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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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2 Story, Joseph, *Commentaries on the Constitution of the United States* (1833) 17

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Because Florida law relegates capital juries to an advisory role at sentencing and conditions eligibility for the death penalty on the findings of the judge alone, the Florida system—and Timothy Hurst's sentence—are unconstitutional. *Ring* v. *Arizona*, 536 U.S. 584 (2002).

The State stakes its response on two propositions, neither of which is correct. First, it claims that Hurst conceded the existence of an aggravating factor. But Hurst never made such a concession and never effectuated a valid waiver of his Sixth Amendment rights.

Second, the State asserts that Florida capital juries make dispositive findings that establish eligibility for a death sentence, leaving to judges only a choice between alternative punishments authorized by the verdict. The Florida Supreme Court has repeatedly rejected that characterization. Florida law "does not require jury findings on aggravating circumstances." *Coday* v. *State*, 946 So. 2d 988, 1005 (Fla. 2006). A Florida defendant becomes eligible for death only if the sentenc-

ing proceeding "results in findings *by the court*," Fla. Stat. § 775.082(1) (emphasis added)—made after "independent analysis"—that aggravating circumstances exist and are not outweighed by mitigating factors. *Delgado* v. *State*, 162 So. 3d 971, 981 (Fla. 2015) (internal quotation marks omitted); Fla. Stat. § 921.141(3).

Moreover, the State's defense of Florida's sentencing scheme disregards the purpose of the jury-trial guarantee and its critical role in capital sentencing. The constitutional right to a jury trial "reflect[s] a profound judgment about the way in which law should be enforced and justice administered," *Ring*, 536 U.S. at 609—a conception of jury verdicts as reflecting group deliberation, responsible factfinding, and the community's voice. The State offers a proceeding in which juries are told that their role is merely advisory; that they need only find undifferentiated "aggravation" without discussing or agreeing on which of Florida's 16 disparate aggravators exists; that they can recommend death even if a majority of jurors rejects each aggravator submitted for consideration; and that they can return a verdict and go home as soon as a bare majority votes for death. The combination of these procedures so cripples the jury's functioning as to eviscerate the essence of trial by jury. *Burch* v. *Louisiana*, 441 U.S. 130 (1979).

I. FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER *RING*

A. Florida's Scheme Violates The Sixth Amendment

Florida's capital sentencing scheme violates the Sixth Amendment under *Ring* v. *Arizona*, 536 U.S. 584 (2002), because it assigns to the judge alone the power to render a defendant eligible for the death penalty by finding aggravating circumstances. As the State con-

cedes (at 17), a Florida capital defendant is not eligible for the death penalty unless one or more aggravators exist. But jury findings of aggravators are neither necessary nor sufficient to authorize a death sentence. *Coday* v. *State*, 946 So. 2d 988, 1005 (Fla. 2006). Florida law provides instead that those findings shall be made "by the court." Fla. Stat. § 775.082(1). The Florida Supreme Court has repeatedly confirmed that eligibility for the death penalty hinges solely upon the trial judge's "independent analysis of the aggravating and mitigating circumstances," "regardless of the jury's recommendation." *Delgado* v. *State*, 162 So. 3d 971, 981 (Fla. 2015) (internal quotation marks omitted); *see also* Fla. Stat. § 921.141(3). Contrary to the State's suggestion (at 6), that analysis is not limited to an independent "weighing" of aggravating and mitigating circumstances. Rather, "the trial court is required to make independent *findings* on aggravation, mitigation, *and* weight." *Russ* v. *State*, 73 So. 3d 178, 198 (Fla. 2011) (emphases added); *see* Pet. Br. 6-9, 18-22; Former Justices Br. 5-10.

