DOCKET NO. 18-8683

IN THE SUPREME COURT OF THE UNITED STATES

JAMES AREN DUCKETT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

Whether certiorari review should be denied where (1) the Florida Supreme Court's decision on retroactivity is a matter purely of state law and does not conflict with any decision of this Court or involve an important, unsettled question of federal law; and (2) Petitioner's death sentence does not violate equal protection or the Eighth Amendment.

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The opinion of the Fifth Judicial Circuit Court in and for Lake County, Florida, denying Petitioner *Hurst* relief is reproduced in Petitioner's Appendix A. The decision of the Florida Supreme Court affirming that denial can be found at *Duckett v. State*, 260 So.3d 230 (Mem) (Fla. 2018).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on December 28, 2018. (Pet. App. B). Petitioner asserts that this Court's jurisdiction is 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 was convicted for the rape and murder of eleven-year-old Teresa McAbee after her body was found in a lake in May 1987. *Duckett v. State*, 568 So.2d 891, 892 (Fla. 1990). Petitioner was a police officer for the City of Mascotte, where McAbee lived, and was the only officer on duty the night she went missing. *Id.* Sometime between 10:00 and 10:30 p.m. on May 11, 1987, McAbee walked a short distance to a convenience store from her home to buy a pencil. *Id.* She left the store with a sixteen-year-old boy, who testified at trial he spoke with the victim for about twenty minutes before Petitioner approached them. *Id.* A clerk at the convenience store testified that Petitioner had asked the clerk for the girl's name and age before approaching the two youths. *Id.*

At trial, the State presented a multitude of evidence to establish Petitioner's guilt. *Id.* The boy with McAbee testified that after speaking with Petitioner, he went to the laundromat to wait for his uncle to arrive, while Petitioner stayed with McAbee. *Id.* Petitioner instructed the uncle to speak with the boy while Petitioner spoke to McAbee. *Id.* Both the uncle and the boy testified Petitioner then put McAbee in the passenger seat of his car, shut the door, and then walked to his driver's door. *Id.* No one testified ever seeing McAbee on the hood of Petitioner's police cruiser. *Id.*

Around 11:00 p.m. McAbee's mother started searching for her daughter. *Id.* The store clerk informed her Petitioner may have driven her daughter to the police station, and she spent the next hour driving around looking for her daughter. *Id.*

While driving around she never spotted a police car, and when she dropped by the Mascotte police station an hour later she found the place empty. *Id.* She drove a short distance to the Groveland police station to report her daughter missing. *Id.* An officer there directed her back to Mascotte, and after returning to the Mascotte station she waited another fifteen to twenty minutes before Petitioner finally arrived. *Id.* Petitioner told her he'd had a brief interaction with McAbee earlier in the night and had informed her to go home. *Id.* He then accompanied the mother to get a photograph of the victim, ostensibly to make a flyer to distribute, but subsequently told a store clerk to not bother posting the flyer. *Id.* A tape of Petitioner's radio calls showed that he received none between 10:50 p.m. and 12:10 a.m., and a store clerk testified that although the police typically drove by every forty-five minutes to an hour, he did not see Petitioner's car between 9:30 p.m. and much later in the evening when Petitioner dropped off the flyer. *Id.*

The next morning McAbee's body was found in a lake less than a mile from the convenience store. *Id.* The medical examiner testified she had been sexually assaulted while she was alive, and then strangled and drowned. *Id.* Semen was discovered on her jeans. *Id.* at 893. A technician for the sheriff's department noted the tire tracks at the scene were similar to the tracks of a Mascotte police car. *Id.* An expert at trial confirmed this, stating the tracks were made by Goodyear Eagle mud and snow tires, which are designed for northern driving; the local tire center had never sold any of those tires in nine years of existence, but had placed them on the two Mascotte police cars after receiving them by mistake. *Id.* Both Petitioner's

and McAbee's fingerprints were found commingled on the hood of his car, and her prints indicated she had been sitting backwards on the hood and had scooted up the car. *Id.* The state also presented the testimony of two petite eighteen- and nineteen-year-old women who stated Petitioner had previously made unwanted sexual advances on them after getting them in his police car. *Id.*

Petitioner testified at trial that he did in fact interact with McAbee and the boy. *Id.* However, he stated that his interaction was brief, saying McAbee was in the passenger seat of his car for only a short period while he spoke to the boy's nephew, and that after the boy left, Petitioner instructed her to go home and did not see her again. *Id.* at 893-4. He denied ever driving by the lake where her body was found. *Id.* at 893. He said he returned to the police station, then left to get coffee and go on patrol, which he was doing when he received the call that McAbee's mother was at the station. *Id.* at 894. He stated he then questioned the boy he'd seen with McAbee, and then got a photograph of her to make flyers. *Id.* As to her fingerprints, he theorized that it was possible she'd sat on the car while he was at the convenience store. *Id.*

