No. 18-1306

IN THE

Supreme Court of the United States

FRED ANDERSON, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether *Hurst v. Florida*, 136 S. Ct. 616 (2016), applies retroactively to Petitioner's sentence.

2. Assuming *Hurst* applies to Petitioner's sentence, whether the Florida Supreme Court erred, as a matter of federal law, in concluding that any *Hurst* error in this case was harmless.

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STATEMENT

1. After shooting two bank tellers, one of them fatally, during a bank robbery at the Mount Dora United Southern Bank ("USB"), Petitioner Fred Anderson, Jr. was convicted of first-degree murder, attempted first-degree murder, robbery with a firearm, and grand theft of a firearm. *Anderson v. State*, 863 So. 2d 169, 174 (Fla. 2003) ("*Anderson I*"). The jury unanimously recommended that he be sentenced to death for the murder, and the trial judge sentenced him to death. *Anderson v. State*, 18 So. 3d 501, 507 (Fla. 2009) ("*Anderson II*").

At the time of the bank robbery and murder, Petitioner was under Community Control, supervised by a county probation officer. *Anderson v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 881, 886 (11th Cir. 2014) ("*Anderson III*").[1] He had previously been convicted of grand theft for embezzling $4,750 in tuition payments while employed in Bethune-Cookman University's admissions office. *Id.* at 885. Initially, he was sentenced to five years' probation and restitution, but after he failed to comply with the restitution payment schedule, his probation was revoked and he was placed under Community Control. *Id.* Once again, however, he failed to make the scheduled restitution payments; he also failed to comply with his Community Control conditions. *Id.* His Lake County probation officer, Kathy Carver, reported his non-compliance, and the

[1] "Community Control is a form of intensive supervised house arrest in the community, including surveillance on weekends and holidays, administered by officers with limited caseloads." *Anderson III*, 752 F.3d at 885 n.9.

county court scheduled a revocation hearing. *Id.* By the time of the hearing, Petitioner had paid less than $100 in restitution. *Anderson II*, 18 So. 3d at 506-07.

As a result of the revocation hearing, which took place on Monday, March 15, 1999, Petitioner was placed under Community Control for 529 days, with one year to be served at the local Probation and Restitution Center ("PRC"), beginning on that Friday, March 19, 1999. *Anderson III*, 752 F.3d at 885-86.

"To obtain the funds to pay the restitution, Anderson decided to rob the Mount Dora USB." *Anderson I*, 863 So. 2d at 174. On the morning of Thursday, March 18, Petitioner visited a friend's house and, "[u]nder the pretense of wanting to use the telephone," obtained access to the friend's shed, where he stole a .22 caliber revolver. *Anderson III*, 752 F.3d at 886. The revolver "fired heavier ammunition than a normal .22 caliber revolver and . . . the hammer had to be pulled back and cocked each time the gun was fired." *Anderson I*, 863 So. 2d at 174. Later that same day, Anderson visited the Mount Dora USB and spoke with a friend, who was a loan secretary at the bank. *Anderson III*, 752 F.3d at 886.

The next day, Friday, March 19, Petitioner went to Carver's office; she was not there, but he spoke with another probation officer. *Id.* He told that officer that he now had the funds to satisfy his restitution obligation, and asked the officer whether he would still need to report to the PRC that afternoon as ordered. *Id.* He was told to report as ordered. *Id.*

Later that morning, Petitioner went to the Mount Dora USB, pretending to be a college student on a

banking-and-finance research assignment. *Id.* Based on that pretense, the bank manager invited Petitioner into his office. *Id.* During their ten- to fifteen-minute conversation, the bank manager "noticed that whenever he took his eyes off of Anderson to glance at the lobby, Anderson's focus shifted to the surveillance VCR on [the manager's] desk." *Id.* at 886-87.

Petitioner then visited another bank and informed the attendant that he wanted to open a bank account, although he was eventually told to return the following Monday. *Id.* at 887. "His plan was to deposit the robbery money into a new bank account at [this] second bank." *Anderson I*, 863 So. 2d at 174.

After he visited the second bank, Petitioner called his community control officer and told her that he had the money to satisfy his restitution obligation. *Anderson III*, 752 F.3d at 887. His Volusia County probation officer, Deborah Laso, responded that he nevertheless was required to report to the PRC as ordered. *Id.* Petitioner failed to do so. *Id.*

The next morning, Saturday, March 20, Petitioner took a loaded .22 caliber revolver from his mother's dresser and asked to borrow her car to go to the store. *Id.* Armed with that revolver and the one he stole earlier that week, he drove to the Mount Dora USB, stopping on the way for orange juice and donuts. *Id.* When he arrived at the bank, he gave the only personnel on duty, Heather Young and Marisha Scott, the orange juice and donuts, "saying that they were tokens of appreciation for arranging his meeting with [the bank manager] the previous day." *Id.* He proceeded to speak with Scott for about an hour and a

half under the ruse of completing his fictional research assignment. *Id.*

About fifteen minutes before the bank was to close, Petitioner told the two tellers that he was going to get a business card from his car to give them. *Id.* Finding this odd, Scott decided to lock the front door while Petitioner was outside. *Id.* But before she could reach the door, Petitioner reentered the bank and pointed one of the revolvers at her, ordering her to go to the vault without setting off any alarms. *Id.* He then ordered the tellers to fill a trash bag with money; they complied and filled it with $71,618. *Id.* at 887-88.

