DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

RICHARD KNIGHT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

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QUESTIONS PRESENTED – CAPITAL CASE

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court struck down Florida's capital sentencing procedures because those procedures authorized a judge, rather than a jury, to make the factual findings necessary for a death sentence. In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court held that in order for a capital penalty phase jury to return a death recommendation that gives the sentencing judge the power and authority to impose a death sentence, the jurors must have unanimously found all facts necessary to impose a sentence of death and unanimously agreed to the recommendation. "In requiring jury unanimity in [the statutorily required fact] findings and in [the jury's] final recommendation if death is to be imposed, [the Florida Supreme Court was] cognizant of significant benefits that will further the administration of justice." 202 So. 3d at 58.

In Petitioner's case, the Florida Supreme Court determined that constitutional error occurred during his capital penalty phase yet concluded, based on an incorrect understanding of this Court's precedents, that such error was not structural in nature and thus amenable to harmless error review. Petitioner seeks this Court's review on the following question:

> **Is the Sixth Amendment error identified by this Court in *Hurst v. Florida* a structural defect that infects the entire constitution of the trial mechanism and thus not amenable to harmless error review?**

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Petitioner, **RICHARD KNIGHT,** is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue its writ of certiorari to review the decision of the Florida Supreme Court in *Knight v. State,* 225 So. 3d 661 (Fla. 2017).

CITATION TO OPINIONS AND ORDERS BELOW

This proceeding was instituted as a result of a petition for writ of habeas corpus filed directly in the Florida Supreme Court during the pendency of Petitioner's appeal in that court from the denial of a motion for postconviction relief under Florida Rule of Criminal Procedure 3.851. The Florida Supreme Court's denial of relief by opinion dated January 31, 2017, is reported at *Knight v. State*, 225 So. 3d 661 (Fla. 2017), and is attached to this petition as Appendix A. A timely motion for rehearing was filed in the Florida Supreme Court and was denied by that court on September 13, 2017. This order is attached to this petition as Appendix B.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257. The Florida Supreme Court issued an opinion denying relief on January 31, 2017, and denied rehearing on September 13, 2017.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.nt part:

The Eighth Amendment to the Constitution of the United States provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND RELEVANT FACTS[1]

The Circuit Court for the Seventeenth Judicial Circuit, in and for Broward County, Florida, entered the final judgments of conviction and death sentence currently at issue.

On June 29, 2000, Mr. Knight was apprehended in Coral Springs, Florida, for questioning regarding the homicides of Odessia Stephens and Hanessia Mullings. Mr. Knight was formally arrested for the murders of Odessia Stephens and Hanessia Mullings on August 21, 2001. Mr. Knight was subsequently indicted for the first-degree murders of Odessia Stephens and Hanessia Mullings.

Before the Honorable Eileen M. O'Connor, in the Circuit Court for the Seventeenth Judicial Circuit, in and for Broward County, Florida, Mr. Knight pled not guilty to all charges. Mr. Knight expressed his desire to proceed to trial.

Voir dire in Mr. Knight's trial began March 13, 2006,[2] and opening statements

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[1]Citations to the state court record will be designated as follows: (R.___) – the record of the direct appeal to the Florida Supreme Court; (T.___) – transcripts in the record of the direct appeal to the Florida Supreme Court; (PCR.___) – the record of the postconviction appeal to the Florida Supreme Court (Supp-PCR. ___).

[2] During voir dire, prospective jurors in Mr. Knight's case were repeatedly told that their role in terms of sentencing was merely advisory and that they were merely returning a nonbinding recommendation to the court. *See, e.g.* V15/1488 ("the jury would reconvene for the purposes of rendering an advisory recommendation as to what sentence should be imposed"); V15/1489 ("The final—the final determination of the sentence . . . is up to me. . . . If you recommend the death penalty, the Court will give great weight and consideration to your

were presented to the jury on April 03, 2006. Closing arguments took place on April 25, 2006, and on April 26, 2006, the jury returned a verdict of guilty on both counts of first-degree murder.

