No. 19-

IN THE
Supreme Court of the United States

FRED ANDERSON, JR.,
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

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CAPITAL CASE

QUESTIONS PRESENTED

The Sixth Amendment requires that a jury, not a judge, find every fact necessary to sentence a defendant to death. In *Hurst v. Florida*, 136 S.Ct. 616 (2016), this Court held that Florida's capital-sentencing scheme violated the Sixth Amendment because it gave juries only an advisory role. The Court held that the "distinction" between no jury verdict and an "advisory jury verdict" is "immaterial" because the jury did "not make specific factual findings" and the judge thus did not have "the assistance of a jury's findings of fact" when sentencing.

Notwithstanding *Hurst*'s holding that an advisory jury verdict is tantamount to no jury verdict at all, the Florida Supreme Court has held that every *Hurst* error is harmless if the advisory jury recommended death by a 12-0 vote because a "jury unanimously [found] all of the necessary facts for the imposition of a death sentence by virtue of its unanimous recommendation."

The questions presented are:

1. Whether a judge-imposed death sentence that violates *Hurst* is a structural error requiring reversal of the sentence.

2. Whether a *Hurst* violation may automatically be deemed "harmless beyond a reasonable doubt" based solely on the fact that the jury, in an advisory capacity, unanimously recommended a death sentence.

PARTIES TO THE PROCEEDING

Petitioner Fred Anderson, Jr., was the appellant in the Supreme Court of Florida. Respondent the State of Florida was the appellee.

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The opinion of the Florida Supreme Court is reported at 257 So.3d 355 (Fla. 2018). App. 1a-4a. The trial court's order is not reported but is reproduced in the appendix. App. 16a-24a.

JURISDICTION

The Florida Supreme Court entered judgment on October 4, 2018. App.1a. The court denied rehearing on November 14, 2018. App. 5a. On January 30, 2019, by operation of Rule 30.1, Justice Thomas extended the time to file this petition until April 15, 2019. *See* No. 18A782. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides: "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."

Section 1 of the Fourteenth Amendment provides: "No state shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The right to a jury is enshrined in the Sixth Amendment and essential to the basic fabric of our criminal justice system. This Court held in *Hurst v. Florida*, 136 S.Ct. 616 (2016), that the Constitution entitles capital defendants in this country to the protections of a jury trial. The Constitution requires the state to prove the facts necessary for a death sen-

tence to an actual jury beyond a reasonable doubt, not to a judge assisted by an "advisory" jury. *Hurst*, 136 S. Ct. at 622.

This petition presents the question whether Florida can categorically deny this fundamental right to petitioner Fred Anderson and to 33 Florida death-row inmates like him. Despite this Court's holding in *Hurst* that an advisory jury is not equivalent to an actual jury, the Florida Supreme Court has refused to resentence defendants who were sentenced to death by a judge rather than a jury, so long as the advisory jury recommended death unanimously.

The Florida Supreme Court's approach defies this Court's precedent and unfairly denies the protections of the Sixth Amendment and *Hurst* to a huge swath of death-row inmates. The court has reached this result through two holdings, both wrong. First, the court holds that a judge-imposed death sentence is not structural error. Second, the court holds that the existence of a unanimous advisory jury recommendation renders the judge-imposed death sentence *per se* harmless. The stakes could hardly be higher: a reversal on *either* question would have an outcome-determinative effect on the death sentences of 34 people, including petitioner.

Both holdings merit review. The court's holding that complete elimination of the jury right at a capital sentencing trial can be harmless widens a deep and acknowledged lower-court conflict as to whether a judge-imposed death sentence is structural error. The court's holding is also irreconcilable with *Sullivan v. Louisiana*, which confirms that an error that "vitiates *all* the jury's findings" is never harmless. 508 U.S. 275, 281 (1993). The error of empaneling an advisory jury vitiates "all" the jury's "findings," and

Hurst said so: there were "no jury findings on which to rely." *Hurst*, 136 S.Ct. at 622 (quotation marks omitted).

Compounding its error of declaring *Hurst* errors non-structural, the Florida Supreme Court's *per se* harmlessness rule flouts *Hurst* itself. The court held that Mr. Anderson's unconstitutional, judge-imposed death sentence was harmless beyond a reasonable doubt for the *sole* reason that the advisory jury at his original sentencing proceeding rendered its advisory recommendation 12-0. App. 2a. The court's explanation was that a "unanimous [advisory] recommendation of death" is "precisely" what is "constitutionally necessary." *Id.* But that is literally the opposite of what *Hurst* held. *Hurst* held that an advisory recommendation is a constitutional non-entity, the equivalent of "no jury findings" at all. 136 S.Ct. at 622. *Hurst* did not care whether the advisory jury was unanimous; rather it required an actual jury to find each element necessary to impose a death sentence, and to weigh the aggravating and mitigating circumstances.

This is not a one-time error. Post-*Hurst*, the Florida Supreme Court has denied resentencing to every defendant who received a 12-0 advisory jury recommendation. The court in these cases ignores the evidence of mitigating and aggravating factors and never considers whether the evidence makes it "clear beyond a reasonable doubt that a rational jury would have" imposed death if told that its conclusion was binding. *Neder v. United States*, 527 U.S. 1, 18 (1999).

If the court had engaged in true harmless-error review, it would make all the difference for Mr. Anderson and the 33 other Florida capital defendants

who have been or will be denied resentencing solely on the ground of the 12-0 advisory recommendation. In every single post-*Hurst* case in which the Florida Supreme Court has engaged in actual harmless-error review—rather than deeming a unanimous advisory sentence *per se* harmless—the court has ordered resentencing. App. 33a-45a. Furthermore, of the 34 Florida capital defendants who have thus far been resentenced post-*Hurst*, all but four—88%—have received life sentences, either because the state does not pursue death or because a properly-instructed jury chose life. *Id.*

The Florida Supreme Court's erroneous understandings of structural error, harmless error, and *Hurst* itself are thus hugely consequential. Reversal could be the difference between life or death for Mr. Anderson and the 33 other Florida capital defendants like him. This case presents an ideal vehicle to resolve both questions presented.

A. Legal Background

1. Before this Court's decision in *Hurst*, Florida trial judges decided whether to sentence defendants to death using a "hybrid" sentencing proceeding. *Hurst*, 136 S.Ct. at 620. The judge would first hold an evidentiary hearing in front of the jury, where the parties presented evidence of aggravating and mitigating factors. "After hearing all the evidence," the jury would deliberate and, by majority vote, would "render an advisory sentence" recommending life imprisonment or death. Fla. Stat. §921.141(2) (2010).

The jury could "return an advisory sentence in favor of death" if "a majority of the jury" found "beyond a reasonable doubt the existence of at least one aggravating circumstance listed in the capital sentencing statute." *Ault v. State*, 53 So.3d 175, 205

(Fla. 2010). But the jury gave a generalized, up-or-down recommendation; it did not "specify[] [its] factual basis," *Hurst*, 136 S.Ct. at 620, and did not need to unanimously agree on which aggravators had been proven, *State v. Steele*, 921 So. 2d 538, 545 (Fla. 2006). Judges were indeed forbidden from using verdict forms that suggested that the jury needed to make specific factual findings about the existence (or relative weight) of aggravators and mitigators. *Id.* at 544-48.

After the jury made its recommendation, the judge would independently "weigh[] the aggravating and mitigating circumstances" and would "enter a sentence of life imprisonment or death." Fla. Stat. §921.141(3) (2010). To impose a death sentence, the judge needed to find the existence of at least one statutory aggravating factor beyond a reasonable doubt and that any aggravating factors outweighed any mitigating ones. If the court imposed a death sentence, it needed to "set forth in writing its findings." *Id.* Those findings, not the jury's advisory verdict, "furnish[ed] the basis for [Florida Supreme Court] review of … death sentences." *Grossman v. State*, 525 So. 2d 833, 839 (Fla. 1988).

2. This Court in *Hurst* held that Florida's capital-sentencing system violated the Sixth Amendment. 136 S.Ct. at 622. The Court explained that Florida's scheme suffered from the same constitutional defect as the one struck down 14 years earlier in *Ring v. Arizona*, 536 U.S. 584 (2002). Neither system "require[d] the jury to make the critical findings necessary to impose the death penalty." 136 S.Ct. at 622.

Florida had attempted to distinguish its advisory system from Arizona's by "treat[ing] the advisory

recommendation by the jury as the necessary factual finding that *Ring* require[d]." *Id.* The Court rebuffed this effort, explaining that the State "fail[ed] to appreciate the central and singular role the judge plays under Florida law"—namely, that to impose a death sentence the judge "*alone*" needed to find specific aggravating circumstances and that they outweighed any mitigating circumstances. *Id.* at 622. The jury may have "recommend[ed] a sentence, but it d[id] not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation [wa]s not binding on the trial judge." *Id.*

3. On remand, the Florida Supreme Court in *Hurst v. State*, 202 So.3d 40 (Fla. 2016) ("*Hurst II*"), held that the Sixth Amendment required the jury to make all findings previously made by judges—"[1] the existence of the aggravating factors proven beyond a reasonable doubt, [2] that the aggravating factors are sufficient to impose death, and [3] that the aggravating factors outweigh the mitigating circumstances." *Id.* at 53. The jury must make all of those findings unanimously. *Id.* at 53-63.

The Florida Supreme Court concluded that Hurst's judge-imposed death sentence was not "harmless error." *Id.* at 66-67. The court first rejected Hurst's argument that judge-imposed death sentences are "structural errors" incapable of harmless-error analysis. *Id.* at 66-67. Nevertheless, applying *Chapman v. California,* 386 U.S. 18 (1967), the court found that the State had not proven the Sixth Amendment error "harmless beyond a reasonable doubt." 202 So.3d at 68-69. The court focused on the fact that the jury recommended a death sentence by a "bare majority" of seven to five. *Id.* The court also

emphasized that, because there was no special verdict form, it could not "determine what aggravators (if any) the jury unanimously found proven beyond a reasonable doubt"—let alone whether any "aggravating factors outweighed the mitigation." *Id.*

4. In a series of later decisions, the Florida Supreme Court has applied *Hurst*'s rule forbidding advisory juries to 172 defendants whose capital sentences became final after *Ring*. App. 33a-48a; *see Mosley v. State*, 209 So.3d 1248, 1274 (Fla. 2016). It has ordered 139 defendants resentenced. *Id.* All those awarded relief under *Hurst* had divided advisory jury votes. App. 33a-45a. To date, 34 of these 139 defendants have been resentenced—30 to life imprisonment and only 4 to death. App. 33a-44a. In other words, 88% of defendants sentenced to death by a judge before *Hurst* have been resentenced to life after *Hurst*. In many of these cases, the State did not even pursue the death penalty; in others, a properly instructed jury chose life instead of death, App. 38a, 41a.

By contrast, the Florida Supreme Court has deemed the use of an advisory jury categorically harmless in any case where the original advisory recommendation was unanimous. The court, over frequent dissent, has "consistently" characterized the *Hurst* errors in these cases as harmless on the theory that "unanimous recommendations" were "precisely" what *Hurst* determined were "constitutionally necessary to impose a sentence of death." *Everett v. State*, 258 So.3d 1199, 1200 (Fla. 2018) (quoting *Davis v. State*, 207 So.3d 142, 175 (Fla. 2016), and cataloging identical decisions).

The Florida Supreme Court has applied this rule and declined to order the resentencing of 28 people,

including petitioner here, who were sentenced to death by a judge following a unanimous advisory jury vote recommending death. App. 45a-47a. Counsel are aware of six remaining post-*Ring* defendants with unanimous advisory verdicts whose judge-imposed death sentences have not yet been reviewed by the Florida Supreme Court. App. 47a-48a.

B. Factual Background and Proceedings Below

1. In March 1999, petitioner Fred Anderson robbed a bank in Mount Dora, Florida. *Anderson v. State*, 863 So. 2d at 174. During the robbery, he shot two tellers, killing one and seriously injuring the other. *Id.* Mr. Anderson surrendered to police at the scene. *Id.* The State charged him with first-degree murder, attempted first-degree murder, robbery with a firearm, and grand theft of a firearm. *Id.* At trial, the State introduced evidence that Mr. Anderson robbed the bank because he owed over $4,000 in restitution from a previous non-violent theft conviction and faced incarceration if he couldn't pay. *Id.*; *Anderson v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 881, 885 (11th Cir. 2014). At the time, Mr. Anderson was the sole support for his elderly, disabled mother. *Id.* at 892. Mr. Anderson admitted to the robbery and shootings. 863 So. 2d at 175. He remembered firing three bullets and testified that he did so only because he panicked. *Id.* at 175, 177. On October 3, 2000, the jury convicted on all four charges. *Id.* at 175.

