No. 18-1306

In the Supreme Court of the United States

FRED ANDERSON, JR., PETITIONER,

v.

STATE OF FLORIDA

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The Florida Supreme Court is flouting this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), by applying a rule of harmless-error review that equates a "unanimous [jury] recommendation" with a unanimous jury verdict. And it is flouting this Court's decision in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), by holding that an error that vitiates *all* the jury's findings is susceptible to harmless-error review in the first place. Petitioner Fred Anderson and 33 others like him will remain on death row because of these holdings. They merit review.

The State's principal response is to speculate that the Florida Supreme Court will reverse itself and hold that *Hurst* does not apply to individuals like Mr. Anderson. But speculation that a state court might *change* state law should not preclude this Court from deciding critically important questions of federal law. In any event, *Hurst* would apply to Mr. Anderson as a matter of federal law.

I. The State Does Not Dispute that the Questions Presented Are Enormously Consequential and It Identifies No Barriers To Review

A. The State does not dispute that both questions presented have immediate, outcome-determinative consequences for dozens of death-row inmates. In particular, the State accepts that the Florida Supreme Court has applied its version of harmless-error review to affirm 28 death sentences, and that at least six more defendants will meet the same fate under the rule applied below. Pet. 27-28. If resentenced by a jury, each of these individuals would likely receive life imprisonment, not death. Pet. 7, 28-29.

The State also does not deny the broad structural significance of the questions presented, or that this

Court frequently grants certiorari to resolve such questions, even in the absence of a split. Pet. 29-30.

Nor does the State contest that the Florida Supreme Court's application of *Hurst* permits wholesale evasion of this Court's decision. Pet. 30-31.[1] The court said Mr. Anderson's unconstitutional sentencing was harmless because "unanimous [jury] recommendation[s]" are "precisely" what *Hurst* made "constitutionally necessary." Pet. App. 2a (quoting *Everett v. State*, 258 So. 3d 1199, 1200 (Fla. 2018)). By that logic, there is no constitutional problem with sentencing a defendant to death based on an advisory jury recommendation, so long as the recommendation was unanimous. That is not "precisely" what *Hurst* held—it is precisely what *Hurst* rejected. Pet. 22.

B. The State's primary asserted barrier to review—that the Florida Supreme Court might reverse itself and declare that *Hurst* does not apply to post-*Ring* defendants as a matter of state law—is no barrier at all.

1. The Florida Supreme Court has held as a matter of state law and "fundamental fairness" that *Hurst* applies to all defendants whose death sentences became final after *Ring*. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). The briefing order in *Owen v. State*, No. SC18-810, does not counsel against review. For one thing, the Florida Supreme Court has not suggested that it will hold *Hurst* inapplicable to defendants like Mr. Anderson as to whom it has already held *Hurst* applicable. For another, the court is considering expanding application of *Hurst* just as much as contracting it. The State's quotation of the *Owen* order (at 10) is incomplete; the

[1] The petition correctly describes *Hurst*: "a jury [must] find every fact necessary to sentence a defendant to death." Pet. i; *contra* Opp. 12-13. The State concedes "the trial court" found those facts. Opp. 6-7.

court directed the parties to address whether the court "should recede from the retroactivity analysis" in both *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Mosley.* Order, No. SC18-810 (Apr. 24, 2019). If the court "recede[s] from" *Asay*, then even pre-*Ring* defendants will be able to raise Sixth Amendment claims. *See Asay*, 210 So. 3d at 22.

In any event, this Court routinely reviews and resolves cases presenting important questions of federal law even when, on remand, the state court might deny relief on a different basis. Likewise, the Court routinely grants review of federal questions that are presented only because a state court has construed state law in a particular way. *Hurst* and *Ring* themselves are examples. Both depended on a state-law premise—that state law, as interpreted by state courts, required proof of certain facts to justify the death penalty. *Ring*, 536 U.S. at 603-04; *Hurst*, 136 S. Ct. at 622. And in both cases, the Court held that the state's procedures violated the Sixth Amendment, but remanded for consideration of the harmlessness question. 536 U.S. at 609 n.7; 136 S. Ct. at 624. That the states on remand could have held the errors harmless—or even entirely changed their capital sentencing procedures—did not preclude review of the important Sixth Amendment questions. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions."). If the indeterminacy of state law sufficed to foreclose this Court's review, then it would never review state-court decisions, as states are always free to upend their law.

