IN THE SUPREME COURT OF FLORIDA

CASE NOS. SC14-1775 & 15-1233

RICHARD KNIGHT

Appellant,

v.

STATE OF FLORIDA

Appellee.

****

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

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ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This Court's direct appeal opinion in Knight v. State, 76 So.3d 879 (Fla. 2011), recites the facts of Knight's convictions for the first degree murders of Hanessia and Odessia Mullings, a mother and her four year old daughter. Following unanimous jury recommendations for death for each of the murders, the trial court sentenced Knight to death. On direct appeal, this court provided the following summary of the aggravators and mitigators found by the trial court:

> Subsequent to the Spencer hearing, the trial court followed the jury's recommendation and sentenced Knight to death. In pronouncing Knight's sentence, the trial court determined that the State had proven beyond a reasonable doubt two statutory aggravating circumstances for the murder of Odessia Stephens: (1) a previous conviction of another violent capital felony, and (2) that the murder was especially heinous, atrocious, or cruel (HAC). The court also found three statutory aggravating circumstances for the murder of Hanessia Mullings: (1) a previous conviction of another violent capital felony, (2) HAC, and (3) the victim was under twelve years of age. The court found no statutory mitigating circumstances but found eight nonstatutory mitigators, which are set forth in our proportionality discussion.[1]

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[1]The aggravators in this case were weighed against eight nonstatutory mitigators: (1) Knight had a good upbringing (slight weight), (2) Knight loves his family (moderate weight), (3) Knight went to high school and excelled in art (little weight), (4) Knight was admired by the children in his neighborhood as a youth and was well regarded by the adults (little weight), (5) Knight was a valuable employee in Jamaica (little weight), (6) Knight had part-time employment at the time of the crime (little weight), (7) Knight behaved well in court (little weight), and (8) Knight is capable of forming loving relationships (moderate weight).

Knight v. State, 76 So.3d at 884, 890. This Court affirmed both the convictions and sentences. It denied Knight's motion and issued the mandate on January 3, 2012. Knight filed a petition for Writ of Certiorari in the United States Supreme Court which was denied on May 14, 2012. Knight v. Florida, 132 S.Ct. 2398 (2012).

Knight filed his notice of appeal for the denial of post-conviction relief on August 29, 2014. Briefing has been completed and oral argument is scheduled for February 2, 2016. On January 12, 2016, the Supreme Court decided Hurst v. Florida, ___ S.Ct. ___, 2016 WL 112683 (January 12, 2016). This Court issued an order directing the parties to brief the impact, if any, upon the pending appeal in this post-conviction case.

SUMMARY OF THE ARGUMENT

Hurst v. Florida is not retroactive and has no application to this post-conviction case. In addition, the jury necessarily found Knight eligible for death sentences by their guilt phase findings that he had committed two separate offenses of first degree murder. Finally, the jury recommendations in this case were unanimous, and any Hurst error would be harmless under the facts of this case.

ARGUMENT

ISSUE I

HURST V. FLORIDA HAS NO APPLICATION TO THIS CASE BECAUSE IT WAS FINAL ON DIRECT REVIEW WHEN HURST WAS DECIDED AND, IN ANY CASE, THERE IS NO ERROR WHERE THE JURY NECESSSARILY FOUND THAT

KNIGHT WAS ELIGIBLE FOR THE DEATH PENALTY BY ITS GUILT PHASE FINDINGS.

In this supplemental brief, Appellant asserts that Hurst v. Florida, ___ S. Ct. ___, 2016 WL 112683 (January 12, 2016) entitles him to a life sentence and requests to either amend his State habeas petition or file a 3.851 motion in light of Hurst. His contention has no merit.

A. *Hurst* does not entitle Knight to a life sentence.

Knight first posits a plainly meritless argument that Hurst entitles him to a life sentence. However, Hurst did not determine capital punishment to be unconstitutional; Hurst only invalidated Florida's *procedures* for implementation, finding that they could result in a Sixth Amendment violation if the judge makes factual findings which are not supported by a jury verdict. The opinion did not hold that Florida's law had structural errors, rather that the procedure for determining death eligibility was invalid. Therefore, Section 775.082(2) does not apply, by its own terms. That section provides that life sentences without parole are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional," and was enacted following Furman in order to fully protect society in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional. This provision, for example, applied in Coker v. Georgia, 433 U.S. 584 (1977), where the United States Supreme Court held that capital punishment was not available for the capital felony of raping an adult woman.

