No. 18-1306

In the Supreme Court of the United States

FRED ANDERSON, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Amicus The Rutherford Institute is an international civil liberties organization focused on ensuring our government's accountability under the Constitution. Founded in 1982 and headquartered in Charlottesville, Virginia, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened and in educating the public on how to resist against government infringement of their rights. The Rutherford Institute works to preserve the most basic freedoms of our Republic, including the Sixth Amendment right to trial by jury.

The issues presented in this case, about whether and in what circumstances putting a defendant to death on the basis of a judge's decision without jury fact-finding can be harmless error, involve significant constitutional protections that the Institute is dedicated to defending.

SUMMARY OF THE ARGUMENT

The Florida Supreme Court has disregarded this Court's holding that the Sixth Amendment requires a jury's finding of the facts necessary to impose the death penalty. *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016). *Hurst* held that the capital sentencing scheme of the State of Florida violated the

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief. Counsel for both parties received timely notice of this filing, pursuant to Rule 37(a)(2); and both parties have given their written consent to this filing.

Sixth Amendment because the trial judge finds those facts: the aggravating circumstances, the balancing of factors, and the overall conclusion that execution is warranted. *Hurst* specifically rejected Florida's argument that the State's advisory juries save the scheme. Yet the Florida Supreme Court has developed a rule under which they do. According to that court, a sentence based on fact finding by the trial judge is acceptable, and the violation of the Sixth Amendment is harmless, so long as the advisory jury reached a unanimous recommendation. Unanimity, in effect, gives the advisory jury the same power as a real jury.

What makes a jury verdict special is not simply that 12 people agreed on something. It is critical that they understand the vital—and, in cases like this, literally life-and-death—task they are undertaking, and that they know the consequences of their decision. To let the single fact that an advisory jury was unanimous be determinative of the harmless-error analysis is inconsistent with the reality of how juries work, and contrary to the principles that underlie the Sixth Amendment.

ARGUMENT

I. THE ABSENCE OF FACT-FINDING BY THE JURY, AS REQUIRED BY *RING* AND *HURST,* IS STRUCTURAL ERROR.

The right to have a jury decide a defendant's fate, by finding the facts prerequisite to punishment to be true beyond a reasonable doubt, is "[a] constitutional protection[] of surpassing importance." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). As the Court has repeatedly proclaimed, the right to a

trial by jury "extends down centuries into the common law," *id.* at 477, and it reflects a "profound judgment about the way in which law should be enforced and justice administered," *id.* at 478 (quoting *In re Winship*, 397 U.S. 358, 361 (1970)).

Deprivation of this right was one of the grievances called out in the Declaration of Independence, para. 20 (U.S. 1776); it was one of the rights claimed in the first actions of the Congresses convened by the American Colonies, *see Duncan v. Louisiana*, 391 U.S. 145, 152 (1968) (quoting resolutions of the 1765 First Congress of the American Colonies and the 1776 First Continental Congress); and it was one of the few individual rights specifically described in the original Constitution, in Article III.

The role of the jury is particularly important in the decision to condemn a defendant to execution. This is the gravest punishment a State can impose, and the power to kill an individual under law represents the final authority of a government over its citizens. The right to a jury should, correspondingly, be at its zenith in precisely these circumstances; the fact-finding necessary to impose the death penalty must be in the hands of a jury of fellow citizens. "We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it." *Ring v. Arizona*, 536 U.S. 584, 612 (2002) (Scalia, J., concurring).

It should inexorably follow that allowing a judge, rather than a jury, to find all of those facts is a fundamental flaw in a capital trial. The absence of a jury acting in its traditional role as fact-finder is a

structural error that affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). The role of the jury as fact-finder is the very framework of the trial process. Where there is *no* factual finding made by a true jury regarding the defendant's sentence, there can be nothing upon which an appellate court can ground its harmless error analysis. *See Sullivan v. Louisiana*, 508 U.S. 275, 283 (1993).

In *Sullivan*, the Court held unanimously that a constitutionally deficient reasonable doubt instruction cannot be harmless error. *Id.* at 281-82. "[N]o matter how overwhelming the evidence," the Court explained, a judge simply "may not direct a verdict for the State." *Id.* at 277 (citing *Sparf v. United States*, 156 U.S. 51 (1895)). In a capital case, the requirement of a fact-finding by a jury in the sentencing phase is just as fundamental as a finding of fact in the guilt stage. *See Ring*, 536 U.S. at 605. Yet what happened in Florida's pre-*Hurst* regime was essentially that a judge directed the verdict of death. That flaw is the same sort of flaw that *Sullivan* held is structural error.

