IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 18-175

FRED ANDERSON, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial, after an evidentiary hearing, of Mr. Anderson's 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. Anderson's 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

Fred Anderson has been sentenced to death. Unlike the previous cases, this case comes before the Court on a developed record, after an evidentiary hearing. That fact alone weighs heavily in favor of oral argument. 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. Fred Anderson, through counsel, respectfully requests this Court grant oral argument.

Anderson also requests that the Court permit full briefing in this case in accord

with the normal, untruncated rules of appellate practice, especially in a case such as this where an evidentiary hearing was conducted. Depriving Anderson the opportunity for full briefing in this case would constitute an arbitrary deprivation of the vested state right to a mandatory plenary appeal in capital cases. *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015) ("[T]his Court has a mandatory obligation to review all death penalty cases to ensure that the death sentence is imposed in accordance with constitutional and statutory directives."); *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

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).

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STATEMENT OF THE CASE

Following a nine day trial, the jury convicted Mr. Anderson of First Degree Murder, Attempted First Degree Murder, Robbery with a Firearm, and Grand Theft of a Firearm. Trial counsel proposed a special verdict form asking the jury to identify which aggravating circumstances it found to exist beyond a reasonable doubt, which the court denied. TR:5,755-56. After a one day penalty phase, the jury returned a generalized recommendation for death by a vote of 12-0. *Id*. at 773. The circuit court, as the sole fact-finder, found aggravating and mitigating factors and weighed them without the benefit of individual factual determination by a jury and sentenced Mr. Anderson to death. The Court found four aggravating circumstances: - 1) Cold, Calculated Premeditated; 2) Pecuniary gain; 3) Previous conviction of a felony and on community control (for Grand Theft); and 4) Prior violent felony (contemporaneous attempted first degree murder of Ms. Scott). The circuit court found no statutory mitigation and some non-statutory mitigation. *Id*. at 851-63.

This Court affirmed the conviction and sentence of death and in doing so, denied Mr. Anderson's *Ring* claim on the merits. *Anderson v. State*, 863 So.2d 169,189 (Fla. 2003). Mr. Anderson petitioned for a Writ of Certiorari, which was denied. *Anderson v. Florida*, 541 U.S. 940 (2004).

Mr. Anderson filed a Successive 3.851 Motion on January 10, 2017. The circuit court granted Mr. Anderson's request for an evidentiary hearing, which was held on

July 28, 2017. R:1528-1600. Mr. Anderson presented the testimony of trial counsel William Stone and the expert testimony of experienced capital trial attorney Terence Lenamon. Due to the constrained page limitations, their relevant testimony will be addressed in the Arguments below. The parties filed Written Closing Arguments, and the circuit court entered an Order denying relief on November 17, 2017. R:1429-1436. Mr. Anderson's timely filed Motion for Rehearing was denied on December 29, 2017, the same day on which the circuit court entered an Amended Order denying relief. R: 1486-1497. This appeal follows.

ARGUMENT

MR. ANDERSON'S DEATH SENTENCE STANDS IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND IN VIOLATION OF *HURST V. FLORIDA*, 136 S. Ct. 616 (2016), AND ITS PROGENY. FURTHER, THE ERROR IS NOT HARMLESS.

This Court held in *Mosley* that *Hurst* was retroactive under both notions of fundamental fairness and under *Witt v. State*, 387 So.2d 922 (Fla. 1980). See *Mosley v. State*, 209 So.3d 1248, 1276 (Fla. 2016). Mr. Anderson's convictions and sentences became final on March 22, 2004. He raised and preserved an *Apprendi*[1] and a *Ring*[2] claim on direct appeal. Under both *Witt* and notions of fundamental fairness as explained in *Mosley*, Anderson is entitled to the retroactive effect of *Hurst* within the parameters set by this Court. Mr. Anderson's death sentence was obtained in

[1] *Apprendi v. New Jersey*, 530 U.S. 466 (2000)
[2] *Ring v. Arizona*, 536 U.S. 584 (2002)

violation of the Federal and Florida Constitutions, and now this Court must consider whether that error was harmless.[3]

A. **Mr. Anderson's death sentence stands in violation of the Sixth Amendment and the error is not harmless.**

The circuit court denied Mr. Anderson's motion to vacate on harmless error grounds, citing only the unanimous verdict and failing to conduct an individual analysis. R:1495. 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* 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.

