IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-1252 & SC14-881

CHARLES L. ANDERSON
APPELLANT

VS.

STATE OF FLORIDA
APPELLEE

CHARLES L. ANDERSON
PETITIONER

VS.

JULIE L. JONES, SECRETARY
FLORIDA DEPARTMENT OF CORRECTIONS
RESPONDENT

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (CRIMINAL DIVISION)

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE/RESPONDENT

PAMELA JO BONDI
Attorney General
Tallahassee, FL

LESLIE T.CAMPBELL
Assistant Attorney General
Florida Bar No.: 0066631
1515 N. Flagler Dr.; Ste. 900
West Palm Beach, FL 33401
Telephone (561) 837-5000
Facsimile (561) 837-5108
E-mail:
Leslie.Campbell@MyFloridaLegal.com
Secondary E-mail:
CapApp@MyFloridaLegal.com

Counsel for Appellee/Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

PRELIMINARY STATEMENT

Appellant/Petitioner, Charles Anderson, will be referred to as "Anderson" and Appellee/Respondent, will be noted as "State". Reference to the records will: "ROA" for direct appeal; "PCR" for postconviciton; "S" for supplemental materials.

STATEMENT OF THE CASE AND FACTS

On direct appeal, Anderson challenged his sentence under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002). This Court affirmed the prior violent felony aggravator, 11 counts of Attempted Capital Sexual Battery, was supported by the evidence, including completed acts of capital sexual battery on KS,[1] the murder victim, and rejected the *Ring* claim. *Anderson v. State*, 841 So.2d 390, 396, 407-09 (Fla. 2003). On October 14, 2003, certiorari raising *Ring* was denied. *Anderson v. Florida*, 540 U.S. 956 (2003). Anderson raised *Ring* in his postconviction and habeas cases. Oral argument was held April 9, 2015.

SUMMARY OF THE ARGUMENT

Supplemental Claim I – Anderson is not entitled to relief under *Hurst* as it is not retroactive, the constitutional

[1]The victim will be identified by her initials ("KS"). KS's mother testified Anderson completed the crime of sexual battery upon KS and the investigating officer testified about the facts of the sexual abuse. "Although Anderson argues that attempt crimes can never qualify as prior violent felonies, this Court has never made such a finding." *Anderson*, 841 So.2d at 406-07.

infirmity is not structural, and he has a prior violent felony.

ARGUMENT

SUPPLEMENTAL ISSUE 1

HURST V. FLORIDA IS NOT RETROACTIVE AND THE PRIOR VIOLENT FELONY AGGRAVATOR WAS FOUND RENDERING ANDERSON ELIGIBLE FOR THE DEATH PENALTY (restated)

Anderson asserts *Hurst v. Florida,* 136 S.Ct. 616 (2016) rendered Florida's capital sentencing unconstitutional and is retroactive under *Witt v. State*, 387 So.2d 922, 925 (1980) and without retroactive application, there would be differential, wholly arbitrary treatment in violation of *Furman v. Georgia*, 408 U.S. 238 (1972) and *Witt*. He claims the prior violent felony aggravator cannot save the death sentence and that §775.082(2), Fla. Stat. requires a life sentence. The State disagrees.

A. STANDARD OF REVIEW - The standard of review for a purely legal claim raising a Sixth Amendment claim is *de novo*. *Cf. Plott v. State*, 148 So. 3d 90, 93 (Fla. 2014)

B. HURST IS NOT RETROACTIVE – *Hurst* is based on *Apprendi* where the Supreme 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*. In *Ring*, the Court extended *Apprendi* to capital cases. The Supreme Court stated: "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*, 136 S.Ct. at 621. "Specifically, a

judge could sentence [defendant] to death only after independently finding at least one aggravating circumstance." *Id*. Because it was a judge, not jury, who did fact-finding to enhance the penalty, Ring's death sentence "violated his right to have a jury find the facts behind his punishment." *Id*.

The Supreme Court found a Florida jury's capital penalty phase role was viewed as advisory and held Florida's capital sentencing structure violated *Ring* as it required a judge to conduct the fact-finding necessary to enhance the sentence by alone finding "the existence of an aggravating circumstance". *Hurst*, 136 S.Ct. at 620-21. In so doing, it overruled *Spaziano v. Florida,* 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989). *Hurst*, 136 S.Ct. at 624.

