CASE NO. 18-7643

IN THE UNITED STATES SUPREME COURT

October 2018, Term

BILLY LEON KEARSE,

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 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; and (3) does not violate the Equal Protection or Due Process Clauses; 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)

II – Whether certiorari review should be denied because 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 not violative of the Supremacy Clause of the United States Constitution and the decision does not conflict with any decision of this Court or involve an important, unsettled question of law? (restated)

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Statutes

Rules

CITATION TO OPINION BELOW

The decision of which Petitioner seeks discretionary review is reported as *Kearse v. State*, 252 So.3d 693 (Fla. 2018).

JURISDICTION

Petitioner, Billy Leon Kearse ("Kearse"), 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[1]

This capital case is before this Court upon the Florida Supreme Court's affirmance of the denial of Kearse'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). There, the Florida Supreme Court determined that under state law those cases were not retroactive to cases final before June 24, 2002, the date *Ring v. Arizona*, 536 U.S. 584 (2002) issued, and thus, Kearse was not entitled to relief.

Kearse is incarcerated and sentenced of death based on a valid judgment of guilt entered November 8, 1991 and sentence of death entered on March 24, 1997. On February 5, 1991, he was indicted for the January 18, 1991 first-degree murder of police officer Danny Parrish and possession of a firearm by a convicted felon. The indictment was amended to include a robbery with firearm count. On October 21, 1991, the jury convicted Kearse of armed robbery and first-degree murder and he was sentenced to death. *Kearse v. State*, 662 So.2d 677, 680 (Fla. 1995).[2] The

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[1] References to the records will be: "1ROA" for the 1991 Direct Appeal; "2ROA-R" and "2ROA-T for the 1996 Resentencing Record and Transcript; "1PCR" for the Initial Postconviction record; "2PCR" for the Successive Postconviction Record; "3PCR" for the Second Successive Postconviction Record; "4PCR" for the 2017 (SC17-346) *Hurst* postconviction appeal; and "5PCR" for the second *Hurst* postconviction record (SC18-458) at issue here. Supplemental materials will be designated by the symbol "S" and where appropriate, the volume and page number(s) will be included.

[2] The Florida Supreme Court found:

> After [police officer Danny] Parrish observed Kearse driving in the wrong direction on a one-way street, he called in the vehicle license number and stopped the vehicle. Kearse was unable to produce a driver's license,

Florida Supreme Court affirmed the conviction, but, remanded for re-sentencing. *Id.*, at 685-86.

Following the new penalty phase and the jury's unanimous death recommendation, on March 25, 1997, Kearse was re-sentenced to death. The Florida Supreme Court affirmed.[3] This Court denied certiorari and on March 26, 2000, the

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> and instead gave Parrish several alias names that did not match any driver's license history. Parrish then ordered Kearse to exit the car and put his hands on top of the car. While Parrish was attempting to handcuff Kearse, a scuffle ensued, Kearse grabbed Parrish's weapon and fired fourteen shots. Thirteen of the shots struck Parrish, nine in his body and four in his bullet-proof vest. A taxi driver in the vicinity heard the shots, saw a dark blue vehicle occupied by a black male and female drive away from the scene, and called for assistance on the police officer's radio. Emergency personnel transported Parrish to the hospital where he died from the gunshot injuries.
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> ... Kearse was arrested at that address. After being informed of his rights and waiving them, Kearse confessed that he shot Parrish during a struggle that ensued after the traffic stop.

Kearse, 662 So.2d at 680.

[3] The Florida Supreme Court stated:

> The trial court found two aggravating circumstances: the murder was committed during a robbery; and the murder was committed to avoid arrest and hinder law enforcement and the victim was law enforcement officer engaged in performance of his official duties (merged into one factor). The court found age to be a statutory mitigating circumstance and gave it "some but not much weight." Of the forty possible nonstatutory mitigating factors urged by defense counsel, the court found the following to be established: Kearse exhibited acceptable behavior at trial; he had a difficult childhood and this

case became final. *Kearse v. Florida*, 121 S.Ct. 1411 (Mar. 26, 2000).

