

IN THE SUPREME COURT OF FLORIDA
CASE NOS. SC12-1252 & SC14-881

CHARLES L. ANDERSON,
Appellant,
v.

STATE OF FLORIDA,
Appellee.

CHARLES L. ANDERSON,
Petitioner,
v.

JULIE L. JONES, etc.
Respondent.

ON APPEAL FROM THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA
&
ORIGINAL PROCEEDING ON PETITION FOR WRIT OF HABEAS CORPUS

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT/PETITIONER

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INTRODUCTION

Anderson filed his Initial Brief in his pending appeal on May 6, 2014. In Argument II of his brief, Anderson argued that his death sentence violated the Sixth Amendment principles set forth in Ring v. Arizona, 536 U.S. 584 (2002). Also on May 6, 2014, Anderson filed a Petition for a Writ of Habeas Corpus. Later, he filed an Amended Petition for a Writ of Habeas Corpus. In Claim I of his amended habeas petition, Anderson argued that his death sentence violated the Sixth Amendment principles set forth in Ring v. Arizona, 536 U.S. 584 (2002). He explained that he was presenting the same claim in both his pending appeal and in his habeas petition:

Because it is not clear to Mr. Anderson which is the proper way to present his argument to this Court, he has included the same argument in his Initial Brief in the appeal from the denial of Rule 3.851 relief, and in this petition for a writ of habeas corpus. Since the two pleadings are due to be filed simultaneously with this Court and he has no means of ascertaining this Court's view of which is the proper way to raise the issue before this Court, Mr. Anderson has decided in abundance of caution that including the same argument in both pleadings is the best way to insure that he does not make the wrong choice and waive his argument.

(Amended Habeas Petition at 16).

This Court heard oral argument on Anderson's pending appeal and amended habeas petition on April 9, 2015. At that time, Anderson advised this Court that certiorari review had been granted in Hurst v. Florida, 135 S.Ct. 1531 (2015), and would be reviewing the applicability of the Ring/Sixth Amendment issue to

Florida's capital sentencing scheme.

On January 12, 2016, the United States Supreme Court issued Hurst v. Florida, 136 S.Ct. 616, 619 (2016), and while addressing Florida's capital sentencing statutes wrote: "We hold this sentencing scheme unconstitutional."

Because the decisions in Hurst v. Florida bears directly on the arguments Anderson made in his Initial Brief and in his Amended Petition for a Writ Habeas Corpus, he filed a motion with this Court requesting the opportunity to present supplemental briefing as to the impact of Hurst on the arguments that he and the State have set forth in their pleadings in the above-entitled matters. Thereafter, this Court granted the motion and ordered the submission of supplemental briefs.

BRIEF RECITATION OF THE RELEVANT FACTS AS TO ARGUMENT II OF THE INITIAL BRIEF AND ARGUMENT I OF THE AMENDED HABEAS PETITION

On September 8, 1994, Anderson was indicted for one count of first-degree murder in the death of Keinya Smith (R. 1). Anderson's trial began on February 3, 1999 (R. 965). On February 11, 1999, the jury returned a verdict finding Anderson guilty of first degree murder (R. 2348). The jury was then discharged, but instructed to returned on March 9, 1999, for the penalty phase of Mr. Anderson's trial.

When the jury returned, both the State and the defense presented evidence. The evidentiary portion of the proceedings concluded at the end of the day on March 10, 1999. On March 11,

1999, counsel gave the closing arguments and the Court instructed the jury. He instructed the jury that it could consider five aggravating circumstances. These included: 1) previous conviction of a violent felony; 2) the homicide occurred in the course of a kidnapping;¹ 3) the homicide was committed for the purpose of avoiding a lawful arrest; 4) the homicide was especially heinous, atrocious or cruel; and 5) the homicide was committed in a cold, calculated and premeditated manner (R. 3267-69).

As to the first aggravator, the instruction given was a bit different than the usual instruction for the previous conviction of a violent felony because the judge determined that under this Court's case law, an attempted sexual battery was not per se violent. Relying upon Sweet v. State, 624 So. 2d 1138 (Fla. 1993), and the cases cited therein, the judge instructed the jury:

The crime of attempted capital sexual battery on a minor is a felony. However, before you can consider this an aggravating circumstance you must consider the individual circumstances of the crime of attempted capital sexual battery on a minor and determine if it involved the use or threat of violence to another person before weighing it as a prior violent felony.

