No. ______

IN THE

Supreme Court of the United States

JESSE GUARDADO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITIONER'S APPENDIX

THIS IS A CAPITAL CASE

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, Florida 32301
(850) 942-8818
billy_nolas@fd.org
sean_gunn@fd.org

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EXHIBIT 1

Supreme Court of Florida

No. SC17-1903

JESSE GUARDADO,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[March 8, 2018]

PER CURIAM.

This case is before the Court on appeal from an order denying a motion to vacate a sentence of death under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

STATEMENT OF THE CASE AND FACTS

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). This Court affirmed Guardado's convictions and sentence of death. *Id.* at 120. This Court also affirmed the denial of Guardado's initial postconviction motion. *Guardado v. State*, 176 So. 3d 886 (Fla. 2015).

In 2017, Guardado filed a motion for postconviction relief arguing that he was entitled to relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016). That motion was continued to give Guardado an opportunity to proceed in this Court with a habeas petition. Guardado filed a petition for a writ of habeas corpus arguing that he was entitled to relief pursuant to both *Hurst v. Florida* and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). This Court held:

> We agree with Guardado that *Hurst* is applicable in his case. *See Mosley 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.

Guardado v. Jones, 226 So. 3d 213, 215 (Fla. 2017).

Subsequently, the circuit court returned to its consideration of Guardado's successive motion for postconviction relief and summarily denied Guardado's motion, stating:

> The current state of the law indicates *Hurst* would apply to the defendant's case. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). However, the law is also clear the defendant is not entitled to a new

> penalty phase based on a harmless error analysis. *See Davis v. State*, 207 So. 3d 142 (Fla. 2016). Indeed, this court is bound by the decision of the Supreme Court of Florida determining any *Hurst* error in the instant case is harmless beyond a reasonable doubt. *Guardado v.* [*Jones*], No. SC17-389, 2017 WL 1954984 (Fla. May 11, 2017) (denying the defendant's petition for a writ of habeas corpus); *Guardado v.* [*Jones*], No.SC17-389, 2017 WL 4150352 (Fla. Sept. 19, 2017) (denying the defendant's motion for rehearing). Therefore, the defendant is not entitled to relief under *Hurst*. As a result, the instant motion is denied.

Guardado v. State, No. 2004-CF-000903, order at 2-3 (Fla. 1st. Cir. Sept. 27, 2017).

Guardado filed the instant appeal. On October 31, 2017, this Court issued an order to show cause why the lower court's order should not be affirmed.

DISCUSSION

Guardado's argument here is nearly identical to that contained in his petition for a writ of habeas corpus filed in this Court on March 8, 2017, which this Court denied in *Guardado v. Jones*, 226 So. 3d at 215. The proceedings below originated on July 5, 2016, but were continued to permit Guardado to seek *Hurst* relief from this Court via his habeas proceedings. After this Court denied Guardado's habeas petition, the postconviction proceedings resumed and the circuit court denied Guardado's motion. Order at 1.

The circuit court correctly concluded that this Court has addressed Guardado's claims. Guardado's arguments in the present appeal are indistinguishable from those contained in his habeas petition.

Further, we have considered and rejected Guardado's claim that *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), affect this Court's harmless error analysis in *Hurst*. *See, e.g.*, *Franklin v. State*, 43 Fla. L. Weekly S86 (Fla. Feb. 15, 2018); *Truehill v. State*, 211 So. 3d 930 (Fla. 2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017).

Because Guardado's claims have been previously rejected, we affirm the circuit court's summary denial of Guardado's successive motion for postconviction relief.

It is so ordered.

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

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

An Appeal from the Circuit Court in and for Walton County,
Kelvin C. Wells, Judge - Case No. 662004CF000903CFAXMX

Billy H. Nolas, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, Tallahassee, Florida; and Clyde M. Taylor, Jr. of Taylor & Taylor, LLC, St. Augustine, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Lisa A. Hopkins, Assistant Attorney General, Tallahassee, Florida,

for Appellee

EXHIBIT 2

Supreme Court of Florida

TUESDAY, OCTOBER 31, 2017

CASE NO.: SC17-1903
Lower Tribunal No(s).:
662004CF000903CFAXMX

JESSE GUARDADO	vs.	STATE OF FLORIDA
Appellant(s)		Appellee(s)

The parties in the above case are directed to file briefs addressing why the lower court's order should not be affirmed based on this Court's precedent in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, No. 16-998 (U.S. May 22, 2017), Davis v. State, 207 So. 3d 142 (Fla. 2016), and Mosley v. State, 209 So. 3d 1248 (Fla. 2016). Parties may include a brief statement to preserve arguments as to the merits of the previously decided cases, as deemed necessary, without additional argument.

Appellant's initial brief, which is not to exceed twenty-five pages, is to be filed by November 20, 2017. Appellee's answer brief, which shall not exceed fifteen pages, shall be filed ten days after filing of appellant's initial brief. Appellant's reply brief, which shall not exceed ten pages, shall be filed five days after filing of Appellee's answer brief.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

BILLY H. NOLAS
LISA HOPKINS
CLYDE M. TAYLOR, JR.

EXHIBIT 3

Filing # 62115527 E-Filed 09/28/2017 10:22:12 AM

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

STATE OF FLORIDA,

CASE NO.: 2004-CF-000903

v.

JESSE GUARDADO,

Defendant.

ORDER DENYING THE DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF IN LIGHT OF HURST V. FLORIDA

THIS CAUSE comes before the court on the Defendant's Motion for Post-Conviction Relief in Light of Hurst v. Florida, filed on July 5, 2016, pursuant to rule 3.851, Florida Rules of Criminal Procedure. The State filed its response to the defendant's successive rule 3.851 motion on August 15, 2016.

On September 19, 2017, a status conference was convened regarding the defendant's successive rule 3.851 motion. Ms. Terri Backhus, Assistant Public Defender; Mr. Sean Gunn, Assistant Public Defender; and Ms. Jennifer Keegan, Assistant Attorney General; attended by telephone. Mr. Joshua Mitchell, Assistant State Attorney, was present. At the status conference, Ms. Terri Backhus stated the Supreme Court of Florida has denied the defendant's motion for rehearing. The parties then presented argument regarding whether additional continuances of such status conference would be necessary. Having considered the successive motion, the State's response, the record, legal authority, and arguments presented at the status conference, the court finds the successive rule 3.851 motion can be denied without an evidentiary hearing.

Electronically Filed Walton Case # 04000903CFAXMX 09/28/2017 09:22:12 AM

PROCEDURAL HISTORY

On October 13, 2005, the defendant was sentenced to death for first-degree murder after the jury returned a unanimous recommendation that he be sentenced to death. The defendant entered a guilty plea to one count each of first-degree murder and robbery with a weapon on October 19, 2004. The defendant's convictions and sentences were affirmed on direct appeal. Guardado v. State, 965 So. 2d 108 (Fla. 2007). The defendant's initial rule 3.851 motion was filed on October 15, 2008, and his amended motion was filed on June 1, 2010. The court denied the defendant's amended rule 3.851 motion after an evidentiary hearing in March 2012. The order denying postconviction relief was affirmed on appeal in 2015. Guardado v. State, 176 So. 3d 886 (Fla. 2015).

ANALYSIS

In the instant motion, the defendant claims his death sentence violates the Sixth and Eighth Amendments under Hurst v. Florida, 136 S. Ct. 616 (2016). The defendant argues that even though he was sentenced to death based on a 12-0 jury recommendation, harmless error did not occur as to his death sentence. The defendant alleges his death sentence should be vacated and a new penalty phase ordered.

The current state of the law indicates Hurst would apply to the defendant's case. See Mosley v. State, 209 So. 3d 1248 (Fla. 2016). However, the law is also clear the defendant is not entitled to a new penalty phase based on a harmless error analysis. See Davis v. State, 207 So. 3d 142 (Fla. 2016). Indeed, this court is bound by the decision of the Supreme Court of Florida determining any Hurst error in the instant case is harmless beyond a reasonable doubt. Guardado v. State, No. SC17-389, 2017 WL 1954984 (Fla. May 11, 2017) (denying the defendant's

petition for a writ of habeas corpus); Guardado v. State, No. SC17-389, 2017 WL 4150352 (Fla. Sept. 19, 2017) (denying the defendant's motion for rehearing). Therefore, the defendant is not entitled to relief under Hurst. As a result, the instant motion is denied.

ACCORDINGLY, it is hereby **ORDERED** that:

1) The Defendant's Motion for Post-Conviction Relief in Light of Hurst v. Florida, filed on July 5, 2016, is **DENIED**.
2) The defendant has thirty days to file an appeal, if he so chooses.

DONE AND ORDERED in Chambers in DeFuniak Springs, Walton County, Florida.

eSigned by KELVIN WELLS in 01 JUDGE WELLS INBOX FOLDER
on 09/27/2017 10:46:32 u4pZSFIU

KELVIN C. WELLS
CIRCUIT JUDGE

KCW/elm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing order has been furnished by electronic delivery to:

TERRI BACKHUS, Assistant Public Defender
Capital Habeas Unit, Office of the Federal Public Defender
227 N. Bronough Street, Suite 4200, Tallahassee, Florida 32301-1300
by electronic delivery to: Terri_backhus@fd.org

SEAN GUNN, Assistant Public Defender
Capital Habeas Unit, Office of the Federal Public Defender
227 N. Bronough Street, Suite 4200, Tallahassee, Florida 32301-1300
by electronic delivery to: sean_gunn@fd.org

[Certificate of Service Continued on the Next Page]

BILLY H. NOLAS, Chief
Capital Habeas Unit, Office of the Federal Public Defender
227 N. Bronough Street, Suite 4200, Tallahassee, Florida 32301-1300
by electronic delivery to: Billy_nolas@fd.org

CLYDE M. TAYLOR, Esq.
Taylor & Taylor P.A., 2303 N. Ponce de Leon Blvd.
St. Augustine, Florida 32084-2606
by electronic delivery to: ct@taylor-taylor-law.com

JOSHUA MITCHELL, Assistant State Attorney
Office of the State Attorney, First Judicial Circuit
524 US Highway 90 East
DeFuniak Springs, Florida 32435
by electronic delivery to: jmitchell@sa01.org

LISA HOPKINS, Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol, Tallahassee, Florida 32399
by electronic delivery to: Lisa.Hopkins@myfloridalegal.com

JENNIFER KEEGAN, Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol, Tallahassee, FL 32399
by electronic delivery to: Jennifer.Keegan@myfloridalegal.com

ATTORNEY GENERAL
Office of the Attorney General
PL-01, The Capitol, Tallahassee, FL 32399
by electronic delivery to: capapp@myfloridalegal.com

ALEX ALFORD
Clerk of Court

Mindy S. Maikowski
eSigned by MINDY MAIKOWSKI in Documents Signed by MINDY MAIKOWSKI on 09/28/2017 09:14:10 wZ5Vzo-F

BY:

Deputy Clerk

EXHIBIT 4

Filing # 64400796 E-Filed 11/20/2017 11:21:39 AM

No. SC17-1903

IN THE

Supreme Court of Florida

JESSE GUARDADO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S RESPONSE TO OCTOBER 31, 2017 ORDER TO SHOW CAUSE

RECEIVED, 11/20/2017 11:23:26 AM, Clerk, Supreme Court

Clyde M. Taylor, Jr.
Taylor & Taylor, LLC
2303 N. Ponce De Leon Blvd., Ste. L
St. Augustine, FL 32084
ct@taylor-taylor-law.com
(904) 687-1630
Florida Bar No. 129747

Billy H. Nolas
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301-1300
billy_nolas@fd.org
(850) 942-8818
Florida Bar No. 806821

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INTRODUCTION

The circuit court denied Appellant Jesse Guardado's claim for federal constitutional relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), based on this Court's per se harmless-error rule for *Hurst* claims. This Court's per se rule provides that *Hurst* errors are harmless beyond a reasonable doubt in every case in which a pre-*Hurst* "advisory" jury unanimously recommended the death penalty, without permitting individualized consideration of how the *Hurst* error may have impacted a defendant's particular case in light of the whole record. This Court's per se rule contravenes United States Supreme Court precedent and should not be applied here.

Under an analysis that complies with federal constitutional requirements, the *Hurst* error at Appellant's sentencing was not harmless beyond a reasonable doubt. This Court should reverse the circuit court's order, vacate Appellant's death sentence, and remand for a new sentencing proceeding that complies with *Hurst*.

REQUEST FOR FULL BRIEFING AND ORAL ARGUMENT

This appeal implicates important f this Court has never addressed. Appellant requests that the Court permit full briefing and oral argument in this case in accord with the normal, untruncated rules of appellate practice. Depriving Appellant full briefing would constitute an arbitrary deprivation of the vested state right to mandatory plenary appeal in capital cases. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

BACKGROUND

After turning himself into the police, waiving his right to counsel, and providing a full confession, Appellant entered a pro se guilty plea to murder and robbery in the Circuit Court of the First Judicial Circuit, in and for Walton County.

