NO. 20-5217

IN THE SUPREME COURT OF THE UNITED STATES

DAVIS KELSEY SPARRE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Capital Case

Questions Presented

I. Whether this Court should grant certiorari review of the Florida Supreme Court's decision that trial counsel was not ineffective under *Strickland v. Washington*, where there is no conflict with this Court's jurisprudence and no important or unsettled question of law is presented for review.

II. Whether this Court should grant certiorari review of the Florida Supreme Court's declination to recede from the established law of *Roper v. Simmons* the Eighth Amendment's prohibition against sentencing a juvenile defendant to death, where the defendant in this case was 19 years old at the time of the murder, where Petitioner failed to raise such a claim on direct appeal and does not allege that the decision below conflicts with this Court's precedents or the decision of any other court.

III. Whether this Court should grant certiorari review of the Florida Supreme Court's finding that any *Hurst* error was harmless and not violative of *Caldwell v. Mississippi*.

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PARTIES TO THE PROCEEDINGS

1) David Kelsey Sparre, Petitioner/Defendant/Appellant.

2) State of Florida, Respondent/Appellee.

OPINION BELOW

The Florida Supreme Court's decision appears as *Sparre v. State*, 289 So. 3d 839 (Fla. 2019) (SC18-1192), *rehearing denied*, 2020 WL 914660 (Feb. 26, 2020).

JURISDICTION

28 U.S.C. § 1257 authorizes this Court's jurisdiction and limits it to federal constitutional issues that were properly presented below.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable

constitutional provisions involved.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY[1]

Petitioner David Kelsey Sparre was convicted by special verdict in 2011 of both first-degree premeditated murder and felony murder, during the commission of a burglary, for the stabbing death of 21-year-old Tiara Pool ("Pool"). The jury also found that Sparre carried, displayed, used, threatened to use or attempted to use a weapon. The detailed facts of the case are set forth in his direct appeal, *Sparre v. State*, 164 So. 3d 1183, 1186-88 (Fla. 2015), but are abbreviated as follows:

On July 5, 2010, 19-year-old Sparre, who lived in Georgia, responded to a Craigslist advertisement Pool posted, wanting "to meet a white male." Pool lived in Jacksonville, Florida, was married and had two children. After Sparre responded to Pool's advertisement, the two spoke multiple times and exchanged numerous text messages through July 8, 2010, some of which contained sexually explicit content.

According to Sparre, he drove his grandmother from Georgia to Jacksonville for a medical procedure and agreed to meet Pool at the hospital on July 8, 2010. The two met at the hospital and Pool drove Sparre to her apartment where they engaged in consensual sexual relations. Sparre claimed that a few hours later, Pool drove him back to the hospital. *Sparre*, 164 So. 3d at 1187.

After being "incommunicado" for several days, Pool's friend, Nichelle Edwards,

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[1] Citations to the records on appeal in the Florida Supreme Court are designated: direct appeal (DAR); denial of Sparre's initial state postconviction motion (PCR).

went to Pool's apartment on July 12, 2010, to check on her. Edwards entered the apartment, went to the bedroom, opened the door slightly and saw a hand on the floor. Edwards ran out of the apartment and dialed 911. Jacksonville Sheriff's Office ("JSO") officers responded to Pool's apartment, finding her bloody, nude body on the master bedroom floor. There was no indication of forced entry into the apartment, but investigators learned that Pool's vehicle, a PlayStation game console, and other items were missing from the apartment. The vehicle was found two days after Pool's body was discovered, parked one block from the hospital where she and Sparre initially met. *Sparre*, 164 So. 3d at 1186-88.

In the master bedroom, investigators found blood around Pool's body, on the carpet, baseboards, and in the bathroom. Investigators testified that a bottle of Oxi-Clean, blood and clothing were found on the bed and the crime scene was "cleaned" to such an extent that virtually no evidence of Pool's assailant was recoverable. A large knife, matching those in Pool's kitchen and later established as the murder weapon, was recovered in the bathroom. Its tip was broken off, the blade was bowed. At trial, the State's medical examiner, Dr. Jesse Giles, testified that Pool was alive and conscious through at least 88 "sharp-force injuries," including 39 defensive wounds. Trial testimony revealed a mixture of DNA material was found on the knife's handle and the Y-DNA matched Sparre. *Sparre*, 164 So. 3d at 1186-88.

JSO detectives arrested Sparre in South Carolina on July 24, 2010, where he had relocated. A second recorded interview took place, during which Sparre gave

various versions of his encounter with Pool, but ultimately admitted killing her with the kitchen knife. Sparre told investigators that he remembered everything he touched in Pool's apartment, noting that he painstakingly wiped down everything he touched with his socks, including his fingerprints from Pool's car.[2] When the detectives asked Sparre how he learned to "clean" a crime scene, he stated by watching the television program CSI: Crime Scene Investigation. *Sparre*, 164 So. 3d at 1188.

Guilt Phase

Sparre knowingly and voluntarily agreed with the defense strategy to argue he committed second-degree murder, not first-degree premediated murder. Among the State's 14 witnesses, Sparre's former girlfriend Ashley Chewning testified that prior to his arrest, Sparre confessed to her that he killed a black woman in her Jacksonville apartment. *Sparre*, 164 So. 3d at 1188-89. She also asked Sparre about the PlayStation game console that he had at the time. Sparre told her, "he stole it from the woman he killed." *Id.* at 1189. After the State rested, Sparre knowingly and voluntarily waived presentation of a defense, including his right to testify in his own behalf. *Id.*

Following closing arguments, the trial court instructed the jury on first-degree premeditated murder, first-degree felony murder with burglary as the underlying

[2] A JSO latent fingerprint examiner testified that Sparre's fingerprints were not detected at the murder scene or in or on Pool's car. *Sparre*, 164 So. 3d at 1188.

felony, as well as second-degree murder and manslaughter. The jury convicted Sparre by special verdict for both premeditated murder and felony murder with both burglary and that Sparre carried, displayed, used, threatened to use, or attempted to use a weapon as the underlying felonies. *Sparre*, 164 So. 3d at 1189.

