IN THE SUPREME COURT OF FLORIDA

KENNETH RAY JACKSON,

Appellant,

v. **Case No. SC13-1232**
L.T. No. 07-CF-019884A
STATE OF FLORIDA, **Death Penalty Case**

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

C. SUZANNE BECHARD
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0147745
Office of the Attorney General
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com
carlasuzanne.bechard@myfloridalegal.com

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

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 issue on which this Court ordered supplemental briefing.

Appellant filed a pretrial motion asking the trial court to declare the death penalty unconstitutional pursuant to Ring v. Arizona, 536 U.S. 584 (2002). (V4/510-18). The trial court denied the motion. (V5/714). The jury convicted Appellant as charged on all counts: first-degree murder of Cuc Thu Tran, sexual battery with a deadly weapon or force likely to cause serious personal injury, second-degree arson of a conveyance, and grand theft of a motor vehicle. (V11/1852-53). Following the penalty phase, the jury recommended by a vote of eleven to one that Appellant receive the death penalty. (V78/5602-05).

The trial court followed the jury's eleven-to-one recommendation and sentenced Appellant to death for Tran's murder. (V17/3034-56; V81/5639-43). The court found two aggravating factors: (1) the murder was committed while Appellant was engaged in commission of sexual battery; and (2) the murder was especially heinous, atrocious, or cruel. The court accorded great weight to both circumstances and found they were not duplicative. (V17/3037-40). The court found thirteen nonstatutory mitigating circumstances, and *sua sponte* found that

the mitigating circumstances "cumulatively diminished [Appellant's] capacity or ability to conform his conduct to the requirements of the law, but [did] not determine that such circumstances diminished his capacity or ability to appreciate the criminality of his conduct." (V17/3051-53).

After briefing was completed, this Court directed the parties to file supplemental briefs addressing the application, if any, of the recent decision in Hurst v. Florida, _ U.S._, 136 S. Ct. 616 (2016).

SUMMARY OF ARGUMENT

Appellant is entitled to no relief based on the United States Supreme Court's opinion in Hurst v. Florida, 136 S. Ct. 616 (2016). Appellant's reliance on § 775.082(2), Florida Statutes, as requiring imposition of a life sentence for his murder conviction is misplaced. The statute provides only that a life sentence would be imposed if the death penalty itself has been ruled unconstitutional. A plain reading of the statute does not support Appellant's strained interpretation for this case. The United States Supreme Court has not held that death as a penalty violates the Eighth Amendment, but has stricken only Florida's current statutory procedures for implementation. Accordingly, § 775.082(2) is not applicable.

Appellant's claim of structural error which can never be harmless is easily refuted by United States Supreme Court case

law. In this case, any potential Sixth Amendment error would be harmless beyond a reasonable doubt given the contemporaneous felony conviction. Accordingly, Appellant's death sentence must be affirmed.

ARGUMENT

SUPPLEMENTAL BRIEFING ISSUE

APPELLANT'S CLAIM THAT HE IS ENTITLED TO RELIEF BASED ON HURST V. FLORIDA, 136 S. CT. 616 (JAN. 12, 2016), IS WITHOUT MERIT. (RESTATED)

Appellant has filed a Supplemental Brief, asserting that his death sentence should be stricken, and he should be resentenced to life in prison, due to the recent opinion in Hurst v. Florida, 136 S. Ct. 616 (2016). For the following reasons, Appellant's argument must be rejected and the death sentence imposed in this case must be affirmed.

In Hurst, the United States Supreme Court held that Florida's death penalty scheme is unconstitutional under the Sixth Amendment to the extent that it "require[s] the judge alone to find the existence of an aggravating circumstance." Hurst, 136 S. Ct. at 624. Nevertheless, Appellant asserts that Florida's law is facially invalid because Hurst requires that a jury enter specific, written factual findings to support the imposition of any death sentence. Appellant submits that Hurst determined that eligibility for the death penalty does not occur in Florida until the judge makes the ultimate determination that sufficient aggravating factors outweigh the mitigating factors to justify a

sentence of death. Appellant also asserts that because Hurst concluded that the statute is facially invalid, he is entitled to be resentenced to life in accordance with § 775.082(2), Florida Statutes, because the death penalty statute cannot be severed or rewritten so as to render it constitutional.

