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IN THE SUPREME COURT OF FLORIDA

MICHAEL T. RIVERA

Plaintiff,

v. **Case No. SC17-1991**
Death Penalty Case

STATE OF FLORIDA,

Appellee.
_____/

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STATE'S REPLY TO NOVEMBER 21, 2017 ORDER TO SHOW CAUSE

COMES NOW, APPELLEE, the State of Florida, by and through the undersigned counsel, and hereby responds to Appellant's Response to the November 21, 2017, Order to Show Cause and asserts that this Court should affirm the denial of the Appellant's successive postconviction motion in accordance with *Asay v. State*, 210 So.3d 1 (Fla. 2016) and *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017); *Asay v. State, 224 So.3d 695 (Fla. 2017); Lambrix v. State*, 227 So.3d 112 (Fla. 2017), *cert. denied*, 138 S.Ct. 312 (2017,)and therefore states:

STATEMENT OF THE CASE AND FACTS[1]

The Appellant, Michael T. Rivera ("Rivera") was convicted

[1] Record of Appeal = ROA. Second Successive Postconviction Motion = 2PCR

of the first-degree murder of an eleven year old girl, "SLJ".[2] During the penalty phase, both aggravating and mitigating factors were presented. The jury ***unanimously*** recommended the death sentence. *Rivera v. State,* 561 So.2d 536, 538 (Fla 1990). On May 1, 1987, the trial court imposed the death penalty, upon finding four aggravating circumstances: (1) prior violent felony; (2) murder committed during the commission of an enumerated felony; (3) heinous, atrocious or cruel ("HAC"); and (4) cold calculated and premeditated ("CCP"). The trial court also found one statutory mitigating factor that the Defendant was under the influence of extreme mental or emotional disturbance. The trial court did not find any non-statutory mitigating factors. *Id.* at 538.

On direct appeal, this Court found that there was insufficient evidence to support a CCP aggravator, but concluded that the error was harmless as the one mitigating factor weighed against the remaining aggravating factors would not have changed the sentence. *Id at 540-541.* On April 19, 1990, this Court affirmed the conviction and sentence, and on June 22, 1990, denied rehearing and issued its mandate. *Id.* at 536. No *writ of certiorari* was filed with the United States Supreme Court.

[2] The female victim's initials are used throughout due the sexual battery conviction.

Pursuant to Rule 3.851, Rivera's conviction and sentence became final on September 22, 1990.

On October 31, 1991, Rivera filed a Rule 3.850 motion, which he later amended two times. The trial court held an evidentiary hearing and denied his claims. This Court affirmed except for the claim of ineffective assistance of counsel during the penalty phase, which was remanded for an evidentiary hearing. *Rivera,* 717 So.2d at 480. After an evidentiary hearing, the trial court denied relief. The trial court's ruling was affirmed by this Court and which denied the habeas petition. *Rivera v. State,* 859 So.2d 495, 512 (Fla. 2003).

On October 1, 1999, Rivera filed a successive rule 3.850 motion. *Rivera v. State,* 995 So.2d 191 (Fla. 2008). The motion was amended twice. This Court remanded for an evidentiary hearing on the claims of *Giglio v. United States,* 405 U.S. 150 (1972), and *Brady v. Maryland,* 373 U.S. 83 (1963) violations, and newly discovered evidence claims. The balance of the claims were affirmed. *Rivera,* 995 So.2d at 197-198. Following the evidentiary hearing, the trial court denied relief, and this Court affirmed. *Rivera v. State*, 187 So. 3d 822. (Fla. 2015).

A second successive post-conviction motion and a motion to exceed page limitation were filed on December 5, 2016, raising a claim under *Hurst v. Florida*. 2PCR 39-68. On January 25, 2017,

the State filed an objection to Rivera's motion to exceed page limitation. 2PCR 76-100. On March 28, 2017, the trial court denied Rivera's motion to exceed page limitations and his motion to amend the pending successive motion. 2PCR 117-118.

This was followed by a motion for rehearing and the State's June 27, 2017, motion to strike the pending postconviction motion for being overlarge. 2PCR 119-312, 317-319. On July 12, 2017, the trial court denied Rivera's motion for rehearing and clarification and granted the State's motion to strike the successive motion. 2PCR 320-321

On August 31, 2017, Rivera filed an amended successive 3.851 motion addressing a claim under *Hurst v. Florida* and *Hurst v. state.* 2PCR 331-357. On September 27, 2017, the trial court denied Rivera's motion, and this appeal followed. 2PCR 382-405. On November 21, 2017, this Court issued an order to show cause ordering Rivera to show cause "why the trial court's order should be affirmed in light of this Court's decision in *Hitchcock v. State,* SC17-445."