2. The judge held an evidentiary hearing in front of the jury to determine whether Mr. Anderson would be sentenced to death. Before the parties presented evidence, the judge instructed the jury that "[t]he final decision as to what punishment shall be imposed[] rests solely with the Judge of this court." App. 25a. "However," the judge continued, "the law

requires that you, the jury render to the Court an advisory sentence as to what punishment should be imposed." *Id.*

The final jury instructions explained that, although the "advisory sentence" would "be given great weight," the "final decision as to what punishment shall be imposed is the responsibility of the judge." App. 27a. The judge instructed the jury that it could consider four aggravating circumstances:

- that the defendant committed the offense while on community control for a previous felony conviction;
- that he had been convicted of another violent felony—namely, the attempted-murder during the same bank robbery;
- that he committed the offense for financial gain; and
- that he committed the offense "in a cold and calculated and premeditated manner, and without any pretense of moral or legal justification"

App. 28a.

Each juror was instructed that, if he or she found any of those aggravating circumstance proven beyond a reasonable doubt, he or she should decide whether they were sufficient to impose the death penalty. App. 29a. If so, each juror would then "weigh the aggravating circumstances against the mitigating circumstances," and the jury would recommend an "advisory sentence … based on these considerations." App. 30a.

The jury returned a unanimous advisory recommendation in favor of death. The verdict form, titled "Advisory Sentencing," read in full: "A majority of the jury, by a vote of 12 to 0, advises and recommends to

the court that it impose the death penalty upon Fred Anderson, Jr." App. 32a. The court denied Mr. Anderson's request for a special verdict form asking the jury to identify the aggravating circumstances it found to exist beyond a reasonable doubt. Trial Tr. vol. 5, at 755-56. The jury was therefore never asked whether it unanimously agreed on any aggravating circumstance.

After its independent review, the trial judge imposed a death sentence. 2001 WL 36236241 (Fla. Cir. Ct. Jan. 11, 2001). The court found that the State had proven all four aggravating factors beyond a reasonable doubt. *Id.* The court found ten mitigating circumstances—including that Mr. Anderson was remorseful, active in his church, and had no prior history of violence—but concluded that these circumstances were outweighed by the aggravators. *Id.*

4. On direct appeal, Mr. Anderson contended that his judge-imposed death sentence violated *Ring*. 863 So. 2d at 189. The Florida Supreme Court affirmed the sentence. *Id.* Mr. Anderson's conviction and sentence became final on March 22, 2004. 541 U.S. 940 (2004) (mem.). He sought collateral relief in state and federal court; all courts denied relief. *See* 18 So. 3d 501 (Fla. 2009); 752 F.3d 881 (11th Cir. 2014).[1]

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[1] In the Eleventh Circuit, Judge Martin wrote separately to express "serious concerns" about the Florida Supreme Court's evaluation of Mr. Anderson's ineffective-assistance claim, noting that trial counsel "failed to discover (and present to the jury) … evidence that Mr. Anderson was violently sexually abused for several years" and had "developed post-traumatic stress disorder and other mental health issues as a result of this abuse." 752 F.3d at 911 (Martin, J., concurring in result only).

6. Following *Hurst*, Mr. Anderson timely moved in state court to vacate his death sentence. On July 20, 2017, the trial court held an evidentiary hearing to determine whether the *Hurst* error in Mr. Anderson's case was harmless. William Stone, Mr. Anderson's trial counsel, testified that he would have pursued a different strategy at sentencing had *Hurst* been on the books. For example, Mr. Stone would have "more aggressively" admonished the jurors about "the significance of their individual participation and the[ir] individual power" over the ultimate sentence. Hr'g Tr. 20:15-20, July 28, 2017.

Terence Lenamon, a seasoned capital-defense attorney who trains lawyers on how to select capital juries after *Hurst*, observed that the court in Mr. Anderson's case "never instructed [the jurors] that they could vote for mercy" even if they found all facts necessary to impose a death sentence. He explained that, in light of *Hurst*, a mercy instruction was "a very powerful tool." *Id.* at 55:10-58:1.

7. On November 17, 2017, the trial court denied Mr. Anderson's *Hurst* claim as harmless, relying on the Florida Supreme Court's "consistent holding that any *Hurst* error was harmless beyond a reasonable doubt, where … the jury unanimously recommended the death sentence." App. 12a. Mr. Anderson moved for rehearing, contending that the court had failed to address his Eighth Amendment claim under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The court denied rehearing and issued an amended order denying the *Caldwell* claim. App. 22a-23a.

Mr. Anderson appealed to the Florida Supreme Court, contending that the violation of the Sixth Amendment was not harmless and that his sentence also violated *Caldwell*. He also preserved the argu-

ment—which the Florida Supreme Court rejected in *Hurst II*—that *Hurst* errors are "structural and not subject to harmlessness review." Br. of Appellant at 3 n.3, *Anderson v. Florida*, No. 18-175 (Fla. April 23, 2018).

8. The Florida Supreme Court affirmed the denial of collateral relief. App. 3a.

The court held that the use of an advisory jury was "harmless beyond a reasonable doubt." The court relied on its repeated holdings 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." App. 2a (quoting *Everett*, 258 So.3d at 1200). It saw no reason to "depart[] from [its] precedent" that "consistently … den[ied] *Hurst* relief to defendants who have received a unanimous jury recommendation of death." App. 2a-3a. The court also rejected Mr. Anderson's claim under *Caldwell*. App. 3a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Review to Decide Whether a Judge-Imposed Death Sentence Is Structural Error

This Court should decide whether the imposition of a sentence of death by a judge—in violation of this Court's holdings that the Sixth Amendment requires juries to impose death sentences—can ever be harmless. The Florida Supreme Court's decision answering that question in the affirmative deepens an existing split of authority and conflicts with this Court's structural-error decisions. The question is critically significant to Mr. Anderson and to 33 other Floridians on death row whose judge-imposed death sen-

tences are deemed harmless under the Florida Supreme Court's approach.

A. The Lower Courts Are Split on Whether a Judge-Imposed Death Sentence Is Structural Error

The question whether the imposition of a death sentence by a judge constitutes structural error is the subject of an acknowledged, well-developed split.

1. The Florida Supreme Court held on remand from *Hurst* that the imposition of the death penalty by a judge, rather than a jury, "is not structural error incapable of harmless error review." *Hurst II*, 202 So. 3d at 67. The court held that, because the failure to submit a single sentencing factor to the jury is not structural error, *see Washington v. Recuenco*, 548 U.S. 212 (2006), a proceeding "in which the judge rather than the jury made *all* the necessary findings to impose a death sentence" was not structural error either. *Hurst II*, 202 So. 3d at 67-68 (emphasis added). Since then, the Florida Supreme Court has applied harmless-error review—rather than deeming the error structural—to every capital defendant who received an unconstitutional death sentence from a judge rather than a jury, including to Mr. Anderson below. *Supra* pp.7-8.

In so holding, the Florida Supreme Court joined several other state high courts, which similarly hold that imposition of a death sentence by a judge rather than a jury can be harmless. *E.g.*, *State v. Whitfield*, 107 S.W.3d 253, 262 (Mo. 2003); *State v. Ring*, 65 P.3d 915, 935 (Ariz. 2003); *see Jackson v. State*, 213 So. 3d 754, 786-87, 790-91 (Fla. 2017) (citing additional cases). These courts likewise conclude that submitting the capital sentencing question to the judge rather than the jury is akin to the failure to submit a single

sentencing factor or single element of a crime to a jury, which this Court held harmless in *Recuenco* and *Neder*. *See Ring*, 65 P.3d at 935.

2. By contrast, three other courts—the Ninth Circuit, the Colorado Supreme Court, and the Idaho Supreme Court—have held that the imposition of a capital sentence by a judge rather than a jury is structural error.

The Ninth Circuit has squarely held that "*Ring* error is not susceptible to harmless-error analysis" because the sentencing "proceeded under a completely incorrect, and constitutionally deficient, framework." *Summerlin v. Stewart*, 341 F.3d 1082, 1116 (9th Cir. 2003) (en banc), *rev'd on other grounds sub nom. Schriro v. Summerlin*, 542 U.S. 348 (2004). The Ninth Circuit explained that "[d]epriving a capital defendant of his constitutional right to have a jury decide whether he is eligible for the death penalty is an error that necessarily affects the framework within which the trial proceeds." *Id.* at 1116. Although this Court later reversed the portion of *Summerlin* addressing retroactivity, it did not address the Ninth Circuit's structural-error holding, and that portion of the holding remains "binding precedent in [the Ninth] Circuit." *See, e.g., S. California All. of Publicly Owned Treatment Works v. EPA*, 853 F.3d 1076, 1082 (9th Cir. 2017).[2]

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[2] The retroactivity of the *Ring*/*Hurst* rule is not at issue because Mr. Anderson's sentence became final after *Ring* was decided. *See Mosley*, 209 So.3d at 1274. Moreover, although this Court reversed the portion of *Summerlin* holding that *Ring* is not retroactive under *Teague v. Lane*, 489 U.S. 288 (1989), structural error "is not coextensive with the second *Teague* exception." *Tyler v. Cain*, 533 U.S. 656, 666-67 & n.7 (2001).

The Idaho Supreme Court likewise has held that *Ring* errors "are not susceptible to harmless-error analysis," both because the weighing of aggravating and mitigating factors is inherently "more subjective" than "evidence of guilt or innocence," and because the absence of an actual jury verdict on death means there is "no jury verdict within the meaning of the Sixth Amendment" to review for harmlessness. *State v. Lovelace*, 90 P.3d 298, 304-05 (Idaho 2004). The Idaho court held that the imposition of a death sentence by a judge rather than a jury is akin to the faulty reasonable-doubt instruction that was structural error in *Sullivan*. *Id.* The court distinguished *Ring* errors from the mere failure to submit one element of a crime to the jury, as in *Neder*, 527 U.S. 1.

The Colorado Supreme Court likewise applied *Ring* to resentence two defendants to life in prison without engaging in harmless-error analysis. *Woldt v. People*, 64 P.3d 256, 272 (Colo. 2003).

3. The split is well-established and widely acknowledged, including by the foremost treatise on criminal procedure. 7 W. LaFave, Crim. Proc. §27.6(d) & n.167 (4th ed. 2018). The Florida Supreme Court has itself recognized that, in holding *Hurst* errors to be susceptible to harmless-error review, it diverged from the Colorado Supreme Court's conclusion that *Ring* errors required automatic resentencing. *Jackson*, 213 So.3d at 790-91 (discussing *Woldt*). And in holding that death sentences imposed by juries could be harmless error, the Arizona Supreme Court acknowledged that it was rejecting the Ninth Circuit's structural error analysis in *Summerlin*, noting that Arizona courts "are not bound by the Ninth Circuit's interpretation of what the Constitution requires." *State v. Sansing*, 77 P.3d 30, 33 n.2

(Ariz. 2003); *see also* Justin F. Marceau, *Arizona's Ring Cycle,* 44 Ariz. St. L.J. 1061, 1103-04 & n.177 (2012) (noting the split).

If Mr. Anderson's unconstitutional death sentence had been imposed by a federal court in the Ninth Circuit or by a state court in Colorado or Idaho, it would have been automatically reversed as structural error, and Mr. Anderson would be entitled to a new sentencing by a jury. But in Florida, it was reviewed for harmlessness. The Court should grant review to resolve the conflict.

B. The Florida Supreme Court's Conclusion that Judge-Imposed Death Sentences Can Be Harmless Conflicts With this Court's Precedent

The Florida Supreme Court's decision to assess *Hurst* errors for harmlessness not only widens a split, it is irreconcilable with this Court's precedent. Under all of this Court's tests for structural error, allowing a judge rather than a jury to impose capital punishment qualifies. *See Weaver v. Massachusetts*, 137 S.Ct. 1899, 1907-09 (2017).

1. When a criminal defendant is deprived of constitutional rights, a reviewing court in certain cases can affirm the conviction or sentence based on the principle of "harmless error." The error must be "harmless beyond a reasonable doubt," *Chapman*, 386 U.S. at 24, meaning that "the guilty verdict actually rendered in [the] trial was surely unattributable to the error," *Sullivan*, 508 U.S. at 279.

