DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

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HARRY JONES,

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED--CAPITAL CASE

1. Whether the Florida Supreme Court's partial retroactivity rule as to violations pursuant to *Hurst v. Florida*, which is based on an arbitrary cutoff date, violates the Eighth and Fourteenth Amendments to the United States Constitution?

2. Whether the evolving standards of decency require jury unanimity before the imposition of a death sentence?

3. Whether jury unanimity in a death penalty case, which the Florida Supreme Court recognizes as being compelled by the Eighth Amendment due to its enhanced reliability, can be subjected to an arbitrary cutoff date for the purpose of determining retroactivity?

4. Whether defendants sentenced to death prior to August 24, 2002, pursuant to Florida Statute §921.141, were convicted of capital murder subjecting them to the death penalty, or whether the fact that the jury did not unanimously find all of the elements required to convict of capital murder mandates that such defendants were only convicted of murder and are therefore ineligible for the death penalty?

5. Whether the elements of capital first degree murder must be found unanimously by a jury in order to render a valid death sentence?

6. Whether, in the wake of *Hurst v. Florida*, this Court's decision in *Caldwell v. Mississippi* is applicable in Florida?

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Petitioner, **HARRY JONES**, is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue a writ of certiorari to review the decision of the Florida Supreme Court.

CITATION TO OPINIONS BELOW

The decision of the Florida Supreme Court in this cause appears as *Jones v. State*, No. SC17-1385 (Fla. Oct 15, 2018), and is attached to this petition as Appendix A.

STATEMENT OF JURISDICTION

The Florida Supreme Court entered its opinion on October 15, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257, with Petitioner having asserted in the state court below and asserting in this Court that the State of Florida has deprived him of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

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

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

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

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. Proceedings in Mr. Jones' Case

On July 18, 1991, Mr. Jones was charged by indictment with first-degree murder, robbery, and grand theft of a motor vehicle

(R. 1). Mr. Jones entered a plea of not guilty (R. 18-20). After Mr. Jones proceeded to trial in May, 1992, the jury was unable to reach a verdict and a mistrial was declared. Mr. Jones was tried again in November, 1992, and the jury returned verdicts of guilty on all charges (R. 786-90). The jury recommended a sentence of death by a vote of 10-2 (PC-R. 93), and the trial court sentenced Mr. Jones to death on November 20, 1992 (R. 828-36).

On direct appeal, the Florida Supreme Court affirmed Mr. Jones' convictions and sentence of death. *Jones v. State*, 648 So. 2d 669 (Fla. 1994). Rehearing was denied on January 25, 1995. This Court denied certiorari on June 19, 1995. *Jones v. Florida*, 515 U.S. 1147 (1995).

On March 21, 1997, Mr. Jones filed a postconviction motion in the state circuit court (PC-R. 235-47). The motion was amended on March 19, 2003, and an evidentiary hearing was held on April 15-16, 2004 (PC-R. 85-86, 468-573). On September 23, 2005, the circuit court denied relief (PC-R. 926-1103). On December 23, 2008, subsequent to briefing and oral argument, the Florida Supreme Court affirmed the denial of postconviction relief. *Jones v. State*, 998 So. 2d 573 (Fla. 2008) (As revised on denial of rehearing). Mandate issued on January 15, 2009.

On February 10, 2009, Mr. Jones filed a federal habeas petition in the Northern District of Florida (Doc. 1). An amended petition was filed on February 4, 2011 (Doc. 43). Thereafter, on October 1, 2013, the district court denied Mr. Jones' amended petition (Doc. 50).

After being granted a certificate of appealability as to two

issue, briefing and oral argument were conducted in the Eleventh Circuit Court of Appeals. On June 30, 2016, the Eleventh Circuit issued an opinion affirming the denial of Mr. Jones' federal habeas petition. *Jones v. Secretary*, 834 F.3d 1299 (11th Cir. 2016). Mr. Jones' petition for en banc and panel rehearing was denied on November 8, 2016. Mr. Jones filed a petition for a writ of certiorari, which was denied by this Court on June 12, 2017. *Jones v. Jones*, 137 S.Ct. 2245 (2017).

On April 5, 2016, Mr. Jones filed a successive petition for writ of habeas corpus in the Florida Supreme Court. The court denied the petition in an order on March 17, 2017. *Jones v. Jones*, No. SC16-607 (Fla. Mar. 17, 2017).

On January 11, 2017, Mr. Jones filed a successive postconviction motion based in part on this Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), and the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016)(PC-R2. 86- 126). The state circuit court denied the motion on June 8, 2017 (4PC-R. 86-88).

A notice of appeal was filed on July 24, 2017 (PC-R2. 201-202). However, on August 22, 2017, the Florida Supreme Court *sua sponte* issued an order staying the appeal pending the disposition of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017).

On August 10, 2017, the Florida Supreme Court issued its decision in *Hitchcock*, stating that "[w]e have consistently applied our decision in *Asay*, denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme

Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)." *Hitchcock*, 226 So. 3d at 2017.

On September 25, 2017, the Florida Supreme Court issued an order directing Mr. Jones to show cause "why the trial court's order should not be affirmed in light of this Court's decision Hitchcock v. State, SC17-445."

