No. 18-6843

IN THE SUPREME COURT OF THE UNITED STATES

JAMES MILTON DAILEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

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

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AMENDED REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. Respondent Incorrectly Asserts that the Florida Supreme Court's *Hurst*[1] Retroactivity Cutoff is Immune From this Court's Review.

Contrary to Respondent's suggestion, this Court has jurisdiction to review whether the *Hurst* retroactivity cutoff created by the Florida Supreme Court is consistent with the United States Constitution. In suggesting that the Florida Supreme Court's *Ring*[2]-based retroactivity cutoff is immune from this Court's review, Respondent misreads the adequate-and-independent-state-ground doctrine, which is inapplicable here. *See* Brief in Opposition ("BIO") at 7-11.

Although "[t]his 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 judgment," *Coleman v. Thompson*, 501 U.S. 722 (1991), this does not mean that all state court rulings that claim a state-law basis are immune from this Court's federal constitutional review. A state court ruling is "independent" only when it has a state-law basis for the denial of a federal constitutional claim that is separate from "the merits of the federal claim." *Foster v. Chatman*, 136 S. Ct. 1737, 1759 (2016); *see also Florida v. Powell*, 559 U.S. 50, 56-59 (2010); *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983).

The federal question here is whether the Florida Supreme Court's *Ring*-based retroactivity cutoff for *Hurst* claims violates the Eighth and Fourteenth Amendments to the United States Constitution. The Florida Supreme Court's application of its state-law *Ring*-based cutoff to Petitioner cannot be "independent" from Petitioner's federal Eighth and Fourteenth Amendment

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

claims. The state court's ruling is inseparable from the merits of the federal constitutional arguments Petitioner has raised throughout this litigation. *See Foster*, 136 S. Ct. at 1759.

Under Respondent's mistaken interpretation of the adequate-and-independent doctrine, this Court could not have granted certiorari in *Hurst* itself, given the Florida Supreme Court's upholding of Florida's prior capital sentencing scheme as a matter of state law. According to Respondent's logic, so long as any state retroactivity scheme is articulated as a matter of state law, this Court is powerless to consider cutoffs drawn at *any* arbitrary point in time, or state rules providing retroactivity to defendants of certain races or religions but not others.

To avoid a confused understanding such as Respondent's, this Court has offered a simple test to determine whether a state ruling rests on adequate and independent state grounds: would this Court's decision on the federal constitutional issue be an advisory opinion, *i.e.*, would the result be that "the same judgment would be rendered by the state court after [this Court] corrected its views of federal laws"? *Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985). In the case of the Florida Supreme Court's *Hurst* retroactivity formula, the answer is "no." If this Court were to hold that the *Ring*-based cutoff violated the Constitution, the Florida Supreme Court surely could not re-impose its prior judgment denying relief based on the *Ring* cutoff.[3]

Respondent wrongly reads *Danforth v. Minnesota*, 552 U.S. 264 (2008), as authorizing the kind of immunity from federal review that Respondent believes the Florida Supreme Court's *Ring* cutoff is due. *See* BIO at 10. Respondent observes that *Danforth* ruled "[s]tate courts may fashion

[3] Petitioner also notes that Respondent's adequate-and-independent argument is undercut by the fact that the state retroactivity doctrine, according to the Florida Supreme Court, was adopted from a *federal* retroactivity test. *See Asay v. State*, 210 So. 3d 1, 16 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016) (both citing *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965)).

their own retroactivity tests, including partial retroactivity tests," but Respondent omits the fact that the state rule in *Danforth* afforded *full* retroactivity and therefore did not implicate the arbitrariness of a retroactivity cutoff. The fallacy of Respondent's *Danforth* argument is apparent when a question such as this is posed: Would there be any doubt that this Court had the authority to review a state rule that provided retroactivity to white defendants but not black defendants, even though such a rule would, in Respondent's reading of *Danforth*, extend retroactivity "more broadly" than providing no retroactivity at all? This Court would have jurisdiction to consider such a rule as a matter of the Eighth and Fourteenth Amendments.

Whether the Florida Supreme Court's retroactivity cutoff exceeds the bounds of the Eighth and Fourteenth Amendments is a federal question controlled by federal law. This Court should grant a writ of certiorari to review that issue.

II. Respondent's Brief Highlights the Florida Supreme Court's Continued Failure to Meaningfully Address Whether its *Ring*-Based Cutoff Violates the Eighth and Fourteenth Amendments.

Respondent reiterates the Florida Supreme Court's original rationale for creating the *Ring*-based retroactivity cutoff as a matter of state law, *see* BIO at 9, but fails to identify a case in which the Florida Supreme Court has meaningfully addressed whether its cutoff violates the Eighth and Fourteenth Amendments. Neither *Asay v. State*, 210 So. 3d 1 (Fla. 2016), nor *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), addressed Petitioner's federal constitutional arguments. *Asay* and *Mosley* were issued on the same day in 2016, and created the state-law *Ring* cutoff. Neither case discusses the Eighth and Fourteenth Amendment arguments Petitioner has raised.

