CASE NO. 18-8453

IN THE SUPREME COURT OF THE UNITED STATES

DUSTY RAY SPENCER,

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]

QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari review where the retroactive application of Hurst v. Florida and Hurst v. State is based on adequate independent state grounds 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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The opinion of the Florida Supreme Court is reported at Spencer v. State, 259 So. 3d 712 (Fla.), reh. denied, 2018 WL 7137676 (Fla. Dec. 13, 2018).

JURISDICTION

The judgment of the Florida Supreme Court was entered on November 8, 2018. Spencer's motion for rehearing was denied December 13, 2018 and the mandate issued on December 31, 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

Petitioner, Dusty Ray Spencer, is a Florida inmate under a death sentence imposed for the brutal first-degree murder of Karen Spencer. Spencer was charged by amended information with first-degree murder [victim Karen Spencer], aggravated assault with a knife [victim Timothy Johnson], attempted first-degree murder [victim Karen Spencer], and aggravated battery [victim Timothy Johnson]. A jury trial commenced before the Honorable Circuit Judge Belvin Perry, Jr., and the jury found Spencer guilty as charged with the exception of finding Spencer guilty of the lesser offense of attempted second-degree murder.

The Florida Supreme Court provided a detailed factual summary in Spencer's initial direct appeal opinion. Spencer v. State, 645 So. 2d 377, 379-80 (Fla. 1994). In its opinion, the court found the following facts:

> Spencer was charged with the first-degree murder of his wife Karen Spencer, who was also Spencer's partner in a painting business. In early December 1991, Karen asked Spencer to move out of the house. On December 10, 1991, Spencer confronted Karen about money which she had withdrawn from the business account. During this argument, Spencer choked and hit Karen and threatened to kill her. Spencer was arrested after Karen reported the incident to the police. According to Karen's account to a police officer, Spencer called her from jail the next day and stated that he was going to finish what he had started as soon as he got out of jail.
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> Although Karen asked Spencer to return home during the holidays, she asked him to leave again after Christmas was over. While Spencer was drinking with friends on New Year's Day, he told one friend that he should take Karen out on their boat and throw her

overboard. Two days later he told that friend that Karen refused to go out on the boat anymore.

On January 4, 1992, Spencer returned to Karen's home and got into a fight with Karen in her bedroom. Karen's teenage son Timothy Johnson was awakened by this fight. When Timothy entered his mother's bedroom, he saw Spencer on top of Karen, hitting her. When Timothy tried to intervene, Spencer struck him in the head with a clothes iron. Spencer followed Timothy back to his bedroom and struck him several more times with the iron. Spencer told Timothy, "You're next; I don't want any witnesses." Karen fled the house and sought help from a neighbor. When Timothy attempted to summon help on the telephone, Spencer yanked the phone cord from the wall. Spencer then fled the house and left town. Timothy and Karen were taken to the hospital and treated for their injuries. At the hospital, Karen told the treating physician that Spencer had hit her with an iron. At trial, the physician stated that Karen's wounds were consistent with having been inflicted with an iron.

Spencer returned to Karen's house on the morning of January 18, 1992. Timothy was again awakened by a commotion, grabbed a rifle from his mother's bedroom, and found Karen and Spencer in the backyard. Timothy testified that Spencer was hitting Karen in the head with a brick, and that he observed a lot of blood on Karen's face. Timothy tried to shoot Spencer, but the rifle misfired and he instead struck Spencer in the head with the butt of the rifle, which was shattered by this impact. Spencer pulled up Karen's nightgown and told her to "show your boy your pussy." He then slapped Karen's head into the concrete wall of the house. Karen told Spencer to "stop." When Timothy attempted to carry his mother away, Spencer threatened him with a knife. Timothy ran to a neighbor's house to summon aid.

