No. 18-8052

IN THE

Supreme Court of the United States

MICHAEL DUANE ZACK, III,

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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TABLE OF CONTENTS

I. Respondent Mistakenly Argues that this Court Lacks Sufficient Jurisdiction to Rule on the Florida Supreme Court's Decision 1

II. Respondent's Arguments Fail to Adequately Address the Eight and Fourteenth Amendment Issues Raised by the Petition Before this Court 3

III. Respondent's Brief Highlights the Certiorari-Worthiness of the Questions Presented 6

TABLE OF AUTHORITIES

Ake v. Oklahoma, 470 U.S. 68 (1985) 2

Apprendi v. New Jersey, 530 U.S. 466 (2000) 3, 4, 6, 7

Asay v. State, 210 So. 3d 1 (Fla. 2016) 2, 3, 4

Branch v. Florida, 128 S. Ct. 1164 (2018) 7

Coleman v. Thompson, 501 U.S. 722 (1991) 2

Danforth v. Minnesota, 552 U.S. 264 (2008) 2, 3, 4

Godfrey v. Georgia, 446 U.S. 420 (1980) 7

Griffith v. Kentucky, 479 U.S. 314 (1987) 2, 3, 4

Hurst v. Florida, 136 S. Ct. 616 (2016) 1, 2, 3

Linkletter v. Walker, 381 U.S. 618 (1965) 2, 4, 5

Michigan v. Long, 463 U.S. 1032 (1983) 1, 2

Montgomery v. Louisiana, 136 S. Ct. 718 (2016) 6

Ring v. Arizona, 536 U.S. 584 (2002) 3, 4, 6, 7

Stovall v. Denno, 388 U.S. 293 (1967) 2, 4

Teague v. Lane, 489 U.S. 288 (1989) 5

Witt v. State, 387 So. 2d 922 (Fla. 1980) 2, 4

I. Respondent mistakenly argues that this Court lacks sufficient jurisdiction to rule on the Florida Supreme Court's decision.

This Court has jurisdiction to rule on the retroactivity scheme established by the Florida Supreme Court under this Court's decision in *Hurst*. Respondent argues that because the test for retroactivity applied to *Hurst* by the Florida Supreme Court was based on independent state law, it is therefore not reviewable by this Court given the holding of *Michigan v. Long*, 463 U.S. 1032 (1983). *See* Brief in Opposition ("BIO") at 15. The adequate-and-independent-state-law doctrine does not, however, immunize states from any constitutional review by this Court. Such a reading of this doctrine would render this Court's review of state court judgments so limited as to be nearly meaningless.

Under the Respondent's rationale, any actions taken by the state that are done under the guise of state law would be unreviewable by this Court, regardless of any Constitutional issues raised. This Court would be barred from ruling on claims where a state has violated the Fourteenth Amendment or the Sixth Amendment, where this Court found sufficient basis to act in *Hurst*, the case central to the issue brought by Mr. Zack. Even where a partial-retroactivity scheme is stated as being grounded on state law, a state could not base it on any criteria that are arbitrary (such as making a case retroactive back to the Governor's fiftieth birthday) or adverse to a federally protected class (such as making retroactivity contingent upon the religion of a defendant).

Further, although *Michigan v. Long* indicates that this Court should refrain from intervening where a state court has made a decision based on independent state

ground, the record must clearly indicate that the rationale does not rely on any interpretation of federal law. *Long*, 463 U.S. at 1040-44. While the basis for the Florida Supreme Court's retroactivity scheme, as articulated in *Asay v. State*, is *Witt v. State*, *Witt* itself is derived primarily from the rationale detailed in federal decisions passed down from this Court in *Stovall* and *Linkletter* (referred to as the *Stovall/Linkletter* test). *See Asay v. State*, 210 So. 3d 1, 16-17 (Fla. 2016) (citing *Witt v. State*, 387 So. 2d 922 (Fla. 1980)); *Witt*, 387 So. 2d at 926 (citing *Stovall v. Denno*, 388 U.S. 293 (1967); *Linkletter v. Walker*, 381 U.S. 618 (1965)). Further, where this rationale by a state court is "interwoven with federal law," there is "a conclusive presumption of jurisdiction" to decide on issues arising out of a case, such as the Florida *Hurst* retroactivity scheme. *Coleman v. Thompson*, 501 U.S. 722, 733 (1991) (citing *Long*, 463 U.S. at 1040-41).

Respondent fails to acknowledge that where a "federal-law holding is integral to the state court's disposition of [a] matter," such an issues does not fall under the umbrella of independent state grounds. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). As the Florida Supreme Court has proximately relied on this Court's decisions to craft a retroactivity scheme, this Court may rule on the Constitutionality of such a scheme. To hold otherwise would indicate that this Court could not rule in similar cases as it has done in *Hurst*. *Hurst v. Florida*, 136 S. Ct. 616, 621-22 (2016) (holding that Florida's *state-law based* sentencing scheme violated the Sixth Amendment) (emphasis added).

