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

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QUESTION PRESENTED

Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring* v. *Arizona*, 536 U.S. 584 (2002).

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INTRODUCTION

Under Florida law, a defendant convicted of a capital felony cannot be sentenced to death unless the State proves beyond a reasonable doubt at least one statutory aggravating circumstance. Because the existence of a statutory aggravator is a condition of the defendant's eligibility for a death sentence, its determination must "be entrusted to the jury." *Ring* v. *Arizona*, 536 U.S. 584, 597 (2002).

Florida law, however, assigns this factfinding role to the trial judge. In Florida, the court makes its own findings as to the existence of aggravating and mitigating circumstances and conducts its own weighing of those circumstances before imposing a sentence of its own determination. In doing so, the court may consider evidence that was never shown to a jury, and may find

aggravators that were not found by or even presented to a jury. Only the judge's written findings of fact are relevant on appellate review of a death sentence.

Florida juries play only an advisory role. The jury recommends a sentence of life or death based on its assessment of aggravating and mitigating circumstances, but that recommendation has no binding effect. Moreover, the jury renders its advisory verdict under procedures that degrade the integrity of the jury's function. Unanimity, and the deliberation often needed to achieve it, is not necessary; only a bare majority vote is required to recommend a death sentence. The jury makes no express findings on aggravating circumstances. And jurors voting for a death sentence need not even agree on which aggravating circumstance exists.

In this case, for example, the State presented two aggravators in arguing that petitioner Timothy Lee Hurst should be sentenced to death. The jury recommended a death sentence by a bare majority of seven to five. The jury made no express findings as to any aggravator. It is entirely possible that four jurors found one aggravator, and three found the other, but that at least two-thirds of the jurors rejected each. The trial court made its own findings that each aggravator existed beyond a reasonable doubt and imposed the death sentence based on its own weighing of the aggravating and mitigating circumstances.

Mr. Hurst's death sentence and the procedures it resulted from cannot stand. Florida's capital sentencing scheme contravenes this Court's holding in *Ring* that findings of fact necessary to authorize a death sentence may not be entrusted to the judge. It departs from the procedures that apply in every other State that allows death sentencing. And it undermines the

jury's basic Sixth and Eighth Amendment functions as responsible factfinder and voice of the community's moral judgment. This case thus arises "at the intersection of [this Court's] decisions" according capital defendants basic Sixth and Eighth Amendment protections in sentencing. *Burch* v. *Louisiana*, 441 U.S. 130, 137 (1979). Even if a State can constitutionally assign the jury only an advisory role, or permit different aggravators to be found by different jurors on different theories, or allow the jury to find aggravating circumstances by a bare majority, a State cannot do all these things at once without transgressing those constitutional protections.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (JA289-321) is reported at 147 So. 3d 435. The order denying rehearing (JA322) is unpublished but is available at 2014 Fla. LEXIS 2652. The judgment of the Circuit Court, First Judicial Circuit, in and for Escambia County, Florida (JA272-288) is unreported.

JURISDICTION

The Supreme Court of Florida entered judgment on May 1, 2014, and denied a timely motion for rehearing on September 4, 2014. The petition for a writ of certiorari was filed on December 3, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Sixth and Eighth Amendments to the U.S. Constitution and Florida Statutes §§ 775.082 and 921.141 are reproduced in the Appendix to this brief.

STATEMENT

A. Hurst's Trial, Initial Sentencing, And Post-Conviction Proceedings

On May 2, 1998, Cynthia Lee Harrison was killed at a Popeye's Fried Chicken restaurant in Escambia County, Florida, where she worked as an assistant manager. Petitioner Timothy Lee Hurst, Harrison's coworker, was charged with first-degree murder, a capital felony under Florida law.

At Hurst's jury trial, the State presented evidence that on the day of Harrison's murder, Harrison and Hurst were scheduled to be at work at 8:00am in preparation for the restaurant's opening at 10:30am. JA27-28. A witness testified that he saw Harrison arrive at the restaurant between 7:00am and 8:30am and go inside, followed shortly thereafter by a man the witness later identified as Hurst. *Id.* Tonya Crenshaw, another assistant manager, testified that when she arrived at 10:30am, she found the door to the restaurant locked and another employee waiting outside with a delivery-truck driver. JA28. Crenshaw testified that when they entered the restaurant, they discovered that the safe was open and money was missing. JA28-29. The driver found Harrison's body in the freezer. Harrison's hands were bound with electrical tape, and she had tape over her mouth. Harrison had "suffered a minimum of sixty incised slash and stab wounds" and had "blood stains on the knees of her pants, indicating that she had been kneeling in her blood." JA29. According to the medical examiner, Harrison's wounds "were consistent with the use of a box cutter." *Id.*

Two of Hurst's friends, Michael Williams and "Lee-Lee" Smith, testified that Hurst told them he had killed Harrison and that he had previously talked about

robbing the restaurant. JA29-30. According to Smith, Hurst showed up at Smith's house on the morning of May 2 with a container of money. Smith said he washed Hurst's bloody pants and threw away Hurst's socks and shoes. JA30.

Smith's mother discovered the container of money the next day and contacted the police. JA30. In a garbage can at Smith's house, the police found a coin purse containing Harrison's driver's license and other personal items. They also found a bank bag marked with "Popeye's" and Harrison's name, a bank deposit slip bearing Hurst's fingerprints, and a blood-stained sock later determined to have "DNA typing … consistent with the victim." JA30-31. Tape similar to that used to bind Harrison's hands and mouth was found in Hurst's car, and evidence indicated that Hurst had been seen with a box cutter several days before the murder. JA29.

The jury was instructed that it could find Hurst guilty of first-degree murder under two theories: "premeditated murder" and "felony murder"—*i.e.*, the "death occurred as a consequence of and while [Hurst] was engaged in the commission of Robbery." Jury Instructions 3-4, *State* v. *Hurst*, No. 98-1795-C (Fla. Escambia County Ct. Mar. 23, 2000). The jury convicted Hurst of first-degree murder, but its general verdict form did not specify which theory was the basis of the conviction. Verdict, *State* v. *Hurst*, No. 98-1795-C (Fla. Escambia County Ct. Mar. 23, 2000). Hurst was not separately convicted of any robbery in connection with Harrison's murder. JA308. After penalty-phase proceedings, Hurst was sentenced to death. The Supreme Court of Florida affirmed, JA27, and this Court denied Hurst's petition for a writ of certiorari, 537 U.S. 977 (2002).

On post-conviction review, the Supreme Court of Florida vacated Hurst's death sentence. JA127. Based on evidence presented at the post-conviction hearing, the court held that there was "no reasonable, strategic reason" for Hurst's attorney's failure to investigate or present evidence concerning Hurst's borderline intelligence—reflected in "an IQ of somewhere between 70 and 78" and "below average adaptive functioning skills"—or evidence that Hurst suffered from brain damage consistent with fetal alcohol syndrome. JA179-187. Counsel's failure, the court determined, "had an identifiable detrimental effect on the process of weighing the aggravation and mitigation in this case." JA190. The court ordered that Hurst be resentenced.

B. Hurst's Resentencing

1. Under Florida law, capital sentencing proceeds "according to the procedure set forth in § 921.141" of the Florida Statutes. Fla. Stat. § 775.082(1) (2011).[1] A death sentence can be imposed only if that procedure "results in findings by the court that such person shall be punished by death," *id.*, including a finding that at least one statutory aggravator exists, *id.* § 921.141(3)(a) (2010). Otherwise, "such person shall be punished by life imprisonment and shall be ineligible for parole." *Id.* § 775.082(1).

Under § 921.141, the trial court begins the separate penalty phase with a jury trial, but the jury's role is limited. "After hearing all the evidence," the jury must "deliberate and render an advisory sentence" recommending either life imprisonment or death. Fla. Stat.

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[1] All citations of Florida Statutes are to the versions in effect when Hurst was resentenced. The current versions remain substantially the same in relevant respects.

§ 921.141(2).[2] Only "a majority vote is necessary for a death recommendation." *Ault* v. *State*, 53 So. 3d 175, 205 (Fla. 2010). The jury must consider:

> (a) [w]hether sufficient [statutory] aggravating circumstances exist … ;
>
> (b) [w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) [b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death.

Fla. Stat. § 921.141(2); *see also id.* § 921.141(5)-(6) (listing aggravating and mitigating circumstances).

The jury may "return an advisory sentence in favor of death [only if] a majority of the jury … find[s] beyond a reasonable doubt the existence of at least one aggravating circumstance." *Ault*, 53 So. 3d at 205. Florida law, however, "does not require jury findings on aggravating circumstances." *State* v. *Steele*, 921 So. 2d 538, 544 (Fla. 2006). The trial court is actually prohibited from using a special verdict form that would require the jury to record its vote on each aggravating factor presented to it. *Id.* at 544-548. Moreover, "[n]othing in [Florida law] … requires a majority of the jury to agree on *which* aggravating circumstances exist." *Id.* at 545. As the Florida Supreme Court has explained, Florida law permits a jury to recommend a death sentence where four jurors believe one aggravator applies, and

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[2] The court may admit evidence it deems "probative" and "relevant to the nature of the crime and the character of the defendant …, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." Fla. Stat. § 921.141(1).

three jurors believe a second aggravator applies, because in that situation, "seven jurors believe that at least one aggravator applies." *Id.*

Once the jury has rendered its advisory sentence, the court may impose a death sentence only if it independently finds beyond a reasonable doubt that at least one "sufficient" aggravating circumstance exists and that the aggravators are not outweighed by any mitigating circumstances. *Williams* v. *State*, 967 So. 2d 735, 751 (Fla. 2007); *see also Kaczmar* v. *State*, 104 So. 3d 990, 1006 (Fla. 2012); *Alford* v. *State*, 307 So. 2d 433, 444 (Fla. 1975); *State* v. *Dixon*, 283 So. 2d 1, 9 (Fla. 1973). In making that determination, the court "is not bound by the jury's recommendation." *Williams*, 967 So. 2d at 751. Instead, the judge has "final authority to determine the appropriate sentence." *Id.*; *Engle* v. *State*, 438 So. 2d 803, 813 (Fla. 1983). Section 921.141(3) directs that "[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." Although the court must give the jury's recommendation "great weight and serious consideration," the court "must still exercise its reasoned judgment in deciding whether the death penalty should be imposed." *Ross* v. *State*, 386 So. 2d 1191, 1197 (Fla. 1980). Thus, "the trial court is required to make independent findings on aggravation, mitigation, and weight." *Russ* v. *State*, 73 So. 3d 178, 198 (Fla. 2011).

To make those findings, the trial court typically conducts a separate sentencing hearing before the judge alone, known as a *Spencer* hearing, wherein both sides are given "an opportunity to be heard," "to present additional evidence," and "to comment on or rebut information in any presentence or medical report." *Spencer* v. *State*, 615 So. 2d 688, 690-691 (Fla. 1993).

