In the Supreme Court of Florida

WILLIE JAMES HODGES,

Appellant,

v. CASE NO. SC14-878

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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SUPPLEMENTAL ISSUE I

WHETHER THE SIXTH AMENDMENT RIGHT-TO-A-JURY-TRIAL PROVISION WAS VIOLATED IN A CASE WITH A RECIDIVIST AGGRAVATING CIRCUMSTANCE? (Restated)

Hodges asserts his Sixth Amendment right-to-a-jury-trial established in *Hurst v. Florida*, 136 S.Ct. 616 (Jan. 12, 2016), was violated. It was not.

Standard of review

The standard of review is *de novo*. Constitutional challenges to statutes are reviewed *de novo*. *Miller v. State*, 42 So.3d 204, 215 (Fla. 2010)(stating "[w]e review a trial court's ruling on the constitutionality of a Florida statute *de novo*" regarding a Sixth Amendment challenge to Florida's death penalty scheme pursuant to *Apprendi* and *Ring*).

Merits

In *Hurst v. Florida*, 136 S.Ct. 616 (Jan. 12, 2016), the United States Supreme Court declared that certain aspects of Florida's death penalty statute, which allowed "the judge alone to find the existence of an aggravating circumstance" violate the Sixth Amendment right-to-a-jury-trial. The *Hurst* Court found Florida's death penalty statute unconstitutional because, under Florida law, a "jury's mere recommendation is not enough." *Hurst*, 136 S. Ct. at 619. The Court noted that, under Florida law, although the judge must give the jury recommendation great weight, the sentencing

order must "reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors." *Id.* at 620.

The *Hurst* Court first explained that the Sixth Amendment and due process "requires that each ***element*** of a crime be proved to a jury beyond a reasonable doubt." *Hurst*, 136 S.Ct. at 621 quoting *Alleyne v. United States*, 570 U.S. –, –, 133 S.Ct. 2151, 2156, 186 L.Ed.2d 314 (2013)(emphasis added). The Court then discussed *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), noting its holding "any fact that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict is an element that must be submitted to a jury." *Id.* at 621 (emphasis added). The *Hurst* Court then noted its application of *Apprendi* in numerous contexts, including capital punishment with *Ring v. Arizona*, 536 U.S. 584, 608, n. 6, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The Court noted it had concluded in *Ring* that "the required finding of an aggravated circumstance exposed *Ring* to a ***greater punishment*** than that authorized by the jury's guilty verdict." *Id.* at 621 (emphasis added). Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment. *Id.*

And then the Court concluded this analysis applied equally to Florida. *Id.* at 621-622. The Court observed "the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. "As with *Ring*, a judge increased Hurst's authorized punishment based on her own factfinding." *Id.* at 622. The problem the Court identified was the "central and singular role the judge plays under Florida law"

because under Florida's statute a defendant was not "eligible for death" until there were "findings ***by the court***." Id. at 622 (emphasis in original). The trial court alone made the factual findings. *Id.* at 622 (emphasis in original). The "jury's function under the Florida death penalty statute was advisory only."

The Court then overruled *Spaziano v. Florida*, 468 U.S. 447, 457-465, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989). The *Hurst* Court concluded that those cases' conclusion that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury, "was wrong, and irreconcilable with *Apprendi*." *Id.* at 623. The Court rejected a stare decisis argument because "in the *Apprendi* context, we have found that stare decisis does not compel adherence to a decision whose underpinnings have been eroded by subsequent developments of constitutional law." *Id.* at 623-624.

The *Hurst* Court concluded the Sixth Amendment right-to-a-jury-trial provision required Florida to base a "death sentence on a jury's verdict, not a judge's factfinding." *Id.* at 624. "Florida's sentencing scheme, which required the judge alone to find the existence of ***an*** aggravating circumstance, is therefore unconstitutional." *Hurst*, 136 S.Ct. at 624 (emphasis added).

Retroactivity

Hurst is not retroactive. This is not a pipeline case. Hodges' conviction and sentence became final on October 3, 2011, when the United States Supreme Court denied the petition for writ of

certiorari. *Hodges v. Florida*, - U.S. -, 132 S.Ct. 164, 181 L.Ed.2d 77 (2011). Hodges' sentence was final years before the United States Supreme Court decided *Hurst* in 2016.

