IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 17-1269

DUSTY RAY SPENCER

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

INITIAL BRIEF

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INTRODUCTION

When Mr. Spencer was ultimately sentenced to death, a judge alone sentenced him to death, using a fundamentally flawed jury recommendation, in violation of the U.S. Constitution and Florida Constitution. The jury recommended a sentence of death by the narrowest margin possible, with a vote of seven to five. This Court affirmed the conviction, but vacated Spencer's death sentence because the trial court improperly instructed the jury on and considered the aggravating circumstance of "cold, calculated and premeditated" (CCP) and failed to consider the two mental health statutory mitigating circumstances. *Spencer v. State*, 645 So.2d 377 (Fla. 1994). This Court instructed the trial judge alone to reweigh and determine Spencer's sentence. On remand, the trial court, without empaneling a new jury, again sentenced Spencer to death and this Court affirmed. *Spencer v. State*, 691 So.2d 1062 (Fla. 1997). To be clear, Spencer did not waive his right to a jury.

The failure to empanel a new jury fundamentally violated Spencer's constitutional rights under the United States Constitution and the corresponding provisions of the Florida Constitution.

REQUEST FOR ORAL ARGUMENT

Dusty Spencer has been sentenced to death. The resolution of issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to

air the issues through oral argument would be appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Dusty Spencer, through counsel, respectfully requests this Court grant oral argument.

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STATEMENT OF THE CASE AND FACTS

Mr. Spencer was tried by a jury and found guilty on November 7, 1992, of first degree murder, aggravated battery and attempted second degree murder in Orange County. Prior to trial, Spencer filed various pretrial motions contesting the constitutionality of the death penalty[1], which included challenges to the jury instructions, lack of unanimity[2] and challenges regarding the weighing of the aggravation and the mitigation[3]. See TR 1992 VIII: 657-76; TR IX: 677-85, 798-17, 818-23, 824-38 and 839-41. Spencer specifically requested that the jury make all required factual findings regarding the aggravation and the mitigation. See TR IX:713-14. These motions were denied. The jury recommended a sentence of death for the first degree murder conviction on December 8, 1992, by a non-unanimous vote of seven to five. The jury made no specific findings on aggravation or mitigation. The jury was instructed on the following aggravating factors: heinous, atrocious and cruel (HAC), cold, calculated and premeditated (CCP), previous

[1] "Section 921.141(5)(i), Florida Statutes, and the death penalty as applied in Florida thus violate the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22 of the Florida Constitution." TR VIII:629.

[2] "…[O]ur statute is unconstitutional because it authorizes a death verdict on the basis of a bare majority vote." TR IX:886.

[3] "Under our law, the trial judge must give "great weight" to a jury's death recommendation, without knowing which circumstances were actually found by the jury or the weight given. Flaws in the jury instructions leading to flaws in the verdict necessarily lead to flawed sentencing." TR VIII:663.

conviction of another felony involving violence based upon contemporaneous convictions. The trial court sentenced Spencer to death on December 21, 1992.

On direct appeal, Spencer challenged the constitutionality of Florida's death penalty statute and raised issues relating to the aggravation and mitigation of his case. Specifically, Spencer challenged the lack of specialized verdict forms and how "the lack of a unanimous jury verdict as to any aggravating circumstance violated Article I, sections 9,16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." *See* Initial Brief of Appellant, Case No. 80,987. This Court denied his claim as being "without merit and [one which] has been consistently rejected by this Court." *Spencer v. State*, 645 So.2d 377, 384 (Fla. 1994). This rejection was based upon the precedent in *Thompson v. State*, 619 So.2d 261, 267 (Fla. 1993). This precedent is not valid.

On September 22, 1994, this Court affirmed the conviction, but vacated Spencer's death sentence because the trial court improperly instructed the jury on and considered the aggravating circumstance of CCP and failed to consider the two mental health statutory mitigating circumstances. *Spencer v. State*, 645 So.2d 377 (Fla. 1994). This Court commented that "[b]ased upon our rejection of the CCP aggravating factor and the trial court's failure to consider the statutory mental mitigating circumstances of extreme disturbance and impaired capacity, we are not certain whether the trial court would find that the aggravation outweighs the

mitigation." *Id*. at 385.