The procedure employed when Mr. Anderson received his death sentence

[3] Mr. Anderson maintains that *Hurst* errors should be deemed "structural" and not subject to harmlessness review. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991). The Sixth Amendment error identified in *Hurst*—stripping the capital jury of its constitutional fact-finding role—represents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. *Hurst* errors "infect the entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and "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 v. United States*, 527 U.S. 1, 8-9 (1999).

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 40,57-58. Individual jurors may exercise "mercy" and vote for a life sentence over death sentence. *Perry v. State*, 210 So. 3d 630, 640 (Fla. 2016).

The "harmless error" doctrine does not preclude *Hurst* relief in this case, notwithstanding the pre-*Hurst* jury's unanimous recommendation to sentence Mr. Anderson to death. 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. Anderson by voting for a life sentence. The State cannot meet this burden in Mr. Anderson's 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).

First, this Court's line of cases finding *Hurst* errors harmless where the pre-*Hurst* jury unanimously recommended death, *see, e.g.*, *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), violates the United States Constitution. Mr. Anderson's 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. This Court cannot reliably infer from the jury's recommendation whether the jury unanimously found—or a hypothetical jury in a constitutional proceeding would have unanimously found—all the other requisite elements for a death sentence. There is a reasonable probability that individual jurors based their overall recommendation for death on a different underlying calculus. *See Hall v. State*, 212 So. 3d 1001, 1037 (Quince, J., dissenting) ("In *Hurst*, we declined to speculate why the jurors voted the way they did, yet because here the jury vote was unanimous, the majority is comfortable determining that it is inconceivable that a jury would not have found the aggravation in Hall's case unanimously, especially given the fact that three of the aggravators found were automatic. Even though the jury unanimously recommended the death penalty, whether the jury unanimously found each aggravating factor remains unknown.") (internal citations and quotations omitted).

Second, Mr. Anderson's case is distinguishable from this Court's precedent. While this Court has yet to find a *Hurst* error harmless where the jury unanimously recommended death, the analysis still must be done on a case by case basis. There is no *per se* rule that a generalized recommendation for death, even if unanimous, is automatically harmless. Contrary to the lower court's finding, the unanimous recommendation is merely one factor in the analysis.

One such distinguishing fact is that Mr. Anderson's jury was not given the "mercy instruction," his jury was never told that they were never required or compelled to recommend death, even if they made all the necessary findings. 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.[4]

[4] The U.S. Supreme Court as far back as 1974 held that a capital sentencer can constitutionally dispense mercy in a case that otherwise might warrant imposition of the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 203 (1976). In Florida, prior to

Accord Perry, 210 So. 3d 630, 640 (Fla. 2016) ("It has long been true that a juror is not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances"). *See also Hurst*, 202 So. 3d at 58 ("Regardless of your findings . . . you are neither compelled nor required to recommend a sentence of death").

Mr. Anderson's case is distinguishable from *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 whom 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

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Hurst, it was the sentencing judge who had been given the authority to dispense mercy in a capital case. However, that authority has now been transferred to the jury under *Hurst v. State*.

uncontroverted." *Id*. This Court found in *Davis*, "This case is truly among the most aggravated and least mitigated." *Id*. at 172. Mr. Anderson's case involved fewer aggravating factors, a single murder, and substantial mitigation.

Moreover, in the post-*Hurst* landscape, jurors now have to complete a multi-step process. First, they must unanimously find beyond a reasonable doubt the existence of at least one aggravating circumstance. Second, any additional aggravating circumstances presented by the State must unanimously be found to exist beyond a reasonable doubt in order to be considered. Third, the jury must unanimously determine beyond a reasonable doubt whether the aggravating circumstances are sufficient to warrant a possible sentence of death. Fourth, the jury must consider the mitigation to determine whether it has been established by the greater weight of the evidence. Fifth, the jury must unanimously decide whether the aggravating factors outweigh the mitigating circumstances. Finally, even if the jury makes *all* of those findings, they are never required or compelled to vote for death. *In re Standard Criminal Jury Instructions In Capital Cases*, 214 So.3d 1236 (Fla. 2017).

