

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

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CHARLES L. ANDERSON,  
Appellant,  
v.

STATE OF FLORIDA,  
Appellee.

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CHARLES L. ANDERSON,  
Petitioner,  
v.

JULIE L. JONES, etc.  
Respondent.

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

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SUPPLEMENTAL REPLY BRIEF OF APPELLANT/PETITIONER

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RECEIVED, 03/14/2016 12:48:34 PM, Clerk, Supreme Court

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## ARGUMENT IN REPLY<sup>1</sup>

### A. WHAT THE STATE WILL NOT ADDRESS

Since the issuance of Hurst v. Florida, 136 S. Ct. 616 (2016), there have been dozens of cases in which Hurst related briefing has been submitted to this Court. There have been close to a dozen or so oral arguments before this Court in which Hurst has been at issue. But in the briefing and in the arguments, the State has steadfastly refused to address the statutorily defined facts that Hurst identified as necessary under Florida statutory law to authorize the imposition of a death sentence:

**[T]he 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).

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

The various attorneys representing the State in the ongoing Hurst briefing and during Hurst related oral arguments have had a mantra that is just repeated over and over. It goes like this:

Ring v. Arizona says the presence of one aggravating circumstance renders a criminal defendant convicted of first degree murder eligible for a death sentence. Hurst is just an extension of Ring to Florida. This Court said in State v. Steele that one aggravating circumstance renders a capital defendant death eligible. All that Hurst means is that one aggravating circumstance must exist to defeat a Hurst claim.

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<sup>1</sup>In 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.”

This Court said in Johnson v. State that Ring is not retroactive, so Hurst is not retroactive.

No matter what arguments capital defendants make in their briefs, no matter what questions this Court asks during oral argument, the mantra is repeated again and again. The various attorneys representing the State before this Court have not and will not engage in a discussion of the statutorily defined facts that are quoted in Hurst as necessary to authorize the imposition of a death sentence. In the Supplemental Answer Brief filed by the State in Mr. Anderson's case, the State's familiar mantra is set forth without regard to Mr. Anderson's arguments in his Supplemental Initial Brief.

Since the State will not address the statutorily defined facts set forth in Hurst and Mr. Anderson's Supplemental Initial Brief, herein Mr. Anderson will address the State's mantra in order to show that it is hollow and devoid of content. Given that the State's mantra is that Hurst is just an extension of Ring v. Arizona, 536 U.S. 584 (2002), Mr. Anderson begins there.

In Ring, the United States Supreme Court held: "Capital defendants, no less than noncapital 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 (emphasis added). This holding in Ring ties the Sixth Amendment right to a jury trial to the legislatively defined facts that authorize an increase in the maximum punishment.

This connection between the Sixth Amendment jury trial right and the legislatively defined facts is the core holding in Ring:

The dispositive question, we said, "is one not of form, but of effect." Id. at 494. **If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt.**

Ring, 536 U.S. at 602 (emphasis added).<sup>2</sup>

Clearly, the Supreme Court in Ring held that the Sixth Amendment right to a jury trial was tied to the legislatively defined facts that must be present to authorize the imposition of a death sentence. But in Mr. Anderson's case and in the other cases in which supplemental briefing has been submitted and in oral arguments heard as to the meaning of Hurst, the State has steadfastly refused to acknowledge that the scope of the Sixth Amendment jury trial right varies from State to State because its application is bound to the specific language of each State's statutes that define the facts necessary to authorize an increase in punishment.

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<sup>2</sup>The citation within this quote is to Apprendi v. New Jersey, 530 U.S. 466 (2000). There, the Supreme Court explained: "Despite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form, but of **effect--does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?**" Apprendi, 530 U.S. at 494 (emphasis added). In his concurrence, Justice Scalia wrote: "And the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury,' has no intelligible content unless it means that **all the facts which must exist** in order to subject the defendant to a legally prescribed punishment **must be found by the jury.**" Apprendi. 530 U.S. at 498 (emphasis added).

