IN THE SUPREME COURT OF FLORIDA

TIFFANY ANN COLE,

Appellant,

v.

STATE OF FLORIDA

Appellee.

Case No. **SC13-2245**

LOWER TRIBUNAL NO. 16-2005-CF-010263D

*** CAPITAL CASE ***

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT,
DUVAL COUNTY, FLORIDA
HON. MICHAEL R. WEATHERBY, CIRCUIT JUDGE

SUPPLEMENTAL REPLY BRIEF CONCERNING *HURST v. FLORIDA*

December 19, 2016

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

OTHER AUTHORITIES

INTRODUCTION

This Court directed Appellant to file a supplemental reply brief no later than five days after the filing of Appellee's supplemental answer brief. Appellant responds to Appellee's arguments as follows.

ARGUMENT

Remand Is Appropriate in Light of *Hurst.*

As previously stated in the supplemental brief regarding *Hurst v. Florida*, 136 S. Ct. 616 (2016), Appellant requests that her case be remanded to the trial court to plead a claim for sentencing relief under *Hurst* or be granted an evidentiary hearing to determine the effect of *Hurst* error in her case.

A. Appellee is Incorrect Regarding Appellant's Preservation of a *Hurst* Claim.

Although Appellee asserts that Appellant has not preserved a *Hurst* claim because she only raised a claim under *Ring v. Arizona*, 536 U.S. 584 (2002) on direct appeal did not again raise such a claim during her post-conviction proceedings, Appellee fails to provide any legal support for the assertion that raising a *Ring* claim twice is required to preserve a *Hurst* claim. Appellee Brief at 7. To the extent that a previously raised *Ring* claim is required at all for preservation of a *Hurst* claim, Appellant has satisfied that requirement by raising her *Ring* claim on direct appeal. Appellant Brief at 2-3; *cf. O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (federal habeas claims are considered exhausted and preserved where there has been one complete round of state-court review, whether on direct appeal or in a post-conviction appeal). In fact, if Appellant had tried to raise the *Ring* claim in subsequent proceedings,

this Court would have barred it. *Thompson v. State*, 410 So.2d 500, 501 (Fla. 1982) (collateral relief proceedings may not be used as a vehicle to retry issues previously litigated on direct appeal). Here, Appellant previously presented her *Ring* claim during her direct appeal proceedings and did all she could to challenge Florida's unconstitutional death penalty statute prior to the Supreme Court's *Hurst* decision.

B. Appellee Is Incorrect that *Hurst* Does Not Apply to Appellant.

Appellee wrongly asserts that *Hurst* does not apply to Appellant on retroactivity grounds and mistakenly relies on prior decisions from this Court regarding *Ring* that have no further validity in light of *Hurst*. Not only have those decisions been effectively overruled in the wake of *Hurst*, but *Hurst* itself is a more robust constitutional decision than *Ring* and addresses a Florida statute that differed in critical ways from the Arizona law in *Ring*. Appellant Brief at 9. Although this Court, in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), *King v. Moore*, 831 So.2d 143 (Fla. 2002), and *Johnson v. State*, 904 So.2d 400 (Fla. 2005), held that *Ring* was inapplicable in Florida because the United States Supreme Court previously had approved of Florida's capital sentencing scheme in *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984), the Supreme Court in *Hurst* explicitly overruled

Hildwin and *Spaziano*, leaving this Court's decisions in the cases relied upon by Appellee with no remaining validity. *See Hurst*, 136 S. Ct. at 616 ("We now expressly overrule *Spaziano* and *Hildwin* in relevant part . . . . Time and subsequent cases have washed away the[ir] logic . . ."). As with *Hitchcock v. Dugger,* 481 U.S. 393 (1987), *Hurst* now has held that this Court misconstrued *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *Ring* as having no application to Florida's capital sentencing statute. Thus, "[c]onsiderations for fairness and uniformity" cannot justify denying the benefit of *Hurst* to those like Appellant whose death sentences were final before *Hurst* was issued. *See Witt*, 387 So.2d at 925. Appellee's reliance on *Johnson*, thus, is no longer valid. Appellee Brief at 14.