As the State concedes (at 25 n.9), a Florida trial court can impose a death sentence even when the jury recommends a life sentence. *E.g.*, *Engle* v. *State*, 438 So. 2d 803, 812 (Fla. 1983). The court can impose a death sentence based on evidence or theories of aggravation presented only to the judge, after the jury has been dismissed. *E.g.*, *id.* at 813; *Williams* v. *State*, 967 So. 2d 735, 751 (Fla. 2007). And the court can impose a death sentence when it is entirely possible, given the number of aggravators presented and the number of jurors voting for death, that no majority of jurors found any single aggravator. *E.g.*, *Gonzalez* v. *State*, 136 So. 3d 1125, 1139 (Fla. 2014); *State* v. *Steele*, 921 So. 2d 538, 545 (Fla. 2005). These outcomes are possible—and oc-

cur with some frequency, *see* Former Justices Br. 15-19—precisely because the jury's verdict, and whatever findings it may imply about aggravating circumstances, are purely advisory.

The State emphasizes the trial judge's obligation to give "great weight" to the jury's recommendation and to override a recommendation of life imprisonment only for clear and convincing reasons. Resp. Br. 6, 25 (citing *Tedder* v. *State*, 322 So. 2d 908, 911 (Fla. 1975), and *Cheshire* v. *State*, 568 So. 2d 908, 910-911 (Fla. 1990)). But as the Florida Supreme Court has held, that obligation does not "chang[e] the clear statutory directive that the jury's role is advisory." *Combs* v. *State*, 525 So. 2d 853, 857 (Fla. 1988). That the trial judge must give weight to the jury's recommendation in making his or her own "independent findings," *Russ*, 73 So. 3d at 198, does not convert the advisory jury into a "de facto" sentencer, *Grossman* v. *State*, 525 So. 2d 833, 839-840 (Fla. 1988)—particularly because, as one Florida trial judge has noted, the jury's advisory verdict is often "essentially meaningless" to the judge, *Aguirre-Jarquin* v. *State*, 9 So. 3d 593, 612 (Fla. 2009) (Pariente, J., specially concurring) (quoting sentencing order of Eaton, J.).[1]

It is irrelevant that there may be capital defendants in Florida—as there surely were in Arizona before *Ring*—whose eligibility for the death penalty is established by a prior conviction or by jury findings entailed in the guilty verdict. *Cf.* Resp. Br. 19-20. That is not so for all Florida capital defendants, and it is not so for

[1] This Court's remark that Florida capital juries serve as "co-sentencer[s]" simply acknowledged that the advisory verdict is one input considered by the trial court in making its independent findings and determining the sentence. Resp. Br. 24 (quoting *Lambrix* v. *Singletary*, 520 U.S. 518, 528 (1997), and *Espinosa* v. *Florida*, 505 U.S. 1079, 1082 (1992) (per curiam)).

Hurst. Pet. Br. 5, 9. Nor is it relevant what "benefits" might inhere in a sentencing scheme that required jury findings of aggravators but then gave defendants a "second chance for life" by allowing the judge to override the jury's recommendation of death. *Cf.* Resp. Br. 26, 35-36. That is not the system Florida has chosen. 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 [did] a trial judge in Arizona" under the law struck down in *Ring*. *Walton* v. *Arizona*, 497 U.S. 639, 648 (1990). Florida's sentencing scheme should be rejected for the same reason as Arizona's.[2]

B. Florida's Scheme Violates The Eighth Amendment

Florida's capital sentencing scheme also violates the Eighth Amendment because it assigns to the judge the power to impose the death penalty. The State criticizes (at 27-29) Hurst's argument on this point as procedurally improper, but the question presented by the Court asks whether Florida's system violates the Eighth Amendment in light of *Ring*, and the answer to that question is yes for the reasons Hurst has explained: History, current practice, and independent evaluation of the penological interests associated with capital punishment confirm that juries, not judges, should be re-

[2] The State correctly distinguishes the outcome in *Hildwin* v. *Florida*, 490 U.S. 638 (1989), as involving prior convictions that need not be found by a jury, but does not deny that *Hildwin*'s reasoning did not survive *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Ring*. Resp. Br. 30 n.13; *see* Pet. Br. 19, 22-26. Moreover, this Court is "less constrained to follow precedent" set in cases, like *Hildwin*, decided "without full briefing or argument on [the] issue." *Johnson* v. *United States*, 135 S. Ct. 2551, 2562-2563 (2015); *see Hildwin*, 490 U.S. at 641 (Marshall, J., dissenting) (noting summary affirmance).

sponsible for selecting the death penalty. Pet. Br. 26-31; *see Ring*, 536 U.S. at 614 (Breyer, J., concurring).