"At this point, Anderson asked the tellers who wanted to die first. Scott begged him not to hurt them." *Id.* at 888. A witness who arrived at the bank heard Scott's voice coming from the vault, saying "'Please don't. Please no.'" *Id.* After hearing gunshots, the witness ran outside and called the police. *Id.* Petitioner fired both revolvers, firing a total of ten shots at point-blank range, seven of which hit Young and two of which hit Scott. *Id.*

Petitioner then put the revolvers in the trash bag and tried to take the surveillance tape from the VCR in the bank manager's office, but he was unable to do so. *Id.* He then ripped the VCR from its mount and tried to pull its cord out of the wall. *Id.* As he did so, the trash bag ripped open, spilling the money and the two revolvers. *Id.* He picked up the money and put his mother's revolver in a nearby trashcan; the other revolver "slipped under [the bank manager's desk], and Anderson did not retrieve it." *Id.* at 888 & n.15.

Hearing moaning sounds coming from the vault, Petitioner was surprised to discover the two tellers were still alive. *Id.* at 888. Scott, who ultimately survived but was left paralyzed, testified that after she was shot, she saw a large black object coming towards her face. *Id.* at 888 n.16. Both tellers had head wounds. *Id.* The State's theory for those head wounds was that "Anderson, after returning to the vault and realizing that the tellers were alive, struck them with the VCR or some other large object. The VCR was dented, but it was unclear how the dent got there." *Id.*

The police arrived less than two minutes after they were called. *Id.* at 888. Upon entering the bank, they saw Petitioner "holding the VCR and the trashcan containing the money and his mother's revolver." *Id.* The officers told Petitioner to "'drop everything"; he complied, falsely identifying himself as the bank janitor, and was handcuffed. *Id.* One of the officers at the scene later testified that Petitioner spontaneously volunteered that "'I did it. I did it by myself. I'm by myself.'" *Id.*

Young died on the way to the hospital, while Scott was paralyzed, with a severely limited ability to intake oxygen. *Id.* at 889.

2. Having been caught in the act was not the only evidence against Petitioner. "The bank's security cameras had recorded the robbery." *Anderson III*, 752 F.3d at 890. His hands tested positive for gunshot residue, and blood on his clothing was consistent with Scott's DNA. *Anderson I*, 863 So. 3d at 175. The Florida Department of Law Enforcement was able to positively match three of the bullets fired with one of the revolvers, and determined that four larger bullets

"displayed the same poor rifling characteristics as the test fires" from the other revolver. *Id.* Under police questioning after his arrest, Petitioner confessed to the robbery and to shooting Young and Scott. *Anderson III*, 752 F.3d at 889. At trial, Petitioner took the stand and admitted to taking the revolvers, robbing the bank, and shooting the tellers. *Anderson I*, 863 So. 2d at 175.

After convicting Petitioner of first-degree murder, attempted first-degree murder, grand theft of a firearm, and robbery with a firearm, the jury unanimously recommended the death penalty. *Id.*

3. The trial court found four aggravating factors: "(1) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP); (2) the defendant was previously convicted of another capital felony or of a felony involving the use of threat or violence to the person (prior violent felony) [the contemporaneous attempted murder of Scott]; (3) the murder was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation; and (4) the murder was committed for pecuniary gain." *Anderson II*, 18 So. 3d at 507–08.

On the other side of the ledger, the trial court found no statutory mitigating factors and ten nonstatutory mitigating factors.[2] After weighing the aggravating

[2] "The 10 non-statutory mitigating circumstances were (1) remorse for conduct (moderate weight); (2) cooperation with law enforcement (some weight); (3) strong religious faith and involvement in church activities (substantial weight); (4) strong

and mitigating factors, the trial court sentenced Anderson to death. *Anderson III*, 752 F.3d at 894–95.

4. The Florida Supreme Court affirmed Anderson's conviction and sentence on direct appeal. *Anderson I*, 863 So. 2d at 189. The court "specifically note[d] that the jury recommended the death sentence by a unanimous vote and one of the aggravating circumstances found by the trial judge was that Anderson had been convicted of a prior violent felony for the contemporaneous conviction of the attempted murder of Scott." *Id.* This Court denied Anderson's subsequent petition for a writ of certiorari. *Anderson v. Florida*, 541 U.S. 940 (2004).

5. Petitioner sought postconviction relief under Rule 3.851 of the Florida Rules of Criminal Procedure, raising a broad range of claims. *Anderson II*, 18 So. 3d at 508. The circuit court held an evidentiary hearing, at which both Petitioner and the State presented witnesses, and denied relief. *Id.* After the Florida Supreme Court affirmed, *id.* at 522, Petitioner petitioned the United States District Court for the Middle District of Florida for a writ of habeas corpus under 28 U.S.C. § 2254. *Anderson III*, 752 F.3d at 901. The district court denied his claims without an evidentiary hearing, and the Eleventh Circuit affirmed. *Id.* at 901, 910. This Court again denied

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community involvement (moderate weight); (5) loving relationship with family (little weight); (6) employment history (little weight); (7) potential for rehabilitation (little weight); (8) no prior history of violence (substantial weight); (9) appropriate courtroom demeanor (little weight); and (10) willingness to plead (little weight)." *Anderson III*, 752 F.3d at 894 n.36.

Petitioner's subsequent petition for certiorari. *Anderson v. Jones*, 135 S. Ct. 1483 (2015).

6. Following this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Florida Supreme Court's decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), Petitioner filed a successive postconviction motion in state court to vacate his death sentence. Pet. App. 2a. The postconviction court held an evidentiary hearing and denied relief. Pet. App. 6a–13a; 14a–15a; 16a–24a.

Petitioner then appealed to the Florida Supreme Court. Pet. App. 1a. The court affirmed, concluding that "any *Hurst* error in this case was harmless beyond a reasonable doubt." Pet. App. 3a. In support of that holding, the court initially noted prior precedent explaining 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 finds all of the necessary facts for the imposition of a death sentence by virtue of its unanimous recommendation." Pet. App. 2a (quotation marks and alterations omitted). In addition, the court noted, it had consistently relied on such precedent "to deny *Hurst* relief to defendants who have received a unanimous jury recommendation of death." *Id.* (quotation marks omitted).

