NO. _____

In the Supreme Court of the United States

QUAWN M. FRANKLIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

DEATH PENALTY CASE

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CAPITAL CASE

QUESTION PRESENTED

Whether the per se harmless-error rule adopted by the Florida Supreme Court, pursuant to which violations of *Hurst v. Florida*, 136 S.Ct. 616 (2016) are automatically deemed harmless beyond a reasonable doubt in every case in which the defendant's advisory jury recommended the death penalty by a unanimous vote, rather than a majority vote, violates (1) this Court's precedents prohibiting state courts from mechanically denying federal constitutional claims on harmless-error grounds without first conducting an individualized review of the record as a whole; and (2) the Eighth Amendment doctrine discouraging reliance on decisions made by jurors whose sense of responsibility for a death sentence was diminished.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Mr. Franklin was the Appellant below. The State of Florida was the Appellee below.

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PETITION FOR WRIT OF CERTIORARI

Quawn M. Franklin respectfully petitions for a writ of certiorari to review the errors in the judgment of the Florida Supreme Court.

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at *Franklin v. State*, 236 So. 3d 989 (Fla. 2018) and reproduced at Appendix A. The trial court's unpublished order denying Mr. Franklin's successive motion for postconviction relief is reproduced at Appendix B.

JURISDICTION

The opinion of the Florida Supreme Court was entered on February 15, 2018. Appendix A. No motion for rehearing was filed. On April 12, 2018, Justice Thomas granted an extension of time to file a petition for certiorari to July 15, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

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

The Eighth Amendment provides:

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

The Fourteenth Amendment provides, in relevant part:

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

STATEMENT OF THE CASE

I. Introduction

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court held that Florida's capital sentencing scheme violated the Sixth Amendment. This Court did not reach the State's assertion that the constitutional error in Mr. Hurst's case was harmless, explaining that Florida's state courts should decide in the first instance whether the error was harmless. *See id*. at 624.

This Petition arises from the Florida Supreme Court's subsequent creation of a per se harmless-error rule for *Hurst* claims, which the Florida Supreme Court has mechanically applied in every case in which the pre-*Hurst* advisory jury unanimously recommended death. The rule relies entirely on the vote of a defendant's "advisory" jury - a jury that did not conduct the fact-finding required by the Sixth Amendment, but made only a generalized recommendation to the judge whether to impose the death penalty. Petitioner asks this Court to review whether the Florida Supreme Court's per se rule is unconstitutional.

II. Factual and Procedural Background

A. Conviction and Sentence

On February 1, 2002, a grand jury returned an indictment for Petitioner on one count of attempted armed robbery and one count of first-degree murder. Following a jury trial on April 22 and 23, 2004, the jury returned a verdict of guilty on all counts. The penalty phase was conducted on April 26, 2004, and ended with a 12-0 death recommendation. The jury returned a special verdict form in which it unanimously found the four aggravating factors that the judge subsequently found applicable in Petitioner's case. The trial court imposed a death sentence on June 3, 2004. The trial court found the following four statutory aggravating circumstances, all of which the court gave great weight:

1. The crime for which the Defendant is to be sentenced was committed while he has been previously convicted of a felony, and was under the sentence of imprisonment.
2. The Defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some 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.

The trial court considered the following six mitigating circumstances together and assigned them some weight:

1. Quawn Franklin's biological mother "gave" him to a friend to raise when he was virtually a newborn baby of six weeks of age.
2. Neither Quawn Franklin's biological mother nor father had any contact with him whatsoever until he was eight years of age. He received no letters, telephone calls, birthday cards, Christmas cards, or gifts from his biological parents for the first eight years of his life.
3. Quawn Franklin changed his last name to Thomas because that was the only family he knew.
4. Quawn Franklin suffered a severe emotionally and psychologically traumatic event when he was just eight years old when his biological mother, armed with a law enforcement officer, took Quawn Franklin, against his will, without prior notice, from the only mother, father, and family he had ever known to go to St. Petersburg to live with total strangers. Quawn was forcibly restrained during his trip to St. Petersburg.
5. After being taken to St. Petersburg, Quawn Franklin attempted to run back to Leesburg to the only family he knew.
6. During the first eight years of his life, he had no criminal history, but after his biological mother took him to live with her in St. Petersburg, he began to commit crimes. At first, his attempts were to return to Leesburg and the only family he had known.

The trial court also considered the following mitigating circumstances:

7. Quawn Franklin was eventually sent to juvenile facilities where he was sexually assaulted by older boys at one of those places. The Court did not believe this mitigating circumstance was proven.
8. At fifteen years of age, Quawn was sentenced to adult prison for one year for the theft of an automobile.
9. At sixteen years of age, Quawn was sentenced to adult prison for ten years for a robbery, a rather harsh sentence for a juvenile even considering his prior juvenile record. Quawn Franklin served eight years and three months of that ten year

sentence. The Court considered this mitigator together with the preceding mitigator and gave them very little weight.