¹Anderson had not been not charged with kidnapping. It was known prior to the instruction conference following the close of evidence that the State wished that the jury be instructed on both premeditated and felony murder. Over Anderson's objection, the judge announced that it would instruct the jury on both premeditated and felony murder (R. 2152-53). The jury's guilty verdict did not specify under which theory of prosecution it had found guilt (R. 2348).

(R. 3267-68).² Thus before this aggravating circumstance could be considered by the jury, the jury was instructed to look at the evidence presented regarding that felony and find that the crime as a matter of fact involved a threat of violence.³

Throughout the trial and in the jury instructions, the jury was repeatedly told that its verdict at the penalty phase was advisory. The verdict was described as a recommendation. Responsibility for imposing a sentence rested with the judge. The jury was also instructed in conformity with Florida statutory law that the first fact question to be considered during the penalty phase deliberations was whether sufficient aggravating

²The judge had explained to counsel that his understanding of the law was that attempted sexual battery was not a per se violent felony and that the State could not just "stand on the fact that it is attempted capital sexual battery alone, without anything else" (R. 2433). To permit the State to do that "would be error" (R. 2433). The judge then indicated that he would allow the State to seek to establish that the prior felony was violent, "but you are going to have to put evidence that there was either force, threats, or violence" (R. 2433). Because of the judge's reading of Sweet, he had allowed the prosecutor to go beyond Anderson's guilty plea and present testimony from Anderson's angry ex-wife, who had known of the sexual contact between Anderson and her daughter and did not report it, but who testified that the sexual contact was accompanied with threats of violence.

³It should be noted that the prosecutor in his penalty phase closing argument regarding this aggravator acknowledged that there was a contested question of fact that the jury had to find beyond a reasonable doubt before it could find this aggravating circumstance established (R. 3177). Specifically, the prosecutor argued: "Was there violence used in raping his step daughter? He says there wasn't. She says there was. Who you going to believe? Who you going to believe?"

circumstances existed to justify the imposition of the death penalty:

It is now your duty to advise the Court as to the punishment that should be imposed upon the defendant for the crime of two counts of first degree murder. You must follow the law that will now be given to you and **render an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist.** The definition of aggravating and mitigating circumstances will be given to you in a few moments. As you've been told, the final decision as to which punishment shall be imposed is the responsibility of the judge. In this case, as the trial judge, that responsibility will fall on me. However, the law requires you to render an **advisory** sentence as to which punishment should be imposed - life imprisonment without the possibility of parole or the death penalty.

Subsequently, the jury returned a death recommendation by a vote of eight (8) to four (4) (R. 3293).

The judge entered his sentencing order on April 19, 1999 (R. 3379). The judge sentenced Mr. Anderson to death, finding that the five (5) statutory aggravating circumstances he found present were sufficient, and that they outweighed the thirteen (13) non-statutory mitigating circumstances that he also found (R. 3370-3379). The five aggravating circumstances found by the judge were: (1) Anderson had a previous conviction of a violent felony (the attempted sexual batteries), (2) the murder was committed while engaged in the commission of a felony (kidnapping), (3) the murder was committed to avoid arrest, (4) the murder was heinous,

atrocious, or cruel, and (5) the murder was committed in a cold, calculated and premeditated manner without any pretense of legal justification (R. 3371-72).⁴

On direct appeal, this Court affirmed Mr. Anderson's conviction and sentence of death, despite striking two of the five aggravators found by the trial judge in his sentencing order. Anderson v. State, 841 So.2d 390, 404-05 (Fla. 2003).⁵ As to the previously convicted of a violent felony, this Court agreed with the trial judge's ruling that it was a question of fact:

Although Anderson argues that attempt crimes can never qualify as prior violent felonies, this Court has never made such a finding. Whether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime. See Gore v.

⁴The thirteen non-statutory mitigators found by the trial judge were: (1) Anderson suffers from sexual dementia (minimal weight), (2) Anderson confessed to his sexual relationship with Keinya during drug addiction counseling (medium weight), (3) Anderson suffered from drug addiction (minimal weight), (4) Anderson comes from a good family (minimal weight), (5) Anderson was a good child (minimal weight), (6) Anderson helped Edwina take care of his three natural children (minimal weight), (7) Anderson loves his children (minimal weight), (8) Anderson sends gifts to his kids while in custody (minimal weight), (9) Anderson is a very caring person (minimal weight), (10) Anderson served in the Coast Guard for five years (minimal weight), (11) society would be protected by Anderson serving a life sentence (minimal weight), (12) Anderson earned money playing the market while in custody and therefore can still be a productive member of society (minimal weight), (13) Anderson has a gift for poetry and can help men who end up in prison (minimal weight) (R. 3372-78).