On November 20, 2017, Mr. Jones filed his response to the show cause order. After responsive pleadings were filed, the Florida Supreme Court on February 22, 2018, issued an order directing further briefing on the non-*Hurst* related issues in the case. Thereafter, on October 15, 2018, the Florida Supreme Court issued its opinion affirming the denial of Mr. Jones' postconviction motion. *Jones v. State*, No. SC17-1385 (Fla. Oct 15, 2018). The court stated:

> In *Hitchcock*, we held that "our decision in *Asay* [*v. State*, 210 So. 3d 1, 22 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017),] forecloses relief" under *Hurst* for defendants whose convictions and sentences were final prior to the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *See also Lambrix v. State*, 227 So. 3d 112, 113 (Fla.) (rejecting Lambrix's argument that the Eighth Amendment, equal protection, and due process require that *Hurst* be applied retroactively to Lambrix even though his sentences were final prior to *Ring*), cert. denied, 138 S.Ct. 312 (2017). Thus, because his sentence became final prior to *Ring*, Jones is not entitled to Hurst relief.
>
> Nor is Jones entitled to relief on his other claims. Jones's claim that his death sentence violates *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and the Eighth Amendment is foreclosed by our recent decision in *Reynolds v. State*, 2018 WL 1633075, 43 Fla. L. Weekly S163, S167-68 (Fla. Apr. 5, 2018), in which we held that "a *Caldwell* claim based on the rights announced in *Hurst* and *Hurst v. Florida* cannot be used to retroactively invalidate the jury instructions that were proper at the time under Florida law" (citing

> *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994)). And *Jones*'s argument that his previously rejected newly discovered evidence claim should be revisited in light of our decision in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), requiring that in capital sentencing proceedings conducted after *Ring* was decided in 2002, the jury must return a unanimous death recommendation before a sentence of death may be imposed, is also foreclosed by our recent decision in *Walton v. State*, 246 So. 3d 246, 249 (Fla. 2018). In *Walton*, we concluded that such a claim was meritless and held that a proper cumulative analysis of newly discovered evidence does not require consideration of changes in the law that might apply if a new trial were granted. Thus, Jones is not entitled to relief on this claim.

Id.

B. The Relevant Legal Landscape

In 2002, this Court decided *Ring v. Arizona*, holding that under the Sixth Amendment, a defendant has the right to have a jury determine the existence of aggravating factors necessary for the imposition of the death penalty. 536 U.S. 584, 609 (2002). This Court, however, did not comment on Florida's similar capital sentencing scheme. It left intact its prior decisions expressly upholding that scheme, and denied post-*Ring* petitions for certiorari raising the *Ring* issue.

After *Ring*, the Florida Supreme Court also denied relief in cases raising *Ring*-based challenges, following the principle that it is for this Court to overrule its own decisions. *See, e.g.*, *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002).

In 2016, in *Hurst v. Florida*, this Court declared Florida's then-existing capital sentencing scheme, codified at section 921.141, Florida Statutes (2010), unconstitutional because the "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere

recommendation is not enough." 136 S.Ct. at 619. This Court determined that "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's" death penalty. *Id*. at 621-22.

On remand, in *Hurst v. State*, the Florida Supreme Court applied *Hurst v. Florida* and Florida law to hold:

> [T]he Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances.

202 So. 3d at 44. The court also expressly grounded its decision on the Eighth Amendment:

> We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

Id.

Thereafter, in two decisions issued on the same *day* — *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) — the Florida Supreme Court addressed the retroactivity of the *Hurst* decisions.[1] Unlike a traditional

[1]Florida's retroactivity analysis is still guided by this (continued...)

retroactivity analysis, however, the Florida Supreme Court did not decide whether the *Hurst v. Florida* decision should or should not be applied retroactively to all prisoners whose death sentences became final before those decisions invalidated the scheme under which they were sentenced.

Instead, the Florida Supreme Court addressed only the Sixth Amendment issue decided in *Hurst v. Florida* and in that context divided those prisoners into two classes based entirely on the date their sentences became final relative to this Court's 2002 decision in *Ring* invalidating Arizona's sentencing scheme, *not* relative to the *Hurst v. Florida* decision itself and not considering the Eighth Amendment issue that required jury findings as to all of the elements in *Hurst v. State*. In *Asay*, the court held that *Hurst v. Florida* does not apply retroactively to Florida prisoners whose death sentences became final on direct review before *Ring*. *Asay*, 210 So. 3d at 21-22. In *Mosley*, the court held that *Hurst v. Florida* does apply retroactively to prisoners whose death sentences became final after *Ring*. *Mosley*, 209 So. 3d at 1283.

The Florida Supreme Court asserted that *Ring* was an appropriate cut-off date for retroactivity of *Hurst v. Florida* because Florida's capital sentencing scheme was not unconstitutional before *Ring*, but that the "calculus" of the

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[1](...continued)
Court's pre-*Teague* three-factor analysis derived from *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). *See Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980).

constitutionality of Florida's scheme changed with *Ring*, rendering that scheme "essentially" unconstitutional. *Id.* at 1280-81.

Although acknowledging that it had failed to recognize that unconstitutionality until this Court's decision in *Hurst v. Florida*, the Florida Supreme Court laid the blame on this Court for the improper Florida death sentences imposed after *Ring*:

> Defendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring* **should not suffer due to the United States Supreme Court's fourteen-year delay in applying Ring to Florida.** In other words, defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring* **should not be penalized for the United States Supreme Court's delay in explicitly making this determination.**

Mosley, 209 So. 3d at 1283 (emphasis added).

Stating that "[c]onsiderations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases,'" the Florida Supreme Court held that post-*Ring* inmates would receive the benefit of the decision in *Hurst v. Florida*. *Id.* (citations omitted). The court did not address the fact that pre-*Ring* inmates also were sentenced to death under a process no longer considered acceptable under the Eighth Amendment, upon which *Hurst v. State* rests.

