DOCKET NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

THOMAS DEWEY POPE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

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QUESTIONS PRESENTED

1. Does the Florida Supreme Court's determination that the jury findings required by *Hurst v. Florida* and *Hurst v. State* enhance the reliability of decisions to impose death, but can only be retroactively applied to cases in which a death sentence was final after June 24, 2002 violate Due Process, the Eighth Amendment, and the Equal Protection Clause of the Fourteenth Amendment?

2. Does the Florida Supreme Court's partial retroactivity analysis concerning *Hurst* violations violate the Supremacy Clause of the United States Constitution in light of this Court's holdings in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)?

3. Do *Hurst v. Florida* and *Hurst v. State* require that *Caldwell v. Mississippi* be retrospectively applied in Florida to preserved claims?

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CITATION TO OPINIONS AND ORDERS BELOW

This proceeding was instituted as a successive motion for postconviction relief under Fla. R. Crim. P. 3.851. The Florida Supreme Court affirmed the lower court's summary denial on February 28, 2018 in *Pope v. State*, 237 So. 3d 926 (2018), which is attached to this petition as Appendix A. The September 6, 2017 order of the Circuit Court in and for Palm Beach County denying Mr. Pope's successive motion is unreported. It is reproduced in Appendix B. The Florida Supreme Court Order to Show Cause issued on January 4th, 2018 is Appendix C. The Appellant's January 24th, 2018 Response to the Order to Show Cause is attached as Appendix D. The State's February 6th, 2018 Reply to Appellant's order to Show Cause is attached as Appendix E. The February 19th, 2018 Reply to the State's Reply to Response is attached as Appendix F.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257. The Florida Supreme Court issued an opinion denying collateral relief on February 2, 2018, and indicated that any motion for rehearing containing reargument would be stricken.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

The Eighth Amendment to the Constitution of the United States provides in relevant part:

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

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Introduction

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court struck down Florida's capital sentencing procedures because those procedures authorized a judge, rather than a jury, to make the factual findings necessary for a death sentence. In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court held that in order for a capital penalty phase jury to return a death recommendation that gives the sentencing judge the power and authority to impose a death sentence, the jurors must have unanimously found all facts necessary to impose a sentence of death and unanimously agreed to the recommendation. "In requiring jury unanimity in [the statutorily required fact] findings and in [the jury's] final recommendation if death is to be imposed, [the Florida Supreme Court was] cognizant of significant benefits that will further the administration of justice." 202 So. 3d at 58.

Following *Hurst v. State*, the Florida Supreme Court issued a series of cases holding that while the unanimity requirement in *Hurst v. State* was retroactively applicable to cases in which death sentences were not final on June 24, 2002, when *Ring v. Arizona*, 536 U.S. 584 (2002) issued, it was not retroactively applicable to cases in which death sentences were final prior to June 24, 2002.

II. Factual and Procedural Background

On February 25, 1982, Mr. Pope was convicted on three counts of first degree murder for the deaths of Caesar Di Russo, Albert Preston Doranz, and Kristine A. Walters. The jury recommended life sentences for the murders of Di Russo and Doranz, and by a non-unanimous vote of 9 to 3, the death penalty for the murder of

Walters. (R. 1278). The presiding judge adopted those sentencing recommendations.

During the initial phase of pre-trial proceedings in state court, Mr. Pope was represented by Douglas McNeil, an attorney with the State Public Defender's Office. Prior to trial, Mr. McNeil withdrew and the presiding judge appointed Scott T. Eber as Special Public Defender to represent Mr. Pope for what remained of pre-trial proceedings and for trial. Following his convictions, Mr. Pope was represented in his direct appeal to the Florida Supreme Court by Special Public Defender Michael D. Gelety. On direct appeal to the Supreme Court of Florida. Mr. Pope raised the following issues: the trial court erred in allowing the video-taped deposition of witness Clarence Lagle to be presented to the jury; the evidence produced at trial was insufficient to sustain the convictions; and the trial court erred in imposing the death sentence. The Florida Supreme Court affirmed the sentences and judgments on direct appeal. *Pope v. State*, 441 So. 2d 1073 (Fla. 1983).

On September 18, 1984, Mr. Gelety filed a motion for postconviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure, seeking a new trial on grounds of ineffective assistance of trial counsel. The motion raised the following errors by trial counsel: (1) Failure to prevent the introduction of Lagle's videotaped deposition; (2) Failure to confer properly with Mr. Pope before or during trial or to prepare Mr. Pope to testify at trial; (3) Failure to object to improper comments made at trial by the court and prosecutor; (4) Failure to present testimony at trial to prove that others could have killed the three victims: (5) Failure to present testimony to prove that Di Russo had a big jewelry deal scheduled; (6) Failure to properly impeach

Susan Eckard; (7) Failure to impeach Dr. Keen Garvin, the State medical examiner; (8) Failure to object to or properly move for a mistrial when other sentencings and hearings occurred in the presence of the jury; (9) Failure to move to suppress irrelevant evidence or to prevent its introduction; (10) Improperly using the Vietnam Syndrome Defense against Mr. Pope's wishes; (11) Failure to present evidence of Mr. Pope's background during the penalty phase; and (12) Failure to request that the jury be sequestered during its deliberations.

The trial court held that except for one claim, Mr. Pope's contentions were either insufficient to state claims for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), or were specifically refuted by the record. An evidentiary hearing was set as to Mr. Pope's claim that his trial counsel was ineffective for utilizing the Vietnam Syndrome Defense against Mr. Pope's wishes.[1] Following the evidentiary hearing, the court denied this claim, finding Mr. Pope knew, understood, and concurred in his trial counsel's opinion that Dr. William Weitz's testimony regarding the Vietnam Syndrome Defense should be used during the guilt phase of the trial. The court also determined Mr. Pope was an active participant in his own trial and that his will had not been ignored by his trial counsel.