Hurst was based on *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which in turn was based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The United States Supreme Court; the Eleventh Circuit; and this Court have all held that *Ring* is not retroactive. *Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S.Ct. 2519, 2526, 159 L.Ed.2d 442 (2004)(holding that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review"); *Turner v. Crosby*, 339 F.3d 1247, 1282-1286 (11th Cir. 2003); *Johnson v. State*, 904 So. 2d 400, 405 (Fla. 2005)(applying *Witt*[1] and holding *Ring* would not be applied retroactively in Florida). Furthermore, both the Eleventh Circuit and the Florida Supreme Court have held that *Apprendi* is not retroactive either. *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001)(holding that *Apprendi* does not apply retroactively); *Hughes v. State*, 901 So. 2d 837, 838 (Fla. 2005)(holding that *Apprendi* does not apply retroactively in Florida). Because *Apprendi* and *Ring* are not retroactive under controlling precedent, then *Hurst*, which was an extension of *Apprendi* and *Ring* to Florida, is not retroactive either and for the same reasons. *Jeanty v. Warden, FCI-Miami*, 757

[1] *Witt v. State*, 387 So.2d 922 (Fla. 1980). *Witt* is based on the older federal test for retroactivity, the *Linkletter-Stovall* test. *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

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)). If the *seminal* case is not retroactive, then none of its progeny is either.

Indeed, the United States Supreme Court has held that its decision in *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), which first extended the Sixth Amendment right-to-a-jury trial to the states was not retroactive. *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968). The *DeStefano* Court used a *Witt*-like test, not the later *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), to determine *Duncan* was not retroactive. The *Summerlin* Court relied heavily on *DeStefano*, observing "if under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be." *Summerlin*, 542 U.S. at 357, 124 S.Ct. at 2526. The *Summerlin* Court's main reasoning was that *Ring* was procedural, not substantive, and therefore, did not warrant retroactive application. All of that logic applies equally to *Hurst*.

The distinction between substantive versus procedural for purpose of retroactivity is limited to matters such as the correct interpretation of the underlying substantive criminal statute. *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)(explaining that retroactivity is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress). The logic of the distinction is that

an incorrect interpretation of the substantive criminal statute could result in a defendant being held in prison, either in whole or in part, for conduct that is not criminal under the correct interpretation of the substantive criminal statute.

The other exception is a new substantive rule that places "certain criminal laws and punishments altogether beyond the State's power to impose." Such new rules decriminalize a class of conduct or prohibit the imposition of a punishment on a particular class of persons. An example of that exception is the recent case of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), which held that *Miller v. Alabama*, 567 U.S. –, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), was retroactive because the new rule of *Miller* was substantive. The *Montgomery* Court explained the difference. Substantive rules set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. "Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating the manner of determining the defendant's culpability." *Montgomery*, 136 S. Ct. at 729-30; Cf. *Witt v. State*, 387 So.2d 922, 929, 931 (Fla. 1980)(explaining that most law changes of "fundamental significance" that will warrant retroactive application "will fall within the two broad categories" of 1) changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties or 2) changes of law which are of sufficient magnitude to necessitate

retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*).[2]

Only those types of substantive new rules are retroactive. *Hurst* did not interpret a criminal statute nor did it hold murder to be legal or that the death penalty was a forbidden punishment. Therefore, *Hurst* is not substantive for purposes of retroactivity.

Every other new rule is considered procedural for the purposes of retroactivity analysis including the relationship between the judge and jury deciding facts explored in *Ring* and *Hurst*. The only procedural rules that are retroactive are those that are a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Whorton v. Bockting*, 549 U.S. 406, 416, 127 S.Ct. 1173, 1180, 167 L.Ed.2d 1 (2007). Fundamental fairness is not implicated because "one can easily envision a system of 'ordered liberty' in which certain elements of a crime are proven to a judge, not to the jury. *United States v. Shunk*, 113 F.3d 31, 37 (5th Cir. 1997). An example of a new procedural rule that would be sufficiently watershed is the right to counsel established in *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). *See Saffle v. Parks*, 494

