

NO. 17-9243
IN THE SUPREME COURT OF THE UNITED STATES

JASON DEMETRIUS STEPHENS,
Petitioner,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

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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 *Stephens v. State*, 238 So. 3d 94 (Fla. 2018).

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(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, Jason Demetrius Stephens, was convicted of first-degree murder, armed kidnapping, six counts of armed robbery, burglary, and aggravated battery, and sentenced to death. *Stephens v. State*, 787 So. 2d 747 (Fla. 2001).

The overwhelming evidence of guilt in this case shows Stephens broke into Robert Sparrow, Jr.'s house on June 2, 1997, at approximately 2 p.m., while a number of people were present. He robbed the people there and kidnapped a child. There were three or four other people with Stephens at the time he committed these crimes. However, Stephens refused to cooperate with the authorities in their efforts to identify the other individuals. One of the individuals, Horace Cummings (Cummings), turned himself into the police and was tried with Stephens. The other two individuals were never apprehended. Stephens testified at trial that Cummings and the other unidentified individuals went to the house to buy drugs and were unaware of his plan to rob the occupants.

There were eight eyewitnesses in the house who testified at trial. While some of the details of the eyewitness' accounts varied, they all substantially agreed with the following summary of events. Stephens entered the house first, carrying a nine-millimeter automatic gun. He was standing next to Robert Sparrow, III (Sparrow III), who was three years and four months old. Upon seeing the gun, the child's mother, Consuelo Brown, physically confronted Stephens. Stephens hit her with the gun on the bridge of her nose. Ms. Brown fell to the ground and her nose began to bleed. Stephens ejected a bullet onto the floor and informed the occupants that the gun was loaded. He told them that he wanted "money and weed." He demanded from Robert Sparrow, Jr. (Sparrow Jr.) the keys to a blue car located outside the house. Sparrow Jr. told Stephens the keys were with someone who was not present at the house.

Thereafter, two other individuals entered the house. One of the

individuals was Cummings, but the other individual was never identified. Stephens made all the occupants lie down on the floor as he searched their pockets for valuables. The unidentified individual, referred to as Plats or Dreds because of the way he wore his hair, held the occupants of the house on the floor at gunpoint while Stephens located a secured room where he could put them. There was some testimony that Sparrow III said he was being choked, but it was unclear from the record who was choking him. After inspecting the house, Stephens determined the bathroom was the most secure location to put his hostages, and he ordered six of them, including six-year-old Kahari Graham, to crawl to the bathroom. Sparrow III was kept separate from the others.

Many of the eyewitnesses testified that Stephens showed his ID and said he was taking Sparrow III with him as insurance. Sparrow Jr. testified Stephens agreed he would leave the child at the corner if he was not followed. Stephens also testified he agreed to leave the child somewhere, but he did not know what location the child's father had referred to in his testimony.

After the occupants had been secured in the bathroom, Sparrow Jr.'s half-brother, David Cobb (Cobb), and his friend, Roderick Gardner (Gardner), arrived at the house. Upon entry, they too were robbed and forced to crawl to the bathroom. One of the items Stephens took from Gardner was his car keys. Gardner was driving his mother's dark green Kia, which had roll-down windows and pull-up locks. There was testimony that Sparrow III had ridden in the Kia the day before he was killed. On that day, he had been scolded for rolling down the windows and trying to open the car door while it was moving. The record did not reflect that Stephens had any way of knowing whether the child was capable of rolling down the windows or opening the car door.

When Stephens exited the house with the child, the other individuals who Stephens testified had only gone to the house to buy drugs, were seated in the black car they had driven to the scene. Stephens testified the other individuals waved him away from the black car because he had the child. Stephens then ordered the boy to get into the Kia. Both cars pulled away from the house, with the Kia following the black car. After driving eight tenths of a mile, both cars pulled over in a residential neighborhood. It was approximately 2:30 p.m. The Kia was parked on the side of the street without the benefit of any shade. The outside temperature was approximately 82 degrees and sunny. The windows in the car were rolled up and all of the doors were closed. At 9:25 p.m., the

dark green Kia was found. Sparrow III was dead, his body lying face down in the passenger's seat with his feet angled toward the steering wheel. The State argued Stephens suffocated Sparrow III before leaving the car. Stephens testified the boy was alive when he left him in the car.

