CAPITAL CASE

No. 17-8148

IN THE
SUPREME COURT OF THE UNITED STATES

LEO LOUIS KACZMAR III, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent.*

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. Whether this Court should grant review of a decision of the Florida Supreme Court holding that the *Hurst v. State*, 202 So.3d 40 (Fla. 2016), error was harmless error rather than structural error?

II. Whether this Court should grant review of a decision of the Florida Supreme Court rejecting a *Caldwell v. Mississippi*, 472 U.S. 320 (1985), claim?

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OPINION BELOW

The Florida Supreme Court's opinion is reported at *Kaczmar v. State*, 228 So.3d 1 (Fla. 2017) (SC13-2247).

JURISDICTION

On January 31, 2017, the Florida Supreme Court affirmed the death sentence following the resentencing. On February 15, 2017, Kaczmar filed a motion for rehearing in the Florida Supreme Court. On October 19, 2017, the Florida Supreme Court denied the rehearing. On January 5, 2018, Kaczmar filed a motion for extension

of time to file the petition for writ of certiorari in this Court. On March 14, 2018, Kaczmar then filed the petition. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(c). Jurisdiction exists pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

The Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. VIII.

The Fourteenth Amendment of the United States Constitution, section one, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On December 13, 2008, Maria Ruiz's body was found in the kitchen of Kaczmar's grandmother's house in Green Cove Springs. She had been stabbed and suffered blunt force trauma to her head. Kaczmar; his wife and two children; his uncle; his father; and his father's girlfriend, the victim, all lived in the house. The house had been set on fire in an apparent attempt to hide the murder. Kaczmar agreed to speak with police and denied any knowledge of the murder or arson and claimed that he had been fishing in Jacksonville all morning. Cell phone tower records, however, placed him in Green Cove at 6:26 a.m. and again at 7:31 a.m., contradicting Kaczmar's statements to police. *Kaczmar v. State*, 104 So.3d 990, 995-98 (Fla. 2012). Kaczmar's socks had blood on them. *Id.* at 997. The blood on Kaczmar's socks matched the victim's DNA profile at one in 880 billion southeastern Hispanics. (T. Vol. 16 678).

Kaczmar was indicted by a grand jury for first-degree murder, attempted sexual battery, and arson. *Kaczmar*, 104 So.3d at 995. A jury returned a verdict of guilty on all three counts and recommended Kaczmar be sentenced to death by a vote of 11 to 1. *Id.*

Kaczmar appealed to the Florida Supreme Court raising nine issues.[1] The Florida Supreme Court affirmed the convictions but remanded for a new penalty phase. *Kaczmar*, 104 So.3d at 995.

On August 19-20, 2013, the trial court conducted the second penalty phase, *Kaczmar v. State*, 228 So.3d 1, 6 (Fla. 2017). Kaczmar, against the advice of counsel, waived his right to present mitigation. *Id.* The only mitigation presented was a stipulation that Kaczmar was 24 years old on the date of the murder. The jury unanimously recommended a death sentence. The trial court found 2 statutory aggravating circumstances; 15 nonstatutory mitigating circumstances; and again sentenced Kaczmar to death. *Id.* at 6-7.

In the direct appeal of the resentecing to the Florida Supreme Court, Kaczmar raised six issues. *Kaczmar*, 228 So.3d at 7, n.8.[2] On January 12, 2016, while the

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[1] The nine issues were: 1) whether the trial court properly denied the motion for judgment of acquittal regarding attempted sexual battery; 2) whether the trial court abused its discretion by allowing the State to call the defendant's wife to testify regarding a plan to fabricate evidence; 3) whether the trial court committed fundamental error by not sua sponte giving a special jury instruction on the heat of passion defense; 4) whether the trial court abused its discretion in limiting closing arguments by preventing defense counsel from reading language of opinions to the jury; 5) whether the trial court properly denied the motion in limine to require the State not to edit the defendant's exculpatory statements from the recordings of the undercover meetings; 6) whether the trial court erred in finding the cold, calculated, and premeditated aggravator; 7) whether the trial court properly denied the motion for judgment of acquittal regarding premeditated murder; 8) whether the trial court properly denied the motion for judgment of acquittal regarding arson; and 9) whether Florida's death penalty statute violates the Sixth Amendment right-to-a-jury-trial.

[2] The six issues were: 1) the trial court erred in assigning great weight to the jury's death sentence recommendation; 2) the trial court improperly interfered with the jury's function by dismissing juror questions as "not relevant"; 3) the prosecutor engaged in impermissible closing argument; 4) the trial court erred in failing to find and give weight to the mitigating circumstance that Kaczmar was abused; 5) Kaczmar's death sentence is disproportionate; and 6) the death penalty was improperly imposed because Florida's death penalty statute is unconstitutional in light of *Ring v.*

appeal was pending in the Florida Supreme Court, this Court decided *Hurst v. Florida*, 136 S.Ct. 616 (2016), which held that Florida's death penalty statute violated the Sixth Amendment right-to-a-jury trial. On February 25, 2016, Kaczmar filed a motion to allow supplemental briefing regarding *Hurst v. Florida*. On February 29, 2016, the Florida Supreme Court ordered the parties to file supplemental briefs. On October 14, 2016, the Florida Supreme Court issued its opinion in *Hurst v. State*, 202 So.3d 40, 54 (Fla. 2016), holding that the Eighth Amendment and Florida law required unanimous jury recommendations of death.

On January 31, 2017, the Florida Supreme Court affirmed the death sentence from the resentencing proceeding. *Kaczmar v. State*, 228 So.3d 1 (Fla. 2017). The Florida Supreme Court found the *Hurst* error to be harmless. *Id.* at 7-9. On February 15, 2017, Kaczmar filed a motion for rehearing in the Florida Supreme Court. On October 19, 2017, the Florida Supreme Court denied the rehearing.

