CASE NO. 18-7226

IN THE UNITED STATES SUPREME COURT

October 2018, Term

OMAR BLANCO,

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]

I – Whether certiorari review should be denied as the Florida Supreme Court denied Blanco's claim on an independent and adequate state ground when it determined that Blanco's claim was time barred under state law?

II - Whether certiorari review should be denied because (1) the Florida Supreme Court's decision finding *Hurst v. Florida* and *Hurst v. State are* not retroactive to cases final before *Ring v. Arizona* was decided is based on state law; (2) does not violate the Eighth Amendment; (3) does not violate the Equal Protection or Due Process Clauses; and (4) does not violate the Sixth Amendment or Supremacy Clause and the Florida Supreme Court decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW I

TABLE OF CONTENTS II

TABLE OF CITATIONS IV

CITATION TO OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE AND FACTS 2

REASONS FOR DENYING THE WRIT 8

ISSUE I - CERTIORARI REVIEW SHOULD BE DENIED AS THE TIME-BAR IMPOSED BY THE FLORIDA SUPREME COURT IS AN INDEPENDENT AND ADEQUATE STATE GROUND TO DENY BLANCO'S INTELLECTUAL DISABILITY CLAIM AS THE RULING DOES NOT CONFLICT WITH A DECISION OF THIS COURT, A FEDERAL CIRCUIT COURT, OR ANOTHER STATE SUPREME COURT AND THIS COURT HAS NOT HELD *HALL V. FLORIDA* TO BE RETROACTIVE TO CASES ON COLLATERAL REVIEW. (RESTATED) 8

A. BLANCO'S CLAIM WAS TIME BARRED UNDER WELL ESTABLISHED FLORIDA LAW 8

B. THE RETROACTIVITY OF *HALL* HAS BEEN DECIDED AS A MATTER OF FLORIDA LAW AND DOES NOT PRESENT AN IMPORTANT OR UNSETTLED QUESTION OF FEDERAL LAW 16

ISSUE II - CERTIORARI REVIEW SHOULD BE DENIED BECAUSE (1) THE FLORIDA SUPREME COURT'S DECISION FINDING *HURST V. FLORIDA* AND *HURST V. STATE* ARE NOT RETROACTIVE TO CASES FINAL BEFORE *RING V. ARIZONA* WAS DECIDED IS BASED ON STATE LAW; (2) DOES NOT VIOLATE THE EIGHTH AMENDMENT OR EQUAL PROTECTION CLAUSE; AND (3) DOES NOT VIOLATE THE SIXTH AMENDMENT OR SUPREMACY CLAUSE; AND THE DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR INVOLVE AN IMPORTANT, UNSETTLED QUESTION OF LAW. (RESTATED) 18

A. THE FLORIDA SUPREME COURT'S DECISION ON RETROACTIVITY IS BASED ON INDEPENDENT AND ADEQUATE STATE LAW 19

B. BLANCO HAS NOT SHOWN CONSTITUTIONAL INFIRMITY BASED ON THE EIGHTH AMENDMENT OR THE EQUAL PROTECTION CLAUSE 22

C. THERE HAS BEEN NO VIOLATION OF THE SUPREMACY CLAUSE NOR IS THERE AN UNDERLYING SIXTH AMENDMENT ERROR IN THIS CASE 28

CONCLUSION 34

CERTIFICATE OF SERVICE 35

TABLE OF CITATIONS

Page(s)

Cases

Alleyne v. United States, 570 U.S. 99 (2013) 33

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 33

Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure, 875 So.2d 563 (Fla. 2004) 10, 11

Apprendi v. New Jersey, 530 U.S. 466 (2000) 22, 33

Asay v. State, 210 So.3d 1 (Fla. 2016) 20, 21

Atkins v. Virginia, 536 U.S. 304 (2002) ..... passim

Beck v. Washington, 369 U.S. 541 (1962) 25

Blanco v. Dugger, 691 F.Supp 308 (S.D. Fla. 1988) 2

Blanco v. Florida, 525 U.S. 837 (1998) 4

Blanco v. Secretary, Florida Department of Corrections, 688 F.3d 1211 (11th Cir. 2012), *cert. denied*, 569 U.S. 926 (2013) 5

Blanco v. Singletary, 504 U.S. 943 (1992) 3

Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991) 3, 12

Blanco v. State, 249 So.3d 536 (Fla. 2018) 1, 7

Blanco v. State, 452 So.2d 520 (Fla. 1984), *cert denied*, 496 U.S. 1181 (1985) 2, 3, 32, 33

Blanco v. State, 507 So.2d 1377 (Fla. 1987) 2

Blanco v. State, 702 So.2d 1250 (Fla. 1997) 3

Blanco v. State, 706 So.2d 7 (Fla. 1997) 4, 32

Blanco v. State, 963 So.2d 173 (Fla. 2007) 4, 11

Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273 (1983) 9

Branch v. State, 234 So.3d 548 (Fla.), *cert. denied*, 138 S. Ct. 1164 (2018) 21

Cardinale v. Louisiana, 394 U.S. 437 (1969).....9, 21

Cherry v. State, 959 So.2d 702 (Fla.), *cert. denied*, 552 U.S. 993 (2007).....6, 11, 15

Cole v. State, 234 So.3d 644 (Fla.), *cert. denied*, 138 S.Ct. 2657 (2018) 21

Crawford v. Washington, 541 U.S. 36 (2004) 22

Danforth v. Minnesota, 552 U.S. 264 (2008) 17, 19, 20

Dorsey v. United States, 567 U.S. 260 (2012) 24

Dugger v. Adams, 489 U.S. 401 (1989).....27

Florida v. Powell, 559 U.S. 50 (2010) 9, 21

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 9, 21

Goodwin v. Steele, 814 F.3d 901 (8th Cir. 2014).....16

Griffith v. Kentucky, 479 U.S. 314 (1987).....23

Grim v. State, 244 So.3d 147 (Fla.), *cert. denied, 139 S.Ct. 480 (2018)*.....*21*

