

IN THE
Supreme Court of the United States

STEPHEN TODD BOOKER,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

REPLY BRIEF FOR PETITIONER

THIS IS A CAPITAL CASE

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, Florida 32301
(850) 942-8818
billy_nolas@fd.org
sean_gunn@fd.org
kelsey_peregoy@fd.org

TABLE OF CONTENTS

I. Respondent Inaccurately Asserts that Certiorari Review of the Florida Supreme Court’s <i>Hurst</i> Retroactivity Formula is Precluded.....	1
II. Respondent’s Brief Only Highlights the Florida Supreme Court’s Consistent Failure to Meaningfully Address Whether the <i>Hurst</i> Retroactivity Rule Violates the Eighth and Fourteenth Amendments.....	3
III. Respondent’s Brief Demonstrates the Certiorari-Worthiness of the Questions Presented.....	5

TABLE OF AUTHORITIES

<i>Ake v. Oklahoma</i> , 470 U.S. 68 (1985).....	2
<i>Asay v. State</i> , 210 So. 3d 1 (Fla. 2016)	2, 3, 4
<i>Cox v. State</i> , 819 So. 2d 705 (Fla. 2002).....	5
<i>Danforth v. Minnesota</i> , 552 U.S. 264 (2008).....	2
<i>Foster v. Chatman</i> , 136 S. Ct. 1737 (2016)	1
<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980)	7
<i>Harris v. Reed</i> , 489 U.S. 255 (1989)	1
<i>Hitchcock v. State</i> , 226 So. 3d 216 (Fla. 2017).....	4
<i>Linkletter v. Walker</i> , 381 U.S. 618 (1965)	2
<i>Mills v. Moore</i> , 786 So.2d 532 (Fla. 2001).....	5
<i>Montgomery v. Louisiana</i> , 136 S. Ct. 718 (2016).....	6
<i>Mosley v. State</i> , 209 So. 3d 1248 (Fla. 2016).....	2, 3
<i>Sireci v. Moore</i> , 825 So. 2d 882 (Fla. 2002)	5
<i>Stovall v. Denno</i> , 388 U.S. 293 (1967).....	2

I. Respondent Inaccurately Asserts that Certiorari Review of the Florida Supreme Court’s *Hurst* Retroactivity Formula is Precluded

This Court has jurisdiction to review the constitutionality of the Florida Supreme Court’s *Hurst* retroactivity formula. Respondent mistakenly contends that this Court lacks jurisdiction to hear this case because the Florida Supreme Court, by relying on a state-law-based test for *Hurst* retroactivity, rested its decision on adequate and independent state-law grounds. *See* Respondent’s Brief in Opposition (“BIO”) at 7. Respondent misconstrues the adequate and independent state ground doctrine, which does not present a barrier to review here.

This Court lacks jurisdiction to review a federal claim on appeal from a state court judgment only “if that judgment rests on a state law ground that is both ‘independent’ of the merits of the federal claim and an ‘adequate’ basis for the court’s decision.” *Foster v. Chatman*, 136 S. Ct. 1737, 1745 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)). Here, however, Booker’s federal claim is not independent from the Florida Supreme Court’s application of its state-law *Ring*-based cutoff. Indeed, the federal question here is whether the Florida Supreme Court’s *Ring*-based retroactivity cutoff for *Hurst* claims, as applied to a post-*Apprendi* death sentence like Booker’s, violates the Eighth and Fourteenth Amendments to the United States Constitution. Thus, the state court’s ruling is inseparable from the merits of Booker’s federal constitutional claim. *See Foster*, 136 S. Ct. at 1759.

Under Respondent’s faulty view, this Court would have had no basis to grant certiorari in *Hurst* itself, given the Florida Supreme Court’s upholding of Florida’s prior capital sentencing scheme as a matter of state law. Indeed, according to

Respondent’s logic, so long as a state retroactivity scheme is articulated as a matter of state law, this Court would be powerless to consider state retroactivity cutoffs drawn at *any* arbitrary point in time, such as the inauguration of the current governor, or the date of Florida’s 100th execution of the post-*Gregg* era.

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—facially or as applied to post-*Apprendi* death sentences like Booker’s—the Florida Supreme Court could not re-impose its prior judgment denying relief based on the *Ring* cutoff.¹

Respondent wrongly 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 due. *See* BIO at 8, 13. 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

¹ Booker also notes that Respondent’s adequate-and-independent argument is undercut by the fact that the state retroactivity doctrine, according to the Florida Supreme Court, was adopted from 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)).

