No. 17-1603

IN THE

Supreme Court of the United States

WILLIAM HAROLD KELLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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August 9, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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As we demonstrated in our petition, the Florida Supreme Court created two cohorts of death-sentenced prisoners and then perversely granted relief to *only* the cohort that was demonstrably less deserving. Respondent has not refuted this showing or even attempted to address it, but this indisputable fact goes to the heart of this case.

If this is a unique situation, it is so only because the Florida Supreme Court's novel partial retroactivity scheme for administering death is so far-fetched that no other state has tried it – yet. This epitomizes the kind of arbitrary and capricious infliction of the death penalty that this Court has unequivocally condemned. Further, the history of this penalty is peppered with one inappropriate, arbitrary application after another, so the persistence of arbitrariness is hardly a one-off. It is time now for this Court to use the more than suitable vehicle of this case to state unequivocally that the promulgation of such manifestly arbitrary schemes, however novel, must come to an end.

Respondent nonetheless calls this a poor vehicle for resolving the question presented. BIO 13. It is not a poor vehicle. The question is clearly and cleanly posed, and the fact that the form of arbitrariness now inflicted by Florida's highest court has yet to be imposed by other states is a reason to regard its imposition on this petitioner as more, not less, egregious. In any event, Respondent's actions speak louder than its words. It is revealing that numerous petitions have been filed in this Court

raising essentially the question presented here, but Florida's Solicitor General has chosen to appear only in this case. This choice speaks volumes. It strongly suggests the Solicitor General sees this as we do – as presenting serious issues warranting a very close look – the precise reason we believe this case presents the best vehicle to review and resolve the question presented. This Court should grant review and take this opportunity to reject Respondent's callous invitation to just look away while Kelley is put to death on a manifestly arbitrary basis.

1. Respondent wrongly proposes that, if Florida has the greater power to deny all retroactive effect to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) ("*Hurst II*"), it also has the lesser power to craft *any* partial retroactivity rule for *Hurst II* that it sees fit, simply invoking a generality about the "important state interest in finality of convictions," BIO 12, to justify drawing whatever line Florida's highest court chose to draw. If Respondent were right, it would be free to impose retroactivity cutoffs drawn coinciding with the date of the last lunar eclipse, or extending only to prisoners who were tried in the Florida Panhandle, or available only to Capricorns.

Despite superficial appearances, the line actually drawn by the Florida Supreme Court in this case is no less arbitrary – a line drawn in terms of whether a capital defendant's conviction became final before or after June 24, 2002, which happens to be the date this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), but might as well have been the date this Court decided any other case that adjudicated a particular aspect of another state's specific statutory

sentencing scheme. Tellingly, Respondent spent years arguing that *Ring* was completely inapposite to Florida's sentencing scheme and, even today, Respondent stresses that *Ring* "did not address [] 'hybrid' capital sentencing procedures, like Florida's, in which the judge decides the ultimate sentence but the jury has an advisory role." BIO 2.

Respondent's embrace of the "important state interest in finality of convictions," BIO 12, is a strange justification for the unprecedented rule announced by the Florida Supreme Court. Unlike a decision to apply *Hurst II only prospectively*, which would have denied its effect to all sentences that were final at the time of that decision, the partial retroactivity rule concocted by the Florida Supreme Court offends equal protection principles by drawing an arbitrary dividing line between similarly situated prisoners, all of whom have *equally final convictions and death sentences* under an equally unconstitutional sentencing scheme. This novel rule of partial retroactivity does not honor an "important state interest in finality of convictions," but instead favors some final convictions and death sentences over others.

Against that backdrop, Respondent offers no response whatever to Kelley's key point that "inmates whose death sentences became final before *Ring* are more likely than their post-*Ring* counterparts to have been sentenced under standards and practices in death penalty cases that would not support a capital sentence today." Pet. 4. Strikingly, Respondent nowhere denies that "the cutoff date chosen by the [Florida] court . . . increases the probability that

death will be imposed on the prisoners least deserving of death and with more compelling cases for relief." BIO 12 (quoting Pet. 4); *see* Brief of Retired Florida Judges and Jurists as *Amicus Curiae*, *Branch v. Jones*, No. 17-7758, 2018 WL 949750 at *10 (U.S. Feb. 2018) ("Worse, the temporal cut-off is often inversely connected to culpability because it disproportionately singles out for the denial of relief many cases that would not be thought death-worthy today.").

