NO. 17-7545

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN ANTHONY COZZIE,

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) the error is not structural in nature and harmless error review was based on an adequate and independent state ground; (2) the jury was properly instructed on its advisory role pursuant to Florida law and the importance of its responsibility was not diminished; and (3) 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. 17-7545

STEVEN ANTHONY COZZIE,

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

Opinion Below

The decision of the Florida Supreme Court appears as *Cozzie v. State*, 225 So. 3d 717 (Fla. 2017), *rehearing denied*, 2017 WL 3751293 (Fla. Aug. 31, 2017).

Jurisdiction

This Court's jurisdiction to review the final judgment of the Florida Supreme Court is authorized by 28 U.S.C. § 1257. No jurisdiction exists in this case, however, because Petitioner's argument was never raised in state court. *See Heath v. Alabama*, 474 U.S. 82, 87 (1985). Additionally, no federal question was raised as the Florida Supreme Court's decision in this case is based on adequate and independent state grounds. Sup. Ct. R. 14(g)(i).

Petitioner attempts to justify this Court's jurisdiction by relying on the Florida Supreme Court's application of Florida law and state constitution in *Hurst v. State*. *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S.Ct. 2161 (2017) However, the Florida Supreme Court's decision in *Hurst v. State* and its implications in Petitioner's case are based on adequate and independent state grounds. As such, the application of harmless error review involving errors of Florida law is a state question and not subject to this Court's review. Additionally, the Florida Supreme Court's decision does not implicate an important or unsettled question of federal law, does not conflict with another state court of last resort or a United States court of appeals, and does not conflict with relevant decisions of this Court. Sup. Ct. R. 10. Additionally, no compelling reasons exist in this case and Petitioner's writ of certiorari should be denied. Sup. Ct. R. 10.

Statement of the Case and Facts

Petitioner, Steven Cozzie, is seeking certiorari review of the opinion from the Florida Supreme Court entered below. The Court affirmed the conviction and sentence. *Cozzie*, 225 So. 3d at 735. Fifteen-year-old CW and her family were visiting the beach for a family vacation. *Id.* at 720. She went on a walk with Petitioner and never returned. *Id.* The same day, Petitioner's friend, Michael Spencer, called the police and told them "that Cozzie had told him he killed the missing girl and that Cozzie had also taken him to see her body." *Id.* at 721. Law enforcement recovered CW's body and Cozzie was arrested the same evening. *Id.* At the trial,

Spencer testified that, in the days leading up to [CW]'s murder, Cozzie talked to him about "[r]aping and killing underage girls and women his own age," including how "[Cozzie] would want to tie them up and just practically rape them and then kill them. . . . Because you just raped somebody's daughter or somebody's mother, why not kill them."

Id.

Cozzie told Spencer that he met the girl on the beach and took her for a walk, but when they arrived at the nature trail, she turned around to go back, and Cozzie "strangled her with his shirt, then with her shirt, then with his bare hands; he stomped on the back of her neck and then found some sort of piece of wood and bashed her head in repeatedly."

Id.

The medical examiner testified that the cause of death was from the combined effects of blunt impact to the head and strangulation. She further testified to the victim's numerous injuries, including: Skull fractures were visible through a laceration in the scalp, and the victim's skull had been shattered into 16 pieces in a 5–inch-by-five-inch area by at least two (but probably more) blows to the head. There were large scratches on the victim's neck extending down to the upper chest, and injuries to the shoulder that appeared to be from glancing blows that missed the victim's head. A splinter was pulled from the wound overlying the skull fractures, and the head injuries were consistent with having been inflicted by a wooden piece of lumber or a piece of a tree.

The medical examiner further testified that the victim had been choked or strangled with force extreme enough to bruise her esophagus. The strangulation was more consistent with ligature strangulation, and could have been from a bikini top or a shirt, and there was bruising on the inner lips indicating some type of smothering. There were mirror-image abrasions to the inside of both of the victim's inner thighs that were consistent with hip bones thrusting into the thigh area. The outer labia had abrasions or scrapes caused by a penis, finger, or some type of instrument that caused blunt or frictional force; these injuries were consistent with contact to the vagina and definitely showed contact to the labia. Vertically oriented abrasions on the victim's back and buttocks were consistent with being dragged, and numerous contusions and abrasions on the victim's body looked like they could have been made by rolling around on the

> ground. There were no markings on the back of the victim's neck consistent with the claim that it had been stomped, and there were no defensive injuries of note; however, all of the injuries were caused prior to death, and one of the victim's hands was bloody, which indicated that it was probably near one of her injuries.

