No. 17-9284

IN THE

Supreme Court of the United States

JESSE GUARDADO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

REPLY BRIEF FOR PETITIONER

THIS IS A CAPITAL CASE

BILLY H. NOLAS
Counsel of Record
SEAN T. GUNN
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818
billy_nolas@fd.org
sean_gunn@fd.org

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I. Respondent Incorrectly Asserts that the Florida Supreme Court's *Hurst* Harmless-Error Rule is Immune From this Court's Review

Respondent incorrectly asserts that the Florida Supreme Court's *Hurst* harmless-error rule is immune from this Court's federal constitutional review. Respondent's misunderstanding is based on four errors.

First, Respondent is wrong that the petition "does not present a federal constitutional question" because, according to Respondent, "the requirements of *Hurst v. Florida* were satisfied in [this] case." Brief in Opposition ("BIO") at 11. There has never been a serious dispute in this case that Petitioner was sentenced to death in violation of *Hurst*. The Florida Supreme Court explicitly agreed below that *Hurst v. Florida* applies to Petitioner's sentence. *Guardado v. State*, 238 So. 3d 162, 163 (Fla. 2018). Respondent's own brief in this Court acknowledges that a judge conducted the fact-finding. *See* BIO at 6. In *Hurst*, this Court held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. at 619. Petitioner's death sentence therefore violates *Hurst*, regardless of additional concerns the Florida Supreme Court discussed on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *See* BIO at 8-9, 10, 11, 17-18.[1]

Second, Respondent is wrong that this Court cannot exercise jurisdiction because the Florida Supreme Court's rule is a state-law matter. *See* BIO at 14-15. From Respondent's perspective, when state courts articulate harmless-error rules as

[1] To the extent Respondent argues that Petitioner's sentencing complied with *Hurst* due to the judge's finding of aggravating factors based on prior convictions, *see* BIO at 13, Petitioner already described that argument's fallacy, *see* Pet. at 33-34.

a matter of state law, there is no federal question for this Court to review, even if the state harmless-error rule is used to deny a federal constitutional claim. Under Respondent's faulty theory, states could evade this Court's precedents by deeming federal constitutional errors "harmless" for any reason at all. This Court has jurisdiction to protect against such end-runs around federal constitutional rights, particularly in capital cases.[2] As the petition explained, whether a state court has exceeded constitutional boundaries in the denial of a federal claim on harmless-error grounds "is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967). Pet. at 27.

Third, Respondent is wrong to attempt to inject an unnecessary retroactivity issue into this case. *See* BIO at 14-15. The Florida Supreme Court held that *Hurst v. Florida* applies retroactively to Petitioner as a matter of state retroactivity law. *Guardado*, 238 So. 3d at 163 (citing *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016)).

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[2] Respondent's position is based on a confused reading of this Court's adequate-and-independent-state-ground precedent. While "[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is *independent of the federal question* and adequate to support the judgment," *Coleman v. Thompson*, 501 U.S. 722 (1991) (emphasis added), this does not mean that all state court rulings that invoke a state-law basis are immune from this Court's federal constitutional review. A state court ruling is deemed "independent" only when it has a state-law basis for the denial of a federal constitutional claim that is separate from the merits of the federal claim. *Foster v. Chapman*, 136 S. Ct. 1737 (2016). Even Respondent acknowledges that a state court's application of a harmless-error rule is a purely state-law question only "where it involves *only errors of state procedure or state law*." BIO at 20 (emphasis added) (citing *Chapman*, 386 U.S. at 21). Here, the Florida Supreme Court's per se harmless-error rule for *Hurst* claims plainly involves the federal constitutional violation described in *Hurst*, not a violation of state procedure or law.

Respondent concedes that the Florida Supreme Court's retroactivity holding in Petitioner's case was permissible under *Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008). See BIO at 14-15. Therefore, the only issue for this Court is whether the Florida Supreme Court, having permissibly held that *Hurst* applies retroactively to Petitioner as a matter of state law, thereafter violated the United States Constitution by mechanically applying its per se harmless-error rule to deny relief.

