DOCKET NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

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PAUL GLENN EVERETT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

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QUESTIONS PRESENTED--CAPITAL CASE

1. Whether the Sixth Amendment error identified by this Court in *Hurst v. Florida* is a structural defect that infects the entire constitutionality of the trial mechanism and thus not amenable to harmless error review?

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

3. Whether defendants sentenced to death 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?

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

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

CITATION TO OPINION BELOW

The decision of the Florida Supreme Court in this cause appears as *Everett v. State*, 258 So. 3d 1199 (Fla. 2018), and is attached to this petition as Appendix A. Mr. Everett's motion for rehearing was denied on November 30, 2018, and is attached to this petition as Appendix B.

STATEMENT OF JURISDICTION

The Florida Supreme Court entered its opinion on May 24, 2018, and rehearing was denied on November 30, 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 compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

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

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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

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

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

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

PROCEDURAL HISTORY

On January 28, 2002, an indictment was filed in the circuit court for Bay County charging Paul Everett with one count of first-degree murder and related offenses (Vol. I R. 5).

After a trial, the jury found Mr. Everett guilty as charged on all counts (Vol. I R. 113). After further evidence, argument, and legal instruction, the jury unanimously recommended that the court sentence Mr. Everett to death (Vol. I R. 131). On January 9, 2003, the court sentenced Mr. Everett to death (Vol. I R. 165).

On appeal, the Florida Supreme Court affirmed Mr. Everett's convictions and sentences. *Everett v. State*, 893 So. 2d 1278 (Fla. 2004). This Court denied Mr. Everett's certiorari petition on April 18, 2005. *Everett v. Florida*, 544 U.S. 987 (2005).

On March 30, 2006, Mr. Everett filed a postconviction motion. Subsequent to an evidentiary hearing, the state circuit court denied relief. Mr. Everett appealed and also filed a state

habeas petition. On October 14, 2010, the Florida Supreme Court denied all relief. *Everett v. State*, 54 So. 3d 464 (Fla. 2010).

On March 21, 2011, Mr. Everett instituted his federal habeas corpus proceedings. On March 28, 2014, the federal district court denied Mr. Everett's petition for writ of habeas corpus. *Everett v. Sec'y, Fla. Dep't of Corrs.*, 2014 WL 11350293. On February 27, 2015, the 11th Circuit affirmed. *Everett v. Sec'y, Fla. Dep't of Corrs.*, 779 F.3d 1212 (11th Cir. 2015). This Court denied certiorari on January 11, 2016. *Everett v. Sec'y, Fla. Dep't of Corrs.*, 136 S.Ct. 795 (2016).

On January 11, 2017, Mr. Everett filed a successive motion to vacate his death sentence (PC-R2. 15-40). On September 18, 2017, the motion was denied (PC-R2. 121-36).

On appeal, the Florida Supreme Court denied all relief. *Everett v. State*, 258 So. 3d 1199 (Fla. 2018).

INTRODUCTION

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court described the capital sentencing scheme under which Mr. Everett was sentenced to death.[1]

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[1]In *Hurst*, this Court considered Florida's capital sentencing scheme as it existed in 2010. *Hurst*, 136 S. Ct. at 620. Mr. Everett was sentenced to death under Florida's capital sentencing scheme as it existed in 2003. However, as relevant here, those two schemes were identical. Compare Fla. Stat. § 775.082(1)(2010) and Fla. Stat.§ 921.141 (2010) with Fla. Stat. § 775.082(1)(2003) and Fla. Stat.§ 921.141 (2003). Since this Court's decision in *Hurst*, legislative changes have been made to Florida's capital sentencing scheme. *See* Act effective March 7, 2016, §§ 1, 3, 2016 Fla. Laws ch. 2016-13 (codified as amended at Fla. Stat.§ 775.082(1) (2017) and Fla. Stat.§ 921.141 (2017); Act effective March 13, 2017 §§ 1, 3, 2017 Fla. Laws ch. 2017-1 (continued...)

