CASE NO. 18-5124

IN THE UNITED STATES SUPREME COURT

October 2017, Term

NORBERTO PIETRI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

[Restated]

Whether certiorari review should be denied because (1) the Florida Supreme Court's decision determining *Hurst v. Florida* and *Hurst v. State are* not retroactive to cases final before *Ring v. Arizona* was decided is based on state law and does not violate the Eighth Amendment or the Equal Protection Clause and (2) partial retroactivity does not violate the Supremacy Clause as the decision 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 decision of which Petitioner seeks discretionary review is reported as *Pietri v. State*, 236 So.3d 235 (Fla. 2018).

JURISDICTION

Petitioner, Norberto Pietri ("Pietri"), is seeking jurisdiction pursuant to 28 U.S.C. § 1257(a). This is the appropriate provision.

CONSTITUTIONAL PROVISIONS INVOLVED

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

STATEMENT OF THE CASE AND FACTS

This capital case is before this Court upon the Florida Supreme Court's affirmance of the denial of Pietri's successive postconviction relief motion addressed to *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) wherein the Florida Supreme Court determined that under state law they were not retroactive to cases final before June 24, 2002, the date this Court issued *Ring v. Arizona*, 536 U.S. 584 (2002).

Pietri, is in state custody and under a sentence of death pursuant to a valid judgment of guilt and death sentence. *Pietri v. Sta*te, 644 So.2d 1347 (Fla. 1994), *cert. denied, Pietri v. Florida*, 515 U.S. 1147 (1995). On September 22, 1988, Pietri was indicted for crimes committed between August 18, 1988 and August 24, 1988 (ROA.21 3177-82)[1] and following a jury trial, on February 7, 1990, Pietri was convicted of First Degree Murder of Police Officer Brian Chappell and fourteen other crimes.[2] After the penalty phase yielded an eight to four death recommendation, on March 15, 1990, the trial court sentenced Pietri to death upon finding no mitigation and aggravation of: (1) under sentence of imprisonment; (2) during the course of a felony (burglary); and (3) avoid arrest merged with victim

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[1] Referencing direct appeal case SC60-75844 record.

[2](1) escape; (2) burglary of an automobile; (3) grand theft of automobile; (4) burglary of dwelling while armed; (5) grand theft of property including revolver; (6) possession of firearm by felon; (8) possession of firearm during felony (9) burglary; (10) grand theft of Aaron Saylor's automobile; (11) robbery of Tami Nelson's automobile; (12) grand theft of Tami and Keith Nelson's motor vehicle; (13) attempted kidnapping; (14) false imprisonment; and (15) possession of cocaine. (ROA.23 3603-05).

was law enforcement officer. (ROA.23 3680, 3708-09).[3] The Florida Supreme Court affirmed the convictions and death sentence, but vacated the non-capital counts for re-sentencing once a Pre-Sentencing Investigation report was completed. *Pietri*, 644 So.2d at 1355. On June 19, 1995, Pietri's case became final with this Court's denial of certiorari. *See Pietri v. Florida*, 515 U.S. 1147 (1995)

On direct appeal, the Florida Supreme Court set out the facts stating:

> Pietri was convicted of fatally shooting West Palm Beach police officer Brian Chappell in August 1988. The killing occurred after Pietri walked away from a work release center, burglarized a home, and stole a pickup truck. Pietri shot Chappell once in the chest when the officer stopped him after a chase of the stolen truck.
>
> The jury convicted Pietri of first-degree murder and recommended death by a vote of eight to four. The trial judge followed the jury's recommendation and sentenced Pietri to death. In imposing the death penalty, the trial judge found four aggravating factors: (1) the murder was committed by someone under a sentence of imprisonment; (2) the murder was committed while Pietri was fleeing after committing a burglary; (3) the murder was a homicide committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; and (4) the murder was committed to avoid arrest or to escape, the murder was committed to disrupt or hinder the lawful enforcement of laws, and the victim was a law enforcement officer performing his official duties. The trial judge found no statutory or nonstatutory mitigating factors.
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> On August 18, 1988, Pietri walked away from the Lantana Community Correctional Work Release Center. At the time, he was restricted to the center's grounds while he awaited transfer to a more secure facility. After

[3] The trial court had found "cold calculated and premeditated," however, the Florida Supreme Court struck it. *Pietri*, 644 So.2d at 1353-54.

his escape, Pietri began a four-day binge of using cocaine.[4] He testified that during this time he committed burglaries to support his drug use. On August 22, he ran out of drugs.

