NO. 17-7171

IN THE SUPREME COURT OF THE UNITED STATES

JESSE GUARDADO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

PAMELA JO BONDI
ATTORNEY GENERAL OF FLORIDA

CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
*Counsel of Record

Jennifer A. Donahue
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
capapp@myfloridalegal.com
(850) 414-3300

COUNSEL FOR RESPONDENT

Capital Case

Question Presented

Whether this Court should grant certiorari where (1) no federal question is presented; (2) the jury was properly advised on its advisory role according to local law and the importance of its responsibility was not diminished; (3) the error reviewed was state based, not structural in nature, and properly subjected to a state based harmless review; and this case presents no important or unsettled question of law worthy of this Court's certiorari review.

Table of Contents

Table of Citations

Cases

Other Authorities

IN THE SUPREME COURT OF THE UNITED STATES
NO. 17-7171

JESSE GUARDADO,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The decision of the Florida Supreme Court appears as *Guardado v. Jones*, 226 So. 3d 213 (Fla. 2017), *reh'g denied*, 2017 WL 4150352 (Fla. Sept. 19, 2017). The Florida Supreme Court's direct appeal decision appears as *Guardado v. State*, 965 So. 2d 108 (Fla. 2007), *cert. denied*, 552 U.S. 1197 (2008). The Florida Supreme Court's post-conviction decision appears as *Guardado v. State*, 176 So. 3d 886 (Fla. 2015).

Jurisdiction

This Court's jurisdiction to review the final[1] judgment of the Florida Supreme

[1] Although this case is final, Petitioner has another case that includes the same claims that are contained in this Petition still pending before the Florida Supreme Court. *See Guardado v. State*, SC17-1903. Since the same claims are still pending review in the Florida Supreme Court, this Petition should be denied. Petitioner should not have two opportunities for this Court to review

Court is authorized by 28 U.S.C. § 1257. However, no federal question was raised as *Hurst v. Florida* is not retroactive to Petitioner under federal law and the Florida Supreme Court's decision in this case is based on adequate and independent state grounds. Sup. Ct. R. 14(g)(i). Additionally, no compelling reasons exists in this case and Petitioner's writ of certiorari should be denied. Sup. Ct. R. 10.

Statement of the Case and Facts

Petitioner, Jesse Guardado, is seeking certiorari review of the denial of his Petition for Writ of Habeas Corpus to the Florida Supreme Court. *Guardado*, 226 So. 3d at 215. The Florida Supreme Court found "the *Hurst* violation in this case is harmless beyond a reasonable doubt. . . ." *Id.*

Petitioner pled guilty to first-degree murder and robbery with a weapon. *Guardado*, 226 So. 3d at 214. After a failed attempt at robbing a local grocery store for money to buy crack cocaine, Guardado robbed and murdered 75-year-old Jackie Malone. *Guardado*, 965 So. 2d at 110. Guardado had previously received assistance from Ms. Malone including financial assistance, a place to live, and help getting a job. *Id.* Guardado knew from his previous experience with Ms. Malone that she would "open her home to him based on their prior trusting relationship" and that "she kept some money on hand in her wallet." *Id.*

> Ms. Malone had already retired for the night so Guardado continually knocked on her door to awaken her. Guardado identified himself by name when she came to the door. She greeted Guardado, and he told her he needed to use the telephone. When she turned away to allow him to enter the house, he pulled the "breaker bar," which was hidden behind his back in his pants, and struck her repeatedly about her

---

these claims.

> head. Ms. Malone raised her hands in defense, and then fell to the living room floor. Ms. Malone did not die from the numerous blows with the "breaker bar," so Guardado pulled the kitchen knife and stabbed her several times, then slashed her throat.

Id. at 111.

> The court found five aggravating factors: (1) the capital felony was committed by a person under sentence of imprisonment or on conditional release supervision; (2) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (to wit: armed robbery, April 9, 1984; robbery with a deadly weapon, July 6, 1990; robbery, January 23, 1991; robbery with a weapon, January 23, 1991; attempted robbery with a deadly weapon, February 17, 2005); (3) the capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, or escape after committing, a robbery with a weapon; (4) the capital felony was especially heinous, atrocious, or cruel (HAC); and (5) the crime was committed in a cold, calculated and premeditated manner (CCP).

Id. at 112.

The jury was instructed that the "punishment for murder in the first degree is either death or life imprisonment without the possibility of parole." (Record at 350). The jury was told to

> render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify imposition of the death penalty and whether sufficient aggravating circumstances exist to outweigh any mitigating circumstances found to exist.

(Record at 350).

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole. Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether aggravating circumstances exist that outweigh the mitigating circumstances.

(Record at 353). "Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision." (Record at 353).

