

**IN THE SUPREME COURT OF FLORIDA
CASE NO SC15-1028**

GUILLERMO O. ARBELAEZ, Appellant,

v.

STATE OF FLORIDA, Appellee

**ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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ARGUMENT

The State first of all argues that this issue is not properly before the Court. Answer Brief at 1. The argument begs the question, since appellant was granted the instant Supplemental Briefing, over the State's objection. In addition to the 30+ cases in which this Court has ordered supplemental briefing since *Hurst* was issued, this Court has issued two stays of execution, in *Lambrix* and *Asay*. Stays of execution are only granted when there is a "significant possibility of relief on the merits." See *Chavez v. State*, 132 So. 3d 826, 832 (Fla. 2014). This Court also recalled a final mandate in a capital case to allow supplemental briefing in *Hojan v. State*, No. SC13-2422 (Fla. Dec. 18, 2015). By doing so, this Court acknowledged that the constitutional problem identified in *Hurst* is significant enough to justify disturbing the finality of capital cases. Given the unambiguous holding of *Hurst*, that the Florida statute under which Arbelaez was sentenced is unconstitutional, the Court needs to make profound determinations as to the application of *Hurst* to cases such as Arbelaez's involving a sentence of death imposed unconstitutionally.

The State claims that *Hurst* "did not find the death penalty unconstitutional" (AB at 13). Quibbling over semantics reveals the weakness of the State's position. The U.S. Supreme Court did not leave any room for doubt or interpretation about exactly what it held when after describing Florida's death penalty scheme it wrote, "[w]e hold this sentencing scheme unconstitutional." *Hurst v. Florida*, 136 S. Ct.

616, 619 (2016). Instead of acknowledging the actual holding of *Hurst* or the plain language of the statute under which Arbelaez was sentenced to death, Florida Statutes § 921.141 (amended March 7, 2016), the State obfuscates, relies on overruled caselaw, and attempts to minimize *Hurst*'s impact by characterizing it as a "trial error".

The State argues that *Hurst* is an extension of *Ring v. Arizona*, 536 U.S. 584 (2002). Refusing to acknowledge either the plain language of the statute or of *Hurst*, the State continues to wrongly argue that Arbelaez was automatically eligible for death because of his contemporaneous conviction for kidnapping at the guilt phase (Answer Brief at 15). This argument arises from the fact that the Arizona statute at issue in *Ring* only required one aggravator, a fact which has been sloppily imported into the current discussion of *Ring*'s applicability to Florida's former statute.¹

In *Ring*, the U.S. Supreme Court held that "[c]apital 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 (emphasis added). This holding ties the Sixth Amendment right to a jury trial to the legislatively defined facts that authorize an increase in the maximum punishment. This connection

¹ Incidentally, Florida's newly minted statute, which provides that future defendants may be eligible for death upon the finding of one aggravator, is irrelevant to this case. Arbelaez was sentenced under the unconstitutional statute, and that is the sentence he is appealing.

between the Sixth Amendment jury trial right and the legislatively defined facts is at the core of *Ring*:

The dispositive question, we said, is one not of form, but of effect. If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how a State labels it—must be found by a jury beyond a reasonable doubt.

Ring, 536 U.S. at 602 (citation omitted). The citation that was omitted was to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). There, the Supreme Court explained, “[d]espite what appears to us the clear ‘elemental’ nature of the factor here, the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?” *Apprendi*, 530 U.S. at 494. In his concurrence, Justice Scalia wrote, “And the guarantee that ‘[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury,’ has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.” *Id.* at 498 (Scalia, J., concurring).

Thus, the Supreme Court held that the Sixth Amendment right to a jury trial was tied to the legislatively defined facts that must be present to authorize the imposition of a death sentence. But in *Arbelaez*’s case and in the other cases in which supplemental briefing has been submitted, the State has steadfastly refused to acknowledge that the scope of the Sixth Amendment jury trial right varies from state

to state because its application is bound to the specific language of each state's statute's definition of the facts necessary to authorize an increase in punishment.