With regard to sentencing, Mr. Knight's counsel filed a series of motions attacking the constitutionality of Florida's capital sentencing scheme on federal constitutional grounds, including the Sixth and Eighth Amendments. For example, he filed a motion to declare Fla. Stat. §941.141 unconstitutional due to its failure to provide adequate guidance to the jury as to the finding of aggravating and mitigating circumstances (V62/689-90); a motion to declare §941.141 unconstitutional because only a bare majority of jurors was sufficient to "recommend" a sentence of death (V62/691-92); and a motion to declare §941.141 unconstitutional for lack of adequate appellate review (V62/693-712).[3] He also filed a motion entitled "Motion to Declare the Florida Death Penalty Statute Unconstitutional Based on the Clear Mandate of the United States Supreme Court Decision of *Ring v. Arizona*"

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recommendation").

[3] Including among the various grounds for this particular motion was the argument that "Florida law does not require special verdicts" and thus "the appellate court is in no position to know what aggravating and mitigating circumstances the jury found" (V62/701). Counsel also argued that Florida law "in effect makes the aggravating circumstances elements of the crime so as to make the defendant death eligible" hence the Florida scheme violated the Sixth and Eights Amendments (*Id*.) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Of course, this was the foundation of this Court's later decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016).

(V62/802-24).[4] This motion argued, *inter alia*, that the "Florida capital sentencing statute was designed to deny the jury a role in making the findings of fact on which eligibility for a death sentence depends" and that under the extant statute, the jury's finding of guilt at the guilt phase "will reflect no more than a finding of premeditated first-degree murder" and that "it is the Court, not the jury, who actually must make the necessary findings of fact" to determine Mr. Knight's death eligibility (*Id*. at 803; 817). He also argued that the Sixth Amendment violation was more apparent because the jury's penalty phase verdict is "merely advisory" and thus cannot satisfy the fact-finding requirement of *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey,* 530 U.S. 466 (2000) (V62/819) (citing *Caldwell v. Mississippi*, 472 U.S. 320 (1985)). Thus, Mr. Knight's motion contended that Florida's capital sentencing scheme violated the Sixth Amendment and he should be sentenced to life imprisonment, the only possible sentence authorized by the guilt phase verdict. All these motions were denied.

Mr. Knight also filed a motion to permit argument and testimony at the penalty phase concerning reasonable doubt as to the proof of the aggravating circumstances (V60/403-05). In the motion, Mr. Knight argued, in part:

> 4. In order to counter the allegations that the State has proven prior violent felony, heinous, atrocious and cruel, during the commission of the felony of child abuse

[4] *See Ring v. Arizona,* 536 U.S. 584 (2002).

> aggravator, and victim under the age of twelve aggravator, it is urged that the Court permit counsel to present further evidence and to argue to the jury that the State has failed to meet its burden to establish beyond a reasonable doubt that these aggravating factors exist as to the Defendant. Although it may be argued that the Defendant was a principle in these acts, the jury may well find, consistent with *Edmond/Tyson* that the Defendant's actions are not sufficiently culpable to merit the imposition of death if the jury were to have a reasonable doubt as to whether or not the Defendant was the actual perpetrator of all of the criminal conduct for which he was convicted.
>
> 5. It is understood that the Appellate Courts have consistently refused Defendant's request to argue residual or lingering doubt as a mitigating factor per se.[] This mitigating factor of residual doubt is requested in this case in the interest of fairness. However, the evidence of a second culprit is not offered in this case to establish merely lingering doubt as a mitigating factor. Rather, it is being offered to counter the proof that the Defendant is guilty of all of the aggravating facts which the State will be offering.

