IN THE SUPREME COURT OF FLORIDA

DUSTY RAY SPENCER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC17-1269
L.T. No. 1992-CF-000473-A-O
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The Appellee will rely upon its prior statement of the facts and procedural history set forth in its initial response to this Court's show cause order filed on October 26, 2017.

The *Hurst* Claim

Spencer's second successive motion based on Hurst v. State, 202 So. 3d 40 (Fla. 2016), was denied April 28, 2017. Spencer appealed the denial of relief and this appeal is pending in Case No. SC17-1269. The Hurst related claims have been briefed pursuant to a show cause order issued by this Court on September 25, 2017. Following briefing, this Court issued a supplemental order for briefing on the "non-Hurst [note omitted] related issues in this case." This brief follows the supplemental brief filed by the Appellant on February 26, 2018.

SUMMARY OF THE ARGUMENT

Spencer essentially re-argues his Hurst related claims in this supplemental brief contrary to this Court's order that the brief was to address non-Hurst issues. Regardless, Spencer's claims are untimely and procedurally barred. Spencer is essentially renewing his argument that a new penalty phase jury was required when this Court struck the CCP aggravator on Spencer's initial direct appeal. Hurst does not serve to resurrect this untimely and procedurally barred claim. Moreover, Spencer's claims are foreclosed by this Court's well established precedent holding that Hurst is not retroactive to defendants whose convictions and sentence were final when the Supreme Court issued Ring v. Arizona, 536 U.S. 584 (2002).

ARGUMENT

PRELIMINARY STATEMENT

Preliminarily, Appellant ignores this Court's order for supplemental briefing by essentially rearguing his Hurst related claims. This Court's order of January 25, 2018 made it clear it was seeking additional briefing on the "non-Hurst [note omitted] related issues in this case." All of the claims raised herein rely upon a retroactive application of Hurst. They do not set forth any separate issues apart from Hurst.[1] Accordingly, the Appellee submits that this Honorable Court may either strike or ignore the Appellant's supplemental brief.

[1] An examination of Spencer's initial brief in response to this Court's show cause order reveals that only a portion of Claim I could possibly relate to a separate non-Hurst claim---the previously litigated claim that a new jury should have been empaneled following the striking of the CCP aggravator. However, as briefed here by Appellant in his supplemental brief, this is simply raised as another reason Spencer believes he is entitled to Hurst relief.

ISSUE

APPELLANT HAS NOT OFFERED ANY PERSUASIVE, MUCH LESS COMPELLING REASONS FOR THIS COURT TO DEPART FROM ITS NOW SETTLED PRECEDENT IN ASAY AND HITCHCOCK HOLDING THAT DEFENDANTS LIKE SPENCER ARE NOT ENTITLED TO RETROACTIVE APPLICATION OF HURST V. STATE.

A. Any Claim That Spencer Was Denied His Sixth Amendment Rights When He Was Resentenced Following The Striking of The CCP Aggravator Is Both Untimely And Procedurally Barred

Spencer argues that he was denied a jury trial on the elements that subjected him to the death penalty, and he was denied his right to proof beyond a reasonable doubt. Spencer argues that since the CCP aggravator was stricken, a new penalty phase jury was required to be empaneled to reconsider the appropriate sentence rather than the trial judge alone. This claim is both untimely and procedurally barred.

The factual basis for this claim arose at the time of this Court's decision on direct appeal and at the very latest, when this Court issued its decision affirming the trial court's imposition of the death sentence following remand. See Spencer v. State, 691 So. 2d 1062, 1064 (Fla. 1996) (Observing that Spencer's case had been remanded "for a reweighing of the aggravating and mitigating circumstances by *the judge*." (emphasis added). This claim is therefore clearly time barred under Fla. R. Crim. P. 3.851(d)(2). The procedural history of this claim, or a related variant, makes it clear that this claim

is not only untimely but it is also procedurally barred.

The last time this Court reviewed a variant of the constitutional claim Spencer seeks to raise here was as an allegation of ineffective assistance of appellate counsel, which was rejected by this Court in 2003. In rejecting Spencer's claim, this Court held that counsel was not ineffective in failing to argue on appeal from resentencing that the trial court erred in failing to empanel a new jury and conduct a *de novo* penalty phase. This Court stated:

> Spencer also asserts that, in light of this Court's determination that the evidence in his case did not support the CCP aggravating circumstance but did support the statutory mental mitigators, see Spencer v. State, 645 So.2d 377, 384-85 (Fla. 1994), Apprendi required that a new jury be impaneled on remand of his case for resentencing. He also asserts that this Court's order on remand was ambiguous as to whether a new jury should be impaneled to consider the mitigating and aggravating circumstances. However, we find no ambiguity in our specific remand for "reconsideration of the death sentence by *the judge*." Id. at 385 (emphasis added). Further, after resentencing was complete we also noted that the case had been remanded "for a reweighing of the aggravating and mitigating circumstances by *the judge*." Spencer v. State, 691 So.2d 1062, 1064 (Fla. 1996) (emphasis added).

Spencer v. State, 842 So. 2d 52, 72-73 (Fla. 2003). Hurst does not resurrect untimely and previously litigated claims.

