No. 18-1449

IN THE
Supreme Court of the United States

HAROLD LEE HARVEY, JR.,
Petitioner,

v.

FLORIDA,
Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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As explained in the Petition, the Florida Supreme Court's partial retroactive application of the *Hurst* decisions is unconstitutionally arbitrary. This case presents a particularly glaring example of that arbitrariness given that Mr. Harvey falls on the wrong side of the *Ring* cut-off date only because of the timing of judicial decisions. Remarkably, Florida's brief in opposition does not attempt to justify using the date *Ring* was decided as a dividing line for the retroactive application of the *Hurst* decisions. Nor could it. Using *Ring* as the cut-off violates the Eighth and Fourteenth Amendments to the Constitution by dividing similarly situated prisoners based on an arbitrary rule.

In lieu of defending the rationality of the *Ring* cut-off, the brief in opposition presents a litany of other arguments. Florida argues, for example, that this Court's review of its novel partial retroactivity rule is barred by the independent and adequate state grounds doctrine. That is not the law. When, as here, a petitioner argues that a state's legal scheme violates the federal Constitution, review by this Court is entirely proper. Florida also argues that partial retroactivity does not necessarily offend the Constitution. But this argument is premised on an incorrect reading of this Court's case law and the false assertion that partial retroactivity is "inherent" to any retroactivity scheme. In any event, the fact that some partial retroactivity schemes may be permissible, even if true, does not show how Florida's arbitrary scheme comports with the anti-arbitrariness requirements of the Eighth and Fourteenth Amendments.

Most troubling, however, is Florida's assertion that the Petition does not present an "important" question. BIO 6. Florida's partial retroactivity rule has already resulted in the execution of four prisoners who were sentenced under an unconstitutional system, including one prisoner—Bobby Joe Long—who was executed after the Petition in this case was filed. Meanwhile, dozens of other prisoners have been granted resentencing even though their cases are materially indistinguishable from those of the executed inmates.

The Petition should be granted.

I. FLORIDA'S ARBITRARY *ASAY/MOSLEY* RULE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Florida Supreme Court has recognized that Florida's prior system of capital sentencing deprived defendants of two constitutional rights: (1) the Sixth Amendment right to have a jury rather than a judge find each fact necessary to impose a death sentence; and (2) the Eighth Amendment right not to be subjected to capital punishment except upon the unanimous decision of the jury. *See Hurst v. Florida* ("*Hurst I*"), 136 S. Ct. 616, 619 (2016); *Hurst v. State* ("*Hurst II*"), 202 So. 3d 40, 57 (Fla. 2016); *see also* Pet. 2, 7. In *Asay* and *Mosley*, the Florida Supreme Court held that the *Hurst* decisions apply retroactively, but only to those prisoners whose death sentences became final after 2002, when this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). *See Asay v. State*, 210 So. 3d 1 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) (creating the "partial retroactivity rule" or the "*Asay/Mosley* rule").

As Mr. Harvey explained in the Petition, the *Asay/Mosley* rule violates the Eighth and Fourteenth Amendments by erecting an arbitrary partition between two similarly situated classes of death-sentenced inmates. Pet. 16–18; *see Parker v. Dugger*, 498 U.S. 308, 321 (1991) (noting that the Eighth Amendment bars "arbitrary or irrational imposition of the death penalty"). Moreover, of the two groups the *Asay/Mosley* rule creates, the group whose sentences were imposed *earlier* in time is the group barred from resentencing, even though those sentences are more likely to have been based on practices now considered unacceptable. The Florida Supreme Court's justification for using *Ring* as the cut-off date—*i.e.*, that *Ring* itself rendered Florida's capital sentencing scheme "essentially [] unconstitutional," *Mosley*, 209 So.3d at 1280—is irrational. *See* Pet. 17. No matter whether they were sentenced before or after *Ring*, all Florida prisoners whose death sentences became final before *Hurst I* were sentenced under an equally unconstitutional process. *Ring* itself did not render those sentences unconstitutional; rather, they were *always* unconstitutional, no matter when imposed, because they violated the Sixth Amendment. To use *Ring* as the dividing line is therefore arbitrary, as a chorus of judges and commentators have recognized. *See* Pet. 5–6 & nn.2–6.