Id. at 722. DNA linked Cozzie to the murder and "[d]uring his closing arguments, defense counsel acknowledged that Cozzie killed [CW] and that it was unlawful to do so. . . ." *Id.*

> Cozzie's jury found him guilty of first-degree premediated murder or felony murder with a weapon; sexual battery with a deadly weapon or force likely to cause serious personal injury; aggravated child abuse causing great bodily harm, permanent disability, or permanent disfigurement; and kidnapping with a weapon with intent to commit a felony.

Id. at 723; (Record at 2409-10).

The jury was instructed to "render an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist." (Record at 2403). "Although the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given weight and deference by the Court in determining which punishment to impose." (Record at 2404). "You must follow the law as it is set out in these instructions. If you fail to follow the law, your recommendation will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter." (Record at 2406).

> An aggravating circumstance must be proved beyond a reasonable doubt before it may be considered by you in arriving at your recommendation. In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating circumstance has been proven.
>
> The State has the burden to prove each aggravating circumstance beyond a reasonable doubt.

(Record at 2407). "Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will be your duty to determine whether the mitigating circumstances outweigh the aggravating circumstances that you find to exist." (Record at 2411).

> If, after weighing the aggravating and mitigating circumstances, you determine that at least one aggravating circumstance is found to exist and that the mitigating circumstances do not outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole.

(Record at 2413). "Before you ballot you should carefully weigh, sift, and consider the evidence, realizing that a human life is at stake, and bring your best judgment to bear in reaching your advisory sentence." (Record at 2414-15).

The aggravators in this case were: "(1) in the course of a sexual battery, aggravated child abuse, and kidnapping; (2) HAC [(especially heinous, atrocious, or cruel)], (3) CCP [(cold, calculating, and premeditated)]; and (4) avoid arrest." *Cozzie*, 225 So. 3d at 725 n.4. The jury recommended the death penalty 12-0. *Id.* at 725.

> The trial court found one statutory mitigator, namely Cozzie's age of 21, to which it assigned moderate weight, and the following 25

> nonstatutory mitigators, to which it assigned weight ranging from no weight to moderate weight: (1) physical abuse (little weight); (2) emotional abuse (little weight); (3) sexual abuse (moderate weight); (4) bullying (little weight); (5) compromised social skills (slight weight); (6) low-average IQ of 83 (moderate weight); (7) neurological deficits (little weight); (8) physical neglect (no weight); (9) emotional neglect (little weight); (10) parental abandonment (slight weight); (11) divorced parents (no weight); (12) family history of drug abuse (no weight); (13) poor role models (no weight); (14) lack of sound reasoning and judgment (little weight); (15) transient lifestyle (little weight); (16) homelessness (no weight); (17) lack of stability (slight weight); (18) lack of psychological care (moderate weight); (19) depression (little weight); (20) saved the lives of two children (little weight); (21) devoted uncle (slight weight); (22) good with animals (no weight); (23) capable of maintaining loving relationships (slight weight); (24) told by family members that he was once "possessed" and had been abducted by aliens (no weight); and (25) worked outside the home and there are no examples of extraordinarily poor conduct in the workplace (slight weight).

Id. at 725 n.5.

Petitioner raised five issues on direct appeal, one of which was "whether Florida's capital sentencing scheme is unconstitutional under *Ring*." *Cozzie*, 225 So. 3d at 726; *Ring v. Arizona*, 536 U.S. 584 (2002). The Florida Supreme Court held that "the *Hurst* error in this case is harmless beyond a reasonable doubt." *Cozzie*, 225 So. 3d at 733; *Hurst v. Florida*, 136 S.Ct. 616 (2016); *Hurst*, 202 So. 3d at 40. The Florida Supreme Court reasoned that

> [w]hat we said in *Davis[]* is also applicable here:
>
> [T]he 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 defendants] be sentenced to death. . . . The unanimous recommendations here are precisely what we determined in *Hurst* to

be constitutionally necessary to impose a sentence of death.

Cozzie, 225 So. 3d at 733; *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016). The Florida Supreme Court *sua sponte* reviewed the record and found the evidence was sufficient to support the conviction and found the death sentence was proportional in relation to other death sentences that the Court has upheld. *Cozzie*, 225 So. 3d at 726, 733-35.

Reasons for Denying the Writ

There is no Basis for Certiorari Review of the Florida Supreme Court's Finding of Harmless Error

Petitioner seeks certiorari review of the Florida Supreme Court's decision which found the *Hurst v. State* error to be harmless beyond a reasonable doubt and affirmed Petitioner's death sentence. *Cozzie*, 225 So. 3d at 733. This Petition alleges that the Florida Supreme Court erred in performing a harmless error analysis because the error in Petitioner's case is structrual. Petitioner argues the error is structural in nature because the jury failed "to return a verdict of guilty beyond a reaosnble doubt as to multiple critical elements necessary to impose the death penalty." (Petition at 1). Though Petitioner claimed below that the error was structural in nature, he relied on the absence of jury factfinding to indicate which of the four aggravating factors were found and which of the aggravating factors were sufficient. (Supp. Pet. at 6-9). Petitioner argues here for the first time that the structural nature of the error revolves around the absence of jury instructions and jury findings beyond a reasonble doubt. Specifically, Petitioner argues that both

the sufficiency of the aggravation and whether the aggravation outweighed the mitigation are elements that must be proven beyond a reasonble doubt. (Petition at 22).

