NO. 18-9270

IN THE SUPREME COURT OF THE UNITED STATES

MANUEL RODRIGUEZ,

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

Brian H. Zack
Assistant Attorney General
Florida Bar No. 1000416
Office of the Attorney General
1 SE Third Avenue, Suite 900
Miami, Florida 33131
Telephone: (305)-377-5441
Facsimile: (305)-377-5655
capapp@myfloridalegal.com
Carolyn.Snurkowski@myfloridalegal.com
Brian.Zack@myfloridalegal.com

COUNSEL FOR RESPONDENT

Capital Case
Question Presented

Petitioner, Manuel Rodriguez, was found guilty of three counts of first-degree murder and armed robbery. The jury unanimously recommended a sentence of death for each of the murders. Petitioner's unanimous sentence of death was finalized on October 2, 2000. Following this Court's decision in *Hurst v. Florida*, the Florida Supreme Court decided *Hurst v. State*. *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). There the Florida Supreme Court explained that for a defendant to be sentenced to death, the jury must find all the aggravating circumstances outweighed the mitigating circumstances and unanimously vote that the defendant receive the death penalty. Following *Hurst v. State*, the Supreme Court decided *Asay v. State* and *Mosley v. State*, which created a bright line retroactivity test where defendants whose sentences of death were finalized prior to this Court's 2002 *Ring v. Arizona* decision would not receive retroactive relief. *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); *Ring v. Arizona*, 536 U.S. 584 (2002). Petitioner's case falls in this category of pre-*Ring* defendants. Thereafter, the Florida Supreme Court enacted Florida Statue section 921.141, which requires that the only element that needs to be proven beyond a reasonable doubt is that the jury find at least one aggravating circumstance. Following the enactment of section 921.141, in *Foster v. State*, the Florida Supreme Court indicated that first-degree murder is a capital felony that is sentenced by death only following a conviction of guilt for first-degree murder, and after the court conducts a sentencing phase procedure.

Petitioner sought postconviction relief through the Florida Supreme Court but was denied relief. Petitioner's petition seeking certiorari review gives rise to the following question presented:

Whether this Court should deny certiorari to review the Florida Supreme Court's ruling on the elements of sentencing required in *Foster v. State,* through the retroactive cases of *Hurst v. Florida* and *Hurst v. State*, where the issue of sentencing elements and retroactivity was decided as an issue of state law in a decision that does not conflict with any of this Court's precedent and which does not present a significant or unsettled issue of constitutional law worth certiorari review.

Table of Contents

Question Presented i

Table of Contents ii

Table of Citations iii

Opinion Below 1

Jurisdiction 1

Statement of the Case and Facts 2

Reasons for Denying the Writ 8

Certiorari review should be denied because (1) Petitioner's claims are procedurally barred and do not conflict with any decisions of this Court or involve an important, unsettled question of federal law in addition to being matters of state law; (2) the Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florida* and *Hurst v. State*, which 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*, does not violate the Eighth or Fourteenth Amendments; and (3) the only mandatory element that needs to be found by a unanimous jury is that at least one aggravating circumstance exist 8

