CASE NO. 18-8664

IN THE UNITED STATES SUPREME COURT

October 2018, Term

RODNEY LOWE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

I - Whether certiorari review should be denied because (1) the Florida Supreme Court's decision finding any *Hurst v. Florida* and *Hurst v. State* error harmless beyond a reasonable doubt comports with *Chapman v. California*; (2) does not violate *Caldwell v. Mississippi* or the Eighth Amendment; (3) does not violate the Sixth Amendment; and (4) does not conflict with any decision of this Court or involve an important, unsettled question of federal law?

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The decision of which Petitioner seeks discretionary review is reported as *Lowe v. State*, 259 So.3d 23 (Fla. 2018).

JURISDICTION

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

CONSTITUTIONAL PROVISIONS INVOLVED

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

STATEMENT OF THE CASE AND FACTS

This capital case is before this Court upon the Florida Supreme Court's affirmance of Lowe's capital re-sentencing wherein he challenged his death sentence on various grounds in addition to a violation of *Hurst v. Florida*, 136 S.Ct 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). The Florida Supreme Court determined that any *Hurst* error was harmless beyond a reasonable doubt. This Petition for Writ of Certiorari followed.

On July 25, 1990, Lowe was indicted for the July 3, 1990 first-degree murder and attempted robbery of Donna Burnell ("Burnell") as she worked at the Nu-Pack convenience store. He was convicted as charged on April 12, 1991, and on May 1, 1991, Lowe was sentenced to death for the murder and was given 15 years for the attempted robbery. The Florida Supreme Court affirmed. *Lowe v. State* (*Lowe I*), 650 So.2d 969 (Fla. 1994). On October 2, 1995, certiorari was denied. *Lowe v. Florida*, 516 U.S. 887 (1995).

In March 1997, Lowe filed a motion for postconviction relief with multiple amendments/supplements. After days of evidentiary hearings relief was denied, but upon rehearing and claims of newly discovered evidence, a new penalty phase was ordered. Both parties appealed. The Florida Supreme Court affirmed the denial of postconviction relief with respect to the guilt phase and agreed a new penalty phase was required. *Lowe v. State* (*Lowe II*), 2 So.3d 21, 29 (Fla. 2008).

The new penalty phase commenced on September 12, 2011 and two days later, the jury unanimously recommended death. Following the *Spencer v. State*, 615 So.2d

688 (Fla. 1993) hearing and the filing of sentencing memoranda,[1] Lowe was sentenced to death on a finding of five aggravators merged to four, outweighed one statutory mitigator and ten non-statutory mitigators. Lowe appealed and relevant here, the Florida Supreme Court rejected the *Hurst* claim and affirmed the new capital sentence. *Lowe v. State* (*Lowe III*), 259 So.3d 23 (Fla. 2018), *reh'g denied*, SC12-263, 2018 WL 6807250 (Fla. Dec. 27, 2018).

On direct appeal of his original conviction, the Florida Supreme Court found:

> The record reveals the following facts. On the morning of July 3, 1990, Donna Burnell was working as a clerk at the Nu–Pack convenience store in Indian River County when a would-be robber shot her three times with a .32 caliber handgun. Ms. Burnell suffered gunshot wounds to the face, head, and chest and died on the way to the hospital. The killer fled the scene without taking any money from the cash drawer.
>
> During the week following the shooting, investigators received information linking the defendant, Rodney Lowe, to the crime. Lowe was questioned by investigators at the police station and, after speaking to his girlfriend, gave a statement that implicated him in the murder. Following this statement, Lowe was arrested and indicted for first-degree murder and attempted robbery.
>
> At trial, the State presented witnesses who testified that, among other things, Lowe's fingerprint had been found at the scene of the crime, his car was seen leaving the parking lot of the Nu–Pack immediately after the shooting, his gun had been used in the shooting, his time card showed that he was clocked-out from his place of employment at the time of the murder, and Lowe had confessed to a close friend on the day of the shooting. The State also presented, over defense objection, the statement Lowe gave to the

[1] In Lowe's sentencing memorandum, he conceded proof of: (1) prior violent felony; (2) during the course of a felony, and (3) on community control aggravators, but contested the weight to be assigned.

police on the day of his arrest. Lowe advanced no witnesses or other evidence in his defense. After closing arguments, the jury returned a verdict finding Lowe guilty of first-degree murder and attempted armed robbery with a firearm as charged.

In the penalty phase, the State introduced a certified copy of Lowe's previous conviction for robbery. Lowe presented testimony in mitigation from a principal at the correctional institution school who testified that Lowe earned his GED and did a good job working as a teacher's aide in her class; that Lowe helped other inmates with their education; that he adapted well to the structured environment of the prison; and that Lowe had not been in any serious trouble during his incarceration pending trial. A pastor of Bible studies at the correctional institution testified that he met Lowe in prison during his previous incarceration and had recommended him to stay at a halfway house, where he stayed for five months after he was released from prison; that Lowe handled responsibility well, was friendly, tried to do his best, and got a job with a lumber company; he concluded that Lowe seemed to have fallen in with a bad crowd after he left the halfway house. Lowe's employer at the lumber company testified that Lowe was an excellent employee, hard-working and reliable, and was liked by the other employees; further, that Lowe gained more responsibility over time and eventually was in charge of the yard when the foreman was not there. Other employees testified that Lowe was a good worker, reliable, and friendly. Lowe's aunt testified concerning his childhood and the fact that his father converted to the Jehovah's Witness faith when Lowe was a teenager. This, in her opinion, caused problems because the children rebelled. She explained that because of this Lowe was unhappy as a teenager and got into trouble as a teenager more serious than normal. Lowe's father was called by the State in rebuttal and explained that the aunt visited only twice a year; he agreed that he was a strict disciplinarian, but that he did not believe his religion caused his son to commit these acts. He stated that he would never speak to his son again. At the conclusion of the penalty phase, the jury, by a nine-to-three vote, recommended the imposition of the death penalty.