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[2] While a state may have a broader retroactivity test than *Teague*, it may not have a narrower retroactivity test. *Montgomery v. Louisiana*, 136 S. Ct. 718, 727-29 (2016)(holding the federal constitution requires "new substantive rules of constitutional law" to be applied retroactively). In other words, *Teague* is the floor for retroactivity. The problem is that a state's test for retroactivity may be so different from *Teague* that it can be hard to tell if that test is unconstitutionally narrower. This Court's *Witt* test raises that problem because it does not focus on the substantive versus procedural distinction, as it should to be in compliance with *Montgomery*. This is yet another reason why this Court should adopt the *Teague* test.

U.S. 484, 495, 110 S.Ct. 1257, 1264, 108 L.Ed.2d 415 (1990)(giving *Gideon* as example of a watershed that would be retroactive because it seriously increases the accuracy of a conviction). The United States Supreme Court has explained that the exception to nonretroactivity for procedural rules is limited to a small core of rules which seriously enhance accuracy. *Graham v. Collins*, 506 U.S. 461, 478, 113 S.Ct. 892, 903, 122 L.Ed.2d 260 (1993)(noting it is unlikely that many such components of basic due process have yet to emerge). A trial conducted with a procedural error "may still be accurate" and for that reason, "a trial conducted under a procedure found to be unconstitutional in a later case does not, as a general matter, have the automatic consequence of invalidating a defendant's conviction or sentence" and therefore, generally, procedural rules are not given retroactive effect. *Montgomery*, 136 S. Ct. at 730. *Hurst*, like *Ring*, is procedural, not substantive and therefore, it is not retroactive

This Court has controlling precedent holding *Ring* is not retroactive. *Johnson v. State*, 904 So. 2d 400, 405-412 (Fla. 2005). The *Johnson* Court did not reach the merits of the *Ring* claim. Instead, its holding was that *Ring* was not retroactive. *Johnson*, 904 So.2d 400, 405 (Fla. 2005)("we ***hold*** that *Ring* does not apply retroactively in Florida to defendants whose convictions already were final when that decision was rendered.")(emphasis added). The *Johnson* Court discussed the retroactivity of *Ring* for 24 paragraphs and did a full-blown *Witt* analysis. This Court also noted that new penalty phases conducted decades after the murder were likely to be less accurate. Conducting new penalty phases decades later would

consume "immense" prosecutorial and judicial resources "without any corresponding benefit to the accuracy or reliability" of the penalty phase. *Johnson*, 904 So.2d at 412. The *Johnson* Court repeated observed that jury factfinding and new penalty phases in old cases do not increase accuracy. *See also Hughes*, 901 So.2d at 840-842 (reasoning that *Apprendi* did not constitute a "development of fundamental significance."). As the United States Supreme Court observed in *Summerlin* itself, *Summerlin*, 542 U.S. at 356, 124 S.Ct. at 2525 ("for every argument why juries are more accurate factfinders, there is another why they are less accurate" and when "so many presumably reasonable minds continue to disagree over whether juries are better factfinders at all, we cannot confidently say that judicial factfinding seriously diminishes accuracy."); *State v. Towery*, 64 P.3d 828, 833 (Ariz. 2003)(using the *Linkletter* test to determine *Ring* is not retroactive because *Ring* was "not designed to improve accuracy;" rather, it shifted "the fact-finding duty from an impartial judge to an impartial jury."). *Hurst* is not of fundamental significance because it does not seriously increase accuracy, as this Court recognized in *Johnson*.

Opposing counsel, quoting *Johnson* but ignoring its actual holding, does not explain why he believes *Johnson* is incorrectly decided. He states that this Court did not address the retroactivity of *Ring* because this Court found *Ring* inapplicable to Florida. But *Johnson* did address the retroactivity of *Ring*. Indeed, it addressed the matter for 24 paragraphs. Opposing counsel ignores the reasoning and holding of *Johnson*. But this Court should not. It should follow its precedent. *Robertson v.*

State, 143 So.3d 907, 910 (Fla. 2014)(stating that the "presumption in favor of stare decisis is strong" and the decision to depart from the principles of *stare decisis* "cannot be taken lightly" and reaffirming the prior precedent).

