CASE NO. 18-5228

IN THE SUPREME COURT OF THE UNITED STATES

QUAWN M. FRANKLIN,

***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 this Court should grant certiorari review of a fact-based decision of the Florida Supreme Court holding that the Hurst v. State, 202 So. 3d 40 (Fla. 2016), error was harmless error when the jury returned a special verdict form unanimously finding the four aggravating circumstances beyond a reasonable doubt and unanimously recommending a death sentence?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the Florida Supreme Court:

1) Quawn M. Franklin, Petitioner in this Court, was the Appellant below.

2) Respondent, the State of Florida, was the Appellee below.

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The decision of the Florida Supreme Court is reported at Franklin v. State, 236 So. 3d 989 (Fla. 2018).

STATEMENT OF JURISDICTION

On February 15, 2018, the Florida Supreme Court affirmed Franklin's conviction and death sentence. No motion for rehearing was filed. On April 12, 2018, Justice Thomas granted Petitioner an extension of time to file the petition for writ of certiorari in this Court. Petitioner timely filed the instant petition.

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. Sup. Ct. R. 14(g)(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE AND FACTS

In December 2001, Petitioner, Quawn M. Franklin, was convicted of attempted armed robbery and first-degree murder in the shooting death of security guard Jerry Lawley in Lake County, Florida. Lawley's murder was the third violent crime committed by Franklin in the span of a two week period.[1] Franklin v. State, 965 So. 2d 79, 84 (Fla. 2007).

After the jury convicted Franklin of first degree murder and attempted armed robbery with a firearm, the court conducted a penalty phase and the jury returned a special interrogatory verdict form at Franklin's request indicating that the jury unanimously found each of the four proposed aggravating factors: (1) the murder was committed while Franklin was serving a prison sentence because he was on conditional release at the time of Lawley's murder; (2) Franklin had previous violent felony convictions, including another capital felony for the murder of

[1] Only three months after being released from prison and while still on conditional release, Franklin kidnapped, robbed, and murdered a pizza delivery driver John Horan. Franklin pled guilty to first degree murder, armed robbery, and kidnapping and was sentenced to three consecutive life sentences. Franklin, 965 So. 2d at 84. Approximately a week after committing the murder of Horan, Franklin committed a forced invasion of the home of Alice Johnson. Franklin struck Johnson in the head with a hammer and stole her Toyota Camry. He subsequently pled guilty to burglary, robbery with a deadly weapon, and attempted felony murder and was sentenced to life imprisonment in the Alice Johnson case. Id. Two days after the home invasion, Franklin committed the instant murder of Jerry Lawley. Id.

John Horan; (3) Lawley's murder was committed for pecuniary gain; and (4) the murder was cold, calculated, and premeditated (CCP). Franklin, 965 So. 2d at 87-88. The jury also unanimously returned a recommendation for a death sentence. The trial court followed the jury's unanimous recommendation and imposed a death sentence. In its sentencing order, the trial court found the same four aggravating factors as the jury and concluded that the aggravators outweighed the mitigating factors. Id.

Following the Florida Supreme Court's opinion affirming Franklin's judgment and sentence on direct appeal, Franklin v. State, 965 So. 2d 79, 84 (Fla. 2007), Franklin unsuccessfully sought postconviction relief in state court. Franklin v. State, 137 So. 3d 969 (Fla. 2014). Franklin also filed a petition for writ of habeas corpus in federal district court, and his petition is currently pending.

On January 9, 2017, Franklin filed a successive postconviction motion in circuit court pursuant to Florida Rule of Criminal Procedure 3.851 seeking 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). After reviewing the State's response and conducting a case management conference, the trial court issued an order on April 3, 2017, denying Franklin's motion based on a finding that

"the Hurst error was harmless beyond a reasonable doubt as the jury returned an interrogatory verdict unanimously agreeing that each of the four aggravating factors were present and unanimously recommending that death was the appropriate sentence given the substantial aggravation and slight mitigation presented." Franklin v. State, 236 So. 3d 989, 992 (Fla. 2018).

On appeal, the Florida Supreme Court affirmed the lower court's order and found that any Hurst error was harmless in Franklin's case given the jury's special verdict form indicating that the jury unanimously found each aggravating circumstance beyond a reasonable doubt and unanimously recommended a death sentence. Id. The court further denied Franklin's claim that the jury's unanimous recommendation violates the Eighth Amendment pursuant to Caldwell v. Mississippi, 472 U.S. 320 (1985), as the court found the issue procedurally barred under state law. Id. The court further rejected the claim on the merits. Id. at 992-93.

Franklin now seeks certiorari review of the Florida Supreme Court's decision.

