IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-436; SC14-2108
LOWER TRIBUNAL NO. 16-2004-CF-6675

JOHN F. MOSLEY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

Honorable Judge Michael R. Weatherby
Judge of the Circuit Court, Division CR-B

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

THE SICHTA FIRM, LLC.
RICK A. SICHTA, ESQUIRE
Fla. Bar No.: 669903
SUSANNE K. SICHTA
Fla. Bar No.: 059108
JOE HAMRICK, ESQUIRE
Fla. Bar No.: 047049
301 W. Bay St., Ste. 14124
904-329-7246
rick@sichtalaw.com
Attorneys for Mr. Mosley

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INTRODUCTION

The State's Supplemental Answer Brief rises and falls on whether this Court accepts its argument that Hurst[1] merely requires that a jury find the existence of a single aggravating factor. The State cannot win this argument on a careful textual analysis of the Hurst opinion.

Hurst explicitly held that all "factual findings" necessary to impose death must be made by the jury, and the opinion quoted the specific subsection of Florida's prior statute that Hurst deemed to hold those "factual findings": **F.S. 921.141(3)**. This subsection required specific written findings as to (a) the existence of ***sufficient*** aggravating factors to justify death, and (b) insufficient mitigating factors to ***outweigh*** the aggravators.

In this Supplemental Reply Brief, Mosley will briefly set forth the unambiguous holding of the Supreme Court's majority opinion in Hurst. Mosley will then respond to the textual argument that the State has been attempting to use since Hurst to justify its reading of that opinion—which consists of a mere two sentences read out of context. Mosley will further address two additional arguments as to Hurst's holding made in the State's Supplemental Answer Brief – one based on Alito's dissenting opinion and the other based on the denial of several petitions of certiorari after Hurst.

[1] Hurst v. Florida, 136 S. Ct. 616 (2016).

Finally, Mosley will demonstrate that the State's arguments that follow as to retroactivity, harmless error, and the appropriate remedy all crumble upon a proper understanding of the "factual findings" that the jury should have made, according to Hurst.

ARGUMENT IN REPLY

I. *Hurst* requires that the jury make all the factual findings previously made by the trial judge under F.S. 921.141(3)

A. Hurst's holding is unambiguous

Section II of the Hurst opinion, which contains the Supreme Court's analysis and holding, explains that the problem with Florida's death penalty scheme was that the "critical findings" necessary for a death sentence were made by a judge rather than by the jury.[2] Hurst at 622. The opinion then delineates the exact ***subsection*** of Florida's statute where those "critical findings" were located: F.S. 921.141(3). That subsection required the judge to make two factual findings: first, (a) that sufficient aggravating circumstances exist (to justify the death penalty), and second, (b) that insufficient mitigating circumstances exist to outweigh the

[2] The roughly five-page Hurst majority opinion is divided into four sections: **Section I** sets forth the factual and procedural history of the case, Hurst at 619-21; **Section II** contains the statement of the law, analysis, and conclusion, id. at 621-22; **Section III** rejects three counter-arguments made by the State,[2] id. at 622-24; and **Section IV** defers the issue of harmless error to this Court. Id. at 624. Thus, for understanding what Florida must do now to fall in line with Hurst's statement of Sixth Amendment jurisprudence, the critical portion of the opinion to study is **Section II**.

aggravating circumstances. The Supreme Court explicitly declared that these conclusions were "critical findings" that constituted elements of capital murder in Florida for Sixth Amendment purposes, and thus Florida law violated Ring.[3] Id. at 622.

The State's argument here is that Hurst says that the Sixth Amendment merely requires, under Florida's statute, that the jury find a single aggravating circumstance. In arguing Hurst to the U.S. Supreme Court, the State made a very similar argument: that Florida's law required the finding of a single aggravating factor and that such finding was implicitly made in the jury's recommendation. The Supreme Court rejected this argument by focusing on the findings listed in F.S. 921.141(3):

> The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death." Fla. Stat. §775.082(1) (emphasis added). ***The trial court alone must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." §921.141(3).***

Id. at 622 (emphasis added).

Where Justice Sotomayor, on behalf of seven of nine members of the U.S. Supreme Court, carefully explained that the "critical findings" for the jury's

[3] Ring v. Arizona, 536 U.S. 584 (2002).

consideration require both (a) the sufficiency and (b) weight of the aggravation, the State's insistence that the jury's mere finding that an aggravator ***exists*** is an obvious misreading of Hurst, which cannot be entertained by this Court.

