NO. 18-8300

IN THE SUPREME COURT OF THE UNITED STATES

PAUL GLEN EVERETT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

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Capital Case

Question Presented

Whether this Court should grant certiorari review where the retroactive application of *Hurst v. Florida* and *Hurst v. State* is based on adequate independent state grounds and the issue presents no conflict between the decisions of other state courts of last resort or federal courts of appeal, does not conflict with this Court's precedent, and does not otherwise raise an important federal question.

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Opinion Below

The decision of the Florida Supreme Court appears as *Everett v. State*, 258 So. 3d 1199 (Fla. 2018).

Jurisdiction

This Court's jurisdiction to review the final judgment of the Florida Supreme Court is authorized by 28 U.S.C. § 1257. However, because the Florida Supreme Court's decision in this case is based on adequate and independent state grounds, this Court should decline to exercise jurisdiction as no federal question is raised. Sup. Ct. R. 14(1)(g)(i). Additionally, the Florida Supreme Court's decision does not implicate an important or unsettled question of federal law, does not conflict with another state

court of last resort or a United States court of appeals, and does not conflict with relevant decisions of this Court. Sup. Ct. R. 10. No compelling reasons exist in this case and this Petition for a writ of certiorari should be denied. Sup. Ct. R. 10.

Statement of the Case and Facts

Petitioner, Paul Glen Everett, was convicted of first-degree murder, burglary of a dwelling with a battery, and sexual battery involving serious physical force. *Everett v. State*, 893 So. 2d 1278 (Fla. 2004).

> The evidence at trial showed that during the late afternoon or early evening of November 2, 2001, [Petitioner] approached Kelly M. Bailey's home, looking for money and carrying a wooden fish bat or billy club. A stranger to the victim, [Petitioner] entered her home uninvited. When Ms. Bailey confronted him, [Petitioner] beat her, and as she tried to escape, knocked her down and raped her. He also forcefully twisted her neck, breaking a vertebra, which paralyzed her and caused her to suffocate to death. Before leaving, [Petitioner] removed his t-shirt, but he took with him some money from the victim's purse, his fish bat, her credit card, and her sweater. Outside the house, he discarded all but the cash. The victim suffered multiple injuries: a knocked-out tooth; a fractured nose; swollen eyelids; lacerations and bruising of her lips; a lacerated lip through which her teeth protruded; abrasions and carpet burns; a broken neck; and vaginal abrasion evidencing the use of force and consistent with nonconsensual sexual intercourse.
>
> [Petitioner] was indicted on charges of first-degree murder, burglary of a dwelling with a battery, and sexual battery involving serious physical force. Among other evidence at trial, the fish bat was traced to the appellant and his DNA matched the vaginal swabs from the victim on all thirteen genetic markers tested.[1] The jury found appellant guilty as charged.

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[1] The DNA expert also testified that the frequency occurrence of appellant's genetic profile is one in 15.1 quadrillion of the Caucasian population, 1.01 quintillion of the African-American population, and 11.2 quadrillion of the Hispanic population.

Id. at 1280.

Following the penalty phase, the jury came back with a unanimous recommendation for death. *Everett*, 893 So. 2d at 1280.[2] Under Florida law, Petitioner's judgment and sentence became final upon this Court's disposition of the petition for a writ of certiorari, which occurred in 2005. *Everett v. Florida*, 125 S. Ct. 1865 (2005); Fla. R. Crim. P. 3.851(d)(1)(B).

Subsequent to the denial, Petitioner filed a postconviction motion, which was denied. The Florida Supreme Court affirmed the denial of Petitioner's postconviction motion, as well as a writ of habeas corpus. *Everett v. State*, 54 So. 3d 464 (Fla. 2010).

In *Hurst v. Florida*, this Court held that Florida's capital sentencing scheme was unconstitutional pursuant to *Ring*'s[3] determination that the Sixth Amendment requires a jury to find the existence of an aggravating circumstance which qualifies a defendant for a sentence of death. *Hurst v. Florida*, 136 S. Ct. 616 (2016). On remand in *Hurst v. State*, the Florida Supreme Court held that in capital cases, the jury must unanimously and expressly find that the aggravating factors 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.

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[2] The jury found three aggravating factors: "(1) appellant was a convicted felon under a sentence of imprisonment at the time of the murder; (2) he committed the murder while engaged in the commission of a sexual battery or a burglary; and (3) the murder was especially heinous, atrocious, or cruel." *Everett*, 893 So. 2d at 1280.

[3] *Ring v. Arizona*, 536 U.S. 584 (2002).

Hurst v. State, 202 So. 3d 40 (Fla. 2016), *cert. denied*, *Florida v. Hurst*, 137 S. Ct. 2161 (2017).

In *Mosley*, the Florida Supreme Court held that *Hurst* applies retroactively to cases which became final after the decision was issued in *Ring* on June 24, 2002. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). On the same day in *Asay*, the Florida Supreme Court held that *Hurst* does not apply retroactively to cases which became final prior to *Ring*. *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 138 S. Ct. 41 (2017).

