NO. _____

In the Supreme Court of the United States

EMANUEL JOHNSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

DEATH PENALTY CASE

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CAPITAL CASE

QUESTION PRESENTED

Did the Florida Supreme Court violate the Supremacy Clause and the Sixth, Eighth, and Fourteenth Amendments in affirming Emanuel Johnson's judicially-determined death sentences and distinguishing him from the condemned whose sentences became final after June 24, 2002?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Emanuel Johnson respectfully petitions for a writ of certiorari to review the errors in the judgment of the Florida Supreme Court.

OPINIONS BELOW

This is a petition regarding the errors of the Florida Supreme Court in denying Mr. Johnson's claim under *Hurst v. Florida*, 136 S. Ct. 616 (2016). The opinion at issue appears at Appendix H and is reported at *Johnson v. State*, 236 So. 3d 232 (Fla. 2018). The order denying Mr. Johnson's *Hurst* claim from the trial court of the Twelfth Judicial Circuit appears at Appendix C. On direct appeal, the opinions from the Florida Supreme Court are reported at *Johnson v. State*, 660 So. 2d 637 (Fla. 1995) (Case No. 88-3199) and *Johnson v. State*, 660 So. 2d 648 (Fla. 1995) (Case No. 88-3200). The opinions of the Florida Supreme Court following post-conviction review are reported at *Johnson v. State*, 104 So. 3d 1010 (Fla. 2012) (Case No. 88-3199) and *Johnson v. State*, 104 So. 3d 1032 (Fla. 2012) (Case No. 88-3200). The order of the trial court imposing the death penalty is unreported.

JURISDICTION

The Florida Supreme Court decided the case on February 2, 2018. Its mandate issued on February 20, 2018. On March 15, 2018, Justice Thomas granted an extension of time to file a petition for certiorari to July 2, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause reads: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides, "[N]or 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." U.S. Const. amend. XIV.

"The Sixth Amendment 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."

Hurst v. Florida, 136 S. Ct. 616, 618 (2016)

STATEMENT OF THE CASE

1. Between April and June 1991, Mr. Johnson was tried, convicted, and sentenced for two separate capital crimes and two non-capital crimes.

2. On November 4, 1988, Mr. Johnson was indicted for first degree murder of Iris White in Case No. 88-3199. The indictment was later amended to include a charge of armed burglary for Case No. 88-3198. The two charges were consolidated for trial. The guilt phase trial took place in the Twelfth Judicial Circuit, Sarasota County, and Mr. Johnson was found guilty on all charges on May 24, 1991. After a penalty phase trial, the jury recommended death by a vote of eight to four on May 30, 1991. *See* Appendix A. The trial court subsequently imposed a death sentence. The judgment and sentence were affirmed on direct appeal by the Florida Supreme Court. *Johnson v. State*, 660 So. 2d 637 (Fla. 1995), *rehearing denied* Sept. 22, 1995. Mr. Johnson's petition for writ of certiorari to the United States Supreme Court was subsequently denied in *Johnson v. Florida*, 517 U.S. 1159 (1996).

3. Also on November 4, 1988, Mr. Johnson was indicted for first degree murder of Jackie McCahon in Case No. 88-3200. The indictment was later amended to include a charge of armed burglary for Case No. 88-3438-CF-A-N1. The charges were consolidated for trial. Mr. Johnson was found guilty following a jury trial in the Twelfth Judicial Circuit, Sarasota County on June 7, 1991. After a penalty phase presentation, the jury recommended death by a vote of ten to two on June 18, 1991. *See* Appendix B. The trial court subsequently imposed a death sentence. The judgment and sentence were affirmed on direct appeal by the Florida Supreme Court. *Johnson v.*

State, 660 So. 2d 648 (Fla. 1995), *rehearing denied* Sept. 22, 1995. Mr. Johnson's petition for writ of certiorari to the United States Supreme Court was subsequently denied in *Johnson v. Florida*, 517 U.S. 1159 (1996).

