No.

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL GORDON REYNOLDS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

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

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PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Florida Supreme Court's plurality decision rejecting Mr. Reynolds' *Caldwell v. Mississippi*, 472 U.S. 320 (1985) claim is error. The jury was affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility.

2. Does the Florida Supreme Court's holding that a *Hurst* error is *per se* harmless where a jury issues a generalized unanimous recommendation for death – after receiving instructions that the judge would make both the findings of facts necessary for a death sentence and render the final decision on the death penalty – contravene the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985)?

LIST OF PARTIES

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael Gordon Reynolds, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Florida Supreme Court and address the important questions of federal constitutional law presented. This case presents a fundamental question concerning the Sixth Amendment right to a jury trial, the Due Process Clause requirement of proof beyond a reasonable doubt, and the Eighth Amendment need for a reliable capital sentencing determination.

CITATION TO OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at --- So.3d ---, 2018 WL 1633075 (Fla. Apr. 5, 2018) and reproduced at App. A. The trial court's order denying Reynolds' successive motion for post-conviction relief is reproduced at Appendix B.

JURISDICTION

The opinion of the Florida Supreme Court was entered on April 5, 2018. (Appendix A). This petition is due on July 5, 2018, and is timely filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. VI.

The Sixth Amendment to the Constitution of the United States

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

U.S. CONST. AMEND. VIII.

The Eighth Amendment to the Constitution of the United States

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

U.S. CONST. AMEND. XIV.

The Fourteenth Amendment to the Constitution of the United States

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

STATEMENT OF THE CASE

A. Florida's Capital Sentencing Structure

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

> First-degree murder is a capital felony in Florida. *See* Fla. Stat. § 782.04(1)(a) (2010). Under state law, the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment. § 775.082(1). "A person who has been convicted of a capital felony shall be punished by death" only if an additional sentencing proceeding "results in findings by the court that such person shall be punished by death." *Ibid*. "[O]therwise such person shall be punished by life imprisonment and shall be ineligible for parole." *Ibid*.
>
> The additional sentencing proceeding Florida employs is a "hybrid" proceeding "in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determinations." *Ring v. Arizona*, 536 U.S. 584, 608, n.6 ... (2002). First, the sentencing judge conducts an evidentiary hearing before a jury. Fla. Stat. § 921.141(1) (2010). Next, the jury renders an "advisory sentence" of life or death without specifying the factual basis of its recommendation. § 921.141(2). "Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." § 921.141(3). If the court imposes death, it must "set forth in writing its findings upon which the sentence of death is based." *Ibid*. Although the judge must give the jury recommendation "great weight," *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975) (*per curiam*), the sentencing order must "reflect the trial judge's independent judgment about the existence of aggravating factors and mitigating factors," *Blackwelder v. State*, 851 So.2d 650, 653 (Fla. 2003) (*per curiam*).

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[1] In *Hurst*, this Court considered Florida's capital sentencing scheme as it existed in 2010. *Hurst*, 136 S. Ct. at 620. Reynolds was sentenced to death under Florida's capital sentencing scheme as it existed in 2003. However, as relevant here, those two schemes were identical. Compare Fla. Stat. § 775.082(1) (2010) and Fla. Stat.§ 921.141 (2010) with Fla. Stat. § 775.082(1) (2003) and Fla. Stat.§ 921.141 (2003).

Since this Court's decision in *Hurst*, legislative changes have been made to Florida's capital sentencing scheme. *See* Act effective March 7, 2016, §§ 1, 3, 2016 Fla. Laws ch. 2016-13 (codified as amended at Fla. Stat.§ 775.082(1) (2017) and Fla. Stat.§ 921.141 (2017); Act effective March 13, 2017 §§ 1, 3, 2017 Fla. Laws ch. 2017-1 (codified as amended at Fla. Stat.§ 775.082(1) (2017) and Fla. Stat. § 921.141 (2017). Unless otherwise stated, references in this petition to Florida's capital sentencing scheme refer to the scheme that was in existence prior to those changes, that was considered in *Hurst*, and under which Reynolds was sentenced to death.

Hurst, 136 S. Ct. at 620.

The Florida Supreme Court held that *Hurst* was applicable to defendants whose sentences became final after *Ring v. Arizona*, 536 U.S. 584 (2002). *See Mosley v. State*, 209 So. 3d 1248, 1274-83 (Fla. 2016). However, the Florida Supreme Court only applied *Hurst* to post-*Ring* defendants with non-unanimous death recommendations and developed a *per se* harmless error rule for unanimous jury recommendations, such as Mr. Reynolds. *See Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016).

B. Trial Court Proceedings and Direct Appeal

Reynolds was tried by a jury and found guilty of two counts of first degree murder, the lesser included offense of second degree murder, and armed burglary of a dwelling during which a battery was committed. Prior to the sentencing phase, Reynolds, in consultation with his attorneys, waived his right to present mitigating evidence. Francis Iennaco, Reynolds trial attorney, asserted that had a constitutional procedure existed, Reynolds would not have waived the presentation of mitigating evidence. Iennaco recommended the waiver at the time of trial, only because he felt six jurors could not be swayed to vote for life.[2] S1:230.

