CAPITAL CASE

No. _____

IN THE

Supreme Court of the United States

WILLIE SETH CRAIN, JR.

Petitioner,

v.

STATE OF FLORIDA

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ANN MARIE MIRIALAKIS
Counsel for Petitioner
Florida Bar No. 0658308
Office of Capital Collateral Regional Counsel
Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
813-558-1600
mirialakis@ccmr.state.fl.us
support@ccmr.state.fl.us

CAPITAL CASE

QUESTIONS PRESENTED

On remand from the Florida Supreme Court's decision in *Hurst v. Florida*, the Florida Supreme Court held, as a state constitutional consequence, that a death verdict could not be rendered without unanimous *jury findings* of the aggravating circumstances proven beyond a reasonable doubt *and* that the aggravating circumstances outweighed any mitigating circumstances, thereby warranting death. Before *Hurst* and its progeny, a panel rendered an advisory recommendation for life or death without making any findings of fact to support their recommendation.

1. The jury's role in the sentencing process as merely an advisory panel diminished its sense of responsibility and its unanimous recommendation cannot be relied upon to find the *Hurst* error was harmless. In light of this *Caldwell v. Mississippi*, 472 U.S. 320 (1985) error, the *Hurst* error is not harmless.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Pages

Statutes:

LIST OF PARTIES

All parties appear in the caption on the cover page.

PETITION FOR WRIT OF CERTIORARI

Willie Seth Crain, Jr. respectfully petitions for a writ of certiorari to review a judgment of the Supreme Court of Florida.

DECISIONS AND ORDERS BELOW

This proceeding was instituted as a successive motion for postconviction relief under Florida Rule Crim. Pro. 3.851. The opinion of the Thirteenth Circuit Court in and for Hillsborough County denying that motion is unreported. It is reproduced in Appendix A. The Florida Supreme Court affirmed in *Crain v. State,* 246 So.3d 206 (Fla. 2018), an opinion reproduced in Appendix B. Numerous earlier opinions in the case do not bear upon the questions now presented.

JURISDICTION

The judgment of the Florida Supreme Court was entered on April 5, 2018. On July 16, 2018, this Court granted a sixty (60) day extension to file a petition extending the deadline to December 2, 2018. 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:

> 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

1. Introduction

The jury's role in the sentencing process as merely an advisory panel diminished its sense of responsibility and its unanimous recommendation cannot be relied upon to find the *Hurst*[1] error was harmless. The Florida Supreme Court cited its analysis in *Reynolds v. State*[2] as the rationale for denying Petitioner's *Caldwell*[3] claim. *See*, Appendix B. In denying Reynolds' appeal, the Florida Supreme Court addressed the *Caldwell* challenge. However, the *Reynolds* opinion was merely a plurality, "so the issue remains without definitive resolution by the Florida Supreme Court." *Kaczmar v. Florida*, 138 S.Ct. 1973 (2018) (Sotomayor, J. dissenting).

Furthermore, the Florida Supreme Court's analysis did not directly address the way in which *Caldwell* was raised in Petitioner's appeal. The Florida Supreme Court directed its analysis toward whether the penalty phase jury instructions were proper as given at the time of Petitioner's trial. The issue that remains is whether having given the flawed instructions can they be relied upon to determine if the *Hurst* error is harmless. This Court should settle the proper application of *Caldwell* to a *Hurst* harmless error analysis. Petitioner contends that in light of this important

---

[1] *Hurst v. Florida*, 136 S.Ct. 616 (2016).
[2] *Reynolds v. State*, -- So.3d --, 2018 WL 1633075 (Fla. Apr. 5, 2018).
[3] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Eighth Amendment *Caldwell v. Mississippi*, 472 U.S. 320 (1985) violation, the *Hurst* error is not harmless.