OVERVIEW

This Court has held that *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) are not retroactive to cases final before June 24, 2004, the day *Ring v. Arizona*, 536 U.S. 584 (2002) was issued. *See Asay v. State*, 210

So.3d 1 at 22 (Fla. 2016). The judgment at issue in *Asay*, 210 So.3d at 1 became final October 7, 1991, and thus, Asay was not eligible for relief under *Hurst v. Florida* or *Hurst*. *Asay*, 210 So.3d at 8. *See also, Asay v. State,* 224 So.3d 695, 703 (Fla. 2017) (reiterating *Hurst* and *Hurst v. Florida* were not retroactive to cases final before *Ring* issued); *Hitchcock v. State*, 226 So.3d 216, 217 (Fla. 2017), (stating "[w]e have consistently applied our decision in *Asay* [210 So.3d at 22], denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)." In this case, Rivera's sentence became final on September 20, 1990, before the *Ring* opinion was issued. Therefore, *Hurst* is not retroactive to him, and the lower court's order denying relief requires affirmance.[3]

[3] Rivera seeks "guidance" as to this Court's "cause" standard. This Court's order to show cause as to why the trial court's order should not be affirmed in light *Hitchcock* means that Rivera should either distinguish this case from *Hitchcock* or explain why *Hitchcock* should be overruled. No further guidance is necessary.

Rivera also complains that this Court's order to show cause violates due process. This is incorrect. This Court is simply utilizing a procedure to address numerous cases that have the same issue. The United States Supreme Court employs a similar procedure when dealing with numerous cases involving the same issue. It decides the lead case, and then it vacates and

ARGUMENT

Rivera's assertion that *Hitchcock* did not address the issue that Florida's enactment of Chapter 2017-1 rendered Rivera's death sentence unconstitutional under the Due Process and Equal Protection clauses is patently incorrect. Four days after *Hitchcock* was issued, in *Asay,* 224 So.3d at 703, the Court stated that Asay's claim based on the retroactive application of Chapter 2017-1 is controlled by its ruling in *Hitchcock*. This Court's decision in *Asay* rejected the claim that chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise." *Id.*

To support this assertion, Rivera states that the legislature intended for Chapter 2017-1 to apply retroactively and provides examples of cases which were given the benefit of *Hurst* while others were not. Specifically, Rivera cites to *Card*

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remands the other cases to the lower courts in light of the new decision in the lead case. This procedure is called "grant, vacate, and remand" or GVR. *Lawrence v. Chater,* 516 U.S. 163, 166 (1996) ("the GVR order has, over the past 50 years, become an integral part of the Court's practice, accepted and employed by all sitting and recent Justices'); *Wellons v. Hall,* 558 U.S. 220, 225 (2010) (observing that "a GVR order conserves the scarce resource of this Court"). The parties in the other cases do not get to brief the issue in the High Court. In contrast, this Court allows the parties in to brief the issue after the lead case is decided in a response to an order to show cause. Rivera cites to no cases from any appellate court holding that this Court's procedures for dealing with a mass cases involving the same issue violates due process.

v. Jones, 219 So.3d 47 (Fla. 2017) as an example of a case where the defendant was convicted prior to *Ring,* but was granted a new sentencing hearing. In *Card,* the defendant was convicted prior to the *Ring* decision, but his sentence did not become final until June 28, 2002, which is post-*Ring. Card,* 219 So.3d at 49. The relevant date is when the defendant's sentence of death became final. As recognized in *Hitchcock*, after *Asay*, 210 So.3d at 1, this Court has adhered staunchly to using the *Ring* decision date as the bright-line cutoff point for retroactivity of a *Hurst* claim. Thus far, this Court has refused to extend *Hurst v. Florida* and *Hurst* to 24 defendants, including Asay, based solely on the fact that their judgments were final prior to the decision in *Ring*.[4]

