

NO. 17-9492  
IN THE SUPREME COURT OF THE UNITED STATES

---

---

RONALD WAYNE CLARK, JR.,  
*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

---

PAMELA JO BONDI  
ATTORNEY GENERAL OF FLORIDA

CAROLYN M. SNURKOWSKI\*  
Associate Deputy Attorney General  
\*Counsel of Record

Jennifer A. Donahue  
Assistant Attorney General  
Office of the Attorney General  
PL-01, The Capitol  
Tallahassee, FL 32399-1050  
Carolyn.Snurkowski@myfloridalegal.com  
capapp@myfloridalegal.com  
(850) 414-3300

COUNSEL FOR RESPONDENT

---

---

## Capital Case

### Question Presented

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

## Table of Contents

|                                                                                                                                                |     |
|------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Question Presented .....                                                                                                                       | i   |
| Table of Contents .....                                                                                                                        | ii  |
| Table of Citations .....                                                                                                                       | iii |
| Opinion Below .....                                                                                                                            | 1   |
| Jurisdiction .....                                                                                                                             | 2   |
| Statement of the Case and Facts .....                                                                                                          | 2   |
| Reasons for Denying the Writ.....                                                                                                              | 5   |
| There is no Basis for Certiorari Review of the Florida Supreme Court's<br>Denial of Retroactive Application of <i>Hurst</i> to Petitioner..... | 5   |
| <i>Hurst</i> is Not Retroactive Under Federal Law Because it Invoked a<br>Procedural, Not a Substantive, Change .....                          | 14  |
| Florida's Amended Death Penalty Statute is Also Not Retroactive Nor<br>Does it Invalidate Any Prior Conviction.....                            | 18  |
| Conclusion .....                                                                                                                               | 25  |

## Table of Citations

### Cases

|                                                                                                        |              |
|--------------------------------------------------------------------------------------------------------|--------------|
| <i>Almendarez-Torres v. United States</i> , 523 U.S. 224 (1998) .....                                  | 6            |
| <i>Apodaca v. Oregon</i> , 406 U.S. 404 (1972) .....                                                   | 22           |
| <i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....                                               | 12           |
| <i>Asay v. Florida</i> , 138 S. Ct. 41 (2017) .....                                                    | 5            |
| <i>Asay v. State</i> , 210 So. 3d 1 (Fla. 2016).....                                                   | 5, 8, 10, 12 |
| <i>Atkins v. Virginia</i> , 536 U.S. 304 (2002) .....                                                  | 16           |
| <i>Branch v. State</i> , 234 So. 3d 548 (Fla. 2018) .....                                              | 6, 11        |
| <i>Clark v. Fla. Att’y Gen.</i> , 821 F.3d 1270 (11th Cir. 2016) .....                                 | 1, 4         |
| <i>Clark v. Florida</i> , 114 S. Ct. 114 (1993).....                                                   | 1, 3         |
| <i>Clark v. Jones</i> , 137 S. Ct. 1103 (2017) .....                                                   | 1            |
| <i>Clark v. State</i> , 238 So. 3d 99 (Fla. 2018).....                                                 | 1, 5         |
| <i>Clark v. State</i> , 35 So. 3d 880 (Fla. 2010).....                                                 | 1, 3, 4      |
| <i>Clark v. State</i> , 613 So. 2d 412 (Fla. 1992).....                                                | 1, 2, 3, 6   |
| <i>Cole v. Florida</i> , 2018 WL 1876873 (Jun. 18, 2018).....                                          | 6            |
| <i>Cole v. State</i> , 234 So. 3d 644 (Fla. 2018).....                                                 | 6            |
| <i>Danforth v. Minnesota</i> , 552 U.S. 264 (2008).....                                                | 9            |
| <i>Dobbert v. Florida</i> , 432 U.S. 282 (1977) .....                                                  | 13           |
| <i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972) .....                                                 | 12           |
| <i>Finney v. State</i> , 660 So. 2d 674 (Fla. 1995) .....                                              | 21           |
| <i>Fla. Ins. Guar. Ass’n, Inc. v. Devon Neighborhood Ass’n, Inc.</i> , 67 So. 3d 187 (Fla. 2011) ..... | 19           |
| <i>Florida v. Hurst</i> , 137 S. Ct. 2161 (2017) .....                                                 | 4            |
| <i>Floyd v. State</i> , 497 So. 2d 1211 (Fla. 1986).....                                               | 21           |
| <i>Furman v. Georgia</i> , 408 U.S. 238 (1972).....                                                    | 13, 17       |
| <i>Hannon v. Florida</i> , 138 S. Ct. 441 (2017).....                                                  | 6, 11        |