In contrast to the Florida Supreme Court's majority, several justices of the court believed the chosen cutoff does not survive scrutiny. In *Asay*, Justice Pariente wrote: "The majority's conclusion results in an unintended arbitrariness as to who

receives relief . . . . To avoid such arbitrariness and to ensure uniformity and fundamental fairness in Florida's capital sentencing . . . *Hurst* should be applied retroactively to all death sentences." *Asay*, 210 So. 3d at 36 (Pariente, J., concurring in part and dissenting in part).

Justice Perry was even more blunt: "In my opinion, the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two groups of similarly situated persons." *Id*. at 37 (Perry, J., dissenting). Justice Perry correctly predicted: "[T]here will be situations where persons who committed equally violent felonies and whose death sentences became final days apart will be treated differently without justification . . . ." *Id*. at 38.

Thereafter, in *Hitchcock*, Justice Lewis complained that the court's majority was "tumbl[ing] down the dizzying rabbit hole of untenable line drawing . . . ." 226 So. 3d at 218 (Lewis, J., concurring in the result).

After reaffirming the *Ring* dividing line cutoff in *Hitchcock*, 226 So. 3d at 217, the Florida Supreme Court summarily denied *Hurst v. Florida* **and** *Hurst v. State* relief in numerous "pre-*Ring*" cases, including Mr. Jones'. In none of its decisions has the Florida Supreme Court made more than fleeting remarks about whether its framework is consistent with the United States Constitution. *See, e.g.*, *Asay v. State*, 224 So. 3d 695, 702-03 (Fla. 2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017); *Hitchcock*, 226 So. 3d at 217.

Shortly thereafter, in *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017), the Florida Supreme Court stated that this Court had "impliedly approved" its *Ring*-based retroactivity cutoff for *Hurst* claims by denying a writ of certiorari in *Asay v. Florida*, 138 S. Ct. 41 (2017). But as this Court has often stated, the denial of a writ of certiorari "imports no expression of opinion on the merits of the case . . . ." *See, e.g., Teague v. Lane*, 489 U.S. 288, 296 (1989)(internal quotation marks omitted).

Two other decisions bear mentioning: On March 8, 2018, the Florida Supreme Court issued its opinion in *Victorino v. State*, 241 So. 3d 48 (Fla. 2018). There, the court ruled:

> For a criminal law to be ex post facto it must be retrospective, that is, it must apply to events that occurred before its enactment; and it must alter the definition of criminal conduct or increase the penalty by which a crime is punishable. *Lynce v. Mathis*, 519 U.S. 433, 441, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997). Florida's new capital sentencing scheme, **which requires the jury to unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that sufficient aggravating factors exist to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death before the trial judge may consider imposing a sentence of death**, *see* § 921.141(2), Fla. Stat. (2017), neither alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable.

Victorino, 241 So. 3d at 50 (emphasis added).

This was in accord with the Florida Supreme Court's decision in *Kirkman v. State*, where the court explained:

> During the pendency of Kirkman's appeal, on remand in *Hurst*, this Court held that:
>
> > before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating

> factors that were proven beyond a reasonable doubt, **unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.**
>
> *Hurst*, 202 So.3d at 57.

233 So. 3d 456, 471-72 (Fla. 2018)(emphasis added).

Victorino was also in accord with the Florida Supreme Court's decision in *Perry v. State*, 210 So. 3d 630 (Fla. 2016). There, the court wrote:

> we construe section 921.141(2)(b) 2. to require the penalty phase jury to unanimously find beyond a reasonable doubt that each aggravating factor exists, **that sufficient aggravating factors exist to impose death**, and **that they outweigh the mitigating circumstances found to exist**.

Perry, 210 So. 3d at 639 (emphasis added). The court explained that this meant that:

> to increase the penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that **the aggravating factors are sufficient to warrant a sentence of death**, that **the aggravating factors outweigh the mitigating circumstances**, and must unanimously recommend a sentence of death.

Perry, 210 So. 3d at 640 (emphasis added). The Florida Supreme Court further explained that these factual findings necessary to authorize a death sentence had long been required:

> It has always been that death can be imposed only when the aggravating factors outweigh the mitigating circumstances, rather than the opposite.

Id. at 637.

And, prior to its decision in *Victorino*, on February 22, 2018, the Florida Supreme Court issued its opinion in *Williams v. State*, _ So. 3d _, 2018 WL 1007810 (Fla. Feb. 22, 2018). There,

the court wrote: "**any fact that increases the statutory maximum sentence is an 'element' of the offense** to be found by a jury." *Id.* at *4 (emphasis added). The Florida Supreme Court further explained that the decision in *Alleyne v. United States*, 570 U.S. 99, 108 (2013), required elements to "be submitted to a jury and **found beyond a reasonable doubt.**" *Williams*, 2018 WL 1007810 at *5 (emphasis added).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER THE FLORIDA SUPREME COURT'S PARTIAL RETROACTIVITY ANALYSIS AS TO THE APPLICATION OF *HURST v. FLORIDA* COMPLIES WITH THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Sixth Amendment right enunciated in *Hurst v. Florida* and found applicable to Florida's capital sentencing scheme guarantees that all facts that are statutorily necessary before a judge is authorized to impose death are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial. *Hurst v. Florida* held, "Florida's capital sentencing scheme violates the Sixth Amendment . . . ." It invalidated Fla. Stat. §§ 921.141(2) and (3) as unconstitutional. Under those provisions, a defendant who had been convicted of a capital felony could be sentenced to death only after the sentencing judge entered written fact findings that: 1) sufficient aggravating circumstances existed that justify the imposition a death sentence, and 2) insufficient mitigating circumstances existed to outweigh the aggravating circumstances. *Hurst v. Florida*, 136 S.Ct. at 620-21. *Hurst v. Florida* found Florida's sentencing scheme unconstitutional because "Florida does not

require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these facts." *Id.* at 622.

