IN THE SUPREME COURT OF FLORIDA

DONTAE MORRIS,

Appellant,

v.

Case No. SC14-1317
Lower Tribunal No.
292010CF010203000AHC

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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SUMMARY OF THE ARGUMENT

Morris is not entitled to any relief due to the United States Supreme Court opinion in Hurst v. Florida, ___ U.S. ___, ___ S. Ct. ___, 2016 WL 112683 (Jan. 12, 2016).

Morris's reliance on Section 775.082(2), Florida Statutes, as requiring imposition of life sentences for his murder convictions is misplaced. That statute provides only that life sentences would be imposed if the death penalty itself has been ruled unconstitutional. A plain reading of the statute does not support Morris's strained interpretation for this case. The United States Supreme Court has not held that death as a penalty violates the Eighth Amendment, but has only stricken Florida's current statutory procedures for implementation. Accordingly, Section 775.082(2) is not applicable.

Morris has not preserved any Sixth Amendment claim for this Court to review, since his initial brief failed to present any such issue. In addition, there was no Sixth Amendment error in the imposition of Morris's death sentences, since the facts to establish his eligibility for capital punishment were necessarily found by a jury, and no additional judicial fact-finding occurred.

Morris's claim of structural error which can never be harmless is easily refuted by United States Supreme Court case law. In this case, any potential Sixth Amendment error would be

harmless beyond any reasonable doubt, given the unanimous nature of the jury recommendations, the prior and contemporaneous felony murder convictions, the jury conviction supporting the "escape" aggravating factor, the uncontested nature of the aggravating factor that the victims were law enforcement officers, and the lack of any judicial finding to apply the heinous, atrocious or cruel or cold, calculated and premeditated aggravating factors. Accordingly, Morris's death sentences must be affirmed.

ARGUMENT

SUPPLEMENTAL ISSUE I

WHETHER THE UNITED STATES SUPREME COURT OPINION IN HURST V. FLORIDA REQUIRES IMPOSITION OF LIFE SENTENCES IN THIS CASE.

Morris has filed a Supplemental Brief, asserting that his death sentences should be stricken, and he should be resentenced to life in prison, due to the recent opinion in Hurst v. Florida, 2016 WL 112683 (Jan. 12, 2016) For the following reasons, Morris's argument must be rejected, and the death sentences imposed in this case must be affirmed.

Morris asserts that Florida's law is facially invalid because Hurst requires that a jury enter specific, written factual findings to support the imposition of any death sentence. Morris submits that Hurst determined that eligibility for the death penalty does not occur in Florida until the judge makes the ultimate determination that sufficient aggravating factors outweigh the mitigating factors to justify a sentence of death. Morris also asserts that because Hurst concluded that the statute is facially invalid, he is entitled to be resentenced to life in accordance with Section 775.082(2), Florida Statutes, because the death penalty statute cannot be severed or re-written so as to render it constitutional.

Putting aside Morris's unsupported implication that Hurst has now recognized a right to jury sentencing, it is clear that 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. Therefore, Section 775.082(2) does not apply, by its own terms. That section provides that life sentences *without parole*[1] are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional," and was enacted following Furman v. Georgia, 408 U.S. 238 (1972), in order to fully protect society in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional, such as thereafter occurred in Coker v. Georgia, 433 U.S. 584 (1977), where the United States Supreme Court held that capital punishment was not available for the capital felony of raping an adult woman.

Although Morris suggests that this Court used similar language to require the commutation of all death sentences to life following Furman in Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972), Morris is misreading and oversimplifying the Donaldson decision. Donaldson is not a case of statutory construction, but one of jurisdiction. Based on our state constitution in 1972, which vested jurisdiction of capital cases in circuit courts rather than the criminal courts of record, Donaldson held that circuit courts no longer maintained jurisdiction over capital

[1] Inmates convicted of capital crimes were otherwise eligible for parole pursuant to Section 947.16(1), Florida Statutes.

cases since there was no longer a valid capital sentencing statute to apply; no "capital" cases existed, since the definition of capital referred to those cases where capital punishment was an optional penalty. Donaldson observes the new statute (§775.082(2)) was conditioned on the invalidation of the death penalty, but clarifies, "[t]his provision is not before us for review and we touch on it only because of its materiality in considering the entire matter." Donaldson, 265 So. 2d at 505.

