DOCKET NO. 18-5181

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL REYNOLDS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

1. Whether this Court should grant review of the Florida Supreme Court's decision holding that Reynolds's jury was not misled about its sentencing role nor was its responsibility minimized in violation of the Eighth Amendment as discussed in this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) by an instruction that accurately reflected Florida law even though that law subsequently changed?

2. Whether this Court should review the Florida Supreme Court's decision holding that any *Hurst* error in Reynolds case was harmless and concluding as a matter of state law that Reynolds's argument erroneously applied its distinguishable Eighth Amendment discussion in *Hurst v. State* to a *Caldwell* claim?

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The decision of the Florida Supreme Court is reported at *Reynolds v. State*, ___ So. 3d ____, 2018 WL 1633075, 43 Fla. L. Weekly S163 (Fla. Apr. 5, 2018).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on April 5, 2018. Petitioner asserts that this Court's jurisdiction is 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.

Petitioner presents this Court with a plurality opinion from the Supreme Court of Florida. Only two justices, Justices Labarga and Lewis, joined in the per curiam opinion. Justices Canady and Polston concurred in result without an opinion. Justice Lawson concurred specially with an opinion finding that there was no cognizable *Caldwell* claim presented. He further stated that any *Caldwell* claim was procedurally barred. Justice Pariente dissented finding that Reynolds's *Caldwell* claim in light of *Hurst v. State* had merit. Finally, Justice Quince dissented, but on *Hurst* harmless error grounds and did not address the *Caldwell* issue. Hence, there is no majority decision of the Florida Supreme Court, only a majority result.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE AND FACTS

On July 22, 1998, Shirley Razor, the mother of Robin Razor, arrived at the trailer where Robin and her 11-year old daughter, Christina Razor, were living with Danny Ray Previtt. Danny had been working on the trailer and Shirley was bringing him items needed for the job. Outside of the trailer Shirley saw Danny lying on the ground. Based on past experience, Shirley believed that Danny was passed out after a night of drinking. Shirley decided to go to her own trailer and eat lunch before returning with the items for Danny.

When she returned to Robin, Christina, and Danny's trailer, she noticed that Danny was still on the ground. It was then that she saw that Danny had a "hole in his head." She ran to a neighbor's house and called the authorities. When fire rescue arrived, Shirley went into the trailer and found Robin's and Christina's bodies.

At trial, the medical examiner testified about the injuries suffered by the three victims:

> The autopsy of Danny Ray Privett revealed that he suffered a large depressed skull fracture with additional injuries to the head area. The wounds appeared to have been caused by three or more separate blows, with the injuries indicating that the assailant had been behind the victim. There was no indication of any defensive wounds on Danny, and examination of his major skull injury revealed that the injury was likely caused by a partially broken cinder block, based on fragments found within the wound. The medical examiner was unable to determine the order in which the injuries had been inflicted upon him. The cause of death for Danny

was determined to be primarily due to blunt force trauma to the head with the large depressed skull fracture probably being the fatal blow. If this blow had been inflicted first, the medical examiner opined that the victim would have lost consciousness within a second to a minute or two.

Robin and Christina Razor were found dead inside the living room portion of the camper trailer being used as living quarters. Robin was found lying on the floor, face up. Christina was found nearby sitting on the couch and leaning to her left. The living room area was in disarray and a large amount of blood was scattered throughout this area of the trailer. Robin Razor's autopsy revealed that she suffered multiple stab wounds along with multiple blows to the side of her face and a broken neck resulting in injuries to her spinal cord. Closer examination revealed that Robin suffered ten stab wounds to the head and neck area and one to the torso area. The wounds appeared to have been inflicted with a sharp object such as a knife or scissors. Based on examination of the Robin's body and the defensive wounds present, the medical examiner opined that she had been involved in a violent struggle. In addition to the above wounds, Robin suffered multiple superficial wounds to her torso area which the medical examiner stated to be consistent with torment wounds—wounds produced not to cause serious injury but to cause aggravation and produce fear in the victim. The medical examiner was of the opinion that because blows to the victim's head were inflicted at different angles and the presence of significant defensive wounds, it was likely that she was conscious and struggling when these wounds were inflicted. The primary cause of death for Robin was determined to be the broken neck and spinal cord injury, although bleeding from the stab wounds would have also resulted in death.

The autopsy of Christina Razor revealed that she suffered blunt force trauma to her head, a stab wound to the base of her neck that pierced her heart, and another stab wound to her right shoulder that pierced her lung and lacerated her pulmonary artery. These latter two wounds would have resulted in significant internal and external hemorrhaging and would have been fatal. The medical examiner indicated that the only sign of defense

> wounds to Christina was the presence of a small contusion to her left hand, which could have occurred as she attempted to block a blow from her assailant. The medical examiner opined that Christina would have lost consciousness within a minute or two of receiving the stab wounds. The primary cause of death for Christina was determined to be internal and external hemorrhaging.

Reynolds v. State, 934 So. 2d 1128, 1135-36 (Fla. 2006).

Shortly before the murders, Reynolds had been involved in an altercation with Danny regarding a trailer that was allegedly given to Reynolds and that Danny had removed from Reynolds's property without his permission. Reynolds informed investigators that he later apologized to Danny and let Danny keep the trailer. Reynolds asserted that he had never been inside the trailer where Robin and Christina lived. The investigator noticed and inquired about a number of injuries on Reynolds's hands and ankle. Reynolds had various explanations for the injuries.

