CASE NO. 18-5402

IN THE UNITED STATES SUPREME COURT

October 2017, Term

THOMAS DEWEY POPE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

Whether certiorari review should be denied because (1) the Florida Supreme Court's decision determining *Hurst v. Florida* and *Hurst v. State are* not retroactive to cases final before *Ring v. Arizona* was decided is based on state law and does not violate the Eighth Amendment or the Equal Protection and Due Process Clauses; (2) partial retroactivity does not violate the Supremacy Clause; and (3) Petitioner's capital sentence comports with *Caldwell v. Mississippi*; and the Florida Supreme Court decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law? (restated)

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CITATION TO OPINION BELOW

The decision of which Petitioner seeks discretionary review is reported as *Pope v. State*, 237 So.3d 926 (Fla. 2018).

JURISDICTION

Petitioner, Thomas Dewey Pope ("Pope"), is seeking jurisdiction pursuant to 28 U.S.C. § 1257(a). This is the appropriate provision.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent, State of Florida (hereinafter "State"), accepts as accurate Petitioner's recitation of the applicable constitutional provisions involved.

STATEMENT OF THE CASE AND FACTS

This capital case is before this Court upon the Florida Supreme Court's affirmance of the denial of Pope's successive postconviction relief motion addressed to *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) wherein the Florida Supreme Court determined that under state law they were not retroactive to cases final before June 24, 2002, the date this Court issued *Ring v. Arizona*, 536 U.S. 584 (2002).

A grand jury indicted Thomas Dewey Pope ("Pope") for the first-degree murders of Al Doranz ("Doranz"), Caesar DiRusso ("DiRusso"), and Kristine Walters ("Walters"). The jury found Pope guilty as charged and recommended life for the murders of Doranz and DiRusso, and death for Walters' murder by a nine-to-three vote. (ROA-R.7 1265-67)[1] *Pope v. State*, 441 So.2d 1073 (Fla. 1983). On October 27, 1983, the Florida Supreme Court affirmed finding:

> On January 19, 1981, the bodies of Al Doranz and Caesar Di Russo were discovered in an apartment rented to Kristine Walters. Both had been dead several days but Di Russo's body was in a more advanced state of decomposition than Doranz's. Both victims had been shot, Doranz three times and Di Russo five times. A spent .22 caliber shell casing was found under Di Russo's body. Three days later, the body of Kristine Walters was found floating in a canal. She had been shot six times with exploding ammunition, her skull was fractured and she had been thrown into the canal while still breathing.
>
> All three victims had been shot with exploding ammunition, so ballistics comparison was impossible. However, parts of an AR-7 rifle were found in the canal near Walters's body and the spent shell casing under Di Russo's body had been fired from an AR-7 weapon.

[1] Identifying the direct appeal record; "2017PCR" references the instant record.

Investigation led to appellant's girlfriend, Susan Eckard, and ultimately police were able to show that Doranz purchased an AR-7 rifle for Pope shortly before the murder. Eckard and Pope admitted being with Doranz and Walters at Walters's apartment on Friday night, the night Doranz and Di Russo were killed. Eckard later testified that Pope had arranged a drug deal with Doranz and Di Russo. She stated that she and Pope left Walters's apartment to visit Clarence "Buddy" Lagle and to pick up some hamburgers. They then returned to the apartment where Pope and Doranz convinced Walters to go with Eckard to the apartment where Pope had been staying.

Later that same night, Pope arrived at his apartment and told the women there had been trouble and that Doranz had been injured but that it was best for Walters to stay away from him for a while. Eckard said she knew that Di Russo and Doranz were dead, and that she had known Pope intended to kill them at this point. The next day, Walters checked into a nearby motel, where Pope supplied her with quaaludes and cocaine. On Sunday, Pope told Walters he would take her to see Doranz. Eckard testified that Pope had told her that he knew he had to get rid of Walters but that he regretted it because he had become fond of her. According to Eckard, Pope described Walters's murder when he returned and said the gun had broken when he beat Walters over the head with it. The next day Eckard went with Pope to the scene of the crime to collect fragments of the broken stock and to look for the missing trigger assembly and receiver.

