No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

JACK RILEA SLINEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

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

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PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Florida Supreme Court's partial retroactivity decision, which limits the class of death-sentenced individuals entitled to a jury determination of their sentence pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), violates the Eighth and Fourteenth Amendments to the United States Constitution.

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

3. Whether structural error occurs when, after having been affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility, the jury fails to unanimously return factual findings or a unanimous verdict for the death penalty.

LIST OF PARTIES

All parties appear on the caption to the case on the cover page. Mr. Sliney was the Appellant below. The State of Florida was the Appellee below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jack Sliney, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Florida Supreme Court and address the important questions of federal constitutional law presented.

This case presents a fundamental question concerning the Sixth Amendment right to a jury trial, the Due Process Clause requirement of proof beyond a reasonable doubt, and the Eighth Amendment need for a reliable capital sentencing determination.

CITATION TO OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at *Sliney v. State*, 235 So. 3d 310 (Fla. 2018) and reproduced at Appendix A. The trial court's unpublished order denying Mr. Sliney's successive motion for post-conviction relief is reproduced at Appendix B. A copy of Mr. Sliney's successive post-conviction motion is reproduced at Appendix C.

JURISDICTION

The opinion of the Florida Supreme Court was entered on January 31, 2018. (Appendix A). No Motion for Rehearing was filed. This petition is due on June 30, 2018, and is timely filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. VI.

The Sixth Amendment to the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. AMEND. VIII.

The Eighth Amendment to the Constitution of the United States

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. AMEND. XIV.

The Fourteenth Amendment to the Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Florida's Capital Sentencing Structure

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

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

[1]In *Hurst*, this Court considered Florida's capital sentencing scheme as it existed in 2010. *Hurst*, 136 S. Ct. at 620. Mr. Sliney was sentenced to death under Florida's capital sentencing scheme as it existed in 1994. App.F. However, as relevant here, those two schemes were identical. Compare Fla. Stat. § 775.082(1)(2010) and Fla. Stat.§ 921.141 (2010) with Fla. Stat. § 775.082(1)(1994) and Fla. Stat.§ 921.141 (1994). Since this Court's decision in *Hurst*, legislative changes have been made to Florida's capital sentencing scheme. *See* Act effective March 7, 2016, §§ 1, 3, 2016 Fla. Laws ch. 2016-13 (codified as amended at Fla. Stat.§ 775.082(1)(2017) and Fla. Stat.§ 921.141 (2017); Act effective March 13, 2017 §§ 1, 3, 2017 Fla. Laws ch. 2017-1 (codified as amended at Fla. Stat.§ 775.082(1)(2017) and Fla. Stat. § 921.141 (2017). Unless otherwise stated, references in this petition to Florida's capital sentencing scheme refer to the scheme that was in existence prior to those changes, that was considered in *Hurst*, and under which Mr. Sliney was sentenced to death.

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

Hurst, 136 S. Ct. at 620.

B. Trial Court Proceedings

Nineteen-year-old Jack Sliney and his seventeen-year old co-defendant were charged by indictment dated September 3, 1992, with one count of first degree premeditated murder, one count of felony murder, and one count of robbery with a deadly weapon. At separate trials, the jury found both Mr. Sliney and his co-defendant guilty on all counts.[2]

Mr. Sliney's trial counsel was discharged after the trial, and the Public Defender's Office was appointed for the penalty phase, which was set for approximately 30 days later. The public defender moved for a continuance to adequately prepare for the penalty phase, and also moved for the appointment of a mitigation specialist. TR ROA Vol. 1, pp. 174-77. Both motions were denied. *Id*. at p. 179. The penalty phase took place on November 4, 1993. Trial counsel presented the testimony of seven witnesses. The presentation took less than one hour and takes up less than 30 pages in the transcript. *Id*. at 181-86; TR ROA Vol. 3, pp. 385-414. For the first degree premeditated murder conviction, the jury returned an advisory sentence of death by a vote of 7-5 after approximately one hour of deliberation. TR ROA Vol. 1, pp. 185-86. The court subsequently conducted a hearing on December 10, 1993, where defense counsel asked the court to consider letters in support of Mr. Sliney. Mr. Sliney also made an oral statement, and the State presented

2 Mr. Sliney's co-defendant, Keith Hartley Wittemen, Jr., was sentenced to life imprisonment without the possibility of parole for the first-degree premeditated murder conviction. However, given that Mr. Wittemen was seventeen at the time of the crime, he is eligible for re-sentencing pursuant to this Court's holding in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012), and those proceedings are ongoing. Because Mr. Sliney was nineteen at the time of the crime, he is not entitled to the same relief as his co-defendant.

victim impact testimony. Supp. TR ROA Vol. 1, pp. 1-24. On February 14, 1994, the trial court, as the sole fact-finder, found aggravating and mitigating factors and weighed them without the benefit of individual factual determination by a jury and sentenced Mr. Sliney to death. TR ROA Vol 2, pp. 221-28.

C. Direct Appeal and State Post-Conviction Motion

On direct appeal, in a 4-3 decision, the Florida Supreme Court affirmed Mr. Sliney's convictions and sentences. *Sliney v. State*, 699 So. 2d 662 (Fla. 1997). Three members of the Court found Mr. Sliney's death sentence to be disproportionate and would have reduced Mr. Sliney's sentence for first degree premeditated murder to life with the possibility of parole after 25 years. This Court denied certiorari on February 23, 1998. *Sliney v. Florida*, 118 S. Ct. 1079 (1998).

