No. 18-5040

IN THE SUPREME COURT OF THE UNITED STATES

HENRY PERRY SIRECI,

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

I. The Florida Supreme Court's pronouncement in *Hurst v. State* implicates the Sixth Amendment.

Respondent incorrectly concludes that because this Court, in *Hurst v. Florida*,[1] did not address the process of weighing the aggravating and mitigating circumstances, the Florida Supreme Court's pronouncement in *Hurst v. State* does not implicate the Sixth Amendment. That is incorrect.

In *Hurst v. Florida*, this Court held that the Sixth Amendment requires "a jury, not a judge, to find *each fact necessary to impose a sentence of death*." 136 S. Ct. 616, 619 (2016) (emphasis added). This Court did not specifically enumerate each fact that would be necessary for such a sentence. Subsequently, the Florida Supreme Court, "based on the mandate of *Hurst v. Florida*," found that the findings of fact necessary to impose death – required to be made by a jury – "include the existence of each aggravating factor [] proven beyond a reasonable doubt, the finding that the aggravators are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances." *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016). By defining the broad mandate laid out by this Court in *Hurst v. Florida*, the Florida Supreme Court specified three factual findings that are required for a death sentence to be constitutional under the Sixth Amendment. The Florida Supreme Court held that, not only must these factual findings be made by a jury, but also that the jury must make these findings unanimously and beyond a reasonable doubt. *Id*.

In Mr. Sireci's case, the jury did not make any of these findings at all, let alone unanimously or beyond a reasonable doubt. Therefore, Mr. Sireci was not eligible for the death penalty.

[1] *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016).

Respondent appears to take the position that because *the trial court* found that Mr. Sireci was previously convicted of a felony, an aggravator under Florida law,[2] there is no Sixth Amendment issue with the fact that a jury failed to make the requisite findings in support of Mr. Sireci's death sentence. (*See* Brief in Opposition ("BIO") p. 11). This argument completely ignores this Court's explicit ruling in *Hurst v. Florida* that the Sixth Amendment "*requires a jury, not a judge*, to find each fact necessary to impose a sentence of death." 136 S. Ct. at 619 (emphasis added). This right requires Florida to base a defendant's death sentence on a jury's verdict, not a judge's factfinding. *Id*. at 624. The Respondent's brief attempts to relitigate a settled issue.

Moreover, the Respondent's proposition has been repeatedly rejected by the Florida Supreme Court. *See e.g. McGirth v. State*, 209 So. 3d 1146, 1164 (Fla. 2017) ("Although the prior violent felony aggravating circumstance was found unanimously by the jury by virtue of McGirth's conviction for attempted first-degree murder of James Miller, whether this aggravating circumstance was 'sufficient' to qualify for the death penalty would also be a jury determination. Because the jury vote was eleven to one, there is no way of knowing if such a finding was unanimous. The same rationale applies to the aggravating factor that the murder occurred during the commission of a robbery.");[3] *Bailey v. Jones*, 225 So. 3d 776, 777 (Fla. 2017)

[2] Another constitutional concern in Florida's death penalty scheme is that concurrent and even *subsequent* convictions can be considered "prior" convictions for purposes of aggravation. This is exactly what happened here, as the "prior" murder to which Respondent refers in its Brief in Opposition is one to which Mr. Sireci pleaded guilty only *after* he was convicted and sentenced to death on the present matter, because he had essentially "given up" on the system. For over 40 years Mr. Sireci has maintained his innocence as to both murders. Because the other crime was not a capital case, the evidence has long been destroyed and thus there is no ability to test any forensic evidence and exonerate Mr. Sireci.

[3] Inexplicably, Respondent cites *McGirth* for the opposite proposition that the Florida Supreme Court's pronouncement in *Hurst v. State* "involving weighing and selection of defendant's sentence are not required by the Sixth Amendment." (*See* BIO p. 12).

("…based on the jury's eleven-to-one recommendation for a sentence to death, we cannot determine that the jury unanimously found that the aggravating factors were sufficient to impose a sentence of death."); *Kopsho v. State*, 209 So. 3d 568 (Fla. 2017) ("… we cannot determine that the jury unanimously found that the aggravators outweighed the mitigation. We can only determine that the jury did not unanimously recommend a sentence of death."); *Johnson v. State*, 205 So. 3d 1285, 1289 (Fla. 2016), *cert. denied sub nom. Fla. v. Johnson*, 137 S. Ct. 2272 (2017) ("We reject the State's contention that Johnson's contemporaneous convictions for other violent felonies insulate Johnson's death sentences from *Ring*[4] and *Hurst v. Florida*.").