> The judge followed the jury's recommendation and imposed the death penalty, finding two aggravating circumstances, specifically: (1) the defendant was previously convicted of a felony involving the use or threat of violence to the person; and (2) the capital felony was committed while the defendant was engaged in or was an accomplice in the attempt to commit any robbery. In imposing the death penalty, the trial judge expressly found the mitigating circumstances did not outweigh the aggravating factors. The trial judge also sentenced Lowe to fifteen years' imprisonment for the attempted robbery conviction.

Lowe I, 650 So.2d at 971–72.

As noted above, Lowe was granted a new trial following his collateral relief litigation. *Lowe II*, 2 So.3d at 29. During the re-sentencing, the State re-established that on June 2, 1990, Dwayne Blackmon[2] ("Blackmon") gave Lowe a .32 caliber gun for his birthday. Lowe was having financial difficulties so he planned a robbery of the Nu-Pack store with Blackmon and Lorenzo Sailor ("Sailor"). On June 29, 1990, Lowe and Blackmon practiced shooting at trash cans in a Wabasso park and afterwards they, along with Sailor, cased the Nu-Pak. That day they aborted the robbery when Lowe, having gone inside the store with a loaded gun, saw two people inside. Blackmon testified there had also been two girls and a boy in the parking lot.

According to Blackmon, the threesome returned to the Nu-Pak the next day, June 30, 1990. This time Lowe and Sailor got out, but when they were about to enter, a car entered the lot causing them again to abort. Blackmon and Lowe did not discuss robbing the store after the second attempt.

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[2] Blackmon died during Lowe's postconviction litigation and his taped prior testimony was played.

On July 3, 1990, Blackmon was home in bed sick with swollen tonsils. Vickie Blackmon Tomlin ("Vickie"), Blackmon's wife at the time, was in bed with him when Patricia White Shegog ("Patricia"), Lowe's girlfriend at the time, arrived. After Vickie left with Patricia, Blackmon dressed so he could find Vickie and give her money. While driving, he saw Vickie and Patricia had been stopped by the police, so Blackmon proceeded to Lowe's home. Later, Vickie and Patricia arrived being driven by Lowe in a white car.

Patricia lived with Lowe in June-July 1990 during which time he was having financial difficulties and possessed a .32 caliber revolver. Patricia testified that on the evening of July 2, 1990, Lowe gave her the gun, and at Lowe's direction, put it under the front seat of their two-door white Mercury Topaz. According to Patricia, on July 3, 1990, Lowe took their Mercury Topaz to work wearing his Gator Lumber work clothes, brown pants, tan shirt, and a baseball cap. Later, that morning, Lowe returned home between 10:00 and 11:00 AM to give her the car and she drove him back to work before going to get Vickie at Blackmon's home. When Patricia arrived, Blackmon was in bed with his head under the covers complaining he was sick; she recognized his voice when they spoke. Shortly thereafter, Patricia and Vickie left.

Vickie testified that between 10:30 and 11:00 AM, Patricia awakened her. While they had planned to go shopping, she had overslept and was still in bed with Blackmon. He was very sick, and his tonsils were swollen. Blackmon was 6' 4," 280 pounds and would have awakened her had he arisen earlier. While driving together that morning, Patricia and Vickie were stopped by the police and told their car fit the

description of a car seen leaving the scene of a crime. Patricia told the officer the car had been with Lowe that morning and worried the officer might find the gun she thought was still under the front seat. Having been ticketed for a suspended license, Patricia returned to Blackmon's home to have "Uncle James" drive her to Gator Lumber. Lowe then drove Patricia and Uncle James home and returned to work. Lowe told Patricia he had taken the gun from the car the night before.

Vickie confirmed that she and Patricia were stopped by the police that morning after which they had "Uncle James" drive them to Gator Lumber and Lowe took them home. Sometime after the homicide, Patricia gave Vickie a gun wrapped in paper toweling printed with blue ducks. Vickie confirmed the .32 was the one she received and gave to Blackmon.

Blackmon testified that he and Lowe spoke on July 3rd near 4:30 PM and that Lowe confessed he had robbed the Nu-Pack, but did not get any money. Lowe admitted he shot the clerk three times, twice in the head and once in the chest. Lowe said he shot the register, but it would not open, and that there had been a little boy in the store.

After Blackmon received the .32 from Lowe through Vickie, he turned it over to the police and reported the incident. The forensics testimony established that the projectiles from Burnell's body came from Lowe's gun. She had been shot in the chest from less than a foot away. The projectile fired at the register was too damaged for an accurate comparison, but it had similar class characteristics as Lowe's .32.

Lowe left work at Gator Lumber at 9:58 AM and clocked back in at 10:34 AM

on July 3rd. That morning he was driving his white Topaz. The last sale at the Nu-Pack that morning was at 10:07 AM and a 911 call was placed by Steven Luedtke ("Luedtke") at 10:17 AM. No money was obtained from the register. When Luedtke arrived at the store, a white car, a Ford Taurus or similar model, was parked with no one inside. He averred that Lowe's Mercury looked like the car. As Luedtke approached the front door, a black male,[3] wearing a ball cap exited and walked quickly toward the driver's door of the white car. The man was 5'8"-5'10" and weighed 150 to 160 pounds. The man was tall and thin, but shorter than Luedtke who is 6'2," and wore light colored clothing, (tan-light brown); the pants were lighter than the shirt, and the collared shirt was buttoned. Luedtke said the man wore glasses, and had a mustache and scraggly facial hair, but not a full beard.