Petitioner filed a writ of habeas corpus in which he raised *Hurst* claims, which the Florida Supreme Court denied. *Guardado v. Jones*, 226 So. 3d 213, 215 (Fla. 2017); *Hurst v. Florida*, 136 S. Ct. 616; *Hurst v. State*, 202 So. 3d 40, *cert. denied*, *Florida v. Hurst*, 137 S. Ct. 2161. In holding the *Hurst* error to be harmless, the Florida Supreme Court concluded:

> In *Davis* [*v. State*], we held that a jury's unanimous recommendation of death is "precisely what we determined in *Hurst* to be constitutionally necessary to impose a sentence of death" because a "jury unanimously f[inds] all of the necessary facts for the imposition of [a] death sentence[ ] by virtue of its unanimous recommendation[ ]." 207 So. 3d [142,]175 [(Fla. 2016)]. We have consistently relied on *Davis* to deny *Hurst* relief to defendants who have received a unanimous jury recommendation of death. *See, e.g.*, *Guardado*[,] 226 So. 3d [at] 215 . . . , *cert. denied*, — U.S. —, 138 S. Ct. 1131 . . . (2018); *Bevel v. State*, 221 So. 3d 1168, 1178 (Fla. 2017); *Cozzie v. State*, 225 So. 3d 717, 733 (Fla. 2017), *cert. denied*, — U.S. —, 138 S. Ct. 1131 . . . (2018); *Morris v. State*, 219 So. 3d 33, 46 (Fla.), *cert. denied*, — U.S. —, 138 S. Ct. 452 . . . (2017); *Oliver v. State*, 214 So. 3d 606, 617-18 (Fla.), *cert. denied*, — U.S. —, 138 S. Ct. 3 . . . (2017); *Truehill v. State*, 211 So. 3d 930, 956-57 (Fla.), *cert. denied*, — U.S. —, 138 S. Ct. 3 . . . (2017); *Tundidor v. State*, 221

> So. 3d 587, 607-08 (Fla. 2017), *cert. denied*, — U.S. —, 138 S. Ct. 829 . . . (2018). Everett is among those defendants who received a unanimous jury recommendation of death, and his arguments do not compel departing from our precedent.

Everett, 258 So. 3d at 1200. The Court concluded that any *Hurst* error was harmless. *Id.*

Reasons for Denying the Writ

The Jury Instructions Properly Advised the Jury of Its Role Under Florida Law and Did Not Diminish the Importance of the Jury's Responsibility in Violation of *Caldwell*.

Petitioner argues that there was a *Caldwell* violation in his case because the jury was instructed that it was recommending the imposition of the death penalty to the judge. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). The Florida Supreme Court has repeatedly rejected challenges to the standard jury instructions in death penalty cases pursuant to *Caldwell*. *Hall v. State*, 212 So. 3d 1001, 1032-33 (Fla. 2017). These claims are rejected because the jury was properly instructed on its role as defined by local law. Further, the seriousness of the jury's role is no way diminished by these instructions. Thus, Petitioner's claim is meritless and not appropriate for certiorari review.

"To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989); *see also Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). In *Caldwell*, the prosecutor made "focused, unambiguous, and strong" remarks which misled the jury into believing the responsibility for sentencing lay

elsewhere. *Caldwell*, 472 U.S. at 340. The comments included "your decision is not the final decision" and "[y]our job is reviewable" and that defense was "insinuating that your decision is the final decision." *Id.* at 325-26.

"This Court has repeatedly said that under the Eighth Amendment, 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" *Caldwell*, 472 U.S. at 329 (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983)). The problem with the argument by the prosecutor in *Caldwell* was that it presented "an intolerable danger that the jury will in fact choose to minimize the importance of its role" and thus be in contravention of the requirements of the Eighth Amendment. *Id.* at 333. However, "'[t]he 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, 1482 (11th Cir. 1997) (quoting *Romano*, 512 U.S. at 9).

In Petitioner's case, the jury was not affirmatively misled. The jury was instructed of its role as assigned by local law. *Davis*, 119 F.3d at 1482; *see Truehill v. Florida*, 138 S. Ct. 3 (2017); *Middleton v. Florida*, 138 S. Ct. 829 (2018); *Guardado*, 138 S. Ct. 1131; *Kaczmar v. Florida*, 138 S. Ct. 1973 (2018). The jury was told that its role was advisory in nature. (Record at 510-13). Since under Florida law, the judge remains the final sentencing authority, a jury's recommendation of death is in fact "advisory." Thus, characterizing the jury's recommendation as "advisory" is an accurate description of the role assigned to the jury by Florida law. Additionally, Petitioner's jury was specifically instructed about the "gravity" of its decision and that

"human life is at stake." (Record at 513). There was no diminishment of the jury's sense of responsibility in recommending a death sentence in Petitioner's case. Thus, there was no *Caldwell* violation in Petitioner's case.

Additionally, the Florida Supreme Court has explicitly rejected *Caldwell* attacks on Florida's standard penalty phase jury instructions in the wake of *Hurst*. *See Reynolds v. State*, 251 So. 3d 811 (Fla. 2018); *Johnston v. State*, 246 So. 3d 266 (Fla. 2018) (citing *Reynolds* in rejecting *Caldwell* claim). The Florida Supreme Court pointed out the absurdity of the "*Hurst*-induced *Caldwell*" claims:

> 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.

Reynolds, 251 So. 3d at 827.