2. No matter what happens in *Owen*, that case cannot create a "vehicle" problem, as the State suggests. Opp. 9. The State argues that, if *Owen* reverses *Mosley*—and assuming the Florida Supreme Court applies

the reversal to Mr. Anderson—Mr. Anderson might not enjoy the benefit of a ruling by this Court in his favor. Opp. 11. But as noted, the Court often grants review in similar situations; so this is not a "vehicle problem." A reversal in *Owen* would not deprive this Court of jurisdiction or otherwise interfere in any way with the Court's resolution of the important federal questions presented. And the pendency of *Owen* does not distinguish Mr. Anderson's petition from any other "vehicle" presenting these questions. The State does not argue otherwise.

Nor would reversal of *Mosley* affect the significance of the questions presented for the criminal justice system more broadly. Courts are sharply divided over whether *Ring* errors are structural. Pet. 12-21; *infra* p.6. The State does not deny that other states still have judge-imposed death penalties that are likely unconstitutional under *Hurst*. Pet. 31-32. The questions presented have broad-ranging importance regardless of whether Florida applies *Hurst* to post-*Ring* defendants under state law.

3. In any event, this Court's decision will be outcome-determinative for post-*Ring* defendants like Mr. Anderson even if *Owen* holds that *Hurst* is nonretroactive under state law. If this Court holds that the Sixth Amendment violations in Mr. Anderson's sentencing were *not* harmless, it will remand. If (as the State assumes) *Owen* has reversed *Mosley*, then Mr. Anderson will assert among other things that his *Hurst* claim does not depend on retroactivity and that, in any event, *Hurst* is retroactive under federal law. If the Florida Supreme Court rejects those arguments, Mr. Anderson can seek this Court's review of that decision, which would be independently certworthy given the dozens of individuals sentenced to death in violation of *Hurst*.

There is no real doubt that *Hurst* applies to Mr. Anderson and others like him as a matter of federal law. The State focuses on the doctrine of federal retroactivity under *Teague v. Lane*, 489 U.S. 288 (1989), which was the basis for this Court's decision in *Schriro v. Summerlin*, 542 U.S. 348 (2004). *Teague* "command[s]" all courts—including state courts—to give retroactive application to certain new rules of constitutional law. *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016). But Mr. Anderson's claim in no way depends on *Hurst* being retroactive. Mr. Anderson's death sentence became final after *Ring*. And as the State admits, "*Hurst* was based on *Ring*": "The analysis the *Ring* Court applied to Arizona's sentencing scheme applie[d] equally to Florida's." Opp. 9-10 (quoting *Hurst*, 136 S. Ct. at 621-22). Because *Hurst* was "merely an application of [*Ring*'s] principle," *Hurst* applies to Mr. Anderson without regard to "retroactivity." *Yates v. Aiken*, 484 U.S. 211, 217 (1988); *see* Pet. 14 n.2; *Stringer v. Black*, 503 U.S. 222, 228-29 (1992).[2]

C. Aside from manufacturing a retroactivity problem, the State does not meaningfully contest that Mr. Anderson's case is an ideal vehicle to resolve the questions presented. Mr. Anderson's jury understood its role to be advisory. Pet. 33. His sentence became final after *Ring*, which held that a jury must make all findings necessary to impose a death sentence. Pet. 34. His claim does not arise on federal habeas review and therefore is not governed by AEDPA. He squarely raised all relevant claims below. Pet. 33. And he had significant miti-

[2] The State repeatedly observes that the petition did not argue that federal law requires application of *Hurst*, Opp. 10-11, but Mr. Anderson had no need to raise the issue because whether *Hurst* applies has not been contested in this case.

gating circumstances that a resentencing jury would consider. Pet. 33-34.

The State's request to delay review until the Florida Supreme Court decides *Owen* is a transparent effort to permanently insulate from review the court's misapplication of harmless-error principles. The number of defendants left to raise these critically important issues in a non-AEDPA posture is dwindling, and several members of this Court have repeatedly called for their resolution. It is time for this Court to grant review. Pet. 27-33.

II. This Court Should Resolve the Split Over Whether *Ring*/*Hurst* Errors are Structural

A. The question whether *Ring*/*Hurst* errors are structural is subject to a well-developed split, which only this Court can resolve. Pet. 13-16 (citing cases). The split has been acknowledged by multiple courts and the foremost treatise on criminal procedure. Pet. 15-16.

