IN THE SUPREME COURT OF FLORIDA

WILLIAM M. KOPSHO,
Appellant,

v. **CASE NO. SC15-1256**

STATE OF FLORIDA,
Appellee.
_____/

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

SUPPLEMENTAL BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

STACEY E. KIRCHER
Assistant Attorney General
Florida Bar No. 050218
Office of the Attorney General
444 Seabreeze Blvd., Ste. 500
Daytona Beach, Florida 32118
Telephone: (386) 238-4990
Facsimile: (386) 226-0457
capapp@myfloridalegal.com [*and*]
stacey.kircher@myfloridalegal.com

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

This supplemental answer brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Kopsho." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, or the State.

STATEMENT OF THE CASE AND FACTS

The Defendant was tried, convicted and sentenced to death (for the second time) in February 2009 for the first-degree murder of his wife, Lynne Kopsho. This Court's (second) direct appeal opinion in *Kopsho v. State*, 84 So. 3d 204 (Fla. 2012), provided the following summary of the aggravators and mitigators found by the trial court:

> Kopsho was sentenced to death on July 2, 2009. The trial judge found four aggravating circumstances: **(1) that at the time of the murder Kopsho was under a sentence of imprisonment or on felony probation (minimal weight); (2) that Kopsho had committed a prior violent felony (great weight); (3) that the murder was committed during an armed kidnapping (moderate weight)**; and (4) that the murder was cold, calculated, and premeditated (great weight).
>
> The trial judge found no statutory mitigating circumstances and the following nonstatutory mitigating circumstances: (1) that Kopsho suffered from mental or emotional disturbance (moderate weight); (2) was reared in an unloving home (little weight); (3) was subjected to emotional and physical abuse as a child (little weight); (4) was abandoned by his mother at age sixteen (little weight); (5) was sent to juvenile detention at age sixteen (little weight); (6) was housed with violent criminals for eight months at age eighteen (little weight); (7) was beaten while at juvenile detention (little weight); (8) was a good brother (little weight); (9) was a good father (little weight); (10) that

> society would be protected by a life sentence (little weight); (11) that Kopsho made voluntary statements and was cooperative (little weight); (12) that he did not flee and assisted in his arrest (little weight); (13) that the murder occurred in the context of marital discord (little weight); (14) that Kopsho was a knowledgeable and helpful employee, was dependable and performed excellent work, and attended bible studies (little weight).

Kopsho v. State, 84 So. 3d at 209-11 (bold emphasis supplied).

Appellant's notice of appeal to this Court was filed May 26, 2015. The State filed its Answer Brief on October 15, 2015. Briefing has been completed and oral argument is scheduled for March 10, 2016. On January 12, 2016, the Supreme Court decided *Hurst v. Florida*, 136 S.Ct. 616, (2016). This Court issued an order on January 29, 2016, directing the parties to brief *Hurst*'s impact, if any, upon the pending appeal in this post-conviction case.

SUMMARY OF THE ARGUMENT

Any claim based on *Hurst* is procedurally barred because Kopsho never raised or preserved any *Ring* claim on direct appeal. Kopsho is not entitled to relief based on *Hurst* where the jury necessarily found Kopsho eligible for a death sentence by its guilt phase findings that he had committed a prior violent felony; was under a sentence of imprisonment or on felony probation; and committed the contemporaneous offense of Armed Kidnapping. *Hurst* is not retroactive and has no application to this post-conviction case. Finally, any *Hurst* error, even if preserved, could only be harmless under the facts of this case.

ARGUMENT

In this supplemental brief, Appellant asserts that *Hurst* entitles him to a life

sentence; a new penalty phase; or a remand for an evidentiary hearing in trial court. None of these contentions have any merit.