Furthermore, contrary to Appellee's suggestion, *Witt v. State*, 387 So.2d 922 (Fla. 1980), is the appropriate retroactivity test. The federal *Teague v. Lane, 489 U.S. 288 (1989),* test is not relevant to this Court's analysis. Though Appellee concedes that *Hurst* meets two of the three *Witt* prongs, Appellee Brief at 14, Appellee wrongly argues that *Hurst* does not constitute a development of fundamental significance. Appellee Brief at 14. As explained in Appellant's initial supplemental brief, *Hurst does* constitute a development of fundamental significance because it is "of sufficient magnitude to necessitate retroactive application as ascertained by the

three-fold test of the United States Supreme Court's decisions in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965)." *Falcon v. State*, 162 So.3d 954, 961 (Fla. 2015) (quoting *Witt*, 387 So.2d at 929) (internal brackets omitted). The fundamental significance of *Hurst* is clear when considered in light of "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." *Witt*, 387 So.2d at 926. Tellingly, several federal and state courts throughout Florida have stayed cases with *Hurst* claims pending this Court's ruling on retroactivity. This Court has stayed the executions of inmates and granted some inmates *Hurst* relief while grappling with the various issues presented by *Hurst* claims.

Moreover, there is good reason why this Court adheres faithfully to *Witt* over *Teague v. Lane*, 489 U.S. 288 (1989), as the federal retroactivity test announced in *Teague* was designed with "[c]omity interests and respect for state autonomy" in mind. *Schriro v. Summerlin*, 542 U.S. at 364. *Teague* was never intended to prohibit a state from granting broader retrospective relief in reviewing its own state convictions. *See Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008). Additionally, the United States Supreme Court's ruling in *Schriro*, which held that *Ring* is not retroactive in federal habeas proceedings, does not

impact the retroactivity of *Hurst* under either *Witt* or *Teague*. Even if *Teague* is applied, *Hurst* would be retroactive under the federal approach, either as a substantive or procedural matter. Most recently, the Supreme Court of Delaware used *Teague* and its progeny to find *Hurst* constitutes a "new watershed procedural rules of criminal procedure that must be applied retroactively in Delaware." *See Powell v. State*, 2016 WL 7243546 (Del. Dec. 15, 2016). It is also noteworthy that the Supreme Court's prior reticence to hold *Ring* retroactive under *Teague* may be eroding, as highlighted by the recent retroactivity decision in *Montgomery v. Louisiana,* 136 S. Ct. 718 (2016). *See* Appellant Brief at 5.

Appellee also argues that the United States Supreme Court has denied certiorari review on some *Hurst* cases involving "recidivist aggravators," thus indicating its unwillingness to depart from the *Ring* harmless error exception for aggravators based on prior or contemporaneous offenses. Appellee Brief at 11. However, it is well-established that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923); *see also Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (denial of writ of certiorari "carries no support whatever for conducing that either the majority or the dissent

in the court below correctly interpreted the scope of our decisions").

Appellee also misconstrues *Caldwell v. Mississippi,* 472 U.S. 320 (1985). *Caldwell* was not solely about a prosecutor's argument, Appellee Brief at 17, but rather held that a capital sentence is invalid where it is imposed by a jury after the jury has been told that the ultimate responsibility for determining the appropriateness of the sentence rested elsewhere and not with the jury. *Id.* at 328-29. Indeed, the Supreme Court "has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its truly awesome responsibility." *Id.* at 341 (internal quotation marks omitted). Here, without even being certain, to the exclusion of all reasonable doubt, that the jury would have made the same death sentence recommendation without the *Hurst* error in this case, the error cannot be harmless. The State's inability in light of *Caldwell* to even show that the jury would have inevitably made the same recommendation only highlights that Appellant's two 9–3 jury recommendations cannot be shown beyond a reasonable doubt to have had no impact on her sentence. And, as noted above, a jury properly advised of its role could have found the requirements for imposing the death penalty satisfied, but nonetheless recommended a life sentence. *Hurst*,

2016 WL 6036978, at *13 (“we do not intend to diminish or impair the jury’s right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.”).