⁵This Court struck the avoiding arrest aggravator and the in the course of a felony aggravator. Anderson v. State, 841 So. 2d at 405-06.

State, 706 So.2d 1328, 1333 (Fla. 1997). Hence, the trial court did not err in permitting the State to present evidence regarding the details of the attempted sexual batteries. Further, **based on this evidence**, the trial court did not err in concluding that the attempted sexual batteries qualified as prior violent felonies under section 921.141(5)(b), Florida Statutes (1993).

Anderson v. State, 841 So. 2d at 407 (emphasis added).

In this Court's opinion in Anderson's direct appeal, it rejected Anderson's argument that his death sentence stood in violation of the Sixth Amendment on the basis of Ring v. Arizona:

Anderson contends that Florida's capital sentencing statute suffers the same constitutional infirmity. However, Anderson's claim has already been addressed by this Court and decided adversely to him. See Bottoson v. Moore, 833 So.2d 693 (Fla.2002) (concluding that Bottoson was not entitled to relief under Ring).

Anderson v. State, 841 So. 2d at 409.

ARGUMENT⁶

THE CAPITAL SENTENCING STATUTE UNDER WHICH ANDERSON WAS TRIED, CONVICTED AND SENTENCED TO DEATH IS UNCONSTITUTIONAL, AND AS A RESULT, HIS DEATH SENTENCES STAND IN VIOLATION OF THE SIXTH AMENDMENT.

A. HURST V. FLORIDA

On January 12, 2016, the United States Supreme Court rendered its 8-1 decision in Hurst v. Florida, 136 S.Ct. 616 (2016), and found that Florida's capital sentencing statute is unconstitutional: "We hold this sentencing scheme

⁶In Anderson's initial brief in his pending appeal, this argument was labeled "Argument II." In his amended habeas petition, this argument was labeled "Argument I."

unconstitutional." Id. at 619. The Court ruled that "[t]he 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." Id. The Hurst opinion identified the statutorily defined facts that must be found under Florida law before a death sentence may be imposed:

The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, **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."** Fla. Stat. § 775.082(1) (emphasis added). 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."** § 921.141(3). "[T]he jury's function under the Florida death penalty statute is advisory only." The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Id. at 622 (emphasis added) (citations omitted).

Under Florida's statute, a death sentence is not authorized unless two statutorily defined facts are found. A unanimous verdict finding the defendant guilty of first degree murder by itself does not authorize a death sentence. The two statutorily defined facts required to authorize the imposition of a death sentence on an individual convicted of first degree murder are 1) the existence of "sufficient aggravating circumstances"⁷ and 2)

⁷It is worth noting that the statutory requirement that "sufficient aggravating circumstances" be found to exist was adopted to insure compliance with Furman v. Georgia, 408 U.S. 238

the absence of "sufficient mitigating circumstances to outweigh the aggravating circumstances." See § 921.141(3); Hurst, 136

(1972), and the narrowing principle adopted therein. The United States Supreme Court has recently explained this purposes of the narrowing requirement as follows:

Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." Atkins, supra, at 319, 122 S.Ct. 2242. This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. Godfrey v. Georgia, 446 U.S. 420, 428-429, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion).

Roper v. Simmons, 543 U.S. 551, 568 (2005).

When Florida's capital sentencing scheme was adopted after Furman, there were 8 aggravating circumstances identified. See State v. Dixon, 283 So. 2d 1, 5-6 (Fla. 1973). In the years since, the list of aggravators has nearly doubled to 15. But even with the 8 that existed at the time, this Court in Dixon stated:

[Jurors] must consider from the facts presented to them-facts in addition to those necessary to prove the commission of the **crime-whether the crime was accompanied by aggravating circumstances sufficient to require death**, or whether there were mitigating circumstances which require a lesser penalty.