On remand, the Florida Supreme Court held in *Hurst v. State* that *Hurst v. Florida* means "that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 57.

Hurst v. Florida changed Florida law and established that capital defendants had a constitutional right to a jury that finds the facts statutorily necessary to authorize a judge to impose a death sentence.

In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2017), the Florida Supreme Court determined that *Hurst v. Florida* and *Hurst v. State* constituted a change in Florida law that was to be applied retroactively to Mosley and required the court to grant postconviction relief, vacate Mosley's death sentence and remand for a resentencing. As the court in *Mosley* observed: "it is undeniable that *Hurst v. Florida* changed the calculus of the constitutionality of capital sentencing in this State." *Id.* at 1281.

However, the same day that the Florida Supreme Court decided *Mosley*, the court also decided *Asay v. State*, 210 So. 3d 1 (Fla.

2016). The court in *Mosley* noted that *Asay* had not extended the benefit of the change in the law created by *Hurst v. Florida* to Asay. *See Asay*, 210 So. 3d at 11 ("we conclude that *Hurst* should not be applied retroactively to Asay's case"); *Id*. ("When considering the three factors of the *Stovall/Linkletter* test together, we conclude that they weigh against applying *Hurst* retroactively to all death case litigation in Florida").

The obscene dichotomy drawn by the Florida Supreme Court in determining that *Hurst v. Florida* is partially retroactive does not comport with uniformity or fairness. Indeed, the logic of *Griffith v. Kentucky*, 479 U.S. 314, 327-28 (1987), is applicable:

> Justice POWELL has pointed out that it "hardly comports with the ideal of 'administration of justice with an even hand,' " when "one chance beneficiary-the lucky individual whose case was chosen as the occasion for announcing the new principle-enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine." *Hankerson v. North Carolina*, 432 U.S. 233, 247, 97 S.Ct. 2339, 2347, 53 L.Ed.2d 306 (1977) (opinion concurring in judgment), *quoting Desist v. United States*, 394 U.S., at 255, 89 S.Ct., at 1037 (Douglas, J., dissenting). *See also Michigan v. Payne*, 412 U.S. 47, 60, 93 S.Ct. 1966, 1973, 36 L.Ed.2d 736 (1973) (MARSHALL, J., dissenting) ("Different treatment of two cases is justified under our Constitution only when the cases differ in some respect relevant to the different treatment"). **The fact that the new rule may constitute a clear break with the past has no bearing on the "actual inequity that results" when only one of many similarly situated defendants receives the benefit of the new rule**. *United States v. Johnson*, 457 U.S., at 556, n. 16, 102 S.Ct., at 2590, n. 16 (emphasis omitted).
>
> We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

(Emphasis added). "[S]elective application of new rules violates the principle of treating similarly situated defendants the same." *Id.* at 323. While Mr. Jones' death sentence was final when *Hurst v. Florida* issued, numerous other capital defendants' death sentences had been final, including Hurst's, when good fortune and good timing meant that at the moment that *Hurst v. Florida* issued, those defendants were free of the shackles of finality.[2]

Moreover, in *Hurst v. State*, the Florida Supreme Court noted that "[i]n requiring jury unanimity in [the statutorily required fact] findings and in [the jury's] final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice." 202 So. 3d at 58. *Hurst v. State* specifically noted that "the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty." *Id.* at 59. The new Florida law enhances and promotes the reliability of death sentences that juries unanimously authorize. Implicit in the holding that unanimity promotes reliable death sentences is the acknowledgment that non-unanimous death sentences are less reliable. Clearly, uniformity and fairness require that Mr. Jones be given the

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[2]In *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980), the Florida Supreme Court noted the Eighth Amendment required extra weight to be given to "individual fairness because of the possible imposition of a penalty as unredeeming as death." In a footnote, the court wrote: "It bears mention that the constitutionality of Florida's capital sentencing procedures, s 921.141, Florida Statutes (1979), is **contingent upon this Court's role of reviewing each case to ensure uniformity in the imposition of the death penalty.**" *Id.* at 926 n.7 (emphasis added).

benefit of *Hurst v. Florida* and the resulting new Florida law. After all, "death is a different kind of punishment from any other that may be imposed in this country," and "[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice . . . ." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

In addition, this Court has previously addressed situations where the death penalty is imposed arbitrarily and capriciously, as is the case here. In *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972), this Court found that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman*, 408 U.S. at 239-40. Because of the recognition that "the penalty of death is qualitatively different from a sentence of imprisonment, however long * * * there is a corresponding difference in the need for reliability" in capital cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978)(finding there is a "qualitative difference" between death and other penalties requiring "a greater degree of reliability when the death sentence is imposed"); *Gregg v. Georgia*, 428 U.S. 153, 187-88 (1976)(stating that "death is different in kind" and as a punishment is "unique in its severity and irrevocability"); *Furman*, 408 U.S. at 238 (Brennan, J., concurring)("Death is a unique punishment in the United States.").

