

IN THE
Supreme Court of the United States

RICHARD WALLACE RHODES,

Petitioner,

v.

STATE OF FLORIDA,

Respondents.

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

REPLY BRIEF FOR PETITIONER

THIS IS A CAPITAL CASE

SARAH BUTTERS
Ausley McMullen
123 S. Calhoun Street
Tallahassee, FL 32301
sbutters@ausley.com

BJORN E. BRUNVAND
J. JERVIS WISE
Brunvand Wise, P.A.
615 Turner Street
Clearwater, FL 33756
bjorn@acquitter.com
jervis@acquitter.com

BILLY H. NOLAS
Counsel of Record
SEAN T. GUNN
KELSEY PEREGOY
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 North Bronough St., Suite 4200
Tallahassee, FL 32301-1300
billy_nolas@fd.org
sean_gunn@fd.org
kelsey_peregoy@fd.org

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I. Respondent Mistakenly Argues that the Florida Supreme Court's Retroactivity Ruling Does Not Permit this Court's Certiorari Review

This Court has jurisdiction to review the Florida Supreme Court's *Hurst* retroactivity framework. Respondent argues that the Florida Supreme Court's retroactivity analysis is an independent matter of state law, governed by *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and that this Court's jurisdiction fails as a result. See Brief in Opposition ("BIO") at 7-8. Respondent's reliance on the adequate-and-independent-state-ground doctrine for that argument is both confused and misplaced. If the doctrine worked as Respondent suggests, as long as any state-drawn retroactivity cutoff was articulated as a matter of state law, this Court would lack jurisdiction to review it, even if the cutoff's basis was a plainly arbitrary date, such as the most recent championship of the local state university's college football team.

Respondent's understanding of the adequate-and-independent doctrine is undercut by *Hurst* itself. This Court's ruling in *Hurst* was premised on a violation of the Sixth Amendment even though the Florida Supreme Court had previously upheld Florida's prior capital sentencing procedure as a matter of state law. See *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016). The result in *Hurst* could not be reached under Respondent's view of the adequate-and-independent-state-ground doctrine. As this Court has made clear, Florida's retroactivity framework, even if grounded in state law, is still subject to the Sixth, Eighth, and Fourteenth Amendments.

Respondent incorrectly reads *Danforth v. Minnesota*, 552 U.S. 264 (2008), as authorizing the kind of immunity from federal review that Respondent believes the

Florida Supreme Court’s *Ring* cutoff is owed. *See* BIO at 7-8. 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. Despite *Danforth*, there would be no 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.

The law of the adequate-and-independent ground doctrine is well settled. 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 adequate to support the judgment,” *Coleman v. Thompson*, 501 U.S. 722 (1991), this does not mean that state court rulings that claim a state-law basis are always 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 Rhodes thus cannot be “independent” from Rhodes’s federal Eighth and Fourteenth Amendment claims. The state court’s ruling is inseparable from the merits of the federal constitutional claim Rhodes has raised throughout this litigation. *See Foster*, 136 S. Ct. at 1759.¹

II. Respondent’s Defense of the Florida Supreme Court’s *Hurst* Retroactivity Rule Involves a Troubling Reading of *Danforth v. Minnesota* That Will Lead to Arbitrary Capital Sentencing Results

Respondent’s defense of the Florida Supreme Court’s rationale for drawing its *Hurst* retroactivity cutoff at *Ring* is troubling and supports certiorari review in this case. Respondent’s main defense of the cutoff is that states are allowed to determine their own retroactivity rules under *Danforth* no matter what rules are crafted, including the creation of partial retroactivity schemes. As noted above, however, Respondent’s *Danforth* argument wrongly assumes that a partial retroactivity scheme like Florida’s provides the minimum protections afforded by federal law.

Respondent relies upon *Dorsey v. United States*, 567 U.S. 260 (2012), BIO at 11, but the issue in *Dorsey* was whether the federal Fair Sentencing Act was intended to apply to those whose crime occurred before the Act’s passage but whose sentencings occurred after. *Id.* at 264. *Dorsey* addressed legislative intent and the narrow class of federal defendants whose proceedings were ongoing at the time of the legislation’s passage. *Dorsey* did not address a partial retroactivity scheme like Florida’s, which

¹ Respondent’s contention that *Witt* is an independent state ground is further belied by the fact that *Witt* is based upon a federal retroactivity test. *See Asay v. State*, 210 So. 3d 1, 16 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016) (both citing *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965)).

separates the entire state's death row into two classes of collateral-review defendants. In fact, neither party in this case has been able to identify another state-created "partial retroactivity" rule like the Florida Supreme Court's, which 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.

