IN THE
SUPREME COURT OF THE UNITED STATES

CASE NO.

LOWER CASE NOS. SC17-1480 and SC17-1484

RONNIE JOHNSON,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

FROM THE SUPREME COURT OF THE STATE OF FLORIDA

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CAPITAL CASE

QUESTION PRESENTED

WHETHER THE BLACK LINE DRAWN BY THE FLORIDA SUPREME COURT IN ASAY v. STATE, 210 So.3d 1 (Fla. 2016), LIMITING THE RETROACTIVE EFFECT OF HURST v. FLORIDA, 577 U.S. —, 136 S.Ct. 616 (2016), TO DEATH SENTENCES THAT WERE FINAL AFTER THE DECISION IN RING v. ARIZONA, 536 U.S. 384 (2002), BUT NOT BEFORE VIOLATED THE SUBSTANTIVE DUE PROCESS CLAUSE AND EQUAL PROTECTIVE CLAUSE OF THE FIFTH AMENDMENT, SIXTH AMENDMENT RIGHT TO JURY TRIAL, AS WELL AS THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AMENDMENT APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

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INTRODUCTION

Petitioner, RONNIE JOHNSON, through counsel, hereby petitions for a Writ of Certiorari from the Supreme Court for the State of Florida which affirmed the Judgment of the Circuit Court for the Eleventh Judicial Circuit, in Miami-Dade County, Florida, denying a Successive Motion for Post-Conviction Relief Pursuant to Fla.R.Crim.P. 3.851 and affirming two Death Sentences imposed in Case Nos. F89-014998 and F89-012383B.

OPINION BELOW

The Supreme Court for the State of Florida issued an Opinion which has been reported as Johnson v. State, 240 So.3d 630 (Fla. 2018). A copy of that Opinion is attached as Appendix "1".

BASIS OF JURISDICTION

RONNIE JOHNSON invokes the jurisdiction of this Court to hear final judgments or decrees issued by the Florida Supreme Court pursuant to Title 28, United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS

AMEND. V–DUE PROCESS/EQUAL PROTECTION

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

AMEND. VI–RIGHT TO TRIAL BY JURY

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . .

AMEND. VIII–PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATUTORY PROVISIONS

Florida Statute Section 921.141, Florida Statute Section 775.082.

STATEMENT OF THE CASE

RONNIE JOHNSON has been sentenced to Death for two murders: Tequila Larkins on March 11, 1989 (F89-014998), and Lee Arthur Lawrence on March 20, 1989 (F89-012383B). The Death Sentences were imposed after two separate trials. At the time of both trials, Florida Statute Section 921.141, provided that a jury of 12 would make a recommendation to the Trial Judge whether to impose the Sentence of Death or Life Imprisonment. That recommendation could be made by a simple majority of the jury.

In F89-014998, the jury recommended that JOHNSON be sentenced to Death by a vote of 9 to 3. In F89-012383B, the jury recommended that JOHNSON be sentenced to Death by a verdict of 7 to 5. In both cases, the Trial Court followed the recommendations of the jury and imposed a Sentence of Death.

Timely Notices of Appeal to the Florida Supreme Court were filed in both cases. In F89-014998, the Conviction and Death Sentence was affirmed on May 8, 1997. Johnson v. State, 696 So.2d 326 (Fla. 1997). A Petition for Writ of Certiorari with this Court was filed, and denied on January 26, 1998. Johnson v. Florida, 522 U.S. 1095 (1998).

In F89-012383B, Johnson's Conviction and Death Sentence was also affirmed on May 8, 1997. Johnson v. State, 696 So.2d 317 (Fla. 1997). A Petition for Writ of Certiorari was denied by this Court on February 23, 1998. Johnson v. Florida, 522 U.S. 1120 (1998). JOHNSON's Convictions and Death Sentences were now final.

In 1997, the Florida Legislature decided to provide post-conviction counsel to inmates under a sentence of death. A one-year limitations period was imposed in order to facilitate capital collateral litigation. A State agency called the Capital Collateral Commission was established to serve as counsel for Death Row inmates. A Registry of private attorneys was created to provide representation when the Capital Collateral Commission had a conflict of interest. As the system was just getting started, it was not until August, 1998, that JOHNSON received Court-appointed counsel.

JOHNSON's original Court-appointed counsel was not able to do his job. He repeatedly requested extensions of the one-year limitations period, which were granted. Finally, by January, 2000, he gave up and withdrew. Mr. White was appointed on February 1, 2000.