In an attempt to rebut this line of reasoning, Florida presents four arguments. None is persuasive.

First, Florida argues at length that the decision below was based on independent and adequate state grounds and is thus unreviewable in this Court. *See, e.g.*,

BIO 8–10, 13. Although the *Asay/Mosley* rule is a construct of state rather than federal law, that fact does not immunize Florida's rule from scrutiny under the federal Constitution. Suppose, for example, that Florida made the *Hurst* decisions retroactive only to women, only to African-Americans, only to Canadian nationals, or only to Libras. Such rules would be creatures of state law, but they would be struck down as violating external constraints imposed by the Constitution.

Mr. Harvey's claims here are based entirely on the federal Constitution. This Court has jurisdiction when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law." *Michigan v. Long*, 463 U.S. 1032, 1040–1041 (1983). And "[w]hen application of a state law bar 'depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and [this Court's] jurisdiction is not precluded.'" *Foster v. Chatman*, 136 S. Ct. 1737, 1746 (2016) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985)). When, as here, a petitioner's sole claim is that state-made law violates the federal Constitution, the independent and adequate state grounds doctrine is no shield against review.[1] Certiorari is thus proper.

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[1] Florida cites *Danforth v. Minnesota*, 552 U.S. 264 (2008), for the proposition that states are "free to employ a partial retroactivity approach without violating the federal constitution." BIO 8–9. *Danforth* provides no support for this proposition; rather, it merely confirms that a State retains the "authority . . . when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive'" under federal law. *Danforth*, 552 U.S. at 282. In other words, *Danforth* posits that state courts can

Second, Florida asserts that the *Asay/Mosley* rule does not violate the Eighth or Fourteenth Amendments. Although Florida suggests in passing that this rule is "not constitutionally infirm" (BIO 8), Florida's arguments on this score are conspicuously thin. Indeed, Florida offers no defense of the *Ring* cut-off date. Nor does Florida marshal any other case in which a partial retroactivity scheme similar to its own has ever been attempted, much less upheld.

Florida's arguments as to the merits of Mr. Harvey's constitutional claims boil down to two contentions. Florida first contends that it is an "inherent" part "of the retroactivity paradigm that some cases will be treated differently than others based on the age of the case." BIO 13. This is inaccurate. Other state courts of last resort have either afforded complete retroactivity as to *Hurst I* or have afforded no retroactivity at all. Pet. 8 & n.7. In either situation, it is wrong to suggest that some cases pre-dating the decision in question "will get the benefit of a new development, while others will not." BIO 13.

Florida also suggests that this Court's decision in *Dorsey v. United States*, 567 U.S. 260 (2012), supports Florida's partial retroactivity rule because *Dorsey* gave "partial retroactive effect" to the Fair Sentencing Act's new, more lenient mandatory minimums for crack cocaine offenses. BIO 11. Not so. *Dorsey* held that *all*

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make new rules retroactive as applied to state criminal convictions even when federal courts do not apply such rules retroactively in federal habeas proceedings. *Danforth* does not support a system that arbitrarily extends retroactivity to certain prisoners, while withholding it from others who are similarly situated.

defendants sentenced *after* the Act's effective date were entitled to benefit from the Act's provisions even if a defendant's offense was committed before the effective date. This in no way supports a retroactivity rule in which prisoners who were all sentenced prior to a new rule of constitutional law are split along an arbitrary line to determine who will receive retroactive application of the new rule. In any event, even if some non-arbitrary partial retroactivity schemes may be permissible, that would not save the arbitrary scheme Florida has developed.

Third, Florida suggests that prior denials of certiorari on this issue warrant another denial here. But Florida's rote listing of past denials (BIO 10 & n.4) glosses over the unique aspects of Mr. Harvey's specific case. As detailed in the Petition, had the Florida Supreme Court denied the State's pro forma rehearing motion in *Harvey I* in the weeks or months after it was filed, then Mr. Harvey would not be on death row today. *See* Pet. 19–20. Mr. Harvey's 1989 convictions would have been vacated, and any new death sentence following retrial would necessarily have become final after *Ring*, thus entitling Mr. Harvey to retroactive application of the *Hurst* decisions under the *Asay*/*Mosley* rule. *See* Pet. 19–21. But because of the unusually long time the Florida Supreme Court took to resolve a routine motion for rehearing, Mr. Harvey may be executed under an unconstitutional sentence.[2]

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[2] In any event, as this Court has "often stated, the 'denial of a writ of certiorari imports no expression of opinion upon the merits of the case.'" *Teague v. Lane*, 489 U.S. 288, 296 (1989) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.)).