The court may consider evidence and arguments that were not presented to the jury and may find aggravators that were not found by or presented to the jury. *Williams*, 967 So. 2d at 751; *Engle*, 438 So. 2d at 813; *see also Bottoson* v. *Moore*, 833 So. 2d 693, 709 (Fla. 2002); *Davis* v. *State*, 703 So. 2d 1055, 1061 (Fla. 1997).

If the court imposes the death sentence, it must "set forth in writing its findings." Fla. Stat. § 921.141(3). And it is those "written findings of fact and the trial record"—not the jury's advisory verdict—that "furnish the basis for [the Florida Supreme] Court's review of … death sentences." *Grossman* v. *State*, 525 So. 2d 833, 839 (Fla. 1988), *receded from on other grounds in Franqui* v. *State*, 699 So. 2d 1312 (Fla. 1997).

2. Hurst's resentencing proceeded in accordance with these provisions of Florida law. On remand, the trial court first allowed evidence of aggravating and mitigating circumstances to be presented to the jury. *See* JA296. "[T]he State presented an abbreviated version of the trial testimony as to the circumstances of the murder," *id.*, and presented two aggravating circumstances to the jury: that Hurst had murdered Harrison while engaged in the commission of a robbery, and that the murder was "especially heinous, atrocious, or cruel," Fla. Stat. § 921.141(5)(d), (h); *see* JA959-960. Defense counsel invited the jury to question whether there was reasonable doubt as to those aggravating circumstances and what weight to give them, JA978-980, and "presented testimony concerning mitigation," JA296. In addition to Hurst's young age at the time of the murder, Hurst's lack of prior criminal history, and other mitigating circumstances, defense counsel contended that Hurst's capacity to conform his conduct to law was substantially impaired by low mental functioning. JA970-977, 980-981, 984.

Several of Hurst's relatives and teachers testified about Hurst's difficult childhood and limited mental capacity. For example, during pregnancy, Hurst's mother, who was just 15 years old at the time, "drank all day, every day." JA300. Hurst's school wanted to place him in a special-education program, but his mother objected. JA301. By the time of the murder, Hurst was a 19-year-old who "had to be reminded to take care of himself … [and] to bathe and dress appropriately." *Id.*

Several expert witnesses testified about Hurst's intellectual disabilities. A psychiatrist opined that "Hurst has widespread abnormalities in multiple areas of his brain … associated with lack of judgment, risk taking, impulsivity, and immaturity." JA302. Two psychologists testified that his IQ was as low as 69, and that he is mentally retarded. JA268-269, 302-304. The State's psychologist, however, emphasized Hurst's past testing "resulting in … IQ scores of 76 and 78," and concluded "that Hurst does not meet the criteria for mental retardation." JA304.[3]

At the end of the penalty-phase trial, the court instructed the jury as to its "duty" "to advise the court" on Hurst's sentence. JA207. The instructions emphasized that:

> the final decision as to which punishment shall be imposed is the responsibility of the judge. … However, the law requires you to render an advisory sentence as to which punishment should be imposed … .

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[3] In light of this testimony, the trial court "determin[ed] that Hurst did not meet the test for mental retardation as a bar to the death penalty" under *Atkins* v. *Virginia*, 536 U.S. 304 (2002). JA304-306.

> Although the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given great weight and deference by the Court in determining which punishment to impose.

JA207-208.

The court then instructed the jury that it could consider two aggravating circumstances: whether Hurst had committed the murder while engaged in the commission of a robbery, and whether the murder was "especially heinous, atrocious or cruel." JA211-212. The court also listed the mitigating circumstances the jury could consider, JA213-214, and explained the weighing of aggravating and mitigating circumstances required under § 921.141, JA215. Finally, the court instructed that "it is not necessary that the advisory sentence of the jury be unanimous." *Id.* Rather, "[i]f a majority of the jury, seven or more, determine that Timothy Lee Hurst should be sentenced to death, your advisory sentence will be" a recommendation of death. JA216.

After deliberating for less than two hours, the jury recommended a death sentence. The vote was seven to five. JA24-25. The verdict form did not identify any aggravators found, JA217, and the trial court denied Hurst's request "for an interrogatory verdict to specify the aggravators found and the votes on each," JA307.

After discharging the jury, the trial court held a *Spencer* hearing. JA218, 258. Hurst and the State each presented sentencing memoranda, but presented no additional evidence. JA230, 238, 258. Four months after the *Spencer* hearing, the court sentenced Hurst to death. JA271. The court stated that it had "independently weigh[ed] the aggravating and mitigating

circumstances." JA259. The court underscored that it had "carefully considered the evidence, the arguments of counsel, and the relevant legal authority." JA260. The court made no mention of the jury's advisory verdict, except to say it "ha[d] given [the jury's recommendation] great weight." JA271.

In its independent review of the sentencing evidence, the court found and assigned "great weight" to both aggravating circumstances presented by the State—that the murder was "committed while [Hurst] was engaged in the commission of a robbery" and that the murder was "especially heinous, atrocious or cruel." JA261-263. The court also found and assigned "moderate weight" to three mitigating circumstances: Hurst's lack of any significant criminal history, Hurst's young age at the time of the crime, and Hurst's "significant mental issues"—namely, his "limited intellectual capacity" and the "widespread abnormalities in his brain … consistent with fetal alcohol syndrome," which affect "judgment and impulse control." JA263-270. Finally, the court concluded that, in its judgment, "the aggravating factors applicable to this crime outweigh the mitigating factors presented." JA271.

C. The Decision Under Review

On automatic appeal to the Supreme Court of Florida, *see* Fla. Stat. § 921.141(4), Hurst challenged his sentence on several grounds. Among other things, Hurst argued that, in light of *Ring* v. *Arizona*, 536 U.S. 584 (2002), "constitutional error occurred in his case because the advisory jury in the penalty phase was not required to find specific facts as to the aggravating factors, and

[because] the jury was not required to make a unanimous recommendation as to the sentence." JA307.[4]

The Florida Supreme Court rejected Hurst's arguments and affirmed the death sentence. The court observed that, before *Ring*, this Court had upheld Florida's capital sentencing scheme in *Hildwin* v. *Florida* on the ground that "'[t]he Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" JA309 (quoting 490 U.S. 638, 640-641 (1989)). Florida courts had subsequently held that "*Ring* does not require the jury to make specific findings of the aggravators or to make a unanimous jury recommendation as to sentence." JA307. The Florida Supreme Court "decline[d] to revisit those decisions in [Hurst's] case." JA308. The court concluded that *Hildwin* remains good law because this Court "has never expressly overruled" it and because "Florida's sentencing procedures do provide for jury input about the existence of aggravating factors prior to sentencing—a process that was completely lacking in the Arizona statute struck down in *Ring*." JA309-310.

Justice Pariente dissented on the ground that "there was no unanimous jury finding of either of the two aggravating circumstances found by the trial

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[4] Hurst also argued that the trial court had erred in rejecting his assertion of mental retardation as a bar to execution under *Atkins* and refusing to submit the question of mental retardation to the jury. JA297-298, 306. The Supreme Court of Florida rejected each of these contentions. JA298-307.

Hurst's petition for certiorari sought review of his *Atkins* claim, including the question whether the factual issues relevant to an *Atkins* claim must be submitted to the jury. Because the revised question as to which this Court granted review does not appear to encompass those issues, this brief does not address them.

judge." JA314. Justice Pariente observed that a defendant convicted of first-degree murder is not eligible for a death sentence in Florida unless additional findings of fact are made regarding aggravators and mitigators. JA316. And under *Ring*, all facts necessary for imposition of a sentence must be found by a jury. JA316-317. In Hurst's case, however, "the jury recommended death by the slimmest margin permitted under Florida law—a bare majority seven-to-five vote," and it was "actually possible that there was not even a majority of jurors who agreed that the same aggravator applied." JA315. In Justice Pariente's view, that outcome contravened *Ring*, *id.*, and raised "possible Eighth Amendment implications" in light of "Florida's outlier status" as the only State that does not require a unanimous jury finding of an aggravating circumstance before a death sentence may be imposed, JA319-320.

SUMMARY OF ARGUMENT

I. In *Ring* v. *Arizona*, this Court held that the Sixth Amendment right to a jury trial requires that the jury be entrusted with finding all facts necessary for imposition of the death penalty, including sentencing aggravators. 536 U.S. 584, 597 (2002). Florida's capital sentencing scheme, however, assigns that factfinding responsibility to the trial judge. Although in Florida a jury renders an advisory verdict recommending a sentence, the jury makes no express findings as to aggravating factors, and its recommendation of death is neither necessary nor sufficient for imposition of the death sentence. Rather, the court independently makes its own findings regarding aggravators and mitigators, and it is the court's factual findings—not the jury's—that authorize imposition of the death sentence. As this Court has recognized, a "Florida trial court no more has

the assistance of a jury's findings of fact with respect to sentencing issues than d[id] a trial judge in Arizona" under the scheme struck down in *Ring*. *Walton* v. *Arizona*, 497 U.S. 639, 648 (1990). Consequently, Florida's capital sentencing scheme violates the Sixth Amendment just as Arizona's did.

Florida's capital sentencing scheme violates the Eighth Amendment, too, because it permits the judge to impose the death penalty. In a concurring opinion in *Ring*, Justice Breyer concluded that "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death." 536 U.S. at 614. Historically, the power to impose the death penalty was the province of the jury, not the judge. Today, nearly every jurisdiction that allows for the death penalty requires the jury to impose it. And only imposition by a jury, which embodies "the community's moral sensibility," ensures that the death penalty serves its sole legitimate penological function of retribution. *Id.* at 614-615.

II. In opposing certiorari in this case, the State argued that Hurst's sentence satisfies the Sixth Amendment because the jury's advisory verdict implied that "the jury ha[d] 'necessarily engag[ed] in the factfinding required for imposition of a higher sentence.'" Opp. 15 (quoting *Jones* v. *United States*, 526 U.S. 227, 250-251 (1999)). But no such inference can be drawn. The jury did not render explicit findings on aggravators. It was not required to agree on which, if any, of the two presented aggravators existed. And each aggravator could have been rejected by two-thirds of the jury. In any event, even if the jury had implicitly made determinate factual findings, that would not cure Florida's Sixth Amendment violation because it was the court's findings, not the jury's, that authorized the

death sentence. "Based solely on the jury's verdict …, the maximum punishment [Hurst] could have received was life imprisonment." *Ring*, 536 U.S. at 597.

III. If this Court nonetheless concluded that Florida's capital sentencing scheme satisfied *Ring* because the jury's advisory verdict recommending death implied the necessary factual findings, Hurst's death sentence would violate the Sixth and Eighth Amendments for other reasons.

