No. 17-6602

IN THE SUPREME COURT OF THE UNITED STATES

John L. Lotter,

Petitioner-Appellant,
v.

SCOTT FRAKES, Director, Nebraska Department of Correctional Institutions,

Respondent-Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Under the standard for granting a Certificate of Appealability (COA), is it "debatable among jurists of reason" that, when a habeas petition is filed by a prisoner in good faith to protect a new, valid federal constitutional claim -- in this case a claim that the state's capital sentencing scheme is unconstitutional in light of *Hurst v. Florida*, 136 S.Ct. 616 (2016) -- against expiration of the statute of limitations while the prisoner exhausts his claim in state court, a district court, upon a finding that the petition lacks authorization from the Court of Appeals as "second or successive," not only is without jurisdiction to reach the merits of the petition, but should be required in the interests of justice under 28 U.S.C. § 1631 to transfer the petition to the Court of Appeals to cure the want of jurisdiction rather than dismiss the petition and thereby deliberately cause any new action to be barred as untimely?

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REPLY ARGUMENT

I. Respondent's brief in opposition is untimely and should not be considered.

Petitioner filed his petition for a writ of certiorari on October 30, 2017. Pursuant to Rule 15.3, this Court set the due date for the brief in opposition (BIO) as Friday, December 1, 2017. Respondent, with the consent of the Petitioner, requested and was granted an extension of time from December 1, 2017 to Monday, December 18, 2017 to file the BIO. However, Respondent did not file his BIO on December 18. Instead, and without seeking either Petitioner's consent or a further extension of time from this Court, Respondent filed an untimely BIO on Thursday, December 21, 2017.

While Respondent's untimely BIO, in contrast to an untimely petition for certiorari (*see* Rule 13.2), does not affect the Court's jurisdiction, the Rules of this Court presuppose that the BIO -- which is mandatory in a capital case -- will in all cases be timely filed. *See* Rule 15.1 ("A brief in opposition to a petition for a writ of certiorari . . . is not mandatory except in a capital case, see Rule 14.1(a), or when ordered by the Court"); Rule 15.3 ("Any brief in opposition *shall* be filed within 30 days after the case is placed on the docket, *unless* the time is extended by the Court or a Justice, or by the Clerk under Rule 30.4") (emphasis added); Rule 15.5 ("If a brief in opposition is *timely* filed, the Clerk will distribute the petition, the brief in opposition, and any reply brief to the Court for its consideration no less

than 14 days after the brief in opposition is filed, unless the petitioner expressly waives the 14-day waiting period"). The Rules do not contemplate that a BIO may be untimely filed. Respondent's failure to comply with the Rules of this Court should preclude consideration of his untimely BIO.

II. Respondent's brief in opposition is not responsive to the question presented, and otherwise misstates Petitioner's arguments.

The question presented in the petition for a writ of certiorari, and repeated in this reply (*supra*, at i), involves a straightforward application of well-established standards governing the issuance of a COA as delineated in prior decisions of this Court, and raises the question whether those standards are met under the circumstances presented. The question presented necessarily encompasses an evaluation of the district court's decision and whether that decision is "debatable among jurists of reason." Pet. at 9 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000)). Instead of addressing *that* question, Respondent changes its substance to a different question about the procedure governing an application with a circuit court of appeals for permission to file a second or successive habeas petition. BIO at i. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 280 (1993) (it is the petition for certiorari, not the BIO, that determines the question presented); Rules of the Supreme Court, Rule 15.3, 24.1(a), and 24.2 (together prohibiting a respondent in a BIO from raising additional questions or changing the substance of the question presented).

Respondent's arguments are then directed against its own straw man rather than the question actually presented in the petition for a writ of certiorari, and as such, are wholly unresponsive to the question presented.[1]

Respondent thus misinterprets Mr. Lotter's argument as "conceding" that he filed an unauthorized successive habeas application in the district court without first obtaining permission from the Court of Appeals. BIO at 5. The district court did determine that the application was an unauthorized "second or successive" petition (Pet.App. B at 2), but what Mr. Lotter argues in his petition for a writ of certiorari is that, once the district court made that finding, the district court was without jurisdiction to decide the merits. Pet. at 10 (citing *Burton v. Stewart*, 549 U.S. 147, 157 (2007). Respondent made the same point in its briefing to the district court before the court issued its ruling. *See* Pet.App. D at 6. It is the district court's disposition of Mr. Lotter's application upon making that finding which is

[1] To the extent Respondent rather oddly suggests otherwise (BIO at 5-6), Mr. Lotter followed standard procedure for seeking to appeal the district court's order to the Eighth Circuit Court of Appeals. The district court certified the notice of appeal and found that Mr. Lotter could proceed *in forma pauperis*, the Eighth Circuit docketed the appeal, and then granted Mr. Lotter until June 9, 2017 to file his application for a COA. Mr. Lotter's application for a COA was timely filed. Pet.App. D.

