**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC15-1630**

**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

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## 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

### I. *HURST* CLAIM.

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.

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 has 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),[1] Defendant insists that *Hurst* is retroactive because this Court allegedly based its decision on a misunderstanding of *Ring*. However, in doing so, Defendant does little more than misconstrue the holding of *Hurst* and the nature of the error under *Hurst*.

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 (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.

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

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).[2] 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.

[2] In fact, in *Blakely*, the Court used similar language to that upon which Defendant relies to suggest that the State had to make findings beyond the finding of a single aggravator yet immediately acknowledged that it was not discussing facts that did not increase the defendant's sentence. *Id.* at 304-05.

*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. *Id.* at 642. 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.[3] 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 ignored 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.[4] 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,

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[3] 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).

[4] 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.[5]

Further, while Defendant argues that the error in having a judge write a sentencing order is structural error, the Court has actually held that such an error was a trial error and not a structural error. *Neder v. United States*, 527 U.S. 1, 6, 8-15 (1999). 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 rejecting the assertion, it found that *Neder* controlled the issue and that such error was subject to harmless error review. *Id.* at 218-22. Consistent

[5] 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).

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 request that this Court revisit *Johnson* should be rejected. *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). Since Defendant's convictions and sentences were final before either *Ring* or *Hurst* were decided, he is not entitled to any relief. The denial of his successive motion for post conviction relief should be affirmed.

Further, Defendant's suggestion that refusing to apply *Hurst* retroactively will result in similarly situated defendants being treated differently and violate *Furman v. Georgia*, 408 U.S. 238 (1972), is also meritless. Defendant's claim regarding similarly situated defendants is based on when the individuals committed their crimes. However, as the Court has explained, whether a rule applies retroactively is not based on what the law was at the time a crime was committed

but whether a claim is redressible based on the stage of the litigation. *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008). Thus, Defendant is actually comparing litigants who are not similarly situated. Moreover, the Court has held that *Furman* only imposes two conditions on capital sentencing: narrowing the class of eligible defendants and consideration of all relevant mitigation. *Marsh*, 548 U.S. at 173-74. Thus, *Furman* imposed no restriction on not applying new procedural rules retroactively.

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 of murdering a law enforcement officer in the performance of his duties, robbing the bank and Ms. Chin-Watson and committing an aggravated assault against Ms. Hadley. (R. 390-92) As a result, Defendant could not even legally challenge the application of murder of a law enforcement officer, hinder a governmental function, avoid arrest, prior violent felony, during the course of a felony and pecuniary gain aggravators at the penalty phase.[6] *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

[6] A review of Defendant's closing shows that he did not attempt to dispute these aggravators. (RST. 1131-54) Moreover, he urged the jury to accept his confession and acknowledged that he had personally shot Off. Bauer.

Defendant was eligible for a death sentence before sentencing began, any error in the fact that the judge wrote a sentencing order is harmless.

Further, assuming the jury findings on whether *Enmund/Tison* were necessary,[7] any error would be harmless. Defendant did not challenge the fact that his culpability was sufficient in his closing. (RST. 1131-54) Instead, he admitted that he had personally shot Off. Bauer and urged the jury to accept his confession. (RST. 1138, 1140-41) In his confession, Defendant admitted his major participation in these crimes. *Franqui v. State*, 804 So. 2d 1185, 1189-90 (Fla. 2001). Moreover, Defendant committed these crimes only after having been involved in two similar crimes in which shots were fired at the victims, including one in which Defendant personally killed the victim. *Franqui v. State*, 699 So. 2d 1312, 1324 (Fla. 1997). Given this overwhelming and uncontradicted evidence, any error in the lack of an explicit jury finding was harmless. Since any error in the fact that the judge wrote the sentencing order is harmless, the denial of the motion for post conviction relief should be affirmed.

