DOCKET NO. 18-5021

IN THE SUPREME COURT OF THE UNITED STATES

PAUL ALFRED BROWN,

***Petitioner*,**

vs.

STATE OF FLORIDA,

***Respondent*.**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

Whether this Court should grant certiorari review where the retroactive application of Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017), 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?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the Florida Supreme Court:

1) Paul Alfred Brown, Petitioner in this Court, was the Appellant below.

2) Respondent, the State of Florida, was the Appellee below.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

CITATION TO OPINION BELOW

The decision of the Florida Supreme Court is reported at Brown v. State, 235 So. 3d 289 (Fla. 2018).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on January 29, 2018. Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction because the Florida Supreme Court's decision in this case is based on adequate and independent state grounds. U.S. 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. U.S. Sup. Ct. R. 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE

Paul Alfred Brown was convicted of the first-degree murder of Pauline Cowell, armed burglary, and attempted murder of Tammy Bird. The facts of the case are succinctly described in the Florida Supreme Court's direct appeal opinion:

> Around 1:30 a.m., March 20, 1986 two gunshots woke Barry and Gail Barlow. Upon entering the Florida room of their home they found Gail's seventeen-year-old sister, Pauline Cowell, dead in her bed. Pauline's friend, Tammy Bird, had also been shot, but was still alive. The room's outside door stood open, missing the padlock with which it had been secured. Pursuant to information indicating Brown might be a suspect, sheriff's deputies began searching for him in places he was known to frequent and found him hiding behind a shed in a trailer park where Brown's brother lived. They arrested Brown and seized a handgun, later linked to the shootings, from his pants pocket.
>
> Brown lived with the murder victim's mother, and the victim had only recently moved into her sister's home. Brown confessed after being arrested and, at the sheriff's office, stated that he had broken into the victim's room to talk with her about some "lies" she had been telling. Although he entered the room armed, Brown claimed that he had not intended to kill the girl, but that he planned to shoot her if she started "hollering."

Brown v. State, 565 So. 2d 304, 305 (Fla. 1990).

The jury recommended the death penalty based on a seven to five vote, and the trial court sentenced Brown to death and found three aggravating circumstances: (1) the murder was committed during the commission of an armed burglary, (2) previous conviction of a violent felony, and (3) committed in

cold, calculated, and premeditated manner. Id. at 307-08. The court also found several mitigating factors (mental capacity, mental and emotional distress, social and economic disadvantage, nonviolent criminal past), but found that they were entitled to so little weight as not to outweigh even any one of the aggravating factors standing alone. Id.

Following the Florida Supreme Court's opinion affirming Brown's judgment and sentence of death, Brown filed a petition for writ of certiorari in this Court. This Court denied the petition on November 26, 1990. Brown v. Florida, 498 U.S. 992, 111 S. Ct. 537 (1990).

On May 8, 1992, Brown filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, and thereafter filed numerous amendments. Ultimately, following an evidentiary hearing, the court denied all relief. The Florida Supreme Court affirmed the denial of postconviction relief. Brown v. State, 755 So. 2d 616 (Fla. 2000). Brown also filed a petition for writ of habeas in the Florida Supreme Court which was denied on November 1, 2001. Brown v. Moore, 800 So. 2d 112 (Fla. 2001).

Brown filed his first successive motion for postconviction relief in 2001 claiming that he was intellectually disabled. The court conducted an evidentiary hearing on Brown's motion and

denied relief. The Florida Supreme Court affirmed the denial of relief. Brown v. State, 959 So. 2d 146 (Fla. 2007).

Brown also sought relief in federal court by filing a petition for writ of habeas corpus. On November 25, 2009, the district court issued an order denying Brown's petition and denying a certificate of appealability (COA). Brown thereafter sought a COA in the Eleventh Circuit Court of Appeals, but that court also denied a COA.

