IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1630

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, FLORIDA

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

MARTIN J. MCCLAIN
Fla. Bar No. 0754773
McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th Street
Wilton Manors, FL 33334
(305) 984-8344
martymcclain@earthlink.net

Counsel for Mr. Franqui

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ARGUMENT I

A. THE *HURST* ISSUE IS PROPERLY BEFORE THE COURT

The State asserts that "all of the arguments being presented in this supplemental brief are not properly before this Court and should be rejected."[1] (SAB at 1). However, this Court, ruled on motion by Mr. Franqui and granted his request for supplemental briefing on the impact of *Hurst v. Florida*, 136 S.Ct. 616 (2016). And then when the State moved to strike Argument II of the supplemental initial brief as outside the scope of this Court's order granting supplemental briefing, this Court denied the State's motion to strike. Thus, this Court specifically authorized Mr. Franqui to present both of the arguments that are set forth in the supplemental initial brief. This would seem to mean that the arguments are in fact properly before this Court.

However, Mr. Franqui has no objection if in light of the State's argument, this Court were to conclude that his current appeal should be held in abeyance while jurisdiction is relinquished to the circuit court so that he may first present his arguments in the circuit court. Since *Hurst* was decided on

[1]Presumably, the State meant to say that the arguments made in Mr. Franqui's supplemental initial brief were not properly before the Court, as opposed to the arguments that the State made in its supplemental answer brief which was the brief actually referred to when the State objected to the arguments in "this supplemental brief."

January 12, 2016, and Chapter 2016-13 became law on March 7, 2016, Mr. Franqui is presenting his claims well within a year of when they became available. There would be no impediment to presenting both arguments to the circuit court in a Rule 3.851 proceeding. Presenting his claims directly to this Court was simply done to expedite considerations of his arguments. But if this Court agrees with the State that consideration of his claims should not be expedited, he has no objection to a relinquishment of jurisdiction to the circuit court.

B. HOLDING OF *HURST*

Next, the State argues that in contending that *Hurst* should apply retroactively Mr. Franqui "does little more than misconstrue the holding of *Hurst* and the nature of the error under *Hurst*." According to the State, Mr. Franqui's argument goes awry when he relies upon the actual language and reasoning set forth in *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.

(SAB at 2). The State does not dispute that the language and reasoning on which Mr. Franqui relies actually comes from the United States Supreme Court's opinion in *Hurst*. Nor does the State dispute that the language in *Hurst* is premised upon that

language in § 921.141 that required the sentencing judge to find as a matter of fact that "sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

Instead, the State argues Mr. Franqui's reliance upon the quoted language in *Hurst* and in § 921.141 is misplaced because when the Supreme Court in *Hurst* referenced the earlier decision in *Ring v. Arizona*, 536 U.S. 584 (2002), it noted that there the Arizona statute was found defective because under Arizona law the factual determination of the existence of one aggravator was necessary to authorize a death sentence. The State's specific assertion is that the Supreme Court in *Hurst*:

> 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).

(SAB at 3). Of course, what was at issue in *Ring* was Arizona law that authorized a judge to impose a death sentence once he determined one aggravating circumstance was present. Thus, a discussion of the Sixth Amendment right at issue in Arizona required consideration of what fact Arizona law required the judge to find before a death sentence was permissible.

The State actually argues that this language in *Hurst* which references *Ring* and the basis for the decision there, i.e.

Arizona law, requires this Court to ignore the rest of the *Hurst* opinion and its discussion of what facts Florida law requires a judge to find before he is authorized to imposed a death sentence. The State also wants this Court to ignore § 921.141 which provided that for a judge to impose a death sentence, he had to:

> set forth in writing [his] findings upon which the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

The State argues that Florida's statutory language and the language in *Hurst* tying the Sixth Amendment right to a jury in Florida to Florida's statutory language is irrelevant to the holding of *Hurst.* Without explaining why the Supreme court in *Hurst* quotes Florida's statutory language as to the facts that must be found before a death sentence can be imposed, the State claims Mr. Franqui's "suggestion that this language constitutes the holding of *Hurst* should be rejected." (SAB at 4).

