Case No. 18-1449

IN THE
SUPREME COURT OF THE UNITED STATES

HAROLD LEE HARVEY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

Whether certiorari review should be denied because (1) the Florida Supreme Court's decision finding *Hurst v. Florida* and *Hurst v. State* are not retroactive to cases final before *Ring v. Arizona* was decided is based on state law; (2) does not violate the Eighth or Fourteenth Amendments; and (3) does not conflict with any decision of this Court or involve an important, unsettled question of federal law? (restated)

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CITATION TO OPINION BELOW

The opinion below is cited as *Harvey v. State*, 260 So. 3d 906 (Fla. 2018).

STATEMENT OF JURISDICTION

Petitioner, Harold Lee Harvey, seeks review pursuant to 28 U.S.C. § 1257(a) and 2101(d). These are the appropriate provisions.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent, State of Florida (hereinafter "State"), accepts as accurate Petitioner's recitation of the applicable constitutional provisions involved.

PROCEDURAL HISTORY AND STATEMENT OF THE CASE AND FACTS

Petitioner is in custody and under a sentence of death. He is subject to the lawful custody of the State of Florida pursuant to a valid judgment of guilt entered on June 18, 1986 for two counts of First-Degree Murder. On June 20, 1986, he was sentenced to death.

On direct appeal, the Florida Supreme Court found that on February 23, 1985, Petitioner met with his

co-defendant, Scott Stiteler, and drove to William and Ruby Boyd's home with the intent to commit a robbery. There, Petitioner confronted Ruby outside the home and brought her inside where William was found. Petitioner and Stiteler demanded money from the Boyds. After getting some money, the co-defendants discussed within earshot of the Boyds what to do before deciding on killing them. As the Boyds started to flee, Harvey shot both victims, killing William instantly. The co-defendants left the home, but Harvey returned to retrieve the empty shell casings only to find Ruby moaning in pain. Petitioner shot her in the head at point blank range. Again, the co-defendants left the Boyds' home and discarded their weapons along the roadside. *Harvey v. State*, 529 So. 2d 1083 (Fla. 1988).

Following Petitioner's conviction and the jury's eleven-to-one sentencing recommendation, the trial court sentenced him to death on both murder counts finding the aggravating factors of: (1) during the course of a felony (robbery/burglary); (2) avoid arrest; (3) cold, calculated, premeditated manner (CCP); and (4) heinous, atrocious and cruel (HAC) and non-statutory mitigation of: (1) low IQ (86); (2) poor education and social skills; and (3) inability to reason abstractly combined with low self-confidence and feelings of inadequacy. *Harvey*, 529 So. 2d at 1087, n.4.

On June 16, 1988, the Florida Supreme Court affirmed. *Id.* at 1088. Certiorari review was sought;

however, this Court denied the petition on February 21, 1989, rendering the case final. *Harvey v. Florida*, 489 U.S. 1040 (1989).

Subsequently, Petitioner sought postconviction relief. The trial court denied all but one claim summarily and denied relief on the remaining claim after an evidentiary hearing. On postconviction appeal, the Florida Supreme Court affirmed in part and remanded four claims for an evidentiary hearing, including the claim of ineffective assistance of guilt phase counsel related to an alleged concession of guilt. *Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995).

After the evidentiary hearing, the trial court again denied relief. Petitioner appealed and the Florida Supreme Court, on July 3, 2003, relying on its *Nixon v. Singletary (Nixon I)*, 758 So. 2d 618 (Fla. 2000) (remanding for an evidentiary hearing, but announced that unless a defendant expressly consents to counsel's strategy of conceding guilt, counsel is "*per se* ineffective")[1] granted relief finding ineffective assistance of counsel for

[1] Following the evidentiary hearing in *Nixon*, the Florida Supreme Court reversed the denial of postconviction relief and ordered a new trial finding there was no evidence the defendant "affirmatively and explicitly agreed to trial counsel's strategy of conceding guilt," thus counsel was ineffective. *Nixon v. State (Nixon II)*, 857 So. 2d 172, 176 (Fla. 2003), *cert. granted*, *Florida v. Nixon*, 540 U.S. 1217 (March 1, 2004), *rev'd and remanded sub nom. Florida v. Nixon,* 543 U.S. 175 (2004).