Once Luedtke entered the Nu-Pack, he heard a child crying and as he approached the counter, he saw Burnell on the floor with the child kneeling by her. Burnell was "sort of" non-responsive; she was shaking with her eyes rolled back in her head. He tried to comfort her as he called 911. He noted that the white car had left the lot. Luedtke assisted in making a composite drawing. Approximately a week later, Luedtke did a live line-up, but was unable to pick out Lowe.

The forensic investigation revealed there were no signs of a struggle in the store. A sweating Cherry 7-UP can was on the lottery table and a wrapped hamburger was in the microwave. Two of Lowe's prints were on the wrapper. Other than the front door, all the Nu-Pack doors were locked.

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[3] Lowe had a mustache in June-July 1990.

Burnell had been shot through the heart, above the left eye and through the top of her head. The muzzle was close to her face when fired. The gunshot wound to the top of her head was fired "more or less straight on" and from close range, but not a contact wound.

Lowe admitted to the police that he knew Burnell from another store, but did not know she worked at Nu-Pack. He admitted he left work twice on July 3rd; once at lunch time and once when Patricia called him. When speaking to the police after he had talked to Patricia, Lowe admitted being at the Nu-Pack with Blackmon and Sailor, but claimed he did not enter the store. According to Lowe, he was driving the white Topaz; Sailor had the loaded .32 and Blackmon a .38. Sailor entered the store and Blackmon stayed outside. Lowe stated that no money was obtained and that Sailor told him he exchanged words with Burnell who was "messin' with her baby." After looking at Sailor, Burnell turned back to the child, and "Sailor" approached and shot Burnell. Next, he tried to open the register, hitting and shooting it, but it would not open. Lowe admitted he saw someone drive into the Nu-Pak as they were leaving. After the shooting, the empty casings were thrown along the road. The purpose of the robbery was to get rent money for Lowe.

Retired Detective Green reported that in July 1990, Blackmon was approximately 6'1"-6'2," 240 to 260 pounds; Lowe was 5'6" or 5'7" and noticeably shorter than Blackmon; Sailor was about 5,' 120 pounds and noticeably shorter than Lowe. Investigator Kerby testified that on the day of his arrest, Lowe had a full mustache.

The prior violent felony aggravator was based on the 1987 burglary and robbery of Thomas Crosby ("Crosby") who explained that as he drove his van into his driveway, he was attacked from behind by someone who had been hiding in the van. Lowe grabbed him around the neck and put a sharp object against his neck. Crosby was told not to move or turn around and to put his keys and wallet on the dash, as Lowe said he did not want to hurt him. After complying, Lowe told Crosby to exit the van. When Crosby got out, Lowe fled in the van only to be found and pursued by the police. Lowe was arrested after crashing the van. Probation Officer, Richard Ambrum, testified that on July 3, 1990, Lowe was on community control for the 1987 felony conviction and had he known Lowe was in possession of guns and committing other offenses, he would have been violated and faced jail time.

Lowe's mitigation case entailed testimony of correction officers, a jail chaplain, family members, witnesses to Blackmon's alleged admissions, and a mental health expert. Corrections officers reported Lowe's good behavior in jail/prison; he was a model inmate with minimal disciplinary reports. In jail, Lowe attended religious services with Chaplin Resinella and counseled other inmates. Warden McAndrew said Lowe would do well in an open prison population and not be a danger to others.

Lowe's mother, Sherri Lowe ("Sherri") testified that both she and her now deceased husband, Charlie Lowe ("Charlie") were retired Kennedy Space Center employees. Lowe grew up in "humble accommodations" which were well maintained. Charlie was a hard worker responsible to his family and did many things with his family. He was strict with his family. Discipline included talking, counseling,

revoking privileges, and corporal punishment involving the use of a hand or belt. Sherri described their family as average, who would do things together, many involving their church.

Charlie had a drinking problem before he joined the Jehovah's Witnesses. When Lowe was 12-years old, Charlie and Sherri separated for about six weeks before reconciling. After joining the church, Charlie made positive changes in his life. Together they taught their children bible studies.

Up to middle school age, Lowe was a very quiet/calm child who was not a discipline problem. He did his chores and was well behaved. When his younger sister was born, Lowe helped his mother. However, when Lowe turned 15 or 16-years old, things changed; he rebelled over his restrictive life. When he was 17, he displayed defiant behavior and would skip school and miss curfews. In his teens, Lowe was arrested and sent to a Department of Corrections ("DOC") juvenile program. Upon release, he lived at home and his parents tried to get him on the right path. His parents remained supportive during his criminal cases and after the murder, Lowe and his family remained in contact and encouraged each other. Sherri loves her son.

Lowe's sister, Toni, seven or eight years his junior, spoke of how her brother was there for her and how he helped her with homework and chores. They had a good relationship. Even after his incarceration, Lowe maintained contact with Toni and counseled her. Lowe offered to help pay for her schooling and sent her cards and gifts. Toni loves her brother and described him as very caring and wanting the best for her; Lowe continues to encourage her.

Dr. Riebsame, a psychologist, testified Lowe did not have any particular criminal activity before 15-years old; he did well in school and is of average intelligence. Problems started in his mid-teens in response to what was going on in the household. Lowe ran from his father's discipline and spent nights in abandoned homes or in the woods. Lowe's initial criminal episodes were handled through the juvenile system, however, as he continued to get into trouble he was sent to Doshier School of Juvenile Justice for several months. After the 1987 carjacking, he was sentenced as an adult youthful offender followed by community control. According to Dr. Riebsame, at 17, Lowe was homeless, shunned by his family and church.