On October 3, 2001, Kearse sought state postconviction relief and following an evidentiary hearing, relief was denied and the Florida Supreme Court affirmed. *Kearse v. State*, 969 So.2d 976 (Fla. 2007). In the related state habeas case, Kearse raised a *Ring v. Arizona*, 536 U.S. 584 (2002) claim. The Florida Supreme Court rejected the issue opining, "First, *Ring* is not retroactive to Kearse's case. . . We also note that Kearse's resentencing jury returned a unanimous recommendation of death...." *Kearse*, 969 So.2d at 992. Subsequently, Kearse's successive postconviction motions challenging the lethal injection protocols and newly discovered evidence were denied and the Florida Supreme Court affirmed. *See Kearse v. State*, 11 So.3d 355 (Fla. 2009); *Kearse v. State*, 75 So.3d 1244 (Fla. 2011).

On or about July 16, 2009, Kearse filed his Petition for Writ of Habeas Corpus with the United States District Court for the Southern District of Florida. That petition was denied on September 1, 2015 and on September 29, 2015 Kearse moved to Alter or Amend the decision and to stay his federal proceedings in light of this Court granting certiorari in *Hurst v. Florida*. Kearse's motions were denied and presently his appeal to the United States Circuit Court of Appeals is pending.

On January 12, 2017, Kearse filed an over-large third successive postconviction motion raising *Hurst v. Florida*, 136 S.C.t 616 (2016). The trial court

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> resulted in psychological and emotional problems. The court determined that the mitigating circumstances, neither individually nor collectively, were "substantial or sufficient to outweigh the aggravating circumstances."

Kearse v. State, 770 So.2d 1119, 1122-23 (Fla. 2000).

denied the motion to exceed the page limitations and Kearse appealed. On May 9, 2017, the appeal (SC17-346) was dismissed for lack of jurisdiction and on November 29, 2017, Kearse returned to the trial court. (5PCR.1 26-82). After the Case Management Conference (5PCR 137-54), a summary denial of relief was entered. (5PCR 110-11). Kearse's rehearing (5PCR 112-22), was denied (5PCR 123-24) and he appealed. The Florida Supreme Court issued an Order to Show Cause why the denial of relief should not be affirmed in light of *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017). Upon consideration of the pleadings filed by the parties, the Florida Supreme Court held:

> After reviewing Kearse's response to the order to show cause, as well as the State's arguments in reply, we conclude that Kearse is not entitled to relief. Kearse was sentenced to death following a jury's unanimous recommendation for death. *Kearse v. State*, 770 So. 2d 1119, 1123 (Fla. 2000). His sentence of death became final in 2001. *Kearse v. Florida*, 532 U.S. 945 (2001). Thus, *Hurst* does not apply retroactively to Kearse's sentence of death. *See Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the denial of Kearse's motion.

Kearse v. State, 252 So. 3d 693, 694 (Fla. 2018). Kearse seeks review of that decision here.

REASONS FOR DENYING THE WRIT

ISSUE I

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

Kearse acknowledges his sentencing jury unanimously recommended the death penalty and that his sentence was final before June 24, 2002, the date *Ring v. Arizona*, 536 U.S. 584 (2002) issued and the date to which the Florida Supreme Court held *Hurst v. Florida* and *Hurst v. State* applied retroactively under State law. However, he asserts that he is entitled to certiorari because his sentence became final after *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and that the Florida Supreme Court's decision on retroactivity is arbitrary and violates the Eighth Amendment to the United States Constitution and the Equal Protection and Due Process Clauses. He maintains that the *Hurst* decisions should have been made retroactive to at least *Apprendi* as *Ring* did not address Florida's capital sentencing and in deciding *Hurst v. Florida*, this Court relied on *Apprendi*. As will be shown below, nothing about the process employed by the Florida Supreme Court in rejecting Kearse's *Hurst* claim is inconsistent with the Constitution. The Florida Supreme Court's decision is based on adequate and independent state grounds, is

not in conflict with any other state court of last review, and is not in conflict with any federal appellate court. Kearse does not provide any "compelling" reason for this Court to review his case on procedural or constitutional grounds. Certiorari review should be denied.

