IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1701
LOWER TRIBUNAL NO. 16-2008-CF-2887

STATE OF FLORIDA,

Appellant/Cross-Appellee,

vs.

RAYMOND BRIGHT,

Appellee/Cross-Appellant.

On Appeal from the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida

Honorable Judge Charles W. Arnold
Judge of the Circuit Court, Division CR-H

APPELLEE'S SUPPLEMENTAL REPLY BRIEF ON THE APPLICATION OF THE U.S. SUPREME COURT'S DECISION IN HURST V. FLORIDA TO THE INSTANT CASE

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INTRODUCTION

The State filed a Supplemental Answer Brief ("SAB") that was a general assessment of Hurst v. Florida, 193 L.Ed.2d 504 (2016), but failed to address any of the arguments Bright made in his Supplemental Initial Brief ("SIB") as to the procedural nuances of his case, i.e., those details that distinguish this case from an abstract question of Hurst's applicability to postconviction cases, generally. Bright's arguments that were ignored by the State will be noted, and a response will be made to the general position on Hurst espoused by the State.

ARGUMENT IN REPLY

I. Hurst and Retroactivity

The State failed to acknowledge Bright's argument that he unquestionably gets the benefit of Hurst because he raised a Ring challenge to Florida's death penalty scheme in a pre-trial motion and again in direct appeal. (SIB 14.) Under this Court's rationale in James v. State, 615 So. 2d 668 (Fla. 1993) (finding the defendant entitled in postconviction to raise his ***preserved*** vagueness challenge to the HAC instruction, after the U.S. Supreme Court years later embraced the defendant's position in Espinosa v. State, 505 U.S. 1079 (1992)), it would be fundamentally unfair to deny Bright the opportunity to argue this claim now that the U.S. Supreme Court

supports the position that Bright has been arguing since 2009. Exhibit 1 to SIB (Bright's pre-trial Ring motion); Exhibit 7 to SIB (Excerpt from Bright's initial brief in direct appeal).

The single dissenting judge in James argued that the holding in Espinosa was not "a change of law of significant magnitude to require retroactive application," but this only underscores the majority's focus on the decisive fact that James preserved this objection ***in his own case***; in fact, the majority did not find it necessary to conduct any general retroactivity analysis under the Witt factors. James, 615 at 669 ("James, however, objected to the then-standard instruction at trial, asked for an expanded instruction, and argued on appeal against the constitutionality of the instruction his jury received. Because of this it would not be fair to deprive him of the *Espinosa* ruling.").[1]

Further, the majority of the State's argument addressing retroactivity in postconviction cases examines *federal* caselaw and its substantive/procedural distinction. (SAB 3-8) However, Florida's standard

[1] See also Rodriguez v. State, 919 So. 2d 1252, 1284 (Fla. 2005) ("To raise an *Espinosa* error in postconviction proceedings in which the sentence and conviction are final, the defendant must allege: (1) that the issue has been preserved for appeal by either an objection at trial or by submitting an expansive jury instruction; and (2) that appellate counsel pursued the issue on direct appeal. *See State v. Breedlove*, 655 So. 2d 74, 76 (Fla. 1995); *Lambrix v. Singletary*, 641 So. 2d 847, 848 (Fla. 1994); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993).").

is not equivalent to the federal standard set forth in Teague v. Lane, 498 U.S. 288 (1989) and Schriro v. Summerlin, 542 U.S. 348 (2004), which Bright explained in his Supplemental Initial Brief. (SIB 10-11, 13 (citing Witt v. State, 387 So. 2d 922, 928 (Fla. 1980).) As Justice Pariente made clear in her dissent in Johnson v. State:

> Applying the test for retroactivity under *Teague*, the United States Supreme Court recently held in *Schriro v. Summerlin*, 542 U.S. 348, 159 L. Ed. 2d 442, 124 S. Ct. 2519 (2004), that Ring does not apply retroactively for purposes of federal law. But *Summerlin* does not control our decision. As courts in other states have noted, state courts are not bound by *Teague* in determining the retroactivity of decisions. *See*: *California v. Ramos*, 463 U.S. 992, 1014, 77 L. Ed. 2d 1171, 103 S. Ct. 3446 (1983) (acknowledging that "states are free to provide greater protections in their criminal justice system than the Federal Constitution requires"); *Colwell v. State*, 118 Nev. 807, 59 P.3d 463, 470 (Nev. 2002) (noting that "we may choose to provide broader retroactive application of new constitutional rules of criminal procedure than *Teague* and its progeny require"); *Cowell v. Leapley*, 458 N.W.2d 514, 517 (S.D. 1990) (noting that states may decide how to provide access to state postconviction relief). We continue to apply our longstanding *Witt* analysis, which provides more expansive retroactivity standards than those adopted in *Teague*.

904 So. 2d 400, 408-09 (Fla. 2005) (disagreeing with the majority's conclusion that Ring should be given retroactive application in Florida courts).

