DOCKET NO. 17-8540

IN THE SUPREME COURT OF THE UNITED STATES

LORAN KENTSLEY COLE,

***Petitioner*,**

vs.

STATE OF FLORIDA,

***Respondent*.**

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

PAMELA JO BONDI
ATTORNEY GENERAL

SCOTT A. BROWNE*
Senior Assistant Attorney General
Florida Bar No. 0802743
***Counsel of Record**

C. SUZANNE BECHARD
Assistant Attorney General
Florida Bar No. 0147745

Office of the Attorney General
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com
scott.browne@myfloridalegal.com
carlasuzanne.bechard@myfloridalegal.com

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

Whether certiorari review should be denied because (1) the state court afforded Cole a constitutionally adequate opportunity to show why unfavorable binding precedent was not applicable to his case; (2) the Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florida* and *Hurst v. State*, which relies on state law to provide that the *Hurst* cases are not retroactive to defendants whose death sentences were final when this Court decided *Ring v. Arizona*, does not violate Equal Protection or the Eighth Amendment; (3) Cole's death sentence comports with *Caldwell v. Mississippi*; and (4) the Florida Supreme Court's decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law?

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The decision of the Florida Supreme Court is reported at *Cole v. State*, 234 So. 3d 644 (Fla. 2018).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on January 23, 2018. (Pet. App. B). Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257(a). Respondent agrees that the statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

Loran Cole was convicted of the 1994 murder of college student John Edwards in the Ocala National Forest. *Cole v. State*, 701 So. 2d 845, 848 (Fla. 1997). Evidence at trial established that after initially befriending them, Cole and William Paul accosted Edwards and his sister Pam as the siblings were camping in the forest. Cole forced Pam to have sexual intercourse with him by threatening harm to her and John unless she cooperated. Unbeknownst to Pam, John had already been murdered. He died from a slashed throat and blows to the head which fractured his skull. Thereafter, Cole and Paul stole the Edwards' camping gear and John's car and left Pam gagged and tied to two trees. *Id.* at 848-49.

Pam was able to free herself by the next morning, but, still believing John was alive, she did not move for fear that Cole would return and harm John if she was gone. She stayed in the same spot until daylight and then tried, unsuccessfully, to find John. Finally, she flagged down a passing motorist who took her to call police. The police returned with Pam to the scene, and John's body was located "face down and . . . covered with pine needles, sand, debris, and small, freshly cut palm fronds." *Id.* "Both of his hands were in an upward fetal position; there was a shoestring ligature around his left wrist and a shoestring

partially wrapped around his right wrist." *Id.* at 849.

Police arrested Cole and Paul a few days later and both men were indicted on charges of first-degree murder, two counts of kidnapping with a weapon, and two counts of robbery with a weapon. Cole was also indicted on two counts of sexual battery. Paul avoided a potential death sentence with a plea of *nolo contendere*. Cole opted for a jury trial and was found guilty on all counts. Following a penalty phase hearing, the jury unanimously recommended that he receive a death sentence. The trial court followed the jury's recommendation and sentenced Cole to death, finding four aggravating circumstances: (1) Cole had previously been convicted of another felony; (2) the murder was committed during the course of a kidnapping; (3) the murder was committed for pecuniary gain; and (4) the murder was heinous, atrocious, or cruel. *Id.* at 849 n.1. The court found no statutory mitigating circumstances, and two nonstatutory mitigating circumstances: (1) Cole suffered from organic brain damage and mental illness (accorded slight to moderate weight); and (2) Cole suffered an abused and deprived childhood (given slight weight). *Id.* The Florida Supreme Court affirmed Cole's convictions and sentences. *Id.* at 856. His case became final when this Court denied certiorari review on March 30, 1998. *Cole v. Florida*, 523 U.S. 1051 (1998).

