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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-1435

WILLIAM THOMPSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
MIAMI-DADE COUNTY, FLORIDA

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..……………………………………………………….ii

ARGUMENT I- THE STATE IS MISTAKEN WHEN IT ASSERTS THAT THIS COURT'S PARTIAL RETROACTIVITY CUT OFF DOES NOT VIOLATE MR. THOMPSON'S EQUAL PROTECTION AND EIGHTH AMENDMENT RIGHTS

……………………………..………..……………………………………………...1

CONCLUSION 9

CERTIFICATE OF COMPLIANCE WITH TYPE AND FONT 10

CERTIFICATE OF SERVICE 10

TABLE OF AUTHORITIES

Cases

Asay v. State, 210 So. 3d 1 (Fla. 2016) ……………………………………....................1,9

Bottoson v. Florida, 537 U.S. 1070 (2002) …..…...3

Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) …..………….................................3

Furman v. Georgia, 408 U.S. 238 (1972)……………………...…………… ..…..2

Glossip v. Gross, 135 S. Ct. 2726 (2015) ………..…....…………………………6

Godfrey v. Georgia, 446 U.S. 420 (1980)……………....………………………...2

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Hitchcock v. State, 226 So. 3d 216 (Fla. 2017)…………………………………....1

Kennedy v. Louisiana, 554 U.S. 407, 436 (2008)……………………………….2

Knight v. Florida, 528 U.S. 990, 120 S.Ct. 459 (1999)……………………..……4

Linkletter v. Walker, 381 U.S. 618 (1965).. 9

Mosley v. State, 209 So.3d 1248 (Fla. 2016)………..1,9

Reynolds v. Florida, 139 S. Ct. 27, 28 (U.S., November 13, 2018).......................4

Sireci v. Florida, 137 S.Ct. 470 (2016)………...3

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State v. Makwanyane & Mchunu, 16 HRLJ 154 (Const'l. Ct. S. Africa 1995).......3

Teague v. Lane, . 489 U.S. 288 (1989)…....…………………………...……… 9

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Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051 (2013)…………..7

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ARGUMENT IN REPLY

THE STATE IS MISTAKEN WHEN IT ASSERTS THAT THIS COURT'S PARTIAL RETROACTIVITY CUT OFF DOES NOT VIOLATE MR. THOMPSON'S EQUAL PROTECTION AND EIGHTH AMENDMENT RIGHTS

The State's Reply to Mr. Thompson's Response to the OTSC "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)," and cognate cases. (Reply, p. 1.) Those cases were wrongly decided and should be reconsidered to the extent that they reject the contentions that this Court's denial of *Hurst*-based relief to inmates whose death sentences were final on June 24, 2002 while granting *Hurst*-based relief to inmates whose death sentences were not yet final on June 24, 2002 (under *Mosley v. State*, 209 So.3d 1248 (Fla. 2016)) violates the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution and that Constitution's Eighth Amendment prohibition against arbitrary capital sentencing.

Mr. Thompson understands that this Court has frequently applied the mid-2002 retroactivity line in cases where death-sentenced inmates in the *Asay* cohort argued that their cases were not rationally distinguishable from those of otherwise similarly situated inmates in the *Mosley* cohort. But this Court has not looked at the big picture and considered the categorical capriciousness of the *Asay-Mosley* divide and how it violates the Equal Protection Clause and the Eighth Amendment.

It should do so here.

The Eighth Amendment requirement of *Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), is that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty" (*id*. at 428). This command "insist[s] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). It refines the older, settled precept that the Equal Protection of the Laws is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). *See*, *e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

The *Asay-Mosley* dividing line drawn by this Court violates these federal rules. To see why this is so, one needs only consider the ways in which condemned inmates in the *Asay* cohort, as a class, do and do not differ from those in the *Mosley* cohort.

