In the Supreme Court of Florida

CASE NO. SC17-1429

MARK JAMES ASAY, *Petitioner*,

v.

JULIE L. JONES,
Secretary, Florida Department of Corrections, *Respondent*.

ANSWER TO SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS

On August 3, 2017, Asay, represented by registry counsel Martin J. McClain, filed a petition for writ of habeas corpus in this Court raising a claim that *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst II*), should be applied retroactively to all capital cases. Asay asserts that this Court should recede from its prior decision in *Asay v. State*, 210 So.3d 1 (Fla. 2016), holding that *Hurst II* is not retroactive as to any case that was final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided. This is the State's response to the successive habeas petition. This Court should not recede from *Asay*.

Facts and procedural history

The facts of the crime and the procedural history of the case are recounted in the State's brief in the appeal from the trial court's denial of the successive postconviction motion in this warrant case. *Asay v. State*, SC17-1400.

On February 5, 2016, as part of the first warrant litigation, Asay filed an appeal of the trial court's denial of his successive postconviction motion in this Court. *Asay v. State*, SC16- 223. In that case, Asay raised the retroactivity of *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), as Issue IV in his initial brief, arguing that *Hurst v. Florida* was retroactive under state law. IB at 107-124. On April 13, 2016, as part of the first warrant litigation, Asay also filed a habeas petition in this Court arguing the retroactivity of *Hurst II*. *Asay v. Jones*, SC16-628.

On December 22, 2016, this Court affirmed the trial court's denial of the successive postconviction motion in the first warrant litigation. *Asay v. State*, 210 So.3d 1 (Fla. 2016). That opinion contained a lengthy discussion of the retroactivity of *Hurst II*. *Asay*, 210 So.3d at 15-22. On January 6, 2017, Asay filed a motion for rehearing. On February 1, 2017, this Court denied the rehearing.

Standard of review

The standard of review is *de novo*. Retroactivity is a pure legal question and

purely legal issues are reviewed *de novo*. *Puglisi v. State*, 112 So.3d 1196, 1204 (Fla. 2013) ("Pure questions of law are subject to de novo review" quoting *Sanders v. State*, 35 So.3d 864, 868 (Fla. 2010)). Not only is the issue of retroactivity a purely legal issue but a habeas petition is an original proceeding meaning that there is no ruling from the lower court for an appellate court to defer to. The standard of review is *de novo*.

Hitchcock tag cases

Opposing counsel relies on the pending litigation in *Hitchcock v. State*, SC17-445, pointing out that 77 capital cases have been tagged to *Hitchcock*. Pet. at 5-7.[1] But those tagged cases involve merely a stay of the briefing, not a stay of an execution. Moreover, while this Court started issuing tag orders the week of June 5, 2017, even after those orders were issued by this Court, this Court relied on its decision in *Asay v. State*, 210 So.3d 1 (Fla. 2016), to deny relief. On June 15, 2017, in *Zack v. State*, 42 Fla. L. Weekly D1301 (Fla. June 15, 2017), this Court denied a capital petitioner *Hurst II* relief based solely on non-retroactively grounds citing *Asay*. This Court has relied on his controlling precedent of *Asay* after tagging capital cases to *Hitchcock*. This Court's tag procedure means little regarding its views of the continuing validity of its holding in *Asay*.

[1] On July 7, 2017, *Hitchcock* was submitted to this Court without oral argument.

Procedural bar

In his current habeas petition Asay argues that *Hurst* should be retroactively applied to all capital cases. But Asay raised that same argument in the first warrant litigation in both the appeal of the denial of his 3.851 motion and in the prior successive habeas petition. *Asay v. State*, SC16- 223; *Asay v. Jones*, SC16-628. As this Court recently explained, successive habeas petitions cannot be used to raise claims that were previously raised in a prior proceeding. *Lambrix v. State*, 217 So. 3d 977, 989 (Fla. 2017) (plurality). Any claim that was already raised and rejected by this Court is procedurally barred. *Id.* This Court addressed the retroactivity of *Hurst II* at length in its opinion in this case. *Asay*, 210 So.3d at 15-22. Therefore, the entire successive habeas petition is procedurally barred.

