DOCKET NO. 18-5012

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

IAN DECO LIGHTBOURNE,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

On petition for a writ of certiorari
to the Florida Supreme Court

REPLY BRIEF OF PETITIONER

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REPLY

At the outset, the Respondent misrepresents that the Florida Supreme Court "determined that Lightbourne was not entitled to relief because *Hurst v. State* was not retroactive to his death sentence." BIO at5. Inherent in this misstatement is the Respondent's continued reliance on the Florida Supreme Court's decisions in *Asay v. State*, 210 So. 3d 1 (Fla. 2016) and *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). In doing so, the Respondent continues to ignore the constitutional provisions at stake and unresolved in those cases. To be certain, although *Asay* held that *Hurst v. Florida* should not apply to the "pre-*Ring*" group, *Asay* did not foreclose Eighth Amendment relief under *Hurst v. State*, nor did *Hitchcock*.[1] In fact, the *Asay* court acknowledged that *Hurst v. Florida* emanates from the **Sixth** Amendment. *Asay*, 210 So. 3d at 11 (emphasis added). The court also recognized that *Hurst v. Florida* "did not address whether Florida's sentencing scheme violates the Eighth Amendment." *Id.* at 15. Here, the Florida Supreme Court affirmed the trial court's

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[1] Merely citing to *Asay*, the Florida Supreme Court denied relief in *Hitchcock*:

> Although Hitchcock references various constitutional provisions as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*. As such, these arguments were rejected when we decided *Asay*.

Id. at 217. Justice Pariente dissented, pointing out that the court "did not in *Asay*, however, discuss the new right announced by this Court in *Hurst* [*v. State*] to a unanimous recommendation for death under the Eighth Amendment. . . . Therefore, *Asay* does not foreclose relief in this case, as the majority opinion assumes without explanation." *Id.* at 220 (Pariente, J., dissenting).

denial of relief, holding that because Lightbourne's death sentence became final in 1984, "*Hurst* does not apply retroactively to [his] sentence of death. *See Hitchcock*, 226 So. 3d at 217." *Lightbourne v. State*, 235 So. 3d 285, 286 (Fla. 2018). Neither *Asay* nor *Hitchcock* resolved the constitutional issues raised here.

Respondent next contends that Florida's retroactivity determinations are a matter of state law. BIO at 6. Relying upon *Danforth v. Minnesota*, 552 U. S. 264 (2008), Respondent argues that Florida is "free to employ a partial retroactivity approach without violating the federal constitution" and argues that the "doctrine employed by the Florida Supreme Court did not violate federal retroactivity standards" because its analysis under *Witt v. State*, 387 So. 2d 922 (Fla. 1980) provided more expansive protection than *Teague v. Lane*, 489 U.S. 288 (1989). BIO at7. Respondent's reliance upon *Danforth v. Minnesota*, however, misconstrues this Court's holding in that case.

This Court has consistently held under the Supremacy Clause state law must be interpreted in conformity with federal law. This means state courts cannot randomly deprive people of vested rights endowed by the federal constitution. As this Court explained in *Danforth*, an exception to the conformity requirement is when states choose to provide ***more*** protection than federal law requires. *Danforth*, 552 U.S. at 282. (emphasis added). In choosing to provide more protection than federal law requires, States are not limited by federal retroactivity holdings that operate to deny relief to its citizens and can expand such protections for their benefit. *Id.* ("In sum, the *Teague* decision limits the kinds of constitutional

violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed "non-retroactive" under *Teague*.). But while a State court is free to employ a partial retroactivity approach without violating federal constitutional law, there are limits. States are not free to simply employ any manner of partial retroactivity without adherence to a defendant's constitutional rights.

And while this Court will not "review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgement," *Coleman v. Thompson*, 501 U.S. 722 (1991), it does not provide immunity to all state court rulings that claim to have based their decisions on state law. State court rulings are only "independent" and unreviewable where the state law basis for denial of a federal constitutional claim is separate from the merits of the federal claim. *See Foster v. Chapman*, 136 S. Ct. 1737, 1759 (2016); *see also Michigan v. Long*, 463, U.S. 1032, 1037-44 (1983).