On appeal to the Florida Supreme Court, Mr. Pope raised the following issues: (1) The jury's separation during its deliberation on Mr. Pope's guilt and Mr. Eber's

[1] Earlier, the trial court held an evidentiary hearing on the issue of whether Mr. Pope's trial counsel was ineffective for failing to prevent the introduction of Lagle's videotaped deposition. The court held that Mr. Pope's trial counsel was not ineffective based upon a finding that Lagle, in fact, was unavailable at the time of trial.

failure to object to the jury's separation or to request sequestration require a new trial; (2) The trial court improperly failed to hold a full evidentiary hearing on Mr. Pope's motion for a new trial; (3) Mr. Eber failed to adequately confer with Mr. Pope before or during trial and failed to prepare Defendant to testify at trial; (4) Mr. Eber failed to object to or properly move for a mistrial when unrelated sentencings and hearings occurred in the presence of the jury; (5) Mr. Eber failed to object to improper comments made at trial by the prosecutor; (6) Mr. Eber failed to impeach Eckard; (7) Mr. Eber failed to investigate evidence or present testimony at trial to prove that others could have killed the three victims; (8) Eber failed to present evidence of mitigating circumstances during the penalty phase of the trial; (9)The trial court improperly denied (without a full hearing) the claim of ineffective assistance stemming from the Lagle videotape; (10) The trial court improperly denied Mr. Pope's motion for new trial regarding Mr. Eber's use of the Vietnam Syndrome Defense.

The Florida Supreme Court affirmed the trial court's denial of Mr. Pope's Rule 3.850 motion. *Pope v. State*, 569 So. 2d 1241 (Fla. 1990). As to the first issue, the court held that separation of the jury during deliberations (i.e., allowing the jurors to go home at night) was not fundamental error where no objection to the separation was made by Mr. Pope's counsel, Mr. Pope's right to a fair and impartial jury was safeguarded through cautionary instructions provided by the trial court, and Mr. Pope failed to make the requisite showing that the outcome of his trial was affected by counsel's failure to object. *Id.* at 1244-45. The court also affirmed the trial court's summary denial of the claims for an evidentiary hearing on the points raised in II (A-

F). As to the third issue, the court noted that the trial court, after having conducted an evidentiary hearing on the issue, found Lagle was indeed unavailable for trial. The court noted there can be no ineffective assistance claim for "stipulating to a proven fact." *Id.* at 1246. Finally, the court affirmed the trial court's finding that Mr. Pope "'knew, understood, and concurred in his trial counsel's opinion that the testimony of Dr. Weitz (concerning this defense) would be used during the defense presentation at trial.'" *Id.* at 1245. The court found Mr. Pope's knowledge and concurrence in the use of Dr. Weitz's testimony was a strategic decision to which he had agreed.

During the pendency of Mr. Pope's initial Rule 3.850 motion, volunteer counsel from the Carlton Fields Law Firm, including Alan F. Wagner, filed a petition for writ of habeas corpus (as amended) before the Florida Supreme Court alleging ineffectiveness of appellate counsel and raising the following issues: The judge and the prosecutor made prejudicial remarks to the jury, which taken as a whole, deprived Mr. Pope of fair and impartial jury consideration of his guilt or innocence. The improper comments by the judge undermined the importance of the instructions as to the law and encouraged the jury to return a verdict based on matters outside the record including comments which tended to indicate the judge's view as to the guilt of the accused or otherwise insinuated against Mr. Pope and/or his counsel. The improper comments by the prosecutor included reference to Mr. Pope's expressed preference for the death penalty, reference to Mr. Pope's demeanor while sitting at counsel table, reference to the strength of evidence presented to the grand jury,

expression of the prosecutor's personal belief in the case and his vouching for the credibility of the State's star witness. Thus the claim was that these judicial and prosecutorial comments constituted, in their cumulative effect, fundamental error mandating a new trial.

Other claims raised included: the trial court failed to provide Mr. Pope with a copy of the presentence investigation report within a reasonable time of sentencing; the sentencing process improperly encouraged the jury to compare and weigh the circumstances surrounding the deaths of the three victims; and that Mr. Pope's conviction must be reversed based on *Caldwell v. Mississippi*.[2] The Florida Supreme Court denied the petition for writ of habeas corpus. *Pope v. Wainwright,* 496 So. 2d 798 (Fla. 1986), *cert denied Pope v. Dugger*, 107 S. Ct. 1617 (1987).

On September 9, 1991 Mr. Pope filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. The District Court dismissed the petition because it was a "mixed" petition in that some of the claims were unexhausted in state court. On April 6, 1995, Mr. Pope filed a second motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850, seeking to vacate his judgment and sentence. In that motion, Mr. Pope presented the claims that the District Court had found unexhausted.[3] On December 26, 1995, the State filed its response to the Rule 3.850 motion. On that

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[2] 472 U.S. 320 (1985).

[3] Mr. Pope also presented some claims from the federal petition that had not been listed by Judge Paine as unexhausted. This issue was resolved by an Order dated April 19, 2000, dismissing certain claims in Mr. Pope's Amended Petition with prejudice as procedurally barred.

same day volunteer counsel moved to withdraw. On January 10, 1996, the Office of the Capital Collateral Representative ("CCR") filed a motion to hold the proceedings in abeyance pending resolution of the designation of counsel. On February 5, 1996, the state court denied Mr. Pope's and the CCR's motions to hold the proceedings in abeyance and ordered volunteer counsel to continue representing Mr. Pope until the court ruled on the pending 3.850 motions, at which time Mr. Wagner would be released. On February 22, 1996, Mr. Pope submitted a *pro se* motion to appoint conflict-free counsel. The state court dismissed with prejudice both Rule 3.850 motions (the one filed by volunteer counsel and the *pro se* amended motion) and denied the *pro se* motion to appoint conflict-free counsel. The state court later denied a CCR motion to reconsider the dismissal.

