CASE NO. 17-6580

IN THE UNITED STATES SUPREME COURT

October 2017 Term

****

DALE GLENN MIDDLETON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

****

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QUESTION PRESENTED

(Restated)

(Capital Case)

1. Whether the Florida Supreme Court could find Hurst v. Florida error harmless where the jury recommendation was unanimous and the facts of the case supported the conclusion that a rational jury would have recommended death?

2. Whether this Court should retreat from its well established precedent allowing a jury to give an advisory recommendation in a death case?

3. Whether this Court should review a case where the jury was properly instructed on the burden of proof and the required elements of an aggravator?

4. Whether this Court should review the Florida Supreme Court's harmless error analysis particular to this case when the state court specifically applied the correct test and used the individualized facts of this case in determining that any error was harmless and that death was the appropriate sentence?

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CITATION TO OPINION BELOW

The decision of which Petitioner seeks discretionary review is reported as Middleton v. State, 220 So. 3d 1152 (Fla. 2017), reh'g denied, No. SC12-2469, 2017 WL 2374697 (Fla. June 1, 2017).

JURISDICTION

Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257. Respondent acknowledges that § 1257 sets out the scope of this Court's certiorari jurisdiction; however, this Court's jurisdiction is limited to federal constitutional issues that were properly presented to and addressed by the state court. See also Sup. Ct. R. 14 (g)(i) (If review of a state court judgement is sought, the Petition for Writ of Certiorari shall specify "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts . . ."). This Court has never held that the Sixth Amendment requires the jury to find the sufficiency of the aggravators or their weight relative to mitigation, if any. This Court's cases hold that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Middleton's concurrent conviction for burglary satisfies the Sixth Amendment as interpreted by this Court.

Middleton attempts to justify this Court's jurisdiction by relying on a Florida Supreme Court's application of state law and the state constitution to what is arguably an expansive reading of this Court's opinion in Hurst v. Florida, 136 S. Ct. 616 (2016). Nonetheless, because of its reliance on Florida constitutional and statutory law, the Florida Supreme Court's decision in this case is based on adequate and independent state grounds. Likewise, the state supreme court's application of harmless error involving errors of state law is a state question not subject to this Court's review. Although it reached the correct conclusion in this case, the Florida Supreme Court's reliance on unanimous jury recommendations to find Hurst errors harmless does not comport with this Court's precedent – or its own.

Finally, the argument that a finding of harmless error based on a unanimous advisory sentence violates the Eight Amendment and this Court's decision in Caldwell v. Mississippi, 472 U.S. 320 (1985) was not decided by the Florida Supreme Court. Further, even if it were properly presented the issue is meritless.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues presented in this capital case involve the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

On September 9, 2009 the State indicted Dale Middleton on one count of first degree murder with a weapon, one count of burglary of an occupied Dwelling while armed, one count of third degree grand theft, and one count in dealing in

stolen property. The jury trial began on July 23, 2012 and the jury convicted Middleton of first degree murder, armed burglary, and dealing in stolen property on August 6, 2012. The penalty phase trial began on August 8, 2012 and concluded the next day with a unanimous jury recommendation for death. The trial court held the hearing pursuant to Spencer v. State, 133 So. 2d 729 (Fla. 1961), on August 24, 2012. On October 19, 2012, the trial court sentenced Middleton to death after finding eleven non-statutory mitigators and 4 aggravating factors. The trial court found the following aggravating circumstances: 1) the murder was committed during a burglary merged with the factor that it was committed for pecuniary gain (great weight); 2) the murder was committed to avoid arrest (great weight); 3) the murder was especially heinous, atrocious, and cruel (great weight); and the murder was committed in a cold, calculated, and premeditated manner (great weight). The non-statutory factors in mitigation the court found were: 1) Middleton suffers from below average intelligence and attention deficit hyperactivity disorder (little weight); 2) he has a long history of chronic substance abuse (some weight); 3) he was neglected as a child and had a dysfunctional family life (little weight); 4) he was steadily employed until his substance abuse and incarcerations made that difficult to maintain (little weight); 5) he had little formal education (little weight); 6) he had two children (little weight); 7) he had remorse for the crime (little weight); and 8) he behaved appropriately in court (little weight).

The historical facts of the case, as outlined by the Florida Supreme Court on direct appeal are:

