IN THE SUPREME COURT OF FLORIDA

RICHARD W. RHODES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC17-628
L.T. No. CRC84-03982CFANO

DEATH PENALTY CASE

APPELLEE'S REPLY TO ORDER TO SHOW CAUSE

On September 22, 2017, this Court issued an order to Appellant to show cause "why the trial court's order should not be affirmed in light of this Court's decision in Hitchcock v. State, SC17-445." This is the State's reply to Appellant's response to the order to show cause. Under this Court's decisions in Asay v. State, 210 So. 3d 1 (Fla. 2016), and Hitchcock v. State, 42 Fla. L. Weekly S753 (Fla. Aug. 10, 2017), Appellant is not entitled to any relief under Hurst v. Florida, 136 S. Ct. 616 (2016), or Hurst v. State, 202 So. 3d 40 (Fla. 2016), because his death sentence became final before Ring v. Arizona, 536 U.S. 584 (2002), was decided. This Court has repeatedly rejected the same arguments Appellant advances in his response. Asay and Hitchcock control, and this Court should again follow its well-established precedent and affirm the trial court's denial of the successive postconviction motion.

PERTINENT FACTS AND PROCEDURAL HISTORY

Appellant was convicted of the first-degree murder of Karen Nieradka, whose decomposing body was found in construction debris in Saint Petersburg on March 24, 1984. Following a penalty phase and sentencing hearing, Appellant was sentenced to death. Rhodes v. State, 547 So. 2d 1201, 1202-03 (Fla. 1989). Upon remand for resentencing, Appellant was again sentenced to death upon a jury's ten-to-two majority recommendation. Rhodes v. State, 638 So. 2d 920, 923 (Fla. 1994). The United States Supreme Court denied his petition for writ of certiorari on December 5, 1994. Rhodes v. Florida, 513 U.S. 1046 (1994).

On November 8, 2016, Appellant filed a successive postconviction motion seeking relief under Hurst v. Florida and Hurst v. State. (R3-27). The State filed a response. (R28-44). Following the issuance of this Court's decisions in Asay and Mosley v. State, 209 So. 3d 1248 (Fla. 2016), the lower court ordered supplemental briefing and the parties complied. (R76-129). On February 1, 2017, the lower court denied relief, reasoning:

> [Hurst v. Florida] does not apply retroactively to the Defendant. In Asay, the Florida Supreme Court held that [Hurst v. Florida] should not be applied retroactively to a case where the death sentence became final before Ring issued. Slip Op. at 35-6. In Mosley, the Court held that [Hurst v. Florida] does apply retroactively to defendants whose sentences became final after Ring. Slip Op. at 61-2. The Court found that Florida's death penalty statute was actually rendered unconstitutional in 2002 by Ring, and, based on concerns for fundamental fairness, defendants sentenced after Ring "should not be

> penalized for the United States Supreme Court's delay in explicitly making this determination." Slip Op. at 61. The Defendant's sentence became final in 1994, when the U.S. Supreme Court denied certiorari review of the Defendant's resentencing appeal. See Rhodes v. Florida, 513 U.S. 1046 (1994). Therefore, under Asay, the Defendant falls within the group not entitled to the retroactive application of [Hurst v. Florida]. The Defendant's arguments do not raise the same type of fundamental fairness concerns as those in Mosley, where Mosley's sentence was actually unconstitutional at the time it was imposed. Accordingly, [Hurst v. Florida] does not apply retroactively to the Defendant, this claim is denied.

(R133).

ARGUMENT

Under this Court's firmly established controlling precedent, Hurst is not retroactively applicable to Appellant because his death sentence became final on December 5, 1994, many years before the Supreme Court's decision in Ring, and also well before the Court decided Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). In Asay v. State, 210 So. 3d 1, 11-22 (Fla. 2016), cert. denied, Asay v. Florida, 2017 WL 1807588 (Aug. 24, 2017), this Court held that any capital defendant whose death sentence was final before Ring was decided in 2002 was not entitled to Hurst relief. This Court performed a full retroactivity analysis

using the test established in Witt v. State, 387 So. 2d 922 (Fla. 1980). Asay, 210 So. 3d at 15-22.