Additionally, the Florida Supreme Court's subsequent decision in *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017), did no more to address the *Ring* cutoff's federal constitutional

implications, as *Hitchcock* said little more than *Asay* and *Mosley* had continuing validity of as a matter of state law.

In Respondent's flawed view, because the Florida Supreme Court provided at least *some* rationale in *Asay* and *Mosley* for creating the *Ring* cutoff, the Eighth and Fourteenth Amendments have not been violated. But as Respondent's own brief shows, the rationale provided by the Florida Supreme Court in *Asay* and *Mosley*—essentially, *Ring* was the point at which Florida's courts *should have known* that Florida's scheme was unconstitutional, *see Mosley*, 209 So. 3d at 1279-81; *Asay*, 210 So. 3d at 15-16—was based entirely on a *state* retroactivity analysis. The state courts "should have recognized" (BIO at 12) rationale has no basis in federal retroactivity law and does not immunize the Florida Supreme Court's arbitrary *Ring* cutoff from Eighth and Fourteenth Amendment scrutiny.

Respondent is also wrong that Petitioner's arguments have been implicitly rejected by prior decisions upholding *traditional* retroactivity rules. *See* BIO at 13-15. This argument fails to recognize the unusual nature of the Florida Supreme Court's rule, which grants relief *on collateral review* to some but not others. Traditional retroactivity rules draw a cutoff at the date this Court announced the relevant constitutional ruling. As Petitioner recognized, such lines have been deemed acceptable. Here, however, the Florida Supreme Court has drawn its retroactivity line at a date years earlier than *Hurst*. This unusual and perhaps unprecedented line drawing by a state court warrants this Court's federal constitutional review.

Nor is the Respondent's reliance on *Dorsey v. United States*, 567 U.S. 260 (2012) persuasive or applicable. *See* BIO at 14-15. *Dorsey* did not present a question of retroactivity, nor did this Court cite or rely on *Teague v. Lane*, 489 U.S. 288 (1989). Instead, *Dorsey* involved a

question of statutory interpretation where this Court addressed a question of congressional intent. *Dorsey*, 567 U.S. at 264.

III. Respondent's Misunderstands And Mischaracterizes Petitioner's *Caldwell*[4] Claim.

Respondent asserts that Petitioner's *Caldwell* claim was not properly presented to the lower court. BIO at 22-23. This is a mischaracterization of the filings below. *See* Appendix E & F to Petition. Moreover, Respondent, in its Reply to the Order to Show Cause at the Florida Supreme Court, proceeded to address this claim substantively on the merits. *See* Response at 10, attached as Appendix A. There can be no real dispute that the issue was properly presented below and is ripe for review by this Court, and to the extent that it was not properly preserved, Respondent has waived its objection.

Respondent also mischaracterizes the post-*Hurst* death penalty scheme in Florida when it argues that there can be no *Caldwell* error because in this case because "Dailey's jury was properly instructed on its role based on the state law existing at the time of his trial." BIO at 17. The *Caldwell* issue here is that Petitioner's pre-*Hurst* jury knew that it was not responsible for making any of the findings of fact required to sentence Petitioner 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 Petitioner's sentence. The fact remains 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. Juries in Florida now 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

[4] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

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 I to Petition.

Similarly, Respondent's argument that Petitioner's prior violent felony conviction somehow established "beyond a reasonable doubt the existence of sufficient aggravation under Florida law" and insulates Petitioner's death sentence from any *Caldwell* or *Hurst* error is a blatant mischaracterization of Florida law and respondent cites no legal precedent for this opinion. BIO at 17. In fact, the Florida Supreme Court has expressly held the exact opposite. *See 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."). No jury has ever found Petitioner's prior violent felony conviction "sufficient" aggravation under Florida law. Instead, they were merely asked to "advise" the sentencing court on what punishment to impose upon Petitioner.

The *Caldwell* issue raised here is whether today the State of Florida can now treat Petitioner's advisory recommendation as mandatory and binding, when the jury was explicitly instructed otherwise and never made the necessary findings of fact as to whether Petitioner's aggravation was "sufficient" to impose death. This Court, in *Hurst v. Florida*, warned against that very thing. The Court cautioned against using what was an advisory 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. An advisory verdict 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.").

IV. Respondent Incorrectly Asserts That No Sixth Amendment Error Occurred In Sentencing Petitioner To Death.

Respondent incorrectly asserts two facts: (1) the judge alone resentencing Petitioner to death does not violate the Sixth Amendment; and (2) the judge's resentencing happened after a mere "correct[ion to] the sentencing order." BIO at 18.

First, this Court has recognized the fundamental right to a trial by jury under the United States Constitution.

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt. 6. Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); see also *Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *Winship*, 397 U.S., at 364, 90 S.Ct. 1068 ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

Apprendi v. New Jersey, 530 U.S. 466, 476–77 (2000). The guarantee of a jury trial under the Sixth Amendment is enshrined in our country's jurisprudence. Specifically, under the Sixth Amendment, there is a guarantee "that all the facts essential to imposition of the level of

punishment that the defendant receives… must be found by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J. concurring). In Petitioner's case, this never occurred and at no point did Petitioner waive this right. On the contrary, as the history of this case clearly demonstrates, Petitioner has been continuously raising his denial of a jury from resentencing onwards. Contrary to Respondent's position, the denial of his jury right is egregious and his death sentence is unconstitutional.