Further, this Court has never held that the Eighth Amendment requires the jury to impose a death sentence. *Proffitt v. Florida*, 428 U.S. 242, 252 (1976). While a plurality of this Court acknowledged "jury sentencing in a capital case can perform an important societal function," this Court "has never suggested that jury sentencing is constitutionally required" in such cases. *Id.* The Eighth Amendment requires capital punishment to be limited "to those who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). As such, the Eighth Amendment requires the death penalty to be limited to a specific category of crimes and "States must give narrow and precise

definition to the aggravating factors that can result in a capital sentence." *Id.* However, the Eighth Amendment does not require that a jury be the final sentencing authority. Petitioner's argument that his Eighth Amendment rights were violated by his jury's unanimous recommendation is not supported by this Court's precedent.

Petitioner's jury was properly instructed of its role under Florida law. The instructions in Petitioner's case in no way diminished the jury's actual responsibilities in the sentencing process. Because Petitioner's jury was properly instructed of its role in sentencing according to Florida law, the jury instructions in Petitioner's case did not violate *Caldwell* and certiorari review should be denied.

The Petition Should Be Denied as It Does Not Allege a Federal Constitutional Violation or Raise a Claim of Error That is Retroactive Under Federal Law, and the Violation of State Law Was Properly Denied as Harmless.

The Florida Supreme Court's affirmance of Petitioner's sentence does not present a federal constitutional question as the requirements of *Hurst v. Florida* were satisfied in his case. The Florida Supreme Court's vast expansion of the holding in *Hurst v. Florida* was not required or even suggested by this Court's holding. For example, *Hurst v. Florida* requires the jury to find one aggravating circumstance existed, not that every aggravating circumstance must be found to exist, before rendering a defendant eligible for the death penalty. Likewise, *Hurst v. Florida* did not establish a new Sixth Amendment right to have a jury determine whether mitigating circumstances exist and determine whether mitigation is sufficiently

substantial to warrant leniency.[4] Additionally, *Hurst v. Florida* did not hold that there is a constitutional right to jury sentencing.

The Florida Supreme Court, however, interpreted *Hurst v. Florida*, the Florida Constitution, and Florida jurisprudence as requiring, before the imposition of the death penalty, that a jury

> 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, 202 So. 3d at 57. This was a vast expansion from the holding in *Hurst v. Florida*, which focused solely on concerns over the imposition of a death sentence based on judicial rather than jury factfinding related to the aggravating factors. To explain this expansion, the Florida Supreme Court reasoned that the jury's "recommendation is tantamount to the jury's verdict in the sentencing phase of trial"

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[4] *See Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty); *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) (rejecting a claim that the constitution requires a burden of proof on whether or not mitigating circumstances outweigh aggravating circumstances, noting that such a question is "mostly a question of mercy"). *See also State v. Mason*, 108 N.E.3d 56, 64-65 (Ohio 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 fact-finding process subject to the Sixth Amendment."); *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.").

and under Florida law, jury verdicts are required to be unanimous. *Id.* at 54. Additionally, the Florida Supreme Court held that unanimity "serves th[e] narrowing function required by the Eighth Amendment"[5] to ensure that death is not "arbitrarily imposed, but . . . reserved only for defendants convicted of the most aggravated and least mitigated of murders." *Id.* at 60 (citing *Gregg v. Georgia*, 428 U.S. 153, 199 (1976); *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987)). Since the Florida Supreme Court's holding in *Hurst v. State* was a product of state law, and does not present a federal question, this Petition should be denied.

Petitioner was found guilty of burglary of a dwelling with a battery and sexual battery involving serious force. *Everett*, 893 So. 2d at 1280. Additionally, Petitioner was a convicted felon under a sentence of imprisonment at the time of the murder. *Id. See Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)) (prior convictions are "a narrow exception" to the Sixth Amendment requirement that defendants have a right to have a jury find facts which expose a defendant to a greater punishment). Thus, at least one aggravating factor was found by the jury to be proven beyond a reasonable doubt by virtue of the guilty verdict and another was exempted from this requirement by

[5] The Eighth Amendment requires states to "give narrow and precise definition to the aggravating factors that can result in a capital sentence" in order to limit the death penalty to a "narrow category of the most serious crimes" and to defendants who are "more deserving of execution." *Roper*, 543 U.S. at 568 (citing *Atkins*, 536 U.S. at 319). This Court has never held that the Eighth Amendment requires the jury's final recommendation in a capital case to be unanimous. *See, e.g., Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

virtue of the prior convictions. Based on these two factors in Petitioner's case, there was no *Hurst v. Florida* error.

Further, *Hurst v. Florida* is only retroactive to Petitioner based on an independent state ground. Petitioner may not ask this Court to enforce a retroactivity ruling based on state law. In *Asay*, the Florida Supreme Court held that any case in which the death sentence was final before June 24, 2002, the date *Ring* was decided, would not receive relief based on *Hurst v. Florida*. *Asay* , 210 So. 3d at 15; *Ring v. Arizona*, 536 U.S. 584 (2002). In making its decision, the Court recognized that its retroactivity test in *Witt* "provides *more expansive retroactivity standards* than those adopted in *Teague*." *Asay*, 210 So. 3d at 15 (citing *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005)) (emphasis in original); *Witt v. State*, 387 So. 2d 922 (Fla. 1980); *Teague v. Lane*, 489 U.S. 288 (1989). Subsequently, the Florida Supreme Court issued an opinion in which it granted retroactive application of *Hurst v. State*, under a state retroactivity analysis, to those cases that were decided post-*Ring*. *See Mosley*, 209 So. 3d at 1276 ("We conclude that under a standard *Witt* analysis, *Hurst* should be applied to Mosley and other defendants whose sentences became final after the United States Supreme Court issued its opinion in *Ring*."). This state law decision does not create a constitutional right to retroactive application of any decision of this Court.

