No. _____

IN THE

Supreme Court of the United States

NORMAN M. GRIM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Can a violation of *Hurst v. Florida*, 136 S. Ct. 616 (2016), be ruled harmless beyond a reasonable doubt, based solely on a pre-*Hurst* "advisory" jury's unanimous vote to recommend the death penalty to the judge, in a case where the advisory jurors heard none of the available mitigating evidence?

2. Does the Florida Supreme Court's per se harmless-error rule for *Hurst* claims violate the Eighth Amendment in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), by relying exclusively on the number of advisory jurors who voted to recommend the death penalty to the judge, where those jurors were repeatedly instructed that the judge alone, notwithstanding the recommendation of the majority of jurors, would make the findings of fact required for a death sentence under state law and bear ultimate responsibility for a death sentence?

3. Does the Florida Supreme Court's per se harmless-error rule for *Hurst* claims, which relies entirely on pre-*Hurst* advisory jury recommendations that did not fulfill Sixth Amendment requirements as to any element of a Florida death sentence, contradict *Sullivan v. Louisiana*, 508 U.S. 275 (1993), and *Neder v. United States*, 527 U.S. 1 (1999)?

4. Where a defendant proffers uncontested evidence and requests a hearing on whether the State could meet its burden of establishing that a *Hurst* violation was harmless beyond a reasonable doubt, does the Florida Supreme Court's summary application of its per se harmless-error rule impermissibly shift the burden of proof and contravene this Court's admonitions that harmless-error review cannot be "automatic or mechanical," *Barclay v. Florida*, 463 U.S. 939, 958 (1983), must consider the whole record, *see Rose v. Clark*, 478 U.S. 570, 583 (1986), and must be followed by "a detailed explanation based on the record," *Clemons v. Mississippi*, 494 U.S. 738, 740 (1990)?

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INDEX TO APPENDIX[1]

[1] Voluminous attachments to the circuit court's May 9, 2017 order (Exhibit 4), and Petitioner's brief responding to the Florida Supreme Court's order to show cause (Exhibit 6), are omitted from this appendix, but are publicly accessible on the Florida Supreme Court's electronic docket (http:// http://onlinedocketssc.flcourts.org/), and can also be provided by the undersigned upon request.

TABLE OF AUTHORITIES

Cases:

Secondary Source:

PARTIES TO THE PROCEEDINGS

Petitioner Norman M. Grim, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court. Respondent, the State of Florida, was the appellee.

DECISION BELOW

The decision of the Florida Supreme Court is reported at 244 So. 3d 147 (Fla. 2018), and reprinted in the Appendix (App.) at 1a.

JURISDICTION

The judgment of the Florida Supreme Court was entered on March 29, 2018. App. 1a. The Florida Supreme Court denied Petitioner's motion for rehearing on May 22, 2018. App. 14a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

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

The Eighth Amendment provides:

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

The Fourteenth Amendment provides, in relevant part:

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

STATEMENT OF THE CASE

I. Introduction

Florida's prior capital sentencing scheme systematically diminished, among other things, the importance of presenting mitigating evidence to juries. No matter what mitigation was presented to an "advisory" jury under Florida's prior scheme, the judge, not the jury, made the findings of fact required for a death sentence, including the existence and weight of any available mitigation. This improper

allocation of fact-finding authority to the judge is why this Court held in *Hurst v. Florida*, 136 S. Ct. 616 (2016), that Florida's scheme violated the Sixth Amendment.

In light of the diminished impact of mitigation presentations to juries under Florida's unconstitutional scheme, Petitioner Norman Grim made the reasonable choice during his pre-*Hurst* trial to decline to present painful and private mitigation to advisory jurors who did not even have the power to make mitigation findings. Instead, after the State presented aggravating evidence and the advisory jury unanimously recommended death, Petitioner's mitigation was presented to the judge alone, who then made the findings of fact required for a death sentence, including the existence of significant mitigation based on evidence the advisory jury never heard.

Despite the fact that the advisory jury's unanimous death recommendation was made after those jurors heard none of the available mitigation in Petitioner's case, the Florida Supreme Court held that the *Hurst* violation at Petitioner's trial was per se harmless beyond a reasonable doubt—*based solely on the advisory jury's unanimous recommendation*. The Florida Supreme Court explained that it could apply its per se rule and exclusively rely on Petitioner's unanimous advisory jury recommendation for its *Hurst* harmless-error analysis, even though Petitioner's advisory jury heard no mitigation before making its recommendation, because Petitioner had validly waived the right to present mitigation to the advisory jury.

As this petition explains, a writ of certiorari should be granted because the Florida Supreme Court's decision contravened the Constitution in four ways:

First, the state court's harmless-error analysis violated the Eighth and Fourteenth Amendments by relying entirely on the vote of an advisory jury that did not hear or consider any of Petitioner's available mitigation, which was presented to the judge alone. Even if Petitioner validly waived his right to present mitigation to an advisory jury with no fact-finding authority, he could not have validly waived a right that was not even recognized in Florida at the time of his pre-*Hurst* trial: the right to present mitigation to a jury that could actually make mitigation findings.

Second, the Florida Supreme Court's application of its per se rule to Petitioner contravened the Eighth Amendment in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), by relying entirely on the number of advisory jurors who voted to recommend the death penalty to the judge after being repeatedly instructed that the judge alone, notwithstanding the recommendation of the majority of jurors, would make the findings of fact required for a death sentence under state law and bear ultimate responsibility for a death sentence.

Third, the Florida Supreme Court's application of its per se rule contradicted *Sullivan v. Louisiana*, 508 U.S. 275 (1993), and *Neder v. United States*, 527 U.S. 1 (1999), which established that a constitutional error infecting a jury verdict may only be held harmless where the jury's verdict is valid as to at least one element, because pre-*Hurst* advisory jury recommendations did not meet Sixth Amendment requirements as to any element of a Florida death sentence.

Fourth, by applying its per se rule and ignoring Petitioner's uncontested evidentiary proffer and request for a hearing on whether the State could meet its

burden of proving that the *Hurst* error in his case was harmless beyond a reasonable doubt, the Florida Supreme Court impermissibly shifted the burden of proof and flouted this Court's admonitions that harmless-error review cannot be "automatic or mechanical," *Barclay v. Florida*, 463 U.S. 939, 958 (1983), must consider the whole record, *see Rose v. Clark*, 478 U.S. 570, 583 (1986), and must be followed by "a detailed explanation based on the record," *Clemons v. Mississippi*, 494 U.S. 738, 740 (1990).

On at least four occasions, Justices of this Court have expressed grave concerns regarding the constitutionality of the Florida Supreme Court's harmless-error denial of *Hurst* claims. *See Kaczmar v. Florida*, 138 S. Ct. 1973, 1973-74 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *Guardado v. Jones*, 138 S. Ct. 1131, 1132-34 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *Middleton v. Florida*, 138 S. Ct. 829, 829-30 (2018) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari); *Truehill v. Florida*, 138 S. Ct. 3, 3 (2017) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari).