To be sure, this Court's cases have generated significant confusion about which rights are structural, and which constitutional errors can possibly be harmless. *See* Daniel Epps, *Harmless Errors and Substantial Rights*, 131 Harv. L. Rev. 2117, 2120 (2018) ("The case law reflects deep uncertainty and disagreement about fundamental questions, such as which constitutional errors should even be subject to harmless error analysis[.]"). Lower courts have continued to struggle with that question.

For example, the Idaho Supreme Court has diligently analyzed how to reconcile *Sullivan* and *Neder v. United States*, 527 U.S. 1 (1999): "[I]n instances where erroneous jury instructions were provided at trial, an appellate court must first determine whether an improper jury instruction affected the entire deliberative process. If it did, then a reversal is necessary as the jury's deliberations were fundamentally flawed, and any attempted harmless error inquiry would essentially result in the appellate court itself acting in the role of jury." *State v. Perry*, 245 P.3d 961, 976 (Ida. 2010). *See also State v. Lovelace*, 90 P.3d 298, 305 (Ida. 2004) (treating *Ring* error as structural because "there was no jury verdict within the meaning of the Sixth Amendment and no constitutionally cognizable finding to review"). By contrast, the Florida Supreme Court has concluded that *Neder* and *Washington v. Recuenco*, 548 U.S. 212 (2006), mean harmless-error analysis applies to every situation in which a judge has found facts that are constitutionally committed by the jury—even when, going far beyond *Neder* and *Recuenco*, the judge found *all* the facts. *See Hurst v. State*, 202 So. 3d 40, 67 (Fla. 2016). The Florida Supreme Court thus analogizes the deep and fundamental flaw of Florida's pre-*Hurst* capital cases—in which a jury made no findings of fact regarding the sentence—to the situations in which this Court has said it can be harmless to fail to submit to the jury an isolated element. The Idaho Supreme Court, meanwhile, recognizes the difference between omitting an element from the jury's task and omitting the entire sentencing phase. This case is an ideal opportunity for the Court to clarify the line between structural and harmless errors.

II. THE LACK OF A JURY CANNOT BE *PER SE* HARMLESS ERROR.

Even if in theory a sentence imposed contrary to *Ring* and *Hurst* could be assessed for "harmless error," the Florida Supreme Court's decision requires this Court's review. The court's approach to harmless-error analysis was contrary to this Court's precedents—including *Hurst* itself—and relied on flawed assumptions about how juries work.

A. Harmless-error review does not permit categorical rules.

This Court has long recognized that harmless error analysis requires individualized review of case records. *See Neder*, 527 U.S. at 19 ("[S]afeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record" before deciding whether "the jury verdict would have been the same absent the error"). As the Court stated in *Sullivan*, "[h]armless-error review looks . . . to the basis on which 'the jury *actually rested* its verdict.'" *Sullivan,* 508 U.S. at 279 (quoting *Yates v. Evatt*, 500 U.S. 391, 404 (1991)). On one occasion long ago, this Court affirmed a harmless-error decision by the Florida Supreme Court precisely because it was not "automatic or mechanical . . ., but rather [the court] upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless." *Barclay v. Florida*, 463 U.S. 939, 958 (1983).

The necessity for this sort of individual, case-by-case examination is inherent in the nature of harmless-error analysis. An error is harmless only if the court is sure, beyond a reasonable doubt, that the judgment against the defendant would have been the

same had the error not occurred. *See Chapman v. California*, 386 U.S. 18, 24 (1967). It is impossible to reach that certainty without investigating the details of the case.[2] Yet the Florida Supreme Court refuses, in a broad category of pre-*Hurst* cases, to conduct the sort of individualized review that this Court commended in *Barclay*. Details about the crime and about the defendant; the fact that jurors deliberated for only 90 minutes, *see infra* at 11; uncertainty, given the jury instructions, about whether the jury even agreed about what particular aggravating circumstances were present; and any other circumstance, were all irrelevant. The court rejected petitioner's request for an individualized determination solely because it has "consistently relied on *Davis* to deny *Hurst* relief to defendants who have received a unanimous jury recommendation of death." Pet. App. 2a.