Putting aside Appellant's unsupported implication that Hurst has now recognized a right to jury sentencing, it is clear that Hurst did not determine capital sentencing to be unconstitutional; Hurst only invalidated Florida's procedures for implementation, finding that they facially could result in a Sixth Amendment violation if the judge makes factual findings which are not supported by a jury verdict. Therefore, § 775.082(2) does not apply by its own terms. That section provides that life sentences *without parole*[1] are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional," and was enacted following Furman v. Georgia, 408 U.S. 238 (1972), in order to fully protect society in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional, such as thereafter occurred in Coker v. Georgia, 433 U.S. 584 (1977), where the United States Supreme Court held that capital punishment was not available for the capital felony of raping an adult woman.

[1] Inmates convicted of capital crimes were otherwise eligible for parole pursuant to § 947.16(1), Florida Statutes.

Although Appellant suggests that this Court used similar language to require the commutation of all death sentences to life following Furman in Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972), Appellant is misreading and oversimplifying the Donaldson decision. Donaldson is not a case of statutory construction, but one of jurisdiction. Based on our state constitution in 1972, which vested jurisdiction of capital cases in circuit courts rather than the criminal courts of record, Donaldson held that circuit courts no longer maintained jurisdiction over capital cases since there was no longer a valid capital sentencing statute to apply; no "capital" cases existed, since the definition of capital referred to those cases where capital punishment was an optional penalty. Donaldson observes the new statute (§ 775.082(2)) was conditioned on the invalidation of the death penalty, but clarifies, "[t]his provision is not before us for review and we touch on it only because of its materiality in considering the entire matter." Donaldson, 265 So. 2d at 505.

The focus and primary impact of the Donaldson decision was on those cases which were pending for prosecution at the time Furman was released. Donaldson does not purport to resolve issues with regard to pipeline cases pending before the Court on direct appeal, or to cases that were already final at the time Furman was decided. This Court's determination to remand all

pending death penalty cases for imposition of life sentences in light of Furman is discussed in Anderson v. State, 267 So. 2d 8 (Fla. 1972), a case which explains that, following Furman, the Attorney General filed a motion requesting that this Court relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position that the death sentences that were imposed were illegal sentences. There is no legal reasoning or analysis to explain why commutation of 40 sentences was required, but it is interesting to observe that this was before the time that either this Court or the United States Supreme Court had determined the current rules for retroactivity, as Teague v. Lane, 489 U.S. 288 (1989), and Witt v. State, 387 So. 2d 922 (1980), were both decided later.

At any rate, there are several cogent reasons for this Court to reject the blanket approach of commuting all capital sentences currently pending before this Court on direct appeal such as followed the Furman decision. Furman was a decision that invalidated all death penalty statutes in the country, with the United States Supreme Court offering nine separate opinions that left many courts "not yet certain what rule of law, if any, was announced." Donaldson, 265 So. 2d at 506 (Roberts, C.J., concurring specially). The Court held that the death penalty as imposed for murder and for rape constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments

to the United States Constitution. The various separate opinions provided little guidance on what procedures might be necessary in order to satisfy the constitutional issues, and whether a constitutional scheme would be possible.

Hurst, on the other hand, is a specific ruling to extend the Sixth Amendment protections first identified in Ring to Florida cases. Relying on dicta[2] in Hurst, Appellant asserts that the United States Supreme Court has determined that a defendant is not eligible for the death penalty under our sentencing scheme until the trial court enters written findings, concluding that sufficient aggravating circumstances outweigh the mitigating circumstances that apply. (Supp. IB, p. 8-9). To the contrary, the holding in Hurst limited the required jury factfinding to

[2] The language Appellant quotes from Hurst on page 9 of his supplemental brief was a rejection of the State's argument that the mere fact that the jury recommended the death sentence in that case meant that it necessarily made a finding of the existence of an aggravating circumstance. The quoted language points out that, under Florida's statutory scheme, it is clear that the jury's advisory recommendation does not equate to the "necessary factual finding that Ring requires." Hurst, 136 S. Ct. at 622. The quoted passage is dicta because it does not "embody the resolution or determination of the specific case before the court." Mills v. State, 773 So. 2d 650, 652 (Fla. 1st DCA 2000)(citation omitted). The Court resolved the Hurst case, not by requiring jury sentencing, but rather by applying the specific holding in Ring to Florida's death penalty scheme. "The Supreme Court in Ring held only that a jury must determine the aggravating factors in a capital case that render a person eligible for the death penalty; it did not require jury determination of the ultimate sentence." Sansing v. Ryan, 2013 WL 474358 (D. Ariz. Feb. 7, 2013).

