IN THE SUPREME COURT OF FLORIDA

TERRANCE TYRONE PHILLIPS,

Appellant,

v. **Case No. SC12-876**

STATE OF FLORIDA, **Death Penalty Case**

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

BERDENE B. BECKLES
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 27481
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Primary E-Mail:
capapp@myfloridalegal.com
Secondary E-Mail:
Berdene.Beckles@myfloridalegal.com
(850) 414-3300 Ext. 3606
(850) 487-0997 (FAX)
COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

STATEMENT OF THE CASE AND FACTS

The State reiterates and incorporates its Statement of the Case and Facts from the Answer Brief, with the following additions pertinent to the issues on which this Court allowed supplemental briefing.

Appellant was found guilty by a jury as charged on all counts: first-degree murder of Reynaldo Antunes-Padilla, first-degree murder of Mateo Hernandez-Perez, armed burglary, attempted armed robbery, and conspiracy to commit armed robbery. (R1:27-30; R3:556-562). Following the penalty phase, the jury recommended by a vote of eight-to-four that Appellant receive the death penalty for the murders of Reynaldo Antunes-Padilla and Mateo Hernandez-Perez. (R3:582-583).

The trial court followed the jury's eight-to-four recommendations and sentenced Appellant to death for Antunes-Padilla's murder and for Hernandez-Perez's murder. (R4:629-638). Appellant was also sentenced to life imprisonment on the armed burglary and attempted armed robbery convictions and fifteen years prison on the conspiracy conviction. (R4:629-638).

The trial court found three aggravating factors: (1) the Appellant was previously convicted of another capital felony for the contemporaneous murders of Antunes-Padilla and Hernandez-Perez; (2) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment, community control, or on felony probation for possession of a controlled

substance; (3) The capital felony was committed while the Appellant was engaged in the commission, of attempt to commit, any robbery or burglary. (R4:651-653). The trial court found one statutory mitigator: the age of the Appellant at the time of the crime. (R4:656-657). The trial court also found nine non-statutory mitigating circumstances. (R4:657-662).

On June 14, 2016, the State filed a Notice of Supplemental Authority citing to United States v. Gabrion, 719 F.3d 511, 531-33 (6th Cir. 2013). Appellant requested that this Court allow supplemental briefing to address the application of the decision. This Court granted Appellant's motion.

SUMMARY OF THE ARGUMENT

United States v. Gabrion, 719 F.3d 511, 531-33 (6th Cir. 2013) provides that the Sixth Amendment right to a jury trial discussed in Apprendi v. New Jersey, 530 U.S. 466 (2000) only applies to findings of "fact" that increase a maximum sentence, not every determination that needs to be made. Gabrion specifically concludes that the weighing of sentencing factors is not itself a factual finding which must be made by a jury. Therefore, once the jury determines that a defendant is eligible for a death sentence by finding an aggravating factor beyond a reasonable doubt, the Sixth Amendment is satisfied. A jury recommendation as to the proper sentence is not an additional finding of fact, but a moral judgment. Since the aggravating factors to support the Appellant's sentences in this case are all premised on unanimous jury verdicts, no Sixth Amendment error has been presented.

ARGUMENT

HURST V. FLORIDA ONLY REQUIRES A JURY FINDING OF AN AGGRAVATING CIRCUMSTANCE.

The State maintains that Hurst v. Florida, 136 S.Ct. 616 (2016) does not compel a finding of Sixth Amendment error in this case. Appellant was found guilty by a jury of two counts of first-degree murder, one count of armed burglary, and one count of attempted robbery. The trial judge found three aggravators based on the contemporaneous murder, underlying felonies, and Appellant's past conviction. Hence, all three aggravators in this case were directly supported by unanimous jury verdicts.

The Appellant maintains Hurst holds that whether sufficient aggravators existed and whether there were sufficient mitigators to outweigh the aggravators are questions of fact. However, as found in United States v. Gabrion, 719 F.3d 511, 531-33 (6th Cir. 2013), the weighing process is not a finding of fact but rather a moral judgment made by the jury. Therefore, as the jury is only required to make findings of fact in regards to aggravating factors, as they alone increase the penalty, Appellant's sentences of death do not require reversal.

In Hurst, the United States Supreme Court stated that Florida's capital sentencing statute was unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002). Throughout the portions of the opinion in which the Court reached and stated its holding, the Court focused on only the finding of an aggravating

circumstance necessary to make a defendant eligible for a death sentence. See Hurst, 136 S.Ct. at 621, 624. In contrast, the Appellant argues that the Hurst opinion asserts that 'facts' include the findings of sufficient aggravating circumstances and findings that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. (SB:9). However, Appellant's understanding is misplaced. The holding in Hurst does not include the weighing process as something that has to be found by the jury as a fact. Rather, that determination involves a moral judgment, not subject to independent proof by objective evidence, but premised on subjective standards, which will reasonably differ among jurors. See United States v. Fields, 483 F.3d 313, 346 (5th Cir. 2007) (citing Caldwell v. Mississippi, 472 U.S. 320, 340 n.7 (1985)).