Kaczmar then filed a petition for writ of certiorari in this Court from the Florida Supreme Court's opinion. This is the State's brief in opposition.

Arizona, 536 U.S. 584 (2002).

REASON FOR DENYING THE WRIT

ISSUE I

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT THE *HURST V. STATE*, 202 So.3d 40 (Fla. 2016), ERROR WAS HARMLESS ERROR RATHER THAN STRUCTURAL ERROR?

Petitioner Kaczmar seeks review of the Florida Supreme Court's decision holding that the *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), error was harmless rather than structural error. There is no conflict between the Florida Supreme Court's decision and this Court's structural error jurisprudence. Indeed, the Florida Supreme Court's decision accords completely with this Court's view that jury instructions omitting an element are subject to harmless error analysis. This Court has repeatedly found such errors not to be structural error. *Neder v. United States*, 527 U.S. 1 (1999); *Washington v. Recuenco*, 548 U.S. 212 (2006). Nor is there any conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court. Opposing counsel cites no federal circuit court case or state supreme court case holding that a jury instruction regarding an omitted element is structural error. Furthermore, the petition ignores the differences between this Court's holding in *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and the Florida Supreme Court's holding in *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), but those differences would be crucial in any structural error verus harmless error analysis. This Court should deny review of this claim.

The Florida Supreme Court's decision

Kaczmar argued in his supplemental brief in the Florida Supreme Court that the *Hurst v. Florida* error was structural error citing *Sullivan v. Louisiana*, 508 U.S. 275

(1993). (SC13-2247 SIB at 5-9).[3] The State, in its supplemental answer brief, argued that Sixth Amendment right-to-a-jury-trial errors are subject to harmless error citing *Neder v. United States*, 527 U.S. 1 (1999), and *Washington v. Recuenco*, 548 U.S. 212 (2006). (SC13-2247 SAB at 17-20).

The Florida Supreme Court found the *Hurst v. State* error harmless, reasoning:

> Kaczmar first argues that his death sentence violates *Hurst v. Florida*, ——U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). We agree but find the error harmless.
>
> In *Hurst v. Florida*, the United States Supreme Court held that Florida's capital sentencing scheme is unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 136 S.Ct. at 619. In *Hurst v. State*, 202 So.3d 40, 54 (Fla. 2016), this Court held that "in addition to finding the existence of any aggravating factor unanimously, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge." *Id.* We further held that a unanimous jury recommendation is required before the trial court may impose a sentence of death. *Id.* We also concluded that a *Hurst* error is capable of harmless error review. *Id.* at 68.
>
> Kaczmar was sentenced to death under the procedure that the United States Supreme Court invalidated in *Hurst v. Florida*. "When the [United States] Supreme Court announces 'a new rule for the conduct of criminal prosecutions,' the rule must be applied to 'all cases, state or federal, pending on direct review or not yet final.' " *State v. Fleming*, 61 So.3d 399, 403 (Fla. 2011) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)). Because Kaczmar's case was pending on direct appeal when *Hurst v. Florida* issued, the United States Supreme Court's decision applies to him. *See Davis v. State*, 207 So.3d 142 (Fla. Nov. 10, 2016).
>
> We must next address whether that error was harmless beyond a reasonable doubt. We conclude that the error was harmless. As this Court explained in *Hurst*:
>
> > The harmless error test, as set forth in *Chapman [v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967),] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the

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[3] The supplemental briefs in this case filed in the Florida Supreme Court are available on the Florida Supreme Court docketing on the Court's website under the case number SC13-2247.

verdict, or alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

Hurst, 202 So.3d at 68 (quoting *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla. 1986)). The Court further discussed the lens through which harmless error should be evaluated:

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

Id. at 68. Regarding the right to a jury trial, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors and that the aggravating factors outweighed the mitigating circumstances.

In this case, we find the *Hurst v. Florida* violation to be harmless beyond a reasonable doubt. We recently decided a similar case, in which that defendant's jury, like Kaczmar's jury, unanimously recommended a death sentence. *Davis*, 207 So.3d at 156. In *Davis*, we held that the *Hurst v. Florida* error was harmless: "With regard to Davis's sentences, we emphasize the unanimous jury recommendations of death. These recommendations allow 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." *Id.* at 174. Kaczmar's jury likewise recommended a death sentence by a unanimous twelve-to-zero vote. Kaczmar's jury received the same standard criminal jury instruction we cited in *Davis*, ensuring that the jury "determine[d] whether sufficient aggravators existed and whether the aggravation outweighed the mitigation before it ... recommend[ed] a sentence of death." *Id.* (citing Fla. Std. Jury Instr. Crim. 7.11). As with the jury in *Davis*, Kaczmar's "jury was presented with evidence of mitigating circumstances and

