CASE NO. 18-5160

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL ANTHONY TANZI,

***Petitioner*,**

vs.

STATE OF FLORIDA,

***Respondent*.**

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

Whether certiorari review should be denied where (1) the Florida Supreme Court's harmless error analysis in the context of an alleged *Hurst v. State* violation involves only purported errors of state procedure; and (2) the Florida Supreme Court's decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law?

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The opinion of the Florida Supreme Court is reported at *Tanzi v. State*, ___ So. 3d ___, 2018 WL 1630749 (Fla. April 5, 2018).

JURISDICTION

The judgment of the Florida Supreme Court was entered on April 5, 2018 and the mandate issued April 26, 2018. Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE

On April 25, 2000, Tanzi "assaulted, abducted, robbed, sexually battered, and killed Janet Acosta." *Tanzi v. State*, 964 So. 2d 106, 111 (Fla. 2007). He was indicted for the murder and was also charged with carjacking with a weapon, kidnapping to facilitate a felony with a weapon, armed robbery with a deadly weapon, and two counts of sexual battery with a deadly weapon. Ultimately, he pled guilty to the first-degree murder, kidnapping, and armed robbery counts. The sexual battery counts were severed. *Id*. Following a penalty phase, the jury unanimously recommended a death sentence. The trial court followed the jury's unanimous recommendation, finding in aggravation: "(1) that the murder was committed by a person previously convicted of a felony and under sentence of imprisonment or on felony probation; (2) that the murder was committed during the commission of a kidnapping; (3) that the murder was committed during the commission of two sexual batteries; (4) that the crime was committed for the purpose of avoiding arrest; (5) that the murder was committed for pecuniary gain; (6) that the murder was especially heinous, atrocious, or cruel (HAC); and (7) that the murder was committed in a cold, calculated, and premeditated (CCP) manner." *Id*. at 111, n.1. The Florida Supreme Court affirmed Tanzi's convictions and sentences on direct appeal. *Id.* at 121. His case became final when this Court denied his petition

for writ of certiorari on February 19, 2008. *Tanzi v. Florida*, 552 U.S. 1195 (2008).

Tanzi continued to seek relief from his convictions and sentences through postconviction litigation. *See Tanzi v. State*, 94 So. 3d 482 (Fla. 2012) (affirming denial of postconviction relief); *Tanzi v. Secretary, Fla. Dept. of Corr.*, 772 F.3d 644 (11th Cir. 2014), *cert. denied*, 136 S. Ct. 155 (2015) (affirming denial of federal habeas corpus petition).

In a successive postconviction motion, Tanzi claimed he was entitled to relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), as interpreted in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). The Florida Supreme Court affirmed the postconviction court's denial of relief, finding that any *Hurst* related error was harmless:

> As we stated in *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), *cert. denied*, ___ U.S. ___ 137 S. Ct. 2218, 198 L.Ed.2d 663 (2017):
>
> > [T]he jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. . . . The unanimous recommendations here are precisely what we determined in *Hurst* to be constitutionally necessary to impose a sentence of death.

(Pet. App. A). Tanzi now seeks certiorari review of the Florida Supreme Court's decision.

REASONS FOR DENYING THE WRIT

CERTIORARI REVIEW SHOULD BE DENIED WHERE (1) THE FLORIDA SUPREME COURT'S HARMLESS ERROR ANALYSIS IN THE CONTEXT OF AN ALLEGED *HURST V. STATE* VIOLATION INVOLVES ONLY PURPORTED ERRORS OF STATE PROCEDURE; AND (2) THE FLORIDA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR INVOLVE AN IMPORTANT, UNSETTLED QUESTION OF FEDERAL LAW.

Tanzi requests this Court review the Florida Supreme Court's decision affirming the denial of his successive postconviction motion, arguing that the Florida court's harmless error analysis violates the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Tanzi further contends that the Florida Supreme Court's harmless error analysis was "automatic and mechanical" in violation of this Court's decisions.