This Court's jurisdiction is limited to only those federal constitutional issues which were presented and considered by the court below. *Illinois v. Gates*, 462 U.S. 213, 218 (1983); *see also Howell v. Mississippi*, 543 U.S. 440, 443 (2005).

> With "very rare exceptions," *Yee v. Escondido*, 503 U.S. 519, 533[ ] (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. *See Heath v. Alabama*, 474 U.S. 82, 87[ ] (1985); *Illinois v. Gates*, 462 U.S. 213, 217-219[ ] (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434[ ] (1940).
>
> . . .
>
> When the highest state court is silent on a federal question before us, we assume the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550[ ] (1987), and the aggrieved party bears the burden of defeating this assumption, *ibid*, by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here," *Webb v. Webb*, 451 U.S. 493, 501[ ] (1981).

Adams v. Robertson, 520 U.S. 83, 86-87 (1997); *see also Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (This Court does not ordinarily review a claim not presented to the court below.); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (This Court sits as a "court of final review and not first view."). As Petitioner failed to raise this claim in any court below, this Court lacks jurisdiction to review Petitioner's claim.

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). However, this Court has already determined that *Hurst v. Florida* error can be reviewed for harmlessness. 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 v. United States*, 527 U.S. 1, 18-19 (1999)). Additionally, this Court would not have found *Hurst v. Florida* error in this case. *Hurst v. Florida* establishes that to comport with the Sixth Amendment, the jury must find at least one aggravating factor was proven beyond a reasonble doubt. *Hurst*, 136 S.Ct. at 621-22. Here, at least one aggravating factor was found by the jury to be proven beyond a reasonable doubt by virtue of the contemporaneous sexual battery, kidnapping, and child abuse felony convictions as the source of the first aggravator, "in the course of a sexual battery, aggravated child abuse, and kidnapping." *Cozzie*, 225 So. 3d at 725. Thus, there was no *Hurst v. Florida* error. As Petitioner does not allege a failure of the jury to find at least one aggravating factor beyond a reasonable doubt, he does not raise a federal question.

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, on remand, the Florida Supreme Court concluded the error is capable of harmless error review even after greatly expanding the holding from *Hurst v. Florida* based on independent state grounds. *Hurst*, 202 So. 3d at 68. This Court should decline to review Petitioner's claim as it is based on a Florida law based

expansion of sentencing requirements in *Hurst v. State*.

On remand, the Florida Supreme Court 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" to ensure that death is not "arbitrarily imposed, but . . . reserved only for defendants convicted of the most aggravated and least mitigated murders." *Hurst*, 202 So. 3d at 60 (citing *Gregg v. Georgia*, 428 U.S. 153, 199 (1976); *McClesky v. Kemp*, 481 U.S. 279, 303 (1987)). However, 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).

Despite Petitioner's argument that the error was structural in nature, *Hurst v. State* error is distinguishable from the error in *Sullivan*. Instead, *Hurst* error is comparable to the error in *Neder*, where this Court determined that the error was not structural and that a harmless error analysis was appropriate. 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*, 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 recommendation of death. (Record at 2407); 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 requirement, the jury was properly instructed.

Additionally, the requirement that aggravators be sufficient and outweigh mitigation has long been a requirement of Florida law. "The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances." *Parker v. Dugger*, 498 U.S. 308, 313 (1991) (citing Fla. Stat. § 921.141(3) (1985)). Petitioner's jury was instructed that if "you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will be your duty to determine whether the mitigating circumstances outweigh the aggravating circumstances that you find to exist." (Record at 2411). However, sufficiency and weighing are not facts which are required to be proven beyond a reasonable doubt as Petitioner argues.

This Court has specifically held that the beyond-a-reasonable-doubt standard for finding that the aggravation outweighs mitigation is not required under federal law. "Weighing is not an end, but a means to reaching a decision." *Kansas v. Marsh*, 548 U.S. 163, 164 (2006). "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." *Tuilaepa v. California*, 512 U.S. 967, 979 (1994). "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." *Id.* (quoting *California v. Ramos*, 463 U.S. 992, 1008 (1983)). "[T]he 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." *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016). Though Petitioner argues that because the Florida Supreme Court considers weighing an "element," it must be found beyond a reasonable doubt, the Florida Supreme Court has never required this standard for weighing. *Hurst*, 202 So. 3d at 54. Additionally, under federal law, there is no requirement that the aggravation must be proven to outweigh the mitigation beyond a reasonable doubt. In Petitioner's case, there was no failure to instruct the jury on a beyond-a-reasonable-doubt standard as occurred in *Sullivan*. Thus, the *Hurst* error in Petitioner's case is not structural and can be analyzed for harmlessness.