This Court should grant a writ of certiorari in Petitioner's case to decide these issues now. Petitioner has, for years, consistently challenged the constitutionality of the scheme that was finally invalidated in *Hurst*, including raising claims under *Ring v. Arizona*, 536 U.S. 466 (2002), which were rejected in state and federal court. The Florida Supreme Court has determined that *Hurst* applies retroactively to Petitioner under state law. Yet Petitioner still cannot benefit from *Hurst* because of the Florida Supreme Court's per se harmless-error rule. Unless this Court intervenes, the Florida Supreme Court will continue to mechanically apply its per se rule to deny *Hurst* relief

to dozens of Florida capital defendants, in sole reliance on the votes of pre-*Hurst* advisory juries, even in cases where the advisory jury heard none of the available mitigation. This Court should grant review and ultimately reverse the decision below.

II. Factual and Procedural Background[2]

A. Conviction and Advisory Jury Recommendation

In 2000, a Florida jury found Petitioner guilty of murder. *Grim v. State*, 841 So. 2d 455, 465 (Fla. 2003). Florida law at the time afforded him the right to an "advisory jury" for the penalty phase. Under Florida's then-scheme, the advisory jury would be comprised of the same jurors who had convicted Petitioner at the guilt phase, but those jurors would not make any findings of fact at the penalty phase. The advisory jurors would instead consider the evidence presented by the parties, and then vote on whether to recommend either the death penalty or life imprisonment to the judge. The jury's generalized recommendation would be determined by a majority vote and would not be accompanied by any findings of fact. After receiving the jury's recommendation, the trial judge alone would make the findings of fact required to impose a death sentence under Florida law, and the judge alone would render the final sentencing determination, notwithstanding the advisory jury recommendation. *See Hurst v. Florida*, 136 S. Ct. 616, 620 (2016) (describing Florida's prior scheme).

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[2] Citations to "Voir Dire Tr." in this petition refer to the penalty-phase voir dire transcript, which is available in Record on Appeal ("ROA") Vol. I. Citations to "Penalty Tr." refer to the transcript of the penalty-phase, which is available in ROA Vols. I-V. Citations to "Sentencing Tr." refer to the sentencing transcript. Citations to "Spencer Tr." refer to the transcript of the judge-only mitigation presentation pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993). Citations to "R-" refer to documents in the record on appeal contained outside of the above volumes.

Petitioner exercised his right to an advisory jury under Florida's then-law. However, Petitioner instructed his attorney not to present any mitigation to the advisory jurors, whom he knew were statutorily precluded from making the findings of fact in support of a death sentence anyway. Counsel followed Petitioner's instructions and presented no mitigation to the advisory jury. Penalty. Tr. 1-34, 712.

Before and during the penalty proceeding, the advisory jurors were reminded of their role in Florida's capital sentencing scheme. The advisory jurors were told that they would not be making any findings of fact or even supplying an explanation for their generalized recommendation of death or life in prison. And the jurors were repeatedly informed during the penalty phase—by the court, the prosecutor, and defense counsel—of the "advisory" nature of their "recommendation." Voir Dire Tr. at 79, 80, 81; Sentencing Tr. At 809; Penalty Tr. 872-74, 897-903, 904-07, 911-914.

At the conclusion of the penalty-phase proceeding, the advisory jury voted unanimously to recommend the death penalty. *See Grim*, 841 So. 2d at 459. The written recommendation stated, in full: "A majority of the jury, by a vote of 12 to 0, advise and recommend to the Court that it impose the death penalty upon Norman Mearle Grim, Jr." R-296. The advisory jury's recommendation contained no further reasoning; nor is any other information regarding the jury's thinking in the record.

B. Mitigation Presented to the Judge Alone

After the advisory jury delivered its recommendation, the judge appointed special counsel to investigate and present mitigating evidence to the judge alone. Penalty Tr. 917-18; *see also Spencer v. State*, 615 So. 2d 688 (Fla. 1993). At the judge-

only mitigation hearing, Petitioner's special counsel presented evidence showing, among other things, that Petitioner was raised in a broken home with an alcoholic father who physically abused him and eventually abandoned the family. Petitioner subsequently developed his own substance abuse problems, anger issues, and mental health challenges as an adult, including suicidal tendencies. The evidence also showed that, in a connection with a previous trial, a doctor had diagnosed Petitioner with mental health problems and concluded that Petitioner could not have formed specific criminal intent in the case. Petitioner's marriage fell apart shortly before the capital offense in part due to these psychological and substance abuse issues. Despite these challenges, the evidence presented also revealed that Petitioner served in the United States Navy and attended college, later filling a leadership role at a construction company. His former supervisors testified that he had an excellent work ethic and had no disciplinary issues at his job. *See* Spencer Tr. at 564-615.

C. Judge's Fact Finding and Death Sentence

After receiving the advisory jury's recommendation, and subsequently hearing the mitigation evidence outside the jury's presence, the judge then carried out his traditional fact-finding role under Florida's then-law, deciding: (1) the specific aggravating factors that had been proven beyond a reasonable doubt, (2) whether that aggravation was "sufficient" to justify the death penalty, and (3) whether the aggravation was outweighed by the mitigation. *See* Fla. Stat. § 921.141(3) (1996).

The judge found three aggravating factors: (1) Petitioner was on parole for a Texas burglary at the time of the capital offense, based on the Texas judgment of

conviction introduced by the State, (2) Petitioner was previously convicted in Florida of crimes involving the use or threat of violence, based on the State's introduction of judgments convicting him of kidnapping, burglary, robbery, and assault in the 1980s, and (3) Petitioner was engaged in the commission of attempt of a sexual battery at the time of the offense. R-309-12.[3]

Based on the mitigating evidence presented at the judge-only hearing, the judge found 11 mitigating circumstances applicable: Petitioner (1) was under the influence of extreme mental or emotional disturbance; (2) had impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law; (3) experienced parental abuse; (4) was a reliable employee; (5) had a history of alcoholism and substance abuse; (6) had mental problems; (7) had a long-term lack of necessary psychiatric care; (8) suffered great situational stress leading up to the offenses and has difficulty dealing with stress conditions; (9) made errors of judgment when under stress, even though he had redeeming qualities; (10) had been a model inmate while awaiting trial and could be a good inmate in the future; and (11) entered prison at a young age. R-312-18; Sentencing Tr. at 626-35.

Despite finding those mitigating circumstances, the judge found as fact that the mitigation did not outweigh the aggravation. Based on his fact finding, the judge sentenced Petitioner to death. R-318-20.

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[3] As explained below, Petitioner proffered uncontested evidence with his *Hurst* motion below, which he argued could have been presented at a constitutional penalty proceeding to show that the circumstances underlying these prior Texas and Florida convictions were not as aggravated as the State's introduction of the judgments of conviction alone likely suggested to the advisory jury and judge at his capital trial.

D. Direct Appeal, State Post-Conviction, and Federal Habeas

The Florida Supreme Court affirmed Petitioner's conviction and death sentence on direct appeal. *Grim v. State*, 841 So. 2d at 465. In 2004, Petitioner filed a motion for state post-conviction relief, arguing, among other things, that Florida's capital sentencing scheme was unconstitutional under *Ring v. Arizona*, 536 U.S. 466 (2002). The Florida Supreme Court affirmed the denial of Petitioner's motion, including the rejection of his *Ring* claim. *Grim v. State*, 971 So. 2d 85 (2007).

In 2011, the United States District Court for the Northern District of Florida denied Petitioner's request for federal habeas relief under 28 U.S.C. § 2254. *Grim v. Buss*, 2011 WL 1299930 (N.D. Fla. Mar. 31, 2011). The district court rejected Petitioner's arguments under *Ring*, holding that Florida's capital sentencing scheme did not violate *Ring* or the Sixth Amendment. *Id.* at *65. The Eleventh Circuit affirmed. *Grim v. Sec'y, Fla. Dep't of Corrs.*, 705 F. 3d 1284, 1289 (11th Cir. 2013).

