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 FLORIDA CENTER FOR CAPITAL REPRESENTATION AT FLORIDA INTERNATIONAL UNIVERSITY COLLEGE OF LAW, FLORIDA PUBLIC DEFENDERS ASSOCIATION, INC., FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS–MIAMI CHAPTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Florida Center for Capital Representation at Florida International University College of Law (FCCR) is a non-profit organization founded in 2014 to support defense attorneys representing Florida defendants facing, or sentenced to, the death penalty. To that end, FCCR offers case consultations and litigation-support services, as well as capital-litigation training programs, to defense attorneys and mitigation specialists across Florida.

The Florida Public Defenders Association, Inc. (FPDA) is a community of Public Defenders united to achieve a vision of guaranteed equal justice for all, with a mission to secure an equitable justice system and ensure high quality representation for people facing loss of liberty.

The Florida Association of Criminal Defense Lawyers (FACDL) is a statewide organization with more than 1,700 members across Florida, including private attorneys, assistant public defenders, and judges. FACDL's mission is, *inter alia*, to "be the unified voice of an inclusive criminal defense community" and to

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici Curiae* states that no counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *Amici* or its counsel made such a contribution. All parties have consented to the filing of this brief and were notified ten days prior to the due date of this brief of the intention to file.

"promote the proper administration of criminal justice."

The Florida Association of Criminal Defense Lawyers–Miami Chapter (FACDL–Miami) are practicing criminal defense lawyers from South Florida. FACDL–Miami is a non-profit, non-partisan organization which constitutes a volunteer professional bar association. It encompasses the United District Court for the Southern District of Florida and has the highest concentration of criminal defense lawyers in Florida.

For 56 years, FACDL–Miami has dedicated itself to improving the criminal justice system and the promotion and protection of individual Constitutional rights. FACDL–Miami has litigated fundamental Constitutional issues in our criminal-justice system and has effected dramatic change in the direction of criminal defense representation in Florida courts. With almost 1,000 affiliated attorneys, which include private defense counsel, public defenders both State and Federal, law professors and judges, FACDL–Miami is the oldest and largest chapter in the State.

The issues before the Court go to the foundation of our State's administration of criminal justice in the Florida courts. *Amici*, comprised of academics, judges, and attorneys who devote much of their time and efforts to safeguarding the constitutional rights of capital defendants, believe they have a particular interest and expertise in the question presented here, and that this brief may be of assistance to this Court. In addition, many of the *Amici* attorneys represent

defendants currently under death sentences whose sentences will be impacted by the decision in this case. Accordingly, the *Amici* have a keen interest in the outcome and are well suited to offer this *Amicus* brief to the Court.

SUMMARY OF THE ARGUMENT

Mr. Anderson's case presents an issue that affects the legitimacy of the criminal-justice system as a whole—harmless-error analysis. Regardless of the severity of the crime or the degree of punishment at issue, any uncertainty in the underpinning of the criminal-justice system related to constitutional errors will lead to inconsistent and unconstitutional results. Because the instant case involves the severest of stakes—human life—the time for resolution of the conflict among jurisdictions regarding constitutional harmless-error analysis is now.

The harmless-error doctrine was designed only to prevent reversal of judgments for defects that do not affect the substantial rights of the parties. The Florida Supreme Court's post-*Hurst* application of the harmless-error doctrine to a structural defect affecting defendants' Sixth and Eighth Amendment rights is logically infirm and in dereliction of this Court's precedent.

After this Court in *Hurst* held that Florida's capital-sentencing scheme had been violating fundamental constitutional rights for over a decade, the Florida

Supreme Court compounded the error by creating a *de-facto per se* harmless-error standard in capital cases that had a unanimous, but generic, *recommendation* for a death sentence without specific findings of fact. *Anderson* perfectly illustrates this *per se* approach. The Florida Supreme Court announces that it has, is, and will continue to automatically deny *Hurst* relief to all defendants for whom a jury unanimously recommended death, without a whisper of case- or fact-specific analysis. This continued misapplication in Florida of the harmless-error doctrine to constitutional errors that have resulted in the application of the ultimate penalty conflicts with various jurisdictions that have properly analyzed the harmless-error doctrine in post-*Hurst*/*Ring* capital-sentencing proceedings or in any other context.

