

CASE NO. 17-7099

IN THE UNITED STATES SUPREME COURT

October 2017 Term

RICHARD KNIGHT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

(Restated)

(Capital Case)

Whether the Sixth Amendment error identified in Hurst v. Florida was procedural in nature as it was in the underlying precedents of Apprendi v. New Jersey and Ring v. Arizona and, therefore, is not retroactive?

CITATION TO OPINION BELOW

The decision of which Petitioner seeks discretionary review is reported as Knight v. State, 225 So. 3d 661 (Fla. 2017).

JURISDICTION

Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257. Respondent acknowledges that § 1257 sets out the scope of this Court's certiorari jurisdiction; however, this Court's jurisdiction is limited to federal constitutional issues that were properly presented to and addressed by the state court. See also Sup. Ct. R. 14 (g)(i) (If review of a state court judgement is sought, the Petition for Writ of Certiorari shall specify "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts . . ."). This Court has never held that this type of Sixth Amendment error is retroactive. Knight attempts to justify this Court's jurisdiction by relying on a Florida Supreme Court's application of state law and the state constitution in deciding that certain cases were entitled to retroactive relief and to what is arguably an expansive reading of this Court's opinion in Hurst v. Florida, 136 S. Ct. 616 (2016). Nonetheless, because of its reliance on Florida constitutional and statutory law, the Florida Supreme Court's decision in this case is based on adequate and independent state grounds. Although

it reached the correct conclusion in this case, the Florida Supreme Court's reliance on unanimous jury recommendations to find Hurst errors harmless does not comport with this Court's precedent – or its own.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues presented in this capital case involve the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Richard Knight was indicted on August 15, 2001 and was arraigned on August 29, 2001 on two counts of first degree murder for the deaths of Odessia Stephens and Hanessia Mullings, mother and daughter. The case eventually came to trial on March 13, 2006. The jury was sworn in on March 22, 2006. Knight made a motion for mistrial and to disqualify the jury the next day on March 23 based on the contention that jury members may had seen him in handcuffs and shackles. The court held an evidentiary hearing and, thereafter, denied the mistrial motion.

On April 26, 2006 the jury found Knight guilty of both counts of first degree murder. The penalty phase began on May 22, 2006. After a number of witnesses testified, the court granted the defense a continuance in the presentation of its case in order to secure another neuropsychologist. The penalty phase trial recommenced

on July 24, 2006. Later that day the jury returned a recommendation for death by a vote of twelve (12) to zero (0).

The court held a Spencer¹ hearing on August 18, 2006. (T 31) The trial court then sentenced Knight to death on March 28, 2007. In its written order the court found two aggravating factors for the murder of Odessia Stephens in Count I. For Count II involving the murder of Hanessia Mullings the court found three aggravating circumstances. The court found no statutory mitigating circumstances but found eight non-statutory ones.

Knight appealed his convictions, raising five issues. In affirming the convictions and the sentence, the Florida Supreme Court found the following facts:

The Guilt Phase

The evidence presented at trial established that Knight lived in an apartment with his cousin, Hans Mullings, Mullings' girlfriend, Odessia Stephens, and their daughter, Hanessia Mullings. Mullings and Odessia had asked Knight to move out numerous times.

On the night of the murder, June 27, 2000, Mullings was at work. At approximately 9 p.m., Mullings spoke to Odessia, who said she was going to bed, and then Mullings left his office to run errands. Knight was at the apartment with Odessia and Hanessia.

Around midnight, an upstairs neighbor heard multiple thumping sounds on the apartment walls and two female voices, one of which was a child crying. The neighbor called 911 at 12:21 a.m. on June 28, 2000. The cries continued after the police arrived.

Officer Vincent Sachs was the first to respond. He arrived at 12:29 a.m. and noted that the lights were on in the master bedroom and hall area, and that a second bedroom's window was slightly ajar.

¹ Spencer v. State, 615 So.2d 688 (Fla. 1993).

After knocking and receiving no response, he walked around the unit and noticed that the lights had been turned off and that the previously ajar window was now completely open and blinds were hanging out of it. Sachs shined his flashlight through the dining room window. He saw blood in the dining room and master bedroom. Further, he noticed Hanessia curled in the fetal position against the closet door. Once inside, he observed Odessia's body in the living room. All of the doors were locked and there had been no ransacking of the apartment.