First, Hurst's sentence would violate the Eighth Amendment because the jury instructions would have misleadingly "minimize[d] the jury's sense of responsibility for determining the appropriateness of death." *Caldwell* v. *Mississippi*, 472 U.S. 320, 341 (1985). The jury was instructed that its sentencing verdict would be purely advisory and that ultimate responsibility for determining whether Hurst should be sentenced to death rested with the trial court. The jury was not instructed that a recommendation of death would authorize the trial court to impose the death sentence.

Second, Hurst's sentence would be unconstitutional because no inference can be drawn from the jury's recommendation that more than seven jurors found any aggravator. Neither the Sixth nor the Eighth Amendment—as incorporated under the Fourteenth Amendment—tolerates a death sentence based on such a slim vote. Florida's simple-majority rule contravenes centuries of practice recognizing unanimous verdicts as the norm in criminal cases. It departs from the uniform position of the federal system and 49 other States in capital and non-capital cases. It disregards the bedrock principle that the jury system is predicated on meaningful deliberations, which a simple-majority vote cannot safeguard. And it contradicts Florida's own judgment

that unanimity is necessary for all jury findings of guilt. This Court has never approved a verdict rendered by a simple-majority vote for any non-petty offense. It should not do so now, particularly in a capital case.

Finally, even if the Constitution permitted a death sentence to be imposed when the jury has been misled about its responsibility for the defendant's sentence, or has found necessary aggravating circumstances by only a bare majority, or has reached no agreement that any particular aggravator exists, a system that combines all of those features cannot stand. Hurst's sentence was imposed under a sentencing scheme that undermines the jury's deliberative function from every angle. The aggregate effect of Florida's procedures prevented the jury from engaging in the adequate "group deliberation" the Constitution requires. *Burch* v. *Louisiana*, 441 U.S. 130, 135 (1979).

ARGUMENT

I. FLORIDA'S CAPITAL SENTENCING SCHEME VIOLATES THE CONSTITUTION UNDER *RING*

A. Florida's Capital Sentencing Scheme Violates The Sixth Amendment Because The Judge Finds Facts Necessary For Imposition Of The Death Penalty

Under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny, "the Sixth Amendment provides defendants with the right to have a jury find" the "facts that increase the prescribed range of penalties to which a criminal defendant is exposed … beyond a reasonable doubt." *Alleyne* v. *United States*, 133 S. Ct. 2151, 2160 (2013) (quotation marks omitted). In *Ring* v. *Arizona*, this Court applied that principle in the context of capital sentencing to hold that "the Sixth Amendment's jury

trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury." 536 U.S. 584, 597 (2002) (footnote omitted).

Florida's capital sentencing scheme violates this principle because it entrusts to the trial court instead of the jury the task of "find[ing] an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609. Although in Florida a jury renders an advisory verdict recommending a sentence based on its assessment of aggravators, mitigators, and the balance between them, the jury makes no express findings as to aggravators, and its recommendation of death is neither necessary nor sufficient to authorize a death sentence and therefore does not bring Florida's scheme into line with the Sixth Amendment. As this Court has already observed, a "Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than d[id] a trial judge in Arizona" under the capital sentencing scheme struck down in *Ring*. *Walton* v. *Arizona*, 497 U.S. 639, 648 (1990). Consequently, as *Ring* made clear when it invalidated Arizona's scheme, Florida's scheme is also invalid.

1. Florida law permits the death penalty to be imposed if and only if the sentencing proceeding "results in findings *by the court* that [the defendant] shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The court must find beyond a reasonable doubt that at least one "sufficient" statutory aggravating circumstance exists (and that the aggravators are not outweighed by mitigating circumstances). *Id.* § 921.141(3). "[O]therwise," Florida law states, the defendant "shall be punished by life imprisonment." *Id.* § 775.082(1). Thus, "[t]he aggravating circumstances of Fla. Stat. § 921.141(6) actually define those crimes … to

which the death penalty is applicable in the absence of mitigating circumstances." *State* v. *Dixon*, 283 So. 2d 1, 9 (Fla. 1973). Florida law, therefore, violates the principle set down in *Ring* that States may not entrust the judge with finding any aggravating circumstances necessary to authorize a death sentence.

Before *Apprendi*, this Court upheld Florida's capital sentencing scheme against a similar Sixth Amendment challenge. In *Hildwin* v. *Florida*, the Court declared that because "an aggravating factor here is not an element of the offense but instead … 'a sentencing factor …,' the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." 490 U.S. 638, 640-641 (1989). But *Apprendi*, *Ring*, and subsequent decisions "have uniformly rejected [the assumption] that in determining the maximum punishment for an offense, there is a constitutionally significant difference between a fact that is an 'element' of the offense and one that is a 'sentencing factor.'" *Southern Union Co.* v. *United States*, 132 S. Ct. 2344, 2356 (2012). When "an aggravating circumstance [is] necessary for imposition of the death penalty," as it is under Florida law, it "operate[s] as the functional equivalent of an element of a greater offense" and therefore must "be found by a jury." *Ring*, 536 U.S. at 609; *see also Apprendi*, 530 U.S. at 482-483, 494 n.19. *Hildwin* does not survive those later decisions.[5]

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[5] Even if *Hildwin* remained valid, it would not control here because one of the aggravators there was that the defendant "had previous convictions for violent felonies," 490 U.S. at 639, and so it would fit the exception to *Apprendi* and *Ring* for the "fact of a prior conviction." *Blakely* v. *Washington*, 542 U.S. 296, 301 (2004). Neither aggravating circumstance presented here fits that exception.

2. The Florida trial judge's duty to give "great weight" to the jury's "advisory sentence" does not spare Florida's capital sentencing scheme from constitutional invalidity under *Ring* by elevating the jury to the role of sentencing factfinder, or even quasi-factfinder. In Florida, authorization to impose the death penalty derives solely from the trial court's independent findings regarding aggravating and mitigating circumstances; the jury's advisory verdict is not necessary or sufficient to authorize the death penalty.

Time and again, the Florida Supreme Court has declared that although the jury's sentencing recommendation carries "great weight," the trial judge "must conduct an independent analysis of the aggravating and mitigating circumstances," "regardless of the jury's recommendation." *Delgado* v. *State*, 2015 Fla. LEXIS 871, at *27-28 (Fla. Apr. 23, 2015) (quotation marks omitted); *see also*, *e.g.*, Fla. Stat. § 921.141(3) (trial court must determine appropriate sentence "[n]otwithstanding the recommendation of a majority of the jury"); *Russ* v. *State*, 73 So. 3d 178, 198 (Fla. 2011) ("[T]he trial court is required to make independent findings on aggravation, mitigation, and weight."); *Williams* v. *State*, 967 So. 2d 735, 751 (Fla. 2007) (court "is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence" (quotation marks omitted)); *Ross* v. *State*, 386 So. 2d 1191, 1197 (Fla. 1980) ("The trial court must still exercise its reasoned judgment in deciding whether the death penalty should be imposed."). The trial court is thus free to consider sentencing evidence and to find aggravators that were never considered or found by the jury, *Williams*, 967 So. 2d at 751; *Spencer* v. *State*, 615 So. 2d 688, 691 (Fla. 1993), and to impose the death penalty even where the jury has recommended a life

sentence, *see, e.g.*, *Grossman* v. *State*, 525 So. 2d 833, 840 (Fla. 1988), *receded from on other grounds in Franqui* v. *State*, 699 So. 2d 1312 (Fla. 1997). And it is the trial court's findings, not the jury's advisory verdict or any findings arguably implicit in it, that the Florida Supreme Court reviews. *Grossman*, 525 So. 2d at 839.

Consequently, the Florida Supreme Court has made clear that the "great weight" accorded the jury's sentencing recommendation does not make the verdict anything other than purely "advisory," and it has dismissed the suggestion that the jury functions as "de facto, if not de jure, sentencer" in capital cases. *Grossman*, 525 So. 2d at 839-840. In *Combs* v. *State*, for example, the Florida Supreme Court held that the trial court was not required to instruct the jury that "a life sentence carries substantial weight and that a jury recommendation of life could be overridden only if virtually no reasonable person could differ." 525 So. 2d 853, 855-858 (Fla. 1988). Such an instruction would have been improper because "the court is the final decision-maker and the sentencer—not the jury," and "the jury's sentencing recommendation in a capital case is *only advisory*." *Id.* (quotation marks omitted); *accord Espinosa* v. *Florida*, 505 U.S. 1079, 1081 (1992) (noting State's assertion that "in the Florida scheme, the jury is not 'the sentencer' … because the trial court is not bound by the jury's sentencing recommendation"). In fact, the Florida Supreme Court has criticized trial judges for relying too heavily on the advisory verdict, but not for relying too little. *Compare Ross*, 386 So. 2d at 1197 (vacating death sentence where "the trial court gave undue weight to the jury's recommendation of death and did not make an independent judgment of whether or not the death penalty should be imposed"), *with Carter* v. *State*, 980 So. 2d 473, 483-484 (Fla. 2008)

(no abuse of discretion even though trial court did "not expressly consider[] the jury's recommendation").

This Court too has repeatedly recognized that, "[i]n Florida, the jury's sentencing recommendation in a capital case is only advisory." *Spaziano* v. *Florida*, 468 U.S. 447, 451 (1984); *see also Espinosa*, 505 U.S. at 1080; *Walton*, 497 U.S. at 648; *Porter* v. *McCollum*, 558 U.S. 30, 40-41 (2009).

3. The Florida Supreme Court nonetheless denied Hurst's *Ring* challenge because "Florida's sentencing procedures do provide for *jury input* about the existence of aggravating factors prior to sentencing—a process that was completely lacking in the Arizona statute struck down in *Ring*." JA310 (emphasis added). "Jury input" may be a fair description of the role played by the advisory verdict in Florida, but it is insufficient to satisfy the Sixth Amendment—as this Court has already recognized.

In *Walton*, the defendant challenged Arizona's capital sentencing scheme under the Sixth Amendment. The Court began by reiterating *Hildwin*'s now-rejected dictate that "'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" 497 U.S. at 648 (quoting 490 U.S. at 640-641). The defendant in *Walton* attempted to avoid *Hildwin*'s implications by distinguishing Florida's scheme from Arizona's—just as the court below did here—on the ground that Arizona's scheme did not provide for any advisory jury verdict. This Court deemed that "distinction[] … not persuasive." *Id.* at 648. Because a jury in Florida "does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge," the

Court concluded, a "Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Id.*

Subsequently in *Ring*, this Court "overrule[d] *Walton* to the extent that it allow[ed] a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." 536 U.S. at 609. Because this Court had rejected the very distinction the court below sought to draw between Arizona's and Florida's capital sentencing schemes, *Ring*'s invalidation of Arizona's capital sentencing scheme applies with equal force to Florida's.

