CASE NO. 24-5939

In the Supreme Court of the United States

JAMES HERARD

Petitioner,

v.

STATE OF FLORIDA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(Capital Case)

I Whether this Court should grant certiorari on an issue which requires an intensive factual analysis which is particular only to this petitioner, does not involve any unsettled issue of federal law, and the state resolution does not conflict with precedent of this Court, another state supreme court, or United States Court of Appeal?

II When Petitioner failed to raise a federal constitutional claim in either the state courts or in this petition, on an issue which was settled solely on state law, should certiorari be granted?

III Whether Petitioner has met the dictates of Supreme Court Rule 10 to obtain certiorari review of the Florida Supreme Court's opinion on the constitutionality of the state sentencing scheme where that decision does not conflict with precedent of this Court, another state supreme court, or United States Court of Appeal nor does it present an unsettled issue of law?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

CITATION TO OPINION BELOW

The decision of which Petitioner seeks discretionary review is reported as *Herard v. State*, 390 So. 3d 610 (Fla. 2024).

STATEMENT OF JURISDICTION

Petitioner, James Herard, is seeking jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution are at issue.

FACTS AND PROCEDURAL HISTORY

James Herard was indicted on March 4, 2009, on 21 gang-related felonies, including the first-degree murders of Eric Jean-Pierre and Kiem Huynh, as well as multiple robberies and shootings for a period stretching from June to December 2008. The jury found him guilty in 2014 of 18 counts, including the two murders. The jury found him not guilty of one charge and the prosecution dismissed another during the trial. After a penalty phase trial, the jury recommended death for one of the murders. The trial court sentenced Herard to death for the Jean-Pierre murder and to life without the possibility of parole for the Huynh murder.

Herard appealed and the Florida Supreme Court affirmed both the convictions and the sentences. It found the facts as follows:

> Herard was the second-in-command of the "BACC Street Crips," a Lauderhill-based branch of the national Crips gang. In the early morning hours of November 14, 2008, Herard and two fellow gang members drove the streets of Lauderhill in search of a victim for their ongoing body-count competition. They randomly came upon Eric Jean-Pierre, who had no gang affiliation and just happened to be walking home from a bus stop. As the gang members' car pulled up alongside Jean-Pierre, Herard's co-passenger Tharod Bell reached out from the vehicle with a 20-gauge shotgun. Herard told Bell to "bust it, bust it, bust it," prompting the latter to shoot Jean-Pierre in the chest at point-blank range. The blast blew away part of Jean-Pierre's heart and killed him almost instantly.
>
> That murder was one of many gang-related crimes that Herard and his associates committed between June and December 2008. Those crimes included Herard's murder of Kiem Huynh, which occurred during the robbery of a Dunkin' Donuts store in Tamarac. There were also robberies and shootings at Dunkin' Donuts stores in Plantation (where Herard had been an employee), Sunrise, and Delray Beach, along with shootings that targeted rival gang members in Lauderhill. On December 2, 2008, Herard and another gang member assaulted two people and stole their pit bull. Lauderhill detectives who witnessed the incident immediately arrested Herard, ending his crime spree.

Herard v. State, 390 So. 3d 610, 615 (Fla. 2024).

Central to the case were Herard's incriminating statements to law enforcement in a series of interrogations over a two-day period after his arrest for stealing a pit bull. For instance, Herard said that Tharod Bell would not have pulled the trigger on Jean-Pierre if Herard himself had not instigated the shooting by repeatedly telling Bell to "bust it." The State also linked Herard to the 20-gauge shotgun used in many of the shootings (including the two murders) and to a white Toyota Camry seen at many of the crime scenes. *Id.*

The defense strategy was to argue that Herard's statements to law enforcement were inconsistent (he initially denied having shot anyone), unreliable, and involuntary. Counsel emphasized that Herard was only 19 years old at the time of the police questioning. The defense highlighted that the police had never recovered the shotgun and lacked any physical or scientific evidence to implicate Herard. Herard himself did not testify at trial. *Id.*

After the jury found Herard guilty, the penalty phase occurred three weeks later, after which the same jury recommended a death sentence for the Jean-Pierre murder and life for the Huynh murder. The trial court then held a hearing pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), in September 2014 at which Herard himself testified. The trial court sentenced Herard to death on January 23, 2015.

