No. _____

IN THE

Supreme Court of the United States

JESSE GUARDADO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does the Florida Supreme Court's per se harmless-error rule for violations of *Hurst v. Florida*, 136 S. Ct. 616 (2016), pursuant to which *Hurst* errors are deemed harmless in every case in which the capital defendant's pre-*Hurst* advisory jury unanimously recommended the death penalty—after receiving instructions that the judge would both make the findings of fact necessary for a death sentence and render the final decision on the death penalty—contravene the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985)?

2. Does the Florida Supreme Court's per se harmless-error rule for *Hurst* violations contravene this Court's decisions 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 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)?

3. Does the Florida Supreme Court's per se harmless-error rule for *Hurst* violations, which relies entirely on an advisory jury recommendation that does not meet Sixth Amendment requirements as to any element of a Florida death sentence, contravene the holding of *Sullivan v. Louisiana*, 508 U.S. 275 (1993)?

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PARTIES TO THE PROCEEDINGS

Petitioner Jesse Guardado, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court.

Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

DECISION BELOW

The decision of the Florida Supreme Court is reported at 238 So. 3d 162, and reprinted in the Appendix (App.) at 1a.

JURISDICTION

The judgment of the Florida Supreme Court was entered on March 8, 2018. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

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

The Eighth Amendment provides:

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

The Fourteenth Amendment provides, in relevant part:

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

STATEMENT OF THE CASE

I. Introduction

On at least three occasions, multiple Justices of this Court have expressed grave concerns regarding the constitutionality of the per se harmless-error rule invented 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 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).

Nevertheless, the Florida Supreme Court has continued to mechanically apply its harmless-error rule to uphold dozens of death sentences based on the very mechanism—an "advisory" jury recommendation devoid of any jury fact-finding—that this Court held in *Hurst* was unconstitutional.

The Florida Supreme Court's rule provides that if a defendant's pre-*Hurst* advisory jury voted to recommend death by a majority vote—i.e., a margin between 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 the Florida Supreme Court upholds the defendant's death sentence. Although in some cases the Florida Supreme Court mentioned additional factors in the course of rendering a harmless-error decision, the court 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. *See* App. 121a-128a.

This petition explains that the Florida Supreme Court's *Hurst* harmless-error rule, which was applied to deny Petitioner Jesse Guardado relief below, is unconstitutional for three reasons. First, the rule violates the Eighth Amendment

under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), by relying entirely on the vote of an advisory jury that was instructed the judge would make the findings of fact necessary for a death sentence and render the final decision on the death penalty. Second, the Florida Supreme Court's rule 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). Third, the rule violates *Sullivan v. Louisiana*, 508 U.S. 275 (1993), and its progeny, which established that a constitutional error infecting a jury verdict may only be held harmless where the jury's verdict is valid as to *at least one* element, by relying entirely on an advisory jury recommendation that *Hurst* held did not meet Sixth Amendment requirements as to *any* element of a Florida death sentence.

The Florida Supreme Court's per se harmless-error rule for *Hurst* claims fits a historical pattern. Over the past 30 years, this Court has overturned similar bright-line rules invented by the Florida Supreme Court because they failed to give full effect to this Court's death penalty jurisprudence. Nine years after this Court decided in *Lockett v. Ohio*, 438 U.S. 586 (1978), that mitigation could not be confined to a statutory list, this Court overturned the Florida Supreme Court's rule barring relief in cases where the jury was not instructed that it could consider non-statutory mitigating evidence as long as some non-statutory evidence was presented to the jury. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987). Twelve years after this Court ruled in

Atkins v. Virginia, 536 U.S. 304 (2002), that the Eighth Amendment prohibits execution of the intellectually disabled, this Court ended the Florida Supreme Court's use of a bright-line IQ-score test to deny *Atkins* claims. *See Hall v. Florida*, 134 S. Ct. 1986 (2014). And 14 years after this Court held in *Ring v. Arizona*, 536 U.S. 584 (2002), that fact-finding underlying a death sentence must be conducted by a jury, not a judge, this Court overturned the Florida Supreme Court's repeated rejection of claims based upon *Ring* or its precursor, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in every instance where the claim was made. *See Hurst*, 136 S. Ct. 616.

Despite this history and the concerns expressed by multiple Justices of this Court, including in Petitioner's own case, *see Guardado*, 138 S. Ct. at 1131, the Florida Supreme Court summarily dismissed Petitioner's arguments that Florida's per se harmless-error rule for *Hurst* claims violates the United States Constitution.

Petitioner's case highlights the injustice of the Florida Supreme Court's current harmless-error rule. As described below, Petitioner—who pleaded guilty and has consistently expressed remorse for his crime—is not the "worst of the worst," and his case is replete with evidence that a jury would find mitigating. Petitioner has also consistently challenged the constitutionality of Florida Supreme Court's pre-*Hurst* capital sentencing scheme ever since this Court decided *Ring*. But if the Florida Supreme Court's *Hurst* harmless-error rule stands, no jury will ever be able to give Petitioner's evidence the consideration required by the Constitution.

This Court should address the Florida Supreme Court's unconstitutional rule now. Waiting years—as the Court did before ending the Florida Supreme Court's

unconstitutional practices in *Hall*, *Hitchcock*, and *Hurst*—would allow the execution of dozens of Florida prisoners whose death sentences were obtained in violation of *Hurst*, while scores of others who were sentenced at the same time pursuant to the same unconstitutional scheme are moved off death row.

II. Factual and Procedural Background[1]

A. Guilty Plea

In 2004, Petitioner initiated contact with local police and tearfully confessed to killing his elderly friend while high on drugs and desperately seeking money to buy more drugs. Penalty Tr. at 29-31, 34. Petitioner subsequently waived his right to counsel and, without seeking any plea bargain from prosecutors, pleaded guilty to murder in a Florida court. Plea Tr. at 1-35. Ever since turning himself in, Petitioner has consistently accepted responsibility and expressed deep remorse for his actions.

B. Penalty Phase and Sentencing

The State sought the death penalty. Petitioner's counsel, appointed by the court for the penalty phase, unsuccessfully moved to preclude the death penalty on the ground that Florida's capital sentencing scheme violated *Ring*. Motions Tr. at 5.