Opposing counsel asserts that *Hurst* is of fundamental significance because it was a "monumental shift" in jurisprudence that overruled *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), as well as this Court's decision in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002). According to this logic, any case that overrules a prior case is necessarily of fundamental significance and automatically retroactive. But the *Bockting* Court held otherwise. *Whorton v. Bockting*, 549 U.S. 406, 416, 127 S.Ct. 1173, 1180, 167 L.Ed.2d 1 (2007)(holding the decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), was not retroactive). The United States Supreme Court in *Bockting* was dealing with a case that overruled prior precedent but the Court still held that that case was not retroactive. Overruling prior precedent does not automatically make a case of fundamental significance.

Opposing counsel, quoting *Witt* but ignoring its actual holding, speaks of fairness and uniformity. IB at 6. But the retroactivity doctrine is really about finality, not uniformity. Finality is the polestar of the retroactivity doctrine. As this Court stated in *Witt* and has repeated on several occasions, the "importance of finality in any justice system, including the criminal justice system, cannot be understated" and at some point, litigation must

"come to an end." *Witt v. State*, 387 So.2d 922, 925 (Fla. 1980). Opposing counsel totally ignores the value of finality in his plea for "fairness." Courts simply must have retroactivity doctrines to ensure the finality of convictions and sentences.

The very nature of the retroactivity doctrine is that cases will not be treated uniformly. If one were to value uniformity over finality, there would be no doctrine of retroactivity. All cases would receive the benefit of any new rule regardless of what stage in the process the case was in, resulting in true uniform treatment. But the problem with uniformity is that no case would ever become final, which is the problem that the retroactivity doctrine was designed specifically to address. Every case would receive the benefit of any new rule ad infinitum resulting in convictions and sentences that are never final. And in capital cases, which last for decades, new rules necessarily will develop during that time frame, which would mean that every capital case would have new trials and new penalty phases without ending. *Witt* itself is a great example of this problem. *Witt* sought retroactive application of not one, or even two, new cases but of six new cases. It would be a rare happenstance for any conviction to become final and for any executions to occur, if this Court routinely applied new rules to old cases. Retrial after retrial would be the result.

Courts already balance the competing interests of finality and fairness by extending the benefit of the new rule to all pipeline cases rather than more logically limiting the benefit of the new rule to cases where the trial occurs after the decision. *Griffith*

v. Kentucky, 479 U.S. 413, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)(creating the pipeline rule). Courts permit the new rule to apply to cases where the trial occurred before the decision establishing the new rule was issued if the case is still pending on direct appeal, i.e., pipeline cases. A more narrow application of retroactivity doctrine would have the new rule apply prospectively only such that the new rule would apply only to trials that occur after the date of the new decision. The nonretroactivity doctrine already extends the benefit of the new rule to a larger-than-necessary group of cases. And this is especially true in capital cases where the direct appeals often take years to be completed. Cases where the trial occurred two or three years ago but are still pending in this court or the United States Supreme Court on direct appeal will get the benefit of *Hurst*, if the *Hurst* claim has any merit. Including pipeline cases is the proper balance between fairness and finality.

The retroactivity doctrine and the pipeline distinction are based on the fact that the new rule will be applied and result in a new trial, if warranted, for the newest cases. Old cases will not get the benefit of the new rule for a reason. As cases become older, retrying the case becomes more difficult. Allowing new trials based on a new rule in older cases could result in unwarranted acquittals due to lost witnesses and evidence. This Court recognized this problem in *Johnson*, observing that applying *Ring* retroactively would require prosecutors to "reassemble witnesses and evidence literally decades" later. *Johnson*, 904 So.2d at 411. Opposing counsel ignores the age of the case and the

problem of retrying older cases in his plea for "fairness," but fortunately the retroactivity doctrine does not. Allowing the guilty to walk or be unjustifiably acquitted due to the age of the case is not fair to the State of Florida or the family of the victims. Furthermore, retrial upon retrial, which would be the result of not having a retroactivity doctrine undermines both the deterrence value of the law and public confidence in the judicial system.