On May, 9, 2003, a jury returned two unanimous recommendations of death for both counts of first degree murder. The jury made no factual findings, including: (1) whether each aggravating circumstance was proven beyond a reasonable doubt; (2) whether the aggravators were sufficient to impose death; and (3) whether the mitigating circumstances were proven by competent substantial evidence.

[2] This issue was raised in Reynolds' Successive Post-Conviction motion regarding the application of *Hurst*.

On September 19, 2003, after conducting a *Spencer*[3] hearing, the trial court found that the State had proven beyond a reasonable doubt the existence of four statutory aggravators for the murder of Robin Razor: (1) Reynolds had previously been convicted of a another capital felony or a felony involving a threat of violence to the person (great weight); (2) Reynolds committed the murder while he was engaged in or was an accomplice in the commission of or an attempt to commit a burglary of a dwelling (great weight); (3) the murder was committed for the purpose of avoiding a lawful arrest (great weight); and (4) the murder was committed in an especially heinous, atrocious, or cruel fashion (great weight). *Reynolds v. State*, 934 So. 2d 1128, 1138 (Fla. 2006). As to Christina Razor's murder, the trial court found that the State had proven beyond a reasonable doubt the existence of five statutory aggravators: (1) Reynolds had previously been convicted of a another capital felony or a felony involving a threat of violence to the person (great weight); (2) Reynolds committed the murder while he was engaged in or was an accomplice in the commission of or an attempt to commit a burglary of a dwelling (great weight); (3) the murder was committed for the purpose of avoiding a lawful arrest (great weight); (4) the murder was committed in an especially heinous, atrocious, or cruel fashion (great weight); and (5) the victim of the murder was a person less than twelve years of age (great weight). *Id*.

The trial court, after acknowledging Reynolds' waiver to present mitigation, found that the following nonstatutory mitigating circumstances had been established and were applicable to both the murders of Robin and Christina Razor: (1) that Reynolds was gainfully employed at the time of the crimes (little weight); (2) that Reynolds manifested appropriate courtroom behavior throughout the proceedings (little weight); (3) that Reynolds cooperated with law enforcement

[3] *Spencer v. State*, 615 So. 2d 688 (Fla.1993).

(little weight); and (4) that Reynolds had a difficult childhood (little weight). The trial court determined that the evidence did not establish that Reynolds could easily adjust to prison life. The trial court recognized that evidence was presented by Reynolds for purposes of establishing lingering doubt, however, the trial court noted that it would not consider any theory of lingering doubt as nonstatutory mitigation in its sentencing analysis. *Id*. at 1138-39.

C. State Post Conviction Motion and Successive Post Conviction Motion

Reynolds filed an appeal in the Florida Supreme Court. In that appeal, Reynolds asserted that Florida's capital sentencing scheme violated his Sixth Amendment right pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002). The Florida Supreme Court affirmed the convictions and sentences of death, and denied Reynolds' *Ring* claim pursuant to the Florida Supreme Court precedent, which asserted that *Ring* was not applicable to Florida. *See Reynolds v. State*, 934 So. 2d 1128, 1160 (Fla. 2006). Reynolds then filed a petition for writ of certiorari to this Court which was denied on January 8, 2007. *Reynolds v. Florida*, 127 S. Ct. 943 (2007).

Reynolds filed a motion for post-conviction relief pursuant to Fl. R. Crim. P. 3851 on December 28, 2007, which raised 16 claims. On April 3, 2008, the post-conviction court held a *Huff*[4] hearing and summarily denied six claims and ruled that three claims did not require an evidentiary hearing. Reynolds filed an amended motion to vacate his convictions and sentences raising five additional claims. The court, after the evidentiary hearing, denied Reynolds' motion for post-conviction relief.

Reynolds appealed the denial of his motion for post-conviction relief and filed a petition for writ of habeas corpus in the Florida Supreme Court. The Florida Supreme Court affirmed the

[4] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

denial of the post-conviction motion and denied the habeas petition on September 27, 2012. *Reynolds v. State*, 99 So. 3d 459 (Fla. 2012). Reynolds filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida and that petition is still pending.

Subsequently, Reynolds filed a successive 3.851 motion based upon *Hurst v. Florida*[5] and *Hurst v. State*.[6] The successive motion was summarily denied on March 27, 2017.

D. Proceedings in the Florida Supreme Court

Reynolds appealed the denial of his successive motion for post-conviction relief. As relevant here, Reynolds asserted in his Response to the Order to Show Cause[7] that denying him the benefits of *Hurst* would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The Florida Supreme Court denied Reynolds' appeal on April 5, 2018, and addressed the *Caldwell*[8] challenge. App. A. The opinion issued by the Florida Supreme Court was merely a plurality, "so the issue remains without definitive resolution by the Florida Supreme Court." *Kaczmar v. Florida*, 585 U.S. __, 2018 WL 3013960 (2018) (Sotomayor, J. dissenting).

REASONS FOR GRANTING THE WRIT

The issue raised by Reynolds is not whether his jury was properly instructed *at the time of his capital trial*, but instead, whether *today* the State of Florida can treat those advisory recommendations as mandatory and binding, when the jury was explicitly instructed otherwise.