Herard appealed, raising five issues.[1] The Florida Supreme Court affirmed. This petition followed.

REASONS FOR DENYING THE WRIT

ISSUE I

The Florida Supreme Court's opinion was in accordance with *Miranda* and does not conflict with any case from this Court or

[1] 1) The court erred for striking a potential juror without sufficient cause; 2) the court erred in not suppressing Herard's statements; the court erred for admitting allegedly irrelevant evidence; 4) the court erred in not allowing the defense to present expert testimony on coerced confessions; and 5) the death sentence was unconstitutional as it was based on a majority jury recommendation.

with any case from a federal circuit court of appeals, or state supreme court. (Restated)

Herard asserts that his statements to various police agencies should have been suppressed because he had invoked his right to counsel, he never reinitiated conversation with the police, and the State never established that any waiver was knowing and voluntary. Those contentions are soundly refuted by the record and the state courts properly denied the motion to suppress based on the law set forth by this Court's cases. Herard is asking this Court to engage in a detailed reevaluation of the intensive fact specific record which is of no interest to any other case but his. The Florida Supreme Court's affirmance of the denial does not conflict with any case from this Court or with any case from a federal circuit court of appeals, or state supreme court. Herard has not raised an important and unsettled question of federal law and has failed to present a compelling reason for this Court to review his case. Certiorari should be denied.

Miranda v. Arizona, 384 U.S. 436, 444, (1966) requires the police to specifically inform a defendant in custody of his rights to counsel and silence before the defendant's statement can be admitted into evidence. A suspect's waiver of *Miranda* rights is valid only if it is "made voluntarily, knowingly[,] and intelligently." *Miranda*, 384 U.S. at 444. There are two essential elements of a valid waiver:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal[s] both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421, (1986) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725, (1979)). "The 'totality of the circumstances' to be considered in determining whether a waiver of *Miranda* warnings is valid based on [this] two-pronged approach . . .[and] may include factors that are also considered in determining whether the confession itself is voluntary." *Ramirez v. State*, 739 So. 2d 568, 575 (Fla. 1999).

In affirming the trial court's denial of the motion to suppress, the Florida Supreme Court found that the Lauderhill detectives honored Herard's request for an attorney and only asked questions to clarify his desire to speak to them after he reinitiated the conversation. They then had him sign the *Miranda* waiver they had previously read to him. The detective then asked a couple of follow-up questions to clarify Herard's wishes before giving him the form to sign. The court found that the other involved detectives gave Herard the *Miranda* warnings which he waived and they fed him, gave him time to sleep and rest, and gave him bathroom breaks. Herard was not threatened or coerced into giving his statements. In the final

interview which occurred after he had been arraigned on the Lauderhill robbery where counsel filed a written invocation of counsel on that specific case, Herard again waived his *Miranda* rights. The Florida Supreme Court properly cited *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009), to find that the invocation of the Sixth Amendment right to counsel was case specific. *Herard*, 390 So. 3d at 619-621. Those findings are supported by the record.

In order to find that a confession is involuntary within the meaning of the Fourth Amendment, there must first be a finding that there was coercive police conduct. The test for determining whether there was police coercion is resolved by reviewing the totality of the circumstances under which the confession was obtained. The State need prove a waiver of *Miranda* rights only by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 168 (1986). While a court's analysis of the waiver issue begins with a presumption that "a defendant did not waive his rights," *North Carolina v. Butler*, 441 U.S. 369, 373 (1979), "litigation over voluntariness tends to end with the finding of a valid waiver," *Missouri v. Seibert*, 542 U.S. 600, 609 (2004). "[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984). "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually

strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver." *Butler*, 441 U.S. at 373.

A suspect's request to cut off questioning until counsel can be obtained must be "scrupulously honored" by the police. *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). The Florida Supreme Court has stated:

> Once a suspect has requested the help of a lawyer, no state agent can reinitiate interrogation on any offense throughout the period of custody unless the lawyer is present, although the suspect is free to volunteer a statement to police on his or her own initiative at any time on any subject in the absence of counsel.

Traylor v. State, 596 So. 2d 592, 966 (Fla. 1992) (footnote omitted).

