No. 17-9564

IN THE SUPREME COURT OF THE UNITED STATES

ETHERIA VERDELL JACKSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

On Petition for a Writ of Certiorari to the Florida Supreme Court

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. Respondent Incorrectly Asserts that the Florida Supreme Court's Decision in this Matter is Immune From This Court's Review.

Respondent erroneously claims that the Florida Supreme Court based its decision solely on independent state grounds and that Jackson is not entitled to the retroactive application of *Hurst*.[1] The respondent's argument misapprehends and ignores the nature of Jackson's argument in his petition for writ of certiorari. This Court has not had occasion to address a partial retroactivity scheme, such as the one at issue here, because such schemes are not the norm. Jackson's argument that states do not enjoy free reign to draw temporal retroactivity cutoffs at *any* point in time emanates logically from this Court's Eighth and Fourteenth Amendment rulings. The Eighth Amendment prohibition against arbitrary and capricious applications of the death penalty refined this Court's Fourteenth Amendment precedents holding that equal protection is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and … [subjects] one and not the other" to a harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). A state does not have unfettered discretion to create classes of condemned prisoners.

The Florida Supreme Court did not simply apply a traditional retroactivity rule here. On the contrary, it crafted a decidedly untraditional and troublesome partial-retroactivity scheme. None of this Court's precedents address the novel concept of "partial retroactivity," whereby a new constitutional ruling of the Court may be available on collateral review to *some* prisoners whose convictions and sentences have already become final, but not to all prisoners on collateral

[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016)

review. As a result, it is important for this Court to examine this procedure that has led to an unconstitutionally arbitrary application of the law in Florida.

Respondent concedes that the Florida Supreme Court's retroactivity holding in Petitioner's case was permissible under *Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008). *See* BIO at 8. The issue before this Court as a matter of law is the arbitrary retroactivity cutoff. Unlike the traditional retroactivity analysis contemplated by this Court's precedents, the Florida Supreme Court did not simply decide whether the *Hurst*[2] decisions should be applied retroactively to all prisoners whose death sentences became final before *Hurst*. Instead, the Florida Supreme Court divided those prisoners into two classes based on the date their sentences became final relative to this Court's June 24, 2002, decision in *Ring*[3], which was issued nearly 14 years before *Hurst*. In *Asay v. State*, 210 So. 3d 1 (Fla. 2016), the court held that the *Hurst* decisions do not apply retroactively to Florida prisoners whose death sentences became final on direct review before *Ring*. *Asay*, 210 So. 3d at 21-22. In *Mosley*, the court held that the *Hurst* decisions do apply retroactively to prisoners whose death sentences became final after *Ring*. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016).

Since *Asay* and *Mosley*, the Florida Supreme Court has uniformly applied its arbitrary *Hurst* retroactivity cutoff granting relief to some collateral defendants while denying relief to other similarly situated defendants. The Florida Supreme Court has granted *Hurst* relief to dozens of "post-*Ring*" prisoners whose death sentences became final after 2002 but before *Hurst*, while simultaneously denying *Hurst* relief to dozens more "pre-*Ring*" prisoners whose sentences became

[2] *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).
[3] *Ring v. Arizona*, 536 U.S. 584 (2002).

final before 2002. However, both sets of prisoners were sentenced under the same exact same sentencing scheme which denied them access to the jury determinations that *Hurst* held to be constitutionally required before Florida could impose a sentence of death.

The Florida Supreme Court's *Hurst* retroactivity cutoff at *Ring* involves a kind and degree of arbitrariness that far exceeds the level justified by traditional retroactivity jurisprudence. The *Ring*-based cutoff not only infects the system with arbitrariness, but it also raises concerns under the Fourteenth Amendment's Equal Protection Clause. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture differently without "some ground of difference that rationally explains the different treatment." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). When two classes are created to receive different treatment, as the Florida Supreme Court has done here, the question is "whether there is some ground of difference that rationally explains the different treatment…" *Id.*; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g.*, *Skinner*, 316 U.S. at 541. When a state draws a line between those capital defendants who will receive the benefit of a fundamental right afforded to every defendant in America—decision-making by a jury—and those who will not be provided that right, the justification for that line must satisfy strict scrutiny. The Florida Supreme Court's rule falls short of that demanding standard.