Structural errors, in contrast, are incapable of being harmless. The defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being "simply an er-

ror in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

2. It is hard to imagine an error that more fundamentally affects the "framework within which the trial proceeds" than instructing the jury that its views on whether the defendant may be sentenced to death are purely advisory, and instead submitting that question to the court. The constitutional error that this Court recognized in *Hurst* (and before that, in *Ring*) is the deprivation of the right to a jury trial in a capital sentencing proceeding. And it is not simply the deprivation of a right to have the jury consider one element or one fact that is critical to the imposition of the death penalty, but every element and every fact. *Hurst* held that, under Florida's advisory jury scheme, the trial court "has *no* jury findings on which to rely." 136 S.Ct. at 622 (emphasis added). The Florida Supreme Court forthrightly acknowledged as much. It observed that, under the sentencing regime *Hurst* struck down, "the judge rather than the jury made *all* the necessary findings." *Hurst II*, 202 So.3d at 67 (emphasis added).

That fact is conclusive for the structural error inquiry, because it renders this case indistinguishable from *Sullivan v. Louisiana*. *Sullivan* held that a faulty reasonable doubt instruction is structural error because it "vitiates *all* the jury's findings." 508 U.S. at 281. Such an instruction constitutes a "defect[] in the constitution of the trial mechanism"; a reviewing court cannot assess its effect on the jury without engaging "in pure speculation—its view of what a reasonable jury would have done" if it had been operating under the right framework. *Id.* (quotation marks omitted). In other words, for purposes of the Sixth Amendment, a jury misinstructed about

the standard of proof is not a jury at all; affirming the misinstructed jury's verdict on appeal would require "the wrong entity"—the court—to "judge[] the defendant guilty." *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986)).

The exact same is true for a jury instructed that its capital sentencing decision is advisory. That constitutional deficiency "vitiates *all* the jury's findings" every bit as much as providing an erroneous reasonable-doubt instruction. Again, this Court has already said so: a trial court reviewing a jury's advisory recommendation "has *no* jury findings on which to rely." *Hurst*, 136 S.Ct. at 622 (emphasis added). And that is the fundamental distinction that the Florida Supreme Court missed when it relied on *Neder*, which held that the failure to submit to the jury *one* element of the crime could sometimes qualify as harmless. *See Hurst*, 202 So.3d at 67; *Jackson*, 213 So.3d at 785-86. *Neder* confirmed that if the error "vitiates *all* the jury's findings," rather than just one, the error is structural. 527 U.S. at 10-11.

Under Florida's pre-*Hurst* death-penalty regime, no jury ever made any requisite findings of fact. The direct conflict between the Florida Supreme Court's harmlessness decision and *Sullivan* requires this Court's intervention.

3. This Court's other structural-error decisions confirm that the use of an advisory rather than an actual jury is not susceptible to review for harmlessness. The Court has identified "at least three" categories of errors that are structural. *Weaver*, 137 S.Ct. at 1907-08. An error is "structural" if (1) it is too difficult for reviewing courts to assess the error's effect on the outcome, (2) the right protected is worth protecting irrespective of its deprivation's effect on

the outcome of a trial, or (3) the error "always results in fundamental unfairness." *Id.* at 1908. *Hurst* errors are the rare class of triple structural errors.

First, *Hurst* errors are structural because their effects are "too hard to measure." *Weaver*, 137 S.Ct. at 1908; *see, e.g.*, *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986). *Sullivan* held that improperly instructing the jury about the "reasonable doubt" standard produced "consequences that are necessarily unquantifiable and indeterminate." 508 U.S. at 281-82. In other words, when a jury misunderstood *how* it was required to evaluate evidence, a reviewing court could only "speculat[e]" about which facts a properly instructed jury would have found. *Id.* at 281. The same is true of *Hurst* errors. "A reviewing court can only engage in pure speculation" about whether a jury that understood its role as the ultimate factfinder would impose a death sentence. *Id.*

The degree of discretion available to capital juries makes it even harder for a reviewing judge to assess the effect of an advisory jury. This Court held in *Caldwell v. Mississippi* that an effort to "minimize the jury's sense of responsibility" by informing it that ultimate responsibility for a death sentence lies elsewhere required reversal. 472 U.S. 320, 341 (1985). The Court "c[ould] not say" that the effort had "no effect on the sentencing decision." *Id.* The Court explained that, as just one example, the jury may vote for death as a means of "'send[ing] a message' of extreme disapproval for the defendant's act," even if the jury was "unconvinced that death is the appropriate punishment." *Id.* at 331.

The effect of a *Hurst* error is all the less ascertainable because tactical and strategic decisions by attorneys may differ dramatically if the jury is the

final arbiter, as the testimony in Mr. Anderson's post-conviction hearing bears out. *Supra* p.11; *see United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

Second, the right protected by *Hurst*—the right to have a jury conclusively decide whether a defendant should be sentenced to death—is a right worth protecting irrespective of its impact on the accuracy of the proceeding. *See Weaver*, 137 S.Ct. at 1908; *see also United States v. Henry*, 472 F.3d 910, 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring).

Beyond holding that defective reasonable-doubt instructions have an unquantifiable effect on trials, *Sullivan* held that such instructions were structural errors because they deprived the defendant of the "basic protection[n]" of the right to trial by jury. 508 U.S. at 281 (quoting *Rose*, 478 U.S. at 577). "The right to trial by jury reflects, [the Court] ha[d] said, 'a profound judgment about the way in which law should be enforced and justice administered.'" *Id.* (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)). The right is "fundamental to the American scheme of justice." *Duncan*, 391 U.S. at 149. A *Hurst* error completely deprives capital defendants of that right.

Third, *Hurst* errors "always result in fundamental unfairness." *Weaver*, 137 S. Ct. at 1908. Aside from the fact that they are insusceptible to accurate harmless-error analysis, and aside from the fact that the jury right is inherently worth protecting irrespective of its practical impact, *Hurst* errors call into question the fundamental fairness of the judicial system as a whole. Just like requiring a criminal defendant to submit to judgment before a biased judge, *see Tumey v. Ohio*, 273 U.S. 510, 532-33 (1927), requiring a criminal defendant to submit to trial before

an advisory jury—one told its sentencing decisions are not what counts—"undermine[s] the fairness of [the] criminal proceeding as a whole." *United States v. Davila*, 569 U.S. 597, 611 (2013).

II. The Court Should Grant Review to Decide Whether a Unanimous Advisory Vote Renders a Judge-Imposed Death Sentence Harmless

Even if *Hurst* errors could be harmless, the Florida Supreme Court's rigid approach to harmless-error-review—which treats a unanimous advisory verdict as *per se* harmless error—is irreconcilable with *Hurst* itself and with this Court's harmless-error cases. The Florida Supreme Court now holds that the use of an advisory jury is harmless because an advisory jury is equivalent to an actual jury. This is *exactly* the argument *Hurst* rejected. Nearly three dozen Florida capital defendants who were unconstitutionally sentenced to death by a judge have been (or will be) denied relief on the basis of the Florida Supreme Court's refusal to accept the holding of *Hurst*. The Court should grant review.

A. The Florida Supreme Court's Harmlessness Analysis Flouts *Hurst*

The court below held that Mr. Anderson's unconstitutionally-secured death sentence was harmless error for one reason and one reason only: his advisory jury provided its advice unanimously. The court held:

> As we have previously explained, 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 finds all of the necessary facts for

> the imposition of a death sentence by virtue of its unanimous recommendation."

App. 2a (alterations omitted) (quoting *Everett*, 258 So.3d at 1200). The court again reaffirmed that it has applied this rule "consistently" to deny relief to every Florida capital defendant whose sentence was obtained in violation of *Hurst*, but whose jury recommendation was unanimous. *Id.*; *see Everett*, 258 So.3d at 1200 (listing cases).

The premise underlying the Florida Supreme Court's rule is the exact premise *Hurst* rejected. The *entire* point of *Hurst* is that an advisory jury's recommendation is not equivalent to an actual jury verdict, which was why Florida's system was unconstitutional under *Ring*. 136 S.Ct. at 621-22. The problem was not that the advisory verdict in *Hurst* was non-unanimous, it was that it was advisory. This Court held that the "distinction" between no jury verdict and an "advisory jury verdict" is "immaterial" because the advisory jury "does not make specific factual findings" and a "Florida trial court" does not have "the assistance of a jury's findings of fact." *Id.* at 622 (quotation marks omitted). It is impossible to square that holding with the reasoning of the court below—that Mr. Anderson's advisory death sentence was harmless because the jury "finds all of the necessary facts … by virtue of its unanimous recommendation." App. 2a.

Federal law required Florida to prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. But the court below is simply assuming harmlessness in case after case, in direct violation of *Hurst*. Indeed, the Florida Supreme Court's repeated statements that a unanimous advisory jury "finds all

of the necessary facts … by virtue of its unanimous recommendation" leaves only one explanation for its systematic approach to *Hurst* errors. App. 2a. The court is not truly conducting harmlessness analysis; it is rather holding, contrary to *Hurst*, that a jury's advisory death sentence does not constitute error *at all*. This Court would be justified in summarily reversing; the court below has "effectively inverted the rule established in" *Hurst*. *Sexton v. Beaudreaux*, 138 S.Ct. 2555, 2560 (2018) (per curiam).

B. The Florida Supreme Court's Harmlessness Analysis Is Irreconcilable with This Court's Harmless-Error Cases

Harmless-error analysis asks whether, without the defect, the outcome would have been the same beyond a reasonable doubt, *Chapman*, 386 U.S. at 24; or, put differently, whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," *Neder*, 527 U.S. at 18. Even putting aside the direct conflict with *Hurst*, the Florida Supreme Court's harmlessness analysis—which makes a defective jury vote determinative and ignores all other evidence in the case—violates fundamental principles of harmless error review. This Court regularly grants certiorari to correct "misapplication[s] of basic rules regarding harmless error." *Davis v. Ayala*, 135 S. Ct. 2187, 2193 (2015). It should do so here.

1. This Court has repeatedly held that, in undertaking harmless-error review, courts may not apply mechanical, *per se* rules. Rather, courts performing harmless-error review must "consider the trial record as a whole." *United States v. Hasting*, 461 U.S. 499, 509 (1983). There must be a "detailed explanation based on the record" supporting a finding of harmless

error. *Clemons v. Mississippi*, 494 U.S. 738, 753 (1990). It is not enough to say that the jury's decision "could have been the same" absent the error; rather, the reviewing court must ask whether the "evidence was of such compelling force as to show beyond a reasonable doubt that the [erroneous instruction] must have made no difference." *Yates v. Evatt*, 500 U.S. 391, 406-07 (1991). "To say that [such] 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." *Id.* at 403; *see also Neder*, 527 U.S. at 19 ("safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record" before deciding whether "the jury verdict would have been the same absent the error").

Thus, assuming that meaningful harmless-error review of *Hurst* errors were possible, at minimum the reviewing court must conduct a searching review of the evidence presented at the sentencing hearing. The court must conclude beyond a reasonable doubt that no reasonable jury—told that its verdict was determinative—could have found that the mitigating factors outweighed the aggravating factors, or sentenced the defendant to life.

That is precisely the approach the Arizona Supreme Court has taken post-*Ring*, holding that a judge-imposed death sentence is only harmless (1) "if we can conclude beyond a reasonable doubt that no reasonable jury would fail to find the aggravating circumstance," and that (2) "no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *State v. Armstrong*, 93 P.3d 1076, 1078, 1081 (Ariz. 2004) (*citing Ring*, 65 P.3d at 946). In order to evalu-

ate the aggravating and mitigating circumstances, the Arizona Supreme Court undertakes an exhaustive examination of the evidence, and it routinely finds that judge-made findings are not harmless when the evidence is conflicting or subject to multiple interpretations.[3]

To be sure, the discretionary nature of a death penalty proceeding generally makes it impossible for a court to ever reliably conclude beyond a reasonable doubt that no rational jury, as the final arbiter, could choose life. And when the court "can only speculate what sentence the [jury] would have issued absent legal error," the error is not harmless. *United States v. Henry*, 852 F.3d 1204, 1209 (10th Cir. 2017) (Gorsuch, J.). Such an error "is not harmless, and … should be returned to the [trial court] for resentencing." *Id.* "When it comes to the loss of liberty, it is better to know on remand than guess on appeal." *Id.* at 1209 n.3; *see also United States v. Burwell*, 690 F.3d 500, 547 n.21 (D.C. Cir. 2012) (Kavanaugh, J., dissenting) (an improper jury instruction is almost always prejudicial error because "juries are not bound by what seems inescapable logic to judges").