I. ***Hurst* does not entitle Kopsho to a life sentence or a new penalty phase.**

Kopsho first presents a plainly meritless argument that *Hurst* entitles him to a life sentence. However, *Hurst* did not determine capital punishment to be unconstitutional; *Hurst* merely invalidated Florida's procedures for implementation, finding that they *could* result in a Sixth Amendment violation if the judge makes factual findings which are **not supported by a jury verdict**. Therefore, Section 775.082(2), Fla. Stat. does not apply, by its own terms. That section provides that life sentences without parole are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional," and was enacted following *Furman v. Georgia*, 408 U.S. 238 (1972), in order to fully protect society in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional. This provision, for example, applied in *Coker v. Georgia*, 433 U.S. 584 (1977), where the United States Supreme Court held that capital punishment was not available for the capital felony of raping an adult woman.

Although Kopsho suggests that this Court used similar language to require the commutation of all death sentences to life following *Furman* in *Donaldson v.*

Sack, 265 So. 2d 499 (Fla. 1972), Kopsho is misreading and oversimplifying the *Donaldson* decision. *Donaldson* is not a case of statutory construction, but one of jurisdiction. Based on our state constitution in 1972, which vested jurisdiction of capital cases in circuit courts rather than the criminal courts of record, *Donaldson* held that circuit courts no longer maintained jurisdiction over capital cases since there was no longer a valid capital sentencing statute to apply. *Donaldson* observed that the new statute, § 775.082(2), was conditioned on the invalidation of the death penalty, but clarifies, "[t]his provision is not before us for review and we touch on it only because of its materiality in considering the entire matter." (*Id*. at 505).

The focus and primary impact of the *Donaldson* decision was on those cases which were pending for prosecution at the time *Furman* was released. *Donaldson* does not purport to resolve issues with regard to pipeline cases pending before the Court on appeal, or to cases that were already final at the time *Furman* was decided. This Court's determination to remand all pending death penalty cases for imposition of life sentences in light of *Furman* is discussed in *Anderson v. State*, 267 So. 2d 8 (Fla. 1972). *Anderson* explains that, following *Furman*, the Attorney General filed a motion requesting that this Court relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position that the death sentences that were imposed were illegal sentences. There is no legal reasoning or

analysis to explain why commutation of 40 sentences was required, but it is interesting to observe that this was before the time that either this Court or the United States Supreme Court had determined the appropriate rules for retroactivity, as in *Teague v. Lane*, 489 U.S. 288 (1989), and *Witt v. State*, 387 So. 2d 922 (1980).

At any rate, there are several cogent reasons for this Court to reject the blanket approach of commuting all capital sentences currently pending before this Court on direct appeal. *Furman* was a decision that 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). The Court held that the death penalty, as 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 would be possible. The situation following *Furman* simply has no application to the limited procedural ruling issued by the Supreme Court in *Hurst*. Appellant's bold assertion that "*Hurst* removed capital offenses … from Florida law" is simply incorrect. (*SIB*

at 3).

II. Remand to the trial court would serve no purpose.

Kopsho's case was final on direct appeal on October 1, 2012, when the United States Supreme Court denied *certiorari*. Any successive motion could only be considered timely by the post-conviction court if Kopsho met the requirements of Rule 3.851(d) which provides an exception for claims that are based on newly discovered evidence or a newly recognized constitutional right that has been held to apply retroactively. *Fla. R. Crim. P*. 3.851(d)(2)(A) & (B). *Hurst* granted no new constitutional right for Kopsho, who was tried, convicted, and found to deserve death, by a jury of his peers in accordance with Florida law and federal law at the time of his trial, is not entitled to any relief. Consequently, *Hurst* can have no application to this case unless and until either this Court or the Supreme Court determines that it should apply retroactively. Furthermore, this Court would be the arbiter of whether sentencing error – if found – would be harmless, not the trial court.