the existence of one aggravating factor. See Hurst, 136 S. Ct. at 624 ("Florida's sentencing scheme, *which required the judge alone to find the existence of an aggravating circumstance*, is ... unconstitutional.")(emphasis added). The Court overruled Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989), "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of the jury's factfinding, that is necessary for the imposition of the death penalty." Hurst, 136 U.S. at 624. In so doing, the Court did not expressly disturb Proffitt v. Florida, 428 U.S. 242 (1975)(holding that Florida's capital sentencing scheme does not violate the Eighth Amendment as interpreted by Furman).

By equating Hurst with Furman, Appellant reads Hurst far too broadly. As we know, Timothy Hurst did not have a prior or contemporaneous conviction. Revealingly, however, following release of the Hurst opinion, the United States Supreme Court denied certiorari review of two direct appeal decisions, leaving intact this Court's denial of any Sixth Amendment error; both cases had sentences supported by prior violent felony convictions. See Fletcher v. State, 168 So. 3d 186 (Fla. 2015), cert. denied, 2016 WL 280859 (Jan. 25, 2016); Smith v. State, 170 So. 3d 745 (Fla. 2015), cert. denied, 2016 WL 280862 (Jan. 25, 2016). After Furman, there were no existing capital cases

left intact. After Hurst, the United States Supreme Court has provided no express reason to disturb any capital sentences supported by prior or contemporaneous convictions.

In Hurst, the United States Supreme Court acknowledged that the holding of Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), concerned the factual findings necessary to enhance a defendant's sentence beyond that which was authorized by the jury's verdict. In Apprendi, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. Two years later, the Court addressed the implications of Apprendi for Arizona's capital sentencing scheme. Because Arizona's capital sentencing scheme had no jury involved in the penalty phase at all, the Court determined that Arizona's capital sentencing scheme was unconstitutional "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Id. at 609. However, the Court expressly noted that the question in that case was whether an aggravating factor "may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee ... requires that the aggravating factor determination be entrusted to the jury."

Ring, 536 U.S. at 597.

While the Court has expanded the portion of the holding of Apprendi to cover findings that increase the sentencing range to which a defendant is exposed even if they did not change the statutory maximum, it has not changed the focus from findings of fact that authorize a sentence. Alleyne v. United States, 133 S. Ct. 2151, 2155, 2158 (2013)(applying Apprendi to factual findings necessary to impose a minimum mandatory term); Southern Union Co. v. United States, 132 S. Ct. 2344 (2012)(applying Apprendi to factual findings that increased the amount of a criminal fine); Cunningham v. California, 549 U.S. 270 (2007)(applying Apprendi to factual findings necessary to increase a sentence to an "upper limit" sentence); Blakely v. Washington, 542 U.S. 296, 303-05 (2004)(applying Apprendi to factual findings necessary to impose a sentence above the "standard" sentencing range even though the sentence was below the statutory maximum). In fact, the Court recently reaffirmed that the Sixth Amendment right underlying Ring and Apprendi did not apply to factual findings made in selecting a sentence for a defendant after the jury has made fact findings necessary for the imposition of a sentence within a particular range. Alleyne, 133 S. Ct. at 2161 n.2 ("Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the

legally prescribed range and does so in a way that aggravates the penalty. Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.' Williams v. New York, 337 U.S. 241, 246, 69 S. Ct. 1079, 93 L.Ed. 1337 (1949). While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing."); see also United States v. O'Brien, 560 U.S. 218, 224 (2010)(recognizing that Apprendi does not apply to sentencing factors that merely guide sentencing discretion without increasing the applicable range of punishment authorized by the jury's verdict).

