No. _____

In the
Supreme Court of the United States

STEVEN ANTHONY COZZIE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

"The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any trial." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). For instance, considering the Sixth Amendment right to jury trial in conjunction with the Due Process Clause requirement of proof beyond a reasonable doubt, structural error occurs when a jury fails to return a "verdict of guilty beyond a reasonable doubt" as to all elements of a simple criminal offense. *Sullivan v. Louisiana*, 508 U.S. 275, 277-82 (1993).

With that in mind, the Sixth Amendment right to jury trial "requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016). And the "Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (plurality opinion) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)), is violated when a jury is "affirmatively misled . . . regarding its role in the sentencing process so as to diminish its sense of responsibility," *Romano v. Oklahoma*, 512 U.S. 1, 10 (1994).

The question presented is:

Whether structural error occurs when, after having been affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility, a jury fails to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty.

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PETITION FOR A WRIT OF CERTIORARI

This case presents a fundamental question concerning the Sixth Amendment right to jury trial, the Due Process Clause requirement of proof beyond a reasonable doubt, and the Eighth Amendment need for a reliable capital sentencing determination: are these rights "basic constitutional guarantees that should define the framework of any" determination of death penalty eligibility, *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017)? This Court should grant review and address that fundamental question for the following compelling reasons.

First, contrary to the Florida Supreme Court's view, structural error occurs when, after having been affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility, a jury fails to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty. In those circumstances, the error is different in order of magnitude than a simple error occurring in the process of a trial. Instead, it amounts to a structural defect in the framework underlying the trial process. It undermines the core foundation on which the process of determining death eligibility depends.

Second, refusing to conclude that such an error is structural, and instead subjecting it to harmless error review, undermines multiple federal constitutional rights. Those rights include the Sixth Amendment right to jury trial, the Due Process Clause requirement of proof beyond a reasonable doubt, and the Eighth Amendment need for a reliable capital sentencing determination.

Third, the Florida Supreme Court's conclusion that the error below was not

structural conflicts with this Court's decision in *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Both there and here, error occurred when, to at least some degree, a jury failed to return a verdict of guilty beyond a reasonable doubt: there, the jury failed to return such a verdict as to all elements of a simple criminal offense, and here, the jury failed to return such a verdict as to multiple critical elements necessary to impose the death penalty. With that in mind, if the error in *Sullivan* always results in fundamental unfairness, then surely the error here does as well.

In addition, as in *Sullivan*, the effects of the error in the present case are simply too hard to measure. More specifically, with respect to multiple elements in both cases, the reviewing court could "only engage in pure speculation–its view of what a reasonable jury would have done." *Sullivan*, 508 U.S. at 281. And to the extent that the *quantity* of constitutionally insufficient findings are less in the present case then in *Sullivan*, the *quality* of the missing findings here–which concern critical elements necessary to impose the death penalty–weighs in favor of finding the error here structural. Further, unlike in *Sullivan*, the error here undermined the reliability of the process for determining eligibility for the death penalty. Thus, an additional rationale weighing in favor of finding the error structural, which did not exist there, exists here.

Fourth, the present case presents an ideal vehicle to clarify analytical tension in a critical area of this Court's structural error jurisprudence. That tension was first highlighted by Justice Scalia in his dissent in *Neder v. United States*. *See* 527 U.S. 1,

32-33 (1999) (Scalia, J., dissenting). More specifically, the present case offers this Court an opportunity to provide guidance as to whether, and if so, how, the *quality* and *quantity* (in absolute or proportionate terms) of constitutionally insufficient findings factor into a structural error analysis when, to at least some degree, a jury fails to return a verdict of guilty beyond a reasonable doubt.

Fifth, the question presented to this Court was properly presented to the Florida Supreme Court. In response, and consistent with its prior conclusion in *Hurst v. State*, 202 So.3d 40, 67 (Fla. 2016), the Florida Supreme Court simply subjected the error below to harmless error analysis. But ultimately, the Florida Supreme Court had a fair opportunity here to address whether structural error occurs when, after having been affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility, a jury fails to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty.

On that note, the Florida Supreme Court has repeatedly failed to address a crucial component of the question presented here. And three justices of this Court have recently highlighted that development. *See Truehill v. Florida*, 138 S. Ct. 3 (2017) (Sotomayor, J., joined by Ginsburg, J., and Breyer, J., dissenting from denial of certiorari). More specifically, the Florida Supreme Court has repeatedly failed to address whether, following this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), a jury instructed in accordance with Florida's pre-*Hurst* capital sentencing scheme (such as Steven Cozzie's jury here) is affirmatively misled regarding its role in

the sentencing process so as to diminish its sense of responsibility in violation of the Eighth Amendment.

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at 225 So.3d 717 and reproduced at App.1-41. The trial court's unpublished order denying Cozzie's motion to declare Florida's capital sentencing scheme unconstitutional is reproduced at App.42.

JURISDICTION

The Florida Supreme Court entered its judgment on May 11, 2017. A timely motion for rehearing was denied on August 31, 2017. App. 43. On November 28, 2017, Justice Thomas extended the time for filing the petition to and including January 28, 2018. Because January 28, 2018, is a Sunday, the petition is due on January 29, 2018. S. Ct. R. 30.1. The jurisdiction of this Court rests on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ."

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property

without due process of law."

