IN THE SUPREME COURT OF FLORIDA

SC17-1499

Trial Court case no.: F92-2141D

RICARDO GONZALEZ

Appellant

VS.

STATE OF FLORIDA

Appellee.

APPELLANT'S RESPONSE TO SHOW CAUSE ORDER

Respectfully submitted by:

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PROCEDURAL HISTORY

Ricardo Gonzalez, Appellant, through the undersigned attorney, files his Response to this Court's Order to Show cause "why the trial court's order should not be affirmed in light of this Court's decision Hitchcock v. State, SC17-445." Gonzalez is of the belief that the Court is requiring this response rather than accepting a full brief on the merits.

Mr. Gonzalez was tried by a jury, in Miami-Dade County Florida, where he was found guilty of charges stemming from a bank robbery in North Miami, Florida, that occurred on January 3, 1992. He was convicted of burglary, grand theft, armed robbery and first degree murder of a law enforcement officer. Mr. Gonzalez was sentenced to death by the Court subsequent to two jury recommendations of death.[1] Neither jury recommendation was unanimous.

On direct appeal, Gonzalez v. State, 700 So2d 1217 (Fla. 1997), cert. denied, 523 U.S. 1062 (1998) Gonzalez I, Mr. Gonzalez raised the following issues:

- The trial court improperly denied him the opportunity to exercise peremptory challenges of jurors Diaz and Andani;

[1] Mr. Gonzalez's first direct appeal resulted in an affirmance of the guilty verdicts, but was remanded for a new penalty phase trial. Gonzalez v. State, 700 So.2d 1217 (Fla. 1997)

- The trial Court erroneously denied his motion to sever which resulted in the introduction of his non testifying co-defendant's statements into evidence at the guilt as well as the penalty phases of his trial; and

- The imposition of the death penalty would be disproportionate.

Both dissenting opinions thought that a reversal of the guilt phase was required due to the fact that the trial court improperly disallowed the defense peremptory challenge of juror Diaz, a presumptive Hispanic male, by a Hispanic defendant.

Although the majority in Gonzalez I found that the co-defendants confessions having been admitted into evidence was error, they determined that it was harmless beyond a reasonable doubt as to the guilt phase since Gonzalez himself made an incriminating statement and there was money found from the robbery at his home pursuant to a consensual search. Justice Anstead said in his dissent[2] that it was "apparent that trying these several defendants together and erroneously utilizing the hearsay out-of-court statements of each of them against one another severely prejudiced the defendants in both the guilt and penalty phases of the trial. It would have been virtually impossible for the jury not to have considered the erroneously admitted co-defendants' statements as major building blocks in the case

[2] There were two dissenting opinions with regard to the affirmance of the guilt phase.

against appellant." *Citing* State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), Gonzalez I, 700 So.2d 1219.

Nevertheless, the Court found that the sentencing needed to be re-tried, because as to the sentence of death they could not "say that the erroneous admission of Franqui's confession which portrayed Gonzalez as the aggressor who precipitated the shooting was harmless beyond a reasonable doubt." Gonzalez I, 700 So.2d at 1219.

In Gonzalez II,[3] the Court found that his attempt to re-address the guilt phase issue regarding the co-defendant's statements, using a confrontation clause analysis, was procedurally barred. Other issues addressed from the second penalty trial, were the following:

- Impermissible doubling by using the victim status as a law enforcement officer as and aggravator as well as to increase the penalty for his homicide to life without parole due to his status, rather than minimum mandatory twenty-five (25) years;
- The trial Court's rejection of uncontroverted defense expert testimony;
- Improper closing argument by the government; and
- A proportionality argument

The second jury recommended a death sentence by a vote of eight to four. The Court sentenced Mr. Gonzalez to death. The Florida Supreme

[3] State v. Gonzalez, 786 So. 2d 559 (Fla. 2001)

Court's "proportionality review rests upon recognition that death is a uniquely irrevocable penalty requiring uniformity in its imposition. [Citations omitted] Thus, they undertook "a qualitative review of the particular circumstances of the instant case in comparison to other capital cases…" Gonzalez II, 786 So.2d at 569. The trial Court determined what aggravating and mitigating factors were found and therefore used in determining the sentence. The jury was not unanimous, nor did they advise the Court which factors they found to be either aggravating or mitigating. The sentence was affirmed.

