NO. 18-9267

IN THE SUPREME COURT OF THE UNITED STATES

JOHN LOVEMAN REESE,

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

Jennifer A. Donahue
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 *Reese v. State*, 261 So. 3d 1246 (Fla. 2019). The Florida Supreme Court's direct appeal decision appears as *Reese v. State*, 694 So. 2d 678 (Fla. 1997). The Florida Supreme Court's decision from direct appeal of the resentencing appears as *Reese v. State*, 768 So. 2d 1057 (Fla. 2000), *cert. denied*, *Reese v. Florida*, 532 U.S. 910 (2001). The Florida Supreme Court's post-conviction decision appears as *Reese v. State*, 14 So. 3d 913 (Fla. 2009). The Eleventh Circuit's decision on federal habeas review appears as *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277 (11th Cir. 2012), *cert. denied*, *Reese v. Tucker*, 568 U.S. 905 (2012).

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

Petitioner, John Loveman Reese, was convicted of first-degree murder, sexual battery, and burglary and sentenced to death following a jury recommendation of eight to four. *Reese*, 694 So. 2d at 680.

> The evidence presented at trial reveals that Reese dated Jackie Grier on and off for seven years; the victim had been Grier's best friend for approximately two and a half years. Reese was extremely possessive and disliked Austin because of the amount of time Grier spent with her. Grier and Austin had begun making trips to Georgia where, unknown to Reese, both had met new boyfriends. They returned from the last of these trips on Monday, January 27, 1992. On Wednesday of the same week, Grier was concerned because she could not reach Austin by phone, and she and a neighbor went to Austin's house and entered through the unlocked back door. They found Austin lying face down in the bedroom, covered with a sheet. She had been strangled with an electrical extension cord that was doubled and wrapped around her neck twice with the ends pulled through the loop.

> Reese was questioned by police after his palm print was found on Austin's waterbed. He confessed to breaking into her home around noon on Tuesday, January 28. He said he waited for her to return home because he wanted to talk to her about Grier, but when he saw Austin coming home from work around four o'clock he got scared and hid in a closet. Reese said that after Austin went to sleep on the sofa, he came out of the closet but panicked when she started to move. He grabbed her around the neck from behind and dragged her into the bedroom. He raped her, then strangled her with the extension cord. He was arrested after his confession.

Id. at 680. On direct appeal, the Florida Supreme Court affirmed the conviction, but remanded to the trial court for the entry of a new sentencing order "expressly weighing all mitigating evidence presented." *Reese*, 694 So. 2d at 685.

On remand the first time, the trial court again erred in failing to conduct a sentencing hearing, instead just correcting the sentencing order. *Reese v. State*, 728 So. 2d 727, 728 (Fla. 1999). On remand the second time, the trial court conducted a sentencing hearing and found:

> three aggravators: (1) the homicide was committed during a burglary and sexual battery; (2) the homicide was heinous, atrocious, or cruel (HAC); and (3) the homicide was committed in a cold, calculated, and premeditated manner (CCP). The court found no statutory mitigators. The court found seven nonstatutory mitigators: (1) good jail record (minimal weight); (2) positive character traits (minimal weight); (3) defendant's support of Jackie Grier and her children (very little weight); (4) his possessive relationship with Jackie Grier (minimal weight); (5) emotional immaturity (little weight); (6) possible use of drugs and alcohol around the time of the murder (little weight); and (7) lack of a significant criminal record (very slight weight). The court rejected the following nonstatutory mitigators: (1) defendant's adaptability to prison life; (2) childhood trauma other than the death of his mother; (3) emotional or mental impairment at the time of the murder; and (4) use of crack cocaine at the time of the murder.

Reese, 768 So. 2d at 1058. The Florida Supreme Court found no error and affirmed

the sentence of death. *Id.* at 1060. The judgment and sentence became final upon denial of certiorari March 5, 2001. *Reese*, 532 U.S. at 910.

