No.

IN THE SUPREME COURT OF THE UNITED STATES

DUSTY RAY SPENCER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

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

---

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether structural error occurs when, after having been affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility, the jury fails to return a verdict as to multiple critical elements necessary to impose the death penalty.

2. Whether structural error occurs when, after having been affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility, the jury fails to unanimously return factual findings or a unanimous verdict for the death penalty.

LIST OF PARTIES

All parties appear on the caption to the case on the cover page. Spencer was the Appellant below. The State of Florida was the Appellee below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Dusty Ray Spencer, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Florida Supreme Court and address the important questions of federal constitutional law presented.

This case presents a fundamental question concerning the Sixth Amendment right to a jury trial, the Due Process Clause requirement of proof beyond a reasonable doubt, and the Eighth Amendment need for a reliable capital sentencing determination.

CITATION TO OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at 2018 WL 5839055 and reproduced at App. A. The trial court's order denying Spencer's successive motion for post-conviction relief is reproduced at Appendix B.

JURISDICTION

The opinion of the Florida Supreme Court was entered on November 8, 2018. (Appendix A). A Motion for Rehearing was filed and was denied by the Florida Supreme Court on December 13, 2018. (Appendix C). This petition is due on March 13, 2019, and is timely filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. VI.

The Sixth Amendment to the Constitution of the United States

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 defense.

U.S. CONST. AMEND. VIII.

The Eighth Amendment to the Constitution of the United States

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

U.S. CONST. AMEND. XIV.

The Fourteenth Amendment to the Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Florida's Capital Sentencing Structure

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

> 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*).

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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. Spencer was sentenced to death under Florida's capital sentencing scheme as it existed in 1992. 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) (1999) and Fla. Stat.§ 921.141 (1999).

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 (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 Spencer was sentenced to death.

Hurst, 136 S. Ct. at 620.

B. Trial Court Proceedings, Initial Direct Appeal, Resentencing and Appeal

Mr. Spencer was tried by a jury and found guilty on November 7, 1992, of first degree murder, aggravated battery and attempted second degree murder in Orange County. Prior to trial, Spencer filed various pretrial motions contesting the constitutionality of the death penalty, which included challenges to the jury instructions and lack of unanimity[2]. See TR 1992 VIII: 657-76; TR IX: 677-85, 798-17, 818-23, 824-38 and 839-41. The jury recommended a sentence of death for the first degree murder conviction on December 8, 1992, by a non-unanimous vote of seven to five. The trial court sentenced Spencer to death on December 21, 1992. Spencer appealed to the Florida Supreme Court. Amongst the issues Spencer raised was the unconstitutionality of Florida's death penalty statute. Spencer challenged the lack of specialized verdict forms and "the lack of a unanimous jury verdict as to any aggravating circumstance violated Article I, sections 9,16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." See Initial Brief of Appellant, Case No. 80,987. The Florida Supreme Court denied his claim as being "without merit and has been consistently rejected by this Court." *Spencer v. State*, 645 So.2d 377, 384 (Fla. 1994). This rejection was based upon the precedent in *Thompson v. State*, 619 So.2d 261, 267 (Fla. 1993). None of this precedent is valid.

On September 22, 1994, the Florida Supreme Court affirmed the conviction, but vacated Spencer's death sentence because the trial court improperly instructed the jury on and considered the aggravating circumstance of "cold, calculated and premeditated" (CCP) and failed to consider

2 "…[O]ur statute is unconstitutional because it authorizes a death verdict on the basis of a bare majority vote." TR IX:886.

