**IN THE SUPREME COURT OF FLORIDA**
**Case Nos. SC14-1775 & SC15-1233**

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**RICHARD KNIGHT,**
**Appellant,**

**v.**

**STATE OF FLORIDA,**
**Appellee.**

**RICHARD KNIGHT,**
**Petitioner,**

**v.**

**JULIE L. JONES, ETC.,**
**Respondents.**

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

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## ARGUMENT IN REPLY

The State's Answer Brief (AB) is notable for what it fails to address, much less dispute. The State ignores and/or misstates the Supreme Court's holding in *Hurst v. Florida*, 2016 WL 112683 (U.S. Jan. 12, 2016); ignores—and therefore does not dispute—that Mr. Knight preserved his constitutional challenges both at trial and on direct appeal; ignores and/or misstates the actual language of Florida's capital sentencing statute; ignores and/or misstates the proper test for retroactivity in Florida; and improperly attributes any significance to the fact that the advisory jury unanimously recommended that the court impose the death penalty. Mr. Knight is entitled to the benefit of *Hurst* and must be sentenced to life imprisonment at this time.

### I. *Hurst*'s holding.

The Supreme Court's explanation of how Florida's statute operates under the Sixth Amendment is unmistakably clear. The State persists in misstating both *Hurst*'s holding and Florida's statute, but "the State cannot dictate reality by fiat." *Hardwick v. Sec'y Fla. Dep't of Corrections,* 803 F.3d 541, 555 (11th Cir. 2015).

First, the State insists that *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" (AB at 3) (first italics in original, second italics added). The Supreme Court does not issue

advisory opinions and did not simply issue a decision which prognosticated that a Sixth Amendment violation "could result" in a Florida capital case under the now-defunct statute. To the contrary: the Supreme Court held "this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Hurst* at *3. This substantive holding could not be clearer.[1]

Second, the State accuses *Mr. Knight* of misconstruing *Hurst* by his argument 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" (AB at 5). But *Hurst* quite explicitly recognized that "the Florida sentencing statute **does not make a defendant eligible for death** until '**findings by the court** that such person shall be punished by death'" **and that** the "**trial court alone must find 'the *facts* . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances**

[1] In *Falcon v. State*, 162 So. 3d 954 (Fla. 2015), addressing the retroactivity of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the State also attempted to persuade this Court that *Miller*—which held that a sentencing scheme that *mandated* life imprisonment without possibility of parole for juveniles was unconstitutional—merely "alter[ed] the procedures that must be followed before such a sentence may be imposed," *Falcon,* 162 So. 3d at 961, and analogized *Miller* to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See* Respondent's Brief in *Falcon v. State*, 2013 WL 9663947 (Fla. Sup. Court) at *19 ("Thus, *Miller*'s change in the sentencing procedures for juveniles is more akin to the effect *Apprendi* had on the sentencing procedures."). This Court "reject[ed] the State's argument." *Falcon*, 162 So. 3d at 961.

**to outweigh the aggravating circumstances.**'" *Hurst* at *6 (quoting from Fla. Stat. §§ 775.082(1) and 941.141(3)) (emphasis added). The eligibility "facts" that the Sixth Amendment requires a jury to make in a Florida capital case are "that sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh the aggravating circumstances."[2] It is the State—not Mr. Knight—that is misconstruing *Hurst* and Florida's capital sentencing statute.

Third, the State insists that Florida's capital sentencing statute merely requires the finding of "an aggravating circumstance" (AB at 6). As explained above, this is not *Hurst*'s holding, nor is the "an aggravating circumstance" language contained in the Florida statute,[3] the jury instructions given to Mr. Knight's jury, or even this

[2] These are not "sentencing selection" factors as the State would have it (AB at 6). Rather, as *Hurst* made quite explicit, they are the eligibility factors that must be found by the jury in order to render a Florida defendant charged with first-degree murder death eligible; and because a judge makes them alone, the Florida statute was unconstitutional. *See also Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt."). The State's reliance on *Kansas v. Carr*, 2016 WL 228342 (U.S. Jan. 20, 2016), is completely misplaced; that was a case interpreting the Eighth—not the Sixth—Amendment. Not a single Sixth Amendment jury trial case is mentioned in *Kansas v. Carr*.