On appeal of the circuit court's denial of the post-conviction motion, Reese raised seven issues:

> (1) trial counsel was constitutionally ineffective for failing to adequately investigate and present mental health mitigation evidence; (2) the rules that prohibit jury interviews are unconstitutional; (3) lethal injection constitutes cruel and unusual punishment; (4) trial counsel was ineffective for failing to object to unconstitutional penalty-phase jury instructions; (5) cumulative error deprived appellant of a fair trial; (6) appellant's death sentence violates *Ring v. Arizona*, 536 U.S. 584[ ] (2002); and (7) appellant is ineligible for the death penalty under *Roper v. Simmons*, 543 U.S. 551[ ] (2005), and *Atkins v. Virginia*, 536 U.S. 304[ ] (2002).

Reese, 14 So. 3d at 916. The Florida Supreme Court affirmed the circuit court's denial of Reese's post-conviction motion. *Id.* at 920.

Reese then sought habeas relief in federal court, which was denied. *Reese*, 675 F.3d at 1281. A certificate of appealability was granted on the issue of alleged improper arguments by the prosecutor, but ultimately the Eleventh Circuit found the claim to be meritless and affirmed the denial of the petition. *Id.* at 1290, 1293.

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 v. Florida*, 136 S. Ct. 616 (2016); *Ring v. Arizona*, 536 U.S. 584 (2002). 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.[1] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *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).

Shortly after the *Hurst* decisions, Petitioner raised a claim asserting that he should be entitled to relief pursuant to *Hurst*. Since Petitioner's case became final pre-*Ring* on March 5, 2001, the Florida Supreme Court denied Petitioner's claim that *Hurst* should apply retroactively to him. *Reese*, 261 So. 3d at 1247. Petitioner then filed this Petition for a writ of certiorari in this Court from the Florida Supreme Court's decision. This is the State's brief in opposition.

Reasons for Denying the Writ

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[1]The Florida Supreme Court's expansion of the holding in *Hurst v. Florida* to include the weighing and selection of a defendant's sentence was not required or even suggested by this Court's decision in *Hurst*. This Court's decision in *Hurst* was a narrow one: "Florida's sentencing scheme, which required the judge alone to **find the existence of an aggravating circumstance**, is . . . unconstitutional." *Hurst v. Florida*, 136 S. Ct. at 624 (emphasis added).

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 *Hurst* is not retroactive to Petitioner because his case became final pre-*Ring* in 2001. *Reese*, 261 So. 3d at 1246. 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 i). 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. Thus, Petitioner's request for certiorari review should be denied.[2]

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[2] This Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of *Hurst v. State*. *See, e.g., Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), *cert. denied*, *Lambrix v. Florida*, 138 S. Ct. 312 (2017); *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, 645 (Fla. 2018), *cert. denied*, *Cole v. Florida*, 138 S. Ct 2657 (2018); *Jones v. State*, 234 So. 3d 545 (Fla. 2018), *cert. denied*, *Jones v. Florida*, 138 S. Ct. 2686 (2018); *Jackson v. State*, 237 So. 3d 905 (Fla. 2018), *cert. denied*, *Jackson v. Florida*, 139 S. Ct. 193 (2018).

This Court does not review state court decisions that are based on adequate and independent state grounds. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."). Since *Hurst* is not retroactive under federal law, the retroactive application of *Hurst* is solely based on a state test for retroactivity. Because the retroactive application of *Hurst* is based on adequate and independent state grounds, certiorari review should be denied.[3]

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

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[3] Aside from the question of retroactivity, certiorari would be inappropriate because there is no underlying federal constitutional error. Petitioner became eligible for a death sentence by virtue of his contemporaneous sexual battery and burglary convictions. *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"). As Petitioner does not allege a failure of the jury to find at least one aggravating factor beyond a reasonable doubt, he does not raise a federal question.

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, 280-81 (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 those we have laid down and to apply those standards in a broader 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."[4] *Id.* at 1283. Thus, the Florida Supreme Court held *Hurst* to be retroactive to *Mosley*, whose case became final in 2009, which is post-*Ring*. *Id.*

Conversely, applying the *Witt* analysis in *Asay*, the Florida Supreme Court held that *Hurst* is not retroactive to any case in which the death sentence was final pre-*Ring*. *Mosley*, 209 So. 3d at 1283. The Court specifically noted that *Witt* "provides *more expansive retroactivity standards* than those adopted in *Teague*." *Asay*, 210 So. 3d at 15 (emphasis in original) (quoting *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005)). However, the Court determined that prongs two and three of the *Witt* test, reliance on the old rule and effect on the administration of justice, weighed heavily against the retroactive application of *Hurst* to pre-*Ring* cases. *Id.* at 20-22. 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

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[4] 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.

