No. 18-5091

OCTOBER TERM 2017

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN FOSTER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

REPLY BRIEF FOR PETITIONER

CAPITAL CASE

SCOTT GAVIN *
Assistant CCRC-South
Florida Bar No. 0058651
CCRC-South
1 EAST BROWARD BLVD. SUITE 444
FORT LAUDERDALE, FL 33301
(954) 713-1284

* *Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

REPLY

The Florida Supreme Court's Ruling on the Retroactivity of *Hurst v. Florida* and *Hurst v. State* Violates Federal Constitutional Law Under the Eighth and Fourteenth Amendments and cannot evade this Court's review on independent and adequate state grounds

Respondent argues that this is not a case which is a proper vehicle for this Court's certiorari review where the Florida Supreme Court's approach to partial retroactive application of the *Hurst* decisions rest on independent and adequate state law grounds. Brief In Opposition (hereafter "BIO") at 14. Relying upon this Court's decision in *Danforth v. Minnesota*, 552 U.S. 264 (2006), Respondent contends that state court rulings on retroactivity are matters of state law, rather than constitutional law, and that states are therefore free to employ partial retroactivity approaches without violating federal constitutional law. BIO at 14. However, Respondent's reliance upon *Danforth v. Minnesota*, and its subsequent contention that the Florida Supreme Court's retroactivity ruling is purely a matter of state law, is wholly inaccurate and a misinterpretation of the law.

Respondent's reliance upon *Danforth v. Minnesota*, 552 U.S. 264 (2008) misconstrues this Court's holding in that case. As this Court has consistently held time and time again, under the Supremacy Clause state law must be interpreted in conformity with federal law. That requirement includes those decisions dealing with both the Sixth and Eighth Amendment. This means state courts cannot randomly deprive people of vested rights endowed by the federal constitution. As this Court explained in *Danforth*, an exception to the conformity requirement is when states

choose to provide ***more*** protection than federal law requires. *Danforth*, 552 U.S. at 282. (emphasis added). In choosing to provide more protection than federal law requires, States are not limited by federal retroactivity holdings that operate to deny relief to its citizens and can expand such protections for their benefit. *Id.* ("In sum, the *Teague* [*v. Lane*, 489 U.S. 288 (1989)] decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed "non-retroactive" under *Teague*.). But while a State court is free to employ a partial retroactivity approach without violating federal constitutional law, there are limits. States are not free to simply employ any manner of partial retroactivity without adherence to a defendant's constitutional rights.

In capital cases both the Eighth and Fourteenth Amendments impose restraints on a state court's application of partial retroactivity rules and the manner which they affix retroactivity cutoff points in time and retroactive application of new rules of law to some defendants and not others. In this Court's seminal decisions in both *Furman v. Georgia*, 408 U.S. 238 (1972) and *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Court noted that where a State wishes to impose capital punishment it is constitutionally required to tailor and apply its laws in a manner which avoids the arbitrary and capricious imposition of the death penalty. *Godfrey*, 446 U.S. at 428. This Court's Eighth Amendment jurisprudence has "insist[ed] upon general rules that ensure constituency in determining who receives a death sentence." *Kennedy v.*

Louisiana, 554 U.S. 407, 436 (2008). Thus, State's do not enjoy unfettered discretion in the employment of state retroactivity cutoffs, particularly where such rulings have the effect of creating different classes of condemned prisoners.

This Court has also long recognized the need for treating similarly situated litigants alike. *See Griffith v. Kentucky*, 479 U.S. 314, 322 (1987). This Court's precedent has established that the Eighth Amendment bars the "arbitrary or irrational imposition of the death penalty." *Parker v. Dugger*, 498 U.S. 308, 321 (1991). In those states where death is an available penalty, the State is required to administer the penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and for those for whom it is not. *See Spaziano v. Florida*, 468 U.S. 447, 460 (1984), *overruled on other grounds*; *Hurst v. Florida*, 136 S. Ct. 616 (2016). This Eighth Amendment principle is consistent with, and also further informed by, the constitutional right to equal protection under the Fourteenth Amendment. Under the Fourteenth Amendment this Court has held that where 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, such disparate treatment violates the right to equal protection. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). In drawing its dividing line for purposes of *Hurst* relief, the Florida Supreme Court's partial retroactivity approach violates both of these Eighth and Fourteenth Amendment precepts.