conceding guilt without an affirmative agreement from Petitioner. *Harvey v. State,* 28 Fla. L. Weekly S513, S513-15 (Fla. July 3, 2003) (remanding for a new trial). However, the State moved for a rehearing rendering Petitioner's case non-final.[2] *See Harvey v. State*, 260 So. 3d 906, 907, n.1 (Fla. 2018) (finding case was not final while the State's rehearing was pending). On December 6, 2004, the Florida Supreme Court directed the State to show cause why a decision on the State's rehearing should not be withheld pending a decision in *Florida v. Nixon*. Shortly thereafter, this Court reversed the Florida Supreme Court's *per se* rule in *Florida v. Nixon*, 543 U.S. 175, 187 (2004). After which, the Florida Supreme Court granted the State's rehearing and vacated its 2003 opinion replacing it with *Harvey v. State*, 946 So. 2d 937 940 (Fla. 2006).

Following the denial of state postconviction relief, Harvey petitioned for a writ of habeas corpus under section 28 U.S.C.A. §2254. Such was denied, and on January 6, 2011, the United States Circuit Court of Appeals affirmed. *See Harvey v. Warden, Union Correctional Institution*, 629 F. 3d 1228 (11th Cir. 2011).

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[2] During the pendency of that motion, on December 22, 2003 Florida petitioned for certiorari review of *Nixon v. State*, 857 So. 2d 172, 176 (Fla. 2003), and on March 1, 2004 certiorari was granted. *See Florida v. Nixon*, 540 U.S. 1217 (March 1, 2004).

In January 2016, this Court issued *Hurst v. Florida*, 136 S. Ct. 616 (2016) finding Florida's capital sentencing statute was unconstitutional in part and remanded for consideration of whether the error was harmless beyond a reasonable doubt. On remand, the Florida Supreme Court issued *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). As a result, on December 21, 2016, Petitioner filed a successive state postconviction relief motion. The following day, the Florida Supreme Court issued *Asay v. State*, 210 So. 3d 1 (Fla. 2016) and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). Therein, it determined that neither *Hurst v. Florida* nor *Hurst v. State* were retroactive to cases final before June 24, 2002, the date *Ring v. Arizona*, 536 U.S. 584 (2002) was decided. Petitioner's plea for *Hurst* relief was denied and on appeal, the Florida Supreme Court affirmed. There it found that Petitioner's case had become final on February 21, 1989 with the denial of certiorari in *Harvey v. Florida*, 489 U.S. 1040 (1989). *See Harvey v. State*, 260 So. 3d 906 (Fla. 2018). Relying on *Hitchcock v. State*, 226 So. 3d 217, 217 (Fla. 2017), *cert. denied*, 138 S.Ct 513 (2017), the Florida Supreme Court reinterred that "*Hurst* relief does not extend to cases final before" *Ring*, and thus, Petitioner, whose case was final before *Ring,* was not entitled to relief. Petitioner seeks review of that decision here.

REASONS FOR DENYING THE WRIT

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE (1) THE FLORIDA SUPREME COURT'S DECISION FINDING *HURST V. FLORIDA* AND *HURST V. STATE* ARE NOT RETROACTIVE TO CASES FINAL BEFORE *RING V. ARIZONA* WAS DECIDED IS BASED ON STATE LAW; (2) DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS; AND (3) DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR INVOLVE AN IMPORTANT, UNSETTLED QUESTION OF FEDERAL LAW

It is Petitioner's suggestion that had the Florida Supreme Court not waited until this Court decided *Nixon*, 543 U.S. 175,[3] he would have been re-

[3] To the extent Petitioner suggests that some nefarious scheme took place arising from the time it took the Florida Supreme Court to resolve his collateral case based on *Nixon v. Florida*, his complaint is meritless. As outlined above, the matter was pending as this Court decided *Nixon v. Florida* which addressed the same issue on appeal in *Harvey*, 946 So. 2d at 937, and thus, the state decision was not final. *See Harvey v. State*, 260 So. 3d at 907, n.1 (finding case was not final while the State's rehearing was pending). Moreover, Petitioner has not pointed to a case holding that it is unconstitutional for an appellate court to hold a case while a higher court resolves that same issue. What the Florida Supreme Court did is akin to the procedure this Court employs when dealing with cases involving the same issue. It decides the lead case, and then vacates and remands the other cases to the lower courts in light of the decision in the lead case. This "grant, vacate, and remand," ("GVR") is "an

sentenced after *Ring*, and been entitled to relief under the *Hurst* decisions. However, recognizing his case was found to be final before *Ring*, he asserts that the creation of partial retroactivity via the *Asay/Mosley* rule is arbitrary and treats materially indistinguishable capital defendants differently in violation of the Eighth and Fourteenth Amendments. As will be shown below, nothing about the process employed by the Florida Supreme Court in rejecting Petitioner's *Hurst* claim is inconsistent with the Constitution. The Florida Supreme Court's decision is based on adequate and independent state grounds, is not in conflict with any other state court of last review and is not in conflict with any federal appellate court. Petitioner does not provide any "compelling" reason for this Court to review his case on procedural or constitutional grounds. Certiorari review should be denied.