10. Quawn Franklin was stabbed during the robbery by the victim and almost died from his stab wound. The Court found that this cannot be characterized as mitigation.
11. Quawn Franklin was cooperative with law enforcement after his arrest for these offenses. The Court gave this some weight.
12. Quawn Franklin took responsibility for these offenses and confessed to the police and the newspaper. The Court gave this some weight.
13. Quawn Franklin offered to plead guilty to these offenses in return for a sentence of life in prison without the possibility of parole consecutive to life sentences he was already serving. The Court gave this very little weight.
14. Quawn Franklin apologized to the family of the victim in this case. The Court considered this mitigating circumstance proven, but gave it very little weight.
15. Quawn Franklin showed remorse for the crimes he committed in this case. The Court considered this mitigating circumstance proven, but gave it very little weight.
16. Quawn Franklin confessed to the other offenses committed just prior to the offenses in this case, which were used to prove an aggravating circumstance in this case. The Court gave this some weight.
17. Quawn Franklin apologized to the families of the victims in those other cases. The Court considered this mitigating circumstance proven, but gave it very little weight.
18. Quawn Franklin showed remorse for the crimes he committed in the other cases. The Court considered this mitigating circumstance proven, but gave it very little weight.
19. Quawn Franklin entered pleas in the related cases and was sentenced to life in prison in those cases. The Court gave this some weight.
20. Not one person appeared to testify for Quawn Franklin during the penalty phase of the trial.
21. The one person, Minnie Thomas, who was subpoenaed to testify for Quawn Franklin at the penalty phase of the trial did not even appear. The Court considered this together with the previous mitigating circumstance and gave them some weight.
22. The co-defendant in this case, Pamela McCoy, received a thirty-five year prison sentence for her role in committing the crimes charged in this case when it is not at all clear how she participated in them. The Court gave this little weight.

B. Direct Appeal and Postconviction

Petitioner's convictions and sentences were affirmed on direct appeal. *See Franklin v. State*, 965 So. 2d 79 (Fla. 2007). Postconviction counsel filed a Motion to Vacate Judgment and Sentence, along with a separate motion alleging that Petitioner is presently incompetent to

proceed in capital collateral proceedings, on November 6, 2008. The circuit court ultimately found Petitioner competent to proceed and denied all postconviction relief, which was affirmed by the Florida Supreme Court. *Franklin v. State*, 137 So. 3d 969 (Fla. 2014). On June 6, 2014, Petitioner filed a Petition under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Custody. The Petition is currently pending in the Middle District of Florida.

C. Motion Seeking *Hurst* Relief

On January 9, 2017, Petitioner filed a Successive Motion to Vacate Death Sentence pursuant to Florida Rule of Criminal Procedure 3.851 seeking *Hurst* relief. The circuit court issued a Final Order Denying Defendant's Successive Motion to Vacate Death Sentence on March 31, 2017. Appendix B. A Notice of Appeal was timely filed on April 28, 2017. On June 20, 2017, the Florida Supreme Court issued an order directing the parties "to file briefs addressing why the lower court's order should not be affirmed based on this Court's precedent in *Hurst v. State (Hurst)*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, No. 16-998 (U.S. May 22, 2017), *Davis v. State*, 207 So. 3d 142 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016)."

On appeal, the Florida Supreme Court stated that "the issue in this case is whether any *Hurst* error during Franklin's penalty phase proceedings was harmless beyond a reasonable doubt." *Franklin*, 236 So. 3d at 992-93. But the Florida Supreme Court applied its per se harmless-error rule to deny *Hurst* relief, without discussing Petitioner's federal constitutional arguments. *Id.* (citing *Davis*, 207 So. 3d at 174). Additionally, the Florida Supreme Court found that Petitioner's claim that "a unanimous jury recommendation violates *Caldwell v. Mississippi*, 472 U.S. 320 (1985), when a jury is repeatedly told that its role is advisory" is procedurally barred because he did not raise it on direct appeal. *Franklin*, 236 So. 3d at 992.

REASONS FOR GRANTING THE WRIT

I. The denial of *Hurst* relief in Petitioner's case was based on the Florida Supreme Court's application of an unconstitutional per se harmless-error rule, which the Florida Supreme Court has mechanically applied in every case in which the pre-*Hurst* advisory jury unanimously recommended death.

On December 22, 2016, the Florida Supreme Court issued *Mosley*, in which it held that under the *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980), analysis *Hurst* should be applied retroactively to cases in which the death sentence became final after the issuance of *Ring*[1]. *Mosley*, 209 So. 3d at 1276-83. Under *Mosley*, Petitioner, whose case became final on December 7, 2007, is clearly entitled to the retroactive application of *Hurst v. Florida*, and there was no dispute below regarding this fact. There being no question that *Hurst* applies retroactively to Petitioner under the governing State law/grounds, the Florida Supreme Court in its opinion affirming the circuit court's order denying his postconviction motion seeking *Hurst* relief conducted a harmless error review of Petitioner's case and found that Petitioner is not entitled to *Hurst* relief as follows:

> Franklin argues that his death sentence violates the Sixth Amendment under *Hurst v. Florida*, ––– U.S. ––––, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). In *Hurst v. State*, 202 So.3d 40, 57 (Fla. 2016), we explained that *Hurst v. Florida* requires "the jury in a capital case [to] unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." We also determined that *Hurst* error is capable of harmless error review. *Id.* at 67. Therefore, the issue in this case is whether any *Hurst* error during Franklin's penalty phase proceedings was harmless beyond a reasonable doubt. *Id.* at 68.
>
> Franklin's penalty phase jury found the existence of each aggravator unanimously and made a unanimous recommendation of death using an interrogatory verdict form. Such a recommendation "allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient

[1] *Ring v. Arizona*, 536 U.S. 584 (2002).