2. The Florida Supreme Court's *per se* rule for unanimous advisory recommendations short-circuits

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[3] *E.g.*, *State v. Moody*, 94 P.3d 1119, 1168 (Ariz. 2004) ("A reasonable jury might have … weighed differently the mitigating factors that were found."); *State v. Dann*, 79 P.3d 58, 61 (Ariz. 2003) ("[W]e cannot say beyond a reasonable doubt that if a jury had … weighed the mitigating circumstances differently, it would not have found them 'sufficiently substantial to call for leniency.'"); *Armstrong*, 93 P.3d at 1079; *State v. Murdaugh*, 97 P.3d 844, 857 (Ariz. 2004).

the harmless-error analysis mandated by *Chapman*. The court did not consider *any* of the evidence presented at Mr. Anderson's sentencing hearing before it deemed the *Hurst* error harmless, including the ten mitigating circumstances that the trial court found proven. *Anderson*, 2001 WL 36236241. Nor did the court address the jury instructions or verdict form, which informed the jury that it would not make the "final decision," and used the words "advisory," "recommendation," or variants 22 times. App 25a-32a. And the court did not conclude that no reasonable jury could have found that the mitigating factors outweighed any aggravating factors, or could have decided to exercise mercy.

Rather, the court relied on a single irrelevant fact to determine harmlessness: the vote of the advisory jury. As explained, a jury vote in a constitutionally defective trial is not probative of whether the outcome would—as opposed to could—have been the same without the defect, *Chapman*, 386 U.S. at 24, and that single irrelevant factor certainly cannot be *determinative*. That is especially so since there is no evidence that the jury unanimously recommended death on the basis of the *same* statutory aggravating factor. In other words, "even assuming some sort of harmless error analysis applies," the advisory vote of a misinstructed jury is "simply not enough evidence to call the error here harmless." *United States v. Games-Perez*, 667 F.3d 1136, 1145 (10th Cir. 2012) (Gorsuch, J., concurring in the judgment).

C. The Florida Supreme Court's Harmlessness Analysis Violates the Eighth Amendment

The Florida Supreme Court's harmlessness analysis independently violates the Eighth Amendment, because it "rest[s] a death sentence on a determina-

tion made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Caldwell*, 472 U.S. at 328-29. In *Caldwell*, a penalty-phase jury was told that its decision to impose the death penalty would not be final because an appellate court would review the sentence. *Id.* The Court reversed: the sentence did not meet the Eighth Amendment's reliability standard because it was impossible to ascertain whether the prosecutor's remarks had an effect on the jury's decision. *Id.* at 341.

To the extent an advisory verdict can be harmless, *Caldwell* forbids treating it as *per se* harmless. The Florida Supreme Court's blind reliance on the advisory jury's recommendation, without considering the jury's diminished sense of responsibility for the death sentence, violates *Caldwell*'s holding that advisory verdicts are unreliable.

III. The Questions Presented Are Enormously Consequential and the Court Should Review Them Now

The two questions presented have immediate, outcome-determinative, life-or-death consequences for 34 death-row inmates, and have broad, recurring significance across criminal law. This case presents an ideal vehicle to resolve these critically important questions, which are logically considered together.

1. Florida's holdings that *Hurst* errors are not structural, combined with its *per se* approach to harmless-error review, has direct, dispositive effect on 34 Florida death-row inmates with unanimous

advisory sentences.[4] The Florida Supreme Court has already systematically and unblinkingly affirmed 28 of these sentences by counting the number of votes rendered by a misinstructed jury. App. 45a-47a. The court's announcement of a *per se* rule means it will do the same for the remaining defendants with unanimous advisory verdicts, of which counsel believe there are six. App. 47a-48a. Before long, the State will have executed enough defendants sentenced in violation of *Hurst* to foreclose this Court's review. Unless the Court intervenes now, these defendants will be executed without a jury deciding that they deserve death.

There is every reason to believe that a properly instructed jury could resentence these defendants to life imprisonment, not death. As noted, 88% of capital defendants ordered resentenced following *Hurst* have now received life sentences, either because the state did not pursue a death sentence or because the jury chose life when it was informed that its sentence was not advisory. *Supra* p.7. And Florida defendants facing capital proceedings for the first time post-*Hurst* receive life rather than death more than two-thirds of the time.[5] In several capital-sentencing proceedings after *Hurst*, the jury has chosen life im-

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[4] This number excludes sentences that became final before *Ring*, to which the Florida Supreme Court has declined to apply *Hurst*. *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016).

[5] Only 13 Florida capital defendants sentenced for the first time post-*Hurst* have received death sentences, App. 52a, while counsel are aware of at least 32 who have received life sentences, App. 49a-51a.

prisonment despite unanimously finding aggravating circumstances sufficient to impose a death sentence and that the aggravators outweighed any mitigators.[6] Sometimes, a single juror has played the deciding role in imposing life.[7] Jurors in these cases, properly instructed that they are the final arbiters, have shown mercy despite unanimously agreeing that the facts supported a death sentence.

This Court has recognized that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-99 & n.9 (1983). As a result, it routinely intervenes to halt even a single unconstitutional death sentence. *E.g.*, *Murphy v. Collier*, No. 18A985 (Mar. 28, 2019). This case will be outcome-determinative for 34 death-row inmates and thus calls out for review.

2. But this case's significance extends even beyond the defendants whose lives are on the line. This case presents a question of central, recurring importance across the criminal justice system: who must impose punishment, the judge or the jury?

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[6] *E.g.*, Verdict Form, *State v. Lee*, No. 2011-CF-2152 (Fla. Cir. Ct. Apr. 12, 2018) (for both victims, 12-0 jury vote on existence of aggravators; 12-0 on sufficiency of aggravators; 12-0 on aggravators outweighing mitigators; 9-3 that defendant should be sentenced to death).

[7] *E.g.*, Verdict Form, *State v. Hampton*, No. 07-CF-12699 (Fla. Cir. Ct. Aug. 24, 2018) (11-1 that defendant should be sentenced to death; 12-0 on all other findings).

This Court has repeatedly granted certiorari to resolve that question—and to resolve harmless error questions stemming from that question. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *Neder*, 527 U.S. 1; *Southern Union Co. v. United States*, 567 U.S. 343 (2012); *Alleyne v. United States*, 133 S. Ct. 2151 (2013). These cases recognize that the answer to this question in any context has profound consequences for individual liberty and shapes public perception of fairness in the justice system. The Framers enshrined the right to trial by jury, after all, as "protection against arbitrary action," and particularly as a "safeguard against … the compliant, biased, or eccentric judge." *Duncan*, 391 U.S. at 156. When the Court "deals with the content of" the Constitution's jury-trial guarantee "it is operating upon the spinal column of American democracy." *Neder*, 527 U.S. at 30 (Scalia, J., dissenting). As a Justice of this Court has observed, defendants understandably "find it unfair" when, for example, trial courts impose enhanced sentences based on facts that have not been found beyond a reasonable doubt by a jury. *United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008) (Kavanaugh, J.).[8]

What's more, *Ring* and *Hurst* show that the Court finds the judge-versus-jury question in the capital sentencing context especially important. But Florida's application of harmless-error analysis is

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[8] S*ee also United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc) (questioning the constitutionality of sentencing enhancements that rely on jury-acquitted conduct).

permitting evasion of *Hurst*. Tomorrow, Florida could begin instructing death-penalty juries that their role is purely advisory, just like before *Hurst*. So long as the advisory jury votes for death unanimously, the Florida Supreme Court could treat these judge-imposed death sentences—rendered in flagrant violation of *Hurst*—as *harmless errors*. In fact, it might even treat the sentences as not erroneous at all, given that it has characterized "unanimous recommendation[s]" as "precisely" what *Hurst* determined to be "constitutionally necessary to impose a sentence of death." App. 2a (quotation marks omitted).

3. This Court routinely intervenes when lower courts announce legal rules that conflict with its own precedent, Sup. Ct. R. 10(c), especially when state appellate courts are affirming death sentences based on factors "irreconcilable with" with this Court's precedents. *E.g.*, *Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017). Florida's approach to harmless error arbitrarily chooses who lives and who dies based on a single factor—an advisory jury vote—that *Hurst* held irrelevant. Under Florida's approach, the advisory vote of a single juror stands between a defendant being resentenced—almost certainly to life—and having his death sentence rubber-stamped.

4. The questions presented also have significance beyond Florida's sentencing system. Florida is not the only State that continues to make *Ring*/*Hurst* errors. While many States reformed their death-penalty schemes after *Ring* and *Hurst*, *see, e.g.*, *Rauf v. State*, 145 A.3d 430 (Del. 2016), both Nebraska and Montana still have judge-imposed death penalties that are likely unconstitutional under *Hurst*. Ne-

braska's system—challenged in a pending petition[9]—requires a sentencing jury to find the existence of an aggravating circumstance beyond a reasonable doubt. Neb. Rev. Stat. § 29-2520(4)(f). But to impose a death sentence, a three-judge panel must independently find aggravating facts, weigh them against mitigating ones, and decide that a death sentence is justified. §§ 29-2521 to -2523. Likewise, Montana requires the judge to hold a sentencing hearing with no jury present and to "find[] that there are no mitigating circumstances sufficiently substantial to call for leniency" before imposing a death sentence. Mont. Code §§46-18-301, -305.

Both of these systems appear to directly violate *Hurst*'s command that the jury must "make the critical findings necessary to impose the death penalty." 136 S.Ct. at 622. If this Court held either system unconstitutional, state appellate courts would immediately be asked to decide whether pending sentences imposed under those schemes were harmless. The harmless-error principles central to this case would help answer that question, if not directly resolve it.

5. Justices of this Court have called for review of the Florida Supreme Court's *Hurst* harmlessness analysis in no fewer than six separate cases. *See Reynolds v. Florida*, 139 S.Ct. 27 (2018) (statement of Breyer, J., respecting denial of certiorari; Sotomayor, J., dissenting from denial); *Kaczmar v. Florida*, 138 S. Ct. 1973 (2018) (Sotomayor, J. dissenting from denial); *Guardado v. Jones* and *Cozzie v. Florida*, 138

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[9] *See* Petition for Writ of Certiorari at 2-3, *Lotter v. Nebraska*, No. 18-8415 (Mar. 11, 2019).

S. Ct. 1131 (2018) (Sotomayor, J., dissenting from denial); *Middleton v. Florida*, 138 S. Ct. 829 (2018) (Breyer, J., dissenting from denial; Sotomayor, J., joined by Ginsburg, J., dissenting from denial); *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Breyer, J., dissenting from denial; Sotomayor, J., joined by Ginsburg and Breyer, J.J., dissenting from denial).

It is time for the Court to grant review and to finally resolve the matter, and this case presents an ideal vehicle. The case squarely presents both questions essential to review of the Florida Supreme Court's post-*Hurst* application of harmless-error review. Mr. Anderson squarely contended below that the *Hurst* error in his capital sentencing was a structural error demanding reversal, and that Florida's *per se* harmless error rule violates *Chapman* and *Caldwell*. He also adduced testimony in an evidentiary hearing showing that *Hurst* dramatically changed defendants' strategy in capital sentencing. The trial and the Florida Supreme Court nonetheless rejected all of Mr. Anderson's arguments based on entrenched precedent. App. 2a, 22a.

This Court's reversal would also have a dispositive effect in Mr. Anderson's case and would result in resentencing. Nothing in the record suggests that the *Hurst* error in his case was harmless. Quite the contrary, his sentencing jury was instructed repeatedly and unequivocally that it played an advisory role: The final instructions used the phrase "advisory sentence" ten times and "recommend" another seven. App. 27a-31a. The jury recorded that it "advise[d] and recommend[ed] to the court that it impose the death penalty" on a form titled "Advisory Sentencing." App. 32a.

Mr. Anderson's case presents none of the various obstacles to review that this Court has identified in its previous denials of certiorari. A large swath of these cases featured defendants whose sentences became final before *Ring* and who, under Florida's retroactivity holdings, were not eligible for relief under *Hurst*. *See Reynolds*, 139 S.Ct. at 27 (statement of Breyer, J., respecting the denial of certiorari). But *Hurst* unquestionably applies to Mr. Anderson.

In other of these cases, the defendants had not "properly raised" arguments that Florida's harmless-rule violates *Caldwell*, *id.* at 29, whereas petitioner squarely raised a *Caldwell* claim along with the others he asserts here, including specifically the argument that the lower court's *per se* harmlessness rule defies *Caldwell*.

In yet other cases, unlike in petitioner's, it was unclear that the juries believed their role to be truly advisory. The jury in *Reynolds*, for example, was instructed that the trial judge could reject the jury's recommendation "only if the facts [are] so clear and convincing that virtually no reasonable person could differ." 251 So.3d 811, 813, 828 (Fla. 2013). And one of the aggravating circumstances in Reynolds's case, which involved three killings, was that he committed the two capital murders "in an especially heinous, atrocious, or cruel fashion." *Id.* at 813-14, 830 n.25. Petitioner's jury, by contrast, did not even hear evidence as to that aggravator.