Driving a pickup truck he had stolen the day before, Pietri went to a house, broke in, and stole items including a 9-mm semiautomatic firearm and a .38-caliber revolver. After the burglary, a witness saw Officer Chappell sitting on his motorcycle, apparently watching for speeding motorists. The witness saw a man driving a silver pickup truck speed by Chappell, and the officer gave chase. The driver stopped after about a mile. Chappell motioned for the driver to move forward to avoid blocking traffic, and the driver complied.

Witnesses testified that as Chappell approached the truck, his gun was in its holster. When the officer was within two to four feet of the truck the driver shot him once in the chest. A forensics firearm examiner testified that Chappell was shot from a distance of three to eight feet. He testified that the casing of the bullet that killed Chappell matched the casings of 9-mm bullets provided by the burglary victim. Thus, the firearms examiner concluded, the bullets had been fired from a weapon taken in the burglary.

After firing the gun, the driver sped off, and Chappell radioed that he had been shot. The first officer who arrived at the scene testified that Chappell's gun was still in the holster. The holster had been unsnapped, however,

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[4] Ralph Valdez, Pietri's nephew, testified that when he saw Pietri on the morning of the shooting, Pietri appeared normal (ROA 2153-54). Denise King testified she saw Pietri at a convenience store on the night before the shooting and on the evening following the shooting and neither time did he appear to be under the influence of alcohol or drugs. King did see Pietri with cocaine (ROA 2189-91, 2196, 2199). Pietri's attorney, Peter Birch, told the jury in opening statements that the case was all about Pietri's cocaine addiction and that Pietri's entire criminal life was centered on obtaining cocaine. Birch also offered that Pietri panicked when stopped by Chappell; Pietri's intent was never to kill Chappell, but simply to get away. (ROA 1820-1824). In closing argument, Birch again explained that the evidence was consistent with Pietri's testimony that he simply reacted in panic and he never intended to kill Chappell. (PCR 6169-6170).

indicating that Chappell may have tried to remove his weapon.

After leaving the scene of the shooting, the driver went to his nephew's house for help disposing of the truck. He dumped the truck in a canal off the Florida Turnpike, and a fingerprint found inside the driver's side window was later identified as Pietri's. Officer Chappell's death prompted an intense search, with Pietri identified as the prime suspect. Pietri stole another car on August 24 and was spotted by police officers near his sister's apartment and later by an off-duty officer at a church. Pietri threatened to shoot the officer, who was not in uniform, and escaped.

Later that same evening, a couple and their five-year-old son were in their car in the driveway of their home. As they prepared to leave, the husband realized he had left something in the house. When he returned to the house, Pietri got in the car and told the wife, "We're leaving, we're leaving." He told the woman, who was in the driver's seat, "Drive, or I'll shoot you." When she hesitated, Pietri pushed her out of the car and began to drive away. He slowed down, however, and let the husband, who had emerged from the house, take their son from the back seat.

Another police officer spotted the couple's car. The driver stopped and waved the officer toward the car. As the officer approached the car with his gun drawn, the driver sped off. Two other officers picked up the chase, which proceeded at speeds of more than 100 miles per hour. Pietri eventually lost control of the car, then jumped out of the car and began running. As Pietri ran, he reached into his pants, pulled out a bag of cocaine, and put it into his mouth. Delray Beach officer Michael Swigert caught Pietri and arrested him.

Pietri testified in his own defense that he is blind in his right eye and that he developed a cocaine addiction which he financed with burglaries. He testified that Chappell stopped him while he was planning to sell stolen goods.

> Pietri admitted shooting Chappell, but said he had not planned to kill the officer and did not aim for his heart.[5]

Pietri, 644 So.2d at 1349-50 (footnotes omitted).

Subsequently, Pietri litigated state and federal collateral challenges to his convictions and sentence all of which were rejected. *Pietri v. State*, 885 So.2d 245, 276 (Fla. 2004) (initial postconviction relief litigation with evidentiary hearing/state habeas petition); *Pietri v. State*, 94 So.3d 501 (Fla. 2012) (successive postconviction litigation based on *Porter v. McCollum*, 558 U.S. 30 (2009)); *Pietri v. Florida Department of Corrections*, 641 F.3d 1276 (11th Cir. 2011), *cert. denied*, 565 U.S. 1207 (2012) (federal habeas corpus litigation). On January 12, 2016, *Hurst v. Florida* issued and the following year, Pietri filed a successive Rule 3.851, Fla. R. Crim. P. motion seeking relief pursuant to *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). On May 17, 2017, relief was denied (PCR-3 116-17) and Pietri appealed.