Cole continued to seek relief from his convictions and sentences through various rounds of postconviction litigation. *See Cole v. State*, 841 So. 2d 409 (Fla. 2003) (affirming denial of Cole's initial postconviction motion); *Cole v. State*, 985 So. 2d 398 (Fla. 2004) (rejecting claim to entitlement to postconviction DNA testing); *Cole v. Crosby*, 2006 WL 1169536 (M.D. Fla. May 3, 2006) (dismissing Cole's federal habeas petition as untimely and alternatively finding that his claims lacked merit); *Cole v. State*, 83 So. 3d 706 (Fla. 2012) (affirming denial of successive motion for postconviction relief); *Cole v. State*, 131 So. 3d 787 (Fla. 2013) (affirming summary denial of second successive postconviction motion).

On January 9, 2017, Cole filed a third successive postconviction motion in which he sought relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), as interpreted in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). After the postconviction court denied relief (Pet. App. A), the Florida Supreme Court stayed Cole's appeal pending the outcome of *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017).

In *Hitchcock*, the Florida Supreme Court reaffirmed its previous holding in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), ruling that *Hurst v. Florida*

as interpreted by *Hurst v. State* is not retroactive to defendants whose death sentences were final when this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). After the court decided *Hitchcock*, it issued an order to show cause directing Cole to show why *Hitchcock* should not be dispositive in his case. (Pet. App. B). The court limited Cole's response to 20 pages, permitted the State to file a 15-page reply, and gave Cole an opportunity to file a 10-page reply to the State's reply. The Florida Supreme Court ultimately affirmed the lower court's denial of relief, finding:

> After reviewing Cole's response to the order to show cause, as well as the State's arguments in reply, we conclude that Cole is not entitled to relief. Cole was sentenced to death following a jury's unanimous recommendation for death. *Cole v. State*, 701 So. 2d 845, 849 (Fla. 1997). Cole's sentence of death became final in 1998. *Cole v. Florida*, 523 U.S. 1051, 118 S. Ct. 1370, 140 L.Ed.2d 519 (1998). Thus, *Hurst* does not apply retroactively to Cole's sentence of death. *See Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the denial of Cole's motion.

(Pet. App. B).

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

REASONS FOR DENYING THE WRIT

Certiorari review should be denied because (1) the state court afforded Cole a constitutionally adequate opportunity to show why unfavorable binding precedent was not applicable to his case; (2) the Florida Supreme Court's ruling on the retroactivity of *Hurst v. Florida* and *Hurst v. State*, which relies on state law to provide that the *Hurst* cases are not retroactive to defendants whose death sentences were final when this Court decided *Ring v. Arizona*, does not violate Equal Protection or the Eighth Amendment; (3) Cole's death sentence comports with *Caldwell v. Mississippi*; and (4) the Florida Supreme Court's decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law.

Cole requests this Court review the Florida Supreme Court's opinion affirming the denial of his third successive postconviction motion, arguing that the lower court's briefing procedure and its ruling on the retroactivity of *Hurst v. Florida* as interpreted by *Hurst v. State* violate due process and equal protection. Specifically, Cole complains that the court's issuance of a show-cause order directing Cole to address why *Hitchcock* did not foreclose relief and limiting the lengths of the parties' briefs infringed upon Cole's "constitutional rights to Due Process and Equal Protection in enforcement of the law." (Pet. at 9). Cole also contends that the court's holding with respect to retroactivity violates equal protection and the Eighth Amendment because Florida's interpretation of *Hurst v. Florida* renders that opinion a substantive rule which must be

applied retroactively to Cole. Finally, Cole urges that the sentencing procedure used in his case violates the Eighth Amendment and this Court's ruling in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), because the jury was given instructions that informed the jury its death recommendation was merely advisory.

As will be shown, nothing about the process employed by the Florida Supreme Court was inconsistent with the Constitution. Cole does not provide any "compelling" reason for this Court to review his case. U.S. Sup. Ct. R. 10. Indeed, Cole cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision in *Cole v. State*, 234 So. 3d 644 (Fla. 2018), in which the court determined that Cole was not entitled to relief under *Hurst v. State* because (1) he was sentenced to death following a jury's unanimous recommendation for death and therefore any *Hurst* error would be harmless, and (2) *Hurst* was not retroactive to his death sentence which became final in 1998. The petition for writ of certiorari should be denied.

I. The Florida Supreme Court's Briefing Order in This Postconviction Case Was a Matter of State Court Procedure That Does Not Implicate, Much Less Violate Due Process or Equal Protection.