STATEMENT OF THE CASE

A. Florida's Capital Sentencing Scheme

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court described the capital sentencing scheme under which Cozzie was sentenced to death.[1]

> First-degree murder is a capital felony in Florida. See Fla. Stat. § 782.04(1)(a) (2010). Under state law, the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment. § 775.082(1). "A person who has been convicted of a capital felony shall be punished by death" only if an additional sentencing proceeding "results in findings by the court that such person shall be punished by death." *Ibid.* "[O]therwise such person shall be punished by life imprisonment and shall be ineligible for parole." *Ibid.*
>
> The additional sentencing proceeding Florida employs is a "hybrid" proceeding "in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determinations." *Ring v. Arizona*, 536 U.S. 584, 608, n.6 . . . (2002). First, the sentencing judge conducts an evidentiary hearing before a jury. Fla. Stat. § 921.141(1) (2010). Next, the jury renders an "advisory sentence" of life or death without specifying the factual basis of its recommendation. § 921.141(2). "Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." § 921.141(3). If the court imposes death, it must "set forth in writing its findings upon which the sentence of death is based." *Ibid.* Although the judge must give the jury recommendation "great weight," *Tedder v. State* 322 So.2d 908, 910 (Fla. 1975) (*per*

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[1] In *Hurst*, this Court considered Florida's capital sentencing scheme as it existed in 2010. *Hurst* 136 S. Ct. at 620. Cozzie was sentenced to death under Florida's capital sentencing scheme as it existed in 2013. App.12-13. However, as relevant here, those two schemes were identical. *Compare* Fla. Stat. § 775.082(1) (2010) *and* Fla. Stat. § 921.141 (2010) *with* Fla. Stat. § 775.082(1) (2013) *and* Fla. Stat. § 921.141 (2013).

Since this Court's decision in *Hurst*, legislative changes have been made to Florida's capital sentencing scheme. *See* Act effective March 7, 2016, §§ 1, 3, 2016 Fla. Laws ch. 2016-13 (codified as amended at Fla. Stat. § 775.082(1) (2017) and Fla. Stat. § 921.141 (2017); Act effective March 13, 2017, §§ 1, 3, 2017 Fla. Laws ch. 2017-1 (codified as amended at Fla. Stat. § 775.082(1) (2017) and Fla. Stat. § 921.141 (2017). Unless otherwise stated, references in this petition to Florida's capital sentencing scheme refer to the scheme that was in existence prior to those changes, that was considered in *Hurst*, and under which Cozzie was sentenced to death.

> *curiam*), the sentencing order must "reflect the trial judge's independent judgment about the existence of aggravating factors and mitigating factors," *Blackwelder v. State*, 851 So.2d 650, 653 (Fla. 2003) (*per curiam*).

Hurst, 136 S. Ct. at 620.

B. Trial Court Proceedings

1. 21-year-old Cozzie killed 15-year-old Courtney Wilkes, who was vacationing in Florida with her parents and siblings, after the pair met on the beach and went for a walk alone. App.1-2. Florida charged Cozzie with first-degree murder; sexual battery with a deadly weapon; child abuse with great bodily harm; and kidnapping.

2. Before trial, Cozzie filed a motion arguing that Florida's capital sentencing scheme was

> unconstitutional . . . to the extent that it denies the fundamental rights to . . . due process . . . and proof beyond a reasonable doubt under the Fifth and Fourteenth Amendments to the United States Constitution, the right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and the rights to due process and a reliable capital sentence determination under the Eighth and Fourteenth Amendments to the United States Constitution.

1R.177. Citing this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), Cozzie contended:

> in Florida, as in Arizona, although the maximum sentence for first-degree murder is death, a defendant convicted of first-degree murder *cannot* be sentenced to death without additional findings of fact that must be made, by explicit requirement of law, by a judge and not a jury. Because the Florida statute requires that a factual determination be made that there are "sufficient" aggravating circumstances to justify imposition of the death penalty and that there are "insufficient" mitigating circumstances to outweigh the aggravating circumstances, the presence of one statutory aggravating circumstance may not be sufficient to render a defendant eligible for imposition of the death penalty. Thus, the Sixth and Fourteenth Amendments require that the jury unanimously determine

> beyond a reasonable doubt the existence of ALL factors that render a defendant eligible to receive a death sentence in Florida.

1R.190-91 (internal citations omitted).

Cozzie also asserted that "a Florida jury's advisory sentencing recommendation cannot be equated with a verdict for Sixth Amendment purposes." 1R.192. On that note, he stressed:

> by its terms, the jury's penalty phase "verdict" *is*, in fact, merely advisory. The jury is repeatedly told during voir dire, and again at the beginning and end of the penalty phase, that "the final decision as to what punishment shall be imposed rests solely with the judge of this Court," and that the jury renders only "an advisory sentence." Thus, the advisory jury in Florida does not bear "the same degree of responsibility as that borne by a 'true sentencing jury.'"

1R.195 (internal citations omitted).

The trial court denied Cozzie's motion. App.42.

3. a. At the outset of jury selection, the court instructed the jury that, at the conclusion of any penalty phase, the jury would deliberate and "return an advisory sentence [as] to which punishment should be imposed upon the defendant." 22Tr.11-12. At the conclusion of the subsequent guilt phase, the jury found Cozzie guilty of first-degree murder and the other charged offenses.

Prior to the penalty phase, Cozzie renewed his motion arguing that Florida's capital sentencing scheme was unconstitutional. 31Tr.1590. The trial court again denied that motion. 31Tr.1590.

b. At the outset of the penalty phase, the court instructed the jury: "The final decision as to which punishment shall be imposed rests with the Judge of this Court.

However, the law requires you, the jury, to render to the Court an advisory sentence as to which punishment should be imposed upon the defendant." 31Tr.1607.

Following the presentation of evidence, the court provided the jury with its final instructions. The court began by stating:

> It's now your duty to advise the Court as to the punishment that should be imposed upon the defendant for the crime of first degree murder. You must follow the law that will be now given to you and render an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist.
>
> . . . As you have been told, the final decision as to which punishment shall be imposed is the responsibility of the judge. In this case, as the trial judge, that responsibility will fall on me. However, the law requires you to render an advisory sentence as to which punishment should be imposed–life imprisonment without the possibility of parole or the death penalty.
>
> Although the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given weight and deference by the Court in determining which punishment to impose.

35Tr.2403-04.

