THE SUPREME COURT OF FLORIDA

CASE NO. SC13-2422

GERHARD HOJAN

Petitioner,

v.

JULIE L. JONES, ETC.

Respondents.

****

SUPPLEMENTAL ANSWER BRIEF IN LIGHT OF *HURST V. FLORIDA*

****

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
Attorney General
Tallahassee, FL

Lisa-Marie Lerner
Assistant Attorney General
Florida Bar No.: 698271
1515 N. Flagler Dr., Ste. 900
West Palm Beach, FL 33401
Telephone (561) 837-5000
Facsimile (561) 837-5108
Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE CASE AND FACTS

Gerard Hojan ("Hojan") was indicted on April 10 on two counts of first degree murder for the deaths of Christina De La Rosa and Willy Absolu, two counts of attempted murder of Barbara Nunn, one count of aggravated battery, three counts of armed kidnapping, and two counts of armed robbery. [R. 12-17] The jury convicted him as charged, save only on premeditated attempted murder, and recommended death on both counts by a vote of nine to three. (T:2479-85, 2648-49) This Court affirmed *Hojan v. State*, 3 So.3d 1204 (Fla. 2009)[1] and on November 30, 2009 certiorari review was denied. *Hojan v. Florida*, 558 U.S. 1052, 130 S.Ct. 741 (2009). Hojan filed a motion for post-conviction relief, which the circuit court denied and this Court affirmed that denial. *Hojan v. State*, 180 So.3d 964 (Fla. 2015). Hojan then filed a federal petition for habeas corpus which is currently stayed pending the determination on this present issue.

---

[1] On direct appeal this Court rejected Hojan's *Ring v. Arizona*, 536 U.S. 584 (2002) claim saying:

> We deny Hojan's claims asserting errors under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Hojan's case also involved convictions for multiple contemporaneous crimes. This Court has held that such facts—found unanimously by a jury—satisfy the requirements of *Ring*. *See, e.g., Rodgers v. State*, 948 So.2d 655, 673 (Fla.2006); *Smith v. State*, 866 So.2d 51, 68 (Fla.2004); *Jones v. State*, 855 So.2d 611, 619 (Fla.2003). Accordingly, we deny Hojan's *Ring* claims.

Hojan v. State, 3 So. 3d 1204, 1209, n.2 (Fla. 2009)

SUMMARY OF THE ARGUMENT

Issue I - Hojan is not entitled to relief under *Hurst v. Florida*, 136 S.Ct. 616 (2016) since it does not require jury sentencing, is not retroactive under *Witt v. State*, 387 So.2d 922, 925 (1980), and does not implicate §775.082(2). Hojan was convicted of multiple concurrent violent felonies which rendered him death eligible, thus, his sentence is constitutional under *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Ring v. Arizona*, 536 U.S. 584 (2002); *Alleyne v. United States*, 133 S. Ct. 2151 (2013).

SUPPLEMENTAL ISSUE 1

HOJAN IS NOT ENTITLED TO RELIEF UNDER *HURST* (restated)

Hojan asserts *Hurst* rendered Florida's capital sentencing unconstitutional entitling him to relief as the jury did not make any findings regarding his sentence. *Hurst* does not entitle Hojan to relief as *Hurst* is not retroactive. Also, *Hurst* does not apply because there is a concurrent violent felony aggravator in this case which qualifies as an exception as jury findings do not apply to such aggravators. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Further, even if *Hurst* does apply, any error is harmless.

