No. 18-5181

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL GORDON REYNOLDS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

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

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. Respondent Incorrectly Asserts that the Florida Supreme Court's Decision in this Matter is Immune From This Court's Review.

Respondent erroneously claims that the Florida Supreme Court based its decision solely on independent state grounds and that Reynolds is not entitled to the application of *Hurst*.[1] The respondent's argument misapprehends and ignores the nature of Reynolds' argument in his petition for writ of certiorari.

A. The Florida Supreme Court's per se harmless error rule violates the United States Constitution.

The Florida Supreme Court has adopted a *per se* approach to defendants with unanimous jury recommendations, automatically denying them *Hurst* relief instead of performing the tailored harmless error review that the Constitutional requires. This results in a fundamental injustice for Reynolds and others in his position. The harmless error inquiry utilized by the Florida Supreme Court merely reviews whether the jury recommendation was unanimous and specifically emphasizes this point.[2] Since the Court's inquiry goes no further, it is simply a talismanic bright line rule that allows for a lazy dispensation of cases, rather than a thoughtful review of each case. In Reynolds' case, this error is glaringly obvious.

Reynolds' penalty phase jury recommended death by a vote of 12 to 0 for two death sentences, and did not return verdicts making any findings of fact. The only documents returned by the jury were advisory recommendations that death sentences be imposed. Although these recommendations were unanimous, they reflect nothing about the jury's findings leading to the

[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016)
[2] "[W]e emphasize the *unanimous* jury recommendations of death." *Davis v. State,* 207 So. 3d 142, 174 (Fla. 2016).

final vote.[3] A final 12 to 0 recommendation does not necessarily mean that the other findings leading to the recommendation were unanimous. Reynolds' jurors were instructed that it was their "duty to advise the court as to what punishment should be imposed," but "*[The Court] may reject your recommendation*." TR 4:737 (emphasis added).

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

Reynolds elected to not present mitigation to the jury in his case. Therefore, pursuant to *Muhammed v. State*, 782 So. 2d 343 (Fla. 2001), as a result of the jury not hearing mitigation – and being unable to perform any weighing of aggravation and mitigation – the trial court was not permitted to afford great weight to the jury recommendation, even though it was unanimous. Ironically, now, the Florida Supreme Court imbues this unanimous recommendation with significantly more weight and importance than even Florida law afforded it to uphold these death sentences. If the jury recommendation carries little to no weight under the law, then it is

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

meaningless and does not carry the full weight of a proper verdict. In spite of this, the unanimity was emphasized and used below to demonstrate that the *Hurst* error is harmless. This is a clear misapprehension and misapplication of this Court's precedent.

The Respondent attempts to argue that there is no basis to attack the Florida Supreme Court's harmless error review and attempts to intertwine this argument with a red herring regarding retroactivity. There is no retroactivity issue in this matter and the Florida Supreme Court agreed that *Hurst* would apply to Reynolds. See *Reynolds v. State*, --- So. 3d ----, 2018 WL 1633075,*2 (Fla. 2018). The issue is squarely the erroneous and unconstitional harmless error review.

This Court has defined the parameters of harmless-error rules. The Court has reiterated that the burden of proving a constitutional error harmless beyond a reasonable doubt rests with the State as the beneficiary of the error. *See, e.g., Arizona v. Fulminante,* 499 U.S. 279, 296 (1991). The Court emphasized that proper harmless-error analysis should consider the error's probable impact on the minds of an average rational jury. *See Harrington v. California*, 395 U.S. 250, 254 (1969). And, the Court made clear that harmless-error rulings must be accompanied by sufficient reasoning based on the actual record. *See, e.g., Clemons v. Mississippi*, 494 U.S. 738, 752 (1990); *Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring) (explaining that a state court "cannot fulfill its obligations of meaningful review by simply reciting the formula for harmless error").

A federal constitutional error's impact must be assessed in the context of the entire record. *See, e.g., Rose v. Clark*, 478 U.S. 570, 583 (1986). When the error's impact is unclear after the whole record is reviewed, courts should not undertake a harmless-error analysis that amounts to "unguided speculation." *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978); *see also O'Neal v.*

McAninch, 513 U.S. 432, 435 (1995) ("[T]he uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict.").