|                                                                                    |               |
|------------------------------------------------------------------------------------|---------------|
| <i>Hannon v. State</i> , 228 So. 3d 505 (Fla. 2017).....                           | 6, 11         |
| <i>Harris v. Alabama</i> , 513 U.S. 504 (1995) .....                               | 16            |
| <i>Hitchcock v. Florida</i> , 138 S. Ct. 513 (2017).....                           | 6, 11         |
| <i>Hitchcock v. State</i> , 226 So. 3d 216 (Fla. 2017).....                        | 6, 11         |
| <i>Hurst v. Florida</i> , 136 S. Ct. 616 (2016) .....                              | 4             |
| <i>Hurst v. State</i> , 202 So. 3d 40 (Fla. 2016) .....                            | 4, 18, 21, 22 |
| <i>In re Coley</i> , 871 F.3d 455 (6th Cir. 2017).....                             | 14            |
| <i>In re Jones</i> , 847 F.3d 1293 (10th Cir. 2017).....                           | 14            |
| <i>In re Winship</i> , 397 U.S. 358 (1970) .....                                   | 23            |
| <i>Jackson v. State</i> , 213 So. 3d 754 (Fla. 2017).....                          | 6             |
| <i>Jenkins v. Hutton</i> , 137 S. Ct. 1769 (2017) .....                            | 6             |
| <i>Johnson v. Louisiana</i> , 406 U.S. 356 (1972).....                             | 22            |
| <i>Johnson v. New Jersey</i> , 384 U.S. 719 (1966) .....                           | 9             |
| <i>Johnson v. State</i> , 904 So. 2d 400 (Fla. 2005) .....                         | 10            |
| <i>Jones v. Florida</i> , 2018 WL 1993786 (Jun. 25, 2018).....                     | 6             |
| <i>Jones v. State</i> , 234 So. 3d 545 (Fla. 2018).....                            | 6             |
| <i>Kansas v. Carr</i> , 136 S. Ct. 633 (2016) .....                                | 7, 22         |
| <i>Kansas v. Marsh</i> , 548 U.S. 163 (2006) .....                                 | 22            |
| <i>Lambrix v. Florida</i> , 138 S. Ct. 312 (2017).....                             | 6, 11         |
| <i>Lambrix v. Jones</i> , 138 S. Ct. 312 (2017).....                               | 7             |
| <i>Lambrix v. Sec’y, Fla. Dep’t of Corr.</i> , 872 F.3d 1170 (11th Cir. 2017)..... | 7, 9, 14, 19  |
| <i>Lambrix v. State</i> , 227 So. 3d 112 (Fla. 2017).....                          | 6, 11         |
| <i>Linkletter v. Walker</i> , 381 U.S. 618 (1965) .....                            | 8             |
| <i>Michigan v. Long</i> , 463 U.S. 1032 (1983) .....                               | 8             |
| <i>Miles v. United States</i> , 103 U.S. 304 (1880) .....                          | 20            |
| <i>Miller v. Alabama</i> , 567 U.S. 460 (2012) .....                               | 15            |
| <i>Montgomery v. Louisiana</i> , 136 S. Ct. 718 (2016).....                        | 14, 15        |

|                                                                    |             |
|--------------------------------------------------------------------|-------------|
| <i>Mosley v. State</i> , 209 So. 3d 1248 (Fla. 2016) .....         | 4, 8, 9, 10 |
| <i>Parker v. Dugger</i> , 498 U.S. 308 (1991).....                 | 21          |
| <i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989).....                 | 11, 15      |
| <i>Pulley v. Harris</i> , 465 U.S. 44 (1984) .....                 | 17          |
| <i>Ring v. Arizona</i> , 536 U.S. 584 (2002) .....                 | 5, 16       |
| <i>Roper v. Simmons</i> , 543 U.S. 551 (2005) .....                | 16, 21      |
| <i>Royster Guano Co. v. Virginia</i> , 253 U.S. 412 (1920).....    | 12          |
| <i>Schriro v. Summerlin</i> , 542 U.S. 348 (2004).....             | passim      |
| <i>State v. Mason</i> , 2018 WL 1872180 (Ohio Apr. 18, 2018).....  | 7           |
| <i>Stovall v. Denno</i> , 388 U.S. 293 (1967).....                 | 8           |
| <i>Tuilaepa v. California</i> , 512 U.S. 967 (1994) .....          | 22          |
| <i>United States v. Sampson</i> , 486 F.3d 13 (1st Cir. 2007)..... | 7           |
| <i>Witt v. State</i> , 387 So. 2d 922 (Fla. 1980).....             | 8           |
| <i>Ybarra v. Filson</i> , 869 F.3d 1016 (9th Cir. 2017) .....      | 14          |
| <i>Zeigler v. State</i> , 580 So. 2d 127 (Fla. 1991) .....         | 21          |