When the police arrived at the scene, they found Karen dead. She had been stabbed four or five times in the chest, cut on the face and arms, and had suffered blunt force trauma to the back of the head. The medical examiner testified that cuts on Karen's right hand and arm were defensive wounds and that death was caused by blood loss from two penetrating stab wounds to the heart and lung. The medical examiner also testified that all of the wounds occurred while Karen was alive and that she probably lived for ten to fifteen minutes

> after receiving the stab wounds in the chest. According to the medical examiner, Karen suffered three impacts to the back of the head that were consistent with her head being hit against a concrete wall. Because this impact would have caused Karen to lose consciousness, the medical examiner testified that the defensive wounds had to have occurred before the head trauma.
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> Spencer was charged with four counts: first-degree premeditated murder and aggravated assault for the January 18 incident and attempted first-degree murder and aggravated battery for the January 4 incident. Spencer moved to sever the counts because they involved separate incidents. The court denied the motion.
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> The jury convicted Spencer of first-degree murder and recommended a death sentence by a seven-to-five vote. The trial judge followed the jury's recommendation and imposed death. The judge found three aggravating circumstances: previous conviction of another felony involving violence based upon the contemporaneous convictions; that the murder was especially heinous, atrocious, or cruel (HAC);2 and that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP).3 The judge found no statutory mitigating circumstances, and one nonstatutory mitigating circumstance (defendant's history and background).
>
> Spencer was also convicted on the counts of aggravated assault and aggravated battery as charged in the indictment and the lesser-included offense of attempted second-degree murder. He was sentenced to five years for aggravated assault, fifteen years for attempted second-degree murder, and fifteen years for aggravated battery, with the sentences to run consecutively for a total of 35 years.

Spencer, 645 So. 2d at 379-80.

On September 22, 1994, the Florida Supreme Court affirmed Spencer's convictions, but remanded for reconsideration of the sentence by the trial court in light of the court striking the cold, calculated, and premeditated aggravator and finding the

statutory mental health mitigators were improperly rejected. Spencer v. State, 645 So. 2d 377 (Fla. 1994).

The trial court reconsidered Spencer's sentence after remand, but found that the aggravating factors outweighed all mitigating circumstances and imposed the death sentence for the murder of Karen Spencer. (RS-T2/68). On September 12, 1996, the Florida Supreme Court affirmed Spencer's sentence on appeal after reconsideration of Spencer's death sentence. Spencer v. State, 691 So. 2d 1062 (Fla. 1996). The judgment and sentence became final upon denial of certiorari by this Court on October 6, 1997. Spencer v. Florida, 522 U.S. 884 (1997); Fla. R. Crim. P. 3.851(d)(1)(B) (A judgment and sentence become final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed").

Spencer unsuccessfully sought post-conviction relief in state court. See Spencer v. State, 842 So. 2d 52 (Fla. 2003). Spencer thereafter sought habeas relief in federal court which denied his claims for relief. Spencer v. Crosby, 2006 WL 7069916 (Fla. M.D. Sept. 7, 2006). The Eleventh Circuit Court of Appeals affirmed the denial of habeas relief on June 22, 2010. Spencer v. Secretary, Dept. of Corr., 609 F.3d 1170 (11th Cir. 2010), cert. denied, 562 U.S. 1203 (2011).

Following unsuccessful collateral attacks in state and federal court, Spencer filed the instant successive post-conviction motion pursuant to Florida Rule of Criminal Procedure

3.851 challenging his death sentence based on Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). On April 28, 2017, the circuit court summarily dismissed Spencer's motion. (Pet. App. B).

After the Florida Supreme Court decided Hitchcock v. State, 226 So. 3d 216 (Fla.), cert. denied, 138 S. Ct. 513 (2017), it issued an order to show cause directing Spencer to show why Hitchcock should not be dispositive in his case. In Hitchcock, the Florida Supreme Court reaffirmed its previous holding in Asay v. State, 210 So. 3d 1 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017), ruling that Hurst v. Florida as interpreted by Hurst v. State is not retroactive to defendants whose death sentences were final when this Court decided Ring v. Arizona, 536 U.S. 584 (2002). The Florida Supreme Court affirmed the lower court's denial of relief, finding "because his sentence became final prior to Ring, Spencer is not entitled to Hurst relief." (Pet. App. A, p. 3).

