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# APPENDIX

# A

2018 WL 1633075
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Supreme Court of Florida.

Michael Gordon REYNOLDS, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–793
|
[April 5, 2018]

**Synopsis**

**Background:** Defendant brought a successive motion to vacate his death sentences after his murder convictions were affirmed on appeal, 934 So.2d 1128, and after the denial of his first motion for postconviction relief was affirmed, 99 So.3d 459. The Circuit Court, Seminole County, No. 591998CF003341A000XX, Kenneth R. Lester, Jr., J., denied the motion. Defendant appealed.

**Holdings:** The Supreme Court held that:

[1] error in sentencing defendant to death without jury making required findings was harmless;

[2] jury was not misled about its sentencing role, and thus there was no *Caldwell* violation; and

[3] as a matter of first impression, a *Caldwell* claim cannot be used to retroactively invalidate jury instructions regarding death sentences that were proper at the time.

Affirmed.

Lawson, J., concurred specially with opinion.

Canady and Polston, JJ., concurred in result.

Pariente, J., filed dissenting opinion.

Quince, J., filed dissenting opinion.

West Headnotes (7)

**[1] Sentencing and Punishment**
Necessity and purpose

**Sentencing and Punishment**
Harmless and reversible error

Trial court's error in sentencing defendant to death without jury making required findings was harmless; even though jury did not receive mercy instruction, jury unanimously recommended death for murder convictions despite being told unanimity was not required, jury was instructed to determine whether sufficient aggravating circumstances existed and whether mitigating circumstances outweighed aggravating circumstances, and defendant waived right to present mitigation. (Per curiam, with two justices joining, two justices concurring separately, and one justice concurring specially.) U.S. Const. Amend. 6.

Cases that cite this headnote

**[2] Sentencing and Punishment**
Harmless and reversible error

Preliminarily, a reviewing court looks to whether the jury recommendation of death was unanimous to determine whether a trial court's error in sentencing a defendant to death without the required jury findings was harmless. (Per curiam, with two justices joining, two justices concurring separately, and one justice concurring specially.)

1 Cases that cite this headnote

**[3] Sentencing and Punishment**
Harmless and reversible error

A unanimous jury recommendation of death is not sufficient alone to conclude that a trial court's error in sentencing defendant without the required jury findings was harmless; rather, it begins a foundation for the reviewing court to conclude beyond a reasonable doubt

that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors. (Per curiam, with two justices joining, two justices concurring separately, and one justice concurring specially.)

1 Cases that cite this headnote

**[4] Sentencing and Punishment**
Harmless and reversible error

A reviewing court looks to factors such as the jury instructions to determine whether a trial court's error in sentencing a defendant to death without the required jury findings was harmless. (Per curiam, with two justices joining, two justices concurring separately, and one justice concurring specially.)

Cases that cite this headnote

**[5] Sentencing and Punishment**
Instructions

Jury was not misled about its sentencing role in way that minimized jury's responsibility, and thus there was no *Caldwell* violation based on trial court stating that final punishment was judge's responsibility and jury's conclusion regarding death sentence was only recommendation; even though law subsequently changed, at time of sentencing trial court was responsible for determining final punishment, and court stated that it could reverse jury recommendation only if facts were so clear and convincing that virtually no reasonable person could differ. (Per curiam, with two justices joining, two justices concurring separately, and one justice concurring specially.) U.S. Const. Amend. 8.

1 Cases that cite this headnote

**[6] Sentencing and Punishment**
Instructions

A *Caldwell* claim that a jury was misled about its sentencing role, based on defendants' rights to have unanimous jury findings regarding death sentences, cannot be used to retroactively invalidate the jury instructions that were proper at the time. (Per curiam, with two justices joining, two justices concurring separately, and one justice concurring specially.) U.S. Const. Amend. 8.

Cases that cite this headnote

**[7] Criminal Law**
In general;unanimity

Jurors must understand their actual sentencing responsibility; jurors do not also need to be informed of how their responsibilities might hypothetically be different in the future, should the law change. (Per curiam, with two justices joining, two justices concurring separately, and one justice concurring specially.)

Cases that cite this headnote

An Appeal from the Circuit Court in and for Seminole County, Kenneth R. Lester, Jr., Judge—Case No. 591998CF003341A000XX

**Attorneys and Law Firms**

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**Opinion**

PER CURIAM.

***1** This case is before the Court on appeal by Michael Reynolds from an order denying a motion to vacate sentences of death under Florida Rule of Criminal Procedure 3.851. Because the order concerns postconviction relief from sentences of death, this Court has jurisdiction under article V, section 3(b)(1), of the Florida Constitution. For the reasons explained below, we affirm the circuit court's denial of relief.

  

## FACTUAL AND PROCEDURAL BACKGROUND

We detailed the underlying crimes in Reynolds's direct appeal. *Reynolds v. State* (*Reynolds I* ), 934 So.2d 1128, 1135–39 (Fla. 2006). For the purposes of this proceeding, it is relevant that Reynolds was convicted for the first-degree murders of Robin and Christina Razor, along with the second-degree murder of Danny Privett and the burglary of a dwelling with armed battery. *Id.* at 1135.

At the penalty phase, Reynolds waived his right to present mitigating evidence. Outside the presence of the jury, Reynolds was advised of his right to present mitigation evidence, but he waived that right after conferring with counsel at length. Moreover, the trial court conducted a thorough colloquy to ensure that Reynolds understood the rights that he was waiving and even recessed for one day, giving Reynolds the opportunity to fully consider his decision. *Reynolds v. State* (*Reynolds II* ), 99 So.3d 459, 493–97 (Fla. 2012). Concerning his waiver, Reynolds explained his decision:

> *I don't want to present a mitigating case here because there's no such thing. I mean, Your Honor, it's a waste of time because I have* [*no mitigators*]. *I've been locked up all my life.*
>
> ....
>
> ... *I have no mitigating*, I have nothing that's gonna dictate against my record, and I know that the final outcome of this is that I'm gonna go to death row, and I would wish, if you would, and if *y'all would honor that and please let me get this done and get up the road. And that's about the best way I can say it, Your Honor. I'm ready to go.*

*Id.* at 493–94 (alteration in original). Trial counsel swore in an affidavit that Reynolds waived mitigation, "at least in part, because he did not think there was any chance of convincing six jurors to vote for life, and did not want to subject his sisters to the stress of testifying before a jury."

In a pretrial motion, Reynolds moved for the use of a special verdict form containing jury factfinding on aggravation. The trial court denied that motion. Moreover, in reading the instructions, the trial court informed the jury that "the final decision as to what punishment shall be imposed is the responsibility of the judge." Yet, the trial court explained that it could reject their advisory recommendation "only if the facts [were] so clear and convincing that virtually no reasonable person could differ." The trial court also informed the jury that "the law require[d] the court to give great weight" to the recommendation.

After deliberation, the jury unanimously recommended death on each count of first-degree murder.

At a *Spencer* [1] hearing, trial counsel filed mitigation with the trial court that it would have presented at the penalty phase—absent Reynolds's waiver of that right. The trial court conducted the *Spencer* hearing. As a result, the trial court found the following aggravators proven beyond a reasonable doubt and afforded great weight to each: for the murder of Robin Razor, the trial court found four aggravators—(1) Reynolds's previous conviction for another capital felony or felony involving use or threat of violence to a person; (2) Reynolds committed the murder while engaged in, or the accomplice to, or attempting to commit, a burglary; (3) the murder was committed for the purpose of avoiding a lawful arrest; and (4) the murder was especially heinous, atrocious, or cruel (HAC)—and for the murder of Christina Razor, the trial court found the same four aggravators, along with a fifth aggravator—the victim of the murder was a person less than twelve years old. On each count of first-degree murder, the trial court found the existence of four statutory mitigators and afforded little weight to each: (1) Reynolds was gainfully employed; (2) Reynolds manifested appropriate courtroom behavior; (3) Reynolds cooperated with law enforcement; and (4) Reynolds had a difficult childhood, including various subparts. [2] In accordance with *Muhammad v. State*, 782 So.2d 343 (Fla. 2001), the trial court did not afford great weight to the unanimous jury recommendation because the jury did not hear the mitigation. [3] After weighing the substantial aggravation against the minimal mitigation, the trial court sentenced Reynolds to death for the murders of Robin and Christina Razor.

***2** Reynolds appealed his convictions and sentences to this Court, and we affirmed. *Reynolds I*, 934 So.2d at 1161. His petition for writ of certiorari was denied by the United States Supreme Court on January 8, 2007. *Reynolds v. Florida*, 549 U.S. 1122, 127 S.Ct. 943, 166 L.Ed.2d 721

(2007). Pursuant to Florida Rule of Criminal Procedure 3.851, Reynolds filed his initial motion for postconviction relief, raising several claims. After an evidentiary hearing, the circuit court denied each claim, which we affirmed along with denying his petition for writ of habeas corpus. *Reynolds II*, 99 So.3d at 501.

Following *Hurst v. State* (*Hurst* ), 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017), Reynolds filed the instant successive motion to vacate his sentences of death. After a case management conference on March 2, 2017, the circuit court denied Reynolds's successive motion in a subsequent written order.

This appeal follows.

## ANALYSIS

In this successive postconviction motion, Reynolds raises two claims: (1) his death sentences violate the Sixth Amendment in light of *Hurst* and *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016); and (2) his death sentences violate the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and must be vacated in light of *Hurst*, *Hurst v. Florida*, and *Perry v. State*, 210 So.3d 630 (Fla. 2016). These issues present purely legal questions, which we review de novo. *E.g.*, *Mosley v. State*, 209 So.3d 1248, 1262 (Fla. 2016).

### Sixth Amendment *Hurst* Claim

**[1]** Reynolds contends that the circuit court erred in denying his successive motion for postconviction relief pursuant to *Hurst* under the Sixth Amendment.

Reynolds's death sentences became final when the Supreme Court denied his writ of certiorari on January 8, 2007. *Reynolds v. Florida*, 549 U.S. 1122, 127 S.Ct. 943, 166 L.Ed.2d 721. Because the sentences became final after *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), *Hurst* applies retroactively to this case. *E.g.*, *Mosley*, 209 So.3d at 1274–83 (applying *Hurst* retroactively to a post–*Ring*, postconviction defendant). In *Hurst*, we held "that in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge." 202 So.3d at 54. Further, we concluded that *Hurst* error is capable of harmless error review. *Id.* at 66–68; *see, e.g.*, *King v. State*, 211 So.3d 866, 889 (Fla. 2017). Accordingly, we must decide whether Reynolds's *Hurst* error was harmless beyond a reasonable doubt. *E.g.*, *Davis v. State*, 207 So.3d 142, 174 (Fla. 2016).

In *Hurst*, we explained our standard for harmless error review:

> Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a *Hurst v. Florida* error, 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 the imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:
>
> > ***3** The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.
>
> "The question is whether there is a reasonable possibility that the error affected the [sentence]."

202 So.3d at 68 (citations omitted) (alteration in original) (quoting *State v. DiGuilio*, 491 So.2d 1129, 1137–38 (Fla. 1986) ).[4] Under this standard, our harmless error analyses in the wake of *Hurst* have varied due to the individualized, case-by-case approach. However, we have conducted these analyses within the same general framework described below.

**[2]** Preliminarily, we look to whether the jury recommendation was unanimous. *See, e.g.*, *Kaczmar v. State*, 228 So.3d 1, 9 (Fla. 2017); *Jones v. State*, 212 So.3d 321, 343–44 (Fla. 2017); *King*, 211 So.3d at 890; *Davis*, 207 So.3d at 174–75. Here, the jury recommendation was unanimous. Although Reynolds's jury was instructed that it was "not necessary that the advisory sentence ... be unanimous," it nonetheless returned two unanimous death sentences. *See Davis*, 207 So.3d at 174–75. Reynolds attempts to analogize his case to nonunanimous decisions such as *Johnson v. State*, 205 So.3d 1285 (Fla. 2016). That comparison falls flat. We have been abundantly clear that there is a critical distinction between unanimous and nonunanimous jury recommendations as they pertain to *Hurst* error. *E.g.*, *Davis*, 207 So.3d at 174 ("[W]e emphasize the *unanimous* jury recommendations of death."). Therefore, Reynolds's case is fundamentally different from any nonunanimous cases where *Hurst* relief was appropriate.

**[3]** **[4]** 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 mitigating factors." *King*, 211 So.3d at 890. Hence, we look to other factors such as the jury instructions. *Kaczmar*, 228 So.3d at 9; *King*, 211 So.3d at 890–91; *Davis*, 207 So.3d at 174–75.

A review of the record reveals that the trial court instructed Reynolds's jury using Florida Standard Jury Instruction (Criminal) 7.11. We have rejected similar *Hurst* claims where defendants received Standard Jury Instruction 7.11. *Kaczmar*, 228 So.3d at 9; *Knight v. State*, 225 So.3d 661, 682–83 (Fla. 2017); *Davis*, 207 So.3d at 174. Moreover, a review of *Kaczmar*, *Knight*, and *Davis* demonstrates that the critical instructions given in those cases were similar to those given here. The trial court here instructed the jury, "It is your duty to ... render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." *See Davis*, 207 So.3d at 174 ("The instructions that were given informed the jury that it needed to determine whether sufficient aggravators existed and whether the aggravation outweighed the mitigation *before* it could recommend a sentence of death."). Even though Reynolds's jury was instructed that unanimous recommendations were not required at that time, the jury still returned two unanimous death sentence recommendations, similar to the circumstances that we upheld in *Kaczmar*, *Knight*, and *Davis*. *See Knight*, 225 So.3d at 683 ("Knight's 'jury was not informed that the finding that sufficient aggravating circumstances outweighed the mitigating circumstances must be unanimous, and ... the jury did, in fact, unanimously recommend death.' " (quoting *Davis*, 207 So.3d at 174–75) (alteration in original) ).