What the two cohorts have in common is that both were sentenced to die under a procedure that allowed death sentences to be predicated upon factual findings not tested by a jury trial – a procedure finally invalidated in *Hurst*

although it had been thought constitutionally unassailable under decisions of the United States Supreme Court stretching back a third of a century.[1]

The ways in which the two cohorts differ are more complex. Notably:

(A) Inmates whose death sentences became final before June 24, 2002 have been on Death Row longer than their post-*Ring* counterparts. They have demonstrated over a longer time that they are capable of adjusting to that environment and continuing to live without endangering any valid interest of the State.

(B) Inmates whose death sentences became final before June 24, 2002 have undergone the suffering chronicled in, *e.g.*, *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, [1993] 1 Zimb. L.R. 239, 240, 269(S) (Aug. 4, 1999), and by Justice Breyer, dissenting from the denial of certiorari in *Sireci v. Florida*, 137 S.Ct. 470 (2016),[2] longer than their post-*Ring* counterparts. The United States Supreme Court, "speaking of a period of *four weeks,* not 40 years, once said that a prisoner's uncertainty before execution is 'one of the most

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[1] See *Spaziano v. Florida*, 468 U.S. 447 (1984); *Hildwin v. Florida*, 490 U.S. 638 (1989); and *Bottoson v. Florida,* 537 U.S. 1070 (2002) (denying certiorari to review *Bottoson v. Moore,* 833 So.2d 693 (Fla. 2002)).

[2] *See also*, *e.g.*, *Soering v. United Kingdom and Germany*, 11 EHRR 439 (European Ct. Human Rts, Series A, Vol. 161, July 7, 1989); *Pratt v. Johnson*, [1994] 2 A.C. 1; *State v. Makwanyane & Mchunu*, 16 HRLJ 154 (Const'l. Ct. S. Africa 1995) (opinion of Justice Madala, ¶ [247]).

horrible feelings to which he can be subjected.'" *Id* at 470. "At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes." *Knight v. Florida*, 528 U.S. 990, 120 S.Ct. 459, 462 (1999) (Justice Breyer, dissenting from the denial of certiorari). Although "lengthy delays [of pre-execution confinement on death row] are made inevitable by the Constitution's procedural protections for defendants facing execution [ ], [they] deepen the cruelty of the death penalty and undermine its penological rationale." *Reynolds v. Florida*, 139 S. Ct. 27, 28 (U.S., November 13, 2018) (statement of Justice Breyer respecting the denial of *certiorari*.) That senseless cruelty is particularly obvious when a rule of nonretroactivity categorically denies relief to a class of inmates, that includes Mr. Thompson, *because* they have endured for sixteen and a half years or more awaiting execution.

(C) Inmates, such as Mr. Thompson, whose death sentences became final before June 24, 2002 are more likely than their post-June-24-2002 counterparts to have been given those sentences under standards that would not produce a capital sentence – or even a capital prosecution – under the conventions of decency prevailing today. In the generation since mid-2002, prosecutors and juries have

been increasingly unlikely to seek and impose death sentences.[3] Thus, we can be

[3] See, *e.g.*, BRANDON L. GARRETT, END OF ITS ROPE 79-80 and figure 4.1 (Harvard University Press 2017); DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2016: YEAR END REPORT 2 – 5 (2016); DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2018: YEAR END REPORT 1 – 5 (2018).

A significant factor in the decreasing willingness of juries to impose death sentences has been the development of a professional corps of capital mitigation specialists – experts focused and trained specifically to assist in the penalty phase of capital trials. This subspecialty has burgeoned as a unique field of expertise since the turn of the century. See, *e.g.*, Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 HOFSTRA L. REV. 1161 (2018); Craig M. Cooley, *Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists*, 30 OKLA. CITY U. L. REV. 23 (2005); Russell Stetler, *Why Capital Cases Require Mitigation Specialists*, 3:3 INDIGENT DEFENSE 1 (National Legal Aid and Defender Association, July/August 1999 *available at* https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/why-mit-specs.authcheckdam.pdf; Jeffrey Toobin, *Annals of the Law: The Mitigator*, THE NEW YORKER, May 9, 2011, pp. 32-39. It is fair to say that capital sentencing trials conducted since 2000, when the United States Supreme Court put the legal community on notice regarding the vital importance of developing mitigating evidence (see *Williams v. Taylor*, 529 U.S. 362 (2000)), have been far more likely to present a full picture of relevant sentencing information than pre-*Williams* trials. The explicit requirement that a mitigation specialist be included in capital defense teams was added to the ABA Guidelines in 2003. See American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003 revision), Guidelines 4.(A)(1) and 10.4(C)(2)(a), 31 HOFSTRA L. REV. 913, 952, 999-1000 (2003); and see *id.* at 959-960. Since that time, the collection and presentation of mitigating evidence in capital cases has been increasingly professionalized. See, *e.g.*, *Supplementary Guidelines for the Mitigation of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008).

