No. _____

IN THE

Supreme Court of the United States

JESSE GUARDADO,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the per se harmless-error rule adopted by the Florida Supreme Court, pursuant to which violations of *Hurst v. Florida* are automatically deemed harmless beyond a reasonable doubt in every case in which the defendant's advisory jury recommended the death penalty by a unanimous vote, rather than a majority vote, violates (1) this Court's precedents prohibiting state courts from mechanically denying federal constitutional claims on harmless-error grounds without first conducting an individualized review of the record as a whole; (2) the Eighth Amendment doctrine discouraging reliance on decisions made by jurors whose sense of responsibility for a death sentence was diminished; and (3) the Sixth Amendment prerequisite of valid jury fact-finding on at least one required element before a constitutional challenge to a defect in the jury's fact-finding may be denied under a harmless-error analysis.

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Petitioner Jesse Guardado, a death-sentenced Florida prisoner, was the state habeas petitioner in the Florida Supreme Court.

Respondent Julie L. Jones, Secretary of the Florida Department of Corrections, was the state habeas respondent in the Florida Supreme Court.

DECISION BELOW

The decision of the Florida Supreme Court is reported at 226 So. 3d 213, and is reprinted in the Appendix (App.) at 1a.

JURISDICTION

The judgment of the Florida Supreme Court was entered on May 11, 2017. App. 1a. The Florida Supreme Court denied Petitioner's motion for rehearing on September 19, 2017. *Id.* at 6a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

The Eighth Amendment provides:

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

The Fourteenth Amendment provides, in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

I. Introduction

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court held that Florida's capital sentencing scheme—the scheme pursuant to which Petitioner Jesse Guardado and hundreds of other Florida prisoners were sentenced to death—violated the Sixth Amendment. This Court did not reach the State's assertion that the constitutional

error in Mr. Hurst's case was harmless, explaining that Florida's state courts should decide in the first instance whether the error was harmless. *Id.* at 624.

This Petition arises from the Florida Supreme Court's subsequent creation of a per se harmless-error rule for *Hurst* claims. The rule relies entirely on the vote of a defendant's "advisory" jury—a jury that did not conduct the fact-finding required by the Sixth Amendment, but made only a generalized recommendation to the judge whether to impose the death penalty. Petitioner asks this Court to review whether the Florida Supreme Court's per se rule is unconstitutional.[1]

The Florida Supreme Court's per se rule has been mechanically applied in every Florida *Hurst* case. If a defendant's advisory jury voted to recommend death by a majority vote—i.e., a margin between 7-to-5 and 11-to-1—the *Hurst* error is deemed not harmless and the Florida Supreme Court vacates the defendant's death sentence. But if the defendant's advisory jury recommended death by a vote of 12 to 0, the *Hurst* error is automatically deemed harmless and the Florida Supreme Court upholds the defendant's death sentence. No other factors are considered. There is no individualized review of the *Hurst* error's impact in light of the specific aggravation and mitigation presented or any factor other than the raw advisory vote.

The Florida Supreme Court's per se harmless-error rule for *Hurst* claims fits a historical pattern. Over the past 30 years, this Court has overturned similar bright-line tests invented by the Florida Supreme Court because they failed to give full effect

[1] Other Florida petitioners are seeking this Court's review of the Florida Supreme Court's per se harmless-error rule for *Hurst* claims. As this Petition illustrates, Petitioner's case is in a uniquely favorable posture for this Court to address the issue.

to this Court's death penalty jurisprudence. Nine years after this Court decided in *Lockett v. Ohio*, 438 U.S. 586 (1978), that mitigation could not be confined to a statutory list, this Court overturned the Florida Supreme Court's bright-line rule barring relief in cases where the jury was not instructed that it could consider non-statutory mitigating evidence. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987). Twelve years after this Court ruled in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment prohibits execution of the intellectually disabled, this Court ended the Florida Supreme Court's use of an unconstitutional bright-line IQ-score test to deny *Atkins* claims. *See Hall v. Florida*, 134 S. Ct. 1986 (2014). And 14 years after this Court held in *Ring v. Arizona*, 536 U.S. 584 (2002), that fact-finding underlying a death sentence must be conducted by a jury, not a judge, this Court overturned the Florida Supreme Court's repeated rejection of *Ring* claims. *See Hurst*, 136 S. Ct. 616.

Despite this history, the Florida Supreme Court has refused to address arguments in Petitioner's or any other case that such a per se harmless-error rule for *Hurst* claims violates the United States Constitution. This Court should resolve this matter now. Waiting for years—as the Court did before ending the Florida Supreme Court's unconstitutional practices in *Hall*, *Hitchcock*, and *Hurst*—would allow the execution of dozens of Florida prisoners whose death sentences were obtained in violation of *Hurst*, while scores of other prisoners, who were sentenced at the same time, pursuant to the same unconstitutional scheme, are moved off death row.

The case of Petitioner Jesse Guardado highlights the injustice of the Florida Supreme Court's current harmless-error rule. As the next section of this Statement

elaborates, Petitioner is not the "worst of the worst," and his case is replete with evidence that a jury would find mitigating. But if the Florida Supreme Court's mechanical rule stands, no jury will ever be able to give Petitioner's evidence the consideration required by the federal Constitution.

II. Factual and Procedural Background[2]

A. Guilty Plea

In September 2004, Petitioner initiated contact with police and tearfully confessed to killing his friend in a desperate pursuit of money to feed his crack cocaine addiction. Penalty Tr. at 29-31, 34. In October 2004, Petitioner waived his right to counsel, expressed remorse for his actions, and, without seeking any bargain, entered a pro se guilty plea to murder and robbery in a Florida court. Plea Tr. at 1-35.

B. Penalty Phase and Sentencing

The State sought the death penalty. Petitioner was appointed counsel for the penalty phase. Counsel unsuccessfully moved to preclude the death penalty on the ground that Florida's capital sentencing scheme violated *Ring*. Motions Tr. at 5.

