

IN THE  
SUPREME COURT OF FLORIDA

CASE NO. SC17-1480

LOWER TRIBUNAL NO. 131989CF0149980001XX

RONNIE JOHNSON,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

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**RESPONSE TO RULE TO SHOW CAUSE**

Appellant, **RONNIE JOHNSON**, through counsel, respectfully files this Response to the Order to Show Cause issued by this Court on September 27, 2017, and in support thereof would state:

1. JOHNSON is under a Sentence of Death imposed on December 13, 1991. This Court affirmed his Conviction and Sentence in Johnson v. State, 696 So.2d 326 (Fla. 1997). On January 26, 1998, JOHNSON's Sentence of Death was made final when the U.S. Supreme Court denied certiorari. Johnson v. Florida, 522 U.S. 1095 (1998). On January 12, 2017, JOHNSON filed a Successive Motion for Post-Conviction Relief contending that the U.S. Supreme Court's decision in Hurst v. Florida, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016),

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and this Court's in Hurst v. State, 202 So.3d 40 (Fla. 2016), held that Florida Statute Section 921.141 (2012), the Capital Sentencing Statute under which Hurst and JOHNSON were sentenced to Death, was unconstitutional "to the extent it failed to require the jury, rather than the Judge, to find each fact necessary to impose the Death Sentence—the jury's advisory recommendations for death was "not enough". Hurst v. Florida, 136 S.Ct. at 619. JOHNSON contended that because Section 921.141 was unconstitutional, his Death Sentence must be vacated. Hurst was decided on direct appeal, and there were no findings made by this Court or the U.S. Supreme Court on its retroactive effect.

2. The U.S. Supreme Court in Hurst v. Florida, based its decision declaring Florida's Capital Sentencing Statute unconstitutional on its earlier decision in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Ring had challenged Arizona's Capital Sentencing Statute that allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. *Id.*, at 588.

3. Hurst followed the instructions and the reasoning in Hurst v. Florida, wherein the U.S. Supreme Court determined that "[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's Death Penalty:

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. Section 921.141(3) [2015]. Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: ‘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. A Florida trial court no more has the assistance of a jury’s findings of fact with respect to sentencing issues than does a trial judge in Arizona.’ Walton v. Arizona, 497 U.S. 639, 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); accord., State v. Steele, 921 So.2d 38, 546 (Fla. 2005). (‘[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely’).

As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst’s authorized punishment based on her own fact-finding. In light of Ring, we hold that Hurst sentence violates the Sixth Amendment. (Emphasis in original).

Hurst v. Florida, 136 S.Ct. At 621-2.

4. The U.S. Supreme Court’s decision in Ring was in turn predicated upon the principles first set forth in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Apprendi guaranteed a criminal defendant’s Sixth Amendment right to trial by jury for the determination of any fact that would increase his sentence. This principle was affirmed in response to the United States Congress and other States that passed laws permitting a sentence to be increased

based upon findings made by preponderance of the evidence by a sentencing judge. Apprendi was a landmark decision that recognized the injustice of allowing defendants to be sentenced based on facts not decided by an unanimous jury beyond a reasonable doubt.

5. Apprendi had a profound impact on the criminal justice system, Federal and all of the States. Apprendi itself concerned a New Jersey “hate” crime sentencing enhancement to assault that would raise the maximum penalty from two years to ten years, and could be decided by the sentencing judge by a preponderance of the evidence.

6. The U.S. Supreme Court clearly held that the so-called sentencing enhancement was, in fact, an element of the crime that must be submitted to a jury and proven beyond a reasonable doubt. Implicit in any verdict by a jury is that it be unanimous. In response to an all-out assault on sentences imposed in the past in violation of Apprendi, prosecutors sought to limit its application to its particular facts: that Apprendi only applied to a sentencing enhancement that raised the maximum possible sentence. Sentencing enhancements within the statutory maximum were not affected by Apprendi, so the argument went. This effort to deny the logical conclusions of Apprendi’s holding eventually failed.

7. In Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), Apprendi was applied to invalidate State Sentencing Schemes. This same principle, that sentencing factors used to determine a sentence must be found by unanimous guilty verdict was expanded in United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), to invalidate the mandatory Federal Sentencing Guidelines. In Ring, the holding of Apprendi was extended to Capital Sentencing Statutes and procedures.