> If, after weighing the aggravating and mitigating circumstances, you determine that the aggravating factors found to exist sufficiently outweigh the mitigating factors or, in the absence of mitigating factors, if you find that the aggravating factors alone are sufficient, you may exercise your option to recommend a death sentence to be imposed rather than a sentence of life in prison without the possibility of parole. However, regardless of your findings with respect to aggravating and mitigating circumstances, you are never required to recommend a sentence of death.

(Record at 358-59). Regarding the gravity of the proceedings, the judge instructed the jury that the

> fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift, and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

(Record at 359). The jury unanimously recommended that Petitioner be sentenced to death. *Guardado*, 226 So. 3d at 215.

Petitioner wished to waive his *Spencer*[2] hearing stating

> I'd like to make it known that I do not wish to have a *Spencer* hearing; I wish for sentencing to be imposed today. I have asked this Court, from day one, that I wanted this to be over with as expediently as possible. And at every turn, it's been delayed, delayed, and delayed. I understand it's of grave concern, but it's time to put it to an end.

---

[2] *Spencer v. State*, 615 So. 2d 688, 691 (Fla. 1993).

(*Spencer* Record at 4). The State then requested that defense present the available mitigation against the wishes of his client in accordance with Florida law. (*Spencer* Record at 4).

> Guardado did not ask the trial court to consider any statutory mitigating circumstances, and the trial court did not find any. The trial court did find nineteen nonstatutory mitigating factors (ten as requested by [counsel for] Guardado, seven additional ones based upon review and consideration of the defense expert at the *Spencer* hearing, and two that were suggested by the State).
>
> The nonstatutory mitigating factors and the weight given by the trial court are: (1) defendant entered a plea of guilty to first-degree murder without asking for any plea bargain or other favor in exchange (great weight); (2) defendant has fully accepted responsibility for his actions and blames nobody else for this crime (great weight); (3) defendant is not a psychopath pursuant to expert testimony and would not be a danger to other inmates or correctional officers should he be given a life sentence (moderate weight); (4) defendant could contribute to an open prison population and work as a plumber or an expert in wastewater treatment plant operations should he be given a life sentence (little weight); (5) defendant fully cooperated with law enforcement to quickly resolve the case to the point of helping law enforcement officers recover evidence to be used against him at trial (great weight); (6) defendant has a good jail record while awaiting trial with not a single incident or discipline report (little weight); (7) defendant has consistently shown a great deal of remorse for his actions (great weight); (8) defendant has suffered most of his adult life with an addiction problem to crack cocaine which was the basis of his criminal actions (some weight); (9) defendant has a good family and a good family support system that could help him contribute to an open prison population (moderate weight); (10) defendant testified he would try to counsel other inmates to take different paths than he has taken should he be given a life sentence (moderate weight); (11) as a child, defendant suffered a major trauma in his life by the crib death of a sibling (moderate weight); (12) as a child, defendant suffered another major trauma in his life by being sexually molested by a neighbor (moderate weight); (13) defendant has a lengthy history of substance abuse (marijuana and Quaaludes) during early teen years, graduating to alcohol and cocaine and substance abuse treatment beginning about age 14 or 15 (little weight); (14) defendant's biological father passed away before defendant developed any lasting memories of him (little

> weight); (15) defendant was raised by his mother, whom he always considered loving, thoughtful and concerned, and by a stepfather he later came to respect (little weight); (16) defendant was under emotional duress during the time frame of this crime (little weight); (17) defendant does not suffer a mental illness or major emotional disorder (little weight); (18) defendant offered to release his personal property, including his truck, to his girlfriend (little weight); and (19) defendant previously contributed to state prison facilities as a plumber and in wastewater treatment work (little weight).

Guardado, 965 So. 2d at 112, 112 n.2.

Ultimately, the "trial court found, as did the jury, that the aggravating circumstances outweighed the mitigating circumstances." *Guardado*, 226 So. 3d at 113. The trial court sentenced Petitioner to death. *Id.* at 111.

Petitioner appealed his judgment and sentence to the Florida Supreme Court raising four issues. *Guardado*, 965 So. 2d at 113, *cert. denied*, 552 U.S. 1197 (2008). The Florida Supreme Court *sua sponte* reviewed the record for sufficiency of the evidence to support his conviction and for proportionality of the death sentence. *Id.* at 118-19. The Court found "competent, substantial evidence" to support the conviction. *Id.* After considering the evidence, the Court conducted a proportionality review and concluded "that the sentence of death is proportional to other murder cases involving similar factual circumstances and similar aggravating and mitigating circumstances." *Id.* The Florida Supreme Court affirmed the conviction and sentence. *Id.* at 120.

After his direct appeal, Petitioner filed a post-conviction motion in the trial court, which was denied. *Guardado*, 176 So. 3d at 889. Petitioner appealed, raising

four claims of ineffective assistance of counsel. *Id.* at 892 n.1. The Florida Supreme Court affirmed the trial court's denial of post-conviction relief. *Id.* at 899.