B. The State's arguments for its narrow reading of Hurst fall short

1. The State's interpretation of *Hurst* is implausible in light of the context of the entire opinion.

The State's Supplemental Answer Brief contains no textual analysis of the Supreme Court opinion, nor does it attempt to address or explain away the clear statement of its holding in Section II that was referenced above.

In fact, there are only two sentences in the Hurst opinion that, if read in isolation, could plausibly lend support to the State's position—one occurs in the opinion's rejection of the State's *stare decisis* argument and the other in the opinion's concluding paragraph.

In rejecting the State's *stare decisis* plea, the Supreme Court reasoned:

> Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.

Id. at 624.[4] This statement cannot accomplish what the State hopes, which is to establish that Hurst merely requires what Spaziano and Hildwin specifically

[4] Spaziano v. Florida, 468 U.S. 447 (1984); Hildwin v. Florida, 490 U.S. 638 (1989).

denied: requiring the jury to find a single aggravating circumstance. The Supreme Court's statement here is meant to declare that it is overruling prior precedent, and it is not designed to be a complete articulation of the multiple problems it found with Florida's capital sentencing scheme.

The other statement in the Supreme Court's opinion is its concluding paragraph, which was quoted in part in the State's Supplemental Answer Brief:

> The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. ***Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.***

Id. at 624 (emphasis added for portion quoted by the State). Similar to its statement overruling Spaziano and Hildwin, this statement notes how little was required of juries in capital cases under Florida law, and declared that scheme to be in violation of the Sixth Amendment. It by no means should be interpreted to say that the Sixth Amendment ***only*** requires that a jury find "the existence of a single aggravating circumstance."[5] This is not a plausible interpretation in light of the entirety of the Hurst opinion, particularly its repeated citation to F.S. 921.141(3) as

[5] The State's mistake is the logical fallacy of confusing *necessary* and *sufficient* conditions. In the two citations from the Hurst opinion, the Supreme Court declares that the prior cases and statute were flawed because they failed to require a certain *necessary* condition for constitutionality, i.e., the finding of a single aggravating factor. But the opinion's full statement of the *sufficient* conditions for constitutionality is found in its analysis/holding in Section II, which cites to the findings required by F.S. 921.141(3).

the source of the "critical findings" necessary to make one eligible for death in Florida.[6]

2. Alito's dissent is unpersuasive and was rejected by the other eight members of the court.

In an attempt to morph the holding of Hurst into something less offensive to existing death sentences in Florida (and trample the true intent of Hurst in the meantime), the State asserts a champion in Justice Alito's dissent in Hurst. Alito contends that "[a]lthough petitioner attacks the Florida system on numerous grounds, the Court's decision is based on a single perceived defect, i.e., that the jury's determination that at least one aggravating factor was proved is not binding on the trial judge." Hurst, 136 S. Ct. at 626. Alito, like the State, ignores large portions of Sotomayor's majority opinion that identify problems with Florida's prior death penalty statute that extend beyond a mere finding of the existence of an

[6] Consider the extensive use of plural "facts" and "findings" contained in the majority's opinion: "The Sixth Amendment requires a jury, not a judge, to find **each fact** necessary to impose a sentence of death." (Id. at 169); "**findings** by the court" (Id. at 620); "the judge makes the ultimate sentencing **determinations**" (Id. at 620); "set forth in writing its **findings** upon which the sentence of death is based" (Id. at 620); "[the trial court] assigned 'great weight' to her **findings**" (Id. at 620); "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**." (Id. at 622); "[the jury] does not make specific **factual findings**" (Id. at 622); "[T]he trial court alone must make **detailed findings** about the existence and weight of aggravating circumstances" (Id. at 622); "**judge-made findings**" (Id. at 622); "**findings** by the court" (Id. at 622); "The trial court alone must find 'the **facts** . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" (Id. at 622); "judge's **factfinding**" (Id. at 624).

aggravating factor, and his reasoning is therefore unpersuasive.

3. The State's attempt to ferret out the U.S. Supreme Court's intent based on which certiorari petitions it has denied post-*Hurst* is unsound legal analysis

In addition to its curious strategy of using Alito's dissent to support its own convoluted interpretation of Hurst, the State's other primary argument is found in the harmless error section of its brief, where it cites to several post-Hurst instances where the U.S. Supreme Court denied petitions for certiorari.[7] The State argues that those decisions prove that the Supreme Court believes cases with recidivist aggravators are immune from Hurst error. (SAB 11-12.)

This argument fails to consider that questions raised by petitions of certiorari involve complex issues of jurisdictional authority, policy considerations, and issues of judicial economy. See 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)). 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.

