

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-979; SC15-297
LOWER TRIBUNAL NO. 16-2005-CF-15549

DONALD LENNETH BANKS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

*On Appeal from the Circuit Court, Fourth
Judicial Circuit, in and for Duval County, Florida*

*Honorable Judge Hugh A. Carithers
Judge of the Circuit Court, Division CR-D*

**APPELLANT'S SUPPLEMENTAL BRIEF ON THE APPLICATION OF
THE U.S. SUPREME COURT'S DECISION IN HURST V. FLORIDA
TO THE INSTANT CASE**

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INTRODUCTION

The current appeal challenges the trial court's order denying Banks' 3.851 motion for postconviction relief and raises a petition for a writ of habeas corpus based on ineffective assistance of direct appeal counsel.¹ The merits briefing on this appeal has been completed by both parties, and oral argument took place on November 5, 2015. This Court has not yet issued its opinion in this case. On January 12, 2016, the U.S. Supreme Court issued its decision in Hurst v. Florida, 136 S. Ct. 616 (2016).

Hurst is a landmark case revamping the constitutional landscape as to what

¹ Banks presents seven issues in this appeal: (1) The trial court erred in denying Banks' claim that counsel rendered ineffective assistance of counsel in its penalty phase investigation and presentation; (2) The trial court erred in failing to find that Banks' trial attorney was deficient in failing to file a motion to suppress the illegal police search of Banks' residence; (3) The trial court erred in denying Banks' claim that counsel was ineffective in failing to preclude DNA evidence; (4) The trial court erred in denying Banks' claim that his attorney was ineffective in eliciting testimony on cross-examination of Sudie Johnson that she saw a video of Banks stabbing someone in an unrelated crime; (5) The trial court erred in rejecting Banks' claim that counsel was ineffective in failing to impeach state witnesses Sudie Johnson and Detective Bodine; (6) The trial court erred in denying Banks' claim that trial counsel was ineffective in failing to investigate and call Kenya Smith in Banks' guilt phase; (7) The trial court erred in denying Banks' claim that counsel was ineffective in failing to object to improper prosecutorial comments that amounted to fundamental error; (8) Mr. Banks' trial was fraught with procedural and substantive errors, which cannot be viewed as harmless when considered as a whole. In his habeas petition, Banks presenting the following claim: Appellate counsel for Mr. Banks was ineffective in failing to present on direct appeal the claim that, after defense objection, the trial court erred in giving the jury the principal theory instruction despite the lack of evidence supporting that theory.

the Sixth Amendment demands before a defendant is eligible to be sentenced to death, with profound ramifications on every case where a defendant was sentenced to death in Florida. In response to Banks' motion, this Court granted both parties leave to file supplemental briefs to address the application of Hurst upon this case.^{2,3}

RELEVANT PROCEDURAL HISTORY

In 2005, Banks was indicted for the first-degree murder of Linda Volum (1 R 18), and his jury would later find him guilty as charged. (5 R 832; 11 R 784.)

Prior to his sentencing, Banks filed a "MOTION TO DECLARE FLA'S CAPITAL SENTENCING PROCEDURE UNCONSTITUTIONAL UNDER *RING V. ARIZONA*" (4 R 660-74), along with a host of other motions on the same day, challenging the constitutionality of Florida's capital sentencing scheme.⁴ The

² Appellant will be referred to as "the Appellant" or "Banks" and the State of Florida will be referred to as "the Appellee" or "the State." Attorney Rick Sichta, who is representing the Appellant for purposes of this appeal, will be referred to herein as the "undersigned counsel." References to the record on direct appeal will be designated by the volume number, followed by "R" and the page number indicated on the Index to the Record on Appeal, for example (1 R 1.)

³ Banks is aware that numerous briefs have already been filed by the parties and *amici curiae* relating to the legal consequences of Hurst upon a pending postconviction capital case in Lambrix v. Jones, Case No. SC16-56, and he will cite to those briefs in reference to some of the issues handled at greater length.

⁴ (1 R 163 – 3 R 528 (E.g., Motion to Prohibit Misleading References to the Advisory Role of the Jury at Sentencing (4 R 606-608); Motion to Declare Section 921.141, Fla. Statutes, Unconstitutional as Applied because of Arbitrariness in Jury

trial judge held a hearing on these motions and denied them on the record. (7 R 1140-1171.)

The trial court proceeded to the penalty phase under the former version of F.S. 921.141, which Hurst has now found to be constitutional.