Applying a new rule that does not "seriously enhance accuracy" only to new cases is quite fair. *Hurst* should only apply to new cases.[3]

Opposing counsel recounts the various times and forums that Hodges has raised a *Ring* claim over the years. Opposing counsel is confusing preservation and exhaustion with proper retroactivity analysis. While this Court made that same mistake in *James v. State*, 615 So. 2d 668, 671 (Fla. 1993), it should not repeat that mistake with *Hurst*. If a case is retroactive, it does matter if the issue was raised previously or not. For example, a death row

[3] Retroactivity is determined from the date of the *Hurst* opinion on January 12, 2016, not the date of the *Ring* opinion in June 24, 2002. Basically, any case such as the *Hurst* case, which overrules prior precedent is a new rule and the retroactivity analysis starts from the date of that new case, which, in the particular situation, is the date of the *Hurst* case. Moreover, the distinction made in the retroactive doctrine is between cases in the pipeline stage and those in postconviction stage. So, any case that was final before *Hurst* was decided in 2016 is in the postconviction stage and not entitled to the benefit of *Hurst*. Improperly dating retroactivity from the date of the *Ring* decision in 2002 blurs this distinction for no logically reason. So, retroactivity is determined from the date of the *Hurst* opinion, not the date of the *Ring* opinion. The proper date for the retroactivity analysis is 2016, not 2002.

inmate who was actually intellectually disabled but who never raised an *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), claim would still be entitled to the retroactive benefit of *Atkins* regardless of his not raising the issue earlier. This Court recently gave defendants two years from the date of the mandate declaring a new rule retroactive to file a 3.850 motion raising the claim. *Falcon v. State*, 162 So. 3d 954, 956 (Fla. 2015). Proper retroactivity analysis does not depend on having previously raised the issue. *Hurst* is not retroactive.

Recidivist aggravators

Even if *Hurst* applied retroactively, it would not apply to this particular case. Two of the aggravating circumstances found by the trial court were recidivist aggravators. Both the under-sentence-of-imprisonment and the prior-violent-felony aggravators were found in this case. *Hodges*, 55 So. 3d at 542; *Hodges*, 55 So. 3d at 522 (noting Hodges was on parole for robbery at the time of the murder). These two aggravators are not required to be found by the jury. The trial court alone may find any recidivist aggravators.

There is an exception to *Hurst* for recidivist aggravators. The United States Supreme Court exempted prior convictions from the holding of *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), explaining 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." The exception

for prior convictions in *Apprendi* was based on the recidivist exception established in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).

That same logic, based on the exception for prior convictions, remains valid and applies in the wake of *Hurst*. *Hurst* did not involve any recidivist aggravators. And the *Hurst* Court did not overrule *Almendarez-Torres*. *Almendarez-Torres* was not cited or discussed by the *Hurst* Court. The prior conviction exception was not at issue in *Hurst*. *Almendarez-Torres* is still good law in the wake of *Apprendi* and all its progeny including *Hurst*. *Pham v. State*, 70 So.3d 485, 496 (Fla. 2011)(explaining that the express exceptions to *Apprendi* that were unaltered by *Ring*); *United States v. Nagy*, 760 F.3d 485, 488 (6th Cir. 2014)(stating that *Alleyne* leaves "no doubt" that *Almendarez-Torres* still good law), *cert. denied*, 135 S. Ct. 1009 (2015); *United States v. King*, 751 F.3d 1268, 1280 (11th Cir. 2014)("We have explained that the Supreme Court's holding in *Almendarez-Torres* was left undisturbed by *Apprendi*, *Blakely*, and *Booker* citing *United States v. Shelton*, 400 F.3d 1325, 1329 (11th Cir. 2005)), *cert. denied*, 135 S.Ct. 389 (2014). The *Almendarez-Torres* exception survived *Apprendi*, *Ring*, and *Hurst*.