Hall v. Florida, 572 U.S. 701 (2014) .....passim

Hannon v. State, 228 So.3d 505 (Fla.), *cert. denied*, 138 S.Ct. 441 (2017) 22

Harris v. Alabama, 513 U.S. 504 (1995).....27

Henry v. State, 134 So.3d 938 (Fla. 2014).....26

Hitchcock v. State, 226 So.3d 216 (Fla.), *cert. denied*, 138 S.Ct. 513 (2017) 21

Hurst v. Florida, 136 S.Ct. 616 (2016).....2, 5, 31, 32

Hurst v. State, 202 So.3d 40 (Fla. 2016) .....passim

In re Cathey, 857 F.3d 221 (5th Cir. 2017) 14

In re Henry, 757 F.3d 1151 (11th Cir. 2014) 12, 13

In re Hill, 437 F.3d 1080 (11th Cir. 2006) 12

In re Holladay, 331 F.3d 1169 (11th Cir. 2003) 12, 14

In re Payne, 722 Fed. Appx. 534 (6th Cir. 2018) 16

Johnson v. United States, 135 S.Ct. 2551 (2015) 29

Johnston v. State, 246 So.3d 266 (Fla.), *cert. denied*, 139 S.Ct. 481 (2018) 21

Jones v. State, 234 So.3d 545 (Fla.), *cert. denied*, 138 S.Ct. 2686 (2018) 21

Jones v. State, 241 So.3d 65 (Fla.), *cert. denied*, 139 S.Ct. 641 (2018) 21

Kansas v. Carr, 136 S.Ct. 633 (2016) 31, 32

Kilgore v. Sec'y, Fla. Dep't of Corr., 805 F.3d 1301 (11th Cir. 2015) 16, 17

Lambrix v. State, 227 So.3d 112 (Fla.), *cert. denied*, 138 S.Ct. 312 (2017) 21, 26

McCleskey v. Kemp, 481 U.S. 279 (1987) 25

McLaughlin v. Florida, 379 U.S. 184 (2008) 23

Michigan v. Long, 463 U.S. 1032 (1983) 9, 21

Miller v. Alabama, 567 U.S. 460 (2012) 13, 28

Montgomery v. Louisiana, 136 S.Ct. 718 (2016) 13, 19, 28, 29

Mosley v. State, 209 So.3d 1248 (Fla. 2016) 20

Neder v. United States, 527 U.S. 1 (1999) 33

Payne v. State, 493 S.W.3d 478 (Tenn. 2016) 18

Penry v. Lynaugh, 492 U.S. 302 (1989) 10, 12, 22

Philmore v. State, 234 So.3d 567 (Fla.), *cert. denied*, 139 S.Ct. 478 (2018) 21

Powell v. Delaware, 153 A.3d 69 (Del. 2016) 30

Rauf v. State, 145 A.3d 430 (Del. 2016).....30

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

Rockford Life Insurance Co. v. Illinois Department of Revenue, 482 U.S. 182 (1987) 27

Rodriguez v. State, 250 So.3d 616 (Fla. 2016) 5, 6, 15

Schriro v. Summerlin, 542 U.S. 348 (2004).....23, 28, 29

Singletary v. Blanco, 504 U.S. 946 (1992).....3

Spaziano v. Florida, 468 U.S. 447, (1984) 26

State v. Gales, 658 N.W.2d 604 (Neb. 2003) 32

State v. Mason, 153 Ohio St.3d 476 (Ohio 2018) 31

Street v. New York, 394 U.S. 576 (1969).....9, 21

Teague v. Lane, 489 U.S. 288 (1989) 17, 20, 22, 23, 24, 30

United States v. Abney, 812 F.3d 1079 (D.C. Cir. 2016) 24

United States v. Purkey, 428 F.3d 738 (8th Cir. 2005) 31

United States v. Sampson, 486 F.3d 13 (1st Cir. 2007).....31

Waldrop v. Comm'r, Alabama Dept. of Corr., 711 Fed. Appx. 900 (11th Cir. 2017)..31

Walls v. State, 213 So.3d 340 (Fla 2016).....6, 14, 16

Welch v. United States, 136 S.Ct. 1257 (2016) 19, 29, 30

Whorton v. Bockting, 549 U.S. 406 (2007) 22

Willacy v. State, 238 So.3d 100 (Fla.), *cert. denied*, 138 S.Ct. 1665 (2018) 21

Williams v. Kelley, 858 F.3d 464 (8th Cir. 2017) 16

Witt v. State, 387 So.2d 922 (Fla.), *cert. denied*, 449 U.S. 1067 (1980) 6, 16, 20

Statutes

28 U.S.C. § 1257(a) 1

Fla. Stat. § 921.137(1) (2013) 15

Fla. Stat. § 921.141(2)(c), Fla. Stat. (2017) 27

Rules

Florida Rules of Criminal Procedure 3.203 ..... passim

Florida Rule of Criminal Procedure 3.203(d)(4)(E) 10

Florida Rule of Criminal Procedure 3.203(d)(4)(F) 10

Florida Rule of Criminal Procedure 3.203(f) 5

Florida Rule of Criminal Procedure 3.851 ..... 5, 10

Rule 10 of the Rules of the United States Supreme Court 33

Other Provisions

Art. I, § 17, Fla. Const 26, 27

Sixth Amendment to the United States Constitution 26

Eighth Amendment to the United States Constitution 22, 24

CITATION TO OPINION BELOW

The decision of which Petitioner seeks discretionary review is reported as *Blanco v. State*, 249 So.3d 536 (Fla. 2018).

JURISDICTION

Petitioner, Omar Blanco ("Blanco"), 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 Blanco's successive postconviction motion addressed to *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Hall v. Florida*, 572 U.S. 701 (2014) in support of an Intellectual Disability ("ID") claim and *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) challenging his death sentence. The Florida Supreme Court determined that under state law Blanco's *Atkins* / *Hall* claim was time-barred and the *Hurst* decisions, again under state law, were not retroactive to cases final before June 24, 2002, the date *Ring v. Arizona*, 536 U.S. 584 (2002) issued, and thus, Blanco was not entitled to relief.