Prior to Mr. White's Appointment, JOHNSON had repeatedly written his Court-appointed attorney advising him of the one-year limitations period for filing Petitions in Federal Court pursuant to 28 U.S.C., Section 2254. The attorney was aware of the one-year limitations period provided in Section 2244(d)(1), but did nothing. It would later be determined by the U.S. District Court that the one-year statute of limitations had passed, and a subsequent 2254 Petition dismissed as untimely. JOHNSON's post-conviction claims for relief were never heard by a Federal Court on their merits.

While Mr. White was preparing his Motions for Post-Conviction Relief, this Court decided the case of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Apprendi held that any sentencing factor that increased the maximum penalty was an element of the offense. As an element of the offense, the State was required to prove it beyond a reasonable doubt to a unanimous jury. By Mr. White's estimation, Apprendi's holding invalidated Florida Statute Section 921.141. Allowing a sentence of death be imposed pursuant to the recommendation of a non-unanimous recommendation would violate the defendant's Sixth Amendment right to trial by jury per Apprendi.

On March 1, 2001, JOHNSON filed his initial Motion for Post-Conviction Relief in both cases. He raised the following issue:

> THAT FLORIDA'S DEATH PENALTY PROCEDURE VIOLATED APPRENDI V. NEW JERSEY.

This issue was summarily denied.

In his original Motions for Post-Conviction Relief, JOHNSON raised several other issues, including the following:

> THAT THE SENTENCING JURY WAS MISLED BY COMMENTS, QUESTIONS AND INSTRUCTIONS THAT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PROPERLY ADDRESSING.

This claim was based on this Court's decision in Caldwell v. Mississippi, 472 U.S. 320 (1985). Caldwell held that "[i]t is constitutionally impermissible to rest a death sentence on a determination made by sentencer who has been led to believe that responsibility for determining the appropriateness of defendant's death rests elsewhere." Id., at 328-29. Where a mere majority recommendation can be used to justify the imposition of the death penalty, further diminishing the jury's sense of responsibility for the ultimate outcome encourages arbitrary and unreliable

verdicts/recommendations in violation of the Eighth Amendment. That argument implicated the principles later articulated in Apprendi and its progeny. This issue was summarily denied.

Both Motions for Post-Conviction Relief focused on the ineffective assistance of trial counsel, Raymond Badini. The investigation into Badini's representation in these two cases shared common elements of incompetence of counsel across the board. Badini's incompetence most dramatically manifested itself in his complete failure to have conducted an adequate investigation into JOHNSON's psychological background in order to properly present his case against the death penalty at the Penalty Phase.

Both Motions for Post-Conviction Relief detailed Badini's lack of expertise and/or effort in dealing with the various death penalty issues. Particularly shocking, in light of Badini's demonstrated incompetence, was the fact that he was not even the attorney who was appointed to handle the case by the Trial Court. He was "referred" the case by his landlord, who was the attorney of record throughout the Trial Court proceedings, but had no role in the trial of either one of them. JOHNSON asserted his claim that this illegal referral of two death penalty cases against the same person from an experienced attorney to a relatively inexperienced one in capital cases was error for which prejudice could be presumed.

Badini's preparation for the Penalty Phase was non-existent. Despite the passage of 30 months from Arraignment to the first trial, which was the murder of Tequila Larkin in F89-014998, Badini failed, neglected, or refused to have a forensic psychiatrist or psychologist evaluate JOHNSON. During jury selection, Badini admitted to the Trial Judge that he had not had JOHNSON evaluated, but offered as an excuse that all the forensic psychiatrists and psychologists available were refusing to take cases because of an alleged refusal by Miami-Dade County to pay their fees. The Trial Judge reached out to Lloyd Miller, M.D., a local forensic psychiatrist, and asked him to "evaluate Johnson as a favor for free."

At an Evidentiary Hearing held to determine whether Badini's representation at Penalty Phase was constitutionally deficient because of his failure to have presented mental health mitigation, JOHNSON acknowledged that Dr. Miller had come to see him at the jail during trial. The interview lasted no more than 15 minutes, and the questions asked were focused on competency to stand trial rather than a search for mitigating evidence. After this short interview, Dr. Miller told Badini he would not be any help.

In the four months that transpired following the Penalty Phase in F89-014998, and the trial of the murder of Lee Arthur Lawrence in Case No. F89-012383B, Badini made no further effort to have JOHNSON psychologically

evaluated. No evidence of JOHNSON's mental health was presented to the jury in either Penalty Phase.

