NO. 18-5518

IN THE SUPREME COURT OF THE UNITED STATES

NORMAN M. GRIM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

PAMELA JO BONDI
ATTORNEY GENERAL OF FLORIDA

CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
*Counsel of Record

Lisa A. Hopkins
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
capapp@myfloridalegal.com
(850) 414-3300

COUNSEL FOR RESPONDENT

Capital Case

Question Presented

Whether this Court should grant certiorari where (1) no federal question is presented; (2) the jury was properly advised on its advisory role according to local law and the importance of its responsibility was not diminished; (3) the error reviewed was state based, not structural in nature, and properly subjected to a state based harmless review; and (4) this case presents no important or unsettled question of law worthy of this Court's certiorari review.

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Opinions Below

The decision of the Florida Supreme Court appears as *Grim v. State*, 244 So. 3d 147 (Fla. 2018).

Jurisdiction

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

relevant decisions of this Court. Sup. Ct. R. 10. No compelling reasons exist in this case and this Petition for a writ of certiorari should be denied. Sup. Ct. R. 10.

Statement of the Case and Facts

Petitioner, Norman Grim, was convicted of first-degree murder and sexual battery upon a person 12 years of age or older with use of a deadly weapon in the death of Cynthia Campbell on July 27, 1998. *Grim v. State*, 841 So. 2d 455 (Fla. 2003).

On July 27, 1998, after being reported missing, Cynthia Campbell's body was found by fishermen off the Pensacola Bay Bridge and was wrapped in a sheet, a shower curtain, and masking tape. *Grim*, 841 So. 2d at 455. The investigation revealed a surveillance video showing Petitioner at a convenience store near the bridge where Campbell's body was found. *Id.* Multiple witnesses testified to seeing him in the vicinity that day.

A piece of green carpet was found on Campbell's body under the tape during the autopsy. *Grim*, 841 So. 2d at 457-58. Investigators saw a similar piece of green carpet at Petitioner's home. *Id.* at 458. The autopsy revealed Campbell's face was covered with deep abrasions and contusions, caused by blunt force trauma. *Id.* The blunt force injuries were consistent with a hammer and she suffered multiple stab wounds to the chest. *Id.*

A striped pillow case that appeared to have blood on it and matched the pattern of the sheet wrapped around Campbell was found in Petitioner's kitchen trash can. *Grim*, 841 So. 2d at 458. Investigators also seized athletic shoes and a rope which appeared to be consistent with the rope found on the victim's body and a pair of blood-

stained denim shorts. *Id.* The investigation revealed forensic evidence which included the following:

> The prescription glasses found in the cooler matched Campbell's prescription records, and the roll of masking tape in the cooler was fracture-matched to the tape found on Campbell's body. The rope and the green carpet found on Campbell's body were compared to the rope and green carpet found at Grim's home. Although the examiner was unable to fracture-match these pieces, he determined that they were identical in appearance, construction, and fiber type and could have originated from the same source. Fingerprints on the coffee cup found on Grim's kitchen counter were identified as Cynthia Campbell's, and the bloody fingerprints on the trash bag box were identified as Grim's.
>
> DNA analysis of stains on the cut-off jean shorts Grim was wearing when arrested revealed twelve genetic markers consistent with the DNA of Cynthia Campbell, and the steak knife found in Grim's cooler yielded six genetic markers consistent with the victim. The hammer found in the same cooler also yielded genetic markers consistent with the victim, as did swabbings from the box of trash bags. Likewise, stains on a pair of blue-jean shorts and a pair of shoes found in Grim's living room bore genetic markers consistent with those of the victim.