Because this Court addressed the retroactivity of *Hurst II* at length in its opinion in this case, that opinion is law-of-the-case regarding the matter. The law-of-the-case doctrine bars consideration of those legal issues that were actually considered and decided in a former appeal. *Fla. Dep't. of Trans. v. Juliano*, 801 So.2d 101, 107 (Fla. 2001). The law-of-the-case doctrine, which is designed to prevent relitigation of the same issues, applies to postconviction proceedings. *McManus v. State*, 177 So.3d 1046, 1047 (Fla. 1st DCA 2015) (citing *State v. McBride*, 848 So.2d 287, 290-91 (Fla. 2003)). In *Zeigler v. State*, 116 So.3d 255, 258 (Fla. 2013), this Court affirmed the denial of a second rule 3.853 motion for DNA testing because the Court had previously affirmed the denial of the first DNA

motion. This Court has explained that the doctrine "prevents the same parties from relitigating issues that have already been fully litigated and determined." *Id.* (citing *State v. McBride*, 848 So.2d 287, 290–91 (Fla. 2003)). The law-of-the-case doctrine applies regardless of whether a party employs different arguments to raise the same claim. *Sireci v. State*, 773 So. 2d 34, 40-41 (Fla. 2000) (finding claims procedurally barred and noting that "to the extent that Sireci uses a different argument to relitigate the same issue, the claim remains procedurally barred."); *Mills v. State*, 684 So. 2d 801, 805 (Fla. 1996) (concluding a claim was barred where it was merely variation of prior postconviction issue). The successive habeas petition and the accompanying amicus brief are raising a claim that is barred by the law-of-the-case doctrine.

Furthermore, Asay filed a motion for rehearing in the first warrant litigation which argued at length about retroactivity. The successive habeas petition is really an untimely second motion for rehearing.

This Court should not entertain a habeas petition or an amicus brief that is procedurally barred; barred by the law-of-the-case doctrine; and amounts to a second rehearing.

Retroactivity

Asay asserts that *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst II*), should be applied retroactively to all capital cases. He argues that this Court should

recede from its holding in *Asay v. State*, 210 So.3d 1 (Fla. 2016), that *Hurst II* is not retroactive as to any case that was final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided. There are no limits to opposing counsel's arguments regarding fairness and uniformity and adopting such a view would have the effect of undermining any finality in capital cases. Non-uniformity based on the age of the case is simply inherent in any retroactivity doctrine. Furthermore, a death sentence imposed by a judge is at least as accurate and reliable as a death sentence based on jury findings. Because the accuracy of the sentence is not at issue, *Hurst II* should not be applied retroactively. This Court should not recede from *Asay*.

In *Asay*, this Court held that any case in which the death sentence was final before *Ring* was decided on June 24, 2002, would not receive *Hurst II* relief. *Hurst II* is not retroactive to any case where the sentence was final before 2002. *Asay*, 210 So.3d at 15-22. The *Asay* Court looked to its previous decision in *Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005). *Id.* at 15. This Court also noted the "vast importance of finality in the justice system." *Id.* at 16. This Court in *Asay* performed an extensive *Witt v. State*, 387 So.2d 922 (Fla. 1980), analysis. This Court addressed the "Purpose of the New Rule" for five paragraphs. *Id.* at 17. This Court then addressed the "Reliance on the Old Rule" for six paragraphs. *Id.* at 18. This Court addressed the "Effect on the Administration of Justice" for three paragraphs. *Id.* at 20. This Court then concluded, "after weighing all three of the

above factors," that "*Hurst* should not be applied retroactively to Asay's case, in which the death sentence became final before the issuance of *Ring*." *Id.* at 22. This Court decided, considering the three factors of the *Stovall/Linkletter* test together, that "they weigh against applying *Hurst* retroactively to all death case litigation in Florida." *Id.* at 22.

Fairness and uniformity

Opposing counsel asserts that fairness and uniformity require that *Hurst II* be retroactively applied to all cases. But fairness does not demand that *Hurst II* be applied to old cases. Inherent in the concept of non-retroactivity is that some cases will get the benefit of a new development, while other cases will not. Drawing a line between newer cases that will receive benefit of a new development in the law and older final cases that will not receive benefit of the new development is part of the landscape of retroactivity analysis.