Officer Natalie Mocny arrived next and walked around the unit.FN1 She also saw the open window and noticed Knight on the other side of some hedges approximately 100 yards from the building. She beckoned him over for questioning. Officer Sachs joined Mocny. According to the officers, Knight had a scratch on his chest, a scrape on his shoulder, and fresh cuts on his hands. Although it was not raining, Knight was visibly wet. Knight was wearing dress clothes and shoes, yet told Mocny that he had been jogging, and that he lived in the apartment, but did not have a key to get inside. There was blood on the shirt he was wearing and on a ten-dollar bill in his possession.

FN1. Officer Amy Allen also testified that she had climbed through the open window to open the apartment door and observed a deceased black female.

The crime scene investigation recovered two wet towels in Knight's bedroom, a shirt, boxers, and a pair of jean shorts under the sink in the bathroom near Knight's bedroom, all of which belonged to Knight and had numerous bloodstains. Two knife blades were also recovered, one from under the mattress in the master bedroom, and another from under Odessia's body.

Odessia's blood was found in the master bedroom between the bed and the wall, on the master bedroom blinds, on the living room carpet, on the knives' handles and blades, and on the knife holder in the kitchen. Odessia's blood was also discovered on Knight's boxers, shirt, jean shorts, the clothing Knight had been wearing when arrested, and his hand. Fingernail scrapings taken from Odessia contained Knight's DNA profile.

Hanessia's blood was found on one of the knives, on Knight's boxers, jean shorts, and on the shower curtain. The shower curtain also contained the blood of Knight's acquaintance, Victoria Martino. Dr. Lance Davis, the medical examiner, observed the bodies at the scene. Odessia was found on the living room floor near the entrance with several broken knife pieces around her. She had twenty-one stab

wounds: fourteen in the neck, one on the chin, and the rest on her back and chest. Additionally, she had twenty-four puncture or scratch wounds and bruising and ligature marks on her neck. The bruises appeared to have been made by a belt or similar object. She also had defensive wounds on both hands and wounds on her leg, chest, back and neck. Several of the knife wounds were fatal but none would have resulted in an instantaneous death. She had bruises from being punched on her scalp and mouth. Davis opined that Knight began his attack in the bedroom with Odessia fleeing to the living room. He estimated that Odessia was conscious for ten to fifteen minutes after the attack.

Davis discovered Hanessia on the floor next to the closet door. There were broken knife pieces around her. She had a total of four stab wounds in her upper chest and neck. Her hand had one additional stab wound and numerous defensive wounds. Hanessia's arms and upper body had numerous bruises and scratches. There were bruises on her neck that were consistent with manual strangulation and bruises on her arms consistent with being grabbed.

Stephen Whitsett and Knight were housed together from June 29, 2000, to July 22, 2000, at the Broward County Jail. Knight confessed to Whitsett about the murders as follows: The night of the murders Knight and Odessia argued. She told him that she did not want to support him and that he would have to move. He asked for some more time because he had just gotten a job, but Odessia refused and told him to leave in the morning. Knight left the house to go for a walk and he became increasingly angry. He returned that night, confronted Odessia in her room, and they argued.

Knight went to the kitchen and got a knife. When he went back to the master bedroom, Odessia was on one side of the bed and Hanessia was on the other. He began by stabbing Odessia multiple times. Odessia eventually stopped defending herself and balled up into a fetal position. Knight then turned to four-year-old Hanessia. The knife broke while he was stabbing Hanessia, so he returned to the kitchen for another. Upon returning, Knight saw Hanessia had crawled to the closet door and was drowning in her own blood.

Again, Knight returned to the kitchen and accidentally cut his hand on one of the broken knives that he had used to stab Odessia and Hanessia. He grabbed another knife. Odessia had crawled from the master bedroom to the living room and was lying in her own blood.

He rolled her over and continued his attack. Odessia's blood covered Knight's hands, so he wiped them on the carpet.

