No. 14-7505

IN THE

Supreme Court of the United States

TIMOTHY LEE HURST,

Petitioner,

v.

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF *AMICI CURIAE* FORMER JUSTICES OF THE SUPREME COURT OF FLORIDA IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amici are former Justices of the Supreme Court of Florida. Two *Amici* were also appellate judges on an intermediate appellate court in Florida, the District Court of Appeal, and two were trial judges in Florida's highest trial court, the Circuit Court. One *amicus* was a state prosecutor and, in that capacity, prosecuted capital cases. All possess extensive expertise and experience with Florida's death-penalty regime, having served on the Supreme Court of Florida, in which the direct and the collateral appeals in every Florida capital case are heard. All are keenly interested in the outcome of this case and believe that their expertise and experience can assist the Court in assessing the merits of this cause.

Harry Lee Anstead was a trial and appellate attorney until 1977, when he joined the Fourth District Court of Appeal, on which he served as Chief Judge. He was appointed to the Florida Supreme Court in 1994, and in 2002 became Florida's 50th Chief Justice. Justice Anstead retired from the Court in 2009.

Rosemary Barkett was appointed to the Circuit Court in 1979, and to the Fourth District Court of Appeal in 1984. In 1985, Justice Barkett became the first woman appointed to the Florida Supreme Court, and she later became the first female Chief Justice of that Court. In 1994, Justice

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 on file with the Clerk's office.

Barkett was named to the United States Court of Appeals for the Eleventh Circuit, on which she served until 2013, at which time she joined the Iran-United States Claims Tribunal, on which she presently serves.

Gerald Kogan was a prosecutor in the Miami-Dade State Attorney's office from 1960-1967, during which time he became the chief prosecutor of the Homicide and Capital Crimes Division. In 1980, Justice Kogan was appointed to the Circuit Court, and in 1984, he was appointed administrative judge of that court's criminal division. Justice Kogan was appointed to the Florida Supreme Court in 1987, on which he served as Chief Justice from 1996 until his retirement from the Court in 1998.

SUMMARY OF ARGUMENT

Ring v. Arizona establishes that a jury, not a judge, must find the aggravating circumstances that a State makes the prerequisite for eligibility for a death sentence. Florida mandates a finding of one or more aggravating circumstances to satisfy that prerequisite. But in practice, Florida death sentences are not based on a jury's factual findings.

The Florida jury's general verdict recommending either a life or death sentence is "essentially meaningless" for the trial judge, because it reveals nothing about what the jury factually found. Instead, Florida's death-penalty statute requires that the trial judge independently make the findings of fact on which the death sentence is based. The Supreme Court of Florida then reviews only the trial judge's findings to determine the propriety of the death

sentence. And neither the trial court nor the Florida Supreme Court is limited to the evidence that was before the jury.

The Florida death-penalty scheme thus accepts —even encourages—incongruity between the jury's findings and those on which the trial judge predicates a death sentence. Florida Supreme Court precedent precludes a specific verdict that would reveal which or how many aggravating circumstances were found by the jury and by how many votes. The Court has authorized a second sentencing hearing after the jury returns its sentencing recommendation at which additional evidence on aggravating and mitigating circumstances can be presented to the trial judge. The Court permits a trial judge to impose, and the Court itself to uphold, a death sentence based on aggravating circumstances that were never argued to the jury, based on evidence that the jury never heard.

Indeed, death sentences are upheld in Florida in cases in which there is no evidence that even a majority of the jury agreed that any particular aggravating circumstance had been proved. Mr. Hurst's case is one such example. The jury vote was 7-5 for a death sentence. Two aggravating circumstances were presented to the jury. With only the jury's general sentencing verdict, it is possible that not even a majority of the jurors agreed that any one aggravator had been established.