At its core, the Florida Supreme Court's fashioning of a non-traditional partial retroactivity framework for application of the *Hurst* decisions is violative of both the Eighth and Fourteenth Amendments. In denying Petitioner's claims for relief, the Florida Supreme Court's pre-*Ring*[1] cutoff for retroactivity of the *Hurst* decisions to his sentence failed to protect against the arbitrary and capricious imposition of a sentence of death and denied Petitioner his right to a reliable and accurate sentencing proceeding and equal protection under the law. Such a ruling, regardless of whether it is couched as being predicated upon a state-based retroactivity analysis, implicates federal questions in the manner which it deprives a defendant of federal constitutional rights. *See Coleman v. Thompson*, 501 U.S. 722 (1991) (a state court's rejection of a federal constitutional claim on procedural grounds will only preclude federal review if the state procedural ruling rests upon an "independent and adequate" state ground.). As this Court has previously held, a state court's ruling is only "independent" and unreviewable when it has a state-law basis for the denial of a federal constitutional claim that is separate from the "merits of the federal claim." *Foster v. Chapman*, 136 S. Ct. 1737, 1759 (2016); *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983).

The federal question which Petitioner has presented both here and below throughout the course of his *Hurst*-based litigation is whether the Florida Supreme Court's *Ring*-based partial retroactivity cutoff for *Hurst* claims violates the Eighth and Fourteenth Amendments, particularly with respect to those defendants who fall

[1] *Ring v. Arizona*, 536 U.S. 584 (2002)

into the post-*Apprendi*[2] pre-*Ring* gap. The ruling by the Florida Supreme Court based upon its state law retroactivity grounds cannot be separated from the merits of those federal constitutional claims raised by Petitioner. *See Foster*, 136 S. Ct. at 1759. Given both the non-traditional framework employed by the Florida Supreme Court in its partial retroactivity approach and the disparate and arbitrary effect which it has produced in application, it cannot evade review on the basis of independent an adequate state grounds.

The Florida Supreme Court's Retroactivity Ruling Violates the Eighth Amendment

In responding to Petitioner's claim that the Florida Supreme Court's partial retroactivity cutoff violates the Eighth Amendment, Respondent attempts to misconstrue Petitioner's argument and misstates the current state of federal law. At the outset, to be clear, Petitioner is not "essentially argu[ing] that basing retroactivity analysis on court dates is itself arbitrary." BIO at 16. Respondent's assertion to that effect is erroneous. Petitioner has not at any point in time throughout his *Hurst*-based litigation made such an argument. Rather, Petitioner has consistently argued that under the Eighth Amendment, where there is a particularized need for both reliability and accuracy in determining who receives the death penalty, injecting the arbitrariness which results from the Florida Supreme Court's partial retroactivity approach to the *Hurst* decisions yields outcomes which are unconstitutional.

Traditional non-retroactivity rules which deny the benefit of new constitutional decisions to prisoners whose sentences became final on direct review

[2] *Apprendi v. New Jersey*, 530 U.S. 466 (2000)

prior to their announcement have long been recognized by this Court to serve legitimate purposes such as protecting the state's interests in the finality of criminal convictions. *See, e.g. Teague v. Lane*, 489 U.S. 288, 309 (1989). Despite the fact that they can result in unequal treatment, this Court has acknowledged that they are a pragmatic necessity of the judicial process. Petitioner's claim does not challenge these well settled and longstanding features of this Court's jurisprudence. Rather, Petitioner is arguing that in creating such rules of retroactivity, courts are still bound to adhere to constitutional restraints. As noted above, there are limits to the court's authority to impose a retroactivity cutoff. In fashioning its partial retroactivity framework for application of the *Hurst* decisions, the Florida Supreme Court adopted a non-traditional approach which exceeds the constitutional limitations justified under traditional retroactivity jurisprudence and the Eighth Amendment. Basing the distinction between who is provided the benefit of the *Hurst* decisions on nothing more than the date when the constitutional defect in their sentence occurred, i.e. the date of finality, results in a framework that is "arbitrary in the extreme." *See Hannon v. Sec'y, Fla. Dept. of Corrs.*, 716 Fed. Appx. 843, 846 (11th Cir. 2017) (Martin, J., concurring).