The State does not dispute Hurst's recitation of the historical evidence that juries have held responsibility for imposing the death sentence throughout American history. Pet. Br. 27-28. And while the State seeks (at 31-32) to dismiss that historical evidence as irrelevant in light of comments in *Apprendi* v. *New Jersey* recognizing judges' sentencing discretion, *Apprendi* was not a capital case and did not address the unique considerations of the Eighth Amendment. *See* 530 U.S. 466, 481-482 (2000).[3] The State similarly does not dispute that, today, all but four States that maintain the death penalty vest the power to select a death sentence in the jury. Resp. Br. 33-34. That consensus "weigh[s] heavily in ascertaining contemporary standards of decency." *Woodson* v. *North Carolina*, 428 U.S. 280, 294-295 (1976) (joint opinion). The State suggests (at 33) that consensus should not matter because "some defendants receive a more lenient sentence from a judge than from a jury." But the same could have been said of the mandatory death-penalty statutes invalidated in *Woodson*, which long resulted in jury nullification verdicts in defendants' favor. *Woodson*, 428 U.S. at 293.

Finally, despite extolling the supposed virtues of judicial sentencing, the State does not deny that judicial sentencing fails in one critical respect: Only the jury can "express the conscience of the community." *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968). Juries

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[3] *Apprendi* cited *Williams* v. *New York*, 337 U.S. 241 (1949), which was a capital case. But *Williams* considered only whether the Due Process Clause limited the "sources and types of evidence" a sentencing judge could consider; it did not address the Eighth Amendment. *Id.* at 245-252.

are "better situated" than judges "to make the moral judgment between life and death." *Glossip* v. *Gross*, 135 S. Ct. 2726, 2752 (2015) (Thomas, J., concurring). Entrusting the jury with the sentencing decision ensures that "the community indeed believes application of the death penalty is appropriate." *Ring*, 536 U.S. at 618 (Breyer, J., concurring); *see also Glossip*, 135 S. Ct. at 2748 (Scalia, J., concurring) ("It is because … questions [related to capital punishment] are contextual and admit of no easy answers that we rely on juries to make judgments about the people and crimes before them."). By relegating the jury to an advisory role, Florida law severs the link between capital sentencing decisions and society's moral judgment.

II. THE *RING* VIOLATION REQUIRES VACATUR OF HURST'S SENTENCE

A. Hurst Did Not Waive His Jury-Trial Right

Faced with the unconstitutionality of Florida's death penalty scheme, the State now contends that no jury finding was necessary in Hurst's case because Hurst supposedly conceded that aggravating circumstances existed. The State acknowledges (at 41-42 n.20) that it made no such suggestion in opposition to certiorari even though the petition raised the *Ring* claim to which the alleged concessions relate. And the State gives no reason why the Court should overlook that failure. *See* S. Ct. R. 15.2. Assuming the Court does consider the point, the argument fails.

For Hurst's supposed concession to obviate the need for a jury finding, the concession would have to rise to the level of a waiver of Hurst's Sixth Amendment right to a jury trial. *Cf. Florida* v. *Nixon*, 543 U.S. 175, 187-188 (2004) (despite counsel's concession of guilt, defendant "retained the rights accorded a de-

fendant in a criminal trial," and the "State was [still] obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crimes").[4] Such a waiver must be a "voluntary," "knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 748 (1970). When applying this standard, "[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights [and] do not presume acquiescence in the loss of fundamental rights," including "the right to trial by jury in criminal cases." *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (internal quotation marks and citations omitted). The decision to waive the jury-trial right must be made by the defendant himself; it "cannot be made for the defendant by a surrogate," such as his lawyer. *Nixon*, 543 U.S. at 187.[5]

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[4] Because "there is [no] 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), the same standard applies to waiver of the right to have a jury determine aggravators necessary for imposition of the death penalty. *See Bryant* v. *State*, 901 So. 2d 810, 822 (Fla. 2005). *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004), did not suggest otherwise, for the admission before the Court there was a guilty plea.