(*Id*.) (footnote omitted). This motion, too, was denied (V60/423).[5]

The penalty phase testimony took place on May 22 and 23, 2006, and then

[5] Prior to closing argument at the penalty phase, Mr. Knight renewed his motion, noting that the State had brought into the courtroom "all of the evidence that was submitted at trial" to presumably use "to argue various aggravating factors" (V55/1101). Defense counsel reminded the court that he wanted to also argue to the jury and present evidence that would have negated some of the aggravating circumstances "such as contemporaneous [capital felony conviction] . . . [and] victim under the age of twelve" (*Id*. at 1102). Defense counsel argued that it would be unfair to deprive Mr. Knight of the ability to argue that these aggravators were not established, or were due lesser weight, but the court refused to alter its prior ruling prohibiting the defense from arguing these points (*Id*. at 1102).

continued until July 24, 2006, on which date the jury returned its advisory recommendations. Both sides presented extensive testimony, including lay witnesses and mental health experts. Before deliberations began in the penalty phase, the trial court instructed the jurors per Florida's standard jury instructions:

> Ladies and gentlemen of the jury, it is now your duty *to advise* the Court as to what punishment should be imposed upon the defendant for his crimes of murder in the first degree.
>
> *As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge*, however, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient aggravating circumstances exist to outweigh any aggravating circumstances found to exist.

(V55/1145-46) (emphasis added). The terms "advisory sentence" and "recommend" were repeated to the jury during the court's instructions on several occasions (V55/1146, 1149, 1153, 1154, 1155).

The jurors were instructed to consider the following aggravating circumstances as to the murder of Odessia Stephens: (1) that Mr. Knight has been previously or contemporaneously convicted of another capital offense or a felony involving the threat of violence (only the contemporaneous conviction for the murder of Hanessia Mullings qualified); and (2) especially heinous, atrocious, or cruel (V55/1146-47). As to the murder of Hanessia Mullings, the jury was instructed

on the following aggravating circumstances: (1) that Mr. Knight has been previously or contemporaneously convicted of another capital offense or a felony involving the threat of violence (only the contemporaneous conviction for the murder of Odessia Stephens qualified); (2) that the crime was committee for the purpose of avoiding or preventing a lawful arrest; and (3) especially heinous, atrocious, or cruel (V55/1147-48). Following the instructions, the jurors were told that they would be taken to the jury room "to render [their] advisory opinions" (V55/1157).

At 3:50 PM, the jury panel retired to the jury room to begin its deliberations (V55/1158). Between 3:50 and 4:00 PM, the attorneys and court gathered the exhibits to provide to the deliberating jurors and, at 4:00PM a recess was taken (V55/1162-63). At 4:49 PM, the jurors announced they had reached advisory recommendations (V55/1163), and both "verdict" forms simply indicated that the jury recommended and advised that the court impose the death penalty by a 12-0 vote on both murder counts (V55/1164-65). The forms revealed no "findings" made by the jury about any eligibility factors set forth in Florida's statute.

In its written sentencing order, the trial court recognized its sole responsibility for making the necessary factual determinations to sentence Mr. Knight to death while affording the jury's recommendations great weight (V37/3707). As to the murder of Odessia Stephens, the court found two aggravating circumstances: (1) the contemporaneous conviction for the murder of Hannesia Mullings, and (2)

especially heinous, atrocious, or cruel (V37/3708-10). As to the murder of Hannesia Mullings, the court found three aggravating circumstances: (1) the contemporaneous conviction for the murder of Odessia Stephens, (2) especially heinous, atrocious or cruel, and (3) the victim was under the age of 12 (V37/3711-13). The court specifically rejected the avoiding arrest aggravating circumstance that had been submitted to the jury and argued by the State to the jury (V37/3711-12). The trial court found no statutory mitigating factors and found eight (8) non-statutory mitigating factors[6] (R. 3713-3727). Following a proportionality review, the trial court, finding that the great weight of the aggravating factors outweighed the non-statutory mitigating factors, determined that the unanimous jury recommendation in favor of death "was an appropriate proportionate and just conclusion" and sentenced Mr. Knight to death on both counts (R. 3727-3729).