***4** Absent from Reynolds's jury instructions was a mercy instruction, which we used to support our harmless error conclusions in *Davis* and *Kaczmar*.[5] Nevertheless, we have held that the failure to give a mercy instruction alone does not necessarily make a *Hurst* error harmful. *Knight*, 225 So.3d at 683 ("[T]he *Davis* jury 'was instructed that it was not required to recommend death even if the aggravators outweighed the mitigators,' while Knight's jury was not. Nonetheless, we believe that Knight's jury received substantially the same critical instructions as Davis's jury." (citation omitted) ). Moreover, in his briefs, Reynolds fails to mention that the mercy instruction was not added to Standard Jury Instruction 7.11 until October 2009—before Davis and Kaczmar's penalty phases but after Reynolds's penalty phase in 2003. *In re Std. Jury Instr. in Crim. Cases–Report No. 2005-2*, 22 So.3d 17, 22, 35 (Fla. 2009); *Davis*, 207 So.3d at 155 (penalty phase in 2011); *Kaczmar*, 228 So.3d at 6 (second penalty phase in 2013). For these reasons, and in accordance with our decisions in *Davis*, *Kaczmar*, and *Knight*, we can conclude that Reynolds's "jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendations." *Davis*, 207 So.3d at 175.

Next, we review the aggravators and mitigators. *See King*, 211 So.3d at 891–92; *Davis*, 207 So.3d at 175. Before doing so, however, there is an important distinction between this case and *Davis* that must be addressed: Reynolds waived his right to present mitigation, while Davis did not. At first blush, this may appear problematic, but we have concluded that a defendant's waiver of the right "to present mitigation to the jury during the penalty phase has no bearing" on a cognizable *Hurst* claim. *Jones*, 212 So.3d at 343 n.3. In *Jones*, we reasoned that the refusal to present mitigation could not give rise to a subsequent *Hurst* claim:

> As previously stated, Jones's waiver of that right was valid, and he "cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence." *Mullens v. State*, 197 So.3d 16, 40 (Fla. 2016), *cert. denied*, [—— U.S. ——], 137 S.Ct. 672 [196 L.Ed.2d 557] (2017).

*Id.* Following the reasoning of *Mullens*, Reynolds—similar to Jones and Mullens—waived his right to jury factfinding on mitigation under the Sixth Amendment. Because he waived that right, he cannot now claim a harmful error for the lack of jury factfinding that he knowingly waived. *See Mullens*, 197 So.3d at 40. Prior to Reynolds's penalty phase, trial counsel, along with the trial court, attempted to influence Reynolds to reverse his decision and ensured that he was examined by a mental health expert. *Reynolds II*, 99 So.3d at 485 n.9, 493–94. Nonetheless, Reynolds chose to waive his right to present mitigation because he considered it a "waste of time" as he had no mitigation. *Id.* at 493. Reynolds now claims that his decision was the result of his belief that he could not convince six jurors to vote for life and, as trial counsel noted, Reynolds's desire not to "subject his sisters to the stress of testifying before a jury." Yet the reason that Reynolds waived mitigation is not pertinent to this analysis under *Mullens* and *Jones*. Instead, the dispositive fact concerning Reynolds's waiver is that he knowingly and intelligently waived his right to jury factfinding on mitigation. *See Mullens*, 197 So.3d at 39–40 ("[W]e fail to see how Mullens, *who was entitled to present mitigating evidence to a jury as a matter of Florida law even after he pleaded guilty and validly waived that right*, can claim error.").

Also, there was not a complete absence of mitigation. Despite his waiver, the trial court considered Reynolds's limited mitigation. As a result, the trial court found four mitigators and afforded little weight to each. Furthermore, Reynolds's waiver was factually less problematic than other waivers that we have upheld. For instance, in *Kaczmar*, a jury returned an eleven-to-one recommendation for death after hearing mitigation. 228 So.3d at 5. However, a second penalty phase jury returned a unanimous recommendation on remand after the defendant waived mitigation. *Id.* at 6. Despite this fact, we found the *Hurst* error harmless and denied relief. *Id.* at 9. It follows that Reynolds's decision to waive mitigation does not constitute a per se harmful *Hurst* error. *See Jones*, 212 So.3d at 343 & n.3; *Kaczmar*, 228 So.3d at 9. [6]

***5** Turning back to the comparison between aggravators and mitigators, we have stated that "it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances." *Davis*, 207 So.3d at 174. Here, there were four and five aggravators found in the murders of Robin and Cristina Razor, respectively. Although the trial court found certain mitigating factors, those circumstances could not have affected the jury because Reynolds waived presentation of mitigation to his jury. Even leaving aside the aggravators that could arguably require a factual finding by the jury, the aggravation here necessarily outweighed the mitigation. Consequently, there is no reasonable dispute as to whether the aggravation outweighed the mitigation, and the jury correspondingly returned death recommendations by twelve-to-zero votes.

Finally, we look at the facts of the case. *See King*, 211 So.3d at 891–92. Here, as Privett relieved himself, Reynolds smashed his head with a cinder block. *Reynolds I*, 934 So.2d at 1135–36, 1157. Then, Reynolds proceeded to kill Christina and Robin Razor—an eleven-year-old girl and her mother—by beating and stabbing them to death because, in Reynolds's words, "with [his] record [he] couldn't afford to leave any witnesses." *Id.* The "egregious facts of this case" firmly buttress the conclusion that the *Hurst* error was harmless beyond a reasonable doubt. *See, e.g.*, *Davis*, 207 So.3d at 175.

Accordingly, we affirm and conclude that "this is one of those rare cases in which the *Hurst* error was harmless beyond a reasonable doubt." *King*, 211 So.3d at 890; *see also Knight*, 225 So.3d at 683; *Davis*, 207 So.3d at 175.

### Eighth Amendment *Caldwell* Claim

**[5]** Reynolds also contends that the circuit court erred in denying his successive motion for postconviction relief pursuant to *Hurst* under the Eighth Amendment. Specifically, Reynolds argues that his sentences violated the Eighth Amendment under *Caldwell*. [7] To date, we have not expressly addressed a *Caldwell* challenge to Standard Jury Instruction 7.11 brought under *Hurst* [8];

thus, we must determine if a legal basis exists for these types of "*Hurst*–induced *Caldwell* claims." We have labeled these as *Hurst*–induced *Caldwell* claims because that distills the essence of the challenge: *Hurst* and its progeny render the previous Standard Jury Instruction violative of *Caldwell*. [9]

Relevant Legal Background

***6** As an introductory matter, it is necessary to review the jurisprudential development of this issue, which began in Florida long before *Caldwell*. In *Blackwell v. State*, 76 Fla. 124, 79 So. 731 (1918), we held that it was reversible error for a prosecutor to make comments that "lessen [a jury's] estimate of the weight of their responsibility, and cause them to shift it from their consciences to the Supreme Court." *Id.* at 736. There, the prosecutor stated, "If there is any error committed in this case, the Supreme Court, over in the capital of our state, is there to correct it, if any error should be done." *Id.* at 735. Despite an objection, the trial court refused to correct that statement and expressly approved of it, which we reversed. *Id.* at 735–36. We noted that the "purpose and effect of this remark was to suggest to the jury that they need not be too greatly concerned about the result of their deliberation" because this Court would be waiting in the wings to correct any errors. *Id.*

Years later, in *Pait v. State*, 112 So.2d 380, 383–86 (Fla. 1959), we reached a similar outcome on analogous facts. Among other statements, the prosecutor there told the jury, "This is the last time the People of this State will try this case in this court. Because whatever you do, the People have no right of appeal. They are done. This is their day. But he may have another day; he has an appeal." *Id.* at 383. We noted that the prosecutor's comment "incorrectly stated the law" and was a type of situation when a statement "so deeply implant[ed] seeds of prejudice or confusion that even in the absence of a timely objection at the trial level it [became] the responsibility of this court to point out the error" and reverse. *Id.* at 384. We concluded that it was impossible for us, as an appellate court, to determine whether the "improper and erroneous" comments persuaded the jury; thus, we could not "say that they were non-prejudicial and harmless." *Id.* at 386.

Taken together, *Blackwell* and *Pait* in some ways represented in Florida what *Caldwell* would become nationally. Some legal commentators have noted as much, "*Blackwell* and *Pait* were *Caldwell* before *Caldwell* was *Caldwell*." *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, 1134 (2016). One critical distinction, however, is that our cases did not "condemn false prosecutorial [and judicial] statements under the Eighth Amendment analysis employed in *Caldwell*." *Sawyer v. Smith*, 497 U.S. 227, 239, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990). It is clear that, even in the absence of *Caldwell*, Florida has a long history of ensuring that jurors understand their role and are not misled as to their responsibility. Yet *Caldwell* represented something different than *Blackwell* and *Pait* because it placed the Eighth Amendment imprimatur upon those general principles. *See Sawyer*, 497 U.S. at 238–40, 110 S.Ct. 2822; *Caldwell*, 472 U.S. at 328–30, 105 S.Ct. 2633.

In *Caldwell*, the Supreme Court ruled that "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." *Id.* at 328–29, 105 S.Ct. 2633. On facts nearly identical to *Blackwell*, the Supreme Court took issue with a Mississippi prosecutor's comments to the jury mentioning automatic review by their high court:

> Now, they would have you believe that you're going to kill this man and they know—they know that *your decision is not the final decision.* My God, how unfair can you be? *Your job is reviewable.* They know it....
>
> ....
>
> ... They said 'Thou shalt not kill.' If that applies to him, it applies to you, *insinuating that your decision is the final decision* and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up *and that is terribly, terribly unfair.* For they know, as I know, and as Judge Baker has told you, that *the decision you render is automatically reviewable by the Supreme Court. Automatically*, and I think it's unfair and I don't mind telling them so.

***7** *Id.* at 325–26, 105 S.Ct. 2633 (emphasis added). The Supreme Court reversed the death sentence because the prosecutor "sought to minimize the jury's sense of responsibility," and the Court could not "say that this

effort had no effect on the sentencing decision," which did "not meet the standard of reliability that the Eighth Amendment requires." *Id.* at 341, 105 S.Ct. 2633. The Court reasoned that shifting a jury's sense of responsibility to appellate courts could create "substantial unreliability as well as bias in favor of death sentences." *Id.* at 330, 105 S.Ct. 2633. Such indications to the jury could persuade jurors to rely on appellate courts to correct their errors, therefore completely depriving defendants of their right to a determination of the appropriateness of death due to the nature of appellate review. *Id.* at 330–33, 105 S.Ct. 2633.

Justice O'Connor cast the deciding fifth vote in *Caldwell*. Her concurring in part opinion explained a disagreement with the Court's analysis of *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). *Caldwell*, 472 U.S. at 341–43, 105 S.Ct. 2633. She wrote,

> In my view, the prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility. I agree there can be no "valid state penological interest" in imparting inaccurate or misleading information that minimizes the importance of the jury's deliberations in a capital sentencing case.

*Id.* at 342, 105 S.Ct. 2633. According to Justice O'Connor, the Court read *Ramos* too broadly, and she concluded that *Ramos* did not preclude a jury from hearing accurate instructions about postsentencing procedures. *Caldwell*, 472 U.S. at 342, 105 S.Ct. 2633. Because the Mississippi Supreme Court applied a presumption of correctness to the jury verdict and could only overturn it under limited circumstances, Justice O'Connor opined that misleading the jury to believe that the appellate court would make the final decision was inaccurate. *Id.* at 342–43, 105 S.Ct. 2633. However, she noted that if "a State conclude[s] that the reliability of its sentencing procedure is enhanced by accurately instructing the jurors on the sentencing procedure, including the existence and limited nature of appellate review," then *Ramos* would not "foreclose a policy choice in favor of jury education." *Caldwell*, 472 U.S. at 342, 105 S.Ct. 2633.

Following *Caldwell*, the status of Florida jury recommendations as "advisory" was somewhat unsettled. We conclusively held that Florida's sentencing scheme was distinguishable from the procedure at issue in *Caldwell*, that jury recommendations in Florida were "merely advisory," and that it was not a *Caldwell* violation to refer to the jury as "advisory" as long as "the jury's role was adequately portrayed and they were in no way misled as to the importance of their role." *Pope v. Wainwright*, 496 So.2d 798, 805 (Fla. 1986). Meanwhile, various opinions from the Eleventh Circuit Court of Appeals questioned our determination. For instance, in *Adams v. Wainwright* (*Adams I* ), 804 F.2d 1526 (11th Cir. 1986), *partially vacated and modified sub nom. Adams v. Dugger* (*Adams II* ), 816 F.2d 1493 (11th Cir. 1987), *rev'd*, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989), the Eleventh Circuit held that *Caldwell* applied to Florida's then-existing sentencing scheme and that certain statements made by a trial court constituted a *Caldwell* violation by creating "an intolerable danger that the jury's sense of responsibility for its advisory sentence was diminished." *Adams I*, 804 F.2d at 1529. In *Combs v. State*, 525 So.2d 853, 856 (Fla. 1988), we again distinguished the sentencing scheme at issue in *Caldwell*, thus finding *Caldwell* inapplicable in Florida. Moreover, we reiterated our understanding—at the time—that the standard jury instruction referring to the jury's recommendation as "advisory" and the trial court as the final sentencer comported with the death penalty statute and properly described the jury's role. *Combs*, 525 So.2d at 856–57. We looked to the plain language of the statute to support our conclusion:

> ***8** (2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render *an advisory sentence to the court*, based upon the following matters: ....
>
> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—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 ....