This Court should grant Mr. Anderson's Petition for a Writ of Certiorari to prevent the ongoing unconstitutional misapplication of the harmless-error doctrine exemplified in *Anderson*, and, more importantly, to safeguard the meaning of the Sixth and Eighth Amendments—specifically within the capital-sentencing context.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari to Resolve the Conflict of Whether *Hurst* Errors Are Structural Errors Not Subject to Harmless-Error Analysis

A. The Harmless-Error Doctrine

At common law, even technical errors at trial resulted in automatic reversal. Phillip J. Mause, *Harmless Constitutional Error: The Implications of* Chapman v. California, 53 Minn. L. Rev. 519, 519 (1968); Roger A. Fairfax Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 Fordham L. Rev. 2027, 2032 (2008) (discussing English common law foundations for harmless-error doctrine). Following the prescription of a statutory- and rule-based harmless-error doctrine via 28 U.S.C. § 2111[2] and Federal Rule of Criminal Procedure 52,[3] courts still presumed that they could not treat constitutional errors as harmless. *See Chapman v. California*, 386 U.S. 18, 42, 87 S. Ct. 824, 837, 17 L. Ed. 2d 705 (1967) (Stewart, J., concurring); Fairfax, *supra*, at 2033–34.

In *Chapman*, however, this Court expanded the harmless-error doctrine to apply to a non-structural, constitutional error if the court is "able to declare a

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[2] 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.").

[3] Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24. Despite expansion of the doctrine's application, sight cannot be lost of the purpose of the doctrine, to "promote[] public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of **immaterial** error." *Satterwhite v. Texas*, 486 U.S. 249, 256, 108 S. Ct. 1792, 1797, 100 L. Ed. 2d 284 (1988) (emphasis added) (internal quotation marks omitted) (quoting *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 3105, 92 L. Ed. 2d 460 (1986)).

Importantly, some errors are so intertwined with the right to a just and fair process, that under no circumstances could a court deem them harmless. *See generally United States v. Dominguez Benitez*, 542 U.S. 74, 81, 124 S. Ct. 2333, 2339, 159 L. Ed. 2d 157 (2004) (citing *Arizona v. Fulminante*, 499 U.S. 279, 309-310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)) ("It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that even preserved [sic] error requires reversal without regard to the mistake's effect on the proceeding."). The lower courts are divided on whether they should treat *Hurst* errors in this way, and the consequences are grave.

B. Structural vs. Trial Errors

A structural error is a defect in the foundation of the trial mechanism, whereas a trial error occurs during the presentation of the case to the jury and may be quantitatively assessed in the context of other

admitted evidence. *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S. Ct. 2078, 2082–83, 124 L. Ed. 2d 182 (1993) (citing *Arizona*, 499 U.S. 279); *accord Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908, 198 L. Ed. 2d 420 (2017) ("[T]he defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself." (internal quotation marks and alterations omitted)).

Structural errors "infect the entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), and "necessarily render a trial fundamentally unfair," *Rose*, 478 U.S. at 577, 106 S. Ct. 3101. This Court has identified several instances of structural error, *see, e.g.*, *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927) (an impartial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (unlawful exclusion of the defendant's race from a grand jury); *Jackson v. Virginia*, 443 U.S. 307, 320, n.14, 99 S. Ct. 2781, 2790 n.14, 61 L. Ed. 2d 560 (1979) (failure to instruct a jury on the reasonable-doubt standard not capable of harmless-error review). This Court did not reach the issue of whether the error in *Hurst v. Florida* could be harmless and left the issue for the state courts to consider. 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016) (citing *Neder v. United States*, 527 U.S. 1, 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), for the premise that the Court ordinarily leaves it to lower courts to pass on the harmlessness of error in the first instance). This has resulted in a conflict among lower courts as to whether

the error is structural or capable of harmless-error analysis. *See* Pet. at 13–15 (collecting cases highlighting conflict).