This Court has held that, in general, a state court's retroactivity determination is a matter of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008) (allowing states to adopt a retroactivity test that is broader

than *Teague*). Petitioner cannot petition this Court to review a finding of harmless error based purely on a violation of state law. That the Florida Supreme Court held that *Hurst* was retroactive to his case does not mean that he can enforce that retroactivity ruling in federal court. When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. This Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). *See also Lambrix v. Sec'y, Dep't of Corr.*, 872 F.3d 1170, 1182 (11th Cir. 2017), *cert. denied, Lambrix v. Jones*, 138 S. Ct. 312 (2017) ("[n]o U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable").

The error complained of in the instant petition is the violation of the expanded sentencing requirements created in *Hurst v. State*, not the federal constitutional requirements set forth in *Hurst v. Florida*. Thus, any violation of that state holding in Petitioner's case would not be reviewed under federal law. No question of federal law has been presented for this Court's review.

Moreover, Petitioner's claim that the Florida Supreme Court used a *per se* test for harmlessness is meritless. In Petitioner's case, the Florida Supreme Court did not use a *per se* harmless error rule based only on the unanimous jury recommendation. Instead, Petitioner received an individualized review. The Court mentioned the

absence of any stricken aggravating factor or "other issue that would undermine the reliability of the unanimous recommendation" as a reason to find the *Hurst v. State* error harmless. *Everett*, 258 So. 3d at 1200 (Pariente, J., concuring). Additionally, the Court cites to *Davis*, which was the first case where *Hurst v. State* error was found to be harmless beyond a reasonable doubt. *Davis*, 207 So. 3d at 175.

In *Davis*, the Florida Supreme Court went into a detailed analysis of why the error was harmless, using the same concepts in reviewing harmlessness as they used in *Hurst v. State*. Instead of restating the entirity of their method in determining harmlessness in each and every case where there was a unanimous jury recommendation, including in Petitioner's case, the Court cites *Davis* and points out the similarities between each case and *Davis*. The Court concluded in Petitioner's case that, like in *Davis*, the error was harmless beyond a reasonable doubt. *Everett*, 258 So. 3d at 1200; *Davis*, 207 So. 3d at 175.

In *Davis*, the Court found the unanimous jury recommendation of death persuasive in analyzing what a rational jury would have done because even though the jury was not informed that their decision had to be unanimous, after considering the aggravation and mitigation in this case, the jury made a unanimous recommendation nonetheless. *Davis*, 207 So. 3d at 174-75. If a jury who was instructed that only a majority was necessary to recommend death made a

unanimous recommendation, certainly a jury instructed that unanimity was necessary would have been unanimous as well.[6]

> 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 informed that it was not required to recommend death unanimously, and despite the mitigation presented, the jury still unanimously recommended that Davis be sentenced to death. . . . The unanimous recommendations here are precisely what we determined in *Hurst*[*v. State*] to be constitutionally necessary to impose a sentence of death.

Id. at 175.

Continuing the analysis of whether the error was harmless in *Davis*, the Court found further support for the conlcusion that any error was harmless based on the egregious facts of the case and the evidence in support of the "*six* aggravating circumstances," which were "signifiant and essentially uncontroverted." *Davis*, 207 So. 3d at 174 (emphasis in original). These factors in combination led to the Court's conclusion that the error in *Davis* was harmless beyond a reasonable doubt.

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[6] Regarding the argument that "Florida juries lean toward mercy when confronted with binding sentencing responsibility," Amicus fails to acknowledge two recent cases which are in direct contradiction to its assertion. In *Deviney*, the original jury recommended death 8-4 after being instructed pre-*Hurst*. *Deviney v. State*, 213 So. 3d 794, 795 (2017). Deviney was granted a new penalty phase and the post-*Hurst* jury made a unanimous jury recommendation of death. *Deviney v. State*, case no. 2008-CF-012641, Duval County, Florida. Similarly, in *Bright*, the pre-*Hurst* jury recommended death 8-4. *State v. Bright*, 200 So. 3d 710, 720 (2016). Bright was granted a new penalty phase and the post-*Hurst* jury made a unanimous jury recommendation of death. *Bright v. State*, case no. 2008-CF-2887-A, Duval County, Florida. In both of these cases, the jury went from being barely over the majority required to being unanimous when instructed that unanimity was required.

Like in *Davis*, the jury instructions in Petitioner's case similarly required the jury to find that the aggravating factors were proven beyond a reasonable doubt and to find that sufficient aggravating circumstances outweighed the mitigating circumstances before considering recommending a death sentence. (Record at 510). Just as in *Davis*, even though the jury was not required to unanimously recommend death, the jury did so in Petitioner's case. Additionally, in Petitioner's case, there were egregious facts, three aggravating circumstances, none of which were stricken on appeal, and no errors were found on appeal in the trial court's determination of mitigation. *Everett*, 893 So. 2d at 1287-88. On direct appeal, the Court found that the conviction was supported by "competent, substantial evidence in this case" and found the sentence of death proportional[7] "[i]n light of the substantial aggravating circumstances and the lack of substantial mitigation." *Id.* at 1288.

