IN THE
Supreme Court of Florida

CARY MICHAEL LAMBRIX,

Petitioner,

v.

JULIE L. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

Case Nos.: SC16-8
SC16-56

DEATH WARRANT SIGNED

**BRIEF OF AMICUS CURIAE,
FLORIDA ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS
ON BEHALF OF PETITIONER LAMBRIX**

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PRELIMINARY STATEMENT

The Florida Association of Criminal Defense Lawyers ("FACDL") is a statewide organization representing over 2,000 members, all of whom are criminal defense practitioners. FACDL is a non-profit corporation whose goal is to assist in the reasoned development of Florida's criminal justice system. Its founding purposes are: promoting study and research in criminal law and related disciplines, ensuring the fair administration of criminal justice in the Florida courts, fostering and maintaining the independence and expertise of criminal defense lawyers, and furthering the education of the criminal defense community.

The issues before the Court go to the foundation of our state's administration of criminal justice in the Florida courts. Additionally, many of FACDL's members represent defendants currently under death sentences whose sentences will be impacted by the decision in this case. Accordingly, FACDL has a keen interest in the outcome and is well suited to offer this amicus brief to the Court.

SUMMARY OF THE ARGUMENT

Under the clear dictates of section 775.082(2) of the Florida Statutes, Mr. Lambrix's death sentence must be held unconstitutional and remanded to the Twentieth Judicial Circuit for imposition of a life sentence. That statute, now and at all times relevant to Mr. Lambrix, has required that a death-sentenced defendant be sentenced to life imprisonment "[i]n the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court." With the advent of *Hurst v. Florida*, the sentence reduction is now mandated.

In the alternative, reversal of the death sentence is required because the constitutional error identified by the Supreme Court in *Hurst* is structural error immune from harmless-error analysis. Because of the general verdict offered by Mr. Lambrix's jury, the prejudice that devolves from the Sixth Amendment defect cannot be quantitatively assessed, but rather, can only be judged through a prism of speculation that the Constitution precludes.

Any attempt at harmless-error scrutiny must additionally fail because, as enunciated in *Caldwell v. Mississippi*, there is an inherent Eighth Amendment component to the prejudice suffered by Mr. Lambrix, whose jurors were repeatedly instructed that the sentencing responsibility rested not with them, but with the trial judge. Academic studies have shown that, with such instructions, especially where

unanimity is not required, a jury fails to perform the deliberative function reliably. That this was the case here is more-than suggested where the jury returned sentencing verdicts on two counts in 45 minutes. It is impossible reliably to conclude that the fact-finding essential to a valid death sentence was performed, or that Mr. Lambrix was not prejudiced by the constitutional violations in the trial court. His death sentence therefore cannot stand.

ARGUMENT AND CITATIONS OF AUTHORITY

I. Introduction

The Florida Association of Criminal Defense Lawyers ("FACDL") concurs with Amicus Curiae, The Capital Habeas Unit ("CHU"), that *Hurst v. Florida,* No. 14-7505, 2015 WL 112683 (Jan. 12, 2016), represents a change in the law of fundamental significance requiring its retroactive application under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *See* CHU AB at 6-17.[1]

FACDL writes separately to expand on Amicus CHU's argument that any death sentence imposed in violation of *Hurst* constitutes structural error, and is therefore not subject to harmless-error review by this or any other court. This conclusion is based first, on the plain language of § 775.082(2), which mandates that if the State's death penalty is found unconstitutional, the courts must commute

[1] FACDL also joins Mr. Lambrix and other Amici Curiae in this case in urging the Court to proceed with issues related to *Hurst v. Florida* in a manner that allows the parties and the Court to fully consider and address the many complicated issues presented by the decision. Proceeding in the context of warrant litigation will not allow such opportunity; thus, FACDL urges the Court to reconsider its denial of a stay of execution for Mr. Lambrix.

all death sentences to life without parole. Second, this Court's jurisprudence addressing when an error is per se reversible, and therefore not subject to a harmless error review, supports the Legislature's approach.

FACDL invites the Court to review the amicus brief submitted in support of Mr. Hurst in the Supreme Court of the United States on behalf of several former Florida circuit court judges. *See Hurst v. Florida*, No. 14-7505, Brief of Amici Curiae Former Florida Circuit Court Judges in Support of Petitioner (June 4, 2015), attached hereto in Appendix.[2] The circuit court judges' concern about the reliability of death sentences imposed by the judiciary, with no meaningful guidance from the jury, is echoed by FACDL herein.

II. The plain language of section 775.082(2) of the Florida Statutes dictates that this Court vacate Mr. Lambrix's death sentence, remand his case to the twentieth Judicial Circuit, and order that he be resentenced to life without parole.

The question before this Court is what remedy should be applied, and to whom, in the wake of the United States Supreme Court's holding that sections 921.141(2) and (3) of the Florida Statutes violate the Sixth Amendment. The Legislature itself has long provided the answer:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be

[2] The brief is also available at http://sblog.s3.amazonaws.com/wp-content/uploads/2015/06/Hurst-Former-Judges-amicus-brief.pdf. (Last accessed Jan. 21, 2016.)

> brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

§ 775.082(2), Fla. Stat. (2015). Thus, this Court should vacate Mr. Lambrix's sentence and remand his case to the Twentieth Judicial Circuit for the imposition of a life sentence. In doing so, it should clarify that the mechanism for obtaining relief for all other individuals currently under sentence of death imposed pursuant to sections 921.141(2) and (3), is to file a Rule 3.851 motion requesting that their death sentences be vacated and a life sentence imposed. *Cf. Falcon v. State*, 162 So. 3d 964 (Fla. 2015) (holding that mechanism for obtaining relief in the wake of *Miller v. Alabama* is to file a timely Rule 3.850 motion).

Amicus FACDL respectfully disagrees with Amicus CHU that in the alternative, the Court could order new sentencing hearings for individuals on death row pursuant to any new statute enacted by the Legislature in the coming weeks. (CHU AB, 15 (citing *Falcon v. State*, 162 So. 3d 964 (Fla. 2015)). The retroactive application of a newly enacted statute in the juvenile, life-without-parole context was a necessity in *Falcon* and its companion cases because the United States Supreme Court's decisions in *Miller v. Alabama* "'opened a breach in Florida's sentencing statutes.'" *Horsely v. State,* 160 So. 3d 393, 399 (Fla. Mar. 19, 2015) (quoting *Hernandez v. State*, 117 So. 3d 778, 783 (Fla. 3d DCA 2013)).