E. *Hurst* Litigation

1. Petitioner's State *Hurst* Motion and Evidentiary Proffer

In January 2016, this Court held in *Hurst* that Florida's capital sentencing scheme violated the Sixth Amendment because it allocated fact-finding authority to the judge, rather than the jury. 136 S. Ct. at 622-24. In June 2016, Petitioner sought *Hurst* relief by filing a post-conviction motion in the state circuit court. He argued that his death sentence should be vacated because: (1) he was sentenced under the same scheme that *Hurst* ruled unconstitutional; (2) the Florida Supreme Court had

already applied *Hurst* retroactively to death sentences in the same posture as his on collateral review; and (3) the harmless-error doctrine did not apply.

With respect to harmless error, Petitioner argued that the State could not meet its burden of showing beyond a reasonable doubt that the *Hurst* error had no impact on his death sentence. The advisory jury's unanimous recommendation, Petitioner explained, could not be determinative of a harmless-error inquiry, consistent with the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, because even though his advisory jury unanimously recommended the death penalty, the record does not establish whether the jury would have made the binding findings of fact required for a death sentence in a constitutional proceeding, particularly given this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and the advisory jury's diminished sense of responsibility for a death sentence pre-*Hurst*.

If there was doubt as to harmless error, Petitioner asked the state court to hold an evidentiary hearing on whether the State could meet its burden of establishing that the *Hurst* error had no impact on his death sentence. In support of that request, Petitioner proffered evidence that he could present to rebut any attempt by the State to show that the *Hurst* error in his case was harmless.

Petitioner submitted records and newly-obtained declarations from multiple sources, including from attorneys who had represented him in prior felony cases that were used as aggravation at his capital trial, from a psychological expert who had evaluated his mental health, and from several other witnesses, which Petitioner explained could have been presented by to a jury at a constitutional penalty

proceeding to diminish the weight of the aggravation. App. 119a-153a. For instance, this evidence could have convinced the jury that the circumstances underlying Petitioner's prior Texas and Florida convictions were not as aggravated as the State's introduction of the judgments of conviction alone suggested.

Defense counsel declined to present such challenges to the State's aggravation, Petitioner explained, because Florida's prior capital sentencing scheme did not even allow the advisory jury to make any findings regarding the aggravation. Petitioner had also instructed counsel not to present mitigation to the advisory jury in part because pre-*Hurst* juries were not empowered to make any findings regarding mitigation. Without the *Hurst* error, Petitioner explained, his evidence showed that his decisions and counsel's entire approach to the penalty phase could have been different and produced a sentence less than death. R. 29-56.

2. State Circuit Court's Order Denying *Hurst* Relief

In May 2017, the circuit court denied Petitioner's *Hurst* motion. App. 19a-32a. The court agreed that *Hurst* applies retroactively to Petitioner under Florida Supreme Court precedent, *id.* at 24a, but held that the *Hurst* error in his case was harmless in light of the advisory jury's unanimous death recommendation, *id.* at 27a.

The court's harmless-error analysis was based on a per se rule first articulated by the Florida Supreme Court in *Davis v. State*, 207 So. 3d 142 (Fla. 2016). Under that per se rule, the Florida Supreme Court holds *Hurst* errors harmless in every case in which the pre-*Hurst* advisory jury recommended the death penalty by a vote of 12 to 0, rather than a majority vote of 11 to 1; 10 to 2; 9 to 3; 8 to 4; or 7 to 5. Although

in some cases the Florida Supreme Court mentions additional factors in the course of its harmless-error analysis, the advisory jury vote always controls the outcome. In reviewing dozens of cases, the court has never held a *Hurst* violation harmful in a case with a unanimous advisory jury recommendation, and the court has never held a *Hurst* violation harmless in a split-vote advisory jury case. *See* App. 154a-163a.[4]

The circuit court did not discuss Petitioner's proffer, stating only that a harmless-error hearing on the *Hurst* error in his case was "unnecessary." *Id.* at 19a.

3. Florida Supreme Court's Order to Show Cause

The Florida Supreme Court ordered Petitioner to show cause why the denial of *Hurst* relief should not be affirmed based on the per se rule first articulated in *Davis*. App. 17a. In response, Petitioner argued that the per se harmless-error rule

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[4] In addition to applying the Florida Supreme Court's per se rule, the circuit court offered three additional reasons supporting harmlessness: (1) aggravating factors were established at Petitioner's penalty phase based on the introduction of his prior judgments of conviction, and those same aggravating factors would have been found without the *Hurst* error, *id.* at 25a-27a; (2) the fact that the advisory jury heard no mitigation is irrelevant to a harmless-error analysis because Petitioner instructed his attorney not to present mitigation to the advisory jury, *id.* at 28a-31a; and (3) the trial judge reasonably determined that the aggravating factors outweighed the mitigation presented to him after the jury's dismissal, *id.* at 31a-32a.

Petitioner disputes, and could say much about, the validity of the "additional" reasons the circuit court provided for its harmless-error ruling. However, because, as explained below, the Florida Supreme Court summarily applied its per se rule without adopting any of the circuit court's additional reasoning, the circuit court's "additional" analysis is not before this Court now. Moreover, as also explained below, although Florida's courts sometimes mention such additional factors in the course of a *Hurst* harmless-error analysis, the Florida Supreme Court's per se rule is always the dispositive factor. No Florida court has ever held a *Hurst* violation harmful in a case with a unanimous advisory jury recommendation, and no Florida court has ever held a *Hurst* violation harmless in a split-vote advisory jury case. *See* App. 154a-163a.

for *Hurst* claims violated the United States Constitution, both facially and as applied to his specific case. App. 34a-64a, 86a-99a.

As applied, Petitioner argued that the per se rule violated the Eighth and Fourteenth Amendments by relying entirely on the vote of an advisory jury that did not hear or consider any of the available mitigation, which was presented to the judge alone. Moreover, Petitioner asserted that, by applying the per se rule and ignoring his uncontested proffer and request for a hearing on whether the State could meet its burden of proving that the *Hurst* error in his case was harmless beyond a reasonable doubt, the circuit court had impermissibly shifted the burden of proof and ignored this Court's admonitions that harmless-error review cannot be "automatic or mechanical," *Barclay v. Florida*, 463 U.S. 939, 958 (1983), must consider the whole record, *see Rose v. Clark*, 478 U.S. 570, 583 (1986), and must be followed by "a detailed explanation based on the record," *Clemons v. Mississippi*, 494 U.S. 738, 740 (1990).

Petitioner further argued that, on its face, the Florida Supreme Court's per se rule is unconstitutional because it violates (1) the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), by relying entirely on the vote of an advisory jury that was repeatedly instructed that the judge, not the jury, would make the binding findings of fact necessary for a death sentence and bear ultimate responsibility for a death sentence; and (2) the Sixth Amendment under *Sullivan v. Louisiana*, 508 U.S. 275 (1993), and *Neder v. United States*, 527 U.S. 1 (1999), which established that constitutional error infecting a jury verdict can be harmless only if the jury's decision is valid as to at least one element, because, as *Hurst* itself explained, Florida's pre-

Hurst advisory jury recommendations did not satisfy Sixth Amendment requirements as to any element of a Florida death sentence.