On remand, the trial court, *without empaneling a new jury*, again sentenced Spencer to death and this Court affirmed. *Spencer v. State*, 691 So.2d 1062 (Fla. 1997). To be clear, Spencer did not waive his right to a jury. Spencer filed a petition for writ of certiorari which was denied on October 6, 1997. *Spencer v. Florida*, 118 S.Ct. 213 (1997). Spencer's petition for writ of certiorari raised the issue that Florida's death penalty statute was unconstitutional because the trial court and this Court refused to consistently apply and weigh unrebutted mitigating factors, and argued that this resulted in an arbitrary and capricious application of the death penalty. At the time the petition was written, *Apprendi v. New Jersey*, 539 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) had not been decided. However, Spencer argued before trial, on direct appeal, and in his writ of certiorari, the substance of the problems regarding the constitutionality of Florida's death penalty scheme that were later fully developed in those decisions.

On July 13, 1998, Spencer filed a Motion to Vacate Judgment and Sentence pursuant to Fla. R. Crim. P. 3.850. The circuit court denied the Motion after a limited evidentiary hearing. Spencer appealed and filed a petition for state habeas relief to this Court. In that appeal, Spencer argued that a jury should have been empaneled to consider the mitigating and aggravating circumstances in his case. Again, this Court stated that Spencer's argument had no merit, because *Apprendi* did not apply

to Florida's capital sentencing scheme[4]. *Spencer v. State*, 842 So.2d 52, 73 (Fla. 2003). He specifically argued that *Apprendi* required that a new jury should have been impaneled when his case was remanded for resentencing and that a jury should have conducted a reweighing of the aggravation and the mitigation, rather than the judge alone. *Id*.

Furthermore, Spencer argued that his sentence violated *Ring v. Arizona*, 536 U.S. 584 (2002) and that Florida's sentencing scheme suffered from the same constitutional infirmities as Arizona's sentencing scheme. At the time, this Court rejected that argument based on *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002)[5]. *Spencer v. State*, 842 So.2d 52, 72 (Fla. 2003). This Court affirmed the denial of his 3.850 Motion and denied his state habeas petition. *Spencer v. State*, 842 So.2d 52 (Fla. 2003).

After an unsuccessful challenge in federal court, Spencer filed a successive 3.851 motion based upon *Hurst v. Florida*[6] and *Hurst v. State*[7]. The successive motion was summarily denied. This appeal followed. Spencer filed a response to the Court's Order to Show Cause, the State responded and Spencer replied. On January

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[4] Spencer specifically challenged the constitutionality of Florida's death penalty scheme under the United States Supreme Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[5] "However, Spencer's claim has already been addressed by this Court and decided adversely to him." *Spencer v. State*, 842 So.2d 52, 72 (Fla. 2003).

[6] *Hurst v. Florida*, 136 S. Ct. 616 (2016).

[7] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

25, 2018, this Court ordered further briefing on Spencer's non-*Hurst* issues. This Initial Brief follows[8].

STANDARD OF REVIEW

The standard of review is *de novo*. *Stephens v. State*, 748 So.2d 1028, 1032 (Fla. 2000).

SUMMARY OF ARGUMENT

Denying Spencer a jury at his resentencing is violation of his Due Process and Equal Protection rights under the federal constitution and resulted in a death sentence that is arbitrary and capricious in violation of the Sixth Amendment and Eighth Amendment of the United States Constitution and the corresponding provisions of the Florida Constitution.

