CASE NO. 17-6735

IN THE UNITED STATES SUPREME COURT

October 2017, Term

RANDY W. TUNDIDOR,

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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QUESTIONS PRESENTED FOR REVIEW

[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 in determining that any error was harmless beyond a reasonable doubt and that death was the appropriate sentence?

5. Whether this Court should exercise its certiorari jurisdiction to review a decision of a state court where the state court opinion rests on adequate and independent state procedural grounds and where record evidence supports the resolution of Petitioner's motion for recusal and the decision does not conflict with any other court opinion nor does it address any unsettled question of federal law?

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The decision of which Petitioner, Randy W. Tundidor seeks discretionary review is reported as *Tundidor v. State,* 221 So3d 587 (Fla. 2017), *reh'g denied,* SC14-2276, 2017 WL 2794223 (Fla. June 28, 2017) which was issued on April 27, 2017 and affirmed the conviction and death sentence on direct appeal.

JURISDICTION

Petitioner, Randy W. Tundidor ("Tundidor"), is seeking jurisdiction pursuant to 28 U.S.C. § 1257. Although this is the appropriate provision, the requirements of same have not been met.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent, State of Florida (hereinafter "State"), accepts as accurate Petitioner's recitation of the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE AND FACTS

This capital case is before this Court upon the Florida Supreme Court's affirmance of Tundidor's convictions and sentences for one count of first-degree murder, two counts of attempted first-degree murder, two counts of armed kidnapping, two counts of armed robbery, one count of armed burglary, and one count of arson entered by the Seventeenth Judicial Circuit Court in and for

Broward County, Florida. *Tundidor*, 221 So.3d at 592-93.

On May 6, 2010, Tundidor, along with his son, Co-defendant Randy H. Tundidor, ("Randy H") were indicted for the April 6, 2010 first-degree murder of Joseph Morrissey, attempted first-degree murder and attempted first-degree felony murder of Linda Morrissey and their son, "PM," armed kidnapping of Joseph and Linda Morrissey, armed burglary, armed robbery of Joseph and Linda Morrissey, and arson. Voir dire commenced on April 16, 2012 with a jury being selected on April 19, 2012 and sworn. On April 23, 2012, opening statements were made. On May 8, 2012, the jury was instructed and began deliberations before being sequestered for the evening. The following day, May 9th, the jury completed its deliberations and returned a verdict of guilty as charged on each count. Subsequently, Tundidor waived mitigation, but made argument before the trial court asserting residual doubt and claiming his innocence. Independent counsel was appointed to investigate and present mitigating evidence to the trial court. Following counsel's investigation and presentation, on November 7, 2014, Tundidor was sentenced to death. *Tundidor*, 221 So.,3d at 597-98.

The facts developed at trial established that Tundidor along with members of his family leased a property from Joseph Morrissey ("Joseph") and his wife, Linda Morrissey ("Linda"). In March/April 2010, a dispute developed regarding calculation of the rent due as a result of repairs Tundidor made to the property. *Tundidor*, 221, So.3d at 593. Upon receipt of a letter from his landlord noting a violation of the lease, Tundidor became angry and reached out to his son, Randy H.

Tundidor ("Junior") to see if Junior knew someone who could hurt Joseph. *Id.*

> Junior offered to help Tundidor scare Joseph if Tundidor would let Junior stay with him at the townhouse. Later that evening, Tundidor picked Junior up in Hollywood and then drove to Tundidor's business.
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> Once at the business, Tundidor told Junior that Joseph was evicting him and destroying his family. During the conversation, Tundidor gathered some items, including a cleaned and loaded silver .380–caliber gun, eight to ten sets of wire cuffs made from zip ties, a screw driver, a big knife, and a set of walkie-talkies, placing these items inside a box. The plan was for Junior to enter the Morrisseys' house, tie them up, and then search for anything of value. Tundidor told Junior to use the walkie-talkies for communication and to turn off his cell phone so the police could not track it. From the business phone line, Tundidor called Hilda, his fiancée, and asked her to "MapQuest" directions to the Morrisseys' house, and she read the results to Tundidor over the phone. Tundidor and Junior left the business at 10:37 p.m. and drove to the Morrisseys' house.
>
> Once at the Morrisseys' house, Junior armed himself with the gun and entered the house through an open window. Junior did not hide his face, but he wore two layers of gloves. Junior walked through the house to a lighted room where he found Linda. Junior asked for Joseph, and Linda brought Junior to the living room where Joseph was sleeping on the couch. Junior yelled to wake Joseph. Next, Junior used the zip tie cuffs to bind Linda's and Joseph's hands, and then he directed them to the master bedroom. Patrick was sleeping on the bed in the master bedroom, but Junior did not wake him. Junior had Linda and Joseph kneel by the bed, and he covered their heads with towels so they could not see. During this time, Junior was communicating with Tundidor using the walkie-talkies to tell him what steps had been completed.
>
> Next, Junior left the Morrisseys in the bedroom and let Tundidor into the house through the front door. Once inside, Tundidor directed Junior to look for valuables. Junior returned to the bedroom and demanded things of value. Linda offered Junior her wedding ring and some

other jewelry, but Junior did not take it because he did not think it was valuable. Junior went through Joseph's wallet, but only found a few dollars and some euros. Junior left the bedroom to go talk to Tundidor. Tundidor told Junior that he wanted money and that Junior had to take the Morrisseys to the ATM to withdraw $5,000. Junior returned to the bedroom and told the Morrisseys that they were going to the bank to withdraw $5,000. They took the Morrisseys' car, and Junior made Joseph drive with Linda in the front passenger seat while Junior sat in the back seat with the gun. Junior left Patrick at the house because he did not want to wake him. When at the ATM machine, Linda was only able to withdraw $500, which she gave to Junior.

