

IN THE SUPREME COURT OF FLORIDA

BRANDON LEE BRADLEY,

Appellant,

v.

Case No. SC14-1412

STATE OF FLORIDA,

Appellee.

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

APPELLEE'S BRIEF IN SURREBUTTAL

PAMELA JO BONDI
ATTORNEY GENERAL

STACEY E. KIRCHER
Assistant Attorney General
Florida Bar No. 050218
Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, Florida 32118
CapApp@myfloridalegal.com
Stacey. Kircher@myfloridalegal.com
Telephone: (386) 238-4990
Facsimile: (386) 226-0457

COUNSEL FOR APPELLEE

RECEIVED, 04/29/2016 05:13:30 PM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE AND FACTS1

SUMMARY OF THE ARGUMENT1

ARGUMENT2

 POINT FIVE: THE TRIAL COURT PROPERLY INSTRUCTED THE
 JURY ON THE AGGRAVATING FACTORS. (AS RESTATED IN
 APPELLEE’S ANSWER BRIEF)2

 POINT SIX: THE TRIAL COURT PROPERLY WEIGHED THE
 AGGRAVATING AND MITIGATING FACTORS (AS RESTATED IN
 APPELLEE’S ANSWER BRIEF)4

 POINT SEVEN: THE TRIAL COURT PROPERLY DENIED
 APPELLANT’S *RING* CLAIM AND HE IS NOT ENTITLED TO A
 STAY BASED ON *HURST*. (AS RESTATED IN APPELLEE’S
 ANSWER BRIEF).....6

 POINT EIGHT: THE TRIAL COURT PROPERLY INSTRUCTED THE
 JURY ON ITS ADVISORY ROLE (AS RESTATED IN APPELLEE’S
 ANSWER BRIEF).....6

CONCLUSION12

CERTIFICATE OF SERVICE12

CERTIFICATE OF COMPLIANCE.....12

TABLE OF AUTHORITIES

CASES

Allen v. State, 137 So. 3d 946 (Fla. 2013)4

Alleyne v. United States, 133 S. Ct. 2151 (2013).....9

Almendarez–Torres v. United States, 523 U.S. 224 (1998).....9

Anderson v. State, 267 So. 2d 8 (Fla. 1972)7

Arizona v. Fulminante, 499 U.S. 279 (1991).....10

Ault v. State, 53 So. 3d 175 (Fla. 2010)4

Caldwell v. Mississippi, 472 U.S. 320 (1985)6

Chapman v. California, 386 U.S. 18 (1967).....10

Combs v. State, 525 So. 2d 853 (Fla. 1988).....6

Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972).....8

Fletcher v. State, 168 So. 3d 186 (Fla. 2015)8, 9

Ford v. State, 802 So. 2d 1121 (Fla. 2001).....4

Furman v. Georgia, 408 U.S. 238 (1972).....7, 8

Galindez v. State, 955 So. 2d 517 (Fla. 2007)11

Hildwin v. Florida, 490 U.S. 638 (1989).....6

Hurst v. Florida, 136 S. Ct. 616 (2016)..... passim

Johnson v. State, 994 So. 2d 960 (Fla. 2008)11

Kansas v. Carr, 136 S.Ct. 633 (2016)5

Neder v. United States, 527 U.S. 1 (1999)..... 3, 10, 11

Pena v. State, 901 So. 2d 781 (Fla. 2005)11

<i>Ring v. Arizona</i> , 536 U.S. 584 (2002).....	3, 5, 9
<i>Smith v. State</i> , 170 So. 3d 745 (Fla. 2015).....	9
<i>State v. Dixon</i> , 283 So. 2d 1 (Fla. 1973).....	5
<i>State v. Steele</i> , 921 So. 2d 538 (Fla. 2005).....	5
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993).....	10
<i>Teague v. Lane</i> , 489 U.S. 288 (1989).....	8
<i>Washington v. Recuenco</i> , 548 U.S. 212 (2006).....	11
<i>Witt v. State</i> , 387 So. 2d 922 (1980).....	8
<u>STATUTES</u>	
§775.082(2), Florida Statutes.....	2, 7

STATEMENT OF THE CASE AND FACTS

The State reiterates and incorporates its Statement of the Case and Facts as recounted in its *Answer Brief*.

On January 12, 2016, the Supreme Court ruled in *Hurst v. Florida*, 136 S. Ct. 616 (2016), that Florida's death penalty sentencing scheme, which required the Judge alone to find the existence of an aggravating circumstance, is unconstitutional.

In the Appellant's *Reply Brief*, Bradley argued *Hurst* in Points Five, Six, Seven, and Eight. (*Reply* at 17-25).

SUMMARY OF THE ARGUMENT

Point Five: Appellant is not entitled to a new penalty phase based upon *Hurst* because the requisite jury findings for the imposition of the death penalty were satisfied in this case where the aggravators of prior violent felony, under a sentence of felony probation, and during the commission of a felony, applied.

