IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1256

WILLIAM M. KOPSHO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References to the State's Supplemental Answer Brief will be in the form [SAB]/[page number]. References to the Record on Appeal will be in the form (Vol. # R. 123).

ARGUMENT

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

I. Mr. Kopsho Preserved His Ring Claim

In her Supplemental Brief, Appellee claims that Mr. Kopsho is procedurally barred from claims based on Hurst v. State, 136 S.Ct. 616 (2016), "because Kopsho never raised or preserved any Ring claim on direct appeal." SAB/2. Mr. Kopsho raised challenges to Florida's death penalty statute in pretrial motions prior to his second trial. Vol. 17, R. 2900-3119. Mr. Kopsho also raised a challenge to Fla. Stat. § 921.141 in section VIII of his initial direct appeal, relating to Mr. Kopsho's second direct appeal, filed on February 3, 2010. In section VIII, Mr. Kopsho specifically sought relief on the theory that Florida misapplied Ring v. Arizona, 536 U.S. 584 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000), and that Mr. Kopsho's Sixth Amendment right was violated when the trial court failed to seek juror decisions as to each aggravating factor and a unanimous jury recommendation of the death penalty. See Initial Brief of Appellant, Case No. SC09-1383 (February 3, 2010). Finally, Mr. Kopsho challenged Florida's death penalty scheme on Sixth Amendment grounds through Issue V of his Initial Brief of Appellant in this case.

Mr. Kopsho preserved his Hurst claim at every procedural stage of his case, from the trial to the appellate level. Any claim that he did not ignores the record in Mr. Kopsho's case.

II. The Limits in Application of Alleyne and Carr to Mr. Kopsho And Fla. Stat. § 921.141

Appellee relies on Alleyne v. United States, 133 S.Ct. 2151 (2013) and Kansas v. Carr, 136 S.Ct. 633 (2016) in arguing limitations of the Supreme Court's ruling in Hurst v. Florida, 136 S.Ct. 616 (2016). Appellee argues that, when read in conjunction with Alleyne and Carr, Hurst only found that it was a judge's role as the fact-finder on aggravating circumstances, within Florida's death penalty framework, that violated its decision in Ring. See SAB/7. Alleyne and Carr do not support this limitation of Hurst. Hurst held that the very decision maker of critical issues of fact and sufficiency relating to a death sentence be a jury, not a judge. See Hurst, 2016 WL at 1, 6-7, 10.

a. Analysis of Alleyne v. United States, 133 S.Ct. 2151 (2013)

Alleyne specifically dealt with a defendant charged with using or carrying a firearm in relation to a crime of violence. Id. at 2155. The defendant faced an increase of his minimum mandatory sentence of five (5) years to seven (7) based on a statutory aggravator ("if the firearm is brandished"). Id. After a jury found the defendant guilty of the underlying crime, the defendant received a sentence of seven (7) years based on the judge's factual determination that the defendant brandished a

firearm. Id. at 2156. This factual finding was not based on a finding by the jury. The Supreme Court vacated the lower court's seven (7) year sentence and remanded the case for resentencing consistent with those facts actually found by the jury. Id. at 2163.

The Alleyne Court noted that a crime consists of "every fact which 'is in law essential to the punishment sought to be inflicted.'" Id. at 2159. Furthermore, a fact is by definition an element of a crime if it increases the punishment of said crime. Id. The Alleyne Court held that a fact requiring the imposition of a minimum sentence, seeing as that it affects the possible punishment a defendant receives, is an element within the conception of Apprendi and therefore must be found by the jury beyond a reasonable doubt. Id. In order to limit its holding, the Alleyne Court also noted that the broad sentencing discretion enjoyed by judges does not violate the Sixth Amendment. Id. "[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." Id., citing Apprendi 530 U.S. at 519.

Of importance, Alleyne was a case where the New Jersey statutory language analyzed did not contain any wording as to how the statutory aggravator was to be weighed by the fact-finder. The statute did not create any form of fact weighing that could be viewed as an element. The Alleyne Court's analysis of New Jersey's statute revolved around language that noted a factual finding of the analyzed aggravator led

to a minimum sentence of seven (7) years. Alleyne, at 2155. Within Alleyne's framework, the New Jersey statute's minimum mandatory punishment of seven years could only occur after a proper jury finding of the aggravator, but that the setting of the specific punishment within the bounds of the law fell upon the judge. See Id.

