IN THE SUPREME COURT OF FLORIDA

CASE NOS. SC14-1775 & 15-1233

RICHARD KNIGHT

Appellant,

v.

STATE OF FLORIDA

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTHTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (CRIMINAL DIVISION)

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SECOND SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE CASE AND FACTS

The State relies on the procedural history set out in its Answer Brief and reiterates the facts included in both that brief and the Supplemental Answer Brief. 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. This Court affirmed both the convictions and sentences.

Knight filed a motion entitled "Motion to Declare the Florida Death Penalty Statute Unconstitutional Based on the Clear Mandate of the United States Supreme Court Decision of Ring v. Arizona" (V. 62:802-24). That motion argued that the Florida capital sentencing statute denied the jury a role in making the findings of fact required for a death sentence, since the trial court was the one to make thee necessary findings of fact. He also argued that the jury's recommendation could not meet the constitutional requirements set out in Ring v. Arizona, 536 U.S. 584 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000) (citing Caldwell v. Mississippi, 472 U.S. 320 (1985).

During the penalty phase trial, Knight filed a motion to have the jury instructed that they must unanimously find beyond a reasonable doubt each aggravator and then unanimously find that the aggravators outweighed the

mitigators, again, beyond a reasonable doubt. (V. 50:681-83) The court denied the proposed instruction as it did with other requested instructions to tell the jury they could use mercy to recommend a life sentence and that a death sentence was never required under the law. (Id. 674-680)

Although Knight was permitted to file a supplemental following Hurst v. Florida, 136 S.Ct. 616 (2016), he has been given another opportunity to file a supplemental brief following Hurst v. State, 202 So.3d 40 (Fla. 2016). The State's second supplemental answer follows.

SUMMARY OF THE ARGUMENT

Hurst v. Florida is not retroactive and has no application to this post-conviction case. In addition, any error is harmless since the jury unanimously found at least two of the aggravators in Hanessia's death and one in Odessia's. Furthermore, the record clearly contains supports the HAC aggravator. Therefore, any error is harmless.

ARGUMENT

HURST V. FLORIDA DOES NOT ENTITLE KNIGHT TO RE-SENTENCING.

Knight again argues that Hurst v. Florida is retroactive and applicable to his case. He also contends that, notwithstanding the unanimous jury recommendations for a death sentence, the State cannot demonstrate that any error in the instruction of the jury and the court's findings of facts was harmless. He argues that this

Court's harmless error analysis in Davis v. State, --- So.3d ---, 2016 WL 6649941 (Fla. Nov. 10, 2016) should be reconsidered because the jury's lack of identified unanimous findings of aggravation is fatal to a harmless error review, and that harmless error should not be found here on proportionality grounds. He also points to Caldwell v. Mississippi, 472 U.S. 320 (1985) to suggest that the jury's recommendation may have been different had they been required to make findings of fact supporting the ultimate sentencing recommendation. The State disagrees. Harmless error beyond a reasonable doubt has been shown on this record.

A. HURST IS NOT RETROACTIVE.

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 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

[1] 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).

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, 136 S.Ct. at 621-622. 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 until 'findings *by the court* that such a person shall be punished by death.'" Id. at 622 (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, 136 S.Ct. at 622-626.

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).

[2] 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

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 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

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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)).

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 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

[3] 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.

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.[1] Knight'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. See 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

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[4] 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.

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.[6]

The Supreme Court's opinion in Hurst does not provide that the holding is to apply retroactively. 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 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.[2]

[2] To the extent that Knight invokes the Eighth Amendment for his retroactivity argument, the Florida Constitution, Art. I, Sec. 17 states that Florida must maintain

B. DAVIS SUPPORTS THAT KNIGHT'S SENTENCING IS HARMLESS BEYOND A RESONABLE DOUBT.

Knight's contemporaneous convictions rested upon an unanimous jury verdict and his jury was able to reach the conclusion death was the appropriate sentence unanimously. By voting 12-0 for death, twice, the jury necessarily found, consistent with their instructions, sufficient aggravation existed to justify recommending death, that the aggravation outweighed mitigation, and that death was the proper sentence. In Davis, a post-Hurst v. State case, this Court reiterated the application of the rigorous harmless error test of State v. DiGuilio, 491 So.2d 1129, 1137 (Fla. 1986) applicable to review of sentencing errors and reasoned:

> . . . As applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances.
>
> With regard to Davis's sentences, we ***emphasize the unanimous jury recommendations*** of death. These recommendations allow us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors. The ***instructions that were given*** informed the jury that it needed to determine whether sufficient aggravators existed and whether the aggravation outweighed the mitigation before it could recommend a sentence of death. See Fla. Std. Jury Instr. (Crim.) 7.11 ("If ... you determine that no aggravating

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the same interpretation as the U.S. Supreme Court. That Court has held that the death penalty does not violate the Eighth Amendment. Gregg v. Georgia, 428 U.S. 153, (1976).

circumstances are found to exist, or that the mitigating circumstances outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are not sufficient, you must recommend imposition of a sentence of life in prison without the possibility of parole rather than a sentence of death."). The jury was presented with evidence of mitigating circumstances and was properly informed that it may consider mitigating circumstances that are proven by the greater weight of the evidence. *See id.* ("If you determine by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence to be imposed.").

