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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Steven Ray Newell,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.  
14

No. CV-12-2038-PHX-JJT

**ORDER**

DEATH PENALTY CASE

15  
16 Before the Court is Newell's motion for supplemental briefing in light of *Hurst v.*  
17 *Florida*, 136 S. Ct. 616 (2016). (Doc. 76.) Respondents filed a response opposing the  
18 motion. (Doc. 77.) Newell filed a reply, citing Rule 15(d) of the Federal Rules of Civil  
19 Procedure. (Doc. 78.) The motion will be denied because the supplemental briefing is  
20 futile. *See Torres v. Ryan*, No. CV 12-0006-PHX-JAT, 2013 WL 4026870, at \*6 (D.  
21 Ariz. Aug. 7, 2013) (“[F]utility by itself can justify denial of a motion to supplement.”).

22 In Claim 36 of his habeas petition, Newell alleges that Arizona's capital  
23 sentencing scheme violates the Sixth, Eighth and Fourteenth Amendments to the United  
24 States Constitution because it does not require the prosecution to prove that aggravating  
25 circumstances outweigh mitigating circumstances beyond a reasonable doubt. (Doc. 38 at  
26 210.) Newell wants to supplement this claim with briefing on the opinion in *Hurst*.

27 Supplemental briefing is futile because *Hurst* does not affect Arizona law. In  
28 *Hurst*, 136 S. Ct. 616, the Supreme Court held that Florida's capital sentencing scheme  
violated *Ring*. Under the Florida scheme, a jury makes an advisory verdict while the

1 judge makes the ultimate factual determinations necessary to sentence a defendant to  
2 death. *Id.* at 621–22. The Court held that this procedure was invalid because it “does not  
3 require the jury to make the critical findings necessary to impose the death penalty.” *Id.*  
4 at 622. The Supreme Court simply applied *Ring* to Florida’s capital sentencing statutes.

5 *Hurst* does not hold, as Newell suggests, that a jury is required to find beyond a  
6 reasonable doubt that the aggravating factors outweigh the mitigating circumstances.  
7 (Doc. 76, Ex. 1 at 4–5.) *Hurst* held only that Florida’s scheme, in which the jury renders  
8 an advisory sentence but the judge made the findings regarding aggravating and  
9 mitigating factors, violated the Sixth Amendment. *Hurst*, 136 S. Ct. at 620. *Hurst* did not  
10 address the process of weighing the aggravating and mitigating circumstances. Indeed,  
11 the Supreme Court has held that the sentencer may be given “unbridled discretion in  
12 determining whether the death penalty should be imposed after it has found that the  
13 defendant is a member of the class made eligible for that penalty.” *Zant v. Stephens*, 462  
14 U.S. 862, 875 (1983); see *Tuilaepa v. California*, 512 U.S. 967, 979–80 (1994). In *Zant*,  
15 the Court explained that “specific standards for balancing aggravating against mitigating  
16 circumstances are not constitutionally required.” *Id.* at 875 n.13; see *Franklin v. Lynaugh*,  
17 487 U.S. 164, 179 (1988) (“[W]e have never held that a specific method for balancing  
18 mitigating and aggravating factors in a capital sentencing proceeding is constitutionally  
19 required.”).

20 In Arizona, in accordance with *Ring* and *Hurst*, the jury makes factual findings  
21 regarding the aggravating and mitigating factors to determine the appropriate sentence.

22 Moreover, *Hurst* does not apply retroactively. The Supreme Court has held that  
23 “*Ring* announced a new procedural rule that does not apply retroactively to cases already  
24 final on direct review.” *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). *Hurst*, which  
25 applies *Ring* in Florida, is also nonretroactive.

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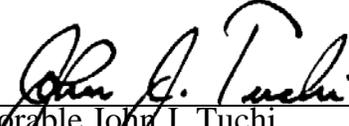
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Accordingly,

**IT IS ORDERED DENYING** Newell's motion for supplemental briefing.

(Doc. 76.)

Dated this 2nd day of February, 2017.

  
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Honorable John J. Tuchi  
United States District Judge