The Florida Supreme Court has acknowledged the tension between *Ring* and Florida's death-penalty process. The Court also has observed that Florida is an outlier—it is the only death-penalty jurisdiction that

fails to require unanimity in either the jury finding of at least one aggravating circumstance or the jury's ultimate sentencing recommendation. The Florida Supreme Court has called upon the Legislature to re-examine the statute, recognizing that the Florida death-penalty scheme may not withstand constitutional scrutiny and that unanimous verdicts play a vital role in ensuring reliability in the deliberation process, but to no avail.

Because the Florida death-penalty regime precludes a special verdict disclosing the jury's sentencing findings, and because there is no symmetry required between that which the jury considers in aggravation and that which the courts consider, there is no assurance that Florida death sentences are premised on a particular aggravating circumstance found by the jury. And because jury unanimity is not mandated during the sentencing process, there is no assurance that a Florida jury's death recommendation represents a reliable consensus of the community. As a consequence, *Amici* believe that the jury's role is impermissibly denigrated and that there is an unacceptable risk that Florida death sentences are erroneously imposed, in violation of the Sixth and the Eighth Amendments to the Constitution of the United States.

ARGUMENT

FLORIDA'S DEATH-SENTENCING SCHEME VIOLATES THE SIXTH AND THE EIGHTH AMENDMENTS IN LIGHT OF THIS COURT'S DECISION IN *RING V. ARIZONA*, 536 U.S. 584 (2002).

A. Overview.

Amici are former Justices of the Supreme Court of Florida. While we have varying views on the efficacy and appropriateness of capital punishment, we speak with one voice on this matter. We believe that Florida's death-penalty scheme, as currently administered, impermissibly deviates from both the national norm and that which this Court's precedent and the Sixth and Eighth Amendments to the Constitution mandate.

As this Court elucidated in *Ring v. Arizona,* 536 U.S. 584, 609 (2002), the Sixth Amendment requires that a jury, not a judge, factually find the aggravating circumstances that a State makes the necessary preconditions for a death sentence. Under Florida law, a finding of one or more aggravating circumstances serves as that prerequisite. *Barclay v. Florida*, 463 U.S. 939, 954 (1983) (Florida statute "requires the sentencer to find at least one valid statutory aggravating circumstance before the death penalty may even be considered"); *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973) (aggravating circumstances "actually define those crimes" for which death may be imposed in the absence of mitigation).

But Florida death sentences are not been premised on a jury's factual findings. Instead, the jury's sentencing

role under the Florida death-penalty scheme is minimized at every step. As *Amici* have seen in cases that we have reviewed, from the prosecutor's voir dire to his or her sentencing argument, from the jury instructions to the sentencing verdict form, the capital jury is told again and again that, while its verdict will be given great weight, its role is merely advisory, for the final decision is the responsibility of the trial court alone. *See* Fla. Std. Jury Instr. (Crim.) 7.11.[2] And the jury's conclusions are masked behind an advisory general verdict that reveals little to the trial judge or the Supreme Court of Florida about what, if anything, the jury factually found. *See Sochor v. Florida*, 504 U.S. 527, 538 (1992) ("the jury in Florida does not reveal the aggravating circumstances on which it relies.").

Unlike the capital punishment statutes in other States or under the federal system, Florida's regime ensures that only the trial judge's factual findings are knowable. Section 921.141(3), Florida Statutes (2015), provides for "Findings in Support of Sentence of Death" – but only by the trial judge -- who is charged with the duty of entering "specific written findings of fact" to support the death sentence "notwithstanding the recommendation of

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2. Florida's penalty-phase jury instructions "in which the role of the jury is minimized," *Bottoson v. Moore*, 833 So. 2d 693, 732 (Fla. 2002) (Lewis, J., concurring in result only) – use the terms "'advise' and 'advisory' more than ten times." *Id* at 733. Instead of attaching any controlling significance to the jury's aggravating findings, the instructions repeatedly remind the jury that the responsibility for the death sentence "rests elsewhere." *Id.* at 731 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985); *accord Bottoson*, 833 So. 2d at 723 (Pariente, J., concurring in result only).

a majority of the jury." Only the factual findings of the trial judge are then reviewed by the Florida Supreme Court. Section 921.141(4), Florida Statutes (2015); *Proffitt v. Florida*, 428 U.S. 242, 251-252 (1976) (Florida death sentence is "determined by the trial judge rather than by the jury" and it is the trial judge who must "justify the imposition of a death sentence with written findings.").