Spencer 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 seeks review of the Florida Supreme Court's decision affirming the denial of his successive post-conviction motion and claims that the state court's holding with respect to the retroactive application of Hurst provides this Court a vehicle to address structural error in Florida's capital sentencing scheme. Petitioner's attempts to portray this as something more than a state law retroactivity ruling are not persuasive and do not merit exercise of this Court's certiorari jurisdiction. Indeed, Petitioner largely ignores the question of retroactivity and instead argues his claims as if his case were on review from a direct appeal, not as a long final post-conviction case. The critical issue in this case is retroactivity, and Petitioner almost completely ignores this issue in his brief before this Court.

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 Petitioner has not provided any "compelling" reason for this Court to review his case, certiorari review should be denied. See Sup. Ct. R. 10.

Respondent notes that this Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of Hurst v. State. See, e.g., Asay v. State, 210 So. 3d 1 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017); Hitchcock v. State, 226 So. 3d 216 (Fla.), cert. denied, 138 S. Ct. 513 (2017); Lambrix v. State, 227 So. 3d 112 (Fla.), cert. denied, 138 S. Ct. 312 (2017); Hannon v. State, 228 So. 3d 505 (Fla.), cert. denied, 138 S. Ct. 441 (2017); Branch v. State, 234 So. 3d 548 (Fla.), cert. denied, 138 S. Ct. 1164 (2018); Cole v. State, 234 So. 3d 644 (Fla.), cert. denied, 138 S. Ct. 2657 (2018); Kaczmar v. State, 228 So. 3d 1 (Fla. 2017), cert. denied, 138 S. Ct. 1973 (2018); Zack v. State, 228 So. 3d 41 (Fla. 2017), cert. denied, 138 S. Ct. 2653 (2018). Petitioner offers no persuasive, much less compelling reasons, for this Court to grant review of his case.

Petitioner's Claim That He Is Entitled To Resentencing By A Jury Following The Striking Of The CCP Aggravators Was Procedurally Barred In State Court.

Petitioner appears to seek review of the Florida Supreme Court's rejection of his claim that Hurst somehow revives his previously denied claim that he was entitled to resentencing by a jury following the striking of an aggravator rather than being resentenced by the judge alone. However, the Florida Supreme Court expressly found this claim untimely and procedurally barred from review.[1] Spencer v. State, 259 So. 3d 712, 714 (Fla. 2018) ("Spencer's claim that he should have been entitled to have a jury reweigh the aggravation and mitigation when his case was remanded for reconsideration of the sentence by the trial judge in 1994 is untimely and procedurally barred."). To the extent Petitioner seeks review of that decision here, he is asking this Court to accept his case to review to the Florida Supreme Court's application of Florida's procedural and time limits on post-

[1] This untimely and procedurally barred claim is also meritless. The error found on direct appeal by the Florida Supreme Court dealt with the trial court's error in assessing and evaluating the evidence presented during the penalty phase hearing. Consequently, the judge reevaluated the evidence in light of the court striking the CCP aggravator and considering the mental health mitigation the court had initially rejected. Spencer, 645 So. 2d at 384. There was simply no reason to empanel a new penalty phase jury. The Florida Supreme Court found trial court error, not error in the instructions or evidence presented to the jury. Accordingly, it was not error for the Florida Supreme Court to order a remand for reweighing and resentencing by the trial court. See generally Romano v. Oklahoma, 512 U.S. 1, 10 (1993) (observing that the Court has condoned remand for reweighing by lower courts after striking an improper or unconstitutional aggravator) (citations omitted).

conviction applications. This is no federal constitutional violation; certiorari review by this Court would involve nothing more than an examination of Florida's application of its own state law with regard to procedural bar.

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); Michigan v. Long, 463 U.S. 1032, 1038 (1983). See also Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); Street v. New York, 394 U.S. 576, 581-82 (1969) (same). Accordingly, certiorari should be denied.

There Is No Underlying Constitutional Violation.