> First-degree murder is a capital felony in Florida. *See* Fla. Stat. § 782.04(1)(a) (2010). Under state law, the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment. § 775.082(1). "A person who has been convicted of a capital felony shall be punished by death" only if an additional sentencing proceeding "results in findings by the court that such person shall be punished by death." *Ibid*. "[O]therwise such person shall be punished by life imprisonment and shall be ineligible for parole." *Ibid*.
>
> The additional sentencing proceeding Florida employs is a "hybrid" proceeding "in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determinations." *Ring v. Arizona*, 536 U.S. 584, 608, n.6 ... (2002). First, the sentencing judge conducts an evidentiary hearing before a jury. Fla. Stat. § 921.141(1) (2010). Next, the jury renders an "advisory sentence" of life or death without specifying the factual basis of its recommendation. § 921.141(2). "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." § 921.141(3). If the court imposes death, it must "set forth in writing its findings upon which the sentence of death is based." *Ibid*. Although the judge must give the jury recommendation "great weight," *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975) (per curiam), the sentencing order must "reflect the trial judge's independent judgment about the existence of aggravating factors and mitigating factors," *Blackwelder v. State*, 851 So.2d 650, 653 (Fla. 2003)(per curiam).

Hurst, 136 S. Ct. at 620.

The Florida Supreme Court held that *Hurst* was applicable to defendants whose sentences became final after *Ring v. Arizona*, 536 U.S. 584 (2002). *See Mosley v. State*, 209 So. 3d 1248,

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[1](...continued)
(codified as amended at Fla. Stat.§ 775.082(1) (2017) and Fla. Stat. § 921.141 (2017). Unless otherwise stated, references in this petition to Florida's capital sentencing scheme refer to the scheme that was in existence prior to those changes, that was considered in *Hurst*, and under which Mr. Everett was sentenced to death.

1274-83 (Fla. 2016). However, the Florida Supreme Court only applied *Hurst* to post-*Ring* defendants with non-unanimous death recommendations and developed a *per se* harmless error rule for unanimous jury recommendations, such as Mr. Everett. *See Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016).

FACTS RELEVANT TO QUESTIONS PRESENTED

Shortly after the State filed its Notice of Intent to Seek the Death Penalty, Mr. Everett filed several motions concerning the constitutionality of Florida Statute § 921.141 and the standard jury instructions. Mr. Everett specifically argued that the instruction describing the jury's role as advisory was unconstitutional (Vol. I R. 52-3). Mr. Everett also argued that such instructions violate *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (*Id.*). In addition, Mr. Everett argued that the jury was required to make all of the requisite fact findings subjecting him to a death sentence unanimously (Vol. 1 R. 54-5). The trial court denied the motions (Vol. III R. 229; *see also* Vol. VIII, R. 333-6).

During voir dire, the State repeatedly referred to the jury's determination as a "recommendation" and/or told the jury that it would simply "recommend" a sentence (Vol. III R. 256, 258, 260, 261, 262, 263, 264, 266, 267, 268, 270, 271, 327, 328, 329, 331, 332, 334, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 387, 416, 417, 418). Indeed, the State's characterization of the jury's recommendation of a death sentence occurred no less than 75 times during voir dire.

At the inception of the penalty phase, the trial court instructed the jury that "[t]he final decision as to what punishment shall be imposed rests solely with the judge of this court; however, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the Defendant." (Vol. IV R. 462).

During the State's closing argument to the jury, the State urged that the jury "[h]ave the courage to speak the truth" and recommend a death sentence (Vol. IV R. 489).

The jury was instructed on three aggravating factors – the crime was committed while Mr. Everett was previously convicted of a felony and was under sentence of imprisonment or on felony probation; the crime was committed while Everett was engaged in the commission of a sexual battery or a burglary; and that the crime was especially heinous, atrocious or cruel.

And shortly before deliberations began, Mr. Everett's jury was instructed:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings.

