IN THE SUPREME COURT OF FLORIDA

PAUL DUROUSSEAU,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC15-1276

SUPPLEMENTAL ANSWER BRIEF OF RESPONDENT

PAMELA JO BONDI
ATTORNEY GENERAL

CARINE L. MITZ
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 11943
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
Primary E-Mail:
capapp@myfloridalegal.com
Secondary E-Mail:
carine.mitz@myfloridalegal.com
(850) 414-3300 Ext. 3580
(850) 487-0997 (FAX)

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PRELIMINARY STATEMENT

The State of Florida files this Supplemental Answer Brief in response to this Court's order of May 16, 2016.

ARGUMENTS

ISSUE I

HURST SHOULD BE CONSTRUED MORE NARROWLY (RESTATED)

In *Hurst v. Florida*, 136 S.Ct.616 (2016), the United States Supreme Court held 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.

Petitioner submits that the *Hurst* Court found three aspects of Florida's capital sentencing scheme unconstitutional: "(1) that the judge rather than the jury had to make the 'critical findings' that the aggravators were **sufficient** to outweigh the mitigators, (2) that the jury was not required to make **specific** findings as to the aggravators and mitigators, and (3) that the jury's decision was not **binding** upon the trial court." (Supp. IB at 14-15) *Hurst* only invalidated Florida's procedures for implementation of a death sentence, finding that they facially could result in a Sixth Amendment violation if the judge makes factual findings, which are not supported by a jury verdict. *Hurst* is not the "wholesale repudiation of Florida's statutory scheme" as Petitioner purports it to be (Supp. IB at 15);

rather, it is an extension of *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

A proper harmless error analysis only requires that a court determine that a rational jury would have found one aggravating circumstance.

Unlike *Hurst*, Durousseau came to the penalty phase with a prior violent felony conviction – an aggravated assault and the jury during the guilt phase found him guilty of two contemporaneous felonies: robbery and sexual battery. Thus, there is no Sixth Amendment error.

ISSUE II

HURST CANNOT BE APPLIED RETROACTIVELY (RESTATED)

Petitioner submits that *Hurst* should be applied retroactively to his case, however this contention fails because *Hurst* does not apply retroactively to cases already final on direct review. *Schriro v. Summerlin*, 542 U.S. 348 (2004). Durousseau's case became final on October 3, 2011, when the United States Supreme Court denied the petition for writ of certiorari. *Durousseau v. Florida*, 132 S.Ct. 149, 181 L.Ed.2d 66, 80 USLW 3183 (2011).

Summerlin controls because the *Hurst* decision resulted in a new **rule of procedure**, which altered only who decides whether any aggravators exist, thus altering only the fact-finding procedure (as opposed to a new substantive rule).

> *Ring's* holding is properly classified as procedural. *Ring* held that 'a sentencing judge, sitting without a jury, [may not] find an aggravating circumstance necessary for imposition of the death penalty.' This holding did not alter the range of conduct Arizona law subjected to the death penalty. It could not have; it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize. Instead, *Ring* 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. Rules that allocate decision-making authority in this fashion are prototypical procedural rules, a conclusion we have reached in numerous other contexts.

Summerlin, 542 U.S. at 353 (internal citations omitted). *See Turner v. Crosby*, 339 F.3d 1247, 1283 (11th Cir. 2003) (concluding that retroactivity analysis of *Apprendi* applies equally to *Ring*, and that, under the *Teague* doctrine, *Ring* does not apply retroactively to Turner's death sentence); *see also Welch v. United States*, 136 S.Ct.1257 (2016) (holding that new constitutional rules of criminal procedure generally do not apply retroactively to cases on collateral review). *Ring* was an extension of *Apprendi*. Because *Apprendi* was a procedural rule, it axiomatically follows that *Ring*, and now *Hurst*, is also a procedural rule.

Likewise, *Hurst* is not retroactive under Florida's *Witt* analysis. While the first two prongs of *Witt* are satisfied; that is, *Hurst* is a decision, which emanates from the United States Supreme Court; and (2) is constitutional in nature, the third prong cannot be met. *Hurst* does not constitute a development of

fundamental significance. *Hurst* does not prohibit the government from criminalizing certain conduct or imposing certain penalties. It is procedural in nature – it does not alter the range of conduct or class of persons the law punishes; it does not change the elements of the offense of murder punishable by death, and does not greatly enhance the fairness or accuracy of death penalty proceedings. Further, this Court conducted a full-blown *Witt* analysis that consisted of twenty-four paragraphs in *Johnson v. State*, 904 So.2d 400 (Fla. 2005) and concluded that *Ring* is not retroactive.

