No. 20-5217

IN THE

Supreme Court of the United States

DAVID KELSEY SPARRE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

THIS IS A CAPITAL CASE

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Review is warranted because this case presents federal questions of great importance.

A. Federal Law As Applied Retroactively by a State Court

The Respondent's brief in opposition points to a constitutional question central to Mr. Sparre's *Hurst* claim: whether, once a state court has adopted a broader approach to the retroactive application of a new rule announced by this Court, is the state court's application of that federal law free from this Court's review? That is, if Petitioner is only able to raise a claim pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), because the Florida Supreme Court has adopted a broader approach to retroactivity than what is required under federal law—as Respondent argues—is this

Court precluded from reviewing a decision of the Florida Supreme Court that is in conflict with decisions of this Court because of that retroactive application?

Respondent points to the fact that the Florida Supreme Court adopted a broader approach to the retroactivity of *Hurst*, *see Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), than this Court has chosen to, *see McKinney v. Arizona*, 140 S. Ct. 702 (2020). Federal law "sets certain minimum requirements that States must meet but may exceed in providing appropriate relief." *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 178-79 (1990). States are not prohibited from giving broader effect to new rules announced by this Court. *Danforth v. Minnesota*, 552 U.S. 264, 282-91 (2008). "A decision by this Court that a new rule does not apply retroactively under *Teague* does not imply that there was no right and thus no violation of that right at the time of trial—only that no remedy will be provided in federal habeas courts." *Id.* at 291. This Court has said the "availability or nonavailability of remedies is a mixed question of state and federal law." *Id.* at 290-91.

Respondent emphasizes that federal law "does not give Sparre a right to relief" because of the *McKinney* decision, and therefore this Court has no relief to give him. Brief in Opposition 22-23, n.15. In other words, Respondent suggests that it does not matter if the Florida Supreme Court has applied *Hurst* correctly—because it relies on a state court's retroactive application, this *Hurst* issue has become a state law issue and this Court does not review state law issues. Brief in Opposition 22-24.

Petitioner contends that this is the wrong take away. The fact that Petitioner has no freestanding remedy in federal habeas court does not dispose of this issue. The

states have the initial responsibility of determining what retroactive effect, if any, is to be given beyond the federal constitutional floor. Once that decision is made, the constitutional violation is not forever rebranded a state law issue.

"While the relief provided by the State must be in accord with federal constitutional requirements, we have entrusted state courts with the *initial duty* of determining appropriate relief." *Am. Trucking Ass'ns*, 496 U.S. at 176, 211 (emphasis added) (expressing that, when state and federal issues are intertwined, state courts should have the opportunity to address them first). The Florida Supreme Court had the opportunity to address the retroactive scope of *Hurst* as determined by its own retroactivity jurisprudence. *Mosley*, 209 So. 3d at 1274-83. Beyond that point, the state court reviews for harmless error, operating based on a reading of what is required by this Court's *Hurst* decision. That is, federal constitutional law. This situation falls within the ambit of state court decisions that are interwoven with federal law and, Petitioner believes, appropriate for review by this Court. *See Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985) (finding that when state court ruling is dependent on an antecedent ruling of federal law—such as whether federal constitutional error has been committed in the first place—state law prong is not independent of federal law); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984) ("It is equally well established . . . that this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law."). Thus, once broader retroactive effect has been given by the state courts, this Court can still exercise its

discretionary review over a decision of a state court of last resort which applies new federal decisions in a manner that raises consequent constitutional issues or conflicts with relevant decisions of this Court. The Court should take review of this case to settle this question.

Finally, Respondent argues that the Florida Supreme Court may decide to overrule *Mosley*. Brief in Opposition 27. The possibility that the Florida Supreme Court could overrule *Mosley* in the future is not significant to this case. In the opinion at issue, the Florida Supreme Court never expressed any disbelief that *Hurst* retroactively applied to Mr. Sparre. The Florida Supreme Court rejected Petitioner's *Hurst* claim because of the jury's unanimous death recommendation. This finding shows that the Florida Supreme Court found that *Hurst* did apply to Petitioner, but believed the error to be harmless.

B. *Teague*'s Old-New Dichotomy as Applied to Defendants Whose Sentences Became Final Between *Ring* and *Hurst*

Petitioner urges the Court to revisit its retroactivity doctrine as applied to defendants like Petitioner, whose sentences became final after the announcement of a new rule, and should therefore have received the benefit of the new rule, but were blocked from relief because this Court did not explicitly overrule conflicting precedent at the time the new rule was announced.