F. Florida Supreme Court's Decision Below

On March 29, 2018, the Florida Supreme Court affirmed the denial of *Hurst* relief based solely on its per se harmless error rule. App. 1a-13a; *Grim v. State*, 244 So. 3d 147, 148 (Fla. 2018). The Florida Supreme Court agreed that Petitioner's death sentence violated *Hurst* and that *Hurst* was retroactive to his case, but held the *Hurst* error harmless based exclusively on the advisory jury's unanimous recommendation. App. 3a-4a; *Grim*, 244 So. 3d at 147-48. The Florida Supreme Court noted that it "has consistently relied on *Davis* to deny *Hurst* relief to defendants that have received a unanimous jury recommendation of death," and "Grim is among those defendants who received a unanimous jury recommendation of death," and found "his arguments do not compel departing from our precedent." App. 3a-4a; *Grim*, 244 So. 3d at 148.

In a footnote, the Florida Supreme Court stated that "[t]he fact that Grim declined to present mitigation to the jury during the penalty phase has no bearing" on the applicability of the per se rule because "Grim'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." App. 4a; *Grim*, 244 So. 3d at 148 n.1 (internal quotation omitted).

The Florida Supreme Court did not discuss any of Petitioner's federal constitutional arguments, or address whether a hearing on harmless error was warranted based on Petitioner's uncontested evidentiary proffer.

Justice Pariente dissented on the ground that, notwithstanding the advisory jury's unanimous recommendation of death, she believed that the *Hurst* error cannot be harmless in this case because "the jury was not presented with any evidence of the significant mitigation . . . which the trial judge subsequently heard, before making its recommendation." App. 5a; *Grim*, 244 So. 3d at 148. Justice Pariente noted the significant mitigation evidence that was never presented to Petitioner's advisory jury. App. 7a-8a; *Grim*, 244 So. 3d at 149-50. She found that the "jury in Grim's case was left with no choice but to recommend death because they did not hear any evidence of mitigation." App. 12a; *Grim*, 244 So. 3d at 152. "Thus," she concluded, "the jury's unanimous recommendation for death in Grim's case is unreliable and cannot support the conclusion that the *Hurst* error is harmless beyond a reasonable doubt." *Id.*

REASONS FOR GRANTING THE WRIT

I. The Florida Supreme Court's Harmless-Error Denial of *Hurst* Relief Exceeded Constitutional Boundaries by Relying Entirely on the Vote of an Advisory Jury that Did Not Hear Any of the Available Mitigation

This Court should grant a writ of certiorari to address whether the Florida Supreme Court's application of its per se harmless-error rule to deny *Hurst* relief Petitioner's case, which relied exclusively on the unanimous vote of Petitioner's pre-*Hurst* advisory jury to "recommend" the death penalty to the judge, violated the Constitution given that significant mitigation evidence existed and was presented to the judge, but was never heard or considered by the advisory jury.

As Justice Pariente emphasized in her dissent, a *Hurst* error cannot be harmless based solely on the vote of a pre-*Hurst* advisory jury where mitigating

evidence existed but was not presented to the jury. App 12a; *Grim*, 244 So. 3d at 151-52. The Florida Supreme Court's decision to uphold Petitioner's death sentence on harmless-error grounds based on the vote of his advisory jury, despite the fact that no mitigation was presented to that advisory jury, does not meet the standards of reliability the Constitution requires in capital cases.[5]

A. The Constitution Requires Sentencers in Capital Cases to Hear and Consider Available Mitigation

This Court has often emphasized that the Constitution requires capital sentences to hear, consider, and give full effect to mitigating evidence. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 42 (2009) ("the Constitution requires that the sentencer in capital cases must be permitted to consider any relevant mitigating factor") (internal quote omitted). This stems from "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 321 (1989) (O'Connor, J., concurring) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987)).

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[5] As discussed below, to the extent that the Florida Supreme Court's decision relied upon Petitioner's purported waiver of his right to present mitigation to a jury, the decision is unsound because even if Petitioner validly waived his right to present mitigation to a pre-*Hurst* advisory jury, he could not at that time have validly waived the right to present mitigation to a constitutional fact-finding jury—the subject of the harmless-error ruling at issue here—because that right was not recognized in Florida at the time of his pre-*Hurst* trial. At a minimum, Petitioner is entitled to factual exploration of the circumstances of the waiver and whether they constituted a valid prospective waiver of all future *Hurst* rights. *See infra*, Sections I(D), IV(A).

The Eighth and Fourteenth Amendments mandate that judges and juries be allowed to give independent weight to any evidence of a defendant's character, record, and background, as well as any circumstances of the offense, that might justify a penalty less than death. Where a jury is impeded from considering available mitigation, the jury's decision does not meet the standards of reliability and individualized consideration imposed by the Eighth and Fourteenth Amendments, and thus cannot sustain the death sentence. *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Lockett v. Ohio*, 438 U.S. 586, 608-09 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 110-17 (1982); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987); *Penry*, 492 U.S. at 328; *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263-64 (2007); *Brewer v. Quarterman*, 550 U.S. 286, 294-96 (2007); *Porter*, 558 U.S. at 42.

B. Decisions by Capital Juries that Heard None of the Available Mitigation Cannot be Dispositive of Harmless-Error Analysis

Because the Constitution requires that capital juries be permitted to hear and consider any relevant mitigating evidence, the decision of a jury that heard none of the available mitigation in a case cannot be dispositive of a harmless-error analysis regarding a separate constitutional error, such as a *Hurst* violation.

In *Chapman v. California*, this Court defined "harmless" constitutional errors as those errors which had no reasonable possibility of contributing to the result, and "in the setting of a particular case are so unimportant and insignificant that they may, *consistent with the Federal Constitution*, be deemed harmless." 386 U.S. 18, 22 (1967) (emphasis added). The harmfulness of a constitutional violation must be assessed on a case-by-case basis in the context of the entire proceeding. *Id.* The

beyond-a-reasonable-doubt standard this Court has said is applicable to harmless-error rules is satisfied when, in light of the record as a whole, a court can conclude there is no reasonable probability the error contributed to the result. *Id.* at 22, 24.

By its terms, *Chapman* requires a review of the record as a whole and restricts the permissible grounds for harmless-error determinations to those "consistent with the Federal Constitution." *Id.* at 22. As explained above, decisions made by jurors who were impeded from considering mitigation fail to satisfy the standards of reliability and individualized consideration required by the Eighth and Fourteenth Amendments. Accordingly, such jury decisions plainly cannot serve as the lynchpin of a constitutional harmless-error analysis regarding a separate constitutional error, such as a *Hurst* violation, at the penalty proceeding. Using a mitigation-blind jury decision as the dispositive factor in a *Hurst* harmless-error analysis would not be "consistent with the Federal Constitution," as *Chapman* requires.