Rather than acknowledge that Ring links the jury trial right to the legislatively defined facts that authorize the imposition of a death sentence, the State sees only the conclusion reached in Ring that in Arizona the Sixth Amendment right was tied to the existence of one aggravating circumstance. But as the Supreme Court explained in Ring, "in Arizona, a 'death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt.'" 200 Ariz., at 279, 25 P.3d, at 1151 (citing § 13-703)." Ring, 536 U.S. at 597. It was due to Arizona's statutory law that the Supreme Court in Ring concluded: "**Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'**" [citation], the Sixth Amendment requires that they be found by a jury." Ring, 536 U.S. at 509 (emphasis added).

In Hurst, the Supreme Court looked to Florida statutory law to ascertain what statutorily defined facts are required under Florida for a death sentence to be authorized:

[T]he 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."

Hurst, 136 S. Ct. at 622 (emphasis in original).

Despite both Ring and Hurst clearly requiring us to look to the governing statutes to see what facts are necessary before a

death sentence may be imposed, the State in its brief refuses to look at Florida's death penalty statute. Instead, it just repeats its mantra: "In Florida, a defendant is death eligible if at least one aggravating factor applies." (Supp AB at 13). There was certainly no language in the statute to that effect prior to March 7, 2016.<sup>3</sup> Instead of setting forth any statutory authority for its assertion, the State drops a footnote and string cites opinions from this Court that relied upon Ring for the proposition that the Sixth Amendment merely requires the jury to find one aggravating circumstance (Supp AB at 13 n.18).

Of course, the string cite begins with State v. Steele, 921 So. 2d 538, 543 (Fla. 2005), a case that is part of the State's mantra. However, an examination of Steele shows that this Court misconstrued Ring:

The Court in Ring concluded that under Arizona's capital sentencing scheme, aggravating factors operate as the "functional equivalent of an element of a greater offense." 536 U.S. at 609, 122 S.Ct. 2428 (quoting Apprendi, 530 U.S. at 494 n. 19, 120 S.Ct. 2348). **Therefore, the Court held, the Sixth Amendment required that they be found by the jury.** Id. Even if Ring did apply in Florida—an issue we have yet to conclusively decide—we read it as requiring only that the jury make the finding of "an element of a greater offense." Id. That finding would be that at least one aggravator exists—not that a specific one does.

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<sup>3</sup>If the State wants to rely upon the new statute as changing Florida's substantive law, it cannot. Substantive changes in statutory law cannot be applied retroactively. But if the new statute were to be applied retroactively, Mr. Anderson's 8-4 jury verdict at his penalty phase would require the imposition of a life sentence.

State v. Steele, 921 So. 2d 546 (emphasis added). The Supreme Court in Ring only held that under Arizona's statute, the finding of one aggravator was necessary to authorize the imposition of a death sentence. This Court erroneously treated the application of the Sixth Amendment to Arizona law as applying in Florida without regard to Florida's statute, which was and is decidedly different from Arizona's statute.<sup>4</sup>

Indeed, this Court's misapprehension of Ring is at the heart of Hurst v. Florida. In the 14 years between Ring and Hurst, this Court failed to look to the statutorily required findings of fact that must be found before a death sentence can be imposed. The statute is quite clear and specific:

[I]f the court imposes a sentence of death, it shall set forth in writing its **findings** of upon which the sentence of death is based **as to the facts**:

a) That **sufficient aggravating circumstances exist** as enumerated in subsection (6), and

(b) That **there are insufficient mitigating circumstances** to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific **written findings of fact** based upon the circumstances in subsection (6) and (7) and upon the records of the trial and the sentencing proceedings. **If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment** in accordance with s. 775.082, and that person shall be

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<sup>4</sup>This Court's failure to properly construe the import of Ring should be compared to the Missouri Supreme Court's analysis of how Ring applied to Missouri's death penalty statute. State v. Whitfield, 107 S.W. 3d 253, 258-65 (Mo. 2003).

ineligible for parole.

§ 921.142, Fla. Stat. (emphasis added).

The statute expressly precludes the imposition of a death sentence absent findings of fact that sufficient aggravators exist and that insufficient mitigators exist. As indicated in Hurst, a defendant is not “eligible” for a death sentence until those facts have been found. Hurst, 136 S. Ct. at 622. Unless those facts are found, a death sentence cannot be imposed. Under Ring and Hurst, the Sixth Amendment right to a jury trial attaches to those statutorily defined facts that are necessary for the imposition of a death sentence.