The United States Supreme Court recently denied certiorari review in two pipeline cases involving recidivist aggravators after *Hurst*. *Smith v. Florida*, 170 So. 3d 745 (Fla. 2015), *cert. denied,* (U.S. Jan. 25, 2016)(No. 15-6430)(prior violent felony aggravator); *Fletcher v. Florida*, 168 So. 3d 186 (Fla. 2015), *cert. denied*, (Jan. 25, 2016)(No. 15-6075)(under-sentence-of-imprisonment

aggravator with an 8-4 jury recommendation and Fletcher also involved the murder-while-engaged-in-a-robbery aggravator which the jury had found during guilt phase by convicting the defendant of home-invasion robbery.). The Supreme Court denied both petitions without dissent - not a single Justice was the slightest bit worried about application of *Hurst* to cases involving recidivist aggravators. Even after *Hurst*, the United States Supreme Court is allowing death sentences in Florida to remain in place if the case involves a recidivist aggravator, as Hodge's case does.

The normal rule that a denial of certiorari does not imply a merits ruling does not apply to the *Smith* and *Fletcher* cases. *Atl. Coast Line R. Co. v. Powe*, 283 U.S. 401, 403-04, 51 S. Ct. 498, 499, 75 L.Ed. 1142 (1931)(stating that the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times citing *United States v. Carver*, 260 U. S. 482, 490, 43 S. Ct. 181, 67 L. Ed. 361 (1923)). Normally, the United States Supreme Court may think the issue has some merit but is too busy with other cases to take the case at that point in time or thinks the case is not a particularly good case to decide the issue or wants the issue to percolate in the lower courts more and so, the Court denies certiorari. But the United States Supreme Court did not have to take either *Smith* or *Fletcher* to have both cases reviewed for *Hurst* error. The High Court has a special procedure called grant, vacate, and remand for reconsideration in light of the new case that does not require any of their time (commonly referred to as GVR). If the United States Supreme Court were the slightest bit concerned with the Sixth

Amendment rulings in either *Smith* or *Fletcher*, it would have simply employed the GVR procedure and remanded the case to the Florida Supreme Court to reconsider in light of *Hurst*. But the United States Supreme Court did not do that in either case. Instead, they denied the petitions in both of those Florida capital cases, which means that both cases, under their own precedent of *Summerlin*, will not get the benefit of *Hurst* review in federal habeas. All of this was well known to the United States Supreme Court when they denied those two petitions. The only possible conclusion is that the recidivist aggravator exception to *Apprendi* and *Ring*, is still alive and well in the wake of *Hurst*. *Hurst* does not apply to cases with recidivist aggravators.

This Court has repeatedly rejected *Ring* claims where the prior violent felony aggravator is present. *Hall v. State*, 107 So.3d 262, 280 (Fla. 2012)("This Court has held that *Ring* does not apply to cases where the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is applicable" citing *Victorino v. State*, 23 So.3d 87, 107–08 (Fla. 2009)); *Evans v. State*, 975 So.2d 1035, 1052-1053 (Fla. 2007)(rejecting a *Ring* claim where the prior violent felony aggravator was present citing *Duest v. State*, 855 So.2d 33, 49 (Fla. 2003)); *Johnson v. State*, 104 So.3d 1010, 1028 (Fla. 2012)(stating that the Florida Supreme Court has repeatedly rejected *Ring* claims where the prior violent felony aggravator has been found); *Hodges v. State*, 55 So. 3d 515, 540 (Fla. 2010)("This Court has repeatedly held that *Ring* does not apply to cases where the prior violent felony, the prior capital felony, or the

under-sentence-of-imprisonment aggravating factor is applicable."). *Hurst* does not apply.

Harmless error

Furthermore, any error was harmless. IB at 13. If even there had been a violation of the Sixth Amendment right-to-a-jury-trial, violations of the right to a jury trial, including *Ring* and *Hurst* claims, are subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)(finding that error in the judge determining the issue of materiality rather than properly submitting the materiality issue to the jury was harmless). Both the United States Supreme Court and this Court have held that violations of the right-to-a-jury-trial are not structural error. *Washington v. Recuenco*, 548 U.S. 212, 222, 126 S.Ct. 2546, 2553, 165 L.Ed.2d 466 (2006)(relying on *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), and holding that the "failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error"); *Galindez v. State*, 955 So.2d 517, 524 (Fla. 2007)(holding harmless error analysis applies to *Apprendi* and *Blakely* error). While opposing counsel cites Justice Anstead's observation in a dissent that the denial of the right-to-a-jury-trial is always harmful, that observation is simply not accurate. Indeed, the opposite is true, as *Recuenco*, *Neder*, and *Galindez* firmly establish.[4]