Respondent's conspicuous silence leaves intact Kelley's showing that the dividing line in question is not merely arbitrary and capricious but *positively perverse*. It would be like a line between those whose juries found several aggravating circumstances and those whose juries found just one aggravating circumstance, denying the class with just one aggravating circumstance the benefit of partial retroactivity while bestowing that benefit on the class with multiple aggravating circumstances.

2. Respondent also stretches another principle beyond recognition. Respondent says that states are free to provide greater protection to criminal defendants than the United States Constitution requires. BIO 21. Nobody disputes that. But it does not logically follow that states can provide such greater protection to criminal defendants willy-nilly, *if* the set of defendants afforded that greater protection is defined in a manner that arbitrarily denies that greater protection to another class of more deserving criminal defendants – a class that differs from the benefited class in no way relevant to the legitimate interests of the state. The general

principle that the United States Constitution provides the floor but not the ceiling for constitutional protections provides no cover for the State of Florida to pick and choose arbitrarily, capriciously, and perversely.

Danforth v. Minnesota, 552 U.S. 264 (2008), and *California v. Ramos,* 463 U.S. 992 (1983), BIO 21, are not to the contrary. Although both cases enunciate the basic principle that states may require more protection be afforded to criminal defendants than the United States Constitution would mandate, neither addresses or implicates the exclusion of a more deserving class or a partial retroactivity scheme remotely like the one at issue in this case.

3. Respondent also advances the flawed assumption that Kelley would not benefit from the relief he seeks. Respondent's primary basis for this argument is its suggestion that *Hurst II* was wrongly decided. BIO 14. Its continued disagreement with the Florida Supreme Court's *Hurst II* decision should, Respondent says, forestall any consideration of Kelley's narrow argument here. *Id.*

That is not so. Kelley's argument does not turn on the correctness of any particular aspect of *Hurst II*; it turns on the even-handed and non-arbitrary application of *Hurst II*. To be clear, Kelley's argument is not that *any* aspect of *Hurst II must* be applied retroactively to all death-sentenced inmates as a matter of federal constitutional law. Rather, Kelley asserts only that, *once* retroactive application of *Hurst II* is made available by the State of Florida, it

cannot be withheld from an arbitrarily singled-out subset such as the pre-*Ring* class.

Respondent's suggestion that this Court should wait for a later day to reach this issue is far from modest. As Respondent must be aware, that later day may never come. And it most certainly would not come in time to be relevant to Kelley, who would in all likelihood be dead by then. Indeed, in making its argument, there are three critical facts that Respondent fails to mention.

First, Florida has adopted a new sentencing statute, Fla. Stat. § 921.141 (2017), in the wake of *Hurst II*. That statute governs, at a minimum, any new sentencings or resentencings after March 13, 2017. The statute requires unanimity by the penalty-phase jury. So, whether *Hurst II* was correct or not as to the scope of this Court's ruling in *Hurst v. Florida*, 136 S. Ct. 616 (2016), or the requirements of the federal constitution related to the unanimity of the penalty-phase jury, the Florida Legislature has now enacted much of *Hurst II* as a new sentencing statute. Respondent's point of entry or incentive to challenge *Hurst II* in this Court is certainly questionable now that the Florida Legislature has independently implemented key aspects of *Hurst II*.

Second, Florida death sentences are being vacated and remanded for new penalty-phase proceedings on a regular basis because of *Hurst II* for the class of death-sentenced inmates with sentences that became final after *Ring* but before *Hurst II*. *See, e.g., Pagan v. State*, 235 So. 3d 317 (Fla. 2018); *Ellerbee v. State*, 232 So. 3d 909 (Fla. 2017); *Gregory*

v. State, 224 So. 3d 719 (Fla. 2017); *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017); *Ault v. State,* 213 So. 3d 670 (Fla. 2017); *Durousseau v. State*, 218 So. 3d 405 (Fla. 2017). That is, the partially retroactive application of *Hurst II* is well under way. It appears that Respondent has largely acquiesced in the reality of *Hurst II* on the ground. Again, it is not clear what, if any, point of entry Respondent envisions for further challenging *Hurst II* now that its partial retroactivity rule has been implemented.