Mr. Pope, represented by the CCR, filed his appeal of the state court's ruling to the Florida Supreme Court on December 4, 1997. In that appeal, Mr. Pope presented the following claims: ineffective assistance of trial counsel, unconstitutionally vague jury instructions on aggravating factors and counsel's ineffectiveness in failing to adequately object, and trial court error in denying the motion to appoint conflict-free counsel and the amended motion for post-conviction relief. *See Pope v. State,* 702 So. 2d 221, 222-23 (1997). The Florida Supreme Court found Mr. Pope's claims for ineffective assistance of counsel barred as both untimely and successive. *Id.* at 223. The court also found the substantive portion of the second claim was barred since the threshold requirement that there be specific objections to the instructions at trial, and that those objections be pursued on appeal, had not been

met. *Id.* at 223-24. Finally, the court found no error as to the third claim regarding the court's denial of Mr. Pope's motion to appoint conflict-free counsel and amended motion for post-conviction relief. *Id.* at 224.

On February 19, 1999, Mr. Pope filed his Amended Petition for Writ of Habeas Corpus in the District Court. Mr. Pope moved to have the habeas petition held in abeyance pending the resolution of the third postconviction motion in state court, which motion was granted.

On February 4, 2002, three weeks before the *Ring v. Arizona* opinion, Mr. Pope filed a third motion for state post-conviction relief pursuant to Fla. R. Crim. P. 3.850, seeking to vacate his judgment and sentence. In his motion, Mr. Pope asserted two claims: he is entitled to a merits determination of previously asserted constitutional claims and to an evidentiary hearing as to collateral counsel's ineffectiveness; and the Florida capital sentencing statute, on its face and as applied, is unconstitutional under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). On April 22, 2002, the state circuit court denied Mr. Pope's motion stating, "the . . . facts do not add up to provide the Defendant with an evidentiary hearing on his claim of ineffective assistance of collateral counsel or to excuse the procedural default in this case," and because "[t]he Florida Supreme Court has rejected claims that *Apprendi v. New Jersey*, *supra*, applies to Florida's capital sentencing statute."

Thereafter, on August 21, 2002, Mr. Pope appealed the denial to the Florida Supreme Court. In that appeal, Mr. Pope presented the following claims: the trial

court erred by summarily denying the claims; Mr. Pope is entitled to an evidentiary hearing; Mr. Pope is entitled to a merits determination of previously asserted constitutional claims and to an evidentiary hearing as to collateral counsel's ineffectiveness; and Mr. Pope was sentenced to death in violation of the Sixth, Eighth, and Fourteenth Amendments because, under the Florida sentencing scheme, the factual findings required to render Mr. Pope eligible for death were made by the judge and not the jury. The Florida Supreme Court denied the motion for postconviction relief citing to Fla. R. Crim. P. 3.850(f). *Pope v. State*, 845 So. 2d 682 (Fla. 2003).

Simultaneously with the filing of the appeal of his third postconviction motion, Mr. Pope filed a second habeas corpus petition with the Florida Supreme Court. In that petition, he argued he was entitled to an evidentiary hearing as to collateral counsel's ineffectiveness in failing to properly file his initial 3.850 motion; and that he was sentenced to death in violation of the Sixth, Eighth, and Fourteenth Amendments because, under the Florida sentencing scheme, the factual findings required to render Mr. Pope eligible for death were made by the judge and not the jury in contravention of *Ring v. Arizona*. The Florida Supreme Court denied the petition in the same Order issued on his third postconviction motion. *Pope v. State*, 845 So. 2d 682 (Fla. 2003). Mr. Pope then amended his pending petition in the District Court with the claims raised in the third postconviction motion and state habeas petition.

On September 9, 2005 Mr. Pope filed a third petition for writ of habeas corpus in the Florida Supreme Court pursuant to *Crawford v. Washington*, 541 U.S. 36

(2004), The Court denied Mr. Pope's petition. *Pope v. Crosby*, 921 So. 2d 629 (Table) (Fla. 2005).

On December 8, 2008 the District Court granted partial habeas relief as to the claim if ineffective assistance of counsel at Mr. Pope's penalty phase. The State appealed this decision and the United States Court of Appeals for the Eleventh Circuit remanded the case back to the District Court for an evidentiary hearing on the ineffectiveness claim. An evidentiary hearing was held from October 17-23, 2012. In an order dated March 26th, 2013, the District Court once again granted habeas relief to Mr. Pope and ordered a new penalty phase. Once again the State appealed to the United States Court of Appeals for the Eleventh Circuit, which reversed the decision of the District Court. *Pope v. Sec., Florida DOC*, 752 F. 3d 1254 (2014). Mr. Pope filed a Petition for Certiorari with this Court, which was denied on March 23, 2015. *See Pope v. Jones*, 135 S. Ct. 1550 (2015).

III. *Hurst* Litigation and the Decision of the Florida Supreme Court

On January 10, 2017, Mr. Pope filed a successive motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.851. (C-PCR. at 3-49).[4] It moved the trial court to set aside his death sentence in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), claiming his death sentence was in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

[4] The Corrected Record on Appeal on the *Hurst* litigation below was filed on October 13, 2017 and is abbreviated herein as (C-PCR. __).