Despite Appellant's acceptance of responsibility, the State sought the death penalty. The circuit court appointed counsel for the penalty phase, who moved to preclude the death penalty on the ground that Florida's capital sentencing scheme violated *Ring v. Arizona*, 536 U.S. 584 (2002). 1 ROA at 169-70. The circuit court denied the *Ring* motion. *Id.* at 196.

Pursuant to the capital sentencing scheme used by Florida at the time (2005), an "advisory" jury was empaneled to hear evidence and make a generalized recommendation to the judge whether Appellant should be sentenced to death or life imprisonment. The jury was not asked to make any findings of fact or otherwise provide a basis for its recommendation. The jury was repeatedly instructed that its recommendation was advisory and that the final sentencing decision rested solely with the judge. *See, e.g.*, 8 ROA at 350 ("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"); ("[I]t is now your duty to advise the court as to what punishment should be imposed upon the defendant").

Appellant's advisory jury returned the following written recommendation:

> 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 recommendation contained no further explanation.

The trial judge, not the jury, then made the findings of fact required to impose a death sentence under Florida law. Those findings of fact were: (1) the aggravating circumstances that had been proven beyond a reasonable doubt; (2) whether the aggravating circumstances were "sufficient" to warrant imposition of the death penalty beyond a reasonable doubt; and (3) whether the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. *See* Fla. Stat. § 942.141(3) (1996), *invalidated by Hurst v. Florida*, 136 S. Ct. 616 (2016).

The trial judge found that five aggravating circumstances had been proven and were sufficient for a death sentence beyond a reasonable doubt. 8 ROA at 4-16.[1] The judge found that 19 mitigating circumstances applied,[2] but that they did

---

[1] The court found that the following aggravating circumstances had been proven beyond a reasonable doubt: (1) Appellant was previously convicted of a felony and was on conditional release; (2) Appellant 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."

[2] The mitigation the court found included: (1) Appellant entered a plea of guilty to first-degree murder without asking for any plea bargain or other favor in exchange; (2) Appellant had fully accepted responsibility for his actions and blamed nobody

not outweigh the aggravators beyond a reasonable doubt. 8 ROA at 16-32. Based on his fact-finding, the judge sentenced Appellant to death.

This Court affirmed Appellant's conviction and death sentence on direct appeal. *Guardado v. State*, 965 So. 2d 108 (Fla. 2007), *cert. denied*, 552 U.S. 1197 (2008). The Court rejected Appellant's argument, preserved at trial, that his sentence was unconstitutional under *Ring*. *Id.* at 118.

---

else for the crime; (3) Appellant 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) Appellant 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) Appellant 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) Appellant has a good jail record while awaiting trial with not a single incident or discipline report; (7) Appellant has consistently shown a great deal of remorse for his actions; (8) Appellant has suffered most of his adult life with an addiction problem to crack cocaine which was the basis of his criminal actions; (9) Appellant has a good family and a good family support system that could help him contribute to an open prison population; (10) Appellant 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, Appellant suffered a major trauma in his life by the crib death of a sibling; (12) as a child, Appellant suffered another major trauma in his life by being sexually molested by a neighbor; (13) Appellant 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) Appellant's biological father passed away before Appellant developed any lasting memories of him; (15) Appellant was raised by his mother, whom he always considered loving, thoughtful and concerned, and by a stepfather he later came to respect; (16) Appellant was under emotional duress during the time frame of the crime; (17) Appellant does not suffer a mental illness or major emotional disorder; (18) Appellant offered to release his personal property, including his truck, to his girlfriend; and (19) Appellant previously contributed to state prison facilities as a plumber and in wastewater treatment work.

The Court later affirmed the denial of Appellant's initial motion for state post-conviction relief, *Guardado v. State*, 176 So. 3d 886 (2015), and denied Appellant's petition for a state writ of habeas corpus, *Guardado v. Jones*, 226 So.3d 213 (2017).

ARGUMENT

I. This Court's denial of state habeas relief does not foreclose this appeal

This Court's prior denial of *Hurst* relief in the habeas corpus proceeding, *see Guardado*, 226 So. 3d at 214, does not foreclose this appeal because none of Appellant's federal constitutional arguments regarding this Court's per se harmless-error rule were addressed by the Court. This Court summarily denied state habeas relief referencing solely state precedent establishing the per se rule. *Id.* As explained in this appeal, the Court's per se rule violates the federal Constitution.

II. The circuit court correctly ruled that Appellant's death sentence violates *Hurst v. Florida* and *Hurst v. State*

The circuit court correctly ruled that Appellant was sentenced to death pursuant to a Florida scheme that has been ruled unconstitutional by the United States Supreme Court and this Court. Order at 2.

In *Hurst v. Florida*, the United States Supreme Court held that Florida's 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. Under Florida's unconstitutional scheme, an "advisory" jury rendered a generalized recommendation for life or death, without specifying the basis for the recommendation, and then the judge alone conducted the fact-finding. *Id.* at 622. In striking down that scheme, the United States Supreme Court held that the jury, not the judge, must make the findings of fact required to impose death. *Id.*

On remand, in *Hurst v. State*, this Court applied the holding of *Hurst v. Florida*, and further held that the Eighth Amendment requires unanimous jury fact-finding as to each of the required elements in addition to a unanimous jury recommendation to impose the death penalty. 202 So. 3d at 53-59. The Court also noted that, even if the jury unanimously finds that each of the required elements is satisfied, the jury is not required to recommend the death penalty, and the judge is not required to sentence the defendant to death. *Id.* at 57-58.

Appellant's jury was never asked to make unanimous findings of fact as to any of the required elements. Instead, after being instructed that its decision was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, the jury rendered a generalized recommendation that the judge sentence Appellant to death. Although his pre-*Hurst* advisory jurors unanimously *recommended* death, the record does not reveal whether Appellant's jurors unanimously agreed that any particular aggravating factor had been proven beyond

a reasonable doubt, or unanimously agreed that the aggravators were sufficient for death, or unanimously agreed that the aggravators outweighed the mitigation.

III. The circuit court correctly ruled that the *Hurst* decisions apply retroactively to Appellant's case on collateral review

The circuit court correctly ruled that *Hurst v. Florida* and *Hurst v. State* apply retroactively to Appellant's 2005 death sentence. Order at 2. Under this Court's precedent, the *Hurst* decisions apply on collateral review as a matter of state law to death sentences, like Appellant's, that became final after the June 24, 2002 decision in *Ring*. *See Mosley v. State*, 209 So. 3d 1248, 1276 (Fla. 2016).

Because Appellant's death sentence was obtained in violation of the *Hurst* decisions, and the *Hurst* decisions apply retroactively to his case on collateral review, the only issue is whether the constitutional error at Appellant's death sentencing should be disregarded under a harmless-error analysis.

IV. The circuit court's ruling that the *Hurst* error at Appellant's sentencing was harmless beyond a reasonable doubt, which relied solely on the pre-*Hurst* advisory jury's recommendation and did not consider the impact of the *Hurst* error in Appellant's specific case in light of the whole record, contravened the United States Supreme Court's harmless-error precedent and the federal Constitution

A. State court harmless-error rulings denying federal constitutional claims must comply with the federal Constitution

The United States Constitution places limits on how state courts may apply harmless-error rules to deny federal constitutional claims. Whether a state court has exceeded federal constitutional boundaries in its harmless-error ruling "is every bit

as much of a federal question as what particular federal constitutional provisions mean, what they guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967). The United States Supreme Court "cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Id.*

In capital cases, harmless-error denials of federal constitutional claims are subjected to heightened federal scrutiny. *See, e.g.*, *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988). As the United States Supreme Court has long recognized, capital cases demand heightened standards of reliability because "death is a different kind of punishment from any other which may be imposed in this country . . . in both its severity and finality." *Beck v. Alabama*, 447 U.S. 625, 637 (1980).

B. This Court's per se harmless-error rule violates the United States Constitution because it relies solely on the product of the underlying federal constitutional violation—an advisory jury vote—which is not a reliable basis to conclude beyond a reasonable doubt that the *Hurst* error had no impact on the sentence

This Court's current per se harmless-error rule for *Hurst* claims violates the United States Constitution because it relies solely on the product of the underlying federal constitutional violation—an advisory jury vote—which is not a reliable basis to conclude beyond a reasonable doubt that the *Hurst* error had no impact on the death sentence. The fact that Appellant's pre-*Hurst* advisory jury unanimously recommended the death penalty does not establish that the same jury, or an average

rational jury, would have unanimously found all the facts necessary to impose a death sentence in a constitutional proceeding that complied with *Hurst*.

Appellant's advisory jury 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.").

Even in cases where the advisory 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. Appellant'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 advisory 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. This Court cannot determine what aggravators Appellant'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). Without any insight into what Appellant's advisory jurors considered in voting to recommend a death sentence, this Court also cannot be sure that an average rational jury in a constitutional proceeding that complied with the *Hurst* decisions would have unanimously found all the facts necessary for a death sentence.[3]

The 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

[3] To the extent the State may argue that the *Hurst* error is rendered harmless by the fact that Appellant's judge found prior-felony aggravators, this Court has correctly rejected the idea that a judge's finding of such aggravators is relevant in the harmless-error analysis of *Hurst* claims. *See, e.g., Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016). This precedent is consistent with federal law.

> 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 Appellant's penalty phase, conducted years earlier. His jury's reasoning remains opaque.

The jury's unanimous recommendation in Appellant'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 Appellant 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. 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 Appellant, and the decision-making in the case may have been different.

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 rely when determining 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 Appellant'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 Appellant'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.

By relying solely on the advisory jury vote to conclude that *Hurst* errors are harmless, this Court's per se rule violates the federal constitutional requirement for heightened reliability in death sentencing. *See Beck*, 447 U.S. at 637.

C. This Court's per se rule violates the United States Constitution by precluding individualized review of the whole record

This Court's per se rule violates the United States Constitution by precluding individualized consideration of the whole record in any unanimous-jury-recommendation case. The per se rule provides that *Hurst* errors are harmless beyond a reasonable doubt in all unanimous-jury cases, and therefore bars any individualized consideration of how a *Hurst* error may have affected a particular case. In Appellant's case, the circuit court applied this Court's per se rule without reviewing the entire record or considering how the *Hurst* error may have impacted Appellant's sentence in the specific context of the whole sentencing proceeding.

In *Chapman v. California*, 386 U.S. 18, 22 (1967), the United States Supreme Court explained that harmless errors are "small errors or defects," which "*in the setting of a particular case* are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." *Id.* at 22 (emphasis added). *Chapman* emphasized that the harmfulness of a constitutional violation must be assessed in the context of the entire proceeding. *Id.*

Especially in capital cases, the United States Supreme Court has warned against applying "harmless-error analysis in an automatic or mechanical fashion." *Clemons v. Mississippi*, 494 U.S. 738, 753 (1990); *see also Parker v. Dugger*, 498 U.S. 308, 319-20 (1991) (admonishing against affirming death sentences on harmless-error grounds based on an incomplete review of the record, including by failing to consider the mitigation). In deciding whether an error in a capital case is harmless, "what is important is an individualized determination" by the reviewing court, given the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases. *Clemons*, 494 U.S. at 753.

The circuit court's application of this Court's per se harmless-error rule did not allow for any individualized review of the impact of the *Hurst* error in Appellant's specific case. Failure to consider the whole record in applying harmless-error rules violates consistent United States Supreme Court precedent. *See, e.g.*, *United States v. Hastings*, 461 U.S. 499, 509 (1983) ("Since *Chapman*, the Court

has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless . . . ."); *Rose v. Clark*, 478 U.S. 570, 583 (1986) ("We have held that *Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless."); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1967) ("Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt."); *Harrington v. California*, 395 U.S. 250, 254 (1969) ("Our decision is based on the evidence in the record."); *Schneble v. Florida*, 405 U.S. 427, 432 (1972) ("[W]e must determine on the basis of our own reading of the record and on what seems to us to have been the probable impact . . . on the minds of the average jury") (ellipses in original); *Clemons*, 494 U.S. at 753 ("[I]t would require a detailed explanation based on the record for us to possibly agree that the error . . . was harmless");*Yates v. Evatt*, 500 U.S. 391, 403 (1991) ("To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.").

By precluding review of the whole record, this Court's per se rule amounts to exactly the opposite of what the United States Supreme Court said in *Barclay v. Florida*, 463 U.S. 939 (1983), constitutes a *constitutional* harmless-error analysis.

In *Barclay*, a capital case, the United States Supreme Court specifically approved "the Florida Supreme Court's practice of reviewing each death sentence to compare it to other Florida capital cases and to determine whether the punishment is too great," based on an individualized consideration of the whole record. 463 U.S. at 958 (internal quotation omitted). The Court found determinative that "the Florida Supreme Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless." *Id.* This Court's current per se harmless-rule for *Hurst* claims is the definition of "mechanical." This Court applies the rule, without exception, in every capital case where the advisory jury unanimously recommended death, without any further review of the record.

