CASE NO. 18-5060

IN THE SUPREME COURT OF THE UNITED STATES

KONSTANTIONOS X. FOTOPOULOS,
PETITIONER

VS.

STATE OF FLORIDA,
RESPONDENT.

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

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Mr. Fotopoulos' petition provides much legal analysis showing why certiorari should be granted, and it is the Florida Supreme Court's fractured decisions and unfairness that were "convoluted," not the Petitioner's arguments as the Respondent asserts at page 5 of the BIO. The State's seeming failure to comprehend Mr. Fotopoulos' petition and mischaracterizing his arguments is an attempt to ignore the federal constitutional problems in the hope that they go away. But, constitutional problems seldom go away; they exist until eventually they are addressed. Mr. Fotopoulos' petition presents an ideal opportunity to address the constitutional violations that resulted not from just the State courts' application of state retroactivity doctrines but most importantly, the constitutional violations that resulted after the State courts applied State retroactivity in an arbitrary and capricious manner that violated equal protection.

The BIO makes much use of *Danforth v. Minnesota*, 552 U.S. 264 (2008). See BIO at 6, 10, 11, 16, 17. *Danforth* held that states may provide for greater retroactivity than required under federal retroactivity law. *Id*. 277, 282. *Danforth*, however, does not allow a state to deny retroactivity when the federal standard requires such application. A state is not free to deny retroactive application of a new law that should be found retroactive under the federal standard of retroactivity. In the *Montgomery v.*

Louisiana litigation (eventually *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the state courts denied relief under *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012) based on a finding of non-retroactivity under state law. *Montgomery*, at 727. On certiorari review, the United States Supreme Court considered whether *Miller* adopted a new substantive rule that applies retroactively on collateral review and whether the state court could refuse to give retroactive effect to the *Miller* decision. *Id*. The Court reversed the state denial based on retroactivity grounds because:

> Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution. If a state collateral proceeding is open to a claim controlled by federal law, the state court "has a duty to grant the relief that federal law requires." *Yates*, 484 U.S., at 218, 108 S. Ct. 534. Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.

Id. at 731–32.

Based on *Montgomery*, a state court may not constitutionally refuse to give retroactive effect to a substantive constitutional right. While *Danforth* allows a state court to extend more retroactivity than federal constitutional law requires, a state may not refuse to apply new law retroactively when the new law meets the requirements for retroactive application. Moreover,

Danforth does not allow a state court to apply law retroactivity arbitrarily, capriciously, and in violation of Equal Protection rights.

A state court can decide to apply greater retroactivity than required under federal law, however, it cannot do so arbitrarily, capriciously and unequally. It also cannot do so in a manner that allows those death sentences that are not the most aggravated and least mitigated to go unremedied while cases with far more aggravated facts will result in life sentences.

Respondent's reliance on the lower court decisions misapprehends this Court's highest authority in the legal system. It also misapprehends the procedural posture in which this Petition is presented to this Court for review. The Respondent cites to two cases from Kansas at page 13 of the BIO to support its position. These cases have no application here because the death penalty system in Kansas is much different than the system that was ruled unconstitutional in Florida. Since reinstating the death penalty in 1994, Kansas required a sentence of death to be decided by a unanimous jury. Florida allowed death sentences to be imposed by trial judges with mere recommendations from non-unanimous advisory panels until this Court declared the system unconstitutional in *Hurst*.

At page 17 the Respondent claims that "there is no conflict with that of any federal appellate court or state supreme court."

By providing for only fractured and partial retroactivity, the State of Florida is in violation of Equal Protection laws. The Florida Supreme Court's decision indeed conflicts with the Supreme Court of Delaware. Delaware extended *Hurst v. Florida* relief to Delaware's entire death row population based on the denial of the condemned prisoners' Sixth Amendment rights to a trial by jury. *Powell v. Delaware*, 153 A. 3d 69 (Del. 2016). Yet, in the State of Florida, where *Hurst* originated, the Florida Supreme Court only extended *Hurst* relief to about half of Florida's death row population.

The State of Florida's fractured retroactivity decisions are in conflict with *Furman v. Georgia*, 408 U.S. 238 (1972). The date line certain drawn by the State of Florida results in arbitrary and capricious leftovers: uncured unconstitutional death sentences. The death sentences that remain in the State of Florida are reminiscent of the following:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . .I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Furman v. Georgia, 408 U.S. 238, 309–10, (1972)(Stewart, J. concurring)(footnotes omitted). The State of Florida should not be

permitted to continue to execute people sentenced to death who were denied Equal Protection of the application of *Hurst* relief following remand.

Petitioner did not use "the majority of his petition to claim that it is unfair for Petitioner to be denied relief because his counsel was ineffective for choosing not to challenge a perceived inconsistency between the State's argument in Hunt's trial and the State's argument in Fotopoulos' trial regarding Fotopoulos' domination over Ms. Hunt." BIO at 18. The Petition used an example of the faulty fact-finding that occurred in Mr. Fotopoulos' trial to show the arbitrariness and capriciousness of the State court's retroactivity split. This was an example of an "Inmate[] whose death sentences became final before June 24, 2002 are more likely than their post-*Ring* counterparts to have received those sentences in trials involving problematic fact-finding." Petition at 27.