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integral part of this Court's practice, accepted and employed by all sitting and recent Justices." *Lawrence v. Chater*, 516 U.S. 163, 166 (1996). *See Wellons v. Hall*, 558 U.S. 220, 225 (2010) (observing "GVR order conserves the scarce resources of this Court"). While some Justices have criticized the GVR practice, those criticisms are on case-specific grounds, not on Due Process grounds. *See, e.g., Stutson v. United States*, 516 U.S. 163, 180-81 (1996) (Scalia, J., dissenting) (arguing for limitations on GVRs in other situations, but noting "largest category" of GVRs arise when the Court's decision "has cast doubt on the judgment rendered by a lower federal court or a state court" and using GVR procedure there serves the "interests of efficiency").

The Florida Supreme Court's holding in *Hurst v. State* followed this Court's ruling in *Hurst v. Florida* in requiring aggravating circumstances be found by a jury beyond a reasonable doubt before a death sentence may be imposed. However, the Florida court expanded this Court's ruling, requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must 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 v. State*, 202 So. 3d at 57. In *Asay*, 210 So. 3d at 22, the Florida Supreme Court ruled, as a matter of state law, *Hurst v. State* is not retroactive to any case final prior to the June 24, 2002, decision in *Ring*. *See Mosley*, 209 So. 3d at 1272-73 (holding, as a matter of state law, *Hurst v. State* applies retroactively to defendants whose sentences were not yet final when *Ring* was decided). Florida's partial retroactive application of *Hurst v. State* is not constitutionally infirm and does not present a matter that merits the exercise of this Court's certiorari jurisdiction.

This Court has held, in general, a state court's retroactivity determinations are a matter of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264 (2008). State courts may fashion their own retroactivity tests, including

partial retroactivity tests. Under *Danforth*, a state supreme court is free to employ a partial retroactivity approach without violating the federal constitution. The state retroactivity doctrine employed by the Florida Supreme Court did not violate federal retroactivity standards. The state court's expansion of *Hurst v. Florida* in *Hurst v. State* is applicable only to Florida defendants and consequently, subject to retroactivity analysis under state law as set forth in *Witt v. State*, 387 So. 2d 922 (Fla.), *cert. denied*, 449 U.S. 1067 (1980). *See Asay*, 210 So. 3d at 15 (noting Florida's *Witt* analysis for retroactivity provides "more expansive retroactivity standards" than the federal standards articulated in *Teague v. Lane*, 489 U.S. 288 (1989) (emphasis in original; citation omitted).

Repeatedly, this Court has recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). *See also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming this Court has no jurisdiction to review state court decision unless a federal question was raised and decided by the state court); *Street v. New York*, 394 U.S. 576, 581-82 (1969). If a state court's decision is based on separate state law, this Court "will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010).

New rules of law typically are applied only to cases that have not been finalized. *Whorton v. Bockting*, 549 U.S. 406 (2007); *Griffith v. Kentucky*, 479 U.S. 314 (1987) (stating "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final...."); *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992) (adopting *Griffith* to the decisions of Florida courts). Retroactivity under *Griffith* is thus dependent on the date of finality of the direct appeal case. Even then, *Hurst v. Florida* relies on *Ring. Ring* followed and applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to capital cases while "announc[ing] a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348 (2004).

Florida's retroactivity analysis is a matter of state law. This fact alone militates against the granting of certiorari. Respondent notes that this Court has denied certiorari repeatedly when petitioned to review the Florida Supreme Court's retroactivity decisions following the issuance of *Hurst v. State*. *See, e.g., Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S.Ct. 41 (2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S.Ct. 513 (2017); *Lambrix v. State*, 227 So. 3d 112 (Fla.), *cert. denied*, 138 S.Ct. 312 (2017).[4]

[4] *See also*, *Johnston v. State,* 246 So. 3d 266 (Fla.), *cert. denied*, 139 S. Ct. 481 (2018); *Grim v. State*, 244 So. 3d 147 (Fla.), *cert. denied*, 139 S. Ct. 480 (2018); *Jones v. State*, 241 So. 3d 65 (Fla.), *cert. denied*, 18-6175, 2018 WL 4829029 (Dec.

