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IN THE SUPREME COURT OF FLORIDA

LUCIOUS BOYD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC18-1589

DEATH PENALTY CASE

RECEIVED, 12/03/2018 02:23:25 PM, Clerk, Supreme Court

STATE'S REPLY TO NOVEMBER 1, 2018 ORDER TO SHOW CAUSE

COMES NOW, APPELLEE, State of Florida, through undersigned counsel, and files its reply to Appellant's Response to Order to Show Cause filed on November 20, 2018 pursuant to this Court's Order dated November 1, 2018 and asserts that this Court should affirm the denial of Appellant's successive postconviction motion in accordance with *Asay v. State*, 210 So.3d 1 (Fla. 2016); *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017); *Asay v. State, 224 So.3d 695 (Fla. 2017)*; *Lambrix v. State*, 227 So.3d 112 (Fla. 2017); *Reynolds v. State*, 251 So.3d 811 (Fla. 2018); *Philmore v. State*, 234 So.3d 567, 568–69 (Fla. 2018); *Hall v. State*, 212 So. 3d 1001, 1033–36 (Fla. 2017). and states:

OVERVIEW

This is an appeal from a third attempt by Appellant, Lucious Boyd ("Boyd"), to obtain relief in his post-*Ring*[1] case

[1] *Ring v. Arizona*, 536 U.S. 584 (2002). On February 21, 2006, certiorari was denied. *Boyd v. Florida*, 546 U.S. 1179 (2006).

following the issuance of *Hurst v. Florida*, 136 S.Ct. 616 (Fla. 2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) and their progeny from his death sentence imposed following a unanimous jury recommendation for the first-degree murder of DD (using initials given the sexual battery conviction). While he claims he is not advancing a *Hurst* claim, but rather an Eighth Amendment and Due Process claim based on the new capital sentencing statute enacted under Chapter 2017-1, Laws of Florida, the challenge stems from *Hurst v. Florida/Hurst* and the changes made to Florida capital sentencing as a result. (R 3-4).

Boyd raises the instant claims even though he is barred under the law of the case. *Boyd v. Jones*, 2017 WL 318931 (Fla. Jan. 23, 2017) (denying successive habeas petition which challenged death sentence as violative of Sixth and Eighth Amendments based on *Hurst v. Florida* and *Hurst v. State*) and the fact the Florida Supreme Court has rejected the constitutional challenges raised in this successive motion. See *Asay v. State*, 210 So.3d 1 (Fla. 2016); *Asay v. State*, 224 So.3d 695 (Fla. 2017); and *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017); *Lambrix v. State*, 227 So.3d 112 (Fla.), *cert. denied*, 138 S.Ct. 312 (2017); *Reynolds v. State*, 251 So.3d 811 (Fla. 2018). This Court has found repeatedly *Hurst* error harmless beyond a

reasonable doubt where the jury recommended death unanimously. *See Davis v. State*, 207 So.3d 142, 173–75 (Fla. 2016). The fact that a new sentencing statute is enacted does not require re-sentencing on cases final on appeal *See* Article X, section 9 of the Florida Constitution. Relief was denied properly.

STATEMENT OF THE CASE AND FACTS

On April 14, 1999, Boyd was indicted for first-degree murder, armed kidnapping, and sexual battery of DD. *Voir dire* commenced December 3, 2001 and a jury was seated the next day. Opening statements were given January 7, 2002, and on January 30, 2003, guilty verdicts were returned on each count. (R.1 6-7; R.3 461-63; R.5 2; R.7 378; R.8 457; R.20 1758-76, 2088-89).[2] Following the penalty phase, the jury unanimously recommended death for the murder. (R.29 2388-91) During the June 21, 2002 sentencing, the court imposed death for the murder of DD, 15 years for the armed kidnapping, and life for the sexual battery. (R.3 498, 546-55; R.30 2494-2503).