In making sentencing findings, the trial judge is not limited to evidence presented to the advisory jury. To the contrary, trial judges have long considered additional evidence and relied on that evidence in finding aggravating circumstances justifying a death sentence. *E.g.*, *Spaziano v. State*, 393 So. 2d 1119, 1121 (Fla. 1981). The Supreme Court of Florida, too, has relied on evidence that the jury never heard, and has looked to such evidence in considering the propriety of a death sentence. *See Echols v. State*, 484 So. 2d 568, 576-77 (Fla. 1985). Accordingly, it is impossible to ensure that all Florida defendants are sentenced to death based on the jury's factual finding of at least one aggravating circumstance, as the Sixth Amendment mandates.[3] What the jury's opaque and unaccountable verdict adds to Florida capital trials is simply a level of confusion that heightens the "risks [of] erroneous imposition of the death sentence." *Mills v. Maryland*, 486 U.S. 367, 375 (1988).

3. *Amicus* former Chief Justice Anstead stated in no uncertain terms "that Florida's sentencing scheme, as written, relies on judges to find the aggravating circumstances necessary to impose the death sentence." *Davis v. State*, 859 So. 2d 465, 481 (Fla. 2003) (Anstead, C.J., dissenting).

B. Every Florida jury recommendation is devoid of factual findings and therefore "essentially meaningless" for the sentencing judge, who must independently find the aggravating and mitigating circumstances in imposing a sentence to death.

Judge O. H. Eaton, "one of our most experienced trial judges in death penalty cases," *Aguirre-Jarquin v. State*, 9 So. 3d 593, 611 (Fla. 2009) (Pariente, J., specially concurring), pointed out the inadequacy of the jury-sentencing verdict. Addressing the jury death recommendations in a double-homicide case, by a 7-5 and 9-3 vote, Judge Eaton lamented that the verdict form provided no guidance on what the jury factually found:

> 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 circumstances. It is possible, in a case such as this one, where several aggravating circumstances are submitted, that none of them received a majority vote.

Id. at 611-12 (quoting Judge Eaton's sentencing order).

A jury death recommendation is thus "essentially meaningless to the trial judge, especially if the parties present additional aggravating and mitigating circumstances" at the second sentencing hearing held

before the trial judge only. *Id.* at 612.[4] Judge Eaton acknowledged a Florida judge's responsibility to make the ultimate sentencing findings "independent" of whatever the jury had found. *Id.* And his factual findings on the aggravating circumstances in support of the death sentences notably included a circumstance on which the advisory jury had never been instructed, while excluding a circumstance on which the jury had specifically been charged. *Id.* at 607-08 (majority opinion).

The Florida Supreme Court nonetheless upheld these death sentences.For the Florida death-penalty scheme readily tolerates incongruity between the jury's factual findings and the findings on which the trial judge premises the sentence to death. Indeed, the Florida Supreme Court condemned, as a "departure from the essential requirements" of Florida law, a trial judge's proposal to provide the jury with special verdicts detailing the aggravating factors found and the jury's vote on those factors. *State v. Steele*, 921 So. 2d 538 (Fla. 2006). The Court stated that, because a trial judge must independently assess the sentencing circumstances, specific jury findings on aggravators "could unduly influence the trial court's own determination of how to sentence the defendant," *id.* at 546:

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4. In *Spencer v. State*, 615 So. 2d 688, 691 (Fla. 1993), the Court addressed the death-sentencing protocol, specifying that an essential component is a sentencing hearing after the jury's recommendation, now known as the "*Spencer* hearing," at which the trial judge must "afford, if appropriate, both the State and the defendant an opportunity to present additional evidence;" and "allow both sides to comment on or rebut information in any presentence or medical report."