III. *Hurst* is not retroactive.

In *Hurst*, the Court held that Florida's capital sentencing structure violated *Ring v. Arizona*, 536 U.S. 584 (2002), because it required a judge to conduct the fact-finding necessary to enhance a defendant's sentence. *Hurst*, at 624. In arriving at its decision, the Court looked directly to Florida's sentencing statute, finding that it does not "make a defendant eligible for death until 'findings *by the court* that such a person shall be punished by death.'" *Id*. at 620 (citing Fla. Stat. §

775.082(1) (emphasis in opinion). Also, under *Spaziano v. State*, 433 So. 2d 508, 512 (Fla. 1983), the jury's role in sentencing a defendant to capital punishment was viewed as advisory. *Spaziano*, 433 So. 2d at 512. Thus, the Supreme Court held Florida's capital sentencing structure, "which required the judge alone to find the existence of an aggravating circumstance," violated its decision in *Ring*, and overruled the prior decisions of *Spaziano*, and *Hildwin v. Florida*, 490 U.S. 638 (1989). *Hurst*, at 620-24.

The Supreme Court recently reaffirmed that the Sixth Amendment right underlying *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) did not apply to factual findings made in selecting a sentence for a defendant after the defendant has been found eligible to receive a sentence within a particular range. *Alleyne v. United States*, 133 S. Ct. 2151, 2161 n.2 (2013) ("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."); *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 to which a defendant is eligible).

Moreover, in *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016), the Court discussed the distinct determinations of eligibility and selection under Kansas' capital sentencing scheme. In doing so, 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. In fact, the Court stated that such determinations were not factual findings at all. *Id*. Instead, the Court termed the determinations regarding the existence of mitigating circumstances as "judgment call[s]" and weighing determinations "question[s] of mercy." *Id*.

When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. The Supreme Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions.[1] *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004).

[1] Those exceptions are: (1) a substantive rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or if it prohibits a certain category of punishment for a class of defendants because of their status or offense"; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating the fundamental

Kopsho appears to argue that *Hurst* created a new substantive rule**,** not a new procedural rule, or, that it created some new fundamental or structural error that is not subject to a harmless error analysis. Neither contention has any merit. In *Schriro v. Summerlin*, the Supreme Court directly addressed whether its decision in *Ring v. Arizona* was retroactive. *Summerlin*, 542 U.S. at 349. The Court held the decision in *Ring* was **procedural** and non-retroactive. *Id*. at 353. This was because *Ring* only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." *Id*. The Court concluded its opinion stating: "The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Summerlin*, 542 U.S. at 358. *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (holding *Crawford v. Washington*, 541 U.S. 36

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fairness and accuracy of the criminal proceeding. *Teague v. Lane*, 489 U.S. 288, 310–13 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002); *Butler v. McKellar*, 494 U.S. 407 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990)).

(2004) was not retroactive under *Teague* and relying extensively on the analysis of *Summerlin*).

Ring did not create a new constitutional right. That right was created by the Sixth Amendment guaranteeing the right to a jury trial.[2] If *Ring* was not retroactive, then *Hurst* cannot be retroactive as *Hurst* is merely an application of *Ring* to Florida. In fact, the decision in *Hurst* is based on an entire line of jurisprudence which courts have almost universally held to not have retroactive application. *See DeStefano v. Woods*, 392 U.S. 631 (1968) (*per curiam*) (holding the Court's decision in *Duncan v. Louisiana*, which guaranteed the right to a jury trial to the States was not retroactive); *McCoy v. United States*, 266 F.3d 1245, 1255, 1259 (11th Cir. 2001) (holding *Apprendi* not retroactive under *Teague*, and acknowledging that every federal circuit to consider the issue reached the same conclusion); *Varela v. United States*, 400 F.3d 864, 866–67 (11th Cir. 2005) (explaining that Supreme Court decisions, such as *Ring*, *Blakely*, and *Booker*, applying *Apprendi*'s "prototypical procedural rule" in various contexts are not retroactive); *Crayton v. United States*, 799 F.3d 623, 624-25 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 424 (2015) (holding that *Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013), which extended *Apprendi* from maximum to minimum