Because binding precedent would foreclose any relief on the

merits of his case, Cole focuses his efforts on complaining about the procedure the Florida Supreme Court used to reach its decision. Cole bemoans the fact that the court issued a show cause order directing him to explain why *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), was not dispositive in his case and imposing page limits on briefing. The Florida Supreme Court's determination of appropriate page limits for a successive postconviction appeal is, however, solely a matter of state court procedural law. Consequently, this determination concerns only state law and is outside the scope of this Court's certiorari jurisdiction. *See, e.g.*, *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1936) (noting that "whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern" and that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state"); *Patterson v. New York*, 432 U.S. 197, 201 (1977) (observing that "it is normally within the power of the State to regulate procedures under which its laws are carried out") (internal quotes and string citation omitted). Accordingly, the constitutional pretensions of Cole's claim before this Court are limited or non-existent. As such, certiorari review should be denied.

Cole's appeal to due process and equal protection to invalidate the state court procedure is unavailing. Cole cannot show that the Florida court's longstanding "tag" procedure violates due process or equal protection. Here, the Florida Supreme Court stayed proceedings in Cole's case (and numerous other cases) pending resolution of identical issues that were pending in *Hitchcock*. Ultimately, the court in *Hitchcock* ruled:

> We have consistently applied our decision in *Asay[v. State*, 210 So. 3d 1 (Fla. 2016)], denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002). *See, e.g., Zack v. State*, ___ So. 3d ___, 42 Fla. L. Weekly S656, 2017 WL 2590703 (Fla. June 15, 2017); *Marshall v. Jones*, 226 So. 3d 211, 2017 WL 1739246 (Fla. May 4, 2017); *Lambrix v. State*, 217 So. 3d 977 (Fla. 2017); *Willacy v. Jones*, No. SC16-497, 2017 WL 1033679 (Fla. Mar. 17, 2017); *Bogle v. State*, 213 So. 3d 833 (Fla. 2017); *Gaskin v. State*, 218 So. 3d 399 (Fla. 2017). Hitchcock is among those defendants whose death sentences were final before *Ring*, and his arguments do not compel departing from our precedent.
>
> Although Hitchcock references various constitutional provisions as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*. As such, these arguments were rejected when we decided *Asay*.

Hitchcock, 226 So. 3d at 217.

After the court decided *Hitchcock*, it issued an order to show cause giving Cole an opportunity to explain why *Hitchcock*

should not be dispositive in this case and imposing page limits on the parties' briefs.

There is no constitutional infirmity involved in this procedure and, therefore, no basis for the exercise of this Court's certiorari jurisdiction. In fact, this Court employs a similar procedure when dealing with numerous cases involving the same issue. It decides the lead case, and then vacates and remands the other cases to the lower courts in light of the new decision in the lead case. This "grant, vacate, and remand," or "GVR" procedure has "become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices." *Lawrence v. Chater*, 516 U.S. 163, 166 (1996). *See also Wellons v. Hall*, 558 U.S. 220, 225 (2010) (observing that "a GVR order conserves the scarce resources of this Court"). While some Justices have criticized the GVR practice, those criticisms are on case-specific grounds, not on due process grounds. *See, e.g., Stutson v. United States*, 516 U.S. 163, 180-81 (1996) (Scalia, J., dissenting) (arguing for limitations on GVRs in other situations but noting that the "largest category" of GVRs arise when a decision of the Supreme Court "has cast doubt on the judgment rendered by a lower federal court or a state court" and using the GVR procedure in that situation serves the "interests of efficiency"). Cole cites no case from

this or any appellate court holding that the "tag" or GVR practice for dealing with a mass of cases involving the same issue violates due process or equal protection.

