IN THE SUPREME COURT OF FLORIDA

TERENCE OLIVER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-1350

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR BREVARD COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This case presents a direct appeal from the Circuit Court for Brevard County, Florida, following the Appellant's convictions and death sentences for first degree murder. This supplemental brief is filed in response to this Court's Order requesting additional briefing in light of ***Hurst v. Florida*, 136 S.Ct. 616 (2016)**. This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Oliver." Appellee, the State of Florida, was the prosecution below. This brief will refer to Appellee as such, the prosecution, or the State.

Unless indicated otherwise, bold-typeface emphasis is supplied. Cases cited in the text of this brief and not within quotations are italicized. Other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

As noted in Appellee's answer brief, on August 19, 2009, a grand jury indicted Terence Tobias Oliver for the first degree murders of Krystal Pinson and Andrea Richardson, armed burglary of a dwelling causing death, and possession of a firearm by a convicted felon. (V3, R350-52).[1] On March 16, 2012, a jury found the Defendant guilty of all counts in the indictment. The capital convictions proceeded to the penalty phase on March 19, 2012.

During penalty phase proceedings, the State introduced judgments and

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[1] Cites to the record are by volume number, "V_" followed by "R_" for the page number.

sentences from Brevard County where Oliver plead guilty to armed robbery in 1995 and to resisting arrest with violence and possession of crack-cocaine in 2002. (V7, R1112, 1123). On March 19, 2012, by a vote of twelve to zero (12-0), the jury returned an advisory verdict recommending that Oliver be sentenced to death for the murders of Andrea Richardson and Krystal Pinson. (V21, R2621). A *Spencer* hearing was held on May 18, 2012. (V2, R283-96). On June 15, 2012, the Court followed the jury's recommendation and imposed two death sentences. (V2, R297-316; V6, R934-955). The trial court found the following aggravating factors for both victims:

1) The Defendant has previously been convicted of another capital felony or a felony involving the use or threat of violence to the person: a 1995 robbery with a firearm/deadly weapon; a 2002 resisting arrest with violence; and the contemporaneous first degree murders of Pinson and Richardson. (Great Weight);

2) The capital felony was committed while the Defendant was engaged in a burglary. (Great Weight);

3) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. (Great Weight);

4) The murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (Great Weight).

The trial court also found that the greater weight of the evidence established the following non-statutory mitigation:

1) The Defendant completed high school. (No Weight);

2) The Defendant attempted to further his education by attending

Le Cordon Bleu Culinary Academy. (Little Weight);

3) The Defendant attempted to further his education by attending Daytona State College. (Little Weight);

4) The Defendant grew up in a household with both parents present. (Some Weight);

5) The Defendant grew up attending church regularly and continued to attend as an adult; he sang gospel songs, played Christian music, and had been a drummer in a Christian band. (Some Weight).

SUMMARY OF THE ARGUMENT

Although *Hurst* held that Florida's death penalty statute in effect at the time of Defendant's trial failed to comply with *Ring*, *Hurst* did not overrule the recidivist aggravator and contemporaneous violent felony exceptions to *Ring*, and these exceptions apply squarely to the facts of Defendant's case. The record demonstrates that Defendant's jury found beyond a reasonable doubt that Defendant committed a contemporaneous capital murder and a burglary; and certified copies of Defendant's guilty pleas and convictions were entered into evidence to establish his prior violent felony convictions. Further, *Hurst* specifically requires the application of the harmless error doctrine to *Hurst/Ring* claims, and in light of the weighty recidivist and contemporaneous violent felony aggravators, the highly substantiated avoid-arrest and CCP aggravators, and the lack of any significantly weighty mitigation, any error in failing to comply with *Ring* is clearly harmless.

ARGUMENT

HURST DOES NOT ENTITLE DEFENDANT TO ANY RELIEF BECAUSE THE RECIDIVIST AGGRAVATOR AND CONTEMPORANEOUS VIOLENT FELONY AGGRAVATOR EXCEPTIONS TO *RING* APPLY SQUARELY TO DEFENDANT'S CASE AND BECAUSE ANY *RING* VIOLATION WOULD BE HARMLESS BEYOND A REASONABLE DOUBT.