Petitioner argues that this Court can no longer rely on its decision in *Johnson* because this Court "misunderstood the fundamental constitutional significance of *Ring* in its decision in *Bottoson . . .* which necessarily sabotaged its *Witt* analysis in *Johnson.*" (Supp. IB at 18) This Court correctly understood *Ring* at the time it decided *Johnson*. This is clear by the fact that the *Hurst* Court had to overrule two cases to reach its opinion. To accept Petitioner's argument, one would have to believe that the United States Supreme Court has been ignoring the fact that Florida has been violating the Sixth Amendment for several years.

Finally, Petitioner's attempt at having *Hurst* declared retroactive under *James v. State*, 615 So.2d 668 (Fla. 1993) also fails. At trial, James objected to the HAC jury instruction and

requested an expanded instruction; later, on appeal, he argued against the constitutionality of the instruction given to his jury. *Id.* at 669. While James' appeal was pending before this Court, the United States Supreme Court declared Florida's former HAC instruction inadequate. *See Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926 (1992). Because he had objected at trial and pursued it on appeal, the *James* Court opined that "it would not be fair to deprive him of the *Espinosa* ruling." *Id.* The Court acted more equitably than legally and avoided addressing retroactivity. Indeed the term "retroactive" is nowhere to be found in the majority's opinion. Justice Grimes' dissent, however, is instructive; he opined that, under *Witt*, *Espinosa*, should not be given retroactive effect, and described it as an "evolutionary refinement" as opposed to a "jurisdictional upheaval[]" or a "change of law of significant magnitude to require retroactive application." *Id.* at 670. He concluded by reminding the majority that "[i]t was deemed inappropriate to give retroactive effect to even such a dramatic and far-reaching change in the law as the requirement to give *Miranda* warnings. The change in Florida law which refined the instruction on heinous, atrocious, and cruel hardly warrants such unsettling treatment." *Id.* at 671.

In short, *Hurst* is not retroactive and for the reasons argued above, Durousseau should not get the benefit of the *Hurst* opinion.

ISSUE III

ANY ERROR IN DUROUSSEAU'S SENTENCE IS HARMLESS (RESTATED)

Petitioner claims that Sixth Amendment error occurred in his case and alleges that such error was necessarily "structural," and not amenable to a harmless error analysis. This argument must be rejected. 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. Surely, if the United States Supreme Court was of the opinion that the error in *Hurst* constituted structural error, it would not have remanded the matter to this Court for a harmless error analysis.

Additionally, this Court has been consistent in finding that deficient jury factfinding, in violation of the Sixth Amendment, can be, and often is, harmless beyond any reasonable doubt. *Johnson v. State,* 994 So.2d 960, 964-65 (Fla. 2008); *Galindez v. State*, 955 So.2d 517, 521-23 (Fla. 2007); *see also Pena v. State*, 901 So.2d 781, 783 (Fla. 2005)(failure to instruct jury on age requirement was not fundamental error).

Petitioner'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.

The determination that deficient factfinding under the Sixth Amendment can be harmless is cemented by *Washington v. Recuenco*, 548 U.S. 212 (2006), where the United States Supreme Court reversed a Washington state court holding that error under *Blakely v. Washington*, 542 U.S. 296 (2004), was structural in nature and could never be harmless. *Blakely* is an *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000)*/Ring v. Arizona*, 536 U.S. 584 (2002) decision which requires jury factfinding where a sentence is to be enhanced due to the defendant's use of a firearm. *See also Galindez v. State*, 955 So.2d 517, 524 (Fla. 2007) (holding harmless error analysis applies to *Apprendi* and *Blakely* error).

Furthermore, opposing counsel's logic applies to every other type of error and would be the end of the harmless error doctrine. *Goodwin v. State*, 751 So.2d 537, 539-41 (Fla. 1999) (detailing the history of the harmless error doctrine and explaining that before the doctrine, appellate courts routinely reversed convictions for almost every error committed during trial resulting in appellate courts being described as "impregnable citadels of technicality" and resulting in harmless

error statutes being enacted). The harmless error doctrine, by its very nature, requires an appellate court to "guess" what the jury would have done. Roger J. Traynor, THE RIDDLE OF HARMLESS ERROR (1970). Florida has a harmless error statute that requires appellate courts to affirm, if possible. § 924.33, Fla. Stat. (2015) (providing that no judgment shall be reversed unless the appellate court is of the opinion, "that error was committed that injuriously affected the substantial rights of the Petitioner" and that it "shall not be presumed that error injuriously affected the substantial rights of the Petitioner"). This Court can, and should, conduct a harmless error analysis in this case, as it has done for numerous other errors in the penalty phase in hundreds of capital cases, including for the improper finding of an aggravator.