*Id.* at 857 (quoting § 921.141(2)–(3), Fla. Stat. (1985) ).[10] Further, we stated that it was not our intention to circumvent the clear statutory directive for an advisory jury role when we held that a trial court may override a jury's life sentence only if the "facts are 'so clear and convincing that virtually no reasonable person could differ.' " *Id.* (quoting *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975) ). We stated much of the same in *Grossman v. State*, 525 So.2d 833 (Fla. 1988), *receded from on other*

*grounds by Franqui v. State*, 699 So.2d 1312, 1319–20 (Fla. 1997), and there specifically rejected the argument that *Tedder* created a rule where "the weight given to the jury's advisory recommendation [wa]s so heavy as to make it the de facto sentence." *Id.* at 840. Later, in companion opinions, the Eleventh Circuit found *Caldwell* error in *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988) (en banc), but no error in *Harich v. Dugger*, 844 F.2d 1464 (11th Cir. 1988) (en banc). [11] Those decisions made clear that the Eleventh Circuit at that time focused primarily on whether the comments minimized the jury's sense of responsibility and whether the trial court "sufficiently correct[ed] the impression." *Mann*, 844 F.2d at 1456 (quoting *McCorquodale v. Kemp*, 829 F.2d 1035, 1037 (11th Cir. 1987) ); *see Harich*, 844 F.2d at 1477–78 (Tjoflat, J., concurring specially).

In the midst of this confusion, the Supreme Court reviewed *Adams II* and issued its decision in *Dugger v. Adams* (*Adams III* ), 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989). In *Adams III*, the Supreme Court did not reach the merits of the *Caldwell* issue, reversing the Eleventh Circuit instead on procedural bar grounds. *Adams III*, 489 U.S. at 407–08, 408 n.4, 109 S.Ct. 1211. The Court thus did "not decide whether in fact the jury as instructed in this case was misinformed of its role under Florida law," and left the question open. *Id.* at 408 n.4, 109 S.Ct. 1211.

A few years later, the Supreme Court clarified its *Caldwell* holding in *Romano v. Oklahoma*, 512 U.S. 1, 8–10, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994). There, the defendant was tried separately for two murders. *Id.* at 3, 114 S.Ct. 2004. The first trial resulted in a death sentence. *Id.* Evidence of the first death sentence was introduced and considered by the jury in the second trial, which resulted in a second death sentence. *Id.* During appeal of the second trial, the first death sentence was vacated and that case remanded for a new trial. *Id.* at 5, 114 S.Ct. 2004. With his second death sentence still on appeal, the defendant argued, in part, that introduction of a prior death sentence undermined the second jury's "sense of responsibility for determining the appropriateness of the death penalty." *Id.* at 3, 114 S.Ct. 2004. The Supreme Court disagreed. *Id.* In its analysis, the Court clarified that Justice O'Connor's position in *Caldwell*, as set forth in her concurring in part opinion, was controlling over the plurality view there:

> ***9** Accordingly, we have since read *Caldwell* as "relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden v. Wainwright*, 477 U.S. 168, 184 n.15, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Thus, "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger* [*III*], 489 U.S. [at] 407 [109 S.Ct. 1211].

*Romano*, 512 U.S. at 9, 114 S.Ct. 2004 (first alteration in original). Despite the fact that the first death sentence was vacated after his second jury considered it as evidence, the Supreme Court still found that the "infirmity identified in *Caldwell* [wa]s simply absent in this case: Here, the jury was not affirmatively misled regarding its role in the sentencing process." *Romano*, 512 U.S. at 9, 114 S.Ct. 2004.

In the aftermath of *Romano*, the Eleventh Circuit brought its understanding of *Caldwell* in line with our interpretation of its application to Florida. *Davis v. Singletary*, 119 F.3d 1471 (11th Cir. 1997). In *Davis*, the Eleventh Circuit expressly overruled any implication in *Mann* and *Harich* "that a prosecutorial or judicial comment or instruction could constitute *Caldwell* error even if it was a technically accurate description under state law of the jury's actual role." *Id.* at 1482. The court noted that such "implications cannot survive the Supreme Court's subsequent holdings" in *Romano*. *Davis*, 119 F.3d at 1482. As a result, the Eleventh Circuit held

> that the references to and descriptions of the jury's sentencing verdict in this case as an advisory one, as a recommendation to the judge, and of the judge as the final sentencing authority are not error under *Caldwell*. Those references and descriptions are not error, because they accurately characterize the jury's and judge's sentencing roles under Florida law.

*Id.* at 1482.

With the relevant history in mind, we now address the claim at issue. The basic argument for such claims follows: after *Hurst*, jury verdicts are no longer advisory and must be unanimous; thus, a jury that was not instructed as such before *Hurst* did not understand its role or feel the weight of its sentencing responsibility. Due to the different considerations for these claims in relation to *Ring*, pre–*Ring* and post–*Ring* claims will be discussed separately.

Pre–*Ring Caldwell* Claims

After *Romano* and before *Ring*, Florida law was settled that it was not a *Caldwell* error to refer to jury recommendations as "advisory" and the trial court as the final sentencer. *E.g.*, *Card v. State*, 803 So.2d 613, 628 (Fla. 2001); *Sireci v. State*, 773 So.2d 34, 40 nn.9 & 11 (Fla. 2000); *Teffeteller v. Dugger*, 734 So.2d 1009, 1026 (Fla. 1999); *Brown v. State*, 721 So.2d 274, 283 (Fla. 1998); *Burns v. State*, 699 So.2d 646, 655 (Fla. 1997); *Johnson v. State*, 660 So.2d 637, 647 (Fla. 1995); *see also Davis*, 119 F.3d at 1482. Similarly, before *Ring* there was no authoritative indication that there were any constitutional infirmities with Florida's capital sentencing scheme. *See Walton v. Arizona*, 497 U.S. 639, 647–48, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), *abrogated by Ring*, 536 U.S. at 609, 122 S.Ct. 2428; *Hildwin v. Florida*, 490 U.S. 638, 639–41, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), *abrogated by Hurst v. Florida*, 136 S.Ct. at 623; *Spaziano v. Florida*, 468 U.S. 447, 462–65, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), *abrogated by Hurst v. Florida*, 136 S.Ct. at 623; *Proffitt v. Florida*, 428 U.S. 242, 259–60, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Therefore, there cannot be a pre–*Ring*, *Hurst*–induced *Caldwell* challenge to Standard Jury Instruction 7.11 because the instruction clearly did not mislead jurors as to their responsibility under the law; therefore, there was no *Caldwell* violation. *See Romano*, 512 U.S. at 9, 114 S.Ct. 2004. The Standard Jury Instruction cannot be invalidated retroactively prior to *Ring* simply because a trial court failed to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts.

***10** Moreover, *Ring* became the cutoff that we set for any and all *Hurst*–related claims. *Hitchcock v. State*, 226 So.3d 216, 217 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017); *see, e.g.*, *Asay v. State*, 210 So.3d 1, 15–22 (Fla. 2016). As a practical matter, a *Hurst*–induced *Caldwell* claim cannot be more retroactive than *Hurst* because the rights announced in *Hurst* serve as the basis for this type of *Caldwell* claim—the two are inextricably intertwined for the purposes of this challenge. If rights are not retroactive prior to *Ring*, then any pre–*Ring* claim based on those rights plainly cannot stand.

Post–*Ring Caldwell* Claims

*Ring* presented the first indication that Florida's then-existing death sentencing scheme may be unconstitutional; so, pre–*Ring* and post–*Ring Hurst*–induced *Caldwell* claims are properly addressed separately. Nevertheless—for these claims—*Ring* amounts to a distinction without a difference. Similar to the discussion above, neither *Ring* nor *Hurst* provides bases for *Caldwell* challenges to the standard jury instruction given in the interim, between 2002 and 2016, because these challenges cannot withstand the Supreme Court's holding in *Romano*. *See* 512 U.S. at 9, 114 S.Ct. 2004.

To be sure, following *Ring*, various members of this Court called into question the constitutionality of Florida's death scheme, going so far as to specifically recommend that the standard jury instruction be revised pursuant to *Caldwell* in light of *Ring*. *See, e.g.*, *Bottoson v. Moore*, 833 So.2d 693, 731–34 (Fla. 2002) (Lewis, J., concurring in result only). Despite this recognition, a majority never conclusively answered *Ring*'s effect on Florida's death scheme. *See Jackson v. State*, 213 So.3d 754, 781 (Fla. 2017); *Johnson v. State*, 904 So.2d 400, 406–07 (Fla. 2005) (leaving the question open while denying retroactive application of *Ring* to postconviction defendants). In plurality opinions, *Bottoson* and *King v. Moore*, 831 So.2d 143 (Fla. 2002), we "concluded that *Ring* did not apply to Florida because the Supreme Court had previously affirmed Florida's capital sentencing process." *Jackson*, 213 So.3d at 781. And, "[a]lthough neither *Bottoson* nor *King* constituted majority decisions that represented a clear rule of law from this Court, the ultimate result was that *Ring* was never applied in this State." *Id.* It was not until *Hurst v. Florida* that *Ring* was decisively applied to Florida's sentencing scheme. *Hurst v. Florida*, 136 S.Ct. at 621–22.

**[6]** **[7]** Because we never applied *Ring* to Florida's scheme, that case did not change our understanding of

  

the jury's role as advisory and it continued as such. [12] In the meantime, we held that the standard jury instruction neither denigrated the jury's role nor violated *Caldwell* nearly every year between *Ring* and *Hurst v. Florida*. *See, e.g.*, *Davis v. State*, 136 So.3d 1169, 1201 (Fla. 2014); *Foster v. State*, 132 So.3d 40, 75 (Fla. 2013); *Patrick v. State*, 104 So.3d 1046, 1064 (Fla. 2012); *Barwick v. State*, 88 So.3d 85, 108–09 (Fla. 2011); *Phillips v. State*, 39 So.3d 296, 304 (Fla. 2010); *Reese v. State*, 14 So.3d 913, 920 (Fla. 2009); *Jones v. State*, 998 So.2d 573, 590 (Fla. 2008); *Barnhill v. State*, 971 So.2d 106, 117 (Fla. 2007); *Miller v. State*, 926 So.2d 1243, 1257 (Fla. 2006); *Rodriguez v. State*, 919 So.2d 1252, 1280 (Fla. 2005); *Globe v. State*, 877 So.2d 663, 673–74 (Fla. 2004); *Griffin v. State*, 866 So.2d 1, 14 (Fla. 2003). [13] Therefore, *Romano* applies with equal force to these post–*Ring Caldwell* claims. The mere contention that Standard Jury Instruction 7.11 referred to the jury as "advisory" and the trial court as the final sentencer cannot constitute a *Caldwell* violation because it fails to "show that the remarks to the jury improperly described the role assigned to the jury by local law." *Romano*, 512 U.S. at 9, 114 S.Ct. 2004 (quoting *Adams III*, 489 U.S. at 407, 109 S.Ct. 1211). Florida law, as it existed between 2002 and 2016, was settled that the standard jury instruction "fully advise[d] the jury of the importance of its role, correctly state[d] the law, d[id] not denigrate the role of the jury and d[id] not violate *Caldwell*." *Patrick*, 104 So.3d at 1064 (quoting *Jones*, 998 So.2d at 590). [14] In *Romano*, despite the fact that the first death sentence, which the second jury relied on as evidence, was later vacated, the Supreme Court reasoned that there was no *Caldwell* violation because the "evidence at issue was neither false at the time it was admitted, nor did it even pertain to the jury's role." *Romano*, 512 U.S. at 9, 114 S.Ct. 2004. Therefore, a *Caldwell* claim based on the rights announced in *Hurst* and *Hurst v. Florida* cannot be used to retroactively invalidate the jury instructions that were proper at the time under Florida law. *See Romano*, 512 U.S. at 9, 114 S.Ct. 2004; *Caldwell*, 472 U.S. at 342–43, 105 S.Ct. 2633 (O'Connor, J., concurring in part). *Caldwell*, as interpreted by *Romano*, ensures that jurors understand their actual sentencing responsibility; it does not indicate that jurors must also be informed of how their responsibilities might hypothetically be different in the future, should the law change. [15]

***11** Furthermore, the specific concerns voiced by the Supreme Court in *Caldwell* are curtailed when applied to these *Hurst*–induced *Caldwell* claims. *See Caldwell*, 472 U.S. at 330–33, 105 S.Ct. 2633. Specifically, most of the Court's reasoning in *Caldwell* stemmed from the fear that jurors would delegate their sentencing responsibility to appellate courts. *See id.* Conversely, under Florida's previous standard jury instruction, any fear would relate to jurors delegating their responsibility to trial courts rather than appellate courts. Calling the recommendations "advisory" and the trial court as the final sentencer is certainly less problematic than the references to appellate review in *Caldwell*, *Blackwell*, and *Pait* because, unlike appellate courts, trial courts are positioned to make factual findings, which they do every day. [16] While denying the retroactivity of *Ring*, the Supreme Court specifically noted that judicial factfinding is not inherently less reliable than jury factfinding. *See Schriro v. Summerlin*, 542 U.S. 348, 355–56, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) ("[F]or every argument why juries are more accurate factfinders, there is another why they are less accurate.... When so many presumably reasonable minds continue to disagree over whether juries are better factfinders *at all*, we cannot confidently say that judicial factfinding *seriously* diminishes accuracy."). Of course, we now understand that Florida's prior sentencing scheme is incompatible with the Sixth Amendment, *Hurst v. Florida*, 136 S.Ct. at 619; however, the concerns noted in *Caldwell*—regarding the Eighth Amendment—have less force under these circumstances, and no constitutional infirmity arises because we cannot conclude that there is a risk of death being imposed arbitrarily or capriciously.

