CASE NO. 18-8399

IN THE SUPREME COURT OF THE UNITED STATES

RANDALL SCOTT JONES,

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. Does the Florida Supreme Court's partial retroactivity formula, designed to limit the class of condemned prisoners obtaining a life-or-death jury determination pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), violate the Eighth and Fourteenth Amendments to the United States Constitution?

II. Does the Florida Supreme Court's partial retroactivity formula employed for *Hurst* violations in Florida violate the Supremacy Clause of the United States Constitution in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)?

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The opinion of the Florida Supreme Court is reported at *Jones v. State*, 259 So. 3d 803 (Fla. 2018).

JURISDICTION

The judgment of the Florida Supreme Court was entered on December 13, 2018, and the mandate issued December 21, 2018. Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE AND FACTS

Petitioner Randall Jones was convicted of the first-degree murders of Matthew Paul Brock and Kelly Lynn Perry, and related offenses, in 1988. The victims had been sleeping in their pickup truck, which Jones wanted to steal after his car became stuck in the sand. After shooting them through the windshield, Jones removed the bodies and hid them in a wooded area nearby. *Jones v. State*, 569 So. 2d 1234, 1235-37 (Fla. 1990). He was seen shortly thereafter with the truck and was ultimately arrested driving the vehicle in Mississippi. *Id.*

In 1990, the Florida Supreme Court affirmed his convictions but reversed the death sentences, and remanded for a new sentencing proceeding. *Jones v. State*, 569 So. 2d 1234, 1240 (Fla. 1990). The resentencing was held in March 1991, and again resulted in jury recommendations of death for both victims. The trial court complied, finding that three aggravating factors for each victim outweighed the minimal mitigation and imposing two death sentences. On appeal, the Florida Supreme Court affirmed the death sentences. *Jones v. State*, 612 So. 2d 1370 (Fla. 1992), *cert. denied,* 510 U.S. 836 (1993). As such, Jones' sentence was final in 1993.

Subsequent collateral challenges have been universally rejected. *See Jones v. State*, 845 So. 2d 55 (Fla. 2003) (affirming denial of initial motion for postconviction relief and denying state petition for writ of habeas corpus); *Jones v. Secretary, Dept. of Corrections*, 644 F.3d 1206 (11th Cir.), *cert. denied*, 132 S. Ct. 590 (2011) (affirming the denial of federal petition for writ of habeas corpus).

On January 10, 2017, Jones filed a successive postconviction motion challenging his sentence, based on *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). Following the Case Management Conference, held on March 21, 2017, the circuit court denied

relief, on May 15, 2017. On April 4, 2018, Mr. Jones filed a petition seeking a belated appeal of the May 15, 2017 order denying postconviction relief. On July 9, 2018, this Court granted the belated appeal.

On September 18, 2018, the court issued an order directing Jones to show why *Hitchcock* should not be dispositive in his case. In *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017), 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*, 136 S. Ct. 616 (2016) 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 responses by the parties, the Florida Supreme Court ultimately affirmed the lower court's denial of relief, finding that *Hurst* does not apply retroactively to Jones' sentence of death that became final in 1993. *Jones v. State*, 259 So. 3d 803, 804 (Fla. 2018).

Jones now seeks certiorari review of the Florida Supreme Court's decision.

REASONS FOR DENYING THE WRIT

Certiorari review should be denied because the Florida Supreme Court's ruling on the retroactivity of *Hurst* 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*, and the court's ruling does not violate the Eighth or Fourteenth Amendments and does not conflict with any decision of this Court or involve an important, unsettled question of federal law.

Petitioner requests that this Court review the Florida Supreme Court's decision affirming the denial of his successive postconviction motion and claims that the state court's holding with respect to the retroactive application of *Hurst* violates the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty, the Fourteenth Amendment's guarantee of equal protection, and the Supremacy Clause. However, the Florida Supreme Court's denial of the retroactive application of *Hurst* to Petitioner's case is based on adequate and independent state grounds, is not in conflict with any other state court of last review, and is not in conflict with any federal appellate court. This decision is also not in conflict with this Court's jurisprudence on retroactivity, nor does it violate the Eighth and Fourteenth Amendments. Thus, because Jones has not provided any "compelling" reason for this Court to review his case, certiorari review should be denied. *See* Sup. Ct. R. 10.