Id. at 458-59 (internal page numbers omitted). Prior to the start of trial, Petitioner expressed his wishes that defense counsel not argue for any lesser conviction and that mitigation not be presented should the case go to a penalty phase. (Record at Vol. I:3-33). At the penalty phase, after much discussion with the court, Petitioner voluntarily and knowingly waived his right to present mitigation. (Record at Vol. V:812-29). The jury unanimously recommended the death penalty. The trial court followed the jury's recommendation, sentencing Petitioner to death for the first-degree murder, followed by 390.5 months of prison for the sexual battery. The trial court found three aggravating circumstances: 1) the murder was committed by a person under sentence of imprisonment, 2) the defendant had prior convictions for violent felonies, and 3)

the murder was committed while the defendant was engaged in the commission of a sexual battery. *Id.* at 460. The trial court found three statutory mitigating circumstances[1] and seventeen nonstatutory mitigating circumstances. *Id.*[2]

Petitioner's judgment and sentence of death were affirmed on appeal by the Florida Supreme Court. *Grim*, 841 So. 2d 455. Petitioner filed a petition for writ of certiorari in the United States Supreme Court, which the Court denied on October 6, 2003. *Grim v. Florida*, 540 U.S. 892 (2003).

Subsequently, Petitioner filed numerous proceedings in state and federal courts, all of which were denied. *See Grim v. State*, 971 So. 2d 85 (Fla. 2007); *Grim v. Sec'y, Fla. Dep't of Corr.*, 705 F.3d 1284 (11th Cir. 2013); *Grim v. Crews*, 134 S.Ct. 67 (2013).

On June 24, 2016, counsel for Petitioner filed a successive motion raising claims based on the United States Supreme Court's recent decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), in the trial court.[3] On May 8, 2017, the trial court judge

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[1] (1) disruptive home life and child abuse (given significant weight); (2) hard-working employee (given significant weight); and (3) mental health problems that did not reach the level of § 921.141(6)(b), Florida Statutes (1997) (given great weight).

[2] The trial court also considered seventeen nonstatutory mitigators. Because many were subsumed within the statutory mitigation and thus already considered, the trial court considered the following remaining nonstatutory mitigators: (1) lack of long-term psychiatric care (no weight); (2) marital problems and situational stresses (great weight); (3) errors of judgment under stress (no additional weight); (4) model prison inmate (some weight); and (5) entered prison at a young age (given little weight).

[3] Petitioner filed several sub-issues within a single claim alleging that Petitioner's death sentence was unconstitutional under *Hurst*. Petitioner argued that *Hurst* was retroactive and argued that it must be applied to all death row inmates. Petitioner also argued that the *Hurst* error was not harmless and that trial counsel would have

entered an order, denying the successive motion without conducting an evidentiary hearing. The Florida Supreme Court affirmed the denial, finding any *Hurst* error to be harmless under *Davis v. State*, 207 So. 3d 142 (Fla. 2016), *cert. denied*, 137 S.Ct. 2218 (2017), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). *Grim*, 244 So. 3d at 148.

Reasons for Denying the Writ

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

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

"To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989); *see also Romano v. Oklahoma*, 512 U.S.

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conducted himself differently if *Hurst* had been in place when the case was tried.

1, 9 (1994). In *Caldwell*, the prosecutor made "focused, unambiguous, and strong" remarks which misled the jury into believing the responsibility for sentencing lay elsewhere. *Caldwell*, 472 U.S. at 340. The comments included "your decision is not the final decision" and "[y]our job is reviewable" and that defense was "insinuating that your decision is the final decision." *Id.* at 325-26.

"This Court has repeatedly said that under the Eighth Amendment, 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" *Caldwell*, 472 U.S. at 329 (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983)). The problem with the argument by the prosecutor in *Caldwell* was that it presented "an intolerable danger that the jury will in fact choose to minimize the importance of its role" and thus be in contravention of the requirements of the Eighth Amendment. *Caldwell*, 472 U.S. at 333. However, "'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, 1482 (11th Cir. 1997) (quoting *Romano*, 512 U.S. at 9).

