IN THE SUPREME COURT OF FLORIDA

PRESSLEY BERNARD ALSTON,

Appellant,

CASE NO. SC17-499

v.

STATE OF FLORIDA,

Appellee.

PRESSLEY BERNARD ALSTON,

Petitioner,

CASE NO. SC17-983

v.

JULIE L. JONES, ET AL.,

Respondents.

_____/

APPELLEE/RESPONDENTS' REPLY TO APPELLANT/PETITIONER'S RESPONSE TO SEPTEMBER 27, 2017, ORDER TO SHOW CAUSE

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STATEMENT OF THE CASE AND FACTS

Pressley Alston was convicted of first-degree murder in the Fourth Judicial Circuit Court in Florida. Alston v. State, 723 So. 2d 148 (Fla. 1998). In the penalty phase, the jury recommended a death sentence by a vote of nine to three. The trial court found the following aggravating factors ("aggravators"): (1) Alston was convicted of three prior violent felonies; (2) the murder was committed during a robbery/kidnapping and for pecuniary gain; (3) the murder was committed to avoid a lawful arrest; (4) the murder was especially heinous, atrocious, or cruel (HAC); and (5) the murder was cold, calculated, and premeditated (CCP). Id. The trial court did not find any statutory mitigating circumstances ("mitigators") and found four nonstatutory mitigators. Id. The Florida Supreme Court affirmed petitioner's conviction and death sentence on direct appeal on September 10, 1998. Id. (rehearing denied December 17, 1998). His conviction and sentence became final when the time for filing a writ of certiorari in the United States Supreme Court elapsed on March 17, 1999.

On July 1, 2002, Alston filed a pro se petition in this Court asking to waive further postconviction appeals. Alston v. State, 894 So. 2d 46 (Fla. 2004). This Court ordered the Fourth Judicial Circuit Court of Florida to hold hearings to determine competency and waiver, if necessary. Id. The trial court conducted an inquiry and determined that Alston did want to waive further postconviction appeals. The trial

court had Drs. Umesh M. Mhatre, Wade Cooper Myers, and Robert M. Berland evaluate Alston and held an evidentiary hearing on the question of Alston's competency pursuant to Faretta v. California, 422 U.S. 806 (1975). The court determined that Alston was competent to waive further appeals, and that his waiver was knowing, voluntary, and intelligent. The trial court discharged Alston's postconviction counsel and dismissed all motions or petitions on postconviction relief with prejudice pursuant to Durocher v. Singletary, 623 So. 2d 482 (Fla.1993). Alston, 894 So. 2d at 58. In an opinion released October 14, 2004, following an extensive review of the trial court proceedings, the Florida Supreme Court found

> that evidence in the form of Dr. Mhatre's reports and testimony, the DOC reports, and the testimony by DOC personnel support the circuit court's conclusion that Alston is competent to proceed. … Given the evidence at hand and the applicable standard of review, we conclude that a sufficient basis exists to support the circuit court's resolution of the conflicting evidence and that the circuit court did not abuse its discretion in finding Alston competent to proceed.

Id., at 56-59. This Court also upheld the trial court's Durocher proceeding and the trial court's finding that "Alston had knowingly, intelligently, and voluntarily waived his rights to postconviction counsel and relief." Id. at 47. In October 2004, counsel was appointed to represent Alston in any state clemency proceedings.

On January 3, 2017, Alston filed his Successive Postconviction Motion ("Successive Motion") in the trial court seeking relief under Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016). On February 16, 2017, the trial court denied the Successive Motion, holding that Asay v. State (Asay V), 210 So. 3d 1 (Fla. 2016), Mosley v. State, 209 So. 3d 1248 (Fla. 2016), and Gaskin v. State, 218 So. 3d 399 (Fla. 2017), barred retroactive application of Hurst to Alston's case, and as such, the Successive Motion was untimely under Rule 3.851(d), Florida Rules of Criminal Procedure.[1] On March 9, 2017, Alston filed a notice of appeal. While Alston's appeal was pending before this Court, he filed a Petition for Writ of Habeas Corpus ("Habeas Petition") in this Court seeking relief under Hurst v. Florida and Hurst v. State.

