No.

In The
Supreme Court of the United States

MARK ANTHONY POOLE,

Petitioner,

v.

STATE OF FLORIDA.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Florida Supreme Court erred in reinstating a capital sentence issued under Florida's pre-2016 scheme, in contravention of this Court's holding in *Hurst v. Florida*, 136 S. Ct. 616 (2016), that such sentences violate the Sixth Amendment because the jury did not make the requisite death-eligibility findings, including that aggravating circumstances outweigh mitigating circumstances.

II. Whether the Florida Supreme Court violated the Eighth Amendment in reinstating a capital sentence lacking a unanimous jury recommendation of death and based on a guilt-phase jury finding rendered without awareness of the consequences for capital sentencing.

PARTIES TO THE PROCEEDINGS

Petitioner Mark Anthony Poole was the movant in the trial court and the appellee/cross-appellant in the Florida Supreme Court.

Respondent State of Florida was the respondent in the trial court and the appellant/cross-appellee in the Florida Supreme Court.

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INTRODUCTION

In *Hurst v. Florida* (*Hurst I*), 136 S. Ct. 616 (2016), this Court decided the very question on which the Florida Supreme Court reached the opposite conclusion below: that Florida's capital-sentencing scheme—permitting a *judge*, rather than the *jury,* to make the death-eligibility finding that aggravators outweigh mitigators—violates the Sixth Amendment. This Court should not countenance the Florida Supreme Court's defiance, particularly when it comes to matters of life and death.

In *Hurst I*, this Court reiterated that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136. S. Ct. at 619. Applying that rule to Florida's capital-sentencing scheme, the Court held that a judge could not "increase[] [the] authorized punishment" from life imprisonment to death "based on [its] own factfinding"—referring explicitly to the death-eligibility finding that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Id.* at 622 (quoting FLA. STAT. § 921.141(3)(b) (2010)). On remand, echoing this Court, the Florida Supreme Court made doubly clear that "the critical findings necessary before the trial court may consider imposing a sentence of death" include "the finding that the aggravating factors outweigh the mitigating circumstances." *Hurst v. State* (*Hurst II*), 202 So. 3d 40, 44 (Fla. 2016) (per curiam). The Florida Supreme Court further held that, "in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous." *Id.*

Consistent with that "now-settled" law, *Okafor v. State*, 225 So. 3d 768, 776 (Fla. 2017) (Lawson, J., concurring), Florida courts vacated nearly 150 death sentences as unconstitutional—including that of Petitioner Mark Anthony Poole. Just a few years later, however, a divided (and newly constituted) Florida Supreme Court abruptly changed course in the decision below. Reinstating Poole's death sentence, the court proclaimed that the "correct understanding of *Hurst* [*I*]" constitutionally requires a jury in Florida's capital-sentencing scheme to find *only* the existence of an aggravating circumstance—and nothing more.

That new "understanding" directly contradicts *Hurst I*, and is at odds with this Court's broader Sixth and Eighth Amendment death-penalty jurisprudence. The decision below gives short shrift to the additional finding that the terms of the Florida statute require before imposition of a death sentence—namely, as this Court recognized in *Hurst I*, that aggravators outweigh mitigators. The decision below also dispenses with the near-universally-accepted rule that the death penalty should not be imposed unless a jury unanimously recommends that punishment. As a result, in this case (as in many others) the jury unwittingly made Poole fully eligible for death at the guilt phase (because his conviction automatically doubled as an aggravator), and the penalty-phase jury was left with no constitutionally prescribed role at all.

This Court should grant certiorari (or summary reversal) to reinstate the dictates of its decision in *Hurst I*, and to restore constitutional protections in capital sentencing for Poole and more than 150 similarly situated defendants in Florida.

OPINIONS BELOW

The opinion of the Florida Supreme Court (App., *infra*, 1a-57a) is reported at 297 So. 3d 487. The trial court's orders (App., *infra*, 58a-167a) are unreported.

JURISDICTION

The Florida Supreme Court issued its judgment on January 23, 2020. Poole timely filed a motion for rehearing and clarification, which was resolved on April 2, 2020. This Court extended the time to file any petition for certiorari due on or after March 19, 2020, to 150 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are reproduced at App., *infra*, 170a-179a.

STATEMENT OF THE CASE

A. Legal Framework

1. Constitutional safeguards against imposition of the death penalty.

a. The Sixth Amendment and the Due Process Clause of the Fifth Amendment together "require[] that each element of a crime be proved to a jury beyond a reasonable doubt." *Hurst I*, 136 S. Ct. at 621. "In *Apprendi v. New Jersey*, this Court held that any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Id.* (alteration in original) (quoting 530 U.S. 466, 494 (2000)). The Court thereby "ensur[ed] that the judge's authority to sentence derives wholly from the jury's

verdict" and that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely v. Washington*, 542 U.S. 296, 306, 313 (2004) (emphasis omitted).

This Court extended *Apprendi*'s rule to the death-penalty context in *Ring v. Arizona*, reasoning that "[c]apital defendants, no less than noncapital defendants, *** are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. 584, 589 (2002). That rule applies "even if the State characterizes the additional findings made by the judge as 'sentencing factor[s].'" *Id.* (alteration in original) (quoting *Apprendi*, 530 U.S. at 492).

b. The Eighth Amendment's prohibition against "cruel and unusual punishments *** reaffirms the duty of the government to respect the dignity of all persons." *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017). Because "[t]he Eighth Amendment is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," this Court "enforce[s] the Constitution's protection of human dignity" by "look[ing] to the evolving standards of decency that mark the progress of a maturing society." *Hall v. Florida*, 572 U.S. 701, 708 (2014) (internal quotation marks omitted).

In addition, the Eighth Amendment safeguards the "fundamental fairness of [a capital] sentencing proceeding." *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985). The unique nature of the death penalty creates a "heightened need for reliability in the determination that death is the appropriate

punishment in a specific case." *Id.*; *see Parker v. Dugger*, 498 U.S. 308, 321 (1991) ("The Constitution prohibits the arbitrary or irrational imposition of the death penalty."). That mandate cannot be satisfied unless "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human *** act with due regard for the consequences of their decision." *Caldwell*, 472 U.S. at 329-330.