2. Factual and Procedural Background

A. Conviction, Death Sentence, and Direct Appeal

In 1998, Petitioner was convicted in a Florida court of first degree felony murder and kidnapping with intent to commit or facilitate the commission of a homicide. A penalty phase was conducted pursuant to the Florida capital sentencing scheme in place at the time. *See Hurst v. Florida*, 136 S. Ct. 616, 620 (2016) (describing Florida's prior scheme). The "advisory panel" recommended the death penalty by a vote of twelve to zero. The panel did not make findings of fact or otherwise specify the factual basis for its recommendation. *See*, Appendix C – Penalty Phase Advisory Recommendation.

The trial judge made the findings of fact required to impose a death sentence under Florida law. *See* Fla. Stat. § 921.141(3) (1999), *invalidated by Hurst*, 136 S. Ct. at 624. The judge found three aggravating circumstances and that those aggravating circumstances were not outweighed by the mitigation.[4] The judge sentenced

---

[4] The trial court found the following Aggravators: (1) prior violent felonies, (2) the murder was committed during the course of a kidnapping, and (3) the victim was under the age of twelve.

As Mitigation, the court found: (1) Non-statutory mental health impairment; (2) Mental problems exacerbated by the use of alcohol and drugs, both legal and illegal; (3) Crain was an uncured pedophile; (4) Crain had a history of abuse and an unstable home life; (5) Crain was deprived of the educational benefits and social learning that one would normally obtain from public education; (6) Crain had a history of hard, productive work; (7) Crain had a good prison record; and (8) Crain had the capacity to form loving relationships.

Petitioner to death. In the Sentencing Order, the trial court found, "There is no way to know what happened to Amanda Brown." *See*, Record on Appeal, V2/R311.

The Florida Supreme Court affirmed Petitioner's conviction and death sentence on direct appeal. *Crain v. State*, 894 So. 2d 59 (Fla. 2004). However, the Court reversed the judgment of guilt of kidnapping and directed the trial court on remand to enter a judgment for false imprisonment, and to resentence accordingly. *Id*. at 76.

A timely motion for rehearing was denied on January 25, 2005. The defendant filed a timely petition for writ of certiorari to the U.S. Supreme Court which was denied on October 3, 2005. *Crain v. Florida*, 126 S.Ct. 47, 163 L.Ed.2d 79 (2005).

B. State and Federal Collateral Proceedings

In state post-conviction proceedings, Petitioner raised nine claims, which were all denied on September 10, 2009. Petitioner appealed the denial of his motion for postconviction relief to the Florida Supreme Court, arguing that the Circuit Court erred in denying Claims 1, 3, 4, 8 and 9. The Florida Supreme Court affirmed the denial of all of Petitioner's Rule 3.851 Motion claims. *Crain v. State*, 78 So. 3d 1025 (Fla. 2011).

On February 15, 2012, Petitioner filed a petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Sec. 2254 in the United States District Court for the Middle

District of Florida, Tampa Division, Case No. 8:12-cv-322-T-27EAJ. In the Federal Petition, Petitioner raised seven Constitutional violations. Petitioner's Petition for a Writ of Habeas Corpus is still pending.

C. *Hurst* Litigation

In January 2017, Petitioner filed a successive motion for state post-conviction relief under *Hurst v. Florida*[5], and its state court progeny, *Hurst v. State*[6] and *Perry v. State*[7]. Petitioner argued that his death sentence is unconstitutional under *Hurst* and *Hurst v. State*.

The state post-conviction court denied relief based on the record and the Florida Supreme Court's decision in *Davis v. State,* 207 So.3d 142, 173-175 (Fla. 2016), which held that that a unanimous death recommendation was not harmful *Hurst* error. The trial court recognized, but did not address Petitioner's argument that his capital sentencing violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985). *See*, Appendix A.