This process was recently employed in *State v. William Wells*, 04-2011-CF498-B, a prison killing case that resulted in a life verdict despite the jury unanimously finding *all* of the aggravation, rejecting a majority of the mitigation, *and* unanimously finding that that the aggravation outweighed the mitigation. Yet,

four jurors still voted for life. R:1370-1386.[5] Similarly, in the case of *State v. Kendrick Silver*, F09-309889A, despite the jury unanimously finding all of the aggravating factors and unanimously finding that the aggravation outweighed the mitigation, there was one juror who voted for mercy, and the verdict was 11-1, resulting in a life sentence. *See* David Ovalle, *How a sole juror spared the life of a two time convicted killer facing the death penalty in Miami*, Miami Herald (August 22, 2017) http://www.miamiherald.com/news/local/crime/article168749802.html.

Moreover, in November 2017, in the same judicial circuit as Mr. Anderson's case, James Bannister was sentenced to life despite a jury finding him guilty of four murders, with two of the victims being children. *State v. James Bannister*, Marion County Case No. 2011-CF-3085. *See also* Katie Pohlman, Bannister sentenced to life for quadruple murders, Ocala Star Banner (November 17, 2017)

[5] The facts in Mr. Wells' case were horrific. He was serving a life sentence at Florida State Prison in closed management after pleading guilty to five counts of first degree murder for the murders of his wife, brother-in-law, father-in-law, his wife's lover, and a drug dealer. The victims were shot over 11 days and the bodies remained in the defendant's trailer with him and his four-year-old son. *See* Associated Press, Mayport Man Pleads Guilty to Five Murders, Gets Life, News4Jax (September 30, 2004) *available at* https://www.news4jax.com/news/mayport-man-pleads-guilty-to-5-murders-gets-life .While in prison, he and a co-defendant stabbed another inmate to death. *See Doty v. State*, 170 So. 3d 731, 734 (Fla. 2015)("Wells ensured that nobody else entered the room, while Doty pulled the body around the desk and began to stab Rodriguez with the homemade knife...Doty and Wells then tied a ligature around Rodriguez's neck, smoked a cigarette, took showers, and, after they were sure that Rodriguez was really dead, called a sergeant working at the prison and confessed to the crime.").

http://www.ocala.com/news/20171117/bannister-sentenced-to-life-for-quadruple-murders. In Mr. Bannister's case, the jury unanimously found that all the aggravators were proven beyond a reasonable doubt, unanimously found that the aggravators were sufficient to warrant a sentence of death, and unanimously found that the aggravation outweighed the mitigation. Yet, there were four votes for life for each murder, resulting in four life sentences. R:1444-1464.

Also in November 2017, in Pasco County, Adam Matos was convicted of four murders, all of which he committed while his young son was present in the house. He stacked the bodies outside on a hill, used the victim's credit card to order pizza, sold the family's dogs on Craigslist, and then fled with his son until he was ultimately arrested several days later. *State v. Adam Matos*, Pasco County Case No. 2014-CF-00586AXWS; *See also* Anastasia Dawson, *Life in prison, not death, for Adam Matos, Pasco jury decides*, Tampa Bay Times (November 21, 2017) http://www.tampabay.com/news/courts/criminal/Life-in-prison-not-death-for-Adam-Matos-Pasco-jury-decides_162862968. As evidenced by the verdict form, there were two votes for life on three of the murders, and one vote for life for the other murder, resulting in four life sentences. R:1466-1483.[6]

[6] Mr. Anderson is aware of at least two other post-*Hurst* cases in Orange County resulting in life sentences in 2018: 1) *State of Florida v. Sanel Saint Simon*, who was convicted of first degree murder of his 16 year old step-daughter, who he had been sexually abusing. *See* Gal Tziperman Lotan, *Jury decides: Life in prison — not death penalty — for Sanel Saint-Simon*, Orlando Sentinel (April 19, 2018)

Mr. Anderson's jury was never given these jury instructions or a detailed verdict form. It is proper for this Court when assessing harmless error to consider the effect these changes would have had on Mr. Anderson's jury had they been properly instructed, and it is proper for this court to consider actual real-world outcomes in the post-*Hurst* landscape. *See Reynolds v. State*, -- So. 3d -- 2018 WL 1633075 at * 12, n. 21 (Fla. Apr. 5, 2018) (using the fact that a jury unanimously issued a death verdict in a *Hurst* resentencing in order to justify a denial of relief).