REASONS FOR DENYING THE WRIT

ISSUE

WHETHER THIS COURT SHOULD GRANT CERTIORARI REVIEW OF A FACT-BASED DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT THE HURST V. STATE, 202 SO. 3D 40 (Fla. 2016), ERROR WAS HARMLESS ERROR WHEN THE JURY RETURNED A SPECIAL VERDICT FORM UNANIMOUSLY FINDING THE FOUR AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT AND UNANIMOUSLY RECOMMENDING A DEATH SENTENCE?

Petitioner seeks certiorari review of the Florida Supreme Court's decision holding that the Hurst v. State, 202 So. 3d 40 (Fla. 2016), error was harmless beyond a reasonable doubt. Petitioner asserts that the Florida Supreme Court has created an unconstitutional per se harmless error standard when reviewing cases where the jury unanimously recommended the death penalty. Petitioner further claims that the court's harmless error review improperly relied on an advisory jury decision "infected with Caldwell error." However, as will be shown, the Florida Supreme Court properly applied harmless error review to the facts of Petitioner's case. Certiorari is therefore unwarranted as the court's decision does not conflict with this Court's jurisprudence, with any other state court of last review, or with any federal appellate court. Thus, because Franklin has not provided any "compelling" reason for this Court to review his case, certiorari review should be denied. See Sup. Ct. R. 10.

A. There is No Underlying Sixth Amendment Violation

In Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court held that, pursuant to the Sixth Amendment, any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury. However, this Court expressly recognized an exception to this rule which allowed for a judge to impose an enhanced sentence when based on a defendant's prior conviction. Id. at 490 ("*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.") (emphasis added); see also Almendarez-Torres v. United States, 523 U.S. 224 (1998) (holding that a prior conviction is not an element of the charged offense but rather a "sentencing factor" which could be utilized by the judge alone to impose a greater punishment after conviction for the offense charged).

Two years after Apprendi, this Court extended the rule to Arizona's capital sentencing scheme and held that it was a violation of the Sixth Amendment for the trial judge, sitting alone, to find the existence of an aggravating circumstance thereby making a defendant eligible for an enhanced sentence of death, but noted that the petitioner was not challenging the

rule announced in Almendarez—Torres. Ring v. Arizona, 536 U.S. 584, 597 n.4 (2002).

In Hurst v. Florida, 136 S. Ct. 616 (2016), this Court extended its Ring holding to Florida's capital sentencing scheme and found Florida's statute unconstitutional on Sixth Amendment grounds. In applying Ring's holding to Florida, the Hurst Court expressly overruled its prior 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." Hurst, 136 S. Ct. 623-24 (emphasis added). This Court noted that the portions of Spaziano and Hildwin which concluded that the "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury," could not survive the reasoning announced in Apprendi and Ring. Id. Accordingly, this Court concluded that Florida's sentencing scheme violated the Sixth Amendment because the judge, rather than the jury, had to find the existence of an aggravating circumstance. Id. at 624.

The Hurst decision reaffirmed this Court's Ring decision that the jury must find each "fact" necessary to impose a sentence of death. Hurst, 136 S. Ct. at 619. Pursuant to this

Court's Sixth Amendment jurisprudence, once the state establishes the existence of an aggravating circumstance, the defendant becomes eligible for an enhanced sentence of death and the jury need not make any additional "factual" findings. See Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003) ("That is to say, for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances': Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death. Accordingly, we held that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt.") (citing Ring v. Arizona, 536 U.S. 584, 608-09 (2002)).

This Court's Hurst v. Florida decision 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. However, on remand to the Florida Supreme Court, the court in Hurst v. State, 202 So. 3d 40, 57 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017), greatly expanded this Court's ruling, 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 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."

In the instant case, there is no Hurst v. Florida violation. It is uncontested that Petitioner had prior violent felony convictions which established beyond a reasonable doubt the prior violent felony aggravating circumstance.[2] The jury also contemporaneously convicted Franklin of armed robbery. Thus, there is no question that Franklin was eligible for the death penalty under this Court's controlling Sixth Amendment jurisprudence. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); Alleyne v. United States, 133 S. Ct. 2151, 2160 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)); Jenkins v.

[2] See footnote 1, supra.

Hutton, ___ U.S. ___, 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). Additionally, the jury in this case returned a special verdict form unanimously finding the four aggravating factors relied upon by the trial judge in sentencing Franklin to death, and the jury unanimously recommended the death penalty. Given these findings, it is clear that there was no Sixth Amendment error in Franklin's case.

B. The Florida Supreme Court Properly Determined that any Hurst v. State Error was Harmless

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 had to make findings on the sufficiency of the aggravating circumstances and on the weighing process. However, 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. Indeed, this Court stated that the determination of whether mitigating circumstances outweigh aggravating circumstances "is mostly a question of mercy . . . leaving the judgement [of] whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof." Kansas v. Carr, 136 S. Ct. 633, 642 (2016).