[5] Florida courts will find a waiver of the jury-trial right only if the defendant personally declares his waiver in writing or after a colloquy with the court on the record, and the "better practice" is to require "both a personal on-the-record waiver and a written waiver." *Tucker* v. *State*, 559 So. 2d 218, 220 (Fla. 1990); *Johnson* v. *State*, 994 So. 2d 960, 964 (Fla. 2008) ("Without a proper colloquy, a defendant's [counsel's] stipulation does not function as a valid waiver."); *State* v. *Upton*, 658 So. 2d 86, 87 (Fla. 1995).

Here, Hurst never admitted the presence of aggravating circumstances, let alone personally waived his Sixth Amendment right to jury findings on aggravators. From his first appeal on, Hurst has maintained—even before *Ring* was decided—that he had a constitutional right to a jury determination whether aggravators existed. *See* Appellant's Initial Br., *Hurst* v. *State*, No. SC00-1042, 2001 WL 34114510, at 52-65 (Fla. Jan. 31, 2001); Record on Appeal Vol. III, *Hurst* v. *State*, No. SC12-1947, at 464-470 (Fla. Nov. 8, 2012) ("2012 ROA"); Appellant's Initial Br., *Hurst* v. *State*, No. SC12-1947, 2013 WL 6008508, at 64-69 (Fla. Mar. 15, 2013). The notion that Hurst simply meant to raise this claim and to seek a verdict form stating jury findings as a hypothetical exercise while simultaneously admitting the existence of aggravators and relinquishing the very constitutional right he sought to vindicate makes no sense.

Zero evidence supports the State's position. The State repeatedly cites Hurst's counsel's description of the case as a "robbery gone bad." *E.g.*, Resp. Br. 43 (quoting Appellant's Initial Br. 24 (SC12-1947)). But to establish the aggravating circumstance of commission during the course of a robbery, the State must show that the capital felony was committed while "the defendant" himself was engaged in robbery. Fla. Stat. § 921.141(5)(d). And here—as the State concedes—"[f]rom the beginning, Hurst denied that he ever made it to work that morning," much less committed a murder or robbery. Resp. Br. 4 (citing JA31); Record on Appeal Vol. III, *Hurst* v. *State*, No. SC00-1042, at 451-453 (Fla. Aug. 4, 2000) ("2000 ROA") (Hurst's initial sentencing memorandum); 2012 ROA Vol. III, at 548 (Hurst's re-sentencing memorandum); Appellant's Initial Br. 6-8 (SC12-1947).

The State grossly overreads several other statements in Hurst's briefs below. Hurst's initial sentencing memorandum—submitted in 2000 in a proceeding that became a legal nullity when the Florida Supreme Court vacated his initial death sentence because he had been denied the effective assistance of counsel, *see State* v. *Fleming*, 61 So. 3d 399, 406 (Fla. 2011); *Preston* v. *State*, 607 So. 2d. 404, 408 (Fla. 1992)—said that "[t]he State established two aggravating circumstances during the penalty phase trial." 2000 ROA Vol. III, at 451, *quoted in* Resp. Br. 42. The same memorandum declared that Hurst had "established" nine mitigating circumstances, 2000 ROA Vol. III, at 451, even though the jury had not found any (explicitly or implicitly) and the State had conceded only four. The locution chosen for those statements—by Hurst's constitutionally ineffective counsel—simply reported the parties' positions at sentencing. It did not purport to effectuate a knowing and voluntary waiver of Hurst's jury-trial right or to concede the existence of an aggravator. And Hurst's counsel's decision not to challenge on appeal the trial court's factual findings on those aggravators, *cf.* Resp. Br. 42-43, reflects a litigation judgment that Hurst's appellate focus was better aimed elsewhere in light of the Florida Supreme Court's deferential review of the trial court's aggravator findings. *See* JA34 (Florida Supreme Court asks only "whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding" (internal quotation marks omitted)). Hurst was not required to contest those findings to preserve his constitutional challenge to the procedures under which the findings were made. *See Nixon*, 543 U.S. at 188.

