No. SC18-815

IN THE

Supreme Court of Florida

JOHN LOVEMAN REESE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S REPLY BRIEF

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I. The State is incorrect in suggesting that this Court's prior cases meaningfully address federal retroactivity in the *Hurst* context, particularly in a post-*Apprendi* case like Mr. Reese's

The State is incorrect in suggesting that this Court's precedent meaningfully addresses whether federal constitutional law requires *Hurst v. Florida*, 136 S. Ct. 616 (2016), to be applied retroactively to Mr. Reese's case. This Court's prior cases involving *Hurst* retroactivity all fail to meaningfully address the federal constitutional arguments Mr. Reese has presented and do not apply to Mr. Reese, whose case became final after *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In attempting to justify this Court's *Ring v. Arizona*, 536 U.S. 584 (2002) cutoff, the State admits that *Apprendi* was the precursor to *Ring*. Answer Brief at 12, n.4. Recognizing that this cuts in Mr. Reese's favor since his death sentence became final after *Apprendi*, the State provides a cursory cite to *Asay v. State*, 210 So. 3d 1 (Fla. 2016), for the proposition that, because *Apprendi* excluded capital cases from its holding, it should not be considered in determining where to draw a retroactivity line. This contention is belied by the *Ring* and *Hurst* decisions. Indeed, as the United States Supreme Court stated in *Hurst*, *Ring* applied *Apprendi*'s analysis to conclude that Mr. Ring's death sentence violated the Sixth Amendment. *See* 136 S. Ct. at 621. In *Hurst*, the Court repeatedly stated that Florida's scheme was incompatible with "*Apprendi*'s rule," of which *Ring* was an application. *Id.* at 621. Both *Ring* and *Hurst* make clear that their operative constitutional holdings derived

directly from *Apprendi*. In *Mosley v. State*, 209 So. 3d 1248, 1279-80 (Fla. 2016), another case cited in the State's answer, this Court reaffirmed that *Ring* flowed directly from *Apprendi*.

Indeed, the cases cited by the State as precluding *Hurst* relief for Mr. Reese do not actually do so. *Asay* and *Mosley* did not address whether federal law required *Hurst* decisions to be applied retroactively in post-*Apprendi* death sentences like Mr. Reese's. Namely, they not address whether it would violate the Eighth and Fourteenth Amendments to draw a *Hurst* retroactivity "cutoff" at *Ring*, rather than *Apprendi*, in light of the fact that *Apprendi* was the constitutional basis for both *Ring* and *Hurst*. As the State's brief shows, the reasoning in *Asay* and *Mosley* rested entirely on the state retroactivity law first articulated in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *See* Answer Brief at 7. *Asay* and *Mosley*, issued on the same day in 2016, could not possibly have addressed Mr. Reese's federal constitutional arguments, because they created the state-law *Ring* cutoff in the first place. Furthermore, the rationale provided by this Court in those decisions—in essence, that *Ring* was the point at which Florida's courts *should have known* that Florida's scheme was unconstitutional, *Mosley*, 209 So. 3d at 1279-81; *Asay*, 210 So. 3d at 15-16—has no basis in federal retroactivity law.

Asay's exclusive reliance on state law is evident from the *Asay* opinion itself. *See* 210 So. 3d at 16 ("To apply a newly announced rule of law to a case that is

already final at the time of the announcement, this Court must conduct a retroactivity analysis pursuant to the dictates of *Witt*."). It does not address Mr. Reese's federal constitutional arguments, whether a retroactivity cutoff drawn at *Ring* violates the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty or the Fourteenth Amendment's Equal Protection and Due Process Clauses. Nor did *Asay* address whether the *Hurst* decisions are "substantive" within the meaning of federal law, such that the Supremacy Clause of the Constitution requires state courts to apply the decisions retroactively under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), in relying totally on *Asay*, also does not preclude relief for Mr. Reese. It did not address the unique position of those defendants whose convictions became final after *Apprendi*, nor did it substantively address any of the other federal retroactivity arguments. *Id.* at 217 ("We affirm because we agree with the circuit court that our decision in *Asay* forecloses relief."); *id.* ("Accordingly, we affirm the circuit court's order summarily denying Hitchcock's successive postconviction motion pursuant to *Asay*."). This cannot be read to address Mr. Reese's federal arguments, as the preceding sentence reads: "As such, these arguments were rejected when we decided *Asay*." *Id.* As explained above, *Asay* was premised entirely on *state* retroactivity law.