In Petitioner's case, the jury was not affirmatively misled. The jury was instructed of its role as assigned by local law. *Davis*, 119 F.3d at 1482; *see Truehill v. Florida*, 138 S.Ct. 3 (2017); *Middleton v. Florida*, 138 S.Ct. 829 (2018); *Guardado v. Jones*, 138 S.Ct. 1131 (2018); *Kaczmar v. Florida*, 138 S.Ct. 1973 (2018). The jury was told that its role was advisory in nature. (Record at Vol V:873, 901). Since under Florida law, the judge remains the final sentencing authority, a jury's

recommendation of death is in fact "advisory." Thus, characterizing the jury's recommendation as "advisory" is an accurate description of the role assigned to the jury by Florida law. Additionally, Petitioner's jury was specifically instructed about the "gravity" of its decision and that "human life is at stake." (Record at Vol. V:906). There was no diminishment of the jury's sense of responsibility in recommending a death sentence in Petitioner's case. Thus, there was no *Caldwell* violation in Petitioner's case.

Additionally, the Florida Supreme Court has explicitly rejected *Caldwell* attacks on Florida's standard penalty phase jury instructions in the wake of *Hurst*. *See Reynolds v. State*, No. SC17-793, 2018 WL 1633075 (Fla. Apr. 5, 2018); *Johnson v. State*, No. SC17-1678, 2018 WL 1633043 (Fla. Apr. 5, 2018) (citing *Reynolds* in rejecting *Caldwell* claim). The Florida Supreme Court pointed out the absurdity of the "*Hurst*-induced *Caldwell*" claims:

> as the argument goes, even pre-*Ring* juries were being misled as to their responsibility in sentencing notwithstanding the fact that such a responsibility did not exist then and does not exist retroactively. This is the exact unwieldiness of *Caldwell* that *Romano* averts. Either juries were being misled or they were not. We conclude that they were not.

Reynolds, 2018 WL 1633075 at *12.

This case is an inappropriate vehicle for certiorari as this is a postconviction case and this Court would have to address retroactivity before even reaching the underlying jury instruction issue. *Hurst* is merely an application or refinement of *Ring* and this Court has already held that *Ring* is not retroactive. *See Schriro v. Summerlin*, 542 U.S. 348 (2004). It would be an odd result indeed if this Court were

to hold that *Hurst* is retroactive, even though *Ring* was not. *Hurst* is only applicable to Petitioner through a more expansive state law test for retroactivity, providing retroactive application to the date this Court decided *Ring* in 2002. As Ring, and by extension *Hurst*, has been held not to be retroactive under federal law, Florida has implemented a test which provides relief to a broader class of individuals in applying Witt v. State, 387 So. 2d 922, 926 (Fla. 1980) instead of *Teague* for determining the retroactivity of *Hurst*.[4] Consequently, this Court would first have to find *Hurst* retroactive under federal law, overruling Schriro v. Summerlin, before reaching the underlying question of harmlessness. Certiorari should be denied.

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

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[4] Federal courts have had little trouble determining that *Hurst*, like *Ring*, is not retroactive at all under *Teague*. See *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1165 n.2 (11th Cir. 2017) ("under federal law Hurst, like Ring, is not retroactively applicable on collateral review"), cert. denied, 138 S.Ct. 217 (2017); *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a *Hurst v. Florida* claim concluding that Hurst v. Florida did not apply retroactively).

536 U.S. 304, 319 (2002)). As such, the Eighth Amendment requires the death penalty to be limited to a specific category of crimes and "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Id.* However, the Eighth Amendment does not require that a jury be the final sentencing authority. Petitioner's argument that his Eighth Amendment rights were violated by his jury's unanimous recommendation is not supported by this Court's precedent.

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

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

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

mitigating circumstances exist and determine whether mitigation is sufficiently substantial to warrant leniency.[5] Additionally, *Hurst v. Florida* did not hold that there is a constitutional right to jury sentencing.

