No. 17-5083

IN THE SUPREME COURT OF THE UNITED STATES

TERENCE TABIUS OLIVER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION

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[Capital Case]

QUESTIONS PRESENTED

1. Whether this Court should exercise its certiorari jurisdiction to review a fact-specific decision by the Florida Supreme Court in affirming Petitioner's death sentences, when the Florida Supreme Court correctly recognized the applicability of the harmless error test pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), the ruling does not conflict with any decision from this Court or any other circuit court, and the core of Petitioner's claim is that the Florida Supreme Court misapplied the harmless error test to the facts of his case.

2. Whether this Court should exercise its certiorari jurisdiction to determine if the death sentencing procedures in this case complied with the Eighth Amendment, when the jury in Petitioner's case was correctly instructed on its role in the sentencing process as required under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and therefore no cognizable constitutional error occurred.

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Petitioner, Terence Tabius Oliver, seeks a writ of certiorari from the April 6, 2017, opinion of the Florida Supreme Court, affirming his convictions and sentences of death. The opinion is reported at *Oliver v. State*, 214 So. 3d 606 (Fla. 2017) (attached as "Appendix A" to Oliver's Petition for a Writ of Certiorari).

JURISDICTION

Oliver's petition seeks review of a decision from the Florida Supreme Court regarding his Sixth Amendment right to a jury trial under the U.S. Constitution, and therefore jurisdiction is proper pursuant to 28 U.S.C. § 1257. Still, Respondent contends that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE

I. Introduction

Oliver was found guilty of two counts of first-degree murder for the shooting deaths of Krystal Pinson and Andrea Richardson, and was sentenced to death for both counts. On appeal, the Florida Supreme Court affirmed Oliver's convictions and death sentences, and held that the lack of specific findings by the jury as to the facts necessary to impose the death penalty, were harmless beyond a reasonable doubt.

The Florida Supreme Court concluded that, based on the record, a rational jury would have found the facts necessary to impose the death sentences in his case.

Oliver presents two claims for review, both arising out of his penalty phase: first, whether his death sentence violates the Sixth Amendment due to the lack of specific findings by the jury; and second, whether the death sentencing procedures in his case complied with the Eighth Amendment. However, the questions posed by Oliver do not conflict with any decision from this Court or any other circuit court, nor has Oliver identified the occurrence of any constitutional error to warrant this Court's exercise of its certiorari jurisdiction. Instead, Oliver merely seeks this Court's review of the Florida Supreme Court's application of the well-settled harmless error test to the facts of his case. Thus, certiorari review is not warranted in this matter.

II. Factual Background

The facts adduced at trial showed the following: Oliver and Pinson had been dating since December 2006, and the two lived together during various times of their relationship. Pet. App. at 2. Oliver was also familiar with Richardson. *Id.* Oliver and Richardson attended school together while growing up, and shortly before the murders, Oliver purchased marijuana at Richardson's home. *Id.*

Between May 2009 and July 22, 2009, Oliver called a mutual friend, Leander Watkins, to speak with Pinson. *Id.* Oliver was concerned that Pinson was cooperating with the police regarding a warrant for his arrest for a crime that occurred in a different county. *Id.* Oliver asked Watkins if he had seen Pinson, and stated, "[s]he's

going to make me do something to her." *Id.*

On July 22, 2009, David Pouncey and Eric Edwards stood outside on the same street where Richardson's house was located. Pet. App. at 2. Pouncey heard "dogs barking and banging noises as if someone were banging a stick against a metal trashcan or knocking something against the door of Richardson's doghouse." Pet. App. at 3. A few minutes later, Pouncey and Edwards saw a person running from the direction of Richardson's home. *Id.* Later, Pouncey and Edwards walked to Richardson's home to check on Richardson. *Id.* Upon entering the residence, Pouncey and Edwards discovered Richardson's body in a fetal position near the side door of the residence. *Id.* Pouncey turned Richardson over, and saw that Richardson was covered in blood. *Id.* Pouncey called out to Pinson, who had been staying with Richardson. *Id.* As Pouncey walked out of the master bedroom, he tripped over Pinson's body, which was positioned as though she had tried to get under the bed. Pet. App. at 4. Both men ran from the residence, and asked a family member to call the police. *Id.*