D. Decision Below

On April 5, 2018, the Florida Supreme Court issued an opinion affirming the denial of *Hurst* relief. *See*, Appendix B; *Crain v. State,* 246 So.3d 206 (Fla. 2018). The Florida Supreme Court's opinion contained the following analysis:

> In this case, Crain argues that, despite this Court consistently holding that *Hurst* errors are harmless in cases where the jury unanimously recommended death, his case is different because: (1) the kidnapping aggravating factor was invalidated; (2) there was no finding that the murder was heinous, atrocious,

[5] *Hurst v. Florida*, 136 S.Ct. 616 (2016).
[6] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).
[7] *Perry v. State,* 210 So.3d 630 (Fla. 2016).

or cruel (HAC) or cold, calculated, and premeditated (CCP); (3) the jury was given inaccurate instructions regarding its sentencing responsibility;[1] and (4) the jury was not instructed on mercy. As we explain below, we reject Crain's arguments and conclude that the *Hurst* error in Crain's case was harmless beyond a reasonable doubt.

This Court also determined that *Hurst* errors are subject to harmless error review. 202 So.3d at 67. In *Davis v. State*, 207 So.3d 142 (Fla. 2016), this Court explained that "it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances." *Id.* at 174. In *Davis*, emphasizing the jury's unanimous recommendation for death, this Court concluded that the *Hurst* error was harmless beyond a reasonable doubt...

The kidnapping aggravating factor in Crain's case remains valid because kidnapping with the intent to inflict bodily harm underlies Crain's first-degree felony murder conviction. *See* § 921.141(5)(d), Fla. Stat. (1997) (including "any: ... kidnapping"). Therefore, the jury properly considered this aggravating factor in making its sentencing recommendation. *See Davis*, 207 So.3d at 175. Thus, the jury's unanimous recommendation for death renders the *Hurst* error harmless beyond a reasonable doubt.

Finally, we have previously rejected Crain's other claims that the jury's unanimous recommendation for death is unreliable and the *Hurst* error is, therefore, not harmless beyond a reasonable doubt. *See, e.g., Reynolds v. State*, No. SC17–793 (Fla. Apr. 5, 2018) (denying *Caldwell* claim); *Morris v. State*, 219 So.3d 33 (Fla.) (no CCP or HAC aggravating factor), *cert. denied*, —— U.S. ——, 138 S.Ct. 452, 199 L.Ed.2d 334 (2017). Thus, this Court can rely on the jury's unanimous recommendation for death to conclude that the *Hurst* error in Crain's case was harmless beyond a reasonable doubt. (Emphasis added.)

Id., at 209-210. The Florida Supreme Court cited its analysis in *Reynolds*[8] as the rationale for denying Petitioner's *Caldwell*[9] claim. In denying Reynolds' appeal, the Florida Supreme Court addressed a *Caldwell* challenge. However, the *Reynolds*

[8] *Reynolds v. State*, -- So.3d --, 2018 WL 1633075 (Fla. Apr. 5, 2018).
[9] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

opinion was merely a plurality, "so the issue remains without definitive resolution by the Florida Supreme Court." *Kaczmar v. Florida*, 138 S.Ct. 1973 (2018) (Sotomayor, J. dissenting). There remains an important question of federal law concerning the Eighth Amendment and a jury's diminished responsibility that should be decided by this Court.

REASONS FOR GRANTING RELIEF

The jury's role in the sentencing process as merely advisory diminished its sense of responsibility and its unanimous recommendation cannot be relied upon to find the *Hurst* error was harmless. In light of this Eighth Amendment, *Caldwell v. Mississippi*, 472 U.S. 320 (1985) error, the *Hurst* error is not harmless.

This Court should grant a writ of certiorari to address whether the Florida Supreme Court's harmless-error analysis for *Hurst*[10] violations contravenes the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The Petitioner properly raised this question before the Florida Supreme Court in his appellate brief and in his Motion for Rehearing. *See*, Appendices D and E.

This question is not only a life-or-death matter for Petitioner, but also impacts dozens of other prisoners on Florida's death row whose death sentences were obtained in violation of *Hurst* and who nevertheless remain subject to execution based on the vote cast by their *Hurst* "advisory" panel—a panel whose sense of responsibility for a death sentence was systemically diminished. On four occasions, Justices of this Court have called for review of this *Hurst-Caldwell* issue. *See Guardado v. Jones*, 138 S.

