No. 17-7171

IN THE

Supreme Court of the United States

JESSE GUARDADO,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. Respondent is Wrong that the Florida Supreme Court's Per Se Harmless-Error Rule for *Hurst* Violations is Immune From this Court's Scrutiny

Respondent is wrong that the Florida Supreme Court's per se harmless-error rule for violations of *Hurst v. Florida*, 136 S. Ct. 616 (2016), is immune from this Court's federal constitutional scrutiny. Respondent erroneously believes that this Court lacks the authority to review whether the state court's per se harmless error rule is constitutional. Respondent's misunderstanding is based on three errors.

First, Respondent is wrong that the petition "does not present a federal constitutional question" because "the requirements of *Hurst v. Florida* were satisfied in [this] case." Brief in Opposition ("BIO") at 7-8. There has never been a serious dispute in this case that Petitioner was sentenced to death in violation of *Hurst v. Florida*. The Florida Supreme Court explicitly agreed below that *Hurst v. Florida* applies to Petitioner's sentence. *Guardado v. Jones*, 226 So. 3d 213, 215 (Fla. 2017). Respondent's own brief in this Court acknowledges that a judge, not a jury, found each fact necessary to sentence Petitioner to death under Florida law. *See* BIO at 6. In *Hurst v. Florida*, this Court held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. at 619. Petitioner's death sentence therefore violates *Hurst v. Florida*, regardless of additional concerns the Florida Supreme Court discussed on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).[1] *See* BIO at 8-9, 10, 11, 17-18.

[1] To the extent Respondent argues that Petitioner's sentencing complied with *Hurst* due to the judge's finding of aggravating factors based on prior convictions, *see* BIO at 9-10, Petitioner already described that argument's fallacy, *see* Pet. at 20-21.

Second, Respondent is wrong that this Court cannot exercise jurisdiction because the Florida Supreme Court's rule is a state-law matter. *See* BIO at 10-11. From Respondent's perspective, when state courts articulate harmless-error rules as a matter of state law, there is no federal question for this Court to review, even if the state harmless-error rule is used to deny a federal constitutional claim. Under Respondent's faulty theory, states could evade this Court's precedents by deeming federal constitutional errors "harmless" for any reason at all. This Court has jurisdiction to protect against such end-runs around federal constitutional rights, particularly in capital cases.[2] As the petition explained, whether a state court has exceeded constitutional boundaries in the denial of a federal claim on harmless-error grounds "is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967). *See* Pet. at 13-15.

[2] Respondent's position is based on a confused reading of this Court's adequate-and-independent-state-ground precedent. While "[t]his Court will not review a question of federal law decided by a state court if the decision of that 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 (1991) (emphasis added), this does not mean that all state court rulings that invoke a state-law basis are immune from this Court's constitutional review. A state court ruling is deemed "independent" only when it has a state-law basis for the denial of a federal constitutional claim that is separate from the merits of the federal claim. *Foster v. Chapman*, 136 S. Ct. 1737 (2016). Even Respondent acknowledges that a state court's application of a harmless-error rule is a purely state-law question only "where it involves *only errors of state procedure or state law*." BIO at 16 (emphasis added) (citing *Chapman*, 386 U.S. at 21). Here, the Florida Supreme Court's per se harmless-error rule for *Hurst v. Florida* claims plainly involves the federal constitutional violation described in *Hurst v. Florida*, not a violation of state procedure or law.

Third, Respondent is wrong to attempt to inject an unnecessary retroactivity issue into this case. *See* BIO at 10-11. The Florida Supreme Court held that *Hurst v. Florida* applies retroactively to Petitioner as a matter of state retroactivity law. *Guardado*, 226 So. 3d at 215 (citing *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016)). Under *Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008), state courts may apply their own retroactivity rules so long as those rules provide at least the protections applicable under federal standards. *See Danforth*, 552 U.S. at 266. Respondent explicitly recognizes that the Florida Supreme Court's retroactivity holding in Petitioner's case was permissible under *Danforth*. See BIO at 10-11. Therefore, the only issue for this Court is whether the Florida Supreme Court, having properly held that *Hurst* applies retroactively to Petitioner, violated the United States Constitution by mechanically applying its per se harmless-error rule to deny relief.