[5] *Hurst v. Florida*, 136 S. Ct. 616 (2016).
[6] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).
[7] Rather than grant full briefing on the issue, the Florida Supreme Court issued an Order to Show Cause which limited briefing on these serious issues.
[8] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

The Florida Supreme Court's plurality decision rejecting Mr. Reynolds' *Caldwell* challenge violates the federal constitution. This constitutes structural error.

Structural error occurs when, after having been affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility, a jury fails to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty. The Florida Supreme Court's refusal to conclude that such an error is structural, and instead subjecting it to harmless error review, undermines multiple federal constitutional rights. Second, the Florida Supreme Court's holding that a unanimous recommendation is binding - unlike a non-unanimous recommendation - based on the same unconstitutional jury instructions and without any individualized factual findings, violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Finally, the present case presents an ideal vehicle to clarify analytical tension in critical areas of this Court's structural error jurisprudence.

I. THE FLORIDA SUPREME COURT'S DECISION MISAPPLIES *CALDWELL* AND UNJUSTLY DENIES REYNOLDS AND OTHER SIMILARLY SITUATED DEFENDANTS A CONSTITUTIONAL DEATH SENTENCE.

A. 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 Reynolds, 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 four 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); *Kaczmar v. Florida*, 585 U.S. __, 2018 WL 3013960 (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, *Hurst* cases shed new light on Eighth Amendment violations of *Caldwell* that should have been addressed by the Florida Supreme Court in Petitioner's case but were not. The only document returned by the jury was an advisory recommendation that death should be imposed. Although the recommendation was unanimous, it reflects nothing about the jury's findings leading to the final vote. A unanimous recommendation does not necessarily mean that the other findings leading to the recommendation were unanimous. It could well mean that after the other findings were made by a majority vote, jurors in the minority acceded to the majority's findings. It could also mean that the vote on the aggravators was split 6-6, and that there was no unanimous finding on a single aggravator. The unanimous vote could also mean the jurors did not attend to the gravity of their task, as they were repeatedly told their verdict was only advisory, and that the judge would make the final determination.

The Florida Supreme Court's total reliance on the advisory jury's recommendation, without considering the jury's diminished sense of responsibility for the death sentence, violates *Caldwell*.[9] Petitioner's advisory jurors were led to believe that their role in sentencing was diminished when they were repeatedly instructed by the court that their recommendation was advisory only 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 Petitioner'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 who properly grasped its critical role in determining a death sentence, would have unanimously found all of the elements for the death penalty satisfied in this case.

Additionally, the Florida Supreme Court's rule does not allow for meaningful consideration of the actual record. Reynolds elected not to present any mitigating evidence to his jury. Florida law, therefore, prohibited the trial court from giving the jury recommendation great weight because the jury was unable to make the requisite weighing between the aggravation and mitigation. The Florida Supreme Court's *per se* rule ignores this fact and simply grants an undue importance to a near meaningless jury recommendation simply because it was unanimous. This indicates a lack of individualized review of this death case by the Florida Supreme Court, something that a *per se* rule encourages.

[9] Indeed, the post-*Hurst* capital jury instructions removed all instances of "advisory" or "recommend." The jury is now explicitly told that they are issuing a "verdict", which is a final and binding decision. *See* Appendix C.

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. For example, in this case, 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 this holding to Florida's pre-*Hurst* advisory jury instructions. *See generally* Craig Trocino & Chance Meyer, *Hurst v. Florida's Ha'p'orth of Tar: The Need to Revisit Caldwell, Clemons, and Proffitt*, 70 U. Miami L. Rev. 1118, 1139-43 (2016).

First, *Caldwell* reasoned that encouraging juries to rely on future appellate court review deprived the defendant of a fair sentencing because it encouraged the jury not to worry about the "intangibles" of the human being before them, but instead, to rest assured in the fact that some higher court would consider those factors for them. *Caldwell*, 472 U.S. at 330-31 "This inability

to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed [those] compassionate or mitigating factors stemming from the diverse frailties of humankind. When we held that a defendant has a constitutional right to the consideration of such factors…we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses." *Id*. (internal citations omitted).

This same concern applies here, where Petitioner's jury was not required to make the findings of fact required to impose a death sentence and learned the ultimate life-or-death decision would be made by the judge. Reynolds' jury was told that "the final decision as to what punishment shall be imposed is the responsibility of the judge" and "I may reject your recommendation." TR 4:737. They were not required to make the findings of fact necessary for the trial court to impose a death sentence. Instead, Reynolds' jury was told *ad nauseam* that its job was merely to "advise" or "recommend" a sentence to the court.

Second, *Caldwell* 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.

Third, *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 his 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.