The arbitrariness which results from the Florida Supreme Court's *Ring*-based cutoff for retroactivity cannot be cured for purposes of the Eighth Amendment by the manner in which the Florida Supreme Court has consistently applied its holding in *Asay v. State,* 210 So. 3d 1 (Fla. 2016) to all pre-*Ring* defendants. BIO at 18. Such an argument overlooks that the Florida Supreme Court's rationale for imposing a *Ring*-

based cutoff is questionable at best. The court described its rationale for imposing a *Ring*-based retroactivity cutoff as follows: "Because Florida's capital sentencing statute has been essentially unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst* retroactively to that time." *Mosley v. State*, 209 So. 3d 1248, 1280 (Fla. 2016). This Court's decision in *Ring,* however, recognized that Arizona's capital sentencing scheme was unconstitutional, not Florida. Florida's capital sentencing statute was always unconstitutional and any attempt at rationalizing a basis for which to provide relief for that constitutional infirmity to some death sentenced defendants and not others, ignores that fact. The ruling in *Hurst v. Florida* that the Sixth Amendment required jury fact finding as to as to all the elements of capital first degree murder under Florida's capital sentencing scheme fully applied at all times, even before this Court's decision in *Ring*. Moreover, the Florida Supreme Court's finding regarding juror unanimity in *Hurst v. State* was predicated upon Eighth Amendment requirements which were not part of this Court's holding in *Ring* which was a Sixth Amendment case. Thus, it was impossible for this Court's decision in *Ring* to have preconfigured the Florida Supreme Court's opinion in *Hurst v. State* which was an Eighth Amendment holding.

Additionally, and of particular relevance to Petitioner's case, Respondent's argument also overlooks that the rationale provided by the Florida Supreme Court ignores that the foundational precedent for this Court's decisions in *Ring* and *Hurst v. Florida* was the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court's decision in *Hurst v. Florida* acknowledged that it was *Apprendi*, not *Ring*,

which first explained the Sixth Amendment requires any fact-finding which increases a defendant's maximum sentence to be found by a jury beyond a reasonable doubt. *Hurst*, 136 S. Ct. at 621. Despite this fact, the Florida Supreme Court has not explained why it drew a line at *Ring* instead of *Apprendi*. And, as this Court has noted, it has failed altogether to address how its *Ring*-based partial retroactivity approach does not violate the Eighth Amendment. *See Truehill,* v. Florida, 138 S. Ct. 3, 199 L. Ed. 2d 272 (2017) (Sotomayor, J., dissenting from denial of certiorari) (At least twice now, capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address. Specifically, those capital defendants, petitioners here, argue that the jury instructions in their cases impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory.).

The fact that the Florida Supreme Court has consistently applied its holding in *Asay* to pre-*Ring* defendants does nothing to cure the arbitrariness which results from its line-drawing at the decision in *Ring*. BIO at 18. We now know that all capital defendants who were sentenced to death at the time of *Hurst v. Florida* were sentenced under an unconstitutional sentencing scheme. Providing relief to some of those defendants but depriving it to others who are similarly situated results in an arbitrariness which is impermissible under the Eighth Amendment.

Most significantly, Respondent's argument fails to even address the Florida Supreme Court's failure to meaningfully distinguish how the application of its *Ring*-

based cutoff does not violate the Eighth and Fourteenth Amendments with respect to those capital defendants whose sentences became final post-*Apprendi* but pre-*Ring*, like Petitioner. Most likely because it cannot state a rational basis for drawing such an arbitrary distinction, Respondent skirts the particular issue as it applies to Petitioner altogether in its briefing. The post-*Apprendi* pre-*Ring* distinction, however, merits attention in Petitioner's case because the Florida Supreme Court has failed to address the federal constitutional arguments which Petitioner raises. Neither the decision in *Mosely* nor *Asay* discussed the Eighth and Fourteenth Amendment arguments Petitioner has raised. Nor did the Florida Supreme Court address the issue in *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017), despite the fact that *Hitchcock* was in a post-*Apprendi* posture, like Petitioner. All three decisions by the Florida Supreme Court in *Asay*, *Mosley*, and *Hitchcock*, did little more than address the validity of the *Ring*-based cutoff on the basis of state law grounds. Contrary to Respondent's misguided view, this is not a sufficient rational basis upon which to rest any rationale for the *Ring*-based cutoff.