After returning to the house, Junior brought Linda and Joseph back into the master bedroom, where he used a new set of zip ties to bind their wrists. Junior covered Joseph's and Linda's heads again. Patrick was still asleep on the bed. Junior used the walkie-talkie to report to Tundidor that the Morrisseys were tied up and scared and that he had obtained some money from them. Tundidor reentered the house, and Junior gave Tundidor the $500. Tundidor began looking around at the Morrisseys' electronic equipment. Tundidor directed Junior to take the Morrisseys' two laptops and put them in Tundidor's car; the laptops were later found at Tundidor's business during a search of the premises.

Next, Tundidor announced to Junior that Joseph had to die. Junior argued with Tundidor, but ultimately, Junior gave the gun to his father and retrieved Joseph from the master bedroom. Junior entered the master bedroom and first bound the Morrisseys' feet together with sets of zip ties. Junior then forced Joseph to hop to the living room. Tundidor threw Joseph on the couch as Junior watched. With gun in hand, Tundidor put a pillow to Joseph's head and pulled the trigger, but the gun jammed. Tundidor gave the gun to Junior and then retrieved the large knife from the box.

Wearing gloves borrowed from Junior, Tundidor stabbed Joseph in the stomach area. Joseph begged for his life as he was being stabbed. Eventually, Joseph stood up, bleeding from the stomach area and his hands. Tundidor

swung the knife at Joseph's head and neck area, making contact there. Joseph fell to the floor. After stabbing Joseph, Tundidor handed the knife to Junior and told him to put it back in the box and to put the box in the car. Junior complied. Junior testified that Tundidor had no difficulty swinging the knife or moving about the house; Tundidor was not limping and was not using oxygen.

Next, Junior and Tundidor went into the garage. Tundidor saw a gas can and directed Junior to pick it up. Junior handed the gas can to Tundidor, and Tundidor started spreading gasoline around the house, starting in the living room and kitchen. Tundidor announced he wanted to kill Linda and Patrick too, saying, "They got to go too." Junior protested, angering his father. Tundidor then lit a fire near Joseph. Junior left the house, and Tundidor followed him out the front door. Tundidor left Linda and Patrick in the bedroom; Linda had her hands tied behind her back and feet tied together, but Patrick was unrestrained.

Linda testified that she struggled and managed to get one hand free from her restraints. During the stabbing, she heard Joseph cry and plead, but was unable to get to him because her feet were bound. She was able to see Joseph moving and twitching like he was being hurt. Then, she saw an orange light coming from the kitchen and heard the fire alarm go off. Linda next heard the two men leave the house through the front door.

Linda tried to hop, but she fell and hurt her arms. Linda called to Patrick and asked him to get scissors; Patrick found a pair and was able to cut Linda free from her restraints. At this point, the house was full of smoke. Patrick crawled to the front door, and Linda looked for Joseph, finding his body in the family room. Linda called to Joseph, but he did not respond. Linda ran outside and screamed for help. Getting no immediate response, Linda ran back inside to Joseph and realized there was "slippery stuff' on the floor and that Joseph was on fire. Linda struggled to pull Joseph out of the house and eventually got Joseph outside on the patio, but he was unresponsive.

An officer who responded to the scene testified that he

found the house filled with smoke and Joseph with his hands and feet bound together, covered in blood, lying on the back patio. The officer smelled gasoline and saw a gas can in the living room and a fire in the kitchen. A fireman testified that he saw a gas can near the front door and could smell gasoline in the air. Linda testified that she had last seen her gas can near the garage door and that she did not know how it came to be near the front door. Junior's DNA was found on the gas can. Also, the shirt Junior wore at the time of his arrest had Joseph's blood on it.

Detective Kendall testified that he arrived on the scene in the early morning hours on April 6, 2010. Based on an interview with Linda, he initially suspected Junior, and he put a warrant out for Junior's arrest. Detective Kendall also sent an officer to observe Tundidor's home in an unmarked car.

Dr. Trelka, the medical examiner, testified that Joseph suffered multiple stab wounds, blunt force trauma, and thermal injuries. Dr. Trelka noted burns to Joseph's scalp and the right side of his neck and shoulder. Joseph may have been alive when he was burned based on the redness of his skin around the burn areas; however, the carbon monoxide level in his blood was negative. If Joseph was alive when burned, it was not for long. Dr. Trelka noted that there was movement between Joseph and his assailant during the stabbings. The stabbing injury to Joseph's hand and finger was potentially fatal and could have been a defensive wound. A knife capable of causing the injuries to Joseph had to be a very sharp, solid weapon and at least seven or eight inches long. The knife the police obtained, a bowie knife, which was the same as the knife missing from Tundidor's collection, was consistent with the injuries Dr. Trelka observed.