When a constitutional rule is announced, its requirements apply to those cases on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). Once a case is final, application of a new rule of constitutional criminal procedure is limited.[2] Such new rules will apply retroactively only if they fit within one of two narrow exceptions.[3] *Schriro v. Summerlin*, 542 U.S. 348, 351

---

[2] *Anderson* raised *Ring* claims on direct appeal and in his pending postconviction cases. This renders the claims procedurally barred. *See Rodriguez v. State*, 919 So.2d 1252, 1281 n.16 (Fla. 2005); *Hardwick v. Dugger*, 648 So.2d 100, 105 (Fla. 1994). While *Hurst* is constitutional in nature, it is not retroactive and cannot revive barred claims.

[3] Those are: (1) substantive rule that "places certain kinds of primary, private individual conduct beyond the power of the

(2004). The Supreme Court determined *Ring* was not retroactive as it was a procedural, not a substantive change; *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." *Summerlin*, 542 U.S. at 349, 352-53.

> 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.[4] *Ring* did not create a new

---

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) procedural rule constituting a watershed rule of criminal procedure implicating fundamental fairness and accuracy of criminal proceedings. *Teague v. Lane*, 498 U.S. 288, 310–13 (1989).

[4] There can be no question Florida relied in good faith upon prior decisions of this Court and the Supreme Court which upheld Florida's capital sentencing. *See Rigterink v. State*, 66 So.3d 866, 895-96 (Fla. 2011) (noting rejection of *Ring* claim in more than 50 cases). Since *Ring*, some 14 years passed without the Supreme Court accepting a case, until *Hurst*, challenging Florida's capital sentencing statute under *Ring*. While the Supreme Court ultimately expanded *Ring* to invalidate Florida's capital sentencing procedure, there were significant differences between the Arizona and Florida statutes that rendered such an expansion far less than certain/inevitable. *See Hurst*, 136 S.Ct. at 625 (Alito, Justice, dissenting) (observing unlike Arizona, in Florida "the jury plays a critically important role" and the

constitutional right. That right was created by the Sixth Amendment guaranteeing the right to a jury trial.[5] *Ring* merely created a new procedural rule. Under *Teague*, a new rule generally applies only to cases on direct review. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (holding *Crawford v. Washington*, 541 U.S. 36 (2004) not retroactive).

Given *Ring* is not retroactive, it follows *Hurst* cannot be retroactive[6] as it is not only an expansion of *Ring* to Florida, but in deciding *Hurst*, the Supreme Court overrule decades old precedent (*Spaziano* and *Hildwin*) finding Florida's capital sentencing constitutional. *Hurst*, 136 S.Ct. at 623-24. Like *Ring*, *Hurst* is a new procedural rule, not dictated by *Ring* as prior Supreme Court precedent was overruled. As provided in *Bockting*, *Crawford* was a new rule because it was not "dictated" by prior precedent, but overruled *Ohio v. Roberts*, 448 U.S. 56,

---

Court's "decision in *Ring* did not decide whether this procedure violate[d] the Sixth Amendment").

[5] The right to a jury trial was extended to the States in *Duncan v. Louisiana*, 391 U.S. 145 (1968) and the Court declined to find retroactivity. *DeStefano v. Woods*, 392 U.S. 631 (1968) *Apprendi*, 530 U.S. at 494 merely extended the right to the sentencing phases when an increase in possible punishment was sought.

[6] *Hurst* is based on an entire line of jurisprudence, none of which has been held retroactive. *See DeStefano*, 392 U.S. at 631; *McCoy v. United States*, 266 F.3d 1245, 1255-59 (11th Cir. 2001) (*Apprendi* not retroactive); *Varela v. United States*, 400 F.3d 864, 866-67 (11th Cir. 2005) (explaining decisions such as *Ring*, *Blakely*, and *Booker* applying *Apprendi*'s "prototypical procedural rule" are not retroactive); *Crayton v. United States*, 799 F.3d 623, 624-25 (7th Cir. 2015) *cert. denied*, 136 S. Ct. 424 (2015) (*Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013), which extended *Apprendi* did not apply retroactively).