[6] The trial court found the following non-statutory mitigating factors: (1) the defendant had a good upbringing and was raised in a caring family (slight weight); (2) the defendant continues to express his love and compassion for his family (moderate weight: (3) the defendant attended high school and excelled in art (little weight); (4) the defendant was admired by the children in the neighborhood and highly thought of by adults (little weight); (5) the defendant was a valuable employee at Playmate Construction in Jamaica (little weight); (6) the defendant was a good worker at various jobs and was gainfully employed at the time of the offense (the court found this factor proven only to the extent that defendant had a part-time job at the time of the offense) (little weight); (7) the defendant demonstrated appropriate courtroom behavior (little weight); and (8) the defendant is capable of forming loving relationships with family members and friends (moderate weight) (R. 3713-3727).

On March 28, 2007, the trial court appointed the Office of the Public Defender of the Seventeenth Judicial Circuit, Broward County, Florida to represent Mr. Knight in his direct appeal to the Florida Supreme Court. On direct appeal, Mr. Knight raised the following issues: (1) the trial court erred in denying his motion for mistrial following the State's redirect examination of Hans Mullings, during which Mullings stated that Knight has a "violent background."; (2) the trial court improperly denied his motion for mistrial for being shackled in the presence of the jury during the guilt phase; (3) the trial court's ruling that no discovery violation occurred and alleges that trial court erred in denying his motion for mistrial based on the State's experts' testimony regarding DNA evidence; (4) Hans Mullings' testimony during the guilt phase proceedings that Knight has a "violent background" required the trial court to seat a new jury for purposes of the penalty phase; and (5) Mr. Knight challenged the constitutionality of Florida's death sentencing scheme as set forth in section 921.141 Fla. Stat. (2000).

The Florida Supreme Court affirmed Mr. Knight's convictions and sentences of death, including ruling on the merits of his challenge to the constitutionality of Florida's capital sentencing scheme. *Knight v. State*, 76 So. 3d 879 (Fla. 2011) [hereinafter *Knight I*]. Mr. Knight's motion for rehearing was denied on December 15, 2011, and the mandate issued on Jan 3, 2012. Mr. Knight filed a Petition for Writ of Certiorari in this Court, which was denied on May 14, 2012. *Knight v. Florida*,

132 S. Ct. 2398 (2012).

Mr. Knight initiated his State postconviction proceeding by requesting public records pursuant to Fla. R. Crim. P. 3.852, and an initial motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851 was timely filed on May 10, 2013 (V. 3 PCR 404-533). The court conducted a number of status hearings, and public records continued to be disclosed up to and including at a hearing on March 6, 2014. An amended Rule 3.851 motion was filed on or about March 11, 2014 (V. 5 PCR 884-966). An evidentiary hearing was conducted on Mr. Knight's amended Rule 3.851 motion on March 27-28, 2014 (V. 20, 21). The parties were granted leave to, and later filed, post-hearing memoranda (V. 7 PCR 1128-1198; 1199-1282). A written order denying relief was filed by the lower court on or about July 30, 2014 (V. 7 PCR 1283-1329).[7] Mr. Knight thereafter timely filed his Notice of Appeal to the Florida Supreme Court (V. 8 PCR 1330-1331).

Mr. Knight's case proceeded in the Florida Supreme Court with briefing by the parties as to the lower court's order denying his amended Rule 3.851 motion. Mr. Knight's appeal was scheduled for oral argument on February 2, 2016. On January 12, 2016, this Court issued its decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), declaring that Florida's capital sentencing statute violated the Sixth

[7] The lower court's order was signed on July 30, 2014, but not filed with the Clerk of Court until the following day (V. 7. PCR 1283).

Amendment. In the wake of *Hurst v. Florida*, the Florida Supreme Court ordered supplemental briefing in Mr. Knight's case and oral argument took place as scheduled on February 2, 2016. In October, 2016, the Florida Supreme Court issued its opinion in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), its decision on remand from this Court's decision in *Hurst v. Florida*. Following the release of *Hurst v. State*, Mr. Knight sought and was granted leave to file additional supplemental briefs.