Empirical research supports the notion that Florida's advisory juries were imbued with a diminished sense of responsibility for the imposition of death sentences before *Hurst*. *See, e.g.*, William J. Bowers, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and Jury Influence Death Penalty Decision-Making*, 63 Wash. & Lee L. Rev. 931, 954-62 (2006). Interviews with Florida jurors conducted through the Capital Jury Project ("CJP") yielded narrative accounts highlighting the detrimental impact of Florida's pre-*Hurst* instructions on jurors' sense of their sentencing role. *See id.* at 961-62. Florida jurors relayed to researchers their understanding that "[w]e don't really make the final decision . . . we would give our opinion but the choice would be up to the judge." *Id.* at 961. One Florida juror told CJP researchers that "the fact that you could make a recommendation, that you didn't make a yes or no, that someone else would make the decision, I think that let us feel off the hook." *Id.* The same juror noted that

he found the pre-*Hurst* sentencing process to be "not as traumatic as deciding [the defendant's] guilt because we would take the steps, make a recommendation, and the judge would make the final choice." *Id.* As another Florida juror said approvingly of Florida's pre-*Hurst* advisory jury instructions, "I didn't want this on my conscience." *Id.*

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*.

Further, the Florida Supreme Court's *per se* harmless error rule fails to ensure sufficient reliability in the death penalty as required by the Eighth Amendment. In order to determine whether there is a "reasonable possibility" that a *Hurst* error contributed to a death sentence, *see Chapman v. California*, 386 U.S. 18, 23 (1967), 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.[10]

[10]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

The second and third elements cut against the harmless-error analysis contemplated 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 capital sentencing case merely by showing that evidence in the record is sufficient to support a death sentence. *See Satterwhite v. Texas*, 486 U.S. 249, 258 (1988). "[W]hat is important is an *individualized determination*," given the well-established Eighth Amendment requirement of individualized sentencing in capital cases. *Clemons v. Mississippi*, 494 U.S. 738, 753 (1990).

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

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each element and that those findings must precede a unanimous overall death recommendation. 202 So. 3d at 53-59.

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 Reynolds' 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*.[11]

[11] As is made clear from trial counsels' affidavits in the state court record below, Defense counsel's approach would also have been different absent the *Hurst* error. Counsel would have conducted his *voir dire* questioning of prospective jurors differently had they known that only one juror needed to be convinced, as to only one of the elements, in order to avoid a death sentence. Counsel

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* harmless error 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 Reynolds and others in his position. Reynolds 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.

B. The Florida Supreme Court Previously Failed To Address A Substantial Eighth Amendment Challenge.

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would have presented evidence diminishing the aggravation differently had they known that the jury, rather than the judge, was required to unanimously find that each aggravating circumstance had been proven beyond a reasonable doubt and that the aggravating circumstances were together sufficient to justify the death penalty. Counsel's thinking and advice to the client on how to proceed would have been altered had they known that the jury would be instructed that it could recommend a life sentence even if it had unanimously agreed that all of the other elements for a death sentence were satisfied.

This Court has recognized that the Florida Supreme Court had failed to address a substantial Eighth Amendment challenge to capital defendant's sentences. As noted by Justice Sotomayor, at least six capital defendants "now face execution by the State without having received full consideration of their claims." *Cozzie v. Florida*, 138 S.Ct. 1131 (2018) (Sotomayor, J., dissenting from denial of certiorari).

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

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

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

Prior to its decision in Mr. Reynolds' case, the Florida Supreme Court has steadfastly refused to mention or discuss "the fundamental Eighth Amendment principle it announced: 'It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer

who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.' *Caldwell*, 472 U.S., at 328–29." *Cozzie*, 584 U.S. __ at *4-5; *see also Kaczmar v. Florida*, __ S.Ct ___, 2018 WL 3013960 (2018) (Sotomayor, J. dissenting).

Like the petitioners in *Truehill* and *Cozzie*, Reynolds also argued that the jury instructions in his case "impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory." *Id*. Reynolds' jurors were explicitly told, "the final decision as to what punishment shall be imposed is the responsibility of the judge." *Reynolds v. State*, --- So. 3d ----, 2018 WL 1633075 *1 (Fla. 2018). In many cases prior to *Reynolds*, the Florida Supreme Court determined that the error was harmless without addressing the defendant's Eighth Amendment challenge. *See King v. State*, 211 So. 3d 866, 889-93 (Fla. 2017); *Kaczmar v. State*, 228 So. 3d 1, 7-9 (Fla. 2017); *Knight v. State*, 225 So. 3d 661, 682-83 (Fla. 2017); *Middleton v. State*, 220 So. 3d 1152, 1184-85 (Fla. 2017); *Tundidor v. State*, 221 So. 3d 587, 607-08 (Fla. 2017); *Guardado v. Jones*, 226 So. 3d 213, 215 (Fla. 2017).

In *Reynolds*, the Florida Supreme Court addressed for the first time a *Caldwell* challenge to its jury instructions in capital cases in light of *Hurst*. *See Reynolds v. State*, -- So. 3d -- 2018 WL 1633075 (Fla. Apr. 5, 2018). The logic, as expounded by the Florida Supreme Court, runs similar to Florida's previous erroneous precedent, that *Ring* did not apply to Florida's sentencing scheme, and the Court ultimately concluded that there is no *Caldwell* violation.