In the absence of the mandatory sentencing statute invalidated by *Miller*, there simply was no statute on the books governing how juveniles serving mandatory life-without-parole should be resentenced. The Court considered several options to fill the void, including fashioning its own remedy, statutory revival, and retroactive application of the new juvenile sentencing statute, Chapter 2014-220. It settled on retroactive application because Chapter 2014-220 was the best available remedy comporting with both legislative intent and the Eighth Amendment. *Id.* at *12-3.

In rejecting the argument that the "Savings Clause," *see* Art. X, § 9, Fla. Const., prohibited retroactive application of the new criminal statute, the Court explained in *Horsely* that the unique circumstances presented an exception:

> [T]he purpose of the "Savings Clause" is to require the statute in effect at the time of the crime to govern the sentence an offender receives for the commission of that crime. *See Castle v. State*, 330 So.2d 10, 11 (Fla.1976). Here, however, the statute in effect at the time of the crime is unconstitutional under *Miller* and the federal constitution, so it cannot, in any event, be enforced. The "Savings Clause" therefore does not apply.

Horsely, 160 So. 3d at 406.

But in the case at bar, unlike in *Falcon* and *Horsely,* there exists no "breach" in Florida's death sentencing statute that this Court must fill. Although sections 921.141(2) and (3) have been invalidated by *Hurst*, section 775.082(2) is a stand-alone statute that establishes the remedy in exactly the scenario the Court now

faces. *See* 775.082(2) ("In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court," persons previously sentenced to death shall be resentenced to life without parole by the courts having jurisdiction over them). Thus, any individual previously sentenced to death for an offense occurring when section 775.082(2) was in effect *must* be resentenced pursuant to that statute upon timely filing of a Rule 3.850 motion invoking it.

III. This Court's jurisprudence precludes a harmless error analysis where such analysis would be supported by sheer speculation.

Should the Court decline to apply section 775.082 to Mr. Lambrix, his sentence must nonetheless be vacated because the constitutional defect at issue constitutes per se, or "structural," error. The Supreme Court found that Florida's capital-sentencing statute violates the Sixth Amendment because "[t]he trial court *alone* must find 'the facts ... [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Hurst*, 2016 WL 112683, at *6 (quoting § 921.141(3), Fla. Stat.). The Sixth Amendment, as applied in Florida, requires that such facts be found unanimously by the jury beyond a reasonable doubt, because it is these facts that render a defendant guilty of an offense eligible for the death penalty. See Fla. R. Crim. P. 3.440. As explained below, the aforementioned elements are distinguishable from the elements at issue in other state and federal statutes

addressed by *Apprendi v. New Jersey* and its progeny, some of which are relied on by the state to support a harmless error approach.

Justice Anstead summed up the harmless-error barrier best in his concurrence in *Bottoson*:

> [C]ompared to our ability to review the actual findings of fact made by the trial judge, there could hardly be any meaningful appellate review of a Florida jury's advisory recommendation to a trial judge since that review would rest on sheer speculation as to the basis of the recommendation, whether considering the jury collectively or the jurors individually. In other words, from a jury's bare advisory recommendation, it would be impossible to tell which, if any, aggravating circumstances a jury or any individual juror may have determined existed. And, of course, a "recommendation" is hardly a finding at all.

Bottoson v. Moore, 833 So. 2d 693, 708 (Fla. 2002) (Anstead, J., concurring) (holding *Ring* inapplicable to Florida's death sentencing statute), *abrogated by Hurst*, 2016 WL 112683. *See also Combs v. State,* 525 So.2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring) ("the sentencing judge can only speculate as to what factors the jury found in making its recommendation. . . ."); *Johnson v. State,* 53 So. 3d 1003, 1007-08 (Fla. 2010) (dispensing with harmless error application based on "sheer speculation"), *as revised on denial of reh'g* (Fla. 2011).

As explained by Justice Scalia in *Sullivan v. Louisiana,* harmless-error review is necessarily more precise and therefore cannot be applied where clarity is absent from the record:

> In *Fulminante,* we distinguished between, on the one hand, "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," 499 U.S., at 309, 111 S. Ct., at 1265, and, on the other hand, trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented," *id.,* at 307–308, 111 S.Ct., at 1252, 1264.

Sullivan v. Louisiana, 508 U.S. 275, 281 (1993). Put more practically, a failure to instruct on an element will not be considered structural where its effect on the factfinder can be assessed in the context of "overwhelming" or "uncontroverted" evidence to support it. *See Johnson,* 53 So. 3d at 1007-08. If the effect on the factfinder cannot be assessed, per se reversal is warranted.

The per se reversible error rule has been applied in Florida where a judge responded to a jury request in the parties' absence and the record was silent as to the nature of the inquiry and response, *see Ivory v. State,* 351 So. 2d 26, 28 (Fla. 1977); where a bailiff had unsupervised communications with a jury, *State v. Merricks,* 831 So. 2d 156, 161 (Fla. 2002); where a sitting juror was substituted after deliberations began, *Williams v. State,* 792 So. 2d 1207, 1210 (Fla. 2001); and where a jury was not instructed on a lesser included offense one step removed from the charged offense, *Pena v. State,* 901 So. 2d 781, 787 (Fla. 2005).

By contrast, in Mr. Lambrix's case, the record is silent as to what any particular juror, much less a unanimous jury, actually found. Indeed, as pointed out by the Court in *Steele,* even a special verdict form indicating which

aggravating circumstances the jury considered, and by how many votes, would have been insufficient to establish that the required jury factfinding was made:

> We cannot predict all the consequences of approving the trial court's order, but we are unwilling to approve ad hoc innovations to a capital sentencing scheme that both the United States Supreme Court and this Court repeatedly have held constitutional. *See, e.g., Hildwin,* 490 U.S. at 640–41, 109 S.Ct. 2055; *Spaziano v. Florida,* 468 U.S. 447, 467, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Barclay,* 463 U.S. at 958, 103 S.Ct. 3418; *Proffitt,* 428 U.S. at 259, 96 S.Ct. 2960; *Kormondy,* 845 So.2d at 54; *State v. Dixon,* 283 So.2d 1, 11 (Fla.1973). **Moreover, any special verdict on aggravators would have to be accompanied by clear instructions on how these changes affect the jury's role in rendering its advisory sentence and the trial court's role in determining whether to impose a sentence of death."**

State v. Steele, 921 So. 2d 538, 547 (Fla. 2005), *as revised on denial of reh'g* (Feb. 2, 2006), *abrogated by Hurst,* 2016 WL 112683.