Anderson, the court explained, "received a unanimous jury recommendation of death." Pet. App. 2a. However, the court did not end its harmless-error analysis there. Pet. App. 2a-3a. Instead, it went on to explain that "[n]either the jury instructions provided in this case, nor the aggravators and mitigators found by the trial court, nor the facts of the case compel

departing from [the court's] precedent." Pet. App. 2a–3a.

The court also rejected Petitioner's argument that under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), a unanimous jury recommendation violates the Eighth Amendment when a jury is told that its role is advisory. Pet. App. 3a. The court explained that it had "'repeatedly rejected *Caldwell* challenges to the advisory standard jury instructions . . . [and] expressly rejected these post-*Hurst Caldwell* claims.'" *Id.* (quoting *Hall v. State*, 246 So. 3d 210, 216 (Fla. 2018) (plurality opinion)).

REASONS FOR DENYING THE PETITION

I. This Case Is A Poor Vehicle For Considering The Issues Petitioner Seeks To Raise.

Petitioner's death sentence became final in 2004, but the claims he seeks to raise are based on this Court's decision in *Hurst v. Florida*, which was decided in 2016. Hence, the questions presented in Anderson's petition assume that *Hurst* is retroactively applicable to his already-final sentence. That assumption is incorrect insofar as it is based on federal law; and it is both unsound and premature insofar as it is based on state law.

This Court's precedent compels the conclusion that *Hurst* is not retroactively applicable as a matter of federal law. This Court has held that *Ring v. Arizona*, 536 U.S. 584 (2002), does not apply retroactively to sentences that had already become final by the time *Ring* was decided. *Schriro v. Summerlin*, 542 U.S. 348 (2004). *Hurst* was based on *Ring*. 136 S. Ct. at 621–22

("The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's."); *id.* at 622 ("In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment."). Accordingly, *Hurst* is not retroactive, so far as federal law is concerned, for the same reasons this Court set out in *Schriro*. *See* 542 U.S. at 351–58.

Consistent with *Schriro*, Pet. 14 n.2, Petitioner does not claim that federal law makes what he characterizes as "the *Ring*/*Hurst* rule" retroactively applicable to his sentence. Rather, Petitioner cites a state case—*Mosley v. Florida*, 209 So. 3d 1248 (Fla. 2016)—for the proposition that the *Hurst* rulings are retroactively applicable as a matter of state law. Pet. 14 n.2 (citing *Mosley* for the proposition that "[t]he retroactivity of the *Ring*/*Hurst* rule is not at issue because Mr. Anderson's sentence became final after *Ring* was decided"). Petitioner's reliance on that state-law ruling is premature and unsound.

On April 24, 2019, the Florida Supreme Court *sua sponte* issued an order directing the State and a capital defendant in a different case to submit briefs addressing "whether [the Florida Supreme Court] should recede from the retroactivity analysis in . . . *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) . . . ." Order, *Owen v. Florida*, Case No. SC18-810 (April 24, 2019).[3] In its brief responding to that order, the State argued that *Mosley* was incorrectly decided and should be overruled. In the State's view, stare decisis should "not preclude" the Florida Supreme Court "from receding

[3] The Florida Supreme Court's docket entries are available at http://onlinedocketssc.flcourts.org/.

from . . . *Mosley*," as "[t]he decisions" in *Mosley* and a related state case "were premised on ignoring long standing existing precedent without justification," Br. 2. The court "should recede" from those cases, the State urged, "as both decisions are the result of an improper application of" certain state-law principles. *Id.* at 3. "In receding from those decisions," the State argued, the Florida Supreme Court "should reaffirm" an earlier state case "which held that *Ring v. Arizona* was not retroactive, and find that *Hurst v. Florida* and *Hurst v. State* are prospective only," Br. 3 (internal citations omitted).

If the Florida Supreme Court recedes from *Mosley*, the *Hurst* rulings will not apply retroactively, as a matter of state law, to Petitioner's sentence. *See* Pet. 14 n.2.

In short, the answers to the questions Petitioner asks this Court to resolve will have no impact on Petitioner's case if the *Hurst* rulings are not retroactively applicable to Petitioner's sentence; Petitioner does not and cannot argue that those rulings are retroactively applicable as a matter of federal law; and the unresolved question whether those rulings are retroactively applicable as a matter of state law does not warrant this Court's review. As things now stand, therefore, it is unclear whether the federal-law issues Petitioner seeks to raise have any application to Petitioner's case; and there is at least a substantial likelihood that the Florida Supreme Court will soon recede from the state-law precedent on which Petitioner's federal-law claims are based. Accordingly, the petition for a writ of certiorari should be denied.

II. This Court Should Not Grant Certiorari To Decide Whether A *Hurst* Violation Is Structural Error.

Petitioner asks this Court to decide "whether a judge-imposed death sentence is structural error." Pet. 12 (alterations omitted). That issue does not warrant the Court's review.

As a threshold matter, Petitioner misapprehends the error this Court identified in *Hurst*. The premise of Petitioner's first question presented is that "the imposition of a sentence of death by a judge" constitutes error in the first place—i.e., that any judge-imposed death sentence is "in violation of this Court's holdings that the Sixth Amendment requires juries to impose death sentences," *id.* That premise misconstrues this Court's caselaw.

This Court has not held that the Sixth Amendment requires jury sentencing in capital cases. Just the opposite: "Any argument that the Constitution requires that a jury impose the sentence of death," this Court has explained, "has been soundly rejected by prior decisions of this Court." *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990). *Hurst* did not overrule such precedent. Instead, the Court there held that Florida's capital sentencing system violated the Sixth Amendment insofar as it "required the judge alone to find the existence of an aggravating circumstance." *Hurst v. Florida*, 136 S.Ct. at 624.

