IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 17-793

MICHAEL GORDON REYNOLDS

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Reynolds' successive motion for post-conviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

Citations shall be as follows: The record on appeal from Mr. Reynolds' trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. The post-conviction record on appeal shall be referred to as "PC" followed by the appropriate volume and page numbers. The record on appeal for the successive post-conviction record on appeal shall be referred to as "R" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Michael Reynolds has been sentenced to death. The resolution of issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Michael Reynolds, through counsel, respectfully requests this Court grant oral argument.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT i

REQUEST FOR ORAL ARGUMENT……...i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE..... 1

STANDARD OF REVIEW 3

ARGUMENT I: THE CIRCUIT COURT ERRED IN DENYING REYNOLDS' CLAIM THAT HIS DEATH SENTENCE IS UNCONSTITUTIONAL UNDER *HURST V. FLORIDA AND HURST V. STATE* 4

ARGUMENT II: THE CIRCUIT COURT ERRED IN DENYING REYNOLDS' CLAIM THAT HIS DEATH SENTENCE STANDS IN VIOLATION OF THE EIGHTH AMENDMENT UNDER *HURST V. FLORIDA, HURST V. STATE AND PERRY V. STATE* AND SHOULD BE VACATED…….17

CONCLUSION AND RELIEF SOUGHT 25

CERTIFICATE OF SERVICE 25

CERTIFICATE OF COMPLIANCE..... 26

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U.S. 466 (2000)……24

Arizona v. Fulminante, 499 U.S. 279 (1991)…...…….5

Blackwell v. State, 79So. 731 (Fla. 1918)……...18

Brecht v. Abrahamson, 507 U.S. 619 (1993)……...…….5

Caldwell v. Mississippi, 472 U.S. 320 (1985)…..…….Passim

California v. Ramos, 463 U.S. 992 (1983)…….23

Clemons v. Mississippi, 494 U.S. 738 (1990)…….……7

Cunningham v. California, 549 U.S. 270 (2007)……...11

Davis v. State, 207 So.3d 142 (Fla. 2016)……Passim

Hall v. State, 212 So.3d 1001 (Fla. 2017)……8

Huff v. State, 622 So.2d 982 (Fla. 1993)……..2

Hurst v. Florida, 136 S. Ct. 616 (2016)……..Passim

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

In re Standard Jury Instructions, 22 So.3d 17 (Fla. 2009)……20

In re Winship, 397 U.S. 358 (1970)……...10

Johnson v. State, 205 So.3d 1285 (Fla. 2016)……...14 & 15

Jones v. State, 212 So.3d 321 (Fla. 2017)……9

Jones v. United States, 526 U.S. 227 (1999)……..24

King v. State, 211 So. 3d 866 (Fla. 2017)……8

Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)……20

Mosley v. State, 209 So. 3d 1248 (Fla. 2016)…….4 & 5

Neder v. United States, 527 U.S. 1 (1999)…….5 & 6

Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973)……2

Perry v. State, 210 So.3d 630 (Fla. 2016)……Passim

Rauf v. State, 145 A.3d 430 (Del. 2016)…….11

Reynolds v. State, 934 So.2d 1128 (Fla. 2006)…….1

Reynolds v. Florida, 127 S.Ct. 943 (2007)……...1

Reynolds v. State, 99 So.3d 459 (Fla. 2012)…….2

Ring v. Arizona, 536 U.S. 584 (2002)……..Passim

Sochor v. State, 883 So.2d 766 (Fla. 2004)……...3 & 7

Spaziano v. State, 433 So.2d 508 (Fla.1983)……..22

Stephens v. State, 748 So.2d 1028 (Fla. 2000)…….3

Sullivan v. Louisiana, 508 U.S. 275 (1993)……...10

Truehill v. State, 211 So.3d 930 (Fla. 2017)……8

U.S. v. Booker, 543 U.S. 220 (2005)……..11

Witt v. State, 387 So.2d 922 (Fla. 1980)……...1, 5 & 4

Statutes/Rules

Florida Constitution, Article I, Section 15(a)……24

Fl. R. Crim. P. 3851…….2

Fl. Stat. § 921.141……3 & 4

Fl. Stat. Chapter 2016-13……3

STATEMENT OF THE CASE

Procedural History and Facts

In the 18th Judicial Circuit in and for Seminole County Mr. Reynolds was tried by a jury and found guilty of two counts of first degree murder, the lesser included offense of second degree murder, and burglary of a dwelling during which a battery was committed while armed.[1] Prior to the sentencing phase, Mr. Reynolds, in consultation with his attorneys, waived his right to present mitigating evidence. On May 9, 2003, a jury returned unanimous recommendations of death for both counts of first degree murder. Mr. Reynolds was ultimately sentenced to death on September 19, 2003.

