IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1472

RONNIE KEITH WILLIAMS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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The State claims that *Hurst* "did not find 'capital punishment' unconstitutional" (AB at 13). Quibbling over semantics reveals the weakness of the State's position. The U.S. Supreme Court did not leave any room for doubt or interpretation about exactly what it held when it wrote, "[w]e hold this sentencing scheme unconstitutional." *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016). Instead of acknowledging the actual holding of *Hurst* or the plain language of the statute under which Williams was sentenced to death, Florida Statutes § 921.141 (amended March 7, 2016), the State obfuscates, relies on overruled caselaw, and attempts to minimize *Hurst's* impact by characterizing it as a procedural rule.

The State's assertion that Williams's *Hurst* claim is procedurally barred because he raised a *Ring*[1] claim on direct appeal is spurious (AB at 7, n.2). Until January 12, 2016, no court in the country had held that Florida's capital sentencing scheme violated the Sixth Amendment for failing to require jurors to find the facts necessary to impose death. *Hurst* created a new claim by rejecting prior Florida law. *Ring* applied the Sixth Amendment to Arizona's capital sentencing scheme. But no court had applied the Sixth Amendment to Florida's scheme until *Hurst*.

The State argues that Williams was automatically eligible for death because there is "a recidivist aggravator in this case which qualifies as an exception as jury

[1] *Ring v. Arizona*, 536 U.S. 584 (2002).

findings do not apply to such aggravators" (AB at 2). This argument arises from the fact that the Arizona statute at issue in *Ring* only required one aggravator, a fact which has been sloppily imported into the *Hurst* discussion, and which the State keeps repeating even though Florida's statute is different from Arizona's.[2]

In *Ring*, the U.S. Supreme Court held that "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536 U.S. at 589. This holding ties the Sixth Amendment right to a jury trial to the legislatively defined facts that authorize an increase in the maximum punishment, whatever those may be in a particular jurisdiction. This connection between the Sixth Amendment jury trial right and the state-specific, legislatively defined facts is at the core of *Ring*.

> The dispositive question . . . is one not of form, but of effect. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how a State labels it—must be found by a jury beyond a reasonable doubt.

Ring, 536 U.S. at 602 (citation omitted).

Thus, *Ring* held that the Sixth Amendment right to a jury trial was tied to the legislatively defined facts that must be present to authorize the imposition of a death

[2] Florida's new statute, which provides that future defendants may be eligible for death upon the finding of one aggravator, is irrelevant. Williams was sentenced under the unconstitutional statute, and that is the sentence he is appealing. Substantive changes in statutory law cannot be applied retroactively in criminal cases. U.S. CONST. art. I, § 9.

sentence, and that those facts are elements which must be submitted to a jury and proved beyond a reasonable doubt. But in Williams's case and in the other cases in which supplemental briefing has been submitted, the State has steadfastly refused to acknowledge that the effect of the Sixth Amendment jury trial right varies from state to state because its application is bound to the specific language of each statute's definition of the facts necessary to authorize an increase in punishment.

Rather than acknowledge that *Ring* links the jury trial right to the legislatively defined facts that authorize the imposition of a death sentence, the State chooses to see only the conclusion in *Ring* that in Arizona, the jury trial right was tethered to the Arizona statute, which allowed for death eligibility upon the finding of one aggravator. But Arizona's statute has nothing to do with the Florida law under which Williams was sentenced. Nowhere in Florida's former statute was it written that the mere presence of a single aggravating circumstance was sufficient to justify the imposition of a death sentence. In fact, the U. S. Supreme Court has recognized that under Florida law, one aggravator is not necessarily enough.

> The language of the statute, which provides that the sentencer must determine whether "sufficient aggravating circumstances exist," § 921.141(3)(a), indicates that any single statutory aggravating circumstance **may not be adequate to meet this standard** if, in the circumstances of a particular case, it is not sufficiently weighty to justify the death penalty.

Barclay v. Florida, 463 U.S. 939, 954 n.12 (1983) (emphasis added).

Similarly, the Eleventh Circuit has held that in Florida, eligibility and weighing of sentencing factors are "collapsed into a single step." *See Jennings v. McDonough*, 490 F.3d 1230, 1257 (11th Cir. 2007). The fact that the Legislature combined the weighing with the eligibility determination is the source of the confusion about *Hurst*'s application of the Sixth Amendment to Florida's statute. The State's confusion is evident from its argument that "*Hurst* does not require anything more the jury find the defendant death eligible; it does not require jury sentencing" (AB 3-4). However, given Florida's statute, jury sentencing is exactly what is required under *Hurst*. The eligibility determination cannot be separated from the weighing process. It is the same step.

