IN THE SUPREME COURT OF THE STATE OF FLORIDA

WILLIAM LEE THOMPSON

Appellant,

v.

Case No. SC18-1435
Lower Court No.: F76-3350-B
Death Penalty Case

STATE OF FLORIDA

Appellee.
_____/

STATE'S REPLY TO APPELLANT'S RESPONSE TO SHOW CAUSE

COMES NOW, APPELLEE, the State of Florida, by and through undersigned counsel, and submits this reply to Thompson's Response to this Court's November 6, 2018, Order to Show Cause and asserts that this Court should affirm the denial of Thompson's successive postconviction motion in accordance with Asay v. State, 210 So. 3d 1 (Fla. 2016) ("Asay V"); Hitchcock v. State, 226 So. 3d 216 (Fla. 2017) *cert. denied*, 138 S.Ct. 513 (2017); Asay v. State, 224 So. 3d 695 (Fla. 2017) ("Asay VI"); Lambrix v. State, 227 So. 3d 112 (Fla. 2017) *cert. denied*, 135 S.Ct. 312 (2017), and therefore states:

STATEMENT OF THE CASE AND FACTS

Appellant, WILLIAM LEE THOMPSON, was convicted of the first-degree murder, kidnapping, and involuntary sexual battery of Sally Ivester and was sentenced to death in 1976. Thompson originally entered a plea of guilty but on appeal was allowed to withdraw his plea after this Court remanded for further proceedings. Thompson

v. State, 351 So. 2d 701 (Fla. 1977). In 1980, Thompson entered a second guilty plea, and following a penalty phase, the jury recommended the death penalty. Thompson v. State, 389 So. 2d 197 (Fla. 1980). Thompson then filed a Rule 3.850 motion, which this Court denied in Thompson v. State, 410 So. 2d 500 (Fla. 1982). He sought federal habeas corpus relief, which was denied. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986). He then filed a second Rule 3.850 motion, which the trial court denied but this Court granted and reversed for resentencing. Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987).

At the resentencing, the jury recommended by a vote of seven to five that Thompson receive the death sentence. The trial court found four aggravators and imposed the death sentence. On appeal, this Court affirmed the death sentence. Thompson v. State, 619 So. 2d 261 (Fla. 1993), *cert. denied*, 510 U.S. 966 (1993). Thompson's sentence was final on November 8, 1993.

Thompson's subsequent collateral challenges have been rejected. See Thompson v. State, 759 So. 2d 650 (Fla. 2000) (affirming denial of initial motion for postconviction relief and denying state petition for a writ of habeas corpus); Thompson v. State, 41 So. 3d 219 (Fla. 2010) (affirming denial of Thompson's successive motion for postconviction relief).

On January 10, 2017, Thompson filed a successive Rule 3.851 motion challenging his sentence based on Hurst v. State, 202 So.

3d 40 (Fla. 2016). On January 30, 2017, the State filed its response. On October 24, 2017, the State requested the circuit court that any further briefing be given a deadline. The circuit court granted the State's request and ordered Thompson to file any amendments to the briefing by November 21, 2017. On November 21, 2017, Thompson filed his Amended 3.851 motion. Following a Huff hearing on July 17, 2018, the circuit court denied relief on July 20, 2018. On November 6, 2018, this Court requested Thompson to file a response to its show cause order as to why Thompson should receive relief in light of this Court's decision in Hurst v. State and Hitchcock v. State. This reply to Thompson's response follows.

ARGUMENT

I. THIS COURT DOES NOT VIOLATE THOMPSON'S DUE PROCESS RIGHTS WHERE IT REQUIRES APPELLANT TO RESPOND TO A SHOW CAUSE ORDER.

Thompson first objects to the Hitchcock briefing requirements on a due process basis. Contrary to Thompson's argument, the show cause order still permits Thompson's case to be analyzed on an individualized determination, which in turn does not unfairly curtail his right to appeal by the outcome in Hitchcock or any other capital case.[1]

[1] This Court's long-standing tag procedure does not violate due process. Indeed, the United States Supreme Court employs a somewhat similar procedure when dealing with numerous cases involving the same issue. It decides the lead case, and then it vacates and remands the other cases to the lower courts in light of the new decision in the lead case. This procedure is referred to as "grant,

Because Thompson points to no specific fact that distinguishes his case from Hitchcock, Hitchcock applies to his case. Like Thompson's argument, Hitchcock also raised Eighth and Fourteenth Amendment claims, and also pointed out that the fact-finding that subjected him to his death sentence was not proven beyond a reasonable doubt. See Hitchcock, 226 So. 3d at 217, n.2 ("We have consistently applied our decision in Asay [V], denying the retroactive application of Hurst v. Florida as interpreted in Hurst v. State to defendants whose death sentences were final when the Supreme Court decided Ring v. Arizona, 536 U.S. 584...(2002)."). Like Hitchcock, Thompson alleges similar constitutional violations but, as this Court found, "these are nothing more than arguments that Hurst v. State should be applied retroactively to his sentence, which became final prior to Ring."