Aside from the state law 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 asserts that he was subject to an "increase in penalty" without any jury at all which constitutes "fundamental error." (Petition at 11). Petitioner is wrong. The unanimous verdict by Spencer's

jury establishing his guilt of qualifying contemporaneous felonies, which constituted an aggravator under clearly established Florida law, was sufficient to meet the Sixth Amendment's factfinding requirement.

Hurst represented an application of Ring to Florida and Ring was based on Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). The holding in Apprendi was that ***"[o]ther than the fact of a prior conviction,*** any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added). Apprendi, 530 U.S. at 490. In Hurst this Court also cited Alleyne v. United States, 570 U.S. 99, 104 (2013), which held any facts that increase the mandatory minimum sentence for an offense must be submitted to the jury and found beyond a reasonable doubt because "the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty." Alleyne, 570 U.S. at 99, 102, 113 n.2. The Alleyne Court explained, "this is distinct from factfinding used to guide judicial discretion in selecting a punishment within limits fixed by law." Id. at 113 n.2. "While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing." Id.

Petitioner became eligible for a death sentence given the guilt phase convictions for contemporaneous violent felonies. See

Alleyne, 570 U.S. at 115-16 (the Court explained that "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime."). Thus, unlike the situation in Hurst, jury findings established that Petitioner was eligible for a death sentence.[2] 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); 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)).

Petitioner's reliance upon the Florida Supreme Court's expansion of Hurst to include weighing and selection of a defendant's sentence is misguided.[3] This Court in Hurst and Ring did not address the weighing process or otherwise indicate that jury sentencing is now required. See United States v. O'Brien, 560 U.S. 218, 224 (2010) (recognizing that Apprendi does not

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[2] § 921.141(6)(b), Fla. Stat. (listing prior violent felony as an aggravator under Florida law).

[3] The dissent observed that "[n]either the Sixth Amendment nor Hurst v. Florida requires a jury to determine the sufficiency of the aggravation, the weight of the aggravation relative to any mitigating circumstances, or whether a death sentence should be imposed." Hurst, 202 So. 3d at 82 (Canady, J., dissenting).

apply to sentencing factors that merely guide sentencing discretion without increasing the applicable range of punishment to which a defendant is eligible).

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 (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); Underwood v. Royal, 894 F.3d 1154, 1184-86 (10th Cir. 2018) (holding that the Court's decision in Hurst v. Florida was limited to aggravating circumstances and did not extend to mitigating circumstances or weighing); 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). 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.

The Florida Court's Ruling On The Retroactivity Of Hurst Is Not Unconstitutional And Only Implicates A Matter Of State Law.

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.[4] 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.

[4] Florida is a clear outlier for giving **any** retroactive effect to an Apprendi/Ring based error. As explained by the Eighth Circuit in Walker v. United States, 810 F.3d 568, 575 (8th Cir. 2016), the consensus of judicial opinion flies squarely in the face of giving any retroactive effect to an Apprendi based error. Apprendi's rule "recharacterizing certain facts as offense elements that were previously thought to be sentencing factors" does not lay "anywhere near that central core of fundamental rules that are absolutely necessary to insure a fair trial."

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").

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

The Florida Supreme Court's determination of the retroactive application of Hurst under the state law is based on adequate and independent state grounds and is not violative of federal law or

this Court's precedent.[5] 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."). Because the Florida Supreme Court's retroactive application of Hurst in Petitioner's case is based on adequate and independent state grounds, certiorari should be denied.

Petitioner's Structural Error And Eighth Amendment Claims Are Clearly Meritless And Offer This Court No Conflict Or Unsettled Claim Of Constitutional Law Which Would Merit Review.

Petitioner asserts that the alleged error in this case is structural and implicates the Eighth Amendment. Petitioner's claim is meritless and his appeal to this Court to grant review of the alleged "structural error" ignores the predicate question

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[5] 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. 2017) ("under federal law Hurst, like Ring, is not retroactively applicable on collateral review"), cert. denied, 138 S. Ct. 217 (2017); Ybarra v. Filson, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a Hurst v. Florida claim concluding that Hurst v. Florida did not apply retroactively).

of retroactivity. This case comes to this Court in a post-conviction, not direct appeal posture. Consequently, the central question decided below, and the one that Petitioner largely ignores, was retroactivity.

