IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 14-2039 & CASE NO. SC 14-582

DANE PATRICK ABDOOL
Petitioner,
v.
JULIE JONES
SECRETARY, DEPARTMENT OF CORRECTIONS

Respondent.

DANE PATRICK ABDOOL
Appellant,
v.
STATE OF FLORIDA
Appellee.

REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF REGARDING *HURST V. FLORIDA*

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Abdool's motion for post-conviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851, as well as a separate Petition for Writ of Habeas Corpus.

Citations shall be as follows: The record on appeal from Mr. Abdool's trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. The supplemental record on appeal from Mr. Abdool's trial shall be referred to as "TRS", followed by the volume and page numbers. The post-conviction record on appeal shall be referred to as "R" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

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Any claims not argued are not waived and Abdool relies on the merits of his Initial Supplemental Brief.

ARGUMENT

Any misstatements or misapprehensions in the State's recitation of the facts will be addressed in turn in the body of the argument.

I. *Hurst* applies retroactively.

In its Supplemental Brief, the State argues that *Hurst*[1] is not retroactive because this Court did not find *Ring*[2] or *Apprendi*[3] retroactive. (Supplemental Brief of Appellee, p. 3). This Court has previously held *Ring* did not apply to Florida's capital sentencing scheme, and continued to rely on *Spaziano v. Florida*[4] and *Hildwin v. Florida*[5] as the controlling law. Because of this continued misunderstanding, the retroactive analysis of *Apprendi* in *Hughes v. State*, 901 So. 2d 837, 838 (Fla. 2005), and of *Ring* in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005) was fundamentally flawed. The *Witt*[6] analyses in both *Hughes* and *Johnson* were based on the incorrect assumption that *Apprendi* and *Ring* did not apply in Florida, and as a result, this Court upheld Florida's scheme. As such, *Johnson* did not definitively resolve the issue of retroactivity because it was based on the faulty

[1] *Hurst v. Florida*, 136 S.Ct. 616 (2016).
[2] *Ring v. Arizona*, 536 U.S. 584 (2002).
[3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
[4] *Spaziano v. Florida*, 468 U.S. 447 (1984)
[5] *Hildwin v. Florida*, 490 U.S. 638 (1989)
[6] *Witt v. State*, 387 So.2d. 922 (Fla. 1980).

conclusion that *Ring* did not apply in Florida. *Hurst* has confirmed that this was incorrect.

Hurst specifically held that *Spaziano* and *Hildwin* are overruled. *Hurst* at 623. ("We now expressly overrule *Spaziano* and *Hildwin* in relevant part."). The US Supreme Court further noted: "Their conclusion was wrong and irreconcilable with *Apprendi*. Indeed, today *is not the first time* we have recognized as much. In *Ring*, we held that another pre-*Apprendi* decision – *Walton*[7]- could not 'survive the reasoning of *Apprendi*'. *Walton*, for its part, was a mere application of *Hildwin's* holding to Arizona's capital sentencing scheme." *Hurst* at 623(emphasis added). In other words, *Ring* implicitly overruled the holdings and logic of both *Hildwin* and *Spaziano* and found that their holdings were wrong. The assumption that *Apprendi* and *Ring* did not apply was deeply flawed and to continue to use the flawed reasoning and assumptions made in *Johnson* and *Hughes* would continue to perpetrate the error.

In expressly overruling *Hildwin* and *Spaziano* and rejecting the doctrine of *stare decisis*, the U.S. Supreme Court indicated that retroactive application of *Hurst* is favored. The Court held that the logic of those decisions had been "washed away" by the subsequent developments of constitutional law in *Apprendi* and *Ring*. *Hurst* at 624. Although not expressly overruled until *Hurst*, the U.S.

[7] *Walton v. Arizona*, 497 U.S. 639 (1990).

Supreme Court held that those precedents contained no substantive reasoning supporting the unconstitutional sentencing scheme in light of *Apprendi* and *Ring* and indicated that this Court was not required to wait for a U.S. Supreme Court decision expressly overruling them. *Id.* at 623-625. Retroactive application is necessary to correct the injustices perpetuated by this faulty reliance.

The State, however, continues to assert, erroneously, that *Hurst* should not be retroactive and its argument against retroactivity is based on a *Teague*[8] analysis rather than a *Witt* analysis. All the cases that the State points to in its brief are federal cases that apply the *Teague* standard. (Supplemental Brief of Appellee, p. 6-12). The State seems to ignore the long line of cases where this Court has rejected the *Teague* standard and instead consistently applied *Witt*.