After *Hurst*, because Florida's statute did not allow for death eligibility based only on one aggravator, prosecutors lobbied the Florida Legislature to insert that language into the new statute. The new law now provides that "[i]f the jury does not unanimously find at least one aggravator, the defendant is ineligible for a sentence of death." Fla. Stat. § 921.141(2)(b)(1) (effective March 7, 2016). The former statute did not contain any such language. Under the former statute, the requisite finding was that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3). Subsection 3 is the single, collapsed step. It is what the Sixth Amendment applies to. And there is no part of it that can be parsed out and identified

as an isolated eligibility determination.

Under *Hurst*, that factual finding of sufficiency—the finding that increases the penalty from life in prison to death—must be made by a jury, not a judge. That is the constitutional principle at the heart of *Hurst*.

> [T]he 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). 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. . . . The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires."

Hurst, 136 S. Ct. at 622 (emphasis in original). Both *Ring* and *Hurst* require courts to look to the governing statute to see what facts are necessary before death may be imposed, but the State refuses to acknowledge the statute, as if ignoring it will make it go away.

Instead, the State simply parrots the line that "[i]n Florida, a defendant is death eligible if at least one aggravating factor applies" (AB at 15), without citing any statutory authority. Because the State cannot cite the former statute (since the statute did not say that), the only support it can offer for its argument are decisions where this Court misconstrued *Ring*. First, the State cites to dicta in *Steele v. State*, 921 So. 2d 538, 543 (Fla. 2005), one of the cases abrogated by *Hurst*. In *Steele*, the Court struggled with the implications of *Ring*, lamenting that "the effect of that decision

on Florida's capital sentencing scheme remains unclear" and that this "uncertainty has left trial judges groping for answers." *Id*. at 540.

Contrary to the State's representation, *Steele* did not hold that the presence of one aggravator automatically qualified one for death. Instead, what the Court actually held was that under Arizona's statute, the finding of one aggravator was necessary for death eligibility. The Court's consideration of *Ring*'s applicability to Florida was inconclusive ("[e]ven if *Ring* did apply in Florida—an issue we have yet to conclusively decide— . . ."), and the most the Court would say about it was that its interpretation of *Ring* was consistent with precedent including *Hildwin v. Florida*, 390 U.S. 638 (1989) and *Spaziano v. Florida,* 468 U.S. 447 (1984), cases which were explicitly overturned by *Hurst*. *See Steele,* 921 So. 2d at 546-47.

Ironically, it was in *Steele* that this Court pleaded with the Florida Legislature to take action to ensure the continued viability of Florida's death penalty scheme. Specifically, the Court implored the Legislature to "revisit the statute to require some unanimity in the jury's recommendations." *Steele*, 921 So. 2d at 548. At the end of the section entitled "The Need for Legislative Action," the Court observed:

> The bottom line is that Florida is now the *only* state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote *both* whether aggravators exist and whether to recommend the death penalty. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.

Id. at 550 (emphasis in original). Unfortunately, the Legislature has indeed decided that it wants Florida to remain an outlier, and whether the new statute will withstand constitutional scrutiny remains to be seen.

The State also cites to *Ault v. State*, 53 So. 3d 175, 205 (Fla. 2010), and *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003)—two more cases where this Court misconstrued *Ring*—to argue that "eligibility is determined by the existence of at least one aggravating factor" (AB 5). However, the Court rejected both *Ring* claims based on *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), another case abrogated by *Hurst* which now has zero precedential value.[3]

Incredibly, the State then goes so far as to assert that "[t]he suggestion that *Hurst* requires juries to find there are insufficient mitigators to outweigh aggravators . . . is meritless" (AB at 6).[4] This argument is astounding considering the plain

[3] The State also relies on the fact that post-*Hurst*, the U.S. Supreme Court recently denied certiorari in direct appeal cases involving prior violent felony aggravators (AB at 14). To cite denials of certiorari as precedent is ludicrous. The denial of a petition for writ of certiorari by the U.S. Supreme Court "imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923).