This Court found that Boyd picked up DD after her car ran out of gas. He took her to his residence where he sexually

[2] The appellate records will be cited as follows: Direct Appeal record will be by "R", to the postconviction record will be "PCR", and supplemental materials will be designated by the symbol "S" preceding the type of record referenced, followed by the appropriate volume and page number(s).

assaulted her before killing and dumping her body in Deerfield Beach. Eye witness testimony and forensic evidence in the form of DNA, blood, semen, bite marks, tire track, bed linen and carpet fibers, possession of the tools similar to those used to torture/kill DD, a laundry bag in the church van Boyd drove covering DD head, and plastic bags established Boyd committed the sexual assault and first-degree murder of DD. *Boyd*, 910 So.2d at 174-77. This Court rejected Boyd's 15 issues. *See Boyd v. State*, 910 So.2d 167, n.4 (Fla. 2005).

Subsequently, on February 14, 2007, Boyd filed his motion for postconviction relief and later filed amendments. (PCR.3 328-403; PCR.8 1257–PCR.12 2188; PCR.14 2545-87). An evidentiary hearing was held on August 28, 29, and 31, 2013 (PCR.30) during which Boyd abandoned certain claims, and on January 7, 2013, relief was denied. In the appeal, this Court affirmed the denial of relief and denied the state habeas petition. *Boyd v. State*, 200 So.3d 685 (Fla. 2017). During the rehearing, *Hurst v. Florida* was decided and Boyd was permitted to supplement his motion for rehearing with a *Hurst* claim. Although the rehearing was denied, Boyd was permitted to file a successive state habeas petition raising the *Hurst* claim which was denied subsequently in an unreported order. *Boyd v. Jones*, 2017 WL 318931 (Fla. Jan.

23, 2017). Following the passage of Chapter 2017-1, Boyd filed a successive postconviction under Rule 3.851, Fla. R. Crim. P. and alternately under Rule 3.800(a), Fla. R. Crim. P. On August 14, 2018, the motion was denied. (2PCR 212-16).

ARGUMENT

Boyd admits he raised a *Hurst v. Florida* and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (“*Hurst*”) claim in his successive state habeas petition. Nonetheless, he seeks review here based on the Legislature’s amending of Florida’s capital sentencing in Chapter 2017-1, Laws of Florida on March 13, 2017 in light of *Hurst* and *Perry v. State,* 210 So.3d 630 (Fla. 2016). He asserts that Chapter 2017-1, created as a result of *Hurst*, a new “greater offense of capital first degree murder” of which he was not convicted, thus, his death sentence violates Due Process and the Eighth Amendment. Boyd claims he is not barred from bringing the instant Eighth Amendment/Due Process claim as it is different from the *Hurst* claim he raised earlier. The pith of the argument is *Hurst* error must be found because this Court found the capital sentencing statute unconstitutional in *Hurst* and the Legislature amended the statute to conform with *Hurst*. In order to grant relief, this Court must ignore its law of the case denying *Hurst* error in Boyd’s habeas case, ignore its

precedent finding *Hurst* error harmless beyond a reasonable doubt where a jury unanimously recommended death, and overlook binding its precedent rejecting the instant constitutional challenges.

Law of the Case[3]/Procedural Bar – As noted above, this Court denied Boyd's successive state habeas petition wherein he raised his *Hurst* challenge. As such, it is the law of the case that any alleged *Hurst* error in Boyd's sentencing is harmless beyond a reasonable doubt and without merit. This Court has been consistent in holding *Hurst* would be retroactive to defendants whose death sentences became final after *Ring v. Arizona*, 536 U.S. 584 (2002) was decided on June 24, 2002, such as Boyd's case, and that their sentences would be reviewed for harmless

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[3] Stating:

> The doctrine of the law of the case requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings. *** Under the law of the case doctrine, a trial court is bound to follow prior rulings of the appellate court as long as the facts on which such decision are based continue to be the facts of the case. *** Moreover, even as to those issues actually decided, the law of the case doctrine is more flexible than res judicata in that it also provides that an appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a "manifest injustice."

Florida Dept. of Transp. v. Juliano, 801 So. 2d 101, 105–06 (Fla. 2001)(citations omitted)

error. *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016). It also has been consistent in finding harmless error for those defendants whose juries recommended death unanimously.[4] *See Davis v. State*, 207 So.3d 142, 173–75 (Fla. 2016); *Reynolds v. State*, 251 So.3d 811 (Fla. 2018); *Hall v. State*, 212 So. 3d 1001, 1033–36 (Fla. 2017); *Guardado v. Jones*, 226 So.3d 213 (Fla. 2017), *cert. denied*, 138 S.Ct. 1131 (2018); *Middleton v. State*, 220 So.3d 1152 (Fla. 2017), *cert. denied*, 138 S.Ct. 829 (2018).

