

CASE NO. 17-9537
IN THE UNITED STATES SUPREME COURT

October 2017, Term

JOHN MARQUARD,

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]

[Restated]

Whether certiorari review should be denied where the state court (1) afforded Petitioner a constitutionally adequate opportunity to show why unfavorable binding precedent was not applicable to his capital case; (2) determined *Hurst v. Florida* and *Hurst v. State* were not retroactive to Petitioner's case based on state law; and (3) Petitioner's capital sentenced comports with *Caldwell v. Mississippi* and the Florida Supreme Court's decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law? (restated)

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CITATION TO OPINION BELOW

The decision of which Petitioner seeks discretionary review is reported as *Marquard v. State*, 234 So.3d 560 (Fla. 2018).

JURISDICTION

Petitioner, John Marquard, (“Marquard”), is seeking jurisdiction pursuant to 28 U.S.C. § 1257(a). This is the appropriate provision.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent, State of Florida (“State”), accepts as accurate Petitioner’s recitation of the applicable constitutional provisions involved.

STATEMENT OF THE CASE AND FACTS

This capital case is before this Court upon the Florida Supreme Court's affirmance of the denial of Marquard's second successive postconviction relief motion addressed to *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). The Florida Supreme Court denied relief finding Marquard's case was final before June 24, 2002, thus, under state law, he was not entitled to the retroactive application of *Hurst v. Florida* and *Hurst v. State*. *Marquard v. State*, 234 So. 3d 560, 561 (Fla. 2018)

Marquard, was convicted of first-degree murder and armed robbery and was sentenced to death. *Marquard v. State*, 641 So.2d 54 (Fla. 1994). On January 23, 1995, pursuant to Rule 3.851(d)(1)(B), Fla. R. Crim. P. 3.851, Marquard's judgment and sentence became final with the denial of certiorari by this Court. *Marquard v. Florida*, 513 U.S. 1132 (1995).

The Florida Supreme Court, on direct appeal, set forth the facts of the case as follows and noted that the jury made a unanimous recommendation of death:

John Marquard, Mike Abshire, and the victim, Stacey Willets, decided to move from North Carolina to Florida in June 1991 using Stacey's car and sharing expenses. Prior to leaving, Marquard and Abshire discussed killing Stacey for her car and money, and during a stop in South Carolina Marquard told Abshire that he was going to kill her because he was tired of arguing with her. In St. Augustine, Marquard and Abshire formulated a plot to kill Stacey that night after luring her into the woods.

Marquard and Abshire invited Stacey to attend a party, drove her to a deserted area, and walked her into the woods. Marquard grabbed her from behind, stabbed her, threw her to the ground, and sat on her back. She was

still breathing, so Marquard held her head under the rainwater that had accumulated in a puddle until she stopped breathing. When her body convulsed, he held her head underwater again. Abshire then stabbed her and the two tried to decapitate her. Marquard was arrested and confessed, saying he remembered walking into the woods with Stacey and standing over her body with a knife in hand. Abshire testified at trial, giving a detailed account of the murder.

Marquard was convicted of first-degree murder and armed robbery. The State put on a single witness to establish aggravation during the penalty phase—a parole officer who testified that Marquard was on parole in North Carolina at the time of the killing. Marquard called Dr. Harry Krop to establish mitigation, and Dr. Krop testified extensively concerning Marquard's deprived childhood and present psychological state. The State put on its own mental health expert, Dr. Merwin, in rebuttal. The jury recommended death by a twelve-to-zero vote, and the court imposed death, finding four aggravating circumstancesFN1 and a number of nonstatutory mitigating factors.FN2 The court imposed a consecutive life term for the armed robbery conviction.

FN1 The judge found that the murder was committed while Marquard was under sentence of imprisonment; was committed during the course of a robbery; was especially heinous, atrocious, or cruel; and was cold, calculated, and premeditated.

FN2 The judge made the following findings:

The Court finds the Defendant had an unstable family life as a child and lacked the emotional support and care he should have received.

....

The Court finds that Defendant suffers from either a personality disorder not otherwise specified or an antisocial personality. There

is not much difference between the two. The Court further finds Defendant did not have a stable home, but had divorced parents and an alcoholic mother with whom he lived. He had a difficult childhood. He may have been sexually abused on one occasion. Defendant used various drugs and alcohol, however, there is no evidence that use of those had anything whatsoever to do with the commission of the murder.