C. This Court should reject the State's implausible argument of what Hurst requires of juries under Florida's statutory scheme

As was argued above, the majority opinion makes crystal clear that the jury

[7] 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).

must make ***all*** of the factual findings required under Florida law before someone is eligible to be sentenced to death. As Hurst was decided on the Sixth Amendment issue, the critical question is not ***what*** findings a state must require prior to someone being sentenced to death (which is an Eighth Amendment concern for narrowing the pool to avoid cruel and unusual punishment), but rather the questions are ***who*** must make the critical findings (judge or jury) and ***where*** in the state statute those factual findings are found. Under Florida's prior death penalty scheme, the U.S. Supreme Court told us exactly **where** those were located (F.S. 921.141(3)) and **who** had to make those findings (the jury).

A careful reading of the Hurst opinion demonstrates the State's interpretation of its holding is decisively mistaken. Much of the State's argument as to retroactivity, harmless error, and the appropriate remedy all collapses if this Court rejects its extremely narrow reading of Hurst.

II. *Hurst* should be applied retroactively to Mosley's case

A. Hurst should be held to be broadly retroactive under the principles set forth in Witt

First, the State addresses retroactivity by examining *federal* caselaw and its substantive/procedural distinction (SAB 3), but this focus is misguided. As Mosley argued in his Supplemental Initial Brief, Florida's standard under Witt is

not governed by the federal standard set forth in Teague.[8] (SIB 10-11.) This point was cogently made in the dissenting opinions of Justice Pariente in Hughes and Justice Anstead in Johnson, in response to the majority's holdings in those cases that Apprendi[9] and Ring respectively were not retroactive in Florida.[10]

As to the Witt analysis, the State asserts that Johnson's finding that Ring was not retroactive is controlling here. (SAB 4-5.) Besides highlighting in his Supplemental Initial Brief this Court's undue reliance on Teague in Johnson, Mosley also argued that this Court should not follow its holding in Johnson that Ring was not "fundamental" under Witt because this Court underestimated the extent of Ring's holding in Johnson. (SIB 11.) The State responds that Mosley's argument requires that this Court accept that the U.S. Supreme Court has known since it decided Ring that Florida's law violated the Sixth Amendment and "has been ignoring [that] fact . . . for several years," and the State opines that "this is a

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[8] Teague v. Lane, 498 U.S. 288 (1989).

[9] Apprendi v. New Jersey, 530 U.S. 466 (2000).

[10] Hughes v. State, 901 So. 2d 837, 854 (Fla. 2005) (Justice Pariente writes, "[W]e should adhere to the *Witt* test rather than adopt the federal test enunciated in *Teague*, whose purpose is to limit federal habeas review of final state court judgments."); Johnson, 904 So. 2d 400, 418 n.13 (Fla. 2005) (Justice Anstead argues against considering the federal Teague standard given that its application to Ring in Schriro "yielded a result that is fundamentally unfair, internally inconsistent, and unreasonably harsh," in that it arbitrarily refused the fundamental right recognized in Ring to "those facing executions and [were] unfortunate enough to fall on the wrong side of Ring's release date.").

difficult proposition to accept." (SAB 5.)

Such an assumption is not required by Mosley's argument. Mosley is well aware that the U.S. Supreme Court's jurisprudence from Apprendi to Ring to Hurst has been a gradual evolution. However, the important consideration for deciding whether Hurst is a fundamental development is not what the Supreme Court understood itself to be saying in Ring at the time that opinion was issued, but what the Supreme Court has now stated in Hurst that Ring means. Given that the Supreme Court's Sixth Amendment jurisprudence today unquestionably sees Ring as far more reaching than this Court (or possibly the U.S. Supreme Court itself) understood at the time Johnson was decided, the holding in Johnson is no longer controlling on the Hurst analysis today.

A fair reading of Hurst's extensive statement regarding the illegality of Florida's sentencing procedure, in contrast to the State's pinched reading of Hurst's holding, leads to the conclusion that it is in fact a fundamental change of law, which should be given full retroactive application to all death row inmates.

B. Hurst should be held to be particularly retroactive in Mosley's case under this Court's holding in James v. State, 615 So. 2d 668 (Fla. 1993)

The State makes no attempt to distinguish Mosley's situation from that of the defendant in James—neither as to preservation of the constitutional error nor as

to any legal distinction between Hurst and Espinosa,[11] the case that James found to be retroactive.[12] Instead, the State casually implies that James is not good law, given that this "Court acted more equitably than legally and avoided addressing retroactivity," although the State stops short of explicitly calling for this Court to overturn James. (SAB 5.)