The trial court held an evidentiary hearing on the motion to suppress on November 20, 2013. In addition to the three detectives who testified, the State admitted into evidence the waiver forms completed by Herard for the various police agencies as well as the DVDs of his recorded statements. Herard filled out a waiver of his *Miranda* rights when interviewed at the Lauderhill Police Department. (ROA 58:1582) The interview was videotaped and admitted into evidence at the suppression hearing. (ROA 5:815) On that video, Herard initially refused to sign the waiver. However, when the detectives were readying to leave, thereby "scrupulously honor[ing]" his desire not to speak with them, he stopped them. Shortly thereafter, he said he wanted to talk and would sign the waiver form, which he did. (Ex. 3 & 4) The detective then asked if he wanted to talk and he said yes. Herard clearly re-

initiated the interview. Under this Court's case law, this situation did not violate *Miranda*.

A defendant is free to initiate contact with the police to give a statement after he has invoked his rights. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). However, even when an accused has invoked the right to silence or right to counsel, if the accused initiates further conversation, is reminded of his rights, and knowingly and voluntarily waives those rights, any incriminating statements made during this conversation may be properly admitted. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1045–46 (1983). The defendant in *Bradshaw* invoked his rights and requested an attorney. The interview ceased. Later, Bradshaw asked an officer what was going to happen to him. The officer reminded him that he did not have to speak to him, after which a conversation ensued in which the officer again reminded him of his rights but Bradshaw admitted the crime. *Bradshaw*, 462 U.S. at 1042. Here, Herard did not want to wait for an attorney to arrive; he wanted to talk. The detective made sure Herard wanted to talk, reminding him of his rights by implying that he did not have to do so. He said he did and then proceeded to sign the waiver form. Under the totality of the circumstances, the trial court's determination that Herard himself re-initiated the discussion comported with both the facts and the law.

Detectives from Broward Sheriff's Office and Sunrise Police Department interviewed Herard in the Public Safety building and video taped the entire time he was in the interview room whether or not an interview was occurring. Herard completed waiver forms for each of those agencies. (ROA 58:1570-71) The DVDs of the interview were before the trial court and provided competent, substantial evidence to support its findings underlying its determination that the statements were voluntary and that there was no coercion or abuse by the police. The record shows no coercive police conduct nor does it show any promises designed to elicit a statement. See *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (holding that where interrogating officer had falsely told defendant that his cousin-who had been in defendant's company on night of alleged crime-had confessed to crime, police misrepresentation of facts "while relevant" was "insufficient ... to make [an] otherwise voluntary confession inadmissible").

Detective Visners from the Sunrise Police Department was the last to interview Herard. The detective fully *Mirandized* Herard and had him sign the waiver form. (ROA 58:1571, 9:1472-73) Visners testified that Herard understood his rights, asked no questions, did not want the conversation recorded, and was quite animated throughout the interview. (ROA 9:1473-75) Again, the record clearly shows that Herard's sstatement and waiver were knowing and voluntary.

Herard also argues that since he invoked his right to counsel by filing a form invocation at his first appearance for the robbery of the dog in Lauderhill, that invocation made the statement he gave Det. Visners inadmissible. Herard is mistaken since the right to both counsel and silence are charge/crime specific and Herard agreed to speak with Visners. (ROA 9;1472-73) *Michigan v. Mosley*, 423 U.S. 96, 103-05 (1975); *McNeil v. Wisconsin*, 501 U.S. 171, 175-82 (1991) (The assertion of the Sixth Amendment right to counsel, which is case specific, does not imply an assertion of the *Miranda* "Fifth Amendment" right was invoked.).

The ruling below does not conflict with a decision of this Court or a federal circuit court or another state supreme court. Likewise, it does not address an important or unsettled question of federal law. See Rule 10, Rules of the Supreme Court of the United States. 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).

In conclusion, competent, substantial evidence supported the state courts' factual findings that Herard's statements were uncoerced and were freely and voluntarily given. Those courts properly applied *Miranda* and its progeny in the legal analysis, taking in the totality of the circumstances around the statements. This Court should deny certiorari.