Petitioner filed a writ of habeas corpus in which he raised *Hurst* claims, which the Florida Supreme Court denied and is now the subject of this appeal. *Guardado*, 226 So. 3d at 215; *Hurst v. Florida*, 136 S.Ct. 616 (2016); *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S.Ct. 2161 (2017). In holding the *Hurst* error to be harmless, the Florida Supreme Court concluded:

> as we stated in *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016):
>
> > "[T]he jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. . . . The unanimous recommendations here are precisely what we determined in *Hurst* to be constitutionally necessary to impose a sentence of death."
>
> Accordingly, the *Hurst* violation in this case is harmless beyond a reasonable doubt and, as in *Davis*, does not entitle Guardado to relief.

Guardado, 226 So. 3d at 215.

Petitioner also filed a successive post-conviction motion raising claims under *Hurst* and appealed the denial of that motion to the Florida Supreme Court. *Guardado v. State*, No. SC17-1903. That appeal is still pending resolution and contains the same claims as contained in this Petition.

Reasons for Denying the Writ

The Petition Should Be Denied as It Does Not Allege a Federal Constitutional Violation or Raise a Claim of Error That is Retroactive Under Federal Law, and the Violation of State Law Was Properly Denied as Harmless.

The Florida Supreme Court's affirmance of Petitioner's sentence does not

present a federal constitutional question as the requirements of *Hurst v. Florida* were satisfied in his case. The Florida Supreme Court's vast expansion of the holding in *Hurst v. Florida* were not required or even suggested by this Court's holding. For example, *Hurst v. Florida* requires the jury to find one aggravating circumstance existed, not that every aggravating circumstance must be found to exist, before rendering a defendant eligible for the death penalty. Likewise, *Hurst v. Florida* did not establish a new Sixth Amendment right to have a jury determine whether mitigating circumstances exist and determine whether mitigation is sufficiently substantial to warrant leniency. Additionally, *Hurst v. Florida* did not hold that there is a constitutional right to jury sentencing.

The Florida Supreme Court, however, interpreted *Hurst v. Florida*, the Florida Constitution, and Florida jurisprudence as requiring, before the imposition of the death penalty, that a jury

> unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Hurst, 202 So. 3d at 57. This was a vast expansion from the holding in *Hurst v. Florida*, which focused solely on concerns over the imposition of a death sentence based on judicial rather than jury factfinding related to the aggravating factors. To explain this expansion, the Florida Supreme Court reasoned that the jury "recommendation is tantamount to the jury's verdict in the sentencing phase of trial" and under Florida law, jury verdicts are required to be unanimous. *Id.* at 54.

Additionally, the Florida Supreme Court held that unanimity "serves th[e] narrowing function required by the Eighth Amendment"[3] to ensure that death is not "arbitrarily imposed, but . . . reserved only for defendants convicted of the most aggravated and least mitigated murders." *Id.* at 60 (citing *Gregg v. Georgia*, 428 U.S. 153, 199 (1976); *McClesky v. Kemp*, 481 U.S. 279, 303 (1987)). Since the Florida Supreme Court's holding in *Hurst v. State* was a product of state law, and does not present a federal question, this Petition should be denied.

Further, in contrast to *Hurst*, here, Petitioner pled guilty both to first-degree murder and robbery with a weapon. The robbery with a weapon was the source of aggravating factor three, and thus is considered proven beyond a reasonable doubt. *See Florida v. Nixon*, 543 U.S. 175, 187 (2004) ("By enering a guilty plea, a defendant waives constitutional rights that inhere in a criminal trial. . . .").

Additionally, Petitioner had six prior felony convictions. *See Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)) (prior convictions are "a narrow exception" to the Sixth Amendment requirement that defendants have a right to have a jury find facts which expose a defendant to a greater punishment). Thus, at least one aggravating factor was found by the jury to be proven beyond a reasonable doubt by virtue of the guilty plea and another was exempted from this requirement by virtue of the prior

---

[3] The Eighth Amendment requires states to "give narrow and precise definition to the aggravating factors that can result in a capital sentence" in order to limit the death penalty to a "narrow category of the most serious crimes" and to defendants who are "more deserving of execution." *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (citing *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). This Court has never held that the Eighth Amendment requires the jury's final recommendation in a capital case to be unanimous. *See, e.g., Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

convictions. Based on these two factors in Petitioner's case, there was no *Hurst v. Florida* error.