Id. at 8 (emphasis added). This requirement was specifically noted in Proffitt v. Florida, 428 U.S. 242, 248 (1976), when the United States Supreme Court found the statute to on its face comply with Furman:

At the conclusion of the hearing the jury is directed to consider "(w)hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . (b)ased on these considerations, whether the defendant should be sentenced to life (imprisonment) or death." ss 921.141(2) (b) and (c) (Supp.1976-1977).

S.Ct. at 622. As a result, these two statutorily defined facts constitute elements of capital first degree murder, i.e. first degree murder plus the statutorily defined elements that authorize the imposition of a greater punishment than that authorized solely on the basis of a first degree murder conviction.

Because Florida's statute does not require a jury to return a verdict finding that these two statutorily defined facts have been proven by the State beyond a reasonable doubt, Florida's capital sentencing statute violates the Sixth Amendment. Hurst v. Florida, 136 S.Ct. at 619 ("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.").

B. RETROACTIVITY OF HURST V. FLORIDA

In his direct appeal, Anderson challenged his death sentence on the basis of the Sixth Amendment ruling in Ring v. Arizona. This Court addressed Anderson's claim on the merits on the basis of its decision in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002). There, this Court had "decline[d]" to find Ring v. Arizona applicable to Florida's capital sentencing scheme. Bottoson, 833 So. 2d at 695.

In Hurst, the United States Supreme Court concluded that "[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's." Hurst, 136 S.Ct at 621-22.

The Supreme Court specifically addressed this Court's ruling in Bottoson writing:

As the Florida Supreme Court observed, this Court "repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century." Bottoson v. Moore, 833 So.2d 693, 695 (2002) (per curiam) (citing Hildwin, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728; Spaziano, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340). "In a comparable situation," the Florida court reasoned, "the United States Supreme Court held:

'If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' " Bottoson, 833 So.2d, at 695 (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)); see also 147 So.3d, at 446-447 (case below).

We now expressly overrule Spaziano and Hildwin in relevant part.

Spaziano and Hildwin summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Hildwin, 490 U.S., at 640-641, 109 S.Ct. 2055. Their conclusion was wrong, and irreconcilable with Apprendi. Indeed, today is not the first time we have recognized as much. In Ring, we held that another pre-Apprendi decision—Walton, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511—could not "survive the reasoning of Apprendi." 536 U.S., at 603, 122 S.Ct. 2428. Walton, for its part, was a mere application of Hildwin's holding to Arizona's capital sentencing scheme. 497 U.S., at 648, 110 S.Ct. 3047.

Hurst, 136 S.Ct. at 623.

At issue in Hurst v. Florida was this Court's decision in

Hurst v. State, 147 So. 3d 435 (Fla. 2014). There, this Court was presented with Hurst's Sixth Amendment challenge to his death sentence on the basis of Ring. And this Court, just like in Anderson's direct appeal, rejected his argument on the basis of Bottoson v. Moore:

Hurst recognizes that our precedent has repeatedly held that Ring does not require the jury to make specific findings of the aggravators or to make a unanimous jury recommendation as to sentence, and he asks us to revisit our precedent on the issue in the decisions in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), and King v. Moore, 831 So.2d 143 (Fla.2002). In the plurality decisions in both cases, we rejected claims that Ring applied to Florida's capital sentencing scheme. We decline to revisit those decisions in this case.

Hurst, 147 So. 3d at 445-46.

It is also worth noting that Hurst was convicted of a 1998 murder. He was tried and sentenced to death in 2000. His death sentence was affirmed by this Court in 2002. Hurst v. Florida, 819 So. 2d 689 (Fla. 2002).⁸ This was nearly one year before this

⁸In his 2002 direct appeal, Hurst argued that his death sentence stood in violation of the Sixth Amendment principles enunciated in Apprendi v. New Jersey, 530 U.S. 466 (2000). This Court rejected the claim saying:

Subsequent to the filing of Hurst's initial brief, this Court decided this issue and has rejected the argument that the Apprendi case applies to Florida's capital sentencing scheme. See Mills v. Moore, 786 So.2d 532 (Fla.), cert. denied, 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001); Mann v. Moore, 794 So.2d 595 (Fla.2001). In his reply brief, Hurst requests that this Court revisit the Mills decision and find that Apprendi does apply to capital sentencing schemes. Having considered the cases Hurst cited and his additional arguments, this Court finds no reason to

Court affirmed Anderson's death sentence in his direct appeal. Subsequently, this Court granted Hurst collateral relief on an ineffective assistance of counsel claim. Hurst v. State, 18 So. 3d 975 (Fla. 2009). Only because this Court ordered a new penalty phase proceeding, was Hurst able to present his Sixth Amendment challenge to Florida's capital sentencing scheme a second time in his second direct appeal. When the United States Supreme Court granted certiorari review, Hurst's Sixth Amendment challenge, which was the same challenge that Anderson presented in his direct appeal in 2003, was found meritorious.