Mr. Pope also asserted that both *Hurst* decisions should be applied retroactively to him under state and federal law. In the motion Mr. Pope also emphasized the arbitrariness of using a bright line cutoff at the date of the *Ring* decision as the dividing line for relief between indistinguishable cases. Mr. Pope subsequently amended with a claim premised upon Chapter 2017-1 of the Laws of Florida, where the legislature confirmed the Florida Supreme Court's statutory construction of Fla. Stat. § 921.141. The trial court granted Mr. Pope's motion for leave to amend on May 31, 2017. Thereafter, on September 6th, 2017, the trial court denied Mr. Pope's motion. He timely appealed to the Florida Supreme Court.

The appeal was stayed pending the disposition of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), another appeal from the denial of *Hurst* relief in a pre-*Ring* death sentence case. On August 10, 2017, the Florida Supreme Court denied relief in *Hitchcock*. Thereafter, on January 4, 2018, the Florida Supreme Court subsequently ordered Mr. Pope to show cause as to why he should not be denied *Hurst* relief in light of *Hitchcock* and the *Ring* based retroactivity cutoff. Dozens of other appellants received identical orders. In response, Mr. Pope distinguished his case from *Hitchcock*, pointing out that the focus of Mr. Hitchcock's argument was solely *Hurst v. Florida* and the Sixth Amendment. Mr. Pope explained that his claim is based upon *Hurst v. State* and his right to a life sentence unless a properly-instructed jury unanimously recommends a death sentence. And as the Florida Supreme Court itself recognized in *Hurst v. State*, this right does not arise from the Sixth Amendment, *Hurst v. Florida* or *Ring v. Arizona*, rather it is a right emanating from the Florida

Constitution and the Eighth Amendment. He also raised a preserved *Caldwell v. Mississippi* issue in the context of the *Hurst* decision

On February 28, 2018, without any discussion of Mr. Pope's individual claims, the Florida Supreme Court denied relief on the basis of *Hitchcock v. State*. *See Pope v. State*, 237 So 3d. 926 (Fla. 2018):

> After reviewing Pope's response to the order to show cause, as well as the State's arguments in reply, we conclude that Pope is not entitled to relief. Pope was sentenced to death following a jury's recommendation for death by a vote of nine to three. *Pope v. State*, 441 So. 2d 1073, 1075 (Fla. 1993), *Pope v. Sec y for Dep't of Cors.*, 680 F.3d 1271, 1278. (11th Cir. 2012) Thus, *Hurst* does not apply retroactively to Pope's sentence of death. *See Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the denial of Pope's motion.
>
> The Court having carefully considered all arguments raised by Pope, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

No motion for rehearing was filed. On May 18th, 2018, Justice Thomas granted Mr. Pope's Application (No. 17A-1281) for a sixty day extension of time to July 28th, 2018 to file his petition for writ of certiorari. This petition is timely filed.

REASONS FOR GRANTING THE WRIT

I. Arbitrary reliability and partial retroactivity

The Florida Supreme Court created an arbitrary bright line cutoff, set at June 24, 2002, in its *Mosley* and *Asay* decisions.[5] This cutoff is so arbitrary as to violate the Eighth Amendment principles enunciated by this Court in *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman*, this Court found that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman*, 408 U.S. at 239-40. In separating those who are to receive the retroactive benefit of *Hurst v. Florida* and/or *Hurst v. State* from those who will not based on the Sixth Amendment decision in *Ring v. Arizona,* the line drawn operates much the same as the IQ score of 70 cutoff at issue in *Hall v. Florida*, 134 S. Ct. 1986 (2014).

In *Hurst v. Florida* this Court declared that the Sixth Amendment right to a jury trial applied to those statutorily defined facts that were necessary to authorize a death sentence. As a result, the Florida Supreme Court had to reassess Florida's capital sentencing scheme, not just what findings had been statutorily mandated as necessary to authorize a death sentence, but what was required of the jury for a reliable sentencing determination after *Hurst v. Florida* struck Florida's capital sentencing scheme as unconstitutional. *See Johnson v. Mississippi*, 486 U.S. 578, 584

[5] *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) and *Asay v. State*, 210 So. 3d 1 (Fla. 2016).

(1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case.").

On remand, in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court ruled that in a Florida capital case, the jury's sentencing recommendation at the penalty phase had to be returned unanimously. Recognizing that the role the jury had previously played was inadequate to insure a reliable, non-arbitrary result, the Florida Supreme Court identified each of the necessary components of a jury's unanimous death recommendation:

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

Hurst v. State, 202 So. 3d at 54 (emphasis added).

The Florida Supreme Court also specifically detailed why the administration of justice warranted the unanimity requirement:

> In requiring jury unanimity in these findings and in its final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice.

Hurst v. State, 202 So. 3d at 58. Reliance was placed on decisions from other courts

regarding the value of unanimity to the deliberative process, which allowed society to have confidence in the jury's fact-finding and research studies regarding the positive effect the unanimity requirement had on a jury's deliberations. According to *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty phase jury has voted unanimously in favor of the imposition of death.

The Eighth Amendment requires that a death sentence carry extra reliability in order to insure that it is not imposed arbitrarily. Heightened reliability in capital cases is a core value of the Eighth Amendment and *Furman v. Georgia*, 408 U.S. 238 (1972). The need for enhanced reliability in capital sentencing procedures has long been established as a requirement under the Eighth Amendment. *See Caldwell v. Mississippi*, 472 U.S. at 341: "Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."