In United States v. Gabrion, 719 F.3d 511, 531-33 (6th Cir. 2013), the Sixth Circuit Court of Appeals rejected the defendant's argument that a jury had to find beyond a reasonable doubt that aggravating factors outweigh mitigating factors. Gabrion argued that his Sixth Amendment rights were violated when the jury was not instructed that they had to find, beyond a reasonable doubt, that the aggravating factors outweighed the mitigating factors. Id. at 531-32. Gabrion argued that the jury's "outweigh" determination is a "fact" that should be determined by the jury because it increased his maximum sentence from life to death and should be proved beyond a reasonable doubt. Id. at 532. The Sixth Circuit rejected this

argument finding that Apprendi does not apply to every decision that increases a maximum sentence. Gabrion, at 532. Rather it only applies to "facts" that increase a maximum sentence, whether a particular fact exists or not. Id. at 532. A jury's consideration or weighing of factors only justifies the imposition of a particular sentence. Id. at 533.

> What § 3593(e) requires, in summary, is not a finding of fact in support of a particular sentence. What § 3593(e) requires is a determination of *the sentence itself*, within a range for which the defendant is already eligible. That makes this case different from any in which the Supreme Court has applied Apprendi. Here, Gabrion was already "death eligible" once the jury found beyond a reasonable doubt that he intentionally killed Rachel Timmerman and that two statutory aggravating factors were present. Jones, 527 U.S. at 377, 119 S.Ct. 2090. At that point the jury did not need to find any additional facts in order to recommend that Gabrion be sentenced to death. It only needed to decide, pursuant to the weighing of factors described in the statute, that such a sentence was "just[ ]." 18 U.S.C. §§ 3591(a), 3593(e). And in making that moral judgment, the jury did not need to be instructed as if it were making a finding of fact.

Gabrion, 719 F.3d at 533. The Sixth Circuit maintained that it is not a finding of fact but instead a moral judgment.

Similarly, other Circuit Courts of Appeals have agreed with the Sixth Circuit. The First, Fifth, Eighth, Ninth, and Tenth Circuits have rejected the argument that Apprendi and its progeny require a capital jury to find beyond a reasonable doubt that aggravating factors outweigh mitigating factors. See United States v. Fields, 516 F.3d 923, 950 (10th Cir. 2008); United States v. Mitchell, 502 F.3d 931, 993-94 (9th Cir. 2007); United States v. Sampson, 486 F.3d 13, 31 (1st Cir. 2007),

United States v. Fields, 483 F.3d 313, 345-46 (5th Cir. 2007); United States v. Purkey, 428 F.3d 738, 748 (8th Cir. 2005). The federal courts reason that although aggravating and mitigating factors constitute facts, when the jury considers whether the aggravating factors "sufficiently" outweigh the mitigating factors "to justify a sentence of death," it makes a "highly subjective" judgment, Fields, 483 F.3d at 346; the jury engages in a "process" whose outcome "is not an objective truth susceptible to (further) proof by either party," Sampson, 486 F.3d at 32; see also Mitchell, 502 F.3d at 993 (finding no requirement the jury make such a finding and questioning "how a beyond-reasonable-doubt standard could sensibly be superimposed upon this process, or why it must be in order to comport with due process").

Moreover, state courts have also agreed that the weighing process undertaken by the jury is not a fact subject to the requirements of Apprendi and its progeny. See also Nunnery v. State, 263 P.3d 235, 253 (2011) (agreeing with other courts that have concluded that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" subject to Ring and Apprendi); Ritchie v. State, 809 N.E.2d 258, 268 (Ind. 2004) (rejecting the argument that the "weighing process" is an eligibility factor that must be found by the jury beyond a reasonable doubt, finding that "[o]nce a statutory aggravator is found by a jury beyond a reasonable doubt, the Sixth Amendment as interpreted in Ring and

Apprendi is satisfied."); Miles v. State, 421 Md. 596, 606, 28 A.3d 667, 673 (2011) (Affirming its prior view "that the weighing process is not a fact-finding one deducible from the evidence, but rather is a matter of judgment[]" and that "Ring applies only to the finding of aggravating factors during the eligibility phase of sentencing and does not impact the selection phase of the process.") (citations omitted); State v. Fry, 138 N.M. 700, 715-20, 126 P.3d 516, 531-36 (N.M. 2005) (holding that "the weighing of aggravating and mitigating circumstances assists the jury in its discretionary task of selecting between two sentences authorized by law in order to ensure that the penalty imposed fits both the offender and the crime[]" and that Apprendi and Blakely do not apply to such a determination).