The court subsequently advised the jury: "An aggravating circumstance must be proved beyond a reasonable doubt before it may be considered by you in arriving at your recommendation. In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating circumstance has been proven." 35Tr.2407. Moments later, the trial court instructed:

> 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 to justify recommending the imposition of the death penalty, it will be your

> duty to determine whether the mitigating circumstances outweigh the aggravating circumstances that you find to exist.

35Tr.2411.

Finally, the court indicated that "it is not necessary that the advisory sentence of the jury be unanimous." 35Tr.2414. The court went on to explain: "If a majority of the jury, which is seven or more, determine that Steven Anthony Cozzie should be sentenced to death, your advisory sentence will be: [The jury] advise[s] and recommend[s] to the Court that it impose the death penalty." 35Tr.2415. "On the other hand, if by six or more votes the jury determines that Steven Anthony Cozzie 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." 35Tr.2415.

During its final instructions, the court ultimately characterized the jury's role in the sentencing process as "recommending" or "advising," or providing a "recommendation" or "advisory sentence," in at least thirty instances. 35Tr.2403-16.

c. At the conclusion of the penalty phase, the jury recommended the death penalty by a vote of twelve to zero. The trial court subsequently found, and assigned weight to, four aggravating circumstances: the capital felony was committed in the course a sexual battery, aggravated child abuse, and kidnapping; it was especially heinous, atrocious, or cruel; it was committed in a cold, calculated, and premeditated manner; and it was committed to avoid arrest. The court also found, and assigned weight to, approximately twenty-five mitigating circumstances. "Thereafter, concluding that the aggravating circumstances 'far outweigh' the mitigating

circumstances, the trial court sentenced Cozzie to death in accordance with the jury's recommendation." App.12-13 (footnote call numbers omitted).

C. Proceedings in Florida Supreme Court

1. Cozzie appealed his death sentence to the Florida Supreme Court. As relevant here, Cozzie asserted in his initial brief that the "trial court erroneously denied Cozzie's motion[] arguing constitutional flaws in the death penalty procedures and imposed a sentence of death in violation of the Sixth Amendment principles announced in *Ring v. Arizona*." Initial Brief of Appellant at 91, *Cozzie v. State*, 225 So.3d 717 (Fla. 2017) (per curiam) (No. SC13-2393). Cozzie pointed out that "Florida's death penalty statute violates *Ring* in a number of areas including . . . the jury's advisory recommendation is not a jury verdict." *Id.* Cozzie also noted in his reply brief that this Court had recently granted a petition for a writ of certiorari in *Hurst*, 136 S. Ct. at 616, and argued that his "death sentence has been unconstitutionally imposed under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because Florida's death penalty scheme does not comply with the mandates of those provisions." Reply Brief of Appellant at 8, *Cozzie*, 225 So.3d at 717 (No. SC13-2393).

2. While Cozzie's appeal remained pending, this Court held Florida's capital sentencing scheme unconstitutional because the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst*, 136 S. Ct. at 619. This Court reasoned: "Like Arizona at the time of *Ring*, Florida does not

require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. This Court also recognized that

> the Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1)(emphasis added). The trial court *alone* must find "the facts...[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3).

Hurst, 136 S. Ct. at 622.

3. Following this Court's *Hurst* decision, the Florida Supreme Court allowed supplemental briefing in Cozzie's case. As relevant here, Cozzie argued in his supplemental brief that "the constitutional defect . . . is that the judge, rather than a unanimous jury, determined 'the facts necessary for imposition of death,' that . . . is[] 'that sufficient aggravating circumstances exist' and 'that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" App.52.

With that in mind, Cozzie asserted:

> This defect is structural and not subject to harmless error review because *the absence of a jury determination of elements of an offense* is a "defect affecting the framework within which the trial proceeds," rather than an error that occurs "during the presentation of the case to the jury, and which may therefore by quantitatively assessed." The *Hurst* defect is structural because it deprives defendants of a "basic protectio[n] without which a [capital] trial cannot reliably serve its function."

App.52 (emphasis added) (internal citations omitted). Cozzie also stressed that "the constitution requires a unanimous jury to find beyond a reasonable doubt 'each fact necessary to impose the sentence of death.'" App.55.

Finally, Cozzie argued in his supplemental brief that the Florida Supreme Court

could "place no weight on the jury's advisory recommendation, given that Cozzie's jury was instructed many times that its recommendation was advisory only, thus diminishing its responsibility in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985)." App.56.

4. a. Following supplemental briefing in Cozzie's case, the Florida Supreme Court re-examined the constitutionality of Florida's capital sentencing scheme in two separate cases.

> Upon review of the decision in Hurst v. Florida, as well as the decisions in Apprendi and Ring, we conclude that the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury–not the judge–must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty. These necessary facts include, of course, each aggravating factor that the jury finds to have been proven beyond a reasonable doubt. However, the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury. . . Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances. . . .
>
> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder–thus allowing imposition of the death penalty–are also elements that must be found unanimously by the jury.

Hurst v. State, 202 So.3d 40, 53-54 (Fla. 2016).[2]

In a decision released contemporaneously, the Florida Supreme Court re-

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[2]Subsequent references to the Florida Supreme Court's decision in *Hurst*, 202 So.3d at 40, will refer to that decision as "*Hurst v. State*." Subsequent references to this Court's decision in *Hurst*, 136 S. Ct. at 616, will refer to that decision as "*Hurst v. Florida*."

emphasized its holding in *Hurst v. State.*

> In that opinion, we held that . . . in cases in which the penalty phase jury is not waived, the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury. Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final jury recommendation.