In its Response to Mr. Lambrix's Petition, the state argues that *Hurst* error is not only subject to harmless-error review, but that the error in this case was, in fact, harmless because Mr. Lambrix was convicted of two contemporaneous murders. (Resp. at 17-9) (noting that this Court has rejected claims raised under *Ring v. Arizona*, 536 U.S. 584 (2002), where the defendant has been convicted of a qualifying contemporaneous felony). However, unlike the error identified in *Ring*, to which the Arizona Supreme Court applied harmless-error review on remand from the Supreme Court, the error identified in *Hurst* cannot be similarly quantified or assessed. This is because Florida's sentencing statute defines death eligibility differently than did the Arizona statute at issue in *Ring,* which provided:

> Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. *See* 200 Ariz., at 279, 25 P.3d, at 1151 (citing Ariz. Rev. Stat. § 13–703). This was so because, in Arizona, a "death sentence may not legally be imposed ... unless *at least one aggravating factor is found to exist beyond a reasonable doubt*." 200 Ariz., at 279, 25 P.3d, at 1151 (citing § 13–703).

Ring, 536 U.S. at 597.[3] Relying on United States Supreme Court precedent, the Arizona Supreme Court held on remand that "a failure to submit one element of an offense to a jury does not infect the trial process from beginning to end[;]" thus, the error is not per se reversible. *State v. Ring*, 65 P.3d 915, 935 (Ariz. 2003) (relying on *United States v. Cotton,* 535 U.S. 625, 630–31 (2002); *Neder v. United States,* 527 U.S. 1, 8 (1999)). The court then concluded that where a capital defendant qualified for one of Arizona's prior conviction aggravators, as did the majority of those whose cases were consolidated with Ring's on remand, the error identified by the Supreme Court was harmless under *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

Similarly, in *Cotton*, on which the Arizona Supreme Court relied, the element found by the sentencing judge (rather than the jury) was the quantity of drugs used to enhance the defendant's sentence for a conspiracy conviction. The United States Supreme Court declined to assess whether the error was structural,

[3] Mr. Lambrix correctly points out that this Court has consistently mischaracterized the eligibility requirement for a death sentence in Florida as identical to that in Arizona's statute. The Court should correct this error in reviewing Mr. Lambrix's case. (Pet. Reply to Resp. at 8-13.)

concluding instead that it did not even qualify as *plain* error because the evidence that the conspiracy involved 50 grams or more of drugs was "overwhelming" and "essentially uncontroverted." *Cotton*, 535 U.S. at 632. The same was true in *Neder*. 527 U.S. at 8 (holding that the trial court's failure to instruct jury that it must find the element of materiality of false statements to convict the defendant of mail, wire, and tax fraud, was subject to harmless-error review).

Setting aside that Amicus believes *Almendarez-Torres* was effectively overruled by *Apprendi*[4], the cases cited above are distinguishable from this one. Florida's capital sentencing statute requires two findings that are substantively different from the elements at issue in Arizona's statute invalidated by *Ring.* While

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[4] In *Apprendi v. New Jersey,* the United States Supreme Court stated in *dicta*, "Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity and we need not revisit it for purposes of our decision. . . ." 530 U.S. 466, 489-90 (2000) (footnote omitted). Indeed, in his dissent in *Almendarez-Torres* itself, Justice Scalia clearly articulated the standard we now know applies to invalidate Florida's death-sentencing scheme under the Sixth Amendment:

> [No] case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.... The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge."

Almendarez-Torres v. United States, 523 U.S. 224, 257, n. 2 (1998) (Scalia, J., dissenting) (emphasis omitted); *see also Apprendi v. New Jersey*, 530 U.S. at 499 (Thomas, J., concurring).

the Arizona law deemed a defendant death eligible upon a finding of "at least one aggravator . . . beyond a reasonable doubt," the Florida statute requires that the fact-finder find "sufficient aggravating circumstances" to qualify the defendant for death, and "insufficient mitigating circumstances to outweigh the aggravating circumstances." Thus, the "element" at issue in Florida can only be determined by the individual and collective assessment, by twelve jurors, of what constitutes "sufficiency" in the death-penalty context.

This sort of determination is, of course, highly subjective, and vastly different from the kind of objective, discrete elements at issue in *Ring*, *Cotton,* and *Neder*. *See also United States v. Booker*, 543 U.S. 220 (2005) (element of materiality of false statements should have been found by the jury); *Blakely v. Washington*, 542 U.S. 961 (2004) (element of "deliberate cruelty" should have been found by the jury). From the face of the general sentencing verdict in Florida, it is impossible to deduce what the advisory jury might have been found. As Judge O. H. Eaton eloquently elaborated:

> The role of the jury during the penalty phase under the Florida death penalty scheme has always been confusing. The jury makes no findings of fact as to the existence of aggravating or mitigating circumstances, nor what weight should be given to them, when making its sentencing recommendation. The jury is not required to unanimously find a particular aggravating circumstance exists beyond a reasonable doubt. It makes the recommendation by majority vote, and it is possible that none of the jurors agreed that a particular aggravating circumstance submitted to them was proven beyond a reasonable doubt. The jury recommendation does not contain any

> interrogatories setting forth which aggravating factors were found, and by what vote; how the jury weighed the various aggravating and mitigating circumstances; and, of course, no one will ever know if one, more than one, any, or all of the jurors agreed on any of the aggravating and mitigating cirumstances.

Aguirre-Jarquin v. State, 9 So. 3d 593, 611 (Fla. 2009) (Pariente, J., specially concurring) (quoting Judge Eaton's sentencing order).

Because the general verdict is devoid of evidence of the jury's factfinding, the constitutional error identified in *Hurst* is structural, thereby precluding the application of harmless-error review and requiring that Mr. Lambrix's death sentence be vacated.

IV. Even if the Court applies a harmless error test to the *Hurst* error in Mr. Lambrix's case, it can place little or no weight on the jury's non-unanimous, advisory recommendation in light of the unavoidable Eighth Amendment violation that otherwise emerges based on *Caldwell v. Mississippi.*

While the United States Supreme Court has never required that a jury, rather than a judge, sentence a defendant who has been found guilty of capital murder, it has now made clear that pursuant to the Sixth Amendment, the jury must find, beyond a reasonable doubt, every element of the offense that renders the defendant eligible for a death sentence, and that finding must be binding on the trial court. *Hurst*, 2016 WL 112683, at *9 (invalidating sections 921.141(2) and (3) of the Florida statutes because they allow a defendant to be sentenced to death based not on a jury's verdict of death-eligibility, but on a judge's factfindings).