Florida argues that the Florida Supreme Court's delay in ruling on the State's rehearing motion was not part of a "nefarious scheme" and that there is no due-process right to a quick decision from an appellate court. *See* BIO 6 n.3. This misses the point. The delay in ruling on the motion is notable not for what it says about the Florida Supreme Court's motives, but rather because it demonstrates the sheer arbitrariness of Florida's partial retroactivity rule.

The Florida Supreme Court stated that *Ring* is the appropriate cut-off because it notified Florida courts that Florida's death penalty scheme was invalid. *Mosley*, 209 So. 3d at 1280. But the Florida Supreme Court declined to charge itself with the same notice when it allowed Mr. Harvey's death sentences to stand after *Ring* was decided. This is the height of arbitrariness.

Fourth, Florida attempts to rebut Mr. Harvey's argument that using *Ring* as the cut-off date for the retroactive effect of *Hurst II* is especially arbitrary given that *Ring* was a Sixth Amendment decision that in no way presaged the Eighth Amendment holding of *Hurst II*. *See* Pet. 19; BIO 14–15. Florida argues that Mr. Harvey's claim must fail because *Hurst II* "did not . . . hold that Florida's capital sentencing violated the Eighth Amendment." BIO 14. This is mistaken. *Hurst II* held that "juror unanimity in any recommended verdict resulting in a death sentence is required *under*

the Eighth Amendment." *Hurst II*, 202 So. 3d at 59 (emphasis added)).[3]

Florida's argument is also legally irrelevant. It does not matter for purposes of this case whether the right to jury unanimity announced in *Hurst II* was premised on the Eighth Amendment or some other source of law. Instead, the question is whether it is consistent with the Constitution to apply that right—no matter where it came from—retroactively to the date of *Ring* but no further. The answer to this question is no, because *Ring* did not discuss jury unanimity or presage the *Hurst II* holding. Thus, there is no rational justification for using the *Ring* cut-off date for the right announced in *Hurst II*. *See* Pet. 8, 19.

II. THE ISSUE IS RECURRING AND IMPORTANT.

As explained in the Petition, the question presented is a matter of life or death for some 160 death row inmates. Pet. 22–23. Florida's suggestion that certiorari is nonetheless inappropriate because the decision below "does not . . . involve an important" question of law is

[3] Florida appears to suggest that *Hurst II* could not have held that the Eighth Amendment requires a unanimous jury recommendation before death may be imposed because such a rule would violate the conformity clause in the Florida Constitution. BIO 14–15. But *Hurst II* announced an Eighth Amendment holding. *See Hurst II*, 202 So. 3d at 44, 59. Florida may believe this holding was wrong, but it remains the law. In any event, the conformity clause governs how the Florida courts may interpret the Florida state constitutional prohibition on cruel and unusual punishment, *see* BIO 15; it has no applicability here, where the basis of the Florida Supreme Court's decision was the Eighth Amendment to the United States Constitution.

baffling. BIO 6. Four inmates have already been executed on the basis of an unconstitutional sentencing scheme since the Florida Supreme Court announced the *Asay/Mosley* rule, including one after the Petition in this case was filed. It is difficult to imagine a more important issue than the one presented here.

Florida's attempt to argue that this issue is not "important" because there is no circuit split (BIO 7), is also unpersuasive. The fact that Florida's partial retroactivity rule is novel and unprecedented (and thus has not created a circuit split) shows why review is appropriate, not why it should be denied. Pet. 23; *Graham v. Florida*, 560 U.S. 48, 67 (2010), *as modified* (July 6, 2010) (Florida sentencing practice invalidated where, among other things, it was "exceedingly rare").