Perry v. State, 210 So.3d 630, 633 (Fla. 2016).

b. Despite recognizing multiple constitutional flaws in Florida's capital sentencing scheme, the Florida Supreme Court concluded that the error "in which the judge rather than the jury made all the necessary findings to impose a death sentence, is not structural error incapable of harmless error review." *Hurst v. State*, 202 So.3d at 67. In support of its conclusion, the Florida Supreme Court cited this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), and stated: "Where an element of the offense was erroneously not submitted to the jury in *Neder*, the Court found harmless error review applied." *Hurst v. State*, 202 So.3d at 67. The Florida Supreme Court also cited this Court's decision in *Washington v. Recuenco* 548 U.S. 212 (2006), and noted: "the Supreme Court held in a noncapital case that failure to submit a sentencing factor to the jury in violation of *Apprendi*, *Blakely*, and the Sixth Amendment was not structural error." *Hurst v. State*, 202 So.3d at 67.

5. Months later, a divided Florida Supreme Court affirmed Cozzie's death sentence. App.35. As relevant here, a majority of the court recognized that "*Hurst* error" occurred when the trial judge, rather than the jury, made the critical findings

necessary to impose the death penalty, but subjected that error to harmless error review. App.30-31.[3] Neither the court's per curiam opinion nor any individual Justice's opinion addressed Cozzie's argument that the jury instructions impermissibly diminished the jury's sense of responsibility for determining that death was the appropriate punishment.

6. Cozzie moved for rehearing. In his motion, he argued that the Florida Supreme Court had "overlooked the effect of instructing Cozzie's jury many times that its recommendation was advisory only." App.66. Cozzie again cited *Caldwell*, 472 U.S. at 320 (plurality opinon), and emphasized: "Repeatedly telling the jury that its role was only advisory undermined the reliability of the deliberative process, thereby presenting an additional barrier to reading anything into the jury's 12-0 recommendation." App.66-67. The Florida Supreme Court denied rehearing without addressing Cozzie's *Caldwell* challenge. App.43.

REASONS FOR GRANTING THE PETITION

Structural error occurs when, after having been affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility, a jury fails to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty. And refusing to conclude that such an error is structural, and instead subjecting it to harmless error review, undermines

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[3]Chief Justice Labarga and Justice Lewis joined the court's per curiam opinion. App.35. Justice Pariente concurred "with the majority's result but disagree[d] with its analysis regarding" the trial court's admission of certain rebuttal testimony. App.38. Justice Quince concurred in part and dissented in part, explaining: "I cannot agree with the majority's finding that the *Hurst* error was harmless beyond a reasonable doubt. To the extent that I would not find the error harmless, I dissent." App.38.

multiple federal constitutional rights. Further, the Florida Supreme Court's conclusion that the error below was not structural conflicts with this Court's decision in *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Finally, the present case presents an ideal vehicle to clarify analytical tension in a critical area of this Court's structural error jurisprudence.

I. The Florida Supreme Court's Decision Undermines Multiple Federal Constitutional Rights And Conflicts With Binding Precedent Of This Court.

A. Error Occurred Below When The Jury Failed To Return A Verdict Of Guilty Beyond A Reasonable Doubt As To Multiple Critical Elements Necessary To Impose The Death Penalty.

1. "Taken together," the Sixth Amendment right to jury trial and the Due Process Clause requirement of proof beyond a reasonable doubt "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged beyond a reasonable doubt.'" *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (quoting *United States v. Gauldin*, 515 U.S. 506, 510 (1995)). This Court has elaborated:

> It is self-evident [that the] requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. 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 . . . 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.*

Sullivan, 508 U.S. at 278 (second emphasis added).

That general principle has been applied to elements necessary to impose

increased punishment, including the death penalty. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. And "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536 U.S. at 589. Thus, the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst v. Florida*, 136 S. Ct. at 619.

2. That said, "state courts are the ultimate expositors of state law," and this Court is generally "bound by their constructions." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *see also Ring*, 536 U.S. at 603. On that note, Florida law provides that "a person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in [section] 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment." Fla. Stat. § 775.082(1) (2013). And that proceeding results in those findings *only if* the court sets "forth in writing its findings...as to the *facts*: [t]hat sufficient aggravating circumstances exist...and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances," Fla. Stat. § 921.141(3) (2013) (emphasis added).

The Florida Supreme Court has construed those state laws and declared:

> [U]nder Florida's capital sentencing scheme, the jury–not the judge–must be the finder of every fact, and thus every element, necessary for the

> imposition of the death penalty. These necessary facts include, of course, each aggravating factor that the jury finds to have been proven beyond a reasonable doubt. However, the imposition of death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury. . . . Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.

Hurst v. State, 202 So.3d at 53; *see also Perry*, 210 So.3d at 633.

3. With that in mind, error occurred below when the jury failed to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty–(1) whether specific aggravating factors existed; (2) whether sufficient aggravating factors existed for the imposition of the death penalty; and (3) whether the aggravating factors outweighed the mitigating circumstances.

In *Hurst v. Florida*, this Court described the illusory nature of the jury's "findings" under Florida's capital sentencing scheme.

> Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Although Florida incorporates an advisory verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona."

136 S. Ct. at 622 (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)).

Thus, for purposes of the Sixth Amendment, multiple critical elements necessary to impose the death penalty in Florida were essentially not submitted to the jury.

Instead, the trial court directed a verdict for the State as to those critical elements. And in the process, the trial court alone determined Cozzie's eligibility for the death penalty. *See id.* ("[T]he Florida sentencing statute does not make a defendant eligible for death until 'findings *by the court* that such person shall be punished by death.'" (quoting Fla. Stat. § 775.082(1) (2010))).

B. The Error Below Was Structural.

1. a. Whether "a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967). And in fulfilling its "responsibility to protect" federal constitutionally guaranteed rights "by fashioning the necessary rule[s]," *id.*, this Court has distinguished between two classes of constitutional errors: trial errors and structural errors, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

Trial errors are "simply . . . error[s] in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Such errors occur "'during presentation of the case to the jury and their effect may 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.'" *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Fulminante*, 499 U.S. at 307-08).