the two mental health statutory mitigating circumstances. *Spencer v. State*, 645 So.2d 377 (Fla. 1994). On remand, the trial court, without empaneling a new jury, again sentenced Spencer to death and the Florida Supreme Court affirmed. *Spencer v. State*, 691 So.2d 1062 (Fla. 1997). To be clear, Spencer did not waive his right to a jury. Spencer filed a petition for writ of certiorari this Court denied certiorari on October 6, 1997. *Spencer v. Florida*, 118 S.Ct. 213 (1997). Spencer's petition for writ of certiorari at the time raised the issue that Florida's death penalty statute was unconstitutional because the trial court and the Florida Supreme Court refused to consistently apply and weigh unrebutted mitigating factors and argued that it resulted in an arbitrary and capricious application of the death penalty. At the time the petition was written, *Apprendi v. New Jersey*, 539 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) had not been decided. However, Spencer argued the rudimentary ideas regarding the weighing of aggravators and mitigators that were later fully developed in those decisions.

C. State Post-conviction Motion and Successive Post-conviction Motion

On July 13, 1998, Spencer filed a Motion to Vacate Judgment and Sentence pursuant to Fla. R. Crim. P. 3.850. The circuit court denied the Motion after a limited evidentiary hearing. Spencer appealed and filed a petition for state habeas relief to the Florida Supreme Court. In that appeal, Spencer argued that a jury should have been empaneled to consider the mitigating and aggravating circumstances. Again, the Florida Supreme Court stated that Spencer's argument had no merit, because *Apprendi* did not apply to Florida's capital sentencing scheme. *Spencer v. State*, 842 So.2d 52, 73 (Fla. 2003). Furthermore, Spencer argued that his sentence violated *Ring v. Arizona*, 536 U.S. 584 (2002). At the time, the Florida Supreme Court rejected that argument based on *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002). *Spencer v. State*, 842 So.2d 52, 72 (Fla.

2003). This Court affirmed the denial of his 3.850 Motion and denied his state habeas petition. *Spencer v. State*, 842 So.2d 52 (Fla. 2003).

D. Proceedings in the Florida Supreme Court

Subsequently, Spencer filed a successive 3.851 motion based upon *Hurst v. Florida*[3] and *Hurst v. State*[4]. The successive motion was subsequently summarily denied by the trial court. The denial was appealed to the Florida Supreme Court. The Florida Supreme Court initially issued an Order to Show Cause. Both Mr. Spencer and the State responded. On January 25, 2018, the Florida Supreme Court directed the parties to further brief "the non-*Hurst* related issues in this case." See Appendix D. The Florida Supreme Court ultimately denied relief on November 8, 2018. A motion for rehearing was filed and that was denied on December 13, 2018.

REASONS FOR GRANTING THE WRIT

Structural error occurs when, after having been affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility, a jury fails to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty, and when it fails to return a unanimous verdict for death. The Florida Supreme Court's refusal to conclude that such an error is structural, and instead subjecting it to harmless error review, undermines multiple federal constitutional rights. Finally, the present case presents an ideal vehicle to clarify analytical tension in critical areas of this Court's structural error jurisprudence.

[3] *Hurst v. Florida*, 136 S. Ct. 616 (2016).
[4] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

I. THE FLORIDA SUPREME COURT'S DECISION UNDERMINES MULTIPLE FEDERAL CONSTITUTIONAL RIGHTS AND CONFLICTS WITH BINDING PRECEDENT OF THIS COURT.

A. Error Occurred Below When The Jury Failed To Return A Verdict Beyond A Reasonable Doubt As To Multiple Critical Elements Necessary To Impose The Death Penalty.

Any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury. *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). "Taken together," the Sixth Amendment right to a jury trial and the Due Process Clause requirement of proof beyond a reasonable doubt "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.'" *Id*. at 476-77 (quoting *United States v. Gauldin*, 515 U.S. 506, 510 (1995)). This ruling was extended to include capital punishment in *Ring v. Arizona*, 436 U.S. 584 (2002).

In *Hurst v. Florida*, this Court held that the Sixth Amendment right to a jury trial "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. 616, 619 (2016). "This right required Florida to base [Dusty Spencer's] death sentence on a jury's verdict, not a judge's factfinding." *Id*. at 624.

