Case No. 18-9363

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL LEE ROBINSON,

***Petitioner*,**

vs.

STATE OF FLORIDA,

Respondent

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

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REPLY TO BRIEF IN OPPOSITION

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I. Respondent incorrectly asserts that the Florida Supreme Court's denial of *Hurst*[1] relief to Defendants who waived an advisory jury does not violate this Court's precedent.

A. Petitioner's claim is not time barred.

Respond is incorrect in its position that Petitioner is procedurally barred from raising his claim that he never waived his right to a penalty phase jury. *See* Brief in Opposition ("BIO") at 9. Although this claim was not raised on direct appeal, Petitioner properly raised this claim as a failure on the part of trial counsel and appellate counsel in his state postconviction motions. On February 21, 2001, Petitioner filed a Motion to Vacate Judgment and Sentence pursuant to Florida Rule of Criminal Procedure 3.850. Petitioner filed his final amended Rule 3.850 motion on October 10, 2001. He argued in his postconviction motions that he did not "voluntarily, knowingly, and intelligently waive his right to a capital sentencing jury, and the trial court's inquiry on the purported waiver was constitutionally inadequate."

On appeal in his state habeas petition, Petitioner argued: (1) the Florida Supreme Court's decision on direct appeal precluding him from seeking a penalty phase jury was error, and appellate counsel unreasonably failed to bring this matter to the court's attention, thereby rendering ineffective assistance of counsel; and (2) Florida's capital sentencing statute violates *Ring v. Arizona*, 536 U.S. 584 (2002). *See* Petition for Writ of Habeas Corpus Case No. SC04-772. Thus Petitioner has preserved the issue.

[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

B. A Defendant cannot knowingly waive a right which does not exist at the time of the waiver.

Petitioner does not disagree that a capital defendant may waive his Sixth Amendment right to a jury trial. Petitioner's actual argument is that any such waiver must be knowing. The State bears the burden of establishing, based on the record in each case, that a defendant's waiver of the Sixth Amendment's jury-trial right was made voluntarily, knowingly, and intelligently, and "with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970); *see also Johnson v. Ohio*, 419 U.S. 924, 925 (1974).

Respondent argues that when a "capital defendant waives a penalty phase jury, he is consenting to judicial factfinding regarding his sentence." BIO at 14. While that position may be true today, it was not true at the time Petitioner was sentenced to death. Prior to *Hurst*, Petitioner had no right to jury factfinding, as the jury merely made a recommendation. Therefore, Petitioner could not "consent" to judicial factfinding when that was his only available option under then-existing Florida law. In essence, when any capital defendant waived an advisory jury, they were giving up no rights since Florida did not allow, nor did juries actually make, any penalty phase findings of fact. Even if Petitioner had an advisory jury, all factfinding was done by the judge alone. By waiving an advisory jury for his first trial, Petitioner forfeited no Sixth Amendment right to jury factfinding because Florida did not afford that right to him. His initial waiver was essentially meaningless.

Thus, any contention by the State that Petitioner knowingly, voluntarily, and intelligently waived a penalty phase jury is comical. In *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), this Court reaffirmed that a defendant cannot voluntarily, knowingly, and intelligently waive a federal constitutional right that was not recognized by the state courts at the time of the purported waiver.

Similarly here, Florida did not recognize a capital defendant's right to penalty phase jury factfinding. Thus, Petitioner could not waive that unrecognized right.

Halbert was an application of this Court's longstanding precedent regarding waivers of federal constitutional rights. *See, e.g.*, *Johnson*, 419 U.S. at 925 ("The accused can only waive a *known* right") (emphasis in original). Because the record in *Halbert* did not reflect an "intentional relinquishment of a known right," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), this Court concluded that its default presumption against Mr. Halbert's waiver of his constitutional right was not overcome. Indeed, as *Halbert* recognized, it is difficult to conceive how a defendant could voluntarily, knowingly, and intelligently waive a right that was unknown to him and unrecognized by the state courts at the time of the plea. *See Halbert*, 545 U.S. at 623.