Like the weighing requirement, the finding that the aggravation is sufficient to warrant the death penalty is also a judgment rather than a fact to be proven beyond a reasonable doubt. The Eighth Amendment requires that "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Roper v. Simmons*, 543 U.S. 551, 568 (2005). The State of Florida has a list of sixteen aggravating factors enumerated in the Statute. Fla. Stat. § 921.141(6). These aggravating factors have been deemed sufficient to impose the death penalty by virtue of their inclusion in the statute. Any one of these aggravating factors is sufficient to cause a defendant to be eligible to receive a sentence of death. Thus, if one of these enumerated aggravating factors has been proven beyond a reasonable doubt, Eighth Amendment concerns have been satisfied. However, the weight that a juror gives to the aggravator based on the evidence is not something that can be defined by a beyond-a-reasonable-doubt

standard. Just as with weighing, the sufficiency of the aggravating factor is a judgment made in the minds of the jurors, which includes a component of mercy, much like weighing. Just like weighing, there is no requirement for a defined standard of proof like beyond-a-reasonable-doubt. Thus, there was no failure to instruct the jury on a beyond-a-reasonable-doubt standard as occurred in *Sullivan*.

Hurst error is distinguishable from the structural error found in *Sullivan*. Instead, *Hurst* error is more comparable to the failure to instruct on an element of the offense, as occurred in *Neder*. In *Neder*, this Court determined that a harmless error analysis can be applied to an erroneous jury instruction which omits an element. *Neder*, 527 U.S. at 11. "It would be illogical to extend the reasoning of *Sullivan* from a defective 'reasonable doubt' instruction to a failure to instruct on an element of the crime." *Id.* at 15. Instead, "where an omitted element is supported by uncontroverted evidence" certainly "the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." *Id.* at 19. In such instances, a harmless error analysis is certainly appropriate.

Similar to *Neder*, 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)). This

error is comparable to the error in *Neder* and can be tested for harmlessness.

In *Hurst v. State*, though the Florida Supreme Court concluded that all the findings necessary for the jury to be allowed to recommend a sentence of death are "elements that must be found unanimously by the jury," they imposed no requirement that sufficiency and weighing be found beyond a reasonable doubt. *Hurst*, 202 So. 3d at 53-54. Instead, the *Hurst v. State* error was that the jury was not instructed to make specific findings related to sufficiency and weighing. Further, the jury was also not instructed that they must make unanimous findings in order to consider a sentence of death. Because the jury was not instructed to make findings on sufficiency and weighing, the *Hurst v. State* error, like the error in *Hurst v. Florida*, is also comparable to the failure to instruct on an element error in *Neder* and distinguishable from the failure to instruct on the correct beyond-a-reasonable-doubt error in *Sullivan*.

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). As in *Neder*, the "omitted element" in Petitioner's case was "supported by uncontroverted evidence" that a properly instructed jury would have made the requisite findings. *Id.* at 18. Thus, the finding that the *Hurst* error was harmless beyond a reasonable doubt in Petitioner's case was proper and is not in

contravention of this Court's precedent or federal law. *Cozzie*, 225 So. 3d at 733.

The Florida Supreme Court's harmless error analysis of the *Hurst v. State* error related to the requirement of jury unanimity 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). Thus, this portion of 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, certiorari review should be denied.

The Jury Instructions Properly Advised the Jury of Its Role Under Florida Law and Did Not Violate *Caldwell* by Diminishing the Importance of the Jury's Responsibility

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 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 Florida law. Further, the seriousness of the jury's role is no way diminished by these instructions. In rejecting these claims, the Florida

Supreme Court's decision is not in conflict with another state court of last review or a United States court of appeal. Nor is the decision addressing "an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10. Thus, Petitioner's claim is not appropriate for certiorari review. Petitioner's claim also lacks merit.

"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 *Ramos*, 463 U.S. at 998-99). 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 2403). 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. Under Florida law, the judge remains the final sentencing authority. Fla. Stat. § 921.141(3). Despite a jury's recommendation of a death sentence, the judge can instead impose a sentence of life imprisonment without the possibility of parole. However, the judge cannot impose a sentence greater than what the jury recommended. Additionally, Petitioner's jury was specifically instructed about the gravity of its decision and that "a human life is at stake." (Record at 2414-15). 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.

Further, 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*, 543 U.S. at 568 (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." *Roper*, 543 U.S. at 568. 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. Thus, the jury instructions in Petitioner's case did not violate *Caldwell* and 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