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IN THE SUPREME COURT OF FLORIDA
Case No. SC13-244 & SC 13-1959

LUCIOUS BOYD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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LUCIOUS BOYD,

Petitioner,

v.

JULIE L. JONES, etc.

Respondents.

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REPLY TO APPELLEE/RESPONDENT'S OPPOSITION TO APPELLANT/PETITIONER'S MOTION TO HOLD MOTION FOR REHEARING IN ABEYANCE AND TO PERMIT SUPPLEMENTAL BRIEFING IN LIGHT OF *HURST V. FLORIDA*

COMES NOW the Appellant/Petitioner, **LUCIOUS BOYD**, by and through counsel, and herein files this reply to Appellee/Respondents' opposition to motion to hold rehearing in abeyance and for supplemental briefing in light of *Hurst v. Florida*. In reply to Appellee/Respondents' opposition therefore, Mr. Boyd states:

On January 27, 2016, Mr. Boyd filed a motion requesting the opportunity to file supplemental briefs in light of the decision in *Hurst v. Florida*, 136 S. Ct. 616

(2016). On the same date, the State filed a response in opposition to Mr. Boyd's request. The State's opposition relies on four points: Mr. Boyd did not raise a claim based on *Ring v. Arizona*[1] on direct appeal or during his postconviction proceedings; *Hurst* has not been found to be retroactive to cases on collateral review; supplemental briefing should be denied because of the existence of the prior violent felony aggravator; and the recommendation for death was made unanimously by Mr. Boyd's jury. The Appellee's arguments speak more to the need for briefing than to there being no *Hurst*–related issues on which this Court should consider both sides.

Whether or not Mr. Boyd should be granted supplemental briefing does not turn on whether he previously raised a *Ring* claim. This Court has ordered supplemental briefing in collateral review cases in which no *Apprendi*[2] or *Ring* claim was raised in the initial brief or state habeas petition, *See Knight v. State*, Case No. SC14-1775, and even in the instance where no *Apprendi* or *Ring* claim was made on direct appeal, *See King v. State,* SC14-1949. Mr. Boyd is not attempting to add a new claim to his rehearing motion, but rather is seeking to be afforded the same opportunity as others on collateral review. In fact, Mr. Boyd's case is not final on collateral review until the denial of his motion for rehearing and until such time as the mandate issues.

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[1] *Ring v. Arizona*, 536 U.S. 584 (2002)
[2] *Apprendi v. New Jersey*, 530 U.S. 466 (2000)

Furthermore, *Hurst's* applicability to Mr. Boyd's case, or whether he should have an opportunity to present a *Hurst* claim, does not depend in any way on prior preservation of a *Ring* or *Apprendi* claim—particularly given this Court's repeated pronouncements that neither case applies to Florida. Such was the case at the time Mr. Boyd filed his initial brief in 2004. *See Lambrix v. State*, Case No. SC16-8 & SC16-56 Appendix A, Florida Supreme Court decisions citing *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) To Reject Claims based on *Ring* or *Apprendi* and Appendix B Florida Supreme Court Decisions Citing *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001) To Reject Claims Under *Ring* or *Apprendi*. It is inconceivable to undersigned counsel that this Court would give the benefit of a watershed constitutional case like *Hurst* to one defendant and not another only because the other defendant declined to raise a claim that, at the time, had been denied by this Court dozens of times and deemed by the State, over and over, to be nothing more than utterly frivolous. After watching the oral arguments this Court held today in cases with *Hurst* issues, counsel is all the more certain that life-and-death in Florida will not turn on a rule that would require a defendant to thumb his nose at this Court's repeated pronouncements that *Ring v. Arizona* was not applicable in Florida. This Court said there was no claim. The State said there was no claim. There was no claim, until *Hurst*.

The State argues in its response that "Hurst has not been found to be retroactive to cases on collateral review…Hence, Boyd does not have a valid basis to raise a challenge under *Hurst*, here." Response at 3. But the complex issue of *Hurst's* retroactivity, evidenced by the many views expressed in the oral arguments today, is one of the very issues that call for supplemental briefing here. Again, the State ignores the fact that this Court has ordered supplemental briefing in numerous other cases to grapple with this difficult issue. *See*, for example, *Lowe v. State*, Case No. SC12-263, 1-14-16 Order granting supplemental briefing; *Knight v. State*, Case No. SC14-1775, 1-19-16 Order directing supplemental briefing; *Dougan v. State*, Case No. SC13-1826, 1-19-16 Order directing supplemental briefing; *Lambrix v. Jones*, Case No. SC16-56, 1-12-16 Order directing supplemental briefing. There is no basis for the State to argue that *Hurst's* non-retroactivity is a forgone conclusion that does not even merit discussion. Mr. Boyd has just as much a right to be afforded an opportunity to present supplemental briefing as to his entitlement to relief under *Hurst* as any other capital defendant with a pending case before this Court.