In September 2005, pursuant to the pre-*Hurst* capital sentencing scheme used by Florida at the time, an advisory jury was empaneled to hear evidence and make a generalized recommendation to the judge whether Petitioner should be sentenced to

[2] Citations to "Penalty Tr." in this Petition refer to the court reporter's original transcript of Petitioner's penalty-phase proceeding, which is available in the Record on Appeal ("ROA") Vols. VI-VIII. Citations to "Sentencing Tr." refer to the sentencing transcript, which is available in ROA Vol. VIII. Citations to "Plea Tr.," which refer to the guilty-plea transcript, and "Motions Tr.," which refer to the transcript of the death-penalty motions hearing, are available in ROA Vol. III. Citations to "Voir Dire Tr." refer to the penalty-phase voir dire transcript, which is available in ROA Vol. IV.

death or life imprisonment. Jurors were informed during voir dire that they would not make any findings of fact or otherwise provide a basis for their recommendation.

1. Testimony Regarding Petitioner's Life and Crime

Jurors at the penalty phase heard information about Petitioner's life and crime, including the following:

Petitioner started using drugs and alcohol in adolescence. He was hooked early and began stealing to fund his addictions, leading to detentions in the juvenile justice system. When he was a teenager, Petitioner was sent to the notorious Arthur G. Dozier School for Boys in Marianna, Florida, where he was made to work in the slaughterhouse.[3] During his early-to-mid-twenties, Petitioner served various jail and prison sentences in the adult system, all stemming from convictions relating to his efforts to fund his drug addiction. Penalty Tr. at 13, 42, 238, 250.

In 1990, when Petitioner was 28 years old, he was convicted of three counts of robbery and sentenced to a 20-year term of incarceration. While serving that sentence, Petitioner set out to improve his life. He trained as a plumber and became state-certified in wastewater management. He maintained a clean disciplinary record, which permitted him to work at a wastewater plant outside the prison's

[3] As detailed in a Department of Justice investigation that led to the facility's permanent closure, youths at Dozier were subjected to physical assaults and psychological torment. *See Investigation of the Arthur G. Dozier School for Boys and the Jackson Juvenile Justice Center, Marianna, Florida,* United States Department of Justice, Civil Rights Division (Dec. 1, 2011), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2011/12/02/dozier_findltr_12-1-11.pdf.

fences. In 2003, when he was 40 years old, Petitioner was placed on conditional release. Penalty Tr. at 55, 205-06, 230-31, 241, 244, 280-85, 298-99, 347.

After his release, Petitioner struggled to adjust to modern society, which had changed drastically since he went to prison 13 years earlier. Petitioner did not know how to pump gas, use computers, or pay bills. He was suspicious of others and always ready to defend himself, an attitude that was necessary to survive in prison but served him poorly on the outside. Petitioner later explained that "there's basically two emotions in prison; there's anger and hate," and that after spending years in that environment, people on the outside "always assumed that I was angry . . . I wouldn't be speaking or moving; I'd be sitting still watching T.V. . . . people would—would just, Jesse, what are you upset about?" Penalty Tr. at 57, 242, 249, 286-87, 333.

Shortly after Petitioner was released from prison, he met a 75-year-old local businesswoman named Jackie Malone, who became a friend and a steadfast source of support in his adjustment to the outside world. Ms. Malone, who owned rental properties in the area, wanted to help Petitioner rebuild his life. She loaned Petitioner money when he was between paychecks. She put together care packages for him with food and supplies. After Petitioner was forced to hastily move out of his trailer home after a confrontation with a drunken landlord, Petitioner went to Ms. Malone for help. Ms. Malone took Petitioner into her house in the middle of the night, put him up for a few days, and offered to let him live in one of her rental properties. Petitioner felt that, "[a]ny time I needed help, I could go to that woman. . . . [S]he was the—probably the best person I ever met in my life." Penalty Tr. at 55-63, 290.

Based on the vocational skills he developed in prison, Petitioner was hired as the operator of wastewater treatment plant in DeFuniak Springs, Florida. He enjoyed the work and was good at his job, but it was a demanding role that required to him to be on call at all hours of the day and night, and it soon began to strain him. Petitioner also developed a romantic relationship with a woman and the two moved in together. But when the relationship dissolved, and the pressures at work mounted, Petitioner relapsed and began to use drugs and alcohol again. Once Petitioner began using crack cocaine, he could not stop. Penalty Tr. at 55-58, 282-83, 288-89, 337.

Late one night, after drinking himself to sleep, Petitioner received a call from the wastewater plant and was directed to report immediately. On the way home from the call, he was pulled over for driving while intoxicated. He was jailed for violating his conditional release. And he was fired from his job. Penalty Tr. at 289-90.

After several weeks in custody on the violation, Petitioner was conditionally released. The conditional release was based on Petitioner's work ethic and letters attesting to his character, including a letter sent by Ms. Malone. Ms. Malone helped Petitioner find a new job at a wastewater plant in Niceville, Florida, but Petitioner found himself unable to resist drugs. He was living at a motel, his crack addiction having overtaken his ability to maintain stable housing. Ms. Malone loaned him money, but it wasn't enough. As Petitioner described, crack became "not just an every day" habit, but "an every awake moment" obsession. Penalty Tr. at 291-93, 300-01.

In September 2004, Petitioner was on a two-week-long crack binge. He was smoking crack all day, every day, and barely sleeping. He was running out of money

to buy more crack. He "spent hours searching through the carpet for a piece that [he] might have dropped." Penalty Tr. at 9, 16, 242, 250, 302, 306.

On September 13, 2004, on the eve of Hurricane Ivan's landfall on Florida's panhandle, Petitioner desperately turned to theft in order to stave off withdrawal from his two-week-binge. He first tried to rob a local grocery store with a knife, but fled when an employee yelled for help. Later that night, he decided to rob the home of Ms. Malone. Petitioner beat and stabbed Ms. Malone to death. He took several items of little value that he pawned for crack money. Penalty Tr. at 74-77, 147.