Implicit in the Florida Supreme Court's recognition that requiring juror unanimity enhances the reliability of a decision imposing death is an acknowledgment that death sentences imposed without such a requirement are less reliable, and thus, do not carry the heightened reliability required under the Eighth Amendment. While the Florida Supreme Court in *Hurst v. State* found non-unanimous death recommendations were lacking in reliability, the level of unreliability is compounded in some cases by matters and issues that increase the unreliability of a particular death sentence. For example, in holding that requiring

unanimity would produce more reliable death sentences, the Florida Supreme Court acknowledged that death sentences imposed without the unanimous support of a jury lacked the requisite reliability:

> After our more recent decision in *Hurst*, 202 So. 3d 40, where we determined that a reliable penalty phase proceeding requires that "the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed," 202 So. 3d at 59, we must consider whether the unpresented mitigation evidence would have swayed one juror to make "a critical difference." *Phillips*, 608 So. 2d at 783.

Bevel v. State, 221 So. 3d 1168, 1182 (Fla. 2017).

In *Mosley v. State*, the Florida Supreme Court noted that the unanimity requirement in *Hurst v. State* carried with it "heightened protection" for a capital defendant. *Id.*, 209 So. 3d at 1278. The Florida Supreme Court also stated in *Mosley* that *Hurst v. State* had "emphasized the critical importance of a unanimous verdict." *Id.* The Court added:

> In this case, where the rule announced is of such fundamental importance, the interests of fairness and "cur[ing] **individual injustice**" compel retroactive application of *Hurst* despite the impact it will have on the administration of justice. *State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990).

Mosley v. State, 209 So. 3d at 1282 (emphasis added) . *Hurst v. State* recognized that a non-unanimous recommendation, like the one that occurred in Mr. Pope's sentencing, lacks the heightened reliability demanded by the Eighth Amendment. *See Hurst v. State*, 202 So. 3d at 59 ("the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a

defendant who stands to lose his life as a penalty.").

Throughout his appellate and collateral proceedings, Mr. Pope has pointed to numerous ways in which his sentence lacks the heightened reliability demanded by the Eighth Amendment. For example, the previous rejection of Mr. Pope's postconviction *Strickland* claims was based on the failure to show prejudice, defined as the reasonable likelihood that six jurors would vote for a life sentence. However, this definition no longer comports with the law. Post-*Hurst* Florida law now provides that if only one juror votes for a life sentence, a life sentence must be imposed. *Strickland* and *Brady* prejudice analysis requires a determination of whether confidence in the reliability of the outcome –the imposition of a death sentence – is undermined by the evidence the jury did not hear due to the *Strickland* and/or *Brady* violations. The new Florida law should be part of the evaluation of whether confidence in the reliability of the outcome is undermined without reference to an arbitrary cut-off date based on *Ring v. Arizona*.

Given that Mr. Pope's sentencing jury recommended death by a 9 to 3 majority, in light of the evidence developed in collateral proceedings that would be admissible, Mr. Pope would certainly receive a sentence of less than death. Due to the arbitrary line the Florida Supreme Court has drawn in the course of deciding *Mosley* and *Asay*, Mr. Pope's death sentence is inherently more unreliable.

Individuals in Mr. Pope's shoes, those with pre-*Ring* death sentences, are more likely to have had proceedings layered in error to the extent that the cumulative unreliability overcomes the interests the State may have in finality. Although the

State's interest in finality increases the older the case is, older cases will often have greater unreliability due to advances in science and improvements in the quality of representation in capital cases over time. Mr. Pope belongs to a class of inmates who are most likely to be deserving of relief from their unconstitutional non-unanimous "death recommendation" death sentences.

Death sentences imposed after a jury did not return unanimous findings on all facts necessary to impose a sentence of death before June 24, 2002, are just as unreliable as similar death sentences imposed after June 24, 2002. The older the death sentence, the more likely it is to be unreliable. The Florida Supreme Court made a substantive change when it required unanimity in *Hurst v. State* because of the special need for reliability in a capital case and to insure that death sentences are not imposed in an arbitrary fashion. But the manner in which this change has been extended retroactively to some death sentenced individuals but not others arbitrarily leaves intact death sentences recognized as lacking reliability.

As explained in *Hurst v. State,* the benefit of the new substantive rules is enhanced reliability. Enhancement of reliability warrants retroactive application of new substantive rules. *See Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting) ("constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied"). The changes mandated by *Hurst v. State* were specifically found to improve accuracy. The difference between an advisory death recommendation by a 9 to 3 majority vote, as in Mr. Pope's case, to the necessity of a unanimous death recommendation before a death sentence is

authorized is analogous to the difference between requiring proof by a preponderance of the evidence and requiring proof beyond a reasonable doubt.

Mr. Pope's jury made no findings at all regarding the elements necessary to allow for the imposition of a death sentence. The jury failed to find unanimously and expressly that all the aggravating factors were proven beyond a reasonable doubt, to unanimously find that the aggravators were sufficient to impose death, and unanimously find that the aggravators outweighed the mitigators. *Hurst v. State* made just this point:

> Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

202 So. 3d at 69.

This Court should also consider whether denying Mr. Pope the benefit of *Hurst v. Florida* and *Hurst v. State* demonstrates a level of capriciousness and inequality so as to violate the Equal Protection Clause. And this Court should consider whether allowing Mr. Pope's death penalty sentence to stand in spite of the recognized risk of unreliability constitutes the arbitrary exercise of governmental power that violates the Due Process Clause.

II. Federal retroactivity and the Supremacy Clause

In his January 11, 2017 state circuit court pleading, Mr. Pope pled that as a matter of federal law in light of this Court's decision in *Montgomery v. Louisiana*, 136

S. Ct. 718 (2016), the Florida courts should reject the notion of "partial retroactivity," which violates the United States and Florida Constitutions.