(Vol IV, R. 510). Mr. Everett's jury recommended a sentence of death by a vote of 12-0 (Vol. I R. 131).

The trial court sentenced Mr. Everett to death finding the three aggravating circumstances upon which the jury had been instructed. The trial court also found four statutory mitigators – Mr. Everett's age; that the crime was committed while Mr. Everett was under the influence of extreme mental or emotional disturbance; that Mr. Everett has no significant history of prior criminal activity; and Mr. Everett's background and drug use. *See* Vol. I R. 152-65. The trial court also found several non-statutory mitigators: Mr. Everett's remorse, his good conduct in custody, the alternative punishment of life imprisonment, and his confession.

THE FLORIDA SUPREME COURT'S RULING

Though the Florida Supreme Court found that error had occurred pursuant to *Hurst v. Florida*, 136 S.Ct. 616 (2016), the Court held that the error was "harmless beyond a reasonable doubt" because his jury's recommendation for death was unanimous. *Everett*, 258 So. 3d at 1200.

REASONS FOR GRANTING THE WRIT

I. THE FLORIDA SUPREME COURT'S HARMLESS ERROR ANALYSIS VIOLATES THE UNITED STATES CONSTITUTION.

In applying the harmless-error doctrine to Mr. Everett's *Hurst v. Florida* claim, the Florida Supreme Court rendered a decision that was objectively unreasonable as a matter of federal law because *Hurst v. Florida* errors are "structural" and therefore not subject to harmless error review.

In *Hurst v. State*, the Florida Supreme Court determined that

Hurst v. Florida error is not structural but rather is the kind of constitutional error that is amenable to harmless error review. *Hurst v. State*, 202 So. 3d 40, 67-68 (Fla. 2016). This determination carried over to Mr. Everett's case, where the Florida Supreme Court performed a harmless error test rather than determining that the error was structural and thus required a per se reversal of his death sentences. To be sure, the issue here is not whether Mr. Everett's death sentence was unconstitutionally imposed: that has already been determined by the Florida Supreme Court. The issue now is whether, under federal law, the remedy fashioned by the Florida Supreme Court is itself constitutional.

The Florida Supreme Court's determination in Mr. Everett's case that *Hurst v. Florida* error is not structural is incompatible with federal law, beginning with *Hurst v. Florida* itself. *Hurst v. Florida* and the subsequent decision by the Florida Supreme Court in *Hurst v. State*, establish the structural nature of the error at issue with regard to Florida's capital sentencing statute. In *Hurst v. Florida*, this Court held that a jury must make all the findings of the facts necessary to authorize a sentence of death. In *Hurst v. State*, the Florida Supreme Court held that, under *Hurst v. Florida* and the Sixth and Eighth Amendments, Florida juries must render unanimous fact-finding, under a beyond-a-reasonable-doubt standard, as to (1) the aggravating factors; (2) whether those specific aggravating factors are together "sufficient" to impose a death sentence, and (3) whether those specific aggravating factors together outweigh the mitigation. *Hurst v. State*, 202 So. 3d at

53-59. In no Florida capital case under the old capital sentencing regime—Mr. Everett's included—did the jury make any findings as to any of these critical facts necessary to authorize a death sentence. And there is no distinction between a jury returning a 12-0 recommendation for death and one making a 7-5 recommendation for death; in neither scenario does the jury render any verdict or make any factual finding on the facts necessary to authorize a death sentence. The "verdict" form filled out by Mr. Everett's jury simply indicated that the jury recommended and advised that the court impose the death penalty by a 12-0 vote on the murder count. The forms revealed no "findings" made by the jury about any eligibility factors set forth in Florida's statute.