The State does not dispute that the en banc Ninth Circuit considered *Ring* errors to be "structural error" in *Summerlin v. Stewart*, 341 F.3d 1082, 1116 (9th Cir. 2003). Instead, the State claims (at 14) that this analysis was "part of an overruled holding," because *Schriro* overruled *Summerlin*'s separate holding that *Ring* was retroactive. But structural error "is not coextensive with" retroactivity analysis. Pet. 14 n.2 (quoting *Tyler v. Cain*, 533 U.S. 656, 666 (2001)). And *Schriro* did not address whether *Ring* errors are structural. 542 U.S. at 355-58. The en banc court's structural-error holding remains good law.

Nor was that holding "dicta." Opp. 14. It was necessary to the court's decision to remand for resentencing, a decision that required the court to determine *both* that *Ring* was retroactive, *and* that the *Ring* error was non-harmless. *See* 341 F.3d at 1121. The Arizona Supreme Court regarded *Summerlin*'s structural-error

analysis as a holding from which the Arizona court departed. *State v. Sansing*, 77 P.3d 30, 33 n.2 (Ariz. 2003).

The Idaho Supreme Court's holding in *State v. Lovelace*, 90 P.3d 298 (Idaho 2004)—that *Ring* errors are "not susceptible to harmless-error analysis"—was not limited to the facts of that case. *Contra* Opp. 14-16. *Lovelace* held that harmless error review is inappropriate in any case where the "facts" involve weighing "aggravating and mitigating" factors, which are inherently "more subjective" than "evidence of guilt or innocence." *Id.* at 304-05. That holding encompasses every death penalty determination. The State quotes (at 15-16) the court's recitation of the harmless-error standard, but that is precisely the standard the court held "inappropriate." *Id.*

As for *Woldt v. People*, 64 P.3d 256 (Colo. 2003), the State argues that the Colorado Supreme Court was bound by state statute. Opp. 16-17. But the statute allowed affirmance of the judge-imposed death penalty if any judge-found "aggravating factors … were also fairly determined to exist beyond a reasonable doubt by the jury's verdicts"—*i.e.*, that the error was harmless. 64 P.3d at 270. *Woldt* held that such an analysis was impossible and unconstitutional. *Id.*; *see Jackson v. State*, 213 So. 3d 754, 790-91 (Fla. 2017) (recognizing the split with *Woldt*).

B. The Florida Supreme Court's decision to assess *Ring/Hurst* errors for harmlessness would merit this Court's review even in the absence of a split, because that decision has life-altering consequences for dozens of death-row inmates and is irreconcilable with this Court's precedent. Pet. 16-21. Under Florida's sentencing regime, a trial court deciding whether to impose death "has *no* jury findings on which to rely." *Hurst*, 136 S. Ct. at 622 (emphasis added). That fact makes this case indistinguishable from *Sullivan*, 508 U.S. 275. Pet. 17-18. *Sullivan* held that an error is structural if it "vitiates *all*

the jury's findings." 508 U.S. at 281. This core holding of *Sullivan*, not other "broad language" this Court later questioned (Opp. 19-20), is what renders *Ring/Hurst* errors structural. Pet. 17-18.[3]

In *Neder v. United States*, 527 U.S. 1, 10-11 (1999), this Court reiterated the fundamental distinction between errors that vitiate *all* the jury's findings (which are structural) and errors that vitiate just one (which are not). The State's reliance on *Neder*—and on *Washington v. Recuenco*, 548 U.S. 212 (2006), which applied *Neder*—is therefore puzzling. Opp. 17-18. The State alternatively argues (at 20) that weighing aggravating and mitigating factors is a "non-factual" determination, and the Florida Supreme Court got it wrong when it concluded otherwise. But this Court reached the same determination, *Hurst*, 136 S. Ct. at 622, and in any event, whatever the number of necessary factual determinations, there is no dispute that Mr. Anderson's jury made none of them.

The State's half-hearted attempt to distinguish *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), also goes nowhere. Petitioner is not arguing for a "rigid test" (Opp. 21) for structural errors. The point is that *Ring/Hurst* errors squarely fit into *all three* categories identified in *Weaver*. Pet. 18-21. All the State can muster is that *Recuenco* governs (Opp. 21), which, as explained, favors finding structural error.