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, e.g.*, *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), *cert. denied*, *Lambrix v. Florida*, 138 S. Ct. 312 (2017); *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 granting of retroactive application to post-*Ring* cases and denying retroactive application to pre-*Ring* cases is commonly referred to as "partial retroactivity." The Florida Supreme Court's distinction between cases which were final pre-*Ring* versus cases which were final post-*Ring* is neither arbitrary, based on random choice or personal whim rather than reason or system, nor capricious, given to sudden and unaccountable changes of mood or behavior, and does not violate the Eighth or Fourteenth Amendment.

In the traditional sense, new rules are applied retroactively only to cases

which are not yet final and are still in the direct appeal pipeline. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"); *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992) (applying *Griffith* to Florida defendants); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context). Under this "pipeline" concept, *Hurst* would only apply to the cases which were not yet final on the date of the decision in *Hurst*. This type of traditional retroactivity can depend on a score of random factors having nothing to do with the offender or the offense, such as trial scheduling, docketing on appeal, etc. 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.[5] Yet, this Court recognizes this type of

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[5] For example, as in *Johnson* and *Calloway*. *Johnson* originally became final February 21, 1984, subsequent litigation led to a new trial being granted in 1987 and the death sentences being vacated in 2010. *Johnson v. Florida*, 465 U.S. 1051 (1984); *Johnson v. Wainwright*, 498 So. 2d 938, 939 (Fla. 1986); *Johnson v. State*, 44 So. 3d 51, 74 (Fla. 2010). After a new penalty phase in 2013, Johnson's case was pending direct appeal when *Hurst* was decided. *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016). As such, though Johnson's crime occurred in the 1980s, he receives the benefit of *Hurst* because his judgment and sentence were not final pre-*Hurst*. Similarly, in *Calloway*, although the crime occurred in 1997, the trial was not completed until 2009 and Appellant's judgment and sentence were not final when

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*,[6] 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*. The Florida Supreme Court has not randomly chosen an unrelated date, such as "Valentine's Day, 2000." (Petition at 27). After certiorari

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Hurst was issued. *Calloway v. State*, 210 So. 3d 1160, 1200 (Fla. 2017). These two scenarios would both receive the benefit of *Hurst* under the "pipeline" concept.

[6] Some Petitioners have argued that the Florida Supreme Court has not provided a non-arbitrary explanation for drawing the line at *Ring* instead of at *Apprendi*. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). However, the Florida Supreme Court did in fact discuss their rationale in *Asay* and *Mosley*. *Asay*, 210 So. 3d at 19; *Mosley*, 209 So. 3d at 1279. The Court concluded that "while the reasoning of *Apprendi* appeared to challenge the underlying prior reasoning of *Walton* and similar cases, the United States Supreme Court expressly excluded death penalty cases from its holding." *Asay*, 210 So. 3d at 19 (citing *Apprendi*, 530 U.S. at 496); *Mosley*, 209 So. 3d at 1279 n.17 (citing *Apprendi*, 530 U.S. at 497); *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled by Ring*, 536 U.S. at 589. Though *Apprendi* served as a precursor to *Ring*, this Court specifically distinguished capital cases from its holding in *Apprendi*. *Apprendi*, 530 U.S. at 496. It was not until *Ring* that this Court determined that *"Apprendi*'s reasoning is irreconcilable with *Walton*'s holding." *Ring*, 536 U.S. at 589. As the Florida Supreme Court reasoned, *Ring* is the appropriate demarcation for retroactive application to capital cases, not *Apprendi*. *Asay*, 210 So. 3d at 19. Thus, the Florida Supreme Court has provided a non-arbitrary explanation for drawing the line of retroactivity at *Ring* rather than

was denied in *Bottoson*, the Florida Supreme Court reasonably believed that *Ring* did not apply to Florida. *Bottson v. Moore*, 833 So. 2d 693 (Fla. 2002), *cert. denied*, 537 U.S. 1070 (2002). It was not until *Hurst v. Florida* directly overruled *Spaziano* and *Hildwin* that *Bottoson* was abrogated and *Ring*'s application to Florida's capital sentencing scheme became clear. *Hurst*, 136 S. Ct. at 623-24; *Spaziano v. Florida*, 468 U.S. 447 (1984); *Hildwin v. Florida*, 490 U.S. 638 (1989).