Petitioner's Claims are Procedurally Barred 8

Florida's Partial Retroactivity Analysis 11

Elements of Florida's Murder Statute and Sentencing Requirements 16

Conclusion 23

Certificate of Service 24

Table of Citations

Statutes

§ 782.04, Fla. Stat. (2018) 7

§ 921.141(1), Fla. Stat. (2017) 7

§ 921.141(2)(a), Fla. Stat. (2017) 21

§ 921.141(2)(b)1., Fla. Stat. (2017) 19, 21

§ 921.141(2)(b)2., Fla. Stat. (2017) 21

§ 921.141(2)(b)2.a.-c., Fla. Stat. (2017) 20

§ 921.141, Fla. Stat. (2017) 9

28 U.S.C. § 1257(a) 1

Rules

Fla. R. Crim. P. 3.851(d)(1)(B) 3

Sup. Ct. R. 10 ..... 2, 8

Sup. Ct. R. 13.1 1

Sup. Ct. R. 14(g)(i) 2

Federal Cases

Alleyne v. United States, 570 U.S. 99 (2013) 17, 19

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 17

Apprendi v. New Jersey, 530 U.S. 466 (2000) 12, 17

Cardinale v. Louisiana, 394 U.S. 437 (1969) 10

Crawford v. Washington, 541 U.S. 36 (2004) 11

Danforth v. Minnesota, 552 U.S. 264 (2008) 10

Dorsey v. United States, 567 U.S. 260 (2012) 12

Florida v. Powell, 559 U.S. 50 (2010) 11

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 10

Griffith v. Kentucky, 479 U.S. 314 (1987) 12

Hurst v. Florida, 136 S. Ct. 616 (2016) 4, 14, 16

Jenkins v. Hutton, 137 S. Ct. 1769 (2017) 17, 21, 22

Johnson v. United States, 135 S. Ct. 2551 (2015).....13

Kansas v. Carr, 136 S. Ct. 633 (2016) 16, 17, 19

Michigan v. Long, 463 U.S. 1032 (1983).....10, 11

Ring v. Arizona, 536 U.S. 584 (2002).....6, 12

Rockford Life Insurance Co. v. Illinois Dept. of Revenue, 482 U.S. 182 (1987).....8

Rodriguez v. Buss, No. 10-22692-CIV, 2011 WL 1827899, *1 (S.D. Fla. May 12, 2011).....4

Rodriguez v. Sec'y, Florida Dept. of Corr., 756 F.3d 1277 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1707 (2015).....4

Schriro v. Summerlin, 542 U.S. 348 (2004).....12, 14

Street v. New York, 394 U.S. 576 (1969).....11

Teague v. Lane, 489 U.S. 288 (1989).....11, 12

United States v. Abney, 812 F.3d 1079 (D.C. Cir. 2016) 12

United States v. O'Brien, 560 U.S. 218 (2010).....18

United States v. Purkey, 428 F.3d 738 (8th Cir. 2005) 18

United States v. Sampson, 486 F.3d 13 (1st Cir. 2007).....18

Waldrop v. Comm'r, Alabama Dept. of Corr., 711 F. App'x 900 (11th Cir. 2017).....18

Welch v. United States, 136 S. Ct. 1257 (2016) 13

Whorton v. Bockting, 549 U.S. 406 (2007) 11

State Cases

Asay v. State, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017) 6, 15

Ault v. State, 53 So. 3d 175 (Fla. 2010).....19

Branch v. State, 234 So. 3d 548 (Fla. 2018), *cert. denied*, 138 S. Ct. 1164 (2018) ...11, 16

Coday v. State, 946 So. 2d 988 (Fla. 2006).....20

Cole v. State, 234 So. 3d 644 (Fla. 2018), *cert. denied*, 138 S. Ct. 2657 (2018) 16

Davis v. State, 207 So. 3d 142 (Fla. 2016).....22

Foster v. State, 258 So. 3d 1248 (Fla. 2018) 6, 7, 20, 21

Hannon v. State, 228 So. 3d 505 (Fla. 2017), *cert. denied*, 138 S. Ct. 441 (2017) 11, 16

Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 512 (2017) 4, 6, 15, 16

Hunter v. State, 29 So. 3d 256 (Fla. 2008) 8

Hurst v. State, 202 So. 3d 40 (Fla. 2016) ..... passim

Jackson v. State, 237 So. 3d 905 (Fla. 2018), *cert. denied*, 139 S. Ct. 193 (2018) 16

Jones v. State, 234 So. 3d 545 (Fla. 2018), *cert. denied*, 138 S. Ct. 2686 (2018) 16

Lambrix v. State, 227 So. 3d 112 (Fla. 2017), *cert. denied*, 138 S. Ct. 312 (2017) 11, 16

McGirth v. State, 209 So. 3d 1146 (Fla. 2017) 18

Mosley v. State, 209 So. 3d 1248 (Fla. 2016) 6, 15

Reynolds v. State, 251 So. 3d 811 (Fla. 2018) 22

Rodriguez v. State, 237 So. 3d 918 (Fla. 2018), *cert. denied*, 139 S. Ct. 209 (2018) 5, 9

Rodriguez v. State, 260 So. 3d 146 (Fla. 2018) 1, 5

Rodriguez v. State, 39 So. 3d 275 (Fla. 2010) 4

Rodriguez v. State, 753 So. 2d 29 (Fla. 2000), *cert. denied*, 531 U.S. 859 (2000) 2, 3, 8

State v. Gales, 658 N.W.2d 604 (Neb. 2003) 18

State v. Mason, 153 Ohio St. 3d 476 (Ohio 2018) 17

Witt v. State, 387 So. 2d 922 (Fla. 1980) 10

Zakrzweski v. State, 254 So. 3d 324 (2018), *cert. denied*, No. 18-8090, 2019 WL 2078132, at *1 (May 13, 2019) 17

Other Authorities

BLACK'S LAW DICTIONARY (10th ed. 2014) 18

IN THE SUPREME COURT OF THE UNITED STATES
NO. 18-9270

MANUEL RODRIGUEZ,
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

Opinion Below

The decision of the Florida Supreme Court appears as *Rodriguez v. State*, 260 So. 3d 146 (Fla. 2018).