A review of the record establishes that Boyd's jury received the standard instructions which were proper at the time and that the contemporaneous convictions and case facts established the aggravation upon which the jury recommended death unanimously.[5] Moreover, merely looking at the trial

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[4] In a case on direct appeal at the time *Hurst v. Florida* and *Hurst* were decided, the Florida Supreme Court rejected the claim of *Hurst* error finding the unanimous jury recommendation allowed the Court to find any error harmless beyond a reasonable doubt.

> In this case, the penalty phase jury returned a unanimous recommendation for a sentence of death. "[This] recommendation[] allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." *Davis*, 207 So.3d at 174.

Tundidor v. State, 221 So. 3d 587, 607 (Fla. 2017), *cert. denied sub nom*. *Middleton v. Florida*, 138 S. Ct. 829 (2018)

[5] Those instructions informed the jury its decision was to be based on whether it found "sufficient aggravating circumstances"

stipulation,[6] there could be no question that the wounds inflicted established HAC. *Boyd*, 910 So.2d at 174-77. Those

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existed "to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." (R.29 2371). The aggravators were to be proven beyond a reasonable doubt, but mitigators could be considered were the jury was "reasonably convinced" of their existence. (R.29 23-7374). The jury was instructed that it could consider the aggravators of commission during the course of a felony of either "sexual battery and/or kidnapping" and the heinous, atrocious, or cruel ("HAC"). If the aggravation, in the jury's estimation did not justify the death penalty, the jury was told its recommendation should be one of life imprisonment. Only in the event the jury found sufficient aggravation were deliberation to continue with evaluation of the mitigation offered. (R.29 2372). Such instructions are not an impediment to finding an Hurst error harmless beyond a reasonable doubt. *See Davis; Hall; Reynolds.* Furthermore, Boyd's sentencing jury convicted him of kidnapping and sexual battery, rendering its unanimous verdict, resulting in death eligibility.

[6] This Court will recall:

> At trial, it was stipulated that [DD] died due to a penetrating head wound and that the bruising on her head was consistent with but not exclusive to the face plate of a reciprocating saw. Wounds to her chest, arms, and head were consistent with but not exclusive to a Torx brand torque screwdriver, and she had defensive wounds on her arms and hands. There was bruising to her vagina that was consistent with sexual intercourse, although the medical examiner could not determine whether the intercourse was consensual or nonconsensual. [DD] had thirty-six superficial wounds on her chest, four on the right side of her head, and twelve on her right hand, some being consistent with defensive wounds and some being consistent with bite marks. One fatal wound to the head perforated the skull and penetrated [DD]'s brain.

Boyd, 910 So.2d at 174-77. Clearly, HAC was established.

felony convictions remain intact, and thus, any *Hurst* infirmity is harmless beyond a reasonable doubt. *Davis; Hall; Reynolds.*

It is Boyd's assertion that it matters not whether this Court reviewed his sentence previously under a Sixth Amendment Hurst/Due Process claim as he now is challenging his death sentence under an Eighth Amendment/Due Process argument. He asserts that this is permissible under *McGautha v. California*, 402 U.S. 183 (1971) (raising Due Process challenge to capital sentencing) and *Furman v. Georgia*, 408 U.S. 238 (1972)(raising Eighth Amendment/Due Process challenge to capital sentencing). However, in those cases different defendants raised different constitutional challenges, while here, Boyd is raising different constitutional challenges against the same sentence in successive pleadings. Boyd could have made these claims but did not. He should be barred here; but even assuming he is not, the claims are meritless.

Eighth Amendment/Due Process Argument - Based on this record, Boyd's Due Process and Eighth Amendment claims fail. In *Hall v. State*, 246 So3d 210 (Fla. 2018), this Court rejected a successive *Hurst* claim in part because the defendant's jury had recommended death by a unanimous vote. That Court stated:

> We deny this subclaim [violation of due process] of

Hall's successive postconviction motion because we have already addressed a *Hurst* harmless error analysis as it pertains to Hall's case in *Hall II*, 212 So.3d at 1033–36. Thus this subclaim is duplicative.