Following this Court's decision in *Hurst v. Florida*, the

Florida Supreme repudiated the binary approach to retroactivity set forth in *Witt* and the *Stoval/Linkletter* standard that was adopted in *Witt*. The Florida Supreme Court's decisions in *Asay* and *Mosley* have opened the door to arbitrariness infecting Florida's death penalty system in violation of the Eighth Amendment.

II. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER THE FLORIDA SUPREME COURT'S PARTIAL RETROACTIVITY ANALYSIS AS TO THE APPLICATION OF *HURST v. STATE* COMPLIES WITH THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In *Hurst v. State*, the Florida Supreme Court ruled that on the basis of the Eighth Amendment and on the basis of the Florida Constitution, the evolving standards of decency now require jury "unanimity in a recommendation of death in order for death to be considered and imposed". 202 So. 3d at 61. This unanimity requirement was not derived from *Hurst v. Florida* itself nor the Sixth Amendment, but from the Florida Constitution and from the Eighth Amendment. In light of the ruling in *Hurst v. State*, Mr. Jones' death sentence stands in violation of both the Florida Constitution and the Eighth Amendment.

In *Mosley*, 209 So. 3d at 1273-74, the Florida Supreme Court observed that in *Hurst v. State*, "**we held, based on Florida's independent constitutional right to trial by jury that, in order for the trial court to impose a sentence of death, the jury's recommendation for a sentence of death must be unanimous.**" (Emphasis added). The requirement that the jury's death recommendation had to be unanimous in order for it to authorize a death sentence was not contained in *Hurst v. Florida*. As the

Florida Supreme Court explained in *Hurst v. State*, the unanimity requirement arose when the mandate of *Hurst v. Florida* intersected with Florida law: "We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense." 202 So. 3d at 44. Thus, *Hurst v. State* was broader in scope than *Hurst v. Florida*. This was because *Hurst v. Florida* meant the statutory facts necessary to authorize a death sentence were elements of capital murder. In turn, this meant that the Florida Constitution requirement that the jury must unanimously find the elements of a crime offense was applicable:

> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements that must be found unanimously by the jury. Thus, we hold that in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge.

Id. at 53-54. The Florida Supreme Court acknowledged that the unanimity requirement had not been found by this Court to be mandated by the Sixth Amendment, but that it arose from the Florida Constitution:

> We are mindful that a plurality of the United States Supreme Court, in a non-capital case, decided that unanimous jury verdicts are not required in all cases under the Sixth Amendment to the United States Constitution. *See Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) (plurality opinion).

> **However, this Court, in interpreting the Florida Constitution and the rights afforded to persons within this State, may require more protection be afforded criminal defendants than that mandated by the federal Constitution.** This is especially true, we believe, in cases where, as here, Florida has a longstanding history requiring unanimous jury verdicts as to the elements of a crime.

202 So. 3d at 57 (emphasis added)(footnote omitted). The Florida Supreme Court then explained the benefit to the administration of justice that its holding would provide would mean more reliable death sentences:

> In requiring jury unanimity in these findings and in its final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice. Supreme Court Justice Anthony Kennedy, while a judge on the Ninth Circuit Court of Appeals, noted the salutary benefits of the unanimity requirement on jury deliberations as follows:
>
> > The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which **gives particular significance and conclusiveness to the jury's verdict.**
>
> *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir.1978). That court further noted that "**[b]oth the defendant and society can place special confidence in a unanimous verdict.**" *Id.* Comparing the unanimous jury requirement to the requirement for proof beyond a reasonable doubt, the Fifth Circuit Court of Appeals stated, "**the unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.' "** *United States v. Gipson*, 553 F.2d 453, 457 (5th Cir.1977).

202 So. 3d at 58 (emphasis added). Thus, the ruling that the Florida Constitution required juror unanimity when returning a

death recommendation was bottomed on enhanced reliability and confidence in the result. *Id.* at 59 (juror unanimity "will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty").[3] Replacing a majority vote verdict with a requirement that the jury must be unanimous when returning a death recommendation is markedly different than switching from a judge to jury as the finder of fact. *See Schriro v. Summerlin*, 542 U.S. 348, 356 (2004)("When so many presumably reasonable minds continue to disagree over whether juries are better factfinders at all, we cannot confidently say that judicial factfinding seriously diminishes accuracy."). The change mandated by *Hurst v. State* was specifically found to improve accuracy, unlike the change in Arizona procedure that resulted from the decision in *Ring v. Arizona*.

The Florida Supreme Court in *Hurst v. State* then alternatively found that a unanimous jury's death recommendation was also required under the Eighth Amendment.

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[3]In *Hurst v. State*, the Florida Supreme Court observed that studies comparing majority rule juries to those required to return a unanimous verdict showed enhanced reliability in unanimous verdicts. 202 So. 2d at 58 ("it has been found based on data that 'behavior in juries asked to reach a unanimous verdict **is more thorough** and grave than in majority-rule juries, and that the former were more likely than the latter jurors to agree on the issues underlying their verdict. Majority jurors had a relatively negative view of their fellow jurors' openmindedness and persuasiveness.'")(Emphasis added); *Id.* ("juries not required to reach unanimity **tend to take less time deliberating and cease deliberating** when the required majority vote is achieved rather than attempting to obtain full consensus; and jurors operating under majority rule **express less confidence in the justness of their decisions.**")(Emphasis added).

> In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to trial by jury, we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment.

