IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1441

LEONARDO FRANQUI,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

SUPPLEMENTAL BRIEF OF APPELLEE

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655
Primary: capapp@myfloridalegal.com
Secondary: Sandra.Jaggard@ myfloridalegal.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF CASE AND FACTS

The State relies on the statement of case and facts in its answer brief.

SUMMARY OF THE ARGUMENT

Defendant's request for relief based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), should be rejected.

ARGUMENT

DEFENDANT'S REQUEST FOR RELIEF BASED ON *HURST* SHOULD BE REJECTED.

Defendant contends that his is entitled to have his death sentence vacated and a life sentence imposed in light of the decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). However, Defendant is entitled to no relief because this issue is not even properly before this Court, and the arguments are meritless even if they were.

As this Court has recognized, it is not proper to raise an issue in a post conviction appeal that was not presented in the post conviction motion. *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988). Here, this matter is on appeal from the denial of a motion for post conviction relief that only raised a claim that Defendant was entitled to relitigate his claim that he is retarded in light of *Hall v. Florida*, 134 S. Ct. 1986 (2014). As such, all of the arguments being presented in this supplemental brief are not properly before this Court and should be rejected.

Even if the issue was properly presented, there would still be no basis for

relief. Acknowledging that this Court and the United States Supreme Court have already held that a determination that a defendant has a Sixth Amendment right to a jury determination of facts related to a sentence is not retroactive, *Johnson v. State*, 904 So. 2d 400 (Fla. 2005); *Hughes v. State*, 901 So. 2d 837 (Fla. 2005),[1] Defendant insists that *Hurst* is retroactive because it somehow akin to *Furman*. However, in doing so, Defendant does little more than misconstrue the holding of *Hurst* and misrepresent the nature of the error at issue.

Latching onto language from *Hurst* regarding what findings are made in a sentencing order, Defendant argues that *Hurst* held that a jury must find that there is "sufficient aggravation" and that there is "insufficient mitigation" before a death sentence can be imposed without violating the Sixth Amendment. However, in relying on this language, Defendant ignores that construing that language as the holding of *Hurst* is inconsistent with the language in which the Court itself described the holding of *Hurst* and the legal precedent on which *Hurst* was decided and would result in the Court deciding an issue in contravention to the principles of federalism embodied in the Constitution.

In section II of the opinion in *Hurst*, the Court held that Florida's capital sentencing statute was unconstitutional in light of *Ring v. Arizona*, 536 U.S. 584

[1] The United States Supreme Court has reached the same conclusion. *Schriro v. Summerlin*, 542 U.S. 348 (2004);

(2002). *Hurst*, 136 S. Ct. at 621-22. In doing so, it recognized that *Ring* had arisen from its prior decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Id.* at 621. It acknowledged that its holding in *Apprendi* was based on a determination that "any fact that 'expose[s] 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." *Hurst*, 136 S. Ct. at 621 (quoting *Apprendi*, 530 U.S. at 494). It admitted that its determination in *Ring* that *Apprendi* rendered Arizona's capital sentencing scheme unconstitutional was based on the realization that "'the required finding of an aggravated circumstance exposed *Ring* to a greater punishment than that authorized by the jury's guilty verdict.'" *Hurst*, 136 S. Ct. at 621 (quoting *Ring*, 536 U.S. at 604). Moreover, at the conclusion of the opinion when it summarized its holding, the Court again limited its holding to the "existence of an aggravating circumstance." *Hurst*, 136 S. Ct. at 624. Thus, throughout the portions of the opinion in which the Court reached and stated its holding, the Court focused on only the finding of an aggravating circumstance necessary to make a defendant eligible for a death sentence. In contrast, the language on which Defendant relies comes not from the section II of the opinion or the conclusion where the Court stated its holding but from section III of the opinion in which the Court was merely explaining why it was rejecting the arguments the State had presented. *Id.* at 622. Given the inconsistency between the language on which Defendant relies and the

language in which the Court actually articulated its holding and the fact that the language is not from the portions of the opinion in which the holding was reached and enunciated, Defendant's suggestion that this language constitutes the holding of *Hurst* should be rejected.