Furthermore, the authority upon which Hall relies in support of his argument, *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), is not determinative. The United States Supreme Court, in *In re Winship*, held that the State must prove all elements of a crime in a juvenile delinquency proceeding beyond a reasonable doubt, just as it would in an adult criminal proceeding, and that the failure to do so would result in a due process violation. 397 U.S. at 367–68, 90 S.Ct. 1068. We conclude that *In re Winship* is distinguishable from Hall's case, however, because Hall's case does not concern a juvenile delinquency proceeding. Moreover, although *Hurst* did result in the requirement that all aggravators and mitigators be proven beyond a reasonable doubt, as we previously stated in *Hall II*, the error in Hall's case was harmless. *See* 212 So.3d at 1033–36 (discussing how the error was harmless due to Hall's unanimous death sentence). Thus we conclude that Hall's death sentence does not violate due process and thus hold that this subclaim is meritless.

Hall's Death Sentence Violates the Eighth Amendment

We deny this claim of Hall's successive postconviction motion because there was no harmful error in this case. *Hall II*, 212 So.3d at 1036. In *Hurst*, we held that unanimity is required under the Eighth Amendment. Similarly, we have determined that defendants whose sentences became final post-*Ring* and who received unanimous jury recommendations are not entitled to *Hurst* relief if the error is deemed to be harmless pursuant to *Davis v. State*, 207 So.3d 142, 173–75 (Fla. 2016).

Hall, 246 So.3d at 216-17. *See*, *Philmore v. State*, 234 So.3d 567, 568–69 (Fla. 2018) (concluding defendant not entitled to relief on claims of due process and Eighth Amendment violations as jury made unanimous recommendation of death which renders any *Hurst* error harmless beyond a reasonable doubt).

Boyd also asserts that a new substantive right was created by Chapter 2017-1 requiring resentencing.[7] He points to *Fiore v.*

[7] Boyd claims *Hurst* and the new statute should be read to have created a new crime of "capital first-degree murder" (motion at 7-8) necessitating re-sentencing. His assertion is without merit. To start, neither this Court in *Hurst,* 202 So.3d at 40 nor the United States Supreme Court in *Hurst v. Florida* have determined that the aggravating factors upon which a **sentence** of death must be based are elements of a crime. In *Hurst v. Florida,* the United States Supreme Court characterized the aggravating factors as "**critical findings**" in the sentencing process and yet did not conclude that these findings must be unanimous or that they should be considered actual elements of a crime presented pre-trial. Likewise, the Florida Supreme Court's imposition of a unanimity requirement on the jury applies to the jury's **recommendation** for a death **sentence.** *Hurst, supra,* at 57. The Court clearly qualified its use of the word "elements" when referring to aggravating factors while simultaneously and consistently recognizing that the context in which this term was being used involved the jury's role at the end of the trial process, i.e., the sentencing phase. Simply because the effect of an aggravating factor has evolved into a recognition that its existence increases a sentence that otherwise would not have been available, it does not logically follow that the jury's consideration of a factor in conjunction with the jury's explicit role post trial, somehow has morphed into something other than a **sentencing recommendation.** If the Florida Supreme Court determined otherwise, it would have so stated. It did not, and, instead, has consistently and explicitly characterized the jury's function in the context of sentencing exclusively.

White, 531 U.S. 225, 226 (2001) to no avail. There, Fiore and his co-defendant, Scarpone, were convicted of operating a hazardous waste facility without a permit. The State of Pennsylvania argued that while Fiore and Scarpone had a permit, they deviated so dramatically from its terms that they violated the statute. The Pennsylvania Supreme Court declined to review Fiore's conviction, but later reversed Scarpone's conviction finding that although it was unlawful to operate without a permit, one who merely deviates from a permit's terms did not qualify as a person without a permit. *Fiore*, 531 U.S at 227.

The appellate court reviewing Fiore's federal habeas petition believed the Pennsylvania court had announced a new rule in Scarpone's case, inapplicable to Fiore, and pointed out that state courts are under no constitutional obligation to apply new rules retroactively. *Id*. However, upon review, the

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Hurst does not support the claim aggravating factors are elements for indictment or due process notice requirements; this Court said: "the Supreme Court's decision in *Hurst v. Florida* requires that all the **critical findings** necessary before the trial court may consider imposing a **sentence** of death must be found unanimously by the jury." *Hurst*, 202 So.3d at 44 (emphasis added). This Court said that the required fact-finding was equivalent to an element of an offense, both of which a jury must determine unanimously and went on to use the Supreme Court decision in conjunction with its own precedent regarding juror unanimity as to elements of a criminal offense to hold that aggravators must be found unanimously.