C. The Florida Supreme Court's Harmless-Error Analysis Violated the Eighth and Fourteenth Amendments by Relying Entirely on the Vote of an Advisory Jury that Heard None of the Available Mitigation, Which Was Presented to the Trial Judge Alone

The Florida Supreme Court's *Hurst* harmless-error analysis in Petitioner's case violated the Constitution by relying entirely on the vote of an advisory jury that did not hear any of the available mitigation. At the judge-only mitigation hearing, defense counsel presented evidence that Petitioner had suffered child abuse, substance abuse, and a broken home, and that he had nonetheless grown to serve in the United States Navy, attend college, and become a valued employee. Mitigating evidence presented to the trial judge also showed that Petitioner faced mental health

challenges and the dissolution of his marriage in the period leading up to the offense. Based on that evidence, the trial judge found 11 mitigating circumstances applicable in Petitioner's case. But none of this mitigation was ever presented to or considered by the advisory jury that recommended the death penalty to the judge.

Despite the fact that Petitioner's advisory jury heard no mitigating evidence, the Florida Supreme Court applied its per se harmless-error rule for *Hurst* claims, relying exclusively on the unanimous vote of the advisory jury in holding the *Hurst* error harmless. In light of *Hurst* and this Court's Eighth and Fourteenth Amendment precedent regarding capital mitigation, the Florida Supreme Court's decision does not meet the standards of reliability the Constitution requires. Under *Hurst*, the jury must make the findings of fact as to each element of a death sentence under Florida law, including the existence and weight of any mitigation. As Justice Pariente observed, "it is clear that a jury not apprised of mitigating evidence cannot properly make all of the requisite findings of fact required to constitutionally impose death—namely, that the aggravation outweighs the mitigation and, further, that death is an appropriate sentence. App. 11a; *Grim*, 244 So. 3d at 151. The Florida Supreme Court wrongly substituted the judge's fact finding regarding mitigation to find harmless the constitutional error in the jury failing to make any mitigation findings.

If the Florida Supreme Court's decision stands, Petitioner will never have the opportunity to present mitigation to a jury with a constitutional fact-finding role, even though the powerful impact of mitigation on meaningful jury proceedings is well

documented.[6] The result would be a "process that accords no significance to relevant facets of the character and record of the individual offender" and that subjects Petitioner to the "blind infliction" of the death penalty, *Woodson*, 428 U.S. at 303-04.

D. Petitioner Could Not Have Validly Waived the Right to Present Mitigation to a Fact-Finding Jury Because that Right Was Unknown to Him and Not Recognized by Florida's Courts at the Time of the Purported Waiver

The Florida Supreme Court's confusion regarding the effect of a defendant's waiver of mitigation in an unconstitutional jury proceeding, on that defendant's rights under *Hurst*, provide further justification for certiorari review in this case.

In a footnote, the Florida Supreme Court discounted concerns regarding its exclusive reliance on a vote taken by advisory jurors who heard none of the available mitigation by explaining that Petitioner had validly waived his right to present mitigation to the jury. App. 4a; *Grim*, 244 So. 3d at 148 n.1. What the Florida Supreme Court failed to recognize, however, is that even assuming that Petitioner validly waived his right to present mitigation to the *advisory jury*—a jury that would not be able to make any findings of fact regarding the mitigation—he could not have knowingly, intelligently, and voluntarily waived a right to present mitigation to a *fact-finding* jury, because the right to jury fact finding at capital sentencing was neither known to him nor recognized by Florida's courts at the time of his trial.

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[6] *See*, *e.g.*, Michelle E. Barnett, Stanley L. Brodsky & Cali Manning Davis, When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials, 22 Behav. Sci. & the L. 751,764 (2004).

In *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), this Court reaffirmed that a defendant cannot voluntarily, knowingly, and intelligently waive a federal constitutional right that was not recognized by the state courts at the time of the purported waiver. Here, although Petitioner had the right, under Florida's unconstitutional scheme, to present mitigation to an advisory jury with no fact-finding role, he did not have the right during his pre-*Hurst* trial to present mitigation to a jury that was constitutionally instructed to find the facts, including the facts regarding mitigation, required to support a death sentence under state law. Therefore, even if Petitioner's waiver of the former right was valid, as the Florida Supreme Court concluded, Petitioner could not have validly waived the latter right because no such right existed in Florida pre-*Hurst*.[7]

II. The Florida Supreme Court's Per Se Harmless-Error Rule for *Hurst* Claims Contravenes the Eighth Amendment Under *Caldwell* By Relying Entirely on the Vote of an Advisory Jury Whose Sense of Responsibility for a Death Sentence was Systematically Diminished

Particularly given the absence of any mitigation presentation to the jury in Petitioner's case, this Court should grant a writ of certiorari to address whether the Florida Supreme Court's per se harmless-error rule for *Hurst* violations contravenes the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

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[7] The issue of "prospective" waivers of *Hurst* rights under *Halbert* and related precedent is currently pending before this Court in a petition for a writ of certiorari filed by Jeffrey Fisher of Stanford Law School and David Cole of the American Civil Liberties Union. *Rodgers v. Florida*, No. 18-113 (petition filed July 23, 2018); *see also Hutchinson v. Florida*, No. 18-5377 (petition filed July 19, 2018) (raising same issue).

On at least four occasions, Justices of this Court have called for review of the intersection between *Hurst* and *Caldwell* in Florida, specifically as it relates to the Florida Supreme Court's per se denial of *Hurst* relief on harmless-error grounds. *See, e.g.*, *Kaczmar v. Florida*, 138 S. Ct. 1973, 1973-74 (2018) (Sotomayor, J., dissenting from denial of certiorari); *Guardado v. Jones*, 138 S. Ct. 1131, 1132-34 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *Middleton v. Florida*, 138 S. Ct. 829, 829-30 (2018) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from denial of certiorari); *Truehill v. Florida*, 138 S. Ct. 3, 3 (2017) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari). This case provides an ideal vehicle for this Court to finally address the intersection between *Hurst* and *Caldwell* in Florida, given the lack of any mitigation presentation to Petitioner's advisory jury.

A. The Florida Supreme Court's *Hurst* Harmless-Error Rule Relies Entirely on Jury Decisions Infected with *Caldwell* Error

In *Caldwell*, this Court emphasized that it "has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task," and the Court has found unconstitutional under the Eighth Amendment comments that "minimize the jury's sense of responsibility for determining the appropriateness of death." *See* 472 U.S. at 341. The Florida Supreme Court's per se harmless-error rule for *Hurst* claims violates the Eighth Amendment by relying entirely on an advisory jury recommendation rendered by jurors whose sense of responsibility for a death sentence was diminished by the trial court's repeated instructions that the jury would be conducting no fact-finding, the jury's role was advisory, and the judge would ultimately be responsible for a death sentence..

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

In the decades between *Caldwell* and *Hurst*, the Florida Supreme Court rejected numerous *Caldwell*-based challenges to Florida's pre-*Hurst* jury instructions based on the assumption that Florida's capital sentencing scheme was constitutional. *See, e.g.*, *Pope v. Wainwright*, 496 So. 2d 798 (Fla. 1986); *Combs v. State*, 525 So. 2d 853, 856 (Fla. 1998); *Davis v. State*, 136 So. 3d 1169, 1201 (Fla. 2014).

Hurst fundamentally undermined the Florida Supreme Court's *Caldwell* precedent. In light of *Hurst*, the rationale underlying the Florida Supreme Court's prior rejection of *Caldwell* challenges—that Florida's "advisory" jury scheme was constitutional—is no longer valid. *Hurst* held that Florida's capital sentencing

scheme was *not* constitutional, and that juries in that scheme were *not* afforded their constitutionally required role as fact finders. Given *Hurst*, it is now clear that Florida's advisory juries were misinformed as to their constitutionally mandated role in determining a death sentence. Advisory jurors were unconstitutionally told that they need *not* make the findings of fact in order for a death sentence to be validly imposed. The pre-*Hurst* instructions thereby "improperly described the role assigned to the jury," in violation of *Caldwell*. *Dugger v. Adams*, 489 U.S. 401, 407 (1989).