In 2005, an advisory jury was empaneled pursuant to Florida's pre-*Hurst* capital sentencing scheme to hear evidence and make a generalized sentencing

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[1] Citations to "Penalty Tr." in this petition refer to the court reporter's original transcript of Petitioner's penalty-phase proceeding, which is available in the Record on Appeal ("ROA") Vols. VI-VIII. Citations to "Sentencing Tr." refer to the sentencing transcript, which is available in ROA Vol. VIII. Citations to "Plea Tr.," which refer to the guilty-plea transcript, and "Motions Tr.," which refer to the transcript of the death-penalty motions hearing, are available in ROA Vol. III. Citations to "Voir Dire Tr." refer to the penalty-phase voir dire transcript, which is available in ROA Vol. IV.

recommendation to the judge, who would then make the necessary findings of fact and render the ultimate decision regarding the death penalty. The jurors were told that they would not make any findings of fact or supply an explanation for their recommendation. And the jurors were repeatedly informed during the penalty phase—by the court, the prosecutor, and defense counsel—of the "advisory" nature of their "recommendation." *See* Voir Dire Tr. at 6, 7, 41, 70, 74, 80, 93, 94, 95, 114, 186, 204, 229, 263, 351; Penalty Tr. at 5, 6, 19, 341, 349, 350, 353, 358, 359, 360, 362.

1. Petitioner's Life and the Offense

The advisory jury heard the following information about Petitioner's life and the offense to which he had confessed and pleaded guilty:

Petitioner started using drugs and alcohol in adolescence. He was hooked early and began stealing to fund his addictions. Various detentions in the juvenile justice system followed. During his teenage years, Petitioner was sent to the notorious Arthur G. Dozier School for Boys in Marianna, Florida, where he experienced violence among staff and other youths, and was made to work in the slaughterhouse.[2]

During his early-to-mid-twenties, Petitioner served minor jail and prison sentences in the adult system, all stemming from convictions relating to his efforts to fund his drug addiction. Penalty Tr. at 13, 42, 238, 250.

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[2] A Department of Justice investigation led to the Dozier school's permanent closure years later. The DOJ report cited systemic violence, including physical assaults, psychological torment, and even deaths among students, particularly during the period Petitioner was there. *Investigation of the Arthur G. Dozier School for Boys and the Jackson Juvenile Justice Center, Marianna, Florida*, United States Department of Justice, Civil Rights Division (Dec. 1, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/02/dozier_findltr_12-1-11.pdf.

In 1990, Petitioner, who was 28 years old at the time, was convicted of three counts of drug-related robbery and sentenced to a 20-year term of incarceration.

While serving his 20-year sentence, Petitioner improved his life. He trained and became state-certified in wastewater management. He maintained a clean disciplinary record, which permitted him to work at a wastewater plant outside the prison. In 2003, when Petitioner was 40 years old, he was conditionally released by the state. Penalty Tr. at 55, 205-06, 230-31, 241, 244, 280-85, 298-99, 347.

Petitioner struggled to adjust to his release. Modern society had changed since he went to prison 13 years earlier. He did not know how to pump gas, use computers, or pay bills. He was also emotionally unequipped to resume a normal life. Petitioner had a prison-survival mentality, which served to alienate him from many people in the outside world. He later reflected, regarding that survivalist attitude, that "there's basically two emotions in prison; there's anger and hate," and that after years locked up, people on the outside "always assumed that I was angry . . . . I wouldn't be speaking or moving; I'd be sitting still watching T.V. . . . people would—would just, Jesse, what are you upset about?" Penalty Tr. at 57, 242, 249, 286-87, 333.

One of the few people Petitioner was able to trust was a 75-year-old local businesswoman named Jackie Malone, who befriended Petitioner after his release and offered to help him, as she had done with other former prisoners reentering society. Ms. Malone, who owned rental properties, offered Petitioner temporary housing and sometimes loaned him money when he was between paychecks. She put together care packages for him with food and other supplies. After Petitioner was

forced to hastily move out of his trailer home after a confrontation with a drunken landlord, Petitioner went to Ms. Malone for help. She took him into her own house for a few days and then offered to let him live in one of her rental properties. Petitioner felt that, "[a]ny time I needed help, I could go to that woman," and that she was one of the kindest people he had ever met in his life. Penalty Tr. at 55-63, 290.

Based on the vocational skills he developed in prison, Petitioner was hired as the operator of wastewater treatment plant in DeFuniak Springs, Florida—a job that required to him to be on call at all hours. The demands of his working life, in contrast to his life in prison, quickly began to strain him mentally and emotionally. Petitioner developed a romantic relationship with a woman, but when the relationship dissolved, and as the pressures at work mounted, Petitioner relapsed and began to use drugs and alcohol again. Once Petitioner began using crack cocaine in particular, he could not stop. Penalty Tr. at 55-58, 282-83, 288-89, 337.

Late one night, after drinking himself to sleep, Petitioner received a call from the wastewater plant and was directed to report immediately. He was pulled over for driving while intoxicated, and jailed for violating the terms of his conditional release. He was fired from his job. Penalty Tr. at 289-90.

After several weeks in custody on the DUI violation, Petitioner was conditionally released again. The conditional release was based on Petitioner's work ethic and letters attesting to his character, including a letter from Ms. Malone.

Ms. Malone helped Petitioner find a new job at a wastewater plant in Niceville, Florida, but Petitioner found himself unable to shake the continued drive for drugs.

He began living at a cheap motel, his crack addiction having overtaken his ability to maintain stable housing. Ms. Malone loaned him money, but it wasn't enough. As Petitioner later described, crack quickly became "not just an every day" habit, but "an every awake moment" obsession. Penalty Tr. at 291-93, 300-01.

In September 2004, Petitioner was on a two-week-long crack binge. He was smoking crack all day, every day, and barely sleeping. He was running out of money to buy more crack. He "spent hours searching through the carpet for a piece that [he] might have dropped." Penalty Tr. at 9, 16, 242, 250, 302, 306. On September 13, on the eve of a hurricane's landfall on Florida's panhandle, Petitioner turned to robbery in an effort to obtain more drug money and stave off withdrawal. He first tried to rob a grocery store with a knife, but fled when an employee yelled for help. Later that night, his racing thoughts turned to Ms. Malone and the items of possible value he had seen in her house. He drove to Ms. Malone's house, still high on crack, and when she greeted him at the door, he beat and stabbed her to death. He took several items of minimal value, which he pawned for crack money. Penalty Tr. at 74-77, 147.

Petitioner was wracked with guilt and remorse in the days following Ms. Malone's killing and decided to turn himself in. On September 21, 2004, he initiated contact with the Walton County Sheriff's Office and, against the advice of public defender counsel, provided investigators with a full confession. He was choked up and tearful. He told police that Ms. Malone "didn't deserve what I did to her." He assisted in the recovery of physical evidence against him. He did not ask for a plea bargain. Penalty Tr. at 11, 17, 29-31, 34, 126-28, 131, 202, 243, 293-94, 304, 335-36.

