No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RODNEY LOWE,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To
The Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI
CAPITAL CASE

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CAPITAL CASE
QUESTIONS PRESENTED

I. Does the Florida Supreme Court's exclusive reliance on a unanimous recommendation of death to find harmless error for violations of *Hurst v. Florida*, 136 S. Ct. 616 (2016), in a pre–*Hurst* case in which the capital defendant's advisory jury, after being instructed that the findings of fact and sentencing decision would be made by the judge alone, violate the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985)?

II. Does the Florida Supreme Court's application of an automatic harmless error rule to *Hurst* violations contravene this Court's decisions holding a finding of harmless error cannot be automatic and mechanical, but must include consideration of the whole record, and must be accompanied by a detailed explanation based on the record?

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Petitioner Rodney Lowe, a death-sentenced prisoner, was appellant in the Florida Supreme Court. Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Rodney Lowe is a condemned prisoner in the State of Florida. Petitioner urges this Honorable Court to issue a Writ of Certiorari to review the affirmance of his death sentence by the Supreme Court of Florida.

CITATION TO OPINION BELOW

The Florida Supreme Court decision affirming the sentence of death is *Lowe v. State*, 259 So. 3d 23 (Fla. 2018), and is attached to this petition as Exhibit A. The denial of rehearing is attached as Exhibit B.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Supreme Court of Florida based on 28 U.S.C. §1257(a) and 2101(d). The Supreme Court of Florida issued its decision on October 19, 2018, and denied the motion for rehearing December 27, 2018. This petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

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

The Eighth Amendment to the United States Constitution provides:

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

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

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

STATEMENT OF THE FACTS AND CASE

A. Introduction

Rodney Lowe was convicted of first degree murder and attempted robbery and sentenced to death followed by a 15 year consecutive sentence. His convictions and sentences were affirmed by the Florida Supreme Court in *Lowe v. State*, 650 So.2d 969 (Fla.1994). A state postconviction motion was granted in part because trial counsel provided ineffective representation, prejudicial only at penalty phase, and the Florida Supreme Court affirmed that order in *Lowe v. State*, 2 So. 3d 21 (Fla. 2009). At the new penalty phase, the jury unanimously recommended death, T2555[1], and the trial court imposed the death sentence. R507.

Appeal was taken, and among other issues petitioner argued the jury's verdict did not authorize a death sentence under the Sixth, Eighth and Fourteenth Amendments. At trial the defense had challenged the constitutionality of the statute and sought special instructions and verdict forms under *Ring v. Arizona*, 536 U.S. 584 (2002), to require the jury to separately and unanimously find each aggravator beyond a reasonable doubt. R176-78; 265-71; 296-318. The trial court denied counsel's request. T2552. The instructions and verdict form did not require the jurors to unanimously find any, or the same, aggravating circumstance beyond a reasonable doubt, its weighing decisions nor any other findings. T2532-2551. The Florida Supreme Court had previously rejected the argument such unanimous findings were required, *see State v. Steele*, 921 So.2d 538 (Fla. 2005), but this Court abrogated *Steele* and other cases and found Florida's death penalty scheme unconstitutional in *Hurst v. Florida*, 136 S.Ct. 616 (Jan. 12, 2016).

Mr. Lowe raised these issues in his Initial Brief. In addition, after this Court's decision in *Hurst*, Mr. Lowe filed a Supplemental Brief, and a Second Supplemental Brief directly addressing

[1] "T" refers to the trial transcript, and "R" to the trial record.

the impropriety of using the unanimous jury recommendation to find harmless error, including the *Caldwell* issue.[2] These arguments are generally referenced in the Florida Supreme Court's decision below. *Lowe*, 259 So. 3d at 64-65.

