DOCKET NO. 17-7099

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

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RICHARD KNIGHT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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REPLY TO RESPONDENT' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTION PRESENTED (AS STATED BY PETITIONER)

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?

QUESTION PRESENTED (AS RESTATED BY RESPONDENT)

Whether the Sixth Amendment error identified in *Hurst v. Florida* was procedural in nature as it was in the underlying precedents of *Apprendi v. New Jersey* and *Ring v. Arizona* and, therefore, is not retroactive?

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Although acknowledging that 28 U.S.C. §1257 establishes the Court's jurisdiction in the instant proceeding, Respondent nonetheless argues that because "[t]his Court has never held that this type of Sixth Amendment error is retroactive," it somehow has no jurisdiction (BIO at 1). This statement, coupled with the manner in which the Respondent has restated the question presented by Mr. Knight, reflects a deep misunderstanding of the law and an intentional dodge of the question actually presented.

Mr. Knight has not presented a question regarding the retroactivity of *Hurst v. Florida*, 136 S.Ct. 616 (2016). That particular question has been decided by the Florida Supreme Court, which held that *Hurst v. Florida* **is** retroactive to Mr. Knight. *See Knight v. State*, 225 So.3d 661, 682 (Fla. 2017). The question presented by Mr. Knight is whether the type of error found in Mr. Knight's case is structural error and therefore not amenable to harmless error review. In *Hurst v. State*, 202 So.3d 40 (Fla. 2016), the Florida Supreme Court determined that it was not structural error employed a harmless error analysis. It is the Florida Supreme Court's determination that the error here is not structural that is the question raised by Mr. Knight. It is absolutely a federal question. *See Arizona v. Fulminante,* 499 U.S. 279 (1991); *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

The Florida Supreme Court analyzed and interpreted this Court's

jurisprudence on structural error, determined that the error identified in *Hurst v. Florida* was not structural, and applied that analysis to Mr. Knight's case. *See Hurst v. State*, 202 So.3d at 66-67 (citing, *inter alia*, *Globe v. Frost*, 135 S.Ct. 429 (2014); *Neder v. United States*, 527 U.S. 1 (1999); *Chapman v. California*, 386 U.S. 18 (1967); and *Fulminante, supra*). How a lower court interprets (or misinterprets) this Court's precedents undeniably raises federal constitutional issues worthy of this Court's certiorari review. *See. e.g. Fiore v. White*, 531 U.S. 225, 226 (2001) ("We granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review").

Reply to Respondent's Statement of the Case and Facts

In addressing the procedures employed by the Florida trial court after the jury in Mr. Knight's case returned two unanimous recommendations for death, the Respondent writes that the trial court judge, in her written order, found two aggravating circumstances for one murder, three aggravating circumstances for the second murder, and found non-statutory mitigation (BIO at 3). This is an incomplete and incorrect portrayal of the then-extant Florida procedure for capital cases.

Before being instructed on the pertinent aggravating and mitigating circumstances they could consider, the jurors were first instructed that their role was merely advisory and that it was up to the court to determine and impose the sentence.

Following the instructions, the jurors were told that they would be taken to the jury room "to render [their] advisory opinions" (V55/1157).

Within an hour after commencing deliberations, 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 necessary to find that Mr. Knight was guilty of capital murder and thus eligible for the death sentence. *Hurst v. State*, 202 So.3d at 53 ("We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements that must be found unanimously by the jury"). These elements, the Florida Supreme Court found, are as follows:

> [W]e hold that in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of the death penalty and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by a judge.

Hurst v. State, 202 So.3d at 54 (emphasis in original).

In her written sentencing order, the Florida trial judge recognized that she had the exclusive 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 (R. 3713-3727). Following a proportionality review, the trial court, finding that the great weight of the aggravating factors which had been proven beyond a reasonable doubt[1] 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).

[1] As previously noted, the trial judge determined that one of the aggravators submitted to the jury for its consideration was the "avoiding arrest" aggravating circumstance. The judge rejected this aggravator because she was "unable to find that this aggravating factor has been proven beyond a reasonable doubt. Thus, this factor will not be considered by this Court in its determination of the Defendant's sentence" (R621) (Sentencing Order).

Notably, the trial judge made none of the findings required under the statute, much less employing a beyond-a-reasonable doubt standard as to each of the requisite elements of the offense of capital murder; she merely determined that the jury's advisory recommendations were "appropriate, "proportionate" and "just."

This Court's Remand in *Hurst v. Florida*

The Respondent urges the Court to deny the writ because, in its view, "this Court remanded *Hurst* back to the Florida Supreme Court for that court to conduct a harmless error analysis" (BIO at 9) (quoting *Hurst v. Florida*, 136 S.Ct. at 624). The Respondent reads too much into this Court's language in *Hurst v. Florida*.

