SUPREME COURT OF THE UNITED STATES

MICHAEL GORDON REYNOLDS *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 18–5181. Decided November 13, 2018

JUSTICE SOTOMAYOR, dissenting from denial of certiorari.

Today, this Court denies the petitions of seven capital defendants, each of whom was sentenced to death under a capital sentencing scheme that this Court has since declared unconstitutional.[1] The Florida Supreme Court has left the petitioners' death sentences undisturbed, reasoning that any sentencing error in their cases was harmless. Petitioners challenge the Florida Supreme Court's analysis because it treats the fact of unanimous jury recommendations in their cases as highly significant, or legally dispositive, even though those juries were told repeatedly that their verdicts were merely advisory. I have dissented before from this Court's failure to intervene on this issue.[2] Petitioners' constitutional claim is substantial and affects numerous capital defendants. The consequence of error in these cases is too severe to leave petitioners' challenges

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[1] In addition to Reynolds' petition, this Court denies the petitions of Jesse Guardado, No. 17–9284; Lenard James Philmore, No. 17–9556; Michael Anthony Tanzi, No. 18–5160; Quawn M. Franklin, No. 18–5228; Norman Mearle Grim, No. 18–5518; and Ray Lamar Johnston, No. 18–5793. For the reasons expressed herein, I respectfully dissent from denial of certiorari in their cases as well.

[2] I thrice dissented because the Florida Supreme Court had failed even to address the significant constitutional question the petitioners raised. See *Guardado* v. *Jones*, 584 U. S. ___ (2018) (opinion dissenting from denial of certiorari); *Middleton* v. *Florida*, 583 U. S. ___ (2018) (same); *Truehill* v. *Florida*, 583 U. S. ___ (2017) (same). I dissented again after the Florida Supreme Court ultimately did take up the question, and I noted the need for a definitive resolution of the issue. *Kaczmar* v. *Florida*, 585 U. S. ___ (2018) (same).

unanswered, and I therefore would grant the petitions.

I

I begin by acknowledging that petitioners have been convicted of gruesome crimes. Their victims, and the families and communities of those victims, have suffered. I am cognizant of their suffering. I am also mindful that it is this Court's duty to ensure that all defendants, even those who have committed the most heinous crimes, receive a sentence that is the result of a fair process. It is with that responsibility in mind that I analyze the petitioners' challenges.

II

Like the petitioners described in my prior dissents, each petitioner here was sentenced pursuant to Florida's former sentencing scheme. That regime involved an evidentiary hearing before a jury, after which the jury would issue an advisory sentence for life or death. See *Hurst* v. *Florida*, 577 U. S. ___, ___–___ (2016) (slip op., at 2–3). Next, the judge independently decided whether aggravating and mitigating factors existed, weighed those factors, and entered a sentence of life or death. *Id.,* at ___ (slip op., at 3). In *Hurst*, this Court held that Florida's scheme violated the Sixth Amendment because it impermissibly allowed a judge to increase the punishment authorized for a defendant "based on her own factfinding." *Id.,* at ___ (slip op., at 6).

Petitioners sought relief from the Florida courts after *Hurst* was decided. Although the Florida Supreme Court assumed that *Hurst* errors had occurred in petitioners' cases, it concluded that any such errors were harmless—in other words, there was "no reasonable possibility" that the errors affected petitioners' sentences. 251 So. 3d 811, 815 (Fla. 2018) (*per curiam*) (case below).

In theory, the Florida Supreme Court's harmless-error

analysis turns on an individualized review of each case. See *id.,* at 816. And, indeed, in some cases the Florida Supreme Court has considered several factors in its harmless-error analysis. See *Davis* v. *State,* 207 So. 3d 142, 174–175 (2016) (referring to the unanimity of the jury recommendations of death as well as the "egregious facts" of the case). In practice, however, the Florida Supreme Court's harmless-error approach appears to reflect a myopic focus on one factor: whether the advisory jury's recommendation for death was unanimous. Because the jurors in pre-*Hurst* cases were informed that they should recommend death only if they determined that sufficient aggravating factors existed and outweighed the mitigating factors, the Florida Supreme Court has reasoned that a jury that unanimously recommended death necessarily made the findings that *Hurst* said are constitutionally required. See *Davis*, 207 So. 3d, at 174–175. By concluding that *Hurst* violations are harmless because jury recommendations were unanimous, the Florida Supreme Court "transforms those advisory jury recommendations into binding findings of fact." *Guardado* v. *Jones*, 584 U. S. ___, ___ (2018) (SOTOMAYOR, J., dissenting from denial of certiorari) (slip op., at 5).

III

A

Because the Florida Supreme Court's harmless-error analysis relies heavily on the fact that a purely advisory jury rendered a unanimous decision, it raises serious questions under this Court's precedents.

In *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), this Court said it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.,* at 328–329. *Caldwell* involved misleading comments by a prosecutor who emphasized

that the jury's verdict would be subject to appellate review. See *id.,* at 336. This Court concluded that the resulting sentence did not satisfy the minimum standard of reliability required by the Eighth Amendment because the prosecutor's suggestions created "an intolerable danger" that the jury would "minimize the importance of its role." *Id.,* at 333. *Caldwell* explained that this Court has "always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" *Id.*, at 341. Where a sentencing jury is encouraged to proceed without that awareness, *Caldwell* suggests that "there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences." *Id.,* at 330.