Throughout Petitioner's penalty phase, the advisory jurors were reminded by the court, the prosecutor, and defense counsel, that their sentencing recommendation—life or death—was "advisory"; that it would not be accompanied by findings of fact or any other explanation for the recommendation; and that the final decision regarding the death penalty rested with the judge. *See* Voir Dire Tr. at 79, 80, 81; Sentencing Tr. at 809; Penalty Tr. 872-74, 897-903, 904-07, 911-914.

The Florida Supreme Court's total reliance on the advisory jury's recommendation, without considering the jury's diminished sense of responsibility for the death sentence, violated *Caldwell*. Petitioner's advisory jurors were repeatedly instructed by the court they would not be making any of the findings of fact that could lead to a death sentence, that their recommendation was advisory, and that the final sentencing decision and ultimate responsibility for a death sentence rested solely with the judge. Given that the jury was led to believe it was not ultimately responsible for the imposition of Petitioner's death sentence, the Florida Supreme Court's per se rule cannot be squared with the Eighth Amendment. No court can be certain beyond

a reasonable doubt in this case that a jury would have made the same unanimous *recommendation* absent the *Hurst* error. A court certainly cannot be sure beyond a reasonable doubt that a jury that properly grasped its critical role in determining a death sentence would have unanimously found all of the elements for the death penalty satisfied, especially given the lack of any mitigation presentation. A jury that properly understood the gravity of its fact-finding role could have been substantially affected by the extensive mitigation presented to the judge in Petitioner's case.

The Florida Supreme Court's rule does not even allow for meaningful examination of the record for *Caldwell* issues. Without any grounding in the record of a specific case, the per se rule cannot permissibly predict that a jury with full awareness of the gravity of its role in the capital sentencing process would have unanimously found or rejected any specific mitigators in a proceeding comporting with constitutional requirements. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988) (holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about jury's vote); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (same). The Florida Supreme Court's failure to consider Petitioner's mitigation in its harmless-error analysis in this case is also inconsistent with *Parker v. Dugger*, where this Court rejected the state supreme court's cursory harmless-error analysis in jury-override cases. 498 U.S. 308, 320 (1991) ("What the Florida Supreme Court could not do, but what it did, was to ignore evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings.").

The Florida Supreme Court's application of its per se rule is also at odds with federal appeals court decisions holding that *Caldwell* violations must be assessed in light of the entire record. *See, e.g.*, *Cordova v. Collens*, 953 F.2d 167, 173 (5th Cir. 1992); *Rodden v. Delo*, 143 F.3d 441, 445 (8th Cir. 1998); *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997). In contrast to these federal decisions, the Florida Supreme Court's per se rule disallows meaningful consideration of factors relevant to an actual *Caldwell* analysis.

B. The Florida Supreme Court's Decision in *Reynolds* Provides Further Justification for Granting Review Here

Shortly after deciding Petitioner's appeal, in which the Florida Supreme Court failed to acknowledge or address his *Caldwell* arguments, a plurality of the Florida Supreme Court attempted for the first time to meaningfully address the intersection of *Hurst* and *Caldwell* in *Reynolds v. State*, No. SC17-793, 2018 WL 1633075 (Fla. Apr. 5, 2018). In *Reynolds*, which, like Petitioner's case, involved a unanimous advisory jury recommendation followed by a judge-only mitigation presentation, the Florida Supreme Court plurality refused to cede any ground regarding its pre-*Hurst* decisions rejecting any applicability of *Caldwell* to Florida's capital sentencing scheme. The court reasoned that, under *Romano v. Oklahoma*, 512 U.S. 1 (1994), *Hurst* has no bearing on whether *Caldwell* was violated because Florida's pre-*Hurst* jury instructions accurately described Florida's capital sentencing scheme *at the time*. *Reynolds*, 2018 WL 1633075, at *10-12. But the plurality failed to recognized that Florida's prior scheme was *not* constitutional before *Hurst*—it was always unconstitutional, as recognized in *Hurst*—and this makes *Romano* inapplicable.

Justice Sotomayor observed in a recent dissent from the denial of certiorari that *Reynolds* "gathered the support only of a plurality," so the issue of whether the Florida Supreme Court's *Hurst* harmless-error rule contravenes *Caldwell* "remains without definitive resolution by the Florida Supreme Court." *Kaczmar*, 138 S. Ct. at 1973. The Florida Supreme Court has still not sufficiently analyzed in a majority opinion how a defendant's pre-*Hurst* advisory jury recommendation can serve as the keystone for a proper *Hurst* harmless-error analysis given that the jury's sense of responsibility for a death sentence was systematically diminished.

The Florida Supreme Court's decision in *Reynolds* demonstrates that it has no convincing response to the concerns expressed by the Justices of this Court in *Kaczmar*, 138 S. Ct. at 1973-74, *Guardado*, 138 S. Ct. 1131, *Middleton*, 138 S. Ct. 829, and *Truehill*, 138 S. Ct. 3, and therefore provides an additional justification for the grant of certiorari review in Petitioner's case on the question of *Caldwell*'s applicability to pre-*Hurst* death sentences.

III. The Florida Supreme Court's *Hurst* Harmless-Error Rule Violates the Sixth Amendment Under *Sullivan* and *Neder* by Relying Entirely on the Vote of an Advisory Jury that Was Unconstitutional Under *Hurst*

Especially in light of the jury's inability to consider the available mitigation in Petitioner's case, this Court should settle whether the Florida Supreme Court's per se harmless-error rule for *Hurst* violations oversteps the Sixth Amendment under *Sullivan v. Louisiana*, 508 U.S. 275 (1993), and *Neder v. United States*, 527 U.S. 1 (1999), by relying entirely on the vote of an advisory jury recommendation that *Hurst* itself explained was unconstitutional. As Justice Sotomayor observed, the Florida

Supreme Court's harmless-error rule for *Hurst* violations impermissibly "transforms those advisory jury recommendations into binding findings of fact." *Guardado*, 138 S. Ct. at 1133-34. Review of the rule is therefore called for under *Sullivan* and *Neder*.

The error in *Sullivan* was the trial court's defective instruction to the jury regarding the requirement that each element of the offense must be found beyond a reasonable doubt—an error that this Court found affected all of the jury's findings. *Sullivan*, 508 U.S. at 277. Justice Scalia's opinion for the unanimous Court held that, even though the jury had rendered a decision on each of the elements of the offense, the trial court's improper instruction on the beyond-a-reasonable-doubt standard "vitiate[] *all* the jury's findings" and meant, for purposes of harmless-error review, that "there has been no jury verdict within the meaning of the Sixth Amendment." *Id.* at 280-81. As a result, "the entire premise of *Chapman* review is simply absent," *id.* at 280, because such review would necessarily require determination of "the basis on which the jury *actually rested* its verdict," *id.* at 279 (internal quotation omitted).[8]

The Florida Supreme Court's per se rule harmless-error rule for *Hurst* claims presents the question of whether *Chapman* and this Court's other harmless-error precedents permit Florida courts in capital cases to rest harmless-error rulings

[8] Although the constitutional error in *Sullivan* was held by this Court to be *incapable* of any harmless-error review, Petitioner does not similarly argue that *Hurst* errors are "structural" and immune from a constitutional harmlessness analysis. Rather, for the reasons explained in this section, Petitioner contends that the Florida Supreme Court cannot, consistent with *Sullivan*, rely exclusively on conducting *Hurst* harmless-error review on an advisory jury decision that does not comply with Sixth Amendment as to any element of a Florida death sentence.

entirely on the votes of advisory jurors whose ultimate decision, like the jury's decision in *Sullivan*, did not constitute a "verdict" under the Sixth Amendment.