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[7] In the wake of *Furman*, many states in redrafting their capital sentencing statutes added a statutory requirement to review whether a capital "sentence is disproportionate to that imposed in similar cases" to "avoid arbitrary and inconsistent results." *Pulley v. Harris*, 465 U.S. 37, 44 (1984); *Furman v. Georgia*, 408 U.S. 238 (1972). As this Court said, "[p]roportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required." *Pulley*, 465 U.S. at 50. Thus, the proportionality in Florida is a product of state law. *Yacob v. State*, 136 So. 3d 539, 546 (Fla. 2014) (citing *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973)); *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991). It serves as an additional check on arbitrariness to ensure the narrowing requirements established by Florida law comply with the Eighth Amendment and are, in practice, fully narrowing capital punishment only for defendants who, based on their crimes and aggravating circumstances, are "most deserving of execution." *Atkins*, 536 U.S. at 319.

After *Davis*, the Florida Supreme Court held *Hurst* error to be harmless beyond a reasonable doubt in approximately 15[8] cases where the jury unanimously recommended death, including in Petitioner's case. In each of these cases, including Petitioner's, each defendant received individualized review and the Court did not use a *per se* test for harmlessness. Looking at *Davis* and the cases that followed, it is clear that the Florida Supreme Court is not using jury unanimity as a *per se* test for harmlessness as Petitioner argues. Instead, a

> unanimous recommendation lays a foundation for us to conclude beyond a reasonable doubt that a rational jury would have unanimously found

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[8] *See King v. State*, 211 So. 3d 866, 892-93 (Fla. 2017) (considering "the unanimous jury recommendation, King's failure to challenge evidence presented in aggravation, as well as the overwhelming and uncontroverted evidence of the four aggravating circumstances and the comparatively weaker mitigating evidence that was challenged by the State"); *Kaczmar v. State*, 228 So. 3d 1, 7-9, 14 (Fla. 2017) (considering "extensive aggravating circumstances" of HAC and prior violent felony which "are among the weightiest of aggravators"); *Knight v. State*, 225 So. 3d 661, 682-83 (Fla. 2017) (considering "'egregious facts'" and "'weighty'" aggravators) (citations omitted); *Hall*, 212 So. 3dat 1035 (considering "evidence in support of the *four* aggravating circumstances" was "significant and essentially uncontroverted" and "[t]hree of the four aggravators were without and beyond dispute") (emphasis in original); *Truehill*, 211 So. 3d at 955-57, *cert. denied*, 138 S. Ct. 3 (2017) (considering that the appellant "has not contested any of the aggravating factors as improper" and a unanimous finding despite there being four statutory mitigating circumstances); *Jones v. State*, 212 So. 3d 321, 342-44 (Fla. 2017), *cert. denied, Jones v. Florida*, 138 S. Ct. 175 (2017) (considering that the evidence supporting the aggravating factors was substantial); *Middleton v. State*, 220 So. 3d 1152, 1184-85 (Fla. 2017) (considering "HAC and during the commission of a burglary aggravators" were supported by the record and "are among the most serious aggravating factors"); *Oliver*, 214 So. 3d at 617-18, *cert. denied*, 138 S. Ct. 3 (2017); *Morris*, 219 So. 3d at 46, *cert. denied*, 138 S. Ct. 452 (2017); *Tundidor*, 221 So. 3d at 607-08; *Cozzie*, 225 So. 3d at 733; *Bevel*, 221 So. 3d at 1177-78 (considering that "no aggravating factors have been struck"); *Philmore v. State*, 234 So. 3d 567, 568 (Fla. 2018) (considering the appellant's "confession and the aggravation in this case"); *Franklin v. State*, 236 So. 3d 989, 992-93 (Fla. 2018).

> that there were sufficient aggravators to outweigh the mitigating factors.

Hall, 212 So. 3d at 1034.

In fact, in its review, the Florida Supreme Court has reversed and remanded two post-*Ring* cases in which there were unanimous jury recommendations. *See Wood v. State*, 209 So. 3d 1217, 1226, 1238 (Fla. 2017) (vacating the sentence because "his death sentence is disproportionate when [CCP and avoid arrest] aggravating factors are struck"); *Bevel*, 221 So. 3d at 1182 (finding the *Hurst* error harmless for the murder where the jury unanimously recommended death, but vacating the death sentence due to ineffective assistance of counsel because "the unpresented mitigation evidence" undermines confidence in the result when "the jury's vote recommending death was dependent on one juror's vote"). If the Florida Supreme Court were merely affirming cases based on the unanimous verdict alone without reviewing the entire record as Petitioner argues, these two cases would have been affirmed.

Since the Florida Supreme Court's holding in *Hurst v. State* was a product of state law, the harmlessness of *Hurst v. State* error is a state question. *Hurst*, 202 So. 3d at 54. 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." *Chapman v. California*, 386 U.S. 18, 21 (1967).

