IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant/Cross-Appellee,

Case No. SC14-1701

v.

RAYMOND BRIGHT,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

PATRICK M. DELANEY
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 85824

Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
Primary E-Mail:
capapp@myfloridalegal.com
Secondary E-Mail:
Patrick.Delaney@myfloridalegal.com
(850) 414-3300 Ext. 4583
COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

This Court ordered supplemental briefing regarding the United States Supreme Court decision in *Hurst v. Florida*, -- S.Ct. --, 2016 WL 112683 (2016), on January 19, 2016. Accordingly, 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.

SUMMARY OF ARGUMENT

The United States Supreme Court decision in *Hurst v. Florida*, is not retroactive, and therefore has no application to Raymond Bright because his conviction became final prior to the Supreme Court's decision. The Court's decision in *Hurst* is a procedural extension of *Ring* to the Florida sentencing structure. In Florida neither *Ring* nor any of its progeny have ever been held to be retroactive. Thus, *Hurst* also cannot be retroactive because it stems from the same procedural line of cases.

The decision in *Hurst* also does not entitle Bright to relief because Bright was sentenced to death with the application of the prior violent felony aggravator. In the wake of *Ring v. Arizona*, the United States Supreme Court acknowledged that recidivist aggravators may be found by the judge alone. Because Bright's death sentence was achieved with a jury finding of a prior violent felony aggravator the holding in *Hurst* is satisfied.

ARGUMENT

I. BRIGHT IS NOT ENTITLED TO RELIEF UNDER *HURST v. FLORIDA*, BECAUSE THE PROCEDUREAL EXTENSION OF *RING v. ARIZONA* TO FLORIDA'S CAPITAL SENTENCING STRUCTURE IS NOT RETROACTIVE.

A. 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. "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.

B. *Hurst v. Florida* is Not Retroactive

Once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. New rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004).

Those exceptions are: (1) a substantive rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making

authority to proscribe or if it prohibits a certain category of punishment for a class of defendants because of their status or offense"; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. § 44, Fla. Jur. 2d – Cases on Collateral Review (2015) (citing *Teague v. Lane*, 498 U.S. 288, 310 – 13 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002); *Butler v. McKellar*, 494 U.S. 407 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990)).

"A case announces a new [substantive] rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 498 U.S. at 301. "New rules of procedure, on the other hand, generally do not apply retroactively." *Summerlin*, 542 U.S. at 352. This is because new rules of procedure are speculative in their result by raising the possibility that "someone convicted with use of the invalid procedure might have been acquitted otherwise." *Id*. If a new rule therefore simply regulates the manner of determining a defendant's culpability, it is procedural. *See Summerlin*, 542 U.S. at 353.

Such was the analysis by the Supreme Court in *Schriro v. Summerlin*, which

directly addressed whether its decision in *Ring v. Arizona* was retroactive.[1] *Summerlin*, 542 U.S. at 349. The Court held the decision in *Ring* was procedural and **non-retroactive**. *Id*. at 353. This was because *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." *Id*.

Ring did not create a new constitutional right. The right was created by the Sixth Amendment guaranteeing the right to a jury trial, and *Apprendi* announced the rule 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.[2] If *Ring* was not retroactive, then *Hurst* cannot be retroactive as *Hurst* is

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[1] The Florida Supreme Court looks to *Witt v. State*, 387 So. 2d 922 (Fla. 1980) when considering the retroactive application of a new constitutional rule of law to final convictions. *Witt* held 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.