Florida law provides that "a person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in [section] 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment." Fla. Stat. § 775.082 (1) (2010). That proceeding results in those findings only if the court sets "forth in writing its findings ... as to the facts: [t]hat sufficient aggravating circumstances exist ... and [t]hat there are insufficient

mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3) (2010).

The Florida Supreme Court has construed those state laws and declared:

> [U]nder Florida's capital sentencing scheme, the jury – not the judge – must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty. These necessary facts include, of course, each aggravating factor that the jury finds to have been proven beyond a reasonable doubt. However, the imposition of death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury…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 40, 53 (Fla. 2016); *see also Perry v. State*, 210 So. 3d 630, 633 (Fla. 2016).

The error occurred in Spencer's case when the jury failed to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty: (1) the existence of the aggravating factors proven beyond a reasonable doubt; (2) that the aggravating factors are sufficient to impose death; and (3) that the aggravating factors outweigh the mitigating circumstances. Further, the Florida Supreme Court has acknowledged that in Spencer's case, the trial court initially erred by considering a weighty aggravator (cold, calculated and premeditated) that was not proved beyond a reasonable doubt, which was a clear error. Finally, when Mr. Spencer was resentenced, the judge alone reweighed the aggravators and the mitigators without the benefit of fact-finding by a jury.

In *Hurst v. Florida*, this Court described the illusory nature of the jury's "findings" under Florida's capital sentencing scheme.

> Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Although Florida incorporates an advisory verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona."

136 S. Ct. at 622 (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)). This Court also explicitly found that under state law, a defendant can only be sentenced to death based on "findings by *the court* that such person shall be punished by death." *Hurst*, 136 S. Ct. at 620. (emphasis added).

Thus, for purposes of the Sixth Amendment, multiple critical elements necessary to impose the death penalty in Florida were essentially not submitted to the jury. Instead, the trial court directed a verdict for the State as to those critical elements. The trial court alone determined Spencer's eligibility for the death penalty by failing to empanel a new jury. *See id*. ("[T]he Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (quoting Fla. Stat. § 775.082(1) (2010))).

The failure to submit critical elements necessary to impose the death penalty to the jury also violated Spencer's Due Process rights. This Court previously held that:

> [Defendant'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.

Fiore v. White, 531 U.S. 225, 228-29 (2001). Because Fiore had not been found guilty of an essential element of the substantively defined criminal offense, his conviction was not constitutionally valid.

In Spencer's case in particular, it would be unjust, fundamentally unfair and error for *Hurst* to not apply to him, especially in light of the fact that Spencer raised a *Ring*-like Sixth Amendment claim that his non-unanimous death sentence was unconstitutional. Spencer has consistently raised this issue since his trial in 1992 including in his initial direct appeal which was concluded, prior to *Ring*. He raised similar challenges to his death sentence in a timely fashion before and when *Apprendi* was decided. He raised a challenge again when *Ring* was decided, only to be denied because of Florida's then erroneous interpretation of *Ring's* non-applicability to Florida. Together, these efforts constitute a pre-*Ring* effort to raise a *Ring*-like claim. Spencer also cited, and was forced to fit his direct appeal arguments within, the framework of *Spaziano v. Florida*, 468 U.S. 447 (1984), which was held unconstitutional by the United States Supreme Court in *Hurst v. Florida*. To deny Spencer the retroactive effect of *Hurst* would be a substantial injustice and a violation of his Sixth and Eighth Amendment rights.

Hurst v. Florida and *Hurst v. State* announced a substantive Sixth Amendment rule requiring that a jury find as fact: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are "sufficient" to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. And, each of those findings is required to be made by the jury beyond a reasonable doubt.

