IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-824

QUAWN M. FRANKLIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF FIFTH JUDICIAL CIRCUIT FOR LAKE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT REGARDING REFERENCES

This is an appeal of the circuit court's denial of Quawn M. Franklin's successive motion for postconviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851. References to the record of the direct appeal of the trial, judgment, and sentence in this case shall be referred to as "R" followed by the appropriate volume and page numbers. References to the postconviction record on appeal shall be referenced as "PC" followed by the appropriate volume and page numbers. References to the record on appeal regarding the successive motion for postconviction relief shall be referenced as SR followed by the appropriate page number.

REQUEST FOR ORAL ARGUMENT

Given the gravity of the case and the complexity of the issues raised herein, Franklin, through counsel, respectfully requests this Court grant oral argument.

STATEMENT OF THE CASE AND FACTS

I. Trial and Direct Appeal

On February 1, 2002, a grand jury returned an indictment for Franklin on one count of attempted armed robbery and one count of first-degree murder. R1/8-9. Following a jury trial on April 22 and 23, 2004, the jury returned a verdict of guilty on all counts. R11/1140-41. 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 Franklin'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.

Franklin's convictions and sentences were affirmed on direct appeal. *Franklin v. State*, 965 So. 2d 79 (Fla. 2007).

II. <u>Postconviction</u>

Postconviction counsel filed a Motion to Vacate Judgment and Sentence, along with a separate motion alleging that Franklin is presently incompetent to proceed in capital collateral proceedings, on November 6, 2008. PC3/437-570. The circuit court ultimately found Franklin competent to proceed and denied all postconviction relief, which was affirmed by this Court. *Franklin v. State*, 137 So. 3d 969 (Fla. 2014). On June 6, 2014, Franklin 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.

On January 9, 2017, Franklin filed a Successive Motion to Vacate Death Sentence pursuant to Florida Rule of Criminal Procedure 3.851 on the basis of the new Florida law arising from *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), *Hurst v. Florida*, 136 S.Ct. 616 (U.S. 2016), the enactment of Chapter 2016-13, *Perry v. State*, 210 So. 3d 630 (Fla. 2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). SR/1-33. The circuit court held a case management conference on March 16, 2017. SR/229-42. The circuit court issued a Final Order Denying Defendant's Successive Motion to Vacate Death Sentence on

March 31, 2017. SR/197-202. A Notice of Appeal was timely filed on April 28, 2017. SR/203-05. On June 20, 2017, this 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)."

JURISDICTION

This Court has jurisdiction. Art. V, § 3(b)(1) Fla. Const.

STANDARD OF REVIEW

The lower court summarily denied Franklin's motion without conducting an evidentiary hearing. Franklin's factual assertions should be accepted as true and the review of this Court should be *de novo*. *See Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999); *see Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999).

SUMMARY OF ARGUMENT

Franklin was sentenced under a statute that was declared unconstitutional in *Hurst v. Florida*, and his death sentence stands in violation of the Sixth and Eighth Amendments to the United States Constitution. It is uncontroverted that *Hurst v. Florida* applies retroactively to Franklin because his judgment and sentence became final after *Ring v. Arizona* was issued. The circuit court erred in finding that the

Hurst error was harmless beyond a reasonable doubt in this case. Although the jury returned a 12-0 recommendation in favor of death and unanimously agreed that four aggravating factors were present, the jury did not return any findings of fact regarding whether the aggravating circumstances outweighed the mitigating circumstances, the jury was not instructed that its death recommendation had to be unanimous, the jury was not told that each individual juror carried responsibility for whether a death sentence was authorized or a life sentence was mandated, and the jurors did not know that they each were authorized to preclude a death sentence simply to be merciful.

ARGUMENT I
THE CIRCUIT COURT ERRED IN DENYING FRANKLIN'S CLAIM THAT HIS DEATH SENTENCE IS UNCONSTITUTIONAL UNDER *HURST V. FLORIDA*.

In Claim 1 of his Successive Motion to Vacate Death Sentence, Franklin argued that his death sentence is unconstitutional under *Hurst v. Florida*. SR/12-17. The circuit court denied relief, finding that "the *Hurst* error was harmless beyond a reasonable doubt as the jury returned an interrogatory verdict unanimously agreeing that each of the four aggravating factors were present and unanimously recommending that death was the appropriate sentence given the substantial aggravation and the slight mitigation presented." SR200. The circuit

court's order should not be affirmed based on this Court's precedent in *Hurst*, 202 So. 3d 40, *Davis*, 207 So. 3d 142, and *Mosley*, 209 So. 3d 1248.