For example, a date cut-off is part of the pipeline doctrine first established in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The *Griffith* Court created the pipeline concept by holding that all new developments in the criminal law must be applied retrospectively to all cases, state or federal, that are pending on direct review. *See also Smith v. State*, 598 So.2d 1063, 1065 (Fla. 1992) (discussing the history of the pipeline concept and *Griffith*). The pipeline concept means that a wide group of newer cases get relief even though the trial in those cases was held

before the new development occurred. The pipeline concept is one of the major reasons the United States Supreme Court has a narrower test for retroactivity and rarely holds any case to be retroactive including Sixth Amendment right-to-a-jury-trial cases. The United States Supreme Court reasons that all the newest cases automatically get relief under *Griffith* but it limits that relief to relatively newer cases. It is simply part of the retroactivity paradigm that some cases will be treated differently than other cases based on the age of the case. In other words, non-uniformity is part and parcel of any retroactivity determination.

Opposing counsel is really asserting that fairness and uniformity demand that all major cases should automatically be retroactive but no court has ever held that. Both federal and state courts have retroactivity doctrines. Indeed, the federal habeas courts have several different tests for retroactivity with each test being increasingly more difficult for federal habeas petitioners to meet depending on the stage of the litigation. The test for retroactivity in the successive habeas context is stricter than the test in the initial habeas context. Compare *Teague v. Lane*, 489 U.S. 288 (1989) (initial motions), with *Tyler v. Cain*, 533 U.S. 656 (2001) (successive motions). The federal courts do the exact opposite of what opposing counsel is asserting fairness and uniformity demand they do.

If opposing counsel's view was adopted by courts, with every new development in the law, a capital defendant would get a new trial or a new penalty phase *ad infinitum*. Given that the litigation in capital cases span decades, there

would never be any finality in capital cases if such a position was adopted. And, as the United States Supreme Court has explained, finality is the overriding concern in any retroactivity analysis including in capital cases. *Penry v. Lynaugh*, 492 U.S. 302, 312 (1989). The *Penry* Court considered and rejected a claim that the test for retroactivity in capital cases should be less narrow than *Teague* because the overriding concern of finality that underlies retroactivity is just as "applicable in the capital sentencing context." *Id.* at 314. And opposing counsel's position that the Eighth Amendment demands the automatic retroactivity of *Hurst II* as to all capital cases is even more extreme than the position rejected by the United States Supreme Court in *Penry*. Finality trumps both fairness and uniformity in the retroactivity realm. *Asay*, 210 So.3d at 16 (noting the "vast importance of finality in the justice system.").

Witt analysis

The amicus brief makes a *Witt* based argument. But this Court performed a full *Witt* analysis in its original opinion in this case. *Hurst II* simply is not of "fundamental significance" as required by *Witt* to warrant retroactive application to older cases due to the nature of the error. The error was a judge rather than a jury made the factual findings regarding the death penalty. But the accuracy of a death sentence is not at issue in such a situation because judicial factfinding is not less reliable than jury factfinding.

Indeed, a good argument can be made that judicial factfinding is more reliable than jury factfinding. A judge, who has a law degree and at least 10 years of experience in the law, as well as specialized training in capital cases, determined the facts surrounding the penalty rather than the lay persons on the jury who have no such background. The judge also has the advantage of presiding at other murder trials to compare the capital case with other murder cases that the jury lacks. One cannot say that jurors are better at criminal factfinding than judges. As the United States Supreme Court observed, in the case determining that *Ring* itself was not significant enough to be retroactive, "for every argument why juries are more accurate factfinders, there is another why they are less accurate." *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004). A death sentence imposed by a judge is at least as accurate as one imposed by a jury. Because the accuracy of the sentence is not at issue, fairness does not demand retroactive application of *Hurst II.*

A second penalty phase conducted decades after the crimes would be less accurate than the first penalty phase. As this Court observed in *Johnson v. State*, 904 So.2d 400, 411 (Fla. 2005), it would be "problematic" for "prosecutors and defense attorneys to reassemble witnesses and evidence literally decades" later and would result in penalty phase proceedings that would be less "accurate than the proceedings they would replace." And granting new penalty phases "would consume immense judicial resources without any corresponding benefit to the

accuracy or reliability of penalty phase proceedings." *Johnson*, 904 So.2d at 412. While opposing counsel focuses on fairness and uniformity, counsel ignores accuracy as being a more important consideration. Because the accuracy of the sentence is decreased by new penalty phases, fairness does not demand retroactive application of *Hurst II*. *Hurst* is simply not that type of error that warrants retroactive application to any case, much less old cases that were final before 2002.