As explained in the Petition, one case is particularly instructive to *Hurst* errors—*Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)—which held that an error in the reasonable doubt instruction was not subject to harmless-error review. Pet. at 17–18.

Courts that have determined *Hurst* errors to be trial errors have cited this Court's decision in *Neder*, which determined that harmless-error analysis can be applied where a jury was not instructed on an element of a crime. 527 U.S. at 8, 119 S. Ct. at 1833 (Rehnquist, J.) ("The error at issue here—a jury instruction that omits an element of the offense—differs markedly from the constitutional violations we have found to defy harmless-error review."); *see generally* Pet. at 13 (collecting cases). This is what the Florida Supreme Court did after this Court remanded in *Hurst*. *Hurst v. State*, 202 So. 3d 40, 67 (Fla. 2016) ("*Hurst II*").

In addition to the various conflicting jurisdictions cited in the Petition, the Delaware Supreme Court also held that Delaware's capital-sentencing scheme (that was similar to Florida's) was unconstitutional because a jury was required to make all necessary findings for the imposition of the death penalty—not a judge. *See Rauf v. State*, 145 A.3d 430, 432–34 (Del. 2016); *see also Phillips v. State*, 154 A.3d 1130 (Del. 2017) (recognizing retroactive application of *Rauf*); *see generally Rauf*,

145 A.3d at 459 (Shine, J., concurring) ("Both Florida's invalidated law and Delaware's leave the ultimate sentencing phase and the final sentencing decision in the hands of a judge. Both have a jury make a recommendation to the court, but this is merely advisory.").

Delaware has since constructively abandoned harmless-error analysis in their post-*Hurst* retroactive sentencing. *E.g.*, *Zebroski v. State*, 179 A.3d 855, 859 (Del. 2018) (citing *Rauf* and recognizing that death sentence under pre-*Hurst* sentencing scheme must be vacated and the defendant must be sentenced to life without probation or parole); *accord State v. Manley*, No. CR IN95-11-1047R2, 2018 WL 1110420, at *1 (Del. Super. Ct. Feb. 28), *aff'd*, 198 A.3d 724 (Del. 2018) (neither applying harmless error nor mentioning it as an option when resentencing prior death-row inmate to life imprisonment).

C. This Court Should Resolve the Conflict to Restore Trust in a Fair Judicial System and Eliminate Continued Waste of Judicial Resources

The late Justice Scalia recognized a "perilous decline" in the public's belief in the right of trial by jury. *Ring v. Arizona*, 536 U.S. 584, 612, 122 S. Ct. 2428, 2445, 153 L. Ed. 2d 556 (2002) (Scalia, J., concurring). "That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because *a judge* found that an aggravating factor existed. 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." *Id.* "Accordingly, *whether or not* the States have been erroneously coerced into the adoption of 'aggravating factors,' wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt." *Id.*

Likewise, retired Justice Stevens admonished in his concurring opinion in *Rose v. Clark* that improper applications of harmless-error review have a "corrosive impact on the administration of criminal justice" and "can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful" prosecutorial interests. 478 U.S. 570, 588–89, 106 S. Ct. 3101, 3111–12, 92 L. Ed. 2d 460 (1986) (Stevens, J., concurring in the judgment).