Respondent would further note that this Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of *Hurst v. State*. *See, e.g.*, *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112 (Fla.), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505 (Fla.), *cert. denied*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548 (Fla.), *cert. denied*, 138 S. Ct. 1164 (2018); *Cole v. State*, 234 So. 3d 644 (Fla.), *cert. denied*, 138 S. Ct. 2657 (2018); *Kaczmar v. State*, 228 So. 3d

1 (Fla. 2017), *cert. denied*, 138 S. Ct. 1973 (2018); *Zack v. State*, 228 So. 3d 41 (Fla. 2017), *cert. denied*, 138 S. Ct. 2653 (2018); *Jones v. State*, 234 So. 3d 545 (Fla.), *cert. denied*, 138 S. Ct. 2686 (2018). Petitioner has not offered any persuasive, much less compelling, reasons for this Court to grant review of this case.

I. There is No Underlying Sixth Amendment Violation.

Aside from the question of retroactivity, certiorari would be inappropriate in this case because there is no underlying federal constitutional error as *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. Petitioner became eligible for a death sentence by virtue of his guilt phase convictions for first-degree homicide and robbery. The unanimous verdict by Petitioner's jury establishing his guilt of his contemporaneous armed 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."); *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)); *Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988) ("The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-

eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase").

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 State v. Mason*, 108 N.E.3d 56, 483-84 (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 principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citations omitted); *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); *State v. Gales*, 658 N.W.2d 604, 628-29 (Neb. 2003) ("[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review to be undertaken by a jury"). The findings required by the Florida Supreme Court following remand in *Hurst v. State* involving the weighing and selection of a defendant's sentence are not required by the Sixth Amendment. *See, e.g., McGirth v. State*, 209 So. 3d 1146, 1164 (Fla. 2017). Thus, there was no Sixth Amendment error in this case.[1]

[1] Even if there were Sixth Amendment error, it would be harmless beyond a reasonable doubt in this case as *Hurst* errors are subject to harmless error analysis. *See Hurst v. Florida*, 136 S. Ct. at 624; *see also Chapman v. California,* 386 U.S. 18, 23-24 (1967). Here, the aggravators found by the trial court, for the two victims, were either uncontestable (as unanimously found by the jury at the guilt phase in the case of the contemporaneous robbery/burglary and homicide during the

II. The Florida Court's Ruling on the Retroactivity of *Hurst* is Not Unconstitutional.

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*, 136 S. Ct. 616 (2016), in requiring that aggravating circumstances be found by a jury beyond a reasonable doubt before a death sentence may be imposed. However, this Court "has not ruled on whether unanimity is required" in capital cases. *Hurst*, 202 So. 3d at 59; *see also Ring v. Arizona*, 536 U.S. 584, 612 (2002) (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); *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." *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004). Thus, *Hurst v. State*'s requirement that the jury make specific factual findings before the imposition of the death penalty is procedural.

The Florida court then expanded this Court's ruling, requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all 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

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commission of a robbery/burglary) or established by overwhelming evidence given the facts surrounding the murder (CCP).

sentence of death." *Hurst v. State*, 202 So. 3d at 57.

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 v. State*, 210 So. 3d 1, 15-22 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017). In *Mosley*, the Florida Supreme Court held that *Hurst* is retroactive to cases which became final after this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), on June 24, 2002. *Mosley*, 209 So. 3d at 1283. In determining whether *Hurst* should be retroactively applied to Mosley, the Florida Supreme Court conducted a *Witt* analysis, the state based test for retroactivity. *See Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980) (determining whether a new rule should be applied retroactively by analyzing the purpose of the new rule, extent of reliance on the old rule, and the effect of retroactive application on the administration of justice) (citing *Stovall v. Denno*, 388 U.S. 293, 297 (1967); *Linkletter v. Walker*, 381 U.S. 618 (1965)). 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 v. Minnesota*, 552 U.S. 264, 280-81 (2008) (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 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*, has been held not to be retroactive under federal law, Florida has implemented a test which provides relief to a broader class of individuals in applying *Witt* instead of *Teague* for determining the retroactivity of *Hurst*. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (holding that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct

review"); *Lambrix v. Sec'y, Fla. Dept. of Corr.*, 872 F.3d 1170, 1182-83 (11th Cir.), *cert. denied*, 138 S. Ct. 312 (2017) (noting that "[n]o U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable").