Junior testified that after leaving the Morrisseys' house, Tundidor and Junior drove back to Tundidor's business. Once there, Tundidor gave Junior $60 so Junior could go buy drugs. About an hour later, Junior returned and found that Tundidor had burned the clothes he wore to the Morrisseys' house and changed into a different set of clothes. Tundidor and Junior then left the business and drove to Tundidor's townhouse. Tundidor gave Junior the

knife, which had been cleaned and ground down, and asked Junior to get rid of it. Junior threw the knife into a nearby lake.

Junior testified that after arriving home, he went into Tundidor's garage to use coke. Junior did not change his clothes. Later in the day on April 6, 2010, the police came to the house to talk to Tundidor, and Junior hid in the attic. After the police left, Tundidor told Junior that the police were looking for Junior. Junior spent the rest of the day in the attic taking drugs. Tundidor woke Junior up in the early hours of April 7, 2010, and told Junior to leave. Junior went to a gas station where he made some phone calls. Within about 45 minutes of arriving at the gas station, Junior was arrested.

Junior was taken to the police station where he met with Detective Kendall. In that meeting on April 7, 2010, Junior "gave him a story," making up names of people that he said were involved in the crimes because he did not want to be charged with murder. Later, on April 29, 2010, Junior spoke with Detective Kendall again, disclosing much, but not all, of what had transpired. Junior testified that he changed his mind and decided to tell the truth and testify against Tundidor because Tundidor was blaming the crimes on Junior and Shawn (Junior's brother and Tundidor's son). In exchange for Junior's testimony against Tundidor, the State reduced the charge to second-degree murder, eliminating the possibility of a death sentence, and Junior agreed to plead guilty to all other charges.

The police searched Tundidor's business and found zip ties similar to those used to bind the Morrisseys, a set of walkie-talkies, and euros in the garbage can. Police documented a burn area in the parking lot, and residue from the area was collected. A surveillance video recorded the burning at 2:30 a.m. on April 6, 2010.

Hilda testified that on April 6, 2010, she learned about the murder on the 6 a.m. news. Junior was at home, which was uncommon. Junior saw the news and looked scared. When Hilda confronted Tundidor about the murder, he asked whether she really wanted to know, and Hilda replied that she did not.

Later that morning, Hilda and Shawn went to work at Tundidor's business and noticed that a bowie-like knife was missing. They also smelled gasoline and a burning odor. The smells were coming from the bathroom and back of the shop. They also saw burn marks in the bathroom and ashes in the parking lot, which had not been there previously. Tundidor told Hilda that he burned Junior's crack pipe and asked her to sweep it away, which she did. Hilda testified that the pile she swept up was "pretty big" and looked like pieces of clothing.

On April 9, 2010, Tundidor asked Hilda to get rid of his silver and black gun. When she refused, he said, "[Y]ou want me to go to jail?" He then locked himself in his room, and she heard him using power tools. Later that day, Hilda found holes and gouges in the drywall of her bedroom where no such marks had existed before.

Shawn testified that on April 5, 2010, he returned home between 9:30 and 10 p.m., before the crime took place, and immediately made a phone call. He did not leave the house again that evening and was on the phone until 1 or 2 a.m. Tundidor was not home when Shawn fell asleep on the couch. Yoska Guillen confirmed that Shawn was on the phone with her on April 5, 2010. This call lasted from 11:20 p.m. until 12:10 a.m. the next morning. During that time, Shawn did not disconnect, and Yoska said she did not hear noises in the background or Shawn talking to anyone else. Hilda also testified that on April 5, Shawn returned home that evening at about 8 p.m. and was on the phone for a very long time, until 10 to 10:30 p.m. While she did not see him the rest of the night, she heard him in the house. Hilda believes she would have been alerted by the alarm noises if Shawn had left the house the night of the crimes.

The following morning, Shawn learned about the Morrisseys on the news and asked Junior what happened. Junior replied that he should ask Tundidor. When Shawn confronted Tundidor, who was also watching the news, Tundidor said: "Nobody f***s with [Tundidor] and gets away with it." Shawn did not press his father any further and just went to work at Tundidor's business. When Shawn arrived at Tundidor's business, he found the doors

locked and alarm set. Upon entering, he noticed that a knife was missing from the display case and its box was on the floor. He found the sink stained with burn marks and a big black burn stain outside near the garage door with ash, clothing pieces, and other material.

Following Junior's arrest, Shawn confronted Tundidor. Tundidor admitted to Shawn that Junior did not know that Joseph was going to die that night; Junior only thought they were going to rob the Morrisseys and that Junior would get money for crack cocaine. Tundidor admitted to Shawn that he sent Junior into the Morrisseys' house to tie up the Morrisseys. Shawn inquired about white sneakers he had left in the car, and Tundidor replied that "they were not white when I was done with them." Tundidor also complained that Joseph was trying to evict him, and Tundidor said he could not let his family be thrown out on the streets, following up with "nobody f***s with [Tundidor]" and "nobody gets away with it." Also, Tundidor asked Shawn to retrieve the rent checks from the mailbox as he no longer had to pay the landlord since he was dead.

As a result of this conversation, Shawn asked the police to let him wear a wire. The resulting recording was played for the jury. On the tape, Tundidor said that Junior had the Morrisseys drive to the bank and withdraw money, that Linda could not identify either him or Junior, that the worst things the police had were the laptops from the house, and that he would pin the murder on "Will" before letting Junior take the blame for murder. Also, Tundidor is heard on the tape saying, "The murder weapon, they ain't gonna find it." Tundidor then told Hilda and Shawn to "look the other way" and not "ask" him things or try to figure things out. On cross-examination, the defense explored Shawn's police statements in which he initially lied to give Junior an alibi, only to later state that Tundidor admitted to going to the Morrisseys' house and killing Joseph.