Florida's pre-*Hurst* advisory jury recommendations are no more verdicts under the Sixth Amendment than the jury findings in *Sullivan*. This Court held in *Sullivan* that the jury's findings did not constitute a verdict that could form the basis for a harmless-error ruling because the trial court's failure to properly instruct the jury on the beyond-a-reasonable-doubt standard negated all the jury's findings. *Id.* at 281. Florida's advisory juries were also given a defective instruction, which impacted all the elements for a death sentence under Florida law. As this Court recognized in *Hurst*, Florida juries were improperly instructed that it was the duty of the trial judge, not the jury, to make findings of fact. Florida's improper jury instructions did not only "vitiate *all* the jury's findings," *id.*, they resulted in no jury findings at all.

Neder v. United States, 527 U.S. 1 (1999), confirms this reading of *Sullivan*. In *Neder*, the constitutional error was a jury instruction that omitted a *single* element of the offense. *Id.* at 8. This Court distinguished that error from the error in *Sullivan*, which was a defective reasonable-doubt instruction on *all* of the elements of the offense. *See id.* at 10-11 ("[T]he jury-instruction error here did not vitiate *all* the jury's findings."). Unlike in *Sullivan*, where there was no remaining constitutionally valid verdict to subject to harmless-error analysis, the Court in *Neder* held that the remainder of an "incomplete" verdict, where the instructions were defective as to only one of several elements, could be reviewed for harmless error. *Id.*

Hurst errors are like the error in *Sullivan*, not *Neder*. Florida's advisory juries rendered *no* findings of fact, more akin to the vitiation of *all* of the jury's findings in *Sullivan*, rather than the omission of only a single finding, as in *Neder*.

Sullivan instructs that where there is no verdict within the meaning of the Sixth Amendment, "[t]here is no *object*, so to speak, upon which harmless-error scrutiny can operate." *Id.* The Florida Supreme Court's *Hurst* harmless-error rule contradicts that principle. The rule relies on the unconstitutional vote of the advisory jury. This Court held in *Hurst* that those juries conducted no valid fact finding within the meaning of the Sixth Amendment. Under *Sullivan* and *Neder*, the Florida Supreme Court's per se rule cannot be constitutional.

IV. By Applying its Per Se Rule Without Considering Petitioner's Proffer and Request for a Hearing, the Florida Supreme Court Impermissibly Shifted the Burden of Proof and Violated This Court's Prohibition Against "Automatic or Mechanical" Harmless-Error Review

Further supporting certiorari review in this case is the Florida Supreme Court's summary application of its per se harmless-error rule without addressing or even acknowledging either the evidence Petitioner proffered with his post-conviction motion, or his request for a hearing on whether the State can meet its burden of proving that the *Hurst* error in his specific case was harmless beyond a reasonable doubt. By applying its per se rule and ignoring Petitioner's uncontested evidentiary proffer, the Florida Supreme Court impermissibly shifted the burden of proof and flouted this Court's admonitions that harmless-error review cannot be "automatic or mechanical," *Barclay v. Florida*, 463 U.S. 939, 958 (1983), must consider the whole

record, *see Rose v. Clark*, 478 U.S. 570, 583 (1986), and must be followed by "a detailed explanation based on the record," *Clemons v. Mississippi*, 494 U.S. 738, 740 (1990).

A. The Florida Supreme Court Failed to Consider Petitioner's Uncontested Proffer and Request for a Hearing

In his *Hurst* litigation in the state circuit court, Petitioner argued that the State could not meet its burden of showing beyond a reasonable doubt that the *Hurst* error had no impact on his death sentence. If there was any doubt as to whether the *Hurst* error was harmless in his case, Petitioner maintained, the state court should hold an evidentiary hearing at which the State could attempt to meet its burden.

Petitioner proffered significant evidence that he could present at a hearing to rebut an attempt by the State to show that the *Hurst* error in his case was harmless. Petitioner submitted newly-obtained declarations from multiple sources, including from attorneys who had represented him in prior felony cases that were used as aggravation at his capital trial, from a psychological expert who had evaluated his mental health, and from several other witnesses, which Petitioner explained could have been presented by to a jury at a constitutional penalty phase to diminish the weight of the aggravation in the minds of the jury. App. 119a-153a.

This evidence could have been presented at a constitutional penalty proceeding to undermine the State's aggravation, even assuming that Petitioner had validly waived his right to present mitigation. For instance, the proffered evidence could have convinced the jury that the circumstances underlying his Texas and Florida convictions were not as aggravated as the judgments of conviction alone suggested.

Defense counsel declined to present such challenges to the State's aggravation during his pre-*Hurst* trial, Petitioner explained, because Florida's prior capital sentencing scheme did not even allow the advisory jury to make any findings regarding the aggravation. For the same reason, Petitioner had also declined to present mitigation to the advisory jury—because pre-*Hurst* juries were not empowered to make any findings regarding mitigation. But without the *Hurst* error, Petitioner explained, he could show at a hearing that his decisions, and counsel's entire approach to the penalty phase, could have been different and produced a sentence less than death without the *Hurst* error.

The circuit court did not discuss Petitioner's proffer, stating only that a harmless-error hearing on the *Hurst* error in his case was "unnecessary." App. 19a. The Florida Supreme Court's opinion did not acknowledge Petitioner's proffer or his request for a hearing. App. 1a-13a; *Grim*, 244 So. 3d at 147-48.

B. This Court Has Imposed Boundaries on State Courts' Use of Harmless-Error Rules to Deny Federal Constitutional Claims in Capital Cases

The United States Constitution imposes limits on a state court's use of a harmless-error rule to reject a federal constitutional claim. Whether a state court has exceeded constitutional boundaries in the denial of a federal claim on harmless-error grounds "is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967).

In *Chapman*, this Court defined "harmless" constitutional errors as those which "*in the setting of a particular case* are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." *Id.* at 22 (emphasis added). *Chapman* requires that the harmfulness of a constitutional violation be assessed on a case-by-case basis in the context of the entire proceeding. *Id.* The beyond-a-reasonable-doubt standard applicable to harmless-error analysis is only satisfied when, in light of a review of the whole record, there is no reasonable probability the error contributed to the result. *Id.* at 22, 24.

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

When a constitutional error's impact is unclear after the whole record is reviewed, courts should not perform harmless-error analysis that amounts to "unguided speculation." *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978); *see also*

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

In capital cases, this Court reviews a state court's harmless-error denial of a federal constitutional claim with heightened scrutiny. *See, e.g.*, *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988). As this Court has long recognized, capital cases demand heightened standards of reliability because "[d]eath is a different kind of punishment from any other which may be imposed in this country . . . in both its severity and its finality." *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (internal quotation omitted). Courts are forbidden from applying "harmless-error analysis in an automatic or mechanical fashion." *Clemons*, 494 U.S. at 753 (quoting *Barclay*, 463 U.S. at 958).