> aggravators to outweigh the mitigating factors." *Davis v. State*, 207 So.3d 142, 174 (Fla. 2016). Although the jury was not properly instructed under *Hurst*, and despite the mitigation presented, the jury still unanimously recommended that Franklin be sentenced to death for the murder of Lawley. Therefore, any *Hurst* error in Franklin's penalty phase was harmless beyond a reasonable doubt and the postconviction court properly denied relief on this claim.
>
> Franklin also contends that a unanimous jury recommendation violates the Eighth Amendment pursuant to *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), when a jury is repeatedly told that its role is advisory. Franklin further claims that his death sentence violates the Eighth Amendment under *Hurst* because the standard jury instructions improperly diminished the jury's role. Franklin's *Caldwell* claim is procedurally barred because he did not raise it on direct appeal. *See Jones v. State*, 928 So.2d 1178, 1182 n.5 (Fla. 2006). To the extent that Franklin's claim about the standard jury instructions is a *Hurst* claim, he is not entitled to relief because of the jury's unanimous recommendation of death and unanimous finding of all four aggravating factors. *See Davis*, 207 So.3d at 174.
>
> Procedural bar notwithstanding, prior to *Hurst*, we repeatedly rejected *Caldwell* challenges to the standard jury instructions used during Franklin's trial. *See Rigterink v. State*, 66 So.3d 866, 897 (Fla. 2011); *Globe v. State*, 877 So.2d 663, 673-74 (Fla. 2004). We have also rejected *Caldwell*-related *Hurst* claims like Franklin's pursuant to *Davis*. *See Oliver v. State*, 214 So.3d 606 (Fla. 2017); *Truehill v. State*, 211 So.3d 930 (Fla 2017). Recently, the defendants in *Oliver* and *Truehill* petitioned the United States Supreme Court for a writ of certiorari to review their *Caldwell* claims, which the Court denied. *Truehill v. Florida*, ––– U.S. ––––, 138 S.Ct. 3, 199 L.Ed.2d 272 (2017). Franklin, whose sentence was final post-*Ring* and who received a unanimous jury recommendation, is not entitled to *Hurst* relief. *See Davis*, 207 So.3d at 174. Accordingly, Franklin is not entitled to relief on this claim.

Franklin, 236 So. 3d at 992-993.

Although Petitioner maintains that the error in this case is a structural error, which should not be subject to a harmless error analysis, even under a harmless error analysis he is still entitled to relief. In *Hurst v. State*, the Florida Supreme Court stated that error under *Hurst v. Florida* "is harmless only if there is no reasonable possibility that the error contributed to the sentence." *Hurst v. State*, 202 So. 3d at 68. Moreover, '"the harmless error test is to be rigorously applied,'" and "the State bears an extremely heavy burden in cases involving constitutional error." *Id.* (quoting *State v. DiGuilio*, 491 So. 2d 1129, 1137 (Fla. 1986)). Therefore, as to *Hurst* error, "the

burden is on the State, as beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the defendant]'s death sentence in this case." *Id.* at 68.

The Sixth Amendment error under *Hurst v. Florida* cannot be proven by the State to be harmless beyond a reasonable doubt in Petitioner's case. The Florida Supreme Court, in finding that the error in this case was harmless, relied on its decision in *Davis* when it found that the *Hurst* error in this case was harmless beyond a reasonable doubt. *See Franklin*, 236 So. 3d at 991-992 (citing *Davis*, 207 So. 3d at 173-75 (finding *Hurst* error harmless given jury's unanimous death recommendation)). Additionally, the Florida Supreme Court referenced the special verdict form in which the jury unanimously found the existence of each aggravator. *See id*. at 990; 992. These findings, however, do not mandate a finding of harmless error, as these are only two of the several inquiries that juries must make under *Hurst v. Florida*. As the Florida Supreme Court explained in *Hurst v. State*, all of the findings necessary for the imposition of a death sentence must be unanimously found by the jury. *See* 202 So. 3d at 57-58; *see also Simmons v. State*, 207 So. 3d 860, 866-67 (Fla. 2016) (remanding for a resentencing based on *Hurst v. State* where, although the jury was provided with an interrogatory verdict form it did not unanimously conclude that the aggravating factors were sufficient, or that the aggravating factors outweighed the mitigating circumstances). The Florida Supreme Court's conclusion that "a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors" amounts to mere speculation. *Franklin*, 236 So. 3d at 992.

The denial of *Hurst* relief in Petitioner's case was based on the Florida Supreme Court's application of an unconstitutional per se harmless-error rule, which the Florida Supreme Court has mechanically applied in every case in which the pre-*Hurst* advisory jury unanimously

recommended death. As explained further below, every unanimous-recommendation case is denied *Hurst* relief in the Florida Supreme Court pursuant to the court's per se rule, regardless of case-specific factors.

A. The Florida Supreme Court's per se harmless-error rule relies entirely on the underlying federal constitutional violation and precludes individualized review of that violation's impact in the context of the record as a whole.

After its decision in *Hurst*, the Florida Supreme Court subsequently created a per se harmless-error rule for *Hurst* claims. The rule relies entirely on the vote of a defendant's "advisory" jury – a jury that did not conduct the specific fact-finding required by the Sixth Amendment. Petitioner asks this Court to find that the Florida Supreme Court's harmlessness finding is an unreasonable application of federal law.