Petitioner was wracked with guilt and remorse. On September 21, 2004, he initiated contact with the Walton County Sheriff's Office and, against the advice of public defender counsel, provided investigators with a full confession. He was choked up and tearful. He told police that Ms. Malone "didn't deserve what I did to her." He assisted in the recovery of physical evidence against him. He did not ask for a plea bargain. Penalty Tr. at 11, 17, 29-31, 34, 126-28, 131, 202, 243, 293-94, 304, 335-36.[4]

2. Advisory Jury Instructions and Recommendation

Before deliberating, the jurors were repeatedly instructed by the judge that their recommendation was advisory and that the final decision regarding the death penalty rested solely with the judge. *See, e.g.*, App. 115a ("The final decision as to what punishment shall be imposed rests solely with the judge of this court. However, the law requires that you, the jury, render to the court an advisory sentence."); *id.*

[4] Petitioner also assisted police with unrelated narcotics investigations by providing the names and addresses of his drug dealers, without asking for anything in return.

("[I]t is now your duty to advise the court as to what punishment should be imposed upon the defendant."). During closing arguments, the prosecutor reiterated the judge's role as the final decision-maker, telling the jury to "*recommend* to Judge Wells to—*advise* Judge Wells to sentence him to death." Penalty Tr. at 341.

The advisory jury was instructed to consider certain aggravating and mitigating circumstances that the judge had determined could apply in Petitioner's case, but the jurors were not asked to make any findings of fact regarding them. The jury was instructed only to broadly recommend a sentence—life or death—without any further explanation, and the jury returned only the following recommendation:

> A majority of the jury by a vote of 12 to 0 advise and recommend to the court that it impose the death penalty upon JESSE GUARDADO.

App. 97a.

3. Trial Judge's Fact-Finding and Death Sentence

The trial judge then made the findings of fact required to impose a death sentence under Florida law: (1) the aggravating circumstances that had been proven beyond a reasonable doubt; (2) the aggravating circumstances were "sufficient" to warrant the death penalty; and (3) the aggravating circumstances outweighed the mitigating circumstances. *See* Fla. Stat. § 942.141(3) (1996).

The trial judge considered the evidence that had been presented to the jury, in addition to supplemental mitigation that had been presented at a separate hearing pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), including that Petitioner had been sexually abused by a neighbor as a child. Sentencing Tr. at 27.

The trial judge found that five aggravating circumstances had been proven beyond a reasonable doubt and were sufficient for the death penalty in Petitioner's case. App. 85a-89a.[5] The judge found that 19 mitigating circumstances applied,[6] but that those mitigating circumstances did not outweigh the aggravating circumstances. *Id.* at 89a-96a. Based on his fact-finding, the judge sentenced Petitioner to death.

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[5] The judge found that the following aggravating circumstances had been proven beyond a reasonable doubt: (1) Petitioner was previously convicted of a felony and was on conditional release; (2) Petitioner was previously convicted of a felony involving the use or threat of violence; (3) the offense was committed during a robbery; (4) the offense was "especially heinous, atrocious or cruel"; and (5) the offense was "committed in a cold and calculated and premeditated manner." *Id.*

[6] The judge found the following mitigating circumstances: Petitioner (1) entered a plea of guilty to first-degree murder without asking for any plea bargain or other favor in exchange; (2) had fully accepted responsibility for his actions and blamed nobody else for the crime; (3) is not a psychopath pursuant to expert testimony and would not be a danger to other inmates or correctional officers should he be given a life sentence; (4) could contribute to an open prison population and work as a plumber or an expert in wastewater treatment plant operations should he be given a life sentence; (5) fully cooperated with law enforcement to quickly resolve the case to the point of helping law enforcement officers recover evidence to be used against him at trial; (6) has a good jail record while awaiting trial with not a single incident or discipline report; (7) has consistently shown a great deal of remorse for his actions; (8) has suffered an addiction problem to crack cocaine which was the basis of his criminal actions; (9) has a good family and a good family support system that could help him contribute to an open prison population; (10) testified he would try to counsel other inmates to take different paths than he has taken should he be given a life sentence; (11) suffered a major trauma in his childhood by the crib death of a sibling; (12) suffered another major trauma in his childhood by being sexually molested by a neighbor; (13) has a lengthy history of substance abuse during his early teen years, graduating to alcohol and cocaine and substance abuse treatment beginning about age 14 or 15; (14) was young when his biological father passed away; (15) was raised by his mother, whom he always considered loving, thoughtful and concerned, and by a stepfather he later came to respect; (16) was under emotional duress during the time frame of the crime; (17) does not suffer a mental illness or major emotional disorder; (18) offered to release his personal property, including his truck, to his girlfriend; and (19) previously contributed to state prison facilities as a plumber and in wastewater treatment work. *Id.*

C. Direct Appeal and State Post-Conviction Motion

The Florida Supreme Court affirmed Petitioner's conviction and death sentence on direct appeal, rejecting his argument that his death sentence violated *Ring*. *See Guardado v. State*, 965 So. 2d 108, 118 (Fla. 2007), *cert. denied*, 552 U.S. 1197 (2008). The Florida Supreme Court later affirmed the denial of Petitioner's motion for state post-conviction relief. *Guardado v. State*, 176 So. 3d 886 (2015).

D. Federal Habeas Petition

Petitioner filed a 28 U.S.C. § 2254 petition and included an unexhausted claim under *Hurst*, which this Court had recently decided. *Guardado v. Jones*, No. 4:15-cv-256, ECF No. 7 (N.D. Fla. Feb. 1, 2017). The United States District Court for the Northern District of Florida granted Petitioner's request to stay the federal petition while he sought *Hurst* relief in state court. *Id.*, ECF No. 30 (N.D. Fla. Feb. 11, 2017).