Knight further confessed that, after he finished with Odessia, he went to the bathroom, took off the blood soaked shorts and T-shirt, and tossed them under the sink. He showered and put on blue polo pants. He wiped down the knives in the living room. At that time, Knight heard a knock on the door and saw the police outside through the peep hole. He ran to his room and out the window. In an attempt to deflect suspicion away from himself, Knight returned to his bedroom window where he saw a female police officer.

Knight was charged by indictment on August 15, 2001, for the murders of Odessia Stephens and Hanessia Mullings. The jury found Knight guilty of both counts of first-degree murder.

The Penalty Phase

At the penalty phase, Knight called six witnesses, several of whom testified about his childhood and upbringing in Jamaica. His teacher, Joscelyn Walker, told the jury that Knight was a respectful and loving boy raised in a very respected family. He said that Knight did have a temper when provoked and would become extremely frustrated at times. Walker had to restrain him from time to time when Knight wanted to fight another child. Knight's high school art teacher, Joscelyn Gopie, described Knight as a pleasant, eager boy who was quite talented at art. Gopie explained that Knight was adopted as a toddler by his family. Knight left high school before he graduated.

Barbara Weatherly is the mother of Knight's former fiancée. She described him as a decent, honorable guy who respected her rules regarding her daughter. He always helped her younger children with their drawing. He was a quiet and peaceful person who spent a lot of time alone. One night at her house he got sick; his eyes rolled back in his head and he frothed at the mouth before passing out. They took him to the hospital where the doctor said that he needed to see a psychiatrist. She last saw him in 1998 when he left to go to the United States.

A former boss and coworker of Knight's, Stanley Davis, also testified. Davis explained that Knight had been adopted into a well respected family and had a close loving relationship with his family members. Knight took over many of his father's duties when his father lost a leg. Knight worked with him at a construction company and was

a good worker. On one occasion Knight fell and blacked out, after which he had difficulty concentrating and became timid.

Valerie River, the defense investigator, and Knight's attorney journeyed to Jamaica to interview Knight's family and friends. Knight was abandoned by his mother and the Knight family found him at a hospital and took him home. He was a good brother and son. Knight's close friends and family said that he was a nice and good person. Knight's sister-in-law used to have Knight babysit her children but eventually stopped because he was careless around the house. Knight blacked out on one occasion. Knight's former boss Stedman Stevenson said he was a hard worker and a quick learner. He took Knight to Florida, and Knight decided to stay.

Knight also presented expert Dr. Jon Kotler who practices nuclear medicine and specializes in PET scans of the brain. He explained that Knight's physical symptoms indicated that he might have a brain injury. The MRI done on him was normal. Dr. Kotler did a PET scan which he interpreted as showing asymmetrical brain activity indicating possible pathology of the brain, perhaps a seizure disorder. He could not say exactly what the pathology might be or how it might manifest itself in Knight's behavior. Dr. Sfakianakis, another nuclear medicine doctor, read the PET results as showing only a mild difference between the brain hemispheres which was within the normal fluctuations of the brain.

Following the presentation of penalty-phase testimony, the jury unanimously recommended the death penalty for both murders.

The Spencer Hearing FN2

FN2. *Spencer v. State*, 615 So.2d 688 (Fla.1993).

The trial court subsequently conducted a *Spencer* hearing on August 18, 2006. At the hearing, the defense submitted the report and deposition of neuropsychologist Dr. Mittenberg who examined Knight but refused to testify at trial. The State submitted the report and deposition of Dr. Lopickalo, another neuropsychologist. Mullings and Eunice Belan also gave victim impact statements.

The Sentencing Order

Subsequent to the *Spencer* hearing, the trial court followed the jury's recommendation and sentenced Knight to death. In pronouncing Knight's sentence, the trial court determined that the State had proven beyond a reasonable doubt two statutory aggravating circumstances for the murder of Odessia Stephens: (1) a previous conviction of another violent capital felony, and (2) that the murder was especially heinous, atrocious, or cruel (HAC). The court also found three statutory aggravating circumstances for the murder of Hanessia Mullings: (1) a previous conviction of another violent capital felony, (2) HAC, and (3) the victim was under twelve years of age. The court found no statutory mitigating circumstances but found eight nonstatutory mitigators, which are set forth in our proportionality discussion.