Similarly, *Hurst* error is not properly characterized as "the deprivation of the right to a jury trial in a capital sentencing proceeding." Pet. 17; *see also id.*

(characterizing the *Hurst* error as "instructing the jury that its views on whether the defendant may be sentenced to death are purely advisory, and instead submitting that question to the court"); *id.* at 18 ("the use of an advisory jury rather than an actual jury"). Instead, *Hurst* stands for the proposition that the Sixth Amendment gives a defendant the right to have a jury make statutorily required *factual* findings necessary to support the death penalty. *See* 136 S.Ct. at 621-22, 624.

A. The Decision Below Does Not Implicate A Split Between The Lower Courts On Whether A *Hurst* Violation Is Structural Error.

Petitioner contends that the decision below conflicts with the decisions of three other lower courts. Pet. 14-15. The primary case on which Petitioner relies was reversed by this Court in *Schriro v. Summerlin*; all three of those cases pre-date this Court's decision in *Schriro*; and, in any event, none of those cases conflicts with the decision below.

The decision below does not conflict with the Ninth Circuit's decision in *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003) (en banc). As relevant, the Ninth Circuit in *Summerlin* "conclude[d] that the Supreme Court's decision in *Ring v. Arizona* applies retroactively so as to require that the penalty of death" imposed in the case "be vacated." *Id.* at 1084 (citation omitted). Applying the retroactivity analysis this Court employed in *Teague v. Lane*, the Ninth Circuit addressed whether *Ring* set out a "watershed rule" of procedure. *Summerlin*, 341 F.3d at 1116. In making that determination, the Ninth Circuit offered the view

that *Ring* error "affects the framework of the trial and must therefore constitute structural error." *Id.* at 1117.

This Court reversed. *Schriro*, 542 U.S. at 358. Of particular relevance here, this Court rejected the argument that "*Ring* falls under the retroactivity exception for watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* at 355 (quotation marks and citation omitted); *see id.* at 355-58.

The Ninth Circuit's view that "*Ring* error is not susceptible to harmless-error analysis," *Summerlin*, 341 F.3d at 1116, does not appear to have been a holding of that case; the issue in *Schriro* was whether *Ring* was retroactive as a matter of federal law, not whether *Ring* error is structural. At any rate, and assuming *arguendo* that the Ninth Circuit's view on structural error was essential to its determination that *Ring* falls within the *Teague* exception for watershed rules of criminal procedure, that part of the Ninth Circuit's opinion did not survive this Court's determination that *Ring* does *not* fall under the retroactivity exception for watershed rules of criminal procedure. *See Schriro*, 542 U.S. at 355-58.

In other words, the Ninth Circuit's statement that *Ring* error is not susceptible to harmless error analysis was either dicta or part of an overruled holding. Either way, that passing statement does not suffice to establish a conflict with the decision below.

Nor does the decision below conflict with *State v. Lovelace*, 90 P.3d 298 (Idaho 2004). *Lovelace* did not hold that alleged *Hurst* errors of the kind at issue here

are "structural" and require resentencing of a defendant whose death sentence had already become final on direct review.

First, *Lovelace* "conclude[d] that *Ring* error [was] not susceptible to harmless-error analysis *in this case*," 90 P.3d at 305 (emphasis added); *see id.* at 303 ("harmless error analysis [was] inapplicable in this case") (title of subsection; alterations omitted). And at least some of the case-specific considerations the court identified do not apply here.[4]

Second, far from holding that *Ring* error is always structural, the Idaho Supreme Court appeared to conclude that such errors *must* be deemed harmless in certain circumstances, including specified circumstances in which "statutory aggravating factors" were not even submitted to, much less found beyond a reasonable doubt by, the jury:

> This Court must first resolve whether the error is harmless beyond a reasonable doubt where the statutory aggravating factors, which render a defendant death eligible, were neither included in the instructions to the jury nor proven beyond a reasonable doubt. Where a reviewing court concludes beyond a reasonable

[4] For example, the aggravating factor at issue in *Lovelace* required the fact-finder to analyze "the 'temporal, spatial, and motivational relationships between the capital homicide' and the kidnapping" offenses of which Lovelace was convicted; and, based on the record before the court, "[t]he facts in evidence contesting that the murder was committed in perpetration of kidnapping" made "application of harmless error inappropriate." *Id.* at 304; *compare infra* Part IV.

> doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless. The Court will find harmless error only if no reasonable jury could find that the State failed to prove the aggravating factors (subsections 6, 7, and 8 of I.C. § 19–2515(h)) beyond a reasonable doubt.

90 P.3d at 304 (citations omitted).

Third, *Lovelace* relied in large part on "the Ninth Circuit's decision in [*Schriro*] holding *Ring* error to be structural." 90 P.3d at 304; *see id.* at 305 (quoting the Ninth Circuit's conclusion that *Ring* error is analogous to the error identified in *Sullivan* such that "there was no jury verdict within the meaning of the Sixth Amendment and no constitutionally cognizable finding to review"). But *Lovelace* was decided in April 2004; the court did not have the benefit of this Court's subsequent decision in *Schriro*, issued two months later, reversing the Ninth Circuit's ruling.

Finally, the decision below does not conflict with *Woldt v. People*, 64 P.3d 256 (Colo. 2003). In that post-*Ring* case, the Colorado Supreme Court evaluated how to proceed after striking down its death penalty scheme, which eschewed the use of penalty-phase juries entirely and called for a three-judge panel to both deem the defendant eligible for death and impose the sentence. *Id.* at 258-59. Rather than squarely address whether *Ring* error is structural—indeed, the term "structural error" appears nowhere in its opinion—the Colorado Supreme Court looked to state statutory law.