After the Florida Supreme Court vacated Petitioner's death sentence on direct appeal, the trial judge alone heard arguments and reweighed the aggravation and the mitigation in this case and gave great weight to the jury's recommendation of death, even though that jury based their recommendation on an erroneous instruction of the cold, calculated and premeditated aggravating factor, and the avoid arrest aggravating factor. The trial judge did not, as Respondent suggests, merely correct a sentencing order (BIO at 18), but instead, relied on two invalid and weighty aggravating circumstances in sentencing Petitioner to death. "Employing an invalid aggravating factor in the weighing process 'creates the possibility ... of randomness,' by placing a 'thumb [on] death's side of the scale,' thus 'creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty.'" *Sochor v. Florida*, 504 U.S. 527, 532 (1992) (internal citations omitted). "Even when other valid aggravating factors exist, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of 'the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances.'" *Id*., citing *Clemons v. Mississippi*, 494 U.S. 738, 752 (1990). The weighing of aggravators and mitigators, under the Sixth Amendment, should be done "by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J. concurring). This did not happen in Petitioner's case.

The increase in penalty imposed upon Petitioner was without any jury at all and constitutes fundamental error. Petitioner's death sentence was based on flawed jury instructions, given to a jury who was erroneously instructed on two weighty aggravating circumstances. This poisoned the fact-finding of the trial court, who chose to adopt, for a second time, the fundamentally flawed recommendation and improperly instructed jury recommendation. No jury unanimously found any aggravating factors existed at all, that sufficient aggravating factors existed for the imposition of the death penalty, or that the aggravating factors outweighed the mitigating circumstances. In addition, the trial court initially ignored evidence of statutory mitigation and relied on evidence not presented in Petitioner's guilt or penalty phase in sentencing him to death. The flaw in the trial court's assessment, and the fact that the State had failed to prove the weighty aggravating circumstances of cold, calculated and premeditated, and avoid arrest, compelled the Florida Supreme Court to reverse Petitioner's sentence on direct appeal.

The Florida Supreme Court specifically found that the trial court's finding of cold, calculated and premeditated, and for the purpose of avoiding arrest, was not supported by the evidence. Further, it found that "the trial court recognized the presence of numerous mitigating circumstances, but then accorded them no weight at all. This was error." *Dailey v. State*, 594 So. 2d 254, 259 (Fla. 1991).

On remand, the trial court, *without empaneling a new jury*, again sentenced Petitioner to death, based upon its own *sufficiency findings and reweighing* of the aggravation and the mitigation. The new death sentence was based upon the original flawed recommendation of a jury which was instructed on two aggravating factors that were not supported by the evidence. This flaw continued into Petitioner's new death sentence as a result of the trial court failing to empanel

a new and properly instructed jury. Petitioner never waived his right to a jury and should have had a new jury empaneled to hear the evidence and make the requisite findings.

This Court has held:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence. *See Clemons v. Mississippi*, 494 U.S. 738, 752, 110 S. Ct. 1441, 1450, 108 L.Ed.2d 725 (1990)…. Even when other valid aggravating factors exist, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of 'the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances.' *Clemons, supra*, 494 U.S., at 752, 110 S. Ct., at 1450 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)); *see Parker v. Dugger*, 498 U.S. 308, 321(1991).

Sochor v. Florida, 504 U.S. 527, 532 (1992). Depriving Petitioner of the "individualized treatment" from the actual reweighing of his aggravating and mitigating factors by a jury, placed the thumb on death's side of the scale.

This Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that the Sixth Amendment, in conjunction with the Due Process clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt. The trial court in Petitioner's case did not do this and simply used the prior jury recommendation, tainted by the improper cold calculated and premeditated, and avoid arrest instruction, in making its own re-evaluation of the aggravating and mitigating circumstances. *See Dailey v. State*, 659 So. 2d 246 (Fla. 1995). This violated Petitioner's Sixth Amendment right to a jury trial.

Respondent's assertion that lower courts have "almost uniformly held that a judge may perform the 'weighing' of factors to arrive at an appropriate sentencing without violating the Sixth Amendment" is flawed and misleading. BIO at 18. In each of those cases, the jury had already performed the necessary factfinding before the defendant was sentenced to death. *Again, that did*

not happen in Petitioner's case. Nor do any of the cases cited by Respondent involve a statute, like Florida's, which requires, before a sentence of death may be considered by the trial court, that "the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors *outweigh* the mitigating circumstances." *Hurst v. State*, 202 So. 3d 40, 53 (Fla. 2016) (emphasis added). No reweighing was done by a jury and Respondent is blatantly incorrect that these findings are not required by the Sixth Amendment. BIO at 18-19. The Sixth Amendment guarantees "that all the facts essential to imposition of the level of punishment that the defendant receives… must be found by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J. concurring).

CONCLUSION

For the foregoing reasons, Petitioner 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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