As this Court has made clear, neither mitigating circumstances nor weighing must be found by a jury; this Court's view is that only aggravating circumstances must be found by the jury because those are the only true factual determinations in capital sentencing. This Court does not view mitigation or weighing as factual findings at all. This Court has explained that aggravating circumstances are "purely factual determinations," but that mitigating circumstances, while often having a factual component, are "largely a judgment call (or perhaps a value call)." Carr, 136 S. Ct. at 642. This Court noted that the mitigating circumstance of mercy, "simply is not a factual determination." Id. at 643. The Carr Court explained that "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy" and that it would mean "nothing" to tell the jury that the defendants "must deserve mercy beyond a reasonable doubt."

Id. at 642.

Neither the concept of structural error nor the concept of harmless error apply to "judgment calls" or "questions of mercy." Because this Court does not view either mitigating circumstances or weighing as factual findings, there is no error regarding a jury's lack of findings to be considered either structural or harmless. When a court finds no error it does not need to conduct a harmless error analysis.

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. Opposing counsel ignores this dilemma in their certiorari petition. 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 any such error was harmless in Franklin's case. In making this determination, the court reviewed the entire record

and found that the jury's special verdict form expressly finding that each aggravating factor had been established beyond a reasonable doubt, and the jury's unanimous recommendation of a death sentence after weighing the four aggravating circumstances against the minimal mitigation presented, allowed the Florida Supreme Court to find that any Hurst error was harmless. Franklin, 236 So. 3d at 992; see also Davis v. State, 207 So. 3d 142, 174 (Fla. 2016) (noting that when the jury unanimously recommends death, it "allow[s] [the court] to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors").

The Florida Supreme Court's finding of harmless error in this case does not conflict with any decision of this Court, or any state court of last resort, and certiorari review is therefore not warranted. The Florida Supreme Court's harmless error analysis is entirely consistent with this Court's holding in Chapman v. California, 386 U.S. 18, 24 (1967), concluding "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." The Florida Supreme Court's decision clearly demonstrates that the court reviewed the record and determined that the Hurst v. State error was harmless in

this case. Petitioner 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 Franklin'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 the 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). Petitioner'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 Franklin's case and properly determined

that any Hurst v. State error was harmless beyond a reasonable doubt given the jury's unanimous fact-finding of the four aggravating circumstances and their unanimous death recommendation.

C. Petitioner's Claim Regarding an Alleged Caldwell Error was Denied Based on Independent, State Law Procedural Grounds

Petitioner argues in his petition that the Florida Supreme Court failed to account for an alleged error based on Caldwell v. Mississippi, 472 U.S. 320 (1985), when conducting its harmless error analysis because the jury was given instructions that its death recommendation was merely advisory. Petitioner raised an Eighth Amendment challenge based on Caldwell in the Florida Supreme Court, but the court denied that claim on the basis of an independent state procedural bar. Franklin, 236 So. 3d at 992.

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); see also Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to

decide cases where there is an adequate and independent state ground."). 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); Long, 463 U.S. at 1041. Because the Florida Supreme Court's denial of Franklin's Caldwell claim is based on adequate and independent state grounds, certiorari review should be denied.

Franklin's attempt to justify this Court's review of a procedurally barred claim by improperly injecting it into his harmless error claim is unavailing. In Caldwell v. Mississippi, 472 U.S. 320, 329 (1985), this Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Thus, to establish a constitutional error under Caldwell, a defendant must show that the instructions to the jury "*improperly described the role assigned to the jury by local law*." Romano v. Oklahoma, 512 U.S. 1, 9 (1994) (emphasis added). Thus, where the record shows, as it does here, that the jury was properly instructed on its role in the sentencing process based on the law existing at the time of trial, the defendant fails to establish a constitutional error under Caldwell.

Here, Petitioner's jury was properly instructed on its role based on the law existing at the time of his trial. The jury was instructed: "it is your duty to follow the law that will now be given to 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." (R.697). The jury was also instructed that an aggravating circumstance had to be proved beyond and to the exclusion of a reasonable doubt before the aggravating circumstance could be considered by the jury in determining its recommendation. (R.698). Furthermore, the jury was instructed that it had to find the existence of at least one aggravating circumstance before it could consider the death penalty as a possible sentence. (R.698).