> Our current system fosters independence because the trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely. Individual jury findings on aggravating factors would contradict this settled practice.

Id.

The Court made clear that, under the Florida death-penalty regime, there is no requirement that a majority of the jurors agree on which aggravating circumstances have been proved, so long as a majority concludes that at least one has been established. "Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only [aggravating circumstance a] applies, while three others believe that only [aggravating circumstance b] applies, because seven jurors believe that at least one aggravator applies." *Id.* at 545 (citations omitted). Requiring a majority vote on any particular aggravating factor would contravene Florida law, as would requiring the jury to tell the trial judge which factors it found. *Id.* at 546-47.[5]

5. The Court later reaffirmed that "[i]n *Steele*, we not only concluded, consistent with prior caselaw, that section 921.141, Florida Statutes, does not require jury findings on aggravating circumstances, we specifically held that it is a departure from the essential requirements of law to use a special verdict form detailing the jury's determination on the aggravating circumstances." *Coday v. State*, 946 So. 2d 988, 1005 (Fla. 2006).

C. After *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court of Florida continues to uphold death sentences in cases in which there is no indication that even a majority of the jury found any single aggravating circumstance.

Amici are aware that a Florida death sentence may be upheld in cases in which one aggravating circumstance is argued to the advisory jury and there is no evidence that the jury unanimously found that aggravating circumstance. *Amici* are aware of other cases in which the death sentence is upheld where multiple aggravating circumstances are argued to the jury and there is no evidence that even a majority of the jurors agreed that one aggravating circumstance had been proved. Because Florida law does not permit special sentencing verdicts by the advisory jury and fails to require any jury unanimity at the death-sentencing stage, either on the aggravating factors or the sentencing recommendation, it is impossible reliably to discern a jury's factual findings or ensure that the sentencing recommendation represents a community consensus.

A few examples of cases in which the death penalty has been imposed and subsequently upheld on appeal underscore the problem. In a case in which the trial court found only one aggravating circumstance, in addition to mitigation, the Florida Supreme Court upheld the death sentence despite an erroneous jury instruction that directed the jury to consider the one aggravator "that *is* established by the evidence." *Butler v. State*, 842 So. 2d 817, 830-31 (Fla. 2003) (emphasis added). The case involved a domestic dispute in which the defendant, who was the father of the decedent's child, became distraught

over her affair with another man, and confronted her and repeatedly stabbed her to death. Evidence showed that the defendant's mother had been killed when he was eight, that his father had been tried for, but acquitted of, the murder, and that the defendant had been drinking and using cocaine on the night of the homicide. *Id.* at 822 (majority opinion); *id.* at 840 (Pariente, J., dissenting).

The jury voted 11-1 to recommend death, with no indication that it had made a factual finding of the sole aggravator presented. The four-justice majority approved the death sentence after the defendant on rehearing called to the Court's attention the then-new *Ring* decision. *Id.* at 834 (majority opinion).

Justice Pariente dissented from the decision to uphold the death sentence in an opinion joined by two justices, and wrote of the jury's recommendation:

> In this case, we cannot be certain that the recommendation reflects a finding of the existence of the single aggravating circumstance submitted to the jury. The trial court instructed the jury to consider the single aggravating circumstance "that *is* established by the evidence" rather than "*if* it is established by the evidence." Because of the trial judge's misstatement, it cannot now be determined whether the jury found that the HAC aggravator existed, as required for a death recommendation, or whether its advisory sentence reflects a mistaken perception that the judge had already found the existence of the aggravator.

Id. at 837 (Pariente, J., dissenting) (footnote and citation to majority opinion omitted).