See id. at 267-72. Central to its determination was a Colorado statute providing that "[i]n the event the death penalty as provided for in this section is held to be unconstitutional . . . , a person convicted of a crime punishable by death under the laws of this state shall be punished by life imprisonment." Colo. Rev. Stat. § 18–1.3–401(5) (2002). "Informed by the rules of statutory construction," the court held, "we give effect to the mandatory statutory provision for life imprisonment." *Woldt*, 64 P.3d at 272. It was therefore constrained to reverse each death sentence that violated *Ring* and remand for imposition of a life sentence. *Id.*

B. The Decision Below Does Not Conflict With This Court's Cases.

1. Contrary to Petitioner's assertion, the "decision to assess *Hurst* errors for harmlessness" is supported by—not "irreconcilable with"—this Court's precedents. Pet. 16.

In *Washington v. Recuenco*, this Court held that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." 548 U.S. 212, 222 (2006). "[M]ost constitutional errors," the Court stressed, "can be harmless." *Id.* at 218 (quotation marks and citation omitted). The Court had addressed a similar kind of error in *Neder v. United States*, 527 U.S. 1 (1999), which held that the failure to submit an element of the offense to the jury was subject to harmless-error analysis. Failure to submit a sentencing factor to the jury, the Court reasoned, was "indistinguishable" from

the failure to submit an element of the offense. *Recuenco*, 548 U.S. at 220.

The same logic applies here. Like the *Blakely* error at issue in *Recuenco*, *Hurst* error involves the failure to submit a sentencing factor to the jury. *See Hurst*, 136 S. Ct. at 619; *Recuenco*, 548 U.S. at 214-15. Both errors are based on the rule laid down in *Apprendi*: "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see Hurst*, 136 S.Ct. at 621; *Recuenco*, 548 U.S. at 214-15. Like *Blakely* error, therefore, *Hurst* error does not necessarily render the criminal proceeding "fundamentally unfair" or an "unreliable" vehicle for imposing criminal liability. *Recuenco*, 548 U.S. at 219; *see also id.* (citing *Schriro* for the proposition that *Ring* error does not implicate "the fundamental fairness and accuracy of the criminal proceeding, in part because [this Court] could not confidently say that judicial factfinding *seriously* diminishes accuracy") (quotation marks omitted).

Nothing in *Hurst* takes this case outside the ambit of cases like *Recuenco* and *Neder*. Indeed, this Court in *Hurst* expressly contemplated the possibility that *Hurst* error might be harmless, remanding the case so that the state court could consider that issue in the first instance. *See Hurst v. Florida*, 136 S.Ct. at 624 (finding "no reason to depart from" the Court's normal practice of allowing "state courts to consider whether an error is harmless," and remanding the case for further proceedings). That disposition hardly suggests that the majority thought *Hurst* error is "incapable of being

harmless." Pet. 16. For his part, Justice Alito thought such a remand unnecessary; in his view, the record before this Court made clear that any *Hurst* error was harmless. *Hurst v. Florida*, 136 S.Ct. at 626-27 (Alito, J., dissenting).

2. Petitioner relies heavily (Pet. 16-21) on two of this Court's cases: *Sullivan v. Louisiana*, 508 U.S. 275 (1993); and *Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017). The decision below does not conflict with either precedent.

This case is hardly "indistinguishable from *Sullivan v. Louisiana*." Pet. 17; *see also id.* at 18 (alleging a "direct conflict" between the decision below and *Sullivan*). *Sullivan* held that a constitutionally deficient reasonable-doubt instruction cannot be harmless error. 508 U.S. at 277-82. *Hurst*, by contrast, held that Florida's prior capital sentencing system was unconstitutional in violation of the Sixth Amendment insofar as it "required the judge alone to find the existence of an aggravating circumstance." 136 S.Ct. at 624; *see id.* at 622 ("hold[ing] that Hurst's sentence violates the Sixth Amendment" because the "judge increased Hurst's authorized punishment based on her own factfinding"). So far as the holding of the case is concerned, *Hurst* error is much more akin to the non-structural error at issue in *Recuenco* than it is to the instructional error deemed structural in *Sullivan*.

At first glance, some of the reasoning in *Sullivan* might seem to provide support for the proposition that the failure to submit certain issues to a jury constitutes structural error. *See Recuenco*, 548 U.S. at 222 n.4; *Neder*, 527 U.S. at 11. As this Court has repeatedly

recognized, however, "a broad interpretation of [that] language from *Sullivan* is inconsistent with [this Court's] case law." *Recuenco*, 548 U.S. at 222 n.4 (citing *Neder*, 527 U.S. at 11-15). That is why this Court has declined to extend the language on which Petitioner relies to cases, like this one, involving failure to submit sentencing factors to a jury. *Compare* Pet. 17-18, *with Recuenco*, 548 U.S. at 222 n.4.

Petitioner appears to rely on the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), for the proposition that *Hurst* error involves deprivation of the right to have a jury make "every" pertinent sentencing determination required by Florida law, not "simply the deprivation of a right to have the jury consider one element or one fact." Pet. 17-18. That submission proceeds on the assumption that *Hurst v. State* was correctly decided. In the State's view, this Court's precedents should not be construed to mean that a jury must make statutorily required *non-factual* findings supporting the imposition of the death penalty—including the normative determination that aggravators outweigh mitigators and the related moral judgment that the defendant should be sentenced to death. *See* 202 So. 3d at 77-83 (Canady, J., dissenting). At a minimum, this Court should not be asked resolve whether error under *Hurst v. State* is harmless before having an opportunity to assess whether that case was correctly decided in the first place.