[4] *See Hannon v. State,* 228 So.3d 505, 513 (Fla. 2017), *Asay*, 210 So.3d at 8, 22(sentence final in 1991; *see Asay v. Florida*, 502 U.S. 895 (1991)); *Jones v. State*, No. SC15-1549, 2017 WL 4296370, *2 (Sept. 28, 2017); *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017)(sentence final in 2000; *see Hitchcock v. State*, 531 U.S. 1040 (2000)); *Zack v. State*, 28 So.3d 41 (Fla. 2017)(sentence final in 2000; *see Zack v. Florida*, 531 U.S. 858 (2000)); *Zakrzewski v. Jones*, 221 So.3d 1159, 1159 (Fla. 2017)(sentence final in 1999; *see Zakrzewski v. Florida*, 525 U.S. 1126 (1999)); *Oats v. Jones*, 220 So.3d 1127, 1129 (Fla. 2017)(sentence final in 1985; *see Oats v. Florida*, 474 U.S. 865 (1985)); *Marshall v. Jones*, 226 So.3d 211 (Fla. 2017)(sentence final in 1993; *see Marshall v. Florida*, 508 U.S. 915 (1993)); *Rodriguez v. State*, 219 So.3d 751, 760 (Fla. 2017)(sentence final in 1993; *see Rodriguez v. Florida*, 510 U.S. 830 (1993)); *Willacy v. Jones*, No. SC16-497, 2017 WL 1033679 (Mar. 17, 2017)(sentence final in 1997; *see Willacy v. Florida*, 522 U.S. 970 (1997)); *Suggs v. Jones*, No. SC16-1066, 2017 WL 1033680, *1

Rivera next claims that he is not foreclosed from relief because *Hitchcock* did not raise Rivera's claim that the reviewing court must revisit the denial of his claims based on newly discovered evidence, *Brady/Giglio,* and *Strickland.* Rivera states that this Court's previous rejection of these claims rested on the understanding that at resentencing, it would take six jurors to return a recommendation of life, thus, any

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(Mar. 17, 2017)(sentence final in 1995; *see Suggs v. Florida*, 514 U.S. 1083 (1995)); *Lukehart v. Jones*, No. SC16-1225, 2017 WL 1033691, *1 (Mar. 17, 2017)(sentence final 2001; *see Lukehart v. Florida*, 533 U.S. 934 (2001)); *Cherry v. Jones*, No. SC16-694, 2017 WL 1033693, *1 (Mar. 17, 2017)(sentence final in 1990; *see Cherry v. Florida*, 494 U.S. 1090 (1990)); *Archer v. Jones*, No. SC16-2111, 2017 WL 1034409, *1 (Mar. 17, 2017)(sentence final in 1996; *see Archer v. Florida*, 519 U.S. 876 (1996)); *Jones v. Jones*, No. SC16-607, 2017 WL 1034410 (Mar. 17, 2017)(sentence final in 1995; *see Jones v. Florida*, 515 U.S. 1147 (1995)); *Hartley v. Jones*, No. SC16-1359, 2017 WL 944232, *1 (Mar. 10, 2017)(sentence final in 1997; *see Hartley v. Florida*, 522 U.S. 825 (1997)); *Geralds v. Jones*, No. SC16-659, 2017 WL 944236, *1 (Mar. 10, 2017)(sentence final in 1996; *see Geralds v. Florida*, 519 U.S. 891 (1996)); *Lambrix v. State*, 227 So.3d 112 (Fla. 2017), *cert. denied*, 17-6222, 2017 WL 4409398 (U.S. Oct. 5, 2017); *Lambrix v. State*, 217 So.3d 977, 989 (Mar. 9, 2017)(sentence final in 1986); *Stein v. Jones*, No. SC16-621, 2017 WL 836806 (Mar. 3, 2017)(sentence final in 1994; *see Stein v. Florida*, 513 U.S. 834 (1994)); *Hamilton v. Jones*, No. SC16-984, 2017 WL 836807 (Mar. 3, 2017)(sentence final in 1998; *see Hamilton v. Florida*, 524 U.S. 956 (1998)); *Davis v. State*, No. SC16-264, 2017 WL 656307 (Feb. 17, 2017)(sentence final in 1998; *see Davis v. Florida*, 524 U.S. 930 (1998)); *Bogle v. State*, 213 So.3d 833, 855 (Fla. 2017)(sentence final in 1995; *see Bogle v. Florida*, 516 U.S. 978 (1995)); *Wainwright v. State*, No. SC15-2280, 2017 WL 394509 (Jan. 30, 2017)(sentence final in 1998; *see Wainwright v. Florida*, 523 U.S. 1127 (1998)); *Gaskin v. State*, 218 So.3d 399, 400 (Jan. 19, 2017)(sentence final in 1993; *see Gaskin v. Florida*, 510 U.S. 925 (1993)).

resentencing ordered now is governed by the new statute. *Hurst* cannot be used to resurrect previously adjudicated claims. *Hurst* is a right-to-a-jury-trial case, and does not operate to breathe new life into previously denied *Brady/Giglio, Strickland,* and newly discovered evidence claims. *Hurst* involves an entirely different constitutional right.