During the guilt phase, Tundidor's counsel argued that Junior and Shawn were responsible for the murder. Tundidor's counsel emphasized Junior's inconsistent statements to the police and statements that Junior made to other jail inmates. Tundidor's counsel also highlighted

> Tundidor's medical problems and physical limitations. Nonetheless, on May 9, 2012, the jury returned a verdict of guilty on each count.

Tundidor, 221 So. 3d at 593–97,

After his conviction, Tundidor announced he was waiving mitigation for the penalty phase and asked that a different judge conduct the *Koon v. State*, 619 So.2d 246 (Fla. 1993) and *Muhammad v. State*, 782 So. 2d 343, 363 (Fla. 2001) inquiry and that this should be outside the presence of the State. (ROA.24 4070-71, 4077-81, 4084-89, 4095, 4113).[1] An *ex parte Koon/Muhammad* hearing was held on October 12, 2012 before Judge Bidwill. (ROA.3 592; ROA.4 600, 631; SROA.5 533-94) After hearing from defense counsel that psychologist, Dr. Lori Butts, had found Tundidor competent to proceed and to waive mitigation and that defense counsel and mitigation expert, Lisa McDermott, had discussed the available mitigation with Tundidor, Judge Bidwill questioned Tundidor extensively. (SROA.5 533-94) It was Judge Bidwill's determination that Tundidor was making a knowing, intelligent, and voluntary waiver of mitigation and the case was returned to Judge Imperato. (ROA.4 605, 607)

On October 22, 2012, the penalty phase was conducted; the defense argued against aggravation, but presented no mitigation. Tundidor requested and received modified jury instructions with respect to mitigation. (ROA.24 4094; ROA.25 4113-16, 4193-4205) The jury returned a unanimous recommendation for death (ROA.25 4209-10).

The day after the penalty phase, Chris Pole ("Pole"), prior trial counsel, was

[1] Referencing the direct appeal record.

questioned by defense counsel Richard Rosenbaum on multiple matters including his mitigation investigation. (ROA.25 4217-20, 4226, 4232-34) Pole started the mitigation investigation when he was appointed. He hired Dr. Lisa McDermott to assist with mitigation and then turned the matter over to Richard Rosenbaum, second chair. During the time he represented Tundidor, Pole discussed the penalty phase case with Rosenbaum. ROA.25 4223-24, 4227-28) Again, Judge Bidwill determined Tundidor wished to waive mitigation for the hearing pursuant to *Spencer v. State*, 615 So.2d 688 (Fla. 1993). On October 23, 2012, Judge Imperato appointed Mitch Polay to investigate mitigation under *Muhammad.* (ROA.4 622-24)

On November 5, 2013 the trial judge, Judge Imperato, was arrested for suspicion of driving under the influence ("DUI") in Palm Beach County. Shortly thereafter, on November 12, 2013 a previously scheduled *Spencer* hearing was convened by Judge Backman, rather than Judge Imperato. Judge Backman declined to proceed with the hearing and made it clear that he was unsure which judge would preside over Tundidor's case in the future, though he was currently assigned to the trial judge's division. While Tundidor argued at the hearing that he was entitled to a new sentencing hearing, the State maintained that the criminal rules only provided for a new sentencing hearing where the trial judge was disabled or dead and that the case would continue to follow Judge Imperato no matter where she was reassigned. Defense counsel told the court that his client wanted a new sentencing phase in front of a different judge; he did not say he would file a motion to recuse Judge Imperato. On December 5, 2013, another hearing was held, this

time before Judge Imperato, at which time defense counsel stated that he had filed a motion to disqualify her based on the arrest. (ROA.28 4326-40) On January 2, 2014, the motion was denied as untimely and legally insufficient.

Subsequently, the *Spencer* hearing was held on July 28-29, 2014, almost two years after independent mitigation counsel had been appointed. Witnesses were produced by counsel for mitigation and by Tundidor for residual doubt. On November 7, 2014, the Motion for new trial was denied and the trial court sentenced Tundidor to death based on:

> . . . aggravators: (1) Tundidor was previously convicted of another capital felony or of a felony involving the use or threat of violence (great weight); (2) the crime was committed while he was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit the crimes of armed kidnapping and arson (great weight); (3) the capital felony was committed for pecuniary gain (great weight); (4) the capital felony was especially heinous, atrocious, or cruel (HAC) (great weight); and (5) the crime was committed in a cold, calculated, and premeditated manner (CCP) (great weight). Additionally, the trial court found the following mitigators: (1) no significant history of prior criminal activity (very little weight); (2) Tundidor had a chaotic and dysfunctional family upbringing (little weight); (3) Tundidor was forced to quit school at a young age (very little weight); (4) Tundidor suffered from physical injuries and pain (very little weight); (5) Tundidor was gainfully employed and ran a successful business (minimal weight); (6) Tundidor was a Red Cross volunteer and did volunteer work for his church (very little weight); (7) Tundidor was well-behaved while awaiting trial in jail (slight weight); and (8) Tundidor has maintained positive relationships (minimal weight).

Tundidor, 221 So.3d at 598.