Mr. Sliney filed a *pro se* Motion to Vacate Judgments of Conviction and Sentence on February 16, 1999. On March 19, 1999, Thomas Ostrander was appointed to represent Mr. Sliney in post-conviction, and counsel subsequently amended the motion. The trial court held an evidentiary hearing on April 29, 2002. On June 19, 2003, Mr. Sliney filed a motion to amend his 3.850 Motion to allege a claim regarding a conflict of interest with his trial lawyer. Mr. Sliney's trial counsel had previously represented Detective Sisk, a key prosecution witness who had interrogated Sliney, in a civil matter prior to Mr. Sliney's trial. Mr. Sliney's trial counsel had also represented Detective Sisk's son in a divorce proceeding prior to Mr. Sliney's trial. Moreover, Mr. Sliney's trial counsel had failed to disclose this potential conflict to Mr. Sliney. The trial court held a supplemental evidentiary hearing on this claim on December 2, 2003. At that supplemental hearing, post-conviction counsel Ostrander failed to adequately present the conflict claim to the court. The trial court denied Mr. Sliney's 3.850 motion on December 14, 2004, and the Florida Supreme Court affirmed the denial of relief. *Sliney v. State*, 944 So. 2d, 270 (Fla. 2006).

To ensure he complied with his federal habeas deadline, Mr. Sliney timely filed a *pro se* federal habeas petition in the United States District Court, Middle District, Ft. Myers Division. *Sliney v. Secretary, Florida Department of Corrections*, 2:06-cv-670-36SPC. (Doc. 1). Subsequently, Ostrander was once again appointed to represent Mr. Sliney, this time in his federal habeas proceedings. (Doc. 9). Mr. Sliney raised six grounds in his federal habeas petition. Four of the grounds were found to be procedurally defaulted due to appellate counsel's[3] failure to raise them during the post-conviction appeal. (Doc. 27). Mr. Sliney's federal habeas petition was denied on September 24, 2010. (Doc. 27). He was also denied a Certificate of Appealability (COA). (Doc. 27). Ostrander filed a Notice of Appeal and an untimely application for COA to the Eleventh Circuit, which was denied by a single judge on December 21, 2010.

Ostrander did not seek reconsideration of the COA from a three-judge panel nor did counsel file a Petition for Writ of Certiorari in the Supreme Court of the United States. Over the next decade, Ostrander failed to visit Mr. Sliney following the 2003 evidentiary hearing in the circuit court,[4] stopped responding to Mr. Sliney's letters, and ceased working on Mr. Sliney's case. In December 2010, Ostrander finally wrote to Mr. Sliney, asserting that appellate counsel had made serious mistakes on appeal and that they had "run out of courts," and thus options, for further post-conviction relief for Mr. Sliney. Ostrander promised to visit and to continue to work on the case, but failed to do either. Mr. Sliney filed multiple motions to discharge Ostrander and sought

[3] Ostrander was approached by Susan Dyehouse regarding her interest in handling Mr. Sliney's appeal after his post-conviction motion was denied. Dyehouse drafted a deficient appeal, which Ostrander did nothing to correct. Instead Ostrander deferred to Dyehouse during the appeal, and only later (after the appeal was lost) did Ostrander disclose to Mr. Sliney that he believed Dyehouse was depressed and that she failed to raise all issues on appeal that could (and should) have been raised.

[4] According to Mr. Sliney's State of Florida Department of Corrections records, despite ostensibly representing Mr. Sliney through 2016, Ostrander's last visit to Mr. Sliney was on January 10, 2002. App. I

to have counsel from the Capital Collateral Regional Counsel – Middle Region (CCRC-M) appointed. The trial court denied Mr. Sliney's Motion to Discharge Counsel on May 23, 2014. Although the trial court did not take testimony or evidence at the hearing, it noted in its Order that while the performance of appellate counsel may have been ineffective, Ostrander was not ineffective for relying on her to handle the appeal.

Subsequently, in August of 2016, Ostrander was suspended from the practice of law by the Florida Supreme Court. Undersigned counsel filed a Motion to Substitute Counsel and Appoint Capital Collateral Regional Counsel – Middle Region (CCRC-M) on August 26, 2016. App. 3. The trial Court granted that request on the same day.

D. Successive Post-Conviction Motion

Through his new post-conviction counsel, Mr. Sliney sought *Hurst* relief by filing a successive motion for post-conviction relief in the state circuit court on January 9, 2017. App. C. Mr. Sliney argued that his death sentence should be vacated because he was sentenced under the same Florida scheme that was ruled unconstitutional by this court in *Hurst*, and by the Florida Supreme Court's subsequent decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The state circuit court denied his motion. App. B.

E. Proceedings in the Florida Supreme Court

Mr. Sliney appealed the denial of his successive motion for post-conviction relief to the Florida Supreme Court on October 17, 2017. As relevant here, Mr. Sliney asserted in his initial brief that denying him the benefits of *Hurst* would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The Florida Supreme Court denied Mr. Sliney's appeal on January 31, 2018. App. A. The opinion denying Mr. Sliney relief was among eighty (80) virtually identical opinions that were released by the Florida Supreme Court. There was no

individual analysis conducted in Mr. Sliney's case. *See* App. A.

REASONS FOR GRANTING THE WRIT

Structural error occurs when, after having been affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility, a jury fails to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty, and when it fails to return a unanimous verdict for death. The Florida Supreme Court's refusal to conclude that such an error is structural undermines multiple federal constitutional rights. The present case presents an ideal vehicle to clarify analytical tension in critical areas of this Court's structural error jurisprudence.

I. The Florida Supreme Court's *Ring*-Cutoff Violates the Eighth Amendment's Prohibition Against Arbitrary and Capricious Capital Punishment and the Fourteenth Amendment's Guarantee of Equal Protection.

A. Traditional Non-Retroactivity Rules Can Serve Legitimate Purposes, but the Eighth and Fourteenth Amendments Impose Boundaries in Capital Cases.

This Court has recognized that traditional non-retroactivity rules, which deny the benefit of new constitutional decisions to prisoners whose cases have already become final on direct review, can serve legitimate purposes, including protecting states' interests in the finality of criminal convictions. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 309 (1989). These rules are a pragmatic necessity of the judicial process and are accepted as constitutional despite some features of unequal treatment. Mr. Sliney does not ask the Court to revisit that settled feature of American law.