The circuit court's application of this Court's per se rule is especially problematic in a capital case, where review of the record matters as an Eighth Amendment matter. In *Clemons v. Missisippi*, the United States Supreme Court recognized that, in deciding whether an error in a capital case is harmless, "what is important is an individualized determination" by the reviewing court, given the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases. *Clemons*, 494 U.S. at 753 (citing *Barclay*, 483 U.S. at 958; *Zant v. Stephens*, 462 U.S. 862, 879 (1983)).

D. This Court's per se rule violates *Caldwell v. Mississippi* by relying solely on an advisory jury recommendation because the advisory jury instructions diminished the jurors' sense of responsibility

This Court's per se rule violates the Eighth Amendment in light of the United States Supreme Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), because the advisory jury instructions diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory. In addition, the same principles articulated in *Caldwell* separately undermine the legitimacy of this Court's application of *Chapman*'s harmless-error standard because they inject further uncertainty into what fact-finding jurors would have conducted in a constitutional proceeding.

In *Caldwell*, the United States 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 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 Appellant 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). Years 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).

Appellant'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 Appellant'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.

Although this Court held in the past that Florida's prior scheme did not violate *Caldwell*, those decisions are obviated by *Hurst*. *See Truehill v. Florida*, No. 16-

9448, 2017 WL 2463876 (Oct. 16, 2017) (Sotomayor, J., dissenting from denial of certiorari) ("Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme."). 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 Appellant'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. *See 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 Appellant’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 Appellant’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 extensive mitigation in Appellant’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.").

E. This Court's per se rule violates *Sullivan v. Louisiana* by relying solely on an advisory jury recommendation because neither the recommendation, nor the record as a whole, reflects even one underlying finding of fact made by a jury under the beyond-a-reasonable-doubt standard

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 . . . to the basis on which the jury *actually rested* its verdict." *Id.* at 279 (emphasis in original) (internal quotation marks omitted). In Appellant'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 Appellant'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 Appellant's case, did not incorporate the beyond-a-reasonable-doubt standard, it would violate due process to rely on them.

F. If this Court is uncertain of the *Hurst* error's impact on Appellant's sentencing based on the current record, harmless-error analysis should not be applied all, but if the Court believes the error is harmless it should not make a ruling before allowing Appellant the opportunity for further evidentiary development

If this Court is uncertain of the *Hurst* error's impact on Appellant's sentencing based on the current record, harmless-error analysis should not be applied at all. *See See O'Neal v. McAninch*, 513 U.S. 432, 435 (1995) ("[T]he uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict."); *see also Hurst v. State*, 202 So. 3d at 69. However, if the Court believes the error is harmless, it should not make a ruling without first remanding to the circuit court to allow Appellant to develop evidence of harmfulness, particularly as it relates to the unconstitutional statute's effect on defense counsel's strategy, challenges to the aggravation, and presentation of mitigation.

CONCLUSION

This Court should reverse the circuit court's order, vacate Appellant's death sentence, and remand for a new sentencing proceeding that complies with *Hurst*.

Respectfully submitted,

/s/Clyde M. Taylor, Jr.
Clyde M. Taylor, Jr.
Taylor & Taylor, LLC
2303 N. Ponce De Leon Blvd., Ste. L
St. Augustine, FL 32084
ct@taylor-taylor-law.com
(904) 687-1630
Florida Bar No. 129747

/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, Suite 4200
Tallahassee, FL 32301-1300
billy_nolas@fd.org
(850) 942-8818
Florida Bar No. 806821

CERTIFICATE OF SERVICE

I certify that on November 20, 2017, the foregoing was served via the e-portal to Clyde Taylor at ct@taylor-taylor-law.com, and Assistant Attorney General Lisa Hopkins at capapp@myfloridalegal.com and lisa.hopkins@myfloridalegal.com.

/s/ Billy H. Nolas
Billy H. Nolas

EXHIBIT 5

Filing # 64776875 E-Filed 11/30/2017 11:19:48 AM

IN THE SUPREME COURT OF FLORIDA

JESSE GUARDADO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

____________________/

CASE NO. SC17-1903
L.T. NO. 2004-CF-000903A
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR WALTON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

LISA A. HOPKINS
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 99459
The Capitol, PL-01
Tallahassee, Florida 32311
Telephone: (850) 414-3300
Facsimile: (850) 414-0997
Lisa.Hopkins@myfloridalegal.com

Counsel for Appellee

RECEIVED, 11/30/2017 11:23:29 AM, Clerk, Supreme Court

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STATEMENT OF THE CASE AND FACTS

Appellant, Jesse Guardado, was convicted of first-degree murder and robbery with a weapon. Guardado v. State, 965 So. 2d 108 (Fla. 2007) (Guardado). After the jury unanimously recommended death, Appellant waived a Spencer[1] hearing, and his waiver was found to be voluntary. Id. at 111. Over Appellant's continued assertion of waiver, the trial court held a Spencer hearing, and sentenced Appellant to death for the first-degree murder charged and 30 years of imprisonment for the robbery with a weapon count, to run consecutive to the murder count. Id. at 111-12. The judgment and sentence became final upon denial of certiorari by the United States Supreme Court on February 19, 2008. Guardado v. Florida, 128 S.Ct. 1250 (2008) (Guardado II); Fla. R. Crim. P. 3.851(d)(1)(B) (A judgment and sentence become final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."). This Court affirmed the denial of Appellant's postconviction motion. Guardado v. State, 176 So. 3d 886 (Fla. 2015) (Guardado III).

On March 9, 2017, Appellant filed with this Court a petition for writ of habeas corpus for relief under Hurst v. Florida, 136 S.Ct. 616 (2016). On May 11, 2017, this Court denied Appellant's petition for habeas relief, finding that the Hurst error in his

[1] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

case was harmless. Guardado v. Jones, 226 So. 3d 213 (Fla. 2017) (Guardado IV). On September 28, 2017, the trial court denied Appellant's Motion for Postconviction Relief, relying in part on this Court's ruling on the petition for habeas corpus relief. On October 27, 2017, Appellant filed this appeal. On October 31, 2017, this Court issued an order for Appellant to show cause as to "why the trial court's order should not be affirmed based on this Court's precedent in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, No. 16-998 (U.S. May 22, 2017), Davis v. State, 207 So. 3d 142 (Fla. 2016), and Mosley v. State, 209 So. 3d 1248 (Fla. 2016)." On November 20, 2017, Appellant filed his "Response to Order to Show Cause." (Response). This is the Appellee's reply to Appellant's Response.

OBJECTION TO ORAL ARGUMENT

Appellee objects to Appellant's request for oral argument. In the briefing schedule, this Court ordered the parties to respond to a limited issue that has been decided by this Court in other cases. As such, oral argument would not serve any purpose other than to delay the proceedings.

SUMMARY OF THE ARGUMENT

The lower court properly denied Appellant's successive motion for postconviction relief. Appellant has failed to show cause as to why his case should be excluded from this Court's precedent in Hurst, Davis, and Mosley. Because the jury unanimously recommended

death in Appellant's case, any Hurst error is harmless beyond a reasonable doubt.

ARGUMENT

Appellant claims that he is entitled to a new penalty phase pursuant to Hurst v. Florida and Hurst. Appellant is not entitled to relief because the unanimous death recommendation from the jury, combined with proper jury instructions and the overwhelming evidence supporting the aggravators in his case, renders any Hurst error harmless. Appellant's claim is without merit and the trial court's ruling should be affirmed because the court properly found that any error was harmless given the jury's unanimous recommendation for death.

The law of the case doctrine applies to Appellant. As this Court has explained the doctrine of the law of the case:

> Generally, under the doctrine of the law of the case, "all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts."

State v. Owen, 696 So. 2d 715, 720 (Fla. 1997). This doctrine is used "to promote finality and efficiency in the judicial process and prevent relitigation of the same issue in a case." Id. In this case, this Court ruled that the Hurst error was harmless. Guardado IV, 226 So. 3d at 215.

In order to be harmless error, there must be no reasonable probability that the Hurst error contributed to Appellant's death

sentence. In Davis, 207 So. 3d at 174, this Court found that when the jury unanimously recommends a death sentence, their unanimous recommendation "allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." In the instant case, the jury unanimously recommended that death was the appropriate sentence, and such a recommendation is "precisely what [this Court] determined in Hurst to be constitutionally necessary to impose a sentence of death." Id. at 175.

A proper harmless error analysis inquires whether the record demonstrates beyond a reasonable doubt that the jury would have unanimously recommended death had it been instructed in accordance with Hurst. See Hurst, 202 So. 3d at 68 (analyzing whether the jury's failure to unanimously find all the facts necessary for imposition of the death penalty contributed to Hurst's death sentence); see also Galindez v. State, 955 So. 2d 517, 523 (Fla. 2007) (explaining that the harmless error analysis for a violation of Apprendi v. New Jersey, 530 U.S. 466 (2000), is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found penetration when there was a failure to have the jury make the victim injury finding regarding penetration).

Any Hurst error in Appellant's case is clearly harmless because the jury in his case voted unanimously to impose the death penalty. This Court has consistently followed Davis and found

harmless error in cases involving unanimous recommendations. See King v. State, 211 So. 3d 866 (Fla. 2017); Kaczmar v. State, No. SC13-2247, 2017 WL 410214 (Fla. Jan. 31, 2017); Knight v. State, 225 So. 3d 661 (Fla. 2017); Truehill v. State, 211 So. 3d 930 (Fla. 2017), cert. denied, Truehill v. Florida, 2017 WL 2463876 (Oct. 16, 2017); Hall v. State, 212 So. 3d 1001 (Fla. 2017); Jones v. State, 212 So. 3d 321 (Fla. 2017); Middleton v. State, 220 So. 3d 1152 (Fla. 2017); Oliver v. State, 214 So. 3d 606 (Fla. 2017); Tunidor v. State, 221 So. 3d 587 (Fla. 2017); Morris v. State, 219 So. 3d 33 (Fla. 2017); Guardado IV; Cozzie v. State, 225 So. 3d 717 (Fla. 2017). In light of this Court's decisive precedent, the jury's unanimous death recommendation in this case renders any Hurst error harmless.

Appellant asserts multiple flawed reasons for this Court to depart from this Court's decisive precedent and find harmful Hurst error in his case. These claims are meritless.

Appellant begins by arguing that a unanimous jury recommendation should not be a dispositive factor in this Court's analysis of whether any Hurst error in his case is harmless and should be held to the federal standard. Under the federal law, violations of the right-to-jury-trial are subject to harmless error. Washington v. Recuenco, 548 U.S. 212, 222 (2006) (relying on Neder v. United States, 527 U.S. 1, 8 (1999), and holding that the "failure to submit a sentencing factor to the jury, like

failure to submit an element to the jury, is not structural error”); Galindez 955 So. 2d at 524 (holding harmless error analysis applies to Apprendi and Blakley errors).[2] In Appellant’s case, the trial court found five aggravating factors.[3] The jury would have found the on-conditional-release aggravator because there is simply no possible dispute as to Appellant’s status of being on conditional release at the time of the murder. And, while the jury is only required to find one aggravator to make Appellant death-eligible, the jury would have found the CCP and HAC aggravators as well. Per Appellant’s own confession, he went to the victim’s home to rob and murder her because “she lived in a

[2] The concurrence in Galindez also observed that this Court has the inherent authority to fashion remedies for constitutional problems, such as Hurst. Galindez, 955 So. 2d at 527 (Cantero, J., concurring) (stating that when “confronted with new constititonal problems to which the Legislature has not yet responded, we have the inherent authority to fashion remedies.” Citing In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So. 2d 1130, 1133 (Fla. 1990)).

[3] These aggravators were:

> (1) the capital felony was committed by a person under the sentence of imprisonment or on conditional release supervision; (2) the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence (to wit: armed robbery, April 9, 1984; robbery with a deadly weapon, July 6, 1990; robbery, 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 I, 965 So. 2d at 112.

secluded area and because she would open her home to him based on their prior trusting relationship." Guardado I, 965 So. 2d at 110. Additionally, the medical examiner testified that the victim suffered several injuries and that she was conscious at least through the time she was stabbed in the heart based on the wounds to her hands that were consistent with defensive wounds. Id. at 111. This Court, on direct appeal, held that the evidence was sufficient to support a finding of both aggravators. Id. at 115-17. The jury would have found the CCP and the HAC aggravators based on the evidence, just as the judge did. The jury would have found the aggravators if a special verdict had been used.

Appellant appears to argue that harmless error requires a remand to the trial court for an evidentiary hearing. But harmless error is an appellate concept. Trial courts do not conduct harmless error analysis, appellate courts do. Hurst errors are **not** structural as both the United States Supreme Court and this Court have already held in the context of Apprendi. Appellant ignores both the United States Supreme Court's holding to the contrary in Recuenco, and this Court's holding to the contrary in Galindez in his arguments.

Appellant asserts that harmless analysis should not be done at all in Hurst cases because trial counsel's approach to the case for life would have been different under the current law. (Response at 11-12). Harmless error does not operate in that manner.

