IN THE SUPREME COURT OF FLORIDA

DONALD OTIS WILLIAMS,

Appellant,

v. **Case No. SC14-814**
Lower Tribunal No. 11-CF-000105-X-04
STATE OF FLORIDA, **Death Penalty Case**

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State reiterates and incorporates its Statement of the Case and Facts from the Answer Brief, with the following additions pertinent to the issue on which this Court ordered supplemental briefing.

Appellant's jury convicted him of the kidnapping, robbery, and murder of 81-year-old Janet Patrick. (V9/1781-83). Prior to trial, Appellant filed motions challenging Florida's capital sentencing scheme based on Ring v. Arizona, 536 U.S. 584 (2002) (V1/174-89); moved for an order striking any reference to the jury's role being merely advisory under Caldwell v. Mississippi, 472 U.S. 320 (1985), and Ring (V2/254-56); and moved for a unanimous jury recommendation and special verdict forms. (V1/170-73; V2/260). A special interrogatory verdict form was used, but the court denied Appellant's motions to bar the death penalty, to strike reference to the jury's advisory role, and to require unanimity. (V11/2101-02, 2108-10). After hearing all of the evidence, the jury returned an interrogatory verdict indicating unanimous findings that four aggravating factors were established beyond a reasonable doubt: (1) Appellant was on felony probation at the time of the murder; (2) Appellant had a prior violent felony conviction; (3) the murder was committed while Appellant was engaged in the commission of a kidnapping; and (4) the victim was particularly vulnerable due to advanced

age or disability. The jury voted nine-to-three that the murder was committed for pecuniary gain. (V10/1830). The jury did not find the existence of any statutory or nonstatutory mitigating circumstances. (V10/1831). The court followed the jury's nine-to-three recommendation and sentenced Appellant to death.

SUMMARY OF ARGUMENT

Appellant is entitled to no relief based on the Unites States Supreme Court's opinion in Hurst v. Florida, __ U.S. __, 136 S. Ct. 616 (2016). There is no Sixth Amendment violation in this case because the jury unanimously found at least one aggravating factor, thus qualifying Appellant for the death sentence the trial court imposed. In fact, the jury unanimously found the existence of four aggravating factors: (1) Appellant was on felony probation at the time of the murder; (2) Appellant had a prior violent felony conviction; (3) the murder was committed while Appellant was engaged in the commission of a kidnapping; and (4) the victim was particularly vulnerable due to advanced age or disability. Therefore, because the jury made the factual findings necessary for the imposition of the death penalty, no Sixth Amendment error occurred and Hurst is inapplicable. Even if this Court were to apply Hurst, it is clear that any constitutional error is harmless beyond a reasonable doubt given the jury's unanimous factual findings.

Additionally, Appellant's reliance on § 775.082(2), Florida

Statutes, as requiring the imposition of a life sentence is misplaced. That provision provides only that a life sentence would be imposed if the death penalty itself has been ruled unconstitutional, which Hurst did not do. Accordingly, § 775.082(2), is not applicable.

Finally, Appellant has failed to preserve any argument for review regarding the standard jury instructions utilized in this case since he failed to raise this issue in his Initial Brief. Even if the issue were preserved, Appellant is entitled to no relief based on Hurst given the court's use of instructions informing the jury that their recommendation is advisory.

ARGUMENT

SUPPLEMENTAL BRIEFING ISSUE

APPELLANT'S CLAIM THAT HE IS ENTITLED TO RELIEF BASED ON HURST V. FLORIDA, __ U.S. __, 136 S. CT. 616 (2016), IS WITHOUT MERIT. (RESTATED)