ARGUMENT

I. Spencer was denied his constitutional right to a jury trial in violation of the Sixth Amendment.

This Court has recognized the fundamental right to a trial by jury under both the United States and Florida Constitutions. "The Supreme Court made clear, as it had in *Apprendi*, 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 Court reiterated, as it had in *Apprendi*, 'that any fact that expose[s] the

[8] No claim previously raised by Mr. Spencer is hereby abandoned.

defendant to a greater punishment than that authorized by the jury's guilty verdict is an 'element' that must be submitted to [the] jury." *Hurst v. State*, 202 So. 3d 40, 51 (Fla. 2016). 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 Spencer's case, this never occurred and at no point did Spencer waive this right. On the contrary, as the history of this case clearly demonstrates, Spencer has been continuously raising his denial of a jury from resentencing onwards. The denial of his jury right is egregious and his death sentence is unconstitutional.

"Where a defendant's death sentence has been vacated and the case is remanded to the trial court to conduct a new penalty phase proceeding before a new jury, '[t]he resentencing should proceed *de novo on all issues bearing on the proper sentence which the jury recommends be imposed*. A prior sentence, vacated on appeal, is a nullity'." *Morton v. State*, 789 So. 2d 324, 334 (Fla. 2001), citing *Teffeteller v. State*, 495 So.2d 744, 745 (Fla.1986); *see also Wike v. State*, 698 So.2d 817, 821 (Fla.1997) (citing *Bonifay v. State*, 680 So.2d 413 (Fla.1996) (emphasis added). "In fact, as we have explained, *a resentencing is a 'completely new proceeding,'* and the trial court is under no obligation to make the same findings as those made in a prior sentencing

proceeding." *Id*., citing *Phillips v. State*, 705 So.2d 1320, 1322 (Fla.1997) (citing *King v. Dugger*, 555 So.2d 355, 358–59 (Fla.1990)) (emphasis added). "[W]hen a sentence is vacated the defendant is resentenced at a new proceeding subject to the full panoply of due process rights…" *State v. Fleming*, 61 So.3d 399, 408 (Fla. 2011). Even though this is the state of our law in Florida, Spencer was deprived of its application.

The trial judge alone heard arguments and reweighed the aggravation and the mitigation in this case and gave great weight to the jury recommendation of death, even though that jury based their recommendation on an erroneous instruction of CCP, one of the weightiest aggravators. "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). As is clear, 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).

Under the principles of fundamental fairness, Spencer is entitled to a review of his death sentence and should have a jury, not a judge, weigh his aggravation and mitigation. To continue to deny Spencer review of his constitutional challenges is an arbitrary and capricious result that, as will be discussed below, also violates the Eighth Amendment. "This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." *State v. Owen*, 696 So.2d 715, 720 (Fla.1997). This case is one of those cases that this Court should reconsider.

The increase in penalty imposed on Spencer was without any jury at all and constitutes fundamental error. Spencer's death sentence was based on flawed jury instructions, given to a jury who recommended death by a bare majority. 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, sufficient aggravating factors existed for the imposition of the death penalty, or that the aggravating factors outweighed the mitigating circumstances. The trial court initially ignored evidence of statutory mitigation. The flaw in the trial court's assessment, and the fact that the State had failed to prove the weighty aggravating circumstance of CCP compelled this Court to state: "Based upon our rejection of the

CCP aggravating factor and the trial court's failure to consider the statutory mental mitigating circumstances of extreme disturbance and impaired capacity, *we are not certain whether the trial court would find that the aggravation outweighs the mitigation*." *Spencer v. State*, 645 So.2d 377, 385 (Fla. 1994) (emphasis added).

This Court specifically found that the trial court's finding of CCP was not supported by the evidence. Further, this Court found "that the evidence offered in support of the mental mitigating circumstances also negates the cold component of the CCP aggravator." *Id*. at 384. Finally, the trial court failed to consider "that Spencer was under the influence of extreme mental or emotional disturbance at the time the murder was committed and that his capacity to conform his conduct to the requirements of law was impaired." *Id*.