In an opinion dated January 31, 2017, the Florida Supreme Court affirmed the denial of Mr. Knight's Rule 3.851 motion for postconviction relief and denied his Petition for Habeas Corpus. *Knight v. State*, 225 So. 3d 661 (Fla. 2017). The Court unanimously agreed that Mr. Knight's guilt phase claims were without merit but the majority of the Court concluded that there was constitutional error at Mr. Knight's penalty phase in light of *Hurst v. Florida* and that he was entitled to retroactive application of *Hurst v. Florida*:

> In two rounds of supplemental briefs, Knight argues that he was unconstitutionally sentenced to death because his penalty phase jury did not find all of the facts necessary to impose the death penalty. We agree. *See Hurst v. Florida*, --- U.S. ---, 136 S. Ct. 616, 624 (2016). Because Knight's death sentence became final in 2012, *Hurst v. Florida* applies retroactively to him. *See Mosley v. State*, No. SC14-436, --- So. 3d ---, ----, 2016 WL 7406506, at *25 (Fla. Dec. 22, 2016).

Knight II at 682.

Having determined that Mr. Knight's death sentences were unconstitutionally

imposed, the Florida Supreme Court addressed the remedy. The Court rejected Mr. Knight's argument that he must be sentenced to life imprisonment under section 775.082(2), Fla. Stat. *Knight II* at 682. The Court then addressed whether the error was harmless beyond a reasonable doubt, having decided in *Hurst v. State* that *Hurst v. Florida* error was not structural error[8] and therefore a violation of the Sixth Amendment per *Hurst v. Florida* was amenable to a harmless error analysis. Relying on the harmless error test it had employed in another capital case where the jury also

[8] In *Hurst v. State*, the Florida Supreme Court, for the first time, analyzed *Hurst v. Florida* error and rejected Hurst's argument (made also by Mr. Knight in his supplemental briefing) that the error identified in *Hurst v. Florida* was structural in nature and thus not amenable to harmless error review:

> Hurst contends that harmless error review cannot apply at all because the error identified by the Supreme Court in this case is structural—that is, error that is per se reversible because it results in a proceeding that is always fundamentally unfair.[] He contends that even if harmless error review is allowed, the *Hurst v. Florida* error cannot be quantified or assessed in a harmless error review in this case because the record is silent as to what any particular juror, much less a unanimous jury, actually found. We conclude that the error that occurred in Hurst's sentencing proceeding, in which the judge rather than the jury made all the necessary findings to impose a death sentence, is not structural error incapable of harmless error review. Nevertheless, here, we agree that error in Hurst's penalty phase proceeding was not harmless beyond a reasonable doubt.

Hurst, 202 So. 3d at 67.

returned a unanimous recommendation for death, the Florida Supreme Court found Mr. Knight's case to be "one of the rare cases in which the *Hurst v. Florida* violation is harmless beyond a reasonable doubt." *Knight II* at 682 (citing *Davis v. State*, 207 So. 3d 142 (Fla. 2016)).[9]

As the Florida Supreme Court explained, in *Davis*, the Court had held that the jury's unanimous death recommendation allowed it "to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." *Knight II* at 682 (quoting *Davis*, 207 So. 3d at 174). The Florida Supreme Court then mechanistically applied the analysis in *Davis* to Mr. Knight's case despite acknowledging that there were significant differences in how the jury in Mr. Knight's case was instructed as opposed to the jury in *Davis*: notably, in *Davis*, the jurors were informed of their right to extend mercy to Mr. Davis in that it was not required to recommend the death penalty even if there were sufficient aggravators to outweigh the mitigating circumstances. *Knight II* at 683. In Mr. Knight's case, the jurors received no