The State steadfastly refuses to acknowledge that the Sixth Amendment right to a jury is linked to the statutorily defined facts that must be present to authorize a judge to impose a death sentence. In *Ring*, the Supreme Court held: "Capital defendants, no less than noncapital 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 connection between the Sixth Amendment jury trial right and the legislatively defined facts is the core holding in *Ring*:

> The dispositive question, we said, "is one not of form, but of effect." Id. at 494. **If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt.**

Ring, 536 U.S. at 602 (emphasis added).

Rather than acknowledge that *Ring* links the jury trial right to the legislatively defined facts that authorize the imposition of a death sentence, the State sees only the conclusion reached in *Ring* that in Arizona the Sixth Amendment right was tied to the existence of one aggravating circumstance. But as the Supreme Court explained in *Ring*, "in Arizona, a 'death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt.' 200 Ariz., at 279, 25 P.3d, at 1151 (citing § 13-703)." *Ring*, 536 U.S. at 597. It was due to Arizona's statutory law that the Supreme Court in *Ring* concluded: "**Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'** [citation], the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 509 (emphasis added).

In *Hurst*, the Supreme Court looked to Florida statutory law

to ascertain what statutorily defined facts are required under Florida for a death sentence to be authorized:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings **by the court** that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court **alone** must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

Hurst, 136 S. Ct. at 622 (emphasis in original). Despite both *Ring* and *Hurst* clearly requiring us to look to the governing statutes to see what facts are necessary before a death sentence may be imposed, the State in its brief refuses to look at Florida's death penalty statute. However, § 921.141 expressly precluded the imposition of a death sentence absent findings of fact that sufficient aggravators exist and that insufficient mitigators exist. Unless those facts are found, a death sentence cannot be imposed. Under *Ring* and *Hurst*, the Sixth Amendment right to a jury trial attaches to those statutorily defined facts that are necessary for the imposition of a death sentence. The State chooses to ignore the law.

C. *KANSAS V. CARR*, AN EIGHTH AMENDMENT DECISION

Apparently out of desperation, the State suggests that somehow *Hurst,* a Sixth Amendment case addressing the right to a jury determination, was limited by *Kansas v. Carr*, 136 S. Ct. 633 (2016), an Eighth Amendment case addressing whether "the Eighth Amendment requires capital-sentencing courts in Kansas 'to

affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt.'" *Id*. at 642.

In *Hurst*, the issue was whether Florida capital defendants are entitled to have a jury determined whether facts, statutorily defined as necessary to authorize a judge to impose death, have been proven. In *Carr*, Kansas law vested the capital sentencing decision in juries, and the issue presented concerned whether the jury instructions interfered with the Eighth Amendment right to an individualized sentencing. *Kansas v. Carr*, 136 S. Ct. at 641.

Carr might be relevant to Mr. Franqui's case if his jury had determined his sentence, and if Mr. Franqui was presenting an Eighth Amendment challenge to the instructions given to his hypothetical sentencing jury. As is, the State's citation to *Carr* shows some recognition that under *Hurst*, Mr. Franqui was deprived of his Sixth Amendment right to a jury finding of the statutorily defined facts necessary to authorize a death sentence.[2]

D. RETROACTIVITY

As to whether *Hurst* is retroactive, the State's mantra is: *Johnson v. State*, 904 So. 2d 400 (Fla. 2005), says *Ring* is not retroactive, so *Hurst* is not retroactive. But when this Court

[2]The State also seems unaware that Eighth Amendment eligibility concerns constitutional restrictions limiting the use of the death penalty to the worst of the worst. Sixth Amendment eligibility concerns statutorily defined facts that are necessary to allow a judge to impose a death sentence. While "eligibility" may be used in both Sixth and Eighth Amendment cases, its meaning is not the same in the two contexts.