Blanco was convicted and sentenced to death for the first-degree murder of John Ryan and armed burglary which were affirmed on direct appeal. *Blanco v. State*, 452 So.2d 520 (Fla. 1984), *cert. denied*, 469 U.S. 1181 (1985). On January 31, 1986, after a death warrant was signed, Blanco filed a motion for postconviction relief. Following an evidentiary hearing, relief was denied and the Florida Supreme Court affirmed. *Blanco v. State*, 507 So.2d 1377 (Fla. 1987). On February 3, 1986, Blanco filed a state habeas corpus petition, which was consolidated with the postconviction appeal, and relief was denied. *Id.*

Following a second death warrant, Blanco filed a petition for writ of habeas corpus with the federal district court, the execution was stayed, and another evidentiary hearing was held resulting in the granting of the writ in part. *Blanco v. Dugger*, 691 F.Supp 308 (S.D. Fla. 1988). On appeal, the federal circuit court

affirmed finding that it was proper to deny habeas corpus relief with respect to Blanco's convictions and to grant the writ with respect to the penalty phase ineffective assistance claim. *Blanco v. Singletary*, 943 F.2d 1477, 1510 (11th Cir. 1991). The certiorari petitions were denied and the case was set for resentencing. *Blanco v. Singletary*, 504 U.S. 943 (1992); *Singletary v. Blanco*, 504 U.S. 946 (1992). During resentencing, Blanco filed a successive postconviction relief motion claiming newly discovered evidence. Relief was denied and the Florida Supreme Court affirmed. *Blanco v. State*, 702 So.2d 1250, 1251 (Fla. 1997).

On appeal following resentencing, the Florida Supreme Court provided:

> The facts are set out fully in our opinion on direct appeal. *See Blanco v. State*, 452 So.2d 520 (Fla. 1984). Omar Blanco broke into John Ryan's home at 11 p.m., January 14, 1982, struggled with Ryan, and shot him. As Ryan fell onto a bed, Blanco shot him six more times. Blanco was arrested a few minutes later and was identified at the scene by a neighbor. Blanco's wallet, driver's license, and keys were found at the scene. The next day, he was identified by Ryan's niece, Thalia, who had confronted him in her lighted bedroom for several minutes just before the shooting. (It was Thalia's bed that Ryan fell onto when he was first shot, and she was lying underneath him when he was shot six more times.)
>
> * * *
>
> At resentencing, the State presented the testimony of the victim's niece (Thalia) and that of numerous officers and forensic experts. Blanco, on the other hand, presented the testimony of ten lay witnesses, the statements of his mother and father, and the testimony of two mental health experts. The jury recommended death by a ten-to-two vote and the trial court imposed the death sentence based on two aggravating circumstances, one statutory mitigating circumstance,[FN6] and eleven nonstatutory mitigating circumstances.[FN7]

FN6 The court found impaired capacity.

FN7 The court found the following: *** 3) dull intelligence; *** 5) organic brain damage; ****

Blanco v. State, 706 So.2d 7, 8-9 (Fla. 1997).

Following the jury's ten-to-two death recommendation, the court imposed a death sentence upon finding the prior violent felony aggravator and merged aggravators of pecuniary gain with felony murder (burglary) outweighed the statutory mitigator of "impaired capacity" with eleven non-statutory mitigators. As found in the re-sentencing record on appeal in Case no. 60-85118, in response to the prosecutor's question whether Blanco was "retarded," Dr. Maulion, the defense psychiatrist, replied Blanco "is what we call dull normal" and the associated IQ was 75 – 80. (2-PCR/2PP.42 1834-35) The defense's licensed psychologist, Dr. Bukstel, reported that Blanco fell into the category of "dull normal" now identified as the "range just above the mentally deficiency range." Continuing, Dr. Bukstel noted that considering the standard error of measurement, Blanco fell closer to the "low average range." The WAIS-R results put Blanco in the 8th or 9th percentile range. (2-PCR/2PP.43 1921-22). On direct appeal, the Florida Supreme Court affirmed. *Blanco*, 706 So.2d 7 and on October 5, 1998, Blanco's death sentence became final with denial of certiorari. *Blanco v. Florida*, 525 U.S. 837 (1998).

Between 1999 and 2007, Blanco unsuccessfully sought collateral relief from the state courts. Of interest here, an Intellectually Disabled ("ID") claim was not raised. *See Blanco v. State*, 963 So.2d 173 (Fla. 2007) (affirming denial of postconviction relief motion and denying the state habeas petition). Likewise,

Blanco's federal habeas petition did not include an ID claim and was denied after an evidentiary hearing where he had testified extensively. *Blanco v. Secretary, Florida Department of Corrections*, 688 F.3d 1211 (11th Cir. 2012) (affirming federal district court's denial of federal habeas corpus petition after evidentiary hearing), *cert. denied*, 569 U.S. 926 (2013).

In May 2015, Blanco for the first time filed a successive postconviction motion addressed to *Atkins* and *Hall* (4-PCR at 16-40). Following the issuance of *Hurst v. Florida*, Blanco filed an amended postconviction relief motion. (4-PCR 319-35). In his *Atkins* claim, Blanco argued that he was ID, but had been prevented from raising the claim earlier as his IQ scores were above 70 and only after a May 2015 evaluation using the Mexican version of the WAIS-III, of the Wechsler Adult Intelligence Scale ("WAIS") did he score a 75 and thus, under *Hall*, had a claim for ID. Initially, the trial court found Blanco's *Atkins* claim untimely, however, concluded that *Hall* was retroactive and granted an evidentiary hearing.

