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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-787

CHARLES GROVER BRANT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
HILLSBOROUGH COUNTY, FLORIDA

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

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PRELIMINARY STATEMENT

Mr. Brant does not abandon or concede any issues and/or claims not specifically addressed in the Supplemental Reply Brief. Mr. Brant expressly relies on the arguments made in the Supplemental Initial Brief for any claims and/or issues that are only partially addressed or not addressed at all in this Supplemental Reply.

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ARGUMENT IN REPLY

MR. BRANT'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER *HURST V. FLORIDA* BECAUSE A JUDGE, RATHER THAN A JURY, FOUND THE FACTS NECESSARY TO IMPOSE DEATH AND ANY WAIVER WAS NOT KNOWING WITHIN THE REQUIREMENTS OF THE DUE PROCESS CLAUSE

In response to Mr. Brant's Supplemental Initial Brief, the State asserts four arguments, all of which must fail. The State argues that 1) Mr. Brant's case is not affected by *Hurst v. Florida*, 136 S. Ct. 616 (2016), because Mr. Brant waived his right to an advisory jury, 2) that Fla. Stat. 775.082 does not apply, 3) that *Hurst* is not retroactive, and 4) Brant's contemporaneous felonies preclude a finding of reversible error. Each argument will be addressed in turn.

In support of the argument that *Hurst* does not apply to Mr. Brant because he waived an advisory jury, the State relies on *Bryant v. State*, 901 So. 2d 810 (Fla. 2005). *Bryant*, however, is unavailing. In *Bryant*, this Court premised the denial of Bryant's claim on *Guzman v. State*, 721 So.2d 1155, 1158 (Fla.1998). However, the *Guzman* decision rested on a faulty premise – that *Ring* did not invalidate Florida's death penalty scheme in any way:

> [W]e held a waiver valid where the trial judge and defense counsel questioned defendant in open court as to his decision. In a later appearance before this Court, Guzman once again challenged his jury trial waiver on the grounds that *Ring* and *Apprendi* were decided in the interim and that he was not informed of their effect when he made his waiver. *Guzman v. State*, 868 So.2d 498, 511 (Fla.2003). This Court held that "because *Ring* and *Apprendi* did not invalidate any aspect of

> Florida's death sentencing scheme," Guzman's claim lacked merit. *Id.* ("*Ring* did not expand Guzman's jury rights beyond what he knew when he waived those rights.").

Bryant v. State, 901 So. 2d 810, 822-23 (Fla. 2005). The foundation of this Court's reasoning in *Bryant*, which rested on this Court's erroneous understanding of the impact of *Ring* on Florida's death penalty scheme, has crumbled and cannot form the basis to deny Mr. Brant's claim. There is nothing in the record that shows that the Court, or trial counsel, advised Brant that the Florida death penalty scheme was unconstitutional. In fact, what the record shows is that Brant waived his right to an *advisory jury in an unconstitutional death penalty scheme*. That waiver cannot be said to be knowing and voluntary within the Due Process requirements of the State and federal constitutions. In addition, as set out in his Initial Brief and Supplemental Initial Brief, the waiver was unknowing due to the ineffective assistance of counsel.

The State next argues that Florida Statute 775.082(2) does not apply because "*Hurst* did not determine capital punishment to be unconstitutional." (Supp. Answer Brief, p. 8). However, basic rules of statutory construction require this Court to apply the unambiguous plain language of section 775.082. A court's analysis of a statute begins with the plain language. *Alachua City v. Expedia, Inc.*, 175 So. 3d 730, 733 (Fla. 2015); *J.M. v. Gargett*, 101 So. 3d 352, 356 (Fla. 2012). When a statute's text "conveys a clear and definite meaning, that meaning controls." *Gargett*, 101 So. 3d at 356. The plain language of section 775.082(2) is clear: when the death penalty in

a capital felony is held unconstitutional by the Supreme Court of the United States, the court "shall" resentence the defendant to life. *Hurst* declared the death penalty in Florida to be unconstitutional and this satisfied the unambiguous first prong of section 775.082(2).

Because the language of section 775.082(2) is clear and does not produce an absurd result, this Court need not look to the legislative history. *State v. Burris,* 875 So. 2d 408, 410 (Fla. 2004). However, a review of the legislative history supports the application of the statute to Mr. Brant's case. In 1974, after the effects of *Furman v. Georgia*, 408 U.S. 238 (1972), had settled, the Legislature revoked the prior subsection 2 and substituted the language from subsection 3 in its place. Thus, current subsection 2 remained intentionally on the books after *Furman*. And, in 1998, the Legislature revisited the statute when Florida's electric chair had garnered attention and raised concerns about the constitutionality of that method of execution. The Legislature added language to section 775.082(2), carving out a single-exception to subsection 2. This, the Legislature was aware of the statute, considered its terms and chose to modify the statute to exclude the imposition of a life sentence if a method of execution was declared unconstitutional. The rest of the statute remained and remains untouched.