Mr. Reynolds filed an appeal in this Court. In that appeal, Mr. Reynolds asserted that Florida's capital sentencing scheme violated his Sixth Amendment right pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002). The Florida Supreme Court affirmed the convictions and sentences of death, and denied Mr. Reynolds' *Ring* claim pursuant to Florida Supreme Court precedent. See *Reynolds v. State*, 934 So.2d 1128, 1160 (Fla. 2006). Mr. Reynolds then filed a petition for writ of certiorari to the United States Supreme Court that was denied on January 8, 2007. *Reynolds v. Florida*, 127 S.Ct. 943 (2007).

Mr. Reynolds then filed a motion for postconviction relief pursuant to Fl. R.

[1] *Reynolds v. State*, 934 So.2d 1128 (Fla. 2006).

Crim. P. 3851 on December 28, 2007, which raised 16 claims. On April 3, 2008, the postconviction court held a *Huff*[2] hearing and summarily denied six claims, and ruled that three claims did not require an evidentiary hearing. Due to a conflict, Capital Collateral Regional Counsel (CCRC) was discharged before the evidentiary hearing and Mr. Reynolds acted *pro se* for a short time before new counsel was appointed. After new counsel was appointed, Mr. Reynolds filed an amended motion to vacate his convictions and sentences, raising five additional claims. On August 10, 2009, after a second *Huff* hearing, three of the new claims were denied and the postconviction court granted a hearing on nine claims. The circuit court, after the evidentiary hearing, denied Mr. Reynolds' motion for postconviction relief.

Mr. Reynolds then appealed the denial of his motion for postconviction relief and filed a petition for writ of habeas corpus in this Court[3]. This Court affirmed the denial of the postconviction motion and denied the habeas petition on September 27, 2012. See *Reynolds v. State*, 99 So.3d 459 (Fla. 2012). Mr. Reynolds filed a petition for writ of habeas corpus in federal district court and that petition is still pending[4].

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[2] *Huff v. State*, 622 So.2d 982 (Fla. 1993).

[3]CCRC was re-appointed to represent Mr. Reynolds during the appeal and the attorney who handled the postconviction proceedings was allowed to withdraw.

[4] Counsel handling Mr. Reynolds' federal petition has filed a Motion to Determine and Appoint Counsel in order to pursue a successive motion in light of *Hurst*. This motion was ultimately denied. Mr. Reynolds requested a *Nelson* hearing against his current CCRC counsel, but this request was also denied. See R1:308, 326; see also *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973).

On January 12, 2016, *Hurst v. Florida*, 136 S. Ct. 616 (2016), issued. It declared Florida's capital sentencing scheme unconstitutional. On March 7, 2016, Chapter 2016-13 was enacted. It was the legislature's effort to rewrite § 921.141 in the wake of *Hurst* to cure the constitutional deficiencies. On October 14, 2016, this Court issued its decision in *Perry v. State*, 210 So.3d 630 (Fla. 2016), and declared the 10-2 provision contained in Chapter 2016-13 to be unconstitutional under *Hurst v. Florida*. In *Perry*, this Court concluded that the Sixth and the Eighth Amendments required a unanimous jury verdict recommending a death sentence before one could be imposed. Also, *Hurst v. State*[5] was decided. As a result of these changes in the law, Mr. Reynolds filed a successive motion to vacate his death sentences in the circuit court. After the case management conference which was held on March 2, 2017, the circuit court denied Mr. Reynolds' motion. R1:305-310. Mr. Reynolds filed this timely appeal.