Petitioner suggests the Florida Supreme Court's decision to make the *Hurst* decisions partially retroactive to *Ring* is arbitrary and violative of the Eighth Amendment and Equal Protection. Again, the retroactivity decision is a matter of state law. Furthermore, if partial retroactivity were "arbitrary and capricious" in violation of the Eighth Amendment, then this Court would not have given partial retroactive effect to a change in the penal law discussed in *Dorsey v. United States*, 567 U.S. 260 (2012). There, this Court held that the Fair Sentencing Act was partially retroactive as it applied to those offenders who committed their offenses before the effective date of the act, but who were sentenced following the date of the Act. *Dorsey*, 567 U.S. at 273; *United States v. Abney*, 812 F. 3d 1079 (D.C. Cir. 2016) (explaining that prior to *Dorsey*, this Court did not hold a change in a criminal penalty as partially retroactive).

Petitioner is not entitled to relief under *Hurst v. Florida* or *Hurst v. State* as his death sentence was final before *Ring*. *Harvey v. State*, 529 So. 2d 1083

10, 2018); *Willacy v. State*, 238 So. 3d 100, 101 (Fla. 2018), *cert. denied* 128 S.Ct. 1665 (2018); *Cole v. State*, 234 So. 3d 644 (Fla. 2018*), cert. denied*, No. 17-8540, 2018 WL 1876873, at *1 (U.S. June 18, 2018); *Philmore v. State*, 234 So. 3d 567, 568 (Fla.), *cert. denied*, 139 S. Ct. 478 (2018)*; Jones v. State*, 234 So. 3d 545 (Fla. 2018), *cert. denied*, 138 S.Ct. 2686 (2018); *Branch v. State*, 234 So. 3d 548 (Fla.), *cert. denied*, 138 S.Ct. 1164 (2018); *Hannon v. State*, 228 So. 3d 505 (Fla.), *cert. denied*, 138 S.Ct. 441 (2017).

(Fla. 1988), *cert denied*, *Harvey v. Florida*, 489 U.S. 1040 (1989). To the extent Petitioner implies he should receive retroactive application of the *Hurst* decisions as his sentence had been "vacated" for a period of time between 2003 and 2006, his position is not well founded. As discussed above, the opinion initially vacating Petitioner's sentence based on *Nixon I*, 758 So. 2d at 618 was never final. That opinion was withdrawn following *Florida v. Nixon*, 543 U.S. 175, 187 (2004). *See Harvey v. State*, 946 So. 2d 937 940 (Fla. 2006). As such, Petitioner's argument fails. Moreover, under state law, Petitioner is not entitled to retroactive application of either *Hurst* decision on collateral review. Hence, this Court should deny certiorari review.

It is also Petitioner's assertion that setting *Ring* as the cutoff date for partial retroactivity of *Hurst v. Florida* relief should not bar him from retroactive application of *Hurst v. State* as *Ring* did not prefigure unanimity holding in *Hurst v. State* based on the Florida Supreme Court's discussion of the Eighth Amendment. (P. at 19). This argument was not made in the same terms below as Petitioner presents here. Before the Florida Supreme Court, the pith of his Eighth Amendment argument was addressed towards a claim of general arbitrariness and whether his alleged mental status should be considered. As such, this Court should "decline to reach [such a claim] in the first instance" as the lower court has not considered the claim. *See Gonzalez v. Duenas-Alvarez*, 549

U.S. 183, 194 (2007); *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459 (1999) (noting "we do not decide in the first instance issues not decided below"); *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (same).

Nonetheless, any retroactive application of a new development in the law under any analysis will mean some cases will get the benefit of a new development, while others will not, depending on a date. Drawing a line between newer cases that will receive the benefit of a new development in the law and older final cases that will not receive the benefit is part and parcel of the landscape of any retroactivity analysis. It is simply part of the retroactivity paradigm that some cases will be treated differently than others based on the age of the case. This is not arbitrary and capricious or a violation of the Eighth Amendment and Equal Protection; it is simply a fact inherent in the retroactivity analysis. Additionally, in *Beck v. Washington*, 369 U.S. 541 (1962), this Court refused to find constitutional error in the alleged misapplication of Washington law by Washington courts: "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions ... [or] immunity from judicial error....' Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Id.* at 554-55 (citation omitted).