To deny Anderson the benefit of the ruling in Hurst v. Florida, while Hurst obviously gets the benefit, would mean that all that separates Hurst from prevailing on the Sixth Amendment claim and Anderson not prevailing is the ineffectiveness of Hurst's trial attorney at his 2000 trial. Such a distinction would be wholly arbitrary in violation of Furman v. Georgia, and unfair within the meaning of Witt v. State, 387 So. 2d 922, 925 (Fla. 1980) (emphasis added) (quotations omitted):

Considerations of fairness and uniformity make it very **"difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."**

revisit the Mills decision, and thus we reject Hurst's final claim.

Hurst v. State, 819 So. 2d at 703.

Accordingly, this Court in Witt v. State concluded that:

The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring **fairness and uniformity in individual adjudications**. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief **is necessary to avoid individual instances of obvious injustice**.

Witt, 387 So. 2d at 925 (emphasis added). Thus, the Witt standard for retroactive application is a yardstick for determining when “[c]onsiderations of fairness and uniformity” trumps “[t]he doctrine of finality.” See Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987) (“We find that the United States Supreme Court’s consideration of Florida’s capital sentencing statute in its Hitchcock opinion represents a sufficient change in the law that potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default.”).

Under Witt, Anderson cannot be treated differently than Hurst. Uniformity and fairness demand that they both receive the benefit of the Supreme Court’s ruling in Hurst v. Florida.

C. HURST ERROR AT ANDERSON’S TRIAL

Anderson’s jury was repeatedly told and instructed that its penalty phase verdict was advisory. Though it was told that it was to consider whether sufficient aggravating circumstances existed to justify the imposition of a death sentence and whether the mitigating circumstances outweighed the aggravation, the jury did not return a verdict setting forth its findings. Further, the

jury was instructed that its recommendation was to be by a majority vote, and it returned a death recommendation by a vote of 8-4. Because the jury did not return a unanimous verdict finding the presence of the facts necessary under Florida law to authorize the imposition of a death sentence, Anderson's death sentence stands in violation of the Sixth Amendment under Hurst v. Florida.

In its response to Anderson's motion for supplemental briefing, the State argued:

Anderson's request for supplemental briefing should be denied because of the existence of the prior violent felony aggravator. Here, Anderson pled guilty to 11 counts of Attempted Capital Sexual Battery, a violent crime, and based on those convictions, he was indisputably eligible for his death sentence. Anderson's eligibility for a death sentence, unlike Hurst's, is supported by a plea agreement, the factual basis of which necessarily was admitted to by Anderson.

Appellee/Respondent's Response in Opposition to Appellant/Petitioner's Motion Requesting the Opportunity to File Supplemental Briefs in Light of Hurst v. Florida, 2016 WL 112683 (January 12, 2016), dated 1-22-16 at 4-5. This argument for why Hurst has no applicability to Anderson's death sentence is contrary to the record and contrary to this Court's ruling in Anderson's direct appeal. The State's position is just not true.

At Anderson's penalty phase, the judge ruled that whether the attempted sexual batteries to which Anderson had entered guilty pleas were violent was a question of fact on which the

State was required to present evidence. The judge told counsel that his understanding of the law was that attempted sexual battery was not a per se violent felony and that the State could not just "stand on the fact that it is attempted capital sexual battery alone, without anything else" (R. 2433). To permit the State to do that "would be error" (R. 2433). The judge advised that he would allow the State to seek to establish that the prior felony was violent, "but you are going to have to put evidence that there was either force, threats, or violence" (R. 2433). Pursuant to the judge's ruling, testimony was presented. In his closing argument, the prosecutor conceded that the question of whether the prior crimes were violent was a contested factual issue: "Was there violence used in raping his step daughter? He says there wasn't. She says there was. Who you going to believe? Who you going to believe?" (R. 3177).

