Filing # 38931309 E-Filed 03/11/2016 03:44:00 PM

RECEIVED, 03/11/2016 03:48:30 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC03-2282

BOBBY RALEIGH,

Petitioner,

v.

JULIE L. JONES,

Respondent.

_____/

MOTION TO REPOPEN HABEAS PROCEEDING AND ORDER BRIEFING IN LIGHT OF *HURST V. FLORIDA*

COMES NOW the Appellant, **BOBBY RALEIGH**, by and through undersigned counsel, and herein moves the Court to reopen the habeas proceeding in Case No. SC03-2282 initiated in 2003, and order the parties to provide supplemental briefing and argument as to the effect of the recent decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), on Mr. Raleigh's death sentence. In support thereof, Mr. Raleigh states as follows:

1. Mr. Raleigh is a Florida death-sentenced inmate. In June of 1995, Mr. Raleigh pled guilty to two counts of first degree murder; one count was for the Doug Cox homicide, the other was for the Tim Eberlin homicide. At the time of the guilty plea, the State entered a nolle prosequi on a separate burglary charge.

2. In August of 1995, a penalty phase proceeding was conducted before a jury. The jury was repeatedly instructed that its verdict would be an advisory sentencing recommendation. A

juror who expressed frustration with the prosecutor's cross-examination of the defense's mental health expert was removed from the jury at the State's request.[1]

3. Mr. Raleigh's jury was instructed on six aggravating circumstances: 1) pecuniary gain; 2) in the course of a burglary; 3) avoid arrest; 4) cold, calculated and premeditated; 5) heinous atrocious or cruel; and 6) the previous conviction of a violent felony. The jury was also instructed that it was first required to determine if sufficient aggravating circumstances existed to justify a death sentence, and then determine if insufficient mitigating circumstances were present to outweigh the aggravating circumstances. The jury returned two unanimous death recommendations. The jury did not indicate in any fashion which of the six aggravating circumstances each juror found as to each homicide.

4. Subsequently, the judge when imposing death sentences found three aggravating circumstances as to Douglas Cox homicide. These included: 1) in the course of a burglary; 2) cold, calculated and premeditated; and 3) the previous conviction of a violent felony (the guilty plea as to the Tim Eberlin homicide).

---

[1]In Mr. Raleigh's direct appeal, this Court wrote: "we are bound to follow the trial court's ruling absent an abuse of discretion. Because reasonable persons could agree with the trial court's ruling, we find no abuse of discretion and thus no error." *Raleigh v. State*, 705 So. 2d 1324, 1328 (Fla. 1998).

5. As to the Tim Eberlin homicide, the judge found four aggravating circumstances: 1) in the course of a burglary; 2) avoid arrest; 3) heinous, atrocious or cruel; and 4) the previous conviction of a violent felony (the guilt plea as to Douglas Cox homicide.

6. The judge specifically found that the State had not proven the pecuniary gain aggravating circumstance as to either homicide. He also concluded that the avoid arrest aggravator and the HAC aggravator did not apply to the Cox homicide. And, he concluded that the CCP aggravator did not apply to the Eberlin homicide. As to the in the course of the burglary aggravator, the judge rejected the defense's contention that there had been no burglary committed because Mr. Raleigh's entry into the trailer was with the consent of Eberlin.[2]

7. As to mitigating circumstances, the judge refused to instruct the jury regarding the no significant history of prior criminal activity. In his sentencing order, the judge found one statutory mitigating circumstance was present: Mr. Raleigh's age (19 years old) at the time of the homicides. He rejected the substantial domination statutory mitigator. The judge then found fifteen non-statutory mitigating circumstances. However, the judge refused to find the life sentences imposed on Mr. Raleigh's

[2]Mr. Raleigh was not convicted of a burglary and did not plead guilty to a burglary.

co-defendant was a mitigating circumstance.

8. On appeal, Mr. Raleigh argued that the jury had been improperly instructed to consider the pecuniary gain aggravator even though the judge concluded that it had not been proven beyond a reasonable doubt. *Raleigh v. State*, 705 So. 2d at 1327-28.[3] Mr. Raleigh also challenged all of the aggravating circumstances found by the sentencing judge as improperly found, except for the aggravator premised upon the contemporaneous homicide convictions. As to this aggravator, Mr. Raleigh argued: "This Court has recognized that, where this aggravating factor is based on contemporaneous crimes arising out of a single criminal episode, the import of the aggravating factor is lessened. *Terrv v, State*, 668 So. 2d 954 (Fla. 1996)." Initial Brief, *Raleigh v. State*, Case No. SC87,584 at 35. Rejecting Mr. Raleigh's arguments, this Court affirmed. *Raleigh v. State*, 705 So. 2d at 1331.