At the Evidentiary Hearing, JOHNSON called Merry Haber, Ph.D., a forensic psychologist, who specialized in death penalty mitigation, and was practicing at the time of JOHNSON's trials. Dr. Haber diagnosed JOHNSON with certain personality disorders. She identified an adjustment disorder with mixed disturbance of emotions and conduct, and a sexual disorder derived from discomfort with his homosexuality. These disorders were recognized in the DSM-III, which was in use at the time of JOHNSON's trials. Dr. Haber attributed these disorders to maladjustments from a series of stressors that had occurred in JOHNSON's life almost immediately before his murder spree, which were aggravated by the shame he experienced as a homosexual and substance abuser. These traumatic effects included the deaths of close friends and relatives as well as the disability of a beloved grandmother, and produced the stressors on his psyche which altered his behavior. While Badini had presented some testimony about these events, he had only sought their use to curry sympathy from the jury. This argument was viciously mocked by the prosecutor.

Dr. Haber explained that JOHNSON's repressed homosexuality, particularly his maladjustment to it, pushed him over the edge, and put his life into a tailspin.

He would sneak out of his mother's house dressed in women's clothing to prostitute himself for drugs. Due to the shame that overt homosexuality brought him in the macho African-American ghetto environment where he lived, JOHNSON felt compelled to prove his manhood by killing people targeted by a local drug dealer. (That drug dealer, Bobby Robinson, was released from prison in 2008). Haber testified how the adjustment disorders she had diagnosed adversely affected his judgment. She noted that JOHNSON's psychological profile offered a far different picture of his motivations and mental conditions from the cold-blooded killer for hire portrayed by the State. None of JOHNSON's personality disorders, including his homosexuality and his maladjustment to it, were uncovered by Badini during his representation. No other mental health professional than Dr. Miller had interviewed JOHNSON. The homosexuality issue was only relevant to the death penalty due to JOHNSON's maladjustment, not because he was a homosexual. The Trial Court denied relief on this issue as well.

Both Motions for Post-Conviction Relief were denied on January 17, 2003. JOHNSON filed timely Notices of Appeal to the Florida Supreme Court. One of the issues raised in both cases stated as follows:

> THAT THE TRIAL COURT ERRED IN DETERMINING THAT FLORIDA'S PENALTY PHASE PROCEDURE DID NOT VIOLATE APPRENDI V. NEW JERSEY, 530 U.S. 466 (2000).

On March 31, 2005, the Florida Supreme Court affirmed the Trial Court's denial of JOHNSON's Motions for Post-Conviction Relief in both cases: Johnson v. State, 921 So.2d 490 (Fla. 2005) [F89-014998], Johnson v. State, 903 So.2d 888 (Fla. 2005) [F89-012383B].

During the pendency of litigation at the Trial Court level, this Court had handed down Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L..Ed.2d 556 (2002). Ring had applied the principles of Apprendi to Arizona's Death Penalty Statute. It reinforced the constitutional principle established in Apprendi that sentencing factors are elements of the offense that must be proven beyond a reasonable doubt through unanimous verdicts. The Florida Supreme Court rejected JOHNSON's argument stating in identical language in both cases:

> Johnson argued 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 509, 903 So.2d at 900.

On January 12, 2016, the United States Supreme Court declared that Florida's capital sentencing scheme, under which an advisory jury makes a recommendation to the Judge, and the Judge makes the critical findings needed for imposition of a death sentence, violated the Sixth Amendment right to trial by jury, overruling Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), and abrogating Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), Tedder v. State, 322 So.2d 908 (1975), Blackwelder v. State, 851 So.2d 650 (Fla. 2003), and State v. Steele, 921 So.2d 538 (2005). Hurst v. Florida, 577 U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The Court held that Florida Statute Section 921.141, the capital sentencing statute under which Hurst was sentenced to death, was unconstitutional "to the extent it failed to require the jury, rather than the Judge to find the facts necessary to impose the death sentence–the jury's advisory recommendation for death was "not enough." Hurst v. Florida, 136 S.Ct. at 619. The Supreme Court refused to take up the issue of whether the error in sentencing was harmless, remanding the case to the Florida Supreme Court to consider whether the error was harmless beyond a reasonable doubt. Hurst v. Florida, 136 S.Ct. at 624. The Court did not make any findings as to retroactivity.