This Court decidedly did *not* remand with instructions that the Florida Supreme Court "conduct a harmless error analysis" nor did this Court "expressly recognize[]" that the error identified in *Hurst v. Florida* "is subject to harmless error review" (BIO at 9). Rather, this Court simply reversed the Florida Supreme Court's decision in Mr. Hurst's case and acknowledged its practice of "normally leav[ing] it up to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here." This hardly means that the Court "expressly recognized" that the error was simply trial—as opposed to structural—error. Indeed, as discussed *infra*, many of the Respondent's arguments in it BIO serve to establish the structural nature of the error that infected Mr. Knight's capital sentencing proceeding.

Respondent's Analogy to Plain Error is Unavailing

The Respondent devotes the majority of its pleading addressing an issue not present in Mr. Knight's case, but (sort of) gets to the point in the latter part of its BIO. It argues "*Hurst* errors are not structural errors because they do not always render the trial fundamentally unfair" (BIO at 13) (citing *Johnson v. United States*, 520 U.S. 461, 470) (citing *United States v. Olano*, 507 U.S. 725, 736 (1993)). Neither *Johnson* nor *Olano* addresses the type of error at issue in Mr. Knight's case; rather, they both tackle application of the plain error standard under Fed. R. Crim. P. 52 in the context of the failure to object to (1) a judicial finding of materiality in a perjury prosecution, *Johnson*, 507 U.S. at 463, and (2) the presence of alternate jurors in the room where the actual jurors were deliberating. *Olano*, 507 U.S. at 727. Mr. Knight's case does not involve plain error or the application of Fed. R. Crim. P. 52 and its own particular standard for reviewing plain error.

Respondent Misunderstands the Post-*Hurst v. Florida* Framework

The Respondent's position as to the actual question presented by Mr. Knight rests on a fundamentally flawed understanding of the Court's decision in *Hurst v. Florida* and the subsequent legal developments in Florida. This wrong understanding leads it to argue that the error in Mr. Knight's case is not structural and that the framework of *Sullivan v. Louisiana*, 508 U.S. 275 (1993), is inapplicable.

The Respondent's only attempt to distinguish *Sullivan* appears in the last paragraph of its BIO:

> *Sullivan* was a case where the trial court gave a constitutionally deficient beyond-a-reasonable-doubt instruction. This Court held that is [sic] such a situation, ***an appellate court could not do a harmless error analysis because the Fifth Amendment requires proof beyond a reasonable doubt which could not exist with a deficient instruction; there was no valid verdict without that present***. No such problem is present with *Hurst* error.

(BIO at 19-20) (emphasis added). By asserting that "no such problem" is present in the error found in Florida's statute, the Respondent is providing materially false information to this Court as to what happened following *Hurst v. Florida* and how Florida defines the crime of capital first-degree murder.

Following this Court's remand, the Florida Supreme Court was called upon to review its capital sentencing statute in light of this Court's determination that "Florida's capital sentencing scheme violated this [Sixth Amendment] guarantee of the right to a jury trial on *all elements of the crime of capital murder*." *Hurst v. State*, 202 So.3d at 51 (emphasis added). The Florida Supreme Court ultimately held:

> We also conclude that, **just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder**—thus allowing imposition of the death penalty—**are also elements that must be found unanimously by the jury**. Thus, we hold that in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the

> imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge.

Id. at 53-54 (emphasis added) . Thus, the Florida Supreme Court in *Hurst v. State* construed Florida's statute and found that it identified "**elements**" of "**capital murder**" that a jury must find to "**essentially convict**." The Florida Supreme Court further recognized that these "**elements**" of the substantive crime of "**capital murder**" were longstanding and appeared in the statute. *See id.* at 53 ("As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308 (1991), under Florida law, 'The death penalty may be imposed only where **sufficient aggravating circumstances** exist that **outweigh** mitigating circumstances.' *Id*. at 313 (emphasis added) (quoting § 921.141(3) , Fla. Stat. (1985))."). (emphasis added as to the year of the statute cited).

Given what the Florida Supreme Court actually determined the error to be—the failure of a Florida penalty phase jury to find (much less be instructed) that it must find, beyond a reasonable doubt, all elements under the statute to convict the defendant of the crime of capital murder—the intersection with the *Sullivan* "structural error" analysis becomes clear. "What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause." *Sullivan,* 508 U.S. at 277. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of **every fact necessary to constitute**

the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added).[2]

The problem identified in *Sullivan* was a constitutionally-deficient reasonable doubt instruction that relieved the State of its obligation to "persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements [of the offense]." *Sullivan*, 508 U.S. at 278 (quoting *Winship*, 397 U.S. at 364). The Court explained "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." *Sullivan*, 508 U.S. at 278. [3] Where the factfinder is deprived of the responsibility of finding all elements of an offense that would authorize an increase in punishment, "there has been no jury verdict within the meaning of the Sixth Amendment." *Id*. at 280. Thus,

> [t]here being no jury verdict of guilty-beyond-a-reasonable-doubt, the question of whether the *same* verdict of guilty-beyond-a-reasonable doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, on which the

[2] *See also Patterson v. New York*, 432 U.S. 197, 215 (1977) ("a State must prove every ingredient of an offense beyond a reasonable doubt, and [ ] it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (since the jury may have read the instruction as relieving the State of proving an element beyond a reasonable doubt, defendant was denied "his right to the due process of law").