In Florida, the maximum punishment for first-degree murder on the basis of a conviction alone is life imprisonment. The Sixth Amendment requires a judge to make the findings necessary to differentiate first-degree murder from first-degree murder for which a defendant may be sentenced to death. *See Hurst*, 136 S. Ct. at 621 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) and *Ring v. Arizona*, 536 U.S. 584, 597 (2002)). In other words, the findings justifying a death sentence are an element of the crime of death-eligible first-degree murder, and as such, they must be found by a jury beyond a reasonable doubt. *Id.* The U.S. Supreme Court's decision in *Hurst* ruled that Florida's capital sentencing scheme was unconstitutional under the Sixth Amendment in light of *Ring*, a decision that it reached 14 years prior. Specifically, the Court held, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.* at 619. In *Hurst v. Florida*, the Supreme Court noted that former Fla. Stat. § 921.141(3) required the trial court *alone* to find "'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" 136 S. Ct. at 622 (emphasis in original). It furthermore specifically rejected the

State's argument that the jury's advisory recommendation could serve as the required factual finding. *Id.*

On October 14, 2016, this Court issued its decisions in *Hurst*, 202 So. 3d 40 and *Perry*, 210 So. 3d 630. This Court in *Hurst* held as follows:

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must 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 equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.

Hurst, 202 So. 3d at 57-58. Moreover, this Court held in *Perry* that the newly enacted death penalty statute in light of *Hurst v. Florida* was unconstitutional "because it requires that only ten jurors recommend death as opposed to the constitutionally required unanimous, twelve-member jury." *Perry*, 210 So. 3d at 640. Accordingly, the jury must unanimously find that sufficient aggravators exist to justify a death sentence and that the aggravators outweigh the mitigating factors in the case. Finally, if a unanimous death recommendation is not returned, a death sentence cannot be

imposed. Thus, a life sentence is mandated if one or more jurors vote in favor of a life sentence due to a desire to be merciful even if the jury unanimously determined that sufficient aggravators existed and that they outweigh the mitigators. *See Perry*, 210 So. 3d at 634.

Thereafter, on December 22, 2016, this 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*. 209 So. 3d at 1276-83. Under *Mosley*, Franklin, 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. SR/199. Therefore, this Court in accordance with *Hurst*, must conduct a harmless error analysis. *See Hurst*, 202 So. 3d 40.

In *Hurst*, this 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*, 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 Franklin's case. The circuit court, in finding that the error in this case was harmless, relied on this Court's decision in *Davis* in its finding that the *Hurst* error in this case was harmless beyond a reasonable doubt. SR/200; *Davis,* 207 So. 3d at 173-75 (finding *Hurst* error harmless given jury's unanimous death recommendation). Although Franklin's jury recommended death by a vote of 12-0 and returned a special interrogatory verdict form unanimously finding four aggravating factors, this does 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 this Court explained in *Hurst*, all of the findings necessary for the imposition of a death sentence must be unanimously found by the jury. *See Hurst*, 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). Franklin's penalty phase jury did not return a verdict making any additional findings of fact, so we have

no way of knowing if the jurors unanimously found the aggravators sufficient for death, or if the jurors unanimously found that the aggravating circumstances outweighed the mitigating circumstances.

It is clear from the circuit court's order that the jury's unanimous death recommendation was the driving force behind its affirmance of Franklin's death sentence. However, it is a clear violation of the Fifth, Sixth and Eighth Amendments to the U.S. Constitution to rely on, or even consider, the original sentencing jury's advisory death recommendation as evidence that the *Hurst* error in this case is harmless. As this Court acknowledged on remand in *Hurst*, the determinations regarding the sufficiency of aggravators and the relative weight of aggravating and mitigating circumstances are Sixth Amendment factual findings. 202 So. 3d at 57. It necessarily follows that, to comply with the Constitution, each of these determinations must be made unanimously and beyond a reasonable doubt, pursuant to instructions that accurately communicate the finality of those findings. Because the jury's sentence recommendation in this case was advisory and, to the extent that it involved a resolution of disputed facts, did so pursuant to an unstated burden of proof, it did not serve any Sixth Amendment function. Therefore, the circuit court cannot treat the recommendation as a fact-finding, nor can it assume or speculate that the jury, if properly instructed, would have reached the same conclusion.