On January 10, 2017, Brown filed a successive postconviction motion pursuant to Florida Rule of Criminal Procedure 3.851 in state court seeking relief under Hurst v. Florida, 136 S. Ct. 616 (2016), as interpreted in Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). The circuit court summarily denied Brown's motion and Brown appealed to the Florida Supreme Court. On June 6, 2017, the Florida Supreme Court stayed Brown's appeal pending the outcome of Hitchcock v. State, 226 So. 3d 216 (Fla.), cert. denied, 138 S. Ct. 512 (2017).

In Hitchcock, the Florida Supreme Court reaffirmed its previous holding in Asay v. State, 210 So. 3d 1 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017), in which it held that Hurst v. Florida as interpreted by Hurst v. State is not retroactive to defendants whose death sentences were final when this Court

decided Ring v. Arizona, 536 U.S. 584 (2002). After the court decided Hitchcock, it issued an order to show cause directing Brown to show why Hitchcock should not be dispositive in his case. Following briefing, the Florida Supreme Court ultimately affirmed the lower court's denial of relief, finding that Hurst does not apply retroactively to Brown's sentence of death that became final in 1990. Brown v. State, 235 So. 3d 289 (Fla. 2018).

Brown now seeks certiorari review of the Florida Supreme Court's decision.

REASONS FOR DENYING THE WRIT

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE THE FLORIDA SUPREME COURT'S RULING ON THE RETROACTIVITY OF HURST RELIES ON STATE LAW TO PROVIDE THAT THE HURST CASES ARE NOT RETROACTIVE TO DEFENDANTS WHOSE DEATH SENTENCES WERE FINAL WHEN THIS COURT DECIDED RING V. ARIZONA, AND THE COURT'S RULING DOES NOT VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENTS AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR INVOLVE AN IMPORTANT, UNSETTLED QUESTION OF FEDERAL LAW.

Brown's petition presents yet another instance in which a death-sentenced Florida murderer who was denied the retroactive application of this Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), and the Florida Supreme Court's decision in Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017), seeks this Court's declaration that Hurst v. State is retroactive on collateral review. Florida's retroactivity analysis, however, is a matter of state law. This fact alone militates against the grant of certiorari in this case. Indeed, 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., Asay v. State, 210 So. 3d 1 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017); Hitchcock v. State, 226 So. 3d 216 (Fla.), cert. denied, 138 S. Ct. 513 (2017); Lambrix v. State, 227 So. 3d 112 (Fla.), cert. denied, 138 S. Ct. 312 (2017); Hannon v. State, 228 So. 3d 505 (Fla.), cert. denied, 138 S. Ct. 441 (2017); Branch v.

State, 234 So. 3d 548 (Fla.), cert. denied, 138 S. Ct. 1164 (2018); Kaczmar v. State, 228 So. 3d 1 (Fla. 2017), cert. denied, 138 S. Ct. 1973 (2018); Cole v. State, 234 So. 3d 644 (Fla.), cert. denied, 17-8540, 2018 WL 1876873 (June 18, 2018); Zack v. State, 228 So. 3d 41 (Fla. 2017), cert. denied, 17-8134, 2018 WL 1367892 (June 18, 2018); Jones v. State, 234 So. 3d 545 (Fla.), cert. denied, 17-8652, 2018 WL 1993786 (June 25, 2018).

Nevertheless, as the others have done before him, Brown attempts to apply a constitutional veneer to his argument for review of the state court's retroactivity decision, asserting that the Constitution demands full retroactive application of Hurst v. Florida and Hurst v. State. As will be shown, nothing about the Florida Supreme Court's retroactivity decision is inconsistent with the United States Constitution. Brown does not provide any "compelling" reason for this Court to review his case. U.S. Sup. Ct. R. 10. Brown cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision in Brown v. State, 235 So. 3d 289 (Fla. 2018), in which the court determined that Brown was not entitled to relief because Hurst v. State was not retroactive to his death sentence. Nothing presented in the petition justifies the exercise of this Court's certiorari jurisdiction.

I. There Is No Underlying Sixth Amendment Violation.

Aside from the question of retroactivity, certiorari would be inappropriate in this case because there is no underlying federal constitutional error as 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 first degree murder and a contemporaneous violent felony - armed robbery with a deadly weapon. 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 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."); Alleyne v. United States, 133 S. Ct. 2151, 2160 n.1

(2013) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in Almendarez-Torres v. United States, 523 U.S. 224 (1998)).