On the night after the murders, Oliver visited Felicia Whaley and Ms. Whaley's boyfriend. *Id.* Ms. Whaley said that Oliver seemed "normal," but later noticed that Oliver had been crying. *Id.* Oliver asked Whaley to drop him off at a Walgreens store so he could meet with Sheena Camiscioli and Chelsea Wilson. *Id.*

Oliver, Camiscioli, and Wilson drove to a Motel 6 to rent a room. Pet. App. at 5. On the way to Motel 6, Camiscioli watched Oliver wrap a handgun in a bag and

discard it in a lake. *Id.* After arriving at Motel 6, the police contacted Camiscioli and asked for Oliver's whereabouts, but Camiscioli told the police that she had no knowledge of Oliver's whereabouts. *Id.*

After securing a room at the motel, Camiscioli noticed that Oliver had acted distant, and asked Oliver whether everything was okay. Pet. App. at 6. Oliver began to cry, and told Camiscioli that Pinson "was on a lot of his paperwork and he was tired." *Id.* According to Camiscioli, Oliver "mentioned that he was tired of the domestic violence and [Pinson] always calling the police on him." *Id.* While crying, Oliver told Camiscioli that he killed Pinson in Richardson's bed, and that he shot Richardson because Richardson was present and had begun to run out the back door. *Id.* However, Oliver told Camiscioli that he was not concerned, because Richardson had sold drugs out of his house, so the murders would look like a robbery had occurred. *Id.* Oliver also told Camiscioli that there was no evidence linking him to the murders. *Id.*

After Oliver's arrest, Camiscioli led law enforcement to the lake where Oliver discarded the firearm. Pet. App. at 7. The law enforcement dive team recovered a .40 caliber firearm and magazine, which was wrapped in the same packaging that Camiscioli previously observed when Oliver discarded the firearm. *Id.* The .40 caliber shell casings recovered near the victims' bodies matched the firearm recovered by the dive team. Pet. App. at 8-9.

The autopsy results showed that both Pinson and Richardson died from the

infliction of multiple gunshot wounds. Pet. App. at 8-9. The medical examiner identified three gunshot wounds to Richardson's body, and eight gunshot wounds to Pinson's body. *Id.*

The jury found Oliver guilty of first-degree murder for the shooting deaths of Pinson and Richardson. Pet. App. at 9. The jury also found Oliver guilty of armed burglary of a dwelling with discharge, causing death. *Id.* The trial court found Oliver guilty of possession of a firearm by a convicted felon. *Id.*

At the conclusion of the penalty phase, the trial court instructed the jury that it had to render a recommendation based upon its determination as to whether aggravating circumstances existed to justify the imposition of the death penalty. Tr. XX: 2583. The jury was also instructed that although its recommendation was advisory, "the jury recommendation must be given great weight and deference by the [c]ourt in determining which punishment to impose." Tr. XX: 2583-84.

The trial court instructed the jury on four aggravating circumstances as to the death of Andrea Richardson: 1) Oliver was previously convicted of another capital felony, or a felony involving the use or threat of violence to the person; 2) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; 3) the capital felony was committed during the commission of a burglary; and 4) the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Tr. XX: 2588-90. As to the death of Krystal Pinson, the trial court

instructed the jury on the same aggravating circumstances as Mr. Richardson, and gave an additional instruction on the heinous, atrocious, or cruel aggravating circumstance. Tr. XX: 2590-92.

After deliberations, the jury unanimously returned a recommendation for the imposition of the death penalty for both murders. Pet. App. at 9. The trial court found the existence of four aggravating factors: 1) Oliver had been previously convicted of a capital felony, which was based on a conviction for robbery with a firearm or deadly weapon in 1995, a 2002 conviction for resisting arrest with violence, and the contemporaneous first-degree murders of Pinson and Richardson; 2) the capital felonies were committed while Oliver was engaged in the commission of a burglary; 3) the capital felonies were committed for the purpose of avoiding or preventing a lawful arrest; and 4) and the murders were committed in a cold, calculated, and premediated manner without any pretense of moral or legal justification. Pet. App. at 26-27. The trial court followed the jury's unanimous recommendation, and imposed the death penalty for both murders. Pet. App. at 9.