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Florida does not dispute that the facts of this case squarely present both prongs of the *Asay/Mosley* question: (1) whether the *Ring* cut-off can be used to limit the retroactivity of *Hurst I*, ***and*** (2) whether the *Ring* cut-off can be used to limit retroactivity as to the distinct Eighth Amendment jury unanimity requirement of *Hurst II*. Instead, Florida attempts to gin up three vehicle problems. But all three of these purported "problems" are either red herrings or are premised on incorrect arguments.

First, Florida argues that "any possible error [in Mr. Harvey's sentencing] was clearly harmless." BIO 17; *see id.* at 17–21. But the lack of unanimity in Mr. Harvey's jury verdict—in the context of *Hurst II*'s holding that

the jury must "unanimously recommend a sentence of death" before "the trial judge may consider imposing" that sentence, 202 So 3d. at 57—disproves this argument. Florida's argument that the *Hurst I* error is harmless similarly fails. To prevail on this theory, Florida must satisfy "an extremely heavy burden": proving "beyond a reasonable doubt" that "there is no reasonable possibility" that Mr. Harvey's sentence would have been different if the jury (rather than the judge) had been required to find "the aggravators sufficient to impose death and [find] that the aggravating factors outweighed the mitigation." *Hurst II*, 202 So. 3d at 68. As Justice Barbara J. Pariente explained, concurring in the result in the decision below, "the jury's nonunanimous recommendations for death by votes of eleven to one indicate that the *Hurst* error is not harmless beyond a reasonable doubt." *Harvey v. State*, 260 So. 3d 906, 907 (Fla. 2018) (Pariente, J., concurring in result).

Second, Florida argues that Mr. Harvey has waived the argument that the *Ring* cut-off for retroactive application of *Hurst II* is arbitrary because *Ring* was a Sixth Amendment case while *Hurst II*'s jury-unanimity holding was based on the Eighth Amendment. BIO 12; *see* Pet. 19. Florida's suggestion that the argument in the Petition "was not made in the same terms below" (BIO 12) is mistaken. Mr. Harvey presented the same argument to the Florida Supreme Court in his merits brief and even in his motion for reconsideration. *See, e.g.*, Initial Brief of Appellant at 21, *Harvey v. Florida* (No. SC17-790), 2018 WL 5259021 (Fla. Apr. 27, 2018) ("The Eighth Amendment right to unanimity is distinct from the Sixth Amendment right articulated in

[*Hurst I*] to have jurors, rather than a judge, find the facts supporting a death sentence. These two distinct rights are based on different amendments to the federal Constitution and serve different purposes."); Appellant's Motion for Rehearing or Reconsideration at 5, *Harvey v. Florida* (No. SC17-790) (Filing # 81885640) (Fla. Dec. 10, 2018) (noting that the decision below "jumble[d] two different constitutional rights" and that the claims under the Sixth and Eighth Amendments "require separate retroactivity analyses").

Third, Florida argues that "there was no underlying federal constitutional error" in Mr. Harvey's sentencing. BIO 15. This is so, the State argues, because the jury's "convictions for robbery and burglary support the 'during the course of a felony' aggravator[;] [h]ence, at least one aggravating circumstance in this case rests squarely upon the jury's guilt phase verdict." BIO 16. Even accepting Florida's proposition as true, this does not show the absence of an underlying federal constitutional error. As the Florida Supreme Court made clear in *Hurst II*, the jury must not only find all aggravating factors, but "as importantly," the jury must also find that "the aggravating factors outweighed the mitigation."[4] 202 So. 3d at 68. In Mr. Harvey's case—as Florida acknowledges, *see* BIO 17–21—the judge, not

[4] Florida notes that "[l]ower courts have *almost* uniformly rejected the notion that the weighing process is a 'fact' that must be found by the jury." BIO 15 n.5 (emphasis added). The brief in opposition neglects to mention, however, that the Florida Supreme Court's own decision on this issue—which is the controlling precedent for Mr. Harvey's case—makes clear that the weighing process *is* a fact that must be found by the jury.

the jury, conducted the weighing process, resulting in a constitutional error.

The constitutionality of the Florida Supreme Court's partial retroactivity scheme is presented clearly and cleanly in Mr. Harvey's case, and there are no vehicle issues that would complicate this Court's review.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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