2. Advisory Jury Recommendation

Throughout the penalty phase, and immediately before deliberating, the advisory jurors were repeatedly reminded by the court, the prosecutor, and defense counsel, that their sentencing recommendation—life in prison or death—was "advisory" and would not be accompanied by findings of fact or any other explanation for the recommendation, and that the final decision regarding the death penalty rested solely with the judge. Voir Dire Tr. at 6, 7, 41, 70, 74, 80, 93, 94, 95, 114, 186, 204, 229, 263, 351; Penalty Tr. at 5, 6, 19, 341, 349, 350, 353, 358, 359, 360, 362.

The advisory jury returned the following written recommendation:

> A majority of the jury by a vote of 12 to 0 advise and recommend to the court that it impose the death penalty upon JESSE GUARDADO.

App. 90a. The advisory jury "verdict" contained no further information regarding the jury's reasoning; nor is any such information included elsewhere in the record.

3. Judge's Fact-Finding and Death Sentence

After the jury's recommendation, the judge made the findings of fact required to impose a death sentence under Florida law: (1) the specific aggravating circumstances that had been proven beyond a reasonable doubt; (2) those aggravating circumstances were "sufficient" to justify the death penalty; and (3) the aggravating circumstances outweighed the mitigating circumstances. *See* Fla. Stat. § 921.141(3) (1996). The judge considered the evidence that had been presented to the jury, in addition to supplemental mitigation that had been presented at a separate hearing

pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), including that, as a child, Petitioner had been sexually abused by a predatory neighbor. Sentencing Tr. at 27.

The judge found that five aggravating circumstances had been proven beyond a reasonable doubt and were sufficient for the death penalty in Petitioner's case. App. 85a-89a. The five aggravating circumstances found by the judge were: (1) Petitioner was previously convicted of a felony and was on conditional release; (2) Petitioner was previously convicted of a felony involving the use or threat of violence; (3) the offense was committed during a robbery; (4) the offense was "especially heinous, atrocious or cruel"; and (5) the offense was "committed in a cold and calculated and premeditated manner." *Id.*

The judge found that 19 mitigating circumstances must be weighed against the aggravation, including that Petitioner: (1) pleaded guilty to first-degree murder without asking for any plea bargain or other favor in exchange; (2) fully accepted responsibility for his actions and blamed nobody else for the crime; (3) is not a psychopath and would not be a danger to other inmates or correctional officers should he be given a life sentence according to experts; (4) could contribute to a prison population and work as a plumber or an expert in wastewater treatment operations should he be given a life sentence; (5) fully cooperated with law enforcement to quickly resolve the case to the point of helping law enforcement officers recover evidence to be used against him at trial; (6) has a good jail record while awaiting trial with not a single incident or discipline report; (7) has consistently shown a great deal of remorse for his actions; (8) has suffered an addiction problem to crack cocaine

which was the basis of his criminal actions; (9) has a good family and a good family support system that could help him contribute to an open prison population; (10) testified he would try to counsel other inmates to take different paths than he has taken should he be given a life sentence; (11) suffered a major trauma in his childhood by the crib death of a sibling; (12) suffered another major trauma in his childhood by being sexually molested by a neighbor; (13) has a lengthy history of substance abuse during his early teen years, graduating to alcohol and cocaine and substance abuse treatment beginning about age 14 or 15; (14) was young when his biological father passed away; (15) was raised by his mother, whom he always considered loving, thoughtful and concerned, and by a stepfather he later came to respect; (16) was under emotional duress during the time frame of the crime; (17) does not suffer a mental illness or major emotional disorder; (18) offered to release his personal property, including his truck, to his girlfriend; and (19) previously contributed to state prison facilities as a plumber and in wastewater treatment work. *Id.*

The judge concluded that the mitigation did not outweigh the aggravation. *Id.* at 89a-96a. Based on his fact-finding alone as to the elements for a death sentence under Florida law, the judge sentenced Petitioner to death.

C. Direct Appeal, State Post-Conviction, and Federal Habeas

The Florida Supreme Court affirmed Petitioner's conviction and death sentence on direct appeal. *Guardado v. State*, 965 So. 2d 108, 118 (Fla. 2007). The court rejected his argument, preserved in a trial motion, that his death sentence was obtained in violation of *Ring v. Arizona*, 536 U.S. 584 (2002).

The Florida Supreme Court later affirmed the denial of Petitioner's motion for state post-conviction relief. *Guardado v. State*, 176 So. 3d 886 (2015).

In 2016, Petitioner filed a federal habeas petition pursuant to 28 U.S.C. § 2254, including an unexhausted claim under *Hurst*, which this Court had decided weeks earlier. *See Guardado v. Jones*, No. 4:15-cv-256, ECF No. 7 (N.D. Fla. Feb. 1, 2017). The United States District Court for the Northern District of Florida granted Petitioner's request to stay the federal petition while he exhausted *Hurst* relief in the state courts. *Id.*, ECF No. 30 (N.D. Fla. Feb. 11, 2017).

D. *Hurst* Litigation

Petitioner sought *Hurst* relief by initiating two separate proceedings in state court, which unfolded on parallel tracks and resulted in merits decisions. First, in July 2016, Petitioner filed a successive post-conviction motion in the state trial court challenging his death sentence under *Hurst*. *Guardado v. State*, No. 2004-CF-903 (Fla. 1st. Cir.). Then, in March 2017, Petitioner filed a state habeas petition under *Hurst* in the Florida Supreme Court. *Guardado v. Jones*, No. SC17-389 (Fla S. Ct.).

In both *Hurst* proceedings, Petitioner argued that his death sentence should be vacated because (1) he was sentenced under the same scheme that *Hurst* ruled unconstitutional, (2) the Florida Supreme Court applied *Hurst* retroactively to death sentences in his posture, and (3) the harmless-error doctrine did not apply.

In May 2017, while his motion was pending in the state trial court, the Florida Supreme Court denied Petitioner's state habeas petition. *Guardado v. Jones*, 226 So. 3d 213, 215 (Fla. 2017). In its state habeas decision, the Florida Supreme Court

agreed that Petitioner's death sentence violated *Hurst* and that *Hurst* was retroactive to his case. But the court concluded that the harmless-error doctrine precluded relief. The court's harmless-error holding was not individualized; rather, the court applied a per se rule first articulated in *Davis v. State*, 207 So. 3d 142 (Fla. 2016).

Under that per se rule, the Florida Supreme Court has held that *Hurst* errors are harmless in every case in which the pre-*Hurst* advisory jury recommended the death penalty by a vote of 12 to 0, rather than a majority vote of 11 to 1; 10 to 2; 9 to 3; 8 to 4; or 7 to 5. Although in some cases the Florida Supreme Court mentions additional factors in the course of a harmless-error decision, the court 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. *See* App. 121a-128a.