On direct appeal, Tundidor challenged the finding that his Motion to Recuse

Judge Imperato was untimely and legally insufficient. Also, in light of *Hurst v. Florida*, 136 S.Ct. 616 (2016), he challenged his death sentence. The Florida Supreme Court agreed the recusal motion was untimely given state law Rule 2.330(e) and:

> the trial judge's DUI arrest on November 5, 2013, was the basis for Tundidor's motion. The arrest was public knowledge on November 6, 2013, yet Tundidor did not file the motion until December 5, 2013. Because the motion was filed well outside of the 10–day timeframe, it was untimely.

Tundidor, 221 So.3d at 602. With respect to the *Hurst v. Florida* challenge, the Florida Supreme Court conducted a harmless error review. It pointed to the unanimous jury sentencing recommendation as supporting its conclusion "'beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors.' *Davis*, 207 So.3d at 174." and that the jury "unanimously found all of the facts necessary for the imposition of the death sentence by virtue of its unanimous recommendation." *Tundidor*, 221 So.3d 607-08.

REASONS FOR DENYING THE WRIT

ISSUES I AND II

CERTIORARI REVIEW IS UNWARRANTED AS THE FLORIDA SUPREME COURT CONDUCTED AN INDIVIDUALIZED HARMLESS ERROR ANALYSIS BASED ON STATE LAW REQUIREMENTS ANNOUNCED IN *HURST V. STATE* ARISING FROM ITS EXPANSION OF *HURST V. FLORIDA* AND THE JURY WAS INSTRUCTED PROPERLY ON ITS SENTENCING ROLE (restated).

Petitioner Tundidor points to *Hurst v. Florida*, 1367 S.Ct. 616 (2016) and *Caldwell v. Mississippi*, 472 U.S. 320 (1985) to assert his death sentence is unconstitutional under the Sixth and Eighth Amendments He maintains that the harmless error review conducted by the Florida Supreme Court was improper as it focused on the unanimous recommendation of the sentencing jury to find *per se* harmlessness, thereby, incorrectly treating the jury recommendation "as the necessary factual finding that *Ring v. Arizona*, 536 U.S. 584 (2002)] requires." Additionally, he challenges the sentencing procedures on Eighth Amendment grounds as his jury was instructed the recommendation was advisory, thus, diminishing the jury's sense of responsibility in the sentencing process. Jurisdiction does not lie here as the matter under review arises from a state law expansion of *Hurst v. Florida* in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), and thus, rests on state law grounds alone and is not before this Court properly. Moreover, the harmless error review of his death sentence was conducted on an individual basis and does not conflict with any case from this Court, federal circuit, or state supreme court. No unsettled, important question of federal law exists in this case.

Certiorari review should be denied.

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). Also, this Court does not have jurisdiction to review the application of the harmless-error rule where it "involves only errors of state procedure or state law." *Chapman v. California*, 386 U.S. 18, 21 (1967).

This Court is being asked to assess the Florida Supreme Court's harmless error analysis where *Hurst v. Florida* error was alleged and where the jury was instructed its recommendation was advisory. Tundidor attempts to establish this Court's jurisdiction by relying on the 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*. However, given the Florida Supreme Court's reliance on Florida constitutional and statutory law, its decision is based on an adequate and independent state ground which does not support certiorari review.

Furthermore, the Florida Supreme Court's application of harmless-error involving errors of state law is a state question not subject to this Court's review. While the state court reached the correct conclusion in Tundidor's case, its reliance on the unanimous jury recommendation to find the alleged *Hurst v. Florida* error harmless beyond a reasonable doubt does not comport with this Court's precedent; nonetheless, it does not support certiorari review. Likewise, the argument that a finding of harmless error based on a unanimous advisory sentence violates the Eighth Amendment and this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) was not presented properly nor addressed by the Florida Supreme Court. Even if it had been presented properly, the issue is without merit and does not support certiorari review.

At trial, Tundidor waived mitigation and his jury recommended death unanimously. On direct appeal, Tundidor pointed to *Hurst v. Florida* to challenge his death sentence as unconstitutional. The Florida Supreme Court resolved the matter against Tundidor by considering the unanimity of the jury recommendation in light of the instructions. The Florida Supreme Court reasoned:

> While Tundidor's appeal was pending, the United States Supreme Court issued its decision in *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), in which it held that Florida's capital sentence scheme violated the Sixth Amendment to the United States Constitution. The Supreme Court concluded that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.* at 619.
>
> On remand from the United States Supreme Court in *Hurst*, we stated that "the Supreme Court's decision in

Hurst v. Florida requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury." *Hurst v. State (Hurst)*, 202 So.3d 40, 44 (Fla. 2016), *petition for cert. filed*, No. 16–998 (U.S. Feb. 13, 2017). We further held that "in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous." *Id.* Finally, we explained that *Hurst v. Florida* error is capable of harmless error review. Id. at 67. Thus, the issue here is whether any *Hurst* error during Tundidor's penalty phase proceedings was harmless beyond a reasonable doubt.

The standard for evaluating whether the error was harmless beyond a reasonable doubt "is whether there is a reasonable possibility that the error affected the [sentence]." *Id.* at 68 (*quoting DiGuilio*, 491 So.2d at 1139) (alteration in original). "As applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances." *Davis v. State*, 207 So.3d 142, 174 (Fla. 2016), *petition for cert. filed*, No. 16–8569 (U.S. April 3, 2017); *accord Hurst*, 202 So.3d at 67–68.