This Court found that *Ring v. Arizona*, 536 U.S. 584 (2002), was a "new procedural rule" that did not apply retroactively, but would apply going forward. *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). Then, this Court found that *Hurst* was also a "new rule"—"*Ring* and *Hurst* do not apply retroactively on collateral

review." *See McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020) ("McKinney's case became final on direct review in 1996, long before *Ring* and *Hurst*."). What Respondent fails to address is that, unlike in Mr. McKinney's case, *Ring* does not need to be retroactive for Petitioner. *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007); *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (an old or "settled" rule applies to all cases).

Petitioner's case began in 2010—eight years after *Ring*. Petitioner was sentenced on March 30, 2012, and that sentence became final when this Court denied his petition for certiorari on November 2, 2015. *Sparre v. Florida*, 136 S. Ct. 411 (2015). At the point Petitioner's conviction and sentence became final, *Ring* had long been decided, and *Hurst* had just been argued on October 13, 2015. The *Hurst* decision would be issued two months later—on January 12, 2016.

"The theory that the habeas petitioner is entitled to the law prevailing at the time of his conviction" is complex. *Desist v. United States*, 394 U.S. 244, 263-64 (1969). "[I]t is necessary to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." (Harlan, J., dissenting). Like in many cases, this is right on the mark, as the lineage of *Hurst* can be traced back through *Ring v. Arizona* to *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

This Court has said that a case "announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*

v. Lane, 489 U.S. 288, 301 (1989). "[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* (emphasis in original). This Court later instructed that courts should survey the legal landscape at the point of finality and ask whether lower courts at the time would have felt compelled by existing precedent to conclude that the rule sought was required by the Constitution. *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997). If a state court would not have felt obligated to adopt the rule, the rule is "new." *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

The issue is that, even while *Ring* should have applied prospectively to defendants uniformly throughout this country, Florida defendants did not get the benefit of this rule because Florida courts were bound by the directly conflicting *Hildwin* case. *See Hildwin v. Florida*, 490 U.S. 638 (1989). Asking whether a state court presented with Petitioner's claim would have felt obligated to adopt the rule of *Ring* at the time Petitioner's conviction and sentence became final is a non-starter. Florida courts were bound by *Hildwin*. They had no authority to overrule it and grant *Ring* relief. *See Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002) (plurality opinion) ("[A]lthough Bottoson contends that there now are areas of 'irreconcilable conflict' . . . [i]f a precedent of [the United States Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). This was the "decisive" pillar of the Eleventh Circuit's reasoning in *Evans*: "The Supreme Court has told us many times

that, if a precedent of the Supreme Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to the Supreme Court, the prerogative of overruling its own decisions." *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1263 (11th Cir. 2012) (internal quotations omitted). "*Hildwin* is directly on point, and it is binding on us, unless and until the Supreme Court explicitly overrules it." *Id.* at 1264. Acknowledging the argument that *Hildwin* conflicts with *Ring,* the Eleventh Circuit noted that neither it nor the district court had the right to overrule *Hildwin*. *Id.* at 1265 (reversing district court's grant of relief on *Ring* grounds).[1]

Justice Harlan advised that "the doctrine of stare decisis cannot always be a complete answer to the retroactivity problem if a habeas petitioner is really entitled to the constitutional law which prevailed at the time of his conviction." *Desist*, 394 U.S. 244 at 264. Many of the Supreme Court's decisions "are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation." *Id.* A snapshot of the legal landscape at a certain point in time will depict the lower courts "following the doctrine of stare decisis . . . [applying] the rules which

[1] The District Court had concluded that "[a]s the Florida sentencing statute currently operates in practice, the Court finds that the process completed before the imposition of the death penalty is in violation of *Ring* in that the jury's recommendation is not a factual finding sufficient to satisfy the Constitution; rather, it is simply a sentencing recommendation made without a clear factual finding. In effect, the only meaningful findings regarding aggravating factors are made by the judge." *Evans v. McNeil*, No. 08-14402-CIV, 2011 WL 9717450, at *53 (S.D. Fla. June 20, 2011), *rev'd in part sub nom. Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249 (11th Cir. 2012).

have been authoritatively announced by this Court." *Id*. But, "[i]f anyone is responsible for changing these rules, it is this Court." *Id*. Because this Court was the only one with the authority to overrule *Hildwin*, which had bound all lower courts in Florida, review is warranted to address the issues created by the intersection of this Court's retroactivity doctrine and this Court's instruction that lower courts must continue following decisions that the Court does not expressly overrule, especially as applied to an important context like capital punishment.

"[We have said a] holding is not [dictated by precedent] . . . unless it would have been 'apparent to all reasonable jurists.' " *Chaidez*, 568 U.S. at 347. "But that account has a flipside. *Teague* also made clear that a case does not announce a new rule, when it is merely an application of the principle that governed a prior decision to a different set of facts." *Id*. at 347-48 (cleaned up). Because *Apprendi* was extended to the capital punishment/aggravating circumstances context by *Ring*, *Hurst* is not anything new or novel. *Hurst* exemplified the straightforward application of precedent to the right set of facts, "the kind of factual circumstances it was meant to address." *Id*.; *compare Lambrix*, 520 U.S. at 528 ("It is significant that *Espinosa* itself did not purport to rely upon any controlling precedent.") *with Hurst v. Florida*, 136 S. Ct. 616, 621-22 (2016) ("The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's.").

