IN THE SUPREME COURT OF FLORIDA

DANIEL BURNS,

Appellant,

v.

CASE NO. SC17-726
Lower Tribunal No. 1987-CF-2014
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

STATE'S REPLY TO SEPTEMBER 22, 2017 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 *Hitchcock v. State*, SC17-445", in the case of *Burns v. State*, SC17-726.

Under this Court's decisions in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Hitchcock v. State*, 42 Fla. L. Weekly S753, 2017 WL 3431500 (Fla. Aug. 10, 2017), Burns is not entitled to any *Hurst* relief because his sentence became final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided. This Court has repeatedly rejected the same arguments opposing counsel presents in the response. In sum, *Asay* and *Hitchcock* control. This Court should once again follow its well-established precedent and affirm the trial court's denial of the successive postconviction motion.

Procedural history of the *Hurst* claim

Burns' death sentence became final on February 23, 1998, when the United States Supreme Court denied his petition for writ of certiorari in the direct appeal from the resentencing. *Burns v. Florida*, 522 U.S. 1121 (1998).

On January 9, 2017, Burns filed a successive 3.851 postconviction motion in the state trial court raising a claim based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). On January 27, 2017, the State filed an answer to the successive motion in the trial court. On March 21, 2017, the trial court denied the successive postconviction motion, citing *Asay*. Burns then appealed the denial of his successive postconviction *Hurst* motion to this Court. *Burns v. State*, SC17-726.

On September 22, 2017, this Court issued an order for Burns to show cause why *Hitchcock* does not control. *Burns v. State*, SC17-726. On October 11, 2017, Burns filed his response. This is the State's reply to the order to show cause.

Merits

Under this Court's well-established controlling precedent, *Hurst* is not retroactively applicable to Burns because his death sentence became final in 1998. *Burns v. Florida*, 522 U.S. 1121 (1998).

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 v. Arizona*, 536 U.S. 584 (2002), was decided, on June 24, 2002, was not entitled to *Hurst* relief. This Court performed a full retroactivity analysis using the *Witt v. State*, 387 So. 2d 922 (Fla. 1980), test in *Asay*. *Asay*, 210 So. 3d at 15-22.

This Court reaffirmed its holding in *Asay*, in *Hitchcock v. State*, 42 Fla. L. Weekly S753, 2017 WL 3431500 (Fla. Aug. 10, 2017). This Court in *Hitchcock* rejected several constitutional challenges to its non-retroactivity rule reaffirming its prior holding in *Asay*. Opposing counsel in his response to the order to show cause makes many of the same Eighth Amendment, equal protection, and due process arguments that this Court explicitly rejected in *Hitchcock, Asay*, 2017 WL 3472836 at *6 (*Asay VI*), and *Lambrix v. State*, SC17-1687, 2017 WL 4320637 (Fla. Sept. 29, 2017). *Hitchcock*, 2017 WL 3431500 at *2; *Asay VI* (denying an Eighth Amendment challenge to the holding in *Asay*); *Lambrix*, 2017 WL 4320637at *1 (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 for the same reasons.[1]

Moreover, this Court has explicitly followed *Asay* in a number of capital cases.[2] This Court recently affirmed 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 citing *Asay*); *Asay v. State*, 2017 WL 3472836 (Fla. Aug. 14, 2017) (*Asay VI*) (same in active warrant); *Lambrix v. State*, SC17-1687, 2017 WL 4320637 (Fla. Sept. 29, 2017) (same in active warrant). So, since December of 2016 and as recently as September of 2017, this Court has consistently followed *Asay*. This Court has repeatedly held in numerous capital cases, including active warrant cases that *Hurst* does not apply retroactively to

[1] The Eleventh Circuit has also rejected equal protection, due process, and Eighth Amendment challenges to this Court's non-retroactivity rule in *Lambrix v. Sec'y, 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).

[2] *Bogle v. State*, 213 So. 3d 833, 855 (Fla. 2017) (denying *Hurst* relief citing *Asay*); *Lambrix v. State*, 217 So. 3d 977, 989 (Fla. March 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. March 17, 2017) (denying *Hurst* relief citing *Asay*); *Oats v. Jones*, 2017 WL 2291288 (Fla. May 25, 2017) (denying *Hurst* relief citing *Asay*); *Rodriguez v. State*, 219 So. 3d 751, 760 (Fla. April 20, 2017), *rehearing denied*, SC15-1795, 2017 WL 2598492 (Fla. June 15, 2017) (denying *Hurst* relief citing *Asay*).

defendants like Burns. *Asay* is firmly established precedent. *Asay* and *Hitchcock* control.

While opposing counsel insists that *Hurst* is retroactive under federal law, it is not. The United States Supreme Court has held that *Ring* was not retroactive in *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (using the federal test for retroactivity of *Teague v. Lane*, 489 U.S. 288 (1989)). If a case is not retroactive under the broader state test for retroactivity of *Witt v. State*, 387 So. 2d 922 (Fla. 1980), which this Court used in *Asay*, it is certainly not retroactive under the narrower federal test for retroactivity of *Teague*. *See Asay,* 210 So. 3d at 15 (describing *Witt* as "more expansive" than *Teague,* citing *Johnson v. State,* 904 So. 2d 400, 409 (Fla. 2005)).