The focus and primary impact of the Donaldson decision was on those cases which were pending for prosecution at the time Furman was released. Donaldson does not purport to resolve issues with regard to pipeline cases pending before the Court on direct appeal, or to cases that were already final at the time Furman was decided. This Court's determination to remand all pending death penalty cases for imposition of life sentences in light of Furman is discussed in Anderson v. State, 267 So. 2d 8 (Fla. 1972), a case which explains that, following Furman, the Attorney General filed a motion requesting that this Court relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position that the death sentences that were imposed were illegal sentences. There is no legal reasoning or analysis to explain why commutation of 40 sentences was required, but it is interesting to observe that this was before the time that either this Court or the United

States Supreme Court had determined the current rules for retroactivity, as Teague v. Lane, 489 U.S. 288 (1989), and Witt v. State, 387 So. 2d 922 (1980), were both decided later.

At any rate, there are several cogent reasons for this Court to reject the blanket approach of commuting all capital sentences currently pending before this Court on direct appeal such as followed the Furman decision. Furman was a decision that invalidated all death penalty statutes in the country, with the United States Supreme Court offering nine separate opinions that left many courts "not yet certain what rule of law, if any, was announced." Donaldson, 265 So. 2d at 506 (Roberts, C.J., concurring specially). The Court held that the death penalty as imposed for murder and for rape constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The various separate opinions provided little guidance on what procedures might be necessary in order to satisfy the constitutional issues, and whether a constitutional scheme would be possible.

Hurst, on the other hand, is a specific ruling to extend the Sixth Amendment protections first identified in Ring to Florida cases. While Morris acknowledges that Hurst does not require jury sentencing (Supplemental Brief, p. 9), he asserts that the United States Supreme Court has determined that a defendant is not eligible for the death penalty under our

sentencing scheme until the trial court enters written findings, concluding that sufficient aggravating circumstances outweigh the mitigating circumstances that apply (Supplemental Brief, p. 6). While the language quoted in Morris's brief seems to support the position that the Hurst Court has misinterpreted Florida's law as to eligibility, other language in the opinion appears to limit the required jury factfinding to the existence of one aggravating factor. For example, it is telling that Hurst does not expressly disturb Proffitt v. Florida, 428 U.S. 242 (1976), and only explicitly overrules Spaziano v. Florida, 468 U.S. 447 (1984) and Hildwin v. Florida, 490 U.S. 638 (1989), "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, 2016 WL 112683 at *8.

By equating Hurst with Furman, Morris reads Hurst far too broadly. As we know, Timothy Hurst did not have a prior conviction. Following release of the Hurst opinion, the United States Supreme Court denied certiorari review of two direct appeal decisions, leaving intact this Court's denial of any Sixth Amendment error; both cases had sentences supported by prior violent felony convictions. See Fletcher v. State, 168 So. 3d 186 (Fla. 2015), cert. denied, 2016 WL 280859 (Jan. 25, 2016); Smith v. State, 170 So. 3d 745 (Fla. 2015), cert. denied,

2016 WL 280862 (Jan. 25, 2016). After Furman, there were no existing capital cases left intact. After Hurst, the United States Supreme Court has provided no express reason to disturb any capital sentences supported by prior convictions. The remedy for death row prisoners provided by Furman had not been extended to current death row inmates by Hurst.

Morris appears to accept an interpretation of Hurst which only requires jury factfinding as to eligibility but not selection. This is consistent with prior United States Supreme Court cases underlying the decision, as well as Kansas v. Carr, 2016 WL 228342 (Jan. 20, 2016), decided just over a week after Hurst. In Hurst, the United States Supreme Court acknowledged that the holding of Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), concerned the factual findings necessary to make a defendant eligible for a sentence that was greater than that authorized by the jury's verdict.

In Apprendi, the United States Supreme Court examined whether the Sixth Amendment required a jury finding regarding a fact that made a defendant eligible for a sentence that exceeded the statutory maximum for the offense of which he was convicted. The Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. At the

time, the Court rejected the assertion that this holding would invalidate state capital sentence schemes based on the belief that once a jury had found a defendant guilty of a capital offense, the statutory maximum for the crime was death. Id. at 497 & n.21. Thus, the Court's focus was on facts that made a defendant eligible for a sentence and not *all* findings that influenced the selection of a sentence.

Two years later, the Court addressed the implications of Apprendi for Arizona's capital sentence scheme based on the Arizona Supreme Court's holding that the United States Supreme Court had misunderstood how Arizona's capital sentence scheme worked and that an Arizona defendant was not eligible for a death sentence until an aggravator was found at the penalty phase. Ring, 584 U.S. at 595-96. Because Arizona had no jury involved in the penalty phase at all, the Court determined that Arizona's capital sentencing scheme was unconstitutional "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Id. at 609. However, the Court did not alter the fact that the focus of this type of Sixth Amendment claim was on eligibility; not selection. In fact, the Court expressly noted that the claim being presented in that case was limited to an eligibility finding. Id. at 597 & n.4.