In addition, because the Sixth Amendment also necessitates that the sufficiency of aggravating circumstances and the relative weight of aggravating and mitigating circumstances be proven to a jury, those facts must, like the existence of aggravating circumstances, be established beyond a reasonable doubt. The Fifth Amendment's due process guarantee requires that, in all criminal prosecutions, the government prove each element of the crime beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). This requirement attaches to any factual finding necessitated by the Sixth Amendment. As the U.S. Supreme Court noted in *Sullivan v. Louisiana*,

> it is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

508 U.S. 275, 278 (1993).

The *Apprendi* line of cases clearly incorporate this requirement, as the Supreme Court noted time and time again that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490; *see U.S. v. Booker*, 543 U.S. 220, 244 (2005) ("Any fact (other than a prior conviction) which

is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."); *see Cunningham v. California*, 549 U.S. 270, 273 (2007) ("[f]actfinding to elevate a sentence …, this Court's decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard"); *see also Rauf v. State*, 145 A. 3d 430, 434, 488 (Del. 2016) (weighing determination in a death penalty case must be made by the jury, beyond a reasonable doubt).

This Court's conclusion that jury findings regarding the sufficiency of aggravating circumstances and the relative weight of aggravating and mitigating circumstances fall under the Sixth Amendment's umbrella necessarily requires that these determinations must be made beyond a reasonable doubt. Any jury determination of these facts in the absence of the stringent standard of proof guaranteed by the Fifth Amendment, as occurred during the original penalty phase below, is insufficient to meet constitutional muster.

Neither can the Court perform harmless error analysis on jury findings or verdicts that are based on an improper (or unspecified) standard of proof. Federal precedent requires that, before a reviewing court may apply harmless-error analysis, there must be a valid jury verdict, founded in proof beyond a reasonable doubt, in

the original proceedings. *See Sullivan*, 508 U.S. at 279-80. A valid jury verdict is necessary because, to determine harmlessness, the appellate court must consider "not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Id*. at 279. Where there is no valid jury verdict for the Court to consider, this analysis is impossible. *See id*.

Because there was no Sixth Amendment jury verdict here, *see Sullivan*, 508 U.S. at 278 ("the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"), the circuit court cannot rely on the advisory recommendation, even when unanimous, to determine harmlessness. This practice necessarily involves an unconstitutional inquiry:

> The [proper] inquiry … is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Id. By concluding that the jury's sentencing recommendation, when unanimous, represents the "verdict" that would have been reached were there no Sixth Amendment errors, the circuit court makes this same mistake.

For a court to conclude that the jury would have unanimously found that there

were sufficient aggravating circumstances that outweighed the mitigating circumstances would constitute speculation and substituting its judgment for that of the jury. *See Davis*, 207 So. 3d at 175-77 (Perry, J., dissenting); *see King v. State*, 211 So. 3d 866, 893-94 (Fla. 2017) (Perry, J., dissenting). Because Franklin's jury did not make definitive findings as to all of the facts necessary to make him eligible for death, the circuit court "cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst*, 136 S.Ct. at 622.

Furthermore, there is doubt that a properly instructed jury would have unanimously returned a death recommendation. In the wake of *Hurst v. Florida* and the resulting new Florida law, the jury under *Caldwell v. Mississippi*, 472 U.S. 320 (1985) must be correctly instructed as to its sentencing responsibility. This means that post-*Hurst* the individual jurors must know that they each will bear the responsibility for a death sentencing resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. *See Perry*, 210 So. 3d 630. As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. Indeed because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury's

unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulting death sentence to be vacated. *See Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). The probability that at least one juror would not join a death recommendation if a resentencing were now conducted is likely given that the proper *Caldwell* instructions would be required. The likelihood of one or more jurors voting for a life sentence increases when a jury is told a death sentence could only be authorized if the jury returned a unanimous death recommendation and that each juror had the ability to preclude a death sentence simply by refusing to agree to a death recommendation. *See Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.").

Consideration must also be given to the fact that trial counsel would have tried the case differently under *Hurst v. Florida* and the resulting new Florida law. As Franklin argued in postconviction, trial counsel provided ineffective assistance of counsel by failing to file a motion for change of venue and for failing to conduct an adequate voir dire, especially in light of the extensive pre-trial publicity surrounding

the three cases in which Franklin was charged. There is a reasonable probability that this contributed to the jury returning a 12-0 recommendation.