The Eleventh Circuit recently held that *Hurst* is not retroactive under federal law. *Lambrix v. Sec'y, Fla. Dept. of Corr.*, 851 F.3d 1158, 1165, n.2 (11th Cir. 2017) ("under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review" citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004)), *cert. denied, Lambrix v. Jones*, 17-5153, 2017 WL 3008927 (Fla. Oct. 2, 2017); *Lambrix v. Sec'y, 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 according to both the United States Supreme Court and the Eleventh Circuit.

Appellant argues that this Court violated federal retroactivity standards, and the Supremacy Clause, in determining the changes to Florida's capital punishment to be partially retroactive. However, the United States Supreme Court has repeatedly held that certain matters are not retroactive, including in the capital context and including *Ring* itself, which was a Sixth Amendment right-to-a-jury-trial case. *Schriro v. Summerlin*, 542 U.S. 348 (2004). In fact, the United States Supreme Court, itself, has given partial retroactive effect to a change to the penal law. *United States v. Abney*, 812 F.3d 1079, 1098 (D.C. 2016) ("Prior to its decision in *Dorsey*, the Supreme Court 'never held any change in a criminal penalty to be partially retroactive'). In *Dorsey v. United States*, 567 U.S. 260 (2012), the court held the *Fair Sentencing Act* to be partially retroactive to those offenders who committed offenses prior to the effective date of the act but were sentenced after that date.

Appellant argues that this Court created a new substantive rule in *Hurst v. State*, and cites *Welch v. United States*, 136 S. Ct. 1257 (2016), as support. However, the United States Supreme Court, in *Welch*, certainly did not overrule

Summerlin. In fact, the *Welch* decision supports the determination that the new *Hurst* rule is procedural:

> "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S., at 353, 124 S. Ct. 2519. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id*., at 351–352, 124 S. Ct. 2519 (citation omitted); see Montgomery, supra, at ——, 136 S. Ct., at 728. Procedural rules, by contrast, "regulate only the manner of determining the defendant's culpability." *Schriro*, 542 U.S., at 353, 124 S. Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." *Ibid*. "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id*., at 352, 124 S. Ct. 2519.

Id. at 1264-65. The *Welch* court found that the rule in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which "changed the substantive reach of the Armed Career Criminal Act", was a substantive, rather than procedural, change because it altered the class of people affected by the law. *Welch,* 136 S. Ct. at 1265. In explaining how the rule in *Johnson* was not procedural, the *Welch* court stated, "[i]t did not, for example, "allocate decision making authority" between judge and jury, *ibid.*, or regulate the evidence that the court could consider in making its decision". Here, the new *Hurst* rule allocated the decision-making authority to determine aggravators from the judge to the jury, which is precisely how the *Welch* court

defined a procedural change. Based on United States Supreme Court precedent, there can be no doubt that the *Hurst* rule is a procedural rule.

Nevertheless, Appellant claims that *Hurst v. State* should be retroactive because the decision addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right. However, Florida law has required that the State prove the aggravating circumstances at the beyond-a-reasonable-doubt standard of proof for decades. *Williams v. State*, 37 So. 3d 187, 194-95 (Fla. 2010) (stating that the State has the burden to prove beyond a reasonable doubt each and every aggravating circumstance); *Aguirre-Jarquin v. State*, 9 So. 3d 593, 607 (Fla. 2009) (explaining that the State must prove the existence of an aggravator beyond a reasonable doubt citing *Parker v. State*, 873 So. 2d 270, 286 (Fla. 2004)); *Diaz v. State*, 132 So. 3d 93, 117 (Fla. 2013) (explaining that mitigating factors must be established by the greater weight of the evidence citing *Mansfield v. State*, 758 So. 2d 636, 646 (Fla. 2000)). And the standard jury instructions for capital cases informs the jury that the standard of proof for aggravators is beyond a reasonable doubt. The "retroactivity" of the beyond-a-reasonable-doubt-standard of proof is a non-issue in this case (and other Florida capital cases as well).