Jurisdiction

The Florida Supreme Court issued its opinion affirming the summary denial of Petitioner's successive postconviction motion for relief on December 13, 2018. *Rodriguez v. State*, 260 So. 3d 146 (Fla. 2018). Petitioner's "Petition for Writ of Certiorari" was docketed in this Court on May 13, 2019. The Petition is timely filed before this Court. Sup. Ct. R. 13.1.

Pursuant to 28 U.S.C. § 1257(a), this Court has jurisdiction to review the decision of the Florida Supreme Court. However, Respondent submits that this Court

should not exercise its jurisdiction as Petitioner fails to raise a novel question of federal law. The Florida Supreme Court's decision was based on independent and adequate state grounds and Petitioner has not raised a question of federal law. Sup. Ct. R. 14(g)(i). Additionally, because the Florida Supreme Court's decision does not conflict with the decision of another United States court of appeals, another state court of last resort, or with relevant decisions of this Court, this Petition should be denied. Sup. Ct. R. 10.

Statement of the Case and Facts

Petitioner, Manuel Rodriguez, was convicted of three counts of first-degree murder and one count of armed burglary. *Rodriguez v. State*, 753 So. 2d 29, 33 (Fla. 2000), *cert. denied*, 531 U.S. 859 (2000). The facts established that in December 1984, Petitioner and co-defendant Luis Rodriguez committed the robbery of Bea Joseph, Sam Joseph, and Genevieve Abraham at the apartment of the Josephs. *Id.* at 33-34. During the robbery, Petitioner shot and killer Sam and Bea Joseph with his own gun and ordered Luis Rodriguez to kill Genevieve Abraham with a gun found in the Josesphs' bedroom. *Id.* at 34. In 1992, Rafael Lopez, Luis Rodriguez's brother-in-law provided the police with information about the murders and led to Petitioner's questioning and arrest. *Id.* at 34. At his jury trial, the jury found Petitioner guilty on all counts. *Id.* at 35.

During the penalty phase, the State presented evidence that Petitioner had seventy-one prior violent felony convictions (the contemporaneous murders in the case at bar, twenty-three convictions of armed robbery, seventeen convictions of

armed kidnapping, eight convictions of aggravated assault with a firearm, and the remaining number of convictions for carrying a concealed weapon and possession of a firearm by a convicted felon). *Id.* The jury unanimously recommended the death penalty for Petitioner for each of the murders. *Id.*

The trial court found the following aggravating factors applied to Petitioner: (1) the murder was committed while Petitioner was under a sentence of imprisonment; (2) Petitioner had previously been convicted of violent felonies; (3) the murder was committed during an armed robbery; (4) the murder was committed to avoid arrest; (5) the murder was committed for pecuniary gain; and (6) the murder was cold, calculated, and premeditated. *Id.* The trial court did not find any statutory mitigation. *Id.* However, the trial court found the following nonstatutory mitigating circumstance applied: Petitioner was mentally ill, had a history of drug abuse and drug psychosis, and he was a good brother, loving father, and caring son. *Id.*

The trial court weighed the aggravating factors against the mitigating factors and sentenced Petitioner to death. *Id.* On appeal, the Florida Supreme Court affirmed Petitioner's sentence of death. *Id.* at 48. Petitioner filed a petition for writ of certiorari to this Court, which was denied in 2000. *Id.*, *cert. denied*, 531 U.S. 859 (2000). Under Florida Rule of Criminal Procedure 3.851(d)(1)(B), Petitioner's sentence of death became final on October 2, 2000, following this Court's denial of the petition for writ of certiorari. *Rodriguez*, 753 So. 2d at 48; Fla. R. Crim. P. 3.851(d)(1)(B).

Petitioner continued seeking relief from his conviction and sentence through

postconviction litigation. *Rodriguez v. State*, 39 So. 3d 275 (Fla. 2010) (affirming denial of first motion for postconviction relief); *Rodriguez v. Buss*, No. 10-22692-CIV, 2011 WL 1827899, *1 (S.D. Fla. May 12, 2011) (denying petition for writ of habeas corpus relating to ineffective assistance of counsel, failure to disclose evidence, and prosecutorial misconduct); *Rodriguez v. Sec'y, Florida Dept. of Corr.*, 756 F.3d 1277 (11th Cir. 2014) (affirming denial of petition for writ of habeas corpus), *cert. denied*, 135 S. Ct. 1707 (2015).