This Court is the final arbiter of the meaning of the Constitution. *Cf. Dixon v. Duffy*, 344 U.S. 143, 145–46, 73 S. Ct. 193, 194, 97 L. Ed. 153 (1952) (granting certiorari to determine whether defendant had been deprived rights under the Federal Constitution because the Supreme Court, alone, "is the final arbiter of such a claim"). As such, this Court should address the Florida Supreme Court's misapplication of the harmless-error doctrine to the Sixth and Eighth Amendment violations.

As this Court has explained, *Hurst* errors violate defendants' fundamental right to trial by jury at the most critical point of a criminal trial, and upon remand, the Florida Supreme Court expressly acknowledged the Eighth Amendment implications of *Hurst* errors.[4] *Hurst II*, 202 So. 3d 40. Yet, despite the lack of a jury sentencing verdict within the meaning of the Sixth Amendment, the lower courts continue to apply harmless error without the benefit of an "*object* . . . upon which harmless-error scrutiny [could] operate." *Sullivan*, 113 S. Ct. at 2082. Under *Sullivan*, it is the specific finding made by the actual jury in each case that must be analyzed, not the finding that an appellate court might speculate a jury might have made had it been properly instructed on its responsibility to make the life or death decision.

While merits briefing will enlighten this Court further, it should be noted that the lower courts' continued reliance on *Neder* is misplaced. *Neder* is materially distinguishable from *Hurst* because *Neder* had a properly empaneled jury as required by the Sixth Amendment that was only improperly instructed during trial (i.e., a procedural error) as to what it needed to convict, whereas in *Hurst* the jury was never properly empaneled at all as the trier of fact, as required by the Constitution (i.e., a structural error). Resolution of the proper constitutional standard is imperative to the fair

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[4] While this Court did not address the Eighth Amendment implications in its *Hurst* opinion, the Florida Supreme Court's *Hurst II* opinion has put the issue squarely within this Court's consideration.

and uniform functioning of this Country's death penalty jurisprudence and this Court should grant certiorari.

II. Even If *Hurst* Errors Could Be Harmless, the Florida Supreme Court's Harmless-Error Analysis is Inconsistent With This Court's Well-Established Standards

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all **facts** essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by **the jury** beyond a reasonable doubt.

Ring, 536 U.S. at 610, 122 S. Ct. at 2444 (Scalia, J., concurring) (emphasis added). No distinction should be drawn between sentencing- and guilt-phase verdicts because "any fact that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict is an element that must be submitted to a jury." *See* Craig Trocino & Chance Meyer, Hurst v. Florida's *Ha'p'orth of Tar: The Need to Revisit* Caldwell, Clemons, *and* Proffitt, 70 U. Miami L. Rev. 1118, 1160 (Summer 2016) (internal quotation marks omitted) (quoting *Hurst*, 136 S. Ct. at 621).

After deciding to permit harmless-error review in *Hurst*-error proceedings, the Florida Supreme Court developed a custom of dispensing with harmless-error analysis by summarily restating the reasonable-doubt

standard without providing underlying factual analysis. Indeed, without the benefit of specific findings by the jury, the reviewing court's willingness to hypothesize that the jurors would have unanimously found one aggravator existed is tantamount to soothsaying, not a finding supported beyond a reasonable doubt. Permitting any court to continue this disregard of constitutional protections with such an unsubstantiated harmless-error review is an affront to the Constitution and the criminal-justice system designed to protect the public.

A. The Harmless-Error Doctrine Must Be Narrowly Applied to Constitutional Errors in Capital Sentencing

This Court has made clear that harmless-error analysis must be completed on a "case-by-case" basis. *Neder*, 527 U.S. at 14; *accord Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1255 (Fla. 2014) ("[A]ppellate courts must evaluate harmless error on a case-by-case basis."). In criminal cases—where defendants' liberty and social interests are at issue—courts must apply the harmless-error doctrine sparingly. *See Kotteakos v. United States*, 328 U.S. 750, 762, 66 S. Ct. 1239, 1246, 90 L. Ed. 1557 (1946) ("Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment."); Donald A. Winslow, *Harmful Use of Harmless Error in Criminal Cases*, 64 Cornell L. Rev. 538, 539 (1979) (citing *Chapman v. United States*, 547 F.2d

1240, 1250 (5th Cir.), *cert. denied*, 97 S. Ct. 1705 (1977) ("The infusion of 'harmlessness' into error must be the exception, and the doctrine must be sparingly employed. A miniscule error must coalesce with gargantuan guilt, even where the accused displays an imagination of Pantagruelian dimensions.")).