E. State Habeas Petition

Petitioner sought *Hurst* relief by filing a state habeas corpus petition directly in the Florida Supreme Court. *See* Fla. Const. Art. V, § 3(b)(9) (conferring original jurisdiction for the Florida Supreme Court to grant writs of habeas corpus). Petitioner argued that his death sentence should be vacated because he was sentenced under the same Florida scheme that was ruled unconstitutional by this Court in *Hurst*, and by the Florida Supreme Court's subsequent decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). App. 21a-24a.

Petitioner noted that the *Hurst* decisions were retroactive to his death sentence under state-law precedent. *Id.* at 24a-25a (citing *Mosley v. State*, 209 So. 3d 1248,

1276 (Fla. 2016) (holding as a matter of state law that *Hurst* is retroactive on collateral review to death sentences that became final on direct appeal after the 2002 decision in *Ring*)). The only issue for the Florida Supreme Court to decide, Petitioner averred, was whether the *Hurst* error in his case was "harmless." App. 32a-33a.

Petitioner acknowledged that, beginning in *Davis v. State*, 207 So. 3d 142 (Fla. 2016), the Florida Supreme Court had mechanically applied a per se harmless-error rule deeming *Hurst* errors harmless in every case in which the defendant's pre-*Hurst* advisory jury unanimously recommended death.

Petitioner argued, however, that the Florida Supreme Court's per se rule violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and specifically asked the Florida Supreme Court to address whether its rule was consistent with federal constitutional requirements. *Id.* at 33a-55a.

Respondent did not file any response in the Florida Supreme Court.

F. Decision Below

The Florida Supreme Court issued an opinion agreeing with Petitioner that "*Hurst* is applicable in his case" on collateral review as a matter of state law. *Guardado v. Jones*, 226 So. 3d 213, 215 (Fla. 2017). But the Florida Supreme Court applied its per se harmless-error rule to deny *Hurst* relief, without discussing Petitioner's federal constitutional arguments. *Id.* (citing *Davis*, 207 So. 3d at 175).

Justice Quince dissented, explaining that, "because *Hurst* requires a jury, not a judge, to find each fact necessary to impose a sentence of death, the error cannot be

harmless where such a factual determination was not made." *Guardado*, 226 So. 3d at 215-16 (Quince, J., dissenting).[7]

REASONS FOR GRANTING THE WRIT

I. The Florida Supreme Court's Per Se Harmless-Error Rule Relies Entirely on the Product of the Underlying Federal Constitutional Violation and Precludes Individualized Review of that Violation's Impact in the Context of the Record as a Whole

A. State Courts May Not Apply Harmless-Error Rules that Obstruct the Underlying Federal Constitutional Right

The United States Constitution imposes limits on a state court's use of a harmless-error rule to reject a federal constitutional claim. Whether a state court has exceeded constitutional boundaries in the denial of a federal claim on harmless-error grounds "is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967). This Court "cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Id.*

In *Chapman*, this Court defined "harmless" constitutional errors as those errors which had no reasonable possibility of contributing to the result, and "*in the setting of a particular case* are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." *Id.* at 22-23.[8] Thus,

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[7] Internal quotations are omitted in this Petition unless otherwise indicated.

[8] Emphasis in quotations is supplied in this Petition unless otherwise indicated.

the harmfulness of a constitutional violation must be assessed on a case-by-case basis in the context of the entire proceeding. *Id.* The beyond-a-reasonable-doubt standard applicable to harmless-error rules is satisfied when, in light of the record as a whole, a federal constitutional error had no reasonable probability of contributing to the result. *Id.* at 22, 24.

Since *Chapman*, this Court has refined the parameters of harmless-error rules. The Court has reiterated that the burden of proving a constitutional error harmless beyond a reasonable doubt rests with the State, as the beneficiary of the error. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). The Court has emphasized that proper harmless-error analysis should consider the error's probable impact on the minds of an average rational jury. *See Harrington v. California*, 395 U.S. 250, 254 (1969). And the Court has made clear that harmless-error rulings must be accompanied by sufficient reasoning based on the actual record. *See, e.g.*, *Clemons v. Mississippi*, 494 U.S. 738, 752 (1990); *Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring) (explaining that a state court "cannot fulfill its obligations of meaningful review by simply reciting the formula for harmless error").

A federal constitutional error's impact must be assessed in the context of the entire record. *See, e.g.*, *Rose v. Clark*, 478 U.S. 570, 583 (1986). When the error's impact is unclear after the whole record is reviewed, courts should not undertake a harmless-error analysis that amounts to "unguided speculation." *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978); *see also O'Neal v. McAninch*, 513 U.S. 432,

435 (1995) ("[T]he uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict.").

B. This Court's Precedents Impose Exacting Standards on a State Court's Use of a Harmless-Error Rule to Deny Federal Constitutional Claims in Capital Cases

In capital cases, this Court reviews a state court's harmless-error denial of a federal constitutional claim with heightened scrutiny. *See, e.g.*, *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988). As this Court has long recognized, capital cases demand heightened standards of reliability because "[d]eath is a different kind of punishment from any other which may be imposed in this country . . . in both its severity and its finality." *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *see also Kyles v. Whitley*, 514 U.S. 419, 422 (1995) ("[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."). Accordingly, courts are forbidden from applying "harmless-error analysis in an automatic or mechanical fashion" in a capital case. *Clemons*, 494 U.S. at 753.

This Court has previously applied these standards to review harmless-error rulings of the Florida Supreme Court. *See, e.g.*, *Schneble v. Florida*, 405 U.S. 427 (1972); *Barclay v. Florida*, 463 U.S. 939 (1983); *Parker v. Dugger*, 498 U.S. 308 (1991); *Sochor*, 504 U.S. 527. In some cases, the Florida Supreme Court's harmless-error analysis survived this Court's federal constitutional scrutiny. *See, e.g.*, *Schneble*, 405 U.S. at 432; *Barclay*, 463 U.S. at 958. In other cases, it did not. *See, e.g.*, *Parker*, 498 U.S. at 320; *Sochor*, 504 U.S. at 540.

