No. 17-9386

IN THE

Supreme Court of the United States

DONALD BRADLEY,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

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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 Unreviewable By This Court

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 this Court lacks jurisdiction because "the Florida Supreme Court's denial of retroactive application to Petitioner is based on adequate and independent state grounds," Respondent misreads the adequate-and-independent-state-ground doctrine, which does not present a barrier to review here. *See* Brief in Opposition ("BIO") at 1, 6-7.

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 state court rulings that claim a state-law basis are always 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. Chapman*, 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, particularly as applied to a post-*Apprendi* death sentence like Petitioner's, 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 thus 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 claim. *See Foster*, 136 S. Ct. at 1759.

Under Respondent's faulty view of the adequate-and-independent doctrine, 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. Indeed, according to Respondent's logic, so long as a state retroactivity scheme is articulated as a matter of state law, this Court would lack jurisdiction to consider state retroactivity cutoffs drawn at *any* arbitrary point in time, such as the governor's birthday or the date of the last lunar eclipse.

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 plainly is "no." If this Court were to hold that the *Ring*-based cutoff violated the Constitution—facially or as applied to post-*Apprendi* death sentences like Petitioner's—the Florida Supreme Court surely could not re-impose its prior judgment denying relief based on the *Ring* cutoff.[1]

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[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)).

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, Particularly as Applied to Post-*Apprendi* Death Sentences Like Petitioner's

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 6-12, but fails to identify a case in which the Florida Supreme Court has meaningfully addressed whether its cutoff violates the Eighth and Fourteenth Amendments, particularly as applied to post-*Apprendi* death sentences like Petitioner's. 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 10-13, 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.

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.

Moreover, the Florida Supreme Court's purported rationale in *Mosley* and *Asay* for not applying *Hurst* to the small number of defendants who were sentenced between *Apprendi* and *Ring* is belied by its own pre-*Ring* decisions rejecting *Apprendi* claims in the context of Florida's capital sentencing scheme, which provided different rationales for denying relief. In fact, in rejecting pre-*Ring* claims under *Apprendi*, the Florida Supreme Court often provided a similar explanation as was later offered in support of rejecting *Ring* claims: *Apprendi* does not apply in Florida. *See*, *e.g.*, *Mills v. Moore*, 786 So. 2d 532, 537 (Fla. 2001); *Cox v. State*, 819 So. 2d 705, 724 (Fla. 2002); *Sireci v. Moore*, 825 So. 2d 882, 888 (Fla. 2002).

And importantly, neither *Asay* nor *Mosley* involved defendants with death sentences that became final between *Apprendi* and *Ring*. Any implicit rationale Respondent believes the Florida Supreme Court provided in *Asay* and *Mosley* regarding why the retroactivity line should be drawn at *Ring* rather than *Apprendi*, thus constitutes dicta. And, as Petitioner has explained, the Florida Supreme Court has never specifically addressed in any subsequent case why a retroactivity rule that grants *Hurst* relief to dozens of post-*Ring* prisoners, while denying relief to the handful of prisoners whose death sentences became final during the two-year period between *Apprendi* and *Ring*, complies with the Eighth and Fourteenth Amendments.

Respondent is also wrong that Petitioner's arguments have been implicitly rejected by prior decisions upholding *traditional* retroactivity rules. 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, which works a particularly stark injustice in cases like Petitioner's with a post-*Apprendi* death sentence, warrants this Court's federal constitutional review.

III. Respondent's Brief Actually Highlights, 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, nor does Respondent show that denying the benefit of *Hurst* to the handful of collateral-review defendants whose death sentences became final after *Apprendi* but before *Ring* is an acceptable result under this Court's Eighth and Fourteenth Amendment precedents, or the decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

Respondent makes much of the absence of a conflict between the Florida Supreme Court's retroactivity formula and those of other states. *See* BIO at 1,2, 6, 21. But this is only because no other state 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. Indeed, 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).

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 19 (discussing dissenting opinions of Justices Lewis and Pariente); *id.* at 8 (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 "post-*Apprendi*, 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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