On June 8, 2017, this Court stayed Alston's appeal and Petition pending the disposition of Hitchcock v. State, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). On August 10, 2017, this Court affirmed the conviction and sentence in Hitchcock in accordance with this Court's decision in Asay V, 210 So. 3d at 1. On September 27, 2017, this Court issued an order for Alston to show cause as to "why

[1] Notably, numerous procedural bars apply to the Hurst claim Alston raised below. Alston's January 3, 2017 Successive Motion well exceeded the one year time limitation after his judgement and sentence became final. See Fla. R. Crim. P. 3.851 (d)(1). As his claim did not fall into one of the enumerated exceptions to the one year limitation, his petition was untimely. See Fla. R. Crim. P. 3.851(d)(2). Further, Alston entered a valid Durocher waiver and the trial court's acceptance of that waiver was affirmed by this Court. Alston cannot now assert postconviction claims simply because he has changed his mind. See Trease v. State, 41 So. 3d 119 (Fla. 2010).

the trial court's order should not be affirmed and the petition for a writ of habeas corpus should not be denied in light of this Court's decision in Hitchcock v. State, SC17-445." On October 13, 2017, Alston filed his "Appellant/Petitioner's Response to September 27, 2017 Order to Show Cause" ("Response"). This is the Appellee/Respondents' reply to Alston's Response.

SUMMARY OF THE ARGUMENT

Alston has failed to show cause as to why his case should be excluded from this Court's precedent in Asay V as reaffirmed by Hitchcock. Because Alston's case was final before Ring, Hurst is not retroactive under federal law, and his claim for relief is procedurally barred, this Court should deny Alston's pending appeal from the denial of his Successive Motion and his pending Habeas Petition.

ARGUMENT

Alston argues that various constitutional rules mandate the retroactive application of Hurst v. Florida and Hurst v. State to his case. The circuit court properly found that Alston was not entitled to relief based on this Court's precedent, and he has failed to show cause as to why the court's ruling should not be affirmed and why his Habeas Petition should not be denied.

In Asay v. State (Asay V), 210 So. 3d 1, 22 (Fla. 2016), this Court held that Hurst v. State, 202 So. 3d 40 (Fla. 2016), is not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in Ring v. Arizona, 536

U.S. 584 (2002). This Court performed a retroactivity analysis under state law using the standard set forth in Witt v. State, 387 So. 2d 922 (Fla. 1980), which provides "*more expansive retroactivity standards* than those adopted in Teague,[2]" which enumerates the federal retroactivity standards. Asay V, 210 So. 3d at 15-16 (emphasis in original) (quoting Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005)); see also Danforth v. Minnesota, 522 U.S. 264, 280-81 (2008) (allowing states to adopt a retroactivity test that is broader that Teague).

A. The June 24, 2002, Cutoff for Hurst Retroactivity is Not Unconstitutional

Alston alleges that the retroactivity cutoff for Hurst relief established by Asay V, 210 So. 3d at 1, violates various constitutional principles, including the Due Process Clause, the Equal Protection Clause, fundamental fairness, and the Eighth Amendment protection against arbitrary and capricious punishment. To support his point, Alston notes various facts in other cases, such as how long this Court took to issue its opinion in a case. He asserts that the differing circumstances of a case will affect when the case was final and thereby affect whether a given defendant is entitled to a review of Hurst error in his case. Alston appears to conclude that it is unconstitutional to extend Hurst relief to some defendants and not others based on when their convictions and sentences became final.

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

While every case is different, and these differences may impact when a conviction and sentence becomes final, these differing outcomes arise in every circumstance where a new constitutional rule is not applied retroactively to cases on collateral review. If Alston's complaints were valid, they would compel retroactive application to every case every time a change in the law occurred. Such a result would be untenable and would upend any semblance of finality in the criminal justice system.

Finality is a significant consideration when determining whether to apply new rules to existing cases. Penry v. Lynaugh, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context) (abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002)). In Griffith v. Kentucky, 479 U.S. 314, 328 (1987), the Supreme Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." See also Smith v. State, 598 So. 2d 1063, 1065 (Fla. 1992). Under this "pipeline" concept, only those still pending direct review would receive the benefit of relief from Hurst error. The fact that this Court has drawn the line at the decision date in Ring instead of the decision date in Hurst, benefits more appellants instead of less.

While Alston alleges that the June 24, 2002, Hurst retroactivity cutoff violates the Due Process Clause, the Equal Protection Clause, and the Eighth Amendment's prohibition of arbitrary and capricious punishments, these claims have been specifically rejected by this Court's opinion in Lambrix v. State, No. SC17-1687, 2017 WL 4320637, *1 (Fla. Sep. 29, 2017). In its Lambrix opinion, this Court made clear that its opinions in Hitchcock, 2017 WL 3431500 at *1, and Asay v. State (Asay VI), 224 So. 3d 695 (Fla. 2017), contemplated and rejected such constitutional arguments.[3] Lambrix, at *1-2.