#### Other Authorities

|                                                                                                                                                                                                                   |        |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| 28 U.S.C. § 1257 .....                                                                                                                                                                                            | 2      |
| Death Penalty Information Center, Florida Death-Penalty Appeals Decided in Light of <i>Hurst</i> , available at <a href="https://deathpenaltyinfo.org/node/6790">https://deathpenaltyinfo.org/node/6790</a> ..... | 14     |
| Fla. R. Crim. P. 3.851.....                                                                                                                                                                                       | 3      |
| Fla. Stat. § 921.141 .....                                                                                                                                                                                        | 20, 21 |
| Senate Bill Analysis and Fiscal Impact Statement, SB 280, Feb. 21, 2017 .....                                                                                                                                     | 19     |
| Sup. Ct. R. 10.....                                                                                                                                                                                               | 2      |
| Sup. Ct. R. 14.....                                                                                                                                                                                               | 2      |

IN THE SUPREME COURT OF THE UNITED STATES  
NO. 17-9492

RONALD WAYNE CLARK, JR.,  
*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 *Clark v. State*, 238 So. 3d 99 (Fla. 2018). The Florida Supreme Court's direct appeal decision appears as *Clark v. State*, 613 So. 2d 412 (Fla. 1992), *cert. denied*, *Clark v. Florida*, 114 S. Ct. 114 (1993). The Florida Supreme Court's post-conviction decision appears as *Clark v. State*, 35 So. 3d 880 (Fla. 2010). The Eleventh Circuit Court of Appeals' affirmance of the denial of Appellant's federal habeas petition appears as *Clark v. Fla. Att'y Gen.*, 821 F.3d 1270 (11th Cir. 2016), *cert. denied*, *Clark v. Jones*, 137 S. Ct. 1103 (2017).

## 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, Ronald Clark, was convicted of first-degree murder of Ronald Willis and sentenced to death. *Clark*, 613 So. 2d at 412. On January 12, 1990, Appellant and John Hatch

decided to hitchhike to Jacksonville to shoot pool. Along the way they shot at signs and beer bottles with a pistol Hatch had stolen from a house he had been remodeling. Willis stopped to give them a ride, and, during the ride, Clark whispered to Hatch that he was going to steal the truck. When Hatch asked Willis to stop the truck, both he and Clark got out of the truck, and Clark, who had the stolen pistol, shot Willis seven or eight times. Clark shoved Willis' body to the center of the seat, Hatch got in the passenger's seat, and Clark drove to a more secluded area. Clark pulled Willis' body from the truck, during which Willis' shirt came off. Clark then took Willis' wallet and boots and pushed his body into a ditch. Clark and Hatch went to a restaurant and to Hatch's ex-wife's apartment complex, but later returned to where they had left the body. Taking the body with them, they went to

Clark's father's house and got a rope and several cinder blocks. They then drove to the Nassau County Sound Bridge, tied the blocks to the body, and dumped it into the water. After driving around some more, they went to an acquaintance's house to buy drugs. The acquaintance went with them to the motel where Willis' ex-wife and her sister found the truck. Hatch and Clark left the state, eventually winding up in South Carolina. Hatch returned to Nassau County, where he was arrested. South Carolina authorities arrested Clark on February 7, 1990 and returned him to Florida.

*Id.* at 413. Petitioner was found guilty of armed robbery and first-degree murder and sentenced to death after the jury's recommendation by a vote of eleven to one.