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

> unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Hurst v. State, 202 So. 3d 40, 57 (Fla. 2016). This was a vast expansion from the holding in *Hurst v. Florida*, which focused solely on concerns over the imposition of a death sentence based on judicial rather than jury factfinding related to the aggravating factors. To explain this expansion, the Florida Supreme Court reasoned

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[5] *See Jenkins v. Hutton*, 137 S.Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty); *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016) (rejecting a claim that the constitution requires a burden of proof on whether or not mitigating circumstances outweigh aggravating circumstances, noting that such a question is "mostly a question of mercy"). *See also State v. Mason*, 2018 WL 1872180, *5-6 (Ohio Apr. 18, 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment."); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found.").

that the jury "recommendation is tantamount to the jury's verdict in the sentencing phase of trial" and under Florida law, jury verdicts are required to be unanimous. *Id.* at 54. Additionally, the Florida Supreme Court held that unanimity "serves th[e] narrowing function required by the Eighth Amendment"[6] to ensure that death is not "arbitrarily imposed, but . . . reserved only for defendants convicted of the most aggravated and least mitigated murders." *Id.* at 60 (citing *Gregg v. Georgia*, 428 U.S. 153, 199 (1976); *McClesky v. Kemp*, 481 U.S. 279, 303 (1987)). Since the Florida Supreme Court's holding in *Hurst v. State* was a product of state law, and does not present a federal question, this Petition should be denied.

Further, in contrast to *Hurst*, here, Petitioner was found guilty of both first-degree murder and sexual battery on a person 12 years of age or older. The sexual battery was the source of aggravating factor three, and thus is considered proven beyond a reasonable doubt. *See Florida v. Nixon*, 543 U.S. 175, 187 (2004) ("By enering a guilty plea, a defendant waives constitutional rights that inhere in a criminal trial. . . .").

Additionally, Petitioner had six prior felony convictions. *See Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (citing *Almendarez-Torres v. United States*, 523

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

U.S. 224 (1998)) (prior convictions are "a narrow exception" to the Sixth Amendment requirement that defendants have a right to have a jury find facts which expose a defendant to a greater punishment). Thus, at least one aggravating factor was found by the jury to be proven beyond a reasonable doubt by virtue of the guilty conviction and another was exempted from this requirement by virtue of the prior convictions. Based on these two factors in Petitioner's case, there was no *Hurst v. Florida* error.

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

Moreover, Petitioner's claim that the Florida Supreme Court used a *per se* test for harmlessness is meritless. In Petitioner's case, the Florida Supreme Court did not use a *per se* harmless error rule based only on the unanimous jury recommendation. Instead, Petitioner received an individualized review. The Court specifically mentions the facts as described on direct appeal and the unanimous jury verdict. *Grim*, 244 So. 3d at 147. Additionally, the Court cites to *Davis*, which was the first case where *Hurst v. State* error was found to be harmless beyond a reasonable doubt. *Davis*, 207 So. 3d at 175.

In *Davis*, the Florida Supreme Court went into a detailed analysis of why the error was harmless, using the same concepts in reviewing harmlessness as they used in *Hurst v. State*. Instead of restating the 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 Court cites *Davis* and points out the similarities between each case and *Davis*. The Court concluded in Petitioner's case that, like in *Davis*, the error was harmless beyond a reasonable doubt. *Grim*, 244 So. 3d at 148; *Davis*, 207 So. 3d at 175.

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

> Here, the jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. In fact, although the jury was informed that it was not required to recommend death unanimously, and despite the mitigation presented, the jury still unanimously recommended that Davis be sentenced to death. . . . The unanimous recommendations here are precisely what we determined in *Hurst v. State* to be constitutionally necessary to impose a sentence of death.

Id. at 175.

Continuing the analysis of whether the error was harmless in *Davis*, the Court found further support for the conlcusion that any error was harmless based on the egregious facts of the case and the evidence in support of the "*six* aggravating

circumstances," which were "signifiant and essentially uncontroverted." *Davis*, 207 So. 3d at 174 (emphasis in original). These factors in combination led to the Court's conclusion that the error in *Davis* was harmless beyond a reasonable doubt.