No wonder, then, that the State did not raise Hurst's supposed concessions at any point during this appeal or in opposition to certiorari, and no wonder that the Florida Supreme Court resolved Hurst's *Ring* challenge on the merits without suggesting that Hurst had relinquished his Sixth Amendment rights. Nor did the Florida Supreme Court suggest that any *Ring* error could be overlooked as harmless, JA307-310—likely because the State never argued harmlessness, either. *See* Appellee's Answer Br., *Hurst* v. *State*, No. SC12-1947, 2013 WL 6008507, at 97-100 (Fla. May 22, 2013). The State now asserts harmless error, but cites only Hurst's debunked concessions and fact-specific decisions in other cases. Resp. Br. 40. The Court should reject the State's late gambit.[6]

B. The Advisory Verdict Did Not Imply The Necessary Findings

The State alternatively contends (at 44-48) that Hurst's sentencing complied with *Ring* because the jury's death recommendation "necessarily included a finding of an aggravating circumstance." As discussed, such a finding could not cure the *Ring* violation because the jury's implicit "finding" was neither necessary nor sufficient to authorize a death sentence. *Supra* pp. 2-5; Pet. Br. 33-34.

In any event, the jury's 7-5 recommendation cannot support an inference that a majority of jurors agreed that any aggravator or aggravators existed. Pet. Br. 31-32. Because multiple aggravators were presented, it is

[6] At most, the Court should address the constitutional issue as it "ordinarily" does and leave it to the Florida Supreme Court "to pass on the harmlessness of error in the first instance," *Ring*, 536 U.S. at 609 n.7—and to decide whether the State even preserved any assertion of harmlessness.

entirely possible that a super-majority of jurors rejected each one, as the State does not deny. And because the Florida Supreme Court has deemed it a "departure from the essential requirements of [Florida] law" to ask the jury to specify any aggravators it may have found, *Coday*, 946 So. 2d at 1005 (citing *Steele*, 921 So. 2d 538), such indeterminacy will plague every Florida case where the prosecution presents multiple aggravators and the jury recommends death—a situation in which the jury's advisory verdict is "essentially meaningless." *Aguirre-Jarquin*, 9 So. 3d at 612 (Pariente, J., specially concurring) (quoting sentencing order of Eaton, J.); *see* Former Justices Br. 8; Former Judges Br. 17.[7]

Citing *Schad* v. *Arizona*, 501 U.S. 624 (1991), the State responds (at 46) that *Ring* does not require the jury to "agree on a particular aggravator." On this view, taken to its logical conclusion, a death sentence can be imposed so long as seven jurors individually find one statutory aggravator each, even if each of those jurors finds a different aggravator—and even if each aggravator is rejected by 11 jurors. *Schad* does not support the State's position.

Schad held that the Due Process Clause did not require the jury to agree on whether the mens rea element of first-degree murder was satisfied by premeditation or by felony murder. 501 U.S. at 630-631, 645 (plurality); *id.* at 650 (Scalia, J., concurring in part and concurring in judgment). The Court acknowledged

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[7] The State cites *Hildwin* (at 45-46) to defend Florida law's refusal to ask juries to specify any findings, but as discussed, that reasoning does not survive *Ring*. The State also cites *Espinosa* v. *Florida*, 505 U.S. 1079 (1992), but that pre-*Ring* summary decision addressed only whether a jury instruction's defective definition of an aggravating factor so corrupts the judge's subsequent decision that it violates the Eighth Amendment. *Id.* at 1080-1082.

"limits on a State's capacity to define different courses of conduct, or states of mind, as merely alternative means of committing a single offense," *id.* at 632 (plurality), but found it unnecessary to define those limits because the two theories of mental state at issue could reasonably be viewed as morally equivalent and had historically been treated as alternative means to satisfy the same element, *id.* at 643-644.