The medical examiner, Bonifacio Floro, M.D., testified that in his expert medical opinion Robert Sparrow, III had probably died of asphyxiation. However, he could not conclusively rule out hyperthermia as the cause of death. He primarily relied upon multiple "petechiae" in the face and eye lining as an indication of asphyxiation. He also noted there was a small four-millimeter scratch on the back of the child's neck. Dr. Floro concluded this scratch was probably caused by a fingernail. Dr. Floro testified the child's lower lip was bruised, indicating he had been suffocated. Dr. Floro also relied upon the lack of fingerprints or other evidence showing the child tried to roll down the window or open the door in concluding it was more likely that Sparrow III died from asphyxiation than hyperthermia.

Steven Frank Dunton, M.D., testified on the defendant's behalf. After reviewing Dr. Floro's report, he concluded Sparrow III died from hyperthermia. Dr. Dunton relied upon the fact that there were very few signs of asphyxiation. However, he did admit asphyxiation can never be conclusively ruled out because it can leave no signs at autopsy. Dr. Dunton admitted hyperthermia by itself should not cause petechiae, whereas asphyxiation could. However, he went on to explain that gravity will pull the blood down to the lowest point of the body when the heart stops pumping, causing the blood to pool to such a degree that venules rupture resulting in petechiae. He attributed the discoloration of the child's lips to the tissues drying out after death. Therefore, he concluded Dr. Floro erred in relying on the petechiae to diagnose the child's death as being caused by asphyxiation.

Based upon these facts the jury concluded Stephens was guilty of first-degree murder. The verdict form did not delineate between first-degree premeditated murder and first-degree felony murder.

Stephens, 787 So. 2d at 750-52. At the sentencing phase, the jury recommended death by a vote of nine to three. The trial court, in following the jury's recommendation, found three aggravating circumstances: "prior violent felonies; murder during the commission of a felony; and the age of the victim, which were all given great weight."

Id. at 752 n.4.

The trial court discussed and gave some weight to a number of nonstatutory factors including: volunteer church work; the defendant's fondness for children; employment; Stephens' religious and supportive family; Stephens' educational background; adjustment to incarceration; lack of intent to kill; a codefendant's life sentence; and Stephens' pleas of guilty to other offenses.

Id.

After the Florida Supreme Court denied his claims on direct appeal, Petitioner filed a petition for a writ of certiorari to this Court, which was denied November 13, 2001. *Stephens v. Florida*, 534 U.S. 1025 (2001). Under Florida law, Petitioner's judgment and sentence became final upon this Court's disposition of the petition for a writ of certiorari, which occurred in 2001. Fla. R. Crim. P. 3.851(d)(1)(B).

The Florida Supreme Court affirmed the denial of Petitioner's postconviction motion and denied a previous writ of habeas corpus. *Stephens v. State*, 975 So. 2d 405, 427 (Fla. 2007). Petitioner sought a writ of habeas corpus in federal court, which was denied. *Stephens v. Sec'y, Fla. Dep't of Corr.*, 2011 WL 939808, *27 (M.D. Fla. Mar. 17, 2011). The Eleventh Circuit Court of Appeals affirmed the denial of Petitioner's writ of habeas corpus. *Stephens v. Sec'y, Fla. Dep't of Corr.*, 678 F.3d 1219 (11th Cir. 2012).

In *Hurst v. Florida*, this Court held that Florida's capital sentencing scheme was unconstitutional pursuant to *Ring's*¹ determination that the Sixth Amendment

¹ *Ring v. Arizona*, 536 U.S. 584 (2002).

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). 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. *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 in 2001, the Florida Supreme Court denied Petitioner's claim that *Hurst* should apply retroactively to him. *Stephens*, 238 So. 3d at 95. Petitioner then filed a 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

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. *Stephens*, 238 So. 3d at 95. 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 2). 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 on retroactivity. Thus, Petitioner's request for certiorari review should be denied.²

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*, no. 17-8540, 2018 WL 1876873 (Jun. 18, 2018); *Jones v. State*, 234 So. 3d 545 (Fla. 2018), *cert. denied*, *Jones v. Florida*, no. 17-8652, 2018 WL 1993786 (Jun. 25, 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*

³ Aside from the question of retroactivity, certiorari would be inappropriate because there is no underlying federal constitutional error. *Hurst v. Florida* did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. Petitioner became eligible for a death sentence by virtue of his guilt phase convictions for contemporaneous violent felonies, robbery and kidnapping. The unanimous verdict by Petitioner's jury establishing his guilt of these contemporaneous crimes, an aggravator under well-established Florida law, was clearly sufficient to meet the Sixth Amendment's factfinding requirement. *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”). *See also State v. Mason*, 2018 WL 1872180, *5-6 (Ohio Apr. 18, 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.”); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) (“As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found.”).