The 1990-91 psychological testing showed Lowe was of average intelligence with no brain impairment. Dr. Riebsame's testing showed Lowe had no severe mental disorders and Lowe denied hallucinations/delusions. The doctor offered that Lowe is not mentally ill, there is no evidence of psychosis, periods of insanity, or brain damage, and no substance abuse issues. Lowe was found to have a depressive disorder, common for inmates, but no major personality disorder.

Dr. Riebsame testified that he spoke to Lowe and his mother, aunt, brother and sister about Charlie's use of alcohol. All except Lowe's mother referenced Charlie's "heavy alcohol use," while Sherri minimized it. Charlie stopped using alcohol when Lowe was 12. Corporal punishment was employed; Charlie would use his hand, extension cords, broom stick, or paddle to the boys' calves, thighs, and buttocks. However, Dr. Riebsame was not asserting the punishment was abusive; there were no beatings and he was not finding a cause/effect to the homicide. Also,

Dr. Riebsame assessed Lowe for future dangerousness. It was the doctor's opinion Lowe would not be dangerous in the future and offered there is less danger as Lowe will continue to be incarcerated.

Inmate Lisa Miller ("Miller") had been convicted of 12 felonies and two crimes involving dishonesty. She testified that at 14-years old, she dated Blackmon's cousin, Benjamin Carter ("Carter"). At a gathering a few months after the murder, Miller heard Blackmon arguing with Vickie and tell her "I killed one b***ch, I'll do it again" after which Blackmon told Carter some details of the Nu-Pack shooting. Miller stated Blackmon told Carter that Lowe, Lorenzo and Blackmon went into the Nu-Pack and while Lowe was getting a soda from the cooler, Blackmon shot the clerk when she hesitated. Lowe dropped the can and fled. Miller claimed she reported this to the police over the years.

Carter, also an inmate convicted of 11 felonies, noted in 1990, he had a good relationship with Blackmon and knew Lowe and Sailor. It was Carter's testimony that Blackmon never gave any details of the Nu-Pack homicide. When Blackmon spoke of killing a woman, he was speaking in anger; this Blackmon did five or six times. The first time Blackmon spoke of killing was in 1992-93 when he was threatening Miller. Blackmon was reported to have said "you know I killed the b***ch," "you all don't f*** with me" or similar words. Carter does not know if Blackmon was being truthful and on occasion Blackmon would say Sailor killed the victim, but when Blackmon, a bully, wanted to be intimidating, he took credit.

In rebuttal, Police Chief Phil Williams testified that no one ever gave him

information indicating Blackmon was the shooter and received no calls from anyone claiming to be Miller. Officer Grimmich stated that at no time between 1990 and 2003 did Miller report Blackmon shot Burnell. Investigator Kerby knew Carter and testified the police had no suspect for Burnell's homicide until they spoke to Carter. Lowe's name had not come up before they received a call from Detective Render on July 8th about Carter's information and they spoke to Carter personally on July 9th. Carter said he overheard a conversation between his cousin Blackmon and Lowe where Lowe admitted he had tried to rob the Nu-Pak and had killed the clerk. Kerby confirmed with Blackmon and talked with Lowe thereafter. Carter took Kerby and Green to Wabasso Park and showed them where Blackmon and Lowe practiced shooting. The police collected casings and projectiles. Blackmon gave the police the murder weapon he received from Lowe.

Following the close of evidence, the jury was instructed in part that:

> The State and the Defendant have presented evidence relative to the nature of the crime, and the character, background or life of the Defendant. It is now your duty to advise the Court as to the punishment that should be imposed upon the Defendant for the crime of first degree murder.
>
> You must follow the law that will now be given to you in rendering an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, or whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist.
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> ***
>
> In this case as the trial judge that responsibility will fall on

me, however, the law requires that you render an advisory sentence as to which punishment should be imposed, life imprisonment without the possibility of parole for a period of twenty-five years, or the death penalty.

Although the recommendation of the jury as to the penalty is advisory in nature, it is not binding. The jury recommendation must be given great (sic) and deference by the court in determining which punishment to impose.

***

An aggravating circumstance must be proven beyond a reasonable doubt before being considered by you in arriving at your recommendation.

In order to consider the death penalty as a possible penalty, you must determine that at least one *** aggravating circumstance has been proven.

The State has the burden to prove each aggravating circumstance beyond a reasonable doubt.

***

If you have a reasonable doubt as to the existence of an aggravating circumstance, you should find that it does not exist.

However, if you have no reasonable doubt, you should find that the aggravating (sic) does exist and give it whatever weight you determine it should receive.

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

***

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole for twenty-five years.

Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, *** it will then be your duty to determine whether the mitigating circumstances outweigh the aggravating circumstances that you find do exist.

A mitigating circumstance is not limited to the facts surrounding the crime. It can (be) anything***

*** A mitigating circumstance need only be proven by the greater weight of the evidence ****

If you term (sic) that by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence to be imposed.

***

If one or more aggravating circumstances are established *** you should consider all the evidence tending to establish one or more mitigating [ ] circumstances, and give that evidence such weight that you determine it should receive in reaching your conclusion as to the sentence that should be imposed.

***

If after weighing the aggravating and mitigating circumstances you determine that at least one aggravating circumstance is found to exist, and the mitigating circumstances do not outweigh the aggravating circumstances, or the absence of mitigating factors but the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole for twenty-five years.

Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death.