Even assuming *Schad*'s due process analysis could give substance to the Sixth Amendment's jury-trial guarantee, it would not support the State's position because Florida's statutory aggravators are too disparate. To satisfy due process, elements of crimes must be defined so as not to "risk[] serious unfairness" or to "lack[] support in history or tradition." *Richardson* v. *United States*, 526 U.S. 813, 820 (1999) (citing *Schad*, 501 U.S. at 632-633 (plurality), and *id.* at 651 (Scalia, J., concurring)); *see also Schad*, 501 U.S. at 642. Florida law recognizes 16 statutory aggravators, Fla. Stat. § 921.141(5)—twice as many as when this Court decided *Proffitt* v. *Florida*, 428 U.S. 242, 251 (1976). Those aggravators range from the crime's "especially heinous, atrocious, or cruel" nature, to the defendant's motive for "pecuniary gain," to the defendant's membership in a criminal gang, to the age of the victim. Fla. Stat. § 921.141(5). The Florida Supreme Court has interpreted these aggravators to be distinct factors that reflect disparate levels of blameworthiness. *E.g.*, *Bevel* v. *State*, 983 So. 2d 505, 524 (Fla. 2008). This wide-ranging menu of incommensurable aggravators bears no resemblance to the long-lived historical treatment of felony murder and premeditated murder at issue in *Schad*.

The State's reliance on *Schad* also ignores a key requirement of any valid capital punishment system. To prevent arbitrariness in the infliction of the death

penalty, aggravators must be "determinate" and must "genuinely narrow the class of persons eligible for the death penalty." *Arave* v. *Creech*, 507 U.S. 463, 474 (1993) (internal quotation marks omitted). They must "provide specific and detailed guidance" and "make rationally reviewable the process for imposing a sentence of death." *Id.* at 470-471 (internal quotation marks omitted); *see also Maynard* v. *Cartwright*, 486 U.S. 356, 361-363 (1988). A sentencing scheme like the one the State posits, in which jurors can find the undifferentiated element of "aggravation" on any number of disparate theories, would fail those requirements. Florida law does not—and could not constitutionally—condition eligibility for the death penalty on the mere presence of "enhanced culpability," as the State suggests (at 47), but rather requires a finding of one or more enumerated and clearly differentiated aggravators. Fla. Stat. § 921.141(3), (5). The jury's general advisory verdict in Hurst's case does not entail such a finding.

III. The State's Defense Of Florida's Capital Sentencing Scheme Raises Other Constitutional Problems

If Florida juries actually made the finding required by *Ring* as the State contends, they would do so in a way that contravenes basic Sixth and Eighth Amendment guarantees in several other respects, most fundamentally under this Court's decision in *Burch* v. *Louisiana*, 441 U.S. 130 (1979). Pet. Br. 34-54. These failures are not unpreserved alternative arguments for reversal. *Cf.* Resp. Br. 48. They are unavoidable defects of the State's defense of Hurst's sentence. The Court cannot reject Hurst's *Ring* challenge on the grounds the State advances without confronting the bankruptcy of the State's concept of the right to a jury trial.

A. The Jury Had No Sense Of Responsibility For Hurst's Sentence

As is typical in Florida cases, Hurst's jury was told that it was not responsible for determining whether Hurst would be eligible for the death penalty. The jury was not asked to render specific findings on aggravators, and was repeatedly told that its role was merely "advisory" and that "[t]he final decision as to which punishment shall be imposed was the responsibility of the judge." JA207-208; *see also* JA342; JA498; JA985; Former Justices Br. 6 n.2 (standard instructions "repeatedly remind the jury that the responsibility for the death sentence 'rests elsewhere'").

If, therefore, the State were right that the jury made implicit findings that authorized imposition of the death sentence, the jury instructions would have misleadingly "minimize[d] the jury's sense of responsibility for determining the appropriateness of death," in violation of the Eighth Amendment. *Caldwell* v. *Mississippi*, 472 U.S. 320, 341 (1985); *see* Pet. Br. 35. Telling the jury that its recommendation would be given weight by the judge does not convey the level of responsibility the State now attributes to the jury's verdict.