2. Florida's capital-sentencing scheme.

a. Under Florida's longstanding pre-2016 capital-sentencing scheme, at issue here, "[a] person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in findings by the court that such person shall be punished by death." FLA. STAT. § 775.082(1) (2011). Absent those findings, "such person shall be punished by life imprisonment and shall be ineligible for parole." *Id.*

Section 921.141 provides that, "[u]pon conviction or adjudication of guilt of a defendant of a capital felony, the [trial] court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment." FLA. STAT. § 921.141(1). In that "sentencing proceeding," which "shall be conducted before a jury impaneled for that purpose," the parties may present "evidence *** as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6)" of the statute. *Id.*

The jury's role is limited to "render[ing] an advisory sentence to the court" of "life imprisonment or death." FLA. STAT. § 921.141(2). The sentence is "advisory" because, "[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." *Id.* § 921.141(3).

Critically, in order to "impose[] a sentence of death, [the court] shall set forth in writing its *findings* upon which the sentence of death is based as to" two "*facts*: (a) That sufficient aggravating circumstances exist ***, and (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances." FLA. STAT. § 921.141(3) (emphases added); *see id.* ("In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact."). A court's failure to "make the findings *** within 30 days after the rendition of the judgment and sentence" results in a "sentence of life imprisonment in accordance with § 775.082." *Id.*

b. This Court held Florida's capital-sentencing scheme unconstitutional in *Hurst I*. Citing section 921.141(3), the Court explained that "Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts." 136 S. Ct. at 622.

In particular,

> the Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat.

> § 775.082(1) (emphasis added). The trial court *alone* must find "the facts *** [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3).

136 S. Ct. at 622 (alterations and ellipsis in original).

Consequently, under that statutory regime, "the maximum punishment [a defendant] could have received without any judge-made findings [i]s life in prison without parole." 136 S. Ct. at 622. Where "a judge increased [that] authorized punishment based on her own factfinding," the "sentence violates the Sixth Amendment." *Id.*

On remand, the Florida Supreme Court recognized that *Hurst I* "requires *** all the critical findings necessary before the trial court may consider imposing a sentence of death" to "be found unanimously by the jury." *Hurst II*, 202 So. 3d at 44. "[T]hese specific findings *** include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances." *Id.* In addition, under the Eighth Amendment, "in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous." *Id.*[1]

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[1] After *Hurst II*, the Florida legislature amended the death-penalty statute to: (i) "require[] the jury to determine whether at least one aggravating factor has been proven beyond a reasonable

In *Mosley v. State*, the Florida Supreme Court determined that *Hurst* applies retroactively to any capital defendant whose death sentence became final after this Court's 2002 decision in *Ring*. 209 So. 3d 1248 (Fla. 2016) (per curiam).

B. Factual And Procedural History

1. In 2001, Poole, an African-American, was charged with burglary, robbery, the first-degree murder of Noah Scott, and the attempted first-degree murder and sexual battery of Loretta White. At trial, the State sought to prove that Poole entered Scott and White's mobile home, raped and struck White with a tire iron while also striking Scott, and stole video games that he later sold. *Poole v. State*, 997 So. 2d 382, 387-389 (Fla. 2008) (per curiam). Poole's trial counsel conceded guilt as to the non-homicide offenses (over Poole's express objection), the jury convicted on

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doubt, and *** to find the aggravating factors unanimously and to specify which aggravating factors have been found unanimously"; (ii) "expressly indicate[] that a death sentence cannot be considered unless at least one aggravating factor has been proven beyond a reasonable doubt"; (iii) "requir[e] the jury to make a sentencing recommendation based on the weighing of whether sufficient aggravating factors exist *** [and] whether those aggravating factors outweigh the mitigating circumstances found to exist"; and (iv) allow the jury to "recommend a death sentence so long as at least ten jurors agree that the defendant should be sentenced to death." *Perry v. State*, 210 So. 3d 630, 636-638 (Fla. 2016) (per curiam); *see* 2016-13 Fla. Laws § 3, at 3-4. After the Florida Supreme Court struck down the (final) provision allowing a nonunanimous jury to recommend death, *see Perry*, 210 So. 3d at 639-640, the Florida legislature amended the statute to require unanimity, 2017-1 Fla. Laws § 1, at 1. Citations herein are to the pre-2016 version of the statutes, under which Poole was sentenced.

all counts, and the trial court sentenced Poole to death. *Id.* at 388. On direct appeal, the Florida Supreme Court affirmed Poole's convictions but vacated his death sentence. *Id.* at 389-397.

On remand, the jury recommended a death sentence on the first-degree murder count by an 11-1 vote. *Poole v. State*, 151 So. 3d 402, 408 (Fla. 2014) (per curiam). The trial court found four aggravating circumstances: (1) the contemporaneous conviction for the attempted murder of White; (2) that the capital felony occurred during the commission of a burglary, robbery, and sexual battery; (3) that the capital felony was committed for financial gain; and (4) that the capital felony was committed in a heinous, atrocious, or cruel manner. *Id.* The trial court also found two statutory mental mitigating circumstances and 11 nonstatutory mitigating circumstances. *Id.* Finding that the aggravating circumstances outweighed the mitigating circumstances, the trial court sentenced Poole to death in August 2011. *Id.* The Florida Supreme Court affirmed. *Id.* at 419.

2. Poole filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.851. As relevant here, Poole argued that his death sentence must be vacated as unconstitutional under *Hurst I* and *II*. App., *infra*, 58a-61a.

The trial court agreed. In Poole's case, a jury neither made "all the critical findings necessary" for "imposi[tion] [of] a death sentence" nor recommended a sentence of death by a unanimous vote. App., *infra*, 61a-63a. Accordingly, Poole was "entitled to a new penalty phase trial." *Id.* at 64a.

3. The State appealed, arguing that Poole's death sentence did not violate the Sixth or Eighth Amendments and inviting the Florida Supreme Court to reexamine *Hurst II*. The Florida Supreme Court—over a dissent—receded in part from *Hurst II* and reversed the order vacating Poole's death sentence.[2]

a. The majority recognized that in *Hurst I* "[w]hat mattered" to this Court "was that the Florida sentencing statute does not make a defendant eligible for death until findings *by the court* that such person shall be punished by death." App., *infra*, 21a (internal quotation marks omitted) (quoting FLA. STAT. § 775.082(1)). *Hurst I* expressly identified "the 'facts' necessary to impose the death penalty" under Florida law when it "[p]oint[ed] to section 921.141(3)." *Id.* at 20a-21a.