4. On March 31, 1997, Mr. Johnson timely filed his first post-conviction motion for Case No. 88-3199, which was subsequently amended on September 15, 2003. Also on March 31, 1997, Mr. Johnson filed his first post-conviction motion for Case No. 88-3200, which was amended on March 4, 2002. An evidentiary hearing was held for both motions on August 3 and 4, 2009. The trial court denied the motions in a written order dated September 16, 2010. The Florida Supreme Court affirmed the trial court's order in *Johnson v. State*, 104 So. 3d 1010 (Fla. 2012), *rehearing* denied December 28, 2012 (Case No. 88-3199) and *Johnson v. State*, 104 So. 3d 1032 (Fla. 2012), *rehearing* denied December 28, 2012 (Case No. 88-3200).

5. On February 12, 2013, Mr. Johnson timely filed a Petition for Writ of Habeas Corpus to the United States District Court, Middle District (Tampa Division) for both capital cases. At this time, Mr. Johnson's habeas corpus petition is still pending. *See* Case Nos. 8:13-cv-00392-SDM-TGW and 8:13-cv-00393-SDM-AEP.

6. Mr. Johnson filed a Successive Motion to Vacate Judgment of Conviction and Sentence concerning newly discovered evidence of microscopic hair comparison analysis on December 9, 2015 for Case. No. 88-3199. This motion was denied without an evidentiary hearing by written order on March 30, 2016. The lower court's denial was affirmed by the Florida Supreme Court on December 9, 2016 in *Johnson v. State*, 2016 WL 7176765 (Fla. 2016).

7. On January 6, 2017, Mr. Johnson filed a post-conviction motion based on the application of *Hurst* to both of his capital cases. *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Hurst v. State*, 202 So. 3d 40 (Fla. 2106). The Sarasota County Circuit Court denied relief as to both cases

based on *Asay v. State*, 210 So. 3d 1 (Fla. 2016) (establishing *Hurst* holdings would only be applied retroactively to cases final after June 24, 2002). *See* Appendix C.

8. Mr. Johnson's appeals from the trial court's denial were stayed by the Florida Supreme Court pending the outcome *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017) (reaffirming the application of *Asay*). *See* Appendix D & E. The Florida Supreme Court permitted a 20-page response to its Order to Show Cause why Mr. Johnson's case should not be affirmed under *Hitchcock. See* Appendix F & G. The Florida Supreme Court affirmed the circuit court's denial. *See* Appendix H. A mandate was issued from the Florida Supreme Court on February 20, 2018. *See* Appendix I. This petition follows.

REASONS FOR GRANTING THE WRIT

When the Florida Supreme Court drew an arbitrary line between inmates condemned before June 24, 2002 and those sentenced after, it violated both the Supremacy Clause and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This petition should be granted and further briefing should be ordered to fully and fairly assess the impacts of the *Hurst* decision on Mr. Johnson and all of Florida's death row inmates.

I. By Denying Mr. Johnson the Benefit of the *Hurst* Decision, the Florida Supreme Court Violated the Eighth and Fourteenth Amendments of the United States Constitution

Hurst followed *Ring* in subjecting the capital sentencing process to the Sixth Amendment requirement of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). All facts necessary for criminal sentencing enhancements must be found by a jury. *Id. Hurst,* 136 S. Ct. at 618. Applying Florida's retroactivity doctrines, the Florida Supreme Court ("FSC") held that inmates whose death sentences were not final on June 24, 2002 were entitled to resentencing under *Hurst* and that inmates whose death sentences became final before June 24, 2002 were not entitled to resentencing. *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); *Asay v. State*, 210 So. 3d 1 (Fla. 2016).

On remand from *Hurst*, the FSC implemented the Sixth Amendment ruling by interpreting its state constitution and statute as requiring that a jury's death verdict must rest upon findings that include the sufficiency of aggravation and its preponderance over mitigation, so that a death sentence should be recommended; and it held that these findings must be unanimous. *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *See Hurst v. Florida*, 136 S. Ct. 616 (2016). In *Hitchcock*, the FSC held that these state-law rights—as well as the federal Sixth Amendment jury-trial right—would be applied retroactively to the *Mosley* cohort but denied to the *Asay*

cohort. *Hitchcock*, 226 So. 3d at 217 (reaffirming the application of *Asay* to Florida citizens whose death sentences became final before June 24, 2002). The lives of as many as 164 Florida citizens, including Mr. Johnson, may hang on this Court's approval of the FSC's misguided interpretation.