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[5] Pietri testified he spent the days after his escape abusing cocaine and committing burglaries to support his habit, and on the morning of the shooting, he was smoking crack (ROA 2339-67). On the morning of murder, Pietri burglarized the unoccupied Kutlick/Tronnes residence. He opened the doors of his truck, put on loud music, and used a towel to pretend to clean the windows of the house. Upon breaking into the home, he wiped away his fingerprints and opened all of the doors to the house to provide for an easy escape if he were confronted. In the master bedroom, he found a sheriff's badge, and thought, "Law, I'm in big trouble" then took the nine millimeter Browning weapon he found checking to make sure it was loaded. Pietri placed the nine millimeter on the truck's dashboard and sought a place to sell the stolen jewelry/property for cash or cocaine (ROA 2373-84, 2386-87, 2504). He admitted that while being followed by Chappell, he was considering his options - flee or surrender. When he stopped, Pietri watched as Chappell, with gun holstered, approached. Pietri retrieved his gun, cocked it, turned, and shot Chappell. He claimed he had not thought about and did not intend to kill Chappell; he did not aim for Chappell's heart (ROA 2388-2392, 2506-10, 2511-2512).

On September 25, 2017, the Florida Supreme Court issued an Order to Show Cause asking the parties to address:

> why the trial court's order should not be affirmed in light of this Court's decision *Hitchcock v. State*, SC17-445. The response shall be limited to no more than 20 pages. Appellee may file a reply on or before Thursday, October 26, 2017, limited to no more than 15 pages. Appellant may file a reply to the Respondent's reply on or before Monday, November 6, 2017, limited to no more than 10 pages.

(Pet. Appx. C) The parties filed their respective pleadings, and on February 2, 2018, the Florida Supreme Court concluded:

> After reviewing Pietri's response to the order to show cause, as well as the State's arguments in reply, we conclude that Pietri is not entitled to relief. Pietri was sentenced to death following a jury's recommendation for death by a vote of eight to four. Pietri v. State, 644 So.2d 1347, 1349 (Fla. 1994). Pietri's sentence of death became final in 1995. Pietri v. Florida, 515 U.S. 1147, 115 S.Ct. 2588, 132 L.Ed.2d 836 (1995). Thus, Hurst does not apply retroactively to Pietri's sentence of death. See Hitchcock, 226 So.3d at 217. Accordingly, we affirm the denial of Pietri's motion.

Pietri, 236 So.3d at 236. Pietri seeks certiorari review of this decision.

REASONS FOR DENYING THE WRIT

ISSUE I

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE (1) THE FLORIDA SUPREME COURT'S DECISION DETERMINING *HURST V. FLORIDA* AND *HURST V. STATE* ARE NOT RETROACTIVE TO CASES FINAL BEFORE *RING V. ARIZONA* WAS DECIDED IS BASED ON STATE LAW AND DOES NOT VIOLATE THE EIGHTH AMENDMENT OR THE EQUAL PROTECTION CLAUSE; AND (2) PARTIAL RETROACTIVITY DOES NOT VIOLATE THE SUPREMACY CLAUSE; AS THE DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR INVOLVE AN IMPORTANT, UNSETTLED QUESTION OF FEDERAL LAW (RESTATED).

It is Pietri's assertion that the Florida Supreme Court's decision finding *Hurst v. Florida* and *Hurst v. State* partially retroactive is arbitrary and violates the Eighth Amendment to the United States Constitution and the Equal Protection and Due Process Clauses. He maintains that the new requirement of a unanimous jury recommendation shows that his non-unanimous recommendation is unreliable and suggests that his death sentence was imposed in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Continuing, Pietri presses that partial retroactivity should be rejected under *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) the Supremacy Clause which requires a "substantive" constitutional change, of which he claims *Hurst v. Florida* and *Hurst v. State* are examples, to be applied retroactively. As will be shown below, nothing about the process employed by the Florida Supreme Court rejecting Pietri's *Hurst* claim that is inconsistent with the Constitution. Pietri does not provide any "compelling" reason for this Court to

review his case on procedural or constitutional grounds. Certiorari review should be denied.

1. Partial retroactivity based on state law does not violate the Eighth Amendment or the Equal Protection and Due Process Clauses

The Florida Supreme Court's holding in *Hurst v. State* followed this Court's ruling in *Hurst v. Florida* in requiring that aggravating circumstances be found by a jury beyond a reasonable doubt before a death sentence may be imposed. The Florida court then 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 v. State*, 210 So. 3d 1, 22 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), the Florida Supreme Court ruled that, as a matter of state law, *Hurst v. State* is not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *See Mosley v. State*, 209 So.3d 1248, 1272-73 (Fla. 2016) (holding, as a matter of state law, *Hurst v. State* does apply 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.[6]

This Court has held that, 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 defendants in Florida, 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*