In contrast, structural errors "are structural defects in the constitution of the

trial mechanism." *Fulminante*, 499 U.S. at 309. They affect "the framework within which the trial proceeds." *Id.* at 310. "Errors of this type are so intrinsically harmful as to require automatic reversal . . . without regard to their effect on the outcome." *Neder*, 527 U.S. at 7. Put another way, structural "errors require reversal without regard to the evidence in the particular case." *Rose v. Clark*, 478 U.S. 570, 577 (1986).

b. "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any trial." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). With that in mind, the "precise reason why a particular error is not amenable to [harmless error] analysis–and thus the precise reason why the Court has deemed it structural–varies in a significant way from error to error." *Id.* at 1908.

For instance, "an error has been deemed structural if the error always results in fundamental unfairness," such as where a defendant is denied a reasonable-doubt jury instruction. *Id.* Further, "an error has been deemed structural if the effects of the error are simply too hard to measure." *Id.* Additionally, in deciding whether an error is structural, this Court has repeatedly considered whether the error undermined the reliability of the adjudicative process. *See, e.g.*, *Neder*, 527 U.S. at 8-9 (observing that structural "errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function'" (quoting *Rose*, 478 U.S. at 577-78)). But "[t]hese categories are not rigid," *Weaver*, 137 S. Ct. at 1908, and in "a particular case, more than one of these rationales may be part of the explanation for why an error is

deemed to be structural," *id.* (citing *Sullivan*, 508 U.S. at 280-82 (1993)).

2. In the present case, structural error occurred when the jury failed to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty. That error was different in order of magnitude than a simple error occurring in the process of a trial. Instead, that error amounted to a structural defect in the framework underlying the trial process. It undermined the core foundation on which the process of determining death eligibility depended.

Multiple rationales dictate that conclusion. First, the jury's failure to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty always results in fundamental unfairness. "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). In particular, a jury's "overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977). "For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction." *Id.* at 572-73 (internal citations omitted). And "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment," *Blakely v. Washington*, 542 U.S. 296, 313 (2004), including "each fact necessary to

impose a sentence of death," *Hurst v. Florida*, 136 S. Ct. at 619.

In light of those constitutional first principles, it is always fundamentally unfair for a trial court to direct a verdict for the State as to multiple critical elements necessary to impose the death penalty. Simply put, "the wrong entity judged the defendant," *Rose*, 478 U.S. at 578, to be eligible for a penalty "qualitatively different from a sentence of imprisonment, however long," *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

Second, the effects of the jury's failure to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty are simply too hard to measure. Again, under Florida's capital sentencing scheme, a jury "'does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge.'" *Hurst v. Florida*, 136 S. Ct. at 622 (quoting *Walton*, 497 U.S. at 648). And the "advisory recommendation by the jury" falls short of "the necessary factual finding" required by the Sixth Amendment. *Id.*

In addition, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, *and proved beyond a reasonable doubt*." *Apprendi*, 530 U.S. at 490 (emphasis added). On that note, the Florida Supreme Court has determined that two such facts are: (1) whether sufficient aggravating factors existed for the imposition of the death penalty, and (2) whether the aggravating factors outweighed the mitigating circumstances. *Hurst v. State*, 202

So.3d at 53. But under Florida's capital sentencing scheme, the jury is not instructed as to any standard of proof regarding these elements. *See* 35Tr.2411; *see also* Fla. Std. Jury Instr. (Crim.) 7.11 (2013)[4]. As a result, "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made" by a reviewing court. *Sullivan*, 508 U.S. at 281.

Third, the error undermined the reliability of the process for determining eligibility for the death penalty. In the capital context, a particular constitutional consideration arises. Again, "the penalty of death is qualitatively different from a sentence of imprisonment, however long." *Woodson*, 428 U.S. at 305 (plurality opinion). "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* Simply put, the "Eighth Amendment insists upon 'reliability in the determination that death is the appropriate punishment in a specific case.'" *Oregon v. Guzek*, 546 U.S. 517, 525 (2006) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989)).

As a result, a capital jury "must not be misled regarding the role it plays in the sentencing decision." *Romano v. Oklahoma*, 512 U.S. 1, 8 (1994) (citing *Caldwell*, 472 U.S. at 336 (plurality opinion)). More specifically, a capital jury must not be "affirmatively misled . . . regarding its role in the sentencing process so as to diminish

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[4]A 2013 version of the Florida Standard Jury Instructions in Criminal Cases can be found in the appendix to the opinion in *In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2*, 22 So.3d 17 (Fla. 2009) (mem.).

its sense of responsibility." *Id.* at 10.

But under Florida's capital sentencing scheme, a capital jury is affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility. As an initial matter, such a jury is instructed that it will "render an advisory sentence" but "the final decision as to which punishment shall be imposed is the responsibility of the judge." 35Tr.2403-04; *see also* Fla. Std. Jury Instr. (Crim.) 7.11 (2013). In fact, in at least thirty instances in the final instructions alone, the jury's role in the sentencing process is characterized as "recommending" or "advising," or providing a "recommendation" or "advisory sentence." 35Tr.2403-16; *see also* Fla. Std. Jury Instr. (Crim.) 7.11 (2013).

And those instructions diminish the jury's sense of responsibility throughout the sentencing process, including during any jury determination of whether the defendant is eligible for the death penalty. The instructions indicate that the jury's input–including its "findings"–into the sentencing process is not binding or controlling. In particular, those instructions convey that the jury's input is not binding on the trial court. Instead, the judge makes "the final decision."

Further, those instructions affirmatively mislead the jury regarding its role in the sentencing process. As just discussed, the instructions convey that the jury's input is not binding, including on the trial court. But the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst v. Florida*, 136 S. Ct. at 619. As a result, a jury's findings as to those elements are binding and controlling, including on the trial court. In particular, if a jury fails to find

one or more of those elements, the defendant is not eligible for death. That is "the final decision." The judge cannot alter it.

