IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1752

WILLIAM THOMPSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, MIAMI-DADE COUNTY, FLORIDA

SUPPLEMENTAL REPLY BRIEF OF APPELLANT IN LIGHT OF *HURST V. FLORIDA*

MARIE-LOUISE SAMUELS PARMER
Special Assistant CCRC-S

BRI LACY
Staff Attorney

CAPITAL COLLATERAL REGIONAL COUNSEL - SOUTH
1 East Broward Blvd., Suite 444
Fort Lauderdale, Florida 33301

COUNSEL FOR MR. THOMPSON

PRELIMINARY STATEMENT

Mr. Thompson does not abandon or concede any issues and/or claims not specifically addressed in the Supplemental Reply Brief. Mr. Thompson expressly relies on the arguments made in the Supplemental Initial Brief for any claims and/or issues that are only partially addressed or not addressed at all in this Supplemental Reply.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

ARGUMENT IN REPLY

MR. THOMPSON'S CONVICTION AND DEATH SENTENCE ARE UNCONSTITUTIONAL UNDER *HURST V. FLORIDA* BECAUSE A JUDGE, RATHER THAN A JURY, FOUND THE FACTS NECESSARY TO IMPOSE DEATH

In response to Mr. Thompson's Supplemental Initial Brief, the State asserts two arguments, both of which must fail. The State argues that 1) Mr. Thompson's claim is not properly before the court and, 2) that his arguments are "meritless" because *Hurst*[1] is not retroactive and Mr. Thompson misconstrues *Hurst* (Supp. AB 1). Each argument will be addressed in turn.

The State argues that Mr. Thompson's claim that his death sentence is unconstitutional under *Hurst* is not properly before this Court because Mr. Thompson failed to present this issue in his Rule 3.851 postconviction motion (Supp. AB 1). The State's argument is meritless and the case upon which the State relies, *Doyle v. State*, 526 So. 2d 909 (Fla. 1988), is unavailing.

On February 16, 2016, this Court granted Mr. Thompson's request for supplemental briefing in light of the January 11, 2016 decision in *Hurst*. Indeed, this court has ordered or granted supplemental briefing in dozens of cases before this Court. It is the tectonic shift in Florida's death penalty scheme created by *Hurst* that gives rise to Mr. Thompson's claim. The State minimizes the meaning and impact

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

of *Hurst*, as that is the only means through which the State can make its argument.

Doyle is distinguishable as it merely stands for the wholly unremarkable proposition that a capital defendant must timely bring claims on direct appeal. The State's reliance on *Doyle* to fault Mr. Thompson for not raising his *Hurst* claim ten or more years ago crumbles on cursory review. The State has argued for years and years, in case after case, that *Ring*[2] did not apply in Florida, and this Court mistakenly adopted the State's flawed argument. It was not until January 11, 2016, when the Supreme Court decided *Hurst*, that Mr. Thompson could have raised this claim. Mr. Thompson promptly sought leave from this Court to raise the claim before this Court, or, in the alternative, to be given leave to file a successive 3.851 motion challenging his death sentence which was obtained through an unconstitutional statute. The State's argument cannot withstand scrutiny.

At the heart of its argument, the State suggests that *Hurst* is not retroactive and that Mr. Thompson has "misconstrue[d] the holding of *Hurst* and misrepresent[ed] the nature of the error at issue" (Supp. AB 2-3). In making this argument, the State has failed to recognize the statutorily defined facts that *Hurst* identified as necessary under Florida statutory law to impose a sentence of death:

> [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

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

> exist" and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." §921.141(3).

Hurst at 622. (internal citations omitted). The State argues that this statement in *Hurst* does not matter (Supp. AB 2-4), and "should be rejected." *Id.* But in making this argument, the State does not address the statutorily defined facts quoted in *Hurst* as necessary to authorize a death sentence.

The State premises its argument on a misreading of *Ring v. Arizona*. In *Ring*, the Court held that "capital 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). *Ring* tied the Sixth Amendment right to a jury trial to the legislatively defined facts which authorize an increase in punishment. "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." *Id.* at 602.