The federal question that has been presented by Petitioner in this case is whether the Florida Supreme Court's partial retroactivity approach utilizing *Ring* as a cutoff point violates the Eighth and Fourteenth Amendments. The Florida Supreme Court's ruling, albeit premised on a state law analysis, is inseparable from the merits of Petitioner's federal constitutional claim raised in the state courts below. *See Foster*, 136 S. Ct. at 1759.

In this Court's seminal decisions in both *Furman v. Georgia*, 408 U.S. 238 (1972) and *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Court noted that where a State wishes to impose capital punishment it is constitutionally required to tailor and apply its laws in a manner which avoids the arbitrary and capricious imposition of the death penalty. *Godfrey*, 446 U.S. at 428. This Court's Eighth Amendment jurisprudence has "insist[ed] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). Thus, States do not enjoy unfettered discretion in the employment of state retroactivity cutoffs, particularly where such rulings have the effect of creating different classes of condemned prisoners with no discernable differences.

This Court has also long recognized the need for treating similarly situated litigants alike. *See Griffith v. Kentucky*, 479 U.S. 314, 322 (1987). This Court's precedent has established that the Eighth Amendment bars the "arbitrary or irrational imposition of the death penalty." *Parker v. Dugger*, 498 U.S. 308, 321 (1991). In those states where death is an available penalty, the State is required to administer the penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and for those for whom it is not. *See Spaziano v. Florida*, 468 U.S. 447, 460 (1984), *overruled on other grounds*; *Hurst v. Florida*, 136 S. Ct. 616 (2016). This Eighth Amendment principle is consistent with, and also further informed by, the constitutional right to equal protection under the Fourteenth Amendment. Under the Fourteenth Amendment

this Court has held that where 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 uniquely harsh form of punishment, such disparate treatment violates the right to equal protection. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). In drawing its dividing line for purposes of *Hurst* relief, the Florida Supreme Court's partial retroactivity approach violates both of these Eighth and Fourteenth Amendment precepts.

Whether or not the Florida Supreme Court's retroactivity cutoff goes beyond the bounds permissible under the Eighth and Fourteenth Amendments is a federal question controlled by federal law and, therefore, should compel this Court to grant certiorari in order to review that question.

This Court's opinion in both *Ring v. Arizona,* 536 U.S. 584 612 (2002) and *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004), two of the cases on which Respondent relies for the proposition that *Hurst v. Florida* announced a procedural change, dealt with the factual determinations which were required under Arizona's capital sentencing statute, not Florida's. Both *Schriro* and *Ring* dealt with review of Arizona's capital sentencing scheme's requirement of jury fact-finding as to one aggravating factor in order to render a defendant eligible for a sentence of death. Comparatively, this Court's decision in *Hurst v. Florida*, and subsequently the Florida Supreme Court's holding in *Hurst v. State*, were concerned with the jury's role at sentencing under Florida law and Florida's capital sentencing scheme, not Arizona.

Unlike the system in Arizona, Florida's capital sentencing scheme requires jury fact finding beyond the existence of one mere aggravator. In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court reviewed Florida's death penalty and concluded that "[w]e hold this sentencing scheme unconstitutional," because "[t]he Sixth Amendment requires a jury, not a judge, ***to find each fact necessary to impose a sentence of death***." *Id.* at 619 (emphasis added). The Court identified those critical factfindings, leaving no doubt as to how the statute must be read under the Sixth Amendment: "the Florida sentencing statute does not make a defendant eligible for death ***until findings . . . [of] sufficient aggravating circumstances . . . and . . . insufficient mitigating circumstances to outweigh the aggravating circumstances***." *Id.* at 622 (citing Florida Statutes § 921.141(3)) (quotations omitted). *Hurst* identified these findings as the operable findings that must be made by a jury. *Hurst* resolved that "[a] jury's mere recommendation is not enough." *Id.* at 619.

The basis for the Sixth Amendment requirement is that findings of fact statutorily required to render a defendant death-eligible must be considered to be elements of the offense, separating first degree murder from capital murder under Florida law, and thereby forming part of the definition of the crime of capital murder in Florida. *See Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (applying the ruling of *Jones v. United States*, 526 U.S. 227 (1999) that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt" to state sentencing schemes under the Fourteenth Amendment). There is no conviction

of capital murder in Florida without the jury findings required by *Hurst*.