[2] The right to a jury trial was extended to the States in *Duncan v. Louisiana*, 391 U.S. 145 (1968). But, in *Destefano v. Woods*, 392 U.S. 631 (1968) (*per curiam*), the Supreme Court declined to apply the holding of *Duncan* retroactively. *Apprendi* merely extended the right to a jury trial to the sentencing phase, when the

merely an extension of *Ring* to Florida. In fact, the decision in *Hurst* is based on an entire line of jurisprudence, none of which has ever been held to be retroactive.[3] *See, Destefano v. Woods*, 392 U.S. 631 (1968) (*per curiam*) (holding the Court's decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968), which guaranteed the right to a jury trial to the States was not retroactive); *Harris v. United States*, 536 U.S. 545, 581 (2002) (Thomas, J. dissenting (acknowledging that neither the U.S. Supreme Court nor any court of appeals has ever held *Apprendi* to have a retroactive effect.) (overruled on other grounds by *Alleyne v. United States*, 133 S.Ct. 2151 (2013))); *McCoy v. United States*, 266 F.3d 1245, 1255, 1259 (11th Cir. 2001) (holding *Apprendi* not retroactive under *Teague*, and acknowledging that every federal circuit to consider the issue reached the same conclusion); *Summerlin*, 542 U.S. 348 (holding *Ring v. Arizona*, not retroactive). Thus, because the United States Supreme Court expressly found that *Ring* was not retroactive, it follows that the decision in *Hurst*, which simply extended *Ring* to Florida, is also not retroactive.

State sought to increase the maximum possible punishment. *Apprendi*, 530 U.S. at 494. Then *Ring* applied *Apprendi* in the context of capital defendants. *Ring*, 536 U.S. at 589. And finally, the Court held in *Hurst* that the Florida statute violated *Ring*. *Hurst*, 2016 WL 112683 *5 – 9.

[3] The Missouri Supreme Court has applied *Ring* retroactively, but it did so only in five cases where the jury deadlocked on a sentencing verdict, and therefore the judge made all the requisite findings and sentenced the defendant to death. *State v. Whitfield*, 107 S.W.3d 253, 268 – 69 (Mo. 2003).

The Eleventh Circuit has addressed similar claims in considering whether the United States Supreme Court decision in *Alleyne v.United States,* was retroactive. *Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014).[4] In *Jeanty*, the defendant sought the retroactive application of *Alleyne*, which applied *Apprendi*, to attack his sentence on collateral review. *Jeanty*, 757 F. 3d at 1284. In denying relief and holding *Alleyne* not retroactive, the Eleventh Circuit wrote "[i]f *Apprendi*'s rule is not retroactive on collateral review, then neither is a decision applying [*Apprendi*'s] rule." *Id*. at 1285 (citing *In re Anderson*, 396 F.3d 1336,

[4] Recently, the First District Court of Appeals rejected a defendant's attempt at a similar retroactive application based on hindsight from *Apprendi*. *Butterworth v. United States*, 775 F.3d 459, 467 – 68 (1st Cir. 2015), *cert denied*, 135 S.Ct. 1517 (2015). Butterworth argued that he was entitled to the benefit of the United States Supreme Court decision in *Alleyne v. United States*, which clarified the Court's opinion in *Apprendi* by holding "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Butterworth*, 775 F.3d at 461 – 64 (citing *Alleyne*, 133 S.Ct. at 2155). Butterworth asserted the opinion *Alleyne* announced a new watershed rule of procedure based on *Apprendi*, yet the First District Disagreed because Butterworth overlooked the fact that *Apprendi* itself was not retroactive. *Butterworth*, 775 F.3d at 467 – 68. In denying relief the First District took note that "[j]udicial interpretation of the Constitution…builds on itself." *Id*. A new procedural protection which was held to be not retroactively applicable does not have its status changed because of evolution within the law years later. *Id*. "So the fact that *Apprendi* was cited by subsequent cases extending the jury trial guarantee and heightened burden of proof to mandatory state sentencing guidelines, *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004), federal sentencing guidelines, *Booker*, 543 U.S. at 244 – 45, 125 S.Ct. 738, and the death penalty, *Ring v. Arizona*, 536 U.S. 584, 589, 122 S.Ct. 2428, 153 L.Ed. 2d 556 (2002), does not a watershed moment make of *Apprendi* itself." *Id*.

1340 (11th Cir. 2005) (explaining that decisions "based on an extension of *Apprendi*" are not retroactive).