Even apart from the Court's prior recognition that Florida's scheme is not meaningfully different from the Arizona scheme struck down in *Ring*, the availability of the jury's *advice*—of its mere "input"—does not satisfy the Sixth Amendment right to a jury trial. The Court has repeatedly said that the Sixth Amendment prohibits entrusting the judge with "finding" the facts necessary to impose the sentence. *Ring*, 536 U.S. at 597, 602; *United States* v. *Booker*, 543 U.S. 220, 232 (2005); *Alleyne*, 133 S. Ct. at 2160. Across the many cases in which the Court has considered the role of the jury since *Apprendi* and *Ring*, it has never suggested that such a Sixth Amendment defect could be cured simply by having the jury provide *advice*.

The Court's silence reflects the reality that an advisory role would not serve the jury's essential function in preserving liberty. The jury-trial right "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely* v. *Washington*, 542 U.S. 296, 305-306 (2004). Thus, the "historic role of the jury" has been as "an intermediary between the State and criminal defendants." *Alleyne*,

133 S. Ct. at 2161. When the Sixth Amendment was ratified, juries functioned as factfinders. *Ring*, 536 U.S. at 599. That is the traditional role *Apprendi* and *Ring* restored. But if a State could depart from that tradition and assign the jury an advisory role while vesting the judge with responsibility for essential factfinding, as Florida has, it could "relegate[] [the jury] to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 307. For example, much as this Court has feared before, under Florida's view of the Sixth Amendment, "a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it[,] or of making an illegal lane change while fleeing the death scene"—as long as the jury also offered the judge its recommendation as to whether the judge should find him guilty of murder. *Id.* at 306-307. If that were permissible, "[t]he jury could not function as circuitbreaker in the State's machinery of justice." *Id.* at 306.

4. For the reasons discussed above, *Ring*'s overturning of *Walton* decisively repudiated *Hildwin* as well. But even if that were not so, principles of *stare decisis* would not stand in the way of now expressly overruling *Hildwin* and holding Florida's capital sentencing scheme unconstitutional under *Ring*. "*[S]tare decisis* cannot possibly be controlling" where the constitutional precedent involves "a procedural rule [that] does not serve as a guide to lawful behavior" and where "the [precedent] has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995); *see also Alleyne*, 133 S. Ct. at 2163 n.5 ("The

force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections.").

That is the case here. The Sixth Amendment's bar against entrusting a judge with finding any circumstance necessary to authorize the death penalty is a fundamental rule of constitutional procedure. *Alleyne*, 133 S. Ct. at 2163 n.5 (*Apprendi* "concern[s] procedural rules that implicate fundamental constitutional protections"); *Blakely*, 542 U.S. at 305-306 (right to jury trial is "a fundamental reservation of power in our constitutional structure"); *Duncan* v. *Louisiana*, 391 U.S. 145, 148-149 (1968) (right to jury trial is "fundamental right"). As detailed above, from *Apprendi* through *Alleyne*, this Court has adopted and reinforced a view of the Sixth Amendment that is utterly inconsistent with *Hildwin*'s underpinnings—and it has overturned other similarly aberrant precedents along the way. *See Ring*, 536 U.S. at 608-609 (overturning *Walton*); *Alleyne*, 133 S. Ct. at 2155 (overturning *Harris* v. *United States*, 536 U.S. 545 (2002)). Moreover, given that "*Apprendi* [and *Ring* are] now more than a decade old," any "reliance interests" Florida might claim in *Hildwin* "are by this point attenuated." *Southern Union*, 132 S. Ct. at 2357.

Tellingly, the three other States that, at the time of *Ring*, had "hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations," *Ring*, 536 U.S. at 608 n.6, modified their capital sentencing schemes after *Ring* to ensure that the jury makes all findings necessary for imposition of the death penalty (even if the judge still selects the sentence). *See Brice* v. *State*, 815 A.2d 314, 320 (Del. 2003); *Bostick* v. *State*, 773 N.E.2d 266, 273 (Ind. 2002); *Ex parte McGriff*, 908 So. 2d 1024, 1037 (Ala. 2004).

Therefore, because Florida's outlier capital sentencing scheme entrusts to the trial court the task of finding facts necessary for imposition of the death penalty, and because the jury's advisory role does not meaningfully distinguish Florida's scheme from the Arizona scheme struck down in *Ring*, Florida's scheme violates the Sixth Amendment and must also be struck down. This Court should no longer countenance "the repeated spectacle of a man's going to his death [in Florida] because a *judge* found that an aggravating factor existed." *Ring*, 536 U.S. at 612 (Scalia, J., concurring).

B. Florida's Capital Sentencing Scheme Violates The Eighth Amendment Because It Assigns To The Judge The Power To Impose The Death Penalty

In a concurring opinion in *Ring*, Justice Breyer concluded that "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death." 536 U.S. at 614; *see also Woodward* v. *Alabama*, 134 S. Ct. 405, 406-410 (2013) (Sotomayor, J., dissenting from denial of certiorari). That conclusion is correct. In *Spaziano*, this Court found no Eighth Amendment violation in Florida's commitment of capital sentencing to judges. 468 U.S. at 464-465. But it is clear that each of the three guideposts of this Court's Eighth Amendment jurisprudence—history, current practice, and independent judgment—compels the opposite conclusion: juries, not judges, must be responsible for imposing the death penalty. Nor can *Spaziano* be salvaged on *stare decisis* grounds, for "[t]he force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections." *Alleyne*, 133 S. Ct. at 2163 n.5. In answer to the Court's question whether Florida's capital

sentencing scheme violates the Eighth Amendment in light of *Ring*, the Court should therefore overrule *Spaziano* and restore Florida juries to their traditional and appropriate role as sentencers in capital cases.[6]

1. Historically, the power to impose the death penalty was the province of the jury, not the judge. English criminal law "prescribed a particular sentence for each offense," *Apprendi*, 530 U.S. at 479, and the penalty for many felonies was fixed at death. *See, e.g.*, *Woodson* v. *North Carolina*, 428 U.S. 280, 289 (1976) (joint opinion); *Eddings* v. *Oklahoma*, 455 U.S. 104, 110-111 (1982); *Southern Union*, 132 S. Ct. at 2361 (Breyer, J., dissenting). Juries routinely exercised this sentencing discretion by "issuing 'partial verdicts' or 'downvaluing' stolen goods"—practices "immortalized through Blackstone's colorful phrase, 'pious perjury.'" Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 2013 (2005).[7] In fact, since most eighteenth-century criminal trials lacked "contested inquiries into guilt or innocence," the primary function of the jury trial "was to decide the sanction." Langbein, *The Origins of Adversary Criminal Trial* 59 (2003).

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[6] To the extent the Court suggested in *Proffitt* v. *Florida*, 428 U.S. 242, 252 (1976), or *Harris* v. *Alabama*, 513 U.S. 504 (1995), that jury sentencing is not constitutionally required in capital cases, those suggestions are unavailing for the same reasons that counsel in favor of overruling *Spaziano*.

[7] Judges did have some power to effect a downward departure from a jury-imposed death sentence by seeking a royal pardon. Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings about* Apprendi, 82 N.C. L. Rev. 621, 638 (2004). But no authority suggests that a judge could unilaterally impose a death sentence against the jury's verdict.

American juries similarly held unilateral power to impose the death penalty. For example, in homicide cases, juries "had the option of (1) convicting the defendant of murder, which carried a mandatory death sentence; (2) convicting the defendant of manslaughter, which was not a capital crime; or (3) acquitting the defendant." Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings about* Apprendi, 82 N.C. L. Rev. 621, 648 (2004). In effect, this "g[a]ve the jury not only the power of conviction, but also the power of execution." *Id.*; *see also* Iontcheva, *Jury Sentencing as Democratic Practice*, 89 Va. L. Rev. 311, 323 (2003) ("More than factfinders, juries decided the fate of the defendants they convicted.").

In the early nineteenth century, many American States became concerned about the harshness of mandatory death penalties, as well as the rate of "mercy" acquittals of guilty defendants. *Woodson*, 428 U.S. at 289-290. The States responded by giving juries *more* power over sentencing. The first wave of reforms created new categories of homicide, which gave juries more discretion to convict defendants of non-capital homicide. *Id.* at 290. As that option failed to resolve the concern, States gave juries yet more sentencing authority, "forthrightly granting juries the discretion which they had been exercising in fact." *McGautha* v. *California*, 402 U.S. 183, 199-200 (1971), *vacated on other grounds sub nom. Crampton* v. *Ohio*, 408 U.S. 941 (1972); *see also Woodson*, 428 U.S. at 289-290.

2. The jury's authority over capital sentencing remained consistent in the twentieth century despite shifts in American views regarding capital punishment. *See, e.g.*, *Andres* v. *United States*, 333 U.S. 740, 758 (1948) (Frankfurter, J., concurring) (jury had power over sentencing in all but three of 43 States with death

penalty); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. Pa. L. Rev. 1099, 1100-1101 (1953) ("[T]hirty-five states and the Federal Government provide that the jury shall determine whether the death penalty shall be imposed, four provide that the jury may recommend the punishment to be inflicted but that such recommendation shall not be binding upon the judge, and six have abolished the death penalty for murder, leaving only three that still require capital punishment" (footnotes omitted)).[8] In *Spaziano* itself, this Court recognized that among the States that had reinstated the death penalty after *Furman*, "the majority view [was] that capital sentencing … should be performed by a jury." 468 U.S. at 463 (30 of 37 jurisdictions with capital sentencing statutes "give the life-or-death decision to the jury").

The consensus of other jurisdictions continues to make jury sentencing the norm in the modern era of bifurcated (or trifurcated) capital sentencing. In 27 of the 31 States that maintain the death penalty, as well as in the federal system, the jury makes the final decision whether to impose the death penalty. *See Woodward*, 134 S. Ct. at 407 (Sotomayor, J., dissenting from denial of certiorari).[9] Only Florida, Alabama, Delaware, and Montana leave the final sentencing decision to the court. *Id.*

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[8] When this Court decided *Furman*, Florida, too, "gave the jury complete life-or-death discretion." Ehrhardt & Levinson, *Florida's Legislative Response to* Furman*: An Exercise in Futility?*, 64 J. Crim. L. & Criminology 10, 17 (1973). Juries in Florida had authority to choose between death and life sentences for nearly 100 years. *See Newton* v. *State*, 21 Fla. 53, 100 (1884).

[9] Nebraska, which also left the capital sentencing decision to the judge, *Woodward*, 134 S. Ct. at 407, abolished the death penalty by statute enacted on May 27, 2015.