In *Hurst*, the Supreme Court declared certain aspects of Florida's capital sentencing, which allowed "the judge alone to find the existence of an aggravating

circumstance" violated the Sixth Amendment right-to-a-jury-trial. A portion of the statute was unconstitutional because, under Florida law, a "jury's mere recommendation is not enough" as the judge's sentencing order must "reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors." *Hurst*, 136 S.Ct. at 619-20. The Court explained that the Sixth Amendment and due process "requires that each element of a crime be proved to a jury beyond a reasonable doubt." *Hurst*, 136 S.Ct. at 621 *quoting Alleyne v. United States*, 133 S.Ct. 2151, 2156 (2013). It then noted that *Apprendi v. New Jersey*, 530 U.S. 466, 494, (2000), held "any fact that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict is an element that must be submitted to a jury. *Hurst*, 136 S.Ct. at 621. Turning to *Ring v. Arizona*, 536 U.S. 584, 608, n. 6 (2002), the Court noted it had expanded *Apprendi* to Arizona capital defendants and the same analysis applied to Florida. *Hurst*, 136 S.Ct. at 621-622. The problem the Court identified was the "central and singular role the judge plays under Florida law" because under Florida's statute a defendant was not "eligible for death" until there were "findings by the court." *Hurst*, 136 S.Ct. at 622. The Court then overruled *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989).

A. STANDARD OF REVIEW - The standard of review for a purely legal claim raising a Sixth Amendment claim is *de novo*. *Cf. Plott v. State*, 148 So. 3d 90, 93 (Fla. 2014)

B. *HURST* DOES NOT REQUIRE JURY SENTENCING – Hojan asserts that *Hurst* mandates jury sentencing as it requires the jury to find not only that the aggravators, but that sufficient aggravators exist and that insufficient mitigators exist to outweigh the aggravators. *Hurst* does not require anything more the jury find the defendant death eligible; it does not require jury sentencing.

Hurst is an expansion of *Ring* to Florida and *Ring* was based on *Apprendi*. The holding in *Apprendi* was that any fact, other than the fact of a prior conviction, that "increases the penalty for a crime" beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. As explained by *Ring*, because aggravators "operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609 (citation omitted).

The *Hurst* court cited *Alleyne*, which held any facts that increase the mandatory minimum sentence for an offense must be submitted to the jury and found beyond a reasonable doubt 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." *Alleyne*, 133 S. Ct. at 2151, 2155, 2161 n.2. The *Alleyne* Court explained, "this is *distinct from factfinding used to guide judicial discretion in selecting a punishment within limits fixed by law*." *Id*. (emphasis supplied). "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." *Alleyne*, 133 S.Ct. at 2161, n.2. It is only facts that increase or aggravate the penalty that are treated as elements that must be found by the jury. As such, mitigators are not jury questions under the Sixth Amendment.

The only facts in Florida's death penalty statute that increase the penalty to death are aggravating circumstances. In Florida, eligibility is determined by the existence of at least one aggravating factor. *State v. Steele*, 921 So. 2d 538, 543 (Fla. 2005) ("[t]o obtain a death sentence, the State must prove beyond a reasonable doubt at least one aggravating circumstance"); *Ault v. State*, 53 So.3d 175, 205 (Fla. 2010) (2010)(stating that "to return an advisory sentence in favor of death a majority of the jury must find beyond a reasonable doubt the existence of at least one aggravating circumstance listed in the capital sentencing statute."); *Zommer v. State*, 31 So.3d 733, 754 (Fla. 2010)(*State v. Dixon*, 283 So.2d 1 (Fla. 1973), interpreted "sufficient aggravating circumstances" to mean one or more

such circumstance); *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994) ("[t]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase") citing *Lowenfield v. Phelps*, 484 U.S. 231, 244–246 (1988). Presumptively, death is the appropriate sentence. *Dixon*, 283 So.2d at 9. As eligibility is a matter of state law, this Court's determination controls. *Ring*, 536 U.S. at 603 (noting Arizona's construction of own law is authoritative). The suggestion *Hurst* requires juries find there are insufficient mitigators to outweigh aggravators is meritless. *Kansas v. Carr*, 136 S.Ct. 633 (2016) (noting aggravating factors are "purely factual determination" but, in contrast, whether mitigation exists is "largely a judgment call (or perhaps a value call)" and the ultimate question whether mitigating circumstances outweigh aggravating circumstances is "mostly a question of mercy."). *Hurst* specifies constitutional error occurs when a judge alone finds the existence of an aggravator. *Hurst*, 136 S.Ct. at 624. Under *Hurst* and *Carr*, only aggravators must be found by the jury.

