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

PETITIONER'S APPENDIX

BILLY H. NOLAS
Counsel of Record
SEAN T. GUNN
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 North Bronough St., Suite 4200
Tallahassee, FL 32301-1300
(850) 942-8818
billy_nolas@fd.org

INDEX TO APPENDIX

EXHIBIT 1

Florida Supreme Court Opinion (May 11, 2017)

Supreme Court of Florida

No. SC17-389

JESSE GUARDADO,
Petitioner,

vs.

JULIE L. JONES, etc.,
Respondent.

[May 11, 2017]

PER CURIAM.

This case is before the Court on the petition of Jesse Guardado for a writ of habeas corpus. We have jurisdiction. See art. V, § 3(b)(9), Fla. Const.

The underlying facts of this case were described in this Court's opinion on direct appeal. Guardado v. State, 965 So. 2d 108, 110-12 (Fla. 2007). Guardado pleaded guilty to murder in the first degree and robbery with a weapon. After hearing evidence at the penalty phase, the jury returned a unanimous recommendation that Guardado be sentenced to death. The trial court found five[1]

1. The trial court found the following five aggravating factors: (1) the capital felony was committed by a person under sentence of imprisonment or on conditional release supervision; (2) the defendant was previously convicted of

aggravating factors and nineteen[2] nonstatutory mitigating circumstances. We affirmed Guardado's convictions and sentence of death. We also affirmed the

---

another capital felony or of a felony involving the use or threat of violence to the person (to wit: armed robbery, April 9, 1984; robbery with a deadly weapon, July 6, 1990; robbery, January 23, 1991; robbery with a weapon, January 23, 1991; attempted robbery with a deadly weapon, February 17, 2005); (3) the capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, or escape after committing, a robbery with a weapon; (4) the capital felony was especially heinous, atrocious, or cruel (HAC); and (5) the crime was committed in a cold, calculated and premeditated manner (CCP). Guardado, 965 So. 2d at 112.

2. The trial court found the following nineteen mitigating circumstances: (1) defendant entered a plea of guilty to first-degree murder without asking for any plea bargain or other favor in exchange (great weight); (2) defendant has fully accepted responsibility for his actions and blames nobody else for this crime (great weight); (3) defendant 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 (moderate weight); (4) defendant 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 (little weight); (5) defendant 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 (great weight); (6) defendant has a good jail record while awaiting trial with not a single incident or discipline report (little weight); (7) defendant has consistently shown a great deal of remorse for his actions (great weight); (8) defendant has suffered most of his adult life with an addiction problem to crack cocaine which was the basis of his criminal actions (some weight); (9) defendant has a good family and a good family support system that could help him contribute to an open prison population (moderate weight); (10) defendant testified he would try to counsel other inmates to take different paths than he has taken should he be given a life sentence (moderate weight); (11) as a child, defendant suffered a major trauma in his life by the crib death of a sibling (moderate weight); (12) as a child, defendant suffered another major trauma in his life by being sexually molested by a neighbor (moderate weight); (13) defendant has a lengthy history of substance abuse (marijuana and Quaaludes) during early teen years, graduating to alcohol and cocaine and substance abuse treatment beginning about age 14 or 15 (little weight);

denial of Guardado's initial postconviction motion. Guardado v. State, 176 So. 3d 886 (Fla. 2015).

In his present habeas petition, Guardado argues that he is entitled to relief pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), petition for cert. filed, No. 16-998 (U.S. Feb. 13, 2017). We agree with Guardado that Hurst is applicable in his case. See Mosely v. State, 209 So. 3d 1248 (Fla. 2016). However, because we find that the Hurst error in this case is harmless beyond a reasonable doubt, we deny Guardado's petition. As we stated in Davis v. State, 207 So. 3d 142, 175 (Fla. 2016):

> [T]he jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. . . . The unanimous recommendations here are precisely what we determined in Hurst to be constitutionally necessary to impose a sentence of death.

Accordingly, the Hurst violation in this case is harmless beyond a reasonable doubt and, as in Davis, does not entitle Guardado to relief.

---

(14) defendant's biological father passed away before defendant developed any lasting memories of him (little weight); (15) defendant was raised by his mother, whom he always considered loving, thoughtful, and concerned, and by a stepfather he later came to respect (little weight); (16) defendant was under emotional duress during the time frame of this crime (little weight); (17) defendant does not suffer a mental illness or major emotional disorder (little weight); (18) defendant offered to release his personal property, including his truck, to his girlfriend (little weight); and (19) defendant previously contributed to state prison facilities as a plumber and in wastewater treatment work (little weight). Guardado, 965 So. 2d at 112 n.2.

It is so ordered.

LABARGA, C.J., and PARIENTE, and LEWIS, JJ., concur.
CANADY, POLSTON, and LAWSON, JJ., concur in result.
QUINCE, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

QUINCE, J., dissenting.

I cannot agree with the majority's finding that the Hurst error was harmless beyond a reasonable doubt. As I've stated previously, "[b]ecause 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." Hall v. State, 42 Fla. L. Weekly S153, S165 (Fla. Feb. 9, 2017) (Quince, J., concurring in part and dissenting in part) (quoting Hurst v. Florida, 136 S. Ct. 616, 619 (2016)); see also Truehill v. State, 42 Fla. L. Weekly S223, S234 (Fla. Feb. 23, 2017) (Quince, J., concurring in part and dissenting in part).

Original Proceeding – Habeas Corpus

Billy H. Nolas, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, Tallahassee, Florida,

for Petitioner

Pamela Jo Bondi, Attorney General, and Berdene Beckles, Assistant Attorney General, Tallahassee, Florida,

for Respondent

EXHIBIT 2

Florida Supreme Court Rehearing Denial (Sep. 19, 2017)

Supreme Court of Florida

TUESDAY, SEPTEMBER 19, 2017

CASE NO.: SC17-389
Lower Tribunal No(s).:
662004CF000903CFAXMX

JESSE GUARDADO vs. JULIE L. JONES, ETC.

Petitioner(s) Respondent(s)

Petitioner's Motion for Rehearing is hereby denied.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

LISA HOPKINS
BILLY H. NOLAS
HON. ALEX ALFORD, CLERK

EXHIBIT 3

Petitioner's State Habeas Petition (Mar. 8, 2017)

Filing # 53481885 E-Filed 03/08/2017 05:58:14 PM

No. SC17-___

IN THE

Supreme Court of Florida

JESSE GUARDADO,

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

RECEIVED, 03/08/2017 05:58:29 PM, Clerk, Supreme Court

Billy H. Nolas
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough Street #4200
Tallahassee, FL 32301
billy_nolas@fd.org
Florida Bar No. 00806821

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

This petition for a writ of habeas corpus calls on the Court to once again review the constitutionality of a death sentence in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Under those decisions, Petitioner Jesse Guardado's death sentence violates the United States and Florida Constitutions and should be vacated.

There will be no serious dispute in this proceeding that Petitioner's death sentence violates the constitutional decisions in *Hurst v. Florida* and *Hurst v. State*. Nor will there be any serious dispute that the *Hurst* decisions apply retroactively to Petitioner. The disputed issue for this Court to resolve will be whether the *Hurst* error in Petitioner's case should be overlooked because it was "harmless beyond a reasonable doubt," which is to say "there is no reasonable probability that the error contributed to the sentence." *Hurst v. State*, 202 So. 3d at 68. This dispute should be resolved in Petitioner's favor.

This Court's precedent establishes that *Hurst* claims require individualized harmless error review, and that the burden is on the State to prove in each particular case that the *Hurst* error did not impact the death sentence. It is true that this Court has found *Hurst* errors harmless in some cases where, as in Petitioner's case, the jury returned a unanimous recommendation for death. But this Court has also indicated that a unanimous jury recommendation is not by itself dispositive of the harmless

error analysis. In other words, there are at least some unanimous-recommendation cases in which the *Hurst* error did impact the sentence.

This habeas corpus petition presents the opportunity for this Court to address such a case. Although Petitioner's jury returned a unanimous recommendation, the State cannot establish in his particular case that the *Hurst* error was harmless beyond a reasonable doubt. Rather, the record in Petitioner's case reflects that the *Hurst* error did in fact impact Petitioner's death sentence.

Accordingly, for the reasons that follow, Petitioner respectfully requests that this Court vacate his death sentence in light of the *Hurst* decisions.

JURISDICTION

This Court has original jurisdiction to grant Petitioner a writ of habeas corpus under Article I, Section 13, and Article V, Section 3(b)(9), of the Florida Constitution. This proceeding is also authorized by Florida Rule of Appellate Procedure 9.030(a)(3). This petition complies with the Rule 9.100(a) requirements.

REQUEST FOR ORAL ARGUMENT

In light of the seriousness of a death sentence and the complexity of the constitutional issues presented herein, Petitioner respectfully requests oral argument.

BACKGROUND

In 2004, Petitioner pleaded guilty to murder and robbery in the Circuit Court of the First Judicial Circuit, in and for Walton County. Prior to the penalty phase,

Petitioner moved to preclude the death penalty on the ground that Florida's capital sentencing scheme was unconstitutional in light of *Ring v. Arizona*, 536 U.S. 584 (2002). 1 ROA at 169-70. The circuit court denied the *Ring* motion. *Id.* at 196.

After aggravating and mitigation evidence was presented penalty phase, the court instructed Petitioner's "advisory" sentencing jury as follows:

> [T]he final decision as to what punishment shall be imposed rests solely with the judge . . . . [h]owever, it's 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 imposition of the death penalty and whether sufficient aggravating circumstances exist to outweigh any mitigating circumstances found to exist.

8 ROA at 350.

After deliberating, the jury returned a generalized advisory recommendation to impose the death penalty. The jury's verdict stated, in full:

> WE, THE JURY, advise and recommend to the Court as follows, as to the offense of Murder in the First Degree:
>
> 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.

2 ROA at 298. The verdict form did not contain any findings of fact or specify the basis for the jury's recommendation.

The court, not the jury, then made the critical findings of fact required to impose a sentence of death under Florida law. The court found that the following aggravating factors 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." The court, not the jury, found beyond a reasonable doubt that those aggravating factors were "sufficient" to impose the death penalty, and that the aggravators were not outweighed by the mitigation.[1] 8 ROA at 4-16. Based upon this fact-finding, the court sentenced Petitioner to death.

[1] The mitigation the court found included: (1) Petitioner entered a plea of guilty to first-degree murder without asking for any plea bargain or other favor in exchange; (2) Petitioner had fully accepted responsibility for his actions and blamed nobody else for the crime; (3) Petitioner 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) Petitioner 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) Petitioner 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) Petitioner has a good jail record while awaiting trial with not a single incident or discipline report; (7) Petitioner has consistently shown a great deal of remorse for his actions; (8) Petitioner has suffered most of his adult life with an addiction problem to crack cocaine which was the basis of his criminal actions; (9) Petitioner has a good family and a good family support system that could help him contribute to an open prison population; (10) Petitioner testified he would try to counsel other inmates to take different paths than he has taken should he be given a life sentence; (11) as a child, Petitioner suffered a major trauma in his life by the crib death of a sibling; (12) as a child, Petitioner suffered another major trauma in his life by being sexually molested by a neighbor; (13) Petitioner has a lengthy history of substance abuse (marijuana and Quaaludes) during early teen years, graduating to alcohol and cocaine and substance abuse treatment beginning about age 14 or 15; (14) Petitioner's biological father passed away before Petitioner developed any lasting memories of him; (15) Petitioner was

On direct appeal, Petitioner argued that Florida's capital sentencing scheme was unconstitutional in light of *Ring*. Petitioner acknowledged this Court's rulings, in cases like *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002), that *Ring*'s Sixth Amendment holding was inapplicable to Florida's capital sentencing scheme because, prior to *Ring*, Florida's scheme had been upheld by the United States Supreme Court.[2] Petitioner argued that this Court should "re-examine its holding in *Bottoson* and *King*, consider the impact *Ring* has on Florida's death penalty scheme, and declare Section 921.41[,] Florida Statutes unconstitutional." Appellant's Br. at 52-53. This Court affirmed Petitioner's sentence, rejecting his *Ring* claim on the ground that, "[i]n numerous cases that have been decided since the *Ring* decision, this Court has rejected similar arguments that Florida's death penalty statute is unconstitutional based on *Ring*." *Guardado*, 965 So. 2d at 118. The Court also stated that *Ring* did not apply because "one of the aggravating circumstances found in [this] case is a prior violent felony." *Id.* This

---

raised by his mother, whom he always considered loving, thoughtful and concerned, and by a stepfather he later came to respect; (16) Petitioner was under emotional duress during the time frame of the crime; (17) Petitioner does not suffer a mental illness or major emotional disorder; (18) Petitioner offered to release his personal property, including his truck, to his girlfriend; and (19) Petitioner previously contributed to state prison facilities as a plumber and in wastewater treatment work. 8 ROA at 16-32.

[2] *See, e.g., Hildwin v. Florida*, 490 U.S. 638 (1989).

Court subsequently affirmed the denial of Petitioner's initial Florida Rule of Criminal Procedure 3.851 motion. *Guardado v. State*, 176 So. 3d 886 (2015).

In February 2016, Petitioner filed an initial petition for federal habeas corpus relief in the United States District Court for the Northern District of Florida. *Guardado v. Jones*, No. 4:15-cv-256, ECF No. 7 (N.D. Fla. Feb. 1, 2016); *see also* 28 U.S.C. § 2254. Petitioner raised a claim under *Hurst v. Florida*, which he noted had been decided just weeks earlier. *Id.* at 68-75.

On July 5, 2016, Petitioner filed a successive Rule 3.851 motion in the circuit court, seeking state post-conviction relief under *Hurst v. Florida*. This Court subsequently issued the decision in *Hurst v. State*.

On February 11, 2017, U.S. District Judge Robert Hinkle ordered Petitioner's federal habeas proceedings held in abeyance until Florida's courts have had the opportunity to fully address Petitioner's claims under *Hurst v. Florida* and *Hurst v. State*. *Guardado*, No. 4:15-cv-256, ECF No. 30 (N.D. Fla. Feb. 11, 2017).

On February 28, 2017, the circuit court held a status conference regarding Petitioner's successive Rule 3.851 motion. Petitioner's counsel informed the circuit court that, in light of this Court's recent *Hurst* decisions, he would be filing a *Hurst*-based petition for a writ of habeas corpus in this Court. The circuit court agreed to continue the Rule 3.851 proceedings until at least May 2017 to allow Petitioner to seek *Hurst* relief through an original habeas proceeding in this Court.

ARGUMENT

I. Petitioner's death sentence violates *Hurst v. Florida* and *Hurst v. State*

Petitioner's death sentence violates *Hurst v. Florida* and *Hurst v. State*. In *Hurst v. Florida*, the United States Supreme Court held that Florida's capital sentencing scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. 136 S. Ct. at 620-22. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify the death penalty; and (3) whether those aggravators outweighed the mitigation. Florida's unconstitutional scheme first required an advisory jury to render a generalized sentencing recommendation for life or death by a majority vote, without specifying the factual basis for the recommendation, and then empowered the sentencing judge alone, notwithstanding the jury's recommendation, to conduct the required fact-finding. *Id.* at 622. The Court held that before making its recommendation, the jury, not the judge, must make the findings of fact required to impose the death penalty under Florida law. *Id.*

In *Hurst v. State*, this Court held that, in addition to the principles articulated in *Hurst v. Florida*, the Eighth Amendment also requires *unanimous* jury fact-finding as to (1) which aggravating factors were proven, (2) whether those aggravators were "sufficient" to impose the death penalty, and (3) whether those

aggravators outweighed the mitigation. 202 So. 3d at 53-59.[3] This Court made clear that each of those determinations are "elements" that must be found by a unanimous jury beyond a reasonable doubt. *Id.* at 57; *see also Jones v. State*, No. SC14-990, 2017 WL 823600, at *16 (Fla. Mar. 2, 2017). In addition to rendering unanimous findings on each of those elements, this Court explained that the jury must unanimously recommend the death penalty before a death sentence may be imposed. *Hurst v. State*, 202 So. 3d at 57 ("[B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death."). The Court further cautioned that, even if the jury unanimously found each of the elements required to impose the death penalty satisfied, the jury was not required to recommend the death penalty. *Id.* at 57-58 ("We equally emphasize that . . . we do not intend to diminish or impair the jury's right to recommend a sentence of life

[3] As this Court correctly noted in *Hurst v. State*, "in interpreting the Florida Constitution and the rights afforded to persons within this State, [the Florida Supreme Court] may require more protection be afforded to criminal defendants than that mandated by the federal Constitution." 202 So. 3d at 57. This Court's unanimity holding was consistent with the constitutional "evolving standards of decency," *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), which have led to a national consensus that death sentences may be imposed only upon unanimous jury verdicts.

even if it finds the aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.").

