No. _____

OCTOBER TERM 2017

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL A. TANZI,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does the Florida Supreme Court's application of a *per se* harmless–error rule to violations of *Hurst v. Florida*, 136 S. Ct. 616 (2016), in every pre–*Hurst* case in which the capital defendant's advisory jury, after being instructed that the findings of fact and sentencing decision would be made by the judge alone, voted unanimously to recommended the death penalty, violate the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985)?

2. Does the Florida Supreme Court's application of a *per se* harmless–error rule to *Hurst* violations contravene this Court's decisions holding that harmless–error review cannot be automatic and mechanical, must include consideration of the whole record, and must be accompanied by a detailed explanation based on the record?

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PARTIES TO THE PROCEEDINGS BELOW

Petitioner Michael A. Tanzi, a death–sentenced Florida prisoner, was the appellant in the Florida Supreme Court.

Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael A. Tanzi, prays that a Writ of Certiorari issue to review the opinion of the Florida Supreme Court.

CITATIONS TO OPINION BELOW

The opinion of the Florida Supreme Court in this cause, reported as *Tanzi v. State*, ___ So. 3d ___, 2018 WL 1630749 (Apr. 5, 2018), is attached as to this Petition as "Appendix A." The order denying successive motion for postconviction relief in the circuit court is non-published and attached to this Petition as "Appendix B."

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257(a) and 2101 (d). The Florida Supreme Court issued its decision on April 5, 2018. This petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

The Eighth Amendment provides:

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

The Fourteenth Amendment provides, in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

I. Introduction

On at least three occasions, multiple Justices of this Court have expressed grave concerns regarding the constitutionality of the *per se* harmless–error rule invented by the Florida Supreme Court for death sentences that were obtained in violation of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Florida Supreme Court's refusal to meaningfully address whether its rule is consistent with the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. *See Guardado v. Jones*, 138 S. Ct. 1131 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *Middleton v. Florida*, 138 S. Ct. 829 (2018) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari); *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari).

Nevertheless, the Florida Supreme Court has continued to mechanically apply its harmless–error rule to uphold dozens of death sentences based on the very mechanism—an "advisory" jury recommendation devoid of any jury fact–finding—that this Court held in *Hurst v. Florida* to be unconstitutional.

The Florida Supreme Court's rule provides that if a defendant's pre–*Hurst* advisory jury voted to recommend death by a majority vote—i.e., a margin between 7–to–5 and 11–to–1—the *Hurst* error is *not* harmless and the death sentence must be vacated. But if the defendant's pre–*Hurst* advisory jury recommended death by a vote of 12–to–0, the *Hurst* error is automatically deemed harmless and the Florida Supreme Court upholds the defendant's death sentence. Although in some cases the Florida Supreme Court has mentioned additional factors in the course of rendering a

harmless– error decision, the court has *never* held a *Hurst* violation harmful in a case with a unanimous advisory jury recommendation; and the court has *never* held a *Hurst* violation harmless in a split–vote advisory jury case. The vote of the pre–*Hurst* advisory jury is *always* the dispositive factor.

The Florida Supreme Court's *Hurst* harmless–error rule, which was applied to deny Mr. Tanzi relief below, is unconstitutional for several reasons. The rule violates the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), by relying entirely on the vote of an advisory jury that was instructed the judge would make the findings of fact necessary for a death sentence and render the final decision on the death penalty. The rule contravenes this Court's precedents holding that harmless–error review cannot be "automatic and mechanical," *Barclay v. Florida*, 463 U.S. 939 (1983), must include consideration of the whole record, *see, e.g.*, *Rose v. Clark*, 478 U.S. 570, 583 (1986), and must be accompanied by "a detailed explanation based on the record," *Clemons v. Mississippi*, 494 U.S. 738, 740 (1990).

This Court should address the Florida Supreme Court's unconstitutional rule now. Waiting years—as the Court did before ending the Florida Supreme Court's unconstitutional practices *Hurst*—would allow the execution of dozens of Florida prisoners whose death sentences were obtained in violation of *Hurst*, while scores of others who were sentenced at the same time, pursuant to the same unconstitutional scheme, are moved off death row.

II. Relevant Facts and Procedural History[1]

The Circuit Court for the Sixteenth Judicial Circuit, in and for Monroe County, Florida, entered the final judgments of conviction and death sentence currently at issue. Mr. Tanzi was indicted for the first–degree murder of Janet Acosta on May 16, 2000. (R. 13–14) An amended information was filed on March 26, 2002, charging Mr. Tanzi with carjacking with a weapon, kidnapping to facilitate a felony with a weapon, armed robbery with a deadly weapon, and two counts of sexual battery with a deadly weapon. (R. 299–301)

Initially, Mr. Tanzi pled not guilty to all charges. (R. 22) On January 31, 2003, Mr. Tanzi entered a guilty plea to the counts of first–degree murder, carjacking, kidnapping, and armed robbery. The trial court denied Mr. Tanzi's request for a waiver of a penalty phase jury. (R. 1925–26) Later that same day, Mr. Tanzi attempted, unsuccessfully, to withdraw his guilty plea. (R. 2044)

Mr. Tanzi's penalty phase began on February 10, 2003. From the moment potential jurors entered the courtroom, throughout jury selection, and in their penalty phase instructions, jurors were told that their sentencing recommendation—life in prison or death—was merely "advisory" and that the final decision regarding the death penalty rested solely with the judge. Just before retiring to consider their

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[1] Citations to the Record on Appeal are as follows:

"(R. _____)" - The Record on Direct Appeal to the Florida Supreme Court.