Petitioner is also not implying that this Court has previously held that the Eighth Amendment requires unanimous jury recommendations. BIO at 19. Respondent's argument here once again misconstrues Petitioner's claim for relief. This Court has not, as of yet, held that unanimous jury recommendations are required in capital cases under the Eighth Amendment. The Florida Supreme Court, however, has definitively held that under the Florida Constitution and the corresponding provisions in the Eighth Amendment, unanimous jury

recommendations are required under Florida's capital sentencing scheme. *Hurst v. State*, 202 S. 3d 40, 59-60 (Fla. 2016). (Although the United States Supreme Court has not ruled on whether unanimity is required in the jury's advisory verdict in capital cases, the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death.). In doing so, the Florida Supreme Court noted that it based this finding on "the principle that death is different" and the understanding that "any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed." *Id.* (citations omitted). The court's holding in *Hurst v. State* made clear that the right to unanimity in Florida's capital sentencing scheme was based upon the Eighth Amendment as well as the requirements to unanimity that flow from the Sixth Amendment and Florida's right to trial by jury. *Id.* at 59. Thus, while this Court has not ruled that unanimous jury sentencing is required under the Eighth Amendment and federal law, the Florida Supreme Court has determined that Florida's capital sentencing scheme does require juror unanimity when seeking to impose death.

This Court's opinion in *Ring* did not consider the question of whether juror unanimity was required under Florida's capital sentencing scheme as it was not the issue before the Court. Respondent's attempt to rely on this Court's opinion in *Ring* to establish otherwise is misguided and inaccurate. This Court's opinion in *Ring* does nothing to establish, one way or the other, whether under Florida's capital sentencing scheme juror unanimity is required under the Eighth Amendment. What this Court's

opinion in *Ring* does make clear, however, is that in determining whether a given state's capital sentencing scheme is constitutional, that analysis turns in part on the specific capital sentencing statute under review. In this regard, any attempt at comparisons between Arizona's and Florida's capital sentencing scheme is inherently flawed given that each respective state's capital sentencing statue provides for vastly different roles of the jury as factfinder at sentencing.[3]

And while it is true that this Court has not, in *Ring* or any other case, mandated jury sentencing in capital cases, finding that Florida's partial retroactivity approach to the *Hurst* holdings is arbitrary and capricious under the Eighth Amendment would not require reading into the Constitution a mandate that is not present. BIO at 19. Rather, it would require acknowledgment by this Court that the Florida Supreme Court's holding in *Hurst v. State* that the Florida Constitution and the Eighth Amendment required unanimity in capital sentencing was a valid interpretation of what was constitutionally required under Florida's capital sentencing scheme. Such a determination would merely require the recognition of

[3] As has been noted in Petitioner's Initial Petition to this Court, Florida's capital sentencing scheme requires factual findings by the jury unanimously and beyond a reasonable doubt as to the existence of each aggravator, that the aggravators are sufficient to warrant death, that the aggravators outweigh the mitigation in the case, and whether or not to impose mercy. *Hurst v. State*, 202 So. 3d at 57. Conversely, Arizona's capital sentencing statue which was at issue in *Ring v. Arizona*, provided only that the jury find the existence of one aggravating factor in order to render a defendant eligible for death. It did not, unlike Florida's capital sentencing scheme, specifically provide for any finding by the jury as to sufficiency or weight of the aggravator vs. the mitigators. § 13-703. Ariz. Rev. Stat. Ann. (2001). It is these critical differences which make Respondent's repeated reliance upon the decision in *Ring v. Arizona* misguided and unavailing.

rights which are already provided to capital defendants under Florida's capital sentencing statute.

Petitioner's death sentence was not "imposed in accordance with all applicable constitutional principles at the time it was imposed." BIO at 20. The right to a jury determination of each element of a crime beyond a reasonable doubt under the Sixth Amendment, in conjunction with the Due Process Clause, was longstanding and did not come into existence upon the issuance of this Court's decision in *Hurst v. Florida*. *Hurst*, 136 S. Ct. at 621; citing *Alleyne v. United States*, 570 U.S. 99 (2013). Given that the Sixth Amendment applied with full force at all times, this Court's determination that Florida's capital sentencing scheme was unconstitutional because it failed to provide for that right meant that Florida's capital sentencing scheme was unconstitutional even before *Hurst v. Florida.* Additionally, while the right to a unanimous jury recommendation was not announced until the Florida Supreme Court's decision in *Hurst v. State*, the section in the Florida Constitution upon which the Florida Supreme Court relied, and the corresponding provisions in the Eighth Amendment, were both equally longstanding and widely recognized as foundational precepts of capital sentencing jurisprudence. As the Florida Supreme Court made clear, it was basing its determination in *Hurst v. State* on the Eighth Amendment prohibition against the arbitrary and capricious imposition of a death sentence and the requirement that capital sentencing laws adequately perform a narrowing function in order to ensure against that prohibition. *Hurst*, 202 So. 3d at 60; citing *Gregg v. Georgia*, 428 U.S. 153 (1976). The court found that the requirement that jury

unanimously recommend death in order to make a death sentence possible served that narrowing function as required by the Eighth Amendment. *Id.*