Buddy Lagle told the police he had made a silencer for the AR-7 rifle at Pope's request. Because Lagle planned to leave the jurisdiction to take a job on a ship in the Virgin Islands, he was deposed on videotape pursuant to an order granting the state's motion to perpetuate testimony. When the state was unable to produce him at trial, the videotape was admitted into evidence.

Pope was convicted of three counts of first degree murder. The jury recommended a life sentence for the murders of Doranz and Di Russo and death for Walters's murder. The state indicated its agreement with that recommendation, and the trial court imposed sentence accordingly.

Pope, 441 So.2d at 1074-75. Rehearing was denied on January 11, 1984 and Pope did not seek certiorari review; thus, for purposes of postconviction litigation, his case became final 90-days later on April 10, 1984 under Rule 3.851, Fla. R. Crim. P.

On September 17, 1984, Pope filed a postconviction relief motion (entitled Motion for New Trial) and later amended it. Following an evidentiary hearing, the trial court denied relief and on October 11, 1990, this was affirmed by the Florida Supreme Court. *Pope v. State*, 569 So.2d 1241 (Fla. 1990). During the pendency of that motion, Pope filed a petition for writ of habeas corpus with the Florida Supreme Court which denied relief. *Pope v. Wainwright*, 496 So.2d 798, 801-03 (Fla. 1986) *cert. denied*, 480 U.S. 951 (1987).

In September 1991, Pope filed a federal habeas petition, however, in March 1995, Pope filed a second state postconviction relief motion. Ultimately, on May 29, 1996, the trial court summarily denied relief as procedurally barred. The Florida Supreme Court affirmed. *Pope v. State*, 702 So.2d 221 (Fla. 1997). Later, Pope returned to federal court where eventually all relief was denied. *See, Pope v. Sec'y, Florida Dept. of Corr.*, 680 F.3d 1271 (11th Cir. 2012); *Pope v. Sec'y, Florida Dept. of Corr.*, 752 F.3d 1254, 1256 (11th Cir. 2014). Also during the pendency of his federal litigation, Pope filed successive postconviction motions and appeals. *See Pope v. State*, 845 So.2d 892 (Fla. 2003); *Pope v. Crosby*, 921 So.2d 629 (Fla. 2005) (Tables); *Pope v. State*, 27 So.3d 661 (Fla. 2010).

On January 10, 2017, Pope filed his fourth successive postconviction motion in which he challenged his capital sentence based on *Hurst v. Florida*, 136 S.Ct. 616

(2016). In his May 31, 2017 amendment, Pope relied upon *Hurst v. State*, 202 So.3d 40 (Fla. 2016) to claim entitlement to a resentencing. (2017PCR 3-53, 81-106). On September 6, 2017, relief was denied summarily. (2017PCR 141-44) On January 4, 2018, the Florida Supreme Court issued an Order to Show Cause requiring:

> Appellant shall show cause on or before Wednesday, January 24, 2018, why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, SC17-445. The response shall be limited to no more than 20 pages. Appellee may file a reply on or before Thursday, February 8, 2018, limited to no more than 15 pages. Appellant may file a reply to the Appellee's reply on or before Monday, February 19, 2018, limited to no more than 10 pages.

(Pet. Appx C). After the parties filed their respective pleadings, the Florida Supreme Court, on February 28, 2018, affirmed the denial of postconviction relief stating:

> Pope's motion sought relief pursuant to the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and our decision on remand in *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). After this Court decided *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017), Pope responded to this Court's order to show cause arguing why *Hitchcock* should not be dispositive in this case.
>
> After reviewing Pope's response to the order to show cause, as well as the State's arguments in reply, we conclude that Pope is not entitled to relief. Pope was sentenced to death following a jury's recommendation for death by a vote of nine to three, and his sentence of death became final in 1984. *Pope v. State*, 441 So. 2d 1073, 1075 (Fla. 1983); *Pope v. Sec'y for Dep't of Corrs.*, 680 F.3d 1271, 1278 (11th Cir. 2012). Thus, *Hurst* does not apply retroactively to Pope's sentence of death. *See Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the denial of Pope's motion.