Hurst v. State, 202 So. 3d at 59. The Florida Supreme Court in *Hurst v. State* observed:

> If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Id. at 60. In *Hurst v. State*, the Florida Supreme Court found that under the Eighth Amendment and the Florida Constitution, the evolving standards of decency now require jury "unanimity in a recommendation of death in order for death to be considered and imposed". *Id.* at 61. Quoting this Court, *Hurst v. State* noted, "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Id.* Then, from a review of the capital sentencing laws throughout the United States, *Hurst v. State* found that a national consensus reflecting society's evolving standards of decency was apparent:

> The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances.

Id. Accordingly, the court in *Hurst v. State* concluded:

> the United States and Florida Constitutions, as well as the administration of justice, are implemented by requiring unanimity in jury verdicts recommending death as a penalty before such a penalty may be imposed.

Id. at 63. The Eighth Amendment holding in *Hurst v. State* turned upon both 1) a finding of a consensus reflecting the evolving standards of decency that now precluded the execution of a defendant without a jury's unanimous death recommendation, and 2) the enhanced reliability that would result from no longer allowing a jury's death recommendation to be returned without juror unanimity.

What constitutes cruel and unusual punishment under the Eighth Amendment turns upon considerations of the "evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311-12 (internal quotation marks omitted). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.' *Furman*, 408 U.S. at 382 (Burger, C. J., dissenting)." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008).

According to *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty phase jury has voted unanimously in favor of the imposition of death. This Court has explained that the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury

practices that are constitutionally permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The near-uniform judgment of the states is that only a defendant who a jury unanimously concluded should be sentenced to death can receive a death sentence. As a result, those defendants who have had one or more jurors vote in favor of a life sentence are not eligible to receive a death sentence. This class of defendants, those who have had jurors formally vote in favor a life sentence, cannot be executed under the Eighth Amendment.

Mr. Jones is within the protected class. At his penalty phase, two jurors voted in favor of the imposition of a life sentence. Under the Eighth Amendment, his execution would thus constitute cruel and unusual punishment. Mr. Jones' death sentence must accordingly be vacated.

Hurst v. State must be applied retroactively to Mr. Jones. When a juror in a capital proceeding has voted against recommending death, the defendant is within a class that society's evolving standards of decency has concluded to be ineligible for a death sentence.

Moreover, the purpose of the ruling in *Hurst v. State* was to enhance the reliability of a death recommendation. Enhancement of reliability also warrants retroactive application of *Hurst v. State* and *Perry v. State* to Mr. Jones. *See Desist v. United States*, 394 U.S. 244, 262 (Harlan, J., dissenting)("The greatly expanded writ of habeas corpus seems at the present time to serve two principal functions. [Citations] First, it seeks to assure that no man has been incarcerated under a procedure which creates

an impermissibly large risk that the innocent will be convicted. **It follows from this that all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas.**")(Emphasis added).[4]

In *Mosley v. State*, the Florida Supreme Court explained the basis for the decision in *Hurst v. State* to require juror unanimity when returning a death recommendation:

> Under Florida's independent constitutional right to a trial by jury, this Court concluded: "If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, **provide the highest degree of reliability** in meeting these constitutional requirements in the capital sentencing process." [202 So. 3d] at 60.

209 So. 3d at 1278 (emphasis added).

The retroactivity analysis of new law under the Eighth Amendment is different than the analysis under the Sixth Amendment. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016), this Court wrote:

> A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees.

Accordingly, a new substantive rule under the Eighth Amendment

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[4] *See United States v. Johnson*, 457 U.S. 537, 548 (1982)("We now agree with Justice Harlan that "'[r]etroactivity' must be rethought," *Desist v. United States*, 394 U.S. 244, at 258, 89 S.Ct., at 1038 (dissenting opinion). We therefore examine the circumstances of this case to determine whether it presents a retroactivity question clearly controlled by past precedents, and if not, whether application of the Harlan approach would resolve the retroactivity issue presented in a principled and equitable manner.").

must be applied retroactively:

> A substantive rule, in contrast, forbids "criminal punishment of certain primary conduct" or prohibits "a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S., at 330, 109 S.Ct. 2934; *see also Schriro, supra*, at 353, 124 S.Ct. 2519 (A substantive rule "alters the range of conduct or the class of persons that the law punishes"). Under this standard, and for the reasons explained below, *Miller* announced a substantive rule that is retroactive in cases on collateral review.

Montgomery, 136 S. Ct. at 732.

Under *Hurst v. State*, a death sentence may not be imposed on the class of defendants whose jury did not unanimously vote in favor of a death recommendation. As to those within that class of defendants, *Hurst v. State* must be applied retroactively. Since Mr. Jones is within that class of defendants, he must be accorded the retroactive benefit of *Hurst v. State*.

III. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER POSTCONVICTION DEFENDANTS SENTENCED PURSUANT TO FLORIDA STATUTE §921.141 WERE CONVICTED OF CAPITAL MURDER SUBJECTING THEM TO THE DEATH PENALTY OR WHETHER THE FACT THAT THE JURY DID NOT UNANIMOUSLY FIND ALL OF THE ELEMENTS REQUIRED TO CONVICT OF CAPITAL MURDER MANDATES THAT POSTCONVICTION DEFENDANTS, LIKE MR. JONES, WERE ONLY CONVICTED OF MURDER AND ARE INELIGIBLE FOR THE DEATH PENALTY.