B. Unanimity among an advisory jury cannot, by itself, make a *Ring* / *Hurst* error harmless.

Worse, the Florida Supreme Court's categorical rule directly contravenes what this Court said in *Hurst*. As petitioner has cogently explained, Pet. 12,

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[2] When a court of appeals developed a *per se* standard for *plain*-error analysis of sentences under the Federal Rules of Criminal Procedure, this Court held that courts should not apply "categorical rules." *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016). "Instead of relying on presumptions," Justices Alito and Thomas noted in concurrence, "a court of appeals must engage in [a] full-record assessment." *Id.* at 1350 (Alito, J., concurring). If categorical rules are inappropriate where the defendant bears the burden of showing prejudice, they are even less valid for determining whether a constitutional error is genuinely harmless.

the rationale for the Florida court's *per se* rule is that "a jury's unanimous recommendation of death is precisely what we [previously] determined . . . to be constitutionally necessary to impose a sentence of death because a jury unanimously f[inds] all of the necessary facts," Pet. App. 2a; and that rationale is precisely the argument this Court rejected in *Hurst*, *see* 136 S. Ct. at 622 ("The State cannot . . . treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.").

Besides ignoring the holding of *Hurst*, the Florida Supreme Court's reasoning is blind to many of the principles that motivate the Sixth Amendment. The protection afforded by juries—including from the requirement that a jury be unanimous—comes from adherence to the jury process, not from the fact that jurors happen to agree on a non-binding recommendation. What matters is that the jurors be told that they are making the actual decision about the sentencing facts and that they be required to reach unanimity.

A jury rendering an advisory recommendation about a death sentence has much less actual responsibility for the outcome than a real jury. And empirical evidence shows that juries are well aware of this dynamic. In states where the trial judge has the authority to override the jury's sentencing verdict, nearly all the jurors saw the sentencing responsibility as at least shared with the trial judge." Ross Kleinstuber, *"Only a Recommendation": How Delaware Capital Sentencing Law Subverts Meaningful Deliberations and Jurors' Feelings of Responsibility*, 19 Widener L. Rev. 321, 328 (2013). Kleinstuber surveyed capital jurors from a State with

a Florida-like sentencing process—judges and advisory juries—and found that only 8.6% of the jurors thought that whether the defendant lived or died was strictly the jury's responsibility. *Id.* at 333. In another study that interviewed capital jurors in several states, including Florida, only 4.9% of jurors in hybrid-sentencing states believed their punishment decision was final. William J. Bowers, et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision Making*, 63 Wash. & Lee L. Rev. 931, 956 (2006) (hereinafter "Bowers 1"). In contrast, among the jurors surveyed from states where a jury renders a binding verdict on death, 45.6% of jurors believed the judge must accept the jury's sentence. *Id.*

Whether juries feel responsible for the ultimate outcome in a sentencing proceeding is a critical factor determining how they undertake their deliberations. *Cf. Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) ("[I]t was constitutionally impermissible [under the Eighth Amendment] 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 rests elsewhere."). Juries that share sentencing responsibility with the judge tend to reach a verdict quicker than juries who do not. *See* Bowers 1, at 974. "Assuming personal responsibility for the outcome of decisions also leads decision-makers to take more time in rendering judgments, and to avoid the biases involved in making quick judgments. When decision-makers feel less responsible, they generally employ less complex judgment strategies and may use simple heuristic principles of judgment." Steven J. Sherman,

The Capital Jury Project: The Role of Responsibility and How Psychology Can Inform the Law, 70 Ind. L.J. 1241, 1242 (1995).

Advisory jurors also tend to demonstrate decreased comprehension of jury instructions. Bowers 1, at 969. Research shows that jurors sharing sentencing responsibility with the judge are "more often ignorant of or wrong about the rules supposed to govern their decision-making, at least in part because they typically presumed they understood when they did not and because they usually made no effort to learn otherwise when they were wrong—both signs that they were less serious or conscientious about making the sentencing decision than jurors in other states." *Id.* In one study, researchers concluded "over 35 percent of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove mitigation factors beyond reasonable doubt." William J. Bowers, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing,* 39 Crim. L. Bull. 51, 68 (2003). Such empirical evidence suggests that the possibility of a judge overriding a jury's sentence recommendation decreases the likelihood the jury will ensure it fully comprehends jury instructions. Bowers 1, at 972.