Harmless-error analysis should be at its most stringent when violations of a defendant's Sixth and Eighth Amendment rights result in a death sentence. *See Guardado v. Jones*, 584 U.S. ___, ___, 138 S. Ct. 1131, 1134, 200 L. Ed. 2d 729 (2018) (Sotomayor, J., dissenting from denial of certiorari) ("This Court can and should intervene in the face of the troubling situation.").

B. The Florida Supreme Court's Method of Conducting Harmless-Error Analysis is Detached from this Court's Reasonable-Doubt Standard

Even if *Hurst* errors could be subject to harmless-error analysis, the Florida Supreme Court's sidestepping of the federal harmless-error analysis is contrary to a fair justice system and needs immediate correction to protect the integrity of the criminal justice system.

Starting on remand from this Court's *Hurst* decision, the Florida Supreme Court initially conducted harmless-error analysis accounting for the lack of constitutionally mandated findings. *Hurst v. State*, 202

So. 3d 40 (Fla. 2016) ("*Hurst II*"). However, the court still focused on the jury's recommendation:

> The jury recommended death by only a seven to five vote, a bare majority. Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances. Nevertheless, the fact that only seven jurors recommended death strongly suggests to the contrary.

Id. at 68. As the *Hurst* errors were before the court again in retroactive review, the court began to take a more distorted approach to its harmless-error analysis and solely relied on the jury recommendation where such recommendation was unanimous—albeit lacking any specified factual findings that were unanimous. *See Davis v. State*, 207 So. 3d 142, 75 (Fla. 2016), *cert. denied*, ___ U.S. ___, 137 S. Ct. 2218, 198 L. Ed. 2d 663 (2017) (finding no reasonable doubt because "the jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations"); *see also Reynolds v. Florida*, 139 S. Ct. 27, 33, 202 L. Ed. 2d 389 (2018) (Sotomayor, J., dissenting from denial of certiorari) (discussing the theory on which the Florida Supreme Court should be reviewing the errors and its actual "myopic" approach of focusing on the defective jury vote). The *Anderson*

decision represents a culmination of this pattern: It is an explicit acknowledgment that a unanimous jury recommendation is dispositive on the harmless-error question, without any further analysis.

The Florida Supreme Court has previously recognized that *Chapman* requires a rigorous review and for the state, as the beneficiary of the error, to carry its "extremely heavy burden" "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction," *Hurst II*, 202 So. 3d at 68 (quoting *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986) (internal quotation marks omitted); however, it has essentially abandoned this requirement in its ongoing *de-facto per se* decision-making,[5] *see generally* Trocino & Meyer, *supra*, at 1158 (recognizing that the Florida Supreme Court had previously opined that when a jury is told that in some measure they could disregard their own responsibility it can hardly be treated as harmless because such errors infect the entire trial) (internal quotation marks and footnotes omitted)).

Moreover, a reviewing court's "bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion." *Sochor v. Florida*, 504 U.S. 527, 541, 112 S. Ct. 2114, 2123–24, 119

[5] "Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs." 1A Fed. Jury Prac. & Instr. § 12:10 (6th ed.).