These constitutional principles fully applied at all times and were applicable to the sentencing procedures employed at the time Petitioner was sentenced to death. Despite their applicability, however, Petitioner was not afforded those rights. We know this by the fact that Petitioner's death sentence rests on a jury recommendation that was not unanimous but instead a vote of 9-3. We also know this by the fact that the record from his trial establishes that his jury was not properly instructed as to their role at sentencing and the fact that his jury was not required to return a unanimous jury recommendation on each of the requisite findings of fact required for each element of capital first degree murder. Such record facts are not speculation, and contrary to Respondent's contention, clearly identify the lack of reliability in the proceedings used to sentence him to death. BIO at 20.

The decisions in *Hurst v. Florida* and *Hurst v. State* are premised upon the goal of ensuring enhanced fairness and accuracy in capital sentencing procedures. To the extent that Respondent attempts to argue that "[j]ust like *Ring* did not enhance the fairness or efficiency of death penalty procedures, neither does *Hurst*," that contention is belied by the holdings in both decisions. BIO at 21. This Court's decision in *Hurst v. Florida* was meant to address the constitutional infirmities which resulted from the failure of Florida's capital sentencing statute to provide for jury fact-finding as to each and every fact necessary to impose death. *Hurst*, 136 S. Ct. at 619. Implicit in that holding is the understanding that extension of the beyond a reasonable doubt

standard of fact finding by a jury as to each and every element necessary for the imposition of death provides greater accuracy and safeguards in reducing the risk of inaccurately sentencing someone to death. *See In re Winship*, 397 U.S. 358, 363-64 (1970) (the reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error). Extending that right not just to guilt determinations but also to sentencing determinations, and specifically those which involve the determination of whether to impose a sentence of death, is an extension of that recognition. At its bottom, this Court's holding in *Hurst* is about ensuring reliability in that process and adhering to the Eighth Amendment requirement that the death penalty be imposed in a reliable and non-arbitrary manner. *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

Similarly, the Florida Supreme Court's holding in *Hurst v. State*, providing for juror unanimity in Florida's capital sentencing scheme, was aimed at providing greater accuracy. The court's holding was explicit that the requirement of juror unanimity was to provide for greater reliability in capital sentencing. *Hurst*, 202 So. 3d at 60. (If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process). Just as this Court did in *Hurst v. Florida*, the Florida Supreme Court noted that this requirement was meant to ensure the narrowing function required by the Eighth Amendment in capital cases. *Id.*

In sum, what the language from both of the *Hurst* decisions bears out is that in each case the decisions had as their aim the goal of enhancing the fairness or efficiency of death penalty procedures. Unlike the scenario presented in *Ring,* and the subsequent decision in *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004), this is not an argument comparatively as to the greater accuracy between judge or jury as the ultimate factfinder, but rather what was required under Florida's capital sentencing scheme for purposes of the Eighth Amendment where the jury is entrusted with that function. The decisions in both *Hurst* cases make clear, where that is the role assigned to the jury under a state's capital sentencing scheme, requiring the jury to return findings of fact as to each and every factual determination required to impose a greater sentence and doing so unanimously enhance the fairness and accuracy of the procedures used to impose a sentence of death.

Last, Respondent contends that the sentencing procedures utilized in Petitioner's case do not violate this Court's ruling in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) because the instructions given to Petitioner's jury correctly reflected the state of Florida law at the time of his trial. BIO at 21-22. In making this assertion Respondent cites to this Court's precedent in *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) and *Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986), as well as the Florida Supreme Court's recent decision in *Reynolds v. State*, 43 Fla. L. Weekly S163, *9, 2018 WL 1633075 (Fla. April 5, 2018). Respondent's argument, however, is without merit.