STANDARD OF REVIEW

The standard of review is *de novo*. *Stephens v. State*, 748 So.2d 1028, 1032 (Fla. 2000). The lower court's legal rulings are reviewed *de novo* and deference is given to factual findings supported by competent and substantial evidence. *Sochor v.State*, 883 So.2d 766, 772 (Fla. 2004). In this matter, since the successive motion was summarily denied, Mr. Reynolds' factual assertions should be accepted as true.

[5] *Hurst v. State*, 202 So.3d 40 (Fla. 2016).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING REYNOLDS' CLAIM THAT HIS DEATH SENTENCE IS UNCONSTITUTIONAL UNDER *HURST V. FLORIDA* AND *HURST V. STATE*.

The Circuit Court denied Mr. Reynolds' motion to vacate solely on harmless error grounds. This was error. The Sixth Amendment right enunciated in *Hurst v. Florida*, and found applicable to Florida's capital sentencing scheme, guarantees that all facts that are statutorily necessary before a judge is authorized to impose a death sentence are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial. *Hurst v. Florida,* held that "Florida's capital sentencing scheme violates the Sixth Amendment . . . ." It invalidated Fla. Stat. §§ 921.141(2) and (3) as unconstitutional. *Hurst v. Florida* found Florida's sentencing scheme unconstitutional because, "Florida does not require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these facts." *Id*. at 622.

This Court held in *Mosley*[6] that *Hurst* was retroactive under both notions of fundamental fairness and under *Witt*[7]. See *Mosley v. State*, 209 So.3d 1248, 1276 (Fla. 2016). Mr. Reynolds' convictions and sentences became final on October 2, 2006. He raised and preserved a *Ring* claim at trial and on direct appeal. Thus, as

[6] *Mosley v. State*, 209 So.3d 1248 (Fla. 2016).
[7] *Witt v. State*, 387 So.2d 922 (Fla. 1980).

the circuit court properly found, under both *Witt* and notions of fundamental fairness as explained in *Mosley,* Mr. Reynolds' case is retroactive within the parameters set by this Court.

The procedure employed when Mr. Reynolds received two death sentences at his sentencing deprived him of his Sixth Amendment rights under *Hurst v. Florida*. In the wake of *Hurst v. Florida,* this Court has held that each juror is free to vote for a life sentence even if the requisite facts have been found by the jury unanimously. *Hurst v. State,* 202 So.3d at 57-58. Individual jurors may decide to exercise "mercy" and vote for a life sentence and in so doing preclude the imposition of a death sentence. *Perry v. State,* at 640.

In *Hurst v. Florida*, the United States Supreme Court did not rule that harmless error review actually applies to *Hurst* claims, observing that it "normally leaves it to the state courts to consider whether an error is harmless." 136 S. Ct. at 624 (citing *Neder v. United States*, 527 U.S 1, 25 (1999)). This Court should have concluded that *Hurst* errors are not capable of harmless error review. That is because the Sixth Amendment error identified in *Hurst* – divesting the capital jury of its constitutional fact-finding role at the penalty phase- represents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). *Hurst* errors are structural because they "infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 630

(1993). In other words, *Hurst* errors "deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist. *Neder*, 527 U.S. at 1.

Even if the *Hurst* error in Mr. Reynolds' case capable of harmless error review, the Sixth Amendment error under *Hurst v. Florida* cannot be proven by the State to be harmless beyond a reasonable doubt. In *Hurst v. State*, 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." 202 So.3d at 68. "[T]he harmless error test is to be rigorously applied, and the State bears an extremely heavy burden in cases involving constitutional error." *Id*. (internal citations and quotation marks omitted). The State must show 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 Mr. Reynolds by voting for a life sentence. The State cannot meet this burden in Mr. Reynolds' case. A harmless error analysis must be performed on a case-by-case basis, and there is no one-size fits all analysis; rather there must be a "detailed explanation based on the record" supporting a finding of

harmless error. *See Clemons v. Mississippi*, 494 U.S. 738, 753 (1990). *Accord Sochor v. Florida*, 504 U.S. 527, 540 (1992).

