IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1863

LOWER COURT CASE NO. 01 CF 002956

PAUL GLEN EVERETT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

The issue presented in this appeal presents several distinct questions of law. Circuit court rulings of law are reviewed de novo

REQUEST FOR ORAL ARGUMENT

Mr. Everett has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Everett, through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF THE CASE[1]

On January 28, 2002, an indictment was filed in the circuit court for Bay County charging Everett with one count of first-degree murder and related offenses (Vol. I R. 5).

After a trial, the jury found Everett guilty as charged on all counts (Vol. I R. 113). After further evidence, argument, and legal instruction, the jury unanimously recommended that the court sentence Everett to death (Vol. I R. 131). On January 9, 2003, the court sentenced Everett to death (Vol. I R. 165).

On appeal, this Court affirmed Everett's convictions and sentences. Everett v. State, 893 So. 2d 1278 (Fla. 2004). The U.S. Supreme Court denied Everett's certiorari petition on April 18, 2005. Everett v. Florida, 544 U.S. 987 (2005).

On March 30, 2006, Everett filed a postconviction motion. Subsequent to an evidentiary hearing, the circuit court denied relief. Everett appealed and also filed a state habeas petition. On October 14, 2010, this Court denied all relief. Everett v. State, 54 So. 3d 464 (Fla. 2010).

On March 21, 2011, Everett instituted his federal habeas corpus proceedings. On March 28, 2014, the federal district court denied Everett's petition for writ of habeas corpus. Everett v. Sec'y, Fla. Dep't of Corrs., 2014 WL 11350293. On February 27, 2015, the 11th Circuit affirmed. Everett v. Sec'y, Fla. Dep't of Corrs., 779 F.3d 1212 (11th Cir. 2015). The U.S. Supreme Court

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[1]The following will be utilized to cite to the record: "Vol. __ R. _." - record on direct appeal; "PC-R. _." - record on postconviction appeal; "PC-R2. __." - record on successive postconviction appeal.

denied certiorari on January 11, 2016. Everett v. Sec'y, Fla. Dep't of Corrs., 136 S.Ct. 795 (2016).

On January 11, 2017, Everett filed a successive motion to vacate his death sentence (PC-R2. 15-40). On September 18, 2017, the motion was denied (PC-R2. 121-36). Everett appealed.

STATEMENT OF RELEVANT FACTS

Shortly after the State filed its Notice of Intent to Seek the Death Penalty, Everett filed several motions concerning Florida Statute § 921.141 and the standard jury instructions. Everett specifically argued that the instruction describing the jury's role as advisory was unconstitutional (Vol. I R. 52-3). Everett also argued that such instructions violate Caldwell v. Mississippi, 472 U.S. 320 (1985) (Id.). In addition, Everett argued that the jury was required to make all of the requisite fact findings subjecting him to a death sentence unanimously (Vol. 1 R. 54-5). The trial court denied the motions (Vol. III R. 229; see also Vol. VIII, R. 333-6).

During voir dire, the State repeatedly referred to the jury's determination as a "recommendation" and/or told the jury that it would simply "recommend" a sentence (Vol. III R. 256, 258, 260, 261, 262, 263, 264, 266, 267, 268, 270, 271, 327, 328, 329, 331, 332, 334, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 387, 416, 417, 418). Indeed, the State's characterization of the jury's recommendation of a death sentence occurred no less than 75 times during voir dire.

At the inception of the penalty phase, the trial court instructed the jury that "[t]he final decision as to what

punishment shall be imposed rests solely with the judge of this court; however, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the Defendant." (Vol. IV R. 462).

During the State's closing argument to the jury, the State urged that the jury "[h]ave the courage to speak the truth" and recommend a death sentence (Vol. IV R. 489).

The jury was instructed on three aggravating factors – the crime was committed while Everett was previously convicted of a felony and was under sentence of imprisonment or on felony probation; the crime was committed while Everett was engaged in the commission of a sexual battery or a burglary; and that the crime was especially heinous, atrocious or cruel.

And shortly before deliberations began, Everett's jury was instructed:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings.

(Vol IV, R. 510). Everett's jury recommended a sentence of death by a vote of 12-0 (Vol. I R. 131).