This arbitrary line drawing makes no rational sense, when all the defendants, including Jackson, were sentenced under the same unconstitutional scheme.

2. Respondent's Arguments Under Florida Supreme Court's Recent Plurality Decision in *Reynolds* Underscore the Need for this Court to Evaluate Under *Caldwell*.

The respondent claims that Jackson's jury was properly instructed and that there is no

Caldwell[4] violation. BIO at 13. Further, based on *Reynolds*[5], the respondent urges this Court to continue Florida's erroneous rejection of valid *Caldwell* claims and underscores the need for this Court to grant certiorari. The basis for the Florida Supreme Court's rejection of *Caldwell* claims is that at the time the juries were instructed, they were properly instructed according to local law. However, this argument fails to recognize and blatantly ignores the fact that this "local law," Florida's death penalty sentencing scheme, was found unconstitutional pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016). The argument runs that although the juries were instructed under an unconstitutional statute, the unconstitutional death sentence recommendations should continue to stand, despite their unconstitutional nature. Further, the plurality doubled-down on its pre-*Hurst* decisions summarily rejecting the applicability of *Caldwell* to Florida's capital sentencing scheme, but for the first time attempted to provide an explanation. The argument is absurdist at best and promotes a continuing arbitrary and disparate treatment between individuals sentenced to death in Florida. The biggest flaw with this argument is the failure to recognize that Florida's sentencing scheme was unconstitutional before *Hurst*.

The issue raised by Jackson, which the respondent appears to categorize as absurd (BIO at 15), is not whether their juries were properly instructed *at the time of their capital trials*, but instead, whether *today* the State of Florida can now treat those advisory recommendations as mandatory and binding, when the jury was explicitly instructed otherwise. This Court, in *Hurst v. Florida*, warned against that very thing. This Court cautioned against using what was an advisory

[4] *Caldwell v. Mississippi*, 472 U.S. 320 (1987).
[5] *Reynolds v. State*, -- So. 3d -- 2018 WL 1633075 at *1 (Fla. Apr. 5, 2018).

recommendation to conclude that the findings necessary to authorize the imposition of a death sentence had been made by the jury:

> "[T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State*, 433 So. 2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Hurst, 136 S. Ct. at 622; see also *See also Kaczmar v. Florida*, 138 S. Ct 1973 (2018) (Sotomayor, J., dissenting from the denial of certiorari)("The resulting opinion, however, gathered the support only of a plurality, so the issue remains without definitive resolution by the Florida Supreme Court.").

An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation, the juror's inability to be merciful based upon sympathy, and what aggravating factors could be found and weighed in the sentencing calculus) cannot be used as a substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004 (1983) ("Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed."). It should be noted that the Florida Supreme Court has still not sufficiently analyzed, in a definitive majority opinion, how a defendant's pre-*Hurst* advisory jury recommendation can serve as the lynchpin for a proper *Hurst* harmless-error analysis when the advisory jury's sense of responsibility for a death sentence was systematically diminished by the design and operation of Florida's prior scheme. The Florida Supreme Court's steadfast refusal to address this point, undermines multiple federal constitutional rights, and makes this petition the ideal vehicle to clarify analytical tension in critical areas of this Court's jurisprudence.

3. Respondent erroneously claims there is no structural error.

The respondent asserts that there is no structural error in Jackson's verdict and death sentence. *See* BIO at 17. This is incorrect. The error occurred in Jackson's case when the jury returned none of the required findings of facts at all – let alone unanimously – and when the jury failed to return a unanimous death recommendation. Further, errors were made in Jackson's sentencing, specifically, when the trial court considered an aggravating factor that was not supported by the evidence. Under the Sixth Amendment, Jackson was entitled to have a jury, not a judge, weigh and evaluate the aggravators against the mitigation. This failure deprived Jackson of the proper individualized sentencing required by the Constitution. Jackson's jury returned an advisory recommendation of death by a vote of seven-to-five, a bare majority and far from unanimous. This is does not satisfy the Eighth Amendment and his death sentence cannot stand.