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."[2] *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 v. State*, 210 So. 3d 1, 22 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), the Florida Supreme Court held that *Hurst* is not retroactive to any case in which the death sentence was final pre-*Ring*. The court specifically noted that *Witt* "provides *more expansive retroactivity standards* than those adopted in *Teague*." *Asay*, 210 So. 3d

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

at 15 (emphasis in original) (quoting *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005)). The court determined that prongs two and three of the *Witt* test, reliance on the old rule and effect on the administration of justice, weighed heavily against the retroactive application of *Hurst* to pre-*Ring* cases. *Asay*, 210 So. 2d at 20-22. As related to the reliance on the old rule, the court noted "the State of Florida in prosecuting these crimes, and the families of the victims, had extensively relied on the constitutionality of Florida's death penalty scheme based on the decisions of the United States Supreme Court. This factor weighs heavily against retroactive application of *Hurst v. Florida* to this pre-*Ring* case." *Id.* at 20. As related 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 his judgment and sentence became final in 1991, pre-*Ring*. *Id.* at 8, 20.

Since *Asay*, the Florida Supreme Court has continued to apply *Hurst* retroactively to all post-*Ring* cases and declined to apply *Hurst* retroactively to all pre-*Ring* cases. *See Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017), *cert. denied*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548, 549 (Fla. 2018), *cert. denied*, 138 S. Ct. 1164 (2018). This distinction between cases which were final pre-*Ring* versus cases which were final post-*Ring* is neither arbitrary nor capricious.[3]

[3] Federal courts have had little trouble determining that *Hurst*, like *Ring*, is not retroactive at all under *Teague*. *See Lambrix v. Sec'y, Fla. Dept. of Corr.*, 851 F.3d 1158, 1165 n.2 (11th Cir.) *cert. denied*, 138 S. Ct. 217 (2017); ("under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review"), *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying

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"); *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*. Even under the "pipeline" concept, cases whose direct appeal was 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 date of the decision in *Hurst*. 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*, defendants should not be penalized for time that it took for this determination to be made official in *Hurst*. Certainly, the Florida Supreme Court has demonstrated "some ground of difference that rationally explains the different treatment" between pre-*Ring* and post-*Ring* cases. *Eisenstadt v.*

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permission to file a successive habeas petition raising a *Hurst v. Florida* claim concluding that *Hurst v. Florida* did not apply retroactively).

Baird, 405 U.S. 438, 447 (1972); *see also Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (To satisfy the requirements of the Fourteenth Amendment, "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."). Unquestionably, extending relief to more individuals, defendants who would not receive the benefit of a new rule under the pipeline concept because their cases were already final when *Hurst* was decided, cannot 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.

Petitioner's suggestion that his sentence violates the Equal Protection Clause is plainly without merit. "The Equal Protection Clause of the Fourteenth Amendment 'is essentially a direction that all persons similarly situated should be treated alike.'" *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). A criminal defendant challenging the State's application of capital punishment must show intentional discrimination to prove an equal protection violation. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) ("A criminal defendant alleging an equal protection violation must prove the existence of purposeful discrimination"). A "'[d]iscriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *McCleskey*, 481 U.S. at 298. Here, Petitioner is being treated exactly the same as similarly situated murderers.

Petitioner's argument that his sentence somehow violates the Eighth Amendment is plainly meritless. To the extent Petitioner 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.

Petitioner's death sentence is neither unfair nor unreliable because the judge imposed the sentence in accordance with the law existing at the time of his trial. Petitioner cannot establish that his sentencing procedure was less accurate than future sentencing procedures employing the new standards announced in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Certainly, other than speculation, Petitioner has neither identified nor established any particular lack of reliability in the proceedings used to impose his death sentence. *See Hughes v. State*, 901 So. 2d 837, 844 (Fla. 2005) (holding that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) is not retroactive and noting that "neither the accuracy of convictions nor of sentences imposed and final before *Apprendi* issued is seriously impugned"); *Rhoades v. State*, 233 P.3d 61, 70-71 (2010) (holding that *Ring* is not retroactive after conducting its own independent *Teague* analysis and observing, as this Court did in *Summerlin*, that there is debate as to whether juries or judges are the better fact-finders and that it could not say "confidently" that judicial factfinding "seriously diminishes accuracy"). Just like *Ring* did not enhance the fairness or efficiency of death penalty procedures, neither does *Hurst.* As this Court has explained, "for every argument why juries are more accurate factfinders, there is another why they are less accurate." *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004). Thus, because the

accuracy of Petitioner's death sentence is not at issue, fairness does not demand retroactive application of *Hurst*.