[10] *Hurst v. Florida*, 136 S.Ct. 616 (2016).

Ct. 1131 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *Kaczmar v. Florida*, 138 S.Ct. 1973 (2018) (Sotomayor, J. dissenting from the denial of certiorari); *Middleton v. Florida*, 138 S. Ct. 829 (2018) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari); *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari).

The Florida Supreme Court finally addressed a *Caldwell* challenge in *Reynolds V. State*. However, the *Reynolds* opinion was merely a plurality, "so the issue remains without definitive resolution by the Florida Supreme Court." *Kaczmar v. Florida*, 138 S.Ct. 1973 (2018) (Sotomayor, J. dissenting). Unfortunately, the Florida Supreme Court's analysis of *Caldwell* in determining if the *Hurst* error was harmless misapprehended the issue. The Florida Supreme Court focused on whether the trial court should have issued a different instruction in light of *Caldwell*. However, the Florida Supreme Court failed to address and consider whether the advisory panel's recommendation can be considered reliable in light of the findings in *Caldwell* concerning diminished responsibility. The Reynolds opinion leaves this *Caldwell* error essentially unanswered. This Court should resolve the matter.

In the past, the Florida Supreme Court has reasoned that this Court has accepted Florida's jury role as advisory, therefore the instructions are merely a reflection of law set out in Florida Statute 921.141 (1985). *See*, *Combs v. State*, 525 So. 2d 853, 857 (Fla. 1988), citing to *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). The Florida Supreme Court in *Combs* went on to point out:

> A simple reading of section 921.141, Florida Statutes (1985), explains why the prosecutor and defense counsel stated to the jury that its role was to render an advisory sentence. That statute provides in part:
>
> > (2) ADVISORY SENTENCE BY THE JURY. — After hearing all the evidence, the jury shall deliberate and render *an advisory sentence to the court,* based upon the following matters:
> >
> > (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. — Notwithstanding the recommendation of a majority of the jury, *the court,* after weighing the aggravating and mitigating circumstances, *shall enter a sentence* of life imprisonment or death... .
>
> *Id.* (emphasis added). Clearly, under our process, the court is the final decision-maker and the sentencer — not the jury.

Id. This reasoning has not been valid, since this Court rendered its opinion in *Apprendi*[11] and *Ring*[12]. In 2016, this Court reiterated its position concerning the jury's role in *Hurst*, ruling that Florida's death penalty statute is unconstitutional. This Court found:

> [T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983).
>
> ---
>
> We now expressly overrule *Spaziano* and *Hildwin* in relevant part.
>
> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S., at 640-641, 109 S.Ct. 2055. Their conclusion was wrong, and irreconcilable with *Apprendi.* Indeed, today is not the first time we have recognized as much. In *Ring,* we held that another pre-*Apprendi* decision — *Walton*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 — could not "survive the reasoning of *Apprendi.*" 536 U.S., at 603, 122 S.Ct. 2428.

[11] *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).
[12] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

Hurst, at 622-623. In overruling *Spaziano*, the foundation for the Florida Supreme Court's reasoning that Florida's death penalty instructions do not violate *Caldwell* is not supported, and has not been supported since this Court rendered its decisions in *Apprendi* and *Ring* over fifteen years ago. Therefore, this *Caldwell* violation dates back to *Apprendi/Ring*, at the very least. Similarly, the Florida Supreme Court has recognized that since *Ring,* Florida's death sentencing statute is a violation of the Sixth Amendment. *See, Mosley v. State*, 209 So.3d 1248 (Fla. 2016).