Since *Davis v. State*, 207 So. 3d 142, the Florida Supreme Court's per se rule has been mechanically applied in every Florida *Hurst* case.[2] If a defendant's advisory jury voted to recommend death by a majority vote – i.e., a margin between 7-to-5 and 11-to-1 – the *Hurst* error is deemed not harmless and the Florida Supreme Court vacates the defendant's death sentence. *See, e.g.*, *Newberry v. State*, 214 So. 3d 562, 567-68 (Fla. 2017). But if the defendant's advisory jury recommended death by a vote of 12-to-0, the *Hurst* error is automatically deemed

[2] Including Petitioner's case, the Florida Supreme Court has applied this per se rule in at least 23 cases to date: *Davis v. State*, 207 So.3d 142 (Fla. 2016); *King v. State*, 207 So. 3d 177 (Fla. 2016); *Knight v. State*, 225 So. 3d 661 (2017); *Kaczmar v. State*, 228 So. 3d 1 (Fla. 2017); *Hall v. State*, 212 So. 3d 1001 (Fla. 2017); *Truehill v. State*, 211 SO. 3d 930 (Fla. 2017); *Middleton v. State*, 220 So. 3d 1152 (Fla. 2017); *Oliver v. State*, 214 So. 3d 606 (Fla. 2017); *Tundidor v. State*, 221 So. 3d 587 (Fla. 2017); *Morris v. State*, 219 So. 3d 33 (Fla. 2017); *Cozzie v. State*, 225 So. 3d 717 (Fla. 2017); *Guardado v. Jones*, 226 So. 3d 213 (Fla. 2017); *Philmore v. State*, 234 So. 3d 567 (Fla. 2018); *Franklin*, 236 So. 3d 989; *Grim v. State*, 43 Fla. L. Weekly S155 (Fla. 2018); *Smithers v. State*, 43 Fla. L. Weekly S154 (Fla. 2018); *Reynolds v. State*, 43 Fla. L. Weekly S163 (Fla. 2018); *Taylor v. State*, 43 Fla. L. Weekly S171 (Fla. 2018); *Crain v. State*, 43 Fla. L. Weekly (Fla. 2018); *Tanzi v. State*, 43 Fla. L. Weekly S173 (Fla. 2018); *Johnston v. State*, 43

harmless and the Florida Supreme Court upholds the defendant's death sentence. No other factors are meaningfully considered.

The Florida Supreme Court's per se harmless-error rule for *Hurst* claims fits a historical pattern. Over the past thirty years, this Court has overturned similar bright-line tests invented by the Florida Supreme Court because they failed to give full effect to this Court's death penalty jurisprudence. Nine years after this Court decided in *Lockett v. Ohio*, 438 U.S. 586 (1978) that mitigation could not be confined to a statutory list, this Court overturned the Florida Supreme Court's bright-line rule barring relief in cases where the jury was not instructed that it could consider non-statutory mitigating evidence. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987). Twelve years after this Court ruled in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment prohibits the execution of the intellectually disabled, the Court ended the Florida Supreme Court's use of an unconstitutional bright-line IQ-score test to deny *Atkins* claims. *See Hall v. Florida*, 134 S. Ct. 1986 (2014). And 14 years after this Court held in *Ring*, 536 U.S. 584, that fact-finding underlying a death sentence must be conducted by a jury, not a judge, this Court overturned the Florida Supreme Court's repeated rejection of *Ring* claims. *See Hurst*, 136 S. Ct. 616.

Despite this history, the Florida Supreme Court has refused to address arguments in Petitioner's or any other case that such a per se harmless-error rule for *Hurst* claims violates the United States Constitution. In so doing, the Florida Supreme Court continues to uphold unconstitutional death sentences such as Petitioner's, while scores of other prisoners, who were sentenced at the same time, pursuant to the same unconstitutional scheme, are moved off death row. If this mechanical rule stands, Petitioner's case will never be given the individualized jury

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Fla. L. Weekly S162 (Fla. 2018); *Hall v. State*, 43 Fla. L. Weekly S178 (Fla. 2018); *Everett v.*

fact-finding required by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The United States Constitution imposes limits on a state court's use of a harmless-error rule to reject a federal constitutional claim. Whether a state court has exceeded constitutional boundaries in the denial of a federal claim on harmless-error grounds "is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967). Federal courts "cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Id.* Thus, the harmfulness of a constitutional violation must be assessed on a case-by-case basis in the context of the entire proceeding. *Id.* at 22-23.

This Court has emphasized that proper harmless-error analysis should consider the error's probable impact on the minds of an average rational jury. *See Harrington v. California*, 395 U.S. 250, 254 (1969). Moreover, this Court has made clear that harmless-error rulings must be accompanied by sufficient reasoning based on the actual record. *See, e.g.*, *Clemons v. Mississippi*, 494 U.S. 738, 752 (1990); *see Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring) (explaining that a state court "cannot fulfill its obligations of meaningful review by simply reciting the formula for harmless error").

A federal constitutional error's impact must be assessed in the context of the entire record. *See, e.g.*, *Rose v. Clark*, 478 U.S. 570 (1986). When the error's impact is unclear after the whole record is reviewed, courts should not undertake a harmless-error analysis that amounts to "unguided speculation." *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978); *see also O'Neal v.*

State, 43 Fla. L. Weekly S250 (Fla. 2018).

McAninch, 513 U.S. 432, 435 (1995) ("[T]he uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict.").