Marquard, 641 So.2d at 55–56. In a later appellate review, the Florida Supreme Court provided:

Codefendant Abshire was tried separately, was found guilty of first-degree murder, and was likewise sentenced to death. This Court subsequently reversed Abshire's conviction and vacated his death sentence based on the fact that during Abshire's trial, the assistant state attorney indicated that he sought to exclude women from the jury solely because of gender. *Abshire v. State*, 642 So. 2d 542 (Fla. 1994). Upon remand, Abshire received a life sentence.

Marquard filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, and on May 12, 1999, the trial court ordered a hearing. Defense counsel amended the motion, asserting that Marquard's death sentence should be vacated based on newly discovered evidence that Abshire's sentence was reduced to life and Abshire's admission to cutting the victim's neck while she was still alive. After holding an evidentiary hearing, the trial court denied relief but reserved jurisdiction on Marquard's proportionality claim. Marquard appealed the denial of relief, and this Court temporarily relinquished jurisdiction for the sole purpose of allowing the circuit court to enter an order on proportionality. After reviewing the record, the trial court found that Marquard's sentence of death was proportional. This consolidated appeal and petition for writ of habeas corpus followed.

Marquard v. State, 850 So. 2d 417, 422–23 (Fla. 2002).

Following the denial of certiorari by this Court, Marquard unsuccessfully sought collateral relief from both the state and federal courts. *See Marquard v. State*, 850 So.2d 417 (Fla. 2002) (affirming the circuit court's denial of defendant's original postconviction relief motion and denying the state habeas petition); *Marquard v. Sec'y for Dept. of Corr.*, 429 F.3d 1278 (11th Cir. 2005) (affirming the federal district court's denial of federal habeas corpus petition), *cert. denied*, 547 U.S. 1181 (2006); *Marquard v. State*, 993 So.2d 513 (Fla. 2008) (denying successive postconviction motion addressed to lethal injection protocols in unpublished opinion).

On January 16, 2016, this Court issued *Hurst v. Florida*, which applied *Ring v. Arizona*, 536 U.S. 584 (2002) to Florida's capital sentencing scheme. This Court reiterated 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 (determining that Florida's sentencing scheme was unconstitutional to the extent it required the judge alone to find the existence of an aggravating circumstance). Subsequently, the Florida Supreme Court issued *Hurst v. State* and *Asay v. State*, 210 So.3d 1 (Fla. 2016) (holding *Hurst v. Florida* and *Hurst* not retroactive to cases final before June 24, 2002). *See also Mosley v. State*, 209 So. 3d 1248, 1272-73 (Fla. 2016) (holding that, as a matter of state law, *Hurst v. State* does apply retroactively to defendants whose sentences were not yet final when Supreme Court issued *Ring*).

As a result, on January 9, 2017, Marquard filed a second successive motion for postconviction relief claiming entitlement to a new sentencing and asserting n *Hurst v. Florida* and *Hurst v. State* should be applied retroactively and that his sentence violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as related Florida Constitutional provisions. The trial court followed, *Asay* determining *Hurst* relief was not available to Marquard. Alternately, the trial court found any *Hurst* error harmless beyond a reasonable doubt. In so doing, it relied on *Davis v. State*, 207 So.3d 142, 174 (Fla. 2016) and found Marquard's jury rendered a unanimous death recommendation, although instructed "there was no requirement to do so," "after considering a full presentation of mitigating circumstances and aggravating factors" coupled with the fact the mitigation "was neither extensive or compelling," thus, beyond a reasonable doubt, the jury "made the requisite factual findings to support a death sentence before it returned the unanimous recommendation." (Pet. Apx C at 5) Relief was denied and Marquard appealed.