1. 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.

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).[4]

Kearse suggests the Florida Supreme Court's decision to make the *Hurst* decisions retroactive to *Ring* instead of *Apprendi* is arbitrary and violative of the Eighth Amendment, Equal Protection and Due Process. Again, the retroactivity decision is a matter of state law. Also, this Court has not held *Hurst v. Florida* to be retroactive. Kearse's argument in support of retroactivity back to *Apprendi* is not well taken. He offers that *Ring* was limited to reviewing Arizona's capital sentencing, and thus, *Ring* is an arbitrary date for retroactivity and violates the Eighth Amendment. He claims June 26, 2000, the date *Apprendi* issued should be the date for retroactivity, as this Court looked to *Apprendi* in discussing the Sixth Amendment requirement for jury fact finding when deciding *Hurst v. Florida* and

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[4] *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*, 18-6175, 2018 WL 4829029 (Dec. 10, 2018); *Willacy v. State*, 238 So. 3d 100, 101 (Fla. 2018), *cert. denied* 128 S.Ct. 1665 (2018); *Cole v. State*, 234 So. 3d 644 (Fla. 2018*), cert. denied*, No. 17-8540, 2018 WL 1876873, at *1 (U.S. June 18, 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. 2018), *cert. denied*, No. 17-8652, 2018 WL 1993786, at *1 (U.S. June 25, 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).

concluding Florida's capital sentencings was unconstitutional in part as it allowed a judge, sitting alone, to make findings necessary to impose the death penalty. Kearse's argument fails and does not support certiorari review.

First, *Apprendi* carved out capital sentencing from its application. In *Apprendi*, the Court left intact *Walton v. Arizona*, 497 U.S. 639 (1990), and distinguished it from non-capital cases. *Apprendi*, 530 U.S., at 497. Second, it was not until *Ring* that *Walton* was overruled, thus, there was no recognized constitutional infirmity of capital cases based on *Apprendi*. Third, neither *Apprendi* nor *Ring* were made retroactive as each was found to have been a procedural change in the law. Even under the Florida Supreme Court's reliance on *Witt* to assess retroactivity in *Asay* and *Mosley*, there was no basis to make the *Hurst* cases retroactive to *Apprendi*. Hence, the state law retroactivity decision to make *Ring* the date for retroactivity and not *Apprendi* does not violate the Eighth Amendment; it is not arbitrary under the state law analysis conducted in *Asay* and *Mosely*.[5] This Court should deny certiorari.

2. Kearse has not shown constitutional infirmity based on the Eighth Amendment, Equal Protection, or Due Process

There is no Eighth Amendment infirmity or violations of Equal Protection and Due Process 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

[5] 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).

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*. 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). 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), Kearse 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. 25). 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, Kearse 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* 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, Equal Protection or Due Process; it is simply a fact inherent in the retroactivity analysis.

Kearse's argument for the finding of a violation of the Equal Protection or Due Process Clauses 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 partial retroactivity ruling was based on the date of the *Ring* decision, not based on a purposeful intent to deprive post-*Apprendi*/pre-*Ring* death sentenced defendants in general, and Kearse 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. Kearse is being treated the same as similarly situated capital defendants. Hence, his due process and equal protection arguments fail 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 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).

It is also Kearse's position that the Florida Supreme Court could not rely on *Ring* as the retroactivity date as it was a Sixth Amendment case and *Hurst v. State* was based on the Eighth Amendment. (P at 21-24). Here again, Kearse's challenge fails. 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 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 maters. Consequently, *Hurst v. Florida* only overrules *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 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). Kearse's reliance on the Eighth Amendment discussed in *Hurst v. State* is misplaced and does not support his claim for certiorari.