[4] The United States Supreme Court remanded the *Hurst* case to the Florida Supreme Court for a harmlessness determination because the Court "normally leaves it to state courts to consider whether

Opposing counsel's reliance on *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), is misplaced. IB at 14. *Sullivan* concerned a flaw in the reasonable-doubt jury instruction which was structural error, not subject to harmless error review. The United States Supreme Court has itself rejected the analogy to *Sullivan* regarding this type of error. *Neder*, 527 U.S. at 11-13, 119 S.Ct. at 1834-35. As the *Neder* Court observed, explaining the difference and why an omission of an element of the crime was subject to harmless error, a flawed beyond-a-reasonable-doubt instruction has the effect of vitiating "all the jury's findings" but, "in contrast," an omission of an element does not have the effect of vitiating "***all*** the jury's findings." *Neder*, 527 U.S. at 11, 119 S.Ct. at 1834 (emphasis in original). *Sullivan* is simply not on point but both *Recuenco* and *Galindez* are directly on point.

Furthermore, *Ring* errors are of greater magnitude than *Hurst* errors. While the Arizona Supreme Court rarely found *Ring* errors to be harmless in any particular case, that was due to the magnitude of the error. *State v. Ring*, 65 P.3d 915, 946 (Ariz. 2003). Arizona's death penalty statute, which was at issue in *Ring*, however, was judge-only capital sentencing. Florida's death penalty statute, in contrast, as the *Ring* Court itself noted, is a hybrid system involving both a judge and a jury. *Ring*, 536 U.S. at 608, n.6, 122 S.Ct. at 2442, n.6 (noting that Arizona committed

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an error is harmless, and we see no reason to depart from that pattern here." *Hurst*, 136 S. Ct. at 624. The issue of harmlessness was raised in the briefs in *Hurst*, so if the Court thought the error was structural, the Court would have addressed that issue, not remand to this Court.

both factfinding and the ultimate sentencing decision entirely to judges but that four States, including Florida, "have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations."). Florida's scheme is judge-plus-jury sentencing, not judge-only sentencing. In the Arizona cases, there was no jury but in Florida there was a jury. This is not a case where there was no jury at all. Hodges' jury recommended death by a vote of 10 to 2, which is exactly what the new death penalty statute requires. *Hodges*, 55 So. 3d at 542. While the jury participation was less than the law currently requires under *Hurst*, there was jury participation. Any error is even more harmless when there was a jury.

The trial court found five aggravating circumstances: 1) the offense was committed by person under sentence of imprisonment; 2) the defendant had been convicted of a prior violent felony; 3) the offense was committed during commission of or attempt to commit sexual battery; 4) the offense was committed for pecuniary gain; 5) and the offense was especially heinous, atrocious, or cruel (HAC). *Hodges*, 55 So. 3d at 542. Neither the under-sentence-of-imprisonment nor the prior-violent-felony aggravating circumstance have to be found by the jury under the existing caselaw, as explained above.

And, even if *Hurst* requires the jury to find all non-recidivist aggravators, any rational jury would have found the remaining three aggravating circumstances.[5] If the jury had been given a special

[5] The rational jury test is the harmless error test the Court employed in *Neder* which dealt with this exact type of error. The Court stated that the harmless-error inquiry is whether it was

verdict form asking them to find that the aggravators of the offense was committed during commission of, or attempt to commit, sexual battery; that the offense was committed for pecuniary gain; and that the offense was especially heinous, atrocious, or cruel (HAC), the jury would have done so. Regarding the sexual battery aggravator, as this Court noted, the victim's "pants and panties were pulled down to her legs." *Hodges*, 55 So. 3d at 520. Regarding the pecuniary gain aggravator, it was undisputed that the victim's purse was taken and the victim's daughter testified that she saw the perpetrator escaping from the victim's house "carrying something." *Hodges*, 55 So. 3d at 519. Regarding the HAC aggravator, the medical examiner testified that the victim had two blows to the head and stab wounds to her neck which cut her jugular vein and then a claw hammer and knife were found next to her body. *Hodges*, 55 So.3d at 520. The jury also would have found the HAC aggravator. Any error was harmless.