The Florida Supreme Court stayed Marquard's appeal pending its decision in *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, 138 S.Ct. 513 (2017). Following issuance of *Hitchcock*, the Florida Supreme Court issued an Order to Show Cause "why the trial court's order should not be affirmed in light of" *Hitchcock*. Marquard' was afforded a response of twenty pages and a reply of ten pages. The State's responsive pleading was set at fifteen pages. (Pet. Apx B). It was the Florida Supreme Court's decision:

Marquard was sentenced to death following a jury's unanimous recommendation for death. *Marquard v. State*, 641 So.2d 54, 56 (Fla. 1994). Marquard's sentence of death became final in 1995. *Marquard v. Florida*, 513 U.S. 1132, 115 S.Ct. 946, 130 L.Ed.2d 890 (1995). Thus, *Hurst* does not apply retroactively to Marquard's sentence of death. *See Hitchcock [v. State]*, 226 So.3d 216, 217 (Fla. 2017), *cert. denied*, — U.S. —, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017)].

Marquard v. State, 234 So. 3d 560, 561 (Fla. 2018).

REASONS FOR DENYING THE WRIT

ISSUE I

WHETHER CERTIORARI REVIEW SHOULD BE DENIED WHERE THE STATE COURT (1) AFFORDED PETITIONER A CONSTITUTIONALLY ADEQUATE OPPORTUNITY TO SHOW WHY UNFAVORABLE BINDING PRECEDENT WAS NOT APPLICABLE TO HIS CAPITAL CASE; (2) DETERMINED *HURST V. FLORIDA* AND *HURST V. STATE* WERE NOT RETROACTIVE TO PETITIONER'S CASE BASED ON STATE LAW; AND (3) PETITIONER'S CAPITAL SENTENCE COMPORTS WITH *CALDWELL V. MISSISSIPPI* AND THE FLORIDA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR INVOLVE AN IMPORTANT, UNSETTLED QUESTION OF FEDERAL LAW? (RESTATED).

It is Marquard's position that the page limitations imposed by the Florida Supreme Court violated the Eighth Amendment and denied him Equal Protection and Due Process under the Fourteenth Amendment as he was not given the opportunity to brief his *Hurst* claim fully. He also takes issue with the Florida Supreme Court's determination that Hurst relief is not available to capital defendants whose cases were final before this Court decided *Ring*. Marquard maintains that the Eighth Amendment requires he receive relief based on *Caldwell v. Mississippi*, 472 U.S. 320 (1985) as his jury was advised its sentencing role was advisory. As will be shown, nothing about the process employed by the Florida Supreme Court was inconsistent with the Constitution. Marquard does not provide any "compelling" reason for this Court to review his case. U.S. Sup. Ct. R. 10. Indeed, Marquard has not cited to any decision from this or any appellate court that

conflicts with *Marquard*, 234 So.3d at 561 or holds that page-limitations for pleadings are unconstitutional, that *Hurst v. Florida* must be applied retroactively to all cases on collateral review, and that his capital sentence is in violation of *Caldwell*. Certiorari review should be denied.

The Florida Supreme Court's Briefing Order in Petitioner's Successive Postconviction Appeal Is a Matter of State Court Procedure and Does Not Implicate the Federal Constitution, Due Process or Equal Protection.

Marquard takes issue with the procedure and page limitations the Florida Supreme Court imposed for the successive postconviction appeal of his *Hurst v. Florida/Hurst v. State* claim. It is Marquard's position that the page limitation denied him access to the courts and meaningful review. However, the Florida Supreme Court's determination of appropriate page limits for a successive postconviction appeal is 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 "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 "it is normally within the power of the State to regulate procedures under which its laws are carried out") (internal quotes/citations omitted). Accordingly, Marquard's constitutional protestations here do not support certiorari review.

Marquard's Eighth Amendment, Due Process and Equal Protection arguments challenging the state briefing procedure is unavailing. He cannot show that the Florida court's longstanding "tag" procedure violates any federal constitutional right. The Florida Supreme Court merely limited the number of pages for a successive appeal to twenty after it had thoroughly reviewed in its lead case, *Hitchcock*, 226 So.3d at 216-17, whether *Hurst* claims were retroactive to cases where the sentence was final before *Ring*.¹ There is no constitutional infirmity in this procedure and, thus, 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

¹ 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.

and remands the other cases to the lower courts in light of the decision in the lead case. This “grant, vacate, and remand,” (“GVR”) is “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 Wellons v. Hall*, 558 U.S. 220, 225 (2010) (observing “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 “largest category” of GVRs arise when the Court’s decision “has cast doubt on the judgment rendered by a lower federal court or a state court” and using GVR procedure there serves the “interests of efficiency”). Marquard fails to cite a case from this or any appellate court holding that the “tag” or GVR practice for dealing with a mass number of cases involving the same issue violates Due Process or Equal Protection.