In the present case, structural error occurred when the jury failed to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty, failed to find elements unanimously, and when the jury failed to return a unanimous recommendation of death. These errors were different in order of magnitude than a simple error occurring in the process of a trial. Instead, the errors amounted to a structural defect in the framework underlying the trial process. It undermined the core foundation on which the process of determining death eligibility depended.

Structural errors "are structural defects in the constitution of the trial mechanism." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). They affect "the framework within which the trial proceeds." *Id.* at 310. "Errors of this type are so intrinsically harmful as to require automatic reversal ... without regard to their effect on the outcome." *Neder v. U.S.*, 527 U.S. 1, 7 (1999). Put

another way, structural "errors require reversal without regard to the evidence in the particular case." *Rose v. Clark*, 478 U.S. 570, 577 (1986). "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any trial." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). With that in mind, the "precise reason why a particular error is not amenable to [harmless error] analysis – and thus the precise reason why the Court has deemed it structural – varies in a significant way from error to error." *Id*. at 1908. In deciding whether an error is structural, this Court has repeatedly considered whether the error undermined the reliability of the adjudicative process. *See, e.g., Neder*, 527 U.S. at 8-9 (observing that structural "errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function'" (quoting *Rose*, 478 U.S. at 577-78)). But "[t]hese categories are not rigid," *Weaver*, 137 S. Ct. at 1908, and in "a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural," *id.* (citing *Sullivan v. Louisiana*, 508 U.S. 280, 282 (1993)).

In the present case, structural error occurred when the jury failed to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to the imposition of the death penalty, failed to find these elements unanimously, and when the jury failed to return a unanimous recommendation of death. These errors were different in order of magnitude than a simple error occurring in the process of a trial. Instead, the errors amounted to a structural defect in the framework underlying the trial process. It undermined the core foundation on which the process of determining death eligibility depended.

The respondent continues to argue that the findings made by the court in Jackson's case are deemed sufficient (BIO at 19), however, these findings, were made by a judge – not a jury in

violation of Jackson's Sixth Amendment right. "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base [Jackson's] death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." *Hurst v. Florida*, 136 S. Ct. at 624 (2016). The respondent's arguments ignore this. Further, under Florida's capital sentencing scheme, a jury "'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.'" *Hurst v. Florida*, 136 S. Ct. at 622 (quoting *Walton v Arizona*, 497 U.S. 648 (1990)). And, the "advisory recommendation by the jury" falls short of "the necessary factual finding" required by the Sixth Amendment. *Id*.

In addition, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The Florida Supreme Court has determined that three such facts are: (1) the existence of the aggravating factors proven beyond a reasonable doubt; (2) that the aggravating factors are sufficient to impose death; and (3) that the aggravating factors outweigh the mitigating circumstances. *Hurst v. State*, 202 So. 3d at 53. And, these facts must be found unanimously. *Id*. at 44. Jackson's jury made none of these findings. Furthermore, his jury was not instructed that it must unanimously find each element beyond a reasonable doubt. Jackson's jury was repeatedly told its verdict was a "recommendation" and / or "advisory" only. Worse still, Jackson's jury was instructed on an aggravating circumstance -- cold, calculated and premeditated -- that was not supported by competent evidence and was stricken as improper by the Florida Supreme Court. *See Jackson v. State*, 530 So. 2d 269, 274 (Fla. 1988).

These errors undermined the reliability of the process for determining Jackson's eligibility for the death penalty and his death sentence cannot stand. Since "the penalty of death is qualitatively different from a sentence of imprisonment, however long ... there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 305 (1976) (plurality opinion). Simply put, the "Eighth Amendment insists upon 'reliability in the determination that death is the appropriate punishment in a specific case.'" *Oregon v. Guzek*, 546 U.S. 517, 525 (2006) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989)). As a result, the Florida Supreme Court concluded "that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment." *Hurst*, 202 So. 3d at 59. Jackson's jury never found any of the necessary elements making him death eligible, let alone found them unanimously. As a result, Jackson's death sentence violates the Sixth, Eighth, and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, Jackson respectfully requests that this Court grant the petition for writ of certiorari to review the judgment of the Florida Supreme Court.

Respectfully submitted,

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