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 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 we have laid down and to apply those standards in a boarder range of cases than is required by this [Court].”). As *Ring*, and by extension *Hurst*, has been held not to be retroactive under federal law, Florida has implemented a test which provides relief to a broader class of individuals in applying *Witt* instead of *Teague* for determining the retroactivity of *Hurst*. See *Schriro v. Summerlin*, 542 U.S. 348, 258 (2004) (holding that “*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review”); *Lambrich 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 *Rings* 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*, 904 So. 2d at 409). However, the Court determined that prongs two and three of the *Witt* test, reliance on the old rule

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.

and effect on the administration of justice, weighed heavily against the retroactive application of *Hurst* to pre-*Ring* cases. *Asay*, 210 So. 2d at 20-22. As related to the reliance on the old rule, the Court noted “the State of Florida in prosecuting these crimes, and the families of the victims, had extensively relied on the constitutionality of Florida's death penalty scheme based on the decisions of the United States Supreme Court. This factor weighs heavily against retroactive application of *Hurst v. Florida* to this pre-*Ring* case.” *Id.* at 20. 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 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 distinction between cases which were final pre-*Ring* versus cases which were final post-*Ring* is neither arbitrary nor capricious.

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* 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. (Petition at 18-19). 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, such as Petitioner’s example of *Bowles* and *Card*. *Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613 (Fla. 2001).⁵ 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.⁶ Yet, this Court recognizes this type of traditional retroactivity as

⁵ Though both *Bowles* and *Card* were both decided on October 11, 2001, in *Bowles*, the rehearing was denied and the Mandate was issued January 10, 2002, but in *Card*, the rehearing was denied and the Mandate was issued December 20, 2001.

⁶ Petitioner uses the example of *Johnson* and *Calloway*. Although *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.*

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*, 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*. 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 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

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 *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.

⁷ Approximately 150 defendants whose convictions became final post-*Ring* are being

not receive the benefit of a new rule under the pipeline concept because their cases were already final when *Hurst* was decided, cannot violate the Eighth or Fourteenth Amendment. 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.

Appellant argues that the Florida Supreme Court has not provided a non-arbitrary explanation for drawing the line at *Ring* instead of at *Apprendi*. (Petition at 16). 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 v. New Jersey*, 530 U.S. 466, 496 (1987)); *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. Thus, as the Florida Supreme Court reasoned, *Ring* is the appropriate demarcation for retroactive

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 June 8, 2018).

application to capital cases, not *Apprendi*. *Asay*, 210 So. 3d at 19. Though Petitioner argues that *Apprendi* should be the delineation point for retroactivity rather than *Ring*, the Florida Supreme Court specifically declined to extend retroactive application of *Hurst* to cases which became final post-*Apprendi* but pre-*Ring*. The Court's rationale is derived directly from *Apprendi*: "this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." *Apprendi*, 530 U.S. at 496 (citing *Walton*, 497 U.S. at 647-49). Thus, the Florida Supreme Court has provided a non-arbitrary explanation for drawing the line of retroactivity at *Ring* rather than *Apprendi*.

Petitioner also attempts to raise a *Caldwell* claim in this section. (Petition at 27-28); *Caldwell v. Mississippi*, 472 U.S. 320 (1987). However, because this is a postconviction case, this Court would first need to address and resolve the issue of retroactivity before even reaching the merits of Petitioner's jury instruction claim.

Aside from the separate question of retroactivity, it is clear that there was no *Caldwell* violation in this case. In order to establish constitutional error under *Caldwell*, a defendant must show that the comments or instructions to the jury "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). Since the jury in this case was unquestionably properly informed of its role in sentencing Petitioner at the time of trial, this claim lacks merit. *See Truehill v. Florida*, 138 S.Ct. 3 (2017); *Middleton v. Florida*, 138 S.Ct.

829 (2018); *Guardado v. Jones*, 138 S.Ct. 1131 (2018). Therefore, there was no *Caldwell* violation.