In capital cases, this Court reviews a state court's harmless-error denial of a federal constitutional claim with heightened scrutiny. *See, e.g.*, *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988). As the Court has long recognized, capital cases demand heightened standards of reliability because "[d]eath is a different kind of punishment from any other which may be imposed in this country . . . in both its severity and its finality." *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *see also Kyles v. Whitley*, 514 U.S. 419, 422 (1995) ("[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."). Accordingly, courts are forbidden from applying "harmless-error analysis in an automatic or mechanical fashion" in a capital case. *Clemons*, 494 U.S. at 753.

This Court has previously applied these standards to review harmless-error rulings of the Florida Supreme Court. *See, e.g.*, *Schneble v. Florida*, 405 U.S. 427 (1972); *Barclay v. Florida*, 463 U.S. 939 (1983); *Parker v. Dugger*, 498 U.S. 308 (1991); *Sochor*, 504 U.S. 527. In some cases, the Florida Supreme Court's harmless-error analysis survived this Court's federal constitutional scrutiny. *See, e.g.*, *Schneble*, 405 U.S. at 432; *Barclay*, 463 U.S. at 958. In other cases, it did not. *See, e.g.*, *Parker*, 498 U.S. at 320; *Sochor*, 504 U.S. at 540.

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

As Petitioner's case and other cases clearly demonstrate, where a jury working under Florida's unconstitutional system reached a unanimous advisory recommendation of death, the Florida Supreme Court refuses to entertain any individualized, record-based arguments before holding the federal constitutional *Hurst* error harmless beyond a reasonable doubt.

This Court's precedent is clear and consistent that harmless-error analysis must include review of the whole record. *See, e.g.*, *United States v. Hastings*, 461 U.S. 499, 509 (1983) ("Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record *as a whole* and to ignore errors that are harmless."); *Rose*, 478 U.S. at 583 ("We have held that *Chapman* mandates consideration of the *entire record* prior to reversing a conviction for constitutional errors that may be harmless."); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1967) ("Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the *whole record*, that the constitutional error was harmless beyond a reasonable doubt."); *see also Arizona v. Fulminante*, 499 U.S. 279, 306 (1991) (explaining that the "common thread" connecting cases subject to harmless-error review under *Chapman* is that each involves "trial error" that may "be qualitatively assessed *in the context of the other evidence presented* in order to determine whether its admission was harmless beyond a reasonable doubt").

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

constitutional error on the specific jury in the case, but also whether an average rational jury would have reached the same conclusion without the constitutional error. *See Harrington*, 395 U.S. at 254. The Florida Supreme Court's per se rule is inconsistent with *Sochor v. Florida* and *Clemons v. Mississippi*, where this Court highlighted that harmless-error rulings must be accompanied by specific reasoning grounded in the whole record. *See Sochor*, 504 U.S. at 541; *Clemons*, 494 U.S. at 752. In addition, the Florida Supreme Court's per se rule's failure to consider mitigation contradicts *Parker v. Dugger*, 498 U.S. 308, where this Court rejected such a cursory harmless-error analysis by the Florida Supreme Court. *See* 498 U.S. at 320 ("What the Florida Supreme Court could not do, but what it did, was to ignore evidence of mitigating circumstances in the record."). The automatic per se harmlessness rule created by the Florida Supreme Court in cases with unanimous jury recommendations effectively leaves the State with no burden whatsoever, and leaves defendants with 12-0 jury death recommendations with no opportunity for full constitutional review of their sentence.

The spirit of *Hurst* – ensuring that capital defendants do not languish under death sentences arrived at through unconstitutional means – has been controverted through the mechanical rule applied in cases where the advisory jury unanimously recommended the death penalty. The Florida Supreme Court also seemed to recognize in *Hurst v. State* that a pre-*Hurst* advisory jury recommendation does not demonstrate on its own that the evidence presented at the penalty phase was sufficient to support a death sentence. *See Hurst v. State*, 202 So. 3d at 68. However, even if it did, as the Florida Supreme Court alleges in this case, that still does not permit the Florida Supreme Court's per se rule to stand. *See Satterwhite*, 486 U.S. at 258 (explaining that the state does not meet burden of establishing that error in a capital sentencing is harmless merely by showing that the evidence in the record is sufficient to support a death

sentence). There is a critical difference between concluding that a properly instructed jury *could* have reached a unanimous death recommendation, and that it would have done so beyond a reasonable doubt. As the next section explains, that is especially so in light of the improper role assigned to the jury by pre-*Hurst* instructions that violate *Caldwell* by unconstitutionally minimizing the jury's responsibility in sentencing someone to death.

A reliable harmless-error analysis must begin with what this Court held in *Hurst* that a jury must do for a Florida death sentence to be constitutional. This Court ruled that the Sixth Amendment requires juries to make the findings of fact regarding the elements required for a death sentence under Florida law: (1) the aggravating circumstances that had been proven beyond a reasonable doubt; (2) the aggravating circumstances were together "sufficient" to justify the death penalty beyond a reasonable doubt; and (3) the aggravating circumstances outweighed the mitigation evidence beyond a reasonable doubt. *See Hurst*, 136 S. Ct. at 620-22.[3] The second and third of these elements cut against the harmless-error analysis in Justice Alito's dissent in *Hurst*. Justice Alito stated that he would have held the *Hurst* error harmless because the evidence supported the trial judge's finding of "at least one aggravating factor." *Id.* at 626 (Alito, J., dissenting). But, as the Florida Supreme Court recognized in *Hurst v. State*, unlike the Arizona capital sentencing scheme at issue in *Ring*, Florida's scheme required fact-finding as to the aggravators *and their sufficiency to warrant the death penalty. Hurst v. State*, 202 So. 3d at 68. The fact that sufficient evidence exists to prove at least one aggravator to the jury is not enough to conclude that a *Hurst* error is harmless. *See id.* at 53 n. 7. Furthermore, this Court has

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

made clear that the State does not meet its harmless-error burden in a capital sentencing case merely by showing that evidence in the record is sufficient to support a death sentence. *See Satterwhite*, 486 U.S. at 258. "[W]hat is important is an *individualized determination*," given the well-established Eighth Amendment's requirement of individualized sentencing in capital cases. *Clemons*, 494 U.S. at 753.