In order to become death eligible, each of those three findings must be independently and unanimously found by the jury beyond a reasonable doubt. A conviction of capital murder alone does not render a defendant death eligible. A death sentence cannot be imposed without a finding that the State proved those additional elements beyond a reasonable doubt. Anything less violates

the Due Process Clause. Without a constitutional conviction of capital first degree murder, coupled with the requisite findings of fact in the penalty phase, any death sentence imposed is illegal because it is in excess of the statutory maximum for a conviction of first degree murder.

The increase in penalty imposed on Spencer was without any jury at all and fundamental error. Spencer's death sentence was based on flawed jury instructions, given to a jury who did not recommend death unanimously and the fact-finding of a trial court, who chose to adopt, for a second time, the fundamentally flawed recommendation. No unanimous jury found "all aggravating factors to be considered," "sufficient aggravating factors exist[ed] for the imposition of the death penalty," or that "the aggravating factors outweigh the mitigating circumstances." In fact, in Spencer's case, the trial court initially ignored evidence of statutory mitigation the first time Spencer was sentenced to death. Lastly, there was no "unanimity in the final jury recommendation for death." Spencer had a number of other rights under the United States Constitution, and possibly more extensive. Failure to apply *Hurst* retroactively to Spencer, especially where he raised a *Ring*-like claim at his first opportunity, would be a violation of his due process and equal protection rights under the federal constitution and would result in a death sentence that is arbitrary and capricious in violation of the Sixth Amendment and Eighth Amendment of the United States Constitution and the corresponding provision of the Florida Constitution. His death sentence must accordingly be vacated.

B. Error Occurred Below When The Jury Failed To Return A Unanimous Verdict on As To The Elements Or The Ultimate Sentence.

One of the foundational precepts of the Eighth Amendment, that death is different, requires unanimity in any death recommendation. *See, e.g., 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 v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States."). This is to ensure that the death penalty is not being arbitrarily or capriciously imposed, but properly tailored to the most aggravated and least mitigated of murders. "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. 2d at 60.

Like most states which have retained the death penalty, federal law requires the jury's verdict in a capital case to be unanimous. *See* 18 U.S.C. § 3593(e); Fed. R. Crim. P. 31(a). This Court reiterated that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (abrogated on other grounds in *Atkins*, 536 U.S. at 321)). Thus, the vast majority of capital sentencing laws provide clear and reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated and found *all* of the requisite findings of fact. Of the states that have retained the death penalty, Alabama is now the only state which does not require a unanimous jury recommendation for death. *See* Ala. Code § 13A-5-46 ("The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors.").

As a result, the Florida Supreme Court held that the Eighth Amendment and Florida's right to trial by jury, requires jury unanimity in all death cases. *Hurst v. State*, 202 So. 3d at 61.

The error occurred in Spencer's case when the jury returned none of the required findings of facts at all – let alone unanimously – and, when the jury failed to return a unanimous death recommendation. Additionally, the jury in Spencer's case was instructed to consider an aggravator which was not proven by competent evidence, which was an error that affected the death recommendation. The effect of the error was such that the Florida Supreme Court struck the erroneous aggravator and vacated the death sentence and remanded for a resentencing. The trial court at Spencer's second sentencing did not empanel a new jury and took the recommendation from the original tainted sentence and used it in its analysis to justify sentencing Spencer to death a second time. Under the Sixth Amendment, Spencer was entitled to have a jury independently weigh and evaluate the evidence from his new penalty phase and come up with a new recommendation. This failure deprived Spencer of a proper individualized sentencing as required by the Constitution. Spencer's jury returned an advisory recommendation of death by a vote of seven-to-five, a mere majority vote. This does not satisfy the Sixth or Eighth Amendment and his death sentence cannot stand.

C. The Errors Were Structural.

Whether "a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967). In fulfilling its "responsibility to protect" federal constitutionally guaranteed rights "by fashioning the necessary rule[s]," *id*., this Court has distinguished between two classes of constitutional errors: trial errors and structural errors, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). Trial errors are "simply ...

error[s] in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Such errors occur "during presentation of the case to the jury and their effect may 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.'" *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Fulminante*, 499 U.S. at 307-08).