Turning to the assertion that the Florida Supreme Court could not rely on *Ring* as the retroactivity date as it was a Sixth Amendment case and *Hurst v. State* was based on the Eighth Amendment. (P at 19) Petitioner's challenge fails. Although the Florida Supreme Court discussed the Eighth Amendment in *Hurst v. State*, it did not, nor could it, hold that Florida's capital sentencing violated the Eighth Amendment and required resentencing. In fact, the Florida Supreme Court rejected Eighth Amendment challenges to capital sentences after *Hurst v. State*. *See Lambrix v. State*, 227 So. 3d 112, 113 (Fla.) (rejecting arguments based on Eighth Amendment, due process, and equal protection following *Hurst v. Florida* and *Hurst v. State*. Furthermore, in *Spaziano*, this Court held the Eighth Amendment is not violated in a capital case when the ultimate responsibility of imposing death rests with the judge. *Spaziano v. Florida*, 468 U.S. 447, 463–64, (1984). In deciding *Hurst v. Florida*, this Court analyzed the case pursuant to Sixth Amendment grounds only. It did not address any Eighth Amendment matters. Consequently, *Hurst v. Florida* only overrules *Spaziano* to the extent *Spaziano* allows a sentencing judge to find an aggravating circumstance independent of a jury's fact-finding. This Court has never held that a unanimous jury recommendation is required under the Eighth Amendment.

Furthermore, while the Florida Supreme Court initially included reference to the Eighth Amendment as a reason for warranting unanimous

jury recommendations in its *Hurst v. State* decision, the Court did not, and cannot, overrule this Court's surviving *Spaziano* precedent. Florida has a conformity clause in its constitution requiring courts interpret Florida's prohibition on cruel and unusual punishment in conformity with the United States Supreme Court's Eighth Amendment jurisprudence. Art. I, § 17, Fla. Const.; *Henry v. State*, 134 So. 3d 938, 947 (Fla. 2014) (noting courts bound by United States Supreme Court precedent regarding Eighth Amendment claims under Article I, section 17 of the Florida Constitution). Petitioner's reliance on the Eighth Amendment discussed in *Hurst v. State* is misplaced and does not support his claim for certiorari.

Aside from the question of retroactivity, certiorari would be inappropriate in this case because there was no underlying federal constitutional error as *Hurst v. Florida* did not address the process of weighing the aggravating and mitigating circumstances nor did it suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. Rather, *Hurst v. Florida* is a Sixth Amendment case which applied *Ring* to Florida's sentencing scheme, reiterating that a jury, not a judge, must find the existence of an aggravating factor to make a defendant eligible for the death penalty.[5] *Hurst v. Florida*, 136 S. Ct. at 624.

[5] Lower courts have almost uniformly rejected the notion that the weighing process is a "fact" that must be found by the jury in order to satisfy the Sixth Amendment. *See State v. Mason*, 153 Ohio St. 3d 476, 483 (Ohio, April 18, 2018) (noting

Petitioner became eligible for a death sentence by virtue of his convictions supported by his extensive confession, including statements regarding Petitioner's intent, actions, and the Boyds' knowledge of their impending death. The convictions for robbery and burglary support the "during the course of a felony" aggravator. Hence, at least one aggravating circumstance in this case rests squarely upon the jury's guilt phase verdict.[6]

"[n]early every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citation omitted); *United States v. Sampson*, 486 F. 3d 13, 32 (1st Cir. 2007) (opining "[a]s other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F. 3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *Waldrop v. Comm'r, Alabama Dept. of Corr.*, 711 F. App'x 900, 923 (11th Cir. 2017) (unpublished)(rejecting *Hurst v. Florida* claim and explaining "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict.") (citation omitted); *State v. Gales*, 658 N.W. 2d 604, 628-29 (Neb. 2003) (stating "we do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review to be undertaken by a jury").

[6] Also, it must be noted that Petitioner was convicted of the double homicide of Ruby and William Boyd which would support a prior violent felony aggravator. Although not

See Jenkins v. Hutton, 137 S. Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty).