Rather, if Mr. Anderson obtained relief, he would almost certainly join the 30 defendants who have already been resentenced to life. Mr. Anderson's case features significant mitigating circumstances—among them a "horrific" childhood history of violent sexual abuse. *Anderson*, 752 F.3d at 911 (Martin, J.,

concurring). The trial court found ten mitigating factors, including Mr. Anderson's substantial remorse, his active participation in his church and volunteer work, and that he had "no prior history of violence." 2001 WL 36236241. The Sixth and Eighth Amendments demand that Mr. Anderson receive the chance to convince a jury to impose a life sentence, rather than a death sentence.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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Counsel for Petitioner

APRIL 15, 2019

APPENDIX

APPENDIX A

SUPREME COURT OF FLORIDA

No. SC18-175

FRED ANDERSON, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

October 4, 2018

PER CURIAM.

Fred Anderson, Jr., a prisoner under sentence of death, appeals the circuit court's order denying his successive motion for postconviction relief, which was filed under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

In 1999, a jury convicted Anderson of first-degree murder, attempted first-degree murder, robbery with a firearm, and grand theft of a firearm. After hearing evidence during the penalty phase, the jury unanimously recommended a sentence of death for the first-degree murder by a vote of twelve to zero. We affirmed Anderson's convictions and sentence of death on direct appeal. *Anderson v. State*, 863 So. 2d 169 (Fla. 2003). We also affirmed the denial of his initial motion for postconviction relief and denied his petition for writ of habeas corpus. *Anderson v. State*, 18 So. 3d 501 (Fla. 2009).

In January 2017, Anderson filed a successive postconviction motion to vacate his death sentence in light of the decision of United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and this Court's decision in *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). The postconviction court granted Anderson's request for an evidentiary hearing, which was held on July 28, 2017. The postconviction court issued an order denying relief on November 17, 2017. Anderson moved for rehearing, which the postconviction court denied on December 29, 2017, the same day on which the court entered an amended order denying relief. This appeal follows.

Anderson argues the *Hurst* error in his case was not harmless despite the jury's unanimous recommendation for death and that the postconviction court erred in denying his successive motion. As we have previously explained, "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[ ].'" *Everett v. State*, 43 Fla. L. Weekly S250, S250, 2018 WL 2355339 (Fla. May 24, 2018) (quoting *Davis v. State*, 207 So. 3d 142 (Fla. 2016), *cert. denied*, 137 S. Ct. 2218 (2017)). This Court has "consistently relied on *Davis* to deny *Hurst* relief to defendants who have received a unanimous jury recommendation of death." *Everett*, 43 Fla. L. Weekly at S250.

As previously discussed, Anderson received a unanimous jury recommendation of death. Neither the jury instructions provided in this case, nor the aggra-

vators and mitigators found by the trial court, nor the facts of the case compel departing from our precedent. We conclude any *Hurst* error in this case was harmless beyond a reasonable doubt, and Anderson is therefore not entitled to relief.

Anderson also contends that a unanimous jury recommendation violates the Eighth Amendment pursuant to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), when a jury is told that its role is advisory. However, we have "repeatedly rejected *Caldwell* challenges to the advisory standard jury instructions . . . [and] expressly rejected these post-*Hurst Caldwell* claims." *Hall v. State*, 246 So. 3d 210 (Fla. 2018) (plurality opinion); *see also Reynolds v. State*, 43 Fla. L. Weekly S163, S169, 2018 WL 1633075 (Fla. Apr. 5, 2018) (plurality opinion) ("*Hurst*-induced *Caldwell* claims against the standard jury instruction do not provide an avenue for *Hurst* relief."). Therefore, Anderson is not entitled to relief on this claim either.[1]

Accordingly, because we conclude any *Hurst* error in this case was harmless beyond a reasonable doubt, and the remaining claims are similarly without merit, we affirm the postconviction court's order denying Anderson's successive motion for postconviction relief.

It is so ordered.

PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.

CANADY, C.J., concurs in result.

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[1] We likewise reject Anderson's argument that he is entitled to a new proportionality analysis with respect to his death sentence.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Lake County,

G. Richard Singeltary, Judge – Case No. 351999CF000572AXXXXX

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Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Patrick Bobek, Assistant Attorney General, Daytona Beach, Florida,

for Appellee

APPENDIX B

SUPREME COURT OF FLORIDA

Case No.: SC18-175

Lower Tribunal No(s).: 351999CF000572AXXXXX

FRED ANDERSON, JR.,

Appellant(s),

vs.

STATE OF FLORIDA,

Appellee(s).

Wednesday, November 14, 2018

Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.

A True Copy
Test:

[SEAL]

/s/ John A. Tomasino
John A. Tomasino
Clerk, Supreme Court

APPENDIX C

IN THE CIRCUIT COURT OF THE FIFTH
JUDICAL CIRCUIT IN AND FOR
LAKE COUNTY, FLORIDA

Case No: 1999 CF 0572

STATE OF FLORIDA,

vs.

FRED ANDERSON, JR.,

Defendant.

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE DEATH SENTENCE

THIS CAUSE, came on for consideration of Defendant's *Successive Motion to Vacate Death Sentence* filed on January 10, 2017. The Court has considered the Motion, weighed the evidence presented at the evidentiary hearing, the relevant statutory authority and case law, and has reviewed written final arguments. The Court, being otherwise fully advised in the premises, finds the following:

I. FACTUAL SUMMARY

On March 20, 1999 Anderson robbed United Southern Bank, and shot two Marisha Stott and Heather Young. *Anderson v. State*, 863 So. 2d 169, 173 (Fla. 2003). Ms. Young died from the gunshot wounds she received from Anderson; however, Ms. Scott survived but was left paralyzed. *Id.* The evidence at trial showed that Anderson was on community control supervision at the time of the incident, that he did

not have funds to pay restitution, and he had recently been ordered to spend 1 year at a probation center beginning March 19, 1999. *Id*. at 173. On the day prior to the robbery, Anderson called his supervisor and told her that he had the money to pay off the restitution. *Id.* at 174.

Also on March 19, 1999, Anderson went to the bank under the pretense that he was a student who was writing a paper on banking and finance. *Id.* at 174. He spoke with Scott and met with the bank manager, Allen Seabrook. While at the bank, Anderson took note of the bank's security VCR in Seabrook's office. *Id*. The following day, Anderson returned to. the bank under the ruse that he wanted to thank the employees for helping him. *Id*. The bank was scheduled to close at noon and Young and Scott were the only employees working. When there were no customers left inside the bank, Anderson told Young and Scott that he was going to his car to get his business card. *Id.* Anderson returned to the bank with two firearms and ordered Scott and Young into the vault, where he ordered them to fill a trash liner with money. *Id.* Ms. Scott testified that Anderson asked which one of them wanted to die first, and Ms. Scott said she begged Anderson not to be shot. *Id.* A customer, Sherry Howard, entered the bank; and heard Ms. Scott say "Please don't," or "please no". *Id*. Ms. Howard then heard a series of gunshots, and subsequently ran outside of the bank to call the police. *Id.* An officer arrived on scene and saw Anderson ripping electrical equipment from the wall, with a trash can in his hand that contained more than $70,000. *Id.*

Anderson's hands tested positive for gunshot residue, and blood that was recovered from his clothing

was consistent with Ms. Scott's DNA. *Id*. at 175. The testimony of the forensic pathologist revealed that Ms. Young had a total of 7 gunshot wounds, 6 of which could have been fatal. *Id*.

Anderson testified in his case in chief. He admitted to shooting both tellers, although he testified that he could only remember firing 3 shots. The jury found Anderson guilty of grand theft, armed robbery, attempted first-degree murder, and first-degree murder, and unanimously recommended a death sentence by a 12-0 vote. *Id.*

The trial court found four aggravating factors: 1) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, given great weight; 2) the murder was committed for pecuniary gain, given moderate weight; 3) the murder was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation, given little weight; and 4) that Anderson was convicted of a previous violent felony, which was given great weight. *Id*. at 175 n. 5. The trial court followed the jury's recommendation and sentenced Anderson to death. *Id.* at 175. On appeal, the Florida Supreme Court affirmed the convictions and sentence of death. *Id.* at 189. The United States Supreme Court denied Anderson's petition for writ of certiorari on March 22, 2004. *Anderson v. Florida*, 541 U.S. 940 (2004).

II. POSTCONVICTION PROCEEDINGS

Anderson. sought postconviction relief, and filed a motion to vacate his death sentence, and the trial court denied the motion. *Anderson v. State/McNeil*, 18 So. 3d 501, 506 (Fla. 2009). Anderson appealed the

denial of his motion and simultaneously filed a filed a petition for habeas corpus. *Id.* The Florida Supreme Court affirmed the trial court's order, and also denied Anderson's petition for habeas corpus relief. *Id*.

Thereafter, Anderson filed a petition for habeas corpus relief in the United States District Court pursuant to 28 U.S.C. § 2254, and the motion was denied *Anderson v. Secretary Florida Dept. of Corrections*, 2011 WL 2784192 (M.D. Fla. July 15, 2011). The Eleventh Circuit Court of Appeals affirmed the District Court's rulings. *Anderson v. Secretary, Florida Dept. of Corrections*, 752 F. 3d 881, 884 (11th Cir. 2014). Anderson subsequently filed a petition for writ of certiorari in the United States Supreme Court and the Court denied the petition. *Anderson v. Jones*, 135 S. Ct. 1483 (2015).

Anderson filed the instant successive motion to vacate on January 10, 2017. In his motion, Anderson raised the following 1) his death sentence violated *Hurst v. Florida*, 136 S. Ct. 616 (2016); 2) his death sentence violated *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) under the Eighth Amendment; and 3) that he is entitled to a new postconviction proceeding. An evidentiary hearing was held on July 20, 2017.

III. SUMMARY OF TESTIMONY

William Stone, Esq.

William Stone retired from the practice of law in 2011.[1] (EH:18) He was formerly employed by the Public Defender's Office, and had practiced law for more than forty years. (EH:18, 26). Mr. Stone was the lead attorney representing Anderson at his trial.

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[1] "EH" designates the evidentiary hearing transcript followed by any appropriate page number.

Mr. Stone testified that the *Hurst* decisions changed Florida law, because "unanimity is the big word." (EH:19). According to Mr. Stone, his trial tactics would have differed had the *Hurst* decisions been entered prior to Anderson's jury trial. (EH: 20). He would have more aggressively argued to the jurors their independent role and the significance of each vote. (EH: 20-21). He also would have argued the importance of the individual vote during *voir dire.* (EH: 21-22). Additionally, Mr. Stone testified would have attempted to develop more mitigation evidence relating to Anderson's mother and his probation officers. (EH: 23-24)

However, Mr. Stone admitted that in capital cases, he would not "put all his eggs in one basket," but would try to find as many jurors as he could that would vote for a life-sentence. (EH:27-28) He also admitted that nothing prevented him from aggressively arguing to the jurors their role in the sentencing process, or the importance of their individual vote. (EH:32).

Terence Lenamon, Esq.

Mr. Lenamon has practiced law since 1993, and specializes in capital litigation. (EH:44) Mr. Lenamon was contacted by Anderson's counsel, and was asked to review the jury instructions as well as Mr. Anderson's successive postconviction motion. (EH:51).

Mr. Lenamon stated that before *Hurst* decisions were rendered, attorneys had to try to select six jurors who would recommend a life sentence, but post-*Hurst*, attorneys only have to focus on getting one juror to vote for a life sentence. (EH:52-53). He also stated that it would affect how attorneys pick

juries. (EH:56-57). Both Mr. Stone and Mr. Lenamon made reference to the "Colorado Method" of jury selection and its emphasis on the selection of an individual juror who would he more likely to recommend a life sentence.

However, Mr. Lenamon admitted that he had no knowledge of how harmless error is decided. (EH:65) He further stated that nothing prevented a defense lawyer from emphasizing the importance of an individual opinion to a juror prior to the *Hurst* decisions. (EH:68). He also had no knowledge as to how harmless error is analyzed. (EH:67-68) Mr. Lenamon also acknowledged that there is no case from the Florida Supreme Court that grants *Hurst* relief to defendants whose death recommendation was unanimous. (EH:68).

