IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-876

TERRANCE TYRONE PHILLIPS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

SUPPLEMENTAL REPLY BRIEF OF APPELLANT RE: STATE'S SUPPLEMENTAL AUTHORITY

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ARGUMENT IN REPLY RE *HURST* AND *GABRION*

1. Hurst found that a Florida defendant is not eligible to receive death sentence until written findings of fact are rendered determining sufficient aggravators exist and insufficient mitigators exist to outweigh the aggravators.

In its Supplemental Answer Brief, the State refuses to address what the United States Supreme Court said in Hurst v. Florida, 136 S. Ct. 616 (2016), about Florida's capital sentencing statute - the same statute under which Mr. Phillips was sentenced to death. In Hurst, the Supreme Court found:

> As described above and by the Florida Supreme Court, **the 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) (emphasis added). 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.**" § 921.141(3).

Id. at 622 (emphasis added) (citations omitted).

Because the State continues to ignore what the Supreme Court in Hurst found as a matter of law, it bears repeating: "the Florida sentencing statute **does not make a defendant eligible** for death until 'findings by the court that such person shall be punished by death.'" Id. (emphasis added). Thus under Florida law,[1] Mr. Phillips **was not eligible** for a death sentence until the judge made and entered his written findings of fact as

[1]This was Florida law up until March 7, 2016, when a revised statute became effective.

required by the governing Florida statute, and determines: "**the facts** . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3), Fla. Stat (emphasis added). As a result, "the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole." Hurst, 136 S. Ct. at 622.[2]

Contrary to this clear and unambiguous language in Hurst, the State repeatedly asserts in its Supplemental Answer Brief that a Florida defendant becomes death eligible when a non-unanimous advisory jury finds an aggravator. (Supp AB at 3) ("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."); (Id. at 4) ("the jury is only required to make findings of fact in regards to aggravating factors, as they alone increase the penalty"); (Id. at 8) ("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"); (Id. at 11) ("Appellant was death eligible based on the facts supported by unanimous jury verdicts. Therefore, the

[2]In Hurst, the Supreme Court reported that: "Florida concedes that Ring [v. Arizona, 536 U.S. 584 (2002)] required a jury to find every fact necessary to render Hurst eligible for the death penalty." However, that is not the position the State takes in its Supplemental Answer Brief in Mr. Phillips' case.

Sixth Amendment was satisfied"). Repeating a falsehood over and over does not make the falsehood any less false. In Hurst, the Supreme Court found that under Florida law a defendant **is not death eligible** until the judge makes and enters his written findings of fact. Hurst, 136 S. Ct. at 622.[3]

The Supreme Court went even further in Hurst and addressed what **facts** the judge was required to find: "'**the facts** . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" Id. As the Supreme Court noted, under Florida law the sufficiency of the aggravators was and is a factual question. Id. at 619 ("Florida law required the judge to hold a separate hearing and **determine whether sufficient aggravating circumstances existed** to justify imposing the death penalty.") (emphasis added). The question of whether the mitigators were insufficient to outweigh the aggravators was and is also question of fact because Florida law said it was a fact.

2. United States v. Gabrion concerned the federal death penalty; it did not address Florida's capital sentencing statute, nor the analysis of Florida's statute set forth in Hurst.

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[3]In its brief, the State refuses to address Hurst's analysis of Florida law as to when a defendant becomes eligible for a death sentence. Instead, the State falsely asserts: "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." (Supp AB at 4-5). This simply isn't true.

In its brief, the State treats United States v. Gabrion, 719 F.3d 511 (6th Cir. 2013), as controlling precedent that limits the subsequent decision by the United States Supreme Court in Hurst. (Supp AB at 4). The State maintains that Gabrion, a 2013 decision from the Sixth Circuit,[4] governs as to whether under Florida law the aggravators are sufficient and/or whether they are outweighed by the mitigators are facts within the meaning of Hurst. (Supp AB 9) ("Gabrion rejects any argument that a jury must find as a 'fact' that the aggravating facts sufficiently outweigh the mitigating factors"). However, the Supreme Court has made clear that the scope of the Sixth Amendment right to a jury's verdict is dependent upon the provisions of the specific statutory scheme at issue. Ring v. Arizona, 536 U.S. at 602.[5] See

[4]Gabrion issued almost three years before the Supreme Court issued its opinion in Hurst. The Sixth Circuit, which issued Gabrion, is a court that is bound by the rulings of the United States Supreme Court. Opinions from the Sixth Circuit are not binding on this Court - Florida is not within the Sixth Circuit. However, the Supreme Court's ruling in Hurst is binding upon this Court. And in its decision in Hurst, the Supreme Court identified when under Florida law a defendant becomes eligible to receive a death sentence. Gabrion, which addressed the federal death penalty statute, did not and could not anticipatorily overrule Hurst as to what Florida law provides.