In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court identified the facts or elements necessary to increase the authorized punishment to the death penalty, a matter that is clearly substantive. "[A]ny 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Alleyne v. United States*, 133 S.Ct. 2151, 2160 (2013). "Defining facts that increase a mandatory statutory minimum to be part of the substantive offense

enables the defendant to predict the legally applicable penalty from the face of the indictment." *Id.* at 2161. A court decision identifying the elements of a statutorily defined criminal offense constitutes substantive law that dates back to the enactment of the statute. *Bousley v. United States*, 523 U.S. 614, 625 (1998)(Stevens, J., concurring in part and dissenting in part)("This case does not raise any question concerning the possible retroactive application of a new rule of law, *cf. Teague v. Lane*, 489 U.S. 288 (1989), because our decision in *Bailey v. United States*, 516 U.S. 137 (1995), did not change the law. It merely explained what § 924(c) had meant ever since the statute was enacted. The fact that a number of Courts of Appeals had construed the statute differently is of no greater legal significance than the fact that 42 U.S.C. § 1981 had been consistently misconstrued prior to our decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)."). "A judicial construction of a statute is an authoritative statement of what the statute meant **before as well as after the decision** of the case giving rise to that construction." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994)(emphasis added).

Thus, while *Hurst v. State* has generally been cited for its ruling pursuant to the Florida Constitution and the Eighth Amendment that a "death recommendation" must be returned by a unanimous jury in order to authorize the imposition of a death

sentence[5], there is another aspect to *Hurst v. State*, i.e. the judicial construction of § 921.141, Fla. Stat.

As explained in *Hurst v. State*, the Florida Supreme Court held that the statutorily defined facts necessary to increase the range of punishment to include death were elements to be proven by the State **"to essentially convict a defendant of capital murder**." *Id.* at 53-54 (emphasis added). The elements of capital first degree murder include: 1) the presence of aggravating factors as statutorily defined, 2) a finding of fact that sufficient aggravating factors exist to justify a death sentence, and 3) a finding that the aggravating factors outweigh any mitigating factors. *See Id.* at 53 ("As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308 (1991), under Florida law, 'The death penalty may be imposed only where **sufficient aggravating circumstances** exist that **outweigh** mitigating circumstances.' *Id.* at 313 (emphasis added)(quoting § 921.141(3), Fla. Stat. (1985)).").

Indeed, on March 13, 2017, the Florida Legislature confirmed the Florida Supreme Court's statutory construction when Chapter 2017-1 of the Laws of Florida was enacted. As such, under *Fiore v. White*, 531 U.S. 225 (2001), the elements of capital first degree murder identified in *Hurst v. State* and confirmed in Chapter 2017-1 as substantive law date to the statutory

[5]In *Hitchcock*, 226 So. 3d at 217, this Court addressed the constitutional ruling of *Hurst v. State* requiring a "death recommendation" to be returned by a unanimous jury and indicated that it would not be applied in cases in which the death sentence became final prior to June 24, 2002.

enactment. *See State v. Dixon*, 283 So. 2d 1 (Fla. 1973).

And, this Court has held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of **every fact** necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). *See Patterson v. New York*, 432 U.S. 197, 215 (1977)("a State must prove every ingredient of an offense beyond a reasonable doubt, and [ ] it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979)(since the jury may have read the instruction as relieving the State of proving an element beyond a reasonable doubt, defendant was denied "his right to the due process of law").

The sufficiency of the aggravators and whether they outweigh the mitigators were both identified in *Hurst v. State* as elements necessary "**to essentially convict a defendant of capital murder**." *Hurst v. State*, 202 So. 3d at 53-54 (emphasis added). Yet, in Mr. Jones' case, neither was found to have been proven beyond a reasonable doubt.

IV. THIS COURT SHOULD CONSIDER WHETHER MR. JONES' SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS THE JURY'S SENSE OF RESPONSIBILITY AT THE PENALTY PHASE WAS INACCURATELY DIMINISHED IN VIOLATION OF *CALDWELL v. MISSISSIPPI*, 472 U.S. 320 (1985).

Throughout Mr. Jones' capital trial the jury was repeatedly told they were simply recommending an advisory sentence to the trial judge (*See* T. 13-199 (voir dire); T. 977-88 (State's

closing argument at the penalty phase); 948-9 and 996-1001 (jury instructions)). In fact, Mr. Jones' jury was told that their advisory recommendation was not binding on the trial judge (T. 10), and as the jury left the courtroom to deliberate about whether or not to recommend that Mr. Jones be sentenced to death, they were instructed that the final decision on the sentence rested with the trial judge (T. 948). It should also be noted that the instructions provided prior to deliberating did not inform the jury that their recommendation was entitled to great weight (T. 996-7).[6]

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[6]In *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975), the Florida Supreme Court held that the jury's recommendation "should be given great weight.". However, though *Tedder* had been the law for over fifteen years when Mr. Jones' penalty phase occurred, the final jury instructions provided by the trial court failed to impart this critical instruction to the jury.

In 2009, the Florida Supreme Court recognized the need for amending the standard jury instructions, adding both the "great weight" language as well as the directive that the jury is "neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." *See Henyard v. State*, 689 So. 2d 239, 249-50 (Fla. 1996). The Florida Supreme Court explained:

> As to the weighing function, we have authorized the proposed amendments for publication and use. First, in the initial portion of the instruction, we have authorized an amendment stating that the jury recommendation must be given great weight and deference. This proposal is consistent with the Court's case law in this area. *See Tedder v. State*, 322 So. 2d 908, 910 (Fla.1975) ("A jury recommendation under our trifurcated death penalty statute should be given great weight."). While we agree with this proposal, we have included a directive to caution judges that this "great weight" instruction should be given only in cases where mitigation was in fact presented to the jury. *See Muhammad v. State*, 782 So.2d 343, 361-62 (Fla.2001) ("We do find ... that the trial court erred when it

(continued...)