While the Court has altered the portion of the holding of Apprendi to cover findings that increase the sentencing range to which a defendant is exposed even if they did not change the statutory maximum, it has not changed the focus from findings that made a defendant eligible for a sentence. Alleyne v. United States, 133 S. Ct. 2151, 2155, 2158 (2013) (applying Apprendi to factual findings necessary to impose a minimum mandatory term); Southern Union Co. v. United States, 132 S. Ct. 2344 (2012) (applying Apprendi to factual findings that increased the amount of a criminal fine); Cunningham v. California, 549 U.S. 270 (2007) (applying Apprendi to factual findings necessary to increase a sentence to an "upper limit" sentence); Blakely v. Washington, 542 U.S. 296, 303-05 (2004) (applying Apprendi to factual finding necessary to impose a sentence above the "standard" sentencing range even though the sentence was below the statutory maximum). In fact, the Court recently reaffirmed that the Sixth Amendment right underlying Ring and Apprendi did not apply to factual findings made in selecting a sentence for a defendant after the defendant has been found eligible to receive a sentence within a particular range. Alleyne, 133 S. Ct. at 2161 n.2 ("Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty. Importantly,

this is distinct from factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.' Williams v. New York, 337 U.S. 241, 246, 69 S. Ct. 1079, 93 L.Ed. 1337 (1949). While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing."); see also United States v. O'Brien, 560 U.S. 218, 224 (2010) (recognizing that Apprendi does not apply to sentencing factors that merely guide sentencing discretion without increasing the applicable range of punishment to which a defendant is eligible).

Moreover, in Kansas v. Carr, 2016 WL 228342, at *8 (Jan. 20, 2016), the Court discussed the distinct determinations of eligibility and selection under a capital sentencing scheme. In doing so, the Court stated that an eligibility determination was limited to findings related to aggravating circumstances and that determinations regarding whether mitigating circumstances existed and the weighing process were selection determinations. In fact, the Court stated that such determinations were not factual findings at all. Instead, the Court termed the determinations regarding the existence of mitigating circumstances as "judgment call[s]" and weighing determinations "question[s] of mercy." Id.

In Florida, eligibility is determined by the existence of one aggravating factor. State v. Steele, 921 So. 2d 538, 543 (Fla. 2005) ("To obtain a death sentence, the State *must* prove beyond a reasonable doubt at least one aggravating circumstance"). Death is presumptively the appropriate sentence. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). As eligibility is a matter of state law, this Court's determination controls. Ring, 536 U.S. at 603 ("the Arizona court's construction of the State's own law is authoritative").

Accordingly, Morris's argument that Hurst requires juries to find as a matter of fact that there are sufficient aggravating circumstances to outweigh the applicable mitigating circumstances is without merit. Hurst specifies that constitutional error occurs when a trial judge "alone" finds the existence of "an aggravating circumstance." Hurst, at *9. This Sixth Amendment error is necessarily one that can be avoided or prevented with the requirement of specific jury findings to support the eligibility determination. While Morris reiterates that this Court cannot re-write or sever the substantive statute, he misses the point that Hurst is a procedural ruling, and therefore a remedy is within the scope of ameliorative measures available to this Court. Because the death penalty has not been constitutionally prohibited as a possible punishment in

Hurst, Section 775.082(2) does not mandate a blanket commutation of death sentences as Morris requests.

Finally, the practice in other states does not suggest that commutation of all non-final death sentences in Florida is necessary under Hurst. Morris's reliance on the Colorado Supreme Court's decision to remand two pending pipeline cases for imposition of life sentences without parole under a similar Colorado statute is misplaced. First of all, the Colorado statute at issue is not identical to the Florida statute, as it is not triggered by a finding that "the death penalty" is unconstitutional, but specifies that, in the event the death penalty "as provided for in this section," is found to be unconstitutional, life sentences are mandated. Woldt v. People, 64 P.3d 256, 259 (Colo. 2003). In addition, Colorado was applying its own state statute, following the death penalty jurisprudence of that state, which initially required jury sentencing, was amended in 1995 following Walton v. Arizona, 497 U.S. 639 (1990) to employ a three-judge panel to make both eligibility and selection determinations, and then returned to pure jury sentencing in 2003 following Ring. Defendants Woldt and Martinez were found eligible and sentenced by three-judge panels following the 1995 amendment, and the Colorado Supreme Court held that their sentences violated the Sixth Amendment. The impact of that conclusion, with the resulting remand for

imposition of life sentences, was based on rules of statutory construction that required the Court to decide between two competing and conflicting statutes.