Florida's death penalty statute specifically notes that a jury's finding of death must be based on "(b) whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist[.]" Fla. Stat. § 921.141(2)(b). Florida, through its statutory language and the framework imposed by Hurst, set the aforementioned weighing as a factual finding in and of itself. Within Alleyne's framework, a jury's death sentence advisory can only occur after a specific factual finding that the aggravating circumstances outweigh the mitigating circumstances. The actual setting of the death penalty within the bounds of the law (the range being to follow the jury's verdict or impose a life sentence) falls upon the judge.

b. Analysis of Kansas v. Carr, 136 S.Ct. 633 (2016)

In Carr, the United States Supreme Court reviewed Kansas's Supreme Court's decision to overturn three death sentences based on a failure of the trial judge to instruct the jury explicitly as to the burden of proof relating to mitigating circumstances. Id. at 637. Gleason and the Carr brothers challenged, on Eighth Amendment grounds, this failure to instruct their juries as to the burden of proof for

mitigating circumstances. The Carr Court relied on Eighth Amendment grounds to issue their holding, noting that "[a]mbiguity in capital-sentencing instructions gives rise to constitutional error only if "there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way that prevents the consideration of the constitutionally relevant evidence.'" Id. at 642. Finding no reasonable likelihood that the juries in the Gleason or Carr trials misapplied the jury instructions in a manner depriving consideration of relevant evidence, the Carr Court reversed the Supreme Court of Kansas' judgments and remanded for further proceedings. Id. at 646.

The Hurst and Carr decisions rest on separate frameworks relating to their corresponding constitutional amendments. In her Supplemental Brief of Appellee, Appellee appears to rely on Carr's brief dicta related to eligibility and selection phases in death penalty cases. The specific passage follows:

> "Approaching the question in the abstract, and without reference to our capital-sentencing case law, we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination (the so-called "selection phase" of a capital-sentencing proceeding). It is possible to do so for the aggravating-factor determination (the so-called "eligibility phase"), because it is a purely factual determination."
>
> Id. at 642.
>
> Appellee then extrapolates from this dicta, noting the
>
> "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."

SAB/8.

The Supreme Court was analyzing a separate state's death penalty statute under an Eighth Amendment framework. The opinion in Carr simply does not create a bright line rule forcefully reconstructing every State's death penalty statute, including hybrid state's such as Florida, to contain a selection phase and eligibility phase with each possessing characteristics as decreed by the Supreme Court. This passage did not relate to any analysis as to what a jury must actually find to satisfy the Sixth Amendment and at no point did any other passage in Carr do so.

Carr simply does not apply to any interpretation of Hurst or Hurst's application. Mr. Kopsho's Hurst claim relies on separate constitutional and statutory grounds. Carr simply does not apply here.

III. Hurst Does Not Mandate The Application of Harmless Error Analysis And a Hurst Error is Not Harmless in Any Case

Appellee asserts that Hurst, in its statement that the "[Supreme] Court normally leaves it to state courts to consider whether an error is harmless," somehow declared that any error arising here from Florida's death penalty scheme is subject to harmless error review. The plain language of Hurst's statement merely notes that the Florida Supreme Court is free to decide on its own whether any error here is harmless. There is no position taken by the Supreme Court and to claim so injects wording simply not present in Hurst.

Appellee then contends that, because Mr. Kopsho was convicted here of the contemporaneous offense of armed kidnapping, along with a previous jury's verdict on a prior violent felony, which led to a sentence of felony probation, Mr. Kopsho is death eligible for a capital sentence since Florida only requires that at least one aggravating factor be found by the jury. SAB/14. It is important to note that the jury's factual finding in the guilt phase of the trial as to armed kidnapping was limited to the convictions themselves. The jury made no findings regarding whether the murder itself was committed while Mr. Kopsho was engaged in the commission of an armed kidnapping.

In addition, to claim that the existence of only one aggravating circumstance automatically mandates eligibility to be sentenced to death under Fla. Stat. § 921.141 ignores the very language of said statute. In Ring, the factual determination required by the Arizona statute before a death sentence was authorized was the presence of at least one aggravating factor. In contrast, Hurst explained that the requisite facts required to render a defendant death-eligible under Fla. Stat. § 921.141(3) are whether "sufficient aggravating circumstances exist" and whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Hurst, 136 S.Ct. at 622. Neither of these factual determinations were made by Mr. Kopsho's jury. Florida's statute, unlike Arizona's, does not state that if one aggravating circumstance is established, the defendant may be sentenced to death,

or that the existence of one aggravator is sufficient to warrant a sentence of death. The plain language of the statute requires that the fact-finder hold that there are "sufficient aggravating circumstances" before a death sentence can be returned. Fla. Stat. 921.141(3). Because Mr. Kopsho's jury made no findings as to the facts necessary to make a defendant eligible for death, the State "cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring requires." Id.

CONCLUSION

For the reasons discussed herein, as well as in Mr. Kopsho's Supplemental Initial Brief, Mr. Kopsho is entitled to have his death sentence vacated and have a life sentence imposed or, in the alternative, new penalty phase proceedings consistent with Hurst in order to preserve guarantees of the Sixth Amendment. See Id., 620-24.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 22, 2016, we electronically filed the foregoing **Supplemental Reply Brief of the Appellant** with the Clerk of the Florida Supreme Court by using the CM/ECF system which will send a notice of electronic filing to: Stacey Kircher, Assistant Attorney General stacey.kircher@myfloridalegal.com, capapp@myfloridalegal.com; and by U.S. Mail to William Kopsho, DOC# 122787, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026.

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CERTIFICATE OF COMPLIANCE

We hereby certify that a true copy of the foregoing Supplemental Reply Brief of Appellant, was generated in Times New Roman, 14-point font, pursuant to Fla. R. App. P. 9.210.

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