Clearly, 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, Marquard's argument suggests that any limitation on briefing would be unconstitutional. Such would lead to the absurd and unworkable result where litigants would have free reign to file hundreds of pages of briefing raising frivolous issues and further burdening the court system.

Bounds v. Smith, 430 U.S. 817 (1977) and *Douglas v. People of State of California*, 372 U.S. 353 (1963) do not advance Marquard's plea for certiorari review. In *Douglas*, this Court ruled unconstitutional California's requirement that appellate counsel be appointed for an indigent defendant only if the appellate court determined such appointment would be helpful to the defendant or court. *Douglas*, 372 U.S. 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.*² Additionally, *Bounds* does not provide Marquard with a basis for certiorari review. In *Bounds*, 430 U.S. at 830-31, this Court concluded that state agencies further the constitutional right of access to court by assisting inmates in the preparation and filing of legal papers by providing an adequate law library. Such concerns are not present here.

Again, this was an appeal from a second successive postconviction motion. It was not an initial appeal as of right, or even an initial postconviction appeal. Marquard had counsel throughout and was provided records and transcripts for his

² *Anders v. California*, 386 U.S. 738, 744 (1967) sets out procedures for counsel to follow when representing indigents on direct appeal when the case is frivolous.

state and federal proceedings. His successive postconviction motion was submitted within the standard 25-page limit under Fla. R. Crim. P. 3.851(e)(2) and other than asking for “full briefing” (Marquard’s Response pages 2, 5-6), he filed his responsive appellate pleading without identifying any claim he had to forego due to page limits. Even here, Marquard has not identified any meritorious issues he was forced to abandon based on the state court’s briefing procedure. The “basic question is one of adequacy of [defendant’s] access to procedures for review of his conviction, . . . and [this question] must be decided in light of avenues which [defendant] chose not to follow as well as those he now seeks to widen.” *United States v. McCollom*, 426 U.S. 317, 326 (1976)). *See Jones v. Barnes*, 463 U.S. 745, 749 (1983) (opining right to appellate counsel does not include right to have counsel press every non-frivolous claim). Marquard never gave the state court a basis to expand briefing.

Furthermore, Marquard was given the opportunity to try and distinguish his case from the decision in the lead case, *Hitchcock*, and show why *Hurst v. Florida/Hurst v. State* should be retroactive to his case even in light of *Asay*, 210 So.3d at 22 (determining *Hurst* not retroactive to cases final before June 24, 2002); *Mosley*, 209 So.3d 1274 (noting “we have now held in *Asay v. State*, that *Hurst* does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in *Ring*”). The state court procedure does not implicate a federal constitutional right and Marquard has not shown that the decision conflicts with a decision of this Court or any other federal circuit court or state supreme court. This Court should deny certiorari.

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

Marquard asserts he is entitled to retroactive application of *Hurst* because capital defendant's whose cases was not final until after *Ring* received relief and such disparate treatment runs afoul of the equal protection clause of the Fourteenth Amendment. He maintains that "partial retroactivity" is unconstitutional, and pointing to *McLaughlin v. Florida*, 379 U.S. 184 (2008) he suggests there is no sound basis for the different treatment. (Pet. 11-12). 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, Marquard 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.

The Florida Supreme Court's holding in *Hurst v. State* followed this Court's ruling in *Hurst v. Florida* in requiring that aggravating circumstances be found by a jury beyond a reasonable doubt before a death sentence may be imposed. The Florida court then expanded this Court's ruling, requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 57. In *Asay*, 210 So.3d at 22, the Florida Supreme

Court ruled that, as a matter of *state law*, established in *Witt v. State*, 387 So.2d 922 (Fla. 1980), *cert. denied*, 449 U.S. 1067 (1980), *Hurst v. State* is not retroactive to any case in which the death sentence was final prior to date *Ring* issued. *See also Mosley*, 209 So.3d at 1272-73 (holding that, as a matter of *state law*, *Hurst v. State* does apply retroactively to defendants whose sentences were not yet final when this Court issued *Ring*). Florida's partial retroactive application of *Hurst v. State* is not constitutionally unsound and does not otherwise present a matter that merits the exercise of this Court's certiorari jurisdiction.