Lower courts have almost uniformly held that a judge may perform the "weighing" of factors to arrive at an appropriate sentence without violating the Sixth Amendment. See State v. Mason, ___ N.E.3d ____, 2018 WL 1872180 at *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.") (string citations omitted); 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."); United States v. Purkey, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); State v. Gales, 658 N.W.2d 604, 628-29 (Neb. 2003) ("[W]e do not read either Apprendi or Ring to require that the determination of mitigating circumstances, the balancing function, or proportionality review to be undertaken by a jury"). The

findings required by the Florida Supreme Court following remand in Hurst v. State involving the weighing and selection of a defendant's sentence are not required by the Sixth Amendment. See, e.g., McGirth v. State, 209 So. 3d 1146, 1164 (Fla. 2017).

Additionally, it is clear that there is no underlying constitutional error in Brown's case.[1] The unanimous verdict by Brown's jury establishing his guilt of a contemporaneous armed robbery was clearly sufficient to meet the Sixth Amendment's fact-finding requirement, and he was properly rendered eligible for a death sentence at that point. See Alleyne v. United States, 133 S. Ct. 2151, 2162-63 (2013) (explaining that "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime."); see also

[1] Significantly, this Court's recent decision in Jenkins v. Hutton, 137 S. Ct. 1769 (2017), confirmed the constitutionality of an Ohio death sentence based on a jury's guilt phase determination of facts. In Jenkins, the lower court ordered a new sentencing trial because, in that court's view, the penalty phase jury failed to make the necessary factual findings to support a death sentence. However, because the necessary aggravating factors were established beyond a reasonable doubt by the jury during the guilt phase, this Court reversed and reinstated the death sentence. Like Florida, a single aggravating factor under Ohio law is sufficient to render a capital defendant death eligible. Because the requisite aggravators were established during the guilt phase, Jenkins entered the penalty phase with eligibility for a death sentence firmly established beyond a reasonable doubt. This Court concluded that the federal habeas court erred in concluding that inadequate factual findings invalidated his death sentence.

Waldrop v. Comm'r, Alabama Dep't of Corr., 711 Fed. Appx. 900 (11th Cir. 2017) (rejecting a Hurst claim and explaining that "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict"); Lowenfield v. Phelps, 484 U.S. 231, 244-45 (1988) ("The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase"). Thus, there was no Sixth Amendment error in this case.[2]

II. The Florida Court's Ruling on the Retroactivity of Hurst v. Florida and Hurst v. State is a Matter of State Law That Does Not Violate the United States Constitution.

[2] Even if there were Sixth Amendment error, it would be harmless beyond a reasonable doubt in this case as Hurst errors are subject to harmless error analysis. See Hurst v. Florida, 136 S. Ct. at 624; see also Chapman v. California, 386 U.S. 18, 23-24 (1967). Here, the aggravators found by the trial court were either uncontestable (as unanimously found by the jury at the guilt phase in the case of the contemporaneous violent felony convictions for attempted murder and armed robbery) or were established by overwhelming evidence given the nature of the murder and the finding of the CCP aggravator. See Brown v. State, 565 So. 2d 304, 30708 (Fla. 1990).

The Florida Supreme Court's holding in Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017), followed this Court's ruling in Hurst v. Florida, 136 S. Ct. 616 (2016), in requiring that aggravating circumstances be found by a jury beyond a reasonable doubt before a death sentence may be imposed. The Florida court then expanded this Court's ruling, requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." Hurst v. State, 202 So. 3d at 57.