> Roberta Christensen, as well as her husband of thirty-one years, lived in a trailer across the street from Middleton. On July 1, 2009, Mr. Christensen went to New Jersey to visit the couple's son. Before her husband left, they bought mobile phones that allowed them to use a walkie-talkie mechanism to communicate while they were apart.
>
> Middleton lived in a trailer with Garrett Wade Fowler, Kenneth Wade Sullivan and Sullivan's girlfriend, Haleigh Zinker. On occasion, Middleton would visit the victim at her home and would sometimes borrow money and cigarettes from her. On the morning of July 27, 2009, Middleton went over to the victim's trailer while she was preparing to go to the bank. After he left, she realized that she had left approximately $400 in tip money out, and suspected that Middleton had seen it. She deposited the money into the bank that afternoon. When the victim returned from the bank she noticed that someone had attempted to remove the screen from the window by her front door.
>
> On the morning of July 28, 2009, Middleton rode around with his girlfriend's roommate, Steve Britnell, for a period of time looking for drugs. The two eventually found methamphetamine around twelve or one o'clock that afternoon. They returned to Middleton's trailer and shared the methamphetamine. At this time, Garrett Wade Fowler and his girlfriend were also at the trailer. At approximately 4:30 p.m., Fowler and Britnell decided to go to Walmart to "boost." Middleton declined to go, stating that he had business to take care of, that someone owed him some money, and that he needed to take a shower.
>
> While Britnell and Fowler were gone, Middleton took a knife from the sink of his trailer and went over to the victim's home. While in the victim's kitchen, he asked her for money. When she refused and attempted to push him out of the trailer, he attacked her with the knife. Christensen was alive and moving erratically as she was dragged from the kitchen area to the bedroom. Once in the bedroom, Middleton cut Christensen's throat. Before leaving her home, Middleton stole her flat-screen television and power cord and carried the television across the street to his trailer. There, he washed his hands in the kitchen sink, changed his clothes, but kept his boots on. He placed the bloody clothes in a bag with the murder weapon.
>
> When Fowler and Britnell returned to Middleton's trailer,

Middleton was there with Chris Jenkins, Kenneth Wade Sullivan and Sullivan's girlfriend. There was a flat screen television in the kitchen with a blanket covering it. At this time, Middleton had already showered and his hair was still wet. He stated that the person that owed him money had given him the television as payment.

After Jenkins and Sullivan left, Fowler was sitting on the porch as Middleton stood at the door. Fowler noticed that Middleton had a red substance on his boots, which Middleton claimed happened because he got something out of the dumpster. Later, Britnell and Middleton drove around in Britnell's black Pontiac to two different pawn shops trying to sell the victim's television; both pawn shops were closed. They both then got on the phone and began to call around to see if they could find someone who wanted to purchase the television.

At approximately 5:30 p.m., Middleton called Christopher Jenkins to his home. Middleton asked Jenkins to bring drugs with him. When Jenkins arrived at Middleton's trailer, Middleton asked Jenkins for assistance in selling the television. After Jenkins took a photo of the television, he and Middleton went into the bedroom where Middleton crushed and consumed two Roxicodone pills, saving one pill for later.

Mrs. Christensen's husband had last spoken to her on July 28, 2009, around 2:50 p.m. He watched a movie and fell asleep from approximately 4 p.m. to 6:40 p.m. When he woke up he was surprised that his wife had not called him; he repeatedly attempted to contact his wife on the walkie-talkie phone, to no avail. He also left a message on the home's voicemail. Mr. Christensen called the couple's other son who lived near the victim's home and asked him to check on his mother.

When the Christensen's son and his wife arrived at his parents' home, he noticed Mrs. Christensen's car parked in its usual spot. The trailer door was unlocked and the son went inside. When the son walked into the kitchen, he saw a big puddle of blood on the kitchen floor. Next to the puddle of blood he saw a yellow broom with a sharp edge. He followed the path of blood to a closed bedroom door. He opened the door and saw his mother's dead body on the floor. He heard his father on the walkie-talkie calling out for him and his mother. He went outside to call the police. He stopped his wife from entering the trailer. While on the phone with the 911 dispatcher, he went back into the trailer to confirm that his mother was not

> breathing.
>
> Randy Ammons helped Middleton sell the television to his brother, Rolland Ammons. When Middleton went to Randy Ammons' house, he said that he had just taken a shower and did not want the dog to jump on him. A little after 7 p.m., Middleton, in a vehicle driven by Wade Fowler, followed Randy Ammons to Ronnie Ammons' house to sell the television. Fowler stayed outside by his car while Middleton took the television, covered with a comforter, inside and sold it to Rolland for $200. At some point earlier, while riding around trying to sell the television, Middleton placed the bag with the bloody clothes and the murder weapon inside of a dumpster.
>
> After selling the television, Britnell drove Middleton to a gas station, where Middleton purchased cocaine from someone in a truck. They consumed some of the drugs while in the car. Soon thereafter, the serpentine belt on the car broke and Britnell drove to a relative's house to have it fixed. While the car was being fixed, Middleton walked a few hundred yards to a local bar, Brewskis, and called Britnell to pick him up once the car was fixed. When Middleton got back to the car, he was really upset and was crying while he was on the phone with his girlfriend and said, "I'm sorry." The two drove back to the trailer park where Middleton lived. When they arrived, there were police cars in the area. Not wanting to get too close to the police officers, the two turned off at someone else's house, where they got out of the car and stood in the yard.
>
> Later that evening, officers found Middleton at the residence of Darrell Dubel. When the officers arrived, Britnell's car was there. At this time, Middleton was barefoot and had placed his boots and socks in Britnell's trunk. Officer John Rhoden asked Brandon Jenkins, Britnell and Middleton to come to the Sheriff's Office for questioning. Middleton's boots were later recovered from the trunk and were found to have the victim's blood on them. While in custody, Middleton confessed. The bloody clothes and the murder weapon were never discovered.

Middleton, 220 So. 3d at 1159–61.

REASONS FOR DENYING THE WRIT

POINTS ONE AND TWO

THE FLORIDA SUPREME COURT DID NOT USE AN AUTOMATIC HARMLESS ERROR TEST WHEN IT ANALYZED THE HURST ERROR AND THE JURY WAS PROPERLY ADVISED ABOUT ITS ROLE.