Accordingly, the unanimity or non-unanimity of a defendant's pre-*Hurst* advisory jury's vote cannot by itself resolve a proper harmless-error inquiry. The fact that an advisory jury unanimously *recommended* the death penalty does not establish that the same jury would have made, or an average rational jury would make, the three specific *findings of fact* to support a death sentence in a constitutional proceeding.

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

Moreover, in a constitutional proceeding where the jury was instructed that its findings of fact would be binding on the trial court in the ultimate decision whether to impose a death sentence, the jury may have considered the evidence more carefully, and given the mitigation

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the jury unanimously finds each of the required elements satisfied, the jury is still not required to

more weight. This idea, explored further in the next section of this Petition, is at the heart of this Court's decision in *Caldwell*, 472 U.S. 320.[4]

The United States Constitution requires state courts to apply this myriad of potential effects on a case-by-case basis. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("[T]here is a . . . need for reliability in the determination that death is the appropriate punishment *in a specific case*."). The Florida Supreme Court's per se rule automatically relieves the State of its burden, simply based on a reckless assumption that a 12-0 vote for death under an unconstitutional scheme would have been the same under a constitutional scheme. In a capital case, this violates the federal constitutional requirement for heightened reliability in death sentencing and allows for impermissible "unguided speculation." *Holloway*, 435 U.S. at 490-91; *see also Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids arbitrary and capricious infliction of the death penalty.").

Instead of providing for the tailored harmless-error review the Constitution requires, the Florida Supreme Court has adopted a per se rule that works a fundamental injustice on Petitioner and others in his position. Petitioner sits on death row today while dozens of other Florida prisoners, some of whom were sentenced before him, some of whom were sentenced after him,

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recommend death, and the judge is not required to impose death. *See id.* at 57-58.

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

and many of whom committed murders, including multiple murders, involving equally aggravating circumstances as in his crime have been granted resentencings under *Hurst*. Because no culpability-related distinctions can justify this disparity of results, the rule that produced it violates the Eighth Amendment.

B. The Florida Supreme Court's per se harmless-error rule relies entirely on advisory jury decisions infected with *Caldwell* error.

In *Caldwell*, the penalty-phase jury did not receive an accurate description of its role in the sentencing process due to the prosecutor's suggestion that the jury's decision to impose the death penalty would not be final because an appellate court would review the sentence. *Caldwell*, 472 U.S. at 328-29. This Court found that the prosecutor's remarks "led [the jury] to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Id.* at 329. The Court concluded that, because it could not be ascertained that the remarks had no effect on the jury's sentencing decision, the jury's decision did not meet the Eighth Amendment's standards of reliability. *See id.* at 341. Accordingly, *Caldwell* held 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 sentence lies elsewhere." *Id.* at 328-29.

This is the situation at bar. Petitioner's jury was instructed by the judge that "the final decision as to what punishment should be imposed is the responsibility of this court", and was repeatedly instructed that they were to render an advisory sentence. The jury in this case deliberated for less than one hour before rendering a death recommendation. Where a jury is told that the ultimate responsibility regarding sentencing lies with the judge, there are "specific reasons to fear substantial unreliability as well as bias in favor of death sentences." *Caldwell*, 472 U.S. at 328-29. Empirical research supports the notion that Florida's advisory juries were

imbued with a diminished sense of responsibility for the imposition of death sentences before *Hurst*. *See, e.g.*, William J. Bowers, et. al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and Jury Influence Death Penalty Decision-Making*, 63. WASH. & LEE L. REV. 931, 950-62 (2006). Research conducted through the Capital Jury Project ("CJP") concludes that jurors in states with "hybrid systems" where their sentencing decision is merely a recommendation (such as Florida) "are more likely to deny responsibility, invest less energy in understanding instructions, and more often rush to judgment". *Id.* at 950.

Interviews with Florida jurors yielded narrative accounts highlighting the detrimental impact of Florida's pre-*Hurst* instructions on jurors' sense of their sentencing role. Bowers, *supra* p. 19, at 961-62. Jurors relayed to researchers their understanding that "[w]e don't really make the final decision . . . we would give our opinion but the choice would be up to the judge." *Id.* at 961. One Florida juror told CJP researchers that "the fact that you could make a recommendation, that you didn't make a yes or no, that someone else would make the decision, I think that let us feel off the hook." *Id.* The same juror noted that he found the pre-*Hurst* sentencing process to be "not as traumatic as deciding [the defendant's] guilt because we would take the steps, make a recommendation, and the judge would make the final choice." *Id.* As another Florida juror said approvingly of Florida's pre-*Hurst* advisory jury instructions, "I didn't want this on my conscience." *Id.*