This case arises at the intersection of two principles that have become central fixtures of the United States Supreme Court's jurisprudence over the past four and a half decades. The first principle, emanating from *Furman v. Georgia*, 408 U.S. 238 (1972) and *Godfrey v. Georgia*, 446 U.S. 420 (1980), is 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 principle "insist[s] 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's concern against capriciousness in capital cases refines the older, settled precept 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 uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

The second principle, from *Linkletter v. Walker*, 381 U.S. 618 (1965), and later refined in *Teague v. Lane*, 489 U.S. 288 (1989), recognizes the pragmatic necessity for the Court to evolve constitutional protections prospectively without undue cost to the finality of preexisting judgments. This need has driven acceptance of various rules of non-retroactivity, all of which necessarily accept the level of arbitrariness that is inherent in the drawing of temporal lines. To see why this is so, one needs only consider the ways in which Florida's pre-*Ring* condemned inmates do and do not differ from their post-*Ring* peers: what all of

Florida's death row inmates have in common is that they were all sentenced under a procedure that allowed death sentences to be predicated upon factual findings not tested by a jury trial—a procedure finally invalidated in *Hurst* although it had been thought constitutionally unassailable under decisions of this Court stretching back a third of a century. *See Spaziano v. Florida*, 468 U.S. 447 (1984); *Hildwin v. Florida,* 490 U.S. 638 (1989); and *Bottoson v. Florida*, 537 U.S. 1070 (2002) (denying *certiorari* review of *Bottoson v. Moore,* 833 So. 2d 693 (Fla. 2002)). Mr. Johnson was unlucky to be sentenced in 1991, decades before this Court would recognize the Sixth Amendment protections in sentencing.

There are other critical inequalities in the treatment of Florida's Death Row inmates. First, inmates whose death sentences became final before June 24, 2002 have been on death row longer than their post-*Ring* counterparts. They have demonstrated over a longer time that they are capable of adjusting to the prison environment and continuing to live without endangering any valid interest of the State. Second, inmates whose death sentences became final before June 24, 2002 have undergone the suffering chronicled in, *e.g.*, *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, 1 Zimb. L.R. 239, 240, 269(S) (Aug. 4, 1999), and most recently by Justice Breyer, dissenting from the denial of certiorari in *Sireci v. Florida*, 137 S. Ct. 470 (2016), longer than their post-*Ring* counterparts. "This Court, speaking of a period of *four weeks,* not 40 years, once said that a prisoner's uncertainty before execution is 'one of the most horrible feelings to which he can be subjected.'" *Id.* at 470. "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*, 528 U.S. 990, 120 S. Ct. 459, 462 (1999) (Justice Breyer, dissenting from the denial of *certiorari*). Third, inmates whose death sentences became final before June 24, 2002

are more likely than their post-*Ring* counterparts to have been given those sentences under standards that would not produce a capital sentence—or even a capital prosecution—under the conventions of decency prevailing today. In the generation since *Ring* was decided, prosecutors and juries have been increasingly unlikely to seek and impose death sentences. A significant number of cases which terminated in a death verdict before *Ring* would not be thought death-worthy by today's standards. We cannot say which specific cases would or would not; but it is plain generically that some inmates condemned to die before *Ring* would receive less than capital sentences today.