[2] The right to a jury trial was extended to the States in *Duncan v. Louisiana*, 391 U.S. 145 (1968). But, in *DeStefano v. Woods*, 392 U.S. 631 (1968) (*per curiam*), the Court declined to apply the holding of *Duncan* retroactively. *Apprendi* merely extended the right to a jury trial to the sentencing phase, when the State sought to increase the maximum possible punishment. *Apprendi*, 530 U.S. at 494.

sentences, did not, like *Apprendi* or *Ring*, apply retroactively); *State v. Johnson*, 122 So. 3d 856, 865-66 (Fla. 2013) (holding *Blakely* not retroactive in Florida).

Significantly, this Court has already decided that *Ring* does not apply retroactively in Florida. In *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005), this Court comprehensively applied the *Witt* factors to determine that *Ring* was not subject to retroactive application. This Court concluded:

> We conclude that the three *Witt* factors, separately and together, weigh against the retroactive application of *Ring* in Florida. To apply *Ring* retroactively "would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state ... beyond any tolerable limit." *Witt*, 387 So. 2d at 929-30. Our analysis reveals that *Ring*, although an important development in criminal procedure, is not a "jurisprudential upheaval" of "sufficient magnitude to necessitate retroactive application." *Id*. at 929. We therefore hold that *Ring* does not apply retroactively in Florida and affirm the denial of Johnson's request for collateral relief under *Ring*.

This Court specifically noted the severe and unsettling impact that retroactive application would have on our justice system (commuting 386 death sentences.) *Johnson*, 904 So. 2d at 411-12. Appellant's invitation for this Court to revisit this Court's decision is unpersuasive. He asserts that the decision need not be disruptive as this Court can simply reduce the 386 death sentences to life in prison. However, there is no support for this proposition. Neither the Federal nor Florida constitutions justify or authorize this Court to take such action. Such a decision would ignore the considerable interests of the citizens of this State and, in particular, victims' family members upon whom the emotional toll of such an

action cannot be measured.

State and federal courts have uniformly held that *Ring* is not retroactive. *See State v. Towery*, 204 Ariz. 386, 393-94, 64 P.3d 828, 835-36 (2003), *cert. dismissed*, 539 U.S. 986 (2003). ("Conducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice" and would be inconstant with the Court's duty to protect victim's rights under the Arizona Constitution); *Rhoades v. State*, 233 P.3d 61, 70-71 (2010), *cert. denied*, 562 U.S. 1258 (2011) (holding that *Ring* is not retroactive after conducting its own independent *Teague* analysis and observing, as the Supreme Court did in *Summerlin*, that there is debate as to whether juries or judges are the better fact-finders and that it could not say "confidently" that judicial factfinding "seriously diminishes accuracy."); *Colwell v. State*, 59 P.3d 463, 473 (2002), *cert. denied*, 540 U.S. 981 (2003) **(**applying *Teague* to find that *Ring* announced a new procedural rule that would not be subject to retroactive application).

This Court's decision in *Falcon v. State*, 162 So. 3d 954, 961 (Fla. 2015) provides no support for retroactive application in this case. In *Falcon*, this Court held that the Supreme Court in *Miller* announced a new substantive rule to bar mandatory life sentences without the possibility of parole for all juveniles. Subsequently, the Supreme Court decided that *Miller* announced a new substantive rule that was retroactive. The fact the ruling was described as substantive, not

procedural, was critical to the retroactivity analysis. Since both this Court and the Supreme Court has held that *Ring* announced a new procedural rule, not a substantive rule, *Falcon* has no application to this case. In summary, since both the Supreme Court and this Court have held that *Ring* does not apply retroactively, *Hurst* should not apply retroactively. *See Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014) (observing "if *Apprendi*'s rule is not retroactive on collateral review, then neither is a decision applying its rule") (citing *In re Anderson*, 396 F.3d 1336, 1340 (11th Cir. 2005)). Appellant is not entitled to relief.