*Clark*, 25 So. 3d at 884. After refusing to put on any evidence of mitigation, the

court instructed the jury that the aggravators it could consider were prior conviction of violent felony, felony murder in the course of a robbery, and committed for pecuniary gain, but, if the jury found the second and third aggravators, they should be merged and considered as a single aggravator. The court instructed that the mitigators that could be considered were Clark's character and the circumstances of the crime and Clark's age.

*Clark*, 613 So. 2d at 414. After asking the trial judge to consider three mental health experts' reports, the "trial court found that all three aggravators and no mitigators had been established" and sentenced Appellant to death. *Id.* On direct appeal, the Florida Supreme Court affirmed the convictions and sentences. *Id.* at 415.

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 in 1993. *Clark*, 510 U.S. at 836. 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 1993. Fla. R. Crim. P. 3.851(d)(1)(B).

Petitioner filed a post-conviction motion raising twenty-eight claims. *Clark*, 35 So. 3d at 885 n.3. The Florida Supreme Court affirmed the post-conviction court's denial of Petitioner's claims. *Id.* at 893.

After the denial of his State post-conviction motion, Petitioner filed a federal habeas petition in the United States District Court for the Middle District of Florida, which denied the petition and a certificate of appealability. *Clark*, 821 F.3d at 1282. The Eleventh Circuit issued a certificate of appealability on three questions then affirmed the decision of the district court. *Id.* at 1282, 1291.

In *Hurst v. Florida*, this Court held that Florida's capital sentencing scheme was unconstitutional pursuant to *Ring*'s determination that the Sixth Amendment requires a jury to find the existence of an aggravating circumstance which qualifies a defendant for a sentence of death. *Hurst v. Florida*, 136 S. Ct. 616 (2016). 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); *Ring v. Arizona*, 536 U.S. 584

(2002). 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 1993, the Florida Supreme Court denied Petitioner's claim that *Hurst* should apply retroactively to him. *Clark*, 238 So. 3d at 100. Petitioner then filed this Petition for a writ of certiorari 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 1993. *Clark*, 238 So. 3d at 100. The Petition alleges that the Florida Supreme Court's refusal to retroactively apply *Hurst* to pre-*Ring* cases is in violation of the Fifth Amendment's guarantee of fundamental fairness, 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 16-19). However, the Florida Supreme Court's retroactive application of *Hurst* to only post-*Ring* cases does not violate the Fifth, 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.<sup>1</sup>

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 conviction for a contemporaneous felony, armed robbery, and his prior conviction of a violent felony, felony murder in the course of a robbery. *Clark*, 613 So. 2d at 413-14; *see also Jackson v. State*, 213 So. 3d 754, 787 (Fla. 2017), *citing Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The unanimous verdict by Petitioner's jury establishing his guilt of this contemporaneous crime, an aggravator under well-established Florida law, was clearly sufficient to meet the Sixth Amendment's fact-finding requirement. *See Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a

---

<sup>1</sup> 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).

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.”). Thus, there was no *Hurst v. Florida* error in Petitioner’s case.

Additionally, *Hurst* is not retroactive under federal law. “*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, 358 (2004). Since *Hurst* is an extension of *Ring*, it is also not retroactive under federal law. *Hurst*, 136 S. Ct. at 662 (“As with *Ring*, a judge increased Hurst’s authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst’s sentence violates the Sixth Amendment.”); *see also Lambrix v. Sec’y, Fla. Dep’t of Corr.*, 872 F.3d 1170, 1182-83 (11th Cir. 2017), *cert. denied*, *Lambrix v. Jones*, 138 S. Ct. 312 (2017) (“No U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable.”).

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.

The Florida Supreme Court first analyzed the retroactive application of *Hurst* in *Mosley* and *Asay*. *Mosley*, 209 So. 3d at 1276-83; *Asay*, 210 So. 3d at 15-22. In *Mosley*, the Florida Supreme Court held that *Hurst* is retroactive to cases which became final after the June 24, 2002, decision in *Ring*. *Mosley*, 209 So. 3d at 1283. In determining whether *Hurst* should be retroactively applied to *Mosley*, the Florida Supreme Court conducted a *Witt* analysis, the state based test for 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*, 542 U.S. at 258 (holding that “*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review”); *Lambrix*, 872 F.3d 1170, 1182-83 (noting that “[n]o U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable”).