In other words:

> As the [U.S.] Supreme Court itself noted in *Hurst [I]*, section 775.082(1), Florida

[2] Poole cross-appealed the trial court's separate ruling denying postconviction relief based on trial counsel's decision to concede guilt to the non-homicide offenses over Poole's objection, in violation of the Sixth Amendment as interpreted in *Florida v. Nixon*, 543 U.S. 175 (2004), and as clarified in this Court's intervening decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). The Florida Supreme Court held that Poole waived that claim, App., *infra*, 9a-11a, despite: (i) the State's admission that it was "certainly" "aware that [what counsel's advice was] was going to be an issue," Oral Arg. 9:21-9:30; (ii) a lengthy evidentiary hearing on the reasonableness of trial counsel's concession strategy, *see id.* (recognizing that "there is a factual basis in the record"); and (iii) the trial court's conclusion (irreconcilable with *McCoy*) that trial counsel had "authority to concede Guilt," App., *infra*, 105a-124a. Poole does not challenge the Florida Supreme Court's waiver determination in this Court.

> Statutes, states that the punishment for a capital felony is life imprisonment unless "the procedure set forth in s[ection] 921.141 results in findings by the court that such person shall be punished by death." The required trial court findings are set forth in section 921.141(3), Florida Statutes, which is titled "Findings in Support of Sentence of Death." When the Supreme Court referred to "the critical findings necessary to impose the death penalty," it referred to those findings as "facts" and cited section 921.141(3).

App., *infra*, 26a (quoting 136 S. Ct. at 622).

Turning to section 921.141(3), the majority described that provision as "requir[ing] two findings": (1) a section 921.141(3)(a) finding "[t]hat sufficient aggravating circumstances exist"; and (2) a section 921.141(3)(b) finding "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." App., *infra*, 26a-27a (alterations except first in original). Yet in an about-face from *Hurst II* and in direct contradiction of *Hurst I*, the majority reasoned that, under "the correct understanding of *Hurst [I]*," *id.* at 24a (formatting altered), the Sixth Amendment applied only to the first finding, which was satisfied in this instance by Poole's contemporaneous convictions.

In the majority's view, the section 921.141(3)(a) finding that aggravating circumstances exist is "an eligibility finding." App., *infra*, 26a. By contrast, it asserted, the section 921.141(3)(b) finding that mitigating circumstances do not outweigh aggravating

circumstances is a "selection finding" that was "not a 'fact' that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict" and thus "need not be submitted to a jury." *Id.* at 30a-31a. According to the majority, this Court in *Hurst I* did not hold otherwise because that case was "about eligibility, not selection." *Id.* at 25a.

As to the *Hurst II* requirement that the jury provide a unanimous recommendation of death, the majority considered itself "bound by" this Court's decision in *Spaziano v. Florida*, 468 U.S. 447 (1984). App., *infra*, 31a-32a. The majority read *Spaziano* to reject *Hurst II*'s holding "that the Eighth Amendment requires a unanimous jury recommendation of death." *Id.*

The majority thus "recede[d] from *Hurst [II]* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance." App., *infra*, 39a.

b. Justice Labarga—who had been in the *Hurst II* majority with Justices Pariente, Lewis, and Quince before their mandatory retirement in 2019, and Justice Perry before his mandatory retirement in 2016—dissented "in the strongest possible terms." App., *infra*, 51a. He emphasized that in "reced[ing] from the requirement that Florida juries unanimously recommend that a defendant be sentenced to death," the majority "retreat[s] from the national consensus and takes a huge step backward in Florida's death penalty jurisprudence," which "for a brief and shining moment" had "br[ought] [Florida's] capital sentencing laws into harmony with the direction of society reflected in [the vast majority of] states and with

federal law." *Id.* at 51a-52a, 55a-56a (internal quotation marks omitted). In doing so, the majority "removed a significant safeguard for the just application of the death penalty in Florida" that "serve[d] th[e] narrowing function required by the Eighth Amendment." *Id.* at 54a, 56a.[3]

4. Poole sought rehearing on the merits and clarification as to the scope of the remand. The Florida Supreme Court denied rehearing (over Justice Labarga's "firm[]" dissent, App., *infra*, 169a), but confirmed that the trial court should resolve Poole's unaddressed penalty-phase claims. *Id.* at 168a.

REASONS FOR GRANTING THE WRIT

In 2016, applying this Court's decision in *Hurst I*, the Florida Supreme Court held in *Hurst II* that the Sixth and Eighth Amendments bar imposition of a death sentence where, as here, a jury neither finds that aggravating circumstances outweigh mitigating circumstances nor unanimously recommends death. In receding from those conclusions, which prompted vacatur of nearly 150 death sentences, the Florida

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[3] Justice Lawson—who had replaced Justice Perry and urged *Hurst II*'s "faithful application" as "solidif[ied]" and "now-settled Florida law," *Okafor*, 225 So. 3d at 776 (Lawson, J., concurring)—switched positions by "fully concurr[ing] in the majority opinion" below and authoring a special concurrence responding to Justice Labarga's dissent. App., *infra*, 40a-50a. Justice Lawson thus joined the two dissenting Justices in *Hurst II* (current Chief Justice Canady and Justice Polston) to form a majority with Justice Muñiz, who was appointed in the wake of the three-Justice mandatory retirement in 2019. The other two newly appointed Justices were confirmed to the U.S. Court of Appeals for the Eleventh Circuit prior to issuance of the decision below.

Supreme Court flouts this Court's decision in *Hurst I* and breaks with the Delaware Supreme Court as to weighing, and makes Florida an outlier as to unanimity. In many cases (including this one) where a prior or contemporaneous felony conviction doubles as an aggravating circumstance, the jury's guilt-phase verdict will automatically and unknowingly open the door to capital punishment and make the jury's sentencing-phase participation immaterial. Given that the stakes could not be higher, this Court should grant certiorari and make clear that the Court meant what it said in *Hurst I*.