C. The Florida Supreme Court's Decision That The Error Below Was Not Structural Conflicts With This Court's Decision That The Error In *Sullivan v. Louisiana* Was Structural.

1. Sullivan was charged with murder. *Sullivan*, 508 U.S. at 276. At trial, the judge provided the jury with a constitutionally deficient definition of reasonable-doubt. *Id.* at 277. The jury found Sullivan guilty. *Id.* On appeal, the Louisiana Supreme Court recognized that the judge's instruction was unconstitutional, but subjected that error to harmless error review. *Id.*

This Court reversed. *Id.* at 282. This Court agreed with the Louisiana Supreme Court that Sullivan's right to "a jury verdict of guilty beyond a reasonable doubt" had been denied. *Id.* at 278. However, this Court held that the "deprivation of that right . . . unquestionably qualifies as 'structural error.'" *Id.* at 281-82. In reaching its holding, this Court considered both whether the error always resulted in fundamental unfairness, as well as whether the effects of the error were simply too hard to measure. *Id.* at 279-82.

More specifically, this Court reasoned that the "right to trial by jury reflects . . . 'a profound judgment about the way in which law should be enforced and justice administered.'" *Id.* at 281 (quoting *Duncan*, 391 U.S. at 155). In particular, the "Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it

requires an actual jury finding of guilt." *Id.* at 280. As a result, this Court reasoned, "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. To buttress that point, this Court cited the following passage from *Rose*, 478 U.S. at 570:

> We have stated that 'a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelming the evidence may point in that direction. This rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; *the error in such a case is that the wrong entity judged the defendant guilty.*

Id. at 578 (emphasis added) (internal citations omitted).

This Court also reasoned that the effects of the error were "necessarily unquantifiable and indeterminate." *Id.* at 281. In that context, this Court emphasized that "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings." *Id.* at 281. As a result, a "reviewing court can only engage in pure speculation–its view of what a reasonable jury would have done." *Id.*

2. In the present case, consistent with its conclusion in *Hurst v. State*, 202 So.3d at 67, the Florida Supreme Court decided that the error below was subject to harmless error review, and thus, not structural. App.30. That decision conflicts with *Sullivan*. First, both here and there, the error at issue concerned the jury's failure to return a

verdict of guilty beyond a reasonable doubt.

Second, whereas the error in *Sullivan* involved the "wrong entity," *id.* at 281, judging the defendant guilty of a simple criminal offense, the error in the present case involved the "wrong entity" judging the defendant eligible for the death penalty. Again, the jury here was specifically told that the trial court would make "the final decision." 35Tr.2403. All that being the case, if the error in *Sullivan* always results in fundamental unfairness, then surely the error here does as well.

Third, in both cases, the effects of the error were simply too hard to measure. Admittedly, in *Sullivan*, the constitutionally deficient definition of reasonable doubt "vitiate[d] *all* the jury's findings." 508 U.S. at 281. In contrast, in the present case, the jury returned "beyond a reasonable doubt" findings as to the elements of first-degree murder. 5R989-91; 6R1009; 30TR1573-74.[5] Nonetheless, the jury here failed to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty. In particular, as to two of those critical elements, the jury was not instructed as to any standard of proof. *See* 35Tr.2411; *see also* Fla. Std. Jury Instr. (Crim.) 7.11 (2013).

As a result, with respect to multiple elements in both cases, the reviewing court could "only engage in pure speculation–its view of what a reasonable jury would have done." *Sullivan*, 508 U.S. at 281. And to the extent that the *quantity* of

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[5]The jury was instructed as to both first-degree premeditated murder and first-degree felony murder, 5R89-91, and it returned a general verdict as to that count, 6R1009. In the process, the jury essentially found that (1) Wilkes was dead; (2) Cozzie killed her; and (3) Wilkes' death either was premeditated or occurred while Cozzie was engaged in the commission of a specific felony.

constitutionally insufficient findings are less in the present case then in *Sullivan*, the *quality* of the missing findings here–which concern critical elements necessary to impose the death penalty–weighs in favor of finding the error here structural.

Fourth, unlike in *Sullivan*, the jury's failure here to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty undermined the reliability of the process for determining eligibility for the death penalty. *See* discussion *supra* pp. 22-24. Thus, an additional rationale weighing in favor of finding the error structural, which did not exist in *Sullivan*, exists here.

D. The Florida Supreme Court Incorrectly Reasoned That The Error Below Was Analogous To The Errors In *Neder v. United States* and *Washington v. Recuenco.*

1. The Florida Supreme Court has cited this Court's decisions in *Neder*, 527 U.S. at 1, and *Recuenco*, 548 U.S. at 212, as support for its conclusion that the error below is not structural error. *Hurst v. State*, 202 So.3d at 67. In *Neder*, the trial court "erred in refusing to submit the issue of materiality to the jury with respect to" tax fraud charges. 527 U.S. at 4. This Court held that the error was not structural. *Id.* In reaching its holding, this Court reasoned that "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9. More particularly, this Court emphasized, the error "did not 'vitiat[e] *all* the jury's findings.'" *Id.* at 11 (quoting *Sullivan*, 508 U.S. at 281). Further, this Court observed that Neder "did not, and

apparently could not, bring forth facts contesting the omitted element." *Id.* at 19.

In *Recuenco*, Recuenco "was convicted of assault in the second degree based on the jury's finding that he assaulted his wife 'with a deadly weapon.'" 548 U.S. at 214. At sentencing, the trial court "applied a 3-year firearm enhancement to [his] sentence based on its own factual findings" in violation of the Sixth Amendment. 548 US. at 215. This Court held that the error was not structural. *Id.* at 222. In reaching its holding, this Court concluded that "this case is indistinguishable from *Neder*." *Id.* at 220.

2. But the errors in *Neder* and *Recuenco* are not analogous to the error in the present case. First, a jury's failure to return a verdict of guilty beyond a reasonable doubt as to a single element of a simple criminal offense or a single sentencing factor in a noncapital case may result in fundamental fairness in some cases. But it may not in others. In contrast, a jury's failure to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty always results in fundamental unfairness. *See* discussion *supra* pp. 20-21.