Extensive DNA evidence found in the interior and on the exterior of the trailer matched Reynolds's DNA profile. A neighbor saw a car matching Reynolds's at the trailer the night before the bodies were discovered. Reynolds was charged with three counts of first-degree murder and burglary of a dwelling with an armed battery. The jury found Reynolds guilty of first-degree murder of Robin and Christina; guilty of the lesser-included offense of second-degree murder of Danny; and guilty of burglary of a dwelling during which an armed battery was committed.

At the penalty phase, Reynolds, after consultation with his attorney, waived his right to present mitigation.[1] The State presented evidence of Reynolds's multiple prior convictions, the circumstances surrounding a previous aggravated battery conviction, and victim impact testimony. The jury unanimously recommended death for the first-degree murders of Robin and Christina. At a *Spencer*[2] hearing, Reynolds testified, and the State relied on the evidence already presented in the guilt and penalty phases.

The judge sentenced Reynolds to death for the murders of Robin and Christina. The court's sentencing order notes that the State proved beyond a reasonable doubt the existence of four statutory aggravators for the murder of Robin: (1) Reynolds had previously been convicted of a another capital felony or a felony involving a threat of violence to the person (great weight); (2) Reynolds committed the murder while he was engaged in or was an accomplice in the commission of or an attempt to commit a burglary of a dwelling (great weight); (3) the murder was committed for the

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[1] Reynolds also wanted to waive his right to a jury's penalty recommendation. The trial court refused to allow the waiver and Reynolds raised that issue on direct appeal asserting it was an abuse of discretion. The Florida Supreme Court concluded the court did not abuse its discretion in requiring a penalty-phase jury recommendation. *Reynolds*, 934 So. 2d at 1148.

[2] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

purpose of avoiding a lawful arrest (great weight); and (4) the murder was committed in an especially heinous, atrocious, or cruel fashion (great weight).

As to Christina's murder, the court's order states that five statutory aggravators were proved beyond a reasonable doubt: (1) Reynolds had previously been convicted of another capital felony or a felony involving a threat of violence to the person (great weight); (2) Reynolds committed the murder while he was engaged in or was an accomplice in the commission of or an attempt to commit a burglary of a dwelling (great weight); (3) the murder was committed for the purpose of avoiding a lawful arrest (great weight); (4) the murder was committed in an especially heinous, atrocious, or cruel fashion (great weight); and (5) the victim of the murder was a person less than twelve years of age (great weight).

The court acknowledged Reynolds's waiver of the presentation of mitigating evidence but, nonetheless, the court considered and weighed any mitigation that it found was established. The court found that the following nonstatutory mitigating circumstances had been established and were applicable to both the murders of Robin and Christina: (1) that Reynolds was gainfully employed at the time of the crimes (little weight); (2) that Reynolds manifested appropriate courtroom behavior throughout the proceedings (little

weight); (3) that Reynolds cooperated with law enforcement (little weight); and (4) that Reynolds had a difficult childhood (little weight). *Reynolds*, 934 So. 2d at 1138-39. *See also* Resp. Apx. A - Amended Sentencing Order dated September 19, 2003.

The Florida Supreme Court affirmed Reynolds's convictions and sentences in 2006, and this Court denied certiorari review on January 8, 2007. *Reynolds v. Florida*, 549 U.S. 1122 (2007). Reynolds original postconviction motion was denied after an evidentiary hearing and the Florida Supreme Court affirmed the denial of relief. *Reynolds v. State*, 99 So. 3d 459 (Fla. 2012).

Reynolds's Post-Hurst Successive Postconviction Motion:

After the Florida Supreme Court issued its decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017) Reynolds filed a successive postconviction motion, which was denied. The Florida Supreme Court affirmed the denial of relief. *Reynolds v. State*, ___ So. 3d ___, 2018 WL1633075, 43 Fla. L. Weekly S163 (April 5, 2018).

The Florida Supreme Court found that, pursuant to its retroactivity analysis in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017), *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State* applied retroactively to Reynolds's conviction, which became final in 2007. Even so, the court proceeded to conduct a harmless error analysis. As a

preliminary step in its harmless error analysis, the court noted that Reynolds's dual death sentences were premised on unanimous jury recommendations. The court stated, however, that "a unanimous recommendation is not sufficient alone" to find harmless error. Instead, for a *Hurst* error to be deemed harmless, a review of the record must reveal that there is no reasonable possibility that the error affected the sentence.

The record in Reynolds's case revealed that his jury was instructed that it was the jury's duty to "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." *Reynolds*, 2018 WL 1633075 *3. Even though the jury was instructed that its recommendation did not need to be unanimous, it returned two unanimous death recommendations.

The Florida Supreme Court also evaluated the aggravating and mitigating circumstances. Reynolds knowingly and voluntarily waived any jury factfinding as to mitigation when he waived his right to present mitigation to the jury. Nonetheless, the trial court considered limited mitigation in its sentencing order. The Florida Supreme Court concluded that the aggravating factors in this case outweighed the mitigating circumstances noting that

"[t]he 'egregious facts of this case' firmly buttresses the conclusion that the *Hurst* error was harmless beyond a reasonable doubt." *Id.* at *5 *quoting Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016).