Like in *Davis*, the jury instructions in Petitioner's case similarly required the jury to find that the aggravating factors were proven beyond a reasonable doubt and to find that sufficient aggravating circumstances outweighed the mitigating circumstances before considering recommending a death sentence. (Record at Vol. V:902-03). Just as in *Davis*, even though the jury was not required to unanimously recommend death, the jury did so in Petitioner's case. Additionally, in Petitioner's case, there were egregious facts, three aggravating circumstances, none of which were stricken on appeal, and no errors were found on appeal in the trial court's determination of mitigation, of which Petitioner had elected to not present. *Grim*, 841 So. 2d at 460. On direct appeal, the Court found "the evidence sufficient to support each conviction. We further conclude that the death penalty is proportional." *Id.* at 464. Additionally, the Florida Supreme Court stated "[t]he fact that Grim declined to present mitigation to the jury during the penalty phase has no bearing here. Grim's waiver of that right was valid, and he 'cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence.'" *Grim*, 244 So. 3d at 148 n.1. *Jones v. State*, 212 So. 3d 321, 343 n.3 (Fla. 2017) (quoting *Mullens v. State*, 197 So. 3d 16, 40 (Fla. 2016), *cert. denied*, 137 S.Ct. 672 (2017)), *cert. denied, Jones v. Florida*, 138 S.Ct. 175 (2017).

After *Davis*, the Florida Supreme Court held *Hurst* error to be harmless beyond a reasonable doubt in approximately fifteen[7] cases where the jury unanimously recommended death, including in Petitioner's case. In each of these cases, including Petitioner's, each defendant received individualized review and the Court did not use a *per se* test for harmlessness. Looking at *Davis* and the cases that followed, it is clear that the Florida Supreme Court is not using jury unanimity as a *per se* test for harmlessness as Petitioner argues. Instead, a

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

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[7] *See King v. State*, 211 So. 3d 866, 892-93 (Fla. 2017) (considering "the unanimous jury recommendation, King's failure to challenge evidence presented in aggravation, as well as the overwhelming and uncontroverted evidence of the four aggravating circumstances and the comparatively weaker mitigating evidence that was challenged by the State"); *Kaczmar v. State*, 228 So. 3d 1, 7-9 (Fla. 2017) (considering "extensive aggravating circumstances" of HAC and prior violent felony which "are among the weightiest of aggravators"); *Knight v. State*, 225 So. 3d 661, 682-83 (Fla. 2017) (considering "egregious facts" and "weighty" aggravators); *Hall*, 212 So. 3d at 1033-35 (considering "evidence in support of the *four* aggravating circumstances" was "significant and essentially uncontroverted" and "[t]hree of the four aggravators were without and beyond dispute") (emphasis in original); *Truehill v. State*, 211 So. 3d 930, 955-57 (Fla. 2017), *cert. denied*, 138 S.Ct. 3 (2017) (considering that the appellant "has not contested any of the aggravating factors as improper" and a unanimous finding despite there being four statutory mitigating circumstances); *Jones*, 212 So. 3d at 342-44, *cert. denied*, 138 S.Ct. 175 (2017) (considering that the evidence supporting the aggravating factors was substantial); *Middleton v. State*, 220 So. 3d 1152, 1184-85 (Fla. 2017) (considering "HAC and during the commission of a burglary aggravators" were supported by the record and "are among the most serious aggravating factors"); *Oliver v. State*, 214 So. 3d 606, 617-18 (Fla. 2017), *cert. denied*, *Oliver v. Florida*, 138 S.Ct. 3 (2017); *Morris v. State*, 219 So. 3d 33, 46 (Fla. 2017), *cert. denied*, *Morris v. Florida*, 138 S.Ct. 452 (2017); *Tundidor v. State*, 221 So. 3d 587, 607-08 (Fla. 2017); *Cozzie v. State*, 225 So. 3d 717, 733 (Fla. 2017); *Bevel v. State*, 221 So. 3d 1168, 1177-78 (Fla. 2017) (considering that "no aggravating factors have been struck"); *Philmore v. State*, 234 So. 3d 567, 569 (Fla. 2018) (considering the appellant's "confession and the aggravation in this case"); *Franklin v. State*, 236 So. 3d 989, 992-93 (Fla. 2018).