Knight v. State, 76 So.3d 879, 881-84 (Fla. 2011). That court denied Knight's motion for re-hearing on December 15, 2011 and issued the mandate on January 3, 2012. Knight filed a petition for Writ of Certiorari in the United States Supreme Court which was denied on May 14, 2012. Knight v. Florida, 132 S.Ct. 2398 (2012).

On May 10, 2013 Knight filed his motion for post-conviction relief and the court granted an evidentiary hearing on ineffective assistance of counsel claims. On March 11, 2014, Knight filed an amended motion. The evidentiary hearing was held on March 27 & 28, 2014. After hearing the evidence and considering the written argument from both sides, the post-conviction court denied relief in a written order.

Knight appealed and also filed a state writ of habeas corpus on May 26, 2015. The Florida Supreme Court ordered supplemental briefing based on Hurst v.

Florida, 136 S.Ct. 616 (2016). On January 31, 2017, the Florida Supreme Court denied Knight post-conviction relief on both the guilt and penalty phase issues and denied him habeas relief as well. The mandate issued on September 29, 2017.

Knight filed a federal petition for a writ of habeas corpus on September 29, 2017, which is still pending.

REASONS FOR DENYING THE WRIT

Knight contends that the Florida Supreme Court's application of the harmless error doctrine to the Hurst error in his case was objectively unreasonable as a matter of federal law because he argues the error was structural in nature and is not subject to a harmless error review. That stance is contrary to both Hurst v. Florida as well as other precedent from this Court.

In Hurst v. Florida, 136 S.Ct. 616 (2016), this Court held that the jury, not the judge, must find the facts of the aggravators to make the defendant eligible for the death sentence. Id. at 622. Furthermore, this Court expressly recognized that the error in allowing a sentencing judge to find the existence of aggravating factors, independent of a jury's fact-finding, is subject to harmless error review. Holding with tradition though, this Court remanded Hurst back to the Florida Supreme Court for that court to conduct a harmless error analysis. Id. at 624.

The Hurst v. Florida decision emanated from the earlier Supreme Court decision in Apprendi v. New Jersey, 530 U.S. 466, 494 (2000). In Apprendi, this

Court held that a defendant is entitled to a jury determination of any fact designed to increase the maximum punishment allowed by a statute. Id. Subsequently, in Ring v. Arizona, 536 U.S. 584 (2002), the Court extended its holding in Apprendi to capital cases stating “capital defendants, no less than non-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. “Arizona’s capital sentencing scheme violated Apprendi’s rule because the State allowed a judge to find the facts necessary to sentence a defendant to death.” Hurst v. Florida, 136 S.Ct. at 621. “Specifically, a judge could sentence [a defendant] to death only after independently finding at least one aggravating circumstance.” Id. Because it was the judge, and not a jury, which conducted the fact-finding to enhance the penalty, “Ring’s death sentence therefore violated his right to have a jury find the facts behind his punishment.” Id.

In Hurst v. Florida, this Court held that Florida’s capital sentencing structure violated Ring because it required a judge to conduct the fact-finding necessary to enhance a defendant’s sentence. Hurst v. Florida, 136 S.Ct. at 621-622. In arriving at its decision, the Court looked directly to Florida’s sentencing statute, finding that it does not “make a defendant eligible for death until ‘findings *by the court* that such a person shall be punished by death.’” Id. at 622 (citing Fla. Stat. § 775.082(1) (emphasis in opinion)). Also, under Spaziano v. State, 433 So. 2d 508,

512 (Fla. 1983), the jury's role in sentencing a defendant to capital punishment was viewed as advisory. Spaziano, 433 So. 2d at 512. Thus, the Supreme Court held Florida's capital sentencing structure, "which required the judge alone to find the existence of an aggravating circumstance", violated its decision in Ring, and overruled the prior decisions of Spaziano v. State of Florida, and Hildwin v. Florida, 490 U.S. 638 (1989). Hurst v. Florida, 136 S.Ct. at 622-625.

When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. Griffith v. Kentucky, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. This Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions.¹ Schriro v. Summerlin, 542 U.S. 348, 351 (2004).

