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

REPLY BRIEF

JULISSA R. FONTÁN
Assistant CCRC
Florida Bar No. 0032744

MARIA E. DELIBERATO
Assistant CCRC
Florida Bar No. 664251

CHELSEA R. SHIRLEY
Assistant CCRC
Florida Bar No. 112901
Capital Collateral Regional Counsel – Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637
(813)558-1600

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PRELIMINARY STATEMENT

Any claims not argued are not waived and Mr. Reynolds' relies on the merits of his Initial Brief.

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 Appellee argues that simply because the jury's death sentence recommendation was unanimous, that no other steps need to be taken in a harmless error analysis. This is incorrect and objectively an unreasonable application of law, as well as an objectively unreasonable determination of the facts. Mr. Reynolds' jury made only a *recommendation* to impose the death penalty, without making any findings of fact as to any of the elements required for a death sentence under Florida law. The verdict form did not contain any findings of fact or specify the basis for the jury's recommendation.

In *Hurst v. State*[1], this Court held that, under *Hurst v. Florida*[2] and the Sixth and Eighth Amendments, Florida juries must render unanimous fact-finding, under a beyond-a-reasonable-doubt standard, as to: (1) the aggravating factors; (2) whether those specific aggravators are together "sufficient" to impose the death penalty; and

[1] *Hurst v. State*, 202 So.3d 40 (Fla. 2016).
[2] *Hurst v. Florida*, 136 S. Ct. 616 (2016).

(3) whether those specific aggravators together outweigh the mitigation. *Hurst v. State*, 202 So. 3d at 53-59. The Court also clarified that the jury's unanimous findings on the necessary elements must precede the jury's vote to make an overall recommendation for death. *Id.* at 57 ("[B]efore 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.").

Thus, even in cases like Mr. Reynolds' where the jury unanimously *recommended* death, a reviewing court cannot know whether the jury in fact unanimously found—or a hypothetical jury in a constitutional proceeding would have unanimously found—all the other requisite elements for a death sentence. Petitioner's jurors may have reached a unanimous overall recommendation to impose the death penalty, but there is nothing in the record that reveals the recommendation's basis, nor does the record show *any* jury findings of fact. There remains a reasonable probability that individual jurors, or sub-groups of jurors, based their overall recommendation for death on a different underlying calculus. The jurors may not have all agreed on which aggravating factors applied to Petitioner. Certain jurors may not have agreed that a specific set of aggravating

factors considered by other jurors was sufficient for the death penalty or outweighed the mitigation. Accordingly, it cannot be said that all jurors agreed as to each of the necessary findings for the imposition of the death penalty under Florida law[3].

Moreover, the Court cannot be certain that Mr. Reynolds' jury would have declined to exercise its discretion to recommend a life sentence after itself making the findings of fact on the other required elements, as it would have been entitled to do under Florida law. *See* Fla. Stat. § 921.141(3)(2) (revised Florida capital sentence statute providing that, even if the jury recommends death, "the court, after considering each aggravating factor found by the jury and all the mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury."). In the harmless error context, it cannot be assumed that the jury's exercise of its discretion to recommend a life sentence would have been the same in a post-*Hurst* proceeding.

[3] Justice Quince correctly noted this fatal problem with the majority's reasoning in her dissent in previous cases. *See Guardado v. State*, 2017 WL 1954984, at *2 (Quince, J., dissenting) ("I cannot agree with the majority's finding that the Hurst error was harmless beyond a reasonable doubt. As I've stated previously, [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 a factual determination was not made.") (internal quotations omitted); *see also Hall v. State*, 212 So.3d 1001, 1036–37 (Fla. 2017) (Quince, J., concurring in part and dissenting in part); *Truehill v. State*, 211 So.3d 930, 961 (Fla. 2017) (Quince, J., concurring in part and dissenting in part).

Further, unlike as the Appellee suggests, a harmless error analysis must be performed on a case-by-case basis. Harmless error analysis goes beyond simply checking for a unanimous recommendation. 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). 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).