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.

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http://www.orlandosentinel.com/news/breaking-news/os-sanel-saint-simon-death-penalty-closing-arguments-20180418-story.html (April 19, 2018); and 2) *State of Florida v. Johan Quinones*, who, just ten months after being released from prison for a prior robbery, shot and killed the two people he believed were responsible for his initial arrest. *See* Gal Tziperman Lotan, *Man found guilty of killing two for 'revenge' faces death penalty*, Orlando Sentinel (January 23, 2018) http://www.orlandosentinel.com/news/breaking-news/os-johan-quinones-murder-trial-verdict-20180123-story.html. *See also* Laura C. Morel, *Far fewer Florida killers are sentenced to die after courts require unanimous juries*, Tampa Bay Times (April 12, 2018) http://www.tampabay.com/news/courts/criminal/Far-fewer-Florida-killers-are-sentenced-to-die-after-courts-require-unanimous-juries_167160363

There is no discernible difference between the jury findings (or lack thereof) in Mr. Anderson's case and the jury findings (or lack thereof) in any of the scores of cases in which this Court has found the *Hurst* error not to be harmless. As Justices Perry and Quince explained in their dissent in *Davis v. State:*

> By ignoring the record and concluding that all aggravators were unanimously found by the jury, the majority is engaging in the exact type of conduct the United States Supreme Court cautioned against in *Hurst v. Florida*.

207 So. 3d 142, 176 (Fla. 2016).When considering harmless error, this Court must look at the totality of the evidence, both at trial and in post-conviction. Substantial mitigation was not presented to Mr. Anderson's jury, due to ineffective assistance of counsel. His original penalty phase lasted only one day. His jury never heard that he suffers from brain damage and Post-Traumatic Stress Disorder ("PTSD"), due to repeated sexual assaults as a young boy. Coupled with the other mitigation the jury had heard and assuming they were properly instructed, had they known that Mr. Anderson had been brutally raped as a child over a period of seven years and that while in the bank vault that day, he was in a dissociative state suffering from PTSD, the State cannot demonstrate beyond a reasonable doubt that at least one juror would not have voted for life. This is especially true in light of the multiple post-*Hurst* life verdicts cited above that have much stronger evidence in support of the aggravating factors.

Failing to present this substantial and compelling mitigation was especially

harmful in Mr. Anderson's case where the prosecutor characterized Mr. Anderson's defense as the "National Enquirer Defense" and that "inquiring minds want to know" why this crime happened. TR:17, 2212. It was certainly at the forefront of the jury's mind as to why Mr. Anderson could have committed such an act. Telling the jury that Michael Green violently raped Mr. Anderson as a child, that seven-year-old Mr. Anderson had to bury a pair of bloody underwear in order to hide the shameful abuse, and that he carried that trauma and shame into adulthood would have been the type of evidence that would have influenced the jury as to his moral culpability. *See Anderson v. Secretary*, 752 F.3d 881 (11th Cir. 2014) (Martin, J., concurring) (recognizing that "Mr. Anderson's horrific history of child sexual abuse is the kind of troubled history that the [Supreme] Court has declared relevant to assessing a defendant's moral culpability.") (internal citations and quotations omitted).