The jury's belief that it was not ultimately responsible for Petitioner's death sentence is a violation of the principles annunciated in *Caldwell*. Here, in light of the impact of the "advisory" instructions to the jury, this Court cannot even be certain that the jury would have made the same unanimous *recommendation* without the *Caldwell* error. And, critically, the Court cannot be sure that Petitioner would have received a death sentence.[13]

In the wake of *Hurst* and *Hurst v. State*, the Florida Supreme Court completely revamped Florida's death penalty jury instructions, notably removing the word "advisory recommendation" and replacing it with "verdict." *See*, *In Re: Standard Criminal Jury Instructions in Capital Cases*, SC17-583 (Fla. April 13, 2017). Therefore, in light of the fact that the Florida Supreme Court took steps to amend the death penalty jury instructions so that they conform to United States Supreme Court law, the Florida Supreme Court should have acknowledged the fact

[13] *See also, Rose v. Clark*, 478 U.S. 570, 578 (1986) (recognizing that an "error is harmless if, beyond a reasonable doubt, it did not *contribute to the verdict* obtained.") (Internal quotation marks and citation omitted).

that Petitioner's jury's instructions prejudiced his case and there was a reasonable probability that the *Caldwell* error contributed to his death sentence.

Unfortunately, the Florida Supreme Court affirmed the denial of Petitioner's appeal, denying his *Caldwell* claim and finding the *Hurst* error harmless. In denying Petitioner's *Caldwell* claim, the Florida Supreme Court cited *Reynolds v. State*, -- So.3d --, 2018 WL 1633075 (Fla. Apr. 5, 2018) (denying *Caldwell* claim). *Crain v. State*, 246 So.3d 206, 210 (Fla. 2018). The majority's opinion in *Reynolds* focuses on whether jury instructions which existed pre-*Hurst* can be found to be in violation of *Caldwell*. *Reynolds*, at*28. The Florida Supreme Court reasoned that if the instructions were based on the law as it stood at the time they were given, then the instructions properly described the jury's role at that time.[14] However, the impact of *Caldwell* does not end there. While it may be true that the instructions accurately reflected Florida's death sentencing scheme as it existed at that time, it must be considered that Florida's death sentencing scheme was unconstitutional at that time, because that scheme violated the precepts annunciated by this Court's opinion in *Ring*.[15] Therefore, it is not enough to ask did the instructions reflect the sentencing scheme at that time and the role described for the jury therein. In conducting a harmless error analysis of the *Hurst* error, where Florida had unconstitutionally shifted the responsibility of determining a defendant's death eligibility to a judge, the

[14] The Florida Supreme Court focused its analysis of the *Caldwell* issue in terms of whether the jury was **misled as to its role** in the sentencing process, citing *Romano v. Oklahoma*, 512 US 1 (1994) and *Davis v. Singletary*, 119 F.3d 1471 (11th Cir. 1997). *Reynolds*, at 23.

[15] *Ring v. Arizona*, 536 U.S. 584 (2002).

Florida Supreme Court needed to ask if the jury's understanding of its role had an effect on its deliberation and non-binding recommendation. The Florida Supreme Court noted in *Reynolds*:

> We stated much of the same in *Grossman v. State*, 525 So. 2d 833 (Fla. 1988), *receded from on other grounds by Franqui v. State*, 699 So. 2d 1312, 1319-20 (Fla. 1997), and there specifically rejected the argument that *Tedder* created a rule where "the weight given to the jury's advisory recommendation [wa]s so heavy as to make it the de facto sentence." *Id.* at 840. (Emphasis added)

Id., at *21. The issue raised in *Tedder*[16] concerned a trial court's override of a jury's life recommendation. It then stands to reason, if the instruction telling the jury that their recommendation should be given "great weight" is still not enough to make it a verdict for life, we cannot now say that the jury being told that their recommendation should be given great weight is enough to consider it a verdict for death.

Again, this is more than an issue of whether the trial court should have or could have given a different instruction to the jury at the penalty phase. In determining if the *Hurst* error was harmless, we must ask if we may rely on the panel's non-binding recommendation. We must look at that recommendation through the lens of *Caldwell,* and realize it is not reliable enough to treat it as a verdict.