In capital cases, this Court reviews a state court's harmless-error denial of a federal constitutional claim with heightened scrutiny. *See, e.g.*, *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988). As this Court has long recognized, capital cases demand heightened standards of reliability because "[d]eath is a different kind of punishment from any other which may be imposed in this country . . . in both its severity and its finality." *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *see also Kyles v. Whitley*, 514 U.S. 419, 422 (1995) ("[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."). Accordingly, courts are forbidden from applying "harmless-error analysis in an automatic or mechanical fashion" in a capital case. *Clemons*, 494 U.S. at 753.

This Court has previously applied these standards to review harmless-error rulings of the Florida Supreme Court. *See, e.g.*, *Schneble v. Florida*, 405 U.S. 427 (1972); *Barclay v. Florida*, 463 U.S. 939 (1983); *Parker v. Dugger*, 498 U.S. 308 (1991); *Sochor*, 504 U.S. 527. The Florida Supreme Court's *per se* harmless-error rule contravenes this Court's requirement that state courts, especially in capital cases, conduct an individualized review of the record as a whole before denying federal constitutional relief on harmless-error grounds. The Florida Supreme Court's *per se* rule operates mechanically, rather than individually, to deem *Hurst* errors harmless in every case in which the advisory jury unanimously recommended death. The only real criterion for a *Hurst* error to be deemed harmless is a unanimous recommendation. In this matter, the recommendation is not a true verdict and is completely and utterly useless. To deny Reynolds relief pursuant to this bright line rule, is deny him the individualized review he deserves.

2. Respondent's Arguments Under Florida Supreme Court's Recent Plurality Decision in *Reynolds* Underscore the Need for this Court to Evaluate Under *Caldwell*.

The respondent claims that Reynolds' jury was properly instructed and that there is no *Caldwell*[4] violation. BIO at 17. Further, based on *Reynolds*[5], the respondent urges this Court to continue Florida's erroneous rejection of valid *Caldwell* claims and underscores the need for this Court to grant certiorari. The basis for the Florida Supreme Court's rejection of *Caldwell* claims is that at the time the juries were instructed, they were properly instructed according to local law. However, this argument fails to recognize and blatantly ignores the fact that this "local law," Florida's death penalty sentencing scheme, was found unconstitutional pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016). The Court's argument is that although the juries were instructed under an unconstitutional statute, the unconstitutional death sentence recommendations should continue to stand, despite their unconstitutional nature. Further, the plurality doubled-down on its pre-*Hurst* decisions summarily rejecting the applicability of *Caldwell* to Florida's capital sentencing scheme, but for the first time attempted to provide an explanation. The argument is absurdist at best and promotes a continuing arbitrary and disparate treatment between individuals sentenced to death in Florida. The biggest flaw with this argument is the failure to recognize that Florida's sentencing scheme was unconstitutional before *Hurst*.

The issue raised by Reynolds is not whether his jury was properly instructed *at the time of hiscapital trials*, but instead, whether *today* the State of Florida can now treat those advisory recommendations as mandatory and binding, when the jury was explicitly instructed otherwise. This Court, in *Hurst v. Florida*, warned against that very thing. This Court cautioned against using

[4] *Caldwell v. Mississippi*, 472 U.S. 320 (1987).
[5] *Reynolds v. State*, -- So. 3d -- 2018 WL 1633075 at *1 (Fla. 2018).

what was an advisory recommendation to conclude that the findings necessary to authorize the imposition of a death sentence had been made by the jury:

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

Hurst, 136 S. Ct. at 622; *see also Kaczmar v. Florida*, 138 S. Ct 1973 (2018) (Sotomayor, J., dissenting from the denial of certiorari) ("The resulting opinion, however, gathered the support only of a plurality, so the issue remains without definitive resolution by the Florida Supreme Court.").