III. Proceedings Below

On appeal, Oliver contended that his death sentences were contrary to this Court's decisions in *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, 136 S. Ct. 616 (2016). In addressing the applicability of *Hurst* to Oliver's case, the court noted that in *Hurst*, this Court stated: "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere

recommendation is not enough." Pet. App. at 19 (quoting *Hurst*, 136 S. Ct. at 619). On remand from *Hurst*, the Florida Supreme Court stated that, based on Florida's constitutional right to a jury trial, a jury is required to find "the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances" before a death sentence may be imposed. Pet. App. at 20 (quoting *Hurst v. State* (*Hurst II*), 202 So. 3d 40, 44 (Fla. 2016). The court also noted that, based on the Florida Constitution, a jury is required to unanimously recommend a death sentence. Pet. App. at 20.

Furthermore, the court noted that it had previously determined that any error in a jury's failure to find the facts necessary to impose the death penalty was subject to harmless error review. Pet. App. at 20. Thus, the only question that remained in Oliver's case, was whether the lack of specific findings by the jury in his case was harmless error. *Id.*

In its harmless error analysis, the court first began by stating, "[a]s applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances." Pet. App. at 21 (citations omitted). In examining the record in Oliver's case, the court noted that the jury instructions required the jury to determine whether sufficient aggravating circumstances existed and whether the

aggravation outweighed the mitigation, before it could recommend a death sentence. Pet. App. at 21 (citations omitted). The court concluded that based on the jury instructions and the jury's verdict, the jury made the requisite factual findings before it issued its unanimous recommendation of a death sentence. Pet. App. at 22 (citations omitted). Thus, the court concluded that the lack of specific findings by the jury was harmless, and that Oliver was not entitled to relief. *Id.*

REASONS FOR DENYING THE WRIT

I. Certiorari Is Unwarranted To Review The Florida Supreme Court's Application Of The Harmless Error Test To The Facts Of This Case.

Petitioner seeks this Court's review as to whether the lack of specific jury findings for the facts necessary to impose the death penalty amounts to a lack of a verdict under the Sixth Amendment. In making this argument, Petitioner creates an illusory conflict between the Florida Supreme Court's decision, and this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and alleges that reversal is warranted under *Sullivan v. Louisiana*, 508 U.S. 275 (1993). However, Petitioner is incorrect, and his claim does not warrant review by this Court. There is no conflict between this Court's decision in *Hurst* and the decision rendered below, nor is there any conflict that exists between the Florida Supreme Court's decision below and any other circuit court. Furthermore, the Florida Supreme Court applied the harmless error test as this Court stated should be applied in capital cases, where there are no specific findings as to the existence of aggravating circumstances. Accordingly, Petitioner's claim does not warrant certiorari review from this Court.

A. There is no conflict between the Florida Supreme Court's opinion and any decision from this Court, or any other circuit court.

Petititoner contends that the Florida Supreme Court's decision runs afoul of this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Specifically, Petitioner contends that the Florida Supreme Court held that the jury's unanimous recommendation "obviated the need for *any* of those specific findings." Pet. at. 17

(emphasis within the original quotation). However, Petitioner mischaracterizes the Florida's Supreme Court's holding, and thus his argument is entirely incorrect. The Florida Supreme Court did **not** hold that a unanimous jury recommendation obviates the need for specific findings by the jury. Instead, the court merely held that, based on the evidence within the record, a rational jury would have found the facts necessary to impose the death senetnces in Petititoner's case. Thus, there is no conflict between this Court's decision in *Hurst* and the decision rendered below, and thus, review is not warranted.

First, "certiorari jurisdiction exists to clarify the law, its exercise 'is not a matter of right, but of judicial discretion.'" *City and County of San Francisco, California v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (citations ommitted). Indeed, this Court has long held, "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). Thus, in the absence of a conflict between decisions of this Court or other circuit courts, certiorari review is not warranted. *See Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (denying certiorari review in the absence of a conflict).

Second, in *Hurst*, this Court applied *Ring v. Arizona*, 536 U.S. 584 (2002) to Florida's death sentencing statute, and held that the Sixth Amendment requires the jury to find the existence of an aggravating circumstance. *Hurst*, 136 S. Ct. at 624. More notably, in *Hurst*, this Court found that the failure to submit an aggravating

circumstance to the jury, was capable of harmless error review. *See Hurst*, 136 S. Ct. at 624 ("[t]his Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here.")