Petitioner is not "ask[ing] this Court to enforce a retroactivity ruling based on state law," BIO at 14; there is simply no retroactivity question before this Court. If this Court grants certiorari review, holds that the Florida Supreme Court's harmless-error analysis was unconstitutional, and remands for a proper harmlessness analysis, the Florida Supreme Court's state retroactivity ruling will remain sound on remand.[3]

Fourth, Respondent is wrong that the questions presented in this petition are barred by the law-of-the-case doctrine. *See* BIO at 1 n.1. Respondent's law-of-the-case argument is based entirely on this Court's denial of Petitioner's prior certiorari petition, which raised *Hurst* questions. Respondent's argument falls apart for

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[3] *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), does not suggest that this Court should substitute the Florida Supreme Court's state-law retroactivity ruling with a federal retroactivity analysis under *Teague v. Lane*, 489 U.S. 288 (1989). *Summerlin* was a federal habeas corpus case and, unlike in this case, there had been no prior retroactivity ruling regarding *Ring* in the petitioner's favor by the state supreme court. Also, *Lambrix v. Secretary*, 872 F.3d 1170 (11th Cir. 2017), does not suggest that the Florida Supreme Court's retroactivity ruling needs reconsideration here. In *Lambrix*, the Eleventh Circuit declined to apply *Hurst* retroactively under federal law only after the Florida Supreme Court had held that *Hurst* was *not* retroactive as a matter of state law. *Id.* at 1175. Here, the Florida Supreme Court properly held that *Hurst was* retroactive to Petitioner under state law.

numerous reasons, including that the denial of certiorari has no precedential value and does not form part of the law of the case for purposes of future certiorari review. *See, e.g.*, *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366 n.1 (1973).[4] To the extent Respondent contends that the law-of-the-case in the Florida Supreme Court is binding on this Court with respect to Petitioner's federal constitutional arguments, that contention is incorrect because this Court, not the Florida Supreme Court, is the final arbiter of federal constitutional questions in this case.

II. Respondent's Arguments Under the Florida Supreme Court's Recent Plurality Decision in *Reynolds* Underscore the Need for this Court's *Caldwell* Scrutiny

Respondent's dismissal of Petitioner's *Caldwell* arguments as "absurd" relies in part on the Florida Supreme Court's recent decision in *Reynolds v. State*, No. SC17-793, 2018 WL 1633075 (Fla. Apr. 5, 2018). BIO at 10. Respondent's *Reynolds* arguments only underscore the need for this Court to grant certiorari to review whether the Florida Supreme Court's per se *Hurst* harmless-error rule contravenes *Caldwell*, as several Justices of this Court have already called for the Court to do. *See, e.g.*, *Kaczmar v. Florida*, 138 S. Ct. 1973, 1973-74 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *Guardado v. Jones*, 138 S. Ct. 1131 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *Middleton v. Florida*, 138 S. Ct. 829 (2018) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of

[4] The law of the case doctrine is also a "discretionary rule of practice," not a mandate. *United States v. U.S. Smelting, R & M Company*, 339 U.S. 186, 199 (1950).

certiorari); *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari).

Justice Sotomayor observed in a recent dissent from the denial of certiorari in *Kaczmar v. Florida* that *Reynolds* "gathered the support only of a plurality," so the issue of whether the Florida Supreme Court's *Hurst* harmless-error rule contravenes *Caldwell* "remains without definitive resolution by the Florida Supreme Court. *Kaczmar*, 138 S. Ct. at 1973. Respondent's brief ignores Justice Sotomayor's dissent in *Kaczmar* and instead erroneously suggests that *Reynolds* is a majority opinion of the Florida Supreme Court. *See* BIO at 10. Justice Sotomayor was nonetheless correct that the Florida Supreme Court has still not sufficiently analyzed in a definitive majority opinion how a defendant's pre-*Hurst* advisory jury recommendation can serve as the lynchpin for a proper *Hurst* harmless-error analysis when the advisory jury's sense of responsibility for a death sentence was systematically diminished by the design and operation of Florida's prior scheme.

The plurality's reasoning in *Reynolds* provides little hope that the Florida Supreme Court will ever sufficiently address the *Caldwell* matter unless this Court steps in. In *Reynolds*, the plurality doubled-down on its pre-*Hurst* decisions summarily rejecting the applicability of *Caldwell* to Florida's capital sentencing scheme, but for the first time attempted to provide an explanation. The court held that, under *Romano v. Oklahoma*, 512 U.S. 1 (1994), *Hurst* has no bearing on whether *Caldwell* was violated in any case because Florida's pre-*Hurst* jury instructions accurately described Florida's capital sentencing scheme at the time. *Reynolds*, 2018

WL 1633075, at *10-12. But there is a critical flaw in the Florida Supreme Court's analysis: Florida's prior scheme was unconstitutional before *Hurst*, making *Romano* inapplicable.