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

---

<sup>2</sup> Under this rationale, it would not make sense to only 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

which is post-*Ring*. *Id.*

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

---

be punished for not raising what he/she believed to be a frivolous claim.

retroactively to all post-*Ring* cases and declined to apply *Hurst* retroactively to all pre-*Ring* cases. See, e.g., *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017), *cert. denied*, *Lambrix v. Florida*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017), *cert. denied*, *Hannon v. Florida*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548, 549 (Fla. 2018), *cert. denied*, *Branch v. Florida*, 138 S. Ct. 1164 (2018). This 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. Even under the “pipeline” concept, cases whose direct appeal was decided on the same day might have their judgment and sentence become final on either side of the line for retroactivity. Additionally,

under the “pipeline” concept, “old” cases where the judgment and/or sentence has been overturned will receive the benefit of new law as they are no longer final. 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*. In moving the line of retroactive application back to *Ring*,<sup>3</sup> 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

---

<sup>3</sup> Though *Apprendi* served as a precursor to *Ring*, this Court distinguished capital cases from its holding in *Apprendi* and thus *Ring* is the appropriate demarcation for retroactive application to capital cases. *Asay*, 210 So. 3d at 19; *Apprendi v. New Jersey*, 530 U.S. 466, 496 (2000).

individuals,<sup>4</sup> defendants who would not receive the benefit of a new rule because their cases were already final when *Hurst* was decided, does not 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.

Petitioner argues that the Florida Supreme Court is being unfair in selectively applying *Hurst* to “similarly situated” defendants, namely those who “were free of the shackles of finality.” (Petition at 17). However, in the wake of *Furman*, similar Equal Protection claims were rejected. *See Lambrix*, 872 F.3d at 1183; *Dobbert v. Florida*, 432 U.S. 282, 301 (1977); *Furman v. Georgia*, 408 U.S. 238 (1972). These claims were based on the two-category division of pre-*Furman* cases; those who were subject to the new statute because they had not yet been tried and those whose cases were commuted because they were already final. *Dobbert*, 432 U.S. at 288, 301. This Court held that defendants who had yet to be tried and sentenced were “not similarly situated to those whose sentences were commuted. He was neither tried nor sentenced prior to *Furman*, as were they. . . .” *Id.* at 301. Just as with the categorization of cases after *Furman*, post-*Hurst*, “Florida obviously had to draw the line at some point.” *Id.* As such, Petitioner is not similarly situated to those who are receiving a new sentencing phase pursuant to *Hurst* as his judgment was final pre-*Ring*.

---

<sup>4</sup> Approximately 150 defendants whose convictions became final post-*Ring* are being re-sentenced pursuant to *Hurst*. Death Penalty Information Center, Florida Death-Penalty Appeals Decided in

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

***Hurst* is Not Retroactive Under Federal Law Because it Invoked a Procedural, Not a Substantive, Change.**

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); *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.”). 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”).

In support of his argument that *Hurst* was a substantive rather than a procedural change, Petitioner analogizes *Hurst* to *Montgomery*. (Petition at 28);

---

Light of *Hurst*, available at <https://deathpenaltyinfo.org/node/6790> (last visited Jun. 29, 2018).

*Miller v. Alabama*, 567 U.S. 460 (2012). In *Montgomery* this Court found the change was substantive because “it rendered life without parole an unconstitutional penalty for ‘a class of defendants because of their status’ — that is juvenile offenders . . .” and 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, unlike in *Montgomery*, the Court in *Hurst* did not “conflate[ ] 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). Thus, *Hurst* is distinguishable from *Montgomery*.

Unlike the change in *Montgomery*, *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 *Montgomery*, 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 argues that the Florida Supreme Court’s imposition of the unanimity requirement in *Hurst v. State* causes all non-unanimous verdicts to be violative of the Eighth Amendment and that “evolving standards of decency” and

“enhanced reliability and confidence in the result” necessitate unanimous recommendations in all death penalty cases. (Petition at 19-20, 22). However, the Florida Supreme Court’s imposition of the unanimity requirements in *Hurst v. State* is purely a matter of state law, is not a substantive change, and did not cause death sentences imposed pre-*Ring* to be in violation of the Eighth Amendment.