Penalty Phase

Sparre knowingly and voluntarily waived presentation of a mitigation case, despite defense counsel informing the court that it was prepared to present substantial mitigation evidence and several witnesses. The trial court instructed the jury on two aggravating circumstances of felony murder and that the murder was especially heinous, atrocious and cruel ("HAC"). The jury was instructed on two statutory mitigators (extreme mental or emotional disturbance and Sparre's age); the general catch-all mitigator of "any other factors in the defendant's character, background or life"; and 17 non-statutory mitigators. The jury unanimously recommended Sparre be sentenced to death. *Sparre*, 164 So. 3d at 1189-91.

Sparre again knowingly and voluntarily waived presentation of mitigation evidence at the *Spencer*[3] hearing. Defense counsel proffered that mitigation evidence was substantial and would have been presented through 25 witnesses. The State presented the testimony of JSO Officer Daisy Peoples and Chewning, who identified a January 2, 2012, letter Sparre attempted to mail to Chewning. The letter, retrieved

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

by corrections' staff before it was mailed, described Sparre's assertion that he deliberately planned Pool's murder several days before seeing her and intended to carry it out by stabbing or other sharp force trauma. The trial judge ordered that the letter be sealed and neither witness was permitted to read from or disclose the contents of the letter.[4] *Sparre*, 164 So. 3d at 1191-92.

The State advised the trial court that it was prohibited from giving the jury's death recommendation great weight because the defense chose not to present any mitigation during the penalty phase. The State also acknowledged that the statutory age mitigator applied, but urged the trial court to give it little weight because even though Sparre was 19 years old when he murdered Pool, he was not an inexperienced young man.[5] *Sparre*, 164 So. 3d at 1192.

The trial court gave great weight to both the HAC and that the murder was committed during the course of a burglary aggravators. The single statutory mitigator that Sparre was 19 years old at the time of the murder was given moderate weight. In its weighing decision, the trial court stated, to be significantly mitigating, age must be "linked with some other characteristic" such as immaturity, but found

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[4] The January 2 letter was admitted into evidence on February 9, 2012. Sparre previously wrote Chewning a letter in September 2011, stating, "human blood stinks" and he "slumped that bitch." DAR 0996-98. A redacted version of this letter was available to the guilt-phase jury.

[5] Non-statutory mitigators found included that fact that he had a child, received his GED, participated in high school ROTC and served in the Army National Guard for one year. *Sparre*, 164 So. 3d at 1192.

"no evidence of significant emotional immaturity." *Sparre*, 164 So. 3d at 1192. Thirteen non-statutory mitigating circumstances were found and assigned weight. *Id.* at 1192-93.

Based on the heinous nature of Pool's murder, the trial court concluded that the aggravating factors far outweighed the mitigating circumstances. Although the trial court did not give the jury's death recommendation great weight, Sparre was sentenced to death. The Florida Supreme Court affirmed Sparre's conviction and sentence, rejecting the argument that Florida's capital sentencing scheme was unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002), and also concluding that Sparre's claim lacked merit even if *Ring* applied. *Sparre*, 164 So. 3d at 1185, 1194. Sparre raised only three claims on direct appeal; of particular relevance here, he did not argue that his sentence violated the Eighth Amendment or that this Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), should be extended to the facts of his case. *See id.* at 1185-86. *Sparre*, 164 So. 3d at 1185, 1194. Sparre's conviction and death sentence were affirmed on January 22, 2015, and became final on November 2, 2015, when this Court denied certiorari review. *Sparre v. Florida*, 136 S. Ct. 411 (2015).

State Postconviction Proceedings

Sparre filed his amended initial motion for state postconviction relief on June 19, 2017.[6] PCR 967-1059. Among the 36 state postconviction claims, those raised in

[6] *See* Fla. R. of Crim. P. 3.851.

this Petition include: 1) ineffective assistance of counsel claims under *Strickland*[7] for failure to a) retain a forensic pathologist, b) argue evidence supporting second-degree murder in guilt-phase closing argument, and c) object to prosecutor statements in guilt- and penalty-phase closing arguments; 2) trial court error by referring to the jury's decision as a "recommendation," violating *Caldwell*;[8] and 3) Sparre's death sentence is unconstitutional under *Hurst v. Florida*, 136 S. Ct. 616 (2016) ("*Hurst v. Florida*"). The trial court denied all of the postconviction claims, which Sparre appealed to the Florida Supreme Court. PCR 2845-2911.

The Florida Supreme Court upheld the trial court's denial of Sparre's PCM, as well as finding no cumulative error resulted. *Sparre*, 289 So. 3d 839. Florida's high court rejected Sparre's arguments and held: 1) trial counsel was not ineffective for failing to consult and retain a forensic pathologist; 2) trial counsel was not ineffective for failing to argue evidence supporting the second-degree murder defense theory in closing argument; 3) trial counsel was not ineffective for failing to object to statements made by the prosecutor in guilt- and penalty-phase closing arguments; 4) no cumulative error; 5) the trial court did not err by failing to extend this Court's holding in *Roper v. Simmons*, 543 U.S. 551 (2005), even if that claim was not procedurally barred because Sparre failed to raise it on direct appeal; and 6) his death

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[7] *Strickland v. Washington*, 466 U.S. 668 (1984).

[8] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

sentence was constitutional in light of *Hurst v. Florida* and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) ("*Hurst v. State*"). *Sparre*, 289 So. 3d 839.

Respondent notes, although it upheld the trial court's denial of Sparre's *Strickland* claims, the Florida Supreme Court found trial counsel's performance deficient in two aspects: 1) the guilt-phase closing argument was deficient for attacking the victim and not linking evidence to the second-degree murder theory; and 2) failure to object to two out of numerous statements by the prosecutor. *Sparre*, 289 So. 3d at 851-53. However, counsel was not *ineffective* under *Strickland* because the prejudice prong was not established and there was no reasonable probability that the jury's verdict would have been affected. *Id.* It is the Florida Supreme Court's affirmance of the trial court's denial of these postconviction claims upon which the Petition is based.

REASONS FOR DENYING THE WRIT

I. THE FLORIDA SUPREME COURT'S DETERMINATION THAT TRIAL COUNSEL WAS NOT INEFFECTIVE UNDER *STRICKLAND* DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR PRESENT AN IMPORTANT OR UNSETTLED QUESTION OF LAW FOR THIS COURT'S REVIEW.