Additionally, the language is actually inconsistent with the precedent on which the Court relied. In *Apprendi*, the Court examined whether the Sixth Amendment required a jury finding regarding a fact that made a defendant eligible for a sentence that exceeded the statutory maximum for the offense of which he was convicted. It held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. At the time, it rejected the assertion that this holding would invalidate state capital sentence schemes based on the belief that once a jury had found a defendant guilty of a capital offense, the statutory maximum for the crime was death. *Id.* at 497 & n.21. Thus, the Court's focus was on facts that made a defendant eligible for a sentence and not all findings that influenced the selection of a sentence.

Two years later, the Court addressed the implications of *Apprendi* for Arizona's capital sentence scheme based on the Arizona Supreme Court's holding that the Court had misunderstood how Arizona's capital sentence scheme work and that a death sentence was not authorized until an aggravator was found at the

penalty phase. *Ring*, 536 U.S. at 595-96. Because Arizona had no jury involved in the penalty phase at all, it determined that Arizona's capital sentencing scheme was unconstitutional "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609. However, it did not alter the fact that the focus of this type of Sixth Amendment claim was findings needed to increase the maximum sentence; not facts that merely influenced the sentence selected. In fact, it expressly noted that the claim being presented in that case was limited to the finding of an aggravator. *Id.* at 597 & n.4.

While the Court has altered the portion of the holding of *Apprendi* to cover findings that increased the sentencing range to which a defendant is exposed even if they did not change the statutory maximum, it has not changed the focus from findings that made a defendant eligible for a sentence. *Alleyne v. United States*, 133 S. Ct. 2151, 2155, 2158 (2013); *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012); *Cunningham v. California*, 549 U.S. 270 (2007); *Blakely v. Washington*, 542 U.S. 296, 303-05 (2004). In fact, it recently reaffirmed that the Sixth Amendment right underlying *Ring* and *Apprendi* did not apply to factual findings made in selecting a sentence for a defendant after a finding had been made that authorized the defendant to receive a sentence within a particular range. *Alleyne*, 133 S. Ct. at 2161 n.2 ("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). Given this continued focus on those findings that authorize a greater sentence, Defendant's suggestion that *Hurst* somehow required jury findings about mitigation should be rejected.

Additionally, it should be remembered that a week after the Court issued its decision in *Hurst*, the Court issued a decision in *Kansas v. Carr*, 136 S. Ct. 633 (2016). There, the Court discussed the distinct determinations of eligibility and selection under capital sentencing scheme. In doing so, it 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.[2] In fact, it stated that such determinations were not factual findings at all. *Id.* Instead, it termed the determinations regarding the existence of mitigating circumstances as "judgment call[s]" and weighing determinations "question[s] of mercy." *Id.* While it has been suggested that *Carr*'s statements about eligibility should be ignore because findings regarding mitigation are not required by Kansas law, this is untrue. Kansas's death penalty statute expressly requires that a decision regarding whether a death sentence should be imposed be based on a determination that "one or more of the aggravating circumstances enumerated in K.S.A. 21-6624, and amendments thereto, exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist." Kan. Stat. Ann. § 21-6617.[3] Given *Carr* and the focus of *Apprendi* based claims on eligibility, Defendant's suggestion that *Hurst* required jury findings on issues regarding mitigation and weighing should be rejected.

Additionally, Defendant's claim regarding the holding of *Hurst* should be rejected because such a holding would conflict with the principle of federalism underlying our Constitution. The Court has recognized that federal courts,

---

[2] In fact, this was the second time the Court had reversed the Kansas Supreme Court for finding that *Ring* implicated findings regarding mitigation and weighing. *Kansas v. Marsh*, 548 U.S. 163, 169-73 (2006).

