No. 17-9389

IN THE

Supreme Court of the United States

CHARLES KENNETH FOSTER,

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

JULIE A. MORLEY
MARGARET S. RUSSELL
Capital Collateral Regional Counsel
Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
(813) 558-1600
morley@ccmr.state.fl.us

BILLY H. NOLAS
Counsel of Record
SEAN T. GUNN
SHEHNOOR K. GREWAL
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818
billy_nolas@fd.org

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I. Respondent Mistakenly Argues that the Florida Supreme Court's Retroactivity Ruling Does Not Permit this Court's Certiorari Review

This Court has jurisdiction to review the constitutionality of the *Hurst* retroactivity formula. Respondent erringly asserts that this Court lacks jurisdiction to hear this case because the Florida Supreme Court, by relying on a state-law based test for *Hurst* retroactivity, rested its decision on adequate and independent state-law grounds. *See* Brief in Opposition ("BIO") at 10-13. Respondent miscomprehends the adequate-and-independent state ground doctrine, which does not present a barrier to review here.

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).

Mr. Foster's case does not reach this Court's standard of *independent*. Here, the federal question 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. In this regard, the Florida Supreme Court's application

of its state-law *Ring* cutoff to Mr. Foster's case cannot be independent from Mr. Foster's federal claim.

Under Respondent's faulty view, this Court would have had no basis to grant certiorari 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 be powerless to consider state retroactivity cutoffs drawn at *any* arbitrary point in time, such as inauguration of the current governor, or the date of Florida's 100th execution of the post-*Gregg* era.

This Court has developed a simple test to determine whether a state ruling rest 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, 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] Mr. Foster 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)).

Moreover, Respondent misconstrues this Court's opinion in *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 10-13. Respondent observes that *Danforth* ruled that 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 members of one religion but not members of another, even though such a rule would, in Respondent's view, extend retroactivity "more broadly" than providing no retroactivity at all?

Whether the Florida Supreme Court's retroactivity cutoff goes beyond 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 question.

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 Amendment

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 by failing to cite any case where the Florida Supreme Court has engaged in such federal constitutional analysis in more than a conclusory fashion. Respondent's brief also reflects confusion over the federal constitutional issue here,

which is not whether "basing retroactivity analysis on court dates itself is arbitrary," BIO at 17, but whether the Constitution permits the Florida Supreme Court to arbitrarily grant relief on collateral review to some cases but not others.

Although Respondent emphasizes the lack of a split amongst state and federal appellate court on this issue, that is because the Florida Supreme Court's rule is truly unique in its design and pernicious effect. In fact, neither party in this case has been able to identify another state-created "partial retroactivity" rule like the Florida Supreme Court's, which 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. Indeed, it is difficult to conceive 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).

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

Overall, Respondent's arguments support the case for granting certiorari in this case and settling whether the Florida Supreme Court's *Ring* cutoff is constitutional. Respondent's brief reflects the Florida Supreme Court's problematic approach to the question of *Hurst* retroactivity and its refusal to grapple with federal constitutional law. 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).

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 Florida'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 Rhodes's arguments have merit. *See Pet.* at 27-28 (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 Mr. Foster and dozens of other Florida prisoners in the "pre-*Ring*" category. This Court should grant a writ of certiorari in Mr. Foster's case to address these issues now.

Respectfully submitted,

/s/ Billy H. Nolas

BILLY H. NOLAS
Counsel of Record
SEAN T. GUNN
SHEHNOOR K. GREWAL
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818
billy_nolas@fd.org

JULIE A. MORLEY
MARGARET S. RUSSELL
Capital Collateral Regional Counsel
Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
(813) 558-1600
morley@ccmr.state.fl.us

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