When this Court adopted the *Witt* standard for retroactivity it specifically ruled that *it was not bound by a federal standard*. *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980). This Court found federal retroactivity law too restrictive, and crafted *Witt* specifically to provide greater, more expansive, more inclusive protection. See *Johnson*, 904 So. 2d at 409 (reaffirming commitment to "our longstanding *Witt* analysis, which provides more expansive retroactivity standards than those adopted in *Teague*"); see also *Hughes*, 901 So. 2d at 857 (Anstead, J., dissenting) (observing that the federal standard is "considerably more restrictive"

[8] *Teague v. Lane*, 489 U.S. 288 (1989).

than *Witt*). The decision to have a more expansive retroactivity standard was wise because the federal standard was "fashioned upon considerations wholly inapplicable to state law systems." *Hughes*, 901 So. 2d at 861 (Anstead, J., dissenting).

Teague is "focus[ed] on the impropriety of disturbing a final conviction, it diverts attention from constitutional violations and prohibits relief except in the very rare case.'" *State v. Whitfield*, 107 S.W. 3d 253, 268 n. 15 (Mo. 2003) (quotations omitted). "[T]he *Teague* plurality's main focus and concern in adopting a more restrictive view of retroactivity was to limit the scope of federal habeas review of state convictions." *Hughes*, 901 So. 2d at 862. This Court's prior retroactivity analysis of *Ring* and *Apprendi* should have no bearing on this Court's assessment of *Hurst*'s retroactivity because they were both assessed under the incorrect assumption that *Hildwin* and *Spaziano* remained the controlling law. The heart of the State's argument appears to be to urge this Court to continue with this erroneous assumption and ignore what the Supreme Court has stated in very plain, succinct, clear language: *Ring* and *Apprendi* apply to Florida and have applied *all along*.

The State incorrectly relies upon *Alleyne v. U.S.*, 133 S.Ct. 2151 (2013) to claim that the finding of one aggravating factor is sufficient. Aside from the fact that like *Hurst*, Abdool had no prior or contemporaneous felony convictions, this is

unpersuasive and clearly ignores what *Hurst* plainly states: a judge alone cannot find the aggravating circumstances. *Hurst* at 624. Florida's death penalty statute specifically notes that a jury's finding of death must be based on "(b) whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist[.]" Fla. Stat. §921.141(2)(b). Florida, through its statutory language and the framework imposed by *Hurst*, set the aforementioned weighing as a factual finding in and of itself. Within *Alleyne*'s framework, a jury's death sentence advisory can only occur after a specific factual finding that the aggravating circumstances outweigh the mitigating circumstances, however, the actual setting of the death penalty falls upon the judge. *Alleyne*'s framework does not apply, *Hurst*'s does.

The State also argues that *Ring* is mere procedural rule and that "a *Ring* error does not fundamentally undermine the fairness or integrity of capital sentencing proceedings". (Supplemental Brief of Appellee, p. 10). This assertion ignores the premise of the Court's holding in *Hurst*. "We granted certiorari to resolve whether Florida's capital sentencing scheme violates the *Sixth Amendment in light of Ring*. *We hold that it does* and reverse." *Hurst* at 621 (emphasis added). "The right to trial by jury reflects, we have said, 'a profound judgment about the way in which law should be enforced and justice administered.' The deprivation of that right with consequences that are necessarily unquantifiable and indeterminate,

unquestionably qualifies as a structural error." *Sullivan v. Louisiana*, 508 U.S. 275, 281-282 (1993), citing *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). "*The Sixth Amendment protects a defendant's right to an impartial jury*. This *right required* Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." *Hurst* at 624 (emphasis added). It is abundantly clear that the right to a jury and jury findings is beyond a mere procedural rule, but instead is a fundamental component of the Sixth Amendment right to a jury trial. The State's minimization of *Hurst*, *Ring* and *Apprendi* ignores what the U.S. Supreme Court has unambiguously stated in *Hurst*: capital sentencing does indeed entail the fundamental right to a jury as enshrined by the Sixth Amendment.

The State misconstrues Abdool's argument on *stare decisis*. Abdool argued in his Initial Supplemental Brief that the U.S. Supreme Court in explicitly overruling *Hildwin* and *Spaziano* and rejecting the doctrine of *stare decisis*, had indicated that retroactive application of *Hurst* is favored. The State in *Hurst* argued that *stare decisis* compelled the U.S. Supreme Court to uphold Florida's sentencing scheme. *Hurst* at 623. That argument failed and was found to not "hold water". *Id*. at 622. The State now argues that "[*s*]*tare decisis* is a separate legal concept and is unrelated to the retroactivity analysis." (Supplemental Brief,

p. 12).