On remand, the trial court, *without empaneling a new jury*, again sentenced Spencer to death, based upon its own reweighing of the aggravation and the mitigation. *Spencer v. State*, 691 So.2d 1062 (Fla. 1997). The new death sentence was based upon the original flawed recommendation of a jury which was instructed on an aggravating factor that was not supported by the evidence. This flaw continued into his new death sentence as a result of the trial court failing to empanel a new and properly instructed jury. Spencer never waived his right to a jury and should have had a new jury empaneled to hear the evidence and make the requisite findings[9].

[9] Mr. Spencer has continuously raised these issues since his original death sentence.

The United States Supreme 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) (emphasis added). Depriving Spencer 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.

The Supreme Court has stated, as it had in *Apprendi*, 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. This Court reiterated, echoing *Apprendi*, "that any fact that expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict is an 'element' that must be submitted to [the] jury." *Hurst v. State*, 202 So. 3d 40, 51 (Fla. 2016). The trial court in Spencer's case did not do this and simply used the prior jury recommendation, tainted by the improper CCP instruction, in making its own re-evaluation of the mitigating circumstances. See *Spencer v. State*, 691 So.2d 1062 (1996). This violated Spencer's Sixth Amendment right to a jury trial.

II. Fundamental fairness requires that Spencer's death sentence be re-evaluated based on new constitutional precedent.

The equitable "fundamental fairness" retroactivity doctrine, which this Court has applied in cases such as *Mosley*[10] and *James v. State*, 615 So. 2d 668 (Fla. 1993) should be applied to Spencer. This Court has granted relief in the past to defendants based upon "changes in the law retroactively to postconviction defendants who preserved the issue for review on their direct appeal prior to the change." *State v. Silva*, 2018 WL 654715, *4 (Fla. February 1, 2018), (Lewis, J. dissenting).

In *James v. State*, 615 So.2d 668 (Fla. 1993), this Court granted relief to a defendant who had asserted at trial and on direct appeal that the jury instruction pertaining to the heinous, atrocious, or cruel aggravating circumstance was unconstitutionally vague before the United States Supreme Court ultimately reached that same conclusion in *Espinosa v. Florida*, 505 U.S. 1079 (1992). This Court concluded that despite James' case becoming final before the principle of law had been decided, "it would be unjust to deprive James of the benefit of the Supreme Court's holding in *Espinosa* after he had properly presented and preserved such a claim." *State v. Silva*, 2018 WL 654715, *4 (Fla. February 1, 2018), (Lewis, J. dissenting); *see James v. State*, 615 So.2d 668, 669 (Fla. 1993) ("[I]t would not be fair to deprive him of the *Espinosa* ruling.")

[10] *Mosley v. State*, 209 So.3d 1248 (Fla. 2016).

In *Mosley*, a majority of this Court recognized that "fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence." *Mosley v. State*, 209 So.3d 1248, 1274-75 (Fla. 2016). Mosley received the retroactive benefit from *Hurst v. State* "because Mosley raised a *Ring* claim at his first opportunity and was then rejected at every turn, we conclude that fundamental fairness requires the retroactive application of *Hurst*, which defined the effect of *Hurst v. Florida*, to Mosley." *Id*. at 1275. In *Mosley*, this Court explained that "[t]he situation presented by the United States Supreme Court's holding in *Hurst* is not only analogous to the situation presented by *James*, but also *concerns a decision of greater fundamental importance* than was at issue in *James*." *Id.* (emphasis added). This Court was correct because "the fundamental right to a trial by jury under both the United States and Florida Constitutions is implicated, and Florida's death penalty sentencing procedure has been held unconstitutional, thereby making the machinery of post-conviction relief . . . necessary to avoid individual instances of obvious injustice." *Id.* (internal quotation omitted).