> Where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively. *See Montgomery*, 136 S. Ct. at 731-32 ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge."). In *Montgomery*, the petitioner initiated a state post-conviction proceeding seeking retroactive application of *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding imposition of mandatory sentences of life without parole on juveniles violates Eighth Amendment). The Louisiana Supreme Court (in contrast to what the Florida Supreme Court did in *Falcon*) held that *Miller* was not retroactive under its state retroactivity doctrines. The United States Supreme Court reversed, holding that Louisiana could not bar retroactivity under its state doctrines because the *Miller* rule was substantive and therefore Louisiana was obligated under the federal Constitution to apply it retroactively on state post-conviction review.
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> The *Hurst* decisions announced substantive rules that under the federal Constitution may not be denied to Florida defendants on state retroactivity grounds. In *Hurst v. State*, the Florida Supreme Court announced two substantive rules. First, the Court held that the Sixth Amendment requires that a jury decide whether the aggravating factors have been proven beyond a reasonable doubt, whether they are sufficient to impose the death penalty, and whether they are outweighed by the mitigating factors. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a particular juvenile is or is not a person "whose crimes reflect the transient immaturity of youth" is substantive, not procedural).
>
> Second, the Court held that the Eighth Amendment requires the jury's fact- finding during the penalty phase to be unanimous. The Court explained that the unanimity rule is required to implement the constitutional mandate

> that the death penalty be reserved for a narrow class of the worst offenders, and assures that the determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Hurst v. State*, 202 So. 3d at 60-61 ("By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law."); *see also Perry v. State*, 2016 WL 6036982, at *7 ("We also held [in *Hurst*] that, based on Florida's requirement for unanimity in jury verdicts and on the Eighth Amendment to the United States Constitution, a jury's ultimate recommendation of the death sentence must be unanimous."). As the Court made clear, the function of the unanimity rule is to ensure that Florida's overall capital system complies with the Eighth Amendment. See *Id.* at *47-48. That makes the rule substantive, *see Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"), even though its subject has to do with the method by which a jury makes decisions. *See Montgomery*, 136 S. Ct. at 735 (noting that existence of state flexibility in determining method by which to enforce constitutional rule does not convert substantive rule into procedural one).
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> Because the rules announced in the *Hurst* decisions are substantive within the meaning of federal law, this Court has a duty under the federal Constitution to apply them retroactively to Petitioner under Florida's retroactivity doctrines.

C-PCR 26-29 (Fla. R. Crim. P. 3.851 Motion) (fn. 9 omitted concerning *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004)).

The state circuit court's September 6, 2017 order denying relief failed to make mention of *Montgomery*, or federal retroactivity, and relied on the Florida Supreme Court's opinions in *Asay v. State* and *Hitchcock v. State* for the denial of retroactive application of *Hurst v. State* in Mr. Pope's case. On appeal, the Florida Supreme

Court issued an order on January 4, 2018 requiring that "Appellant shall show cause on or before January 24, 2018, why the trial court's order should not be affirmed in light of this Court's decision *Hitchcock v. State*, SC17-445. The response shall be limited to no more than 20 pages."

The *Hitchcock* opinion also made no mention of *Montgomery*, and due to the limitations on Mr. Pope's response, the *Montgomery* argument concerning federal retroactivity was noted only by reference to the argument below; "Mr. Pope argued [in his Fla. R. Crim. P. 3.851 motion] both *Hurst* decisions should apply retroactively under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), the equitable fundamental fairness doctrine, and **as a matter of federal law**." Response to Order to Show Cause at 4-5. (Appendix C) (emphasis added)

In *Montgomery*, 136 S. Ct. at 731-32, this Court held that the Supremacy Clause of the United States Constitution requires the state courts to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis. In that case, a Louisiana state prisoner filed a claim in state court seeking the retroactive application of the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment.) The state court denied the prisoner's claim on the ground that *Miller* was not retroactive as a matter of state retroactivity law. *Montgomery*, 136 S. Ct. at 727. This Court reversed, holding that because the *Miller* rule was substantive as a matter of federal law, the state court was obligated to apply it

retroactively. *See id.* at 732-34.

Montgomery v. Louisiana clarified that the Supremacy Clause requires state courts to apply substantive rules retroactively notwithstanding the result under a state-law analysis. *Montgomery*, 136 S. Ct. at 728-29 ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, *the Constitution* requires state collateral review courts to give retroactive effect to that rule.") (emphasis added). Thus, *Montgomery* held, "[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id.* at 731-32.

Importantly for purposes of *Hurst* retroactivity analysis, this Court found the *Miller* rule substantive in *Montgomery* even though the rule had "a procedural component." *Id.* at 734. *Miller* did "not categorically bar a penalty for a class of offenders or type of crime – as, for example, [the Court] did in *Roper* or *Graham*." *Miller*, 567 U.S. at 483. Instead, "it mandate[d] only that a sentence follow a certain process – considering an offender's youth and attendant characteristics – before imposing a particular penalty." *Id.* Despite *Miller's* "procedural" requirements, the Court in *Montgomery* warned against "conflat[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the manner of determining the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (first alteration added). The Court explained, "[t]here are instances in which a substantive change in the law must

be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," *id.* at 735, and that the necessary procedures do not "transform substantive rules into procedural ones," *id.* In *Miller*, the decision "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*." *Id.* at 734.

Hurst v. Florida explained that under Florida law, the factual predicates necessary for the imposition of a death sentences were: (1) the existences of particular aggravating circumstances; (2) that those particular aggravating circumstances were "sufficient" to justify the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst* held that those determinations must be made by juries. Those decisions are as substantive as whether a juvenile is incorrigible. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule). Thus, in *Montgomery*, these requirements amounted to an "instance [ ] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish." *Id.* at 735.