[5]The State in its brief inexplicably says that "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." (Supp AB at 9). Ring, as explained herein, made clear that what is to be found by a jury is dependent upon the statute. The Sixth Amendment right is not one size fits all. It does not apply identically across the board. What is subject to the right to trial by jury depends upon the statutory language at issue. The scope of the Sixth

Apprendi v. New Jersey, 530 U.S. 466, 499 (2000) (Scalia, J., concurring) (the Sixth Amendment right to a 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.") (emphasis added); Id. at 501 (Thomas, J., concurring) ("if the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact-such as a fine that is **proportional** to the value of stolen goods-that fact is also an element.") (emphasis added).

In addressing Arizona's argument that because its statute provided the sentence for first degree murder was either death or life imprisonment, a conviction by itself authorized the imposition a death sentence, the Supreme Court in Ring wrote:

> This argument overlooks Apprendi's instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." Ibid.; see 200 Ariz., at 279, 25 P.3d, at 1151. The Arizona first-degree murder statute "authorizes a maximum penalty of death only in a formal sense," Apprendi, 530 U.S., at 541, 120 S.Ct. 2348 (O'CONNOR, J., dissenting), for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. See § 13-1105(C) ("First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703." (emphasis added)). If Arizona prevailed on its opening argument,

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Amendment right is dependent upon a state's governing statute.

> Apprendi would be reduced to a "meaningless and formalistic" rule of statutory drafting. See 530 U.S., at 541, 120 S.Ct. 2348 (O'CONNOR, J., dissenting).

Ring, 536 U.S. at 604.

The Supreme Court in Ring looked at Arizona law to see what was required before a death sentence was authorized:

> **Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment.** See 200 Ariz., at 279, 25 P.3d, at 1151 (citing Ariz.Rev.Stat. § 13-703). This was so because, in Arizona, **a "death sentence may not legally be imposed ... unless** at least **one aggravating factor is found** to exist beyond a reasonable doubt." 200 Ariz., at 279, 25 P.3d, at 1151 (citing § 13-703).

Ring, 536 U.S. at 597 (emphasis added).

Gabrion did not look to Florida's capital sentencing statute and address what findings were required before a death sentence was permitted. That is what the Supreme Court in Hurst did. And, it found that a death sentence was not an option until the entry of written "findings by the court that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). See State v. Steele, 921 So. 2d 538, 546 (Fla.2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely"); Blackwelder v. State, 851 So. 2d 650, 653 (Fla. 2003) ("A sentencing order should reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors and the weight each should receive."); Bouie

v. State, 559 So. 2d 1113, 1116 (Fla. 1990) (a death sentence struck when the judge's written findings not entered in conformity with statute); Campbell v. State, 571 So.2d 415, 419 (Fla. 1990) (statute "requires 'specific written findings of fact based upon [aggravating and mitigating] circumstances.'") (brackets in original); Van Royal v. State, 497 So. 2d 625, 628 (Fla. 1986) (death sentence struck because no written findings of fact were entered as statute required). As was stated in Hurst, 136 S. Ct. at 622, "Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts."

A defendant in Florida cannot receive a death sentence until 1) he or she had been convicted of first degree murder, and 2) the judge has made and entered written findings which 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. And in making those two findings of fact, the judge is required to make detailed findings about the existence and weight of the aggravating and mitigating factors. Carter v. State, 980 So. 2d 473, 483 (Fla. 2008) ("Under section 921.141(3), Florida Statutes (2002), the trial court must independently **determine the existence of aggravating and mitigating circumstances and the weight to be given each**.") (emphasis added). A death sentence

could not be imposed - it is not an option - simply because one or more aggravating factors existed. The statute did not permit a death sentence simply because the jury, by a majority vote or by a unanimous vote, found an aggravating factor.

In Gabrion, a jury had determined the sentence. The issue on appeal concerned the instructions given as to the Government's burden of proof as to whether the aggravating factors outweighed the mitigating factors. To resolve that issue, the Sixth Circuit in Gabrion looked to Jones v. United States, 527 U.S. 373 (1999). There, the Supreme Court had construed the federal death penalty statute. In its opinion which pre-dated Apprendi, the Supreme Court concluded that under the federal statute a defendant became eligible for a death sentence once the jury unanimously found the presence of aggravating factors. Jones, 527 U.S. at 377 ("Once petitioner became death eligible, the jury had to decide whether he should receive a death sentence."). On the basis of the statutory construction conducted in Jones, the court in Gabrion said that the Government did not bear the burden of proving beyond a reasonable doubt that the aggravating factors sufficiently outweighed the mitigating factors to justify a death sentence. Gabrion, 719 F.3d at 533 ("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.").