Even though the jury was not informed that the finding that sufficient aggravating circumstances outweighed the mitigating circumstances must be unanimous, and even though it was instructed that it was not required to recommend death even if the aggravators outweighed the mitigators, the jury did, in fact, unanimously recommend death. See id. ("If, after weighing the aggravating and mitigating circumstances, you determine that at least one aggravating circumstance is found to exist and that the mitigating circumstances do not outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole. Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death."). ***From these instructions, we can conclude that the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendations***. Further supporting our conclusion that any *Hurst v. Florida* error here was harmless are the egregious facts of this case-*Davis* set two women on fire, one of whom was pregnant, during an armed robbery, and shot in the face a Good Samaritan who was

> responding to the scene. The evidence in support of the six aggravating circumstances found as to both victims was significant and essentially uncontroverted.
>
> We conclude that the State can sustain its burden of demonstrating that any *Hurst v. Florida* error was harmless beyond a reasonable doubt. Here, the jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. In fact, although the jury was informed that it was not required to recommend death unanimously, and despite the mitigation presented, the jury still unanimously recommended that Davis be sentenced to death for the murders of Bustamante and Luciano. The unanimous recommendations here are precisely what we determined in *Hurst* to be constitutionally necessary to impose a sentence of death. Accordingly, Davis is not entitled to a new penalty phase.

Davis, 2016 WL 6649941, at *28–30 (footnotes omitted, emphasis supplied).

Knight's jury was instructed consistent with most of the instructions given in Davis. The jury was instructed it had to determine that at least one aggravator was proven beyond a reasonable doubt to even consider death as a possible penalty, to determine whether sufficient aggravators exist to justify the death penalty, whether the mitigation outweighs the aggravation if aggravation found. The jury also was properly instructed on the finding of mitigators. (V. 55:1145-1155). The jury was instructed further that: "Before your ballot, you should carefully weigh, sift and consider the evidence and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence. (V. 55:1154)

C. CALDWELL V. MISSISSIPPI

Knight suggests that the jury instruction that its recommendation was advisory precludes a finding of harmless error. After Apprendi and Ring, this Court continued to find that Florida's jury instructions regarding advisory sentences were consistent with the United States Constitution. In Smith v. State, 151 So. 3d 1177, 1182 (Fla. 2014), reh'g denied (Nov. 26, 2014) this Court noted its repeated rejection of Caldwell challenges to the current standard jury instructions citing Rigterink v. State, 66 So.3d 866, 897 (Fla. 2011) and Globe v. State, 877 So.2d 663, 673–74 (Fla. 2004). Here, the defense told the jury about the seriousness of its recommendation: "And make no mistake about it, please. A vote of death means just that. If you vote for death, absent some unbelievably compelling reason to do otherwise, that is going to be what happens." (Vol. 55:1130) As in Davis, the jury spoke as one recommending unanimously that death is the appropriate sentence. Given this Court's determination that the jury's sentencing role was not constitutionally deficient under the standard instructions and Knight's jury twice recommended death unanimously, Caldwell does not undercut the sentence in this case.

Furthermore, the judge knew that a death sentence did not have to be imposed even though a jury had recommended one. Such an override was always an option. Knight has not explained why the trial court would have made a different decision had it received the factual findings of the jury supporting its

sentencing decision of death.

D. ANY ERROR WAS HARMLESS.

Knight contends that the State cannot show any error was harmless because: there were no interrogatories on the aggravators to show which the jury found unanimously; the jury was told their role was only advisory; they were not instructed on mercy; the avoid arrest instruction was given; the aggravators failed to narrow sufficiently; and the jury showed diminished responsibility by returning its recommendation in under an hour.[3] These contentions are without merit. The facts of the case clearly show that any error was harmless.

Knight was convicted of two murders, both of which involved both stabbing and strangling. Murder is profoundly different than other felonies like burglary, so the contemporaneous conviction here both properly narrowed the field of death eligibility and could be given great weight in the jury's deliberation. Further, it was undisputed that Hanessia was four years old, still a toddler. Contrary to Knight's contention, the legislature did want to impose stronger penalties for the first degree murder of a young child and it does narrow the class of people eligible for the death penalty. The jury would have found both the contemporaneous violent felony and the age of the victim aggravators unanimously, giving the vote one clear aggravator for Odessia and two for Hanessia.

[3] Knight abandoned the issues regarding mercy, the narrowing, and diminished responsibility by failing to pursue them on direct appeal.

While the defense did contest the HAC aggravator for both killings, the facts the jury heard clearly support a unanimous finding for that as well. Both victims were in bed when Knight attacked them with knives. Both suffered multiple stab wounds, had deep bruises on their arms or shoulders showing how he held them down, and had strangulation bruising. Both victims survived for some time after they were attacked. The medical examiner said that Odessia lived for ten to fifteen minutes after the attack. The neighbor heard the frenzied screaming of Hanessia and her calling for her father during and after the attack. Knight himself told how she was drowning in her own blood, while curled up next to the closet. Finally, Knight broke two knives and bent a twelve-inch long butcher knife while attacking the two, showing both the ferociousness of the attack and that he rearmed himself multiple times. As noted above, the jury was instructed properly, thus under Davis, HAC may be used in the sentencing calculus and proportionality analysis. This Court should find that any claimed Hurst error is harmless beyond a reasonable doubt in light of the jury findings inherent in the verdict as well as including the avoid arrest aggravator included in the penalty phase.

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 9th of December, 2016.

/s/ Lisa-Marie Lerner_____
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