was properly informed that it may consider mitigating circumstances that are proven by the greater weight of the evidence." *Id.* (citing Fla. Std. Jury Instr. Crim. 7.11). As in *Davis*, Kaczmar's "jury was not informed that the finding that sufficient aggravating circumstances outweighed the mitigating circumstances must be unanimous, and even though it was instructed that it was not required to recommend death even if the aggravators outweighed the mitigators, the jury did in fact recommend death unanimously." *Id.* (citing Fla. Std. Jury Instr. Crim. 7.11). Given that Kaczmar's jury received the same critical instructions as Davis's jury, we are confident beyond a reasonable doubt that here, as in *Davis*, "the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendations." *Id.* Finally, as in *Davis*, "the egregious facts of this case" provide "[f]urther support[ ] [for] our conclusion that any *Hurst v. Florida* error here was harmless." *Id.* at 175. Kaczmar stabbed a woman approximately ninety-three times after she refused to have sex with him, burned down his own house to cover up the murder, and attempted to recruit an undercover police officer to frame his friend for the murder. *See Kaczmar*, 104 So.3d at 996-97. The sentencing court found two aggravating factors: that Kaczmar had previously been convicted of a violent felony and that the murder was especially heinous, atrocious, or cruel (HAC). See § 921.141(5)(b), (h) (2009). "And this Court has indicated that the prior violent felony and HAC aggravators are 'two of the most weighty in Florida's sentencing calculus.' " *Partin v. State*, 82 So.3d 31, 46 (Fla. 2011) (quoting *Sireci v. Moore*, 825 So.2d 882, 887 (Fla. 2002)).

Accordingly, we hold that the *Hurst v. Florida* violation was harmless beyond a reasonable doubt. *See Davis*, 207 So.3d at 175. What we said in *Davis* is equally true in this case:

> Here, the jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. In fact, although the jury was informed that it was not required to recommend death unanimously, and despite the mitigation presented, the jury still unanimously recommended that [the defendant] be sentenced to death.... The unanimous recommendations here are precisely what we determined in *Hurst v. State* to be constitutionally necessary to impose a sentence of death.

Id. As in *Davis*, the *Hurst v. Florida* violation in Kaczmar's case does not entitle him to a new penalty phase

Kaczmar v. State, 228 So.3d 1, 7-9 (Fla. 2017) (SC13-2247).

No conflict with this Court's Sixth Amendment jurisprudence

There is no conflict between the Florida Supreme Court's decision in this case and this Court's decisions regarding structural error. See Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). Kaczmar asserts

that *Hurst v. Florida* error is structural error not subject to harmless error analysis. Pet. at 19-33. But this Court's Sixth Amendment jurisprudence provides that a violation of the Sixth Amendment right-to-a-jury-trial error is not structural error.

In *Neder v. United States*, 527 U.S. 1, 8 (1999), a case where the judge found an element of the crime instead of the jury, this Court explained that structural error occurs in "only a very limited class of cases." *Id.* at 8. The *Neder* Court explained that while an omission of an element of the crime was subject to harmless error, a flawed beyond-a-reasonable-doubt jury instruction was not because it has the effect of vitiating "***all*** the jury's findings" but, "in contrast," an omission of an element does not have the effect of vitiating "all the jury's findings." *Id.* at 11 (emphasis in original). This Court in *Neder* observed that the error of the judge making the factual findings regarding an element "differs markedly" from the type of errors that defy harmless error review. *Id.* at 8. The *Neder* Court then explained the criticism that spawned the harmless error doctrine in the first place which was based on appellate courts reversing regardless of its effect on the judgment which encouraged "litigants to abuse the judicial process" and "the public to ridicule it." *Id.* at 18. The *Neder* Court explained that if a criminal defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any error from such a trial was subject to harmless error analysis. *Id.* at 8 (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)).

In *Washington v. Recuenco*, 548 U.S. 212 (2006), this Court held that the judge rather than the jury determining an element of the crime in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was not structural error. The Washington Supreme Court had concluded that violations of the Sixth Amendment right-to-a-jury-trial under *Blakely v. Washington*, 542 U.S. 296 (2004), could never be harmless error but this Court reversed. This Court explained again that it is the "rare" error that is structural. *Recuenco*, 548 U.S. at 218. The *Recuenco* Court once again followed the

"strong presumption" that "if a criminal defendant had counsel and was tried by an impartial adjudicator," any error from such a trial was subject to harmless error analysis. *Id.* (quoting *Neder*, 527 U.S. at 8).

Kaczmar relies on *Sullivan v. Louisiana*, 508 U.S. 275 (1993), as the basis for his structural error argument. Pet. at 25. The *Neder* Court itself distinguished the beyond-a-reasonable-doubt standard of proof problem presented by *Sullivan* from the error of judge-made findings problem presented by *Neder*. *Neder*, 527 U.S. at 10-12. The *Neder* Court explained that, while a flaw in the reasonable doubt instruction infects *all* of the jury findings, but a judge making the findings instead of the jury does not. *Id.* at 11 (emphasis in original). Furthermore, the *Neder* "strong presumption" that any error is subject to harmless error applies here because Kaczmar had counsel and was tried by an impartial jury and an impartial judge.

Kaczmar attempts to distinguish *Neder* and *Recuenco* but fails. *Neder* and *Recuenco* are directly on point. *Neder* involved the judge making a factual finding that should have been made by the jury, just as *Hurst* does. And *Recuenco* involved an *Apprendi* error, just as *Hurst* does. *Sullivan*, on the other hand, involved the reasonable doubt jury instruction. Not only do both *Neder* and *Recuenco* involve the same type of error as occurred in this case, both were decided after *Sullivan*. *Neder* and *Recuenco* control, not *Sullivan*.

Kaczmar improperly relies on Justice Scalia's dissent in *Neder*. Pet. at 31-32. But conflict cannot be established based on a dissent. Pet.at 31-32. Nor does this argument account for Justice Scalia's later view that the judge rather than the jury determining an element was not structural error. Justice Scalia joined the majority in *Recuenco*. The Florida Supreme Court correctly determined that *Hurst* error was not structural error in accordance with this Court's decision in *Neder* and *Recuenco*.

There is no conflict with this Court's Sixth Amendment jurisprudence regarding structural error.