In its state habeas decision in Petitioner's case, the Florida Supreme Court discussed no factors other than the unanimous jury recommendation, and held the *Hurst* violation harmless. *Guardado*, 226 So. 3d 213. The court did not acknowledge Petitioner's argument that applying the per se harmless-error rule to him would violate the Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution. This Court denied a writ of certiorari. *Guardado v. Jones*, 138 S. Ct. 1131 (2018).[3]

[3] Justice Sotomayor dissented from the denial of certiorari, arguing that, in light of the Florida Supreme Court's failure to acknowledge or address the issue, the Court should grant a writ of certiorari to decide whether Petitioner's death sentence violates the Eighth Amendment in light of *Hurst* and *Caldwell v. Mississippi*, 472 U.S. 320 (1985). *Guardado*, 138 S. Ct. at 1132-34. As explained below, this certiorari petition provides the Court a better opportunity to rule on that issue in a more favorable procedural posture than his state habeas proceeding because this case originated in

In September 2017, before Petitioner filed his certiorari petition arising from the state habeas proceeding, the state trial court denied his *Hurst* post-conviction motion on harmless-error grounds by applying the Florida Supreme Court's per se rule. On appeal, in October 2017, the Florida Supreme Court ordered Petitioner to show cause why the denial of *Hurst* relief should not be affirmed based on *Hurst*, *Davis*, and *Mosley v. State*, 209 So. 3d 1248, 1276 (Fla. 2016) (holding that *Hurst* applies retroactively to death sentences that became final after 2002). App. 7a.

In his response to the order to show cause, Petitioner noted that the trial court had correctly ruled that his death sentence violated *Hurst* and that *Hurst* is retroactive to his 2007 death sentence under state precedent. *Id.* at 21a-23a (citing *Mosley*, 209 So. 3d at 1276). Petitioner argued that the trial court's harmless-error ruling, however, should be overturned as a matter of federal constitutional law for the reasons set forth in this petition. Petitioner argued that applying the Florida Supreme Court's per se harmless-error rule to his case would violate the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), because the rule relied entirely on the vote of an advisory jury that was repeatedly instructed that the judge would make the findings necessary for a death sentence and render the final decision on the death penalty. Petitioner also argued that the Florida Supreme Court's rule contravenes this Court's precedents holding that harmless-error review cannot be "automatic and mechanical," *Barclay v. Florida*, 463 U.S. 939 (1983), must

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a state trial court—where an individualized determination and evidentiary harmless-error hearing were denied based on the Florida Supreme Court's per se rule.

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). Petitioner further argued that the Florida Supreme Court's per se rule violates *Sullivan v. Louisiana*, 508 U.S. 275 (1993), and its progeny, which established that a constitutional error infecting a jury verdict may be held harmless only if the jury's verdict is valid as to *at least one* element, and that harmless error therefore cannot be found in reliance on an advisory jury recommendation that does not meet Sixth Amendment requirements as to *any* element of a Florida death sentence. *Id.* at 23a-41a.

F. Florida Supreme Court's Decision

In March 2018, the Florida Supreme Court affirmed the denial of *Hurst* relief by applying its per se harmless-error rule. *Guardado v. State*, 238 So. 3d 162 (Fla. 2018).[4] The court cited its prior analysis in Petitioner's state habeas ruling, and specifically rejected Petitioner's argument that "*Caldwell* and *Sullivan* affect this Court's harmless-error analysis in *Hurst*." *Id.* at 163. For that proposition, the Florida Supreme Court provided no explanation, but cited its opinions in *Franklin v. State*, 236 So. 3d 989 (Fla. 2018); *Truehill v. State*, 211 So. 3d 930 (Fla. 2017); and *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2018), none of which actually contained a *Caldwell* analysis, as will be addressed below. *Guardado*, 238 So. 3d at 164.

[4] Petitioner's certiorari petition arising from the state habeas proceeding was at that time pending. *See* No. 17-7171, *cert. denied*, 138 S. Ct. 1131 (Apr. 2, 2018).

REASONS FOR GRANTING THE WRIT[5]

I. The Florida Supreme Court's Per Se Harmless-Error Rule for *Hurst* Violations Contravenes the Eighth Amendment Under *Caldwell*

This Court should grant a writ of certiorari to address whether the Florida Supreme Court's per se harmless-error rule for *Hurst* violations contravenes the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This question is not only a life-or-death matter for Petitioner, but also impacts dozens of other prisoners on Florida's death row whose death sentences were obtained in violation of *Hurst* and who nevertheless remain subject to execution based solely on the vote cast by their pre-*Hurst* "advisory" jury—a jury whose sense of responsibility for a death sentence was systemically diminished. On three occasions, Justices of this Court have called for review of this *Hurst-Caldwell* issue, including in Petitioner's own case. *See 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). This Court should resolve the matter now.

"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*,

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[5] All internal quotations are omitted and all emphasis in quotations is supplied in this section unless otherwise indicated.

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 that was 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.

In *Caldwell*, a Mississippi penalty-phase jury did not receive an accurate description of its role in the sentencing process due to the prosecutor's suggestion that the jury's decision to impose the death penalty would not be final because an appellate court would review the sentence. *Id.* at 328-29. This Court found that the prosecutor's remarks impermissibly "led [the jury] to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Id.* at 329. The Court concluded that, because it could not be ascertained that the remarks had no effect on the jury's sentencing decision, the jury's decision did not meet the Eighth Amendment's standards of reliability. *Id.* at 341. Accordingly, *Caldwell* held the following: under the Eighth Amendment, "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 sentence lies elsewhere." *Id.* at 328-29.

In the decades between *Caldwell* and *Hurst*, the Florida Supreme Court rejected numerous *Caldwell*-based challenges to Florida's pre-*Hurst* jury instructions. Beginning in *Pope v. Wainwright*, 496 So. 2d 798 (Fla. 1986), the Florida Supreme Court dismissed the relevance of *Caldwell* on the theory that, unlike with

the Mississippi scheme at issue in *Caldwell*, Florida's instructions accurately described the jury's "merely" advisory nature: "[I]n Florida it is the trial judge who is the ultimate sentencer," and the jury "is merely advisory." *Id.* at 805. The Florida Supreme Court, finding "nothing erroneous about informing the jury of the limits of its sentencing responsibility," so as to "relieve some of the anxiety felt by jurors impaneled in a first-degree murder trial," held that its advisory jury instructions complied with *Caldwell* and accurately described a constitutionally valid scheme. *Id.*

In *Combs v. State*, 525 So. 2d 853, 856 (Fla. 1998), the Florida Supreme Court reaffirmed its holding in *Pope* that Florida's advisory jury scheme complied with *Caldwell*. The Florida Supreme Court further noted that it was "deeply disturbed" by decisions of the United States Court of Appeals for the Eleventh Circuit, in cases like *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), and *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988) (en banc), which had expressed doubts as to whether Florida's scheme complied with *Caldwell*. For years after *Pope* and *Combs*, the Florida Supreme Court continued to reject *Caldwell* challenges to Florida's advisory jury instructions. *See, e.g.*, *Davis v. State*, 136 So. 3d 1169, 1201 (Fla. 2014).