Respondent attempts to distinguish *Halbert* from the instant case by arguing that this case involves "an explicit waiver to have a jury participate in sentencing" (BIO at 16) in contrast to Halbert who was "not informed that his plea would result in a complete denial of appointed appellate counsel" (BIO at 17). Respondent continues by stating that "Robinson was fully aware" of what rights he was waiving because *Hurst* announced no new right which did not previously exist under Florida law. *Id*. This argument stands in stark contrast to this Court's holding in *Hurst*:

> As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); *see Steele*, 921 So.2d, at 546. "[T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Hurst v. Florida, 136 S. Ct. 616, 622 (2016). *Hurst* explicitly addressed a capital defendant's right to have a jury make the necessary factual findings prior to the imposition of a death sentence. This right was repeatedly rejected by the Florida Supreme Court prior to *Hurst*. *See Hurst v. State*, 202 So. 3d 40, 62 (Fla. 2016) ("Since the issuance of *Ring* almost fifteen years ago, many death row inmates have raised *Ring* claims in this Court and have been repeatedly rebuffed based on pre-*Ring* precedent that held the jury was not required to make the critical findings necessary for imposition of the death penalty."). Only after *Hurst v. Florida* issued was this right recognized in Florida.

Respondent maintains that "Robinson waived the right to a sentencing jury" (BIO at 22) but fails to answer how Petitioner could have waived a right that was not recognized by the courts. It was impossible for Petitioner to knowingly and "explicitly waive" a right which he was not recognized as having to begin with.

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.

Contrary to Respondent's suggestion, this Court has jurisdiction to review whether the *Hurst* retroactivity cutoff created by the Florida Supreme Court is consistent with the United States Constitution. In suggesting that the Florida Supreme Court's *Ring*[2]-based retroactivity cutoff is immune from this Court's review, Respondent misreads the adequate-and-independent-state-ground doctrine, which is inapplicable here.

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

[2] *Ring v. Arizona*, 536 U.S. 584 (2002).

adequate to support the judgment," *Coleman v. Thompson*, 501 U.S. 722 (1991), this does not mean that 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" only when it has 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).

The federal question here is whether the Florida Supreme Court's *Ring*-based retroactivity cutoff for *Hurst* claims violates the Eighth and Fourteenth Amendments to the United States Constitution. The Florida Supreme Court's application of its state-law *Ring*-based cutoff to Petitioner cannot be "independent" from Petitioner's federal Eighth and Fourteenth Amendment claims. The state court's ruling is inseparable from the merits of the federal constitutional arguments Petitioner has raised throughout this litigation. *See Foster*, 136 S. Ct. at 1759.

Under Respondent's mistaken interpretation of the adequate-and-independent doctrine, this Court could not have granted 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 logic, so long as any state retroactivity scheme is articulated as a matter of state law, this Court is powerless to consider cutoffs drawn at *any* arbitrary point in time, or state rules providing retroactivity to defendants of certain races or religions but not others.

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.

Nor is the Respondent's reliance on *Dorsey v. United States*, 567 U.S. 260 (2012) persuasive or applicable. *See* BIO at 27. *Dorsey* did not present a question of retroactivity, nor did this Court cite or rely on *Teague v. Lane*, 489 U.S. 288 (1989). Instead, *Dorsey* involved a question of statutory interpretation where this Court addressed a question of congressional intent. *Dorsey*, 567 U.S. at 264.

Finally, Respondent's Equal Protection argument is equally unconvincing and false. Respondent concedes that the Equal Protection clause "prohibits disparity of treatment by a State between classes of individuals whose situations are debatably the same." BIO at 29. Respondent then argues that "Robinson is not similarly situated with the defendants who are entitled to *Hurst* relief, because those defendants were sentenced to death under an unconstitutional sentencing scheme." *Id*. Robinson was sentenced under the exact same sentencing scheme as every other defendant sentenced between 2002 and 2016. *Hurst* held that "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016). This process was the same sentencing scheme which existed prior to June 24, 2002, when *Ring* was issued and which existed when Petitioner was sentenced to death in 1996 and 1999. Simply because Florida failed to comply with the Sixth Amendment does not mean this right did not exist. Pre-*Ring* and post-*Ring* defendants are similarly situated because they were sentenced under the same exact Florida statute which denied them their right Sixth Amendment rights.

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 issue.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to review the judgment of the Florida Supreme Court.

Respectfully submitted,

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