No. 18-8453

IN THE SUPREME COURT OF THE UNITED STATES

DUSTY RAY SPENCER,

***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

1. Respondent Incorrectly Asserts that There is no Underlying Constitutional Violation for This Court's Review.

Respondent erroneously claims that there is no underlying Constitutional violation and places a great significance in the fact that the jury found Mr. Spencer unanimously guilty of the crimes charged, but ignores the fact that his jury did not make *any* findings regarding sentencing and ultimately made a non-unanimous and legally meaningless sentencing recommendation. *See* Brief in Response ("BIO") at 10-11. This stance completely ignores this Court's explicit ruling in *Hurst* that "*requires a jury, not a judge*, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016) (emphasis added). "This right required Florida to base [Spencer's] death sentence on a jury's verdict, *not a judge's factfinding*." *Id*. at 624 (emphasis added). Further, the Respondent's brief parrots Florida's unconstitutional stance that existed prior to *Hurst v. Florida* and attempts to relitigate a settled issue. Florida's sentencing scheme was unconstitutional, as was recognized by this Court. The Respondent's stance is untenable and unreasonable.

Further, the respondent incorrectly argues that the jury made implicit findings as to one aggravating factor, contemporaneous violent felony. The State argues that because Mr. Spencer's jury unanimously found him guilty of "qualifying contemporaneous felonies, which constituted an aggravator under clearly established Florida law" that this was sufficient to meet the "Sixth Amendment's factfinding requirement." BIO at 11. This ignores the fact that Mr. Spencer's jury made no findings at his penalty phase, including whether the contemporaneous violent felony aggravating factor was sufficient to impose death.

The State argues that Mr. Spencer "became eligible for a death sentence given the guilt phase convictions for contemporaneous violent felonies." BIO at 11. This is false. In order to become death eligible, pursuant to *Hurst v. Florida* and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) a jury must find: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are "sufficient" to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Each of those findings must be independently and unanimously found by the jury beyond a reasonable doubt. A conviction of capital murder alone does not render a defendant death eligible. Nor does a capital murder plus some other conviction render any defendant death eligible in Florida. The cases cited by the State (BIO at 11-12) refer to other state statutes and what they require to render a particular defendant eligible. The State fails to look at what rendered Mr. Spencer death eligible in Florida. A death sentence cannot be imposed without a finding that the State has proved the additional elements listed in Florida's statute beyond a reasonable doubt. Anything less violates the Sixth Amendment, Eighth Amendment and the Due Process Clause. Without a constitutional conviction of capital first degree murder, coupled with the requisite findings of fact in the penalty phase, any death sentence imposed is illegal because it is in excess of the statutory maximum for a conviction of first degree murder.

The error occurred in Mr. Spencer's case when the jury failed to find the additional elements beyond a reasonable doubt. Further, the Florida Supreme Court has acknowledged, and the Respondent blatantly ignores, that in Mr. Spencer's case, the trial court initially erred by considering a weighty aggravator (cold, calculated and premeditated) that was not proved beyond

a reasonable doubt. Additionally, when Mr. Spencer was resentenced, the judge alone reweighed the aggravators and the mitigators without the benefit of fact-finding by a jury.

In *Hurst v. Florida*, this Court described the illusory nature of the jury's "findings" under Florida's prior capital sentencing scheme.

> Like Arizona at the time of *Ring*[1], Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Although Florida incorporates an advisory verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona."

136 S. Ct. at 622 (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)). This Court also explicitly found that under state law at the time, a defendant could only be sentenced to death based on "findings by *the court* that such person shall be punished by death." *Hurst*, 136 S. Ct. at 620. (emphasis added).

Thus, for purposes of the Sixth Amendment, multiple critical elements necessary to impose the death penalty in Florida were essentially not submitted to the jury. Instead, the trial court directed a verdict for the State as to those critical elements. The trial court alone determined Mr. Spencer's eligibility for the death penalty by failing to empanel a new jury. *See id*. ("[T]he Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (quoting Fla. Stat. § 775.082(1) (2010))).

[1] *Ring v. Arizona*, 436 U.S. 584 (2002).

The failure to submit critical elements necessary to impose the death penalty to the jury violated Mr. Spencer's Due Process rights. This Court previously held that:

> [Defendant's] conviction and continued incarceration on this charge violate due process. We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.

Fiore v. White, 531 U.S. 225, 228-29 (2001). Because Fiore had not been found guilty of an essential element of the substantively defined criminal offense, his conviction was not constitutionally valid. Similarly here, Mr. Spencer's death sentence is not valid because essential elements of his sentence were not found by a jury.

2. Respondent Incorrectly Asserts that the Florida Supreme Court's Decision in this Matter is Immune From This Court's Review.

Respondent erroneously claims that that Mr. Spencer is not entitled to the retroactive application of *Hurst*. BIO at 9, 14. The respondent's argument misapprehends and ignores the nature of Mr. Spencer's argument in his petition for writ of certiorari. This Court has not had occasion to address a partial retroactivity scheme because such schemes are not the norm. The proposition that States do not enjoy free reign to draw temporal retroactivity cutoffs at any point in time emanates logically from this Court's Eighth and Fourteenth Amendment rulings. 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. S*kinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). A state does not have unfettered discretion to create classes of condemned prisoners.

The Florida Supreme Court did not simply apply a traditional retroactivity rule here. On the contrary, it crafted a decidedly untraditional and troublesome partial-retroactivity scheme. 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. As a result, it is important for this Court to examine this procedure that has led to an unconstitutionally arbitrary application of the law in Florida.