In this case, the penalty phase jury returned a unanimous recommendation for a sentence of death. "[This] recommendation[ ] allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." *Davis*, 207 So.3d at 174. Further:

> Even though the jury was not informed that the finding that sufficient aggravating [factors] outweighed the mitigating circumstances must be unanimous, and even though it was instructed that it was not required to recommend death even if the aggravators outweighed the mitigators, the jury did, in fact, unanimously recommend death. From these instructions, we can conclude that the jury unanimously made the requisite factual findings to impose death

> before it issued the unanimous recommendations.
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> *Id.* at 175 (citation omitted).
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> Thus, we conclude that the State has sustained its burden of demonstrating that any *Hurst* error in Tundidor's penalty phase was harmless beyond a reasonable doubt. The jury unanimously found all of the facts necessary for the imposition of the death sentence by virtue of its unanimous recommendation. Accordingly, Tundidor is not entitled to a new penalty phase.

Tundidor, 221 So.3d at 607-08.

In *Hurst v. Florida*, this Court recognized that the Sixth Amendment error in allowing a sentencing judge to find the existence of aggravating factors, independent of a jury's fact-finding, was subject to harmless error review. Based on this Court's precedent, it remanded the case to the Florida Supreme Court for a harmless error assessment.

However, on remand, the Florida Supreme Court did not limit its review to the question of whether the Sixth Amendment error found by this Court was harmless beyond a reasonable doubt. Instead, the Florida Supreme Court determined that the state constitution mandates that defendants have the right to 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 to support the death penalty and are not outweighed by mitigating circumstances. Based on that conclusion, 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, 202 So.3d at 68 (emphasis supplied).

Justice Canady, joined by Justice Polston, wrote a dissenting opinion where Justice Canady concluded that 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). Throughout *Hurst v. Florida*, where this Court discussed its holding, it only focused on the finding of an aggravating factor necessary to make a defendant eligible for a death sentence, not on the balancing of aggravating and mitigating factors or the ultimate propriety of a capital sentence. *See also Hurst v Florida*, 136 S. Ct. 619 (noting "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 v. Florida*, 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 *Hurst v. Florida* issued, this Court emphasized that mitigating circumstances and aggravation/mitigation weighing do not require jury fact-finding. Indeed, this Court stated that those considerations 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.

Carr, 136 S. Ct. at 642 .

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, i.e., the sufficiency of aggravating factors and the weighing process, before a death sentence can be imposed.[2] Because

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[2] 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

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).

However, 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 the aggravating factor(s) alone that is required to be found by the jury. Indeed, the aggravation 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, Tundidor and the Florida Supreme Court conflate the jury findings that subject a defendant to a potential death sentence i.e., eligibility findings, improperly with the weighing process during which the jury considers and weighs aggravators and mitigators to decide on the appropriate sentence. Furthermore, as will be discussed in detail below, 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.*

Pointing to other cases with unanimous jury recommendation where the Florida Supreme Court found *Hurst* error harmless Tundidor suggests that unanimity is the sole factor considered, and thus, the Florida Supreme Court has

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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).

created a *per se* harmless error determination. This is not true as is evident in the analysis in *Knight v. State*, 225 So.3d 661, 682-83 (Fla 2017). There, after discussing the unanimous jury recommendation and the jury instructions, the Florida Supreme Court reasoned:

> 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, 225 So.3d at 682-83. The Florida Supreme Court clearly did an individualized harmless error analysis in this case as it did in *Knight* and *Davis*.

It is also Tundidor's claim that the Florida Supreme Court's harmless error analysis is faulty as it elevated a jury recommendation to a verdict in violation of *Hurst v. Florida*. For support he points to *Sullivan v. Louisiana*, 508 U.S. 276 (1993). However, *Sullivan* offers him no support. There the trial court gave a constitutionally deficient beyond-a-reasonable-doubt instruction. This Court held that in 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. That problem is not present with *Hurst v. Florida* 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.

Additionally, Tundidor contends that the *Hurst v. Florida* error could not be harmless because there was a *Caldwell v. Mississippi*, 472 U.S. 320 (1985) violation as his 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 decide whether death was appropriate. Initially, this issue is not before this Court properly as 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). *Hurst v. Florida* did not alter that precedent.

"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) (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). Tundidor's jury was advised of its proper role to render a recommendation and that the judge was responsible for

determining the sentence. Certiorari should be denied.

ISSUE III

CERTIORARI SHOULD BE DENIED AS THE STATE COURT DECISION RESTED ON AN INDEPENDENT STATE PROCEDURAL GROUND (restated)

Tundidor asserts that under *Caperton v. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), his due process rights were violated. He maintains that he raises a federal question in spite of his attorney missing the filing deadline for a motion to recuse the trial court, because the trial judge should have recused herself *sua sponte* as a result of her arrest for driving under the influence ("DUI") and resulting prosecution by a State Attorney's Office outside the judge's circuit. Alternately, he argues that his Sixth Amendment rights were violated as his counsel rendered ineffective assistance for not filing the motion to recuse in a timely manner. The Florida Supreme Court rested its decision on state procedural grounds independent of the federal question and did not reach the ineffectiveness argument as it was a nullity having been raised for the first time in the reply brief. This Court should deny certiorari.