In a more recent capital case, the Court, in a 4-3 decision, upheld a death sentence premised on three aggravating circumstances, despite the presence of mitigation. *Peterson v. State*, 94 So. 3d 514 (Fla. 2012). The decedent was the defendant's stepfather who had been abusing the defendant's mother, had instructed her not to give the defendant money, and had forced him to move out of the house. The decedent was beaten about the head and shot twice. *Id.* at 519. By a 7-5 vote, the jury recommended a death sentence. *Id.* at 523.

In her dissenting opinion, which was joined by two justices, Justice Pariente explained that none of the three aggravators "automatically demonstrate[s] the jury has made the necessary findings to warrant the possibility of a death sentence, such as a prior violent felony or that the murder occurred while in the course of an enumerated felony that was also found by the jury." *Id.* at 538 (Pariente, J., dissenting). Additionally -- particularly because the jury recommended a death sentence by a bare majority -- "[i]t is possible that there was no majority of jurors who agreed that the same aggravator applied." *Id.* at 540. Since the maximum penalty for first-degree murder is life without parole eligibility, and "the death penalty cannot be imposed unless and until additional factual findings are made as to the existence of aggravators—a decision that the jury must make," *id.* , the death sentence was wrongly upheld.

Mr. Hurst's death sentence suffers from an identical flaw. Again over three justices' dissent and on a 7-5 jury

vote for death, the Florida Supreme Court upheld the death sentence predicated on two aggravating factors, notwithstanding substantial mitigation. *Hurst v. State*, 147 So. 3d 435 (Fla. 2014). The case involves a robbery at a Popeye's restaurant by a restaurant employee, during which another employee was fatally stabbed with a box cutter.

Justice Pariente again dissented, in an opinion joined by two justices, and underscored that not all defendants convicted of first-degree murder are eligible for a death sentence; an additional factual finding is required. In holding that Hurst's death sentence could not be reconciled with *Ring* because there was no assurance that the requisite factual finding had been made by the jury, the justice expounded:

> In Hurst's case, the jury recommended death by the slimmest margin permitted under Florida law – a bare majority seven-to-five vote. Because a penalty-phase jury in Florida is not required to make specific factual findings as to the aggravating circumstances necessary to impose the death penalty pursuant to Florida's capital sentencing statute, it is actually possible that there was not even a majority of jurors who agreed that the same aggravator applied.

Id. at 449 (Pariente, J., dissenting) (citation omitted).

D. A Florida death sentence may be based on evidence and aggravating circumstances never presented to the advisory jury.

We believe that there is another significant problem with Florida's scheme. Florida law not only fails to require that the jury make the factual findings that *Ring* deems essential, it also refrains from requiring symmetry between the trial judge's and the jury's aggravating-circumstance findings. Thus, because trial judges independently impose a death sentence, the judge is not precluded from justifying a death sentence based on evidence and aggravating circumstances that were never before the jury. *Amici* believe that this asymmetry can result in death sentences being imposed and upheld for reasons not found, or even rejected, by the advisory jury.

Even after this Court's *Ring* decision, the Florida Supreme Court has insisted that it is not improper for a trial court to consider aggravating circumstances that were not presented to the jury. *Williams v. State*, 967 So. 2d 735, 751 (Fla. 2007). In rejecting the defendant's claim that the trial court improperly found an aggravator that was never argued to the jury, the Court reaffirmed that it "has held that it is not error for a judge to consider and find an aggravator that was not presented to or found by the jury." *Id.* (citation omitted); *but see id.* at 67-68 (Pariente, J., concurring) (cautioning trial courts to refrain from finding aggravating circumstances on which the jury was not instructed).

Nor is this practice new. In *Engle v. State*, 438 So. 2d 803, 813 (Fla. 1983), a case on which the *Williams* Court relied, the Court upheld the override of a jury's

life recommendation even though the trial judge relied on two aggravating circumstances that were never before the jury. In rejecting the defendant's contention that he should be allowed "to have the existence and validity of aggravating circumstances determined as they were placed before his jury," *id.*, the Court rebuffed the suggestion that trial judges should be confined by the jury advisory proceedings:

> The trial judge, however, is not limited in sentencing to consideration of only that material put before the jury, is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence. Prior cases make it clear that during sentencing, evidence may be presented as to any matters deemed relevant, and that a trial judge may consider information, such as presentence and psychological reports, which were not considered by the jury during its sentencing deliberations.