Rather than addressing the concerns of Justice Sotomayor and the other dissenting Justices of this Court, the Florida Supreme Court's decision in *Reynolds* represents an attempt to rebuke those concerns. Mr. Reynolds's petition for a writ of certiorari seeking review of the Florida Supreme Court's opinion in his case is pending in this Court. *See Reynolds v. Florida*, No. 18-5158. The pending petition in *Reynolds*, combined with Respondent's reliance on *Reynolds* in this case, provide additional justification for this Court to grant certiorari review.

III. Respondent's Attempts to Characterize the Florida Supreme Court's *Hurst* Harmless-Error Analysis as Individualized are Belied by the Rule's Consistent Results in Every Unanimous-Recommendation Case

The Florida Supreme Court has made no secret of its creation of a per se harmless-error rule for *Hurst* claims. Beginning in *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), and in dozens of cases since, the Florida Supreme Court has consistently articulated the reason it believes that *Hurst* errors are harmless in all cases where the advisory jury unanimously recommended the death penalty, regardless of any other case-specific factors.

The Florida Supreme Court's per se rule is premised on the idea that—because advisory juries (1) were instructed on the facts a judge must find in order to impose a death sentence under Florida law; (2) were told that their recommendation to the judge should be based on the same considerations; and (3) unanimously recommended

the death penalty—the same jury, or any other jury, certainly would have found the facts necessary for a death sentence under Florida law. The Florida Supreme Court maintains this belief regardless of the fact that pre-*Hurst* juries were told of their "advisory" nature and made no findings in support of their overall recommendation, and regardless of any case-specific factors. The very nature of the Florida Supreme Court's reasoning compels the same result in *every* unanimous-recommendation case.

Rather than defending the Florida Supreme Court's rationale for the per se rule, Respondent attempts to argue that there is no per se rule at all, and that each *Hurst* case, including Petitioner's, receives individualized harmless-error review. But Respondent's argument is belied by every single *Hurst* case the Florida Supreme Court has decided in which there was a unanimous jury recommendation. In all of those cases, the Florida Supreme Court considered jury unanimity dispositive of the harmless-error inquiry. There have been no exceptions. The Florida Supreme Court has found *Hurst* errors harmless in all of the more than three-dozen unanimous-jury-recommendation cases it has reviewed, and declined to find harmless error in any case in which the jury was not unanimous. *See* Death Penalty Information Center, *Florida Death-Penalty Appeals Decided in Light of Hurst*, *available at* https://deathpenaltyinfo.org/Hurst_Cases_Reviewed (updated June 19, 2018).

Respondent fails to identify a single case, out of a total of nearly 200, in which the Florida Supreme Court either (1) declined to apply the harmless-error doctrine and granted *Hurst* relief where there was a unanimous jury recommendation, or (2) applied the harmless-error doctrine and denied *Hurst* relief where there was a non-

unanimous jury recommendation. That is because no such case exists. The Florida Supreme Court has applied its per se harmless-error rule to deny *Hurst* relief in more than three-dozen unanimous-recommendation cases, while declining to find harmless error in more than 150 non-unanimous-recommendation cases. Respondent asks this Court to draw an unreasonable inference from these consistent results. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).[5]

Respondent points to some cases where the Florida Supreme Court, having applied the per se rule, goes on to describe other factors that favor a harmless-error ruling. *See* BIO at 14-15 & n.7. But this does not negate the per se nature of the unanimous-jury-recommendation rule. It is the unanimous jury recommendation that is the common determinative factor in the Florida Supreme Court's harmless-error analysis in every *Hurst* case. The Florida Supreme Court has never denied *Hurst* relief on harmless-error grounds without relying on the unanimous jury