This Court found Florida's death sentencing procedure unconstitutional in Hurst v. Florida, 136 S.Ct. 616 (2016), because the jury did not find the aggravators after the penalty phase trial. Middleton contends that the Florida Supreme Court used a *per se* harmless error test when it analyzed the Hurst error in his case, arguing it focused solely on the unanimous jury recommendation. He further argues that the jury's recommendation is not the equivalent to a verdict so the Florida Supreme Court could not do a proper harmless error analysis. However, the Florida Supreme Court's decision that the unanimous jury recommendation was harmless was based solely on state law and is, therefore, not properly before this Court.

The Florida Supreme Court addressed the Hurst error in Middleton's case as follows:

> During the pendency of this case, the United States Supreme Court found Florida's death penalty scheme unconstitutional in Hurst v. Florida, —U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). We granted supplemental briefing in which Middleton argued that he is entitled to a new penalty phase. On remand from the United States Supreme Court, we determined that "before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and

that the aggravating factors outweigh the mitigating circumstances." Hurst v. State, 202 So.3d 40, 53 (Fla. 2016). We further held that a unanimous jury recommendation is necessary for the imposition of death and determined that Hurst error is capable of harmless error review. Id. at 68.

We reject Middleton's argument that he is entitled to a life sentence under section 775.082(2), Florida Statutes (2012). See Hurst, 202 So.3d at 63–66. Thus, the issue before us is whether any Hurst error during Middleton's penalty phase proceedings was harmless beyond a reasonable doubt. This Court has determined that Hurst error is evaluated by the following harmless error standard:

> Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. State, 753 So.2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," [State v.] DiGuilio, 491 So.2d [1129,] 1137 [Fla. 1986], and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a Hurst v. Florida error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:
>
> > The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.
>
> DiGuilio, 491 So.2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." Id.

> Id. at 68 (last alteration in original). For the error to be harmless, this Court must determine that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances.
>
> We emphasize the unanimous jury recommendation of death in this case. This unanimous recommendation allows us to determine that, beyond a reasonable doubt, a rational jury would have unanimously found that sufficient aggravating factors outweighed the mitigation. See Davis v. State, 207 So.3d 142, 173–74 (Fla. 2016). Jurors in Middleton's case heard standard jury instructions informing them that they were to determine sufficient aggravators existed and that aggravation outweighed mitigation before recommending death. See Fla. Std. Jury Instr. (Crim.) 7.11. Jurors were presented with mitigation and informed that they could consider mitigating circumstances of which they were reasonably convinced.
>
> Although the jurors were not informed that they were required to find unanimously that sufficient aggravating circumstances outweighed the mitigation, the jury did recommend death unanimously in this case. We conclude that the jury would have unanimously made the findings necessary to impose death. See Davis, 207 So.3d at 175. The extreme aggravation in this case further bolsters our determination that any Hurst error is harmless beyond a reasonable doubt: the trial court found both HAC and during the commission of a burglary aggravators supported by competent, substantial evidence. These are among the most serious aggravating factors.
>
> We find that the State can sustain its burden of showing that any Hurst error in this case was harmless beyond a reasonable doubt. Although the jury in this case was informed that it was not required to recommend death unanimously, it did so. The unanimous recommendation of death in this case is the sort of recommendation we have determined is constitutionally sufficient to impose a sentence of death. Cf. Davis, 207 So.3d at 175. Based on the foregoing, Middleton is not entitled to a new penalty phase.

Middleton, 220 So. 3d at 1184–85. The Florida court used the unanimous recommendation in conjunction with the facts of the case to find the Hurst error harmless. Those facts included the multi-room nature of the stabbing attack, the

defensive wounds, the number of stab wounds, and the fact that the victim was almost decapitated; those facts were the basis for the heinous, atrocious, and cruel aggravating factor. The jury had already unanimously found Middleton guilty of burglary, which was the other aggravating factor. Under Florida law, as noted in the opinion, these two aggravating factors are two of the most serious and weightiest. See Estelle v. McGuire, 502 U.S. 62, 68, 112 S. Ct. 475 (1991); Stringer v. Black, 503 U.S. 222, 234-235 (1992). The Florida Supreme Court did not just automatically find the error harmless based on the unanimous recommendation.

In Hurst v. Florida, 136 S. Ct. 616 (2016) this Court expressly recognized that the error in allowing a sentencing judge to find the existence of aggravating factors, independent of a jury's fact-finding, is subject to harmless error review. Holding with tradition though, this Court remanded Hurst back to the Florida Supreme Court for that court to conduct a harmless error analysis.

However, the Florida Supreme Court did not limit its review to the question of whether the error under the Sixth Amendment was harmless as identified by this Court. Instead, the Florida Supreme Court concluded that the state constitution mandates that defendants have the right to a unanimous jury findings regarding the elements of a criminal offense applies not only to the existence of an aggravating factor but also to whether the aggravating factors are sufficient and not outweighed

by mitigating circumstances. Using that starting point, the Florida Supreme Court found the error was not harmless in Hurst's case. In doing so, the court noted Justice Alito's dissent in Hurst v. Florida and his harmless error analysis. The Florida Supreme Court stated:

> Justice Alito, in his dissent in *Hurst v. Florida*, opined that the error was harmless beyond a reasonable doubt because, in his view, "it defies belief to suggest that the jury would not have found the ***existence of either aggravating factor if its finding was binding***." *Hurst v. Florida*, 136 S. Ct. at 626 (Alito, J., dissenting). Despite Justice Alito's confidence on this point, after a detailed review of the evidence presented as proof of the aggravating factors and evidence of substantial mitigation, we are not so sanguine as to conclude that Hurst's jury would without doubt have found both aggravating factors—***and, as importantly, that the jury would have found the aggravators sufficient to impose death and that the aggravating factors outweighed the mitigation.*** The jury recommended death by only a seven to five vote, a bare majority. Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances. Nevertheless, the fact that only seven jurors recommended death strongly suggests to the contrary.

