

IN THE SUPREME COURT OF FLORIDA

DONALD DAVID DILLBECK,

Appellant,

v.

Case No. SC17-847

STATE OF FLORIDA,

Appellee.

_____ /

**APPELLANT’S REPLY TO STATE’S REPLY TO ORDER
TO SHOW CAUSE**

COMES NOW the Appellant, Donald Dillbeck, through undersigned counsel, and files this reply to the “State’s Reply to Order to Show Cause” (hereinafter “State’s Reply”) filed October 17, 2017.

Reply Argument

The State makes several mischaracterizations of Dillbeck’s arguments, asserting that they are “the same arguments” that this Court has rejected in other cases (State’s Reply, p. 1), that Dillbeck “makes many of the same Eighth Amendment ... arguments that this Court explicitly rejected in *Hitchcock*, *Asay VI*, and *Lambrix* (State’s Reply, p. 3), and an incorrect claim that Dillbeck asserted in his response to the order to show cause that *Schriro v. Summerlin* was overruled in *Montgomery v. Louisiana* (State’s Reply, p. 7). None of these statements is

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accurate, nor does the State's Reply cite to any pleading or opinion to support these assertions. Decisions in cases other than *Hitchcock* are irrelevant to the present show cause order, and Dillbeck's case presents issues not raised or decided in *Hitchcock*.

Dillbeck's first argument is that this Court announced a substantive rule of law in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), when it held that the Eighth Amendment requires the jury to render a unanimous verdict as to all factual findings and the ultimate recommendation of death during capital sentencing proceedings. The State's Reply doesn't even address this argument, ignoring it completely. Instead, the State argues that the Sixth Amendment right to trial by jury is procedural (State's Reply, p. 10).

Dillbeck conceded that in *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004), the Supreme Court held that the Sixth Amendment right announced in *Ring v. Arizona* was not retroactive (Dillbeck's Response, p. 6). Rather than assert that this ruling was overruled by *Montgomery*, Dillbeck asserted that the Eighth Amendment right to a unanimous verdict as to all jury findings required by § 921.141 is substantive in nature and requires a retroactivity analysis separate from the *Witt* analysis applied to the purely procedural rule announced in *Hurst v. Florida*, 136 S. Ct. 616 (2016).

The ruling in *Hurst v. Florida* derived from *Ring* and was based solely on

the Sixth Amendment right to trial by jury in capital sentencing announced in *Ring*. However, the ruling in *Hurst v. State* is based in part on the Eighth Amendment. As such, the retroactivity of that rule is not governed by *Summerlin*.

The State offers no explanation for why a rule announcing a unanimous verdict requirement in capital sentencing is not a new substantive rule. This Court's stated reason for requiring juror unanimity was "to help narrow the class of murderers subject to capital punishment." *Hurst II*, 202 So. 3d at 60 (citing *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987)). This narrowing function discussed in *McCleskey* derives from the Eighth Amendment prohibition on arbitrary imposition of the death penalty. Contrary to the State's argument, this goes beyond merely shifting the role of fact-finder from judge to jury, an issue expressly avoided in *McCleskey*. See *Id* at 303 n.25. The Sixth Amendment right to trial by jury and the Eighth Amendment right to individualized sentencing are not the same and do not overlap, and a retroactivity ruling as to one right has no bearing on the other.

Dillbeck's second argument is that *Hurst v. State* assigned a burden of proof of beyond a reasonable doubt to the jury's finding that the aggravating factors are sufficient for death, a standard which did not previously apply to that finding and which is substantive in nature. The State argues that *Ivan V. v. City of New York* and other decisions regarding substantive rules of law do not apply because *Hurst*

did not announce a new rule. The State reasons that, “Florida law has required that the State prove aggravators at the beyond-a-reasonable-doubt standard of proof for over three decades.” (State’s Reply, p. 7).

That is true as to the existence of one or more aggravating factors. However, prior to *Hurst v. State*, the State was not required to prove beyond a reasonable doubt that the aggravating factors were sufficient for death. It is now.

In support of his position, Dillbeck cited to two decisions by the Delaware Supreme Court that applied the standard of proof beyond a reasonable doubt to a jury’s findings in a capital sentencing proceeding and then applied that rule retroactively. In reply, the State attempts to distinguish *Powell v. Delaware*, 153 A. 3d 69 (Del. 2016), which held that the rule in *Rauf v. State*, 145 A. 3d 430 (Del. 2016), is retroactive. The State’s argument is that *Rauf* remedied the prior unconstitutional use of a lower burden of proof while *Hurst* did not, and therefore *Powell* does not support Dillbeck’s argument that *Hurst v. State* should be applied retroactively (State’s Reply, p. 8). The State is incorrect because it is conflating the rule announced in *Hurst v. Florida* with this Court’s holding in *Hurst v. State*.

The State is misconstruing the following language from the *Powell* opinion:

Ring only implicated the Sixth Amendment right to a jury. The same was true in *Hurst* because Florida also already required proof beyond a reasonable doubt.

Powell, 153 A. 3d at 73-74. When *Powell* stated that “*Hurst*” only implicated the Sixth Amendment right to a jury, it was referring to *Hurst v. Florida*. The hyperlink in the opinion takes the reader to the U.S. Supreme Court’s opinion in *Hurst v. Florida*. Thus, the Delaware Supreme Court was distinguishing the due process claim before it from the Sixth Amendment issue resolved in *Hurst v. Florida*, and was not distinguishing the Eighth Amendment and burden of proof issues decided in *Hurst v. State*.