In contrast, structural errors "are structural defects in the constitution of the trial mechanism." *Fulminante*, 499 U.S. at 309. They affect "the framework within which the trial proceeds." *Id.* at 310. "Errors of this type are so intrinsically harmful as to require automatic reversal ... without regard to their effect on the outcome." *Neder v. U.S.*, 527 U.S. 1, 7 (1999). Put another way, structural "errors require reversal without regard to the evidence in the particular case." *Rose v. Clark*, 478 U.S. 570, 577 (1986). "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any trial." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). With that in mind, the "precise reason why a particular error is not amenable to [harmless error] analysis – and thus the precise reason why the Court has deemed it structural – varies in a significant way from error to error." *Id*. at 1908.

For instance, "an error has been deemed structural if the error always results in fundamental unfairness," such as where a defendant is denied a reasonable-doubt jury instruction. *Id.* Further, "an error has been deemed structural if the effects of the error are simply too hard to measure." *Id*. "[I]f the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," the error is structural. *McCoy v. Louisiana*, 138 U.S. 1500, 1510 (2018) (internal citations omitted). Additionally, in deciding whether an error is structural,

this Court has repeatedly considered whether the error undermined the reliability of the adjudicative process. *See, e.g.*, *Neder*, 527 U.S. at 8-9 (observing that structural "errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function'" (quoting *Rose*, 478 U.S. at 577-78)). But "[t]hese categories are not rigid," *Weaver*, 137 S. Ct. at 1908, and in "a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural." *Id*. (citing *Sullivan*, 508 U.S. at 280-82 (1993)).

In the present case, structural error occurred when the jury failed to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty, failed to find elements unanimously, and when the jury failed to return a unanimous recommendation of death. These errors were different in order of magnitude than a simple error occurring in the process of a trial. Instead, the errors amounted to a structural defect in the framework underlying the trial process. It undermined the core foundation on which the process of determining death eligibility depended. The error is further compounded in cases where trial judges rely on faulty jury recommendations and resentence defendants to death, without the benefit of a jury.

Multiple rationales dictate that conclusion. First, the jury's failure to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty always results in fundamental unfairness. "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). In particular, a jury's "overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." *United States v. Afartin Linen Supply*

Co., 430 U.S. 564, 572 (1977). "For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction." *Id*. at 572-73 (internal citations omitted). And "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment," *Blakely v. Washington*, 542 U.S. 296, 313 (2004), including "each fact necessary to impose a sentence of death," *Hurst v. Florida*, 136 S. Ct. at 619.

In light of those first constitutional principles, it is always fundamentally unfair for a trial court to direct a verdict for the State as to multiple critical elements necessary to impose the death penalty. Simply put, "the wrong entity judged the defendant," *Rose*, 478 U.S. at 578, to be eligible for a penalty "qualitatively different from a sentence of imprisonment, however long." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). This is particularly true in Spencer's case where he was not provided a jury in his second sentencing. In Florida, "[w]here a defendant's death sentence has been vacated and the case is remanded to the trial court to conduct a new penalty phase proceeding before a new jury, '[t]he resentencing should proceed *de novo on all issues bearing on the proper sentence which the jury recommends be imposed*. A prior sentence, vacated on appeal, is a nullity'." *Morton v. State*, 789 So. 2d 324, 334 (Fla. 2001), citing *Teffeteller v. State*, 495 So.2d 744, 745 (Fla.1986); *see also Wike v. State*, 698 So.2d 817, 821 (Fla.1997) (citing *Bonifay v. State*, 680 So.2d 413 (Fla.1996) (emphasis added). "In fact, as we have explained, *a resentencing is a 'completely new proceeding,'* and the trial court is under no obligation to make the same findings as those made in a prior sentencing proceeding." *Id*., citing *Phillips v. State*, 705 So.2d 1320, 1322 (Fla.1997) (citing *King v. Dugger*, 555 So.2d 355, 358–59 (Fla.1990)) (emphasis added). "[W]hen a sentence is vacated the defendant is resentenced at a

new proceeding subject to the full panoply of due process rights…" *State v. Fleming*, 61 So.3d 399, 408 (Fla. 2011). However, in Spencer's case, this was ignored and he was not afforded "a new proceeding subject to the full panoply of due process rights." *Id.*

