Case No. 18-9356

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2018

BOBBY JOE LONG,

Petitioner,

vs.

MARK S. INCH, ET AL,

Respondent

REPLY BRIEF FOR PETITIONER

ON PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT

DEATH WARRANT ISSUED
EXECUTION SET FOR MAY 23, 2019

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Respondent's brief does not provide any good reason for this Court to deny review in this case. Petitioner timely raised constitutional violations in a state petition for a writ of habeas corpus, as is allowed by Florida state law. While the Florida Supreme Court dismissed his petition on timeliness grounds, Petitioner can establish that this was an inadequate state ground because it is not consistently followed, as shown by the cases in his certiorari petition and discussed further below.

As an initial matter, it is important to note that the Florida Supreme Court recently changed membership due to Florida's mandatory judicial retirement law. Three out of seven justices took the bench in January 2019. Since that change, the Court has started radically departing from even its most recent precedent. *Compare Orange County v. Singh*, No. SC18-79, 2019 WL 98251 (Fla. Jan. 4, 2019) (holding that the Florida Election Code does not preempt counties from holding non-partisan elections), *with Orange County v. Singh*, No. SC18-79, 2019 WL 1716301 (Fla. Apr. 18, 2019) (holding that the Florida Election Code *does* preempt counties from holding non-partisan elections).

In a decision relevant to capital defendants and necessary to the stability and predictability of the state post-conviction landscape, the Florida Supreme Court found this Court's finding in *Hurst v. Florida*, 136 S. Ct. 616 (2016), is retroactive to capital defendants whose convictions were not final when this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). But a few weeks ago, the new Florida Supreme Court issued an order to a post-conviction appellant ordering him to brief whether it should recede from its holding in *Mosley*.

See Owen v. State, No. SC18-810, Order (Fla. Apr. 24, 2019). In denying Petitioner's request for a stay based on *Owen*, the new Florida Supreme Court indicated that it is considering revoking *Hurst* retroactivity, despite *Mosley*'s role in the capital collateral landscape for the past two years and the fact that some capital defendants have already been granted *Hurst* relief because of its rule.

The Florida Supreme Court's decision in Petitioner's case that capital petitioners are no longer able to file state habeas petitions based on a change in the facts or law since their initial post-conviction appeal is just the latest in the recent and troubling indications of the new Florida Supreme Court's willingness to depart from established precedent and practice. As is clear from Petitioner's case and *Owen*, capital cases will not be immune to these changes. Regardless of whether these instances continue, this sudden shift regarding the timing of and type of issues raised in habeas petitions falls far below the consistent application necessary to be considered an adequate and independent state ground precluding this Court's review.

I. Respondent Ignores the Fact that a State Habeas Petition was the Proper Vehicle to Bring Mr. Long's Claims, which became Ripe when Petitioner's Death Warrant was Signed

Respondent's argument does not rebut Petitioner's assertion that his claims were not ripe until his death warrant was signed and that a state habeas petition was the proper vehicle for these claims.

First, Petitioner's claim concerning his severe mental illness as a bar to execution relies upon legal developments and standards that emerged subsequent to his direct appeal and post-conviction proceedings. Numerous other capital defendants

in Florida have similarly raised state habeas petitions based on developing case law that emerged after their direct appeal or initial post-conviction proceedings; however, many of those defendants did not have a procedural bar applied by the Florida Supreme Court. *See, e.g., Kearse v. State*, 969 So. 2d 976, 992 (Fla. 2007) (state habeas petition based on the United States Supreme Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Ring v. Arizona*, 122 S.Ct. 2428 (2002)); *Breedlove v. Crosby*, 916 So. 2d 726 (Fla. 2005) (same); *Hertz v. Jones*, 218 So. 3d 428 (Fla. 2017) (state habeas petition based on *Hurst v. Florida*, 136 S.Ct. 616 (2016)).

