IN THE SUPREME COURT OF FLORIDA

CASE NOS. SC13-819 & SC14-22

RODERICK MICHAEL ORME,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

RODERICK MICHAEL ORME,
Petitioner,

v.

JULIE L. JONES, ETC.
Respondent.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, STATE OF FLORIDA

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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ARGUMENT I

THE CAPITAL SENTENCING STATUTE UNDER WHICH MR. ORME WAS TRIED, CONVICTED AND SENTENCED TO DEATH IS UNCONSTITUTIONAL, AND AS A RESULT, HIS DEATH SENTENCE STANDS IN VIOLATION OF THE SIXTH AMENDMENT.

In its brief in opposition, the State summarizes the U.S. Supreme Court's decision in Hurst v. Florida, 136 S.Ct. 616 (2016), as follows:

> In *Hurst*, the United States Supreme Court held that Florida's death penalty scheme is unconstitutional under the Sixth Amendment to the extent that it "require[s] the judge alone to find the existence of an aggravating circumstance." *Hurst*, 136 S.Ct. at 624. The Court noted that, under Florida law, although the judge must give the jury recommendation greater weight, the sentencing order must "reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors." *Id*. at 620.

(Supp. Answer Brief at 2). According to the State, the U.S. Supreme Court in Hurst "did not determine capital sentencing to be unconstitutional; *Hurst* only invalidated Florida's procedures for implementation, finding that they facially could result in a Sixth Amendment violation if the judge makes factual findings which are not supported by a jury verdict." (Supp. Answer Brief at 4).

The State's argument, which relies on a portion of a sentence taken out of context from the U.S. Supreme Court's opinion in Hurst, ignores the actual holding in Hurst:

> We hold this sentencing scheme unconstitutional. **The Sixth Amendment requires a jury**, not a judge, **to find each fact necessary to impose a sentence of death.** A jury's mere recommendation is not enough.

(Emphasis added). By beginning this paragraph with the phrase, "We hold", the U.S. Supreme Court has clearly indicated that this

paragraph is what the Hurst decision holds that the Sixth Amendment requires.

Thus, the State's claim that Hurst only holds that Florida's statute is unconstitutional "**to the extent** that it 'require[s] the judge alone to find the existence of an aggravating circumstance'" is simply not a fair reading of Hurst (emphasis added). Indeed, the paragraph from which the State lifted the quoted language to which it seeks to reduce the Hurst opinion provides in full:

> The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

Hurst, 136 S.Ct. at 624. This paragraph makes clear that the Sixth Amendment was violated because Hurst's death sentence was not based upon a jury's verdict, but instead upon a judge's factfinding. The portion of one sentence in the paragraph that the State seeks to treat as the sum total of the opinion merely identifies the most minimal fact that the statute requires the judge alone to find. However, after finding an aggravating circumstance, the statute as the opinion sets out, requires that before a death sentence may be imposed, the judge must find as a matter of fact: 1) that sufficient aggravating circumstances exist, and 2) that insufficient mitigating circumstances exist to outweigh the aggravating circumstances.

This requirement is clearly spelled out in the Hurst opinion when the U.S. Supreme Court identified the factfinding that

Florida law necessitated to be made by the judge instead of the jury. The Hurst opinion quoted the statutorily defined facts that a judge must find before a death sentence can be imposed:

> The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, **the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death.**" Fla. Stat. § 775.082(1) (emphasis added). The trial court alone **must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.**" § 921.141(3).

Id. at 622 (emphasis added) (citations omitted).[1] Nowhere in the Supplemental Answer Brief does the State address the statute quoted in Hurst as identifying the facts that a judge must find in order to impose a death sentence. Nowhere does the State address the "facts" that the statute requires to be found, i.e. "**[t]hat sufficient aggravating circumstances exist**" and "**[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.**" (Emphasis added).

The State further contends that Hurst is not retroactive and that Mr. Orme's case is not a "pipeline" case (Answer Brief at 4). According to the State, Hurst was based on Ring v. Arizona, 536 U.S. 584 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000), which the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, and this Court have all held not to be retroactive

[1]The sentence with which this quote begins is an apt description of the State's position in its Supplemental Answer Brief: "The State fails to appreciate the central and singular role the judge plays under Florida law."