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[5] Respondent points to two cases in an attempt to show that not all unanimous-recommendation cases produce the same harmless-error result in the Florida Supreme Court, *see* BIO at 19-20, but neither example supports that point. As Respondent acknowledges, in *Wood v. State,* 209 So. 3d 1217, 1226, 1238 (Fla. 2017), the Florida Supreme Court found, in a unanimous-recommendation case, that the jury's consideration of improper aggravators—*not the Hurst v. Florida error itself*—was not harmless. In *Bevel v. State*, 221 So. 3d 1168, 1177-78 (Fla. 2017), the Florida Supreme Court held that the *Hurst* error was harmless, based on the unanimous jury recommendation, before granting relief on a separate claim of ineffective assistance of counsel. Respondent argues that if the Florida Supreme Court consistently applied a per se harmless-error rule for *Hurst* claims, *Wood* and *Bevel* "would have been affirmed." BIO at 20. But the denial of *Hurst* relief *was affirmed* in both cases under the Florida Supreme Court's per se harmless-error approach. The fact that relief was granted on other grounds does not show that the Florida Supreme Court conducts individualized harmless-error review of *Hurst* violations.

recommendation, even if other factors are discussed. In many cases, such as Petitioner's, the unanimous recommendation is the only factor discussed.

In light of the consistency of the Florida Supreme Court's decisions, it strains credibility for Respondent to pretend that no per se rule exists. But Respondent's hesitance to defend the Florida Supreme Court's logic behind creating the rule is understandable. As the petition explained, the vote of a defendant's advisory jury cannot by itself resolve a proper harmless-error inquiry. *See* Pet. at 33-37.

Respondent also declines to defend the Florida Supreme Court's abandonment of the burden of proof that this Court has said rests with the State in a proper harmless-error analysis. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). Respondent does not address the petition's explanation that the Florida Supreme Court's per se rule effectively relieves the State of its constitutional obligation to establish that the *Hurst* error in Petitioner's case was harmless beyond a reasonable doubt. *See* Pet. at 32-33. Respondent does not dispute that the State filed *nothing* in the proceeding below, but still received the benefit of a "harmless-error" ruling.

IV. Respondent Offers No Support for her Contention that Petitioner Received Individualized Harmless-Error Review as Required by this Court's Precedent

Respondent offers no convincing evidence for her contention that Petitioner received individualized harmless-error review as required by this Court's precedent. According to Respondent, Petitioner received individualized harmless-error review—of whether there is a reasonable possibility that the *Hurst* error impacted his death sentence, *see Chapman*, 386 U.S. at 22-23—because the Florida Supreme Court (1)

"specifically mention[ed] the facts as described on direct appeal, the five aggravating factors, the non-statutory mitigating circumstances, and the unanimous jury verdict," and (2) "cite[d] to *Davis*," a decision which "went into a detailed analysis of why the error was harmless" in Mr. Davis's case. BIO at 15-16. Respondent casts the Florida Supreme Court's reference to *Davis* as a shortcut for *Hurst* harmlessness review: "Instead of restating the entirety of their method in determining harmlessness in each and every case where there was a unanimous jury recommendation, including in Petitioner's case, the [Florida Supreme Court] cites *Davis* and points out the similarities between each case and *Davis*." *Id.* This cannot be acceptable.

A recitation of the facts described on direct appeal, the aggravating and mitigating factors, and the unanimous jury verdict cannot be sufficient to uncover the probable effect of the *Hurst* error on Petitioner's sentencing proceeding. Nor is a citation to *Davis*, an entirely separate case, sufficient. A proper harmless-error inquiry in Petitioner's case should have focused on whether, in the context of the whole record, there is a reasonable chance of a different result if it had been the jury, rather than the judge, that had been empowered to conduct the fact-finding required for a death sentence. *See Chapman*, 386 U.S. at 22-23. In that context, review of the "whole record," which this Court has deemed essential in a valid harmless-error analysis, *see, e.g.*, *Yates v. Evatt*, 500 U.S. 391, 403 (1991), certainly must include a review of Petitioner's mitigation.

None of Petitioner's mitigation was considered as part of the Florida Supreme Court's *Hurst* harmless-error analysis.