If on the other hand *** you determine that no aggravating

> circumstances are found to exist, or that the mitigating circumstances outweigh the aggravating circumstances, or in the absence of mitigating factors but the aggravating factors alone are not sufficient, you must recommend the imposition of a sentence of life imprisonment without the possibility of parole for a period of twenty-five years, rather than a sentence of death.
>
> ***
>
> In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. The fact that the jury can recommend a sentence of life imprisonment without the possibility of parole for twenty-five years, or death in this case on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings****

Following deliberations, the jury rendered a unanimous recommendation for death. In Lowe's sentencing memorandum, he conceded proof of the aggravators of: (1) prior violent felony; (2) during the course of a felony, and (3) on community control. The trial court followed the jury's unanimous recommendation and determined the aggravation was sufficient to support a death sentence and outweighed the mitigation. Lowe was sentenced to death[4] for the first-degree murder of Burnell.

On direct appeal of the re-sentencing, Lowe challenged his death sentence; and after *Hurst v. Florida*, 136 S.Ct. 616 (2016) issued, he was permitted to supplement

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[4] The court found aggravators: (1) under sentence of imprisonment/on community control (great weight ("wt"); (2) prior violent felony (great wt); (3A) felony murder (great wt) merged with (3B) pecuniary gain; and (4) avoid arrest (great wt); the statutory age mitigator (little wt); and non-statutory mitigators: (1) good behavior while in confinement (moderate wt); (2) family relationships (little wt); (3) creative ability no wt); (4) maturity (little wt); (5) religious faith (little wt); (6) work ethic (little wt); (7) extra-curricular sporting activities (no wt); (8) Lowe is emotionally supportive of his sister (no wt); (9) low risk of future danger (little wt); and (10) good courtroom behavior (little wt).

his argument. The Florida Supreme Court rejected the challenge determining any *Hurst* error in the case was harmless beyond a reasonable doubt stating:

> XV. *Hurst v. Florida*
>
> Lowe relies on *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), to argue that the trial court erred in denying his requests for special verdict forms and jury instructions to separately and unanimously find each aggravator beyond a reasonable doubt. While Lowe's appeal was pending, the United States Supreme Court issued its decision in *Hurst v. Florida*, and on remand we issued our decision in Hurst. In the wake of *Hurst v. Florida* and *Hurst*, we granted supplemental briefing to address the impact of those decisions on Lowe's sentence. In *Davis v. State*, 207 So.3d 142, 175 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2218, 198 L.Ed.2d 663 (2017), this Court 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[ ]." Here, the jury was informed that before it could consider the death penalty, it must first determine that at least one aggravating circumstance has been proven beyond a reasonable doubt. Also, as in *Davis*, the jury was informed "that it needed to determine whether sufficient aggravators existed and whether the aggravation outweighed the mitigation before it could recommend a sentence of death." *Id.* at 174. Among other things, the jury was also informed that, regardless of its findings, it was neither compelled nor required to recommend a sentence of death. Despite the mitigation presented and the fact that the jury was properly informed that it may consider mitigating circumstances proven by the greater weight of the evidence, the jury unanimously recommended that Lowe be sentenced to death. "Th[is] recommendation[ ] allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." *Id*

> This Court has consistently relied on *Davis* to deny *Hurst* relief to defendants who have received a unanimous jury recommendation of death. *See, e.g., Cozzie v. State*, 225 So.3d 717, 733 (Fla. 2017), cert. denied, —— U.S. ——, 138 S.Ct. 1131, 200 L.Ed.2d 729 (2018); *Morris v. State*, 219 So.3d 33, 46 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 452, 199 L.Ed.2d 334 (2017); *Tundidor v. State*, 221 So.3d 587, 607-08 (Fla. 2017), *cert. denied*, —— U.S. ——, 138 S.Ct. 829, 200 L.Ed.2d 326 (2018); *Oliver v. State*, 214 So.3d 606, 617-18 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 3, 199 L.Ed.2d 272 (2017); *Truehill v. State*, 211 So.3d 930, 956-57 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 3, 199 L.Ed.2d 272 (2017). Lowe's arguments do not compel departing from our precedent. Because the *Hurst* error in Lowe's penalty phase was harmless beyond a reasonable doubt, he is not entitled to a new penalty phase.

Lowe III, 259 So. 3d at 64–65 (Fla. 2018). Lowe seeks certiorari review of that decision.

REASONS FOR DENYING THE WRIT

ISSUE I

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE (1) THE FLORIDA SUPREME COURT'S DECISION FINDING ANY *HURST V. FLORIDA* AND *HURST V. STATE* ERROR HARMLESS BEYOND A REASONABLE DOUBT COMPORTS WITH *CHAPMAN V. CALIFORNIA*; (2) DOES NOT VIOLATE *CALDWELL V. MISSISSIPPI* OR THE EIGHTH AMENDMENT; (3) DOES NOT VIOLATE THE SIXTH AMENDMENT; AND (4) DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR INVOLVE AN IMPORTANT, UNSETTLED QUESTION OF LAW. (RESTATED)

It is Lowe's position that the Florida Supreme Court failed to conduct a proper individualized harmless error analysis of his *Hurst* claim under *Chapman v. California*, 386 U.S. 18 (1967), but instead conducted one which was "automatic and mechanical" by affirming solely on the fact that the jury had rendered a unanimous decision recommending the death penalty. Continuing, Lowe maintains that the harmless error analysis applied is unconstitutional under *Caldwell v. Mississippi*, 472 U.S. 320 (1985) as it relies upon an advisory jury recommendation where the jury was instructed the judge would make the final capital sentencing decision. As will be shown below, nothing about the process employed by the Florida Supreme Court in rejecting Lowe's *Hurst* claim is inconsistent with the Constitution. Furthermore, the Florida Supreme Court's decision does not conflict with a decision of this Court, another federal circuit court, or state supreme court. Lowe has not provided a "compelling" reason for this Court to review his case. Certiorari should be denied.