(Answer Brief at 4).[2] Therefore, the State maintains that "[b]ecause *Apprendi* and *Ring* are not retroactive under controlling precedent, then *Hurst*, which was an extension of *Apprendi* and *Ring* to Florida, is not retroactive either for the same reasons." (Answer Brief at 5).

The State's argument is erroneous for several reasons. First, ignored by the State is the fact that even had the federal courts addressed the retroactivity of Hurst, which they have yet to do, such an analysis would have no impact on this Court's determination. When this Court adopted the Witt retroactivity standard, it specifically ruled that it was not bound by the federal standard. Witt v. State, 387 So. 2d 922, 926 (Fla. 1980). This Court found federal retroactivity law too restrictive, and crafted Witt specifically to provide greater, more expansive, more inclusive protection. See Johnson, 904 So. 2d at 409 (reaffirming commitment to "our longstanding *Witt* analysis, which provides more expansive retroactivity standards than those adopted in *Teague* [*v. Lane*, 489 U.S. 288 (1989)]"); see also Hughes v. State, 901 So. 2d 837, 857 (Fla. 2005) (Anstead, J., dissenting) (observing that the federal standard is "considerably more restrictive" than *Witt*).[3]

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[2]Citing to this Court's decision in Johnson v. State, 904 So. 2d 400 (Fla. 2005), the State submits that this Court has controlling precedent holding Ring is not retroactive (Supp. Answer Brief at 6). The State urges this Court to follow the precedent of Johnson (Supp. Answer Brief at 7).

[3]The decision to have a more expansive retroactivity standard was wise because the federal standard was "fashioned upon considerations wholly inapplicable to state law systems."

Moreover, ignored by the State is the fact that this Court's prior retroactivity analysis was both fundamentally flawed and inapplicable to the present situation. In neither Hughes nor Johnson did this Court resolve the retroactivity of Hurst. And while this Court engaged in a retroactivity analysis of Apprendi in Hughes, and of Ring in Johnson, those analyses were infused with this Court's failure to recognize that Apprendi and Ring do in fact apply in Florida, and that as a result, Florida's capital sentencing scheme was unconstitutional.

Hughes and Johnson, decided on the same day, both presumed the inapplicability of Ring in Florida in assessing the impact of Apprendi and Ring under Witt. Because the Witt analysis depends on the impact of the change in the law, a prior finding that there is little to no change profoundly affects the Witt analysis. Now that it is known from Hurst that Apprendi renders Florida's capital sentencing scheme unconstitutional and caused Hildwin v. Florida, 490 U.S. 638 (1989) and Spaziano v. Florida, 468 U.S. 447 (1984) to be overruled, a new assessment under Witt must be conducted. Hurst's retroactivity in Florida must be

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Id. at 861 (Anstead, J., dissenting). The federal standard in Teague is "focus[ed] on the impropriety of disturbing a final conviction, it diverts attention from constitutional violations and prohibits relief except in the very rare case.'" State v. Whitfield, 107 S.W. 3d 253, 268 n. 15 (Mo. 2003) (quotations omitted). "[T]he *Teague* plurality's main focus and concern in adopting a more restrictive view of retroactivity was to limit the scope of federal habeas review of state convictions." Hughes, 901 So. 2d at 862. Indeed, federal habeas courts in capital cases are directed to uphold state court decisions that they find to be incorrect as long as there is some reasoning to support the incorrect ruling. See Williams v. Taylor, 529 U.S. 362, 410 (2000).

assessed, not Apprendi's (which was not a capital case), and certainly not Ring's (which contemplated Arizona's sentencing scheme).

Instead of addressing the actual holding in Hurst and looking to what statutorily defined facts must be found before a death sentence is authorized, the State proceeds to rely on an opinion from this Court which misunderstood the decision in Ring v. Arizona:

> In Florida, a sentence of death is authorized upon the finding of the existence of one aggravating factor. *Zommer v. State*, 31 So. 3d 733 (Fla. 2010)("To obtain a death sentence, the State must prove beyond a reasonable doubt at least one aggravating circumstance"). If there is one aggravating circumstance, death is presumably the appropriate sentence. *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973).

(Supp. Answer Brief at 11).