Prior to *Ring*, the Florida Supreme Court held that "[i]nforming the jury that its recommended sentence is 'advisory' is a correct statement of Florida law and does not violate *Caldwell*." *Rigterink v. State*, 66 So. 3d 866, 897 (Fla. 2011). The Court further held that no

Caldwell claim in Florida "could be sustained on its merits because unlike *Caldwell*, *in Florida the judge rather than the jury is the ultimate sentencing authority*." *Foster v. Dugger*, 518 So. 2d 901, 902 (Fla. 1988) (emphasis added). This Court then issued *Ring*. Florida refused to recognize this Court's holding in *Ring*, instead finding that *Ring* was not applicable to Florida. *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002).

However, at least one justice recognized Florida's capital sentencing scheme was problematic. "[I]n light of the dictates of *Ring v. Arizona*, it necessarily follows that Florida's standard penalty phase jury instructions may no longer be valid and are certainly subject to further analysis" under *Caldwell*. *Bottoson v. Moore*, 833 So. 2d 693, 731 (Fla. 2002) (Lewis, J., concurring in result only). Justice Lewis opined:

> [I]n light of the decision in *Ring v. Arizona*, it is necessary to reevaluate both the validity, and, if valid, the wording of [Florida's standard capital] jury instructions. The United States Supreme Court has defined the reach of *Caldwell* by stating that "*Caldwell* is relevant only to certain types of comment – those that misled the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible that it should for the sentencing decision." *Darden v. Wainwright*, 477 U.S. 168 (1986)…. Clearly, under *Ring*, the jury plays a vital role in the determination of a capital defendant's sentence through the determination of aggravating factors. *However, under Florida's standard penalty phase jury instructions, the role of the jury is minimized, rather than emphasized, as is the necessary implication drawn from Ring.*
>
> ***
>
> By highlighting the jury's advisory role, and minimizing its duty under *Ring* and to find the aggravating factors, Florida's standard penalty phase jury instructions must certainly be reevaluated under [*Caldwell*].

Id., 833 So. 2d at 732 (emphasis added). In spite of this awareness, the Florida Supreme Court failed to correct its capital jury instructions.

Now, in the aftermath of *Hurst v. Florida*, the Florida Supreme Court has failed to address why treating an advisory, non-binding jury recommendation as a mandatory jury verdict does not

violate *Caldwell*, since Reynolds' jury – and every pre-*Hurst* jury in Florida – was repeatedly instructed that the ultimate decision belonged to the judge. The issue raised by Reynolds, is not whether his jury was properly instructed *at the time of his capital trial*, but instead, whether *today* the State of Florida can treat those advisory recommendations as mandatory and binding, when the jury was explicitly instructed otherwise. This Court, in *Hurst v. Florida*, warned against that very thing. This Court cautioned against using what was an advisory recommendation to conclude that the findings necessary to authorize the imposition of a death sentence had been made by the jury:

> "[T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Hurst, 136 S. Ct. at 622.

In dismissing Reynolds' *Caldwell* claim, the Florida Supreme Court completely misapprehended, and failed to address, Reynolds' argument on this point. The Florida Supreme Court held that Reynolds' "jury was not misled as to its role in sentencing" *at the time of his capital trial*. *Reynolds*, 2018 WL 1633075, at *12. Thus, the majority concluded that *Caldwell* was not violated because, *at the time they rendered their advisory recommendation*, the jurors understood "their actual sentencing responsibility" was advisory, and *Caldwell* does not require that jurors "must also be informed of how their responsibilities might hypothetically be different in the future." *Id*. at *10. Reynolds is not arguing that his capital jury should have been instructed on how their responsibilities might be different in the future. Instead, as this Court held in *Caldwell*, Reynolds argues that the State of Florida cannot treat an advisory recommendation based on unconstitutional jury instructions as the necessary fact-finding that *Ring* requires. An advisory

verdict (premised upon inaccurate information regarding the binding nature of a life recommendation, the juror's inability to be merciful based upon sympathy, and what aggravating factors could be found and weighed in the sentencing calculus) cannot be used as a substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004 (1983) ("Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed."). *Caldwell* is clear on this point: "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. 472 U.S. at 333. The Florida Supreme Court's steadfast refusal to properly apply this Court's explicit precedent undermines multiple federal constitutional rights, and makes this petition the ideal vehicle to clarify analytical tension in critical areas of this Court's jurisprudence.

C. Juries in the State of Florida were not properly instructed as to their roles pursuant to *Ring v. Arizona* and as a result, due to their diminished understanding of their fact-finding role, the jury's role was impermissibly diminished and violates *Caldwell*.