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 alike.").

Unquestionably, extending relief to more individuals,[7] 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, and would not receive a benefit under *Teague*, cannot violate the Eighth or Fourteenth Amendment, especially where a

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Apprendi.

[7] 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 May 14, 2019).

logical rationale for implementing partial retroactivity is employed. 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 arguments that the Florida Supreme Court's grant of partial retroactivity is arbitrary and capricious boils down to particulars of all older cases that are in no way related to *Ring*. The Florida Supreme Court's determination that the "fundamental fairness" interest in applying *Hurst v. Florida* to all of the post-*Ring* cases to which *Ring* should have been applied outweighed the State's interest in finality. *Mosley*, 209 So. 3d at 1275. It cannot be said that determining finality outweighed any interest in applying *Hurst v. Florida* retroactively to pre-*Ring* cases when *Ring* itself was deemed to not apply retroactively is arbitrary and capricious. However, Petitioner argues that four "complexities" make the Florida Supreme Court's *Ring* cut-off "a kind and degree of capriciousness that far exceeds the level justified by normal nonretroactivity jurisprudence." (Petition at 21).

First, Petitioner argues that inmates whose cases became final pre-*Ring* have "demonstrated over a longer time that they are capable of adjusting" to imprisonment than those who are post-*Ring*, which makes the Florida Supreme Court's grant of partial retroactivity arbitrary and capricious. (Petition at 22). This is not an argument which negates the Florida Supreme Court's partial retroactivity reasoning. This is instead an argument for clemency, specifically commutation to the lesser sentence of life without parole, a process by which every Florida

defendant can petition to have their sentence reduced by the governor. *See* Rules of Executive Clemency,[8] Rule 15 Commutation of Death Sentences. This argument that defendants whose cases became final pre-*Ring* have been imprisoned longer and have adapted better to imprisonment than defendants whose cases became final post-*Ring* does not render the grant of partial retroactivity due to a long misunderstanding that *Ring* should have been applied to Florida since 2002 arbitrary and capricious.

Second, Petitioner argues that a lengthy delay between sentencing and execution justifies extending retroactivity to pre-*Ring* cases. (Petition at 22-23). This is essentially a *Lackey* claim. *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., opinion respecting the denial of certiorari). However, these claims are made by many defendants who have been on death row for long periods of time, they have no specific tie to *Ring*, and are routinely denied by this Court. *See, e.g., Sireci v. Florida*, 137 S. Ct. 470 (2016) (forty years since being first sentenced to death in 1976); *Conner v. Sellers*, 136 S. Ct. 2440, 2441 (2016) (thirty-four years since being initially sentenced to death); *Thompson v. McNeil*, 556 U.S. 1114 (2009) (thirty-two years since first being sentenced to death). *Lackey* claims are raised so often that in *Knight*, Justice Thomas felt compelled to observe:

> I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of

[8] The Rules of Executive Clemency can be found at the following link: https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf

> appellate and collateral procedures and then complain when his execution is delayed.

Knight v. Florida, 528 U.S. 990 (1999) (Thomas, J., concurring). Justice Thomas went on to conclude that:

> [f]ive years ago, Justice Stevens issued an invitation to state and lower courts to serve as "laboratories" in which the viability of this claim could receive further study. These courts have resoundingly rejected the claim as meritless. I submit that the Court should consider the experiment concluded.

Id. at 990 (citations omitted). Further, the denial of retroactivity to older cases is not "*because* they have endured for sixteen and a half years or more awaiting execution," it is because *Ring* itself is not retroactive. (Petition at 23). This argument that prisoners who have been on death row longer deserve reprieve more than post-*Ring* defendants does not have any specific tie to *Ring* and does not render the Florida Supreme Court's grant of partial retroactivity arbitrary and capricious.