I. THE FLORIDA SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *HURST I*

At a minimum, this Court's decision in *Hurst I* precludes imposition of Poole's death sentence, which lacks a jury finding that aggravating circumstances outweigh mitigating circumstances. Regardless of whether the Sixth Amendment requires a jury to render that finding in all capital-sentencing schemes, Florida's scheme is explicit that the death penalty cannot be imposed in its absence. FLA. STAT. §§ 775.082(1), 921.141(3)(b). This Court therefore held that Florida's weighing finding is one of the "facts" that "[t]he Sixth Amendment requires a jury, not a judge, to find *** to impose a sentence of death." *Hurst I*, 136 S. Ct. at 619, 622 (quoting FLA. STAT. § 921.141(3)).

The Florida Supreme Court correctly embraced that conclusion (as it was compelled to do) in *Hurst II*, and the trial court in turn vacated Poole's unconstitutional death sentence. The Florida

Supreme Court's abrupt change-of-heart and reinstatement of Poole's death sentence cannot be reconciled with either *Hurst I* or the Delaware Supreme Court's application of *Hurst I* to an analogous statute.

A. *Hurst I* Governs The Capital-Sentencing Scheme At Issue

1. Hurst I *held that, for Sixth Amendment purposes, Florida's scheme prohibits the death penalty absent a factual finding that aggravating circumstances outweigh mitigating circumstances.*

This Court decided *Hurst I* against a backdrop of decisions implementing the guarantees of the Sixth Amendment, including *Apprendi*, *Ring*, and *Blakely*. *See* 136 S. Ct. at 621-622. *Apprendi* set forth the foundational rule that any "finding" that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is one that "must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 494. *Ring* extended that prescription to the death-penalty context, holding that "[c]apital defendants, no less than noncapital defendants, *** are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"—"even if the State characterizes the additional findings made by the judge as 'sentencing factor[s].'" 536 U.S. at 589 (second alteration in original). Following *Ring*, *Blakely* reaffirmed that *Apprendi* "ensur[es] that the judge's authority to sentence derives wholly from the jury's verdict" and that "every defendant has the right to insist that the

prosecutor prove to a jury all facts legally essential to the punishment." 542 U.S. at 306, 313 (emphasis omitted).

Hurst I applied those precedents to Florida's capital-sentencing scheme. This Court reiterated "that any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." 136 S. Ct. at 621 (alteration in original) (quoting *Apprendi*, 530 U.S. at 494). In striking down Florida's capital-sentencing scheme under that principle, this Court first noted that, pursuant to section 775.082(1), the "maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment." *Id.* at 620. As that Florida statute made clear, "'[a] person who has been convicted of a capital felony shall be punished by death' only if an additional sentencing proceeding 'results in findings by the court that such person shall be punished by death.'" *Id.* (quoting FLA. STAT. § 775.082(1)). "[O]therwise such person shall be punished by life imprisonment and shall be ineligible for parole." *Id.* (alteration in original) (quoting FLA. STAT. § 775.082(1)).

In discussing the statutory findings for Sixth Amendment purposes, this Court stated that "Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts." 136 S. Ct. at 622 (citing FLA. STAT. § 921.141(3)). Per section 921.141(3), "[t]he trial court alone must make detailed findings about the existence and *weight* of aggravating circumstances." *Id.* (emphasis added) (quoting *State v. Steele*, 921 So. 2d 538, 546 (Fla. 2005)).

Synthesizing these provisions of Florida's statutory scheme, the Court then made crystal clear why that scheme "violates the Sixth Amendment." 136 S. Ct. at 622. First, "the Florida sentencing statute does not make a defendant eligible for death until 'findings *by the court* that such person shall be punished by death.'" *Id.* (quoting FLA. STAT. § 775.082(1)). Second, section 921.141(3) by its terms requires two distinct findings: "The trial court *alone* must find 'the facts *** [t]hat sufficient aggravating circumstances exist' *and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.*'" *Id.* (ellipsis and alterations in original) (second emphasis added) (quoting FLA. STAT. § 921.141(3)).

This Court's straightforward conclusion in *Hurst I* that the weighing finding under Florida law was a death-*eligibility* requirement for Sixth Amendment purposes comports with settled precedent. As the Florida Supreme Court previously recognized, "Florida law has long required findings beyond the existence of a single aggravator before the sentence of death may be recommended or imposed." *Hurst II*, 202 So. 3d at 53 n.7 (citing FLA. STAT. § 921.141(3)). Specifically, "under Florida law, '[t]he death penalty may be imposed only where *sufficient aggravating circumstances* exist that *outweigh* mitigating circumstances.'" *Id.* at 53 (quoting *Parker*, 498 U.S. at 313); *see id.* ("[B]efore a sentence of death may be *considered* by the trial court in Florida, the jury must find *** that the aggravating factors outweigh the mitigating circumstances.") (emphasis added). In any event, *this* Court has already resolved that issue as a matter of Sixth Amendment law.

2. The decision below breaks with the Delaware Supreme Court's application of Hurst I.

The Florida Supreme Court's about-face brings it into conflict not only with this Court but also the Delaware Supreme Court. As recognized in *Hurst II*, "[t]he Delaware Supreme Court recently declared that state's capital sentencing law unconstitutional *** because the Sixth Amendment requires the jury, not the judge, to find that the aggravating circumstances outweigh the mitigating circumstances." 202 So. 3d at 61 n.17, 73 (citing *Rauf v. Delaware*, 145 A.3d 430 (Del. 2016) (per curiam)). In receding from that shared understanding of *Hurst I*, the decision below puts the Florida Supreme Court at odds with the Delaware Supreme Court.

In *Rauf*, the Delaware Supreme Court confronted six questions certified in view of *Hurst I*, including:

> Does the Sixth Amendment to the United States Constitution require a jury, not a sentencing judge, to find that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist *because, under 11 Del. C. § 4209, this is the critical finding upon which the sentencing judge "shall impose a sentence of death*"?