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

The Florida Supreme Court's Application of Retroactivity Does Not Violate the Supremacy Clause of the United States Constitution

Petitioner also argues that *Hurst* provided a substantive change in the law and thus should be afforded full retroactive application under federal law pursuant to *Montgomery*. (Petition at 28-29); *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). However, *Hurst*, like *Ring*, was a procedural change, not 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."). Thus, like *Ring*, *Hurst* is not retroactive under federal law. *See Lambrix*, 872 F.3d at 1182 ("No U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable."); *see also Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (holding that "*Hurst* does not apply retroactively to cases on collateral review"); *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (noting that this Court had not made *Hurst* retroactive to cases on collateral review); *In re Jones*, 847 F.3d 1293, 1295 (10th Cir. 2017) ("the Supreme Court has not held that *Hurst* announced a substantive rule"). Thus, neither *Ring* nor *Hurst* are retroactive under federal law.

In support of his argument that *Hurst* was a substantive rather than a procedural change, Petitioner analogizes *Hurst* to *Miller*. (Petition at 26-28); *Miller v. Alabama*, 567 U.S. 460 (2012). Petitioner argues that like *Miller*, *Hurst* “conflates a procedural requirement necessary to implement a substantive guarantee with a rule that ‘regulate[s] only the *manner of determining* the defendant’s culpability.’” *Montgomery*, 136 S.Ct. at 734-35 (quoting *Summerlin*, 542 U.S. at 353) (emphasis in original). But this Court found *Miller* to be a substantive change because “it rendered life without parole an unconstitutional penalty for ‘a class of defendants because of their status’ — that is juvenile offenders . . .” and *Miller* to be retroactive because “the vast majority of juvenile offenders — “faces a punishment that the law cannot impose upon him.”” *Montgomery*, 136 S.Ct. at 734 (quoting *Penry*, 492 U.S. at 330); *Summerlin*, 542 U.S. at 352. However, *Hurst* is distinguishable from *Miller*.

Unlike *Miller*, *Hurst* is procedural. In *Hurst* the same class of defendants committing the same range of conduct face the same punishment. Further, unlike the now unavailable penalty in *Miller*, the death penalty can still be imposed under the law after *Hurst*. Instead, *Hurst*, like *Ring*, merely “altered the range of permissible methods for determining whether a defendant’s conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment.” *Summerlin*, 542 U.S. at 353. Thus, *Hurst* is a procedural change and not retroactive under federal law.

Petitioner next relies on *Welch* to argue that the Eighth Amendment unanimity requirement announced in *Hurst v. State* was a substantive change and

is retroactive under federal law. (Petition at 31-33); *Welch v. United States*, 136 S.Ct. 1257 (2016). *Welch* does not distinguish itself from *Summerlin*, but instead quotes *Summerlin* to describe the distinctions between a substantive and a procedural change. *Id.* at 1265. In *Welch*, this Court found that striking down the residual clause of the Armed Career Criminal Act in *Johnson* caused a substantive change because “the same person engaging in the same conduct is no longer subject to the Act.” *Id.*; *Johnson v. United States*, 135 S.Ct. 2551 (2015). *Hurst* is distinguishable from *Welch*.

Unlike *Welch*, after *Hurst*, Florida’s death penalty sentencing scheme still applies to the same persons engaging in the same conduct. In *Hurst v. State*, the Florida Supreme Court explained that the “requirement that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment even more significantly, and expresses the values of the community as they currently relate to imposition of death as a penalty.” *Hurst*, 202 So. 3d at 60. Again, this is an alteration in the procedure necessary to obtain a death sentence. Neither the range of conduct nor the class of persons has been altered. The only change is the manner of determining a defendant’s sentence. Thus, *Ring* and *Hurst* announced a procedural change, not a substantive one.

Additionally, this Court “has not ruled on whether unanimity is required” in capital cases. *Hurst*, 202 So. 3d at 59; *see also Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). As this Court noted, “holding that *because [a State] has made a certain fact essential to the death penalty, that fact must be*

found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.” *Summerlin*, 542 U.S. at 354 (emphasis in original). Thus, *Hurst v. State's* requirement that the jury make specific factual findings before the imposition of the death penalty is procedural.

Lastly, Petitioner argues that *Hurst* “addressed the proof-beyond-a-reasonable-doubt standard,” which causes a substantive change and that makes *Hurst* retroactive under federal law. (Petition at 33). However, *Hurst* did not address the proof-beyond-a-reasonable-doubt standard. The standard of proof for proving aggravating factors in Florida has been beyond a reasonable doubt long before *Hurst* was decided. *See* Fla. Std. J. Inst. (Crim.) 7.11; *Floyd v. State*, 497 So. 2d 1211, 1214-15 (Fla. 1986); *Zeigler v. State*, 580 So. 2d 127, 129 (Fla. 1991); *Finney v. State*, 660 So. 2d 674, 680 (Fla. 1995).