I. Standard of Review.

The State agrees with Defendant in that the review of a purely legal question should be *de novo. Jackson v. State,* 64 So. 3rd 90, 92 (Fla. 2011).

II. Cases Leading to the *Hurst* Decision.

In *Apprendi v. New Jersey,* 530 U.S. 466, 494 (2000), the Supreme Court held that a defendant is entitled to a jury determination of any fact that must be found in order to increase the maximum punishment allowed by a statute. *Id.* In *Ring v. Arizona*, 536 U.S. 584 (2002), the Court extended *Apprendi* to capital cases holding that "capital defendants, no less than non-capital defendants …are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring,* 536 U.S. at 589. The Court found that "Arizona's capital sentencing scheme violated *Apprendi's* rule because the State allowed a judge to find the facts necessary to sentence a defendant to death." *Hurst v. Florida*, 136 S.Ct. at 621. "Specifically, a judge could sentence [a defendant] to death only after independently finding at least one aggravating circumstance." *Id.* Because it was the judge, and not a jury, who conducted the fact-finding to enhance the penalty, "Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment." *Id.*

III. The *Hurst* Decision.

In *Hurst v. Florida*, the United States Supreme Court held that Florida's capital sentencing structure violated *Ring* because it required a judge to conduct the fact-finding necessary to enhance a defendant's sentence. *Hurst,* 136 S. Ct. at 621-622. In its decision, the Court pointed to Florida's sentencing statute which provided that a death sentence could not be imposed unless there has been "findings *by the court* that such a person shall be punished by death." *Id*. at 622 (citing Fla. Stat. § 775.082(1) (emphasis in original). Ultimately, the United States Supreme Court held that the provisions of Florida's capital sentencing statute, "which required the judge alone to find the existence of an aggravating circumstance," was inconsistent with its decision in *Ring* and the Sixth Amendment. The *Hurst* decision also specifically overruled *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, and *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055.[2]

It is equally important for this Court to consider what the *Hurst* decision did not hold. *Hurst* did not overrule any of the cases that established exceptions to *Ring* claims. And, most notably to Defendant's case, it did not overrule the exceptions based upon aggravators founded upon prior violent felony convictions,

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[2] *Spaziano v. State*, 433 So. 2d 508, 512 (Fla. 1983), upheld the jury's role in sentencing a defendant to capital punishment as advisory. *Spaziano*, 433 So. 2d at 512. In *Hildwin*, the United States Supreme Court 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." 490 U. S., at 640–641.

contemporaneous violent felony convictions, or murders that were committed in the course of other felony offenses. *See Middleton v. State*, 40 Fla. L. Weekly, S574 (Fla. Oct. 22, 2015), *reh'g denied*, (Fla. Jan. 13, 2016) ("Moreover, this Court has rejected *Ring* challenges where the trial court has found as an aggravating circumstance that the crime was committed in the course of a felony or the defendant has a prior violent felony conviction as both aggravators involve facts that were already submitted to a jury and thus are in compliance with *Ring*"); *Jackson v. State*, 180 So. 3d 938, 964 (Fla. 2015), *reh'g denied*, (Dec. 18, 2015) ("[T]his Court has repeatedly held that *Ring* does not apply where the trial court found the aggravating factors of prior violent felony and felony probation, both of which are present in this case") ; *Hobart v. State*, 175 So. 3d 191, 203-04 (Fla. 2015), *reh'g denied*, (Sept. 17, 2015) ("[T]his claim is without merit under our precedent because one of the aggravators found by the trial court was the prior violent felony involving the contemporaneous murder of Hamm and the conviction for aggravated battery") ; *Smith v. State*, 170 So. 3d 745, 764 (Fla. 2015) *cert. denied*, 2016 WL 280862 (U.S. Jan. 25, 2016) ("[B]ecause the trial court found the prior-violent-felony aggravator and because the jury unanimously recommended the sentence of death, *Ring* is not implicated.")

The United States Supreme Court also specified that the harmless error doctrine should be applied to any death sentence that was imposed in violation of *Ring* or *Hurst* and remanded *Hurst* to Florida so this analysis could be done:

> Finally, we do not reach the State's assertion that any error was harmless. See *Neder* v. *United States*, 527 U. S. 1, 18–19 (1999)

> (holding that the failure to submit an uncontested element of an offense to a jury may be harmless). This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here. *See Ring*, 536 U.S. at 609.

