No. 17-7758

IN THE

Supreme Court of the United States

ERIC SCOTT BRANCH,

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 WITH AN EXECUTION SCHEDULED FOR THURSDAY, FEBRUARY 22, 2018, AT 6:00 P.M.

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I. Respondent Erroneously Believes that the Florida Supreme Court's Retroactivity Ruling is Immune from this Court's Scrutiny

This Court has jurisdiction to review the Florida Supreme Court's *Hurst* retroactivity framework. Respondent's argument that "[t]his Court lacks the authority" to review the Florida Supreme Court's *Ring*-cutoff formula is premised on the erroneous belief that the state supreme court's framework is immune from this Court's Eighth Amendment, Fourteenth Amendment, and Supremacy Clause scrutiny. *See* Brief in Opposition ("BIO") at 15-17; *see also id.* at 3 n.1.

From Respondent's perspective, so long as the retroactivity scheme is articulated as a matter of state law, this Court would lack jurisdiction to consider state retroactivity cutoffs drawn at the date of the nation's bicentennial, or the date of the last lunar eclipse, or the date of the state governor's fortieth birthday. This Court would also lack jurisdiction to review state rules providing retroactivity to prisoners who are atheists but not to Christian prisoners, prisoners who are over 6 feet tall versus shorter prisoners, and so on.

Respondent's jurisdictional position is based on a confused reading of this Court's adequate-and-independent-state-ground precedent. While "[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is *independent of the federal question* and adequate to support the judgment," *Coleman v. Thompson*, 501 U.S. 722 (1991) (emphasis added), this does not mean that all state court rulings that claim a state-law basis are immune from this Court's constitutional review. A state court ruling is deemed "independent" only when it has a state-law basis for the denial of a federal

constitutional claim that is separate from "the merits of the federal claim." *Foster v. Chapman*, 136 S. Ct. 1737 (2016); *see also Florida v. Powell*, 559 U.S. 50, 56-59 (2010); *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983). Otherwise, this Court would have lacked jurisdiction in *Hurst* itself, given the Florida Supreme Court's upholding of Florida's prior capital sentencing scheme as a matter of state law.

To avoid a confused understanding such as Respondent's, this Court has offered a simple test in the form of a question: Would this Court's decision on the federal constitutional issue constitute an advisory opinion, i.e., would the result be that "the same judgment would be rendered by the state court after [this Court] corrected its views of federal laws"? *Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985). In the case of the Florida Supreme Court's *Hurst* retroactivity formula, the answer plainly is "no." If this Court were to hold that the *Ring*-based cutoff violated the Constitution, the Florida Supreme Court could not re-impose its prior judgment.[1]

II. Respondent Does Not Defend the Florida Supreme Court's Rationale for Drawing a *Hurst* Retroactivity Cutoff at *Ring*

Respondent provides no defense of the Florida Supreme Court's rationale for drawing a *Hurst* retroactivity cutoff at *Ring*. While defending rules of non-retroactivity generally, *see* BIO at 22-23, Respondent does not attempt to explain why the particular line drawn by the Florida Supreme Court at the 14-year-old decision

[1] As an aside, Petitioner also notes that Respondent's "jurisdictional argument" is undercut by the fact that the state retroactivity doctrine, according to the Florida Supreme Court, was adopted from a federal retroactivity test. *See Asay v. State*, 210 So. 3d 1, 16 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016) (both citing *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965)).

in *Ring*—which was about Arizona's, not Florida's, capital sentencing scheme—serves a legitimate purpose or is in accord with the Eighth Amendment's prohibition against arbitrary and capricious capital punishment and the Fourteenth Amendment's guarantee of equal protection.

Respondent's silence is particularly striking in light of the amicus curiae brief of retired Florida Justices and Judges filed in support of granting certiorari. These respected former jurists of the Florida Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and Florida trial courts, agree with Petitioner's argument that the Florida Supreme Court's *Hurst* retroactivity formula is inconsistent with the Eighth and Fourteenth Amendments. They urge this Court to act so as to avoid a prolonged injustice. Dissenting current members of the Florida Supreme Court have also explained that Petitioner's argument is correct. *See* Petition at 19-20 (discussing the dissenting opinions of Justices Lewis and Pariente); *id.* at 8 (discussing Justice Pariente's separate opinion in this case). However, Respondent's brief does not attempt to defend the cut-off formula.

III. Respondent's Brief Highlights the Certiorari-Worthiness of the Questions Presented

Respondent's arguments actually highlight, rather than diminish, the certiorari-worthiness of the questions presented. The State of Florida here takes the extreme position that the Eighth and Fourteenth Amendments do not operate where a state court creates a rule of retroactivity under state law, no matter where the cutoff is drawn and no matter why similarly-situated prisoners are separated into classes. *See* BIO at 15-17, 21-23. In response to the arguments of Petitioner and a chorus of

former Florida jurists and current dissenting Florida Justices concerning the unconstitutionality of the *Ring*-based cutoff formula, Respondent provides no argument defending the cutoff as a rational point at which to draw a line. As for Respondent's position regarding *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), Respondent asserts that the *Hurst* decisions cannot have announced rules that should be applied retroactively because "[t]he right to a jury trial is procedural, not substantive," no matter what the jury is deciding or why the decision-making is imparted to a jury. BIO at 25; *but see* Petition at 25-32 (discussing *Montgomery*).

Respondent notes the absence of a conflict between the Florida Supreme Court's retroactivity formula and those of other states. *Id.* at 18. But the reason for this is that the cutoff formula devised by the Florida Supreme Court is an extreme outlier among American retroactivity rulings. Neither party in this case has been able to identify another state-created "partial retroactivity" rule, much less a rule that imposes a cutoff based not on the date of a conviction's finality relative to the actual constitutional decision of this Court, but on the conviction's finality relative to the date this Court rendered some other decision years earlier in a case from another state. Nor is it conceivable that such a rule can exist in the capital setting, where there is a constitutional responsibility to avoid "the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). If left not reviewed, the Florida Supreme Court's out-of-step framework may result in the unconstitutional execution of dozens of Florida prisoners.

The Court should stay Petitioner's execution and grant a writ of certiorari to review the decision below.

Respectfully submitted,

/s/ Billy H. Nolas

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