Furthermore, Kearse's jury recommended death unanimously. Kearse claims that the jury was not required to identify the aggravation it found unanimously, thus, his sentence lacks the heightened reliability required by the Eighth Amendment. However, *Spaziano*, as noted above does not require this. Also, Kearse's suggestion that the Eighth Amendment requires "unanimity" and his reliance on *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) where it quotes

Gardner v. Florida, 430 U.S. 349 (1977) for this may be a typographical error.[6] In any case this Court has not so held.

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[6] In arguing that unanimity is required under the Eighth Amendment (P at 21-22), Kearse offers that in *Johnson*, Justice White cited *Gardner* for the proposition that "The fundamental respect for ***unanimity*** underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." (P at 22). However, in *Gardner v. Florida*, 430 U.S. 349, 363 (1977), this Court stated:

> In holding that the failure to conduct the sort of posttrial sentencing proceeding which Florida law requires, and which was conducted in this case, rendered North Carolina's mandatory death penalty statute unconstitutional, the plurality said:
>
> > '(W)e believe that in capital cases the fundamental respect for ***humanity*** underlying the Eighth Amendment, *see Trop v. Dulles*, 356 U.S. (86), at 100, 78 S.Ct. (590), at 597 (2 L.Ed.2d 630) (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Gardner, 430 U.S. at 363 (emphasis added). In *Johnson*, this Court provided:

> The fundamental respect for ***humanity*** underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special " 'need for reliability in the determination that death is the appropriate punishment'" in any capital case. *See Gardner v. Florida*, 430 U.S. 349, 363–364, 97 S.Ct. 1197, 1207–1208, 51 L.Ed.2d 393 (1977) (WHITE, J., concurring in judgment)(*quoting Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991–92, 49 L.Ed.2d 944 (1976)).

Johnson, 486 U.S. at 584–85. This Court was referencing "humanity" not unanimity.

Kearse's suggestion that the likelihood one or more jurors may have voted for life increases had the jury been told its decision must be unanimous and that the judge could not override a life recommendation (P at 22-23) had one juror refused to vote for death is not well taken in light of the discussion in *Mugnin v. State*, 689 So.2d 1026, 1030 (Fla. 1995) and *Hurst v. State* itself. There are two well settled principles regarding juries and their fact-finding role. First, jurors are obviously well equipped to analyze evidence and, therefore, it is assumed that if the evidence supports but one of two different theories, the jury would have found that which was supported by the evidence. *Cf. Mugnin*, 689 So.2d at 1030 (finding harmless error where jury instructed on both felony murder and premeditated murder and rendered general verdict of first degree murder where evidence clearly supported felony murder but not premeditation). The second principle which is relevant to a harmless error review, is what effect a "*Hurst* instruction on unanimity" would have had on a rational jury. According to the rationale outlined in *Hurst v. State*, a requirement of unanimity in capital sentencing, leads jurors to be more thorough, they take more time in deliberations, they are more likely to agree on issues, they work harder to evaluate the evidence and to reach a consensus; and they tend to be more "evidence driven." *Hurst v. State*, 202 So.3d at 58. Based on this data, a rational jury, instructed in conformity with *Hurst v. State*, would be a jury that would be more focused and motivated to follow the evidence and reach a *consensus*.

Here, it is clear Kearse's jury found a contemporaneous violent felony (robbery) and that the victim killed was a law enforcement officer based on the

conviction. It is not reasonable to assert that had the jury be instructed on the unanimity requirement that it would reject the guilt phase decision, reject the aggravation, and recommend life. Kearse's jury was instructed in accordance with the jury instruction in effect ***and recommended death unanimously***. The jury's unanimous recommendation completely undercuts Petitioner's basis for certiorari review.

Similarly, *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) does not form a basis for certiorari review here. In *Caldwell* 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)). In any case, there was no *Caldwell* error here. 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).[7] Kearse's jury was instructed properly on its role based on the state law existing at the time of his

[7] 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 was appropriate. "To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role 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")

trial. *See Reynolds v. State*, 251 So.3d 811, 818-28 (Fla. 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").[8]

Kearse 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.[9]

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[8] 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*, 251 So.3d 811 (Fla. 2018); *Johnson v. State*, 246 So. 3d 266 (Fla. 2018) (citing *Reynolds* in rejecting *Caldwell* claim), cert. denied, 139 S. Ct. 481 (2018),

[9] 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). 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).