This Court also ruled that *Hurst* claims must be subjected to individualized harmless error review, and that the burden is on the State to prove, beyond a reasonable doubt, that the *Hurst* error did not impact the sentence. *Id.* at 67-68.[4] If the State is unable to make that showing, this Court will vacate the death sentence.

Petitioner's jury was never asked to make render unanimous findings on any of the elements required to impose a death sentence under Florida law. Instead, after being instructed that its verdict was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, Petitioner's jury rendered only a generalized advisory recommendation to impose the death penalty. The record does not reveal whether the jurors unanimously agreed that any particular aggravating factors was proven beyond a reasonable doubt, or unanimously agreed that those aggravators were sufficient to impose the death penalty, or unanimously agreed that those aggravators outweighed the mitigation.

[4] As explored further in Section IV(B), *infra*, this Court declined to rule that the error in Mr. Hurst's case was harmless beyond a reasonable doubt because the court found no reliable way to determine "what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt," or "how many jurors have found the aggravation sufficient for death," or "if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances." *Id.* at 68.

Accordingly, Petitioner's death sentence violates the Sixth and Eighth Amendments in light of *Hurst v. Florida* and *Hurst v. State*.

II. The *Hurst* decisions apply retroactively to Petitioner under both the *Witt* and fundamental fairness doctrines, which this Court has said are independent bases for retroactivity under Florida law

The *Hurst* decisions apply retroactively to Petitioner under both the *Witt* and fundamental fairness doctrines, which this Court has said are independent bases for retroactivity under Florida law. Retroactivity analysis in this case is straightforward and easily resolved in Petitioner's favor on two separate grounds. In *Mosley v. State*, Nos. SC14-436 & SC14-2108, 2016 WL 7406506, at *17-25 (Fla. Dec. 22, 2016), this Court made clear that the *Hurst* decisions are retroactive to those, like Petitioner, whose death sentence became final after *Ring* (under a *Witt* retroactivity analysis), and also to those, like Petitioner, who challenged the constitutionality of Florida's capital sentencing scheme before *Hurst* (under a fundamental fairness analysis).

A. The *Hurst* decisions are retroactive to Petitioner under *Witt*

The *Hurst* decisions are retroactive to Petitioner under Florida's traditional retroactivity analysis, which was articulated in *Witt v. State*, 387 So. 2d 922 (1980). In *Mosley*, this Court held that, "under a standard *Witt* analysis, *Hurst* should be applied to Mosley and *other defendants* whose sentences became final after the United States Supreme Court issued its opinion in *Ring*." 2016 WL 7406506, at *19 (emphasis added); *see also id.* ("Defendants who were sentenced to death . . . after

Ring should not suffer due to the United States Supreme Court's fourteen-year delay in applying *Ring* to Florida . . . ."). [5] Petitioner's death sentence became final in 2008, nearly six years after *Ring* was decided, when the United States Supreme Court denied his petition for a writ of certiorari. That resolves the retroactivity question in this case because, as this Court made clear in *Mosley*, the *Hurst* decisions are retroactive to all post-*Ring* sentences under a *Witt* retroactivity analysis.

B. The *Hurst* decisions are separately retroactive to Petitioner under the fundamental fairness doctrine

Although *Witt* provides a sufficient basis to apply the *Hurst* decisions retroactively to Petitioner, it should also be noted that the *Hurst* decisions are separately retroactive to him under this Court's fundamental fairness doctrine. As this Court explained in *Mosley*, although *Witt* is the "standard" retroactivity test in Florida, defendants may also be entitled to *Hurst* retroactivity by virtue of the fundamental fairness doctrine, which the Court has previously applied in cases like

[5] Although not directly at issue here, it does *not* follow that all defendants whose sentences became final before *Ring* are categorically excluded from retroactive application of the *Hurst* decisions under a standard *Witt* analysis. The decisions in *Mosley* and *Asay v. State*, Nos. SC16-223, SC16-102, SC16-628, 2016 WL 7406538 (Fla. Dec. 22, 2016), together establish that *Witt* retroactivity is also subject to an individualized analysis, and that pre-*Ring* defendants may be entitled to *Witt* retroactivity depending on the individualized circumstances of their case. Moreover, as explained in Section II(B) of this petition, *infra*, a *Witt* analysis is not the only manner by which the *Hurst* decisions may be held to apply retroactively in a particular case. In addition to or instead of *Witt*, courts may apply the *Hurst* decisions retroactively under this Court's "fundamental fairness" doctrine.

James v. State, 615 So. 2d 668 (Fla. 1993). *Mosley*, 2016 WL 7406506, at *19 ("This Court has previously held that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty"). Fundamental fairness is an equitable analysis that does not rely on *Witt*.

Fundamental fairness differs from *Witt* analysis by focusing on whether it would be unfair to bar the defendant from seeking *Hurst* relief. The doctrine applies where the defendant previously attempted to challenge Florida's unconstitutional capital sentencing scheme. *Id.* at *18-19 & n.13 ("The difference between a retroactivity approach under *James* and a retroactivity approach under a standard *Witt* analysis is that under *James*, a defendant or his lawyer would have had to timely raise a constitutional argument, in this case a Sixth Amendment argument, before this Court would grant relief. However, using a *Witt* analysis, any defendant who falls within the ambit of the retroactivity period would be entitled to relief regardless of whether the defendant or his or her lawyer had raised the Sixth Amendment argument."). This Court emphasized in *Mosley* that ensuring fundamental fairness in retroactivity analysis outweighed any state interest in the finality of death sentences. *Id.* at *19. The date a sentence became final relative to when *Ring* was decided is not relevant in fundamental fairness analysis.

In *Mosley*, this Court drew an analogy to *James*'s retroactive application of the United States Supreme Court's decision in *Espinosa v. Florida*, 505 U.S. 1079

(1992). In *James*, this Court concluded "that defendants who had raised a claim at trial or on direct appeal that the jury instruction pertaining to the HAC aggravating factor was unconstitutionally vague were entitled to the retroactive application of *Espinosa*." *Id.* In *Mosley*, this Court explained that "[t]he situation presented by the United States Supreme Court's holding in *Hurst* is not only analogous to the situation presented by *James*, but also concerns a decision of greater fundamental importance than was at issue in *James*." *Id.* This Court was correct because, under the *Hurst* decisions, "the fundamental right to a trial by jury under both the United States and Florida Constitutions is implicated, and Florida's death penalty sentencing procedure has been held unconstitutional, thereby making the machinery of post-conviction relief . . . necessary to avoid individual instances of obvious injustice." *Id.* (internal quotation omitted). The application of the fundamental fairness doctrine thus makes as much sense for *Hurst* claims as for *Espinosa* claims.

Petitioner is entitled to retroactive application of the *Hurst* decisions under the fundamental fairness doctrine, separate and apart from *Witt*, because he raised a challenge to Florida's unconstitutional capital sentencing statute at the earliest opportunity before his penalty phase, and continued to press the issue in this Court in his direct appeal. His claims were rejected under this Court's precedent, which was later overruled by *Hurst v. Florida* and *Hurst v. State*.

Before the penalty phase, Petitioner moved to preclude the death penalty on the ground that Florida's capital sentencing scheme was unconstitutional in light of *Ring*. 1 ROA at 169-70. The circuit court denied the motion based on this Court's precedent holding that *Ring* did not apply in Florida. *Id.* at 196. On direct appeal, Petitioner argued that *Ring* applied in Florida. Petitioner acknowledged this Court's rulings, in cases like *Bottoson* and *King*, that *Ring*'s Sixth Amendment holding was inapplicable to Florida's capital sentencing scheme because the Supreme Court had previously upheld Florida's scheme. Petitioner argued that this Court should "re-examine its holding in *Bottoson* and *King*, consider the impact *Ring* has on Florida's death penalty scheme, and declare Section 921.41 Florida Statutes unconstitutional." Appellant's Br. at 52-53. This Court affirmed Petitioner's sentence, rejecting his *Ring* claim on the ground that, "[i]n numerous cases that have been decided since the *Ring* decision, this Court has rejected similar arguments that Florida's death penalty statute is unconstitutional based on *Ring*." *Guardado*, 965 So. 2d at 118. The Court also stated that *Ring* did not apply because "one of the aggravating circumstances found in [this] case is a prior violent felony." *Id.* In light of the *Hurst* decisions, those rulings are no longer valid.

Under the fundamental fairness doctrine, these circumstances provide an ample basis to apply the *Hurst* decisions retroactively to Petitioner, who anticipated the defects in Florida's capital sentencing scheme that were later articulated in the

Hurst decisions and raised those defects at the earliest opportunity, both before the penalty phase and on direct appeal. As a matter of fundamental fairness, Petitioner should not now be denied the chance to seek relief under the *Hurst* decisions. Applying the *Hurst* decisions retroactively to Petitioner "in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness," and, as this Court has made clear, "it is fundamental fairness that underlies the reasons for retroactivity of certain constitutional decisions, especially those involving the death penalty." *Mosley*, 2016 WL 7406506, at *25.

III. Although this Court has not yet addressed the federal implications of *Hurst* retroactivity, the United States Constitution requires retroactive application of the *Hurst* decisions to Petitioner

In addition to *Hurst* being retroactive to Petitioner under both the *Witt* and fundamental fairness retroactivity doctrines as a matter of Florida law, the federal Constitution protects Petitioner's right to *Hurst* retroactivity. Federal law requires *Hurst* to be applied retroactively even by state courts applying state retroactivity doctrines. Petitioner's federal right to *Hurst* retroactivity does not turn on the date his sentence became final relative to the date *Ring* was decided. Federal law does not countenance the concept of "partial retroactivity," under which a new constitutional rule is applied to some cases on collateral review but not to others.

Petitioner's federal right to *Hurst* retroactivity is highlighted by the United States Supreme Court's recent decision in *Montgomery v. Louisiana*, 136 S. Ct. 718

(2016). Where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively. *See id.* at 731-32 ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge."). In *Montgomery*, the petitioner initiated a state post-conviction proceeding seeking retroactive application of *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding imposition of mandatory sentences of life without parole on juveniles unconstitutional). The Louisiana Supreme Court (in contrast to what this Court did in *Falcon v. State*, 162 So. 3d 954 (Fla. 2015)) held that *Miller* was not retroactive under state retroactivity law. The United States Supreme Court reversed, holding that Louisiana could not bar retroactivity under its state doctrines because the *Miller* rule was substantive and therefore Louisiana was obligated under the federal Constitution to apply it retroactively on state post-conviction review.

The *Hurst* decisions announced substantive rules that, under the United States Constitution, may not be denied to Florida defendants on state retroactivity grounds. In fact, in *Hurst v. State*, this Court announced two substantive rules. First, this Court ruled in *Hurst v. State* that the Sixth Amendment requires that juries decide, *beyond a reasonable doubt*, whether each of the elements of a death sentence have been satisfied—certain aggravating factors have been proven, the aggravators are

sufficient to impose the death penalty, and the aggravators outweigh the mitigation. Such findings are manifestly substantive.[6] *See Montgomery*, 136 S. Ct. at 734 (holding that decision whether a particular juvenile is a person "whose crimes reflect the transient immaturity of youth" is substantive, not procedural). The Supreme Court has consistently applied proof-beyond-a-reasonable-doubt rules retroactively to *all* defendants. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).

Second, this Court held in *Hurst v. State* that the Eighth Amendment requires the jury's finding of the elements during the penalty phase to be unanimous. The Court explained that the unanimity rule is required to implement the constitutional

[6] The Supreme Court's decision in *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004) is distinguishable. In *Summerlin*, the Supreme Court applied the federal retroactivity test in *Teague v. Lane*, 489 U.S. 288 (1989), and determined that *Ring* was not retroactive on federal habeas review because the requirement that the jury rather than the judge make findings as to whether the defendant had a prior violent felony aggravator was procedural rather than substantive. But *Summerlin* did not review a capital sentencing statute like Florida's that requires the jury not only to make fact-finding regarding the applicable aggravators, but also as to whether the aggravators were *sufficient* for the death penalty. Moreover, unlike *Ring*, *Hurst* addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the Supreme Court has always regarded such decisions as substantive. *See Powell v. Delaware*, 2016 WL 7243546, at *3 (Del. Dec. 15, 2016) (holding *Hurst v. Florida* retroactive under state's *Teague*-like retroactivity doctrine and distinguishing *Summerlin* as "only address[ing] the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof."); *see also Guardado v. Jones*, No. 4:15-cv-256 (N.D. Fla. May 27, 2016) (federal judge explaining that *Hurst* federal retroactivity is possible despite *Summerlin* because *Summerlin* unlike *Hurst* "did not address the requirement for proof beyond a reasonable doubt," and "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive. *See Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).").

mandate that the death penalty be reserved for a narrow class of the worst offenders, and assures that the determination "expresses the values of the community as they currently relate to the imposition of the death penalty." 202 So. 3d at 60-61 ("By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law."). As this Court made clear, the function of the unanimity-of-fact-finding rule is to ensure that Florida's overall capital system complies with the Eighth Amendment. *See id.* at *47-48. That makes the rule substantive, *see Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"), even though its subject has to do with the method by which a jury makes decisions. *See Montgomery*, 136 S. Ct. at 735 (noting that existence of state flexibility in determining method by which to enforce constitutional rule does not convert substantive rule into procedural one).

Because the rules announced in the *Hurst* decisions are substantive, this Court has a duty under the federal Constitution to apply them retroactively to Petitioner.

IV. The *Hurst* error in Petitioner's case was not harmless beyond a reasonable doubt, notwithstanding the unanimous jury recommendation

Because Petitioner's death sentence violates *Hurst v. Florida* and *Hurst v. State*, and those decisions are retroactive to him under both state law (the *Witt* and

fundamental fairness doctrines) and federal law, Petitioner should be granted relief from his death sentence unless the State can prove that the *Hurst* error in his case was "harmless beyond a reasonable doubt." In the *Hurst* context, this Court has defined "harmless beyond a reasonable doubt" as "no reasonable probability that the error contributed to the sentence." *Hurst v. State*, 202 So. 3d at 68.

This Court's precedent establishes that *Hurst* claims require individualized harmless error review, and that the burden is on the State to prove in each particular case that the *Hurst* error did not impact the death sentence. *Id.* at 67-68 ("[T]he burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the] death sentence."). The "State bears an extremely heavy burden" in this context. *Id.* at 68. The State's ability to meet its burden of proving that a *Hurst* error was harmless beyond a reasonable doubt is "rare." *King v. State*, No. SC14-1949, 2017 WL 372081, at *17 (Fla. Jan. 26, 2017).

It is true that this Court has found *Hurst* errors harmless in some cases where, as in Petitioner's case, the jury returned a unanimous recommendation of a death sentence. However, as explained below, this Court has also indicated that a unanimous recommendation is not by itself dispositive of the harmless error analysis. There are at least some unanimous-recommendation cases in which there the *Hurst* error *did* impact the death sentence. This proceeding presents this Court

with the opportunity to address such a case. Although Petitioner's jury unanimously recommended the death penalty, the State cannot prove beyond a reasonable doubt that the *Hurst* error was harmless.

A. This Court has indicated that a unanimous jury recommendation is a factor in *Hurst* harmless error analysis, but not necessarily a dispositive factor in every case

This Court has indicated that a unanimous jury recommendation is a factor in *Hurst* harmless error analysis, but not necessarily a dispositive factor in every case. The Court has emphasized this principle on several occasions. For example, in *Hall v. State*, this Court stated that a jury's unanimous recommendation "lays a *foundation* for us to conclude beyond a reasonable doubt" that the *Hurst* error was harmless, and then assessed other harmlessness factors, such as the "egregious facts" of the case, reflecting a traditional harmless error analysis that evaluated the aggravation and mitigation. No. SC15-1662, 2017 WL 526509, at *22-23 (Fla. Feb. 9, 2017) (emphasis added). Again in *King v. State*, the Court emphasized that the unanimous recommendation was not dispositive, but rather "*begins a foundation* for us to conclude beyond a reasonable doubt" that the *Hurst* error was harmless. 2017 WL 372081, at *17 (emphasis added). In *Wood v. State*, No. SC15-954, 2017 WL 411336, at *13 (Fla. Jan. 31, 2017), this Court indicated that a *Hurst* error in a unanimous-recommendation case would—if the case were not already being remanded for imposition a life sentence on proportionality grounds—require a

remand for a new penalty phase because the jury had been instructed to consider inappropriate aggravators.