On October 14, 2016, the Florida Supreme Court on remand evaluated the effect the U.S. Supreme Court decision had on Florida's capital sentencing scheme. Hurst v. State, 202 So.3d 40 (Fla. 2016). The Court considered the evolution of the Sixth Amendment right to trial by jury both before and after Ring. The Court noted that the U.S. Supreme Court had originally held in Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), that Arizona's death penalty law "was compatible with the Sixth Amendment because the facts found by the Judge qualified as sentencing considerations, not as 'element[s] of the offense of capital murder.'" Hurst, 202 So.3d at 47, quoting Ring, 536 U.S. at 588, 122 S.Ct. 2428 (quoting Walton, 497 U.S. at 649, 110 S.Ct. 3047). The Court further noticed that ten years after Walton, the U.S. Supreme Court decided Apprendi, in which it held that the Sixth Amendment does not permit a defendant in a non-capital case, without additional jury findings, to be exposed to a penalty exceeding the maximum he would receive if the punishment was based only on the facts reflected in the jury's guilty verdict. Implementing the same principle in Ring–and applying it to capital defendants–the Supreme Court stated that "[t]his prescription governs . . . even if the State characterizes additional findings made by the Judge as 'sentencing factor[s].'" Id., quoting Ring, 536 U.S. at 589, 122 S.Ct. 2428 (quoting Apprendi, 530 U.S. at 492, 120 S.Ct. 348).

The Florida Supreme Court acknowledged that the U.S. Supreme Court in Ring had held, "capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any facts on which the Legislature conditions are inclusive of the maximum punishment." Id., quoting Ring, 536 U.S. at 589, 122 S.Ct. 2428. The Court further found that a defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless the Judge makes critical factual findings that allow the imposition of the sentence of death. Id., at 48-49, quoting Ring, 536 U.S. at 602, 122 S.Ct. 2428. Ring then overruled Walton, and the jury's role in determining critical facts in homicide cases under the Sixth Amendment invalidated Arizona's capital sentencing scheme. "[J]ust as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder–must allow an imposition of the death penalty–and also elements that must be found unanimously by the jury." Hurst, 202 So.2d at 53-54. The Court went on to hold that "in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the *aggravating factors are sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be

considered by the Judge." Id., at 54. The jury's recommendation for death must be unanimous. Id.

On January 12, 2017, JOHNSON filed Successive Motions for Post-Conviction Relief in both cases. Citing both this Court's and the Florida Supreme Court's decisions in Hurst, JOHNSON argued that since the statute under which he had been twice sentenced to death violated the Constitution, his death sentences should be vacated. Although the Florida Supreme Court had remanded Hurst for a new Penalty Phase, JOHNSON contended that he should be resentenced to life imprisonment pursuant to Florida Statute Section 775.082(2), which states in pertinent part:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the Court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the Court, and the Court shall sentence such person to life imprisonment as provided in subsection (1).

In the alternative, JOHNSON requested a new Penalty Phase.

JOHNSON also contended that Hurst should be retroactively applied to his cases. Since he had raised the issue in his State habeas petitions, and the Florida Supreme Court had denied relief on the merits, he should benefit from a change in the law that validated his position. The cases relied upon by the Florida Supreme

Court to deny him relief had been abrogated by this Court in Hurst. Without those cases, JOHNSON deserved relief.

The Trial Court rejected JOHNSON's claim that Hurst should be applied retroactively to him. After hearing Oral Argument, both Successive Motions for Post-Conviction Relief were denied on June 5, 2017. Timely Notices of Appeal were filed to the Florida Supreme Court.

The sole issue on appeal was whether Hurst was retroactive to JOHNSON's cases. There was no question that if Hurst was applicable, he would be entitled to new Penalty Phase Trials. What prevented JOHNSON from enjoying the fruits of Hurst was a "black line" drawn by the Florida Supreme Court. The Florida Supreme Court had held that Hurst would only apply to those cases where the death penalty became final after this Court's decision in Ring. Hitchcock v. State, 226 So.3d 216 (Fla. 2017); Asay v. State, 210 So.3d 1 (Fla. 2016).

RETROACTIVITY ANALYSIS BY THE FLORIDA SUPREME COURT–DRAWING THE BLACK LINE

Hurst was decided on direct appeal and made no findings as to retroactivity for those sentenced to death whose convictions were already final. The Florida Supreme Court initially considered the issue of retroactivity in Mosley v. State, 209 So.3d 1248 (Fla. 2016).