Hurst, 136 S. Ct. at 624. While Defendant contends Section 775.082(2), *Florida Statutes*, precludes this Court's harmless error analysis,[3] as discussed in section V herein, this argument is based upon a flawed interpretation of said statute and is accordingly meritless.

IV. Longstanding exceptions to *Ring* that directly apply to Defendant.

The long-standing precedent cited in page 6 *infra* remains undisturbed by *Hurst.* In light of said authority, this Court should continue to reject *Ring* claims whenever a trial court has found as an aggravating circumstance that the crime was committed in the course of a felony or that the defendant has a prior violent felony conviction when these aggravators involve facts that were already submitted to a jury or admitted by the defendant. Other legal precedent left undisturbed by *Hurst* also belies any argument Defendant may make claiming that a reversal of his death sentence pursuant to *Ring* or *Hurst* is warranted because his CCP and avoid-arrest aggravator findings were neither submitted to a jury nor admitted. This argument would fail because under both federal and Florida law, only one aggravating circumstance is constitutionally required to increase a sentence to death. See *Tuilaepa v. California*, 512 U.S. 967, 971-72, 114 S.Ct. 2630, 2634, 129 L.Ed.2d 750 (1994) (explaining that to "render a defendant eligible for the death penalty ...

[3] *Supplemental Initial Brief* (hereinafter "SIB") at 5-6.

the trier of fact must convict the defendant of murder and find one aggravating circumstance (or its equivalent) at either the guilt or penalty phase" citing cases); *Ault v. State*, 53 So. 3d 175, 205 (Fla. 2010) (stating that "to return an advisory sentence in favor of death a majority of the jury must find beyond a reasonable doubt the existence of at least one aggravating circumstance listed in the capital sentencing statute."); *Zommer v. State*, 31 So. 3d 733, 754 (Fla. 2010) (noting that, in *State v. Dixon*, 283 So.2d 1 (Fla. 1973), "this Court interpreted the term 'sufficient aggravating circumstances' in Florida's capital sentencing scheme to mean one or more such circumstances)(emphasis in original).

Ultimately, nothing in the *Hurst* opinion requires this Court to recede from the longstanding case law establishing the recidivist aggravator exception and the contemporaneous felony exception to *Ring.* Further, the logic behind the opinions setting forth these exceptions remains as valid now as it was before *Hurst*. Since there can be no question that Defendant's aggravators fall squarely within these exceptions, this Court should accordingly reject Defendant's *Ring* claim.

V. Inapplicability of *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Defendant argues that the error in this case is "structural" and not subject to harmless error analysis because the jury was told that their recommendation was advisory. *SIB* at 10. Defendant also contends the jury instructions diminished the jury's sense of responsibility in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and avers that *Hurst* requires the jury to make the selection determination as to the appropriate sentence. *SIB* at 11. However, these claims remain invalid under *Hurst*.

Hurst does not require jury sentencing; it only requires that the jury make the factual determination that an aggravating factor exists. *Hurst* also did not find that the jury instructions informing the jury that their selection recommendation was advisory were unconstitutional and, as previously argued, *Hurst* only specifically overruled *Spaziano* and *Hildwin,* and only overruled them "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of the jury's factfinding, that is necessary for imposition of the death penalty") *Hurst*, 136 S. Ct. at 623-4. Accordingly, this Court's holding in *Combs v. State,* 525 So. 2d 853 (Fla. 1988), remains valid law which clearly supports the denial of Defendant's *Caldwell* claim:

> Clearly, under our process, the court is the final decision-maker and the sentencer-not the jury… We believe the instructions, in their entirety, properly explain the jury's role under the Florida statute. The portions criticized are taken out of context and no mention is made of the last paragraph which emphasizes the importance of the jury's role:
>
> > The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

Combs v. State, 525 So. 2d 853, 857-58 (Fla. 1988)