decided *Johnson*, it had misconstrued *Ring*. In *Johnson*, this Court did not recognize the true scope of *Ring*, and its impact on *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984). In *Johnson*, this Court said that "the question is whether *Ring* is of 'sufficient magnitude' to require retroactive application." *Johnson*, 904 So. 2d at 409. Because it did not perceive the true scope of *Ring* and the magnitude of the jurisprudential upheaval it engendered, this Court's opinion in *Johnson* simply does not control as to the retroactivity of *Hurst*, which was of such magnitude that *Hildwin* and *Spaziano* were formally and expressly overruled.

E. *STATE V. DIXON*

The State resorts to misrepresentation when it cites *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), for its claim that it held one aggravator was automatically sufficient to authorize a death sentence (SAB at 8). In *Dixon*, this Court explained that the post-*Furman* statute required the jury to "consider from the facts presented to them-facts in addition 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**." *State v. Dixon*, 283 So. 2d at 8 (emphasis added). Just two years later, this Court vacated a death sentence because the aggravators were not sufficient to justify a death sentence. *Swan*

v. State, 322 So. 2d 485, 489 (Fla. 1975) ("we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of the death penalty.").[3] The State's argument as to the holding of *Dixon* is just wrong.

F. STATE'S HARMLESS ERROR ARGUMENT

The State's harmless error argument is entirely dependent upon its misreading of *Hurst* and § 921.141. When *Hurst* and the statute are properly read, sentencing relief is required.

ARGUMENT II

With no real analysis, the State writes: "Defendant's suggestion that the mere fact the Legislature choose to change to a 10-2 [recommendation] creates an Eighth Amendment requirement is meritless." (SAB at 15). However, the new § 921.141 shows that death sentences premised upon a jury's simple majority vote recommending a death sentence violate the Eighth Amendment's evolving standards of decency and constitutes cruel and unusual punishment. It also shows that granting other similarly situated individuals the benefit of the new statute while depriving Mr. Franqui of its benefit would leave his death sentences dependent upon the arbitrary application of the new statute in violation of the Eighth Amendment, as well as Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Under *Furman v. Georgia*, 408 U.S. 238 (1972), Florida cannot

[3]The judge found the crime was heinous, atrocious or cruel.

permit capital defendants to be executed on the basis of arbitrary or capricious factors. To treat some 9-3, 8-4, or 7-5 jury recommendations as death recommendations while treating other 9-3, 8-4, or 7-5 jury recommendations as binding life recommendations is arbitrary and violates the Eighth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

The enactment of Chapter 2016-13 has established that Mr. Franqui's death sentence constitute cruel and unusual punishment and violates the Eighth Amendment. The new statute reflects a consensus under the Eighth Amendment that a defendant cannot be sentenced to death when 3 or more jurors have formally voted in favor of a life recommendation. Under the new statute, at least 10 jurors must recommend death before a death sentence can be imposed. If 3 or more jurors formally vote against a death recommendation, the defendant cannot be sentenced to death. As the new § 921.141 establishes, the norms that "currently prevail" do not permit the imposition of a death sentence when three or more jurors have formally voted for a life recommendation. Moreover, Eighth Amendment rulings premised upon evolving standards of decency must be applied retroactively. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). To carrying out Mr. Franqui's death sentence in these circumstances would constitute cruel and unusual punishment and violate the Eighth Amendment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Reply Brief has been furnished by electronic service to Sandra Jaggard, Assistant Attorney General, at Sandra.Jaggard@myfloridalegal.com, on this 2nd day of May, 2016.

/s/ Martin J. McClain
MARTIN J. MCCLAIN
Fla. Bar No. 0754773
McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th Street
Wilton Manors, FL 33334
(305) 984-8344
martymcclain@earthlink.net

Counsel for Mr. Franqui

CERTIFICATE OF FONT

This is to certify that this Supplemental Reply Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

/s/ Martin J. McClain
MARTIN J. MCCLAIN