The trial court sentenced Everett to death finding the three aggravating circumstances upon which the jury had been

instructed. The trial court also found four statutory mitigators – Everett's age; that the crime was committed while Everett was under the influence of extreme mental or emotional disturbance; that Everett has no significant history of prior criminal activity; and Everett's background and drug use. *See* Vol. I R. 152-65. The trial court also found several non-statutory mitigators: Everett's remorse, his good conduct in custody, the alternative punishment of life imprisonment, and his confession.

SUMMARY OF THE ARGUMENT

1. Mr. Everett is being denied due process and equal protection because this Court has restricted his arguments on appeal.

2. Mr. Everett's sentence violates the Sixth Amendment and the State cannot show that there is no reasonable possibility that the error contributed to his death sentence.

3. Mr. Everett's death sentence violates the U.S. Constitution because his jury did not unanimously find the requisite elements that were necessary in finding him guilty of capital first-degree murder and making him eligible for a death sentence.

4. At Mr. Everett's capital trial, the jury instructions, prosecutor's comments and argument minimized the role of the jury and cause his death sentence to be unreliable.

5. Mr. Everett's previously adjudicated Strickland claims must be re-evaluated in light of Hurst v. State and the new sentencing statute.

ARGUMENT

ARGUMENT I

MR. EVERETT IS BEING DENIED DUE PROCESS AND EQUAL PROTECTION UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS.

After filing his notice of appeal, on December 6, 2017, this Court entered an order stating:

> The parties in the above case are directed 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). Parties may include a brief statement to preserve arguments as to the merits of the previously decided cases, as deemed necessary, without additional argument.
>
> Appellant's initial brief, which is not to exceed twenty-five pages, is to be filed by December 26, 2017. Appellee's answer brief, which shall not exceed fifteen pages, shall be filed ten days after filing of appellant's initial brief. Appellant's reply brief, which shall not exceed ten pages, shall be filed five days after filing of Appellee's answer brief.

However, Everett submits that his appeal is not one subject to this Court's discretionary jurisdiction. See Fla. R. App. Pro. 9.030(a)(2). He has a substantive right to appeal the denial of a successive Rule 3.851 motion. See Fla. Const. Art. V, § 3(b)(1); Fla. Stat. § 924.066 (2016). This Court "**shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal**." Fla. R. App. Pro. 9.140(i)(emphasis added). Defining and restricting Everett's arguments and severely curtailing the page limitation means the appeal is not of right as the Florida Constitution requires.[2] The December 6th order

[2]Everett's substantive right to appeal the denial of his Rule 3.851 motion is protected by the Due Process and Equal Protection Clauses. See Evitts v. Lucey, 469 U.S. 387, 393 (1985); Lane v. Brown, 372 U.S. 477, 484-85 (1963).

violates Everett's due process and equal protection rights.

Individualized appellate review in each capital appeal, whether in the course of direct or collateral proceedings, is mandated by the Florida Constitution. That individualized review is necessary to insure Florida's capital sentencing scheme complies with the Eighth Amendment. See Proffitt v. Florida, 428 U.S. 242, 258 (1976)("The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.").

On the basis of the Florida Constitution, Everett objects to the defining and restricting of his arguments, as well as the severely shortened page limitation. He also objects on the basis of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and on the basis of the Eighth Amendment.

This Court should allow Everett an opportunity to fully present his arguments before this Court.

ARGUMENT II

MR. EVERETT'S DEATH SENTENCE VIOLATES THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Everett is entitled to relief under Hurst v. Florida, 136 S.Ct. 616 (2016). In Hurst v. Florida, the U.S. Supreme Court declared Florida's capital sentencing scheme unconstitutional.

On December 22, 2016, this Court held that Hurst v. Florida was retroactive. Mosley v. State, 209 So. 3d 1248, 1280 (Fla. 2016). Everett, like Mosley, is entitled to the benefit of Hurst v. Florida, as his conviction and death sentence became final on April 18, 2005. Everett v. Florida, 544 U.S. 987 (2005).