Under this Court's current jurisprudence, it is inferred from the jury's unanimous recommendation that the jury must have conducted unanimous fact-finding- within the meaning of the Sixth Amendment- as to each of the requirements for death sentence under Florida law. This inference is flawed and in the cases since *Hurst*, relating to unanimous death recommendations, this Court has engaged in speculation as to what the jury actually found. As this Court pointed out in *Hurst v. State*, "[b]ecause there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances." 202 So. 3d at 69. That is still true, even with a unanimous recommendation.

"[B]ecause here the jury vote was unanimous, the majority is comfortable substituting its weighing of the evidence to determine which aggravators each of the jurors found. Even though the jury unanimously recommended the death penalty, whether the jury unanimously found each aggravating factor remains unknown." *Davis v. State*, 207 So.3d 142, 175-76 (Fla. 2016) (Perry, J., concurring in part and dissenting in part). Further, "[b]ecause *Hurst* requires a jury, not a judge, to find

each fact necessary to impose a sentence of death, the error cannot be harmless where such factual determination was not made." *Hall v. State*, 212 So.3d 1001, 1036-37 (Fla. 2017) (Quince, J., concurring in part and dissenting in part); see also *Truehill v. State*, 211 So.3d 930, 961 (Fla. 2017) (Quince, J., concurring in part and dissenting in part). This Court cannot rely upon a legally meaningless recommendation by an advisory jury, *Hurst v. Florida*, 136 S.Ct. at 622 (Sixth Amendment cannot be satisfied by merely treating "an advisory recommendation by the jury as the necessary factfinding"), as making findings the Sixth Amendment requires a jury to make. To refuse to speculate as to the jury's fact-finding in non-unanimous verdict cases, but to accept the mere fact of unanimity, absent actual fact-finding, is arbitrary line drawing that has resulted in an arbitrary upholding of unconstitutional death sentences. Factually, comparing Mr. Reynolds' case and at least a dozen other *Hurst*-relief eligible defendants with 11-1 death recommendations with equally or more horrific facts demonstrates the unconstitutional result of this Court's interpretation of *Hurst* and its progeny.

Furthermore, this Court has indicated that a unanimous recommendation is not by itself dispositive of the harmless error analysis. In *King v. State*, the Court emphasized that the unanimous recommendation was not dispositive, but rather "*begins a foundation* for us to conclude beyond a reasonable doubt" that the *Hurst* error was harmless. *King v. State*, 211 So. 3d 866, 890 (Fla. 2017) (emphasis added).

Most recently, in *Jones v. State*, the Court explained that the instructions to the jury, in combination with the unanimous recommendation, allowed the Court to conclude that three of the required elements for a death sentence had been satisfied—sufficiency of the aggravation, weight of the aggravation relative to the mitigation, and the unanimous recommendation—but that an individualized examination of the specific aggravators found by the judge was still necessary to determine whether "the remaining element: that the jury unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt"—was satisfied. *Jones v. State*, 212 So.3d 321, 333-34 (Fla. 2017) (internal quotes omitted). This Court has made clear that in some unanimous-recommendation cases, the *Hurst* error may not be harmless. Mr. Reynolds' case is such a case.

Although Mr. Reynolds' penalty phase jury recommended death by a vote of 12 to 0 for two death sentences, the jury did not return verdicts making any findings of fact. The only documents returned by the jury were advisory recommendations that death sentences be imposed. Although these recommendations were unanimous, they reflect nothing about the jury's findings leading to the final vote. A final 12 to 0 recommendation does not necessarily mean that the other findings leading to the recommendation were unanimous. It could well mean that after the other findings were made by a majority vote and jurors in the minority acceded to the majority's findings. In fact, *Hurst v. State* made just this point:

> Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

202 So. 3d at 69. It simply cannot be said that all the jurors agreed as to each of the necessary findings for the imposition of the death penalty under Florida law. The unanimous votes could also mean the jurors did not attend to the gravity of their task, as they were told the judge could impose death regardless of the jury's recommendations.