In his initial brief, Appellant claimed entitlement to relief based on Ring v. Arizona, 536 U.S. 584 (2002). Additionally, because the United States Supreme Court had granted certiorari in Hurst, Appellant requested that this Court hold the proceedings in abeyance until the Court issued its opinion. On January 12, 2016, the Court ruled in Hurst that Florida's death penalty scheme is unconstitutional under the Sixth Amendment to the extent that it "require[s] the judge alone to find the existence of an aggravating circumstance." Hurst, 136 S. Ct. at 624. The Court noted that the jury's advisory recommendation

could not serve as the necessary factual finding required by Ring. Id. at 622. In reversing Hurst's sentence, the Court did not address the State's argument that any error was harmless, but remanded the case to this Court to conduct such an analysis. Id. at 624. Appellant now argues in his supplemental brief that this Court cannot analyze his case under the harmless error standard, and that, pursuant to § 775.082(2), this Court must commute his sentence to life in prison. Appellant's argument is meritless and he is entitled to no relief based on Hurst.

Contrary to Appellant's position, § 775.082(2) does not require that his sentence be commuted to life in prison. The United States Supreme Court did not strike down the punishment options contained in Chapter 775, but held only that the *procedures* for imposition of a death sentence outlined in § 921.141(2) and (3) were unconstitutional. This limitation is the only reasonable conclusion, particularly in light the Court expressly overruling Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989), "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of the jury's factfinding, that is necessary for the imposition of the death penalty," but not disturbing the precedent of Proffitt v. Florida, 428 U.S. 242 (1976)(holding that Florida's capital sentencing scheme does not violate the Eighth Amendment as interpreted by Furman v. Georgia, 408 U.S.

308 (1972)). Hurst, 136 S. Ct. at 623-24.

Section 775.082(2) provides that life sentences without parole are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional." The provision was enacted in the wake of Furman v. Georgia, 408 U.S. 308 (1972) in order to protect society in the event capital punishment *as a whole* were to be deemed unconstitutional. See, e.g., Coker v. Georgia, 433 U.S. 584 (1977)(holding that capital punishment is not available for the capital felony of raping an adult woman). As previously stated, Hurst's holding was limited to a finding that Florida's death penalty scheme violates the Sixth Amendment right to a jury trial to the extent it "require[s] the judge alone to find the existence of an aggravating factor." Hurst, 136 S. Ct. at 624.

Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972), upon which Appellant relies, does not advance Appellant's cause. The focus and primary impact of Donaldson was on cases pending for prosecution at the time Furman was released. It is not a case of statutory construction, but one of jurisdiction. In 1972, the Florida Constitution vested jurisdiction of capital cases in circuit courts rather than criminal courts of record. Donaldson held that circuit courts no longer maintained jurisdiction over capital cases because, following Furman, there was no longer a valid capital sentencing statute to apply. Id. at 505. This

Court observed that the new provision, § 775.082(2), was conditioned on the invalidation of the death penalty, but clarified that "[t]his provision is not before us for review and we touch on it only because of its materiality in considering the entire matter." Donaldson, 265 So. 2d at 505.

Donaldson does not purport to resolve issues regarding pipeline cases pending before the Court on appeal, or to cases that were already final at the time Furman was decided. Furthermore, in Anderson v. State, 267 So. 2d 8 (Fla. 1972), this Court explained that, following Furman, the Attorney General took the position that the 40 death sentences that had been imposed prior to Furman were illegal sentences and requested remand for imposition of life sentences. There is no explanation for the Attorney General's position at that time; however, it is noteworthy that this occurred prior to the decisions in Teague v. Lane, 489 U.S. 288 (1989), and Witt v. State, 387 So. 2d 922 (1980), in which rules concerning retroactivity were announced.

Furman 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, 265 So. 2d at 506 (Roberts, C.J., concurring specially). Furman held that the death penalty 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 might be possible.