The decision below likewise does not conflict with *Weaver v. Massachusetts*. *See* Pet. 18-21. *Weaver* addressed a public-trial violation during jury selection, where the error was neither preserved nor raised on

direct review, but was raised later via an ineffective assistance of counsel claim. 137 S.Ct. at 1907-13. In that context, the Court held, a defendant must demonstrate prejudice to secure a new trial. *Id.* In explicating that holding, the Court accepted that "[i]n the direct review context," unconstitutional courtroom closure had "been treated by this Court as a structural error." *Id.* at 1905.

Hurst error does not involve improper courtroom closure; and *Weaver*'s holding that the courtroom closure claim at issue there required the defendant to show prejudice does not support, much less compel, the conclusion that *Hurst* error calls for automatic reversal regardless of prejudice.

Weaver did not articulate a rigid test holding that "[a]n error is 'structural' if" it falls into any one of "'at least three' categories." *See* Pet. 18. Rather, the Court explained that "the precise reason why the Court" has deemed certain errors to be structural "varies in a significant way from error to error." 137 S.Ct. at 1908. Based on prior cases, the Court noted that "[t]here appear to be at least three broad rationales" for treating an error as structural. *Id.* Petitioner argues that those three rationales support the conclusion that *Hurst* error is structure. Pet. 19-21. But by deciding *Recuenco* the way it did, this Court has already implicitly rejected the notion that an omitted sentencing factor fits within those categories. *See* 126 S.Ct. at 2551-53; *see also Schriro*, 542 U.S. at 355-56.

III. This Court Should Not Grant Review to Decide Whether a Unanimous Jury Vote Renders a *Hurst* Error Harmless.

Petitioner claims that "[e]ven if *Hurst* errors could be harmless, the Florida Supreme Court's rigid approach to harmless-error-review—which treats a unanimous advisory verdict as *per se* harmless error—is irreconcilable with *Hurst* itself and with this Court's harmless-error cases." Pet. 21; *see also* Pet. i (asserting that the Florida Supreme Court finds "*every Hurst* error . . . harmless if the advisory jury recommended death by a 12-0 vote" (emphasis added)). That issue does not warrant review for several reasons. First, contrary to Petitioner's contention, the Florida Supreme Court did not apply a *per se* rule based on juror unanimity when finding the error here harmless, making this case a poor vehicle for resolving the question presented. Second, the issue poses no split of authority. Third, it is not constitutionally impermissible for a court to consider—as one factor, among many, germane to assessing whether *Hurst* error was harmless—the unanimity of the jury's recommendation. Fourth, the court's harmless error analysis does not conflict with this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

1. The second question Petitioner presents for this Court's review rests on a foundational, yet incorrect, premise: that the Florida Supreme Court applies a "rigid," "*per se*" approach under which *Hurst* error is conclusively presumed harmless whenever a jury's vote is unanimous. Pet. 21. But the Florida Supreme Court has not held that "every" 12-0 vote renders a *Hurst*

error harmless, Pet. i, and has instead expressly disclaimed an exclusive reliance on unanimity.

A. In a series of decisions, the Florida Supreme Court has faithfully applied this Court's harmless error precedents in the context of *Hurst* error. In *Hurst v. State* itself, the court began its evaluation of harm by observing that "*the [Supreme] Court framed the test [for harmless error] as follows: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'*" *Hurst v. State*, 202 So. 3d 40, 67 (Fla. 2016) (quoting *Neder*, 527 U.S. at 18). Again quoting this Court, the Florida Supreme Court emphasized that a reviewing court, tasked with considering the harm of a failure to instruct the jury on its fact-finding duties, must ask "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Id.* And the court was similarly cognizant of the burden of proof governing harmless error review, which "places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict." *Id.* at 68 (quoting *State v. DiGuilio*, 491 So. 3 1129, 1138 (Fla. 1986)).

"Therefore," the court found, "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." *Id.*

It was with that test in mind that the Florida Supreme Court found the error harmful in *Hurst v.*

State and many subsequent cases involving non-unanimous death recommendations. *See*, *e.g.*, *Johnson v. State*, 205 So. 3d 1285, 1289-90 (Fla. 2016).

B. The Florida Supreme Court has not checked those standards at the door when reviewing 12-0 jury verdicts. To be sure, the court has considered the unanimous nature of an advisory recommendation when finding, in a given case, the *Hurst* error to be harmless. 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.* (emphasis added; quoting *King v. State*, 211 So. 3d 866, 890 (Fla. 2017)). 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).

Appling that approach, the Florida Supreme Court routinely considers "the trial record as a whole," Pet. 23 (quotation marks omitted), in assessing whether *Hurst* error was harmless—precisely the sort of inquiry Petitioner himself would require. *See*, *e.g.*, *Philmore v. State*, 234 So. 3d 567, 568 (Fla. 2018); *King v. State*, 211 So. 3d 866, 891-93 (Fla. 2017); *Knight v. State*, 225 So. 3d 661, 682-83 (Fla. 2017); *Davis v. State*, 207 So. 3d 142, 174-75 (Fla. 2016).

In short, Petitioner is wrong to assert that the Florida Supreme Court "relie[s] on a single irrelevant fact to determine harmlessness." Pet. 26. "For those cases that received a unanimous recommendation," the Florida Supreme Court "individually review[s] the circumstances to ensure that any *Hurst* error did not affect the sentence." *Reynolds v. State*, 251 So. 3d 811, 826 (Fla. 2018).

