IN THE SUPREME COURT OF FLORIDA

Case No. SC15-1441

LEONARDO FRANQUI,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

Todd G. Scher
Florida Bar No. 0899641
Law Office of Todd G. Scher, P.L.
398 E. Dania Beach Blvd. Suite 300
Dania Beach, FL 33004
Tel: 754-263-2349
Fax: 754-263-4147
TScher@msn.com

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

Argument in Reply ……... 1

A. The *Hurst* Issue is Properly Before the Court 1

B. *Hurst*'s Holding 1

C. Retroactivity 8

D. Structural Error and Harmful Error 9

Certificate of Service 11

TABLE OF AUTHORITIES

Apprendi v. New Jersey,
530 U.S. 466 (2000).....2

Blakely v. Washington,
542 U.S. 296 (2004).....10

Daniels v. Allen,
344 U.S. 443 (1953).....8

Hildwin v. Florida,
390 U.S. 638 (1989).....7

Hurst v. Florida,
136 S.Ct. 616 (2016).....1

Jackson v. Dugger,
837 F.2d 1469 (11th Cir. 1988).....6

Johnson v. State,
904 So.2d 400 (Fla. 2005).....9

Kansas v. Carr,
136 S.Ct. 633 (2016).....5

Randolph v. State,
463 So.2d 186 (Fla. 1984).....6

Ring v. Arizona,
536 U.S. 584 (2002).....2

Ring v. State,
25 P.3d 1139 (Ariz. 2001).....3

Schriro v. Summerlin,
542 U.S. 348 (2004).....8

Spaziano v. Florida,
468 U.S. 447 (1984).....7

State v. Dixon,
283 So.2d 1 (Fla. 1973).....5

State v. Recuenco,
163 Wash. 2d 428 (Wa. 2008).....10

State v. Steele,
921 So.2d 538 (Fla. 2005).....7

Sullivan v. Louisiana,
508 U.S. 275 (1993).....10

Washington v. Recuenco,
548 U.S. 212 (2006).....10

Witt v. State,
387 So.2d 922 (Fla. 1980).....8

Zant v. Stephens,
462 U.S. 862 (1983).....5

ARGUMENT IN REPLY

A. The *Hurst* Issue is Properly Before the Court.

The State argues that "this issue is not [] properly before this Court" and that therefore Mr. Franqui is entitled to no relief (SAB at 1).[1] This Court, on motion by Mr. Franqui, granted his request for supplemental briefing on the impact of *Hurst v. Florida*, 136 S.Ct. 616 (2016).[2] This issue is properly before the Court at this time notwithstanding the State's current position.

B. *Hurst*'s Holding.

The State claims that Mr. Franqui has "misrepresent[ed] the nature of the error at issue" (SAB at 2). This is an ironic accusation from the Appellee, whose brief is rife with misrepresentations. Mr. Franqui will attempt to untangle the web of distortions woven by the State, which is grounded at its core on its stubborn refusal to acknowledge *Hurst*'s core holding.

The State insists that *Hurst* is just about "what findings are made in a sentencing order" (SAB at 2). *See also* SAB at 9 ("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") (footnote omitted).

---

[1] Citations to "SAB" refer to the State's Supplemental Answer Brief.

[2] This Court has ordered supplemental briefing on *Hurst* in dozens of cases and has stayed two pending executions in light of *Hurst*.

Naturally the State provides no reference in *Hurst* for such an imaginative—and wrong—understanding of *Hurst*'s core holding. *Hurst*'s holding is clear and unmistakably clear: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Hurst*, 136 S.Ct. at 619.

Repeating the mantra it has regurgitated in all of the supplemental briefing it has submitted to this Court post-*Hurst*, the State, without citation to any statutory authority, insists that all that is required in Florida to make a defendant death-eligible is the finding of a single aggravating circumstance (SAB at 3), going to far as to argue that the one-aggravator standard was compelled by *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v New Jersey*, 530 U.S. 466 (2000) (SAB at 3). The State is wrong, as Mr. Franqui explains below.