On remand in *Hurst v. State* (*Hurst II*), 202 So. 3d 40 (2016), the Florida Supreme Court expanded this Court's decision, and based on **Florida's constitutional right to a jury trial**, required additional factual findings to be made by the jury in order to impose a death sentence. *See Hurst II*, 202 So. 3d at 57 ("the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.")

However, there was nothing in this Court's decision in *Hurst* to conclude that the process of weighing the mitigating and aggravating factors was a "fact" for Sixth Amendment purposes. Indeed, this Court stated that the determination of whether mitigating circumstances outweigh aggravating circumstances "is mostly a question of mercy . . . leaving the judgement [of] whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof." *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016).

Hence, Petitioner's attempt to connect and integrate the Florida Supreme Court's decision with this Court's decision in *Hurst* cannot stand, particularly as the

Florida Supreme Court based its holding on Florida's separate constitutional right to a jury trial. *See Hurst II*, 202 So. 3d at 54 (holding that the additional factual determinations are "founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven . . . .") Instead, all this Court required, and thus the only similarity with the Florida Supreme Court's decision, is the requirement for the jury to find the existence of the aggravating circumstances. *Hurst*, 136 S. Ct. at 624. Thus, the additional factual determinations which the Florida Supreme Court held were required under Florida's separate right to a jury trial, are not appropriate for this Court's review. *See Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996) (noting that certiorari jurisdiction is not generally appropriate to review applications of state law).

Still, the Florida Supreme Court's decision does not conflict with this Court's decision in *Hurst*, as the court never held that a unanimous jury recommendation "obviates" the need for the required factual determinations. Most notably, Petitioner cannot quote or cite to a single sentence in the court's opinion to support his argument that the court held that factual determinations are unnecessary when a jury unanimously recommends a death sentence. Instead, the court's opinion clearly recognized and applied this Court's holding in *Hurst*, and stated that a jury is required to find the existence of an aggravating circumstance, in addition to other findings to impose the death penalty. *See* Pet. App. at 20 (citations omitted) ("[i]n capital cases in Florida, these specific findings required to be made by the jury include

the existence of each aggravating factor that has been proven beyond a reasonable doubt . . . .") Hence, Petitioner's assertion of a conflict between the Florida Supreme Court's decision and this Court's decision in *Hurst* is, respectfully, illusory and meritless.

Likewise, Petitioner's argument that the harmless error test cannot apply in his case is also without merit. At issue in *Neder v. United States*, 527 U.S. 1 (1999), was the failure to submit an element of an offense to the jury. *Id.* at 6. In holding that the error was capable of harmless error review, this Court stated, "[i]t would be illogical to extend the reasoning of *Sullivan* from a defective 'reasonable doubt' instruction to a failure to instruct on an element of the crime." *Id.* at 15. This Court went on to distinguish cases like *Sullivan* and stated,

> The error at issue here—a jury instruction that omits an element of the offense—differs markedly from the constitutional violations we have found to defy harmless-error review. Those cases, we have explained, contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.

Neder, 527 U.S. at 8 (citations omitted); *see also Washington v. Recuenco*, 548 U.S. 212, 222 (2006) ("[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error.")

Applying the aforementioned principles, any error in the lack of specific findings by the jury in this case was, in fact, subject to the harmless error test. The failure to submit the aggravating factors to the jury was not structural error, which would render a harmless error analysis meaningless within the Sixth Amendment.

In other words, the defect did not affect the framework in which the trial proceeded. Instead, the error amounted nothing more than a simple error in the trial process itself. Therefore, the error, was, in fact, subject to harmless error review.

Accordingly, *Sullivan* concerned an entirely different issue from the issue presented in *Neder*, and thus Petitioner's reliance on *Sullivan* is greatly misplaced. In *Sullivan*, this Court held that an erroneous jury instruction on the proof beyond a reasonable doubt standard could not be subject to harmless error review. *Sullivan*, 508 U.S. at 281-82. In so holding, this Court concluded that where a jury does not believe that it must find beyond a reasonable doubt that a defendant is guilty, the erroneous instruction is structural error. *Id.* at 282-83. Rephrased, without the beyond a reasonable doubt standard of proof, there was no jury verdict of "guilty-beyond-a-reasonable-doubt," making the harmless error test meaningless and inapplicable. *Id.* at 280.