B. Pertinent Facts.

The facts of the offense are set forth in the Florida Supreme Court's decision on his original direct appeal as follows:

> On the morning of July 3, 1990, Donna Burnell was working as a clerk at the Nu-Pack convenience store in Indian River County when a would-be robber shot her three times with a .32 caliber handgun. Ms. Burnell suffered gunshot wounds to the face, head, and chest and died on the way to the hospital. The killer fled the scene without taking any money from the cash drawer.
>
> During the week following the shooting, investigators received information linking the defendant, Rodney Lowe, to the crime. Lowe was questioned by investigators at the police station and, after speaking to his girlfriend, gave a statement that implicated him in the murder. Following this statement, Lowe was arrested and indicted for first-degree murder and attempted robbery.
>
> At trial, the State presented witnesses who testified that, among other things, Lowe's fingerprint had been found at the scene of the crime, his car was seen leaving the parking lot of the Nu-Pack immediately after the shooting, his gun had been used in the shooting, his time card showed that he was clocked-out from his place of employment at the time of the murder, and Lowe had confessed to a close friend on the day of the shooting. The State also presented, over defense objection, the statement Lowe gave to the police on the day of his arrest. Lowe advanced no witnesses or other evidence in his defense. After closing arguments, the jury returned a verdict finding Lowe guilty of first-degree murder and attempted armed robbery with a firearm as charged.

Lowe v. State, 650 So. 2d 969, 971 (Fla. 1994).

On the direct appeal of his resentencing trial, the Florida Supreme Court described the aggravating, and some of the mitigating factors:

[2] Documents available at: http://onlinedocketssc.flcourts.org/DocketResults/LTCases?CaseNumber=263&CaseYear=2012

> In following the jury's unanimous recommendation of death, the trial court found the following five aggravating circumstances, merged to four: (1) under sentence of imprisonment/community control (great weight); (2) prior violent felony (great weight); (3A) murder in the course of a felony (great weight) merged with (3B) pecuniary gain; and (4) avoid arrest (great weight). The trial court found one statutory mitigator, statutory age (little weight).[3] Regarding the ten nonstatutory mitigators argued by Lowe, the trial court gave them all little to no weight, except for good behavior while in confinement, which the trial court gave moderate weight.

Lowe v. State, 259 So. 3d 23, 66 (Fla. 2018).

C. The instructions at the sentencing trial.

The jury in this case was repeatedly told it was only to render an advisory recommendation or sentence, and that the judge would decide whether the death sentence should be imposed. Prior to *voir dire*, the trial court instructed each panel it would render an advisory sentence and the judge would give its recommendation great weight. V 4, T198-99, 200, 201, 203. These instructions were repeated by the Court to each of the panels of prospective jurors. V7, T554-55 (same).

After the jury was selected and sworn, it was similarly instructed:

> The punishment for this crime is either death or life imprisonment, requiring the Defendant to serve no less than 25 years before becoming eligible for parole. The **final decision** as to which punishment shall be imposed rests with me. However, the law requires that you the jury render to the Court an **advisory sentence** as to which punishment should be imposed upon the Defendant. However, under the law, I'm required to give your **recommendation** great weight. (e.s.).

V13, T1314. The Court continued, "After your deliberation you'll return an **advisory** sentence as to what punishment should be imposed upon the Defendant." T1315-16. (e.s.).

Final instructions after closing arguments repeated the same theme, as the jury was told by the Court again: "The **final decision** as to which punishment shall be imposed rests with me. However, the law requires that you, the jury, render to the Court an **advisory sentence** as to which

[3] Mr. Lowe was 20 years and nine months of age at the time of this offense.

punishment should be imposed upon the Defendant." V 21, T2533 (e.s.). "You must follow the law that will now be given to you in rendering an **advisory sentence**," T2534 (e.s.). Continuing:

> In this case as the trial judge **that responsibility will fall on me**, however, the law requires that you render an advisory sentence as to which punishment should be imposed, life imprisonment without the possibility of parole for a period of twenty-five years, or the death penalty.
>
> **Although the recommendation of the jury as to the penalty is advisory in nature, it is not binding**. The jury **recommendation** must be given great and deference by the court in determining which punishment to impose.
>
> Your **advisory sentence** should be based upon the evidence of aggravating and mitigating circumstances that have been presented to you in these proceedings.