On direct appeal, this Court remanded for resentencing before the trial court based upon allegations of trial court error in assessing and weighing the CCP aggravator and mental

health mitigation. Spencer's penalty phase jury was not prevented from hearing or assessing any proposed mitigating evidence. The error found on appeal by this Court dealt with the trial court's error in assessing and evaluating the evidence presented during the penalty phase hearing.[2] Consequently, on remand the judge reevaluated the evidence in light of the court striking the CCP aggravator and considering the mental health mitigation the court had initially rejected. There was simply no reason to empanel a new penalty phase jury. This Court found trial court error, not error in the instructions or evidence presented to the jury. Accordingly, it was not error for this Court to order a remand for reweighing and resentencing by the trial court. See generally Romano v. Oklahoma, 512 U.S. 1, 10 (1993) (observing that the Court has condoned remand for reweighing by lower courts after striking an improper or unconstitutional aggravator) (citations omitted).

In addition to being procedurally barred and untimely, this claim is also without merit. The State "bears the burden to prove each aggravating circumstance beyond a reasonable doubt."

[2] Spencer filed a Petition for Writ of Certiorari to the Supreme Court on July 14, 1997, generally asserting that Florida's death penalty statute was unconstitutional because the trial court and Florida Supreme Court refused to consistently apply mitigating circumstances established in the record. The Court denied certiorari on October 6, 1997. Spencer v. Florida, 522 U.S. 884 (1997).

Smith v. State, 170 So. 3d 745, 760 (Fla. 2015). The jury in Spencer's case was instructed that the aggravating circumstances they may consider must be proven beyond a reasonable doubt. As a result, this meritless claim should be summarily denied.

Moreover, the State disagrees that Spencer was subject to an "increase in penalty" without any jury at all which constitutes "fundamental error." (Appellant's Supplemental Brief at 8). Hurst represented an application of Ring to Florida and Ring was based on Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). The holding in Apprendi was 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." Apprendi, 530 U.S. at 490. The Hurst court also cited Alleyne v. United States, 570 U.S. 99, 104 (2013), which held any facts that increases the mandatory minimum sentence for an offense must be submitted to the jury and found beyond a reasonable doubt 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." Alleyne, 570 U.S. at 99, 102, 113 n.2. The Alleyne Court explained, "this is distinct from factfinding used to guide judicial discretion in selecting a punishment within limits fixed by law." Id. at 113 n.2. "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." Id.

Appellant became eligible for a death sentence given the guilt phase convictions for contemporaneous violent felonies. The unanimous verdict by Spencer's jury establishing his guilt of these contemporaneous crimes was clearly sufficient to meet the Sixth Amendment's factfinding requirement, and he was properly rendered eligible for a death sentence at that point. See Alleyne, 570 U.S. at 115-16 (the Court explained that "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime."). See also Jenkins v. Hutton, 582 U.S. ___, 137 S. Ct. 1769 (2017) (confirming the constitutionality of an Ohio death sentence based on a jury's guilt-phase determination of facts); Waldrop v. Comm'r, Alabama Dep't of Corr., 15-10881, 2017 WL 4271115, at *20 (11th Cir. Sept. 26, 2017) (unpublished) (In rejecting a Hurst claim the Court explained: "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt

when it returned its guilty verdict. See § 13A-5-45(e).").

II. The Remaining Claims Simply Re-argue The Retroactivity Of *Hurst* And Are Foreclosed By Binding Precedent

The remainder of Appellant's brief largely re-argues the reasons Spencer believes that Hurst should apply to him. However, Spencer's convictions and sentences were unquestionably final prior to the issuance of Ring. Therefore, under this Court's now settled precedent, he is not entitled to any relief. See Asay v. State, 210 So. 3d 1, 11-22 (Fla. 2016), cert. denied, 138 S. Ct. 41 (2017); Hitchcock v. State, 226 So. 3d 216, 217 (Fla.), cert. denied, 138 S. Ct. 513 (2017). The State will rely upon the arguments previously submitted in response to this Court's show cause order rather than repeat them here. However, the State notes that in addition to being foreclosed by binding precedent, Spencer's successive motion for post-conviction relief was untimely under the plain language of Rule 3.851. See Hamilton v. State, 2018 WL 773977 (Fla. Feb. 8, 2018) ("Accordingly, because Hamilton's successive motion was filed after the expiration of the one-year time limitation and none of the exceptions to the one-year time limitation in rule 3.851(d)(2) are applicable to either of the claims raised by Hamilton in his successive postconviction motion, the postconviction court properly denied the successive motion as untimely.") (citing Fla. R. Crim. P. 3.851(d)(2)).

CONCLUSION

WHEREFORE, the Appellee, State of Florida, respectfully requests that this Honorable Court affirm the Order denying post-conviction relief entered below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of March, 2018, I electronically filed the foregoing with the Clerk of the Florida Supreme Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Julissa R. Fontán, Maria E. DeLiberato and Chelsea Shirley, Assistants CCRC, Law Office of the Capital Collateral Regional Counsel, Middle Region, 12973 N. Telecom Parkway, Temple Terrace, Florida 33637-0907 (fontan@ccmr.state.fl.us, deliberato@ccmr.state.fl.us, shirley@ccmr.state.fl.us and support@ccmr.state.fl.us).

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Scott A. Browne
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