[3] This language *does*, however, appear in the new proposed legislation submitted by the Florida Prosecuting Attorney's Association (FPAA) (Attachment A). In its proposal to the legislature in wake of *Hurst*, the FPAA rewrote §921.141(2) to state as follows: "After hearing all the evidence presented in aggravation and mitigation, the jury shall deliberate and determine whether the State has proven, beyond a

Court's pre-*Ring* jurisprudence. The "an aggravating circumstance" *was* at issue in *Ring*, where Arizona's statute—at issue in *Ring*—made clear that the factual determination required by Arizona law before a death sentence was authorized was the presence of at least one aggravating factor. *Ring v. State*, 25 P.3d 1139, 1151 (Ariz. 2001). But that is not Florida law. The fact that sufficient aggravating circumstances must be found under Florida law to render a capital defendant death eligible is unlike the Arizona law which was at issue in *Ring*, and has at least two important consequences in assessing *Hurst*'s scope and impact in Florida: (1) the finding of a prior violent felony does not cure *Hurst* error, and (2) a finding of the felony murder aggravator does not cure *Hurst* error. Before a death sentence can be imposed there must be a finding that those circumstances if present are sufficient in a given case to justify a death sentence. Not all prior violent felonies are equal. The sufficiency finding required by the statute means that there must be a case-specific assessment of the facts of the prior crime of violence and a determination as to whether the facts of the prior crime of violence[4] in conjunction with the factual basis

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reasonable doubt, *the existence of one or more of the aggravating factors* set forth in subsection (6)" (Attachment A at 1) (emphasis added). If the statute already provided that—as the State in Mr. Knight's case contends that it does—then why the need to rewrite the statute in light of *Hurst* and change the findings that need to be made by the jury? The answer, of course, is that the statutory scheme struck down in *Hurst* does not provide that death eligibility can be found upon the finding of merely one aggravating factor as the FPAA recognizes.

[4] *See Sweet v. State*, 624 So. 2d 1138, 1143 (Fla. 1993) (trial court erred in failing to instruct jury that it had to consider the individual circumstances of the crime in order

for any other aggravating circumstance present in the case are sufficient to justify the imposition of death sentence. *See, e.g. Swan v. State*, 322 So. 2d 485, 489 (Fla. 1975) ("Having considered the total record, we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of the death penalty."); *Proffitt v. State*, 510 So. 2d 896, 898 (Fla. 1987) (in a case where the only aggravator established was the "in the course of a felony" circumstance, the court vacates death sentencing, writing: "To hold, as argued by the state, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty."); *Rembert v. State*, 445 So. 2d 337, 340 (Fla. 1984) ("Thus, we are left with only one valid aggravating circumstance. Rembert introduced a considerable amount of nonstatutory mitigating evidence, but the trial court chose to find that no mitigating circumstances had been established. Given the facts and circumstances of this case, as compared with other first degree murder cases, however, we find the death penalty to be unwarranted here."); *Chaky v. State*, 651 So. 2d 1169, 1173 (Fla. 1995) (death penalty not warranted where long aggravator, based on prior violent felony conviction, was

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to determine if it was violent before weighing it as a prior violent felony); *Johnson v. State*, 465 So. 2d 499, 505 (Fla. 1988) (simply instructing jury at a capital penalty phase that burglary is a felony involving the use or threat of violence for purpose of finding the prior violent felony aggravator, without making it clear that this depends on the facts of the burglary, is error); *Mann v. State*, 420 So. 2d 578 (Fla. 1982) (same).

mitigated by the facts of that crime); *Jorgenson v. State*, 717 So. 2d 423 (Fla. 1998) (same).[5]

Fourth, the State fails to recognize *Hurst*'s acknowledgement that "under state law, the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment." *Hurst* at *3 (citing §775.082(1), Fla. Stat.). In other words, all that Mr. Knight stands convicted of is two counts of first-degree murder; he was not convicted of first-degree murder along with a finding of the additional element or elements by a unanimous jury instructed (as it is at the guilt phase) that its finding of the additional elements of the crime specifically identified in *Hurst* are binding on the court and that its role is not merely advisory or that its verdict is not to be made by a straw poll. *See Fiore v. White*, 531 U.S. 225, 228 (2001) ("the Due Process Clause . . . forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt"). Under *Fiore*, *Hurst*'s clarification of the plain language of the statute dates back to the statute's enactment and must be applied to Mr. Knight.

## II. Retroactivity.

[5] As noted in Mr. Knight's supplemental Initial Brief, trial counsel attempted to present argument and evidence to undermine the weight of the aggravating circumstances (V60/403-04), including the contemporaneous murder convictions, but the court refused. In this case, Mr. Knight challenged all of the aggravators, or at least counsel attempted to challenge them all but was thwarted by the State and the lower court's rulings.

Despite this Court's continued adherence to the retroactivity test from *Witt v. State*, 387 So. 2d 922 (Fla. 1980), *see Falcon v. State*, 162 So. 3d 954 (Fla. 2015), the State argues retroactivity under the federal *Teague*[6] standard. Reliance on *Teague* is misplaced and provides no assistance to the Court in determining *Hurst*'s retroactivity.[7] The State barely attempts to articulate any *Witt* analysis with regard to *Hurst*, arguing merely that the analysis of the Court in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005), with regard to *Ring*'s retroactivity, suffices to dictate the retroactivity of *Hurst* (AB at 12). But this Court is tasked with addressing the retroactivity of *Hurst*, not *Ring*. When this Court issued *Johnson*, it was still relying on the vitality of *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*,

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[6] *Teague v. Lane*, 489 U.S. 288 (1989). Apparently the State would rather address the unrelated *Teague* standard than this Court's retroactivity analyses that followed *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and *Lockett v. Ohio*, 438 U.S. 586 (1978).