66 (1980). The announcement of a new rule, where prior precedent is overruled, runs from the date of the new case; here, from January 12, 2016 for *Hurst*. *Hurst* will not apply to any case final before January 12, 2016. Anderson's case was final on October 14, 2003. *Anderson*, 540 U.S. at 956.

In *Johnson v. State*, 904 So.2d 400, 411-12 (Fla. 2005) this Court decided *Ring* was not retroactively under *Witt v. State*, 387 So.2d 922 (Fla. 1980)[7] specifically noting the severe and unsettling impact retroactive application would have on our justice system with nearly 400 death sentenced inmates:

> …the three *Witt* factors, separately and together, weigh against the retroactive application of *Ring* in Florida. To apply *Ring* retroactively "would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state...beyond any tolerable limit." *Witt*, 387 So. 2d at 929-30. Our analysis reveals that *Ring*, although an important development in criminal procedure, is not a "jurisprudential upheaval" of "sufficient magnitude to necessitate retroactive application." *Id*. at 929. We therefore hold that *Ring* does not apply retroactively…

The Arizona Supreme Court reached the same conclusion after

[7] In *Witt*, this Court explained that a new rule of constitutional procedure will not apply to final convictions 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. The opinion notes that a "development of fundamental significance" falls within two categories, either "changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" or "those changes of law which are of sufficient magnitude to necessitate retroactive application. ..." *Id*. at 929.

Ring. *See State v. Towery*, 204 Ariz. 386, 393-94, 64 P.3d 828, 835-36 (2003) ("[c]onducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice" and would be inconstant with duty to protect victims' rights under State Constitution).

Anderson points to *Thompson v. Dugger*, 515 So.2d 173, 175 (Fla. 1987) and to the different postures of his case and Hurst's[8] to suggest it would be "wholly arbitrary" in violation of *Furman*, and fundamentally unfair[9] under *Witt* to treat them differently. Such is the nature of finality[10] and the

---

[8] Hurst obtained a retrial of his 1998 conviction due to ineffective assistance of counsel, and thus, benefits from the expansion of *Ring* whereas Anderson's claims of ineffectiveness have been denied by the trial court.

[9] Fundamental fairness is not implicated as one can envision a system of "ordered liberty" where elements of a crime are proven to a judge, not to the jury. *United States v. Shunk,* 113 F.3d 31, 37 (5th Cir. 1997). An example of a new "watershed" procedural rule is the right to counsel established in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). *See Saffle v. Parks*, 494 U.S. 484, 495 (1990)(*Gideon* is retroactive; it seriously increases accuracy of conviction). The exception to nonretroactivity for procedural rules is limited to a small core of rules which seriously enhance accuracy. *Graham v. Collins*, 506 U.S. 461, 478 (1993). A trial conducted with a procedural error "may still be accurate" and for that reason, "a trial conducted under a procedure found to be unconstitutional in a later case does not, as a general matter, have the automatic consequence of invalidating a defendant's conviction or sentence;" generally, procedural rules are not retroactive. *Montgomery v. Louisiana*, 136 S.Ct. 718, 730 (2016).

[10] As noted in *Calderon v. Thompson*, 523 U.S. 538, 556 (1998):

> A State's interests in finality are compelling when a federal court of appeals issues a mandate denying

retroactivity doctrine given the timing of the cases. Reliance on *Thompson* is misplaced. The Court in *Thompson* did not perform a proper or complete *Witt* analysis, but this Court did in *Johnson*. Also, *Johnson* dealt with the Sixth Amendment jury trial right and *Ring*, not the Eighth Amendment, as in *Thompson*. *Johnson* controls and Anderson offers no compelling justification for revisiting *Johnson*. Assuming, a new *Witt* analysis would be appropriate, all of the same factors apply with equal force to hold *Hurst* not retroactive. Such an application would be highly deleterious to finality and unsettle reasonable expectations for justice by Florida citizens and victims' families.