[3] *Accord Apprendi v. New Jersey*, 530 U.S. 466 (2000).

> harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty 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; it requires an actual jury finding of guilty.

Id. (emphasis in original) (citation omitted). Accordingly, the "[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt" is a structural error. *Id*. at 281 (citation omitted).

Given the Florida Supreme Court's actual holding that Florida's substantive law separates *"regular"* first-degree murder from *capital* first-degree murder, and the undeniable fact that a Florida jury is not instructed on, much less required to find, these elements beyond a reasonable doubt, Respondent unwittingly acknowledges *Sullivan*'s application (BIO at 19-20) (*Sullivan*'s structural error analysis only applies where "the Fifth Amendment requires proof beyond a reasonable doubt which could not exist with a deficient instruction").

The way the Florida Supreme Court even framed the issue on remand from this Court demonstrates its own misunderstanding of the analysis. The Florida Supreme Court claimed that Mr. Hurst was arguing that the error was structural "because the record is silent as to what any particular juror, much less a unanimous jury, actually found." *Hurst v. State*, 202 So.3d at 67. While that is a true statement,

it is not the actual issue to be analyzed when determining whether this constitutional error is or is not structural. What the Florida Supreme Court—and the Respondent—fail to contemplate is that a Florida capital penalty phase jury is required, under the Fifth Amendment, to return a "verdict" on all of the elements of *capital first-degree murder* beyond a reasonable doubt. The failure of Mr. Knight's jury to make any of the requisite findings means that there is no "verdict" and thus no object on which the harmless error analysis can operate. *Sullivan*, 508 U.S. at 280.

Rather than conducting this analysis, the Florida Supreme Court looked to cases where, for example, there was a claimed violation of the Sixth Amendment due to the failure to submit a sentencing factor or an element of the offense to the jury. *Hurst v. State*, 202 So.3d at 67 (citing, *inter alia*, *Neder v. United States*, 527 U.S. 1 (1999) , and *Washington v. Recuenco*, 548 U.S. 212 (2006)). But those cases do not involve what Mr. Knight's case does: an unquestionable violation of *Winship*'s due process requirement that a jury must find, beyond a reasonable doubt, every element of the crime of capital first-degree murder, which has certain statutorily defined elements to differentiate it from "regular" first-degree murder. There was no beyond-a-reasonable-doubt "verdict" by Mr. Knight's jury on these elements of "capital" first-degree murder, as required by *Winship*, despite the Florida Supreme Court's recognition that "just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially

convict a defendant of capital murder—thus allowing imposition of the death penalty—are elements that must be found unanimously by the jury." *Hurst v. State*, 202 So.3d at 53-54. This due process aspect of the analysis was overlooked by the Florida Supreme Court and is ignored by the Respondent. The *Sullivan* analysis applies here, and the error at issue is unquestionably structural.

Respondent's Improper Reliance on the "Utterly Meaningless" Advisory Jury Recommendation

Reliance by the Respondent on the "unanimity" of the advisory jury's "recommendations" for death as being in any way meaningful is improper. Nothing in this Court's jurisprudence suggests that the Constitution would tolerate the notion that a verdict of guilt of the elements of a crime can be supplanted or substituted by an "advisory recommendation" by that jury. Would the Constitution tolerate the jury, at the guilt phase of a capital trial, being told that it merely had to return an "advisory recommendation" as to the defendant's guilt? Of course not.

Yet this is exactly what the Florida Supreme Court is doing. It is substituting the unanimous "advisory recommendation" for the missing jury verdict on the elements of capital murder. *See Knight v. State*, 225 So.3d 661, 682 (Fla. 2017). In other words, the Florida Supreme Court is "effectively transform[ing] the pre-*Hurst* jury recommendations into binding findings of fact." *Middleton v. Florida*, 2018 WL 1040001 at *1 (U.S. Feb. 26, 2018) (Sotomayor, with whom Justice Ginsburg joins, dissenting from the denial of certiorari). But when there is "no jury verdict of guilty-

beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." *Sullivan*, 508 U.S. at 280 (emphasis in original). "Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly" a structural error, *id.* at 281, and the Florida Supreme Court's contrary determination should be reversed.

CONCLUSION

Petitioner, Richard Knight, submits that the Court should issue its writ of certiorari to the Florida Supreme Court in this case.

Respectfully submitted,

/s/ Todd G. Scher
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of March, 2018, I electronically filed the foregoing pleading with the Court's electronic filing system which will send a notice of electronic filing to opposing counsel of record. Furthermore, I HEREBY CERTIFY that I have also mailed a copy of the foregoing Reply to Counsel for Respondent, Assistant Attorney General Lisa-Marie Lerner, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, FL 33401.

/s/ Todd G. Scher
TODD G. SCHER