In Arizona, as Morris notes, the Arizona Supreme Court rejected blanket commutation, finding that the unconstitutional portion of the statute could be severed to preserve pending death cases. State v. Pandeli, 161 P.3d 557 (Ariz. 2007). This is the approach this Court should take. This Court has repeatedly recognized its obligation to uphold any portion of the statute, to the extent there is a reasonable basis for doing so, based on the rule favoring validity. Donaldson, 265 So. 2d at 501, 502-03; Driver v. Van Cott, 257 So. 2d 541 (Fla. 1972); Davis v. State, 146 So. 2d 892 (Fla. 1962).

There is no reading of Hurst which suggests that a Sixth Amendment violation necessarily occurs in every case when the statute is followed. In considering whether a new sentencing proceeding may be required by Hurst in a pending pipeline case, this Court needs to determine whether Sixth Amendment error occurred on the facts of that particular case; that is, whether a jury factfinding of eligibility is available in the record, such as a prior or contemporaneous conviction. There is no need to re-write the statute or sever the offending portion permitting judicial factfinding, since the Sixth Amendment may have been satisfied on the facts of a particular case. If there

was a Sixth Amendment violation, the question shifts to the impact of that error, and whether any prejudice to the defendant may have occurred. With this approach, this Court is respecting those death sentences which can be salvaged upon finding that any potential constitutional error was harmless, while protecting the Sixth Amendment rights of all defendants. Accordingly, this Court should reject Morris's plea to remand this case for entry of a sentence of life imprisonment pursuant to Section 775.082(2), Florida Statutes.

SUPPLEMENTAL ISSUE II

WHETHER MORRIS MUST BE RESENTENCED DUE TO HARMFUL SIXTH AMENDMENT ERROR.

Morris also claims that Sixth Amendment error occurred in his case, and alleges that such error is necessarily "structural," and not amenable to a harmless error analysis. This argument must be rejected on a number of bases.

Initially, it must be noted that any possible constitutional error has not been preserved for appellate review in this case. Although there was a motion filed in the lower court to challenge the validity of Florida's death penalty procedures in light of Ring v. Arizona, 536 U.S. 584 (2002), the denial of that motion was not presented as an issue in Morris's initial brief. The failure to present an argument on appeal constitutes a waiver of any error, and Morris is not entitled to consideration of this claim. See Beasley v. State, 18 So. 3d 473, 481 (Fla. 2009) (finding waiver as to issues not fully presented in appellate brief); Coolen v. State, 696 So. 2d 738, 742, n.2 (Fla. 1997); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) (noting even conclusory reference to issue on appeal, without further elucidation, will result in waiver). This Court has held that deficient jury factfinding under the Sixth Amendment is not fundamental error. Pena v. State, 901 So. 2d 781, 783 (Fla. 2005). Accordingly, Morris's current claim should be rejected as procedurally barred.

Even if the issue is considered, no relief is due. Morris claims that Sixth Amendment error occurred in his case, and that the error is structural in nature, due to the flawed statutory scheme placing the obligation for factfinding with the judge rather than the jury. He argues that his death sentences are unconstitutional, "because the jury recommendation in this case contains none of the required fact-finding underpinning the judge's sentence" (Supplemental Brief, p. 9). Morris admits that jury sentencing is not required, and therefore any extraneous judicial factfinding is not fatal to the scheme. However, on the facts of this case, jury factfinding for Morris's eligibility and even for his selection for the death penalty is well established in the record.

First, the prior conviction exception to the Sixth Amendment findings required by Apprendi and Ring has not been disturbed in Hurst. Ring itself recognizes the critical distinction of an enhanced sentence supported by a prior conviction. See Almendarez-Torres v. United States, 523 U.S. 224 (1998) (permitting judge to impose higher sentence based on prior conviction); Ring, 536 U.S. at 598 n.4 (noting Ring does not challenge Almendarez-Torres, "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"); Alleyne v. United States, 133 S. Ct. 2151, 2160 n.1 (2013) (affirming Almendarez-Torres

provides valid exception for prior convictions). As Morris had both a prior murder conviction and a contemporaneous murder conviction which rendered him death-eligible, both supported by unanimous jury verdicts, no Sixth Amendment error has been shown in this case.