Mosley's case was on appeal from the trial court's denial of his Motion for Post-Conviction Relief Pursuant to Rule 3.851 when the U.S. Supreme Court case of Hurst v. Florida was decided. He filed a Motion requesting leave to file supplemental briefing to address the impact of Hurst v. Florida on his case. The Florida Supreme Court granted the Motion, and Mosely submitted supplemental briefing contending that he was entitled to relief under Hurst v. Florida, and his sentence of death must be vacated because of the jury's non-unanimous death recommendation. The Florida Supreme Court in Mosely decided to apply Hurst v. Florida to habeas petitioners whose convictions were final after the U.S. Supreme Court decided Ring. Id., at 1283.

The Florida Supreme Court in Mosely based its finding of retroactivity on its analysis of Hurst v. Florida as not relying on new jurisdictional developments in Sixth Amendment case law, but directly on Ring, which was decided in 2002. 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).

Mosley, at 1273, quoting Hurst v. Florida, 136 S.Ct. at 621-22.

Thus, in holding Florida's Death Penalty Statute unconstitutional, the U.S. Supreme Court had applied the exact reasoning of Ring.

The Florida Supreme Court in Mosley used the Ring case as the dividing line separating those cases for which Hurst v. Florida would apply retroactively. So long as the conviction and sentence of death were final after Ring, then the post-conviction litigant would be able to raise the unconstitutionality of Section 921.141 when seeking relief from the death penalty. If the conviction and sentence of death became final before Ring, then Hurst v. Florida would be unavailable. At the least, JOHNSON contends that Hurst v. Florida's holding should be applied to him because he raised the issue in his first Post-Conviction

Motion immediately after the U.S. Supreme Court decided Apprendi v. New Jersey in 2000. Apprendi was the first case decided by the U.S. Supreme Court that held that any fact that raised the maximum penalty for an offense was an element that needed to be proven by the jury beyond a reasonable doubt. Apprendi was the prerequisite to Ring. Ring applied the holding in Apprendi to capital cases.

The Florida Supreme Court in Mosley clearly understood the significance of Apprendi to the holding in Ring.

> It was not until Ring that the United States Supreme Court applied its reasoning from Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), holding that a jury must find every fact necessary to increase the maximum punishment, to capital sentencing. Ring, 536 U.S. at 589, 122 S.Ct. 2428. In the words of Justice Scalia, Ring brought about 'new wisdom':
>
> The 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. Id. at 609, 122 S.Ct. 2428. Ring specifically overruled Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), but failed to address the constitutionality of Florida's capital sentencing scheme by not discussing Hildwin or Spaziano, thereby leaving those decisions intact to support an argument that Florida's capital sentencing scheme remained valid. Ring, 536 U.S. at 603, 122 S.Ct. 2428. Thus, this Court continued to rely in good faith on precedent supporting the validity of Florida's capital sentencing scheme, despite doubt about its constitutionality. The plurality in Bottoson v. Moore concluded that it was within the purview of the United States Supreme Court to overrule Hildwin and Spaziano to the extent they upheld Florida's

> death penalty statute from Sixth Amendment attacks. Nevertheless, the Florida Legislature did not revise our capital sentencing statute until 2016, after the United States Supreme Court decided Hurst v. Florida. While inaction was clearly within the Legislature's prerogative, it is now for this Court to determine whether to deny relief to those defendants who were sentenced to death under an invalid statute based solely on the United States Supreme Court's delay in overruling Hildwin and Spaziano.
>
> Because Florida's capital sentencing statute has essentially been unconstitutional since Ring in 2002, fairness strongly favors applying Hurst, retroactively to that time. The "extent of reliance" prong is not a question of whether this Court properly or in good faith relied on United States Supreme Court precedent, but how the precedent changed the calculus of the constitutionality of Florida's death penalty scheme.

Mosley at 1279-80.

JOHNSON contends that Ring was born of Apprendi, and the "black line" should have been extended to 2000 at least, assuming that any "black line" could be drawn that does not violate equal protection. That JOHNSON acted within the time period for seeking State habeas relief should at least entitle him to the benefit of Apprendi/Ring holdings.

On the same day that Mosley was decided, the Florida Supreme Court decided the case of Asay v. State, 210 So.2d 1 (Fla. 2016). In Asay, the murders took place on July 17, 1987. Asay's conviction and sentence of death became final on October 7, 1991. He filed a Motion for Post-Conviction Relief in 1993. After being denied by the Circuit Court, the Florida Supreme Court denied relief on

October 26, 2000. A Petition for Writ of Habeas Corpus filed before the Florida Supreme Court on October 25, 2001, which denied relief on October 4, 2002. It was not until 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. Id., at 19.