The State notes (at 49) that the Florida Supreme Court has upheld Florida's standard jury instructions against *Caldwell* claims. But the court has done so only because it acknowledges what the State's brief denies: that the sentencing verdict is purely advisory, so that instructions to that effect are not misleading. *See Combs*, 525 So. 2d at 856-858; Pet. Br. 36. The State cannot have it both ways. Either the instruction satisfies *Caldwell* because it accurately describes a sentencing scheme that violates *Ring*, *see Combs*, 525 So. 2d at 858, or the instruction violates *Caldwell* because it fails

to give the jury a proper understanding of its role within the scheme the State submits to satisfy *Ring*.

B. The Jury Deliberated Under A Simple Majority Rule

If the State were right that the jury made implicit findings that authorized the imposition of Hurst's death sentence, those findings would have violated the Sixth and Eighth Amendments because Florida law permitted the jury to make them by no more than a majority vote, and there is no basis to infer that any more than seven jurors found an aggravator. Pet. Br. 36-52.

The State does not deny that no other State permits an element of any serious crime to be established by a simple-majority verdict. Pet. Br. 41-44. Nor does it cite a single decision by any court approving of such a voting rule. Pet Br. 38-41. The State rests largely on *Apodaca* v. *Oregon*, 406 U.S. 404 (1972). But *Apodaca* involved a super-majority (10-2) rule applicable only in non-capital cases. *Id.* at 406 (plurality); *see also Johnson* v. *Louisiana*, 406 U.S. 356, 369-380 (1972) (Powell, J., concurring in the judgment in *Apodaca*). It lends no support to the application of a simple-majority (7-5) rule in capital cases. Pet. Br. 39.[8]

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[8] *Johnson*, also a non-capital case, held only that a 9-3 verdict does not violate the separate due process requirement that the elements of a crime be established beyond a reasonable doubt. 406 U.S. at 359; *cf.* Resp. Br. 51-52, 54.

Because *Apodaca* did not consider a simple-majority rule, the Court need not revisit that decision. But should the Court see a need to do so, overruling *Apodaca*'s approval of any departure from unanimity would not implicate any cognizable reliance interests of the States. Pet. Br. 45-47; *cf.* Resp. Br. 56. Only Oregon, Louisiana, and Florida have adopted nonunanimous rules, and each did so before *Apodaca*.

The State also does not dispute that centuries of Anglo-American practice have shunned simple-majority jury rules in favor of unanimity or near-unanimity. Pet. Br. 40-43. Historical considerations are critical in interpreting Sixth Amendment guarantees, *e.g.*, *Apprendi*, 530 U.S. at 478-484; *Crawford* v. *Washington*, 541 U.S. 36, 42-56 (2004)—particularly where a feature of the common-law jury trial, such as unanimity, was considered "indispensable," 2 Story, *Commentaries on the Constitution of the United States* § 777, at 248 (1833). The State seeks (at 52) to dismiss this history on the theory that the *Apodaca* plurality upheld a non-unanimous voting rule (but not a simple-majority rule) based on supposed ambiguity in the evidence of the Sixth Amendment's original intent. But five Justices in *Apodaca* rejected the plurality's view on that point.[9]

The State's suggestion (at 53-55) that simple-majority deliberations are not necessarily worse than those produced by more demanding voting rules is equally meritless. "'[T]he 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); *see also McKoy* v. *North Carolina*, 494 U.S. 433, 452 (1990) (Kennedy, J., concurring) ("[U]nanimity … is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room[.]"). The "consistent"

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[9] *Johnson*, 406 U.S. at 371 n.6 (Powell, J., concurring in the judgment in *Apodaca*) (ambiguity in the Sixth Amendment's history "not sufficient … to override the unambiguous history of the common-law right"); *id.* at 382 & nn.1-2 (Douglas, J., joined by Brennan, J., and Marshall, J., dissenting) (similar); *Apodaca*, 406 U.S. at 414-415 (Stewart, J., joined by Brennan, J., and Marshall, J., dissenting) (similar).

findings of the empirical research show that juries not subject to a unanimity requirement "tend to take less time to reach a verdict, take fewer polls, and … 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* Pet. Br. 44-45; ABA Br. 14-16. Hurst's case illustrates the point. The jurors deliberated for less than two hours before recommending death by a 7-5 margin. JA24-25.[10]