Hurst v. State, 202 So. 3d 40, 68 (Fla. 2016) (emphasis added).

Justice Canady, joined by Justice Polston, wrote a dissenting opinion. In Justice Canady's view, the Sixth Amendment, as construed by this Court in Hurst v. Florida, "simply requires that an aggravating circumstance be found by the jury." Hurst, 202 So. 3d at 77. Because Justice Canady "disagree[d] with the majority's expansive understanding of Hurst v. Florida," he also disagreed with the

legal standard underlying the majority's harmless error analysis: "Although the jury may not have reached unanimous determinations regarding the sufficiency of the aggravating circumstances, whether they were outweighed by the mitigating circumstances, and whether a death sentence should be imposed, such determinations . . . are not required by Hurst v. Florida or the Sixth Amendment." Id. at 83.

Justices Canady and Polston are correct. This Court has never held that the Sixth Amendment requires the jury to find the sufficiency of the aggravators or their weight relative to mitigation, if any. This Court's cases hold that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). While this Court later modified the holding in Apprendi to cover findings that increased the sentencing range to which a defendant is exposed even if they did not exceed the statutory maximum, it has not changed the focus from findings that make a defendant eligible for a particular sentence. Alleyne v. United States, 133 S. Ct. 2151, 2155, 2158 (2013); Southern Union Co. v. United States, 132 S. Ct. 2344 (2012); Cunningham v. California, 549 U.S. 270 (2007); Blakely v. Washington, 542 U.S. 296, 303-05 (2004). Consistent with this well-established Sixth Amendment doctrine, this Court in Hurst v. Florida repeatedly framed its

conclusion in terms of *factual* determinations in general and one factual determination in particular—a finding that at least one of the statutorily enumerated aggravating factors exists.

When read in context and with this Court's precedent in mind, the use of the phrase "each fact necessary to impose a sentence of death" in Hurst v. Florida is a reference to the factual findings that make a defendant eligible for a death sentence; not the considerations made in selecting an appropriate sentence for a particular defendant. Specifically, this Court held "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." Hurst, 136 S. Ct. at 624 (emphasis added). Thus, throughout the Hurst opinion where this Court discusses its holding, it focused only on the finding of an aggravating factor necessary to make a defendant eligible for a death sentence. See also Hurst, 136 S. Ct. 619 ("Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. The judge so found and sentenced Hurst to death. We hold this sentencing scheme unconstitutional.")

Moreover, in Hurst v. Florida this Court expressly stated that it was overruling its prior decisions in Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989), only "to the extent they allow a

sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." Hurst, 136 S. Ct. at 624. Spaziano and Hildwin also held that jury sentencing was not constitutionally required. Hildwin, 639 U.S. at 638-40; Spaziano, 468 U.S. at 458-65. By only overruling the portions of Spaziano and Hildwin that allow a judge independently to find an aggravator needed to make a defendant eligible for a death sentence, this Court left intact the portions of those decisions that held that jury sentencing was not constitutionally required.

In Kansas v. Carr, 136 S. Ct. 633, 642 (2016), decided eight days after this Court issued Hurst v. Florida, this Court emphasized that mitigating circumstances and aggravation/mitigation weighing do not require jury fact-finding. Indeed, this Court stated that those consideration are not "facts" as that term is used in this Court's Sixth Amendment jurisprudence.

> Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror 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 the 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.

The majority of the Florida Supreme Court, based on its interpretation of the state statute and the state constitution, concluded that a jury must unanimously find all the statutorily-required components – including the sufficiency of aggravating

factors and the weighing process - before a death sentence can be imposed.[1] Because the Florida Supreme Court's decision depends on the application of state law this Court does not have jurisdiction to review the state court's harmless error analysis. The application of the harmless error rule is a state question where it "involves only errors of state procedure or state law" as in this case. Chapman v. California, 386 U.S. 18, 21 (1967).

To the extent this Court should resolve any issue related to what "facts" the Sixth Amendment requires the jury to find this Court should restate and clarify for the Florida Supreme Court that it is only the aggravating factor that is required to be found by the jury. Indeed, the aggravating factor is the only "fact" involved in the sentencing process. Failing to recognize the distinction between "facts" that require a jury finding, and questions of judgment and mercy, Middleton and the Florida Supreme Court improperly conflate the jury findings that subject a defendant to a potential death sentence i.e., eligibility findings - with the weighing process during which the jury considers and weighs aggravators and mitigators.