Petitioner asks this Court to review the Florida Supreme Court's prejudice analysis related to three *Strickland* claims raised in his initial state postconviction motion. Pet. at 23. The Petition incorporates a cumulative error argument, positing that the Florida Supreme Court's *Strickland* prejudice assessment must have considered "the totality of counsel's performance and its cumulative effect of the

deficient performance." Pet. at 25. Sparre argues, Florida's high court "conducted an improper prejudice analysis" by overlooking claims that trial counsel failed to 1) retain a forensic pathologist to support the second-degree murder defense theory; 2) conduct an effective closing argument to support the defense theory; and 3) object to prosecutor statements in guilt- and penalty-phase closing arguments. Pet. at 23-24.

This Court's rules state that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *see also Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring) (explaining that error correction is outside the mainstream of the Court's function and is not among the compelling reasons for granting certiorari review). This Court has stated, the "*Strickland* standard is a general one, so the range of reasonable applications is substantial." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

While the Florida Supreme Court found trial counsel deficient in two of the three *Strickland* claims, it declined to find counsel ineffective, because no prejudice resulted and found no cumulative error. As discussed below, Petitioner's claims are fact-intensive and case specific, not warranting review. The Petition primarily offers a *factual* re-discussion of the issues and argues that the court below erred in applying *Strickland* to the facts of this case. The Petition fails to present a conflict with this Court's precedent or that of any state court of last resort. Consequently, certiorari should be denied.

A. Failure to retain forensic pathologist

Petitioner argued that trial counsel was ineffective for failing to consult and retain a forensic pathologist to testify in support of the defense theory that he killed the victim in a frenzied state in order to negate premeditated first-degree murder. PCR 989-90.[9] The Florida Supreme Court rejected this claim concluding that counsel made "a reasonable strategy decision." *Sparre*, 289 So. 3d at 849. The Florida Supreme Court noted, trial counsel testified at the state postconviction evidentiary hearing "that retaining a forensic pathologist would have allowed the State to emphasize the gruesome details of Sparre's attack on the victim." *Id.* at 850. Accepting this testimony, Florida's high court stated,

> the record shows that if trial counsel had consulted and retained [a forensic pathologist] to testify at trial, the State would have been able to emphasize the gruesome nature of the murder, and [the forensic pathologist] would not have been able to fully rebut the testimony of Dr. Giles, thus still leaving the jury without definitive expert testimony that the killing was frenzied.

Id. This analysis does not conflict with *Strickland* and the Petition fails to include such an argument.

Regarding ineffectiveness for *not presenting* a defense expert witness, this Court explained that "*Strickland* [did] not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite

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[9] State Postconviction Claim Eleven (PCR 989-90); Issue 4 on appeal (SC18-1192).

expert from the defense." *Richter*, 562 U.S. at 111. Often, defense counsel's cross-examination of the prosecution's expert witness "will be sufficient." *Id.*

This is precisely what the Florida Supreme Court found, that "trial counsel was able to cross-examine Dr. Giles concerning the subject matter that the defense expert proposed by postconviction counsel . . . would have addressed." *Sparre*, 289 So. 3d at 850. For example, on cross-examination at trial, counsel posed the following to Dr. Giles regarding timing of the attack:

> Q. And so, there's really no way you could other than speculate the amount of time it took for this attack?
>
> A. I can't give you an exact amount, just very brief — just an estimate at best.
>
> * * *
>
> Q. And you really can't say how quickly this attack took for 89 wounds, can you? That's speculation?
>
> A. All I can give you is an estimate of a period.

DAR 1039, 1041.

At the state postconviction evidentiary hearing, trial counsel testified a forensic pathologist was not necessary because of Sparre's "concession of guilt, 89 stab wounds" and the "only thing to explore was the time of death." PCR 3563-64. Counsel further testified that not retaining a forensic pathologist was a strategy call, not to "belabor the cause and manner of death, 89 stab wounds in front of a jury," which was uncontested, so "don't bring things up because then it could open up other areas of potential problems," the jury would "hear it twice," which "would be prejudicial." PCR 3566-68.

Petitioner's reference to this Court's comment in *Buck v. Davis*, 137 S. Ct. 759, 777 (2017), that "[s]ome toxins can be deadly in small doses," is inconsequential. Pet. at 25. The *Buck* Court found defense counsel ineffective for presenting a penalty-phase expert witness, whose report indicated that because the defendant was black, he was "disproportionately predisposed . . . to violent conduct." *Id.* at 775. This expert testified "about the connection between Buck's race and the likelihood of future violence," in a state where "the jury had to make a finding of future dangerousness before it could impose [the] death [penalty]," as the equivalent of an aggravating factor. *Id.* Noting that "[i]t would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race," this Court found that the expert's testimony could not be "dismissed as '*de minimis*,'" demonstrating prejudice. *Id.* at 775-77. *See also Lambrix v. Sec'y, Fla. Dept. of Corr.*, 851 F.3d 1158, 1171-72 (11th Cir. 2017) (describing the *Strickland* claim in *Buck* as one where defense counsel himself presented "race-based evidence of future dangerousness" which is a "pernicious" injury that harms not only the petitioner, but the community at large). If anything, *Buck* presents the converse of Sparre's case in that counsel chose not to present an expert witness who had the potential to be detrimental.

The Florida Supreme Court conducted a thorough analysis in rejecting this ineffectiveness claim. *Sparre*, 289 So. 3d at 849-50. Because it found trial counsel was not deficient, the Florida Supreme Court had no need to reach *Strickland*'s prejudice prong.

B. Failure to conduct effective closing argument

Sparre argues that the Florida Supreme Court wrongly concluded he did not suffer prejudice from trial counsel's guilt-phase closing argument, which attacked the victim and failed to explain the defense theory that Sparre "snapped," committing the murder in a frenzy. Pet. at 23-24.[10] Although the Florida Supreme Court found trial counsel's performance deficient, it held that no prejudice resulted because there was no reasonable probability that counsel's performance affected the jury's guilty verdict of premeditated first-degree murder. *Sparre*, 289 So. 3d at 851.

The sole federal authority Petitioner cites regarding counsel's closing argument, is this Court's decision in *Herring v. New York*, 422 U.S. 853 (1975). *Herring* is essentially a "right to counsel case," where under New York state statute, judges in a non-jury criminal trial were given the discretion of whether to hear closing arguments. The trial judge in that case declined to hear defense counsel's "summation," a decision reversed by this Court.