No conflict with any federal appellate court or state supreme court

Not only is there no conflict with this Court, there is no conflict with that of any federal appellate court or state supreme court either. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). In the absence of such conflict, certiorari is rarely warranted.

The federal circuits court, of course, follow *Recuenco*. *See, e.g., United States v. McCray*, 563 Fed. Appx. 705, 709 (11th Cir. 2014) (explaining that an *Alleyne v. United States*, 570 U.S. 99 (2013), error, like *Apprendi* error, is subject to harmless error analysis citing *Recuenco*). And most state courts of last resort, including the Florida Supreme Court, follow *Recuenco* as well. *Galindez v. State*, 955 So.2d 517, 519 (Fla. 2007) (concluding that *Apprendi* and *Blakely* errors are subject to harmless error analysis citing *Recuenco*). Opposing counsel cites no federal circuit case or state supreme court case holding that this type of error is structural error. He cites no case from any federal circuit court or state court of last resort that follows *Sullivan* instead of *Recuenco* in this particular area.

There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals or that of any state supreme court.

Hurst error and harmlessness

There is one area where there is tension between the Florida Supreme Court's view and this Court's view and that is in the nature of a *Hurst* error. There are significant differences between this Court's holding in *Hurst v. Florida* and the Florida Supreme Court's holding in *Hurst v. State.* This Court's holding in *Hurst v. Florida* was limited to aggravating circumstances. *Hurst v. Florida*, 136 S.Ct. at 624 (holding "Florida's sentencing scheme, which required the judge alone to find the existence of ***an aggravating circumstance***, is therefore unconstitutional") (emphasis added); *see also State v. Mason*, __ N.E.3d ___, 2018 WL 1872180 (Ohio April 18, 2018) (holding that Ohio's death penalty scheme was constitutional under this Court's decision in *Hurst v. Florida*; explaining that weighing is not a factual determination for purposes of the Sixth Amendment; and concluding that *Hurst v. Florida* does not require a jury to find mitigating facts or perform the weighing). But the Florida Supreme Court greatly expanded that holding in its *Hurst v. State* opinion to include jury findings of the sufficiency of the aggravating circumstances; jury findings of mitigation; and jury findings of weighing. Opposing counsel insists that mitigating circumstances and weighing are elements under *Hurst v. State.* But that is not this Court's view.

This Court has observed that "weighing is not an end; it is merely a means to reaching a decision." *Kansas v. Marsh*, 548 U.S. 163, 179 (2006). This Court's view is that neither mitigating circumstance nor weighing must be found by a jury; this Court's view is that only aggravating circumstances must be found by the jury because those are the only true factual determinations in capital sentencing. This Court does not view mitigation or weighing as factual findings at all. This Court has explained that aggravating circumstances are "purely factual determinations," but that mitigating circumstances, while often having a factual component, are "largely a judgment call (or perhaps a value call)." *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016).

This Court noted that the mitigating circumstance of mercy, "simply is not a factual determination." *Id.* at 643. The *Carr* Court explained that "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy" and that it would mean "nothing" to tell the jury that the defendants "must deserve mercy beyond a reasonable doubt." *Id.* at 642.

Neither the concept of structural error nor the concept of harmless error apply to "judgment calls" or "questions of mercy." Because this Court does not view either mitigating circumstances or weighing as factual findings, there is no error regarding a jury's lack of findings to be considered either structural or harmless. When a court finds no error it does not conduct a harmless error analysis on that non-error.

It is difficult to decide questions of harmless error if two courts do not agree on the nature of the error. While the Florida Supreme Court sees mitigation and weighing as factual determinations that the jury must make, this Court does not.[4] This Court is going to be hard pressed to conduct any type of harmless error analysis regarding factual findings that it does not view as facts at all or as being error in the first place.[5]

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[4] Most lower appellate courts agree with this Court's view that the Sixth Amendment right to jury findings is limited to aggravating circumstances and does not extend to weighing. As the Ohio Supreme Court recently observed, "nearly every court" that has considered the issue has held that the Sixth Amendment only applies to the eligibility decision and aggravating circumstances. *State v. Mason*, __ N.E.3d ___, 2018 WL 1872180, *5 (Ohio April 18, 2018) (citing several federal circuit cases and state supreme court cases).

[5] Mitigating circumstances simply are not elements of the crime of capital murder under state law regardless of the Florida Supreme Court's decision in *Hurst v. State.* The prosecution does not prove mitigating circumstances; the defense does. And mitigating circumstances are not proven beyond a reasonable doubt by the defense under Florida law. Rather, mitigating circumstances are only required to be proven by the "greater weight of the evidence." *Coday v. State*, 946 So.2d 988, 1001 (Fla. 2006) (citing *Campbell v. State*, 571 So.2d 415, 419 (Fla. 1990)).

While the Florida Supreme Court failed to directly address the nature of mitigating circumstances in its *Hurst v. State* opinion, it did treat the weighing as a

Opposing counsel ignores this dilemma in their certiorari petition. This dilemma makes this case a poor vehicle for deciding the issue of whether *Hurst v. Florida* error is structural error. Pet. at 32.

There is yet another vehicle problem in this case. Kaczmar waived the presentation of mitigation during the resentencing. A stipulation that Kaczmar was 24 years old at the time of the murder was presented to the jury in support of the age mitigating circumstance. But no other mitigation was presented to the jury. *Kaczmar*, 228 So.3d at 6 (noting Kaczmar refused to present mitigation to the jury other than a stipulation regarding his age). A refusal to presentation mitigation to the jury amounts to a waiver of the right under *Hurst v. State* to jury findings on mitigation and weighing. A capital defendant cannot waive the presentation of mitigation and then asserted his right to jury findings on mitigation and weighing was violated. Opposing counsel also ignores the waiver issue in the petition. A case with a threshold waiver issue is a poor vehicle to decide a structural error question.