Aside from the question of retroactivity, in Washington v. Recuenco, 548 U.S. 212 (2006), this Court made clear that the judge rather than the jury determining an element of the crime in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000), was not structural error. This Court explained again that it is the "rare" error that is structural. Recuenco, 548 U.S. at 218. The Court once again followed the "strong presumption" that "if a criminal defendant had counsel and was tried by an impartial adjudicator," any error from such a trial was subject to harmless error analysis. Id. (quoting Neder, 527 U.S. at 8).

Petitioner improperly attempts to mingle the separate legal concepts of a structural error raised and addressed on direct appeal with the separate question of retroactivity. Assuming for a moment a Hurst error can be discerned in this case, according to this Court, the right to a jury trial is a procedural right. This Court specifically observed in a retroactivity case, that "Ring's holding is properly classified as procedural" because the Sixth Amendment's jury-trial guarantee "has nothing to do with the range of conduct a State may criminalize." Summerlin, 542 U.S. at 353. The Summerlin Court, which held that Ring was not retroactive, explained that rules that allocate decision making

authority between the judge and the jury "are prototypical procedural rules." Id. (emphasis added). This Court noted that it had classified the right to a jury trial as procedural "in numerous other contexts." Id. at 353-54 (citing numerous cases).

Furthermore, both the majority opinion and the concurring opinion in Alleyne v. United States, 570 U.S. 99 (2013), classified the right to a jury trial regarding facts required to impose a minimum mandatory sentence as procedural. Alleyne, 570 U.S. at 116 n.5 ("the force of stare decisis is at its nadir in cases concerning procedural rules . . ."); Alleyne, 570 U.S. at 119 (Sotomayor, J., concurring) ("when procedural rules are at issue . . ."). This Court's opinion in Alleyne, like this Court's opinion in Hurst v. Florida itself, was explicitly based on Apprendi v. New Jersey, 530 U.S. 466 (2000). The Alleyne majority and the Alleyne concurrence both characterized that Apprendi-based right as procedural. This Court views Apprendi and all its progeny, including Hurst v. Florida, as procedural, not substantive. See also Montgomery v. Louisiana, 136 S. Ct. 718, 730 (2016) (citing Summerlin and characterizing Ring as a procedural rule designed to enhance the accuracy of a conviction or sentence). While opposing counsel may view the right to a jury trial as substantive, this Court has repeatedly classified it as procedural and in very similar context to Hurst. There is no conflict between this Court's jurisprudence and the Florida Supreme Court's decision.

Petitioner incorrectly asserts that he was denied a trial on the "critical" elements that are necessary to impose a death sentence. His argument ignores Florida's longstanding practice of using the beyond-a-reasonable-doubt standard of proof for proving aggravating factors in Florida. Florida law has required that the State prove aggravators at the beyond-a-reasonable-doubt standard of proof for over three decades. Williams v. State, 37 So. 3d 187, 194-95 (Fla. 2010) (stating that the State has the burden to prove beyond a reasonable doubt each and every aggravating circumstance); Aguirre-Jarquin v. State, 9 So. 3d 593, 607 (Fla. 2009) (explaining that the State must prove the existence of an aggravator beyond a reasonable doubt, citing Parker v. State, 873 So. 2d 270, 286 (Fla. 2004)). Therefore, the "retroactivity" of the beyond-a-reasonable-doubt standard of proof is a non-issue in this case and every other Florida capital case as well. See Fla. Std. J. Inst. (Crim.) 7.11; Finney v. State, 660 So. 2d 674, 680 (Fla. 1995). Hurst did nothing to change this standard. Furthermore, neither Hurst v. Florida nor Hurst v. State changed the standard of proof as to any required finding in Florida's capital sentencing proceedings. Rather, both Hurst v. Florida and Hurst v. State addressed who makes the findings — the jury versus the judge — not what standard of proof is used.[6]