VI. The effect of section 775.082(2), *Florida Statutes* on Defendant's case in light of *Hurst* and harmless error.

Even if this Court were to find constitutional error in the instant case, any error would be harmless and would not entitle Defendant to relief. The law is well settled that, even when there is constitutional error, the court may conduct a harmless error analysis. See generally *Chapman v. California*, 386 U.S. 18, 20-22 (1967) (rejecting argument that all federal constitutional errors must be deemed harmful, but rather, adopting rule that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"); *Arizona v. Fulminante*, 499 U.S. 279, 306-08 (1991) (applying harmless error analysis to "trial error" when defendant's confession was improperly admitted); *Neder v. United States*, 527 U.S. 1, 8 (1999) (holding that erroneous jury instructions which omit an element of the offense is subject to harmless error analysis). Furthermore, Defendant's claim that Section 775.082(2), *Florida Statutes* prohibits this Court from conducting a harmless error analysis with regard to his *Ring* is misguided.

Section 775.082(2), *Florida Statutes* (emphasis added) provides:

> **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…

This statute is inapplicable to the instant case because *Hurst* did not hold that "the death penalty" is unconstitutional. If it had, there would have been no reason to remand *Hurst* to this Court for the purpose of conducting a harmless error analysis

to determine if the death penalty could be enforced upon Hurst despite the *Ring* violation that occurred in his case. Clearly, said statute was enacted to address the procedure that should be followed in the event the death penalty is ever abolished by this Court or by the United States Supreme Court, and such was plainly not the case in *Hurst*. The United States Supreme Court's directive to conduct a harmless error analysis in light of Hurst's *Ring* violation appears to be controlling precedent that is uncontradicted by any Florida law. And in light of the facts of the instant case, any *Ring* violation that may have occurred would be harmless beyond a reasonable doubt.

The aggravating factors found in Defendant's case were supported by highly compelling evidence. In addition to the two extremely weighty aggravators[4] that were established though copies of certified convictions, guilty pleas and jury findings regarding contemporaneous crimes, the totality of the evidence on record also strongly supported the remaining avoid arrest and CCP aggravators. The trial court's sentencing order, as quoted in the State's *Answer Brief* at 52-54, details extensive and compelling evidence which supports the trial court's CCP finding,

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[4] 1) The Defendant has previously been convicted of another capital felony or a felony involving the use or threat of violence to the person: a 1995 robbery with a firearm/deadly weapon; a 2002 resisting arrest with violence; and the contemporaneous first degree murders of Pinson and Richardson. (Great Weight);

2) The capital felony was committed while the Defendant was engaged in a burglary. (Great Weight);

and Defendant's clearly established motive to kill Pinson because she was "calling the police on him"[5] and was "going to make me do something to her"[6] in addition to a lack of any motive other than witness elimination to kill Richardson, was highly compelling evidence in support of the avoid arrest aggravator. The United State Supreme Court has consistently held that a legally deficient jury factfinding is harmless where the evidence is otherwise overwhelming. In *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), a jury convicted defendant but was not instructed about an element of the offense. In reviewing the applicability of the harmless error doctrine to the case, the Court explained that:

> a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is "no," holding the error harmless does not "reflec[t] a denigration of the constitutional rights involved." *Rose*, 478 U.S., at 577, 106 S.Ct. 3101.

Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 1839, 144 L. Ed. 2d 35 (1999)

The lack of any substantial mitigation regarding the instant double homicide also supports a harmless error finding. No statutory mitigators applied and with regard to the nonstatutory mitigation, the evidence submitted during penalty phase established that Defendant does not suffer from low intelligence or any significant

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[5] (V15, R1569; V18, R2108)
[6] (V15, R1569)

mental disturbances. In fact, witness testimony established that Defendant is bright and musically talented. The evidence also established that Defendant did not suffer from any significant childhood abuse or abandonment issues. Under the circumstances, any one of the highly substantiated aggravators involved in this case clearly outweighed the totality of all the mitigation presented, and one aggravator was based upon a jury finding that Defendant committed a burglary during the course of the murders, while another was based upon Defendant's guilty pleas and convictions for prior serious violent felony offenses. Under these circumstances, any *Ring* violation that may have occurred in Defendant's case was clearly harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing analysis, the State respectfully reasserts its requests that this Honorable Court affirm Appellant's convictions and sentences of death.

Respectfully submitted and certified,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been electronically delivered to Nancy Ryan, Esq., Asst. Public Defender at: ryan.nancy@pd7.org, Office of the Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118 this 7th day of March, 2016.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

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