The State submitted the following aggravating circumstances to the jury: (1) prior violent felony conviction (two prior robberies, an aggravated battery, and an attempted murder), (2) pecuniary gain, (3) heinous, atrocious, or cruel (“HAC”), and (4) cold, calculated, and premeditated (“CCP”). (5 R 849-54.)

The jury’s verdict form did not make any specific findings as to which aggravators were proven, but it recommended death by a vote of 10-2 (14 R 961) and answered a special interrogatory that Banks played a “significant role” in the homicide of the victim. (5 R 848.)

The court followed the jury’s sentencing recommendation. (5 R 855.) The court found three aggravating factors: (1) prior violent felony (very great weight); (2) HAC (very great weight); and (3) CCP (great weight). (6 R 994-98.) The state sought the financial gain aggravator, but the court found that it had not been proven. (6 R 998.) The trial court found the following mitigation: (1) low IQ (very little weight); (2) a deficit in Banks’ brain—mild to moderate frontal lobe

Overrides and Sentencing.” (4 R 682-700); Motion to Dismiss and to Declare Sections 782.04 and 921.141, Florida Statutes, Unconstitutional for a Variety of Reasons.) Banks filed another series of similar motions on January 22, 2008. (4 R 660 – 753.)

impairment (moderate weight); (3) anti-social traits (little weight); (4) Banks was not the only participant in the murder (not proven, no weight); (5) Banks had a difficult youth (little weight). (6 R 999-1000.)

Banks presented six issues on direct appeal, but he did not raise a claim that Florida's capital sentencing scheme violated Ring v. Arizona, 536 U.S. 584 (2002), as argued in his pre-trial motions and denied by the trial court.⁵

This Court affirmed conviction and sentence on June 3, 2010. Banks v. State, 46 So. 3d 989, 1001 (Fla. 2010).

ARGUMENT

I. Hurst is fundamentally significant in Florida's capital jurisprudence

The United States Supreme Court “granted certiorari [in Hurst] to determine whether Florida's capital sentencing scheme violates the Sixth Amendment in light of Ring. [] We hold that it does.” Hurst, 136 S. Ct. 621. Such a definitive rejection of Florida's “capital sentencing scheme” has not occurred since 1972 in Furman v.

⁵ Banks raised the following six issues on direct appeal: “(A) the trial court erred in denying a cause challenge to a prospective juror whose daughter had been the victim of an armed robbery; (B) the trial court erred in allowing the State to exercise peremptory challenges against two African-Americans; (C) the trial court erred in admitting DNA results without requiring the presentation of statistical evidence; (D) the trial court erred in denying a motion for mistrial when a witness mentioned Banks' involvement in another crime; (E) the trial court erred during the penalty phase by allowing the State to present a video of Banks committing an armed robbery; and (F) the trial court erred in finding the cold, calculated, and premeditated (CCP) aggravating circumstance.” Banks v. State, 46 So. 3d 989, 994-95 (Fla. 2010).

Ga., 408 U.S. 238 and even then it was not Florida's own sentencing scheme that was directly considered.

In Furman, the Supreme Court ruled that the death penalty, as imposed in each of the three cases before it (two from Georgia and one from Texas), violated the Eighth Amendment due to an arbitrariness and lack of procedural safeguards in practice.⁶ In response to this ruling, the Florida legislature adopted its current "hybrid" capital sentencing scheme under F.S. 921.141, in which the jury considers aggravating and mitigating circumstances and renders an advisory verdict by a majority vote, but the trial judge must make additional specific findings before a defendant becomes eligible to be sentenced to death. See Proffitt v. Florida, 428 U.S. 242, 247-50 (1976).

Although Florida's hybrid system was approved by the U.S. Supreme Court multiple times following Furman (e.g., Proffitt (1976); Spaziano v. Florida, 468 U.S. 447 (1984); Hildwin v. Florida, 490 U.S. 638 (1989)), its constitutionality came into serious doubt after the Supreme Court's decision in Ring.

In Ring, the Supreme Court was faced with evaluating the constitutionality

⁶ In Furman, the Supreme Court ruled 5-4 in a one-paragraph opinion that the imposition of the death penalty in the cases before it violated the Eighth Amendment, but none of the majority justices joined the opinion of any other. Three majority justices (Stewart, White, Douglas) articulated concerns related to arbitrariness related inadequate laws in place to assure some rational basis to determine when the death penalty was applied, and when it was not. The other two majority justices (Brennan, Marshall) found that the death penalty *in itself* violated the Eight Amendment.

