CASE NO. 18-9274

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM LEE THOMPSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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[CAPITAL CASE]

QUESTIONS PRESENTED FOR REVIEW

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

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The opinion of the Florida Supreme Court is reported at *Thompson v. State*, 261 So.3d 1255 (Fla. 2019).

JURISDICTION

The judgment of the Florida Supreme Court was entered on January 7, 2019, and the mandate issued January 24, 2019. Petitioner invokes the jurisdiction of this Court based on 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 AND FACTS

Petitioner William Lee Thompson was convicted of the first-degree murder, kidnapping, and involuntary sexual battery of Sally Ivester and was sentenced to death in 1976. *Thompson v. State*, 389 So. 2d 197, 198 (Fla. 1980). After taking the victim to a motel, Petitioner and his co-defendant beat the victim with a chain and sexually assaulted her using a Billy club and a chair leg. *Id.* at 198. After a brief interruption to take the victim to a phone booth to call her mother to obtain money, Petitioner resumed torturing her by burning various parts of her body with lit cigarettes and lighters and sexually assaulting her with the Billy club and the chair leg until she died from internal bleeding and multiple injuries. *Id.* at 198, 200.

On direct appeal, the Florida Supreme Court permitted Petitioner to withdraw his plea and remanded for further proceedings finding Petitioner's "pleas were based on a failure of communication or misunderstanding of the facts." *Thompson v. State*, 351 So. 2d 701, 701 (Fla. 1977). On remand, Petitioner again pleaded guilty and was sentenced to death. The Florida Supreme Court affirmed the convictions and sentence. *Thompson*, 389 So. 2d at 197.

On appeal in 1982, the Florida Supreme Court affirmed the denial of Petitioner's first postconviction motion. *Thompson v. State*, 410 So. 2d 500 (Fla. 1982). Petitioner's subsequent motion for federal habeas corpus relief was also denied. *Thompson v. Wainwright*, 787 F.2d 1447 (11th Cir. 1986). After appealing the denial of his second postconviction motion, the Florida Supreme Court granted his

motion and reversed for resentencing. *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987). At resentencing, the jury recommended death by a vote of seven to five, which was affirmed by the Florida Supreme Court. *Thompson v. State,* 619 So. 2d 261 (Fla. 1993), *cert. denied*, 510 U.S. 966 (1993). Petitioner's sentence was final on November 8, 1993.

Subsequent collateral challenges have been rejected. *Thompson v. State,* 759 So. 2d 650 (Fla. 2000) (affirming denial of initial motion for postconviction relief and denying state petition for writ of habeas corpus); *Thompson v. State,* 41 So. 3d 219 (Fla. 2010) (affirming denial of Petitioner's successive motion for postconviction relief). On January 10, 2017, Petitioner filed a successive Rule 3.851 motion challenging his sentence based on *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017).

On January 30, 2017, the State filed its response. On November 21, 2017, Petitioner filed an amended motion. The circuit court ultimately denied his motion on July 20, 2018.

After Petitioner filed his notice of appeal, the Florida Supreme Court on November 6, 2018 issued an order directing Petitioner to show why *Hitchcock* should not be dispositive in his case. In *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017), the Florida Supreme Court reaffirmed its previous holding in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), in which it held that *Hurst v. Florida*, 136 S. Ct. 616 (2016) as interpreted by *Hurst*

v. State is not retroactive to defendants whose death sentences were final when this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). Following responses by the parties, the Florida Supreme Court affirmed the lower court's denial of relief, finding that *Hurst* does not apply retroactively to Petitioner's sentence of death that became final in 1993. *Thompson v. State*, 261 So.3d 1255 (Fla. 2019). Petitioner now seeks certiorari review of the Florida Supreme Court's decision. This is the State's brief in opposition.

REASONS FOR DENYING THE WRIT

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

The Petition alleges that the Florida Supreme Court's refusal to retroactively apply *Hurst v. State* 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 4). But the Florida Supreme Court's retroactive application of *Hurst v. State* to only post-*Ring* cases does not violate the Eighth or Fourteenth Amendment. Additionally, the Florida Supreme Court's denial of the retroactive application of *Hurst v. State* to Petitioner's case is based on adequate and independent state grounds, is not in conflict with any other state court of last review, and is not in conflict with any federal appellate court. This decision is also not in conflict with this Court's jurisprudence on retroactivity, with any other state court of last review, or any federal appellate court. Thus, because Petitioner has not provided any "compelling" reason for this Court to

review his case, certiorari review should be denied. *See* Sup. Ct. R. 10.

Petitioner has not offered any persuasive or compelling reasons for this Court to grant review of this case.