[9] Despite the putative "rarity" of finding *Hurst v. Florida* error harmless beyond a reasonable doubt, the Florida Supreme Court has been mechanistically determining, based on its decision in *Davis*, that *Hurst v. Florida* error is harmless beyond a reasonable doubt in every single case thus far involving a unanimous jury recommendation. Yet the Florida Supreme Court has found harmful *Hurst* error and remanded for a resentencing in every single case involving a non-unanimous jury recommendation subsequent to 2002,

instruction that they had the right to dispense mercy irrespective of having made all of the necessary findings for the imposition of the death penalty. *Id*. Despite this glaring difference between *Davis* and Mr. Knight's case, the Florida Supreme Court simply concluded: "Nonetheless, we believe that Knight's jury received *substantially the same critical instructions* as Davis's jury, allowing us to conclude beyond a reasonable doubt that here, as in *Davis*, "the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendations." *Knight II* at 683 (quoting *Davis*) (emphasis added). This conclusion, along with its determination that the "egregious facts of this case," led the Florida Supreme Court to determine that the *Hurst v. Florida* error was harmless beyond a reasonable doubt in Mr. Knight's case.

Senior Justice Perry dissented as to the majority's determination that the *Hurst v. Florida* error could be deemed harmless in Mr. Knight's case:

> In *Hurst v. State*, 202 So. 3d 40, 69 (Fla. 2016), we declined to speculate why the jurors voted the way they did; yet, here, the majority 'conclude[s] beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors.' . . . Even though the jury unanimously recommended the death penalty, whether the jury unanimously found each aggravating factor remains unknown.
>
> The majority's reweighing of the evidence—particularly the gruesome facts of the victims' deaths—to support its conclusion is not an appropriate harmless error review. The harmless error review is not a sufficiency of the

> evidence test, and the majority's analysis should instead focus on the effect of the error on the trier of fact. *State v DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986). By ignoring the record and concluding that all aggravators were unanimously found by the jury, the majority is engaging in the same type of conduct the United States Supreme Court cautioned against. *See Hurst v. Florida*, 136 S. Ct. at 622.
>
> Because the harmless error review is neither a sufficiency of the evidence review nor 'a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence,' *DiGuilio*, 491 So. 2d at 1139, I cannot conclude beyond a reasonable doubt that the error here was harmless, and I would vacate Knight's unconstitutional death sentence.

Knight II at 684-85 (Perry, J., concurring in part and dissenting in part).

Justice Quince also dissented from the affirmance of Mr. Knight's death sentences, adding to the criticism of the majority opinion for employing an incorrect harmless error analysis:

> . . . I cannot agree with the majority's conclusion that the *Hurst* error in this case is harmless beyond a reasonable doubt. Because I would find that the *Hurst* error in this case requires a new penalty phase, I dissent.
>
> I agree with Senior Justice Perry's statement that '[t]he majority's reweighing of the evidence . . . to support its conclusion' contravenes our decision in *Hurst v. State*, 202 So. 3d at 49, and is the conduct the United States Supreme Court reproached in *Hurst v. Florida*, 136 S. Ct. at 623.
>
> Here, although the jury unanimously recommended a death sentence, we cannot know that the jury found each aggravator unanimously. Because one of the aggravators found by the trial court for each murder in this case—that

> the murder was especially heinous, atrocious, or cruel—requires specific factual findings, *Hurst* requires the jury, not the trial judge, make that determination. The jury made no such determination in Knight's case. Accordingly, I would vacate Knight's death sentence and remand for resentencing. *See Hurst*, 202 So. 3d at 69.

Knight II at 684 (Quince, J., concurring in part and dissenting in part).

REASONS FOR GRANTING THE WRIT

In applying the harmless-error doctrine to Mr. Knight's *Hurst v. Florida* claim, the Florida Supreme Court rendered a decision that was objectively unreasonable as a matter of federal law because *Hurst v. Florida* errors are "structural" and therefore not subject to harmless error review. Certiorari review is warranted to address whether the type of error identified in *Hurst v. Florida* is structural and thus not amenable to harmless error review. Mr. Knight's case presents a perfect vehicle for the Court to address this serious constitutional question.