The sentencing process in petitioner's case is an unsettling illustration of effects like these. The jury spent less than ninety minutes deliberating petitioner's fate, beginning at 4:45 pm and returning

to the courtroom at 6:23 pm.[3] Sentencing Tr., at 2664, 2666, *State v. Anderson*, No. 99-0572 (Fla. Dist. Ct. App. 2001). Indeed, one juror apparently had a flight to catch on the evening of deliberations. After the jury returned and rendered its advisory verdict, the prosecutor asked the court to remind a juror to "drive very carefully" and then provided her with a note "in case she misses her flight." *Id.* at 2671.

Furthermore, in a real jury process requiring unanimity, the jury is told that it must reach a unanimous decision. That requirement—as opposed to the occasional outcome that, even without a unanimity instruction, the jury might end up being unanimous—is critical.

Where unanimity is required, juries engage in a multi-staged deliberative process. *See* Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 Hastings L.J. 103 (2010). To reach a unanimous verdict, research shows that capital juries first identify the majority viewpoint of the jury. *Id.* at 105. The majority then "isolat[es] those jurors resisting the majority's arguments and focus[] the spotlight on the holdouts in an effort to show them they must have taken a wrong turn in arriving at their conclusion." *Id.* at 105-106. The next stage involves convincing the "holdouts" to embrace the majority's position. *Id.* at 106. Finally, the holdouts seek to reconcile their viewpoints as best they can with the ultimate verdict. *Id.* One study found that in such jury deliberations working towards unanimity "several significant procedural events

[3] These are the recorded times that the jury exited and re-entered the courtroom. The time of actual deliberation was likely considerably less.

occurred after the group had reached a majority position." Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1273 (2000). Indeed, "[t]wenty-seven percent of the requests for additional instructions from the judge, twenty-five percent of the oral corrections of errors made during discussion, and thirty-four percent of the discussions of the standard of proof beyond a reasonable doubt occurred in efforts to reach unanimity after a majority view had surfaced." *Id.*

In contrast, where unanimity is not required, juries engage in more hurried deliberations. The rush to judgment "appears even greater when jurors may recommend punishment without a unanimous vote." Bowers 1, *supra* at 980. Just so here: The jury rushed to finish its work in less than 90 minutes so that one of the jurors could make a flight. Did one of the jurors have reservations that he or she considered unimportant because they were only making a recommendation anyway? Did the jurors even air their reservations, since they were not specifically told they would have to find the facts unanimously? It is impossible to know. It is similarly impossible to be confident—*beyond a reasonable doubt*—that every time the advisory jurors all vote one way on their nonbinding recommendation, they would have reached the same conclusion when required to do a proper jury process from the beginning.

III. THE PETITION SHOULD BE GRANTED

As petitioner has explained, the lower courts are divided about how to respond to defendants sentenced to death under deficient pre-*Ring* or pre-*Hurst* procedures. Pet. Br. at 13-16. This split demands a resolution. A defendant in Idaho or

Colorado sentenced under a judge's fact-finding is entitled to relief, while a defendant in Florida in the same situation will be executed. This discrepancy should cause the Court serious concern.

Furthermore, *certiorari* is warranted because of the profound nature of the error below. First, Florida denies proper harmless-error review to petitioners on death row that are seeking relief under *Hurst*. This alone is sufficient to justify a writ of *certiorari*. *Cf. Davis v. Ayala*, 135 S. Ct. 2187, 2193 (2015) (granting certiorari in a death penalty case to correct "misapplication of basic rules regarding harmless error"). Second, by even allowing a categorical rule for harmless-error analysis, the Florida Supreme Court has departed from the general understanding of harmless-error analysis shared by other courts. *See, e.g., Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2002) (refusing to adopt a bright line rule because it would "hold[] troubling implications for the viability of future civil rights actions"); *State v. Tollardo*, 275 P.3d 110, 124 (N.M. 2012) ("Harmless error review necessarily requires a case-by-case analysis."); *State v. Fulminante*, 778 P.2d 602, 610 (Ariz. 1988) ("Federal courts have approached the determination of harmless error on a case-by case basis."). Florida's deviation, on an issue as critical as assessing when an acknowledged constitutional error in a criminal trial can be tolerated, must be corrected.[4] Third, the Florida Supreme Court has acted contrary

[4] Harmless error "is almost certainly the most frequently invoked doctrine in all criminal appeals." Epps, *supra*, at 2119 (noting that between 1.38% and 2.15% of all reported federal appellate decisions in each year between 1979 and 1994 mentioned "harmless error").

to this Court's decision in *Hurst*, by pronouncing a categorical rule for harmless-error analysis that relies on the very argument this Court explicitly rejected.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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