Reynolds directs us to our Eighth Amendment discussion in *Hurst*. His argument is relatively straightforward—*Hurst* mandated unanimity in jury sentencing under the Eighth Amendment, which his jury was not instructed on; thus, his jury did not appreciate the significance of its verdict. Yet, this contention misapplies our decision in *Hurst*. *Apprendi*, *Ring*, and *Hurst v. Florida* were Sixth Amendment cases; and *Hurst* was largely the same. As Reynolds indicates, one difference between *Hurst* and those three earlier cases is that we reached an Eighth Amendment issue. 202 So.3d at 59–63. [17] However, we concluded that the Eighth Amendment requires unanimity in jury sentencing. *Id.* at 59. We did not discuss jury instructions other than to dispel the apprehension that a single holdout juror could derail the administration of a penalty phase. *Id.* at 62–63. *Caldwell* claims are related to, but dissimilar from, the Eighth Amendment issue that we discussed in *Hurst*. As demonstrated above, *Caldwell*

claims, limited to a certain extent by *Romano*, focus on a jury's understanding of the responsibility ascribed to it by law. That is a wholly different matter from whether the Eighth Amendment requires jury factfinding and final verdicts to be unanimous. It follows that our discussion of the Eighth Amendment in *Hurst* is inapposite to the matter at hand.

The distinction between *Hurst*–induced *Caldwell* claims and the actual rights announced in *Hurst* is crucial. Reynolds seeks to conflate the two without any recognition of their significant differences. This approach is problematic because it ignores the Sixth and Eighth Amendment rights to a jury trial that we discussed in *Hurst*. Rather than arguing entitlement to those rights, the claim seeks relief *solely* because Standard Jury Instruction 7.11 in 2003 was not compliant with *Hurst*, a case decided thirteen years later. Under such an approach, the holding, timing, and retroactivity of a later case that changes the law are all irrelevant; and the only determinative question is whether the jury instructions given then would be proper today. But that is not *Caldwell*. This argument stretches *Caldwell* thin—to a breaking point—well beyond its holding that a sentencer cannot be misled "to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 329, 105 S.Ct. 2633. Absent limited, unique circumstances,[18] we have granted resentencing to each post–*Ring*, nonunanimous defendant who has requested *Hurst* relief. For those cases that received a unanimous recommendation, we have individually reviewed the circumstances to ensure that any *Hurst* error did not affect the sentence. *E.g.*, *Davis*, 207 So.3d at 173–75. In so doing, our constant focus has been on the Sixth and Eighth Amendment rights to a jury trial elucidated in *Hurst*; thus, defendants seeking relief must do so based upon those rights.[19] Moreover, as part of our *Hurst* harmless error analysis, we already review the jury instructions to determine if the instructions actually given affected the sentence. *See Kaczmar*, 228 So.3d at 9; *King*, 211 So.3d at 890–91; *Davis*, 207 So.3d at 174–75. Consistent with our precedent, we reviewed Reynolds's jury instructions and concluded that they did not render his *Hurst* error harmful. *Supra*, pp. ——– – ———.

***12** Also, acceptance of *Hurst*–induced *Caldwell* claims would produce an absurd result regarding the retroactivity of *Hurst* because for these claims, unlike other types of *Hurst*–related claims, *Ring* is not determinative. *See supra* pp. ——– – ———; *cf. Asay*, 210 So.3d at 15–22. As demonstrated, jury recommendations in Florida under the previous sentencing scheme were advisory both pre- and post–*Ring*. To invalidate Standard Jury Instruction 7.11, despite the fact that it accurately described the jury's role as advisory, would ignore *Romano* while allowing *Caldwell* claims to swallow retroactivity whole. Such a holding, in effect, would make *Hurst* completely retroactive purely because the pre–*Hurst* standard jury instruction did not—and could not—reflect *Hurst*. This outcome would effectively add a fourth prong to the *Witt*[20] retroactivity test that we employed in *Mosley* and *Asay*: whether the jury instructions given accurately predicted the change in law. *See Mosley*, 209 So.3d at 1276–83; *Asay*, 210 So.3d at 15–22. As already explained, the result advanced by Reynolds becomes particularly circuitous when applied to pre–*Ring Caldwell* claims. *See supra* p. ——. *Hurst* does not apply to pre–*Ring* cases. *E.g.*, *Hitchcock*, 226 So.3d at 217. Thus, the rights announced in *Hurst* are inapplicable pre–*Ring*. *Id.* Regardless, as the argument goes, even pre–*Ring* juries were being misled as to their responsibility in sentencing notwithstanding the fact that such a responsibility did not exist then and does not exist retroactively. This is the exact unwieldiness of *Caldwell* that *Romano* averts. Either juries were being misled or they were not. We conclude that they were not.

Finally, these *Hurst*–induced *Caldwell* claims rest upon a simple, albeit conclusory, premise which Reynolds clearly stated: "The chances that at least one juror would not join a death recommendation if a resentencing were now conducted are likely given that proper *Caldwell* instructions would be required"; thus, the unanimous recommendation does not meet the Eighth Amendment's reliability requirement. To be sure, this notion is unsubstantiated. But it is further weakened by the fact that juror unanimity was not required under Florida's previous death scheme, so a converse argument could be made. Any juror that had any doubt whatsoever could vote for a life sentence without feeling any responsibility for leniency towards the individual found guilty of first-degree murder. Of course, under the previous scheme, the other jurors who voted for death had no incentive to pressure a holdout juror because only a bare majority was required. Before *Hurst*, jurors had various options for recommendations, including life, 7–to–5 death, 8–to–4 death, 9–to–3 death, 10–to–2 death, 11–to–1 death, and unanimous death outcomes. Now, the sentencing verdict

is binary—life or death. Therefore, cases that previously received nonunanimous death recommendations may become unanimous death verdicts. This has already occurred. On March 23, 2017, we granted *Hurst* relief due to an *eight-to-four death jury recommendation*, sending Randall Deviney back for resentencing. *Deviney v. State*, 213 So.3d 794, 794–95 (Fla. 2017). Deviney has already been resentenced to death by a *unanimous jury verdict*. [21] Plainly, the entire rationale beneath these *Hurst*–induced *Caldwell* claims is on uneven footing. We assume that jurors will follow the instructions given to them. *Crain v. State*, 894 So.2d 59, 70 (Fla. 2004). Accordingly, we will not guess at whether or not individual jurors before *Hurst* were voting for the death of another person haphazardly after being instructed by the trial court not to "act hastily or without due regard to the gravity of these proceedings" and to realize "that a human life is at stake." *See* Fla. Std. Jury Instr. (Crim.) 7.11.

Accordingly, we conclude that *Hurst*–induced *Caldwell* claims against the standard jury instruction do not provide an avenue for *Hurst* relief.

This Case

Based on the foregoing, we conclude that the circuit court properly denied Reynolds's Eighth Amendment *Caldwell* claim. Reynolds received Standard Jury Instruction 7.11, and his jury was not misled as to its role in sentencing. *See Romano*, 512 U.S. at 9, 114 S.Ct. 2004. Although not necessary, further supporting our conclusion is the fact that the trial court gave a *Tedder* instruction, stating that it could reverse the jury recommendation "only if the facts [were] so clear and convincing that virtually no reasonable person could differ." *See Tedder*, 322 So.2d at 910. In accordance with our general holding pertaining to *Hurst*–induced *Caldwell* claims and the actual jury instructions given to Reynolds's jury, we can conclude beyond a reasonable doubt that the jury was properly instructed under the existing law in a manner that underscored "their power to determine the appropriateness of death as an 'awesome responsibility.' " *See Caldwell*, 472 U.S. at 330, 105 S.Ct. 2633 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 320, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) ).

**CONCLUSION**

***13** Accordingly, we affirm the circuit court's denial of Reynolds's motion for postconviction relief.

It is so ordered.

LABARGA, C.J., and LEWIS, J., concur.

LAWSON, J., concurs specially with an opinion.

CANADY and POLSTON, JJ., concur in result.

PARIENTE, J., dissents with an opinion.

QUINCE, J., dissents with an opinion.

LAWSON, J., concurring specially.
I concur in the majority's decision. *See Okafor v. State*, 225 So.3d 768, 775–76 (Fla. 2017) (Lawson, J., concurring specially). I write briefly, however, to explain why I disagree with the majority's characterization of *Hurst v. State*, 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017), as being compelled by or grounded in the Eighth Amendment's prohibition on cruel and unusual punishment and why the majority is wrong to view Reynolds' Eighth Amendment claim pursuant to *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), through the lens of *Hurst*.

Florida's Constitution unambiguously mandates that this Court interpret "[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment ... in conformity with the decisions of the United States Supreme Court," art. I, § 17, Fla. Const., which has held that the Eighth Amendment does not require jury sentencing in capital cases. *See Spaziano v. Florida*, 468 U.S. 447, 464–65, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), *overruled on other grounds by Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 624, 193 L.Ed.2d 504 (2016) (overruling *Spaziano* on *Sixth Amendment grounds* to the extent it "allow[s] a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty").

In light of *Spaziano*, a faithful application of the Florida Constitution prohibits grounding *Hurst* in the Eighth Amendment and, therefore, necessarily prohibits using

  

*Hurst* to create the *Caldwell* Eighth Amendment capital sentencing problem that the majority opinion purports to solve. *See* majority op. at —— – ——. Because the "Hurst–induced *Caldwell* claim" coined by the majority is not cognizable as a matter of law, analyzing a procedurally barred *Caldwell* claim in light of *Hurst* is not an exercise that I would—or that this Court should—undertake. *See also Owen v. State*, 773 So.2d 510, 515 n.11 (Fla. 2000) ("[T]his Court has repeatedly held that *Caldwell* errors cannot be raised on collateral review.").

PARIENTE, J., dissenting.

For the reasons fully explained in my dissenting opinion in *Grim v. State*, No. SC17–1071, —— So.3d ——, 2018 WL 1531121 (slip op. Fla. Mar. 29, 2018), at 3–11, because the jury did not hear any evidence of mitigation, I would conclude that this Court cannot rely on the jury's unanimous recommendations for death in Reynolds' case to determine that the *Hurst*[22] error is harmless beyond a reasonable doubt. Per curiam op. at 14. Because *Hurst* applies retroactively to Reynolds' sentences of death, which became final in 2007, the dispositive issue in this case is whether the *Hurst* error is harmless beyond a reasonable doubt. *Hurst*, 202 So.3d at 68–69; *see Mosley v. State*, 209 So.3d 1248, 1283–84 (Fla. 2016); *Davis v. State*, 207 So.3d 142, 174–75 (Fla. 2016). I also write to explain that Reynolds' *Caldwell*[23] claim, brought in light of *Hurst*, has merit because the jury instructions used in Reynolds' trial misled the jury as to its role in capital sentencing.

### Whether the *Hurst* Error Is Harmless Beyond a Reasonable Doubt

***14** After being convicted of two counts of first-degree murder, Reynolds "waived his right to present mitigating evidence." *Reynolds v. State* (*Reynolds I* ), 934 So.2d 1128, 1138 (Fla. 2006); *see* per curiam op. at 2. As the per curiam opinion explains, "[t]rial counsel swore in an affidavit that Reynolds waived mitigation, 'at least in part, because he did not think there was any chance of convincing six jurors to vote for life, and did not want to subject his sisters to the stress of testifying before a jury.' " Per curiam op. at 2–3. After hearing only evidence of aggravation, the penalty phase jury "returned unanimous recommendations of death for both first-degree murder convictions." *Reynolds I*, 934 So.2d at 1138.

After the penalty phase, the trial court held a *Spencer*[24] hearing, where "the sole testimony presented by the defense was the testimony of Reynolds himself. The State did not present any testimony, relying solely on the evidence and testimony admitted during the guilt and penalty phase trials as support for the aggravating factors." *Reynolds I*, 934 So.2d at 1138. Acknowledging Reynolds' mitigation waiver, the trial court determined that the aggravating factors outweighed the mitigation and sentenced Reynolds to death for both first-degree murder convictions. *Id.*[25]

As to the mitigation that the jury did not hear before making its sentencing recommendations, the trial court found the following statutory mitigating circumstances for both murders: (1) Reynolds was gainfully employed; (2) Reynolds manifested appropriate courtroom behavior throughout trial; (3) Reynolds cooperated with law enforcement; and, (4) Reynolds had a difficult childhood. *Id.* at 1138–39; *see* per curiam op. at 4. In finding that Reynolds had a difficult childhood, the trial court noted that Reynolds "suffered from an upbringing marked by physical and psychological abuse"; his "father was a chronic alcoholic"; his "mother was chronically ill and was often hospitalized during [his] childhood"; Reynolds "was regularly hit, slapped and kicked by his drunken father, without warning"; his father would sometimes pour ice water on him in the middle of the night; Reynolds "regularly cared for his disabled, wheelchair-bound sister because his mother was unable to do so"; he "helped run household affairs around the home"; his mother died when he was 17 years old; his education was limited to the tenth grade; Reynolds began using alcohol at the age of 14; and, he "had essentially no adult supervision as a child." Second Am. Sentencing Order ("SO"), at 14–15, 26–27.

***15** Pursuant to this Court's opinion in *Muhammad v. State*, 782 So.2d 343, 361–62 (Fla. 2001), the trial court in this case properly did "not give the recommendation[s] of the jury great weight." SO, at 16; *see* per curiam op. at 4. However, as I fully explained in my dissenting opinion in *Grim*, this does not overcome the *Hurst* error—the absence of a unanimous jury finding that the aggravation in Reynolds' case outweighed the mitigation. *See Hurst*, 202 So.3d at 44.