Counsel's possible strategy is simply not part of the analysis. It is the facts of the cases, not any possible changes in the litigation strategy that matters to harmless error. Appellant appears to argue that trial counsel was ineffective under Strickland[4] for failing to anticipate the change in the law under Hurst. However, this Court has "consistently held that trial counsel cannot be held ineffective for failing to anticipate changes in the law." Hitchcock v. State, 991 So. 2d 337, 348 (Fla. 2008) (citing Cherry v. State, 781 So. 2d 1040, 1053 (Fla. 2000)).

Nor does Appellant explain why trial counsel would have approached the case differently, given that trial counsel knew, and the jury is instructed, that the jury's recommendation would be given great weight.

Under the pre-Hurst law, a jury's recommendation was not some sort of empty formality. It was nearly impossible for a trial judge to override a jury's recommendation of life under Tedder v. State, 322 So. 2d 908 (Fla. 1975). As the Eleventh Circuit observed, this Court's "stringent application" of the Tedder standard meant that the last override affirmed on appeal was over 20 years ago. Evans v. Sec'y, Fla. Dept. of Corr., 699 F.3d 1249, 1258 (11th Cir. 2012). But a trial court could, as a practical matter, totally ignore a jury's recommendation of death because the State could

[4] Strickland v. Washington, 466 U.S. 668 (1984).

not appeal such a ruling under double jeopardy principles.[5] The law in Florida at the time of Appellant's sentencing phase in 2005 was well established—a jury recommendation mattered a great deal. And all this was true even before Ring was decided in 2002, much less before Hurst was decided in 2016. Trial counsel had every incentive at the original penalty phase to pick jurors who would vote for life. And trial counsel had every incentive at the original penalty phase to present a full mitigation case to the jury.

Furthermore, Appellant's logic applies to every other type of error and it would be the end of harmless error doctrine. Goodwin v. State, 751 So. 2d 537, 539-41 (Fla. 1999) (detailing the history of the harmless error doctrine and explaining that before the doctrine, appellate courts routinely reversed convictions for almost every error committed during trial, resulting in appellate courts being described as "impregnable citadels of technicality"

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[5] Williams v. State, 595 So. 2d 936 (Fla. 1992) (holding that the Double Jeopardy Clause prohibits a new penalty phase where the judge had imposed a life sentence at the first penalty phase, citing Brown v. State, 521 So. 2d 110 (Fla. 1988)); Arizona v. Rumsey, 467 U.S. 203 (1984) (concluding that the Double Jeopardy Clause barred a new penalty phase where trial judge had found no aggravating circumstances and sentenced the defendant to life at the first penalty phase because a life sentence constitutes an "acquittal of the death penalty"); State v. Ballard, 956 So. 2d 470, 475 (Fla. 2d DCA 2007) (Villanti, J., concurring) (noting that it is only a judge's decision to override a jury's recommendation of life that is appealable; conversely, a decision to override a jury's recommendation of death is not applicable).

and resulting in harmless error statutes being enacted). The harmless error doctrine, by its very nature, requires an appellate court to "guess" what the jury would have done. Roger J. Traynor, The Riddle of Harmless Error (1970). Florida has a harmless error statute that requires appellate courts to affirm, if possible. § 924.33, Fla. Stat. (2017) (providing that no judgment shall be reversed unless the appellate court is of the opinion, "that error was committed that injuriously affected the substantial rights of the appellant"). Appellant is really arguing for a presumption of harmfulness in violation of the statute. This Court can, and should, conduct harmless error analysis in Hurst cases, as it has done for numerous other errors in the penalty phase in hundreds of capital cases, including for the improper finding of an aggravator, throughout the years. In this case, any Hurst error was harmless.

Appellant also argues that since the jury only recommended the imposition of the death penalty, there is a "Caldwell issue." See Caldwell v. Mississippi, 472 U.S. 320 (1985). This Court has repeatedly rejected challenges to the standard jury instructions in death penalty cases pursuant to Caldwell. Hall, 212 So. 3d at 1032-33. "To establish a Caldwell violation, a defendant must necessarily show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407 (1989); see also Romano v. Oklahoma, 512 U.S. 1, 9 (1994). Thus, references and descriptions that accurately

characterize the jury's and judge's sentencing roles under Florida law do not violate Caldwell. Even under the current death penalty statute, the jury's final unanimous recommendation of death is still an "advisory" verdict, as the judge is free to disagree with the jury's recommendation of death and sentence a defendant to a life sentence. After such a decision is made, under double jeopardy principles, a defendant "can no longer be put in jeopardy of receiving the death penalty." Williams v. State, 595 So. 2d 936, 938 (Fla. 1992). The judge remains the final sentencing authority in Florida and a jury's recommendation of death remains "advisory." Thus, characterizing the jury as "advisory" is an accurate description of the role assigned to the jury by Florida law and there is no Caldwell violation.

Additionally, the jury instructions provided in Appellant's case do not mislead a jury. A jury's sentencing verdict is advisory and the trial court has the authority to depart from a jury's death recommendation and impose a life sentence when it sees fit. This fact has not changed following Hurst. See § 921.141(2)(3), Fla. Stat. (2017) (referring to jury's sentencing verdict as a "recommendation" to the court).

As Appellant has failed to demonstrate any basis for this Court to recede from this precedent, Appellee urges this Court to affirm the trial court's denial of Appellant's Hurst claims.

CONCLUSION

In conclusion, as a matter of law, Appellant is not entitled to Hurst relief, and Appellee respectfully requests that this Honorable Court affirm the postconviction court's order denying Appellant relief under Hurst.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Lisa A. Hopkins
Assistant Attorney General
Florida Bar No. 99459
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
Telephone: (850)414-3336
Facsimile: (850)414-0997
capapp@myfloridalegal.com [and]
lisa.hopkins@myfloridalegal.com

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 30th day of November, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Billy Nolas, at billy_nolas@fd.org, and Clyde Taylor, at ct@taylor-taylor-law.com, Attorneys for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Lisa A. Hopkins
COUNSEL FOR APPELLEE

EXHIBIT 6

Filing # 64892316 E-Filed 12/04/2017 10:20:15 AM

No. SC17-1903

IN THE

Supreme Court of Florida

JESSE GUARDADO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S REPLY

RECEIVED, 12/04/2017 10:23:26 AM, Clerk, Supreme Court

Clyde M. Taylor, Jr.
Taylor & Taylor, LLC
2303 N. Ponce De Leon Blvd., Ste. L
St. Augustine, FL 32084
ct@taylor-taylor-law.com
(904) 687-1630
Florida Bar No. 129747

Billy H. Nolas
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301-1300
billy_nolas@fd.org
(850) 942-8818
Florida Bar No. 806821

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I. The State does not dispute that Appellant's death sentence violates *Hurst* or that *Hurst* applies retroactively to Appellant's case on collateral review

The State is correct in not disputing the circuit court's ruling that Appellant was sentenced to death pursuant to a Florida scheme that was ruled unconstitutional by the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

The State is also correct in not disputing the circuit court's ruling that the *Hurst* decisions apply retroactively to Appellant's case on collateral review. *See Mosley v. State*, 209 So. 3d 1248, 1276 (Fla. 2016). Accordingly, the only inquiry is whether, consistent with United States Supreme Court precedent, the *Hurst* error at Appellant's sentencing was harmless beyond a reasonable doubt.

II. The State is incorrect that the law-of-the-case doctrine applies because this Court has never addressed, in Appellant's case or any other case, whether its per se harmless-error rule violates the federal Constitution

The State is incorrect in arguing that the law-of-the-case doctrine requires this Court to uphold its unconstitutional per se harmless-error rule for *Hurst* claims. Although this Court previously declined to grant Appellant *Hurst* relief in its May 2017 habeas corpus decision, the Court did not address any of Appellant's federal constitutional arguments regarding the per se harmless-error rule for *Hurst* claims. The Court relied exclusively on state precedent establishing the per se rule. *See Guardado v. Jones*, 226 So.3d 213 (2017). The precedent cited in the State's own response shows that the law-of-the-case doctrine does not prevent this Court from

reaching federal constitutional arguments that have never been addressed in Appellant's case or any other case. State's Resp. at 3 (citing *State v. Owen*, 696 So. 3d 715, 720 (Fla. 1997) ("Generally, under the doctrine of the law of the case, all questions of law *which have been decided by the highest appellate court* become the law of the case which must be followed in subsequent proceedings.").[1]

III. The State fails to recognize that this Court's application of harmless-error rules must comply with the United States Constitution

The State fails to recognize that this Court's application of harmless-error rules must comply with the federal Constitution. Whether a state court has exceeded constitutional boundaries in the denial of a federal constitutional claim on harmless-error grounds "is every bit as much of a federal question as what particular federal constitutional provisions mean, what they guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967). In capital cases, a state court's harmless-error ruling is reviewed with heightened scrutiny. *See, e.g.*, *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988).

The United States Supreme Court has previously subjected this Court's harmless-error rulings to federal constitutional scrutiny. *See, e.g.*, *Schneble v. Florida*, 405 U.S. 427 (1972); *Barclay v. Florida*, 463 U.S. 939 (1983); *Parker v. Dugger*, 498 U.S. 308 (1991); *Sochor v. Florida*, 504 U.S. 527 (1992). In some

[1] All emphasis in quotations in this Reply is supplied unless otherwise indicated.

cases, this Court's harmless-error analysis survived. *See, e.g.*, *Schneble*, 405 U.S. at 432; *Barclay*, 463 U.S. at 958. In other cases, it did not. *See, e.g.*, *Parker*, 498 U.S. at 320; *Sochor*, 504 U.S. at 540. This Court's harmless-error rule for *Hurst* claims will fall into the latter category. A per se rule that *Hurst* errors are harmless in every case in which the defendant's pre-*Hurst* advisory jury unanimously recommended the death penalty, without individualized review of the error's impact in light of the whole record in any case, violates the Sixth, Eighth, and Fourteenth Amendments.

IV. The State does not explain how this Court's per se rule allows consideration of the *Hurst* error's probable impact on the decision-making of both Appellant's advisory jury and a rational post-*Hurst* jury

The United States Supreme Court has emphasized that proper harmless-error analysis should consider the constitutional error's probable impact on the minds of an average rational jury. *See Harrington v. California*, 395 U.S. 250, 254 (1969). The State's response recognizes that this Court's precedent also provides that harmless-error analysis should consider what a rational jury could have decided. *See* State's Resp. at 3-4. As the State observes, in prior decisions, including those involving errors under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court has applied the "average rational jury" test in conducting harmless-error analysis. *See, e.g.*, *Galindez v. State*, 955 So. 2d 517, 521-24 (Fla. 2007). But here, the State fails to explain how this Court's per se rule for *Hurst* claims allows for such analysis. This Court's per se rule focuses solely on the number of advisory jurors who voted

to recommend death and precludes any wider review of the record. The rule is insufficient to conclude whether, in light of the whole record, there is no reasonable probability that a rational jury would have found the facts necessary for death.

Without reviewing the record of Appellant's penalty phase, the circuit court could not determine beyond a reasonable doubt what an average rational jury would have decided in Appellant's case without the *Hurst* error. Under a proper harmless-error analysis that is consistent with federal standards, an individualized review of the record shows that the hardships Appellant suffered throughout his life—depression, neglect, abandonment, rape, beatings, and drug addiction—coupled with his acceptance of responsibility and guilty plea, could have persuaded rational jurors in a constitutional proceeding to find facts supporting a life sentence.

V. The State fails to explain how it carried its burden of proving the *Hurst* error harmless beyond a reasonable doubt merely through the circuit court's mechanical application of this Court's per se harmless-error rule

The United States Supreme Court has consistently reiterated that the burden of proving a federal constitutional error harmless beyond a reasonable doubt rests with the State. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). Here, the State fails to explain how it carried its burden of proving the *Hurst* error harmless beyond a reasonable doubt merely through the circuit court's mechanical application of this Court's per se harmless-error rule. This Court's per se rule violates federal precedent by effectively leaving the State with no harmless-error burden at all.

VI. The State inadequately addresses Appellant's federal arguments

A. The State fails to explain how this Court's per se rule complies with United States Supreme Court precedent holding that harmless-error review must include consideration of the whole record

The State fails to explain how this Court's per se rule complies with United States Supreme Court precedent holding that harmless-error review must consider the whole record. In *Chapman v. California*, 386 U.S. 18, 22-23 (1967), the Court defined "harmless" constitutional errors as those which "*in the setting of a particular case* are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." Since *Chapman*, the Court has reiterated that errors must be reviewed in light of the whole record. *See, e.g.*, *United States v. Hastings*, 461 U.S. 499, 509 (1983) ("Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record *as a whole* and to ignore errors that are harmless."); *Rose v. Clark*, 478 U.S. 570, 538 (1986) ("We have held that *Chapman* mandates consideration of the *entire record* prior to reversing a conviction for constitutional errors that may be harmless.").