Second, it may be possible to measure the effects of a jury's failure to return a verdict of guilty beyond a reasonable doubt as to a single element of a simple criminal offense or a single sentencing factor in a noncapital case. Put another way, it may be possible to measure the effects of an error that "vitiates" only one such jury finding. But it is not possible to measure the effects of a jury's failure to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose

the death penalty. That is particularly true where those critical elements include whether sufficient aggravating factors exist for imposition of the death penalty and whether the aggravating factors outweigh the mitigating circumstances.

Admittedly, the error here did not "vitiate" the jury's findings as to the elements of first-degree murder. Nonetheless, the jury's failure to return findings as to the critical elements necessary to impose the death penalty is more analogous to a jury's failure to return findings as to all elements of a simple criminal offense (*Sullivan)* than to a jury's failure to return a finding as to a single element of a simple criminal offense (*Neder*) or a single sentencing factor in a noncapital case (*Recuenco*).

Third, in *Neder* and *Recuenco*, the jury's failure to return a verdict of guilty beyond a reasonable doubt as to a single element of a simple criminal offense or a single sentencing factor in a noncapital case did not undermine the reliability of the process for determining guilt or innocence, or eligibility for an increased prison sentence. In particular, the defendant in *Neder* did not even contest the element on which the jury failed to return a finding. In contrast, here, Cozzie contested whether certain aggravating factors existed; whether, to the extent aggravating factors did exist, they were sufficient for imposition of the death penalty; and whether the aggravating factors outweighed the mitigating circumstances. 35Tr.2370-99. And more generally, unlike in *Neder* and *Recuenco*, the jury's failure here to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty undermined the reliability of the process for determining

eligibility for the death penalty. *See* discussion *supra* pp. 22-24.

II. This Case Presents An Ideal Vehicle To Clarify Analytical Tension In A Critical Area of This Court's Structural Error Jurisprudence.

In multiple criminal cases, this Court has addressed the issue of whether structural error occurs when, to at least some degree, a jury fails to return a verdict of guilty beyond a reasonable doubt. In that specific context, this Court's structural error jurisprudence can be viewed on a spectrum.

On one end of that spectrum, structural error occurs if a trial court refuses to submit a case to a jury and directs a verdict for the State as to all elements. *Rose*, 478 U.S. at 578. Moving towards the center of the spectrum, structural error also occurs if a jury fails to return a verdict of guilty beyond a reasonable doubt as to *all* elements. *Sullivan*, 277-82. Crossing the center of the spectrum and continuing to move towards the opposite end, structural error does *not* occur if a jury fails to return a verdict of guilty beyond a reasonable doubt as to only a *single* element, *Neder*, 527 U.S. at 8-15, or a *single* sentencing factor, *Recuenco*, 548 U.S. at 218-22. Finally (and obviously), structural error does not occur if a jury returns a verdict of guilty beyond a reasonable doubt as to all elements.

But what about in the center of the spectrum? What happens if a jury returns a verdict of guilty beyond a reasonable doubt as to multiple elements, but *not* as to multiple other elements? As to a *single* element, but *not* as to multiple other elements? How many is too many? Does proportion matter? (And does the "quality" of the "missing" element(s) ever factor into the structural error analysis?)

In dissent in *Neder*, Justice Scalia emphasized this analytical tension.

> The Court reaffirms the rule that it would be structural error (not susceptible of "harmless error" analysis) to "vitiat[e] *all* the jury's findings." A court cannot, no matter how clear the defendant's culpability, direct a guilty verdict. The question that this raises is why, if denying the right to conviction by jury is structural error, taking *one* of the elements of the crime away from the jury should be treated differently from taking *all* of them away–since failure to prove one, no less than failure to prove all, utterly prevents conviction.
>
> The Court never asks, much less answers, this question. Indeed, we do not know, when the Court's opinion is done, *how many* elements can be taken away from the jury with impunity, so long as appellate judges are persuaded that the defendant is surely guilty. What if, in the present case, beside keeping the materiality issue for itself, the District Court had also refused to instruct the jury to decide whether the defendant signed his tax return? If Neder had never contested that element of the offense, and the record contained a copy of his signed return, would his conviction be automatically reversed in that situation but not in this one, even though he would be just as obviously guilty? We do not know. We know that all elements cannot be taken from the jury, and that one can. How many is too many (or perhaps what proportion is too high) remains to be determined by future improvisation.

Neder, 527 U.S. at 32-33 (Scalia, J., dissenting) (internal citations omitted).

The present case presents an ideal vehicle for clarifying the analytical tension highlighted by Justice Scalia. Here, the jury returned a verdict of guilty beyond a reasonable doubt as to the elements of simple first-degree murder. But it failed to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty. Thus, in terms of the "elements . . . necessary for the jury to essentially convict a defendant of capital murder–thus allowing imposition of the death penalty," *Hurst v. State*, 202 So.3d at 53, the jury returned constitutionally sufficient findings as to three elements, but failed to return such findings as to three other elements.

And the latter three elements did not determine simply guilt or innocence or even eligibility for an increased prison sentence; they determined eligibility for death–a "qualitatively different" penalty, *Woodson*, 428 U.S. at 305 (plurality opinion). These circumstances present a perfect opportunity for this Court to provide state and federal courts throughout the nation with guidance as to whether, and if so, how, the *quality* and *quantity* (in absolute or proportionate terms) of constitutionally insufficient findings factor into a structural error analysis when, to at least some degree, a jury fails to return a verdict of guilty beyond a reasonable doubt.

III. The Question Presented Was Properly Raised But Went Unaddressed Below, And A Similar Circumstance Has Recurred Repeatedly.