Third, Respondent is certainly aware that most death-sentenced inmates in Kelley's pre-*Ring* class are traveling on a similar timetable. In 2017, the Florida Supreme Court entered stays in over 100 capital proceedings, including Kelley's, in which *Hurst* claims were raised. These stays were shortly followed by orders to show cause why the proceedings should not be dismissed in the light of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). Then, in January 2018, the Florida Supreme Court denied relief in those cases, including Kelley's, on the basis of *Hitchcock*. Many certiorari petitions in this Court have been filed in these cases over the past few months. The issue is now clearly framed up for the Court. Because a large portion of Kelley's pre-*Ring* class is traveling on the same timetable, that cohort's time for filing a petition for certiorari on this issue in this Court is now, if ever. After this wave of certiorari petitions is resolved, there may not be many, if any, remaining members of the pre-*Ring* class with a timely point of entry to seek certiorari from a Florida Supreme Court order denying relief.

This case accordingly presents the Court with what may be its best and possibly last opportunity to address squarely and decisively the federal constitutionality of the Florida Supreme Court's arbitrary imposition of a partial retroactivity rule. There are no impediments to reaching the question raised. Given the facts detailed above as to what is happening in Florida, there is every reason to believe that a ruling from this Court that Florida's bizarrely novel rule of partial retroactivity violates the Eighth and Fourteenth Amendments would lead directly to relief for Kelley.

4. Respondent also attempts in vain to justify the use of *Ring* as a partial retroactivity dividing line for the *Hurst II* unanimity ruling implicating Eighth Amendment principles. BIO 22-23. *Ring* was decided on Sixth Amendment grounds. Yet, the important unanimity ruling in *Hurst II* cited Eighth Amendment principles. It is all the more arbitrary to use the date that *Ring* was decided as the partial retroactivity cutoff for the Eighth Amendment ruling that appeared for the first time in *Hurst II*. Pet. 21 (The Florida Supreme Court "also used *Ring* as the partial retroactivity cutoff for its own *Hurst II* decision based on Eighth Amendment requirements, which manifestly was *not* prefigured by *Ring*."). Respondent nonetheless says that the court's Eighth Amendment ruling "turned as much on *Ring* as the court's Sixth Amendment holding." BIO 22. *Ring*, however, had nothing to say about the Eighth Amendment.

In fact, far from arguing that the Eighth Amendment ruling in *Hurst II* was dictated by the

Ring decision, Respondent actually argues (at an earlier point in its opposition) that the Eighth Amendment unanimity ruling in *Hurst II conflicts* with this Court's precedents. BIO 14. Thus, the use of *Ring* as a partial retroactivity cutoff for the *Hurst II* Eighth Amendment ruling is particularly arbitrary.

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The Florida Supreme Court's novel partial retroactivity rule arbitrarily denies Kelley and approximately 160 other Death Row prisoners in his pre-*Ring* class the benefits of this Court's *Hurst* ruling, which struck down Florida's capital sentencing statute.

Respondent notes the absence of a conflict between this partial retroactivity ruling and any other rulings of the federal Courts of Appeals or state courts of last resort. BIO 10. The presence of a square conflict is, to be sure, the most common ground for granting certiorari. But it has never been the *only* ground. And the absence of a conflict should, both as a matter of basic fairness and as an institutional matter, not lead to denying a hearing when that absence reflects not uniformity in the law or settled precedent but, rather, the utter novelty of the arbitrary rule crafted by a state's highest court.

Just as the Eighth Amendment's ban on "cruel and *unusual*" punishments treats the very novelty of a penalty scheme as a reason to view it with constitutional suspicion, so the case for granting review here is strengthened by the fact that neither party in this case has been able to identify another state-created partial retroactivity rule, much less one

in a capital setting where there is a constitutional imperative: "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *see Furman v. Georgia*, 408 U.S. 238 (1972).

As was also the situation in *Hurst* itself, this case presents an important question of constitutional law that should be reviewed now. *See* Sup. Ct. R. 10(c). And, as noted above, many similar petitions from the pre-*Ring* class necessarily are being filed contemporaneously, diminishing the chances that this question will be presented time after time in the future. In sum, if this question is not reviewed now, the Florida Supreme Court's novel and arbitrary scheme likely will result in the execution of dozens of Florida prisoners under an unconstitutional sentencing scheme, while other prisoners with convictions equally final long before *Hurst* will avoid the infliction of that penalty.

By granting a writ of certiorari now, this Court can resolve important questions of federal constitutional law before this wave of cases enters the realm of federal collateral review on this issue. The interests of sound and orderly judicial administration favor immediate review.

Finally, the principle at stake – that retroactive application of state court rulings determining who will be put to death cannot arbitrarily exclude groups of inmates who are not relevantly distinguishable from those that are included – is a principle of

profound significance to the consistency of the entire capital punishment regime with the rule of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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