In Schriro v. Summerlin, this Court directly addressed whether its decision in Ring v. Arizona was retroactive. Summerlin, 542 U.S. at 349. The Court held

¹ Those exceptions are: (1) a substantive rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or if it prohibits a certain category of punishment for a class of defendants because of their status or offense"; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. Teague v. Lane, 498 U.S. 288, 310-13 (1989); Penry v. Lynaugh, 492 U.S. 302 (1989) (abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002)); Butler v. McKellar, 494 U.S. 407 (1990); Saffle v. Parks, 494 U.S. 484 (1990)).

the decision in Ring was procedural and non-retroactive. Id. at 353. This was because Ring only “altered the range of permissible methods for determining whether a defendant’s conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment.” Id. The Court concluded its opinion stating: “The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment’s guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review.” Summerlin, 542 U.S. at 358.

Ring did not create a new constitutional right. That right was created by the Sixth Amendment guaranteeing the right to a jury trial.² If Ring was not retroactive, then Hurst cannot be retroactive as Hurst is merely an application of Ring to Florida. In fact, the decision in Hurst is based on an entire line of jurisprudence, none of which has ever been held to be retroactive. See DeStefano

² The right to a jury trial was extended to the States in Duncan v. Louisiana, 391 U.S. 145 (1968). But, in DeStefano v. Woods, 392 U.S. 631 (1968) (*per curiam*), the Court declined to apply the holding of Duncan retroactively. Apprendi merely extended the right to a jury trial to the sentencing phase, when the State sought to increase the maximum possible punishment. Apprendi, 530 U.S. at 494.

v. Woods, 392 U.S. 631 (1968) (*per curiam*) (holding the Court's decision in Duncan v. Louisiana, which guaranteed the right to a jury trial to the States was not retroactive); McCoy v. United States, 266 F.3d 1245, 1255, 1259 (11th Cir. 2001) (holding Apprendi not retroactive under Teague, and acknowledging that every federal circuit to consider the issue reached the same conclusion); Varela v. United States, 400 F.3d 864, 866–67 (11th Cir.2005) (explaining that Supreme Court decisions, such as Ring, Blakely, and Booker, applying Apprendi's "prototypical procedural rule" in various contexts are not retroactive); Crayton v. United States, 799 F.3d 623, 624-25 (7th Cir. 2015) cert. denied, 136 S. Ct. 424 (2015) (holding that Alleyne v. United States, 570 U.S. ___, ___, 133 S. Ct. 2151, 2156 (2013), which extended Apprendi from maximum to minimum sentences, did not, like Apprendi or Ring, apply retroactively). Since this Court has expressly found that Ring was not retroactive, Hurst v. Florida, which applied Ring to invalidate Florida's statute, is also not retroactive.

Hurst errors in general are not structural errors because they do not always render the trial fundamentally unfair. The alleged Hurst error in this case was not structural because, on this record, there is no basis for concluding that the error "seriously affected the fairness, integrity or public reputation of judicial proceedings." Johnson v. United States, 520 U.S. 461, 470 (1997) citing United States v. Olano, 507 U.S. 725, 736 (1993). Paraphrasing this Court's statement in

Johnson, it would be the reversal of Knight's death sentences that would have that effect. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Johnson, 520 U.S. at 470 quoting R. Traynor, The Riddle of Harmless Error 50 (1970).

Upon remand, The Florida Supreme Court had to interpret and apply the Hurst v. Florida decision to the facts in that case. However, the Florida Supreme Court did not limit its review to the question of whether the error under the Sixth Amendment was harmless as identified by this Court. Instead, the Florida Supreme Court concluded that the state constitutional right to a jury trial mandates that defendants have the right to a unanimous jury findings regarding the elements of a criminal offense applies not only to the existence of an aggravating factor but also to whether the aggravating factors are sufficient and not outweighed by mitigating circumstances. Using that starting point, the Florida Supreme Court found the error was not harmless in Hurst's case.

The Florida Supreme Court found that the Hurst error was not retroactive to those defendants whose cases were final before Ring. Asay v. State, 210 So. 3d 1 (Fla. 2016). In addressing the question of whether retroactivity should be extended to those case final after Ring, the state court found that it should, based on two state law grounded principles. Under existing state law precedent, the court stated,

“fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence.” Mosley v. State, 209 So. 3d 1248, 1274–75 (Fla. 2016).