The Florida Supreme Court then engaged in a lengthy discussion of what it termed Reynolds's "*Hurst*-based *Caldwell* claim." Ultimately, the court concluded that neither *Ring v. Arizona,* 536 U.S. 584 (2002) nor *Hurst* "provides a bases for *Caldwell* challenges to the standard jury instruction given . . . between 2002 and 2016" because any such challenge could not withstand this Court's holding in *Romano v. Oklahoma*, 512 U.S. 1 (1994). *Reynolds*, 2018 WL 1633075 *10. The court recognized that 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." *Id.* A contrary holding would produce an absurd result, according to the court, because invalidating a conviction based on what was at the time an accurate jury instruction would allow *Caldwell* claims to swallow whole *Hurst* partial retroactivity. Accepting Reynolds's argument would, in effect, add a fourth prong to the state's retroactivity standard in *Witt v. State*, 387 So 2d 922 (Fla. 1980). That is, it would require a consideration of whether a jury instruction

accurately predicted a change in the law. *Id.* at *12.

The Florida Supreme Court also stated that Reynolds misinterpreted its Eighth Amendment holding in *Hurst v. State*. Reynolds's argument, as condensed by the court, was that because the Florida Supreme Court held that the Eighth Amendment required unanimous jury penalty recommendations, which Reynolds's jury was not told, his jury did not appreciate the significance of its responsibility. The court held that Reynolds misapplied it Eighth Amendment discussion in *Hurst v. State* noting that although *Caldwell* claims are related to the Eighth Amendment issue discussed in *Hurst*, they are not the same. The court summed up Reynolds's argument and its rejection of it this way: "as the argument goes, even pre-*Ring* juries were being misled as to their responsibility in sentencing notwithstanding the fact that such a responsibility did not exist then and does not exist retroactively. This is the exact unwieldiness of *Caldwell* that *Romano* averts. Either juries were being misled or they were not. We conclude that they were not." Id. at * 12.

After the Florida Supreme Court affirmed the denial of his successive postconviction motion, Reynolds filed the instant petition and this is the State's brief in opposition.

REASONS FOR DENYING THE WRIT

THERE IS NO BASIS FOR CERTIORARI REVIEW OF THE FLORIDA SUPREME COURT'S HARMLESS ERROR DECISION BECAUSE THERE IS NO CONFLICT BETWEEN STATE COURTS OF LAST RESORT OR UNITED STATES COURTS OF APPEAL NOR DOES THE CASE PRESENT AN IMPORTANT UNSETTLED QUESTIONS OF FEDERAL LAW.

As stated in Rule 10 of the Rules of the Supreme Court of the United States certiorari review "will be granted only for compelling reasons." Additionally, consideration of a decision by a state court of last resort should involve an "important question of federal law that has not been, but should be, resolved by this Court" or should involve cases that decide a federal question in a way that conflicts with other state high courts or federal courts of appeal. Cases that do not divide the federal or state courts or that do not present important, unsettled questions of federal law usually do not merit certiorari review. *Rockford Life Insurance Co. v. Illinois Dept. of Revenue*, 482 U.S. 182, 184, n. 3 (1987); *Braxton v. United States*, 500 U.S. 344, 348 (1991).

Much of the Florida Supreme Court's plurality decision is dependent on the interplay of state-law based retroactivity of *Hurst v. Florida* and *Hurst v. State* and this Court's decision in *Caldwell*. This Court has never held that *Hurst v. Florida*, which is based nearly entirely on the Sixth Amendment, is retroactive. Indeed, this Court has already stated that neither *Ring* nor *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which are precursors

of *Hurst*, are retroactive. *Schriro v. Summerlin*, 542 U.S. 348 (2004); *See also Blakely v. Washington*, 542 U.S. 296, 323 (2004) (stating "*Ring* (and *a fortiori Apprendi*) does not apply retroactively . . . .").

Reynolds's case is presented to this Court in a postconviction posture. *Hurst* is applicable to Reynolds through an expansive state law test for retroactivity, providing retroactive application to the date this Court decided *Ring* in 2002. As *Ring*, and by extension *Hurst*, is not retroactive under federal law, Florida has implemented a test that provides relief to a broader class of individuals applying *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980).[3] This Court would first have to find *Hurst* retroactive under federal law, overruling *Schriro v. Summerlin*, before reaching the underlying question of harmlessness. As such, this case is an inappropriate vehicle for certiorari.

Similarly, pursuant to this Court's jurisprudence, there can be no federally based "*Hurst*-induced *Caldwell* claims." The fact that a state court has held, as a matter of state law, that a

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[3] Federal courts have had little trouble determining that *Hurst*, like *Ring*, is not retroactive at all under *Teague v. Lane*, 489 U.S. 288 (1989). 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).

decision of this Court and a later related state supreme court decision are partially retroactive,[4] does not provide a basis for this Court to address tangentially related constitutional claims. This Court has repeatedly recognized that where a state court judgment rests on adequate and independent state law grounds, the Court's jurisdiction fails. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). *Florida v. Powell*, 559 U.S. 50, 57 (2010) (stating that if a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision.")