But of course, the statute at issue in Mr. Phillips' case is not the federal death penalty statute at issue in Jones v. United States, 527 U.S. at 377, and in Gabrion. And under Florida's statute, the Supreme Court in Hurst expressly stated: "the Florida sentencing statute **does not make a defendant eligible** for death until 'findings by the court that such person shall be punished by death.'" Hurst, 136 S. Ct. at 622. (emphasis added).

Gabrion simply did not address Florida's capital sentencing statute and the determination in Hurst that a Florida defendant was not death eligible until the judge entered his written findings of fact. Gabrion simply does not apply here; Hurst does.

It is not a question under Hurst of how the statute could have been written. It is a question of how it was written and what factual determination were required to be set forth in the findings of fact which were necessary before a death sentence was authorized. Under Florida law, "the maximum punishment [Mr. Phillips] could have received without any judge-made findings was life in prison without parole." Hurst, 136 S. Ct. at 622.

The Supreme Court in Hurst definitively stated: "We hold this sentencing scheme unconstitutional. **The Sixth Amendment requires a jury**, not a judge, **to find each fact necessary to impose a sentence of death.**" Hurst, 136 S. Ct. at 619(emphasis added). That means all of the facts required to be addressed and

found in the written findings of fact, which is necessary under Florida law to authorize a death sentence, must be found by a unanimous jury instead of by a judge. Hurst, 136 S. Ct. at 621 (the Sixth Amendment right to a jury trial means the "right to have a jury find **the facts behind his punishment.**"). Because Mr. Phillips' jury did return a verdict finding "the facts behind his punishment," his death sentences rest on facts found by the judge and stand in violation of Hurst and the Sixth Amendment.

3. The Delaware Supreme Court's recent decision in Rauf v. State further shows that the State's reliance upon Gabrion is misplaced.

Recently, the Delaware Supreme Court addressed the decision in Hurst v. Florida, and whether Delaware's statutory capital sentencing scheme was constitutional in light of that decision. Rauf v. State, - A.3d -, Case No. 39, 2016 (Del. August 2, 2016).[6] Delaware's statute, like Florida's, had provided for a jury to make a non-binding recommendation by a majority vote to the sentencing judge who then made findings and had the final say as to whether a death sentence was imposed. However, in the wake of Ring v. Arizona, legislative changes were made, and the jury was subsequently required to unanimously determine the existence of statutory aggravators before making a non-binding recommendation by a majority vote. The unanimous jury's

[6]Unlike Gabrion, the decision in Rauf actually addresses the Supreme Court's analysis in Hurst and the provisions of Florida's capital sentencing statute at issue therein.

determination of what aggravators were present became binding. Rauf, Slip Op. at 43, 45 (Strine, C.J., concurring).[7] As to whether the aggravators outweighed the mitigators, under Delaware law the jury's decision was by a majority vote and not binding on the sentencing judge who was required to independently find that "the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist" before a death sentence could be imposed.[8] Rauf, Slip Op. at 45.

Within this statutory context, the Delaware Supreme Court in Rauf addressed whether it was constitutional under Hurst for the judge and not the jury to make the determination that the aggravators outweighed the mitigators. The Delaware Supreme Court concluded that its statute was unconstitutional under Hurst:

> Does the Sixth Amendment to the United States Constitution require a jury, not a sentencing judge, to find that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist because, under 11 Del. C. § 4209, this is the critical finding upon which the sentencing judge —shall impose a sentence of death ?
>
> Yes. **Because Delaware's death penalty statute does not require the jury to perform this function, it is**

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[7]Chief Judge Strine's concurring opinion was joined by two other members of the Delaware Supreme Court. It thus represented the view of a majority that court.

[8]The legislature had at one point amended Delaware's statute to remove any requirement that the jury's recommendation was entitled to great weight. As explained in Rauf, the current statute at issue therein provided that "the jury's recommendation shall only be given such consideration as deemed appropriate." Rauf, Slip Op at 44.

unconstitutional.

Rauf, Slip at 4 (per curiam)(footnote omitted)(emphasis added).

In the wake of Ring v. Arizona, the Delaware Supreme Court had found its statute to be constitutional. Brice v. State, 815 A.2d 314 (Del. 2003). It read Ring to mean that "as long as the jury has already found one death eligibility factor", the judge's consideration of additional aggravators when imposing death did not increase the authorized punishment and thus did not violate the Sixth Amendment. Rauf, Slip at 48 (Strine, C.J., concurring). In the wake of Hurst, Chief Justice Strine in his concurrence, which represented a majority of the court, acknowledged some ambiguity within Hurst. However, after careful analysis of the opinion in Hurst, Chief Justice Strine concluded that:

> Under our statute the findings required to make a defendant "eligible" for the death penalty are not sufficient to enable him to be sentenced to death. Rather, it is obvious that § 4209 makes other findings necessary.