The State hides from this reality by repeating its mantra and refusing to address the actual holdings in Ring and Hurst.

## **B. RETROACTIVITY**

As to whether Hurst is retroactive, the State’s mantra is: Johnson v. State, 904 So. 2d 400 (Fla. 2005), says Ring is not retroactive, so Hurst is not retroactive.

But when this Court decided Johnson, it had construed Ring as merely requiring the existence of one aggravating circumstance to satisfy a capital defendant’s Sixth Amendment right to a jury trial. In Johnson, this Court did not recognize the true scope of Ring, and its impact on Hildwin v. Florida, 490 U.S. 638 (1989), and Spaziano v. Florida, 468 U.S. 447 (1984). In Johnson, this Court said that “the question is whether Ring is of ‘sufficient

magnitude' to require retroactive application." Johnson, 904 So. 2d at 409. Because it did not perceive the true scope of Ring and the magnitude of the jurisprudential upheaval it engendered, this Court's opinion in Johnson simply does not control as to the retroactivity of Hurst, which was of such magnitude that Hildwin and Spaziano were formally and expressly overruled.

Only by minimizing the scope of Hurst through its repetitive mantra employing this Court's erroneous reading of Ring in Steele and Johnson and other cases, is the State able ignore the fact that Hurst is of "sufficient magnitude" that it must be retroactive under Witt v. State, 387 So. 2d 922 (Fla. 1980).

In addition, the State argues that Mr. Anderson's claim is procedurally barred because he presented the claim in his direct appeal and this Court found it meritless on the basis of this Court's misreading of Ring. See Anderson v. State, 841 So. 2d 390, 409 (Fla. 2003) ("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)."). However, Hurst has definitively established that this Court's rejection of Mr. Anderson's Ring claim was erroneous.

In such circumstances, a procedural bar resting on res

judicata principles must yield. In 2003, this Court erroneously denied Mr. Anderson's Ring claim. This Court has the power and jurisdiction to revisit an erroneously rejected constitutional claim when the US Supreme Court has expressly reversed in another case this Court's ruling rejecting the same constitutional claim. See State v. Akins, 69 So. 3d 261, 268 (Fla. 2011) ("Under Florida law, appellate courts have 'the power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice.' Muehlman v. State, 3 So. 3d 1149, 1165 (Fla. 2009) (alteration in original).").

**C. HARMLESS ERROR?**

Mr. Anderson argued in his Supplemental Initial Brief that the Hurst error was structural and could not be harmless under the test set forth in Neder v. United States, 527 U.S. 1 (1999). He continues to rely on that argument, as well as his arguments in his earlier brief that a life sentence must be imposed.

However to the extent that Hurst error is held to be subject to harmless error analysis, Mr. Anderson must address the State's mendacious insistence that the prior violent felony existed as a matter of law in Mr. Anderson's case. At Anderson's penalty phase, the judge ruled that whether the attempted sexual batteries to which Mr. Anderson had entered guilty pleas were violent was a question of fact on which the State was required to

present evidence. In the direct appeal, 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." Anderson v. State, 841 So. 2d at 407.<sup>5</sup> Thus, it was a question of fact, not one of law.

The Hurst error present on the face of the record shows that the State could never prove that the error was harmless beyond a reasonable doubt. Four jurors voted in favor of a life sentence, presumably because those jurors did not find the sufficient statutorily defined facts present.<sup>6</sup> Since Florida law requires unanimity as to elements, 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.

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<sup>5</sup>Here, the jury found none of the facts "necessary to impose a sentence of death." The judge found 5 aggravators, 2 of which were struck on appeal. One of the two aggravators struck was the in-the-course-of-a-felony aggravator. This Court found 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. The judge also found 13 non-statutory mitigating circumstances were present. Id. at 396-97.

<sup>6</sup>This is without regard to the relevant non-record evidence regarding how the pre-Hurst law impacted strategic decisions made in the trial which would show that the constitutional error was not harmless. Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991).

**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 14<sup>th</sup> day of March, 2016.

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**CERTIFICATE OF FONT**

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

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