The Florida Supreme Court first analyzed the retroactive application of Hurst in Mosley v. State, 209 So. 3d 1248, 1276-83 (Fla. 2016), and Asay v. State, 210 So. 3d 1, 15-22 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017). In Mosley, the Florida Supreme Court held that Hurst is retroactive to cases which became final after this Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), on June 24, 2002. 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. See 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, 358 (2004) (holding that

"Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review"); Lambrix v. Secretary, Fla. Dep't of Corr., 872 F.3d 1170, 1182-83 (11th Cir. 2017), cert. denied, 138 S. Ct. 312 (2017) (noting that "[n]o U.S. Supreme Court decision holds that its Hurst 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."[3] Id. at 1283. Thus, the Florida Supreme Court

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

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 v. State, 210 So. 3d 1, 22 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017), the Florida Supreme Court held that Hurst is not retroactive to any case in which the death sentence was final pre-Ring. The court specifically noted that Witt "provides *more expansive retroactivity standards* than those adopted in Teague." Asay, 210 So. 3d at 15 (emphasis in original) (quoting Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005)). The court determined that prongs two and three of the Witt test, reliance on the old rule and effect on the administration of justice, weighed heavily against the retroactive application of Hurst 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,

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Supreme Court interpreted this Court's decision in Hurst to include weighing and selection of the defendant's sentence, thereby causing an unnecessarily dramatic and costly impact to the State's capital sentencing system.

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 his judgment and sentence became final in 1991, pre-Ring. Id. at 8, 20.

Since Asay, the Florida Supreme Court has continued to apply Hurst 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, 138 S. Ct. 513 (2017); Lambrix v. State, 227 So. 3d 112, 113 (Fla. 2017), cert. denied, 138 S. Ct. 312 (2017); Hannon v. State, 228 So. 3d 505, 513 (Fla. 2017), cert. denied, 138 S. Ct. 441 (2017); Branch v. State, 234 So. 3d 548, 549 (Fla. 2018), cert. denied, 138 S. Ct. 1164 (2018). This distinction between cases which were final pre-Ring versus cases which were final post-Ring is neither arbitrary nor capricious.[4]

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

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"); 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. 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, 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, defendants who would not receive the benefit of a new rule under the pipeline concept because their cases were already final when Hurst was decided, 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.

The Florida Supreme Court's determination of the retroactive application of Hurst under the state law Witt standard is based on adequate and independent state grounds and is not violative of federal law or this Court's precedent. This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); see also 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."); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." Florida v. Powell, 559 U.S. 50, 57 (2010). Because the Florida Supreme Court's retroactive application of Hurst in Petitioner's case is based on adequate and independent state grounds, certiorari review should be denied.

III. The Florida Supreme Court's Application of Hurst's 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 v. Louisiana, 136 S. Ct. 718 (2016). However, Hurst, like Ring, was a procedural change, not a substantive one. See Schriro v. Summerlin, 542 U.S. 348, 358 (2004) ("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 v. Secretary, Fla. Dep't of Corr., 872 F.3d 1170, 1182-83 (11th Cir. 2017), cert. denied, 138 S. Ct. 312 (2017) ("No U.S. Supreme Court decision holds that its Hurst decision is retroactively applicable."); 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 v. Alabama, 567 U.S. 460 (2012). In Miller, this Court found the imposition of mandatory sentences of life without parole on juveniles a violation of the Eighth Amendment and 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 whose crime reflects irreparable corruption." Montgomery, 136 S. Ct. at 734 (quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989)). As such, the rule in Miller announced a substantive rule which was held retroactive "because it 'necessarily carr[ies] a significant risk that a defendant' – here, the vast majority of juvenile offenders — 'faces a punishment that the law cannot impose upon him.'" Montgomery, 136 S. Ct. at 734 (quoting 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 v. United States, 136 S. Ct. 1257 (2016), to argue that the Eighth Amendment unanimity requirement announced in Hurst v. State was a substantive change and is retroactive under federal law. 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 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); 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. 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. 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. See 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. v. City of New York, 407 U.S. 203, 205 (1972), and 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's 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.

In the instant case, 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 the Supremacy Clause and certiorari review should be denied.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 24th day of July, 2018, a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION has been submitted using the Electronic Filing System. I further certify that a copy has been sent by U.S. mail to: Maria Perinetti, The Law Office of the Capital Collateral, Regional Counsel - Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637.

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