As related to the finding that aggravation is sufficient, *Hurst* did not ascribe a standard of proof. *Hurst*, 202 So. 3d at 54. The Eighth Amendment requires that “States must give narrow and precise definition to the aggravating factors that can result in a capital sentence.” *Roper v. Simmons*, 543 U.S. 551, 568 (2005). The State of Florida has a list of sixteen aggravating factors enumerated in the statute. Fla. Stat. § 921.141(6). These aggravating factors have been deemed sufficient to impose the death penalty by virtue of their inclusion in the statute. Any one of these aggravating factors is sufficient to cause a defendant to be eligible to receive a sentence of death. Thus, if one of these enumerated aggravating factors has been

proven beyond a reasonable doubt, any Eighth Amendment concerns have been satisfied. However, the weight that a juror gives to the aggravator based on the evidence is not something that can be defined by a beyond-a-reasonable-doubt standard.

As related to the finding that the aggravation outweighs the mitigation, *Hurst* did not ascribe a standard of proof. *Hurst*, 202 So. 3d at 54. This Court has specifically held that the beyond-a-reasonable-doubt standard for finding that the aggravation outweighs mitigation is not required under federal law. *See Kansas v. Marsh*, 548 U.S. 163, 164 (2006) (“Weighing is not an end, but a means to reaching a decision.”); *Tuilaepa v. California*, 512 U.S. 967, 979 (1994) (“A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision.”); *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016) (“[T]he 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 the defendants must deserve mercy beyond a reasonable doubt.”). The weight that a juror gives to the aggravation as compared to the weight given to mitigation is also not something that can be defined by a beyond-a-reasonable-doubt standard.

In support of his argument that *Hurst* should be retroactive under the federal *Teague* standard as a substantive change because it “addressed the proof-beyond-a-reasonable-doubt standard,” Petitioner relies upon *Ivan V.* and *Powell*. (Petition at 33-34); *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972); *Powell v. Delaware*, 153

A.3d 69 (Del. 2016). However, *Hurst* is distinguishable from these cases because it did not address the proof-beyond-a-reasonable-doubt standard.

In *Ivan V.*, the holding of *In re Winship* which required that the proof-beyond-a-reasonable-doubt standard be afforded to juveniles was given full retroactive effect. *Ivan V.*, 407 U.S. at 203-04; *In re Winship*, 397 U.S. 358 (1970). As previously discussed, *Hurst* did not alter the burden of proof as aggravating circumstances have long been required to be proven beyond a reasonable doubt in Florida. Thus, *Ivan V.* is not analogous to *Hurst*.

In *Powell*, the Delaware Supreme Court agreed that “neither *Ring* nor *Hurst* involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof.” *Powell*, 153 A.3d at 74. The Delaware Supreme Court used this fact to distinguish *Hurst* from Delaware’s “watershed ruling” in *Rauf* which was the basis for Delaware to find that *Rauf* retroactively applied to *Powell* under *Teague*. *Powell*, 153 A.3d at 74; *Rauf v. State*, 145 A.3d 430 (Del. 2016). Thus, *Powell* applies Delaware specific law and is not in conflict with the Florida Supreme Court’s determination of the retroactive application of *Hurst*. As Florida’s and Delaware’s death penalty statutes are different, an interpretation by the Supreme Court of Delaware that *Hurst* should be given full retroactive effect is not in conflict with the decision of the Florida Supreme Court. As only Delaware’s case law calls for the retroactive application of *Hurst* beyond *Ring*, there is no conflict between the Florida Supreme Court’s retroactive application and any other state court of last resort.

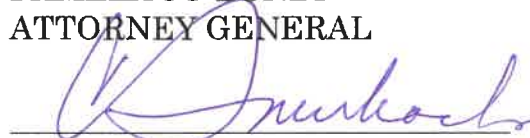
The Florida Supreme Court’s determination of the retroactive application of

Hurst under *Witt* is based on an independent state ground and is not violative of federal law or this Court's precedent. *Hurst* did not announce a substantive change in the law and is not retroactive under federal law. Thus, there is no violation of the Supremacy Clause and certiorari review should be denied.

Conclusion

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

Respectfully submitted,
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