Nonetheless, Reynolds claims that the Florida Supreme Court's decision violates the federal constitution because it rejects his argument that the Eighth Amendment and this Court's *Caldwell* decision require not a consideration of "whether his jury was properly instructed at the time of his capital trial, but instead, whether today the State of Florida can treat those advisory recommendations as mandatory and binding." Reynolds further asserts that a jury recommendation of death reached after the jury was properly instructed as to the applicable state law constitutes structural error because of subsequent changes to the law.

The assertions themselves, in addition to being legally

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[4] This Court has held that, generally, a state court's retroactivity determinations are matters of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264 (2008).

incorrect, reveal why this Court should not grant certiorari review. First, nothing in the *Caldwell* decision or its progeny stands for the proposition that the Eighth Amendment is violated when a jury is properly instructed at the time of trial, but the law subsequently changes. In fact, that is the opposite of what *Caldwell* stands for. As will be discussed in further detail, this Court has made clear that *Caldwell* violations occur only when remarks to the jury improperly describe the role assigned to the jury by local law and does so in a way that undermines the jury's sense of responsibility. *See Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). Therefore, the Florida Supreme Court's decision is not in conflict with this Court's *Caldwell* decision; rather, it is in conformity with it.

Further, Reynolds's structural error argument relies on various faulty premises, including: 1) that his jury was affirmatively misled; 2) that the Sixth and Eighth Amendments require unanimous jury findings regarding not only the existence of aggravating circumstances, but also as to the sufficiency of the aggravating circumstances and their weight relative to mitigating factors, if any; and 3) that judicial fact-finding cannot be reviewed for harmless error.

Again, Reynolds is wrong on all counts. As already noted, Reynolds's jury was properly instructed. Additionally, this Court

has never held that the constitution requires a jury to determine the relative weight of aggravating circumstances and mitigating factors, let alone that it must do so unanimously. In fact, this Court has expressly stated that such findings by a jury are *not* necessary. *See Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) (noting, "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy . . .")[5] Similarly, this Court has stated that jury sentencing is not a prerequisite to the constitutionality of a death sentence. *See Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (stating, this Court "has never suggested that jury sentencing is constitutionally required."). Furthermore, this Court has repeatedly stated that the failure to submit a sentencing factor or even an element of an offense to a jury can be reviewed for harmless error. *Neder v.*

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[5] *State v. Mason*, 2018 WL 1872180, *5, 6 (Oh. Apr. 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 principal offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citations 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); *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 be undertaken by a jury").

United States, 527 U.S. 1, 18-19 (1999) (concluding that the lack of a jury determination on an element of the offense is subject to harmless-error analysis.) Therefore, the Florida Supreme Court's decision is not in conflict with any decision by this Court regarding the role of a capital penalty phase jury nor does it present an important question of unsettled federal law.

ISSUE I

REYNOLDS'S JURY WAS NOT MISLED ABOUT ITS SENTENCING ROLE NOR WAS ITS RESPONSIBILITY IN DETERMINING AN APPROPRIATE SENTENCE MINIMIZED IN VIOLATION OF THE EIGHTH AMENDMENT BY A JURY INSTRUCTION THAT ACCURATELY REFLECTED FLORIDA LAW AND SPECIFICALLY INFORMED THE JURY THAT THEIR RECOMMENDATION WOULD BE GIVEN GREAT WEIGHT BY THE SENTENCING JUDGE.

What Reynolds's jury was told about its role in determining his sentence:

In 2003, when Reynolds was sentenced, Florida's death penalty statute required the penalty-phase jury to advise the court as to an appropriate sentence based on whether sufficient aggravating factors existed; whether sufficient mitigating circumstances existed that outweigh the aggravating circumstances found to exist; and, based on these considerations, whether a defendant should be sentenced to life imprisonment or death. § 921.141 (2), Fla. Stat. (2003). Notwithstanding the jury's recommendation, the court independently found and weighed the aggravating and mitigating circumstances and, if imposing a death sentence, issued a written order detailing the aggravating and mitigating

circumstances and the weight assigned to each. § 921.141(3), Fla. Stat. (2003).

Even so, recognizing the jury's important role in the proceedings, Florida courts instructed penalty-phase juries, including Reynolds's, that the law required the court to give the jury's recommendation great weight. Similarly, Reynolds's jury was instructed that the court could "reject its recommendation only if the facts are so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). And, to reinforce the significance of the jury's undertaking, Reynolds's jury was told that "[t]he fact that the determination of whether you recommend a sentence of death or life 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 a human life is at stake and bring to bear your best judgment in reaching your advisory sentence."

***Hurst v. Florida* and *Hurst v. State*:**

In 2016, thirteen years after Reynolds's jury unanimously recommended two death sentences, this Court held that Florida's sentencing scheme violated the Sixth Amendment because it permitted the judge alone to find the existence of an aggravating

circumstance. *Hurst*, 136 S. Ct. at 624. In doing so, this Court overruled its previous decisions in *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989) "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for the imposition of the death penalty." *Id.* This Court remanded *Hurst* to the Florida Supreme Court for a harmless error analysis.

On remand, the Florida Supreme Court expanded this Court's *Hurst* decision by additionally requiring that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all 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 40, 57 (Fla. 2016). The state court recognized that this Court has never held that the Eighth Amendment requires jury unanimity as to its ultimate sentencing recommendation. Nonetheless, the Florida Supreme Court found that sentencing recommendation unanimity would serve the Eighth Amendment's concern of "narrow[ing] the class of murderers subject to capital punishment." *Id.* at 60.