The jury's recommendation in Mr. Anderson's case also does not account for the fact that defense counsel's approach to diminishing the weight of the aggravating factors and presenting mitigation at the penalty phase, would have been different had counsel known that the jury, not the judge, would be required to unanimously agree on each of the elements required to impose the death penalty. As indicated by trial counsel's testimony at the evidentiary hearing, had this case been tried in a post-*Hurst* landscape, "we would have gotten a special verdict form" and "that's something that would have been more aggressively asserted in arguments, I'm sure,

and in jury selection, to make sure that each juror understood the significance of their individual power and authority that each individual juror had." R:1547. Trial counsel further explained that if he only had to convince one juror to vote for life he would have "asserted the intimidating influence that Mr. and Mrs. Carver, the probation officers, had with respect to Fred's motivation and thinking at the time that this crime occurred." R:1550. Counsel asserted that Mr. Anderson "was abjectly terrified" and "they were the ones that put the terror in him." R:1551. For Mr. Anderson, who suffered from PTSD due to repeated sexual trauma as a child, the threat of being sent to what was essentially a prison where he feared he would be re-victimized, was an important piece of mitigation that trial counsel would have and should have presented under a post-*Hurst* scheme where each juror's vote matters. This is evidenced by trial counsel's recollection of the juror who was crying only after the penalty phase recommendation was returned. As such, prevailing norms expert Terry Lenamon, counsel of record for the William Wells and James Bannister cases referenced above, explained that the post-*Hurst* instructions "empower[] the jury" and likely would have empowered the crying juror, because she could still have followed the law, while never being required or compelled to vote for death. R:1585.

This Court has no more an idea of what Mr. Anderson's jury based its recommendation upon than the thought processes of a jury that returned a

generalized non-unanimous recommendation for death. Failure to grant Mr. Anderson relief while granting relief to similarly situated defendants violates Mr. Anderson's right to Equal Protection of the Laws under the Fourteenth Amendment to the Constitution of the United States (e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against arbitrary infliction of the punishment of death under the Eighth Amendment to the Constitution of the United States (*Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam)).

As a matter of federal constitutional law, any reliance on the jury's recommendation in denying *Hurst* relief on harmless error grounds would contravene the Sixth Amendment in light of *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasizing that "harmless-error review looks, we have said, to the basis on which the jury *actually rested* its verdict."). In Mr. Anderson's case, there was no constitutionally valid jury verdict containing the findings of fact required to impose a death sentence. *Sullivan* requires that, before a reviewing court may apply harmless error analysis, there must be a valid jury verdict, grounded in the proof-beyond-a-reasonable-doubt standard. The logic of *Sullivan* applies equally here:

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

Id. at 279-80. In Mr. Anderson's case too, any reliance on his advisory jury's recommendation would constitute a violation of the Sixth Amendment.

In addition, the Due Process Clause of the Fourteenth Amendment requires that the State must prove each element 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. In *Sullivan*, the Court observed that "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." 508 U.S. at 278. "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." *Id.* This requirement is incorporated into the *Hurst* line of cases, beginning with *Apprendi*, 530 U.S. at 476 ("[A]ny 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."). Any reliance upon the jury recommendation requires the underpinnings of the recommendation to be made beyond a reasonable doubt. Florida's pre-*Hurst* jury determinations, including the advisory recommendation in this case, did not incorporate the beyond-a-reasonable-doubt standard.

To the extent any of the aggravators applied to Mr. Anderson were based on prior convictions, the judge's finding of such aggravators does not render the *Hurst* error harmless. As noted above, Florida law requires fact-finding as to both the existence of aggravators *and* the "sufficiency" of the particular aggravators to warrant imposition of the death penalty. There is no way to conclude whether the jury would have made the same sufficiency determination as the judge. *See, e.g.*, *Franklin v. State,* 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst.*").

B. Mr. Anderson's death sentence stands in violation of the Eighth Amendment and the error is not harmless.

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[7].

Mr. Anderson's jury was led to believe that its role was diminished when the court instructed it that the jury's role was advisory and that the judge would ultimately determine his sentence. In the penalty phase instructions and verdict form *alone*, the jury was told *23 times* that their decision was merely a "recommendation" or an "advisory sentence." TR Vol. 5, p. 769-73. During closing argument, the State told the jury six times that they were merely issuing a "recommendation" as to the sentence. TR Vol. 18, p. 2597-2600; Vol. 19, p. 2603-2623.