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[6] Respondent notes that this Court has repeatedly denied certiorari to review the Florida Supreme Court's retroactivity decisions following the issuance of *Hurst v. State*. *See, e.g., Jones v. State*, 234 So. 3d 545 (Fla. 2018), *cert. denied*, No. 17-8652, 2018 WL 1993786, at *1 (U.S. June 25, 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); *Branch v. State*, 234 So. 3d 548 (Fla. 2018), *cert. denied*, 138 S. Ct. 1164 (2018); *Hannon v. State*, 228 So. 3d 505 (Fla. 2017), *cert. denied*, 138 S. Ct. 441 (2017); *Lambrix v. State*, 227 So. 3d 112 (Fla. 2017), *cert. denied*, 138 S. Ct. 312 (2017); *Hitchcock*, 226 So. 3d 216, *cert. denied*, 138 S. Ct. 513; *Asay*, 210 So. 3d 1, *cert. denied*, 138 S. Ct. 41.

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 that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); *Street v. New York*, 394 U.S. 576, 581-82 (1969) (same). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010).

Florida's retroactivity analysis is a matter of state law. This fact alone militates against the grant of certiorari. It should be noted that this Court has denied repeatedly certiorari 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); *Hannon v. State*, 228 So.3d 505 (Fla.), *cert. denied*, 138 S.Ct. 441 (2017); *Branch v. State*, 234 So.3d 548 (Fla.), *cert. denied*, 138 S.Ct. 1164 (2018).

Pietri argues that the Florida Supreme Court's partial retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* violates the Eighth Amendment and the Equal Protection and Due Process Clauses. He also claims the sentencing procedure used in his case violates this *Caldwell v. Mississippi*, 472 U.S. 320 (1985), because the jury was instructed that its death recommendation was advisory and did not have to be unanimous, thus, rendering it unreliable. The Florida Supreme

Court's retroactivity ruling is not contrary to federal law. It does not conflict with precedent from this Court or any other federal appellate or state supreme court. *Caldwell* does not provide an avenue for relief. Certiorari review is unnecessary.

New rules of law such as the rule announced in *Hurst v. Florida* do not usually apply to cases that are final. *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (explaining the normal rule of non-retroactivity and holding the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), was not retroactive). Also, the general rule is one of non-retroactivity for cases on collateral review, with narrow exceptions. *See Teague v. Lane*, 489 U.S. 288, 307 (1989) (observing there were only two narrow exceptions to general rule of non-retroactivity for cases on collateral review). Further, certain matters are not retroactive at all. *Hurst v. Florida* was based on this Court's holding in *Ring*, which in turn was based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court has held that "*Ring* announced a new *procedural rule* that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (emphasis added).

In *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), this Court held "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Under this "pipeline" concept, only those cases still pending direct review or not yet final would receive the benefit from alleged *Hurst* error. Retroactivity under *Griffith* depends on the date of the finality of the direct appeal. Under *Teague,* if a case is final on direct

review, the defendant will not receive the benefit of the new rule unless one of the narrow exceptions announced in *Teague* applies. Again, finality is the critical date-based test under *Teague.* There is nothing about Florida's decision providing partial retroactivity to *Hurst v. Florida* and *Hurst v. State* that is contrary to this Court's retroactivity jurisprudence.

Moreover, if partial retroactivity violated the United States Constitution or this Court's retroactivity jurisprudence, this Court would not have given partial retroactive effect to a change in the penal law in *Dorsey v. United States*, 567 U.S. 260 (2012). In *Dorsey*, this Court held that the Fair Sentencing Act was partially retroactive in that it would apply to those offenders who committed applicable offenses prior to the effective date of the act, but who were sentenced after that date. *Id.* at 273. *See United States v. Abney*, 812 F.3d 1079, 1097-98 (D.C. Cir. 2016) (noting prior to decision in *Dorsey*, Court had not held a change in criminal penalty to be partially retroactive).

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 nor a violation of the Eighth Amendment; it is simply a fact inherent

in the retroactivity analysis.

Pietri's argument for the finding of a violation of the Equal Protection Clause is likewise without merit. A criminal defendant challenging the State's application of capital punishment must show intentional discrimination to prove an equal protection violation. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). A "'[d]iscriminatory purpose' . . . implies more than intent as violation or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 298.

The Florida court's partial retroactivity ruling was based on the date of the *Ring* decision, not based on a purposeful intent to deprive pre-*Ring* death sentenced defendants in general, and Pietri specifically, relief under *Hurst v. State*. The Florida Supreme Court has been consistent in denying *Hurst* relief to those defendants whose convictions and sentences were final when *Ring* was issued in 2002. Pietri is being treated the same as similarly situated capital defendants. Hence, his equal protection argument fails and certiorari should be denied.

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).