Further, *Hurst v. Florida* is only retroactive to Petitioner based on an independent state ground. Petitioner may not ask this Court to enforce a retroactivity ruling based on state law. In *Asay*, the Florida Supreme Court held that any case in which the death sentence was final before June 24, 2002, the date *Ring* was decided, would not receive relief based on *Hurst v. Florida*. *Asay v. State*, 210 So. 3d 1, 15 (Fla. 2016); *Ring v. Arizona*, 536 U.S. 584 (2002). In making its decision, the Court recognized that its retroactivity test in *Witt* "provides *more expansive retroactivity standards* than those adopted in *Teague*." *Asay*, 210 So. 3d at 15 (citing *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005)); *Witt v. State*, 387 So. 2d 922 (Fla. 1980); *Teague v. Lane*, 489 U.S. 288 (1989). Subsequently, the Florida Supreme Court issued an opinion in which it granted retroactive application of *Hurst v. State*, under a state retroactivity analysis, to those cases that were decided post-*Ring*. *See Mosley v. State*, 209 So. 3d 1248, 1276 (Fla. 2016) ("We conclude that under a standard *Witt* analysis, *Hurst* should be applied to Mosley and other defendants whose sentences became final after the United States Supreme Court issued its opinion in *Ring*."). This state law decision does not create a constitutional right to retroactive application of any decision of this Court.

This Court has held that, in general, a state court's retroactivity determination is a matter of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008) (allowing states to adopt a retroactivity test

that is broader than *Teague*). Petitioner cannot petition this Court to review a finding of harmless error based purely on a violation of state law. That the Florida Supreme Court held that *Hurst* was retroactive to his case does not mean that he can enforce that retroactivity ruling in federal court. When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. This Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). *See also Lambrix v. Sec'y, Dep't of Corr.*, 872 F.3d 1170, 1182 (11th Cir. 2017), *cert. denied*, 138 S.Ct. 312 (2017) ("[n]o U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable").

The error complained of in the instant petition is the violation of the expanded sentencing requirements created in *Hurst v. State*, not the federal constitutional requirements set forth in *Hurst v. Florida*. Thus, any violation of that state holding in Petitioner's case would not be reviewed under federal law. No question of federal law has been presented for this Court's Review.

Moreover, Petitioner's claim[4] that the Florida Supreme Court used a *per se*

---

[4] Amicus echoes this *per se* harmlessness argument. In support of this *per se* harmlessness argument, Amicus claims that three "categories" of defendants are being subjected to *per se* denial of relief. The other two "categories" include cases which were final pre-*Ring* and cases where the defendant waived a sentencing jury. Since Petitioner's case was not pre-*Ring* and he did not waive his sentencing jury, these claims by Amicus are irrelevant to Petitioner's case and are not addressed in this brief. However, the State disagrees with Amicus' statements related to these two other "categories" of cases.

test for harmlessness is meritless. In Petitioner's case, the Florida Supreme Court did not use a *per se* harmless error rule based only on the unanimous jury recommendation. Instead, Petitioner received an individualized review. The court specifically mentions the facts as described on direct appeal, the five aggravating factors, the non-statutory mitigating circumstances, and the unanimous jury verdict. *Guardado*, 226 So. 3d at 214. Additionally, the Court cites to *Davis*, which was the first case where *Hurst v. State* error was found to be harmless beyond a reasonable doubt. *Davis*, 207 So. 3d at 175.

In *Davis*, the Florida Supreme Court went into a detailed analysis of why the error was harmless, using the same concepts in reviewing harmlessness as they used in *Hurst v. State*. Instead of restating the entirity of their method in determining harmlessness in each and every case where there was a unanimous jury recommendation, including in Petitioner's case, the Court cites *Davis* and points out the similarities between each case and *Davis*. The Court concluded in Petitioner's case that, like in *Davis*, the error was harmless beyond a reasonable doubt. *Guardado*, 226 So. 3d at 215; *Davis*, 207 So. 3d at 175.

In *Davis*, the Court found the unanimous jury recommendation of death persuasive in analyzing what a rational jury would have done because even though the jury was not informed that their decision had to be unanimous, after considering the aggravation and mitigation in this case, the jury made a unanimous recommendation nonetheless. *Davis*, 207 So. 3d at 174-75. If a jury who was instructed that only a majority was necessary to recommend death made a

unanimous recommendation, certainly a jury instructed that unanimity was necessary would have been unanimous as well.[5]

> 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 Davis 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.

Id. at 175.

Continuing the analysis of whether the error was harmless in *Davis*, the Court found further support for the conlcusion that any error was harmless based on the egregious facts of the case and the evidence in support of the "*six* aggravating circumstances," which were "signifiant and essentially uncontroverted." *Davis*, 207 So. 3d at 174 (emphasis in original). These factors in combination led to the Court's conclusion that the error in *Davis* was harmless beyond a reasonable doubt.