8. The key to the Sixth Amendment right to trial by jury is the requirement that a jury reach an unanimous decision and on all findings of fact that impact the imposition of the Death Penalty. In that regard, Section 921.141, which permitted a recommendation of death be made by a mere majority of the jury, violated Apprendi. After Ring, the violation was clear. Nonetheless, this Court rejected every attempt to apply Ring to invalidate Section 921.141. See, Bottoson v. Moore, 833 So.2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002), King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002), Blackwelder v. State, 851 So.2d 650 (Fla. 2003).

9. In State v. Steele, 921 So.2d 538 (Fla. 2005), this Court considered a Petition for Common-Law Certiorari filed by the State challenging a Trial Court's requirement that the State provide notice of the aggravating circumstances it

intended to use to justify the imposition of the death penalty. While affirming the right of a Trial Court to do so under Ring, the requirement of majority vote on each aggravator was rejected as “an unnecessary expansion of Ring.” The Court reasoned that the recommendation of the jury went to the “imposition of a higher sentence”, rather than a finding as to the individual aggravator. 921 So.2d at 546. But even as to that “higher sentence”, the Court retreated from Apprendi/Ring’s mandate of unanimity. Noting that Florida would be the only State remaining that did not require an unanimous finding by the jury recommending the Death Penalty, this Court still refused to expand Ring to require it.

10. In Steele, Justice Wells issued a concurring Opinion. He explained “the further developments in sentencing laws in respect to construction of Federal constitutional rights to jury determinations stemming from the Sixth Amendment to the United States Constitution” that presaged Hurst. Apprendi, Ring, and Blakely were described as an evolution in awareness by the Court of the full ramifications of enforcing the Sixth Amendment’s Right to a Jury Trial. The Federal Death Penalty Act, 18 U.S.C., Sections 3591-97 (2000), which required notice to a defendant setting forth aggravating factors that the Government proposed to prove as justification for a sentence of death, and an unanimous recommendation for the death sentence was held up as a model of compliance with

the Apprendi/Ring concerns. Justice Wells concluded that:

I believe that the Federal statute's procedures can serve as a model for the Florida revision since those procedures do not appear to have Apprendi-Ring problems. By the Florida Legislature enacting this revision, Florida's Statute would clearly be in compliance with United States Constitution and be consistent with the changes in sentencing which the Legislature has enacted since Florida's death penalty was reestablished in the 1970's.

921 So.2d at 550-2 (J. WELLS, concurring).

The Florida Legislature waited until Hurst before revising Section 921.141 to be in compliance with Apprendi/Ring.

11. This Court decided the issue of retroactivity in Mosley v. State, 209 So.3d 1248 (Fla. 2016), and Asay v. State, 210 So.3d 1 (Fla. 2016). In Mosley, the Court decided to apply Hurst v. Florida to habeas petitioners whose convictions were final after the U.S. Supreme Court decided Ring.

12. On the same day that Mosley was decided, this Court decided Asay. Asay's conviction and sentence of death became final on October 7, 1991, long before Apprendi or Ring. He had filed a Motion for Post-Conviction Relief in 1993. After being denied by the trial court, this Court denied relief on October 26, 2000. A Petition for Writ of Habeas Corpus filed on October 25, 2001, was denied on October 4, 2002. Neither the appeal nor post-conviction pleadings

raised Apprendi or Ring. It was only on October 17, 2002, that Asay filed his first Successive Post-Conviction Motion in which he contended that Florida's Capital Sentencing Statute was unconstitutional pursuant to Ring. Since his conviction had been finalized before Ring had been decided, and there was no opportunity for him to have raised Ring or even Apprendi in his first Post-Conviction Motion, the Court ruled that Hurst v. Florida would not be applied retroactive to his case. Asay, 210 So.2d at 22.

13. Justice Perry dissented, arguing that limiting the retroactive application of Hurst v. Florida to those cases that were not final when Ring was decided was a line drawn that was "arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two groups of similarly situated persons." He was also concerned by what he characterized as "Florida's troubled history in applying the death penalty in a discriminatory manner." He concluded that the "majority's decision today leads me to declare that I no longer believe that there is a method of which the State can avail itself to impose the death penalty in a constitutional manner." Returning to the retroactivity issue, Justice Perry plainly stated that "Retroactivity isn't binary—either something is retroactive, has affect on the past, or it is not." He condemned the majority's reliance on concerns regarding the administration of

justice pointing out that those concerns could be obviated by following Section 775.082(2) and vacating the death sentences rather than ordering a new Penalty Phase. Asay, 210 So.2d at 37-8 (PERRY, J., dissenting).