This Court reaffirmed its holding in Asay in Hitchcock v. State, 42 Fla. L. Weekly S753 (Fla. Aug 10, 2017). In Hitchcock, this Court rejected several constitutional challenges to its non-retroactivity rule and reaffirmed its prior holding in Asay. Here, Appellant raises many of the same constitutional challenges this Court has explicitly rejected Hitchcock and subsequent decisions. See Hitchcock ("Although Hitchcock references various constitutional provisions as a basis for arguments that Hurst v. State should entitle him to a new sentencing proceeding, these are nothing more than arguments that Hurst v. State should be applied retroactively to his sentence, which became final prior to Ring. As such, these arguments were rejected when we decided Asay."); Asay v. State, 42 Fla. L. Weekly S755 (Fla. Aug. 14, 2017) ("Asay VI") (denying Eighth Amendment challenge to the holding in Asay); Lambrix v. State, 2017 WL 4320637 (Fla. Sept. 29, 2017) (denying Eighth Amendment, due process, and equal protection challenges to the holding in Asay, citing Hitchcock and Asay VI). This Court should again reject these various constitutional challenges as they are "nothing more than arguments that Hurst v. State should

be applied retroactively to [Appellant's] sentence, which became final prior to Ring." Hitchcock, 42 Fla. L. Weekly S753.[1]

Furthermore, this Court has explicitly followed Asay in numerous capital cases which are now final. See, e.g., Bogle v. State, 213 So. 3d 833, 855 (Fla. 2017) (denying Hurst relief citing Asay); Lambrix v. State, 217 So. 3d 977, 989 (Fla. Mar. 9, 2017), rehearing denied, SC16-56, 2017 WL 1927739 (Fla. May 10, 2017) (denying Hurst relief citing Asay); Lukehart v. Jones, 2017 WL 1033691 (Fla. Mar. 17, 2017) (relying on Asay to deny Hurst relief); Oats v. Jones, 2017 WL 2291288 (Fla. May 25, 2017) (denying Hurst relief based on Asay); Rodriguez v. State, 219 So. 3d 751, 760 (Fla. 2017), rehearing denied, SC15-1795, 2017 WL 2598492 (Fla. June 15, 2017) (denying Hurst relief based on Asay). This Court recently reaffirmed that holding yet again in several cases, including in two active death warrant cases. Jones v. State, 2017 WL 4296370, *2 (Fla. Sept. 28, 2017) (denying Hurst relief based on Asay); Asay VI (same, during active warrant); Lambrix v. State, SC17-1687, 2017 WL 4320637 (Fla. Sept. 29, 2017) (same, during active warrant). Thus, this Court has repeatedly and consistently held in numerous capital cases, including active

[1] The Eleventh Circuit Court of Appeals has also rejected equal protection, due process, and Eighth Amendment challenges to this Court's non-retroactivity rule in Lambrix v. Secretary, Fla. Dept. of Corr., ___ F.3d ___, 2017 WL 4416205 (11th Cir. Oct. 5, 2017) (No. 17-14413), cert. denied, Lambrix v. Jones, 2017 WL 4456332 (Oct. 5, 2017).

death warrant cases, that Hurst does not apply retroactively to murderers whose death sentences were final prior to the decision in Ring. Asay is firmly established precedent; Asay and Hitchcock control the resolution of this matter.

While Appellant insists that Hurst is retroactive under federal law, it is not. The United States Supreme Court has held that Ring was not retroactive. Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (using the federal test for retroactivity established in Teague v. Lane, 489 U.S. 288 (1989), to find that Ring, which announced a new procedural rule, does not apply retroactively to death penalty cases already final on direct review). If a case is not retroactive under the broader Witt test, which this Court used in Asay, it is certainly not retroactive under the narrower federal test for retroactivity in Teague. See Asay, 210 So. 3d at 15 (describing the Witt test as "more expansive" than Teague) (citing Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005). See also Lambrix v. Secretary, Fla. Dept. of Corr., 851 F.3d 1158, 1165 n.2 (11th Cir. 2017) (holding that "under federal law Hurst, like Ring, is not retroactively applicable on collateral review"); Lambrix v. Secretary, Fla. Dept. of Corr., ___ F.3d ___, 2017 WL 4416205, *8 (11th Cir. Oct. 5, 2017) (concluding this Court's holding in Asay to be "fully in accord with the U.S. Supreme Court's precedent in Ring and Schriro"), cert. denied, Lambrix v. Jones, 2017 WL 4456332

(Oct. 5, 2017). Hurst v. State is not retroactive under federal law.