Petitioner maintains that fairness and uniformity require that *Hurst* be retroactively applied to all cases. Contrary to his argument, 'fairness' does not provide a mechanism for vacating his death sentence. What fairness calls for, is that the State not bear the time and expense of conducting another penalty phase and victim's family not be forced to endure another proceeding simply because the law has changed since Jones was sentenced. *State v. Towery*, 64 P.3d 828, 835-36 (Ariz. 2003) ("[c]onducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice" and would be inconsistent with the Court's duty to protect victims' rights under the Arizona Constitution). Petitioner's fairness argument rings hollow against the interests of the State, which prosecuted him in good faith under the law existing at the time of his trial, the concept of finality, and the interests of the victims' family members.

The Florida Supreme Court's determination of the retroactive application of *Hurst* under the state law *Witt* standard is based on adequate and independent state grounds and is not violative of federal law or this Court's precedent. This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *see also Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has

no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010); *Long*, 463 U.S. at 1041. Because the Florida Supreme Court's retroactive application of *Hurst* in Petitioner's case is based on adequate and independent state grounds, certiorari review should be denied.

Certiorari review would also be inappropriate in this case because, assuming for a moment any *Hurst* error can be discerned from this record, such error would be harmless. *Hurst* errors are subject to harmless error analysis. *See Hurst v. Florida*, 136 S. Ct. at 624; *see also Chapman v. California*, 386 U.S. 18, 23-24 (1967). Here, the aggravating circumstances found by the trial court[4] and affirmed by the Florida Supreme Court on appeal either were uncontestable, as unanimously found by the jury at the guilt phase of this case or established by overwhelming evidence. 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 state supreme courts as a consideration in the decision to grant review).

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[4] 1) For Brock's murder the court found: previous conviction of a violent felony (Perry's murder and the other crimes committed against her); committed during an armed robbery combined with committed for pecuniary gain as a single aggravator; and committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. For Perry's murder the court found prior violent felony (Brock's murder and the other crimes committed against him), committed during a burglary, and committed in a cold, calculated, and premeditated manner. *Jones*, 612 So. 2d at 1375.

III. The Florida Supreme Court's Application of *Hurst*'s Retroactivity Does Not Violate the Supremacy Clause of the United States Constitution

Petitioner also argues that *Hurst* provided a substantive change in the law and thus should be afforded full retroactive application under federal law pursuant to *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). *Petition* at 25. However, *Hurst*, like *Ring,* was a procedural change, not a substantive one. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review."). Thus, like *Ring, Hurst* is not retroactive under federal law. *See Lambrix v. Secretary, Fla. Dept. of Corr.*, 872 F.3d 1170, 1182-83 (11th Cir. 2017), cert. denied, 138 S. Ct. 312 (2017) ("No U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable."); *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"). Thus, neither *Ring* nor *Hurst* are retroactive under federal law.

In support of his argument that *Hurst* was a substantive rather than a procedural change, Petitioner analogizes *Hurst* to *Miller v. Alabama*, 567 U.S. 460 (2012). *Petition* at 25-27. In *Miller*, this Court found the imposition of mandatory sentences of life without parole on juveniles a violation of the Eighth Amendment and a substantive change because "it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status' — that is, juvenile offenders whose crime reflects irreparable corruption" *Montgomery*, 136 S. Ct. at 734 (*quoting Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). As such, the rule in *Miller* announced a substantive rule which was held to retroactive "because it 'necessarily carr[ies] a significant risk

that a defendant' – here, the vast majority of juvenile offenders — 'faces a punishment that the law cannot impose upon him.'" *Montgomery*, 136 S. Ct. at 734 (*quoting Summerlin*, 542 U.S. at 352). However, *Hurst* is distinguishable from *Miller.*

Unlike *Miller, 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 *Miller*, 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.