In Anderson's direct appeal, this Court agreed with the trial judge's ruling that it was a question of fact:

Although Anderson argues that attempt crimes can never qualify as prior violent felonies, this Court has never made such a finding. Whether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime. See Gore v. State, 706 So.2d 1328, 1333 (Fla. 1997). Hence, the trial court did not err in permitting the State to present evidence regarding the details of the attempted sexual batteries. Further, **based on this evidence**, the trial court did not err in concluding that the attempted sexual batteries qualified as prior violent felonies under section 921.141(5)(b), Florida Statutes (1993).

Anderson v. State, 841 So. 2d at 407 (emphasis added).

This Court found that “**based on this evidence**” (which included the testimony of Anderson’s ex-wife which the prosecutor conceded was contested by Anderson in his testimony), “the trial court did not err in concluding that the attempted sexual batteries qualified as prior violent felonies.” Id. This must be text book Hurst error under the State’s limited reading of Hurst that it has set forth in other cases, i.e. that a jury must only find the existence of one aggravator, because here this aggravator as this Court noted on direct appeal was found by the judge on the basis of evidence presented at the penalty phase.

However, Hurst actually held that “[t]he 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.” Hurst, 136 S.Ct. at 619. Here, the jury found none of the facts “necessary to impose a sentence of death.” The judge found 5 aggravating circumstances, 2 of which this Court struck on direct appeal.⁹ Anderson’s death sentence violates the Sixth Amendment. Hurst v. Florida.

D. A LIFE SENTENCE MUST BE IMPOSED

Section § 921.141, Fla. Stat., sets forth Florida’s death

⁹One of the two aggravators this Court struck on direct appeal was the in-the-course-of-a-felony aggravator. This Court specifically concluded that the State had not proven that the homicide occurred in the course of a kidnapping. Anderson v. State, 841 So. 2d at 405-06.

penalty scheme. In Hurst, the Supreme Court ruled the statutory scheme violated the Sixth Amendment. While the Supreme Court did not specifically address Florida's capital sentencing scheme in Furman v. Georgia, 408 U.S. 238 (1972), Florida's Attorney General conceded before this Court that the decision in Furman rendered Florida's death penalty scheme unconstitutional under the Eighth Amendment. Thus, the 2016 decision in Hurst parallels the effect of 1972 decision in Furman.

In the wake of Furman, this Court had to consider the impact of Furman upon death sentences that had been imposed pursuant to an unconstitutional sentencing scheme. In Donaldson v. Sack, 265 So. 2d 499, 501 (Fla. 1972), this Court noted that under Furman, Florida's death penalty statute was unconstitutional:

We have examined every reasonable avenue to uphold the several statutes and rules insofar as they assert 'capital offense,' as we must do under the rule favoring validity unless clearly indicated otherwise. We are unable in the face of existing authorities and logic to find support for the continuance of 'capital offense' as heretofore applied. Accordingly, it must fall with the U.S. Supreme Court's **holding against the death penalty as provided under present legislation**. Our decision is compelled by that Court's action.

(Emphasis added). This Court then noted the then recently legislative adopted provision § 775.082(2).¹⁰ This Court observed

¹⁰Section 775.082(2), Florida Statutes, which provides:

In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced

that § 775.082(2) was relevant because Furman had "invalidat[ed] the death penalty as now legislated." Id. In fact, Chapter 72-118, which added the pertinent language contained in section 775.082(2), was enacted in the 1972 Legislative session in anticipation of Furman. Donaldson, 265 So. 2d at 503 ("At their 1972 Session, the Legislature foresaw the possibility of the current situation."). The statute was effective October 1, 1972; Furman was decided on June 29, 1972, but rehearing wasn't denied until October 10, 1972. Furman v. Georgia, 409 U.S. 902 (1972).

In Reino v. State, 352 So. 2d 853, 860-61 (Fla. 1977), this Court noted § 775.082(2) was adopted in anticipation of Furman:

As early as March, 1972, the legislature was cognizant of the possibility of the decision reached in Furman. Not only did the legislature revise the death penalty statute to be effective October 1, 1972 (Ch. 72-72, Laws of Florida), it enacted Ch. 72-118, Laws of Florida, filed in the office of the Secretary of State March 30, 1972, which amended Section 775.082, Florida Statutes, by adding a new subsection reading:

In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person who has been convicted of a capital felony shall be punished by life imprisonment.