Thus, the only issue is whether the error that occurred is harmless. In this regard, this Court has held:

> Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. State, 753 So.2d 9, 20 (Fla.2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," [State v.] DiGuilio, 491 So.2d [1129,] 1137 [Fla.1986], and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a Hurst v. Florida error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:
>
> > The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.
>
> DiGuilio, 491 So.2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." Id.

Hurst v. State, 202 So. 3d 40, 68 (Fla. 2016). In other words, the State must prove beyond a reasonable doubt that the jury's failure to unanimously find not only the existence of each aggravating factor, that the aggravating factors are sufficient, and that the aggravating factors outweigh the mitigating circumstances had no effect on the death recommendations. The State must also show beyond a reasonable doubt that no properly instructed juror would have dispensed mercy to Everett by voting for a life sentence. All of these considerations must be factored into any evaluation of the reliability of Everett's death

sentence and the likely outcome if a resentencing were conducted in conformity with Florida's new capital sentencing procedure. Id. at 57. This Court has held that such a finding will occur only in "rare" cases. King v. State, 211 So. 3d 866, 892 (Fla. 2017).

The circuit court held that here the error was harmless because though the trial court found a great deal of mitigation, it also determined that each aggravator individually outweighed the mitigation (PC-R2. 123). The circuit court also relied on the jury's unanimous recommendation for death, suggesting that that factor was dispositive that any error was harmless, according to this Court (PC-R2. 123-4).

As to the first issue, the flaw in the circuit court's ruling is that it was the trial court and not the jury that made the particular finding about each aggravator. Clearly, Everett presented abundant mitigation, including evidence of four statutory mitigators and several non-statutory mitigators. Certainly, even a single juror may have found the mitigation, while not outweighing the aggravating factors, significant enough to render a verdict in favor of life. However, pursuant to Hurst v. Florida, the jury simply did not know or understand its role in sentencing Everett to death, including the unanimous findings it was required to make. The jury instructions were faulty and misleading. See Caldwell v. Mississippi, 472 U.S. 320 (1985). In Everett's case, the State simply cannot demonstrate no reasonable possibility that the error affected the sentence.

Further, the fact that the jury unanimously recommended a

death sentence is not dispositive of the harmless error issue. Indeed, in Wood v. State, this Court found that the State could not prove the harmlessness of the Hurst error despite the fact that the jury had returned a unanimous death recommendation. 209 So. 3d 1217, 1234 (Fla. 2017). Moreover, in reviewing the cases in which this Court has found that the State met its burden of showing harmless error, those cases are distinct from the facts and circumstances surrounding the jury's recommendation in Everett's case.

First, when this Court found harmless error in Davis v. State, 207 So. 3d 142, 175 (Fla. 2016), the Court placed significant emphasis on the instructions the jury was provided:

> From these instructions, we can conclude that the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendations. Further supporting our conclusion that any Hurst v. Florida error here was harmless are the egregious facts of this case—Davis set two women on fire, one of whom was pregnant, during an armed robbery, and shot in the face a Good Samaritan who was responding to the scene. The evidence in support of the six aggravating circumstances found as to both victims was significant and essentially uncontroverted.".

See also King v. State, 211 So. 3d 866, 891 (Fla. 2017)("From these instructions, we can further conclude that the jury unanimously made the requisite factual findings to support a death sentence before it returned the unanimous recommendations.").

However, the instructions provided in Davis and King differed critically from the instruction provided in Everett's case. In Everett's case, the jury was instructed:

You are instructed that this evidence when considered with

> the evidence you have already heard is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

(PC-R2. Vol. IV R. 463). By contrast, in Davis, the jury was instructed:

> If ... you determine that no aggravating circumstances are found to exist, or that the mitigating circumstances outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are not sufficient, you must recommend imposition of a sentence of life in prison without the possibility of parole rather than a sentence of death.

Davis, 207 So. 3d at 175. And,

> ...If you determine by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence to be imposed.

Id.