This Court has also recognized that numerous decisions from the United States Supreme Court that provided new developments in constitutional law were not retroactive. *See Johnson v. State*, 904 So. 2d 400 (Fla. 2005), cited in *Chandler v. State*, 75 So. 3d 267 (Fla. 2011) (holding that under the *Witt* factors, *Ring v. Arizona* is not retroactive to Florida's inmates whose convictions and sentences were final at the time of the decision); *Hughes v. State*, 901 So. 2d 837, 838 (Fla. 2005) (holding *Apprendi v. New Jersey*, is not retroactive); *Walton v. State*, 77 So. 3d 639, 644 (Fla. 2011) (holding *Porter v. McCollum*, 558 U.S. 30 (2009), which required a reweighing of all aggravation and mitigation evidence presented during both the trial and post-conviction, not retroactive); *Dennis v. State*, 109 So. 3d 680, 703 (Fla. 2012) (citing *Chandler v. Crosby*, 916 So. 2d 728, 729 – 31 (Fla. 2005) (holding *Crawford v. Washington*, 541 U.S. 36 (2004), not retroactive).

Even assuming a new *Witt* analysis would be appropriate, all of the same factors apply with equal force to hold that *Hurst* is not retroactive. Such an application would be greatly deleterious to finality and unsettle the reasonable expectations for justice by Florida's citizens and, in particular, countless numbers

of victims' family members.[5]

There can be no credible argument that Florida failed to apply *Ring* in bad faith. The State certainly relied in good faith upon prior decisions of this Court which upheld Florida's capital sentencing structure. *See e.g. Rigterink v. State*, 66 So. 3d 866, 895 – 96 (Fla. 2011) (noting that "[i]n over fifty cases since *Ring*'s release, this Court has rejected similar *Ring* claims"). Indeed, since *Ring* was decided, more than a decade passed without the Supreme Court accepting a case challenging Florida's capital sentencing statute in light of *Ring*, until *Hurst*.

While the United States Supreme Court ultimately extended *Ring* to invalidate

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[5] As noted by the Supreme Court in *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) the concept of finality is of vital importance to our system of justice. The Court stated:

> A state's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relied. At that point, having in all likelihood borne for years "the significant costs of federal habeas review," *id*. at 490-491, 111 S.Ct., at 1469, the State is entitled to the assurance of finality. When lengthy federal proceedings have run their course and a mandate denying relief has issued, finality acquires an added moral dimension. 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. *See generally Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed. 2d 720 (1991). To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," *Herrera v. Collins*, 506 U.S. 390, 421, 113 S.Ct. 853, 871, 122 L.Ed. 2d 203 (1993) (O'CONNOR, J., concurring), an interest shared by the State and the victims of crime alike.

Florida's capital sentencing procedure, there were significant differences between the Arizona and Florida statues that rendered such an extension far less than certain or inevitable. *See Hurst*, at *9 – 10 (ALITO, J. dissenting) (observing that unlike Arizona, "[u]nder the Florida system, the jury plays a critically important role and that the Court's "decision in *Ring* did not decide whether this procedure violate[d] the Sixth Amendment…").

Finally, Justice Sotomayor's opinion in *Hurst* and the recent denial for a stay of execution hint at the non-retroactive application of the Court's decision.[6] The opinion in *Hurst* does not directly state that the holding is to apply retroactively. Such an omission is noteworthy given the Court's general acceptance that "…new rules generally should not be applied retroactively to cases on collateral review." *Teague*, 498 U.S. at 300, 305 (quoting Mishkin, foreword: the High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 64 (1965). In addition, when the Court overturned *Spaziano* and *Hildwin*, it did so because the

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[6] Following oral arguments in *Hurst*, the United States Supreme Court denied an application for a stay of execution in the case of *Jerry Correll v. Florida*, --S.Ct.--, 2015 WL 6111441 (2015). Correll had applied for a stay of execution based on the pending decision in *Hurst*, yet in an 8 – 1 vote the Court denied his application for a stay. It is a safe assumption the Court was well aware of its decision, and would have granted a stay of execution if it had intended a retroactive application of *Hurst*.

opinions in those cases directly conflicted with the Court's decision in *Apprendi* and *Ring*, and the reversal was "to the extent [*Spaziano* and *Hildwin*] allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for the imposition of the death penalty." *Hurst*, 2016 WL 112683 *8. If the Court intended the retroactive application, there would be no need to single out two cases, and limit the application of the holding. Thus, Bright is not entitled to any relief under *Hurst*, because the United States Supreme Court decision does not have a retroactive application.