Hurst caused a rupture to the Florida Supreme Court's *Caldwell* precedent. In light of *Hurst*, the rationale underlying the Florida Supreme Court's prior rejection of *Caldwell* challenges—that Florida's "advisory" jury scheme was constitutionally valid—has evaporated. That is because *Hurst* held that Florida's capital sentencing scheme was *not* constitutional, and that juries in that scheme were *not* afforded their constitutionally required role as fact-finders. Given *Hurst*, it is now clear that

Florida's advisory juries were misinformed as to their constitutionally required role in determining a death sentence. The juries were unconstitutionally told that they need not make the critical findings of fact in order for a death sentence to be imposed. The pre-*Hurst* jury instructions thereby "improperly described the role assigned to the jury," in violation of *Caldwell*. *Dugger v. Adams*, 489 U.S. 401, 408 (1989).

As a result, *Hurst* cases shed new light on Eighth Amendment violations of *Caldwell* that should have been ot addressed by the Florida Supreme Court in Petitioner's case but were not. Throughout the penalty phase, and immediately before deliberating, Petitioner's advisory jurors were reminded by the court, the prosecutor, and defense counsel, that their sentencing recommendation—life in prison or death—was "advisory"; that it would not be accompanied by findings of fact or any other explanation for the recommendation; and that the final decision regarding the death penalty rested with the judge. *See* Voir Dire Tr. at 6, 7, 41, 70, 74, 80, 93, 94, 95, 114, 186, 204, 229, 263, 351; Penalty Tr. at 5, 6, 19, 341, 349, 350, 353, 358, 359, 360, 362.

In its decision below, the Florida Supreme Court stated that it had "considered and rejected Guardado's claim that *Caldwell* . . . affect[s] this Court's harmless error analysis in *Hurst*," citing its earlier decisions in *Franklin*, *Truehill*, and *Hitchcock*. App. 5a; *Guardado*, 238 So. 3d at 163-64. That was a surprising statement because neither *Franklin*, *Truehill*, nor *Hitchcock*, contain any *Caldwell* analysis whatsoever. In *Franklin*, the Florida Supreme Court stated only that "we have also rejected *Caldwell*-related *Hurst* claims like Franklin's," and cited *Truehill*. But *Truehill* did

not cite *Caldwell*, much less consider its impact on *Hurst* harmlessness. The third case, *Hitchcock*, also did not cite or discuss *Caldwell*. As Justice Sotomayor observed regarding the denial of Petitioner's earlier certiorari petition, *Guaradado*, 138 S. Ct. at 1133, the lack of any *Caldwell* discussion in the cases cited by the Florida Supreme Court makes it "hard to understand how the Florida Supreme Court 'considered and rejected,'" Petitioner's argument that holding the *Hurst* error in his case harmless would violate the Eighth Amendment under *Caldwell*.

The Florida Supreme Court's total reliance on the advisory jury's recommendation, without considering the jury's diminished sense of responsibility for the death sentence, violates *Caldwell*. Petitioner's advisory jurors were led to believe that their role in sentencing was diminished when jurors were repeatedly instructed by the court that their recommendation was advisory and that the final sentencing decision rested solely with the judge. Given that the jury was led to believe it was not ultimately responsible for the imposition of Petitioner's death sentence, the Florida Supreme Court's per se rule cannot be squared with the Eighth Amendment. Under *Caldwell*, no court 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 fact-finding role could have been substantially affected by the extensive mitigation in Petitioner's case.

The Florida Supreme Court's rule does not allow for meaningful consideration of the actual record. The per se rule cannot permissibly predict that a jury with full awareness of the gravity of its role in the capital sentencing process would have unanimously found or rejected any specific mitigators in a proceeding comporting with constitutional requirements. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988) (holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about jury's vote); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (same). The Florida Supreme Court's failure to consider Petitioner's mitigation in its harmless-error analysis is also inconsistent with *Parker v. Dugger*, where this Court rejected the state supreme court's cursory harmless-error analysis in jury-override cases. 498 U.S. 308, 320 (1991) ("What the Florida Supreme Court could not do, but what it did, was to ignore evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings.").

The Florida Supreme Court's application of its per se rule is also at odds with federal appeals court decisions holding that *Caldwell* violations must be assessed in light of the entire record. *See, e.g.*, *Cordova v. Collens*, 953 F.2d 167, 173 (5th Cir. 1992); *Rodden v. Delo*, 143 F.3d 441, 445 (8th Cir. 1998); *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997); *Mann*, 844 F.3d 1446. In contrast to these federal decisions, the Florida Supreme Court's per se rule disallows meaningful consideration of factors relevant to an actual *Caldwell* analysis. And here, the fact that the advisory jury was informed of its diminished role from 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 related to improper comments by a prosecutor also supports applying the rule to Florida's pre-*Hurst* advisory jury instructions. *See generally* Craig Trocino & Chance Meyer, *Hurst v. Florida's Ha'p'orth of Tar: The Need to Revisit Caldwell, Clemons, and Proffitt*, 70 U. Miami L. Rev. 1118, 1139-43 (2016). First, *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 and learned the ultimate life-or-death decision would be made by the judge.

Second, *Caldwell* reasoned that a jury's desire to sentence harshly in order to "send a message," rather than to impose a sentence proportional to the crime, "might make a jury very receptive to a prosecutor's assurance that it can more freely 'err

because the error may be corrected on appeal." *Id.* at 331. In Florida too, pre-*Hurst* advisory juries were likely receptive to assurances that jurors were not responsible for fact-finding, and that the judge would ultimately be responsible for finding the elements necessary for a death sentence.

Third, *Caldwell* reasoned that a jury may get the impression from comments about appellate review that only a death sentence would trigger exacting appellate scrutiny of the whole case. *Id.* at 332. This same concern applies to Florida's pre-*Hurst* juries, which would have been more inclined to recommend death in order to trigger the trial judge's full exercise of her sentencing discretion.