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. *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; *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."); *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,

is insufficient to pass constitutional muster.

Additionally, Mr. Reynolds' jury was repeatedly told its recommendation was advisory only. See TR4:737-741. In order to treat a jury's advisory recommendation (especially two returned by unanimous votes) as binding, 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 the 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 simply by voting against a death recommendation. See *Perry v. State*. Mr. Reynolds' jury was told the exact opposite–that Mr. Reynolds could be sentenced to death regardless of the jury's recommendation, thus relieving jurors of individual responsibility. Mr. Reynolds' jurors were instructed that it was their "duty to advise the court as to what punishment should be imposed," but "*I may reject your recommendation.*" TR 4:737 (Emphasis added).

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.

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."). Mr. Reynolds' death sentences likewise violate the Eighth Amendment under *Caldwell*, which will be discussed in further detail below.

This Court has addressed whether or not error under *Hurst v. Florida* is harmless in recent cases. In *Hurst v. State*, this Court concluded that although "[t]he evidence of the circumstances surrounding this murder can be considered overwhelming and essentially uncontroverted," "the harmless error test is not limited to consideration of only the evidence of aggravation, and it is not an 'overwhelming evidence' test." *Hurst* at 69. This Court found that "the evidence of mitigation was extensive and compelling" but, absent an interrogatory verdict, it could not "say with any certainty how the jury viewed that mitigation." *Id*. However, in light of the mitigation and the jury's 7 to 5 death recommendation, the court could not "find beyond a reasonable doubt that no rational jury, as the trier of fact, would determine that the mitigation was 'sufficiently substantial' to call for a life sentence." *Id*. (quoting *State v. Ring*, 65 P.3d 915, 946 (Ariz. 2003)).

In *Davis v. State*, 207 So.3d 142, 174 (Fla. 2016), where the jury recommended two death sentences by 12 to 0 votes, this Court found the *Hurst* error harmless because the unanimous jury recommendations "allow us to conclude beyond a

reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." This Court based its conclusion in part on the jury instructions, including an instruction saying, "Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death." *Id.* at 175. This Court also relied upon "the egregious facts of this case" in which "Davis set two women on fire, one of who was pregnant, during an armed robbery, and shot in the face a Good Samaritan who was responding to the scene." *Id.* Thus, this Court concluded, "[t]he evidence in support of the six aggravating circumstances found as to both victims was significant and essentially uncontroverted." *Id*. Earlier in the opinion in a discussion of proportionality, this Court found, "This case is truly among the most aggravated and least mitigated." *Id*. at 172.

In *Johnson v. State*, 205 So.3d 1285 (Fla. 2016), the jury recommended three death sentences by votes of 11 to 1. There were three victims in *Johnson*, as there were here. The trial court found three aggravating factors in the deaths of victims Evans and Beasley, including the cold, calculated and premeditated aggravator, and two aggravating factors in the death of victim Burnham. *Id*. at 1288 & n.1. The trial court also found three statutory and ten nonstatutory mitigating circumstances. *Id*. at nn.2,3. The trial court gave most of the mitigating factors slight or very slight weight. *Id*. In addressing whether the *Hurst* error was harmless, this Court first

rejected "the State's contention that Johnson's contemporaneous convictions for other violent felonies insulate Johnson's death sentences from *Ring* and *Hurst v. Florida*." *Id*. at 1289. This Court found the case "obviously include[s] substantial aggravation," but the Court also found that "the evidence of mitigation was extensive and compelling." *Id* at 1290. Based on "a nonunanimous jury recommendation and a substantial volume of mitigation evidence," this Court could not conclude "'beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency.'" *Id*. (quoting *State v. Ring*, 65 P.3d 915, 946 (Ariz. 2003)).