In *Butterworth v. United States*, 775 F.3d 459, 467-68 (1st Cir. 2015), *cert. denied*, 135 S. Ct. 1517 (2015), the Court rejected an attempt to justify retroactive application of *Alleyne v. United States*, 133 S.Ct. 2151 (2013) based on *Apprendi* hindsight noting neither the Supreme Court, nor any other federal court, had found a new procedural rule not

---

> federal habeas relief. . . . Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. *See generally Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," *Herrera v. Collins,* 506 U.S. 390, 421, 113 S.Ct. 853, 871, 122 L.Ed.2d 203 (1993) (O'CONNOR, J., concurring), an interest shared by the State and the victims of crime alike.

retroactive under the watershed exception only later to change its mind after "the law's intervening evolution." There is no reason for this Court to depart from its prior determination *Ring* is not retroactive. Such a departure would represent a clear break from precedent. *See Chandler v. Crosby*, 916 So.2d 728 (Fla. 2005) (*Witt* weighs against retroactive application of *Crawford* and noting "new rule does not present a more compelling objective that outweighs the importance of finality."); *Hughes v. State*, 901 So.2d 837, 838 (Fla. 2005) (*Apprendi* not retroactive); *State v. Statewright*, 300 So.2d 674 (Fla. 1974) (*Miranda v. Arizona*, 384 U.S. 436 (1966) not retroactive).

Hurst does not provide for retroactive application.[11] *This* is noteworthy given the stance in *Teague* that "'whether a decision [announcing new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision'" and a general acceptance that "...new rules generally should not be applied retroactively to cases on collateral review." *Teague*, 498 U.S. at 300-05. Given both the Supreme Court and this Court have held *Ring* is not retroactive, *Hurst* should not be applied retroactively.

[11] Following oral arguments in *Hurst*, the Court denied a stay of execution in *Jerry Correll v. Florida*, 2015 WL 6111441 (Oct. 29, 2015). Correll had applied for the stay based on the pending decision in *Hurst;* yet in an 8 – 1 vote the Court denied the stay. It may be assumed the Court would have granted a stay if it had intended a retroactive application of *Hurst*.

C. §775.082(2), FLA. STAT. IS NOT IMPLICATED – Pointing to *Donaldson v. Sack*, 265 So.2d 499 (Fla. 1972), Anderson asserts *Hurst* entitles him to a life sentence under §775.082(2). *Hurst* does not hold as Anderson suggests and did not determine "capital sentencing" was unconstitutional; it only invalidated the procedure.[12] By its own terms, §775.082(2) does not apply.[13]

Donaldson is not a statutory construction case, but one of jurisdiction.[14] The focus/impact of *Donaldson* was on cases which

---

[12] A reading of *Hurst* as only requiring jury factfinding as to death eligibility, but not sentence selection is consistent with prior Supreme Court cases underlying the decision, as well as *Kansas v. Carr*, 136 S.Ct. 633 (2016), decided a week after *Hurst*. In *Hurst*, the Supreme Court acknowledged *Apprendi*, and *Ring*, concerned the factual findings necessary to make a defendant eligible for a sentence greater than that authorized by the jury's verdict. *See Alleyne v. United States*, 133 S. Ct. 2151, 2155, 2158, 2161 n.2 (2013) (applying *Apprendi* and stating "Juries must find any facts that increase either the statutory maximum or minimum 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. Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.' *Williams v. New York*, 337 U.S. 241 . . . 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."); *United States v. O'Brien*, 560 U.S. 218, 224 (2010) (recognizing *Apprendi* does not apply to sentencing factors that merely guide sentencing discretion without increasing range of punishment).

[13] That section provides life sentences are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional," as was enacted following *Furman*, in order to protect society in the event capital punishment as a whole were deemed unconstitutional. *Coker v. Georgia*, 433 U.S. 584 (1977)

[14] Based on Florida constitution in 1972, *Donaldson* held circuit courts no longer had jurisdiction over capital cases as there was no longer a valid capital sentencing statute; no capital

were ***pending for prosecution*** when *Furman* issued, not pipeline cases pending on direct appeal, or those already final. This Court's determination to remand all pending death cases for imposition of life sentences was discussed in *Anderson v. State*, 267 So.2d 8 (Fla. 1972) where it explained the Attorney General had moved to relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position those death sentences were illegal. This Court did not elucidate why commutation of 40 sentences was required, but it is interesting this predated *Teague, Witt*, and there rules for retroactivity.

Other differences between *Furman* and *Hurst* bode against blanket commutation of death sentences to life including that *Furman* was a decision invalidating ***all*** death sentences while *Hurst* is a specific ruling extending Sixth Amendment protections first noted in *Ring* to Florida cases and remanding for harmless error. It is telling *Hurst* does not disturb *Proffitt v. Florida*, 428 U.S. 242 (1976), only explicitly overruling *Spaziano* and *Hildwin*, "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of the jury's factfinding, that is necessary for imposition of the death penalty."