Even if further jury findings were required for sentencing, or for all of the relevant facts to support the imposition of a death sentence as argued by Morris, no Sixth Amendment error occurred here. The trial judge in this case found the prior conviction aggravating factor, and also concluded that the avoid arrest/during an escape aggravating factor applied. The judge did not independently weigh the escape aggravator, because he found it merged with the uncontested factor that the victims were law enforcement officers. But notably, Morris's jury convicted him of the escape charge, thereby supplying a jury verdict to support the second aggravating factor. In addition, the judge did not find and weigh either the heinous, atrocious or cruel factor, or the cold, calculated and premeditated factor. Since the judge did not find the existence of any aggravating factor which is not supported by a jury verdict (other than that merged with the escape factor), Morris's sentences were not enhanced by any aggravator found by the judge alone. Accordingly, no potential Sixth Amendment error has been shown.

Finally, even if a jury must ultimately find that death is the appropriate sentence, Morris's jury was able to reach that conclusion, unanimously. By voting 12-0 to recommend the death sentence, the jury necessarily had to find, consistent with their instructions, that the applicable aggravating factors outweighed the mitigation which existed.

Even if some Sixth Amendment violation could be discerned on these facts, United States Supreme Court case law clearly demonstrates that it was harmless beyond any reasonable doubt. Morris's claim of structural error is refuted by Neder v. United States, 527 U.S. 1 (1999), where the Court rejected the argument that a conviction returned after one element of the offense was mistakenly not submitted to the jury for consideration presented a case of structural error. Neder explains why Morris's reliance on Sullivan v. Louisiana, 508 U.S. 275 (1993), is misplaced. Although Sullivan found that constitutional error which prevented a jury from returning a "complete verdict" could not be harmless, the Court reviewed the relevant decisions in Neder and determined that reversal was not required where the evidence of the omitted element was overwhelming and uncontested. Neder, 527 U.S. at 19.

The determination that deficient factfinding under the Sixth Amendment can be harmless is cemented by Washington v. Recuenco, 548 U.S. 212 (2006), where the United States Supreme

Court reversed a Washington state court holding that error under Blakely v. Washington, 542 U.S. 296 (2004), was structural in nature and could never be harmless. Blakely is an Apprendi/Ring decision which requires jury factfinding where a sentence is to be enhanced due to the defendant's use of a firearm. Of course, the United States Supreme Court remanded Hurst itself to this Court for determination of harmlessness, noting that "[t]his 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." Hurst, 2016 WL 112683 at *8.

This Court has been consistent in finding that deficient jury factfinding, in violation of the Sixth Amendment, can be and often is harmless beyond any reasonable doubt. Galindez v. State, 955 So. 2d 517, 521-23 (Fla. 2007); Johnson v. State, 994 So. 2d 960, 964-65 (Fla. 2008); see Pena v. State, 901 So. 2d 781, 783 (Fla. 2005) (failure to instruct jury on age requirement was not fundamental error).

In this case, Morris killed two law enforcement officers. The video of the shootings reflects that Morris was being taken into custody when he calmly and deliberately secured a gun and then shot both officers in the head at very close range. In addition to having prior violent felony convictions for each officers' death, on March 13, 2013, Morris was convicted of the first-degree murder conviction and attempted robbery of Rodney

Jones. He offered no statutory mitigation beyond the "catchall" factor based on his low intelligence, background, family history, and positive character traits. The jury recommended both death sentences by a vote of 12 to 0.

Morris has offered nothing to overcome the overwhelming facts, universally supported by jury verdicts as well as his jury's unanimous sentencing recommendation, which demand imposition of the death penalty in this case. No reasonable factfinder could disagree with the weighing decision eloquently outlined in the trial court's sentencing order. No possible constitutional error prejudiced Morris on these facts. Accordingly, his death sentences should be upheld.

CONCLUSION

WHEREFORE, the State requests that this Honorable Court affirm the judgments and sentences imposed below.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 2016, I electronically filed the foregoing with the Clerk of the Court by using the E-filing Portal which will send a notice of electronic filing to the following: Cynthia Dodge, Assistant Public Defender, Office of the Public Defender, Tenth Judicial Circuit, Post Office Box 9000-Drawer PD, Bartow, Florida 33831-9000, **cdodge@pd10.org**, **appealfilings@pd10.org** [and] **mlinton@pd10.org**.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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