ISSUE II

Certiorari should be denied where Petitioner failed to raise a federal constitutional claim below and the Florida Supreme Court resolved the evidentiary issue based on state law, a decision which does not conflict with a case from this court or any other federal circuit or state supreme court. (Restated)

Herard argues that the trial court's refusal to allow him to present evidence on false confessions based on the Reid[2] interviewing technique was reversible error. This issue is without merit since the state courts properly applied the relevant state law for the admission of expert testimony. Importantly, he does not identify the federal question at issue or the constitutional amendment that allegedly was violated. Herard offers no reason for certiorari review as set out in Rule 10. Not only were these constitutional claims not presented below, but the Florida Supreme

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[2] The Reid technique is an interrogation method involving nine steps which includes: confronting the defendant with the evidence; overcoming defendant's

Court's resolution of the admission of evidence issue rested on state law. Furthermore, that resolution does not conflict with a case from this Court, a federal circuit court, or other state supreme court, nor does it raise an important, unsettled question of federal law. Certiorari should be denied.

The question Petitioner offers for review has two related but independent reasons for denial of the writ. First, the federal question was not fairly presented below and ruled on by the Florida Supreme Court. Second, the issue Petitioner raises here is a state court evidentiary question decided based on state law, not federal constitutional law. Finally, the claim presents no significant or unsettled question of constitutional law.

Herard below complained that under Daubert *v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), his expert's testimony on confession techniques should have been admitted at trial. He did not allege the ruling deprived him of due process under the Fourteenth Amendment. *See generally Duncan v. Henry*, 513 U.S. 364, 366 (1995) ("Respondent did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment."). An inadequately presented constitutional claim in state court does not merit certiorari review.

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objections; and minimizing defendant's culpability.

The underlying state court ruling on the admissibility of expert testimony rests upon and was decided on state law. Where no federal question is presented, certiorari review is inappropriate. *See Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982); *Zucht v. King*, 260 U.S. 174 (1922). Herard's argument that he was prejudiced when the trial court prohibited his expert from testifying was based on a state evidentiary rule. Under Florida law, admission of evidence is within the court's discretion and its ruling will be affirmed unless there has been an abuse of discretion. *Williams v. State*, 967 So. 2d 735, 748 (Fla. 2007). "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." *White v. State*, 817 So. 2d 799, 806 (Fla. 2002). The admission of expert testimony is governed by section 90.702, Florida Statutes (2014). The proposed testimony must be "the product of reliable principles and methods," and it must be the case that "[t]he witness has applied the principles and methods reliably to the facts of the case." § 90.702(2)(3), Fla. Stat. The Florida Supreme Court determined that Herard's expert "was not prepared reliably to address the specifics of Herard's case, including whether law enforcement used adequate safeguards in its questioning." *Herard*, 390 So. 3d at 621–22. It further found that the expert's "proposed testimony about the purported link between the Reid Technique and false confessions was equivocal and

potentially confusing to the jury." *Id.* Therefore, it found that the trial court did not abuse its discretion in excluding the testimony. *Id.*

The Florida Supreme Court's ruling on the admissibility of Herard's proposed expert testimony was resolved under Florida law. What was presented below was a routine state evidentiary question. Further, the Florida Supreme Court's opinion is not in conflict with a decision of this Court, nor does it provide a basis for review under Rule 10. Consequently, this Court should deny certiorari.

ISSUE III

Certiorari review should be denied because Florida's capital sentencing does not violate the Eighth or Sixth Amendments as it narrows the class of defendants eligible for the death penalty. The Florida Supreme Court's opinion does not conflict with any decision of this Court, a federal circuit court, or state supreme court. (Restated)

In his final issue, Herard claims that the imposition of his death sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and should be stricken. He argues that the sentencing scheme in Florida at the time of his trial was unconstitutional under *Hurst v. Florida*, 577 U.S. 92 (2016), so that the only remedy for that error is a life sentence or a new penalty phase trial. Herard argues that *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), set out the correct standards that should be used in death penalty cases and, notwithstanding the Florida Supreme Court's decision in *State v. Poole*, 297 So. 3d

487 (Fla. 2020), the standards set out in *Hurst v. State* are the ones that must be used in a new penalty phase trial. Herard goes on to argue that the Florida death penalty sentencing structure violates the Eighth Amendment because the jury does not actually determine the sentence, and its role is too truncated to withstand Constitutional scrutiny. Lastly, he challenges the constitutionality of Florida's aggravators, saying that they fail to sufficiently narrow the class of individuals subject to the death penalty. Florida's capital sentencing scheme has been found constitutional, and the instant decision of the Florida Supreme Court does not conflict with a case from this Court or with a case from a federal circuit court of appeals or state supreme court. Also, Herard has not raised an important and unsettled question of federal law. Herard has failed to present a "compelling" reason for this Court to review his case. Certiorari should be denied.