C. *HURST* IS NOT RETROACTIVE – Regardless of the scope of *Hurst*, it is not retroactive. Hojan's convictions and death sentences became final with the denial of certiorari on November 30, 2009. When a constitutional rule is

announced, its requirements apply to those cases on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). Once a case is final, application of a new rule of constitutional criminal procedure is limited.[1] Such new rules apply retroactively only if they fit within one of two narrow exceptions.[2] *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). The Supreme Court determined *Ring* was not retroactive as it was a procedural, not a substantive change; *Ring* only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." *Summerlin*, 542 U.S. at 349, 352-53.

> The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.

---

[1] Hojan challenged his sentence under *Ring* on direct appeal which was rejected. *Hojan*, 3 So.3d at 1209. This renders the claims procedurally barred. *See Rodriguez v. State*, 919 So.2d 1252, 1281 n.16 (Fla. 2005); *Hardwick v. Dugger*, 648 So.2d 100, 105 (Fla. 1994). While *Hurst* is constitutional in nature, it is not retroactive and cannot revive barred claims. Furthermore, the State still maintains that Hojan's *Ring* claims were not preserved since he demanded the withdrawal of the motions at trial.

[2] Relevant for this argument is the exception: (2) procedural rule constituting a watershed rule of criminal procedure implicating fundamental fairness and accuracy of criminal proceedings. *Teague v. Lane*, 498 U.S. 288, 310–13 (1989).

Summerlin, 542 U.S. at 358.[3] *Ring* did not create a new right. That right was created by the Sixth Amendment guaranteeing the right to a jury trial.[4] *Ring* merely created a new procedural rule. Under *Teague v. Lane, 498 U.S. 288, 310–13 (1989),* a new rule generally applies only to cases on direct review. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (*Crawford v. Washington*, 541 U.S. 36 (2004) not retroactive).

Given *Ring* is not retroactive, it follows *Hurst* cannot be retroactive[5] as it is not only an expansion of *Ring* to Florida, but in deciding *Hurst,* the Supreme Court

---

[3] There can be no question Florida relied in good faith upon prior decisions of this Court and the Supreme Court which upheld Florida's capital sentencing. *See Rigterink v. State*, 66 So.3d 866, 895-96 (Fla. 2011) (noting rejection of *Ring* claim in more than 50 cases). Since *Ring*, some 14 years passed without the Supreme Court accepting a case, until *Hurst*, challenging Florida's capital sentencing statute under *Ring*. There were significant differences between the Arizona and Florida statutes that rendered the Hurst decision far less than certain. *See Hurst*, 136 S.Ct. at 625 (Alito, Justice, dissenting) (observing unlike Arizona, in Florida "the jury plays a critically important role" and the Court's "decision in *Ring* did not decide whether this procedure violate[d] the Sixth Amendment").

[4] The right to a jury trial was extended to the States in *Duncan v. Louisiana*, 391 U.S. 145 (1968) and the Court declined to find retroactivity. *DeStefano v. Woods*, 392 U.S. 631 (1968) *Apprendi,* 530 U.S. at 494 merely extended the right to the sentencing phases when an increase in possible punishment was sought.