The State suggests that Mr. Boyd's contemporaneous convictions of armed kidnapping and sexual assault alone made him eligible for the death penalty because they constitute the existence of a prior violent felony aggravator. The State is wrong on several points. First and foremost, the State fails to recognize *Hurst's* acknowledgement that "under state law, the maximum sentence a capital felon may

receive on the basis of the conviction alone is life imprisonment." *Hurst* at *3 (citing §775.082(1), Fla. Stat.). *Hurst* quite explicitly recognized that "the Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death'" and that 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* at *6 (quoting from Fla. Stat. §§ 775.082(1) and 941.141(3)) (emphasis added). The findings of fact that the Sixth Amendment requires a jury to make in a Florida capital case are "that sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

Hurst made clear what the findings are under Florida's statute. Florida's capital sentencing statute does not merely require the finding of one aggravating circumstance. It cannot be said that Mr. Boyd's jury made any finding that "sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances" simply because he was convicted of the contemporaneous felonies. Additionally, and of note, Mr. Boyd's jury was never actually instructed that the contemporaneous convictions could be considered as prior violent felony aggravators. Rather, the jury was instructed on the 'during the course of a felony aggravator,' which does not

encompass the prior violent aggravator. The State did not even rely on the aggravator it now asserts to have been automatically found as a result of Mr. Boyd's conviction and therefore somehow made this case Sixth Amendment-compliant despite *Hurst*.

Not only would the presence of a prior violent felony fail to satisfy Florida's statute because there would be no finding of sufficiency, but there would also be no finding by the jury that the felony was necessarily violent. In *State v. Sweet*, 624 So. 2d 1138, 1143 (Fla. 1993), this Court found that possession of a firearm by a convicted felon is not "per se a crime of violence," but that "the circumstances of this particular crime were shown to have been violent, as Sweet used the firearm to hit someone in the face and ribs." There was no such additional finding of violence in this case. As Justice Anstead explained in his opinion in *Duest v. State*, concurring in part and dissenting in part:

> Florida's sentencing scheme requires additional findings beyond the bare fact of a prior conviction before it can be used as an aggravating circumstance. Section 921.141(5)(b), Florida Statutes (2002) permits the finding of an aggravating circumstance where "[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Hence, other than a conviction of a capital felony, the trial judge must find that a felony conviction involved the use or threat of violence before this aggravating circumstance is proven. Indeed, our case law suggests that this aggravating circumstance often rests on factual determinations well beyond the mere existence of a prior conviction.

Duest v. State, 855 So. 2d 33, 55 (Fla. 2003) (Anstead, J., concurring in part and dissenting in part). After Hurst, we know that not only must the additional factual determination of violence be made, it must be made by the jury.

The State's reliance on the jury's recommendation (even though it was unanimous) is misplaced and contrary to *Hurst*. *Hurst* at *3 ("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.") (emphasis added); *id*. at *6 ("The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires"). Mr. Boyd's penalty phase jury was repeatedly misinformed as to its responsibility in the sentencing process. The jurors were, over and over, told that their role was simply to render a "recommendation" or an "advisory sentence" and that the Court was "not bound by the recommendation." The trial court emphasized that the final decision of sentence lies with the judge and not with the jurors (R. 39). The unanimity of the jury does nothing to change the fact that the judge unconstitutionally replaced the jury's findings with his own.

The State also provided misinformation by indicating to the jury that they were only responsible for making a recommendation to the Court during the second phase of trial (R. 177, 180). The State emphasized it was the Court that ultimately made the decision as to sentence (R.181). This diminishing of the jurors' sense of responsibility was furthered by the trial court's preliminary instructions at the

beginning of the penalty phase highlighting "the final decision as to what punishment shall be imposed rests solely with the judge." (Supp. R. 430-31). This sentiment was echoed again during the final instructions to the jury where they were repeatedly told their duty was to "advise" the court as to punishment and that the final decision as to punishment was the responsibility of the judge (R. 2371). Given those instructions and the record at penalty phase, all that it is able to be known for certain about the result of the jury's deliberation is that "[a] majority of the jury, by a vote of 12-0, *advise and recommend* to the court that it impose the death penalty upon Lucious Boyd for the murder of [D.D.]." (R. 2388-89).

WHEREFORE, based on the foregoing, the Appellant/Petitioner, Lucious Boyd, respectfully moves the Court to hold in abeyance his motion for rehearing in Case No. SC13-244 and SC-1959 and grant the parties opportunity to submit supplemental briefing in the above-styled case as to the effect of the recent decision in *Hurst v. Florida*, 2016 WL 112683 (January 12, 2016) on his sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Leslie Campbell, Assistant Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401, via email this 2nd day of February, 2016.

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