There is no basis for granting certiorari review of this issue.

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factual finding that must be made by the jury. But before a jury can make "factual findings" regarding the weighing of aggravating circumstances against the mitigating circumstances, the jury must make the antecedent factual findings regarding mitigating circumstances. Even if the Florida Supreme Court views mitigating circumstances as only partially factual and partially a judgment call, then weighing is not actually a factual finding either because a large component of what the jury is weighing — the mitigating circumstances — are not factual in nature.

Nor does the Florida Supreme Court explain how the most common mitigating circumstance of "mercy" can possibly be viewed as factual. Opposing counsel cannot seriously be arguing that mercy is an element of the crime of capital murder that must be proven by the prosecution beyond a reasonable doubt. Yet this Court would have to adopt such a view to reach the structural error versus harmless error question regarding weighing presented by the petition.

ISSUE II

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE FLORIDA SUPREME COURT REJECTING A *CALDWELL V. MISSISSIPPI*, 472 U.S. 320 (1985), CLAIM?

Petitioner Kaczmar seeks review of the Florida Supreme Court's decision holding that the *Hurst v. State* error was harmless but which did not address the *Caldwell v. Mississippi*, 472 U.S. 320 (1985), claim. This Court does not grant review of issues not presented below. The *Caldwell* claim was not properly presented to the Florida Supreme Court with "fair precision." Additionally, there is no conflict between the Florida Supreme Court's decision and this Court's Eighth Amendment jurisprudence of *Caldwell* and its progeny. Nor is there any conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court. Furthermore, there is no valid *Caldwell* claim. Under this Court's decision in *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994), a defendant must show that the remarks to the jury improperly described the role assigned to the jury by local law to establish a *Caldwell* violation. A Florida jury's decision regarding a death sentence was, and remains, an advisory recommendation. A Florida judge, under both the old death penalty statute and the new death penalty statute, may ignore a jury's recommendation of death and impose a life sentence. Florida's standard penalty phase jury instructions do not violate *Caldwell*. Moreover, the Florida Supreme Court recently held that Florida's standard penalty phase jury instructions do not violate *Caldwell*. *Reynolds v. State*, ___ So.3d ___, 2018 WL 1633075 (Fla. Apr. 5, 2018). This Court should deny review of this claim.

The Florida Supreme Court's decision

Kaczmar argued in his supplemental brief filed in the Florida Supreme Court that the *Hurst v. State* error was structural error. And in support of that structural error

argument, he asserted there was a "*Caldwell* problem" because the jury was repeatedly informed that their recommendation was advisory and, therefore, the Florida Supreme Court should not place any weight on the jury's unanimous recommendation of death in its harmless error analysis. (SC13-2247 SIB at 9-12).[6] Oddly, he admitted in his supplemental brief that the characterization of the jury's decision as an advisory recommendation "accurately identified the role of the jury under Florida law." SIB at 11. The State in its answer brief addressed the *Caldwell* claim only in a footnote, stating that because "no *Caldwell* claim was raised in the initial brief, the State declines to address the issue. *Caldwell* is not part of a proper harmless error analysis." (SC13-2247 SAB at 20, n.7). His reply brief did not address *Caldwell* any further.

Kaczmar's argument regarding *Caldwell* was actually made in support of argument that the error should be viewed as structural error rather than harmless error, not as a separate issue. Because the *Caldwell* claim was not raised as a separate issue, the Florida Supreme Court did not address the *Caldwell* claim. The Florida Supreme Court did not discuss or cite *Caldwell* in their opinion. *Kaczmar*, 228 So.3d at 7-9.

Not properly presented below

Kaczmar did not properly present a *Caldwell* claim to the Florida Supreme Court. While the structural error argument was properly presented below, the *Caldwell* claim was not. The *Caldwell* claim was not presented as an actual separate claim but as an argument in support of another argument. Indeed, petitioner's own statement in the supplemental brief that the instructions "accurately identified the role of the jury under Florida law" negates any actual *Caldwell* claim.

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[6] The supplemental briefs in this case filed in the Florida Supreme Court are available on the Florida Supreme Court docketing on the Court's website under the case number SC13-2247.

Typically, this Court does not review a claim not properly presented to the lower court. *Adams v. Robertson*, 520 U.S. 83, 87-88 (1997) (discussing the various ways a petitioner may properly present an issue to a lower court and dismissing the writ of certiorari as improvidently granted because the issue was not presented to the state supreme court). This Court is a court of final review, "not first review." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (dismissing the writ of certiorari as improvidently granted). This Court requires that the claim be presented with "fair precision." *Adams*, 520 U.S. at 88. There is little analytical connection between structural error and *Caldwell*. A *Caldwell* claim is based on the Eighth Amendment. On the other hand, a harmless error is a species of remedy that applies to nearly all constitutional provisions; a claim of structural error is not an Eighth Amendment claim. A petitioner may not cite a case in support of an entirely separate claim and then assert that he properly presented both claims to the lower court. The *Caldwell* claim was not presented to the Florida Supreme Court with "fair precision" and this Court should deny review on that basis alone.

No conflict with this Court's Eighth Amendment jurisprudence

There is no conflict between the Florida Supreme Court's decision in this case and this Court's decisions in *Caldwell* and its progeny. See Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review).

