DOCKET No. 18-5065

OCTOBER TERM 2018

IN THE SUPREME COURT OF THE UNITED STATES

MANUEL ANTONIO RODRIGUEZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

REPLY BRIEF FOR PETITONER

CAPITAL CASE

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REPLY

I. Respondent Incorrectly Asserts that the Florida Supreme Court's Ring-based Partial Retroactivity Ruling is immune from this Court's review.

Respondent asserts that the Florida Supreme Court's *Ring*-based retroactivity cutoff is "a matter of state law," which according to Respondent, "is not contrary to federal law and does not conflict with this Court's precedent." Brief in Opposition ("BIO") at 8-9. Respondent's misunderstanding is based on three errors.

First, Respondent's argument stems from a misreading of this Court's ruling in *Hurst v. Florida*, the Florida Supreme Court's rulings in *Hurst v. State*, and a misunderstanding of Petitioner's federal constitutional claims. Respondent contends the Florida Supreme Court "followed this Court's ruling in *Hurst v. Florida*," but then expanded upon the ruling by requiring "additional findings" which Respondent claims are not required under federal law. BIO at 5-6. As a result, Respondent claims that, "under this Court's jurisprudence, there was no Sixth Amendment error in this case." BIO at 6 fn. 5. To arrive at this contention, Respondent ignores the very aspects of Florida law that reveal Florida's arbitrary nature and instead relies on two irrelevant cases interpreting Ohio's capital sentencing scheme.

Respondent fails to acknowledge numerous distinctions, including the fact that Ohio's capital sentencing scheme does not involve a hybrid system like Florida's. In fact, the case upon which Respondent relies expressly states, "Ohio law requires the critical jury findings that were **not required** by the laws at issue in *Ring* and *Hurst*." *State v. Mason*, – N.E. 3d – 2018 WL 1872180 *4 (Ohio, April 18, 2018) (emphasis

added).[1] Thus, Respondent's attempt to analogize Ohio's capital sentencing scheme with Florida's is flawed and confuses the distinction between the two state's capital sentencing statutes and the attendant substantive constitutional rights provided within.

In *Hurst v. State*, the Florida Supreme Court specifically noted that "the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury." 202 So. 3d 40, 53 (Fla. 2016). The court explained that it based its holding upon "the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven." *Id.* at 54. Accordingly, because the Florida Supreme Court has provided that these additional findings are required under **Florida's capital sentencing scheme**, the focus of the issue here is not whether this Court has found that these additional factors are required under federal law. Rather, it is whether denial of that recognized right through the Florida Supreme Court's *Ring*-based partial retroactivity framework under state law, violates the Eighth and Fourteenth Amendment.

Second, in arguing that the Florida Supreme Court's *Ring*-based retroactivity cutoff is somehow immune from this Court's review, Respondent misapplies the adequate and independent state grounds doctrine, which does not present a barrier to review here. Respondent contends that "a state court's retroactivity determinations

[1] *State v. Mason* is also inapplicable to the discussion here because it has no precedential value over this Court or the Florida Supreme Court.

are a matter of state law" and under *Danforth v. Minnesota*, 552 U. S. 264 (2008), "[s]tate court[s] may fashion their own retroactivity tests…without violating the federal constitution[.]" BIO at 7. Respondent's argument is misguided and ignores Petitioner's federal constitutional arguments.

While "[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," not 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 and unreviewable only where the state law basis for the denial of a federal constitutional claim 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 that has been presented by Petitioner in this case is whether the Florida Supreme Court's partial retroactivity ruling utilizing *Ring* as a cutoff point for retroactive application of the *Hurst* decisions violates the Eighth and Fourteenth Amendments by creating arbitrary and unequal results to similarly situated prisoners. The application by the Florida Supreme Court of its *Ring*-based partial retroactivity cutoff based on its state-law *Witt* analysis is not, and cannot, be independent of Petitioner's federal constitutional claims under the Eighth and Fourteenth Amendments. The state court ruling provided by the Florida Supreme

Court is inseparable from the merits of Petitioner's federal constitutional claim raised in the state courts below. *See Foster*, 136 S. Ct. at 1759.

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. According to Respondent's flawed logic, as 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 time.

Third, Respondent's reliance on *Danforth v. Minnesota* misconstrues this Court's holding in that case. Respondent observes that, in *Danforth*, this Court held that states "may fashion their own retroactivity tests, including partial retroactivity tests," *see* BIO at 7, 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. According to Respondent's interpretation, *Danforth* immunizes the Florida Supreme Court's *Ring*-based partial retroactivity cutoff from federal review by providing that states may retroactively apply a case more broadly than federal courts would. 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 or not the Florida Supreme Court's partial retroactivity cutoff goes beyond the bounds permissible under the Eighth and Fourteenth Amendments is a

federal question controlled by federal law. This Court should grant a writ of certiorari in order to review that question.