In Kansas v. Carr, __ U.S. __, 136 S. Ct. 633 (2016), decided only a week after Hurst, the Court discussed the distinct determinations of eligibility and selection under capital sentencing schemes. In doing so, the Court stated that an eligibility determination was limited to findings related to aggravating circumstances, and that determinations regarding whether mitigating circumstances existed and the weighing process were selection determinations. Id. at 642. In fact, the Court stated that such determinations were not factual findings at all. Instead, the Court termed the determinations regarding the existence of mitigating circumstances as "judgment call[s]"

and weighing determinations "question[s] of mercy." Id.

In Florida, a sentence of death is authorized upon the finding of the existence of one aggravating factor. State v. Steele, 921 So. 2d 538, 543 (Fla. 2005)("To obtain a death sentence, the State *must* prove beyond a reasonable doubt at least one aggravating circumstance"). Death is presumptively the appropriate sentence. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). As the availability of the death sentence in a particular circumstance is a matter of state law, this Court's determination controls. Ring, 536 U.S. at 603 ("the Arizona court's construction of the State's own law is authoritative").

Accordingly, Appellant's argument that Hurst requires juries to find as a matter of fact that there are sufficient aggravating circumstances to outweigh the applicable mitigating circumstances is without merit. Hurst specifies that constitutional error occurs when a trial judge "alone" finds the existence of "an aggravating circumstance." Hurst, 136 S. Ct. at 624. This Sixth Amendment error is necessarily one that can be avoided or prevented with the requirement of specific jury findings as to the existence of an aggravating circumstance. While Appellant argues that § 921.141, Florida Statutes, is unconstitutional in its entirety and that subsections (2) and (3) cannot be severed, he misses the point that Hurst is a procedural ruling, and therefore a remedy is within the scope of

ameliorative measures available to this Court.[3]

In Cramp v. Board of Public Instruction, 137 So. 2d 828, 830 (Fla. 1962), this Court set forth a test for severability, to determine the extent to which a statute which has been deemed unconstitutional may still be operable. While a court certainly cannot re-write a substantive statute in order to render it constitutional, there is no impediment to a court salvaging a condemned statute through the adoption of procedural rules that satisfy any constitutional deficits that have been found. Because Hurst did not find that the death penalty was constitutionally prohibited, § 775.082(2) does not mandate a blanket commutation of death sentences as Appellant requests.

Furthermore, the practice in other states does not suggest that commutation of all non-final death sentences in Florida is necessary under Hurst. Appellant's reliance on the Colorado

[3] Indeed, Florida courts have expressly recognized the power and discretion of trial courts to fashion rules of procedure when necessary. See State v. Ford, 626 So. 2d 1338 (Fla. 1993)(holding that a trial court may employ a procedure if necessary to further an important public interest); Hernandez v. State, 597 So. 2d 408 (Fla. 3d DCA 1992)(finding that the trial court's procedure in allowing a child to testify by closed circuit television, although not expressly authorized by rule or statute, was appropriate); Harrell v. State, 709 So. 2d 1364 (Fla. 1998)(approving procedure used by trial court governing use of trial testimony by satellite transmission). See also Galindez v. State, 955 So. 2d 517, 527 (Fla. 2007)(Cantero, J., concurring)("When confronted with new constitutional problems to which the Legislature has not yet responded, we have the inherent authority to fashion remedies").

Supreme Court's decision to remand two pending pipeline cases for imposition of life sentences without parole under a similar Colorado statute is misplaced. The Colorado statute is not identical to the Florida statute, as it is not triggered by a finding that "the death penalty" is unconstitutional, but specifies that, in the event the death penalty "as provided for in this section," is found to be unconstitutional, life sentences are mandated. Woldt v. People, 64 P.3d 256, 259 (Colo. 2003).

In Arizona, the Arizona Supreme Court rejected blanket commutation, finding that the unconstitutional portion of the statute could be severed to preserve pending death cases. State v. Pandeli, 161 P.3d 557 (Ariz. 2007). This is the approach this Court should take. This Court has repeatedly recognized its obligation to uphold any portion of the statute, to the extent there is a reasonable basis for doing so, based on the rule favoring validity. Donaldson, 265 So. 2d at 501, 502-03; Driver v. Van Cott, 257 So. 2d 541 (Fla. 1972); Davis v. State, 146 So. 2d 892 (Fla. 1962).