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. Id., at 36-41 (PERRY, J., dissenting).

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 fact-finding and unanimity in Florida's capital sentencing procedure at the trial level and on direct appeal, the underlying gravamen of this entire issue." Id., at 30-31 (LEWIS, J., concurring).

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 represented 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).

Justice Pariente's conclusions were based, in part, on the holding of the Florida Supreme 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.

Although JOHNSON did not specifically raise a Sixth Amendment issue at trial or direct appeal, he did raise one at his initial Motion for Post-Conviction Relief filed before Ring. In both his cases, non-unanimous jury recommendations containing no findings of fact were made. A judge made findings of fact to impose the death penalty, which was later prohibited by Hurst, and, he argued, always prohibited by Apprendi. Fla.R.Crim.P. Rule 3.851 describes the procedure for collateral relief after a death sentence has been imposed. The grounds for relief are set forth in Rule 3.850. Rule 3.850(a)(1) permits a person in custody to vacate a judgment when [t]he judgment was entered or sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida." JOHNSON's sentence was imposed in violation of Apprendi although he had to wait sixteen

years until Hurst v. Florida by the U.S. Supreme Court, and later the Florida Supreme Court to agree with him. Full retroactivity should be extended to JOHNSON and all others similarly situated.

Having determined that the statute that was used to sentence JOHNSON to death has been declared unconstitutional in violation of the Sixth Amendment, his remedy should be a remand for the imposition of a life sentence. See, Florida Statute Section 775.082(2) (2016). See also, Simmons v. State, 207 So.3d 860 (2016) (PERRY, J., concurring in part and dissenting in part); Hurst v. State, 202 So.3d 40, 75-76 (Fla. 2016) (PERRY, J., concurring in part and dissenting in part).

In Hitchcock v. State, 226 So.3d 216 (Fla. 2017), the Florida Supreme Court affirmed the black line rule 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 which became final in 2000, before Ring.

Justice Lewis wanted to extend Hurst to those cases final before Ring where defendants made objections during trial or direct appeal. Those defendants "who properly preserve the substance of a Ring challenge at trial and on direct appeal prior to that decision should also be entitled to have their constitutional challenges heard." Id., at 219. (LEWIS, J., concurring).

Justice Pariente dissented. She again challenged the black line drawn by the majority in Asay. Stating, "[t]o deny Hitchcock relief when other similarly situated defendants have been granted relief amounts to a denial of due process." Reiterating her prior dissent in Asay, she concluded that the right announced in Hurst under both the Sixth and Eighth Amendment required full retroactivity. While agreeing that the preservation of error approach taken by Justice Lewis was preferable to the black line, "this resolution still results in the additional arbitrariness of defendants being granted a new penalty phase only if their lawyers have the foresight to raise an issue that was repeatedly determined to be meritless before Ring." Id., at 222. (PARIENTE, J., dissenting).

Justice Pariente, in her dissent, opened the door to a consideration of whether the death sentence was reliable based on the existence of strong mitigation. Noting that the jury's most recent vote to recommend Hitchcock be sentenced to death was 10-2, the existence of significant mitigating evidence as well as the lack of clarity why two jurors determined that death was not the appropriate punishment in the case, she concluded that the Hurst error was not harmless beyond a reasonable doubt. Id., at 222-23. (PARIENTE, J., dissenting).

JOHNSON contends that he had demonstrated meritorious psychological mitigation at his State habeas evidentiary hearing sufficient to show prejudice

arising from the ineffectiveness of trial counsel at Penalty Phase. Eight jurors over two trials who voted for life did so in the absence of a competent presentation of mitigating evidence. JOHNSON would not likely have received his death sentences had the jury's recommendation for death need have been unanimous.

After handing down the Hitchcock decision, the Florida Supreme Court issued a Rule to Show Cause demanding JOHNSON explain why its ruling should apply to him. JOHNSON filed a timely Response.

On March 27, 2018, the Florida Supreme Court affirmed the denial of JOHNSON's Successive Motions for Post-Conviction Relief in both cases rejecting his Hurst claim. Following Hitchcock, the Court held that JOHNSON was not entitled to relief under Hurst because his sentences of death became final in 1998 before Ring. Justice Pariente dissented for the same reasons she discussed in her dissent in Hitchcock.