Under these cases, the State cannot show beyond a reasonable doubt that the *Hurst* error in Mr. Reynolds' case was harmless. First, as this Court held in *Johnson*, Mr. Reynolds' contemporaneous convictions do not render the error harmless. Second, Mr. Reynolds' trial counsel filed a Motion for Special Verdict Form Containing Findings of Fact by the Jury, which was denied by the trial court. TR 2:337-340; TR 2:383-384. The verdict forms we are left with on the record, merely record that the jury "advise and recommend to the court that it impose the death penalty." TR 4:743. No findings of fact, made by the jury, are on record. We do not know the weight that was given to the aggravators or mitigators. The record is silent on those issues. All the record shows is a blanket 12 man vote for "an advisory sentence," as it is described multiple times in the jury instructions. TR 4:737-741.

This was not a verdict. Furthermore, the jury was explicitly told that "the final decision as to what punishment shall be imposed is the responsibility of the judge" and "I may reject your recommendation." TR 4:737. Third, although as in *Davis*, Mr. Reynolds' jury returned unanimous recommendations, the other factors this Court relied upon in finding harmless error in *Davis* are not present in Mr. Reynolds' case. In addition to the unanimous recommendations in *Davis*, this Court found the error harmless because the jury received a mercy instruction which Mr. Reynolds' jury did not receive. *Davis* at 174; see TR 4:737-741. The jury was never told it could still opt for mercy, however, they were instructed that the court "may reject your recommendation." TR 4:737. Under these circumstances, to engage in speculation that the jury's recommendation somehow followed the fact-finding required under the Sixth Amendment is folly and "contrary to our clear precedent governing harmless error review," especially in light of the record in this case. *Hurst v. State*, 202 So.3d at 69.

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. In this case, Mr. Reynolds' trial counsel provided affidavits stating that their approach to the jury and strategy in Mr. Reynolds' case was profoundly affected by the state of the law at the time Mr. Reynolds' was tried. Both attorneys unequivocally stated that their approach to jury selection and trial strategy would have been different. See

R 1:217-221 and R 1:226-231.

Mr. Laurence addressed how the change in the law would have affected his advice to Mr. Reynolds regarding Mr. Reynolds decision to waive the presentation of mitigation. Mr. Laurence submitted that he could have changed Mr. Reynolds' mind and gone forward with a mitigation presentation. R1:221. Mr. Iennaco also addressed the issue of the waiver and asserted that had a constitutional procedure existed, Mr. Reynolds would not have waived the presentation of mitigating evidence, because Reynolds felt that six jurors could not be swayed. R1:230. This is evidence that the unconstitutional procedure that was in place at the time of Mr. Reynolds' trial adversely affected the rubric of decision-making made by both the attorneys in this case and Mr. Reynolds himself. Because the motion below was summarily denied without a hearing, the affidavits must be accepted as true.

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

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."). 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 his or her power to preclude a death sentence. *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[8].

Jurors must feel the weight of their sentencing responsibility and know about their individual authority to preclude a death sentence. See *Blackwell v. State,* 79So.

[8] This would certainly apply to the circumstances in Mr. Reynolds' case when the jury was repeatedly reminded its penalty phase verdict was merely an advisory recommendation. See TR 4:737-741.

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 United States 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.

This is especially true in Mr. Reynolds' case, where the jury was not only repeatedly told its sentence was merely advisory, but also that the judge made the ultimate decision and could reject the recommendation entirely. TR 4:737-41. Justice Pariente noted that "[t]he role of the jury during the penalty phase under the Florida death penalty scheme has always been confusing," and, "absent a recommendation for life, the jury recommendation is essentially meaningless to the trial judge." *In re Standard Jury Instructions,* 22 So.3d 17, 19 (Fla. 2009). This still holds true even when the recommendation is unanimous, because the jury was misled as to its role and responsibility as the decision maker. As a result, "a real danger exists that a resulting death sentence will be based at least in part on the determination of a decision maker that has been misled as to the nature of its responsibility." *Mann v. Dugger*, 844 F.2d 1446, 1454-55 (11th Cir. 1988).

Further, Mr. Reynolds' jury was not advised of each jurors' authority to dispense mercy, as the jury instructions do not mention the possibility at all. See TR 4:737-41. The chances that at least one juror would not join a death recommendation if a resentencing were now conducted are likely given that 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. *Caldwell*, 472 U.S. at 330. In Mr. Reynolds' case, the State cannot prove beyond a reasonable doubt that not a single juror would have voted for life given proper *Caldwell*-compliant instructions.