New death penalty statute

Asay also asserts that the new death penalty statute requiring unanimous jury recommendations of death should be applied to him. Pet. at 33.

As this Court has explained, a statute is applied retrospectively only if there is "clear evidence of legislative intent to apply the statute retrospectively." *Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So.3d 187, 194 (Fla. 2011) (citing *In Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, 986 So.2d 1279 (Fla. 2008)). If there is no such clear intent, the statute is not applied retrospectively.

Nothing in the text of the new statute or legislative history of Chapter 2017-1, Laws of Florida, evinces a legislative intent to wipe out all prior death sentences and require a new penalty phase proceeding for every defendant on death row.

Opposing counsel points to no language in the text of the statute or any

statement in the legislative history that supports an argument that the legislature intended to grant all capital defendants new penalty phases. There is nothing to support a claim that the legislature intended the statute to apply to all capital cases instead of applying only to those defendants granted new penalty phases under the existing law.

Indeed, the Senate Staff Analysis of S.B. 280 refers to this Court's decision in *Asay*. See Senate Staff Analysis dated Feb 21, 2017, at 6. The Senate Staff Analysis states: "It is the date of the *Ring* opinion (2002) that has become the Florida Supreme Court's bright line for deciding *Hurst*'s retroactivity. If a sentence became final prior to the *Ring* decision, defendant is not entitled to *Hurst* relief. If, however, the sentence became final on or after the date of the *Ring* opinion, *Hurst* applies." *Id.* at 6-7. "For those defendants entitled to *Hurst* relief if the jury did not vote unanimously for a death sentence, based on case histories since *Hurst*, it appears those cases will be remanded for new penalty phases." *Id.* at 7. The Analysis also indicated that this Court's decision on the retroactivity of *Hurst II* will "significantly increase both the workload and associated costs of public defender offices for several years to come." *Id.* at 7. The Legislature certainly did not hint at any desire to increase the cost of *Hurst II* even higher by expanding its application to all capital cases. The new death penalty statute does not apply retrospectively to Asay.

This Court should not recede from *Asay* and the new statute does not apply

to this case. Accordingly, this Court should deny the habeas petition.

Motion to stay

On August 3, 2017, Asay represented by Martin J. McClain, filed a motion to stay his execution in the habeas case. A stay of execution is warranted only when there are substantial grounds upon which relief might be granted. *Chavez v. State*, 132 So.3d 826, 832 (Fla. 2014) (citing *Bowersox v. Williams*, 517 U.S. 345 (1996) and denying a stay); *Howell v. State*, 109 So.3d 763, 778 (Fla. 2013) (stating that a defendant must show that there are substantial grounds upon which relief might be granted to obtain a stay of execution and denying a stay). There are no substantial grounds to stay this execution.

The habeas petition and the amicus brief present one issue which is a claim that *Hurst II* should be applied retroactively to all capital cases. Asay asserts that this Court should recede from its prior decision in *Asay* regarding retroactivity. But the retroactivity issue is hardly an issue of first impression to this Court. This Court is well aware of the arguments regarding the retroactivity of *Hurst II* because those arguments have been made in dozens of capital cases over the last ten months or so and were addressed in detail in the *Asay* decision itself which had three separate and long dissents. The dissenters made the same arguments being made in the habeas petition and amicus brief. A stay is not needed to

address retroactivity.

Opposing counsel relies on the pending litigation in *Hitchcock v. State*, SC17-445, as a basis for a stay in this case. But the capital cases that were tagged to *Hitchcock* involve a stay of briefing, not a stay of an execution. There is a vast difference between the two types of stays.

And this is a rescheduled execution. Stays of rescheduled executions should be even more rare than other stays. Asay should be required to present a particularly compelling reason for a stay of his rescheduled execution and he has presented none.

Accordingly, the motion for stay should be denied.

CONCLUSION

The State respectfully requests that this Honorable Court deny the successive habeas petition and the motion to stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished by e-portal to has been furnished via the e-portal to Martin J. McClain, McClain & McDermott, 141 N.E. 30th Street, Wilton Manors, FL 33334; phone: (305) 984-8344; email: martymcclain@earthlink.net this 4th day of August, 2017.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Bookman Old Style 12 point font.

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