The facts and circumstances in *Herring*, have no bearing on the claim before this Court. Moreover, the Petition offers no circuit court or state court of last resort case citation, finding both deficient performance and prejudice where defense counsel did not advance a theory in guilt-phase closing argument, that was not a defense to first-degree murder.

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[10] State Postconviction Claim Ten (PCR 984-89); sub-claim, Issue 5. III on appeal (SC18-1192).

C. Failure to object to prosecutor's statements

Sparre asserts his *Strickland* claim for trial counsel's failing to object to numerous statements by the prosecutor, made in guilt- and penalty-phase closing arguments warrants review. Pet. at 21 and 25.[11] Petitioner inaccurately claims defense counsel failed to object "to the prosecutor's improper argument that Mr. Sparre . . . sought her out as 'easy prey.'" Pet. at 22-23. Trial counsel *did* object to the penalty-phase "easy prey" comment as "name calling," but was overruled. *See* DAR 1344.

The Florida Supreme Court found trial counsel deficient for failing to object to two prosecutorial comments, out of several, which 1) misrepresented the defense theory that the killing was frenzied, rather than premediated; and 2) denigrated the mitigating circumstance that he was under the influence of extreme mental or emotional disturbance. *Sparre*, 289 So. 3d at 851-52.[12] However, Florida's high court found Sparre failed to establish prejudice as a result of the deficiencies, thus rejecting the *Strickland* claims. *Id.* at 853. This is a perfectly acceptable application of this

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[11] State Postconviction Claims Thirteen and Twenty-eight (PCR 992-93; 1038-40); Issue 6 on appeal (SC18-1192).

[12] The improper comments were: Guilt phase: "Was he just kind of having fun with her? Is he just enjoying – was it just a thrill kill and then he just kind of got a little carried away?" *Sparre*, 289 So. 3d at 852; DAR at 1092. Penalty phase: the prosecutor "crossed the line into denigrating Sparre's proposed mitigating circumstance that he was under the influence of extreme mental or emotional disturbance as demonstrated by the frenzied nature of the killing." *Id.* at 852; DAR 1364-66.

Court's controlling precedent. *See Strickland*, 466 U.S. at 697 (noting that both deficiency and prejudice must be proven and that it is often "easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice").

In its prejudice analysis for both claims, the Florida Supreme Court reasoned that there was no reasonable probability that trial counsel's failure to object during either guilt or penalty-phase closing arguments affected the jury's guilty verdict or its sentencing recommendation. *Sparre*, 289 So. 3d at 853. Sparre does not even attempt to establish any conflict between the Florida Supreme Court's decision and this Court, or any other appellate court, regarding the *Strickland* claims. Because no conflict or misapplication of the law exists, review should be denied.

D. Cumulative error

Finally, Petitioner combines the three claims discussed above to raise a cumulative error issue for review. Sparre asserts, "the Florida Supreme Court conducted an improper prejudice analysis," which "overlooked" counsel's deficiencies. Pet. at 23. The Florida Supreme Court addressed the cumulative effect of trial counsel's errors in the context of the two deficiency findings—defense counsel's closing argument and failing to object to the prosecutor's statements in closing arguments. Nonetheless, the case before this Court is not the proper vehicle to raise a cumulative error claim.

The Florida Supreme Court opinion in *Sparre* acknowledged, "[w]here trial counsel is deficient in more than one area, however, we must 'consider the impact of

these errors cumulatively to determine whether [the defendant] has established prejudice.'" *Sparre*, 289 So. 3d at 847 (citation omitted). The Florida Supreme Court stated, "we must analyze whether these two deficiencies, taken together, are sufficient to establish requisite prejudice. . . . They are not." *Id.* at 853.

Florida's high court found trial counsel deficient for failing to deliver a proper guilt-phase closing argument and object to the prosecutor's closing argument that "crossed the line into denigrating this defense." *Sparre*, 289 So. 3d at 850-51, 853. Taking these two deficiencies together and finding they were not "sufficient to establish the requisite prejudice," the Florida Supreme Court declined to find cumulative error stating, "[t]here is no reasonable probability that, taken together, these deficiencies affected the first-degree murder verdict or the sentence of death on the record before us." *Id.* at 853.

This is not a case where the state high court found counsel's deficient performance in two or more instances and then explicitly refused to consider cumulative prejudice. Instead, the Florida Supreme Court reasonably applied the clearly established law of *Strickland*, finding deficiency in its analysis, but no prejudice. *See, e.g., Ponticelli v. Sec'y, Fla. Dept. of Corr.*, 690 F.3d 1271 (11th Cir. 2012). Because prejudice was not established, any cumulative error claim is meritless.

In sum, Petitioner has not established any reason for this Court to grant review of these fact-specific claims. There is no conflict between the Florida Supreme Court

and this Court or any other state supreme court regarding the denial of relief under *Strickland*.

II. THE FLORIDA SUPREME COURT'S DECISION NOT TO EXTEND *ROPER V. SIMMONS*' EIGHTH AMENDMENT'S PROHIBITION OF SENTENCING JUVENILES TO DEATH DOES NOT WARRANT REVIEW.

Sparre seeks certiorari review of the Florida Supreme Court's decision *not* to extend the Eighth Amendment's prohibition of sentencing to death capital defendants under the age of 18 at the time of the murder, as set forth in *Roper*, 543 U.S. 551.[13] This case is not a good vehicle for considering that issue. It is undisputed that Petitioner did not raise any such claim on direct appeal. *See Sparre*, 164 So. 3d at 1185-86; Pet. 25-26. What is more, Petitioner does not and cannot point to any justification for that procedural default. Notably, *Roper* was decided in 2005; Petitioner's sentencing hearing took place in 2012, *Sparre*, 164 So. 3d at 1192; and Petitioner's *Roper* claim relies heavily on publications that predated his sentencing hearing, *see* Pet. 29-33 (citing sources from 2004, 2005, 2009, 2010, and 2011).