During the nearly eight months between this Court's decisions in *Asay* and *Hitchcock*, numerous *Hurst* defendants, including those sentenced between *Apprendi* and *Ring*, raised federal retroactivity arguments in this Court and the circuit courts, explaining that *Asay* had not resolved those federal matters in its exclusively-state-law analysis and imploring the courts to explicitly address federal law. If this Court had intended to put those arguments to rest in *Hitchcock*—including whether a retroactivity cutoff at *Ring* is unconstitutional as applied to post-*Apprendi* defendants—it could have done so, but the *Hitchcock* Court declined to do so. *Hitchcock* never mentions the small number of death sentences (like Mr. Reese's) that became final between *Apprendi* and *Ring*, the Eighth Amendment's prohibition against arbitrariness and capriciousness, or the Fourteenth Amendment's Equal Protection and Due Process Clauses.

Nor do the other cases cited by the State address federal arguments in general or as applied to post-*Apprendi* death sentences, and they are not applicable in Mr. Reese's case. For instance, the Eleventh Circuit's decision in *Lambrix v. Sec'y*, 872 F.3d 1170 (11th Cir. 2017), does not deal with a post-*Apprendi* case, is not precedential in this Court, and was decided in the context of the federal habeas statute. Moreover, *Lambrix* dealt primarily with an idiosyncratic issue—the "retroactivity" of Florida's new capital sentencing statute—and did not focus squarely on the retroactivity of the constitutional rules arising from the *Hurst*

decisions. Similar idiosyncratic presentations and "pre-*Apprendi*" postures also render inapplicable to Mr. Reese this Court's active-death-warrant decisions in *Asay v. State*, 224 So. 3d 695 (Fla. 2017), *Lambrix v. State*, 227 So. 3d 112 (Fla. 2017), *Hannon v. State*, 228 So. 3d 505 (Fla. 2017), and *Branch v. State*, 234 So. 3d 548 (Fla. 2018).

II. The State's limited substantive arguments concerning partial *Hurst* federal retroactivity are not persuasive

The State fails to engage substantively with Mr. Reese's argument that a retroactivity cutoff at *Ring* violates the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty. The State simply makes superficial claims that the *Ring* cutoff is "neither arbitrary nor capricious," Answer Brief at 10, and that, because traditional retroactivity "can depend on a score of random factors having nothing to do with the offender or the offense" without violating the Eighth and Fourteenth Amendments, neither does partial retroactivity. Answer Brief at 10-12.

The State's failure to substantively address the important Eighth and Fourteenth Amendment problems with a *Ring*-based retroactivity cutoff is telling. As Mr. Reese explained, a *Ring* cutoff injects into Florida's death penalty jurisprudence a level of arbitrariness and capriciousness—and also denial of equal protection and due process of law—that is not present in typical circumstances where retroactivity is withheld based on widely-recognized pragmatic necessity for courts

to evolve constitutional protections prospectively without undue cost to the finality of preexisting judgments. This is especially true for Mr. Reese because, as explained above, his conviction was finalized after the decision in *Apprendi*, which directly led to *Ring*. It is also true because there are more general problems with the partial retroactivity scheme.

A *Hurst* retroactivity cutoff at *Ring* inaugurates a degree of capriciousness that far exceeds the level justified by "normal" jurisprudence. To see why this is so, one need only consider how Florida's pre-*Ring* inmates do and do not differ from their post-*Ring* peers. The two groups were both sentenced under a procedure that allowed death sentences to be predicated upon factual findings not tested by a jury trial. But inmates whose death sentences became final before *Ring* have been on death row longer than their post-*Ring* counterparts and have demonstrated over a longer time that they are capable of adjusting to that environment and continuing to live without endangering any valid interest of the State. Pre-*Ring* inmates also have undergone the prolonged suffering chronicled by Justice Breyer, dissenting from the denial of certiorari in *Sireci v. Florida*, 137 S. Ct. 470 (2016), longer than their post-*Ring* counterparts.