As noted above, in *Hurst v. State*, the Florida Supreme Court determined that *Hurst v. Florida* error is not structural but rather is the kind of constitutional error that is amenable to harmless error review. *Hurst v. State*, 202 So. 3d at 67-68. This determination carried over to Mr. Knight's case, where the Florida Supreme Court performed a harmless error test rather than determining that the error was structural and thus required a per se reversal of his death sentences. To be sure, the issue here

is not whether Mr. Knight's death sentences were unconstitutionally imposed: that has already been determined by the Florida Supreme Court. The issue now is whether, under federal law, the remedy fashioned by the Florida Supreme Court is itself constitutional. Mr. Knight submits it is not and that certiorari review of the Florida Supreme Court's decision is warranted.

The Florida Supreme Court's determination in Mr. Knight's case that *Hurst v. Florida* error is not structural is incompatible with federal law, beginning with *Hurst v. Florida* itself (as Justice Quince and Senior Justice Perry observed in their written opinions dissenting from the affirmance of Mr. Knight's death sentences). Contrary to the conclusion of the Florida Supreme Court, Mr. Knight submits that error under *Hurst v. Florida* is structural, not amendable to harmless error review, and that the Florida Supreme Court's determination that *Hurst v. Florida* error is subject to harmless error review is wholly inconsistent with federal law.

Hurst v. Florida itself, and the subsequent decision by the Florida Supreme Court in *Hurst v. State*, establish the structural nature of the error at issue with regard to Florida's capital sentencing statute. In *Hurst v. Florida*, this Court held that a jury must make all the findings of the facts necessary to authorize a sentence of death. In *Hurst v. State*, the Florida Supreme Court held that, under *Hurst v. Florida* and the Sixth and Eighth Amendments, Florida juries must render unanimous fact-finding, under a beyond-a-reasonable-doubt standard, as to (1) the aggravating factors; (2)

whether those specific aggravating factors are together "sufficient" to impose a death sentence, and (3) whether those specific aggravating factors together outweigh the mitigation. *Hurst v. State*, 202 So. 3d at 53-59. In no Florida capital case under the old capital sentencing regime—Mr. Knight's included—did the jury make any findings as to any of these critical facts necessary to authorize a death sentence. And there is no distinction between a jury returning a 12-0 recommendation for death and one making a 7-5 recommendation for death; in neither scenario does the jury render any verdict or make any factual finding on the facts necessary to authorize a death sentence. Both "verdict" forms filled out by Mr. Knight's jury simply indicated that the jury recommended and advised that the court impose the death penalty by a 12-0 vote on both murder counts (V55/1164-65). The forms revealed no "findings" made by the jury about any eligibility factors set forth in Florida's statute.

Thus, even in cases like Mr. Knight's where the jury unanimously *recommended* death, a reviewing court cannot know whether the jury in fact unanimously found—or a hypothetical jury in a constitutional proceeding would have unanimously found—all of the requisite facts necessary to authorize a death sentence. Yet in Mr. Knight's case, the Florida Supreme Court *assumed* that by virtue of the jury's 12-0 recommendation, the jury must necessarily have unanimously found all of the facts necessary to authorize a death sentence. *Knight II* at 683. This is directly contrary to *Hurst v. Florida*'s rule that a Florida penalty

phase *recommendation*—no matter the vote—is constitutionally irrelevant because it cannot, as a matter of law, supplant a jury's fact-finding. *Hurst v. Florida*, 136 S. Ct. at 622 ("The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires").

The error in Mr. Knight's case is a classic example of a "structural error." In *Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991), this Court distinguished between "structural defects in the constitution of the trial mechanism" which are not subject to harmless error review, and trial errors that occur "during the presentation of the case to the jury, which may be quantitatively assessed in the context of other evidence presented." Mr. Knight submits that the error found by the Court in *Hurst v. Florida* represents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," *id*. at 310, and that the Florida Supreme Court's determination otherwise cannot be squared with *Fulminante*. Measured against the *Fulminante* standard, *Hurst v. Florida* error is structural because it "infect[s] the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993).[10] In other words, *Hurst v. Florida* errors "deprive defendants

[10] Some members of the Florida Supreme Court have also noted the impossibility of applying a harmless-error test to the type of error later identified in *Hurst v. Florida*. For example, Justice Anstead summed up the harmless-error barrier best in a 2002 opinion addressing *Ring*'s impact on Florida's capital sentencing statute:

> [C]ompared to our ability to review the actual findings of

of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination" of whether the facts necessary to impose a death sentence are unanimously found by the jury. *See Neder v. United States*, 527 U.S. 1, 8 (1999).

