No. 18-5037

IN THE

Supreme Court of the United States

RICHARD EUGENE HAMILTON

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 Adequate and Independent State Ground Doctrine Precludes this Court from Reviewing the Florida Supreme Court's Hurst Retroactivity Cutoff

Respondent incorrectly argues that the adequate and independent state ground doctrine precludes this Court from reviewing the Florida Supreme Court's *Hurst* retroactivity cutoff. Contrary to Respondent's suggestion, that doctrine does not present a barrier to certiorari review. 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 where, unlike here, there is 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).

Here, the Florida Supreme Court's state retroactivity test is inextricably linked to the federal question raised by the petition: whether the Florida Supreme Court's *Ring*-based retroactivity cutoff for *Hurst* claims violates the Eighth and Fourteenth Amendments of the Constitution. The Florida Supreme Court's application of its state-law *Ring*-based cutoff to Mr. Hamilton cannot be "independent" from Mr. Hamilton's federal Eighth and Fourteenth Amendment claims. The state court's

ruling is inseparable from the merits of the federal constitutional claim Mr. Hamilton has raised throughout this litigation.

If Respondent's view of the adequate and independent state ground doctrine were accepted, it would mean that, 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, or even state rules providing retroactivity to white defendants but not black defendants. 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.

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]

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[1] Mr. Hamilton notes that Respondent's adequate-and-independent argument is also 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's application of *Danforth v. Minnesota* to this case is misguided. In respondent's view, *Danforth* immunizes the Florida Supreme Court's *Ring*-based cutoff from federal review by providing that states may retroactively apply a case more broadly than federal courts would. However, Respondent fails to consider the fact that the state rule in *Danforth* afforded full retroactivity and therefore did not result in the same arbitrariness of the Florida Supreme Court's *Ring*-based cutoff.

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 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 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 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. Respondent's insistence that *Asay v. State*, 210 So.3d 1 (Fla. 2016), and *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), addressed Mr. Hamilton's federal constitutional arguments, *see* BIO at 7-9, is wrong because *Asay* and *Mosley*, issued on the same day, created the state-law *Ring* cutoff in the first place. Neither case discusses the Eighth and Fourteenth Amendment arguments Mr. Hamilton 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.

Respondent is also wrong that Mr. Hamilton's arguments have been implicitly rejected by prior decisions upholding *traditional* retroactivity rules. *See* BIO at 10-12. 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 Mr. Hamilton recognized, such lines have been deemed acceptable. 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 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. 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 cases, or the decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

Respondent notes an absence of a conflict between the Florida Supreme Court's retroactivity formula and those of other states. *See* BIO at 1, 5. 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 Mr. Hamilton's arguments have merit. *See* Pet. at 17-18 (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. Hamilton and other Florida prisoners in the "pre-*Ring*" category. This Court should grant a writ of certiorari in Mr. Hamilton's case to address these issues now.

Respectfully submitted,

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