Second, by its very nature, Petitioner's double jeopardy claim could not be ripe for consideration until he had served twenty-five years in prison and his execution had been scheduled. It is the attempt to carry out Petitioner's execution that constitutes the second punishment for the same crime, thereby triggering the Fifth Amendment violation. In similar circumstances, the Florida Supreme Court has recognized that such issues are not cognizable until a death warrant has been signed. *See Hall v. Moore*, 792 So. 2d 447, 450 (Fla. 2001) (stating that it is premature for a death-sentenced individual to present a claim of incompetency or insanity with regard to his execution if a death warrant has not been signed); *Barnhill v. State*, 971 So. 2d 106 (Fla. 2007) (same); *Anderson v. State*, 18 So. 3d 301 (Fla. 2009) (same); *Israel v. State*, 985 So. 2d 510 (Fla. 2008) (same); *Rigterink v. State*, 66 So. 3d 866, 897-98 (Fla. 2011) (Claim that lethal injection constitutes cruel or unusual punishment is not ripe for review as Governor had not yet signed a death warrant)

II. Respondent Does Not Attempt to Rebut the Fact that the Florida Supreme Court Routinely Considers State Habeas Petitions Filed After the Initial Post-Conviction Appeal.

While Petitioner does not concede that his claims were procedurally barred, Respondent's argument in support of the adequacy of the Florida Supreme Court's determination is based upon the notion that a state habeas petition can only be raised at one time, simultaneous to an initial post-conviction appeal (BIO at 6-7). Thus, according to Respondent, Petitioner's state habeas petition was rejected by the Florida Supreme Court on well settled state law grounds and rules of procedure (BIO at 6).

Respondent's argument fails to address or even acknowledge the case law set forth in the Petition establishing the inadequacy of the state law ground to support the judgment. For instance, as the Petition explained, the Florida Supreme Court has on numerous occasions given merits consideration to state habeas petitions concerning legal developments and standards emerging subsequent to direct appeal and post-conviction proceedings (Petition at 9-10). Such consideration has occurred even when the state habeas petitions were filed and litigated under a pending death warrant (Petition at 10).

Contrary to Respondent's assertion, the Florida Supreme Court's procedural rule was not adequate, as it was not "firmly established and regularly followed." *See Walker v. Martin*, 562 U.S. 307, 316 (2011). In other cases where the respondent has suggested that a procedural bar precludes this Court's jurisdiction, this Court has reviewed the practice of the state court to determine whether the rule was "'strictly

or regularly followed.'" *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). The reality here is that the Florida Supreme Court has over the years routinely entertained on the merits state habeas petitions, based on many different claims, filed well beyond the initial post-conviction stage. *See, e.g. Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987); *Martin v. Dugger*, 515 So. 2d 185 (Fla. 1987); *Riley v. Wainwright*, 517 So. 2d 656 (Fla. 1987); *Darden v. Dugger*, 521 So. 2d 1103 (Fla. 1988); *Eutzy v. State*, 541 So. 2d 1143 (Fla. 1989); *O'Callaghan v. State*, 542 So. 2d 1324 (Fla. 1989); *Martin v. Singletary*, 599 So. 2d 121 (Fla. 1992); *Kennedy v. Singletary*, 602 So. 2d 1285 (Fla. 1992); *Mills v. Singletary*, 606 So. 2d 623 (Fla. 1992); *Johnson v. Singletary*, 612 So. 2d 575 (Fla. 1993); *Henderson v. Singletary*, 617 So. 2d 313 (Fla. 1993); *Mills v. Singletary*, 622 So. 2d 943 (Fla. 1993); *Atkins v. Singletary*, 622 So. 2d 951 (Fla. 1993); *Marek v. Singletary*, 626 So. 2d 160 (Fla. 1993); *Roberts v. Singletary*, 626 So. 2d 168 (Fla. 1993); *Lambrix v. Singletary*, 641 So. 2d 847 (Fla. 1994); *Porter v. State*, 653 So. 2d 374 (Fla. 1995); *Doyle v. Singletary*, 655 So. 2d 1120 (Fla. 1995); *White v. Singletary*, 663 So. 2d 1324 (Fla. 1995); *Jones v. Butterworth*, 691 So. 2d 481 (Fla. 1997); *McCray v. State*, 699 So. 2d 1366 (Fla. 1997); *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999); *Glock v. Moore*, 776 So. 2d 243 (Fla. 2001); *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001); *Johnston v. Moore*, 789 So. 2d 262 (Fla. 2001); *Downs v. Moore*, 801 So. 2d 906 (Fla. 2001); *King v. State*, 808 So. 2d 1237 (Fla. 2002); *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *King v. Moore*, 831 So.2d 143 (Fla. 2002); *Diaz v. Crosby*, 869 So. 2d 538 (Fla. 2003); *Haliburton v. Crosby*, 865 So. 2d 480 (Fla. 2003); *Valle v. Crosby*, 859 So.