The structural nature of *Hurst v. Florida* error is further underscored by what Justice Scalia, writing for the Court, called the "illogic of harmless-error review" in the context of the Sixth Amendment constitutional error at issue in *Hurst*. *See Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993). Because *Hurst v. Florida* made clear that Florida's statute did not allow for a jury verdict on the facts necessary to impose a death sentence that was compatible with the Sixth Amendment, "the entire

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> fact made by the trial judge, there could hardly be any meaningful appellate review of a Florida jury's advisory recommendation to a trial judge since that review would rest on sheer spectulation as to the basis of the recommendation, when considering the jury collectively or the jurors individually. In other words, from a jury's bare advisory recommendation, it would be impossible to tell which, if any, aggravating circumstances a jury or any individual juror may have determined existed. And, of course, a "recommendation" is hardly a finding at all.

Bottoson v. Moore, 833 So. 2d 693, 708 (Fla. 2002) (Anstead, J., concurring), *abrogated by Hurst v. Florida*, 136 S. Ct. 616 (2016). *See also Combs v. State*, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring) ("the sentencing judge can only speculate as to what factors the jury found in making its recommendation . . . ."); *Johnson v. State*, 53 So. 3d 1003, 1007-08 (Fla. 2010) (dispensing with harmless error application based on "sheer speculation").

premise of [harmless error] review is simply absent." *Id*. at 280. Harmless error analysis would require a court to determine in the first instance "not whether, in a trial that occurred without the error, a [jury factfinding of the facts necessary to impose a death sentence] actually rendered in [original] trial was surely unattributable to the error." *Id.* There being no jury findings on the facts necessary to impose a death sentence in the Florida statute struck down by the Court, it is not possible to review whether such findings would have occurred absent the *Hurst v. Florida* error. In such cases

> [t]here is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty [of sufficient aggravators that outweighed the mitigating factors] beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal . . . .

Id. For the Florida Supreme Court to "hypothesize a [jury's findings on the facts necessary to impose a death sentence] that was never in fact rendered—no matter how inescapable the findings to support the verdict might be—would violate the jury-trial guarantee." *Id.* [11]

[11] In *Hurst v. State*, the Florida Supreme Court also found support for rejecting *Hurst v. Florida* error as structural in this Court's decision in *Washington v. Recuenco*, 548 U.S. 212 (2006). Its reliance was misplaced. In *Recuenco*, the Court

For these reasons, Mr. Knight submits that *Hurst v. Florida* error is the type of "pervasive, framework-shifting [constitutional] violation" that qualifies as structural error. *United States v. Roy*, 855 F.3d 1133, 1208 (11th Cir. 2017) (en banc) (Pryor, J., concurring). The Florida Supreme Court's decision to the contrary is inconsistent with *Hurst v. Florida* itself, *Arizona v. Fulminante*, and *Sullivan v. Lousiana.* Mr. Knight's death sentences are thus due to be vacated at this time because the constitutional error in his case already found by the Florida Supreme Court is structural in nature and not amenable to harmless error analysis. Certiorari to the Florida Supreme Court should be granted.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Florida Supreme Court in this case.

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held that error under *Blakely v. Washington*, 542 U.S. 296 (2004), was not structural. But the Court also determined that the questioned remained open whether the error could be harmless under state law. *Recuenco*, 548 U.S. at 218 n.1. On remand, the Washington Supreme Court determined that harmless-error analysis did not apply as a matter of state law. *State v. Recuenco*, 163 Wash.2d 428 (Wa. 2008).

Respectfully submitted,

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