Third, Petitioner argues that pre-*Ring* cases are more likely than post-*Ring* cases "to have been given those sentences under standards that would not produce a capital sentence" today. (Petition at 23-25). Again, this argument has no specific tie to *Ring*. Certainly, all cases tried before 2019 were tried without "the conventions of decency prevailing today." (Petition at 23). The remedy to that problem is not to eliminate any pre-2019 sentence as this approach "seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague*, 489 U.S. at 1074. Further, despite Petitioner's

assertion that juries are increasingly unlikely to impose death sentences, Petitioner fails to acknowledge recent cases which are in direct contradiction to his assertion. In *Deviney*, the original jury recommended death 8-4 after being instructed pre-*Hurst*. *Deviney v. State*, 213 So. 3d 794, 795 (Fla. 2017). Deviney was granted a new penalty phase and the post-*Hurst* jury made a unanimous jury recommendation of death. *Deviney v. State*, no. SC17-2231.[9] Similarly, in *Bright*, the pre-*Hurst* jury recommended death 8-4. *State v. Bright*, 200 So. 3d 710, 720 (Fla. 2016). Bright was granted a new penalty phase and the post-*Hurst* jury made a unanimous jury recommendation of death. *Bright v. State*, no. SC17-2244.[10] Doty was granted a new penalty phase due to a 10-2 jury recommendation pursuant to *Hurst* and was re-sentenced to death unanimously. *Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015); *Doty v. State*, no. SC18-973.[11] Hojan was granted a new penalty phase due to a 9-3 jury recommendation pursuant to *Hurst* and was re-sentenced to death unanimously. *Hojan v. State*, 212 So. 3d 982, 1000 (Fla. 2017); *Hojan v. State*, no. SC18-2149.[12] In these cases, the jury went from being non-unanimous to

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[9] The online docket for this case can be found at the following link: http://onlinedocketssc.flcourts.org/DocketResults/CaseDocket?Searchtype=Case+Number&CaseYear=2017&CaseNumber=2231

[10] The online docket for this case can be found at the following link: http://onlinedocketssc.flcourts.org/DocketResults/CaseDocket?Searchtype=Case+Number&CaseYear=2017&CaseNumber=2244

[11] The online docket for this case can be found at the following link: http://onlinedocketssc.flcourts.org/DocketResults/LTCases?CaseNumber=973&CaseYear=2018

[12] The online docket for this case can be found at the following link:

unanimous when instructed under the new statute. This argument that defendants whose cases became final long ago deserve reprieve more than post-*Ring* defendants because of evolving standards of decency does not have any specific tie to *Ring* and does not render the Florida Supreme Court's grant of partial retroactivity arbitrary and capricious.

Fourth, Petitioner argues that pre-*Ring* cases are more likely to have had "trials involving problematic factfinding." (Petition at 25-27). Just as standards of decency evolve as mentioned above, so does the sophistication of the trial presentation. Again, this argument has no specific tie to *Ring*. Certainly, all cases tried before 2019 were tried with forensic science theories and practices or eye-witness evidence which might be considered less reliable than such evidence presented in 2019 trails. But as above, the remedy to that problem is not to eliminate any pre-2019 conviction as this approach "seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague*, 489 U.S. at 1074. This argument that defendants whose cases became final long ago deserve reprieve more than post-*Ring* defendants because of evolving standards of evidence presentation does not have any specific tie to *Ring* and does not render the Florida Supreme Court's grant of partial retroactivity arbitrary and capricious.

Petitioner's four arguments that the Florida Supreme Court's grant of partial

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http://onlinedocketssc.flcourts.org/DocketResults/LTCases?CaseNumber=2149&CaseYear=2018

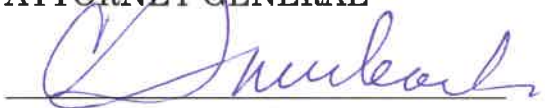
retroactivity is arbitrary and capricious is an argument that because pre-*Ring* cases are older, they are more deserving of resentencing than the post-*Ring* cases which were given relief. However, as the Florida Supreme Court did not arbitrarily grant partial retroactivity, but instead based their decision on a reasoned principle, there is no violation of the Eighth Amendment.

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

Conclusion

Respondent respectfully submits that the Petition for a writ of certiorari should be denied.

Respectfully submitted,
ASHLEY MOODY
ATTORNEY GENERAL



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

Jennifer A. Donahue
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