  

Significantly, Florida's pre–*Hurst* capital sentencing scheme, which required only seven jurors to recommend a sentence of death, guided Reynolds' calculation for waiving mitigation. Per curiam op. at 2–3. However, we now know that the United States and Florida Constitutions require all twelve jurors to vote for death. *Hurst*, 202 So.3d at 44. Therefore, Reynolds' calculation for waiving the right to present evidence of mitigation to the jury would be starkly different in proceedings guided by our post–*Hurst* capital sentencing statute—requiring only one juror to vote for life. *See Kaczmar v. State*, 228 So.3d 1, 16 (Fla. 2017) (Pariente, J., concurring in part and dissenting in part); *see also* § 921.141, Fla. Stat. (2017). Thus, in light of Reynolds' mitigation waiver, I cannot rely on the jury's uninformed, albeit unanimous, recommendations for death to determine that the *Hurst* error is harmless beyond a reasonable doubt.

Next, I turn to address the per curiam opinion's discussion of Reynolds' claim to a right to relief under *Hurst* pursuant to the United States Supreme Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)—what the per curiam opinion labels a "*Hurst*–induced *Caldwell* claim." Per curiam op. at 15; *see* concurring specially op. at —— (Lawson, J.). As the per curiam opinion acknowledges, although this claim has been raised by numerous defendants, this Court has not "expressly addressed" the merits of this claim. Per curiam op. at 14 & n.8.

### *Caldwell* Claim

This Court made clear in *Hurst*, which is now final, that, in addition to the constitutional requirements of the Sixth Amendment, "juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment." 202 So.3d at 59. *Hurst* also provided the constitutional requirements for imposing capital sentences in a manner that is not arbitrary and furthers the "narrowing function required by the Eighth Amendment." *Id.* at 60. Therefore, contrary to both the per curiam opinion and Justice Lawson's concurring specially opinion, I would conclude that Reynolds' *Caldwell* claim is valid. *Cf.* concurring specially op. at ——– ——(Lawson, J.).

In *Caldwell*, the United States Supreme Court held that 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.*" 472 U.S. at 328–29, 105 S.Ct. 2633 (emphasis added). As to the pre–*Hurst* jury instructions, I explained in *Hamilton v. State*, 43 Fla. L. Weekly S82 (Fla. Feb. 8, 2018):

> Florida's pre–*Hurst* jury instructions referred to the advisory nature of the jury's recommendation over a dozen times. Further, the jury was only required to make a recommendation between life or death to the trial court, which then held the ultimate responsibility of making the requisite factual findings and determining the appropriate sentence. Thus, it was made abundantly clear to the jury that they were not responsible for rendering the final sentencing decision.

***16** *Id.* at S84 (Pariente, J., dissenting) (citations omitted). Similar to how a majority of this Court denied the applicability of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), to Florida's capital sentencing scheme,[26] this Court consistently determined that *Caldwell* did not compromise the validity of Florida's jury instructions—even after *Ring*. Per curiam op. at 19–24.

However, if Florida's capital sentencing scheme was invalid from the point that the United States Supreme Court decided *Ring*, as the United States Supreme Court made clear in *Hurst v. Florida*, 136 S.Ct. at 622, and this Court's retroactivity analyses confirm,[27] it is difficult to understand how Florida's standard jury instructions, following an unconstitutional statute, did not also create constitutional error. *See* per curiam op. at 28 & n.15. Indeed, in a concurring in result only opinion in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), Justice Lewis argued that, "in 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*, 833 So.2d at 731 (Lewis, J., concurring in result only). Justice Lewis explained:

> [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 mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden v. Wainwright*, 477 U.S. 168 [106 S.Ct. 2464, 91 L.Ed.2d 144] (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 to be drawn from* Ring.
>
> Under Florida's standard penalty phase jury instructions, the jury is told, even before evidence is presented in the penalty phase, that its sentence is only advisory and the judge is the final decisionmaker. The words "advise" and "advisory" are used more than ten times in the instructions, while the members of the jury are only told once that they must find the aggravating factors beyond a reasonable doubt. The jury is also instructed several times that its sentence is simply a recommendation. *By highlighting the jury's advisory role, and minimizing its duty under Ring to find the aggravating factors, Florida's standard penalty phase jury instructions must certainly be reevaluated under* [Caldwell].
>
> Just as the high Court stated in *Caldwell*, Florida's standard jury instructions "minimize the jury's sense of responsibility for determining the appropriateness of death." *Caldwell*, 472 U.S. at 341 [105 S.Ct. 2633]. *Ring* clearly requires that the jury play a vital role in determining the factors upon which the sentencing will depend, and Florida's jury instructions tend to diminish that role and could lead the jury members to believe they are less responsible for a death sentence than they actually are.

***17** *Id.* at 732–33 (emphasis added) (citations omitted).

Of course, *Hurst v. Florida* held that Florida's existing capital sentencing law was unconstitutional under *Ring*, and the jury's proper role in capital sentencing is far more significant than the pre–*Hurst* statutory scheme and jury instructions provided. *See Hurst v. Florida*, 136 S.Ct. at 622. It follows that the jury instructions following the unconstitutional scheme, which minimized the jury's role in capital sentencing, were likewise deficient.

Not only was the jury in Reynolds' case apprised only of information that aggravated Reynolds' crime, the jury was repeatedly told that its sentencing recommendation between life and death was merely "advisory." In fact, in instructing the jury, the trial judge explicitly stated that "the final decision as to what punishment shall be imposed is the responsibility of the judge." Per curiam op. at 3. Therefore, because *Hurst* applies retroactively to Reynolds' sentence of death, I would conclude that *Caldwell* further supports the conclusion that the *Hurst* error in Reynolds' case is not harmless beyond a reasonable doubt.

**Conclusion**

The greatest concern in capital sentencing is ensuring that the death penalty is not imposed arbitrarily or capriciously. For all the reasons explained above, I cannot conclude that the *Hurst* error in Reynolds' case is harmless beyond a reasonable doubt. Thus, I would grant Reynolds a new penalty phase.

Accordingly, I dissent.

QUINCE, J., dissenting.

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*, ––U.S. ––––, 136 S.Ct. 616, 619, 193 L.Ed.2d 504 (2016) ). I am even more troubled in a case such as this one, where the defendant waived his right to present mitigation to avoid subjecting his sisters to the stress of testifying when he felt it was highly unlikely he would convince six jurors to vote for life. I agree with Justice Pariente's viewpoint that our *Hurst* jurisprudence affects a defendant's calculus in determining whether to present mitigation. I accordingly cannot agree with the majority that the *Hurst* error in this

  

case is harmless beyond a reasonable doubt. Accordingly, I dissent.

**All Citations**

--- So.3d ----, 2018 WL 1633075, 43 Fla. L. Weekly S163

Footnotes

1 *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

2 The trial court rejected two statutory mitigators and afforded them no weight: (1) residual doubt; and (2) Reynolds's easy adjustment to prison life.

3 Any question regarding the continued vitality of *Muhammad* is not before us today.

4 Relatedly, Reynolds contends that the *Hurst* error was harmful because trial counsel would have tried the case differently under the new law. To be sure, attorneys have different considerations to make in the post–*Hurst* landscape. Reynolds's claim, however, amounts to nothing more than pure speculation. Additionally, as demonstrated above, our harmless error review focuses on the effect on the trier of fact—here the jury—not on potential, after-the-fact trial strategy. For these reasons, this portion of Reynolds's claim fails.

5 The mercy instruction is the portion of Standard Jury Instruction 7.11 that informs a jury that they are "neither compelled nor required to recommend" death. *Perry*, 210 So.3d at 640.

6 Although Justice Pariente is within her prerogative to continue disagreeing on this point of law, it should be noted that the dissenting position has been soundly rejected by this Court. *See Grim v. State*, No. SC17–1071, —— So.3d —— (Fla. Mar. 29, 2018); *Jones*, 212 So.3d at 343 & n.3; *Kaczmar*, 228 So.3d at 9.

7 Reynolds asserts two other Eighth Amendment arguments. The first, that trial counsel would have tried the case differently under the new law, does not merit discussion, as noted above. *See supra* note 4. The second, that his indictment failed to list the aggravators, is similarly meritless. We have "repeatedly rejected the argument that aggravating circumstances must be alleged in the indictment." *Pham v. State*, 70 So.3d 485, 496 (Fla. 2011). Moreover, prior to *Hurst*, we held that "neither *Apprendi* nor *Ring* requires that aggravating circumstances be charged in the indictment." *Rogers v. State*, 957 So.2d 538, 554 (Fla. 2007). It follows that *Hurst* did not impact this settled point of law; therefore, this part of Reynolds's Eighth Amendment claim necessarily fails as well.

8 Other defendants have raised these claims, which we have rejected without discussion. *See, e.g.*, *Truehill v. State*, 211 So.3d 930 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 3, 199 L.Ed.2d 272 (2017). In light of the dissenting opinions to the denial of certiorari in *Truehill v. Florida*, however, we now explicitly address what has already been implicitly decided.

9 The special concurrence takes issue with our viewing this *Caldwell* claim "through the lens of *Hurst*." Concurring specially op. at —— – ——(Lawson, J.). However, we only view *Caldwell* through the *Hurst* lens here because that is the claim that Reynolds—along with numerous other defendants—raised. As explained in detail below, we agree with the special concurrence that these types of claims categorically fail and improperly use *Caldwell*. This Court, however, must acknowledge the challenge in order to answer it definitively.

10 The excerpted language from section 921.141, Florida Statutes, remained substantively unchanged between *Combs* and *Hurst v. Florida*.

11 Judge Tjoflat's special concurrence was actually the Eleventh Circuit's plurality opinion as it pertained to the *Caldwell* issue in *Harich. Harich*, 844 F.2d at 1475; *see Davis v. Singletary*, 119 F.3d 1471, 1482 n.5 (11th Cir. 1997).

12 In fact, the advisory nature of jury recommendations was the entire point of *Hurst v. Florida.* 136 S.Ct. at 619 ("We hold this sentencing scheme unconstitutional. 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.").

13 Federal courts also agreed with our conclusion in this regard. *See, e.g.*, *Davis v. Sec'y, Dep't of Corrs.*, No. 8:08-cv-1842-T-33MAP, 2009 WL 3336043 *1, *32 (M.D. Fla. Oct. 15, 2009) ("Because Florida law remains unchanged after *Ring*, and because the standard jury instructions accurately describe the jury role at sentencing under Florida law, there can be no *Caldwell* violation." (citing *Romano*, 512 U.S. at 9, 114 S.Ct. 2004) ); *see also Belcher v. Sec'y, Dep't of Corrs.*, 427 Fed.Appx. 692, 695 (11th Cir. 2011); *Troy v. Sec'y, Dep't of Corrs.*, No. 8:11-cv-796-T30-AEP, 2013 WL 24212, at *1, *45–47 (M.D. Fla. Jan. 2, 2013); *Morris v. Sec'y, Dep't of Corrs.*, No. 8:06-cv-1289-T-27TGW, 2009 WL 3170497, at *1, *38 (M.D. Fla. Sept. 30, 2009).

14 The dissent's acknowledgement that *this Court* consistently rejected *Caldwell* claims after *Ring* defeats its own argument that *certain justices'* recognition of potential problems somehow renders these *Hurst*–induced *Caldwell* claims cognizable.

  

*See* dissenting op. at ——— – ——— (Pariente, J.). A majority of the Court never recognized these *Caldwell* issues; therefore, juries were not being misled under Florida law.

15 Justice Pariente's dissent completely fails to address *Romano*, which results in a flawed conclusion. According to the dissent, "it is difficult to understand how Florida's standard jury instructions, following an unconstitutional statute, did not also create constitutional error." Dissenting op. at ———. Occasionally the law is difficult to understand when one ignores the controlling precedent. Here, *Romano* makes it easy to understand that there was no *Caldwell* violation because the standard jury instruction accurately informed juries of their then-existing responsibilities.

16 Relatedly, we have expressly rejected *Hurst* challenges to death sentences imposed *solely* by trial courts when defendants waived their rights to a penalty phase jury. *E.g.*, *Mullens*, 197 So.3d at 38–40.

17 The special concurrence disputes our "characterization of [*Hurst*] as being compelled by or grounded in the Eighth Amendment." Concurring specially op. at ———. Yet *Hurst* being compelled by or grounded in the Eighth Amendment is not our "characterization" here; it is specifically part of what *Hurst* held and discussed at length. *Hurst*, 202 So.3d at 59 ("[T]he foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death.").

18 *See State v. Silvia*, 235 So.3d 349 (Fla. 2018).

19 Our discussion in this case is limited to *Hurst*–induced *Caldwell* claims against Standard Jury Instruction 7.11. Obviously, this opinion does not affect proper *Caldwell* challenges.

20 *Witt v. State*, 387 So.2d 922 (Fla. 1980).

21 *Man Gets Death Sentence Again for Killing Neighbor*, Chi. Trib., Oct. 14, 2017, http://www.chicagotribune.com/news/sns-bc-fl--death-penalty-hearing20171014-story.html.

22 *Hurst v. State* (*Hurst* ), 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ———, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017); *see Hurst v. Florida*, —— U.S. ———, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016).

23 *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

24 *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

25 The trial court found the following aggravating factors for the murder of Robin Razor and assigned them the noted weight: (1) Reynolds had previously been convicted of a another capital felony or a felony involving a threat of violence to the person (PVF) (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 (HAC) (great weight). *Reynolds I*, 934 So.2d at 1138.