Like in *Davis*, the jury instructions in Petitioner's case similarly required the jury to find that the aggravating factors were proven beyond a reasonable doubt and to find that sufficient aggravating circumstances outweighed the mitigating

---

[5] Regarding Amicus' argument that "Florida juries lean toward mercy when confronted with binding sentencing responsibility," Amicus fails to acknowledge two recent cases which are in direct contradiction to its assertion. In *Deviney*, the original jury recommended death 8-4 after being instructed pre-*Hurst*. *Deviney v. State*, 213 So. 3d 794, 795 (2017). Deviney was granted a new penalty phase and the post-*Hurst* jury made a unanimous jury recommendation of death. *Deviney v. State*, case no. 2008-CF-012641, Duval County, Florida. Similarly, in *Bright*, the pre-*Hurst* jury recommended death 8-4. *State v. Bright*, 200 So. 3d 710, 720 (2016). Bright was granted a new penalty phase and the post-*Hurst* jury made a unanimous jury recommendation of death. *Bright v. State*, case no. 2008-CF-2887-A, Duval County, Florida. In both of these cases, the jury went from being barely over the majority required to being unanimous when instructed that unanimity was

circumstances before considering recommending a death sentence. (Record at 350). Just as in *Davis*, even though the jury was not required to unanimously recommend death, the jury did so in Petitioner's case. Additionally, in Petitioner's case, there were egregious facts, five aggravating circumstances, none of which were stricken on appeal, and no errors were found on appeal in the trial court's determination of mitigation. *Guardado*, 965 So. 2d at 113-18. On direct appeal, the Court found that the conviction was supported by "competent, substantial evidence in the record" and found the sentence of death proportional[6] "to other murder cases involving similar factual circumstances and similar aggravating and mitigating circumstances." *Id.* at 118-19.

After *Davis*, the Florida Supreme Court held *Hurst* error to be harmless beyond a reasonable doubt in approximately fifteen[7] cases where the jury

---

required.

[6] In the wake of *Furman*, many states in redrafting their capital sentencing statutes added a statutory requirement to review whether a capital "sentence is disproportionate to that imposed in similar cases" to "avoid arbitrary and inconsistent results." *Pulley v. Harris*, 465 U.S. 37, 44 (1984); *Furman v. Georgia*, 408 U.S. 238 (1972). As this Court said, "[p]roportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required." *Pulley*, 465 U.S. at 50. Thus, the proportionality in Florida is a product of state law. *Yacob v. State*, 136 So. 3d 539, 546 (Fla. 2014) (citing *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973)); *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991). It serves as an additional check on arbitrariness to ensure the narrowing requirements established by Florida law comply with the Eighth Amendment are, in practice, fully narrowing capital punishment only for defendants who, based on their crimes and aggravating circumstances, are "most deserving of execution." *Atkins*, 536 U.S. at 319.

[7] *See King v. State*, 211 So. 3d 866, 892-93 (Fla. 2017) (considering "the unanimous jury recommendation, King's failure to challenge evidence presented in aggravation, as well as the overwhelming and uncontroverted evidence of the four aggravating circumstances and the comparatively weaker mitigating evidence that was challenged by the State"); *Kaczmar v. State*, 228 So. 3d 1, 7-9 (Fla. 2017) (considering "extensive aggravating circumstances" of HAC and prior violent felony which "are among the weightiest of aggravators"); *Knight v. State*, 225 So. 3d 661, 682-83 (Fla. 2017) (considering "egregious facts" and "weighty" aggravators); *Hall v. State*, 212 So. 3d 1001, 1033-35 (Fla. 2017) (considering "evidence in support of the *four* aggravating circumstances" was "significant and essentially uncontroverted" and "[t]hree of the four aggravators were without and

unanimously recommended death, including in Petitioner's case. In each of these cases, including Petitioner's, each defendant received individualized review and the Court did not use a *per se* test for harmlessness. Looking at *Davis* and the cases that followed, it is clear that the Florida Supreme Court is not using jury unanimity as a *per se* test for harmlessness as Petitioner argues. Instead, a

> unanimous recommendation lays a foundation for 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.

Hall, 212 So. 3d at 1034.

In fact, in its review, the Florida Supreme Court has reversed and remanded two post-*Ring* cases in which there were unanimous jury recommendations. *See Wood v. State*, 209 So. 3d 1217, 1226, 1238 (Fla. 2017) (vacating the sentence because "his death sentence is disproportionate when [CCP and avoid arrest] aggravating factors are struck"); *Bevel*, 221 So. 3d at 1182 (Fla. 2017) (finding the *Hurst* error harmless for the murder where the jury unanimously recommended death, but vacating the death sentence due to ineffective assistance of counsel because "the unpresented mitigation evidence" undermines confidence in the result

