NO. 18-8409

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY MUNGIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

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

Lisa A. Hopkins
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

Capital Case

Question Presented

Whether this Court should grant certiorari review where the retroactive application of *Hurst v. Florida* and *Hurst v. State* is based on adequate independent state grounds and the issue presents no conflict between the decisions of other state courts of last resort or federal courts of appeal, does not conflict with this Court's precedent, and does not otherwise raise an important federal question.

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Opinion Below

The decision of the Florida Supreme Court appears as *Mungin v. State*, 259 So. 3d 716 (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, because the Florida Supreme Court's decision in this case is based on adequate and independent state grounds, this Court should decline to exercise jurisdiction as no federal question is raised. Sup. Ct. R. 14(1)(g)(i). Additionally, the Florida Supreme Court's decision 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. Sup. Ct. R. 10. No compelling reasons exist in this case and this Petition for a writ of certiorari should be denied. Sup. Ct. R. 10.

Statement of the Case and Facts

The facts of the murder committed by Petitioner are recited in the Florida Supreme Court's direct appeal opinion:

> Betty Jean Woods, a convenience store clerk in Jacksonville, was shot once in the head on September 16, 1990, and died four days later. There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, later identified the man as Mungin. After the shooting, a store supervisor found a $59.05 discrepancy in cash at the store.
>
> Mungin was arrested on September 18, 1990, in Kingsland, Georgia. Police found a .25–caliber semiautomatic pistol, bullets, and Mungin's Georgia identification when they searched his house. An analysis showed that the bullet recovered from Woods had been fired from the pistol found at Mungin's house.
>
> Jurors also heard *Williams* rule evidence of two other crimes. They were instructed to consider this evidence only for the limited purpose of proving Mungin's identity.
>
> First, William Rudd testified that Mungin came to the convenience store where he worked on the morning of September 14, 1990, and asked for cigarettes. When Rudd turned to get the cigarettes, Mungin shot him in the back. He also took money from a cash box and a cash register. Authorities determined that an expended shell recovered from the store came from the gun seized in Kingsland.
>
> Second, Thomas Barlow testified that he saw Meihua Wang Tsai screaming in a Tallahassee shopping center on the afternoon of September 14, 1990. Tsai had been shot while working at a store in the shopping center. A bullet that went through Tsai's hand and hit her in the head had been fired from the gun recovered in Kingsland.

> The judge instructed the jury on both premeditated murder and felony murder (with robbery or attempted robbery as the underlying felony), and the jury returned a general verdict of first-degree murder.
>
> In the penalty phase, several witnesses who knew Mungin while he was growing up testified that he was trustworthy, not violent, and earned passing grades in school. Mungin lived with his grandmother from the time he was five, but Mungin left when he was eighteen to live with an uncle in Jacksonville. An official from the prison where Mungin was serving a life sentence for the Tallahassee crime testified that Mungin did not have any disciplinary problems during the six months Mungin was under his supervision. Harry Krop, a forensic psychologist, testified that he found no evidence of any major mental illness or personality disorder, although Mungin had a history of drug and alcohol abuse. Krop said he thought Mungin could be rehabilitated because of his normal life before drugs, his average intelligence, and his clean record while in prison.
>
> The jury recommended death by a vote of seven to five. The trial judge followed the jury's recommendation and sentenced Mungin to death. In imposing the death penalty, the trial judge found two aggravating factors: (1) Mungin had previously been convicted of a felony involving the use or threat of violence to another person; and (2) Mungin committed the capital felony during a robbery or robbery attempt and committed the capital felony for pecuniary gain. The trial judge found no statutory mitigation and gave minimal weight to the nonstatutory mitigation that Mungin could be rehabilitated and was not antisocial.

Mungin v. State, 689 So. 2d 1026, 1028 (Fla. 1995) (footnotes omitted).

Petitioner's judgment and sentence of death was affirmed on appeal by the Florida Supreme Court. *Mungin*, 689 So. 2d at 1028. Petitioner filed a petition for a writ of certiorari in the United States Supreme Court which the Court denied on October 6, 1997. *Mungin v. Florida*, 118 S. Ct. 102 (1997). Under Florida law, Petitioner's judgment and sentence became final upon this Court's disposition of the petition for a writ of certiorari. Fla. R. Crim. P. 3.851(d)(1)(B).