of Arizona's capital sentencing scheme, which it had once before found constitutional in the post-Furman era in Walton v. Arizona, 497 U.S. 639 (1990). In the Arizona scheme, the jury played no role in the penalty phase once it announced its verdict of guilt, and it was up to the trial court to decide whether at least one aggravating factor justified the imposition of the death penalty. In announcing its holding that Arizona's statute was unconstitutional, the Supreme Court quickly surveyed the development of its Sixth Amendment jurisprudence over the preceding twelve years:

In *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990), this Court held that Arizona's sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not as "elements of the offense of capital murder." *Id.*, at 649. Ten years later, however, we decided *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), which held that the Sixth Amendment does not permit a defendant to be "exposed . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.*, at 483. This prescription governs, *Apprendi* determined, even if the State characterizes the additional findings made by the judge as "sentencing factors." *Id.*, at 492.

Apprendi's reasoning is irreconcilable with *Walton's* holding in this regard, and today we overrule *Walton* in relevant part. Capital defendants, no less than noncapital defendants, we conclude, 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 588-89.

This caused serious constitutional concerns for Florida's statute, which this

Court recognized immediately. See e.g., Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002). However, this Court felt constrained in Bottoson to affirm the constitutionality of Florida’s capital scheme after Ring, until and unless the U.S. Supreme Court explicitly overruled its pre-Ring decisions of Hildwin and Spaziano, which approved of Florida’s post-Furman capital sentencing scheme. Id. at 695.

In Hurst, the U.S. Supreme Court did just that, explicitly overruling Hildwin and Spaziano, and, in a decisive vote of 8-1, holding that Florida’s sentencing scheme is unconstitutional.⁷ The Supreme Court found three distinct aspects of Florida’s statutory scheme to be unconstitutional: (1) that the jury was not required to make **specific** findings as to the aggravators and mitigators,⁸ (2) that the judge rather than the jury had to make the critical findings that the mitigators were not

⁷ Justice Breyer concurred in the judgment, finding that the Eighth rather than Sixth Amendment dictated that Florida’s scheme was unconstitutional. Hurst, 136 S. Ct. at 624. Justice Alito was the lone dissenter, based on his skepticism as to the validity of Ring’s central holding and his belief that at the very least Ring should not be extended to Florida’s statute. Hurst, 136 S. Ct. at 624-27; see also the textual distinctions between F.S. 921.141(2), related to the jury’s role, and F.S. 921.141(3), related to the judge’s role.

⁸ E.g., Hurst, 136 S. Ct. at 623-24 (“Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge **to find an aggravating circumstance**, independent of **a jury’s factfinding**, that is necessary for imposition of the death penalty.”) (emphasis added).

sufficient to outweigh the aggravators,⁹ and (3) that the jury’s decision was not **binding** upon the trial court.^{10, 11} See generally Lambrix Habeas Reply at 18-54; Lambrix ACLU Amicus.

Hurst’s wholesale repudiation of Florida’s statutory scheme leaves the Florida capital landscape uprooted in a manner similar to what Furman did for the whole nation.

This supplemental brief will proceed to consider Hurst and its applicability to Banks in light of (1) the issue of retroactivity, (2) the applicability of harmless

⁹ E.g., Hurst, 136 S. Ct. at 622 (“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); see Steele, 921 So. 2d, at 546. ‘[T]he jury’s function under the Florida death penalty statute is advisory only.’ Spaziano v. State, 433 So. 2d 508, 512 (Fla. 1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring requires.” (emphasis added)).

¹⁰ E.g., Hurst, 136 S. Ct. at 621 (“Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: “It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not **binding** on the trial judge.”). Therefore, if there was any doubt left after Ring, it is now clear that it would be unconstitutional for a judge to sentence to death in the face of a jury’s finding that any aggravators were insufficient to outweigh the mitigators.

¹¹ Although not explicitly found by the opinion in Hurst, the conclusion seems unavoidable from its explicit holdings, in conjunction with Florida law that all elements of a crime must be found unanimously by a jury, that the jury’s verdict must be unanimous as to the requisite capital findings in the penalty phase. Florida’s bare majority requirement is certainly a violation of the Sixth Amendment. See generally Lambrix Habeas Reply at 35-43.

error analysis, and (3) the potential remedies for the constitutional violations suffered.

II. **Hurst should be applied retroactively to Banks' case**

Each state has the authority to determine its own procedural standard for whether cases in collateral proceedings should be allowed a retroactive application of a newly found principle of constitutional law. See Danforth v. Minnesota, 552 U.S. 264 (2008) (holding that states are not bound to adopt the more restrictive federal retroactivity standard). Florida's three-prong retroactivity analysis was established in the case of Witt v. State, 387 So. 2d 922, 928 (Fla. 1980). Given that the Hurst decision (1) "emanate[d] from . . . the United States Supreme Court" and (2) is undeniably "constitutional in nature," the sole question facing this Court now as to the retroactive application of Hurst is whether it (3) "constitutes a [constitutional] development of fundamental significance." Id. at 931.

