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IN THE SUPREME COURT OF FLORIDA

RICHARD P. FRANKLIN,

Appellant,

Case No. SC13-1632

v.

STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR COLUMBIA COUNTY, FLORIDA

SUPPLEMENT ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, RICHARD FRANKLIN, filed his "Supplemental Brief of Appellant" on February 25, 2016, presenting argument regarding the United States Supreme Court decision of *Hurst v. Florida*, -- S.Ct. --, 2016 WL 112683 (2016). The State therefore presents the following argument as its answer to Franklin's supplemental brief. The State relies on its Statement of Case and Facts from the previously filed briefs. Any citations to the record also follow the same format from the previous briefs.

ARGUMENT

I. FRANKLIN'S SENTENCE SATISFIES THE REQUIREMENTS OF *HURST v. FLORIDA*, BECAUSE OF THE RECIDIVIST AGGRAVATORS APPLIED TO HIS CASE.

Franklin asserts his death sentence is unconstitutional under the Sixth Amendment, based on the United States Supreme Court decision in *Hurst v. Florida*, 2016 WL 112683 *5 – 6 (2016), and claims he is therefore entitled to a life sentence. (Supp. Brief at 1 – 2). Because the decision in *Hurst* was rendered prior to Franklin's conviction becoming final, he is entitled to the benefit of the *Hurst* decision as his case is in the "pipeline." However, Franklin does not qualify for relief under *Hurst* because his death sentence was achieved with the application of a recidivist aggravator, and therefore the requirements of *Hurst* have been met.

a. The Standard of Review

The constitutionality of a statute is reviewed *de novo*. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013). A claim under the Sixth Amendment right to a jury trial is an issue of pure law, also subject to *de novo* review. *Cf. Plott v. State*, 148 So. 3d 90, 93 (Fla. 2014) (stating that because a claim of an *Apprendi/Blakely* error "is a pure question of law," the "Court's review is de novo").

b. The United States Supreme Court Decision in *Hurst v. Florida*.

In order to fully understand the decision by the United States Supreme Court in *Hurst*, one must first go back to the Court's decision in *Apprendi v. New Jersey*,

530 U.S. 466, 494 (2000). There the Court held that a defendant is entitled to a jury determination of any fact designed to increase the maximum punishment allowed by a statute. *Apprendi*, 530 U.S. at 494.

Then in *Ring v. Arizona*, 536 U.S. 584 (2002), the Court extended its holding in *Apprendi* to capital cases stating "capital defendants, no less that non-capital 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. The Court determined that "Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts necessary to sentence a defendant to death." *Hurst v. Florida*, 2016 WL 112683 *5. "Specifically, a judge could sentence [a defendant] to death only after independently finding at least one aggravating circumstance." *Id*. Because it was the judge, and not a jury, which conducted the fact-finding to enhance the penalty, "Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment." *Id.*

Finally, in *Hurst v. Florida*, the Court held that Florida's capital sentencing structure violated *Ring*, because it required a judge to conduct the fact-finding necessary to enhance a defendant's sentence. *Hurst*, 2016 WL 112683 *5 – 6. In arriving at its decision, the Court looked directly to Florida's sentencing statute which does not "make a defendant eligible for death until 'findings by the court that such a person shall be punished by death.'" *Id*. at *6 (citing Fla. Stat. §

775.082(1) (emphasis in opinion). Also, under *Spaziano v. State*, 433 So. 2d 508, 512 (Fla. 1983), the jury's role in sentencing a defendant to capital punishment was viewed as advisory. *Spaziano*, 433 So. 2d at 512. Thus, the Supreme Court held Florida's capital sentencing structure, "which required the judge alone to find the existence of an aggravating circumstance", violated its decision in Ring, and in-part overruled the prior decisions of *Spaziano v. State of Florida*, and *Hildwin v. Florida*, 490 U.S. 638 (1989). *Hurst*, 2016 WL 112683 *6 – 9.

c. The Recidivist Aggravator Exception to *Apprendi v.New Jersey* and *Ring v. Arizona*.

In Florida, a defendant is eligible for a capital sentence if at least one aggravating factor has been applied to the case. *Ault v. State*, 53 So. 3d 175, 205 (Fla. 2010), *cert. denied*, 132 S.Ct. 224 (Oct. 3, 2011) (No. 10-11173); *Zommer v. State*, 31 So. 3d 733, 752 – 54 (Fla. 2010), *cert. denied* 562 U.S. 878 (Oct. 4, 2010) (No. 09-11400). As the availability of a death sentence in a particular circumstance is a matter of state law, this Court's determination controls. *Ring*, 536 U.S. at 603 (stating the "Arizona court's construction of the state's own law is authoritative"). The finding of a prior violent felony based on a unanimous jury conviction is therefore acceptable as an aggravating factor, and the decision in *Hurst* did not disturb that aspect of the Florida capital sentencing structure.