[3] The State concedes (at 18-19) that this Court has never decided whether *Hurst* errors are structural. The fact that the Court remanded in *Hurst* or that a justice dissented (Opp. 19) is irrelevant.

III. Florida's Approach to Harmless-Error Review Flouts *Hurst* and This Court's Other Precedents

Florida's *per se* harmless-error rule conflicts with *Hurst* and with this Court's harmless-error cases, and nothing in the opposition undercuts the need for review.

A. The State does not dispute that *if* the Florida Supreme Court were applying a *per se* harmless-error rule in *Ring/Hurst* cases based solely on juror unanimity, it would warrant reversal by this Court. Instead, the State insists that the Florida Supreme Court does not apply a *per se* harmless-error rule. Opp. 24-25.

The claim is false. The State does not identify a single fact on which the court below relied to find harmlessness other than the unanimous jury recommendation. And the State does not dispute that, in the 172 cases presenting *Hurst* errors, the Florida Supreme Court has *never* ordered resentencing based on *Hurst* in a case involving a 12-0 advisory jury verdict. Pet. App. 45a-48a. And with one exception where it found waiver, it has ordered resentencing in *every* case involving a non-unanimous jury. Pet. App. 33a-45a. That is the very definition of a *per se* rule.

And in this very case (and numerous others), the Florida Supreme Court stated that any *Hurst* error was harmless because "a jury's unanimous recommendation of death is 'precisely what we determined in *Hurst* to be constitutionally necessary'" and that the court has "*consistently* relied on" that rule "to deny *Hurst* relief to defendants who have received a unanimous jury recommendation of death." Pet. App. 2a (emphasis added).

The State points (at 24) to *Allen v. State*, 261 So. 3d 1255, 1288 (Fla. 2019). But this Court should consider what *Allen* actually did: it held that the mere fact of the unanimous jury recommendation, combined with the standard pre-*Hurst* jury instruction, established harmlessness "beyond a reasonable doubt." *Id.*

B. The State argues that considering the advisory jury's vote as one relevant "factor" is permissible. Opp. 22, 26-27. That is not what the Florida Supreme Court does, but in any event, an advisory jury's vote is irrelevant to harmless-error review. Pet. 26, 31. *Hurst*'s point is that an advisory jury is not equivalent to an actual jury, so an advisory jury's vote is not evidence of how an actual jury will vote. Florida's advisory jurors had no reason to believe their individual votes would decide a defendant's fate; they were told *both* (1) that their role was advisory and (2) that unanimity was not required. At minimum, a juror likely would have considered his task more carefully had he known his lone vote stood between the defendant and a death sentence. Pet. 28-29. The State does not identify a single other context in which courts count juror votes when assessing whether an error infecting those votes was harmless—because it makes no sense to do so. And the Florida Supreme Court's use of advisory jury votes in its harmless-error analysis is a quintessential *Caldwell* violation. *Contra* Opp. 27-30.

C. The State's eleventh-hour attempt (at 31) to show that the decision below was "[c]orrect" (for the wrong reason) only underscores the need for this Court's review. Instead of relying on the analysis below, the State argues that any reasonable (non-advisory) jury would have found a required aggravator beyond a reasonable doubt, and that a judge can then weigh aggravators and mitigators. But the State's *ex post* harmless-error analysis contradicts Florida's own law—reflected in statutes and judicial decisions—that non-advisory juries must make the "normative determination" that death is appropriate, not just find an aggravator. Opp. 31-32. The State acknowledges that fact, but simply declares that the Florida Supreme Court "erred" in reaching that conclusion. *Id.*

This is not how harmless-error review works. "It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." *Stringer*, 503 U.S. at 235. The question is and must be whether a *Florida jury*—properly constituted and instructed under both state and federal law—would have unanimously determined that Mr. Anderson's aggravators *outweigh* his mitigators and that death was the proper sentence. That question is inherently insusceptible to harmless-error analysis.

Finally, the fact that this Court has denied review of the harmless-error question in the past is not evidence that the question is not certworthy. *Contra* Opp. 27, 30. Even the State does not dispute that if the Florida Supreme Court does apply a *per se* harmless-error rule, that rule would directly contravene this Court's precedents. And this case is the right vehicle to consider the important questions presented. Pet. 32-35.

Respectfully submitted.

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