Franklin's death sentence stands in violation of the Sixth Amendment, *Hurst v. Florida*, *Perry v. State*, and *Hurst v. State*. His jury did not return any findings of fact regarding whether the aggravating circumstances outweighed the mitigating circumstances, his jury was not instructed that its death recommendation had to be unanimous, the jury was not told that each individual juror carried responsibility for whether a death sentence was authorized or a life sentence was mandated, and the jurors did not know that they each were authorized to preclude a death sentence simply to be merciful. The *Hurst* error in Franklin's case warrants relief. The State cannot show the error to be harmless beyond a reasonable doubt that no properly instructed juror would have refused to vote in favor of a death recommendation. Although the jury unanimously found four aggravating factors in this case, the mitigation presented during trial and postconviction is compelling, Franklin suffered trauma and loss during his childhood and adolescence, the lack of a father figure, the illness of his mother, hearing deficits, being identified as emotionally disturbed and emotionally handicapped in his school records, low intellectual functioning, lack of a sense of self, and the development of a delusional disorder that eventually led to hallucinations and a series of bizarre behaviors after his arrest,

much of which his penalty phase jury never heard. Because the State cannot meet its burden here, a new penalty phase trial is required.

ARGUMENT II
THE CIRCUIT COURT ERRED IN DENYING FRANKLIN'S CLAIM THAT HIS DEATH SENTENCE STANDS IN VIOLATION OF THE EIGHTH AMENDMENT UNDER *HURST V. FLORIDA* AND SHOULD BE VACATED.

In Claim 2 of his Successive Motion to Vacate Death Sentence, Franklin argued that his death sentence stands in violation of the Eighth Amendment under *Hurst v. Florida* and should be vacated. SR/17-22. The circuit court denied Franklin's Successive Motion to Vacate Death Sentence without specifically addressing this claim. SR/197-202. The circuit court's order should not be affirmed based on this Court's precedent in *Hurst*, 202 So. 3d 40, *Davis*, 207 So. 3d 142, and *Mosley*, 209 So. 3d 1248.

In *Hurst*, this Court explained that, in accordance with Florida's capital sentencing scheme, the jury has a "right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances." *Hurst*, 202 So. 3d at 58, citing *Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000). In other words, before a judge can impose the death penalty, the jury must be told it has the right to recommend a life sentence, even if the precedent factual findings are all made unanimously. This safeguard is to

allow jurors in capital cases to "exercise reasoned judgment in his or her vote as to a recommended sentence." *Hurst*, 202 So. 3d at 58.[1] Accord *Perry*, 210 So. 3d at 640. ("It has long been true that a juror is not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances"). *See also Hurst*, 202 So. 3d at 58 ("Regardless of your findings . . . you are neither compelled nor required to recommend a sentence of death").

This Court further held in *Hurst* that there is an Eighth Amendment right to have a jury unanimously recommend a death sentence before a death sentence is permissible. *Hurst*, 202 So. 3d at 59 ("we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment."). This Court in *Hurst* explained:

> This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these

[1] The U.S. Supreme Court as far back as 1974 held that a capital sentence can constitutionally dispense mercy in a case that otherwise might warrant imposition of the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 203 (1976). In Florida prior to *Hurst*, it was the sentencing judge who had been given the authority to dispense mercy in a capital case. However, that authority has now been transferred to the jury under *Hurst v. State*.

constitutional requirements in the capital sentencing process.

Id. at 60. Thus, the Eighth Amendment's evolving standards of decency now require a unanimous death recommendation before a death sentence is permissible:

> Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion) (holding that the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

Id. at 60. In *Hurst*, this Court ruled that on the basis of the Eighth Amendment and on the basis of the Florida Constitution, the evolving standards of decency now requires jury "unanimity in a recommendation of death in order for death to be considered and imposed". *Id*. at 61.

But the jury must know and appreciate the significance of its verdict:

> In a capital case, the gravity of the proceeding and the concomitant juror responsibility weigh even more heavily, and it can be presumed that the penalty phase jurors will take special care to understand and follow the law.