"(PCR. _____)" - The record on appeal to the Florida Supreme Court of the denial of postconviction relief.

recommendation, the jury was instructed:

> [I]t is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge.

(R. 1802)

The "findings" returned by the jury were limited to the following:

> Advisory sentence. A majority of the jury, by a vote of 12 to zero, advise and recommend to the Court that it impose the death penalty upon Michael A. Tanzi. Dated this 19th day of February, 2003.

(R. 1821–22) The jury returned none of the findings of fact required to impose a death sentence under Florida law. *See* Fla. Stat. § 921.141(3) (1996). The jury did not find: (1) that specific aggravating circumstances had been proven beyond a reasonable doubt; (2) that those aggravating circumstances were "sufficient" to justify the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances.

The judge, alone, found that seven aggravating circumstances had been proven beyond a reasonable doubt and were sufficient for the death penalty: (1) the murder was committed by a person previously convicted of a felony and under sentence of imprisonment or on felony probation (given great weight); (2) the murder was committed during the commission of a kidnapping (great weight); (3) the murder was committed during the commission of two sexual batteries (great weight); (4) the crime was committed for the purpose of avoiding arrest (great weight); (5) the murder was committed for pecuniary gain (great weight); (6) the murder was especially heinous,

atrocious, or cruel ("utmost" weight); and (7) the murder was committed in a cold, calculated, and premeditated manner (great weight) (R. at 1804–1832)

In mitigation, the court found: (1) Mr. Tanzi suffered from Axis II personality disorders (given some weight); (2) Mr. Tanzi was institutionalized as a youth (some weight); (3) Mr. Tanzi's behavior benefited from psychotropic medications (some weight); (4) Mr. Tanzi lost his father at a young age (some weight); (5) Mr. Tanzi was sexually abused as a child (some weight); (6) Mr. Tanzi twice attempted to join the military (some weight); (7) Mr. Tanzi cooperated with law enforcement (some weight); (8) Mr. Tanzi assists other inmates by writing letters and he enjoys reading (some weight); (9) Mr. Tanzi's family has a loving relationship with him (some weight); and (10) Mr. Tanzi has a history of substance abuse (given no weight). (R. at 1804–1832)

The judge concluded that the mitigation did not outweigh the aggravation. (R. 1831) Based on his fact–finding, alone, as to the elements for a death sentence under Florida law, the judge sentenced Mr. Tanzi to death. (R. 1804–1832)[2]

On direct appeal, Mr. Tanzi argued *inter alia* that Florida's capital sentencing statute is unconstitutional under *Ring v. Arizona* because it requires a judge, rather than a jury, to find facts necessary to impose death, that an advisory jury does not satisfy the Sixth and Fourteenth Amendments and that *Ring* and Florida law require that aggravating circumstances be charged in the indictment and found unanimously by the jury beyond a reasonable doubt. The Florida Supreme Court rejected Mr.

[2] Mr. Tanzi was sentenced to consecutive life sentences for each count of carjacking, kidnapping and robbery. (R. 1804-1832)

Tanzi's arguments and affirmed the conviction and death sentence. *Tanzi v. State*, 964 So. 2d 106 (Fla. 2007).

On November 26, 2007, Mr. Tanzi filed a Petition for Writ of Certiorari in this Court alleging, *inter alia*, that Florida's death penalty statute was unconstitutional under *Ring v. Arizona*. This Court denied certiorari on February 19, 2008. *Tanzi v. Florida*, 128 S. Ct. 1243 (2008).

In postconviction proceedings, Mr. Tanzi filed a Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend pursuant to Florida Rule of Criminal Procedure 3.851 on February 13, 2009. (PCR. 1– 175) Mr. Tanzi filed a Motion for Leave to Amend with two additional claims, which was denied. (PCR. 392–93) After conducting an evidentiary hearing (PCR.–T 1–433), the circuit court denied relief as to all claims. (PCR. 511–520) Mr. Tanzi timely appealed to the Florida Supreme Court and petitioned for writ of habeas corpus. The Florida Supreme Court affirmed the denial of relief and denied a writ of habeas corpus. *Tanzi v. State*, 94 So. 3d 482 (Fla. 2012).

Mr. Tanzi filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida, alleging, *inter alia*, that his death sentence was unconstitutional under *Ring v. Arizona*. That petition was denied and Mr. Tanzi appealed to the Eleventh Circuit Court of Appeals, which affirmed. *Tanzi v. Secretary, DOC*, 772 F.3d 644 (Fla. 2014). Mr. Tanzi petitioned this Court for a writ of certiorari, which was denied. *Tanzi v. Secretary, DOC*, 136 S. Ct. 155 (2015).