There was no violation of *Caldwell*. 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. *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994); *see also Dugger v. Adams*, 489 U.S. 401 (1989). *Caldwell* requires that the prosecutor, judge, or jury instructions misrepresent the jury's role in sentencing. *Darden v. Wainwright*, 477 U.S. 168, 183, n.15 (1986) (rejecting a *Caldwell* attack, explaining that "*Caldwell*

is relevant only to certain types of comment — those that ***mislead*** the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision") (emphasis added). Petitioner admitted in his supplemental brief filed in the Florida Supreme Court in this case that the characterization of the jury decision as an advisory recommendation was an "accurately identified the role of the jury under Florida law."

Even today, under Florida's new death penalty statute, the judge remains the final sentencer in Florida. A jury's recommendation of death in Florida is just that — a recommendation. Florida's new death penalty statute refers to the jury's vote as a "recommendation." Ch. 2017-1, § 1, Laws of Fla. ("If a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death."); *see also In re Standard Criminal Jury Instructions in Capital Cases*, 214 So.3d 1236, 1238, n.4 (Fla. 2017) (Lawson, J., concurring) (stating: "the jury's verdict is only a recommendation"). A Florida trial court, while bound by the jury's findings of no aggravation and a recommendation of a life sentence, is not bound by a jury's recommendation of a death sentence. A judge is still free to reject the jury's death recommendation of death and impose a life sentence. And such a decision is not even appealable under double jeopardy principles under long established precedent. *Williams v. State*, 595 So.2d 936 (Fla. 1992) (holding that the Double Jeopardy Clause prohibits a new penalty phase where the judge had imposed a life sentence at the first penalty phase citing *Brown v. State*, 521 So.2d 110 (Fla. 1988)); *State v. Ballard*, 956 So.2d 470, 475 (Fla. 2d DCA 2007) (Villanti, J., concurring) (noting a judge's decision to override a jury's recommendation of death is not appealable); *cf. Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003). Characterizing the jury's recommendation as advisory is accurate. The jury's recommendation in Florida was, and remains, "advisory."

Two United States Supreme Court Justices have expressed the view that *Caldwell* is an issue in Florida in non-final capital cases.[7] *Truehill v. Florida*, 138 S.Ct. 3 (Oct. 16, 2017) (Sotomayor, J., dissenting from the denial of certiorari) (advocating that the Florida Supreme Court revisit its precedent rejecting *Caldwell* challenges to the use of the term "advisory" to describe the jury's recommendation in the wake of *Hurst*); *Middleton v. Florida*, 138 S.Ct. 829 (Feb. 26, 2018) (Sotomayor, J., dissenting from the denial of certiorari) (expressing the view that describing a juror's role in sentencing as "merely advisory" is a *Caldwell* concern and because the Florida Supreme Court's reasoning that "unanimity ensured that jurors had made the necessary findings of fact" under *Hurst* "effectively" transforms "the pre-*Hurst* jury recommendations into ***binding*** findings of fact") (emphasis added). Justice Sotomayor repeated her concerns alone recently in *Guardado v. Jones*, 138 S.Ct. 1131 (April 2, 2018) (Sotomayor, J., dissenting from the denial of certiorari).[8]

But *Caldwell* requires that the prosecutor, judge, or jury instructions ***misrepresent*** the jury's role in sentencing. *Darden v. Wainwright*, 477 U.S. 168, 183, n.15 (1986) (rejecting a *Caldwell* attack, explaining that "*Caldwell* is relevant only to certain types of comment — those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision"). Florida's new death penalty statute refers to the jury's decision as a "recommendation." Ch. 2017-1, § 1, Laws of Fla. There is no misrepresentation

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[7] Justice Breyer's separate opinion was based mainly on his view that the Eighth Amendment requires jury sentencing in capital cases — a view no other Justice has taken. While he purports to join the dissenters, he does so on separate grounds. He cannot be said to agree with Justice Sotomayor that there is a *Caldwell* problem with the Florida Supreme Court's harmless error analysis.

[8] Neither Justice Breyer nor Justice Ginsburg joined Justice Sotomayor in *Guardado*, as they had previously done.

of the jury's role under local law from use of the word "advisory." Under *Romano*, that statutory language, in and of itself, ends any *Caldwell* claim. *Bowling v. Parker*, 344 F.3d 487, 514-15 (6th Cir. 2003) (rejecting a *Caldwell* claim based on the prosecutor's use of the word "recommend" because it "does not misstate local law because Kentucky statutes also use the word 'recommend'").

Furthermore, it is difficult to see a *Caldwell* problem with the standard jury instructions given in capital cases. See Standard Jury Instruction 7.11 (Penalty Proceedings — Capital Cases). The standard penalty phase jury instructions inform the jury: "Before you ballot you should carefully weigh, sift, and consider the evidence, and all of it, realizing that ***human life is at stake***." *The Florida Bar re: Standard Jury Instructions Criminal Cases*, 477 So.2d 985, 988 (Fla. 1985); *In re Standard Jury Instructions in Criminal Cases - Report No. 2005-2*, 22 So.3d 17, 36 (Fla. 2009) (emphasis added). The standard penalty phase instructions also inform the jury: although "the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given ***great weight*** and deference by the Court in determining which punishment to impose." *In re Standard Jury Instructions in Criminal Cases - Report No. 2005-2*, 22 So.3d at 28-29 (emphasis added). The jury instructions provide: "All of us are depending upon you to make a wise and legal decision in this matter." *Id.* at 30. At the end of the instructions, the jury is told that "Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death." *Id.* at 35. "You should take sufficient time to fairly discuss the evidence and arrive at a well reasoned recommendation." *Id.* at 36. It is difficult to see how a jury would underestimate its importance in capital sentencing given such instructions.