But in creating such rules, courts are bound by constitutional restraints. In capital cases, the Eighth and Fourteenth Amendments limit a state court's application of untraditional non-retroactivity rules, such as those that fix retroactivity cutoffs at points in time other than the date

of the new constitutional ruling. For instance, a state rule that a constitutional decision rendered by this Court in 2018 is only retroactive to prisoners whose death sentences became final after the last turn of the century would intuitively raise suspicions of unconstitutional arbitrariness. This Court has not had occasion to address a partial retroactivity scheme because such schemes are not the norm, but the proposition that states do not enjoy free reign to draw temporal retroactivity cutoffs at *any* point in time emanates logically from the Court's Eighth and Fourteenth Amendment rulings.

In *Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), this Court described the now-familiar idea that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428. This Court's Eighth Amendment decisions have "insist[ed] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008).

The Eighth Amendment prohibition against arbitrariness and capriciousness in capital cases refined this Court's Fourteenth Amendment precedents holding that equal protection is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and … [subjects] one and not the other" to a harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). A state does not have unfettered discretion to create classes of condemned prisoners.

The Florida Supreme Court did not simply apply a traditional retroactivity rule here. On the contrary, it crafted a decidedly untraditional and troublesome partial-retroactivity scheme.

B. The Florida Supreme Court's *Hurst* Retroactivity Cutoff at *Ring* Involves Something Other Than the Traditional Non-Retroactivity Rules Addressed by This Court's *Teague* and Related Jurisprudence.

The unusual non-retroactivity rule applied by the Florida Supreme Court in this and other cases seeking *Hurst*-relief involves something very different than the traditional non-retroactivity rules addressed in this Court's precedents. This Court has long understood the question of retroactivity to arise in particular cases *at the same point in time*: when the defendant's conviction or sentence becomes "final" upon the conclusion of direct review. *See, e.g.*, *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987); *Teague*, 489 U.S. at 304-07. The Court's modern approach to determining whether retroactivity is required by the United States Constitution is premised on that assumption. *See, e.g.*, *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016) ("In the wake of *Miller*,[5] the question has arisen whether its holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided.").

The Court's decision in *Danforth v. Minnesota*, 552 U.S. 264 (2006), which held that states may apply constitutional rules retroactively even when the United States Constitution does not compel them to do so, also assumed a definition of retroactivity based on the date that a conviction and sentence became final on direct review. 552 U.S. at 268-69 ("[T]he Minnesota court correctly concluded that federal law does not *require* state courts to apply the holding in *Crawford*[6] to cases that were final when that case was decided … [and] we granted certiorari to consider whether *Teague* or any other federal rule of law *prohibits* them from doing so.") (emphasis in original).

None of this Court's precedents address the novel concept of "partial retroactivity," whereby a new constitutional ruling of the Court may be available on collateral review to *some* prisoners whose convictions and sentences have already become final, but not to all prisoners on collateral review.

[5] *Miller v. Alabama*, 567 U.S. 460 (2012).
[6] *Crawford v. Washington*, 541 U.S. 36 (2004).

In two separate decisions issued on the same day—*Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016)—the Florida Supreme Court addressed the retroactivity of this Court's decision in *Hurst v. Florida*, as well as the Florida Supreme Court's own decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), under Florida's state retroactivity test.[7]

Unlike the traditional retroactivity analysis contemplated by this Court's precedents, the Florida Supreme Court did not simply decide whether the *Hurst* decisions should be applied retroactively to all prisoners whose death sentences became final before *Hurst*. Instead, the Florida Supreme Court divided those prisoners into two classes based on the date their sentences became final relative to this Court's June 24, 2002, decision in *Ring*, which was issued nearly 14 years before *Hurst*. In *Asay*, the court held that the *Hurst* decisions do not apply retroactively to Florida prisoners whose death sentences became final on direct review before *Ring*. *Asay*, 210 So. 3d at 21-22. In *Mosley*, the court held that the *Hurst* decisions do apply retroactively to prisoners whose death sentences became final after *Ring*. *Mosley*, 209 So. 3d at 1283.

The Florida Supreme Court offered a narrative-based justification for this partial retroactivity framework, explaining that "pre-*Ring*" retroactivity was inappropriate because Florida's capital sentencing scheme was not unconstitutional before this Court decided *Ring*, but that "post-*Ring*" retroactivity was appropriate because the state's statute became unconstitutional as of the time of *Ring*.

[7] Florida's retroactivity analysis is still guided by this Court's pre-*Teague* three-factor analysis derived from *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). *See Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980) (adopting *Stovall*/*Linkletter* factors).

Although acknowledging that it had failed to recognize that unconstitutionality until this Court's decision in *Hurst*, the Florida Supreme Court laid the blame on this Court for the improper Florida death sentences imposed after *Ring*:

> Defendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring should not suffer due to the United States Supreme Court's fourteen-year delay in applying Ring to Florida*. In other words, defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring should not be penalized for the United States Supreme Court's delay in explicitly making this determination*. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Witt*, 387 So. 2d at 925. Thus, Mosley, whose sentence was final in 2009, falls into the category of defendants who should receive the benefit of *Hurst*.

Mosley, 209 So. 3d at 1283 (emphasis added).

Since *Asay* and *Mosley*, the Florida Supreme Court has uniformly applied its arbitrary *Hurst* retroactivity cutoff granting relief to some collateral defendants while denying relief to other similarly situated defendants. The Florida Supreme Court has granted *Hurst* relief to dozens of "post-*Ring*" prisoners whose death sentences became final after 2002 but before *Hurst*, while simultaneously denying *Hurst* relief to dozens more "pre-*Ring*" prisoners whose sentences became final before 2002. However, both sets of prisoners were sentenced under the same exact same sentencing scheme which denied them access to the jury determinations that *Hurst* held to be constitutionally required before Florida could impose a sentence of death.