Notably, Cole was not appealing his conviction and sentence, or even the denial of his initial postconviction motion. Rather, he was appealing from the denial of his **third successive postconviction motion**. There is no constitutional violation where the courts place reasonable limitations on pleadings in this context. *See, e.g., Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987) (finding no federal constitutional right to postconviction relief); *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (entitlements apply only to first appeal as a matter of right). Indeed, rules of court procedure place limits on briefing in every case. *See, e.g.*, U.S. Sup. Ct. R. 33 (specifying format and limitations on briefs filed in this Court, including word limits). *See also Jones v. Barnes*, 463 U.S. 745, 753 (1983) (noting that most courts impose page limits on briefs as well as limits on the time given for oral arguments). Carried to its logical conclusion, Cole's argument would suggest that any sort of limitation on briefing would be unconstitutional. This is would lead to the absurd and unworkable result where litigants would have free reign to file hundreds of pages of briefing in every case raising frivolous

issues and further burdening the court system.

Furthermore, Cole's case was given an individual determination by the Florida Supreme Court. He was granted an opportunity to show cause why the trial court's order should not be affirmed in light of *Hitchcock* (i.e., to either distinguish his case from *Hitchcock*, or to explain why *Hitchcock* should be overruled). He filed a 20-page response to the order to show cause in which he raised numerous arguments why *Hitchcock* should not preclude reversal of the trial court's order denying relief. (Resp. App. A).

Relying on cases dealing with the adequacy of an indigent defendant's access to the state's appellate system, Cole argues that the issue here is whether he "will receive the same opportunity to convince this [sic] Florida of the merits of his issues as everyone seeking relief under Florida Rule of Criminal Procedure 3.851 receives." (Pet. at 12). The cases on which Cole relies do not advance his cause. *Griffin v. Illinois*, 351 U.S. 12 (1956), a right-to-counsel case, involved an Illinois rule allowing a convicted criminal defendant to present claims of trial error to the Supreme Court of Illinois only if he procured a transcript of the testimony adduced at his trial. *Id.* at 13 n.2. There was no exception for an indigent defendant other than one sentenced to death. *Id.* Thus, a noncapital defendant who was

unable to pay the cost of obtaining a transcript was unable to receive appellate review. This Court invalidated the Illinois rule because once a state establishes appellate review, the state cannot "bolt the door to equal justice." *Id.* at 24 (Frankfurter, J., concurring in the judgment). Similarly, this Court in *Eskridge v. Washington State Board of Prison Terms and Paroles*, 357 U.S. 214 (1958), invalidated a state rule giving free transcripts only to indigent defendants who could convince a trial judge that "justice will thereby be promoted." *Id.* at 215.

In *Douglas v. California*, 372 U.S. 353 (1963), this Court ruled unconstitutional California's requirement that appellate counsel be appointed for an indigent defendant only if the appellate court determined that such appointment would be helpful to the defendant or to the court itself. *Id.* at 357-58. This Court opined that the California requirement left an indigent defendant, "where the record is unclear or the errors are hidden," with a "meaningless ritual, while the rich man [enjoyed] a meaningful appeal." *Id.* In *Anders v. California*, 386 U.S. 738 (1967), this Court set forth procedures an appointed attorney must follow when representing an indigent defendant on direct appeal when the attorney finds the case wholly frivolous. *Id.* at 744.

It bears repeating that this was an appeal from Cole's **third successive postconviction motion**. This was not an initial appeal as of right, or even an initial postconviction appeal. As Cole readily admits, he was not denied counsel or a transcript. (Pet. at 12). He was afforded the opportunity to appeal the denial of his third successive postconviction motion, within the reasonable limitations placed upon the process by the Florida Supreme Court under the circumstances. Cole does not identify any meritorious issues he was forced to abandon based on the lower court's show cause procedure. Indeed, although permitted by Florida's rules of appellate procedure, **Cole never moved the court to allow him to file a longer brief**. *See* Fla. R. App. P. 9.210(a)(5)(E) (setting forth page limitations on briefs in Florida's appellate courts and providing that "[t]he court may permit longer briefs"). Instead of filing a proper motion under the rule, Cole merely complained in his brief about the "deprivation" of "full briefing." (Resp. App. A at pgs. 1-2). *See United States v. McCollom*, 426 U.S. 317, 326 (1976) (opining that ultimately, the "basic question is one of adequacy of [a defendant's] access to procedures for review of his conviction, . . . and [this question] must be decided in light of avenues which [the defendant] chose not to follow as well as those he now seeks to widen"). *See also Jones*, 463 U.S. at 749 (opining

that the right to appellate counsel does not include the right to have counsel press every nonfrivolous claim).