The United States Supreme Court has held that, in general, a state court's retroactivity determinations are a matter of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264 (2008). State courts may fashion their own

retroactivity tests including partial retroactivity tests. A state supreme court is welcome to employ a partial retroactivity approach without violating the federal constitution under *Danforth*. The state retroactivity doctrine employed by this Court did not violate federal retroactivity standards. This Court's expansion in *Hurst v. State* is only applicable to defendants in Florida, and, consequently, subject to retroactivity analysis under *Witt v. State,* 387 So. 2d 922 (Fla. 1980). This Court has characterized the violation of the right-to-a-jury-trial as procedural, not substantive. *State v. Fleming*, 61 So. 3d 399, 403 (Fla. 2011) (characterizing the Florida Supreme Court holding in *Hughes v. State,* 901 So. 2d 837, 838 (Fla. 2005), that *Apprendi* was not retroactive as having "analyzed *Apprendi* under the *Witt* factors and concluded that the new *Apprendi* <u>*rule of procedure*</u> did not apply retroactively") (emphasis added). Under *Witt,* this Court found retroactive application applies to those death sentences which were made final after the United States Supreme Court's decision in *Ring*. *Hurst v. State*. Consistent with *Apprendi* and *Ring, Hurst v. Florida* is not retroactive under federal law. *Hurst v. State* is retroactive under state law only.

Appellant argues that the failure to employ a full retroactive application of *Hurst v. State* means that the death sentence is being imposed in a capricious and arbitrary manner. Essentially, the argument is that there is no meaningful distinction based on the culpability and severity of offense, rather, it is based on the mere date *Ring* was issued. However, Appellant disregards the fact that all of the offenders on

death row were placed there after determination of guilt, through plea or trial, of first-degree murder, beyond a reasonable doubt; therefore, each and every one of the offenders was found culpable for the most severe of all criminal offenses. Because the constitutional constructs of the past permitted the judge to make the final determination that an aggravator was found beyond a reasonable doubt does not invalidate that finding, thus qualifying the offender to be punished by death. This Court's retroactive application of *Hurst v. Florida* did not create a capital punishment scheme that is arbitrary and capricious. Rather, it has systematically afforded the class of offenders whose capital conviction was not final prior to the new constitutional rule born in *Ring*, to be resentenced in accordance with *Ring/Hurst v. Florida*. Because Appellant's sentence was final when *Ring* issued, he was not entitled to a resentencing under either a state or federal retroactivity analysis.

Appellant's argument for a violation of the Equal Protection Clause fares no better than the Eight Amendment argument. "The Equal Protection Clause of the Fourteenth Amendment 'is essentially a direction that all persons similarly situated should be treated alike.'" *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). A criminal defendant challenging the State's application of capital punishment must show intentional discrimination to prove an equal protection violation. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) ("A criminal defendant alleging an equal protection violation must prove the existence of purposeful discrimination"). A

"'[d]iscriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *McClesky*, 481 U.S. at 298.

Finally, although *Hurst* is clearly not retroactively applicable to Appellant's case, even if it were, the trial court's ruling should still be affirmed because any error was harmless given the jury's unanimous recommendation for death. In order to be harmless error, there must be no reasonable possibility that the *Hurst* error contributed to Burns' death sentence. In *Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016), this Court found that when the jury unanimously recommends a death sentence, their unanimous recommendation "allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." In the instant case, the jury unanimously recommended that death was the appropriate sentence, and such a recommendation is "precisely what [this Court] determined in *Hurst* to be constitutionally necessary to impose a sentence of death." *Id.* at 175.

This Court has consistently followed *Davis* and found harmless error in cases involving unanimous recommendations. *See King v. State*, 211 So. 3d 866 (Fla. 2017); *Kaczmar v. State*, No. SC13-2247, 2017 WL 410214 (Fla. Jan. 31, 2017);

Knight v. State, Nos. SC14-1775, SC15-1233, 2017 WL 411329 (Fla. Jan. 31, 2017); *Truehill v. State*, 211 So. 3d 930 (Fla. 2017), cert. denied, 2017 WL 2463876 (Oct. 16, 2017); *Hall v. State*, 212 So. 3d 1001 (Fla. 2017); *Jones v. State*, 212 So. 3d 321 (Fla. 2017); *Middleton v. State*, 220 So. 3d 1152 (Fla. 2017); *Oliver v. State*, 214 So. 3d 606 (Fla. 2017); *Tundidor v. State*, 221 So. 3d 587 (Fla. 2017); *Morris v. State*, 219 So. 3d 33 (Fla. 2017); *Guardado v. Jones*, No. SC17-389, 2017 WL 1954984 (Fla. May 11, 2017); *Cozzie v. State*, No. SC13-2393, 2017 WL 1954976 (Fla. May 11, 2017). As Appellant has failed to demonstrate any basis for this Court to recede from this precedent, the State urges this Court to affirm the trial court's denial of his *Hurst* claims.

Here, just as in *Hitchcock*, Appellant 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 Burn's sentence. This case became final on February 23, 1998, which is prior to the June 24, 2002, decision in *Ring*. As such, *Hurst v. State* is not retroactive to this case. Thus, this petition should be denied.

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 filed the foregoing with the Clerk of Court by using the E-Portal Filing System which will send a notice of electronic filing to the following: Mark S. Gruber and Julie Morley, Assistant CCRC, Law Office of the Capital Collateral Regional Counsel - Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907, **gruber@ccmr.state.fl.us**, **morley@ccmr.state.fl.us**, and **support@ccmr.state.fl.us**.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this reply is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Lisa Martin
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