Pope, 237 So.3d at 926-27. Pope seeks review of the Florida Supreme Court's decision here.

REASONS FOR DENYING THE WRIT

ISSUE I

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE (1) THE FLORIDA SUPREME COURT'S DECISION DETERMINING *HURST V. FLORIDA* AND *HURST V. STATE* ARE NOT RETROACTIVE TO CASES FINAL BEFORE *RING V. ARIZONA* WAS DECIDED IS BASED ON STATE LAW AND DOES NOT VIOLATE THE EIGHTH AMENDMENT OR THE EQUAL PROTECTION AND DUE PROCESS CLAUSES; (2) PARTIAL RETROACTIVITY DOES NOT VIOLATE THE SUPREMACY CLAUSE; AND (3) PETITIONER'S CAPITAL SENTENCE COMPORTS WITH *CALDWELL V. MISSISSIPPI* AS THE DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR INVOLVE AN IMPORTANT, UNSETTLED QUESTION OF LAW (RESTATED).

It is Pope's assertion that the Florida Supreme Court's decision finding *Hurst v. Florida* and *Hurst v. State* partially retroactive is arbitrary and violates the Eighth Amendment to the United States Constitution and the Equal Protection and Due Process Clauses. He maintains that Florida's new requirement of a unanimous jury recommendation shows that his non-unanimous recommendation is unreliable. Continuing, Pope presses that partial retroactivity should be rejected under *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) the Supremacy Clause which requires a "substantive" constitutional change, of which he claims *Hurst v. Florida* and *Hurst v. State* are examples, to be applied retroactively. As his final point, Pope suggests that his death sentence was imposed in violation of *Caldwell v.*

Mississippi, 472 U.S. 320 (1985). As will be shown below, nothing about the process employed by the Florida Supreme Court in rejecting Pope's *Hurst* claim is inconsistent with the Constitution. Pope does not provide any "compelling" reason for this Court to review his case on procedural or constitutional grounds. Certiorari review should be denied.

1. Partial retroactivity based on state law does not violate the Eighth Amendment or the Equal Protection and Due Process Clauses

The Florida Supreme Court's holding in *Hurst v. State* followed this Court's ruling in *Hurst v. Florida* in requiring that aggravating circumstances be found by a jury beyond a reasonable doubt before a death sentence may be imposed. The Florida court then expanded this Court's ruling, requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So.3d at 57. In *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), the Florida Supreme Court ruled that, as a matter of state law, *Hurst v. State* is not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *See Mosley v. State*, 209 So.3d 1248, 1272-73 (Fla. 2016) (holding, as a matter of state law, *Hurst v. State* applies retroactively to defendants whose sentences were not yet final when *Ring* was decided). Florida's partial retroactive

application of *Hurst v. State* is not constitutionally infirm and does not present a matter that merits the exercise of this Court's certiorari jurisdiction.

This Court has held that, in general, a state court's retroactivity determinations are a matter of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264 (2008). State courts may fashion their own retroactivity tests, including partial retroactivity tests. Under *Danforth*, a state supreme court is free to employ a partial retroactivity approach without violating the federal constitution. The state retroactivity doctrine employed by the Florida Supreme Court did not violate federal retroactivity standards. The state court's expansion of *Hurst v. Florida* in *Hurst v. State* is applicable only to defendants in Florida, and, consequently, subject to retroactivity analysis under state law as set forth in *Witt v. State*, 387 So.2d 922 (Fla.), *cert. denied*, 449 U.S. 1067 (1980). *See Asay*, 210 So.3d at 15 (noting Florida's *Witt* analysis for retroactivity provides "*more expansive retroactivity standards*" than the federal standards articulated in *Teague v. Lane*, 489 U.S. 288 (1989) (emphasis in original; citation omitted).

