IN THE SUPREME COURT OF FLORIDA
Case No. SC13-2422

GERHARD HOJAN,
Petitioner,

v.

JULIE L. JONES, ETC.,
Respondents.

SUPPLEMENTAL REPLY BRIEF OF APPELLANT IN LIGHT OF *HURST V. FLORIDA*

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ARGUMENT IN REPLY

In its Answer Brief, the State makes arguments that are completely non-responsive to the arguments made by Mr. Hojan. In fact, most of the State's arguments do not even acknowledge the actual holding in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and are contrary to the Florida sentencing scheme under which Mr. Hojan was sentenced and which was struck down by the Supreme Court in *Hurst* as violative of the Sixth Amendment. Rather, the State argues that (1) *Hurst* is not retroactive, (2) that *Hurst* "does not apply" because there is a concurrent violent felony aggravator which qualifies as an "exception" under *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and (3) even if *Hurst* applies, "any error is harmless" (SAB at 2).[1] Mr. Hojan addresses the State's arguments in turn.

1. *Hurst*'s Retroactivity.

a. *Hurst*'s holding.

The State contends that *Hurst* is not retroactive,[2] but in order to determine the

[1] References to "SAB" refer to the State's Supplemental Answer Brief.

[2] The State acknowledges that Mr. Hojan preserved his Sixth Amendment challenged both prior to trial and on his direct appeal to this Court (SAB at 7 n.1) ("Hojan challenged his sentence under *Ring* on direct appeal which was rejected") (citing *Hojan v. State*, 3 So. 3d 1204, 1209 (Fla. 2009)). However, it argues that "[t]his renders the claims procedurally barred" (SAB at 7 n.1). Given that *Hurst* demonstrates that this Court's prior understanding of the application of both *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was incorrect, the State's half-hearted argument, buried in a footnote, about a procedural bar, should be rejected.

retroactivity of *Hurst*'s holding, the actual holding of the case must be determined. This is where the State's brief in Mr. Hojan's case (and in all of the other cases where the State has briefed *Hurst)* falls short. The State ignores the arguments made in the Supplemental Initial Brief filed by Mr. Hojan, ignores the *Hurst* opinion, and ignores the unambiguous wording of the Florida statute.

Although the State acknowledges that the Sixth Amendment and *Hurst* require a jury determination of death eligibility (SAB at 4), the State's argument that follows completely falls off the rails.[3] Without citing any statutory authority, the State insists that the "only facts in Florida's death penalty statute that increase the penalty to death are aggravating circumstances" and that "[i]n Florida, eligibility is determined by the existence of at least one aggravating factor" (SAB at 5). But this is not what the statute provided. *Hurst* itself identified as necessary under Florida statutory law to authorize the imposition of a death sentence:

> [**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) (emphasis added). 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. §** 921.141(3).

[3] Indeed, the State's desperation is evidenced by its resurrection of a long-ago discredited argument that "[p]resumptively, death is the appropriate sentence" in Florida (SAB at 6). Any such construction of Florida's capital sentencing scheme runs afoul of the Eighth Amendment. *See Jackson v. Dugger,* 837 F.2d 1469, 1473 (11th Cir. 1988).

Id. at 622 (emphasis added) (citations omitted).

The State did not address the statutorily defined facts set forth in *Hurst* and explained in Mr. Hojan's Supplemental Initial Brief. Rather, it merely repeats its mantra that *Hurst* is just an extension of *Ring* and *Apprendi* (SAB at 4) ("*Hurst* is an expansion of *Ring* to Florida and *Ring* was based on *Apprendi*"). But the State's position is void of any meaning when one actually looks at those decisions rather than applying a grab-bag approach of taking out-of-context holdings from various cases and merging them into what the State prefers the Sixth Amendment to mean.

In *Ring,* the Supreme Court held: "Capital defendants, no less than noncapital 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 (emphasis added). This holding in *Ring* ties the Sixth Amendment right to a jury trial to the legislatively-defined facts that authorize an increase in the maximum punishment. This connection between the Sixth Amendment jury trial right and the legislatively-defined facts is the core holding in *Ring*:

> The dispositive question, we said, "is one not of form, but of effect." *Id*. at 494. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - ***no matter how the State labels it*** -must be found by a jury beyond a reasonable doubt.