Justice Anstead's dissent in that same case offers insightful criticism of Teague and Summerlin:

> The United States Supreme Court has recently decided in *Schriro v. Summerlin*, 542 U.S. 348, 159 L. Ed. 2d 442, 124 S. Ct. 2519 (2004), that *Ring* should not be retroactively applied in the federal courts. Of course, *Schriro* was applying the federal standard from *Teague v. Lane*, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989), and therefore does not control the question of retroactivity in Florida.
>
> In fact, *Schriro* is a text-book example for why the states should be wary of embracing *Teague*. Its application with regard to *Ring* has yielded a result that is fundamentally unfair, internally inconsistent, and unreasonably harsh. The Supreme Court notes that "the right to jury trial is fundamental to our system of criminal procedure," *see Schriro*, 124 S. Ct. at 2526, yet arbitrarily concludes that this fundamental right should not be enjoyed by those facing executions and unfortunate enough to fall on the wrong side of Ring's release date. As I have noted in *Hughes*, "if anything, the more restrictive standards of federal review place increased and heightened importance upon the quality and reliability of the state proceedings." *Hughes v. State*, 901 So. 2d 837, 30 Fla. L. Weekly S 285 (Fla. Apr. 28, 2005) Applying *Apprendi* and *Ring* retroactively is favored by "the legal system's commitment to 'equal justice'—i.e. to 'assuring a uniformity of ultimate treatment among prisoners.'" *Schriro*, 124 S. Ct. at 2528-29 (Breyer, J., dissenting) (quoting *Mackey v. United States*, 401 U.S. 667, 689, 28 L. Ed. 2d 404, 91 S. Ct. 1160 (1971). Thus, while unfortunate, the decision in *Schriro* only reaffirms the importance of Florida's independent consideration of retroactivity under *Witt*.

Id. at 418 n.13.

The State in its Supplemental Answer Brief makes the precise error that Justices Pariente and Anstead warned against. Teague and Summerlin should not be evaluated by Florida Courts in attempting to determine retroactivity as to Hurst—Witt is the authority here, and the State's brief

fails to even set out Witts's three elements let alone conducts any analysis of them; rather, it focuses on a policy analysis of the finality of judgments. (SAB 8-9.)

Finally, in the retroactivity section of its brief, the State began a series of suppositions, which continued throughout its brief, as to what the U.S. Supreme Court *might* be trying to imply or suggest in several recent decisions denying petitions for certiorari[2] and denying a motion to stay by an inmate sentenced to death.[3] The State seeks unwarranted guidance from those decisions as to the Supreme Court's position on retroactivity, harmless error, and even whether F.S. 775.082(2) applies. (SAB 10, n.6 (denial of motion to stay as indicative of position of retroactivity); SAB 12-13, 12 n.7 (denial of petitions for certiorari as indicative of harmless error); SAB 14 (denial of petitions for certiorari as indicative of whether F.S. 775.082(2) applies).) Further, the State suggests that Justice Sotomayor would have

[2] Fletcher v. Florida, No. 15-6075, 2016 U.S. LEXIS 880 (Jan. 25, 2016); Smith v. Florida, No. 15-6430, 2016 U.S. LEXIS 908 (Jan. 25, 2016).

[3] Correll v. Florida, 193 L.Ed.2d 307 (U.S. 2015). This case was decided on October 29, 2015, a mere sixteen days after the oral arguments in Hurst on October 13, 2015. Both Breyer and Sotomayor separately dissented from the denial of certiorari because they thought the court should grant a stay until they had reached a resolution in Hurst, acknowledging the obvious, that no resolution had yet been reached. Id. at 308. For the State to assert that this is evidence that the majority of the court in Correll made that decision because they knew how Hurst would eventually be decided and whether it would be retroactive is beyond a stretch.

explicitly declared Hurst retroactive in the majority opinion had the Court believed that retroactivity was necessary. (SAB 10-11.)

All of these arguments fail to consider the narrow power that the U.S. Supreme Court exercises, which is deciding cases and controversies in front of them. Justice Sotomayor did not address the retroactivity of Hurst because she had no authority to do so – that was not a necessary question to resolve Hurst's case, and thus to have spoken to retroactivity would have constituted pure dicta. Also, the questions raised by petitions of certiorari and motions to stay involve complex issues of jurisdictional authority, policy considerations, and issues of judicial economy.[4] For the State to assert clairvoyant knowledge as to the precise motivations of the justices of that court for their decisions in cases surrounding Hurst is presumptuous, and not legally sound.

II. Hurst and Harmless Error

The State ignores Bright's argument that error is apparent in this case because the trial judge explicitly stated in his sentencing order and in his oral pronouncement of sentence that he would not have imposed a death sentence but-for his finding of the heinous, atrocious, and cruel aggravator ("HAC").

[4] E.g., USCS Supreme Ct. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion." (listing potential reasons to grant certiorari)).