Hurst v. Florida held that Florida's capital sentencing scheme was unconstitutional under *Ring* and that Florida's sentencing scheme misapprehended the jury's role in capital sentencing. The Sixth Amendment requires a jury, not a judge, "to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Hurst v. Florida*, 136 U.S. 616, 619 (2016). This unconstitutional scheme was in place when Reynolds was sentenced to death by a jury that was unaware and confused as to its true role. Florida's "advisory" jury instructions

were so confusing that jurors consistently reported that they did not understand their role.[12] If the advisory jury did recommend life, judges—who must run for election and reelection in Florida—could impose the death penalty anyway.[13]

The verdict forms in this case merely record that the jury "advise and recommend to the court that it impose the death penalty." TR 4:743;[14] *see* App. F. The jury did not make findings of fact on the record. The jury made no factual findings including: aggravators, if any, the jury

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[12] The ABA found one of the areas in need of most reform in Florida capital cases was significant juror confusion. ABA Florida Report at vi ("In one study over 35 percent of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt. The same study also found that over 36 percent of interviewed Florida capital jurors incorrectly believed that they were *required* to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt, and 25.2 percent believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a legitimate aggravating circumstance under Florida law."). *See, e.g.*, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE FLORIDA DEATH PENALTY ASSESSMENT REPORT, AN ANALYSIS OF FLORIDA'S DEATH PENALTY LAWS, PROCEDURES, AND PRACTICES, American Bar Association (2006) [herein "ABA Florida Report"].

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

[14] Citations shall be as follows: The record on appeal from Mr. Reynolds' trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. The post-conviction record on appeal shall be referred to as "PC" followed by the appropriate volume and page numbers. The successive post-conviction record on appeal shall be referred to as "S" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

found beyond a reasonable doubt; what aggravators, if any, the jury found sufficient to impose death; or what mitigators were proven. The record is silent on those issues. All the record shows is a blanket 12 man vote for "an advisory sentence," as it is described multiple times in the standard jury instructions. TR 4:737-41. Because Reynolds' jury did not reveal what aggravating factors, if any, they relied on, we are left to guess and speculate as to their actual findings. Florida's sentencing scheme encourages secretiveness and ultimately insulates the jury's weighing from appellate review, via its complete absence from the record. This is not a verdict as contemplated by *Ring* or *Hurst*.

Furthermore, the jury was explicitly told that "the final decision as to what punishment shall be imposed is the responsibility of the judge" and "I may reject your recommendation." TR 4:737. Under Florida's standard instructions at the time, the jury was told, even before evidence was presented at the penalty phase, that its sentence was only advisory and the judge was the final decision maker. TR 4:737. The jury is only told once during the instructions that they are to make findings, and only as to the aggravating factors. Florida cannot now treat this advisory, non-final recommendation based upon unconstitutional jury instructions as binding findings of fact, especially when the jury was instructed just the opposite.

Finally, all the mitigating factors found by the trial court, and the subsequent weighing of those factors against the aggravation, came from information that only the trial judge considered based on evidence that was presented Reynolds' *Spencer* hearing. The determination of the weight of the mitigating factors and how this was weighed against the aggravating factors was done solely by the trial judge. The jury did not hear about these mitigating factors, and thus, could not consider them.

As the Florida Supreme Court acknowledged in *Hurst v. State*, "[b]ecause there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances." 202 So. 3d at 69. The Court cannot rely upon a legally meaningless recommendation by an advisory jury, *Hurst v. Florida*, 136 S. Ct. at 622 (Sixth Amendment cannot be satisfied by merely treating "an advisory recommendation by the jury as the necessary factfinding"), as the necessary factual findings *Ring* requires. It is difficult to comprehend how Florida can claim that its standard jury instructions, brought about by an unconstitutional statute, do not create a constitutional error that affected every single death sentence since *Ring*, until the statute was altered due to *Hurst*. It is reflective of Florida's arbitrary and misguided application of this Court's precedent.

The Florida Supreme Court believes that because the jury instructions accurately described Florida's *then* unconstitutional understanding of the role of the jury, that there is no *Caldwell* error now when it treats this unconstitutional recommendation as binding. Florida cannot repeatedly instruct the jury that its findings are not final and then treat them as such. This pretzel logic is erroneous and further compounds the error in Reynolds' case. Not only did Florida's standard jury instructions explicitly state that the jury was making a recommendation and did not inform them of their factfinding capacity, an error under *Ring* and *Hurst*, but it also informed the jury that the judge was the final authority as to the sentence to be imposed. In other words, their decision was not binding and the jury was aware of that fact. This is a direct violation of *Caldwell* where "it is unconstitutionally impermissible to rest a death sentence on a determination made by

sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29.

Further, the Florida Supreme Court places an almost talismanic significance in a jury recommendation that was unanimous. "[W]e emphasize the *unanimous* jury recommendations of death." *Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016). In essence, "because here the jury vote was unanimous, the [Florida Supreme Court] is comfortable substituting its weighing of the evidence to determine which aggravators each of the jurors found. Even though the jury unanimously recommended the death penalty, whether the jury unanimously found each aggravating factor remains unknown." *Davis v. State*, 207 So. 3d 142, 175-76 (Fla. 2016) (Perry, J., concurring in part and dissenting in part).