Here, however, the failure to submit the aggravating circumstances to the jury was not structural error as in *Sullivan*. The error did not involve a defect in the reasonable doubt standard to render a harmless error analysis meaningless, as in *Sullivan*. Instead, the error only dealt with the failure to submit an element to the jury, which this Court held in *Neder* was subject to harmless error analysis. Thus, contrary to Petitioner's contention, the Florida Supreme Court's decision does not conflict with any decision from this Court or any other circuit court. Moreover, this

Court's jurisprudence is well settled, and does not need any further briefing or clarification. Therefore, certiorari review is not warranted and should be denied.

B. Certiorari Review Is Not Warranted Where Petitioner Seeks Only To Have This Court Revisit The Florida Supreme Court's Application Of The Harmless Error Test.

At the heart of Petitioner's claim, is the contention that the Florida Supreme Court misapplied the harmless error test, or that the court incorrectly concluded that the error in his case harmless. However, Petitioner's argument is not only meritless, but also further proves why certiorari review is not warranted.

Rule 10 of this Court's rules states, "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *See also Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring) (citations omitted) ("error correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari.")

Here, the crux of Petitioner's argument rests on his contention that the State cannot show that the error in his case was harmless, which goes to the very heart of Rule 10 and what this Court stated in *Tolan*. To resolve Petitioner's question, this Court would have to engage in the very "error correction" analysis that this Court stated was against its principle function. Thus, Petitioner has demonstrated that there is no compelling reason for this Court to exercise its certiorari jurisdiction in this case. Accordingly, certiorari review should be denied.

Nevertheless, Petitioner's contention is without merit, and the Florida Supreme Court correctly affirmed Petitioner's convictions and death sentences. Petitioner asserts that the jury made none of the Sixth Amendment findings as required under *Hurst*, even going so far as to assert that no jury verdict within the meaning of the Sixth Amendment occurred. Pet. at 18-19. However, Petitioner's contention is false. Notably, Petitioner's case fell outside of the required fact-finding under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) due to the fact that one of the aggravating circumstances dealt with prior convictions. *See Apprendi*, 530 U.S. at 490 ("[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."); *Alemendarez-Torres v. United States*, 523 U.S. 224, 230 (1998) (noting that a prior conviction does not operate as an element of an offense). Here, one of Petitioner's convictions for first-degree murder, qualified as a prior capital felony offense. Accordingly, given the contemporaneous shooting deaths which would have qualified as prior capital offenses, Petitioner's case fell outside of the required fact-finding under *Apprendi*.

Furthermore, even if Petitioner's case fell within the fact-finding required under *Apprendi*, Petitioner's contention is still meritless. The prior capital felony aggravating circumstance found by the judge, was, in fact, found by the jury. Rephrased, the jury necessarily found the existence of the prior capital felony aggravating circumstance, by virtue of the contemporaneous conviction for first-

degree murder. Likewise, the jury also found Petitioner guilty of armed burglary of a dwelling with discharge causing death. Thus, the jury necessarily found the existence of a second aggravating factor, that the capital felonies were committed during the commission of a burglary. Hence, Petitioner's claim that no Sixth Amendment findings were made, is, respectfully, entirely false.

Additionally, the Florida Supreme Court correctly held that the lack of specific factual findings by the jury in Petitioner's case was harmless beyond a reasonable doubt. At the outset of the harmless error analysis, the court stated, "[a]s applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances." Pet. App. at 21 (citations omitted). In conducting its analysis, the court noted "[t]he instructions that were given informed the jury that it needed to determine whether sufficient aggravators existed and whether the aggravation outweighed the mitigation before it could recommend a sentence of death . . . ." *Id.* (citations omitted) (emphasis within the original). Thus, the court stated that "[t]he jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendation." Pet. App. at 22. Ultimately the court concluded that, based on Florida's separate constitutional right to a jury trial, that the jury made the necessary constitutional findings to impose the death sentences. *Id.*

The decision of the Florida Supreme Court is supported by the evidence within the record. The facts adduced at trial on which the jury based its verdict showed that Petitioner had tried contacting Pinson due to his knowledge that Pinson was cooperating with law enforcement to affect his arrest for a crime that occurred in another county. Petitioner was heard banging on the door of the Richardson's residence, in an attempt to gain entry to the residence. The evidence also showed that Petitioner was seen running from the residence after the victims were murdered. Hence, if special interrogatories were given, a rational jury, properly instructed, would have found that the murders were committed for the purpose of preventing an arrest, and that the murders were committed in a cold, calculated and premeditated manner. Accordingly, as Petitioner's argument is without merit that the State cannot meet its burden of proving harmless error is entirely meritless.