The state argued in *Hurst* that because the jury recommended a death sentence, its members necessarily found at least one aggravating circumstance during deliberations; thus, any error resulting from the trial court's improper factfinding was harmless. This argument was rejected by the Supreme Court based on the the state's failure to "appreciate the central and singular role the judge plays under Florida law." *Id.* at *6 (citing §§ 775.082(1), 921.141(3), Fla. Stat.; *Steele*, 921 So. 2d at 546; *Spaziano v. State*, 433 So. 2d 508, 512 (1983)). The court made clear that the state could not both minimize the jury's role statutorily, through instructions and in argument, but then rely on the jury's death recommendation to confer on the jury the very role the Legislature put squarely on the judge's shoulders. *Hurst*, 2016 WL 112683, at *6.

This holding is consistent with *Caldwell v. Mississippi*, which held that "it is constitutionally impermissible [under the Eighth Amendment] 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." 472 U.S. 320, 328-29 (1985) (relying in part on "a concern that the sentencing process [in capital cases] should facilitate the responsible and reliable exercise of sentencing discretion.") (citations omitted). Indeed, following *Ring*, members of this Court posited that Florida's instruction minimizing the advisory role of the jury might be unconstitutional. In *Combs,* the Court rejected a *Caldwell*

claim because, unlike the prosecution's misleading argument in *Caldwell*, the challenged Florida jury instruction accurately reflected the jury's advisory role. 525 So. 2d at 856-57. But in doing so, the Court acknowledged that if the jury's verdict were *not* merely advisory, the Court "would necessarily have to find that [Florida's] standard jury instructions, as they have existed since 1976, violate the dictates of *Caldwell*," thereby requiring "resentencing proceedings for virtually every individual sentenced to death in this state since 1976." *Id.* at 858 (quotation marks omitted). *See also Bottoson*, 833 So. 2d at 733, (Lewis, J., concurring) ("[C]learly, under *Ring*, the jury plays a vital role in the determination of a capital defendant's sentence through the determination of aggravating factors. However, under Florida's standard penalty phase jury instructions, the role of the jury is minimized, rather than emphasized, as is the necessary implication to be drawn from *Ring*.").

As recounted in Mr. Lambrix's Petition, the jurors in his case were told again and again, by both the judge and the prosecutor, that their role was only advisory—a *recommendation*. The impact of this instruction, though it accurately identified the role of the jury under Florida law, was to put another heavy thumb on the scale of harm wrought by the Sixth Amendment error itself, ensuring that the jury's deliberative process was anything but reliable under the Eighth Amendment. *See Caldwell*, 472 U.S. at 329 ("[M]any of the limits that this Court

has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion.") (citations omitted).

The reasoning behind *Caldwell* is straightforward and applies with equal strength to the Sixth Amendment error identified in *Hurst* and at issue in this case—the improper minimization of the jury's role, whether by statute, argument, or instruction, violates the Eighth Amendment. The court "has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State." *Id.* Where the jury is improperly told that it may shift its responsibility to another entity—"As you have been told, the final decision as to which punishment shall be imposed is the responsibility of the trial judge. In this case, as the trial judge, that responsibility will fall on me," Fla. Std. Jury Instr. 7.11(2)—there are "specific reasons to fear substantial unreliability as well as bias in favor of death sentences." *Caldwell*, 472 U.S. at 330. At least two of the four reasons identified by the court in *Caldwell* are relevant to this case.

First, jurors instructed that their role is only advisory might choose to "send a message" of disapproval by recommending a death sentence, even when they have not made the requisite findings of fact to expose the defendant to such a

sentence. *See id.* at 331. Their conscience will be relieved by the assurances made by the Court and the prosecutor that the judge is the ultimate sentencer.

Second, informing the jurors that responsibility for its fact finding will lie with the trial judge, "presents an intolerable danger that the jury will in fact choose to minimize the importance of its role. Indeed, one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of [judicial] review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in." *Id.* at 333 (noting that because jurors in capital cases find themselves swimming in very uncomfortable waters, and are given substantial discretion to determine whether another should die, a minimizing role is "highly attractive" to them).

The Capital Jury Project's (CJP) research buttresses the above reasoning. The CJP compiled data from 1198 jurors in 353 capital trial in fourteen states. The states accounted for 76.12% of all persons on death row as of January 1, 2005, and included the three so-called "hybrid" states—Alabama, Delaware, and Florida. Among other outcomes, the CJP found that,

> The Sixth and Eighth Amendment arguments enunciated in *Ring* and the importance of jury's recognizing their responsibility emphasized in *Caldwell* all suggest that the hybrid systems are fatally flawed. Findings revealing that jurors in states with hybrid systems are *more likely to deny responsibility, invest less energy in understanding instructions, and more often rush to judgment* demonstrate how the potential for judicial override eviscerates Sixth and Eighth Amendment protections and warrants the concerns raised in *Caldwell*.

William J. Bowers et. al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 Wash. & Lee L. Rev. 931, 951 (2006). Moreover, jurors in hybrid states saw the jury as "less responsible than the judge and themselves individually as less responsible than the jury collectively for the defendant's punishment." *Id.* at 954.

The message here is not that judicial sentencing is inherently unconstitutional, but that informing the jurors that their role in sentencing is subordinate to what the constitution requires is likely to have adverse consequences on the reliability of the jury's deliberation process and, thus, its recommendation. That is to say, a reviewing court cannot assume that the recommendation actually reflects actual factual findings of any *one* of the jurors, let alone all of them collectively.

The reliability problems found by the CPJ and identified in *Caldwell* are especially acute in Florida, one of only two states in the country that allow a death sentence recommendation based on a simple majority of the jury. While a unanimity requirement may not always produce different outcomes, it does produce more reliable outcomes. "[W]here unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots." American Bar Association, American Jury Project, *Principles for Juries and Jury*

Trials, 24, available at http://www.americanbar.org/content/dam/aba/migrated/jury/pdf/final_commentary_july_1205.authcheckdam.pdf (last accessed Jan. 19, 2016). Moreover, "[a] non-unanimous decision rule allows juries to reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation." *Id.* In short, failing to require unanimity among jurors undermines the credibility of the outcome of deliberations.[5]

The significant empirical research affirming the wisdom of the unanimity requirement led the American Bar Association to conclude in 2005, that "[a] unanimous decision should be required in all criminal cases heard by a jury." *Principles for Juries and Jury Trials, supra*, at 23. Other organizations and commentators have concluded the same. *See, e.g.*, Dennis J. Divine, et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7

[5] As Professor Shari Seidman Diamond, Mary R. Rose, and Beth Murphy explain, "[T]houghtful minorities are sometimes marginalized when the majority has the power to ignore them in reaching a verdict. Although juries generally engage in serious and intense deliberations, jurors themselves report more thorough and open-minded debate when they reach unanimity." Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U. L. Rev. 201, 230 (2006); *see id.* (noting that "[t]he image of eccentric holdout jurors outvoted by sensible majorities receives no support. Indeed, the judge agreed with the verdict favored by the holdouts in a number of these cases"). Indeed, jurors who do not agree with the majority view contribute more vigorously to jury deliberations when operating under a unanimous verdict scheme. *See Principles for Juries and Jury Trials*, *supra*, at 24; Reid Hastie et al., *Inside the Jury*, 108-12 (1983); *see also* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272 (2000) (noting "[a] shift to majority rule appears to alter both the quality of the deliberative process and the accuracy of the jury's judgment"). As a result, verdicts-by-majority-rule undermine the public credibility of our judicial system. *See id.* at 1278.