145 A.3d at 434 (emphasis added).

In answering "yes," the court made clear that Delaware's statute "plainly requires that a specific finding be made before a death sentence can be issued. That finding is whether 'the aggravating

circumstances found to exist outweigh the mitigating circumstances found to exist.'" 145 A.3d at 464 (Strine, C.J., joined by Holland and Seitz, JJ.) (footnote omitted) (quoting DEL. CODE ANN. tit. 11, § 4209(c)(3)); *see id.* at 485 (Holland, J., joined by Strine, C.J., and Seitz, J.) ("The relevant 'maximum' sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment."). Put another way, "[u]nder [Delaware's] statute the findings required to make a defendant 'eligible' for the death penalty are not sufficient to enable him to be sentenced to death. Rather, it is obvious that [the statute] makes other findings necessary." *Id.* at 464 (Strine, C.J., joined by Holland and Seitz, JJ.).

That made Delaware's capital-sentencing scheme invalid. *Hurst I* instructs that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. at 619. And "[a]s in Florida's statutory scheme that was held to be unconstitutional in *Hurst*, in Delaware, the judge alone 'must find the facts that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances' before a death sentence may be imposed." 145 A.3d at 485-486 (Holland, J., joined by Strine, C.J., and Seitz, J.) (quoting 136 S. Ct. at 622).

Rauf thus reinforces the conclusion—reflected in *Hurst I*—that statutes (like Florida's and Delaware's) prohibiting imposition of a death sentence absent a specific weighing finding implicate the Sixth

Amendment. In those states, weighing constitutes a "critical finding upon which the sentencing judge shall impose a sentence of death" and therefore must be supplied by a jury. *Hurst II*, 202 So. 3d at 61 n.17 (internal quotation marks omitted) (quoting *Rauf*, 145 A.3d at 432-435).

B. The Florida Supreme Court Cannot End-Run *Hurst I* By Recharacterizing The Weighing Finding

Summarizing *Hurst I*, the decision below acknowledges this Court's recognition that in Florida "the punishment for a capital felony is life imprisonment unless 'the procedure set forth in s[ection] 921.141 results in findings by the court that such person shall be punished by death.'" App., *infra*, 26a. It further acknowledges that "[t]he required trial court findings are set forth in section 921.141(3) *** , which is titled 'Findings in Support of Sentence of Death,'" and that "[w]hen the [U.S] Supreme Court referred to 'the critical findings necessary to impose the death penalty,' it referred to those findings as 'facts' and cited section 921.141(3)"—a provision that "requires two findings." *Id.* (quoting 136 S. Ct. at 622). And with respect to the second "finding," the decision below concedes "that section 921.141(3)(b) requires a judicial finding 'as to the fact[]' that the mitigators do not outweigh the aggravators." *Id.* at 29a (alteration in original).

As discussed (pp. 7, 15-17, *supra*), those clear-cut statutory provisions led the Florida Supreme Court in *Hurst II* to reach the same conclusion as this Court did in *Hurst I*: the weighing finding codified at section 921.141(3)(b) is necessary to impose the death penalty

and therefore subject to the Sixth Amendment's jury-finding rule. Yet barely three years later, the decision below receded from *Hurst II*, ignored the explicit holding of *Hurst I*, and held precisely the opposite. None of the Florida Supreme Court's justifications for that turnabout—in defiance of this Court's precedent—withstands scrutiny.

1. First and foremost, the suggestion that *Hurst I* does not bear on the weighing requirement because of this Court's "exclusive focus on aggravating circumstances," App., *infra*, 25a, is patently incorrect. To the contrary, *Hurst I* is controlling on weighing.

This Court quoted *State v. Steele* for the proposition that "[t]he trial court alone must make detailed findings about the existence and *weight* of aggravating circumstances." 136 S. Ct. at 622 (emphasis added) (quoting 921 So. 2d at 546). And in explaining that "the Florida sentencing statute does not make a defendant eligible for death until 'findings *by the court* that such person shall be punished to death,'" *id.* (quoting FLA. STAT. § 775.082(1)), this Court did not limit its analysis to section 921.141(3)(a)'s aggravating-circumstances finding. Rather, citing *Steele* once more, this Court quoted verbatim section 921.141(3)(b)'s weighing finding as well: "The trial court alone must find 'the facts *** [t]hat sufficient aggravating circumstances exist' *and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances*.'" *Id.* (ellipsis and alterations in original) (emphasis added and omitted) (quoting FLA. STAT. § 921.141(3)). That language—critical to this Court's decision holding the same Florida capital-sentencing scheme unconstitutional—cannot simply be ignored.

This is not the first time this Court has faced intransigence to one of its rulings in the death-penalty context. *See, e.g.*, *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005) ("We find this conclusion as unsupportable as the 'dismissive and strained interpretation' of his evidence that we disapproved when we decided Miller-El was entitled to a certificate of appealability."). Indeed, summary reversal has been ordered where "[t]he state court *** erroneously relied on a test [this Court] never countenanced and now ha[s] unequivocally rejected." *Smith v. Texas*, 543 U.S. 37, 45 (2004) (per curiam) (prohibiting nullification jury instruction that constrained consideration of mitigating evidence under Eighth Amendment). *Hurst I* makes the Florida Supreme Court's decision here no different.

2. Even apart from the fact that *Hurst I* already decided the issue, the Florida Supreme Court's attempted distinction falls short on its own terms. According to the Florida Supreme Court, section 921.141(3)(a) (existence of aggravator) sets forth an "eligibility finding" of "pure[] fact[]," while section 921.141(3)(b) (weighing of aggravators and mitigators) sets forth a "selection finding" of "moral judgment." App., *infra*, 28a-29a. But that "line is artificial," for there is "significant overlap between the two" findings. John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 2023 (2005); *see Apprendi*, 530 U.S. at 494 (describing "distinction between 'elements' and 'sentencing factors'" to be "constitutionally novel and elusive").