Petitioner argues that because there are no jury findings on the requisite aggravating circumstances, it is not possible to review whether such findings would have occurred absent the *Hurst* error. This is incorrect. The trial court found the following four aggravators at the penalty phase as to Tyresa Mack's murder: (1) Durousseau was previously convicted of a felony involving the use or threat of violence (given great weight); (2) the murder was committed while the defendant was engaged in the commission of a robbery or sexual battery, which was found by the jury at the guilt phase (given great weight);

(3) the murder was committed for pecuniary gain (given little to moderate weight); and (4) the murder was especially heinous, atrocious, or cruel (HAC) (given great weight). *Durousseau v. State*, 55 So.3d 543, 549 (Fla. 2010).

Prior Violent Felony Convictions

Petitioner was convicted of aggravated assault in May, 2001. During its penalty phase presentation, the State submitted into evidence a copy of the judgment and sentence reflecting this conviction. (R/XXXVI 3190)

Hurst is based on *Ring* and *Ring*, in turn, is based on *Apprendi*. The holding in *Apprendi* was that any fact, "other than the fact of a prior conviction," that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. The exception for prior convictions in *Apprendi* was based on the recidivist exception established in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The *Almendarez-Torres* exception means that any recidivist aggravators may still be found by the judge alone in the wake of *Hurst*. Unlike Durousseau's case, *Hurst* did not involve any recidivist aggravators. Further, the *Hurst* Court did not overrule *Almendarez-Torres*; *Almendarez-Torres* is still good law in the wake of *Apprendi* and all its progeny including *Hurst*. *United States v. Nagy*, 760 F.3d 485, 488 (6th Cir. 2014)(stating

that *Alleyne* leaves "no doubt" that *Almendarez-Torres* is 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).

This Court has also 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, 1052-53 (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.2d 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."). Furthermore, the United States Supreme Court

denied certiorari review in three pipeline cases after *Hurst*, all of which involved recidivist aggravators (*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, (U.S. Jan. 25, 2016) (No. 15-6075) (under-the-sentence-of-imprisonment aggravator)); and *Hobart v. State*, 175 So.3d 191 (Fla. 2015), cert. denied, (U.S. Mar. 21, 2016) (No. 15-7476) (prior violent felony and during-the-commission-of-a-robbery aggravators), supporting the State's position that such a conviction necessarily removes a capital defendant from the proscriptions of *Ring*.

Murder committed during the course of a robbery or sexual battery

Without explaining why, Petitioner boldly avers that "[t]he State cannot rely on either of the prior violent felony convictions to survive harmless error analysis in this case." (Supp. IB at 21) He goes on to argue that "[w]ithout a specific jury finding that an aggravator had been proven beyond a reasonable doubt, the trial court had no authority under *Hurst* to enter a sentence of death on that aggravator. . . ." (Supp. IB at 21)

Petitioner's argument is flawed as jury findings are present in this case concerning his contemporaneous violent felony convictions. As part of its guilt phase verdict, the jury found

that Petitioner committed Mack's murder during the commission of two felonies: sexual battery and robbery. (R/VIII 1418; *see also* Sentencing Order at R/IX 1583)

Murder was committed for pecuniary gain

At trial, witnesses testified that a television, and a necklace and matching bracelet were missing from Mack's home. Scattered around her body where she was found were the contents of her purse. (R/IX 1586) Finally, the jury's guilt phase finding that the murder was committed during a robbery supports this aggravator.