On January 11, 2017, Mr. Tanzi filed a successive Rule 3.851 post–conviction motion arguing, *inter alia*, that his death sentence should be vacated because his

death sentence is unconstitutional under *Hurst v. Florida* and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). In denying postconviction relief, the circuit court concluded that *Hurst v. Florida* is retroactive to Mr. Tanzi's case, but found that the *Hurst* error was harmless:

> The Court notes that the Florida Supreme Court has repeatedly found *Hurst* errors harmless in cases like this one with unanimous jury recommendations. *See Truehill v. State*, So. 3d 2017 WL 727167, at *19 (Fla. Feb. 23, 2017); *King v. State*, 2017 WL 372081, at *19 (Fla. Jan. 26, 2017); *Knight v. State*, So. 3d 2017 WL 4 113 29 (F1a. Jan. 31, 2017); *Kaczmar v. State*, So. 3d 2017 WL 410214 (Fla. Jan. 31, 2017); *Hall v. State*, So. 3d 2017 WL 526509, at *23 (Fla. Feb. 9, 2017). The jury's unanimous recommendation is "precisely what [the Florida Supreme Court] determined in *Hurst* to be constitutionally necessary to impose a sentence of death." *Davis* [*v. State*, 207 So. 3d 142, 175 (Fla. 2016)]. Thus, given the jury's recommendation and the powerful evidence establishing the aggravators, the Court finds the *Hurst* error is harmless beyond a reasonable doubt in this case.

(PCR2. at p. 102)

Mr. Tanzi appealed to the Florida Supreme Court. Rather than allowing briefing and argument, the court ordered the parties to file briefs "addressing why the lower court's order should not be affirmed based on this Court's precedent in *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, No. 16–998 (U.S. May 22, 2017), *Davis v. State*, 207 So. 3d 142 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016)."

In response, Mr. Tanzi argued that the court's "show cause" proceeding violates his right to appeal the denial of postconviction relief and to be meaningfully heard. Mr. Tanzi alleged further that this procedure implicates his right to due process and

equal protection, and that individualized appellate review of all capital appeals, whether in the course of direct or collateral proceedings, is required by the Florida Constitution. *See Proffitt v. Florida*, 428 U.S. 242, 258 (1976)("The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.").

Addressing the merits of his *Hurst* claims, Mr. Tanzi noted that the State had conceded that his death sentence violated *Hurst* and that *Hurst* is retroactive to his death sentence, which was rendered after this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). (PCR2. 74–75) Anticipating that the Florida Supreme Court would dispose of Mr. Tanzi's case on the basis of the unanimous jury recommendation, as it had done in numerous others cases, Mr. Tanzi argued that applying a *per se* harmless–error rule would violate the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985) because such a rule relied entirely on the vote of an advisory jury that was repeatedly instructed that the judge would make the findings necessary for a death sentence and render the final decision on the death penalty. Mr. Tanzi also argued that the Florida Supreme Court's *per se* rule contravenes this Court's precedents holding that harmless–error review must include "detailed explanation based on the record" supporting a finding of harmless error. *See Clemons v. Mississippi*, 494 U.S. 738, 753 (1990); *see also Sochor v. Florida*, 504 U.S. 527, 540 (1992).

Mr. Tanzi also stressed that the outcome of his case should not be determined based *Davis v. State*, 207 So. 3d 142 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248

(Fla. 2016) because, unlike in *Davis* and *Mosley*, Mr. Tanzi's jurors were never instructed that they could exercise mercy by not joining a death recommendation, irrespective of their views on the aggravation and mitigation. In addition, Mr. Tanzi's jury's sentencing decision was skewed by the instructions on the aggravators, which allowed the jury to consider aggravators that this Court later ruled did not apply.[3]

Applying the *per se* harmless error rule first announced in *Davis*, the Florida Supreme Court affirmed the denial of *Hurst* relief. *Tanzi v. State*, 2018 WL 1630749, at *2 (Fla. 2018). The court denied Mr. Tanzi's *Caldwell*–related challenges with a single sentence: "Additionally, we reject Tanzi's *Hurst*–induced *Caldwell* claim. *See Reynolds v. State*, No. SC17–793, slip op. at 26–36 (Fla. Apr. 5, 2018)." *Id.* (internal citation omitted).

Justice Quince dissented:

> I cannot agree with the majority's finding that the *Hurst* error was harmless beyond a reasonable doubt. As I have stated previously, "[b]ecause *Hurst* requires 'a jury, not a judge, to find each fact necessary to impose a sentence of death,' the error cannot be harmless where such a factual determination was not made." *Hall v. State*, 212 So. 3d 1001, 1036–37 (Fla. 2017) (Quince, J., concurring in part and dissenting in part) (citation omitted) (quoting *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016)); *see also Truehill v. State*, 211 So. 3d 930, 961 (Fla.) (Quince, J., concurring in part and dissenting in part), *cert. denied*, 138 S. Ct. 3

[3] In addition, Mr. Tanzi argued that changes in Florida law require the court to revisit his previously presented *Brady* and *Strickland* claims to determine whether the evidence presented to support each claim undermines confidence in the outcome of the penalty phase in light of new law. Mr. Tanzi emphasized that this claim could not be denied the basis of *Davis* or *Mosley* because neither Mr. Davis nor Mr. Mosley raised this claim, and this claim was not addressed by the court in its previous decisions. In affirming the denial of postconviction relief in Mr. Tanzi's case, the Florida Supreme Court didn't even address this claim.

> (2017). The jury did not make the specific factual findings that *Hurst* requires a jury to find in order to impose some of the most serious aggravators at issue in this case.
>
> Therefore, I dissent.