Ring, 536 U.S. at 602 (emphasis added). Clearly, the Supreme Court in *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 sentence. But in Mr. Hojan's case and in the other cases in which supplemental briefing has been submitted and in oral arguments heard as to the meaning of *Hurst,* the State has steadfastly refused to acknowledge that the scope of the Sixth Amendment jury trial right varies from state to state because its application is bound to the specific language of each State's statutes that define 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 sees only the conclusion reached in *Ring* that ***in Arizona*** the Sixth Amendment right was tied to the existence of one aggravating circumstance. But as the Supreme Court explained in *Ring*, "in Arizona, a 'death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt.' 200 Ariz., at 279, 25 P.3d, at 1151 (citing § 13-703)." *Ring*, 536 U.S. at 597. It was due to Arizona's statutory law that the Supreme Court in *Ring* concluded: "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' [citation], the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 509 (emphasis added). In *Hurst*, the Supreme Court looked to ***Florida statutory law*** to ascertain what statutorily defined facts are required under Florida for a death sentence to be authorized:

> [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) (emphasis added). 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."

Hurst, 136 S. Ct. at 622 (emphasis in original).

Despite both *Ring* and *Hurst* clearly requiring us to look to the governing statutes to see what facts are necessary before a death sentence may be imposed, the State in its brief refuses to look at Florida's death penalty statute. Instead, it just repeats its mantra: "In Florida, eligibility is determined by the existence of at least one aggravating factor" (SAB at 5). There was certainly no language in the statute to that effect prior to March 7, 2016.[4] Instead of setting forth any statutory authority for its assertion, the State cites to a few opinions from this Court that relied upon *Ring* for the proposition that the Sixth Amendment merely requires the jury to find one aggravating circumstance (SAB at 5-6). Of course, the string cite begins with *State v. Steele*, 921 So. 2d 538, 543 (Fla. 2005) a case that is part of the State's mantra. However, an examination of *Steele* shows that this Court misconstrued *Ring*:

> The Court in *Ring* concluded that under Arizona's capital sentencing scheme, aggravating factors operate as the "functional equivalent of an element of a greater offense." 536 U.S. at 609, 122 S. Ct. 2428 (quoting *Apprendi*, 530 U.S. at 494 n. 19, 120 S. Ct. 2348). Therefore, the Court

[4] If the State wants to rely upon the new statute as changing Florida's substantive law, it cannot. Substantive changes in statutory law cannot be applied retroactively. But if the new statute were to be applied retroactively, Mr. Hojan's 9-3 jury verdicts at his penalty phase would require the imposition of a life sentence.

> held, the Sixth Amendment required that they be found by the jury. *Id.* Even if *Ring* did apply in Florida—an issue we have yet to conclusively decide—we read it as requiring only that the jury make the finding of "an element of a greater offense." *Id*. That finding would be that at least one aggravator exists-not that a specific one does.

Steele, 921 So. 2d at 546 (emphasis added). The Supreme Court in *Ring* only held that under ***Arizona's*** statute, the finding of one aggravator was necessary to authorize the imposition of a death sentence. This Court in *Steele* (and in all of its jurisprudence post *Apprendi* and *Ring*) erroneously treated the application of the Sixth Amendment to Arizona law as applying in Florida without regard to Florida's statute, which was and is decidedly different from Arizona's statute. Indeed, this Court's misapprehension of *Ring* is at the heart of *Hurst v. Florida* because in the 14 years between *Ring* and *Hurst*, this Court failed to look to the statutorily required findings of fact that must be found before a death sentence can be imposed. The statute expressly precludes the imposition of a death sentence absent findings of fact that sufficient aggravators exist and that insufficient mitigators exist.[5] As indicated

[5] Ignoring *Hurst* and the then-extant statutory language, the State argues that the "insufficient mitigation" finding of fact is not a jury question under the Sixth Amendment. (SAB at 5). But again, it bears repeating that this is not what the Supreme Court said in *Hurst* nor is it what the Florida statute provided at the time of Mr. Hojan's sentencing. The insufficiency of the mitigation is an eligibility determination placed in the Florida Statute by the Florida legislature. Simply because the State wishes to label it something else now (a "sentence selection" factor rather than an "eligibility factor") is of no moment for the Sixth Amendment analysis. "[A]ll facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense,

in *Hurst,* a defendant is not "eligible" for a death sentence until those facts have been found. *Hurst,* 136 S. Ct. at 622. Unless those facts are found, a death sentence cannot be imposed. Under *Ring* and *Hurst*, the Sixth Amendment right to a jury trial attaches to those statutorily defined facts that are necessary for the imposition of a death sentence. The State hides from this reality by repeating its mantra and refusing to address the actual holdings in *Ring* and *Hurst*.

b. Retroactivity of the actual holding of *Hurst.*

Because it refuses to acknowledge the holding of *Hurst,* it is not surprising that in terms of retroactivity the State merely repeats its mantra: because *Ring* is not retroactive, "it follows that *Hurst* cannot be retroactive" (SAB at 8). As explained in the previous section, the State's argument that *Hurst* is merely *Ring* repackaged for Florida is a gross misunderstanding of *Hurst* and the statutory language at issue in *Hurst.*

The State trots out *Teague v. Lane*, 498 U.S. 288 (1989), and *Schriro v. Summerlin*, 542 U.S. 348 (2004), to support its argument that *Hurst* is not retroactive (SAB at 7-8), yet fails to meaningfully address the fact that this Court follows the test set forth in *Witt v. State*, 398 So. 2d 922 (Fla. 1980). This Court specifically crafted *Witt* to provide greater, more expansive protection than was provided by

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sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.." *Ring*, 536 U.S. at 610 (Scalia, J., concurring).

federal caselaw.