3. Finally, evaluating the relevant penological interests confirms that juries should make the final decision as to life or death in capital cases. "[U]nless a criminal sanction serves a legitimate penological function, it constitutes 'gratuitous infliction of suffering' in violation of the Eighth Amendment." *Baze* v. *Rees*, 553 U.S. 35, 78 (2008) (Stevens, J., concurring); *Gregg* v. *Georgia*, 428 U.S. 153, 183 (1976) (joint opinion). Of the principal functions of criminal sentencing—rehabilitation, incapacitation, deterrence, and retribution—only retribution provides a constitutionally defensible basis for application of the death penalty. *Baze*, 553 U.S. at 79 (Stevens, J., concurring); *Ring*, 536 U.S. at 614-615 (Breyer, J., concurring).[10] But, as Justice Breyer explained in his *Ring* concurrence, "[i]n respect to retribution, jurors possess an important comparative advantage over judges." *Id.* at 615. Juries "are more attuned to 'the community's moral sensibility'" and "'reflect more accurately the composition and experiences of the community as a whole.'" *Id.* (quoting *Spaziano*, 468 U.S. at 481, 486 (Stevens, J., concurring in part and dissenting in part)). As a result, they more faithfully "express the conscience of the community on the ultimate question of life or death" in a specific case. *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968). By contrast, Florida's transfer of the ultimate sentencing decision "to a lone government official's decree," *Harris*, 513 U.S. at 522-523 (Stevens, J., dissenting),

[10] Rehabilitation does not apply, and incapacitation is accomplished by a life sentence without possibility of parole. *Baze*, 553 U.S. at 78 (Stevens, J., concurring); *Ring*, 536 U.S. at 615 (Breyer, J., concurring). And "there remains no reliable statistical evidence that capital punishment in fact deters potential offenders." *Baze*, 553 U.S. at 79 (Stevens, J., concurring); *see also Ring*, 536 U.S. at 614-615 (Breyer, J., concurring). Reliance on these interests in *Spaziano*, 468 U.S. at 461-462, was misplaced.

unmoors the death penalty from its function as an "express[ion of] the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg*, 428 U.S. at 184 (joint opinion); *see also id.* at 183 ("[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct."). And, in so doing, Florida's scheme undermines the reliability of the punishment as a reflection of contemporary moral values.

II. THE JURY'S ADVISORY VERDICT DOES NOT IMPLY THE FINDING REQUIRED BY *RING*

In opposing certiorari in this case, the State argued that where the jury has recommended a sentence of death, "the jury has 'necessarily engag[ed] in the fact-finding required for imposition of a higher sentence.'" Opp. 15 (quoting *Jones* v. *United States*, 526 U.S. 227, 250-251 (1999)). On that view, there was no *Ring* violation in this case because the jury's advisory verdict recommending death implied that it had found at least one aggravating factor, thereby authorizing the trial court to impose the death penalty. This contention is both factually wrong and unavailing under *Ring*.

1. It cannot be inferred that the jury found any particular aggravator. The jury certainly did not make explicit findings on aggravators. *See* JA217. Florida prohibits the trial court from "using a penalty phase special verdict form that details the jurors' determination concerning aggravating factors." *State* v. *Steele*, 921 So. 2d 538, 548 (Fla. 2006); *see also Espinosa*, 505 U.S. at 1080 ("verdict does not include specific findings of aggravating and mitigating circumstances"); *Walton*, 497 U.S. at 648 ("[I]n Florida the jury … does not make specific factual findings with regard to the existence of

mitigating or aggravating circumstances."). The trial court accordingly denied Hurst's request to use such a form. JA307.

Nor does the jury's seven-to-five vote recommending death support an inference that a majority of jurors found any one aggravator. Although the jurors were instructed that they could recommend death only if they "determine[d] that at least one aggravating circumstance is found to exist," JA215, they were presented with two aggravating circumstances, JA211-212. And "[n]othing in [Florida law] … requires a majority of the jury to agree on *which* aggravating circumstances exist." *Steele*, 921 So. 2d at 545. It is entirely possible that as few as four jurors found one aggravator and three found the other, and thus that each aggravator was rejected by at least two-thirds of the jurors. *See id.* (observing that Florida permits this precise scenario); *see Sochor* v. *Florida*, 504 U.S. 527, 538 (1992) ("Because the jury in Florida does not reveal the aggravating factors on which it relies, we cannot know whether this jury actually relied on [a particular] factor.").[11] The advisory verdict's inherent indeterminacy with respect to aggravators—which will exist in every capital case in Florida except where the jury is presented with only one aggravator *and* votes to recommend a death sentence—precludes the advisory verdict from bringing Hurst's sentence into line with the Sixth Amendment under *Ring* because it cannot be said that the jury has actually found a fact necessary to authorize the sentence.

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[11] The jury's earlier verdict convicting Hurst of first-degree murder also does not imply that the jury found facts sufficient to establish any particular aggravator. *Supra* p. 5.

2. In any event, implicit factual findings—whether determinate or indeterminate—cannot cure Florida's *Ring* violation because, as discussed, under Florida law it is the court's findings alone, not the jury's verdict or any findings implied by that verdict, that authorizes the death sentence.

The State's contrary argument (Opp. 15) rests on this Court's remark in *Jones* v. *United States* that the unanimous jury in *Hildwin* "made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." 526 U.S. 227, 250-251 (1999). But *Jones* does not express the Court's considered, authoritative judgment about the constitutionality of Florida's capital sentencing scheme in general or of a death sentence after a jury recommendation of death in particular. In *Jones*, the Court addressed the Sixth Amendment to ascertain whether one proposed interpretation of the federal statute before it "would raise serious constitutional questions" that could be avoided by adopting a different interpretation. *See* 526 U.S. at 250-252. The Court did not decide what the Constitution actually requires. *Id.* In addition, *Jones* was decided before *Ring* and *Apprendi*, at a time when the Court was still "endeavor[ing] to distinguish certain capital sentencing decisions, including *Walton*," without confronting the Sixth Amendment issues it ultimately resolved in *Ring*. *Ring*, 536 U.S. at 600-603.

Ring has since made clear that even if the jury's advisory sentence recommending death implied that the jury here had found at least one aggravator—and as discussed above, it does not—Hurst's sentence would not comport with the Sixth Amendment. Just as in *Ring*, the jury's recommendation of death here did

not authorize a death sentence. "Based solely on the jury's verdict"—whether its guilty verdict, its advisory verdict recommending death, or both—"the maximum punishment [Hurst] could have received was life imprisonment." *Ring*, 536 U.S. at 597. "This was so because"—as discussed above—in Florida, as in Arizona at the time of *Ring*, "a death sentence may not legally be imposed … unless at least one aggravating factor is found to exist beyond a reasonable doubt" by the trial court. *Id.*; *Blakely*, 542 U.S. at 304 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." (quotation marks and citation omitted)). Florida bars the use of a special verdict form for capital sentencing precisely because "requiring specific jury findings on aggravators without guidance about their effect on the imposition of a sentence could … harm[] the trial court's independent determination of the existence of the aggravating and mitigating circumstances." *Franklin* v. *State*, 965 So. 2d 79, 102 (Fla. 2007) (quotation marks omitted). The State's "implicit findings" theory therefore fails.

III. If The Jury's Advisory Verdict Implied The Finding Required By *Ring*, Hurst's Sentence Would Violate The Constitution For Other Reasons

If, contrary to the arguments above, the State were correct that the jury's advisory verdict satisfied *Ring* on the theory that the jury implicitly made the findings of fact necessary to authorize imposition of the death sentence, Hurst's sentence still could not be sustained. Florida law imposes constraints that would scuttle the jury's function as responsible factfinder and bulwark of the community's judgment.

A. Hurst's Sentence Would Violate The Eighth Amendment Because It Would Have Been Based On Jury Instructions That Misleadingly Minimized The Jury's Sense Of Responsibility

If the jury's advisory verdict implied the finding necessary to satisfy *Ring*, then Hurst's sentence would violate the Eighth Amendment because the jury instructions would have misleadingly "minimize[d] the jury's sense of responsibility for determining the appropriateness of death." *Caldwell* v. *Mississippi*, 472 U.S. 320, 341 (1985); *see also Romano* v. *Oklahoma*, 512 U.S. 1, 8 (1994). Under the Eighth Amendment, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-329; *see also id.* at 342 (O'Connor, J., concurring) ("[T]he prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility.").

Here, the jury was instructed that its sentencing verdict would be purely advisory and that responsibility for determining whether Hurst should be sentenced to death rested with the trial court. Before the jurors retired to deliberate, the trial court told them that theirs would be "an advisory sentence," and that, although their recommendation "must be given great weight," "the final decision as to which punishment shall be imposed is the responsibility of the judge." JA207-208. Nowhere did the court instruct the jury that its verdict would constrain the court's sentencing deliberation, let alone control it. Nowhere did the court instruct that the jury's recommendation alone was

sufficient to authorize the court to impose the death sentence by (implicitly) finding at least one aggravating circumstance. And nowhere did the court instruct that the jury's finding of an aggravator was necessary for the imposition of a capital sentence.

The Florida Supreme Court has acknowledged this Eighth Amendment concern. In *Combs*, the court rejected a *Caldwell* objection to Florida's standard jury instructions—which have remained substantially the same as the instructions given here, *see* 525 So. 2d at 856-857—but did so only because the jury's sentence was "only advisory," such that the instructions were not misleading. *Id.* In doing so, the court acknowledged that if the jury's verdict were *not* merely advisory, then 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 "a resentencing proceeding for virtually every individual sentenced to death in this state since 1976." *Id.* at 858 (quotation marks omitted).

B. Hurst's Sentence Would Violate The Sixth And Eighth Amendments Because The Jury's Supposed Implied Finding May Have Been Made By Only A Simple Majority

In addition, if the jury's recommendation implied a factual finding as to aggravating circumstances that authorized imposition of the death penalty, that finding would not satisfy the Sixth and Eighth Amendments because no inference can be drawn from the jury's recommendation that more than seven jurors found an aggravator. JA215-217. This Court has never accepted that an element of a serious crime—which is how aggravators must be viewed for Sixth Amendment purposes under *Ring*, *supra* p. 19—can be found by a sim-

ple-majority verdict. It should not do so now, and it should especially not do so in a capital case. Florida's simple-majority rule contravenes centuries of jurisprudential history recognizing unanimous verdicts as the norm in criminal cases. It stands as the lone outlier against the uniform position of the federal system and 49 other States—in capital and non-capital offenses alike. It lacks the safeguards of fairness that are secured by more demanding voting rules, which find support in social science addressing the unanimity requirement. And it contradicts Florida's own judgment that unanimity is necessary for all jury findings of guilt.

1. The Sixth and Fourteenth Amendments forbid simple-majority jury verdicts

Allowing the aggravating circumstances that make a defendant eligible for a death sentence to be established by a simple-majority vote violates the right to a jury trial secured by the Sixth and Fourteenth Amendments.