IV. ANALYSES

Anderson petitions the Court to grant him relief from his death sentence pursuant to Florida Rule of Criminal Procedure 3.851, arguing that his death sentence violates his Sixth Amendment and Eight Amendment rights under *Hurst v. Florida*, 136 S. Ct. 616 (2016) ("Hurst I"). and *Hurst v. State*, 202 So. 3d 40. (Fla. 2016) ("Hurst II"). Because Anderson's death sentence became final after the decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *Hurst* applies retroactively. *See Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). In this case, the Court must apply the harmless error test, by which the defendant is only entitled to relief absent a finding that the alleged *Hurst* error was harmless beyond a reasonable doubt. *See Hurst II; Chapman v. California*, 386 U.S. 18 (1967). Anderson claims he was prejudiced because the methods employed by his trial counsel and the jury's actions would, have differed in a post-

Hurst landscape. In determining whether the error was harmless, the Court's task is to examine the record and decide whether, beyond a reasonable doubt, a rational jury would have unanimously found all facts necessary to impose the death penalty and would have concluded that death was the appropriate sentence. *See Mosley*, 209 So. 3d at 1284; *Neder v. United States*, 527 U.S. 1, 19-20 (1999).

Regarding the ways in which trial counsel would have tried Anderson's case differently, both of the witnesses called by Anderson at the evidentiary hearing, Mr. Lenamon and Mr. Stone, testified that there was nothing preventing a defense attorney from utilizing different jury selection methods from those used at trial, or arguing aggressively to the jurors, before the *Hurst* decision. As for potential retroactive *Hurst* impact regarding the jury, the Florida Supreme Court has found defendants were not entitled to a new penalty phase, consistently holding that any *Hurst* error was harmless beyond a reasonable doubt where, like with Anderson, the jury unanimously recommended the death sentence. *See Kaczmar v. State*, 42 Fla. L. Weekly S127 at *4-5 (Fla. Jan. 31, 2017); *See also Knight v. State*, 42 Fla. L. Weekly S133 at *14-15 (Fla. Jan. 31, 2017).

The Court, having considered and weighed the totality of the evidence, including the testimony presented by Anderson's witnesses at the evidentiary hearing, is unconvinced that the trial counsel's strategy would have differed or even if it had, such strategy would have achieved a different result regarding the jury's findings and unanimous recommendation to impose a death sentence. As such, the Court finds that any alleged *Hurst* error was harmless beyond a reasonable doubt. For all of the foregoing reasons,

Anderson is not entitled to a new penalty phase proceeding.

ORDERED AND ADJUDGED that the *Defendant's Successive Motion to Vacate Death Sentence* is DENIED.

DONE and ORDERED in Tavares, Lake County, Florida, this 17 day of November, 2017.

/s/ G. Richard Singeltary
G. RICHARD SINGELTARY
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE FIFTH
JUDICAL CIRCUIT IN AND FOR
LAKE COUNTY, FLORIDA

Case No: 1999 CF 0572

STATE OF FLORIDA,

vs.

FRED ANDERSON, JR.,

Defendant,

ORDER DENYING DEFENDANT'S
MOTION FOR REHEARING

THIS CAUSE, came on for consideration of Defendant's *Motion for Rehearing*, filed on December 1, 2017. The court, having considered the motion, reviewed the file, consulted the relevant authority, and being otherwise fully advised in the premises, finds the following: Defendant's motion raises two arguments in favor of rehearing: 1) that the court did not squarely address Defendant's *Caldwell* claim[1] in the Order Denying *Defendant's Successive Motion to Vacate Death Sentence* and; 2) that two capital cases where life sentences were issued Since the submission of Defendant's written closing argument serve as new evidence regarding the impact of the post-*Hurst* sentencing scheme on jurors, when deciding whether to issue a life sentence or impose the death penalty.

First, regarding Defendant's *Caldwell* claim, the court has issued an *Amended Order Denying Defend-*

[1] *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985).

ant's Successive Motion to Vacate Death Sentence that more squarely addresses this argument. As for Defendant's second argument; Defendant cites two recent cases decided since the submission of Defendant's closing argument.[2] The motion state that, in both of those cases, under the new sentencing scheme with post-*Hurst* instructions, both juries "unanimously found that all the aggravators were proven beyond a reasonable doubt, unanimously found the aggravators were sufficient to warrant a sentence of death, and unanimously found that the aggravation outweighed the mitigation." The court recognizes that the juries in those cases issued life verdicts, but relies on the ruling that was previously issued in the *Order Denying Defendant's Successive Motion to Vacate Death Sentence* and reissued in the *Amended Order Denying Defendant's Successive Motion to Vacate Death Sentence.*

For the foregoing reasons, it is:

ORDERED AND ADJUDGED that the Defendant's *Motion for Rehearing* is DENIED.

DONE and ORDERED in Tavares, Lake. County, Florida, this 29 day of December, 2017.

/s/ G. Richard Singeltary
G. RICHARD SINGELTARY
CIRCUIT JUDGE

[2] *State of Florida v. James Bannister,* Marion County Case No. 2011-CF 3085; *State of Florida v. Adam Matos,* Pasco County Case No 2014-CF-00586AXWS.

IN THE CIRCUIT COURT OF THE FIFTH
JUDICAL CIRCUIT IN AND FOR
LAKE COUNTY, FLORIDA

Case No: 1999 CF 0572

STATE OF FLORIDA,

vs.

FRED ANDERSON, JR.,

Defendant,

AMENDED ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE DEATH SENTENCE

THIS CAUSE, came on for consideration of Defendant's *Successive Motion to Vacate Death Sentence* filed on January 10, 2017. The Court has considered the Motion, weighed the evidence presented at the evidentiary hearing, the relevant statutory authority and case law, and has reviewed written final arguments. The Court, being otherwise fully advised in the premises, finds the following:

I. FACTUAL SUMMARY

On March 20, 1999, Anderson robbed United Southern Bank, and shot two tellers, Marisha Scott and Heather Young. *Anderson v. State*, 863 So. 2d 169,173 (Fla. 2003). Ms. Young died from the gunshot wounds she received from Anderson; however, Ms. Scott survived but was left paralyzed. *Id.* The evidence at trial showed that Anderson was on community control supervision at the time of the

incident, that he did not have funds to pay restitution, and he had recently been ordered to spend 1 year at a probation center beginning March 19, 1999. *Id*. at 173. On the day prior to the robbery, Anderson called his supervisor and told her that he had the money to pay off the restitution. *Id*. at 174.

Also on March 19, 1999, Anderson went to the bank under the pretense that he was a student who was writing a paper on banking and finance. *Id*. at 174. He spoke with Scott and met with the bank manager, Allen Seabrook. While at the bank, Anderson took note of the bank's security VCR in Seabrook's office. *Id.* The following day, Anderson returned to the bank under the ruse that he wanted to thank the employees for helping him. *Id*. The bank was scheduled to close at noon and Young and Scott were the only employees working. When there were no customers left inside the bank, Anderson told Young and Scott that he was going to his car to get his business card. *Id.* Anderson returned to the bank with two firearms and ordered Scott and Young into the vault, where he ordered them to fill a trash liner with money. *Id.* Ms. Scott testified that Anderson asked which one of them wanted to die first, and Ms.-Scott said she begged Anderson not to be shot. *Id.* A customer, Sherry Howard, entered the bank, and heard. Ms. Scott say "Please don't," or "please no." *Id.* Ms. Howard then heard a series of gunshots, and subsequently ran outside of the bank to call the police. *Id.* An officer arrived on scene and saw Anderson ripping electrical equipment from the wall, with a trash can in his hand that contained more than $70,000. *Id*.

Anderson's hands tested positive for gunshot residue, and blood that was recovered from his clothing

was consistent with Ms. Scott's DNA. *Id*. at 175. The testimony of the forensic pathologist revealed that Ms. Young had a total of 7 gunshot wounds, 6 of which could have been fatal. *Id*.

Anderson testified in his case in chief. He admitted to shooting both tellers. although he testified that he could only remember firing 3 shots. The jury found Anderson guilty of grand theft, armed robbery, attempted first-degree murder, and first-degree murder, and unanimously recommended a death sentence by a 12-0 vote. *Id*.

The trial court found four aggravating factors: 1) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, given great weight; 2) the murder was committed for pecuniary gain, given moderate weight; 3) the murder was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation, given little weight; and 4) that Anderson was convicted of a previous violent felony, which was given great weight. *Id*. at 175 n. 5. The trial court followed the jury's recommendation and sentenced Anderson to death. *Id*. at 175. On appeal, the Florida Supreme Court affirmed the convictions and sentence of death. *Id*. at 189. The United States Supreme Court denied Anderson's petition for writ of certiorari on March 22, 2004. *Anderson v. Florida*, 541 U.S. 940 (2004).

II. POSTCONVICTION PROCEEDINGS

Anderson sought postconviction relief, and filed a motion to vacate his death sentence, and the trial court denied the motion. *Anderson v. State/McNeil*, 18 So. 3d 501, 506 (Fla. 2009). Anderson appealed

the denial of his motion and simultaneously filed a petition for habeas corpus. *Id.* The Florida Supreme Court affirmed the trial court's order, and also denied Anderson's petition for habeas corpus relief. *Id.*

Thereafter, Anderson filed a petition for habeas corpus relief in the United States District Court pursuant to 28 U.S.C. § 2254, and the motion was denied. *Anderson v. Secretary, Florida Dept. of Corrections*, 2011 WL 2784192 (M.D. Fla. July 15, 2011). The Eleventh Circuit Court of Appeals affirmed the District Court's ruling. *Anderson v. Secretary, Florida Dept. of Corrections*, 752 F.3d 881, 884 (11th Cir. 2014). Anderson subsequently filed a petition for writ of certiorari in the United States Supreme Court, and the Court denied the petition. *Anderson v. Jones*, 135 S. Ct. 1483 (2015).

Anderson filed the instant successive motion to vacate on January 10, 2017. In his motion, Anderson raised the following claims: 1) his death sentence violates *Hurst v. Florida*, 136 S. Ct. 616 (2016); 2) his death sentence violates *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) under the Eighth Amendment; 3) his death sentence is unconstitutional under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and; 4) that he is entitled to a new postconviction proceeding. An evidentiary hearing was held on July 20, 2017.

III. SUMMARY OF TESTIMONY

William Stone, Esq.

William Stone retired from the practice of law in 2011.[1] (EH:18) He was formerly employed by the Public Defender's Office, and had practiced law for

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more than forty years. (EH:18, 26). Mr. Stone was the lead attorney representing Anderson at his trial.

Mr. Stone testified that the *Hurst* decisions changed Florida law, because 'unanimity is the big word.' (EH: 19). According to Mr. Stone, his trial tactics would have differed had the *Hurst* decisions been entered prior to Anderson's jury trial. (EH:20). He would have more aggressively argued to the jurors their independent role and the significance of each vote. (EH: 20-21). He also would have argued the importance of the individual vote during *voir dire*. (EH: 21-22). Additionally, Mr. Stone testified that he would have attempted to develop more mitigation evidence relating to Anderson's mother and his probation officers. (EH: 23-24)

However, Mr. Stone admitted that in capital cases, he would not "put all his eggs in one basket," but would instead try to find as many jurors as he could that would vote for a life-sentence. (EH:27-28) He also admitted that nothing prevented him from aggressively arguing to the jurors their role in the sentencing process, or the importance of their individual vote. (EH: 32)

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Mr. Lenamon has practiced law since 1993, and specializes in capital litigation. (EH: 44) Mr. Lenamon was contacted by Anderson's counsel, and was asked to review the jury instructions as well as Mr. Anderson's successive postconviction motion. (EH:51).

Mr. Lenamon stated that before the *Hurst* decisions were rendered, attorneys had to try to select six jurors who would recommend a life sentence, hut post-*Hurst*, attorneys only have to focus on getting

one juror to vote for a life sentence. (EH: 52-53). He also stated. that it would affect how attorneys pick juries. (EH: 56-57). Both Mr. Stone and Mr. Lenamon made reference to the "Colorado Method" of jury selection and its emphasis on the selection of an individual juror who would be more likely to recommend a life sentence.

However, Mr. Lenamon admitted that he had no knowledge of how harmless error is decided. (EH: 65) He further stated that nothing prevented a defense lawyer from emphasizing the importance of an individual opinion to a juror prior to the *Hurst* decisions. (EH: 68). He also had no knowledge as to how harmless error is analyzed. (EH: 67.68) Mr. Lenamon also acknowledged that there is no case from the Florida Supreme Court that grants *Hurst* relief to defendants whose death recommendation was unanimous. (EH: 68).