Contrary to the assertions of the Respondent, this is not just a matter of state law. This framework fashioned by the Florida Supreme Court following this Court's decision in *Hurst v. Florida* now becomes a matter of federal law because the framework violates the Sixth, Eighth, and Fourteenth Amendments, as well as Equal Protection laws, and *Furman*. Florida's June 24, 2002 cutoff date essentially resulted in approximately half of Florida's death row population getting *Hurst* relief. The death row inmates left behind clearly have viable Equal Protection and Eighth Amendment claims.

All of the inmates in Florida prior to *Hurst* were sentenced to death under the same unconstitutional system. Equal Protection laws and the evolving standards of decency in death penalty jurisprudence should not permit the State of Florida to leave behind and execute inmates whose cases were final prior to June 24, 2002. This Court should no more permit the State of Florida to choose this date for fractured and partial retroactivity than if they chose to grant *Hurst* relief only to defendants whose last names began with the second half of the alphabet (N-Z).

Though the State of Florida may have attempted to apply state law, they did so unconstitutionally. If Florida was truly providing more relief than *Teague v. Lane*, 489 U.S. 288 (1989), Mr. Fotopoulos would not be laboring under a death sentence anymore. The setting of a totally arbitrary and capricious date line that results in violation of the Eighth Amendment prohibition against cruel and unusual punishments and Equal Protection considerations is not a constitutionally tolerable system. The State of Florida is certainly permitted to afford broader *Hurst* protections, but not to restrict *Hurst* protections as they have done.

Recently, Justice Lewis of the Florida Supreme Court concurred as follows on the *Hurst* retroactivity issue:

> This Court's adoption of the *Stovall/Linkletter* standard was intended to provide "more expansive retroactivity standards" than those of *Teague*. *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005). However, the Court's retroactivity decision post-*Hurst* eschews that intention. . . .the majority of this Court draws its

> determinative, albeit arbitrary, line. As a result, Florida will treat similarly situated defendants differently—here, the difference between life and death—for potentially the simple reason of one defendant's docket delay. Vindication of these constitutional rights cannot be reduced to either fatal or fortuitous accidents of timing.
>
> Every pre-*Ring* defendant has been found by a jury to have wrongfully murdered his or her victim. There may be defendants that properly preserved challenges to their unconstitutional sentences through trial and direct appeal, but this Court nonetheless chooses to limit the application of *Hurst* which may result in the State wrongfully executing those defendants. It seems axiomatic that "two wrongs don't make a right"; yet this Court essentially condones that outcome with its very limited interpretation of *Hurst*'s retroactivity and application.
>
> For the reasons discussed above, I continue to respectfully dissent on the *Hurst* issue.

Taylor v. State, --So. 3d --, 2018 WL 2057452, 10-11 (Fla. 2018) (footnotes omitted).

Florida has been extremely careless with its repeated unconstitutional application of the death penalty. This Court should grant certiorari. When it comes to the prudent administration of the ultimate penalty, Florida has looked the other way and permitted it to be applied recklessly. When it comes to the use of the death penalty, Florida has been permitted to violate the evolving standards of decency for far too long.

The State of Florida cannot grant only partial retroactivity, because in so doing, this violates Equal Protection laws. This is not fair. The criminal proceeding and appellate result is absolutely unconstitutional and unreliable. The State of Florida

cannot afford *Hurst* relief to some death row inmates yet not others without violating the Equal Protection rights held by those inmates whose cases happened to fall on the wrong side of the calendar. The Florida system continues to be unconstitutional and unreliable because it proposes to execute the oldest of the oldest rather than the most aggravated and least mitigated.

Mr. Fotopoulos submits that based on the history of death penalty reversals in Florida and considering their continuing violations of the evolving standards of decency, the State of Florida is certainly in need of further constitutional guidance from this Court. The Florida legislature chose to ignore this Court's 2002 *Ring* decision, and failed to revise their statutes until 15 years later following this Court's decision in *Hurst*. It is quite significant that a near unanimous Florida Senate voted this year (33 "yeas" to 3 "nays") to find *Hurst* fully retroactive. The legislature reasoned that to rule otherwise would cause a "miscarriage of justice" for those left behind on Florida's death row, finding that full retroactivity would "provide a more just and final resolution in those cases." (Florida Senate House Bill 870, March 9, 2018). This proposed legislation unfortunately never reached the Florida House of Representatives.

It suffices at this stage to point out that there are both practical and federal-systemic compelling reasons to merit review. As a practical matter, the lives of as many as 163 Florida inmates

hinge on the questions that Mr. Fotopoulos presents here, and the Florida Supreme Court denied more than 100 cases in summary denial fashion one by one, under the controlling authority of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017).

As a federal-systemic matter, *Danforth v. Minnesota*, 552 U.S. 264 (2008), is instructive. *Danforth* was sufficiently compelling to attract this Court's review in order to establish that the States are free to maintain retroactivity doctrines differing from this Court's own *Teague* rules for federal claims. Following *Danforth*, it is no less compelling for this Court to determine whether there are any federal constitutional limits to that freedom when a State's doctrines are aberrant. *See Chapman v. California*, 386 U.S. 18, 21 (1967) ("Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights.")

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully Submitted,

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