This Court will not take up a question of federal law presented in a case "if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This rule applies with equal force whether the state-law ground is substantive or procedural and whether the case is on direct review from state courts or in habeas corpus actions. *Id.* Also, 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). Additionally, "this Court has stated that when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). Petitioners before this Court bear the burden of establishing that their federal claim was raised "at a time and in the manner required by the state law" and with "fair precision and in due time." *Adams v. Robertson*, 520 U.S. 83, 87 (1997) *citing Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988) *quoting Webb v. Webb*, 451 U.S. 493, 501 (1981); *New York ex. Re. Bryant v Zimmerman*, 278 U.S. 63, 67 (1928). A petitioner's failure to comply with state procedural rules for raising a federal claim is an adequate and independent ground for the state court to have disregarded the federal claim. *Adams*, 520 U.S. at 88-89.

Tundidor committed his crimes in Broward County Florida and was prosecuted by the State Attorney for the Seventeenth Judicial Circuit. Following the Jury's unanimous recommendation of death, but before the trial judge, Judge Imperato, Circuit Court Judge Seventeenth Judicial Circuit, was able to hear additional sentencing mitigation, she was arrested on November 5, 2013 for DUI in

Palm Beach County.[3] This became public knowledge on November 6, 2013. Shortly thereafter, on November 12, 2013, Judge Backman discussed Judge Imperato's situation, however, given that this was a capital case, Judge Backman declined to proceed with the pre-sentencing hearing. (ROA.28 4329) Judge Backman made it clear that he was unsure which judge would preside over Tundidor's case going forward, though he was currently assigned to Judge Imperato's division; Judge Backman could not inform the litigants "if or when [the trial judge] will ever be back." (ROA.28 4326-40) While Tundidor asserted at the hearing that he was entitled to a new sentencing proceeding, the State maintained that under Rule 3.231 Fla. R. Crim. P., a new sentencing hearing would be required only where the trial judge was disabled or dead. Otherwise, the case would continue to follow the trial judge no matter to which division she was reassigned. Defense counsel told the court that his client wanted a new sentencing phase in front of a different judge; he did not say that he would seek to recuse the trial judge if she continued on the case. (ROA.28 4326-40) On December 5, 2013, another hearing was held, this time before the Judge Imperato, during which defense counsel said he had moved to recuse her based on the arrest. On January 2, 2014, the motion was denied as untimely and

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[3] Tundidor suggests that Judge Imperato was being prosecuted by the "State," suggesting he was being prosecuted by the same entity prosecuting the judge. However, Judge Imperato was arrested in another judicial circuit, Palm Beach Fifteenth Judicial Circuit, with a separate state attorney's office, Office of the State Attorney for the Fifteenth Judicial Circuit which had no jurisdiction or legal involvement with the state attorney or the cases in the circuit where his case was pending. Indeed, if the "State" was considered the same entity regardless of the prosecuting office, there would be no procedure by which the Governor could reassign criminal prosecutions to different circuits when a conflict occurs. *See, e.g., Antonacci*, 122 So. 3d 400, 403 (Fla. 4th DCA 2013).

legally insufficient.

Tundidor challenged that ruling on direct appeal. In response to the State's suggestion that the ruling was correct as the motion was untimely, Tundidor raised for the first time in his reply brief that trial court was ineffective. The Florida Supreme Court concluded:

> Tundidor argues that the trial court erred in denying his motion to disqualify the trial judge after the guilt and penalty phases but before the Spencer hearing. Because the motion was untimely, we affirm its denial.
>
> A motion to disqualify must be filed within 10 days after discovery of the facts that are the grounds for the motion. Fla. R. Jud. Admin. 2.330(e).
>
> In this case, the trial judge's DUI arrest on November 5, 2013, was the basis for Tundidor's motion. The arrest was public knowledge on November 6, 2013, yet Tundidor did not file the motion until December 5, 2013. Because the motion was filed well outside of the 10–day timeframe, it was untimely.
>
> Therefore, the motion was properly denied because it was untimely.

Tundidor, 221 So.3d at 602.

Here, the Florida Supreme Court found Tundidor's motion to recuse the trial court was untimely under a state procedural rule as he failed to file the motion within ten days of the judge's arrest even though he was aware of that fact. Under *Adams*, this is an independent state law ground which does not touch upon a federal question and is a recognized basis to deny certiorari.

With respect to Tundidor's due process and Eighth Amendment federal claims raised here, he has not shown that certiorari is required. The Florida

Supreme Court's resolution did not reach the federal question, nonetheless, under the facts of this case, no constitutional violation has been shown and *Caperton* does not assist Tundidor in his endeavor. As noted above, the facts of this case reveal that the jury had rendered a unanimous death recommendation, but before the trial court sentenced Tundidor, she was arrested by an authority outside her circuit and was subject to prosecution by a State Attorney's office not associated with Tundidor's prosecution.

In *Caperton,* this Court recognized that "most matters relating to judicial disqualification [do] not rise to a constitutional level," however, under the common law, recusal was required where the jurist "has 'a direct, personal, substantial, pecuniary interest' in the case." *Caperton*, 556 U.S. at 876. (citations omitted) . Two additional grounds for recusal were identified also: (1) those involving situations where the judge has a "financial interest in the outcome of a case, although the interest was less than what would have been considered personal or direct at common law;" and (2) where a judge had a "conflict arising from his participation in an earlier proceeding" equating such to a "one-man grand jury." *Caperton*, 556 U.S. at 877, 880. This Court characterized the inquiry as an objective one asking "not whether the judge is actually, substantially biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton*, 566 U.S. at 881. Recusal was found necessary in Caperton where the challenged judge had accepted excessive campaign donations from a principal in a case before the court on appellate review, and those campaign

donations amounted to more than all the donations made by other supporters combined.