In fact, in *Hurst v. State* the Florida Supreme Court specifically rejected Respondent's present position that a jury verdict of guilty for a contemporaneous felony alone can serve as sufficient aggravation under the Sixth Amendment to impose the death sentence:

> Accordingly, we reject the State's argument that *Hurst v. Florida* only requires that the jury unanimously find the existence of one aggravating factor and nothing more. The Supreme Court in *Hurst v. Florida* made clear that the jury must find "each fact necessary to impose a sentence of death," 136 S.Ct. at 619, "any fact that expose[s] the defendant to a greater punishment," *id.* at 621, "the facts necessary to sentence a defendant to death," *id.*, "the facts behind" the punishment, *id.*, and "the *critical findings* necessary to impose the death penalty," *id.* at 622 (emphasis added). *Florida law has long required findings beyond the existence of a single aggravator before the sentence of death may be recommended or imposed*. *See* § 921.141(3), Fla. Stat. (2012).

202 So. 3d at 53, n7. (emphasis added).

Later in its Brief in Opposition – in an attempt to explain Florida's failure to comply with *Ring* for the nearly 14 intervening years between *Ring* and *Hurst* – Respondent cites *Ellerbee v. State*, 87 So. 3d 730, 747 (Fla. 2012) to commend the Florida Supreme Court for "properly

[4] *Ring v. Arizona*, 536 U.S. 584 (2002).

recogniz[ing]" that a prior or contemporaneous violent felony conviction took the case out of the purview of *Ring*. (*See* BIO p. 15, n. 7). However, Respondent's reliance on this case is perplexing is light of the fact that, post-*Hurst*, the Florida Supreme Court reversed itself and granted Mr. Ellerbee habeas relief based on his *Hurst* claim, despite the fact that Mr. Ellerbee's capital crime was committed during the commission of a felony. *Ellerbee v. State*, 232 So. 3d 909, 933 (2017). Respondent is mistaken in its continued reliance upon the argument that a contemporaneous jury verdict of guilty for another felony is sufficient to comply with the Sixth Amendment requirement that a jury consider all facts necessary to the imposition of a death sentence, as required by *Hurst v. Florida* and *Hurst v. State*.

Respondent cites to several lower courts from outside of Florida that have "almost uniformly held that a judge may perform the 'weighing' of factors to arrive at an appropriate sentence without violating the Sixth Amendment." (*See* BIO pp. 11-12). These cases are irrelevant and unsupportive, as the Florida Supreme Court has found that, in order to comply with this Court's Sixth Amendment jurisprudence, the weighing must be done by a unanimous jury. *See Hurst v. State*, *supra*. Respondent's argument here concedes, however, that whether the weighing is done by the judge or the jury clearly implicates the Sixth Amendment, and thus belies its contention that there is no underlying constitutional issue.

Respondent further asserts that Mr. Sireci's argument that he was denied the right to have jury find – beyond a reasonable doubt – each of the critical elements that subject him to the death penalty is "plainly meritless" because Florida has a long standing practice of using the beyond a reasonable doubt standard. (*See* BIO p. 23). Although it is not entirely clear to which portion of the cert petition Respondent refers here, it seems clear that Respondent and the Petitioner agree that Florida requires the *jury* to make determinations *beyond a reasonable doubt*. Therefore, based

on the fact that Mr. Sireci's jury did not unanimously make findings as to his eligibility for the death penalty beyond a reasonable doubt, his sentence violates the Sixth Amendment.

Accordingly, certiorari review is appropriate in this case because there is an underlying Sixth Amendment issue regarding Mr. Sireci's death sentence.

II. Respondent fails to recognize that Florida, in its application of its retroactivity evaluation as laid out in *Witt* - although more expansive than *Teague* - must still comply with the requirements of the Constitution in meting out relief.