The State also 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 misconstrued *Ring* and failed to recognize its true scope. *Johnson* rested on a rotten foundation which collapsed when Hurst overruled *Hildwin v. Florida*, 390 U.S. 638 (1989) and *Spaziano v. Florida*, 468 U.S. 447 (1984). Also, *Hurst* is not *Ring. Ring* reviewed an Arizona death penalty scheme that was different than *Hurst*'s review of Florida's scheme. There is nothing left of *Johnson* for the State to rely on, and the suggestion that *Hurst* is not retroactive because this Court held in *Johnson* that *Ring* was not retroactive is simply absurd.

2. Harmless Error?

Again, citing pre-*Hurst* decisions which misinterpreted *Ring* and erroneously determined that eligibility in Florida for a death sentence could rest upon merely the finding of one aggravating circumstance, the State argues that "Hojan was death eligible based on his numerous concurrent felony convictions" that provided "the basis for the violent felony aggravator" (SAB at 14-15). But, as noted herein and in his Supplemental Initial Brief, this is not, nor has ever been, the legislatively-defined facts to make a Florida defendant eligible for the death penalty. Thus, the fallacy of the State's entire argument – that a *Ring* claim is harmless in the face of a prior felony conviction – is laid bare. Mr. Hojan is not raising a *Ring* claim. He is raising

a *Hurst* claim.

The State continues to rely on a putative "prior conviction" exception per the Supreme Court's decision in *Almendarez-Torres* (SAB at 15). But again, the State persists in refusing to acknowledge Florida's statutory scheme which mandated as eligibility findings "sufficient aggravating circumstances" and "insufficient mitigating circumstances." No "exception" for this is found in *Hurst* nor is *Almendarez-Torres* relevant to the analysis here. Importantly, the Supreme Court in *Alemendarez-Torres* noted that to require the so-called "recidivist" factor to be part of the eligibility determination would be "anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty, a punishment far more severe than that faced by petitioner here." *Almendarez-Torres*, 523 U.S. at 247. The "existing case law" referred to by the *Almendarez-Torres* Court consisted of three cases – *Walton v. Arizona*, 497 U.S. 639 (1990), *Hildwin v. Florida*, and *Spaziano v. Florida* – all of which were subsequently overturned by the Supreme Court in *Ring* and in *Hurst*. There is no "precedent," as the State argues, that "a *Ring* claim is harmless in the face of a prior felony conviction" (SAB at 15) and even if there were, Mr. Hojan has raised a *Hurst* claim, not a *Ring* claim.

The State also contends that "*Hurst* did not find structural error" and "permits application of harmless error" (SAB at 15 n.14). *Hurst* did not, as asserted by the

State, specifically "permit application" of harmless error (AB at 15). It simply reversed this Court and acknowledged its practice of "normally leav[ing] it up to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here." This hardly means that this Court is precluded from determining that *Hurst* error is not amenable to harmless error review, the position advanced by Mr. Hojan. The State posits that *Washington v. Recuenco*, 548 U.S. 212 (2006), supports the notion that the error here is not structural in nature (SAB at 15 n.14). In *Recuenco*, the Supreme Court held that error under *Blakely v. Washington*, 542 U.S. 296 (2004), was not structural. But the Supreme Court also determined that the questioned remained open whether the error could be harmless under state law. *Recuenco*, 548 U.S. at 218 n.1. On remand, the Washington Supreme Court determined that harmless-error analysis did not apply as a matter of state law. *State v. Recuenco*, 163 Wash.2d 428 (Wa. 2008).

There were no jury findings in Mr. Hojan's case. We have no idea what the jury found. We only know that the jury was instructed its role was merely advisory and recommended death by a vote of 9-3, thus the State cannot 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).

CONCLUSION

Based on the foregoing arguments and in light of *Hurst v. Florida*, Mr. Hojan submits that the Court should vacate his unconstitutional sentences of death.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on this 28th day of March, 2016, and opposing counsel will be served on this date. Counsel further certifies that this brief is typed in Times New Roman 14-point font.

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