Yet, in the wake of *Hurst v. State* and the Florida Supreme Court's interpretation of *Hurst v. Florida* therein, the issues now presented are well beyond that initial distinction. In *Hurst v. State*, the Florida Supreme Court ruled that in a Florida capital case, the jury's sentencing recommendation at the penalty phase had to be returned unanimously. The Florida Supreme Court identified each of the necessary components of a jury's unanimous death recommendation:

> We hold that in addition to **unanimously finding the existence of any aggravating factor**, the jury must also **unanimously find that the aggravating factors are sufficient for the imposition of death** and **unanimously find that the aggravating factors outweigh the mitigation** before a sentence of death may be considered by the judge. * * * As we explain, we also find that in order for a death sentence to be imposed, **the jury's recommendation for death must be unanimous.** This recommendation is tantamount to the jury's verdict in the sentencing phase of trial; and historically, and **under explicit Florida law, jury verdicts are required to be unanimous.**

202 So. 3d at 54. Such findings are inherently different from those provided under the Arizona statute under review by this Court in both *Ring* and *Schriro*.

Moreover, unlike the holdings in *Schriro* or *Ring,* the *Hurst* decisions announced substantive rules which the federal Constitution protects against being denied to Florida defendants on state retroactivity grounds. The Florida Supreme Court's holding in *Hurst v. State* that the Sixth Amendment requires a jury to decide whether the aggravating factors have been proven beyond a reasonable doubt, whether they are sufficient to impose death, and whether they are outweighed by the mitigating factors are manifestly substantive. *See Montgomery*

v. Louisiana, 136 S. Ct. 718, 734 (2016) (holding that the determination whether a particular juvenile is or is not a person "whose crimes reflect the transient immaturity of youth" is substantive, not procedural). Similarly, the Florida Supreme Court's holding in *Hurst v. State* that the Eighth Amendment requires unanimous jury fact-finding at the penalty phase is likewise substantive. We know this because the court explained as much, holding that the unanimity rule was required to implement the constitutional mandate that the death penalty be reserved for a narrow class of only the worst of offenders and to assure the determination of the jury "express that values of the community as they currently relate to the death penalty." *Hurst*, 202 So. 3d at 60-61. ("By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law."). The function of the unanimity rule is to ensure Florida's overall capital system complies with the Eighth Amendment. Such rulings are also manifestly substantive, regardless of the fact that they deal with the method by which a jury decides. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"); *see also Montgomery*, 136 S. Ct. at 735 (noting that existence of state flexibility in determining method by which to enforce constitutional rule does not convert substantive rule into procedural one).

The change in Florida's sentencing law did not simply transfer factfinding duties from a judge to a jury. Unlike the circumstances in *Schriro v. Summerlin*, 542 U.S. 348 (2004), the change here includes going from an advisory jury recommendation requiring seven of twelve jurors to vote in favor of an advisory death recommendation, to requiring a jury to return a unanimous death verdict before a judge has the power to impose a death sentence. Going from a majority vote to a unanimous verdict is akin to going from proof by a preponderance of the evidence to proof beyond a reasonable doubt. It is a change designed to make a decision to impose a death sentence more reliable. *See Addington v. Texas*, 441 U.S. 418, 423 (1979) ("The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"). This change is tantamount to the guilt phase presumption of innocence that can only be overcome by a unanimous jury's verdict finding that the State carried its burden to prove guilt beyond a reasonable doubt.

Furthermore, this Court addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right in *Hurst v. Florida*, and this Court has always regarded proof-beyond-a-reasonable-doubt decisions as substantive. *See In re Winship*, 397 U.S. 358 (1970); *see also Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware's state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only

addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof."). Respondent's attempt to analogize this Court's holding in both cases with those in the *Hurst* decisions is flawed.

The Respondent asserts that Mr. Lightbourne's *Caldwell v. Mississippi*, 472 U.S. 320 (1985) claim does not support his Equal Protection argument. But, Mr. Lightbourne did not attempt to "tie his Equal Protection argument" to *Caldwell*. BIO at 12. Mr. Lightbourne argued it is the Eighth Amendment that requires jurors to feel the weight of their sentencing responsibility in capital cases. As this Court explained in *Caldwell*, "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." 472 U.S. at 328-29. *See also Blackwell v. State*, 79 So. 731, 736 (Fla. 1918).