Recently, after reaffirming the *Ring* cutoff in *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017), the Florida Supreme Court summarily denied *Hurst* relief in 80 "pre-*Ring*" cases, including Mr. Sliney's, in just two weeks. Many of these litigants have pressed the Florida Supreme Court to recognize the constitutional infirmities of its partial retroactivity doctrine, but in none of its

decisions has the Florida Supreme Court made more than fleeting remarks about whether its framework is consistent with the United States Constitution. *See, e.g.*, *Asay v. State*, 224 So. 3d 695, 702-03 (Fla. 2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017); *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017); *Hitchcock*, 226 So. 3d at 217. In *Hannon v. State*, the Florida Supreme Court stated that this Court had "impliedly approved" its *Ring*-based retroactivity cutoff for *Hurst* claims by denying a writ of certiorari in *Asay v. Florida*, 138 S. Ct. 41 (2017). *Hannon*, 228 So. 3d at 513; *but see Teague*, 489 U.S. at 296 ("As we have often stated, the denial of a writ of certiorari imports no expression of opinion upon the merits of the case.") (internal quotation omitted).

As the next section of this Petition explains, the Florida Supreme Court's *Ring*-based scheme of partial retroactivity for *Hurst* claims involves more than the kind of tolerable arbitrariness that is present in traditional non-retroactivity rules.

C. The Florida Supreme Court's *Hurst* Retroactivity Cutoff at *Ring* Exceeds Eighth and Fourteenth Amendment Limits.

1. The *Ring*-Based Cutoff Creates More Arbitrary and Unequal Results than Traditional Retroactivity Decisions.

The Florida Supreme Court's *Hurst* retroactivity cutoff at *Ring* involves a kind and degree of arbitrariness that far exceeds the level justified by traditional retroactivity jurisprudence.

As an initial matter, the Florida Supreme Court's rationale is questionable. The court described its rationale as follows: "Because Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst* retroactively to that time," but not before then. *Mosley*, 209 So. 3d at 1280. But Florida's capital sentencing scheme did not become unconstitutional when *Ring* was decided—*Ring* recognized that Arizona's capital

sentencing scheme was unconstitutional. Florida's capital sentencing statute was always unconstitutional, and it was recognized as such in *Hurst*, not *Ring*.

The Florida Supreme Court's approach raises serious questions about line-drawing at a prior point in time. There will always be earlier precedents of this Court upon which a new constitutional ruling builds.[8] That does not mean that these cases form the basis for an arbitrary retroactivity line.

Further, the Florida Supreme Court's retroactivity line at *Ring* denies *Hurst* relief to prisoners whose sentences became final before *Ring* and who correctly, but unsuccessfully, challenged Florida's unconstitutional sentencing scheme after *Ring*,[9] while granting relief to prisoners who failed to raise any challenge, either before or after *Ring*.

The Florida Supreme Court's rule also does not reliably separate Florida's death row into meaningful pre-*Ring* and post-*Ring* categories. In practice, the date of a particular Florida death sentence's finality on direct appeal in relation to the June 24, 2002, decision in *Ring* can depend on a score of random factors having nothing to do with the offender or the offense: whether there were delays in a clerk's transmitting the direct appeal record to the Florida Supreme Court; whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with the Florida Supreme Court's summer recess; how long the assigned Justice took to draft the opinion

[8] The foundational precedent for both *Ring* and *Hurst* was the Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). As *Hurst* recognizes, it was *Apprendi*, not *Ring*, which first explained that the Sixth Amendment requires any fact-finding that increases a defendant's maximum sentence to be found by a jury beyond a reasonable doubt. *Hurst*, 136 S. Ct. at 621. However, the Florida Supreme Court has never explained why it drew a line at *Ring* as opposed to *Apprendi*, which further evidences the arbitrary nature of there being a temporal line for retroactivity at all.

[9] *See, e.g.*, *Miller v. State*, 926 So. 2d 1243, 1259 (Fla. 2006); *Nixon v. State*, 932 So. 2d 1009, 1024 (Fla. 2006); *Bates v. State*, 3 So. 3d 1091, 1106 n.14 (Fla. 2009); *Bradley v. State*, 33 So. 3d 664, 670 n.6 (Fla. 2010).

for release; whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener's error necessitating issuance of a corrected opinion; whether counsel chose to file a petition for a writ of certiorari in this Court or sought an extension to file such a petition; how long a certiorari petition remained pending in this Court; and so on.

Another arbitrary factor affecting whether a defendant receives *Hurst* relief under the Florida Supreme Court's date-of-*Ring* retroactivity approach includes whether a resentencing was granted because of an unrelated error. Under the current retroactivity rule, "older" cases dating back to the 1980s with a post-*Ring* resentencing qualify for *Hurst* relief, while other less "old" cases do not. *See, e.g.*, *Johnson v. State*, 205 So. 3d 1285, 1285 (Fla. 2016) (granting *Hurst* relief to a defendant whose crime occurred in 1981 but who was granted relief on a third successive post-conviction motion in 2010, years after the *Ring* decision); *cf. Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (granting *Hurst* relief in a case where the crime occurred in the late 1990s, but interlocutory appeals resulted in a 10-year delay before the trial). Under the Florida Supreme Court's approach, a defendant who was originally sentenced to death before Mr. Sliney, but who was later resentenced to death after *Ring*, would receive *Hurst* relief while Mr. Sliney does not.

The *Ring*-based cutoff not only infects the system with arbitrariness, but it also raises concerns under the Fourteenth Amendment's Equal Protection Clause. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture differently without "some ground of difference that rationally explains the different treatment." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). When two classes are created to receive different treatment, as the Florida Supreme Court has done here, the question is "whether there is some ground of difference that rationally explains the different treatment…" *Id.*; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). The Fourteenth Amendment requires that distinctions in state criminal laws that

impinge upon fundamental rights must be strictly scrutinized. *See, e.g.*, *Skinner*, 316 U.S. at 541. When a state draws a line between those capital defendants who will receive the benefit of a fundamental right afforded to every defendant in America—decision-making by a jury—and those who will not be provided that right, the justification for that line must satisfy strict scrutiny. The Florida Supreme Court's rule falls short of that demanding standard.