In reviewing whether the error in *Hurst v. State* was harmless, the Florida Supreme Court reviewed whether there was "no reasonable possiblity that the error contributed to the sentence." *Hurst*, 202 So. 3d at 68 (citing *Zack v. State*, 753 So. 2d

9, 20 (Fla. 2000)); *see also State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986). Florida's harmless error test which was set forth in *DiGuilio* is derived from this Court's precedent in *Chapman* and *Hasting* but is a separate state test for harmlessness. *Id.* at 1134-35; *Chapman*, 386 U.S. at 24; *United States v. Hasting*, 461 U.S. 499, 511 (1983).

> [T]he 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 in [a] case.

Hurst, 202 So. 3d at 68. Further, "[w]here the jury has not been instructed to find an element of the offense, the test for harmless error asks whether it is clear beyond a reasonable doubt that a rational jury would have found the element of the offense." *Jones v. State*, 212 So. 3d 321, 344 (Fla. 2017) (citing *Neder v. United States*, 527 U.S. 1, 18 (1999)); *see also Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017) (proper consideration is "whether a properly instructed jury could have recommended death").

In using the state harmlessness test, the Florida Supreme Court is not analyzing harmlessness in a way that contravenes existing federal law. In fact, the Florida test for harmlessness is derived from and similar to the federal test. It is perhaps a more stringent test than would be applied in federal court as it appears to employ both *Chapman*'s effect on the verdict test and *Neder*'s rational jury test. This

strictness favors defendants as it allows for fewer findings of harmless error[9] than would occur just under the *Neder* test.

The defects addressed by the Florida Supreme Court in *Hurst v. State* are premised on a question of state law and procedure and have been analyzed under a state based harmless error rule. The Florida Supreme Court's analysis of these errors is not in contravention with federal law, this Court's precedent, or the constitution. In fact, harmlessness in light of the *Hurst v. State* factors is much more rigorous and difficult for the State to prove than the analysis of the *Hurst v. Florida* error. Indeed, as Justice Alito noted in his dissent regarding whether the error was harmless in *Hurst*: "[i]n light of this evidence, it defies belief to suggest that the jury would not have found the existence of either aggravating factor if its finding was binding." *Hurst*, 136 S. Ct. at 626 (Alito, J., dissenting). However, the Florida Supreme Court was not as "sanguine" after their analysis of the record. *Hurst*, 202 So. 3d at 68. Their uncertainty focused almost exclusively on the issue of unanimity and the effect that not instructing on unanimity had on the verdict. *Id.* This concern is much less apparent when the jury was unanimous in spite of being instructed that only a majority was required. Certainly, the instruction that only a majority was required

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[9] Of the post-*Ring* cases, there are approximately 34 cases with unanimous recommendations and approximately 153 cases with non-unanimous recommendations. The Florida Supreme Court has found the error to be harmful in all non-unanimous cases. *See Pagan v. State*, 235 So. 3d 317, 319 (Fla. 2018) (Lawson, J., dissenting) (finding *per se* reversible error in all non-unanimous cases is not the "proper harmless analysis").

for a recommendation of death did not affect the verdict if the jury was unanimous in its recommendation.

This Court would not require the Florida Supreme Court to test Petitioner's case for harmless error because there was no *Hurst v. Florida* error and because *Hurst* is not retroactive to Petitioner under federal law. The error defined in *Hurst v. State* is a product of state law which is not in contravention of federal law or this Court's precedent. The Florida Supreme Court's state based harmless error test is also not in contravention of federal law or this Court's precedent. The Florida Supreme Court has not employed a *per se* harmless error test to cases in which the jury unanimously recommended death. Petitioner received an individualized harmless error review. Thus, Petitioner raises no issue which is deserving of certiorari review and such review should be denied.

Hurst Error is Not Structural Error and Can Be Analyzed for Harmlessness.

Petitioner argues that *Hurst* error is not subject to a harmless error analysis in light of *Sullivan*. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Petitioner argues that the *Hurst* error is structural and resulted in no jury findings in Petitioner's case because the erroneous jury instructions impacted "all of the elements for a death sentence under Florida law." (Petition at 12-13). However, this Court remanded *Hurst* back to the Florida Supreme Court specifically to conduct a harmless error analysis. *Hurst*, 136 S. Ct. at 624 (citing *Neder*, 527 U.S. at 18-19). This certainly indicates that *Hurst* error can be reviewed for harmlessness. On remand, the Florida

Supreme Court also concluded that the error is capable of harmless error review. *Hurst*, 202 So. 3d at 68. Petitioner's claim lacks merit as both Courts agree that *Hurst* error can be tested for harmlessness.

Petitioner's claim also lacks merit because *Hurst* error is distinguishable from the error in *Sullivan*. Instead, *Hurst* error is comparable to the error in *Neder*, where this Court determined that a harmless error analysis was appropriate. Additionally, as discussed above, *Hurst* is only retroactive under state law, not federal law. The error as described in *Hurst v. State* is also based on an independent state ground. Even if Petitioner was correct that *Hurst v. State* error is structural, it would not apply retroactively to his case under federal law. Thus, Petitioner's claim lacks merit, is contrary to this Court's precedent, and is not appropriate for certiorari review.