Point Six: Appellant is entitled to no relief based on *Hurst*. *Hurst* did not change the competent, substantial evidence standard in reviewing a judge's findings of mitigating and aggravating factors, and did not assign a burden of proof to mitigating factors.

Points Seven and Eight: Appellant is entitled to no relief based on *Hurst*. His new or amended claims are procedurally barred since they were not presented in

his *initial brief*. Moreover, no Sixth Amendment error occurred in this case, since the aggravating factor premised on the Appellant's prior convictions is supported by the constitutionally required jury findings.

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

Appellant'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 a reasonable doubt given Appellant's prior violent felony convictions and the overwhelming and uncontested evidence of the remaining aggravators found. Accordingly, Appellant's death sentence must be affirmed.

ARGUMENT

POINT FIVE: THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE AGGRAVATING FACTORS. (AS RESTATED IN

APPELLEE’S ANSWER BRIEF)

Appellant is not entitled to a new penalty phase based upon *Hurst* because the requisite jury findings for the imposition of the death penalty were satisfied in this case where the aggravators of under sentence of felony probation, prior violent felony, and in the commission of a robbery, applied. On Page 17 of his *Reply Brief*, Appellant argues that Appellee’s harmless error argument on the subject of merged aggravator jury instructions was “overtaken” by *Hurst*.

Hurst is neither instructive nor applicable to this particular claim. *Hurst* neither spoke to jury instructions, nor merged aggravators. To the extent *Hurst* was instructive on whether or not harmless error was applicable in capital cases, *Hurst* does not preclude harmless error analysis on the subject of judge-determined aggravators. In fact, as further discussed *infra*, the High Court necessarily contemplated harmless error review in *Hurst* when the Court stated:

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*, [*Ring v. Arizona*, 536 U.S. 584 (2002)] 536 U.S. at 609 n.7.”

Hurst, at 624.

Clearly, any error in sentencing a defendant to death, contrary to Appellant’s

position, is subject to harmless error review in the context of a *Ring/Hurst* claim – which asks only whether a defendant’s Sixth Amendment right to jury sentencing was violated under the facts of his particular case. This Court need not reach that issue here, however, because this claim is more specifically controlled by the authority as argued in Appellee’s *Answer Brief*.

POINT SIX: THE TRIAL COURT PROPERLY WEIGHED THE AGGRAVATING AND MITIGATING FACTORS (AS RESTATED IN APPELLEE’S ANSWER BRIEF)

Appellant argues in Point Six that “the parties’ arguments on this point have been overtaken by the events of 2016.” (*Reply* at 18). Appellant’s argument in his *Initial Brief* was that the trial court erred in the weighing of the aggravating and mitigating factors and that appropriate weight was not accorded to Bradley’s substance abuse, “brain damage,” and “intellectual disability.” (*IB* at 61-66).

Appellee submits that *Hurst* – though admittedly changing the procedure for the determination of aggravators – did not change the procedure for determining the existence of mitigating factors, and did not overrule this court’s precedent as to the proper weighing procedures as held in *Ault v. State*, 53 So. 3d 175, 188 (Fla. 2010); *Allen v. State*, 137 So. 3d 946 (Fla. 2013); *Ford v. State*, 802 So. 2d 1121, 1134-35 (Fla. 2001).

Appellant’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. (*Reply* at 21). In *Hurst*, the Court

applied *Apprendi* and *Ring* to Florida's capital sentencing scheme and found that it was an unconstitutional violation of the Sixth Amendment for the trial judge, independent of the jury, to make the factual finding of an aggravating factor necessary to make a defendant eligible for the death penalty. *Hurst*, 136 S.Ct. at 622. *Hurst* specifies that constitutional error occurs when a trial judge "alone" finds the existence of "an aggravating circumstance." *Hurst*, 136 S.Ct. at 622.

In Florida, eligibility for the death sentence 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").

Moreover, in *Kansas v. Carr*, 136 S.Ct. 633 642 (2016), decided only a week after *Hurst*, the Court discussed the distinct determinations of eligibility and selection under capital sentencing schemes. 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.*

POINT SEVEN: THE TRIAL COURT PROPERLY DENIED APPELLANT'S *RING* CLAIM AND HE IS NOT ENTITLED TO A STAY BASED ON *HURST*. (AS RESTATED IN APPELLEE'S ANSWER BRIEF)

POINT EIGHT: THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON ITS ADVISORY ROLE (AS RESTATED IN APPELLEE'S ANSWER BRIEF)

In his *Reply Brief*, Appellant now combines his arguments on Points Seven and Eight, which, in the *Initial Brief*, were argued as a *Ring* claim, and a *Caldwell* claim, respectively. Appellant asserts that *Hurst* “mandates the reversal of the death sentence in any case where, as here, Florida’s standard penalty-phase jury instructions were read.” (*Reply* at 19). Bradley argues that instructions that refer to the advisory nature of the jury’s sentencing recommendation violate *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

This claim was argued in Point Eight in his *Initial Brief*. Appellant now contends that *Hurst* effectively overruled *Combs v. State*, 525 So. 2d 853 (Fla. 1988) (noting that there is no *Caldwell* error in Florida because, as recognized in *Spaziano*, the trial judge is the sentencer in Florida – not the jury). On the merits, *Hurst* is not instructive on jury instructions and *Combs* has not been found unconstitutional under *Hurst* (overruling *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”). Because the jury was properly instructed as to its role in sentencing at the time of the penalty phase, Appellant’s *Caldwell* claim must be rejected.