Id. (citations omitted).

The Supreme Court of Florida continues to permit trial judges to impose death sentences based on aggravating circumstances that the trial judges alone found. *Davis v. State*, 703 So. 2d 1055, 1061 (Fla. 1998); *Sims v. State*, 681 So. 2d 1112, 1118 (Fla. 1996); *Hoffman v. State*, 474 So. 2d 1178 (Fla. 1985); *Fitzpatrick v. State*, 437 So. 2d 1072, 1078 (Fla. 1983). And that Court itself has looked beyond the trial judge's aggravating-circumstance findings in upholding a death sentence. *Echols v. State*, 484 So. 2d 568, 576-77 (Fla. 1985).

Additional evidence that was never offered to the jury can also form the basis for trial-court findings on the aggravating circumstances. The routine practice of securing PSI reports after the capital jury renders its sentencing recommendation continues in Florida, albeit with new implications following *Ring*. *See, e.g.*, *Baker v. State*, 71 So. 3d 802, 813 (Fla. 2011); *Jones v. State*, 845 So. 2d 55, 73 (Fla. 2003); *Shellito v. State*, 701 So. 2d 837, 843 (Fla. 1997); *State v. Evans*, 2012 WL 12012753, *2-3 (Fla. Cir. Ct. May 30, 2012). Indeed, the Florida Supreme Court early on rejected any notion that trial judges should refrain from relying on a PSI conducted after the jury advisory proceeding in finding aggravating circumstances justifying the death sentence. *Songer v. State*, 322 So. 2d 481, 483-84 (Fla. 1975).

The Supreme Court of Florida has expressly authorized a sentencing court's reliance on the PSI for its aggravating-circumstance findings. For example, in *White v. State*, 403 So. 2d 331, 339 (Fla. 1981), the Court upheld the death sentence despite the jury's recommendation for life imprisonment on a vote of 12-0. The Court explicated that the "trial judge noted that as a result of the presentence investigation and information presented at sentencing he was made aware of a number of factors which the jury did not have an opportunity to consider." *Id.* at 339-40 (footnote omitted). As a result, the Court upheld the jury override where the trial court found two aggravating circumstances that were never presented to the jury.

This practice of predicating a death sentence on information that the jury never heard was reaffirmed in *Porter v. State*, 429 So. 2d 293 (Fla. 1983). After the Court

initially ordered a trial-judge re-sentencing because the judge had relied on a deposition to support the aggravating circumstances without notifying defense counsel, *Porter v. State*, 400 So. 2d 5, 7 (Fla. 1981), the judge re-imposed a death sentence, again using the deposition to support two of the three aggravating circumstances found. *Porter*, 429 So. 2d at 295-96. The Court affirmed, explaining that the decision to override the jury's life recommendation was justified in part because the trial court had access to the "deposition, which the jury did not see." *Id.* at 296.

Following the re-sentencing, the Court ordered yet another re-sentencing due to the bias of the original trial judge, but explained that empaneling a new jury was unnecessary. *Porter v. State*, 723 So. 2d 191, 196 (Fla. 1998). Emphasizing that "the judge is the sentencing authority and the jury's role is merely advisory," *id.*, the Court pointed out that a trial judge's death sentence is predicated on "the record before the jury but also upon the record as developed at the part of [the] sentencing proceeding that is solely before the trial judge." *Id.* at 198.