As will be shown, nothing about the Florida Supreme Court's harmless error decision is inconsistent with the United States Constitution. Tanzi does not provide any "compelling" reason for this Court to review his case. U.S. Sup. Ct. R. 10. Indeed, Tanzi cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision in *Tanzi v. State*, 2018 WL 1630749 (Fla. April 5, 2018), in which the court determined that Tanzi was not entitled to relief because any alleged error based on *Hurst v. State* was harmless beyond a reasonable doubt. Nothing presented in the petition justifies the exercise of this Court's certiorari jurisdiction.

I. The Florida Court's Harmless Error Rule Is Purely a Matter of State Law.

In *Chapman v. California*, 386 U.S. 18, 20-21 (1965), this Court explained that the "application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law." The Florida Supreme Court applied Florida's harmless-error rule to a purely state law matter—the "findings" the Florida Supreme Court grafted onto this Court's *Hurst v. Florida* ruling as a matter of state constitutional law. As will be shown, Tanzi's death sentence did not violate the Sixth Amendment ***at all*** given his prior and contemporaneous felony convictions. Thus, a harmless-error analysis was unnecessary in the first instance. To the extent the Florida Supreme Court engaged in a harmless-error analysis in Tanzi's case, such was a matter of state law, rendering this matter inappropriate for this Court's certiorari review.

This Court's ruling in *Hurst v. Florida* was a narrow one: "Florida's sentencing scheme, which required the judge alone to find **the existence of an aggravating circumstance**, is . . . unconstitutional." *Hurst v. Florida*, 136 S. Ct. at 624 (emphasis added). The Florida Supreme Court expanded that narrow Sixth Amendment holding by 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. The findings required by the Florida Supreme Court involving the weighing and selection of a defendant's sentence are not required by the Sixth Amendment.[1] *See Kansas v. Marsh*, 548 U.S. 163, 164 (2006) ("Weighing is not an end, but a means to reaching a decision."); *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) ("[t]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that defendants must deserve mercy beyond a reasonable doubt.").

These additional requirements are a creation of the Florida Supreme Court based on its interpretation of the Florida Constitution and therefore constitute state law. *See Hurst v. State*, 202 So. 3d at 57 ("[T]his Court, in interpreting the Florida Constitution and the rights afforded to persons within this State, may require more protection be afforded criminal

[1] The dissent observed that "[n]either the Sixth Amendment nor *Hurst v. Florida* requires a jury to determine the sufficiency of the aggravation, the weight of the aggravation relative to any mitigating circumstances, or whether a death sentence should be imposed." *Hurst v. State*, 202 So. 3d at 82 (Canady, J., dissenting).

defendants than that mandated by the federal Constitution."). *See also Hurst v. State*, 202 So. 3d at 71 ("Given this State's historical adherence to unanimity and the significance of the right to trial by jury, the majority correctly concludes that article I, section 22, of the Florida Constitution requires that all of the jury fact-finding, including the jury's final recommendation of death, be unanimous.") (Pariente, J., concurring)).[2]

The Florida Supreme Court made it clear, in both the majority opinion and the concurring opinion, that the additional jury findings it now required in death penalty proceedings rested on Florida law and not on the federal Constitution. The Florida court then applied its decision in *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986), to analyze whether the error in Hurst's case was harmless. *Hurst v. State*, 202 So. 3d at 67-68. The court stated that in the context of a *Hurst* error, "the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not

[2] In her concurring opinion, Justice Pariente also addressed the dissent's argument that the majority opinion strayed far afield of this Court's holding in *Hurst v. Florida*: "The *Hurst v. Florida* remand requires only that this Court's proceedings not be inconsistent with the United States Supreme Court's opinion in *Hurst v. Florida*, 136 S. Ct. at 624. This Court's decision is based on both Florida's constitutional right to jury trial as well as the federal Sixth and Eighth Amendments." *Hurst v. State*, 202 So. 3d at 74 (Pariente, J., concurring).