This Court has recognized that cases which have not developed conflicts

between federal or state courts or presented important, unsettled questions of federal law usually do not deserve certiorari review. *Rockford Life Insurance Co. v. Illinois Department of Revenue,* 482 U.S. 182, 184, n. 3 (1987). The law is well-settled that this Court does not grant certiorari for the purpose of reviewing evidence and/or discussing specific facts. *United States v. Johnston*, 268 U.S. 220 (1925) (denying certiorari to review evidence or discuss specific facts). Further, this Court has rejected requests to reassess or re-weigh factual disputes. *Page v. Arkansas Natural Gas Corp.*, 286 U.S. 269 (1932) (rejecting request to review fact questions); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1924) (same). Also, this Court does not have jurisdiction to review the application of the harmless-error rule where it "involves only errors of state procedure or state law." *Chapman v. California*, 386 U.S. 18, 21 (1967).

I. *The Application Of Florida's Harmless Error Rule In This Case Is Purely a Matter of State Law.*

The Florida Supreme Court applied Florida's harmless-error rule to a purely state law matter—the "findings" the Florida Supreme Court grafted onto this Court's *Hurst v. Florida* ruling as a matter of state constitutional law. As will be shown, Lowe's death sentence did not violate the Sixth Amendment at all given his prior and contemporaneous felony convictions. As such, a harmless-error analysis was unnecessary in the first instance. To the extent the Florida Supreme Court engaged in a harmless-error analysis in Lowe's case, such was a matter of state law, rendering this matter inappropriate for this Court's certiorari review.

This Court's ruling in *Hurst v. Florida* was a narrow one: "Florida's sentencing

scheme, which required the judge alone to find the existence of an aggravating circumstance, is . . . unconstitutional." *Hurst v. Florida*, 136 S. Ct. at 624 (emphasis added). The Florida Supreme Court expanded that narrow Sixth Amendment holding by requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 57. The findings required by the Florida Supreme Court involving the weighing and selection of a defendant's sentence are not required by the Sixth Amendment. See *Kansas v. Marsh*, 548 U.S. 163, 164 (2006) ("Weighing is not an end, but a means to reaching a decision."); *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) ("[t]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that defendants must deserve mercy beyond a reasonable doubt.").

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

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

Review in this case would be inappropriate because to even reach the harmless error issue Lowe attempts to present to this Court, this Court would first have to discern a constitutional error. However, there is no Sixth Amendment violation and the affirmance of the death sentence in this case does not violate *Hurst v. Florida* as *Hurst v. Florida* does not require jury sentencing. Rather, it is a Sixth Amendment case which applied *Ring* to Florida's sentencing scheme, reiterating that a jury, not a judge, must find the existence of an aggravating factor to make a defendant eligible for the death penalty. *Hurst v. Florida*, 136 S.Ct. at 624. Three of the aggravating circumstances here, all conceded at the trial level, are: (1) prior violent felony; (2) murder committed during the course of a felony, and (3) defendant on community control. Each is supported by a conviction found by a unanimous jury or the sentence imposed thereon. Consequently, unlike the situation in *Hurst v. Florida*, Lowe's eligibility for the death penalty is supported by his jury's guilt phase verdict. *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). *Hurst v. Florida* did not address the process of weighing the

aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment.[5] In *Kansas v. Carr*, 136 S.Ct. 633 (2016), decided eight days after this Court issued *Hurst v. Florida*, this Court emphasized:

> Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one jury might consider mitigating another might not. And of course, the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that defendants must deserve mercy beyond a reasonable doubt, or must more-likely-than-not deserve it. . . . In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

Carr, 136 S. Ct. at 642

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[5] Lower courts have almost uniformly rejected the notion that the weighing process is a "fact" that must be found by the jury in order to satisfy the Sixth Amendment. *See State v. Mason*, 153 Ohio St.3d 476, 483 (Ohio 2018) (noting "[n]early every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citation omitted); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) (opining "[a]s other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *Waldrop v. Comm'r, Alabama Dept. of Corr.*, 711 Fed. Appx. 900, 923 (11th Cir. 2017) (unpublished) (rejecting *Hurst* claim and explaining "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict.") (citation omitted); *State v. Gales*, 658 N.W.2d 604, 628-29 (Neb. 2003) (stating "we do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review to be undertaken by a jury").

As set forth in the facts above, Lowe's penalty phase jury heard extensive evidence of how Lowe cased the convenience store with his friends, then perpetrated the robbery and murder alone in an attempt to obtain rent money. The jury heard how the clerk, known to Lowe, was shot three times, twice at close range. The penalty phase jury also learned that Lowe had a criminal history which involved a carjacking with a sharp object and that he was on community control from that prior violent felony at the time of the instant murder. *Lowe*, 259 So.3d at 33-34, 58-61.[6] *See Alleyne v. United States*, 570 U.S. 99 (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)). There was no underlying constitutional error in this case. Certiorari should be denied. *See Chapman,* 386 U.S. at 21 (observing the Court does not have jurisdiction to review "only errors of state procedure or state law.").