Applying the aforementioned legal principles, Petitioner has failed to identify a cognizable claim under the Eighth Amendment to warrant certiorari review. There is no evidence in the record to suggest that the jury in Petitioner's case was improperly instructed on its role in the sentencing process under the law in effect at the time of Petitioner's trial. The jury was instructed that it needed to determine whether

sufficient aggravators existed and, if so, whether the aggravation outweighed the mitigation before the death penalty could be imposed. The jury ultimately returned a unanimous verdict of death based on the conclusion of all twelve jurors that four aggravating circumstances existed and such aggravating circumstances outweighed the mitigating circumstances. Based on the instructions given and the jury's unanimous death recommendation, the Florida Supreme Court properly determined that Franklin was not entitled to any relief on his procedurally barred Caldwell claim. Franklin, 236 So. 3d at 992-93. Thus, Petitioner's contention that the jury instructions were improper under the Eighth Amendment necessarily fails.

Furthermore, there is no evidence to suggest that the jury instructions in any way diminished the jurors' sense of responsibility. The record shows that while the jury was instructed that its recommendation was advisory, the judge also instructed the jury that its advisory recommendation would be "given great weight by this court in determining what sentence to impose in this case." (R.697). Accordingly, Petitioner's Caldwell argument is without merit, and does not warrant this Court's certiorari review.

D. Petitioner's Reliance on Sullivan v. Louisiana, 508 U.S. 275 (1993), to Question the Florida Supreme Court's Harmless Error Analysis is Misplaced.

Petitioner claims that the Florida Supreme Court's harmless error analysis contradicts the principles set forth in Sullivan v. Louisiana, 508 U.S. 275 (1993), because the court relied on the jury's unanimous finding of the four aggravating circumstances and the jury's unanimous recommendation for a death sentence. In Sullivan, this Court ruled that an erroneous jury instruction concerning the guilt beyond a reasonable doubt standard is not subject to a harmless error analysis. "Although most constitutional errors have been held amenable to harmless error analysis, . . . some will always invalidate the conviction." Id. at 279 (citing Arizona v. Fulminante, 499 U.S. 279, 306-07 (1991). In Sullivan, the "instructional error consist[ed] of a misdescription of the burden of proof, which vitiates *all* the jury's findings." Id. at 281. Because of the seriousness of this error, this Court found the error to be structural and not subject to a harmless error analysis. Id.

In Neder v. United States, 527 U.S. 1, 6 (1999), this Court considered a case in which the trial judge failed to submit the element of materiality to the jury in a prosecution for mail, wire, and tax fraud, after incorrectly concluding that the issue was one for the judge and not the jury to determine. On review, this Court held that "[i]t would be illogical to extend the reasoning of Sullivan from a defective 'reasonable doubt'

instruction to a failure to instruct on an element of the crime." Id. at 15. Such a mistake, this Court concluded, does not require automatic reversal but would instead be subject to a harmless error analysis. Id. at 8. Indeed, Neder emphasized that structural errors are limited to a narrow class of cases that "infect the entire trial process," necessarily rendering a "trial fundamentally unfair." Id.; 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, which applied Apprendi to hold that a jury must find the existence of aggravating factors necessary to impose the death penalty, was a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding, in part because the Court could not "confidently say that judicial factfinding *seriously* diminishes accuracy") (emphasis in original).

Applying the aforementioned principles, any Hurst v. State error in the lack of specific findings by the jury regarding the weighing process was, in fact, subject to harmless error analysis. Clearly, under this Court's jurisprudence, it is well established that the critical distinction between the errors

considered in Neder and in Sullivan is that the error in Sullivan invalidated ***all*** of 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").

In the instant case, the jury made the factual findings required by this Court in Hurst v. Florida when they returned a specific jury verdict form unanimously finding that each of the four aggravating circumstances had been established by proof beyond a reasonable doubt. The jury then weighed the aggravation and mitigation and unanimously recommended a death sentence. Thus, the jury's unanimous verdict and recommendation of death provides the evidence necessary to conclude beyond a reasonable doubt that a rational jury would have unanimously found that sufficient aggravating factors existed to impose the death penalty and that those aggravating factors outweighed the mitigating circumstances presented.

In sum, this Court should decline to exercise its certiorari review because the Florida Supreme Court's decision finding harmless error is entirely consistent with this Court's precedent and does not present this Court with an unsettled

question of law. At the heart of Petitioner's claim is the contention that the Florida Supreme Court incorrectly concluded that the Hurst v. State error in his case was harmless. However, Petitioner's argument is not only meritless, but also further proves why certiorari review is not warranted. Rule 10 of this Court's rules states, "a petition for a 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) ("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 Petitioner's question presented, this Court would have to engage in the very "error correction" analysis that this Court has stated is against its principle function. Thus, Petitioner 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: Maria Perinetti, The Law Office of the Capital Collateral, Regional Counsel - Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637.

s/ Stephen D. Ake
COUNSEL FOR RESPONDENT