This Court in Hurst declared Florida's Death Penalty Statute unconstitutional as it permitted a sentence of death upon less than a unanimous jury recommendation. The Florida Supreme Court decided to make this holding retroactive, but drew an arbitrary line where similarly situated defendants would either receive a new Penalty Phase or not depending upon when their sentence of death became final. This Court should accept certiorari in this case to erase that

line and grant full retroactivity to those under a sentence of death imposed under an unconstitutional statute.

REASONS WRIT SHOULD BE GRANTED

Death penalty cases are a class apart from non-death penalty cases. Furman v. Georgia, 408 U.S. 238, 285-87, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). That "death is different" compels a closer look at the application of constitutional principles implicated by a process that is irrevocable. The finality of a death sentence, the inability to take it back, the unavailability of a redo, flips the argument for finality. A prisoner wrongfully incarcerated will be released, but a prisoner put to death cannot be resurrected.

In Furman, Justice Douglas, in his concurring Opinion, described the history of the Eighth Amendment from its antecedents in England following the Norman Conquest to its inclusion in the Bill of Rights. "It is [ ] settled that the proscription of clear and unusual punishments forbids the judicial imposition of them as well their imposition by the Legislature." Id., at 239, 92 S.Ct. at 2728, (MARSHALL, J., concurring), citing Weems v. United States, 217 U.S. 349, 378-82, 30 S.Ct. 544, 553-55. 54 L.Ed. 783 (1910).

Justice Marshall quoted with approval a witness's statement at Hearings before the House Judiciary considering a Bill that would abolish all executions,

who stated the following:

> Any penalty, a fine, imprisonment or the death penalty could be unfairly or unjustly applied. The vice in this case is not in the penalty but in the process by which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties, or on any innocent parties, regardless of what the penalty is.

Id., at 247-48, 92 S.Ct. at 2731, (MARSHALL, J., concurring), quoting Hearings before Subcommittee No. 3 of the House Committee on the Judiciary, 92nd Cong., 2d Sess., Ernest van den Haag, testifying on H.R. 8414, et al., at 116-17.

Justice Marshall famously documented the existence of racial disparities in the imposition of the death penalty that supported his contention that regardless of the intent of the Framers, the death penalty was being imposed in an arbitrary and capricious manner.

Justice Brennan traced the historical effort to define what constituted cruel and unusual punishment. He, too, explained how "death is different".

> There has no national debate about punishment, in general or by imprisonment, comparable to the debate about the punishment of death. No other punishment has been so continuously restricted, see, infra, at 2755-2757, nor has any State yet abolished prisons, as some have abolished this punishment. And those state that still inflict death reserve it for the most heinous crimes. Juries, of course, have always treated death cases differently, as have governors exercising their commutation powers. Criminal defendants are of the same view. 'As all practicing lawyers know, they have defended persons charged with capital offenses, often the only goal possible is to avoid the death penalty.' Griffin v. Illinois, 351 U.S. 12, 28, 76 S.Ct. 585, 595, 100 L.Ed. 891 (1956) (BURTON and MINTON, J.J., dissenting). Some Legislatures have required particular procedures, such as two State trials and automatic appeals, applicable only in

> death cases. 'It is the universal experience in the administration of criminal justice that those charged with capital offenses are granted special consideration.' Ibid. See, Williams v . Florida, 399 U.S. 78, 103, 90 S.Ct. 1893, 1907, 26 L.Ed.2d 446 (1970). (All states require juries of 12 in death cases). This Court, too, almost always treats death cases of a class apart. And the unfortunate effect of this punishment upon the functioning of the judicial process is well known; no other punishment has a similar effect.

Id., at 286-287, 92 S.Ct. at 2750-2751 (BRENNAN, J., concurring).

Justice Brennan goes on to explain that a person executed by the State loses the "right to have rights." Id., at 290, S.Ct. at 2752 (BRENNAN, J., concurring).

> Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been for a lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, see, Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), yet the finality of death precludes relief. An executed person has indeed 'lost the right to have rights.' As one 19th century proponent of punishing criminals by death declared 'When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere.'

Id., at 290, S.Ct. at 2752-53 (BRENNAN, J., concurring).