Appellant further argues that Fla. Statute §775.082 (2) requires that his sentence be commuted to life in prison based upon the ruling in *Hurst*. (*Reply* at 22). **This new argument based on the recent United States Supreme Court decision in *Hurst* – raised for the first time in Appellant’s reply brief – is not properly before this Court and is procedurally barred.**

Secondarily, it is without merit. *Hurst* did not determine capital punishment to be unconstitutional; *Hurst* merely invalidated Florida’s procedures for implementation, finding that they *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), Fla. Stat. does not apply, by its own terms. That section provides that life sentences without parole 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.

Appellant’s reliance on *Anderson v. State*, 267 So. 2d 8 (Fla. 1972) is misplaced. This Court’s determination to remand all pending death penalty cases for imposition of life sentences in light of *Furman* is discussed in *Anderson*, 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 notable that this was before the time that either this Court or the United States Supreme Court had determined the appropriate rules for retroactivity, as in *Teague v. Lane*, 489 U.S. 288 (1989), and *Witt v. State*, 387 So. 2d 922 (1980).

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 v. Sack*, 265 So. 2d 499 (Fla. 1972) (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. Anderson and the situation following *Furman* simply has no application to the limited procedural ruling issued by the Supreme Court in *Hurst*.

Moreover, *Hurst* has limited applicability to Bradley, who falls outside of the scope of *Apprendi/Ring/Hurst* because of his prior violent felony convictions. *Hurst* did not have a prior or contemporaneous 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*, 136 S.Ct. 980 (2016);

Smith v. State, 170 So. 3d 745 (Fla. 2015), *cert. denied*, 136 S.Ct. 980, *reh'g denied*, 2016 WL 1079054 (U.S. Mar. 21, 2016). The United States Supreme Court has provided no express reason to disturb any capital sentences supported by prior convictions.

Here, there is no Sixth Amendment violation as recognized in *Hurst* as Bradley was eligible for the death penalty at the outset of the instant resentencing proceedings based on his prior and contemporaneous convictions. *See generally Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (holding that the fact of a prior conviction may be found by the judge even if it increases the statutory maximum sentence); *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 (2013) (affirming *Almendarez-Torres* provides valid exception for prior convictions); *see also Fletcher v. State*, 168 So. 3d 186 (Fla. 2015), *cert. denied*, 136 S.Ct. 980 (2016) (post-*Hurst* denial of certiorari where defendant had prior felony conviction and was under a sentence of imprisonment, and the murder was committed during the course of a robbery); *Smith v. State*, 170 So.3d 745 (Fla. 2015), *cert. denied*, 136 S.Ct. 980, *reh'g denied*, 2016 WL 1079054 (U.S. Mar. 21, 2016) (post-*Hurst* denial of certiorari review where defendant had a prior violent felony conviction, was on felony probation, and the murder was committed during the course of a burglary).

In his *Initial Brief*, Appellant argued that his jury recommendation was

constitutionally deficient because it was not unanimous. (*IB* at 67-68). He did not claim additional jury factfinding was necessary, which was the ultimate issue in the *Hurst* decision. *See Hurst v. Florida*, 136 S. Ct. 616 (2016). This new argument is not preserved for review, was improperly raised for the first time in Appellant's *Reply Brief*. And subsequently, is not properly before the court. On the merits, *Hurst* does not speak to unanimous jury findings whatsoever, and Appellant's assertion that he is entitled to a new penalty phase because of his 10-2 death recommendation is unsupported.

Finally, even if this Court were to find any constitutional error in the instant case, the State submits that any error was harmless and does not entitle Appellant to relief. The law is well settled that, even when there is constitutional error, the court may conduct 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). *Neder* explains why Appellant'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 further 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* 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*, 136 S.Ct. at 624.

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).

No possible constitutional error effected Appellant under the facts of his case. Accordingly, his death sentence should be upheld.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's conviction and sentence of death.


CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished by E-Mail to Christopher S. Quarles, Assistant Public Defender, quarles.chris@pd7.org and support@pd7.org; Nancy Ryan, Assistant Public Defender ryan.nancy@pd7.org and lombardo.michelle@pd7.org, 444 Seabreeze Blvd., Suite 210, Daytona Beach, FL 32118 on this 29th day of April, 2016.

CERTIFICATE OF COMPLIANCE

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

PAMELA JO BONDI
ATTORNEY GENERAL

/s/


STACEY E. KIRCHER
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 050218
Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, Florida 32118
Stacey.Kircher@MyFloridaLegal.com
Secondary E-Mail:
CapApp@MyFloridaLegal.com
Telephone: (386) 238-4990
Facsimile: (386) 226-0457
COUNSEL FOR APPELLEE