None of the situations identified in *Caperton* exist in Tundidor's case. Here, record shows the judge was arrested in a different county and was prosecuted by a different State Attorney's office than the one prosecuting Tundidor. There is nothing in that set of facts that shows Judge Imperato had "a direct, personal, substantial, pecuniary interest" in the outcome of Tundidor's case, nor did she have a financial interest in the matter, nor a "conflict arising from [her] participation in an earlier proceeding." As such, Tundidor has not shown a violation of federal constitutional rights necessitating a recusal. Tundidor has not pointed to a case where automatic recusal is required under the facts of this case. As such, under Supreme Court Rule 10 there is no basis for certiorari review.

Additionally, Tundidor's Sixth Amendment claim that his trial counsel rendered ineffective assistance does not offer him a means to obtain certiorari review. This issue was not raised in Tundior's initial brief; it was raised in the reply. It is well settled that an issue not raised in the initial brief is deemed abandoned and may not be raised for the first time in the reply brief. *See Pasha v. State*, 225 So. 3d 688, 713 (Fla. 2017); *Johnson v. State*, 135 So.3d 1002, 1029 n.11 (Fla. 2014)(finding issue not preserved for review as it was raised for first time in reply brief); *Hoskins v. State*, 75 So.3d 250, 257 (Fla. 2011) (stating argument not raised in initial brief barred); *Jones v. State*, 966 So. 2d 319, 330 (Fla. 2007) (same) *Hall v. State*, 823 So.2d 757, 763 (Fla. 2002) ("Hall made no argument regarding

equal protection in his initial brief; thus, he is procedurally barred from making this argument in his reply brief."); Fla. R. App. P. 9.210(d) (providing "reply brief shall contain argument in response and rebuttal to argument presented in the answer brief.") The procedural bar imposed by state precedent is an independent and sufficient basis to deny certiorari. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)

Nonetheless, based on the fact there is no legal basis to require recusal as set forth above, the fact that the motion was not filed within the required ten-days does not in and of itself establish deficient performance and prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). Judge Imperato's misdemeanor arrest does not establish a basis for recusal based upon a due process violation as noted in *Caperton*. Hence, Tundidor has not shown that counsel's actions fell below constitutionally professional conduct.

Likewise, *Moskowitz v. Moskowitz*, 998 So. 2d 660 (Fla. 4th DCA 2009) does not assist Tundidor in his attempt to show *Strickland* deficiency as *Moskowitz* is distinguishable from the instant case facts. In *Moskowitz*, a husband and wife sought a divorce decree. *Id.* at 661. During the proceedings, the husband unsuccessfully attempted to introduce evidence that the wife abused drugs and required an examination by a physician. *Id.* Prior to the end of the trial, the trial judge was arrested for possession of a controlled substance. *Id.* The husband attempted to disqualify the trial judge, citing, among other things, the "bias shown by the court regarding the wife's use of drugs and in light of the recent arrest of the presiding judge for misdemeanor marijuana charges ...." *Id.* The state district

appellate court found the cumulative effect of the arrest coupled with certain statements made by the trial judge, such as that he [would have been] unlikely to be left with funds to pay his expert," reasonably caused the husband "to believe that the judge [was] not neutral about him[.]" *Id.* at 662. Moskowitz does not stand for the proposition that each time a trial judge faces criminal prosecution, recusal is demanded. Hence, again *Strickland* deficiency has not been shown.

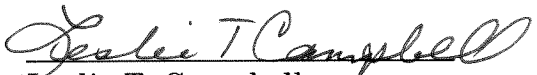
Furthermore, because Tundidor has not established deficiency or that had a motion been filed timely the trial court would have been required to enter an order of recusal, *Strickland* prejudice has not been established. It has not been shown that but for the failure to file a timely motion for recusal Tundidor would not have been sentenced to death. As this Court will recall, the jury, prior to the judge's arrest, had convicted Tundidor of first-degree murder and related crimes and unanimously recommended death. It is well settled in Florida that a jury's sentencing recommendation is given great weight by the trial court. *See Ault v. State,* 53 So. 3d 175, 200 (Fla. 2010) (*citing Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975)(holding "[a] jury recommendation under our trifurcated death penalty statute should be given great weight.") As such, Tundidor has not shown a basis for certiorari review of a federal question not reached by the Florida Supreme Court. This Court should deny certiorari.

CONCLUSION

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

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL



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Case No.: 17-6735

October 2017, Term

IN THE SUPREME COURT OF THE UNITED STATE

RANDY W. TUNDIDOR,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CERTIFICATE OF SERVICE I, Leslie T. Campbell, a member of the Bar of this Court, hereby certifies that on January 22, 2018, a copy of the Brief for Respondent in Opposition in the above entitled case was furnished by United States mail, postage prepaid, to Gary Lee Caldwell, ESQ., Office of the Public Defender, Fifteenth Judicial Circuit, 421 Third Street, West Palm Beach, FL 33401, counsel for Petitioner herein. I further certify that all parties required to be served have been served.

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