The State, however, in Mr. Thompson's case, has failed to acknowledge that the scope of the Sixth Amendment right varies from State to State because its application is tethered to the language of each State's statute and how each State legislature chose to define the facts necessary to authorize an increase in punishment.

In *Hurst*, the Court looked to Florida statutory law, as was required by the holding in *Ring: "*[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 . . . that 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 the clear language in *Ring* and *Hurst*, the State refuses to consider the language contained in the Florida statute and relies on *State v. Steele*, 921 So. 2d 538, 545 (Fla. 2005) to support its argument that the finding of a single aggravator supports the imposition of a sentence of death (Supp. AB 8). However, in *Steele*, this Court misconstrued *Ring* when it stated: "Even if *Ring* did apply in Florida – we read it as requiring only that the jury make the finding of an 'element of a greater offense.' That finding would be that at least one aggravator exists – not that a specific one exists." *Steele*, 921 So. 2d at 546. This Court mistakenly applied the Sixth Amendment test to Arizona statutory law rather than applying it to the language in Florida's death penalty statute. Indeed, this Court's misapprehension of *Ring*, forms the core of the Court's holding in *Hurst.*

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 chooses to see only the conclusion in *Ring* that in Arizona, the jury trial right was tethered to the Arizona statute, which allowed for death eligibility upon the finding of one aggravator. But Arizona's statute has nothing to do with the Florida law under which

Mr. Thompson was sentenced. Nowhere in Florida's former statute was it written than the mere presence of a single aggravating circumstance was sufficient to justify the imposition of a death sentence. In fact, the U. S. Supreme Court has recognized that under Florida law, one aggravator is not necessarily enough.

> The language of the statute, which provides that the sentencer must determine whether "sufficient aggravating circumstances exist," § 921.141(3)(a), indicates that any single statutory aggravating circumstance **may not be adequate to meet this standard** if, in the circumstances of a particular case, it is not sufficiently weighty to justify the death penalty.

Barclay v. Florida, 463 U.S. 939, 954 n.12 (1983) (emphasis added).

The State's reliance on *Alleyne v. United States*, 133 S. Ct. 2151 (2013) to support its argument that "the Sixth Amendment right underlying *Ring* and *Apprendi* did not apply to factual findings 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" (Supp. AB 5). *Alleyne* is a non-capital case from Virginia about whether *Apprendi*[3] applied to a Virginia statute's sentencing enhancement provision. The actual holding of *Alleyne* was that *Apprendi* did apply and therefore any fact which increased the possible penalty was an element that had to be found by a jury *Alleyne* actually supports Mr. Thompson's argument that any fact which increases the possible penalty is an element which must be found unanimously by a jury. Mr.

[3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Thompson's jury made no such findings, which is why his death sentence is unconstitutional under *Hurst* and cannot stand. Similarly, the Eleventh Circuit has made clear that in Florida, eligibility and the weighing of sentencing factors are "collapsed into a single step." *See Jennings v. McDonough*, 490 F.3d 1230, 1257 (11th Cir. 2007). The Florida Legislature combining the weighing with the eligibility determination is the source of the confusion about *Hurst*'s application of the Sixth Amendment to Florida's statute

The State further argues that this Court should rely on its precedent in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005), where this Court found *Ring* not to be retroactive (Supp. AB 11-12). But 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 asked if *Ring* was of "'sufficient magnitude' to require retroactive application." *Johnson*, 904 So. 2d at 409. The State ignores the fact that *Johnson* rested on a rotten foundation which collapsed when *Hurst* overruled *Hildwin* and *Spaziano.* Because this Court did not give full meaning or import to the scope of *Ring*, this Court's analysis in *Johnson* was fundamentally flawed and cannot and should not be relied upon in determining the jurisprudential upheaval of *Ring* and *Hurst* and the retroactive application of those decisions.