Furthermore, Cole's claim to entitlement to a proportionality review of his death sentence under *Proffitt v. Florida*, 428 U.S. 242 (1976), rings hollow in light of the fact that he received just such a review on direct appeal. *Cole*, 701 So. 2d at 853 ("[W]e have performed our own proportionality review based upon the entire record," and "conclude under that proportionality review that imposition of the death penalty is warranted."). *Hurst v. Florida* applied *Ring* to Florida's capital 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 (Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is . . . unconstitutional"). There is nothing in this Court's holding in *Hurst v. Florida* which would even suggest, much less mandate, additional litigation on the issue of proportionality.

Cole's case presented the same issue presented in *Hitchcock* and numerous other similarly situated cases: does *Hurst v. Florida* as interpreted by *Hurst v. State* apply retroactively to this case? Cole was given a chance to explain why *Hitchcock* should not be dispositive in his case. He was afforded an

opportunity to file a 20-page counseled brief, as well as a 10-page counseled reply brief. Consistent with this Court's precedent, Cole was provided adequate access to Florida's appellate system under the circumstances. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 612 (1974) (providing that the Fourteenth Amendment ensures that "indigents have an adequate opportunity to present [their] claims fairly within the adversary system"). Because Cole was provided with adequate access to Florida's appellate system, his equal protection and Fourteenth Amendment rights were not violated.

In sum, the briefing procedure employed by the Florida Supreme Court for Cole's third successive postconviction appeal represents a matter of state law which is beyond this Court's certiorari jurisdiction. Moreover, there is no conflict among state supreme courts or an important or unsettled question of law implicated by the procedural ruling below. Accordingly, there is no basis for the exercise of this Court's certiorari jurisdiction.

II. The Florida Court's Ruling on Retroactivity Does Not Violate Equal Protection or the Eighth Amendment.

This Court has held that, in general, a state court's retroactivity determinations are a matter of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264

(2008). State courts may fashion their own retroactivity tests, including partial retroactivity tests. A state supreme court is welcome to employ a partial retroactivity approach without violating the federal constitution under *Danforth*. The state retroactivity doctrine employed by the Florida Supreme Court did not violate federal retroactivity standards. The court's expansion of *Hurst v. Florida* in *Hurst v. State* is applicable only to defendants in Florida, and, consequently, subject to retroactivity analysis under state law as set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). 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); *Long*, 463 U.S. at 1041. Accordingly,

certiorari should be denied.[1]

Cole argues that the Florida court's partial retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* violates the Eighth Amendment and equal protection. He also claims that the Florida court's decision in *Hurst v. State* "makes *Hurst* substantive, based on federal retroactivity law." (Pet. at 20). Cole is incorrect. The Florida Supreme Court's retroactivity ruling does not conflict with any of this Court's precedent.

New rules of law, such as the rule announced in *Hurst v. Florida*, do not normally 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). Additionally, the general rule is one of nonretroactivity for cases on collateral review, with narrow exceptions. *See Teague v. Lane*, 489 U.S. 288, 307 (1989) (observing that there were only two narrow exceptions to the general rule of nonretroactivity for cases on collateral

[1] This Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of *Hurst v. State*. *See, e.g., Lambrix v. State*, 227 So. 3d 112 (Fla), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505 (Fla.), *cert. denied*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548 (Fla.), *cert. denied*, 138 S. Ct. 1164 (2018).

review). Furthermore, certain matters are not retroactive at all. *Hurst v. Florida* was based on this Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002), which in turn was based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court has held that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004).

In *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), this Court held "that 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 would receive the benefit from alleged *Hurst* error. Retroactivity under *Griffith* depends on the date of the finality of the direct appeal. The test for retroactivity in *Teague* also depends upon a specific date. That is, if a case is final on direct review, the defendant will not receive the benefit of the new rule unless one of the exceptions announced in *Teague* applies. Again, the date of finality is the critical date-based test under *Teague*.

