CAPITAL CASE

DOCKET NO. 18-6877

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD EARL SHERE, Jr.,

***Petitioner*,**

vs.

STATE OF FLORIDA,

***Respondent*.**

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

REPLY TO BRIEF IN OPPOSITION

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CAPITAL CASE

REPLY ON QUESTION PRESENTED

The State's reformulation of the question presented avoids the important issues that are properly before this Court. Certiorari should be granted. Even if the decision to deny retroactivity were a state court decision, no state is free to apply state law contrary to equal protection and no state is free to impose and maintain a death sentence in an arbitrary and capricious manner. Florida's capital sentencing structure does violate *Caldwell v. Mississippi* because the jury, unconstitutionally sitting as an advisory panel, had their role diminished.

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REPLY TO BRIEF IN OPPOSITION

THE STATE'S BRIEF IN OPPOSITION DOES NOT OVERCOME MR. SHERE'S ARGUMENTS FOR GRANTING CERTIORARI.

The grounds in Mr. Shere's petition are properly before this Court. This petition reaches this Court as gross injustices remain in Florida's death penalty system that can only be adequately addressed by this Court. Mr. Shere maintains that: The Florida Supreme Court's denial of retroactive relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), on the ground that his death sentence became final before June 24, 2002 under the decision in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), while granting retroactive *Hurst* relief to inmates whose death sentences had not become final on June 24, 2002 under the decision in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), violated Mr. Shere's right to Equal Protection of the Laws under the Fourteenth Amendment to the Constitution of the United States (e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against arbitrary infliction of the punishment of death under the Eighth Amendment to the Constitution of the United States (e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam); *Johnson v. Mississippi*, 486 U.S. 578, 584-585, 587 (1988)). This Court should grant certiorari.

The State argued a number of points in its Brief in

Opposition. These points are countered as follows:

The Florida Supreme Court's decision conflicts with this Court's decision in *Hurst v. Florida,* and numerous cases decided by this Court that established the requirements for the constitutional imposition of the death penalty.

The State argued "that Shere does not provide any 'compelling' reason for this Court to review his case". BIO at 6. The unconstitutional execution of more than a hundred individuals is sufficiently compelling. The Florida Supreme Court's decision in Mr. Shere's case (and the other pre-*Ring*[1] cases which relief was denied) conflicts with this Court's decision in *Hurst v. Florida* and the numerous cases decided by this Court that limit the death penalty to most aggravated and least mitigated, and that death not be arbitrarily or capriciously imposed.

Whether retroactivity is based on state law or federal law, no state is free to apply state law contrary to equal protection and no state is free to impose and maintain a death sentence in an arbitrary and capricious manner.

The State argued that "nothing about the Florida Supreme Court retroactivity decision is inconsistent with the United States Constitution." BIO at 6. Mr. Shere disagrees.

The State is free to allow greater retroactivity than that which is required by the United States Constitution, but not less. *See Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). ("The normal framework for determining whether a new rule applies to

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

cases on collateral review stems from the plurality opinion in *Teague v. Lane,* 489 U.S. 288 (1989)). The state is not free to apply its own retroactivity law in a manner that renders the remaining death sentences unconstitutional.

A state is also not free to deny retroactive application of a new law that should be found retroactive under the federal standard of retroactivity. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016), the state courts denied relief under *Miller v. Alabama,* 567 U.S. 460 (2012), based on a finding of non-retroactivity under state law. *Montgomery,* 136 S.Ct at 727. On certiorari review, this 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 *Miller*. *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. Accordingly, based on *Montgomery*, a state court may not constitutionally refuse to give retroactive effect to a

substantive constitutional right. While *Danforth v. Minnesota,* 552 U.S. 264 (2008), 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 federal retroactive application.

The State "cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Montgomery,* 136 S.Ct at 731-32. In Mr. Shere's case, giving retroactive effect to the post-*Ring* cases but not to the pre-*Ring* cases, based on no other distinction than the calendar, violates equal protection and is arbitrary and capricious.

There was no independent and adequate state ground for the State to seek refuge from the Constitution.

The independent and adequate state ground theory does not prevent review of state court decisions that conflict with the United States Constitution. In the instant case it was the so-called state court decision finding that the Eighth and Fourteenth Amendments were not violated that was the basis for denying Mr. Shere a remedy.