Another significant factor appears to be that public support for the death penalty is waning. *Compare* Alan Judd, "Poll: Most Favor New Execution Method" *Gainesville Sun*, February 18, 1998, p. 1 ("Asked whether convicted

sure that a significant number of cases which terminated in a death verdict that became final before June 24, 2002 would not be thought death-worthy by 2016 or 2018 standards. We cannot say which specific cases would or would not; but it is plain generically – and even more plain in cases where the jury was almost evenly divided in its penalty recommendation, as it was (7 to 5) in Mr. Thompson's case –

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murderers should be put to death or sentenced to life in prison, 68 percent chose execution. Twenty-four percent preferred life prison terms, while 8 percent offered no opinion.") *with* Craig Haney, "Column: Floridians prefer life without parole over capital punishment for murderers," *Tampa Bay Times*, Tuesday, August 16, 2016, 3:46 p.m., *available at http://www.tampabay.com/opinion/columns/column-floridians-prefer-life-without-parole-over-capital-punishment-for/2289719* (In "a recent poll of a representative group of nearly 500 jury-eligible Floridians. . . . when respondents are asked to choose between the two legally available options — the death penalty and life in prison without parole — Floridians clearly favor, by a strong majority (57.7 percent to 43.3 percent), life imprisonment without parole over death. The overall preference was true across racial groups, genders, educational levels and religious affiliation.") Although direct comparison of these 1998 and 2016 poll results is not possible because the 1998 report does not specify either the precise nature of the population sampled or the exact form of the question asked, the general trend suggested by the two polls is consistent with the evolution of popular opinion regarding the death penalty reflected in national polling and other indicia. See Death Penalty – Gallup Historical Trends – Gallup.com, *available at* http://www.gallup.com/poll/1606/death-penalty.aspx (between 1985 and 2001, the median percentage of the population favoring death was 54.5 %; the median percentage of the population favoring LWOP was 36 %; between 2006 and 2014, the median percentage favoring death was 49%; the median percentage favoring LWOP was 46 %); *Glossip v. Gross*, 135 S. Ct. 2726, 2772-2775 (2015) (Justice Breyer, joined by Justice Ginsburg, dissenting), citing, *e.g.*, Reid Wilson, "Support for Death Penalty Still High, But Down," *Washington Post*, GovBeat, June 5, 2014, online at www. washingtonpost.com/blogs/govbeat/wp/2014/06/05/support-for-death-penalty-still-high-but-down.

that some inmates condemned to die in the era before the middle of 2002 would receive less than capital sentences today.

(D) Inmates whose death sentences became final before June 24, 2002 are more likely than their post-June-24-2002 counterparts to have received those sentences in trials involving problematic factfinding. The past two decades have witnessed a broad-spectrum recognition of the unreliability of numerous kinds of evidence – flawed forensic-science theories and practices, hazardous eyewitness identification testimony, and so forth – that was accepted without question in capital trials conducted before the turn of the twenty-first century.[4] Doubts that