Rather than acknowledge that *Ring* links the jury trial right to the legislatively defined facts that authorize the imposition of a death sentence, the State sees only the conclusion reached in *Ring* that in Arizona, the jury trial right was tethered to the Arizona statute, which allowed for death eligibility upon the finding of one aggravator. But Arizona's statute has nothing to do with the Florida law under which Arbelaez was sentenced. Nowhere in Florida's former statute was it written that the mere presence of a single aggravating circumstance was sufficient to justify the imposition of a death sentence. In fact, prosecutors lobbied the Florida Legislature to change the statute and insert new language authorizing death eligibility upon the finding of one aggravator. The new law provides that "[i]f the jury does not unanimously find at least one aggravator, the defendant is ineligible for a sentence of death." Fla. Stat. § 921.141(2)(b)(1) (effective March 7, 2016). The former statute did not contain any such language. Under the former statute—the statute under which Arbelaez was sentenced to death—the requisite finding was that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3)

Under *Hurst*, that factual finding of sufficiency—the finding that increases the penalty from life in prison to death—must be made by a jury, not a judge. That is the heart of *Hurst*'s holding.

[T]he 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). 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.”

Hurst, 136 S. Ct. at 622 (emphasis in original). Both *Ring* and *Hurst* require courts to look to the governing statute to see what facts are necessary before death may be imposed, but the State will not acknowledge the statute, as if ignoring it will make it go away.

Instead, the State simply spends the majority of its brief insisting that Florida requires only the finding of an aggravator to make a defendant death eligible (Answer Brief at 3), without citing any statutory authority. Because the State refuses to discuss the plain language of the former statute (since the statute said something different than what the State wishes it said), the only support it can offer for its argument are decisions where this Court misconstrued *Ring*. First, the State cites to dicta in *Steele v. State*, 921 So. 2d 538, 543 (Fla. 2005), one of the many cases abrogated by *Hurst*. In *Steele*, the Court struggled with the implications of *Ring*, lamenting that “the effect of that decision on Florida’s capital sentencing scheme

remains unclear” and that this “uncertainty has left trial judges groping for answers.” *Id.* at 540.

Contrary to the State’s representation, *Steele* did not hold that the presence of one aggravator automatically qualified one for death. Instead, the Court’s narrow holding was that the trial court had erred by using special verdict forms because “under current law, a trial judge . . . depart[s] from the essential requirements of law by requiring a majority of jurors to agree that a particular aggravator applies.” *Steele* at 540. The Court’s consideration of *Ring* was inconclusive (“[e]ven if *Ring* did apply in Florida—an issue we have yet to conclusively decide— . . .”), and the most the Court would say about it was that its interpretation of *Ring* was consistent with precedent, including *Hildwin* and *Spaziano*, which were specifically overturned by *Hurst*. See *Steele* at 546-47.

In fact it was *Steele*, of all cases, in which this Court pleaded with the Florida Legislature to take action to ensure the continued viability of Florida’s death penalty scheme. Specifically, the Court implored the Legislature to “revisit the statute to require some unanimity in the jury’s recommendations.” *Steele* at 548. In fact, the U. S. Supreme Court has recognized that under Florida law, one aggravator is not necessarily enough, meaning that it cannot serve as an eligibility finding.

The language of the statute, which provides that the sentencer must determine whether “sufficient aggravating circumstances exist,” § 921.141(3)(a), indicates that any single statutory aggravating circumstance **may not be**

adequate to meet this standard if, in the circumstances of a particular case, it is not sufficiently weighty to justify the death penalty.

Barclay v. Florida, 463 U.S. 939, 954 n.12 (1983) (emphasis added).

Similarly, the Eleventh Circuit has made clear that in Florida, eligibility and the weighing of sentencing factors are “collapsed into a single step.” See *Jennings v. McDonough*, 490 F.3d 1230, 1257 (11th Cir. 2007). The Florida Legislature combining the weighing with the eligibility determination is the source of the confusion about *Hurst*’s application of the Sixth Amendment to Florida’s statute.