For the murder of Christina Razor, the trial court the following five aggravating factors and assigned them the noted weight: (1) PVF (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) HAC (great weight); and (5) the victim of the murder was a person less than 12 years of age (great weight). *Id.*

26 *See Bottoson v. Moore*, 833 So.2d 693, 695 (Fla. 2002); *King v. Moore*, 831 So.2d 143, 144–45 (Fla. 2002).

27 *See Asay v. State* (*Asay V* ), 210 So. 3d 1, 15–22 (Fla. 2016), *cert. denied*, —— U.S. ———, 138 S.Ct. 41, 198 L.Ed.2d 769 (2017); *Mosley*, 209 So.3d at 1276–83.

# APPENDIX

# B

IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO. 98-CF-3341-A

STATE OF FLORIDA,

Plaintiff(s),

vs.

MICHAEL GORDON REYNOLDS,

Defendant(s).
_____/



**ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE DEATH SENTENCES**

The Defendant was charged with three counts of first-degree premeditated murder, each a capital felony, and one count of burglary of a dwelling with a battery while armed with a weapon, a life felony. The State was seeking the death penalty as to each of the murders. A death qualified jury was selected between April 21–22, 2003 and the trial took place from April 23–May 7, 2003. The Defendant was found guilty of the lesser included offense of second-degree murder for the killing of Danny Privett and was found guilty as charged for the remaining charges. The penalty phase was held on May 8-9, 2003. The jury unanimously recommended death for the murders of Robin Razor and Christina Razor. On September 19, 2003, this Court sentenced the Defendant to death for the murders of Robin and Christina Razor and life in prison for both the murder of Danny Privett and for the burglary. The convictions and sentences were affirmed on appeal. *Reynolds v. State*, 934 So. 2d 1128 (Fla. 2006), *cert. den.*, 549, U.S. 1122, 127 S.Ct. 943, 166 L.Ed.2d 721 (2007).

On December 28, 2007, the Defendant filed a Motion for Post-Conviction Relief pursuant to Fla. R. Crim. P. 3.851 in which he raised sixteen claims. The State responded to all claims on January 24, 2008. The Defendant added five claims in a motion filed on August 10, 2009. The evidentiary hearing on the motion took place from September 14–16, 2009. The Court denied the motion in its entirety on July 7, 2010. That order was affirmed by the Florida Supreme Court. *Reynolds v. State*, 99 So. 3d 459 (Fla. 2012).

On January 10, 2017, the Defendant filed the instant "Successive Motion to Vacate Death Sentences" in which he claims that his death sentences should be vacated based upon the United States Supreme Court ruling in *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016), hereinafter *Hurst I*, and the Florida Supreme Court ruling in *Hurst v. State*, 202 So. 3d 40, 45 (Fla. 2016), hereinafter *Hurst II*. The State e-

filed its response on February 9, 2017. As required by Fla. R. Crim. P. 3.851(f)(5)(B), a case management conference was held on March 2, 2017, at which time the parties provided legal argument on the merits of the motion.

In *Hurst I*, the United States Supreme Court held that Florida's capital sentencing scheme is unconstitutional because the judge, and not the jury, makes the necessary findings of fact to impose the death sentence. 136 S. Ct. at 619. In *Hurst II*, the Florida Supreme Court, in determining whether Florida's death sentencing scheme violated the Sixth Amendment as it is interpreted under the Florida Constitution, held that:

> before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

*Hurst II*, 202 So. 3d at 57. The Florida Supreme Court further found that unanimity is required by the Eighth Amendment and the Florida Constitution. It stated

> In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to trial by jury, we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment ...
> the unanimous finding of the aggravating factors and the fact they are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help narrow the class of murderers subject to capital punishment. However, the further requirement that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment even more significantly, and expresses the values of the community as they currently relate to imposition of death as a penalty ...
> Moreover, Florida's capital sentencing law will comport with these Eighth Amendment principles in order to more surely protect the rights of defendants guaranteed by the Florida and United States Constitutions. When all jurors must agree to a recommendation of death, their collective voice will be heard and will inform the final recommendation. This means that the voices of minority jurors cannot simply be disregarded by the majority, and that all jurors' views on the proof and sufficiency of the aggravating factors and the relative weight of the aggravating factors to the mitigating circumstances must be equally heard and considered.

*Id.* at 59-62.

In *Mosley v. State*, the Florida Supreme Court concluded that the *Hurst* rulings apply to all defendants whose sentences were not yet final when the United States Supreme Court issued its opinion in *Ring v. Arizona*, 536 U.S. 584 (2002).[1] *Mosley v. State*, SC14-2108, 2016 WL 7406506, at *25 (Fla.

[1] In *Asay v. State*, the Florida Supreme Court held that the *Hurst* rulings do not apply retroactively to defendants whose sentences were final before he issuance of *Ring*. *Asay v. State*, SC16-102, 2016 WL 7406538, at *13 (Fla. Dec. 22, 2016).

Dec. 22, 2016), *reh'g denied*, SC14-2108, 2017 WL 510491 (Fla. Feb. 8, 2017). *Ring* was issued on June 24, 2002 and the Defendant's conviction became final on January 8, 2007, the date that the United States Supreme Court denied his petition for writ of certiorari. *See* Fla. R. Crim. P. 3.851(d)(1)(B).

Turning now to whether the Defendant is entitled to relief, the Florida Supreme Court has addressed several cases in which it analyzed whether *Hurst II* applies and whether those defendants are entitled to be resentenced.[2] In cases that became final after *Ring* where the jury recommendations were unanimous, the Florida Supreme Court has consistently held that the *Hurst* error was harmless beyond a reasonable doubt. For example, in *Davis v. State*, the Court stated:

> With regard to Davis's sentences, we emphasize the *unanimous* jury recommendations of death. These recommendations allow us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors ...
> We conclude that the State can sustain its burden of demonstrating that any *Hurst v. Florida* error was harmless beyond a reasonable doubt. Here, the jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. In fact, although the jury was informed that it was not required to recommend death unanimously, and despite the mitigation presented, the jury still unanimously recommended that Davis be sentenced to death ... The unanimous recommendations here are precisely what we determined in *Hurst* to be constitutionally necessary to impose a sentence of death.

*Davis v. State*, 207 So. 3d 142, 174–75 (Fla. 2016), *reh'g denied,* SC11-1122, 2017 WL 56089 (Fla. Jan. 5, 2017) (emphasis in original); *see also Jones v. State*, SC14-990, 2017 WL 823600 (Fla. Mar. 2, 2017); *Truehill v. State*, SC14-1514, 2017 WL 727167 (Fla. Feb. 23, 2017); *Hall v. State*, SC15-1662, 2017 WL 526509 (Fla. Feb. 9, 2017); *Kaczmar v. State*, SC13-2247, 2017 WL 410214 (Fla. Jan. 31, 2017); *Knight v. State*, SC14-1775, 2017 WL 411329 (Fla. Jan. 31, 2017); *King v. State*, SC14-1949, 2017 WL 372081 (Fla. Jan. 26, 2017).

In those cases within the *Hurst* window in which the jury's recommendations were not unanimous, the Florida Supreme Court has, without exception, remanded for new penalty phases. Regardless of the overwhelming evidence presented in support of the aggravating circumstances or the extreme nature of the particular murders, the Court has refused to substitute its judgment for those penalty phase juries. The Court has been adamant that in non-unanimous cases, it would be improper to find that a jury would have unanimously recommended death had it been instructed that its recommendation must be unanimous. The rationale for this unwillingness to do so is that the Court:

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[2] The Florida Supreme Court has repeatedly found that defendants are not entitled to *Hurst* relief when they either waived their penalty phase juries or their sentences became final prior to *Ring*. *See Mullens v. State*, 197 So. 3d 16, 38 (Fla. 2016), *reh'g denied*, SC13-1824, 2016 WL 4377112 (Fla. Aug. 9, 2016), and *cert. denied*, 137 S.Ct 672 (2017); *Wright v. State*, SC13-1213, 2016 WL 6901449 (Fla. Nov. 23, 2016); *Asay*, 2016 WL 7406538 at *13; *Gaskin v. State*, SC15-1884, 2017 WL 224772, at *2 (Fla. Jan. 19, 2017); *Bogle v. State*, SC11-2403, 2017 WL 526507, at *16 (Fla. Feb. 9, 2017).

> cannot conclude beyond a reasonable doubt that the jury ... unanimously found that there were sufficient aggravating factors to impose death, or that the aggravators outweighed the mitigation ... We cannot speculate why ... jurors did not find that sufficient aggravating factors existed to impose death or that those aggravating factors outweighed the mitigation, or whether the ... jurors, in fact, made those findings but were following the trial court's instructions that they were not required to recommend death.

*Williams v. State*, SC14-814, 2017 WL 224529, *19 (Fla. Jan. 19, 2017) (jury recommendation of 9 to 3); *see also Simmons v. State*, 207 So. 3d 860 (Fla. 2016) (jury recommendation of 8 to 4); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (jury recommendation of 11 to 1); *Dubose v. State*, SC10-2363, 2017 WL 526506 (Fla. Feb. 9, 2017) (jury recommendation of 8 to 4); *Durousseau v. State*, SC15-1276, 2017 WL 411331 (Fla. Jan. 31, 2017) (jury recommendation of 10 to 2); *Hojan v. State*, SC13-2422, 2017 WL 410215 (Fla. Jan. 31, 2017) (jury recommendation of 9 to 3); *Calloway v. State*, SC10-2170, 2017 WL 372058 (Fla. Jan. 26, 2017) (jury recommendation of 7 to 5); *McGirth v. State*, SC15-953, 2017 WL 372095 (Fla. Jan. 26, 2017) (jury recommendation of 11 to 1); *Armstrong v. State*, SC14-1967, 2017 WL 224428 (Fla. Jan. 19, 2017) (jury recommendation of 9 to 3); *Kopsho v. State*, SC15-1256, 2017 WL 224727 (Fla. Jan. 19, 2017) (jury recommendation of 10 to 2); *Mosley v. State*, SC14-2108, 2016 WL 7406506 (Fla. Dec. 22, 2016), *reh'g denied*, SC14-2108, 2017 WL 510491 (Fla. Feb. 8, 2017) (jury recommendation of 8 to 4); *Franklin v. State*, SC13-1632, 2016 WL 6901498 (Fla. Nov. 23, 2016) (jury recommendation of 9 to 3).

Based upon the foregoing, this Court finds that the Defendant is within the window period set forth in the *Hurst* rulings because his death sentence became final after *Ring*. However, given that the jury recommendation was unanimous even though the jury was instructed that it must weigh the proven aggravators against the mitigating circumstances, but was not required to unanimously recommend death, this Court finds that any Sixth or Eighth Amendment *Hurst* errors were harmless beyond a reasonable doubt. *See Davis*, 207 So. 3d at 174-75. Therefore, the Defendant is not entitled to have his death sentences vacated under *Hurst*.[3]

The Defendant also asserts that this Court should permit him to reargue his 3.851 claims in light of the *Hurst* holdings. The cases cited by the Defendant in support of this claim are distinguishable, in

[3] After the hearing, counsel filed a document titled "Case Status and Request for *Nelson* Hearing." In this pleading, counsel advised that the Defendant was unsatisfied with the arguments made during the case management conference and that the Defendant also wished to remind the Court of the contentious jury deliberations. The factual issues raised in counsel's pleading are irrelevant to the legal issue presented, as any contentiousness between the jurors would have inhered in the verdict and a challenge to the jury's unanimous verdict should have been raised in the Defendant's direct appeal. There is no basis contained in the document to require a *Nelson* hearing. The Defendant supplemented that motion in a letter filed on March 14, 2017. In this letter, he expresses dissatisfaction with counsel's failure to amend the motion to include *Hurst* claims. The Defendant's dissatisfaction with counsel's failure to raise a *Hurst* claim is, as noted above, not a correct statement of the proceedings. The Court has reviewed *Hurst* and its progeny, as noted above, and the case law is clear about the effect of *Hurst* error on unanimous versus non-unanimous jury verdicts. The Defendant also fails to state any basis for a *Nelson* hearing.

that those cases addressed the effect of newly-discovered evidence upon the verdicts rendered in the original trials. In both *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014), and *Swafford v. State*, 125 So. 3d 760 (Fla. 2013), the Florida Supreme Court found that the newly-discovered evidence, when viewed in conjunction with the evidence presented at the trials, rendered those verdicts unreliable. That is a different issue than the issue arising out of *Hurst*.

The *Hurst* cases permitted death sentenced defendant to assert purely legal claims regarding the adequacy of the advisory recommendations made by penalty phase juries. Both of the Defendant's trial attorneys provided affidavits that the penalty phase strategy would have been substantially different had they been operating under *Hurst*, as the strategy employed to convince one juror to recommend life would be substantially different than having to convince six jurors to recommend life. Those assertions are not relevant at this time. "Counsel cannot be held ineffective for failing to anticipate changes in the law." *Cherry v. State*, 781 So. 2d 1040, 1053 (Fla. 2000). Trial counsel was found to have acted appropriately under the applicable law in effect at the time of the trial, and the recent change in the law would not now render their representation deficient. Thus, there is no basis to reassess their performance during the guilt or penalty phases, and *Hurst* does not impact any rulings on legal matters raised in the prior 3.851 motion.

**ORDERED AND ADJUDGED:**

1. The Defendant's Successive Motion to Vacate Death Sentences is hereby **denied.**
2. The Defendant has 30 days from the date of rendition of this Order in which to file an appeal.