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vacate, and remand" or GVR for short. Lawrence v. Chater, 516 U.S. 163, 166 (1996) ("the GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices"); Wellons v. Hall, 558 U.S. 220, 225 (2010) (observing that "a GVR order conserves the scarce resources of this Court"). The parties in the other cases do not get to brief the issue in the High Court. In contrast, this Court allows the parties in the tag cases to brief the issue after the lead case is decided in a response to an order to show cause. While some United States Supreme Justices have criticized the GVR practice, those criticisms are on case specific grounds, **not on due process grounds**. Opposing counsel cites no case from any appellate court holding that the court's procedures for dealing with a mass of cases involving the same issue, such as tagging or GVR, violates due process.

Hitchcock, 226 So. 3d at 217. Thus, this Court must deny Thompson's first argument on these grounds.

II. THIS COURT'S HITCHCOCK DECISION DOES NOT VIOLATE THOMPSON'S SIXTH, EIGHTH, OR FOURTEENTH AMENDMENT RIGHTS.

A. Thompson's Sixth and Eighth Amendment Hurst Claims are not applicable to his case.

Thompson claims his death sentence is unconstitutional under the Sixth and Eighth amendments as interpreted in Hurst v. Florida and Hurst v. State. Thompson further asserts that a failure to find Hurst v. Florida and Hurst v. State retroactive to his case is a denial of his due process rights.

Contrary to Thompson's argument, this Court applied state law correctly in finding Hurst v. Florida and Hurst v. State are retroactive to cases final before June 24, 2002 and should continue to follow the precedent of Asay V, Hitchcock, and Lambrix as well as Mosley v. State, 209 So.3d 1248 (Fla. 2016) and the cases reviewed following Mosley. Thompson has not offered any arguments on retroactivity or the Sixth and Eighth Amendments that have not previously been presented to this Court and subsequently rejected after due consideration. Likewise, he has offered nothing to cause this Court to alter its precedent. As such Asay V, Hitchcock, and Lambrix foreclose Thompson's presented claims.

This Court has held Hurst v. Florida and Hurst v. State are not retroactive to cases final before June 24, 2002, the day Ring v. Arizona issued. See Asay V, 210 So.3d at 8, 22; Asay VI, 224

So.3d at 703 (reiterating Hurst v. State and Hurst v. Florida not retroactive to cases final before Ring); Hitchcock, 226 So. 3d at 217 (stating "[w]e have consistently applied our decision in Asay V, [210 So.3d at 22], denying the retroactive application of Hurst v. Florida as interpreted in Hurst v. State to defendants whose death sentences were final when the Supreme Court decided Ring....")

In Asay V, this Court applied the Witt v. State, 387 So. 2d 922 (Fla. 1980), analysis to determine whether Hurst was retroactive under state law, "which provides **more expansive retroactivity standards** than those adopted in Teague [v. Lane], 489 U.S. 288 (1989)," which enumerates the federal retroactivity standards. Asay, 210 So. 3d at 15-16 (emphasis in original) (quoting Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005)); see also Danforth v. Minnesota, 522 U.S. 264, 280-81 (2008) (allowing states to adopt retroactivity test that is broader than Teague). As recognized in Hitchcock, after Asay V this Court has strongly adhered to using Ring's decision date as the bright-line cutoff point for retroactivity of Hurst claims.

On August 10, 2017, this Court reaffirmed Asay V stating:

> Although Hitchcock refences various constitutional provisions as a basis for arguments that Hurst v. State should entitle him to a new sentencing proceeding, these are nothing more than arguments that Hurst v. State should be applied retroactively to his sentence, which became final prior to Ring. As such, these arguments were rejected when we decided Asay. Accordingly, we

> affirm the circuit court's order summarily denying Hitchcock's successive postconviction motion pursuant to Asay.

Hitchcock, 226 So. 3d at 217; Lambrix, 227 So. 3d at 113 (rejecting arguments based on Eighth Amendment, due process, equal protection, and a substantive right based on new legislation).