The trial judge alone heard arguments and reweighed the aggravation and the mitigation in this case and gave great weight to the jury recommendation of death, even though that jury based their recommendation on an erroneous instruction of CCP, one of the weightiest aggravators. "Employing an invalid aggravating factor in the weighing process 'creates the possibility ... of randomness,' by placing a 'thumb [on] death's side of the scale,' thus 'creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty,'" *Sochor v. Florida*, 504 U.S. 527, 532 (1992)(internal citations omitted). "Even when other valid aggravating factors exist, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of 'the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances'." *Id.*, citing *Clemons v. Mississippi*, 494 U.S. 738, 752 (1990). As is clear, the weighing of aggravators and mitigators, under the Sixth Amendment, should be done "by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J. concurring).

Third, the error undermined the reliability of the process for determining eligibility for the death penalty. In the capital context, a particular constitutional consideration arises. Again, "the penalty of death is qualitatively different from a sentence of imprisonment, however long." *Woodson*, 428 U.S. at 305 (plurality opinion). "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* Simply put, the "Eighth Amendment insists upon 'reliability in

the determination that death is the appropriate punishment in a specific case.'" *Oregon v. Guzeh*, 546 U.S. 517, 525 (2006) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989)).

As a result, the Florida Supreme Court concluded "that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment." *Hurst*, 202 So. 3d at 59. Spencer's jury never returned any unanimous verdict during the penalty phase.

Additionally, a capital jury "must not be misled regarding the role it plays in the sentencing decision." *Romanov. Ohlahoma*, 512 U.S. 1, 8 (1994) (citing *Caldwell*, 472 U.S. at 336 (plurality opinion)). More specifically, a capital jury must not be "affirmatively misled ... regarding its role in the sentencing process so as to diminish its sense of responsibility." *Id*. at 10.

But under Florida's capital sentencing scheme, a capital jury is affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility. As an initial matter, such a jury is instructed that the "[f]inal 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…." Fla. Std. Jury Instr. (Crim.) 7.11 (1992). In fact, there are several instances in the final instructions alone where the jury's role in the sentencing process is characterized as "recommending", or providing a "recommendation" or "advisory sentence." Fla. Std. Jury Instr. (Crim.) 7.11 (1992).

Those instructions diminished the jury's sense of responsibility throughout the sentencing process, including during any jury determination of whether Spencer is eligible for the death penalty. The instructions indicate that the jury's input – including its "findings" – into the sentencing process is not binding or controlling. In particular, those instructions convey that the

jury's input is not binding on the trial court. Instead, the judge makes "the final decision." In Spencer's case, this flaw is highlighted by the fact that the jury was instructed incorrectly on an aggravator that was not proven by the evidence.

Further, those instructions affirmatively misled the jury regarding its role in the sentencing process. As just discussed, the instructions convey that the jury's input is not binding, including on the trial court. However, the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst v. Florida*, 136 S. Ct. at 619. As a result, a jury's findings as to those elements are binding and controlling, including on the trial court. In particular, if a jury fails to find one or more of those elements or if the jury fails to unanimously find for death, the defendant is not eligible for death. That is "the final decision." The judge cannot alter it.

II. THE QUESTIONS PRESENTED WERE PROPERLY RAISED BUT WENT UNADDRESSED BELOW, AND HAVE BEEN REPEATEDLY IGNORED BY THE FLORIDA SUPREME COURT.

