

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-1147

ANTONIO LEBARON MELTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**REPLY TO APPELLEE'S REPLY TO ORDER TO SHOW CAUSE
AND MOTION FOR GUIDANCE AS TO THE STANDARD FOR
DETERMINING WHAT CONSTITUTES CAUSE**

COMES NOW the Appellant, ANTONIO LEBARON MELTON, in the above-entitled matter and replies to Appellee's reply to his Response to Order to Show Cause and Motion for Guidance as to the Standard for Determining What Constitutes Cause. Mr. Melton states:

Mr. Melton's Objection and Motion for Guidance

1. In his Response, Mr. Melton requested that this Court adhere to the Florida Rules of Appellate Procedure and permit him to fully brief the issues that were raised and arose in the circuit court. However, the State ignores both the legal and factual bases of Mr. Melton's argument. Indeed, the State characterizes Mr. Melton's argument as a complaint about the page limitation. See Reply at 3, n.1. That is simply not the case. However, the State ignores the legal bases of Mr. Melton's argument and instead attempts to analogize the substantive right to appeal to this Court with the discretionary procedure the United States Supreme Court follows when reviewing cases with similar legal issues. See Reply at 3, n.1.

2. First, as explained in his Response, Mr. Melton has a

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substantive right to appeal the denial of his Rule 3.851 motion which challenged the constitutionality of his death sentence. Contrary to the State's misunderstanding of the law, that right is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) ("if a State has created appellate courts as "an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S., at 18, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."). This principle applies to collateral appeals as well as direct appeals. *Lane v. Brown*, 372 U.S. 477, 484-85 (1963. The State refuses to acknowledge *Evitts*, *Griffin* or *Lane*.

3. Further, while the United States Supreme Court's review is discretionary, a petition for writ of certiorari is always permitted. While the Court may not require briefing before ruling on an issue, a petitioner has never been prohibited from using the provisions set forth in the rules to request review. In Mr. Melton's case, the rules and standards have been ignored in requiring him to show cause before he is permitted to brief the issues in his case. The State fails to acknowledge this critical distinction.

4. And, equally ignored by the State is the principle that individualized review of all death sentences is required by the Florida Constitution. That individualized review is necessary to insure Florida's capital sentencing scheme complies with the Eighth Amendment. See *Proffitt v. Florida*, 428 U.S. 242, 258

(1976) ("The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases."). Individualized review is as necessary as individualized sentencing in a capital case. See *Mosley v. State*, 209 So. 3d 1248, 1282 (Fla. 2016) ("In this case, where the rule announced is of such fundamental importance, the interests of fairness and **'cur[ing] individual injustice'** compel retroactive application of *Hurst* despite the impact it will have on the administration of justice.") (emphasis added); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."). See *Parker v. Dugger*, 498 U.S. 308 (1991). Individualized review is necessary to insure reliability when a death sentence is imposed. *Monge v. California*, 524 U.S. 721, 732 (1998) ("Because the death penalty is unique 'in both its severity and its finality,' [*Gardner v. Florida*, 430 U.S.] at 357, we have recognized an acute need for reliability in capital sentencing proceedings.").

5. Thus, Mr. Melton submits that his appeal must be permitted to proceed on the basis of the Florida Constitution, on the basis of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and on the basis the Eighth Amendment. See *Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015) ("[T]his Court has a mandatory obligation to review all death penalty cases to ensure that the death sentence is imposed in accordance with

constitutional and statutory directives."); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

Mr. Melton's Show of Cause

6. The State argues that Mr. Melton's issues, many of which have been raised and "explicitly rejected in *Hitchcock*, *Asay IV*, and *Lambrix*" have no merit because this Court found that "*Hurst*" is only retroactive to *Ring*. Reply at 1, 4.