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[1] While the Florida Supreme Court's interpretation of this Court's decisions is arguably incorrect, the benefit of this Court granting certiorari is outweighed by the cost of doing so when state courts provide additional protections to criminal defendants. This Court risks expending resources "where the only concern is that a State has 'overprotected' its citizens." Carr, 136 S. Ct. at 647 (Kagan, J. dissenting) citing Michigan v. Long, 463 U.S. 1032 (1983) (Stevens, J. dissenting). Similarly, this Court risks issuing opinions that have little to no effect if the state court can reinstate its prior holding based on state law. Carr, 136 S. Ct. at 647 citing Coleman v. Thompson, 501 U.S. 722 (Blackmun, J. Dissenting).

And, as will be discussed in detail later in this pleading, the Florida Supreme Court's reliance on recommendation unanimity in finding harmless error is premised on its erroneous reading of this Court's decision in Hurst v. Florida.

Middleton cites to other cases with unanimous jury recommendation where the Florida Supreme Court found Hurst error harmless to imply that it does so with regard to nothing else. This is not true as can be seen by the following example. After discussing the unanimous jury recommendation and the jury instructions, the Florida Supreme Court analyzed the error in the case of Richard Knight as follows:

> Finally, as in *Davis*, "the egregious facts of this case" provide "[f]urther support[ ] [for] our conclusion that any *Hurst v. Florida* error here was harmless." *Id.* at 175. In a violent and bloody struggle, Knight murdered a mother and her four-year-old daughter in an argument about whether Knight had to move out of the mother's apartment. Knight strangled and repeatedly stabbed the mother with multiple knives in her bedroom in the middle of the night while the daughter was present. The mother could not yell for help because Knight's attack had destroyed her larynx. The mother suffered, still conscious, through the attack for at least ten minutes following the fatal wounds. She tried and failed to escape. Knight also attempted to strangle and repeatedly stabbed the daughter. Knight's stabbings caused the daughter's lungs to fill with blood, and she essentially drowned in her own blood. Both victims died gruesome, painful deaths.
>
>> The trial court found two statutory aggravating circumstances for the murder of [the mother]: (1) a previous conviction of another violent capital felony, and (2) HAC. The court also found three statutory aggravating circumstances for the murder of [the daughter]: (1) a previous conviction of another violent capital felony, (2) HAC, and (3) the victim was under twelve years of age.

> *Knight*, 76 So.3d at 890. As we have repeatedly noted, "[t]he HAC and prior violent felony aggravators have been described as especially weighty or serious aggravators set out in the sentencing scheme." *Hildwin v. State*, 84 So.3d 180, 190 (Fla. 2011).
> What we said in *Davis* is equally true here:
>
> > Here, the jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. In fact, although the jury was informed that it was not required to recommend death unanimously, and despite the mitigation presented, the jury still unanimously recommended that [the defendant] be sentenced to death .... The unanimous recommendations here are precisely what we determined in *Hurst[v. State]* to be constitutionally necessary to impose a sentence of death.
>
> *Davis*, 207 So.3d at 175. Accordingly, we hold that the *Hurst v. Florida* violation in Knight's case was harmless beyond a reasonable doubt. See id. As in *Davis*, the *Hurst v. Florida* violation here does not entitle Knight to a new penalty phase.

Knight v. State, 225 So. 3d 661, 682-83 (Fla2017). The Florida court clearly did an individualized harmless error analysis in that case as it did in this one.

Middleton asserts that, since the jury gave a recommendation rather than a verdict, there can be no harmless error analysis. He cites to Sullivan v. Louisiana, 508 U.S. 276 (1993) as support but it does not avail him. Sullivan was a case where the trial court gave a constitutionally deficient beyond-a-reasonable-doubt instruction. This Court held that is such a situation, an appellate court could not do a harmless error analysis because the Fifth Amendment requires proof beyond a reasonable doubt which could not exist with a deficient instruction; there was no valid verdict without that present. No such problem is present with Hurst error.

This Court in Hurst v. Florida held that such an error was amenable to a harmless error analysis. Hurst v. Florida, 136 S. Ct. at 618.

Middleton further contends that the Hurst error could not be harmless because there was a Caldwell v. Mississippi, 472 U.S. 320 (1985) violation since the jury was misadvised about its responsibility. The jury, not the court, was responsible for sentencing the defendant in Caldwell. The error was for the State to tell the jury that the appellate court would review that sentence and would be decide whether death was appropriate. Initially, this issue is not properly before this Court since the Florida Supreme Court did not address this error in its opinion. Further, this Court does not require the jury to be the sentencer in death cases and it is the trial court, rather than the jury, which sentences a defendant to death in Florida. This Court has upheld the jury's advisory role in sentencing a defendant to capital punishment in Florida. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Spaziano v. Florida, 468 U.S. 447, 465, 104 S.Ct. 315 (1984). The Hurst v. Florida decision did not alter stance.

"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). The standard jury instructions in Florida, used in this case, correctly advised the jury about its role and the weight its recommendation is given. See Patrick v. State, 104 So. 3d 1046, 1064 (Fla.

2012) ("'[T]he 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). Middleton's jury was advised of its proper role to render a recommendation and that the judge was responsible for determining the sentence.

This Court should deny the writ.

POINT THREE

THE GIVEN JURY INSTRUCTION CORRECTLY STATED FLORIDA LAW AND DID NOT RELIEVE THE PROSECUTION OF PROVING THE AGGRAVATOR.