Commutation of all death sentences to life following Hurst is neither required nor appropriate. This Court's determination to remand all pending death penalty cases for imposition of life sentences in light of Furman is discussed in

Anderson v. State, 267 So. 2d 8 (Fla. 1972), a case which explains that, following Furman, the Attorney General filed a motion requesting that this Court relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position that the death sentences that were imposed were illegal sentences. There is no legal reasoning or analysis to explain why commutation of 40 sentences was required, but it is interesting to observe that this was before the time that either this Court or the United States Supreme Court had determined the appropriate rules for retroactivity, as were later established in Teague v. Lane, 489 U.S. 288 (1989) and Witt v. State, 387 So. 2d 922 (1980). At any rate, there are several cogent reasons for this Court to reject the blanket approach of commuting all capital sentences currently pending before this Court such as followed the Furman decision. 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 in Furman 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. The situation following Furman simply has no application to the limited procedural ruling issued by the Supreme Court in Hurst.

B. Hurst is not retroactive and, therefore, remand to the trial court to consider a motion based upon *Hurst* would be futile

Knight's case was final on direct appeal when the Supreme Court denied certiorari. Consequently, Hurst can have no application to this case until and unless either this Court or the Supreme Court determines that it should apply retroactively.[2] Hurst is not retroactive. Consequently, Knight, who was tried, convicted, and sentenced in accordance with Florida and federal law at the time of his trial, is not entitled to any relief.

In claiming that Hurst mandates that, to be eligible for a death sentence, a jury must find the facts that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh them, Appellant misconstrues Hurst. The Court did not state that the Sixth Amendment requires a "jury," not a judge to conduct the necessary weighing to impose a sentence of death. In Hurst, the Court held that Florida's capital sentencing structure violated Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), because it required a judge to conduct the fact-finding necessary to enhance a defendant's sentence, i.e. to make a defendant *eligible* to be sentenced to death. Hurst, 2016 WL 112683, *5–6. In arriving at its decision, the Court looked directly to Florida's sentencing statute, finding that it does not "make a defendant eligible for death

[2] Any successive motion could only be considered timely by the post-conviction court if Knight met the requirements of Rule 3.851(d) which provides an exception for claims that are based on newly discovered evidence or a newly recognized constitutional right that has been held to apply retroactively. Fla. R. Crim. P. 3.851(d)(2)(A) & (B).

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 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.

The Supreme Court recently reaffirmed that the Sixth Amendment right underlying Ring and Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), did not apply to factual findings made in selecting a sentence for a defendant after the defendant has been found eligible to receive a sentence within a particular range. Alleyne v.United States, 133 S. Ct. 2151, 2161 n.2 (2013) ("Juries must find any facts that increase either the statutory maximum or minimum 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. Importantly, this is distinct from fact finding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.' *Williams v. New York*, 337 U.S. 241, 246, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). 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."); *see also* United States v. O'Brien, 560 U.S. 218, 224 (2010)(recognizing that *Apprendi* does not apply to sentencing factors that merely guide sentencing discretion without increasing the applicable range of punishment to which a defendant is eligible).

Moreover, in Kansas v. Carr, 2016 WL 228342, at *8 (Jan. 20, 2016), the Supreme Court discussed the distinct determinations of eligibility and selection under capital sentencing schemes. In doing so, the Court stated that an eligibility determination was limited to findings related to aggravating circumstances and that determinations regarding whether mitigating circumstances existed and the weighing process were *selection* determinations. In fact, the Court stated that such determinations were not factual findings at all. Id. Instead, the Court termed the determinations regarding the existence of mitigating circumstances as "judgment call[s]" and weighing determinations "question[s] of mercy." Id.

When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. Griffith v. Kentucky, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. The Supreme Court has held that new

rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions.[3] Schriro v. Summerlin, 542 U.S. 348, 351 (2004).

Knight argues that Hurst created a new substantive rule, not a new procedural rule, or that it created some new fundamental or structural error that is not subject to a harmless error analysis. Neither contention has any merit.

In Schriro v. Summerlin, the Supreme Court directly addressed whether its decision in Ring v. Arizona was retroactive. 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. The Court concluded its opinion stating: "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

[3] 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. 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)).