Psychol. Pub. Pol'y & L. 622, 669 (2001) (reviewing all available social science and concluding that laws allowing non-unanimous verdicts have a significant effect when the prosecution's case "is not particularly weak or strong"). In short, empirical evidence confirms the Framers' fundamental insight that "it is the unanimity of the jury that preserves the rights of mankind." John Adams, A Defence of the Constitutions of Governments of the United States of America (1787).

The facts from Mr. Lambrix's case demonstrate that failing to require unanimity and denigrating the role of the jury leads to quick, unreliable work: twelve jurors were charged with recommending a sentence for Mr. Lambrix for not *one*, but *two* counts of capital murder. They exited the courtroom to begin deliberations at 3:10 p.m. (R. 2677). Forty-five minutes later, at 3:55 p.m., the jurors alerted the trial court that they had reached a recommendation for both offenses. (R. 2679). As to Count I, the jury recommended a death sentence by a vote of 10-2. As to Count II, the jury recommended a death sentence by a vote of 8-4. (R. 2680). The jurors barely would have had time to get settled in the jury room and vote on each recommendation, let alone consider each aggravating and mitigating circumstance and deliberate in any meaningful way.

To call the error identified in *Hurst* "harmless" in this context, simply because the jury returned a general verdict that is consistent with the trial court's

factfinding and sentence, would be to stretch the definition of "harmless" beyond the breaking point. This is especially true because the trial judge is required to give the jury's recommendation "great weight," *see Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975), thereby increasing the likelihood of consistent outcomes. In light of *Caldwell,* what we know about juror behavior, and what we know about Mr. Lambrix's jury in particular, this Court should give little if any weight to the jury's nonunanimous, "drive-by" recommendation which, in addition to its violation of the Sixth Amendment, carries with it none of the hallmarks of reliability required by the Eighth Amendment.

CONCLUSION

Based upon the foregoing, FACDL respectfully submits that *Hurst v. Florida* mandates that this Court declare Mr. Lambrix's sentence of death unconstitutional, vacate it, and remand his case to the Twentieth Judicial Circuit with an order that he be resentenced to life in prison pursuant to section 775.082(2) of the Florida Statutes. Alternatively, the Court should find the error identified in *Hurst* per se reversible, thereby requiring the same result, whether by order vacating the death sentence by this Court, or via Rule 3.851 motion in the trial court.

If the Court applies a harmless-error review, it must also vacate Mr. Lambrix's death sentence. As Judge Eaton has explained, the jury's general verdict

is "essentially meaningless" in revealing what, if anything, the jury factually found, *Aguirre-Jarquin v. State*, 9 So. 3d at 612 (citation omitted). As a result, sentencing judges have been reduced, as Chief Judge Belvin Perry noted, to "fishing in the dark." *Id.* at 611 (citation omitted). But there is no justification at this point for this Court likewise to fish in the dark for harmless error, particularly where jury unanimity was not required and the jury was invited to "pass the buck" to the sentencing judge, yielding record fast deliberations. The error recognized by the Supreme Court in *Hurst* is of fundamental significance and reaches down to the very roots of the Sixth Amendment right to a trial by jury. It cannot be dismissed as merely harmless.

Respectfully submitted,

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IN THE

Supreme Court of Florida

CARY MICHAEL LAMBRIX,

Petitioner,

v.

JULIE L. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

Case Nos.: SC16-8
SC16-56

DEATH WARRANT SIGNED

APPENDIX

Hurst v. Florida, SC No. 14-7505, Brief of Amicus Curiae Former Florida Circuit Court Judges in Support of Petitioner (June 4, 2015)

No. 14-7505

IN THE

Supreme Court of the United States

TIMOTHY LEE HURST,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF OF *AMICI CURIAE* FORMER FLORIDA CIRCUIT COURT JUDGES IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are former Florida jurists who presided over capital trials in their capacity as circuit court judges. *Amici* consist of a bipartisan group ranging across the political spectrum. *Amici* include both proponents and opponents of capital punishment, but all *Amici* agree that by providing judges, rather than juries, with the independent power to issue a death sentence, Florida's capital sentencing statute violates the Eighth Amendment to the United States Constitution.

The individual *Amici* are:

- Judge Thomas H. Bateman, III served on the Circuit Court for Florida's Second Judicial Circuit Court from 2001 through 2009, and as Leon County Court Judge from 1990 through 2001. While a jurist, he served as Associate Dean of the Florida College of Advanced Judicial Studies and a contributing faculty member to the AJS course entitled Handling Capital Cases, under the Chairmanship of *Amicus* Judge O.H. Eaton, Jr. Judge Bateman has served as a member of the Supreme Court of Florida's Criminal Court Steering Committee and twice served as Chair of The Florida Bar's Criminal Procedure Rules Committee. Before becoming a Judge, he served

1. Pursuant to Supreme Court Rules 37.3(a) and 37.6, *Amici Curiae* certify that no counsel for a party authored this brief in whole or part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that the parties have consented to the filing of this brief in letters submitted herewith.

as an Assistant Attorney General for the State of Florida, an Assistant Public Defender for Orange County, Florida, and a Deputy Sheriff for the Broward County Sheriff's Office.

- Judge Nikki Ann Clark served on the Circuit Court for Florida's Second Judicial Circuit from 1993 through 2009. She was then appointed to serve on the First District Court of Appeal in 2009 by Governor Charlie Crist and retired in 2015. She is a former Assistant Attorney General for the State of Florida and a former attorney for Legal Services of North Florida.

- Judge O.H. Eaton, Jr. served on the Circuit Court for Florida's Eighteenth Judicial Circuit Court from 1986 through 2010, including as Chief Judge. He was a member of the Florida Sentencing Commission from 1991 until 1998, and served as Chair of the Criminal Justice Section of the Florida Conference of Circuit Judges from 1994 through 1996. He was selected to be a member of the American Bar Association's Florida Capital Punishment Assessment Committee (2004-2005), and was the Chair of the Supreme Court of Florida's Criminal Court Steering Committee from its inception in 2002 until 2010. He teaches the Handling Capital Cases course at the Florida College of Advanced Judicial Studies and at the National Judicial College, University of Nevada, Reno.