> If, after weighing the aggravating and mitigating circumstances, you determine that at least one aggravating circumstance is found to exist and that the mitigating circumstances do not outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole. **Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death.**

Id. (emphasis added); see also King, 211 So. 3d at 890-1; Truehill v. State, 211 So. 3d 930, 955-6 (Fla. 2017)(discussing the instructions to the jury, which included: "If ... you determine that no aggravating circumstances are found to exist, or that the mitigating circumstances outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the

aggravating factors alone are not sufficient, you must recommend imposition of a sentence of life in prison without the possibility of parole rather than a sentence of death."). Thus, the instructions in Davis, King and Truehill were far more compliant with Hurst v. State than the instructions provided in Everett's case.

In addition, a glaring difference is that unlike Davis' jury, Everett's jury was not instructed that "it was not required to recommend death even if the aggravators outweighed the mitigators." Id. This distinction is critical because it informed Davis' jury that it had the power to reject a death recommendation irrespective of finding the other facts necessary to impose a death sentence, thus giving this Court the confidence that not only did the jury unanimously find the facts necessary to impose death but also the ability to conclude that no juror had determined to recommend mercy to Davis. The mercy instruction has nothing to do with whether the jury ultimately makes a unanimous finding on the facts necessary to impose death; rather, its effect is to give the jurors the ability to do the exact opposite. That is, it gives individual jurors the power to reject a death sentence by extending mercy to the defendant. Everett's jury was not given this instruction.

As this Court observed in Hurst v. State, each Florida juror in a capital case has the "right to recommend a sentence of life even if [he or she] finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances." Hurst v. State, 202 So. 3d 40, 57-58 (Fla. 2016).

Everett's jury heard a very different and deficient instruction than the juries in Davis and King. Everett's jury did not receive any instruction on its ability to dispense mercy. Because the State "bears an extremely heavy burden" in order to establish that this type of error is harmless beyond a reasonable doubt, and that it must demonstrate that "there is no reasonable probability that the error contributed to the sentence." Hurst, 202 So. 3d at 67-68 (emphasis added), Everett submits that this burden cannot be met under these circumstances where this Court is left to speculate whether one properly-instructed juror could well have decided to dispense mercy to Everett as it would have been that juror's right.

Perhaps most telling that the instructional distinctions between Everett, and Davis, King and Truehill, is the fact that in a recent capital trial from the same circuit as Everett, where the jury was instructed that is may exercise mercy even if it has unanimously found all of the facts necessary to sentence the defendant to death, the jury chose life. See PC-R2. 96-101 (in double homicide prosecution: jury finds by way of special verdict that the State proved beyond a reasonable doubt the existence of various aggravating circumstances as to each murder; that the aggravating factor or factors is or are sufficient to warrant a sentence of death; that the State proved beyond a reasonable doubt that the aggravating factor(s) outweighed the mitigating circumstances; but that one or more jurors find the appropriate sentence is life imprisonment without the possibility of parole).

Also, Everett's jury was improperly instructed on a myriad

of occasions, especially right before they began deliberating, that its role was merely advisory and that the jurors' responsibility was solely to render an advisory recommendation for the judge to consider:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings.

(Vol. IV R. 510). In order to rely for any reason on a jury's advisory recommendation (especially one by a 12-0 vote), the jury must be correctly instructed as to its sentencing responsibility under Caldwell v. Mississippi, 472 U.S. 320 (1985). This means that post-*Hurst* the individual jurors must know that each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence by simply voting against a death recommendation. As 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 improperly diminished in Caldwell, the U.S. 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. In Everett's case, it is likely (or the State cannot prove otherwise beyond a reasonable doubt) that at least one juror would not have joined a death recommendation given proper Caldwell-compliant instructions.

Everett's jury's sentencing responsibility was diminished in violation of Caldwell, it was also not instructed that it could dispense mercy irrespective of the aggravation and mitigation. Its recommendation was clearly skewed in favor of death; in other words there was another "thumb" on "death's side of the scale." Stringer v. Black, 503 U.S. 222, 232 (1992). Alone and in conjunction with the other factors that undermine any reliance on the jury vote here, this Court "may not assume it would have made no difference"

And, in Everett's case, the trial court found only three aggravating factors – the crime was committed while Everett was previously convicted of a felony and was under sentence of imprisonment or on felony probation[3]; the crime was committed while Everett was engaged in the commission of a sexual battery or a burglary; and that the crime was especially heinous, atrocious or cruel. And, the trial court found four statutory mitigators, but the jury was not instructed as to any of them – Everett's age; that the crime was committed while Everett was under the influence of extreme mental or emotional disturbance;