To the extent Petitioner suggests that jury sentencing is now required under federal law, this is not the case. See *Ring*, 536 U.S. at 612 (Scalia, J., concurring) (“[T]oday’s judgment has nothing to do with jury sentencing. What today’s decision says is that the jury must find the existence of the fact that an aggravating factor existed.”) (emphasis in original); *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding that the Constitution does not prohibit the trial judge from “impos[ing] a capital sentence”). No case from this Court has mandated jury sentencing in a capital case, and such a holding would require reading a mandate into the Constitution that is simply not there. The Constitution provides a right to trial by jury, not to sentencing by jury.

The Eighth Amendment requires capital punishment to be limited “to those who commit a ‘narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” *Roper v. Simmons*, 543 U.S. 551, 568 (2005), *quoting Atkins v. Virginia*, 536 U.S. 304, 319 (2002). As such, the death penalty is limited to a specific category of crimes and “States must give narrow and precise definition to the aggravating factors that can result in a capital sentence.” *Roper*, 543 U.S. at 568. In finding Florida’s death penalty

unconstitutional, this Court did not invalidate Florida's statutory scheme based on Eighth Amendment narrowing concerns. Implicit in the holding of *Hurst v. Florida* was that Florida's statutory scheme sufficiently narrowed and was in compliance with the Eighth Amendment.

However, many states also add protections that go above and beyond the requirements of the Eighth Amendment. Often times, these additional state based requirements are forward looking in anticipation of evolving standards of decency to ensure that their capital sentencing schemes will remain constitutionally valid in the future. These additional protections are based on adequate and independent state grounds. For example, in the wake of *Furman*, many states in redrafting their capital sentencing statutes added a statutory requirement to review whether a capital "sentence is disproportionate to that imposed in similar cases" to "avoid arbitrary and inconsistent results." *Pulley v. Harris*, 465 U.S. 37, 44 (1984); *Furman v. Georgia*, 408 U.S. 238 (1972). As this Court noted, "[p]roportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required." *Pulley*, 465 U.S. at 50.

Like with the addition of proportionality review, the Florida Supreme Court's *Hurst v. State* requirement of unanimous jury findings and recommendations during capital sentencing procedures is an additional safeguard that is beyond the requirements of the Eighth Amendment. *Hurst*, 202 So. 3d at 61 ("Florida's capital sentencing law will comport with these Eighth Amendment principles in order to

more surely protect the rights of defendants guaranteed by the Florida and United States Constitutions.”) (emphasis added). Because these are additional safeguards that are premised on the principles of but not necessitated by the Eighth Amendment, they are state requirements and thus based on adequate and independent state grounds. *Id.* at 62 (noting that the unanimity requirements are forward looking and will “dispel most, if not all, doubts about the future validity and long-term viability of the death penalty in Florida”).

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. *Hurst* did not announce a substantive change in the law and is not retroactive under federal law. Thus, there is no violation of federal law and certiorari review should be denied.

**Florida’s Amended Death Penalty Statute is Also Not Retroactive  
Nor Does it Invalidate Any Prior Conviction.**

Florida’s death penalty statute, Fla. Stat. § 921.141, was amended after, and in comport with, the decisions in *Hurst v. Florida* and *Hurst v. State*. Neither *Hurst* nor the new statute create a new crime with new elements. The same conduct remains prohibited. Only the process by which the sentence is determined has been altered. No substantive change has occurred which makes *Hurst* retroactive under federal law. Thus, there is no basis for which certiorari review should be granted. Thus, this Petition should be denied.

In general, there is a presumption against retroactive application of statutes

absent an express statement of legislative intent. *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 195 (Fla. 2011). There is no express statement that the legislature intended that chapter 2017-1 be applied retroactively, and thus this presumption cannot be rebutted. *See also* Senate Bill Analysis and Fiscal Impact Statement, SB 280, Feb. 21, 2017, at 6-7 (noting that this Court's retroactive application to post-*Ring* decisions will "significantly increase both the workload and associated costs of public defender offices for several years to come"). Further,

no U.S. Supreme Court decision holds that the failure of a state legislature to make revisions in a capital sentencing statute retroactively applicable to all of those who have been sentenced to death before the effective date of the new statute violates the Equal Protection Clause, the Due Process Clause, or the Eighth Amendment.

*Lambrix*, 872 F.3d at 1183.

Since the legislature did not express an intent for the statute to be retroactive, it is not retroactive to cases which were final prior to enactment of the new statute. Petitioner's judgment became final in 1993 and he has not received a new guilt or penalty phase since that time. Thus, the 2017 enactment of changes to the capital sentencing statute would not be applicable to Petitioner's case unless Petitioner were to receive a new guilt and/or penalty phase.