In the decades since *Caldwell*, the Florida Supreme Court has rejected numerous *Caldwell* challenges to Florida's pre-*Hurst* jury instructions. Beginning in *Pope v. Wainwright*, 496 So. 2d 798 (Fla. 1986), the Florida Supreme Court dismissed the relevance of *Caldwell* on the theory that, unlike with the Mississippi scheme at issue in *Caldwell*, Florida's instructions accurately described the jury's "merely" advisory nature: "[I]n Florida it is the trial judge who is

the ultimate sentencer," and the jury "is merely advisory." *Id.* at 805. The Florida Supreme Court, finding "nothing erroneous about informing the jury of the limits of its sentencing responsibility," for the valid purpose of "reliev[ing] some of the anxiety felt by jurors impaneled in a first-degree murder trial," held that its advisory jury instructions complied with *Caldwell* and accurately described a constitutionally-valid scheme. *Id.*

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

In light of *Hurst*, the rationale underlying the Florida Supreme Court's rejection of *Caldwell* challenges has evaporated, but the Florida Supreme Court refused to address Petitioner's argument that it should revisit the applicability of *Caldwell* to Florida's pre-*Hurst* scheme; a position of which at least some current justices of this Court have previously taken issue with. *Cf. Truehill v. Florida*, 138 S. Ct. 3 (2017) (Mem) (Sotomayor, J., dissenting from the denial of certiorari) ("Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where the court was the final decision-maker and the sentence - not the jury."); *see also*, *Middleton v. Florida*, 138 S. Ct. 829 (2018) (Mem) (Breyer, J., Sotomayor, J., Ginsburg, J., dissenting for the denial of certiorari). Justice Sotomayor, in her dissent from the denial of

certiorari in *Guardado v. Jones*, specifically discussed this case in its criticism of the Florida Supreme Court's continued refusal to address post-*Hurst Caldwell*-based challenges:

> Following the dissent from the denial of certiorari in *Truehill*, the Florida Supreme Court has on at least two occasions taken the position that it has, in fact, considered and rejected petitioners' *Caldwell*-based challenges. In *Franklin v. State*, 236 So. 3d 989 (2018) (*per curiam*), the Florida Supreme Court stated that, "prior to *Hurst*, [it] repeatedly rejected *Caldwell* challenges to the standard jury instructions." *Id.*, at ----, 2018 WL 897427, at *3. The decisions it cited in support of that pre-*Hurst* precedent rely on one fact: "Informing the jury that its recommended sentence is 'advisory' is a correct statement of Florida law and does not violate *Caldwell*." *Rigterink v. State*, 66 So.3d 866, 897 (Fla.2011) (*per curiam*); *Globe v. State*, 877 So.2d 663, 673-674 (Fla.2004) (*per curiam*) (stating that it has rejected *Caldwell* challenges to the standard jury instructions, citing cases that similarly rely on the fact that the instructions accurately reflect the advisory nature of the jurors' role). But of course, "the rationale underlying [this] previous rejection of the *Caldwell* challenge [has] now [been] undermined by this Court in *Hurst*," *Truehill*, 583 U.S., at ----, 138 S.Ct., at 4, and the Florida Supreme Court must therefore "grapple with the Eighth Amendment implications of [its subsequent post-*Hurst*] holding" that "then-advisory jury findings are now binding and sufficient to satisfy *Hurst*,'" *Middleton*, 583 U. S., at ----, 138 S.Ct., at 830. Its pre-*Hurst* precedent thus does not absolve the Florida Supreme Court from addressing petitioners' new post-*Hurst Caldwell*-based challenges.
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> The Florida Supreme Court in *Franklin* did not stop there, however. It went on to state that it had "also rejected *Caldwell*-related *Hurst* claims" more recently, citing *Truehill v. State*, 211 So.3d 930 (Fla.2017) (*per curiam*), and *Oliver v. State*, 214 So.3d 606 (Fla.2017) (*per curiam*), noting that "the defendants in *Oliver* and *Truehill* petitioned the United States Supreme Court for a writ of certiorari to review their *Caldwell* claims, which the Court denied." *Franklin*, 236 So.3d at ----, 2018 WL 897427, *3. This is a surprising statement, because Quentin Truehill and Terence Oliver were the two petitioners whose claims were at issue in my dissent in *Truehill*. *Franklin* did not discuss that dissent, joined by two other Justices, which specifically noted that "the Florida Supreme Court has failed to address" the important *Caldwell*-based challenge. *Truehill*, 583 U.S., at ----, 138 S.Ct., at 3. Earlier this month, in rejecting a motion to vacate a sentence brought by petitioner Jesse Guardado, the Florida Supreme Court again held that it had 'considered and rejected' post-*Hurst Caldwell*-based challenges, citing *Franklin*, 236 So.3d 989, and *Truehill*, 211 So.3d 930. *Guardado v. State*, --- So. 3d ---, 2018 WL 1193196, *2 (Mar. 8, 2018).
>
> It is hard to understand how the Florida Supreme Court "considered and rejected" these *Caldwell*-based challenges based on its decisions in *Truehill* and *Oliver*. Those cases did not mention or discuss *Caldwell*. Nor did they mention

> or discuss the fundamental Eighth Amendment principle it announced: "It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S., at 328-329. In neither *Truehill* nor *Oliver* did the Florida Supreme Court discuss the grave Eighth Amendment concerns implicated by its finding that the *Hurst* violations in those cases are harmless, a conclusion that transforms those advisory jury recommendations into binding findings of fact. Although the Florida Supreme Court noted in *Truehill* that the defendant in that case "contends that he is entitled to relief pursuant to *Hurst v. Florida* because the jury in his case was repeatedly instructed regarding the non-binding nature of its verdict," 211 So.3d, at 955, that was the first and last reference to that argument. There was absolutely no reference to the argument in *Oliver*. 214 So.3d 606.
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> Therefore, the Florida Supreme Court has (again) failed to address an important and substantial Eighth Amendment challenge to capital defendants' sentences post-*Hurst*. Nothing in its pre-*Hurst* precedent, nor in its opinions in *Truehill* and *Oliver*, addresses or resolves these substantial *Caldwell*-based challenges. This Court can and should intervene in the face of this troubling situation.