A. The Questions Were Properly Presented To The Florida Supreme Court.

In the present case, although the Florida Supreme Court did not expressly address the question presented to this Court, it had a fair opportunity to do so. Although his case was pre-*Ring*, Spencer filed pre-trial, appeal and post-conviction motions in the circuit court raising various *Ring*-type claims. Without the benefit of the *Ring* or *Hurst* decisions, Spencer raised a challenge to Florida's capital sentencing scheme during post-conviction. *See* TR 1992 VIII: 657-76; TR IX: 677-85, 798-17, 818-23, 824-38 and 839-41. Specifically, Spencer challenged the lack of specialized verdict forms and how "the lack of a unanimous jury verdict as to any aggravating circumstance violated Article I, sections 9,16 and 17 of the Florida Constitution and the Fifth,

Sixth, Eighth and Fourteenth Amendments to the United States Constitution." See Initial Brief of Appellant, Case No. 80,987. This effort constituted a pre-*Ring* effort to raise *Ring*-like challenges.

Within one year from the issuance of *Hurst v. Florida*, Spencer filed a successive post-conviction motion arguing Florida's capital sentencing scheme was unconstitutional because it denied criminal defendants their right to a jury verdict of guilty beyond a reasonable doubt as to the critical elements necessary to impose death, and denied criminal defendants the right to have those findings be unanimous. In support thereof, Spencer argued that those findings were substantive and cited (1) the Sixth Amendment right to jury trial, as well as this Court's decision in *Ring*, 536 U.S. at 584; (2) the Eighth Amendment need for reliability in making a capital sentencing determination; and (3) the Fourteenth Amendment requirement of proof beyond a reasonable doubt. *Id*. The trial court denied that motion.

On appeal before the Florida Supreme Court, Spencer reasserted his federal constitutional claim. In both his response to the order to show cause and reply brief, Spencer specifically argued that the error undermined the process for determining eligibility for the death penalty in light of this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

For its part, and consistent with its prior conclusion in *Hurst v. State*, 202 So. 3d at 67, the Florida Supreme Court simply decided that the error below was subject to harmless error review, and thus, was not structural. *See* App. A. In these circumstances, despite the Florida Supreme Court's failure to expressly discuss the constitutional issue, Spencer's claim that structural error arose under the Sixth, Eighth, and Fourteenth Amendments is properly before this Court. *See Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973).

B. The Florida Supreme Court Has Repeatedly Failed To Address A Crucial Component Of The Questions Presented.

Just recently, this Court has recognized that the Florida Supreme Court has failed to address a substantial Eighth Amendment challenge to capital defendant's sentences. As noted by Justice Sotomayor, at least six capital defendants "now face execution by the State without having received full consideration of their claims." *Cozzie v. Florida*, 138 S. Ct. 1131, 1132 (2018) (Sotomayor, J., dissenting from denial of certiorari).

In addition, three justices recently highlighted the Florida Supreme Court's repeated failure to address post-*Hurst v. Florida* Eighth Amendment challenges to Florida's capital sentencing scheme. *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Sotomayor, J., joined by Ginsburg, J., and Breyer, J., dissenting from denial of certiorari). Those justices also recognized that this Court's recent decision in *Hurst v. Florida*, 136 S. Ct. at 616, cast such Eighth Amendment challenges in a new light.

> Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where "the court [was] the final decision-maker and the sentencer-not the jury." In *Hurst v. Florida*, however, we held that process, "which required the judge alone to find the existence of an aggravating circumstance," to be unconstitutional.
>
> With the rationale underlying its previous rejection of the *Caldwell* challenge now undermined by this Court in *Hurst*, petitioners ask that the Florida Supreme Court revisit the question. The Florida Supreme Court, however, did not address that Eighth Amendment challenge.

Truehill, 138 S. Ct. at 3 (Sotomayor, J., joined by Ginsburg, J., and Breyer, J., dissenting from denial of certiorari) (internal citations omitted).