This Court has not hesitated in the past to apply fundamental fairness to defendants who have properly preserved challenges before there were decisions enshrining those challenges as law. In fact, when this Court has declined to apply the rule of fundamental fairness as expounded in *James*, it has been as a result of

failures to preserve the issue for appeal. *See Glock v. Moore*, 776 So.2d 243, 254-55 (Fla. 2001) ("In *James*, however, the defendant properly raised the issue in the trial court and again on appeal. Glock, on the other hand, failed to raise the issue on appeal.")[11]. Applying fundamental fairness and retroactive effect to a defendant who has preserved the issue does not unnecessarily open the flood gates, but only grants relief to those, like Spencer, who have specifically preserved the issues. To do otherwise would not only engender an unfair and random result, but would be a violation of due process rights under the Fourteenth Amendment and the corresponding provisions of the Florida Constitution. "Due process requires that fundamental fairness be observed in each case for *each* defendant." *Gore v. State*, 719 So.2d 1197, 1203 (Fla. 1998) (emphasis added).

Further, it undercuts the importance of preservation of issues. "Preservation of the issue is perhaps the most basic tenet of appellate review, see *Steinhorst v. State*, 412 So.2d 332, 338 (Fla. 1982); and this Court should be particularly cognizant of preservation issues for capital defendants." *Hitchcock v. State*, 226 So. 3d 216, 218

[11] "In *James*, we concluded that the defendant's challenge to the heinous, atrocious, or cruel aggravator *was not barred, because he objected at trial*, while his challenge to the cold, calculated, and premeditated jury instruction was barred because James failed to register an objection thereon during the trial. *See id.; see also Clark v. Dugger*, 559 So.2d 192, 193-94 (Fla.1990) (holding that "an objection at trial is necessary to trigger ... retroactivity"); *Parker v. Dugger*, 550 So.2d 459, 460 (Fla.1989)." (same). *Walton v. State*, 847 So. 2d 438, 445 (Fla. 2003).

(Fla. 2017) (Lewis, J., concurring in result). "This preservation approach—enshrined in *James*—ameliorates some of the majority's concern with the effect on the administration of justice. Defendants, like Hitchcock, who did not properly preserve their constitutional challenges—through trial and direct appeal—forfeited them just as any other defendant who fails to raise and preserve a claim. However, those defendants who challenged Florida's unconstitutional sentencing scheme based on the substantive matters addressed in *Hurst* are entitled to consideration of that constitutional challenge." *Id*. "Vindication of these constitutional rights cannot be reduced to either fatal or fortuitous accidents of timing." *Id*. Further, "it is arbitrary in the extreme to [distinguish] between people on death row based on nothing other than the date when the constitutional defect in their sentence occurred." *Hannon v. Sec'y, Fla. Dept. of Corrs.*, 2017 WL 5177614, at *3 (11th Cir. Nov. 8, 2017) (Martin, J., concurring).

As noted above, like Mosley, Spencer raised Sixth Amendment challenges to the constitutionality of Florida's death penalty statute early and often: pretrial, on direct appeal, in his petition for writ of certiorari, in his postconviction motion, and in his state petition for habeas corpus. Spencer has consistently challenged the validity of Florida's sentencing scheme based upon the same arguments that were credited in *Hurst v. Florida, Hurst v. State* and *Perry v. State*[12]. In this case, the interests of

[12] *Perry v. State*, 210 So.3d 630 (Fla. 2016).

finality must yield to fundamental fairness. It would be fundamentally unfair and an error to ignore the Sixth Amendment infirmities in Spencer's case, especially in light of the fact that he raised pre-*Apprendi* and pre-*Ring* claims in a timely fashion and due to this Court's prior erroneous legal interpretations, was denied relief at that time. Applying the recent Sixth Amendment decisions retroactively to Spencer "in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness," and "it is fundamental fairness that underlies the reasons for retroactivity of certain constitutional decisions, especially those involving the death penalty." *Mosley* at 1282.