The State's argument ignores the fact that the sufficiency of the aggravators is a necessary element of capital first degree murder under Florida's capital sentencing scheme. See Swan v. State, 322 So. 2d 485, 489 (Fla. 1975) ("Having considered the total record, we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of the death penalty."). Moreover, ignored by the State is the fact that this Court in addressing Ring claims erroneously believed that the holding in Ring was that the Sixth Amendment merely required a jury to find the existence of an aggravating circumstance. However, as Hurst makes clear, the Sixth Amendment requires the jury to determine all facts statutorily required to be found before a death sentence is authorized. Under Arizona substantive

law, a death sentence was authorized upon the finding of one aggravating circumstance. This Court's Ring decisions failed to address the Sixth Amendment requirement specifically set forth in Hurst that "each fact necessary to impose sentence of death" must be found by a jury. 136 S.Ct. at 619.[4]

Finally, the State asserts that if this Court were to order that Mr. Orme be resentenced, Chapter 2016-13, Laws of Florida would govern (Supp. Answer Brief at 15). Citing to Dobbert v. Florida, 432 U.S. 282 (1977), the State contends that any capital murder committed before the enactment of the new death penalty statute may be tried under the new statute without *ex post* facto concerns (Supp. Answer Brief at 16).

Mr. Orme submits that if the new Florida statute is properly read under Ring and Hurst and properly analyzed under Collins v. Youngblood, 497 U.S. 37 (1990), its enactment only made procedural changes, not substantive ones. See also Weaver v. Graham, 450 U.S. 24, 28 (1981); Carmell v. Texas, 529 U.S. 513 (2000). The changes in the new version of §921.141 would be procedural because they concern how the case is adjudicated and therefore retroactive application of these provisions would not violate the Ex Post Facto Clause.

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[4]Ignoring the holding in Hurst and the statutory requirement that there must be a factual determination that "sufficient aggravating circumstances exist," the State claims that Hurst does not apply here because Mr. Orme's case involves contemporaneous convictions (Supp. Answer Brief at 11-12). However, in Mr. Orme's case the jury did not return a unanimous verdict finding as a matter of fact that sufficient aggravating circumstances existed to justify the imposition of a death sentence or that insufficient mitigating circumstances existed to outweigh the aggravating circumstances.

While the new §921.141 is the Legislature's attempt to comply with Hurst, the statute maintains potential procedural flaws arising from ambiguity in its language. Subsection (2) requires that the jury unanimously find each aggravating factor. Although the new statute requires the jury to determine whether "sufficient aggravating factors" exist to support a death sentence, whether "aggravating factors exist which outweigh the mitigating circumstances found to exist" and whether "the defendant should be sentenced to life imprisonment without the possibility of parole or to death"--the facts Hurst held must be found by a jury--the statute does not expressly require jury unanimity as to any of these factual questions. It merely says a death recommendation occurs when ten jurors vote to recommend death.

However, Florida law requires that the jury unanimously make these factual findings. "[T]he [unanimity] requirement was an integral part of all jury trials in the Territory of Florida in 1838 . . . ." Bottoson v. Moore, 833 So. 2d 693, 714 (Fla. 2002)(Shaw, J., concurring). Likewise, the requirement that Florida juries find elements unanimously has been an "inviolate tenet of Florida jurisprudence since the State was created." Id. Rule 3.440. Fla. R. Crim. P, provides, "[n]o verdict may be rendered unless all of the trial jurors concur in it." Florida juries are instructed, "[w]hatever verdict you render must be unanimous, that is, each juror must agree to the same verdict." Fla. Std. Jury Instr. (Crim.) 3.10.

In the past, this Court has made procedural fixes to

Florida's death penalty scheme through statutory construction when necessary to circumvent and/or overcome perceived constitutional defects in the statute. See e.g., Tedder v. State, 322 So. 2d 908 (Fla. 1975); Songer v. State, 365 So. 2d 696 (Fla. 1978). Mr. Orme submits that to comply with Hurst and longstanding Florida law requiring juror unanimity on elements of a criminal offense, this Court can and should construe the statute as finding that juror unanimity is required as to whether sufficient aggravators exist to justify a death sentence, and whether those aggravators outweigh the mitigating circumstances.

CONCLUSION

Mr. Orme submits that relief is warranted in the form of a life sentence or any other relief that this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Supplemental Reply Brief has been furnished by electronic service to Tineshia Morris, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on this 2nd day of May, 2016.

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