C. That was as true in this case as it was in the Florida Supreme Court's earlier decisions. The decision below expressly noted that, in evaluating the harm in Petitioner's case, the court had considered factors other than the jury's unanimous recommendation—including "the jury instructions provided in this case," "the aggravators and mitigators found by the trial court," and "the facts of the case" more generally. Pet. App. 2a-3a. In light of *all* these factors, the Florida Supreme Court "conclude[d] [that] any *Hurst* error in this case was harmless beyond a reasonable doubt, and Anderson is therefore not entitled to relief." *Id.* at 3a.

2. Petitioner has not identified any split of authority that might warrant the Court's review. At most, he implies that the Florida Supreme Court's approach conflicts with the harmless error analysis applied by the Arizona Supreme Court in its post-*Ring* cases. Pet. 24-25 & n.3 (citing cases). Properly understood, however, the Florida Supreme Court's caselaw calls for a court assessing the effect of *Hurst* error to consider the facts of the crime and individual aggravators and mitigators, just as the Arizona Supreme Court did in the cases Petitioner cites.

It is true that, unlike the Arizona Supreme Court, the Florida Supreme Court considers the split of the jury's vote as one factor among many. But that is because, unlike in Florida, juries played no role in Arizona's pre-*Ring* capital sentencing scheme. *See Ring v. State*, 65 P.3d 915, 925-26 (Ariz. 2003). Instead, Arizona conducted penalty phase proceedings before a judge alone, permitting the judge to "impose the death sentence if it found at least one aggravating circumstance and 'no mitigating circumstances sufficiently substantial to call for leniency,'" with no assistance at all from a jury. *Id.* (quoting 1973 Ariz. Sess. Laws. ch. 138 § 5). As a result, there was no jury recommendation of any kind for the Arizona Supreme Court to consider as part of its harmless error analysis after *Ring*, and no occasion for that court to consider whether doing so would have been appropriate.

3. On the merits, it is not constitutionally impermissible for a court to consider the unanimity of the jury's recommendation, among other factors, in assessing whether *Hurst* error was harmless. Indeed, jury consensus is particularly relevant in light of the Florida Supreme Court's expansive interpretation of this Court's ruling in *Hurst*.

First, the jury's unanimous vote is undoubtedly germane to the requirement, adopted by the Florida supreme court on remand from *Hurst v. Florida*, that "the jury's recommendation for death *must* be unanimous." 202 So. 3d at 54 (emphasis added).

Second, the standard jury instructions, though not requiring unanimity, nevertheless informed jurors that, before recommending a sentence of death, they must be satisfied that sufficient aggravators both

existed and outweighed any mitigators. Pet. App. 28a-30a. The fact that the jury *did* unanimously find the presence of sufficient aggravators, unanimously find that those aggravators outweighed any mitigators, and unanimously conclude that death was the appropriate sentence—even though they were not instructed that they had to do so unanimously—supplies, at a minimum, some evidence that a rational jury *would have made* those same unanimous determinations if told that it had to do so.

Given these considerations, it is unsurprising that, on at least 11 occasions, this Court has declined to review the second question presented by this Petition. *See Guardado v. Jones*, 226 So. 3d 213 (Fla. 2017), *cert. denied*, 138 S. Ct. 1131 (2018); *Tundidor v. State*, 221 So. 3d 587 (Fla. 2017), *cert. denied*, 138 S. Ct. 829 (2018); *Middleton v. State*, 220 So. 3d 1152 (Fla. 2017), *cert. denied*, 138 S. Ct. 829 (2018); *Truehill v. State*, 211 So. 3d 930 (Fla. 2017), *cert. denied*, 138 S. Ct. 3 (2017); *Oliver v. State*, 214 So. 3d 606 (Fla. 2017), *cert. denied*, 138 S. Ct. 3 (2017); *Grim v. State*, 244 So. 3d 147 (Fla. 2018), *cert. denied*, 139 S. Ct. 480 (2018); *Franklin v. State*, 236 So. 3d 989 (Fla. 2018), *cert. denied*, 139 S. Ct. 479 (2018); *Crain v. State*, 246 So. 3d 206 (Fla. 2018), *cert. denied*, 139 S. Ct. 947 (2019); *Tanzi v. State*, 251 So. 3d 805 (Fla. 2018), *cert. denied*, 139 S. Ct. 478 (2018); *Guardado v. State*, 238 So. 3d 162 (Fla. 2018), *cert. denied*, 139 S. Ct. 477 (2018); *Lowe v. State*, 259 So. 3d 23 (Fla. 2018), *cert. denied*, __ S. Ct. __ (2019).

4. Finally, Petitioner asserts, as an additional basis for reviewing the harm question, that the Florida Supreme Court's harmless error analysis

"independently violates the Eighth Amendment" because "[t]o the extent an advisory verdict can be harmless, *Caldwell* forbids treating it as *per se* harmless." Pet. 26–27 (citing *Caldwell v. Mississippi*, 472 U.S. 320 (1985)). As explained above, however, the Florida Supreme Court does not treat unanimous advisory verdicts as "*per se*" proof of harmless error.

But even if that premise were correct, the decision below does not conflict with *Caldwell*. There, this Court explained that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328–29. In that case, for instance, the prosecutor secured a death sentence in violation of the Eighth Amendment by assuring the jury that "the decision you render is automatically reviewable by the Supreme Court," *id.* at 325–26—thereby "minimiz[ing] the jury's sense of responsibility for determining the appropriateness of death." *Id.* at 341.

In subsequent decisions, this Court has "read *Caldwell* as '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.'" *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (quoting *Darden v. Wainwright*, 477 U.S. 168, 184 n.15 (1986)). "Thus, '[t]o 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.'" *Id.* (citation omitted).