1. This Court has never approved a simple-majority rule for jury verdicts in criminal cases. The guarantee of a jury trial "reflect[s] … a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan*, 391 U.S. at 156. As this Court has emphasized, by "[p]roviding an accused with the right to be tried by a jury of his peers," the Framers "gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.*

The Sixth and Fourteenth Amendments fulfill these purposes in slightly different ways in federal and state cases, respectively. In federal cases, the Sixth

Amendment requires that all convictions for non-petty offenses be by a unanimous jury verdict. *Andres*, 333 U.S. at 748-749; *Hawaii* v. *Mankichi*, 190 U.S. 197, 211-212 (1903). Thus, Hurst's sentence could not constitutionally have been imposed in federal court. *Ring* requires that "the aggravating circumstances necessary for the imposition of the death penalty" be found by the jury, 536 U.S. at 609; but Florida does not require unanimity for aggravators, and the jury here was instructed accordingly, JA215-217.

The standard is somewhat different—but no more tolerant of a simple-majority rule—in state cases. This distinction results from the Court's splintered ruling in *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), involving Oregon's "ten of twelve" rule. In *Apodaca*, eight Justices agreed that the right to a jury trial "applied identically" in federal and state cases. *McDonald* v. *City of Chicago*, 561 U.S. 742, 766 n.14 (2010) (plurality) (citing *Johnson* v. *Louisiana*, 406 U.S. 356, 395 (1972) (Brennan, J., dissenting in *Apodaca*)). But because those eight Justices were evenly divided on whether the Sixth Amendment required unanimity, Justice Powell's separate concurrence broke the tie, and he concluded that the Sixth Amendment requires unanimity in federal cases, but that Oregon's "ten of twelve" rule passed muster under the Fourteenth Amendment. *Id.*; *Johnson*, 406 U.S. at 369-380 (Powell, J., concurring in the judgment in *Apodaca*); *id.* at 381-382 (Douglas, J., dissenting); *Apodaca*, 406 U.S. at 406 (plurality); *id.* at 414-415 (Stewart, J., dissenting). As a result, the per se unanimity requirement applicable in federal cases does not extend fully to the States. But the States are still prohibited from altering their jury systems—including their voting rules—in a way that threatens the "jury's essential feature": "the 'interposition between the

accused and his accuser of the commonsense judgment of a group of laymen'" and "'the community participation and shared responsibility that results from that group's determination of guilt or innocence.'" *Burch* v. *Louisiana*, 441 U.S. 130, 135 (1979).

Apodaca itself casts serious doubt on a simple-majority rule. While a majority of the *Apodaca* Court declined to recognize an across-the-board unanimity requirement in state cases, another (overlapping) majority made clear that a simple-majority rule would, at a minimum, raise great constitutional concerns. *See Apodaca*, 406 U.S. at 414 (Stewart, J., joined by Brennan, J., and Marshall, J., dissenting) (unanimity required in state court); *Johnson*, 406 U.S. at 380-381 (Douglas, J., joined by Brennan, J., and Marshall, J.) (same); *Johnson*, 406 U.S. at 415 (Blackmun, J., concurring in *Apodaca*) ("a system employing a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty"). And Justice Powell recognized that "[a]pproval of Oregon's 10-2 requirement does not compel acceptance of all other majority-verdict alternatives." *Johnson*, 406 U.S. at 377 n.21 (Powell, J., concurring in the judgment in *Apodaca*). With four Justices believing a simple-majority rule unconstitutional, one Justice expressing "great difficulty," and another Justice disclaiming any approval, *Apodaca* lends no support to Florida's simple-majority rule.

2. Each of the factors this Court considers in the Sixth Amendment context—history, current practice, and functional considerations, *e.g.*, *Apprendi*, 530 U.S. at 478-484; *Burch*, 441 U.S. at 138-139—confirms that a simple-majority rule is inadequate to fulfill the jury trial's fundamental purposes.

By the eighteenth century, it was well-established that a guilty verdict in criminal cases required a unanimous jury. Sir William Blackstone explained that "the trial by jury … is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 Blackstone, *Commentaries on the Laws of England* 379 (1768); *see also* 4 Blackstone, *Commentaries on the Laws of England* 343 (1769) ("[T]he truth of every accusation … should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours," *quoted in Apprendi*, 530 U.S. at 477). Similarly, John Adams wrote in 1786 that "it is the unanimity of the jury that preserves the rights of mankind." 1 Adams, *A Defence of the Constitutions of Government of the United States of America* 376 (3d ed. 1797). Justice Wilson concurred in his lectures in 1790-1791: "To the conviction of a crime, the undoubting and the unanimous sentiment of the twelve jurors is of indispensable necessity." 2 Wilson, *The Works of the Honourable James Wilson, L.L.D.* 350 (1804). And James Madison's draft of the Sixth Amendment explicitly provided for the right to trial "by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites." 1 Annals of Cong. 452 (1789).[12]

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[12] Whether Madison's inclusion of "unanimity" alongside the "other accustomed requisites" of the jury-trial right shows that Congress intended to constitutionalize a unanimity requirement in the Sixth Amendment may be debated in light of Congress's amendment of Madison's draft. *See Apodaca*, 406 U.S. at 409-410 (plurality). But, at a minimum, Madison's draft confirms that, at the time of the Founding, more than a bare majority was required.

In the early nineteenth century, Justice Story similarly observed that, in criminal cases, "unanimity in the verdict of the jury is indispensable." 3 Story, *Commentaries on the Constitution of the United States* § 777, at 248 (1833). And unanimity—not a bare-majority rule—continued to define the contours of the right to a jury trial at the time of the Fourteenth Amendment's ratification. *See, e.g.*, Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 320 (1868) ("The jury must unanimously concur in the verdict."); 1 Bishop, *Commentaries on the Law of Criminal Procedure* 532 (1866) (statute authorizing a verdict "upon anything short of the unanimous consent of the twelve jurors" is "void"); Tiffany, *A Treatise on Government, and Constitutional Law* 367 (1867) ("[T]rial by jury is understood to mean—generally—trial by a jury of twelve men, impartially selected, and who must unanimously concur in the guilt of the accused before a legal conviction can be had."); Proffatt, *A Treatise on Trial by Jury* 119 (1880) ("[I]t is required that th[e] jury shall be unanimous.").

The "current jury practices of the several States" establish that a simple-majority rule is an aberration by contemporary standards as well. *Burch*, 441 U.S. at 138. No State, except Florida, applies a simple-majority verdict rule with respect to the elements of *any* serious (*i.e.*, non-petty) crime—much less for capital cases.[13] The federal system and all States but two—Oregon and Louisiana—require unanimity to convict a defendant of

[13] The Sixth Amendment right to trial by jury applies to "non-petty" offenses—*i.e.*, those where imprisonment for more than six months is authorized. *Baldwin* v. *New York*, 399 U.S. 66, 68-69 (1970).

any non-petty offense.[14] The two outliers deviate from unanimity only to the extent of allowing a ten-to-two verdict, and even then only in non-capital cases. In capital cases, both Louisiana and Oregon require unanimity at all stages. La. Const. art. I, § 17(A); La. Code Crim. P. Ann. art. 782(A); Or. Const. art. I, § 11.

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[14] *See* Ala. R. Crim. P. 23.1(a); Alaska R. Crim. P. 31(a); Ariz. Const. art. II, § 23; Ark. Code Ann. § 16-89-126(a), 128; Cal. Const. art. I, § 16; *People* v. *Russo*, 25 P.3d 641, 645 (Cal. 2001); Colo. Rev. Stat. Ann. § 16-10-108; Colo. R. Crim. P. 31(a)(3); Conn. Super. Ct. R. Crim. P. § 42-29; Del. Super. Ct. R. Crim. P. 31(a); Fla. R. Crim. P. 3.440; *Ball* v. *State*, 70 S.E. 888 (Ga. Ct. App. 1911); *State* v. *Arceo*, 928 P.2d 843, 872 (Haw. 1996); Idaho Crim. Ct. R. 31(a); Idaho Code Ann. §§ 19-2316, 2317; 725 Ill. Comp. Stat. 5/115-4(o); Ind. St. Ct. Jury R. 16(a); *Fisher* v. *State*, 291 N.E. 2d 76, 82 (Ind. 1973); Iowa R. Crim. P. 2.22(5); Kan. Stat. Ann. § 22-3421; Ky. R. Crim. P. 9.82(1); Me. R. Crim. P. 31(a); Md. Const. Decl. of Rights, art. 21; Md. R. 4-327(a); Mass. R. Crim. P. 27(a); Mich. Ct. R. 6.410(B); Minn. R. Crim. P. 26.01, subd. 1(5); Miss. Const. art. 3, § 31; *Fulgham* v. *State*, 46 So. 3d 315, 324 (Miss. 2010); Mo. Const. art. I, sec. 22(a); *State* v. *Celis-Garcia*, 344 S.W.3d 150, 155 (Mo. 2011) (en banc); Mont. Const. art. II, § 26; Neb. Const. art. I, § 6; *State* v. *Hochstein*, 632 N.W.2d 273, 282 (Neb. 2001); Nev. Rev. Stat. § 175.481; N.H. Const. Pt. 1, art. 15; *State* v. *Dushame*, 616 A.2d 469, 472 (N.H. 1992); N.J. Ct. R. 1:8-9; N.M. R. Crim. P. 5-611(A); N.Y. Const. art. I, § 2; *People* v. *DeCillis*, 199 N.E.2d 380, 381 (N.Y. 1964); N.C. Const. art. I, § 24; N.C. Gen. Stat. § 15A-1201-(a); N.D. Const. art. I, § 13; Ohio R. Crim. P. 31(A); Okla. Const. art. II, § 19; Pa. R. Crim. P. 648(B); R.I. Super. R. Crim. P. 31(a); *State* v. *Logue*, 28 S.E.2d 788, 791 (S.C. 1944); S.D. Codified Laws § 23A-26-1; Tenn. R. Crim. P. 31(a); Tex. Code Crim. P. arts. 36.29(a), 37.02, 37.03; Utah Const. art. I, § 10; Utah R. Crim. P. 21(b); Va. Const. art. I, § 8; Va. S. Ct. R. 3A:17(a); Vt. Const. ch. I, art. 10; Vt. R. Crim. P. 31(a); Wash. Super. Ct. Crim. R. § 6.16(a)(2); W. Va. R. Crim. P. 31(a); Wis. Const. art. I, §§ 5, 7; *Holland* v. *State*, 280 N.W.2d 288, 290 (Wis. 1979); Wyo. Stat. § 7-11-501. Fed. R. Crim. P. 31(a). The Uniform Code of Military Justice requires a unanimous verdict for capital crimes; a two-thirds majority is required for all other offenses. 10 U.S.C. § 852(a); R. for Courts-Martial 1004(a)(2).

The consensus is even stronger with respect to findings that make a defendant eligible for the death penalty. The federal system and all other States that retain the death penalty require that such findings be made by a unanimous jury. *See Steele*, 921 So. 2d at 548-549 & nn.3-5.[15] The Florida Supreme Court itself has recognized that Florida is now "the outlier state." *Id.* at 550.