Finally, Appellee’s harmless error arguments regarding “automatic” aggravators are misplaced. This Court, as Appellee acknowledges, has rejected the State’s contention that prior convictions for other violent felonies insulate a death sentence from *Ring* and *Hurst v. Florida*.” Appellee Brief at 10; *see Franklin v. State,* 2016 WL 6901498, at *6 (Fla. Nov. 23, 2016). As a result, notwithstanding the specific aggravators that the State pursued at sentencing, further trial court proceedings are necessary in this case to determine as a matter of fact, beyond a reasonable doubt, whether the *Hurst* error in Appellant’s case was harmless. This Court cannot determine, without first remanding for evidentiary proceedings, whether a jury in a hypothetical capital sentencing proceeding that complied with *Hurst* would have made the same “sufficiency” findings as the trial judge in any particular case, even where one or more of the aggravating circumstances were permissibly found by the judge. A determination of whether an individual would have been sentenced to death, notwithstanding the Sixth Amendment infirmity baked into Florida’s now-invalidated capital sentencing system, would require the Court to hypothesize—in an

imaginary proceeding consistent with *Hurst*—whether the jury would have found "sufficient" aggravating circumstances for a death sentence, and whether the jury would have found that any mitigating circumstances were "insufficient" to outweigh the aggravating circumstances.

C. Appellee Is Incorrect That Appellant's *Hurst* Error is Harmless.

Appellee asserts that any error in Appellant's penalty phase proceedings is harmless error. Appellee Brief at 19-22. To further support such argument, Appellee states that the jury "heard the facts of the two murders she committed during the guilt phase" and that the two 9–3 recommendations should not be reversed and remanded for a new sentencing simply because of the jury's recommendation. Appellee Brief at 20. However, Appellee fails to present any evidence that the jury findings were harmless in Appellant's case.

This Court has held that the burden is on the State to establish that there is "no reasonable possibility that the error contributed to the sentence." *Hurst*, 2016 WL 6036978, at *23. Without an evidentiary hearing, this Court would be constrained to conduct harmless error review based on its own or the parties' speculation, which this Court made clear, is not permissible. *Id.* at *3. An evidentiary hearing is necessary to determine whether the State can demonstrate beyond a reasonable

doubt that any difference in counsel's strategy had no reasonable probability of affecting Appellant's sentence. At a hearing on whether the *Hurst* error in her penalty phase was harmless beyond a reasonable doubt, Appellant could present evidence, that (1) defense counsel's approach to diminishing the weight of the aggravating factors above would have been different had counsel known that the jury, not the judge, would make the critical findings of fact, and (2) there would have been a different sentencing result.

D. There Are No Automatic Aggravators in Florida.

There is no bar on Appellant's *Hurst* claim by virtue of the fact that among the aggravating factors found by the trial judge at her sentencing were aggravators based on contemporaneous felonies. Although *Ring* referred to an exception approving of Arizona judges, rather than juries, finding certain aggravating factors such as one based on a prior felony conviction, the same exception was not held to apply to *Hurst* in either the United States Supreme Court's or this Court's decisions, and in fact does not apply to *Hurst*.

As previously stated, Appellant Brief at 23–25, the *Ring* exception does not apply to *Hurst* because, as described earlier, the Florida death penalty law under which Appellant was sentenced, unlike the Arizona law at issue in *Ring*, required not only that one or more aggravating factors be found to impose a

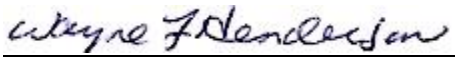
death sentence, but also required factual determinations that "*sufficient* aggravating circumstances exist" to impose a death sentence, and that "there are *insufficient* mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3) (emphasis added). Thus, unlike in a *Ring* claim, the presence of a single aggravating factor or even multiple aggravating factors are not enough to say that the death penalty was properly imposed in Florida.

In other words, although the jury may have inevitably made the same findings of fact as Appellant's judge with respect to an aggravating factor based on Appellant's prior or contemporaneous felonies, it cannot be assumed that the jury would have made the same *sufficiency* determination as the judge. This Court also rejected in *Franklin* "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida.*" *Franklin,* 2016 WL 6901498, at *6.

CONCLUSION

For the foregoing reasons, Appellant should be given the opportunity to present her *Hurst* issue to the circuit court or be granted an evidentiary hearing to present evidence regarding the impact the *Hurst* error had upon her sentencing.

Respectfully submitted,



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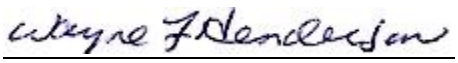
I CERTIFY that a true and correct copy of the foregoing was furnished by email to the Office of the Attorney General, Carolyn M. Snurkowski, carolyn.snurkowski@myfloridalegal.com on December 19, 2016.



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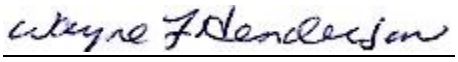

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