Rauf, Slip Op at 61.

Chief Justice Strine articulated the issue that he saw Hurst presenting:

> the question in this context is not whether factual determinations are involved in the weighing phase of capital sentencing, but whether the Sixth Amendment requires those factual judgments to be made by a jury.

Id. at 60. For him, the answer to this question rested with the import to be afford the language in Hurst stating: "The Sixth Amendment requires a jury, not a judge, to find each fact

necessary to impose a sentence of death." Hurst, 136 S. Ct. at 619. Ultimately, Chief Justice Strine concluded that the Supreme Court had to know what it was saying and what that meant:

> I am reluctant to conclude that the Supreme Court was unaware of the implications of **requiring "a jury, not a judge, to find each fact necessary to impose a sentence of death." If those words mean what they say, they extend the role of a death penalty jury beyond the question of eligibility.**

Rauf, Slip Op at 61 (footnote omitted) (emphasis added). He explained that in his view: "no state will be able to draft a statute in which the factual findings that occur after the eligibility phase are not necessary for death." Id. at 77-78. This is because factual determinations are part of the process by which the capital sentencing decision is made under the Eighth Amendment principles enunciated in Furman v. Georgia, 408 U.S. 238 (1972), and its progeny:

> Since Furman, it has been understood that whatever authority is given the power to determine the sentence in a capital case must consider the relevant aggravating and mitigating factors, balance them, have an option to give life, and base any determination to give a death sentence on a determination that the aggravating factors outweigh those mitigating for the comparatively more merciful one. **Not only does this involve a consideration of the facts, it results in a decision of existential fact: Whether the defendant should live or die.**

Rauf, Slip Op. at 75-76 (emphasis added).

The decision and analysis set forth in the majority opinion in Rauf is certainly much more pertinent and persuasive as to the

meaning and import of Hurst than is Gabrion.

4. In Gabrion, the jury made the sentencing decision, and thus, the issue on appeal was not about the Sixth Amendment right to a jury trial.

The State's Summary of the Argument begins:

> 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.

(Supp AB at 3). But, Gabrion did not concern the Sixth Amendment right to a jury trial. The defendant there had a jury determine his sentence. On appeal, he challenged the jury instructions:

> But **Gabrion argues that the jury was required to make the latter determination—i.e., the "outweighs" one—beyond a reasonable doubt.** The district court did not instruct the jury to that effect, so Gabrion says we must vacate his sentence.

Gabrion, 719 F.3d at 532 (emphasis added). In his argument, Gabrion did rely on Apprendi because it addressed the due process right under the Fourteenth Amendment that required the proof beyond-a-reasonable-doubt standard. As to this issue, Apprendi relied upon the holding in In re Winship, 397 U.S. 358, 364 (1970): "[w]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Apprendi, 530 U.S. at 477.[9]

[9]Apprendi dealt with **both** the Sixth Amendment right to a jury trial, and the State's obligation under the Due Process

This distinction between the Sixth Amendment right to a jury and the due process right set forth in Winship is not merely a matter of semantics. Just because the State takes what has historically been an element of the crime and turns the element's absence into an affirmative defense does not mean that the defendant loses his right to a jury determine his guilt. Martin v. Ohio, 480 U.S. 228, 233-36 (1987); Patterson v. New York, 432 U.S. 197, 210 (1977). When state law provides for an affirmative defense which if proven results in an acquittal, the right to a jury trial remains intact. Apprendi, 530 U.S. at 484-85.

Even if the presence of mitigators that outweigh the aggravators is viewed as an affirmative defense, Florida's statute requires the affirmative defense to be considered and rejected in the required written findings before a death sentence is authorized. See Martin v. Ohio; Patterson v. New York.

CONCLUSION

The Sixth Amendment required "Florida to base [Appellant's] death sentence[s] on a jury's verdict, not a judge's factfinding." Hurst, 136 S. Ct. at 624. Under Hurst, Mr. Phillips' death sentences cannot stand.

Clause to prove the elements of a crime beyond a reasonable doubt. Id. at 476-77 ("At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "**due process of law**," **Amdt. 14, and** the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the **right to a** speedy and public trial, by an impartial **jury**," **Amdt. 6**.)(emphasis added).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Reply Brief has been furnished by electronic service to Berdene Beckles, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on this 11th day of August, 2016.

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CERTIFICATE OF FONT

This is to certify that this Supplemental Reply Brief Re: State's Supplemental Authority has been produced in a 12 point Courier type, a font that is not proportionately spaced.

/s/ Martin J. McClain
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