Thereafter, a 3.851 motion was filed; an evidentiary hearing was conducted on one of the issues. The issues raised in his prior post - conviction motion were:

- Ineffective assistance of counsel at guilt phase of trial;
- Ineffective assistance of counsel at second penalty trial;
- Newly discovered evidence, to wit: life sentence imposed on co-defendant Fernando Fernandez should result in his own life sentence;
- Failure of the trial court to disclose records exempt from production under Fla. R. of Crim Pro. 3.852;
- Application of new rule 3.851 to Gonzalez violated his due process and equal protection rights;

- Florida capital sentencing procedures violated his right to have a unanimous jury verdict in violation of Ring v. Arizona, 122 S.Ct. 2428 (2002); and

- Right against cruel and unusual punishment as he may be incompetent at the time of execution.[4]

All claims were denied in, Gonzalez v. State, 990 So.2d 1017 (Fla. 2008) (GONZALEZ III).

A federal habeas petition was filed on petitioner's behalf. All of those claims were denied as well.

On the basis of the new Florida law arising from Hurst v. Florida, the enactment of Chapter 2016-13, Perry v. State, Hurst v. State, and Mosley v. State, Mr. Gonzalez filed his Successive Post-Conviction motion pursuant to Rule 3.851 at issue in the instant appeal and sought relief arising from the resulting new Florida law that was previously unavailable to him. Mr. Gonzalez seeks to set aside his convictions and/or death sentence.

The trial court had jurisdiction and authority to grant Appellant's 3.851 motion since Gonzalez sits on death row, despite the fact that his penalty

[4] Gonzalez also included the claim that the Circuit court erred in striking his original post-conviction motion without giving him leave to amend. This was cured because he was permitted to amend and the Court addressed the amended motion on the merits.

phase proceeding [5]was unconstitutional due to, *inter-alia*, a non-unanimous jury recommendation[6] of death.

> The trial court sentenced Gonzalez to death, finding six aggravating factors, which were merged into three factors: prior violent felonies based on the contemporaneous convictions for armed robbery and aggravated assault; murder committed during a robbery/murder committed for pecuniary gain; and murder committed to avoid a lawful arrest/victim a law enforcement officer preforming his duties/murder committed to hinder enforcement of laws. These aggravating circumstances were found to outweigh [by the judge, not the jury] the following mitigating circumstances: no significant prior criminal history; brain damage, learning disability and below-average intelligence; remorse; cooperation with authorities; life sentences given to two codefendants; and good conduct while incarcerated and potential for rehabilitation. The trial court considered but rejected the statutory mental health mitigators, as well as the minor participation mitigator. The nonstatutory mitigator of family background was likewise rejected. Gonzalez v. State, 786 So.2d 559 (Fla. 2001).

ARGUMENT

The Court herein requires Mr. Gonzalez to address why the recent decision in Hitchcock v. State (SC17-445) should not control the outcome of the review by this Court of the denial of Gonzalez' 3.851 Successive Motion for Post Conviction relief. Gonzalez understands that Hitchcock, plain and simple, has rejected the full retroactive application of Hurst v. Florida, and

[5] Gonzalez's' conviction of guilt was upheld on direct appeal, however his first death sentence was reversed due to the State's use of his co-defendants against him as substantive evidence against of guilt and as evidence of the extent of his participation. Gonzalez v. State, 700 So.2d 1217 (Fla. 1997)
[6] 8-4

Hurst v. State, 202 So.3d 40 (Fla. 2016). Instead of full retroactive application, like other "watershed" cases, Hitchcock reaffirms the majority of the Court's confines, that all death row prisoners that had their cases finalized after Ring v. Arizona, 536 U.S. 585 (2002) are entitled to a full review to determine whether the errors inherent in every death penalty case prior to Hurst were harmless beyond a reasonable doubt. Mr. Gonzalez submits that the cutoff date of June, 24, 2002 as has been determined in Mosley v. State, 209 So.3d 1248 (Fla. 2016) is not the date that should apply in the instant case, instead the Court should determine that June 26, 2000, the date of Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) is the appropriate date of retroactive application.[7] After all, the Hurst decision was predicated upon the legal concept enunciated in Apprendi, namely that a Jury rather than a Judge must make factual determinations beyond a reasonable doubt.