In 2003, Mungin filed an appeal in this Court challenging the trial court's denial of his initial postconviction motion and an accompanying habeas corpus petition. *Mungin v. State*, 932 So. 2d 986 (Fla. 2006). The Florida Supreme Court affirmed the trial court's ruling and denied the habeas corpus petition. *Id.* Mungin subsequently filed an appeal in the Court challenging the trial court's summary denial of his successive postconviction motion. *Mungin v. State*, 79 So. 3d 726 (Fla. 2011). After his case was remanded for an evidentiary hearing, the postconviction court again denied relief and the Court affirmed. *Mungin v. State*, 141 So. 3d 138 (Fla. 2013).

On January 12, 2017, Mungin filed a successive postconviction motion seeking relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). (PCR I:1-70). The trial court did not order the State to respond and ultimately denied Mungin's postconviction motion because he was not entitled to *Hurst* relief as a matter of law and his motion was untimely. (PCR I:76-80).

On May 1, 2017, Mungin filed a notice of appeal with this Court. On June 5, 2017, the Florida Supreme Court stayed the appeal pending the resolution of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). On September 22, 2017, the Court issued an order for Mungin to show cause as to "why this trial court's order should not be affirmed in light of this Court's decision [in] *Hitchcock v. State*, SC17-445." On November 15, 2018, after briefs were submitted by the parties, the Court held that Mungin is not entitled to relief under *Hurst*, as his case was final prior to the decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *Mungin*, 259 So. 3d at 717.

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. *Hurst*, 136 S. Ct. 616. 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, *cert. denied*, *Florida v. Hurst*, 137 S. Ct. 2161 (2017).

In *Mosley*, the Florida Supreme Court held that *Hurst* applies retroactively to cases which became final after the decision was issued in *Ring* on June 24, 2002. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). On the same day in *Asay*, the Florida Supreme Court held that *Hurst* does not apply retroactively to cases which became final prior to *Ring*. *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 138 S. Ct. 41 (2017).

Reasons for Denying the Writ

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

Petitioner seeks certiorari review of the Florida Supreme Court's decision holding that his successive attempt to obtain *Hurst* relief in state court was procedurally barred and its alternate ruling that *Hurst* was not retroactive to

Petitioner because his case became final pre-*Ring* in 1997. *Mungin*, 259 So. 3d at 717. The Petition alleges that the Florida Supreme Court's refusal to retroactively apply *Hurst* to pre-*Ring* cases is in violation of the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection. (Petition at 2). However, the Florida Supreme Court's retroactive application of *Hurst* to only post-*Ring* cases does not violate the Eighth or Fourteenth Amendment. Further, the Florida Supreme Court's denial of retroactive application to Petitioner 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. Thus, Petitioner's request for certiorari review should be denied.[1]

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

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[1] 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*, 226 So. 3d 216, *cert. denied, Hitchcock*, 138 S. Ct. 513; *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); *Cole v. State*, 234 So. 3d 644 (Fla. 2018), *cert. denied, Cole v. Florida*, 138 S. Ct. 2657 (2018); *Kaczmar v. State*, 228 So. 3d 1 (Fla. 2017), *cert. denied, Kaczmar v. Florida*, 138 S. Ct. 1973 (2018); *Zack v. State*, 228 So. 3d 41 (Fla. 2017), *cert. denied, Zack v. Florida*, 138 S. Ct. 2653 (2018).

advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."). Aside from the hurdle of procedural bar, 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* and *Asay*. *Mosley*, 209 So. 3d at 1276-83; *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, 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)). 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 (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 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*, 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. Dep't of Corr.*, 872 F.3d 1170, 1182-83 (11th Cir. 2017), *cert. denied*, *Lambrix v. Jones*, 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-

[2] Under this rationale, it would not make sense only to grant relief to those who continued to raise *Ring* in the 14 years between *Ring* and *Hurst* as this would encourage the filing of 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.