14. Justice Lewis concurred in the result, but was concerned about the limitations on retroactivity set by the majority. In his view, the “majority opinion has incorrectly limited the retroactive application of Hurst by barring relief to even those defendants who, prior to Ring, have properly asserted, presented, and preserved challenges to the lack of jury factfinding and unanimity in Florida’s capital sentencing procedure at the trial level and on direct appeal, the underlying gravamen of this entire issue.” Asay did not raise a Sixth Amendment challenge prior to Ring. Asay, 210 So.2d at 30-1 (LEWIS, J., concurring).

15. Justice Pariente concurred in part, and dissented in part. She recognized that Hurst “was undoubtedly a decision of fundamental constitutional significance based not only on the United States Supreme Court’s decision in Hurst v. Florida, but also on Florida’s separate constitutional right to trial by jury under Article I, Section 22, of the Florida Constitution.” That Hurst required unanimous jury findings of each aggravating factor, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances and the unanimous jury recommendation of death as part

of Florida’s constitutional right to a trial by jury represents a decision of “fundamental constitutional significance.” She applied the retroactivity standard in Witt v. State, 387 So.2d 922 (Fla. 1980), to justify full retroactivity of Hurst. “A faithful Witt analysis includes consideration of uniqueness and finality of the death penalty, together with the fundamental constitutional rights at stake when the State sentences someone to death—mainly the right to trial by jury in sentencing by a unanimous jury as guaranteed by both the Sixth Amendment to the United States Constitution and Article I, Section 22, of the Florida Constitution.” Asay, 210 So.3d at 32-3 (PARIENTE, J., concurring in part, dissenting in part).

16. Justice Pariente conclusions were based, in part, on the holding of this Court in Perry v. State, 210 So.3d 630 (Fla. 2016). Perry arose from a challenge to the Amendment to Florida’s Capital Sentencing Scheme passed into law after Hurst v. Florida was decided. Ch. 2016-13, Laws of Fla. (2016). The Statute amended Section 921.141 to permit a death recommendation if there are ten votes rather than the single majority permitted under prior law. This Court held that Hurst v. Florida required a unanimous recommendation by the jury before a Sentence of Death could be imposed. The Court concluded as follows:

[T]o increase the penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to

warrant a sentence of death, that the aggravating factors outweigh the mitigating circumstances, and must unanimously recommend a sentence of death. (Citation omitted). While most of the Act can be construed constitutionally under our holding in Hurst, the Acts 10-2 jury recommendation requirement renders the Act unconstitutional.

210 So.3d at 640.

In Perry, the Court finally recognized that Apprendi/Ring's requirement that all findings of fact that would increase the sentence must, consistent with the Sixth Amendment right to trial by jury, be determined by unanimous jury beyond a reasonable doubt.

17. On August 10, 2017, this Court decided Hitchcock v. State, — So.3d —, 32 Fla.L.Weekly S753, 2017 WL 3431500 (Fla. August 10, 2017). In Hitchcock, the Court affirmed the black line it drew in Asay for extending retroactive effect under Hurst to only those convictions and sentences of death that were final after Ring. Hitchcock was denied relief because his sentence of death became final in 2000, before Ring. The question before the Court is whether JOHNSON, whose Sentence of Death was also final before Ring should suffer the same ruling as Hitchcock.

#### REASONS WHY HITCHCOCK SHOULD NOT PRECLUDE RELIEF

18. Death is different, and a fundamental change in the law that affects the

proceedings by which a death penalty is imposed must be in strict compliance with both the United States and Florida Constitution. If the Florida Legislature has devised a system that fails constitutional muster, then every person sentenced to die should have their sentence of death vacated. The only remaining question is whether their death sentences should be automatically reduced to life imprisonment or should they get another Penalty Phase.