Petitioner is not "ask[ing] this Court to enforce a retroactivity ruling based on state law," BIO at 10; there is simply no retroactivity question before this Court. If this Court grants certiorari review, holds that the Florida Supreme Court's harmless-error analysis was unconstitutional, and remands for a proper harmlessness analysis, the Florida Supreme Court's retroactivity ruling will remain sound on remand.[3]

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[3] *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), does not suggest that this Court should reconsider the Florida Supreme Court's retroactivity ruling with a separate federal retroactivity analysis under *Teague v. Lane*, 489 U.S. 288 (1989). *Summerlin* was a federal habeas corpus case and, unlike in this case, there had been no prior retroactivity ruling regarding *Ring* in the petitioner's favor by the Arizona Supreme Court. Also, *Lambrix v. Secretary*, 872 F.3d 1170 (11th Cir. 2017), does not suggest that the Florida Supreme Court's retroactivity ruling needs reconsideration here. In *Lambrix*, the Eleventh Circuit declined to apply *Hurst* retroactively under federal law only after the Florida Supreme Court had held that *Hurst* was *not*

In short, the Florida Supreme Court decided Petitioner's case on the merits, albeit in a manner that flouts federal constitutional principles. The petition for a writ of certiorari is proper. This Court should exercise its jurisdiction to grant review of the question presented.[4]

II. The Florida Supreme Court Has Clearly Articulated and Applied its Per Se *Hurst* Harmless-Error Rule, But Respondent Pretends No Such Rule Exists

The Florida Supreme Court has made no secret of its creation of a per se harmless-error rule for *Hurst* claims. Beginning in *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), and in dozens of cases since, the Florida Supreme Court has consistently articulated the reason it believes that *Hurst* errors are harmless in all cases where the advisory jury unanimously recommended the death penalty, regardless of any other case-specific factors. The Florida Supreme Court reasons

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retroactive as a matter of state law. *Id.* at 1175. Here, the Florida Supreme Court properly held that *Hurst was* retroactive to Petitioner under state law.

[4] Respondent correctly notes that, in addition to seeking *Hurst* relief by filing a state habeas petition directly in the Florida Supreme Court, resulting in the decision below, Petitioner separately sought *Hurst* relief through a post-conviction motion filed in a Florida trial court. And Respondent is correct that Petitioner's appeal from the trial court's denial of the separate post-conviction motion is currently pending in the Florida Supreme Court. *See* BIO at 1-2 n.1

But Respondent is incorrect that the pending state appeal is a reason to deny the current certiorari petition. The Florida Supreme Court, having already ruled in its state habeas decision that the *Hurst* violation in Petitioner's case, like all other unanimous-jury-recommendation cases, was per se harmless beyond a reasonable doubt, will undoubtedly affirm the denial of *Hurst* relief in Petitioner's pending appeal, based on the law of the case and/or reapplication of the per se rule. There is no need for this Court to await the Florida Supreme Court's decision in that appeal before addressing the question presented by this petition, and good reason to address the issue now, before dozens more *Hurst* violations are swept away as "harmless."

that—because advisory juries (1) were instructed on the facts a judge must find in order to impose a death sentence under Florida law; (2) were told that their recommendation to the judge should be based on the same considerations; and (3) unanimously recommended the death penalty—the same jury, or any other jury, certainly would have found the facts necessary for a death sentence under Florida law. The Florida Supreme Court maintains this belief regardless of the fact that pre-*Hurst* juries were told of their "advisory" nature and made no findings in support of their overall recommendation, and regardless of any case-specific factors. The very nature of the Florida Supreme Court's reasoning compels the same result in *every* unanimous-recommendation case.

Rather than defending the Florida Supreme Court's rationale for the per se rule, Respondent attempts to argue that there is no per se rule at all, and that each *Hurst* case, including Petitioner's, receives individualized harmless-error review. But Respondent's argument is belied by every single *Hurst* case the Florida Supreme Court has decided in which there was a unanimous jury recommendation. In all of those cases, the Florida Supreme Court considered jury unanimity dispositive of the harmless-error inquiry. There have been no exceptions. The Florida Supreme Court has found *Hurst* errors harmless in all of the more than three-dozen unanimous-jury-recommendation cases it has reviewed, and declined to find harmless error in any case in which the jury was not unanimous. *See* Death Penalty Information Center, *Florida Death-Penalty Appeals Decided in Light of Hurst*, *available at* https://deathpenaltyinfo.org/Hurst_Cases_Reviewed (last accessed Mar. 1, 2018).