[4] The State attempts to lump intellectual disability in with mitigation to argue that the ID determination is not subject to a *Hurst* analysis: "ID is a mitigating factor" (AB at 6); "neither mitigators nor ID, which is akin to mitigation, are not [sic] jury questions under the Sixth Amendment" (AB at 5). This argument fails for two reasons: first, the question of whether there are sufficient mitigators to outweigh the aggravators **is** part of the statutorily defined factual finding a jury must make under *Hurst*. Second, ID is not "akin to mitigation." It is a categorical bar to execution.

language of the former statute. Florida Statutes § 921.141(3), relevantly entitled "[f]indings in support of sentence of death," provided that, before imposing a death sentence, it must be found that "sufficient aggravating circumstances exist," and then there must be a finding that there are "insufficient mitigating circumstances to outweigh the aggravating circumstances." The findings of fact in subsection (3) are the operable findings for the Sixth Amendment analysis under *Hurst*. They are precisely the critical findings that the Sixth Amendment requires juries to make, and which Williams's jury did not make.

The State argues that *Hurst* is just a minor procedural blip and as such, it is not retroactive. This assertion is belied by the maelstrom of activity *Hurst* inspired, both in the Florida Legislature and in this Court. In the wake of *Hurst*, the Legislature scrambled to quickly pass a new law, because it recognized that *Hurst* meant that there was no valid death penalty statute in Florida. This Court, in addition to the 35+ cases in which it has ordered supplemental briefing, issued two stays of execution and recalled a final mandate in a capital case to allow supplemental briefing.[5] By doing so, this Court has acknowledged that the constitutional problem identified in *Hurst* is significant enough to justify disturbing finality. This would not be the case if *Hurst* were, as the State keeps repeating, just a procedural rule.

[5] *Lambrix v. State*, Nos. SC16-8, SC16-56; *Asay v. State*, Nos. SC16-223, SC16-02; *Hojan v. State*, Nos. SC13-2422, SC13-5.

The State trots out *Teague v. Lane*, 498 U.S. 288 (1989) and *Schriro v. Summerlin*, 542 U.S. 348 (2004) yet again to support its argument that *Hurst* is not retroactive, yet fails to meaningfully address Williams's argument that *Witt v. State*, 387 So. 2d 922 (Fla. 1980) controls. The State cites *Johnson v. State*, 904 So. 2d 400 (2005) to argue that *Ring* is not retroactive in Florida under *Witt*, ignoring the fact that in *Johnson*, this Court failed to recognize *Ring*'s true scope. *Johnson* rested on a rotten foundation which collapsed when *Hurst* overruled *Hildwin* and *Spaziano*. There is nothing left of *Johnson* for the State to rely on, and the argument that *Hurst* is not retroactive because this Court held in *Johnson* that *Ring* was not retroactive is specious.

Williams argued in his supplemental initial brief that the *Hurst* error was structural and could never be harmless. He continues to rely on that argument, as well as his argument that he is entitled to a life sentence under Fla. Stat. § 775.082. However, to the extent that this Court decides a harmless error analysis is appropriate, Williams must address the State's assertion that "Williams was [death] eligible based on a recidivist aggravator" (AB at 15).

There is no such thing as automatic death eligibility under Florida law. There were no jury findings regarding aggravators. We have no idea what the jury found. We only know that the jury recommended death by a vote of 10-2. Because we do not—and cannot—know what the jury found, the State could never prove that the

Hurst error was harmless beyond a reasonable doubt. "To hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury trial guarantee." *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993). It would lead to the sort of "frail conjecture" that precludes meaningful appellate review. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

Two of Williams's jurors voted for a life sentence, presumably because those jurors did **not** find sufficient statutorily defined facts to justify a death sentence. There is no way to conclude beyond a reasonable doubt that Williams's jury—if properly instructed that its verdict would be binding on the judge—would have unanimously found the facts necessary to impose death, particularly since there was copious mitigation that was not presented to his jury. Williams's jury made no findings, which is why his death sentence is unconstitutional and cannot stand.

Finally, the State argues that *Hurst*'s retroactivity was already determined more than two months before it was issued because the U.S. Supreme Court denied a stay in *Correll v. Florida*, 2015 WL 6111411 (Oct. 29, 2015). The State asserts that "[i]t may be assumed the Court would have granted a stay if it had intended a retroactive application of *Hurst*" (AB at 12, n.10). Not only is this argument nonsensical, but the more disturbing aspect is that the State would have this Court continue to make the mistakes of the past. Williams urges this Court not to do so.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I certify that a true copy of the foregoing was electronically served to Leslie Campbell, Esq. at leslie.campbell@myfloridalegal.com on March 18, 2016.

I further certify that this brief was typed in Times New Roman 14 point font.

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