The State's response even acknowledges that "[a] proper harmless-error analysis inquires whether *the record demonstrates* beyond a reasonable doubt that the jury would have unanimously recommended death had it been instructed in accordance with *Hurst*." State's Resp. at 3-4. But this Court's per se harmless-error rule for *Hurst* claims does not allow for consideration of the entire record. The

Court's record-blind rule turns on a single numerical fact that is common to every unanimous-jury-recommendation case and precludes any case-specific analysis.

The requirement to review the whole record is not a mere technicality in this case. There are critical factors other than the pre-*Hurst* advisory jury's vote that must be considered in the context of the whole record in determining whether a death sentence was inevitable even without the *Hurst* error. These factors include the particular aggravation and mitigation in the case, the *Hurst* error's impact on the advisory jury's diminished sense of responsibility for a death sentence, and the *Hurst* error's impact on defense's strategy and approach. By failing to allow for consideration of those and other objective factors, this Court's per se rule cannot ensure a constitutional level reliability in Florida's death penalty. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("[T]here is a . . . need for reliability in the determination that death is the appropriate punishment *in a specific case*.").

B. The State fails to recognize that the basis for this Court's pre-*Hurst* decisions rejecting *Caldwell* claims is no longer valid after *Hurst*

The State fails to recognize that the basis for this Court's pre-*Hurst* decisions rejecting *Caldwell v. Mississippi*, 472 U.S. 320 (1995), claims is no longer valid after *Hurst*. Before *Hurst*, this Court rejected numerous *Caldwell* challenges to its advisory jury instructions on the ground that the instructions accurately described the jury's role in Florida's constitutionally-valid scheme. *See, e.g.*, *Pope v. Wainwright*, 496 So. 2d 798, 805 (Fla. 1986); *Combs v. State*, 525 So. 2d 853, 856

(Fla. 1998). *Hurst* held that Florida's capital sentencing scheme was *not* constitutional, and that juries in that scheme were *not* afforded their constitutionally-required role as fact-finders. The pre-*Hurst* advisory jury instructions "improperly described the role assigned to the jury." *Dugger v. Adams*, 489 U.S. 401, 408 (1989).

As Justice Sotomayor recently observed, this Court should address whether its rejection of *Caldwell* challenges to Florida's prior jury instructions should be revisited in light of *Hurst*. *See Truehill v. Florida*, No. 16-9448, 2017 WL 2463876 (Oct. 16, 2017) (Sotomayor, J., dissenting from the denial of certiorari) ("Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where the court was the final decision-maker and the sentencer—not the jury.").

This Court's per se rule fails to consider the impact of the jury's diminished sentence of responsibility for a death sentence under *Caldwell*. Given the jury's belief that it was not ultimately responsible for Appellant's death sentence, this Court's per se rule cannot be squared with the Eighth Amendment. Under *Caldwell*, the circuit could not even be certain beyond a reasonable doubt that a jury in Appellant's case would have made the same unanimous *recommendation* without the *Hurst* error. The court certainly could not be sure beyond a reasonable doubt that a rational jury, understanding its critical role in determining a death sentence, would have unanimously found all of the elements for the death penalty satisfied.

C. The State fails to explain how this Court's per se rule complies with *Sullivan* given that neither the advisory jury recommendation, nor the record as a whole, reflects even one underlying finding of fact made by a jury under the beyond-a-reasonable-doubt standard

The State fails to explain how this Court's per se rule complies with *Sullivan v. Louisiana*, 508 U.S. 275 (1993), given that neither the advisory jury recommendation, nor the record as a whole, reflects even one underlying finding of fact made by a jury under the beyond-a-reasonable-doubt standard. The error in *Sullivan* was a defective instruction to the jury regarding the requirement that each element must be found beyond a reasonable doubt. *Sullivan*, 508 U.S. at 277. The United States Supreme Court reasoned that even though the jury in *Sullivan* had rendered a verdict reflecting the findings of fact necessary for a conviction, the trial court's failure to instruct the jury on the beyond-a-reasonable-doubt standard "vitiate[d] *all* the jury's findings" and meant, for purposes of harmless-error review, that "there has been no jury verdict within the meaning of the Sixth Amendment." *Id.* at 281. Without a constitutionally-valid jury verdict, the Court explained, "the entire premise of *Chapman* review is simply absent," *id.* at 281, because such review would necessarily require determination of "the basis on which the jury actually rested its verdict," *id.* at 279 (quoting *Yates*, 500 U.S. at 404) (emphasis in original).

The *Hurst* error produced by Florida's advisory jury scheme presents the inverse problem for harmless-error review. In *Sullivan*, the jury was not instructed on the beyond-a-reasonable-doubt standard before rendering findings of fact.

Florida's advisory juries were instructed on the beyond-a-reasonable-doubt standard, insofar as they were told that the elements for a death sentence must be found beyond a reasonable doubt, *but the judge, not the jury, was solely responsible for the fact-finding*, and only *after* the jury made its overall recommendation. If harmless-error review was problematic in *Sullivan* because the jury's fact-finding was not preceded by a proper reasonable doubt instruction, harmless-error review in a *Hurst* case is equally problematic because, although Florida's advisory juries were given beyond-a-reasonable-doubt instructions, those instructions were not followed by any jury fact-finding. Florida's pre-*Hurst* advisory jury recommendations are no more "verdicts" under the Sixth Amendment than the jury findings in *Sullivan*.

This Court need not go so far as to hold that *Hurst* errors are never subject to harmless-error analysis. But, at a minimum, this Court should hold that its per se harmless-error rule for *Hurst* claims violates *Sullivan* by relying entirely on an advisory jury recommendation that contains no jury fact-finding under the beyond-a-reasonable-doubt standard on any of the elements required for a death sentence.

VII. This Court should not repeat the same mistakes that led to the United States Supreme Court's reversals in *Hitchcock*, *Hall*, and *Hurst*

This Court's mechanical denial of *Hurst* relief on harmless-error grounds is only the latest chapter in its history of applying unconstitutional bright-line tests to curtail United States Supreme Court decisions. Twelve years after *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court had to intervene in

Hall v. Florida, 134 S. Ct. 1986 (2014), to halt this Court's use of an unconstitutional bright-line test to deny *Atkins* claims by redefining the clinical definition of sub-average intellectual functioning. Nine years after *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), the United States Supreme Court had to intervene in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), to stop this Court from applying an unconstitutional per se rule that barred relief even when the jury was never instructed that it could consider non-statutory mitigation. And 14 years after *Ring v. Arizona*, 536 U.S. 584 (2002), the United States Supreme Court was compelled to overrule, in its near-unanimous opinion in *Hurst*, this Court's rejection of *Ring* and upholding of Florida's scheme.

This Court should end its mechanical application of the per se harmless-error rule for *Hurst* claims now, rather than waiting years for the United States Supreme Court to clarify what the Constitution requires, as happened in *Hall*, *Hitchcock*, and *Hurst*. The federal constitutional quandary arising from this Court's per se harmless-error rule for *Hurst* claims would never have arisen in the first place if this Court had correctly read *Ring* as foreclosing Florida's advisory-jury scheme. The Court should not compound its error by continuing to apply a flawed per se rule.

VIII. Conclusion

For the reasons above and in Appellant's initial response to the order to show cause, this Court should reverse the circuit court's order, vacate Appellant's death sentence, and remand for a new sentencing proceeding that complies with *Hurst*.

Respectfully submitted,

/s/Clyde M. Taylor, Jr.
Clyde M. Taylor, Jr.
Taylor & Taylor, LLC
2303 N. Ponce De Leon Blvd., Ste. L
St. Augustine, FL 32084
ct@taylor-taylor-law.com
(904) 687-1630
Florida Bar No. 129747

/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, Suite 4200
Tallahassee, FL 32301-1300
billy_nolas@fd.org
(850) 942-8818
Florida Bar No. 806821

CERTIFICATE OF SERVICE

I certify that on December 4, 2017, the foregoing was served via the e-portal to Clyde Taylor at ct@taylor-taylor-law.com, and Assistant Attorney General Lisa Hopkins at capapp@myfloridalegal.com and lisa.hopkins@myfloridalegal.com.

/s/ Billy H. Nolas
Billy H. Nolas

EXHIBIT 7

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 13 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.

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.

(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.

(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

EXHIBIT 8

IN THE CIRCUIT COURT

FILED
WALTON CO FLORIDA
CLERK OF COURTS

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

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DM
9-15-05

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EXHIBIT 9

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

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JM
9-15-05

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.

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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.

1 both sides, then you have a vacillating or wavering
2 opinion and then the correct decision is life; the
3 State did not convince you beyond and to the exclusion
4 of every reasonable doubt that these aggravating
5 circumstances outweigh any mitigation you've heard.
6 Justice will be served by your decision to recommend
7 that this young man spend the rest of his life in
8 prison. Justice will be served.
9 And he didn't try to make any light -- Maybe he
10 could carry on the good things that Ms. Malone had
11 accomplished in her life. He wasn't trying to be
12 facetious about that; he meant that in a very sincere
13 way. Perhaps there is maybe some way he can find a way
14 to make a difference, a good difference. He won't get
15 that chance to make a difference sitting on death row;
16 he won't get that chance.
17 Ladies and gentlemen, justice will be served and
18 you'll be doing your duty, as you heard the evidence,
19 if you would recommend life in prison for Mr. Guardado.
20 Thank you.
21 THE COURT: Thank you,
22 Mr. Gontarek.
23
24 JURY CHARGE
25 Ladies and gentlemen, I thank you for your close

1 attention during this trial. I would ask that you give
2 your close attention to these instructions.
3 The defendant in this case has entered a plea of
4 guilty to murder in the first degree and robbery with a
5 weapon. Consequently, you will not concern yourself
6 with the question of his guilt.
7 The punishment for murder in the first degree is
8 either death or life imprisonment without the
9 possibility of parole. The final decision as to what
10 punishment shall be imposed rests solely with the Judge
11 of this court. However, the law requires that you, the
12 jury, render to the Court an advisory sentence as to
13 what punishment should be imposed upon the defendant.
14 It is now your duty to advise the Court as to what
15 punishment should be imposed upon the defendant for his
16 crime of murder in the first degree. As I told you,
17 the final decision remains with the Judge. However,
18 it's your duty to follow the law that now will be given
19 to you by the Court and render to the Court an advisory
20 sentence based upon your determination as to whether
21 sufficient aggravating circumstances exist to justify
22 imposition of the death penalty and whether sufficient
23 aggravating circumstances exist to outweigh any
24 mitigating circumstances found to exist.
25 Your advisory sentence should be based upon the

1 evidence that has been presented to you in these
2 proceedings. The aggravating circumstances that you
3 may consider are limited to any of the following that
4 are established by the evidence. Number one: The
5 crime for which Jesse Guardado is to be sentenced was
6 committed while he had been previously convicted of a
7 felony and was under sentence of imprisonment or was
8 placed on conditional release. Number two: The
9 defendant had been previously convicted of a felony
10 involving the use or threat of violence to some person.
11 The crimes of robbery and attempted robbery are
12 felonies involving the use of threat or violence to
13 another person. Number three: The crime for which the
14 defendant is to be sentenced was committed while he was
15 engaged in the commission of the crime of robbery.
16 Number four: The crime for which the defendant is to
17 be sentenced was especially heinous, atrocious, or
18 cruel.
19 "Heinous" means extremely wicked or shockingly
20 evil. "Atrocious" means outrageously wicked and vile.
21 "Cruel" means designed to inflict a high degree of pain
22 with utter indifference to or even enjoyment of the
23 suffering of others. The kind of crime intended to be
24 included as heinous, atrocious, or cruel is one
25 accompanied by additional acts that show that the crime

1 was conscienceless or pitiless and was unnecessarily
2 torturous to the victim.
3 Number five: The crime for which the defendant is
4 to be sentenced was committed in a cold and calculated
5 and premeditated manner and without any pretense of
6 moral or legal justification.
7 "Cold "means the murder was the product of calm
8 and cool reflection. "Calculated" means having a
9 careful plan or prearranged design to commit murder. A
10 killing is "premeditated" if it occurs after the
11 defendant consciously decides to kill. The decision
12 must be present in the mind at the time of the killing.
13 The law does not fix the exact period of time that must
14 pass between the formation of the premeditated intent
15 to kill and the killing. The period of time must be
16 long enough to allow reflection by the defendant. The
17 premeditated intent to kill must be formed before the
18 killing. However, in order for this aggravating
19 circumstance to apply, a heightened level of
20 premeditation demonstrated by a substantial period of
21 reflection is required.
22 A "pretense of moral or legal justification" is
23 any claim or justification or excuse that, though
24 insufficient to reduce the degree of murder,
25 nevertheless rebuts the otherwise cold, calculated, or

1 premeditated nature of the murder.
2 If you find the aggravating circumstances do not
3 justify the death penalty, your advisory sentence
4 should be one of life imprisonment without the
5 possibility of parole. Should you find sufficient
6 aggravating circumstances do exist, it will then be
7 your duty to determine whether aggravating
8 circumstances exist that outweigh the mitigating
9 circumstances.
10 Among the mitigating circumstances you may
11 consider, if established by the evidence, is any aspect
12 of the defendant's character, record, or background and
13 any circumstance of the offense.
14 Each aggravating circumstance must be established
15 beyond a reasonable doubt before it may be considered
16 by you in arriving at your decision. A reasonable
17 doubt is not a mere possible doubt, a speculative,
18 imaginary, or forced doubt. Such a doubt must not
19 influence you to disregard an aggravating circumstance
20 if you have an abiding conviction that it exists. On
21 the other hand, if, after carefully considering,
22 comparing, and weighing all the evidence, you don't
23 have an abiding conviction that the aggravating
24 circumstances exist or, if having a conviction, it is
25 one which is not stable, but one which wavers and

1 vacillates, then the aggravating circumstances have not
2 been proven beyond a reasonable doubt and you should
3 disregard it because the doubt is reasonable.
4 It is to the evidence introduced in this
5 proceeding and to it alone that you are to look for
6 that proof.
7 A reasonable doubt as to the existence of an
8 aggravating circumstance might arise from the evidence,
9 conflict in the evidence, or lack of evidence.
10 If you have a reasonable doubt as to the existence
11 of an aggravating circumstance, you should find that it
12 does not exist. However, if you have no reasonable
13 doubt, you should find that the aggravating
14 circumstance does exist and give it whatever weight you
15 feel it should receive.
16 If one or more aggravating circumstances are
17 established, you should consider all the evidence
18 tending to establish one or more mitigating
19 circumstance and give that evidence such weight as you
20 feel it should receive in reaching your conclusion as
21 to the sentence that should be imposed.
22 A mitigating circumstance need not be proven
23 beyond a reasonable doubt by the defendant. If you are
24 reasonably convinced that a mitigating circumstance
25 exists, you may consider it as established.