Additionally, Pietri's assertion that his sentence is unreliable and that his previously rejected *Brady v. Maryland*, 373 U.S. 83 (1963) and *Strickland v. Washington*, 466 U.S. 668 (1984) should be considered in support of that argument is without merit. This argument assumes he is entitled to relief under *Hurst*, when as explained throughout, he is not. It further assumes that his *Brady*[7] and *Strickland* claims can be resurrected, when they cannot be. Even if Pietri could relitigate his previously disposed of *Brady* and *Strickland* claims, he would be entitled to no relief because the state and federal courts resolved those issues in accordance with Supreme Court precedence. Morover, the prejudice standard applied to those claims was not a Sixth Amendment fact-finding error addressed in Hurst v. Florida. Resolution of those claims does not support the instant claim that Pietri's sentence is unreliable.

Pietri's attempt to tie his Equal Protection argument to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), fails. First, the decision in *Caldwell* did not interpret the Equal Protection Clause. There, this Court found that a prosecutor's comments diminishing the jury's sense of responsibility for determining the appropriateness of a death sentence was "inconsistent with the Eighth Amendment's 'need for reliability in the determination that death is the appropriate

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[7] Pietri's *Brady* claim, as presented in his federal habeas petition, asserted that the state improperly obtained a confidential document which contained an interview between himself and his pre-trial investigator, Virgina Synder. It is further alleged that the document was then turned over to members of the Delray police department. Clearly, no Brady violation existed as Pietri was aware of the document allegedly obtained from his private investigator. The document had not been suppressed.

punishment in a specific case.'" *Caldwell*, 472 U.S. at 323 (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). Second, there was no *Caldwell* error in this case. To establish constitutional error under *Caldwell*, a defendant must show that the comments or instructions to the jury "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994).[8] Pietri's jury was instructed properly on its role based on the state law existing at the time of his trial. *See Reynolds v. State*, ___ So.3d ___, 2018 WL 1633075, *9 (Fla. April 5, 2018) (explaining that under *Romano*, the Florida standard jury instructions at issue "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").[9]

Pietri also points to *Caldwell* to assert constitutional error as his jury was instructed its role was advisory and did not need to be unanimous thereby violating

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[8] In *Caldwell*, error was found based on the prosecutor's argument to the jury that the appellate court would review that sentence and would decide whether a death sentence was appropriate. "To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989); *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")

[9] Respondent is cognizant of the Honorable Justice Sotomayor's dissent from the denial of certiorari in *Middleton v. Florida*, 138 S. Ct. 829 (2018), wherein she criticized the Florida Supreme Court for not addressing the *Caldwell* claim in cases where *Hurst* was applicable under state law. The Florida Supreme Court has now, however, explicitly rejected *Caldwell* attacks on Florida's standard penalty phase jury instructions in the wake of *Hurst*. *See Reynolds v. State*, ___ So. 3d ___, 2018 WL 1633075 (Fla. April 5, 2018); *Johnson v. State*, ___ So. 3d ___, 2018 WL 1633043 (Fla. April 5, 2018) (citing *Reynolds* in rejecting *Caldwell* claim).

the Eighth Amendment as discussed in *Caldwell*. First, there is no underlying Sixth Amendment violation and no conflict between the Florida Supreme Court's decision and this Court's Eighth Amendment jurisprudence set forth in *Caldwell* and its progeny. There is no conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court.[10]

Pietri's jury was properly informed that it aggravators had to be proven beyond a reasonable doubt, but mitigation needed to be proven by a preponderance of the evidence. Further, the jury needed to determine whether sufficient aggravating factors existed and, if so, whether the aggravation outweighed the mitigation before the death penalty could be imposed. His jury was also informed that its recommendation "is extremely important" and would be given "great weight" by the trial court. The jurors were told that life should be recommended if the aggravation did not justify the death penalty. Only where sufficient aggravation was found did the jury have to determine whether the migration outweighed the aggravation. (Resp. App. A – Direct Appeal Record pages 3087-94). A Florida jury's decision regarding a death sentence was, and remains, an advisory recommendation. *See Dugger v. Adams*, 489 U.S. 401 (1989). *See also* §

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[10] This Court has recognized that cases which have not developed conflicts between federal or state courts or presented important, unsettled questions of federal law usually do not deserve certiorari review. *Rockford Life Insurance Co. v. Illinois Department of Revenue*, 482 U.S. 182, 184, n. 3 (1987). The law is well-settled that this Court does not grant certiorari for the purpose of reviewing evidence and/or discussing specific facts. *United States v. Johnston*, 268 U.S. 220 (1925) (denying certiorari to review evidence or discuss specific facts). Further, this Court has rejected requests to reassess or re-weigh factual disputes. *Page v. Arkansas Natural Gas Corp.*, 286 U.S. 269 (1932) (rejecting request to review fact questions); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1924) (same).