contribute to Hurst's death sentence in this case." *Id.* at 68. The court disagreed with the dissenting opinion in *Hurst v. Florida* that "`it defies belief to suggest that the jury would not have found the existence of either aggravating factor if its finding was binding.'" *Hurst v. State*, 202 So. 3d at 68 (*quoting Hurst v. Florida*, 136 S. Ct. at 626 (Alito, J., dissenting)). Noting that it now required ***more*** under Florida law than this Court required under the Sixth Amendment, the Florida Supreme Court opined that "we are not so sanguine as to conclude that Hurst's jury would without doubt have found both aggravating factors—**and, as importantly, that the jury would have found the aggravators sufficient to impose death and that the aggravating factors outweighed the mitigation.**" *Id.* (emphasis added). Following its conclusion that these non-fact weighing matters were now part of what a jury must unanimously "find" under Florida law, the court opined:

> In Hurst's case, we cannot find beyond a reasonable doubt that no rational jury, as the trier of fact, would determine that the mitigation was "sufficiently substantial" to call for a life sentence. Nor can we say beyond a reasonable doubt that there is no possibility that the *Hurst v. Florida* error in this case contributed to the sentence.

Hurst v. State, 202 So. 3d at 69.[3]

[3] It is noteworthy that in its harmless error analysis in *Hurst v. State*, the Florida Supreme Court went so far as to differentiate the weighing matters from the "*Hurst v. Florida* error." *Hurst v. State*, 202 So. 3d at 69.

Florida's additional requirements in death penalty cases following *Hurst v. State* are not mandated by the United States Constitution. Therefore, the Florida Supreme Court's harmless error rule as it relates to alleged *Hurst* error "involves only errors of state procedure or state law." *Chapman*, 386 U.S. 18, 20-21. This Court has repeatedly 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 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 harmless error analysis in the *Hurst* context rests solely on matters of state law. This fact alone militates against the grant of certiorari in this case.

II. There Was No Error in This Case.

Tanzi complains that Florida's harmless error analysis violates the Eighth Amendment under *Caldwell v. Mississippi*, 472

U.S. 320 (1985), because the jury was instructed that its death recommendation was advisory. He also claims that Florida's harmless error analysis constituted a "per se" rule that contravenes the Eighth and Fourteenth Amendments and this Court's decisions holding that harmless error review must not be "mechanical" because the Florida Supreme Court has yet to find an alleged *Hurst* error harmless where the jury unanimously recommended the death penalty. This case is uniquely inappropriate for certiorari review of Florida's harmless error analysis as it applies to alleged *Hurst* error because there was no error under *Hurst v. Florida* in this case at all.

Tanzi's prior felony conviction and his contemporaneous convictions for sexual battery and kidnapping established beyond a reasonable doubt the existence of three aggravating factors. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (recognizing the "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 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). This Court's ruling in *Hurst v. Florida* did not change the recidivism exception articulated in

Apprendi and *Ring v. Arizona,* 536 U.S. 584 (2002).

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.[4] 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 So. 3d 1146, 1164 (Fla. 2017). There was no Sixth Amendment error in this case.

To the extent Tanzi suggests that jury sentencing is now required under federal law, this is not the case. *See Ring*, 536

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[4] *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").

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 that the Constitution does not prohibit the 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 simply not there. The Constitution provides a right to **trial** by jury, not to **sentencing** by jury.