There is no reading of Hurst which suggests that a Sixth Amendment violation necessarily occurs in every case when the statute is followed. In considering whether a new sentencing proceeding may be required by Hurst in a pending pipeline case, this Court needs to determine whether Sixth Amendment error

occurred on the facts of that particular case; that is, whether a jury factfinding as to an aggravating circumstance, such as a contemporaneous felony, is apparent on the record. If there was a Sixth Amendment violation, the question shifts to the impact of that error, and whether any prejudice to the defendant may have occurred. With this approach, this Court is respecting those death sentences which can be salvaged upon finding that any potential constitutional error was harmless, while protecting the Sixth Amendment rights of defendants.

Appellant claims that Sixth Amendment error occurred in his case and alleges that such error was necessarily "structural," and not amenable to a harmless error analysis. This argument must be rejected. First, the United States Supreme Court remanded Hurst itself to this Court for determination of harmlessness, noting that "[t]his Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here." Hurst, 136 S. Ct. at 624. This Court has been consistent in finding that deficient jury factfinding, in violation of the Sixth Amendment, can be and often is harmless beyond any reasonable doubt. Galindez v. State, 955 So. 2d 517, 521-23 (Fla. 2007); Johnson v. State, 994 So. 2d 960, 964-65 (Fla. 2008). See also Pena v. State, 901 So. 2d 781, 783 (Fla. 2005)(failure to instruct jury on age requirement was not fundamental error).

Second, the prior conviction exception to the Sixth Amendment findings required by Apprendi and Ring has not been disturbed in Hurst. Ring itself recognizes the critical distinction of an enhanced sentence supported by a prior conviction. See Almendarez-Torres v. United States, 523 U.S. 224 (1998)(permitting judge to impose higher sentence based on prior conviction); Ring, 536 U.S. at 598 n.4 (noting Ring does not challenge Almendarez-Torres, "which held that the fact of a prior conviction may be found by the judge even if it increases the statutory maximum sentence"); Alleyne v. United States, 133 S. Ct. 2151, 2160 n.1 (2013)(affirming Almendarez-Torres provides valid exception for prior convictions). As Appellant had a contemporaneous felony conviction—supported by a unanimous jury verdict—which qualified him for the death sentence, no Sixth Amendment error has been shown in this case.

Even if some Sixth Amendment violation could be discerned on these facts, United States Supreme Court case law clearly demonstrates that it was harmless beyond a reasonable doubt. Appellant's claim of structural error is refuted by Neder v. United States, 527 U.S. 1 (1999), where the Court found no structural error although the jury convicted the defendant after one element of the offense was mistakenly not submitted for the jury's consideration. Neder explains why Appellant's reliance on Sullivan v. Louisiana, 508 U.S. 275 (1993), is misplaced.

Although Sullivan found that constitutional error which prevented a jury from returning a "complete verdict" could not be harmless, the Court reviewed the relevant decisions in Neder and determined that reversal was not required where the evidence of the omitted element was overwhelming and uncontested. Neder, 527 U.S. at 19.

The determination that deficient factfinding under the Sixth Amendment can be harmless is cemented by Washington v. Recuenco, 548 U.S. 212 (2006), where the United States Supreme Court reversed a Washington state court holding that error under Blakely v. Washington, 542 U.S. 296 (2004), was structural in nature and could never be harmless. Blakely is an Apprendi/Ring decision which requires jury factfinding where a sentence is to be enhanced due to the defendant's use of a firearm.

In this case, Appellant murdered the victim while engaged in the contemporaneous felony of sexual battery. The jury's unanimous verdict for the contemporaneous felony unquestionably qualified Appellant for the death sentence. Under the Apprendi/Ring/Hurst line of cases, no possible constitutional error prejudiced Appellant on these facts. Accordingly, his death sentence should be upheld.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the judgment and sentence imposed on Appellant Kenneth Ray Jackson.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 17th, 2016, I electronically filed the foregoing with the Clerk of the Court by using the e-portal filing system which will send a notice of electronic filing to the following: **Julius Aulisio**, Assistant Public Defender, Public Defenders Office, Tenth Judicial Circuit, P.O. Box 9000-Drawer PD, Bartow, Florida 33831, **jaulisio@pd10.org**, **mjudino@pd10.state.fl.us**.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ C. Suzanne Bechard
C. SUZANNE BECHARD
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0147745
Office of the Attorney General
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com
carlasuzanne.bechard@myfloridalegal.com

COUNSEL FOR APPELLEE