Id. at *2. This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Florida Supreme Court's *Per se* Harmless–Error Rule for *Hurst* Violations Contravenes the Eighth Amendment Under *Caldwell*

This Court should grant a writ of certiorari to address whether the Florida Supreme Court's *per se* harmless–error rule for *Hurst* violations contravenes the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This question is not only a life–or–death matter for Mr. Tanzi, but also impacts dozens of other prisoners on Florida's death row whose death sentences were obtained in violation of *Hurst* and who nevertheless remain subject to execution based solely on the vote cast by their pre–*Hurst* "advisory" jury—a jury whose sense of responsibility for a death sentence was systemically diminished. On three occasions, Justices of this Court have called for review of this *Hurst–Caldwell* issue. *See Guardado v. Jones*, 138 S. Ct. 1131 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *Middleton v. Florida*, 138 S. Ct. 829 (2018) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari); *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari). This Court should resolve the matter now.

"This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task," and has

found unconstitutional under the Eighth Amendment comments that "minimize the jury's sense of responsibility for determining the appropriateness of death." *Caldwell*, 472 U.S. at 341. Under *Caldwell*, the Florida Supreme Court's *per se* harmless–error rule for *Hurst* claims violates the Eighth Amendment by relying entirely on an advisory jury recommendation that was rendered by jurors whose sense of responsibility for a death sentence was diminished by the trial court's repeated instructions that the jury's role was merely advisory.

In *Caldwell*, a Mississippi penalty–phase jury did not receive an accurate description of its role in the sentencing process due to the prosecutor's suggestion that the jury's decision to impose the death penalty would not be final because an appellate court would review the sentence. *Id.* at 328–29. This Court found that the prosecutor's remarks impermissibly "led [the jury] to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Id.* at 329. The Court concluded that, because it could not be ascertained that the remarks had no effect on the jury's sentencing decision, the jury's decision did not meet the Eighth Amendment's standards of reliability. *Id.* at 341. Accordingly, *Caldwell* held the following: under the Eighth Amendment, "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 sentence lies elsewhere." *Id.* at 328–29.

In the decades between *Caldwell* and *Hurst*, the Florida Supreme Court rejected numerous *Caldwell*–based challenges to Florida's pre–*Hurst* jury

instructions. Beginning in *Pope v. Wainwright*, 496 So. 2d 798 (Fla. 1986), the Florida Supreme Court dismissed the relevance of *Caldwell* on the theory that, unlike with the Mississippi scheme at issue in *Caldwell*, Florida's instructions accurately described the jury's "merely" advisory nature: "[I]n Florida it is the trial judge who is the ultimate sentencer," and the jury "is merely advisory." *Id.* at 805. The Florida Supreme Court, finding "nothing erroneous about informing the jury of the limits of its sentencing responsibility," so as to "relieve some of the anxiety felt by jurors impaneled in a first–degree murder trial," held that its advisory jury instructions complied with *Caldwell* and accurately described a constitutionally valid scheme. *Id.* In *Combs v. State*, 525 So. 2d 853, 856 (Fla. 1998), the Florida Supreme Court reaffirmed its holding in *Pope* that Florida's advisory jury scheme complied with *Caldwell*. The Florida Supreme Court further noted that it was "deeply disturbed" by decisions of the United States Court of Appeals for the Eleventh Circuit, in cases like *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), and *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988) (en banc), which had expressed doubts as to whether Florida's scheme complied with *Caldwell*. For years after *Pope* and *Combs*, the Florida Supreme Court continued to reject *Caldwell* challenges to Florida's advisory jury instructions. *See, e.g.*, *Davis v. State*, 136 So. 3d 1169, 1201 (Fla. 2014).

Hurst caused a rupture to the Florida Supreme Court's *Caldwell* precedent. In light of *Hurst*, the rationale underlying the Florida Supreme Court's prior rejection of *Caldwell* challenges—that Florida's "advisory" jury scheme was constitutionally valid—has evaporated. That is because *Hurst* held that Florida's capital sentencing

scheme was *not* constitutional, and that juries in that scheme were *not* afforded their constitutionally required role as fact–finders. Given *Hurst*, it is now clear that Florida's advisory juries were misinformed as to their constitutionally required role in determining a death sentence. The juries were unconstitutionally told that they need not make the critical findings of fact in order for a death sentence to be imposed. The pre–*Hurst* jury instructions thereby "improperly described the role assigned to the jury," in violation of *Caldwell*. *Dugger v. Adams*, 489 U.S. 401, 408 (1989).

As a result, the *Hurst* cases shed new light on Eighth Amendment violations of *Caldwell* that should have been addressed by the Florida Supreme Court in Mr. Tanzi's case but were not. In affirming the denial of Mr. Tanzi's *Caldwell* claims, the Florida Supreme Court relied on its recent decision in *Reynolds v. State*, No. SC17–793, 2018 WL 1633075 (Fla. Apr. 5, 2018). However, the court's rationale in *Reynolds* is deeply flawed.