Putting aside for a moment the lack of any federal constitutional error, under these facts, any possible error was clearly harmless. Petitioner's thorough confession supports the balance of the aggravators found by the trial court. In addition to the contemporaneous violent felonies discussed above, the court found the avoid arrest, CCP, and HAC aggravators.[7] As the Florida Supreme Court addressed on direct appeal:

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utilized by the trial court, contemporaneous convictions for homicide can qualify as previous convictions of violent felony and may be used as aggravating factors. *See Mahn v. State*, 714 So. 2d 391, 399 (Fla. 1998) (finding conviction of double homicide supports prior violent felony aggravator for each homicide); *Windom v. State*, 656 So. 2d 432, 440 (Fla.) (reaffirming previous holdings that "contemporaneous convictions prior to sentencing can qualify as previous convictions in multiple conviction situations"), *cert. denied*, 516 U.S. 1012 (1995); *Johnson v. State*, 438 So. 2d 774 (Fla. 1983), *cert. denied*, 465 U.S. 1051 (1984); *King v. Stat*e, 390 So. 2d 315 (Fla. 1980), *cert. denied*, 450 U.S. 989 (1981); *Lucas v. State*, 376 So. 2d 1149 (Fla. 1979). Such is supported by the jury's verdict and would weigh heavily should a harmless error analysis be deemed necessary.

[7] The facts of this case show a cold, calculated, and premeditated killing, done to avoid arrest, and one which was heinous, atrocious, and cruel given that the Boyds overheard Petitioner discuss his planned killing as indicated by their

> In determining whether the circumstance of heinous, atrocious and cruel applies, the mind set or mental anguish of the victims is an important factor. *** Both victims in this case were elderly persons who had been accosted in their home. They became aware of their impending deaths when Harvey and Stiteler discussed the necessity of disposing of witnesses. In desperation, the Boyds tried to run away, but Harvey shot both of them. When Harvey later came back into the house and realized that Mrs. Boyd was not yet dead, he fired his gun into her head at point blank range. *** We find these facts sufficient to support a finding that both murders were especially heinous, atrocious and cruel.
>
> We also find that the murders were committed for the purpose of avoiding lawful arrest. The test is whether the dominant motive behind the murders is to eliminate witnesses who can testify against the defendant. *** Both

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attempt to flee. *See Knight v. State*, 225 So. 3d 661, 683 (Fla. 2017) (reiterating HAC is one of the weightiest of aggravators); *Porter v. State*, 788 So. 2d 917, 925 (Fla. 2001) (announcing that the CCP aggravator is weighty)

> Harvey and Stiteler were known by their victims, and they discussed in the Boyds' presence the need to kill them to avoid being identified.
>
> Finally, the facts support the finding that the murders were committed in an especially cold, calculated and premeditated manner. *** That Harvey and Stiteler planned the robbery in advance and even cut the phone lines before going over the bridge to the Boyds' home would not, standing alone, demonstrate a prearranged plan to kill. However, once the Boyds were under their control, they openly discussed whether to kill the Boyds. These murders were undertaken only after the reflection and calculation which is contemplated by this statutory aggravating circumstance.

Harvey v. State, 529 So. 2d 1083, 1087 (Fla. 1988), *abrogated on other grounds by Fenelon v. State*, 594 So. 2d 292 (Fla. 1992). Consequently, unlike the situation in *Hurst v. Florida*, Petitioner's eligibility for the death penalty is supported by the jury's guilt phase verdict.

Again, *Hurst v. Florida* did not address the weighing process or suggest the Sixth Amendment required that the jury conduct the weighing.

However, in *Kansas v. Carr*, 136 S. Ct. 633 (2016), decided eight days after *Hurst v. Florida* was issued, this Court emphasized:

> Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one jury might consider mitigating another might not. And of course, the 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 defendants must deserve mercy beyond a reasonable doubt, or must more-likely-than-not deserve it. . . . In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

Carr, 136 S. Ct. at 642. As such, the constitutional fact finding was conducted by the jury when it rendered its guilt phase verdict convicting Petitioner of the contemporaneous felonies. *See Alleyne v. United States*, 570 U.S. 99, 111, n.1 (2016) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)).

There was no Sixth Amendment error in this case. Petitioner's convictions rendered him death eligible based on the "during the course of a felony" aggravator under Florida law. Furthermore, assuming that any such error could be discerned, under the rational juror test for harmless error discussed in *Neder v. United States*, 527 U.S. 1, 18-19 (1999) any such error was harmless. Petitioner's confession established the balance of the strong aggravation in this case. As no important or unsettled question of federal law has been presented in this petition, certiorari should be denied.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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