T2534 (e.s.). The advisory nature of the jury's recommended sentence was repeated during the instruction on reasonable doubt, T2539, weighing, T2542, no requirement of unanimity and weighing and sifting before balloting, T2546, as well as four times again in the explanation of the verdict form, which included the phrase "advisory recommendation." T2546-47.

Hurst relief was denied based on the Florida Supreme Court's express and singular finding the unanimous jury recommendation rendered the error harmless:

> In *Davis v. State*, 207 So.3d 142, 175 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2218, 198 L.Ed.2d 663 (2017), this Court held that a jury's unanimous recommendation of death is "precisely what we determined in Hurst to be constitutionally necessary to impose a sentence of death" because a "jury unanimously f[inds] all of the necessary facts for the imposition of [a] death sentence[ ] by virtue of its unanimous recommendation[ ]." Here, the jury was informed that before it could consider the death penalty, it must first determine that at least one aggravating circumstance has been proven beyond a reasonable doubt. Also, as in *Davis*, the jury was informed "that it needed to determine whether sufficient aggravators existed and whether the aggravation outweighed the mitigation before it could recommend a sentence of death." *Id*. at 174. Among other things, the jury was also informed that, regardless of its findings, it was neither compelled nor required to recommend a sentence of death. Despite the mitigation presented and the fact that the jury was properly informed that it may consider mitigating circumstances proven by the greater weight of the evidence, the jury unanimously recommended that Lowe be sentenced to death. "Th[is] recommendation[ ] allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." *Id*.

> This Court has consistently relied on *Davis* to deny *Hurst* relief to defendants who have received a unanimous jury recommendation of death. *See, e.g.*, *Cozzie v. State*, 225 So.3d 717, 733 (Fla. 2017), *cert. denied*, —— U.S. ——, 138 S.Ct. 1131, 200 L.Ed.2d 729 (2018); *Morris v. State*, 219 So.3d 33, 46 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 452, 199 L.Ed.2d 334 (2017); *Tundidor v. State*, 221 So.3d 587, 607-08 (Fla. 2017), *cert. denied*, ——— U.S. ——, 138 S.Ct. 829, 200 L.Ed.2d 326 (2018); *Oliver v. State*, 214 So.3d 606, 617-18 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 3, 199 L.Ed.2d 272 (2017); *Truehill v. State*, 211 So.3d 930, 956-57 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 3, 199 L.Ed.2d 272 (2017). Lowe's arguments do not compel departing from our precedent. Because the *Hurst* error in Lowe's penalty phase was harmless beyond a reasonable doubt, he is not entitled to a new penalty phase.

Lowe, 259 So. 3d at 64-5.

REASONS FOR GRANTING THE WRIT

I. Introduction.

The Supreme Court of Florida's complete and utter deference to a pre-*Hurst* unanimous death recommendation does not comport with the Constitution.

In *Hurst*, this Court declined to address the harmfulness of the constitutional error, adhering to its practice of leaving the issue "to state courts to consider whether an error is harmless." *Id*. at 624. From the many cases decided by the Florida Supreme Court since, this Court can now see the state court has unconstitutionally applied harmless error to *Hurst* cases in a mechanical and unsearching fashion, focusing almost exclusively on whether the pre-*Hurst* jury was unanimous in its nonbinding recommendation of death. This issue has percolated long enough; it is time for this Court to take certiorari and discern what has become of the resulting brew.