[3] The same is true of the Arizona law at issue in *Ring*. Ariz. Rev. Stat. Ann. §13–703 (2001).

including it, are bound by state court interpretations of state law except when the interpretation was an "obvious subterfuge to evade consideration of a federal issue." *Mullaney v. Wilbur*, 421 U.S. 684, 691 & n.11 (1975). It has recognized that how a capital sentencing statute functions to make a defendant eligible for the death penalty is an issue of state law. *Zant v. Stephens*, 462 U.S. 862, 870-73 (1983). Thus, the United States Supreme Court was bound, as a matter of constitutional federalism, by this Court's interpretation of what facts had to be found for a defendant to be eligible for the death penalty unless it could be shown that this Court's interpretation was an obvious attempt to avoid a finding of a Sixth Amendment violation.

However, no such showing can be made. Well before any of the *Apprendi*-based decisions existed, this Court had held not only is a death sentence authorized once a single aggravating circumstance is found but also that death is the presumptive proper sentence once any aggravator is found. *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973). After *Ring*, this Court adhered to the interpretation that a death sentence was authorized if an aggravator was found. *State v. Steele*, 921 So. 2d 538, 545 (Fla. 2005). Since this Court's decision regarding eligibility was not an obvious attempt to avoid the Sixth Amendment issue, it was binding on the Court. Since Defendant's claim regarding the language in *Hurst* would have the United States Supreme Court overruling this Court on an issue of state law, it should be

rejected.

Instead, consistent with the language that *Hurst* itself uses in discussing its holding, the precedent on which *Hurst* is based and this Court's binding interpretation regarding what facts must be found for a death sentence to be authorized, the actual holding of *Hurst* is properly understood as finding a Sixth Amendment violation when a judge writes a sentencing order if the order is not based on a jury finding of an aggravator necessary to make a defendant eligible for a death sentence.[4]

Further, while Defendant cites to *Arizona v. Fulminante*, 499 U.S. 279 (1986), *Sullivan v. Louisiana*, 508 U.S. 275 (1993), *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and *Neder v. United States*, 527 U.S. 1 (1999), to argue that the error in having a judge write a sentencing order is structural error, those cases does not support this assertion. Neither *Brecht*, *Fulminante* nor *Sullivan* concerned an error in allegedly not have a jury make a finding regarding whether an element of a crime had been proven beyond a reasonable doubt. While *Neder* did concern an

[4] The fact that the Court was only concerned with the finding of an aggravator is confirmed by the fact that the Court has repeatedly denied certiorari to Florida defendants who had jury findings of aggravators from the guilt phase or prior violent felonies in the wake of *Hurst*. *Hobart v. State*, 175 So. 3d 191, 203 (Fla. 2015), *cert. denied*, 2016 WL 1078981 (Mar. 21, 2016); *Fletcher v. State*, 168 So. 3d 186 (Fla. 2015), *cert. denied*, 136 S. Ct. 980 (2016), *reh'g denied*, 2016 WL 854330 (Mar. 7, 2016); *Smith v. State*, 170 So. 3d 745 (Fla. 2015), *cert. denied*, 136 S. Ct. 980 (2016), *reh'g denied*, 2016 WL 1079054 (Mar. 21, 2016).

error in failing to have a jury finding on an element, the Court actually held that such an error was a trial error and not a structural error. *Neder*, 527 U.S. at 6, 8-15.

Moreover, in *Washington v. Recuenco*, 548 U.S. 212, 215 (2006), the Court considered whether errors based on the *Apprendi* line of cases was a structural error. In rejected the assertion, it found that *Neder* controlled the issue and that such error were subject to harmless error review. *Id.* at 218-22. Consistent with this approach, this Court has held that the failure to obtain a jury finding on an *Apprendi* type error is subject to a harmless error analysis. *Galindez v. State*, 955 So. 2d 517, 521-23 (Fla. 2007). In fact, in *Galindez*, the Court expressly noted that it had applied a harmless error analysis to the failure to have a jury decide an element of an offense. *Id.* at 522. Thus, under binding precedent, the error found in *Hurst* was a mere trial error regarding the identity of the fact finder.