Petitioner is wrong to assert that "[t]here are clear indications in the Florida Supreme Court's opinion in *Branch* that the state court would afford Mr. Branch relief if it did not feel bound by its view of this Court's current Eighth Amendment jurisprudence." Pet. 26. Indeed, the court in *Branch* said just the opposite:

> On direct appeal, Branch did not challenge the trial court's rejection of age as a mitigating circumstance. Furthermore, the Supreme Court decided *Roper* on March 1, 2005. Branch filed the habeas petition in

[13] State Postconviction Claim Thirty-four (PCR 1051-53); Issue 8 on appeal.

> *Branch II* on August 31, 2005, and he did not assert that he was ineligible for execution pursuant to *Roper*. *Accordingly, this claim is waived as it could have been raised previously.*

Branch v. State, 236 So. 3d 981, 986 (Fla. 2018), *cert. denied, Branch v. Florida*, 138 S. Ct. 1164 (2018) (No. 17-7825) (emphasis added).

Petitioner's claim is likewise "waived," as a matter of state law, "as it could have been raised previously." *See Branch*, 236 So. 3d at 986.

It is no answer to say that the Florida Supreme Court cited precedent that "plainly forecloses relief on the merits of Sparre's *Roper* claim." *Sparre*, 289 So. 3d at 853 (citing *Branch*, 236 So. 3d at 987). Such precedent, the court held, bars Sparre's *Roper* claim "even assuming it is not procedurally barred because Sparre failed to raise it on direct appeal." *Id.* That precedent does not suggest that Florida's procedural default doctrine is somehow nullified by or "interwoven with federal law," Pet. 25. At a minimum, this Court should not be asked to resolve the Eighth Amendment claim Petitioner presents in a case where that claim was not raised on direct review and thus appears to be waived as a matter of state law.

Even putting aside Petitioner's unexcused procedural default, his *Roper* claim does not merit this Court's review. Certiorari is not a matter of right, but of judicial discretion and will be granted only for compelling reasons. Sup. Ct. R. 10. Review would be appropriate where a conflict exists among United States courts of appeals and state courts concerning the meaning of provisions of federal law, such as that in *Roper*. *See Braxton*, 500 U.S. at 347; *see also* Sup. Ct. R. 10(b). However, in this case,

there is no conflict between the Florida Supreme Court's decision *not* to extend *Roper* and this Court's Eighth Amendment jurisprudence. Nor is there an undecided question of federal law.

Since this Court's *Roper* decision, federal courts of appeal that have reached the issue of its expansion have declined to do so. *See United States v. Bernard*, 762 F.3d 467, 482 (5th Cir. 2014); *In re Garner*, 612 F.3d 533, 534 (6th Cir. 2010); and *Melton v. Sec'y, Fla. Dept. of Corr.*, 778 F.3d 1234, 1237 (11th Cir. 2015). Two state supreme courts have also rejected the invitation to expand *Roper*. *See Bowling v. Commonwealth*, 224 S.W.3d 577 (Ky. 2006); *State v. Tucker*, 181 So. 3d 590 (La. 2015). Most importantly, this Court has continued to identify 18 as the critical age for purposes of Eighth Amendment jurisprudence. *See Miller v. Alabama*, 567 U.S. 460, 465 (2012) (prohibiting mandatory sentences of life without parole for homicide offenders who committed their crimes before the age of 18); *Graham v. Florida*, 560 U.S. 48, 74-75 (2010) (prohibiting sentences of life without parole for non-homicide offenders who committed their crimes before the age of 18).

Petitioner has not shown that the well-established law of *Roper* was misapplied. Nor, has Petitioner provided this Court with any state court of last resort decision which advocates its extension, as he urges this Court should do. Moreover, Sparre has not offered any compelling reasons to revisit this Court's well-settled precedent.

Sparre was 19 years old when he murdered Pool, stabbing her approximately 89 times. His age was accepted as a mitigating circumstance and assigned moderate weight. PCR 592. Further, his maturity was illustrated by the facts that he had a child, received his high school GED, participated in high school ROTC and served in the Army National Guard for one year. *Sparre*, 164 So. 3d at 1192. With no evidence contrary to the Florida Supreme Court's decision, Sparre's death sentence is constitutional and certiorari review should be denied.

III. THE FLORIDA SUPREME COURT'S *HURST V. STATE* HARMLESS ERROR ANALYSIS DOES NOT PRESENT A CONFLICT WITH THIS COURT'S PRECEDENT OR AN UNSETTLED QUESTION OF CONSTITUTIONAL LAW.

Petitioner seeks certiorari review of the Florida Supreme Court's rejection of his *Hurst v. Florida* state postconviction claim, claiming that the judge, not the jury, made the requisite findings to impose the death penalty.[14] Sparre inaccurately asserts that although the jury's sentencing recommendation was unanimous, it "made none of the findings of fact required for a death sentence under Florida law." Pet. at 37. Sparre also comingled a purported *Caldwell* violation in this issue, asserting that the jury's sentencing role was diminished and suggests this Court should "revisit the state's decisional law on *Caldwell*, particularly in light of *Hurst*." Pet. at 37-39. Sparre specifically frames his question before this Court as a narrow one: "The only issue here is whether the *Hurst* error was 'harmless.'" Pet. at 37.

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[14] State Postconviction Claim Thirty-six (PCR 1055-56); Issue 9 on appeal (SC18-1192).

The Florida Supreme Court's denial of Sparre's *Hurst* and *Caldwell* claims is supported by well-established federal precedent. As will be seen in the merits analysis, Sparre has not demonstrated that there is anything debatable about the claim he is now urging this Court to review.

Rule 10 of the Rules of the Supreme Court of the United States identifies the relevant considerations in determining the propriety of certiorari review. Sparre makes no effort to establish that any of these considerations are met.

Just last term, this Court concluded that "*Ring* and *Hurst* do not apply retroactively on collateral review." *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020) (citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004)). McKinney, a petitioner on death row, "advanced an . . . argument based on *Ring* and *Hurst*." *Id.* He argued that he was entitled to relief because *Ring* and *Hurst* "now requir[e]" a jury to find aggravating circumstances that make a defendant eligible for the death penalty. *Id.* The Court rejected that argument, pointing out that his "case became final on direct review in 1996, long before *Ring* and *Hurst*." *Id.* Because "*Ring* and *Hurst* do not apply retroactively on collateral review," and because McKinney's case "[came] to [the Court] on . . . collateral review, *Ring* and *Hurst* do not apply." *Id.*

Sparre's conviction and sentence became final in 2015. He therefore cannot claim the benefit of *Hurst* under federal law.[15]

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[15] Sparre was able to raise his *Hurst* claim in state court only because the Florida Supreme Court has adopted a broader approach to retroactivity under state law.