921.141(2)(c), Fla. Stat. (2017) (providing that "[i]f 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") (emphasis added). Thus, there was no violation of *Caldwell* because there were no comments or instructions to the jury that "improperly described the role assigned to the jury by local law." *Romano*, 512 U.S. at 9. Pietri's jury was advised accurately that its decision was an advisory recommendation that would be accorded "great weight."

This case is as inappropriate vehicle for certiorari as this is a postconviction case and this Court would have to address retroactivity before even reaching the underlying jury instruction issue. Even so, under the rational juror test for a harmless error analysis discussed in *Neder v. United States*, 527 U.S. 1, 18-19 (1999) and *Jenkins v. Hutton*, 137 S.Ct. 1769 (2017) no Sixth Amendment violation has been established. As such, *Hurst v. Flori*da has not opened the door to Pietri's claim of an Eighth Amendment violation based on *Caldwell*.

Additionally, to the extent Pietri's could be interpreted as suggesting a Sixth Amendment violation occurred, his conviction for killing a law enforcement officer and the contemporaneous convictions for burglary, robbery, and attempted kidnapping, to name a few, established beyond a reasonable doubt the existence of two aggravators: (1) killing during the course of a felony (burglary); and (2) avoid arrest merged with victim was law enforcement officer. *See Apprendi*, 530 U.S. at 490; *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (recognizing "narrow exception . . . for the fact of a prior conviction" set forth in *Almendarez-Torres v.*

United States, 523 U.S. 224 (1998)). *See also Jenkins v. Hutton*, 137 S.Ct. 1769, 1772 (2017) (noting jury's findings that defendant engaged in 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). This Court's ruling in *Hurst v. Florida* did not change the recidivism exception articulated in *Almendarez-Torres*; *Apprendi* and *Ring*.

Lower courts have almost uniformly held that a judge may perform the "weighing" of factors to arrive at an appropriate sentence without violating the Sixth Amendment.[11] The findings required by the Florida Supreme Court following remand in *Hurst v. State* involving the weighing and selection of a defendant's sentence are not required by the Sixth Amendment. *See, e.g., McGirth v. State*, 209

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[11] *State v. Mason*, ___ N.E.3d ___, 2018 WL 1872180, *5-6 (Ohio, April 18, 2018) ("Nearly 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) ("As 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.*, 2017 WL 4271115, *20 (11th Cir. Sept. 26, 2017) (unpublished) (rejecting *Hurst* 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) ("[W]e 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").

So.3d 1146, 1164 (Fla. 2017). There was no Sixth Amendment error in this case.[12] In fact, *Hurst v. Florida* did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. In *Kansas v. Carr*, 136 S. Ct. 633 (2016), decided eight days after this Court issued *Hurst v. Florida*, 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.

To the extent Pietri suggests that jury sentencing is now required under federal law, this is not the case. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the ***fact*** that an aggravating factor existed.") (emphasis in original); *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding Constitution does not prohibit trial judge from "impos[ing] a capital sentence"). No case from this Court has mandated jury sentencing in a capital case, and such a holding would require reading a mandate into the Constitution that is

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[12] *Hurst* errors are subject to harmless error analysis. *See Hurst v. Florida*, 136 S. Ct. at 624. *See also Chapman v. California*, 386 U.S. 18, 23-24 (1967). Here, the aggravating circumstances found by the trial court were either uncontestable or well-established by overwhelming evidence.

simply not there. The Constitution provides a right to trial by jury, not to sentencing by jury.

Under the rational juror test for a harmless error analysis discussed in *Neder v. United States*, 527 U.S. 1, 18-19 (1999) and *Jenkins v. Hutton*, 137 S.Ct. 1769 (2017) no Sixth Amendment violation has been established. As such, *Hurst v. Flori*da has not opened the door to Pietri's claim of an Eighth Amendment violation based on *Caldwell*.

There is no conflict between the Florida Supreme Court's decision and this Court's Sixth Amendment or Eighth Amendment jurisprudence. Further, there is no conflict between the Florida Supreme Court's decision and that of any other federal appellate or state supreme court. Finally, there is no underlying constitutional error under the facts of this case. Certiorari review should be denied.

2. The Florida Supreme Court's Failure to Apply Full Retroactive Effect to the *Hurst* Decisions Does Not Violate the Supremacy Clause.

It is Pietri's position that the Florida Supreme Court's to give partial retroactive application to *Hurst* claims is violative of the dictates of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) and improper under the Supremacy Clause. In doing so, he asserts that the Florida court created a new substantive rule in *Hurst v. State* which must be applied retroactively to all cases in which alleged *Hurst* error occurred.