**DONE AND ORDERED** in chambers at Sanford, Seminole County, Florida this 27th day of March, 2017.

**KENNETH R. LESTER, JR., Circuit Judge**

I hereby certify that copies of the foregoing have been furnished by mail this 27th day of March, 2017, to:

Thomas W. Hastings, Esquire
Office of the State Attorney
THastings@sa18.org
semfelony@sa18.org

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Michael Gordon Reynolds #324170
Union Correctional Institution
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Florida Department of Corrections
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GRANT MALOY, Clerk of Courts

By: _____
DEPUTY CLERK

**GRANT MALOY**
**Clerk of the Circuit Court and Comptroller**
**SEMINOLE COUNTY**
**P.O. Box 8099**
**Sanford, Florida 32772-8099**

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# APPENDIX

# C

**7.11 FINAL INSTRUCTIONS IN PENALTY PROCEEDINGS — CAPITAL CASES**
§ 921.141, Fla. Stat.

*This instruction should be given after the closing arguments in the penalty phase of a death penalty trial. The instruction is designed for first degree murders committed after May 24, 1994, when the Legislature omitted the possibility of parole for anyone convicted of First Degree Murder. For first degree murders committed before May 25, 1994, this instruction will have to be modified.*

**Members of the jury, you have heard all the evidence and the argument of counsel. It is now your duty to make a decision as to the appropriate sentence that should be imposed upon the defendant for the crime of First Degree Murder. There are two possible punishments: (1) life imprisonment without the possibility of parole, or (2) death.**

**In making your decision, you must first unanimously determine whether the aggravating factor[s] alleged by the State [has] [have] been proven beyond a reasonable doubt. An aggravating factor is a circumstance that increases the gravity of a crime or the harm to a victim. No facts other than proven aggravating factors may be considered in support of a death sentence.**

*Aggravating factors. § 921.141(6), Fla. Stat.*
**The aggravating factor[s] alleged by the State [is] [are]:**

*Give only those aggravating factors noticed by the State which are supported by the evidence.*
**1.** (Defendant) **was previously convicted of a felony and [under sentence of imprisonment] [on community control] [on felony probation].**

**2.** (Defendant) **was previously convicted of [another capital felony] [a felony involving the [use] [threat] of violence to another person].**

*Give 2a or 2b as applicable.*
**a. The crime of** (previous crime) **is a capital felony.**

**b. The crime of** (previous crime) **is a felony involving the [use] [threat] of violence to another person.**

**3.** (Defendant) **knowingly created a great risk of death to many persons.**

**4. The First Degree Murder was committed while** (defendant) **was [engaged] [an accomplice] in [the commission of] [an attempt to commit] [flight after committing or attempting to commit]**

**any**

*Check § 921.141(6)(d), Fla. Stat., for any change in list of offenses.*
**[robbery].**
**[sexual battery].**
**[aggravated child abuse].**
**[abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement].**
**[arson].**
**[burglary].**

**[kidnapping].**
**[aircraft piracy].**
**[unlawful throwing, placing or discharging of a destructive device or bomb].**

**5. The First Degree Murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.**

**6. The First Degree Murder was committed for financial gain.**

**7. The First Degree Murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.**

**8. The First Degree Murder was especially heinous, atrocious or cruel.**

**"Heinous" means extremely wicked or shockingly evil.**

**"Atrocious" means outrageously wicked and vile.**

**"Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.**

**The kind of crime intended to be included as especially heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to** (decedent).

**9. The First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.**

**"Cold" means the murder was the product of calm and cool reflection.**

**"Calculated" means having a careful plan or prearranged design to commit murder.**

**A killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.**

**However, in order for this aggravating factor to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.**

**A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold,**

**calculated, or premeditated nature of the murder.**

**10.** (Decedent) **was a law enforcement officer engaged in the performance of [his] [her] official duties.**

**11.** (Decedent) **was an elected or appointed public official engaged in the performance of [his] [her] official duties, if the motive for the First Degree Murder was related, in whole or in part, to** (decedent's) **official capacity.**

**12.** (Decedent) **was a person less than 12 years of age.**

**13.** (Decedent) **was particularly vulnerable due to advanced age or disability, or because** (defendant) **stood in a position of familial or custodial authority over** (decedent)**.**

*With the following aggravating factor, definitions as appropriate from § 874.03, Fla. Stat., must be given.*

**14. The First Degree Murder was committed by a criminal street gang member.**

**15. The First Degree Murder was committed by a person designated as a sexual predator or a person previously designated as a sexual predator who had the sexual predator designation removed.**

**16. The First Degree Murder was committed by a person subject to**

**[a domestic violence injunction issued by a Florida judge],**
**[a [repeat] [sexual] [dating] violence injunction issued by a Florida judge],**
**[a protection order issued from [another state] [the District of Columbia] [an Indian tribe] [a commonwealth, territory, or possession of the United States]],**

**and**

**the victim of the First Degree Murder was [the person] [a [spouse] [child] [sibling] [parent] of the person] who obtained the [injunction] [protective order].**

*Merging aggravating factors. Give the following paragraph if applicable. For example, the aggravating circumstances that 1) the murder was committed during the course of a robbery and 2) the murder was committed for financial gain, relate to the same aspect of the offense and may be considered as only a single aggravating circumstance. Castro v. State, 597 So. 2d 259 (Fla. 1992).*

**Pursuant to Florida law, the aggravating factors of** *(insert aggravating factor)***and** *(insert aggravating factor)* **are considered to merge because they are considered to be a single aspect of the offense. If you unanimously determine that the aggravating factors of** *(insert aggravating factor)* **and**

*(insert aggravating factor)* **have both been proven beyond a reasonable doubt, your findings should indicate that both aggravating factors exist, but you must consider them as only one aggravating factor.**

*Victim-impact evidence. Give if applicable. Also, give at the time victim impact evidence is admitted, if requested.*

**You have heard evidence about the impact of this murder on the [family] [friends] [community] of** (decedent)**. This evidence was presented to show the victim's uniqueness as an individual and the resultant loss by** (decedent's) **death. However, you may not consider this evidence as an aggravating factor.**

*Give in all cases.*

**As explained before the presentation of evidence, the State has the burden to prove an aggravating factor beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to disregard an aggravating factor if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating factor exists, or if, having a conviction, it is one which is not stable but one which waivers and vacillates, then the aggravating factor has not been proved beyond a reasonable doubt and you must not consider it in providing a verdict.**

**A reasonable doubt as to the existence of an aggravating factor may arise from the evidence, a conflict in the evidence, or the lack of evidence. If you have a reasonable doubt as to the existence of an aggravating factor, you must find that it does not exist. However, if you have no reasonable doubt, you should find the aggravating factor does exist.**

**A finding that an aggravating factor exists must be unanimous, that is, all of you must agree that [the] [each] presented aggravating factor exists. You will be provided a form to make this finding [as to each alleged aggravating factor] and you should indicate whether or not you find [the] [each] aggravating factor has been proven beyond a reasonable doubt.**

**If you do not unanimously find that at least one aggravating factor was proven by the State beyond a reasonable doubt, then the defendant is not eligible for the death penalty, and your verdict must be for a sentence of life imprisonment without the possibility for parole. At such point, your deliberations are complete.**

**If, however, you unanimously find that [one or more] [the] aggravating factor[s] [has] [have] been proven beyond a reasonable doubt, then the defendant is eligible for the death penalty, and you must make additional findings to determine whether the appropriate sentence to be imposed is life imprisonment without the possibility of parole or death.**

*Mitigating circumstances. § 921.141(7), Fla. Stat.*

**If you do unanimously find the existence of at least one aggravating factor and that the aggravating factor[s] [is] [are] sufficient to impose a sentence of death, the next step in the process is for you to determine whether any mitigating circumstances exist. A mitigating circumstance is anything that supports a sentence of life imprisonment without the possibility of parole, and can be anything which might indicate that the death penalty is not appropriate. It is not limited to the facts surrounding the crime. A mitigating circumstance may include any aspect of the defendant's character, background, or life or any circumstance of the offense that may reasonably indicate that the death penalty is not an appropriate sentence in this case.**

**It is the defendant's burden to prove that one or more mitigating circumstances exist. Mitigating circumstances do not need to be proven beyond a reasonable doubt. Instead, the defendant need only establish a mitigating circumstance by the greater weight of the evidence, which means evidence that more likely than not tends to establish the existence of a mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you must consider it established and give that evidence such weight as you determine it should receive in reaching your verdict about the appropriate sentence to be imposed. Any juror persuaded as to the existence of a mitigating circumstance must consider it in this case.**

**Among the mitigating circumstances you may consider are:**

*Give only those mitigating circumstances for which evidence has been presented.*

**1.** (Defendant) **has no significant history of prior criminal activity.**

*If the defendant offers evidence on this circumstance and the State, in rebuttal, offers evidence of other crimes, also give the following:*

**Conviction of** (previous crime) **is not an aggravating factor to be considered in determining the penalty to be imposed on the defendant, but a conviction of that crime may be considered by the jury in determining whether the defendant has a significant history of prior criminal activity.**

**2. The First Degree Murder was committed while** (defendant) **was under the influence of extreme mental or emotional disturbance.**

**3.** (Decedent) **was a participant in (**defendant's**) conduct or consented to the act.**

**4.** (Defendant) **was an accomplice in the First Degree Murder committed by another person and [his] [her] participation was relatively minor.**

**5.** (Defendant) **acted under extreme duress or under the substantial domination of another person.**

**6. The capacity of** (defendant) **to appreciate the criminality of [his] [her] conduct or to conform [his] [her] conduct to the requirements of law was substantially impaired.**

**7.** (Defendant's) **age at the time of the crime.**

*The judge should also instruct on any additional mitigating circumstances as requested.*

**8. The existence of any other factors in** (defendant's) **character, background, or life or the circumstances of the offense that would mitigate against the imposition of the death penalty.**

**Your decision regarding the appropriate sentence should be based upon proven aggravating factors and established mitigating circumstances that have been presented to you during these proceedings.**

**The next step in the process is for each of you to determine whether the aggravating factor[s] that you have unanimously found to exist outweigh[s] the mitigating circumstance[s] that you have individually found to exist. The process of weighing aggravating factors and mitigating circumstances is not a mechanical or mathematical process. In other words, you should not merely total the number of aggravating factors and compare that number to the total number of mitigating circumstances. The law contemplates that different factors or circumstances may be given different**

**weight or values by different jurors. Therefore, in your decision-making process, each individual juror must decide what weight is to be given to a particular factor or circumstance. Regardless of the results of each juror's individual weighing process—even if you find that the sufficient aggravators outweigh the mitigators—the law neither compels nor requires you to determine that the defendant should be sentenced to death.**

**Once each juror has weighed the proven factors, he or she must determine the appropriate punishment for the defendant. The jury's decision regarding the appropriate sentence must be unanimous if death is to be imposed. To repeat what I have said, if your verdict is that the defendant should be sentenced to death, your finding that each aggravating factor exists must be unanimous, your finding that the aggravating factors are sufficient to impose death must be unanimous, your finding that the aggravating factor[s] found to exist outweigh the established mitigating circumstances must be unanimous, and your decision to impose a sentence of death must be unanimous.**

**You will be provided a form to reflect your findings and decision regarding the appropriate sentence. If your vote on the appropriate sentence is less than unanimous, the defendant will be sentenced to life in prison without the possibility of parole.**

**The fact that the jury can make its decision on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you vote, you should carefully consider and weigh the evidence, realizing that a human life is at stake, and bring your best judgment to bear in reaching your verdict.**

*Weighing the evidence.*

**When considering aggravating factors and mitigating circumstances, it is up to you to decide which evidence is reliable. You should use your common sense in deciding which is the best evidence and which evidence should not be relied upon in making your decision as to what sentence should be imposed. You may find some of the evidence not reliable, or less reliable than other evidence.**

**You should consider how the witnesses acted, as well as what they said. Some things you should consider are:**

1. **Did the witness seem to have an opportunity to see and know the things about which the witness testified?**

2. **Did the witness seem to have an accurate memory?**

3. **Was the witness honest and straightforward in answering the attorneys' questions?**

4. **Did the witness have some interest in how the case should be decided?**

5. **Did the witness's testimony agree with the other testimony and other evidence in the case?**

*Give as applicable.*

6. **Had the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?**

7. **Had any pressure or threat been used against the witness that affected the truth of the witness's testimony?**

8. **Did the witness at some other time make a statement that is inconsistent with the testimony he or she gave in court?**

9. **Has the witness been convicted of a felony or of a misdemeanor involving [dishonesty] [false statement]?**

10. **Does the witness have a general reputation for [dishonesty] [truthfulness]?**

*Law enforcement witness.*

**The fact that a witness is employed in law enforcement does not mean that [his] [her] testimony deserves more or less consideration than that of any other witness.**

*Expert witnesses.*

**Expert witnesses are like other witnesses with one exception—the law permits an expert witness to give an opinion. However, an expert's opinion is only reliable when given on a subject about which you believe that person to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.**

*Accomplices and Informants.*

**You must consider the testimony of some witnesses with more caution than others. For example, a witness who [claims to have helped the defendant commit a crime] [has been promised immunity from prosecution] [hopes to gain more favorable treatment in his or her own case] may have a reason to make a false statement in order to strike a good bargain with the State. This is particularly true when there is no other evidence tending to agree with what the witness says about the defendant. So, while a witness of that kind may be entirely truthful when testifying, you should consider [his] [her] testimony with more caution than the testimony of other witnesses.**

*Child witness.*

**You have heard the testimony of a child. No witness is disqualified just because of age. There is no precise age that determines whether a witness may testify. The critical consideration is not the witness's age, but whether the witness understands the difference between what is true and what is not true, and understands the duty to tell the truth.**

*Give only if the defendant testified.*

**The defendant in this case has become a witness. You should apply the same rules to consideration of [his] [her] testimony that you apply to the testimony of the other witnesses.**