[5] *Hurst* is based on an entire line of jurisprudence, none of which has been held retroactive. *See DeStefano*, 392 U.S. at 631; *McCoy v. United States*, 266 F.3d 1245, 1255-59 (11th Cir. 2001) (*Apprendi* not retroactive); *Varela v. United States*, 400 F.3d 864, 866–67 (11th Cir. 2005) (explaining decisions such as *Ring*, *Blakely*, and *Booker* applying *Apprendi*'s "prototypical procedural rule" are not retroactive); *Crayton v. United States*, 799 F.3d 623, 624-25 (7th Cir. 2015) *cert. denied*, 136 S. Ct. 424 (2015) (*Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013), which extended *Apprendi* did not apply retroactively).

overrule decades old precedent (*Spaziano* and *Hildwin*) finding Florida's capital sentencing constitutional. *Hurst*, 136 S.Ct. at 623-24. Like *Ring*, *Hurst* is a new procedural rule, not dictated by *Ring* as prior Supreme Court precedent was overruled. As provided in *Bockting*, *Crawford* was a new rule because it was not "dictated" by prior precedent, but overruled *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The announcement of a new rule, where prior precedent is overruled, runs from the date of the new case; here, from January 12, 2016 for *Hurst*. *Hurst* will not apply to any case final before January 12, 2016. Hojan' case was final on March 24, 2008. *Hojan*, 558 U.S. at 1052; Hurst does not apply.

In *Johnson v. State*, 904 So.2d 400, 411-12 (Fla. 2005) this Court decided *Ring* was not retroactive under *Witt v. State*, 387 So.2d 922 (Fla. 1980)[6], specifically noting the severe and unsettling impact retroactive application would have on our justice system with nearly 400 death sentenced inmates:

> …the three *Witt* factors, separately and together, weigh against the retroactive application of *Ring* in Florida. To apply *Ring* retroactively "would, we are convinced, destroy the stability of the law, render

[6] In *Witt*, this Court explained that a new rule of constitutional procedure will not apply to final convictions unless the change: "(a) Emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Witt*, 387 So.2d at 931. The opinion notes that a "development of fundamental significance" falls within two categories, either "changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" or "those changes of law which are of sufficient magnitude to necessitate retroactive application. ..." *Id*. at 929.

> punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state...beyond any tolerable limit." *Witt*, 387 So. 2d at 929-30. Our analysis reveals that *Ring*, although an important development in criminal procedure, is not a "jurisprudential upheaval" of "sufficient magnitude to necessitate retroactive application." *Id*. at 929. We therefore hold that *Ring* does not apply retroactively…

The Arizona Supreme Court reached the same conclusion after *Ring*. *See State v. Towery*, 204 Ariz. 386, 393-94, 64 P.3d 828, 835-36 (2003) ("[c]onducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice" and would be inconstant with duty to protect victims' rights under State Constitution).

Hojan claims other cases such as *Gideon v. Wainwright*, 373 U.S. 335 (1963) *Furman v. Georgia*, 408 U.S. 238 (1972); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); and *Falcon v. State*, 162 So.3d 954 (Fla. 2015) were given retroactive application necessitating the same treatment of *Hurst.* These cases do not further his position.

Gideon,[7] is one of the few examples of a "watershed" procedural rule under the Sixth Amendment supporting retroactive application. However, it does not

[7] Fundamental fairness is not implicated as one can envision a system of "ordered liberty" where elements of a crime are proven to a judge, not to the jury. *United States v. Shunk*, 113 F.3d 31, 37 (5th Cir. 1997). An example of a new "watershed" procedural rule is the right to counsel established in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). *See Saffle v. Parks*, 494 U.S. 484, 495 (1990)(*Gideon* is retroactive; it seriously increases accuracy of conviction). The exception to

mandate retroactive application for *Hurst* as both *Apprendi* and *Ring* have been determined not to be retroactive. While *Falcon* recognized *Miller v. Alabama*, 132 S.Ct. 2455 (2012) to have retroactive application, it, like *Furman,* was addressed to the Eighth Amendment, not a Sixth Amendment procedural issue. *Falcon* and *Furman* are on a different footing than *Hurst* and its procedural rule. The fact one constitutional announcement is retroactive and another is not, does not render the decision unfair, but balances the need for fairness and finality.[8] *Johnson,* discussed above, dealt with the Sixth Amendment jury trial right and *Ring*, not the Eighth Amendment, and Hojan offers no compelling justification for revisiting *Johnson*. Assuming, a new *Witt* analysis would be appropriate, the same factors in *Johnson* apply with equal force to hold *Hurst* not retroactive. A different result would be