I. The Florida Supreme Court's Ruling on the Retroactivity of *Hurst v. State* is Not Unconstitutional.

As a preliminary matter, 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 v. State* is not retroactive under federal law, the retroactive application of *Hurst v. State* is solely based on a state test for retroactivity. Because the retroactive application of *Hurst v. State* is based on adequate and independent state grounds, certiorari review should be denied.

The Florida Supreme Court first analyzed the retroactive application of *Hurst v. State* in *Mosley v. State*, 209 So. 3d 1248, 1276-83 (Fla. 2016), and *Asay v. State*, 210 So. 3d 1, 15-22 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017). In *Mosley*, the Florida Supreme Court held that *Hurst v. State* is retroactive to cases which became final after this Court's decision in *Ring v. Arizona* on June 24, 2002. *Mosley*, 209 So. 3d at 1283. In determining whether *Hurst v. State* should be retroactively applied to

Mosley, the Florida Supreme Court conducted a *Witt*[1] analysis, the state-based test for retroactivity. *Mosley*, 209 So. 3d at 1274.

Since "finality of state convictions is a *state* interest, not a federal one," states are permitted to implement standards for retroactivity that grant "relief to a broader class of individuals than is required by *Teague*," which provides the federal test for retroactivity. *Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008) (emphasis in original); *Teague v. Lane*, 489 U.S. 288 (1989); *see also Johnson v. New Jersey*, 384 U.S. 719, 733 (1966) ("Of course, States are still entirely free to effectuate under their own law stricter standards than we have laid down and to apply those standards in a broader range of cases than is required by this [Court]."). As *Ring* 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 v. State*. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (holding that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review"); *Lambrix v. Sec'y, Fla. Dept. of Corr.*, 872 F.3d 1170, 1182-83 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 312 (2017) (noting that "[n]o U.S. Supreme Court decision holds that its *Hurst v. State* decision is retroactively applicable").

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[1] *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)).

The Florida Supreme Court determined that all three *Witt* factors weighed in favor of retroactive application of *Hurst v. State* to cases which became final post-*Ring*. *Mosley*, 209 So. 3d at 1276-83. The court concluded that "defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring* should not be penalized for the United States Supreme Court's delay in explicitly making this determination."[2] *Id.* at 1283. The Florida Supreme Court accordingly held *Hurst v. State* to be retroactive to Mosley, whose case became final in 2009, which is post-*Ring*. *Id.*

Conversely, applying the *Witt* analysis in *Asay v. State*, the Florida Supreme Court held that *Hurst v. State* is not retroactive to any case in which the death sentence was final pre-*Ring*. The court specifically noted that *Witt* "provides *more expansive retroactivity standards* than those adopted in *Teague*." *Asay*, 210 So. 3d at

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[2] Of course, the gap between this Court's rulings in *Ring* and *Hurst* may be fairly explained by the fact that the Florida Supreme Court properly recognized, in the State's view, that a prior violent felony or contemporaneous felony conviction took the case out of the purview of *Ring*. *See Ellerbee v. State*, 87 So. 3d 730, 747 (Fla. 2012) ("This Court has consistently held that a defendant is not entitled to relief under *Ring* if he is convicted of murder committed during the commission of a felony, or otherwise where the jury of necessity has unanimously made the findings of fact that support an aggravator.") (string citations omitted). *Hurst v. Florida* presented this Court with a rare "pure" *Ring* case, that is a case where there was no aggravator supported either by a contemporaneous felony conviction or prior violent felony. Accordingly, this Court's opinion in *Hurst* should have been read by the Florida Supreme Court following remand as a straight forward application of *Ring* under the facts presented. However, a majority of the Florida Supreme Court interpreted this Court's decision in *Hurst* to include weighing and selection of the defendant's sentence, thereby causing an unnecessarily dramatic and costly impact to the State's capital sentencing system.

15 (emphasis in original) (quoting *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005)). The court determined that prongs two and three of the *Witt* test, reliance on the old rule and effect on the administration of justice, weighed heavily against the retroactive application of *Hurst v. State* to pre-*Ring* cases. *Asay*, 210 So. 2d at 20-22. As related to the reliance on the old rule, the court noted "the State of Florida in prosecuting these crimes, and the families of the victims, had extensively relied on the constitutionality of Florida's death penalty scheme based on the decisions of the United States Supreme Court. This factor weighs heavily against retroactive application of *Hurst v. Florida* to this pre-*Ring* case." *Id.* at 20. 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 v. State* was not retroactive to Asay since his judgment and sentence became final in 1991, pre-*Ring*. *Id.* at 8, 20.