Petitioners who preserved the Sixth Amendment issue, the right to a jury weighing the aggravation and the mitigation and the right to a unanimous jury, "should also be entitled to have their constitutional challenges heard." *See Asay v. State*, 210 So.3d 1, 30 (Fla. 2016) (Lewis, J. concurring). "Accordingly, the fact that some defendants specifically cited the name *Ring* while others did not *is not dispositive*. Rather, the proper inquiry *centers on whether a defendant preserved his or her substantive constitutional claim* to which and for which *Hurst* applies." *Id.* (emphasis added). "Similarly, I believe defendants who properly preserved the substance of a *Ring* challenge[13] at trial and on direct appeal prior to that decision

[13] Spencer also argues that a defendant, such as himself, who preserved the substance of an *Apprendi* challenge throughout the length of his case is entitled to have those claims considered under the principle of fundamental fairness.

should also be entitled to have their constitutional challenges heard." *Hitchcock v. State*, 2017 WL 3431500 *2 (Fla. 2017) (Lewis, J. concurring)[14]. Spencer did **exactly** what Justice Lewis contemplated and preserved a pre-*Ring* Sixth and Eighth Amendment challenge, a unanimity challenge, and argued that the aggravation and the mitigation in his case should have been weighed by a jury and not a judge. He raised the issues on his direct appeals and preserved the issues in his subsequent appeals and postconviction litigation. This is the **exact** situation that should merit retroactive constitutional relief, irrespective of whether the case came before or after *Ring*. "[T]hose defendants who challenged Florida's unconstitutional sentencing scheme based on the substantive matters addressed in *Hurst* are *entitled to consideration of that constitutional challenge*." *Id*. (Emphasis added). Spencer's Sixth and Eighth Amendment challenges to his sentence deserve to be heard.

Spencer's case is a prime example of why this Court's arbitrary partial retroactivity bright line rule is erroneous. Denying relief to Spencer would fly in the face of this Court's precedent as laid out in *James* and *Mosley*. Spencer, under principles of fundamental fairness, should have his constitutional challenges heard and should be entitled to a new penalty phase.

III. Failing to apply the principle of fundamental fairness as described in

[14] Justice Lewis agreed that Hitchcock, like Asay, did not merit relief because he raised his challenges **after** *Apprendi* was decided. Spencer is different from both Asay and Hitchcock because he was making *Apprendi* and *Ring*-like challenges prior to both *Apprendi* and *Ring*.

***James* to Spencer will result in an arbitrary and capricious application of the death penalty and deny Spencer his Due Process rights under the United States Constitution and the Florida Constitution.**

Since reinstating the death penalty in *Gregg v. Georgia*,[15] the U.S. Supreme Court has barred "sentencing procedures that create [] a substantial risk that [a death sentence] would be inflicted in an arbitrary and capricious manner." 428 U.S.153, 188 (1976) (plurality opinion); *see also Gardner v. Florida*, 430 U.S. 349, 358(1977) (plurality opinion) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (recognizing the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case")[16]. Gradually, over time, juries became central to the procedures surrounding the imposition of death sentences. As the United States Supreme Court has explained:

> "[O]ne of the most important functions any jury can perform in [deciding whether to impose death in a given case] is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment would hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"

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[15] *Gregg v. Georgia*, 428 U.S. 153 (1976).

[16] *See also Zant v. Stephens*, 462 U.S. 862, 885 (1983); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion)("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.").

Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968) (quoting *Trop*[17]); *see also Atkins v. Virginia*, 536 U.S. 304, 323-24 (2002) (Rehnquist, J., dissenting) ("[T]he actions of sentencing juries, though entitled to less weight than legislative judgments, is a significant and reliable objective index of contemporary values . . . ." (quotations and citations omitted)).

Spencer was denied the benefit of a jury and these protections. Instead, the trial court compounded the original error by simply reweighing the aggravation and the mitigation – with no additional evidence- and sentenced Spencer to death again, despite the clear implication from this Court that there were doubts that the aggravation would outweigh the mitigation[18]. The trial court simply adopted the previous jury recommendation and edited its original findings to take into account the mitigating circumstances that the trial court previously ignored. Accepting this tainted and flawed death sentence, where a jury made no findings on remand, was an unacceptable rubber stamping of all of the previous errors. An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation, the juror's inability to be merciful based upon sympathy, and what aggravating factors could be found and weighed in the sentencing calculus) cannot be used as a substitute for a unanimous verdict from a properly instructed jury.