Id. at 860-61.

to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

The State's position, which has been asserted in other cases, that § 775.082(2) does not apply after Hurst -- because the death penalty has not been declared unconstitutional *per se* -- fails to recognize that Furman had not declared the death penalty unconstitutional *per se*. In State v. Dixon, 283 So. 2d 1 (Fla. 1973), this Court ruled that Furman did not abolish the death penalty. This Court in Dixon wrote: "[Furman] does not abolish capital punishment." "Capital punishment is not, *per se*, violative of the Constitution of the United States . . . or of Florida." Id. at 6-7. It was the *procedure or scheme* for imposing the death penalty that rendered Florida's death penalty scheme unconstitutional under the Eighth Amendment as explained in Furman.

Certainly, § 775.082(2) makes no distinction between a ruling invalidating Florida's death penalty scheme on Eighth Amendment grounds and a ruling invalidating the scheme on Sixth Amendment grounds. Therefore, this post-Hurst situation cannot be dismissed as different from the post-Furman situation in 1972. Under this Court's post-Furman jurisprudence, Anderson must be sentenced to life imprisonment in the wake of Hurst because no individual case-by-case determination has been provided for by statute.

Upon the conviction of first degree murder alone, the only sentence permitted by virtue of the decision in Hurst v. Florida

is life imprisonment. As it relates to his death sentences, all that Anderson stands convicted of now is first degree murder. He was not convicted of first degree murder along with a finding of the statutorily defined facts which must be found in order for a death sentence to be authorized, i.e. the element or elements necessary to authorize an increase in the punishment above that authorized just a conviction of first degree murder.

In Anderson's case, the only possible punishment authorized by the convictions of first degree murder alone was life imprisonment without the possibility of parole.¹¹ At the time that the jury returned unanimous verdict of guilty of first degree murder, there were no findings as to the presence of the statutorily defined facts,¹² i.e. the elements, 1) whether sufficient aggravating circumstances existed to justify the imposition of a death sentence, and 2) whether sufficient mitigating circumstances to outweigh the aggravators did not exist. Pursuant to the statutory scheme in place at the time, the

¹¹As Hurst now makes clear that **any** fact, no matter how it is labeled, which increases the punishment authorized by a guilty verdict, constitutes an element of the death eligible offense, i.e. capital first degree murder, and must be found by a jury beyond a reasonable doubt.

¹²In Apprendi v. New Jersey, 530 U.S. 466 (2000), Justice Thomas wrote in his concurrence that courts have "long had to consider which facts are elements," but that once that question is answered, "it is then a simple matter to apply that answer to whatever constitutional right may be at issue in a case--here, Winship and the right to trial by jury." Id. at 501.

Sixth Amendment requires that Anderson be sentenced to life because his jury did not convict him of first degree and the additional elements necessary to authorize a death sentence.

E. AVAILABILITY OF HARMLESS ERROR ANALYSIS

In addressing this issue in its Answer Brief and Response to the Habeas Petition, the only assertion that approached a harmless error argument was the contention that the prior conviction of a violent felony aggravator was exempt from the holding of Ring v. Arizona.¹³ However as noted previously, Hurst v. Florida held that “[t]he 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.” Id.¹⁴ Further, Hurst specifically identified the statutorily defined facts that Florida law requires to be found before a death sentence may be authorized: “‘[t]hat sufficient aggravating circumstances exist’ and ‘[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.’” Hurst v. Florida, 136 S.Ct. at 622 (emphasis added). Under Florida’s governing statute and under Hurst, it is

¹³As discussed supra, the State’s argument is wrong even under Ring because whether the previously convicted of a crime of violence aggravator existed in this case was a question of fact as the trial judge held and as this Court held on direct appeal. Accordingly even under Ring, it was a factual issue for the jury.

¹⁴Hurst’s holding is broader than the holding in Ring because Florida’s statute requires finding of facts before a death sentence can be imposed that Arizona law did not require.

not a question of whether an aggravating circumstance is present; there must be a finding of fact by a jury that sufficient aggravating circumstances exist to justify a death sentence.

Anderson does recognize that the issue of the availability of harmless error was mentioned in Hurst although the United States Supreme Court did not resolve its applicability:

Finally, we do not reach the State's assertion that any error was harmless. See Neder v. United States, 527 U.S. 1, 18-19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (holding that the failure to submit an uncontested element of an offense to a jury may be harmless). This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here. See Ring, 536 U.S., at 609, n.7, 122 S. Ct. 2428.