Reliance on *Montgomery* for his argument is misplaced. In *Montgomery*, Louisiana ruled that this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which held that a juvenile could not be sentenced to mandatory life in prison

without the possibility of parole, did not apply retroactively. *Montgomery*, 136 S.Ct. at 727. This Court reversed because *Miller* "announced a substantive rule of constitutional law." *Id.* at 734. The rule in *Miller* was substantive rather than procedural because it placed a particular punishment beyond the State's power to impose. *See Schriro v. Summerlin*, 542 U.S. at 352 (defining substantive rule as a new rule that places "particular conduct or persons" "beyond the State's power to punish"). In other words, *Miller* categorically prevented the State from imposing a mandatory life sentence on anyone who was a juvenile when he or she committed a crime. *Id.* Because *Miller* was determined to have created a substantive rule, it applied retroactively regardless of when a qualifying defendant's conviction became final. *Montgomery*, 136 S. Ct. at 729 (stating "Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.").

Unlike the ruling in *Miller*, the rulings in *Hurst v. Florida* and *Hurst v. State* were procedural, not substantive. *See Montgomery*, 136 S.Ct. at 730 (noting "[p]rocedural rules . . . are designed to enhance the accuracy of a conviction or sentence by regulating 'the ***manner*** *of determining* the defendant's culpability.'") (emphasis in original; quoting *Schriro*, 542 U.S. at 353). *See also Schriro*, 542 U.S. at 352 (reiterating "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.").

Pietri cites to *Welch v. United States*, 136 S.Ct. 1257 (2016), in support of his

argument. This Court in *Welch* did not, however, overrule *Schriro*. Indeed, *Welch* supports the determination that the new *Hurst* rule is procedural:

> "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353, 124 S. Ct. 2519. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.*, at 351-352, 124 S. Ct. 2519 (citation omitted); *see Montgomery, supra*, at ····, 136 S. Ct. at 728. Procedural rules, by contrast, "regulate only the manner of determining the defendant's culpability." *Schriro*, 542 U.S. at 353, 124 S. Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." *Ibid.* "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.*, at 352, 124 S. Ct. 2519.

Welch, 136 S. Ct. at 1264-65.

In *Welch*, this Court found that the rule in *Johnson v. United States*, 135 S.Ct. 2551 (2015), which "changed the substantive reach of the Armed Career Criminal Act," was a substantive, rather than procedural, change because it altered the class of people affected by the law. *Welch*, 136 S.Ct. at 1265. In explaining how the rule in *Johnson* was not procedural, this Court in *Welch* stated, "[i]t did not, for example, 'allocate decision making authority between judge and jury, *ibid.*, or regulate the evidence that the court could consider in making its decision." *Welch*, 136 S. Ct. at 1265 (citation omitted). Here, the new rule announced in *Hurst v. Florida*, and expanded in *Hurst v. State*, allocated the authority to make certain capital sentencing decisions from the judge to the jury. This is how this Court in *Welch* defined a procedural change. Considering this precedent, there can be no

doubt that the *Hurst* rule is a procedural rule. Accordingly, the Supremacy Clause does not require that Florida give full (or indeed any) retroactive effect on collateral review to the rule announced in *Hurst v. Florida* or *Hurst v. State*.

In support of his argument that *Hurst* should be retroactive under the federal *Teague* standard as a substantive change because it "addressed the proof-beyond-a-reasonable-doubt standard," Pietri relies upon *Powell v. Delaware*, 153 A.3d 69 (Del. 2016). Pietri reliance is misplaced. In *Powell*, the Delaware Supreme Court agreed that "neither *Ring* nor *Hurst* involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof." *Powell*, 153 A.3d at 74. The Delaware Supreme Court used this fact to distinguish *Hurst* from Delaware's "watershed ruling" in *Rauf* which was the basis for Delaware to find that *Rauf* retroactively applied to *Powell* under *Teague*. *Powell*, 153 A.3d at 74; *Rauf v. State*, 145 A.3d 430 (Del. 2016). Thus, *Powell* applies Delaware specific law and is not in conflict with the Florida Supreme Court's determination of the retroactive application of *Hurst*. As Florida's and Deleware's death penalty statutes are different, an interpretation by the Supreme Court of Deleware that *Hurst* should be given full retroactive effect is not in conflict with the decision of the Florida Supreme Court. As only Deleware's case law calls for the retroactive application of *Hurst* beyond *Ring*, there is no conflict between the Florida Supreme Court's retroactive application and any other state court of last resort.

In sum, the questions Pietri presents do not offer any matter which comes within the parameters of Rule 10 of the Rules of the United States Supreme Court.