As this Court has previously noted, the resulting opinion in *Reynolds* was delivered with only a plurality of the justices of the Florida Supreme Court, therefore the issue has not been definitively resolved by the court. *See Kaczmar v. Florida*, 138 S. Ct. 1973 (2018) (Sotomayor, J., dissenting from the denial of certiorari). The Florida Supreme Court's opinion in *Reynolds* did not resolve the Eighth Amendment concerns which exist from the reliance on pre-*Hurst* jury recommendations that were rendered after the jury was instructed that their role was merely advisory. *See Guardado v. Jones*, 138 S. Ct. 1131, 1132 (2018) (Sotomayor, J., dissenting from denial of certiorari). Such instructions still implicate *Caldwell* "where the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role," in contravention of the Eighth Amendment. *Id.*; citing *Caldwell v. Mississippi*, 472 U.S. at 333.

Further, Respondent's arguments relying upon this Court's prior holdings in both *Romano* and *Darden* are not entirely accurate. As Respondent correctly points out this Court's holding in *Romano* determined that to establish a *Caldwell* violation, a defendant must necessarily show that the remarks to the jury improperly described the role assigned to the jury by local law. *Romano*, 512 U.S. at 9; citing *Dugger v. Adams*, 489 U.S. 401, 407 (1989) (additional citations omitted). However, this Court also found in *Romano* that there was no *Caldwell* violation present because the evidence relied upon was not false and "the jury was not affirmatively misled regarding its role in the sentencing process." *Romano*, 512 U.S. at 9. This Court

further noted that the trial court's instructions emphasized the importance of the jury's role and it was never conveyed or intimated in any way by the court or the attorneys that the jury could shift its responsibility in sentencing or that its role in any way had been minimized. *Id.* Thus, even where the instructions may have properly reflected the role assigned to the jury by local law, this Court still looked to determine whether those instructions nevertheless impermissibly diluted the jury's sense of responsibility as ultimate factfinder.

Under Respondent's misguided logic, jury instructions which accurately reflected local law, but nonetheless denied defendants substantive rights provided by the Constitution, would still be permissible. However, that is not the state the law. Respondent fails to realize that even where jury instructions accurately reflect the local law, but nonetheless improperly undermine the jury's sense of responsibility, they still run afoul of the Eighth Amendment. Especially where those instructions affirmatively mislead jurors as to their role in the sentencing process. Following the *Hurst* decisions, regardless of the fact that Florida's jury instructions accurately reflected the "local law" of Florida at the time, those instructions violated the Eighth Amendment where they were based on an unconstitutional sentencing scheme which failed to provide for jury findings as to all factual determination necessary to impose death and impermissibly diluted the jury's role as ultimate decision maker.

"[I]t 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 v. Mississippi, 472 U.S. 320, 328-29 (1985). Such is the case here where Petitioner's jury was led to believe that the responsibility for the determination as to whether a sentence of death was imposed rested with the judge, not the jury. Any attempt at alleviating that constitutional violation by way of the fact that the instructions provided at the time reflected the structural infirmity in Florida's capital sentencing scheme is merely doubling down on the harm to capital defendants sentenced under that unconstitutional scheme.

The Error Present in Petitioner's Case Is Not Harmless Beyond a Reasonable Doubt

Respondent asserts that if any constitutional error were found to be present in Petitioner's case, it would nevertheless be harmless beyond a reasonable doubt. BIO at 24. This is so, Respondent argues, because "[t]here is no doubt that the jury would have found the existence of the same two aggravating circumstances relied upon by the trial judge in imposing the death sentence in his case." BIO at 25. Respondent attributes this argument to the fact that the two aggravators at Petitioner's penalty phase, the avoid arrest aggravator and the cold, calculated, and premeditated aggravator, were established by 'overwhelming evidence.' BIO at 25. Respondent's argument, however, is contrary to the Florida Supreme Court's standard of review for *Hurst* error under its harmless error analysis.

In reviewing for *Hurst error*, the Florida Supreme Court has consistently noted that it rejects a one size fits all approach to harmless error review. The court has repeatedly held that its harmless error review must necessarily include a case-by-case, fact specific inquiry into the potential error. *Reynolds v. State*, __ So. 3d __, 2018

WL 1633075 at *3 (Fla. April 5, 2018). The court has noted that the test for harmless error is to be 'rigorously applied' and the State bears a heavy burden as the beneficiary of the error to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for the imposition of the death penalty did not contribute to the sentence at issue. *Mosley*, 209 So. 3d at 1283; citing *Hurst v. State*, 202 So. 3d 40, 68 (2016). The court has made clear that review for harmless error should focus on the effect which any potential error may have had on the jury. Factors which the court has noted are instructive are whether there was a unanimous jury recommendation, the jury instructions which were provided, whether a mercy instruction was given, and review of the aggravators and mitigators. *See Reynolds*, __ So. 3d. __ 2018 WL 1633075 at *3-4.