The Florida Supreme Court's decision does not conflict with this Court's Sixth Amendment jurisprudence:

In *Hurst v. Florida*, this Court's holding was clear. "Florida's sentencing scheme, which required the judge alone to find the existence of an *aggravating circumstance*" violated the Sixth Amendment's right to a jury trial. *Hurst v. Florida*, 136 S. Ct. at 624 (emphasis added).

There is no *Hurst v. Florida* error, as defined by this Court, in Reynolds's case. Significantly, the aggravators in this case include a prior violent felony and contemporaneous murder convictions. In addition to the contemporaneous murder convictions, Reynolds was found guilty of armed burglary in this case. Therefore, as to the murder of Robin Razor, two of the four aggravating factors that made him eligible for the death penalty were found beyond a reasonable doubt by a jury. Likewise, as to the murder of Christina, two of the aggravating factors are supported by a specific jury verdict. One aggravator, although not subject to a specific jury finding, is undisputed - she was under the age of 12 at the time of the murder. Accordingly, Reynolds's death sentence satisfies the requirements of *Apprendi*, *Ring*, and *Hurst v. Florida*. *See also Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017) (noting Hutton's guilt-phase jury necessarily found the existence of aggravating factors.) *Waldrop v. Comm'r, Alabama Dep't of Corr.*, 711 Fed. Appx. 900 (11th Cir. 2017) (unpublished)

(In rejecting a *Hurst* claim the court explained: "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.")

Furthermore, this Court has never overturned, and has repeatedly reaffirmed, *Apprendi*'s recidivism exception, relying on the holding of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). There, this Court stated that a prior conviction does not require additional fact-finding by a subsequent jury. *See James v. United States*, 550 U.S. 192, 214 n.8 (2007) (noting that prior convictions need not be treated as an element of the offense for Sixth Amendment purposes.); *See also Cunningham v. California*, 549 U.S. 270 (2007) (noting *Apprendi's* recidivism exception); *Jones v. United States*, 526 U.S. 227, 249 (1999) (explaining that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees").

The aggravating factors in Reynolds's case include a prior violent felony conviction, a contemporaneous armed burglary conviction, and two contemporaneous murder convictions.[6]

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[6] Contrary to Reynolds's assertion, we are hardly "left to guess and speculate" as to the jury's findings of aggravating factors. (Pet. p. 26). Two of the aggravating factors are established either

Therefore, the Florida Supreme Court's decision is not in conflict with *Apprendi*, *Ring*, or *Hurst*. Likewise, the decision in this case does not present an important unsettled question of federal law.

The Florida Supreme Court's decision does not conflict with this Court's *Caldwell* decision:

This Court's decision in *Caldwell*, as elucidated in *Romano*, is equally as straightforward. A capital penalty-phase jury should not be *misled* regarding the role it plays in the sentencing process; and the jury's responsibility in determining an appropriate sentence should not be *diminished*. A *Caldwell* error, therefore, has two interrelated components. First, a jury must be misled by jury instructions, prosecutor argument, or judicial comments. Second, they must be misled in a way that diminished their role in the process.

Reynolds's jury was properly instructed regarding its role in the sentencing process according to state law as it existed at the time of his penalty phase. Reynolds does not contend otherwise. Instead, he insists that there is a *Caldwell* violation because the Florida Supreme Court "treats this unconstitutional recommendation as binding." Reynolds fails to recognize that *Caldwell* focuses on what the jury was told and the effect any erroneous information may have had on its sense of responsibility. *Caldwell* is not

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by a prior conviction or are included in the jury's guilty verdicts in this case.

concerned with what an appellate court may or may not rely on in reviewing procedural errors to determine if they are harmless. *Caldwell* errors do not arise and cannot exist in an appellate opinion. A yet to be written appellate opinion can have no effect on the jury's role or sense of responsibility. Of course, the entire premise of Reynolds's claim is faulty. The jury recommendation in his case is not unconstitutional under either *Caldwell* or *Hurst*. As such there is no important, unsettled question of federal law for this Court to address.

Again, ignoring that *Caldwell* is concerned only with what the jury heard and understood, Reynolds seems to argue that his Eighth Amendment rights were violated because, under Florida law, the sentencing court could not afford the recommendation great weight because Reynolds waived presentation of mitigation to the jury. Reynolds is correct that Florida law does prohibit the sentencing court from giving a death recommendation great weight when a defendant waives his right to present mitigation to the jury. *Muhammad v. State*, 782 So. 2d 343 (2001). And, in fact, the sentencing order in this case acknowledges that the court did not give the death recommendation great weight. (Resp. Apx. A). It is unclear how the jury's sense of responsibility was *diminished* when, from its perspective, the death recommendation would weigh heavily in favor of a death sentence but, in fact, it was given little or

no weight.

Reynolds is also correct in stating that his jury was told that their recommendation was advisory and that the court was responsible for sentencing. That was true then and, with regard to a death recommendation, true now.[7] Still, Florida juries are hardly led to believe that their role in the proceedings is insignificant – even post-*Ring*, pre-*Hurst* juries. *See Darden v. Wainwright*, 477 U.S. 168, 183 n. 15 (1986) ("*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.").