(SIB 17-20.) Thus, Bright's sentence would be in violation of the Sixth Amendment if a jury did not find HAC beyond a reasonable doubt, and we have no idea in this case whether a single juror in this case found HAC, much less a majority, and certainly not the unanimous jury that is likely required after Hurst. Further, the State failed to address Bright's argument that under Hurst a trial judge would be prohibited from using HAC as an aggravator in his sentencing selection if it was known that the jury had found that HAC had not been proven beyond a reasonable doubt. (SIB 18-20.)

What the State did argue was that Hurst did not apply to Bright because of the "recidivist aggravator[]" that Bright had in the form of his prior violent felony conviction. (SAB 1.) Thus, the State's position seems to be that Hurst does not require that the jury find *every* mitigator on which the judge relies, or even *any* mitigator on which the judge relies, as long as *some* jury found *some* aggravator at *some* point in history. (SAB 11-12.) If this is indeed the State's position, it is a gross misreading of Hurst.

On the contrary, the majority opinion in Hurst keys into the "critical findings" that must be made under Florida law in order to make one eligible for the death penalty, and it recognizes that those "critical findings" are located in subsection three of F.S. 921.141 (related to judge's

responsibility), rather than subsection two (related to jury's responsibility).[5] Thus, for Florida's statute to be made constitutional, the requirements that now are upon the judge must be shifted to the jury, i.e., subsection two needs to subsume subsection three. The text of the statute makes it clear what those "critical findings" are that the jury should have been making all along:

> (a) That ***sufficient*** aggravating circumstances exist…, and
>
> (b) That there are insufficient mitigating circumstances to ***outweigh*** the aggravating circumstances.

F.S. 921.141(3) (emphasis added). The statute also requires that "specific ***written*** finding of fact" be made as to both those issues. Id. (emphasis added). Finally, the opinion in Hurst declares repeatedly that those jury findings must be "***binding***" and not merely "advisory" or a "recommendation" to the trial judge.[6]

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[5] Hurst, 193 L.Ed.2d at 511 ("The analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of Ring, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. §921.141(3).").

[6] E.g., Hurst, 193 L.Ed.2d at 511 ("It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge."); Id. at 508 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.").

Thus, it is essential to understand what is signified by the Supreme Court's insistence that the jury's critical findings be "binding." First, it is clear that the binding nature of their findings requires that if the jury finds that no aggravators exist, or that the aggravators are *insufficient* to outweigh the mitigators, then the judge cannot impose death notwithstanding the jury's findings, thus explicitly making overrides of life sentences unconstitutional. Second, and decisive for Bright's case, the requirement that the jury's findings are binding logically necessitates that the trial judge is bound by the specific aggravating circumstances that the jury found had been proved beyond a reasonable doubt. Why else would the Supreme Court have been so concerned about specificity in the jury's findings,[7] if the trial judge could ignore those specific findings and base a death sentence upon aggravators not presented to the jury, or by aggravators the jury specifically found were not proven beyond a reasonable doubt?

Thus, constitutional harm was rendered when the trial court sentenced Bright to death, relying heavily on the HAC aggravator, when the jury had

[7] E.g., Hurst, 193 L.Ed.2d at 513 ("*Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Their conclusion was wrong, and irreconcilable with *Apprendi*.") (citation omitted).

never made a specific factual finding as to whether HAC had been proved beyond a reasonable doubt.[8]

CONCLUSION

The State's silence as to the procedural nuances of Bright's case speaks volumes. Bright, having preserved his challenge to the Florida death penalty scheme under the Sixth Amendment and Ring, is entitled under the law and basic fairness to have the Hurst holding retroactively applied to him. Under Hurst, Bright is undoubtedly harmed, as his jury never made a specific finding as to whether the State proved HAC beyond a reasonable doubt, which was the primary factor which influenced the trial judge to impose the death sentence.

However, if this Court grants Bright's well-founded appeal protesting his innocence and requesting a new trial, the Hurst analysis becomes unnecessary in this case. And if this Court affirms the trial court's order vacating Bright's death sentence and ordering a new sentencing hearing, then this Court only needs to decide whether Hurst mandates that Bright's sentence be automatically commuted to a life sentence, under F.S. 775.082(2), or any other basis.

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[8] The harm was further aggravated, under Caldwell v. Mississippi, 472 U.S. 320 (1985), by the fact that the jury was not instructed that their verdict was binding and not merely advisory, weakening the moral responsibility Bright's jury felt before it issued its recommendation of death. (See SIB 16.)

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the instant notice has been served to the Office of the Attorney General via e-mail at capapp@myfloridalegal.com and Patrick.delaney@myfloridalegal.com this 27th day of January, 2016.

/s/ **Rick Sichta**
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CERTIFICATE OF COMPLIANCE AND AS TO FONT

I **HEREBY CERTIFY** that this brief is submitted by Appellant, using Times New Roman, 14-point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure Rule 9.210(a)(2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

/s/ **Rick Sichta**
A T T O R N E Y