In contrast to the court's majority, several members of the Florida Supreme Court have explained that the cutoff does not survive scrutiny. In *Asay*, Justice Pariente wrote: "The majority's conclusion results in an unintended arbitrariness as to who receives relief … To avoid such arbitrariness and to ensure uniformity and fundamental fairness in Florida's capital sentencing … *Hurst* should be applied retroactively to all death sentences." *Asay*, 210 So. 3d at 36 (Pariente, J., concurring in part and dissenting in part). Justice Perry was more direct: "In my opinion, the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two grounds of similarly situated persons." *Id.* at 37 (Perry, J., dissenting). Justice Perry correctly predicted: "[T]here will be situations where persons who committed equally violent felonies and whose death sentences became final days apart will be treated differently without justification." *Id.* And in *Hitchcock*, Justice Lewis noted that the Court's majority was "tumbl[ing] down the dizzying rabbit hole of untenable line drawing." *Hitchcock*, 226 So. 3d at 218 (Lewis, J., concurring in the result).

2. The *Ring*-Based Cutoff Denies *Hurst* Relief to the Most Deserving Class of Death-Sentenced Florida Prisoners

The Florida Supreme Court's *Ring*-cutoff forecloses *Hurst* relief to the class of death-sentenced prisoners for whom relief makes the most sense. In fact, several features common to Florida's "pre-*Ring*" death row population compel the conclusion that denying *Hurst* relief in their cases, while affording *Hurst* relief to their "post-*Ring*" counterparts, is especially perverse.

Florida prisoners who were tried for capital murder before *Ring* are more likely to have been sentenced to death by a system that would not produce a capital sentence—or sometimes even a capital prosecution—today. Since *Ring* was decided, as public support for the death penalty has waned, prosecutors have been increasingly unlikely to seek, and juries increasingly unlikely to impose, death sentences.[10]

Post-*Ring* sentencing juries are more fully informed of the defendant's entire mitigating history than juries in the pre-*Ring* period. Providing limited information to juries was especially endemic to Florida in the era before *Ring* was decided.[11] And, as for mitigating evidence, Florida's statute did not even include the "catch-all mitigator" statutory language until 1996.[12]

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[10] *See, e.g.*, Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades*, PEW RESEARCH CENTER, Sep. 29, 2016, *available at* http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four decades/ ("Only about half of Americans (49%) now favor the death penalty for people convicted of murder, while 42% oppose it. Support has dropped 7 percentage points since March 2015, from 56%.
The number of death sentences imposed in the United States has been in steep decline in the last two decades. In 1998, there were 295 death sentences imposed in the United States; in 2002, there were 166; in 2017 there were 39. Death Penalty Information Center, *Facts About the Death Penalty* (updated December 2017), at 3, *available at* https://deathpenaltyinfo.org/documents/FactSheet.pdf.

[11] *See, e.g.*, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE FLORIDA DEATH PENALTY ASSESSMENT REPORT, AN ANALYSIS OF FLORIDA'S DEATH PENALTY LAWS, PROCEDURES, AND PRACTICES, American Bar Association (2006) [herein "ABA Florida Report"]. The 462 page report concludes that Florida leads the nation in death-row exonerations, inadequate compensation for conflict trial counsel in death penalty cases, lack of qualified and properly monitored capital collateral registry counsel, inadequate compensation for capital collateral registry attorneys, significant juror confusion, lack of unanimity in jury's sentencing decision, the practice of judicial override, lack of transparency in the clemency process, racial disparities in capital sentencing, geographic disparities in capital sentencing, and death sentences imposed on people with severe mental disability. *Id*. at iv-ix. The report also "caution[s] that their harms are cumulative." *Id*. at iii.

[12] ABA Florida Report at 16, citing 1996 Fla. Laws ch. 290, § 5; 1996 Fla. Laws ch. 96-302, Fla. Stat. 921.141(6)(h) (1996).

Florida's pre-*Hurst* "advisory" jury instructions, which were used in Mr. Sliney's penalty phase, were also so confusing that jurors consistently reported that they did not understand their role.[13] If the advisory jury did recommend life, judges—who must run for election and reelection in Florida—could impose the death penalty anyway.[14] In fact, relying on their arbitrary pre-*Ring* cutoff, the Florida Supreme Court summarily denied *Hurst* relief to a defendant who was sentenced to death after a judge "overrode" a jury's recommendation of life. *See Marshall v. Jones*, 226 So. 3d 211 (Fla. 2017).

Furthermore, especially in these "older cases," the advisory jury scheme invalidated by *Hurst* implicated systematic violations of *Caldwell v. Mississippi*, 472 U.S. 320 (1987). *Cf. Truehill v. Florida*, 138 S. Ct. 3 (2017) (Sotomayor, J., dissenting from the denial of certiorari) ("Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in

[13] The ABA found one of the areas in need of most reform in Florida capital cases was significant juror confusion. ABA Florida Report at vi ("In one study 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 mitigating factors beyond a reasonable doubt. The same study also found that over 36 percent of interviewed Florida capital jurors incorrectly believed that they were *required* to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt, and 25.2 percent believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a legitimate aggravating circumstance under Florida law.").

[14] *See* ABA Florida Report at vii ("Between 1972 and 1979, 166 of the 857 first time death sentences imposed (or 19.4 percent) involved a judicial override of a jury's recommendation of life imprisonment without the possibility of parole … Not only does judicial override open up an additional window of opportunity for bias—as stated in 1991 by the Florida Supreme Court's Racial and Ethnic Bias Commission but it also affects jurors' sentencing deliberations and decisions. A recent study of death penalty cases in Florida and nationwide found: (1) that when deciding whether to override a jury's recommendation for a life sentence without the possibility of parole, trial judges take into account the potential "repercussions of an unpopular decision in a capital case," which encourages judges in judicial override states to override jury recommendations of life, "especially so in the run up to judicial elections;" and (2) that the practice of judicial override makes jurors feel less personally responsible for the sentencing decision, resulting in shorter sentencing deliberations and less disagreement among jurors.").

capital cases in the past, it did so in the context of its prior sentencing scheme, where the court was the final decision-maker and the sentencer—not the jury."). In contrast to post-*Ring* cases, the pre-*Ring* cases did not include more modern instructions leaning towards a "verdict" recognizable to the Sixth Amendment. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993).