The circumstances under which Mr. Reynolds' jury returned its 12-0 death recommendations[9] show 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 simply "does not meet the standard of reliability that the Eighth Amendment requires." *Id*. at 341. "[I]t is constitutionally impermissible to rest a death sentence on a determination

[9] It should be noted that Mr. Reynolds' raised other issues with respect to his jury and the jury instructions on direct appeal and during postconviction proceedings, which he does not waive. Furthermore, in Mr. Reynolds' currently pending federal habeas, he has raised issues concerning his attorneys' failure to remove a juror who continued deliberations, even after his mother passed away. All of these circumstances influence how this jury came to its recommendation and cumulatively demonstrate that the error in this case is not harmless.

made by a sentence who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere." *Id*. at 328-29.

This Court cannot rely on the jury's death recommendations in Mr. Reynolds' 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 United States 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, 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.”).

Mr. Reynolds death sentences should be vacated because they were obtained in violation of the Florida Constitution. On remand in *Hurst v. State*, the Florida Supreme Court found that the right to a jury trial found in the United States Constitution required that all factual findings be made by the jury unanimously under the Florida Constitution. In addition to Florida's jury trial right, the Florida Supreme Court found that the Eighth Amendment's evolving standards of decency and bar on arbitrary and capricious imposition of the death penalty, require a unanimous jury fact-finding. *Hurst v. State*, 202 So. 3d at 59–60. The increase in penalty imposed on Mr. Reynolds was without any jury at all. No unanimous jury found "all aggravating factors to be considered," "sufficient aggravating factors exist[ed] for the imposition of the death penalty," or that "the aggravating factors outweigh the mitigating circumstances." This was a further violation of Florida Constitution.

Mr. Reynolds had a number of other rights under the Florida Constitution that are at least coterminous with the United States Constitution, and possibly more extensive. This Court should also vacate Mr. Reynolds’ death sentences based on

the Florida Constitution. Article I, Section 15(a) provides:

> (a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

Article I, Section 16(a) provides in relevant part:

> (a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges. ..

Prior to *Apprendi*[10], *Ring*, and *Hurst*, the United States Supreme Court addressed a similar question in a federal prosecution and held that: "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 232 (1999). Because the State proceeded against Mr. Reynolds under an unconstitutional system, the State never presented the aggravating factors as elements for the Grand Jury to consider in determining whether to indict Mr. Reynolds. A proper indictment would require that the Grand Jury find that there were sufficient aggravating factors to go forward with a capital prosecution. Mr. Reynolds was denied his right to a proper Grand Jury Indictment. Additionally, because the State was proceeding under an unconstitutional death penalty scheme, Mr. Reynolds was never formally informed of the full "nature and cause of the accusation" because the aggravating factors were

[10] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

not found by the Grand Jury and contained in the indictment.

Finally, the unconstitutional system that was in place at the time of Mr. Reynolds' trial influenced Mr. Reynolds to waive the presentation of mitigating evidence, because he felt he could not sway six jurors. Had he been sentenced under a constitutional sentencing scheme that required a unanimous verdict for death, Mr. Reynolds would not have waived the presentation of mitigating evidence. Mr. Iennaco specifically referenced this in his affidavit to the circuit court. R1:230. Unfortunately, due to the summary denial of the successive motion and denial of an evidentiary hearing, Mr. Reynolds was unable to develop these factual circumstances. However, Mr. Iennaco's affidavit shows how Florida's unconstitutional sentencing scheme adversely affected the outcome of Mr. Reynolds' trial and rendered the *Hurst* error *not* harmless.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Reynolds relief on his successive 3.851 motion. This Court should order that his sentences be vacated and remand the case for a new penalty phase, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically

delivered to Assistant Attorney General Vivian Singleton, Vivian.Singleton@myfloridalegal.com and capapp@myfloridalegal.com, on this 26th day of June, 2017.

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CERTIFICATE OF COMPLIANCE

I 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. P. 9.100 and 9.210**.**

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