- Judge Janet E. Ferris served on the Circuit Court for Florida's Second Judicial Circuit from 1999

through 2009. Prior to becoming a judge, she served as an assistant prosecutor in the Broward County State Attorney's Office, in the Florida Office of the Attorney General as the first Chief of the Civil RICO section, and as General Counsel to the Florida Department of Law Enforcement.

- Judge Martha Ann Lott served on the Circuit Court for Florida's Eighth Judicial Circuit from 1997-2013, and was Chief Judge from 2009 through 2012. She served as Alachua County Court Judge from 1991 through 1997. Prior to becoming a judge, she served as an assistant public defender and worked in private practice.

- Judge Philip J. Padovano served on the Circuit Court for Florida's Second Judicial Circuit from 1988 through 1996, at which time he was appointed to serve on the First District Court of Appeal until his retirement in 2015. For the past fifteen years, he has served as Chair of the Florida Bar Association's Committees on Florida Standard Jury Instructions in Criminal Cases and Committee to Recommend Minimum Standards for Lawyers in Capital Cases.

- Judge Larry G. Turner served on the Circuit Court for Florida's Eighth Judicial Circuit from 1997 through 2004. Early in his career, he served as an Assistant State Attorney for the Eighth Judicial Circuit, and then began work in private practice. He is a former President of the Florida Association for Criminal Defense Lawyers and has served as a member of the Executive Council

of Florida Bar Criminal Law Section for twelve years. Judge Turner has taught both academic and practice courses as an adjunct professor at the University of Florida Levin College of Law.

SUMMARY OF THE ARGUMENT

This Court repeatedly has held that, if it is to withstand Eighth Amendment scrutiny, capital sentencing requires heightened reliability and, thus, heightened procedural safeguards. *See, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Gregg v. Georgia*, 428 U.S. 153, 188-89 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Similarly, the Court has emphasized the importance of juries in protecting our citizenry from arbitrary government action that leads to the unjust deprivation of liberty. *See Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). For three, interrelated reasons, *Amici,* all former Florida trial judges who have presided over capital trials, believe that, because a death sentence constitutes the ultimate deprivation of liberty, its application can have constitutional legitimacy only when it arises from the reasoned deliberations of twelve jurors who represent a cross-section of the community, not from the judgment of a single, elected jurist.

First, the primary goal of today's capital-sentencing statutes is retribution. Because retribution's goal is to reflect "society's and the victim's interest in seeing that the offender is repaid for the hurt he caused," *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008) (citations omitted), and because the decision to deprive the defendant of his or her life is so unique in kind and severity, the decision

that retribution demands imposition of the death penalty should only be made by twelve representatives of the "community as a whole," *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007), as they "are more likely to express the 'conscience of the community'" than are judges. *Ring v. Arizona*, 536 U.S. 584, 615-16 (2002) (Breyer, J., concurring in judgment) (citation omitted).

Second, capital sentencing involves a weighing of aggravating and mitigating circumstances. The former are largely fact-bound circumstances designed to narrow the class of death-eligible defendants, *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988), while the latter must take into account a vast array of evidence designed to ensure that the "sentence imposed . . . reflect[s] a reasoned *moral* response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). In short, the decision whether mitigating circumstances serve as a basis for sparing a defendant's life is distinctly dependent on contemporary community moral judgments and must therefore be made by the community's representatives – jurors – in order to ensure the reliability that the Eighth Amendment demands.

Finally, Florida's transition to judicial sentencing in capital cases was a result of the misguided interpretation of *Furman v. Georgia*, 408 U.S. 238 (1972), as prohibiting all discretionary capital sentencing by juries. The Supreme Court of Florida later endeavored to fix this error by requiring trial judges to give "great weight" to a jury's advisory verdict when determining whether to sentence a defendant to death. *Tedder v. State*, 322 So. 2d

908, 910 (Fla. 1975). But without requiring jurors to report specific findings as to which aggravating and mitigating circumstances they found and how those circumstances were applied, and without defining the meaning of "great weight," the Supreme Court left trial judges to apply an undefined term to an undefined verdict. When the requirement that judges substitute their own judgment for that of the "conscience of the community" is combined with the uncertainty of having to apply "great weight" to an "essentially meaningless" jury verdict, *Aguirre-Jarguin v. State*, 9 So. 3d 593, 611 (Fla. 2009) (Pariente, J., specially concurring), the heightened safeguards required before imposition of the ultimate sentence all but disappear in Florida. *Amici* therefore believe this Court should find Florida's death-sentencing statute unconstitutional under the Eighth Amendment.

ARGUMENT

THE DECISION TO IMPOSE A DEATH SENTENCE HAS UNIQUE FEATURES THAT REQUIRE IT BE MADE BY A JURY OF LAY CITIZENS.

This Court has long recognized that death is fundamentally different in kind from any other punishment that society may impose. *Furman v. Georgia*, 408 U.S. 238, 286-291 (1972) (Brennan J., concurring). The "qualitative difference" in its finality, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), demands a correspondingly "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (quoting *Woodson*, 428 U.S. at 305 (1976)). In *Gregg v. Georgia*, 428

U.S. 153, 188-89 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), this Court made clear that in order for a state's capital punishment scheme to withstand Eighth Amendment scrutiny, states are required to apply special procedural safeguards to "minimize the risk of wholly arbitrary and capricious action" in imposing the death penalty. As former Florida trial judges with significant experience presiding over capital trials, *Amici* have come to the conclusion that, in keeping with the death-penalty schemes of the federal system and the vast majority of states,[2] "[o]ne such safeguard . . . is that a jury, and not a judge, should impose any sentence of death." *Woodward v. Alabama*, 134 S. Ct. 405, 407 (2013) (Sotomayor, J., dissenting from denial of certiorari).

Reliance on juries to safeguard against arbitrary and capricious government action is well rooted in our system's history:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . The framers of the constitutions strove to create

2. In 27 of the 31 states that maintain the death penalty, as well as the federal system, a death sentence may only be imposed by the jury. *See Woodward v. Alabama*, 134 S. Ct. 405, 407 n.2 (2013) (Sotomayor, J., dissenting from denial of certiorari). Only Florida, Alabama, Delaware and Montana leave the ultimate sentencing decision to the judge. *Id.* Nebraska, which formerly allowed judicial sentencing, abolished the death penalty by legislative act on May 27, 2015. *See* Leg. 268, 104th Leg., 1st Sess. (Neb. 2015).

