IN THE SUPREME COURT OF FLORIDA
CASE NO. SC14-1949

MICHAEL L. KING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF TWELFTH JUDICIAL CIRCUIT FOR SARASOTA COUNTY, STATE OF FLORIDA
Lower Tribunal No. 08-CF-1087

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References to the State's Supplemental Answer Brief will be in the form [SAB]/[page number].

ARGUMENT

Appellant relies on the arguments presented in his Supplemental Initial Brief. While he will not reply to every issue and argument raised by the Appellee, he expressly does not abandon the issues and claims not specifically replied to.

I. The Retroactivity of *Miller v. Alabama,* 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012)

In his Supplemental Initial Brief, Mr. King cited *Falcon v. State*, 162 So. 3d 954 (Fla. 2015), a case in which this Court applied the *Witt* test to *Miller v. Alabama*, 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012), and held that *Miller*, which "forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders", applies retroactively in post-conviction proceedings. The Appellee argues that *Falcon* provides no support for the retroactive application of *Hurst.* Mr. King respectful disagrees. Just as the U.S. Supreme Court in *Hurst* did not remove the death penalty as a possible penalty for first degree murder, the Court in *Miller* did not remove life in prison without the possibility of parole as a possible sentence for juvenile offenders.[1] Rather, as this Court explained in *Falcon*, under *Miller*, the Constitution requires "a sentencer may impose a sentence of life

[1] "We do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles." *Miller*, 132 S.Ct. at 2469.

imprisonment without the possibility of parole on a juvenile homicide offender, the sentencer must first 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Falcon*, 162 So. 3d at 959, *citing Miller*, 132 S.Ct. at 2469. On January 25, 2016, the U.S. Supreme Court in *Montgomery v. Louisiana*, No. 14-7505, 2016 WL 112683 (Jan. 25, 2016) applied the federal retroactivity test established in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed. 2d 334 (1989) and held that *Miller* announced a new substantive rule that is retroactive in cases on state collateral review. While there is certainly a procedural component to the holdings of both cases, *Hurst*, like *Miller*, is substantive in nature and would be retroactive under *Teague*. *Montgomery*, 2016 WL at 14 (holding that "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish"). Although the *Witt* test is distinct from the federal retroactivity test established in *Teague*, the U.S. Supreme Court held that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Montgomery*, 2016 WL at 7.

II. A *Hurst* Error is Not Harmless in Any Case, Even Where a Contemporaneous Felony Exists, or Where the Jury Recommended Death by a Vote of 12 to 0.

Mr. King's jury was instructed by the judge:

> As you have been told, the final decision as to what punishment shall be imposed is my responsibility. However, the law requires that you render an advisory sentence as to what punishment should be imposed upon the defendant.

R30/3730.

The jury was further instructed that they could consider four aggravating circumstances: (1) The murder was especially heinous, atrocious, or cruel (HAC); (2) The murder was especially cold, calculated, and premeditated (CCP); (3) The murder was committed for the purpose of avoiding a unlawful arrest; and (4) The murder was committed while King was engaged in the commission of a sexual battery or kidnapping. R30/3730-34. The judge went on to instruct the jury as follows:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole. Should you find aggravating circumstances do exist to justify the death penalty, it will then be your duty to determine whether the aggravating circumstances outweigh the mitigating circumstances that do exist.

R30/3734-35.

The jury was instructed that "[m]itigation may also consist of any factor that could reasonably bear on the sentence", and they were specifically asked to consider two

statutory mitigating factors and thirteen non-statutory mitigating factors. R30/3735-37.

The judge ultimately found that all four aggravating factors existed. R11/2048-58. He afforded great weight to the first three aggravating factors, and only moderate weight to the aggravating factor that the murder was committed while Mr. King was engaged in the commission of a sexual battery or kidnapping. R11/2048-58.

Mr. King's jury deliberated for less than two hours regarding their advisory sentence. Penalty phase deliberations began at 11:51 a.m. on September 4, 2009. R30/3746. From approximately 2:21 to 2:27 p.m., the court addressed the following question from the jury: "Can a juror recommend the death penalty without agreeing to all four of the aggravating circumstances beyond a reasonable doubt?" R30/3747-52. The jury was instructed by the court at 2:27 p.m. "that the answer to this question is contained in the instructions and you must rely upon the instructions that I gave you concerning this matter." R30/3752. At 2:27 p.m., court adjourned and the jury returned to their deliberations. R30/3752. Despite their apparent confusion and lack of unanimity regarding which aggravating circumstances had been established, they returned with an advisory verdict only minutes later, at 2:43 p.m. R30/3753-54.