In *Sullivan*, the jury was given an instruction which included a definition of reasonable doubt which had already been held unconstitutional. *Sullivan*, 508 U.S. at 277. "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, 306-10 (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 (emphasis omitted). Because of the seriousness of this error, this Court found the error to be structural and not subject to a harmless error analysis. *Id.*

Unlike *Sullivan*, in *Hurst v. Florida*, there was not an issue with the reasonable doubt instruction. Under Florida Law, the jury was instructed that the

aggravators must be proven beyond a reasonable doubt before they could be used to make a death recommendation. Fla. Std. J. Inst. (Crim.) 7.11; *see also Floyd v. State*, 497 So. 2d 1211, 1214-15 (Fla. 1986); *Zeigler v. State*, 580 So. 2d 127, 129 (Fla. 1991); *Finney v. State*, 660 So. 2d 674, 680 (Fla. 1995). As it related to the beyond a reasonable doubt standard for aggravators, the jury was properly instructed.

Instead, *Hurst* error is more comparable to the failure to instruct on an element of the offense, as occurred in *Neder*, rather than failure to instruct on the beyond a reasonable doubt standard in *Sullivan*. In *Neder*, this Court determined that a harmless error analysis can be applied to an erroneous jury instruction which omits an element, and that this is consistent with the holding in *Sullivan*. *Neder*, 527 U.S. at 11. The error in *Hurst v. Florida* was that the statute allowed "a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Hurst*, 136 S. Ct. at 624. "[A]ny 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." *Id.* at 621 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)). Thus, the error in *Hurst* is more comparable to the error in *Neder*.

Despite Petitioner's argument that because of the *Hurst* error, there is no verdict in his case, the "absence of a 'complete verdict' on every element of the offense establishes no more than that an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee." *Neder*, 527 U.S. at 12. It does not result in no jury findings at all as Petitioner argues. (Petition at 13). In *Neder*,

the "omitted element" was "supported by uncontroverted evidence" and it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 18. Certainly, if it was appropriate for the error in *Neder* to be tested for harmlessness, it is also appropriate to test *Hurst* error for harmlessness. In Petitioner's case, the Florida Supreme Court found that the *Hurst* error was harmless beyond a reasonable doubt. *Everett*, 258 So. 3d at 1200. This finding was proper and is not in contravention of this Court's precedent or federal law.

The Florida Supreme Court's harmless error analysis of the *Hurst v. State* error is also not in contravention of this Court's precedent or federal law. This Court has held that failure to instruct on jury unanimity can be analyzed for harmless error. *See Richardson v. United States*, 526 U.S. 813, 824 (1999).[10] Thus, the *Hurst v. State* error was also not structural and the Florida Supreme Court properly analyzed the error for harmlessness.

The Florida Supreme Court properly found that the error in Petitioner's case was harmless beyond a reasonable doubt. This finding was neither in contravention of this Court's precedent, nor in violation of federal law. Thus, certiorari review should be denied.

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[10] There is some argument between the Circuits on which harmless error test applies to *Richardson*, *Brecht* or *Chapman*. *Santana-Madera v. United States*, 260 F.3d 133, 140 (2d Cir. 2001) (This Court has not "definitively established the proper harmless error standard to apply when a constitutional error is being evaluated for the first time on collateral review."); *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). However, *Chapman* has not been declared an improper harmless test in the context of a failure to instruct a jury on an unanimity requirement.

Florida's Amended Death Penalty Statute is Also Not Retroactive Nor Does it Invalidate Any Prior Conviction.

Florida's death penalty statute, Fla. Stat. § 921.141, was amended after, and in comport with, the decisions in *Hurst v. Florida* and *Hurst v. State*. Neither *Hurst* nor the new statute create a new crime with new elements. The same conduct remains prohibited. Only the process by which the sentence is determined has been altered. No substantive change has occurred which makes *Hurst* retroactive under federal law. Thus, there is no basis for which certiorari review should be granted. Consequently, this Petition should be denied.

In general, there is a presumption against retroactive application of statutes absent an express statement of legislative intent. *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 195 (Fla. 2011). There is no express statement that the legislature intended that chapter 2017-1 be applied retroactively, and thus this presumption cannot be rebutted. *See also* Senate Bill Analysis and Fiscal Impact Statement, SB 280, Feb. 21, 2017, at 6-7 (noting that this Court's retroactive application to post-*Ring* decisions will "'significantly increase both the workload and associated costs of public defender offices for several years to come'"). Further,

> no U.S. Supreme Court decision holds that the failure of a state legislature to make revisions in a capital sentencing statute retroactively applicable to all of those who have been sentenced to death before the effective date of the new statute violates the Equal Protection Clause, the Due Process Clause, or the Eighth Amendment.

Lambrix, 872 F.3d at 1183.

Since the legislature did not express an intent for the statute to be retroactive, it is not retroactive to cases which were final prior to enactment of the new statute. Petitioner's judgment became final in 2005 and he has not received a new guilt or penalty phase since that time. Thus, the 2017 enactment of changes to the capital sentencing statute would not be applicable to Petitioner's case unless Petitioner were to receive a new guilt and/or penalty phase.

The changes to Florida's death penalty statute were made in the aftermath of *Hurst* and implement the changes from *Hurst*. The changes include requiring a unanimous jury vote for a recommendation of death instead of a majority vote, requiring specific findings from the jury regarding the existence and sufficiency of the aggravation and the weighing of aggravation against mitigation, and disallowing judicial override of a jury's recommendation of life. As discussed above, these are procedural changes, not substantive ones.