The American system's rejection of simple-majority verdict rules is not just well-established; it is eminently well-founded. This Court has "long been of the view that 'the very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.'" *Jones* v. *United States*, 527 U.S. 373, 382 (1999) (quoting *Allen* v. *United States*, 164 U.S. 492, 501 (1896)) (brackets omitted). As Justice Kennedy explained when sitting on the court of appeals:

> The dynamics of the jury process are such that often only one or two members express doubt

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[15] Since *Steele* surveyed the States in 2005, seven States (Connecticut, Illinois, Maryland, Nebraska, New Jersey, New Mexico, and New York) have eliminated the death penalty, bringing the number of capital-punishment States to 31. Further, while *Steele* stated that, in Utah and Virginia, the jury need not necessarily "find *each* aggravator unanimously," 921 So. 2d at 549 (emphasis added), both require unanimity for the aggravators necessary to make the defendant death-eligible. *See Archuleta* v. *Galetka*, 267 P.3d 232, 259 (Utah 2011) ("[T]he fact finder in the guilt phase must find—unanimously and beyond a reasonable doubt—the statutory aggravator that makes death a possible sentence"); *Prieto* v. *Commonwealth*, 682 S.E.2d 910, 935 (Va. 2009) (holding, after *Steele*, that unanimity as to aggravators is required). In both Utah and Virginia, moreover, "the jury must unanimously recommend the death penalty." *Steele*, 921 So. 2d at 549.

> as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict.

United States v. *Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978). Non-unanimous voting rules compromise this function—most severely when the voting rule is a simple majority.

Empirical research confirms that concern. According to a 2001 study, "several consistent findings have emerged" in research conducted over the last four decades: Juries not subject to a unanimity requirement "tend to take less time to reach a verdict, take fewer polls, … hang less often," and most importantly, "cease deliberating when [the minimum necessary vote] is reached." Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001) (citations omitted); *see also* Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272-1273 (2000) (reporting similar findings); *see also* Jonakait, *The American Jury System* 103 (2003). Most troubling, evidence from jurisdictions that do require unanimity—thus forcing jurors to continue deliberating—shows that prolonged deliberations affect outcomes. According to one study, when unanimity is required, "a simple majority of seven votes for death on the first ballot almost invariably portends … that eventually a life sentence will emerge from the jury room." Sundby, *War*

and Peace in the Jury Room: How Capital Juries Reach Unanimity, 62 Hastings L.J. 103, 107-108 (2010).

This case exemplifies the extent to which a simple-majority rule can undermine the "'community participation'" and "'shared responsibility'" in the verdict that underpin the right to a jury trial. *Burch*, 441 U.S. at 135. After four days of testimony, and despite the gravity of their task, the jurors spent less than two hours in the jury room before recommending that Hurst be sentenced to death by the slightest of margins. JA24-25.

3. Because this Court has never considered the constitutionality of a simple-majority rule under the Sixth Amendment, invalidating Hurst's sentence on this ground would not require revisiting any of this Court's decisions. To the extent the Court views *Apodaca*'s upholding of Oregon's "ten of twelve" rule as necessarily approving a seven-to-five rule, however, it should overturn it.

Apodaca was wrong when it was decided. Justice Powell's tie-breaking concurrence rested on the notion that the Fourteenth Amendment did not incorporate "'jot-for-jot and case-for-case'" every element of the Sixth Amendment's right to a jury trial. *Johnson*, 406 U.S. at 375 (Powell, J., concurring in the judgment in *Apodaca*). But, as both the dissenters and Justice Powell himself recognized, this Court had already rejected the proposition that the Fourteenth Amendment incorporated only a "watered-down version of [Bill of Rights] guarantees." *Id.* at 384 (Douglas, J., dissenting in *Apodaca*); *see also Apodaca*, 406 U.S. at 414 (Stewart, J., dissenting) (same); *Johnson*, 406 U.S. at 375 (Powell, J., concurring in the judgment in *Apodaca*) (acknowledging the "course of constitutional interpretation" upon which

the Court "ha[d] embarked" in prior cases). *Stare decisis* considerations are weakened where the relevant precedent is "inconsistent with earlier Supreme Court precedent." *United States* v. *Dixon*, 509 U.S. 688, 704 (1993).

Since *Apodaca*, moreover, this Court has rejected Justice Powell's "watered down" notion of incorporation. In *McDonald*, a plurality of this Court confirmed that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" 561 U.S. at 765. Writing separately, Justice Thomas also concluded that the Fourteenth Amendment makes applicable against the States all the "individual rights enumerated in the Constitution." *Id.* at 823 (Thomas, J., concurring). *Apodaca* thus stands out as an "exception" that can only be explained as "the result of an unusual division among the Justices." *Id.* at 766 n.14 (plurality). "*[S]tare decisis* does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law." *Alleyne*, 133 S. Ct. at 2164 (Sotomayor, J., concurring) (quoting *Gaudin*, 515 U.S. at 521).[16]

In sum, *stare decisis* considerations do not warrant adhering to *Apodaca*, which was incorrect when decided

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[16] The factual premise of *Apodaca*'s ruling has also been discredited by the empirical research, discussed above, showing that unanimity is instrumental to preserving the traditional jury function. *See supra* pp. 44-45. Moreover, while Justice Powell relied upon the position of the American Bar Association at the time as support for his conclusion, the ABA has long since reconsidered and abandoned that position in favor of unanimity. *See* ABA, *Standards of Judicial Administration Relating to Trial Courts* Standard 2.10 (1992).

and has been undermined by subsequent developments. They especially cannot do so here, where, in addition, "a majority of the Court expressly disagreed with the rationale of the plurality" at the time of the decision, *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 66 (1996), and the decision involves "procedural rules that implicate … fundamental constitutional protections"—an area where "[t]he force of *stare decisis* is at its nadir." *Alleyne*, 133 S. Ct. at 2163 n.5.

2. The Eighth and Fourteenth Amendments forbid Florida's simple-majority rule in capital cases

Even if a simple majority were permissible for jury verdicts in non-capital cases, it is prohibited by the Eighth and Fourteenth Amendments in capital cases because it "'risks erroneous imposition of the death sentence.'" *Mills* v. *Maryland*, 486 U.S. 367, 375 (1988).

This Court has held that "there is a significant constitutional difference between the death penalty and lesser punishments," *Beck* v. *Alabama*, 447 U.S. 625, 637 (1980):

> "Death is a different kind of punishment from any other which may be imposed in this country. … From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action."

Id. at 637-638 (quoting *Gardner* v. *Florida*, 430 U.S. 349, 357-358 (1977) (opinion of Stevens, J.)) (brackets omitted); *see also*, *e.g.*, *Gregg*, 428 U.S. at 181-188 (joint opinion); *id.* at 231-241 (Marshall, J., dissenting);

Woodson, 428 U.S. at 305 (joint opinion). It is therefore "'of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'" *Beck*, 447 U.S. at 637-638.

To that end, this Court has repeatedly invalidated under the Eighth and Fourteenth Amendments "procedural rules that tended to diminish the reliability of the sentencing determination." *Beck*, 447 U.S. at 638 (quotation marks omitted); *see, e.g.*, *Woodson*, 428 U.S. at 301-305 (joint opinion) (States may not impose mandatory death sentences); *Roberts* v. *Louisiana*, 428 U.S. 325, 335-336 (1976) (joint opinion) (same); *Beck*, 447 U.S. at 638-646 (States must permit juries to consider lesser-included non-capital offense); *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality) (States may not constrain sentencer's consideration of relevant mitigating circumstances); *Eddings*, 455 U.S. at 117 (similar).

History and the "'evolving standards of decency,'" *Hall* v. *Florida*, 134 S. Ct. 1986, 1992 (2014)—as evidenced by current practice and independent judgment, *see id.* at 1996-2001—demonstrate that Florida's simple-majority rule is too unreliable to establish the factual predicate for a death sentence.

First, the rule that a death sentence requires a unanimous jury verdict as to all necessary factual predicates—including all aggravating circumstances—has "impressive historical credentials." *Ford* v. *Wainwright*, 477 U.S. 399, 406 (1986). English and American history establishes that convictions in criminal cases traditionally required a unanimous verdict by the jury. *See supra* pp. 40-41. This right to a unanimous verdict, moreover, necessarily extended to all facts necessary to impose the death penalty because, at least throughout

the eighteenth and nineteenth centuries, all factfinding—with respect to both guilt and capital sentencing—remained the exclusive province of the jury. *See Apprendi*, 530 U.S. at 479; *Woodson*, 428 U.S. at 289-291; *McGautha*, 402 U.S. at 197-198; *supra* pp. 27-28. A death sentence founded on non-unanimous factual findings would have been unknown to the Framers of the Eighth and Fourteenth Amendments alike.

Second, this Court has "pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Atkins* v. *Virginia*, 536 U.S. 304, 312 (2002).[17] On the question of jury unanimity, the legislatures' consensus is overwhelming: All States that retain the death penalty other than Florida, as well as the federal system, require that a jury establish the eligibility for a death sentence by unanimous verdict. *Supra* p. 43. Florida's outlier status is "strong evidence of consensus that our society does not regard" imposing death based on a simple-majority vote as "proper or humane." *Hall*, 134 S. Ct. at 1998.

Third, independent judgment confirms the impropriety of a simple-majority rule for aggravating circumstances in capital cases. As already explained, this Court's precedent has long recognized the critical purpose served by jurors' "comparison of views" and "arguments among … themselves.'" *Jones*, 527 U.S. at 382; *see also McKoy* v. *North Carolina*, 494 U.S. 433, 452 (1990) (Kennedy, J., concurring) ("Jury unanimity

[17] This Court has considered such consensus as an important component of Eighth Amendment analysis in cases challenging the procedure for selecting the sentence, as well as in cases where the propriety of capital punishment was substantively in issue. *E.g.*, *Woodson*, 428 U.S. at 294 (joint opinion); *Hall*, 134 S. Ct. at 1996-1998.

… is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community."); *supra* pp. 43-44. This conclusion, moreover, is confirmed by empirical research indicating that juries not subject to a unanimity requirement engage in less meaningful deliberation and often end deliberations altogether as soon as the minimum necessary vote is reached. *Supra* pp. 44-45; *cf. Hall*, 134 S. Ct. at 2000 (independent judgment "is informed by the views of medical experts").[18]

Finally, Florida's own adherence to a unanimity requirement in all other criminal contexts renders its adoption of the looser simple-majority rule in capital sentencing "arbitrary and capricious." *Gregg*, 428 U.S. at 188 (joint opinion). This Court often views intrajurisdictional inconsistencies as relevant under the Eighth Amendment. *See, e.g.*, *Beck*, 447 U.S. at 636-637 (invalidating Alabama's failure to instruct capital juries on lesser-included offenses and noting that "Alabama itself gives the defendant a right to such instructions under appropriate circumstances"); *Graham* v. *Florida*, 560 U.S. 48, 60 (2010) (explaining when courts should "compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction"); *id.* at 88 (Roberts, C.J., concurring) (citing "'intrajurisdictional' comparison of the sentence at issue" in

[18] That the Eighth Amendment prohibits a unanimity requirement for *mitigating* circumstances does not alter this analysis. *See McKoy*, 494 U.S. at 443; *Mills*, 486 U.S. at 373-374. Requiring different voting rules for aggravating and mitigating circumstances makes sense because mitigating circumstances, unlike aggravators, are not factual prerequisites for imposing the death penalty and do not increase—but generally decrease—the risk that the death penalty will be imposed.

proportionality analysis); *Harmelin* v. *Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring) (same).