The jury did not buy his story and convicted him of sexual battery and first-degree murder. *Id.* After the ensuing penalty phase they voted eight-to-four recommending death. *Id.* The judge found two aggravating factors: 1) the murder was committed during the commission of or immediately after a sexual battery, and 2) the murder was especially heinous, atrocious, or cruel. *Id.* In mitigation, the judge found that Petitioner had no significant history of prior criminal activity, and

that his family background and education were mitigating. *Id.* After weighing these factors, the judge followed the jury vote and sentenced Petitioner to death. *Id.*

Petitioner has since repeatedly and unsuccessfully sought to overturn his convictions and sentence in both state and federal court. *See*, *Duckett v. State*, 918 So.2d 224 (Fla. 2005) (affirming denial of postconviction relief); *Duckett v. Florida*, 127 S.Ct. 103 (Mem) (2006) (denying writ of certiorari); *Duckett v. McDonough, Sec'y Dep. of Corr.*, 701 F.Supp.2d 1245 (M.D. Florida 2010) (denial of writ of habeas corpus); *Duckett v. State*, 148 So.3d 1163 (Fla. 2014) (affirming denial of postconviction relief); *Duckett v. State*, 231 So.3d 393, *reh'g denied* (Fla. 2017) (affirming denial of postconviction relief).

In the instant case, Petitioner filed a successive motion for postconviction relief pursuant to this Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016) and the Florida Supreme Court's subsequent decision of *Hurst v. State*, 202 So.3d 40 (Fla. 2016). Petitioner argued that Florida's partial-retroactivity of *Hurst* relief violated his constitutional rights. (Petition at 13). The Circuit Court denied his motion on July 18, 2018, and Petitioner appealed. (Petition at 14). The Florida Supreme Court stayed the appeal as they considered *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), where they subsequently affirmed their retroactivity of *Hurst* to only those defendants whose sentences were final after *Ring v. Arizona*, 536 U.S. 584 (2002). (Petition at 14). After briefing, the Florida Supreme Court held:

> After reviewing Duckett's response to the order to show cause, as well as the State's arguments in reply, we conclude that Duckett is not entitled to relief. Duckett was convicted of first-degree murder and sentenced to death following the jury's recommendation for death by a

> vote of eight to four, and his sentence of death became final in 1990. *Duckett v. State*, 568 So.2d 891, 894 (Fla. 1990). Thus, *Hurst* does not apply retroactively to Duckett's *231 sentence of death. *See Hitchcock*, 226 So.3d at 217; *see also Foster v. State*, No. SC18-860, 258 So.3d 1248, 1251–52, 2018 WL 6379348, at *2-4 (Fla. Dec. 6, 2018) (explaining why the "elements of 'capital first-degree murder' " argument derived from Hurst and the legislation implementing Hurst "has no merit"). Accordingly, we affirm the postconviction court's order denying relief.

Duckett v. State, 260 So.3d 230 (Mem) (Fla. 2018).

This petition follows.

REASONS FOR DENYING THE WRIT

Certiorari review should be denied because: (1) the Florida Supreme Court's decision on retroactivity is a matter purely of state law and does not conflict with any decision of this Court or involve an important, unsettled question of federal law; and (2) Petitioner's death sentence does not violate equal protection or the Eighth Amendment.

Petitioner requests this Court review the Florida Supreme Court's decision affirming the denial of his successive postconviction motion, arguing that the state court's decision on retroactivity violates the Eighth and Fourteenth Amendments. He also argues that his sentence violates the Eighth Amendment and Equal Protection.

As will be shown, nothing about the Florida Supreme Court's retroactivity decision is inconsistent with the United States Constitution. Petitioner does not provide any "compelling" reason for this Court to review his case. U.S. Sup. Ct. R. 10. Indeed, Petitioner cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision below, in which the court determined that Petitioner was not entitled to relief because *Hurst v. State* was not retroactive to his death sentence. Nothing presented in the petition justifies the exercise of this Court's certiorari jurisdiction.

The Florida Supreme Court's holding in *Hurst v. State* followed this Court's ruling in *Hurst v. Florida* in requiring that aggravating circumstances be found by a jury beyond a reasonable doubt before a death sentence may be imposed. 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 sentence of death." *Hurst v. State*, 202 So.3d at 57. In *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), the Florida Supreme Court ruled that, as a matter of state law, *Hurst v. State* is not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *See also Mosley v. State*, 209 So.3d 1248, 1272-73 (Fla. 2016) (holding that, as a matter of state law, *Hurst v. State* does apply retroactively to defendants whose sentences were not yet final when this Court issued *Ring*). Florida's partial retroactive application of *Hurst v. State* is not constitutionally unsound and does not otherwise present a matter that merits the exercise of this Court's certiorari jurisdiction.

This Court has held that, in general, a state court's retroactivity determinations are a matter of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264 (2008). State courts may fashion their own retroactivity tests, including partial retroactivity tests. A state supreme court is free to employ a partial retroactivity approach without violating the federal constitution under *Danforth*. The state retroactivity doctrine employed by the Florida Supreme Court did not violate federal retroactivity standards. The court's expansion of *Hurst v. Florida* in *Hurst v. State* is applicable only to defendants in Florida, and,

consequently, subject to retroactivity analysis under state law as set forth in *Witt v. State*, 387 So. 2d 922 (Fla.), *cert. denied*, 449 U.S. 1067 (1980). *See Asay*, 210 So.3d at 15 (noting that Florida's *Witt* analysis for retroactivity provides "more expansive retroactivity standards" than the federal standards articulated in *Teague v. Lane*, 489 U.S. 288 (1989) (emphasis in original; citation omitted).