Hurst v. Florida, 136 S.Ct. 616, 624 (2016) (emphasis added).

Obviously, the Supreme Court in Hurst left the State's assertion that any error was harmless for this Court to address in the first instance.¹⁵ In so doing though, the Supreme Court referred this Court to Neder v. United States, 527 U.S. 1 (1999), noting parenthetically that the failure to instruct on an **uncontested element** in that case had been found harmless.¹⁶

The citation to Neder was not a determination that Hurst

¹⁵It is hard to understand how harmless error can apply when Anderson was convicted of first degree murder by a jury in 1999; and after Hurst, there is no constitutional procedure in place by which a death sentence can be imposed.

¹⁶Here, Anderson contested the presence of the statutorily defined facts. This on its face takes Anderson's case outside the scope of Neder.

error is subject to harmless error analysis. Indeed, in Neder is an extended discussion of when harmless error may be available as to constitutional error and when it may not be appropriate to consider constitutional error subject to harmless error analysis. It is certainly Anderson's position that Hurst error is structural error that can never be harmless.¹⁷

But assuming arguendo that Hurst error is subject to harmless error analysis, the Hurst error present on the face of

¹⁷Unlike the circumstances in Neder, the element at issue under Hurst is the element that separates first degree murder and a life sentence from capital first degree murder and a death sentence. Unlike the circumstances in Neder where the presence of the element was not contested, Anderson did contest whether he should be sentenced to death and would contest it again in a new proceeding. Moreover a reversal in Anderson's case on the basis of Hurst would not by itself require a retrial of his guilt of first degree murder. It would either require the imposition of a life sentence or a remand for a new proceeding to determine whether the State could now prove the statutorily defined facts necessary to authorize the imposition of a death sentence, and Anderson would contest the existence of those facts. This distinguishes Neder and demonstrates that the error should be found structural and not subject to harmless error.

Of course at his 1999 trial, Anderson did not have notice that the statutorily defined facts were elements that under the Sixth Amendment a jury was required to find proven beyond a reasonable doubt. Due process demands reasonable notice which was not given here. This Court cannot rely on counsel's actions or inactions to find errors harmless when counsel's strategic decisions were made on the basis of misinformation as to factual issues the Sixth Amendment required the jury to determine. Voir dire would be conducted differently. The exercise of peremptory challenges may be impacted. The jury instructions as to the importance of its role as to the sentence that would be imposed would have to comply with Caldwell v. Mississippi, 472 U.S. 320 (1985). The full ramifications of Hurst on Florida capital trials at the moment can only be guessed.

the trial record demonstrates that the State could never prove that the error was harmless beyond a reasonable doubt. Certainly not in Anderson's case where four jurors voted in favor of a life sentence, presumably because those jurors did not find the statutorily defined facts present.¹⁸ Since Florida law requires unanimity, there is no way to conclude beyond a reasonable doubt that Anderson's jury if properly instructed that its determination of the statutorily defined facts would be binding on the judge would have unanimously found the statutorily defined facts necessary to authorize a death sentence.¹⁹

F. CONCLUSION

Under Hurst, Anderson's death sentence cannot stand. He was not convicted by a jury of first degree murder plus the statutorily defined facts that constitute elements of capital first degree murder and must be found before a death sentence is authorized.

¹⁸This is without regard to the relevant non-record evidence regarding how the pre-Hurst law impacted and changed strategic decisions made in the course of the trial which should also be considered before constitutional error is determined to be harmless. Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991).

¹⁹Florida law requires elements to be found unanimously by the jury. Since before Florida was admitted into the union as a state, Florida juries have been required to find elements of an offense unanimously. "[T]he requirement was an integral part of all jury trials in the Territory of Florida in 1838." Bottoson v. Moore, 833 So. 2d 693, 715 (Fla. 2002) (Shaw, J., concurring). Likewise, the requirement that Florida juries find elements unanimously has been an "inviolable tenet of Florida jurisprudence since the State was created." Id. at 714.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Supplemental Initial Brief has been furnished by electronic service to Leslie Campbell, Assistant Attorney General, at Leslie.Campbell@myfloridalegal.com, on this 29th day of February, 2016.

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This is to certify that this Supplemental Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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