Pre-*Ring* inmates also are more likely than their post-*Ring* counterparts to have been sent to death row under standards that would not produce a capital sentence—or even a capital prosecution—under the conventions of decency

prevailing today. In the generation since *Ring*, prosecutors and juries have been increasingly unlikely to seek and impose death sentences. A significant number of cases which terminated in a death verdict before *Ring* are cases where a death sentence would not be imposed, or even pursued, in the modern era. And pre-*Ring* inmates are more likely to have received death sentences in trials involving problematic fact-finding: the past two decades have witnessed a broad-spectrum recognition of the unreliability of numerous kinds of evidence—flawed forensic theories and practices, hazardous eyewitness identification testimony, and so forth—that was accepted without question in pre-*Ring* capital trials. Doubts that would cause today's prosecutors, juries, and judges to hesitate to seek or impose a death sentence were unrecognized in the pre-*Ring* era. Evidence that led to confident convictions and unhesitating death sentences decades ago would have substantially less convincing power to prosecutors, juries, and judges today.

Taken together, these considerations highlight that a *Ring*-based retroactivity cutoff involves a level of caprice that exceeds that tolerated by standard-fare retroactivity rules. A *Ring* cutoff's denial of relief in precisely the class of cases in which relief makes the most sense is irremediably perverse and inconsistent with the Eighth and Fourteenth Amendments.

The State also relies on *Schriro v. Summerlin*, 542 U.S. 348 (2004), for the proposition that the United States Supreme Court's ruling in that case—that *Ring* is

not retroactive in a federal habeas proceeding—means that *Hurst* is not retroactive under federal law. Answer Brief at 17-19. But the Arizona statute at issue in *Ring* and *Summerlin* did not require fact-finding regarding the aggravators *and* their "sufficiency" to justify the death penalty. That difference is critical for federal retroactivity. Indeed, *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. Such a change occurred in the *Hurst* decisions where, for the first time, the United States Supreme Court and this Court found it unconstitutional for a judge alone to make a finding of fact as to the "sufficiency" of the aggravation. As Mr. Reese explained earlier, under *Montgomery*, states are bound by the Supremacy Clause to apply constitutional rules retroactively when those rules are substantive within the meaning of federal law. 136 S. Ct. at 728-29 ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."). The *Hurst* decisions announced substantive rules, and the Supremacy Clause requires this Court to apply those rules retroactively.

Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard. Although the State attempts to distinguish *Ivan V. v. City of New York*, 407 U.S. 203 (1972), *see* Answer Brief at 23, its attempt falls flat. Even assuming, as the State suggests, that Florida's scheme formerly incorporated the

beyond-a-reasonable-doubt standard, that standard was misapplied to findings of fact made by a trial judge, not by the jury. The *Hurst* decisions held that *the jury* must make the beyond-a-reasonable-doubt findings that subject a defendant to a death sentence. Indeed, a federal judge in Florida, citing *Ivan V.*, has already observed the distinction between the holding of *Summerlin* and the retroactivity of *Hurst* because of the beyond-a-reasonable-doubt standard. *See Guardado v. Jones*, No. 4:15-cv-256 (N.D. Fla. May 27, 2016) (contrasting *Hurst* to *Ring* and *Summerlin* because the latter decisions "did not address the requirement for proof beyond a reasonable doubt," and "[t]he Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive").

III. Neither the State's *Caldwell* arguments nor this Court's plurality decision in *Reynolds* can be reconciled with the Eighth Amendment

The State's contention that the Florida capital sentencing scheme held unconstitutional in *Hurst* does not implicate the Eighth Amendment rights of those sentenced under that scheme in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), *see* Answer Brief at 13-17, wrongly perpetuates the flawed line of reasoning a plurality of this Court applied in *Reynolds v. State*, No. SC17-793, 2018 WL 1633075 (Fla. Apr. 5, 2018). Neither the State's *Caldwell* arguments nor this Court's plurality decision in *Reynolds* can be reconciled with the Eighth Amendment.

On at least four occasions, Justices of the United States Supreme Court have called for review of the intersection between *Hurst* and *Caldwell* in Florida. *See, e.g., Kaczmar v. Florida*, 138 S. Ct. 1973, 1973-74 (2018) (Sotomayor, J., dissenting from denial of certiorari); *Guardado v. Jones*, 138 S. Ct. 1131, 1132-34 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *Middleton v. Florida*, 138 S. Ct. 829, 829-30 (2018) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from denial of certiorari); *Truehill v. Florida*, 138 S. Ct. 3, 3 (2017) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari). Clearly, this is an issue of grave concern that should be specifically addressed in Mr. Reese's case.