The same holds true for Sparre's *Caldwell* claim. Under *Caldwell v. Mississippi*, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. 320, 328-29 (1985).

Here, Sparre alleges that "the whole record" supports a possible *Hurst* error and his jury "could have voted for life" if it had not been instructed of its advisory sentencing recommendation. Pet. at 38. Sparre's *Caldwell* claim travels through *Hurst* because, in the wake of that decision, a jury must make certain findings before a judge may impose death and thus, in Sparre's view, his jury was misled into thinking that the trial court alone was responsible for sentencing. But, even assuming that theory otherwise had merit, *Hurst* is not retroactive on collateral review as a matter of federal law; consequently, federal law does not give Sparre a right to relief based on a *Caldwell* claim that requires retroactive application of *Hurst*.

The Petition in this case was filed some six months after this Court issued its decision in *McKinney*. Yet Sparre does not address the Court's recent determination that "*Ring* and *Hurst* do not apply retroactively on collateral review," *McKinney*, 140 S. Ct. at 708, and still less does he offer any justification for revisiting that ruling.

See Mosley v. State, 209 So. 3d 1248, 1274 (Fla. 2016).

Nor does he allege any split of authority on the retroactivity question. This Court should deny certiorari on that basis alone.

Moreover, the Florida Supreme Court's denial of Sparre's *Hurst* and *Caldwell* claims is supported by well-established federal precedent. As will be seen in the merits analysis, Sparre has not demonstrated that there is anything debatable about the claim he is now urging this Court to review.

Sparre's *Hurst v. Florida* Claim

The record provides ample support for the Florida Supreme Court's harmless error analysis, and this Court has repeatedly declined to review comparable determinations that *Hurst* violations constituted harmless error.[16] Sparre offers no persuasive, much less compelling reasons to grant review of this case.

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[16] *E.g.*, *Lowe v. State*, 259 So. 3d 23 (Fla. 2018), *cert. denied*, *Lowe v. Florida*, 139 S. Ct. 2717 (2019); *Anderson v. State*, 257 So. 3d 355 (Fla. 2018), *cert. denied*, *Anderson v. Florida*, 140 S. Ct. 291 (2019); *Reynolds v. State*, 251 So. 3d 811 (Fla. 2018), *cert. denied*, *Reynolds v. Florida*, 139 S. Ct. 27 (2018); *Tanzi v. State*, 251 So. 3d 805 (Fla. 2018), *cert. denied*, *Tanzi v. Florida*, 139 S. Ct. 478 (2018); *Johnston v. State*, 246 So. 3d 266 (Fla. 2018), *cert. denied*, *Johnston v. Florida*, 139 S. Ct. 481 (2018); *Crain v. State*, 246 So. 3d 206 (Fla. 2018), *cert. denied*, *Crain v. Florida*, 139 S. Ct. 947 (2019); *Grim v. State*, 244 So. 3d 147 (Fla. 2018), *cert. denied*, *Grim v. Florida*, 139 S. Ct. 480 (2018); *Guardado v. State*, 238 So. 3d 162 (Fla. 2018), *cert. denied*, *Guardado v. Florida*, 139 S. Ct. 477 (2018); *Philmore v. State*, 234 So. 3d 567 (Fla. 2018), *cert. denied*, *Philmore v. Florida*, 139 S. Ct. 478 (2018); *Guardado v. Jones*, 226 So. 3d 213 (Fla. 2017), *cert. denied*, 138 S. Ct. 1131 (2018); *Morris v. State*, 219 So. 3d 33 (Fla. 2017), *cert. denied*, *Morris v. Florida*, 138 S. Ct. 452 (2017); *Oliver v. State*, 214 So. 3d 606 (Fla. 2017), *cert. denied*, *Oliver v. Florida*, 138 S. Ct. 3 (2017); *Truehill v. State*, 211 So. 3d 930 (Fla. 2017), *cert. denied*, *Truehill v. Florida*, 138 S. Ct. 3 (2017).

This Court need not even reach the question of harmlessness, as there was no cognizable constitutional error requiring harmless error review. As such, this case would be a uniquely inappropriate vehicle to address the question of harmless error, as both this Court and the Florida Supreme Court have recognized that there is no underlying constitutional error where the jury findings necessarily include an aggravating circumstance as in Petitioner's case.

The Florida Supreme Court has recently receded from its *Hurst v. State* decision and narrowed the eligibility requirements to impose the death penalty under state law.[17] In *State v. Poole*, 297 So. 3d 487 (Fla. 2020) (pet. for cert. filed), the Florida Supreme Court repudiated *Hurst v. State*'s additional jury findings and what "constitutes an element," beyond those required by this Court in *Hurst v. Florida* and section 921.141(3)(a), Florida Statutes. *Id.* at 503, 505. The *Poole* decision did so,

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[17] This Court's *Hurst* decision did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. However, on remand in *Hurst v. State*, 202 So. 3d at 57, *cert. denied*, *Florida v. Hurst*, 137 S. Ct. 2161 (2017), the Florida Supreme Court greatly expanded this Court's ruling, requiring that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." The court's expansion of the holding in *Hurst v. Florida* was not required or even suggested by this Court's decision in *Hurst*. 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).

"except to the extent it requires a jury to unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *Id.* at 507-08. This is in accord with recent precedent from this Court. *See McKinney v. Arizona*, 140 S. Ct. at 707 ("Under *Ring* and *Hurst* [*v. Florida*], a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.").

In any case, review of the Florida Supreme Court's harmless error analysis reveals no constitutional question or fairly debatable factual question. In denying this claim, Florida's high court cited to its own precedent in *Philmore v. State*, 234 So. 3d 567, 568 (Fla. 2018), and Sparre does not even attempt to identify any conflicting federal law that applies.