In Petitioner's case the jury did not make the requisite findings of fact that *Hurst* requires a jury to find in order to impose a sentence of death. Petitioner's jury recommendation was 9-3 and non-unanimous. The jury instructions provided to Petitioner's jury repeatedly instructed them that their role was merely advisory and that the final decision as to whether death was to be imposed rested with the judge, not them. (ROA at 2052, 2107, 2110-11). Notably, there was no mercy instruction provided and his jury was told that mercy should not factor into their consideration of whether to recommend a death sentence. (R. 2092). Last, and most significantly, comparison of the aggravators and mitigators in Petitioner's case do not support a finding beyond a reasonable doubt that a jury would have unanimously found there

were sufficient aggravating factors that outweighed the mitigating circumstances. *See Davis v. State*, 207 So. 3d 142, 174 (Fla. 2017).

Petitioner's case was not the most aggravated and least mitigated of crimes. *See Hurst*, 202 So. 3d at 60. (Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation.). One of the two aggravators in Petitioner's case, the avoid arrest aggravator, was improperly found by the trial court where the court improperly transferred the intent of Petitioner's co-defendants to Petitioner. The trial court ignored that under Florida law, the motive required for application of this aggravator is personal to the individual and Petitioner was not one of the two members of the group from that night who had been caught by the victim vandalizing the local high school and therefore had no motive to commit the crime. *See Hernandez v. State*, 4 So. 3d 642 (Fla. 2009) (Proof of intent to avoid arrest or effectuate escape must be very strong). There was no evidence that Petitioner was in any danger of being arrested. *See Dafour v. State*, 495 So. 2d 154, 163 (Fla. 1986).

There was also a wealth of mitigation in Petitioner's case that went unpresented due to trial counsel's ineffectiveness. Petitioner's jury never heard mitigating evidence regarding his troubled family history and turbulent home environment during his childhood and adolescence. The jury never heard anything about Petitioner's extensive history of witnessing domestic violence between his mother and her four different husbands, along with the domestic violence that

Petitioner himself endured at his various stepfathers' hands. The jury never heard anything about Petitioner's medical history and his difficult birth during which he was born prematurely and shortly after birth suffered anoxic shock and almost died. The jury was never presented with anything regarding Petitioner's extensive mental health background which included diagnoses of bi-polar disorder, frontal lobe impairment, possible non-verbal learning disorder, and depression. Nothing was provided explaining to the jurors how Petitioner's difficult birth left him with neurological development issues which one doctor, Dr. Hyde, found were indicative of right hemispheric dysfunction. Most importantly, the jurors were not provided with any explanation as to how these impairments had significant effects on Petitioner's behavior at the time of the crime and the way they affected his decision-making and impulse control. And how those impairments, coupled with Petitioner's age of 18 at that time, played a significant role in his ability to regulate his conduct. Had counsel conducted even the most rudimentary of investigations, rather than simply abdicating to Petitioner's mother and presenting a "good guy" defense, the jury would have heard substantial statutory and non-statutory mitigation.

That this information may have altered or impacted the jury's weighing of the aggravation and mitigation is not the only concern. Consideration must also be given to the fact that under Florida law the jury is free to exercise mercy even where the requisite facts have been unanimously found by the jury to impose death. *Hurst v. State*, 202 So. 3d at 57-58. Any one individual juror is free to exercise mercy and impose a life sentence. *Perry v. State*, 210 So. 3d 630, 640 (Fla. 2016). Although

residual doubt is not mitigation under Florida law, residual doubt could have certainly been one reason why three jurors did not vote for death and under Hurst could have been free to exercise mercy even if the jurors unanimously found the existence of all other required factual findings.