A. **Hurst should be held to be broadly retroactive under the principles set forth in Witt**

Given the fact that Hurst shatters Florida's capital sentencing scheme in a way unmatched since Furman, this is a constitutional development of "fundamental significance." See generally Lambrix Habeas Reply at 54-83; Lambrix CHU Amicus at 2-17. Further, finding Hurst to be retroactive would be consistent with extensive Florida caselaw applying Witt's more generous retroactivity standard. See, e.g., Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989) (finding retroactive

Booth v. Maryland, 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987), which held that the use of victim impact evidence in a capital trial was held to be irrelevant and impermissibly inflammatory in violation of the Eighth Amendment); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987) (finding retroactive Hitchcock v. Dugger, 481 U.S. 393, 95 L. Ed. 2d 347, 107 S. Ct. 1821 (1987), which held Florida’s jury instructions in capital cases were held to impermissibly limit the sentencer’s consideration of nonstatutory mitigating circumstances in violation of the Eighth Amendment); Falcon v. State, 162 So. 3d 954 (Fla. 2015) (finding retroactive Miller v. Alabama, 132 S. Ct. 2455 (2012), which held that mandatory life sentences without the possibility of parole). See Bottoson, 833 So. 2d at 717 n.50 (Fla. 2002) (Anstead, dissenting).

In its Habeas Response in the Lambrix brief, the State primarily focuses its argument that Hurst is not of “fundamental significance” upon the fact that this Court found that Apprendi and Ring should not be applied retroactively in the cases of Hughes v. State, 901 So. 2d 837, 843-44 (Fla. 2005), and Johnson v. State, 904 So. 2d 400 (Fla. 2005), respectively. (Lambrix State Response at 6-16.) There are two crucial problems with this argument.

First, as was argued by the dissent in both Hughes and Johnson, the majority in those opinions relied too heavily upon the federal standard for retroactivity, which is more restrictive than Florida’s standard. E.g., Johnson, 904 So. 2d at 418

n.13 (Fla. 2005) (Anstead, dissenting). This distinction between the federal and state standards is grounded upon the need for comity in federal collateral review of final state decisions. Id. Secondly, and even more importantly, the U.S. Supreme Court has made it clear that this Court—trapped under the Hildwin holding—underestimated and misunderstood the fundamental constitutional significance of Ring in its decision in Bottoson (Hurst, 136 S. Ct. at 620), which necessarily sabotaged its Witt analysis in Johnson. Given that the retroactivity analysis is grounded upon a proper understanding of the constitutional import of the new constitutional rule, this Court must now recognize that Johnson provides no reliable guidance as to whether Hurst, in light of the new understanding of Ring's significance, should be found to be retroactive.

Rather, Hurst ushers in a new Furman-like era of constitutional upheaval, and this necessitates a finding that its holding should be applied retroactively to all defendants who were sentenced to death under Florida's current statutory scheme.

B. Hurst should be held to be particularly retroactive in Banks' case by an extension of this Court's holding in James v. State, 615 So. 2d 668 (Fla. 1993)

However, the retroactivity analysis is simpler as to Banks' individual case. Banks' attorney's filed multiple pre-sentencing Ring motions in his case prior to his sentencing (1 R 137-149; 2 R 352; 3 R 334, 337), alleging constitutional arguments that the Supreme Court finally ruled upon in Hurst.

In James v. State, 615 So. 2d 668 (Fla. 1993), this Court held that the defendant should get the retroactive benefit of Espinosa v. State, 505 U.S. 1079 (1992) (finding Florida’s HAC instruction to be unconstitutionally vague), because he *preserved* a vagueness challenge to the HAC instruction. This Court reasoned as follows: “James [] objected to the then-standard instruction at trial, asked for an expanded instruction, and argued on appeal against the constitutionality of the instruction his jury received. Because of this it would not be fair to deprive him of the *Espinosa* ruling.” Id. at 669; see also Jackson v. State, 648 So. 2d 85 (Fla. 1994) (This Court applied its holding that the CCP instruction was unconstitutionally vague retroactively to cases where the error was similarly preserved as in James, i.e., a trial objection and a direct appeal claim.).