IV. Kopsho's Sixth Ammendment Rights were not violated and any error could only be harmless

Appellant takes the position that any *Hurst* error is structural and not subject to harmless error review. That position is in stark contrast to the Supreme Court's own, where the Court stated:

> Finally, we do not reach the State's assertion that any error was harmless. *See Neder v. United States*, 527 U.S. 1, 18-19 (1999) (holding that the failure to submit an uncontested element of an offense to a jury may be harmless). This 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. *See Ring*, 536 U.S. at 609 n.7."

Hurst, at 624. It seems clear that any error, contrary to Appellant's position, is subject to harmless error review.

Furthermore, in this case the jury convicted Kopsho of the contemporaneous offense of Armed Kidnapping. The jury also found that Kopsho had been under a

sentence of felony probation and had committed a prior violent felony. Each of these facts, independently, and considered together, remove Kopsho from any considerations under *Ring/Hurst.* Hurst was in a distinctly different position from Kopsho. *Hurst* presented the United States Supreme Court with a 'pure' claim under *Ring,* where the jury neither gave a unanimous recommendation nor were any of the established aggravating circumstances identifiable as having come from a jury verdict. *Hurst,* 147 So. 3d at 445–47. In Florida, a defendant is *eligible* for a capital sentence if at least one aggravating factor applied to the case. *See Ault v. State*, 53 So. 3d 175, 205 (Fla. 2010); *Zommer v. State*, 31 So. 3d 733, 752-54 (Fla. 2010); *State v. Steele,* 921 So. 2d 538, 540 (Fla. 2005). In Kopsho's case, a unanimous jury convicted him of Armed Kidnapping, and based on this convictions, he was eligible for his 10-2 reccomendation of death. Unlike Hurst, Kopsho's death sentence eligibility is supported by unanimous jury findings.

Even still, *Hurst* does not hold there is a constitutional right to any jury sentencing. Despite Appellant's transposition of the non-synonmous words "verdict" and "sentence", the argument that a jury has to find each and every aggravator is without merit. (*SIB* at 15). Once the jury found one aggravator, Kopsho became eligible for the higher range penalty-death. In *Alleyne*, 133 S. Ct. at 2162-63, the Court explained that "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime." In Florida, only one aggravating

factor is necessary to support the higher range penalty-death. This Court has consistently rejected *Ring* claims where the defendant is convicted of a qualfying contemporaneous felony. *Ellerbee v. State*, 87 So. 3d 730, 747 (Fla. 2012).

Moreover, the Supreme Court has recognized the distinction of an enhanced sentence supported by a prior conviction. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (permitting judge to impose higher sentence based on prior conviction); *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). Consequently, this Court's well-established precedent that any *Ring* claim is harmless in the face of Kopsho's contemporaneous qualifying felony conviction for Armed Kidnapping was not disturbed by *Hurst*.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the denial of post-conviction relief entered below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of February, 2016, I electronically filed the foregoing with the Clerk of the Florida Supreme Court by using the e-portal filing system which will send a notice of electronic filing to the following: Rueben A. Neff (**neff@ccmr.state.fl.us; support@ccmr.state.fl.us)** and Eric Pinkard (**pinkard@ccmr.state.fl.us; support@ccmr.state.fl.us)**, Assistants CCRC, Law Office of the Capital Collateral Regional Counsel - Middle Region, 12973 N. Telecom Parkway, Temple Terrace, Florida 33637-0907.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Stacey E. Kircher

STACEY E. KIRCHER
Assistant Attorney General
Florida Bar No. 050218
Office of the Attorney General
444 Seabreeze Blvd., Ste. 500
Daytona Beach, Florida 32118
Telephone: (386) 238-4990
Facsimile: (386) 226-0457
capapp@myfloridalegal.com [*and*]
stacey.kircher@myfloridalegal.com

COUNSEL FOR APPELLEE