More recently, in *Jones v. State*, the Court explained that the instructions to the jury, in combination with the unanimous recommendation, allowed the Court to conclude that three of the required elements for a death sentence had been satisfied—sufficiency of the aggravation, weight of the aggravation relative to the mitigation, and the unanimous recommendation—but that an individualized examination of the specific aggravators found by the judge was still necessary to determine whether "the remaining element: that the jury unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt"—was satisfied. 2017 WL 823600, at *16 (internal quotes omitted).[7] Thus, the Court has made clear that in some unanimous-recommendation cases, the *Hurst* error was *not* harmless. Petitioner's is such a case.

It makes practical sense that *Hurst* errors in at least *some* unanimous-recommendation cases should not be deemed harmless beyond a reasonable doubt.

[7] As explained in Section IV(F), *infra*, this Court's reasoning that those three elements can be deemed satisfied based on the jury instructions and the unanimous recommendation should be abandoned. Contrary to this Court's reasoning in *Jones*, the jury instructions and a unanimous recommendation do not establish those elements beyond a reasonable doubt. Although it is not necessary for resolving the harmless error inquiry in Petitioner's favor, this Court should in this and future cases abandon the undue reliance placed on the combination of the jury instructions and the unanimous recommendation. For purposes of this discussion, however, the point remains that the Court did not rely on the unanimous recommendation alone.

After all, as *Hurst v. State* recognized, unanimous jury verdicts are the norm in capital sentencing schemes throughout the country. If all *Hurst* errors in unanimous-recommendation cases are harmless, then relief under *Hurst*, or one of its predecessors like *Ring*, would never have been available in any state other than the minority of split-vote capital sentencing states like Florida. And under the same logic, relief under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the predecessor of both *Ring* and *Hurst*, which addressed improper judge-fact-finding in the non-capital sentencing context, would *never* be available because the preceding jury votes in those guilt-phase cases are always required to be unanimous. Nothing in *Hurst*, *Ring*, or *Apprendi* supports such an "automatic" application of harmless error in unanimous vote cases; nor do this Court's post-*Hurst* decisional law support such a constricted view of the Sixth and Eighth Amendments.

The *Hurst* error in Petitioner's case should not be ruled harmless beyond a reasonable doubt, not only due to the problems inherent in using the advisory jury's recommendation to infer what fact-finding would have occurred in a constitutional proceeding, *see* Section IV(B), *infra*, but also because the circumstances of Petitioner's specific case reflect, more than those of other unanimous-recommendation cases this Court has so far addressed, that the *Hurst* error impacted his death sentence. Accordingly, in this particular unanimous-recommendation case, this Court should rule the *Hurst* error not harmless.

B. Here, the unanimous recommendation is insufficient to reliably conclude that the jury would have unanimously found all of the required elements a constitutional proceeding, particularly in light of the jury's belief about its role and the substantial mitigation

In Petitioner's case, the jury's unanimous recommendation is insufficient to reliably conclude that the jury would have unanimously found all the required elements for the death penalty satisfied in a constitutional proceeding, particularly in light of the jury's belief about its role in sentencing and the substantial mitigation.

As a general matter, it is only logical that a unanimous pre-*Hurst* jury recommendation does not serve as a complete bar to *Hurst* relief under the harmless error doctrine. After all, Florida juries before *Hurst*, including Petitioner's, made only a general *recommendation* to impose the death penalty, without deciding if any of the other required elements had been satisfied. In *Hurst v. State*, this Court held that the jury must render unanimous fact-finding, under a beyond-a-reasonable-doubt standard, on all of the required elements for a death sentence: (1) which aggravating factors were proven, (2) whether those aggravators were "sufficient" to impose the death penalty, and (3) whether those aggravators outweighed the mitigation. 202 So. 3d at 53-59. The jury's unanimous findings on those elements must precede the jury's vote as to whether to recommend a death sentence. *See id.* at 57 ("[B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating

factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death."). Therefore, even in cases where the jury unanimously *recommended* death, there is no way to know whether the jury would have unanimously found all the other preceding elements satisfied beyond a reasonable doubt. *See Hall*, 2017 WL 526509, at *24 (Quince, J., dissenting) ("Even though the jury unanimously recommended the death penalty, whether the jury unanimously found each aggravating factor remains unknown."). Indeed, Petitioner's jurors may have reached a unanimous overall *recommendation*, but there is nothing in the record that reveals the basis for the recommendation, and there is therefore a reasonable probability that each juror, or groups of jurors, may have based their recommendations on a different calculus. This Court has made clear that all jurors must be on the same page with respect to *each* of the underlying elements.

And as this Court cautioned in *Hurst v. State*, engaging in speculation about the jury's fact-finding "would be contrary to our clear precedent governing harmless error review." 202 So. 3d at 69; *see also Mosley*, 2016 WL 7406506, at *26. Indeed, the reasoning this Court supplied in declining to speculate about the jury's fact-finding in *Hurst v. State*, even though that case involved a non-unanimous jury recommendation, applies equally to Petitioner's unanimous jury recommendation:

> Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a

> reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

202 So. 3d at 68. Here too, this Court cannot determine what aggravators Petitioner's jury found proven beyond a reasonable doubt, how many jurors found which particular aggravators sufficient for death, or how the jurors conducted the weighing process (particularly given the uncertainty about what specific aggravators each juror considered in the first place).

Indeed, this problem of tapping into a Florida advisory jury's collective psyche was apparent long before *Hurst*. As Justice Pariente noted in 2009, in reviewing the recommendations of the Committee on Standard Jury Instructions:

> The jury makes no findings of fact as to the existence of aggravating or mitigating circumstances, nor what weight should be given to them, when making its sentencing recommendation. The jury is not required to unanimously find a particular aggravating circumstance exists beyond a reasonable doubt. It makes the recommendation by majority vote, and it is possible that none of the jurors agreed that a particular aggravating circumstance submitted to them was proven beyond a reasonable doubt. 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*. This places the Court in the position of not knowing which aggravating and mitigating circumstances the jury considered to be proved and provides little, if any, guidance in determining a sentence.

In re Standard Jury Instructions in Criminal Cases – Report No. 2005-2, 22 So. 3d 17, 26 (Fla. 2009) (Pariente, J., concurring) (emphasis added). Justice Pariente noted that, without this Court mandating the use of special verdicts, the "the trial judge [presently] does not know how the jury considered the various aggravating and mitigating circumstances," and that it would be "most helpful to the trial judge [in preparing the sentencing order] to know how the jury viewed the evidence presented in the penalty phase," for this would "provide valuable assistance in deciding the weight to be given to each circumstance." *Id.* at 24. In that 2009 case, this Court declined to mandate special verdicts. And no special verdict was used in Petitioner's penalty phase, conducted years earlier. His jury's reasoning is therefore opaque.

This uncertainty as to what the advisory jury would have decided if tasked with making the critical findings of fact takes on additional significance in light of the principles articulated in the United States Supreme Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell*, the Court held that a capital sentence is invalid if it was imposed by a jury that believed that the ultimate responsibility for determining the appropriateness of a death sentence rested elsewhere and not with the jury. *Id.* at 328-29. The Supreme Court explained that it "has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its truly awesome responsibility." *Id.* at 341 (internal

quotation omitted). The jurors in *Caldwell* were informed of their diminished sentencing responsibility by the prosecutor, who assured them during his summation that their decision would be automatically reviewed by an appellate court. The Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere." *Id.* at 328-29. The *Caldwell* holding applies equally here, where the jury was informed that its recommendation was only something for the court to consider in making the determination as to the appropriateness of a death sentence.

Shortly after Petitioner was sentenced to death, this Court recognized that "research establishes that many Florida capital jurors do not understand their role and responsibilities when deciding whether to impose a death sentence." *In re Standard Jury Instructions*, 22 So. 3d at 19 (citing ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report* (2006)). As Justice Pariente noted in concurrence, "[t]he role of the jury during the penalty phase under the Florida death penalty scheme has always been confusing," and, "absent a recommendation for life, the jury recommendation is essentially meaningless to the trial judge." *Id.* at 26 (Pariente, J., concurring) (internal quotations omitted). Yeas ago, the Eleventh Circuit recognized that "the concerns voiced in *Caldwell* are triggered when a Florida sentencing jury is misled

into believing that its role is unimportant," and that "[u]nder such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decision maker that has been misled as to the nature of its responsibility." *Mann v. Dugger*, 844 F.2d 1446, 1454-55 (11th Cir. 1988).

Petitioner's jury was led to believe that its role in sentencing was diminished when the Court instructed it that "the final decision as to what punishment shall be imposed rests solely with the judge . . . . [h]owever, it's 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 imposition of the death penalty and whether sufficient aggravating circumstances exist to outweigh any mitigating circumstances found to exist." 8 TR at 350 (emphasis added). The court emphasized that the jury's finding and weighing of the aggravating and mitigating circumstances was solely for the purpose of its decision whether to "*recommend* a death sentence be imposed rather than a sentence of life in prison without the possibility of parole," and further clarified that "it is not necessary that the advisory sentence of the jury be unanimous." *Id.* at 358-59 (emphasis added). It was with these instructions in mind, which informed Petitioner's jury "that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere," *id.* at 328-29, that the jurors rendered a unanimous recommendation to impose the death penalty.

The constitutional error in *Hurst* cases requires a different *Caldwell* analysis than was undertaken in *Combs v. State*, 525 So. 2d 853, 856 (Fla. 1998), where this Court ruled that *Caldwell* had not been violated by jury instructions that failed to inform the jury that its advisory recommendation would carry significant weight in the court's sentencing decision. In *Combs*, this Court distinguished the Mississippi capital sentencing scheme at issue in *Caldwell* on the ground that "the Florida procedure does not empower the jury with the final sentencing decision; rather, the trial judge imposes sentence." *Id*. at 856. That distinction is no longer true in light of the *Hurst* decisions. Under the *Hurst* decisions, Florida juries are now solely responsible for finding all of the elements required to impose a death sentence. It cannot be assumed, therefore, what Petitioner's jury would have found as to all of the required elements if the jury was advised of its proper role. And of course, a jury properly advised of its role could have found all of the requirements for imposing the death penalty satisfied, but nonetheless recommended a life sentence. *Hurst v. State*, 202 So. 3d at 57 ("[W]e do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.").

Given the jury's belief that it was not ultimately responsible for the imposition of Petitioner's death sentence, this Court cannot even be certain, to the exclusion of all reasonable doubt, that the jury would have made the same unanimous

recommendation without the *Hurst* error. In light of the principles articulated in *Caldwell*, this Court therefore also cannot be certain, to the exclusion of all reasonable doubt, that the jury would have unanimously found all of the other required elements satisfied. And, of course, the Court cannot be sure that the jury would have declined to exercise its discretion to unanimously recommend a life sentence after itself making the findings on the other required elements.

Moreover, the jury's consideration of the mitigation in Petitioner's case may have been significantly impacted by the jury's knowledge that it was not ultimately responsible for the sentence. In a constitutional proceeding, where the jury was properly apprised of its role as fact-finder, the jury may have afforded greater weight to the mitigation in Petitioner's case. As such, it cannot be concluded that a jury would have unanimously found or rejected any specific mitigators in a constitutional proceeding. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about jury's vote). In *Hurst v. State*, this Court emphasized that mitigation is an important consideration in assessing harmless error. 202 So. 3d at 68-69 ("Because we do not have an interrogatory verdict commemorating the findings of the jury . . . we cannot find beyond a reasonable doubt that no rational jury, as trier of fact, would determine that the mitigation was 'sufficiently substantial' to call for a life sentence.").

In Petitioner's case, the court found the following mitigation: (1) Petitioner entered a plea of guilty to murder without asking for any plea bargain or other favor in exchange; (2) Petitioner fully accepted responsibility for his actions and blamed nobody else; (3) Petitioner 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) Petitioner 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) Petitioner 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) Petitioner has a good jail record while awaiting trial with not a single incident or discipline report; (7) Petitioner has consistently shown a great deal of remorse for his actions; (8) Petitioner has suffered most of his adult life with an addiction problem to crack cocaine which was the basis of his criminal actions; (9) Petitioner has a good family and a good family support system that could help him contribute to an open prison population; (10) Petitioner testified he would try to counsel other inmates to take different paths than he has taken should he be given a life sentence; (11) as a child, Petitioner suffered a major trauma in his life by the crib death of a sibling; (12) as a child, Petitioner suffered another major trauma in his life by being sexually molested by a neighbor; (13) Petitioner has a lengthy history of substance abuse (marijuana and Quaaludes) during early teen

years, graduating to alcohol and cocaine and substance abuse treatment beginning about age 14 or 15; (14) Petitioner's biological father passed away before Petitioner developed any lasting memories of him; (15) Petitioner was raised by his mother, whom he always considered loving, thoughtful and concerned, and by a stepfather he later came to respect; (16) Petitioner was under emotional duress during the time frame of the crime; (17) Petitioner does not suffer a mental illness or major emotional disorder; (18) Petitioner offered to release his personal property, including his truck, to his girlfriend; and (19) Petitioner previously contributed to state prison facilities as a plumber and in wastewater treatment work. 8 ROA at 16-32.

Given this mitigation, the State cannot show that there is no reasonable probability that at least some jurors in a constitutional proceeding, having been properly advised of their role as ultimate fact-finder in deciding whether to sentence Petitioner to death, would have decided that the death penalty should not be imposed.

For those reasons, the jury's unanimous recommendation in Petitioner's case is insufficient to reliably conclude that the jury would have unanimously found all of the required elements satisfied in a constitutional proceeding.

C. The jury's unanimous recommendation does not account for the possibility that defense counsel's approach to diminishing the weight of the aggravating factors and presenting mitigation would have been different in a constitutional proceeding

The jury's unanimous recommendation in Petitioner's case also does not account for the possibility that defense counsel's approach to diminishing the weight

of the aggravating factors and presenting mitigation at the penalty phase would have been different had counsel known that the jury, not the judge, would be required to unanimously agree on each of the elements required to impose the death penalty.

The impact of the unconstitutional scheme may have begun as early as jury selection for the penalty phase. Counsel may have conducted his questioning of prospective jurors differently had he known that only one juror needed to be convinced, as to only one of the required elements, in order for Petitioner to avoid a death sentence. During the penalty phase itself, defense counsel's approach may have been different had the jury, rather than the judge, been required to unanimously find that each specific aggravating factor had been proven beyond a reasonable doubt. Indeed, in a constitutional proceeding, defense counsel may have successfully diminished or eliminated some aggravators.

Defense counsel's approach may also have been different had the jury, as opposed to the judge, been required to unanimously make the "sufficiency" and "insufficiency" findings regarding the aggravating factors. In addition, counsel's approach to the mitigation may have differed had he known that the jury would render the findings regarding the weight of aggravation and mitigation. Counsel's thinking also may have been altered had he known 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. Counsel may have given different advice to Petitioner, and the decision-making in the case may have been different.

Given those and other uncertainties about the *Hurst* error's impact on counsel's strategy or diminishing the aggravating factors and presentation of the mitigation at the penalty phase, the jury's unanimous recommendation does not allow this Court to reliably conclude that the jury would have unanimously made all of the required findings of fact in a constitutional proceeding. In this regard, as noted in Section IV(G), *infra*, an evidentiary hearing may be necessary to establish how defense counsel's approach may have been different in a post-*Hurst* penalty phase.

D. The unanimous recommendation does not account for the possibility that the court may have exercised its discretion to impose a life sentence if the court was bound by the jury's findings on each of the elements, rather than the court's own findings

The jury's unanimous recommendation also does not account for the possibility that the sentencing court may have exercised its discretion to impose a life sentence if the court had been bound by the *jury's* findings on each of the elements required for a death sentence, rather than the *court's own* findings on those elements. *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."); Fla. Stat. § 921.141(3)(2) (revised Florida capital sentence statute providing that, even if the jury recommends death, "the court, after considering each aggravating factor found by the jury and all

the mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury."). The *Hurst* decisions have fundamentally altered the source of information upon which judges are required to determine whether to impose a life sentence as a matter of discretion.