[6](...continued)
gave great weight to the jury's recommendation in light of Muhammad's refusal to present mitigating evidence and the failure of the trial court to provide for an alternative means for the jury to be advised of available mitigating evidence.").

And second, in the latter portion of the instruction, we have authorized an amendment stating that the jury is "neither compelled nor required to recommend death," even where the aggravating circumstances outweigh the mitigating circumstances. This amendment is consistent with our state and federal case law in this area. *See Cox v. State*, 819 So.2d 705, 717 (Fla.2002) ("[W]e have declared many times that 'a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors' ") (quoting *Henyard v. State*, 689 So.2d 239, 249-50 (Fla.1996)); *see also Gregg v. Georgia*, 428 U.S. 153, 199, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality) (explaining that a jury can constitutionally dispense mercy in cases deserving of the death penalty). We note that this amended language is less stringent than the proposal, which provides: "Regardless of your findings with respect to aggravating and mitigating circumstances you are never required to recommend a sentence of death."

These amendments are intended to address the ABA's finding that a substantial percentage of Florida's capital jurors (over thirty-six percent of those interviewed) believed that they were required to recommend death if they found the defendant's conduct to be "heinous, vile or depraved," or (over twenty-five percent of those interviewed) if they found the defendant to be "a future danger to society." ABA Report at vi. The ABA report also concludes as follows: Approximately forty-eight percent of capital jurors believed that mitigating circumstances had to be proved beyond a reasonable doubt, thirty-five percent of jurors did not know that any mitigating evidence could be taken into consideration, and fourteen percent of jurors believed that only the enumerated mitigating circumstances could be considered. *Id.* at 304. Because of the critical role that aggravators and mitigators play in the weighing process, these areas of confusion are a cause for concern. **We are hopeful, however, that the re-ordering of these instructions, the definitions of key terms that have been added, and the amended explanatory language, including the discussion of burdens of proof, will assist jurors in understanding**

(continued...)

At the time of Mr. Jones' 1992 trial, what the jury was told may have been consistent with the procedure set forth in Florida law at that time. *See Combs v. State*, 525 So. 2d 853 (Fla. 1988). But, it was clearly inaccurate and unconstitutional. This is because it was recognized by this Court in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as **bias in favor of death sentences** when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.") (emphasis added).

Indeed in *Caldwell v. Mississippi*, a unanimous jury verdict in favor of a death sentence was vacated because the jury was not correctly instructed as to its sentencing responsibility.[7]

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[6](...continued)
their role in the capital sentencing process and will eliminate juror confusion in this area.

In re Standard Jury Instructions in Criminal Cases - Report No. 2005-2, 22 So. 3d 17, 21-22 (Fla. 2009)(emphasis added).

[7]In *Caldwell*, the prosecutor responding to defense counsel's argument had stated in his closing argument to the jury: "Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable." *Id.* at 325. Because the jury's sense of responsibility was improperly diminished by this argument, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Caldwell*, 472 U.S. at 341. *Caldwell*
(continued...)

Caldwell held: "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* 328-29. Jurors must feel the weight of their sentencing responsibility; they must know that if the defendant is ultimately executed it will be because no juror exercised her power to preclude a death sentence. Part of feeling the weight of a juror's sentencing responsibility is dependent upon knowing of their individual authority to preclude a death sentence. *See Blackwell v. State*, 79 So. 731, 736 (Fla. 1918) (prejudicial error found in "the remark of the assistant state attorney as to the existence of a Supreme Court to correct any error that might be made in the trial of the cause, in effect told the jury that it was proper matter for them to consider when they retired to make up their verdict. Calling this vividly to the attention of the jury tended to lessen their estimate of the weight of their responsibility, and cause them to shift it from their consciences to the Supreme Court."). Where the jurors' sense of responsibility for a death sentence is either not explained or is in fact diminished, a jury's unanimous verdict in favor of a death sentence violates the Eighth Amendment and the resulting

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[7](...continued)
explained: "Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'" *Id.* at 331.

death sentence cannot stand. *Caldwell*, 472 U.S. at 341.

While *Caldwell* was the law before Mr. Jones' death sentence became final, it was ruled to be inapplicable to Florida capital proceedings by the Florida Supreme Court. *See Darden v. State*, 475 So. 2d 217, 221 (Fla. 1985). In *Darden*, the court held that under Florida's sentencing scheme, the jury was not responsible for the sentence and thus *Caldwell* was not applicable to jury instructions in Florida telling the jury that its role was advisory:

> In *Caldwell*, the Court interpreted comments by the state to have misled the jury to believe that it was not the final sentencing authority, because its decision was subject to appellant review. We do not find such egregious misinformation in the record of this trial, and we also note that Mississippi's capital punishment statute vests in the jury the ultimate decision of life or death, whereas, in Florida, that decision resides with the trial judge.

Given that *Darden* is no longer the law, Mr. Jones submits that the comments, argument and instructions heard by Jones' jury referring almost a hundred times to the advisory nature of its' sentencing recommendation, clearly and repeatedly diminished the jury's sense of responsibility in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and the United States' Constitution.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United States Mail, first class postage prepaid, to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-6536, on this 10th day of January, 2019.

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