In addition, Sparre's case is a poor vehicle for assessing *Hurst v. Florida* error because, under federal law, *Hurst* is not retroactive to Sparre,[18] *see McKinney v. Arizona*, 140 S. Ct 702, and Sparre was able to invoke *Hurst* in state court only because Florida has adopted, as a matter of state law, a broader approach to retroactivity. *See Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016). Florida's *Hurst*

[18] Sparre's case became final in 2015.

retroactivity jurisprudence, however, is in flux: the Florida Supreme Court previously asked the parties in a capital case to file supplemental briefs on the question of whether it should recede from *Mosley*, *see* Order, *Owen v. State*, No. SC18-810 (Apr. 24, 2019),[19] and at least one justice has urged the court to do so. *See Brown v. State*, 2020 WL 5048548, at *26 (Fla. Aug. 27, 2020) (Canady, C.J., concurring in result) (calling *Mosley* "the ghost of a precedent" and suggesting that it be revisited in light of the court's more recent decisions).

At any rate, this Court's precedent establishes that there is no underlying constitutional error in this case. After hearing the guilt-phase evidence, Sparre's jury found him guilty of first-degree murder, finding both that the killing was premeditated and done during the commission of a felony, namely burglary. *Sparre*, 289 So. 3d at 845. The unanimous verdict by Sparre's jury establishing his guilt of felony murder was clearly sufficient to meet the Sixth Amendment's factfinding requirement, *see Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (explaining that the "the fact of a prior conviction" is an exception to *Apprendi*'s jury-finding requirement); *Almendarez-Torres v. United States*, 523 U.S. 224, 243-48 (1998), and he was properly rendered eligible for a death sentence. Since there is no underlying constitutional violation, there is no reason to review the question of harmlessness

[19] The Florida Supreme Court resolved *Owen* on another basis–its conclusion that there was no *Hurst* error–and therefore did not need to confront whether to recede from *Mosley*. *See Owen v. State*, 2020 WL 3456746 (Fla. June 25, 2020).

presented in this Petition.

When Sparre was sentenced to death in 2012, a defendant convicted of a capital crime in Florida could be sentenced to death only if the trial judge found both, the existence of at least one statutorily enumerated aggravating circumstance and that the aggravating circumstances outweighed the mitigating circumstances. *Spaziano v. Florida*, 468 U.S. 447, 451-52 & n.4 (1984), *overruled in part by Hurst v. Florida*, 136 S. Ct. 616 (citing § 921.141(2)(b), (3)(b), Fla. Stat. (1983)). The sentencing jury would render an advisory verdict, but the judge would make the ultimate sentencing determination. *See id.* (citing § 921.141(3), Fla. Stat. (1983)). This system affords capital defendants the benefits flowing from jury involvement while still retaining the protections associated with judicial sentencing. *See e.g., Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality opinion) ("[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.").

Sparre contends that his jury failed to make any of the required factual findings, and suggests that the Florida Supreme Court merely rubber-stamped his claim as harmless because his penalty phase jury was unanimous in recommending a death sentence. Petitioner omits the important fact that his jury, the same panel that unanimously recommended death, also found beyond a reasonable doubt that

Sparre had committed felony murder with an underlying burglary. This offense was sufficient to render him death eligible under Florida law; any federal component to his alleged *Hurst v. Florida* claim fails because the requisite Sixth Amendment jury factfinding was established beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490.

Assuming *arguendo* that Petitioner has established a *Hurst* error, the Florida Supreme Court properly held that any error was harmless. Petitioner complains that the Florida Supreme Court employs a "per se harmless error rule" limited solely to determining whether a jury's sentencing recommendation was unanimous. Pet. 40. Petitioner misconstrues the Florida Supreme Court's harmless error rulings, however.

It is true that the Florida Supreme Court has considered the unanimous nature of an advisory recommendation when finding an alleged *Hurst* error to be harmless. *See, e.g.*, *Davis v. State*, 207 So. 3d 142, 173-75 (Fla. 2016). But it has explicitly observed that a 12-0 vote "*alone is insufficient* to determine harmless error." *Allen v. State*, 261 So. 3d 1255, 1288 (Fla. 2019) (emphasis added). Rather than rely exclusively on 12-0 votes, the court has clarified that "a jury's unanimous recommendation" merely "*begins a foundation for 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.* (citation omitted; emphasis added). To complete its harmless error review, the Florida Supreme Court insists it

"must also consider other factors such as the jury instructions, the aggravators and mitigators, and the facts of the case." *Id.* (citations omitted). It is therefore not true, as Petitioner would have it, that the Florida Supreme Court "engage[s] in no semblance of individualized review" (Pet. 40) when assessing alleged *Hurst* errors for harmlessness.

Nothing in the decision below suggests that the Florida Supreme Court departed from its precedents here, even if it did not lay out in complete detail the basis for its conclusion that any *Hurst* error was harmless.

In short, the Florida Supreme Court's rejection of Sparre's *Hurst v. Florida* claim is consistent with this Court's precedent and certiorari review should be denied. *See McKinney v. Arizona*, 140 S. Ct. 702.

The *Caldwell* Claim

Next, Sparre argues that trial counsel "consistently diminished the jury's sentencing role . . . in violation of the Eighth Amendment," by referring to their penalty decision as a "recommendation." Pet. at 38. Sparre postulates that "the whole record" supports a possible *Hurst* error and his jury "could have voted for life" if it had not been instructed of its advisory sentencing recommendation. The Florida Supreme Court rejected the *Hurst* argument, but did not overtly comment on any *Caldwell* component of the issue. Nonetheless, the *Caldwell* issue is essentially a factual dispute, not befitting review by this Court. *See United States v. Johnston*, 268 U.S. 220 (1925) (denying certiorari to review evidence or discuss specific facts).

Sparre's argument fails in part because the capital sentencing procedure at issue in *Caldwell* is significantly different from Florida's. Mississippi employs direct jury sentencing in capital cases; the judge plays no part other than to oversee the validity of the process. *See* MS Code § 99-19-103. Compared to a Mississippi jury, the sentencing role of Florida juries in capital cases is diminished, but not in a way that violates *Caldwell*.

Under the statute in effect at the time of Sparre's sentencing, the jury was required to consider and weigh the aggravators and mitigators but its recommendation as to whether death was warranted, while given great weight, was not binding; the court could reject a death recommendation by the jury and impose life. Sparre's failure to acknowledge this distinguishing factor substantially weakens his *Caldwell* claim.