Repeatedly, this Court has recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). *See also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); *Street v.*

New York, 394 U.S. 576, 581-82 (1969) (same). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010).

Florida's retroactivity analysis is a matter of state law. This fact alone militates against the grant of certiorari. It should be noted that this Court has denied repeatedly 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).

Pope argues that the Florida Supreme Court's partial retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* violates the Eighth Amendment and the Equal Protection and Due Process Clauses. He also claims the sentencing procedure used in his case is unconstitutional because the jury was instructed that its death recommendation was advisory and did not have to be unanimous, thus, rendering it unreliable. The Florida Supreme Court's retroactivity ruling is not contrary to federal law. It does not conflict with precedent from this Court or any other federal appellate or state supreme court. Certiorari review is unnecessary.

New rules of law such as the rule announced in *Hurst v. Florida* do not usually apply to cases that are final. *See Whorton v. Bockting*, 549 U.S. 406, 416

(2007) (explaining the normal rule of non-retroactivity and holding the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), was not retroactive). Also, the general rule is one of non-retroactivity for cases on collateral review, with narrow exceptions. *See Teague v. Lane*, 489 U.S. 288, 307 (1989) (observing there were only two narrow exceptions to general rule of non-retroactivity for cases on collateral review). Further, certain matters are not retroactive at all. *Hurst v. Florida* was based on this Court's holding in *Ring*, which in turn was based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court has held that "*Ring* announced a new *procedural rule* that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (emphasis added).

In *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), this Court held "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Under this "pipeline" concept, only those cases still pending direct review or not yet final would receive the benefit from alleged *Hurst* error. Retroactivity under *Griffith* depends on the date of the finality of the direct appeal. Under *Teague,* if a case is final on direct review, the defendant will not receive the benefit of the new rule unless one of the narrow exceptions announced in *Teague* applies. Again, finality is the critical date-based test under *Teague.* There is nothing about Florida's decision providing partial retroactivity to *Hurst v. Florida* and *Hurst v. State* that is contrary to this Court's retroactivity jurisprudence.

Moreover, if partial retroactivity violated the United States Constitution or this Court's retroactivity jurisprudence, this Court would not have given partial retroactive effect to a change in the penal law in *Dorsey v. United States*, 567 U.S. 260 (2012). In *Dorsey*, this Court held that the Fair Sentencing Act was partially retroactive in that it would apply to those offenders who committed applicable offenses prior to the effective date of the act, but who were sentenced after that date. *Id.* at 273. *See United States v. Abney*, 812 F.3d 1079, 1097-98 (D.C. Cir. 2016) (noting prior to decision in *Dorsey*, Court had not held a change in criminal penalty to be partially retroactive).

Any retroactive application of a new development in the law under any analysis will mean some cases will get the benefit of a new development, while others will not, depending on a date. Drawing a line between newer cases that will receive the benefit of a new development in the law and older final cases that will not receive the benefit is part and parcel of the landscape of any retroactivity analysis. It is simply part of the retroactivity paradigm that some cases will be treated differently than others based on the age of the case. This is not arbitrary and capricious nor a violation of the Eighth Amendment; it is simply a fact inherent in the retroactivity analysis.

Pope's argument for the finding of a violation of the Equal Protection Clause is likewise without merit. A criminal defendant challenging the State's application of capital punishment must show intentional discrimination to prove an equal protection violation. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). A

"'[d]iscriminatory purpose' . . . implies more than intent as violation or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 298.

The Florida Supreme Court's partial retroactivity ruling was based on the date of the *Ring* decision, not based on a purposeful intent to deprive pre-*Ring* death sentenced defendants in general, and Pope specifically, relief under *Hurst v. State*. The Florida Supreme Court has been consistent in denying *Hurst* relief to those defendants whose convictions and sentences were final when *Ring* was issued in 2002. Pope is being treated the same as similarly situated capital defendants. Hence, his equal protection argument fails and certiorari should be denied.