Because of the clear parallels to the Florida system, many jurists could not help but realize that the *Ring* decision applied to this state; however, without intervention from lawmakers or this Court, there was little Florida courts could do

but continue down a dead-end path. The explicit overruling of an earlier Supreme Court holding is something that can only be done by this Court—equal application of the law was not served when defendants in the rest of the United States were able to avail themselves of the *Ring* decision, but defendants in Florida were deprived of the benefit of *Ring* for many years through no fault of their own. This Court should take up review to address this problem.

C. Constitutional Error Exists in This Case

Respondent asserts that this Court "need not even reach the question of harmlessness, as there was no cognizable constitutional error requiring harmless error review" because "the jury findings necessarily include an aggravating circumstance as in Petitioner's case." Brief in Opposition 25. Respondent asserts that the jury's finding that Mr. Sparre was guilty of first-degree murder under both a premeditated-intent theory and felony-murder theory can double as a finding of aggravating circumstances. Brief in Opposition 27. Respondent argues that the jury found Petitioner guilty of "felony murder with an underlying burglary," which was automatically "sufficient to render him death eligible under Florida law" and the Sixth Amendment. Brief in Opposition 29.

First, on postconviction appeal, the Florida Supreme Court did not reference the finding of guilt at all in reference to *Hurst*. It curtly rejected this claim, noting that "our precedent forecloses Sparre's *Hurst* claim." *Sparre v. State*, 289 So.3d 839, 853 (Fla. 2019) (citing *Philmore v. State*, 234 So. 3d 567 (Fla. 2018) and *Davis v. State*, 207 So. 3d 142, 173-75 (Fla. 2016)). The Florida Supreme Court was citing to its own

per se harmless error rule. The Florida Supreme Court has found *Hurst* errors harmless in every case in which the advisory jury recommended death by a vote of 12 to 0. This abrupt conclusion is not a substitute for principled harmless error review. *See Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring).

Moreover, this one-sentence review shows that the jury's sentencing recommendation was treated as the dispositive factor. There was no further discussion. The Florida Supreme Court effectively substituted the jury's advisory recommendation for the necessary death-eligibility findings under *Hurst*. Review is warranted because the Florida Supreme Court continues to find *Hurst* error to be harmless in a manner that conflicts with relevant decisions of this Court. *See Hurst*, 136 S. Ct. at 622; *Sullivan v. Louisiana*, 508 U.S. 275, 279-82 (1993) ("[T]o hypothesize a . . .verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee."). The state court found that the error was harmless; the state court did not find that there was no error.

Respondent takes the position that there was no error at all. Respondent is incorrect to assert that the finding of guilt can serve as an implicit finding for the following aggravating circumstance: that the capital felony was committed "in the commission of, or an attempt to commit . . . burglary . . . ." § 921.141(5)(d), Fla. Stat. (2010).[2] This requires understanding how aggravating circumstances are different

[2] This aggravator is listed under § 921.141(6)(d) of the 2019 Florida Statutes.

from the guilt-phase theory of felony murder in Florida.[3]

Florida Supreme Court precedent allows the State to proceed on a felony murder theory at trial even when the indictment only charged the defendant with premeditated murder, as in Petitioner's case: "[A] charge of first-degree premeditated murder necessarily includes the theory of felony murder because 'the perpetration, or attempt to perpetrate, any of said felonies, during which a homicide is committed, stands in lieu of and is the legal equivalent of premeditation.' " *Weatherspoon v. State*, 214 So. 3d 578, 585-86 (Fla. 2017) (the State "may prosecute the charge of first-degree murder under a theory of felony murder when the indictment charges premeditated murder"). *Id.* The State can try to show premeditation directly, or imputed premeditation, through the actions taken to commit the underlying felony. *Id.* "The basis of this Court's reasoning . . . was that the crimes of first-degree premeditated murder and felony murder were . . . simply different theories the State might assert in its attempt to prove first-degree premeditated murder." *Id.* With this understanding, one sees that felony murder does not automatically equate to an aggravating circumstance.

[3] The State's line of argument is consistent with the Florida Supreme Court's more recent approach in *State v. Poole*, in which the Florida Supreme Court found that because the jury also found Mr. Poole guilty of the other charged counts—attempted first-degree murder, sexual battery, armed burglary, and armed robbery—the guilty verdict had "satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt," presumably because of the overlap between certain enumerated aggravators and the elements the jury must have found for the other counts. *State v. Poole*, 297 So. 3d 487, 508 (Fla. 2020). This trend in the Florida Supreme Court's decisions should be cause for concern. The death eligibility determination should not be tacked on to the guilty verdict *post-hoc*.