In the decades between *Caldwell* and *Hurst*, this Court rejected numerous *Caldwell*-based challenges to Florida's pre-*Hurst* jury instructions based on the assumption that Florida's capital sentencing scheme was constitutional. *See, e.g., Pope v. Wainwright*, 496 So. 2d 798 (Fla. 1986); *Combs v. State*, 525 So. 2d 853, 856 (Fla. 1998); *Davis v. State*, 136 So. 3d 1169, 1201 (Fla. 2014). *Hurst* fundamentally undermined this Court's *Caldwell* precedent. In light of *Hurst*, the rationale underlying this Court's prior rejection of *Caldwell* challenges—that Florida's "advisory" jury scheme was constitutional—is no longer valid. *Hurst* held that Florida's capital sentencing scheme was *not* constitutional, and that juries in that scheme were *not* afforded their constitutionally required role as fact finders. Given *Hurst*, it is now clear that Florida's advisory juries were misinformed as to their

constitutionally mandated role in determining a death sentence. Advisory jurors were unconstitutionally told that they need *not* make the findings of fact in order for a death sentence to be validly imposed. Contrary to the State's suggestion, the pre-*Hurst* instructions thereby "improperly described the role assigned to the jury," in violation of *Caldwell*. *Dugger v. Adams*, 489 U.S. 401, 407 (1989).

In *Reynolds*, this Court's plurality refused to cede any ground regarding its pre-*Hurst* decisions rejecting any applicability of *Caldwell* to Florida's capital sentencing scheme. The Court reasoned that, under *Romano v. Oklahoma*, 512 U.S. 1 (1994), *Hurst* has no bearing on whether *Caldwell* was violated because Florida's pre-*Hurst* jury instructions accurately described Florida's scheme *at the time*. *Reynolds*, 2018 WL 1633075, at *10-12. But the plurality failed to recognized that Florida's prior scheme was *not* constitutional before *Hurst*—it was always unconstitutional, as recognized in *Hurst*—and this makes *Romano* inapplicable.

Justice Sotomayor observed in a recent dissent from the denial of certiorari that *Reynolds* "gathered the support only of a plurality," so the issue of whether the Florida Supreme Court's *Hurst* harmless-error rule contravenes *Caldwell* "remains without definitive resolution by the Florida Supreme Court." *Kaczmar*, 138 S. Ct. at 1973. This Court has still not sufficiently analyzed in a majority opinion how a death sentence obtained under Florida's prior "advisory jury" scheme complies with

the Eighth Amendment under *Caldwell* given that the jury's sense of responsibility for a death sentence was systematically diminished.

Mr. Reese's advisory jurors were repeatedly instructed by the court that they would not be making any of the findings of fact that could lead to a death sentence, that their recommendation was advisory, and that the final sentencing decision and ultimate responsibility for a death sentence rested solely with the judge. Given that the jury was led to believe it was not ultimately responsible for the imposition of Mr. Reese's death sentence, that sentence violates the Eighth Amendment.

IV. The State abandons any "harmless error" arguments

The State abandons any argument that the *Hurst* error in Mr. Reese's case was harmless by failing to reference harmless error in its opening brief. *See Hoskins v. State*, 75 So. 3d 250 (Fla. 2011). The *Hurst* error in this case is not harmless in light of the advisory jury's non-unanimous recommendation to impose the death penalty.

V. The State agrees that Mr. Reese's brain damage claim is unripe and should not be addressed at this time

The State agrees that, because Mr. Reese's brain damage claim is unripe, this Court should not now address it. *See* Answer Brief at 24. As Mr. Reese explained in his initial brief, the circuit court's dismissal of the claim on ripeness grounds was without prejudice, and he will refile the claim in the circuit court, pursuant to his federal constitutional rights, *see McWilliams v. Dunn*, 137 S. Ct. 1790, 1798 (2017), at an appropriate time. *See* Initial Brief at 33-34.

VI. Conclusion

This Court should hold that federal law requires the *Hurst* decisions to be applied retroactively to Mr. Reese's death sentence and grant relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2018, the foregoing was served via the e-portal to Assistant Attorney General Jennifer Donahue, counsel for the State, at jennifer.donahue@myfloridalegal.com and capapp@myfloridalegal.com.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this computer-generated reply brief is in compliance with the requirements of Florida Rule of Appellate Procedure 9.210.

/s/ Christopher J. Anderson
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