Here, despite the uniquely grave context of capital sentencing, Florida's simple-majority rule for capital sentencing is inexplicably *less* demanding than the voting rule Florida applies in all other criminal proceedings. Florida law is clear that "[n]o verdict may be rendered unless *all* of the trial jurors concur in it." Fla. R. Crim. P. 3.440 (emphasis added); *see also Bottoson* v. *Moore*, 833 So. 2d 693, 714 (Fla. 2002) (Shaw, J., concurring) (unanimity requirement "has been an inviolate tenet of Florida jurisprudence since the State was created"); *Motion to Call Circuit Judge to Bench*, 8 Fla. 459, 482 (1859) ("The common law wisely requires the verdict of a petit jury to be unanimous."). This unanimity requirement, moreover, applies to all criminal cases in which a jury is empaneled—a broad swath that even includes many misdemeanors. *See, e.g.*, *Rodriguez Sanchez* v. *State*, 503 So. 2d 436, 437 (Fla. Dist. Ct. App. 1987) (jury unanimity required when defendant charged with misdemeanor "for the alleged theft of a blouse having a value of less than one hundred dollars").

"The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case." *Mills*, 486 U.S. at 383-384. Under Florida law, however, the jury's decision "on a matter so grave as the determination of whether a human life should be taken," *Gregg*, 428 U.S. at 189 (1976) (joint opinion), requires only a majority vote. A Florida jury must deliberate until it reaches unanimity to convict a defendant for stealing a blouse, but can recommend a

defendant's execution without seeking any consensus as to aggravators beyond a simple majority. The Eighth Amendment cannot abide such an anomalous, attenuated standard of reliability.

C. Hurst's Sentence Would Be Unconstitutional Because The Aggregate Effect Of The Defects In Florida's Capital Sentencing Scheme Subverts The Jury's Deliberative Function

Even if the many defects identified above could be tolerated in isolation, they certainly cannot be tolerated in combination. The "essential feature" of the jury trial is the "'interposition between the accused and his accuser of the commonsense judgment of a group of laymen'" and the assurance of "'community participation and shared responsibility'" in and for the verdict. *Burch*, 441 U.S. at 135. A jury can serve these ends only if its procedures promote adequate "group deliberation" and responsible factfinding. *Id.* Here, Florida law relegates the jury to a purely advisory role in violation of *Ring*. But if, as the State suggests, no *Ring* violation arose because the jury in fact made implicit findings that authorized Hurst's death sentence, the State would have to confront the fact that in making those implicit findings, the jury operated under constraints that combined to render its deliberations hollow.

As this Court has recognized, procedures that undermine adequate group deliberation are constitutionally invalid whether they do so in isolation or collectively. In *Burch*, this Court invalidated Louisiana's practice allowing convictions by a vote of five out of six jurors. The Court had previously held that jury size could be reduced to six, *Williams* v. *Florida*, 399 U.S. 78 (1970), and had previously upheld a less-than-unanimous ten-to-two voting rule, *Apodaca*, 406 U.S. at

411; *see also Johnson*, 406 U.S. at 364-365 (nine-to-three rule does not violate Due Process Clause). But Louisiana's "five of six" practice at issue in *Burch* arose "at the intersection of [the Court's] decisions concerning jury size and unanimity." *Burch*, 441 U.S. at 137. The Court accordingly focused on the aggregate effects on the function of the jury of Louisiana's reduced jury size and relaxed decision rule. *Id.* at 138-139. The Court concluded:

> [W]hen a State has reduced the size of its juries to the minimum number of jurors permitted by the Constitution, the additional authorization of nonunanimous verdicts by such juries sufficiently threatens the constitutional principles that led to the establishment of the size threshold that any countervailing interest of the State should yield.

Id. at 139. Together, Louisiana's practices did "not permit the jury to function in the manner required by" the Constitution, but "threatened the fairness of the proceeding and the proper role of the jury." *Id.* at 137-138.

Similar logic applies here. Even if the various aspects of Florida's capital sentencing scheme identified above could be constitutional in isolation, Hurst's sentence would still be invalid because their aggregate effect undermines any confidence in the quality of the jury's deliberations. Assume that, despite *Caldwell*, a jury may be misled to believe that its (implied) finding of an aggravator is merely "advisory" when in fact it is critical to the availability of the death sentence. Assume that, despite the views of a majority of this Court in *Apodaca* and every State's practice with respect to non-aggravator elements of non-petty crimes, a jury may find an aggravator by a simple majority. Assume,

finally, that despite *Ring*, the jury need not even agree on which aggravator exists—so that as few as four jurors may find one of the presented aggravators while three jurors find the other aggravator. At a minimum, the aggregate effect of these procedures would prevent the jury from conducting the meaningful deliberation required by the Constitution. Hurst's sentence thus cannot be sustained.

CONCLUSION

The Florida Supreme Court's judgment should be reversed and Hurst's sentence should be vacated.

Respectfully submitted.

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APPENDIX

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fla. Stat. § 775.082. Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison

Effective: July 1, 2011 to June 30, 2014

(1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

(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, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be 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.

(3) A person who has been convicted of any other designated felony may be punished as follows:

(a) 1. For a life felony committed prior to October 1, 1983, by a term of imprisonment for life or for a term of years not less than 30.

2. For a life felony committed on or after October 1, 1983, by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years.

3. Except as provided in subparagraph 4., for a life felony committed on or after July 1, 1995, by a term of imprisonment for life or by imprisonment for a term of years not exceeding life imprisonment.

4. a. Except as provided in sub-subparagraph b., for a life felony committed on or after September 1, 2005, which is a violation of s. 800.04(5)(b), by:

(I) A term of imprisonment for life; or

(II) A split sentence that is a term of not less than 25 years' imprisonment and not exceeding life imprisonment, followed by probation or community control for the remainder of the person's natural life, as provided in s. 948.012(4).

b. For a life felony committed on or after July 1, 2008, which is a person's second or subsequent violation of s. 800.04(5)(b), by a term of imprisonment for life.

(b) For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment.

(c) For a felony of the second degree, by a term of imprisonment not exceeding 15 years.

(d) For a felony of the third degree, by a term of imprisonment not exceeding 5 years.

(4) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

(a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding 1 year;

(b) For a misdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days.

(5) Any person who has been convicted of a noncriminal violation may not be sentenced to a term of imprisonment nor to any other punishment more severe than a fine, forfeiture, or other civil penalty, except as provided in chapter 316 or by ordinance of any city or county.

(6) Nothing in this section shall be construed to alter the operation of any statute of this state authorizing a trial court, in its discretion, to impose a sentence of imprisonment for an indeterminate period within minimum and maximum limits as provided by law, except as provided in subsection (1).

(7) This section does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from

office, or impose any other civil penalty. Such a judgment or order may be included in the sentence.

(8)(a) The sentencing guidelines that were effective October 1, 1983, and any revisions thereto, apply to all felonies, except capital felonies, committed on or after October 1, 1983, and before January 1, 1994, and to all felonies, except capital felonies and life felonies, committed before October 1, 1983, when the defendant affirmatively selects to be sentenced pursuant to such provisions.

(b) The 1994 sentencing guidelines, that were effective January 1, 1994, and any revisions thereto, apply to all felonies, except capital felonies, committed on or after January 1, 1994, and before October 1, 1995.

(c) The 1995 sentencing guidelines that were effective October 1, 1995, and any revisions thereto, apply to all felonies, except capital felonies, committed on or after October 1, 1995, and before October 1, 1998.

(d) The Criminal Punishment Code applies to all felonies, except capital felonies, committed on or after October 1, 1998. Any revision to the Criminal Punishment Code applies to sentencing for all felonies, except capital felonies, committed on or after the effective date of the revision.

(e) Felonies, except capital felonies, with continuing dates of enterprise shall be sentenced under the sentencing guidelines or the Criminal Punishment Code in effect on the beginning date of the criminal activity.

(9)(a) 1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:

a. Treason;

b. Murder;

c. Manslaughter;

d. Sexual battery;

e. Carjacking;

f. Home-invasion robbery;

g. Robbery;

h. Arson;

i. Kidnapping;

j. Aggravated assault with a deadly weapon;

k. Aggravated battery;

l. Aggravated stalking;

m. Aircraft piracy;

n. Unlawful throwing, placing, or discharging of a destructive device or bomb;

o. Any felony that involves the use or threat of physical force or violence against an individual;

p. Armed burglary;

q. Burglary of a dwelling or burglary of an occupied structure; or

r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, s. 827.071, or s. 847.0135(5);

within 3 years after being released from a state correctional facility operated by the Department of Corrections or a private vendor or within 3 years after being released from a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state.

2. "Prison releasee reoffender" also means any defendant who commits or attempts to commit any offense listed in sub-subparagraphs (a)1.a.-r. while the defendant was serving a prison sentence or on escape status from a state correctional facility operated by the Department of Corrections or a private vendor or while the defendant was on escape status from a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state.

3. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:

a. For a felony punishable by life, by a term of imprisonment for life;

b. For a felony of the first degree, by a term of imprisonment of 30 years;

c. For a felony of the second degree, by a term of imprisonment of 15 years; and

d. For a felony of the third degree, by a term of imprisonment of 5 years.

(b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early

release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.

(c) Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.

(d) 1. It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless the state attorney determines that extenuating circumstances exist which preclude the just prosecution of the offender, including whether the victim recommends that the offender not be sentenced as provided in this subsection.

2. For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney.

(10) If a defendant is sentenced for an offense committed on or after July 1, 2009, which is a third degree felony but not a forcible felony as defined in s. 776.08, and excluding any third degree felony violation under chapter 810, and if the total sentence points pursuant to s. 921.0024 are 22 points or fewer, the court must sentence the offender to a nonstate prison sanction. However, if the court makes written findings that a nonstate prison sanction could present a danger to the public, the court may sentence the offender to a state correctional facility pursuant to this section.

(11) The purpose of this section is to provide uniform punishment for those crimes made punishable under

this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.

Fla. Stat. § 921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

Effective: October 1, 2010

(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the cir-

cumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful

throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(*l*) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal gang member, as defined in s. 874.03.

(*o*) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

(p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

(6) Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(7) Victim impact evidence.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(8) Applicability.—This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. 893.135.