In light of the consistency of the Florida Supreme Court's decisions, it strains credibility for Respondent to pretend that no per se rule exists. But Respondent's hesitance to defend the Florida Supreme Court's logic behind creating the rule is understandable. As the petition explained, the vote of a defendant's advisory jury cannot by itself resolve a proper harmless-error inquiry. *See* Pet. at 20-24.

Respondent also declines to defend the Florida Supreme Court's abandonment of the burden of proof that this Court has said rests with the State in a proper harmless-error analysis. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). Respondent does not address the petition's explanation that the Florida Supreme Court's per se rule effectively relieves the State of its constitutional obligation to establish that the *Hurst* error in Petitioner's case was harmless beyond a reasonable doubt. *See* Pet. at 19. Respondent does not dispute that the State filed *nothing* in the proceeding below, but still received the benefit of a "harmless-error" ruling.

III. Respondent's Evidence that the Florida Supreme Court Always Conducts Individualized *Hurst* Harmless-Error Review is Weak

Respondent's evidence that the Florida Supreme Court has not created a per se harmless-error rule for *Hurst* claims, and instead conducts individualized harmless-error review in every case, is not persuasive. *See* BIO at 11-18. Respondent fails to identify a single case, out of a total of nearly 200, in which the Florida Supreme Court either (1) declined to apply the harmless-error doctrine and granted *Hurst* relief where there was a unanimous jury recommendation, or (2) applied the harmless-error doctrine and denied *Hurst* relief where there was a non-unanimous jury recommendation. That is because no such case exists. The Florida Supreme

Court has applied its per se harmless-error rule to deny *Hurst* relief in more than three-dozen unanimous-recommendation cases, while declining to find harmless error in more than 150 non-unanimous-recommendation cases. Respondent asks this Court to draw an unreasonable inference from these consistent results. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).[5]

Respondent points to some cases where the Florida Supreme Court, having applied the per se rule, goes on to describe other factors that favor a harmless-error ruling. *See* BIO at 14-15 & n.7. But this does not negate the per se nature of the unanimous-jury-recommendation rule. It is the unanimous jury recommendation that is the common determinative factor in the Florida Supreme Court's harmless-error analysis in every *Hurst* case. The Florida Supreme Court has never denied *Hurst* relief on harmless-error grounds without relying on the unanimous jury recommendation, even if other factors are discussed. In many cases, such as Petitioner's, the unanimous recommendation is the only factor discussed.

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[5] Respondent points to two cases in an attempt to show that not all unanimous-recommendation cases produce the same harmless-error result in the Florida Supreme Court, *see* BIO at 15-16, but neither example supports that point. As Respondent acknowledges, in *Wood v. State,* 209 So. 3d 1217, 1226, 1238 (Fla. 2017), the Florida Supreme Court found, in a unanimous-recommendation case, that the jury's consideration of improper aggravators—*not the Hurst v. Florida error itself*—was not harmless. In *Bevel v. State*, 221 So. 3d 1168, 1177-78 (Fla. 2017), the Florida Supreme Court held that the *Hurst* error was harmless, based on the unanimous jury recommendation, before granting relief on a separate claim of ineffective assistance of counsel. Respondent argues that if the Florida Supreme Court consistently applied a per se harmless-error rule for *Hurst* claims, *Wood* and *Bevel* "would have been affirmed." BIO at 16. But the denial of *Hurst* relief *was affirmed* in both cases under the Florida Supreme Court's per se harmless-error approach. The fact that relief was granted on other grounds does not show that the Florida Supreme Court conducts individualized harmless-error review of *Hurst* violations.

IV. Respondent's Evidence that the Florida Supreme Court Conducted Individualized Review in Petitioner's Case is Even Weaker

Respondent's evidence that Petitioner received individualized *Hurst* harmless-error review is particularly weak. According to Respondent, Petitioner received individualized harmless-error review—i.e., review of whether there is a reasonable possibility that the *Hurst* error impacted his death sentence, *see Chapman*, 386 U.S. at 22-23—because the Florida Supreme Court (1) "specifically mention[ed] the facts as described on direct appeal, the five aggravating factors, the non-statutory mitigating circumstances, and the unanimous jury verdict," and (2) "cite[d] to *Davis*," a decision which "went into a detailed analysis of why the error was harmless" in Mr. Davis's case. BIO at 12. Oddly, Respondent casts the Florida Supreme Court's reference to *Davis* as a kind of shortcut for *Hurst* harmlessness review: "Instead of restating the entirety of their method in determining harmlessness in each and every case where there was a unanimous jury recommendation, including in Petitioner's case, the [Florida Supreme Court] cites *Davis* and points out the similarities between each case and *Davis*." *Id.* This cannot be acceptable.