The Florida Supreme Court's unusually uninsightful application of harmless error has not escaped this Court's attention. In recent months, more than one Justice of this Court has questioned the constitutionality of the harmless error rule applied by the Florida Supreme Court for death sentences that were obtained in violation of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Florida Supreme Court's refusal to meaningfully address whether its rule is consistent with the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. *See Reynolds v. Florida,* 139 S.Ct. 27 (2018)(Breyer and Sotomayor, JJ., dissenting from the denial of certiorari); *Guardado v. Jones*, 138 S. Ct. 1131 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *Middleton v. Florida*, 138 S. Ct. 829 (2018) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari); *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari). Yet to date the votes necessary to grant certiorari have not been forthcoming, even though the Florida Supreme Court's harmless error rule is based on the

very mechanism—an "advisory" jury recommendation devoid of any jury factfinding— this Court held unconstitutional in *Hurst v. Florida*.

The Florida Supreme Court's rule mandates that if a defendant's pre–*Hurst* advisory jury voted to recommend death by a majority vote, that is, anywhere between a margin of 7 to 5 and 11 to 1, the *Hurst* error is not harmless and the death sentence must be vacated. But if the defendant's pre–*Hurst* advisory jury recommended death by a vote of 12 to 0, the *Hurst* error is automatically deemed harmless and that Court upholds the defendant's death sentence. Although in some cases the Florida Supreme Court has mentioned additional factors in the course of rendering a harmless error decision, it has never held a *Hurst* violation harmful in a case with a unanimous advisory jury recommendation; and the court has never held a *Hurst* violation harmless in a split vote advisory jury case. The vote of the pre–*Hurst* advisory jury is always the dispositive factor. In fact, in Mr. Lowe's case, the unanimous death recommendation was expressly the sole factor the Florida Supreme Court relied upon to find the *Hurst* error harmless.

The Florida Supreme Court's *Hurst* harmless error rule, which was applied to deny Mr. Lowe relief below, is unconstitutional. It violates the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), by relying entirely on the vote of an advisory jury which was instructed that the judge would make the findings of fact necessary for a death sentence and render the final decision on the death penalty. It also contravenes this Court's precedents holding that harmless error review cannot be "automatic and mechanical," *Barclay v. Florida*, 463 U.S. 939 (1983), must include consideration of the whole record, *see, e.g.*, *Rose v. Clark*, 478 U.S. 570, 583 (1986), and must be accompanied by "a detailed explanation based on the record," *Clemons v. Mississippi*, 494 U.S. 738, 740 (1990).

II. Sole reliance on a unanimous pre-*Hurst* jury advisory recommendation violates *Caldwell*.

This Court should grant a writ of certiorari to address whether the Florida Supreme Court's automatic harmless error rule for *Hurst* violations contravenes the Eighth and Fourteenth Amendments under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This issue affects dozens of prisoners on Florida's death row whose death sentences were obtained in violation of *Hurst* and who nevertheless remain subject to execution based solely on the vote cast by their pre–*Hurst* "advisory" jury; a jury whose sense of responsibility for a death sentence was systemically diminished.

"This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task," and has found unconstitutional under the Eighth Amendment comments that "minimize the jury's sense of responsibility for determining the appropriateness of death." *Caldwell*, 472 U.S. at 341. Under *Caldwell*, the Florida Supreme Court's *per se* harmless error rule for *Hurst* claims violates the Eighth Amendment by relying entirely on an advisory jury recommendation rendered by jurors whose sense of responsibility for a death sentence was diminished by the trial court's repeated instructions that the jury's role was merely advisory.

The Florida Supreme Court's reliance on the advisory jury's recommendation, without considering the jury's diminished sense of responsibility for the death sentence, violates *Caldwell*. Mr. Lowe's advisory jurors were led to believe their role in sentencing was diminished when jurors were repeatedly instructed by the court their recommendation was advisory and the final sentencing decision rested solely with the judge. Because the jury was led to believe it was not ultimately responsible for the imposition of Mr. Lowe's death sentence, the Florida Supreme

Court's automatic rule cannot be squared with the Eighth Amendment. Under *Caldwell*, no court can be certain beyond a reasonable doubt that a jury would have made the same unanimous recommendation absent the *Hurst* error. A court certainly cannot be sure beyond a reasonable doubt that a jury that properly grasped its critical role in determining a death sentence would have unanimously found all of the elements for the death penalty satisfied. Indeed, a jury that properly understood the gravity of its factfinding role could have been substantially affected by the mitigation in Mr. Lowe's case.