In *Reynolds*, the Florida Supreme Court relied on *Romano v. Oklahoma*, 512 U.S. 1 (1994), to conclude that *Hurst* has no bearing on whether *Caldwell* was violated in any case because Florida's pre–*Hurst* jury instructions accurately described Florida's capital sentencing scheme at the time. *Reynolds*, 2018 WL 1633075, at *10–12. But Florida's prior scheme was *not* constitutional before *Hurst*, and this makes *Romano* inapplicable. In *Reynolds*, the Florida Supreme Court tried to dispel the notion that its *Hurst* harmless–error rule relies entirely on the advisory jury vote by saying that other factors are to be considered:

> Preliminarily, we look to whether the jury recommendation was unanimous . . . . Yet a unanimous recommendation is

> not sufficient alone; rather it begins a foundation for us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigators.

2018 WL 1633075, at * 3. But if the Florida Supreme Court truly considered other factors, it would be remarkable beyond coincidence that in the dozens of *Hurst* cases the court has reviewed, the court has *never* held a *Hurst* violation harmful in a case with a unanimous advisory jury recommendation; and the court has *never* held a *Hurst* violation harmless in a split– vote advisory jury case. The vote of the pre–*Hurst* advisory jury always controls.

Throughout the penalty phase, and immediately before deliberating, Mr. Tanzi's advisory jurors were reminded by the court, the prosecutor, and defense counsel, that their sentencing recommendation—life in prison or death—was "advisory"; that it would not be accompanied by findings of fact or any other explanation for the recommendation; and that the final decision regarding the death penalty rested with the judge.

The Florida Supreme Court's reliance on the advisory jury's recommendation, without considering the jury's diminished sense of responsibility for the death sentence, violates *Caldwell*. Mr. Tanzi's advisory jurors were led to believe that their role in sentencing was diminished when jurors were repeatedly instructed by the court that their recommendation was advisory and that the final sentencing decision rested solely with the judge. Given that the jury was led to believe it was not ultimately responsible for the imposition of Mr. Tanzi's death sentence, the Florida Supreme Court's *per se* rule cannot be squared with the Eighth Amendment. Under

Caldwell, no court can be certain beyond a reasonable doubt that a jury would have made the same unanimous *recommendation* absent the *Hurst* error. A court certainly cannot be sure beyond a reasonable doubt that a jury that properly grasped its critical role in determining a death sentence would have unanimously found all of the elements for the death penalty satisfied. Indeed, a jury that properly understood the gravity of its fact–finding role could have been substantially affected by the extensive mitigation in Mr. Tanzi's case.

The Florida Supreme Court's rule does not allow for meaningful consideration of the actual record. The *per se* rule cannot permissibly predict that a jury with full awareness of the gravity of its role in the capital sentencing process would have unanimously found or rejected any specific mitigators in a proceeding comporting with constitutional requirements. *Cf. Mills v. Maryland*, 486 U.S. 367, 375–84 (1988) (holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about jury's vote); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (same). The Florida Supreme Court's failure to consider Mr. Tanzi's mitigation in its harmless–error analysis is also inconsistent with *Parker v. Dugger*, where this Court rejected the state supreme court's cursory harmless–error analysis in jury–override cases. 498 U.S. 308, 320 (1991) ("What the Florida Supreme Court could not do, but what it did, was to ignore evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings.").

The Florida Supreme Court's application of its *per se* rule is also at odds with

federal appeals court decisions holding that *Caldwell* violations must be assessed in light of the entire record. *See, e.g.*, *Cordova v. Collens*, 953 F.2d 167, 173 (5th Cir. 1992); *Rodden v. Delo*, 143 F.3d 441, 445 (8th Cir. 1998); *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997); *Mann*, 844 F.3d 1446. In contrast to these federal decisions, the Florida Supreme Court's *per se* rule disallows meaningful consideration of factors relevant to an actual *Caldwell* analysis. And here, the fact that the advisory jury was informed of its diminished role from the trial judge, rather than only the prosecutor as in *Caldwell*, strengthens the case for finding an Eighth Amendment violation. Arguments by prosecutors are "likely to be viewed as the statements of advocates," whereas jury instructions are likely "viewed as definitive and binding statements of the law." *Boyde v. California*, 494 U.S. 370, 384 (1990). As this Court has recognized, "[t]he influence of the trial judge on the jury is necessarily and properly of great weight, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946).

This Court's rationale for the rule announced in *Caldwell* as it related to improper comments by a prosecutor also supports applying the rule to Florida's pre–*Hurst* advisory jury instructions. *Caldwell* reasoned that encouraging juries to rely on future appellate court review deprived the defendant of a fair sentencing because appellate courts are ill–suited to evaluate the appropriateness of a death sentence in a particular case, especially with respect to mitigation. *Caldwell*, 472 U.S. at 330–31. This same concern applies here, where the jury was not required to make the findings

of fact required to impose a death sentence, knowing that the ultimate life–or–death decision would be made by the judge.

Caldwell also reasoned that a jury's desire to sentence harshly in order to "send a message," rather than to impose a sentence proportional to the crime, "might make a jury very receptive to a prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal." *Id.* at 331. In Florida too, pre–*Hurst* advisory juries were likely receptive to assurances that jurors were not responsible for fact–finding, and that the judge would ultimately be responsible for finding the elements necessary for a death sentence.

Additionally, *Caldwell* reasoned that a jury may get the impression from comments about appellate review that only a death sentence would trigger exacting appellate scrutiny of the whole case. *Id.* at 332. This same concern applies to Florida's pre– *Hurst* juries, which would have been more inclined to recommend death in order to trigger the trial judge's full exercise of her sentencing discretion.