Applying that standard, the Eleventh Circuit has concluded that Florida's standard jury instructions in capital cases do not violate *Caldwell*, finding that "the references to and descriptions of the jury's sentencing verdict in this case as an advisory one, as a recommendation to the judge, and of the judge as the final sentencing authority are not error under *Caldwell*." *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997). "Those references and descriptions" instead "accurately characterize the jury's and judge's sentencing roles under Florida law." *Id.*; *see also Reynolds v. State*, 251 So. 3d 811, 824 (Fla. 2018) (plurality opinion) (discussing Florida cases reaching the same conclusion).

Hurst does not change that analysis. As a threshold matter, the jury was accurately instructed about its role at the time of Petitioner's sentencing; and the better view of the law is that this Court's ruling in *Hurst* does not apply retroactively to Petitioner's sentence.

Even putting that consideration aside, the intervening *Hurst* decisions do not support the conclusion that the jury in this case was misled as to its role in the sentencing process. *See Romano*, 512 U.S. at 9. To be sure, *Hurst v. State* concluded that the "jury's recommendation for death must be unanimous." 202 So. 3d at 54. But that does not mean the jury is now the ultimate decisionmaker where previously it was not. The responsibility to impose death remains, as it has for decades, with the sentencing judge. Indeed, post-*Hurst*, the Florida Supreme Court continues to reference the jury's "*recommendation* for death" and the "*advisory* verdict in capital cases," *id.* at

54, 59 (emphases added)—proof that the judge is still the final arbiter. In other words, the judge retains the option to choose leniency—even when a jury has not—and impose a life sentence. *See* Fla. Stat. § 921.141(3)(a)2. (providing that if the jury recommends a death sentence, the judge "may impose a sentence of life imprisonment without the possibility of parole or a sentence of death").

In short, Florida's jury instructions did not mislead the jury about its role under local law. *Romano*, 512 U.S. at 9.

All of this explains why this Court has repeatedly declined to consider *Caldwell* challenges to the Florida Supreme Court's harmless error rulings after *Hurst*. *See 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*, 138 S. Ct. 452 (2017); *Oliver v. State*, 214 So. 3d 606 (Fla. 2017), *cert. denied*, 138 S. Ct. 3 (2017); *Truehill v. State*, 211 So. 3d 930 (Fla. 2017), *cert. denied*, 138 S. Ct. 3 (2017); *Reynolds v. State*, 251 So. 3d 811 (Fla. 2018), *cert. denied*, 139 S. Ct. 27 (2018); *Grim v. State*, 244 So. 3d 147 (Fla. 2018), *cert. denied*, 139 S. Ct. 480 (2018); *Crain v. State*, 246 So. 3d 206 (Fla. 2018), *cert. denied*, 139 S. Ct. 947 (2019); *Johnston v. State*, 246 So. 3d 266 (Fla. 2018), *cert. denied*, 139 S. Ct. 481 (2018); *Tanzi v. State*, 251 So. 3d 805 (Fla. 2018), *cert. denied*, 139 S. Ct. 478 (2018); *Guardado v. State*, 238 So. 3d 162 (Fla. 2018), *cert. denied*, 139 S. Ct. 477 (2018); *Philmore v. State*, 234 So. 3d 567 (Fla. 2018), *cert. denied*, 139 S. Ct. 478 (2018); *Lowe v. State*, 259 So. 3d 23 (Fla. 2018), *cert. denied*, __ S. Ct. __ (2019).

IV. The Decision Below Was Correct.

The Florida Supreme Court correctly concluded that any *Hurst* error in this case did not require resentencing. Several considerations support that conclusion.

First, the better view of the law is that *Hurst* does not apply retroactively to Petitioner's sentence, which became final long before *Hurst* was decided. *See supra* Part I.

Second, the record amply supported the Florida Supreme Court's conclusion that any reasonable jury would have found the existence of an aggravating circumstance, rendering harmless any error under *Hurst v. Florida*. To begin with, it was beyond dispute that Petitioner was on community control at the time he murdered Heather Young, in and of itself a sufficient aggravating factor. *See* Fla. Stat. § 921.141(5)(a) (1996); *Anderson III*, 752 F.3d at 886. Next, Petitioner was caught in the act while robbing a bank—obviously for "pecuniary gain," *id.* § 921.141(5)(f)—and there was abundant other evidence of his financial motive. *See Anderson I*, 863 So. 2d at 174 ("To obtain the funds to pay the restitution, Anderson decided to rob the Mount Dora USB."). Third, Petitioner had been "previously convicted of another capital felony or of a felony involving the use or threat of violence to the person," *id.* § 921.141(5)(b)—the attempted murder of Marisha Scott, a fact already found by the same jury when it convicted him for that crime. That aggravating factor is particularly relevant here because, under *Apprendi*—and therefore under *Hurst*—the jury need

not find the existence of a "prior conviction." *Apprendi*, 530 U.S. at 490. Finally, the facts of this case—including the many pretenses Petitioner employed over a period of several days and the brutal nature of his crimes—assuredly evinced a murder that was carried out in a "cold, calculated, and premeditated manner." Fla. Stat. § 921.141(5)(i); *see supra* at 1-5.

Third, any alleged error under *Hurst v. State*, 202 So. 3d 40, does not supply a basis for reversing the decision below. *Hurst v. State* erred in holding that the Sixth Amendment requires a jury to make non-factual normative determinations that are statutorily required to support a death sentence—including the determination that aggravators outweigh mitigators and the related moral judgment that death is the appropriate sentence. *See generally* 202 So. 3d at 77-83 (Canady, J., dissenting). Assuming *arguendo* that *Hurst v. State* was correctly decided, the record in this case—including extensive evidence of aggravation and premeditation and the jury's unanimous findings—supported the Florida Supreme Court's conclusion that any error here was harmless. *See* Pet. App. 2a-3a, 16a-18a; *see also Anderson*, 752 F.3d at 884-901.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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