The changes to Florida's death penalty statute were made in the aftermath of *Hurst* and implement the changes from *Hurst*. The changes include requiring a unanimous jury vote for a recommendation of death instead of a majority vote, requiring specific findings from the jury regarding the existence and sufficiency of

the aggravation and the weighing of aggravation against mitigation, and disallowing judicial override of a jury's recommendation of life. As discussed above, these are procedural changes not substantive ones.

These changes to the sentencing procedure did not create a new offense as Petitioner argues. (Petition at 30-31). The class of persons who are death eligible and the range of conduct which causes those defendants to be death eligible did not change. The aggravating factors necessary to qualify a defendant as eligible for the death penalty were not changed. In fact, the specific aggravators used in Petitioner's case had been in place since at least 1987. The only changes made were the requirement of specific jury findings of unanimity for the existence and sufficiency of the aggravating factors and that they outweigh mitigation, and for a death recommendation.

Petitioner also argues that two of the elements identified in *Hurst v. State* were not found proven beyond a reasonable doubt in his case, "sufficiency of the aggravators and whether they outweigh the mitigators." (Petition at 32). However, the only requirements of proof beyond a reasonable doubt are the elements for a finding of guilt for first-degree murder and that the aggravating factors were proven. Fla. Stat. § 921.141(2)(a) (2017) ("the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor . . ."). The standard of proof for guilt has long been proof beyond a reasonable doubt, and certainly was at Petitioner's trial. *See Miles v. United States*, 103 U.S. 304, 312 (1880). Similarly, the standard of proof for proving

aggravating factors was beyond a reasonable doubt at Petitioner's trial. *See 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). Thus, all elements which required findings beyond a reasonable doubt were in fact found beyond a reasonable doubt at Petitioner's trial.

Similarly, the requirement that aggravators be sufficient and outweigh mitigation has long been a requirement of Florida law. "The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances." *Parker v. Dugger*, 498 U.S. 308, 313 (1991); *citing* Fla. Stat. § 921.141(3) (1985). The 2017 change to the statute merely requires that the jury make these findings unanimously in order for the defendant to be eligible to receive a death sentence.

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*, 543 U.S. at 568. 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.

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.

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 *In re Winship* and *Fiore*. (Petition at 31); *In re Winship*, 397 U.S. 358 (1970); *Fiore v. White*, 531 U.S. 225 (2001). However, *Hurst* is distinguishable from these cases. *In re Winship* required that the proof-beyond-a-reasonable-doubt standard be afforded to juveniles “during the adjudicatory stage of a delinquency proceeding. . . .” *In re Winship*, 397 U.S. at 368. *Hurst* did not alter the burden of proof during the adjudication phase in finding a defendant guilty of first-degree murder. In *Fiore*, this Court held that the Federal Due Process Clause was violated when an individual was convicted of a crime despite his conduct not being prohibited by the criminal statute, and thus every element of the crime had not been proven beyond a reasonable doubt. *Fiore*, 531 U.S. at 228. As was true in *Hurst* and here, Petitioner’s conduct is clearly in violation of the criminal statute and by virtue of his conviction for first-degree murder, every element of the crime was proven beyond a reasonable doubt. As discussed previously, *Hurst* did not alter the burden of proof. Thus, neither *Fiore* nor *In re Winship* is applicable to the discussion of the retroactive application of *Hurst*.

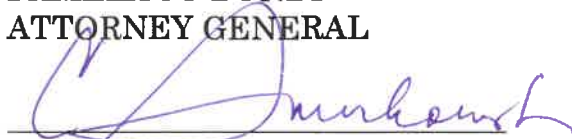
No substantive change has occurred which makes Fla. Stat. § 921.141 or

*Hurst* retroactive under federal law. Thus, there is no basis for which certiorari review should be granted. Thus, this Petition should be denied.

## Conclusion

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

Respectfully submitted,  
PAMELA JO BONDI  
ATTORNEY GENERAL



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

Jennifer A. Donahue  
Assistant Attorney General

Office of the Attorney General  
PL-01, The Capitol  
Tallahassee, FL 32399-1050  
Carolyn.Snurkowski@myfloridalegal.com  
capapp@myfloridalegal.com  
(850) 414-3300

COUNSEL FOR RESPONDENT