[17] *Trop v. Dulles*, 356 U.S. 86 (1958).

[18] "[W]e are not certain whether the trial court would again find that the aggravation outweighs the mitigation." *Spencer v. State*, 645 So.2d 377, 385 (Fla. 1994).

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.").

"[D]eath is a different kind of punishment from any other that may be imposed in this country," and "[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice . . . ." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). The result in Spencer's case is arbitrary and capricious, as he should have had a properly instructed jury consider the aggravation and mitigation anew and then have *the jury* conduct the weighing analysis. This failure is a violation of his Due Process and Equal Protection rights under the federal constitution and resulted in a death sentence that is arbitrary and capricious in violation of the Sixth Amendment and Eighth Amendment of the United States Constitution and the corresponding provision of the Florida Constitution. His death sentence must accordingly be vacated.

IV. Spencer's death sentence stands in violation of the Eighth Amendment and should be vacated.

There was no unanimity in the final jury recommendation for death. This was a further violation of the Florida Constitution. This Court recognized that:

> "[A]s a result of the longstanding adherence to unanimity in criminal jury trials in Florida, the right to a jury trial set forth in article I, section 22 of the Florida Constitution requires that in cases in which the penalty phase jury is

> not waived, the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury. Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final jury recommendation of death.
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> ….
>
> [B]ased on Florida's requirement of unanimity in jury verdicts and on the Eighth Amendment to the United States Constitution, a jury's ultimate recommendation of the death sentence must be unanimous."

Perry v. State, 210 So.3d 630, 633 (Fla. 2016) (internal citations removed).[19]

Spencer had a number of other rights under the Florida Constitution that are at

[19] On March 13, 2017, Chapter 2017-1, Laws of Florida, was enacted. It revised Florida's capital sentencing statute, § 921.141, Fla. Stat., to confirm that a defendant convicted of first degree murder cannot receive a death sentence unless the State convinces a unanimous jury to return a "recommendation" of death. Before it can return a unanimous death "recommendation" 2 and authorize a death sentence, the jury must first "identify[] each aggravating factor" that it has unanimously found proven beyond a reasonable doubt. See § 921.141(2)(b). Next, the jury must unanimously find beyond a reasonable doubt that the aggravators that found to exist are sufficient to justify a death sentence. Then, the jury must unanimously find beyond a reasonable doubt that the aggravators outweigh the mitigators. See § 921.141(2)(b)(2). Having made these unanimous findings, the jurors must then unanimously reject mercy in favor of a death sentence. Only if the jury returns a unanimous death verdict, can a judge under the revised § 921.141 impose a death sentence. Under the revised § 921.141, the statutory maximum sentence that can be imposed on a first degree murder conviction is one of life imprisonment. For a death sentence to be permissible, the defendant must be convicted of the next higher degree of murder, i.e. capital first degree murder. The revised § 921.141 provides for proof of the elements necessary to raise a conviction of first degree murder up to capital first degree murder to be presented at a penalty phase proceeding. But, a unanimous jury's finding that the State has proven the necessary elements beyond a reasonable doubt is functionally a verdict finding the defendant guilty of capital first degree murder.

least coterminous with the United States Constitution, and possibly more extensive. "All of the elements of a criminal offense *must be found by a jury unanimously as a matter of constitutional criminal procedure*, particularly all elements that make a defendant death eligible," *Davis v. Mitchell*, 318 F.3d 682, 688 (6th Cir. 2003) (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999) and *Ring v. Arizona*, 536 U.S. 584, 586 (2002)) (emphasis added). Failure to apply the principle of fundamental fairness to Spencer, especially where he raised a *Ring*-like claim and jury unanimity[20] at his first opportunity, would be a violation of his Due Process and Equal Protection rights under the federal constitution and would result in a death sentence that is arbitrary and capricious in violation of the Sixth Amendment and Eighth Amendment of the United States Constitution and the corresponding provision of the Florida Constitution.

