statute, the judge is and remains the final sentencer. A jury recommendation of death to a Florida trial court is just that, a recommendation. Florida's new death penalty statute, "FINDINGS AND RECOMMENDED SENTENCE BY THE JURY," refers to the jury's vote as a "recommendation" and provides,

> If 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. If a unanimous jury does not determine that the defendant should be sentenced to death, the *jury's recommendation to the court* shall be a sentence of life imprisonment without the possibility of parole.

Florida Statutes § 921.141 (2)(c) (emphasis added). A jury's "recommended" sentence is also referred to in § 921.141 (3)(a), Florida Statutes. Further, a Florida judge, while bound by a jury's findings of no aggravation and a recommended life sentence, is free to reject a jury's recommendation of death and impose a life sentence. Such a decision is not even appealable in Florida. *Williams v. State*, 595 So. 2d 936 (Fla. 1992).

While Jones' jury may have heard references to the "advisory nature" of their sentencing recommendation many times, the jury was nonetheless instructed as to the gravely important nature and impactful role, which did not violate *Caldwell*. Nor,

does Jones' fact-based argument establish an unresolved federal question. Jones may not simply rely on cumulative references to the term "advisory," yet discount and ignore the thorough actions the trial court took to convey the significance of the jury's role to show the jury's role was somehow diminished, entitling him to relief.

The Petition Does Not Present an Unresolved Federal Question and the Florida Supreme Court's Decision Does Not Conflict With Any Federal or Appellate Court or Other State Supreme Court.

This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds and the basis of the ruling is adequate, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *see also Long*, 463 U.S. at 1040 ("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 independent state law grounds, 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.

As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10 (b) (listing conflict among federal

appellate courts and state supreme courts as a consideration in the decision to grant review). In the absence of such conflict, certiorari is rarely warranted.

Simply, the Petition fails to present a federal question regarding a *Hurst*-induced *Caldwell* claim which is unresolved, necessitating this Court's review. Nor does the Petition show that any conflict exists. In fact, this Court has denied certiorari petitions raising *Caldwell* issues in light of *Hurst*, albeit with dissent and commentary by members of the Court.[7]

The Eleventh Circuit has consistently rejected *Caldwell* challenges to Florida's jury instructions in capital cases in the years since *Romano* explaining, 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). The Eleventh Circuit concluded "the references to and descriptions of the jury's sentencing verdict in this case as an advisory one, as a recommendation to the judge, and of the judge as the final sentencing authority are not error under *Caldwell*." *Id.* at 1482. "Those references and descriptions are not error, because they accurately characterize the jury's and judge's sentencing roles under Florida law." *Id.*; *see also*

[7] *Reynolds v. State*, 251 So. 3d 811 (Fla. 2018), *cert. denied, Reynolds v. Florida*, 139 S. Ct. 27 (2018); *Middleton v.* State, 220 So. 3d 1152 (Fla. 2017), *cert. denied, Middleton v. Florida*, 138 S. Ct. 829 (2018); *Philmore v. State*, 234 So. 3d 567 (Fla. 2018), *cert. denied, Philmore v. Florida*, 139 S. Ct. 478 (2018); *Walls v. State*, 238 So. 3d 96 (Fla. 2018), *cert. denied, Walls v. Florida*, 139 S. Ct. 185 (2018); *Truehill v. State*, 211 So. 3d 930 (Fla. 2017), *cert. denied, Truehill v. Florida*, 138 S. Ct. 3 (2017); *Kaczmar v. State*, 228 So. 3d 1 (Fla. 2017), *cert. denied, Kaczmar v. Florida*, 138 S. Ct. 1973 (2018).

Provenzano v. Singletary, 148 F.3d 1327, 1334 (11th Cir. 1998) (recognizing the limitations on prior Eleventh Circuit *Caldwell* cases which had "to be read" in light of the Supreme Court's subsequent decisions in *Romano* and *Dugger*); *Johnston v. Singletary*, 162 F.3d 630, 642-44 (11th Cir. 1998) (rejecting both a straight *Caldwell* claim and an ineffectiveness claim based on *Caldwell* as being "without merit"); *Belcher v. Sec'y, Fla. Dept. of Corr.*, 427 Fed. Appx. 692, 695 (11th Cir. 2011) (rejecting a claim of ineffective assistance of counsel for failing to make a *Caldwell* objection where Florida "treats the jury's verdict as advisory," and the "remarks made by the prosecutor, viewed in context, accurately portrayed the relationship between the judge and jury and did not denigrate the jury's role in the proceedings," *citing Davis*). While these cases were decided before *Hurst v. Florida*, nothing in that opinion would change the Eleventh Circuit's analysis in these cases.

The Petition includes no federal circuit court case or state supreme court case finding a *Caldwell* violation based on jury instructions referring to their sentencing recommendation as "advisory" under state law. Further, there is no conflict between the Florida Supreme Court's decision in Jones' case and that of any federal circuit court of appeals or that of any state supreme court.[8] Therefore, Jones' claims are

---

[8] Other federal circuit courts have held that the use of "advisory" or "recommendation" do not violate *Caldwell*. *See Bowling v. Parker*, 344 F.3d 487, 514-15 (6th Cir. 2003) (use of the word "recommend" "does not misstate local law" or Kentucky statutes); *Fleenor v. Anderson*, 171 F.3d 1096, 1098-99 (7th Cir. 1999) (use of the word "recommendation" rejected because Indiana juries make "a recommendation to the judge about whether or not to impose the death penalty, but the judge is not required to follow the recommendation–it is his decision to make," *citing* Ind. Code § 35-50-2-9(e)); *Wilson v. Sirmons*, 536 F.3d 1064, 1121 (10th Cir. 2008) (claim based on description of the jury's sentencing role as a "recommendation" was an accurate description of Oklahoma law).

without merit and certiorari review in this case should be denied.

CONCLUSION

The Petition before the Court does not present any conflict between the Florida Supreme Court's decision and any decision of this Court. Nor is any unsettled question of federal law involved. Therefore, the Respondent respectfully submits that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
Florida Bar No. 158541
Counsel of Record

Janine D. Robinson
Assistant Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
capapp@myfloridalegal.com
(850) 414-3300

COUNSEL FOR RESPONDENT