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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Any claims not specifically argued herein are not waived, and Spencer relies on the merits of his Initial Brief.

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's claim that he was denied his Constitutional right to a jury trial under the Sixth Amendment is not procedurally barred.

First, the State's misconstrues or misunderstands: (1) the grievousness of having a jury consider an unsupported aggravating factor; and (2) the importance of each jury finding that is necessary before a defendant becomes eligible for death. The State summarizes the error found on direct appeal in this case as simply "a trial court error" for failing to properly assess and weigh the CCP aggravator and the mental health mitigation. State's Answer Brief at 5-6. The State contends that Spencer's penalty phase jury "was not prevented from hearing or assessing any proposed mitigating evidence…the judge reevaluated the evidence [and]…there was simply no reason to empanel a new penalty phase jury" *Id.* at 6. This completely misses the point. The

failure to empanel a new penalty phase jury was error. Spencer's original penalty phase jury was instructed on an improper, and weighty, aggravating factor. There is simply no way to now determine whether that had any effect on Spencer's jury recommendation. It was the *jury*'s responsibility, after the striking of the CCP aggravator, to consider and weigh the remaining aggravating and mitigating factors. Spencer's jury recommendation was 7-5. Without the CCP aggravator, there is no way to determine if one less aggravating factor would have tipped the scales toward a life recommendation. The State cannot prove beyond a reasonable doubt that the jury would have again returned a death recommendation. This Court held: "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 is not proof beyond a reasonable doubt.

Additionally, 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.

Second, the State fails to address that 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 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.

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 v. State*, 615 So. 2d 668 (Fla. 1993), 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."). 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). Spencer, as the State acknowledges in its Answer Brief, has continuously raised and preserved Sixth Amendment challenges. State's Answer Brief at 4-5. As such, he cannot now be barred from relief.

The State wholly fails to address the argument that denying Spencer relief 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 (Fla. 2017) (Lewis, J., concurring in result). Petitioners who preserved the Sixth Amendment issue, "should also be entitled to have their constitutional challenges heard." *See Asay v. State*, 210 So.3d 1, 30 (Fla. 2016) (Lewis, J. concurring). Spencer 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*. Spencer's Sixth and Eighth Amendment challenges to his sentence deserve to be heard.

Lastly, the State misunderstands the number and importance of each jury finding that is necessary before a defendant becomes eligible for a death sentence. The State contends that Spencer "became eligible for a death sentence given the guilt phase convictions for contemporaneous violent felonies." State's Answer Brief at 8. This is a misstatement of the law. In Florida, capital defendants do not become death eligible until and unless a unanimous jury finds: any aggravating factors beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, *and* that the aggravating factors outweigh any mitigating circumstances. This Court has held that:

> all the critical findings necessary before the trial court *may consider* imposing a sentence of death must be found unanimously by the jury….In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances.

Hurst v. State, 202 So. 3d 40 (Fla. 2016) (emphasis added). At that point, a defendant is death eligible but *the jury is still never required to impose death*. None of these elements were ever found by any jury in Spencer's case.

A capital defendant does not become death eligible simply based on the jury's guilt phase verdicts. The State's case citations are misleading and not relevant on this point.

The State cited *Jenkins v. Hutton*, 137 S. Ct. 1769, 1770 (2017), reh'g denied, 138 S. Ct. 43 (2017), for the proposition that a death sentence could be based on a jury's guilt-phase determination of facts. State's Answer Brief at 8. However, this is a misrepresentation of that case. In *Jenkins*, "an Ohio jury convicted Hutton of aggravated murder, attempted murder, and kidnaping. In connection with the aggravated murder conviction, *the jury made two additional findings*: that Hutton engaged in 'a course of conduct involving the ... attempt to kill two or more persons,' and that Hutton murdered Mitchell while 'committing, attempting to commit, or fleeing immediately after ... kidnapping.'" *Id*. at 1770 (emphasis added). Thus, a guilt phase jury in Ohio makes not only guilt-phase determinations, but also *additional aggravating factor determinations*, unlike Florida, which reserves those findings for a separate penalty phase. The State's argument was also expressly rejected by the Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616, 622-23 (2016), and by this Court in *Pagan v. State*, -- So. 3d. -- 2018 WL 654450, at *1 (Fla. Feb. 1, 2018) ("In considering whether the error was harmless, we decline the State's invitation to model our *Hurst* harmless error analysis after the Supreme Court's recent analysis of procedural default in *Jenkins v. Hutton*, ——U.S. ——, 137 S.Ct. 1769 (2017)).

II. Spencer's remaining claims are not foreclosed or untimely.

This Court's existing precedent does not foreclose relief to Spencer. 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). Spencer is simply asking this Court to apply its own precedent to him.

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*, 210 So.3d 630 (Fla. 2016). In this case, the interests of 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*[1] 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 at trial and on direct appeal prior to that decision should also be entitled to have their constitutional challenges heard." *Hitchcock v. State*, 226 So. 3d 216, 218 (Fla. 2017) (Lewis, J. concurring). Spencer did **exactly** what Justice Lewis contemplated and preserved a pre-*Ring* Sixth and Eighth Amendment challenge, a

[1] *Apprendi v. New Jersey*, 539 U.S. 466 (2000).

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.

Lastly, the State relies on *Hamilton v. State,* -- So. 3d -- 2018 WL 773977 (Fla. Feb. 8, 2018), for the proposition that Spencer's successive motion was untimely. Spencer's successive motion for postconviction relief was not untimely under Rule 3.851. Like Spencer, after both *Hurst* decisions but before decisions on retroactivity were issued, numerous capital defendants filed successive postconviction motions based on those decisions. Yet, relief was granted. *See Matthews v. State,* Circuit Court No. 2008-CF-

030969, Volusia County, FL; *Martin v. State*, Circuit Court No. 2009-CF-014374, Duval County, FL; *Calhoun v. State*, Circuit Court No. 2011-CF-000011, Holmes County, FL; and *Rigterink v. State*, Circuit Court No. 2003-CF-006982, Polk County, FL. Denying Spencer similar relief amounts to an irregular application of state procedural grounds which is not a valid basis to bar appellate review. *See Ford v. Georgia*, 498 U.S. 411, 424 (1991); *Johnson v. Mississippi*, 486 U.S. 578, 587-89 (1988); *James v. Kentucky*, 466 U.S. 341, 345-49 (1984); *Barr v. City of Columbia*, 378 U.S. 146, 149-50 (1964); *Staub v. Baxley*, 355 U.S. 313, 318-320 (1958) (citing the seminal cases of *Ward v. Board of County Com'rs of Love County, Okl.*, 253 U.S. 17 (1920), and *Davis v. Wechsler*, 263 U.S. 22 (1923)); *Williams v. Georgia*, 349 U.S. 375, 382-89 (1955), reaffirmed in *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964) (per curiam). Further, applying state procedural grounds in a novel or unpredictable manner also cannot be a basis to bar appellate review. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 454-458 (1958); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-302 (1964). Therefore, since similarly filed successive motions were held to be timely and granted, Spencer's successive motion must also be considered timely.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, this Court should order that Spencer's sentence be vacated and remand his 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 22nd day of March, 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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