Aside from failing to present any federal constitutional error, this case is also inappropriate for certiorari review because this Court would first have to decide the predicate question of retroactivity. Tanzi's case was final in 2008, well before this Court decided *Hurst*. *Hurst* is only applicable to Tanzi through a more expansive state law test for retroactivity, providing retroactive application to the date this Court decided *Ring* in 2002.[5] As *Ring*, and by extension *Hurst*, has been held not

[5] In *Mosley v. State*, 209 So. 3d 1248, 1276-83 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), the Florida Supreme Court held that *Hurst* is retroactive to cases which became final after this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), on June 24, 2002. *Mosley*, 209 So. 3d at 1283. In determining whether *Hurst* should be retroactively applied to Mosley, the Florida Supreme Court conducted a *Witt* analysis, the state-based test for retroactivity. *See Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980) (determining whether a new rule should be applied retroactively

to be retroactive under federal law, Florida has implemented a test which provides relief to a broader class of individuals in applying *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980) instead of *Teague* for determining the retroactivity of *Hurst*. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (holding that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review"). Federal courts have had little trouble determining that *Hurst*, like *Ring*, is not retroactive at all under *Teague*. *See Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1165 n.2 (11th Cir. 2017) ("under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review"), *cert. denied*, 138 S. Ct. 217 (2017); *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a *Hurst v. Florida* claim concluding that *Hurst v. Florida* did not apply retroactively). Consequently, this Court would first have to find *Hurst* retroactive under federal law, overruling *Schriro v. Summerlin,* before reaching the underlying question of harmlessness. Certiorari should be denied.

Tanzi's attempt to tie his harmless error complaint to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), fails. In *Caldwell*,

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by analyzing the purpose of the new rule, extent of reliance on the old rule, and the effect of retroactive application on the administration of justice) (citing *Stovall v. Denno*, 388 U.S. 293, 297 (1967); *Linkletter v. Walker*, 381 U.S. 618 (1965)).

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 punishment in a specific case.'" *Caldwell*, 472 U.S. at 323 (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). Just as there was no Sixth Amendment error, there was also no *Caldwell* error in this case. The absence of ***any*** error renders Tanzi's complaint about Florida's harmless error analysis completely void and therefore inappropriate for the exercise of this Court's certiorari jurisdiction.

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). Tanzi's jury was properly instructed on its role based on the state law existing at the time of his trial. *See Reynolds v. State*, ___ So. 3d ___, 2018 WL 1633075, *10 (Fla. April 5, 2018) (rejecting defendant's *Caldwell* challenge and explaining that "*Caldwell*, as interpreted by *Romano*, ensures that jurors understand their actual sentencing responsibility; it does not indicate that jurors must also be informed of how their responsibilities might hypothetically be different in the future, should the law change").

Tanzi's jury was not misled as to its role under the law as

it existed at the time of his trial. Indeed, in closing argument, defense counsel emphasized that it was the jury's "responsibility" to determine the sentence because the judge would give "great weight" to the recommendation and in "only the rarest of circumstances would he not follow it. . . ." A Florida jury's decision regarding a death sentence was, and still remains, an advisory recommendation. *See Dugger v. Adams*, 489 U.S. 401 (1989). *See also* § 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.

Tanzi's argument that Florida has a "per se" harmless error rule in *Hurst* related cases that violates the Eighth Amendment and this Court's precedents is unavailing. As noted, this Court's *Hurst v. Florida* opinion 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. Rather, the Florida Supreme Court expanded this Court's holding in its *Hurst v. State* opinion and, based on Florida's constitutional right to a jury trial, found that the

jury must make findings on the sufficiency of the aggravating circumstances and on the weighing process. However, as previously explained, there was nothing in this Court's decision in *Hurst v. Florida* to conclude that the process of weighing the aggravating and mitigating factors was a "fact" for Sixth Amendment purposes. *See Kansas v. Carr*, 136 S. Ct. 633, 642 (2016).

It is difficult to decide questions of harmless error if two courts do not agree on the nature of the error. While the Florida Supreme Court sees mitigation and weighing as factual determinations that the jury must make, this Court does not. This Court would be hard pressed to conduct any type of harmless error analysis regarding factual findings that it does not view as facts at all or as being error in the first place. Tanzi ignores this dilemma; however, this dilemma makes this case a poor vehicle for deciding the issue of whether the Florida Supreme Court erroneously conducted its harmless error analysis of the *Hurst v. State* error.