As described in the next section, the Florida Supreme Court's harmless-error ruling in this case falls into the latter category.

C. The Florida Supreme Court's Per Se Rule Perpetuates the Underlying Federal Constitutional Error by Failing to Allow for Individualized Review of the Error's Impact in the Context of the Record as a Whole

The Florida Supreme Court's per se harmless-error rule contravenes this Court's requirement that state courts, especially in capital cases, conduct an individualized review of the record as a whole before denying federal constitutional relief on harmless-error grounds. The Florida Supreme Court's per se rule operates mechanically, rather than individually, to deem *Hurst* errors harmless in every case in which the advisory jury unanimously recommended death.

As Petitioner's case and other cases demonstrate, when a jury working under Florida's unconstitutional system reached a unanimous advisory recommendation of death, the Florida Supreme Court refuses to entertain any individualized, record-based arguments before holding the federal constitutional *Hurst* error harmless beyond a reasonable doubt.

This Court's precedent is clear and consistent that harmless-error analysis must include review of the whole record. *See, e.g.*, *United States v. Hastings*, 461 U.S. 499, 509 (1983) ("Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record *as a whole* and to ignore errors that are harmless."); *Rose*, 478 U.S. at 583 ("We have held that *Chapman* mandates consideration of the *entire record* prior to reversing a conviction for constitutional errors that may be harmless."); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1967)

("Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the *whole record*, that the constitutional error was harmless beyond a reasonable doubt."); *Yates v. Evatt*, 500 U.S. 391, 403 (1991) ("To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to *everything else the jury considered on the issue in question*, as revealed in the record."); *see also Fulminante*, 499 U.S. at 306 (explaining that the "common thread" connecting cases subject to harmless-error review under *Chapman* is that each involves "trial error" that may "be qualitatively assessed *in the context of the other evidence presented* in order to determine whether its admission was harmless beyond a reasonable doubt"). And state courts outside of Florida have recognized and applied this Court's mandate that harmlessness be analyzed in the context of the whole record. *See, e.g.*, *State v. Cage*, 583 So. 2d 1125, 1128 (La. 1991) ("*Chapman* harmless error analysis . . . mandates consideration of the entire record.").[9]

The Florida Supreme Court's per se harmless-rule defies this Court's law. Despite Petitioner's detailed, record-based arguments regarding the impact of the *Hurst* error on his death sentence, *see, e.g.*, App. 42a-55a, the Florida Supreme Court

[9] Even if subjected to the harmless-error standard for federal habeas cases announced in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Florida Supreme Court's per se rule would be impermissible. In those cases too, this Court has emphasized the need to consider the whole record in any harmless-error analysis. *See, e.g.*, *id.* at 642 (O'Connor, J., concurring) ("The purpose of reviewing the *entire record* is, of course, to consider all the ways that error can infect the course of a trial."); *United States v. Lane*, 474 U.S. 438, 448 (1986) ("That kind of inquiry requires a review of the *entire record*."); *Calderon v. Coleman*, 525 U.S. 141, 148 (1998) ("The test requires the reviewing judge to evaluate the error in the context of the *entire record*.").

refused to address them. The Florida Supreme Court has followed the same mechanical approach to harmless-error analysis in *every* capital case in which the pre-*Hurst* advisory jury's recommendation was unanimous.[10]

The Florida Supreme Court's per se rule flouts this Court's understanding in *Barclay v. Florida* that "the Florida Supreme Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless." *Barclay*, 463 U.S. at 958. The Florida Supreme Court's rule is also at odds with this Court's decision in *Harrington v. California*, which explained that proper harmless-error analysis not only considers the impact of a constitutional error on the specific jury in the case, but also whether an average rational jury would have reached the same conclusion without the constitutional error. *See* 395 U.S. at 254. The Florida Supreme Court's per se rule is inconsistent with *Sochor v. Florida* and *Clemons v. Mississippi*, where this Court highlighted that harmless-error rulings must be accompanied by specific reasoning grounded in the whole record. *See Sochor*, 504 U.S. at 541; *Clemons*, 494 U.S. at 752. And the Florida Supreme Court's per se rule's failure to consider mitigation contradicts *Parker v. Dugger*, where this Court rejected such a cursory harmless-error analysis by the Florida Supreme Court. *See* 498 U.S.

[10] *See, e.g.*, *Davis*, 207 So. 3d 142; *King v. State*, 211 So. 3d 866, 889-93 (Fla. 2017); *Kaczmar v. State*, 228 So. 3d 1, 7-9 (Fla. 2017); *Knight v. State*, 225 So. 3d 661, 682-83 (Fla. 2017); *Hall v. State*, 212 So. 3d 1001, 1034 (Fla. 2017); *Truehill v. State*, 211 So. 3d 930, 956 (Fla. 2017); *Jones v. State*, 212 So. 3d 321, 334 (Fla. 2017); *Middleton v. State*, 220 So. 3d 1152, 1184 (Fla. 2017); *Oliver v. State*, 214 So. 3d 606, 617 (Fla. 2017); *Morris v. State*, 219 So. 3d 33, 46 (Fla. 2017); *Tundidor v. State*, 221 So. 3d 587, 607 (Fla. 2017); *Cozzie v. State*, 225 So. 3d 717, 733 (Fla. 2017).

at 320 ("What the Florida Supreme Court could not do, but what it did, was to ignore evidence of mitigating circumstances in the record.").

The Florida Supreme Court's per se rule relieves the State of its burden to prove *Hurst* errors harmless beyond a reasonable doubt. *See Fulminante*, 499 U.S. at 297 ("*Our review of the record leads us to conclude* that the State has failed to meet its burden of establishing, beyond a reasonable doubt, that the [error] was harmless error."). As Justice Sotomayor recently observed, the allocation of the burden of proof to the State can prove outcome-determinative in some cases. *See Gamache v. California*, 562 U.S. 1083 (2010) (Sotomayor, J., statement respecting the denial of a writ of certiorari) (collecting cases). Even though it is undisputed that Petitioner's death sentence was imposed under a capital sentencing scheme that violated the Federal Constitution, the Florida Supreme Court's per se rule for unanimous-jury-recommendation cases effectively leaves the State with no burden at all. In fact, in Petitioner's case, Respondent did not even file a brief in the Florida Supreme Court.