II. ***Any Possible Hurst Error Was Clearly Harmless On These Facts And There Is No Conflict Or Unsettled Question Of Law Regarding Either The Lower Court's Harmless Error Analysis Or The Jury Instructions Provide To The Jury***

Putting aside for a moment the rather significant hurdle of the complete absence of any constitutional error, this Court is being asked to assess the Florida Supreme Court's harmless error analysis and find it did not meet constitutional standards where *Hurst v. Florida* error was alleged, and the jury was instructed its advisory recommendation need not be unanimous. Pointing to other cases with

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[6] Even assuming for a moment that a constitutional error can be discerned in this case, any such error was harmless under these facts. *See Neder v. United States*, 527 U.S. 1, 18-19 (1999).

unanimous jury recommendations where the Florida Supreme Court found *Hurst* error harmless, Lowe suggests that unanimity was the sole factor considered, and thus, the Florida Supreme Court created a *per se* harmless error determination. Contrary to Lowe's suggestion, the Florida Supreme Court performed a constitutional harmless error review by considering whether the alleged error contributed the sentence in light of the jury instructions and case facts.

In *Davis v. State*, 207 So.3d 142 (Fla. 2016), the Florida Supreme Court reiterated its harmless error analysis of a *Hurst v. Florida* claim stating:

> In *Hurst* [*v. State*], we explained that standard by which harmless error should be evaluated:
>
> > Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. *See, e.g., Zack v. State*, 753 So.2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," [*State v.*] *DiGuilio*, 491 So.2d [1129,] 1137 [Fla.1986], and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a *Hurst v. Florida* error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:
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> > > The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the

> trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.
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> *DiGuilio*, 491 So.2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." *Id.*
>
> *Id.* (alteration in original). As applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances.

Davis, 207 So.3d at 174.

In rejecting the alleged *Hurst* error in *Davis*, the Florida Supreme Court considered whether a sentence imposed before *Hurst v. Florida* issued was harmless beyond a reasonable doubt on direct appeal in light of the instructions given the jury, the unanimity of the jury's recommendation, and the facts of the case supporting the aggravation. *Davis*, 207 So.3d at 174-75. Likewise, in *Knight v. State*, 225 So.3d 661, 682-83 (Fla 2017) the Florida Supreme Court made clear that the unanimous verdict was not the only factor considered under its harmless error standard. In *Knight*, after discussing the unanimous jury recommendation and the jury instructions, the Florida Supreme Court quoted *Davis*, 207 So.3d at 175 in finding "the egregious facts of this case" provide "[f]urther support[ ] [for] our conclusion that any *Hurst v. Florida* error here was harmless." *Knight*, 225 So.3d at 682-83. Also, in *Truehill v. State*, 211 So.3d 930, 957 (Fla.), *cert. denied*, 138 S.Ct. 3 (2017), cited in *Lowe III* as support for the harmless error finding, the Florida Supreme Court reiterated that its analysis

encompassed the aggravators and mitigators presented in the case and how that evidence would be viewed. As such, it is clear that the Florida Supreme Court cited and understood the proper harmless error standard and applied it to Lowe's case which included three, ***uncontested*** by the trial attorney, aggravators: (1) prior violent felony; (2) during the course of a felony, and (3) on community control all of which were found by a unanimous jury and would satisfy *Hurst v. Florida*. *See Alleyne v. United States*, 570 U.S 99 (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)). Further, this was not a highly mitigated case as it contained one statutory mitigator (age) of little weight and ten nonstatuory mitigators all, except one, given little to no weight. *Lowe III*, 259 So.3d at 66. The Florida Supreme Court's assessment did not create a conflict necessitating certiorari review.

In his petition, Lowe also contends that the Florida Supreme Court could not rely on the unanimous jury recommendation to find harmless error as there was a *Caldwell v. Mississippi*, 472 U.S. 320 (1985) violation. He contends that his jury was misadvised about its responsibility and as such the advisory recommendation could not be used to satisfy the requirements of *Hurst v. Florida,* or to support a harmless error finding. The alleged *Caldwell* error does not form a basis for certiorari review.

To establish constitutional error under *Caldwell*, a defendant must show that the comments or instructions to the jury "improperly described the role assigned to

the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994).[7] . In *Caldwell* this Court found that a prosecutor's comments diminishing the jury's sense of responsibility for determining the appropriateness of a death sentence was "inconsistent with the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell*, 472 U.S. at 323 (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). Unlike the jury in *Caldwell*, Lowe's jury was instructed properly on its role based on the state law existing at the time of his trial; neither the prosecutor's argument nor the jury instructions diminished the jury's sense of its responsibility, thus, there was no *Caldwell* error here. *See Reynolds v. State*, 251 So.3d 811, 818-28 (Fla. 2018) (explaining that under *Romano*, the Florida standard jury instructions at issue "cannot be invalidated retroactively prior to *Ring [v. Arizona*, 536 U.S. 584 (2002)] simply because a trial court failed to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts").[8]

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[7] In *Caldwell*, error was found based on the prosecutor's argument to the jury that the appellate court would review that sentence and would decide whether the death sentence was appropriate. "To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989); *Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986) (rejecting a *Caldwell* attack, explaining "*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")

[8] Respondent is cognizant of the Honorable Justice Sotomayor's dissent from the denial of certiorari in *Middleton v. Florida*, 138 S.Ct. 829 (2018), wherein she criticized the Florida Supreme Court for not addressing the *Caldwell* claim in cases where *Hurst* was applicable under state law. The Florida Supreme Court has now, however, rejected explicitly *Caldwell* attacks on Florida's standard penalty phase jury

Lowe points to *Caldwell* to assert constitutional error as his jury was instructed that its role was advisory and did not need to be unanimous thereby violating the Eighth Amendment as discussed in *Caldwell*. First, there is no underlying Sixth Amendment violation as will be discussed below and no conflict between the Florida Supreme Court's decision and this Court's Eighth Amendment jurisprudence set forth in *Caldwell* and its progeny. Likewise, there is no conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court.