19. It is telling that Hurst focused the Ring problem as the judge taking away from the jury the ultimate decision to impose the death penalty. When the Florida Legislature attempted to remedy that issue by amending Section 921.141 to require a unanimous decision as to the aggravating factors, but a non-unanimous recommendation, it was struck down as violating the right to an unanimous jury guaranteed by the U.S. and Florida Constitutions. Perry, 210 So.3d at 640. It is the unanimous verdict, not the procedure by which the death penalty is imposed, that lies at the heart of the Apprendi/Ring/Hurst holdings. As noted by this Court in Steele, by 2005, Florida was the only State at that time that did not require an unanimous recommendation for the Death Penalty.

20. Justice Pariente also dissented in Hitchcock. She stated:

Reliability is the lynchpin of Eighth Amendment jurisprudence, and the death sentence imposed without a unanimous jury verdict for death is inherently unreliable. The statute under which

Hitchcock was sentenced, which did not require unanimity in the jury's recommendation for death, was unconstitutional under the Sixth and Eighth Amendments. To deny Hitchcock relief when other similarly-situated defendants have been granted relief amounts to a denial of due process. The Eighth Amendment and due process arguments presented here and not addressed by the majority in Asay, in addition to the Sixth Amendment announced in Hurst v. Florida and Hurst, 'create[] the rare situation in which finality yields to fundamental fairness in order to ensure that the constitutional rights of all capital defendants in Florida are upheld.

Hitchcock v. State, 2017 WL 3431500\*3 (PARIENTE, J., dissenting) citing Asay v. State, 210 So.3d at 35 (PARIENTE, J., concurring in part, dissenting in part).

As to retroactivity, Justice Pariente explained that "any line drawn in the retroactive application of Hurst to capital defendants 'results in unintended arbitrariness as to who receives relief.'" Id., at \*4, citing Asay, 210 So.3d at 36 (PARIENTE, J., concurring in part, dissenting in part).

21. The arbitrary drawing of a black line fails to ensure uniformity and fundamental fairness in Florida's Capital Sentencing. Justice Perry provided an example in his dissenting Opinion in Asay that was quoted in full by Justice Pariente in her dissent in Hitchcock. It bears rendition herein.

For example, Asay committed two murders on the night of July 17, 1987. His sentence became final on October 7, 1991, when the United States Supreme Court denied certiorari. See, Asay v.

Florida, 502 U.S. 895, 112 S.Ct. 265, 116 L.Ed.2d 218 (1991). Asay's 9-3 jury recommendation that resulted in a death sentence would not be constitutional if Hurst v. Florida applied to him, but the majority holds that he is not entitled to the Sixth Amendment protections articulated in Hurst v. Florida. Yet, under the present majority's decision, another defendant who committed his offense on an earlier date but had his sentence vacated and was later resentenced after Ring, cannot receive the death penalty without the protections articulated in Hurst. Timothy Hurst committed his crimes on May 2, 1990, and was originally sentenced on April 26, 2000, which was final October 21, 2002, a few short months after the decision in Ring. The majority application of Hurst v. Florida makes constitutional protection depend on little more than a roll of the dice.

Hitchcock, supra at \*4 (PARIENTE, J. (Concurring in part, dissenting in part), quoting Asay, 210 So.3d at 39-40 (PERRY, J., dissenting).

It is just this level of arbitrariness that justified the relief granted to all inmates on Death Row around the United States following the U.S. Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

22. Applying Hitchcock/Asay to JOHNSON and all others similarly situated fails to account for those, like JOHNSON, who raised Apprendi challenges or otherwise challenged Section 921.141 under Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). As to the Apprendi claim, JOHNSON raised it before Ring was decided in his original Motion for Post-Conviction Relief Under Fla.R.Crim.P. 3.851. The summary

denial of that ground for relief was affirmed by this Court in Johnson v. State, 921 So.2d 490 (Fla. 2005). By that time, Ring had been decided. The Court disposed of JOHNSON's Apprendi/Ring argument stating:

Johnson argues that Florida's Death Penalty Scheme violates Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court has repeatedly rejected similar claims. See, Bottoson v. Moore, 833 So.2d 693 (Fla.) cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002); King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002).

921 So.2d at 509.

Pursuant to Hurst v. Florida and Hurst, its 2005 Opinion in JOHNSON's case was wrong.