IV. ANALYSES

Anderson petitions the Court to grant him relief from his death sentence pursuant to Florida Rule of Criminal Procedure 3.851, arguing that his death sentence violates his Sixth Amendment and Eight Amendment rights under *Hurst v. Florida*, 136 S. Ct. 616 (2016) ("Hurst I") and *Hurst v. State*, 202 So. 3d 40 (Ea. 2016) ("Hurst II"). Because Anderson's death sentence became final after the decision in *Ring v. Arizona*, 536 U.S. 584 (2002), *Hurst* applies retroactively. *See Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). In this case, the Court must apply the harmless error test, by which the defendant is only entitled to relief absent a finding that the alleged *Hurst* error was harmless beyond a reasonable doubt. *See Hurst II; Chapman v. California*, 386 U.S. 18 (1967). Anderson claims he was prejudiced

because the methods employed by his trial counsel and the jury's actions would have differed in a post-Hurst landscape. In determining whether the error was harmless, the Court's task is to examine the record and decide whether, beyond a reasonable doubt, a rational jury would have unanimously found all facts necessary to impose the death penalty and would have concluded that death was the appropriate sentence. *See Mosley*, 209 So. 3d at 1284; *Neder v. United States*, 527 U.S. 1, 19-20 (1999).

Regarding the ways in which trial counsel would have tried Anderson's case differently, both of the witnesses called by Anderson at the evidentiary hearing, Mr. Lenamon and Mr. Stone, testified that there was nothing preventing a defense attorney from utilizing different jury selection methods from those used at trial, or arguing aggressively to the jurors, before the *Hurst* decision. As for potential retroactive *Hurst* impact regarding the jury; the Florida Supreme Court has found defendants were not entitled to a new penalty phase, consistently holding that any *Hurst* error was harmless beyond a reasonable doubt, where, like with Anderson, the jury unanimously recommended the death sentence. *See Kaczmar v. State*, 42 Fla. L Weekly S127 at *4-5 (Fla. Jan. 31, 2017); *see also Knight v. State*, 42 Fla. L. Weekly S133 at *14-15 (Fla. Jan. 31, 2017).

Anderson also argues his death sentence is unconstitutional under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), alleging that the jury in this case was incorrectly instructed that their sentencing responsibility was only to make a non-binding recommendation that was purely advisory. *Caldwell* stands for the proposition that "... it is constitutionally impermissible to rest a death sentence on a determination

made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere," *Caldwell*, 472 U.S. 320, at 328-29. Review of the record on direct appeal shows that although the words "advisory sentence" were used to describe the jury's sentencing responsibility, the jury was also instructed, among other things, that their recommendation would "be given great weight by this court in determining what sentence to impose," that the court could impose a sentence other than what they recommend "only under rare circumstances," and that they "should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence." *See Record on Direct Appeal, Vol. 5*, 769–772. Considering the entirety of the instructions given to the jury in this case, rather than the few words isolated in the defendant's argument, the court finds that the death sentence is constitutional under *Caldwell* because the instructions given to the jury were sufficient to lead them to understand their "responsibility for determining the appropriateness of the defendant's death sentence."

The Court, having considered and weighed the totality of the evidence, including the testimony presented by Anderson's witnesses at the evidentiary hearing, is unconvinced that the trial counsel's strategy would have differed; or that even if it had, such strategy would have achieved a different result regarding the jury's findings and unanimous recommendation to impose a death sentence. Further, the court is unconvinced that the jury in this case was led to believe that their responsibility rested elsewhere when they determined the appropriateness of the

defendant's death sentence, As such, the Court finds that any alleged Hurst error was harmless beyond a reasonable doubt. For all of the foregoing reasons, Anderson is not entitled to a new penalty phase proceeding.

ORDERED AND ADJUDGED that the *Defendant's Successive Motion to Vacate Death Sentence* is DENIED.

DONE and ORDERED in Tavares, Lake County, Florida, this 29 day of December, 2017.

/s/ G. Richard Singletary
G. RICHARD SINGLETARY
CIRCUIT JUDGE

APPENDIX D

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR LAKE COUNTY

Case No: 99-572-CF-DS

STATE OF FLORIDA

vs.

FRED ANDERSON, JR.

PRELIMINARY PENALTY PHASE INSTRUCTIONS

(Trial Transcript pp. 2361–62)

* * *

[2361]

THE COURT: Ladies and gentlemen of the jury, you have found the defendant guilty of Murder in the First Degree. The punishment for this crime is either death or life imprisonment without the possibility of parole.

The final decision as to what punishment shall be imposed, rests solely with the Judge of this court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what [2362] punishment should be imposed upon the defendant.

The State and the defendant will now present evidence relative to the nature of the crime and the character of the defendant.

You are instructed that this evidence, when considered with the evidence that you have already heard, is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty.

Second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

I believe both counsel want to make a brief opening statement.

* * *

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR LAKE COUNTY

Case No: 99-572-CF-DS

STATE OF FLORIDA

vs.

FRED ANDERSON, JR.

FINAL PENALTY PHASE INSTRUCTIONS

Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of Murder in the First Degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your advisory sentence is required by law, and will be given great weight by this court in determining what sentence to impose. It is only under rare circumstances that this Court could impose a sentence other than what you recommend.

Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings.

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

1. The crime for which Fred Anderson, Jr. is to be sentenced was committed while he had been previously convicted of a felony and was on community control. I now instruct you that Grand Theft is a felony.

2. The defendant has been previously convicted of another felony involving the use of violence to some person. The crime of Attempted Murder in the First Degree is a felony involving the use of violence to another person.

3. The crime for which the defendant is to be sentenced was committed for financial gain;

4. The crime for which the defendant is to be sentenced was committed in a cold and calculated and premeditated manner, and without any pretense of moral or legal justification.

"Cold" means the murder was the product of calm and cool reflection. "Calculated" means having a careful plan or prearranged design to commit murder.

As I have previously defined for you, a killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long

enough to allow for reflection by the defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating circumstance to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required. A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated and premeditated nature of the murder.

You have heard evidence that concerns the uniqueness of Heather Young as an individual human being and the resultant loss to the community's members by Heather Young's death. Family members are unique to each other by reason of the relationship and role each has in the family. A loss to the family is a loss both to the community of the family and the larger community outside the family. While such evidence is not to be considered as establishing either an aggravating or mitigating circumstance, you may still consider it as evidence in the case.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence must be one of life imprisonment without possibility of parole.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances you may consider, if established by the evidence, are any of the following circumstances that would mitigate against the imposition of the death penalty:

1. Any aspect of the defendant's character, record or background.

2. Any other circumstance of the offense.

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

If a majority of the jury determines that Fred Anderson, Jr. should be sentenced to death, your advisory sentence will be:

> A majority of the jury, by a vote of _____, advises and recommends to the court that it impose the death penalty upon Fred Anderson, Jr.

On the other hand, if by six or more votes the jury determines that Fred Anderson, Jr. should not be sentenced to death, your advisory sentence will be:

> The jury advises and recommends to the court that it impose a sentence of life imprisonment upon Fred Anderson, Jr. without possibility of parole.

You will now retire to consider your recommendation. When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreperson and returned to the court.

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR LAKE COUNTY

Case No: 99-572-CF-DS

STATE OF FLORIDA

vs.

FRED ANDERSON, JR.

ADVISORY SENTENCING

A MAJORITY OF THE JURY, BY A VOTE OF 12 TO 0, ADVISES AND RECOMMENDS TO THE COURT THAT IT IMPOSE THE DEATH PENALTY UPON FRED ANDERSON, JR.

DATED THIS 5th DAY OF OCTOBER, 2000.

/s/_____
FOREPERSON

APPENDIX E: Known Florida Capital Defendants Sentenced to Death by a Judge Before *Hurst* but After *Ring*

Defendant	Advisory Jury Vote(s)	Sentence Reversed?	Resentencing Outcome, If Any
7 to 5 advisory jury vote			
Brown, Thomas Theo	7-5	Yes	
Carr, Emilia	7-5	Yes	Life (state declined to seek death)
Davis, Adam W.	7-5	Yes	
Davis, William Roger III	7-5	No[1]	
Guzman, Victor	7-5	Yes	Life (state declined to seek death)
Hobart, Robert	7-5	Yes	Life (defendant waived right to post-conviction challenge in exchange for sentence of life imprisonment)
Hurst, Timothy	7-5	Yes	

[1] Florida Supreme Court held that defendant had waived postconviction review of his *Hurst* claim. 257 So. 3d 100, 107-08 (Fla. 2018).

Defendant	Advisory Jury Vote(s)	Sentence Reversed?	Resentencing Outcome, If Any
Israel, Connie Ray	7-5	Yes	Life (state declined to seek death)
Lebron, Jermaine	7-5	Yes	Life (state declined to seek death)
McCoy, Richard (aka Jamil Rashid)	7-5	Yes	Life (state declined to seek death)
Patrick, Eric Kurt	7-5	Yes	
Peterson, Robert Earl	7-5	Yes	
Phillips, Galante	7-5	Yes	
Woodel, Thomas	7-5	Yes	
Gregory, William	7-5, 7-5 (multiple victims)	Yes	Life (state declined to seek death)
Pagan, Alex	7-5, 7-5	Yes	
Rigterink, Thomas William	7-5, 7-5	Yes	
Robards, Richard	7-5, 7-5	Yes	Life (state declined to seek death)
Calloway, Tavares David	7-5, 7-5, 7-5, 7-5, 7-5	Yes	

Defendant	Advisory Jury Vote(s)	Sentence Reversed?	Resentencing Outcome, If Any
8 to 4 advisory jury vote			
Anderson, Charles L.	8-4	Yes	
Buzia, John	8-4	Yes	Life (state declined to seek death)
Campbell, John	8-4	Yes	
Caylor, Matthew	8-4	Yes	
Deviney, Randall	8-4	Yes	Death
Dubose, Rasheem	8-4	Yes	
England, Richard	8-4	Yes	
Hall, Donte Jermaine	8-4	Yes	
Hayward, Steven	8-4	Yes	Life (state declined to seek death)
King, Cecil	8-4	Yes	
Mosley, John	8-4	Yes	
Newberry, Rodney	8-4	Yes	

Defendant	Advisory Jury Vote(s)	Sentence Reversed?	Resentencing Outcome, If Any
Peterson, Charles	8-4	Yes	Life (state declined to seek death)
Rodgers, Theodore	8-4	Yes	Life (defendant pled to life imprisonment)
Simmons, Eric Lee	8-4	Yes	
White, Dwayne	8-4	Yes	Life (state declined to seek death)
Bright, Raymond	8-4, 8-4	Yes[2]	Death
Deparvine, Williams James	8-4, 8-4	Yes	
Doorbal, Noel	8-4, 8-4	Yes	
Eaglin, Dwight	8-4, 8-4	Yes	
Jackson, Michael James	8-4, 8-4	Yes	
Snelgrove, David B.	8-4, 8-4	Yes	

[2] Florida Supreme Court granted relief for ineffective assistance of counsel; declined to reach *Hurst* issue. 200 So.3d 710, 742 (Fla. 2016).

Defendant	Advisory Jury Vote(s)	Sentence Reversed?	Resentencing Outcome, If Any
9 to 3 advisory jury vote			
Altersberger, Joshua	9-3	Yes	
Andres, Rafael	9-3	Yes	
Armstrong, Lancelot	9-3	Yes	
Baker, Cornelius	9-3	Yes	
Barnhill, Arthur	9-3	Yes	Life (state declined to seek death)
Belcher, James	9-3	Yes	
Caraballo, Victor	9-3	Yes[3]	Life (state declined to seek death)
Conde, Rory	9-3	Yes	
Diaz, Joel	9-3	Yes	Life (state declined to seek death)
Evans, Paul H.	9-3	Yes	

[3] Florida Supreme Court vacated sentence for improper admission of rebuttal testimony on defendant's competency. 39 So. 3d 1234, 1250 (Fla. 2010).

Defendant	Advisory Jury Vote(s)	Sentence Reversed?	Resentencing Outcome, If Any
Franklin, Richard P.	9-3	Yes	
Hampton, John	9-3	Yes	Life (jury resentenced[4])
Huggins, John	9-3	Yes	
Jackson, Ray	9-3	Yes	Life (state declined to seek death)
Lebron, Joel	9-3	Yes	
Martin, David	9-3	Yes	
McLean, Derrick	9-3	Yes	
Merck, Jr., Troy	9-3	Yes	
Nelson, Micah	9-3	Yes	
Partin, Phillup Alan	9-3	Yes	
Seibert, Michael	9-3	Yes	
Smith, Stephen V.	9-3	Yes	
Tisdale, Eriese Alphonso	9-3	Yes	

[4] *See* 2007-CF-12599 (Fla. Cir. Ct., Pinellas Cty. Aug. 24, 2018).