Petitioner has always accepted full responsibility for the crime. Shortly after the murder, Petitioner turned himself into the police, confessed, and pleaded guilty. Petitioner led a difficult life leading up to his imprisonment on death row. He struggled from a life-long addiction to drugs and alcohol. As a juvenile, he was sent to the notorious Arthur G. Dozier School for Boys, where he was terrorized and abused, and made to work in the slaughterhouse. After being sentenced as a young man to a 20-year prison term for drug-related robberies, Petitioner set out to improve his life. He maintained a clean disciplinary record and became state-certified in wastewater management. But after his release from prison, he struggled to adjust to modern society, and became embroiled in addiction again. On the day of the murder, Petitioner was on a two-week-long crack binge. The victim was his friend. Petitioner has always expressed remorse for his actions.

Not only was none of this information considered in the Florida Supreme Court's harmless-error analysis, but as a result of that court's per se rule, none of Petitioner's mitigation will ever be heard by a jury endowed with the fact-finding role that this Court held is required by the Sixth Amendment.[6]

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[6] Respondent's assertion that the Florida Supreme Court fulfilled its obligation to conduct individualized harmless-error analysis of the *Hurst* violation when it reviewed Petitioner's case for proportionality on direct appeal, *see* BIO at 18, not only contravenes this Court's precedent, but is absurd on its face. "The Florida Supreme Court's discussion of the proportionality of [a] petitioner's sentence is not an acceptable substitute for harmless error analysis." *Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring); *see also id.* at 540 (explaining that harmless-error is a "quite different enquiry" from proportionality). More to the point, Petitioner's direct appeal in the Florida Supreme Court concluded in 2007, nearly a decade before *Hurst*. The Florida Supreme Court's direct-appeal review of Petitioner's death sentence on state proportionality grounds cannot substitute for a

V. Respondent's Position that Advisory Jury Recommendations are Verdicts Within the Meaning of the Sixth Amendment and *Sullivan* Only Highlights the Certiorari-Worthiness of the Questions Presented

Respondent's arguments regarding *Sullivan v. Louisiana*, 508 U.S. 275 (1993), attempt to recast the issue as whether *Hurst* errors are structural or capable of harmless-error review. *See* BIO at 22-25. But these arguments confuse the relevance of *Sullivan* as described in the petition. *Chapman* and this Court's other harmless-error precedents should not permit state courts, particularly in capital cases, to decline to grant a constitutional penalty phase on the basis of the votes of advisory jurors whose ultimate decision, like the jury decision in *Sullivan*, did not constitute a "verdict" under the Sixth Amendment. *See* Pet. at 37-40.

Respondent's own briefing regarding the perceived inapplicability of *Sullivan* to *Hurst* violations raises more questions than it answers. *See id.* at 22-25. In Respondent's view, the unconstitutional Florida jury instructions that improperly allocated fact-finding authority as to each element for a death sentence to the judge, rather than the jury, are more like the improper instruction as to only *one* of multiple offense elements analyzed by this Court in *Neder v. United States*, 527 U.S. 1 (1999), than the improper reasonable-doubt instruction on *every* offense element that "viate[d] all the jury's findings" in *Sullivan*. *See* BIO at 23-25. But Respondent fails to explain how Florida's flawed instructions infected less than all of the elements for

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proper analysis of the impact of the *Hurst* violation, which was not recognized until 2016. In 2007, the Florida Supreme Court believed that Florida's capital sentencing scheme was constitutionally-valid, and the court could not possibly have considered the impact that jury-fact-finding may have had on the outcome.

a death sentence. Respondent's only answer is that "there was not an issue with the reasonable doubt instruction," as there was in *Sullivan*. BIO at 24. Respondent cannot show how the advisory jury's recommendation constitutes a Sixth Amendment verdict in Petitioner's case when there were no jury findings at all, on any element of the offense. As Respondent sees it, the jury's one-sentence recommendation in Petitioner's case—"A majority of the jury by a vote of 12 to 0 advise and recommend to the court that it impose the death penalty upon Jesse Guardado"—is a valid Sixth Amendment basis upon which the Florida Supreme Court can rest its entire harmless-error analysis. As the petition explains, *Sullivan* and this Court's other harmless-error cases strongly suggest otherwise. *See* Pet. at 37-40.

CONCLUSION

This Court should grant a writ of certiorari and review the decision of the Florida Supreme Court.

Respectfully submitted,

/s/ BILLY H. NOLAS
BILLY H. NOLAS
Counsel of Record
SEAN T. GUNN
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818
billy_nolas@fd.org
sean_gunn@fd.org