2d 516 (Fla. 2003); *Hertz v. Jones*, 218 So. 3d 428 (Fla. 2017); *Card v. Jones*, 219 So. 3d 47 (Fla. 2017); *Bailey v. Jones*, 225 So. 3d 776 (Fla. 2017); *Nelson v. Jones*, etc., No. SC17-2034 (Fla. Feb. 9, 2018).

Even where the Florida Supreme Court ultimately finds a procedural bar, it is virtually unheard of for the court to dismiss a habeas petition before full briefing and without consideration of the merits. *See, e.g., Schoenwetter v. State*, 46 So. 3d 535 (Fla. 2010); *Diaz v. Crosby*, 869 So. 2d 538 (Fla. 2003). This is true even for cases under warrant. *See, e.g., Branch v. State*, 236 So. 3d 981 (Fla. 2018) (the Florida Supreme Court considered Branch's habeas petition seeking an extension of *Roper v. Simmons*, 543 U.S. 551 (2005); *Marek v State*, 8 So. 3d 1123 (Fla. 2009) (the Florida Supreme Court considered Marek's postconviction claim, filed under an active death warrant, which concerned the length of time spent on death row awaiting execution); *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (the Florida Supreme Court considered Bottoson's state habeas petition, filed under an active death warrant, which concerned this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002)); *King v. Moore*, 831 So. 2d 143 (Fla. 2002) (same).

Respondent's argument falls as the Florida Supreme Court's procedural rule was not faithfully and regularly applied. *See Card v. Dugger*, 911 F.2d 1494, 1517 (11th Cir. 1990). As a result, the Florida Supreme Court could and should have addressed Petitioner's federal issues. *See Hathorn*, 457 U.S. at 262 ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply

evenhandedly to all similar claims."). This Court has jurisdiction to grant a writ of certiorari here.

III. Respondent's Jurisdictional Argument is Erroneous as a Matter of Law

Respondent is of the opinion that because the Florida Supreme Court did not address the merits of Petitioner's constitutional questions, this Court lacks certiorari jurisdiction to consider the Petition (BIO at 8). According to Respondent, any federal claim addressed by this Court would amount to nothing more than an advisory opinion (BIO at 8).

Respondent's argument is erroneous as a matter of law. In *Cardinale v. Louisiana*, 394 U.S. 437 (1969), the first of two cases relied upon by Respondent, the federal constitutional issue was raised in this Court for the first time on review of the state court decision. *Id.* at 438. This Court explained that "[e]ven though States are not free to *avoid* constitutional issues on inadequate state grounds, *O'Connor v. Ohio*, 385 U.S. 92 (1966), they should be given the first *opportunity* to consider them." *Id.* at 439 (emphasis added).

In *Street v. New York*, 394 U.S. 576 (1969), the second case relied upon by Respondent, the issue concerned whether the federal question was sufficiently and properly raised in the state court. *Id.* at 583. This Court explained that where "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Id.* at 582.

Contrary to Respondent's assertion, this Court's jurisdiction does not rest upon whether the state court addressed the federal constitutional issue involved. Rather, as this Court made clear in *Cardinale* and *Street*, the issue concerns whether the state court was apprised of the federal constitutional issue.

Because the present Petitioner raised his federal issue in state court—which Respondent does not deny—this case is analogous to *Hathorn v. Lovorn*. 457 U.S. at 255. In *Hathorn*, the petitioner had raised a federal issue under the Voting Rights Act in state court. *Id.* at 262. The Mississippi Supreme Court dismissed the claim on timeliness grounds, and on petition for certiorari review to this Court, the respondent argued that this Court did not have jurisdiction. *Id.* at 263. This Court found that the procedural ruling was not an independent and adequate state ground because it was not consistently followed and that, as a result, the state court had been obligated to consider and uphold the federal law. *Id.* at 269; *see also Adams v. Robertson*, 520 U.S. 83, 87 (1997) (explaining that inadequate state procedural rules can overcome the presumption that a petitioner did not properly raise a federal issue in state court). Accordingly, this Court found it had jurisdiction and considered the claim on the merits, ultimately ruling in favor of the petitioner—despite the absence of a merits decision from the state court. *Hathorn*, 457 U.S. at 270.

Respondent does not dispute the fact that Petitioner raised his Fifth, Eighth and Fourteenth Amendment issues with specificity before the state court below. As previously discussed, Petitioner has established that the Florida Supreme Court's procedural bar in this case was inadequate. Given that Respondent's remaining

argument regarding lack of jurisdiction is meritless, Petitioner's federal constitutional issues are properly before this Court.

Respectfully submitted,

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