[6] In Ybarra v. Filson, 869 F.3d 1016 (9th Cir. 2017), the Ninth Circuit rejected a similar argument to that which Petitioner makes in this Court. The Ninth circuit reasoned that even if Hurst v. Florida extended the beyond-a-reasonable-doubt standard

The trial court and jury were instructed that they must find the aggravators proven to exist beyond a reasonable doubt. And, Petitioner's jury did convict him of contemporaneous violent felonies, which constitute a qualifying aggravator under Florida law. Thus, Petitioner's attempts to turn this case into something more than a state law retroactivity question fails.

The Florida Supreme Court's imposition of the unanimity requirement 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. 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." Roper, 543 U.S. at 568. Petitioner's death sentence was imposed in accordance with all applicable constitutional principles at the time it was imposed.

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of proof to the weighing determinations, it did not redefine capital murder and therefore, Hurst v. Florida was not required to be applied retroactively.

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 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 (Idaho 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.

There is No Cognizable Error Or Unresolved Constitutional Question Surrounding The Jury Instructions Used In Spencer's Case.

Finally, Petitioner complains that the sentencing procedure used in his case violated this Court's ruling in Caldwell v. Mississippi, 472 U.S. 320 (1985), because the jury was given instructions that informed the jury its death recommendation was merely advisory. However, this case would be a uniquely inappropriate vehicle for certiorari because this is a post-conviction case and this Court would have to address retroactivity before even reaching the underlying jury

instruction issue.[7] This matter does not merit this Court's review.

Contrary to Petitioner's argument, the Florida Supreme Court has addressed the question of jury instructions following the issuance of Hurst. The Florida Supreme Court rejected this claim below, providing in part: ". . .Spencer's claim that his death sentence violates Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L.Ed.2d 231 (1985), and the Eighth Amendment is foreclosed by our recent decision in Reynolds v. State, 251 So. 3d 811, 825 (Fla. 2018), petition for cert. filed, No. 18-5181 (U.S. July 3, 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.'" Spencer, 259 So. 3d at 714. This ruling does not conflict with any decision of this Court or that of another state supreme court.

To establish constitutional error under Caldwell, a defendant must show that the comments or instructions to the jury "improperly described the role assigned to the jury by local law." Romano v. Oklahoma, 512 U.S. 1, 9 (1994). Spencer's jury

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[7] Petitioner cites dissents from the denial of certiorari in several Florida cases in support of his plea for review of his case. However, those dissents from the denial of certiorari were in cases involving harmless error where the Florida Supreme Court acknowledged that Hurst applied. See Cozzie v. Florida, 138 S. Ct. 1131 (2018) and Truehill v. Florida, 138 S. Ct. 3 (2017). In contrast here, Hurst does not apply under the State based retroactivity analysis.

was properly instructed on its role based on the state law existing at the time of his trial. See Reynolds v. State, 251 So. 3d 811, 825 (Fla. 2018) (rejecting defendant's Caldwell challenge and explaining that "Caldwell, as interpreted by Romano, ensures that jurors understand their actual sentencing responsibility; it does not indicate that jurors must also be informed of how their responsibilities might hypothetically be different in the future, should the law change."). 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). Thus, there was no violation of Caldwell because there were no comments or instructions to the jury that "improperly described the role assigned to the jury by local law." Romano, 512 U.S. at 9.

In conclusion, 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. 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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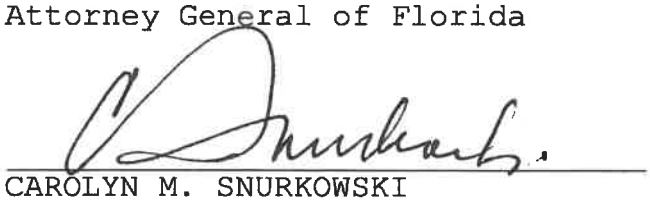

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