First, the *Hurst* Court did not "admit" that *Apprendi* and *Ring* mandated that the Sixth Amendment was satisfied as long as the jury has found a single aggravating circumstance (SAB at 3); rather, only through a careful excision (*i.e.* a misrepresentation) or a sloppy reading of the Supreme Court's actual opinion can the State arrive at this false conclusion. When the *Hurst* Court addressed *Ring* and the Arizona statute, it explained that, *under Arizona law*, "a judge could sentence Ring to death only after independently finding at least one aggravating circumstance." *Hurst*, 136 S.Ct. at 621 (quoting *Ring*, 536 U.S. at 592). Ring's

judge "followed this procedure, found *an aggravating circumstance,* and sentenced Ring to death." *Id*. (emphasis added). The Supreme Court in *Hurst* thereafter explained that, in *Ring*—interpreting Arizona law—it had "no difficulty concluding that "`the required finding *of an aggravating circumstance* exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.' *Hurst*, 136 S.Ct. at 621 (emphasis added) (quoting *Ring*, 536 U.S. at 604; *Apprendi*, 530 U.S. at 494). What is lost on the State—or what it persists in misunderstanding—is that the Arizona statute at issue in *Ring* only required at least one aggravator in order to make a defendant eligible for the death penalty. *See Ring v. State*, 25 P.3d 1139, 1151 (Ariz. 2001).

In *Ring*, the Supreme Court held that "[c]apital defendants . . . are entitled to a jury determination of **any fact on which the legislature conditions an increase in their maximum punishment**." *Ring*, 536 U.S. at 589 (emphasis added). This holding ties the Sixth Amendment right to a jury trial to the legislatively defined facts that authorize an increase in the maximum punishment. This connection between the Sixth Amendment jury trial right and the legislatively defined facts is at the core of *Ring*:

> The dispositive question, we said, is one not of form, but of effect. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how a State labels it—must be found by a jury beyond a reasonable doubt.

Ring, 536 U.S. at 602 (citation omitted). The omitted citation is to *Apprendi*, where the Supreme Court explained: "[d]espite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is not one of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494.

It is thus clear that in *Ring* and in *Apprendi,* the Supreme Court held that the Sixth Amendment right to a jury trial was tied to the legislatively defined facts that must be present in order to authorize an increased sentence—here a death sentence—and did not announce the robotic "one aggravator" rule that the State has conjured. And—to state the obvious—in order to determine the legislatively defined facts, one must look at the legislation at issue: *Florida's* capital sentencing statute. This is precisely what the *Hurst* Court did. The Court explained that "Florida does not require the jury to make the *critical findings* necessary to impose the death penalty" but instead "Florida requires a judge to find these *facts*." *Hurst*, 136 S.Ct. at 622 (emphasis added) (citing §921.141(3)) (emphasis added).[3] The citation to §921.141(3) refers to the "findings" of the "facts" that the Florida legislature defined as those which made a defendant eligible for the death penalty: "the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]here are insufficient mitigating circumstances to outweigh the aggravating circumstances.'"

[3] Note the Supreme Court's use of the plural in writing "findings" and "facts."

Hurst, 136 S.Ct. at 622. [4] These are the legislatively defined facts, chosen by Florida's legislature, to determine eligibility in a Florida capital case.

Second, the State accuses the United States Supreme Court of not understanding federalism when deciding *Hurst* because, according to the State, the Supreme Court was bound by this Court's interpretation of what facts had to be found to determine death eligibility, *i.e.* the one-aggravator standard (SAB at 7-8).[5] But the State's reasoning is circular for it cites no statutory authority for its "one-aggravator" standard. Instead it argues that this Court, in *State v. Dixon*, 283 So.2d 1 (Fla. 1973), "held" that a "death sentence [is] authorized once a single aggravating circumstance is found" (SAB at 8) (citing *Dixon*, 283 So.2d at 9).