However, while his postconviction litigation was pending, the Florida Supreme Court issued its order in *Rodriguez v. State* stating:

> This cause is before this Court on Rodriguez's appeal of the summary denial of his "Motion for Determination of Intellectual Disability and Successive Motion to Vacate Death Sentences with Special Request for Leave to Amend" pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203. Rodriguez's motion was filed on May 22, 2015. Rodriguez, who had never before raised an intellectual disability claim, asserted that there was "good cause" pursuant to Rule 3.203(f) for his failure to assert a previous claim of intellectual disability and only after the United States Supreme Court decided *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), did he

> have the basis for asserting an intellectual disability claim. The trial court rejected the motion as time barred, concluding there was no reason that Rodriguez could not have previously raised a claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The trial court further concluded that Rodriguez could not have relied on *Cherry v. State*, 959 So.2d 702 (Fla. 2007), which established the bright-line cut-off of 70 for IQ scores disapproved of in *Hall*, because he never raised an intellectual disability claim after *Atkins* as required by Rule 3.203.
>
> We have considered the issues raised, and affirm the trial court's denial of Rodriguez's motion as time-barred for the reasons stated by the trial court.

Rodriguez v. State, 250 So.3d 616 (Fla. 2016). Later, the Florida Supreme Court issued *Walls v. State*, 213 So 3d 340, 346-47 (Fla 2016) wherein it found under *Witt v. State*, 387 So.2d 922 (Fla. 1980) that *Hall* was retroactive to defendants who had raised an *Atkins* claim timely under Rule 3.203, Fla. R. Crim. P. and had been denied relief.

Subsequently, upon the State's motion for rehearing, Blanco's *Atkins / Hall* postconviction relief claim was denied.[1] (4-PCR 530-31 635-43; S4-PCR 673-74). Likewise, the *Hurst* claim was denied as Blanco's sentence was final on October 5, 1998, years before *Ring* issued. Blanco appealed and the Florida Supreme Court affirmed reasoning:

> We conclude that Blanco's intellectual disability claim is foreclosed by the reasoning of this Court's decision in *Rodriguez*. In *Rodriguez*, this Court applied the time-bar

[1] Blanco, in August 2018, filed an application, Case number 18-13262-P, with the United States Circuit Court of Appeals, Eleventh Circuit seeking an order permitting a second/successive federal habeas petition to raise an *Atkins* claim. On August 30, 2018, the application was denied.

> contained within rule 3.203 to a defendant who sought to raise an intellectual disability claim under *Atkins* for the first time in light of *Hall*. We also conclude that Blanco's Hurst claim is foreclosed by this Court's decision in *Hitchcock*. In *Hitchcock*, this Court applied *Asay* to mean that *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), is the cutoff for any and all *Hurst*-related claims. Accordingly, we affirm the circuit court's orders denying Blanco's fifth motion for postconviction relief.

Blanco v. State, 249 So.3d 536, 537 (Fla. 2018). Blanco seeks review here.

REASONS FOR DENYING THE WRIT

ISSUE I

CERTIORARI REVIEW SHOULD BE DENIED AS THE TIME-BAR IMPOSED BY THE FLORIDA SUPREME COURT IS AN INDEPENDENT AND ADEQUATE STATE GROUND TO DENY BLANCO'S INTELLECTUAL DISABILITY CLAIM AND THE UNDERLYING RULING DOES NOT CONFLICT WITH A DECISION OF THIS COURT, A FEDERAL CIRCUIT COURT, OR ANOTHER STATE SUPREME COURT.

Blanco seeks certiorari review of the Florida Supreme Court's decision applying a time-bar under state law to his claim of Intellectual Disability ("ID") as he failed to raise the claim following *Atkins v. Virginia*, 536 U.S. 304 (2002) or within the time limits imposed by Rule 3.203, Florida Rule of Criminal Procedure. Instead, Blanco raised the claim for the first time following *Hall v. Florida*, 572 U.S. 701 (2014) even though this Court has not held *Hall* to be retroactive to cases on collateral review. The time-bar at issue here is an independent and adequate state ground and does not conflict with a decision of this Court, another federal circuit court, or state supreme court. Blanco has not provided a "compelling" reason for this Court to review his case on procedural or constitutional grounds. Certiorari should be denied.

A. Blanco's Claim Was Time Barred Under Well Established Florida Law

This case comes to this Court in a post-conviction posture, and the Florida Supreme Court has already determined that *Hall* is retroactive as a matter of state law. However, the Florida Supreme Court has made it clear that a defendant

like Blanco had to assert his claim that he was intellectually disabled under *Atkins* in a timely manner. Blanco failed to do so, despite pursuing numerous meritless successive postconviction claims even after this Court had decided *Atkins*. The Florida Supreme Court's application of a time-bar for ID claims is undeserving of certiorari review when considering the development of the law relating to ID claims. *Cf. Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983) (noting "constitutional claim can become time-barred just as any other claim can").

This is no Federal constitutional violation; certiorari review by this Court would involve nothing more than an examination of Florida's application of its own state law with regard to procedural bar. 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); *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). Accordingly, certiorari should be denied.

Florida has a right to insist on timely presentation of claims in the postconviction context. In light of *Atkins*, the Florida Supreme Court promulgated

Rule 3.203, Fla. R. Crim. P. in *Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure*, 875 So.2d 563 (Fla. 2004). Rule 3.203(d)(4)(E)-(F) as originally adopted specifically provided that prisoners whose cases were in various postconviction procedural postures could file a successive motion for collateral relief in state court to assert an *Atkins* claim.[2] The provisions relevant to Blanco provided:

> (E) If a death sentenced prisoner has filed a motion for postconviction relief and that motion has been ruled on by the circuit court and an appeal is pending on or before October 1, 2004, the prisoner may file a motion in the supreme court to relinquish jurisdiction to the circuit court for a determination of mental retardation within 60 days from October 1, 2004. The motion to relinquish jurisdiction shall contain a copy of the motion to establish mental retardation as a bar to execution, which shall be raised as a successive rule 3.851 motion, and shall contain a certificate by appellate counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is mentally retarded.
>
> (F) If a death sentenced prisoner has filed a motion for postconviction relief, the motion has been ruled on by the circuit court, and that ruling is final on or before October 1, 2004, the prisoner may raise a claim under this rule in a successive rule 3.851 motion filed within 60 days after October 1, 2004. The circuit court may reduce this time

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[2] On June 20, 2002, this Court issued *Atkins* which held that it was unconstitutional to execute a person who was ID; however, it left it to the States to develop the appropriate methods for enforcing this prohibition announced in *Atkins*, 536 U.S. at 317. In deciding *Atkins*, this Court abrogated *Penry v. Lynaugh*, 492 U.S. 302 (1989) which had held that execution of an ID capital defendant was not unconstitutional so long as such was considered in mitigation. Also, in *Penry*, this Court provided that "if we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as *Penry* regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review." *Penry*, 492 U.S. at 330.