In sum, as the decision by the Florida Supreme Court does not conflict with any decision by this Court, and the record shows that the court applied the harmless error test in accordance with this Court's jurisprudence in *Neder* and *Hurst*, certiorari review is not warranted in this matter.

II. Certiorari Should Be Denied On The Second Question Presented.

Petitioner alleges that the death sentencing procedures used in this case failed to comply with the Eighth Amendment, because the jury was advised that its recommendation was advisory and non-binding. However, Petitioner's argument does not warrant certiorari review. There is nothing within the record to suggest that the

jury was improperly instructed on its role in the sentencing process. Therefore, certiorari review by this Court is not warranted.

A. The Jury Was Correctly Instructed On Its Role In The Sentencing Process, And Therefore No Cognizable Constitutional Error Occurred.

Petitioner's claim does not warrant certiorari review, because the record shows that the jury was correctly instructed on its role in the sentencing process based on the law in effect at the time of trial.

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), this Court held 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." *Id.* at 329. Thus, to establish a constitutional error under *Caldwell*, a defendant must show that the instructions to the jury "**improperly described the role assigned to the jury by local law**." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (emphasis added). Thus, where the record shows, as it does here, that the jury was properly instructed on its role in the sentencing process based on the law existing at the time of trial, the defendant fails to establish a constitutional error under *Caldwell*. Furthermore, although Petitioner appears to suggest that jury sentencing is required under the Eighth Amendment, *see* Pet. at 23, this contention also fails. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("today's judgement has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an

aggravating factor existed.") (emphasis within the original).

Here, at the time of Petitioner's trial, Section 921.141(2), Florida Statutes (2014) stated the following,

> (2) ADVISORY SENTENCE BY THE JURY. – After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated [below];
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

The jury was instructed: "[y]ou must follow the law that will now be given to you and render an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist." Tr. XX: 2583. The jury was also instructed that an aggravating circumstance had to be proved beyond a reasonable doubt, before the aggravating circumstance could be considered by the jury in determining its recommendation. Tr. XX: 2587. Furthermore, the jury was instructed that it had to find the existence of at least one aggravating circumstance before it could consider the death penalty as a possible sentence. Pet. App. at 21.

Applying the aforementioned legal principles, Petitioner has failed to identify a cognizable claim under the Eighth Amendment to warrant certiorari review. There is no evidence in the record to suggest that the jury in Petitioner's case was

improperly instructed on its role in the sentencing process under the law in effect at the time of Petitioner's trial. The jury was instructed that it had to determine that sufficient aggravating circumstances existed before it could render a recommendation to impose the death penalty, in accordance with section 921.141. Thus, Petitioner's contention that the jury instructions were improper under the Eighth Amendment necessarily fails.

Furthermore, there is no evidence to suggest that the jury instructions in any way diminished the jurors' sense of responsibility, as Petitioner contends. The record shows that the while jury was instructed that its recommendation was advisory, the judge also instructed the jury that "**the jury recommendation must be given great weight and deference by the Court in determining which punishment to impose.**" Tr. XX: 2583-84 (emphasis added). Even during preliminary discussions with the jury panel, the trial court advised the jury that it was required to give its recommendation great weight, and that the court had to defer to the jury's recommendation. Tr. VIII: 119-20, Tr. X: 571-72. Accordingly, Petitioner's argument is without merit, and does not warrant review.

In sum, this Court should deny certiorari review in this matter. There is no evidence within the record to suggest that the jury was improperly instructed on its role in the sentencing process, and thus Petitioner has no cognizable claim under the Eighth Amendment. Furthermore, Petitioner has not presented an important, unsettled federal question to warrant an exercise of this Court's certiorari

jurisdiction. Accordingly, Respondent requests that this Court deny certiorari review in this matter.

CONCLUSION

Based on the foregoing discussions, Respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Vivian Singleton, a member of the Bar of this Court, hereby certify that on this 4th day of August, 2017, a copy of the Respondent's Brief in Opposition in the above entitled case was furnished by United States mail, postage prepaid, to Nancy Ryan, Assistant Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, FL 32118. I further certify that all parties required to be served have been served.

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