In sentencing Herard to death, the trial court found three aggravators of: (1) defendant was previously convicted of another capital felony involving the use or threat of violence to the person under section 921.141(5)(b); (2) CCP under section 921.141(5)(I); and (3) defendant is a criminal gang member under section 921.141(5)(n). (ROA 1281-86). The Florida Supreme Court declined to recede from *Poole* but found that there is no violation of the Sixth Amendment since the jury unanimously found Herard guilty of multiple prior violent felonies. It further

reiterated that the Florida law adequately narrows the class of defendants subject to the death penalty. *Herard*, 390 So. 3d at 622-23.

Sixth Amendment

It is Herard's position that his sentence is unconstitutional as he was sentenced under a statute which was declared unconstitutional in *Hurst v. Florida*, and that decision should dictate either a new penalty phase or a life sentence. As noted earlier, the Florida Supreme Court receded from *Hurst v. State* in line with the direction given from this Court in *Hurst v. Florida*.

This Court has never held that the sufficiency of the aggravating factors, the weighing of the aggravating factors and mitigating circumstances, or the jury recommendation are elements that must be proven unanimously beyond a reasonable doubt under the Sixth Amendment before a trial court may impose the death penalty on a criminal defendant. In fact, this Court has expressly rejected such contentions. *McKinney v. Arizona*, 140 S. Ct. 702, 707-08 (2020) ("Under *Ring* [*v. Arizona*, 536 U.S. 584 (2002),] and *Hurst* [*v. Florida*], a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.").

Accordingly, Herard's entire argument is predicated on an erroneous interpretation of the Sixth Amendment's requirements. The Sixth Amendment only requires that the *facts* which make a criminal defendant eligible for the death penalty be found beyond a reasonable doubt. Neither the sufficiency of the aggravating factors, nor the weighing of the aggravating factors and mitigating circumstances are facts, as explained by this Court in *McKinney v. Arizona*, 589 U.S. 139, 143-44 (2020).

Florida's current death penalty statute sets out specific steps the jury must take before recommending a death sentence for a criminal defendant. If the jury:

> 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:
>
> a. Whether sufficient aggravating factors exist.
>
> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
>
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

§ 921.141(2)(b), Fla. Stat. (2020).

The statute's requirements thus differ from the Sixth Amendment's

requirements because the statute requires the jury to make non-factual selection findings before recommending a death sentence. The statute's text reflects this as it identifies the unanimous finding of at least one aggravating factor as the eligibility requirement for the imposition of the death penalty. Put another way, the statute identifies the existence of an aggravating factor as a fact that must be unanimously found by the jury before the death penalty may be imposed. The additional statutory requirements, sufficiency and weighing, are selection findings that pertain to the jury recommendation, not the Sixth Amendment.

In this case, Herard was convicted of multiple contemporaneous felonies by his guilt phase jury. Like *Poole*, Herard's convictions rendered him death eligible and his sentence constitutional under the proper understanding of *Hurst v. Florida*. *See also McKinney*. This Court should deny certiorari.

Eighth Amendment

Herard next takes issue with the jury's role in the penalty phase and sentencing, hinting that the Constitution requires the jury to sentence a defendant rather than render a recommendation. Certiorari should be denied as Florida's statute does not run afoul of the Eighth Amendment. The ruling below does not conflict with a decision of this Court or a federal circuit court or another state supreme court.

This Court has reviewed Florida's capital sentencing under Eighth

Amendment challenges and has found section 921.141 constitutional as it requires the sentencer to weigh aggravating and mitigating factors against each other and to focus on the "circumstances of the crime and the character of the individual defendant." *Proffitt v. Florida*, 428 U.S. 242, 251-52 (1976). *See also, Spaziano v. Florida*, 468 U.S. 447, 463 (1984), overruled on other grounds by *Hurst v. Florida*, 577 U.S. 92 (2016) (finding Florida's capital sentencing unconstitutional under Sixth Amendment challenge). Moreover, a capital sentence remains constitutional despite imperfections in the criminal justice system. *Kansas v. Marsh*, 548 U.S. 163, 181 (2006). Jury sentencing is not required. *Proffitt*, 428 U.S. at 252 (1976) (noting that while jury sentencing can perform an important function in a capital case, the Court has "never suggested that jury sentencing is constitutionally required."). Certiorari should be denied.