And here, the fact the advisory jury was informed of its diminished role by the trial judge, rather than only the prosecutor as in *Caldwell*, strengthens the case for finding an Eighth Amendment violation. Arguments by prosecutors are "likely to be viewed as the statements of advocates," whereas jury instructions are likely "viewed as definitive and binding statements of the law." *Boyde v. California*, 494 U.S. 370, 384 (1990). As this Court has recognized, "[t]he influence of the trial judge on the jury is necessarily and properly of great weight, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946).

This Court's rationale for the rule announced in *Caldwell* as it relates to improper comments by a prosecutor also supports applying the rule to Florida's pre– *Hurst* advisory jury instructions. *Caldwell* reasoned that encouraging juries to rely on future appellate court review deprived the defendant of a fair sentencing because appellate courts are ill–suited to evaluate the appropriateness of a death sentence in a particular case, especially with respect to mitigation. *Caldwell*, 472 U.S. at 330–31. This same concern applies here, where the jury was not required to make the findings of fact required to impose a death sentence, knowing that the ultimate life or death decision would be made by the judge.

This Court should grant a writ of certiorari and address the Florida Supreme Court's unconstitutional harmless error rule in light of *Caldwell*.

III. The Florida Supreme Court's rule violates the Sixth, Eighth and Fourteenth Amendment requirements that harmless error review must not be mechanical and must consider the entire record.

This Court should grant a writ of certiorari to decide whether the Florida Supreme Court's automatic harmless error rule for *Hurst* violations contravenes the Sixth, Eighth and Fourteenth Amendments under this Court's precedents establishing that a state court's harmless error review, particularly in a capital case, must not be "automatic and mechanical," *Barclay v. Florida*, 463 U.S. 939 (1983), must include consideration of the whole record, *see Rose v. Clark*, 478 U.S. 570, 583 (1986), and must be accompanied by "a detailed explanation based on the record," *Clemons v. Mississippi*, 494 U.S. 738, 740 (1990). The Florida Supreme Court's harmless error rule for *Hurst* violations does none of these things.

The United States Constitution imposes limits on a state court's use of a harmless error rule to deny a federal constitutional claim. Whether a state court has exceeded constitutional boundaries in the denial of a federal claim on harmless error grounds "is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967). Since *Chapman*, this Court has reiterated the burden of proving a constitutional error harmless beyond a reasonable doubt rests with the state, as the beneficiary of the error. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). The Court has also emphasized that proper harmless error analysis should consider the error's probable impact on the minds of an average rational jury. *See Harrington v. California*, 395 U.S. 250, 254 (1969). And the Court has found harmless error rulings must be accompanied by sufficient reasoning based on the actual record. *See, e.g.,*

Clemons, 494 U.S. at 752; *Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring) (explaining that a state court "cannot fulfill its obligations of meaningful review by simply reciting the formula for harmless error.").

A federal constitutional error's impact must be assessed in the context of the entire record. *See, e.g.*, *Rose*, 478 U.S. at 583. When the error's impact is unclear after the whole record is reviewed, courts should not perform harmless–error analysis that amounts to "unguided speculation." *Holloway v. Arkansas*, 435 U.S. 475, 490–91 (1978); *see also O'Neal v. McAninch*, 513 U.S. 432, 435 (1995) ("[T]he uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict.").