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." Summerlin, 542 U.S. at 358. See Whorton v. Bockting, 549 U.S. 406, 416 (2007) (holding *Crawford v. Washington*, 541 U.S. 36 (2004) was not retroactive under Teague and relying extensively on the analysis of *Summerlin*).

Ring did not create a new constitutional right. That right was created by the Sixth Amendment guaranteeing the right to a jury trial.[4] If Ring were not retroactive, then Hurst cannot be retroactive since it is merely an application of Ring to Florida law. In fact, the decision in Hurst is based on an entire line of jurisprudence that courts have almost universally held not to have retroactive application. See DeStefano v. Woods, 392 U.S. 631 (1968) (*per curiam*) (holding the Court's decision in Duncan v. Louisiana, which guaranteed the right to a jury trial to the States was not retroactive); 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

[4] 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 Court declined to apply the holding of Duncan retroactively. Apprendi merely extended the right to a jury trial to the sentencing phase, when the State sought to increase the maximum possible punishment. Apprendi, 530 U.S. at 494.

conclusion); Varela v. United States, 400 F.3d 864, 866–67 (11th Cir.2005) (explaining that Supreme Court decisions, such as Ring, Blakely, and Booker, applying Apprendi's "prototypical procedural rule" in various contexts are not retroactive); Crayton v. United States, 799 F.3d 623, 624-25 (7th Cir. 2015) {fs28 cert. denied 136 S. Ct. 424 (2015) (holding that Alleyne v. United States, 570 U.S. ___, ___, 133 S. Ct. 2151, 2156 (2013), which extended Apprendi from maximum to minimum sentences, did not, like Apprendi or Ring, apply retroactively); State v. Johnson, 122 So. 3d 856, 865-66 (Fla. 2013)(holding Blakely not retroactive in Florida).

Since the United States Supreme Court expressly found that Ring was not retroactive, Hurst, which applied Ring to invalidate Florida's statute, is also not retroactive. Significantly, this Court has already decided that Ring does not apply retroactively in Florida. In Johnson v. State, 904 So. 2d 400, 412 (Fla. 2005), this Court comprehensively applied the Witt factors to determine that Ring was not subject to retroactive application. This Court concluded:

> *We conclude that 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 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 in Florida and affirm the denial of Johnson's request for collateral relief under* Ring.

This Court specifically noted the severe and unsettling impact that retroactive application would have on our justice system [with nearly 400 death sentenced prisoners]. Johnson, 904 So. 2d at 411-12.[5] Appellant's invitation for this Court to revisit its previous decision is unpersuasive. Neither the federal or Florida constitutions justify or authorize this Court to take such action as re-sentencing all death sentences to life. Furthermore, such a decision would ignore the considerable interests of the citizens of this State and, in particular, victims' family members upon whom the emotional toll of such an action cannot be measured.

The Supreme Courts of Arizona, Nevada and Idaho also reached the same conclusion on retroactivity as this Court in Johnson. Ring is not retroactive.[6] See

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[5] This Court's decision in State v. Johnson, 122 So. 3d at 865-66, similarly holding that one of Apprendi's many permutations was not retroactive, is also instructive. In finding Blakely was not retroactive, this Court stated, in part:

> *Retroactive application of the rule announced in Blakely would require review of the records of numerous cases, first to determine whether Blakely error occurred, then whether such error was preserved, and finally, whether the error was harmless. In those cases where a claim for postconviction relief survives such review, juries would likely have to be empaneled to hear evidence and determine sentence enhancements. All told, this would be a time-consuming undertaking that would significantly strain our scarce court resources. Even if the retroactive application extended only to cases finalized in the interval between the issuance of Apprendi and Blakely, the disruption would be significant. Accordingly, this factor also weighs against applying Blakely retroactively.*

[6] In a decision issued before the Supreme Court issued its opinion on retroactivity in Summerlin the Missouri Supreme Court applied Ring retroactively to those few cases where the jury had deadlocked on a verdict and therefore the

State v. Towery, 204 Ariz. 386, 393-94, 64 P.3d 828, 835-36 (2003); Rhoades v. State, 149 Idaho 130, 139-40, 233 P.3d 61, 70-71 (2010); Colwell v. State, 118 Nev. 807, 821-22, 59 P.3d 463, 473 (2002), cert. denied, 540 U.S. 981 (2003).