II. Respondent's Partial Retroactivity Argument Demonstrates the Certiorari-Worthiness of the Question Presented.

Respondent's argument that the Florida Supreme Court's partial retroactivity formula is not contrary to federal law obfuscates the issues and underscores the need for granting certiorari in this case. Respondent fails to meaningfully address the issue and instead attempts to reframe the issue as whether "basing retroactivity analysis on court dates is itself arbitrary." *See* BIO 10-11. But the issue is not whether *all* retroactivity doctrines are arbitrary, it is whether the Florida Supreme Court's unconventional partial retroactivity formula, which grants relief to some defendants but not others on collateral review, violates the Eighth and Fourteenth Amendments.

Respondent seems to take 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 how similarly situated prisoners are separated into classes. Respondent provides no meaningful defense for why 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 precedent, or the decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

Respondent further contends this Court's review is not warranted because according to Respondent, partial retroactivity in general is constitutional as evinced by this Court's previous application in *Dorsey v. United States*, 567 U.S. 260 (2012).

See BIO at 10. Respondent seems to suggest, without any explanation or applicable support, that Florida's partial retroactivity formula is therefore equally constitutional. Respondent's argument here is both misleading and willfully ignorant of this Court's actual rationale in *Dorsey*.

In attempting to analogize this Court's purported "partial retroactivity" holding which **expanded the benefit** of a new rule in a **non-capital** federal drug sentencing case with the Florida Supreme Court's *Ring*-based cutoff which **limits the benefit** of a new rule for **capital defendants**, Respondent either misapprehends or fails to acknowledge numerous distinctions.[2]

First and foremost, Respondent's entire argument seems to be based on a misreading of *United States v. Abney*, 812 F. 3d 1079, 1097-98 (D.C. Cir. 2016) (Brown, J., dissenting)[3] and a distortion of this Court's rationale in *Dorsey*. A cursory review of *Dorsey* demonstrates that this Court did not conduct a retroactivity analysis in determining the impact of the Fair Sentencing Act's new, more lenient penalties on pre-Act defendants. *See Dorsey*, 567 U.S. at 264 ("…our conclusion rests upon an analysis of the Guidelines-based sentencing system Congress has established…"). Instead, this Court's analysis focused on deciphering the congressional intent behind the new statute. By examining the language in the relevant federal sentencing

[2] For example, Respondent fails to recognize that neither case that Respondent relies upon dealt with capital crimes and the heightened constitutional requirements in capital cases under the Eighth Amendment.

[3] Respondent's argument here is disingenuous as Respondent failed to acknowledge that its argument relies on a non-binding dissent.

statutes, as well as the Fair Sentencing Act's language, structure, and basic objectives, this Court found that it was Congress's intent to apply the Act's more lenient penalties to pre-Act defendants. Respondent fails to comprehend that *Dorsey*'s holding rests on statutory analysis as opposed to a retroactivity analysis. But more importantly, Respondent overlooks the fact that this Court's rationale in *Dorsey* supports Petitioner's argument.

In holding that the Fair Sentencing Act's more lenient penalties apply to Pre-Act defendants, this Court rested its conclusion "primarily upon the fact that a contrary determination would seriously undermine basic Federal Sentencing objectives such as **uniformity and proportionality in sentencing**. Indeed, seen from that perspective, a contrary determination would produce sentences less uniform and more disproportionate than if Congress had not enacted the Fair Sentencing Act at all." *Dorsey*, 567 U.S. at 264 (internal quotations omitted). This Court recognized that applying the old drug act's penalties to pre-Act offenders who were to be sentenced after the act "would create disparities of a kind that Congress enacted the Sentencing Reform Act and the Fair Sentencing Act to prevent." *Id.* at 276. Moreover, this Court realized that not applying the Fair Sentencing Act "would do more than preserve a disproportionate status quo; it would make matters worse. It would create new anomalies—new sets of disproportionate sentences—not previously present." *Id.* at 278.

Respondent fails to see that the only logical application of *Dorsey*'s rationale to Florida involves reframing the issue to "whether the Florida Supreme Court's

decision to apply its new capital sentencing statute, Chapter 2017-1, to some pre-Chapter 2017-1 defendants, but not all, violates this Court's precedent." Given that Respondent reframed the issue, Petitioner will now address it.[4]

In *Dorsey* this Court had to analyze six separate considerations in order to determine the intent behind the Fair Sentencing Act. However, this is simply not the case in Florida. The Florida Supreme Court and the Florida Legislature have already made it clear that the elements identified in *Hurst v. State* and codified by the legislature in Chapter 2017-1, Laws of Florida, are longstanding and applicable to homicides that occurred before Chapter 2017-1 was enacted. *See Victorino v. State*, 241 So. 3d 48 (Fla. 2018) (finding no ex post facto violation in applying Chapter 2017-1 to new penalty phases). Moreover, even if the intent was unclear, Respondent's argument would still fail in light of the other factors this Court considered in *Dorsey*. For example, this Court explained that failing to apply the new penalties to pre-Act offenders would result in the imposition of disparate sentences involving