> period and expedite the proceedings if the circuit court determines that such action is necessary.

Id. at 571.

On or about July 1, 2003, Blanco's postconviction motion was denied by the trial court summarily and his appeal to the Florida Supreme Court was pending on October 1, 2004 when Rule 3.203 went into effect.[3] As a result, Blanco had until November 30, 2004 to file the necessary pleadings to raise an ID claim under *Atkins*. It was not until June 7, 2007 that the Florida Supreme Court interpreted the definition of ID to have a bright-line cutoff IQ of 70 without consideration of the Standard Error of Measurement ("SEM"). *See Cherry v. State*, 959 So.2d 702, 712–13 (Fla. 2007) (holding SEM need not be taken into account), *cert. denied*, 552 U.S. 993 (2007), *abrogated by Hall v. Florida*, 572 U.S. 701 (2014).

Some fourteen years after *Atkins* and seven years after *Cherry*, this Court decided *Hall*. There it found unconstitutional Florida's statute barring further consideration of a capital inmates ID where his IQ was above 70 irrespective of the SEM. *Hall*, 572 U.S. at 720. This Court determined that the bright-line cutoff failed to consider the medical community's practice of considering an IQ score as a range of scores reflecting the natural fluctuations in a person's IQ and that the score was not static and could not be reduced to a single number. *Id.* at 720. With the medial community's definition in mind, this Court found that "an individual with an IQ score between 70 and 75 or lower may show intellectual disability by

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[3] On April 12, 2007 the Florida Supreme Court decided *Blanco v. State*, 963 So.2d 173 (Fla. 2007) (affirming summary denial of original Rule 3.851 postconviction relief motion), *rehearing denied*, August 8, 2007.

presenting additional evidence regarding difficulties in adaptive functioning" and concluding that "when a defendant's IQ score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability including testimony regarding adaptive deficits."

Hall, unlike *Atkins*, did not address the question of retroactivity. *See In re Henry*, 757 F.3d 1151 (11th Cir. 2014) (finding *Hall* not retroactive); *In re Holladay*, 331 F.3d 1169 (11th Cir. 2003) (finding *Atkins* retroactive based on *Penry*); *In re Hill*, 437 F.3d 1080, 1083 (11th Cir. 2006) (finding that the defendant's habeas corpus application, including his *Atkins* claim, was time-barred, because he filed it twenty-nine months after the deadline). As such, the Florida Supreme Court's treatment of ID claim post-*Hall* was an independent and adequate state law determination.[4] In fact, this Court has not held that *Hall* placed a class of

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[4] Time limits for postconviction litigation such as those imposed in Florida in this case are common and do not offend any constitutional principle. Moreover, there is every reason to doubt such a belated claim as that presented by Blanco here. Petitioner was repeatedly examined by mental health experts both at trial and in post-conviction litigation, and, represented by numerous attorneys, yet no ID claim was filed until some 14 years after *Atkins* and a year after *Hall*. Equally important, Blanco disagreed with defense counsel on who should be called in the guilt and penalty phases, that he wanted an appeal, and that he maintained he was not guilty *See Blanco v. Singletary*, 943 F.2d 1477, 1481-1505 (11th Cir. 1991) (1982 ROA v.9; v.10; and v.11 1770-89, 1825-27, 1866). Blanco also was subjected to cross-examination during his 1982 trial and federal habeas evidentiary hearing. (1982 ROA v.9 1420-2/17/11 federal hearing v.1 117-55) During the federal hearing, Blanco sparred with the State's counsel and challenged counsel throughout. Also, Blanco has learned some English over the years. At one point during the initial 1982 trial, the prosecutor asked that the record reflect Blanco responded to his question before the interpreter translated the question and the judge noted that Blanco understood the discussion of his birthday which was stated in English (Direct Appeal v.9; v. 1433; v.11 1798). During the federal evidentiary hearing, Blanco admitted he has learned some English and that he has English language

defendants beyond the State's power to execute; *Hall* did not enlarge the class of defendants already protected by *Atkins*. Even if *Hall* may be seen as expanding the *Atkins* protected class, it did not bar completely those defendants' executions. It merely rejected summary denials of relief based on an IQ result without consideration of the SEM for one of the three prongs of ID. Likewise, *Hall* did not foreclose the State from implementing time limitations for the orderly conduct of litigation. *See In re Henry*, 757 F. 3d at 1160-63.

Blanco pleads for certiorari review pointing to the Florida Supreme Court's finding of retroactivity of *Hall*, yet imposing a time-bar of defendants who had not raised timely claims following *Atkins*. In support, he cites *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). There, this Court held that the state court was in error when it refused to find *Miller v. Alabama*, 567 U.S. 460 (2012) and its determination 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 determined that *Miller* had "announced a substantive rule of constitutional law," not a procedural one because it placed a specific punishment beyond the State's power to impose. *Id.* at 734. That is not the case with *Hall*. *See Henry*, 757 F.3d at 1159-60.

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books in his cell which he reads with the help of an English/Spanish dictionary. (2/17/11 federal hearing v.1 154-55). Intellectual disability is a pervasive life-long disability—not a condition that suddenly appears in middle age, coincidently, with the benefit of exempting the defendant from his capital sentence. The record belies the suggestion that Blanco falls into the ID category.