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 members of one religion but not members of another, even though such a rule would, in Respondent's view, extend retroactivity "more broadly" than providing no retroactivity at all?

II. Respondent's Brief Only Highlights the Florida Supreme Court's Consistent Failure to Meaningfully Address Whether the *Hurst* Retroactivity Rule Violates the Eighth and Fourteenth Amendments

Respondent's brief only highlights the Florida Supreme Court's failure to meaningfully address whether its *Hurst* retroactivity cutoff complies with the Eighth and Fourteenth Amendments. Respondent reiterates the Florida Supreme Court's original rationale for creating the *Ring*-based retroactivity cutoff as a matter of state law, *see* BIO at 8-13, but fails to identify a case in which the Florida Supreme Court has meaningfully addressed whether its cutoff violates the Eighth and Fourteenth Amendments, particularly as applied to post-*Apprendi* death sentences.

Respondent's reliance on *Asay v. State*, 210 So.3d 1 (Fla. 2016), and *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), for the proposition that the Florida Supreme Court has fully grappled with the issues Booker raises in this petition, is misplaced. *See* BIO at 8-12. *Asay* and *Mosley*, issued on the same day in 2016, created the state-law *Ring* cutoff in the first place. Neither case discussed the Eighth and Fourteenth Amendment arguments Booker has raised. And, importantly, neither *Asay* nor *Mosley* involved defendants with death sentences that became final between *Apprendi* and *Ring*, like Booker's. Any implicit rationale Respondent believes the

Florida Supreme Court provided in *Asay* and *Mosley* regarding why the retroactivity line should be drawn at *Ring* rather than *Apprendi* thus constitutes dicta.

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* had continuing validity as a matter of state law. Even though the defendant in *Hitchcock* was in a post-*Apprendi* posture, the Florida Supreme Court refused to address whether its *Ring* cutoff was unconstitutional as applied to a post-*Apprendi* death sentence. The Florida Supreme Court has never specifically addressed in any subsequent case why a retroactivity rule that grants *Hurst* relief to dozens of post-*Ring* prisoners, while denying relief to the handful of prisoners whose death sentences became final during the two-year period between *Apprendi* and *Ring*, complies with the Eighth and Fourteenth Amendments.

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.

Moreover, the Florida Supreme Court's purported rationale in *Mosley* and *Asay* for not applying *Hurst* to the small number of defendants who were sentenced between *Apprendi* and *Ring* is belied by its own pre-*Ring* decisions rejecting *Apprendi* claims in the context of Florida's capital sentencing scheme, which provided different rationales for denying relief. In fact, in rejecting pre-*Ring* claims under *Apprendi*, the Florida Supreme Court often provided a similar explanation as was later offered in support of rejecting *Ring* claims: *Apprendi* does not apply in Florida. *See, e.g., Mills v. Moore*, 786 So. 2d 532, 537 (Fla. 2001); *Cox v. State*, 819 So. 2d 705, 724 (Fla. 2002); *Sireci v. Moore*, 825 So. 2d 882, 888 (Fla. 2002).

Respondent is also wrong that Booker's arguments have been implicitly rejected by prior decisions upholding *traditional* retroactivity rules. *See* BIO at 13. Traditional retroactivity rules, as Booker has acknowledged, draw a cutoff at the date this Court announces the relevant constitutional ruling. The Florida Supreme Court's rule, however, grants relief *on collateral review* to some defendants but not others. This unusual line drawing by a state court, which works a particularly stark injustice in cases like Booker's with a post-*Apprendi* death sentence, warrants this Court's federal constitutional review.

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

Respondent's arguments demonstrate the certiorari-worthiness of the questions presented. Respondent 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 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 the 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, or the decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

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 1, 2, 6, 21. 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 like the one the Florida Supreme Court has created. Nor is it conceivable that such a rule can exist in the capital setting, where there is a heightened 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 members of the current Florida Supreme Court have also explained that Booker’s arguments have merit. *See* Pet. at 19 (discussing dissenting opinions of Justices Lewis and Pariente); *Id.* at 8 (discussing Justice Pariente’s separate opinion in this case).

If this Court does not act, the Florida Supreme Court’s out-of-step framework may result in the unconstitutional execution of Booker and other Florida prisoners in the “post-*Apprendi*, pre-*Ring*” category. This Court should grant a writ of certiorari in Booker’s case to address these issues now.

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, Florida 32301

(850) 942-8818

billy_nolas@fd.org

sean_gunn@fd.org

kelsey_peregoy@fd.org

JULY 2018