Pietri does not identify any direct conflict with this Court or other federal circuit courts or state supreme courts, nor does he offer any unresolved, pressing federal question. He challenges only the application of this Court's well-established principles to the Florida Supreme Court's decision. As such, Pietri does not demonstrate any compelling reasons for this Court to exercise its certiorari jurisdiction under Rule 10. This Court should deny the petition.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent requests respectfully that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

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Case No.: 18-5124

October 2017, Term

IN THE SUPREME COURT OF THE UNITED STATE

NORBERTO PIETRI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE I, Leslie T. Campbell, a member of the Bar of this Court, hereby certify that on August 1, 2017, a copy of the Brief for Respondent in Opposition in the above entitled case was furnished by United States mail, postage prepaid, to WILLIAM M. HENNIS, III, ESQ., Office of the Capital Collateral Regional Counsel-South, One East Broward Boulevard, Suite 444, Fort Lauderdale, FL 33301, counsel for Petitioner herein. I further certify that all parties required to be served have been served.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

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APPENDIX A

Are any of us that certain of our judgment? This is your decision. It is one that will remain with you forever.

With life there is hope. There is room for error, there is a chance to help others.

With death there is nothing. Thank you.

THE COURT: All right. Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of first-degree murder.

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge.

However, it is your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your advisory sentence recommendation is extremely important. The Court is required to give great weight to your verdict.

Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or nonguilt aspect of the Defendant and evidence that has been presented to you in these proceedings.

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence.

Number one: The crime for which Norberto Pietri is to be sentenced was committed while he was under sentence of imprisonment.

Number two: The crime for which the Defendant is to be sentenced was committed while he was engaged in flight after committing or attempting to commit the crime of burglary.

Number three: The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or

preventing a lawful arrest or affecting an escape from custody.

Number four: The crime for which the Defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

Number five: The crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner, without any pretense of morals or legal justification.

This factor requires a heightened degree of premeditation beyond the premeditation required for first-degree murder.

Calculate means to plan the nature of beforehand, to think out, design, prepare or adapt by forethought or careful plan.

Six: The victim of the crime was a law enforcement officer engaged in the performance of his official duties.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of

life imprisonment without the possibility of parole for twenty-five years.

Should you find that sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

The mitigating circumstances you may consider if established by the evidence are any aspect of the Defendant's character or record and any circumstances of the offense.

Because the Court has not read a list of mitigating circumstances does not prevent you from finding any mitigating circumstances in the case.

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence sufficient weight as you

feel it should receive in reaching your conclusion as to the sentence that should be imposed.

If two or more enumerated aggravating circumstances are supplied by or come from a single aspect or part of the case, then you should consider that as supporting a single aggravating circumstance.

A mitigating circumstance need not be proved beyond a reasonable doubt.

If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law.

You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based on these considerations.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

The fact that the determination

of whether you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.

Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake and bring to bear your best judgment in reaching your advisory sentence.

If a majority of the jury determine that Norberto Pietri should be sentenced to death, your advisory sentence will be: A majority of the jury by a vote of, and Mr. Collins will fill in whatever the vote may be, advise and recommend to the Court that it impose the death penalty upon Norberto Pietri.

On the other hand, if by a six or more vote the jury determines that Norberto Pietri should not be sentenced to death, your advisory sentence will be: The jury advises and recommends to the Court

that it impose a sentence of life imprisonment upon Norberto Pietri without the possibility of parole for twenty-five years.

You will now retire to consider your recommendation.

When you have reached the advisory sentence, and in conformity with these instructions that form of recommendation should be signed by Mr. Collins, your foreman, and returned to the Court.

Now, what I am going to do, this is the verdict form that will also go with you. I am going to release the attorneys at a quarter of 12:00.

Mr. Robertson will make arrangements to take you to Roxy's again. I guess they don't call it that, that is what the locals call it.

The attorneys will not have to be back until 2:00 o'clock. So you will have plenty of time. It takes a little more time I think to eat there than at the Helen Wilkes.

We will be available for you at 2:00 o'clock. Again I echo all of our thanks

for your concentration, attention and time. It is valued and appreciated.

Mr. Collins, ladies and gentlemen, you are free to retire to consider your advisory sentence.

(Whereupon, the jury retired to deliberate at 11:25 o'clock, a.m.)

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THE COURT: Ladies and gentlemen in the courtroom, when the advisory sentence is received, I would remind you that at the first proceeding you were restrained, controlled and polite. I will expect the same courtesy this time.

I understand these proceedings are tense and that stress is involved. There is nothing to be done about that but your good control is appreciated and commended.

Mr. Bailiff, we are in recess. The attorneys are excused at a quarter of.

THE BAILIFF: How about the evidence, Judge?

THE COURT: The charts weren't really in evidence. Do you want them left here?

MR. BURTON: No.