> an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968) (footnote omitted).

In accord with the Eighth Amendment's heightened need for reliability, "the right to have an authentic representative of the community apply its lay perspective to the determination that must precede a deprivation of liberty [] applies with special force to the determination that must precede a deprivation of life." *Spaziano v. Florida*, 468 U.S. 447, 482-83 (1984) (Stevens, J., concurring in part and dissenting in part). "[T]he life-or-death decision in capital cases depends upon its link

to community values for its moral and constitutional legitimacy." *Id.* at 483. Having been charged with the grueling task of deciding the fate of numerous capital defendants, *Amici* believe the conclusion that a sentence of death is appropriate in a particular case is one far more fit for juries to make. The following important considerations have compelled us to believe that the Eighth Amendment requires that safeguard.

A. Whether Retribution Demands a Death Sentence is a Determination Best Made by a Jury.

While this Court has identified three societal functions served by capital punishment—deterrence, incapacitation, and retribution, *see Gregg*, 428 U.S. at 183—*Amici* are convinced that the primary justification for today's capital punishment system is retribution. *See Ring v. Arizona*, 536 U.S. 584, 614-15 (2002) (Breyer, J., concurring in judgment) (citing studies to demonstrate "the continued difficulty of justifying capital punishment in terms of its ability to deter crime [or] incapacitate offenders"); *Harris v. Alabama*, 513 U.S. 504, 517-18 (1995) (Stevens, J., dissenting) (dispelling rehabilitation, incapacitation, and deterrence justifications). "[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct," *Gregg*, 428 U.S. at 183, and a sentence of death thus "expresses the community's judgment that no lesser sanction will provide an adequate response to the defendant's outrageous affront to humanity." *Harris*, 513 U.S. at 518 (Stevens, J., dissenting) (citing *Gregg*, 428 U.S. at 184).

Because retribution's goal is to reflect "society's and the victim's interest in seeing that the offender is

repaid for the hurt he caused," *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008) (citations omitted), and because the decision to deprive the defendant of his or her life is so unique in kind and severity, *Amici* believe that twelve representatives of the "community as a whole," *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007), should be charged with determining whether retribution demands imposition of the death penalty through the deliberative process. As Justice Breyer notes in his concurrence in *Ring*, jurors "possess an important comparative advantage over judges . . . [because] they are more likely to express the 'conscience of the community' on the ultimate question of life or death." *Ring*, 536 U.S. at 615-16 (Breyer, J., concurring in judgment) (citation omitted).

This point was recently underscored in an article by *Amicus* Judge O.H. Eaton, Jr., who has for many years taught a mandatory, week-long judicial training course for Florida trial judges newly-assigned to handle capital cases. *See* Judge O.H. Eaton, Jr., *Capital Punishment: A Failed Experiment (Part 2)*, 24 Florida Defender 56, 60-61 (Spring 2012). During the training, new judges are presented with a hypothetical case about the murder of a drug dealer involving three defendants of varying degrees of culpability. *Id.* at 60. At the end of the week, the student judges are asked what sentence they would impose for the most culpable of the defendants. *Id.* Over a twelve-year period (2001-2012), the judges' verdicts were split virtually down the middle every year: approximately 45 percent of the judges consistently voted to sentence the most culpable of the defendants to life in prison and 55 percent voted to sentence him to death. *Id.*

This statistical evidence, while not scientific, provides credible data that the sentence in a capital case has more to do with the judicial assignment than the facts of the

case. Each elected jurist comes to the bench with his or her own background, experience, and belief system, all likely to inform his or her verdict. As Judge Eaton's judicial course demonstrates, two judges can look at the same case, with the same set of facts, and reach different verdicts. While this is also the case for two jurors, we, as former trial judges who have grappled with such life-and-death decisions, believe that a sentence of death stemming from the considered judgment of twelve members of a jury engaging in the deliberative process is likely to be a more reliable representation of the community's moral values and conscience than one imposed by a single judge.

B. Because of the Central Role of Mitigation in Post-*Gregg* Capital Sentencing, the Decision Whether to Impose a Death Sentence Should Be Made by a Jury.

In the wake of *Gregg* and its companion cases, all American capital-sentencing procedures have integrated the weighing of aggravating against mitigating circumstances. Because the purpose of aggravating circumstances is to provide the sentencer with the guidance needed to "genuinely narrow the class of persons eligible for the death penalty" to those whose crimes warrant the most severe sentence, *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)), the finding of an aggravating circumstance involves a fact-bound inquiry with relatively fixed, specific contours.[3] *See Tuilaepa v. California*, 512 U.S. 967, 973

3. The Sixth Amendment, as construed by this Court in *Ring v. Arizona*, 536 U.S. 584 (2002), requires that the finding of any aggravating circumstance which is the prerequisite for imposing a capital sentence be made by a jury.

(1994) ("Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant . . . .").

Conversely, mitigating circumstances serve to ensure that capital offenders are treated "as uniquely individual human beings . . . [and not] as members of a faceless, undifferentiated mass to be subjected to the blind infliction of death." *Woodson*, 428 U.S. at 304. Thus, the consideration of mitigating circumstances must be wide-ranging and must take into account a vast array of circumstances that are not reducible to sharp-edged facts but involve complex, value-laden judgments. *See, e.g.*, *Tennard v. Dretke*, 542 U.S. 274, 284 (2004) (holding no factual nexus to crime needed for mitigating evidence to be relevant).

For more than a third of a century now, it has been the rule that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (footnotes omitted); *accord, e.g.*, *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1986); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). The premise of this requirement is that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263-64 (2007).

The consideration of mitigation as a basis for sparing a defendant's life involves judgments that are unique in the American criminal-justice system in two regards: they take account of a sweeping range of information, much of it irreducible to discrete, concrete, facts; and they explicitly, centrally focus upon *moral* judgment. *See Payne v. Tennessee*, 501 U.S. 808, 809 (1991) (noting there are "[v]irtually no limits" placed on relevant mitigating evidence); *Abdul-Kabir*, 550 U.S. at 236-64 ("[B]efore a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment . . . in light of his personal history and characteristics and the circumstances of the offense."). We believe that this kind of judgment must be made not by legal professionals, but by a jury of lay citizens if the death penalty is to comport with "'evolving standards of decency that mark the progress of a maturing society.'" *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

To be sure, this Court has been content to allow judicial factfinding in capital cases in certain contexts, including when the Court considered the retroactivity of *Ring*. *See Schriro v. Summerlin*, 542 U.S. 348, 355-56 (2004). But in *Schriro,* the issue under consideration was not whether jurors were more reliable capital sentencers than jurists, but whether judicial factfinding "'so seriously diminishe[d]'" accurate and reliable factual determinations of aggravating circumstances as to render them constitutionally assailable. *Id.* (applying and citing retroactivity standard in *Teague v. Lane*, 489 U.S. 288, 312-13 (1989)).