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Court held that a death sentence violates the Eighth Amendment if the jury was not correctly instructed as to its sentencing responsibility. *Caldwell* held: "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id*. 328-29. Jurors must feel the weight of their sentencing

[20] "…[O]ur statute is unconstitutional because it authorizes a death verdict on the basis of a bare majority vote." TR IX:886.

responsibility; they must know that if the defendant is ultimately executed it will be because no juror exercised his or her power to preclude a death sentence.

Spencer's jury was repeatedly told its recommendation was advisory only. In order to treat a jury's advisory recommendation as binding, the jury must be correctly instructed as to its sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This means that the individual jurors must know that each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. See *Perry v. State*[21]. Indeed, because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulting death sentenced to be vacated. *Caldwell*, 472 U.S. at 341. Spencer's death sentence likewise violates the Eighth Amendment under *Caldwell*. The Court explained:

> "In evaluating the various procedures developed by States to determine the appropriateness of death, this Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State. . .. Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with—and indeed as indispensable to—the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, [428 U.S.] at 305

[21] *Perry v. State*, 210 So.3d 630 (Fla. 2016).

(plurality opinion).

> . . . .
> In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.
>
> . . . .
> This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its "truly awesome responsibility." In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. *Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires*."

Id. at 329-41 (emphasis added).

Based on this lack of reliability, the Supreme Court vacated the sentence of death. *Id*. at 341. As Justice Pariente recently pointed out, "*Caldwell*, which was decided seventeen years before *Ring*, further supports the conclusion that defendants whose sentences were imposed after a jury nonunanimously recommended a sentence of death should be eligible for *Hurst* relief to avoid unconstitutional arbitrariness and ensure reliability in imposing the death penalty." *Hamilton v. State*, No. SC 17-42, 9 (Fla. February 8, 2018) (Pariente, J. dissenting). Spencer's death sentence likewise violates the Eighth Amendment under *Caldwell*. The chances that at least one juror would not join a death recommendation if a resentencing were now conducted are likely given that proper *Caldwell* instructions would be required. The likelihood of one or more jurors voting for a life sentence increases when a jury is told a death

sentence could only be authorized if the jury returned a unanimous death recommendation and that each juror had the ability to preclude a death sentence simply by refusing to agree to a death recommendation. *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."). In Spencer's case, the State cannot prove beyond a reasonable doubt that not a single juror would have voted for life given proper *Caldwell*-compliant instructions, especially since five jurors voted originally for life.

The United States Supreme Court warned against using what was an advisory verdict to conclude that the findings necessary to authorize the imposition 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 v. Florida, 136 S. Ct. at 622. An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation, the juror's inability to be merciful based upon sympathy, and what aggravating factors could be found and weighed in the sentencing calculus) 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.").

Over and over, the United States Supreme Court and this Court have made clear that "the critical linchpin of the constitutionality of the death penalty is that it be imposed in a reliable and not arbitrary manner." *Asay v. State*, 224 So. 3d 695, 708 & n.8 (Pariente, J., dissenting) (citing *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *Glossip v. Gross*, 135 S. Ct. 2726, 2760-62 (2015) (Breyer, J., dissenting)); accord *Hurst*, 202 So. 3d at 59-60; see generally *Furman v. Georgia*, 408 U.S. 238 (1972). "[I]t is arbitrary in the extreme to [distinguish] between people on death row based on nothing other than the date when the constitutional defect in their sentence occurred." *Hannon v. Sec'y, Fla. Dept. of Corrs*., 2017 WL 5177614, at *3 (11th Cir. Nov. 8, 2017) (Martin, J., concurring). It is not constitutionally permissible to execute a person whose death sentence was imposed under an unconstitutional scheme. Spencer's death sentence should be overturned and remanded for a new penalty phase.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, this Court should order that his sentence be vacated and remand the case for a new penalty phase, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Scott Browne, Scott.Browne@myfloridalegal.com, capapp@myfloridalegal.com, on this 26th day of February, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Response to Order to Show Cause, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100.

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