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

C. The Florida Supreme Court Impermissibly Relieved the State of Its Burden of Proof and Violated This Court's Prohibition Against "Automatic or Mechanical" Harmless-Error Review

In light of the above standards, the Florida Supreme Court's summary application of its per se *Hurst* harmless-error rule, without even acknowledging the evidence Petitioner proffered or his request for a hearing, impermissibly relieved the State of its burden of proof and violated the prohibition against "automatic or mechanical" harmless-error review.

The Florida Supreme Court's application of its per se rule in this case effectively relieved the State of its burden to prove the *Hurst* error harmless beyond

a reasonable doubt, as this Court's precedents require. *See Fulminante*, 499 U.S. at 297 ("Our review of the record leads us to conclude that the State has failed to meet its burden of establishing, beyond a reasonable doubt, that the [error] was harmless error."). In *Hurst v. State*, 202 So. 3d 40, 68 (Fla. 2016), the Florida Supreme Court itself acknowledged that "the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the] death sentence." But the per se harmlessness rule relieves the State of that burden. Even in cases like Petitioner's, where uncontested evidence was proffered to rebut any harmless-error arguments, the Florida Supreme Court declines to allow for the kind of individualized, holistic review of the record this Court's precedents require.

The Florida Supreme Court's per se harmless-error rule, particularly as applied in a case where the advisory jury heard none of the available mitigation, also contravenes this Court's requirement that state courts conduct an individualized review of the record as a whole before denying federal constitutional relief on harmless-error grounds, especially in capital cases. The Florida Supreme Court's per se rule operates mechanically, rather than individually, to deem *Hurst* errors harmless in every case where the advisory jury unanimously recommended death.

In cases where a Florida jury operating under Florida's unconstitutional pre-*Hurst* system reached a unanimous death recommendation, the Florida Supreme Court has generally refused to entertain individualized, record-based arguments before holding the *Hurst* error harmless. Although in some cases the Florida Supreme

Court mentions factors other than the vote itself in the course of its harmless-error ruling, the vote is always the dispositive factor. In the dozens of *Hurst* cases it has reviewed, the court has *never* held a *Hurst* error harmful in a case with a unanimous advisory jury recommendation. And the court has *never* held a *Hurst* error harmless in a split-vote advisory jury case. The vote always controls.

This Court requires that harmless-error analysis include review of the whole record. *See, e.g.*, *United States v. Hastings*, 461 U.S. 499, 509 (1983) ("Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record *as a whole* and to ignore errors that are harmless.") (emphasis added); *Rose*, 478 U.S. at 583 ("We have held that *Chapman* mandates consideration of the *entire record* prior to reversing a conviction for constitutional errors that may be harmless.") (emphasis added); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1967) ("Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the *whole record*, that the constitutional error was harmless beyond a reasonable doubt.") (emphasis added) (internal quotation omitted); *Yates v. Evatt*, 500 U.S. 391, 403 (1991) ("To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to *everything else the jury considered on the issue in question*, as revealed in the record.") (emphasis added).

The Florida Supreme Court's per se rule flouts this Court's understanding in *Barclay v. Florida* that "the Florida Supreme Court does not apply its harmless-error analysis in an automatic or mechanical fashion, but rather upholds death sentences

on the basis of this analysis only when it actually finds that the error is harmless." *Barclay*, 463 U.S. at 958. The rule is also at odds with this Court's decision in *Harrington v. California*, which explained that proper harmless-error analysis not only considers the impact of a constitutional error on the specific jury in the case, but also whether an average rational jury would have reached the same conclusion without the constitutional error. *See* 395 U.S. at 254. The Florida Supreme Court's per se rule is inconsistent with *Sochor v. Florida* and *Clemons v. Mississippi*, where this Court highlighted that harmless-error rulings must be accompanied by specific reasoning grounded in the whole record. *See Sochor*, 504 U.S. at 539-40; *Clemons*, 494 U.S. at 752. And the rule's failure to consider mitigation contradicts *Parker v. Dugger*, where this Court rejected a cursory harmless-error analysis by the Florida Supreme Court. 498 U.S. at 320 ("What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record.").

By relieving the State of its burden and failing to consider the whole record in Petitioner's case or to allow a hearing on his uncontested proffer, the Florida Supreme Court's per se rule failed to ensure sufficient reliability in Petitioner's death sentence.

In order to determine whether there is a "reasonable possibility" that the *Hurst* error contributed to Petitioner's death sentence, *see Chapman*, 386 U.S. at 23, a reliable harmless-error analysis must begin with what this Court held in *Hurst* a jury must do for a Florida death sentence to be constitutional. This Court ruled in *Hurst* the Sixth Amendment requires juries to make the findings of fact regarding the elements necessary for a death sentence under Florida law: (1) the aggravating

circumstances that had been proven beyond a reasonable doubt; (2) the aggravating circumstances were together "sufficient" to justify the death penalty beyond a reasonable doubt; and (3) the aggravating circumstances outweighed the mitigation evidence beyond a reasonable doubt. *See* 136 S. Ct. at 620-22.[9]

The second and third elements cut against the harmless-error analysis in Justice Alito's dissent in *Hurst*. Justice Alito stated that he would hold the *Hurst* error harmless because the evidence supported the trial judge's finding of "at least one aggravating factor." *Id.* at 626 (Alito, J., dissenting). But, as the Florida Supreme Court recognized in *Hurst v. State*, 202 So. 3d at 68, unlike the Arizona capital sentencing scheme at issue in *Ring*, Florida's scheme required fact finding as to the aggravators *and their sufficiency to warrant the death penalty*. The fact that sufficient evidence exists to prove at least one aggravator to the jury is not enough to conclude that a *Hurst* error is harmless. *See id.* at 53 n.7. And, in any event, this Court has made clear that the State does not meet its harmless-error burden in a capital sentencing case merely by showing that evidence in the record is sufficient to support a death sentence. *See Satterwhite*, 486 U.S. at 258. "What is important is an *individualized determination*," given the well-established Eighth Amendment requirement of individualized sentencing in capital cases. *Clemons*, 494 U.S. at 753.

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

Accordingly, the vote of a defendant's pre-*Hurst* advisory jury cannot by itself resolve a proper harmless-error inquiry. The fact that an advisory jury unanimously *recommended* the death penalty does not establish that the same jury would have made, or an average rational jury would make, the three specific findings of fact to support a death sentence in a constitutional proceeding. This is especially true in a case like Petitioner's, where the jury heard none of the available mitigating evidence.

Even if, speculatively, the jury made all the necessary findings, the same sentence would not necessarily have followed. Jury findings in a constitutional proceeding may have yielded a lesser number of aggravators than the judge's findings. Jury findings may have yielded different "sufficiency" and "insufficiency" determinations than those made by the judge. The jury may have made different findings regarding the weight of the aggravation, and could have evaluated the mitigation differently. And the judge, with findings from a properly instructed jury, might have exercised his sentencing discretion differently. *See Hurst v. State*, 202 So. 3d at 57 (noting that *Hurst* preserved "the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life").

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

Constitutional harmless-error analysis requires that the State bear the burden of dispelling these possibilities beyond a reasonable doubt. *See Woodson v. North*

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

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

CONCLUSION

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

Respectfully submitted,

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