Further, Alston asserts briefly that this Court must extend Hurst retroactively to his case under the fundamental fairness doctrine. (Response at 9, fn. 3). Alston misinterprets the Mosley v. State, 209 So. 3d 1248 (Fla. 2016), holding to extend Hurst relief to pre-Ring cases through the fundamental fairness doctrine when an Apprendi or Ring claim was previously raised. The Mosley fundamental fairness discussion concerned the impact this Court's reliance on pre-Hurst precedent had on Mosley's *post*-Ring case. Specifically, the Court noted that Mosley had previously sought Ring relief and was denied on bases this Court now considers incorrect. Mosley, 209 So. 3d at 1275. Mosley's fundamental fairness discussion was never

[3] Alston's argument that it is unfair to extend Hurst retroactivity to the Ring decision date but not to the June 26, 2000, decision date in Apprendi v. New Jersey, 530 U.S. 466 (2000), is meritless. Unlike Ring, the Apprendi opinion clearly states it does not apply to capital cases, and thus the decision date should not serve as an end for Hurst retroactivity. Apprendi, 530 U.S. at 496-97. Further, this Court has declined to extend Hurst relief in Lukehart v. Jones, No. SC16-1255, 2017 WL 1033691, *1 (Fla. Mar. 17, 2017), in which the conviction and sentence became final after Apprendi, but before June 24, 2002.

intended to create an exception to the June 24, 2002, Hurst retroactivity cutoff, and this Court has confirmed this by rejecting the same argument in Gaskin v. State, 218 So. 3d 399 (Fla. 2017). Even if such an exception was intended by Mosley, it would be inapplicable to Alston because he failed to raise the substance of a Ring-type claim on direct appeal. Initial Brief of Appellant, Alston v. State, 723 So. 2d at 148.

This Court has consistently adhered to using June 24, 2002, as the cutoff point for retroactivity.[4] (Response at 1). This Court's Hitchcock opinion reaffirmed the decision in Asay V and rejected Hitchcock's various constitutional arguments. This Court noted that Hitchcock's constitutional arguments against the Ring retroactivity cutoff had been considered and rejected in the Asay V opinion. Hitchcock, 2017 WL 3431500 at *2; see also Asay VI, 224 So. 3d at 703 (rejecting the claim that Chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"); Lambrix, 2017 WL 4320637 at *1

[4] See Asay, 210 So. 3d at 8, 22; Jones v. State, No. SC15-1549, 2017 WL 4296370, *2 (Fla. Sept. 28, 2017); Hitchcock, 2017 WL 3431500; Zack v. State, Nos. SC15-1756, SC16-1090, 2017 WL 2590703, *5 (Fla. June 15, 2017); Zakrzewski v. Jones, 221 So. 3d 1159 (Fla. 2017); Oats v. Jones, 220 So. 3d 1127 (Fla. 2017); Marshall v. Jones, No. SC16-779, 2017 WL 1739246 (Fla. May 4, 2017); Rodriguez v. State, 219 So. 3d 751 (Fla. 2017); Willacy v. Jones, No. SC16-497, 2017 WL 1033679 (Fla. Mar. 17, 2017); Suggs v. Jones, No. SC16-1066, 2017 WL 1033680, *1 (Fla. Mar. 17, 2017); Lukehart, No. SC16-1225, 2017 WL 1033691, *1; Cherry v. Jones, No. SC16-694, 2017 WL 1033693, *1 (Fla. Mar. 17, 2017); Archer v. Jones, No. SC16-2111, 2017 WL 1034409, *1 (Fla. Mar. 17, 2017); Jones v. Jones, No. SC16-607, 2017 WL 1034410 (Mar. 17, 2017); Hartley v. Jones, No. SC16-1359, 2017 WL 944232, *1 (Mar. 10, 2017); Geralds v. Jones, No. SC16-659, 2017 WL 944236, *1 (Fla. Mar. 10, 2017); Lambrix v. State, 217 So. 3d 977 (Fla. 2017); Stein v. Jones, No. SC16-621, 2017 WL 836806 (Fla. Mar. 3, 2017); Hamilton v. Jones, No. SC16-984, 2017 WL 836807 (Fla. Mar. 3, 2017); Davis v. State, No. SC16-264, 2017 WL 656307 (Fla. Feb. 17, 2017); Bogle v. State, 213 So. 3d 833 (Fla. 2017); Wainwright v. State, No. SC15-2280, 2017 WL 394509 (Fla. Jan. 30, 2017); Gaskin, 218 So. 3d at 399.

(rejecting arguments based on the Eighth Amendment, denial of due process and equal protection, and a substantive right based on new legislation).