After remand, the Florida Supreme Court described substantive provisions it found to be required by the Eighth Amendment. *Hurst v. State*, 202 So. 3d at 48-69. Those provisions represent the Florida Supreme Court's view on the substantive requirements of the United States Constitution when it adjudicated Mr. Pope's case

in the proceedings below.

Hurst v. State held not only that the requisite jury findings must be made beyond a reasonable doubt, but also that juror unanimity is necessary for compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders and that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Hurst v. State*, 202 So. 3d at 60-61. The function of the unanimity rule is to insure that Florida's death-sentencing scheme complies with the Eighth Amendment and to "achieve the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law." *Id.* As a matter of federal retroactivity law, this is also substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"). And it remains substantive even though the subject concerns the method by which the jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (noting that state's ability to determine the method of enforcing constitutional rule does not convert a rule from substantive to procedural).

In *Welch*, the Court addressed the retroactivity of the constitutional rule articulated in *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). In *Johnson*, the Court held that a federal statute that allowed sentencing enhancement was unconstitutional. *Id.* at 2556. *Welch* held that *Johnson's* ruling was substantive because it "affected the reach of the underlying statute rather than the judicial

procedures by which the statute is applied" – therefore it must be applied retroactively. *Welch*, 136 S. Ct. at 1265. The Court emphasized that its determination whether a constitutional rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function," i.e., whether the new rule alters only the procedures used to obtain the conviction, or alters instead the class of persons the law punishes. *Id.* at 1266.

The same reasoning applies in the *Hurst* context. The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt and that the Eighth Amendment requirement of jury unanimity in fact-finding are substantive constitutional rules as a matter of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on "the judge-sentencing scheme. *Id.* The "unanimous finding of aggravating factors and [of] the facts that 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*," *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the very purpose of the rules is to place certain individuals beyond the state's power to punish by death. Such rules are substantive, *see Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes."). and

Montgomery requires the states to impose them retroactively.

Hurst retroactivity is not undermined by *Schriro v. Summerlin*, 542 U.S. at 364, where this Court held that *Ring* was not retroactive in a federal habeas case. In *Ring*, the Arizona statute permitted a death sentence to be imposed upon a finding of fact that at least one aggravating factor existed. *Summerlin* did not review a statute, like Florida's, that required the jury not only to conduct the fact-finding regarding the aggravators, but also fact-finding on whether the aggravators were sufficient to impose death and whether the death penalty was an appropriate sentence. *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred in *Hurst* where this Court held that it was unconstitutional for a judge alone to find that "sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal citation omitted).

Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a reasonable-doubt standard in addition to the jury trial right, and this Court has always regarded proof-beyond-a reasonable-doubt decisions as substantive. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (explaining that "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect."); *see also Powell v. Delaware*, 153 A.3d 69 (Del. 2016)

(holding *Hurst* retroactive under Delaware's state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof").

"Under the Supremacy Clause of the Constitution . . . . [w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Montgomery*, 136 S. Ct. at 731-32. Because the outcome-determinative rights articulated in *Hurst v. Florida* and *Hurst v. State* are substantive, the Florida Supreme Court was not at liberty to foreclose the retroactive application to Mr. Pope's case.

III. *Caldwell v. Mississippi*

The Florida Supreme Court has persistently held that *Caldwell* is inapplicable to Florida. If a bias in favor of a death recommendation increases when the jury's sense of responsibility is diminished, removing the basis for that bias increases the likelihood that additional jurors will vote for a life sentence. The likelihood increases even more when the jury receives accurate instructions as to each juror's power and authority to dispense mercy and preclude a death sentence.

Mr. Pope's jury, which voted for death by a non-unanimous 9 to 3 vote, was repeatedly misinformed as to its responsibility in the sentencing process. The issue was raised in Mr. Pope's original state habeas petition, which argued that his death

sentence had been imposed in violation of *Caldwell*.[6] The claim was that his conviction must be reversed and the death sentence vacated because the judge and the prosecutor repeatedly trivialized the jury's solemn role in sentencing by urging the jury to not view itself as the final arbiter of punishment and by inviting the jury to recommend death because the judge was there to "correct" that recommendation if necessary based on *Caldwell v. Mississippi*.

The Florida Supreme Court denied Mr. Pope's petition for writ of habeas corpus court holding that "even if these comments were found to have the effect complained of, this 'error' is not so fundamental as to require a new trial."[7] *Pope v. Wainwright,* 496 So. 2d 798, 802 (Fla. 1986), *cert. denied,* 107 S. Ct. 1617 (1987). This finding is now in tatters when analyzed through the lens of *Hurst v. Florida* and *Hurst v. State*.

In *Caldwell*, this Court held it is constitutionally impermissible to rest a death sentence on a determination made by a jury that was "led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29.[8] As this Court explained in *Caldwell*, "there are

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[6] State habeas petition at 24.

[7] "The statements complained of by Mr. Pope were not objected to at trial. Appellate counsel cannot be said to be "ineffective for failing to raise issues which he was procedurally precluded from raising, unless such errors are fundamental in nature . . . ." *Pope v. Wainwright*, 496 So. 2d at 801 (citations omitted).

[8] The Florida Supreme Court has previously rejected *Caldwell* challenges, including Mr. Pope's in his state habeas petition in 1986, in the context of "proper jury instructions" given in the pre-*Hurst* sentencing scheme. Recently a dissent to the denial of certiorari by three justices of this Court in *Truehill v. Florida*, 138 S. Ct. 3 (2017) noted that "capital defendants in Florida have raised an important Eighth

specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Id.* at 330.