Id. at 63. Indeed, under *Caldwell*, 472 U.S. 320, a unanimous jury verdict in favor of a death sentence violates the Eighth Amendment if the jury was not correctly instructed as to its sentencing responsibility. *Caldwell* held: "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." *Id*. 328-29. Jurors must feel the weight of their sentencing responsibility; they must know that if the defendant is ultimately executed it will be because no juror exercised her power to preclude a death sentence.

In *Caldwell*, the prosecutor responding to defense counsel's argument stated in his argument before the jury: "Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable." *Id*. at 325.[2] Because the jury's sense of responsibility was improperly diminished by this argument, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). *Caldwell* explained:

[2] In her concurrence, Justice O'Connor wrote: "In telling the jurors, 'your decision is not the final decision…[y]our job is reviewable,' the prosecutor sought to minimize the sentencing jury's role, by creating the mistaken impression that automatic appellate review of the jury's sentence would provide the authoritative determination of whether death was appropriate." *Caldwell*, 472 U.S. at 342-43.

"Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'" *Id*. at 331. This would certainly apply to the circumstances in Franklin's case when the jury was repeatedly reminded its penalty phase verdict was merely an advisory recommendation.

Jurors must feel the weight of their sentencing responsibility and know about their individual authority to preclude a death sentence. *See Blackwell v. State*, 79 So. 731, 736 (Fla. 1918) (prejudicial error found in "the remark of the assistant state attorney as to the existence of a Supreme Court to correct any error that might be made in the trial of the cause, in effect told the jury that it was proper matter for them to consider when they retired to make up their verdict. Calling this vividly to the attention of the jury tended to lessen their estimate of the weight of their responsibility, and cause them to shift it from their consciences to the Supreme Court."). Where the jurors' sense of responsibility for a death sentence is not explained or is diminished, a jury's unanimous verdict in favor of a death sentence violates the Eighth Amendment and the death sentence cannot stand. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing

decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.").

The U.S. Supreme Court in *Caldwell* found that diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."). If a bias in favor of a death recommendation increases when the jury's sense of responsibility is diminished, removing the basis for that bias increases the likelihood that one or more jurors will vote for a life sentence. The likelihood increases even more when the jury receives accurate instruction as to each juror's power and authority to dispense mercy and preclude a death sentence.

Franklin's jury was not advised of each jurors' authority to dispense mercy. The circumstances under which Franklin's jury returned its 12-0 death recommendation shows that it cannot now be viewed as a valid unanimous verdict or that the *Hurst* error was harmless without violating the Eighth Amendment. "Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the

defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'" *Caldwell*, 472 U.S. at 331. The advisory recommendation "does not meet the standard of reliability that the Eighth Amendment requires." *Id*. at 341.

This Court cannot rely on the jury's death recommendation in Franklin's case as showing either that he was not deprived of his Eighth Amendment right to require a unanimous jury's death recommendations or that the violation of the right was harmless. To do so would violate the Eighth Amendment because the advisory verdict was not returned in proceedings compliant with the Eighth Amendment. *Caldwell*, 472 U.S. at 332 ("The death sentence that would emerge from such a sentencing proceeding would simply not represent a decision that the State had demonstrated the appropriateness of the defendant's death.").

In *Hurst*, the U.S. Supreme Court warned against using what was an advisory verdict to conclude that the findings necessary to authorize the imposition of a death sentence had been made by the jury:

> "[T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Hurst, 136 S. Ct. at 622. An advisory verdict (premised upon inaccurate information

regarding the binding nature of a life recommendation, the juror's inability to be merciful based upon sympathy, and what aggravating factors could be found and weighed in the sentencing calculus) cannot be used as a substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004 (1983) ("Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed.").

CONCLUSION

Franklin's death sentence rests upon findings made by the trial court as a result of the procedure now held unconstitutional. The *Hurst* error in his case cannot be proven to be harmless beyond a reasonable doubt. This Court should reverse the lower court's order and grant him a new penalty phase trial.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this 10th day of July, 2017.

WE HEREBY FURTHER CERTIFY that a true copy of the foregoing was served via electronic mail to **Stephen D. Ake**, Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013, at stephen.ake@myfloridalegal.com and capapp@myfloridalegal.com on this 10th day of July, 2017.

We HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to QUAWN M. FRANKLIN, DOC #268130, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083, on this 10th day of July, 2017.

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CERTIFICATE OF COMPLIANCE

We hereby certify that a true copy of the foregoing Initial Brief of Appellant was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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