Here, just as was presented in Hitchcock, Thompson raises multiple constitutional provisions to argue Hurst should be applied retroactively to him. He claims that denying him retroactive application of Hurst violates the Sixth and Eighth Amendments of the United States Constitution as he was not provided Due Process and Equal Protection. As determined in Asay V, 210 So. 3d at 8, 22, and reaffirmed in Hitchcock, 226 So. 3d at 117; Lambrix 227 So. 3d at 113; and Asay VI, 224 So. 3d at 703, Hurst v. State does not apply retroactively.[2] Thompson's case became

[2] The Eleventh Circuit has rejected the argument that Hurst is retroactive under federal law, stating: "[t]he Supreme Court has held that Ring does not apply retroactively to cases on collateral review. See Schriro v. Summerlin, 542 U.S. 348, 358[ ] (2004) (holding that Ring does not apply retroactively under federal law to death-penalty cases already final on direct review.)." Lambrix v. Sec'y, Fla. Dep't of Corr., 872 F.3d 1170, 1182-83 (11th Cir. 2017), *cert. denied* Lambrix v. Florida, 138 S. Ct. 312 (2017). Further, the Eleventh Circuit held that this Court's ruling, that Hurst did not apply retroactively to Lambrix, whose judgment was final in 1986, "is fully in accord with the U.S. Supreme Court's precedent in Ring and Schriro." Lambrix, 872 F.3d 1170, 1182-83. The Eleventh Circuit also rejected the statutory retroactivity argument stating:

> jurists of reason would not find this position debatable: the Florida court's rejection of Lambrix's constitutional-statutory claim was not contrary to, or

final on November 8, 1993, about seven months after affirmance on direct appeal. See Fla. R. Crim. P. 3.851(d) Hence, Hurst v. State and Hurst v. Florida are not retroactive to this case and this Court must affirm the trial court's denial of relief.

Even if Hurst were to be applied retroactively, relief would not be warranted under the Eighth Amendment or Caldwell v. Mississippi, 472 U.S. 320, 330 (1985),[3] or Hurst as any error would be harmless beyond a reasonable doubt. Here, Thompson was convicted of first degree murder, kidnapping, and involuntary sexual battery. The trial court found the four aggravators: (1) the crime was engaged during a sexual battery; (2) the crime was committed for financial gain; (3) the crime was heinous, atrocious, or cruel; and (4) the crime was committed in a cold, calculated, and premeditated manner. The facts supporting these come from the

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> an unreasonable application of, the holding of a Supreme Court decision.

Id. at 1183.; see Dobbert v. Florida, 432 U.S. 282, 301 (1977).

[3] First, any complaint about jury instructions and/or argument of counsel at this point is untimely and procedurally barred. Troy v. State, 57 So. 3d 828, 838 (Fla. 2011). Second, to establish constitutional error under Caldwell, a defendant must show the instructions "improperly described the role assigned to the jury by local law." Romano v. Oklahoma, 512 U.S. 1, 9 (1994). Here, the jury was instructed properly on its role based upon then existing law. It is absurd to suggest the jury should have been instructed in accordance with a constitutional change in the law which occurred more than 20 years after the trial. Third, there is nothing in the record to support the proposition that the jury's sentencing responsibility was diminished or rendered the recommendation unreliable.

details of the crimes charged and jury verdicts of guilty beyond a reasonable doubt. While recognizing this Court's precedent to the contrary, the State maintains there is no Sixth Amendment error here as Thompson became death eligible upon conviction. Without question, and as the jury found by its guilt phase verdict, the murder of Ivester was committed during a felony sexual battery, rendering Thompson death eligible. The Sixth Amendment requires nothing more than jury fact-finding sufficient to support the sentence; it does not mandate any specific jury recommendation as a pre-requisite to the sentence.

B. Thompson's 2017-1 Claim is Procedural and Not Retroactive to Thompson

Thompson argues that the revised Chapter 2017-1 and section 921.141 of the Florida Statutes provide substantive rights. Thompson's attempt to avoid this Court's retroactivity ruling by asserting a substantive statutory right under the revised statute is without merit. He argues that the statutory requirements under § 921.141 are substantive rights that existed since its enactment and should apply to him. Response at 16. However, Hurst v. Florida and Hurst v. State established a new rule of procedure, as codified in § 921.141, and this new procedure is not retroactive to Thompson. Furthermore, Asay VI has provided clarity on this matter. Asay VI, 224 So. 3d at 703 (rejecting claim that Hurst and Chapter

2017-1, Laws of Florida should be applied retroactively to defendant whose case became final before June 24, 2002).