Indeed, much of what the jury is told is meant to enhance, and even increase, the jury's sense of responsibly. Florida penalty-phase juries are and were told that the judge will give their recommendation great weight. In fact, though, under Florida law if the sentencing court arbitrarily gives a death recommendation little or even no weight that decision is unreviewable regardless of how unjustified the court's reasoning

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[7] Under Florida's new statute, only life recommendations can be characterized as "binding." § 921.141(2)(c), Fla. Stat. (2018). Even under the previous versions of the statute, a jury's finding of no aggravating factors was, for all practical purposes, binding. *Evans v. Sec'y, Fla. Dep't Corr.*, 699 F.3d 1249, 1256 (11th Cir. 2012) (noting the Florida Supreme Court's "stringent application" of the *Tedder v. State*, 322 So. 2d 908 (Fla. 1975) standard under which the last override of a life recommendation affirmed on appeal was in 1994).

may be. Under both the old death penalty statute, and the current death penalty statute, unanimous jury recommendations for death are not binding on the sentencing judge. Even so, from the jury's perspective, if they recommend death that will weigh heavily in favor of a death sentence. Therefore, their sense of responsibility is not diminished. It is enhanced.

Because Reynolds's jury was properly instructed, and nothing was said to diminish the gravity of the task they were undertaking, there is no *Caldwell* error. As such, there is no basis for this Court to exercise its certiorari jurisdiction because the Florida Supreme Court is not in conflict with any decision of this Court and the state court's decision does not present a question of important, unsettled federal law.

Reynolds resorts to state law and improperly conflates *Hurst v. State* and *Caldwell*:

Being unable to establish a free-standing *Caldwell* claim, Reynolds conflates *Hurst v. State* and *Caldwell* hoping that a viable Eighth Amendment violation will materialize. To conjure up a *Caldwell* issue, Reynolds asserts that because *Hurst v. State* pointed to the Eighth Amendment in deciding that penalty-phase jury unanimity was required, his jury, which was not told their recommendation must be unanimous, did not appreciate the significance of its decision.

While it is true that the Florida Supreme Court's *Hurst*

decision discussed the Eighth Amendment, it did so to *buttress* its already stated conclusion that its reading of *Hurst v. Florida* along with "Florida's state constitutional right to trial by jury, and our Florida jurisprudence" required a unanimous sentencing recommendation. *Hurst*, 202 So. 3d at 50. In fact, in this case Justice Lawson's concurrence criticized the notion that *Hurst v. State* was compelled by the Eighth Amendment prohibition against cruel and unusual punishment. *Reynolds*, 2018 WL 1633075 * 13. The plurality decision countered that *Hurst v. State* was not compelled by the Eighth Amendment; rather, the Eighth Amendment was merely part of what the *Hurst v. State* court discussed. *Reynolds*, 2018 WL 1633075 n. 17.

Addressing its own precedent, the Florida Supreme Court stated that Reynolds's argument "misapplies our decision in *Hurst*." The Florida Supreme Court noted that *Caldwell* had no bearing on its discussion of jury unanimity in *Hurst v. State* and that the Eighth Amendment issue discussed in *Hurst v. State* is significantly different from the Eighth Amendment issue addressed in *Caldwell*. Reynolds is attempting to build a *Caldwell* claim on a foundation of misinterpreted state law. Consequently, this Court lacks jurisdiction to review the decision of the Florida Supreme Court. *Michigan v. Long*, 463 U.S. 1032, 1038 (1983).

The Florida Supreme Court's decision does not conflict with that of any federal appellate court or state supreme court:

The Eleventh Circuit has consistently rejected *Caldwell* challenges to Florida's jury instructions in capital cases in the years since *Romano*. As the Eleventh Circuit has explained, the infirmity identified in *Caldwell* is "simply absent" in a case where "the jury was not affirmatively misled regarding its role in the sentencing process." *Davis v. Singletary*, 119 F.3d 1471, 1481-82 (11th Cir. 1997) (*quoting Romano*, 512 U.S. at 9); *See also Johnston v. Singletary*, 162 F.3d 630, 642-44 (11th Cir. 1998); *Belcher v. Sec'y, Fla. Dep't of Corr.*, 427 Fed. Appx. 692, 695 (11th Cir. 2011). While these cases were decided before *Hurst v. Florida* nothing in *Hurst v. Florida* impacts any of the Eleventh Circuit's analysis in these cases.

Other federal circuit courts have also held that the use of the words "advisory" or "recommendation" does not violate *Caldwell* when it accurately reflects state law. *Lorraine v. Coyle*, 291 F.3d 416, 446 (6th Cir. 2002); *Bowling v. Parker*, 344 F.3d 487, 514-15 (6th Cir. 2003); *Fleenor v. Anderson*, 171 F.3d 1096, 1098-99 (7th Cir. 1999); *Wilson v. Sirmons*, 536 F.3d 1064, 1121 (10th Cir. 2008).

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

court. Therefore, this Court should deny review of this issue.

ISSUE II

THE FLORIDA SUPREME COURT CONCLUDED AS A MATTER OF STATE LAW THAT REYNOLDS'S ARGUMENT ERRONEOUSLY APPLIED ITS DISTINGUISHABLE EIGHTH AMENDMENT DISCUSSION IN *HURST V. STATE* TO A *CALDWELL* CLAIM.