A recitation of the facts described on direct appeal, the aggravating and mitigating factors, and the unanimous jury verdict cannot be sufficient to uncover the probable effect of the *Hurst* error on Petitioner's sentencing proceeding. Nor is a citation to *Davis*, an entirely separate case, sufficient. A proper harmless-error inquiry in Petitioner's case should have focused on whether, in the context of the whole record, there is a reasonable chance of a different result if it had been the jury, rather than the judge, that had been empowered to conduct the fact-finding required

for a death sentence. *See Chapman*, 386 U.S. at 22-23. In that context, review of the "whole record," which this Court has deemed essential in a valid harmless-error analysis, *see, e.g.*, *Yates v. Evatt*, 500 U.S. 391, 403 (1991), certainly must include a review of Petitioner's mitigation.

None of the compelling mitigation in Petitioner's case was considered as part of the Florida Supreme Court's *Hurst* harmless-error analysis.

Petitioner has always accepted full responsibility for the crime. Shortly after the murder, Petitioner turned himself into the police, confessed, and pleaded guilty. Petitioner led a difficult life leading up to his imprisonment on death row. He struggled from a life-long addiction to drugs and alcohol. As a juvenile, he was sent to the notorious Arthur G. Dozier School for Boys, where he was terrorized and abused, and made to work in the slaughterhouse. After being sentenced as a young man to a 20-year prison term for drug-related robberies, Petitioner set out to improve his life. He maintained a clean disciplinary record and became state-certified in wastewater management. But after his release from prison, he struggled to adjust to modern society, and became embroiled in addiction again. On the day of the murder, Petitioner was on a two-week-long crack binge. The victim was his friend. Petitioner has always expressed remorse for his actions.

Not only was none of this information considered in the Florida Supreme Court's harmless-error analysis, but as a result of the court's per se rule, none of

Petitioner's mitigation will ever be heard by a jury endowed with the fact-finding role that this Court held is required by the Sixth Amendment.[6]

V. Respondent's Troubling *Caldwell* and *Sullivan* Arguments Highlight the Certiorari-Worthiness of the Question Presented

Respondent's troubling arguments regarding the petition's discussion of *Caldwell v. Mississippi*, 472 U.S. 320 (1987), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), highlight, rather than diminish, the certiorari-worthiness of the question presented. *See* BIO at 18-24.

In response to the petition's argument that the Florida Supreme Court's per se harmless-error rule relies entirely on an advisory jury vote that was infected with *Caldwell* error, Respondent relies on (1) the Florida Supreme Court's continuing insistence that *Caldwell* has never applied and still does not apply to Florida's prior capital sentencing scheme, notwithstanding *Hurst*, *see* BIO at 18-19; and (2) the fact that jurors in Florida's prior scheme were accurately instructed regarding the

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[6] Respondent's assertion that the Florida Supreme Court fulfilled its obligation to conduct individualized harmless-error analysis of the *Hurst* violation when it reviewed Petitioner's case for proportionality on direct appeal, *see* BIO at 13-14, not only contravenes this Court's precedent, but is absurd on its face. "The Florida Supreme Court's discussion of the proportionality of [a] petitioner's sentence is not an acceptable substitute for harmless error analysis." *Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring); *see also id.* at 540 (explaining that harmless-error is a "quite different enquiry" from proportionality). More to the point, Petitioner's direct appeal in the Florida Supreme Court concluded in 2007, nearly a decade before *Hurst*. The Florida Supreme Court's direct-appeal review of Petitioner's death sentence on state proportionality grounds cannot substitute for a proper analysis of the impact of the *Hurst* violation, which was not recognized until 2016. In 2007, the Florida Supreme Court believed that Florida's capital sentencing scheme was constitutionally-valid, and the court could not possibly have considered the impact that jury-fact-finding may have had on the outcome.