1 Weighing the evidence. It's up to you to decide
2 which evidence is reliable. You should use your common
3 sense in deciding which is the best evidence and which
4 evidence should not be relied upon in considering your
5 verdict. You may find some of the evidence not
6 reliable or less reliable than other evidence.
7 You should consider how the witnesses acted as
8 well as what they said. Some of the things you should
9 consider are as follows. Number one: Did the witness
10 seem to have an opportunity to see and know the things
11 about which the witness testified? Number two: Did
12 the witness seem to have an accurate memory? Number
13 three: Was the witness honest and straightforward in
14 answering the attorneys' questions? Number four: Did
15 the witness have some interest in how the case should
16 be decided? Number five: Did the witness' testimony
17 agree with the other testimony and other evidence in
18 the case? Number six: Was it proven that the witness
19 had been convicted of a crime?
20 You may rely upon your own conclusion about the
21 witness. A juror may believe or disbelieve all or any
22 part of the evidence or the testimony of any witness.
23 Expert witnesses are like other witnesses with one
24 exception; the law permits an expert witness to give
25 his or her opinion. However, an expert's opinion is

1 reliable only when given on a subject about which you
2 believe him or her to be an expert. Like other
3 witnesses, you may believe or disbelieve all or any
4 part of an expert's testimony.
5 The defendant in this case has become a witness.
6 You should apply the same rules in considering his
7 testimony that you would apply to the testimony of the
8 other witnesses.
9 A statement claimed to have been made by the
10 defendant outside of court has been placed before you.
11 Such a statement should always be considered with
12 caution and be weighed with great care to make certain
13 it was freely and voluntarily made. Therefore, you
14 must determine from the evidence that the defendant's
15 alleged statement was knowingly, voluntarily, and
16 freely made.
17 In making this determination, you should consider
18 the total circumstances, including but not limited to
19 one: Whether when the defendant made the statement, he
20 had been threatened in order to get him to make it; and
21 two: Whether anyone had promised him anything in order
22 to get him to make it. If you conclude the defendant's
23 out of court statement was not freely and voluntarily
24 made, you should disregard it.
25 Rules for deliberation. These are some general

1 rules that apply to your discussion. You must follow
2 these rules in order to return a lawful verdict. You
3 must follow the law as it is set forth in these
4 instructions. If you fail to follow the law, your
5 verdict will be a miscarriage of justice. There is no
6 reason for failing to follow the law in this case. All
7 of us are depending upon you to make a wise and legal
8 decision in this matter.
9 This case must be decided only upon the evidence
10 that you have heard from the testimony of the witnesses
11 and have seen in the form of the exhibits in evidence
12 and these instructions.
13 This case must not be decided for or against
14 anyone because you are angry at anyone.
15 Remember, the lawyers are not on trial. Your
16 feelings about them should not influence your decision
17 in this case.
18 It is entirely proper for a lawyer to talk to a
19 witness about what testimony the witness would give if
20 called to the courtroom. The witness should not be
21 discredited by talking to a lawyer about his or her
22 testimony.
23 Your verdict should be -- Let me start over. Your
24 verdict should not be influenced by feelings of
25 prejudice, bias, or sympathy. Your verdict must be

1 based on the evidence and on the law contained in these
2 instructions.
3 You have heard evidence about the impact of this
4 homicide on the family, friends, and community of
5 Jackie Malone. This evidence may be considered by you
6 to determine the victim's uniqueness as an individual
7 human being and the resultant loss by Jackie Malone's
8 death. However, the law does not allow you to weigh
9 this evidence as aggravating circumstances. Your
10 recommendation to the Court must be based only on the
11 aggravating circumstances and the mitigating
12 circumstances upon which you've been instructed.
13 The sentence that you recommend to the Court must
14 be based upon the facts as you find them from the
15 evidence and the law. If, after weighing the
16 aggravating and mitigating circumstances, you determine
17 that the aggravating factors found to exist
18 sufficiently outweigh the mitigating factors or, in the
19 absence of mitigating factors, if you find that the
20 aggravating factors alone are sufficient, you may
21 exercise your option to recommend a death sentence to
22 be imposed rather than a sentence of life in prison
23 without the possibility of parole. However, regardless
24 of your findings with respect to aggravating and
25 mitigating circumstances, you are never required to

1 recommend a sentence of death.

2 The process of weighing aggravating and mitigating

3 factors to determine the proper punishment is not a

4 mechanical process. The law contemplates that

5 different factors may be given different weights or

6 values by different jurors. In your decision making

7 process, you and you alone are to decide what weight is

8 to be given to a particular factor.

9 In these proceedings, it is not necessary that the

10 advisory sentence of the jury be unanimous.

11 The fact that the determination of whether you

12 recommend a sentence of death or sentence of life

13 imprisonment in this case can be reached by a single

14 ballot should not influence you to act hastily or

15 without due regard to the gravity of these proceedings.

16 Before you ballot, you should carefully weigh, sift,

17 and consider the evidence, and all of it, realizing

18 that human life is at stake, and bring to bear your

19 best judgment in reaching your advisory sentence.

20 If a majority of the jury -- seven or more --

21 determine that Jesse Guardado should be sentenced to

22 death, your advisory sentence will be --

23 And we've prepared a verdict form for you. It

24 reads: In the Circuit Court of the State of Florida.

25 State of Florida versus Jesse Guardado. A case number.

1 We the jury advise and recommend to the Court as
2 follows as to the offense of murder in the first
3 degree. The first blank says: A majority of the jury,
4 by a vote of -- and a majority would be seven or more
5 or however many voted the other way -- advise and
6 recommend to the Court that it impose the death penalty
7 upon Jesse Guardado. The second blank: The jury
8 advise and recommend to the Court that it impose a
9 sentence of life imprisonment upon Jesse Guardado
10 without the possibility of parole.
11 If you'll look at your verdict forms there, the
12 last sentence is, So say we all. And today is the 15th
13 day of September, 2005. It has a place for the
14 foreperson to sign.
15 So, a majority of the jury, by a vote of seven or
16 more, would be a vote to impose the death penalty. On
17 the other hand, if by six or more votes the jury
18 determines that Jesse Guardado should not be sentenced
19 to death, your advisory sentence will be that: The
20 jury advises and recommends to the Court that it impose
21 a sentence of life imprisonment upon Jesse Guardado
22 without the possibility of parole.
23 When you have reached an advisory sentence in
24 conformity with these instructions, the form of verdict
25 that I just read to you should be signed by your

1 foreperson, dated with today's date, and returned to
2 the Court.
3 There is no set time for a jury to reach a
4 verdict. Sometimes it only takes a few minutes; other
5 times it takes hours or even days. It all depends upon
6 the complexity of the case, the issues involved, and
7 the make up of the individual jury. You should take
8 sufficient time to fairly discuss the evidence and
9 arrive at a well reasoned verdict.
10 Deciding a verdict is exclusively your job. I
11 cannot participate in that decision in any way. Please
12 disregard anything I may have said or done that makes
13 you think I prefer one verdict over another.
14 Can I see the two attorneys for just a second?
15 (WHEREUPON, a bench conference took place off the
16 record.)
17 Ladies and gentlemen, in a few minutes you'll be
18 taken to the jury room by the bailiff. The first thing
19 you should do is to elect a foreperson. The foreperson
20 presides over your deliberations like the chairperson
21 of a meeting. It is the foreperson's job to sign and
22 date the verdict form when you have reached a decision.
23 And the foreperson will bring the verdict form back to
24 the courtroom when you return. Obviously, either a man
25 or a woman can be a foreperson of the jury.

1 All right. You will, in a moment, retire to
2 consider your recommendation as to the penalty to be
3 imposed upon this defendant.
4 Gentlemen, was that the instructions that I said I
5 would give?
6 MR. GONTAREK: Yes, Judge.
7 MR. ELMORE: Yes, Your Honor.
8 THE COURT: All right. And
9 also, gentlemen, at this time, my notes indicate that
10 Mr. Edwin Cuchens was Alternate Number one and
11 Ms. Dottie Kitch was Alternate Number two. Is that
12 correct?
13 MR. ELMORE: Yes, Your Honor.
14 MR. GONTAREK: Yes, Judge.
15 THE COURT: The good news for
16 the two of you folks is you're going to be excused at
17 this time. You were the alternate jurors. You're
18 welcome to stick around and stay or you can leave.
19 And you can call the clerk's office if you need an
20 excuse; they'll be glad to give you that. And so I'd
21 ask Mr. Cuchens and Ms. Kitch, if you'll step out?
22 If you need to retrieve something from the jury room,
23 you can do that.
24 And then once they leave the jury box, I will
25 allow the remaining members of the jury to go back and

EXHIBIT 10

Florida Death-Penalty Appeals Decided in Light of Hurst

Last updated: May 15, 2018

Total number of prisoners whose cases have been reviewed by Florida Supreme Court (or, if relief is granted, by a Circuit Court) in light of *Hurst*: 259

Number of prisoners who have obtained relief under *Hurst*: 128 (49.42%)

Number of prisoners who have been denied relief under *Hurst*: 131 (50.58%)

The Florida Supreme Court has declared that it will apply its decisions in *Hurst v. State* and *Asay v. State*—which held that non-unanimous jury recommendations of death violate the Florida state constitution and the Sixth Amendment of the U.S. Constitution—to new death penalty cases and to older cases in which the direct appeal process was final on or before the U.S. Supreme Court decided *Ring v. Arizona* in June 2002.