Defendant	Advisory Jury Vote(s)	Sentence Reversed?	Resentencing Outcome, If Any
Williams, Donald	9-3	Yes	
Carter, Pinkney	9-3, 8-4	Yes	
Cole, Tiffany Ann	9-3, 9-3	Yes	
Hojan, Gerhard	9-3, 9-3	Yes	Death
Rimmer, Robert	9-3, 9-3	Yes	
Serrano, Nelson	9-3, 9-3, 9-3, 9-3	Yes	
10 to 2 advisory jury vote			
Abdool, Dane	10-2	Yes	
Banks, Donald	10-2	Yes	
Bargo, Michael Shane	10-2	Yes	
Bradley, Brandon Lee	10-2	Yes	
Brookins, Elijah	10-2	Yes	
Cox, Allen	10-2	Yes	

Defendant	Advisory Jury Vote(s)	Sentence Reversed?	Resentencing Outcome, If Any
Cruz, Joel	10-2	Yes[5]	Life (jury resentenced)
Doty, Wayne	10-2	Yes	
Durousseau, Paul	10-2	Yes	
Evans, Wydell Jody	10-2	Yes	Life (state declined to seek death)
Glover, Dennis T.	10-2	Yes	
Gonzalez, Leonard	10-2	Yes	
Hodges, Willie James	10-2	Yes	
Jeffries, Kevin G.	10-2	Yes	Life (state declined to seek death)
Jordan, Joseph	10-2	Yes	
Kirkman, Vahtiece	10-2	Yes	
Kopsho, William M.	10-2	Yes	

[5] Florida Supreme Court did not adjudicate *Hurst* error, but following *Hurst* trial court ordered resentencing and jury sentenced to life imprisonment. No. 13-CF-7959 (Fla. Cir. Ct., Pinellas Cty.).

Defendant	Advisory Jury Vote(s)	Sentence Reversed?	Resentencing Outcome, If Any
Matthews, Douglas	10-2	Yes	
McMillian, Justin	10-2	Yes	
Morris, Dontae	10-2	Yes	
Pham, Tai	10-2	Yes	
Sexton, John	10-2	Yes	
Smith, Joseph	10-2	Yes	
Taylor, John Calvin	10-2	Yes	
Turner, James Daniel	10-2	Yes	Life (jury resentenced[6])
Wheeler, Jason	10-2	Yes	
White, William Melvin	10-2	Yes	Life (state declined to seek death)
Williams, Ronnie Keith	10-2	Yes	
Zommer, Todd	10-2	Yes	
Ault, Howard Steven	10-2, 9-3	Yes	

[6] *See* No. 2005-CF-1954 (Fla. Cir. Ct., St. John's Cty., Mar. 1, 2019).

Defendant	Advisory Jury Vote(s)	Sentence Reversed?	Resentencing Outcome, If Any
Davis, Barry T.	10-2, 9-3	Yes	
Frances, David	10-2, 9-3	Yes	
Smith, Corey	10-2, 9-3	Yes	
Hernandez-Alberto, Pedro	10-2, 10-2	Yes	Life (state declined to seek death)
Hertz, Gerry	10-2, 10-2	Yes	
McKenzie, Norman Blake	10-2, 10-2	Yes	
Victorino, Troy	10-2, 10-2, 9-3, 7-5	Yes	
Hunter, Jerone	10-2, 10-2, 9-3, 9-3	Yes	
Heyne, Justin	10-2, 8-4	Yes	
Schoenwetter, Randy	10-2, 9-3	Yes	
11 to 1 advisory jury vote			
Bailey, Robert J.	11-1	Yes	
Braddy, Harrel	11-1	Yes	
Card, James	11-1	Yes	

Defendant	Advisory Jury Vote(s)	Sentence Reversed?	Resentencing Outcome, If Any
Darling, Dolan a/k/a Sean Smith	11-1	Yes	
Douglas, Luther	11-1	Yes	
Ellerbee, Terry	11-1	Yes	Life (state declined to seek death)
Floyd, Maurice Lamar	11-1	Yes	Life (defendant pled to life imprisonment)
Guzman, James	11-1	Yes	
Hernandez, Michael	11-1	Yes	Life (defendant pled to life imprisonment)
Jackson, Kenneth R.	11-1	Yes	Life (state declined to seek death)
Johnson, Richard Allen	11-1	Yes	
Johnston, Ray	11-1	Yes	
Kocaker, Genghis	11-1	Yes	
Lawrence, Jonathan	11-1	Yes	Death

Defendant	Advisory Jury Vote(s)	Sentence Reversed?	Resentencing Outcome, If Any
McCoy, Thomas	11-1	Yes	
McGirth, Renaldo Devon	11-1	Yes	
Miller, Lionel Michael	11-1	Yes	Life (state declined to seek death)
Murray, Gerald Delane	11-1	Yes	
Okafor, Bessman	11-1	Yes	
Orme, Roderick	11-1	Yes	
Parker, J.B.	11-1	Yes	
Poole, Mark	11-1	Yes	
Silvia, William	11-1	Yes	
Troy, John	11-1	Yes	Life (state declined to seek death)
Dennis, Labrant	11-1, 11-1	Yes	
Pasha, Khalid	11-1, 11-1	Yes	Life (state declined to seek death)
Wade, Alan L.	11-1, 11-1	Yes	

Defendant	Advisory Jury Vote(s)	Sentence Reversed?	Resentencing Outcome, If Any
Johnson, Paul Beasley	11-1, 11-1, 11-1	Yes	
Brooks, Lamar	11-1, 9-3	Yes	
12 to 0 advisory jury vote			
Allen, Margaret	12-0	No	
Anderson, Fred, Jr.	12-0	No	
Conahan, Daniel O., Jr.	12-0	No	
Cozzie, Steven Anthony	12-0	No	
Crain, Willie Seth	12-0	No	
Everett, Paul Glenn	12-0	No	
Franklin, Quawn M.	12-0	No	
Grim, Norman	12-0	No	
Guardado, Jesse	12-0	No	
Hall, Enoch D.	12-0	No	
Johnston, Ray	12-0	No	
Jones, Henry Lee	12-0	No	

Defendant	Advisory Jury Vote(s)	Sentence Reversed?	Resentencing Outcome, If Any
Kaczmar, III, Leo L.	12-0	No	
King, Michael L.	12-0	No	
Lowe, Rodney Tyrone	12-0	No	
Middleton, Dale	12-0	No	
Philmore, Lenard James	12-0	No	
Sparre, David	12-0	No	
Tanzi, Michael	12-0	No	
Taylor, William Kenneth	12-0	No	
Truehill, Quentin	12-0	No	
Tundidor, Randy W.	12-0	No	
Davis, Jr., Leon	12-0, 12-0, 8-4	No	
Knight, Richard	12-0, 12-0	No	
Morris, Dontae	12-0, 12-0	No	
Oliver, Terence Tabius	12-0, 12-0	No	

Defendant	Advisory Jury Vote(s)	Sentence Reversed?	Resentencing Outcome, If Any
Reynolds, Michael	12-0, 12-0	No	
Smithers, Samuel	12-0, 12-0	No	
Wood, Zachary Taylor	12-0	Yes[7]	
Bevel, Thomas	12-0, 8-4	Yes[8]	
Boyd, Lucious	12-0	TBD[9]	
Brown, Tina	12-0	TBD[10]	
Floyd, Franklin Delano	12-0	TBD[11]	
Hilton, Gary Michael	12-0	TBD[12]	

[7] Florida Supreme Court vacated sentence under statutory review for proportionality. 209 So. 3d 1217, 1236-37 (Fla. 2017).

[8] Florida Supreme Court vacated non-unanimous sentence under *Hurst*; granted relief for ineffective assistance for unanimous sentence. 221 So. 3d 1168, 1178, 1182 (Fla. 2017).

[9] Counsel is aware of six defendants with unanimous advisory jury verdicts whose *Hurst* errors have not yet been reviewed by the Florida Supreme Court for harmlessness. Information about their cases is available through the dockets in their criminal cases. *See* No. 99-5809-CF-10A (Fla Cir. Ct., Broward Cty.).

[10] No. 2010 CF 001608-A (Fla. Cir. Ct., Escambia Cty.).

[11] No. 97-2016-CF-ANO (Fla. Cir. Ct., Pinellas Cty.).

[12] No. 2008-CF-697 (Fla. Cir. Ct., Leon Cty.).

Defendant	Advisory Jury Vote(s)	Sentence Reversed?	Resentencing Outcome, If Any
McCray, Gary Barnard	12-0	TBD[13]	
Smith, Delmer	12-0	TBD[14]	
defendant waived advisory jury			
Allred, Andrew	Jury waived	No	
Davis, Jr., Leon	Jury waived	No	
Dessaure, Kenneth	Jury waived	No	
Hutchinson, Jeffrey	Jury waived	No	
Mullens, Khadafy	Jury waived	No	
Rodgers, Jeremiah	Jury waived	No	

Sources: Unless otherwise noted, all information obtained from the Death Penalty Information Center. *See Florida Death-Penalty Appeals Decided in Light of Hurst* (Apr. 2, 2019), https://deathpenaltyinfo.org/Hurst_Cases_Reviewed; *Florida Prisoners Sentenced to Death After Non-Unanimous Jury Recommendations, Whose Convictions Became Final After Ring* (Mar. 18, 2019), https://deathpenaltyinfo.org/Hurst_Relief_Expected. Information about the outcome of resentencings was obtained from public dockets for each defendant.

[13] No. 2004-CF-001149 (Fla. Cir. Ct., Clay Cty.).

[14] No. 2010-CF-479AX (Fla. Cir. Ct., Manatee Cty.).

APPENDIX F: Known Florida Capital Defendants Sentenced to Life Imprisonment for First Time After *Hurst*

Defendant	Date of Sentence	County	Case No.
Avant, Darell	7/5/18	Orange	13-CF-17099
Bannister, James	11/17/17	Marion	11-CF-3085
Carter, Anthony	6/21/18	Columbia	14-CF-183
Clark, Rodney	9/19/17	Palm Beach	12-CF-013686
Coleman, Kelvin	8/29/17	Marion	13-CF-0851
Collins, Keith	11/6/18	Duval	14-CF-151
Delancy, Andre	7/16/18	Broward	06-CF-20315-10A
Evans, Patrick	10/19/17	Pinellas	08-CF-26829
Forbes, Bernard	7/16/18	Broward	06-CF-20315-10B
Gaskey, Joshua	7/1/17	Holmes	15-CF-00160
Hampton, John Lee	8/27/18	Pinellas	07-CF-12699
Ingraham, Eloyn	7/16/18	Broward	06-CF-20315-10C
Jean-Marie, Frantzy	7/24/18	Miami-Dade	07-CF-31111

Defendant	Date of Sentence	County	Case No.
Joseph, Jefty	2/13/18	Palm Beach	13-CF-12488
Lee, John Allen	4/12/18	Sarasota	11-CF-2152
Luongo, Jacqueline	11/2/17	Broward	14-CF-12153
Mariotti, David	4/17/18	Lake	16-CF-1752
Mason III, George	9/25/18	Hernando	14-CF-1379
Matos, Adam	11/21/17	Pasco	14-CF-5586
Montgomery, Eric	7/19/18	Broward	12-CF-2688
Parilla, Marco	3/23/18	Pinellas	14-CF-20418
Quinones, Johan	3/27/18	Orange	14-CF-8535
Roque, Raul	11/5/18	Lake	06-CF-003043
Saint Simon, Sanel	4/19/18	Orange	14-CF-12661
Silver, Kendrick	8/21/17	Miami-Dade	09-CF-30889
Taylor, Elton	3/14/18	Palm Beach	13-CF-11180
Theodore, Christian	6/2/17	Sarasota	15-CF-0203
Thomason, William	6/10/17	Okaloosa	13-CF-2271

Defendant	Date of Sentence	County	Case No.
Thompson, Derrick Ray	12/14/17	Santa Rosa	14-CF-1124
Toledo, Luis	11/3/17	Volusia	13-CF-102888
Wells, William	10/4/17	Bradford	11-CF-0498
Wilson, Curtis	10/13/17	Citrus	12-CF-01233

APPENDIX G: Known Florida Capital Defendants Sentenced to Death for First Time After *Hurst*

Defendant	Date of Sentence
Alcegaire, Johnathan	3/8/2019
Avsenew, Peter	8/28/2018
Beamon, Rocky	1/28/2019
Bush, Sean	12/21/2017
Colley, James	11/30/2018
Craven, Daniel	9/12/2018
Damas, Mesac	10/27/2017
Rogers, Shawn	12/18/2017
Santiago-Gonzalez, Angel	4/13/2018
Smiley, Benjamin	2/23/2018
Smith, Donald	5/2/2018
Wall, Craig	6/3/2016
Woodbury, Michael	9/21/2018

Source: Fla. Dep't Corrections, *Death Row Roster*, http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx (last visited Apr. 10, 2019).