L. Ed. 2d 326 (1992) (O'Connor, J., concurring); *e.g.*, *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990) (remanding for "a detailed explanation based on the record" when lower court failed to undertake explicit analysis supporting its conclusion of harmless error); *accord White v. Singletary*, 972 F.2d 1218, 1228–29 (11th Cir. 1992) (Kravitch, J., concurring in part, dissenting in part). Justice Scalia has likewise observed that the "Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." *Sullivan*, 508 U.S. at 280, 113 S. Ct. 2078 (citing *Bollenbach v. United States*, 326 U.S. 607, 614, 66 S. Ct. 402, 90 L. Ed. 350 (1946)).

Yet, as currently before this Court in Mr. Anderson's case, the Florida Supreme Court has routinely decided to step in as the sentencer without the benefit of specific factual findings—despite its own lip service to the impropriety of doing so. *Hurst II*, 202 So. 3d at 68 ("Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact." (internal quotation marks omitted)); *see also* Trocino & Meyer, *supra*, at 1153 ("[T]the Florida Supreme Court could not step in as the sentencer under the Eighth Amendment without having the requisite fact-findings on which to rely under the Sixth Amendment."); *id.* ("[T]he problem with Florida's aggravating circumstances after *Hurst* is not merely that the jury was instructed to find an

improper one, or improperly instructed to find a proper one; the problem is that the jury was instructed not to make any record findings as to individual aggravating circumstances at all.").

While this Court has previously denied review of other *Hurst*-related petitions, the instant case includes a clear record of the Florida Supreme Court's dereliction of its appellate-review responsibility. The Florida Supreme Court represents that it conducts case-by-case analysis. *Reynolds v. State*, 251 So. 3d 811, 815 (Fla.), *cert. denied sub nom. Reynolds v. Fla.*, 139 S. Ct. 27, 202 L. Ed. 2d 389 (2018) ("Under this standard, our harmless error analyses in the wake of *Hurst* have varied due to the individualized, case-by-case approach."). But, the court's opinion below exemplifies the true *per se* nature of the court's review and its willingness to substitute itself into the shoes of the proper fact finder—the jury.

Mr. Anderson's case exemplifies the "rubberstamping" in which the Florida Supreme Court engages whenever a defendant's unanimous—but advisory—jury recommends death. Indeed, Justices of the Florida Supreme Court have continually dissented from the court's equating the prior advisory jury with the requisite fact-finding jury. *See, e.g.*, *Everett v. State*, 258 So. 3d 1199, 1200–01 (Fla. 2018), *reh'g denied*, No. SC17-1863, 2018 WL 6729940 (Fla. Nov. 30, 2018) (Quince, J., dissenting) ("While the trial court here found the heinous, atrocious, or cruel (HAC) aggravator proven, this aggravator requires a factual determination that can only be made by the jury."); *Reynolds*,

251 So. 3d at 829–30 (Pariente, J., dissenting) (explaining how *Hurst* could have affected defendant's decision to waive mitigation); *Grim v. State*, 244 So. 3d 147, 148–52 (Fla. 2018) (Pariente, J., dissenting) (explaining how a mitigation waiver affects the *Hurst* harmless-error analysis); *Hall v. State*, 212 So. 3d 1001, 1036–37 (Fla. 2017) (Quince, J., concurring in part and dissenting in part) (quoting *Hurst*, 136 S. Ct. at 619, 193 L. Ed. 2d 504) ("Because *Hurst* 'requires a jury, not a judge, to find each fact necessary to impose a sentence of death,' the error cannot be harmless where such a factual determination was not made."); *see also Truehill v. State*, 211 So. 3d 930, 961–62 (Fla. 2017) (Quince, J., concurring in part and dissenting in part); *Middleton v. State*, No. SC12-2469, 2017 WL 2374697, at *1–2 (Fla. June 1, 2017) (Pariente, J., dissenting) (explaining how a stricken aggravating factor affects the *Hurst* harmless-error analysis).

The Florida Supreme Court's continued refusal to adhere to this Court's dictates on structural and harmless error does violence to the safeguards enshrined in the Sixth and Eighth Amendments. Accordingly, this Court should grant the Petition.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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