---

cases existed, as the definition of capital referred to those cases where capital punishment was an optional penalty. *This Court* observed the new statute (§775.082(2)) was conditioned on invalidation of the death penalty, but clarified, "[t]his provision is not before us for review and we touch on it only because of its materiality in considering the entire matter." *Donaldson*, 265 So. 2d at 505.

Anderson reads *Hurst* too broadly when equating it with *Furman*. Unlike Anderson's situation, Hurst did not have a prior conviction. After *Furman*, no existing capital cases remained intact, but following *Hurst*, the Supreme Court denied certiorari on two direct appeal decisions[15] leaving intact this Court's denial of Sixth Amendment error. *Hurst* provides no express reason to disturb any sentence supported by a prior conviction.

D. EVEN IF *HURST* WERE TO APPLY, ANY ERROR IS HARMLESS – Hurst was in a distinctly different position from Anderson as Hurst did not have a prior violent or contemporaneous felony conviction.[16] This Court has been consistent in finding that deficient jury factfinding, under the Sixth Amendment, can be and often is harmless.[17] *Galindez v. State*, 955 So. 2d 517, 521-

---

[15] Both were supported by prior violent felony convictions. *Fletcher v. State*, 168 So.3d 186 (Fla. 2015), *cert. denied*, 2016 WL 280859 (Jan. 25, 2016); *Smith v. State*, 170 So.3d 745 (Fla. 2015), *cert. denied*, 2016 WL 280862 (Jan. 25, 2016). In *Carr*, 136 S.Ct. at 647-49, the Court discussed the distinct factors of eligibility and selection under capital sentencing. It found an eligibility determination was limited to findings related to aggravators. Those of mitigation and weighing were selection determinations, noting such were not factual findings, but were "judgment call[s]" and "question[s] of mercy." *Id*.

[16] *Hurst v. State*, 147 So.3d 435, 440-41 (Fla. 2014). Hurst presented the Court with a pure *Ring* claim; one not supported by a unanimous recommendation or an enumerated aggravator arising from a jury verdict. *Hurst*, 147 So.3d at 445-47.

[17] *Hurst* did not find structural error. Moreover, it permits application of harmless error. In *Neder v. United States*, 527 U.S. 1 (1999), the Court rejected the argument that a conviction returned after one element of the offense was mistakenly not submitted to the jury presented a case of structural error. *Neder* explains why reliance on *Sullivan v. Louisiana*, 508 U.S.

23 (Fla. 2007); *Johnson v. State*, 994 So.2d 960, 964-65 (Fla. 2008). *Hurst* does not hold there is a constitutional right to jury sentencing. In Florida, a defendant is death eligible if at least one aggravating factor applies.[18] Here, Anderson pled guilty to 11 counts of Attempted Capital Sexual Battery, a violent crime, and based on this conviction, he was eligible for

---

275 (1993), is misplaced. Although *Sullivan* found constitutional error which prevented a jury from returning a "complete verdict" could not be harmless, it reviewed *Neder* and determined reversal was not required where evidence of the omitted element was overwhelming and uncontested. *Neder*, 527 U.S. at 19. The determination that deficient factfinding under the Sixth Amendment can be harmless is cemented by *Washington v. Recuenco*, 548 U.S. 212 (2006), where the Supreme Court reversed the state holding that *Blakely v. Washington*, 542 U.S. 296 (2004) error, was structural and could never be harmless.

[18] In Florida, eligibility is determined by the existence of at least one aggravating factor. *State v. Steele*, 921 So. 2d 538, 543 (Fla. 2005) ("[t]o obtain a death sentence, the State must prove beyond a reasonable doubt at least one aggravating circumstance"); *Ault v. State*, 53 So.3d 175, 205 (Fla. 2010); *Zommer v. State*, 31 So.3d 733, 754 (Fla. 2010)(*State v. Dixon*, 283 So.2d 1 (Fla. 1973), interpreted "sufficient aggravating circumstances" to mean one or more such circumstance); *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994) ("[t]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase") citing *Lowenfield v. Phelps*, 484 U.S. 231, 244-246 (1988). Presumptively, death is the appropriate sentence. *Dixon*, 283 So.2d at 9. As eligibility is a matter of state law, this Court's determination controls. *Ring*, 536 U.S. at 603 (noting Arizona construction of its law is authoritative). The suggestion *Hurst* requires juries to find there are sufficient aggravators to outweigh mitigators is without merit. *Hurst* specifies constitutional error occurs when a judge alone finds the existence of an aggravator. *Hurst*, 136 S.Ct. at 624.