The decision below declares that only a determination that "lend[s] itself to being objectively

verifiable" triggers the Sixth Amendment. App., *infra,* 29a. Yet the section 921.141(3)(a) finding that a sufficient aggravating circumstance exists, which all agree is subject to *Apprendi*, does not always fit that bill. For instance, "[w]hen a jury makes an eligibility decision by finding that a murder was 'especially heinous,' how heinous does that mean?" Douglass, *supra*, at 2023; *see* FLA. STAT. § 921.141(5)(h); *see also Amoros v. State*, 531 So. 2d 1256, 1260 (Fla. 1988) (per curiam) ("First-degree murder is a heinous crime; however, this statutory aggravating circumstance requires the incident to be '*especially* heinous, atrocious, and cruel.'"); *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973) ("To a layman, no capital crime might appear to be less than heinous[.]"); *Hartley v. State*, 686 So. 2d 1316, 1323 (Fla. 1996) (per curiam) ("Execution-style killings are not generally [heinous, atrocious, or cruel.]").

Moreover, to whatever extent the weighing of aggravators and mitigators is "*mostly* a question of mercy," *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) (emphasis added), that hardly precludes a legislature (like Florida's) from conditioning eligibility for the death penalty upon a weighing "finding[] *** as to *** fact[]," FLA. STAT. § 921.141(3). The requirement that "the trier of fact must convict the defendant of murder and find one 'aggravating circumstance,'" App., *infra*, 24a (quoting *Tuilaepa v. California*, 512 U.S. 967, 971 (1994)), sets a constitutional floor, not a ceiling, *see Boyde v. California*, 494 U.S. 370, 377 (1990) ("States are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable administration of the death penalty.") (internal quotation marks omitted). Unlike

Florida, not all states have elected to provide a weighing-finding protection to capital defendants. But once states do so, they cannot avoid the strictures of the Sixth Amendment.

McKinney v. Arizona, 140 S. Ct. 702 (2020), does not alter that conclusion. In stating that "a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances" under *Hurst I*, *id.* at 707, *McKinney* at most set forth a general rule. It did not purport to analyze Florida's pre-2016 statutory scheme or grapple with (much less overrule) the portion of *Hurst I* striking down that scheme on the ground that "[t]he trial court *alone* must find 'the fact[] *** '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances'" before imposing the death penalty. 136 S. Ct. at 622 (last alteration in original) (quoting FLA. STAT. § 921.141(3)(b)). Indeed, *McKinney* is explicitly directed to the "narrow" issue of whether, following a determination on collateral review that the sentencer failed to consider relevant mitigating evidence, "the Arizona Supreme Court could not itself reweigh the aggravating and mitigating circumstances." 140 S. Ct. at 706. Accordingly, it should go without saying that *Hurst I*, not *McKinney*, is the controlling precedent for analyzing the application of the Sixth Amendment to the Florida scheme at issue here.

For the same reasons, it makes no difference that, at least according to certain state courts of last resort, a jury need not conduct the weighing of aggravators and mitigators either under their *particular* capital-sentencing schemes or as a *general* constitutional rule. Case in point, the decision below quotes the Missouri

Supreme Court's conclusion that weighing "is a 'discretionary judgment call that neither the state nor the federal constitution entrusts exclusively to the jury.'" App., *infra*, 29a (quoting *State v. Wood*, 580 S.W.3d 566, 585 (Mo. 2019)). But left unmentioned is the Missouri Supreme Court's additional statement that "Missouri's death penalty sentencing procedure is fundamentally different from the Florida statute the Supreme Court invalidated in *Hurst*." *Wood*, 580 S.W.3d at 588; *accord State v. Belton*, 74 N.E.3d 319, 336-337 (Ohio 2016) ("Ohio's capital-sentencing scheme is unlike the laws at issue in *** *Hurst*.").

3. In the end, the Florida Supreme Court's parsing of eligibility and selection runs headlong into *Apprendi*, which "repeatedly instructs *** that the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." *Ring*, 536 U.S. at 604-605. As quoted in the decision below, "the relevant inquiry is one not of form but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict"? App., *infra*, 17a (quoting *Apprendi*, 530 U.S. at 494); *see Ring*, 536 U.S. at 604 ("The Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense, for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty.") (citation and internal quotation marks omitted).

In Florida, as this Court has already made clear, the weighing finding unmistakably stands between life imprisonment and the ultimate penalty of death: "[T]he maximum punishment Timothy Hurst could

have received without any judge-made findings was life in prison without parole. As with *Ring*, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, *** Hurst's sentence violates the Sixth Amendment." *Hurst I*, 136 S. Ct. at 622. That reasoning applies as much to the weighing finding as it does to the aggravating-circumstances finding—both of which the Florida legislature (and hence this Court) deemed "findings" of "facts" that "make a defendant *eligible* for death." *Id.* (emphasis added).

II. THE EIGHTH AMENDMENT REQUIRES THE JURY TO PROVIDE A UNANIMOUS RECOMMENDATION OF DEATH AND TO APPRECIATE ITS ROLE IN CAPITAL SENTENCING

A. The Decision Below Retreats From A National Consensus On Unanimity

Beyond ensuring adherence to this Court's Sixth Amendment holding in *Hurst I*, this Court's intervention is warranted for another reason: the Florida Supreme Court wrongly did away with the requirement that a unanimous jury recommend death. In (re)aligning itself with only Alabama, Florida "returns *** to its status as an absolute outlier among the jurisdictions in this country that utilize the death penalty." App., *infra*, 51a (Labarga, J., dissenting). Even if the Eighth Amendment permitted imposition of the death penalty absent a unanimous jury recommendation decades ago, it does not countenance that societal aberration today.

1. "To enforce the Constitution's protection of human dignity, we loo[k] to the evolving standards of

decency that mark the progress of a maturing society, recognizing that [t]he Eighth Amendment is not fastened to the obsolete." *Moore*, 137 S. Ct. at 1048 (alterations in original) (internal quotation marks omitted). That "test *** helps to ensure that 'the State's power to punish is exercised within the limits of civilized standards.'" *Hurst II*, 202 So. 3d at 61 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (plurality opinion)).

In *Hurst II*, the Florida Supreme Court determined that Florida's capital-sentencing law had not "ke[pt] pace with 'evolving standards of decency,'" as measured by "the legislation enacted by the country's legislatures." 202 So. 3d at 60-61; *see Roper v. Simmons*, 543 U.S. 551, 564 (2005) ("These data give us essential instruction."). "In failing to require a unanimous recommendation for death as a predicate for possible imposition of the ultimate penalty, Florida ha[d] been a clear outlier." *Hurst II*, 202 So. 3d at 61.