In *Hurst*, the Florida Supreme Court stated that "the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the] death sentence." *Hurst v. State*, 202 So. 3d at 68. But this idea has now been abandoned through the mechanical rule applied in cases where the advisory jury unanimously recommended the death penalty. The Florida Supreme Court also seemed to recognize in *Hurst v. State* that a pre-*Hurst* advisory jury recommendation does not demonstrate on its own that the evidence presented at

the penalty phase was sufficient to support a death sentence. *See* 202 So. 3d at 68. But even if it did, that would still not save the Florida Supreme Court's per se rule. *See Satterwhite*, 486 U.S. at 258 (explaining that the state does not meet burden of establishing that error in a capital sentencing is harmless merely by showing that the evidence in the record is sufficient to support a death sentence). There is a critical difference between concluding that a properly instructed jury *could* have reached a unanimous death recommendation, and that it would have done so beyond a reasonable doubt. As the next section explains, that is especially so in light of the constitutionally-mandated role of a sentencing jury in Florida.

D. The Florida Supreme Court's Per Se Rule Fails to Ensure Sufficient Reliability in Florida's Death Penalty

In order to determine whether there is a "reasonable possibility" that a *Hurst* error contributed to a death sentence, *see Chapman*, 386 U.S. at 23, a reliable harmless-error analysis must begin with what this Court held in *Hurst* that a jury must do for a Florida death sentence to be constitutional. The Court ruled the Sixth Amendment requires juries to make the findings of fact regarding the elements required for a death sentence under Florida law: (1) the aggravating circumstances that had been proven beyond a reasonable doubt; (2) the aggravating circumstances were together "sufficient" to justify the death penalty beyond a reasonable doubt; and (3) the aggravating circumstances outweighed the mitigation evidence beyond a reasonable doubt. *See* 136 S. Ct. at 620-22.[11]

[11] Applying this Court's decision on remand, the Florida Supreme Court held, in *Hurst v. State*, that the Eighth Amendment also requires Florida juries to render

The second and third of these elements cut against the harmless-error analysis in Justice Alito's dissent in *Hurst*. Justice Alito stated that he would have held the *Hurst* error harmless because the evidence supported the trial judge's finding of "at least one aggravating factor." *Id.* at 626 (Alito, J., dissenting). But, as the Florida Supreme Court recognized in *Hurst v. State*, 202 So. 3d at 68, unlike the Arizona capital sentencing scheme at issue in *Ring*, Florida's scheme required fact-finding as to the aggravators *and their sufficiency to warrant the death penalty*. The fact that sufficient evidence exists to prove at least one aggravator to the jury is not enough to conclude that a *Hurst* error is harmless. *See id.* at 53 n. 7. And, in any event, this Court has made clear that the State does not meet its harmless-error burden in a capital sentencing case merely by showing that evidence in the record is sufficient to support a death sentence. *See Satterwhite*, 486 U.S. at 258. "[W]hat is important is an *individualized determination*," given the well-established Eighth Amendment's requirement of individualized sentencing in capital cases. *Clemons*, 494 U.S. at 753.

Accordingly, the vote of a defendant's pre-*Hurst* advisory jury cannot by itself resolve a proper harmless-error inquiry. The fact that an advisory jury unanimously *recommended* the death penalty does not establish that the same jury would have made, or an average rational jury would make, the three specific *findings of fact* to support a death sentence in a constitutional proceeding.

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unanimous findings of fact on each element, and that those findings must precede a unanimous overall death recommendation. *See* 202 So. 3d at 53-59. The Florida Supreme Court also emphasized that even if the jury unanimously finds each of the required elements satisfied, the jury is still not required to recommend death, and the judge is not required to impose death. *Id.* at 57-58.

Indeed, prior to *Hurst*, the Florida Supreme Court recognized the ambiguity inherent in Florida's advisory jury recommendations. In 2009, the Florida Supreme Court considered, but declined, to mandate interrogatory advisory jury recommendations in death penalty cases. *See In re Standard Jury Instructions*, 22 So. 3d 17 (Fla. 2009). A concurrence in that decision observed:

> The jury recommendation does not contain any interrogatories setting forth which aggravating factors were found, and by what vote; how the jury weighed the various aggravating and mitigating circumstances; and, of course, no will ever know if one, more than one, any or all of the jurors agreed on any of the aggravating and mitigating circumstances. It is possible, in a case such as this one, where several aggravating circumstances are submitted, that none of them received a majority vote.

Id. at 26 (Pariente, J., concurring). The same is true of Petitioner's advisory jury recommendation.

Even if, speculatively, the jury made all the necessary findings, the same sentence would not necessarily have followed. Jury findings in a constitutional proceeding may have yielded a lesser number of aggravators than the judge's findings. Jury findings may have yielded different "sufficiency" and "insufficiency" determinations than those made by the judge. The jury may have made different findings regarding the weight of the aggravating or mitigating circumstances. And the judge, with findings from a properly instructed jury, might have exercised his sentencing discretion differently. *See Hurst v. State*, 202 So. 3d at 57 (noting that nothing in *Hurst* has diminished "the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life.").