23. As Justice Pariente explained in Hitchcock, his death sentence was vacated by either the Florida or U.S. Supreme Courts four times. Unfortunately for him, his final death sentence was affirmed in 2000, before Apprendi or Ring. She describes his strong case for relief on the merits in order to highlight the injustice of denying summary relief because their fundamental constitutional violation occurred on the other side of a black line. Hitchcock, 2017 WL 3431500 at \*5 (PARIENTE, J., dissenting).

24. JOHNSON also presented a compelling case for relief on other grounds in his 3.851 Motion. He established that his court-appointed attorney, Arthur

Huttoe, Esq., a former Judge, did not actually handle his case to trial. He “referred” the case to Raymond Badini, Esq., who was a tenant in his office building. JOHNSON alleged that they split the meager court-appointed fees, although an Evidentiary Hearing on that point was not granted. Badini had little experience handling capital cases. He spent little time or effort preparing for Penalty Phase. Despite the passage of 31 months from the date of Huttoe’s appointment to the first day of trial, Badini did not have JOHNSON evaluated by any forensic psychologist or psychiatrist. He confessed this deficiency to the Trial Judge on opening day, and an arrangement was made for Dr. Lloyd Miller to conduct an evaluation. JOHNSON averred that Dr. Miller had spent approximately 15 minutes with him. Between JOHNSON’s conviction for first-degree murder and the commencement of Penalty Phase, no effort was made to obtain any further mental health evaluations. Finally, Badini conducted a facially inadequate voir dire during death qualification. He did not ask a single juror about their attitude towards the death penalty. Instead, he used silly examples during the death qualification phase of voir dire asking whether they understood that the aggravating circumstances had to be proven beyond a reasonable doubt.

25. During post-conviction litigation, Dr. Merry Haber evaluated JOHNSON. She contrasted the fun-loving, jovial man who got along with

everybody portrayed during Penalty Phase with a much darker, tormented reality. Badini did not present during Penalty Phase any evidence to explain JOHNSON's behavior and motivations to murder in a mitigating fashion. According to Dr. Haber, JOHNSON was a homosexual who suffered from an adaptive disorder. Constantly needing to prove himself as a man in the anti-gay African-American culture, he was willing, or indeed compelled, to undertake the task of murdering the drug dealer rival of Bobby Robinson. Bobby Robinson was a co-defendant whose conviction and death sentence was overturned on direct appeal. He entered into a plea, and was released in 2008.

26. As the Caldwell claim, JOHNSON contended that his jury was repeatedly and unconstitutionally instructed by the Court that its role was merely "advisory". These instructions violated the Eighth Amendment. In Caldwell, the U.S. Supreme Court stated:

[W]e conclude that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death was elsewhere.

Caldwell, 472 U.S. at 328-9.

In a sense, Caldwell was a precursor to the Apprendi/Ring/Hurst line of cases that assigned the principal responsibility for finding guilt for sentencing to death less

with the jury, and not with the Judge. Not only was JOHNSON's jury told that their role was advisory so as to diminish their importance, improper under the law in effect at the time of trial, but the elevation of the jury's role as ultimate fact finder, makes the Caldwell violation all the more egregious.

27. Unless this Court is going to narrowly construe Hurst v. Florida to maintain a black line before which no person under sentence of death can benefit from the invalidation of Florida's Capital Sentencing Statute, Hitchcock does not control the result in the case at bar. The Eighth Amendment and Due Process issues were not addressed in Hitchcock. The focus in Apprendi/Ring/Hurst on the need for an unanimous verdict, raised most eloquently by Justice Pariente in dissent, was not specifically addressed in Hitchcock. The fact that JOHNSON had raised and litigated the Apprendi/Ring issue before the Ring decision distinguishes his case from Hitchcock's.

THEREFORE, Appellant requests the opportunity to fully brief his case for review by this Court.

/s/ Charles G. White  
CHARLES G. WHITE, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was efiled/mailed this 17th day October, 2017, to: Office of the Miami-Dade State Attorney, 1350 N.W. 12<sup>th</sup> Avenue, Miami, FL 33136-2111; Attorney General's Office, 444 Brickell Avenue, Suite 950, Miami, FL 33131, and [capapp@myfloridalegal.com](mailto:capapp@myfloridalegal.com); and Ronnie Johnson, DC# # 440701/P-4123, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026.

Respectfully submitted

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