No. 17-9375

IN THE

Supreme Court of the United States

DONALD DAVID DILLBECK,

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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I. Respondent Incorrectly Asserts that the Florida Supreme Court's *Hurst* Retroactivity Cutoff is Immune From this Court's Review

Contrary to Respondent's suggestion, this Court has jurisdiction to review whether the *Hurst* retroactivity cutoff created by the Florida Supreme Court is consistent with the United States Constitution. In suggesting that the Florida Supreme Court's *Ring*-based retroactivity cutoff is immune from this Court's review, Respondent misreads the adequate-and-independent-state-ground doctrine, which is inapplicable here. *See* Brief in Opposition ("BIO") at 10.

Although "[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), this does not mean that all state court rulings that claim a state-law basis are immune from this Court's federal constitutional review. A state court ruling is "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. Chatman*, 136 S. Ct. 1737, 1759 (2016); *see also Florida v. Powell*, 559 U.S. 50, 56-59 (2010); *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983).

The federal question here is whether the Florida Supreme Court's *Ring*-based retroactivity cutoff for *Hurst* claims violates the Eighth and Fourteenth Amendments to the United States Constitution. The Florida Supreme Court's application of its state-law *Ring*-based cutoff to Petitioner cannot be "independent" from Petitioner's federal Eighth and Fourteenth Amendment claims. The state court's ruling is

inseparable from the merits of the federal constitutional arguments Petitioner has raised throughout this litigation. *See Foster*, 136 S. Ct. at 1759.

Under Respondent's mistaken interpretation of the adequate-and-independent doctrine, this Court could not have granted certiorari in *Hurst* itself, given the Florida Supreme Court's upholding of Florida's prior capital sentencing scheme as a matter of state law. According to Respondent's logic, so long as any state retroactivity scheme is articulated as a matter of state law, this Court is powerless to consider cutoffs drawn at *any* arbitrary point in time, or even state rules providing retroactivity to defendants of certain races or religions but not others.

To avoid a confused understanding such as Respondent's, this Court has offered a simple test to determine whether a state ruling rests on adequate and independent state grounds: would this Court's decision on the federal constitutional issue be 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 is "no." If this Court were to hold that the *Ring*-based cutoff violated the Constitution, the Florida Supreme Court surely could not re-impose its prior judgment denying relief based on the *Ring* cutoff.[1]

[1] Petitioner also notes that Respondent's adequate-and-independent 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)).

Respondent wrongly reads *Danforth v. Minnesota*, 552 U.S. 264 (2008), as authorizing the kind of immunity from federal review that Respondent believes the Florida Supreme Court's *Ring* cutoff is due. *See* BIO at 10-11. Respondent observes that *Danforth* ruled "states are free to retroactively apply a case more broadly than the federal courts would," but Respondent omits the fact that the state rule in *Danforth* afforded *full* retroactivity and therefore did not implicate the arbitrariness of a retroactivity cutoff. The fallacy of Respondent's *Danforth* argument is apparent when a question such as this is posed: Would there be any doubt that this Court had the authority to review a state rule that provided retroactivity to white defendants but not black defendants, even though such a rule would, in Respondent's reading of *Danforth*, extend retroactivity "more broadly" than providing no retroactivity at all? This Court would have jurisdiction to consider such a rule as a matter of the Eighth and Fourteenth Amendments.

Whether the Florida Supreme Court's retroactivity cutoff exceeds the bounds of the Eighth and Fourteenth Amendments is a federal question controlled by federal law. This Court should grant a writ of certiorari to review that issue.

II. Respondent's Brief Highlights the Florida Supreme Court's Continued Failure to Meaningfully Address Whether its *Ring*-Based Cutoff Violates the Eighth and Fourteenth Amendments

Respondent reiterates the Florida Supreme Court's original rationale for creating the *Ring*-based retroactivity cutoff as a matter of state law, *see* BIO at 8-9, but fails to identify a case in which the Florida Supreme Court has meaningfully addressed whether its cutoff violates the Eighth and Fourteenth Amendments.