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Abdool, Dane	Orange	N	N	10-2	Y	4/6/17
Allred, Andrew	Seminole	N	WAIVED JURY		N	11/16/17
Alston, Pressley Bernard	Duval	Y	N	9-3	N	1/22/18
Altersberger, Joshua Lee	Highlands	N	N	9-3	Y	4/27/17
Anderson, Charles L.	Broward	N	N	8-4	Y	3/9/17
Anderson, Richard	Hillsborough	Y	N	11-1	N	1/26/18
Archer, Robin Lee	Escambia	Y	N	7-5	N	3/17/17
Armstrong, Lancelot Uriley	Broward	N	N	9-3	Y	1/19/17
Asay, Marc	Duval	Y	N	9-3, 9-3	N **(EXECUTED)**	12/22/16
Atwater, Jeffrey Lee	Pinellas	Y	N	11-1	N	1/23/18
Ault, Howard Steven	Broward	N	N	9-3, 10-2	Y	3/9/17
Bailey, Robert J.	Bay	N	N	11-1	Y	7/6/17
Baker, Cornelius	Flagler	N	N	9-3	Y	3/23/17
Banks, Donald	Duval	N	N	10-2	Y	4/20/17
Bargo, Michael Shane	Marion	N	N	10-2	Y	6/29/17
Barnhill, Arthur	Seminole	N	N	9-3	Y	2/20/17
Barwick, Darryl Brian	Bay	Y	Y	12-0	N	2/28/18
Bates, Kayle Barrington	Bay	Y	N	9-3	N	1/22/18
Beasley, Curtis W.	Polk	Y	N	10-2	N	1/23/18
Belcher, James	Duval	N	N	9-3	Y	11/2/17
Bell, Michael	Duval	Y	Y	12-0, 12-0	N	1/29/18
Bevel, Thomas	Duval	N	N	8-4, 12-0	Y*	6/15/17
Booker, Stephen Todd	Duval	Y	N	8-4	N	1/30/18

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Bowles, Gary Ray	Duval	Y	Y	12-0	N	1/29/18
Braddy, Harrel	Miami-Dade	N	N	11-1	Y	6/15/17
Bradley, Brandon Lee	Brevard	N	N	10-2	Y	3/30/17
Bradley, Donald	Clay	Y	N	10-2	N	1/22/18
Branch, Eric Scott	Escambia	Y	N	10-2	N **(EXECUTED)**	1/22/18
Brookins, Elijah	Gadsden	N	N	10-2	Y	4/20/17
Brooks, Lamar	Okaloosa	N	N	9-3, 11-1	Y	3/10/17
Brown, Paul Alfred	Hillsborough	Y	N	7-5	N	1/29/18
Brown, Paul Anthony	Volusia	Y	Y	12-0	N	2/28/18
Burns, Daniel Jr.	Manatee	Y	Y	12-0	N	1/23/18
Buzia, John	Seminole	N	N	8-4	Y	4/6/17
Byrd, Milford Wade	Hillsborough	Y	Unknown	Unknown	N	2/28/18
Calloway, Tavares David	Miami-Dade	N	N	7-5, 7-5, 7-5, 7-5, 7-5	Y	1/26/17
Campbell, John	Citrus	N	N	8-4	Y	8/30/17
Card, James	Bay	N	N	11-1	Y	5/4/17
Carr, Emilia	Marion	N	N	7-5	Y	2/7/17
Carter, Pinkney	Duval	N	N	9-3, 8-4	Y	10/4//17
Caylor, Matthew	Bay	N	N	8-4	Y	5/18/17
Clark, Ronald Wayne Jr.	Duval	Y	N	11-1	N	1/23/18
Cole, Loran	Marion	Y	Y	12-0	N	1/23/18
Cole, Tiffany Ann	Duval	N	N	9-3, 9-3	Y	6/29/17
Conde, Rory	Miami-Dade	N	N	9-3	Y	8/31/17
Consalvo, Robert	Broward	Y	N	11-1	N	1/31/18
Cox, Allen	Lake	N	N	10-2	Y	7/23/17
Cozzie, Steven Anthony	Walton	N	Y	12-0	N	5/11/17
Crain, Willie Seth	Hillsborough	N	Y	12-0	N	4/5/18
Damren, Floyd William	Clay	Y	Y	12-0	N	2/2/18
Darling, Dolan a/k/a Sean Smith	Orange	N	N	11-1	Y	3/29/17
Davis, Adam W.	Hillsborough	N	N	7-5	Y	5/2/17
Davis, Barry T.	Walton	N	N	9-3, 10-2	Y	5/11/17
Davis, Jr., Leon	Polk	N	Y	12-0, 12-0, 8-4	N	11/10/16
Davis, Jr., Leon	Polk	N	WAIVED JURY		N	11/10/16
Davis, Mark Allen	Pinellas	Y	N	8-4	N	1/29/18
Davis, Toney D.	Duval	Y	N	11-1	N	2/17/17
Dennis, Labrant	Miami-Dade	N	N	11-1, 11-1	Y	7/7/17
Deparvine, Williams James	Hillsborough	N	N	8-4, 8-4	Y	4/6/17
Derrick, Samuel Jason	Pasco	Y	N	7-5	N	2/2/18

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Dessaure, Kenneth	Pinellas	N	WAIVED JURY		N	11/16/17
Deviney, Randall	Duval	N	N	8-4	Y	3/23/17
Diaz, Joel	Lee	N	N	9-3	Y	6/15/17
Dillbeck, Donald David	Leon	Y	N	8-4	N	1/24/18
Doorbal, Noel	Miami-Dade	N	N	8-4, 8-4	Y	9/20/17
Doty, Wayne	Bradford	N	N	10-2	Y	8/7/17
Douglas, Luther	Duval	N	N	11-1	Y	6/29/17
Dubose, Rasheem	Duval	N	N	8-4	Y	2/9/17
Durousseau, Paul	Duval	N	N	10-2	Y	1/31/17
Eaglin, Dwight	Charlotte	N	N	8-4, 8-4	Y	4/3/17
England, Richard	Volusia	N	N	8-4	Y	5/22/17
Evans, Paul H.	Indian River	N	N	9-3	Y	3/20/17
Evans, Steven Maurice	Orange	Y	N	11-1	N	1/24/18
Evans, Wydell Jody	Brevard	N	N	10-2	Y	
Finney, Charles	Hillsborough	Y	N	9-3	N	1/26/18
Floyd, Maurice Lamar	Putnam	N	N	11-1	Y	5/17/17
Ford, James D.	Charlotte	Y	N	11-1, 11-1	N	1/23/18
Foster, Charles	Bay	Y	N	8-4	N	1/29/18
Foster, Kevin Don	Lee	Y	N	9-3	N	1/29/18
Fotopoulos, Konstantinos	Volusia	Y	N	8-4, 8-4	N	1/29/18
Frances, David	Orange	N	N	9-3, 10-2	Y	3/29/17
Franklin, Richard P.	Columbia	N	N	9-3	Y	11/23/16
Gamble, Guy R.	Lake	Y	N	10-2	N	1/29/18
Gaskin, Louis	Flagler	Y	N	8-4, 8-4	N	2/28/18
Geralds, Mark Allen	Bay	Y	Y	12-0	N	2/28/18
Glover, Dennis T.	Duval	N	N	10-2	Y	9/14/17
Gonzalez, Leonard	Escambia	N	N	10-2	Y	5/23/17
Gonzalez, Ricardo	Miami-Dade	Y	N	8-4	N	3/23/18
Gordon, Robert R.	Pinellas	Y	N	9-3	N	1/31/18
Gregory, William	Volusia	N	N	7-5, 7-5	Y	8/31/17
Griffin, Michael Allen	Miami-Dade	Y	N	10-2	N	2/2/18
Grim, Norman	Santa Rosa	N	Y	12-0	N	3/29/18
Guardado, Jesse	Walton	N	Y	12-0	N	5/11/17
Gudinas, Thomas Lee	Collier	Y	N	10-2	N	1/30/18
Guzman, James	Volusia	N	N	11-1	Y	2/22/18
Guzman, Victor	Miami-Dade	N	N	7-5	Y	4/6/17
Hall, Donte Jermaine	Lake	N	N	8-4	Y	6/15/17
Hall, Enoch D.	Volusia	N	Y	12-0	N	2/9/17
Hamilton, Richard	Hamilton	Y	N	10-2	N	2/18/18

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Hampton, John	Pinellas	N	N	9-3	Y	5/4/17
Hannon, Patrick	Hillsborough	Y	Y	12-0	N **(EXECUTED)**	11/1/17
Hartley, Kenneth	Duval	Y	N	9-3	N	1/26/18
Hayward, Steven	St. Lucie	N	N	8-4	Y	3/24/17
Heath, Ronald Palmer	Alachua	Y	N	10-2	N	2/28/18
Hernandez, Michael	Santa Rosa	N	N	11-1	Y	5/11/17
Hernandez-Alberto, Pedro	Hillsborough	N	N	10-2, 10-2	Y	5/9/17
Hertz, Gerry	Wakulla	N	N	10-2, 10-2	Y	5/18/17
Heyne, Justin	Brevard	N	N	10-2, 8-4	Y	4/6/17
Hitchcock, James	Orange	Y	N	10-2	N	8/10/17
Hobart, Robert	Santa Rosa	N	N	7-5	Y	2/21/18
Hodges, George Michael	Hillsborough	Y	N	10-2	N	2/2/18
Hodges, Willie James	Escambia	N	N	10-2	Y	3/16/17
Hojan, Gerhard	Broward	N	N	9-3, 9-3	Y	1/31/17
Huggins, John	Orange	N	N	9-3	Y	5/23/17
Hunter, Jerone	Volusia	N	N	10-2, 10-2, 9-3, 9-3	Y	6/16/17
Hurst, Timothy	Escambia	N	N	7-5	Y	10/14/16
Hutchinson, Jeffrey	Okaloosa	N	WAIVED JURY	WAIVED JURY	N	3/15/18
Israel, Connie Ray	Duval	N	N	7-5	Y	3/21/17
Jackson, Etheria Verdell	Duval	Y	N	7-5	N	1/24/18
Jackson, Kenneth R.	Hillsborough	N	N	11-1	Y	3/23/17
Jackson, Michael James	Duval	N	N	8-4, 8-4	Y	6/9/17
Jackson, Ray	Volusia	N	N	9-3	Y	4/24/17
Jeffries, Kevin G.	Bay	N	N	10-2	Y	7/13/17
Jeffries, Sonny Ray	Orange	Y	N	11-1	N	1/26/18
Jennings, Brandy Bain	Collier	Y	N	10-2, 10-2, 10-2	N	1/29/18
Johnson, Emanuel	Sarasota	Y	N	8-4, 10-2	N	2/2/18
Johnson, Paul Beasley	Polk	N	N	11-1, 11-1, 11-1	Y	12/1/16
Johnson, Richard Allen	St. Lucie	N	N	11-1	Y	3/24/17
Johnson, Ronnie	Miami-Dade	Y	N	7-5, 9-3	N	3/27/18
Johnston, Ray	Hillsborough	N	N	11-1	Y	7/21/17
Johnston, Ray	Hillsborough	N	Y	12-0	N	7/21/17
Jones, Henry Lee	Brevard	N	Y	12-0	N	3/2/17
Jones, Marvin Burnett	Duval	Y	N	9-3	N	1/22/18
Jones, Victor	Miami-Dade	Y	Y/N	10-2, 12-0	N	9/28/17
Jordan, Joseph	Volusia	N	N	10-2	Y	8/22/17

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Kaczmar, III, Leo L.	Clay	N	Y	12-0	N	1/31/17
Kelley, William H.	Highlands	Y	N	8-3 [not a typo]	N	1/26/18
King, Cecil	Duval	N	N	8-4	Y	7/12/17
King, Michael L.	Sarasota	N	Y	12-0	N	1/26/17
Kirkman, Vahtiece	Brevard	N	Y	10-2	Y	1/11/18
Knight, Richard	Broward	N	Y	12-0, 12-0	N	1/31/17
Kocaker, Genghis	Pinellas	N	N	11-1	Y	10/6/17
Kokal, Gregory Alan	Duval	Y	Y	12-0	N	1/24/18
Kopsho, William M.	Marion	N	N	10-2	Y	1/19/17
Krawczuk, Anton	Duval	Y	Y	12-0	N	1/31/18
Lamarca, Anthony	Pinellas	Y	N	11-1	N	1/30/18
Lambrix, Cary Michael	Glades	Y	N	8-4, 10-2	N **(EXECUTED)**	9/29/17
Lawrence, Gary	Santa Rosa	Y	N	9-3	N	2/2/18
Lebron, Joel	Osceola	N	N	7-5	Y	4/20/17
Lightbourne, Ian	Marion	Y	N	Unrecorded	N	1/26/18
Long, Robert Joe	Hillsborough	Y	Y	12-0	N	1/29/18
Lucas, Harold Gene	Lee	Y	N	11-1	N	1/24/18
Marquard, John	St. Johns	Y	Y	12-0	N	1/24/18
Martin, David	Clay	N	N	9-3	Y	7/13/17
Matthews, Douglas	Volusia	N	N	10-2	Y	12/5/17
McCoy, Richard (aka Jamil Rashid)	Duval	N	N	7-5	Y	9/6/17
McCoy, Thomas	Walton	N	N	11-1	Y	11/8/17
McGirth, Renaldo Devon	Marion	N	N	11-1	Y	1/26/17
McKenzie, Norman Blake	St. Johns	N	N	10-2, 10-2	Y	6/19/17
McLean, Derrick	Orange	N	N	9-3	Y	4/24/17
McMillian, Justin	Duval	N	N	10-2	Y	4/13/17
Melton, Antonio Lebaron	Escambia	Y	N	8-4	N	2/2/18
Mendoza, Marbel	Miami-Dade	Y	N	7-5	N	1/30/18
Merck, Jr., Troy	Pinellas	N	N	9-3	Y	5/5/17
Middleton, Dale	Okeechobee	N	Y	12-0	N	3/9/17
Miller, David Jr.	Duval	Y	N	7-5	N	1/31/18
Miller, Lionel Michael	Orange	N	N	11-1	Y	5/8/17
Morton, Alvin	Pasco	Y	N	11-1, 11-1	N	2/2/18
Morris, Dontae	Hillsborough	N	Y	12-0, 12-0	N	4/27/17
Morris, Dontae	Hillsborough	N	N	10-2	Y	1/11/18
Morris, Robert D.	Polk	Y	N	8-4	N	1/26/18
Mosley, John F.	Duval	N	N	8-4	Y	12/22/16
Mullens, Khadafy	Pinellas	N	WAIVED JURY		N	6/16/16