Lastly, it is also important that prisoners whose death sentences became final before *Ring* was decided in 2002 have been incarcerated on death row longer than prisoners sentenced after that date. Notwithstanding the well-documented hardships of Florida's death row, *see, e.g., Sireci v. Florida*, 137 S. Ct. 470 (2016) (Breyer, J., dissenting from the denial of certiorari), they have demonstrated over a longer time that they are capable of adjusting to a prison environment and living without endangering any valid interest of the state. "At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes." *Knight v. Florida*, 120 S. Ct. 459, 462 (1999) (Breyer, J., dissenting from the denial of certiorari). Mr. Sliney, who has been in custody since he was a teenager, has been on death row for nearly 25 years, well over half of his life, and has adjusted without endangering himself, other inmates, or prison staff.

Taken together, these considerations show that the Florida Supreme Court's partial non-retroactivity rule for *Hurst* claims involves a level of arbitrariness and inequality that is hard to reconcile with the Eighth and Fourteenth Amendments.

II. THE FLORIDA SUPREME COURT'S DECISION UNDERMINES MULTIPLE FEDERAL CONSTITUTIONAL RIGHTS AND CONFLICTS WITH BINDING PRECEDENT OF THIS COURT.

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

Any fact that "expose[s] 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. *Apprendi*, 530 U.S. at 494. "Taken together," the Sixth Amendment right to a jury trial and the Due Process Clause requirement of proof beyond a reasonable doubt "indisputably entitle a criminal defendant to a 'jury determination that [he] is guilty of every element of the crime with which he is charged beyond a reasonable doubt.'" *Id*. at 476-77 (quoting *United States v. Gauldin*, 515 U.S. 506, 510 (1995)). This ruling was extended to include capital punishment in *Ring v. Arizona*, 536 U.S. 584 (2002).

In *Hurst v. Florida*, this Court held that the Sixth Amendment right to a jury trial "requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 136 S. Ct. 616, 619 (2016). "This right required Florida to base [the defendant's] death sentence on a jury's verdict, not a judge's factfinding." *Id*. at 624.

Florida law provides that "a person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in [section] 921.141 results in findings *by the court* that such person shall be punished by death, otherwise such person shall be punished by life imprisonment." Fla. Stat. § 775.082 (1) (2010). Such a sentencing proceeding results in a death sentence only if the court sets "forth in writing its findings ... as to the facts: [t]hat sufficient aggravating circumstances exist ... and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3) (2010).

In construing Florida's capital sentencing laws in the wake of *Hurst v. Florida*, the Florida Supreme Court declared:

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

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

Hurst v. State, 202 So. 3d 40, 53 (Fla. 2016); *see also Perry v. State*, 210 So. 3d 630, 633 (Fla. 2016).

The error occurred in Mr. Sliney's case when the jury failed to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty, as both the Supreme Court of the United States and Florida Supreme Court have recognized as necessary for a death sentence to be constitutional. *Hurt v. Florida*, 136 S. Ct. 616; *Hurst v. State*, 202 So. 3d 40. Specifically, Mr. Sliney's jury failed to find, beyond a reasonable doubt: (1) the existence of the aggravating factors proven beyond a reasonable doubt; (2) that the aggravating factors are sufficient to impose death; and (3) that the aggravating factors outweigh the mitigating circumstances.

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

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

136 S. Ct. at 622 (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)). This Court also explicitly found that under Florida law, a defendant can only be sentenced to death based on "findings by *the court* that such person shall be punished by death." *Hurst*, 136 S. Ct. at 620. (emphasis added).

Thus, for purposes of the Sixth Amendment, multiple critical elements necessary to impose the death penalty in Florida were never submitted to the jury. Instead, the trial court directed a verdict for the State as to those critical elements. The trial court alone determined Mr. Sliney's eligibility for the death penalty. *See id*. ("[T]he Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (quoting Fla. Stat. § 775.082(1)(2010)).

The failure to submit to the jury critical elements necessary to impose the death penalty also violated Mr. Sliney's Due Process rights. This Court has previously held that "[Defendant's] conviction and continued incarceration on this charge violate due process. We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Fiore v. White*, 531 U.S. 225, 228-29 (2001). Like Mr. Sliney, because Fiore had not been found guilty of an essential element of the substantively defined criminal offense, his conviction was not constitutionally valid.

Hurst v. Florida and *Hurst v. State* announced a substantive Sixth Amendment rule requiring that a jury find as fact: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are "sufficient" to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Further, each of those findings is required to be made by the jury beyond a reasonable doubt.

In order to become death eligible, each of those three findings must be independently and unanimously found by the jury beyond a reasonable doubt. A conviction of capital murder alone does not render a defendant death eligible. A death sentence cannot be imposed without a finding that the State proved those additional elements beyond a reasonable doubt. Anything less violates the Due Process Clause. Without a constitutional conviction of capital first degree murder, coupled with the requisite findings of fact in the penalty phase, Mr. Sliney's death sentence is illegal because it is in excess of the statutory maximum for a conviction of first degree murder.

B. Error Occurred Below When The Jury Failed To Return A Unanimous Verdict As To The Elements Or The Ultimate Sentence.

One of the foundational precepts of the Eighth Amendment, that death is different, requires unanimity in any death recommendation. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (finding there is a "qualitative difference" between death and other penalties requiring "a greater degree of reliability when the death sentence is imposed"); *Gregg v. Georgia*, 428 U.S. 153, 187–88 (1976) (stating that "death is different in kind" and as a punishment is "unique in its severity and irrevocability"); *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States."). This is to ensure that the death penalty is not being arbitrarily or capriciously imposed, but properly tailored to the most aggravated and least mitigated of murders. "If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process." *Hurst v. State*, 202 So. 2d at 60.

Like most states which have retained the death penalty, federal law requires the jury's verdict in a capital case to be unanimous. *See* 18 U.S.C. § 3593(e); Fed.R.Crim.P. 31(a). This Court reiterated that the "clearest and most reliable objective evidence of contemporary values is

the legislation enacted by the country's legislatures." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (abrogated on other grounds in *Atkins*, 536 U.S. at 321). Thus, the vast majority of capital sentencing laws provide clear and reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated and found all of the requisite findings of fact. Of the states that have retained the death penalty, Alabama is now the only state which does not require a unanimous jury recommendation for death. *See* Ala. Code § 13A-5-46 ("The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors.").