Conversely, the decision whether to impose a sentence of death, with its central focus upon the weighing of fact-based aggravating circumstances against "compassionate or mitigating factors stemming from the diverse frailties of humankind," *Woodson*, 428 U.S. 304-05, is so distinctly dependent upon contemporary community moral judgments that it must be made by the community's representatives – jurors – in order to ensure the reliability that the Eighth Amendment demands.[4]

C. The Advisory Jury under Florida's Death-Penalty Scheme Fails to Satisfy the Eighth Amendment's Reliability Requisite.

Throughout the century leading up to this Court's decision in *Furman*, Florida law required that juries render the final sentencing decisions in capital cases. *Spaziano*, 468 U.S. at 474 (Stevens, J., dissenting). This practice was mandated because juries "maintain a link between contemporary community values and the penal system – a link without which the determination of

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4. Indeed, in *Schriro*, the Court distinguished the issue before it from the consideration at issue in this case: "The dissent contends that juries are more accurate because they better reflect community standards in deciding whether, for example, a murder was heinous, cruel, or depraved. . . . But the statute here does not condition death eligibility on whether the offense is heinous, cruel, or depraved as determined by community standards." *Schriro v. Summerlin*, 542 U.S. 348, 357 (2004) (citation omitted). By contrast, the Eighth Amendment requirement that a sentencer consider the "'compassionate or mitigating factors stemming from the diverse frailties of humankind,'" *Sumner v. Shuman*, 483 U.S. 66, 74 (1987) (citation omitted), *does* requires the application of "community standards."

punishment would hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) (quoting *Trop*, 356 U.S. at 101)). Following *Furman*, the Florida Legislature transferred ultimate sentencing authority to trial judges, mandating independent judicial decision-making while retaining jury participation in the form of an advisory role. *See* Fla. Stat. § 921.141(2)-(3) (1973); *Proffitt v. Florida*, 428 U.S. 242, 247-51 (1976).

As Justice Stevens noted in his dissenting opinion in *Spaziano*, "[t]he change in the decision-making process that occurred in 1972 was not motivated by any identifiable change in the legislature's assessment of community values; rather it was a response to this Court's decision in *Furman*." *Spaziano*, 468 U.S. at 474 (Stevens J., dissenting) (citing Ehrhardt & Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 64 J. Crim. L. & Criminology 10 (1973)). "Predictably, the variety of opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." *Lockett*, 438 U.S. at 599. The Florida Legislature was among those that misconstrued *Furman* as condemning all discretionary capital sentencing by juries, and it consequently looked to judicial sentencing as a corrective. The Florida Supreme Court early on appreciated that this fix-for-*Furman* had the drastic downside of detaching capital sentencing from contemporary community values. In its own attempt to navigate the "tension" between *Furman*'s perceived command of regularity and Anglo-American law's longstanding recognition of the role of compassionate mitigation as an element in capital sentencing, *see, e.g.*,

Penry, 492 U.S. at 319, the Florida Supreme Court recognized that the jury's advisory verdict "could be a critical factor in determining whether or not the death penalty should be imposed," *Lamadline v. State*, 303 So. 2d 17, 20 (Fla. 1974); and the Court accordingly attempted to enhance the significance of that verdict by declaring that a trial judge must give it "great weight." *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

But this well-intended standard has proven impossible to employ reliably for two reasons. First, the jury's general verdict provides the sentencing judge with no specific findings regarding which aggravating and mitigating circumstances were found or how they were applied. *See* Fla. Stat. § 921.141(3). Second, as noted by *Amicus* Judge Eaton, Jr., "a definition of this subjective term, 'great weight,' is not contained in the statute or the case law." *Aguirre-Jarquin v. State*, 9 So. 3d 593, 611 (Fla. 2009) (Pariente, J., specially concurring). Trial judges charged with the discomforting duty to substitute their own moral judgment for the conscience of the community also must wrestle with the impossible task of applying an undefined term to an undefined verdict.[5] Thus, not only is

5. Jurors face a similarly obscure task, for they are asked to pay "due regard to the gravity" of the proceedings, but repeatedly informed that their verdict is a "recommendation," and "advisory," and that "the final decision as to which punishment shall be imposed is the responsibility of the judge. In this case, as the trial judge, that responsibility will fall on me." Fla. Std. Jury Instr. (Crim.) 7.11. Empirical studies reveal that the jury under this type of sentencing scheme feels little responsibility for its sentencing recommendation and that the deliberations are consequently short and less-than thorough. *See, e.g.*, William J. Bowers, *et al.*, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the*

the reliability of Florida's capital sentencing compromised by severing the crucial "link [to] contemporary community values," *Witherspoon*, 391 U.S. at 519 n.15, it is further undermined by the uncertainty of requiring judges to give "great weight" to a jury's "essentially meaningless" advisory verdict when determining whether to impose the ultimate sentence. *Aguirre-Jarquin*, 9 So. 3d at 611-12.

Given that the decision whether to impose a death sentence goes far beyond a strict legal inquiry, a single elected trial judge cannot reliably supplant the deliberative moral judgment of twelve jurors representing the "conscience of the community." Although we believe that Florida's judges endeavor to perform this duty honorably and to the best of their abilities, it is our considered view that no single judge can accurately speak for the collective conscience of the community with the heightened degree of reliability that the Eighth Amendment requires.

Judge and the Jury Influence Death Penalty Decision-Making, 63 Wash. & Lee L. Rev. 931, 952-80 (2006). Were jurors to be charged with making the decision to impose a death sentence, the instructions would be changed, of course, with the likely result that jurors would understand their awesome task and deliberate accordingly, as they do in the vast majority of jurisdictions that require jury death sentencing. *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted,

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June 4, 2015

CERTIFICATE OF SERVICE

Undersigned counsel hereby certify that a true and correct copy of the foregoing has been furnished to: Scott A. Browne, Assistant Attorney General, Counsel for Respondent, via e-service to scott.browne@myfloridalegal.com, to the capital appeals intake box of the Attorney General's Office at cappapp@myfloridalegal.com, and to Counsel for Petitioner, William N. Henness, III, at hennisw@ccr.state.fl.us, this 22nd day of January, 2016.

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that this brief complies with the type-font limitation.

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