In *Ring v. Arizona*, the United States Supreme Court acknowledged that recidivist aggravators may be found by the judge alone. *Ring*, 122 S.Ct. at n.4 (noting

that none of the aggravators at issue relate to past convictions and therefore the holding in *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998), which allowed the judge to find the fact of a prior conviction even it if increases the sentence beyond the statutory maximum was not being challenged). Recidivist aggravators are those which have been established by a unanimous jury verdict during the guilt phase of a trial, such as: (1) a prior violent felony; (2) murder of a law enforcement officer; (3) defendant's status as under a sentence of imprisonment or on felony probation; and (4) murder during the course of a robbery, kidnapping, or sexual assault. In those cases if a defendant has been previously convicted or contemporaneously convicted for an underlying offense that establishes the aggravator, then a jury has made a *defacto* factual finding of the aggravator. Indeed, even the initial merits brief filed by Hurst in the United States Supreme Court did not challenge the recidivist aggravator exception to *Apprendi* and *Ring*, and the opinion in *Hurst* was silent as to the recidivist aggravator exception.

Even after their decision in *Hurst*, the United States Supreme Court denied certiorari petitions in *Timothy Fletcher v. Florida*, No. 15-6075 (2016), and *Delmer Smith v. Florida*, No. 15-6430 (2016). Both *Fletcher* and *Smith* raised *Ring* in their petitions for certiorari, and each had the presence of a recidivist aggravator.[1]

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[1] Delmer Smith was sentenced with a unanimous recommendation of death, and

This Court has also repeatedly observed that *Ring* does not apply to cases involving recidivist aggravators, such as the prior violent felony aggravator or the under sentence of imprisonment aggravator. *McCoy v. State*, 132 So. 3d 756, 775 – 76 (Fla. 2013); *Johnson v. State*, 104 So. 3d 1010, 1028 (Fla. 2012); *Hodges v. State*, 55 So. 3d 515, 540 (Fla. 2010). Accordingly, because the application of a recidivist aggravator requires a unanimous jury finding of fact, the application of a recidivist aggravator therefore satisfies the requirements of *Hurst*.

In this case, Franklin was previously convicted of first-degree murder in 1994. Then Franklin was serving a life sentence while he committed the murder in this case. The trial court's application of the prior violent felony and under sentence of imprisonment aggravators are thus supported by unanimous jury verdicts and satisfy the requirements of *Hurst*. Unlike the defendant in *Hurst*, Franklin's case is consistent with both *Apprendi* and *Ring*, and does not conflict with any other case. Franklin therefore does not qualify for relief under *Hurst*, and his argument should be rejected.

d. Franklin is Not Entitled to a Life Sentence Under Fla. Stat. § 775.082(2).

There are several cogent reasons for this Court to reject the blanket approach of

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the prior violent felony aggravator. *Smith v. State*, 170 So. 3d 745, 754 (Fla. 2015). Timothy Fletcher was sentenced to death, and the aggravator of under sentence of imprisonment was applied, because the murder involved a prison escape. *Fletcher v. State*, 168 So. 3d 186, 201 (Fla. 2015).

commuting all capital sentences as was the case following the decision in *Furman v. Georgia*, 408 U.S. 238 (1972). *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 v. Sack*, 265 So. 2d 499, 506 (Fla. 1972) (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. *Hurst* did not declare the capital punishment as unconstitutional in Florida under the Eighth Amendment; *Hurst* did rule the sentencing structure for capital punishment as unconstitutional because a jury did not conduct the fact-finding necessary to increase the statutory maximum punishment. By equating *Hurst* with *Furman*, Franklin reads *Hurst* far too broadly. Once again, the recent denial of certiorari petitions in both *Smith v. Florida* and *Fletcher v. Florida*, shows us the Court's intention; because had United States Supreme Court believed that capital punishment in Florida was unconstitu-

tional ala *Furman*, the petitions for certiorari would have been granted, vacated, and remanded back to the Florida Supreme Court. Instead, the Court denied each petition, and has allowed executions to proceed forward. Thus, there is no merit to Franklin's argument that he is entitled to a life sentence under § 775.082(2) Fla. Stat. (2015).

CONCLUSION

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

CERTIFICATE OF SERVICE

I CERTIFY that copy of the foregoing document has been furnished to Nada Carey, Counsel for Appellant, nada.carey@flpd2.com, Leon County Courthouse, 301 S. Monroe Street, Tallahassee, Florida 32301, by email this 29th day of February 2016.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

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