Moreover, the Florida Supreme Court, as previously noted, has explicitly endorsed the practice of holding a second sentencing proceeding before only the trial judge at which additional evidence may be presented for and against a death sentence, *Spencer v. State*, 615 So. 2d 688, 690-91 (Fla. 1993), a practice that continues in the aftermath of *Ring*. *E.g.*, *Troy v. State*, 948 So. 2d 635, 648-49 (Fla. 2006). The *Spencer* Court clarified that Florida's death-penalty scheme contemplates that a trial judge conducts this sentencing hearing after the jury advisory proceeding, and that at this hearing, both sides where appropriate should be afforded an opportunity to

present further evidence. *Id.* at 691. Evidence adduced at this "*Spencer* hearing" may be considered by the court in formulating its findings justifying a death sentence. *See Brooks v. State*, 918 So. 2d 181, 209 (Fla. 2005) (testimony introduced only before trial court at *Spencer* hearing used to sustain determination that defendant inflicted the fatal blow).

E. The Florida death-penalty scheme cannot withstand constitutional scrutiny.

The utter speculation on what the advisory jury found and the numerous permutations of possibilities eviscerate any prospect for a reliable death sentence that is appropriately reverent of the jury's fact-finding role. As a consequence, *Amici* believe that Florida has deviated from, not only the national norm, but from the guarantees enshrined in the Sixth and Eighth Amendments to the Constitution. As Judge Eaton so eloquently elaborated:

> 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.

* * *

> A sentencing order should reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors and the weight each should receive.
>
> * * *
>
> Florida trial judges are bound to follow precedent laid down by the Supreme Court of Florida. That Court has taken the position that the Florida capital punishment scheme is constitutionally valid unless and until the United States Supreme Court declares otherwise. Following that precedent, knowing the obvious due process problems with Florida's death penalty scheme, certainly tests the resolve of trial judges, who must decide who will live and who will die.

Aguirre-Jarquin v. State, 9 So. 3d at 612 (Pariente, J., specially concurring) (quoting Judge Eaton) (citations omitted).

The Florida Supreme Court has recognized the obvious tension between *Ring* and Florida's death-penalty statute, as well as Florida's outlier status as the only State that requires no jury unanimity in its death-sentencing regime. *State v. Steele*, 921 So. 2d at 550, 552-53. Writing for a unanimous Court, Justice Cantero lauded the value of unanimous verdicts that induce "a jury to deliberate thoroughly and help[] to assure the reliability of the ultimate verdict," *id.* at 549 (citation omitted), and called upon the Legislature to re-examine the statute:

> [W]e express our considered view, as the court of last resort charged with implementing Florida's capital sentencing scheme, that in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations.
>
> * * *
>
> The bottom line is that Florida is now the *only* state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote *both* whether aggravators exist and whether to recommend the death penalty. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.

Id. at 548, 550.

But the Florida Legislature has refused to act. As a result, trial judges in Florida continue to decide independently whether to impose a life or death sentence without the input of factual findings by the jury, and thus, with only the jury's "essentially meaningless" assistance. *Aguirre-Jarquin v. State*, 9 So. 3d at 612 (Pariente, J., dissenting) (quoting Judge Eaton's sentencing order). *Amici* are keenly aware of the Sixth Amendment's "veneration for the protection of the jury in criminal cases," *Ring v. Arizona*, 536 U.S. at 612 (Scalia, J., concurring), as well as the "heightened reliability demanded by the Eighth

Amendment" in a capital case. *Sumner v. Shuman*, 483 U.S. 66, 72 (1987) (citations omitted). Without any jury-unanimity requirement in the death-penalty process and without a special verdict disclosing the jury's sentencing findings, judges in this State, as one experienced trial judge analogized, are left to make this ultimate sentencing decision by "fishing in the dark." *Aguirre-Jarquin*, 9 So. 3d at 611 (citation omitted).

CONCLUSION

Amici urge the Court to hold that Florida's death-penalty scheme fails to meet the requirements of the Sixth and Eighth Amendments in light of *Ring v. Arizona*, and to reverse the Florida Supreme Court's judgment and order the vacatur of Mr. Hurst's death sentence.

Respectfully submitted,

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