Furthermore, the Supremacy Clause does not require states to adopt Teague. States are free to adopt their own broader retroactivity tests. Danforth v. Minnesota, 552 U.S. 264, 280 (2008); Montgomery v. Louisiana, 136 S. Ct. 718, 128-29 (2016) (explaining that, under Danforth, states are free to have broader, but not narrower, retroactivity tests if a new substantive rule of constitutional law is involved). Contrary to Appellant's assertion, Montgomery did not overrule Summerlin. Indeed, the Montgomery Court relied upon Summerlin in its discussion. Montgomery, 136 S. Ct. at 723, 728. If anything, the Montgomery Court reaffirmed Summerlin.

Ivan V. v. City of New York, 407 U.S. 203 (1972), is irrelevant to any retroactivity analysis in Florida. If a rule of law is not new, there is no retroactivity analysis required. Butler v. McKellar, 494 U.S. 407, 412 (1990) (defining a "new rule" for purpose of retroactivity as one that "breaks new ground or imposes a new obligation," such as a decision that explicitly overrules an earlier holding). Florida's standard of proof for aggravating circumstances is not new. Florida law has required that the State prove aggravators beyond a reasonable doubt for over three decades. See, e.g., Floyd v. State, 497 So. 2d 1211, 1214 (Fla. 1986) (striking an aggravator that was not proven "beyond a reasonable

doubt"). Hurst did not truly involve the standard of proof. The issue in Hurst v. Florida was who makes the decision—judge or jury—not standard of proof. Nor is the new unanimity requirement of Hurst v. State the equivalent of a standard of proof. There is no issue concerning retroactivity as to the standard of proof for aggravating circumstances.

Appellant misreads Powell v. Delaware, 153 A.3d 69 (Del. 2016). In Powell, the Delaware Supreme Court distinguished Florida law in Hurst v. State from Delaware law in Rauf v. State, 145 A.3d 430 (Del. 2016), pointing out that Florida law did not involve a change in standard of proof for aggravating circumstances. Powell, 153 A.3d at 73-74 (stating that "unlike Rauf," Hurst v. State did not involve "a lower burden of proof"). Nor would the United States Supreme Court agree with the Delaware Supreme Court about a standard of *proof* applying to the *weighing process*, much less that Teague or Ivan V mandates retroactive application of any new standard. See Kansas v. Carr, 136 S. Ct. 633, 642 (2016) (expressing doubt whether it is even possible to apply a standard of proof to either mitigation or weighing and opining that weighing is "mostly a question of mercy," not one of fact); Kansas v. Marsh, 548 U.S. 163, 175 (2006) (holding that a death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances because no particular "method for balancing mitigating and aggravating

factors in a capital sentencing proceeding is constitutionally required"). Certainly Powell, a state case involving a change in Delaware law, does not establish that federal constitutional law mandates retroactive application of Hurst v. State, particularly in the face of United States Supreme Court precedent to the contrary. Hurst v. State is simply not retroactive under federal law.

In sum, this Court's rulings in Asay and Hitchcock control. Accordingly, this Court should follow its firmly established precedent and affirm the lower court's denial of Appellant's successive postconviction motion.

CONCLUSION

WHEREFORE, the Appellee, State of Florida, respectfully requests this Honorable Court to affirm the trial court's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of October 2017, I electronically filed the foregoing with the Clerk of the Florida Supreme Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Bjorn Erik Brunvand, Esq. and J. Jervis Wise, Esq., Brunvand Wise, P.A., 615 Turner Street, Clearwater, Florida 33756, **bjorn@acquitter.com** and **jervis@acquitter.com**; Billy H. Nolas, Esq., Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, 227 N. Bronough St., Suite 4200, Tallahassee, Florida 32301-1300, **billy_nolas@fd.org**; Sarah S. Butters, Esq, Ausley McMullen, 123 South Calhoun Street, Tallahassee, Florida 32301, **sbutters@ausley.com.**

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