Further, the Respondent argues that the jury instructions in Mr. Lightbourne's case do not violate this Court's ruling in *Caldwell v. Mississippi* because he was accurately advised with respect to the local law. BIO at 12. Justice Sotomayor, dissenting in *Guardado v. Jones*, 138 S. Ct. 1131 (2018) explained why that assertion is flawed:

> The decisions [the Florida Supreme Court has] cited in support of that pre-*Hurst* precedent rely on one fact: "Informing the jury that its recommended sentence is 'advisory' is a correct statement of Florida law and does not violate *Caldwell*." *Rigterink v. State*, 66 So.3d 866, 897 (Fla.2011) (*per curiam*); *Globe v. State*, 877 So.2d 663, 673-674 (Fla.2004) (*per curiam*) (stating that it has rejected *Caldwell* challenges to the standard

> jury instructions, citing cases that similarly rely on the fact that the instructions accurately reflect the advisory nature of the jurors' role). **But of course, "the rationale underlying [this] previous rejection of the *Caldwell* challenge [has] now [been] undermined by this Court in *Hurst*,"** *Truehill*, 583 U.S., at ——, 138 S.Ct., at 4, and the Florida Supreme Court must therefore "grapple with the Eighth Amendment implications of [its subsequent post-*Hurst*] holding" that "then-advisory jury findings are now binding and sufficient to satisfy *Hurst*," *Middleton*, 583 U.S., at ——, 138 S.Ct., at 830. Its pre-*Hurst* precedent thus does not absolve the Florida Supreme Court from addressing petitioners' new post-*Hurst Caldwell*-based challenges.

Guardado, 138 S. Ct. at 1132–33 (2018)(emphasis added). Justice Sotomayor recently pointed out that although the Florida Supreme Court recently "set out to 'explicitly address' the *Caldwell* claim" in *Reynolds v. State*, 2018 WL 1633075 (Fla. Apr. 5, 2018), the issue remains unresolved because the opinion "gathered the support only of a plurality, so the issue remains without definitive resolution by the Florida Supreme Court." *Id.*, at *1.

Florida requires the jury to not only unanimously find the existence of any aggravating factor, but the jury must also unanimously find that the aggravating factors are sufficient and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge. This undercuts the Respondent's argument that "[t]his Court's ruling in *Hurst v. Florida*, did not change the recidivism exception articulated in *Apprendi* and *Ring*." Given that Florida requires the jury to find more than the existence of one aggravator in order for the defendant to be eligible for the crime of capital first degree murder, Respondent cannot rest on the jury finding the existence of the aggravators to

dismiss his *Hurst* claims. Mr. Lightbourne's jury did not find the necessary elements to essentially convict Mr. Lightbourne of capital first degree murder. Additionally, Mr. Lightbourne's jury's vote was never recorded, and we can never know what it was. His penalty phase—if it can be called that—lasted less than two hours. The jury began penalty deliberations at 10:53 a.m. and returned a recommendation at 11:58 a.m., a mere hour and five minutes later. As the Florida Supreme Court recognized, "juries not required to reach unanimity tend to take less time deliberating and cease deliberating when the required majority vote is achieved rather than attempting to obtain full consensus . . . ." *Hurst v. State*, 202 So. 3d at 58. An unrecorded vote for a death recommendation obtained from one hour of deliberation after a two-hour penalty phase cannot possibly be considered reliable.

CONCLUSION

Because the Respondent fails to engage with the law as it stands in the wake of *Hurst v. Florida* and *Hurst v. State*, Respondent ignores that applying the *Hurst* decisions to some Florida prisoners and not others when all were sentenced to death under the same unconstitutional scheme ensures that the death penalty will be applied arbitrarily and capriciously and that Florida citizens with unreliable death sentences will be executed, and that similarly situated prisoners will be treated differently, in violation of the Eighth and Fourteenth Amendments.

This Court should grant certiorari.

Respectfully submitted,

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