Because the jury's sense of responsibility was improperly diminished in *Caldwell*, this Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). In Mr. Pope's case, his jury's 9 -3 recommendation for death is incurably unreliable.

Mr. Pope's case exemplifies the presumption of *Caldwell* error where his jury received inaccurate instructions as to their ultimate responsibility during sentencing and as to their power to dispense mercy and preclude a death sentence. The jury in

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Amendment challenge to their death sentences that the Florida Supreme Court has failed to address." (Sotomayor, J., dissenting, joined by Breyer and Ginsburg, JJ.)

In response the Florida Supreme Court has rejected any review through the lens of *Hurst* litigation. *See Reynolds v. State*, ---So. 3d--- 2018 WL 1633075 at *9 (Fla. April 5, 2018) ("[T]here 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.") (emphasis added); *but see Reynolds v. State*, 2018 WL 1633075, at *15-*17 (Pariente, J. dissenting). The Florida Supreme Court majority points responsibility for its failure to find *Caldwell* violations on this Court's prior holdings. The majority ignores the preservation of *Caldwell* issues and punishes defense counsel's anticipation of changes in interpretation of constitutional law.

Mr. Pope's case was precluded from instruction about exercising mercy and was instructed that its recommendation was advisory and could be returned on the basis of a simple majority vote, thus, the weight of the sentencing decision was taken off the jury's shoulders and the proceeding all but insured an unreliable result.

In both its *Hurst* and *Caldwell* analyses the Florida Supreme Court has demonstrated that it is unprepared to find that it is constitutionally impermissible to execute a person whose death sentence was imposed in proceedings now recognized as producing constitutionally unreliable results. This Court must now consider whether the death sentence imposed on Mr. Pope constitutes cruel and unusual punishment in violation of the Eighth Amendment where Florida law no longer permits a death sentence to be imposed unless the jury unanimously consents, where Mr. Pope's jury did not unanimously find the required facts to impose a death sentence, and where the jury instructions improperly diminished the jury's sense of responsibility.

In the wake of *Hurst v. Florida* and the resulting new Florida law, a jury's **unanimous** death recommendation is necessary in order to authorize the imposition of a death sentence. Mr. Pope preserved his *Caldwell* claim at the first opportunity afforded him in state habeas and the Florida Supreme Court's 1986 rationale for denying the claim is in direct conflict with *Hurst v. Florida*, *Hurst v. State* and the new Florida death penalty statute:

> Under Mississippi law it is the jury who makes the ultimate decision as to the appropriateness of the defendant's death. *See* Miss. Code Ann. § 99-19-101 (Supp.1985). Whereas, in Florida it is the trial judge who

is the ultimate "sentencer." *See Thompson v. State,* 456 So. 2d 444 (Fla.1984). **The jury's recommendation, although an integral part of Florida's capital sentencing scheme, is merely advisory**. *See* § 921.141(2), Fla. Stat. (1985). This scheme has been upheld against constitutional challenge. *See Proffitt v. Florida,* 428 U.S. 242, 96 S. Ct. 2960, 49 L.Ed.2d 913 (1976).

In the instant case, petitioner argues that repeated reference by the trial judge and prosecutor to the advisory nature of the jury's recommendation overly trivialized the jury's role and encouraged them to recommend death. We cannot agree. We find nothing erroneous about informing the jury of the limits of its sentencing responsibility, as long as the significance of its recommendation is adequately stressed. **It would be unreasonable to prohibit the trial court or the state from attempting to relieve some of the anxiety felt by jurors impaneled in a first-degree murder trial. We perceive no eighth amendment requirement that a jury whose role is to advise the trial court on the appropriate sentence should be made to feel it bears the same degree of responsibility as that borne by a "true sentencing jury." Informing a jury of its advisory function does not unreasonably diminish the jury's sense of responsibility.** Certainly the reliability of the jury's recommendation is in no way undermined by such non-misleading and accurate information. *See Caldwell,* 105 S. Ct. 2646 (O'Connor, J., concurring). Further, if such information should lead the jury to "shift its sense of responsibility" to the trial court, the trial court, unlike an appellate court, is well-suited to make the initial determination on the appropriateness of the death sentence.

Although the jury in this case was told a number of times throughout the trial that its role was only advisory and the trial judge had ultimate responsibility for the sentence imposed, the jury's role was adequately portrayed and they were in no way misled as to the importance of their role. In his final instructions to the jury, the trial judge stressed the significance of the jury's recommendation and the seriousness of the decision they were being asked to make. Therefore, the comments complained of did not deprive the petitioner of a fair determination of the appropriateness of his death. Since there is no merit to Pope's argument that

> the death sentence was imposed in a fundamentally unfair manner, appellate counsel was not ineffective for failing to raise this point on appeal. *See Middleton v. State,* 465 So. 2d 1218, 1226 (Fla.1985) (statements by trial court and prosecutor that jury's role in sentencing was advisory only with final decision resting with court are factually and legally correct; even if such comments were improper they must be objected to at trial as they are not so improper as to constitute fundamental error).

Pope v. Wainwright, 496 So. 2d at 804 (emphasis added). After *Hurst v. Florida*, the jury's penalty phase verdict is no longer advisory and the jury bears the responsibility for a resulting death sentence. Additionally, the individual jurors must know that each has the power to exercise mercy by simply voting against a death recommendation. Mr. Pope's jury, who heard faulty evidence and instructions, returned an advisory death recommendation by a non-unanimous 9 to 3 verdict. The Florida Supreme Court refuses to acknowledge that the preserved *Caldwell* claim originally presented in state habeas in 1986 is material in light of *Hurst v. State* and that Mr. Pope is not receiving what the Eighth Amendment requires.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Florida Supreme Court in this case.

Respectfully submitted,

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