Additionally, in *Beck v. Washington*, 369 U.S. 541 (1962), this Court refused to find constitutional error in the alleged misapplication of Washington law by Washington courts: "We have said time and againthat the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . .' Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Id.* at 554-55 (citation omitted).

Additionally, Pope's assertion that his sentence is unreliable and that his previously rejected *Brady v. Maryland*, 373 U.S. 83 (1963) and *Strickland v. Washington*, 466 U.S. 668 (1984) claims should be considered in support of that argument is without merit. This argument assumes he is entitled to relief under *Hurst*, when as explained throughout, he is not. It further assumes that his *Brady*

and *Strickland* claims can be resurrected, when they cannot be. Even if Pope could relitigate his previously disposed of claims, he would not be entitled to any relief because the state and federal courts resolved those issues in accordance with this Court's precedent. Morover, the prejudice standard applied to those claims was not a Sixth Amendment fact-finding error addressed in *Hurst v. Florida*. Resolution of those claims does not support the instant claim that Pope's sentence is unreliable.

2. The Florida Supreme Court's Failure to Apply Full Retroactive Effect to the *Hurst* Decisions Does Not Violate the Supremacy Clause.

It is Pope's position that the Florida Supreme Court's giving partial retroactive application to *Hurst* claims is violative of the dictates of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) and improper under the Supremacy Clause. In doing so, he asserts that the Florida court created a new substantive rule in *Hurst v. State* which must be applied retroactively to all cases in which alleged *Hurst* error occurred.

Reliance on *Montgomery* for his argument is misplaced. In *Montgomery*, Louisiana ruled that this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which held that a juvenile could not be sentenced to mandatory life in prison without the possibility of parole, did not apply retroactively. *Montgomery*, 136 S.Ct. at 727. This Court reversed because *Miller* "announced a substantive rule of constitutional law." *Id.* at 734. The rule in *Miller* was substantive rather than procedural because it placed a particular punishment beyond the State's power to impose. *See Schriro v. Summerlin*, 542 U.S. at 352 (defining substantive rule as a new rule that places "particular conduct or persons" "beyond the State's power to

punish"). *Miller* categorically prevented the State from imposing a mandatory life sentence on anyone who was a juvenile when the crime was committed. *Id.* Because *Miller* was determined to have created a substantive rule, it applied retroactively regardless of when a qualifying defendant's conviction became final. *Montgomery*, 136 S. Ct. at 729 (stating "Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.").

Unlike the ruling in *Miller*, the rulings in *Hurst v. Florida* and *Hurst v. State* were procedural, not substantive. *See Montgomery*, 136 S.Ct. at 730 (noting "[p]rocedural rules . . . are designed to enhance the accuracy of a conviction or sentence by regulating 'the ***manner*** *of determining* the defendant's culpability.'") (emphasis in original; quoting *Schriro*, 542 U.S. at 353). *See also Schriro*, 542 U.S. at 352 (reiterating "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.").

Pope also cites *Welch v. United States*, 136 S.Ct. 1257 (2016) in support of his argument. This Court in *Welch* did not overrule *Schriro*. Indeed, *Welch* supports the conclusion that this Court's decision in *Hurst* applied a procedural rule:

> "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353, 124 S. Ct. 2519. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.*, at 351-352, 124 S. Ct. 2519 (citation omitted); *see Montgomery, supra*, at ----, 136 S. Ct. at 728. Procedural rules, by contrast, "regulate only the manner

> of determining the defendant's culpability." *Schriro*, 542 U.S. at 353, 124 S. Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." *Ibid.* "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.*, at 352, 124 S. Ct. 2519.

Welch, 136 S. Ct. at 1264-65.