Even if Defendant were entitled to relief, Defendant's suggestion that he is automatically entitled to a life sentence is meritless. This Court has long recognized that a reversal does not preclude a retrial or resentencing, where the

[7] In *Cabana v. Bullock*, 474 U.S. 376 (1987), the Court rejected the argument that this finding needed to be made by a jury.

reversal was not based on a finding of insufficient evidence. *State v. Sykes*, 434 So. 2d 325, 328 (Fla. 1983); *Tibbs v. State*, 397 So. 2d 1120, 1127 (Fla. 1981). An acquittal of the death penalty only occurs when there has been a factual finding sufficient to entitle a defendant to a life sentence, which does not occur when a fact finder has imposed a death sentence. *Poland v. Arizona*, 476 U.S. 147, 155-57 (1986); *see also Sattazahn v. Pennsylvania*, 537 U.S. 101, 106-10 (2003). Here, a death sentence was imposed, and the only error is a procedural error regarding the identity of that fact finder. *See Summerlin*, 542 U.S. at 354. Thus, Defendant's suggestion that he is entitled to a life sentence automatically is meritless.[8]

Moreover, Defendant's suggestion that Ch. 2016-13, Laws of Fla. must be construed as requiring the findings regarding mitigation and the weighing process as part of the eligibility determination is meritless. The Court has already held that the Eighth Amendment is not violated by requiring defendant to bear the burden of proving that the mitigation outweighs the aggravation under a statute that requires the finding of only one aggravator.[9] *Marsh*, 548 U.S. at 169-72. Moreover, it has

[8] This is particularly true as 6 aggravators apply just from the jury's guilt phase verdict.

[9] Defendant's suggestion that the aggravators do not narrow the class of death eligible defendants simply because there are 16 aggravators is also meritless. As the Court has recognized, the Constitution does not forbid the consideration of any fact in aggravation so long as one aggravator that narrows the class of death eligible defendant is found. *Zant*, 462 U.S. at 878-79. Moreover, analysis of whether a particular aggravator is unconstitutional is based on whether that

held that findings regarding mitigation and weight are not factual findings at all. *Carr*, 136 S. Ct. at 642. Thus, Defendant's arguments are specious.

Further, Defendant's suggestion that Ch. 2016-13 would be a substantive change in law if the Court construed it as making a defendant eligible for the death penalty once a single aggravator is found is also meritless. As noted above, this is how this Court has always defined death-eligibility. *Dixon*, 283 So. 2d at 9; *Steele*, 921 So. 2d at 545. Since the Legislature repeatedly reenacted the statue after this Court so ruled, this definition of eligibility was already part of the statute. *Burdick v. State*, 594 So. 2d 267, 271 (Fla. 1992). Thus, the fact that the Legislature chose to include the language expressly does not constitute a substantive change in the law. This is all the more true as the requirement that a death sentence be based on consideration of aggravators and mitigators at all is a procedural change.[10] *Dobbert v. Florida*, 432 U.S. 282 (1977).

## II. EIGHTH AMENDMENT/DOUBLE JEOPARDY.

Defendant next contends that Ch. 2016-13 shows that having a jury recommendation less than 10-2 violates the Eighth Amendment and that he is entitled to a life sentence through the long since vacated 9-3 recommendation he

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aggravator narrow the class. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). Defendant presents no argument about any particular aggravator.

[10] The same is true of changing the identity of the fact finding. *Welch v. United States*, 2016 WL 1551144, *8 (Apr. 18, 2016)

received at his original trial. However, these arguments are meritless.

The United States Supreme Court has repeatedly held that other than requiring a procedure to narrow the class of defendants and allowing defendants to present all relevant mitigation, the Eighth Amendment does not impose constraints on the methods through which a state legislature chooses to organize capital scheme proceedings. *Marsh*, 548 U.S. at 173-74. This is true even when the procedure the state chooses is unique. *Harris v. Alabama*, 513 U.S. 504, 510 (1995). As such, Defendant's suggestion that the mere fact the Legislature choose to change to a 10-2 creates an Eighth Amendment requirement is meritless.

Moreover, his Double Jeopardy argument is also meritless. Even when the Court has recognized a new Eighth Amendment right, it has held that it is improper to apply Double Jeopardy principles to finding made under a prior standard as a finding that the new right is satisfied. *Bobby v. Bies*, 556 U.S. 825, 833-34 (2009)(where finding did not amount to an acquittal at time rendered, it could not be convert to acquittal by change in law). Thus, Defendant's attempt to rely on a jury recommendation of death that was long since vacated at his insistence does not entitle him to a life sentence.

## CONCLUSION

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

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by email to Martin J. McClain, martymcclain@earthlinknet, 141 N.E. 30th Street, Wilton Manors, Florida 33334, this 25th day of April 2016.

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## CERTIFICATE OF COMPLIANCE

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

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