Finally, *Caldwell* reasoned that where a jury is divided on the proper sentence, jurors who favor death may be susceptible to using the prosecutor's characterization of the jury's diminished role as an argument to convince the jurors who favor life to defer to a death recommendation. *Id.* at 333. "Indeed, one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in." *Id.* The same concern is valid here, where advisory jurors who favored a death recommendation

may have asked jurors who favored life to change their votes to death, given that the judge would ultimately conduct the fact–finding regardless of the recommendation.[4]

This Court should grant a writ of certiorari and address the Florida Supreme Court's unconstitutional harmless–error rule in light of *Caldwell*. Ultimately, this Court should instruct the Florida Supreme Court to meaningfully consider whether the rationale underlying its pre–*Hurst* decisions rejecting *Caldwell* challenges to Florida's capital scheme, including *Pope*, *Combs*, and subsequent decisions, have any continuing validity in light of *Hurst*.

II. The Florida Supreme Court's Rule Violates the Eighth and Fourteenth Amendment Requirements That Harmless–Error Review Must Not Be Mechanical and Must Consider the Whole Record

This Court should grant a writ of certiorari to decide whether the Florida Supreme Court's *per se* harmless–error rule for *Hurst* violations contravenes the Eighth and Fourteenth Amendments under this Court's precedents establishing that a state court's harmless–error review, particularly in a capital case, must not be "automatic and mechanical," *Barclay v. Florida*, 463 U.S. 939 (1983), must include consideration of the whole record, *see Rose v. Clark*, 478 U.S. 570, 583 (1986), and must be accompanied by "a detailed explanation based on the record," *Clemons v. Mississippi*, 494 U.S. 738, 740 (1990). The Florida Supreme Court's harmless–error

[4] The jury's confusion as to their role is especially evident in Mr. Tanzi's case. At the request of the defense, and with the agreement of the State, the jury was specifically instructed that "“[l]ack of remorse is not an aggravating factor and you are not to consider it as such." (T. 1811). Regardless, an un-named juror later explained the rationale for the jury's death recommendation: "He didn't care. He had no regrets, no remorse." Charles Rabin, "Confessed Murderer Gets Death Sentence," The Miami Herald, April 12, 2003.

ruling in Mr. Tanzi's case satisfies none of those constitutional requirements.

The United States Constitution imposes limits on a state court's use of a harmless–error rule to reject a federal constitutional claim. Whether a state court has exceeded constitutional boundaries in the denial of a federal claim on harmless–error grounds "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 *Chapman v. California*, this Court defined "harmless" constitutional errors as those which had no reasonable possibility of contributing to the result, and "*in the setting of a particular case* are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." *Id.* at 22–23. Thus, the harmfulness of a constitutional violation must be assessed on a case–by–case basis in the context of the entire proceeding. *Id.* The beyond–a–reasonable–doubt standard applicable to harmless–error rules is satisfied when, in light of the record as a whole, an error had no reasonable probability of contributing to the result. *Id.* at 22, 24.

Since *Chapman*, this Court has refined the parameters of harmless–error rules. The Court has reiterated that the burden of proving a constitutional error harmless beyond a reasonable doubt rests with the State, as the beneficiary of the error. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). The Court has emphasized that proper harmless–error analysis should consider the error's probable impact on the minds of an average rational jury. *See Harrington v. California*, 395

U.S. 250, 254 (1969). And the Court has made clear that harmless–error rulings must be accompanied by sufficient reasoning based on the actual record. *See, e.g.*, *Clemons*, 494 U.S. at 752; *Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring) (explaining that a state court "cannot fulfill its obligations of meaningful review by simply reciting the formula for harmless error.").

A federal constitutional error's impact must be assessed in the context of the entire record. *See, e.g.*, *Rose*, 478 U.S. at 583. When the error's impact is unclear after the whole record is reviewed, courts should not perform harmless–error analysis that amounts to "unguided speculation." *Holloway v. Arkansas*, 435 U.S. 475, 490–91 (1978); *see also O'Neal v. McAninch*, 513 U.S. 432, 435 (1995) ("[T]he uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict.").

In capital cases, this Court reviews a state court's harmless–error denial of a federal constitutional claim with heightened scrutiny. *See, e.g.*, *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988). As this Court has long recognized, capital cases demand heightened standards of reliability because "[d]eath is a different kind of punishment from any other which may be imposed in this country . . . in both its severity and its finality." *Beck v. Alabama*, 447 U.S. 625, 637 (1980). Accordingly, courts are forbidden from applying "harmless–error analysis in an automatic or mechanical fashion" in a capital case. *Clemons*, 494 U.S. at 753.

This Court has previously applied these standards to review harmless–error rulings of the Florida Supreme Court. *See, e.g.*, *Schneble v. Florida*, 405 U.S. 427 (1972); *Barclay*, 463 U.S. 939; *Parker*, 498 U.S. 308; *Sochor*, 504 U.S. 527. In some

cases, the Florida Supreme Court's harmless–error analysis survived this Court's federal constitutional scrutiny. *See, e.g.*, *Schneble*, 405 U.S. at 432; *Barclay*, 463 U.S. at 958. In other cases, it did not. *See, e.g.*, *Parker*, 498 U.S. at 320; *Sochor*, 504 U.S. at 540. The Florida Supreme Court's harmless–error ruling in this case falls into the latter category.