Thus, even in cases like Mr. Everett's where the jury unanimously recommended death, a reviewing court cannot know whether the jury in fact unanimously found—or a hypothetical jury in a constitutional proceeding would have unanimously found—all of the requisite facts necessary to authorize a death sentence. Yet in Mr. Everett's case, the Florida Supreme Court assumed that by virtue of the jury's 12-0 recommendation, the jury must necessarily have unanimously found all of the facts necessary to authorize a death sentence. *Everett*, 258 So. 3d at 1200. This is directly contrary to *Hurst v. Florida*'s rule that a Florida penalty phase recommendation—no matter the vote—is constitutionally irrelevant because it cannot, as a matter of law, supplant a jury's fact-finding. *Hurst v. Florida*, 136 S.

Ct. at 622 ("The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires").

The error in Mr. Everett's case is a classic example of a "structural error." In *Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991), this Court distinguished between "structural defects in the constitution of the trial mechanism" which are not subject to harmless error review, and trial errors that occur "during the presentation of the case to the jury, which may be quantitatively assessed in the context of other evidence presented." Mr. Everett submits that the error found by the Court in *Hurst v. Florida* represents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," *id*. at 310, and that the Florida Supreme Court's determination otherwise cannot be squared with *Fulminante*. Measured against the *Fulminante* standard, *Hurst v. Florida* error is structural because it "infect[s] the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993).[2]

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[2]Some members of the Florida Supreme Court have also noted the impossibility of applying a harmless-error test to the type of error later identified in *Hurst v. Florida*. For example, Justice Anstead summed up the harmless-error barrier best in a 2002 opinion addressing *Ring*'s impact on Florida's capital sentencing statute:

> [C]ompared to our ability to review the actual findings of fact made by the trial judge, there could hardly be any meaningful appellate review of a Florida jury's advisory recommendation to a trial judge since that review would rest on sheer spectulation as to the basis of the recommendation, when considering the jury collectively or the jurors individually. In other

(continued...)

In other words, *Hurst v. Florida* errors "deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination" of whether the facts necessary to impose a death sentence are unanimously found by the jury. *See Neder v. United States*, 527 U.S. 1, 8 (1999).

The structural nature of *Hurst v. Florida* error is further underscored by what Justice Scalia, writing for the Court, called the "illogic of harmless-error review" in the context of the Sixth Amendment constitutional error at issue in *Hurst*. *See Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993). Because *Hurst v. Florida* made clear that Florida's statute did not allow for a jury verdict on the facts necessary to impose a death sentence that was compatible with the Sixth Amendment, "the entire premise of [harmless error] review is simply absent." *Id*. at 280. Harmless error analysis would require a court to determine in the first instance "not whether, in a trial that occurred without the error, a [jury factfinding of the facts necessary to impose a death sentence] actually rendered in [original] trial was surely

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[2](...continued)
words, from a jury's bare advisory recommendation, it would be impossible to tell which, if any, aggravating circumstances a jury or any individual juror may have determined existed. And, of course, a "recommendation" is hardly a finding at all.

Bottoson v. Moore, 833 So. 2d 693, 708 (Fla. 2002)(Anstead, J., concurring), abrogated by *Hurst v. Florida*, 136 S. Ct. 616 (2016). *See also Combs v. State*, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring)("the sentencing judge can only speculate as to what factors the jury found in making its recommendation . . . ."); *Johnson v. State*, 53 So. 3d 1003, 1007-08 (Fla. 2010) (dispensing with harmless error application based on "sheer speculation").

unattributable to the error." *Id*. There being no jury findings on the facts necessary to impose a death sentence in the Florida statute struck down by the Court, it is not possible to review whether such findings would have occurred absent the *Hurst v. Florida* error. In such cases

> [t]here is no object, so to speak, upon which harmless error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty [of sufficient aggravators that outweighed the mitigating factors] beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal . . . .

Id. For the Florida Supreme Court to "hypothesize a [jury's findings on the facts necessary to impose a death sentence] that was never in fact rendered—no matter how inescapable the findings to support the verdict might be—would violate the jury-trial guarantee." *Id*.[3]

For these reasons, Mr. Everett submits that *Hurst v. Florida* error is the type of "pervasive, framework-shifting "[constitutional] violation" that qualifies as structural error. *United States v. Roy*, 855 F.3d 1133, 1208 (11th Cir. 2017)(en

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[3]In *Hurst v. State*, the Florida Supreme Court also found support for rejecting *Hurst v. Florida* error as structural in this Court's decision in *Washington v. Recuenco*, 548 U.S. 212 (2006). Its reliance was misplaced. In *Recuenco*, this Court held that error under *Blakely v. Washington*, 542 U.S. 296 (2004), was not structural. But this Court also determined that the questioned remained open whether the error could be harmless under state law. *Recuenco*, 548 U.S. at 218 n.1. On remand, the Washington Supreme Court determined that harmless-error analysis did not apply as a matter of state law. *State v. Recuenco*, 163 Wash.2d 428 (Wa. 2008).

banc)(Pryor, J., concurring). The Florida Supreme Court's decision to the contrary is inconsistent with *Hurst v. Florida* itself, *Arizona v. Fulminante*, and *Sullivan v. Lousiana*. Mr. Everett's death sentence is thus due to be vacated at this time because the constitutional error in his case already found by the Florida Supreme Court is structural in nature and not amenable to harmless error analysis. Certiorari is warranted.

II. MR. EVERETT'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court explained that, in accordance with Florida's capital sentencing scheme, the jury has a "right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances." *Hurst*, 202 So. 3d at 58, citing *Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000). In other words, before a judge can impose the death penalty, the jury must be told it has the right to recommend a life sentence, even if the precedent factual findings are all made unanimously. This safeguard is to allow jurors in capital cases to "exercise reasoned judgment in his or her vote as to a recommended sentence." *Hurst*, 202 So. 3d at 58.

The Florida Supreme Court further held in *Hurst v. State* that there is an Eighth Amendment right to have a jury unanimously recommend a death sentence before a death sentence is permissible. *Hurst v. State*, 202 So. 3d at 59 ("we conclude that

juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment."). Thus, the Eighth Amendment's evolving standards of decency now requires a unanimous death recommendation before a death sentence is permissible:

> Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion) (holding that the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

Id. at 60.

But of course, the jury must know and appreciate the significance of its verdict:

> In a capital case, the gravity of the proceeding and the concomitant juror responsibility weigh even more heavily, and it can be presumed that the penalty phase jurors will take special care to understand and follow the law.

Id. at 63. Indeed, under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), a unanimous jury verdict in favor of a death sentence violates the Eighth Amendment if the jury was not correctly instructed as to its sentencing responsibility. In *Caldwell*, this Court 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.

In *Caldwell*, the prosecutor responding to defense counsel's argument stated in his argument before 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, this Court held that **the jury's unanimous verdict** imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). *Caldwell* 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.[4]

Jurors must feel the weight of their sentencing responsibility and know about their individual authority to

[4]This would certainly apply to the circumstances in Mr. Everett's case when the jury was repeatedly reminded its penalty phase verdict was merely an advisory recommendation.

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 not explained or is diminished, a jury's unanimous verdict in favor of a death sentence violates the Eighth Amendment and the death sentence cannot stand. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.").

This Court in *Caldwell* found 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.").

If a bias in favor a death recommendation increases when the jury's sense of responsibility is diminished, removing the basis for that bias increases the likelihood that one or more jurors

will vote for a life sentence. The likelihood increases even more when the jury receives accurate instruction as to each juror's power and authority to dispense mercy and preclude a death sentence. In this regard, the context of the prosecutor's improper argument in *Caldwell* is important. The prosecutor was responding to and trying to blunt defense counsel's assertion that the sentencing decision rested with the jury and that it could chose mercy:

> I implore you to exercise your prerogative to spare the life of Bobby Caldwell.... I'm sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution.... You are the judges and you will have to decide his fate. It is an awesome responsibility, I know—an awesome responsibility.

Caldwell, 472 U.S. at 324.

Mr. Everett's jury was not advised of each jurors' authority to dispense mercy. Indeed, the instructions suggested otherwise.