Finally, inmates whose death sentences became final before *Ring* are more likely than their post-*Ring* counterparts to have received those sentences in trials involving problematic fact-finding. The past two decades have witnessed a broad-spectrum recognition of the unreliability of numerous kinds of evidence—flawed forensic-science theories and practices, hazardous eyewitness identification testimony, that was accepted without question in pre-*Ring* capital trials. Doubts that would cloud today's capital prosecutions and cause today's prosecutors and juries to hesitate to seek or impose a death sentence were unrecognized in the pre-*Ring* era. Evidence which led to confident convictions and hence to unhesitating death sentences a couple of decades ago would have substantially less convincing power to prosecutors and juries today. Concededly, penalty retrials in the older cases would also pose greater difficulties for the prosecution because of the greater likelihood of evidence loss over time. But the prosecution's case for death in a penalty trial seldom depends on the kinds of evidentiary detail that are required to achieve conviction at the guilt-stage trial. Even if a prosecutor does opt to seek a penalty retrial and fails to obtain a new death sentence, the bottom-line consequence is that the inmate will continue to be incarcerated for life. That is a

substantially less troubling outcome than the prospect of outright acquittals in guilt-or-innocence retrials involving years-old evidence that concerned the Court in *Linkletter* and *Teague*.

Taken together, these considerations make it plain that the particular application of non-retroactivity resulting from the Court's *Mosley-Asay* divide involves a level of caprice that runs far beyond that tolerated by standard-fare *Linkletter* or *Teague* rulings. Its denial of relief in precisely the class of cases in which relief makes the most sense is irremediably perverse. This degree of capriciousness and inequality violates the Eighth Amendment and Equal Protection.

II. The *Hurst* Decisions Announced Substantive Constitutional Rules and the Supremacy Clause of the United States Constitution Requires State Courts to Apply Those Rules Retroactively to All Cases on Collateral Review

In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), the United States Supreme Court held that the Supremacy Clause of the Constitution requires state courts to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis. In *Montgomery*, a Louisiana state prisoner filed a claim in state court seeking retroactive application of the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The state court denied the prisoner's claim on the ground that *Miller* was not retroactive as a matter of state retroactivity law. *Montgomery*, 136 S. Ct. at 727. The United States Supreme Court reversed, holding that because the *Miller* rule was substantive as a matter of federal law, the state court was obligated to apply it retroactively. *See id.* at 732-34. The Court explained that "*the Constitution* requires state collateral review courts to give retroactive effect to that rule," *id.* at 728-29

(emphasis added), and that, "[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id.* at 731-32.

The *Montgomery* Court found the *Miller* rule substantive even though the rule had "a procedural component." *Id.* at 734. *Miller* did "not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* or *Graham*." *Miller*, 567 U.S. at 483. Instead, "it mandate[d] only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* Despite *Miller*'s procedural mandates, the Court in *Montgomery* warned against, "conflat[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the *manner of determining* the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). Instead, the Court explained, "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," and that the necessary procedures do not "transform substantive rules into procedural ones." *Id.* at 735.

The *Hurst* decisions announced substantive rules that should have been applied retroactively to Mr. Johnson by the FSC under the Supremacy Clause. At least two substantive rules were established by *Hurst v. Florida* and *Hurst v. State*. First, a Sixth Amendment rule was established requiring that a jury find as fact beyond a reasonable doubt: (1) each aggravating circumstance beyond a reasonable doubt; (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. Such findings are substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule). As in *Montgomery*, these requirements amounted to an "instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish." *Id.* at 735.

An Eighth Amendment rule was established that requires the elements to be found unanimously by the jury. The substantive nature of the unanimity rule is apparent from the FSC's explanation in *Hurst v. State* that unanimity: (1) is necessary to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders, and (2) ensures that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." 202 So. 3d at 60-61. The function of the unanimity rule is to ensure that Florida's death-sentencing scheme complies with the Eighth Amendment and to "achieve the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law." *Id.* As a matter of federal retroactivity law, the rule is therefore substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"). This is true even though the rule's subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (state's ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).

The Sixth Amendment requirement that each element of a Florida death sentence

must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rules as a matter of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable fact-finding procedures could not legitimate a sentence based on" the judge-sentencing scheme. *Id.* The "unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*," *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the new law by necessity places certain individuals beyond the state's power to impose a death sentence. Thus, a substantive rule, rather than a procedural rule, resulted from the *Hurst* decisions. *See Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes"). Common sense dictates that no ruling is more substantive than one that determines which men and women will be subject to the death penalty based on a non-unanimous jury recommendation.