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Murray, Gerald Delane	Duval	N	N	11-1	Y	4/4/17
Nelson, Joshua D.	Lee	Y	Y	12-0	N	1/31/18
Nelson, Micah	Polk	N	N	9-3	Y	3/8/17
Newberry, Rodney	Duval	N	N	8-4	Y	4/6/17
Oats, Jr. Sonny Boy	Marion	Y	UNKNOWN		N	5/25/17
Occhicone, Dominick A.	Pasco	Y	N	7-5	N	1/30/18
Okafor, Bessman	Orange	N	N	11-1	Y	6/8/17
Oliver, Terence Tabius	Brevard	N	Y	12-0, 12-0	N	4/6/17
Orme, Roderick	Bay	N	N	11-1	Y	3/30/17
Overton, Thomas M.	Monroe	Y	N	8-4, 9-3	N	2/2/18
Pace, Bruce Douglas	Santa Rosa	Y	N	7-5	N	1/30/18
Pagan, Alex	Broward	N	N	7-5, 7-5	Y	2/1/18
Parker, J.B.	Martin	N	N	11-1	Y	4/20/17
Partin, Phillup Alan	Pasco	N	N	9-3	Y	3/27/17
Pasha, Khalid	Hillsborough	N	N	11-1, 11-1	Y	5/11/17
Peterka, Daniel Jon	Okaloosa	Y	N	8-4	N	1/22/18
Peterson, Robert Earl	Duval	N	N	7-5	Y	7/6/17
Pham, Tai	Seminole	N	N	10-2	Y	3/22/17
Phillips, Galante	Duval	N	N	7-5	Y	4/20/17
Phillips, Harry Franklin	Miami-Dade	Y	N	7-5	N	1/22/18
Philmore, Lenard James	Martin	N	Y	12-0	N	1/25/18
Pietri, Norberto	Palm Beach	Y	N	8-4	N	2/2/18
Poole, Mark	Polk	N	N	11-1	Y	3/31/17
Pope, Thomas Dewey	Broward	Y	N	9-3	N	2/28/18
Puiatti, Carl	Pasco	Y	N	11-1	N	1/23/18
Quince, Kenneth Darcell	Volusia	Y	WAIVED JURY		N	1/18/18
Raleigh, Bobby Allen	Volusia	Y	Y	12-0, 12-0	N	2/28/18
Reaves, William	Indian River	Y	N	10-2	N	5/2/18
Reynolds, Michael	Seminole	N	Y	12-0, 12-0	N	4/5/18
Rhodes, Richard Wallace	Pinellas	Y	N	10-2	N	1/23/18
Rigterink, Thomas William	Polk	N	N	7-5, 7-5	Y	4/6/17
Rimmer, Robert	Broward	N	N	9-3, 9-3	Y	6/29/17
Robards, Richard	Pinellas	N	N	7-5, 7-5	Y	4/6/17
Rodgers, Jeremiah	Santa Rosa	N	WAIVED JURY		N	2/8/18
Rodgers, Theodore	Orange	N	N	8-4	Y	4/3/17
Rogers, Glen Edward	Hillsborough	Y	Y	12-0	N	1/30/18
Rodriguez, Manuel Antonio	Miami-Dade	Y	Y	12-0, 12-0, 12-0	N	1/31/18
San Martin, Pablo	Miami-Dade	Y	N	9-3	N	2/28/18

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Schoenwetter, Randy	Brevard	N	N	10-2, 9-3	Y	4/7/17
Seibert, Michael	Broward	N	N	9-3	Y	6/22/17
Serrano, Nelson	Polk	N	N	9-3, 9-3, 9-3, 9-3	Y	5/11/17
Sexton, John	Pasco	N	N	10-2	Y	6/29/17
Silvia, William	Seminole	N	N	11-1	Y	2/20/17
Simmons, Eric Lee	Lake	N	N	8-4	Y	12/22/16
Sireci, Henry Perry	Orange	Y	N	11-1	N	1/31/18
Sliney, Jack R.	Charlotte	Y	N	7-5	N	1/31/18
Smith, Corey	Miami-Dade	N	N	9-3, 10-2	Y	3/16/17
Smith, Joseph	Sarasota	N	N	10-2	Y	7/13/17
Smith, Stephen V.	Charlotte	N	Y	9-3	Y	4/21/17
Smithers, Samuel	Hillsborough	N	Y	12-0, 12-0	N	3/29/18
Snelgrove, David B.	Flagler	N	N	8-4, 8-4	Y	5/11/17
Sochor, Dennis	Broward	Y	N	10-2	N	1/30/18
Stein, Steven Edward	Duval	Y	N	10-2	N	1/31/18
Stephens, Jason Demetrius	Duval	Y	N	9-3	N	1/22/18
Stewart, Kenneth Allen	Hillsborough	Y	N	10-2	Y	4/25/17
Stewart, Kenneth Allen	Hillsborough	Y	N	10-2	N	1/26/18
Sweet, William Earl	Duval	Y	N	10-2	N	1/24/18
Suggs, Ernest	Walton	Y	N	7-5	N	3/17/17
Tanzi, Michael	Monroe	N	Y	12-0	N	4/5/18
Taylor, John Calvin	Clay	N	N	10-2	Y	10/12/17
Taylor, Perry	Hillsborough	Y	N	8-4	N	5/3/18
Taylor, Steven Richard	Duval	Y	N	10-2	N	1/24/18
Taylor, William Kenneth	Hillsborough	N	Y	12-0	N	4/5/18
Thomas, William Gregory	Duval	Y	N	11-1	N	1/24/18
Trease, Robert J.	Sarasota	Y	N	11-1	N	1/24/18
Trepal, George	Polk	Y	N	9-3	N	1/26/18
Trotter, Melvin	Manatee	Y	N	11-1	N	1/26/18
Troy, John	Sarasota	N	N	11-1	Y	6/13/17
Truehill, Quentin	St. Johns	N	Y	12-0	N	2/23/17
Tundidor, Randy W.	Broward	N	Y	12-0	N	4/27/17
Turner, James Daniel	St. Johns	N	N	10-2	Y	6/19/17
Twilegar, Mark	Lee	Y	WAIVED JURY		N	11/2/17
Victorino, Troy	Volusia	N	N	10-2, 10-2, 9-3, 7-5	Y	6/14/17
Wade, Alan L.	Duval	N	N	11-1, 11-1	Y	5/1/17
Walls, Frank	Okaloosa	Y	Y	12-0	N	1/22/18

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Wheeler, Jason	Lake	N	N	10-2	Y	5/23/17
White, Dwayne	Seminole	N	N	8-4	Y	3/30/17
Whitfield, Ernest	Sarasota	Y	N	7-5	Y	1/30/18
White, William Melvin	Orange	N	N	10-2	Y	4/20/17
Whitton, Gary Richard	Walton	Y	Y	12-0	N	1/31/18
Willacy, Chadwick	Brevard	Y	N	11-1	N	1/23/18
Williams, Donald Otis	Lake	N	N	9-3	Y	1/19/17
Williams , Ronnie Keith	Broward	N	N	10-2	Y	6/29/17
Windom, Curtis	Orange	Y	Y	12-0, 12-0, 12-0	N	1/23/18
Wood, Zachary Taylor	Washington	N	Y	12-0	Y**	1/31/17
Woodel, Thomas	Polk	N	N	7-5	Y	8/18/17
Zack, Michael Duane	Escambia	Y	N	11-1	N	6/15/17
Zakrzewski, Edward	Okaloosa	Y	N	7-5, 7-5, 6-6	N	5/25/17
Zommer, Todd	Osceola	N	N	10-2	Y	4/13/17

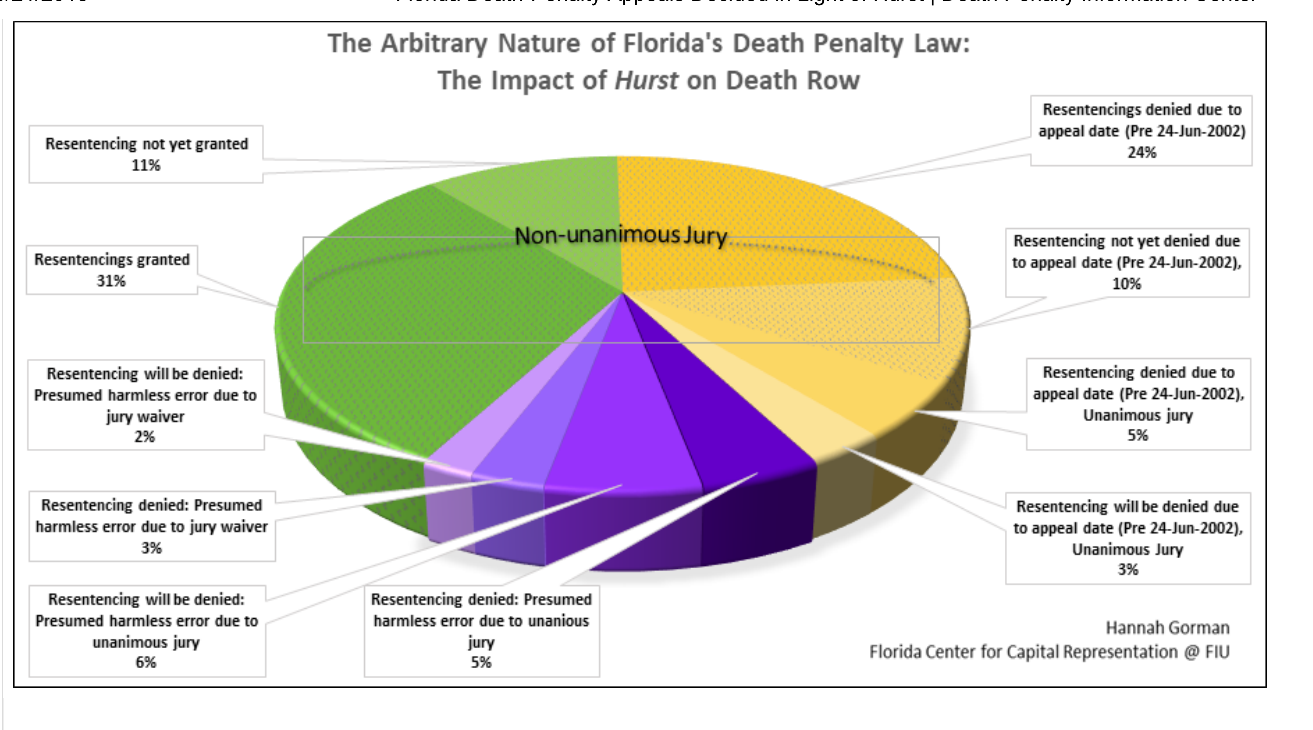
* The Florida Supreme Court granted relief under *Hurst* on Bevel's non-unanimous death sentence, but granted relief based on ineffective assistance of counsel on Bevel's unanimous death sentence.

** The Florida Supreme Court noted that Wood's sentence would not have been harmless under *Hurst* because it struck two of the three aggravating circumstances found by the trial court; however, the court vacated the death sentence and imposed a life sentence under its statutory review for proportionality. Not counted in total.

For more background on the Florida legislative and court actions related to the jury unanimity issue, see ***Hurst v. Florida* Background**.

To check on the status of cases involving Florida death-row prisoners with non-unanimous jury recommendations for death whose sentences became final after the U.S. Supreme Court's June 2002 decision in *Ring v. Arizona*, see **this chart**.

Hannah Gorman, with the Florida Center for Capital Representation at Florida International University, created the pie chart below (November 16, 2017) based on her analysis of Florida death sentences that have been or will be overturned based on *Hurst*, as well as sentences that have been or will be affirmed because they either (A) became final before *Ring* (i.e., based on the date of their appeal) or (B) were presumed harmless based on a unanimous jury verdict or the defendant's waiver of a jury sentence. This chart includes prisoners who have had their death sentences affirmed by Circuit Courts. According to this information, there are a total of 377 prisoners who were sentenced under the unconstitutional sentencing scheme, but only 42% (157) of Florida death-row prisoners who were sentenced under that scheme will be entitled to relief.


The Arbitrary Nature of Florida's Death Penalty Law:
The Impact of *Hurst* on Death Row
Resentencing not yet granted 11%
Resentencings granted 31%
Resentencing will be denied: Presumed harmless error due to jury waiver 2%
Resentencing denied: Presumed harmless error due to jury waiver 3%
Resentencing will be denied: Presumed harmless error due to unanimous jury 6%
Resentencing denied: Presumed harmless error due to unanious jury 5%
Non-unanimous Jury
Resentencings denied due to appeal date (Pre 24-Jun-2002) 24%
Resentencing not yet denied due to appeal date (Pre 24-Jun-2002), 10%
Resentencing denied due to appeal date (Pre 24-Jun-2002), Unanimous jury 5%
Resentencing will be denied due to appeal date (Pre 24-Jun-2002), Unanimous Jury 3%
Hannah Gorman
Florida Center for Capital Representation @ FIU