The issue before this Court as a matter of law is the arbitrary retroactivity cutoff date. Unlike the traditional retroactivity analysis contemplated by this Court's precedents, the Florida Supreme Court did not simply decide whether the *Hurst* decisions should be applied retroactively to all prisoners whose death sentences became final before *Hurst*. Instead, the Florida Supreme Court divided those prisoners into two classes based on the date their sentences became final relative to this Court's June 24, 2002, decision in *Ring*[2], which was issued nearly 14 years before *Hurst*. In *Asay v. State*, 210 So. 3d 1 (Fla. 2016), the court held that the *Hurst*[3] decisions do not apply retroactively to Florida prisoners whose death sentences became final on direct review before *Ring*. *Asay*, 210 So. 3d at 21-22. In *Mosley*, the court held that the *Hurst* decisions do apply retroactively to prisoners whose death sentences became final after *Ring*. *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016).

Since *Asay* and *Mosley*, the Florida Supreme Court has uniformly applied its arbitrary

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

Hurst retroactivity cutoff granting relief to some collateral defendants while denying relief to other similarly situated defendants. The Florida Supreme Court has granted *Hurst* relief to dozens of "post-*Ring*" prisoners whose death sentences became final after 2002 but before *Hurst*, while simultaneously denying *Hurst* relief to dozens more "pre-*Ring*" prisoners whose sentences became final before 2002. However, both sets of prisoners were sentenced under the same exact same sentencing scheme which denied them access to the jury determinations that *Hurst* held to be constitutionally required before Florida could impose a sentence of death.

The Florida Supreme Court's *Hurst* retroactivity cutoff at *Ring* involves a kind and degree of arbitrariness that far exceeds the level justified by traditional retroactivity jurisprudence. The *Ring*-based cutoff not only infects the system with arbitrariness, but it also raises concerns under the Fourteenth Amendment's Equal Protection Clause. 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*, 316 U.S. at 541. 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.

This arbitrary line drawing makes no rational sense, when all the defendants, including Mr. Spencer, were sentenced under the same unconstitutional scheme.

3. The Respondent's arguments regarding the Florida Supreme Court's recent plurality decision in *Reynolds*[4] underscores the need for this Court's review.

Respondent also mischaracterizes the post-*Hurst*[5] death penalty scheme in Florida when it argues that there can be no *Caldwell*[6] error because Florida's current scheme remains advisory. (BIO at 24). The *Caldwell* issue here is that Mr. Spencer's pre-*Hurst* jury knew that it was not responsible for making any of the findings of fact required to sentence Mr. Spencer 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. Spencer'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 necessary to impose a death sentence – 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.

In urging this Court to dismiss Mr. Spencer's *Caldwell* claim as meritless, Respondent relies in part on the Florida Supreme Court's recent decision in *Reynolds v. State*, 251 So. 3d 811

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[4] *Reynolds v. State*, 251 So. 3d 811 (Fla. 2018).
[5] *Hurst v. Florida*, S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).
[6] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

(Fla. 2018). (BIO at 24-5). Respondent's *Reynolds* arguments only underscore the need for this Court to grant certiorari - as several Justices of this Court have already called for the Court to do - to review whether the Florida Supreme Court's *per se Hurst* harmless-error rule denying *Hurst* relief to entire categories of defendants contravenes *Caldwell*. *See, e.g.*, *Kaczmar v. Florida*, 138 S. Ct. 1973, 1973-74 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *Guardado v. Jones*, 138 S. Ct. 1131 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *Middleton v. Florida*, 138 S. Ct. 829 (2018) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari); *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari).

In a recent dissent from the denial of certiorari, Justice Sotomayor observed that *Reynolds* "gathered the support only of a plurality," of the Florida Supreme Court, so the issue of whether the Florida Supreme Court's *Hurst* harmless-error rule contravenes *Caldwell* "remains without definitive resolution by the Florida Supreme Court." *Kaczmar*, 138 S. Ct. at 1973. Respondent's brief concedes that *Reynolds* was a plurality opinion, but ignores the significance of that fact. (BIO at 24). Justice Sotomayor was correct that the Florida Supreme Court has not sufficiently analyzed, in a definitive majority opinion, how a defendant's pre-*Hurst* advisory jury recommendation can serve as the lynchpin for a proper *Hurst* harmless-error analysis when the advisory jury's sense of responsibility for a death sentence was systematically diminished by the design and operation of Florida's prior scheme.

The plurality's reasoning in *Reynolds* provides little hope that the Florida Supreme Court will ever sufficiently address the *Caldwell* matter unless this Court steps in. In *Reynolds*, the plurality doubled-down on its pre-*Hurst* decisions summarily rejecting the applicability of

Caldwell to Florida's capital sentencing scheme, but for the first time attempted to provide an explanation. The court held that, under *Romano v. Oklahoma*, 512 U.S. 1 (1994), *Hurst* has no bearing on whether *Caldwell* was violated in any case because Florida's pre-*Hurst* jury instructions accurately described Florida's capital sentencing scheme *at the time*. *Reynolds*, 251 So. 3d, at 824-28. But, there is a critical flaw in the Florida Supreme Court's analysis: Florida's prior scheme was unconstitutional before *Hurst*, making *Romano* inapplicable.

Rather than addressing the concerns of Justice Sotomayor and the other dissenting Justices of this Court, the Florida Supreme Court's decision in *Reynolds* represents an attempt to rebuke those concerns. The Respondent's reliance on *Reynolds* in this case, provide additional justification for this Court to grant certiorari review here.

CONCLUSION

For the foregoing reasons, Spencer 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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April 29, 2019