Once again, Reynolds wants this Court to intervene in a decision that is based on adequate and independent state law grounds. The Florida Supreme Court's opinion includes consideration of Reynolds's "*Hurst*-based *Caldwell* claim." In the Florida Supreme Court, Reynolds argued that the state court's discussion of the Eighth Amendment in *Hurst v. State* was the basis of his *Caldwell* argument. Unfortunately for Reynolds, the state court expressly stated that its Eighth Amendment discussion in *Hurst v. State* "is inapposite to the matter at hand." *Reynolds*, 2018 WL 1633075 * 11. Because a state court is the final arbiter of state law this Court should not exercise its discretionary jurisdiction.

As the state court noted in *Hurst v. State*, *this* Court has never held that penalty-phase jury unanimity or jury sentencing is constitutionally required in death penalty cases. *Hurst*, 202 So. 2d at 60. Other than broadly requiring states to have standards that prevent arbitrary and capricious imposition of a death sentence and that account for the relevant character and record of the offender, this Court has never imposed a specific procedure

that all death penalty states must use to satisfy the Eighth Amendment. *See Gregg v. Georgia*, 428 U.S. 153, 195 (1976) ("We do not intend to suggest that only the above-described procedures would be permissible under [*Furman v. Georgia*, 408 U.S. 238 (1972)] or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis.") Consequently, the decision of the Florida Supreme Court does not present this Court with an important question of unsettled federal law.

Reynolds also complains that the Florida Supreme Court employed a per se harmless error rule in his case. Reynolds criticizes the Florida Supreme Court's "total reliance" on the advisory jury recommendation. Reynolds ignores the state courts explicit statement that "a unanimous recommendation is not sufficient" alone to find any penalty-phase error harmless.[8] *Reynolds*, 2018 WL 1633075 * 3.

In reviewing for harmless error, the state court looked to the record as a whole; including the jury instructions. Regarding

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[8] In comparison, the Florida Supreme Court has found *Hurst* errors to be harmful in all post-*Ring* cases where the jury's recommendation was not unanimous, regardless of the type and nature of the aggravating factors. *See e.g. Johnson v. State*, 205 So. 3d 1285 (Fla. 2016); *Deviney v. State*, 213 So. 3d 794, 799 (Fla. 2017); *Banks v. State*, 219 So. 3d 32 (Fla. 2017); *Abdol v. State*, 220 So. 3d 1106 (Fla. 2017); *Kirkman v. State*, 233 So. 3d 456 (Fla. 2018); *Pagan v. State*, 235 So. 3d 317 (Fla. 2018); *Everett v. State*, 43 Fla. L. Weekly S250 (Fla. May 24, 2018).

the instructions, the court noted:

> The trial court here instructed the jury, "It is your duty to ... 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." *See Davis*, 207 So. 3d at 174 ("The instructions that were given informed the jury that it needed to determine whether sufficient aggravators existed and whether the aggravation outweighed the mitigation before it could recommend a sentence of death."). Even though Reynolds's jury was instructed that unanimous recommendations were not required at that time, the jury still returned two unanimous death sentence recommendations, similar to the circumstances that we upheld in *Kaczmar*, *Knight*, and *Davis*. *See Knight*, 225 So. 3d at 683 ("Knight's 'jury was not informed that the finding that sufficient aggravating circumstances outweighed the mitigating circumstances must be unanimous, and ... the jury did, in fact, unanimously recommend death.' " (*quoting Davis*, 207 So. 3d at 174-75) (alteration in original)).

Reynolds, 2018 WL 1633075 *3.

Further, the court recognized that Reynolds's jury was not given the so-called "mercy instruction," which informs jurors that they are not compelled to recommend death even if they find the aggravators outweigh the mitigation. This instruction was not made part of Florida's standard jury instruction until after Reynolds's trial. Even so, the court found that Reynolds's jury received "substantially the same critical instruction" as those juries who also heard a mercy instruction. Hence, the court was able to conclude that Reynolds's jury made the requisite findings of fact before it issued it unanimous recommendations. *Reynolds*, 2018 WL

1633075 * 4.

Next, the court considered the aggravators and mitigators; acknowledging that Reynolds waived his right to present mitigation to the jury. Because Reynolds knowingly and intelligently waived presentation of mitigation, he could not subsequently claim a *Hurst v. State* violation for lack of jury findings on mitigation.[9] *Id.* Even so, the Florida Supreme Court noted that mitigation was presented to and considered by the sentencing court. The court concluded that the "aggravation necessarily outweighed the mitigation" and supported the jury's unanimous recommendation.

> Here, as Privett relieved himself, Reynolds smashed his head with a cinder block. Then, Reynolds proceeded to kill Christina and Robin Razor—an eleven-year-old girl and her mother—by beating and stabbing them to death because, in Reynolds's words, "with [his] record [he] couldn't afford to leave any witnesses." The "egregious facts of this case" firmly buttress the conclusion that the *Hurst* error was harmless beyond a reasonable doubt.

Reynolds, 2018 WL 1633075 * 5 (internal citations omitted).

Reynolds's assertion that the Florida Supreme Court's harmless-error analysis relied only on the unanimous recommendation is simply not supported by the opinion of the court below.