But Justice Sotomayor shows an even deeper misunderstanding of the logic of *Caldwell*. *Caldwell* requires both that there be a misrepresentation of the jury's role

and that the jury hear that misrepresentation. The jury must hear misrepresentation for their sense of responsibility to be diminished, which is the core of *Caldwell*. One simply cannot premise a *Caldwell* violation on something the jury never heard. The Florida Supreme Court made its observations and statements that concern Justice Sotomayor as part of its harmless error analysis of the *Hurst* error in *Truehill*, *Middleton*, and *Guardado*. She believes that the Florida Supreme Court turned the recommendation into a binding one by its harmless error analysis. But the jury, obviously, never heard the Florida Supreme Court's opinion in *Truehill*, *Middleton*, or *Guardado*. An appellate court's harmless error analysis occurs long after the jury has been dismissed. The Florida Supreme Court's opinion is written many months, or often years, after the jury's penalty phase deliberations. Juries never hear that opinion. No one read the Florida Supreme Court's opinion (that had not been written yet) to these juries. There simply is no way the jury's sense of responsibility was diminished by statements made in an appellate opinion they never read. It is the standard jury instruction that the jury hears, not the opinion. *Caldwell* violations cannot be premised on appellate opinions. There is both no misrepresentation and no jury knowledge of the statement and therefore, no possible *Caldwell* problem.

Additionally, the misrepresentation must ***decrease*** the jury's sense of responsibility for sentencing to be a *Caldwell* violation. A misrepresentation of their role that ***increases*** their sense of responsibility is not a *Caldwell* problem. The juries in Florida are told in the standard penalty phase jury instructions that the judge would give their recommendation great weight including their recommendation of death. While the instructions tell the jury that any type of recommendation will be given great weight, in fact, the judge does not have to give a jury's death recommendation any weight. And a judge totally ignoring the jury recommendation of death is not even appealable regardless of how unjustified his reasons for doing so are. If anything,

Florida's standard penalty phase jury instructions increase the jury's sense of responsibility which simply is not a *Caldwell* violation.

Furthermore, Justice Sotomayor is mistaken in believing that a jury's death recommendation is "binding" on a trial court in Florida. It is not. Under both the old death penalty statute and the new death penalty statute, a judge may still sentence a defendant to life regardless of the jury recommendation of death. Unanimous jury recommendations of death are not binding on the trial court. While a jury's finding of no aggravating factors is now binding under the new statute, a jury's finding of no aggravating factors was nearly binding under the caselaw interpreting the old statute. *Evans v. Sec'y, Fla. Dept. of Corr.*, 699 F.3d 1249, 1256 (11th Cir. 2012) (noting the Florida Supreme Court's "stringent application" of the *Tedder v. State*, 322 So.2d 908 (Fla. 1975), standard under which the last override affirmed on appeal was over twenty years ago in 1994). But a jury's recommendation of death is ***not*** binding in any manner under either the old statute or the new statute. And therefore, it is perfectly accurate to refer to the jury's recommendation of death as either a recommendation or as advisory, because that is exactly what it is.

The entire premise of the dissent is based on the statement that if "those then-advisory jury findings are now binding" there is a *Caldwell* problem because the jury instructions "repeatedly emphasized the nonbinding, advisory nature of the jurors' role." *Middleton*, 138 S.Ct. at 830. But that premise is faulty. Harmless error analysis by an appellate court cannot create "binding" findings in the trial court in the face of both the statute and long-existing precedent that the trial court may ignore a jury's death recommendation and impose a life sentence.

The Florida Supreme Court's decision in this case does not conflict with either this Court's decision in *Caldwell* or its progeny, particularly *Romano*. There is no conflict between the Florida Supreme Court and this Court.

No conflict with any federal appellate court or state supreme court

Not only is there no conflict with this Court, there is no conflict with that of any federal appellate court or state supreme court. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). In the absence of such conflict, certiorari is rarely warranted.

The Eleventh Circuit has consistently rejected *Caldwell* challenges to the Florida's jury instructions in capital cases in the years since *Romano*. As the Eleventh Circuit has explained, 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, 1481-82 (11th Cir. 1997) (quoting *Romano*, 512 U.S. at 9). The Eleventh Circuit concluded "the references to and descriptions of the jury's sentencing verdict in this case as an advisory one, as a recommendation to the judge, and of the judge as the final sentencing authority are not error under *Caldwell*." *Davis*, 119 F.3d d at 1482. "Those references and descriptions are not error, because they accurately characterize the jury's and judge's sentencing roles under Florida law." *Id.*; *see also Provenzano v. Singletary*, 148 F.3d 1327, 1334 (11th Cir. 1998) (recognizing the limitations on prior Eleventh Circuit *Caldwell* cases which had "to be read" in light of the Supreme Court's subsequent decisions in *Romano* and *Dugger*); *Johnston v. Singletary*, 162 F.3d 630, 642-44 (11th Cir. 1998) (rejecting both a straight *Caldwell* claim as well as an ineffectiveness claim based on *Caldwell* as being "without merit"); *Belcher v. Sec'y, Fla. Dept. of Corr.*, 427 Fed. Appx. 692, 695 (11th Cir. 2011) (rejecting a claim of ineffective assistance of counsel for failing to make a *Caldwell* objection

because Florida "treats the jury's verdict as advisory," therefore, the "remarks made by the prosecutor, viewed in context, accurately portrayed the relationship between the judge and jury and did not denigrate the jury's role in the proceedings" citing *Davis*). While these cases were decided before *Hurst v. Florida* nothing in *Hurst v. Florida* changes any of the Eleventh Circuit's analysis in these cases.