Moreover, this Court has given partial retroactive effect to a change in the penal law. In *Dorsey v. United States*, 567

U.S. 260 (2012), this Court held the Fair Sentencing Act to be partially retroactive in that it would apply to those offenders who committed offenses prior to the effective date of the act but who were sentenced after that date. *See United States v. Abney*, 812 F.3d 1079, 1097-98 (D.C. Cir. 2016) (noting that prior to its decision in *Dorsey*, this Court had never held any change in a criminal penalty to be partially retroactive).

The Florida Supreme Court's holding in *Hurst v. State* followed this Court's holding in *Hurst v. Florida* in requiring that aggravating circumstances be found by a jury beyond a reasonable doubt. The Florida court then found that as a matter of state law, "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), the Florida Supreme Court ruled that *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), is not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in *Ring*. The judgment in *Asay* became final October 7,

1991, and thus the defendant was not eligible for any relief under *Hurst v. State*. *Asay*, 210 So. 3d at 8. *See also Mosley v. State*, 209 So. 3d 1248, 1272-73 (Fla. 2016) (holding that *Hurst v. State* applies retroactively to defendants whose sentences were not yet final when this Court issued *Ring*).

Cole argues that the Florida Supreme Court created a new substantive rule in *Hurst v. State*, and cites *Welch v. United States*, 136 S. Ct. 1257 (2016), in support. However, this Court in *Welch* certainly did not overrule *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). Indeed, the *Welch* decision supports the determination that the new *Hurst* rule is procedural:

> "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. The *Welch* Court found that 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, the *Welch* 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. State* allocated the decision-making authority to determine capital sentencing from the judge to the jury, which is precisely how the *Welch* Court defined a procedural change. Based on this Court's precedent, there can be no doubt that the *Hurst* rule is a procedural rule. Aside from the separate issue of retroactivity under state law, there is no conflict among courts applying *Hurst* under the United States Constitution.

III. There Is No Underlying Sixth Amendment Violation.

Hurst v. Florida did not require jury sentencing. Rather, *Hurst v. Florida* was 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*,

135 S. Ct. at 624. *Hurst v. Florida* did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. In *Kansas v. Carr*, 136 S. Ct. 633 (2016), decided eight days after this Court issued *Hurst v. Florida*, this Court emphasized:

> 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. Therefore, Cole fails to present a constitutional question which would warrant certiorari review.

Cole's contemporaneous conviction for kidnapping and his prior felony conviction established beyond a reasonable doubt the existence to two aggravating factors. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *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)). *See also Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017) (noting

that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty). This Court's ruling in *Hurst v. Florida* did not change the recidivism exception articulated in *Apprendi* and *Ring*.

Lower courts have almost uniformly held that a judge may perform the "weighing" of factors to arrive at an appropriate sentence without violating the Sixth Amendment.[2] The findings required by the Florida Supreme Court following remand in *Hurst v. State* involving the weighing and selection of a defendant's

[2] *State v. Mason*, 2018 WL 1872180, *5-6 (Ohio, April 18, 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citation omitted); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *Waldrop v. Comm'r, Alabama Dept. of Corr.*, 2017 WL 4271115, *20 (11th Cir. Sept. 26, 2017) (unpublished) (rejecting *Hurst* claim and explaining "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict.") (citation omitted); *State v. Gales*, 658 N.W.2d 604, 628-29 (Neb. 2003) ("[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review to be undertaken by a jury").

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.[3]

IV. Cole's Death Sentence Comports with the Eighth Amendment and *Caldwell v. Mississippi*.

Finally, Cole complains that the sentencing procedure used in his case violated the Eighth Amendment and this Court's ruling in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), because the jury was given instructions that informed the jury its death recommendation was merely advisory. This matter does not merit this Court's review. In order 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). Cole's jury was properly instructed on its role based on the law existing at the time of his trial. This case would be a uniquely inappropriate vehicle for certiorari because this is a postconviction case and this Court would have to address retroactivity before even reaching the underlying jury

[3] *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); *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Here, the aggravators found by the trial court were either uncontestable or well-established by overwhelming evidence. Moreover, the jury's death recommendation was unanimous.

instruction issue.[4]

To the extent Cole suggests that jury sentencing is now required under federal law, this is not the case. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed.") (emphasis in original); *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding that the Constitution does not prohibit the trial judge from "impos[ing] a capital sentence"). No case from this Court has mandated jury sentencing in a capital case, and such a holding would require reading a requirement into the Constitution that is simply not there. The Constitution provides a right to **trial** by jury, not to **sentencing** by jury.