As noted above, in expressly overruling *Hildwin* and *Spaziano* the Court held that the logic of those decisions had been "washed away" by the subsequent developments of constitutional law in *Apprendi* and *Ring*. *Hurst* at 624. Although not expressly overruled until *Hurst*, the U.S. Supreme Court held that those precedents contained no substantive reasoning supporting the unconstitutional sentencing scheme in light of *Apprendi* and *Ring* and indicated that this Court was not required to wait for a U.S. Supreme Court decision *expressly* overruling them. *Id.* at 623-625.

In fact, the *Hurst* decision makes crystal clear that *Apprendi* and *Ring* are the law and applied *at the time they were decided*. In discussing how *stare decisis* did not apply in Mr. Hurst's case, the U.S. Supreme Court pointed to a decision that undermined the logic of *Hildwin* and *Spaziano* long before Mr. Hurst was even granted certiorari. See *Hurst* at 623. The decision the U.S. Supreme Court pointed to was *Ring*, directly implying that those decisions were not the law at the time *Ring* was decided.[9] To state that the decisions in *Apprendi* and *Ring* still do not apply in Abdool's case is wrong and unjust. While *Hurst* may have lifted obstacles

[9] "Their conclusion was wrong and irreconcilable with *Apprendi*. Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre-*Apprendi* decision – *Walton* - could not 'survive the reasoning of *Apprendi*'. *Walton*, for its part, was a mere application of *Hildwin*'s holding to Arizona's capital sentencing scheme." *Hurst* at 623.

to the application of *Ring* to Florida's scheme, it was nonetheless dictated by *Ring*.

The holdings in *Johnson* and *Hughes* have their underpinnings in *Hildwin*, which is no longer good law. "Although 'the doctrine of *stare decisis* is of fundamental importance to the rule of law[,]… [o]ur precedents are not sacrosanct.'… '[W]e have overruled prior decisions where necessity and propriety of doing so has been established.'" *Hurst* at 623, citing *Ring v. Arizona*, 536 U.S. 584, 608 (2002). Additionally, Arizona's death penalty statute is fundamentally different from Florida's. As such, prior reliance on *Johnson* is now misplaced. *Hurst* squarely held that *Florida's* death penalty scheme is unconstitutional.

Mr. Abdool, like many other death row inmates in a similar posture, urges this Court to revisit the retroactivity analysis in light of *Hurst* and the very clear message the U.S. Supreme Court has sent. The infirmity found in Mr. Hurst's sentence, the same one that infects Abdool's sentence, is that the sentencing scheme he was sentenced under violates the Sixth Amendment *in light of Ring*.[10]

II. The Error is Not Harmless

Finally, the State claims that *Hurst* was remanded in order to conduct a harmlessness error. This is incorrect. "The judgment of the Florida Supreme

[10] The State argues that the fact the Supreme Court accepted no other cases with *Ring* claims up until now justifies denying retroactive application. Supplemental Brief of Appellee, 10. This argument fails, as denial of certiorari is not precedent and nothing can be inferred from that. However, the Supreme Court's decision in *Hurst* does provide instruction to this Court.

Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion." *Hurst* at 624. With respect to harmlessness, the Court stated: "This Court normally leaves it to state courts to consider whether an error is harmless…" *Hurst* at 624. The mention of harmless error in *Hurst* arose as a response to the State's own suggestion that the error would be harmless. *Hurst* at 624. The U.S. Supreme Court merely mentioned it and stated it would not address the issue because it was the Court's normal practice to leave such considerations to state courts. *Id*. This in no way mandates or orders that this Court or any other state court in Florida has to engage in a harmless error analysis.

However, if this Court does engage in a harmless error analysis, the error with respect to Abdool is not harmless. There were no unanimous findings in the Abdool's guilt phase that could support any aggravators. The State urges this Court to speculate that any jury would have found HAC or CCP under the facts of the crime. Speculating as to what a jury would have done does not equate to actual factual findings by the jury. Trial counsel urged the trial court to allow for special verdict forms. The State objected[11]. TR5:564. The trial court, believing it was following this Court's precedent, did not allow for the submission of a special

[11] The State in its response to trial counsel's death penalty motions stated, "Unless and until a material change occurs in section 921.141, the decisional law, the applicable rules of procedure, or standard instructions and verdict form, a trial court departs from the essential requirements of the law in requiring a special verdict form that details the jurors' votes on specific aggravating circumstances. *State v. Steele*, 921 So.2d 538, 547 (Fla. 2005)."

verdict form. The State now wishes to turn back the clock and assume that that jury would have found the two aggravators the State had submitted. There is no support in the record for the State's speculation.