In his third claim, Rivera argues that *Asay* does not foreclose relief based on *Hurst* because that issue was not raised in *Asay*. Contrary to Rivera's assertion, there is no retroactive constitutional right to a life sentence. In *Asay*, 210 So.3d at 15-16, this Court discussed the appropriate test for assessing retroactivity of *Hurst.* It applied the *Witt v. State*, 387 So.2d 922 (Fla. 1980) analysis for retroactivity under state law, "which provides ***more expansive retroactivity standards*** than those adopted in *Teague [v. Lane]*, 489 U.S. 288 (1989)," which enumerates the federal retroactivity standards. *Id.* (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 than *Teague*).

Even if *Hurst* were applied retroactively to Rivera's case, relief would not be warranted as any error would be harmless beyond a reasonable doubt. Rivera's jury was given the standard

jury instructions that if the aggravators outweighed the mitigators, they may recommend death, but were not required to recommend a death sentence. ROA XI: 2132-2135, XII: 2300-2304. Even considering those instructions, Rivera's jury unanimously recommended death. ROA XI: 2139, XI: 2307. Consistently, this Court has found that a unanimous jury recommendation supports a finding that any alleged *Hurst* error was harmless beyond a reasonable doubt as a unanimous recommendation is evidence that the jury unanimously found all the facts required for the imposition of a death sentence. *See Davis v. State*, 207 So.3d 142, 173–74 (Fla. 2016).[5]

Further, the aggravation in this case was: (1) previous convictions of another felony or a felony involving the use or

[5] *See also Cozzie v. State*, 42 Fla. L. Weekly S579 (Fla. May 11, 2017), *reh'g denied*, SC13-2393, 2017 WL 3751293 (Fla. Aug. 31, 2017); *Knight v. State*, 42 Fla. L. Weekly S133 (Fla. Jan. 31, 2017), *reh'g denied*, SC14-1775, 2017 WL 4020597 (Fla. Sept. 13, 2017); *Guardado v. Jones*, 42 Fla. L. Weekly S552 (Fla. May 11, 2017), *reh'g denied*, SC17-389, 2017 WL 4150352 (Fla. Sept. 19, 2017); *Tundidor v. State*, 221 So. 3d 587, 608 (Fla. 2017), *reh'g denied*, SC14-2276, 2017 WL 2794223 (Fla. June 28, 2017); *Middleton v. State*, 220 So.3d 1152, 1185 (Fla. 2017), *reh'g denied*, 42 Fla. L. Weekly S637 (Fla. June 1, 2017); *Morris v. State*, 219 So.3d 33, 46 (Fla. 2017), *reh'g denied*, SC14-1317, 2017 WL 2463873 (Fla. June 7, 2017); *Oliver v. State*, 214 So.3d 606, 618 (Fla. 2017); *Hall v. State*, 212 So. 3d 1001, 1035 (Fla. 2017), *reh'g denied*, SC15-1662, 2017 WL 1150799 (Fla. Mar. 28, 2017); *Jones v. State*, 212 So. 3d 321, 344 (Fla. 2017), *cert. denied*, 16-9651, 2017 WL 2734810 (U.S. Oct. 2, 2017); *Truehill v. State*, 211 So. 3d 930, 957 (Fla. 2017); *King v. State*, 211

threat of violence; (2) murder was committed while engaged in the commission of a felony; and (3) HAC. ROA XII: 2309-2313. Prior to this trial, Rivera was convicted of kidnapping, attempted murder, aggravated child abuse, aggravated battery, burglary with the intent to commit battery, and indecent assault upon a child. Rivera strangled SLJ while he was trying to sexually assault the child. Rivera's prior convictions, and the evidence presented at trial, establish that a rational jury would have unanimously found all the aggravating factors and recommended death.

While recognizing this Court's precedent to the contrary, the State maintains that there was no Sixth Amendment error in this case as Rivera became eligible for a death sentence due to his prior felony convictions. The Sixth amendment requires nothing more that jury fact-finding sufficient to support the resulting sentence; it does not mandate any specific jury verdict or recommendation as a pre-requisite to a given sentence.