Petitioner also relies on *Welch v. United States*, 136 S. Ct. 1257 (2016), to argue that the Eighth Amendment unanimity requirement announced in *Hurst v. State* was a substantive change and is retroactive under federal law. *Petition* at 28. *Welch* does not distinguish itself from *Summerlin*, but instead quotes *Summerlin* to describe the distinctions between a substantive and a procedural change. *Id.* at 1265. The *Welch* court found that the rule in *Johnson* was substantive because it altered the class of people affected by the law. *Id.* at 1265. In explaining how the rule in *Johnson* was not procedural, this Court 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". Here, the new rule allocated the decision-making authority to determine aggravators from the judge to the jury. Based on this Court's precedent, there can be no doubt that the rule in *Hurst v. Florida* was a procedural rule. Further, in *Welch*, this Court found that striking down the residual clause of the Armed Career Criminal Act in *Johnson* caused a

substantive change because "the same person engaging in the same conduct is no longer subject to the Act." *Id.; Johnson v. United States*, 135 S. Ct. 2551 (2015). Therefore, *Hurst* is factually distinguishable from *Welch*.

Unlike *Welch*, after *Hurst,* Florida's death penalty sentencing scheme still applies to the same persons engaging in the same conduct. In *Hurst v. State*, the Florida Supreme Court explained that the "requirement that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment even more significantly, and expresses the values of the community as they currently relate to imposition of death as a penalty." *Hurst*, 202 So. 3d at 60. Again, this is an alteration in the procedure necessary to obtain a death sentence. Neither the range of conduct nor the class of persons has been altered. The only change is the manner of determining a defendant's sentence. Thus, *Ring* and *Hurst* announced a procedural change, not a substantive one.

Additionally, this Court "has not ruled on whether unanimity is required" in capital cases. *Hurst*, 202 So. 3d at 59; *see also 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); *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. Thus, *Hurst v. State*'s requirement that the jury make specific factual findings before the imposition of the death penalty is procedural.

As related to the finding that aggravation is sufficient, *Hurst* did not ascribe a standard of proof. *Hurst*, 202 So. 3d at 54. The Eighth Amendment requires that "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Roper v. Simmons*, 543 U.S. 551, 568 (2005). The State of Florida has a list of sixteen aggravating factors enumerated in the statute. *See* 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.

Similarly, *Hurst* did not ascribe a standard of proof. *Hurst*, 202 So. 3d at 54. This Court has specifically held that the beyond-a-reasonable-doubt standard for finding that the aggravation outweighs mitigation is not required under federal law. *See Kansas v. Marsh*, 548 U.S. 163, 164 (2006) ("Weighing is not an end, but a means to reaching a decision."); *Tuilaepa v. California*, 512 U.S. 967, 979 (1994) ("A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision."); *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) ("[T]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt."). The weight that a juror gives to the aggravation as compared to the weight given to mitigation is also not something that can be defined by a beyond-a-reasonable-doubt standard.

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," Petitioner relies upon *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972). However, *Hurst* is distinguishable from *Ivan V.* because it did not address the proof-beyond-a-reasonable-doubt standard. In *Ivan V.*, the holding of *In re Winship* which required that the proof-beyond-a-reasonable-doubt standard be afforded to juveniles was given full retroactive effect. *Ivan V.,* 407 U.S. at 203-04; *In re Winship,* 397 U.S. 358 (1970). However, the standard of proof for proving aggravating factors in Florida had been beyond a reasonable doubt long before *Hurst* was decided. *See* Fla. Std. J. Inst. (Crim.) 7.11; *Floyd v. State*, 497 So. 2d 1211, 1214-15 (Fla. 1986); *Zeigler v. State*, 580 So. 2d 127, 129 (Fla. 1991); *Finney v. State,* 660 So. 2d 674, 680 (Fla. 1995). Thus, *Ivan V.* is not analogous to *Hurst.*

The Florida Supreme Court's determination of the retroactive application of *Hurst* under *Witt v. State,* 387 So. 2d 922 (Fla. 1980), is based on an independent state ground and is not violative of federal law or this Court's precedent. *Hurst* did not announce a substantive change in the law and is not retroactive under federal law. Thus, there is no violation of the Supremacy Clause and certiorari review should be denied. Nothing in the petition justifies the exercise of this Court's certiorari jurisdiction.

CONCLUSION

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

Respectfully submitted,

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