Before *Hurst*, judges first rendered findings on each of the elements required to impose a death sentence, and if the court found those requirements for the death penalty were satisfied, the judge then decided, based on his own findings, whether to impose a death sentence or life sentence. That is what occurred in Petitioner's case: the judge made findings and then, based on those findings, decided that a death sentence was warranted. However, after the *Hurst* decisions, *juries* now make the underlying findings on the elements required to impose a death sentence. If the jury finds that the requirements for the death penalty are satisfied, the judge still decides whether to sentence the defendant to death or exercise his or her discretion to impose a life sentence, but now *based on the jury's findings*. Thus, it is unknown whether Petitioner's judge would have exercised his discretion to impose a life sentence in the same way if he was bound by the jury's underlying findings, rather than his own.

For example, the jury's findings in a proceeding that complied with *Hurst* may have yielded a lesser number of aggravators than the judge's findings, which may have led the judge to decide that a life sentence was appropriate. The jury's findings

in a constitutional proceeding may have also yielded different "sufficiency" and "insufficiency" determinations than those made by Petitioner's judge. And the jury may have made different findings regarding the relative weight of the aggravators or mitigators. Whereas Petitioner's judge was bound only by his own findings on those elements in determining whether to exercise his discretion to impose a life sentence, the judge in a constitutional proceeding that complied with *Hurst* would be required to exercise his discretion in the context of the jury's findings, not his own. The jury's unanimous recommendation thus does not allow this Court to reliably conclude that there is no reasonable probability that the judge would have imposed a life sentence if bound by the jury's findings rather than his own findings.

E. To the extent the State may argue that the *Hurst* error is rendered harmless by the fact that Petitioner's aggravators were based on contemporaneous and prior felony convictions, this Court has rejected the idea that a judge's finding of such aggravators is relevant in the harmless error context

To the extent the State may argue that the *Hurst* error is rendered harmless by the fact that, among the aggravators applied to Petitioner, were those based on contemporaneous and prior felony convictions, this Court has rejected the idea that a judge's finding of such aggravators is relevant in the harmless-error analysis of *Hurst* claims, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g.*, *Franklin v. State*, 2016 WL 6901498, at *6 (Fla. Nov. 23, 2016) (rejecting "the State's contention that Franklin's prior convictions for other violent felonies

insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*."); *McGirth v. State*, 2017 WL 372095, at *2 (Fla. Jan. 26, 2017) (contemporaneous felony); *Mosley*, 2016 WL 7406506, at *3 (contemporaneous felony); *Armstrong v. State*, 2017 WL 224428, at *1 (Fla. Jan. 19, 2017) (prior violent felony); *Calloway v. State*, 2017 WL 372058, at *9 (Fla. Jan. 26, 2017) (prior violent felony); *Durousseau v. State*, 2017 WL 411331, at *6 (Fla. Jan. 31, 2017) (prior violent felony); *Simmons v. State*, 207 So. 3d 860, 861 (Fla. 2016) (prior violent felony). Notably, this Court found the *Hurst* error *not* harmless in *Mosley* despite the fact that the judge in that case had found a contemporaneous felony aggravator. *Mosley*, 2016 WL 7406506, at *3. The same reasoning should apply in Petitioner's case.

F. This Court should abandon any suggestion in some prior cases that an advisory jury's unanimous recommendation is a factor to consider in *Hurst* harmless error analysis because such reliance violates the United States Constitution

As noted in Section IV(A), *supra*, this Court can hold that the *Hurst* error in Petitioner's case was not harmless beyond a reasonable doubt without contradicting any of its decisions in other unanimous-recommendation cases. First, *Hurst* claims require individualized harmless error review, and the burden is on the State to prove in each particular case that the *Hurst* error did not impact the sentence. Second, while this Court has ruled *Hurst* errors harmless in some unanimous-recommendation cases, the Court has also indicated that a unanimous jury recommendation is not by itself dispositive of the harmless error analysis. Third, in

light of the individual circumstances of this case, and the instructions to the jury, the Court may hold that Petitioner's *Hurst* error was not harmless beyond a reasonable doubt without contradicting any of its rulings in other cases.

That being said, although it is not necessary for resolving the harmless error inquiry in Petitioner's favor, there are important reasons, grounded in federal constitutional law, that this Court should altogether abandon the reliance it has previously placed on the advisory jury's unanimous recommendation.[8]

As previously explained in Section IV(B), *supra*, this Court cannot reliably infer from the unanimous jury *recommendation* in a particular case that that the same jury would have unanimously found that each of the required *elements* for a death sentence were satisfied in a constitutional proceeding, particularly in light of *Caldwell*'s holding about the impact of a jury's belief that its death-sentencing role is minimized, i.e., that jurors do not have the ultimate responsibility for deciding life or death. The jury's unanimous recommendation also does not account for the possibility that defense counsel's approach to the penalty phase may have been different in a constitutional proceeding, or that the court may have decided to impose a life sentence if bound by jury findings, rather than its own. But in addition to those

[8] *See Davis v. State*, 207 So.3d 142 (Fla. 2016); *King*, 2017 WL 372081, at *17; *Hall*, 2017 WL 526509, at *22-23; *Kaczmar v. State*, No. SC13-2247, 2017 WL 410214 (Fla. Jan. 31, 2017); *Knight v. State*, No. SC14-1775, 2017 WL 411329 (Fla. Jan. 31, 2017); *Truehill v. State*, No. SC14-1514, 2017 WL 727167 (Fla. Feb. 23, 2017); *Jones*, 2017 WL 823600, at *16.

previously-discussed considerations, reliance on advisory jury recommendations in conducting *Hurst* harmless error analysis violates the United States Constitution.

Under the Sixth Amendment, any reliance on the jury's recommendation is problematic in light of *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993). In *Sullivan*, the Supreme Court emphasized that "[h]armless-error review looks, we have said, to the basis on which the jury *actually rested* its verdict." *Id.* at 279 (emphasis in original) (internal quotation marks omitted). In Petitioner's and other pre-*Hurst* Florida cases, there was no constitutionally valid jury verdict on the critical findings of fact required to impose a death sentence. *Sullivan* requires that, before a reviewing court may apply harmless error analysis, there must be a valid jury verdict, grounded in the proof-beyond-a-reasonable-doubt standard.

Although *Sullivan* addressed a jury verdict as to guilt, the logic of *Sullivan* applies equally in the capital penalty-phase context:

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Id. at 279-80. In Petitioner's case too, any reliance on his advisory jury's unanimous recommendation would be a violation of the Sixth Amendment.

Reliance upon an advisory jury's unanimous recommendation also runs afoul of the Fourteenth Amendment. The Due Process Clause requires that, in all criminal prosecutions, the State must prove each element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). This requirement attaches to any factual finding necessitated by the Sixth Amendment. In *Sullivan*, the Supreme Court observed that "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. "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt . . . . In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Id.* This requirement is clearly incorporated into the *Hurst* line of cases, beginning with *Apprendi*, 530 U.S. at 476 ("[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, *and proved beyond a reasonable doubt*.") (emphasis added). Any reliance upon the jury recommendation requires the underpinnings of the recommendation to be made beyond a reasonable doubt. Because Florida's pre-*Hurst* jury determinations, including the unanimous advisory recommendation in Petitioner's case, did not incorporate the beyond-a-reasonable-doubt standard, it would violate due process to rely on them.

G. Although the record is sufficient for this Court to rule that the *Hurst* error in Petitioner's case was *not* harmless, further evidentiary proceedings should precede any ruling that the error here *was* harmless beyond a reasonable doubt

Although the record is sufficient for this Court to rule that the *Hurst* error in Petitioner's case was *not* harmless, further evidentiary proceedings should precede any ruling by this Court that the error here *was* harmless beyond a reasonable doubt. As this Court made clear in *Hurst v. State*, courts should not base harmlessness determinations on speculation. *See* 202 So. 3d at 69. If, for example, it can be established today that one or more of the aggravators considered by the jury and judge were invalid, *Hurst* relief is appropriate.

Accordingly, if this Court has doubts as to whether the *Hurst* error in Petitioner's case played any role in Petitioner's being sentenced to death, Petitioner respectfully requests a remand to the circuit court for evidentiary proceedings at which the effect of the *Hurst* error can be developed, particularly as it relates to the unconstitutional statute's effect on defense counsel's strategy, challenges to the aggravation, and presentation of mitigation.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court vacate his death sentence in light of *Hurst v. Florida* and *Hurst v. State*.

Respectfully submitted,

/s/ Billy H. Nolas
Billy H. Nolas
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough Street #4200
Tallahassee, FL 32301
billy_nolas@fd.org
Florida Bar No. 00806821

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2017, the foregoing was served via the e-portal to Assistant Attorney General Robert J. Morris III, counsel for Respondent, at robert.morris@myfloridalegal.com and capapp@myfloridalegal.com.

/s/ Billy H. Nolas
Billy H. Nolas

CERTIFICATE OF COMPLIANCE

I hereby certify that this computer-generated petition for a writ of habeas corpus is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.100(I).

/s/ Billy H. Nolas
Billy H. Nolas

EXHIBIT 4

Petitioner's Rehearing Motion (May 25, 2017)

Filing # 56912991 E-Filed 05/25/2017 10:30:58 AM

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

JESSE GUARDADO,

Petitioner,

v. **No. SC17-389**

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

Respondent.
_____/

RECEIVED, 05/25/2017 10:33:29 AM, Clerk, Supreme Court

MOTION FOR REHEARING AND CLARIFICATION

Petitioner, through counsel, moves for rehearing and clarification of this Court's May 11, 2017 opinion denying his petition for a writ of habeas corpus under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The Court's decision was objectively unreasonable as a matter of federal law, and should also be reconsidered in light of state law. Rehearing is warranted because the Court overlooked and misapprehended points of fact and law establishing the harmful impact of the *Hurst* error on Petitioner's sentencing. Clarification is also appropriate concerning significant arguments in the petition that the Court's decision did not expressly address. *See* Fla. R. App. P. 9.300(a).

I. The Court correctly agreed that Petitioner's death sentence is unconstitutional under the retroactive decisions in *Hurst v. Florida* and *Hurst v. State* but incorrectly denied relief under the harmless error doctrine

As an initial matter, this Court correctly agreed in its May 11 opinion that Petitioner's death sentence is unconstitutional under both *Hurst v. Florida* and *Hurst v. State*, and that those decisions apply retroactively to his case. *Guardado v. Jones*, SC17-389, 2017 WL 1954984, at *2 (Fla. May 11, 2017) ("We agree with Guardado that *Hurst* is applicable in his case.") (citing *Mosely v. State*, 209 So.3d 1248 (Fla. 2016)). The applicability of *Hurst* to Petitioner is based on settled law, particularly in light of the United States Supreme Court's recent denial of the State's petition for a writ of certiorari to review this Court's decision in *Hurst v. State*. *See Florida v. Hurst*, No. 16-998, 2017 WL 635999 (May 22, 2017) (denying writ of certiorari).

The sole basis for this Court's denial of *Hurst* relief in this case was this Court's interpretation of the harmless error doctrine. *Id.* ("However, because we find that the *Hurst* error in this case is harmless beyond a reasonable doubt, we deny Guardado's petition."). For the reasons below, the Court's application of the harmless error doctrine in denying Petitioner's *Hurst* claim was objectively unreasonable under federal law, misapprehended points of fact and law establishing the harmful impact of the *Hurst* error on Petitioner's sentencing, and failed to clarify

the reasons for rejecting significant arguments presented in the habeas petition. Rehearing and clarification are therefore appropriate. *See* Fla. R. App. P. 9.300(a).[1]

II. In applying the harmless error doctrine to Petitioner's *Hurst* claim, this Court rendered a decision that was objectively unreasonable as a matter of federal law because *Hurst* errors are "structural" and therefore not subject to harmless error review

In applying the harmless error doctrine to Petitioner's *Hurst* claim, this Court's May 11 decision was objectively unreasonable because *Hurst* errors are "structural" and therefore not subject to the kind of harmless error review conducted by this Court in its decision denying relief. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991) (distinguishing 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."). This Court's contrary holding in *Hurst v.* State, 202 So. 3d at 67—that *Hurst* errors *are* subject to harmless error review—should be overruled.

[1] "Objective unreasonableness" is the standard against which the federal habeas courts will measure this Court's disposition of Petitioner's *Hurst* claim on harmless error grounds, if this Court does not grant rehearing. *See Mitchell v. Esparza*, 540 U.S. 12, 17-18 (2003). Because, as explained below, this Court's decision was objectively unreasonable, Petitioner should receive relief from the federal courts in subsequent proceedings under 28 U.S.C. § 2254. Petitioner urges that this Court grant relief now in order to avoid needless delay.

In *Hurst v. Florida*, the United States Supreme Court did not rule that harmless error review actually applies to *Hurst* claims, observing that it "normally leaves it to state courts to consider whether an error is harmless." 136 S. Ct. at 624 (citing *Neder v. United States*, 527 U.S. 1, 25 (1999). This Court should have concluded that *Hurst* errors are not capable of harmless error review. That is because the Sixth Amendment error identified in *Hurst*—stripping the capital jury of its constitutional fact-finding role at the penalty phase—represents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante*, 499 U.S. at 310. *Hurst* errors are structural because they "infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993). In other words, *Hurst* errors "deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist. *Neder*, 527 U.S. at 1.

The structural nature of *Hurst* claims is further underscored by what the late 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* made clear that Florida's statute did not allow for a jury verdict on the necessary elements for a death sentence that was compatible with the Sixth Amendment, "the entire premise of

[harmless error] review is simply absent." *Id.* at 280. Harmless error analysis would require this Court to determine in the first instance "not whether, in a trial that occurred without the error, a [jury fact-finding of sufficient aggravating circumstances] would surely have been rendered, but whether the [death sentence] actually rendered in [original] trial was surely unattributable to the error." *Id.* There being no jury findings on the requisite aggravators, it is not possible to review whether such findings would have occurred absent the *Hurst* error. In such cases:

> There 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 the aggravating circumstances] beyond a reasonable doubt—not that the jury's actual finding of guilty [of the aggravators] 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 this Court "to hypothesize a [jury's finding of aggravating circumstances] 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.* at 280.

Accordingly, this Court should grant rehearing, hold that *Hurst* errors are "structural" and therefore not subject to harmless error review, and vacate Petitioner's death sentence, which the Court has already acknowledged was obtained in violation of the United States Constitution.

However, as explained in the remainder of this motion, even if this Court maintains the view that harmless error review applies to Petitioner's *Hurst* claim, the May 11 decision still constitutes an objectively unreasonable application of clearly established federal law.

III. Even if harmless error review applies, the Court's decision was objectively unreasonable because the Court denied *Hurst* relief by inferring from the jury's unanimous recommendation that the jury necessarily conducted unanimous fact-finding as to each of the underlying requirements for a death sentence

In ruling that the *Hurst* error at Petitioner's sentencing was harmless, the Court unreasonably inferred from the jury's unanimous recommendation that the jury must have also conducted underlying unanimous fact-finding—within the meaning of the Sixth Amendment—as to each of the requirements for a death sentence under Florida law, such that a death sentence would have inevitably resulted even without the *Hurst* error. *See Guardado*, 2017 WL 1954984, at *2 ("[T]he jury unanimously found all of the necessary facts for the imposition of [a] death sentence[] by virtue of its unanimous recommendation[.]") (internal quotation marks omitted) (quoting *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016)). This inference by the Court was flawed. It constituted an objectively unreasonable application of law as well as an objectively unreasonable determination of the facts. After all, Petitioner's jury made only a *recommendation* to impose the death penalty, without making any findings of fact as to any of the elements required for a death

sentence under Florida law. As Petitioner noted in his habeas petition, the jury's verdict stated only:

> WE, THE JURY, advise and recommend to the Court as follows, as to the offense of Murder in the First Degree:
>
> 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.

2 ROA at 298. The verdict form did not contain any findings of fact or specify the basis for the jury's recommendation.

In *Hurst v. State*, this 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 aggravators are together "sufficient" to impose the death penalty; and (3) whether those specific aggravators together outweigh the mitigation. *Hurst v. State*, 202 So. 3d at 53-59. The Court also clarified that the jury's unanimous findings on the necessary elements must precede the jury's vote to make an overall recommendation for death. *Id.* at 57 ("[B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.").