The circumstances under which Mr. Everett's jury returned its 12-0 death recommendation shows that it cannot now be viewed as a valid unanimous verdict or that the *Hurst* error was harmless without violating the Eighth Amendment. The advisory recommendation simply "does not meet the standard of reliability that the Eighth Amendment requires." *Id.* at 341.

The Florida Supreme Court erred in relying on the jury's death recommendation in Mr. Everett's case as showing that the jury's unanimous death recommendation was harmless; the ruling

violates the Eighth Amendment because the advisory verdict was not returned in proceedings compliant with the Eighth Amendment. *Caldwell*, 472 U.S. at 332 ("The death sentence that would emerge from such a sentencing proceeding would simply not represent a decision that the State had demonstrated the appropriateness of the defendant's death.").

In *Hurst v. Florida*, this Court warned against using what was an advisory verdict to conclude that the findings necessary to authorize the imposition a death sentence had been made by the jury:

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

Hurst v. Florida, 136 S. Ct. at 622. An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation and the juror's inability to be merciful based upon sympathy) cannot be used as a substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004 (1983)("Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed.").

Mr. Everett's death sentence stands in violation of the Eighth Amendment. Certiorari is warranted.

III. MR. EVERETT'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court addressed Fla. Stat. § 921.141 and concluded:

> Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.

Hurst v. State, 202 So. 3d at 53. Because these were the statutorily defined facts necessary to increase the range of punishment to include death, proving them was necessary "**to essentially convict a defendant of capital murder.**" These facts were thus elements of capital murder.[5] *Id.* at 53-54. In *Hurst v. State*, the Florida Supreme Court said:

> **[A]ll the findings necessary for imposition of a death sentence are "elements"** that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding 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.** We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient

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[5]While the Florid Supreme Court referred to the higher degree of murder as "capital murder," Mr. Everett herein refers to the higher degree of murder as capital first degree murder. While, the labeling is not constitutionally significant, what is significant is the Florida Supreme Court's recognition that the elements set forth in the statute when combined with the elements of first degree murder are constituent parts of a new offense, a higher degree of murder.

> to impose death, and that they outweigh the mitigating circumstances. See Brooks v. State, 762 So.2d 879, 902 (Fla.2000). As the relevant jury instruction states: "Regardless of your findings ... you are neither compelled nor required to recommend a sentence of death." Fla. Std. Jury Instr. (Crim.) 7.11 Penalty Proceedings—Capital Cases. Once these critical findings are made unanimously by the jury, each juror may then "exercis[e] reasoned judgment" in his or her vote as to a recommended sentence. See Henyard v. State, 689 So.2d 239, 249 (Fla.1996) (quoting Alvord v. State, 322 So.2d 533, 540 (Fla.1975)).

Id. at 57-58.

Hurst v. State identified the Eighth Amendment demand for heightened reliability in capital cases as reason why it was necessary for a unanimous jury to find the statutory elements to have been proven beyond a reasonable doubt:

> * * * 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.

Hurst v. State, 202 So. 3d at 60. The holding in *Hurst v. State*, while resting on the Eighth Amendment, also implicated this Court's holding that elements must be proven "beyond a reasonable doubt" which was set forth in *In re Winship*, 397 U.S. 358 (1970):

> *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307, 316 (1979).

Fiore v. White, 531 U.S. 225, 226 (2001), this Court addressed the import of the Due Process Clause in this context:

> We granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review.

But before resolving the issue, this Court asked the Pennsylvania Supreme Court to explain the basis for one of its decisions regarding the elements of the statutorily defined criminal offense for which Fiore had been convicted.[6] Was the decision construing the criminal statute a new interpretation or was it a straightforward reading of the statute? *Fiore v. White*, 531 U.S. at 226. The Pennsylvania Supreme Court explained that its earlier "ruling merely clarified the plain language of the statute." *Id.* at 228. This meant that the ruling dated back to the statute's enactment. This explained:

> the question is simply whether Pennsylvania can, consistently with the Federal Due Process Clause, convict Fiore for conduct that its criminal statute, as properly interpreted, does not prohibit.