Further, the "Rule of Lenity" dictates that the statute be construed in the manner most favorable to Mr. Brant. *Reino v. State,* 352 So. 2d 853, 860 (Fla. 1977);

section 775.021(1), Fla. State. (1983). A fundamental principle of Florida law is that "penal statutes must be strictly construed." *Perkins v. State,* 574 So. 2d 1310, 1312 (Fla. 1991); *State v. Byars,* 823 So. 2d 740, 742 (Fla. 2002). This Court should apply section 775.082(2) and sentence Mr. Brant to life.

The State argues that *Hurst* is not retroactive, (Supp. Answer Brief, p. 11), and that this Court should rely on its precedent in *Johnson v. State,* 904 So. 2d 400 (Fla. 2005), where this Court found *Ring* not to be retroactive. (Answer Brief, p. 13-14). But in *Johnson,* this Court did not recognize the true scope of *Ring* and its impact on *Hildwin v. Florida,* 490 U.S. 638 (1989) and *Spaziano v. Florida,* 468 U.S. 447 (1984). In *Johnson,* this Court asked if *Ring* was of "'sufficient magnitude' to require retroactive application." *Johnson,* 904 So. 2d at 409. The State ignores the fact that *Johnson* rested on a rotten foundation which collapsed when *Hurst* overruled *Hildwin v. Florida,* 390 U.S. 638 (1989) and *Spaziano v. Florida,* 468 U.S. 447 (1984). Because this Court did not give full meaning or import to the scope of *Ring,* this Court's analysis in *Johnson* was fundamentally flawed and cannot and should not be relied upon in determining the jurisprudential upheaval of *Ring* and *Hurst* and the retroactive application of those decisions.

The State also argues that *Hurst* is just a minor procedural change and as such, it is not retroactive. This assertion is belied by the maelstrom of activity *Hurst* inspired, both in the Florida Legislature and in this Court. In the wake of *Hurst,* the

Legislature scrambled to quickly pass a new law, because it recognized that *Hurst* meant that there was no valid death penalty statute in Florida. This Court, in addition to the 30+ cases in which it has ordered supplemental briefing, issued two stays of execution and recalled a final mandate in a capital case to allow supplemental briefing.[1] By doing so, this Court has acknowledged that the constitutional problem identified in *Hurst* is significant enough to justify disturbing the finality of capital cases. This would not be the case if *Hurst* were, as the State keeps repeating, just a procedural rule.

The State also trots out *Schriro v. Summerlin*, 542 U.S. 348 (2004) (Answer Brief, p. 12 -13) to support its argument that *Hurst* is not retroactive. However, this Court made clear in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), that Florida employs its own retroactivity analysis.

Mr. Brant argued in his supplemental initial brief that *Hurst* error was structural and could never be harmless. He continues to rely on that argument, as well as his argument that he is entitled to a life sentence under Fla. Stat. §775.082. However, to the extent that this Court decides a harmless error analysis is appropriate (which the *Hurst* Court specifically declined to address), Mr. Brant must address the State's assertion that a single aggravator qualifies Mr. Brant for a death sentence. (Supp. Answer brief, p. 22). Although the State conflates the issue with another

[1] *Hojan v. State*, No. SC13-2422 (Fla. Dec. 18, 2015)

concern, whether specific findings were made as to the finding of an aggravator, Mr. Brant maintains that the *Hurst* error is more than a fact finding issue and "infected the entire trial process." *Arizona v. Fulimante*, 499 U.S. 279, 310 (1991).

There were no jury findings. We have no idea what a jury would have found had Mr. Brant not been deprived of his constitutional right to a jury verdict- not just a mere jury advisory recommendation. The State could never prove in Mr. Brant's case that the *Hurst* error was harmless beyond a reasonable doubt. "To hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury trial guarantee." *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993). The mere existence of the aggravating factors, as argued by the State, fails to recognize the extensive mitigation in Mr. Brant's case as discovered in post-conviction and set out extensively in Mr. Brant's Initial Brief to this Court. There is no way to conclude beyond a reasonable doubt that if Mr. Brant had had a jury — that had been properly instructed that its determination of the statutorily defined facts would be binding on the judge— that jury would have unanimously found the facts necessary to impose death. [2]

[2] Florida's newly minted statute, which provides that future defendants are eligible for death upon the finding of one aggravator, is irrelevant. Mr. Brant was sentenced under the unconstitutional statute, and that is the sentence he is appealing. Substantive changes in statutory law cannot be applied retroactively in criminal cases. U.S. CONST. art. I, § 9.

CONCLUSION AND RELIEF SOUGHT

In light of *Hurst,* Mr. Brant asks that this Court vacate his unconstitutional sentence of death; and/or permit him to file a state habeas petition to raise a *Hurst* claim; and/or allow him to file a Rule 3.851 motion raising a *Hurst* claim; and/or grant any other relief that this Court deems just and proper.

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CERTIFICATE OF FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Supplemental Reply Brief has been filed with the Court and served on opposing counsel, Assistant Attorney General Christina Zuccaro, using the Florida Courts e-filing portal on the 22nd day of March, 2016. Counsel further certifies that on the same day a copy has been mailed to Mr. Brant via U.S. Mail, first class postage prepaid.

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