Finally, *Caldwell* reasoned that where a jury is divided on the proper sentence, jurors who favor death may be susceptible to using the prosecutor's characterization of the jury's diminished role as an argument to convince the jurors who favor life to defer to a death recommendation. *Id.* at 333. "Indeed, one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in." *Id.* The same concern is valid here, where advisory jurors who favored a death recommendation may have asked jurors who favored life to change their votes to death, given that the judge would ultimately conduct the fact-finding regardless of the recommendation.

Empirical research supports the notion that Florida's advisory juries were imbued with a diminished sense of responsibility for the imposition of death sentences before *Hurst*. *See, e.g.*, William J. Bowers, *The Decision Maker Matters: An*

Empirical Examination of the Way the Role of the Judge and Jury Influence Death Penalty Decision-Making, 63 Wash. & Lee L. Rev. 931, 954-62 (2006). Interviews with Florida jurors conducted through the Capital Jury Project ("CJP") yielded narrative accounts highlighting the detrimental impact of Florida's pre-*Hurst* instructions on jurors' sense of their sentencing role. *See id.* at 961-62. Florida jurors relayed to researchers their understanding that "[w]e don't really make the final decision . . . we would give our opinion but the choice would be up to the judge." *Id.* at 961. One Florida juror told CJP researchers that "the fact that you could make a recommendation, that you didn't make a yes or no, that someone else would make the decision, I think that let us feel off the hook." *Id.* The same juror noted that he found the pre-*Hurst* sentencing process to be "not as traumatic as deciding [the defendant's] guilt because we would take the steps, make a recommendation, and the judge would make the final choice." *Id.* As another Florida juror said approvingly of Florida's pre-*Hurst* advisory jury instructions, "I didn't want this on my conscience." *Id.*

Over Justice Sotomayor's objection, this Court declined to address the *Hurst-Caldwell* issue on certiorari from the Florida Supreme Court's state habeas decision in Petitioner's case. This certiorari petition provides the Court a new opportunity to rule on that issue in a more favorable procedural posture than his state habeas proceeding. The proceedings below originated in a state trial court—where an individualized harmless-error determination and evidentiary hearing could have been provided but were nevertheless denied.

This Court should grant a writ of certiorari and address the Florida Supreme Court's unconstitutional harmless-error rule in light of *Caldwell*. Ultimately, this Court should instruct the Florida Supreme Court to meaningfully consider whether the rationale underlying its pre-*Hurst* decisions rejecting *Caldwell* challenges to Florida's capital scheme, including *Pope*, *Combs*, and subsequent decisions, have any continuing validity in light of *Hurst*.[6]

II. The Florida Supreme Court's Rule Violates the Eighth and Fourteenth Amendment Requirements That Harmless-Error Review Must Not Be Mechanical and Must Consider the Whole Record

This Court should grant a writ of certiorari to decide whether the Florida Supreme Court's per se harmless-error rule for *Hurst* violations contravenes the 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

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[6] After affirming the denial of *Hurst* relief in Petitioner's case, the Florida Supreme Court decided *Reynolds v. State*, No. SC17-793, 2018 WL 1633075 (Fla. Apr. 5, 2018), and attempted in that decision to discuss *Caldwell*, although the discussion was deeply flawed. In *Reynolds*, the Florida Supreme Court doubled-down on its pre-*Hurst* decisions regarding the applicability of *Caldwell* to Florida's capital sentencing scheme. The court wrote that, under *Romano v. Oklahoma*, 512 U.S. 1 (1994), *Hurst* has no bearing on whether *Caldwell* was violated in any case because Florida's pre-*Hurst* jury instructions accurately described Florida's capital sentencing scheme at the time. *Reynolds*, 2018 WL 1633075, at *10-12. But Florida's prior scheme was *not* constitutional before *Hurst*, and this makes *Romano* inapplicable.

The state court's decision in *Reynolds*—which represents an attempt to rebuke the concerns expressed by Justices Sotomayor, Ginsburg, and Breyer in *Guardado*, 138 S. Ct. 1131, *Middleton*, 138 S. Ct. 829, and *Truehill*, 138 S. Ct. 3— provides an additional justification for the grant of certiorari review in Petitioner's case on the question of *Caldwell*'s applicability to pre-*Hurst* death sentences.

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 ruling in Petitioner's case satisfies none of those constitutional requirements.

A. The United States Constitution Imposes Limits on State-Court Harmless-Error Denials of Federal Constitutional Claims

The United States Constitution imposes limits on a state court's use of a harmless-error rule to reject 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).

In *Chapman v. California*, this Court defined "harmless" constitutional errors as those which had no reasonable possibility of contributing to the result, and "*in the setting of a particular case* are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." *Id.* at 22-23. Thus, the harmfulness of a constitutional violation must be assessed on a case-by-case basis in the context of the entire proceeding. *Id.* The beyond-a-reasonable-doubt standard applicable to harmless-error rules is satisfied when, in light of the record as a whole, an error had no reasonable probability of contributing to the result. *Id.* at 22, 24.

Since *Chapman*, this Court has refined the parameters of harmless-error rules. The Court has reiterated that 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 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 made clear that 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.").

B. This Court's Precedents Impose Boundaries on State Courts' Use of Harmless-Error Rules to Deny Federal Constitutional Claims in Capital Cases

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 previously 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. 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 falls into the latter category.

C. The Florida Supreme Court's Per Se Rule Perpetuates the *Hurst* Violation by Failing to Allow for Individualized Review of the Error's Impact in the Context of the Whole Record

The Florida Supreme Court's per se harmless-error rule contravenes this Court's requirement that state courts conduct an individualized review of the record as a whole before denying federal constitutional relief on harmless-error grounds, especially in capital cases. The Florida Supreme Court's per se rule operates mechanically, rather than individually, to deem *Hurst* errors harmless in every case where the advisory jury unanimously recommended death.

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 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 court 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 always controls.[7]

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

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[7] In *Reynolds*, the Florida Supreme Court tried to dispel the notion that its *Hurst* harmless-error rule relies entirely on the advisory jury vote by saying that other factors are to be considered. *See* 2018 WL 1633075, at * 3 ("Preliminarily, we look to whether the jury recommendation was unanimous . . . . Yet a unanimous recommendation is not sufficient alone; rather it begins a foundation for us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigators."). But if the Florida Supreme Court truly considered other factors, it would be remarkable beyond coincidence that in the dozens of *Hurst* cases the court has reviewed, the court 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 always controls. *See See* App. 121a-128a.

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 per se practice defies this Court's law. Despite Petitioner's detailed, record-based arguments about the impact of the *Hurst* error on his death sentence, *see, e.g.*, App. 42a-55a, 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. *See* App. 121a-128a.