The Florida Supreme Court's *per se* harmless–error rule contravenes this Court's requirement that state courts conduct an individualized review of the record as a whole before denying federal constitutional relief on harmless–error grounds, especially in capital cases. The Florida Supreme Court's *per se* rule operates mechanically, rather than individually, to deem *Hurst* errors harmless in every case where the advisory jury unanimously recommended death.

In cases where a Florida jury operating under Florida's unconstitutional pre–*Hurst* system reached a unanimous death recommendation, the Florida Supreme Court has generally refused to entertain individualized, record–based arguments before holding the *Hurst* error harmless. Although in some cases the Florida Supreme Court mentions factors other than the vote itself in the course of its harmless–error ruling, the vote is always the dispositive factor. In the dozens of *Hurst* cases it has reviewed, the court has *never* held a *Hurst* violation harmful in a case with a unanimous advisory jury recommendation. And the court has *never* held a *Hurst* violation harmless in a split–vote advisory jury case. The vote always controls. This Court's decisions require that harmless–error analysis include an actual assessment of the whole record. *See, e.g.*, *United States v. Hastings*, 461 U.S. 499, 509 (1983)

(“Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record *as a whole* and to ignore errors that are harmless.”); *Rose*, 478 U.S. at 583 (“We have held that *Chapman* mandates consideration of the *entire record* prior to reversing a conviction for constitutional errors that may be harmless.”); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1967) (“Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the *whole record*, that the constitutional error was harmless beyond a reasonable doubt.”); *Yates v. Evatt*, 500 U.S. 391, 403 (1991) (“To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to *everything else the jury considered on the issue in question*, as revealed in the record.”); *see also Fulminante*, 499 U.S. at 306 (explaining that the “common thread” connecting cases subject to harmless–error review under *Chapman* is that each involves “trial error” that may “be qualitatively assessed *in the context of the other evidence presented* in order to determine whether its admission was harmless beyond a reasonable doubt”). And state courts outside of Florida have recognized and applied this Court’s mandate that harmlessness be analyzed in the context of the whole record. *See, e.g.*, *State v. Cage*, 583 So. 2d 1125, 1128 (La. 1991) (“*Chapman* harmless error analysis . . . mandates consideration of the entire record.”).

The Florida Supreme Court’s *per se* practice defies this Court’s law. Despite Mr. Tanzi’s detailed, record–based arguments about the impact of the *Hurst* error on his death sentence, the Florida Supreme Court refused to address them. And the

Florida Supreme Court has followed the same mechanical approach to harmless–error analysis in *every* capital case where the pre–*Hurst* advisory jury's recommendation was unanimous.

The Florida Supreme Court's *per se* rule flouts this Court's understanding in *Barclay v. Florida* that "the Florida Supreme Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless." *Barclay*, 463 U.S. at 958. The rule is also at odds with this Court's decision in *Harrington v. California*, which explained that proper harmless–error analysis not only considers the impact of a constitutional error on the specific jury in the case, but also whether an average rational jury would have reached the same conclusion without the constitutional error. *See* 395 U.S. at 254. The Florida Supreme Court's *per se* rule is inconsistent with *Sochor v. Florida* and *Clemons v. Mississippi*, where this Court highlighted that harmless–error rulings must be accompanied by specific reasoning grounded in the whole record. *See Sochor*, 504 U.S. at 541;; *Clemons*, 494 U.S. at 752. And the rule's failure to consider mitigation contradicts *Parker v. Dugger*, where this Court rejected a cursory harmless–error analysis by the Florida Supreme Court. *See* 498 U.S. at 320 ("What the Florida Supreme Court could not do, but what it did, was to ignore evidence of mitigating circumstances in the record.").

The Florida Supreme Court's *per se* rule also gives the State a windfall in cases involving undisputed constitutional error: it relieves the State of its burden to prove the *Hurst* error harmless beyond a reasonable doubt. *See Fulminante*, 499 U.S. at

297 ("*Our review of the record leads us to conclude* that the State has failed to meet its burden of establishing, beyond a reasonable doubt, that the [error] was harmless error."). As Justice Sotomayor has observed, the allocation of the burden of proof to the State can prove outcome–determinative. *See Gamache v. California*, 562 U.S. 1083 (2010) (Sotomayor, J., statement respecting the denial of a writ of certiorari).

In *Hurst v. State*, 202 So. 3d 40, 68 (Fla. 2016), the Florida Supreme Court stated that "the burden is on the State, 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 imposition of the death penalty did not contribute to [the] death sentence." But the Florida Supreme Court has now abandoned this through the mechanical rule applied in cases where the advisory jury unanimously recommended the death penalty. The Florida Supreme Court also seemed to recognize in *Hurst v. State* that a pre–*Hurst* advisory jury recommendation does not demonstrate on its own that the evidence presented at the penalty phase was sufficient to support a death sentence. *See* 202 So. 3d at 68. But even if it did, that would still not save the Florida Supreme Court's *per se* rule. *See Satterwhite*, 486 U.S. at 258 (explaining that the state does not meet burden of establishing capital sentencing error is harmless merely by showing that the evidence in the record is sufficient to support a death sentence). There is a critical difference between concluding that a properly instructed jury *could* have reached a unanimous death recommendation and that it would have done so beyond a reasonable doubt.