United States Supreme Court requested the Pennsylvania court explain whether Scarpone's case created a new law. The Pennsylvania court replied that *Scarpone* did not announce a new law, but clarified the law at the date Fiore's conviction became final. Based on that explanation, the Supreme Court ruled that because Scarpone's case did not create a new law, it did not present an issue of retroactivity; instead, the question was whether Fiore could be convicted for conduct Pennsylvania's statute did not prohibit. The Court ruled Fiore's conviction was a violation of due process because failure to possess a permit is a basic element of the crime and Pennsylvania could not prove this element as Fiore had a permit. *Id*. at 228-229.

Fiore is inapplicable here as that defendant was convicted of a crime for which the state could not prove an essential element. Conversely, Boyd was found guilty of first degree murder by a unanimous jury; the State proved all required elements. *Hurst* merely established a procedural change in sentencing. Procedural changes are applicable only to pending prosecutions. This Court recognized the procedural nature of the change in *Jackson v. State*, 213 So. 3d 754 (Fla. 2017) where it discussed Chapter 2016-13, the predecessor of Chapter 2017-1, and its increase in the number of jurors necessary to recommend

death, and finding the change was procedural not substantive.

This Court noted that, but for requiring a unanimous jury vote, Chapter 2016-13 could be applied to pending prosecutions. *Evans v. State*, 213 So. 3d 856, 3 (Fla. 2017), *citing Perry v. State*, 210 So. 3d 630 (Fla. 2016). It follows that Chapter 2017-1, as found in the revised §921.141, Fla. Stat., is a procedural change applicable to pending prosecutions only. Further, Article X, §9 of the Florida Constitution states, "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." Defendants are not entitled to a new penalty phase every time there is a change in the sentencing statute. *See Asay v. State*, 224 So.3d 695, 703 (Fla. 2017) (rejecting claim chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"). The only statute relevant is the statute that existed at the time Boyd's case became final.

Likewise, this Court has rejected the notion that Chapter 2017-1 created a substantive right to a resentencing. The fact that the Legislature enacted a new statute following *Hurst*, does not give a death sentenced defendant a new substantive right. *See Lambrix*, 227 So.3d at 113 (rejecting arguments based on Eighth Amendment, due process, equal protection, and a

substantive right based on new legislation); *Hitchcock*, 226 So.3d at 216; *Asay*, 210 So.3d at 22; *Asay,* 224 So.3d at 703 (rejecting claim chapter 2017-1 "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"); *Reynolds v. State*, 251 So.3d at 811 (rejecting constitutional challenge based on *Hurst* informed by *Caldwell v. Mississippi*, 472 U.S. 320 (1985)). The new statute does not apply to Boyd. *See* Article X, section 9, Florida Constitution.

To the extent Boyd relies on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), it is of no assistance. *Apprendi* has been held not to be retroactive, *Galindez v. State*, 955 So.2d 517 (Fla. 2007) and this Court, under state law has found *Hurst* to be retroactive only to *Ring*.[8] See *Mosley*, 209 So.3d at 1274.

CONCLUSION

Boyd has failed to show any constitutional infirmity under the Eighth Amendment or Due Process Clause. This Court should affirm the summary denial of relief.

[8] In *Apprendi*, 530 U.S. at 497, the Court left intact *Walton v. Arizona*, 497 U.S. 639 (1990), distinguishing it from non-capital cases. It was not until *Ring* that *Walton* was overruled, thus, there was no constitutional infirmity of capital cases based on *Apprendi.* Even under *Mosley*, 209 So.3d at 1274, there is no basis to make *Hurst v. Florida* retroactive to *Apprendi*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Suzanne Meyers Keffer, Esq., at Keffers@ccsr.state.fl.us, and Scott Gavin, Esq. at Gavins@ccsr.state.fl.us, this 3rd day of December 2018.

CERTIFICATE OF FONT COMPLIANCE

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

/s/ Leslie T. Campbell
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