[7] The State relies on *Teague*'s distinction between "substantive" changes in the law and new "procedural" rules to argue that because *Ring* was held not to be retroactive in federal habeas proceedings, *Hurst* likewise cannot be retroactive under *Teague* (AB at 8-10). But under *Witt*, that distinction is not germane:

> [S]ociety recognizes that a sweeping change of law can so drastically alter the *substantive or procedural underpinnings* of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, *under process no longer considered acceptable and no longer applied to indistinguishable cases.*

*Witt*, 387 So. 2d at 925 (emphasis added).

468 U.S. 447 (1984), both of which were overruled in *Hurst*. Further, the *Witt* analysis conducted in *Johnson* was infused with this Court's failure to recognize that *Ring* and *Apprendi* applied in Florida, a fact which has now been answered by *Hurst*. *Johnson* also was infused with the Court's reliance on its prior decision in *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002) (denying *Ring* claim because "the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century").

*Hurst*'s retroactivity in Florida must be assessed, not *Apprendi*'s (which was not a capital case), and certainly not *Ring*'s, which addressed Arizona's statute and which this Court has repeatedly found has no application in Florida. *See* Reply to Response to Petition for Habeas Corpus, *Lambrix v. Jones*, No. SC16-56. Now that we know from *Hurst* that *Apprendi* and *Ring* apply to Florida and that *Hildwin* and *Spaziano* are no longer sustainable, a new *Witt* analysis mandates retroactive application of *Hurst*, which is undoubtedly a "sweeping change of law" that has drastically "alter[ed] the substantive or procedural underpinnings" of Mr. Knight's case in such a way that it would "make it very difficult to justify depriving [him] of his [] life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Witt*, 387 So. 2d at 925.

Yet another reason—unaddressed by the State—mandates application of *Hurst* to Mr. Knight: he preserved this issue at trial and on direct appeal. Under these

circumstances, "it would not be fair to deprive him of the [*Hurst*] ruling." *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) (defendant, in second Rule 3.850 proceeding, granted relief and given the benefit of *Espinosa v. Florida*, 505 U.S. 1079 (1992), because he raised issue at trial and on appeal; "[b]ecause of this it would not be fair to deprive him of the *Espinosa* ruling"). While Mr. Knight certainly believes that *Hurst*'s retroactivity should not depend on prior preservation of a *Ring* or *Apprendi* claim—particularly given this Court's repeated pronouncements that neither case applies to Florida—Mr. Knight did raise the issue at trial and on appeal, and fairness dictates that *Hurst* applies to him. *Accord Fiore v. White*.

**III. Harmless Error.**

The State suggests that Mr. Knight's contemporaneous convictions of first-degree murder "alone" made him eligible for the death penalty (AB at 15) (citing pre-*Hurst* cases).[8] But *Hurst* made clear what the eligibility findings are under Florida's statute, and the State makes no argument that Mr. Knight's jury made any finding that "sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Those are the eligibility findings the jury is required to make, as *Hurst* holds.

[8] The State makes this argument in a section purportedly attempting to make a harmless error analysis (AB at 15), but this argument really is another attempt to avoid *Hurst* and argue that contemporaneous convictions somehow supplant the eligibility factors identified in *Hurst*. As explained earlier in this brief, this is not, nor has ever been, what Florida law provides, nor was it what the jury was instructed.

The State's only actual attempt at "harmless error" analysis is its sole argument that "given the conviction and unanimous recommendations, any potential error is harmless" (AB at 15).[9] This is simply an inadequate attempt at a meaningful analysis. In any event, the State's reliance on the jury's "recommendations" (even though they were unanimous) is misplaced and contrary to *Hurst. Hurst* at *3 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. *A jury's mere recommendation is not enough.*") (emphasis added); *id*. at *6 ("The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires"). All that it known about the result of the jury's "deliberation" is what it said in the form it returned to the court: "a majority of the jury, by a vote of 12-0, advise and recommend to the court that it impose the death penalty" (V60/491-92). No more and no less. Would the Sixth

[9] *Hurst* did not, as asserted by the State, "specifically allow for consideration 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. Knight, as well as the Amicus brief filed by the CHU in *Lambrix v. Jones*, No. SC16-56. The State posits that *Washington v. Recuenco*, 548 U.S. 212 (2006), supports the notion that the error here is not structural in nature (AB at 15). 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).

Amendment be satisfied if, at the guilt phase, the jury returned a verdict form reflecting that it merely advised and recommend that the court find Mr. Knight guilty? Of course not.

## CONCLUSION

For the reasons set forth herein and in his supplemental Initial Brief, Mr. Knight's death sentence should be vacated and a life sentence imposed.

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 29th day of January, 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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