Given the actual holding of *Hurst* and the fact that it is a trial error, Defendant's attempt to equate *Hurst* with *Furman* is specious. In *Furman*, the Court invalidated capital punishment in all the states because it believed that the manner in which it was being administered was arbitrary and capricious. Thus, *Furman* was a broad ruling based on concerns of fairness and reliability. *Hurst*, in contrast, was merely a decision regarding a trial error concerning the identity of a fact finder, which does not raise the same concerns for fairness and reliability. *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968); *see also Summerlin*, 542 U.S. at

353-54, 356-57. Thus, Defendant's attempt to equate *Hurst* with *Furman* should be rejected.

Instead, the more appropriate case with which *Hurst* equates is *Duncan*, which held that the Sixth Amendment right to jury applied to the states. As the Court held after applying the same test for retroactivity that this Court applies, that change in law was not of fundamental significance. *DeStefano v. Woods*, 392 U.S. 631 (1968). Thus, Defendant's request that this Court reconsider its prior determinations regarding the lack of retroactivity of *Apprendi*-based cases should be rejected, and *Hurst* should be held not to apply retroactively.

Defendant's attempt to compare *Hurst* to *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and *Falcon v. State*, 162 So. 3d 954 (2015), is also inapt. *Miller* created a new substantive rule that precluded the State from imposing a sentence of life without the possibility of parole in most case. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). However, as both this Court and the United States Supreme Court have already recognized the type of change in law at issue in *Hurst* did not create a substantive change. *Summerlin*, 542 U.S. at 354-55; *Johnson*, 904 So. 2d at 409-10. Instead, it creates a mere procedural change regarding the identity of the fact finding that did not even materially alter the reliability of the sentencing decision. As such, *Falcon*'s balancing of the factors regarding retroactivity is inapplicable to the change of law in *Hurst*.

Defendant next suggests that this Court should reconsider its prior determinations that the type of error does not merit retroactive application because this Court allegedly relied on a determination that this type of error was inapplicable to Florida. However, these assertions provide no basis to reconsider this Court's precedent.

While Defendant claims that *Johnson* was based on a belief that *Ring* did not apply to Florida, this is not true. In *Johnson*, the Court expressly recognized that it had not decided how *Ring* might apply to Florida when it reached its decision. *Johnson*, 904 So. 2d at 406. Thus, Defendant's suggestion that the decisions in *Johnson* was based on a belief that the cases do not apply to Florida is false.

Finally, Defendant appears to contend that *Johnson* should be reconsidered because this Court's prior determination of the effect on the administration of justice was flawed as it was based on the need to conduct review of old records and resentencings. Instead, he avers that §775.082(2), Fla. Stat. mandates that he receive an immediate life sentence. However, as the plain language of that provision provides, it is only applicable when the death penalty is declared unconstitutional. Here, as argued above, the Court did not find the death penalty unconstitutional; it merely found a trial error regarding the identity of the fact finder in the procedure through which a death sentence is imposed. Thus, *Hurst* did not hold the death penalty itself unconstitutional, and §775.082(2) does not apply.

Since that section does not apply, Defendant's suggestion that this Court misconstrued the effect on the administration of justice should be rejected.

Defendant's citation to *Anderson v. State*, 267 So. 2d 8 (Fla. 1972), does not compel a different result. In *Anderson*, 267 So. 2d at 9, this Court read *Furman* as having declared the death penalty itself unconstitutional. This Court then granted those individuals with cases pending before this Court relief under Fla. R. Crim. P. 3.800 at the request of the State, finding the sentences illegal. *Id.* However, as this Court has held, 3.800 relief is only appropriate where a court could not have imposed a sentence and not merely when there was an error in sentencing that might have affected a sentencing decision. *Brooks v. State*, 969 So. 2d 238, 244 (Fla. 2007). Here, as argued above, *Hurst* did not invalidate the death penalty itself; it merely found a trial error in the manner in which the death penalty was imposed. Moreover, this error did not make it such that a death penalty could not have been imposed. It merely required a change in the procedure to impose such a sentence. Thus, *Anderson* also does not support Defendant's position.