Middleton contends that the Florida jury instruction for the cold, calculated, and premeditated ("CCP") aggravator relieves the prosecution from the burden of proving it beyond a reasonable doubt, thus violating his right to due process. He argues that under the language of the instruction, the prosecution does not have to prove that the intent to kill arose before the crime began. This Court should deny review since the language does so instruct and is constitutional.

There is no United States Supreme Court case finding Florida's CCP instruction to be unconstitutional. Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) concerned Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravator. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) concerned Georgia's "the substantial history of serious

assault of criminal convictions" aggravator. Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) concerned Oklahoma's HAC aggravator. Richmond v. Lewis, 506 U.S. 40, 48, 121 L. Ed. 2d 411, 113 S. Ct. 528 (1992) concerned Arizona's "heinous, cruel, or depraved" instruction, not Florida's CCP instruction. None involved the CCP aggravator. None involved Florida's aggravators.

Of this Court's cases dealing with Florida aggravators, neither held Florida's CCP aggravator to be unconstitutional. Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) concerned the heinous, atrocious, or cruel ("HAC") instruction, not the CCP instruction and therefore, Sochor v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 2121-22, 119 L.Ed.2d 326 (1992) concerned both the HAC and the CCP aggravators, but the challenge to the CCP aggravator in Sochor was to the sufficiency of the evidence, not vagueness, so Sochor has no direct application to this case.

The Eleventh Circuit had rejected a vagueness challenge to Florida's CCP jury instruction prior to the enactment of the AEDPA. Harich v. Wainwright, 813 F.2d 1082, 1102 (11th Cir. 1987). Harich, citing Zant and Godfrey, argued Florida's CCP aggravating circumstance did not genuinely narrow the class of persons eligible for the death penalty because first degree murder is, by definition, premeditated. The Eleventh Circuit explained that the Florida Supreme Court had

held that § 921.141(5)(i) did narrow the class because it required "heightened" level of premeditation citing Card v. State, 453 So. 2d 17, 23 (Fla. 1984) (stating that “premeditation must rise to a level beyond that which is required for a first degree murder conviction”). The Eleventh Circuit found that Florida’s CCP aggravating circumstance, “so construed, provides adequate guidance both to the sentencing court and to the advisory jury.” The Eleventh Circuit concluded that, because Florida courts have construed § 921.141(5)(i) to require a greater degree of premeditation and cold-bloodedness than is required to obtain a first degree murder conviction, “§ 921.141(5)(i) is a facially valid aggravating circumstance because it genuinely narrows the class of persons eligible for the death penalty.” This part of the panel’s decision was adopted by the Eleventh Circuit en banc. Harich v. Dugger, 844 F.2d 1464, 1468-69 (11th Cir. 1988) (en banc) (adopting sections IB, II, III, IV, VI, and VII of Judge Clark's panel opinion). So, given that the Florida Supreme Court routinely applies the limiting construction to this aggravator, there is no constitutional violation.

Turning to the CCP instruction given, the jury was correctly instructed that the State had to prove that the killing was done in a cold and calculated manner. Middleton argues that the intent to kill had to arise before the crime began, i.e. before the actual murder began, not the entire crime. The trial court instructed that “[t]*he premeditated intent to kill must be formed before the killing*” and that

"[e]ach aggravating circumstance must be established beyond a reasonable doubt before it may be considered." There was no error in this instruction and the Florida Supreme Court's denial of relief was correct under existing Supreme Court law.

Middleton argues that the error was not harmless since the jury may have relied on the aggravator. However, the jury does not sentence a defendant in Florida, the trial court does. Given that the jury was properly instructed about when the intent had to have been formed and that the State had to prove it beyond a reasonable doubt there was no error so there would be no harmless error analysis. There is no problem with the jury recommendation even given that the CCP aggravator was later stricken. "'This Court will not presume that a general verdict rests on a ground that the evidence does not support. *Griffin v. United States*, 502 U.S. 46, 59–60, 112 S.Ct. 466, 474, 116 L.Ed.2d 371. P. 2122.'" Sochor v. Florida, 504 U.S. 527, 528, 112 S. Ct. 2114, 2116, 119 L. Ed. 2d 326 (1992). The writ should be denied.

POINT FOUR

THE FLORIDA SUPREME COURT CONDUCTED A PROPER HARMLESS ERROR ANALYSIS UNDER THE EIGHTH AMENDMENT.

In his final point, Middleton contends that the Florida Supreme Court uses an automatic or *per se* harmless error test when it analysis whether a trial court sentences a defendant to death based on improperly found aggravators, thereby denying him the constitutionally required individualized sentencing decision. Contrary to Middleton's assertions, the Florida Supreme Court did a proper harmless error test and did an individualized sentencing analysis when it found his sentence proportional.

This Court's precedent holds that an appellate court may conduct harmless error analysis regarding an invalid aggravator without violating the right to a jury trial. Clemons v. Mississippi, 494 U.S. 738, 741, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)(concluding that the "[f]ederal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review."); See also Herring v. Secretary, Dept. of Corrections, 397 F.3d 1338, 1342-1344 (11th Cir. 2005)(discussing, but not deciding, a Clemons claim that the Florida Supreme Court conducted an improper harmless error analysis in relation to the CCP aggravator).