---

[4] These are not "sentencing selection" factors as the State argues (SAB at 5-7). Rather, as *Hurst* made quite explicit, they are the facts that must be found by the jury in order to render a Florida defendant charged with first-degree murder death eligible; and because a judge makes them alone, the Florida statute was unconstitutional. *See also Ring,* 536 U.S. at 610 (Scalia, J., concurring) ("the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt."). The State's reliance on *Kansas v. Carr*, 136 S.Ct. 633 (2016), is completely misplaced; that was a case interpreting the Eighth—not the Sixth—Amendment. Not a single Sixth Amendment jury trial case is mentioned in *Kansas v. Carr*.

[5] The State asserts that *Zant v. Stephens*, 462 U.S. 862 (1983), precludes a federal court from assessing how a state statute makes a defendant eligible for the death penalty (SAB at 8). *Zant* said no such thing. Rather, the Supreme Court evaluated Georgia law after remanding to the Georgia Supreme Court for clarification on matters of state law and then went on to decide the federal constitutional questions presented. How a state statute operates under the Sixth Amendment is a quintessential federal constitutional question.

Dixon "held" no such thing. The sentence from *Dixon* cited by the State simply speaks to death being the presumptive sentence[6] if the judge found at least one aggravating circumstance, and was later clarified by the Court to mean that "[o]ne valid aggravating circumstance **may be sufficient** to support a death sentence in the absence of at least one overriding mitigating circumstance." *Randolph v. State*, 463 So.2d 186, 193 (Fla. 1984) (emphasis added). The Court saw fit to clarify this language in *Dixon* in order "to stress that the capital sentencing procedure is not a mere counting process of X number of aggravating circumstances and number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death. . . . " *Id*. Not surprisingly, the State ignores that part of *Dixon* where the Court explained that the post-*Furman*[7] capital sentencing statute required the jury to "consider from the facts presented to them—facts in addition to those necessary to those necessary to prove the commission of the crime—*whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether there were mitigating circumstances which require a lesser penalty*." *Dixon*, 283 So.2d at 8 (emphasis added). These are the legislatively defined facts set forth in the capital sentencing

---

[6] Any such construction of Florida's capital sentencing scheme runs afoul of the Eighth Amendment. *See Jackson v. Dugger,* 837 F.2d 1469, 1473 (11th Cir. 1988).

[7] *Furman v. Georgia*, 408 U.S. 238 (1972).

statute under which Mr. Franqui was sentenced and which was struck in *Hurst*. *Dixon* does not change the operative findings of fact that the Florida Legislature determined must be made to render a capital defendant death-eligible.

Third, the State continues to rely on dicta from *State v. Steele*, 921 So.2d 538 (Fla. 2005), to prop up its "one aggravator" eligibility argument (SAB at 8). But *Steele* did not "adhere[] to the interpretation that a death sentence was authorized if an aggravator is found" (SAB at 8) (quoting *Steele*, 921 So.2d at 545). What the Court *actually* held was that under Arizona's statute, the finding of one aggravator was necessary for death eligibility. The Court's consideration of *Ring*'s applicability to Florida was inconclusive ("[e]ven if *Ring* did apply in Florida—an issue we have yet to conclusively decide— . . . "), and the most the Court would say about it was that its interpretation of *Ring* was consistent with precedent including *Hildwin v. Florida*, 390 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984), cases which were explicitly overturned by *Hurst*. *Steele*, 921 So.2d at 546-47.

Fourth, the State continues to rely on the denial of certiorari by the United States Supreme Court in Florida cases post-*Hurst* as actual **evidence** that the *Hurst* Court "was only concerned with the finding of an aggravator" (SAB at 9 n.4). "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." *Daniels v. Allen*, 344 U.S. 443,

439 (1953) (citation omitted). Indeed, the Supreme Court denied certiorari in Linroy Bottoson's case after holding his case pending its decision in *Ring*;[8] now it is known that Bottoson's position was correct, as *Hurst* establishes, and Mr. Bottoson was subsequently executed. Denial of certiorari is meaningless.