Kearse'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 justify the imposition of the death penalty and, whether sufficient mitigating circumstances exist to outweigh any aggravation. The jury was instructed that if it found the aggravation did not justify the death penalty, its recommendation had to life imprisonment. Conversely, if sufficient aggravation were found, the jury had to determine whether the mitigation outweighed the aggravation. The jury was instructed properly based upon then existing law. (2ROA-T.29 2684-94). It is absurd to suggest the jury should have been instructed in accordance with a change in the law occurring 20 years later. The claim is speculative; there is nothing indicating the jury's responsibility was diminished. Certiorari should be denied.

To the extent Kearse speculates as to why the jury rendered the recommendation it did and posits the decision was insufficient to allow the trial judge to impose the death sentence, *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).[10] 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 local law." Romano, 512 U.S. at 9.

3. There is no underlying Sixth Amendment error in this case

Although not raised directly, *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 rests squarely upon the jury's guilt phase finding of robbery. Consequently, unlike the situation in *Hurst*, Kearse's eligibility for the death penalty is supported by the 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

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[10] 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.

conduct the weighing process to satisfy the Sixth Amendment.[11] In *Kansas 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.

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[11] 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, April 18, 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.*, 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) (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").

Carr, 136 S. Ct. at 642

As set forth above, Kearse's penalty phase jury heard extensive evidence as to his killing of Officer Parrish as he conducted a routine traffic stop of Kearse who had been driving the wrong way down a one-way street. Instead of complying with the Officer Parrish's requests, Kearse struggled with the officer as he was being handcuffed, stole the officer's gun, and killed him with it. Following his arrest at the address he gave Officer Parrish, Kearse confessed to having killed the officer during the struggle which ensued during the traffic stop. See, *Kearse*, 662 So.2d at 680. The aggravation, contemporaneous robbery and avoid arrest, inhered in the jury's guilt phase verdict and the sentencing jury recommended death unanimously. The fact that this case is one of the most aggravated and least mitigated is evident on the record facts and jury's unanimous recommendation of death. The large amount of evidence proving Kearse was the perpetrator also established the aggravation. *Kearse v. State*, 770 So.2d 1119, 1122-23 (Fla. 2000). *See Apprendi*, 530 U.S. at 490; *Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (2013) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). Furthermore, under the rational juror test for a harmless error analysis discussed in *Neder v. United States*, 527 U.S. 1, 18-19 (1999) and *Jenkins v. Hutton*, 137 S.Ct. 1769 (2017) no Sixth Amendment violation has been established and certiorari should be denied.

ISSUE II

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE 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 NOT VIOLATIVE OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION AND THE DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR INVOLVE AN IMPORTANT, UNSETTLED QUESTION OF LAW (restated)

Kearse asserts that the partial retroactivity of the Hurst decisions violates the Supremacy Clause of the United States Constitution as he maintains Hurst v. Florida announced a substantive rule of constitutional law requiring full retroactivity regardless of any state law analysis. In support, he points to *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016). However, that reliance is misplaced. Certiorari should be denied.

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 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 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.").

Kearse 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 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*.

Furthermore, as noted above, 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.[12] 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.[13] 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 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," Kearse 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

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[12] See Footnote 11.

[13] *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 uncontestable as they were found by the guilt phase jury, i.e., robbery and avoid arrest/hinder law enforcement/victim was law enforcement officer engaged in performance of his official duties (merged into one factor) and the penalty phase jury recommended death unanimously.

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

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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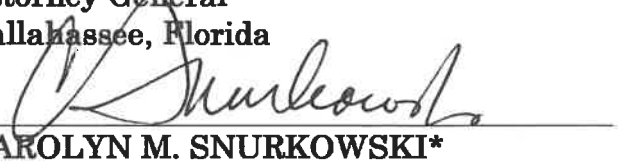

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