Thus, even in cases like Petitioner'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 the other requisite elements for a death sentence. Petitioner's jurors may have reached a unanimous overall recommendation to impose the death penalty, but there is nothing in the record that reveals recommendation's basis, nor does the record show *any* jury findings of fact. There remains a reasonable probability that individual jurors, or sub-groups of jurors, based their overall recommendation for death on a different underlying calculus. The jurors may not have all agreed on which aggravating factors applied to Petitioner. Certain jurors may not have agreed that a specific set of aggravating factors considered by other jurors was sufficient for the death penalty or outweighed the mitigation. Accordingly, it cannot be said that all jurors agreed as to each of the necessary findings for the imposition of the death penalty under Florida law.[2]

[2] Justice Quince correctly noted this fatal problem with the majority's reasoning in her dissent in this and other cases. *See Guardado*, 2017 WL 1954984, at *2 (Quince, J., dissenting) ("I cannot agree with the majority's finding that the Hurst error was harmless beyond a reasonable doubt. As I've stated previously, [b]ecause 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.") (internal quotations omitted); *see also Hall v. State*, 212 So.3d 1001, 1036–37 (Fla. 2017) (Quince, J., concurring in part and dissenting in part); *Truehill v. State*, 211 So.3d 930, 961 (Fla. 2017) (Quince, J., concurring in part and dissenting in part).

Moreover, the Court cannot be certain that Petitioner's jury would have declined to exercise its discretion to recommend a life sentence after itself making the findings of fact on the other required elements, as it would have been entitled to do under Florida law. *See* Fla. Stat. § 921.141(3)(2) (revised Florida capital sentence statute providing that, even if the jury recommends death, "the court, after considering each aggravating factor found by the jury and all the mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury."). In the harmless error context, it cannot be assumed that the jury's exercise of its discretion to recommend a life sentence would have been the same in a post-*Hurst* proceeding.

This Court itself has noted such an analytic problem in numerous other cases where the jury's recommendation was not unanimous, but the Court has unreasonably declined to apply the same logic in cases where the jury's recommendation was unanimous. In *Hurst v. State*, where the jury rendered a non-unanimous recommendation, the Court stated that engaging in speculation about the jury's fact-finding "would be contrary to our clear precedent governing harmless error review." 202 So. 3d at 69; *see also Mosley*, 2016 WL 7406506, at *26. That same reasoning holds true in cases such as Petitioner's where there was a unanimous recommendation. Indeed, on its face, the reasoning this Court supplied in declining

to speculate about the jury's fact-finding in *Hurst v. State* applies equally to Petitioner's unanimous jury recommendation:

> Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

202 So. 3d at 68. Here too, this Court cannot determine what aggravators Petitioner's jury found proven beyond a reasonable doubt, how many jurors found which particular aggravators sufficient for death, or how the jurors conducted the weighing process (particularly given the uncertainty about which specific aggravators each juror or various sub-groups of jurors considered in the first place). For purposes of the harmless error doctrine, there is simply no way to divine from the advisory jury's general recommendation whether the jurors would have found all of the necessary facts for a death sentence in a constitutional proceeding.

IV. The Court denied *Hurst* relief in an objectively unreasonable manner under the harmless error doctrine because the Court ignored the harmful impact of the *Hurst* error arising from the jury's belief about its role in sentencing and the substantial mitigation in the case

In addition to erroneously inferring fact-finding from the jury's unanimous recommendation, the Court's refusal to grant Petitioner *Hurst* relief based on the harmless error doctrine unreasonably ignored the impact of the jury's belief about its role in determining the ultimate sentence and the substantial mitigation in this

case. The uncertainty as to what a jury would have decided in a constitutional proceeding where the jury, and not the judge, was tasked with making the findings of fact necessary to impose the death penalty, takes on particular significance in light of the principles articulated by the United States Supreme Court in *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This Court's May 11 opinion unreasonably omitted any consideration or discussion of Petitioner's arguments regarding the interplay between *Caldwell* and *Hurst* in the harmless error context.

In *Caldwell*, the Supreme Court held that a capital sentence is invalid if it was imposed by a jury that believed that the ultimate responsibility for determining the appropriateness of a death sentence rested elsewhere and not with the jury. *Id.* at 328-29. The Court explained that it "has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its truly awesome responsibility." *Id.* at 341 (internal quotation omitted). The jurors in *Caldwell* were informed of their diminished sentencing responsibility by the prosecutor, who assured them during his summation that their decision would be automatically reviewed by an appellate court. The Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere." *Id.* at 328-29. The *Caldwell* holding

applies equally in the *Hurst* harmless error context, where Florida juries were informed that their recommendations were only something for the courts to consider in making their own determination as to the appropriateness of a death sentence.

The juror confusion generated by Florida's unconstitutional statute is well-documented. This Court itself recognized, shortly after Petitioner was sentenced, that "research establishes that many Florida capital jurors do not understand their role and responsibilities when deciding whether to impose a death sentence." *In re Standard Jury Instructions*, 22 So. 3d at 19 (citing ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report* (2006)). Justice Pariente noted that "[t]he role of the jury during the penalty phase under the Florida death penalty scheme has always been confusing," and, "absent a recommendation for life, the jury recommendation is essentially meaningless to the trial judge." *Id.* at 26 (Pariente, J., concurring) (internal quotations omitted). The Eleventh Circuit has also recognized that "the concerns voiced in *Caldwell* are triggered when a Florida sentencing jury is misled into believing that its role is unimportant," and that "[u]nder such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decision maker that has been misled as to the nature of its responsibility." *Mann v. Dugger*, 844 F.2d 1446, 1454-55 (11th Cir. 1988).

Here, Petitioner's jury was led to believe that its role in sentencing was diminished when the trial court instructed it that "the final decision as to what punishment shall be imposed rests solely with the judge . . . . [h]owever, it's 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 imposition of the death penalty and whether sufficient aggravating circumstances exist to outweigh any mitigating circumstances found to exist." 8 TR at 350 (emphasis added). The court emphasized that the jury's finding and weighing of the aggravating and mitigating circumstances was solely for the purpose of its decision whether to "*recommend* a death sentence be imposed rather than a sentence of life in prison without the possibility of parole," and further clarified that "it is not necessary that the advisory sentence of the jury be unanimous." *Id.* at 358-59 (emphasis added). It was with those instructions in mind, which informed Petitioner's jury "that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere," *id.* at 328-29, that the jurors rendered a unanimous recommendation to impose the death penalty.

In light of the jury's belief that it was not ultimately responsible for Petitioner's death sentence, the conclusory harmless error analysis in this Court's May 11 opinion, which relies entirely on the jury's unanimous recommendation, is not reasonable under the circumstances. Here, in light of the impact of the

"advisory" instructions to the jury, this Court cannot even be certain that the jury would have made the same unanimous *recommendation* without the *Hurst* error. Given the principles articulated in *Caldwell*, this Court also cannot be sure that the jury would have found all of the other elements for a death sentence satisfied. And, critically, the Court cannot be sure that Petitioner would have received a death sentence. *See Rose v. Clark*, 478 U.S. 570, 578 (1986) (recognizing that an "error is harmless if, beyond a reasonable doubt, it did not contribute to the verdict obtained") (emphasis in original) (internal quotation marks and citation omitted).

Without the *Hurst* error, where the jury was properly apprised of its role as fact-finder, there is a reasonable likelihood that the jury would have afforded greater weight to the mitigation in Petitioner's case. As such, it cannot be concluded that a jury would have unanimously found or rejected any specific mitigators in a constitutional proceeding. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about jury's vote). In *Hurst v. State*, this Court emphasized that mitigation is an important consideration in assessing harmless error. 202 So. 3d at 68-69 ("Because we do not have an interrogatory verdict commemorating the findings of the jury . . . we cannot find beyond a reasonable doubt that no rational jury, as trier of fact, would determine that the mitigation was 'sufficiently substantial' to call for a life sentence.").

In this context, proper judicial review would have measured the impact of the unconstitutional jury scheme and instructions on the jury's consideration of mitigation against the standard articulated by the in *Boyde v. California*, 494 U.S. 370 (1990). In *Boyde*, the Supreme Court explained that the proper standard is whether there is a "reasonable likelihood" that the jury was impeded from consideration of constitutionally relevant evidence. *Id.* at 380. The "reasonable likelihood" standard, the Court explained, "better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical 'reasonable' juror could or would have interpreted the instruction." *Id.* After all, "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Id.* at 381.

The extensive mitigation in Petitioner's case suggests a reasonable likelihood that a jury in a constitutional proceeding, where it was properly apprised of its role as fact-finder in determining whether a death sentence would be imposed, may not have agreed that each of the elements for a death sentence was satisfied. The trial court found the following mitigation had been established: (1) Petitioner entered a plea of guilty to murder without asking for any plea bargain or other favor in exchange; (2) Petitioner fully accepted responsibility for his actions and blamed nobody else; (3) Petitioner 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) Petitioner 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) Petitioner 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) Petitioner has a good jail record while awaiting trial with not a single incident or discipline report; (7) Petitioner has consistently shown a great deal of remorse for his actions; (8) Petitioner has suffered most of his adult life with an addiction problem to crack cocaine which was the basis of his criminal actions; (9) Petitioner has a good family and a good family support system that could help him contribute to an open prison population; (10) Petitioner testified he would try to counsel other inmates to take different paths than he has taken should he be given a life sentence; (11) as a child, Petitioner suffered a major trauma in his life by the crib death of a sibling; (12) as a child, Petitioner suffered another major trauma in his life by being sexually molested by a neighbor; (13) Petitioner has a lengthy history of substance abuse (marijuana and Quaaludes) during early teen years, graduating to alcohol and cocaine and substance abuse treatment beginning about age 14 or 15; (14) Petitioner's biological father passed away before Petitioner developed any lasting memories of him; (15) Petitioner was raised by his mother, whom he always considered loving, thoughtful and concerned, and by a stepfather

he later came to respect; (16) Petitioner was under emotional duress during the time frame of the crime; (17) Petitioner does not suffer a mental illness or major emotional disorder; (18) Petitioner offered to release his personal property, including his truck, to his girlfriend; and (19) Petitioner previously contributed to state prison facilities as a plumber and in wastewater treatment. 8 ROA at 16-32.

If the fact-finding at Petitioner's penalty phase had been conducted by a jury that understood its constitutional role in sentencing, the above mitigation may well have been found to be weightier than the aggravation. Because there is a reasonable likelihood that the jury's consideration of the evidence was "impermissibly inhibited" by the unconstitutional statute, *see Boyde*, 494 U.S. at 380, a reasonable Court would not have found the *Hurst* error harmless in Petitioner's case.

V. The Court denied *Hurst* relief in an objectively unreasonable manner under the harmless error doctrine by ignoring the harmful impact of the *Hurst* error arising from the likelihood that defense counsel's approach to diminishing the weight of the aggravating factors and presenting mitigation would have been different in a constitutional proceeding

This Court's refusal to grant Petitioner *Hurst* relief based on the harmless error doctrine also unreasonably ignored the likelihood that defense counsel's approach to diminishing the weight of the aggravating factors and presenting mitigation would have been different in a constitutional proceeding. This Court's May 11 opinion unreasonably omitted any discussion of Petitioner's arguments regarding the impact of the unconstitutional statute on defense counsel's strategy and advice to Petitioner,

and unreasonably failed to address the possibility that counsel's strategic decisions and advice may have resulted in a different outcome in a constitutional proceeding.

The impact of the unconstitutional scheme on Petitioner's sentence may have begun as early as jury selection for the penalty phase. Defense counsel would have questioned prospective jurors differently had he known that only one juror needed to be convinced, as to only one of the required elements, in order for Petitioner to avoid a death sentence. During the penalty phase itself, defense counsel's approach would have been different had the jury, rather than the judge, been required to unanimously find that each specific aggravating factor had been proven beyond a reasonable doubt. Indeed, in a constitutional proceeding, defense counsel would have sought to diminish or eliminate some aggravators.

Defense counsel's approach may also have been different had the jury, as opposed to the judge, been required to unanimously make the "sufficiency" and "insufficiency" findings regarding the aggravating factors. In addition, counsel's approach to the mitigation would have differed had he known that the jury would render the findings regarding the weight of aggravation and mitigation. Counsel's thinking also may have been altered had he known 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. And, counsel surely would have given different advice to Petitioner, and the decision-making in the case may have

been different. All of this stands against a harmless error ruling without at least remanding the matter to afford Petitioner an evidentiary hearing in the trial court, where the effect of the error on counsel could be addressed.

VI. The Court denied *Hurst* relief in an objectively unreasonable manner under the harmless error doctrine by ignoring the harmful impact of the *Hurst* error arising from the possibility that the trial judge may have exercised its discretion to impose a life sentence if the judge was bound by the jury's findings on each of the elements, rather than the judge's own findings

The Court's refusal to grant Petitioner *Hurst* relief based on the harmless error doctrine also unreasonably ignored the possibility that the trial judge may have exercised its discretion to impose a life sentence if the judge was bound by the jury's findings on each of the elements, rather than the judge's own findings. This Court's May 11 opinion unreasonably omitted any discussion of Petitioner's arguments regarding the discretion afforded to trial judges to impose a life sentence and the likelihood that the *Hurst* error may have impacted the exercise of that discretion.

As Petitioner explained, the jury's unanimous recommendation does not account for the possibility that the sentencing court may have exercised its discretion to impose a life sentence if the court had been bound by the *jury's* findings on each of the elements required for a death sentence, rather than the *court's own* findings on those elements. This Court has emphasized that Florida judges maintained before *Hurst*, and continue to maintain after *Hurst*, absolute discretion to impose a life sentence even upon receiving a unanimous jury recommendation for death. *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."); Fla. Stat. § 921.141(3)(2) (revised Florida capital sentence statute providing that, even if the jury recommends death, "the court, after considering each aggravating factor found by the jury and all the mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury."). For harmless error analysis, it cannot be assumed that the judge would have exercised the discretion in the same manner if the judge was considering the *jury*'s fact-finding, rather than his own.

The *Hurst* decisions fundamentally altered the source of information upon which judges are required to determine whether to impose a life sentence as a matter of discretion. Before *Hurst*, judges first rendered findings on each of the elements required to impose a death sentence, and if the court found those requirements for the death penalty were satisfied, the judge then decided, based on his own findings, whether to impose a death sentence or life sentence. That is what occurred in Petitioner's case: the judge made findings and then, based on those findings, decided that a death sentence was warranted. However, after the *Hurst* decisions, *juries* now make the underlying findings on the elements required to impose a death sentence. If the jury finds that the requirements for the death penalty are satisfied, the judge

still decides whether to sentence the defendant to death or exercise his or her discretion to impose a life sentence, but now *based on the jury's findings*. Thus, it is unknown whether Petitioner's judge would have exercised his discretion to impose a life sentence in the same way if he was bound by the jury's underlying findings, rather than his own. Bound by the jury's findings of fact, the judge may well have decided that a life sentence was appropriate in Petitioner's case.

For example, the jury's findings in a proceeding that complied with *Hurst* may have yielded a lesser number of aggravators than the judge's findings, which may have led the judge to decide that a life sentence was appropriate. The jury's findings in a constitutional proceeding may have also yielded different "sufficiency" and "insufficiency" determinations than those made by Petitioner's judge. And the jury may have made different findings regarding the relative weight of the aggravators or mitigators. Whereas Petitioner's judge was bound only by his own findings on those elements in determining whether to exercise his discretion to impose a life sentence, the judge in a constitutional proceeding that complied with *Hurst* would be required to exercise his discretion in the context of the jury's findings, not his own. The jury's unanimous recommendation thus could not allow this Court to reliably conclude that there is no reasonable probability that the judge would have imposed a life sentence if bound by the jury's findings rather than his own findings.