Respondent wrongly reads *Danforth v. Minnesota*, 552 U.S. 264 (2008), as

authorizing some kind of immunity from federal review that Respondent believes the Florida Supreme Court's *Ring* cutoff is due. *See* BIO at 15-16. Respondent observes that *Danforth* ruled "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 white defendants but not black defendants, even though such a rule would, in Respondent's reading of *Danforth*, extend retroactivity "more broadly" than providing no retroactivity at all?

II. Respondent's arguments fail to adequately address the Eighth and Fourteenth Amendment issues raised in Mr. Zack's petition.

The underlying rationale of *Hurst*, articulating that non-jury fact-finding violates the Sixth Amendment, was not precluded by this Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) from being applicable to capital cases. Respondent, in pointing to the Florida Supreme Court's reasoning justifying its *Hurst* retroactivity framework, asserts that this Court "expressly excluded death penalty cases from its holding." *See* BIO at 23-24 (citing *Asay*, 210 So. 3d at 19). However, these assertions ignore the fundamental principles of *Apprendi*, which dictate that a jury must find facts necessary to increase a defendant's penalty, which formed the basis of *Hurst* and underlies Florida's retroactivity scheme.

While in *Apprendi* this Court indicated that a series of capital cases at the time did not fall under the stated rationale, to say that this excluded all capital cases from

the holding is an oversimplification. This exception in *Apprendi* only indicated that where a statute had no elemental requirements to impose a death sentence beyond those required to find guilt, a jury was not necessary to find additional aggravating factors that were not required by statute. *Apprendi*, 530 U.S. at 496-97. Imposition of the holding on the referenced capital cases was not deemed necessary by this Court at the time as no additional facts needed to be found before a judge could impose the death sentence. *Id.*

Florida's scheme has always been distinct, as statutes required the finding of aggravating factors before a court could impose a death sentence and the necessary fact-finding was not done by a jury. This scheme was unconstitutional when *Apprendi* was decided and this was further acknowledged in *Ring* and *Hurst*, where this Court affirmed that *Apprendi* was the accurate interpretation of Sixth Amendment law as it relates to requiring aggravating factors in death sentencing schemes. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

The Florida Supreme Court, in enacting its retroactivity scheme, further disregards Mr. Zack's constitutional concerns by asserting that *Witt* provides relief to more defendants than federal law requires. Although a state may grant broader protection to its citizens than the Federal Constitution requires in terms of retroactivity, Respondent does not establish that this is the case with Florida's scheme and that by which such protections are provided. *Danforth v. Minnesota*, 552 U.S. 264, 275 (2008). The Florida Supreme Court relied on its *Witt* test to apply *Hurst* retroactively, where the substantive prong is labeled the *Stovall/Linkletter* test. *Asay*,

210 So. 3d at 16-17. The factors involved in this test are vague and it is not apparent how these expand retroactivity to a broader range of citizens than this Court's *Teague* analysis. Respondent argues that *Teague* need not be applied by the Florida Supreme Court as retroactivity has not been applied federally to *Hurst*, however this does not excuse Florida from the Constitutional constraints of this Court's decisions.[1] *See* BIO at 15-16.

In crafting the *Teague* analysis, this Court acknowledged that the rationale in *Linkletter* "had not led to consistent results" and "led to the disparate treatment of similarly situated defendants on direct review." *Teague v. Lane*, 489 U.S. 288, 302-03 (1989). In its reliance on *Linkletter* to craft a retroactivity scheme for *Hurst*, the Florida Supreme Court has set a standard that has led to the "disparate treatment" this Court sought to prevent in *Teague*. *Id.* As Respondent attempts to argue, Florida is free to craft a retroactivity scheme that offers relief to a broader range of citizens than is constitutionally required, but *Hurst*-retroactivity has not had such an effect and a state cannot offer retroactivity in a manner that arbitrarily differentiates between like citizens.

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[1] Respondent's analysis of traditional retroactivity rules further misinterprets this Court's holding in *Griffith*, which acknowledged the issues with treating similarly situated parties differently and reduces the scope of the "clear break" exception, rather than stating a general principle to rely on. *Griffith v. Kentucky*, 479 U.S. 314, 326-28 (1987).

III. Respondent's brief highlights the certiorari-worthiness of the questions presented.

Respondent's arguments actually highlight, rather than diminish, the certiorari-worthiness of the questions presented. The State of Florida here 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 what the rationale, 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 a 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.

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 20-22. 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).

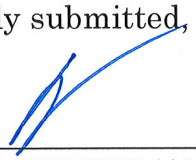
That is why former jurists of the Florida Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and Florida's trial courts, as well as respected legal academics, have urged this Court to address the important federal constitutional issues regarding the Florida Supreme Court's *Hurst* 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 former members of the Florida Supreme Court have also explained that Petitioner's arguments have merit. *See* Pet. at 20-21.

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.

CONCLUSION

This Court should grant a writ of certiorari and review the decision of the Florida Supreme Court.

Respectfully submitted,



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