Other federal circuit courts have also held that the use of the words "advisory" or "recommendation" does not violate *Caldwell. Lorraine v. Coyle*, 291 F.3d 416, 446 (6th Cir. 2002) (rejecting a *Caldwell* claim to the prosecutor's repeated use of the word that its verdict was only a recommendation because that is an accurate statement of Ohio law); *Bowling v. Parker*, 344 F.3d 487, 514-15 (6th Cir. 2003) (rejecting a *Caldwell* claim based on the prosecutor's use of the word "recommend" because it "does not misstate local law because Kentucky statutes also use the word 'recommend'" citing *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1101 (6th Cir. 1990) (en banc)); *Fleenor v. Anderson*, 171 F.3d 1096, 1098-99 (7th Cir. 1999) (rejecting a *Caldwell* claim based on the prosecutor's use of the word "recommendation" because the jury in Indiana "makes a recommendation to the judge about whether or not to impose the death penalty, but the judge is not required to follow the recommendation—it is his decision to make, not the jury's" citing Ind.Code § 35-50-2-9(e)); *Wilson v. Sirmons*, 536 F.3d 1064, 1121 (10th Cir. 2008) (rejecting a *Caldwell* claim to the prosecutor's description of the jury's sentencing role as a "recommendation" because that was an accurate description of Oklahoma law).

Opposing counsel cites to no federal circuit court case or state supreme court case holding that there is a *Caldwell* violation based on jury instructions referring to the jury's recommendation regarding sentencing as a recommendation or as advisory when it is an advisory recommendation under state law.

There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals or that of any state supreme court. This claim presents an issue that there is no conflict among the courts regarding and that lack of conflict is a second reason for denying review of this issue.

The Florida Supreme Court's recent *Caldwell* precedent

While Justice Sotomayor criticized the Florida Supreme Court for not addressing the *Caldwell* claim, the Florida Supreme Court has now addressed the *Caldwell* issue in two recent cases. The Florida Supreme Court recently has explicitly rejected *Caldwell* attacks on Florida's standard penalty phase jury instructions in the wake of *Hurst*. *Reynolds v. State*, ___ So.3d ___, 2018 WL 1633075 (Fla. Apr. 5, 2018) (SC17-793); *see also Johnston v. State*, 2018 WL 1633043 (Fla. Apr. 5, 2018) (SC17-1678) (rejecting a *Caldwell* claim citing *Reynolds*).

In *Reynolds v. State*, ___ So.3d ___, 2018 WL 1633075 (Fla. Apr. 5, 2018) (SC17-793), a plurality of the Florida Supreme Court held that there was no *Caldwell* violation because the jury was not misled about its sentencing role. The penalty phase jury instructions given at the penalty phase in 2003 informed the jury that "the final decision as to what punishment shall be imposed is the responsibility of the judge" and also explained that the judge could reject their advisory recommendation "only if the facts were so clear and convincing that virtually no reasonable person could differ" and that "the law required the court to give great weight" to the recommendation. *Id.* at *1. Years later, after the direct appeal and the initial postconviction appeal, Reynolds filed a successive postconviction motion raising a claim based on *Hurst v. State* and a claim based on *Caldwell*. *Id.* at *2. The trial court summarily denied the successive motion and Reynolds appealed to the Florida Supreme Court.

The Florida Supreme Court concluded that *Hurst v. State* applied to Reynolds but that the *Hurst* error was harmless. *Reynolds*, 2018 WL 1633075 at *2-*5. The Florida Supreme Court then turned to the *Caldwell* issue with an extensive discussion of that matter. *Id.* at *5-*12. The Florida Supreme Court first explained that Reynolds was raising a *Caldwell* challenge to Florida Standard Jury Instruction 7.11 which the Court referred to as a "*Hurst*–induced *Caldwell* claim." *Id.* at *5. The Florida Supreme Court discussed this Court's holding in *Romano v. Oklahoma*, 512 U.S. 1, 8-10 (1994), limiting *Caldwell* to comments that mislead the jury as to their role under state law. *Id.* at *8-*9. The Florida Supreme Court rejected this attack on the standard jury instruction because the instructions "cannot be invalidated retroactively prior to *Ring* simply because a trial court failed to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts." *Id.* at *9. The Florida Supreme Court concluded that "a *Caldwell* claim based on the rights announced in *Hurst*" cannot be used to "retroactively invalidate the jury instructions that were proper at the time under Florida law." *Id.* at *10. *Caldwell* does not require that jurors "be informed of how their responsibilities might hypothetically be different in the future, should the law change." *Id.* The Florida Supreme Court queried that either juries were being misled or they were not and they concluded "they were not." *Id.* at *12. The Florida Supreme Court concluded that Standard Jury Instruction 7.11 did not mislead the jury as to its role in sentencing and affirmed the trial court's denial of the successive postconviction motion. *Id.*

Only two Justices joined this opinion. Two other Justices concurred in the result only. So, there actually is no majority opinion, only a majority result.

Justice Lawson concurred with an opinion. *Reynolds*, 2018 WL 1633075 at *13. He stated that *Caldwell* claim was procedurally barred because such claims must be raised on direct appeal. He also wrote that "faithful application of the Florida Constitution

prohibits grounding *Hurst* in the Eighth Amendment" and also prohibits using *Hurst* to create a *Caldwell* problem. Justice Quince dissented but on harmless error grounds, not on *Caldwell* grounds. *Id.* at *17 (Quince, J., dissenting). Only Justice Pariente dissented in *Reynolds* regarding the *Caldwell* claim. *Id.* at *13-*17 (Pariente, J., dissenting). She was the only Justice of the Florida Supreme Court who found the *Caldwell* claim valid.

There is no basis for granting certiorari review of this issue.

Accordingly, this Court should deny the petition.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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