Reynolds' penalty phase jury recommended death by a vote of 12 to 0 for two death sentences, and did not return verdicts making any findings of fact. The only documents returned by the jury were advisory recommendations that death sentences be imposed. Although these recommendations were unanimous, they reflect nothing about the jury's findings leading to the final vote.[15] A final 12 to 0 recommendation does not necessarily mean that the other findings leading to the recommendation were unanimous. It could well mean that after the other findings were made by a majority vote, jurors in the minority acceded to the majority's findings. It simply cannot be said that all the jurors agreed as to each of the necessary findings for the imposition of the death penalty. The unanimous votes could also mean the jurors did not attend to the gravity of their task, as they were told the judge could impose death regardless of the jury's

[15] Reynolds' trial counsel, in an attempt to obtain a *Ring*-compliant verdict, filed a Motion for Special Verdict Form Containing Findings of Fact by the Jury, which was denied by the trial court. TR 2:337-340; TR 2:383-384; *see also* App. E.

recommendations. This also relieved jurors of their individual responsibility. Reynolds' jurors were instructed that it was their "duty to advise the court as to what punishment should be imposed," but "*[The Court] may reject your recommendation.*" TR 4:737 (emphasis added).

Based upon the unanimous recommendation in this case, the Florida Supreme Court incorrectly assumed that the jury found all of the aggravating circumstances, found them to be sufficient, and that they outweighed the mitigation, in the complete absence of any proof on the record. The jury in this matter was not given a specialized verdict form, as exists now, which would show their findings. What further undercuts the assumption made by the court below as to the importance of a unanimous recommendation is the fact that Reynolds' jury heard no mitigation and thus could not make a weighing or findings. The only findings made in Reynolds' case were by the trial judge, who could not, by law, grant great weight to the jury recommendation.

Reynolds elected to not present mitigation to the jury in his case. Therefore, pursuant to *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001), as a result of the jury not hearing mitigation – and being unable to perform any weighing of aggravation and mitigation – the trial court was not permitted to afford great weight to the jury recommendation, even though it was unanimous. Ironically, now, the Florida Supreme Court imbues this unanimous recommendation with much more weight and significance than even Florida law afforded it to uphold these death sentences. If the jury recommendation carries little to no weight under the law, then it is meaningless and does not carry the full weight of a proper verdict. In spite of this, the unanimity was emphasized and used below to demonstrate that not only was the *Hurst* error harmless, but also that there was no *Caldwell* error as well. This is a clear misapprehension and misapplication of this Court's precedent.

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

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

Any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury. *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). "Taken together," the Sixth Amendment right to a jury trial and the Due Process Clause requirement of proof beyond a reasonable doubt "indisputably entitle a criminal defendant to a 'jury determination that [he] is guilty of every element of the crime with which he is charged beyond a reasonable doubt.'" *Id*. at 476-77 (quoting *United States v. Gauldin*, 515 U.S. 506, 510 (1995)). This ruling was extended to include capital punishment in *Ring v. Arizona*, 436 U.S. 584 (2002).

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

Florida law provides that "a person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in [section] 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment." Fla. Stat. § 775.082 (1) (2010). After that proceeding, the court must set "forth in writing its findings ... as to the facts: [t]hat

sufficient aggravating circumstances exist ... and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3) (2010).

The Florida Supreme Court has construed those state laws and declared:

> [U]nder Florida's capital sentencing scheme, the jury – not the judge – must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty. These necessary facts include, of course, each aggravating factor that the jury finds to have been proven beyond a reasonable doubt. However, the imposition of death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury…Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.

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

The error occurred in Reynolds' case when the jury failed to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty: (1) the existence of the aggravating factors proven beyond a reasonable doubt; (2) that the aggravating factors are sufficient to impose death; and (3) that the aggravating factors outweigh the mitigating circumstances. This was a clear error.

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

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

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

Thus, for purposes of the Sixth Amendment, multiple critical elements necessary to impose the death penalty in Florida were essentially not submitted to the jury. Instead, the trial court directed a verdict for the State as to those critical elements. The trial court alone determined Reynolds' eligibility for the death penalty. *See id*. ("[T]he Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (quoting Fla. Stat. § 775.082(1) (2010)).

The failure to submit critical elements necessary to impose the death penalty to the jury also violated Reynolds' Due Process rights. This Court previously held that:

> [Defendant's] conviction and continued incarceration on this charge violate due process. We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.

Fiore v. White, 531 U.S. 225, 228-29 (2001). Because Fiore had not been found guilty of an essential element of the substantively defined criminal offense, his conviction was not constitutionally valid.

Hurst v. Florida and *Hurst v. State* announced a substantive Sixth Amendment rule requiring that a jury find as fact: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are "sufficient" to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case.

Hurst v. State, 202 So. 3d at 53-59. And, each of those findings is required to be made by the jury beyond a reasonable doubt.

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

B. The Errors Were Structural.

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

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

In contrast, structural errors "are structural defects in the constitution of the trial mechanism." *Fulminante*, 499 U.S. at 309. They affect "the framework within which the trial proceeds." *Id.* at 310. "Errors of this type are so intrinsically harmful as to require automatic reversal ... without regard to their effect on the outcome." *Neder v. U.S.*, 527 U.S. 1, 7 (1999). Put another way, structural "errors require reversal without regard to the evidence in the particular case." *Rose v. Clark*, 478 U.S. 570, 577 (1986). "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any trial." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). With that in mind, the "precise reason why a particular error is not amenable to [harmless error] analysis – and thus the precise reason why the Court has deemed it structural – varies in a significant way from error to error." *Id*. at 1908.