Since *Asay*, the Florida Supreme Court has continued to apply *Hurst v. State* retroactively to all post-*Ring* cases and declined to apply *Hurst v. State* retroactively to all pre-*Ring* cases. *See Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017), *cert. denied*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548, 549 (Fla. 2018), *cert. denied*,

138 S. Ct. 1164 (2018). This distinction between cases which were final pre-*Ring* versus cases which were final post-*Ring* is neither arbitrary nor capricious.[3]

In the traditional sense, new rules are applied retroactively only to cases which are not yet final. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"); *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992) (applying *Griffith* to Florida defendants); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context). Under this "pipeline" concept, *Hurst v. State* would only apply to the cases which were not yet final on the date of the decision in *Hurst v. State*. 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 or docketing on appeal. 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, "old" cases where the judgment and/or sentence has been overturned will receive the benefit of new law as they are no longer

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

final. Yet, this Court recognizes this type of traditional retroactivity as proper and not violative of the Eighth or Fourteenth Amendment.

The only difference between this more traditional type of retroactivity and the retroactivity implemented by the Florida Supreme Court is that it stems from the date of the decision in *Ring* rather than from the date of the decision in *Hurst v. State*. In determining *Ring* to be the retroactivity application cutoff date,[4] the Florida Supreme Court reasoned that Florida's death penalty sentencing scheme should have been recognized as unconstitutional upon the issuance of the decision in *Ring*. As such, defendants should not be penalized for time that it took for this determination to be made official in *Hurst v. State*.

Certainly, the Florida Supreme Court has demonstrated "some ground of difference that rationally explains the different treatment" between pre-*Ring* and

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[4] 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 *Apprendi*.

post-*Ring* cases. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *see also 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."). Had the Florida Supreme Court denied relief to defendants whose cases were already final when *Hurst v. State* was decided for instance, that determination would not have violated the Eighth or Fourteenth Amendment. Thus, just like the more traditional application of retroactivity, the *Ring*-based cutoff for the retroactive application of *Hurst v. State* is not in violation of the Eighth or Fourteenth Amendment, as it unquestionably extends relief to more individuals.

II. Petitioner fails to raise any basis to support his contention that the Florida Supreme Court's determination of partial retroactivity is arbitrary and capricious.

The Florida Supreme Court's determination that the "fundamental fairness" interest in applying *Hurst v. Florida* to all 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 is arbitrary and capricious, particularly when *Ring* itself was deemed to not apply retroactively. Petitioner makes four arguments to assert that the Florida Supreme Court's *Ring* cut-off creates "a kind and degree of capriciousness that far exceeds the level justified by normal nonretroactivity jurisprudence." (Petition at 14). But these arguments are founded

from holdings of older cases that are in no way related to *Ring*. As shown below, each his four arguments fail to establish any basis for granting certiorari review in this case.

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 15). 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,[5] 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 15-16). 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

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[5] *Rules of Executive Clemency*, FLA COMM'N ON OFFENDER REVIEW, https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf.

defendants who have been on death row for long periods of time, 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 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). Also, the reason for denying retroactivity to older cases is not "*because* they have endured for sixteen and a half years or more awaiting execution" (Petition at 16); it is because *Ring* itself is not retroactive. 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 16-18). 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 16). 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.

Importantly, 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.[6] 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.[7] Doty was granted a new penalty phase due to a 10-2 jury

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[6] *Deviney v. State*, no. SC17-2231, *available at* http://onlinedocketssc.flcourts.org/DocketResults/CaseDocket?Searchtype=Case+Number&CaseYear=2017&CaseNumber=2231

[7] *Bright v. State*, no. SC17-2244, *available at* http://onlinedocketssc.flcourts.org/DocketResults/CaseDocket?Searchtype=Case+Number&CaseYear=2017&CaseNumber=2244

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.[8] 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.[9]

In these cases, the jury went from being non-unanimous to 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*. It also 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 18). 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

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[8] *Doty v. State*, no. SC18-973, *available at*: http://onlinedocketssc.flcourts.org/DocketResults/LTCases?CaseNumber=973&CaseYear=2018

[9] *Hojan v. State*, no. SC18-2149, *available at*: http://onlinedocketssc.flcourts.org/DocketResults/LTCases?CaseNumber=2149&CaseYear=2018

presented in 2019 trials.[10] 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 retroactivity is arbitrary and capricious amount to the notion that because pre-*Ring* cases are older, they are more deserving of resentencing than the post-*Ring* cases which were given relief. But there is no Eighth Amendment violation where the Florida Supreme Court based their decision to grant partial retroactivity on a reasoned principle.

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[10] Notably, the State of Florida has appropriate vehicles where any defendant may raise a successive challenge and bring a motion for postconviction relief where specific proof of new scientific evidence would have allowed the jury to reach a different result. *See* Fla. R. Crim. P. 3.851; Fla. R. Crim. P. 3.853.

CONCLUSION

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. Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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