The court then conducted a retroactivity analysis focusing on how to analyze when fairness must be balanced with finality based on changes in the law. Under Witt v. State, 387 So.2d 922 (Fla. 1980), a change in the law does not apply retroactively “unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.” Witt, 387 So.2d at 931. After conducting the Witt analysis and weighing the retroactivity against the need for finality, the court concluded that defendants whose case were final after Ring were entitled to retroactive application of the two Hurst decisions. Id. at 1283. That retroactivity was entirely based on state law. Because the Florida Supreme Court’s decision depended on the application of only state law, this Court does not have jurisdiction to review the state court’s decision about retroactivity or its harmless error analysis. Those decisions on retroactivity and the application of the harmless error rule are state questions where it “involves only errors of state procedure or state law” as in this case. Chapman v. California, 386 U.S. 18, 21 (1967).

As to whether any error was harmless in Knight's case, the Florida Supreme Court fully analyzed the issue fully based on the facts of the case.

We also decline to vacate Knight's death sentence because we find that this is one of the rare cases in which the *Hurst v. Florida* violation is harmless beyond a reasonable doubt. *See Davis v. State*, 207 So.3d 142, 175, 2016 WL 6649941 (Fla. Nov. 18, 2016).

In *Davis*, this Court held that the *Hurst v. Florida* error was harmless: "With regard to Davis's sentences, we emphasize the unanimous jury recommendations of death. These recommendations allow us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." *Id.* at 174 (emphasis omitted). Knight's jury likewise recommended a death sentence by a unanimous twelve-to-zero vote. Knight's jury received substantially the same standard jury instruction as we cited in *Davis*, ensuring that the jury "determine[d] whether sufficient aggravators existed and whether the aggravation outweighed the mitigation before it ... recommend[ed] a sentence of death." *Id.* (citing Fla. Std. Jury Instr. (Crim.) 7.11). As with the jury in *Davis*, Knight's "jury was presented with evidence of mitigating circumstances and was properly informed that it may consider mitigating circumstances that are proven by the greater weight of the evidence." *Id.* (citing Fla. Std. Jury Instr. (Crim.) 7.11). As in *Davis*, Knight's "jury was not informed that the finding that sufficient aggravating circumstances outweighed the mitigating circumstances must be unanimous, and ... the jury did, in fact, unanimously recommend death." *Id.* (citing Fla. Std. Jury Instr. (Crim.) 7.11).

To be sure, Knight's jury and the *Davis* jury were not identically instructed. For instance, the *Davis* jury "was instructed that it was not required to recommend death even if the aggravators outweighed the mitigators," while Knight's jury was not. *Id.* (citing Fla. Std. Jury Instr. (Crim.) 7.11). Nonetheless, we believe that Knight's jury received substantially the same critical instructions as *Davis*'s jury, allowing us to conclude beyond a reasonable doubt that here, as in *Davis*, "the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendations." *Id.*

Finally, as in *Davis*, “the egregious facts of this case” provide “[f]urther support[] [for] our conclusion that any *Hurst v. Florida* error here was harmless.” *Id.* at 175. In a violent and bloody struggle, Knight murdered a mother and her four-year-old daughter in an argument about whether Knight had to move out of the mother's apartment. Knight strangled and repeatedly stabbed the mother with multiple knives in her bedroom in the middle of the night while the daughter was present. The mother could not yell for help because Knight's attack had destroyed her larynx. The mother suffered, still conscious, through the attack for at least ten minutes following the fatal wounds. She tried and failed to escape. Knight also attempted to strangle and repeatedly stabbed the daughter. Knight's stabbings caused the daughter's lungs to fill with blood, and she essentially drowned in her own blood. Both victims died gruesome, painful deaths.

The trial court found two statutory aggravating circumstances for the murder of [the mother]: (1) a previous conviction of another violent capital felony, and (2) HAC. The court also found three statutory aggravating circumstances for the murder of [the daughter]: (1) a previous conviction of another violent capital felony, (2) HAC, and (3) the victim was under twelve years of age.