---

beyond dispute") (emphasis in original); *Truehill v. State*, 211 So. 3d 930, 955-57 (Fla. 2017), *cert. denied*, 138 S.Ct. 3 (2017) (considering that the appellant "has not contested any of the aggravating factors as improper" and a unanimous finding despite there being four statutory mitigating circumstances); *Jones*, 212 So. 3d at 342-44, *cert. denied*, 138 S.Ct. 175 (2017) (considering that the evidence supporting the aggravating factors was substantial); *Middleton v. State*, 220 So. 3d 1152, 1184-85 (Fla. 2017) (considering "HAC and during the commission of a burglary aggravators" were supported by the record and "are among the most serious aggravating factors"); *Oliver v. State*, 214 So. 3d 606, 617-18 (Fla. 2017), *cert. denied*, 138 S.Ct. 3 (2017); *Morris v. State*, 219 So. 3d 33, 46 (Fla. 2017), *cert. denied*, 138 S.Ct. 452 (2017); *Tundidor v. State*, 221 So. 3d 587, 607-08 (Fla. 2017); *Cozzie v. State*, 225 So. 3d 717, 733 (Fla. 2017); *Bevel v. State*, 221 So. 3d 1168, 1177-78 (Fla. 2017) (considering that "no aggravating factors have been struck"); *Philmore v. State*, no. SC17-711, 2018 WL 549181, *1 (Fla. Jan. 25, 2018) (considering the appellant's "confession and the aggravation in this case"); *Franklin v. State*, no. SC17-824, 2018 WL 897427, *3 (Fla. Feb. 15, 2018).

when "the jury's vote recommending death was dependent on one juror's vote"). If the Florida Supreme Court were merely affirming cases based on the unanimous verdict alone without reviewing the entire record as Petitioner argues, these two cases would have been affirmed.

Since the Florida Supreme Court's holding in *Hurst v. State* was a product of state law, the harmlessness of *Hurst v. State* error is a State question. *Hurst*, 202 So. 3d at 54. The "application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law." *Chapman*, 386 U.S. at 21.

In reviewing whether the error in *Hurst v. State* was harmless, the Florida Supreme Court reviewed whether there was "no reasonable possiblity that the error contributed to the sentence." *Hurst*, 202 So. 3d at 68 (citing *Zack v. State*, 753 So. 2d 9, 20 (Fla. 2000)); *see also State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986). Florida's harmless error test which was set forth in *DiGuilio* is derived from this Court's precedent in *Chapman* and *Hasting*, but is a separate state test for harmlessness. *Id.* at 1134-35; *Chapman*, 386 U.S. at 24; *Hasting*, 461 U.S. at 511.

> [T]he 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 [the] death sentence in [a] case.

Hurst, 202 So. 3d at 68. Further, "[w]here the jury has not been instructed to find an element of the offense, the test for harmless error asks whether it is clear beyond a reasonable doubt that a rational jury would have found the element of the

offense." *Jones v. State*, 212 So. 3d 321, 344 (Fla. 2017) (citing *Neder*, 527 U.S. at 18); *see also Jenkins v. Hutton*, 137 S.Ct. 1769, 1772 (2017) (proper consideration is "whether a properly instructed jury could have recommended death").

In using the state harmlessness test, the Florida Supreme Court is not analyzing harmlessness in a way that contravenes existing federal law. In fact, the Florida test for harmlessness is derived from and similar to the federal test. It is perhaps a more stringent test than would be applied in federal court as it appears to employ both *Chapman*'s effect on the verdict test and *Neder*'s rational jury test. This strictness favors defendants as it allows for fewer findings of harmless error[8] than would occur just under the *Neder* test.

The defects addressed by the Florida Supreme Court in *Hurst v. State* are premised on a question of state law and procedure and have been analyzed under a state based harmless error rule. The Florida Supreme Court's analysis of these errors is not in contravention with federal law, this Court's precedent, or the constitution. In fact, harmlessness in light of the *Hurst v. State* factors is much more rigorous and difficult for the State to prove than the analysis of the *Hurst v. Florida* error. Indeed, as Justice Alito noted in his dissent regarding whether the error was harmless in *Hurst*: "[i]n light of this evidence, it defies belief to suggest that the jury would not have found the existence of either aggravating factor if its finding was binding." *Hurst*, 136 S.Ct. at 626 (Alito, J., dissenting). However, the

[8] Of the post-*Ring* cases, there are approximately 34 cases with unanimous recommendations and approximately 153 cases with non-unanimous recommendations. The Florida Supreme Court has found the error to be harmful in all non-unanimous cases. *See Pagan v. State*, no. SC17-872, 2018 WL 654450, *2 (Fla. Feb. 1, 2018) (Lawon, J., dissenting) (finding per se reversible error in all non-

Florida Supreme Court was not as "sanguine" after their analysis of the record. *Hurst*, 202 So. 3d at 68. Their uncertainty focused almost exclusively on the issue of unanimity and the effect that not instructing on unanimity had on the verdict. *Id.* This concern is much less apparent when the jury was unanimous in spite of being instructed that only a majority was required. Certainly, the instruction that only a majority was required for a recommendation of death did not affect the verdict if the jury was unanimous in its recommendation.