Counting Alabama and Delaware (which had just declared its capital-sentencing law unconstitutional, *see* pp. 18-20, *supra*), "Florida [wa]s one of only three [states to retain the death penalty] that d[id] not require a unanimous jury recommendation for death." *Hurst II*, 202 So. 3d at 61 & n.17. On top of that, "federal law requires the jury's recommendation for death in a capital case to be unanimous." *Id.* at 61. As such, "[t]he vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated

upon all the evidence of aggravating factors and mitigating circumstances." *Id.*[4]

"By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida" thus "achieve[d] the important goal of bringing its capital sentencing laws into harmony with the direction of society reflected in all these states and with federal law." *Hurst II*, 202 So. 3d at 61. But equally important, insisting that the jury itself "express the conscience of the community on the ultimate question of life or death," *id.* (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)), served the Eighth Amendment's "narrowing function": it "ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders" and "provide[s] the highest degree of reliability in meeting the[] constitutional requirements in the capital sentencing process." *Id.* at 60.

2. In the decision below, the Florida Supreme Court "retreat[ed] from the national consensus" and "t[ook] a giant step backward" in "remov[ing] a significant safeguard for the just application of the death penalty in Florida." App., *infra*, 52a, 56a (Labarga, J., dissenting). Despite *Hurst II*'s extended

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[4] Today, only Alabama still permits imposition of the death penalty absent a unanimous jury recommendation. *See* DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2019: YEAR END REPORT 21 (2019), https://files.deathpenaltyinfo.org/reports/year-end/YearEndReport2019.pdf. Despite the decision below, which concerns Florida's pre-2016 capital-sentencing scheme, current Florida law still requires a unanimous jury recommendation of death. *See* App., *infra*, 56a (Labarga, J., dissenting); note 1, *supra*.

discussion of the jury-unanimity requirement under the Eighth Amendment, the decision below did not make any reference to the "evolving standards of decency" test. Instead, it simply declared that this Court had "rejected that exact argument" in *Spaziano v. Florida*. App., *infra*, 31a.

Spaziano did no such thing. In that case, this Court scrutinized the "premise *** that the capital sentencing decision is one that, in all cases, should be made by a jury." 468 U.S. at 458. In other words, the issue at hand was whether "jury sentencing" was mandatory in a death case. *Id.* at 464. Although the Court held that it was constitutional to "plac[e] responsibility on the trial judge to impose the sentence in a capital case," *id.*, that hardly forecloses an argument that the death penalty cannot be imposed absent a unanimous jury *recommendation*. As *Hurst II* was careful to stress, such a requirement is not tantamount to jury sentencing: "[E]ven if the jury unanimously recommends a death sentence, the trial court is never required to impose death." 202 So. 3d at 62 n.18; *see id.* at 58 ("Nor do we intend by our decision to eliminate the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life.").

More fundamentally, to the extent *Spaziano* is relevant, the Florida Supreme Court failed to appreciate that standards of decency have evolved since that decision was rendered 36 years ago. *See, e.g.*, *Roper*, 543 U.S. at 564 (concluding that current standards of decency did not permit sentencing a juvenile to death, despite opposite conclusion 16 years earlier); *Atkins v. Virginia*, 536 U.S. 304, 314 (2002) (explaining that "[m]uch ha[d] changed since" Court

decided 13 years earlier that then-existing standards of decency permitted executing persons with mental disabilities). As this Court has cautioned, "[a] claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." *Atkins*, 536 U.S. at 311.

On that score, "Alabama is the only state that permits a judge to impose the death penalty based upon a jury's nonunanimous recommendation of death." Michael L. Radelet & G. Ben Cohen, *The Decline of the Judicial Override*, 15 ANN. REV. L. & SOC. SCI. 539, 549 (2019); *see* note 4, *supra*. Such "scarcity of state laws permitting capital sentencing without a unanimous jury penalty verdict is 'strong evidence of consensus that our society does not regard this [procedure] as proper.'" *Id.* (alteration in original) (quoting *Hall*, 572 U.S. at 718). Particularly in light of Florida's "shameful" record number of death-row exonerations, the Eighth Amendment demands that Florida "maintain [the] reasonable safeguard[]" of a unanimous jury recommendation, which "ensur[es] that the death penalty is fairly administered." App., *infra*, 55a (Labarga, J., dissenting).

B. The Decision Below Permits Death Where A Jury Lacks Awareness Of Capital-Sentencing Ramifications And Does Not Participate At The Penalty Phase

The constitutional upshot of eliminating the jury-unanimity requirement (along with the jury-weighing finding) is that, for a Florida court to impose the death

penalty, a sentencing jury need find only one or more aggravating circumstances. App., *infra*, 28a. As this case demonstrates, however, a death sentence may stand even in the absence of that finding where the defendant has been convicted of prior or contemporaneous felonies that serve as statutory aggravators. *See* FLA. STAT. § 921.141(5)(a)-(b), (d); *see also Ring*, 536 U.S. at 597 n.4 (discussing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"). The same would be true whenever a defendant is convicted of a charge that bakes in an aggravating circumstance. *See, e.g.*, *id.* § 921.141(5)(j), (*l*) (providing that aggravating circumstance may be found where victim was law enforcement officer engaged in performance of official duties or a person less than 12 years of age).

To make matters worse, the Florida Supreme Court's ruling deprives the jury of any opportunity to exercise a fundamental tenet of capital sentencing: mercy. *See Simmons v. State*, 207 So. 3d 860, 867 (Fla. 2016) (per curiam) (vacating death sentence under *Hurst* where four jurors may have "voted for life *** simply as an exercise of mercy"); *Henyard v. State*, 689 So. 2d 239, 249-250 (Fla. 1996) (recognizing that "a jury can constitutionally dispense mercy in case deserving of death penalty" and "is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors") (citing *Gregg v. Georgia*, 428 U.S. 153, 203 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

All of that raises a further constitutional problem: The Eighth Amendment requires a jury to

appreciate that its findings will be used to support a death sentence, and does not tolerate the effective elimination of the jury's role at the critical stage where the death penalty is considered.