For instance, "an error has been deemed structural if the error always results in fundamental unfairness," such as where a defendant is denied a reasonable-doubt jury instruction. *Id.* Further, "an error has been deemed structural if the effects of the error are simply too hard to measure." *Id.* Additionally, in deciding whether an error is structural, this Court has repeatedly considered whether the error undermined the reliability of the adjudicative process. *See, e.g.*, *Neder*, 527 U.S. at 8-9 (observing that structural "errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function'" (quoting *Rose*, 478 U.S. at 577-78)). But "[t]hese categories are not rigid," *Weaver*, 137 S. Ct. at 1908, and in "a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural," *id.* (citing *Sullivan v. Louisiana*, 508 U.S. 275, 280-82 (1993).

In the present case, structural error occurred when: (1) the jury failed to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty, and (2) failed to find elements unanimously. These errors were different in order of magnitude than a simple error occurring in the process of a trial. Instead, the errors amounted to a structural defect in the framework underlying the trial process. It undermined the core foundation on which the process of determining death eligibility depended.

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

In light of those first constitutional principles, it is always fundamentally unfair for a trial court to direct a verdict for the State as to multiple critical elements necessary to impose the death penalty. Simply put, "the wrong entity judged the defendant," *Rose*, 478 U.S. at 578, to be eligible

for a penalty "qualitatively different from a sentence of imprisonment, however long," *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

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

In addition, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. The Florida Supreme Court has determined that three such facts are: (1) the existence of the aggravating factors proven beyond a reasonable doubt; (2) that the aggravating factors are sufficient to impose death; and (3) that the aggravating factors outweigh the mitigating circumstances. *Hurst v. State*, 202 So.3d at 53. These facts must be found unanimously. *Id*. at 44. But under Florida's capital sentencing scheme, Reynolds' jury was repeatedly told its verdict was a "recommendation" and / or "advisory" only. This misled the jury.

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

Third, the error undermined the reliability of the process for determining eligibility for the death penalty. Again, "the penalty of death is qualitatively different from a sentence of imprisonment, however long." *Woodson*, 428 U.S. at 305 (plurality opinion). "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id*. Simply put, the "Eighth Amendment insists upon 'reliability in the determination that death is the appropriate punishment in a specific case.'" *Oregon v. Guzeh*, 546 U.S. 517, 525 (2006) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989)). As a result, the Florida Supreme Court concluded "that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment." *Hurst*, 202 So. 3d at 59.

Additionally, a capital jury "must not be misled regarding the role it plays in the sentencing decision." *Romano v. Oklahoma*, 512 U.S. 1, 8 (1994) (citing *Caldwell*, 472 U.S. at 336 (plurality opinion)). More specifically, a capital jury must not be "affirmatively misled ... regarding its role in the sentencing process so as to diminish its sense of responsibility." *Id*. at 10. But under Florida's capital sentencing scheme, a capital jury is affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility.

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

fact finding, which was not done by a jury, was fundamentally flawed and simply rubber stamped by the Florida Supreme Court.

Further, those instructions affirmatively misled the jury regarding its role in the sentencing process. As just discussed, the instructions convey that the jury's input is not binding, including on the trial court. Also, because Reynolds failed to present any mitigation, the trial court, under Florida law, is further admonished that it cannot give great weight to the jury recommendation, *because the jury was unable to make the requisite weighing between aggravation and mitigation.*[16]

The "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst v. Florida*, 136 S. Ct. at 619. As a result, a jury's findings as to those elements are binding and controlling, including on the trial court. In particular, if a jury fails to find one or more of those elements or if the jury fails to unanimously find for death, the defendant is not eligible for death. That is "the final decision." *See* App. C. The judge cannot alter it. In Reynolds' case, the jury was able to agree unanimously to a death sentence, but the record holds no clues as to what- if any- findings the jury may have made. Further, their recommendation was admittedly flawed because the jury was unable to fulfill its statutory role – even under the

[16] "We do find, however, that the trial court erred when it gave great weight to the jury's recommendation in light of Muhammad's refusal to present mitigating evidence and the failure of the trial court to provide for an alternative means for the jury to be advised of available mitigating evidence. In determining whether the court erred in this case in giving the jury's recommendation great weight, we must consider the role of the advisory jury. Pursuant to section 921.141(2), Florida Statutes (1995), the jury's advisory sentence must be based on '[w]hether sufficient aggravating circumstances exist as enumerated in subsection (5)' and '[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist.' § 921.141(2)(a)–(b), Fla.Stat. (1995). 'The jury's responsibility in the process is to make recommendations based on the circumstances of the offense and the character and background of the defendant.' *Herring v. State*, 446 So.2d 1049, 1056 (Fla.1984). The failure of Muhammad to present any evidence in mitigation hindered the jury's ability to fulfill its statutory role in sentencing in any meaningful way." *Muhammad v. State*, 782 So. 2d 343, 361–62 (Fla. 2001).

unconstitutional scheme Florida had in place - because they were unable to determine if sufficient mitigating circumstances exist which outweigh the aggravating circumstances. Reynolds' death sentence should not stand.

CONCLUSION

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

Respectfully submitted,

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