The overwhelming weight of precedent cited above has rejected the notion that the weighing process and its result are a "fact" subject to Apprendi and its progeny. The jury's determination concerning the relative weight of the factors it uses in determining an appropriate sentence, however it is characterized, does not increase the penalty. A defendant becomes eligible for a sentence of death if the jury finds beyond a reasonable doubt that he acted with requisite intent and that at least one statutory aggravating factor exists. Once the jury finds the defendant death-eligible, it weighs the aggravating factors against the mitigating factors to select the appropriate sentence. See Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003) (murder conviction "exposes a defendant to a maximum penalty of life

imprisonment" while a finding of aggravating circumstances "increases the maximum permissible sentence to death").

Appellant asserts that the State's reliance on Gabrion does not support its prior position that Hurst was a narrow ruling that the jury only needs to find one aggravating factor. (SB: 7). However, Gabrion does not speak to the amount of aggravators necessary to find a defendant eligible for a death sentence. Florida law is clear that only one aggravator is necessary. See Hurst, 136 S.Ct. at 624 (holding that "Florida's sentencing scheme, which required the judge alone to find the existence of *an aggravating circumstance*, is therefore unconstitutional.") (emphasis applied). Instead, Gabrion rejects any argument that a jury must find as a 'fact' that the aggravating factors sufficiently outweigh mitigating factors. Ring and other cases show that the weighing process and the finding of mitigators are not facts that need to be found by a unanimous jury for the imposition of a death sentence.

In Kansas v. Carr, 136 S.Ct. 633, 642 (2016), the United States Supreme Court stated:

> Whether mitigation exists, however, is largely a judgment call … what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy.

Therefore, mitigators and the weighing process do not have to be found beyond a reasonable doubt, which allows for mercy on the part of the Defendant. Further,

Ring did not overrule other cases that permitted judges to weigh factors found by a jury or to reweigh aggravating factors found to be invalid. See Proffitt v. Florida, 428 U.S. 242, 252 (1976); Clemons v. Mississippi, 494 U.S. 738, 745 (1990). Therefore, Gabrion supports the State's argument that aggravating factors are the only facts that need to be found by the jury under Ring and Hurst.

Moreover, although the opinion in Gabrion involves a federal statute, the holding is still applicable. The relevant holding discusses facts which must be found by a jury in order to fulfill the Sixth Amendment. Gabrion, 719 F.3d at 533. Language in Florida's statute characterizing the weighing process as a "fact" merely reflects that the jury is engaged in a process that will result in a procedural fact which may lead to the imposition of a death sentence; the jury is actually creating a fact, not simply finding one. In weighing aggravators against mitigators, the jury's finding can result in a death sentence or a life sentence, a totally subjective decision. Gabrion makes clear that the Sixth Amendment right to a jury extends to findings that makes a defendant death eligible. Id. at 533.

Appellant asserts that the findings of the trial court have been treated as factual determinations. (SB:19). However, as noted in Gabrion not every determination is a fact that applies under Apprendi. Gabrion, at 532. Therefore, Appellant's reliance on cases such as Swan v. State, 322 So. 2d 485, 489 (Fla. 1975) do not refute the fact that there only has to be a finding of one aggravator to make a

defendant eligible for death under Apprendi. Whether the aggravator sufficiently outweighs the mitigator can be the opinion of the sentencer and not a fact. See Swan, at 489. ("…we are of the *opinion* that there were insufficient aggravating circumstances...") (emphasis applied). Accordingly, the finding of an aggravator is the only fact that has to be found by a jury.

In this case, Appellant was found guilty by a jury of two counts of first-degree murder, armed burglary, and attempted robbery. Based on the jury's recommendation, the trial court sentenced the Appellant to death. The trial court found three aggravating circumstances: (1) the Appellant was previously convicted of another capital felony for the contemporaneous murders of Antunes-Padilla and Hernandez-Perez; (2) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment, community control, or on felony probation for possession of a controlled substance; (3) the capital felony was committed while the Appellant was engaged in the commission, or attempt to commit, any robbery or burglary. Appellant was death eligible based on the facts supported by unanimous jury verdicts. Therefore, the Sixth Amendment was satisfied. As there is no requirement under Ring, Apprendi, or any other case law that the weighing process or mitigators must be found by the jury, there was no error under Hurst. Consequently, Appellant's sentences of death should be affirmed.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Terrance Phillips's convictions and sentences.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL on Aug 1, 2016: Martin J. McClain, Esq. at martymcclain@earthlink.net.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/s/ *Berdene B. Beckles*

By: BERDENE B. BEKLES
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 27481
Attorney for Appellee, State of Fla.
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
Primary E-Mail:
capapp@myfloridalegal.com
Secondary E-Mail:
Berdene.Beckles@myfloridalegal.com
(850) 414-3300 Ext. 3606
(850) 487-0997 (FAX)