Furthermore, because this case is in a post-conviction posture, any harmless error analysis requires the Court to look at the totality of the facts in Abdool's case, both those developed at trial and during post-conviction. See *Williams v. Taylor*, 529 U.S. 362 (2000); see also *Swafford v. State*, 125 So.3d 760 (Fla. 2013). The facts developed in post-conviction reveal a wealth of mitigation that was not presented to the jury in Abdool's trial. Abdool had a pathological mother, who internationally kidnapped him and his brother from Trinidad when he was nine years old, ripping him away from his biological father, maternal grandmother, and his homeland. Furthermore, Abdool presented significant evidence in post-conviction that his confession, which was the sole basis for the State's CCP evidence, should have been suppressed under *Haliburton v. State*, 514 So.2d 1088 (Fla. 1987), since there was an attorney at the police station trying to see him while he was being interrogated. In post-conviction, Abdool also challenged the State's facts of the crime, and offered unrebutted scientific testimony that supported Abdool's version of events that this crime was an ill-conceived attempt by a 19-year-old brain damaged young man to scare the victim into leaving him alone, instead of a cold, calculated and premeditated murder. This new evidence is

compounded by the fact that there are no jury findings in the trial record, only those made by the trial court. A judge, not a jury, increased Abdool's punishment based on her own independent factfinding and this, pursuant to *Ring* and *Hurst*, is a violation of the Sixth Amendment. When the evidence is reviewed in its totality, combined with the *Ring* violation, the error cannot be harmless.

Further, the State claims that *Hurst* does not hold there is a constitutional right to any jury sentencing. (Supplemental Brief of Appellee, p.19.) This blatantly ignores the essential holding in *Hurst*: "The Sixth Amendment protects a *defendant's right to an impartial jury*. This *right* required Florida to base Timothy Hurst's death sentence on *a jury's verdict*, not a judge's factfinding." *Hurst* at 624 (emphasis added). It also ignores *Ring*: "Accordingly, whether or not the States have been erroneously coerced into the adoption of "aggravating factors," wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: *they must be found by the jury beyond a reasonable doubt*." *Ring v. Arizona*, 536 U.S. 584, 612, 122 S. Ct. 2428, 2445 (2002) (Scalia, J. concurring) (emphasis added).

It is abundantly clear from the face of the record that in Abdool's case, a judge, and not a jury, found each facts necessary to impose a sentence of death and this is a direct violation of the Sixth Amendment as interpreted not just by *Hurst*,

but also by *Ring*, which was the law at the time Abdool was sentenced. In fact, based upon the face of the record, the jury made *no* findings at all, other than a non-unanimous recommendation of death. In Abdool's case, the trial in its sentencing order stated, "this Court finds this aggravating factor is present"[12] and "[t]he Court… finds that the aggravating circumstances outweigh the mitigating circumstances." TR7:870, 872 and 895. However, the aggravating factors, HAC and CCP, are quintessentially findings that must be made by a jury. However, the trial court made the findings, not the jury.

The State's argument before this Court is basically the exact same failed argument presented to the U.S. Supreme Court in *Hurst*. The argument continues to "fail to appreciate the central and singular role the judge plays under Florida law." *Hurst* at 622. Mr. Abdool's case is indistinguishable from *Hurst* and "[a]s with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with *Ring*, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment." *Hurst* at 622.

CONCLUSION

As was discussed at length in Abdool's Initial Supplemental Brief, *Hurst*

[12] The findings were for HAC and CCP, the only aggravators in this case.

should be applied retroactively. In his case in particular, the argument for retroactivity is compelling, as the law at the time he was sentenced was *Ring* and *Apprendi* and those decisions should have applied to his sentencing. What *Hurst* has made clear is that the scheme under which Abdool was sentenced is unconstitutional because he was sentenced under a scheme that did not comply with either *Ring* or *Apprendi*. To continue to uphold Abdool's sentence because of an incorrect assumption and a failure to apply Constitutional principles at his sentencing would simply be unjust. As previously noted, Abdool, throughout his trial, direct appeal and in his state habeas, has repeatedly objected that pursuant to *Ring* and the Sixth and Eighth Amendment, his nonunamious jury sentence was unconstitutional. Even the State, during oral arguments in this case back on June 3, 2015, conceded and agreed that if *Hurst* is found to be retroactive, it would apply to Abdool, because Abdool's case is a pure *Ring* case. For the State to argue otherwise now is simply disingenuous.

Abdool is entitled to retroactive application of *Hurst* and to have his death sentence vacated and life sentence imposed. Or, in the alternative, Abdool is entitled to a new penalty phase proceeding consistent with *Hurst* in order to preserve the guarantees of the Sixth Amendment.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Scott A. Browne, Assistant Attorney General @ scott.browne@myfloridalegal.com and CapApp@myfloridalegal.com, on this 10th day of March, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Brief of Appellant was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210**.**

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