The State also argues that *Hurst* "merely found a trial error" in the manner in

which the death penalty was imposed and that Florida Statute §775.082(2), mandating a life sentence does not apply because the death penalty was not found to be unconstitutional (Supp. AB 13). The U.S. Supreme Court did not leave any room for doubt or interpretation about exactly what it held in *Hurst v. Florida* when it wrote, "**[w]e hold this sentencing scheme unconstitutional**. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose death. A jury's mere recommendation is not enough." *Hurst*, 136 S. Ct. at 619 (emphasis added). In this manner, the sentencing scheme itself is unconstitutional. Florida has been sentencing and executing people in violation of the United States Constitution for decades. In facing this reality, the State is not given pause by its oath to honor the Constitution and uphold its principles, but rather forges ahead. The State remarkably urges this Court to treat a claim for *Hurst* relief as any run-of-the-mill request.

Instead of acknowledging the actual holding of *Hurst* or the plain language of the statute under which Mr. Thompson was sentenced to death, Florida Statutes §921.141 (amended March 7, 2016), the State attempts to minimize *Hurst's* impact by characterizing it as a procedural rule.

The State contends that Mr. Thompson's arguments contravene "the principles of federalism embodied in the Constitution" (Supp. AB 7). The State attempts to resuscitate pre-*Hurst* law by claiming that federalism denies the United States Supreme Court the power to interfere with the way that Florida's death penalty

functions. The Supremacy Clause of the U.S. Constitution reveals the fallacy of that argument.

> This Constitution, and the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. CONST. art. VI, § 2. States cannot have unconstitutional death penalty schemes. And *Hurst* found Florida's scheme unconstitutional. Federalism cannot revive it.

After *Hurst*, because Florida's statute did not allow for death eligibility based on only one aggravator, prosecutors lobbied the Florida Legislature to insert that language into the new statute. The new law now provides that "[i]f the jury does not unanimously find at least one aggravator, the defendant is ineligible for a sentence of death." Fla. Stat. § 921.141 (2)(b)(1) (effective March 7, 2016). The former statute did not contain any such language. Under the former statute, the requisite finding was that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141 (3).

Under *Hurst*, that factual finding of sufficiency—the finding that increases the penalty from life in prison to death—must be made by a jury, not a judge. That is the constitutional principle at the heart of *Hurst*.

> [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). 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. . . . The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires."

Hurst, 136 S. Ct. at 622 (emphasis in original). Both *Ring* and *Hurst* require courts to look to the governing statute to see what facts are necessary before death may be imposed, but the State refuses to acknowledge the statute, as if ignoring it will make it go away.

Instead, the State simply parrots the line that "[a]fter Ring, this Court adhered to the interpretation that a death sentence was authorized if an aggravator was found" (Supp. AB 8), without citing any statutory authority. Because the State cannot cite the former statute (since the statute did not say that), the only support it can offer for its argument are decisions where this Court misconstrued *Ring*. First, the State cites to dicta in *Steele*, 921 So. 2d at 543, one of the cases abrogated by *Hurst*. In *Steele*, this Court struggled with the implications of *Ring*, lamenting that "the effect of that decision on Florida's capital sentencing scheme remains unclear" and that this "uncertainty has left trial judges groping for answers." *Id*. at 540.

Contrary to the State's representation, *Steele* did not hold that the presence of one aggravator automatically qualified one for death. Instead, 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* and *Spaziano,* cases which were specifically overturned by *Hurst*. *See Steele,* 921 So. 2d at 546-47.

Ironically, it was in *Steele* that this Court pleaded with the Florida Legislature to take action to ensure the continued viability of Florida's death penalty scheme. Specifically, the Court implored the Legislature to "revisit the statute to require some unanimity in the jury's recommendations." *Steele,* 921 So. 2d at 548. At the end of the section, entitled "The Need for Legislative Action," the Court observed:

> The bottom line is that Florida is now the *only* state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote *both* whether aggravators exist and whether to recommend the death penalty. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.

Id. at 550 (emphasis in original). Unfortunately, the Legislature has indeed decided that it wants Florida to remain an outlier, and whether the new statute will withstand constitutional scrutiny remains to be seen.

The State argues that *Hurst* is just a minor procedural blip and as such, it is not retroactive. This assertion is belied by the maelstrom of activity *Hurst* inspired, both in the Florida Legislature and in this Court. In the wake of *Hurst*, the Legislature

scrambled to quickly pass a new law, because it recognized that *Hurst* meant that there was no valid death penalty statute in Florida. In addition to the 30+ cases in which it has ordered supplemental briefing, this Court issued two stays of execution and recalled a final mandate in a capital case to allow supplemental briefing.[4] By doing so, this Court has acknowledged that the constitutional problem identified in *Hurst* is significant enough to justify disturbing the finality of capital cases. This would not be the case if *Hurst* were, as the State keeps repeating, just a procedural rule.