Hurst, by contrast, is a specific ruling extending the Sixth Amendment protections identified in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), to Florida's capital sentencing scheme. By equating Hurst with Furman, Appellant reads Hurst far too broadly. Hurst did not invalidate the death penalty. Notably, following the release of the Hurst opinion, the Supreme Court denied certiorari review of two direct appeal decisions, leaving intact this Court's denial of any Sixth Amendment error; both cases had sentences supported by prior violent felony convictions. See Fletcher v. State, 168 So. 3d 186 (Fla. 2015), cert. denied, 2016 WL 280859 (Jan. 25, 2016); Smith v. State, 170 So. 3d 745 (Fla. 2015), cert. denied, 2016 WL 280862 (Jan. 25, 2016). After Furman, there were no existing capital cases left intact. After Hurst, the Supreme Court has provided no express reason to disturb any capital sentences supported by prior convictions. The remedy for death row prisoners provided by Furman has not been extended to current death row inmates by Hurst.

In Hurst, the Supreme Court acknowledged that the holdings of

Apprendi and Ring concerned the factual findings necessary to enhance a defendant's sentence. In Apprendi, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. Two years later, the Court addressed the implications of Apprendi for Arizona's capital sentencing scheme. Because Arizona's capital sentencing scheme had no jury involved in the penalty phase at all, the Court found it unconstitutional "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Id. at 609. However, the Court expressly noted that the question in that case was whether an aggravating factor "may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee ... requires that the aggravating factor determination be entrusted to the jury." Ring, 536 U.S. at 597.

While the Court has expanded the Apprendi holding to include findings that increase the sentencing range to which a defendant is exposed even if they did not change the statutory maximum, it has not expanded the focus from findings that authorize a sentence. Alleyne v. United States, 133 S. Ct. 2151, 2155, 2158 (2013)(applying Apprendi to factual findings necessary to impose

a minimum mandatory term); Southern Union Co. v. United States, 132 S. Ct. 2344 (2012)(applying Apprendi to factual findings that increased the amount of a criminal fine); Cunningham v. California, 549 U.S. 270 (2007)(applying Apprendi to factual findings necessary to increase a sentence to an "upper limit" sentence); Blakely v. Washington, 542 U.S. 296, 303-05 (2004)(applying Apprendi to factual findings necessary to impose a sentence above the "standard" sentencing range even though the sentence was below the statutory maximum). In fact, the Court recently reaffirmed that the Sixth Amendment right underlying Ring and Apprendi did not apply to factual findings made in selecting a sentence for a defendant after the jury has made the fact findings necessary for the imposition of a sentence within a particular range.

> 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 factfinding 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.

Alleyne, 133 S. Ct. at 2161 n.2. 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 authorized by the jury's verdict).

In Kansas v. Carr, __ U.S. __, 136 S. Ct. 633 (2016), decided only a week after Hurst, the Court discussed the distinct determinations of eligibility for a sentence and selection of a sentence under capital sentencing schemes. 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. Id. at 642. In fact, the Court stated that such determinations were not factual findings at all. Instead, the Court termed the determinations regarding the existence of mitigating circumstances as "judgment call[s]" and weighing determinations "question[s] of mercy." Id. Thus, Carr addresses and resolves Appellant's argument that weighing must be left to the jury because it is indistinguishable from the factfinding process itself. They are not the same. Particularly under the facts of Appellant's case, where there are jury findings of prior and contemporaneous felonies qualifying Appellant for the death penalty, the Florida law which required the sentencing judge to weigh aggravators against mitigators before imposing sentence is not implicated by Hurst.

In Florida, a sentence of death is authorized upon the finding of the existence of one aggravating factor. State v.

Steele, 921 So. 2d 538, 543 (Fla. 2005)("To obtain a death sentence, the State *must* prove beyond a reasonable doubt at least one aggravating circumstance."). Death is presumptively the appropriate sentence. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). As sentencing enhancement is a matter of state law, this Court's determination controls. Ring, 536 U.S. at 603 ("the Arizona court's construction of the State's own law is authoritative").