While the Florida Supreme Court viewed the weighing process as a factual finding under *Hurst v. State*, it nevertheless determined that any such error was harmless in Tanzi's case. In so doing, the court relied on its reasoning in *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), *cert. denied* ___ U.S. ___, 137 S. Ct. 2218 (2017). In *Davis*, as in this case, the jury unanimously recommended the death penalty. *Id.* at 174. The court

reiterated the *DiGuilio* harmless error standard as it relates to alleged *Hurst* error: "the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute" to the death sentence imposed. *Id.* (quoting *Hurst v. State*, 202 So. 3d at 68). The *Davis* court provided a detailed analysis of its review of the record giving rise to a finding of harmless error, including a review of the instructions to the jury, the facts of the case, and the jury's unanimous jury recommendation. *Davis*, 207 So. 3d at 174-75. The court noted in *Davis* that "[t]he evidence in support of the *six* aggravating circumstances found as to both victims was significant and essentially uncontroverted." *Id.*, at 175 (emphasis in original). The court then concluded that any *Hurst* error was harmless beyond a reasonable doubt:

> Here, the jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. In fact, although the jury was not informed that it was not required to recommend death unanimously, and despite the mitigation presented, the jury still recommended that Davis be sentenced to death for the murders of Bustamante and Luciano. The unanimous recommendations here are precisely what we determined in *Hurst* to be constitutionally necessary to impose a sentence of death. Accordingly, Davis is not entitled to a new penalty phase.

Davis, 207 So. 3d at 175.

Although the Florida Supreme Court did not set forth its

reasoning in Tanzi's case, there is no basis to suggest it subjected the record in this case to any less rigorous analysis than it did in the *Davis* case, including taking into consideration the *seven* aggravating circumstances supporting Tanzi's death sentence. Indeed, Tanzi has not identified a single sentence or quote in the court's opinion to support his argument that the court applied a per se harmless error analysis without examining the facts of Tanzi's case.

The law is well-settled that this Court does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984). This Court is "consistent in not granting certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). Tanzi's personal dissatisfaction with the Florida Supreme Court's harmless error determination does not warrant certiorari review. *See Rose v. Clark*, 478 U.S. 570, 584 (1986) (noting that although this Court has authority to perform harmless error review, it "do[es] so sparingly"). As this Court has previously noted, the Florida Supreme Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually

finds that the error is harmless. *Barclay v. Florida*, 463 U.S. 939, 958 (1983). In this case, the Florida Supreme Court reviewed Tanzi's case and determined that any *Hurst v. State* error was harmless beyond a reasonable doubt.

In sum, this Court should decline to exercise its certiorari jurisdiction because the Florida Supreme Court's decision finding harmless error is entirely consistent with this Court's precedent and does not present any unsettled question of law. At the heart of Tanzi's claim is the contention that the Florida Supreme Court incorrectly concluded that the *Hurst v. State* error in his case was harmless. Tanzi's argument is not only meritless, but also further proves why certiorari review is not warranted. Rule 10 of this Court's rules states that "a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *see also Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring) (noting that "error correction" is "outside the mainstream of the Court's functions and . . . not among the 'compelling reasons'" that govern the grant of certiorari) (citations omitted). To resolve Tanzi's questions presented, this Court would have to engage in the very "error correction" analysis that this Court has stated is against its principle function. Thus, Tanzi has demonstrated that there is no compelling reason for this Court to exercise its certiorari

jurisdiction in this case. Accordingly, certiorari review 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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 8th day of August 2018, a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION has been submitted using the Electronic Filing System. I further certify that a copy has been sent by U.S. mail to: Paul Kalil, Assistant CCRC-S, Law Office of the Capital Collateral Regional Counsel, Southern Region, One East Broward Boulevard, Suite 444, Fort Lauderdale, Florida 33301. All parties required to be served have been served.

s/ Scott A. Browne
SCOTT A. BROWNE
Counsel for Respondent