In *Welch*, this Court found the rule in *Johnson v. United States*, 135 S.Ct. 2551 (2015), which "changed the substantive reach of the Armed Career Criminal Act," was a substantive rather than procedural change because it altered the class of people affected by the law. *Welch*, 136 S.Ct. at 1265. In explaining how the rule in *Johnson* was not procedural, this Court in *Welch* stated, "[i]t did not, for example, 'allocate decision making authority between judge and jury, *ibid.*, or regulate the evidence that the court could consider in making its decision." *Welch*, 136 S. Ct. at 1265 (citation omitted). Here, the new rule announced in *Hurst v. Florida*, and expanded in *Hurst v. State*, allocated the authority to make certain capital sentencing decisions from the judge to the jury. This is how this Court in *Welch* defined a procedural change. Considering this precedent, there can be no doubt that the *Hurst* rule is a procedural one. Accordingly, the Supremacy Clause does not require that Florida give full (or indeed **any**) retroactive effect on collateral review to the rule announced in *Hurst v. Florida* or *Hurst v. State*.

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," Pope relies upon *Powell v. Delaware*, 153 A.3d 69 (Del. 2016). His reliance is misplaced. In *Powell*, the Delaware Supreme Court agreed that "neither *Ring* nor *Hurst* involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof." *Powell*, 153 A.3d at 74. The Delaware Supreme Court used this fact to distinguish *Hurst* from Delaware's "watershed ruling" in *Rauf* which was the basis for Delaware to find that *Rauf* retroactively applied to *Powell* under *Teague*. *Powell*, 153 A.3d at 74; *Rauf v. State*, 145 A.3d 430 (Del. 2016). Thus, *Powell* applies Delaware specific law and is not in conflict with the Florida Supreme Court's determination of the retroactive application of *Hurst*. As Florida's and Deleware's death penalty statutes are different, an interpretation by the Supreme Court of Deleware that *Hurst* should be given full retroactive effect is not in conflict with the decision of the Florida Supreme Court. As only Deleware'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 sum, the questions Pope presents do not offer any matter which comes within the parameters of Rule 10 of the Rules of the United States Supreme Court. He does not identify any direct conflict with this Court or other federal circuit courts or state supreme courts, nor does he offer any unresolved, pressing federal question. Pope challenges only the application of this Court's well-established principles to the Florida Supreme Court's decision. As such, Pope does not demonstrate any compelling reasons for this Court to exercise its certiorari

jurisdiction under Rule 10. This Court should deny the petition.

3. There is no violation of *Caldwell v. Mississippi*.

Pope's attempt to tie his Equal Protection argument to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), fails. First, the decision in *Caldwell* did not interpret the Equal Protection Clause. There, this Court found that a prosecutor's comments diminishing the jury's sense of responsibility for determining the appropriateness of a death sentence was "inconsistent with the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell*, 472 U.S. at 323 (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). This case is an inappropriate vehicle for certiorari as this is a postconviction case and this Court would have to address retroactivity before even reaching the underlying jury instruction issue. *Hurst* is merely an application or refinement of *Ring* and this Court has already held that *Ring* is not retroactive. *See Schriro.* It would be an odd result indeed, if this Court were to hold that *Hurst* is retroactive, even though *Ring* was not.

In any case, there was no *Caldwell* error in this case. To establish constitutional error under *Caldwell*, a defendant must show that the comments or instructions to the jury "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994).[2] Pope's jury was instructed

[2] In *Caldwell*, error was found based on the prosecutor's argument to the jury that the appellate court would review that sentence and would decide whether the death sentence were appropriate. "To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role

properly on its role based on the state law existing at the time of his trial. *See Reynolds v. State*, ___ So.3d ___, 2018 WL 1633075, *9 (Fla. April 5, 2018) (explaining that under *Romano*, the Florida standard jury instructions at issue "cannot be invalidated retroactively prior to *Ring* simply because a trial court failed to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts").[3]

Pope also points to *Caldwell* to assert constitutional error as his jury was instructed its role was advisory and did not need to be unanimous thereby violating the Eighth Amendment as discussed in *Caldwell*. First, there is no underlying Sixth Amendment violation and no conflict between the Florida Supreme Court's decision and this Court's Eighth Amendment jurisprudence set forth in *Caldwell* and its progeny. There is no conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court.[4]

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assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989); *Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986) (rejecting a *Caldwell* attack, explaining "*Caldwell* is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision")