Accordingly, Appellant's argument that Hurst requires juries to find as a matter of fact that there are sufficient aggravating circumstances to outweigh the applicable mitigating circumstances is without merit. Hurst specifies that constitutional error occurs when a trial judge "alone" finds the existence of "an aggravating circumstance." Hurst, at 622. This Sixth Amendment error is necessarily one that can be avoided or prevented with the requirement of specific jury findings to support enhancement. While Appellant argues that this Court cannot re-write or sever the substantive statute, he misses the point that Hurst is a *procedural* ruling, and therefore a remedy is within the scope of ameliorative measures available to this Court.[1]

[1] Indeed, Florida courts have expressly recognized the power and discretion of trial courts to fashion rules of procedure when necessary. See State v. Ford, 626 So. 2d 1338 (Fla.

This Court has recognized that where a portion of a statute is deemed unconstitutional, the remainder may be salvaged. The essential test for doing so is to determine whether the "bad features" can be separated out without offending legislative intent. See Cramp v. Board of Public Instruction, 137 So. 2d 828, 830 (Fla. 1962). Hurst affects the procedural portions of § 921.142. This Court has the inherent authority to fashion a procedure that is both constitutional and consistent with the legislative intent.

Because Hurst did not find that the death penalty itself was constitutionally prohibited, § 775.082(2) does not mandate a blanket commutation of death sentences as Appellant requests. Moreover, the Sixth Amendment error identified in Hurst is not implicated when a defendant has a prior conviction, as in the instant case. Furthermore, the constitutional error is one which can be avoided or prevented with the requirement of specific jury findings to support the defendant's qualification for the

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1993)(holding that a trial court may employ a procedure if necessary to further an important public interest); Hernandez v. State, 597 So. 2d 408 (Fla. 3d DCA 1992)(finding that the trial court's procedure in allowing a child to testify by closed circuit television, although not expressly authorized by rule or statute, was appropriate); Harrell v. State, 709 So. 2d 1364 (Fla. 1998)(approving procedure used by trial court governing use of trial testimony by satellite transmission). See also Galindez v. State, 955 So. 2d 517, 527 (Fla. 2007)(Cantero, J., concurring)("When confronted with new constitutional problems to which the Legislature has not yet responded, we have the inherent authority to fashion remedies.").

death penalty, as was done in this case. Here, there is no Sixth Amendment violation as recognized in Hurst as the death penalty was within the permissible range of sentencing options based upon Appellant's prior and contemporaneous convictions. See generally Almendarez-Torres v. United States, 523 U.S. 224 (1998)(holding that the fact of a prior conviction may be found by the judge even if it increases the statutory maximum sentence); Ring, 536 U.S. at 598 n.4 (noting Ring does not challenge Almendarez-Torres, "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"); Alleyne, 133 S. Ct. at 2160 n.1 (affirming Almendarez-Torres provides valid exception for prior convictions). It is undisputed that Appellant was convicted of a prior felony. Additionally, the jury unanimously convicted Appellant in the instant case of kidnapping, robbery, and first-degree murder of victim Janet Patrick, thus making the factual determination that the murder was committed while Appellant was engaged in the commission of a kidnapping. As Appellant has both a prior violent felony conviction and a contemporaneous felony conviction which authorized the death penalty, no Sixth Amendment error has been shown in this case.

There is no reading of Hurst which suggests that a Sixth Amendment violation necessarily occurs in every case when the statute is followed. In considering whether a new sentencing

proceeding may be required by Hurst in a pending pipeline case, this Court needs to determine whether Sixth Amendment error occurred on the facts of that particular case; that is, whether a jury factfinding as to an aggravating circumstance, such as a prior or contemporaneous felony, is apparent on the record. If there were a Sixth Amendment violation, the question shifts to the impact of that error, and whether any prejudice to the defendant may have occurred. See Chapman v. California, 386 U.S. 18, 20-22 (1967). With this approach, this Court is respecting death sentences that can be salvaged upon finding any potential constitutional error was harmless, while protecting the Sixth Amendment rights of defendants.