This Court would not require the Florida Supreme Court to test Petitioner's case for harmless error because there was no *Hurst v. Florida* error and because *Hurst* is not retroactive to Petitioner under federal law. The error defined in *Hurst v. State* is a product of state law which is not in contravention of federal law or this Court's precedent. The Florida Supreme Court's state based harmless error test is also not in contravention of federal law or this Court's precedent. The Florida Supreme Court has not employed a *per se* harmless error test to cases in which the jury unanimously recommended death. Petitioner received an individualized harmless error review. Thus, Petitioner raises no issue which is deserving of certiorari review and such review should be denied.

The Jury Instructions Properly Advised the Jury of Its Role Under Florida Law and Did Not Diminish the Importance of the Jury's Responsibility in Violation of *Caldwell*

Petitioner also argues that there was a *Caldwell* violation in his case because the jury was instructed that it was recommending the imposition of the death

---

unanimous cases is not the "proper harmless analysis").

penalty to the judge. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). The Florida Supreme Court has repeatedly rejected challenges to the standard jury instructions in death penalty cases pursuant to *Caldwell*. *Hall v. State*, 212 So. 3d 1001, 1032-33 (Fla. 2017). These claims are rejected because the jury was properly instructed on its role as defined by local law. Further, the seriousness of the jury's role is no way diminished by these instructions. Thus, Petitioner's claim is meritless and not appropriate for certiorari review.

"To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989); *see also Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). In *Caldwell*, the prosecutor made "focused, unambiguous, and strong" remarks which misled the jury into believing the responsibility for sentencing lay elsewhere. *Caldwell*, 472 U.S. at 340. The comments included "your decision is not the final decision" and "[y]our job is reviewable" and that defense was "insinuating that your decision is the final decision." *Id.* at 325-26.

"This Court has repeatedly said that under the Eighth Amendment, 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" *Caldwell*, 472 U.S. at 329 (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983)). The problem with the argument by the prosecutor in *Caldwell* was that it presented "an intolerable danger that the jury will in fact choose to minimize the importance of its role" and thus be in contravention of the requirements of the

Eighth Amendment. *Caldwell*, 472 U.S. at 333. However, "'the infirmity identified in *Caldwell* is simply absent' in a case where 'the jury was not affirmatively misled regarding its role in the sentencing process.'" *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997) (quoting *Romano*, 512 U.S. at 9).

In Petitioner's case, the jury was not affirmatively misled. The jury was instructed of its role as assigned by local law. *Davis*, 119 F.3d at 1482. The jury was told that its role was advisory in nature. (Record at 350, 353). Since under Florida law, the judge remains the final sentencing authority, a jury's recommendation of death is in fact "advisory." Thus, characterizing the jury's recommendation as "advisory" is an accurate description of the role assigned to the jury by Florida law. Additionally, Petitioner's jury was specifically instructed about the "gravity" of its decision and that "human life is at stake." (Record at 359). There was no diminishment of the jury's sense of responsibility in recommending a death sentence in Petitioner's case. Thus, there was no *Caldwell* violation in Petitioner's case.

This Court has never held that the Eighth Amendment requires the jury to impose a death sentence. *Proffitt v. Florida*, 428 U.S. 242, 252 (1976). While a plurality of this Court acknowledged "jury sentencing in a capital case can perform an important societal function," this Court "has never suggested that jury sentencing is constitutionally required" in such cases. *Id.* The Eighth Amendment requires capital punishment to be limited "to those who commit a 'narrow category of the most serious crimes' and whose extreme culpability makes them 'the most

deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). As such, the Eighth Amendment requires the death penalty to be limited to a specific category of crimes and "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Id.* However, the Eighth Amendment does not require that a jury be the final sentencing authority. Petitioner's argument that his Eighth Amendment rights were violated by his jury's unanimous recommendation is not supported by this Court's precedent.

Petitioner's jury was properly instructed of its role under Florida law. The instructions in Petitioner's case in no way diminished the jury's actual responsibilities in the sentencing process. Because Petitioner's jury was properly instructed of its role in sentencing according to Florida law, the jury instructions in Petitioner's case did not violate *Caldwell* and certiorari review should be denied.

Hurst Error is Not Structural Error and Can Be Analyzed for Harmlessness

Petitioner argues that *Hurst* error is not subject to a harmless error analysis in light of *Sullivan*. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Petitioner argues that the *Hurst* error is structural and resulted in no jury findings in Petitioner's case because the erroneous jury instructions impacted "all of the elements for a death sentence under Florida law." (Petition at 29-30). However, this Court remanded *Hurst* back to the Florida Supreme Court specifically to conduct a harmless error analysis. *Hurst*, 136 S.Ct. at 624 (citing *Neder*, 527 U.S. at 18-19).