Justice Stewart noted that "[t]hese death sentences are cruel and unusual in the same way as being struck by lightening is cruel and unusual." He found "the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." Although he found that racial

discrimination had not been proven, he concluded that the death penalty should not be imposed "under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." Id., at 309-10, 92 S.Ct. at 2762-63 (STEWART, J., concurring). Justice Stewart was joined by Justice White in concluding that the sentencing processes (or procedure) used to impose the death penalty in the various states rendered the death penalty cruel and unusual under the Eighth Amendment.

The effect of Furman was, of course, to invalidate all of the death penalty capital sentencing statutes in effect in all the states. By operation of law, death sentences were reduced to life imprisonment. There were no more executions in the United States for several more years.

Although an Eighth Amendment case, the majority in Furman found fault with the death penalty as applied by the Courts, not as an excessive exercise of legislative authority. In the wake of Furman, the death penalty was resurrected in almost all of the States as well as by Congress.

The Florida Legislature passed Section 921.141, which required that a defendant convicted of a capital felony must be provided a bifurcated trial, with a separate sentencing proceeding following his conviction to determine whether he should receive the death penalty or life imprisonment. The jury would reach the decision by a majority vote. The Florida Supreme Court rejected a constitutional

challenge to Section 921.141 under the Fifth Amendment Due Process and Eighth Amendment. Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, sub nom., Spinkellink v. Florida, 428 U.S. 911 (1976), rehearing denied, 492 U.S. 874 (1976). Spinkellink sought habeas relief in the Federal Courts where Section 921.141 again passed constitutional muster. Spinkellink v. Wainright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979). rehearing denied, 441 U.S. 937 (1979). See also, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 9131 (1976).

In reacting to Hurst v. Florida, the Florida Supreme Court finally awoke to a fundamental defect in Section 921.141; to-wit: the recommendation of a Penalty Phase jury can be by majority vote.

JOHNSON's juries were instructed by the Court that they needed to find the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt to recommend death. But it was the Judge who was the ultimate sentencer. There always existed the fear that jurors would not understand the vital importance of their recommendation, and vote for death thinking that if their judgment mistaken, the Judge will correct it. As addressed in Caldwell, supra, caution must be exercised when instructing a jury to prevent them from delegating

the responsibility of imposing the death penalty on the Judge, rather than as the unanimous judgment of the jury as a whole.

In Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), this Court held that although the Sixth Amendment compelled the United States Courts to require that jury verdicts be unanimous, the unanimity requirement was not forced on the states through the Fourteenth Amendment. The Florida Courts could theoretically apply Apodaca to maintain the majority recommendations of an advisory jury in a capital case without offending the Sixth Amendment, but how does that square with the fact that every other jury decision in Florida is based upon a unanimous verdict? Given the unique characteristics, and the irrevocable penalty recognized by all Courts in capital cases, permitting a majority recommendation violated equal protection.

The notion of jury unanimity and proof beyond a reasonable doubt for every element of the offense as propounded by Apprendi and Ring has finally been recognized by the Florida Supreme Court. This union of Sixth Amendment with Eighth Amendment rights created a substantive rule, not a procedural one. In non-capital cases, where juror unanimity was a given, Apprendi and its progeny taught that it was for a jury to decide beyond a reasonable doubt any sentencing factor. This caused the Federal Courts to uniformly hold that relief under Apprendi would

not be given to any convictions final before it was decided.

But "death is different". The reliability of the fact-finding process requires proof beyond a reasonable doubt and a unanimous jury. An unreliable result violates the Eighth Amendment.

This Court in Hurst v. Florida invalidated Florida's Death Penalty Statute on Sixth Amendment grounds. The Sixth Amendment violations went to the heart of the reliability of the findings of fact relied upon by the sentencing Judge deciding whether to impose the death penalty. It was that Sixth Amendment violation that constituted the Eighth Amendment violation. Rather than restrict the retroactivity of Hurst v. Florida to those death sentences that were final after Ring, it should be applied to vacate all death sentences imposed by a majority recommendation from the advisory Penalty Phase jury. There is no justification for drawing a black line above which constitutional violations are corrected, and below which they are not. Such a result not only tarnishes the credibility of Florida's death penalty on those already executed, but it raises the monstrous prospect of persons like JOHNSON being executed based upon sentences of death imposed in violation of the U.S. Constitution.

This Court should grant certiorari in order to correct the error made that the Florida Supreme Court in Asay when it drew that black line, and erase it.

CONCLUSION

Upon the arguments and authorities aforementioned, Petitioner requests this Court accept certiorari in this case.

Respectfully submitted,

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