These changes to the sentencing procedure did not create a new offense as Petitioner argues. (Petition at 20-28). The class of persons who are death eligible and the range of conduct which causes those defendants to be death eligible did not change. The aggravating factors necessary to qualify a defendant as eligible for the death penalty were not changed. In fact, the specific aggravators used in Petitioner's case had been in place since at least 1987. The only changes made were the requirement of specific jury findings of unanimity for the existence and sufficiency of the aggravating factors and that they outweigh mitigation, and for a death recommendation.

Petitioner also argues that three of the elements identified in *Hurst v. State* were not found proven beyond a reasonable doubt in his case, "sufficiency of the aggravators and whether they outweigh the mitigators." (Petition at 27). However, the only requirements of proof beyond a reasonable doubt are the elements for a finding of guilt for first-degree murder and that the aggravating factors were proven. Fla. Stat. § 921.141(2)(a) (2017) ("the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor . . ."). The standard of proof for guilt has long been proof beyond a reasonable doubt, and certainly was at Petitioner's trial. *See Miles v. United States*, 103 U.S. 304, 312 (1880). Similarly, the standard of proof for proving aggravating factors was beyond a reasonable doubt at Petitioner's trial. *See Floyd*, 497 So. 2d at 1214-15; *Zeigler*, 580 So. 2d at 129; *Finney*, 660 So. 2d at 680. Thus, all elements which required findings beyond a reasonable doubt were in fact found beyond a reasonable doubt at Petitioner's trial.

Similarly, the requirement that aggravators be sufficient and outweigh mitigation has long been a requirement of Florida law. "The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances." *Parker v. Dugger*, 498 U.S. 308, 313 (1991); *citing* Fla. Stat. § 921.141(3) (1985). The 2017 change to the statute merely requires that the jury make these findings unanimously in order for the defendant to be eligible to receive a death sentence.

As related to the finding that aggravation is sufficient, *Hurst* did not ascribe a

standard of proof. *Hurst*, 202 So. 3d at 54. The Eighth Amendment requires that "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Roper*, 543 U.S. at 568 (citation omitted). The State of Florida has a list of 16 aggravating factors enumerated in the statute. Fla. Stat. § 921.141(6). These aggravating factors have been deemed sufficient to impose the death penalty by virtue of their inclusion in the statute. Any one of these aggravating factors is sufficient to cause a defendant to be eligible to receive a sentence of death. Thus, if one of these enumerated aggravating factors has been proven beyond a reasonable doubt, any Eighth Amendment concerns have been satisfied. However, the weight that a juror gives to the aggravator based on the evidence is not something that can be defined by a beyond-a-reasonable-doubt standard.

As related to the finding that the aggravation outweighs the mitigation, *Hurst* did not ascribe a standard of proof. *Hurst*, 202 So. 3d at 54. This Court has specifically held that the beyond-a-reasonable-doubt standard for finding that the aggravation outweighs mitigation is not required under federal law. *See Kansas v. Marsh*, 548 U.S. 163, 164 (2006) ("Weighing is not an end, but a means to reaching a decision."); *Tuilaepa v. California*, 512 U.S. 967, 979 (1994) ("A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing 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 the defendants must deserve mercy beyond a reasonable

doubt."). The weight that a juror gives to the aggravation as compared to the weight given to mitigation is also not something that can be defined by a beyond-a-reasonable-doubt standard.

Additionally, this Court "has not ruled on whether unanimity is required" in capital cases. *Hurst*, 202 So. 3d at 59; *see also Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). As this Court noted, "holding that, *because [a State]* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive." *Summerlin*, 542 U.S. at 354 (emphasis in original). Thus, *Hurst v. State*'s requirement that the jury make specific factual findings before the imposition of the death penalty is procedural.

In support of his argument that *Hurst* should be retroactive under the federal *Teague* standard as a substantive change because it "addressed the proof-beyond-a-reasonable-doubt standard," Petitioner relies upon *In re Winship* and *Fiore*. (Petition at 21-23); *In re Winship*, 397 U.S. 358 (1970); *Fiore v. White*, 531 U.S. 225 (2001). However, *Hurst* is distinguishable from these cases. *In re Winship* required that the proof-beyond-a-reasonable-doubt standard be afforded to juveniles "during the adjudicatory stage of a delinquency proceeding. . . ." *In re Winship*, 397 U.S. at 368. *Hurst* did not alter the burden of proof during the adjudication phase in finding a defendant guilty of first-degree murder. In *Fiore*, this Court held that the Federal Due Process Clause was violated when an individual was convicted of a crime despite

his conduct not being prohibited by the criminal statute, and thus every element of the crime had not been proven beyond a reasonable doubt. *Fiore*, 531 U.S. at 228. As was true in *Hurst* and here, Petitioner's conduct is clearly in violation of the criminal statute and by virtue of his conviction for first-degree murder, every element of the crime was proven beyond a reasonable doubt. As discussed previously, *Hurst* did not alter the burden of proof. Thus, neither *Fiore* nor *In re Winship* is applicable to the discussion of the retroactive application of *Hurst*.

No substantive change has occurred which makes Fla. Stat. § 921.141 or *Hurst* retroactive under federal law. Thus, there is no basis for which certiorari review should be granted. Consequently, this Petition should be denied.

Conclusion

Respondent respectfully submits that the Petition for a writ of certiorari should be denied.

Respectfully submitted,
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