The State also trots out *Teague v. Lane*, 498 U.S. 288 (1989) and *Schriro v. Summerlin*, 542 U.S. 348 (2004) (Supp. AB 2, 12) to support its argument that *Hurst* is not retroactive, and alleges a difficult to fathom assertion that Mr. Thompson's argument that "the rules regarding retroactive (sic) have different purposes in state and federal court is again false" (Supp. AB 13). However, this Court made clear in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), that Florida employs its own retroactivity analysis.

Mr. Thompson argued in his supplemental initial brief that the *Hurst* error 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. However, to the extent that this Court decides a harmless error analysis is appropriate

[4] *Hojan v. State*, No. SC13-2422 (Fla. Dec. 18, 2015)

(which the *Hurst* Court specifically declined to address), Mr. Thompson must address the State's mendacious assertion that Mr. Thompson argues that "having a judge write a sentencing order is structural error" (Supp. AB 9). Although the State conflates the issue with another concern, whether specific findings were made as to the finding of an aggravator, Mr. Thompson maintains that the *Hurst* error is more than a fact finding issue and "infected the entire trial process." *Arizona v. Fulimante*, 499 U.S. 279, 310 (1991).

There were no jury findings. We have no idea what the jury found. We only know that the jury recommended death by a vote of 7-5, which leads to the second point: the State could never prove in Mr. Thompson's case that the *Hurst* error was harmless beyond a reasonable doubt. "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). Five of Mr. Thompson's jurors voted for a life sentence, presumably because those jurors did **not** find sufficient statutorily defined facts to justify a death sentence. There is no way to conclude beyond a reasonable doubt that Mr. Thompson's jury—if properly instructed that its determination of the statutorily defined facts would be binding on the judge—would have unanimously found the facts necessary to impose death.

The State lastly argues that Mr. Thompson was automatically eligible for

death because he "pled guilty of (sic) sexual battery" (Supp. AB 15). But this argument also must fail, as it relies on the flawed argument a set out above, premised on the failure to consider the statutory language drafted by the Florida legislature. [5]

CONCLUSION AND RELIEF SOUGHT

In light of *Hurst,* Mr. Thompson asks that this Court vacate his unconstitutional sentence of death; and/or permit him to file a state habeas petition to raise a *Hurst* claim; and/or allow him to file a Rule 3.851 motion raising a *Hurst* claim; and/or grant any other relief that this Court deems just and proper.

s/Marie-Louise Samuels Parmer
MARIE-LOUISE SAMUELS PARMER
Fla. Bar No. 0005584
Special Assistant CCRC-South
Designated Lead Counsel

BRI LACY
Fla. Bar No. 116001
Staff Attorney

[5] Florida's newly minted statute, which provides that future defendants are eligible for death upon the finding of one aggravator, is irrelevant. Mr. Thompson was sentenced under the unconstitutional statute, and that is the sentence he is appealing. Substantive changes in statutory law cannot be applied retroactively in criminal cases. U.S. CONST. art. I, § 9.

CERTIFICATE OF FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of this Supplemental Reply Brief has been filed with the Court and served on opposing counsel, Assistant Attorney General Sandra Jaggard, using the Florida Courts e-filing portal on the 21st day of March, 2016. Counsel further certifies that on the same day a copy has been mailed to Mr. Thompson via U.S. Mail, first class postage prepaid.

/s/ Marie-Louise Samuels Parmer
MARIE-LOUISE SAMUELS PARMER
Fla. Bar No. 0005584
Special Assistant CCRC-South
Designated Lead Counsel

BRI LACY
Fla. Bar No. 116001
Staff Attorney

Capital Collateral Regional Counsel-South
1 E. Broward Blvd., Ste. 444
Fort Lauderdale, FL 33301
954-713-1284
marie@samuelsparmerlaw.com

COUNSEL FOR MR. THOMPSON