*Witness talked to lawyer.*

**It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about [his] [her] testimony.**

*Give in all cases.*

**You may rely upon your own conclusion about the credibility of any witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.**

*Give only if the defendant did not testify.*

**The defendant exercised a fundamental right by choosing not to be a witness in this case. You must not be influenced in any way by [his] [her] decision. No juror should ever be concerned that the defendant did or did not take the witness stand to give testimony in the case.**

*Rules for deliberation.*

**These are some general rules that apply to your discussions. You must follow these rules in order to make a lawful decision.**

**1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your decisions will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make wise and legal decisions in this matter.**

**2. Your decisions must be based only upon the evidence that you have heard from the testimony of the witnesses, [have seen in the form of the exhibits in evidence,] and these instructions.**

**3. Your decisions must not be based upon the fact that you feel sorry for anyone or are angry at anyone.**

**4. Remember, the lawyers are not on trial. Your feelings about them should not influence your decisions.**

*Give #5 if applicable.*

**5. The jury is not to discuss any question[s] that [a juror] [jurors] wrote that [was] [were] not asked by the Court, and must not hold that against either party.**

**6. Your decisions should not be influenced by feelings of prejudice or racial or ethnic bias. Your decisions must be based on the evidence and the law contained in these instructions.**

*Submitting case to jurors.*

**In just a few moments you will be taken to the jury room by the [court deputy] [bailiff]. When you have reached decisions in conformity with these instructions, the appropriate form[s] should be signed and dated by your foreperson.**

**During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You are not to communicate with any person outside the jury about this case, and you must not talk about this case in person or through the telephone, writing, or electronic communication, such as a blog, Twitter, e-mail, text message, or any other means.**

*Give if judge has allowed jurors to keep their electronic devices during the penalty phase.*

**Many of you may have cell phones, tablets, laptops, or other electronic devices here in the courtroom. The rules do not allow you to bring your phones or any of those types of electronic devices into the jury room. Kindly leave those devices on your seats where they will be guarded by the [court deputy] [bailiff] while you deliberate.**

**Do not contact anyone to assist you during deliberations. These communications rules apply until I discharge you at the end of the case. If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the [court deputy] [bailiff].**

*Give if applicable.*

**During this trial, [an item] [items] [was] [were] received into evidence as [an] exhibit[s]. You may examine whatever exhibit[s] you think will help you in your deliberations.**

*Give a or b as appropriate.*

**a. The[se] exhibit[s] will be sent into the jury room with you when you begin to deliberate.**

**b. If you wish to see an[y] exhibit[s], please request that in writing.**

**I cannot participate in your deliberations in any way. Please disregard anything I may have said or done that made you think I preferred one decision over another. If you need to communicate with me, send a note through the [court deputy] [bailiff], signed by the foreperson. If you have questions, I will talk with the attorneys before I answer, so it may take some time. You may continue your deliberations while you wait for my answer. I will answer any questions, if I can, in writing or orally here in open court.**

**In closing, let me remind you that it is important that you follow the law spelled out in these instructions. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For more than two centuries we have lived by the constitution and the law. No juror has the right to violate rules we all share.**

**Comment**

This instruction was adopted in 2017 [214 So. 3d 1236] and amended in 2018.

# APPENDIX

# D

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY,
FLORIDA.

STATE OF FLORIDA,

Plaintiff,

V.

MICHAEL GORDON REYNOLDS,

Defendant.
_____/

CASE NO.: 98-3341-CFA



**JURY INSTRUCTIONS: PENALTY PHASE**
**INSTRUCTION FOR DELIBERATIONS**

Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant for his crimes 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. However, the law requires the court to give great weight to your recommendation. I may reject your recommendation only if the facts are so clear and convincing that virtually no reasonable person could differ. It is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your advisory sentences should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings.

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

**1. The defendant, prior to today's penalty phase proceeding, has been convicted of another capital offense or of a felony involving the use or threat of violence to some person; Capital offenses and felonies involving the use or threat of violence arising from the same criminal episode, resulting in a contemporaneous conviction with the capital offense, the sentencing recommendation for which you are to consider, are included within this definition.**

a. The crime of First Degree Murder is a capital felony.
b. The crimes of Aggravated Robbery, Aggravated Assault, Aggravated Battery, and Second Degree Murder are felonies involving the use or threat of violence to another person.

**2. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of or attempting to commit the crime of Burglary.**

I will now define the offense of Burglary contrary to Florida Statute 810.02.

BURGLARY

Before you can find the defendant guilty of Burglary, the State must prove the following three elements beyond a reasonable doubt.

1. Michael Gordon Reynolds entered a structure owned by or in the possession of Danny Ray Privett or Robin Razor.

2. Michael Gordon Reynolds did not have the permission or consent of Danny Ray Privett or Robin Razor, or anyone authorized to act for said person, to enter the structure at the time.

3. At the time of entering the structure Michael Gordon Reynolds had a fully formed, conscious intent to commit the offense of First Degree Premeditated Murder, Aggravated Battery or Battery in the structure. The definitions of those offenses will be provided shortly.

The intent with which an act is done is an operation of the mind and, therefore, is not always capable of direct and positive proof. It may be established by circumstantial evidence like any other fact in a case.

Even though an unlawful entering of a structure is proved, if the evidence does not establish that it was done with the intent to commit First Degree Premeditated Murder, Aggravated Battery or Battery, the defendant must be found not guilty of Burglary.

"Structure' means any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that structure.

The definition of First Degree Premeditated Murder is as follows:

1. The victim, Robin Razor or Christina Razor, is dead.
2. The death was caused by the criminal act of Michael Gordon Reynolds
3. There was a premeditated killing of Robin Razor or Christina Razor.

An "act" includes a series of related actions arising from and performed pursuant to a single design or purpose.

"Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the

exact period of time that must pass between the formation of the premeditated intent to kill and the killing.

The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

The offense of Aggravated Battery is defined as follows:

1. Michael Gordon Reynolds intentionally touched or struck Robin Razor or Christina Razor against her will or intentionally caused her bodily harm.

2. Michael Gordon Reynolds in committing the battery intentionally or knowingly caused great bodily harm to Robin Razor or Christina Razor or used a deadly weapon.

A weapon is a "deadly weapon" if it is used or threatened to be used in a way likely to produce death or great bodily harm.

The offense of Battery is defined as follows:

Michael Gordon Reynolds intentionally touched or struck Robin Razor or Christina Razor against her will, or intentionally caused bodily harm to Robin or Christina Razor.

3. **The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest.**

4. **The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.**

5. **The victim of the capital felony was a person less that 12 years of age.**

The State may not rely upon a single aspect of the offense to establish more than one aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are proven beyond a reasonable doubt by a single aspect of the offense, you are to consider that as supporting only one aggravating circumstance.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

Among the mitigating circumstances you may consider, if established by the evidence are:

1. **Any aspect of the defendant's character, record, or background.**

2. **Any other circumstance of the offense.**

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

It is to the evidence introduced only in this proceeding, and in the guilt phase, that you are to look for that proof.

A reasonable doubt as to the existence of an aggravating circumstance may arise from the evidence, conflicts in the evidence or the lack of evidence.

If you have reasonable doubt as to the existence of an aggravating circumstance, you should find that it does not exist. However, if you have no reasonable doubt, you should find that the aggravating circumstance does exist and give it whatever weight you feel it should receive.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant.

If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

The sentencing recommendation of the jury as to the murder of each victim and the evidence applicable to each must be considered separately and a separate sentencing recommendation returned as to each.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

If a majority of the jury determine that Michael Gordon Reynolds should be sentenced to death, your advisory sentence will be:

> A majority of the jury, by a vote of 12, advise and recommend to the court that it impose the death penalty upon Michael Gordon Reynolds

On the other hand, if by six or more votes the jury determines that Michael Gordon Reynolds should not be sentenced to death, your advisory sentence will be:

> The jury advises and recommends to the court that it impose a sentence of life imprisonment upon Michael Gordon Reynolds without possibility of parole.

You will now retire to consider your recommendation. When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreperson and returned to court.

# APPENDIX

# E

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

Michael Gordon Reynolds,

Defendant. /

CASE NO.: 98-3341CFA

COURT APPOINTED

FILED IN OFFICE
MARYANNE MORSE
CLERK CIRCUIT COURT
00 JUL 10 AM 11:26
SEMINOLE CO. FL
BY D.C.

MOTION FOR SPECIAL VERDICT FORM
CONTAINING FINDINGS OF FACT BY THE JURY

COMES NOW The Accused, Michael Gordon Reynolds, by and through his undersigned counsel, and respectfully moves this Honorable Court to direct the jury to utilize a verdict form with specific findings as to the aggravating factors in this cause, in order to return findings of fact as to aggravating circumstances in concert with the jury's recommendation of the penalty to be imposed in this cause.

As grounds for this request, the Accused states:

1. Florida's statutory scheme for imposing a death sentence requires that the sentence be supported by findings of fact supporting the aggravating and mitigating circumstances. §921.141, Fla.Stat.; *State v. Dixon*, 283 So.2d 1 (Fla. 1973).

2. During the penalty phase, the jury is presented evidence as to aggravating and mitigating circumstances and instructed to return a recommendation based upon the jury's findings as to these circumstances.

3. After the trial is completed, this Court would then consider the jury's recommendation and impose a sentence. If the sentence is death, this Court must support the sentence with findings of facts as to the aggravating circumstances.

4. The sentence of death is then subject to appellate review in the Supreme Court of Florida. This entails a review of the findings of fact to support the sentence.

5. To aid appellate review, this Court is required to file written findings supporting the sentence. *State v. Dixon*, 283 So.2d 1 (Fla. 1973).

6. The review of this proceeding, as well as the jury's responsibility to weigh the evidence in consideration of their recommendation as to penalty, would be greatly enhanced by identification of which aggravating factors had been found to exist by the jury, beyond and to the exclusion of a reasonable doubt.

7. Specific findings of fact on a verdict form would also enhance the ability of counsel and the court to identify the issues, thereby focussing attention on what is at issue and eliminating extraneous issues, which would save time and effort.

8. Specific findings of fact on a verdict form for penalty phase would also assist the Court in the preparation of its written findings as part of sentencing.

9. Furthermore, specific findings of fact would prevent the possibility of the Court imposing penalty based upon a completely different set of aggravating factors than those considered by the jury. Such an occurrence, which is quite conceivable without special verdict forms, is inconsistent with the constitutional requirement that the court give great weight to the jury's recommendation.

10. If a death sentence is imposed, specific findings of fact would aid the Supreme Court in Florida when it reviews this case on appeal, both in determining whether error has occurred, and whether any such error is harmless or prejudicial.

11. A proposed Special Verdict Form is attached hereto.

WHEREFORE counsel for the Accused respectfully moves this Honorable Court to grant this motion and provide a specific verdict form for the jury, as described in this motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to the State Attorney's Office, 100 E. 1st Street, Sanford, Florida 32771 this 7th day of July, 2000.

Francis V. Iennaco
LeBlanc & Iennaco
Post Office Box 2245
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(407) 896-7444
Florida Bar Number: 0841994

wp51\c\discovery

# APPENDIX

# F

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY,
FLORIDA.

STATE OF FLORIDA,

Plaintiff,

V.

MICHAEL GORDON REYNOLDS

Defendant.
_____/

CASE NO.: 98-3341-CFA

FILED IN OFFICE
MARYANNE MORSE
CLERK CIRCUIT COURT
03 MAY -9 AM 11:54
SEMINOLE CO. FLA.
BY D.C.

**SENTENCING RECOMMENDATION OF THE JURY**
**COUNT II: VICTIM ROBIN RAZOR**

X A MAJORITY OF THE JURY, BY A VOTE OF 12, ADVISE AND RECOMMEND TO THE COURT THAT IT IMPOSE THE DEATH PENALTY UPON MICHAEL GORDON REYNOLDS.

_____ THE JURY ADVISES AND RECOMMENDS TO THE COURT THAT IT IMPOSE A SENTENCE OF LIFE IMPRISONMENT UPON MICHAEL GORDON REYNOLDS WITHOUT THE POSSIBILITY OF PAROLE.

Allen B Clark
FOREPERSON

DATE: 5-9-03

INSTRUCTIONS TO FOREPERSON: PLACE AN "X" AT THE BEGINNING OF THE LINE REPRESENTING THE SENTENCING RECOMMENDATION OF THE JURY AND SIGN YOUR NAME AND ENTER THE DATE.

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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA.

STATE OF FLORIDA,

Plaintiff,

V.

MICHAEL GORDON REYNOLDS

Defendant.

CASE NO.: 98-3341-CFA

FILED FOR RECORD
MARYANNE MORSE
CLERK CIRCUIT COURT
03 MAY -9 AM 11:54
SEMINOLE CO. FLA
BY D.C.

**SENTENCING RECOMMENDATION OF THE JURY**
**COUNT III: VICTIM CHRISTINA RAZOR**

X A MAJORITY OF THE JURY, BY A VOTE OF 12, ADVISE AND RECOMMEND TO THE COURT THAT IT IMPOSE THE DEATH PENALTY UPON MICHAEL GORDON REYNOLDS.

____ THE JURY ADVISES AND RECOMMENDS TO THE COURT THAT IT IMPOSE A SENTENCE OF LIFE IMPRISONMENT UPON MICHAEL GORDON REYNOLDS WITHOUT THE POSSIBILITY OF PAROLE.

Allen B Clark
FOREPERSON

DATE: 5-9-03

INSTRUCTIONS TO FOREPERSON: PLACE AN "X" AT THE BEGINNING OF THE LINE REPRESENTING THE SENTENCING RECOMMENDATION OF THE JURY AND SIGN YOUR NAME AND ENTER THE DATE.



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