In capital cases, this Court reviews a state court's harmless error denial of a federal constitutional claim with heightened scrutiny. *See, e.g.*, *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988). As this Court has long recognized, capital cases demand heightened standards of reliability because "[d]eath is a different kind of punishment from any other which may be imposed in this country . . . in both its severity and its finality." *Beck v. Alabama*, 447 U.S. 625, 637 (1980). Accordingly, courts are forbidden from applying "harmless–error analysis in an automatic or mechanical fashion" in a capital case. *Clemons*, 494 U.S. at 753. This Court has applied these standards to review harmless error rulings of the Florida Supreme Court. *See, e.g.*, *Schneble v. Florida*, 405 U.S. 427 (1972); *Barclay*, 463 U.S. 939; *Parker*, 498 U.S. 308; *Sochor*, 504 U.S. 527. In some cases, the Florida Supreme Court's harmless error analysis survived this Court's federal constitutional scrutiny. *See, e.g.*, *Schneble*, 405 U.S. at 432; *Barclay*, 463 U.S. at 958. But in other cases, it did not. *See, e.g.*, *Parker*, 498 U.S. at 320; *Sochor*, 504 U.S. at 540. The Florida Supreme Court's harmless error ruling in this case cannot survive constitutional scrutiny.

In cases where a Florida jury operating under Florida's unconstitutional pre– *Hurst* system reached a unanimous death recommendation, the Florida Supreme Court has generally refused to even entertain individualized, record-based arguments before holding the *Hurst* error harmless. Although in some cases the Florida Supreme Court mentions factors other than the vote itself in the course of its harmless error ruling, the vote is always the dispositive factor. In the dozens of *Hurst* cases it has reviewed, the Florida Supreme Court has never held a *Hurst* violation harmful in a case with a unanimous advisory jury recommendation. And that Court has never held a *Hurst* violation harmless in a split vote advisory jury case. The vote always controls. This Court's decisions require that harmless error analysis include an actual assessment of the whole record. *See, e.g., United States v. Hastings*, 461 U.S. 499, 509 (1983) ("Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless."); *Rose*, 478 U.S. at 583 ("We have held that *Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless."); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1967) ("Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt."); *Yates v. Evatt*, 500 U.S. 391, 403 (1991) ("To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."); *see also Fulminante*, 499 U.S. at 306 (explaining that the "common thread" connecting cases subject to harmless–error review under Chapman is that each involves "trial error" that may "be qualitatively assessed in the context of the other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt"). And state courts outside of

Florida have recognized and applied this Court's mandate that harmlessness be analyzed in the context of the whole record. *See, e.g., State v. Cage*, 583 So. 2d 1125, 1128 (La. 1991) ("Chapman harmless error analysis . . . mandates consideration of the entire record.").

The Florida Supreme Court's automatic practice defies this Court's jurisprudence. Despite Mr. Lowe's record-based arguments about the impact of the *Hurst* error on his death sentence, the Florida Supreme Court refused to address them. And the Florida Supreme Court has followed the same mechanical approach to harmless error analysis in every capital case where the pre–*Hurst* advisory jury's recommendation was unanimous.

Harmless error in a capital sentencing case cannot be found by merely showing the evidence in the record is sufficient to support a death sentence. *See Satterwhite*, 486 U.S. at 258. "[W]hat is important is an individualized determination," given the well–established Eighth Amendment requirement of individualized sentencing in capital cases. *Clemons*, 494 U.S. at 753. Accordingly, the vote of a defendant's pre–*Hurst* advisory jury cannot by itself resolve a proper harmless–error inquiry. The fact that an advisory jury unanimously recommended the death penalty does not establish that the same jury would have made, or an average rational jury would make, the three specific findings of fact to support a death sentence in a constitutional proceeding.

Instead of providing for the tailored harmless error review the Constitution requires, the Florida Supreme Court has adopted an automatic approach that works a fundamental injustice on Mr. Lowe and others in his position. This Court should grant certiorari to review this substantial and far-reaching issue.

CONCLUSION

Petitioner Rodney Lowe requests certiorari review be granted.

Respectfully submitted,

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STEVEN H. MALONE
March 26, 2019