VII. This Court's reliance on the advisory jury's recommendation in denying Petitioner *Hurst* relief on harmless error grounds constituted an objectively unreasonable application of clearly established federal law

This Court's reliance on the advisory jury's recommendation in denying Petitioner *Hurst* relief on harmless error grounds constituted an objectively unreasonable application of clearly established federal law. Under the Sixth Amendment, any reliance on the jury's recommendation in denying *Hurst* relief on harmless error grounds is problematic in light of *Sullivan*, 508 U.S. at 279-80. In *Sullivan*, the Supreme Court emphasized that "[h]armless-error review looks, we have said, to the basis on which the jury *actually rested* its verdict." *Id.* at 279 (emphasis in original) (internal quotation marks omitted). In Petitioner's and other pre-*Hurst* Florida cases, there was no constitutionally valid jury verdict on the findings of fact required to impose a death sentence. *Sullivan* requires that, before a reviewing court may apply harmless error analysis, there must be a valid jury verdict, grounded in the proof-beyond-a-reasonable-doubt standard.

Although *Sullivan* addressed a jury verdict as to guilt, the logic of *Sullivan* applies equally in the capital penalty-phase context:

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Id. at 279-80. In Petitioner's case too, this Court's reliance on his advisory jury's recommendation constituted a violation of the Sixth Amendment, and thus the May 11 decision represents an objectively unreasonable application of federal law.

This Court's reliance upon Petitioner's advisory jury's unanimous recommendation also ran afoul of the Fourteenth Amendment. The federal Due Process Clause requires that, in all criminal prosecutions, the State must prove each element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). This requirement attaches to any factual finding necessitated by the Sixth Amendment. In *Sullivan,* the Supreme Court observed that "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. "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt . . . . In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Id.* This requirement is clearly incorporated into the *Hurst* line of cases, beginning with *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) ("[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, *and proved beyond a reasonable doubt*.") (emphasis added). Any reliance

upon the jury recommendation requires the underpinnings of the recommendation to be made beyond a reasonable doubt.

Florida's pre-*Hurst* jury determinations, including the advisory recommendation in Petitioner's case, did not incorporate the beyond-a-reasonable-doubt standard. Indeed, federal judge Robert Hinkle has acknowledged in Petitioner's own case that *Hurst* is a "proof-beyond-a-reasonable-doubt decision." *Guardado v. Jones*, No. 4:15-cv-256, ECF No. 20 (N.D. Fla. May 27, 2016). Because the advisory jury's recommendation in Petitioner's case did not incorporate the beyond-a-reasonable-doubt standard, it was a violation of Petitioner's due process rights, and an objectively unreasonable application of federal law, for this Court to deny relief in reliance on the jury recommendation in denying *Hurst* relief.

VIII. Conclusion

Rehearing and clarification should be granted because this Court's May 11, 2017 opinion (1) was objectively unreasonable as a matter of state and federal law, and (2) overlooked, misapprehended, and failed to address material points fact and law establishing the harmful impact of the *Hurst* error on Petitioner's sentencing.

Respectfully submitted,

/s/ Billy H. Nolas
Billy H. Nolas
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough Street #4200
Tallahassee, FL 32301
billy_nolas@fd.org
Florida Bar No. 806821

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2017, the foregoing was served via the e-portal to Assistant Attorney General Lisa Hopkins, counsel for Respondent, at lisa.hopkins@myfloridalegal.com and capapp@myfloridalegal.com.

/s/ Billy H. Nolas
Billy H. Nolas

EXHIBIT 5

Sentencing Order (Oct. 13, 2005)

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR WALTON COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO. 04CF000903

STATE OF FLORIDA,

Plaintiff,

v.

JESSE GUARDADO,

OCT 12 2005

Defendant.
_____/

SENTENCING ORDER

The defendant previously pled guilty before the Court to both counts of the Indictment (Count I - *Murder in the First Degree*; Count II – *Robbery With a Weapon*). On September 12-15, 2005, a penalty phase jury convened and heard evidence in support of aggravating factors and mitigating factors. The defendant testified before the penalty phase jury. On September 15, 2005, the jury returned a unanimous twelve to zero (12-0) recommendation that the defendant be sentenced to death. On September 15, 2005, after the jury's advisory sentence, the defendant waived a Spencer[1] hearing and the Court then found the defendant's waiver to be voluntarily entered, but stressed to defendant that he would again be offered the opportunity to present additional mitigation before sentencing. On September 15, 2005, the Court requested that both counsel for the state and counsel for the defendant submit sentencing memoranda at least five days before the final sentencing; and the Court set final sentencing for September 30, 2005. The defense memorandum was received on September 20, 2005. The State's memorandum was received on September 27, 2005. In its sentencing memorandum, the State specifically requested a Spencer hearing despite defendant's purported waiver and the Court's colloquy related thereto. On September 30, 2005, over defendant's continued assertion of waiver, the Court held a Spencer hearing, received additional mitigation evidence, and set final sentencing for today, October 13, 2005. The Court allowed both sides three workdays to submit an addendum to their

[1] Spencer v. State, 615 So. 2d 688 (Fla. 1993). At a Spencer hearing, the defendant is allowed to present additional mitigating evidence to the trial judge. The State is also allowed to present additional evidence as to the aggravating factors presented to the advisory jury, but may not present new aggravating factors or evidence thereof. Both sides are also allowed additional argument.

1:19 pm 10-19-05

340

sentencing memorandum. Prior to adjournment of the Spencer hearing, the State announced on the record that it would not submit an addendum. The defendant did not submit an addendum within the time allowed. In that the case was not tried before a jury, the Court's determination of aggravating and mitigating factors is based solely upon the evidence presented at the penalty phase proceedings held September 12-15, 2005, and the Spencer hearing held on September 30, 2005. Having heard and considered the evidence and argument of counsel presented in the penalty phase proceedings and Spencer hearing, and having considered the sentencing memoranda, the Court finds as follows:

A. AGGRAVATING FACTORS

1. **The capital felony was committed by a person under sentence of imprisonment or on conditional release supervision.** See Section 921.141(5)(a), Florida Statutes. The defendant, JESSE GUARDADO, was previously sentenced to state prison for 20 years for the crime of *robbery with a deadly weapon* in Orange County, Florida, and to 15 and 20 years for the crimes of *robbery* and *robbery with a weapon* in Seminole County, Florida, running concurrent to the Orange County sentence. He was placed on conditional release supervision on January 1, 2003, related to the aforementioned cases. His conditional release supervision was due to expire on February 6, 2014, as established by State's Exhibit # 16, a Certificate of Conditional Release and Terms of Conditional Release for defendant, and by the testimony of Mr. Gilbert Fortner, a Florida Department of Corrections probation officer, who was assigned the defendant when arrested in this case. This homicide occurred on or about September 13, 2004. Thus, the defendant was under a sentence of imprisonment or on conditional release supervision when he committed this capital felony. This aggravating circumstance was proved beyond a reasonable doubt.

2. **The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.** See Section 921.141(5)(b), Florida Statutes. The evidence established that the defendant JESSE GUARDADO was previously convicted of the following crimes (listed by offense; date of conviction/sentence; case number; county/state; and sentence):

(1) *Armed Robbery*, April 9, 1984, case 83-1608, Orange County, Florida, for which defendant was sentenced to state prison. (A certified copy of the conviction and sentence was admitted in evidence as State's Exhibit # 12).

(2) *Robbery With a Deadly Weapon*, July 6, 1990, case 89-5977, Orange County, Florida, for which defendant was sentenced as a habitual offender to state prison, concurrent with cases 89-5977 and 89-2454-CFA. (A certified copy of the conviction and sentence was admitted in evidence as State's Exhibit # 15).

(3) *Robbery*, January 23, 1991, case 89-2454-CFA, Seminole County, Florida, for which defendant was sentenced to state prison, concurrent with case 89-5977. (A certified copy of the conviction and sentence was admitted in evidence as State's Exhibit # 13).

(4) *Robbery With a Weapon*, January 23, 1991, case 89-2496-CFA, Seminole County, Florida, for which defendant was sentenced to state prison, concurrent with cases 89-5977 and 89-2454-CFA. (A certified copy of the conviction and sentence was admitted in evidence as State's Exhibit # 14).

(5) *Attempted Robbery With a Deadly Weapon*, case 04CF000920, Walton County, Florida, to which defendant pled guilty and was sentenced on February 17, 2005, as a violent career criminal, to state prison for 40 years. The evidence shows that defendant confessed to this crime committed on or about September 13, 2004 (in the evening, shortly before the murder in the instant case). DeFuniak Springs Police Officer Derek Walters testified that, while on duty on September 13, 2004, he responded to a dispatch call at about 7:28 p.m. to an attempted robbery at the local Winn-Dixie grocery store and met with the victim Mr. James Brown in his investigation of the incident. Mr. James Brown, the victim, testified before the penalty phase jury that while he was working as an employee at the local Winn-Dixie store in DeFuniak Springs, Florida, and while kneeling down in one of the aisles while stocking shelves, a person (who he did not get a good look at) approached him from behind, placed a knife to his throat, and demanded his wallet before running from the scene after he (Mr. Brown) yelled. During the penalty phase proceedings, the prosecutor read to the jury the defendant's stipulation that he was convicted of this crime of *attempted robbery with a deadly weapon*. The Court also takes judicial notice of this prior conviction for purpose of consideration of the sentence to be imposed for this crime.

These five prior convictions for *armed robbery*, *robbery with a deadly weapon*, *robbery*, *robbery with a weapon*, and *attempted robbery with a deadly weapon*, are felonies involving the use or threat of violence to another person. This aggravating circumstance was proved beyond a reasonable doubt.

3. **The capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, or escape after committing a robbery with a weapon.** See Section 921.141(5)(d), Florida Statutes. The defendant JESSE GUARDADO was charged and, upon his plea of guilty on October 19, 2004, in the instant case to Count 2, convicted of committing a *robbery with a weapon* on Ms. Jackie Malone, the victim of this homicide. The evidence shows that the defendant stole from Ms. Malone's residence, property belonging to the victim, including a jewelry box, a brief case, a cellular telephone, and purse which contained cash and a check book with checks. The defendant also admitted in his own testimony in the penalty phase that he robbed Ms. Malone of said personal property at the time that he committed the murder. The capital felony was committed, therefore, while the defendant was engaged in the commission of a robbery with a weapon. This aggravating circumstance was proved beyond a reasonable doubt.

4. **The capital felony was especially heinous, atrocious, or cruel ("HAC").** See Section 921.141(5)(h), Florida Statutes. The evidence shows the following. The defendant JESSE GUARDADO personally knew Ms. Jackie Malone, the 75-year old victim, since on or about 2003. The defendant had been a guest in the Ms. Malone's home (including a few overnight stays when he was in between rentals), had on numerous occasions received assistance from the victim (including financial assistance and help in finding a job -- including the job he held with the Niceville waste water treatment plant at the time of this crime). The defendant had rented places of residence from Ms. Malone (who was a realtor and property manager). The defendant, based on his prior relationship with Ms. Malone, knew that the victim kept some money on hand, including in her wallet. The defendant, in need of money to fix his truck and to obtain crack cocaine for his personal use and recent crack cocaine binging, decided to go to the Ms. Malone's house (located in a remote or secluded area of Walton County, Florida) in the middle of the night (the night of September 13/14, 2005), armed with two weapons (a metal "breaker bar" and a kitchen knife) (State's Exhibits # 3 & 4). Defendant, using his girlfriend's car, drove to the Ms. Malone's home. Ms. Malone had gone to bed for the night. When defendant arrived at Ms. Malone's home, he repeatedly knocked on the door to awaken her and then identified himself by name when she came to the door. Ms. Malone, in her night clothes, opened the front door and greeted the defendant at which time he lied to her that he needed to use her telephone. As Ms. Malone turned away from defendant to allow him to enter the house, the defendant then pulled the "breaker bar" from his pants behind his back and struck Ms. Malone with repeated brutal blows about her head. Ms. Malone raised her hands in defense of the blows. She then fell to the living room floor. Ms. Malone did not die from the repeated blows from the breaker bar, so the defendant then pulled the kitchen knife he had on his person and brutally stabbed her and slashed her throat. The defendant, in his audio and video taped confession to law enforcement investigators (State's Exhibits # 8 and 9, respectively), stated to the effect that he hit Ms. Malone on the head with the breaker bar and thought that would have killed her, but it did not, so he hit her repeatedly. Defendant stated that Ms. Malone fell to the floor behind the couch but it just seemed that she was not going to die, so he tried to stab her with a knife, including to the heart, so it would have been over; but it just seemed not to go that way, she would not die. Defendant further stated that during his earlier days in incarceration at Marianna, he had a job cutting beef, so he knew how to slash across the throat. The defendant further stated that he had hit Ms. Malone repeatedly because she had put her hands up. After beating and stabbing Ms. Malone, the defendant then proceeded to her bedroom where he looked through her belongings for money and valuables, and took her jewelry box, briefcase, purse, and cell phone. Dr. Andrea Minyard, a forensic pathologist and the Chief Medical Examiner for the First District (covering Walton County, Florida), testified that, based upon her review of the autopsy report and the autopsy photographs of Ms. Malone, the victim had suffered injuries including (1) multiple (at least twelve) abrasions, contusions and lacerations of the skin on the head, neck and face, (2) bruising under the surface of the scalp, (3) a subarachnoid hemorrhage, (4) at least two incised wounds on the neck, (5) five stab wounds to the chest, (6) a fracture of the finger, and (7) incised wounds to the right hand. Dr. Minyard identified injuries to Ms. Malone as

depicted in twelve photographs of the victim's body at time of the autopsy (State's Exhibits #11a-*l*). The evidence established beyond a reasonable doubt that Ms. Malone was conscious at least through the time that the defendant inflicted the stab wound to her heart. The medical examiner testified, that in her opinion (1) the victim's injuries were consistent with having been inflicted by an instrument such as the breaker bar (State's Exhibit 3), and the incised wounds and stab wounds by the kitchen knife (State's Exhibit 4); (2) the fracture to the victim's finger was consistent with the victim attempting to fend off the defendant's repeated blows with the breaker bar; and (3) the incised wound to the victim's right hand in the webbing between her index and middle fingers was most consistent with the victim attempting to fend off her attacker by reaching or grabbing for the knife as the defendant repeatedly stabbed her; that it was a textbook example of a victim grabbing at a knife. The medical examiner also testified that the knife wound inflicted to the victim's throat was "pre-mortem", in other words it was not fatal and the victim was still alive after the wound as evidenced by her continuing to breathe in some blood, and therefore, it was inflicted before the fatal stab wound to the heart. The medical examiner further opined that the fatal wound to the victim was the stab to her heart which resulted in filling of the pericardial sac with blood, thereby preventing the heart from beating normally, and which would have rendered the victim unconscious from a few seconds to a couple of minutes for the time to fill up the pericardial sac. The medical examiner opined that the victim experienced a painful death from the defendant's attack. In conclusion, this murder was indeed a conscienceless, pitiless crime, which was unnecessarily torturous to the victim. The evidence establishes beyond a reasonable doubt that the defendant administered a savage attack on Ms. Malone first by repeated blows about her head and limbs with a metal bar, which she tried to fend off and sustained a finger fracture; that the defendant then observed Ms. Malone still alive and lying on the floor despite that flurry of blows; that the defendant then mindful of his previous prison job slaughtering cattle, took out a kitchen knife that he brought with him and twice slashed Ms. Malone's throat and stabbed her (including the fatal stab to her heart) while she grabbed for the knife further trying to fend off or fight her attacker. The defendant admitted the facts concerning the crime. The evidence fully supports and corroborates his admissions. This aggravating circumstance that the capital felony was especially heinous, atrocious, or cruel was proved beyond a reasonable doubt.