[3] Respondent is cognizant of the Honorable Justice Sotomayor's dissent from the denial of certiorari in *Middleton v. Florida*, 138 S. Ct. 829 (2018), wherein she criticized the Florida Supreme Court for not addressing the *Caldwell* claim in cases where *Hurst* was applicable under state law. The Florida Supreme Court has now, however, rejected explicitly *Caldwell* attacks on Florida's standard penalty phase jury instructions in the wake of *Hurst*. *See Reynolds v. State*, ___ So. 3d ___, 2018 WL 1633075 (Fla. April 5, 2018); *Johnson v. State*, ___ So. 3d ___, 2018 WL 1633043 (Fla. April 5, 2018) (citing *Reynolds* in rejecting *Caldwell* claim).

[4] This Court has recognized that cases which have not developed conflicts between federal or state courts or presented important, unsettled questions of federal law usually do not deserve certiorari review. *Rockford Life Insurance Co. v. Illinois*

Pope's jury was informed properly that the aggravators had to be proven beyond a reasonable doubt, but mitigation needed to be proven by a preponderance of the evidence. Further, the jury needed to determine whether sufficient aggravating factors existed to support the imposition of the death penalty and, if so, whether the aggravation outweighed the mitigation before the death penalty could be imposed. His jury was also informed that it had an "awesome" responsibility in recommending a sentence, that it would not have a "harder" decision to make, and not to "act hastily or without due regard to the gravity of these proceedings." The jurors were told that life should be recommended if the aggravation did not justify the death penalty. Only where sufficient aggravation was found did the jury have to determine whether the mitigation outweighed the aggravation. (Resp. App. A – Direct Appeal Record pages 1120-26). A Florida jury's decision regarding a death sentence was, and remains, an advisory recommendation. *See Dugger v. Adams*, 489 U.S. 401 (1989). *See also* § 921.141(2)(c), Fla. Stat. (2017) (providing that "[i]f a unanimous jury determines that the defendant should be sentenced to death, the jury's ***recommendation*** to the court shall be a sentence of death") (emphasis added). Thus, there was no violation of *Caldwell* because there were no comments or instructions to the jury that "improperly described the role assigned to the jury by

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Department of Revenue, 482 U.S. 182, 184, n. 3 (1987). The law is well-settled that this Court does not grant certiorari for the purpose of reviewing evidence and/or discussing specific facts. *United States v. Johnston*, 268 U.S. 220 (1925) (denying certiorari to review evidence or discuss specific facts). Further, this Court has rejected requests to reassess or re-weigh factual disputes. *Page v. Arkansas Natural Gas Corp.*, 286 U.S. 269 (1932) (rejecting request to review fact questions); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1924) (same).

local law." *Romano*, 512 U.S. at 9. Pope's jury was advised accurately that its decision was an advisory recommendation that would be accorded "great weight."

Additionally, to the extent Pope's argument could be interpreted as suggesting a Sixth Amendment violation occurred, the record refutes the claim. The jury convicted Pope of three counts of first degree murder and distinguished between the homicides committed during a drug buy and the death of Kristine Walters who was duped into going to a hotel where Pope kept her drugged during the weekend while contemplating killing her because he did not want a witness to the prior murders. In discussing aggravation, the Florida Supreme Court determined:

> . . . the court found four aggravating circumstances. First, the ***defendant had been convicted of another capital felony, the murders of Donranz and Di Russo***. ... Second, ***the capital felony was committed for the purpose of avoiding or preventing lawful arrest***. The defendant's own statements to Susan Eckard as well as the circumstances surrounding the murder show, beyond a reasonable doubt, that this was the sole motive for the murder. ... Third, the ***capital felony was committed in a cold, calculated and premeditated manner***. Susan Eckard's testimony about Pope's discussions of the murder with her prior to the killing supports beyond a reasonable doubt the finding of premeditation as required by this statutory aggravating factor. ... Fourth, ***the capital felony was especially heinous, atrocious or cruel***. The medical examiner's testimony at trial revealed that the pattern of gun-shot wounds on Walter's body revealed, without indicating the sequence of shots, that she had been shot from the rear, had attempted to flee the attack, and had been shot twice with the gun pressed close to her abdomen. The wounds caused by the explosion of the bullets at impact would have been extraordinarily painful without causing unconsciousness or death. When this had failed to kill her, she had been clubbed over the head with the gun