The decision in *Caldwell* is straightforward. A capital penalty-phase jury should not be *misled* regarding the role it plays in the sentencing process, and the jury's responsibility in determining an appropriate sentence should not be *diminished*. A *Caldwell* error, therefore, has two interrelated components. First, a jury must be misled by jury instructions, prosecutor argument, or judicial comments. Second, they must be misled in a way that diminishes their role in the process. Examination of what took place in Sparre's penalty phase reveals that no *Caldwell* violation occurred; a focused consideration of Sparre's own arguments supports this view.

Sparre correctly notes that his jury was told that their recommendation was advisory and that the court was responsible for sentencing. That was true then and, with regard to a death recommendation, true now. Still, Florida juries are hardly led to believe that their role in the proceedings is insignificant—even post-*Ring*, pre-*Hurst* juries. *See Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986) ("*Caldwell* is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.").

The jury was not misled, but was properly instructed on the importance of their role. It was informed that in order to recommend a death sentence, it must find aggravating circumstances were proven beyond a reasonable doubt, that aggravators must outweigh the mitigating factors and that great weight would be given to their recommendation. The trial excerpts provided below show that Sparre's jury was specifically informed and instructed of their responsibility in a capital case and are by no means exhaustive.[20]

At the commencement of jury selection, the trial judge addressed the prospective venire in part:

> If and only if a verdict of guilty of murder in the first degree is rendered by the jury[,] . . . the jury will reconvene for the purposes of rendering an advisory recommendation to me as to what sentence should be

[20] Far from being minimized, the jury's role was in fact overemphasized in Sparre's case. The trial court was precluded from giving the recommendation great weight because Sparre chose to waive the presentation of mitigation. *See Sparre*, 164 So. 3d at 1192.

> imposed. . . . The final determination as to the sentence to be imposed is up to me. However, your advisory sentence as to what sentence should be imposed on this defendant *is entitled by law to be given great weight by this Court* in determining what sentence to impose in this case.

DAR 48-49 (emphasis added). The state prosecutor reinforced the trial judge's statement to the prospective jurors stating, in part:

> if the defendant is found guilty of first degree murder then you hear aggravators and mitigators and then you weigh those and the Judge is going to give you instructions about that. . . . *Your recommendation carries great weight* but the Judge is actually the one that imposes the sentence.

DAR 192-93 (emphasis added). Sparre's trial counsel asked the prospective jurors regarding the penalty phase, "Does everybody understand that your recommendation as a jury carries great weight with the Court and unless reasonable men can differ, that's the test, it's carried out?" DAR 297.

In penalty-phase closing argument, the prosecutor discussed aggravation to be proven beyond a reasonable doubt, mitigation, weight to be given and the jury's "recommendation" to be made to the trial court. DAR 1340-72. He specifically stated,

> You determine whether aggravating circumstances have been proven. You determine whether mitigating circumstances have been proven and then you come back with a recommendation, and as we talked about *your recommendation carries great weight*. . . . The state's got to prove the aggravators beyond a reasonable doubt.

DAR 1352-53. Trial counsel reminded the jury that "only under rare circumstances if you recommend a death sentence would that ever be overturned. It would be carried out." DAR 1375. Upon instructing the jury, the trial judge again discussed

the jury's "duty to advise the Court as to the punishment that should be imposed," stating,

> You must follow the law that will now be given to you and render an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist.

DAR 1392. The trial judge continued, amplifying the jury's role instructing,

> Although the recommendation of the jury as to the penalty is advisory in nature and is not binding[,] the jury recommendation must be given great weight and deference by the Court in determining which punishment to impose.
>
> * * *
>
> . . . you must follow the law as it is set out in these instructions. If you fail to follow the law your recommendation will be a miscarriage of justice. . . . All of us are depending upon you to make a wise and legal decision in this matter.
>
> * * *
>
> An aggravating circumstance must be proven beyond a reasonable doubt before it may be considered by you in arriving at your recommendation.

DAR 1393-94, 1396.

The jury instructions used in Sparre's case were standard instructions approved by Florida's Supreme Court. Florida juries are told that their job is to make a sentencing recommendation to the trial judge who will then impose the sentence; this is neither misleading nor detrimental to the jury's role as defined under Florida law. Indeed, this Court has addressed Florida's hybrid sentencing procedure, specifically noting the benefits of a jury's consideration of the facts adduced during the penalty phase along with the court's perhaps stronger ability to compare cases so that similar factual scenarios will result in like cases receiving like sentences.

Proffitt, 428 U.S. at 252.

Every capital penalty phase jury in Florida, including Sparre's is given the same standard instructions. Taking Sparre's argument to its logical conclusion would mandate jury sentencing and effectively render Florida's hybrid sentencing system invalid. This Court has never held that jury sentencing is constitutionally required. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed.").

Because Sparre's jury was properly instructed and nothing was said to diminish the gravity of the task they were undertaking, there is no *Caldwell* error. *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). The Eleventh Circuit has consistently rejected *Caldwell* challenges to Florida's jury instructions in capital cases in the years since *Romano*.[21] As the Eleventh Circuit has explained, the infirmity identified in *Caldwell* is "simply absent" in a case where "the jury was not affirmatively misled regarding its role in the sentencing process." *Davis v. Singletary*, 119 F.3d 1471,

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[21] Other federal circuit courts have held that the use of "advisory" or "recommendation" does not violate *Caldwell*. *See Bowling v. Parker*, 344 F.3d 487, 514-15 (6th Cir. 2003) (the word "recommend" "does not misstate local law" or Kentucky statutes); *Fleenor v. Anderson*, 171 F.3d 1096, 1098 (7th Cir. 1999) (use of "recommendation" was rejected because Indiana juries make "a recommendation to the judge about whether or not to impose the death penalty," citing Ind. Code § 35-50-2-9(e)); *Wilson v. Sirmons*, 536 F.3d 1064, 1121 (10th Cir. 2008) (claim based on jury's sentencing role described as a "recommendation" was an accurate description of Oklahoma law).

1481-82 (11th Cir. 1997).

In sum, the Florida Supreme Court's denial of *Hurst* relief in this post-conviction case does not conflict with the relevant decisions of this Court or present an important or unsettled question of law for this Court's review. Accordingly, certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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