5. **The crime for which the defendant is to be sentenced was committed in a cold and calculated and premeditated manner, without any pretense of moral or legal justification. ("CCP").** See Section 921.141(5)(i), Florida Statutes. The defendant JESSE GUARDADO, looking to get high and continue his recent crack cocaine binge and desperate for money for drugs, first went to a local grocery store in the early evening of September 13, 2004, and committed an attempted robbery with a knife against a store employee but was left with no money because the employee-victim thwarted defendant's actions to get his wallet. Later that evening/night, the defendant calmly arranged to drive his girlfriend's vehicle to work (for night shift). The defendant knew that he maintained a change of work clothes in his girlfriend's

car given the nature of his work, and in particular, for this evening/night because the landfall of a hurricane was due to arrive in the next couple days and he had prepared changes of clothing should storm damages require him to remain at work in the days following the hurricane. (Walton County Sheriff's Investigator Lorenz testified that Hurricane Ivan made landfall or struck in the area in the late evening or morning hours of September 15/16.) The defendant drove to the parking lot at Wal-Mart in DeFuniak Springs, where he obtained (from his disabled truck parked there) the kitchen knife, to carry along with the breaker bar already in his possession and that he planned to use to kill Ms. Malone. The defendant confessed that he chose Ms. Malone to murder and rob at night because of the secluded location of her home and because she would open her home to him, even in the dark of the night, because of their prior trusting relationship. During his confession, the defendant admitted that he "knew what he was going to do", or words to that effect, when he drove to the Ms. Malone's home. Also, when asked by Walton County Sheriff's Investigator Roy if he planned to kill Ms. Malone, the defendant answered to the effect, "yes, and get the money". In his testimony during the penalty phase proceedings before the jury, the defendant made no attempt to claim that his decision to kill the victim was not the product of calm and cool reflection; he also made no claim that he was in a frenzied state of mind or rage or that his decision to kill was impromptu, spontaneous, or instantaneous at the time he began the robbery of Ms. Malone. Dr. James Larson, the defense's forensic psychologist, testified before the advisory jury that the defendant was not suffering from any extreme mental or emotional disturbance at the time of the murder and he did not offer any evidence to rebut that the murder was the product of calm and cool reflection. Finally, the defendant made no claim of moral or legal justification. As Investigator Lorenz testified before the advisory jury, during the course of his initial meeting with defendant and while seated in the back seat of the investigators' vehicle, the defendant made a spontaneous statement to him, to the effect that "That lady didn't deserve what I did to her". In his confession and his testimony before the advisory jury, the defendant stated the same and admitted that he had made such spontaneous statement to the law enforcement investigator. This aggravating circumstance was proved beyond a reasonable doubt.

6. None of the other aggravating factors enumerated by statute are found applicable to this case and this Court has not considered them. Nothing except as previously indicated in paragraphs 1-5 above was considered in aggravation.

B. MITIGATING FACTORS

Statutory Mitigating Factors

In his sentencing memorandum, the defendant requested the court to consider the following statutory mitigating circumstances:

None. The Court finds no statutory mitigating factors.

Nonstatutory Mitigating Factors

In his sentencing memorandum, the defendant has asked the Court to find the following nonstatutory mitigating factors:

(1) The defendant entered a plea of guilty to the charge of first degree murder without asking for any plea bargain or other favor in exchange.

(2) The defendant has fully accepted responsibility for his actions and blames nobody else for this crime.

(3) The defendant pursuant to expert testimony is not a psychopath and in Dr. Larson's opinion would not be a danger to other inmates or correctional officers should he be given a life sentence.

(4) The defendant could contribute to an open prison population and work as a plumber or as an expert in waste water treatment plant operations should he be given a life sentence.

(5) The defendant fully cooperated with law enforcement to quickly resolve this case to the point of helping law enforcement recover evidence to be used against him in the trial.

(6) The defendant has a good jail record while awaiting trial with not a single incident or discipline report.

(7) The defendant has consistently shown a great deal of remorse for his actions.

(8) The defendant has suffered most of his adult life with an addiction problem to crack cocaine, which was the basis of his criminal actions.

(9) The defendant has a good family and a good family support system that could help him contribute to an open prison population.

(10) The defendant testified that he would try to counsel other inmates to take different paths than what he has taken should he be given a life sentence.

At the Spencer hearing, defense counsel offered in additional mitigation the defense expert witness Dr. James D. Larson's written psychological evaluation of the defendant. Based upon a review and consideration of said evaluation/report, the Court finds the following additional nonstatutory mitigating factors:

(11) As a child, the defendant suffered a major trauma in his life by the crib death of a sibling.

346

(12) As a child, the defendant suffered another major trauma in his life by being sexually molested by a neighbor.

(13) The defendant has a lengthy history of substance abuse (with marijuana and quaaludes) beginning in his early teenage years and graduating to alcohol and cocaine use; and substance abuse treatment beginning about age 14 or 15.

(14) The defendant's biological father passed away before defendant developed any lasting memories of him.

(15) The defendant was raised by his mother, who he has always considered loving, thoughtful and concerned; and by a stepfather, who he later came to respect, having realized his discord with his family in his teen years was mainly over his substance abuse.

(16) The defendant was under emotional duress during the time frame of this crime.

(17) The defendant does not suffer a mental illness or major emotional disorder.

In its Sentencing memorandum, the State suggested that the Court find a number of nonstatutory mitigating factors (some of which are already addressed above as presented by the defense), including two additional factors listed here, which the Court so finds.

(18) The defendant offered to release his personal property, including truck, to his girlfriend.

(19) The defendant previously contributed to state prison facilities as a plumber and in waste water treatment work.

The following discussion, findings and weight given as to each nonstatutory mitigating factor is set forth below.

(1) The defendant entered a plea of guilty to the charge of first degree murder without asking for any plea bargain or other favor in exchange. One of the investigators assigned to the case, Investigator James Lorenz, a 20-year veteran with the Walton County Sheriff's Office, testified before the advisory jury that the defendant confessed without asking for a plea bargain or other favor in exchange therefore and that he wanted to plead guilty to first degree murder and get the matter over with as quickly as possible. The defendant also testified to same. The evidence otherwise establishes that the defendant did so. The Court has given this factor great weight.

(2) The defendant has fully accepted responsibility for his actions and blames nobody else for this crime. & (7) The defendant has consistently shown a great deal of remorse for his actions. The evidence shows that the defendant appears to be truly remorseful for what he has done. This is evident by the fact that he gave a voluntary confession. His audio and video recorded confession displays much remorse. The defendant expressed in his testimony before the advisory jury that next to his mother, Ms. Malone was probably the best person he had ever met in his life; and he expressed a sincere apology to her family. Dr. James Larson, the defense's psychologist, testified before the advisory jury that the defendant made numerous expressions of genuine remorse to Dr. Larson himself during his interviews for evaluation, during law enforcement interviews based upon records Dr. Larson had reviewed for purposes of the evaluation, and based upon certain results from his MMPI-2 testing of the defendant. The Court does find and recognize that the evidence shows that law enforcement authorities had already developed the defendant as a suspect when they first met with him and at which time he agreed to cooperate. In any event, the defendant's remorse, his voluntary confession, and his guilty plea avoiding the necessity for a guilt phase trial are recognized mitigating circumstances. The Court has given factor (2) great weight and factor (7) great weight.

(3) The defendant pursuant to expert testimony is not a psychopath and in Dr. Larson's opinion would not be a danger to other inmates or correctional officers should he be given a life sentence. Dr. James Larson evaluated the defendant in preparation of the defense case for mitigation. Dr. Larson testified that, in his opinion, the defendant is absolutely not a psychopath. Dr. Larson testified that on the Hare Psychopath Inventory (a testing instrument to look at the "worst of the worst", in other words, those persons who show no remorse and who do not take responsibility for their crimes) the defendant scored in the average range of inmates and he did not score high in any way. In response to questioning as to whether defendant would be a risk to others in prison, Dr. Larson further opined that he would expect the defendant to adjust well to prison given he already had spent about twenty years of his adult life in prison without incident and he suffers from no mental illness. The Court has given this factor moderate weight.

(4) The defendant could contribute to an open prison population and work as a plumber or as an expert in waste water treatment plant operations should he be given a life sentence. The evidence shows that the defendant is well trained, educated, and skilled as a professional in plumbing and in waste water treatment operations. The defendant testified before the advisory jury that while incarcerated he worked as a 24-hour on-call plumber and could handle any plumbing job required in a department of corrections' facility; that while incarcerated he became trained, educated and Florida certified in waste water treatment; and that during his release on conditional release supervision he first worked as the lead operator (including responsibility for reports to the state's Department of Environmental Protection) at the waste water treatment facility with the City of DeFuniak Springs and then later at the waste water treatment plant for the City of Niceville. The defendant's mother, in her letter admitted in

evidence before the advisory jury as Defendant's Exhibit # 2, states in relevant part, that her son is an intelligent, responsible person and was given recognition awards for handling well his waste water job, that he dealt with the many pressures of the job (including handling many serious problems on his own when his backup person was inaccessible), and that he was the person who kept the water in town safe. The court has given this factor little weight.

(5) The defendant fully cooperated with law enforcement to quickly resolve this case to the point of helping law enforcement recover evidence to be used against him in the trial. The evidence shows that law enforcement authorities had already developed the defendant as a suspect when he was first questioned and that he agreed to cooperate with them from that first meeting. In any event, the evidence, including Walton County Sheriff's Investigator Lorenz's testimony and defendant's own testimony before the advisory jury, showed that the defendant immediately cooperated with law enforcement, beginning with his expressing a desire to talk to the investigators, his meeting shortly thereafter with investigators to search his disabled truck at Wal-mart's parking lot, subsequently his confession as earlier noted with respect to the nonstatutory mitigating factor (1) above, and then through law enforcement's search efforts resulting in the eventual recovery of the two murder weapons. The Court has given this factor great weight.

(6) The defendant has a good jail record while awaiting trial with not a single incident or discipline report. The evidence shows that the defendant has displayed good conduct in jail while awaiting the penalty phase proceedings in the instant case. Defendant's Exhibit # 1 is a Walton County Sheriff's Office letter dated September 13, 2005, documenting that that defendant has had no disciplinary or jail incident reports during his incarceration. The Court has given this factor little weight.

(8) The defendant has suffered most of his adult life with an addiction problem to crack cocaine, which was the basis of his criminal actions. The evidence, including his report to Dr. James Larson as part of his psychological evaluation in the instant case, shows that the defendant has suffered from drug abuse beginning in his early teenage years and in his adult life (albeit that he was incarcerated in prison for most of his adult life), and that he abused alcohol and drugs shortly after his release from prison to conditional release supervision in January 2001, and that he particularly abused crack cocaine in the weeks or months preceding this murder. Substance abuse is a mitigating circumstance. Drug addiction is a disease and is recognized as a mitigating circumstance. The Court has given this factor some weight.

(9) The defendant has a good family and a good family support system that could help him contribute to an open prison population. The evidence shows that the defendant has a good family and a good family support system that could help him contribute to an open prison population. His mother's support is clearly evident through her letter admitted in evidence to the advisory jury. The defendant in his own testimony before the advisory jury clearly expressed his love and caring for his mother and stepfather (who have now been married about 32-33 years) as

he looked and spoke toward his family members seated in the courtroom. The defendant further testified that his family especially supported him through these times. He also testified about and visibly expressed great fondness for his three natural brothers (who work in heavy construction and other construction, and aircraft mechanics), a stepsister (retired from emergency room nursing) and a stepbrother (a respiratory therapist), all of whom he mentioned by name. The Court has given this factor moderate weight.

(10) The defendant testified that he would try to counsel other inmates to take different paths than what he has taken should he be given a life sentence. The defendant in his own testimony before the advisory jury expressed a sincere willingness to offer any guidance to other inmates to better themselves and to not make more wrong decisions as he has done. The Court has given this factor moderate weight.

(11) As a child, the defendant suffered a major trauma in his life by the crib death of a sibling. Dr. James Larson noted in his written evaluation that the defendant reported to him the infant sibling's death. The Court finds the defendant's loss of an infant sibling during his childhood to be a mitigating factor. The court has given this factor moderate weight.

(12) As a child, the defendant suffered another major trauma in his life by being sexually molested by a neighbor. Dr. James Larson noted in his written evaluation that the defendant reported to him the sexual abuse by a neighbor during his childhood. The Court finds the abuse suffered by defendant in his childhood to be a mitigating factor. The Court has given this factor moderate weight.

(13) The defendant has a lengthy history of substance abuse (with marijuana and quaaludes) beginning in his early teenage years and graduating to alcohol and cocaine use; and substance abuse treatment beginning about age 14 or 15. Dr. James Larson noted in his written evaluation and testified before the advisory jury that the defendant had a lengthy history of substance abuse and substance abuse treatment. The Court has given this factor little weight.

(14) The defendant's biological father passed away before defendant developed any lasting memories of him. Dr. James Larson noted in his written evaluation and the defendant himself testified before the advisory jury that his biological father had died when defendant was very young. The Court has given this factor little weight.

(15) The defendant was raised by his mother, who he has always considered loving, thoughtful and concerned; and by a stepfather, who he later came to respect, having realized his discord with his family in his teen years was mainly over his substance abuse. Dr. James Larson noted in his written evaluation and the defendant himself testified before the advisory jury that his mother and stepfather raised him, that he always considered his mother loving, thoughtful and concerned, that he later came to respect his stepfather and any difficulty or discord that he might have had with his family in his teen years mostly concerned his substance abuse. The court has given this factor little weight.

350

(16) The defendant was under emotional duress during the time frame of this crime. Dr. James Larson noted in his written evaluation that the defendant was under emotional duress during the time frame of this crime, and testified before the advisory jury that, in his opinion, he meant this in the sense that defendant had expressed that he was recently out of jail and so had economic problems, had difficulties adjusting to society, and was turning to old habits such as substance abuse. On cross-examination, Dr. Larson testified that his opinion in this regard *was not* that defendant was under any extreme mental or emotional duress; *was not* that defendant was under the domination of another person; and *was not* that defendant was substantially impaired. Rather his findings and opinion in this regard included that defendant did appreciate the criminality of his conduct and could conform his conduct to law, that defendant did know right from wrong, and that the defendant suffered no mental defect, no emotional disorder, and no organic brain damage. Dr. Larson also acknowledged on cross-examination that defendant was out of prison about 2-1/2 years at the time of this murder, and also that defendant was gainfully employed and had gone to work for the night after this crime. Finally, the evidence shows, including by defendant's own testimony, that he had the support of his mother, his girlfriend, and also the victim. The court has given this factor little weight.

(17) The defendant does not suffer a mental illness or major emotional disorder. Dr. James Larson noted in his written evaluation and testified before the advisory jury that, in his opinion, the defendant did not suffer a mental illness or major emotional disorder during the time frame of this crime. Dr. Larson testified that based upon his basic psychological, personality and intelligence (or cognitive) testing of defendant, he found that the defendant had no symptoms of a psychopath, his thought processes were well organized and thoughtful, he suffered some depression of course because of the circumstances of the offense, that he scored in the upper part of the average range of intelligence functioning, that his raw IQ score placed him in the 70th percentile, and his full scale IQ placed him in the 63rd percentile. As noted above as to factor (16), on cross-examination, Dr. Larson acknowledged that, in his opinion, the defendant suffered no mental defect, no emotional disorder, and no organic brain damage. The court has given this factor little weight.

(18) The defendant offered to release his personal property, including truck, to his girlfriend. In his testimony before the advisory jury, the defendant offered that he wanted his personal belongings, including his truck that had been left in the Wal-Mart parking lot, to go to his girlfriend. The court has given this factor little weight.

(19) The defendant previously contributed to state prison facilities as a plumber and in waste water treatment work. The evidence, through defendant's own testimony and through Dr. Larson's testimony before the advisory jury, clearly established that the defendant did plumbing work for about 18 of his years spent in incarceration; that he enjoyed such work immensely; that he contributed and was available "on-call" 24 hours a day for such work; that he could handle any plumbing job required in a department of corrections' facility; and that in his

later years of incarceration, through his own efforts to pick up the trade in waste water treatment, he contributed by handling work outside the prison confines where the those treatment plants were located. The court has given this factor little weight.

C. Summary of Findings.

The Court has given the jury's advisory sentence and recommendation great weight. The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that a human life is at stake. The Court finds, as did the jury, that the aggravating circumstances outweigh the mitigating circumstances.

Accordingly, it is:

ORDERED AND ADJUDGED that:

1. As to Count 1, the defendant, **JESSE GUARDADO**, is hereby sentenced to **DEATH** for the first-degree premeditated murder of the victim, Jackie Malone. The defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

2. As to Count 2, Robbery With a Weapon, a first-degree felony, the defendant **JESSE GUARDADO**, is hereby sentenced to state prison for thirty (30) years, consecutive to Count 1.

DONE AND ORDERED in County, Florida, this 13th day of October, 2005.

KELVIN C. WELLS
CIRCUIT JUDGE

Copies furnished in court to:
Assistant State Attorney
Counsel for Defendant
Defendant

352

EXHIBIT 6

Advisory Jury Recommendation (Sep. 16, 2005)

FILED
WALTON CO FLORIDA
CLERK OF COURTS

IN THE CIRCUIT COURT

IN AND FOR WALTON COUNTY, FLORIDA 2005 SEP 15 P 2:40

STATE OF FLORIDA,
Plaintiff,

vs. CLERK NUMBER: 6604CC000903A

JESSE GUARDADO,

Defendant.
_____/

VERDICT

WE, THE JURY, advise and recommend to the Court as follows, as to the offense of Murder in the First Degree:

_✓_ A. 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.