Blanco also points to *In re Cathey*, 857 F.3d 221, 232 (5th Cir. 2017) for support of his position that his *Atkins* claim was not available to him until after *Hall*. In *Cathey*, the Fifth Circuit Court of Appeals granted a petitioner application for a successive federal habeas petition based on its conclusion that his *Atkins* claim was unavailable previously because the petitioner had no possibility of success on the merits until the definition of ID was broadened in *Hall*. His assertion is not well taken here because Blanco was not foreclosed, but had available to him the opportunity to file an *Atkins* claim. As noted above, the statute defining ID did not impose a bright-line cut-off. It was not until 2007 with the issuance of *Cherry* by the Florida Supreme Court that the strict cut-off was imposed for the intellectual functioning prong. *See Hall*, 572 U.S. at 711-12, 720. (noting "when *Atkins* was decided the Florida Supreme Court had not yet interpreted the law to require a strict IQ cutoff at 70. That new interpretation runs counter to the clinical definition cited throughout *Atkins* and to Florida's own legislative report indicating this kind of cutoff need not be used"). Hence, *Atkins* and the promulgation of Rule 3.203 were available to Blanco during the pendency of his state postconviction litigation. *See Holladay*, 331 F.3d at 1172.

Under state law, the Florida Supreme Court concluded that *Hall* should be retroactive to those defendants who had timely raised an *Atkins* claim, but had been denied a hearing or were evaluated under the unconstitutionally "too narrow a definition" of the first prong of an ID claim, namely those with an ID above 70 but within the SEM. *Walls*, 213 So.3d at 346-47. *See also, Walls*, 213 So.3d at 348

(Pariente, J. concurring) (noting "not all capital defendants will be entitled to relief under *Hall*" and pointing to *Rodriguez v. State* for imposition of a time bar as defendants with an IQ between 70 and 75 had no reason not to have raised a timely *Atkins* claim as the bright-line cut-off, disapproved in *Hall,* was not imposed until *Cherry v. State*, 959 So.2d 702 (Fla. 2007)). Such a reading that a time-bar may be imposed for an ID claim is consistent with *Hall*, where this Court provided:

> On its face this statute [Fla. Stat. § 921.137(1) (2013)] could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case. Nothing in the statute precludes Florida from taking into account the IQ test's standard error of measurement, and as discussed below there is evidence that Florida's Legislature intended to include the measurement error in the calculation. But the Florida Supreme Court has interpreted the provisions more narrowly. It has held that a person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited. *See Cherry v. State*, 959 So.2d 702, 712–713 (Fla. 2007) (per curiam). That strict IQ test score cutoff of 70 is the issue in this case.

Hall, 572 U.S. at 711–12.

The finding of a time bar under well-established Florida law does not present this Court with a constitutional question suitable for review. Florida was not required to entertain Blanco's 'newly' discovered ID claim in violation of its own clearly expressed postconviction rules. This finding neither contravenes this Court's precedent, nor violates federal law. The Florida Supreme Court's decision does not conflict with that of any federal appellate court or state supreme court. Accordingly, certiorari should be denied.

B. The Retroactivity of *Hall* Has Been Decided as a Matter of Florida Law and Does Not Present an Important or Unsettled Question of Federal Law

As noted, this case is an inappropriate vehicle to determine the retroactivity of *Hall* because the underlying decision did not address that claim. Florida has already determined that *Hall* will have retroactive application under state law to defendants who pursue their rights in a timely fashion. However, even overlooking the clear procedural bar to this claim below, the retroactivity of *Hall* was decided by the Florida Supreme Court under Florida law. *See Walls v. State*, 213 So.3d 340, 346-47 (Fla 2016) (concluding that under Florida's test for retroactivity of *Witt v. State*, 387 So.2d 922 (Fla. 1980), *Hall* would be given retroactive application). To answer the question presented this Court would have to first determine the predicate question of *Hall*s retroactivity under federal law, not state law. This case, which presents no federal controversy, is clearly an inappropriate vehicle for that determination. Accordingly, certiorari should be denied.

Federal courts have almost uniformly found that *Hall* announced a procedural, not a substantive rule and is not retroactive. *See In re Payne*, 722 Fed. Appx. 534, 538 (6th Cir. 2018) ("Federal courts have repeatedly concluded that *Hall* and *Moore* merely created new procedural requirements that do not amount to 'watershed rules of criminal procedure.'") (citing *Williams v. Kelley*, 858 F.3d 464, 474 (8th Cir. 2017); *Goodwin v. Steele*, 814 F.3d 901, 904 (8th Cir. 2014); *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1314 (11th Cir. 2015) (additional lower court citations omitted). That Florida has announced a rule of retroactivity more

generous than required under *Teague* is a matter of state, not federal constitutional law. Accordingly, certiorari review is inappropriate.

This Court has held, 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 Florida Supreme Court's decision on retroactivity, only making it retroactive to include those defendants who had raised the *Atkins* claim in a timely manner, does not conflict with this Court's jurisprudence and applies only to Florida defendants. *See Hall*, 572 U.S. at 714 (recognizing that after *Atkins*, "a significant majority of States implemented the protections of *Atkins* by taking the SEM into account" while noting, with the exception of Kentucky and Virginia, those States with statutes which may be interpreted as having bright-line cut-offs may not apply those cut-offs to its capital defendants). Since then, when considered in light of federal law, courts have found that *Hall* is not retroactive. *See Kilgore v. Sec'y, Florida Dept. of Corr.*, 805 F.3d 1301, 1314–16 (11th Cir. 2015) (noting "[t]o retroactively apply this kind of new procedural rule [*Hall*] to the final determination of a state court appeal would impose the very uncertainty and costs on the states that *Teague* warned against—discouraging the states from rigorously developing and following their intellectual

disability law, decreasing the importance of finality and its effect on deterrence given the ever-changing nature of our understanding of intellectual disability, and unnecessarily pressing the states to re-evaluate defendants each time intellectual disability standards are changed."); *Payne v. State*, 493 S.W.3d 478, 490 (Tenn. 2016) (noting United States Supreme Court has not ruled that *Hall* is to be applied retroactively to cases on collateral review).

In conclusion, the lower court ruling rests on independent and adequate state law grounds. The underlying decision does not present this Court any constitutional controversy, much less one that warrants this Court's review. Accordingly, certiorari should be denied.