Again, Lowe's jury was informed properly; it was instructed to determine whether sufficient aggravating circumstances (proven beyond a reasonable doubt) exist to justify the imposition of the death penalty, or whether sufficient mitigating circumstances (proven by a preponderance of the evidence) exist that outweigh any aggravating circumstances found to exist. The jury was also instructed that "[i]n order to consider the death penalty as a possible penalty, you must determine that at least one *** aggravating circumstance has been proven" and in the event the jurors find "sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, *** it will then be your duty to determine whether the mitigating circumstances outweigh the aggravating circumstances that you find do exist." The instruction included that "[i]f after weighing the aggravating and

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instructions in the wake of *Hurst*. *See Reynolds v. State*, 251 So.3d 811 (Fla. 2018); *Johnson v. State*, 246 So.3d 266 (Fla. 2018) (citing *Reynolds* in rejecting *Caldwell* claim), *cert. denied*, 139 S. Ct. 481 (2018).

mitigating circumstances you determine that at least one aggravating circumstance is found to exist, and the mitigating circumstances do not outweigh the aggravating circumstances, or the absence of mitigating factors but the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole for twenty-five years." Finally, the jury was informed that "[r]egardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death.". This was proper under existing Florida law. *See Patrick v. State*, 104 So.3d 1046, 1064 (Fla. 2012) (holding "standard penalty phase jury instructions fully advise the jury of the importance of its role, correctly state the law, do not denigrate the role of the jury and do not violate *Caldwell*." (citations omitted)).

Additionally, although the Florida Supreme Court discussed the Eighth Amendment in *Hurst v. State*, it did not, nor could it,[9] hold that Florida's capital

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[9] While the Florida Supreme Court initially included the Eighth Amendment as a reason for warranting unanimous jury recommendations in its *Hurst v. State* decision, the Florida Supreme Court did not, and cannot, overrule this Court's surviving *Spaziano* precedent. Further, Florida has a conformity clause in its constitution requiring state courts interpret Florida's prohibition on cruel and unusual punishment in conformity with the United States Supreme Court's Eighth Amendment jurisprudence. Art. I, § 17, Fla. Const.; *Henry v. State*, 134 So.3d 938, 947 (Fla. 2014) (noting courts bound by United States Supreme Court precedent regarding Eighth Amendment claims under Article I, section 17 of the Florida Constitution). Reliance on the Eighth Amendment discussion in *Hurst v. State* is misplaced and does not support a claim for certiorari. There is no conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court. This Court has recognized that cases which have not developed conflicts between federal or state courts or presented important, unsettled questions of federal law usually do not deserve certiorari review. *Rockford Life Insurance Co. v. Illinois Department of Revenue*, 482 U.S. 182, 184, n. 3 (1987).

sentencing violated the Eighth Amendment. In fact, the Florida Supreme Court rejected Eighth Amendment challenges to capital sentences after *Hurst v. State*. *See Lambrix v. State*, 227 So.3d 112, 113 (Fla.), *cert. denied*, 138 S.Ct. 312 (2017) (rejecting arguments based on Eighth Amendment, due process, and equal protection following *Hurst v. Florida* and *Hurst v. State*). Furthermore, in *Spaziano v. Florida*, 468 U.S. 447, 463-64 (1984), this Court held the Eighth Amendment is not violated in a capital case when the ultimate responsibility of imposing death rests with the judge. In deciding *Hurst v. Florida*, this Court analyzed the case pursuant to Sixth Amendment grounds only. It did not address any Eighth Amendment matters. Consequently, *Hurst v. Florida* only overruled *Spaziano* to the extent *Spaziano* allows a sentencing judge to find an aggravating circumstance independent of a jury's fact-finding. This Court has never held that a unanimous jury recommendation is required under the Eighth Amendment. Moreover, this Court does not require the jury to be the sentencer in death cases and it is the trial court, rather than the jury, which sentences a defendant to death in Florida.[10] This Court has upheld the jury's

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[10] *Hurst v. Florida*, does not demand resentencing. *See Ring v. Arizona*, 536 U.S. 584, 612 (2002) (Scalia, J., concurring) (explaining "today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed."); *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding Constitution does not prohibit the trial judge from "impos[ing] a capital sentence"). A Florida trial court, while bound by the jury's findings of no aggravation and a recommendation of a life sentence, it is not bound by a jury's recommendation of a death sentence. A judge is still free to reject the jury's death recommendation and impose a life sentence. No case from this Court has mandated jury sentencing in a capital case, and such a holding would require reading a requirement into the Constitution that is simply not there. The Constitution provides a right to trial by jury, not to sentencing by jury. It follows there is no basis for certiorari review as a Florida jury's decision regarding a death sentence was, and

advisory role in sentencing a defendant to capital punishment in Florida. *See Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Spaziano v. Florida*, 468 U.S. 447, 465, 104 S.Ct. 315 (1984). *Hurst v. Florida* did not alter that precedent.

In sum, the questions Lowe presents do not offer any matter which comes within the parameters of Rule 10 of the Rules of the United States Supreme Court. He does not identify any direct conflict with this Court or other federal circuit courts or state supreme courts, nor does he offer any unresolved, pressing federal question. As such, he has not demonstrated any compelling reasons for this Court to exercise its certiorari jurisdiction. This Court should deny the petition.

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remains, an advisory recommendation. *See Dugger v. Adams*, 489 U.S. 401 (1989). *See also* § 921.141(2)(c), Fla. Stat. (2017) (providing that "[i]f a unanimous jury determines that the defendant should be sentenced to death, the jury's *recommendation* to the court shall be a sentence of death") (emphasis added).

CONCLUSION

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

Respectfully submitted,

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