Appellant can offer no compelling justification for revisiting this Court's decision in Johnson. Assuming, any 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.[7]

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judge made all the requisite findings and sentenced the defendant to death. In doing so, the court noted that it would have minimal impact in Missouri as the court had identified only **five** such cases. State v. Whitfield, 107 S.W.3d 253, 268-69 (Mo. 2003). C.f. State ex rel. Taylor v. Steele, 341 S.W.3d 634, 652 (Mo. 2011)(noting that subsequently the Supreme Court and federal courts subsequently held Ring not retroactive "[a]nd in light of Whitfield's limited retroactively holding, this Court is not compelled to go further than the United States Supreme Court to provide Sixth Amendment jury sentencing to Taylor.").

[7] As noted by the Supreme Court 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, in part:

> *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.*

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 and prior decisions of the Supreme Court which had upheld Florida's capital sentencing statute. See e.g. Rigterink v. State, 66 So. 3d 866, 895-96 (Fla. 2011). 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 Supreme Court ultimately extended Ring to invalidate Florida's capital sentencing procedure, there were significant differences between the Arizona and Florida statutes that rendered such an extension far less than certain or inevitable. See Hurst at 9-10 (Alito, Justice, dissenting).

There is no reason for this Court to depart from its prior determination that Ring does not apply retroactively to cases that are final on direct appeal. Such a decision would represent a clear break from this Court's precedent which has not found decisions from the Supreme Court providing new developments in constitutional law retroactive. See e.g. Chandler v. Crosby, 916 So. 2d 728, 731 (Fla. 2005) (holding that all three factors in the "Witt analysis weigh against the retroactive application of Crawford[]" and noting that the "new rule does not present a more compelling objective that outweighs the importance of finality.") (citation ommitted); Hughes v. State, 901 So. 2d 837, 838 (Fla. 2005) (holding Apprendi v. New Jersey, is not retroactive); State v. Statewright, 300 So. 2d 674 (Fla. 1974) (declining to retroactively apply Miranda v. Arizona, 384 U.S. 436

(1966). Consequently, both this Court and the Supreme Court has held that Ring announced a new procedural rule, not a substantive rule.

The Court's opinion in Hurst does not provide that the holding is to apply retroactively.[8] Such an omission is noteworthy given the Court was cognizant of its decision in Summerlin holding that Ring was not retroactive and its stance in Teague that "'whether a decision [announcing a new rule 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, 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 conclusion, since both the Supreme Court and this Court have held that Ring v. Arizona does not apply retroactively, Hurst should not applied retroactively in Florida. See Jeanty v. Warden, FCI–Miami, 757 F.3d 1283, 1285 (11th Cir. 2014)(observing "if *Apprendi*'s rule is not retroactive on collateral

[8] Following the oral arguments in Hurst, the Supreme Court denied an application for a stay of execution in the case of Jerry Correll v. Florida, --- S. Ct. ----, 2015 WL 6111441 (Oct. 29, 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 may be assumed the Court was aware of its likely decision, and would have granted a stay of execution if it had intended retroactive application of Hurst.

review, then neither is a decision applying its rule")(citing *In re Anderson*, 396 F.3d 1336, 1340 (11th Cir. 2005)). Appellant is not entitled to relief.

C. The qualifying contemporaneous felonies of first degree murder preclude finding a reversible error in this case.

Given the jury's conviction of Knight for two contemporaneous first degree murder, those convictions alone make Knight eligible for the death penalty under Florida law as well as Hurst. See Ault v. State, 53 So. 3d 175, 205 (Fla. 2010); Zommer v. State, 31 So. 3d 733, 752-54 (Fla. 2010). Knight's eligibility for the death penalty rests on unanimous jury findings, unlike Hurst.

Furthermore, Hurst specifically allowed for the consideration of harmless error. Hurst, section D, p.10. The determination that deficient fact finding under the Sixth Amendment can be harmless is cemented by Washington v. Recuenco, 548 U.S. 212 (2006), where the Supreme Court reversed a Washington state court holding that error under Blakely v. Washington, 542 U.S. 296 (2004), was structural in nature and could never be harmless. Blakely is an Apprendi/Ring decision which requires jury fact finding where a sentence is to be enhanced due to the defendant's use of a firearm. Here, given the conviction and unanimous recommendations, any potential error is harmless.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the denial of post-conviction relief.

Respectfully submitted,

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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).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been electronically furnished to Assistant CCRC-South, tscher@msn.com, 1 East Broward Blvd, Suite 444, Ft. Lauderdale, FL 33301on this 27th of January, 2016.

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