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a death sentence. *See Clemons v. Mississippi*, 494 U.S. 738, 752, 110 S.Ct. 1441, 1450, 108 L.Ed.2d 725 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility ... of randomness," *Stringer v. Black*, 503 U.S. 222, 236, 112 S.Ct. 1130, 1139, 117 L.Ed.2d 367 (1992), by placing a "thumb [on] death's side of the scale," *id.*, at 232, 112 S.Ct., at 1137, thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty," *id.*, at 235, 112 S.Ct., at 1139. Even when other valid aggravating factors exist, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." *Clemons*, supra, 494 U.S., at 752, 110 S.Ct., at 1450 (citing *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)); *see Parker v. Dugger*, 498 U.S. 308, 321, 111 S.Ct. 731, 739, 112 L.Ed.2d 812 (1991). While federal law does not require the state appellate court to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error. *Id.*, at 320, 111 S.Ct., at 739.

Sochor, 504 U.S. at 532. The Florida court did just what was required in Sochor.

The Florida Supreme Court found two of the aggravators found by the trial court to be improper given the facts of the case. It struck both the avoid arrest and the CCP aggravators but then did a harmless error analysis.

> "When this Court strikes an aggravating factor on appeal, 'the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence.'" *Williams v. State*, 967 So.2d 735, 765 (Fla. 2007) (quoting *Jennings v. State*, 782 So.2d 853, 863 n.9 (Fla. 2001)); *see also Diaz v. State*, 860 So.2d 960, 968 (Fla. 2003) ("We find this error harmless, however, after consideration of the two remaining aggravating circumstances and the

> five mitigating circumstances in this case."). Despite striking the avoid arrest and CCP aggravators, two valid aggravators remain in this unanimous death-recommendation case. The two aggravators which remain are that the murder was especially heinous, atrocious, or cruel (HAC) and that is was committed during the commission of a burglary and for pecuniary gain, which were each given "great weight" by the trial court. The trial court did not find any statutory mitigation applicable in this case.
>
> In its sentencing order, the trial court expressly stated that any of the considered aggravating circumstances found in this case, standing alone, would be sufficient to outweigh the mitigation in total presented regarding the Christensen murder. In *Smith v. State*, 28 So.3d 838, 868 (Fla. 2009), this Court held that the trial court's erroneous finding of the CCP aggravator was harmless because the sentencing order provided that "any one of the aggravators found (except the felony probation aggravator) was sufficient to outweigh the mitigating circumstances found in this case and due to the other applicable aggravating factors." Therefore, it is clear that the trial court would have imposed a death sentence for Middleton absent the avoid arrest and CCP aggravators. Because we conclude that there is no reasonable possibility that the erroneous findings of the avoid arrest and CCP aggravators contributed to Middleton's death sentence, the errors were harmless.

Middleton, 220 So. 3d at 1172. That court properly used the harmless error test and applied it in a particularized fashion to Middleton's case. It determined, based on the facts and the sentencing order, the trial court would still have sentenced Middleton to death even without the stricken aggravators. The court then went on to analyze and weigh the aggravators and the mitigators specific to Middleton's case when it conducted the proportionality review.

> Middleton argues that without the avoid arrest and CCP aggravators, his death sentence is disproportionate as compared to cases such as *Perry* and *Davis*. After striking the two aggravators in

this case, we find that the sentence of death is still proportional to similar cases.

In order to ensure uniformity in death penalty proceedings, this Court undertakes a comprehensive analysis of the aggravating and mitigating circumstances to determine whether the case falls within the category of the most aggravated and least mitigated. *See Floyd v. State*, 913 So.2d 564, 578 (Fla. 2005) (quoting *Anderson v. State*, 841 So.2d 390, 407–08 (Fla. 2003)). This analysis involves a thoughtful and deliberate proportionality review considering the totality of circumstances of the case and then comparing it with other capital cases with similar aggravating and mitigating circumstances. It is not a comparison between the number of aggravating and mitigating circumstances. *Tillman v. State*, 591 So.2d 167, 169 (Fla. 1991) (quoting *Porter v. State*, 564 So.2d 1060, 1064 (Fla. 1990)).

In this case, the jury voted twelve to zero in favor of the death penalty. The trial court weighed four aggravators against eleven nonstatutory mitigators.6 The aggravators found are: (1) the capital felony was committed while the defendant was engaged in the commission of a burglary or an attempt to commit a burglary and the capital felony was committed for pecuniary gain; (2) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting escape from custody; (3) the capital felony was HAC; and (4) the capital felony was CCP. The court gave all of these aggravators great weight. The eleven nonstatutory mitigators found are: (a) the defendant has below-average or borderline intelligence (little weight); (b) the defendant suffers from attention deficit hyperactivity disorder (ADHD) (little weight); (c) the defendant has a long history of chronic substance abuse (some weight); (d) the defendant had no adult role models to guide him as a child (little weight); (e) the defendant's mother was not involved in child-rearing or supervision and was unavailable emotionally for her children (little weight); (f) the defendant had a steady history of employment until his chronic substance abuse and incarcerations made it difficult to maintain such employment (little weight); (g) the defendant had little, if any, formal education (little weight); (h) the defendant has two children (little weight); (i) the defendant was subjected to chronic neglect, as well as made aware of sexual abuse that was inflicted by his stepfather upon his sister (little weight); (j) the defendant expressed remorse for his crime (little weight); and (k) the defendant exhibited appropriate courtroom behavior (little weight).