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). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010).

Florida's retroactivity analysis is a matter of state law. This fact alone militates against the grant of certiorari in this case. It should also be noted 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. 2017), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So.3d 112 (Fla. 2017), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228

So.3d 505 (Fla. 2017), *cert. denied*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So.3d 548 (Fla. 2018), *cert. denied*, 138 S. Ct. 1164 (2018); *Jones v. State*, 234 So.3d 545 (Fla. 2018), *cert. denied*, 138 S. Ct. 2686 (2018); *Zack v. State*, 228 So. 3d 41 (Fla. 2017), *cert. denied*, 138 S. Ct. 2653 (2018); *Cole v. State*, 234 So.3d 644 (Fla. 2018), *cert. denied*, 138 S. Ct. 2657 (2018).

New rules of law such as the rule announced in *Hurst v. Florida* do not usually apply to cases that are final. *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (explaining the normal rule of nonretroactivity and holding the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), was not retroactive). Additionally, the general rule is one of nonretroactivity for cases on collateral review, with narrow exceptions. *See Teague v. Lane*, 489 U.S. 288, 307 (1989) (observing that there were only two narrow exceptions to the general rule of nonretroactivity for cases on collateral review). Furthermore, certain matters are not retroactive at all. *Hurst v. Florida* was based on this Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002), which in turn was based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court has held that "*Ring* announced a new **procedural rule** that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (emphasis added).

In *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), this Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Under this

"pipeline" concept, only those cases still pending direct review or not yet final would receive the benefit from alleged *Hurst* error. Retroactivity under *Griffith* depends on the date of the finality of the direct appeal. Under *Teague,* if a case is final on direct review, the defendant will not receive the benefit of the new rule unless one of the narrow exceptions announced in *Teague* applies. Again, finality is the critical date-based test under *Teague.* There is nothing about Florida's decision providing partial retroactivity to *Hurst v. Florida* and *Hurst v. State* that is contrary to this Court's retroactivity jurisprudence.

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

Any retroactive application of a new development in the law under any analysis will mean that some cases will get the benefit of a new development, while other cases will not, depending on a date. Drawing a line between newer cases that will receive benefit of a new development in the law and older final cases that will not receive the benefit is part and parcel of the landscape of any retroactivity

analysis. It is simply part of the retroactivity paradigm that some cases will be treated differently than other cases based on the age of the case. This is not arbitrary and capricious in violation of the Eighth Amendment; it is simply a fact inherent in any retroactivity analysis.

Petitioner attempts to distinguish his petition from those that have challenged Florida's retroactivity analysis before, but fails to do so. As stated by Petitioner, "Applying state retroactivity doctrines, the Florida Supreme Court held in *Mosley v. State* that inmates whose death sentences were not final on June 24, 2002 were entitled to *Hurst*-based relief. It held in *Asay v. State* that inmates whose death sentences became final before that date were not entitled to relief." (Petition at 25) (emphasis added, internal citations omitted).

Petitioner admits that Florida's decision below rests on independent and adequate state grounds. His arguments do nothing to implicate federal jurisdiction, and instead show he merely disagrees with the legal analysis of the Florida Supreme Court's application of purely state law retroactivity. He argues that it is in fact the pre-*Ring* defendants who are most deserving of retroactivity under the federal and Florida tests, and thus the Florida Supreme Court got it wrong. This argument has, of course, been specifically rejected by this Court previously. *See Schriro v. Summerlin*, 542 U.S. 348 (2004) (Holding that *Ring* announced a new procedural rule and was therefore not retroactive to cases already final on direct review).

This case is also uniquely inappropriate for certiorari review because there

was no constitutional error under *Hurst v. Florida*. Petitioner's contemporaneous conviction for sexual battery established beyond a reasonable doubt the existence of an aggravating factor under Florida law. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). *See also Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty). This Court's ruling in *Hurst v. Florida* did not change the recidivism exception articulated in *Apprendi* and *Ring v. Arizona,* 536 U.S. 584 (2002).

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.[1] The findings required by the Florida Supreme Court following

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[1] *State v. Mason*, 108 N.E.3d 56, 64 (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 citation 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); *Waldrop v. Comm'r, Alabama Dept. of Corr.*, 711 Fed. Appx. 900, 923 (11th Cir. 2017) (unpublished) (rejecting *Hurst* claim and explaining "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict.") (citation omitted); *State v. Gales*, 658 N.W.2d 604, 628-29 (Neb.

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). This Court does not grant certiorari to review an error of state law.

As every claim Petitioner has made are matters of state law, there is no basis for this Court to exercise its discretionary jurisdiction.

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").

CONCLUSION

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

Respectfully submitted,

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