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 adoped 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. 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 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 Hitchcock*, 226 So. 3d 216, *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); *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 between 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 number of things, such as a case overlapping with the Florida Supreme Court's summer recess, docketing on appeal, etc. (Petition at 17). 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, such as Petitioner's example of *Bowles* and *Card*. *Bowles v.*

State, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613 (Fla. 2001).[3] 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. 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

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[3] Though both *Bowles* and *Card* were both decided on October 11, 2001, in *Bowles*, the rehearing was denied and the Mandate was issued January 10, 2002, but in *Card*, the rehearing was denied and the Mandate was issued December 20, 2001.

alike."). Unquestionably, extending relief to more individuals,[4] 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.

Aside from the question of retroactivity, certiorari would be inappropriate in this case because there is no underlying federal constitutional error under *Hurst v. Florida*. Under this Court's precedent, Petitioner's prior violent felony conviction, an aggravator under Florida law, satisfies the fact-finding requirements of the Sixth Amendment. *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)). Thus, there was no Sixth Amendment error in this case.

Petitioner also attempts to raise a *Caldwell* claim in this section. (Petition at 22-24); *Caldwell v. Mississippi*, 472 U.S. 320 (1985). As this claim was not raised below,[5] it is not properly before this Court. *See Adams v. Robertson*, 520 U.S. 83, 86-

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[4] Approximately 150 defendants whose convictions became final post-*Ring* are being re-sentenced pursuant to *Hurst*. Death Penalty Information Center, Florida Death-Penalty Appeals Decided in Light of *Hurst*, available at https://deathpenaltyinfo.org/node/6790 (last visited June 8, 2018).

[5] Petitioner cited *Caldwell* in passing in his Response to the Florida Supreme Court's Order to Show Cause as an argument as to why he believes the State could not prove any *Hurst* error in this case was harmless beyond a reasonable doubt.

87 (1997) ("we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court"); *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (This Court does not ordinarily review a claim not presented to the court below.); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (This Court sits as a "'court of final review and not first view.'") (citation omitted). Since this claim was not properly presented below, certiorari review should be denied.

Further, this is a postconviction case, and this Court would have to address retroactivity before even reaching the underlying jury instruction issue. Before this Court could hold that *Hurst*, 136 S. Ct. 616, is retroactive, it would necessarily have to overturn extensive precedent establishing that *Ring* is not. Indeed, federal courts have had little trouble determining that *Hurst*, like *Ring*, is not retroactive under the test announced in *Teague*, 489 U.S. at 288.[6]

Finally, aside from the question of retroactivity, the instruction claim Petitioner seeks to raise here is meritless. In order to establish constitutional error under *Caldwell*, a defendant must show that the comments or instructions to the jury "'improperly described the role assigned to the jury by local law.'" *Romano v.*

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

Oklahoma, 512 U.S. 1, 9 (1994) (citation omitted). Since the jury in this case was unquestionably properly informed of its role in sentencing Petitioner at the time of trial, this claim lacks merit.[7] *See Truehill v. Florida*, 138 S. Ct. 3 (2017); *Middleton v. Florida*, 138 S. Ct. 829 (2018); *Guardado v. Jones*, 138 S. Ct. 1131 (2018). Petitioner's criticism aside, a Florida jury's decision regarding a death sentence was, and still remains, an advisory recommendation. *See Dugger v. Adams*, 489 U.S. 401 (1989). *See also* § 921.141(2)(c), Fla. Stat. (2017) (providing that "[i]f a unanimous jury determines that the defendant should be sentenced to death, the jury's **recommendation** to the court shall be a sentence of death") (emphasis added). Therefore, there was no *Caldwell* violation.

The Florida Supreme Court's determination of the retroactive application of *Hurst* under *Witt* is based on an adequate and independent state ground and is not violative of federal law or this Court's precedent. Thus, certiorari review should be denied.

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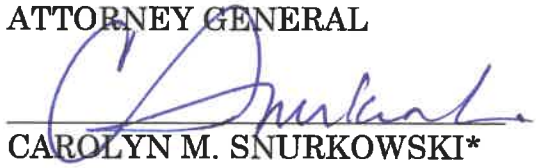
[7] The jury was properly instructed that it was their duty to render to the court an advisory sentence, based upon its determination as to whether sufficient mitigating circumstances existed to outweigh any aggravating circumstances found to exist. The jury was also instructed that the aggravating circumstances must be found to the beyond-a-reasonable-doubt standard.

Conclusion

Respondent respectfully submits that this 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

Lisa A. Hopkins
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