Respondent's insistence that *Asay v. State*, 210 So.3d 1 (Fla. 2016), and *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), addressed Petitioner's federal constitutional arguments, *see* BIO at 11-13, is wrong because *Asay* and *Mosley*, issued on the same day in 2016, created the state-law *Ring* cutoff in the first place. Neither case discusses the Eighth and Fourteenth Amendment arguments Petitioner has raised.

Contrary to Respondent's suggestion, the Florida Supreme Court's subsequent decision in *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017), did no more to address the *Ring* cutoff's federal constitutional implications, as *Hitchcock* said little more than *Asay* and *Mosley* had continuing validity of as a matter of state law.

In Respondent's flawed view, because the Florida Supreme Court provided at least *some* rationale in *Asay* and *Mosley* for creating the *Ring* cutoff, the Eighth and Fourteenth Amendments have not been violated. But as Respondent's own brief shows, the rationale provided by the Florida Supreme Court in *Asay* and *Mosley*—in essence, *Ring* was the point at which Florida's courts *should have known* that Florida's scheme was unconstitutional, *see Mosley*, 209 So. 3d at 1279-81; *Asay*, 210 So.3d at 15-16—was based entirely on a *state* retroactivity analysis. The state court's "should have known" rationale has no basis in federal retroactivity law and does not immunize the *Ring* cutoff from Eighth and Fourteenth Amendment scrutiny.

Respondent is also wrong that Petitioner's arguments have been implicitly rejected by prior decisions upholding *traditional* retroactivity rules. *See* BIO at 17-19. This argument fails to recognize the unusual nature of the Florida Supreme Court's rule, which grants relief *on collateral review* to some but not others.

Traditional retroactivity rules draw a cutoff at the date this Court announced the relevant constitutional ruling. As Petitioner recognized, such lines have been deemed acceptable. Here, however, the Florida Supreme Court has drawn its retroactivity line at a date years earlier than *Hurst*. This unusual and perhaps unprecedented line drawing by a state court warrants this Court's federal constitutional review.

III. Respondent's Brief Actually Supports, Rather than Diminishes, the Certiorari-Worthiness of the Questions Presented

Respondent's arguments in its brief in opposition demonstrate the certiorari-worthiness of the questions presented. Respondent takes the 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. Respondent provides no relevant defense of the Florida Supreme Court's decision to set a retroactivity cutoff that separates collateral-review cases into two categories for different treatment is acceptable under this Court's Eighth and Fourteenth Amendment precedents, or the decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

Respondent emphasizes the absence of a conflict between the Florida Supreme Court's retroactivity formula and those of other states and federal appellate courts. *See* BIO at 23-24. But this is only because no other state or federal court has created a partial retroactivity rule, much less a rule that imposes a cutoff based not on the date of a conviction's finality relative to the implicated constitutional decision of this Court, but rather on the conviction's finality relative to the date this Court rendered some other decision years earlier in a case from another state. Neither party in this

case has been able to identify another example of a 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).

That is why former jurists of the Florida Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and Florida's trial courts, as well as respected legal academics, have urged this Court to address the important federal constitutional issues regarding the Florida Supreme Court's *Hurst* retroactivity framework. *See*, *e.g.*, Brief for Amicus Curiae, Retired Florida Judges and Jurists, *Branch v. Florida*, 138 S. Ct. 1164 (filed Feb. 15, 2018); *see also* Petition for Writ of Certiorari, *Kelley v. Florida*, Case No. 17-1603 (filed May 25, 2018) (Lawrence Tribe, Counsel of Record). Dissenting current members of the Florida Supreme Court have also explained that Petitioner's arguments have merit. *See* Pet. at 18-19 (discussing dissenting opinions of Justices Lewis and Pariente); *id.* at 7 (discussing Justice Pariente's separate opinion in this case).

If this Court does not act, the Florida Supreme Court's out-of-step framework may result in the unconstitutional execution of Petitioner and other Florida prisoners

in the "pre-*Ring*" category. This Court should grant a writ of certiorari in Petitioner's case to address these issues now.

Respectfully submitted,

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