ISSUE II

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

It is Blanco's position that the application of partial retroactivity of the *Hurst* decisions to his case which was final on October 5, 1998 violates the Eighth Amendment and the Equal Protection Clause. Blanco maintains that the Florida Supreme Court's selection of the *Ring v. Arizona*, 536 U.S. 584 (2002) issuance,

June 24, 2002, for retroactivity of the *Hurst* decisions is arbitrary as it allows similarly situated capital defendants to be treated differently. He also asserts that *Hurst v. Florida* announced a substantive change necessitating full retroactivity which he claims is reinforced by the Supremacy Clause. In large part, he points to *Montgomery v. Louisiana*, 136 S.Ct. 718, 731-32 (2016), *Danforth v. Minnesota*, 552 U.S. 264 (2006), and *Welch v. United States*, 136 S.Ct. 1257 (2016) for support. However, that reliance is misplaced. As will be shown below, nothing about the process employed by the Florida Supreme Court in rejecting Blanco's *Hurst* claim is inconsistent with the Constitution. The Florida Supreme Court's decision rests on independent and adequate state ground and does not conflict with a decision of this Court, another federal circuit court, or state supreme court. Blanco has not provided a "compelling" reason for this Court to review his case on procedural or constitutional grounds. Certiorari should be denied.

A. The Florida Supreme Court's Decision on Retroactivity Is Based on Independent and Adequate State Law

The Florida Supreme Court's holding in *Hurst v. State* followed this Court's ruling in *Hurst v. Florida* in requiring aggravating circumstances be found by a jury beyond a reasonable doubt before a death sentence may be imposed. However, the Florida court 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, as a matter of state law, *Hurst v. State* is not retroactive to any case final prior to the June 24, 2002, decision in *Ring*. *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.

Again, this Court has held, 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 Florida defendants 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 this Court has no jurisdiction to review state court decision unless a federal question was raised and decided by the state court); *Street v. New York*, 394 U.S. 576, 581-82 (1969). If a state court's decision is based on separate state law, this Court "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 granting of certiorari. Respondent notes that this Court has denied certiorari repeatedly when petitioned 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).[5]

Blanco suggests the Florida Supreme Court's decision to make the *Hurst*

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[5] *See also, Johnston v. State*, 246 So.3d 266 (Fla.), *cert. denied*, 139 S.Ct. 481 (2018); *Grim v. State*, 244 So.3d 147 (Fla.), *cert. denied*, 139 S.Ct. 480 (2018); *Jones v. State*, 241 So.3d 65 (Fla.), *cert. denied*, 139 S.Ct. 641 (2018); *Willacy v. State*, 238 So.3d 100, 101 (Fla.), *cert. denied*, 139 S.Ct. 191 (2018); *Cole v. State*, 234 So.3d 644 (Fla. 2018), *cert. denied*, 138 S.Ct. 2657 (2018); *Philmore v. State*, 234 So.3d 567, 568 (Fla.), cert. denied, 139 S.Ct. 478 (2018); *Jones v. State*, 234 So.3d 545 (Fla.), *cert. denied*, 138 S.Ct. 2686 (2018); *Branch v. State*, 234 So.3d 548 (Fla.), *cert. denied*, 138 S.Ct. 1164 (2018); *Hannon v. State*, 228 So.3d 505 (Fla.), *cert. denied*, 138 S.Ct. 441 (2017).

decisions retroactive to *Ring* is arbitrary[6] and violative of the Eighth Amendment and Equal Protection. Again, the retroactivity decision is a matter of state law and as noted above includes a larger group of defendants than would have been included had *Hurst v. Florida* been the date for retroactivity, i.e., it includes capital defendants whose cases were final from June 24, 2002 to January 16, 2016. Moreover, this Court has not held *Hurst v. Florida* to be retroactive.

B. Blanco Has Not Shown Constitutional Infirmity Based on The Eighth Amendment or The Equal Protection Clause

There is no Eighth Amendment infirmity or violation of the Equal Protection Clause here, as new rules of law such as the rule announced in *Hurst v. Florida* usually do not 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, 489–90 (2000). This Court has held that "*Ring* announced a new *procedural rule* that does not apply retroactively to cases already final on direct

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[6] With retroactivity, there is usually a cutoff date to provide for finality in appellate processing. *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in capital context).

review." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (emphasis added). This case is an inappropriate vehicle for certiorari as *Hurst v. Florida* is merely an application or refinement of *Ring* and this Court already has held that *Ring* is not retroactive in *Schriro*. It would be an odd result indeed, if this Court were to hold that *Hurst* is retroactive, even though *Ring* was not.

Pointing to *McLaughlin v. Florida*, 379 U.S. 184 (2008), Blanco maintains that "partial retroactivity" is unconstitutional as there is no justifiable basis for creating the two classes of defendants, i.e., those who cases were final pre-*Ring* and those final post-*Ring*. (Pet. 29). Other than asserting his right against an arbitrary infliction of punishment and while noting there are various reasons, delay in briefing, difference in timing of the transmission of the record, or court vacation, Blanco does not cite a case holding that it is unconstitutional to treat defendants differently based on when a case becomes final. Likewise, he has offered nothing to establish that retroactivity must be binary only.

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* encompassing a larger group of defendants based on state law 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 or a violation of the Eighth Amendment or Equal Protection; it is

simply a fact inherent in the retroactivity analysis.

Blanco's argument for the finding of an equal protection violation arising from partial retroactivity is 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 retroactivity ruling was based on the date of the *Ring* decision, not based on a purposeful intent to deprive pre-*Ring* death sentenced defendants 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. Blanco has been treated the same as similarly situated capital defendants. Hence, his equal protection argument fails and certiorari should be denied.[7]

Although the Florida Supreme Court discussed the Eighth Amendment in *Hurst v. State*, it did not, nor could it, hold that Florida's capital sentencing violated the Eighth Amendment and required resentencing. In fact, the Florida Supreme

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[7] 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 again that 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).