Having stricken two of the aggravators, this Court must analyze the two appropriately found aggravators of HAC and during the commission of a burglary/pecuniary gain with the nonstatutory mitigators outlined above. We begin this analysis with the trial court's weighing of both the aggravators and mitigators. Each of the aggravators was given great weight. We have in a long line of cases found the HAC aggravator to be one of the most serious in our limited statutory aggravating circumstances. *See, e.g., Larkins v. State*, 739 So.2d 90 (Fla. 1999). Significantly, the trial court only gave one of the nonstatutory mitigators "some weight" and the other eleven were given "little weight." Additionally, because some of the mitigators were similar, the trial court analyzed them together. Namely, the trial court combined the analysis for the defendant's proposed mitigator of low IQ with his diagnoses of ADHD. The trial court also combined the analysis for the defendant's proposed mitigators of no adult role models, his mother being emotionally unavailable, the defendant being chronically neglected, and his sister being molested by his stepfather.

The defense argues that this case is similar to *Davis v. State*, 604 So.2d 794 (Fla. 1992), and *Perry v. State*, 522 So.2d 817 (Fla. 1988). However, both are distinguishable from this case. In Davis this Court, after striking two aggravators, did not impose a life sentence. Rather we remanded the matter to the trial judge for reconsideration of the sentence because we could not determine beyond a reasonable doubt that the trial judge would have imposed a death sentence in the absence of the two aggravators that were stricken. The trial judge ultimately determined that the remaining aggravating circumstances outweighed the mitigating circumstances and reimposed a sentence of death. We affirmed. The fact that Davis ultimately received a life sentence was not based on the elimination of aggravating circumstances but was the result of postconviction relief for ineffective assistance of counsel regarding racial comments.

This Court in *Perry* had to address a situation involving a judge's override of a jury recommendation of life. In order to uphold the imposition of a death sentence under those circumstances, we must find that no reasonable person could differ with the sentence of death. *See Tedder v. State*, 322 So.2d 908 (Fla. 1975). While *Perry* also involved the striking of two aggravating circumstances, that factor was not the basis for the imposition of a sentence of life imprisonment. This Court made it clear that there were mitigating

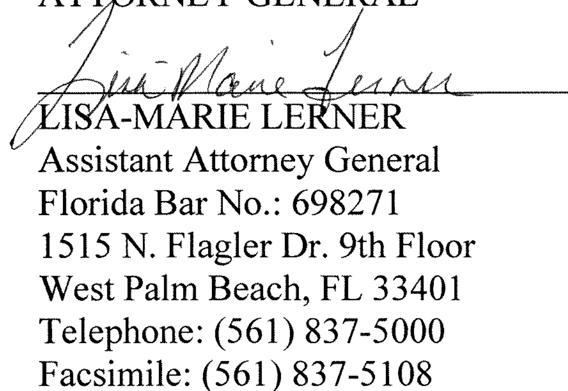
> circumstances presented to the jury that the jury could have considered in reaching its determination of a life sentence. Thus, we said the *Tedder* standard had not been met, and the case was remanded for imposition of a life sentence without parole for twenty five years.
>
> This case is, however, more similar to *Geralds v. State*, 674 So.2d 96 (Fla. 1996), where this Court found the defendant's death sentence to be proportionate under circumstances much like the ones presented here. In *Geralds* the jury unanimously voted for a death sentence, the same aggravators were proven beyond a reasonable doubt, and the trial court gave minimal weight to the defendant's mitigation. Geralds was a carpenter who worked remodeling the victim's trailer. Knowing that the victim's husband was out of town, he attacked her, beating her, stabbing her in the neck and stealing various items from the home. At his original sentencing, the trial court found the same four aggravators that were found in this case. We struck the CCP and witness elimination aggravators, and remanded for a new penalty phase. On appeal from the subsequent sentencing, we again struck the CCP aggravator, but found there was no reasonable likelihood of a life sentence under the circumstance of that case. 674 So.2d at 104–05.
>
> In both this case and *Geralds*, the juries unanimously recommended sentences of death. Both cases ultimately have the aggravators of heinous, atrocious, and cruel murder during the course of a felony/pecuniary gain, and the aggravators were given great weight. The mitigators in each case were nonstatutory, with exception of the age mitigator found in *Geralds*, and in each instance they were given little or very little weight. We conclude here, as we did in Geralds, that even without the aggravators that were stricken, the trial court would have found the aggravating factors substantially outweighed the mitigating evidence. We, therefore, find that Middleton's death sentence is proportional.

<u>Middleton</u>, 220 So. 3d at 1172–75. Middleton received the constitutionally required individualized treatment. The writ should be denied.

<u>CONCLUSION</u>

Based upon the foregoing arguments and authorities, the petition for writ of certiorari should be denied.

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL



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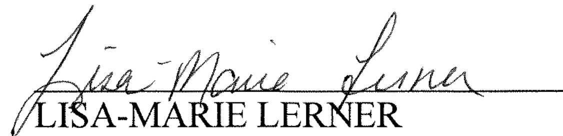
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically served on Jeffrey Anderson, Assistant Public Defender at janderso@pd15.org and appeals@pd15.org this 16th day of January, 2018.



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