Respondent correctly identifies that the Florida Supreme Court utilizes the *Witt*[5] analysis to determine the retroactive application of *Hurst*. Although states are permitted to implement standards for retroactivity that grant relief to a broader class of individuals than is required by the federal test for retroactivity in *Teague*,[6] a state may not do so in a manner that contravenes the Constitution. By determining that *Hurst* is only partially retroactive to an arbitrary date, Florida grants relief in a manner that violates that Eighth and Fourteenth Amendments. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), *reh'g denied*, No. SC14-2108, 2017 WL 510491 (Fla. Feb. 8, 2017) (finding that *Hurst* is retroactive to defendants whose sentence became final after *Ring*); *but see Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017) (finding that *Hurst* is not retroactive to any case in which the death sentence was final prior to *Ring*).

The mere fact that the Constitution does not mandate a course of action does not mean that the action is not subject to Constitutional review. For example, a state is not required to impose the death penalty as punishment for murder. However, when a state chooses to do so, the application of the penalty must be done in a constitutional manner. *See Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Godfrey v. Georgia*, 446 U.S. 420 (1980)

[5] *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980).
[6] *Teague v. Lane*, 489 U.S. 288 (1989).

("if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."). 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).

The Eighth Amendment prohibition against arbitrariness and capriciousness in capital cases 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. 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 review.

Respondent takes the position that dividing inmates along the arbitrary line of pre-*Ring* and post-*Ring* somehow comports with this Court's general rules of consistency in application of the death sentence. 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 v. State of Okl. ex rel Williamson*, 316 U.S. 535, 541 (1942). 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.

Respondent also incorrectly posits that "[s]ince *Asay*, the Florida Supreme Court has continued to apply *Hurst* retroactively to all post-*Ring* cases." (*See* BIO pp. 16-17). In fact, in further arbitrary application of the *Hurst* ruling, Florida has denied *Hurst* relief to individuals whose death sentence became final *after Hurst* based on a *per se* harmless error rule applied to certain individuals who received a vote of 12-0 in favor of death, despite the fact that these cases clearly do not meet the other unanimous finding requirements laid out by the Florida Supreme Court in *Hurst v. State*. *See e.g. Davis v. State*, 207 So. 3d 142 (Fla. 2016); *Hall v. State*, 212 So. 3d 1001 (Fla. 2017); *Kaczmar v. State*, 228 So. 3d 1 (Fla. 2017); *Knight v. State*, 225 So. 3d 661 (Fla 2017); *King v. State*, 211 So. 3d 866 (Fla. 2017); *Truehill v. State*, 211 So. 3d 930 (Fla. 2017); *Jones v. State*, 212 So. 3d 321 (Fla. 2017); *Middleton v. State*, 220 So. 3d 1152 (Fla. 2017); *Oliver v. State*, 214 So. 3d 606 (Fla. 2017); *Morris v. State*, 219 So. 3d 33 (Fla. 2017); *Tundidor v. State*, 221 So. 3d 587 (Fla. 2017); *Cozzie v. State*, 225 So. 3d 717 (Fla. 2017); *Guardado v. Jones*, 226 So. 3d 213 (Fla. 2017); *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017). These ruling further evidence the fact that the partial retroactivity rule laid out by *Asay* and *Mosley* is arbitrary and capricious, and thus violates Mr. Sireci's Eighth and Fourteenth Amendment rights.

III. Respondent mischaracterizes the post-*Hurst* death penalty scheme.

Respondent mischaracterizes the post-*Hurst* death penalty scheme in Florida when it argues that there can be no *Caldwell v. Mississippi*, 472 U.S. 320 (1985) error because Florida's current

scheme remains advisory. (*See* BIO, p. 27). The *Caldwell* issue here is that Mr. Sireci's pre-*Hurst* jury knew that it was not responsible for making any of the findings of fact required to sentence Mr. Sireci to death. That knowledge forms the basis of the constitutional problem, not just the fact that the word "advisory" was used, or that the judge ultimately imposed Mr. Sireci's sentence. Arguing now that the word "advisory" describes both the old and new schemes as a matter of semantics does not change the fact that pre-*Hurst* juries were systematically relegated to a non-factfinding role, which led them to believe that the ultimate responsibility for a death sentence lay elsewhere. Calling the new scheme "advisory" does not diminish the reality that today, juries take their role much more seriously because they are instructed that it is their job to make the critical findings of fact – not the judge's. Indeed, Florida's post-*Hurst* capital jury instructions removed all instances of the words "advisory" or "recommend." The jury is now explicitly told that they are issuing a "verdict", which is a final and binding decision. (*See* Appendix G to Petition).

CONCLUSION

For the foregoing reasons, Mr. Sireci 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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