Furthermore, the fact that Florida “already required proof beyond a reasonable doubt” prior to *Hurst* only referred to the findings as to the existence of one or more aggravating factors, not to the other findings required by § 921.141.

Powell quotes the following language from *Hurst v. State* that illustrates this point:

Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances. These same requirements existed in Florida law when *Hurst* was sentenced in 2012-although they were consigned to the trial judge to make.

Hurst v. State, 202 So. 3d at 53 (italics omitted).

Thus, prior to the *Hurst* decisions, the State was required to prove the existence of one or more aggravating factors beyond a reasonable doubt, and was required to prove that the aggravating factors were sufficient. However, the State

was not required to prove the sufficiency of the aggravators beyond a reasonable doubt until this Court added that requirement in *Hurst v. State*.

In footnote 18 of its opinion in *Hurst v. State*, this Court stated that, “even if the jurors unanimously find that sufficient aggravating factors were proven beyond a reasonable doubt, and that the aggravators outweigh the mitigating circumstances, the jurors are never required to recommend death.” *Hurst v. State*, 202 So. 3d at 62 n.18 (emphasis added). The Court combined the findings as to the existence and the sufficiency of the aggravators in a single phrase and assigned a burden of proof beyond a reasonable doubt and then, separated by a comma, referenced the finding that the aggravators outweigh the mitigators. Dillbeck argued that this language indicated that the sufficiency finding is also subject to the standard of proof beyond a reasonable doubt, which is analogous to the holdings in *Rauf* and *Powell*.¹ If so, this requirement did not exist prior to the decision in *Hurst v. State*.

Requiring the State to prove sufficiency beyond a reasonable doubt is also consistent with the Due Process Clause, which demands that the State prove every

¹ The State offers no argument for why the finding of sufficiency should not be subject to the standard of proof beyond a reasonable doubt, nor any authority establishing that this requirement existed prior to the decision in *Hurst v. State*. However, in light of this Court’s stated desire to insulate Florida’s capital sentencing scheme from further constitutional challenges in the future, it would be anomalous not to include this constitutional guarantee. *See Hurst v. State*, 202 So. 3d at 62 (Stating, “[t]his requirement will dispel most, if not all, doubts about the future validity and long-term viability of the death penalty in Florida.¹⁸”)

necessary element of an offense beyond a reasonable doubt. In *Hurst v. State*, this Court stated:

The Supreme Court made clear [in *Hurst v. Florida*], as it had in *Apprendi*,² that the Sixth Amendment, in conjunction with the Due Process Clause, “requires that each element of a crime be proved to a jury *beyond a reasonable doubt*.”

Hurst v. State, 202 So. 3d at 51 (emphasis added). This Court then analyzed § 921.141 and concluded that “every fact, and thus every element, necessary for the imposition of the death penalty” includes a finding that the aggravating factors are “sufficient to impose death.” *Id* at 52-53.

If the finding of sufficiency is an element, it must be proven beyond a reasonable doubt to comport with Due Process and *Apprendi*. The fact that this Court characterized the sufficiency finding as an element within the meaning of *Apprendi* supports Dillbeck’s interpretation of footnote 18 that the standard of proof beyond a reasonable doubt now applies to that finding.

Therefore, while it is true that the ruling in *Rauf* was partly decided on due process grounds because the finding that the aggravating factors outweigh the mitigating factors was previously subject to the preponderance of the evidence standard and the court increased it to proof beyond a reasonable doubt³, that does

² *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000)

³ *See Powell*, 153 A. 3d at 74 (noting that failure to require proof beyond a reasonable doubt was a Due Process Clause violation).

not distinguish *Powell* from this Court's holding in *Hurst v. State*. Both decisions involve the assignment of a burden of proof beyond a reasonable doubt to a critical finding, or element, necessary for imposition of the death penalty under state law. Therefore, the decisions in *Rauf* and *Powell* are persuasive authority on the question of whether allocation of the burden of proof beyond a reasonable doubt to the jury's finding that the aggravating factors are sufficient for death (1) is required by the Due Process Clause, and (2) is a substantive rule that should be applied retroactively.

This Court cited to *Rauf* and *Powell* in *Hurst v. State*, acknowledging that Florida and Delaware were two of only three states that did not require a unanimous jury recommendation of death in capital sentencing prior to *Hurst v. Florida*. See *Hurst v. State*, 202 So. 3d at 61 n.17. The Court expressed a desire to bring Florida's capital sentencing laws "into harmony with the direction of society reflected in all these states and with federal law." *Id* at 61. Delaware has already done so. Requiring juror unanimity and assigning a burden of proof beyond a reasonable doubt to all critical findings necessary for imposition of the death penalty, including the finding of sufficiency required by § 921.141, are both steps toward accomplishing that "important goal." *Id*. However, both constitute new substantive rules that may qualify for retroactive application irrespective of the

Sixth Amendment jury trial right announced in *Hurst v. Florida*. This question was not addressed or resolved in *Hitchcock*.

Conclusion

Based on the foregoing, Dillbeck requests that the Court discharge the order to show cause and allow this appeal to proceed.

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing response was furnished by electronic service to Charmaine Millsaps, Senior Assistant Attorney General, at capapp@myfloridalegal.com on November 6, 2017.

/s/ Baya Harrison
Baya Harrison, III