B. Hurst Does Not Establish a New Substantive Constitutional Rule

Alston alleges that Hurst is retroactive under the United States Supreme Court's retroactivity test put forth in Teague v. Lane, 489 U.S. 288 (1989), because Hurst constitutes a substantive change. (Response at 15). Alston relies upon Ivan V. v. City of New York, 407 U.S. 203, 205 (1972), and Powell v. Delaware, 153 A. 3d 69 (Del. 2016), to support his argument. (Response at 19). He claims that Hurst is a substantive change because it "addressed the proof-beyond-a-reasonable-doubt standard." (Response at 19). However, the standard of proof for proving aggravating factors in Florida has been beyond a reasonable doubt long before Hurst was decided. See Floyd v. State, 497 So. 2d 1211, 1214-15 (Fla. 1986); Zeigler v. State, 580 So. 2d 127, 129 (Fla. 1991). Alston's reliance on Powell is misplaced because the Delaware Supreme Court in Powell agreed that Ring and Hurst did not change the burden of proof that was used in those cases. Powell, 153 A. 3d at 74 ("neither Ring nor Hurst involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof"). Powell, 153 A. 3d at 74. Furthermore, Powell addressed the retroactivity of Rauf v. State, 145 A. 3d 430 (Del. 2016), the Delaware Court's initial case interpreting Hurst v. Florida. The Delaware Court distinguished Rauf from Hurst and Ring because Rauf addressed burden-of-

proof issues that existed under Delaware state law. Rauf, at 74. Because the Delaware Court held Rauf retroactive based on issues specific to Delaware state law, the Powell case is easily distinguishable from Hurst and fails to support Alston's claim.

Importantly, the United States Supreme Court addressed the retroactivity of Ring, and found that it was a procedural rule that did not justify retroactive application. In Schriro v. Summerlin, 542 U.S. 348 (2004), the Supreme Court determined that Ring was a procedural rule and did not establish substantive constitutional change in the law because it only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." Id., at 353. Ring did not alter the type of conduct that is punishable nor the group or class of people that can be punished under the law. Id. Thus, the new rule established by Ring was procedural in nature and not retroactive to convictions and sentences that were already final. Id. at 358. Since the Supreme Court held that Ring did not create a substantive constitutional rule, and Hurst is simply an extension of Ring to Florida's sentencing scheme, Hurst is likewise procedural in nature and is not retroactive to convictions and sentences that are already final.

Alston further relies on Welch v. U.S., 136 S. Ct. 1257 (2016), to assert that Hurst "place[s] certain murders 'beyond the State's power to punish,'" and is thereby substantive in nature. Contrary to Alston's assertion, Hurst does not change the definition of first-degree murder, nor exclude a class of persons from being subject to the death penalty. Rather, Hurst modifies the procedural steps required to impose the death penalty. The very case Alston relies on aptly illustrates the State's point. In Welch, the United States Supreme Court held that striking the definition of "prior violent felony" in the Armed Career Criminal Act was a substantive change that must be applied retroactively. 136 S. Ct. at 1259. The United States Supreme Court explained that by striking the definition of a prior violent felony, "the same person engaging in the same conduct is no longer subject to the Act." Id. at 1265. In contrast to Welch, Hurst did not change the definition of first-degree murder, but rather, changed the procedural requirements for determining the penalty for first-degree murder. As such, Hurst is plainly procedural in nature.

Alston acknowledges that the Eleventh Circuit has declined to extend Hurst retroactively in Lambrix v. Florida, 872 F. 3d 1170 (11th Cir. 2017), but he attempts to explain this ruling away as a product of a narrow standard of review. However, the Eleventh Circuit's ruling reached the merits of the retroactivity issue and clearly held that Hurst is not retroactive under federal law. The opinion explained that

denying Hurst retroactivity was in full accord with Ring and Schriro, 542 U.S. at 348. Lambrix, 872 F. 3d at 1182-83.

Here, just as in Hitchcock, Alston raises various constitutional provisions to argue that Hurst v. State should be retroactively applied to him. However, just as in Asay, as reaffirmed by Hitchcock, Hurst v. State does not apply retroactively to Alston. This case became final on November 11, 2000, which is prior to the June 24, 2002, decision in Ring. As such, Hurst v. State is not retroactive to this case. Thus, the Habeas Petition should be denied and the trial court's denial of Hurst relief should be affirmed.

This Court's rulings in Asay and Hitchcock apply to Alston, and he has demonstrated no cause for this Court to recede from its lengthy case precedent. Because Alston's judgment and sentence were final prior to the decision in Ring, Hurst is not retroactive to him.

CONCLUSION

WHEREFORE, Appellee/Respondents pray this Court deny Alston's Habeas Petition and affirm the circuit court's denial of Hurst relief in his case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing State's Answer to Defendant's Successive Postconviction Motion has been furnished via the eportal to Robert A. Norgard, Esq., norgardlaw@verizon.net; Billy H. Nolas, Esq., billy_nolas@fd.org, Attorneys for Appellant/Petitioner; this 1st day of November, 2017.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210.

/s/ Jennifer L Keegan
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