This Court has held that, in general, a state court's retroactivity determinations are a matter of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264 (2008). State courts may fashion their own retroactivity tests, including partial retroactivity tests. A state supreme court is free to employ a partial retroactivity approach without violating the federal constitution under *Danforth*. The state retroactivity doctrine employed by the Florida Supreme Court since *Hurst v. State* 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*. *See Asay*, 210 So. 3d at 15 (noting that 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)).

This Court has recognized repeatedly 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 a state court decision on certiorari review unless a federal question is raised and decided in the state court below); *Street v. New York*, 394 U.S. 576, 581-82 (1969) (same). If a state court’s decision is based on separate state law, this Court “of course, will not undertake to review the decision.” *Florida v. Powell*, 559 U.S. 50, 57 (2010).

Florida’s retroactivity analysis is a matter of state law. This fact alone militates against the grant of certiorari in this case. It should also be noted that 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., Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112 (Fla.), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So. 3d 505 (Fla.), *cert. denied*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So. 3d 548 (Fla.), *cert. denied*, 138 S. Ct. 1164 (2018).

Marquard argues that the Florida Supreme Court’s partial retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* violates the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment. However, new rules of law such as the rule announced in *Hurst v. Florida*, do not

usually apply to cases that are final. *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (explaining normal rule of nonretroactivity 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 there were only two narrow exceptions to the general rule of nonretroactivity for cases on collateral review). Furthermore, certain matters are not retroactive at all. *Hurst v. Florida* was based on this Court’s holding in *Ring*, which in turn was based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court has held that “*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.” *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (emphasis added).

In *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), this Court held “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 or not yet final would receive the benefit from alleged *Hurst* error. Retroactivity under *Griffith* depends on the date of the finality of the direct appeal. Under *Teague*, if a case is final on direct review, the defendant will not receive the benefit of the new rule unless one of the narrow exceptions announced in *Teague* applies. Again, finality is the critical date-based test under *Teague*. There is nothing about Florida’s decision providing partial retroactivity to *Hurst v. Florida* and *Hurst v. State* that is contrary to this

Court's retroactivity jurisprudence.

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

Any retroactive application of a new development in the law under any analysis will mean that some cases will get the benefit of a new development, while other cases will not, depending on a date. Drawing a line between newer cases that will receive 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 other cases based on the age of the case. This is not arbitrary and capricious in violation of the Eighth Amendment; it is simply a fact inherent in any retroactivity analysis.

Marquard's argument for a violation of the Equal Protection Clause fares no better than his Eighth Amendment argument. 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 court’s partial retroactivity ruling was based on the date of the *Ring* decision, not based on a purposeful intent to deprive pre-*Ring* death sentenced defendants in general, and Marquard in particular, relief under *Hurst v. State*. The Florida Supreme Court has been entirely consistent in denying *Hurst* relief to those defendants whose convictions and sentences were final when *Ring* was issued in June 2002. Marquard is being treated exactly the same as similarly situated capital defendants. Consequently, his equal protection argument is meritless. Also, 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). This Court should deny review.

Marquard’s Death Sentence Comports with *Caldwell v. Mississippi*.

Here, Marquard points to *Hurst v. Florida*, and *Caldwell* to assert he is entitled to resentencing as his jury was instructed its role was advisory in violation of the Eighth Amendment and *Caldwell*. This issue was not raised before the

Florida Supreme Court. In his successive postconviction relief motion, Marquard assert that in light of *Hurst v Florida* and the changes the Legislature made to the capital sentencing statute, his new jury must be instructed regarding its sentencing responsibility in accordance with *Caldwell*. Even if the *Caldwell* issue is viewed as properly raised, no conflict between the Florida Supreme Court's decision and this Court's Eighth Amendment jurisprudence set forth in *Caldwell* and its progeny exists. Likewise, there is no conflict 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.