Moreover, in a constitutional proceeding where the jury was instructed that its findings of fact would be binding on the trial court in the ultimate decision whether to impose a death sentence, the jury may have considered the evidence more carefully, and given the mitigation more weight. This idea, explored further in Section II of this Petition, is at the heart of this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1987).[12]

The Federal Constitution requires the State to bear the burden of dispelling these possibilities beyond a reasonable doubt on an individualized basis. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("[T]here is a . . . need for reliability in the determination that death is the appropriate punishment *in a specific case*."). The Florida Supreme Court's per se rule automatically relieves the State of its burden. In a capital case, this violates the federal constitutional requirement for heightened reliability in death sentencing and allows for impermissible "unguided speculation." *Holloway*, 435 U.S. at 490-91; *see also Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) ("[I]f a State wishes to authorize capital punishment it has a constitutional

[12] Defense counsel's approach would also have been different absent the *Hurst* error. Counsel may have conducted his voir dire questioning of prospective jurors differently had he known that only one juror needed to be convinced, as to only one of the elements, in order to avoid a death sentence. Counsel may have presented evidence diminishing the aggravation differently had he known that the jury, rather than the judge, was required to unanimously find that each aggravating circumstance had been proven beyond a reasonable doubt and that the aggravating circumstances were together sufficient to justify the death penalty. Counsel's thinking and advice to the client on how to proceed may have been altered had he known that the jury would be instructed that it could recommend a life sentence even if it had unanimously agreed that all of the other elements for a death sentence were satisfied.

responsibility to tailor and apply its law in a manner that avoids arbitrary and capricious infliction of the death penalty.").

Instead of providing for the tailored harmless-error review the Constitution requires, the Florida Supreme Court has adopted a per se rule that works a fundamental injustice on Petitioner and others in his position. Petitioner sits on death row today while dozens of other Florida prisoners—some of whom were sentenced before him, some of whom were sentenced after him, and many of whom committed murders, including multiple murders, involving more aggravating circumstances than his crime—have been granted resentencings under *Hurst*. Because no culpability-related distinctions can justify this disparity of results, the rule that produced it violates the Eighth Amendment.

II. The Florida Supreme Court's Per Se Harmless-Error Rule Fails to Account for the Particular Nature of *Hurst* Error, Which Requires Robust Application of this Court's Harmless-Error Precedents

A. The Florida Supreme Court's Per Se Rule Relies Entirely on Advisory Jury Decisions Infected with *Caldwell* Error

In *Caldwell v. Mississippi*, the penalty-phase jury did not receive an accurate description of its role in the sentencing process due to the prosecutor's suggestion that the jury's decision to impose the death penalty would not be final because an appellate court would review the sentence. 472 U.S. at 328-29. This Court found that the prosecutor's remarks "led [the jury] to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Id.* at 329. This Court concluded that, because it could not be ascertained that the remarks had no effect on the jury's sentencing decision, the jury's decision did not meet the Eighth

Amendment's standards of reliability. *Id.* at 341. Accordingly, *Caldwell* 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 sentence lies elsewhere." *Id.* at 328-29.

In the decades since *Caldwell*, the Florida Supreme Court has rejected numerous *Caldwell* challenges to Florida's pre-*Hurst* jury instructions. Beginning in *Pope v. Wainwright*, 496 So. 2d 798 (Fla. 1986), the Florida Supreme Court dismissed the relevance of *Caldwell* on the theory that, unlike with the Mississippi scheme at issue in *Caldwell*, Florida's instructions accurately described the jury's "merely" advisory nature: "[I]n Florida it is the trial judge who is the ultimate sentencer," and the jury "is merely advisory." *Id.* at 805. The Florida Supreme Court, finding "nothing erroneous about informing the jury of the limits of its sentencing responsibility," for the valid purpose of "reliev[ing] some of the anxiety felt by jurors impaneled in a first-degree murder trial," held that its advisory jury instructions complied with *Caldwell* and accurately described a constitutionally-valid scheme. *Id.*

In *Combs v. State*, 525 So. 2d 853, 856 (Fla. 1998), the Florida Supreme Court reaffirmed its holding in *Pope* that Florida's advisory jury scheme complied with *Caldwell*. The Florida Supreme Court further noted that it was "deeply disturbed" by decisions of the United States Court of Appeals for the Eleventh Circuit, in cases like *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), and *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988) (en banc), which had expressed doubts as to whether Florida's scheme complied with *Caldwell*. For years after *Pope* and *Combs*, the

Florida Supreme Court continued to reject *Caldwell* challenges to Florida's advisory jury instructions. *See, e.g.*, *Davis v. State*, 136 So. 3d 1169, 1201 (Fla. 2014).

In light of *Hurst*, the rationale underlying the Florida Supreme Court's rejection of *Caldwell* challenges has evaporated, but as in Petitioner's case, the Florida Supreme Court continues to refuse to address Petitioner's argument that it should revisit the applicability of *Caldwell* to Florida's pre-*Hurst* scheme. *Cf. Truehill v. Florida*, 138 S. Ct. 3 (2017) (Sotomayor, J., dissenting from the denial of certiorari) ("Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where the court was the final decision-maker and the sentencer—not the jury."). The Florida Supreme Court also refused to engage Petitioner's argument below that a proper harmless-error analysis must consider the combined impact of the *Hurst* and *Caldwell* errors, instead of simply relying on a per se rule.

The jurors in Petitioner's case were repeatedly told by the trial court that their recommendation was advisory and that the final sentencing decision rested solely with the judge. From the very outset of the penalty-phase, during the voir dire process, the advisory jurors were informed by the judge that "[t]he final determination of which sentence should be imposed is my responsibility." Voir Dire Tr. at 6. During closing arguments, the prosecutor reiterated the judge's role as the final decision-maker, telling the jury to "*recommend* to Judge Wells to—*advise* Judge Wells to sentence him to death." Penalty Tr. at 341. The advisory jury repeatedly received the same message in the jury instructions. *See, e.g.*, App. 115a ("The final

decision as to what punishment shall be imposed rests solely with the judge of this court. However, the law requires that you, the jury, render to the court an advisory sentence."); *id.* ("[I]t is now your duty to advise the court as to what punishment should be imposed upon the defendant."). It was with those remarks and instructions in mind, which informed the advisory jury "that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere," *Caldwell*, 472 U.S. at 328-29, that Petitioner's jurors made a recommendation to impose death.