Remedy

Even if the right-to-a-jury-trial was violated and the error was not harmless, the appropriate remedy is a new penalty phase using the new statute, not a life sentence. Any capital murder committed

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"clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Neder, 527 U.S. at 18, 119 S.Ct. at 1838. The *Neder* Court then explained to "set a barrier so high that it could never be surmounted would justify the very criticism that spawned the harmless-error doctrine in the first place: 'Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.'" *Id.* quoting R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50 (1970).

before the enactment of the new death penalty statute may be tried under the new statute without *ex post facto* concerns under the United States Supreme Court precedent of *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). As the Fifth District recently concluded, based on *Dobbert*, trying a defendant under the new statute does not violate the *ex post facto* clause. *State v. Perry,* 2016 WL 1061859, 5D16-516 (Fla. 5th DCA March 16, 2016)(certifying the issue to this Court).[6]

Hodges asserts that he is entitled to a life sentence. But *Dobbert* also makes it clear that such a defendant cannot claim he is automatically entitled to a life sentence because the statute in effect at the time was held unconstitutional. The High Court rejected Hodges' argument decades ago in *Dobbert*. *Knapp v. Cardwell*, 667 F.2d 1253, 1262-63 (9th Cir. 1982)(describing the facts, arguments made, and holding of, *Dobbert*). Indeed, federal courts have rejected any *ex post facto* violation attack on applying a new statute when Delaware changed its statute in the wake of *Ring* based on the holding in *Dobbert*. *See Hameen v. State of Delaware*,

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[6] Nor are any double jeopardy concerns present regarding resentencings that bridge Florida's old and new death penalty statutes. Double jeopardy only prohibits a new penalty phase when a defendant was originally acquitted of death. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). There must be an acquittal or an implied acquittal to invoke the protection of the double jeopardy clause, which would, in the capital context, mean a finding of no aggravating circumstances. There was no acquittal at the first penalty phase because the jury recommended death under the old statute. A defendant who was originally sentenced to death based on a jury recommendation of death can have no valid double jeopardy claim regardless of the change in the statute from 7-to-5 to 10-to-2 because he was not acquitted of anything. There is no acquittal of an aggravator if the jury recommended death.

212 F.3d 226 (3d Cir. 2000). If this Court finds a harmful violation of *Hurst*, the proper remedy is a remand for a second penalty phase.

Opposing counsel's reliance on § 775.082(2) and *Donaldson v. Sack*, 265 So.2d 499 (Fla. 1972), is misplaced. IB at 11. The provision of the penalties statute, § 775.082(2), only applies if the death penalty itself is declared unconstitutional, which *Hurst* did not do. A State may constitutionally impose a death sentence for murder in the wake of *Hurst*, it simply must have more jury involvement before doing so. And, in *Donaldson*, this Court held, in the wake of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), that trial courts lacked jurisdiction in capital cases "until any legislation which may revive 'capital cases.'" This Court explained that, in light of *Furman*, there were no capital cases "until new legislation" which may revive the class of capital cases. *Donaldson*, by its own qualifying language, only applied to the interim between *Furman* and when a new death penalty statute was enacted. But once the new death penalty statute was enacted to fix the *Furman* problem, the class of capital cases again existed and all trial courts then again had jurisdiction. And *Dobbert* made it clear that the new death penalty statute enacted in the wake of *Furman*, could constitutional be applied to cases, such as *Donaldson*. Here, a new death penalty statute was enacted in the wake of *Hurst* and was signed by the Governor on March 7, 2016. HB 7101. A trial court would have jurisdiction over any new penalty phase granted to Hodges. As to § 775.082(2), the *Donaldson* Court clarified that that statute was "not before us for review."

Donaldson, 265 So.2d at 505. It is *Dobbert*, not *Donaldson*, that is on point.

Accordingly, the *Hurst* claim should be denied.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the denial of postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing SUPPLEMENTAL ANSWER BRIEF has been furnished via the e-portal to Robert A. Norgard of Norgard, Norgard, & Chastang, P.O. Box 811 Bartow, FL 33831 (863) 533-8556 this 25th day of March, 2016.

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Counsel certifies that this brief was typed using Courier New 12.