On January 10, 2017, Petitioner filed another successive motion for postconviction relief raising claims pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), as interpreted in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The lower court allowed Petitioner to submit supplemental briefing on April 6, 2017. There, Petitioner advocated for relief under *Hurst v. State* even where the jury unanimously recommended death. On May 5, 2017, the postconviction court denied Petitioner's successive motion for postconviction relief. On June 29, 2017, Petitioner appealed the postconviction court's decision to the Florida Supreme Court, and on July 12, 2017, the Florida Supreme Court stayed Petitioner's appeal pending the outcome of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 512 (2017).

After the Florida Supreme Court decided *Hitchcock*, it issued an order to show cause on September 25, 2017, directing Petitioner to show why *Hitchcock* should not be dispositive to his case. Following briefing, the Florida Supreme Court affirmed the lower court's denial of relief, finding that *Hurst v. State* does not apply retroactively to his death sentence that became final in 2000. *Rodriguez v. State*, 237

So. 3d 918 (Fla. 2018), *cert. denied*, 139 S. Ct. 209 (2018).

On March 13, 2018, Petitioner filed a successive postconviction motion in the circuit court raising due process violations based on *Hurst v. State* and the revised enactment of Chapter 2017-1. He claimed these changes in the law provided him a substantive right, that existed since the enactment of Florida Statutes section 921.141, to the unanimous jury fact finding before the death sentence is imposed. On April 30, 2018, the circuit court denied his motion. On May 25, 2018, the circuit court denied rehearing.

On August 27, 2018, Petitioner filed its response to the Florida Supreme Court's Show Cause Order showing why the trial court's order should not be affirmed in light of *Hitchcock v. State*. *Rodriguez*, 260 So. 3d at 147. The Florida Supreme Court again denied *Hurst* relief. *Id.* at 146; *see also Rodriguez*, 237 So. 3d at 918 (denying Petitioner's claim of *Hurst* relief). The Florida Supreme Court held that Petitioner's claim was procedurally barred, lacked merit, and that Chapter 2017-1 was not applicable to Petitioner because his three unanimous sentences of death were finalized in 2000. *Id.* Petitioner filed his Petition in this Court from the Florida Supreme Court's decision.

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, 202 So. 3d at 57.[1]

Following *Hurst v. State*, the Florida Supreme Court decided *Mosley v. State*, which held that defendants whose sentence(s) of death were finalized after *Ring v. Arizona*, are entitled to *Hurst v. State* relief. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016) ; *Ring v. Arizona*, 536 U.S. 584 (2002) . On the same day, the Florida Supreme Court decided *Asay v. State*,[2] which held that defendants whose sentences of death were finalized prior to *Ring v. Arizona* were not entitled to *Hurst v. State* relief. *Asay v. State*, 210 So. 3d 1, 17-22 (Fla. 2016), *cert. denied*, 138 S.Ct. 41 (2017).

In *Hitchcock*, the Florida Supreme Court reaffirmed its previous holding in *Asay*, in which it held 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*. *Hitchcock*, 226 So. 3d at 217.

In *Foster v. State*, 258 So. 3d 1248, 1251 (Fla. 2018), the Florida Supreme Court recognized that there is no crime titled "capital first-degree murder." Instead, Florida prohibits first-degree murder, codified under Florida Statute section 782.04,

---

[1] 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).

[2] The Florida Supreme Court is currently reconsidering its retroactivity determination in *Asay* in *Owen v. State*, No. SC18-810, ___ So. 3d ___ (Fla. ___).

which is by definition a capital felony punishable by death. *Foster v. State*, 258 So. 3d. at 1251-52; § 782.04, Fla. Stat. (2018). A jury must adjudicate a defendant guilty of first-murder before a court must conduct a separate proceeding to determine whether the defendant shall be sentenced to life imprisonment or the death penalty pursuant to section 921.141(1). *Foster,* 258 So. 3d at 1252; § 921.141(1), Fla. Stat. (2017). The court held that these statutes "that the *Hurst v. State* penalty phase findings are not elements of the capital felony of first-degree murder" but findings that a jury must make before a court can impose a sentence of death. *Foster.* 258 So. 3d at 1252.

This is the State's brief in opposition.

Reasons for Denying the Writ

Certiorari review should be denied because (1) Petitioner's claims are procedurally barred and do not conflict with any decisions of this Court or involve an important, unsettled question of federal law in addition to being matters of state law; (2) the Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florida* and *Hurst v. State*, which 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*, does not violate the Eighth or Fourteenth Amendments; and (3) the only mandatory element that needs to be found by a unanimous jury is that at least one aggravating circumstance exist.