unconstitutional role assigned to them, *see id.* at 19. Respondent ignores the fact that the rationale underlying Florida's historical rejection of *Caldwell* claims has been completely undermined by *Hurst*. *See* Pet. at 24-28. And, in citing precedents for the proposition that *Caldwell* requires a showing that the jury was improperly apprised of its role under local law, Respondent does not grapple with the petition's argument that this Court has now held that the local law at issue here—Florida's prior capital sentencing scheme—*was unconstitutional*. In Respondent's view, no *Caldwell* violation accompanied the *Hurst* violation during Petitioner's sentencing because Florida's unconstitutional capital sentencing scheme was accurately described to the advisory jury, and "the seriousness of the jury's role [was in] no way diminished" by the scheme's allocation of sole fact-finding authority to the judge, and the jury instructions' repeated emphasis that the jury's role was advisory. *See* BIO at 19-20.

Under Respondent's logic, there can be no *Caldwell* violation when a jury is properly informed of its role, even under an unconstitutional state law. This cannot be what this Court meant by a jury being "affirmatively misled regarding its role in the sentencing process." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). Although Petitioner's jury was accurately informed of its role under Florida's unconstitutional scheme, the jury was "affirmatively misled" as to its constitutional role in the death-sentencing process. An unconstitutional state statute should not be allowed to serve as a shield that frustrates the purpose of *Caldwell* and the Eighth Amendment.[7]

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[7] Members of this Court have recently expressed concern with the Florida Supreme Court's harmless-error denial of *Hurst* relief in light of *Caldwell*, and a willingness to review the issue. *See, e.g.*, *Middleton v. Florida*, Nos. 17-6580, 17-6735,

Respondent's arguments regarding *Sullivan* attempt to recast the issue as whether *Hurst* errors are structural or capable of harmless-error review. *See* BIO at 21-22. But these arguments confuse the relevance of *Sullivan* as described in the petition. *Chapman* and this Court's other harmless-error precedents should not permit state courts, particularly in capital cases, to decline to grant a constitutional penalty phase on the basis of the votes of advisory jurors whose ultimate decision, like the jury decision in *Sullivan*, did not constitute a "verdict" under the Sixth Amendment. *See* Pet. at 29.

Respondent's own briefing regarding the perceived inapplicability of *Sullivan* to *Hurst* violations raises more questions than it answers. *See id.* at 23-24. In Respondent's view, the unconstitutional Florida jury instructions that improperly allocated fact-finding authority as to each element for a death sentence to the judge, rather than the jury, are more like the improper instruction as to only *one* of multiple offense elements analyzed by this Court in *Neder v. United States*, 527 U.S. 1 (1999), than the improper reasonable-doubt instruction on *every* offense element that "viate[d] all the jury's findings" in *Sullivan*. *See* BIO at 22-24. But Respondent fails to explain how Florida's flawed instructions infected less than all of the elements for

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2018 WL 1040001, at *1 (Feb. 26, 2017) (Ginsburg, Breyer, Sotomayor, JJ., dissenting from the denial of certiorari); *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Ginsburg, Breyer, Sotomayor, JJ., dissenting from the denial of certiorari).

Petitioner's case provides an ideal opportunity for this Court to confront the interplay between *Caldwell* and the Florida Supreme Court's per se harmless-error rule for *Hurst* claims, in light of the nature of the Florida Supreme Court's opinion, the arguments that were preserved below and presented in the petition for a writ of certiorari, and the compelling mitigation in the case.

a death sentence. Respondent's only answer is that "there was not an issue with the reasonable doubt instruction," as there was in *Sullivan*. BIO at 22-23. Respondent cannot show how the advisory jury's recommendation constitutes a Sixth Amendment verdict in Petitioner's case when there were no jury findings at all, on any element of the offense. As Respondent sees it, the jury's one-sentence recommendation in Petitioner's case—"A majority of the jury by a vote of 12 to 0 advise and recommend to the court that it impose the death penalty upon Jesse Guardado"—is a valid Sixth Amendment basis upon which the Florida Supreme Court can rest its entire harmless-error analysis. As the petition explains, *Sullivan* and this Court's other harmless-error cases strongly suggest otherwise. *See* Pet. at 28-30.

CONCLUSION

This Court should grant a writ of certiorari to review the decision below.

Respectfully submitted,

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