The Florida Supreme Court pointed out that *Caldwell* involved the jury believing that an appellate court could adjust an incorrect result, whereas *Reynolds* and others raising *Caldwell* in the wake of *Hurst* deal with the jury being told the trial court has the ultimate responsibility to determine if a defendant can be sentenced to death. The Florida Supreme Court found, "Calling the recommendations

[16] *Tedder v. State,* 322 So.2d 908 (Fla. 1975).

"advisory" and the trial court as the final sentencer is certainly less problematic than the references to appellate review in *Caldwell*, *Blackwell*, and *Pait* because, unlike appellate courts, trial courts are positioned to make factual findings, which they do every day" *Reynolds*, at *30. This is not a meaningful distinction and the rationale ignores the underlying issue this Court had with the prosecutor's comments in *Caldwell*, "[they] led [the jury] to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Caldwell,* at 329. While the jury's role may have been advisory under the law at the time that Petitioner was sentenced, after *Hurst*, the Supreme Court has ruled that such a sentencing scheme was unconstitutional under *Ring*. *See, Hurst v. Florida*, at 621. The advisory nature of the panel's role carries less weight than a binding verdict. This distinction must be part of a *Hurst* harmless error analysis, which test the State would fail under the precedent established in *Caldwell*.

The Florida Supreme Court also raised the issue in *Reynolds* whether a *Caldwell* analysis would open the door to full retroactivity of *Hurst*, as opposed to retroactivity only going back to the holding in *Ring*. If the jury instruction alone were being considered, then this would likely be the result. However, the analysis begins with a case being qualified for *Hurst* relief (i.e. a post-*Ring* case) and then being analyzed for harmless error. If **in the context of a harmless error analysis,** we ask whether the *Hurst* error diminished the jury's role, as that role was described in *Ring*, then retroactivity preceding *Ring* would not be implicated. *See*, *Ring*, at 609.

The Florida Supreme Court further pointed out in *Reynolds* that the Eighth Amendment findings it made in *Hurst v. State* concerned the requirement of unanimous jury verdicts and did not focus on the jury's understanding of its responsibility. *Reynolds*, at *32. Nevertheless, *Caldwell* has been found to also represent an Eighth Amendment violation:

> On reaching the merits, we conclude that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.
>
> ---
>
> Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with — and indeed as indispensable to — the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina, supra,* at 305 (plurality opinion). See also *Eddings* v. *Oklahoma, supra*; *Lockett* v. *Ohio, supra*.

Caldwell, at 329-330. Accordingly, the *Hurst* error in Petitioner's case should not be considered a harmless error where this Court has ruled that only juries may make findings of fact and their sense of responsibility for that duty should not be diminished.

CONCLUSION

Petitioner's death recommendation was submitted by a mere advisory panel, which had an unconstitutionally diminished role and deprived Petitioner of a fact-finding jury. In light of *Caldwell*, the Florida Supreme Court cannot rely on the

advisory panel's unanimous recommendation for death in determining that the *Hurst* error was harmless.

Petitioner's death sentence was imposed in violation of the Sixth Amendment's guarantee of a right to a jury trial, the Fourteenth Amendment's guarantee of Equal Protection and Due Process and with disregard for the Eighth Amendment's prohibition of capricious capital sentencing. Denying Petitioner the full benefit of his constitutional protections is fundamentally unacceptable. Addressing this claim meaningfully in the present context requires full briefing and oral argument.

Respectfully, certiorari should be granted for this case.

Respectfully submitted,

/s/ Ann Mare Mirialakis
ANN MARIE MIRIALAKIS,
Attorney of Record for Petitioner
Florida Bar No. 0658308
Office of the Capital Collateral Regional Counsel – Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
Phone No. (813) 558-1600
Mirialakis@ccmr.state.fl.us
support@ccmr.state.fl.us