Instead, the Florida Supreme Court has steadfastly refused to mention or discuss "the fundamental Eighth Amendment principle it announced: '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.' *Caldwell*, 472 U. S., at 328–29." *Cozzie*, 138 S. Ct. at 1133.

Like the petitioners in *Truehill* and *Cozzie*, Spencer also argued that the jury instructions in his case "impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory." *Id*. As in the cases of Spencer and the petitioners in *Truehill*, in other cases, the Florida Supreme Court determined that the error was harmless without addressing the defendant's Eighth Amendment challenge. *See King v. State*, 211 So. 3d 866, 889-93 (Fla. 2017); *Kaczmar v. State*, 228 So. 3d 1, 7-9 (Fla. 2017); *Knight v. State*, 225 So. 3d 661, 682-83 (Fla. 2017); *Middleton v. State*, 220 So. 3d 1152, 1184-85 (Fla. 2017); *Tundidor v. State*, 221 So. 3d 587, 607-08 (Fla. 2017); *Guardado v. Jones*, 226 So. 3d 213, 215 (Fla. 2017).

Though the Florida Supreme Court just recently, in another case, addressed that defendant's Eighth Amendment and *Caldwell* challenges to his advisory jury recommendation for death, that case is distinguishable. *See Reynolds v. State*, 251 So. 3d 881 (Fla. 2018).

In dismissing Reynold's *Caldwell* claim, the Florida Supreme Court completely misapprehended, and failed to address, Reynolds' and Spencer's argument on this point. The Florida Supreme Court held that Reynolds' "jury was not misled as to its role in sentencing" *at the time of his capital trial*. *Id*. at 827. Thus, the majority concluded that *Caldwell* was not violated because, *at the time they rendered their advisory recommendation*, the jurors understood "their actual sentencing responsibility" was advisory, and *Caldwell* does not require that jurors "must also be informed of how their responsibilities might hypothetically be different in the future." *Id*. at 823. The Florida Supreme Court failed to address why *treating* this advisory, non-binding jury

recommendation as a mandatory jury verdict did not violate *Caldwell*, since Reynolds' jury – and every pre-*Hurst* jury in Florida – was repeatedly instructed otherwise. The issue raised by Reynolds, and here by Spencer, is not whether their juries were properly instructed *at the time of their capital trials*, but instead, whether *today* the State of Florida can now treat those advisory recommendations as mandatory and binding, when the jury was explicitly instructed otherwise. This Court, in *Hurst v. Florida*, warned against that very thing. This Court cautioned against using what was an advisory recommendation to conclude that the findings necessary to authorize the imposition of 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, 136 S. Ct. at 622.

An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation, the juror's inability to be merciful based upon sympathy, and what aggravating factors could be found and weighed in the sentencing calculus) 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.").

This error is particularly acute in this case due to the way Spencer's ultimate sentencing was handled. This Court has held:

> "In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose

> a death sentence. See *Clemons v. Mississippi*, 494 U.S. 738, 752, 110 S.Ct. 1441, 1450, 108 L.Ed.2d 725 (1990)…. Even when other valid aggravating factors exist, *merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of 'the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances*.' *Clemons*, supra, 494 U.S., at 752, 110 S.Ct., at 1450 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)); see *Parker v. Dugger*, 498 U.S. 308, 321(1991)."

Sochor v. Florida, 504 U.S. 527, 532 (1992) (emphasis added). Depriving Spencer of the "individualized treatment" from the *actual* reweighing of his aggravating and mitigating factors *by a jury*, placed the thumb on death's side of the scale.

The Florida Supreme Court's steadfast refusal to address this point, undermines multiple federal constitutional rights, and makes this petition the ideal vehicle to clarify analytical tension in critical areas of this Court's jurisprudence.

CONCLUSION

For the foregoing reasons, Spencer respectfully requests that this Court grant the petition for writ of certiorari to review the judgment of the Florida Supreme Court.

Respectfully submitted,

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