As noted above, the sentencing scheme in place in Florida when petitioners were sentenced placed the final responsibility with the trial judge. Juries were instructed accordingly. Thus although the jury in this case was instructed that the court would reject a recommendation "only if the facts [we]re so clear and convincing that virtually no reasonable person could differ" and that a "human life [wa]s at stake," the jury also was told that its duty was to "advise the court" and that "the final decision as to what punishment shall be imposed [wa]s the responsibility of the judge." App. D to Pet. for Cert. The jury also heard, repeatedly, that it was to "recommend" an "advisory sentence." *Ibid.* Jury instructions varied across cases. For example, the jurors in petitioner Jesse Guardado's case heard that "human life [wa]s at stake," but not that the court would reject the jury's recommendation only in limited circumstances. App. to Pet. for Cert. in *Guardado* v. *Florida*, O. T. 2018, No. 17–9284, pp. 92a–105a. Like the jurors in this case, the jurors in Guardado's case were instructed that it was their responsibility to "advise the Court" as to the appropriate punishment. *Id.*, at 92a. The

court further instructed jurors that the "[f]inal decision as to what punishment shall be imposed rest[ed] solely with the judge of th[e] court." *Ibid.* These jurors knew that the final decision as to whether Guardado would live or die did not rest with them. The Court's reasoning in *Caldwell* informs how much weight, if any, to give such a purely advisory recommendation for death.

B

In the case below, the Florida Supreme Court addressed the *Caldwell* issue at length. See 251 So. 3d, at 814–828.[3] Two aspects of the plurality's analysis show the need for further engagement with this issue.

First, the Florida Supreme Court said that its application of the harmless-error rule does not entirely turn on jury unanimity. See *id.*, at 816 ("a unanimous recommendation is not sufficient alone" to find harmlessness). To be sure, in some cases the Florida Supreme Court has mentioned factors other than unanimity to support a finding of harmlessness. See, *e.g., Philmore* v. *Florida*, 234 So. 3d 567, 568 (2018), cert. denied, *supra*, p. ___ (noting that the defendant's confession and the aggravation in the case, as well as the jury's unanimous recommendation, supported a finding of harmlessness). But in many other cases, the court's analysis started and ended with the unanimity of the jury's recommendation. Indeed, on the very day that the Florida Supreme Court decided this case, it treated jury unanimity as dispositive in four other capital cases.[4]

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[3] Of the seven justices of the Florida Supreme Court, only two justices concurred in the court's *per curiam* opinion and one justice concurred specially with an opinion. Of the remaining four justices, two dissented and two concurred only in the result.

[4] See *Tanzi* v. *State*, 251 So. 3d 805, 806 (2018), cert. denied, *supra*, p. ___ (citing *Davis* v. *State,* 207 So. 3d 142, 175 (2016), for the proposition that the unanimity of a jury's recommendation for death ensures that jurors have made the necessary findings of fact); *Johnston* v. *State*, 246 So. 3d 266 (2018), cert. denied, *supra*, p. ___ ("Johnston received a

In a recent opinion, the Florida Supreme Court again stated that it "has consistently . . . den[ied] *Hurst* relief to defendants who have received a unanimous jury recommendation of death." *Anderson* v. *State*, ___ So. 3d ___, ___, 2018 WL 4784075, *1 (Oct. 4, 2018) (internal quotation marks omitted). To the extent the Florida Supreme Court gives dispositive weight to the fact that an advisory jury offered a unanimous recommendation, that action implicates the Eighth Amendment concerns that *Caldwell* addressed.

Second, the state court dismissed *Caldwell* as inapplicable to cases like petitioners' because the pre-*Hurst* jury instructions accurately described the advisory role assigned to the jury by state law at that time. 251 So. 3d, at 824–825. It is true that *Caldwell*'s holding invalidates only those sentences imposed following comments that "*mislead* the jury as to its role in the sentencing process." *Romano* v. *Oklahoma*, 512 U. S. 1, 9 (1994) (internal quotation marks omitted; emphasis added). But whether or not *Caldwell* itself makes the petitioners' sentences unconstitutional, the reasoning in *Caldwell* surely informs the related question whether a purely advisory jury recommendation is sufficiently reliable for a court to treat it as legally dispositive for purposes of harmless-error review. *Caldwell* provides strong reasons to doubt that a jury would have reached the same decision had it been instructed that its role was not advisory. See 251 So. 3d, at 832 (Pariente, J., dissenting) ("[T]he jury [in Reynolds'

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unanimous jury recommendation of death and, therefore, the *Hurst* error in this case is harmless beyond a reasonable doubt"); *Crain* v. *State*, 246 So. 3d 206, 210 (2018) ("[T]his Court can rely on the jury's unanimous recommendation for death to conclude that the *Hurst* error in Crain's case was harmless beyond a reasonable doubt"); *Taylor* v. *State*, 246 So. 3d 204, 206 (2018) ("[T]his Court has consistently relied on *Davis* to deny *Hurst* relief to defendants who have received unanimous jury recommendations of death").

case] was repeatedly told that its sentencing recommendation between life and death was merely 'advisory.' . . . I would conclude that *Caldwell* further supports the conclusion that the *Hurst* error in Reynolds' case is not harmless beyond a reasonable doubt").

IV

"[T]his Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State." *Caldwell*, 472 U. S., at 329. The jurors in petitioners' cases were repeatedly instructed that their role was merely advisory, yet the Florida Supreme Court has treated their recommendations as legally binding by way of its harmless-error analysis. This approach raises substantial Eighth Amendment concerns. As I continue to believe that "the stakes in capital cases are too high to ignore such constitutional challenges," *Truehill* v. *Florida*, 583 U. S. ___, ___ (2017) (slip op., at 2), I would grant review to decide whether the Florida Supreme Court's harmless-error approach is valid in light of *Caldwell*. This Court's refusal to address petitioners' challenges signals that it is unwilling to decide this issue. I respectfully dissent from the denial of certiorari, and I will continue to note my dissent in future cases raising the *Caldwell* question.