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.

Furthermore, the Appellee misapprehends Mr. Reynolds' argument regarding how trial counsel would have acted had there been a *Hurst*-complaint statutory sentencing scheme. The Appellee believes and argues that this is an attempt to claim ineffective assistance of counsel. That is not Mr. Reynolds' argument. Evidence of what trial counsel would have done differently goes to the heart of the harmless error analysis and provides evidence of how the error in this case is not harmless. Both trial attorneys unequivocally stated that their approach to jury selection and their trial strategy would have been different. Furthermore, how trial counsel approached the case fundamentally affected the outcome and the decisions made both by counsel and Mr. Reynolds. 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 his 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 Mr. 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. MR. REYNOLDS' DEATH SENTENCE DOES VIOLATE THE EIGHTH AMENDMENT, CONTRARY TO APPELLEE'S ASSERTION.

The Appellee argues that Mr. Reynolds did not establish a constitutional error in his sentence under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This is incorrect. Pursuant to *Caldwell*, 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*, 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. 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. This was not the case in Mr. Reynolds' trial. The jury was repeatedly reminded its penalty phase verdict was merely an advisory recommendation. See TR 4:737-741. 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. 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). The jury in Mr. Reynolds' case was misled as to its role and responsibility as the decision maker.

The circumstances under which Mr. Reynolds' jury returned its 12-0 death recommendations show 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." *Caldwell* at 341. "[I]t is constitutionally impermissible to rest a death sentence on a determination 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. It is clear on the face

of the record that the jury was told that it did not have the ultimate responsibility for the determination of Mr. Reynolds' sentence.

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*[4] requires.

Hurst v. Florida, 136 S. Ct. at 622. This holds true, even if the recommendation from the jury was a unanimous one. In light of the jury's belief that it was not ultimately responsible for Mr. Reynolds' death sentence, the conclusory nature of

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

the harmless error analysis the Appellee is urging this Court to use, would be wholly unreasonable under the circumstances of this particular case. Here, in light of the impact of the "advisory" instructions to the jury, this Court cannot even be certain that the jury would have made the same unanimous *recommendation* without the *Hurst* error. Given the principles articulated in *Caldwell*, this Court also cannot be sure that the jury would have found all of the other elements for a death sentence satisfied. And, critically, the Court cannot be sure that Petitioner would have received a death sentence. *See Rose v. Clark*, 478 U.S. 570, 578 (1986) (recognizing that an "error is harmless if, beyond a reasonable doubt, it did not contribute to the verdict obtained") (emphasis in original) (internal quotation marks and citation omitted).

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 been influenced to waive the presentation of mitigating evidence. It is in this respect, in particular, that the impact of the unconstitutional scheme on Mr. Reynolds' sentence can be felt and why full factual development of how trial counsel would have acted differently under the circumstances is necessary. This is not an argument that counsel acted ineffectively, but that the unconstitutional

sentencing scheme infected the entirety of the trial process, from jury selection, onwards. In this particular case, the impact of the unconstitutional scheme forced Mr. Reynolds to waive a very important right. 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

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 11th day of July, 2017.

/s/ Julissa R. Fontán
Julissa R. Fontán
Florida Bar. No. 0032744
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637
813-558-1600
Fontan@ccmr.state.fl.us

/s/ Maria E. DeLiberato
Maria E. DeLiberato
Florida Bar No. 664251
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637
813-558-1600
deliberato@ccmr.state.fl.us

/s/Chelsea Shirley
Florida Bar No. 112901
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle Region
12973 Telecom Parkway
Temple Terrace, FL 33637
Phone: 813-558-1600
Shirley@ccmr.state.fl.us
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Brief of Appellant was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

/s/ Julissa R. Fontán

Julissa R. Fontán
Florida Bar. No. 0032744
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle Region
12973 North Telecom Parkway
Temple Terrace, Florida 33637-0907
(813) 558-1600
fontan@ccmr.state.fl.us