Since Defendant has not proved a valid basis to revisit this Court's prior determination that *Apprendi*-based cases are not retroactive, those cases apply.[5]

[5] Defendant's attempt to compare *Hurst* to *Hitchcock v. Dugger*, 481 U.S. 393 (1985), does not distinguish *Johnson*. This Court was clearly aware of the change in law in *Hitchcock* when it decided *Johnson*, as it was mentioned by the dissent. *Johnson*, 904 So. 2d at 418 n.14. Moreover, *Hitchcock* did determine that Florida's

Brown v. Nagelhout, 84 So. 3d 304, 309 (Fla. 2012)(holding that to overcome the presumption in favor of stare decisis, a litigant must show not only that decision was erroneous but also the decision is unsound and unworkable).[6] Since Defendant's convictions and sentences were final before either *Ring* or *Hurst* were decided, he is not entitled to any relief.[7] The denial of his successive motion for post conviction relief should be affirmed.

This is all the more true as Defendant would not be entitled to relief even if *Hurst* applied. Given the actual holding of *Hurst*, any error here is clearly harmless. During the guilt phase, Defendant was found guilty attempting to rob the Cabanases. As a result, Defendant could not even legally challenge the application

---

original post-*Furman* capital sentencing law was unconstitutional, as it found that Florida law violated *Lockett* and *Lockett* had held that sentencing schemes that restricted mitigation unduly were unconstitutional. *Hitchcock*, 481 U.S. at 394, 399. The only reason why *Hitchcock* did not cause a statutory change was that the change had already been made by the Legislature. Ch. 79-353, Laws of Fla.; *see also Hitchcock*, 481 U.S. at 397. The fact that *Hitchcock* met *Witt* and the type of change in law at issue here does not is easily understandable as *Hitchcock* changed the evidence considered while *Hurst* merely changes the identity of the fact finder.

[6] The same is true of this Court's prior rejection of the claim regarding jury determinations of retardation. *Arbelaez v. State*, 898 So. 2d 25, 43 (Fla. 2005); *Rodriguez v. State*, 919 So. 2d 1252, 1267 (Fla. 2005). This is all the more true as a finding of retardation would not increase the range of punishment to which a defendant would be subjected as is necessary for the Sixth Amendment right to attach. *Alleyne*, 133 S. Ct. at 2161 n.2.

[7] Defendant's suggestion that this Court should apply the same approach that this Court applied to *Espinosa v. Florida*, 505 U.S. 1079 (1992), would not assist Defendant. This Court has held that only those defendants who preserved the *Espinosa* issue at trial and raised the issue on direct appeal were entitled to relief. *Rodriguez v. State*, 919 So. 2d 1252, 1284 (Fla. 2005). Defendant did neither.

of the during the course of a felony and pecuniary gain aggravators at the penalty phase.[8] *Way v. State*, 760 So. 2d 903, 917 (Fla. 2000). Moreover, the prior violent felony aggravator remains exempt from the requirement of a jury finding. *Almendarez–Torres v. United States*, 523 U.S. 224 (1998). Since Defendant was eligible for a death sentence before sentencing began, any error in the fact that the judge wrote a sentencing order is harmless.

CONCLUSION

For the foregoing reasons, the order denying the successive motion for post conviction relief should be affirmed.

Respectfully submitted,

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

\s\Sandra S. Jaggard
SANDRA S. JAGGARD
Assistant Attorney General

[8] A review of Defendant's closing shows that he did not attempt to dispute these aggravators. (T. 3414-43) Moreover, he acknowledged that the fact he had prior violent felony convictions was not in dispute. (T. 3425)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by email to Todd G. Scher, 398 E. Dania Beach Blvd., # 300, Dania Beach, Florida 33004, this 8th day of April 2016.

\s\Sandra S. Jaggard
SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655
Primary: capapp@myfloridalegal.com
Secondary: Sandra.Jaggard@
myfloridalegal.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Times New Roman 14-point font.

\s\Sandra S. Jaggard
SANDRA S. JAGGARD
Assistant Attorney General