A. The Question Was Properly Presented To the Florida Supreme Court.

This Court has explained:

> With "very rare exceptions," we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. . . .
>
> . . . When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here." We have described in different ways how a petitioner may satisfy this requirement. In some cases, we have focused on the need for petitioners either to establish that the claim was raised "at the time and in the manner required by state law," or to persuade us that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment. In other cases, we have described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with 'fair precision and in due time."

Adams v. Robertson, 520 U.S. 83, 86-87 (1997) (internal citations omitted).

In the present case, although the Florida Supreme Court did not expressly address the question presented to this Court, it had a fair opportunity to do so. In the trial court, Cozzie filed a pre-trial motion arguing that Florida's capital sentencing scheme was unconstitutional because it denied a criminal defendant his right to a jury verdict of guilty beyond a reasonable doubt as to the critical elements necessary to impose the death penalty. 1R.190-92, 195. In support of his position, Cozzie cited (1) the Sixth Amendment right to jury trial, as well as this Court's decision in *Ring*, 536 U.S. at 584; (2) the Eighth Amendment need for reliability in making a capital sentencing determination; and (3) the Fourteenth Amendment requirement of proof beyond a reasonable doubt. 1R.177, 190-92, 195. The trial court denied that motion. App. 42. Prior to the penalty phase, Cozzie renewed his motion, and the court again denied it. 31Tr.1590.

On appeal before the Florida Supreme Court, Cozzie reasserted his federal constitutional claim. *See* Initial Brief of Appellant at 91, *Cozzie v. State*, 225 So.3d 717 (Fla. 2017) (per curiam) (No. SC13-2393); Reply Brief of Appellant at 8, *Cozzie*, 225 So.3d at 717 (No. SC13-2393). Further, in his supplemental brief, Cozzie asserted a related federal constitutional claim that structural error occurred when the jury failed to make the critical findings necessary to impose the death penalty. App. 52-59. And in both his supplemental brief and motion for rehearing, Cozzie specifically argued that the error undermined the process for determining eligibility for the death penalty in light of this Court's decision in *Caldwell*, 472 U.S. 320. App. 56-59, 66-67.

For its part, and consistent with its prior conclusion in *Hurst v. State*, 202 So.3d at 67, the Florida Supreme Court simply decided that the error below was subject to harmless error review, and thus, was not structural. App.30. In these circumstances, despite the Florida Supreme Court's failure to expressly discuss the constitutional issue, Cozzie's claim that structural error arose under the Sixth, Eighth, and Fourteenth Amendments is properly before this Court. *See Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973).

B. The Florida Supreme Court Has Repeatedly Failed To Address A Crucial Component Of The Question Presented.

1. Three justices of this Court recently highlighted the Florida Supreme Court's repeated failure to address post-*Hurst v. Florida* Eighth Amendment challenges to Florida's capital sentencing scheme.

> At least twice now, capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address. Specifically, those capital defendants, petitioners here, argue that the jury instructions in their cases impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory.

Truehill v. Florida, 138 S. Ct. 3 (2017) (Sotomayor, J., joined by Ginsburg, J., and Breyer, J., dissenting from denial of certiorari).

Those justices also recognized that this Court's recent decision in *Hurst v. Florida*, 136 S. Ct. at 616, cast such Eighth Amendment challenges in a new light.

> Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where "the court [was] the

> final decision-maker and the sentencer–not the jury." In *Hurst v. Florida*, however, we held that process, "which required the judge alone to find the existence of an aggravating circumstance," to be unconstitutional.
>
> With the rationale underlying its previous rejection of the *Caldwell* challenge now undermined by this Court in *Hurst*, petitioners ask that the Florida Supreme Court revisit the question. The Florida Supreme Court, however, did not address that Eighth Amendment challenge.

Truehill, 138 S. Ct. at 3 (Sotomayor, J., joined by Ginsburg, J., and Breyer, J., dissenting from denial of certiorari) (internal citations omitted).

2. Like the petitioners in *Truehill*, Cozzie also argued that the jury instructions in his case "impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory." *Id.* And in other post-*Hurst v. Florida* cases in which the Florida Supreme Court ultimately concluded the jury's failure to make the critical findings necessary to impose the death penalty was harmless error, capital defendants raised similar Eighth Amendment challenges. *See* Supplemental Reply Brief of Appellant at 3-9, *King v. State*, 211 So.3d 866 (Fla. 2017) (No. SC14-1949); Supplemental Brief of Appellant at 9-12, *Kaczmar v. State*, 228 So.3d 1 (Fla. 2017); Second Supplemental Initial Brief of Appellant at 21-22, *Knight v. State*, 225 So.3d 661 (Fla. 2017) (No. SC15-1233), *petition for cert. filed* (U.S. Dec. 12, 2017) (No. 17-7099); Supplemental Initial Brief of Appellant at 9-10, *Middleton v. State*, 220 So.3d 1152 (Fla. 2017) (No. SC12-2469), *petition for cert. filed* (U.S. Oct. 26, 2017) (No. 17-6580); Initial Brief of Appellant at 92-94, *Tundidor v. State*, 221 So.3d 587 (Fla. 2017) (No. SC14-2276), *petition for cert. filed* (U.S. Nov. 8, 2017) (No. 17-6735); Petition For Writ of Habeas

Corpus at 26-32, 37-40, *Guardado v. Jones*, 226 So.3d 213 (Fla. 2017) (No. SC17-389), *petition for cert. filed* (U.S. Dec. 18, 2017) (No. 17-7171).

As in the cases of Cozzie and the petitioners in *Truehill*, in these other cases, the Florida Supreme Court determined that the error was harmless without addressing the defendant's Eighth Amendment challenge. *See King*, 211 So.3d at 889-93; *Kaczmar*, 228 So.3d at 7-9; *Knight*, 225 So.3d at 682-83; *Middleton*, 220 So.3d at 1184-85; *Tundidor*, 221 So.3d at 607-08; *Guardado*, 226 So.3d at 215.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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