Knight, 76 So.3d at 890. As we have repeatedly noted, “[t]he HAC and prior violent felony aggravators have been described as especially weighty or serious aggravators set out in the sentencing scheme.” *Hildwin v. State*, 84 So.3d 180, 190 (Fla. 2011).

What we said in *Davis* is equally true here:

Here, the jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. In fact, although the jury was informed that it was not required to recommend death unanimously, and despite the mitigation presented, the jury still unanimously recommended that [the defendant] be sentenced to death The unanimous recommendations here are precisely what we determined in *Hurst*[v. State] to be constitutionally necessary to impose a sentence of death.

Davis, 207 So.3d at 175. Accordingly, we hold that the *Hurst v. Florida* violation in Knight's case was harmless beyond a reasonable doubt. *See id.* As in *Davis*, the *Hurst v. Florida* violation here does not entitle Knight to a new penalty phase.

Knight, 225 So.3d at 682-83.

Even disregarding the detailed factual analysis above, Knight is still not entitled to relief under Hurst because of his contemporaneous murder convictions supporting each of his two death sentences. The jury's unanimous verdict of guilt on each of the murder charges supplies the factual findings necessary to support the aggravators. Therefore, the aggravators were found beyond a reasonable doubt. Additionally, there was no dispute on the aggravator of Hanessia being four years old. Knight's death sentences satisfy the requirements of Apprendi, Ring, and Hurst v. Florida.

This Court has never overturned, and has repeatedly reaffirmed, Apprendi's recidivism exception, relying on the holding of Almendarez-Torres v. United States, 23 U.S. 224 (1998), that a prior conviction does not require additional fact finding by a subsequent jury. See James v. United States, 550 U.S. 192, 214 n.8 (2007) ("To the extent that James contends that the simple fact of his prior conviction was required to be found by a jury, his position is baseless. James admitted the fact of his prior conviction in his guilty plea, and in any case, we have held that prior convictions need not be treated as an element of the offense for Sixth Amendment purposes.") citing Almendarez-Torres, 523 U.S. at 224;

Cunningham v. California, 549 U.S. 270 (2007) (invalidating California's scheme allowing judges to engage in sentence-elevating fact finding, but noting Apprendi's recidivism exception); Ring, 536 U.S. at 597 n.4 (in holding Arizona statutory scheme permitting judge to consider aggravating circumstances in capital sentencing to violate Sixth Amendment under Apprendi, this Court observed that defendant made no challenge to the recidivism exception that fact of prior conviction may be found by sentencing judge as ground for increasing sentence beyond statutory maximum). See also Jones v. United States, 526 U.S. 227, 249 (1999) (explaining that the recidivism exception was permitted because "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees"). Hence, Knight's complaint that the aggravating factors, which included contemporaneous convictions for murder, were not found by the jury has no validity. See also Jenkins v. Hutton, 137 S.Ct. 1769, 1772 (2017)(No constitutional error existed to excuse a procedural default where Hutton's guilt-phase jury necessarily found the existence of aggravating factors.)

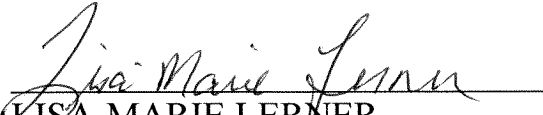
Knight cites to Sullivan v. Louisiana, 508 U.S. 276 (1993) as support for the inability to conduct a harmless error review but it does not avail him. Sullivan was a case where the trial court gave a constitutionally deficient beyond-a-reasonable-doubt instruction. This Court held that in such a situation, an appellate court could

not do a harmless error analysis because the Fifth Amendment requires proof beyond a reasonable doubt which could not exist with a deficient instruction; there was no valid verdict without that present. No such problem is present with Hurst error. This Court in Hurst v. Florida held that such an error was amenable to a harmless error analysis. Hurst v. Florida, 136 S. Ct. at 624.

CONCLUSION

Based upon the foregoing arguments and authorities, the petition for writ of certiorari should be denied.

Respectfully submitted,
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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically served on Todd Scher at Tscher@msn.com, 1 East Broward Blvd, Suite 444, Ft. Lauderdale, FL 33301 on this 15th of February, 2018.

/s/ Lisa-Marie Lerner
LISA-MARIE LERNER