Petitioner Rodriguez's conviction and resulting death sentence for the first-degree murders of Bea Joseph, Sam Joseph, and Genevieve Abraham became final in 2000. *Rodriguez v. State*, 753 So. 2d 29, 33 (Fla. 2000), *cert. denied*, 531 U.S. 859 (2000). Petitioner's instant petition asserts that he is entitled to a resentencing because the State failed to prove the elements of "capital first-degree murder." The Florida Supreme Court decided that relief was not warranted due to a procedural bar. Certiorari review should be denied because the issue below was decided on the basis of state law and this case does not present a fairly debatable or important unsettled question of constitutional law for this Court's review. *See* Sup. Ct. R. 10; *Rockford Life Insurance Co. v. Illinois Dept. of Revenue*, 482 U.S. 182, 184, n.3 (1987). As Petitioner has offered no compelling reason for review, certiorari should be denied.

Petitioner's Claims are Procedurally Barred

Under Florida law, successive motions for postconviction relief are subject to well established limitations. As noted by the Florida Supreme Court in *Hunter v. State*, 29 So. 3d 256, 267 (Fla. 2008):

> Claims raised in prior postconviction proceedings cannot be relitigated

> in a subsequent postconviction motion unless the movant can demonstrate that the grounds for relief were not known and could not have been known at the time of the earlier proceeding. *See Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). Rule 3.851 requires motions filed beyond the time limitations to specifically allege that the facts on which the claim is predicated were unknown or could not have been ascertained by the exercise of due diligence. Fla. R. Crim. P. 3.851(d)(2)(A). Furthermore, the rule requires successive motions to articulate the reasons why a claim was not raised previously and why the evidence used in support of the claim was not previously available. Fla. R. Crim. P. 3.851(e)(2)(B), (e)(2)(C)(iv).

The Florida Supreme Court concluded that the issue of the retroactivity of its decision in *Hurst v. State* was procedurally barred. All of Petitioner's claims were procedurally barred because he has raised the same retroactivity issue in previous postconviction motions, which the Florida Supreme Court has denied.

He argues Florida Statute section 921.141 provide substantive rights that always existed since its enactment in 1972. Section 921.141 was revised in March 2017. § 921.141, Fla. Stat. (2017). Petitioner filed a Rule 3.851 motion for postconviction relief claiming *Hurst v. State* relief, which was denied by the Florida Supreme Court and denied certiorari by this court. *Rodriguez v. State*, 237 So. 3d 918 (Fla. 2018), *cert. denied*, 139 S. Ct. 209 (2018). As section 921.141 codified *Hurst v. State*, many other death penalty defendants took advantage of the opportunity to ask the lower courts for leave to amend their successive motions based on the new law. Accordingly, Petitioner could have made this argument in his first *Hurst v. State* based petition for a writ of certiorari and fails to demonstrate how the grounds for relief were not known and could not have been known at the time of his prior petition for a writ of certiorari.

Petitioner seeks review of the Florida Supreme Court's decision, which held that his claim on appeal was procedurally barred because it concerned the same question in his prior postconviction claim as to whether *Hurst v. State* could be retroactively applied.

This Court should not grant review of an issue that is procedurally barred by the law-of-the-case doctrine. 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 welcome 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 Florida Supreme 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. 1980). 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); s*ee 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); *Long*, 463 U.S. at 1041. Accordingly, certiorari should be denied.[3]

This Court does not grant review of procedurally barred claims. Opposing counsel fails to cite a case where this Court has granted review of an underlying issue of retroactivity where that underlying issue was barred by the law-of-the-case doctrine. Because Petitioner has already raised this claim previously, review should be denied on the basis of the procedural bar alone.

Florida's Partial Retroactivity Analysis

New rules of law, such as the rule announced in *Hurst v. Florida*, do not normally apply to cases that are final. *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (explaining the normal rule of non-retroactivity 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.

---

[3] 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., 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).

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).

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 would receive the benefit from alleged *Hurst* error. Retroactivity under *Griffith* depends on the date of the finality of the direct appeal. The test for retroactivity in *Teague* also depends upon a specific date. *Teague*, 489 U.S. at 310. That is, if a case is final on direct review, the defendant will not receive the benefit of the new rule unless one of the exceptions announced in *Teague* applies. *Id.* Again, the date of finality is the critical date-based test under *Teague*.

Moreover, this Court has given partial retroactive effect to a change in the penal law. In *Dorsey v. United States*, 567 U.S. 260 (2012), this Court held the Fair Sentencing Act to be partially retroactive in that it would apply to those offenders who committed offenses prior to the effective date of the act but who were sentenced after that date. *See United States v. Abney*, 812 F.3d 1079, 1097-98 (D.C. Cir. 2016) (noting that prior to its decision in *Dorsey*, this Court had never held any change in a criminal penalty to be partially retroactive).