An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation, the juror's inability to be merciful based upon sympathy, and what aggravating factors could be found and weighed in the sentencing calculus) cannot be used as a substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004 (1983) ("Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed."). It should be noted that the Florida Supreme Court has still not sufficiently analyzed, in a definitive majority opinion, how a defendant's pre-*Hurst* advisory jury recommendation can serve as the lynchpin for a proper *Hurst* harmless-error analysis when the advisory jury's sense of responsibility for a death sentence was systematically diminished by the design and operation of Florida's prior scheme. The Florida Supreme Court's steadfast refusal to address this point, undermines multiple federal constitutional rights, and makes this petition the ideal vehicle to clarify analytical tension in critical areas of this Court's jurisprudence.

3. Respondent erroneously claims there is no structural error.

The respondent asserts that there is no structural error in Reynolds' verdict and death sentence. *See* BIO at 31. This is incorrect. The error occurred in Reynolds' case when the jury returned none of the required findings of facts at all – let alone unanimously – and when the jury failed to return a unanimous death recommendation. Further, errors were made in Reynolds' sentencing, specifically, when the trial court considered an aggravating factor that was not supported by the evidence. Under the Sixth Amendment, Reynolds was entitled to have a jury, not a judge, weigh and evaluate the aggravating factors against the mitigation. This failure deprived Reynolds of the proper individualized sentencing required by the Constitution. Reynolds's jury returned a unanimous advisory recommendation of death, which, was not to be given great weight, as the jury did not hear any mitigation. This is does not satisfy the Eighth Amendment and his death sentence cannot stand.

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

Structural errors "are structural defects in the constitution of the trial mechanism." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). They affect "the framework within which the trial proceeds." *Id.* at 310. "Errors of this type are so intrinsically harmful as to require automatic

reversal ... without regard to their effect on the outcome." *Neder v. U.S.*, 527 U.S. 1, 7 (1999). Put another way, structural "errors require reversal without regard to the evidence in the particular case." *Rose v. Clark*, 478 U.S. 570, 577 (1986). "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any trial." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). With that in mind, the "precise reason why a particular error is not amenable to [harmless error] analysis – and thus the precise reason why the Court has deemed it structural – varies in a significant way from error to error." *Id*. at 1908. In deciding whether an error is structural, this Court has repeatedly considered whether the error undermined the reliability of the adjudicative process. *See, e.g., Neder*, 527 U.S. at 8-9 (observing that structural "errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function'" (quoting *Rose*, 478 U.S. at 577-78)). But "[t]hese categories are not rigid," *Weaver*, 137 S. Ct. at 1908, and in "a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural," *id.* (citing *Sullivan v. Louisiana*, 508 U.S. 275, 280-82 (1993)).

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

The respondent continues to argue that the findings made by the court in Reynolds' case are deemed sufficient, because it considered the aggravation and the mitigation (BIO at 31). However, these findings, were made by a judge – not a jury- in violation of Reynolds's Sixth Amendment right. "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base [Reynolds's] death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." *Hurst v. Florida*, 136 S. Ct. at 624 (2016). The respondent's arguments ignore this. Further, under Florida's capital sentencing scheme, a jury "'does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge.'" *Hurst v. Florida*, 136 S. Ct. at 622 (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)). And, the "advisory recommendation by the jury" falls short of "the necessary factual finding" required by the Sixth Amendment. *Id*. Finally, it cannot be understated that the advisory recommendation made in this case does not carry the force of a verdict, since Florida law, in this respect, understood that the jury did not make the requisite weighing of aggravation and mitigation. The recommendation is meaningless and ultimately, Mr. Reynolds was sentenced by a judge alone.

These errors undermined the reliability of the process for determining Reynolds' eligibility for the death penalty and his death sentence cannot stand. Since "the penalty of death is qualitatively different from a sentence of imprisonment, however long … there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). Simply put, the "Eighth Amendment insists upon 'reliability in the determination that death is the

appropriate punishment in a specific case.'" *Oregon v. Guzek*, 546 U.S. 517, 525 (2006) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989)). As a result, the Florida Supreme Court concluded "that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment." *Hurst v. State*, 202 So. 3d 40, 59 (Fla. 2016). Reynolds' jury never found any of the necessary elements making him death eligible and the unanimous nature of the recommendation is meaningless. As a result, Reynolds' death sentence violates the Sixth, Eighth, and Fourteenth Amendments.

CONCLUSION

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

Respectfully submitted,

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