Gonzalez submits his argument as to why he is entitled to relief under Hurst v. Florida in this response to the Order to show cause. Mr. Gonzalez, like other death row inmates should be granted the opportunity for this Court to review the penalty phase proceeding for harmless error, because his jury

[7] For purposes of this Response Gonzalez is not arguing for full retroactivity for all prisoners and only addresses the specific question at hand posed by the show cause order.

determined by a non-unanimous[8] vote a recommendation in favor of the death penalty. Since they did not indicate what this vote was predicated upon, the State of Florida cannot prove that the Hurst error was not harmless beyond a reasonable doubt.

Appellant, as have others, maintains that Hurst v. Florida, 136 S. Ct. 616 (2016) requires that all death row prisoners, prior to the enactment of the current 921.141, Florida Statute, either be sentenced to life imprisonment, or to be given, at a minimum,[9] the opportunity to be constitutionally sentenced pursuant to the mandates of Hurst, because the United States Supreme Court in Hurst v. Florida mandates that "as it had in *Apprendi,* that the Sixth Amendment, in conjunction with the Due Process clause, 'requires that each element of a crime be proved to a jury beyond a reasonable doubt' [internal citations omitted] and 'that any fact that expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element that must be submitted to[the] jury." Hurst v. State, 202 So.3d 40, 51 (Fla. 2016), quoting Apprendi v. New Jersey, 120 S. Ct. 2348 (2000.)

[8] The jury made a recommendation of 8 to 4 in favor of the death penalty.
[9] Whether the court should reverse the conviction as well is appropriate in some cases, especially where guilt phase defenses were tailored to avoid the death penalty.

Prior to Hurst, Florida took the position that Apprendi was not intended to affect capital sentencing schemes. Mills v. Moore, 786 So.2d 532 (Fla. 2001). This was so even though "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." Ring, 536 US at 609. Even after Ring this Court denied Apprendi's dictates as it related to the Florida Death Penalty.

Fittingly, Justices of this Court had not agreed with the majority that Apprendi had no effect on the Florida sentencing scheme and voiced concerns and consistently addressed them, either in concurring in result opinions, or in a dissent depending on the facts and issues therein. Hurst has now firmly established that the minority was correct in their interpretation of Apprendi.

The decisions of late, whereby this Court majority acknowledges that Apprendi does dictate pending capital cases, but will not correct the errors of cases finalized prior to the decision in Ring, is both arbitrary and capricious. Had counsel for Gonzalez, petitioned the United States Supreme Court for Writ of Certiorari after this Court affirmed his 8-4 recommendation and subsequent death sentence, he would be deemed eligible for Hurst application

and a new penalty trial, as the United States Supreme Court had stayed the Florida death penalty cases pending Ring. Several prisoners on death row now are getting the benefit of Hurst merely because their attorneys, unlike Gonzalezs' petitioned the Supreme Court for Certiorari. ***Timothy Hurst' case itself, but for his petition to the U.S. Supreme Court, would have been final before Ring.*** [10] Sadly

> [o]n June 28, 2002, the United States Supreme Court denied certiorari in King and Bottoson's cases, which automatically terminated the stays and allowed the executions to go forward [11].
>
> To reach the conclusion that *Ring* somehow undermines Florida's capital sentencing scheme as it was applied to King or Bottoson, it is necessary to conclude that the decision to terminate the King and Bottoson stays of execution even though *Ring* rendered Florida's statue unconstitutional as it had been applied to King and Bottoson. I cannot conclude that the United States Supreme Court would have permitted King and Bottoson to be executed if that court determined that *Ring* invalidated the death sentences imposed in these cases. The United States Supreme Court, which entered the stays in January 2002 after all appeals in this Court had been exhausted, knew the effect of its termination of its stays was to remove any federal court barrier to the executions, which could then be rescheduled and carried out. I conclude that it must logically follow that if the United States

[10] Hurst direct review is found at Hurst v. State, 819 So.2d 689 (Fla. 2002). The decision / opinion was dated April 18, 2002, rehearing was denied on June 3, 2002. His petition to the United States was denied.