---

nonretroactivity for procedural rules is limited to a small core of rules which seriously enhance accuracy. *Graham v. Collins*, 506 U.S. 461, 478 (1993). A trial conducted with a procedural error "may still be accurate" and for that reason, "a trial conducted under a procedure found to be unconstitutional in a later case does not, as a general matter, have the automatic consequence of invalidating a defendant's conviction or sentence;" generally, procedural rules are not retroactive. *Montgomery v. Louisiana*, 136 S.Ct. 718, 730 (2016).

[8] As noted in *Calderon v. Thompson*, 523 U.S. 538, 556 (1998):

> Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. … To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," … an interest shared by the State and the victims of crime alike.

highly deleterious to finality and unsettle reasonable expectations for justice citizens and victims alike.

In *Butterworth v. United States*, 775 F.3d 459, 467-68 (1st Cir. 2015), *cert. denied*, 135 S. Ct. 1517 (2015), the Court rejected an attempt to justify retroactive application of *Alleyne v. United States*, 133 S.Ct. 2151 (2013) based on *Apprendi* hindsight noting neither the Supreme Court, nor any other federal court, had found a new procedural rule not retroactive under the watershed exception only later to change its mind after "the law's intervening evolution." There is no reason for this Court to depart from its prior determination that *Ring* is not retroactive. Such a departure would represent a clear break from precedent. *See Chandler v. Crosby*, 916 So.2d 728 (Fla. 2005) (*Witt* weighs against retroactive application of *Crawford* and noting "new rule does not present a more compelling objective that outweighs the importance of finality."); *Hughes v. State*, 901 So.2d 837, 838 (Fla. 2005) (*Apprendi* not retroactive); *State v. Statewright*, 300 So.2d 674 (Fla. 1974) (*Miranda v. Arizona*, 384 U.S. 436 (1966) not retroactive.

Hurst does not provide for retroactive application.[9] This is noteworthy given *Teague's* reminder "'whether a decision [announcing new rule

[9] Following oral arguments in *Hurst*, the Court denied a stay of execution in *Jerry Correll v. Florida*, 2015 WL 6111441 (Oct. 29, 2015). Correll had applied for the stay based on the pending decision in *Hurst;* yet the Court denied the stay. It may

should] be given prospective or retroactive effect should be faced at the time of [that] decision'" and a general acceptance that "...new rules generally should not be applied retroactively to cases on collateral review." *Teague*, 498 U.S. at 300-05. Like *Ring*, *Hurst* is not retroactive.

D. §775.082(2), FLA. STAT. IS NOT IMPLICATED – Hojan suggests §§775.082(2) requires he receive a life sentence. *Hurst* did not find "capital punishment" unconstitutional; it only invalidated a procedure thus, by its own terms, §775.082(2) does not apply.[10] *Anderson v. State*, 267 So.2d 8 (Fla. 1972) does not support commutation of his sentence; neither does *Donaldson v. Sack*, 265 So.2d 499 (Fla. 1972). *Donaldson* is not a statutory construction case, but one of jurisdiction,[11] the focus which was on cases **pending for prosecution** when *Furman* issued, not pipeline cases on direct appeal. This Court's determination to remand all pending death cases for imposition of life sentences was discussed in

---

be assumed the Court would have granted a stay if it had intended a retroactive application of *Hurst*.

[10] That section provides life sentences are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional," as enacted following *Furman*, to protect society in the event capital punishment as a whole were deemed unconstitutional. *Coker v. Georgia*, 433 U.S. 584 (1977)

[11] Based on Florida constitution (1972), *Donaldson v. Sack*, 265 So.2d 499 (Fla. 1972) held circuit courts no longer had jurisdiction of capital cases as there was no valid capital statute; no capital cases existed, as the definition of capital referred to cases where capital punishment was an option. This Court observed §§775.082(2) was conditioned on invalidation of the death penalty, but clarified, that provision was not before it, but "we touch on it only because of its materiality in considering the entire matter." *Donaldson*, 265 So. 2d at 505.