HAC

Mack's body was discovered face down on a towel with a cord wrapped around her neck. The Medical Examiner testified that she found abrasions around Mack's lips, nose, and cheek area, consistent with her having moved her head from side to side while her head was forced into a towel or mattress beneath her. Mack had ruptured blood vessels in the whites of her eyes. The Medical Examiner opined that the cause of her death was asphyxia, but noted that when a person, such as Mack, struggles with her attacker, it takes longer to lose consciousness and die. Mack also had abrasions on both wrists, which the Medical Examiner opined could have been caused by a restraint. Lastly, there was evidence that Mack was sexually battered during her attack. (R/IX 1584-85)

In short, the evidence supporting the aggravators is overwhelming. *Neder* provides that "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Neder*, 527 U.S. at 17. Applying the harmless error test addressed above, it is apparent that, based on the evidence presented to support the aggravation, a rational jury would have reached the same sentencing recommendation.

This Court should conduct a harmless error analysis and, based on the evidence presented at the penalty phase, determine that any Sixth Amendment error as to the finding of any one of the aggravators was harmless.

ISSUE IV

FLORIDA STATUTE § 775.082(2) DOES NOT REQUIRE A REMAND FOR IMPOSITION OF A LIFE SENTENCE (RESTATED)

Petitioner asserts that this Court need not consider retroactivity or harmless error if it follows § 775.082(2), Fla. Stat. The statute on which he relies, however, does not apply. Because *Hurst* did not find that the death penalty was constitutionally prohibited, § 775.082(2) does not mandate a blanket commutation of death sentences as Petitioner requests. Should this Court determine that any error was not harmless, the

appropriate remedy would be a remand for a new penalty phase, not the automatic imposition of a life sentence.

Florida Statute § 775.082(2)

In *Hurst*, the United States Supreme Court held 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. Petitioner asserts that because *Hurst* concluded that the statute is facially invalid, he is entitled to be resentenced to life in accordance with § 775.082(2), Fla. Stat.

Clearly, *Hurst* did not determine capital sentencing to be unconstitutional; *Hurst* only invalidated Florida's procedures for implementation of a death sentence, finding that they facially could result in a Sixth Amendment violation if the judge makes factual findings which are not supported by a jury verdict. Therefore, § 775.082(2) 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 the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional, such as what occurred thereafter 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, life is warranted.

Although Petitioner 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), Petitioner 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; no "capital" cases existed, since the definition of capital referred to those cases where capital punishment was an optional penalty. *Donaldson* observes 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." *Donaldson*, 265 So.2d 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 direct 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), a case which 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 occurred before the time that either this Court or the United States Supreme Court had determined the current rules for retroactivity, as *Witt v. State*, 387 So. 2d 922 (1980) and *Teague v. Lane*, 489 U.S. 288 (1989), were both decided later.

There are several logical reasons for this Court to reject the blanket approach of commuting all capital sentences currently pending before this Court on direct appeal such as those which followed the *Furman* decision. *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.

By equating *Hurst* with *Furman*, Petitioner reads *Hurst* far too broadly. Hurst did not invalidate all Florida death sentences. After *Furman*, there were no existing capital cases left intact.

In Arizona, the Arizona Supreme Court rejected blanket commutation, finding that the unconstitutional portion of the statute could be severed to preserve pending death cases. *State v. Pandeli*, 161 P.3d 557 (Ariz. 2007). This is the approach this Court should take. This Court has repeatedly recognized its obligation to uphold any portion of the statute, to the extent there is a reasonable basis for doing so, based on the rule favoring validity. *Donaldson*, 265 So.2d at 501, 502-03; *Driver v. Van Cott,* 257 So.2d 541 (Fla. 1972); *Davis v. State*, 146 So.2d 892 (Fla. 1962).

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 contemporaneous felony, is apparent on the record. If there was a Sixth Amendment violation, the question shifts to the harmful impact of that error, and whether any prejudice to the defendant may have occurred. With this approach, this Court is respecting those death sentences, which can be salvaged upon finding that any potential constitutional error was harmless, while protecting the Sixth Amendment rights of defendants.

Since it is clear that § 775.082(2) only applies when the entire death penalty is stricken and not just when the procedures for implementation of the death penalty are stricken, it has no applicability here. Consequently, any argument that Petitioner's case should be remanded for imposition of a life sentence is erroneous. This Court should proceed to a harmlessness determination.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Petitioner's death sentence.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Richard Kuritz, Esquire via the eportal on the 31st day of May, 2016.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL
/s/ *Carine L. Mitz*
CARINE L. MITZ
ASSISTANT ATTORNEY GENERAL
Florida Bar No.: 0011943
PL-01, The Capitol
Tallahassee, FL 32399-1050
capapp@myfloridalegal.com
carine.mitz@myfloridalegal.com
Phone: (850) 414-3580
Attorney for Respondent