Id. at 228. Because the answer to this question was "no," this Court held the Due Process Clause was violated:

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[6]Fiore was convicted of operating a hazardous waste facility without a permit. While Fiore had a permit, the State had "argued that Fiore had deviated so dramatically from the permit's terms that he nonetheless had violated the statute." 531 U.S. at 227. On the State's theory, Fiore was convicted. After Fiore's unsuccessful appeals had concluded, the Pennsylvania Supreme Court in a different case held: "[t]he statute made it unlawful to operate a facility without a permit; one who deviated from his permit's terms was not a person without a permit; hence, a person who deviated from his permit's terms did not violate the statute." *Id.* at 227. After Fiore unsuccessfully challenged his conviction in state court collateral proceedings based on the Due Process Clause, he sought federal habeas relief. "The Court of Appeals believed that the Pennsylvania Supreme Court, in Scarpone's case, had announced a new rule of law and thus was inapplicable to Fiore's already final conviction." *Id.*, at 227.

> This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge violate due process. We have held that **the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.**

Id. at 228-29. Because he had not been found guilty of an essential element, his conviction was not constitutionally valid.

Just as the Pennsylvania Supreme Court had done, the Florida Supreme Court in *Hurst v. State* read the plain language in the statute and saw the statutorily necessary facts to convict of capital first degree murder. The statutorily necessary facts were elements:

> 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.

Hurst v. State, 202 So. 3d at 53-54 (emphasis added). These "elements" came from the statute and had always been there.[7] In the *Scarpone* decision discussed in *Fiore*, the Pennsylvania Supreme Court used the plain meaning of the statute. Thus, the decision had not established a new rule; it merely identified the substantive law in the statute. This is exactly what *Hurst v. State* did. The result must be the same as in *Fiore*. Without a jury finding each element of capital first degree murder proven beyond a reasonable doubt, collateral relief is required.

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[7]In Everett's case, three of the elements identified in *Hurst v. State* were not found proven beyond a reasonable doubt and thus he could not have been convicted of capital first degree murder under the Due Process Clause as explained in *Fiore*.

The error that the Florida Supreme Court assessed in *Hurst v. State* when it addressed harmlessness was the failure to instruct the jury that it had to unanimously find that the State had proven all of the necessary elements beyond a reasonable doubt:

> 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 Hurst's death sentence in this case.

Hurst v. State, 202 So. 3d at 68.

In *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000), the issue before this Court was:

> whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt.

As it began its analysis, this Court explained:

> At stake in this case are constitutional protections of surpassing importance: **the proscription of any deprivation of liberty without "due process of law," Amdt. 14**, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt. 6. Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." United States v. Gaudin, 515 U.S. 506, 510 (1995); see also Sullivan v. Louisiana, 508 U.S. 275, 278 (1993); Winship, 397 U.S., at 364 ("**[T]he 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**").

Apprendi, 530 U.S. at 476-77 (emphasis added).[8] *Apprendi* noted the historical basis for the due process right:

> Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt. "The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.' C. McCormick, *Evidence* § 321, pp. 681-682 (1954); see also 9 J. Wigmore, *Evidence* § 2497 (3d ed.1940)." Winship, 397 U.S., at 361. We went on to explain that the reliance on the "reasonable doubt" standard among common-law jurisdictions " 'reflect[s] a profound judgment about the way in which law should be enforced and justice administered.' " Id., at 361-362 (quoting Duncan, 391 U.S., at 155).

Apprendi, 530 U.S. at 478. This Court observed that the "reasonable doubt" standard demanded by due process protects against erroneous convictions and government overreach:

> As we made clear in Winship, the "reasonable doubt" requirement "has [a] vital role in our criminal procedure for cogent reasons." 397 U.S., at 363, 90 S.Ct. 1068. Prosecution subjects the criminal defendant both to "the possibility that he may lose his liberty upon conviction and ... the certainty that he would be stigmatized by the conviction." Ibid. We thus require this, among other, procedural protections in order to "provid[e] concrete substance for the presumption of innocence," and **to reduce the risk of imposing such deprivations erroneously**. Ibid.