A simple-majority rule also violates the Eighth Amendment by "'risk[ing] erroneous imposition of the death sentence.'" *Mills* v. *Maryland*, 486 U.S. 367, 375 (1988); *see* Pet Br. 47-52. Contrary to the State's assertions (at 57-58), Florida's simple-majority rule—like other procedural rules invalidated under the Eighth Amendment—"favor[s] death" in the most straightforward of ways: It makes a defendant death-eligible when only a majority of jurors agrees on death, while a stricter voting rule would preclude a death sentence in those circumstances without further deliberation and broader agreement.

The State's response (at 57) again seeks to have it both ways. Regardless whether the Eighth Amendment itself requires a jury determination of aggravating circumstances—as the Sixth Amendment certainly does—once a State entrusts the jury with finding ag-

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[10] In *Johnson*, 406 U.S. at 311, the Court rejected the "unsupported assumption[]" that, under a 9-3 rule, jurors in the majority would ignore the views of the minority, where the petitioner had offered "no evidence" to support that claim. Empirical research conducted during the four decades since *Johnson* has provided such evidence. Pet. Br. 44-45. The State cites nothing to the contrary.

gravating circumstances as the State claims to do here, the Eighth Amendment prohibits it from imposing a voting rule that undermines the reliability of the resulting death sentence. *McKoy*, 494 U.S. at 438 (invalidating unanimity requirement as to mitigating circumstances); *Mills*, 486 U.S. at 384 (similar). If the jury were making any findings at all, Florida's simple-majority rule would do just that.[11]

C. Florida's Sentencing Scheme Subverted The Jury's Deliberative Function

Finally, if the State were correct that Hurst's jury made the findings required by *Ring*, those findings would lack the "essential feature" of a meaningful jury trial: "'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. Whatever the validity of Florida's procedures in isolation, their combined effect "at the intersection" of constitutional commands this Court has recognized as essential is to create a unique capital sentencing scheme that does "not permit the jury to function in the manner required by [this Court's] prior cases." *Id.* at 137; Pet. Br. 52-54.

In its sole response—a footnote (at 58 n.33) that does not even acknowledge *Burch* by name—the State shrugs off this point as an assertion of "cumulative er-

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[11] *Spaziano* v. *Florida*, 468 U.S. 447 (1984), was decided before *Ring* on the premise that the judge's "own findings" made the defendant death-eligible. *Id.* at 466. Indeed, in *Spaziano*, the judge imposed the death penalty against the jury's recommendation. *Id.* at 451-452. *Spaziano* does not address the reliability required of jury procedures when—as the State now claims—it is the jury's findings that make a defendant death-eligible.

ror." That contention reveals a fundamental misconception. *Burch* is not a "cumulative error" ruling concerned with the tallying on appeal of prejudice from almost-harmful errors. Rather, *Burch* recognizes a substantive constraint on how States can arrange their criminal proceedings. It requires that, whatever jury procedures a State chooses to adopt, those procedures cannot interact in a way that precludes responsible factfinding. 441 U.S. at 133-138. The State's highly questionable assertion (at 58 n.33) that the "combination of Florida's sentencing approach in most cases benefits the defendant"—even if true—would provide no basis for overlooking the constitutional error that arises when a State's jury practices undermine the integrity of the jury function.

The State's casual dismissal of *Burch*, like its other contentions—that a jury finding of "aggravation" suffices even without juror agreement on any particular theory, that a jury can be misled about the legal effect of its verdict, and that juries need not deliberate beyond a simple majority vote (even if a majority of jurors has actually rejected each relevant aggravator)—reflects an astonishingly crabbed view of the jury's constitutional role in administering the death penalty. Even if the Court were to accept the State's revision of Florida law to resolve the *Ring* violation, *but see supra* pp. 2-5, it should not accept the State's expedient revision of the Sixth and Eighth Amendment protections that govern capital sentencing.

CONCLUSION

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

Respectfully submitted.

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