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 *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 a

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). See also *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (determining that to prove a *Caldwell* violation a defendant must show that the prosecutor’s comments or jury instructions “improperly described the role assigned to the jury by local law. 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”)

The standard jury instructions in Florida at the time of Marquard’s sentencing were used in his case, and correctly advised the jury about its role and the weight its recommendation is given based on the law in existence at the time of sentencing. See *Reynolds v. State*, ___ So. 3d ___, 2018 WL 1633075 (Fla. April 5, 2018) (explaining that under *Romano v. Oklahoma*, 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.”); *Patrick v. State*, 104 So.3d 1046, 1064 (Fla. 2012) (holding “standard penalty phase jury instructions fully advise the jury of the importance of its role, correctly state the

law, do not denigrate the role of the jury and do not violate *Caldwell*.”)(citations omitted). The instant 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 instruction issue.³

To the extent Marquard suggests that jury sentencing is required under federal law, as a result of *Hurst v. Florida*, that is not the case. 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.⁴ It follows there is no

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

⁴ See *State v. Mason*, ___ N.E.3d ___, 2018 WL 1872180, *5-6 (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)

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”)⁵ (emphasis added). Thus, there was no violation of *Caldwell* because there were no comments or instructions to the jury that “improperly described the role assigned to the jury by local law.” *Romano*, 512 U.S. at 9. Marquard’s jury was advised accurately that its decision was an advisory recommendation and in light of that, it recommended death unanimously. *Hurst v. Florida* has not opened the door to Marquard’s claim of an Eighth Amendment violation based on *Caldwell* and certiorari review should be denied.

(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”).

⁵ 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.

Hurst v. Florida and the Sixth Amendment

Although not raised directly, *Hurst v. Florida* does not require jury sentencing. Rather, *Hurst v. Florida* 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. *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

As set forth above, Marquard's jury heard his confession along with extensive testimony and evidence setting forth the basis for the murder and that he was on parole at the time. The fact that this case is one of the most aggravated and least mitigated is evident on the facts and the record and the facts that the jury unanimously recommended death. The large amount of evidence proving Marquard was the murderer was uncontroverted, and included Marquard's confession that he

remembered walking into the woods with Stacey and standing over her body with a knife in his hand, and co-defendant Abshire's testimony at trial, giving a detailed account of the murder. The jury heard how Marquard took the victim to a secluded area under false pretenses to steal her car and money, grabbed her from behind, stabbed her, threw her to the ground, and sat on her back. The jury heard how, while she was still breathing, Marquard held her head down in a muddy puddle until she stopped breathing, and then shoved her head underwater again to make sure he killed her. Defendant and Co-defendant then stabbed her and tried to cut off her head. *Marquard*, 641 So. 2d at 55; *Marquard*, 850 So. 2d at 422

The jury convicted Marquard of first-degree murder and the related contemporaneous felony of armed robbery and knew of his prior violent felony convictions, rendering him death eligible.⁶ *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*.

⁶ (1) murder was committed while Marquard was under sentence of imprisonment; (2) was committed during the course of a robbery; (3) was especially heinous, atrocious, or cruel; and (4) was cold, calculated, and premeditated. *Marquard*, 641 So.2d at 55-56, n.1.

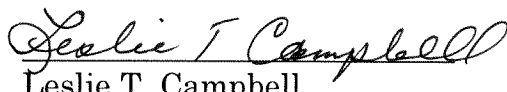
Moreover, Marquard's jury was instructed that the aggravators had to be proven beyond a reasonable doubt while jury need only be "reasonably convinced" as to existence of mitigators. The jury was also told that if it did not find the aggravators sufficient to support death, then life had to be their recommendation. Conversely, if the aggravation was sufficient, then the jury had to consider whether the mitigation outweighed the aggravation and only after doing a careful non-hasty weighing, should the jury report its recommendation. Following these instructions, the jury recommended death unanimously. 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.

CONCLUSION

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

Respectfully submitted,

PAMELA JO BONDI
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A handwritten signature in cursive script, reading "Leslie T. Campbell".

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Case No.: 17-9537

October 2017, Term

IN THE SUPREME COURT OF THE UNITED STATE

JOHN MARQUARD,
Petitioner,
vs.
STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE I, Leslie T. Campbell, a member of the Bar of this Court, hereby certify that on July 24, 2017, a copy of the Brief for Respondent in Opposition in the above entitled case was furnished by United States mail, postage prepaid, to ALI A. SHAKOOR, ESQ., Office of the Capital Collateral Regional Counsel 12973 N. Telecom Parkway; Temple Terrace, FL 33637, counsel for Petitioner herein. I further certify that all parties required to be served have been served.



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