[4] In attempting to address Petitioner's argument, Respondent failed to identify any state-created "partial retroactivity" rule at all, much less a rule that imposes a cutoff based on the conviction's finality relative to the date this Court rendered some other decision years earlier in a case from another state. Instead, Respondent relied on *Dorsey* and general federal retroactivity principles. However, in explaining that the general rule of *Teague v. Lane*, 489 U.S. 288 (1989), "is one of nonretroactivity," *see* BIO at 9, and in using *Schriro v. Summerlin*, 542 U.S. 348 (2004) as an example of a case which followed *Teague* and did not apply the rule from *Ring v. Arizona* to *any capital defendant on collateral review*, Respondent inadvertently highlights exactly how the Florida Supreme Court's cutoff is contrary to this Court's retroactivity jurisprudence. Respondent's argument effectively supports, rather than diminishes, the need for this Court to grant certiorari review in this case.

contemporaneous sentencing, "thereby highlighting a kind of unfairness that modern sentencing statutes typically seek to combat." *Dorsey*, 567 U.S. at 277. This Court warned that failing to apply the new Act would create "a new disparate sentencing 'cliff.'" *Id.* at 279. As Petitioner explained, this kind of unfairness has already occurred as a result of Florida's partial retroactivity formula. *See* Pet. at 25-26.

Contrary to Respondent's position, the Florida Supreme Court's line drawing effort is not remotely similar to *Dorsey*'s and its only logical application supports Petitioner's federal constitution claims.

III. Respondent's Attempt to Characterize the Florida Supreme Court's *Hurst* Harmless-Error Analysis as Individualized are Belied by the Rule's Consistent Results in Every Unanimous-Recommendation Case.

Respondent claims that Petitioner fails to provide "any legal support" for his contention that the Florida Supreme Court has created per se automatic and mechanical harmless error rules for *Hurst* claims. BIO at 16. Yet Respondent's argument does not attempt to defend the Florida Supreme Court's rationale for the per se rule, or even argue that there is no per se rule at all, instead, Respondent simply conducts a harmless error-review while noting that Petitioner himself is not entitled to one.

The Florida Supreme Court has made no secret of its creation of a per se harmless-error rule for *Hurst* claims. Beginning in *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), and in dozens of cases since, the Florida Supreme Court has consistently articulated the reason it believes that *Hurst* errors are harmless in all cases where the advisory jury unanimously recommended the death penalty, regardless of any other case-specific factors.

The Florida Supreme Court's per se rule is premised on the idea that—because advisory juries 1) were instructed on the facts a judge must find in order to impose a death sentence under Florida law; 2) were told that their recommendation to the judge should be based on the same considerations; and 3) unanimously recommended the death penalty—the same jury, or any other jury, certainly would have found the facts necessary for a death sentence under Florida law. The Florida Supreme Court maintains this belief regardless of the fact that pre-*Hurst* juries were told of their "advisory" nature and made no findings in support of their overall recommendation, and regardless of any case-specific factors. The very nature of the Florida Supreme Court's reasoning compels the same result in every unanimous recommendation case.

Rather than addressing any of these points, Respondent simply asserts that each *Hurst* case, including Petitioner's, receives individualized harmless-error review.[5] In fact, Respondent claims "it is misguided to assume that the Florida Supreme Court does not review the record in 12-0 recommendation cases." BIO at 16. But Respondent's argument is belied by every single *Hurst* case the Florida Supreme Court has decided in which there was a unanimous jury recommendation. In all of

[5] Respondent's argument here is confusing and contradictory. Respondent attempts to apply a harmless error analysis to the facts of Petitioner's case in order to show how the *Davis* rule is not automatic, yet Respondent fails to describe *any* other case-specific factors that favor a harmless-error ruling. Instead, Respondent relies on *Davis* itself, noting that Petitioner's unanimous recommendation as well as the "the aggravating circumstances found by the trial court," *see* BIO at 15, establish that there was no *Hurst* error. Accordingly, Respondent's own argument suggests that the Florida Supreme Court disregarded other factors, including Petitioner's mitigation as well as the fact that no mercy instruction was provided to Petitioner's jury.

those cases, the Florida Supreme Court considered jury unanimity dispositive of the harmless-error inquiry. There haven't been any exceptions. The Florida Supreme Court has found *Hurst* errors harmless in all of the more than three-dozen unanimous jury recommendation cases it has reviewed.

Respondent cannot identify a single case in which the Florida Supreme Court declined to apply the harmless-error doctrine and granted *Hurst* relief where there was a unanimous jury recommendation. That is because no such case exists. In light of the consistency of the Florida Supreme Court's decisions, it strains credibility for Respondent to pretend that no per se rule exists.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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