Hurst retroactivity is not undermined by *Summerlin*, 542 U.S. at 364, in which the United States Supreme Court held that *Ring* was not retroactive in a federal habeas case. *Summerlin* did not review a statute, like Florida's, that required the jury not only to conduct the fact-finding regarding the aggravators, but also as to whether the aggravators were *sufficient* to impose death and whether death was an appropriate sentence. *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred in *Hurst* where, for the first time, the Court found it unconstitutional for a judge alone to find that "sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to

outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal citation omitted). Moreover, *Hurst*, unlike *Ring*, addressed the reasonable doubt standard of proof in addition to the jury trial right. Proof-beyond-a-reasonable-doubt decisions are substantive. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).[1]

This uncertainty as to what the advisory jury would have decided if tasked with making the critical findings of fact takes on additional significance in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (holding that a death sentence is invalid if imposed by a jury that believed the ultimate responsibility for determining the appropriateness of a death sentence rested elsewhere). Mr. Johnson's jury was led to believe that its role was diminished when the court instructed it that the jury's role was advisory and that the judge would ultimately determine the sentence. In light of *Caldwell*, this Court cannot even be certain that the jury would have made the same recommendation without the *Hurst* error, and thus cannot be certain that the jury would have unanimously found the preceding required elements beyond a reasonable doubt. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990). *See Boyde v. California*, 494 U.S. 370, 380 (1990) (the proper standard is whether there is a "reasonable likelihood" that the jury was impeded from consideration of constitutionally relevant evidence).

A jury's unanimous recommendation also does not account for the possibility that the sentencing court may have exercised its discretion to impose a life sentence if the court had

[1] *Hurst* errors should be deemed "structural" and not subject to harmlessness review. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991). The Sixth Amendment error identified in *Hurst*—stripping the capital jury of its constitutional fact-finding role—represents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. *Hurst* errors "infect the entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and "deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist, *Neder v. United States*, 527 U.S. 1, 8- 9 (1999).

been bound by the *jury's* findings on each of the elements required for a death sentence, rather than the *court's own* findings on those elements. *See Hurst v. State,* 202 So. 3d at 57 (noting that nothing in *Hurst* has diminished "the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life."); Fla. Stat. § 921.141(3)(2) (2017) (Florida's capital sentencing statute provides an opt-out provision for the court, which may impose a sentence of life imprisonment without the possibility of parole despite unanimous death verdict).

As a matter of federal constitutional law, any reliance on the jury's recommendation in denying *Hurst* relief on harmless error grounds would contravene the Sixth Amendment in light of *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasizing that "harmless-error review looks, we have said, to the basis on which the jury *actually rested* its verdict."). In Mr. Johnson's case, there was no constitutionally valid jury verdict containing the findings of fact required to impose a death sentence. *Sullivan* requires that, before a reviewing court may apply harmless error analysis, there must be a valid jury verdict, grounded in the proof-beyond-a-reasonable-doubt standard. In Mr. Johnson's case, any reliance on his advisory jury's recommendation would constitute a violation of the Sixth Amendment.

In addition, the Due Process Clause of the Fourteenth Amendment requires that the State must prove each element beyond a reasonable doubt. *In re Winship,* 397 U.S. at 364. This requirement attaches to any factual finding necessitated by the Sixth Amendment. In *Sullivan*, the Court observed that "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." 508 U.S. at 278. "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty

beyond a reasonable doubt . . . In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Id.* This requirement is incorporated into the *Hurst* line of cases, beginning with *Apprendi*, 530 U.S. at 476 ("[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). Florida's pre-*Hurst* jury determinations, including the advisory recommendation in Mr. Johnson's cases, did not incorporate the beyond-a-reasonable-doubt standard.

CONCLUSION

For all of these reasons, this Court should grant the petition for writ of certiorari and order further briefing on Mr. Johnson's claims that the Florida Supreme Court violated the Supremacy Clause and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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