"debatable among jurists of reason," whether that finding was itself right or wrong.[2]

It is surely "debatable among jurists of reason" whether a prisoner's habeas application seeking to protect a new, valid claim of the denial of a constitutional

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[2] Respondent argues that Mr. Lotter's application did not satisfy the requirements of 28 U.S.C. § 2244(b)(2)(A) because *Hurst v. Florida*, 136 S.Ct. 616 (2016), has not been made retroactive to cases on collateral review by this Court. BIO at 7. But Respondent fails to acknowledge Mr. Lotter's argument, raised below (Pet.App. D at 13-15), that § 2244(b)(2)(A) may be satisfied without an express holding of retroactivity by this Court upon a showing that retroactivity is "logically dictate[d]" by the Court's holdings. *See* Pet.App. D at 13-15 (discussing *Tyler v. Cain*, 533 U.S. 656, 668-669 (2001) (O'Connor, J., concurring); *id.*, at 669 (quoting *Teague v. Lane*, 489 U.S. 288, 307 (1989)). *See also* Pet.App. D at 16 (citing *Montgomery v. Louisiana*, 136 S.Ct. 718, 734 (2016); *Welch v. United States*, 136 S.Ct. 1257 (2016)).

Nor has Mr. Lotter ever argued that state court decisions finding *Hurst*'s rule to be retroactive satisfy § 2244(b)(2)(A), as Respondent suggests. BIO at 8-9. Rather, Mr. Lotter argued that such decisions satisfy the one-year statute of limitations provided for under 28 U.S.C. § 2244(d)(1)(C), and that his claim was filed within the applicable period of limitations. Pet.App. D at 11-12 (citing *Dodd v. United States*, 545 U.S. 353 (2005); *id.* at 365 n. 4 (Stevens, J., dissenting)).

Respondent also takes issue with the "notion" that "there was no death penalty in Nebraska when the *Hurst v. Florida* decision was issued." BIO at 4 n. 1. As Respondent well knows, whether or not the abolition bill was suspended from going into effect or became law before *Hurst* was decided is currently the subject of litigation in the Nebraska state courts. *See Sandoval v. Ricketts*, Case No. CI17-4302, District Court of Lancaster County, Nebraska. In any event, the referendum vote did not take place until November 8, 2016. The status of the death penalty in Nebraska at the time *Hurst* was decided was, at a minimum, uncertain, and Mr. Lotter's contention that there was "effectively no death penalty in Nebraska when the *Hurst* decision was announced by this Court on January 12, 2016" is accurate. Pet. at 6 n. 3.

right against expiration of the statute of limitation in accordance with a procedure approved by this Court (*see* Pet. at 8) while he seeks to exhaust the claim in state court should, if the district court believes the application to be a "second or successive" petition requiring pre-authorization, be transferred to the Court of Appeals rather than dismissed, thereby causing the prisoner to be forever barred from raising the claim in federal court. That is the subject integral to the question presented, but precisely that which Respondent does not address.[3]

The petition for certiorari presents a question of great importance to the fair and uniform administration of justice in the federal courts. Rule 10(a) and (c). The question presented should be resolved by this Court to ensure the enforcement of consistent and even-handed procedures with respect to a good faith habeas application that has been deemed by a district court to be an unauthorized "second

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[3] Respondent at least tacitly concedes that Mr. Lotter's *Hurst* claim makes a substantial showing of the denial of a constitutional right required for a COA. BIO at 8. Curiously, though, Respondent contends that "Mr. Lotter's cert petition no longer pursues" his constitutional claim concerning death-qualification of his jury. BIO at 5. Respondent's argument that this constitutional claim has somehow been abandoned is misplaced, and confuses the standard for granting a COA with a merits-based determination. The COA inquiry "is not coextensive with a merits-based analysis." *Buck v. Davis*, 137 S.Ct. 759, 773 (2017). When a district court denies a habeas petition on procedural grounds, "a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, *supra*, at 478. Mr. Lotter's COA application made the requisite showing as to both issues. Pet.App. D at 25-31.

or successive" petition, and the circumstances under which the "interest of justice" requires transfer of such petition to the Court of Appeals under 28 U.S.C. § 1631 to cure the want of jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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