The Appellee argues that any *Hurst* error was harmless in this case, given the aggravating circumstances, as well as the jury's unanimous death recommendation. SAB/19-24. Mr. King maintains the position argued in his Supplemental Initial Brief (pages 20-23) that a *Hurst* error can never be harmless. Where a jury is told that the ultimate responsibility regarding sentencing lies with the judge, there are "specific reasons to fear substantial unreliability as well as bias in favor of death sentences." *Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S.Ct. 2633, 86 L.Ed. 2d 231 (1985); *see also*, William J. Bowers, et. al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and Jury Influence Death Penalty Decision-Making*, 63. WASH. & LEE L. REV. 931, 951 (2006) (citing research from the Capital Jury Project that jurors in states with "hybrid systems" "are more likely to deny responsibility, invest less energy in understanding instructions, and more often rush to judgment"). The short duration of the jury's penalty phase deliberation in this case, including the almost immediate rendering of an advisory sentence after the judge answered their question, suggests that the jury did not engage in the careful weighing of the four aggravating circumstances and fifteen mitigating circumstances that they were asked to consider. The instructions that were given to Mr. King's jury, which reassured them that their decision was only advisory and placed the ultimate decision regarding whether Mr. King should live

or die in the hands of the judge, minimized their role and relieved them of the weight that sentencing another human being to death would place on one's conscience. *See Caldwell*, 472 U.S. at 333 (expressing concern that "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest on others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role" and may, in the case of a divided jury, cause jurors who are reluctant to invoke the death sentence to give in). The jury may have decided to "'send a message' of extreme disapproval for the defendant's acts" even if it was unconvinced that death was the appropriate punishment, with the belief that if they were wrong and sentenced Mr. King to death when the sentence should be life, the judge would correct their mistake and spare his life. *See Caldwell*, 472 U.S. at 331.

The Appellee argues that in Florida only one aggravating circumstance is necessary to support a death penalty, and that because the jury convicted Mr. King of kidnapping and sexual battery, "he was indisputably eligible for his death sentence." SAB/20-22. First, to be clear, the jury was not asked to consider the aggravating circumstance under Fla. Stat. § 921.141(5)(b) that "[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Curiously, the Appellee cites this aggravating circumstance in a footnote following a statement that "[t]he trial judge was able to

utilize this aggravator, necessarily found by the jury, in sentencing King. Since King did not challenge application of this aggravator on appeal, the issue is foreclosed in this case." SAB/22-23. The trial judge did not utilize this aggravating circumstance in sentencing Mr. King. Mr. King did not challenge the application of this aggravating circumstance because it was not applied in his case.

Assuming that the Appellee is referring to the aggravating circumstance that was presented to the jury that "[t]he murder was committed while King was engaged in the commission of a sexual battery or kidnapping", the jury's factual finding in the guilt phase trial was limited to the convictions themselves. The jury made no findings regarding whether the murder was committed while Mr. King was engaged in the commission of a sexual battery or kidnapping. Additionally, the existence of one or more aggravating circumstances does not automatically mandate that a defendant be sentenced to death under Fla. Stat. § 921.141. In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2d 56 (2002), the factual determination required by the Arizona statute before a death sentence was authorized was the presence of at least one aggravating factor. In contrast, *Hurst* explained that the requisite facts required to render a defendant death-eligible under Fla. Stat. § 921.141 (3) are whether "sufficient aggravating circumstances exist" and whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

Hurst, 2016 WL at 6. Neither of these factual determinations was made by Mr. King's jury. Nowhere in the statute does it say that if one aggravating circumstance is established, the defendant may be sentenced to death, or that the existence of one aggravator is sufficient to warrant a sentence of death. Rather, the plain language of the statute requires a judge to find that there are "sufficient aggravating circumstances" before a death sentence can be returned. Fla. Stat. § 921.141 (3). In the case at hand, the judge found that the aggravating factor that the murder was committed while Mr. King was engaged in the commission of a sexual battery or kidnapping was established, but he only afforded it moderate weight. R11/2057-58. This aggravating circumstance alone is not "sufficient" to warrant a death penalty. The mere existence of one aggravating circumstance, even if it is uncontroverted, does not prove either of the factual determinations required by Fla. Stat. § 921.141 (3). In fact, in some cases, juries recommend life sentences even where multiple aggravating factors have been established. *See, e.g.*, *Robinson v. State*, 610 So. 2d 1288 (Fla. 1992), *Coleman v. State*, 610 So. 2d 1283 (Fla. 1992), and *Williams v. State*, 622 So. 2d 456 (1993).[2] In other cases, this Court has overturned death

[2] In each of these co-defendant cases, tried separately, the judge overrode the jury's life recommendations and found that five or six aggravating circumstances had been established.

sentences on proportionality review even in the face of substantial aggravation where it found that the aggravation was overweighed by the mitigation that was presented. *See, e.g.*, *Delgado v. State*, 162 So. 3d 971 (Fla. 2015); *Farinas v. State*, 569 So. 2d 425 (Fla. 1990). Because Mr. King's jury made no findings as to the facts necessary to make a defendant eligible for death, the State "cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst*, 2016 WL 112683 at 6.

CONCLUSION

For the reasons discussed herein, as well as in Mr. King's Supplemental Initial Brief, Mr. King and all defendants sentenced to death under the unconstitutional statute are entitled to have their death sentences vacated and life sentences imposed or, in the alternative, new penalty phase proceedings consistent with *Hurst* in order to preserve the guarantees of the Sixth Amendment. *See Hurst*, 2016 WL at 1-4.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing SUPPLEMENTAL REPLY BRIEF OF APPELLANT has been emailed to Scott A. Browne, Assistant Attorney General, at capapp@myfloridalegal.com and Scott.Browne@myfloridalegal.com and Carol Dittmar, Assistant Attorney General, at Carol.Dittmar@myfloridalegal.com, and mailed via United States Postal Service to Michael L. King, DOC #132254, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026 on this 29th day of January, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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