There is no sound jurisprudential reason for this Court to overturn James or to decline to extend its holding to Hurst, in the event that this Court declines to grant full retroactivity to all inmates in postconviction status. James was followed by this Court on multiple occasions in applying Espinosa retroactively (which found Florida's HAC jury instruction unconstitutionally vague).[13] Further, this Court applied James's holding in Jackson v. State, 648 So. 2d 85 (Fla. 1994), and its progeny. In Jackson, this Court held that the CCP instruction was also

[11] Espinosa v. State, 505 U.S. 1079 (1992).

[12] The phrasing of the State's Answer Brief is susceptible to the interpretation that James was in the middle of his ***direct appeal*** when the decision in Espinosa was rendered, but that is not correct. (SAB 5 ("At trial, James objected to the HAC jury instruction and requested an expanded instruction; later, on appeal, he argued against the constitutionality of the instruction given to his jury.").) In fact, James was in the middle of his second ***postconviction appeal*** to this Court—raising issues under Hitchcock v. Dugger, 481 U.S. 393 (1987)—at the time when Espinosa was decided, and this Court allowed James to address Espinosa on that appeal and granted relief on that basis. James, 615 So. 2d at 668-69.

[13] E.g., State v. Breedlove, 655 So. 2d 74, 76 (Fla. 1995); Lambrix v. Singletary, 641 So. 2d 847, 848 (Fla. 1994); Rodriguez v. State, 919 So. 2d 1252, 1284 (Fla. 2005).

unconstitutionally vague, and decided that such holding would be applied retroactively to cases where the error was similarly preserved as in James, i.e., a trial objection and a direct appeal claim. That holding has also been extensively relied upon by this Court.[14] The State asserts no good argument why this Court should ignore the importance of *stare decisis* and overturn this line of cases when it was securely within this Court's discretionary authority to so extend Florida's retroactivity doctrine, and those cases have well-served its purpose of assuring fair and equitable results. Finally, the rationale behind James and Jackson is equally if not more so applicable to Hurst, given its fundamental reshaping of Florida's capital statutory scheme, and there is no compelling reason that the State can give for why they should not be extended to Mosley's case here.

III. The *Hurst* errors in Mosley's sentencing are not harmless

The State presents no counter-argument to Mosley's argument that the questionable credibility of his co-defendant gives rise to a reasonable doubt that the jury found CCP and pecuniary gain (SIB 15-16), suggesting: "The State does not concede this point, but if it were correct, it would not merit a conclusion other than that of harmless error because Petitioner came to the penalty phase with a contemporaneous felony conviction, a finding his jury made during the guilt

[14] E.g., Walls v. State, 641 So. 2d 381, 387 (Fla. 1994); Pope v. State, 702 So. 2d 221, 223-24 (Fla. 1997); Davis v. State, 928 So. 2d 1089, 1132-33 (Fla. 2005); Brown v. State, 755 So. 2d 616 (Fla. 2000); Jones v. State, 690 So. 2d 568, 571 (Fla. 1996).

phase . . . ." (SAB 10.) Like so much of its brief, the State's position as to harmless error is dissipated if this Court rejects its argument that Hurst only requires that a single aggravator be found by a jury.[15] Hurst requires much more—everything listed under the former version of F.S. 921.141(3). Those additional protections were not afforded in Mosley's case, and the State cannot carry its burden in showing that the error was not harmful.

As to the State's argument that this Court should not consider the Caldwell error that occurred in Mosley's case because that argument was not made on direct appeal (though it was raised before the trial court[16]), Mosley responds that Hurst's emphasis on the non-binding nature of the jury's recommendation in Florida makes Hurst's holding inextricably intertwined with the Caldwell[17] holding that a jury's responsibility in recommending death or life must not be unduly minimized. See, e.g., Bottoson v. Moore, 833 So. 2d 693, 723 (Fla. 2002) (Pariente concurring) ("I agree with Justice Lewis that there are deficiencies in our current death penalty

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[15] Justice Alito's harmless error analysis in his dissent suffers from the same flaw. He asserts that there was no reasonable possibility that the jury found *neither* of the two aggravating factors (HAC and in the course of a robbery), and thus the error was harmless. Hurst, 136 S. Ct. at 626. However, this conclusion is based upon his mistaken assumption that Hurst only required that the jury find a single aggravating factor.