_____ B. The jury advises and recommend to the court that it impose a sentence of life imprisonment upon JESSE GUARDADO without possibility of parole.

SO SAY WE ALL, this _16th_ day of _September_, 2005.

Donna Johns
FOREPERSON

IDH
DM
9-15-05

298

EXHIBIT 7

Advisory Jury Instructions & Charge (Sep. 15, 2005)

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
IN AND FOR WALTON COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CLERK NO.: 6604CC000903A
DIVISION: FEL

JESSE GUARDADO

Defendant.
_____/

7.11 PENALTY PROCEEDINGS - CAPITAL CASES

1. Ladies and gentlemen of the jury, the defendant has entered a plea of guilty to Murder in the First Degree and Robbery With a Weapon. Consequently, you will not concern yourselves with the question of his guilt.

2. The punishment for Murder in the First Degree is either death or life imprisonment without the possibility of parole. 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 as to what punishment should be imposed upon the defendant.

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 crime 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 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

103
JM
9-15-05

284

imposition of the death penalty and whether sufficient aggravating circumstances exist to outweigh any mitigating circumstances found to exist.

Your advisory sentence should be based upon the evidence that has been presented to you in these proceedings.

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

1. The crime for which JESSE GUARDADO is to be sentenced was committed while he had been previously convicted of a felony and was under sentence of imprisonment, or was placed on conditional release.
2. The defendant has been previously convicted of a felony involving the use or threat of violence to some person. The crimes of Robbery and Attempted Robbery are felonies involving the use or threat of violence to another person;
3. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery.
4 The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

5. The crime for which the defendant is to be sentenced was committed in a cold and calculated and premeditated manner, and without any pretense of moral or legal justification.

"Cold" means the murder was the product of calm and cool reflection.

"Calculated" means having a careful plan or prearranged design to commit murder.

A killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating circumstance to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated, or premeditated nature of the murder.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole. Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether aggravating circumstances exist that outweigh the mitigating circumstances.

Among the mitigating circumstances you may consider, if established by the evidence, is:

a. Any aspect of the defendant's character, record, or background, and

b. Any circumstance of the offense.

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to disregard an aggravating circumstance if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating circumstance exists, or if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the aggravating circumstance has not been proved beyond a reasonable doubt and you should disregard it, because the doubt is reasonable.

It is to the evidence introduced in this proceeding, and to it alone, that you are to look for that proof.

A reasonable doubt as to the existence of an aggravating circumstance may arise from the evidence, conflicts in the evidence or the lack of evidence.

If you have a reasonable doubt as to the existence of an aggravating circumstance, you should find that it does not exist. However, if you have no reasonable doubt, you should find that the aggravating circumstance does exist and give it whatever weight you feel it should receive.

If one or more aggravating circumstances are established, you should consider all

the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

3.9 WEIGHING THE EVIDENCE

It is up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?
2. Did the witness seem to have an accurate memory?
3. Was the witness honest and straightforward in answering the attorneys' questions?
4. Did the witness have some interest in how the case should be decided?
5. Does the witness' testimony agree with the other testimony and other evidence in the case?
6. Was it proved that the witness had been convicted of a crime?

You may rely upon your own conclusion about the witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

3.9(a) EXPERT WITNESSES

Expert witnesses are like other witnesses, with one exception — the law permits an expert witness to give his or her opinion.

However, an expert's opinion is reliable only when given on a subject about which you believe him or her to be an expert.

Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

3.9(c) DEFENDANT TESTIFYING

The defendant in this case has become a witness. You should apply the same rules to consideration of his testimony that you apply to the testimony of the other witnesses.

3.9 (e) DEFENDANT'S STATEMENTS

A statement claimed to have been made by the defendant outside of Court has been placed before you. Such a statement should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made.

Therefore, you must determine from the evidence that the defendant's alleged statement was knowingly, voluntarily, and freely made.

In making this determination, you should consider the total circumstances, including but not limited to

1. whether, when the defendant made the statement, he had been threatened in order to get him to make it, and

2. whether anyone had promised him anything in order to get him to make it.

If you conclude the defendant's out of court statement was not freely and voluntarily made, you should disregard it.

3.10 RULES FOR DELIBERATION

These are some general rules that apply to your discussion. You must follow these rules in order to return a lawful verdict:

1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.
2. This case must be decided only upon the evidence that you have heard from the testimony of the witnesses and have seen in the form of the exhibits in evidence and these instructions.
3. This case must not be decided for or against anyone or because you are angry at anyone.
4. Remember, the lawyers are not on trial. Your feelings about them should not influence your decision in this case.
5. It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about his or her testimony.
6. Your verdict should not be influenced by feelings of prejudice, bias or sympathy. Your verdict must be based on the evidence, and on the law contained in these instructions.

VICTIM IMPACT EVIDENCE

You have heard evidence about the impact of this homicide on the family, friends, and community of Jackie Malone. This evidence may be considered by you to determine the victim's uniqueness as an individual human being and the resultant loss by Jackie Malone's death. However, the law does not allow you to weigh this evidence as an aggravating circumstance. Your recommendation to the Court must be based only on the aggravating circumstances and the mitigating circumstances upon which you have been instructed.

The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. If, after weighing the aggravating and mitigating circumstances, you determine that the aggravating factors found to exist sufficiently outweigh the mitigating factors, or, in the absence of mitigating factors, if you find that the aggravating factors alone are sufficient, you may exercise your option to recommend that a death sentence be imposed rather than a sentence of life in prison without the possibility of parole. However, regardless of your findings with respect to aggravating and mitigating circumstances you are never required to recommend a sentence of death.

The process of weighing aggravating and mitigating factors to determine the proper punishment is not a mechanical process. The law contemplates that different factors may be given different weight or values by different jurors. In your decision making process, you, and you alone, are to decide what weight is to be given to a particular factor.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgement in reaching your advisory sentence.

You will now retire to consider your recommendation as to the penalty to be imposed upon the defendant.

If a majority of the jury (seven or more) determine that JESSE GUARDADO should be sentenced to death, your advisory sentence will be:

A majority of the jury, by a vote of _____to _____, advise and recommend to the Court that it impose the death penalty upon JESSE GUARDADO.

On the other hand, if by six or more votes the jury determines that JESSE GUARDADO should not be sentenced to death, your advisory sentence will be:

The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon JESSE GUARDADO without possibility of parole.

When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreperson, dated with today's date and returned to the Court.

There is no set time for a jury to reach a verdict. Sometimes it only takes a few minutes. Other times it takes hours or even days. It all depends upon the complexity of the case, the issues involved and the make up of the individual jury. You should take sufficient time to fairly discuss the evidence and arrive at a well reasoned verdict.

3.11 CAUTIONARY INSTRUCTION

Deciding a verdict is exclusively your job. I cannot participate in that decision in any way. Please disregard anything I may have said or done that made you think I preferred one verdict over another.

both sides, then you have a vacillating or wavering opinion and then the correct decision is life; the State did not convince you beyond and to the exclusion of every reasonable doubt that these aggravating circumstances outweigh any mitigation you've heard. Justice will be served by your decision to recommend that this young man spend the rest of his life in prison. Justice will be served.

And he didn't try to make any light -- Maybe he could carry on the good things that Ms. Malone had accomplished in her life. He wasn't trying to be facetious about that; he meant that in a very sincere way. Perhaps there is maybe some way he can find a way to make a difference, a good difference. He won't get that chance to make a difference sitting on death row; he won't get that chance.

Ladies and gentlemen, justice will be served and you'll be doing your duty, as you heard the evidence, if you would recommend life in prison for Mr. Guardado. Thank you.

THE COURT: Thank you, Mr. Gontarek.

JURY CHARGE

Ladies and gentlemen, I thank you for your close

attention during this trial. I would ask that you give your close attention to these instructions.

The defendant in this case has entered a plea of guilty to murder in the first degree and robbery with a weapon. Consequently, you will not concern yourself with the question of his guilt.

The punishment for murder in the first degree is either death or life imprisonment without the possibility of parole. 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 as to what punishment should be imposed upon the defendant.

It is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree. As I told you, the final decision remains with the Judge. However, it's your duty to follow the law that now will 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 imposition of the death penalty and whether sufficient aggravating circumstances exist to outweigh any mitigating circumstances found to exist.

Your advisory sentence should be based upon the

evidence that has been presented to you in these proceedings. The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence. Number one: The crime for which Jesse Guardado is to be sentenced was committed while he had been previously convicted of a felony and was under sentence of imprisonment or was placed on conditional release. Number two: The defendant had been previously convicted of a felony involving the use or threat of violence to some person. The crimes of robbery and attempted robbery are felonies involving the use of threat or violence to another person. Number three: The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery. Number four: The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.

"Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime

was conscienceless or pitiless and was unnecessarily torturous to the victim.

Number five: The crime for which the defendant is to be sentenced was committed in a cold and calculated and premeditated manner and without any pretense of moral or legal justification.

"Cold "means the murder was the product of calm and cool reflection. "Calculated" means having a careful plan or prearranged design to commit murder. A killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing. However, in order for this aggravating circumstance to apply, a heightened level of premeditation demonstrated by a substantial period of reflection is required.

A "pretense of moral or legal justification" is any claim or justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated, or

premeditated nature of the murder.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole. Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether aggravating circumstances exist that outweigh the mitigating circumstances.

Among the mitigating circumstances you may consider, if established by the evidence, is any aspect of the defendant's character, record, or background and any circumstance of the offense.

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. A reasonable doubt is not a mere possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to disregard an aggravating circumstance if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you don't have an abiding conviction that the aggravating circumstances exist or, if having a conviction, it is one which is not stable, but one which wavers and

vacillates, then the aggravating circumstances have not been proven beyond a reasonable doubt and you should disregard it because the doubt is reasonable.

It is to the evidence introduced in this proceeding and to it alone that you are to look for that proof.

A reasonable doubt as to the existence of an aggravating circumstance might arise from the evidence, conflict in the evidence, or lack of evidence.

If you have a reasonable doubt as to the existence of an aggravating circumstance, you should find that it does not exist. However, if you have no reasonable doubt, you should find that the aggravating circumstance does exist and give it whatever weight you feel it should receive.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstance and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proven beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

Weighing the evidence. It's up to you to decide which evidence is reliable. You should use your common sense in deciding which is the best evidence and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable or less reliable than other evidence.

You should consider how the witnesses acted as well as what they said. Some of the things you should consider are as follows. Number one: Did the witness seem to have an opportunity to see and know the things about which the witness testified? Number two: Did the witness seem to have an accurate memory? Number three: Was the witness honest and straightforward in answering the attorneys' questions? Number four: Did the witness have some interest in how the case should be decided? Number five: Did the witness' testimony agree with the other testimony and other evidence in the case? Number six: Was it proven that the witness had been convicted of a crime?

You may rely upon your own conclusion about the witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

Expert witnesses are like other witnesses with one exception; the law permits an expert witness to give his or her opinion. However, an expert's opinion is

reliable only when given on a subject about which you believe him or her to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

The defendant in this case has become a witness. You should apply the same rules in considering his testimony that you would apply to the testimony of the other witnesses.

A statement claimed to have been made by the defendant outside of court has been placed before you. Such a statement should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made. Therefore, you must determine from the evidence that the defendant's alleged statement was knowingly, voluntarily, and freely made.

In making this determination, you should consider the total circumstances, including but not limited to one: Whether when the defendant made the statement, he had been threatened in order to get him to make it; and two: Whether anyone had promised him anything in order to get him to make it. If you conclude the defendant's out of court statement was not freely and voluntarily made, you should disregard it.

Rules for deliberation. These are some general

rules that apply to your discussion. You must follow these rules in order to return a lawful verdict. You must follow the law as it is set forth in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.

This case must be decided only upon the evidence that you have heard from the testimony of the witnesses and have seen in the form of the exhibits in evidence and these instructions.

This case must not be decided for or against anyone because you are angry at anyone.

Remember, the lawyers are not on trial. Your feelings about them should not influence your decision in this case.

It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about his or her testimony.

Your verdict should be -- Let me start over. Your verdict should not be influenced by feelings of prejudice, bias, or sympathy. Your verdict must be

based on the evidence and on the law contained in these instructions.

You have heard evidence about the impact of this homicide on the family, friends, and community of Jackie Malone. This evidence may be considered by you to determine the victim's uniqueness as an individual human being and the resultant loss by Jackie Malone's death. However, the law does not allow you to weigh this evidence as aggravating circumstances. Your recommendation to the Court must be based only on the aggravating circumstances and the mitigating circumstances upon which you've been instructed.

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. If, after weighing the aggravating and mitigating circumstances, you determine that the aggravating factors found to exist sufficiently outweigh the mitigating factors or, in the absence of mitigating factors, if you find that the aggravating factors alone are sufficient, you may exercise your option to recommend a death sentence to be imposed rather than a sentence of life in prison without the possibility of parole. However, regardless of your findings with respect to aggravating and mitigating circumstances, you are never required to

recommend a sentence of death.

The process of weighing aggravating and mitigating factors to determine the proper punishment is not a mechanical process. The law contemplates that different factors may be given different weights or values by different jurors. In your decision making process, you and you alone are to decide what weight is to be given to a particular factor.

In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous.

The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift, and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

If a majority of the jury -- seven or more -- determine that Jesse Guardado should be sentenced to death, your advisory sentence will be --

And we've prepared a verdict form for you. It reads: In the Circuit Court of the State of Florida. State of Florida versus Jesse Guardado. A case number.

We the jury advise and recommend to the Court as follows as to the offense of murder in the first degree. The first blank says: A majority of the jury, by a vote of -- and a majority would be seven or more or however many voted the other way -- advise and recommend to the Court that it impose the death penalty upon Jesse Guardado. The second blank: The jury advise and recommend to the Court that it impose a sentence of life imprisonment upon Jesse Guardado without the possibility of parole.

If you'll look at your verdict forms there, the last sentence is, So say we all. And today is the 15th day of September, 2005. It has a place for the foreperson to sign.

So, a majority of the jury, by a vote of seven or more, would be a vote to impose the death penalty. On the other hand, if by six or more votes the jury determines that Jesse Guardado should not be sentenced to death, your advisory sentence will be that: The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Jesse Guardado without the possibility of parole.

When you have reached an advisory sentence in conformity with these instructions, the form of verdict that I just read to you should be signed by your

foreperson, dated with today's date, and returned to the Court.

There is no set time for a jury to reach a verdict. Sometimes it only takes a few minutes; other times it takes hours or even days. It all depends upon the complexity of the case, the issues involved, and the make up of the individual jury. You should take sufficient time to fairly discuss the evidence and arrive at a well reasoned verdict.

Deciding a verdict is exclusively your job. I cannot participate in that decision in any way. Please disregard anything I may have said or done that makes you think I prefer one verdict over another.

Can I see the two attorneys for just a second?

(WHEREUPON, a bench conference took place off the record.)

Ladies and gentlemen, in a few minutes you'll be taken to the jury room by the bailiff. The first thing you should do is to elect a foreperson. The foreperson presides over your deliberations like the chairperson of a meeting. It is the foreperson's job to sign and date the verdict form when you have reached a decision. And the foreperson will bring the verdict form back to the courtroom when you return. Obviously, either a man or a woman can be a foreperson of the jury.

All right. You will, in a moment, retire to consider your recommendation as to the penalty to be imposed upon this defendant.

Gentlemen, was that the instructions that I said I would give?

MR. GONTAREK: Yes, Judge.

MR. ELMORE: Yes, Your Honor.

THE COURT: All right. And also, gentlemen, at this time, my notes indicate that Mr. Edwin Cuchens was Alternate Number one and Ms. Dottie Kitch was Alternate Number two. Is that correct?

MR. ELMORE: Yes, Your Honor.

MR. GONTAREK: Yes, Judge.

THE COURT: The good news for the two of you folks is you're going to be excused at this time. You were the alternate jurors. You're welcome to stick around and stay or you can leave. And you can call the clerk's office if you need an excuse; they'll be glad to give you that. And so I'd ask Mr. Cuchens and Ms. Kitch, if you'll step out? If you need to retrieve something from the jury room, you can do that.

And then once they leave the jury box, I will allow the remaining members of the jury to go back and