[3]Everett challenged the aggravator that he was previously convicted of a felony and was under sentence of imprisonment or on felony probation and certainly a juror could have agreed with his argument and found it inapplicable or given it no weight.

that Everett has no significant history of prior criminal activity; and Everett's background and drug use, as well as several non-statutory mitigating factors. See Vol. I R. 152-65. Thus, Everett's case is clearly not as aggravated as Davis, King and Truehill's cases, and Everett presented substantial mitigation. Therefore, the circuit court erred in concluding that the State had shown that despite the Hurst error, the jury would have unanimously found that Everett should be sentenced to death.

ARGUMENT III
MR. EVERETT'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

In Hurst v. State, 202 So. 3d 40 (Fla. 2016), this Court addressed the old version of § 921.141 and concluded:

> Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.

Hurst v. State, 202 So. 3d at 53. Because these were the statutorily defined facts necessary to increase the range of punishment to include death, proving them was necessary "**to essentially convict a defendant of capital murder**." These facts were thus elements of capital murder.[4] Id. at 53-54. In Hurst v. State, this Court said:

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[4]While this Court referred to the higher degree of murder as "capital murder," Everett herein refers to the higher degree of murder as capital first degree murder. While, the labeling is not constitutionally significant, what is significant is this Court's recognition that the elements set forth in the statute when combined with the elements of first degree murder are constituent parts of a new offense, a higher degree of murder.

> **[A]ll 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. See Brooks v. State, 762 So.2d 879, 902 (Fla.2000). As the relevant jury instruction states: "Regardless of your findings ... you are neither compelled nor required to recommend a sentence of death." Fla. Std. Jury Instr. (Crim.) 7.11 Penalty Proceedings—Capital Cases. Once these critical findings are made unanimously by the jury, each juror may then "exercis[e] reasoned judgment" in his or her vote as to a recommended sentence. See Henyard v. State, 689 So.2d 239, 249 (Fla.1996) (quoting Alvord v. State, 322 So.2d 533, 540 (Fla.1975)).

Id. at 57-58.

Hurst v. State identified the Eighth Amendment demand for heightened reliability in capital cases as reason why it was necessary for a unanimous jury to find the statutory elements to have been proven beyond a reasonable doubt:

> * * * 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 constitutional requirements in the capital sentencing process.

Hurst v. State, 202 So. 3d at 60. The holding in Hurst v. State, while resting on the Eighth Amendment, also implicated the U.S. Supreme Court's holding that elements must be proven "beyond a reasonable doubt" which was set forth in In re Winship, 397 U.S. 358 (1970):

> Winship presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307, 316 (1979).

Fiore v. White, 531 U.S. 225, 226 (2001), addressed the import of the Due Process Clause in this context:

> We granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review.

But before resolving the issue, the U.S. Supreme Court asked the Pennsylvania Supreme Court to explain the basis for one of its decisions regarding the elements of the statutorily defined criminal offense for which Fiore had been convicted.[5] Was the decision construing the criminal statute a new interpretation or was it a straightforward reading of the statute? Fiore v. White, 531 U.S. at 226. The Pennsylvania Supreme Court explained that its earlier "ruling merely clarified the plain language of the statute." Id. at 228. This meant that the ruling dated back to

[5]Fiore was convicted of operating a hazardous waste facility without a permit. While Fiore had a permit, the State had "argued that Fiore had deviated so dramatically from the permit's terms that he nonetheless had violated the statute." 531 U.S. at 227. On the State's theory, Mr. Fiore was convicted. After Fiore's unsuccessful appeals had concluded, the Pennsylvania Supreme Court in a different case held: "[t]he statute made it unlawful to operate a facility without a permit; one who deviated from his permit's terms was not a person without a permit; hence, a person who deviated from his permit's terms did not violate the statute." Id. at 227. After Fiore unsuccessfully challenged his conviction in state court collateral proceedings based on the Due Process Clause, he sought federal habeas relief. "The Court of Appeals believed that the Pennsylvania Supreme Court, in Scarpone's case, had announced a new rule of law and thus was inapplicable to Fiore's already final conviction." Id., at 227.

the statute's enactment. The U.S. Supreme Court explained:

> the question is simply whether Pennsylvania can, consistently with the Federal Due Process Clause, convict Fiore for conduct that its criminal statute, as properly interpreted, does not prohibit.