Adequate narrowing of class of death eligible defendants.

Finally, Herard argues that Florida's scheme fails to genuinely narrow the category of cases subject to the death penalty. Herard presses that his death sentence is unconstitutional as there are sixteen[3] aggravators listed in the statute when eight had been identified in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972). Contrary to his position, the constitutionality of Florida's capital sentencing

[3] The statute under which Herard was sentenced contained only fifteen aggravators, a through o in section 921.141(5), Fla. Stat. (2008).

has been upheld against claims of failure to properly narrow the class of defendants eligible for the death penalty. Similarly, two of the aggravators which were applied to Herard have been upheld as constitutional and the third, "gang member,"[4] was not challenged below and is constitutional by its very terms. An aggravating factor must afford "a meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1994) (quoting *Furman v. Georgia*, 408 U.S. 238 at 313 (1972). Focusing on the decision of death eligibility, this Court held that "To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994).

A capital sentencing scheme passes constitutional muster if it rationally narrows the class of death-eligible defendants and permits the sentencer to consider any mitigating evidence relevant to its determination. In *Zant v. Stephens*, 462 U.S. 862, 877 (1983), the Court opined that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must

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[4] As noted above, Herard failed to challenge the constitutionality of this aggravator below. In his sentencing memo he merely asserted the weight of this aggravator, if found, should be reduced as the evidence supporting it came from "unreliable sources" including his own confession. This particular aggravator is thus not before

reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."

As noted above, the jury and trial court found the aggravators applicable: (1) previously convicted of another capital felony or a felony involving the use or threat of violence; (2) murder was committed in a cold, calculated, and premeditated manner; and (3) the murder was committed by a criminal gang member. Two of these are longstanding aggravating factors as explained below and there can be no dispute that they narrow the class of defendants eligible for the death penalty.

Since 1973, section 921.141 contained the aggravators of defendant previously convicted of another capital felony or of a felony involving the use or threat of violence. See section 191.141(5). Fla. Stat. (1973). In 1979, the cold, calculated and premeditated ("CCP") aggravator was added to the statute. See section 921.141, Fla. Stat. (1979). Each of the aggravators focuses on the defendant's criminal history and manner in committing the crime or the particular vulnerability and/or suffering of the victim. These aggravating factors differentiate the death eligible murders from other killings and narrow the class of defendants subject to the death penalty.

The prior violent felony aggravator is a long-standing sentencing factor addressed to the defendant's criminal history and recognized as narrowing the

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this Court.

class. Such aggravators distinguish recidivist and violent defendants eligible for capital sentencing from those who have committed petty non-violent crimes prior to the capital murder. Herard has not explained how the application of these aggravators render Florida's death penalty unconstitutional.

For CCP, the State must establish beyond a reasonable doubt that:

> (1) the killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); and (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and (3) the defendant must have exhibited heightened premeditation (premeditated); and (4) there must have been no pretense of moral or legal justification.

Lynch v. State, 841 So. 2d 362, 371 (Fla. 2003). The current CCP instruction does not run afoul of the dictates in *Espinosa v. Florida*, 505 U.S. 1079 (1992). These factors circumscribe the aggravator and narrows the class of premeditated murder defendants eligible for death.

Under Florida law, these factors must be proven beyond a reasonable doubt and be found by both the jury and trial court before a death sentence may be imposed. These are limiting sentencing factors and are specific to the defendant, such as his prior violent criminal history, specific to the manner the crime was committed, such as CCP. The fact that other aggravators have been added to section 921.141 since 1972 does not render the statute unconstitutional overall or as applied to Herard. Those other aggravators too, narrow the eligible class of

defendants.

Under this Court's jurisprudence, as long as the state capital sentencing system: "(1) rationally narrow[s] the class of death-eligible defendants; and (2) permit[s] a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime, the state meets constitutional muster by narrowing the class. A State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed." *Kansas v. Marsh*, 548 U.S. at 174. Here, Herard received individualized sentencing based on a constitutional statute. Certiorari must be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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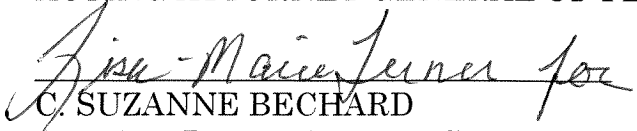

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