This certainly indicates that *Hurst* error can be reviewed for harmlessness. On remand, the Florida Supreme Court also concluded that the error is capable of harmless error review. *Hurst*, 202 So. 3d at 68. Petitioner's claim lacks merit as both courts agree that *Hurst* error can be tested for harmlessness.

Petitioner's claim also lacks merit because *Hurst* error is distinguishable from the error in *Sullivan*. Instead, *Hurst* error is comparable to the error in *Neder*, where this Court determined that a harmless error analysis was appropriate. Additionally, as discussed above, *Hurst* is only retroactive under state law, not federal law. The error as described in *Hurst v. State* is also based on an independent state ground. Even if Petitioner was correct that *Hurst v. State* error is structural, it would not apply retroactively to his case under federal law. Thus, Petitioner's claim lacks merit, is contrary to this Court's precedent, and is not appropriate for certiorari review.

In *Sullivan*, the jury was given an instruction which included a definition of reasonable doubt which had already been held unconstitutional. *Sullivan*, 508 U.S. at 277. "Although most constitutional errors have been held amenable to harmless-error analysis, [ ] some will always invalidate the conviction." *Id.* at 279 (citing *Arizona v. Fulminate*, 499 U.S. 279, 306-10 (1991)). In *Sullivan*, the "instructional error consist[ed] of a misdescription of the burden of proof, which vitiates all the jury's findings." *Id.* at 281. Because of the seriousness of this error, this Court found the error to be structural and not subject to a harmless error analysis. *Id.*

Unlike *Sullivan*, in *Hurst v. Florida*, there was not an issue with the

reasonable doubt instruction. Under Florida Law, the jury was instructed that the aggravators must be proven beyond a reasonable doubt before they could be used to make a death recommendation. Fla. Std. J. Inst. (Crim.) 7.11; *see also Floyd v. State*, 497 So. 2d 1211, 1214-15 (Fla. 1986); *Zeigler v. State*, 580 So. 2d 127, 129 (Fla. 1991); *Finney v. State*, 660 So. 2d 674, 680 (Fla. 1995). As it related to the beyond a reasonable doubt standard for aggravators, the jury was properly instructed.

Instead, *Hurst* error is more comparable to the failure to instruct on an element of the offense, as occurred in *Neder*, rather than failure to instruct on the beyond a reasonable doubt standard in *Sullivan*. In *Neder*, this Court determined that a harmless error analysis can be applied to an erroneous jury instruction which omits an element, and that this is consistent with the holding in *Sullivan*. *Neder*, 527 U.S. at 11. The error in *Hurst v. Florida* was that the statute allowed "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. "[A]ny fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Id.* at 621 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)). Thus, the error in *Hurst* is more comparable to the error in *Neder*.

Despite Petitioner's argument that because of the *Hurst* error, there is no verdict in his case, the "absence of a 'complete verdict' on every element of the offense establishes no more than that an improper instruction on an element of the

offense violates the Sixth Amendment's jury trial guarantee." *Neder*, 527 U.S. at 12. It does not result in no jury findings at all as Petitioner argues. (Petition at 30). In *Neder*, the "omitted element" was "supported by uncontroverted evidence" and it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 18. Certainly, if it was appropriate for the error in *Neder* to be tested for harmlessness, it is also appropriate to test *Hurst* error for harmlessness. In Petitioner's case, the Florida Supreme Court found that the *Hurst* error was harmless beyond a reasonable doubt. *Guardado*, 226 So. 3d at 215. This finding was proper and is not in contravention of this Court's precedent or federal law.

The Florida Supreme Court's harmless error analysis of the *Hurst v. State* error is also not in contravention of this Court's precedent or federal law. This Court has held that failure to instruct on jury unanimity can be analyzed for harmless error. *See Richardson v. United States*, 526 U.S. 813, 824 (1999).[9] Thus, the *Hurst v. State* error was also not structural and the Florida Supreme Court properly analyzed the error for harmlessness.

The Florida Supreme Court properly found that the error in Petitioner's case was harmless beyond a reasonable doubt. This finding was neither in contravention of this Court's precedent, nor in violation of federal law. Thus,

---

[9] There is some argument between the Circuits on which harmless error test applies to *Richardson*, *Brecht* or *Chapman*. *Santana-Madera v. United States*, 260 F.3d 133, 140 (2d Cir. 2001) (This Court has not "definitively established the proper harmless error standard to apply when a constitutional error is being evaluated for the first time on collateral review."); *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). However, *Chapman* has not been declared an improper harmless test in the context of a failure to instruct a jury on an unanimity requirement.

certiorari review should be denied.

Conclusion

Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
Florida Bar No. 158541
*Counsel of Record

Jennifer A. Donahue
Assistant Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
capapp@myfloridalegal.com
(850) 414-3300

COUNSEL FOR RESPONDENT