Court rejected Eighth Amendment challenges to capital sentences after *Hurst v. State*. *See Lambrix*, 227 So.3d at 113 (rejecting arguments based on Eighth Amendment, due process, and equal protection following *Hurst v. Florida* and *Hurst v. State*). Furthermore, in *Spaziano*, this Court held the Eighth Amendment is not violated in a capital case when the ultimate responsibility of imposing death rests with the judge. *Spaziano v. Florida*, 468 U.S. 447, 463–64, (1984). In deciding *Hurst v. Florida*, this Court analyzed the case pursuant to Sixth Amendment grounds only. It did not address any Eighth Amendment matters. Consequently, *Hurst v. Florida* only overruled *Spaziano* to the extent *Spaziano* allows a sentencing judge to find an aggravating circumstance independent of a jury's fact-finding. This Court has never held that a unanimous jury recommendation is required under the Eighth Amendment.

While the Florida Supreme Court initially included the Eighth Amendment as a reason for warranting unanimous jury recommendations in its *Hurst v. State* decision, the Court did not, and cannot, overrule this Court's surviving *Spaziano* precedent. Further, Florida has a conformity clause in its constitution requiring state courts interpret Florida's prohibition on cruel and unusual punishment in conformity with the United States Supreme Court's Eighth Amendment jurisprudence. Art. I, § 17, Fla. Const.; *Henry v. State*, 134 So.3d 938, 947 (Fla. 2014) (noting courts bound by United States Supreme Court precedent regarding Eighth Amendment claims under Article I, section 17 of the Florida Constitution). Reliance on the Eighth Amendment discussion in *Hurst v. State* is misplaced and

does not support a claim for certiorari. There is no conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court.[8]

Hurst v. Florida, does not demand resentencing. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring) (explaining "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 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 requirement into the Constitution that is simply not there. The Constitution provides a right to trial by jury, not to sentencing by jury. It follows there is no bases for certiorari review as 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).[9]

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[8] 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 Department of Revenue*, 482 U.S. 182, 184, n. 3 (1987).

[9] A Florida trial court, while bound by the jury's findings of no aggravation and a recommendation of a life sentence, is not bound by a jury's recommendation of a death sentence. A judge is still free to reject the jury's death recommendation and impose a life sentence.

C. There Has Been No Violation of The Supremacy Clause Nor Is There an Underlying Sixth Amendment Error in This Case

Blanco's reliance upon *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) is misplaced. *Montgomery* addressed Louisiana's ruling 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, not procedural, because it placed a specific punishment beyond the State's power to impose. *See Schriro v. Summerlin*, 542 U.S. at 352 (defining substantive rule as a new rule placing "particular conduct or persons" "beyond the State's power to punish"). *Miller* categorically prevented the State from imposing a mandatory life sentence on a class of juveniles, thus it was a substantive rule, and applied retroactively regardless of when a qualifying defendant's conviction became final. *Montgomery*, 136 S.Ct. at 729.

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.").

Blanco 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 *Hurst v. Florida* 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 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," Blanco 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 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 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.

Hurst v. Florida does not require jury sentencing. Rather, it is a Sixth Amendment case which applied *Ring* to Florida's sentencing scheme, reiterating that a jury, not a judge, must find the existence of an aggravating factor to make a defendant eligible for the death penalty. *Hurst v. Florida*, 136 S.Ct. at 624. One of the aggravating circumstances in this case, i.e., during the course of a felony, rests squarely upon the jury's guilt phase finding of robbery. Additionally, the other aggravator rests on a different jury's unanimous verdict convicting Blanco of a prior armed robbery giving support to the prior violent felony aggravator. Consequently, unlike the situation in *Hurst*, Blanco's eligibility for the death penalty is supported by his jury's guilt phase verdict. *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.[10] In *Kansas v.*

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[10] Lower courts have almost uniformly rejected the notion that the weighing process is a "fact" that must be found by the jury in order to satisfy the Sixth Amendment. *See State v. Mason*, 153 Ohio St.3d 476, 483 (Ohio 2018) (noting "[n]early 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) (opining "[a]s 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.*, 711 Fed. Appx. 900, 923 (11th Cir. 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.*

Carr, 136 S.Ct. 633 (2016), decided eight days after this Court issued *Hurst v. Florida*, this Court emphasized:

> 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

As set forth above, Blanco's penalty phase jury heard extensive evidence as Blanco's breaking into the victim's home while armed, confronting the young female resident and then killing her uncle as he challenged Blanco's presence. As the Florida Supreme Court reiterated, Blanco shot John Ryan once and then another six times as he lay on top of his niece, Thalia. *Blanco v. State*, 706 So.2d 7, 8-9 (Fla. 1997); *Blanco v. State*, 452 So.2d 520 (Fla. 1984). Blanco's wallet and identification were found in the home by the police and Blanco was identified as the perpetrator by a neighbor and Thalia. *Id.* The aggravation, during the course of a felony/armed burglary inhered in the jury's guilt phase verdict and the reasonable sentencing jury would have found that aggravator. The large amount of evidence proving Blanco was the perpetrator of this instant murder established the aggravation of

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Gales, 658 N.W.2d 604, 628-29 (Neb. 2003) (stating "we 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").

during the course of a felony and his prior robbery conviction established the prior violent felony aggravator. *Blanco*, 706 So.2d at 8-9; *Blanco*, 452 So.2d at 520.[11] *See Apprendi*, 530 U.S. at 490; *Alleyne v. United States*, 570 U.S. 99, 111 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)). There was no underlying constitutional error in this case.

In sum, the questions Blanco 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. Blanco challenges only the application of this Court's well-established principles to the Florida Supreme Court's decision. As such, he has not demonstrated any compelling reasons for this Court to exercise its certiorari jurisdiction under Rule 10. This Court should deny the petition.

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[11] Even assuming for a moment that a constitutional error can be discerned in this case, any such error was harmless under these facts. *See Neder v. United States*, 527 U.S. 1, 18-19 (1999).

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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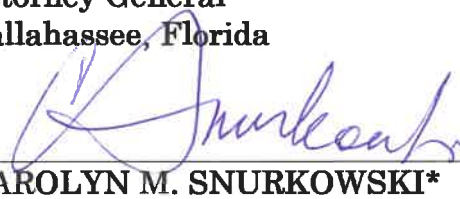

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