9. In 2003, Mr. Raleigh filed a petition for a writ of habeas corpus with this Court. In his habeas petition, Mr. Raleigh argued that his death sentences stood in violation of the Sixth Amendment principle set forth in *Ring v. Arizona*, 536 U.S. 584 (2002). Mr. Raleigh specifically argued that under § 921.141

---

[3]It is not known if any or all of the jurors relied upon this aggravating circumstances in returning the death recommendations even though the sentencing judge ultimately determined that there was insufficient evidence to establish this aggravator.

a death sentence was not authorized unless it was determined as a matter of fact that: "(a) The sufficient aggravating circumstances exist as enumerated in subsection (5), and (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Petition at 8. Mr. Raleigh explained:

> Florida Statute Section 921.141 (3) requires the trial judge to make three factual determinations before a death sentence may be imposed. The trial judge (1) must find the existence of at least one aggravating circumstance, (2) must find that "**sufficient** aggravating circumstances exist" to justify imposition of death, and (3) must find that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." If the judge does not make these findings, "the court **shall** impose a sentence of life imprisonment in accordance with [Section] 775.082." *Id.* (emphasis added). Hence, under a plain reading of the statute, it is not sufficient that an aggravating circumstance is merely present because Florida is a weighing state.

Petition at 15. Accordingly, "[t]he full panoply of rights associated with trial by jury must therefore attach to the finding of 'sufficient aggravating circumstances.'" Petition at 18. But because Florida law failed to extend the right to a jury determination of the statutorily defined facts, Mr. Raleigh argued that: "The Florida capital scheme violates the constitutional principles recognized in *Ring*." Petition at 23-24.

10. This Court rejected Mr. Raleigh's challenge to his death sentences based on *Ring* on the basis of its analysis in *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005). *Raleigh v. State*, 932 So. 2d 1054, 1067. However, this Court's analysis in

Johnson rested on a fundamental misunderstanding of the Sixth Amendment principle set forth in *Ring*. *See Ring v. Arizona*, 536 U.S. at 602 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, the fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt.").

11. On January 12, 2016, the United States Supreme Court issued its decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016). In *Hurst,* the Supreme held that Florida's capital sentencing statute is unconstitutional: "We hold this sentencing scheme unconstitutional." *Hurst,* 136 S.Ct. at 619. The Supreme Court explained that "[t]he 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." *Id*. In *Hurst*, the Supreme Court identified what those critical statutorily defined facts are under Florida law:

> 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). "[T]he jury's function under the Florida death penalty statute is advisory only." The State **cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires**.

Id. at 622 (emphasis added) (citations omitted).

12. Under Florida's statute, authorization for a death sentence is dependent upon the presence of the statutorily-defined facts *in addition to* the verdict unanimously finding the defendant guilty of first-degree murder. In unmistakably clear language, *Hurst* explained that the requisite additional statutorily-defined facts required to render the defendant death eligible are that "sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *See* § 921.141(3); *Hurst*, 136 S. Ct. at 622.

13. The Supreme Court in *Hurst* identified these findings as the operable findings that must be made by a jury. *Hurst*'s holding is rested on the principle that findings of fact statutorily required to authorize a death sentence under Florida law are elements of the offense and separate first-degree murder from capital murder under Florida law. The statutorily defined findings of fact serve as elements of the crime of capital murder in Florida. *See Apprendi*, 530 U.S. 466, 476 (2000); *Jones v. United States*, 526 U.S. 227 (1999). In *Ring*, the Supreme Court applied the *Apprendi* rule to Arizona's capital sentencing scheme and found it violated the Sixth Amendment. The Supreme Court in *Hurst* found that this Court's consideration in *Bottoson* of the

potential impact of *Ring* on Florida's capital sentencing scheme had wrongly failed to recognize that the decisions in *Ring* and *Apprendi* meant that Florida's capital sentencing statute was also unconstitutional.

14. Much of the basis for this Court's erroneous conclusion in *Bottoson v. Moore* and *Johnson v. State* that *Ring* and *Apprendi* were inapplicable in Florida was this Court's continued reliance on *Hildwin,* which held that the Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." This Court's reliance in *Bottoson* and *Johnson* upon the continued vitality of *Hildwin* (and related findings in *Spaziano*) was misplaced and contrary to the logic *of Apprendi* and *Ring* as the Supreme Court explained in *Hurst*:

> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S., at 640–641. **Their conclusion was wrong, and irreconcilable with *Apprendi*.** Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre *Apprendi* decision—*Walton*, 497 U.S. 639, 110 S. Ct. 3047, 111 L.Ed.2d 511—could not "survive the reasoning of *Apprendi*." 536 U.S., at 603. *Walton*, for its part, was a mere application of *Hildwin's* holding to Arizona's capital sentencing scheme. 497 U.S., at 648.