7. Initially, it is unclear whether the State is arguing that *Hurst v. Florida* has been found not to be retroactive, *Hurst v. State* has been found not to be retroactive, or both. Because reliance on *Asay v. State*, 210 So. 3d 1 (Fla. 2016), for the proposition that *Hurst v. State* is not retroactive before *Ring* is misplaced. Indeed, the State ignores the fact that Mr. Asay only raised a challenge based upon *Hurst v. Florida*, as stated in Mr. Melton's brief. *Hurst v. State* had not even been decided when Mr. Asay's briefing and argument were conducted. Therefore, Asay cannot control Mr. Melton's claims concerning *Hurst v. State* that were raised in his Rule 3.851 motion.¹

8. Further, as to whether either *Hurst v. Florida* or *Hurst v. State* are retroactive under federal law, the State's reliance on *Schriro v. Summerlin*, 542 U.S. 348 (2004), and *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 2017 WL 4416205 (11th Cir. Oct. 5,

¹This Court's citation to several opinions that applied *Asay* does not change the fact that Mr. Asay raised no such claim. See Reply at 5, n.3. Thus, the citation to those opinions is misleading.

2017), is misplaced. See Reply at 5, n.2, 9-10.² First, as to *Lambrix*, the 11th Circuit's opinion holds no precedential value because the issue before the 11th Circuit concerned its determination whether to grant a review on the merits as compared to a ruling on the merits. See *Buck v. Davis*, 137 S.Ct. 759, 773 (2017) ("The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.' This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" (citations omitted).

9. And, the retroactivity analysis as it relates to both *Hurst v. Florida* and *Hurst v. State* is not undermined by *Summerlin*. In *Summerlin*, 542 U.S. at 364, the United States Supreme Court held that *Ring* was not retroactive in a federal habeas case. However, *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty ... [the change] would be substantive." 542 U.S. at 354. Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and proof-beyond-a-reasonable-doubt decisions are substantive. See,

²The State's pronouncement that: "The Eleventh Circuit's decision in *Lambrix* is definitive precedent that *Hurst* is not retroactive in federal court" is simply not true. See Reply at 10.

e.g., *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972). Thus, the State's argument does not preclude Mr. Melton from briefing his distinct claims before this Court.

10. Moreover, in *Summerlin*, 542 U.S. at 356, the United States Supreme Court observed: "When so many presumably reasonable minds continue to disagree over whether juries are better factfinders at all, we cannot confidently say that judicial factfinding seriously diminishes accuracy." As Justice Breyer explained in his dissenting opinion in *Summerlin*, this was the basis for the majority's conclusion that *Ring* was not retroactive under *Teague*:

As I have pointed out, the majority does not deny that *Ring*'s rule makes some contribution to greater accuracy. It simply is unable to say "confidently" that the absence of *Ring*'s rule creates an "impermissibly large risk" that the death penalty was improperly imposed.

542 U.S. at 366.

11. However, this Court in *Hurst v. State* repeatedly referenced the enhanced reliability that would result from requiring a jury's unanimous death recommendation before a judge was authorized to impose a death sentence. This Court explained at length the great benefit to the administration of justice that the substantive right to a unanimous death recommendation would provide. Thus, replacing a majority vote recommendation with a requirement that the jury must be unanimous when returning a death recommendation and its failure to do so precludes a death sentence is markedly different than merely switching from a judge to jury as the finder of fact. See *Schriro v. Summerlin*, 542 U.S.

348, 356 (2004). Unlike the circumstances in *Summerlin*, the change is not simply going from judge fact finding to jury fact finding. The change here is going from an advisory jury recommendation requiring seven of twelve jurors to vote in favor of an advisory death recommendation, to requiring a unanimous death recommendation before a judge is authorized to impose a death sentence. Requiring a unanimous death recommendation before a death sentence is authorized clearly enhances the reliability of death sentences imposed in Florida and must be applied retroactively.

12. Likewise, as to the State's argument that fundamental fairness does not mean that *Hurst v. State* must be applied to all capital postconviction defendants, see Reply at 6, the United States Supreme Court in *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016), held:

First, "[n]ew substantive rules generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); see *Montgomery v. Louisiana*, 577 U.S. ----, ----, 136 S.Ct. 718, 728, 193 L.Ed.2d 599 (2016); *Teague, supra*, at 307, 311, 109 S.Ct. 1060. Second, new "'watershed rules of criminal procedure,'" which are procedural rules "**implicating the fundamental fairness and accuracy of the criminal proceeding**," will also have retroactive effect.

(Emphasis added). Thus, Mr. Melton is entitled to the retroactive application of *Hurst v. State*.