***Hurst* errors are not structural errors:**

In addition to asserting that the Florida Supreme Court

[9] As already noted, this Court has never held that mitigation must be subject to jury factfinding.

imposed a per se harmless error rule in his case, Reynolds alleges that his *Hurst/Caldwell* claim constitutes structural error. "[A] constitutional error is either structural or it is not." *Neder v. United States*, 527 U.S. 1, 14 (1999); *See also Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). The majority of constitutional errors are errors in the trial process and can be quantitatively assessed in the context of the evidence presented to determine whether the error is harmless beyond a reasonable doubt. *Arizona v. Fulminante,* 499 U.S. 279 (1991). In *Hurst v. Florida* this Court expressly recognized that the error in allowing a sentencing judge to find the existence of aggravating factors, independent of a jury's factfinding, is subject to harmless error review.

Likewise, on remand in *Hurst v. State*, the Florida Supreme Court addressed Hurst's claim that the error at issue was not subject to harmless error review. Hurst posited that the error was structural and "is per se reversible because it results in a proceeding that is always fundamentally unfair." *Hurst*, 202 So. 3d at 66. Consistent with this Court's directive, and with their own precedent, the Florida Supreme Court rejected this argument and found that such errors can and should be reviewed for harmlessness. *Hurst*, 202 So. 3d at 67. This case does not present this Court with any distinguishable facts or persuasive reasoning for it to

deviate from its relatively recent proclamation that *Hurst* errors are subject to harmless error review.

An example of structural error is found in *Sullivan v. Louisiana*, 508 U.S. 275 (1993). There, the district court gave a defective reasonable doubt instruction; nonetheless, the Supreme Court of Louisiana found the error to be harmless. This Court held that the error cannot be harmless because it "vitiates all the jury's findings." *Id.* at 281. Therefore, there was no actual guilty verdict within the meaning of the Sixth Amendment. Consequently, "the entire premise of *Chapman* review is simply absent." *Id.* at 280.

Not quite a decade later, this Court was presented with the argument that the failure to submit a necessary element of an offense to the jury was a structural error. *Neder*, 527 U.S. 1. Neder argued that the complete omission of an element for the jury's consideration prevented the jury from rendering a complete verdict on every element of the offense and, therefore, the error was structural. He recognized that this Court had applied harmless error review to cases involving improper instruction on an element of an offense but claimed that the failure to have any jury findings at all on an element of the offense led to an incomplete verdict as in *Sullivan*.

This Court held that the absence of jury findings on each

element of an offense establishes only a Sixth Amendment violation, which does not necessarily render the entire trial fundamentally unfair. *Neder*, 527 U.S. at 12. *See also Washington v. Recuenco*, 548 U.S. 212, 222 (2006) ("Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error."); *Schriro v. Summerlin*, 542 U.S. 348, 355-56 (2004) (rejecting a claim that *Ring* was a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of criminal proceedings.)

The critical distinction between the errors considered in *Neder* and in *Sullivan* is that the error in *Sullivan* invalidated all the jury's findings, while the error in *Neder* impacted only the finding of a single element. *See Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (opining that when, as in *Neder*, a jury is "precluded from determining only one element of an offense, . . . harmless-error review is feasible"). As in *Neder*, any error in failing to submit the aggravating factors, or any other sentencing factor, to the jury in a capital case is capable of harmless error analysis.

As noted earlier, at least two aggravating factors in this case are supported by prior convictions or the guilty verdicts rendered by the jury. Nonetheless, even assuming a *Hurst* error regarding the avoid arrest and heinous, atrocious, and cruel aggravators, the error is not structural because there is no basis

for concluding that it "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 470 (1997) *citing United States v Olano*, 507 U.S. 725, 736 (1993). Paraphrasing this Court's statement in *Johnson*, it would be the reversal of Reynolds's death sentences for the brutal and merciless killings of Christina and Robin that would have that effect. "'Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.'" *Johnson*, 520 U.S at 470 *quoting* R. Traynor, *The Riddle of Harmless Error* 50 (1970).

The Florida Supreme Court properly found that the error in Reynolds's case was harmless beyond a reasonable doubt. This finding neither contravenes this Court's precedent, nor violates federal law. This case presents no important, unsettled, or conflicting application of constitutional law. Thus, certiorari review should be denied.

The decision of the Florida Supreme Court does not conflict with that of any federal appellate court or state supreme court:

No federal circuit court holds that these types of errors are structural. *See e.g., United States v. McCray*, 563 Fed. Appx. 705, 709 (11th Cir. 2014) (explaining that an *Alleyne v. United States*, 570 U.S. 99 (2013), error, like *Apprendi* error, is subject to harmless error.). And most state courts of last resort, including the Florida Supreme Court, are in accord. *Galindez v. State*, 955

So. 2d 517, 519 (Fla. 2007) (concluding that *Apprendi* and *Blakely* errors are subject to harmless error analysis). Reynolds cites no federal circuit case or state supreme court case holding that this type of error is structural error. Therefore, there is no basis for this Court to grant certiorari review.

CONCLUSION

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

Respectfully submitted,

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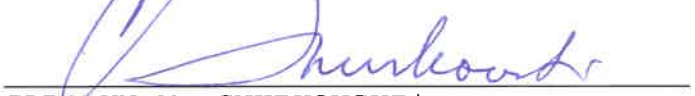

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