Hurst, 136 S.Ct. at 622-23 (emphasis added).

15. This Court also failed to recognize that in Arizona,

the factual determination required by Arizona law before a death sentence was authorized was the presence of at least *one* aggravating factor. *Ring v. State*, 25 P.3d 1139, 1151 (Ariz. 2001). Unlike the Arizona law at issue in *Ring*, Florida law only permits the imposition of a death sentence upon a factual determination *by the court* that **"sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances**." § 921.141(3) (emphasis added).

16. In light of *Hurst*, this Court issued orders requesting supplemental briefing in a large number of pending cases. This Court has even reopened proceedings on a habeas petition after a motion for rehearing had been denied. *See Hojan v. State*, Case No. SC13-2422.

17. Relying on this Court's action in *Hojan v. State*, Mr. Raleigh seeks the same opportunity to provide briefing to this Court as to *Hurst*'s applicability to his case, and in particular to the habeas petition that he filed in 2003 challenging his death sentences under *Ring v. Arizona*. This Court should permit Mr. Raleigh to brief the impact of *Hurst* on his sentences of death and upon this Court's 2006 denial of his habeas petition. Accordingly, this Court should reopen the habeas proceedings in Case No. SC03-2282.

18. This Court has also recently stayed the executions of

Cary Lambrix and Mark Asay while it considers their claims that their death sentences stand in violation of *Hurst*. *See Lambrix v. Jones*, Case No. SC16-56 (Stay issued February 2, 2016); *Asay v. State*, Case No. SC16-223 (Stay issued March 2, 2016). The death sentences imposed on both Mr. Lambrix and Mr. Asay were final long before Mr. Raleigh's death sentences became final. In order for Mr. Lambrix and Mr. Asay to receive the benefit of *Hurst*, this Court will have to conclude that *Hurst* is retroactive under Florida law, i.e. *Witt v. State*, 387 So. 2d 922 (Fla. 1980). In order for this Court to enter stays of execution, a significant possibility of relief must exist. *See Correll v.* State, Case No. SC15-147, Order Issuing Stay of Execution (February 17, 2015). Implicit in this Court's issuance of stays in both *Lambrix* and *Asay*, is a finding that there is a significant possibility that *Hurst* is retroactive and relief will be warranted. To the extent that *Hurst* is held to be retroactive in *Lambrix* and *Asay*, it would also be retroactive to Mr. Raleigh's death sentence. Mr. Raleigh seeks what has been afforded Mr. Lambrix and Mr. Asay, an opportunity to brief the applicability of *Hurst* to his death sentences and this Court's 2006 denial of the *Ring* claim that Mr. Raleigh set forth in his habeas petition.

19. This Court has the power and jurisdiction to reopen a habeas proceeding in order to revisit an erroneously rejected constitutional claim when the United States Supreme Court

specifically reverses in another case this Court's identical ruling rejecting the same constitutional claim. *See State v. Akins*, 69 So. 3d 261, 268 (Fla. 2011) ("Under Florida law, appellate courts have 'the power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice.' *Muehlman v. State*, 3 So. 3d 1149, 1165 (Fla. 2009)(alteration in original)."). This Court's ruling against Mr. Raleigh's *Ring* claim should be revisited in light of *Hurst* and the United States Supreme Court's determination that Mr. Raleigh's previously presented *Ring* claim is in fact meritorious. At the very least, Mr. Raleigh should be afforded the opportunity to brief the impact of *Hurst* on his death sentences, the same opportunity this Court recently afforded Mr. Hojan in Case No. SC13-2422, Mr. Lambrix in Case No. SC16-56, and Mr. Asay in Case No. SC16-223. Given the significance of the ruling in *Hurst v. Florida*, this Court should reopen proceedings on Mr. Raleigh's 2003 habeas petition and set a briefing schedule.

WHEREFORE, based on the foregoing, the Petitioner, Bobby Raleigh, respectfully moves the Court to reopen the habeas proceeding in Case No. SC03-2282, and order the parties to provide briefing and argument as to the effect of the recent decision in *Hurst v. Florida* on Mr. Raleigh's death sentences and

upon this Court's denial of Mr. Raleigh's 2003 challenge to his death sentences on the basis of the Sixth Amendment principles set forth in *Ring v. Arizona*.

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished by electronic service to Vivian Singleton, Assistant Attorney General, Office of the Attorney General, at capapp@myfloridalegal.com her primary email address, on this 11th day of March, 2016.

/s/ Martin J. McClain
MARTIN J. MCCLAIN
Florida Bar No. 0754773
McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th Street
Wilton Manors, FL 33334
(305) 984-8344
martymcclain@earthlink.net

Registry counsel for Mr. Raleigh