The State next relies on *Alleyne v. United States*, 133 S. Ct. 2151 (2013), a non-capital case from Virginia. Answer Brief at 5. In *Alleyne*, 133 S. Ct. at 2162-63, the Court finished by stating, “[the aggravator] must, therefore, be submitted to the jury and found beyond a reasonable doubt.” The actual holding of *Alleyne* was that *Apprendi* did apply to the Virginia non-capital statute, and therefore any fact which increased the possible penalty was an element that had to be found by a jury. So, not only does *Alleyne* fail to support the State’s argument that one aggravator was sufficient under Florida law, it actually supports Abelaez’s argument that any fact which increases the possible penalty is an element which must be found unanimously by a jury. Similar considerations apply to the other cases cited by the State: *State of Southern Union Co. v. United States*, 132 S. Ct.2344 (2012); *Cunningham v.*

California, 549 U.S. 270; *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004), none of which have any bearing on the Florida statute found unconstitutional under *Hurst*.

The State attempts to resuscitate pre-*Hurst* law by claiming that federalism denies the United States Supreme Court the power to interfere with the way that Florida's death penalty is administered (Answer Brief at 8). The Supremacy Clause of the U. S. Constitution reveals the fallacy of that argument.

The Constitution and the laws of the United States...shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to be contrary notwithstanding.

U.S. CONST. Art. VI § 2. States cannot have unconstitutional death penalty statutes.

Hurst found Florida's scheme unconstitutional. Federalism cannot revive it.

The State argues that *Hurst* is just a "trial error" and as such, it is not retroactive. This assertion is belied by the maelstrom of activity *Hurst* inspired, both in the Florida Legislature and in this Court. By doing so, this Court has acknowledged that the constitutional problem identified in *Hurst* is significant enough to justify disturbing the finality of capital cases. This would not be the case if *Hurst* were, as the State keeps repeating, just a procedural rule.

The State trots out *Teague v. Lane*, 498 U.S. 288 (1989) and *Schriro v. Summerlin*, 542 U.S. 348 (2004) yet again to support its argument that *Hurst* is not retroactive, yet fails to meaningfully address Arbelaez's argument that *Witt* controls,

not *Teague* or *Summerlin*. This Court specifically crafted *Witt* to provide greater, more expansive protection than was provided by federal caselaw.

The State also cites *Johnson v. State*, 904 So. 2d 400 (2005) to argue that *Ring* is not retroactive in Florida under *Witt*, ignoring the fact that in *Johnson*, this Court misconstrued *Ring* and failed to recognize its true scope. *Johnson* rested on a rotten foundation which collapsed when *Hurst* overruled *Hildwin v. Florida*, 390 U.S. 638 (1989) and *Spaziano v. Florida*, 468 U.S. 447 (1984). Also, *Hurst* is not *Ring*. *Ring* reviewed an Arizona death penalty scheme that was different than *Hurst*'s review of Florida's scheme. There is nothing left of *Johnson* for the State to rely on, and the suggestion that *Hurst* is not retroactive because this Court held in *Johnson* that *Ring* was not retroactive is simply absurd.

Arbelaez relies on his supplemental initial brief argument that the *Hurst* error was structural and could never be harmless. However, to the extent that this Court decides a harmless error analysis is appropriate (which the *Hurst* Court specifically declined to address), Arbelaez must address the State's assertion that because Arbelaez was found guilty of kidnapping, "he could not even legally challenge the application of the "during the course of a felony aggravator" (Answer Brief at 15).

There were no jury findings. We have no idea what the jury found. We only know that the jury recommended death by a vote of 11-1, thus the State could never prove that the *Hurst* error was harmless beyond a reasonable doubt. One juror voted

for a life sentence, presumably because that juror did **not** find sufficient statutorily defined facts to justify a death sentence. We have no idea whether or not the other jurors relied on this aggravator or not as “sufficient .” There is no way to conclude beyond a reasonable doubt that Arbelaez’s jury—if properly instructed that its determination of the statutorily defined facts would be binding on the judge—would have unanimously found the facts necessary to impose death. “To hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury trial guarantee.” *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993). It would be nothing more than the sort of “frail conjecture” that precludes meaningful appellate review. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

CONCLUSION AND RELIEF SOUGHT

Arbelaez asks that this Court vacate his unconstitutional death sentence and impose a life sentence, or vacate his death sentence and remand his case for resentencing, or grant any other relief that this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I further certify that the foregoing Initial Brief has been produced in a 14 point Times New Roman type, a font that is not proportionately spaced and in compliance with Fla. R. App. Pro. 9.220 and 9.100(l).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been filed through the electronic filing portal and likewise provided to the opposing counsel by the electronic mail associated with the portal on this 18th day of March 2016.

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