As a result, the Florida Supreme Court held that the Eighth Amendment and Florida's right to trial by jury, requires jury unanimity in all death cases. *Hurst v. State*, 202 So. 3d at 61. The error occurred in Mr. Sliney's case when the jury returned none of the required findings of facts at all – let alone unanimously – and when the jury failed to return a unanimous death recommendation. Mr. Sliney's jury returned an advisory recommendation of death by a vote of seven-to-five. This is does not satisfy the Eighth Amendment and his death sentence cannot stand.

C. The Errors Were Structural.

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

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

In contrast, structural errors "are structural defects in the constitution of the trial mechanism." *Fulminante*, 499 U.S. at 309. They affect "the framework within which the trial proceeds." *Id.* at 310. "Errors of this type are so intrinsically harmful as to require automatic reversal ... without regard to their effect on the outcome." *Neder v. U.S.*, 527 U.S. 1, 7 (1999). Put another way, structural "errors require reversal without regard to the evidence in the particular case." *Rose v. Clark*, 478 U.S. 570, 577 (1986).

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

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

categories are not rigid," *Weaver*, 137 S. Ct. at 1908, and in "a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural," *id.* (citing *Sullivan*, 508 U.S. at 280-82 (1993)).

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

Multiple rationales dictate that conclusion. First, the jury's failure to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty always results in fundamental unfairness. "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). In particular, a jury's "overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." *United States v. Afartin Linen Supply Co.*, 430 U.S. 564, 572 (1977). "For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction." *Id.* at 572-73 (internal citations omitted). And "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment," *Blakely v. Washington*, 542 U.S. 296, 313 (2004), including "each fact necessary to impose a sentence of death," *Hurst v. Florida*, 136 S. Ct. at 619. In light

of those first constitutional principles, it is always fundamentally unfair for a trial court to direct a verdict for the State as to multiple critical elements necessary to impose the death penalty. Simply put, "the wrong entity judged the defendant,"[15] to be eligible for a penalty "qualitatively different from a sentence of imprisonment, however long."[16]

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

In addition, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. The Florida Supreme Court has determined that three such facts are: (1) the existence of the aggravating factors proven beyond a reasonable doubt; (2) that the aggravating factors are sufficient to impose death; and (3) that the aggravating factors outweigh the mitigating circumstances. *Hurst v. State*, 202 So. 3d at 53. These facts must be found unanimously. *Id*. at 44. However, under Florida's capital sentencing scheme, Mr. Sliney's jury was not instructed that it must unanimously find each element beyond a reasonable doubt. In fact, Mr. Sliney's jury was not instructed to make a finding as to each of these elements at all. Instead, Mr. Sliney's jury was repeatedly told its verdict was a "recommendation" and/or "advisory" only. *See* App. F.

[15] *Rose*, 478 U.S. at 578
[16] *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

Subsequent to both *Hurst* decisions, the Florida Supreme Court altered Florida's standard jury instructions in an attempt to satisfy the Sixth and Eighth Amendment. *See* App. G. As a result, "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made" by a reviewing court. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

Third, the error undermined the reliability of the process for determining eligibility for the death penalty. In the capital context, a particular constitutional consideration arises. As stated above, "the penalty of death is qualitatively different from a sentence of imprisonment, however long." *Woodson*, 428 U.S. at 305 (plurality opinion). "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id*. Simply put, the "Eighth Amendment insists upon 'reliability in the determination that death is the appropriate punishment in a specific case.'" *Oregon v. Guzeh*, 546 U.S. 517, 525 (2006) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989)). As a result, the Florida Supreme Court concluded "that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment." *Hurst*, 202 So. 3d at 59. Mr. Sliney's jury never returned any unanimous verdict during the penalty phase.

Additionally, a capital jury "must not be misled regarding the role it plays in the sentencing decision." *Romano v. Oklahoma*, 512 U.S. 1, 8 (1994) (citing *Caldwell*, 472 U.S. at 336 (plurality opinion)). More specifically, a capital jury must not be "affirmatively misled ... regarding its role in the sentencing process so as to diminish its sense of responsibility." *Id*. at 10. But under Florida's capital sentencing scheme, a capital jury *is* affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility. As an initial matter, such a jury is instructed that it will "render to the court an advisory sentence" but "the final decision as to which punishment shall be imposed is the responsibility of the judge." TR ROA Vol 1, pp. 188-93; *see also* Fla. Std.

Jury Instr. (Crim.) 7.11 (1993); App. F. In fact, in at least sixteen (16) instances in the final instructions alone, the jury's role in the sentencing process is characterized as "recommending" or "advising," or providing a "recommendation" or "advisory sentence." TR ROA Vol 1, pp. 188-93; *see also* Fla. Std. Jury Instr. (Crim.) 7.11 (1993); App. F. Additionally, the verdict form the jury was to complete was called an "advisory verdict" by the trial court. *See* App. H.

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

Further, those instructions affirmatively misled the jury regarding its role in the sentencing process. As just discussed, the instructions convey that the jury's input is not binding, including on the trial court. However, the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst v. Florida*, 136 S. Ct. at 619. Now, after *Hurst*, a jury's findings as to those elements are binding and controlling, including on the trial court. In particular, if a jury fails to find one or more of those elements or if the jury fails to unanimously find for death, the defendant is not eligible for death. That is "the final decision."

In the wake of *Hurst*, Florida has amended its Standard Jury Instructions to comply with the requirements of *Hurst*. App. G. Mr. Sliney is entitled to be sentenced pursuant to these revised instructions.

III. THE QUESTIONS PRESENTED WERE PROPERLY RAISED BUT WENT UNADDRESSED BELOW, AND HAVE BEEN REPEATEDLY IGNORED BY THE FLORIDA SUPREME COURT.