C. The Prior Violent Felony Aggravator Removes Bright's Case From Relief Under *Hurst.*

Bright is also not entitled to relief under *Hurst* because of the existence of the prior-violent felony aggravator. Hurst was in a distinctly different position from Bright. Hurst, was convicted of first-degree murder, and did not have a prior criminal history or a contemporaneous felony conviction with the murder. *Hurst v. State*, 147 So. 3d 435, 440 – 41 (Fla. 2014). Accordingly, Hurst presented the United States Supreme Court with a pure claim under *Ring v. Arizona*, 536 U.S. 584 (2002), where the jury neither gave a unanimous recommendation nor were any of the established aggravating circumstances identifiable as having come from a jury verdict. *Hurst*, 147 So. 3d at 445 – 47.

Bright was convicted of two counts of fist-degree murder and had a prior conviction for an armed robbery. *Bright v. State*, 90 So. 3d 249, 254 (Fla. 2012).

Although the jury recommendation of death was not unanimous, the jury did unanimously find an aggravating circumstance in Bright's prior violent felony convictions. *Id*. at 254 – 55.

The United States Supreme Court has also acknowledged that recidivist aggravators may be found by the judge alone in the wake of *Ring v. Arizona*. 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). Indeed, even the initial merits brief filed by *Hurst* in the United States Supreme Court does not even challenge the recidivist exception to *Apprendi* and *Ring*. And the opinion in *Hurst* was silent as to the recidivist aggravator exception, leaving it in-tact.

Moreover, 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), on January 25, 2016. Both *Fletcher* and *Smith* raised *Ring* in their petitions for certiorari, and each had the presence of a recidivist aggravator.[7]

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

Each would have presented the Court an opportunity to clarify its position on *Hurst*, and directly address the recidivist aggravator exception to *Ring*. Yet, the Court denied certiorari and in doing so, re-asserted its position that the recidivist aggravator may be found alone the judge. Accordingly, should this Court hold *Hurst* to apply retroactively, any error in Bright's case, would be harmless because Bright was sentenced to death based on a jury determination of an aggravating circumstance. Thus, Bright is not entitled to any relief under either *Ring* or *Hurst* because of the prior violent felony aggravator which was unanimously found by a jury.

D. Bright is Not Entitled to a Life Sentence Under § 775.082(2)

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

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sentence of imprisonment was applied, because the murder involved a prison escape. *Fletcher v. State*, 168 So. 3d 186, 201 (Fla. 2015).

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*, Bright 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 unconstitutional ala *Furman*, the petitions for certoriari 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 Bright's argument that he is entitled to a life sentence under § 775.082(2) Fla. Stat. (2015).

CONCLUSION

Based on the foregoing discussions, *Hurst v. Florida* is not retroactive and did not eliminate the recidivist aggravator exception to *Ring* and *Apprendi*. Accordingly, Raymond Bright is not entitled to relief under *Hurst* because his conviction was final and his sentenced was achieved with the existence of the prior violent felony aggravator.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-File/E-Service on January 27, 2016: Richard A. Sichta, Esq. at rick@sichtalaw.com.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Patrick M. Delaney
By: PATRICK M. DELANEY
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 85824
Attorney for Appellee, State of Fla.
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
Primary E-Mail:
capapp@myfloridalegal.com
Secondary E-Mail:
Patrick.Delaney@myfloridalegal.com
(850) 414-3300 Ext. 4583
(850) 487-0997 (FAX)

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