There is no conflict between the Florida Supreme Court's decision and this Court's Eighth Amendment jurisprudence set forth in *Caldwell* and its progeny. Nor is there any conflict

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[4] 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, unlike here due to non-retroactivity. The Florida Supreme Court has now, however, explicitly rejected *Caldwell* attacks on Florida's standard penalty phase jury instructions in the wake of *Hurst*. *Reynolds v. State*, ___ So. 3d ___, 2018 WL 1633075 (Fla. April 5, 2018); *Johnson v. State*, ___ So. 3d ___, 2018 WL 1633043 (Fla. April 5, 2018) (citing *Reynolds* in rejecting *Caldwell* claim).

between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court. Finally, there is no underlying constitutional error under the facts of this case.

Cole's jury was informed that it needed to determine whether sufficient aggravating factors existed and, if so, whether the aggravation outweighed the mitigation before the death penalty could be imposed. *See In re Standard Jury Inst. In Criminal Cases*, 678 So. 2d 1224 (Fla. 1996). His jury was also informed that its recommendation would be given "substantial weight" by the trial court. (Resp. App. B). As the Florida Supreme Court pointed out, "Cole was sentenced to death following a jury's **unanimous recommendation for death**." *Cole v. State*, 234 So. 3d 644, 645 (Fla. 2018) (emphasis added) (citing *Cole v. State*, 701 So. 2d 845, 849 (Fla. 1997)). Therefore, based on the jury instructions and the jury's unanimous death recommendation, the Court could "conclude that the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendation." *Truehill v. State*, 211 So. 3d 930, 956 (Fla. 2017).

In order to establish a *Caldwell* violation, Cole must show that the remarks to the jury improperly described the role assigned to the jury by local law. *Romano v. Oklahoma*, 512 U.S.

1, 9 (1994). A Florida jury's decision regarding a death sentence was, and still remains, an advisory recommendation; therefore, there was no violation of *Caldwell*. *See Dugger v. Adams*, 489 U.S. 401 (1989). Entitlement to relief under *Caldwell* requires that the prosecutor, judge, or jury instructions misrepresent the jury's role in sentencing. *Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986) (rejecting a *Caldwell* attack, explaining that "*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"). Cole's jury was accurately advised that its decision was an advisory recommendation.[5]

Because the Florida Supreme Court's decision does not conflict with any decision of this Court or involve an

[5] Even today, under Florida's new death penalty statute, the judge remains the final sentencer in Florida. A jury's recommendation of death in Florida is just that—a recommendation. Florida's new death penalty statute refers to the jury's vote as a "recommendation." § 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). *See also In re Standard Jury Instructions in Capital Cases*, 214 So. 3d 1236, 1238 N.4 (Fla. 2017) (Lawson, J., concurring) (stating that "the jury's verdict is only a recommendation"). 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.

important, unsettled question of federal law, this Court should decline to exercise its certiorari jurisdiction in the instant case.

CONCLUSION

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

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL
Tallahassee, Florida

s/ Scott A. Browne
SCOTT A. BROWNE*
Senior Assistant Attorney General
Florida Bar No. 0802743
*Counsel of Record

C. SUZANNE BECHARD
Assistant Attorney General
Florida Bar No. 0147745

Office of the Attorney General
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com
scott.browne@myfloridalegal.com
carlasuzanne.bechard@myfloridalegal.com

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 16th day of May, 2018, a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION has been submitted using the Electronic Filing System. I further certify that a copy has been sent by U.S. mail to: Ali A. Shakoor, Law Office of the Capital Collateral Regional Counsel – Middle Region, 12973 N. Telecom Parkway, Temple Terrace, Florida 33637.

s/ Scott A. Browne
COUNSEL FOR RESPONDENT