The *Welch v. United States*, 136 S. Ct. 1257 (2016), decision supports the determination that the new *Hurst* rule is procedural:

> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353, 124 S. Ct. 2519. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.*, at 351-352, 124 S. Ct. 2519 (citation omitted); *see Montgomery, supra*, at ····, 136 S. Ct. at 728. Procedural rules, by contrast, "regulate only the manner of determining the defendant's culpability." *Schriro*, 542 U.S., at 353, 124 S. Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." *Ibid.* "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.*, at 352, 124 S. Ct. 2519.

Welch, 136 S. Ct. at 1264-65. The *Welch* Court found that the rule in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which "changed the substantive reach of the Armed Career Criminal Act," was a substantive, rather than procedural, change because it altered the class of people affected by the law. *Welch*, 136 S. Ct. at 1265. In explaining how the rule in *Johnson* was not procedural, the *Welch* Court stated, "[i]t did not, for example, 'allocate decision making authority' between judge and jury, *ibid.*, or regulate the evidence that the court could consider in making its decision." *Welch*, 136 S. Ct. at 1265 (citation omitted).

Here, the new rule announced in *Hurst v. State* allocated the decision-making authority to determine capital sentencing from the judge to the jury, which is precisely how the *Welch* Court defined a procedural change. *Hurst*, 202 So. 3d at 57-59. Based on this Court's precedent, there can be no doubt that the *Hurst v. State*

rule is a procedural rule. Aside from the separate issue of retroactivity under state law, there is no conflict among courts applying *Hurst v. State* under the United States Constitution.

Florida was not required to grant retroactive application of *Hurst v. Florida* to all death sentenced murderers regardless of the date their convictions and sentences became final. This Court's ruling in *Hurst v. Florida* 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). However, *Hurst*, like *Ring*, was a procedural change, not a substantive one. *See Summerlin*, 542 U.S. at 358 ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review."). In response, Florida adopted **new procedural requirements** that, among other things, mandated that all factual findings necessary to impose death be found by a unanimous jury. The Florida Supreme Court's interpretation of *Hurst v. Florida* in *Hurst v. State* greatly expanded that procedural rule. Nevertheless, it remained a procedural rule and not a "definition" of Florida's death penalty statute. The range of conduct punished by death in Florida remains the same.

The Florida Supreme Court's holding in *Hurst v. State* followed this Court's holding in *Hurst v. Florida* in requiring that aggravating circumstances be found by a jury beyond a reasonable doubt. *Hurst*, 202 So. 3d at 49-50. The Florida court then found that as a matter of state law, "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." *Id.* at 57. In *Asay v. State*, the Florida Supreme Court ruled that *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*. *Asay*, 210 So. 3d at 22. The judgment in *Asay* became final October 7, 1991, and thus the defendant was not eligible for any relief under *Hurst v. State*. *Id.* at 8; *see also Mosley*, 209 So. 3d at 1272-73 (holding that *Hurst v. State* applies retroactively to defendants whose sentences were not yet final when this Court issued *Ring*).

The Florida Supreme Court reaffirmed its decision denying all retroactive relief to cases that were final before *Ring* in *Hitchcock*. *Hitchcock,* 226 So. 3d at 217 (stating "our decision in *Asay* forecloses relief"). The court rejected Eighth Amendment, equal protection, and due process challenges as applied to *Asay*. The court explained that although *Hitchcock* referenced "various constitutional provisions as a basis for arguments that *Hurst v. State*" entitled him to a new sentencing proceeding, "these are nothing more than arguments that *Hurst v. State* should be applied retroactively." *Id.* at 217.

Petitioner's case falls under the group of cases that were pre-*Ring*. This Court has denied certiorari review to various capital cases that the Florida Supreme Court denied relief on the basis of its partial retroactivity analysis following the issue of *Hurst v. State*. *See, e.g., 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) (denying Eighth Amendment, due process, and equal protection challenges to partial retroactivity citing *Asay* and *Hitchcock*), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017) (finding that the court has "consistently held that *Hurst v. State* is not retroactive prior to June 24, 2002), *cert. denied*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548, 549 (Fla. 2018), *cert. denied*, 138 S. Ct. 1164 (2018); *Cole v. State*, 234 So. 3d 644, 645 (Fla. 2018) (holding that *Hurst v. State* does not apply retroactively to Cole because his sentence of death was finalized in 1998), *cert. denied*, 138 S. Ct. 2657 (2018); *Jones v. State*, 234 So. 3d 545 (Fla. 2018), *cert. denied*, 138 S. Ct. 2686 (2018); *Jackson v. State*, 237 So. 3d 905 (Fla. 2018), *cert. denied*, 139 S. Ct. 193 (2018).