C. Retroactivity.

The State appears to dispute that *Hurst* is a decision warranting retroactive application, yet it makes no argument under *Witt v. State*, 387 So.2d 922 (Fla. 1980). In fact, *Witt* is not even cited in the State's brief and the State does not really even dispute that *Hurst* is retroactive. Rather, it belittles Mr. Franqui's retroactivity argument by changing it. To be sure, Mr. Franqui's position is not simply that *Hurst* is retroactive "because it is somehow akin to *Furman*" (SAB at 2). The 12-page retroactivity discussion in his 25-page Supplemental Initial Brief belies the State's attempt to marginalize Mr. Franqui's argument. That the State cannot bring itself to mention, much less discuss, the *Witt* factors as they pertain to *Hurst* speaks volumes as to the fortitude of its position that *Hurst* is not retroactive, or maybe the State sees the writing on the wall. In any event, trotting out *Schriro v. Summerlin*, 542 U.S. 348 (2004), where the Supreme Court addressed the retroactivity of *Ring* in federal habeas corpus cases employing the federal

[8] *See Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002).

retroactivity standard, is of no assistance to this Court. Nor is insisting on the continuing vitality of the holding in *Johnson v. State*, 904 So.2d 400 (Fla. 2005) (SAB at 2), in any way helpful, particularly without any explanation of the retroactivity of *Hurst*, not *Ring*.

D. Structural Error and Harmful Error.

Mr. Franqui argued in his Supplemental Initial Brief that the *Hurst* error in his case was structural and could never be harmless. He continues to rely on that argument, as well as his argument that he is entitled to a life sentence under Fla. Stat. §775.082. Nevertheless, if the Court were to determine that some sort of harmless error analysis is appropriate, Mr. Franqui will briefly address the State's arguments.

First, the State intolerably mispresents to the Court what Mr. Franqui's argument actually is. He is not arguing that the error was "having the judge write a sentencing order" (SAB at 9). Rather, he has argued structural Sixth Amendment error based on the lack of jury findings, unanimously and beyond a reasonable doubt, of the legislatively defined facts to make him death eligible. Because those findings were not made by a jury, Mr. Franqui's death sentence is unconstitutional and cannot stand.

Because it refuses to acknowledge *Hurst*'s actual holding, the State latches onto other cases as purportedly settling the issue of whether the "*Apprendi* line of

cases" presented structural error (SAB at 9-10). But *Hurst* is not *Apprendi*, nor is it *Ring*, nor does it present an error under *Blakely v. Washington*, 542 U.S 296 (2004). The State's reliance on *Washington v. Recuenco*, 548 U.S. 212, 215 (2006), is curious given the fact that after the Supreme Court remanded Recuenco's case back to the Washington Supreme Court to determine if the *Blakely* error in that case could be harmless under state law, the Washington Supreme Court determined that harmless-error analysis did not apply as a matter of state law. *State v. Recuenco*, 163 Wash.2d 428 (Wa. 2008).

We do not know what the jury actually found in Mr. Franqui's case and thus the State can never establish that the *Hurst* error is harmless beyond a reasonable doubt. There were no jury findings on the legislatively determined eligibility facts as required by the capital sentencing statute. There is simply no way to conclude beyond a reasonable doubt that Mr. Franqui's jury–if properly instructed that its determination of the statutorily defined facts would be binding and that its role was not merely advisory–would have unanimously found the facts necessary to authorize a death sentence. "To hypothesize a guilty verdict that was never in fact rendered–no matter how inescapable the findings to support that verdict might be–would violate the jury trial guarantee." *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

Respectfully submitted,

/s/ *Todd G. Scher*
TODD G. SCHER
Florida Bar No. 0899741
Law Office of Todd G. Scher, P.L.
398 E. Dania Beach Blvd. #300
Dania Beach, FL 33001
Tel: (754) 263-2349
Fax: (754) 263-4147
Email: TScher@msn.com
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April , 2016, I electronically filed the foregoing pleading with the Court's electronic filing system which will send a notice of electronic filing to opposing counsel of record.

/s/ *Todd G. Scher*