

IN THE
Supreme Court of the United States

MICHAEL BERNARD BELL,

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

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I. Respondent Incorrectly Asserts that the Florida Supreme Court’s *Hurst* Retroactivity Cutoff is Unreviewable By this Court

This Court has jurisdiction, despite what Respondent contends, to review whether the *Hurst* retroactivity cutoff created by the Florida Supreme Court is consistent with the United States Constitution. In suggesting this Court lacks jurisdiction because “the Florida Supreme Court’s denial of retroactive application to Mr. Bell is based on adequate and independent state grounds,” Respondent misreads the adequate-and-independent-state-ground doctrine, which does not present a barrier to review here. *See* Brief in Opposition (“BIO”) at 1, 6-7.

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 all state court rulings that claim a state-law basis are automatically 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 Mr. Bell cannot be “independent” from Mr. Bell’s federal Eighth and Fourteenth Amendment claims—the state court’s ruling is

inseparable from the merits of the federal constitutional claim. *See Foster*, 136 S. Ct. at 1759. *See also Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (explaining that when the application of a state law bar “depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded.”).

Under Respondent’s mistaken view of the adequate-and-independent doctrine, this Court would have lacked jurisdiction 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 a state retroactivity scheme is framed as a matter of state law, this Court would lack jurisdiction to consider state retroactivity cutoffs drawn at *any* arbitrary point in time, or state rules that provide retroactivity to members of certain races or religions but not others.

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*, 470 U.S. at 74-75. 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 could not re-impose its prior judgment denying relief based on the *Ring* cutoff.¹ The state

¹ Mr. Bell 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

retroactivity rule and the federal laws are inextricably linked. Therefore, this Court has jurisdiction. *Id.*

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

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 6-7, but fails to identify a case in which the Florida Supreme Court has meaningfully addressed whether its cutoff violates the Eighth and Fourteenth Amendments. Respondent’s insistence that *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), addressed Mr. Bell’s federal constitutional arguments, *see* BIO at 8-9, is wrong because *Asay* and *Mosley*, issued on the same day in 2016, created the state-law *Ring* cutoff in the first place. Neither case discusses the federal arguments arising under the Eighth and Fourteenth Amendments that Mr. Bell now raises.

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. *See* BIO at 12. But as Respondent’s own brief shows, the rationale provided by the Florida Supreme Court in *Asay* and *Mosley*—that *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 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)).

So. 3d at 15-16—was based entirely on a state, not federal, 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 also wrong that Mr. Bell’s arguments have been implicitly rejected by prior decisions upholding *traditional* retroactivity rules. *See* BIO at 11. Partial-retroactivity is not in accord with the traditional way of applying a rule retroactively. The traditional way of restricting retroactive application of *Hurst* would be to draw a line at the date *Hurst* was decided. As Mr. Bell recognized, such lines have been deemed acceptable. However, the Florida Supreme Court has drawn its retroactivity line at a date years earlier than *Hurst*, thereby granting relief *on collateral review* to some but not others. This unusual and perhaps unprecedented line drawing by a state court warrants this Court’s federal constitutional review.

Finally, in continuing to repeat the Florida Supreme Court’s flawed rationale for setting an arbitrary line, Respondent did nothing to address the features of Mr. Bell’s case that compound the *Hurst* error. It is especially arbitrary to preclude *Hurst* relief here, where Mr. Bell started raising claims that Florida’s capital statute was unconstitutional before his trial even started. After this Court’s decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Mr. Bell filed a habeas petition in state court asserting that his appellate counsel was ineffective for not raising an *Apprendi*

claim.² The Florida Supreme Court’s refusal to grant *Hurst* relief to those who, like Mr. Bell, recognized the unconstitutionality of Florida’s capital sentencing statute and have been litigating this issue for years is particularly arbitrary. Respondent did nothing to rebut this point.

Nor did Respondent provide any reason for this Court to disregard the additional and erroneous evidence the trial judge considered in sentencing Mr. Bell—evidence that no jury ever considered and that was not in support of any aggravating factor. As explained in Mr. Bell’s petition for certiorari, the trial judge considered Mr. Bell’s prior criminal record, the fact that Mr. Bell had been released early from a prior conviction at the time of the capital felony, and a separate charge that was pending at the time of Mr. Bell’s capital trial as further aggravation beyond that considered by the jury. *See* Bell Petition at 5. Respondent failed to go beyond its general arguments for denying *Hurst* retroactivity without rebutting the particularities of Mr. Bell’s case that make it even more arbitrary and capricious to preclude *Hurst* relief here.

² Mr. Bell did not have the opportunity to further litigate his claims that Florida’s sentencing scheme is unconstitutional in federal court, as the Middle District for the Northern District of Florida found, and the Eleventh Circuit affirmed, that the Florida Supreme Court’s extension of time for Mr. Bell to file his state post-conviction petition due to the state’s inability to provide statutorily-guaranteed counsel did not warrant equitable tolling of his time to file a § 2254 petition in federal court. *See Bell v. Fla. Att’y Gen.*, 461 F. App’x 843 (11th Cir. 2012).

III. Respondent's Brief Actually Underscores, Rather than Diminishes, the Certiorari-Worthiness of the Questions Presented

Respondent's arguments demonstrate the certiorari-worthiness of the questions presented. 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, nor does Respondent show that this decision can be reconciled with the decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

Respondent emphasizes 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 (*Hurst*), 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 (*Ring*).

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 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. Nor is it conceivable

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).

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 current members of the Florida Supreme Court have also explained that Mr. Bell’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).

IV. Conclusion

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

Respectfully submitted,

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