Elements of Florida's Murder Statute and Sentencing Requirements

Hurst v. Florida was a Sixth Amendment case which applied *Ring* to Florida's sentencing scheme, reiterating that a jury, not a judge, must find the existence of an aggravating factor to make a defendant eligible for the death penalty. *Hurst v. Florida*, 136 S. Ct. at 624. *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. In *Kansas v. Carr*, 136 S. Ct. 633 (2016), decided eight days after this Court issued *Hurst v. Florida*, this Court emphasized:

> Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one jury might consider mitigating another might not. And of course, the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy-the quality of which, as we know, is not strained. It would

> mean nothing, we think, to tell the jury that defendants must deserve mercy beyond a reasonable doubt, or must more-likely-than-not deserve it . . . . In the last analysis, jurors will accord mercy if they do not, which is what our case law is designed to achieve.

Carr, 136 S. Ct. at 642. Therefore, Petitioner fails to present a constitutional question which would warrant certiorari review.[4]

Petitioner's contemporaneous conviction for armed robbery and his prior felony convictions established beyond a reasonable doubt the existence of two aggravating factors. *See Apprendi*, 530 U.S. at 490; *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*.

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

---

[4] This Court has recently denied certiorari review in a similar case regarding a *Foster*-type claim. *See Zakrzweski v. State*, 254 So. 3d 324 (2018), *cert. denied*, No. 18-8090, 2019 WL 2078132, at *1 (May 13, 2019).

[5] *State v. Mason*, 153 Ohio St. 3d 476, 483, 485 (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.*

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).

Opposing counsel insists that the Florida Supreme Court's requiring these additional jury findings in *Hurst v. State* means that all those additional findings, beyond the one aggravating factor, automatically become elements of capital murder. This is not true.

Elements are facts proven by the prosecution beyond a reasonable doubt that increase or aggravate the penalty. That is the dictionary definition of an element and the constitutional definition of an element. BLACK'S LAW DICTIONARY (10th ed. 2014) (elements of crime); *United States v. O'Brien*, 560 U.S. 218, 224 (2010) (contrasting elements of a crime which are facts that the prosecution must prove to a jury beyond a reasonable doubt with sentencing factors which may be found by a judge by a preponderance of the evidence).

Neither *Hurst v. Florida* nor *Hurst v. State* created any new factors that a jury

---

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 F. App'x 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. 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").

needed to find to sentence a defendant to death. It is only facts that increase or aggravate a sentence that are elements that the jury must find beyond a reasonable doubt according to this Court's Sixth Amendment jurisprudence. *Alleyne*, 570 U.S. at 103 (holding that any fact that increases the mandatory minimum sentence for a crime is an element that must be found by the jury). Section 921.141(2)(b)1. makes this sufficiently clear, stating:

> The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:
> 1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.

§ 921.141(2)(b)1., Fla. Stat. (2017).

The Florida Supreme Court may mandate that the jury make additional findings regarding mitigating circumstances and weighing, but that does not turn either mitigating circumstances or weighing of circumstances into elements. Mitigation and weighing of the aggravating and mitigating circumstances are not facts at all. *Carr*, 136 S. Ct. at 642 (explaining that aggravating factors are "purely factual determinations," but that mitigating circumstances, while often having a factual component, are "largely a judgment call (or perhaps a value call)" and weighing is mostly "a question of mercy"). Mitigating circumstances, which must be found before any weighing can be done, are not elements because mitigation is proven by the defense and at a much lower standard of proof than the elements. *Ault v. State*, 53 So. 3d 175, 186 (Fla. 2010) (noting that mitigating circumstances are proven at the "greater weight of the evidence" standard of proof (quoting *Coday v. State*, 946

So. 2d 988, 1003 (Fla. 2006)). If a mitigating circumstance applies it only decreases the penalty.

Additionally, it is not true as a matter of Florida law that the additional findings beyond the aggravating factors are elements. The Florida Supreme Court recently held that the additional findings are ***not*** elements. *Foster,* 258 So. 3d at 1251-53 (rejecting a due process and Eighth Amendment argument that the additional findings required by Florida's new death penalty statute were elements and specifically holding the additional jury findings required "are not elements of the capital felony of first-degree murder"). On the contrary, they are findings that a jury must make: "(1) before a court can impose the death penalty for first-degree murder, and (2) only after a conviction or adjudication of guilty for first-degree murder has occurred." *Id.* Section 921.141 further makes clear that these findings are recommendations that are based on the jury's weighing of the facts in each case. § 921.141(2)(b)2.a.-c., Fla. Stat. (2017). They are not required to be found by proof beyond a reasonable doubt.