Burglary occurs when, notwithstanding an invited entry, a defendant (a) remains in the dwelling, structure, or conveyance surreptitiously, with the intent to commit an offense therein, (b) remains after permission has been withdrawn, with the intent to commit an offense therein, or (c) remains to commit or attempt to commit a forcible felony. § 810.02(b)(2), Fla. Stat. (2010).

A review of the jury instructions shows that the felony murder (burglary) turns on the same issue as premeditated murder. In order to commit felony murder (burglary), the defendant needed to, after having entered the house, "remained" present in the house "with the intent to commit" a forcible felony or offense. (T. 1178-79). That is, premeditation. Petitioner committed "burglary" by committing murder: "Sparre exhibited his intent to commit burglary when he remained in Pool's residence and committed a forcible felony against her (murder)." *Sparre v. State*, 164 So. 3d 1183, 1201 (Fla. 2015).

The reasoning for allowing alternative methods of showing premeditation at the guilt phase does not translate appropriately to the aggravating circumstances determination. Aggravating circumstances are meant to serve a different function: from within the category of the most serious offenses, identifying those offenders who are the worst of the worst. Respondent argues that an aggravating circumstance exists in this case because the murder was committed in the course of murder. The absurdity is apparent. The fact that Petitioner was inside the victim's house, technically meeting the elements of a burglary, was incidental to the killing, and not

the reason for it. Respondent is incorrect to say that Petitioner's conviction carries an implicit aggravating circumstance finding within it.

D. Overbroad Aggravator

If, as Respondent asserts, the jury's finding of guilt under the felony-murder theory automatically made Petitioner death eligible, Petitioner's sentence is in violation of the Constitution. This, too, presents an important federal question.

Application of the subsection (d) aggravating circumstance in the manner that Respondent does is unconstitutionally overbroad. Rather than committing murder in the course of a burglary, this aggravating circumstance was interpreted to apply to burglary that is committed the course of a murder. For this same reason, the state trial judge was incorrect to find this aggravating circumstance.

Applying the aggravator in this way does not provide a principled way to distinguish those defendants that deserve death from those who do not. *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980); *Maynard v. Cartwright*, 486 U.S. 356, 363 (1988); *cf. Davis v. State*, 737 So.2d 480, 484-86 (Ala. 1999) (Almon, J., dissenting) (discussing similar state law issue) ("[This interpretation] has the potential to make almost every murder committed indoors a capital murder, and nearly every crime that occurs indoors can be bootstrapped into a burglary."'). Although superseded by the current version of the statute, the Florida Supreme Court foresaw the implications of the interpretation of burglary that the trial court applied to Mr. Sparre: "[A] number of crimes that would normally not qualify as felonies would suddenly be elevated to burglary . . . The possibility exists that many homicides could

be elevated to first-degree murder, merely because the killing was committed indoors." *Delgado v. State*, 776 So. 2d 233, 239 (Fla. 2000), *superseded by statute*.[4]

E. The Florida Supreme Court's Analysis of *Strickland* Prejudice

The Florida Supreme Court resolved Petitioner's guilt-phase *Strickland* claims on the prejudice prong. The court found that "there is no reasonable probability that trial counsel's deficient performance affected the jury's verdict finding Sparre guilty of first-degree murder, there is no prejudice. As an initial matter, Sparre's defense that the killing was frenzied is not a defense to first-degree *felony* murder." *Sparre*, 289 So. 3d at 851 (emphasis in original). In order to commit burglary, the defendant needed to, after entering, remain in the house "with the intent to commit" an offense inside. Petitioner could not have remained in the house intending to kill the victim without also, by definition, premeditating the murder. A defense which negates premeditation on the premise that the defendant "snapped" and acted without thinking, would negate the intent required for felony murder. Defense counsels' deficient performance at trial and deficient closing argument resulted in prejudice to Petitioner.

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[4] If one finds the application of this aggravator to be unconstitutional, Petitioner would point out that this leaves a single aggravating factor against the mitigating factors. One of the mitigating factors is Petitioner's youth, which should carry significant weight because Petitioner was just above the cutoff established in *Roper v. Simmons*, 543 U.S. 554 (2005). In addition to applying the burglary aggravator unconstitutionally, the trial court found that Petitioner's youth only deserved "moderate weight." The court lessened the significance of Petitioner's youth because the court did not find supporting evidence of emotional immaturity and because, at 19, Petitioner had a GED or high school equivalency, enrolled in the National Guard, and fathered a child as a teenager, which signaled maturity.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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