[16] Mosley filed on August 22, 2005, a "Motion in Limine to Strike Portions of Florida Standard Jury Instructions in Criminal Cases Re: Caldwell v. Mississippi."

[17] Caldwell v. Mississippi, 472 U.S. 320 (1985).

sentencing instructions. Because our present standard penalty phase jury instructions emphasize the jury's advisory role and minimize the jury's duty under *Ring* to find the aggravating factors, Florida's penalty phase jury instructions should be immediately reevaluated so that at a minimum the jurors are told that they are the finders of fact as to the aggravating circumstances."); accord id. at 731 (Lewis, J., concurring). Given that Florida courts mistakenly understood the jury's role to be only advisory and told juries so, it would be unfair for this Court to grant retroactive application of Hurst without recognizing that one of the types of Hurst error is that Florida juries were improperly instructed as the Eighth Amendment requires, per Caldwell.

IV. Remedy for the *Hurst* error in Mosley's case

A. F.S. 775.082(2)

The State attempts to distinguish this Court's approach after Furman by saying that this Court based its decision to commute all death sentences to life sentences, post-Furman, on jurisdictional grounds, rather than on statutory interpretation of F.S. 775.082, specifically in Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972). (SAB 16.) Again, the State's position that Hurst is nowhere near the significance of Furman is clouded by its inappropriately restrictive reading of Hurst's holding. Like Hurst, Furman did not hold that the "death penalty" was unconstitutional, but that the procedures utilized by the two states (Georgia and

Texas) did not provide sufficient procedural guarantees. Hurst actually comes closer than Hurst to declaring the "death penalty" unconstitutional where it specifically declares that Florida's capital "scheme" is unconstitutional, and this Court would be well advised to follow the same path it took in the wake of Furman – commuting all current death sentences to life sentences without the possibility of parole, as was ***requested*** by the State at that time. See generally Amicus Curiae of Florida Association of Criminal Defense Lawyers, et al, Hurst v. State, SC12-1947.

B. Rule 3.851(d)(2)(B)

Mosley asks that this Court find that Hurst is retroactive in his case, then allow Mosley to raise his Hurst claim in a successive 3.851(d)(2)(B) motion, which was precisely designed for this type of claim. The State asserts that this Court should proceed to decide whether Hurst error was harmless in this case, and if so, to remand this case for a new sentencing proceeding. While this Court would have the authority to treat Mosley's supplemental briefing as an extraordinary petition for writ of habeas corpus and to grant the relief that the State suggests, c.f., Chandler v. Crosby, 916 So. 2d 728, 735 (Fla. 2005) (Anstead concurring), a better approach to the types of errors identified by Hurst would be to allow a preliminary proceeding in front of a trial court, after a decision on retroactivity has been reached by this Court. At the evidentiary hearing held by the trial court, testimony

should be taken in order to determine how counsel's strategy would have been affected in both the guilt and penalty phases, had Mosley had the benefit of Hurst's protections prior to his case proceeding through trial and sentencing.

The State hopes that the harmless error analysis will be limited to whether it is beyond a reasonable doubt that the jury found a single aggravating factor in Mosley's case, which would be established here by the contemporaneous murder. However, as set forth above, Hurst explains that a more far-reaching and complex web of error plagued Mosley's sentencing. For this reason, Mosley proposes that the more prudent course would be for this Court to limit its action at this point to opening the door for a successive 3.851 motion to be brought, by making a finding as to Hurst's retroactive application to Mosely's case. C.f., Doty v. State, 2016 Fla. LEXIS 650, at *1 (Mar. 29, 2016) ("The petition for writ of mandamus [related to Hurst] is hereby dismissed ***without prejudice to seek relief in pending circuit court action***.") (emphasis added).

CONCLUSION

The foregoing sets forth Mosley's reply to the State's counter position as to how Hurst should be applied to this case. However, if this Court grants Mosley's well-founded appeal requesting a new trial, the Hurst analysis becomes unnecessary.

Respectfully submitted,
/s/ Rick Sichta
RICK A. SICHTA, Esq.
Fla. Bar No.: 669903
SUSANNE K. SICHTA
Fla. Bar No.: 059108
JOE HAMRICK, Esq.
Fla. Bar No.: 047049
301 W. Bay St., Ste. 14124
904-329-7246
rick@sichtalaw.com
Attorneys for Mr. Mosley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the instant brief has been served to the Office of the Attorney General via e-mail at crimapptlh@myfloridalegal.com and SAO4DuvalCriminal@coj.net this 9th day of May, 2016.

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

CERTIFICATE OF COMPLIANCE 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