Opposing counsel's definition of elements of capital murder is also directly contrary to the actual text of Florida's new death penalty statute. Florida's new death penalty statute provides that a defendant becomes eligible for a death sentence upon a conviction for first-degree murder and the finding of "at least one aggravating factor." § 921.141(2)(a), Fla. Stat. (2017) (providing "After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the

existence of at least one aggravating factor set forth in subsection (6)."). The statute additionally provides that if the jury, "unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death." § 921.141(2)(b)2., Fla. Stat. (2017). However, if the jury, "does not unanimously find at least one aggravating factor, the defendant is ***ineligible*** for a sentence of death." § 921.141(2)(b)1., Fla. Stat. (2017) (emphasis added). A jury's finding of "at least one aggravating factor" makes the defendant eligible for death. § 921.141(2)(a), Fla. Stat. (2017). Aggravating factors are the only elements necessary to be proven beyond a reasonable doubt. None of the additional findings[6] listed in *Foster* are elements. *Foster*, 258 So. 3d at 1251.

Last, Petitioner's claim that he is entitled to a new penalty phase since he did not receive a unanimous jury finding of an aggravator is meritless based on this Court's decision in *Jenkins v. Hutton,* 137 S. Ct. 1769 (2017). In *Jenkins*, the defendant's death sentence was affirmed as constitutional because the jury already found aggravators making him eligible of the death penalty during the guilt phase of the trial. *Id.* at 1772. Specifically, the jury found the defendant "engaged in a course of conduct involving the attempt to kill two or more persons and that [he] murdered Mitchell while committing, attempting to commit or fleeing immediately after kidnapping." *Id.* at 1770. This Court held that the jury found an aggravating

[6] The four other findings are: "(2) identify all aggravating factors that it unanimously finds beyond a reasonable doubt; (3) unanimously determine whether sufficient aggravating factors exist to impose a sentence of death; (4) determine whether any mitigating circumstances exist and unanimously determine whether the aggravating factors outweigh those mitigating circumstances; and (5) unanimously determine that the defendant should be sentenced to death." *Foster*, 258 So. 3d at 1251.

circumstance in the guilt phase of his trial by finding these factors. *Id.* at 1772.

Here, Petitioner's three contemporaneous murder convictions during the course of armed burglary were the necessary aggravators to make him eligible for the death penalty. Petitioner's jury returned guilty verdicts for all three victims in his guilt phase. Like *Jenkins*, the jury's unanimous findings of statutory aggravating factors at Petitioner's guilt phase made him eligible for the death penalty. Since these aggravators were found by Petitioner's jury during his guilt phase, Petitioner's claim should be denied on these grounds.

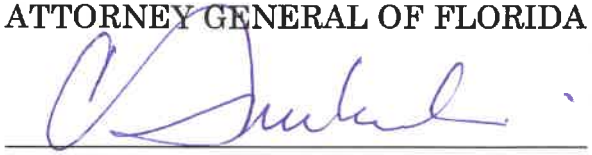
Moreover, Petitioner's jury returned unanimous recommendations for the death penalty. *Arguendo,* even if Petitioner's case was final after 2002, making retroactivity a possibility, he still would not receive the benefit of a new sentencing under *Hurst v. State* or section 921.141 claims. Since he received a unanimous recommendation for death it follows that a under the harmless error analysis, a rational jury would have unanimously found there were sufficient aggravators to outweigh the mitigating factors, beyond a reasonable doubt. *See e.g., Reynolds v. State*, 251 So. 3d 811, 815 (Fla. 2018) ("We have been abundantly clear that there is a critical distinction between unanimous and nonunanimous jury recommendations as they pertain to *Hurst v. State* error); *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016) ("We conclude that the State can sustain its burden of demonstrating that any *Hurst v. Florida* error was harmless beyond a reasonable doubt. Here, the jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations."). Accordingly, this Court should deny the petition.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA



Carolyn M. Snurkowski*
Associate Deputy Attorney General
*Counsel of Record

Brian H. Zack
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
CAPITAL APPEALS
SUNTRUST INTERNATIONAL CENTER
1 SE Third Avenue, Suite 900
Miami, Florida 33131
Telephone: (305) 377-5441
Facsimile: (305) 377-5655
capapp@myfloridalegal.com
Carolyn.Snurkowski@myfloridalegal.com
Brian.Zack@myfloridalegal.com

COUNSEL FOR RESPONDENT