In order to determine whether there is a "reasonable possibility" that a *Hurst*

error contributed to a death sentence, *see Chapman*, 386 U.S. at 23, a reliable harmless error analysis must begin with what this Court held in *Hurst* a jury must do for a Florida death sentence to be constitutional. The Court ruled the Sixth Amendment requires juries to make the findings of fact regarding the elements necessary for a death sentence under Florida law: (1) the aggravating circumstances that had been proven beyond a reasonable doubt; (2) the aggravating circumstances were together "sufficient" to justify the death penalty beyond a reasonable doubt; and (3) the aggravating circumstances outweighed the mitigation evidence beyond a reasonable doubt. *See* 136 S. Ct. at 620–22.[5]

The second and third elements cut against the harmless–error analysis in Justice Alito's dissent in *Hurst*. Justice Alito stated that he would hold the *Hurst* error harmless because the evidence supported the trial judge's finding of "at least one aggravating factor." *Id.* at 626 (Alito, J., dissenting). But, as the Florida Supreme Court recognized in *Hurst v. State*, 202 So. 3d at 68, unlike the Arizona capital sentencing scheme at issue in *Ring*, Florida's scheme required fact–finding as to the aggravators *and their sufficiency to warrant the death penalty*. The fact that sufficient evidence exists to prove at least one aggravator to the jury is not enough to conclude that a *Hurst* error is harmless. *See id.* at 53 n.7. And, in any event, this Court has made clear that the State does not meet its harmless–error burden in a

[5] Applying this Court's decision on remand, the Florida Supreme Court held, in *Hurst v. State*, that the Eighth Amendment also requires Florida juries to render unanimous findings of fact on each element and that those findings must precede a unanimous overall death recommendation. *See* 202 So. 3d at 53-59.

capital sentencing case merely by showing that evidence in the record is sufficient to support a death sentence. *See Satterwhite*, 486 U.S. at 258. "[W]hat is important is an *individualized determination*," given the well–established Eighth Amendment requirement of individualized sentencing in capital cases. *Clemons*, 494 U.S. at 753. Accordingly, the vote of a defendant's pre–*Hurst* advisory jury cannot by itself resolve a proper harmless–error inquiry. The fact that an advisory jury unanimously *recommended* the death penalty does not establish that the same jury would have made, or an average rational jury would make, the three specific findings of fact to support a death sentence in a constitutional proceeding.

Indeed, prior to *Hurst*, the Florida Supreme Court recognized the ambiguity inherent in Florida's advisory jury recommendations. In 2009, the Florida Supreme Court considered mandating interrogatory advisory jury recommendations in death penalty cases, but declined to do so. *See In re Standard Jury Instructions*, 22 So. 3d 17 (Fla. 2009). Justice Pariente's concurrence in that decision observed:

> The jury recommendation does not contain any interrogatories setting forth which aggravating factors were found, and by what vote; how the jury weighed the various aggravating and mitigating circumstances; and, of course, no will ever know if one, more than one, any or all of the jurors agreed on any of the aggravating and mitigating circumstances. It is possible, in a case such as this one, where several aggravating circumstances are submitted, that none of them received a majority vote.

Id. at 26. The same is true of Mr. Tanzi's jury recommendation.

Even if, speculatively, the jury made all the necessary findings, the same sentence would not necessarily have followed. Jury findings in a constitutional proceeding may have yielded a lesser number of aggravators than the judge's

findings. Jury findings may have yielded different "sufficiency" and "insufficiency" determinations than those made by the judge. The jury may have made different findings regarding the weight of the aggravating or mitigating circumstances. And the judge, with findings from a properly instructed jury, might have exercised his sentencing discretion differently. *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").

Moreover, in a constitutional proceeding where the jury was instructed that its findings of fact would be binding on the trial court in the ultimate decision whether to impose a death sentence, the jury may have considered the evidence more carefully, and given the mitigation more weight. This idea, explored further above, is at the heart of this Court's decision in *Caldwell*.

Constitutional harmless error analysis requires that the State bear the burden of dispelling these possibilities beyond a reasonable doubt. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("[T]here is a . . . need for reliability in the determination that death is the appropriate punishment *in a specific case*."). The Florida Supreme Court's *per se* rule automatically relieves the State of its burden. This violates the requirement for heightened reliability in death sentencing and allows for impermissible "unguided speculation." *Holloway*, 435 U.S. at 490–91; *see also Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids arbitrary and capricious infliction of the death penalty.").

Instead of providing for the tailored harmless–error review the Constitution requires, the Florida Supreme Court has adopted a *per se* approach that works a fundamental injustice on Mr. Tanzi and others in his position. Mr. Tanzi sits on death row today while dozens of other Florida prisoners—some of whom were sentenced before him, some of whom were sentenced after him, and many of whom committed murders, including multiple murders and other offenses involving more aggravating circumstances than his crime—have been granted resentencings under *Hurst*. Because no culpability–related distinctions can justify this disparity of results, the rule that produced it violates the Eighth Amendment.

CONCLUSION

This Court should grant a writ of certiorari and review the decision of the Florida Supreme Court.

Respectfully submitted,

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