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[4] See EXECUTIVE OFFICE OF THE PRESIDENT, REPORT TO THE PRESIDENT: FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016) (REPORT OF THE PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY [September 2016], *available at* https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf), supplemented by a January 16, 2017 Addendum, *available at* https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensics_addendum_finalv2.pdf); COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY, NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf; ERIN E. MURPHY, INSIDE THE CELL: THE DARK SIDE OF FORENSIC DNA (2015); Jessica D. Gabel & Margaret D. Wilkinson, *"Good" Science Gone Bad: How the Criminal Justice System Can Redress the Impact of Flawed Forensics*, 59 HASTINGS L. J. 1001 (2008); Paul C. Giannelli, *Wrongful Convictions and Forensic Science The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163 (2007); Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051 (2013); Simon A. Cole *Response: Forensic Science Reform: Out of the Laboratory and into the Crime Scene*, 91 TEX. L. REV. SEE ALSO 123 (2013); Michael Shermer, *Can We Trust Crime*

would cloud today's capital prosecutions and cause today's prosecutors and juries to hesitate to seek or impose a death sentence were unrecognized in that earlier era. Evidence which led to confident convictions and hence to unhesitating death sentences a couple of decades ago would have substantially less convincing power to prosecutors and juries today. Concededly, penalty retrials in the older cases would also pose greater difficulties for the prosecution because of the greater likelihood of evidence loss over time. But the prosecution's case for death in a penalty trial seldom depends on the kinds of evidentiary detail that are required to achieve conviction at the guilt-stage trial; transcript material from the guilt-stage trial will remain available to the prosecutors in all cases in which they opt to seek a death sentence through a penalty retrial; it is a commonplace of capital sentencing practice everywhere that prosecutors often rest their case for death entirely or almost entirely on their guilt-phase evidence, leaving the penalty trial as a *locus* primarily for defense mitigation. And even if a prosecutor does opt to seek a

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Forensics?, SCIENTIFIC AMERICAN, September 1, 2015, *available at* http://www.scientificamerican.com/article/can-we-trust-crime-forensics/; *2016 Flawed Forensics and Innocence Symposium*, 119 W. VA. L. REV. 519 (2016); Aliza B. Kaplan & Janis C. Puracal, *It's Not a Match: Why the Law Can't Let Go of Junk Science*, 81 ALBANY L. REV. 895 (2017-18); Alex Kozinski, *Rejecting Voodoo Science in the Courtroom*, WALL STREET JOURNAL, September 19, 2016, *available at* https://www.wsj.com/articles/rejecting-voodoo-science-in-the-courtroom-1474328199**.** And see, illustratively, *William Dillon, available at https://www.innocenceproject.org/cases/william-dillon/.*

penalty retrial[5] and fails to obtain a new death sentence, the bottom-line consequence is that the inmate will continue to be incarcerated for life. That is a substantially less troubling outcome than the prospect of outright acquittals in guilt-or-innocence retrials involving years-old evidence that concerned this Court in *Witt v. State*[6] or concerned the United States Supreme Court in *Linkletter v. Walker*[7] and *Teague v. Lane*[8].

Taken together, considerations (A) through (D) make it plain that the line which this Court has drawn between the *Asay* cohort and the *Mosley* cohort involves an intolerable level of caprice and inequality that denies Mr. Thompson the federal constitutional rights guaranteed by the Eighth Amendment and Equal Protection respectively.

CONCLUSION AND RELIEF SOUGHT

Mr. Thompson asks that this Court squarely address his arguments and vacate his unconstitutional sentence of death.

s/Marie-Louise Samuels Parmer
MARIE-LOUISE SAMUELS PARMER

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[5] But see the preceding point (C).

[6] 387 So.2d 922 (Fla. 1980).

[7] 381 U.S. 618 (1965).

[8] 489 U.S. 288 (1989).

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WE HEREBY CERTIFY that a copy of this Supplemental Reply Brief has been filed with the Court and served on opposing counsel, Assistant Attorney General Melissa Roca Shaw, using the Florida Courts e-filing portal on the 31st day of December, 2018. Counsel further certifies that on the same day a copy has been mailed to Mr. Thompson via U.S. Mail, first class postage prepaid.

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