Guardado v. Jones, 128 S.Ct. 1131, 1132-34 (2018) (Mem) (internal footnotes omitted) (Sotomayor, J., dissenting for the denial of certiorari). Three days after Justice Sotomayor's dissent in *Guardado*, the Florida Supreme Court addressed a post-*Hurst Caldwell*-based challenge. *See Reynolds*, 43 Fla. L. Weekly S163; *but see*, *Kaczmar v. Florida*, 138 S.Ct. 1973 (2018) (Mem) (Sotomayor, J., dissenting from the denial of certiorari) (pointing out that the *Reynolds* opinion "gathered the support only of a plurality, so the issue remains without definitive resolution by the Florida Supreme Court."). Curiously, despite having decided in *Franklin*, 236 So. 2d 989, that (1) Franklin's *Caldwell*-based challenge is procedurally barred because he did not raise it on direct appeal and (2) they have repeatedly rejected similar *Caldwell*-based claims, the Florida Supreme Court in *Reynolds* addressed a nearly identical post-*Hurst Caldwell* claim on the merits and admitted that they have not "expressly addressed a *Caldwell* challenge to Standard Jury Instruction 7.11 brought under *Hurst*." *Reynolds*, 43 Fla. L. Weekly S163 at *5 (internal footnote omitted). The Florida Supreme Court went on to elaborate in the following footnote that:

> Other defendants have raised these claims, which we have rejected without discussion. *See, e.g.*, *Truehill v. State*, 211 So. 3d 930 (Fla.), *cert. denied*, ---- U.S. ----, 138 S.Ct. 3, 199 L.Ed.2d 272 (2017). In light of the dissenting opinions to the denial of certiorari in *Truehill v. Florida*, however, we now explicitly address what has already been implicitly decided.

Id. at *5, n.8. Petitioner did not receive the benefit of the lower court "explicitly" addressing his claim.

The instructions that were given to Petitioner's jury, which reassured them that their decision was only advisory and placed the ultimate decision regarding whether Petitioner should live or die in the hands of the judge, minimized their role and relieved them of the weight that sentencing another human being to death would place on one's conscience. *See Caldwell*, 472 U.S. at 333 (expressing concern that "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest on others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role" and may, in the case of a divided jury, cause jurors who are reluctant to invoke the death sentence to give in). The jury may have decided to "'send a message' of extreme disapproval for the defendant's acts" even if it was unconvinced that death was the appropriate punishment, with the belief that if they were wrong and sentenced Petitioner to death when the sentence should be life, the judge would correct their mistake and spare his life. *Caldwell*, 472 U.S. at 331.

The Florida Supreme Court's per se harmless-error rule for *Hurst* claims cannot predict, without review of the specific record, that a jury with full awareness of the gravity of its role in the capital sentencing process would have unanimously reached the same conclusion as the advisory jury who was told that its role was subordinate. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988) (holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about jury's vote); *see McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (same).

Caldwell errors must be assessed in light of the entire record. *See, e.g.*, *Cordova v. Collens*, 953 F. 2d 167, 173 (5th Cir. 1992); *Rodden v. Delo*, 143 F. 3d 441, 445 (8th Cir. 1998); *Davis v. Singletary*, 119 F. 3d 1471, 1482 (11th Cir. 1997). However, given its belief that no *Caldwell* error occurred, the Florida Supreme Court did not conduct an analysis of the entire record in Petitioner's case. The failure of the Florida Supreme Court's per se harmless-error rule to account for the inherent *Caldwell* error in all *Hurst* cases, including Petitioner's, is inconsistent not only with this Court's harmless-error precedents, but also with the Eighth Amendment.

C. The Florida Supreme Court's per se harmless-error rule relies entirely on advisory jury decisions not capable of supporting harmless-error analysis under *Sullivan.*

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court recognized that there are some jury errors that cannot be subjected to harmless-error analysis. The error in *Sullivan* was the trial court's defective instruction to the jury regarding the requirement that each element of the offense must be found beyond a reasonable doubt - an error that the Court found affected all of the jury's findings. *See Sullivan*, 508 U.S. at 277. The Court unanimously held, in an opinion by Justice Scalia, that even though the jury had rendered a decision on each of the elements of the offense, the trial court's improper instruction on the beyond-a-reasonable-doubt standard "vitiate[d] *all* the jury's findings" and meant, for purposes of harmless-error review, that "there has been no jury verdict within the meaning of the Sixth Amendment." *Id.* at 281 (emphasis in original). The Court instructed that a constitutionally-valid review would necessarily require determination of "the basis on which the jury *actually rested* its verdict." *Id.* at 279 (emphasis in original).

The Florida Supreme Court's per se rule harmless-error rule for *Hurst* claims presents the

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

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

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

CONCLUSION

For all of these reasons, the Court should grant the petition for writ of certiorari and order further briefing or vacate and remand this case to the Florida Supreme Court.

Respectfully submitted,

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