Id. at 228. Because the answer to this question was "no," the U.S. Supreme Court held the Due Process Clause was violated:

> This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge violate due process. We have held that **the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.**

Id. at 228-29. Because he had not been found guilty of an essential element, his conviction was not constitutionally valid.

Just as the Pennsylvania Supreme Court had done, this Court in Hurst v. State read the plain language in the statute and saw the statutorily necessary facts to convict of capital first degree murder. The statutorily necessary facts were elements:

> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these **findings necessary for the jury to essentially convict a defendant of capital murder** —thus allowing imposition of the death penalty—**are** also **elements** that must be found unanimously by the jury.

Hurst v. State, 202 So. 3d at 53-54 (emphasis added). These "elements" came from the statute and had always been there.[6] In the Scarpone decision discussed in Fiore, the Pennsylvania Supreme Court used the plain meaning of the statute. Thus, the decision had not established a new rule; it merely identified the

[6]In Everett's case, three of the elements identified in Hurst v. State were not found proven beyond a reasonable doubt and thus he could not have been convicted of capital first degree murder under the Due Process Clause as explained in Fiore.

substantive law in the statute. This is exactly what Hurst v. State did. The result must be the same as in Fiore. Without a jury finding each element of capital first degree murder proven beyond a reasonable doubt, collateral relief is required. This was not at issue in Hurst v. Florida.

The error that this Court assessed in Hurst v. State when it addressed harmlessness was the failure to instruct the jury that it had to unanimously find that the State had proven all of the necessary elements beyond a reasonable doubt:

> the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case.

Hurst v. State, 202 So. 3d at 68. This is different from the Sixth Amendment error identified within Hurst v. Florida.

In Apprendi v. New Jersey, 530 U.S. 466, 469 (2000), the issue before the U.S. Supreme Court was:

> whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt.

As it began its analysis, the Supreme Court explained:

> At stake in this case are constitutional protections of surpassing importance: **the proscription of any deprivation of liberty without "due process of law," Amdt. 14**, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt. 6. Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." United States v. Gaudin, 515 U.S. 506, 510 (1995); see also Sullivan v. Louisiana, 508 U.S. 275, 278 (1993); Winship, 397 U.S., at 364 ("**[T]he Due Process Clause protects the accused against conviction except upon proof beyond a**

> **reasonable doubt of every fact necessary to constitute the crime with which he is charged**").

Apprendi, 530 U.S. at 476-77 (emphasis added).[7] Apprendi noted the historical basis for the due process right:

> Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt. "The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.' C. McCormick, *Evidence* § 321, pp. 681-682 (1954); see also 9 J. Wigmore, *Evidence* § 2497 (3d ed.1940)." Winship, 397 U.S., at 361. We went on to explain that the reliance on the "reasonable doubt" standard among common-law jurisdictions " 'reflect[s] a profound judgment about the way in which law should be enforced and justice administered.' " Id., at 361-362 (quoting Duncan, 391 U.S., at 155).

Apprendi, 530 U.S. at 478. The Supreme Court observed that the "reasonable doubt" standard demanded by due process protects against erroneous convictions and government overreach:

> As we made clear in Winship, the "reasonable doubt" requirement "has [a] vital role in our criminal procedure for cogent reasons." 397 U.S., at 363, 90 S.Ct. 1068. Prosecution subjects the criminal defendant both to "the possibility that he may lose his liberty upon conviction and ... the certainty that he would be stigmatized by the conviction." Ibid. We thus require this, among other, procedural protections in order to "provid[e] concrete substance for the presumption of innocence," and **to reduce the risk of imposing such deprivations erroneously**. Ibid.

Apprendi, 530 U.S. at 484 (emphasis added).

In Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993), the

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[7]The decision in Apprendi was primarily about the Sixth Amendment right to trial by jury. Its focus was actually on the Due Process Clause and its requirement that the elements of a charged criminal offense must be proven beyond a reasonable doubt for a conviction to be valid. See also Ring v. Arizona, 536 U.S. 584, 588 (2002)("This case concerns the Sixth Amendment right to a jury trial in capital prosecutions.").

Supreme Court addressed the Due Process Clause requirement:

> What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, see, e.g., Patterson v. New York, 432 U.S. 197, 210 (1977); Leland v. Oregon, 343 U.S. 790, 795 (1952), and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements, see, e.g., In re Winship, 397 U.S. 358, 364 (1970); Cool v. United States, 409 U.S. 100, 104 (1972) (per curiam).

In Sullivan, the failure to instruct a jury on the "beyond a reasonable doubt" standard was held to be structural error.[8]

In Alleyne v. United States, 133 S. Ct. 2151, 2160 (2013), the Supreme Court noted: "Apprendi concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." Alleyne said:

> When a finding of fact alters the legally prescribed punishment so as to aggravate it, **the fact necessarily forms a constituent part of a new offense and must be submitted to the jury**. It is no answer to say that the defendant could have received the same sentence with or without that fact. It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical. One reason is that each crime has different elements and a defendant can be convicted only if the jury has found each element of the crime of conviction.

Alleyne, 133 S. Ct. at 2162 (emphasis added). The identification of the facts necessary to increase the authorized punishment was noted to be a matter of substantive law. Id. at 2161 ("Defining

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[8]Everett's jury was not instructed that the sufficiency of the aggravators and whether they outweighed the mitigating factors were matters to be proved by the State beyond a reasonable doubt. Under Sullivan, this was structural error. See Patterson v. New York, 432 U.S. 197, 215 (1977) ("a State must prove every ingredient of an offense beyond a reasonable doubt, and [ ] it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense").

facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment.").

The error actually analyzed for harmlessness in Hurst v. State was not the narrow Sixth Amendment error identified in Hurst v. Florida.[9] Instead, it has been the failure to instruct the jury of the elements of capital first degree murder and the necessity of a unanimous verdict finding that the State met its burden to prove each element beyond a reasonable doubt.

In Everett's case the jury was not instructed on the need to find three of the four elements of capital first degree murder beyond a reasonable doubt, i.e. 1) the aggravators were sufficient, 2) the aggravators outweighed the mitigators, and 3) there was no basis for a single juror to be merciful and vote to impose a life sentence. The failure to instruct on the need to find all elements of a criminal offense beyond a reasonable doubt violates the Due Process Clause and under Fiore must be applied to the date of the statute that plainly identifies the elements. The retroactivity of a new rule is not an issue because case law recognizing elements set out in the plain language of the

[9]Since jury unanimity was not at issue in Hurst v. Florida, this Court's consideration of whether the death recommendation was unanimous in the harmlessness assessment shows that the error evaluated was not the Hurst v. Florida error. Instead, it was the error in not requiring a unanimous death recommendation that was evaluated. What was left out of the analysis was the judge's findings of fact. That shows that as a result of Hurst v. State, the error in Florida was not judge fact finding in lieu of jury fact finding. The error being measured in the harmless error analysis is the error in permitting advisory recommendations on the basis of a majority vote, instead of juror unanimity.

substantive law must date to the statute's enactment and warrants collateral relief when the jury was not instructed it must find the element was proven beyond a reasonable doubt.

ARGUMENT IV
MR. EVERETT'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

In Hurst v. State, 202 So. 3d 40 (Fla. 2016), 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.

This Court further held in Hurst v. State that there is an Eighth Amendment right to have a jury unanimously recommend a death sentence before a death sentence is permissible. Hurst v. State, 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."). Thus, the Eighth Amendment's evolving standards of decency now requires 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.

But of course, 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 v. Mississippi, 472 U.S. 320 (1985), 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. 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: "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.[10]

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

[10]This would certainly apply to the circumstances in Everett's case when the jury was repeatedly reminded its penalty phase verdict was merely an advisory recommendation.