Appellant claims that Sixth Amendment error occurred in his case and alleges that such error was necessarily "structural" and not amenable to harmless error analysis. First, the United States Supreme Court remanded Hurst itself to this Court for determination of harmlessness, noting that "[t]his Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here." Hurst, 136 S. Ct. at 624. This Court has been consistent in finding that deficient jury factfinding, in violation of the Sixth Amendment, can be and often is harmless beyond a reasonable doubt. Galindez v. State, 955 So. 2d 517, 521-23 (Fla. 2007); Johnson v. State, 994 So. 2d 960, 964-65 (Fla.

2008). See also Pena v. State, 901 So. 2d 781, 783 (Fla. 2005)(failure to instruct jury on age requirement was not fundamental error).

Second, the prior conviction exception to the Sixth Amendment findings required by Apprendi and Ring has not been disturbed or expanded by Hurst. Ring itself recognizes the critical distinction of an enhanced sentence supported by a prior conviction. Ring, 536 U.S. at 598 n.4. As Appellant had a prior violent felony conviction and a contemporaneous felony conviction—supported by unanimous jury verdicts—which qualified him for the death sentence, no Sixth Amendment error has been shown in this case.

Third, Appellant's claim of structural error is refuted by Neder v. United States, 527 U.S. 1 (1999), where the Court found no structural error although the jury convicted the defendant after one element of the offense was mistakenly not submitted for the jury's consideration. Neder explains why Appellant's reliance on Sullivan v. Louisiana, 508 U.S. 275 (1993), is misplaced. In Neder, the Court distinguished Sullivan because the error in Sullivan—the failure to instruct the jury that the State must prove the elements of an offense beyond a reasonable doubt—"vitiate[d] *all* the jury's findings," whereas the trial court's failure to instruct the jury on one element of an offense did not. Neder, 527 U.S. at 11, 13-15.

Appellant posits that the error in this case is structural because the jury was repeatedly told that their recommendation was advisory, diminishing the jury's sense of responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Appellant erroneously asserts that Hurst requires the jury choose the appropriate sentence. As previously argued, Hurst does not require jury sentencing, but rather only requires that the jury make the factual determination that an aggravating factor exists, thus qualifying the defendant for the death penalty. Furthermore, to the extent Appellant challenges the constitutionality of the jury instructions in his supplemental brief, such an argument has not been preserved for appellate review. Although there was a motion filed in the lower court challenging the validity of Florida's standard jury instructions based on Caldwell, the denial of that motion was not presented as an issue in Appellant's Initial Brief. See Beasley v. State, 18 So. 3d 473, 481 (Fla. 2009)(finding waiver as to issues not fully presented in appellate brief).

Even if this Court considers the issue, the jury instructions informing the jury that their sentencing recommendation was advisory has not been found unconstitutional. Hurst, 136 S. Ct. at 624 (overruling Spaziano and Hildwin only "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of the jury's factfinding, that is necessary for

imposition of the death penalty").

Finally, if this Court were to find constitutional error in this case, United States Supreme Court case law clearly demonstrates that it was harmless beyond a reasonable doubt. There can be no doubt that the death penalty was an available sentencing option based on Appellant's prior and contemporaneous convictions. Additionally, the jury unanimously found the existence of four aggravating factors beyond a reasonable doubt: (1) Appellant was on felony probation at the time of the murder; (2) Appellant had a prior violent felony conviction; (3) the murder was committed while Appellant was engaged in the commission of a kidnapping; and (4) the victim was particularly vulnerable due to advanced age or disability. Under the Apprendi/Ring/Hurst line of cases, no possible constitutional error prejudiced Appellant on these facts. Accordingly, his death sentence should be upheld.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the judgment and sentence imposed on Appellant Donald Otis Williams.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 22, 2016, I electronically filed the foregoing with the Clerk of the Court by using the e-portal filing system which will send a notice of electronic filing to the following: **Nancy Ryan**, Office of the Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118, **ryan.nancy@pd7.org**.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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