Thompson's claim that the change in law as codified by Chapter 2017 is substantive, is mistaken. Hurst v. Florida and Hurst v. State, is similar to Ring, where a procedural change was made. See Schriro, 542 U.S. at 353, 358 ("a rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes…rules that regulate only the **manner of determining** the defendant's culpability are procedural.") (emphasis in original) ("Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review."); Lambrix, 872 F.3d at 1182-83 ("No U.S. Supreme Court decision holds that its Hurst decision is retroactively applicable.").

Similarly, the revised Chapter 2017-1 and § 921.141 is not retroactive to Thompson. After Hurst v. Florida and Hurst v. State, the same class of defendants committing the same range of conduct face the same punishment. The death penalty can still be imposed under the law after the Hurst decisions. Hurst v. Florida, like Ring, merely "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." Summerlin, 542 U.S. at 353. Therefore,

Hurst v. State provides a new procedural rule, and Chapter 2017-1 did not codify a substantive right.

Thompson relies on Alleyne v. United States, 133 S. Ct. 2151 (2013), to argue that the facts necessary to increase the authorized punishment to include death are elements of a new or separate offense. Alleyne does no such thing. Alleyne held that any facts that increase the mandatory minimum sentence for an offense must be submitted to the jury and found beyond a reasonable doubt because "the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty." Alleyne, 133 S. Ct. at 2151, 2155, 2161 n.2. The Court explained, "this is distinct from factfinding used to guide judicial discretion in selecting a punishment within limits fixed by law." Id. "While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing." Id. at 2161, n.2.

Again, the generic use of the word "element" in those discussions does not turn a jury's factual finding into an element of the offense itself. In a first-degree murder charge, the elements include facts like a person is dead and the criminal cause of death. The United States Supreme Court recognized this distinction in Ring when it stated that **aggravators** "operate as the functional equivalent of an element of a greater offense."

Ring, 536 U.S. at 609 (emphasis added). Ring did not elevate the statutory aggravating circumstances into elements of a crime, nor did it create a new crime, nor does 2017-1 make the sentencing factors circumstances elements of the crime. Schriro, 542 U.S. at 354-55.

Thompson also relies on Victorino v. State, 241 So. 3d 48 (Fla. 2018) to argue that since the revised Chapter 2017-1 was not ex post facto law, then logic dictates the codified rule from Hurst v. State was a substantive right that always existed and should be applied to him. Response at 17. However, this conflates separate issues and misapplies the holding of Victorino.

This Court held that Victorino was not entitled to an automatic life-sentence after his death sentence was vacated and a new penalty phase ordered. Victorino, 241 So. 3d at 49-50. Victorino attempted to avoid a new death penalty phase by arguing, "to apply the recent post-Hurst case law retroactively to make the Defendant death-eligible would violate the constitution prohibition as against ex post facto laws." Id. at 50. However, this Court clarified, post-Hurst law as codified by § 921.141 was not an ex post facto change since it did not alter the definition of criminal conduct or increase the penalty by which a crime is punishable. Id. at 50.

Accordingly, the change in law was procedural, not substantive. This Court stated in Hurst v. State that the elements

to establish death penalty had existed in Florida law, but concerning non-final cases post-Ring, additional fact finding "**now** must be conducted by the jury." Hurst, 202 So. 3d at 53 (emphasis added). It was a change in who conducted the factfinding procedure rather than what the factfinding procedure was. Thus, while the substantive elements had existed in Florida Law, who applied those elements to qualify a defendant for death penalty changed from judge to jury. Thompson's attempt to argue that Victorino held otherwise is another repeated attempt to seek retroactivity, and thus, should be denied.

Moreover, nothing in the text of the new statute or legislative history of Chapter 2017-1, Laws of Florida, evinces a legislative intent to abrogate all prior death sentences and require a new penalty phase proceeding for every defendant on death row. Indeed, the Senate Staff Analysis of S.B. 280 refers to the Florida Supreme 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, the 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 legislature certainly did not hint at any desire to expand the application of Hurst to all capital cases. Chapter 2017-1 was not meant to apply as a substantive right as it merely codified the language of Hurst. The new statute is completely procedural and applies to any trial held after the effective date of the statute. Therefore, the new death penalty statute does not apply retroactively to Thompson.

Conclusion

WHREFORE, Appellee, respectfully requests this Honorable Court to affirm the trial court's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 18th day of December, 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Marie-Louise Samuels Parmer, Counsel for Appellant, at marier@samuelsparmerlaw.com AND ccrcpleadings@ccsr.state.fl.us; and Brittney Nicole Lacy, Staff Attorney, at lacyb@ccsr.state.fl.us.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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