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 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. In this regard, the context of the prosecutor's improper argument in Caldwell is important. The prosecutor was responding to and trying to blunt defense counsel's assertion that the sentencing decision rested with the jury and that it

could chose mercy:

> I implore you to exercise your prerogative to spare the life of Bobby Caldwell.... I'm sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution.... You are the judges and you will have to decide his fate. It is an awesome responsibility, I know—an awesome responsibility.

Caldwell, 472 U.S. at 324.

Everett's jury was not advised of each jurors' authority to dispense mercy. Indeed, the instructions suggested otherwise.

The circumstances under which Everett'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. The advisory recommendation simply "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 Everett'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 v. Florida, the U.S. Supreme Court warned against

using what was an advisory verdict to conclude that the findings necessary to authorize the imposition 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 v. Florida, 136 S. Ct. at 622. An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation and the juror's inability to be merciful based upon sympathy) 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.").

Everett's death sentence stands in violation of the Eighth Amendment and the Florida Constitution.

ARGUMENT V

THE DECISION IN HURST V. STATE ALONG WITH THE RECENT ENACTMENT OF A REVISED SENTENCING STATUTE REQUIRE THIS COURT TO REVISIT MR. EVERETT'S PREVIOUSLY PRESENTED CLAIMS.

In Hurst v. State, this Court explained:

> Requiring a unanimous jury recommendation before death may be imposed, in accord with precepts of the Eighth Amendment and Florida's right to trial by jury, is a critical step toward ensuring that Florida will continue to have a constitutional and viable death penalty law, which is surely the intent of the Legislature. The requirement will dispel most, if not all, doubts about the future validity and long-term viability of the death penalty in Florida.

202 So. 3d at 62.

In Hildwin v. State, 141 So. 3d 1178, 1184 (Fla. 2014), this Court explained that when presented with qualifying newly discovered evidence:

> the postconviction court must consider the effect of the newly discovered evidence, in addition to all of the evidence that could be introduced at a new trial. Swafford v. State, 125 So.3d 760, 775-76 (Fla. 2013). In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a 'total picture' of the case.

In Swafford v. State, this Court indicated the evidence to be considered in evaluating whether a different outcome was probable included "evidence that [had been] previously excluded as procedurally barred or presented in another proceeding." 125 So. 3d 760, 775-76 (2013). The "standard focuses on the likely result that would occur during a new trial with all admissible evidence at the new trial being relevant to that analysis." Id. Put simply, here the analysis requires envisioning how a new resentencing would look with all of the evidence that would be available. Obviously, the law that would govern at a new trial must be part of the analysis. Here, the revised capital sentencing statute would apply at a resentencing and would require the jury to determine unanimously that sufficient aggravators exist and that they outweigh the mitigators. It would also require the jury to unanimously recommend a death sentence before the sentencing judge would be authorized to impose a death sentence. One single juror voting in favor of a life sentence would require the imposition of a life sentence.

Moreover, implicit in the justification for the new Florida law is an acknowledgment that death sentences imposed under the old capital sentencing scheme were (or are) less reliable. Before executions are carried out in a case in which the reliability of a death sentence is subpar, a re-evaluation of such a death sentence in light of the changes made by Hurst v. State is warranted. A previous rejection of a death sentenced defendant's Strickland claims should be re-evaluated in light of the new requirement that juries must unanimously make the necessary findings of fact and return a unanimous death recommendation before a death sentence is even a sentencing option. Certainly, the Strickland prejudice analysis requires a determination of whether confidence in the reliability of the outcome - the imposition of a death sentence - is undermined by the evidence the jury did not hear due to the Strickland violations. The new Florida law should be part of that evaluation.

When the proper Swafford/Hildwin analysis is conducted with proper consideration given to the new Florida law arising from Hurst v. State, it is in fact more likely than not that, armed with much more mitigating evidence and with Caldwell compliant instructions regarding each juror's sentencing responsibility, Everett would be able to persuade at least one juror to vote for a life sentence.

CONCLUSION

Mr. Everett urges this Court to reverse the circuit court's order and remand for the imposition of a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by electronic mail to Lisa Hopkins, Assistant Attorney General, on this 16th day of January, 2018.

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