> barrel. When the gun barrel broke before the murderous end had been achieved, the defendant dragged his still-living victim to the canal where he threw her to drown. The evidence of conscious psychological and physical suffering is clear from the medical examiner's testimony and supports a finding that this murder was heinous, atrocious and cruel to an extent greater than that inherent in all murders. ... We find no merit to appellant's assignment of error to the finding of any of these factors.

Pope, 441 So.2d at 1076–77 (citations omitted, emphasis supplied).

Clearly, the jury found the "convicted of another capital felony" aggravator as it had convicted Pope of the triple homicide. Inherent in the guilt phase facts are the aggravators of avoid arrest and cold, calculated and premeditated ("CCP") which are supported by Pope's own admissions. Based on the medical examiner's testimony and Pope's admissions, the heinous, atrocious, or cruel ("HAC") finding cannot be questioned. Relying merely on the two prior violent capital felonies, the murders of *Donranz and Di Russo*, establishes beyond a reasonable doubt that no Sixth Amendment error occurred. *See Apprendi*, 530 U.S. at 490; *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (recognizing "narrow exception . . . for the fact of a prior conviction" set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). *See also Jenkins v. Hutton*, 137 S.Ct. 1769, 1772 (2017) (noting jury's findings that defendant engaged in course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty). This Court's ruling in *Hurst v. Florida* did not change the recidivism exception articulated in *Almendarez-Torres*; *Apprendi*; and *Ring*.

Lower courts have almost uniformly held that a judge may perform the "weighing" of factors to arrive at an appropriate sentence without violating the Sixth Amendment.[5] The findings required by the Florida Supreme Court following remand 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). There was no Sixth Amendment error in this case.[6] In fact, *Hurst v. Florida* did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. In *Kansas v. Carr*, 136 S. Ct. 633 (2016), decided eight days after this Court issued *Hurst v. Florida*, this Court emphasized:

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[5] *State v. Mason*, ___ N.E.3d ___, 2018 WL 1872180, *5-6 (Ohio, April 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 citation 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); *Waldrop v. Comm'r, Alabama Dept. of Corr.*, 2017 WL 4271115, *20 (11th Cir. Sept. 26, 2017) (unpublished) (rejecting *Hurst* claim and explaining "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict.") (citation omitted); *State v. Gales*, 658 N.W.2d 604, 628-29 (Neb. 2003) ("[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review to be undertaken by a jury").

[6] *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 aggravating circumstances found by the trial court were either uncontestable or well-established by overwhelming evidence.

> Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one jury might consider mitigating another might not. And of course, the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that defendants must deserve mercy beyond a reasonable doubt, or must more-likely-than-not deserve it. . . . In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

Carr, 136 S. Ct. at 642.

To the extent Pope suggests that jury sentencing is now required under federal law, his argument is misplaced. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring) (noting "today'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 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.

There is no conflict between the Florida Supreme Court's decision and this Court's Sixth Amendment or Eighth Amendment jurisprudence. Further, there is no conflict between the Florida Supreme Court's decision and that of any other federal appellate or state supreme court. Finally, there is no underlying constitutional error under the facts of this case. Certiorari review should be denied.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent requests respectfully that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

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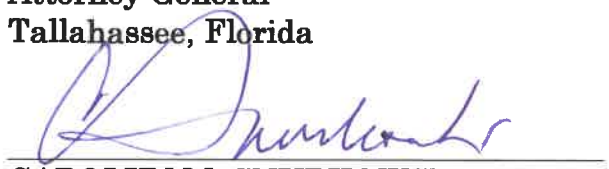

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