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

Hall, 212 So. 3d at 1034.

Since the Florida Supreme Court's holding in *Hurst v. State* was a product of state law, the harmlessness of *Hurst v. State* error is a state question. *Hurst*, 202 So. 3d at 54. The "application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law." *Chapman v. California*, 386 U.S. 18, 21 (1967).

In reviewing whether the error in *Hurst v. State* was harmless, the Florida Supreme Court reviewed whether there was "no reasonable possiblity that the error contributed to the sentence." *Hurst*, 202 So. 3d at 68 (citing *Zack v. State*, 753 So. 2d 9, 20 (Fla. 2000)); *see also State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986). Florida's harmless error test which was set forth in *DiGuilio* is derived from this Court's precedent in *Chapman* and *Hasting*, but is a separate state test for harmlessness. *DiGuilo*, 491 So. 2d at 1134-35; *Chapman*, 386 U.S. at 24; *United States v. Hasting*, 461 U.S. 499, 511 (1983).

> [T]he burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the] death sentence in [a] case.

Hurst, 202 So. 3d at 68. Further, "[w]here the jury has not been instructed to find an element of the offense, the test for harmless error asks whether it is clear beyond a reasonable doubt that a rational jury would have found the element of the offense." *Jones*, 212 So. 3d at 344 (citing *Neder v. United States*, 527 U.S. 1, 18 (1999)); *see*

also Jenkins v. Hutton, 137 S.Ct. 1769, 1772 (2017) (proper consideration is "whether a properly instructed jury could have recommended death").

In using the state harmlessness test, the Florida Supreme Court is not analyzing harmlessness in a way that contravenes existing federal law. In fact, the Florida test for harmlessness is derived from and similar to the federal test. It is perhaps a more stringent test than would be applied in federal court as it appears to employ both *Chapman*'s effect on the verdict test and *Neder*'s rational jury test. This strictness favors defendants as it allows for fewer findings of harmless error[8] than would occur just under the *Neder* test.

The defects addressed by the Florida Supreme Court in *Hurst v. State* are premised on a question of state law and procedure and have been analyzed under a state based harmless error rule. The Florida Supreme Court's analysis of these errors is not in contravention with federal law, this Court's precedent, or the constitution. In fact, harmlessness in light of the *Hurst v. State* factors is much more rigorous and difficult for the State to prove than the analysis of the *Hurst v. Florida* error. Indeed, as Justice Alito noted in his dissent regarding whether the error was harmless in *Hurst*: "[i]n light of this evidence, it defies belief to suggest that the jury would not have found the existence of either aggravating factor if its finding was binding."

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

Hurst, 136 S.Ct. at 626 (Alito, J., dissenting). However, the Florida Supreme Court was not as "sanguine" after their analysis of the record. *Hurst*, 202 So. 3d at 68. Their uncertainty focused almost exclusively on the issue of unanimity and the effect that not instructing on unanimity had on the verdict. *Id.* This concern is much less apparent when the jury was unanimous in spite of being instructed that only a majority was required. Certainly, the instruction that only a majority was required for a recommendation of death did not affect the verdict if the jury was unanimous in its recommendation.

Petitioner's claim that consideration must be given to the fact that trial counsel would have tried the case differently under *Hurst* is unavailing. (Petition at 31-32). Petitioner argues that trial counsel would have challenged the aggravators if he knew that the law was going to change; however, the evidence Petitioner claims trial counsel would have presented is nothing more than mitigation. This argument ignores Petitioner's waiver of presenting mitigation at the penalty phase. In the direct appeal, the Florida Supreme Court stated that because Petitioner had waived the presentation of mitigation during the penalty phase, Petitioner could not then complain on appeal that the trial court abused its discretion in not calling a witness to present mitigation. *Grim*, 841 So. 2d at 462. Petitioner had the right to present mitigation at the penalty phase, but he knowingly and voluntarily waived that right. There is no indication that he would not have waived mitigation *if the law had been different when his penalty phase occurred.* Prior to the ruling in *Hurst*, a court had to give great weight to the recommendation of the jury. Petitioner was advised of that

information when he waived his right to present mitigation before trial began and before the penalty phase. The change in the law does not change what the jury must consider and what weight the judge must give to the recommendation of sentence. As such, Petitioner's claim that the Florida Supreme Court failed to address Petitioner's proffer is meritless.