The Florida Supreme Court's per se rule flouts this Court's understanding in *Barclay v. Florida* that "the Florida Supreme Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless." *Barclay*, 463 U.S. at 958. The rule is also at odds with this Court's decision in

Harrington v. California, which explained that proper harmless-error analysis not only considers the impact of a constitutional error on the specific jury in the case, but also whether an average rational jury would have reached the same conclusion without the constitutional error. *See* 395 U.S. at 254. The Florida Supreme Court's per se rule is inconsistent with *Sochor v. Florida* and *Clemons v. Mississippi*, where this Court highlighted that harmless-error rulings must be accompanied by specific reasoning grounded in the whole record. *See Sochor*, 504 U.S. at 541; *Clemons*, 494 U.S. at 752. And the rule's failure to consider mitigation contradicts *Parker v. Dugger*, where this Court rejected a cursory harmless-error analysis by the Florida Supreme Court. *See* 498 U.S. at 320 ("What the Florida Supreme Court could not do, but what it did, was to ignore evidence of mitigating circumstances in the record.").

The Florida Supreme Court's per se rule also gives the State a windfall in cases involving undisputed constitutional error: it relieves the State of its burden to prove the *Hurst* error harmless beyond a reasonable doubt. *See Fulminante*, 499 U.S. at 297 ("*Our review of the record leads us to conclude* that the State has failed to meet its burden of establishing, beyond a reasonable doubt, that the [error] was harmless error."). As Justice Sotomayor has observed, the allocation of the burden of proof to the State can prove outcome-determinative. *See Gamache v. California*, 562 U.S. 1083 (2010) (Sotomayor, J., statement respecting the denial of a writ of certiorari).

In *Hurst v. State*, 202 So. 3d 40, 68 (Fla. 2016), the Florida Supreme Court stated that "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 [the] death sentence." But the Florida Supreme Court has now abandoned this through the mechanical rule applied in cases where the advisory jury unanimously recommended the death penalty. The Florida Supreme Court also seemed to recognize in *Hurst v. State* that a pre-*Hurst* advisory jury recommendation does not demonstrate on its own that the evidence presented at the penalty phase was sufficient to support a death sentence. *See* 202 So. 3d at 68. But even if it did, that would still not save the Florida Supreme Court's per se rule. *See Satterwhite*, 486 U.S. at 258 (explaining that the state does not meet burden of establishing capital sentencing error is harmless merely by showing that the evidence in the record is sufficient to support a death sentence). There is a critical difference between concluding that a properly instructed jury *could* have reached a unanimous death recommendation and that it would have done so beyond a reasonable doubt.

D. The Florida Supreme Court's Per Se Rule Fails to Ensure Sufficient Reliability in Florida's Death Penalty

In order to determine whether there is a "reasonable possibility" that a *Hurst* error contributed to a death sentence, *see Chapman*, 386 U.S. at 23, a reliable harmless-error analysis must begin with what this Court held in *Hurst* a jury must do for a Florida death sentence to be constitutional. The Court ruled the Sixth Amendment requires juries to make the findings of fact regarding the elements necessary for a death sentence under Florida law: (1) the aggravating circumstances that had been proven beyond a reasonable doubt; (2) the aggravating circumstances were together "sufficient" to justify the death penalty beyond a reasonable doubt; and

(3) the aggravating circumstances outweighed the mitigation evidence beyond a reasonable doubt. *See* 136 S. Ct. at 620-22.[8]

The second and third elements cut against the harmless-error analysis in Justice Alito's dissent in *Hurst*. Justice Alito stated that he would hold the *Hurst* error harmless because the evidence supported the trial judge's finding of "at least one aggravating factor." *Id.* at 626 (Alito, J., dissenting). But, as the Florida Supreme Court recognized in *Hurst v. State*, 202 So. 3d at 68, unlike the Arizona capital sentencing scheme at issue in *Ring*, Florida's scheme required fact-finding as to the aggravators *and their sufficiency to warrant the death penalty*. The fact that sufficient evidence exists to prove at least one aggravator to the jury is not enough to conclude that a *Hurst* error is harmless. *See id.* at 53 n.7. And, in any event, this Court has made clear that the State does not meet its harmless-error burden in a capital sentencing case merely by showing that 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

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[8] Applying this Court's decision on remand, the Florida Supreme Court held, in *Hurst v. State*, that the Eighth Amendment also requires Florida juries to render unanimous findings of fact on each element and that those findings must precede a unanimous overall death recommendation. *See* 202 So. 3d at 53-59.

made, or an average rational jury would make, the three specific findings of fact to support a death sentence in a constitutional proceeding.

Indeed, prior to *Hurst*, the Florida Supreme Court recognized the ambiguity inherent in Florida's advisory jury recommendations. In 2009, the Florida Supreme Court considered mandating interrogatory advisory jury recommendations in death penalty cases, but declined to do so. *See In re Standard Jury Instructions*, 22 So. 3d 17 (Fla. 2009). Justice Pariente's concurrence in that decision observed:

> The jury recommendation does not contain any interrogatories setting forth which aggravating factors were found, and by what vote; how the jury weighed the various aggravating and mitigating circumstances; and, of course, no will ever know if one, more than one, any or all of the jurors agreed on any of the aggravating and mitigating circumstances. It is possible, in a case such as this one, where several aggravating circumstances are submitted, that none of them received a majority vote.

Id. at 26. The same is true of Petitioner's jury recommendation.

Even if, speculatively, the jury made all the necessary findings, the same sentence would not necessarily have followed. Jury findings in a constitutional proceeding may have yielded a lesser number of aggravators than the judge's findings. Jury findings may have yielded different "sufficiency" and "insufficiency" determinations than those made by the judge. The jury may have made different findings regarding the weight of the aggravating or mitigating circumstances. And the judge, with findings from a properly instructed jury, might have exercised his sentencing discretion differently. *See Hurst v. State*, 202 So. 3d at 57 (noting that nothing in *Hurst* has diminished "the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life").

Moreover, in a constitutional proceeding where the jury was instructed that its findings of fact would be binding on the trial court in the ultimate decision whether to impose a death sentence, the jury may have considered the evidence more carefully, and given the mitigation more weight. This idea, explored further above, is at the heart of this Court's decision in *Caldwell*.[9]

Constitutional harmless error analysis requires that the State bear the burden of dispelling these possibilities beyond a reasonable doubt. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("[T]here is a . . . need for reliability in the determination that death is the appropriate punishment *in a specific case*."). The Florida Supreme Court's per se rule automatically relieves the State of its burden. This violates the requirement for heightened reliability in death sentencing and allows for impermissible "unguided speculation." *Holloway*, 435 U.S. at 490-91; *see also Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids arbitrary and capricious infliction of the death penalty.").