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

In light of *Caldwell*, this Court cannot even be certain that the jury would have made the same unanimous *recommendation* without the *Hurst* error, and thus cannot be certain that the jury would have unanimously found the preceding required elements beyond a reasonable doubt. Without the *Hurst* error, where the jury was properly apprised of its fact-finding role, there is a reasonable likelihood that it would have afforded greater weight to Mr. Anderson's mitigation. As such, the Court cannot conclude that a jury would have unanimously found or rejected any specific mitigators in a constitutional proceeding.[8] *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding in mitigation context that the Eighth Amendment is violated when there is uncertainty about a jury's vote).

In order to treat a jury's advisory recommendation 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. Thus, "the jury

[8] Proper judicial review measures the impact of the unconstitutional jury scheme and instructions on the jury's consideration of mitigation against the standard articulated in *Boyde v. California*, 494 U.S. 370 (1990). In *Boyde*, the Supreme Court explained that the proper standard is whether there is a "reasonable likelihood" that the jury was impeded from consideration of constitutionally relevant evidence. *Id.* at 380.

instructions in [Anderson's] case[s] impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory." *Truehill v. Florida*, 138 S. Ct. 3, 3 (2017) (Sotomayor, J., dissenting).

Like the petitioner in *Truehill*, Anderson also argued that the jury instructions in his case "impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory." *Id*. This Court recently addressed a *Caldwell* challenge in *Reynolds v. State*, -- So. 3d -- 2018 WL 1633075 at *1 (Fla. Apr. 5, 2018). However, in denying relief, this Court misapprehended and/or failed to substantively address the issue. This Court held that Reynolds's "jury was not misled as to its role in sentencing" at the time of his capital trial. *Id*. at *12. Thus, the majority concluded that *Caldwell* was not violated because, at the time they rendered their advisory recommendation, the jurors understood "their actual sentencing responsibility" was advisory, and *Caldwell* does not require that jurors "must also be informed of how their responsibilities might hypothetically be different in the future." *Id*. at *10. This Court failed to address why treating this advisory, non-binding jury recommendation as a mandatory jury verdict did not violate *Caldwell*, since Reynolds's jury – and every pre-*Hurst* jury in Florida – was repeatedly instructed otherwise. The issue raised by Reynolds, and here by Anderson, is not whether their juries were properly

instructed *at the time of their capital trials*, but instead, whether *today* the State can now treat those advisory recommendations as mandatory and binding, when the jury was explicitly (and unconstitutionally) instructed otherwise. The United States Supreme Court, in *Hurst v. Florida*, warned against that very thing. The Court cautioned against using what was an advisory recommendation to conclude that the findings necessary to authorize the imposition of a death sentence had been made by the jury:

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

Hurst, 136 S. Ct. at 622. An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation, the juror's inability to be merciful based upon sympathy, and what aggravating factors could be found and weighed in the sentencing calculus) cannot be used as a substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004 (1983) ("Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed.").

Moreover, this Court's analysis of the *Caldwell* issue in *Reynolds* failed to address the unconstitutional status of Florida's death penalty law. In denying

Reynolds's *Caldwell* claim, this Court relied on Justice O'Connor's position in *Romano v. Oklahoma*, 512 U.S. 1 (1994), to find that a *Caldwell* error only occurs when the remarks to the jury improperly described the role assigned to the jury by local law. *Reynolds v. State*, -- So. 3d -- 2018 WL 1633075 at *9 (Fla. Apr. 5, 2018). As a result, this Court concluded that since pre-*Ring* Florida juries were properly instructed as to the status of Florida law, as it existed at that time, no error occurred:

> Therefore, there cannot be a pre-*Ring*, *Hurst*-induced *Caldwell* challenge to Standard Jury Instructions 7.11 because the instruction clearly did not mislead jurors as to their responsibility under the law; therefore, there was no *Caldwell* violation.

Id. However, this conclusion fails to address the unconstitutional nature of Florida's law at that time. Anderson does not dispute that prior to *Hurst*, the standard jury instructions did properly describe the jury's role as being advisory only and ultimately subject to the trial court's "final decision," including regarding the findings necessary to render a defendant eligible for the death penalty.