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

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

Petitioner argues that *Hurst* error is not subject to a harmless error analysis in light of *Sullivan. Sullivan v. Louisiana*, 508 U.S. 275 (1993). Petitioner argues that the *Hurst* error is structural and resulted in no jury findings in Petitioner's case because the erroneous jury instructions impacted "all of the elements for a death sentence under Florida law." (Petition at 27-30). However, this Court remanded *Hurst* back to the Florida Supreme Court specifically to conduct a harmless error

analysis. *Hurst*, 136 S.Ct. at 624 (citing *Neder*, 527 U.S. at 18-19). This certainly indicates that *Hurst* error can be reviewed for harmlessness. On remand, the Florida Supreme Court also concluded that the error is capable of harmless error review. *Hurst*, 202 So. 3d at 68. Petitioner's claim lacks merit as both Courts agree that *Hurst* error can be tested for harmlessness.

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

In *Sullivan*, the jury was given an instruction which included a definition of reasonable doubt which had already been held unconstitutional. *Sullivan*, 508 U.S. at 277. "Although most constitutional errors have been held amenable to harmless-error analysis, . . . some will always invalidate the conviction." *Id.* at 279 (citing *Arizona v. Fulminate*, 499 U.S. 279, 306-10 (1991)). In *Sullivan*, the "instructional error consist[ed] of a misdescription of the burden of proof, which vitiates all the jury's findings." *Id.* at 281. Because of the seriousness of this error, this Court found the error to be structural and not subject to a harmless error analysis. *Id.*

Unlike *Sullivan*, in *Hurst v. Florida*, there was not an issue with the

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

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

Despite Petitioner's argument that because of the *Hurst* error, there is no verdict in his case, the "absence of a 'complete verdict' on every element of the offense establishes no more than that an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee." *Neder*, 527 U.S. at 12. It does

not result in no jury findings at all as Petitioner argues. (Petition at 29). In *Neder*, the "omitted element" was "supported by uncontroverted evidence" and it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 18. Certainly, if it was appropriate for the error in *Neder* to be tested for harmlessness, it is also appropriate to test *Hurst* error for harmlessness. In Petitioner's case, the Florida Supreme Court found that the *Hurst* error was harmless beyond a reasonable doubt. *Grim*, 244 So. 3d at 148. This finding was proper and is not in contravention of this Court's precedent or federal law.

This Court has held that failure to instruct on jury unanimity can be analyzed for harmless error. *See Richardson v. United States*, 526 U.S. 813, 824 (1999).[9] Thus, the *Hurst v. State* error was also not structural and the Florida Supreme Court properly analyzed the error for harmlessness.

The Florida Supreme Court properly found that the error in Petitioner's case was harmless beyond a reasonable doubt. This finding was neither in contravention of this Court's precedent, nor in violation of federal law. This case presents no important, unsettled, or conflicting application of constitutional law by the lower court. Thus, certiorari review should be denied.

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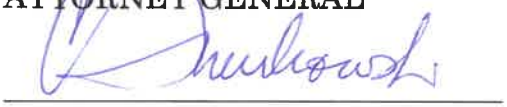
[9] There is some argument between the Circuits on which harmless error test applies to *Richardson*, *Brecht*, or *Chapman*. *Santana-Madera v. United States*, 260 F.3d 133, 140 (2d Cir. 2001) (This Court has not "definitively established the proper harmless error standard to apply when a constitutional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

Conclusion

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

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL



CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
Florida Bar No. 158541
*Counsel of Record

Lisa A. Hopkins
Assistant Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
capapp@myfloridalegal.com
(850) 414-3300

COUNSEL FOR RESPONDENT