Empirical research supports the notion that Florida's advisory juries were imbued with a diminished sense of responsibility for the imposition of death sentences before *Hurst*. *See, e.g.*, William J. Bowers, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and Jury Influence Death Penalty Decision-Making*, 63 Wash. & Lee L. Rev. 931, 954-62 (2006). Interviews with Florida jurors conducted through the Capital Jury Project ("CJP") yielded narrative accounts highlighting the detrimental impact of Florida's pre-*Hurst* instructions on jurors' sense of their sentencing role. *See id.* at 961-62. Florida jurors told relayed to researchers their understanding that "[w]e don't really make the final decision . . . we would give our opinion but the choice would be up to the judge." *Id.* at 961. One Florida juror told CJP researchers that "the fact that you could make a recommendation, that you didn't make a yes or no, that someone else would make the decision, I think that let us feel off the hook." *Id.* The same juror noted that he found the pre-*Hurst* sentencing process to be "not as traumatic as deciding [the defendant's] guilt because we would take the steps, make a recommendation, and the judge would

make the final choice." *Id.* As another Florida juror said approvingly of Florida's pre-*Hurst* advisory jury instructions, "I didn't want this on my conscience." *Id.*

The Florida Supreme Court's per se harmless-error rule for *Hurst* claims cannot predict, without review of the specific record, that a jury with full awareness of the gravity of its role in the capital sentencing process would have unanimously reached the same conclusion as the advisory jury that was told that its role was subordinate. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988) (holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about jury's vote); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (same).

Caldwell errors must be assessed in light of the entire record. *See, e.g.*, *Cordova v. Collens*, 953 F.2d 167, 173 (5th Cir. 1992); *Rodden v. Delo*, 143 F.3d 441, 445 (8th Cir. 1998); *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997). However, given its belief that no *Caldwell* error occurred, the Florida Supreme Court did not conduct an analysis of the entire record in Petitioner's case. The failure of the Florida Supreme Court's per se harmless-error rule to account for the inherent *Caldwell* error in all *Hurst* cases, including Petitioner's, is inconsistent not only with this Court's harmless-error precedents, but also with the Eighth Amendment.

B. The Florida Supreme Court's Per Se Rule Relies Entirely on Advisory Jury Decisions Not Capable of Supporting Harmless-Error Analysis Under *Sullivan*

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court recognized that there are some jury errors that cannot be subjected to harmless-error analysis. The error in *Sullivan* was the trial court's defective instruction to the jury regarding the

requirement that each element of the offense must be found beyond a reasonable doubt—an error that this Court found affected all of the jury's findings. *Sullivan*, 508 U.S. at 277. This Court unanimously held, in an opinion by Justice Scalia, that even though the jury had rendered a decision on each of the elements of the offense, the trial court's improper instruction on the beyond-a-reasonable-doubt standard "vitiate[d] *all* the jury's findings" and meant, for purposes of harmless-error review, that "there has been no jury verdict within the meaning of the Sixth Amendment." *Id.* at 281 (emphasis in original). Without a constitutionally-valid jury verdict, the Court found, "the entire premise of *Chapman* review is simply absent," *id.* at 281, because such review would necessarily require determination of "the basis on which the jury *actually rested* its verdict," *id.* at 279 (emphasis in original).

The Florida Supreme Court's per se rule harmless-error rule for *Hurst* claims presents the question whether *Chapman* and this Court's other harmless-error precedents permit state courts in capital cases to rest harmless-error rulings *entirely* on the votes of advisory jurors whose ultimate decision, like the jury's decision in *Sullivan*, did not constitute a "verdict" under the Sixth Amendment.

Florida's pre-*Hurst* advisory jury recommendations are no more verdicts under the Sixth Amendment than the jury findings in *Sullivan*. This Court held in *Sullivan* that the jury's findings did not constitute a verdict that could form the basis for a harmless-error ruling because the trial court's failure to properly instruct the jury on the beyond-a-reasonable-doubt standard negated all the jury's findings. *Id.* at 281. Florida's advisory juries were also given a defective instruction, which impacted all

the elements for a death sentence under Florida law. As this Court recognized in *Hurst*, Florida juries were improperly instructed that it was the duty of the trial judge, not the jury, to make findings of fact. Florida's improper jury instructions did not only "vitiate *all* the jury's findings," *id.*, they resulted in no jury findings at all.[13]

Sullivan instructs that where there is no verdict within the meaning of the Sixth Amendment, "[t]here is no *object*, so to speak, upon which harmless-error scrutiny can operate." *Id.* (emphasis in original). The Florida Supreme Court's per se harmless-error rule directly contradicts that principle. The Florida Supreme Court's rule relies entirely, to the exclusion of all other considerations, on the votes of advisory juries. This Court held in *Hurst* that those juries conducted no valid fact-finding within the meaning of the Sixth Amendment. Under *Sullivan*, the Florida Supreme Court's per se rule is unconstitutional because it relies entirely on a non-verdict to uphold a sentence of death.

CONCLUSION

This Court should grant a writ of certiorari and review the decision of the Florida Supreme Court.

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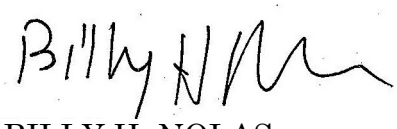
[13] Florida's pre-*Hurst* advisory jury decisions are distinguishable from the "incomplete verdict" at issue in *Neder v. United States*, 527 U.S. 1 (1999), which this Court found salvageable for purposes of harmless-error analysis. In *Neder*, the constitutional error was a jury instruction that omitted one of multiple elements of the offense. *Id.* at 8. This Court distinguished that error from *Sullivan*, where the error was a defective reasonable-doubt instruction on all of the elements of the offense. *See id.* at 10-11 ("[T]he jury-instruction here did not vitiate *all* the jury's findings.") (emphasis in original). As in *Sullivan*, Florida's unconstitutional jury instructions infected all the elements for a death sentence, and advisory juries rendered no findings, leaving no valid jury verdict within the meaning of the Sixth Amendment upon which to rest a proper harmless-error analysis.

Respectfully submitted,



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