"This Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" *Caldwell*, 472 U.S. at 329 (quoting *California v. Ramos*, 463 U.S. 992, 998-999 (1983)); *see also Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[T]his qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."). To that end, this Court has placed "many *** limits" on imposing capital punishment out of "concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." *Caldwell*, 472 U.S. at 329. That concern has led this Court not only to "invalidate[] procedural rules that tend[] to diminish the reliability of the sentencing determination" itself, but also to overturn "rules that diminish the reliability of the guilt determination" and "introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Beck v. Alabama*, 447 U.S. 625, 638, 643 (1980).

The "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case'" is met only when the sentence "rest[s] *** on a determination made by" a jury that "view[s] [its] task as the serious one of determining whether a specific human being should die at the hands of the State." *Caldwell*, 472 U.S. at 323, 329-330 (quoting *Woodson*, 428 U.S. at 305).

Simply put, "the jury must not be misled regarding the role it plays in the sentencing decision." *Romano v. Oklahoma*, 512 U.S. 1, 8 (1994). To require less runs the "unacceptable risk" that "'the death penalty [is] meted out arbitrarily or capriciously.'" *Caldwell*, 472 U.S. at 343 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Ramos*, 463 U.S. at 999). For absent a "capital sentencing jury recogniz[ing] the gravity of its task and proceed[ing] with the appropriate awareness of its truly awesome responsibility," "there are specific reasons to fear substantial unreliability." *Id.* at 330, 341 (majority opinion) (internal quotation marks omitted); *see Garcia v. State*, 492 So. 2d 360, 367 (Fla. 1986) (holding that "[i]t is appropriate to stress to the jury the seriousness which it should attach to its recommendation" because "[t]o do otherwise would be contrary to *Caldwell*").

Those reliability concerns are directly implicated in this case, where a jury unwittingly opened the door to the trial court's imposition of a death sentence. Although the jury that convicted Poole of crimes doubling as statutory aggravators did so at the *guilt* phase of the trial, the 11-1 jury—empaneled on remand following vacatur of Poole's initial death sentence on direct appeal—made no such finding at the *penalty* phase. That distinction matters. Under Florida's death-penalty statute, "the trial and sentencing phases are bifurcated." *Walsh v. State*, 418 So. 2d 1000, 1003 (Fla. 1982) (per curiam). If the jury finds the defendant guilty of a capital offense, "[t]he case then proceed[s] into the penalty phase." *Buford v. State*, 403 So. 2d 943, 946 (Fla. 1981). Only at that

point, in a "separate sentencing proceeding," is death considered. FLA. STAT. § 921.141(1).

That is why the Florida Supreme Court has found "no basis in support of [the] premise that a jury recommendation of a sentence is the same as a jury verdict as to guilt or innocence. Florida's death penalty law completely separates these two functions by establishing a bifurcated trial system." *Cannady v. State*, 427 So. 2d 723, 729-730 (Fla. 1983) (per curiam). Indeed, in Poole's case, the guilt-phase jury was instructed that "the death penalty may *become* an issue *** [i]f and only if the jury returns a verdict of guilty of first-degree murder"; the jury would then "reconvene for the purpose" of considering punishment; and "*at that hearing*, evidence of aggravating and mitigating circumstances w[ould] be presented." Trial Tr. 32 (Apr. 11, 2005) (emphases added).

In reality, however, the answer to whether aggravating circumstances existed was set in stone at the guilt phase. Unbeknownst to the jury that convicted Poole, its guilty verdict would be used to preserve Poole's death sentence in the face of a nonunanimous jury recommendation at the penalty phase (and regardless of its answer on the weighing issue). Even a 12-0 recommendation *against* death could not have prevented the trial court from imposing that sentence based on Poole's other convictions. Poole's death sentence thus rests on precisely what the Eighth Amendment prohibits: a determination made by a jury that did not "act with the due regard for the consequences of [its] decision." *Caldwell*, 472 U.S. at 330.

III. THE QUESTIONS PRESENTED ARE OF UTMOST IMPORTANCE

The significance of the questions presented are beyond cavil. *Hurst I* was the latest in a long line of cases in which this Court granted certiorari to review the constitutionality of Florida's capital-sentencing scheme. The Florida Supreme Court's subsequent decision to make *Hurst* relief retroactive to capital defendants whose sentences became final after *Ring*, *see Mosley*, 209 So. 3d 1248, allowed nearly 250 such defendants to seek relief from their unconstitutional death sentences. Counting Poole, Florida courts had vacated 148 such sentences under *Hurst* to date. *See Florida Death-Penalty Appeals Decided in Light of* Hurst, DEATH PENALTY INFO. CTR. (last updated Jan. 23, 2020), https://deathpenaltyinfo.org/stories/florida-death-penalty-appeals-decided-in-light-of-hurst.[5]

In receding from *Hurst II* and spurning *Hurst I*, the decision below not only reinstates Poole's death sentence but threatens to upend vacatur in many other cases. In addition to arguing that death sentences should be reinstated in pending postconviction proceedings, the State has sought emergency writs barring trial courts from conducting new penalty phases and directing them to consider motions to reinstate the death penalty—even though

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[5] Generally, post-*Ring* sentences where a jury rendered a nonunanimous jury recommendation of death (like Poole's)—of which there were 157 total—have been vacated. Post-*Ring* sentences where a jury rendered a unanimous jury recommendation of death have been deemed harmless error. *See, e.g.*, *Reynolds v. Florida*, 139 S. Ct. 27, 28 (2018) (statement of Breyer, J., respecting the denial of certiorari); *id.* at 32-36 (Sotomayor, J., dissenting from denial of certiorari).

the grant of *Hurst* relief became final upon conclusion of the Florida Supreme Court's review, *see, e.g.*, *State v. Okafor*, No. SC2020-323 (Fla. argued June 2, 2020), or because the State chose to forgo an appeal challenging *Hurst*, *see, e.g.*, *State v. Jackson*, No. SC2020-257 (Fla. argued June 2, 2020).

The consequences of the decision below have reverberated—and will continue to reverberate—through Florida's death-penalty system. This Court should grant certiorari to resolve once again—and for good—whether the scheme under which Poole and scores of others were sentenced to death passes constitutional muster.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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