[11] Footnote number 8 in Bottoson contains the list of other capital cases which were also stayed pending the Ring case, that also were denied certiorari and had stays terminated after the Ring decision. The list included James Armando Card, Michael W. Moore, Jason Looney and Guerry Wayne Hertz.

> Supreme Court had concluded that Florida's capital sentencing statute was rendered unconstitutional as applied to King and Bottoson for the reasons stated in *Ring*, it would have granted certiorari and remanded King and Bottoson to this Court for further consideration in light of *Ring v. Arizona*.

Bottoson v. Moore, 833 So.2d at 697. Because the Court's erroneous understanding of the reach of Apprendi and Ring, Linroy Bottoson, was executed after his petition to the United States Supreme Court for writ of Certiorari was denied. Contrarily, were he not executed in 2002, he would have qualified for the Harmless error analysis that is being systematically denied to pre-Ring Defendants. Gonzalez urges this Court not to make the same faulty deduction, as it did in Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), by misinterpreting a denial of writ of certiorari to Mark Asay[12] as the Supreme Court of the United States has not ruled on the due process not afforded to the class of death row prisoners, who like Gonzalez, have the misfortune that their sentences became final prior to Ring v. Arizona, 536 U.S. 584 (2002) .

The hard and fast rule that even jury override defendants are subject to the same denial of retroactive relief and/or harmless error analysis for pre - Ring type cases is difficult to comprehend. Although Mr. Gonzalez did not have a override, he did not have a unanimous jury recommendation of the

[12] Asay (16-9033) Petition for a writ of certiorari and motion for leave to proceed in forma pauperis was denied on August 24, 2017.

death penalty. Hitchock seemingly dismisses the eighth amendment claim made by Gonzalez that even a unanimous verdict in favor of a death sentence violates the Eighth Amendment when the jury is not correctly instructed as to its sentencing responsibility. Jurors should have had to feel the weight of their sentencing responsibility. Caldwell v. Mississippi, 472 U.S. 320, 328-329 (1985). The United States Supreme Court has not yet addressed that issue as it pertains to pre-Hurst death sentences in Florida and whether the defendants are entitled to relief for cases when the instruction to the jury seem to let juries "off the hook", regardless of whether or not the vote count for death, was unanimous. Since neither Hitchcock nor the US Supreme Court has addressed the issue, the Caldwell claim is one of the issues the Appellant should be entitled to fully brief and argue before this Court.

Other claims raised by Gonzalez in the trial court, which were summarily denied, and were not addressed in Hitchcock include a double jeopardy and ex post facto violations. Gonzalez should have the opportunity to present and brief all issues raised at the trial level.

Gonzalez deserves, as much consideration and fairness as is provided to others similarly situated, who like him, were not afforded a constitutional penalty determination by a jury rather than a judge. Gonzalez did claim Apprendi violations at the first available time, albeit in his motion for post

conviction relief, his attorney's clear failures to address the issues before his case was "final" should not leave him without any recourse. This court would not deny pending cases the constitutional protections finally recognized by the highest court in our country, merely because an attorney failed to know the law. There are now protections in place in order to ensure that only counsel who is truly qualified and knowledgeable may defend capital cases. After all, death is different.

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CONCLUSION

This case should not be affirmed in light of the Court's decision in Hitchcock v. State. Mr. Gonzalez urges this Court to not declare the artificial date of the Ring decision to deny him the opportunity to be fairly judged, based upon clear and decisive legal factual findings, proven beyond a reasonable doubt, by a jury in full agreement, after having been told that their deliberations, thoughts, and possible request to spare the life of Mr. Gonzalez means something, and is not a mere recommendation that a judge can take or leave.[13] Apprendi told this court that the sixth amendment required as such. As the Court affirmed in Hitchcock that there is a line depending on when the State review is final, that will be adhered to, that line should be June 26, 2000 in Mr. Gonzalez case. His case was "final" after that and he brought the Apprendi claim to this Court at his first available opportunity.

Respectfully Submitted by:

/s/ Jeffrey Evan Feiler
Attorney for Ricardo Gonzalez

[13] Two prior juries failed to unanimously come to the conclusion that they would recommend that Mr. Gonzalez should be executed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the instant response to the Court's Show Cause Order was filed via the Florida Court's e-filing portal and served upon the Office of Attorney General as well as Assistant Attorney General Melissa J. Roca by same this 17th day of October, 2017.

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