13. Furthermore, the State's assertion that a line can just be drawn at a particular date and not violate the constitution, due to *Griffith v. Kentucky*, 479 U.S. 314 (1987), is erroneous. See Reply at 6-8. As the State recognizes, "[t]he *Griffith* Court

created the pipeline concept ...". See Reply at 7. The "pipeline concept" places the dividing line between final and non-final. However, that is not what has occurred in Florida. Indeed, many capital defendants whose convictions and death sentences were final when *Hurst v. Florida* was decided have been granted the benefits of *Hurst v. Florida* and *Hurst v. State*. Justice Canady certainly recognized this unorthodox line drawing as he noted in his dissenting opinion in *Mosley v. State*, as to the partial retroactivity this Court had created: "Based on an indefensible misreading of *Hurst v. Florida* and a retroactivity analysis that **leaves the Witt framework in tatters**, the majority unjustifiably plunges the administration of the death penalty in Florida into turmoil that will undoubtedly extend for years." 209 So. 3d 1248, 1291 (Fla. 2016) (emphasis added).

14. And, as recently explained by Judge Martin, in her concurring opinion in *Hannon v. Sec'y, Fla. Dep't of Corr.*, No. 17-14935 (11th Cir. Nov. 8, 2017):

...the effect of ... the Florida Supreme Court's retroactivity decisions, is that going forward, people convicted in Florida of the same crime as Mr. Hannon will now have juries deciding important issues related to their sentences. No jury will decide these issues in Mr. Hannon's case, however, only because of the date his conviction and death sentence became final. And in my view, it is arbitrary in the extreme to make this distinction between people on death row based on nothing other than the date when the constitutional defect in their sentence occurred.

The State's argument ignores the long-standing jurisprudence concerning the Eighth Amendment.

15. As to Claim IV of his Rule 3.851 motion, because Mr. Melton's postconviction proceeding was not final at the time *Ring*

issued, under the State's reasoning, the concepts recognized in *Hurst v. Florida* and *Hurst v. State*, should be applied to that proceeding. See *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017). See Reply at 11-12.

16. Finally, contrary to the State's argument, *Hitchcock v. State* did not address the applicability of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (holding that a death sentence is invalid if imposed by a jury that believed the ultimate responsibility for determining the appropriateness of a death sentence rested elsewhere). See Reply at 12-15. Mr. Melton's jury was led to believe that its role was diminished when the court instructed it that the jury's role was advisory and that the judge would ultimately determine the sentence. As three justice of the United States Supreme Court noted, this Court's review of appeals related to *Hurst v. Florida* and the issues arising in its wake has been woefully deficient. See *Truehill v. Florida*, __ U.S. __, 2017 WL 2463876 (October 16, 2017) (Sotomayor, J., dissenting, joined by Breyer and Ginsburg, JJ.) ("capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address."). (October 16, 2017). This Court's failure to address the *Caldwell* issue also constitutes "cause."

17. To simply state that the jury was instructed properly because even under *Hurst v. State* the judge may override the death sentence and impose life, misses the point. Rather, in the wake of *Hurst v. Florida* and the resulting new Florida law, a Florida jury's unanimous death recommendation is necessary in

order to authorize the imposition of a death sentence. After *Hurst v. Florida*, the jury's penalty phase verdict is not advisory. The jury does bear responsibility for a resulting death sentence. Each juror has the power to exercise mercy and require the imposition of a life sentence. Accordingly, the jury must be correctly instructed as to its sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

18. In *Hurst v. Florida*, the United States Supreme Court wrote that "[t]he State cannot now treat the advisory recommendation by the jury as a necessary factual finding that *Ring* requires." 136 S. Ct. at 622 (emphasis added). This means that post-*Hurst* the individual jurors must know that they each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation.

19. And, the State's position that *Caldwell* was not held to be retroactive, see Reply at 15, ignores the fact that it was decided prior to Mr. Melton's trial proceedings. Therefore, had this Court understand the import of *Caldwell* and the Sixth Amendment violation created by Florida's death penalty statute, Mr. Melton would surely have obtained the constitutional protections that *Caldwell* required.

WHEREFORE, Mr. Melton requests that this Court permit him to submit briefing on the issues that he raised in his amended Rule 3.851 motion and that arose during the proceedings before the circuit court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing reply has been furnished by electronic service to Jennifer Ann Donahue, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on thus 9th day of November, 2017.

/s/. Linda McDermott

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