a death sentence and the jury recommended the death penalty.[19] Anderson's eligibility for a death sentence, unlike Hurst's, is supported by a plea agreement, the factual basis which necessarily was admitted by Anderson.

Anderson argues evidence was required to show violence. While the judge permitted additional evidence of violence, Attempted Capital Sexual Battery is an inherently violent crime.[20] *Blackwelder v. State*, 851 So. 2d 650, 653 (Fla. 2003).

> Blackwelder next claims that the prior violent felony aggravator should be stricken because it was based, in part, on six felony convictions that are not *per se* crimes of violence. Even if he is correct, however (which we do not address), Blackwelder also had been

---

[19] HAC and CCP were upheld. In *King v. Moore*, 831 So.2d 143, 144 (Fla. 2002), a single (HAC) aggravator case, the *Ring* issue was rejected:

> The United States Supreme Court in February 2002 stayed King's execution and placed the present case in abeyance while it decided *Ring*. That Court then, in June 2002, issued its decision in *Ring*, summarily denied King's petition for certiorari, and lifted the stay without mentioning *Ring* in the *King* order. The Court did not direct the Florida Supreme Court to reconsider *King* in light of *Ring*.

[20] *Meadows v. Krischer*, 763 So.2d 1087 (Fla. 4th DCA 1999) (determining State alleged sufficiently jurisdiction over inmate in petition for commitment as sexually violent predator in pertinent part as the petition alleged incarceration based on ***conviction of the violent sexual offense of attempted capital sexual battery)*** Section 394.912(9), Fla. Stat. (2014) provides the definition of "sexually violent offence" includes (d) sexual battery; ***"(e) Lewd, lascivious, or indecent assault or act upon or in presence of the child in violation of s. 800.04 or s. 847.0135(5); (f) An attempt, criminal solicitation, or conspiracy, in violation of s. 777.04, of a sexually violent offense;*** (g) Any conviction for a felony offense in effect at any time before October 1, 1998, which is comparable to a sexually violent offense under paragraphs (a)-(f)."

> convicted of capital sexual battery, which *is per se* a crime of violence. **In addition, Blackwelder had been convicted of attempted capital sexual battery. Therefore, the prior violent felony aggravator is supported by competent, substantial evidence**.

The prior violent felony rendered Anderson death eligible.

This Court has upheld death sentences where a prior violent or contemporaneous felony exists. *Jones v. State*, 855 So.2d 611, 619 (Fla. 2003). The *Hurst* remand permitted a harmless error analysis, thus, this Court should follow those cases where such aggravators were proven. Any argument that a jury must find every aggravator is without merit. Once the jury found one aggravator, Anderson became death eligible. *Alleyne,* 133 S.Ct. at 2162-63 ("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." Only one aggravator is necessary to support a death penalty; finding others does not expose defendants to higher penalties.

The Supreme Court recognized the critical distinction of an enhanced sentence supported by a prior conviction in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (permitting judge to impose higher sentence based on prior conviction); *Ring*, 536 U.S. at 598 n.4; *Alleyne*, 133 S.Ct. at 2160 n.1. *Hurst* did not disturb settled precedent that a *Ring* claim is harmless in the face of a qualifying felony conviction.

CONCLUSION

The State requests respectfully this Court affirm the denial of postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished via the e-portal to: Martin McClain at martymcclain@earthlink.net this 9th day of March, 2016.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL
__/S/ Leslie T. Campbell____
LESLIE T. CAMPBELL
Assistant Attorney General
Florida Bar No. 0066631
1515 N. Flagler Dr.; Ste. 900
Telephone: (561) 837-5000
Facsimile: (561) 837-5108
E-mail:
Leslie.Campbell@MyFloridaLegal.com
Secondary E-mail:
CapApp@MyFloridaLegal.com

COUNSEL FOR APPELLEE