Apprendi, 530 U.S. at 484 (emphasis added).

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[8]The decision in *Apprendi* was primarily about the Sixth Amendment right to trial by jury. Its focus was actually on the Due Process Clause and its requirement that the elements of a charged criminal offense must be proven beyond a reasonable doubt for a conviction to be valid. *See also Ring v. Arizona*, 536 U.S. 584, 588 (2002)("This case concerns the Sixth Amendment right to a jury trial in capital prosecutions.").

In *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993), this Court addressed the Due Process Clause requirement:

> What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, see, e.g., Patterson v. New York, 432 U.S. 197, 210 (1977); Leland v. Oregon, 343 U.S. 790, 795 (1952), and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements, see, e.g., In re Winship, 397 U.S. 358, 364 (1970); Cool v. United States, 409 U.S. 100, 104 (1972) (per curiam).

In *Sullivan*, the failure to instruct a jury on the "beyond a reasonable doubt" standard was held to be structural error.[9]

In *Alleyne v. United States*, 133 S. Ct. 2151, 2160 (2013), this Court noted: "Apprendi concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Alleyne* said:

> When a finding of fact alters the legally prescribed punishment so as to aggravate it, **the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.** It is no answer to say that the defendant could have received the same sentence with or without that fact. It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical. One reason is that each crime has different elements and a defendant can be convicted only if the jury has found each element of the crime of conviction.

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[9]Everett's jury was not instructed that the sufficiency of the aggravators and whether they outweighed the mitigating factors were matters to be proved by the State beyond a reasonable doubt. Under *Sullivan*, this was structural error. *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").

Alleyne, 133 S. Ct. at 2162 (emphasis added). The identification of the facts necessary to increase the authorized punishment was noted to be a matter of substantive law. *Id.* at 2161 ("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.").

The error actually analyzed for harmlessness in *Hurst v. State* was not the narrow Sixth Amendment error identified in *Hurst v. Florida*.[10] Instead, it has been the failure to instruct the jury of the elements of capital first degree murder and the necessity of a unanimous verdict finding that the State met its burden to prove each element beyond a reasonable doubt.

In Mr. Everett's case the jury was not instructed on the need to find three of the four elements of capital first degree murder beyond a reasonable doubt, i.e. 1) the aggravators were sufficient, 2) the aggravators outweighed the mitigators, and 3) there was no basis for a single juror to be merciful and vote to impose a life sentence. The failure to instruct on the need to find all elements of a criminal offense beyond a reasonable doubt violates the Due Process Clause and under *Fiore* must be applied

[10]Since jury unanimity was not at issue in *Hurst v. Florida*, the Florida Supreme Court's consideration of whether the death recommendation was unanimous in the harmlessness assessment shows that the error evaluated was not the *Hurst v. Florida* error. Instead, it was the error in not requiring a unanimous death recommendation that was evaluated. What was left out of the analysis was the judge's findings of fact. That shows that as a result of *Hurst v. State*, the error in Florida was not judge fact finding in lieu of jury fact finding. The error being measured in the harmless error analysis is the error in permitting advisory recommendations on the basis of a majority vote, instead of juror unanimity.

to the date of the statute that plainly identifies the elements. The retroactivity of a new rule is not an issue because case law recognizing elements set out in the plain language of the substantive law must date to the statute's enactment and warrants collateral relief when the jury was not instructed it must find the element was proven beyond a reasonable doubt. Certiorari is warranted.

CONCLUSION

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

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 Lisa A. Hopkins, Assistant Attorney General, Office of the Attorney General, The Capitol - PL-01, Tallahassee, FL 33999, on this 26th day of February, 2019.

/s/. Linda McDermott
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