The State misuses the independent and adequate (and regularly applied) state grounds doctrine. This Court stated in *Johnson v. Mississippi*, 486 U.S. 578 (1988):

> "[W]e have consistently held that the question of when and how defaults in compliance with state procedural

> rules can preclude our consideration of a federal question is itself a federal question." *Henry v. Mississippi,* 379 U.S. 443, 447 [85 S.Ct. 564, 567, 13 L.Ed.2d 408] (1965). "[A] state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.' *Barr v. City of Columbia,* 378 U.S. 146, 149 [84 S.Ct. 1734, 1736, 12 L.Ed.2d 766] (1964)." *Hathorn v. Lovorn,* 457 U.S. 255, 262–263, 102 S.Ct. 2421, 2426–2427, 72 L.Ed.2d 824 (1982); see *Henry v. Mississippi,* 379 U.S., at 447–448, 85 S.Ct., at 567–568. We find no evidence that the procedural bar relied on by the Mississippi Supreme Court here has been consistently or regularly applied.

Id. at 587.

The denial in Mr. Shere's case was not based on an independent and adequate state ground, regularly applied. The Florida Supreme Court did not deny relief because of a procedural bar. Because the Florida Supreme Court did not apply a non-retroactivity bar to the post-*Ring* cases, this would not be a "regularly applied" independent and adequate state ground. Moreover, considering that the court fabricated partial retroactivity from whole cloth in this case, it was even clearer that the State's reliance on the doctrine is misplaced.

Most importantly, there is a distinction between the state basing some ruling on the state's procedural rules and the state's case law just disagreeing with the federal case law. All state court rulings that claim a state law basis are not 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 Mr. Shere cannot be "independent" from Mr. Shere's federal Eighth and Fourteenth Amendment claims. The state court's ruling is inseparable from the merits of the federal constitutional arguments.

Under the State's interpretation of the independent and adequate state ground theory, 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 the State'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 even state rules providing retroactivity to defendants of certain races or religions but not others.

Contrary to the State's response, this Court has offered a simple test to determine whether a state ruling rests on independent and adequate 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.

Equal Protection and Arbitrariness and Capriciousness.

The Eighth Amendment requirement of *Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), is that "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" (*id*. at 428). This command "insist[s] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). It refines the older, settled precept that the Equal Protection of the Laws 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 uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). *See*, *e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The Florida Supreme Court's *Ring-split* dividing line

violates these holdings of this Court.

McCleskey v. Kemp, (1987), stands for the proposition that a petitioner needs to show actual, purposeful discrimination for a *de facto* equal protection claim. Mr. Shere's case is different. In the instant case, there is no need to extrapolate from data, the Florida Supreme Court actually and purposely discriminated between those whose sentences were unfortunate enough to come before *Ring*. As stated in *McCleskey*, there is "a second principle inherent in the Eighth Amendment, 'that punishment for crime should be graduated and proportioned to offense.'" *McCleskey,* 481 U.S. at 300, citing *Weems v. United States*, 217 U.S. 349, 378 (1910). When compared to the more aggravated, and less mitigated, cases that will receive new sentencings that result in life, simply because of the date their case became final, Mr. Shere's death sentence is no longer "graduated and proportioned to [the] offense." *Id*.

Rather than defeat Mr. Shere's claim, *McCleskey* strengthens it. In denying relief to McCleskey, this Court stated: "On the other hand, absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty." *Id.* at 306–07. Mr. Shere has made exactly the showing that this Court required to prove a constitutional violation in *McCleskey*. The decision maker in Mr. Shere's case,

the Florida Supreme Court, acted with discriminatory purpose because it denied relief based on the effect of maintaining the pre-*Ring* individual's death sentences. *Id*. at 297–98. Mr. Shere has showed that the Florida Supreme Court's decisions were arbitrary and capricious.

This Court also made clear in *McCleskey*:

> In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold.

Id. at 305-06. The Florida Supreme Court actually discriminated by picking one side to give relief and one side to not give relief based on no reason attributable to the nature of the case, or the character of the person. Mr. Shere's case fell below the threshold for death before *Hurst*. After *Hurst*, in comparison, this is even more so because the marginal cases like Mr. Shere's will not receive death, either by prosecutorial acquiescence or because the standards are much higher now in Florida in post-*Hurst* penalty phase trials.

The Jury Instructions in Mr. Shere's case did violate *Caldwell v. Mississippi* when considered in light of *Hurst v. Florida* and *Hurst v. State*.

Florida's capital sentencing structure does violate *Caldwell v. Mississippi,* 472 U.S. 320 (1985), because the jury instructions

to the advisory panel, diminished the advisory panel's role, even though they were not sitting as a jury. *Hurst* brought to light that Florida was denying individuals the right to a jury trial. The *Caldwell* issue Mr. Shere raised does not create any additional retroactivity problems; it can stand alone or be considered for the point that the Florida Supreme Court left behind the death sentences of those who were even further removed from a constitutional death sentence. Mr. Shere with a mere 7-5 death advisory panel shows that he was not the most aggravated and least mitigated, then or now, when compared those who will receive death.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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