Anderson where it explained the Attorney General had moved to relinquish jurisdiction to the circuit courts for resentencing to life, taking the position those death sentences were illegal. This Court did not elucidate why commutation of 40 sentences was required, but it is interesting this predated *Teague*, *Witt*, and their rules for retroactivity. Another difference between *Furman* and *Hurst* bodes against commutation of death sentences includes that *Furman* was a decision invalidating ***all*** death sentences while *Hurst* is a specific ruling extending Sixth Amendment protections first noted in *Ring* to Florida cases and remanding for harmless error. It is telling *Hurst* does not disturb *Proffitt v. Florida*, 428 U.S. 242 (1976). Unlike *Furman*, following *Hurst*, the Supreme Court denied certiorari on direct appeal decisions[12] leaving intact the denial of Sixth Amendment error. *Hurst* provides no basis to disturb a sentence supported by a prior conviction.

E. EVEN IF *HURST* WERE TO APPLY, ANY ERROR IS HARMLESS - Hurst did not have a prior violent felony conviction.[13] This Court consistently has held deficient jury fact-finding, under the Sixth Amendment, often

[12] Both were supported by prior violent felony convictions. *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). In *Carr*, 136 S.Ct. at 647-49, the Court discussed the distinct factors of eligibility and selection under capital sentencing. It found an eligibility determination was limited to findings related to aggravators. Those of mitigation and weighing were selection determinations, noting such were not factual findings, but were "judgment call[s]" and "question[s] of mercy." *Id.*

[13] *Hurst v. State*, 147 So.3d 435, 445-47 (Fla. 2014).

is harmless.[14] *Galindez v. State*, 955 So. 2d 517, 521-23 (Fla. 2007); *Johnson v. State*, 994 So.2d 960, 964-65 (Fla. 2008). A Florida defendant is death eligible if at least one aggravating factor applies. *Steele*, 921 So.2d at 543. Hojan was death eligible based on his numerous concurrent felony convictions which were found by a unanimous jury and provided the basis for the violent felony aggravator.

The Supreme Court recognized the critical distinction of an enhanced sentence supported by a prior conviction in *Almendarez-Torres*, 523 U.S. 224; *Ring*, 536 U.S. at 598 n.4; *Alleyne*, 133 S.Ct. at 2160 n.1. *Hurst* did not disturb this precedent that a *Ring* claim is harmless in the face of a prior felony conviction.

CONCLUSION

Based upon the foregoing, relief should be denied.

[14] *Hurst* did not find structural error. Moreover, it permits application of harmless error. In *Neder v. United States*, 527 U.S. 1 (1999), the Court rejected the argument that a conviction returned after one element of the offense was mistakenly not submitted to the jury presented a case of structural error. *Neder* explains why reliance on *Sullivan v. Louisiana*, 508 U.S. 275 (1993), is misplaced. Although *Sullivan* found constitutional error which prevented a jury from returning a "complete verdict" could not be harmless, it reviewed *Neder* and determined reversal was not required where 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 Supreme Court reversed the state holding that *Blakely v. Washington*, 542 U.S. 296 (2004) error, was structural and could never be harmless.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to Todd Scher, Esq., CCRC-South, 1 East Broward Blvd., Suite 444, Ft. Lauderdale, Florida 33301, tscher@msn.com, this 21st day of March, 2016.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Lisa-Marie Lerner
LISA-MARIE LERNER
Assistant Attorney General
Florida Bar No.: 698271
1515 N. Flagler Dr 9th Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5108
Lisamarie.Lerner@myfloridalegal.com
Capapp@myfloridalegal.com

COUNSEL FOR APPELLEE