Because *Hurst v. Florida* requires "a jury, not a judge, to find each fact necessary to impose a sentence of death, the error cannot be harmless where such a factual determination was not made." *Hall v. State*, 212 So. 3d 1001, 1036-37 (Fla. 2017) (Quince, J., concurring in part and dissenting in part) (quoting *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016). Here, where Petitioner's jury did not return findings as to any of the factual determinations necessary to impose death, the error cannot be harmless. Any attempt to discern as much would amount to the type of speculation which has repeatedly been rejected as impermissible. *See Hurst v. State,* 202 So. 3d at 67-68 (holding that claims by prisoners under *Hurst* must be subjected to individualized harmless error review, and that such review places the burden on the state to prove beyond a reasonable doubt, and not based on pure speculation that the *Hurst* error did not affect the jury's recommendation). To the extent that Respondent argues "[t]here is no doubt that the jury would have found the existence of the same two aggravating circumstances" and that the two aggravators were established by 'overwhelming evidence' is based on nothing more than pure speculation and fails to provide Petitioner the factual determinations required by the *Hurst* decisions.

Finally, Respondent argues that this Court did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must

conduct the weighing process to satisfy the Sixth Amendment in *Hurst v. Florida*. BIO at 25. Respondent's contention here is contrary to this Court's holding in *Hurst v. Florida* and misstates the import of that holding, along with *Hurst v. State*, for purposes of harmless error review. In *Hurst v. Florida*, this Court held that Florida's sentencing scheme was unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, ***to find each fact necessary to impose a sentence of death***." *Id.* at 619 (emphasis added). The Court identified those critical factfindings, leaving no doubt as to how the statute must be read under the Sixth Amendment: "the Florida sentencing statute does not make a defendant eligible for death ***until findings*** . . . ***[of] sufficient aggravating circumstances*** . . . ***and*** . . . ***insufficient mitigating circumstances to outweigh the aggravating circumstances***." *Id.* at 622 (citing Florida Statutes § 921.141(3)) (quotations omitted). This Court's holding in *Hurst v. Florida* identified these findings are the operable findings that must be made by a jury and resolved that "[a] jury's mere recommendation is not enough." *Id.* at 619.

Thus, the basis for the Sixth Amendment requirement is that findings of fact statutorily required to render a defendant death-eligible must be considered to be elements of the offense, separating first degree murder from capital murder under Florida law, and thereby forming part of the definition of the crime of capital murder in Florida. *See Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (applying the ruling of *Jones v. United States*, 526 U.S. 227 (1999) that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt" to state

sentencing schemes under the Fourteenth Amendment). There is no conviction of capital murder in Florida without the jury findings required by *Hurst*. That means, that as part of those critical findings, sufficiency of the aggravators and weighing of the aggravators against the mitigation, are indeed part of the requirements of capital sentencing under Florida's system. To the extent the Respondent argues otherwise is patently wrong.

Moreover, in the wake of *Hurst v. State* and the Florida Supreme Court's interpretation of *Hurst v. Florida* therein, the issues now presented are well beyond that initial distinction. In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court ruled that in a Florida capital case, the jury's sentencing recommendation at the penalty phase had to be returned unanimously. The Florida Supreme Court identified each of the necessary components of a jury's unanimous death recommendation:

> We hold that in addition to **unanimously finding the existence of any aggravating factor**, the jury must also **unanimously find that the aggravating factors are sufficient for the imposition of death** and **unanimously find that the aggravating factors outweigh the mitigation** before a sentence of death may be considered by the judge. * * * As we explain, we also find that in order for a death sentence to be imposed, **the jury's recommendation for death must be unanimous.** This recommendation is tantamount to the jury's verdict in the sentencing phase of trial; and historically, and **under explicit Florida law, jury verdicts are required to be unanimous.**

Hurst v. State, 202 So. 3d at 54. Following the Florida Supreme Court's holding in *Hurst v. State*, it is unequivocal that in order to impose death under Florida's capital sentencing scheme, the findings as to the existence of the aggravating factors, the

sufficiency of the aggravators, and the weighing of the aggravators against the mitigation, are what is constitutionally required in order to convict a defendant of capital first degree murder. As a result, any case in which that process has not been afforded a capital sentence stands in violation of the *Hurst* decisions. And such violations are not harmless beyond reasonable doubt, regardless of any conjecture on behalf of the State as to the 'overwhelming nature' of the aggravation. To the extent Respondent attempts to rely upon this argument to cure the *Hurst* error in Petitioner's case, that argument is unavailing.

CONCLUSION

For the above stated reasons, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari to review the Florida Supreme Court decision.

Respectfully submitted,

/s/ Scott Gavin
SCOTT GAVIN
LAW OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL – SOUTH
1 EAST BROWARD BOULEVARD, SUITE 444
FORT LAUDERDALE, FL 33301
(954) 713-1284

* Counsel of Record

August 8, 2018