But, surely the general rule stated by Justice O'Connor in *Romano* presumes that the role assigned to the jury by local law is otherwise consistent with the United States Constitution. It is nonsensical to conclude that Justice O'Connor meant no error occurs if the remarks to the jury properly described the jury's role according to local law, even if that local law violated the federal constitution. Accurately instructing the jury on an unconstitutional law is still unconstitutional. And, this Court's repeated treatment of these accurately instructed, yet unconstitutional, jury

recommendations as "binding" and as "the necessary factual finding that *Ring* requires" is also unconstitutional. *Hurst*, 136 S. Ct. at 622.

Because there was no special verdict form utilized in Mr. Anderson's case, all this Court can do is speculate that all of his jurors found all the necessary factors in order to impose death, since the only thing before this Court is a generalized verdict form. Mr. Anderson was denied his right to a jury finding of fact. Whether that error is harmless cannot be decided based on reference to an advisory panel which made no such findings of fact and which, beyond the mere recommendation, shows no unanimity on any particular aggravating factor. The advisory panel was instructed that the responsibility for determining the appropriateness lied with the trial court, and such reliance violates the Eighth Amendment based on *Caldwell*.

The circumstances under which Mr. Anderson'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.

C. <u>This Court must revisit its proportionality review, comparing Mr. Anderson's case to the first degree murder cases that have been tried post-*Hurst*.</u>

This Court is "required to conduct a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." *Davis v. State*, 207 So. 3d 142, 172 (Fla. 2016) (internal quotations

and citations omitted)*; See also Jeffries v. State*, 222 So. 3d 538, 553 (Fla. 2017) ("Our obligation to review the sentences of similarly situated individuals has been part of our proportionality review since we upheld the death penalty.") (internal citations omitted). In light of *Hurst*, this Court should revisit the proportionality review in Mr. Anderson's case and determine that his death sentence is no longer proportionate.

While proportionality is a state law requirement, its purpose in Florida is to comply with the Eighth Amendment's requirement that the death penalty not be imposed in an arbitrary and capricious manner. *See Proffitt v. Florida*, 428 U.S. 242 (1976). Allowing Mr. Anderson's death sentence to stand without revaluating proportionality denies Mr. Anderson Due Process and Equal Protection under the Fourteenth Amendment, and amounts to a violation of the Eighth Amendment. Mr. Anderson was sentenced to death under an unconstitutional death penalty scheme, by a jury who was poisoned by extensive and racially tinged pre-trial publicity, and who was uninformed as to substantial mitigation due to ineffective assistance of counsel. Taking into account all of the factors, coupled with the lack of a specialized verdict form and zero factual findings made by his jury, Mr. Anderson's case is far from the most aggravated and least mitigated of "similarly situated individuals."

This is evidenced by the life verdicts referenced herein, which were issued in cases of multiple murders, murders of children, murders involving sexual abuse,

murders involving premeditated revenge, and murders committed by repeat violent offenders. While there were aggravating factors in Mr. Anderson's case, he had no prior violent criminal history, substantial mental health mitigation, and committed this act in a desperate attempt to avoid being locked in a facility where he was likely to be re-victimized. As is made clear by real-world outcomes, some in the very same circuit as Mr. Anderson, had his capital trial taken place today under *Hurst*-compliant instructions, at least one juror would have voted for life.

CONCLUSION AND RELIEF SOUGHT

Following *Furman v. Georgia*, 408 U.S. 238, 379, 92 S. Ct. 2726 (1972), Florida enacted a system, upheld by the courts, that prevented any of the decision makers from taking responsibility. For years, Florida told the advisory panel, incorrectly called a jury, that the weighing of aggravating factors was advisory and that the responsibility lies with the trial judge. The trial judge "gave great weight" to the "recommendation" of the sentencing panel, limiting the responsibility of the trial judge. Florida ultimately had no decision maker with the ultimate responsibility for determining a death sentence. *Hurst* made clear that the responsibility clearly lies with a jury. The right to a jury trial predates the United States Constitution and is the mark of a civilized society. Mr. Anderson was sentenced to death without a jury trial on the essential elements that purported to justify his death. This Court should vacate his sentence.

CERTIFICATE OF SERVICE

WE 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 Patrick Bobek, patrick.bobek@myfloridalegal.com and capapp@myfloridalegal.com, on this 23rd day of April, 2018.

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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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