Significantly, the recent United States Supreme Court decision in *Jenkins v. Hutton*, 582 U.S. ___, 137 S. Ct. 1769 (2017), confirmed the constitutionality of an Ohio death

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So. 3d 866, 890 (Fla. 2017), *reh'g denied*, SC14-1949, 2017 WL 961818 (Fla. Mar. 13, 2017).

sentence based on a jury's guilt-phase determination of facts. In *Jenkins*, the lower court ordered a new sentencing trial because, in that court's view, the penalty phase jury failed to make the necessary factual findings to support a death sentence. However, because the necessary aggravating factors were established beyond a reasonable doubt by the jury during the guilt phase, the Supreme Court reversed and reinstated the death sentence. *See also Waldrop v. Comm'r, Alabama Dep't of Corr.*, 15-10881, 2017 WL 4271115, at *20 (11th Cir. Sept. 26, 2017) (explaining its rejection of a *Hurst* claim, the Eleventh Circuit Court of Appeals stated: "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict. *See* §13A-5-45(e).").

Rivera next claims that while *Hitchcock* raised an argument that his death sentence was unconstitutional under *Caldwell v. Mississippi,* 472 U.S. 320 (1985), this Court did not address the argument when denying the appeal. This court has consistently held that "challenges to 'the standard jury instructions that refer to the jury as advisory and that refer to the jury's verdict as a recommendation violate *Caldwell v. Mississippi*'" are without merit. *Hall v. State,* 212 So.3d 1001, 1032 (Fla.

2017).

In his fifth claim, Rivera claims that fundamental fairness, outlined in *Mosley v. State,* 209 So.3d 1248 (Fla. 2016) and *James v. State,* 615 So.2d 668 (Fla. 1993), require this court to conduct an individualized review of Rivera's death sentence. This is essentially a restatement of Rivera's argument that this Court's order to show cause violates his right to appeal the lower court's denial of his motion.

In his final claim, Rivera states that he was prohibited from fully pleading and arguing his claims in the lower court. Specifically, he points to the State's and lower court's adherence to the rules and procedures. The rules are there for the orderly administration of justice. Rivera was given every opportunity to plead his case in the manner outlined by the rules and statutes. On December 5, 2016, Rivera filed 3.851 successive postconviction motion that was 29 pages in length. 2PCR 39-68. On January 25, 2017, the State filed an objection to the motion exceeding the page limitation. 2PCR 76-100. On March 1, 2017, before the court ruled on the motion to exceed page limits, Rivera filed a response to the State's objection and a motion for leave to amend. 2PCR 101-116. Rivera's proposed amended motion was 172 pages in length. On June 27, 2017, the State filed a motion to strike Rivera's motion. 2PCR

317-319. On July 12, 2017, the trial court denied Rivera's motion to amended and granted the State's motion to strike. 2PCR 320-321. On August 31, 2017, Rivera filed a new 3.851 successive postconviction motion that was within page limits. 2PCR 331-357.

on September 27, 2017, the trial court summarily denied relief. 2PCR 358-380, 382-405. While A case management conference was not held in this case, "[F]ailure to hold a hearing on a successive postconviction motion that is legally insufficient on its face is harmless error." Marek v. State, 14 So. 3d 985, 999 (Fla. 2009); *see also* Archer v. State, 151 So. 3d 1223 (Fla. 2014); Davis v. State, 736 So. 2d 1156, 1159 n.1 (Fla. 1999); Groover v. State, 703 So. 2d 1035, 1038 (Fla. 1997) ("[E]ven if a Huff hearing had been required in the instant case, the court's failure to do so would be harmless as no evidentiary hearing was required and relief was not warranted on the motion.").

Given the fact that Rivera's case was final before June 24, 2002 and this Court has previously rejected all of Rivera's claims that *Hurst* should be applied retroactively, the denial of postconviction relief should be affirmed. Moreover, given the fact that the jury's recommendation was unanimous and the guilt phase verdict rendered Rivera death eligible, there is no Sixth

Amendment violation and again, relief was denied properly.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of December 2017, I filed the foregoing with the Clerk of the Court by using the E-Portal Filing System which will send a notice of electronic filing to the following: Martin McClain and Nicole M. Noel, counsel for the defendant.

/s/Ilana Mitzner
CO-COUNSEL, STATE OF FLORIDA