Troubling too is Respondent's insistence that the Florida Supreme Court has adequately addressed its *Ring* cutoff in the context of the Eighth and Fourteenth Amendments. *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), did not address the federal constitutional arguments Rhodes makes here because those decisions, issued on the same day in 2016, created the state-law *Ring* cutoff in the first place. Neither case discusses the Eighth and Fourteenth Amendment arguments Rhodes has raised. Contrary to Respondent's suggestion, the Florida Supreme Court's subsequent decision in *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017), did no more to address the *Ring* cutoff's federal constitutional implications, as *Hitchcock* said little more than *Asay* and *Mosley*, which had continuing validity of as a matter of state law.

In Respondent's flawed view, because the Florida Supreme Court provided at least *some* rationale in *Asay* and *Mosley*, for creating the *Ring* cutoff, the Eighth and Fourteenth Amendments have not been violated. But as Respondent's own brief shows, the rationale provided by the Florida Supreme Court in *Asay* and *Mosley*—in essence, *Ring* was the point at which Florida's courts *should have known* that

Florida’s scheme was unconstitutional, *see Mosley*, 209 So. 3d at 1279-81; *Asay*, 210 So. 3d at 15-16—was based entirely on a *state* retroactivity analysis. The state court’s “should have known” rationale has no basis in federal retroactivity law and does not immunize the *Ring* cutoff from Eighth and Fourteenth Amendment scrutiny.

Respondent is wrong that Rhodes’s arguments have been implicitly rejected by prior decisions upholding *traditional* retroactivity rules. *See* BIO at 10-11. This argument fails to recognize the unusual nature of the Florida Supreme Court’s rule, which grants relief *on collateral review* to some but not others. Traditional retroactivity rules draw a cutoff at the date this Court announced the relevant constitutional ruling. As Rhodes recognized, such lines have been deemed acceptable. However, the Florida Supreme Court has drawn its retroactivity line at a date years earlier than *Hurst*. This unusual and perhaps unprecedented line drawing by a state court warrants this Court’s federal constitutional review.

III. Respondent’s Arguments Support Certiorari Review

Overall, Respondent’s arguments support the case for granting certiorari in this case and settling whether the Florida Supreme Court’s *Ring* cutoff is constitutional. Respondent’s brief reflects the Florida Supreme Court’s problematic approach to the question of *Hurst* retroactivity and its refusal to grapple with federal constitutional law. Respondent takes 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 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 is acceptable under this Court’s Eighth and Fourteenth Amendment precedents, or the decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

The absence of a state or circuit conflict on these issues 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, it is difficult to conceive 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).

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 Florida’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 current members of the Florida Supreme Court have also explained that Rhodes’s arguments have merit. *See* Pet. at 27-28 (discussing dissenting opinions of Justices Lewis and Pariente); *id.* at 7 (discussing Justice Pariente’s separate opinion in this case).

IV. Conclusion

If left uncorrected, the Florida Supreme Court's partial retroactivity rule may result in the unconstitutional execution of dozens of Florida prisoners. This Court should grant a writ of certiorari to review the decision below.

SARAH BUTTERS
Ausley McMullen
123 S. Calhoun Street
Tallahassee, FL 32301
sbutters@ausley.com

BJORN E. BRUNVAND
J. JERVIS WISE
Brunvand Wise, P.A.
615 Turner Street
Clearwater, FL 33756
bjorn@acquitter.com
jervis@acquitter.com

Respectfully Submitted,

/s/ BILLY H. NOLAS
BILLY H. NOLAS

Counsel of Record

SEAN T. GUNN
KELSEY PEREGOY
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 North Bronough St., Suite 4200
Tallahassee, FL 32301-1300
billy_nolas@fd.org
sean_gunn@fd.org
kelsey_peregoy@fd.org