A. The Questions Were Properly Presented to the Florida State Courts.

Within one year from the issuance of *Hurst v. Florida*, Mr. Sliney filed a successive post-conviction motion arguing Florida's capital sentencing scheme was unconstitutional because it denied criminal defendants their right to a jury verdict of guilty beyond a reasonable doubt as to the critical elements necessary to impose death, and denied criminal defendants the right to have those findings be unanimous. App. C. In support thereof, Mr. Sliney argued that those findings were substantive and cited (1) the Sixth Amendment right to jury trial, as well as this Court's decision in *Ring*, 536 U.S. at 584; (2) the Eighth Amendment need for reliability in making a capital sentencing determination; and (3) the Fourteenth Amendment requirement of proof beyond a reasonable doubt. *Id*. The trial court denied that motion. App. B.

On appeal before the Florida Supreme Court, Mr. Sliney reasserted his federal constitutional claim. App. D. In his response to the order to show cause and his reply to the State, Mr. Sliney specifically argued that the error undermined the process for determining eligibility for the death penalty in light of this Court's decision in *Caldwell*, 472 U.S. 320. App. D & E.

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

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

Just recently, several members of this Court recognized that the Florida Supreme Court has failed to address a substantial Eighth Amendment challenge to capital defendant's sentences. As noted by, Justice Sotomayor, at least six capital defendants "now face execution by the State

without having received full consideration of their claims." *Cozzie v. Florida*, 584 U.S. __ at *1 (2018) (Sotomayor, J., dissenting from denial of certiorari).

In addition, three justices recently highlighted the Florida Supreme Court's repeated failure to address post-*Hurst v. Florida* Eighth Amendment challenges to Florida's capital sentencing scheme. *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Sotomayor, J., joined by Ginsburg, J., and Breyer, J., dissenting from denial of certiorari). Those justices also recognized that this Court's recent decision in *Hurst v. Florida*, 136 S. Ct. at 616, cast such Eighth Amendment challenges in a new light.

> Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where "the court [was] the final decision-maker and the sentencer-not the jury." In *Hurst v. Florida*, however, we held that process, "which required the judge alone to find the existence of an aggravating circumstance," to be unconstitutional.
>
> With the rationale underlying its previous rejection of the *Caldwell* challenge now undermined by this Court in *Hurst*, petitioners ask that the Florida Supreme Court revisit the question. The Florida Supreme Court, however, did not address that Eighth Amendment challenge.

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

Instead, the Florida Supreme Court has steadfastly refused to mention or discuss "the fundamental Eighth Amendment principle it announced: '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 rests elsewhere.' *Caldwell*, 472 U. S., at 328–329." *Cozzie*, 584 U.S. __ at *4-5.

Like the petitioners in *Truehill* and *Cozzie*, Mr. Sliney also argued that the jury instructions in his case "impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory." *Id*. The Florida Supreme Court has determined that this error is harmless without addressing the defendants' Eighth Amendment challenge. *See King v. State*, 211 So. 3d 866, 889-93 (Fla. 2017); *Kaczmar v. State*, 228 So. 3d 1, 7-9 (Fla. 2017); *Knight v. State*, 225 So. 3d 661, 682-83 (Fla. 2017); *Middleton v. State*, 220 So. 3d 1152, 1184-85 (Fla. 2017); *Tundidor v. State*, 221 So. 3d 587, 607-08 (Fla. 2017); *Guardado v. Jones*, 226 So. 3d 213, 215 (Fla. 2017).

Though the Florida Supreme Court just recently, in another case, addressed that defendant's Eighth Amendment and *Caldwell* challenges to his advisory jury recommendation for death, that case is distinguishable because the defendant in that case had a unanimous recommendation for death, whereas Mr. Sliney did not. *See Reynolds v. State*, -- So. 3d -- 2018 WL 1633075 at *1 (Fla. Apr. 5, 2018).

Further, in dismissing Reynolds' *Caldwell* claim, the Florida Supreme Court completely misapprehended, and failed to address, the argument on this point. The Florida Supreme Court held that Reynolds' "jury was not misled as to its role in sentencing" at the time of his capital trial. *Id*. at *12. The majority concluded that *Caldwell* was not violated because, at the time Reynolds' jury rendered their advisory recommendation, the jurors understood "their actual sentencing responsibility" was advisory, and *Caldwell* does not require that jurors "must also be informed of how their responsibilities might hypothetically be different in the future." *Id*. at *10. The Florida Supreme Court failed to address why *treating* this advisory, non-binding jury recommendation as a mandatory jury verdict did not violate *Caldwell*, since Reynolds' jury – and every pre-*Hurst* jury in Florida – was repeatedly instructed otherwise. The issue raised by Reynolds, and here by Mr.

Sliney, is not whether their juries were properly instructed *at the time of their capital trials*, but instead, whether *today* the State of Florida can now treat those advisory recommendations as mandatory and binding, when the jury was explicitly instructed otherwise. This Court, in *Hurst v. Florida*, warned against that very thing. This Court cautioned against using what was an advisory recommendation to conclude that the findings necessary to authorize the imposition of a death sentence had been made by the jury: "'[T]he jury's function under the Florida death penalty statute is advisory only.' *Spaziano v. State*, 433 So. 2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst*, 136 S. Ct. at 622; *See also Kaczmar v. Florida*, ---S. Ct. ---, 2018 WL 3013960 (Sotomayor, J., dissenting from the denial of certiorari) ("The resulting opinion, however, gathered the support only of a plurality, so the issue remains without definitive resolution by the Florida Supreme Court.").

An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation, the juror's inability to be merciful based upon sympathy, and what aggravating factors could be found and weighed in the sentencing calculus) cannot be used as a substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004 (1983) ("Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed."). The Florida Supreme Court's steadfast refusal to address this point undermines multiple federal constitutional rights and makes this petition the ideal vehicle to clarify analytical tension in critical areas of this Court's jurisprudence.

CONCLUSION

For the foregoing reasons, Mr. Sliney respectfully requests that this Court grant the petition for writ of certiorari to review the judgment of the Florida Supreme Court.

Respectfully submitted,

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