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[9] Defense counsel's approach would also have been different absent the *Hurst* error. Counsel may have conducted his voir dire questioning of prospective jurors differently had he known that only one juror needed to be convinced, as to only one of the elements, in order to avoid a death sentence. Counsel may have presented evidence diminishing the aggravation differently had he known that the jury, rather than the judge, was required to unanimously find that each aggravating circumstance had been proven beyond a reasonable doubt and that the aggravating circumstances were together sufficient to justify the death penalty. Counsel's thinking and advice to the client on how to proceed may have been altered had he known that the jury would be instructed that it could recommend a life sentence even if it had unanimously agreed that all of the other elements for a death sentence were satisfied.

Instead of providing for the tailored harmless-error review the Constitution requires, the Florida Supreme Court has adopted a per se approach that works a fundamental injustice on Petitioner and others in his position. Petitioner sits on death row today while dozens of other Florida prisoners—some of whom were sentenced before him, some of whom were sentenced after him, and many of whom committed murders, including multiple murders and other offenses involving more aggravating circumstances than his crime—have been granted resentencings under *Hurst*. Because no culpability related distinctions can justify this disparity of results, the rule that produced it violates the Eighth Amendment.

III. The Florida Supreme Court's Per Se Rule Violates the Sixth Amendment Under *Sullivan* by Relying Entirely on the Vote of an Advisory Jury That Was Unconstitutional Under *Hurst*

This Court should settle whether the Florida Supreme Court's per se harmless-error rule for *Hurst* violations oversteps the Sixth Amendment under *Hurst* and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), by relying entirely on the vote of an advisory jury recommendation that *Hurst* itself explained was unconstitutional. As Justice Sotomayor has observed, the Florida Supreme Court's harmless-error doctrine for *Hurst* violations impermissibly "transforms those advisory jury recommendations into binding findings of fact." *Guardado*, 138 S. Ct. at 1133.

The error in *Sullivan* was the trial court's defective instruction to the jury regarding the requirement that each element of the offense must be found beyond a reasonable doubt—an error that this Court found affected all of the jury's findings. *Sullivan*, 508 U.S. at 277. Justice Scalia's opinion for the unanimous Court in

Sullivan held that, even though the jury had rendered a decision on each of the elements of the offense, the trial court's improper instruction on the beyond-a-reasonable-doubt standard "vitiate[d] *all* the jury's findings" and meant, for purposes of harmless-error review, that "there has been no jury verdict within the meaning of the Sixth Amendment." *Id.* at 281 (emphasis in original). Without a constitutionally valid jury verdict, "the entire premise of *Chapman* review is simply absent," *id.* at 281, because such review would necessarily require determination of "the basis on which the jury *actually rested* its verdict," *id.* at 279 (emphasis in original).

The Florida Supreme Court's per se rule harmless-error rule for *Hurst* claims presents the question whether *Chapman* and this Court's other harmless-error precedents permit state courts in capital cases to rest harmless-error rulings *entirely* on the votes of advisory jurors whose ultimate decision, like the jury's decision in *Sullivan*, did not constitute a "verdict" under the Sixth Amendment.

Florida's pre-*Hurst* advisory jury recommendations are no more verdicts under the Sixth Amendment than the jury findings in *Sullivan*. This Court held in *Sullivan* that the jury's findings did not constitute a verdict that could form the basis for a harmless-error ruling because the trial court's failure to properly instruct the jury on the beyond-a-reasonable-doubt standard negated all the jury's findings. *Id.* at 281. Florida's advisory juries were also given a defective instruction, which impacted all the elements for a death sentence under Florida law. As this Court recognized in *Hurst*, Florida juries were improperly instructed that it was the duty of the trial

judge, not the jury, to make findings of fact. Florida's improper jury instructions did not only "vitiate *all* the jury's findings," *id.*, they resulted in no jury findings at all.

Neder v. United States, 527 U.S. 1 (1999), confirms this reading of *Sullivan*. In *Neder*, the constitutional error was a jury instruction that omitted a *single* element of the offense. *Id.* at 8. This Court distinguished that error from the error in *Sullivan*, which was a defective reasonable-doubt instruction on *all* of the elements of the offense. *See id.* at 10-11 ("[T]he jury-instruction here did not vitiate *all* the jury's findings.") (emphasis in original). Unlike in *Sullivan*, where there was no remaining constitutionally-valid verdict to subject to harmless-error analysis, the Court in *Neder* held that the remainder of an "incomplete" verdict, where the instructions were defective as to only one of several elements, could be reviewed for harmless-error. *Id.* *Hurst* errors are like the error in *Sullivan*, not the error in *Neder*. Florida's advisory juries rendered *no* findings of fact, more akin to the vitiation of *all* of the jury's findings in *Sullivan*, rather than the omission of only a single finding, as in *Neder*.

Sullivan instructs that where there is no verdict within the meaning of the Sixth Amendment, "[t]here is no *object*, so to speak, upon which harmless-error scrutiny can operate." *Id.* (emphasis in original). The Florida Supreme Court's *Hurst* harmless-error rule contradicts that principle. The rule relies on the unconstitutional vote of the advisory jury. This Court held in *Hurst* that those juries conducted no valid fact-finding within the meaning of the Sixth Amendment. Under *Sullivan*, the Florida Supreme Court's per se rule is unconstitutional because it relies entirely on a non-verdict to uphold a sentence of death.

In Petitioner's case, the Florida Supreme Court stated that it had previously considered whether "*Sullivan* affect[s] this Court's harmless error analysis in *Hurst*." App. 5a; *Guardado*, 238 So. 3d at 163-64 (citation omitted). But, as with the Florida Supreme Court's insistence that it had addressed *Caldwell* in Petitioner's case, the court's statement that it had previously considered how *Sullivan* impacts *Hurst* harmless-error analysis is inaccurate. Like with *Caldwell*, the Florida Supreme Court pointed to its decisions in *Franklin*, *Truehill*, and *Hitchcock*, as demonstrating that it had considered *Sullivan*. However, as Justice Sotomayor observed regarding *Caldwell*, "this is a surprising statement." *Guardado*, 138 S. Ct. at 1131. The Florida Supreme Court's opinions in *Franklin*, *Truehill*, and *Hitchcock* do not even cite *Sullivan*, let alone address its impact on *Hurst* harmless-error analysis.

This Court should grant review to address, or at least instruct the Florida Supreme Court to address, whether the state court's per se harmless-error rule for *Hurst* claims complies with the Sixth Amendment under *Sullivan*.

CONCLUSION

This Court should grant a writ of certiorari and review the decision of the Florida Supreme Court.

Respectfully submitted,

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