Although the holding of James was found to strictly require both a trial objection and an appellate claim, and Banks did not raise the Ring issue on direct appeal, the principle underpinning this Court’s conclusion in James beckon that their holdings be extended to cover the situation here. Banks filed multiple pre-trial motions contesting the constitutionality of Florida’s death penalty scheme from various angles, and the Supreme Court embraced many of the constitutional challenges that Banks adequately argued to the trial court. (7 R 1140-1171.) Thus, Banks’ trial attorneys were aware of Ring and its significance to Florida’s death penalty scheme, and strenuously litigated this point before the trial judge. In the

event that this Court declines to apply general retroactivity of Hurst to all postconviction cases, Banks petitions this Court to extend James's holding to post-Ring cases similarly situated to Banks, where Hurst error was at least properly objected to prior to sentencing.

This Court has the legal authority to so extend James. State courts have the ability to govern their own retroactivity application, see Danforth v. Minnesota, 552 U.S. 264 (2008), as retroactivity is essentially a procedural question of the timing of when a claim can be brought in a court. See Witt, 387 So. 2d at 928 (“[T]he concept of federalism clearly dictates that we retain the authority to determine which ‘changes of law’ will be cognizable under this state’s postconviction relief machinery.”). Having the discretion to carve out the breadth of its own post-conviction retroactivity, this Court has been guided by the effort to weigh the competing interests in the finality of judgments with the importance of assuring that justice/fairness is achieved in individual cases. Id. at 927.

In extending this Court’s retroactivity analysis in James, this Court did not base that decision on strict legal analysis but upon acting to accomplish a result that was fundamentally fair, in an area (retroactivity) where this Court has the discretion to do so. C.f., Richmond v. State, 118 Nev. 924, 929, 59 P.3d 1249, 1252 (2002) (extending retroactivity to cases on direct appeal where the error had been preserved, based on considerations of “consistency and fairness”); Schoels v.

State, 115 Nev. 33, 37, 975 P.2d 1275, 1277 (1999) (applying new decisional rule retroactively regarding severance of PFCF charge from other counts at trial, due to the appellant preserving the issue with a trial objection). The same action is warranted here in Banks' case.

In this capital case, to deny retroactivity to Banks, where he strenuously objected at trial, but to grant retroactivity to another defendant who also raised the issue on appeal, would be a distinction not grounded in law or fairness and would fall afoul of the Eight Amendment prohibition against an arbitrary or capricious result. Although this Court found that drawing a line at a requirement of an appellate claim in James did not violate Furman's prohibition against arbitrariness in death penalty cases, Glock v. Moore, 776 So. 2d 243, 254-55 (Fla. 2001), Hurst reaches more fundamentally to the core of the capital sentencing process in Florida, and distinguishing between a trial objection and a trial objection/appellate claim for Hurst error is too arbitrary for the Eight Amendment to tolerate.

III. The *Hurst* errors in Banks' sentencing cannot be found to be harmless error

In Hurst, the U.S. Supreme Court left harmless error analysis to the Florida courts. However, it should be noted at the outset that the high court did not find that this particular type of error necessarily *would* be harmless in any cases; it simply noted that *some* types of constitutional error related to the elements of a crime have been found to be harmless in particular cases. 136 S. Ct. at 623-24

(citing Neder v. United States, 527 U.S. 1, 18-19 (1999)). Given the fundamental and sweeping nature of the constitutional deficiencies that the Supreme Court found in Hurst as to Florida's entire capital sentencing procedure, this Court should find that Hurst error is structural error in all cases, not subject to harmless error review. E.g., Jackson v. Virginia, 443 U.S. 307, 320 n.14 (1979) (finding that the holding of In Re Winship, 397 U.S. 358 (1970) regarding the constitutional requirement of proof beyond a doubt in criminal cases is not subject to harmless error analysis).

But even if this Court found that harmless error analysis were necessary as to Hurst error, it is apparent on the face of the record in Banks' case that harm occurred.

As was discussed above, Hurst found three distinct aspects of Florida's statutory scheme to be unconstitutional: (1) that the jury was not required to make **specific** findings as to the existence of aggravators that justify the imposition of death, (2) that the judge rather than the jury had to make the critical finding that the mitigators were **insufficient** to outweigh the aggravators, and (3) that the jury's decision was not **binding** upon the trial court. Each of these errors infected Banks' sentencing proceeding and will be considered in turn, and it will be demonstrated that the State cannot show that there is no reasonable possibility that the Hurst errors did not contribute to the jury's recommendation of death, or that the trial

court's decision was not influenced by reliance on an aggravating factor that was not found by the jury.

A. The jury made no specific findings on which aggravators it found to have been proven beyond a reasonable doubt, and whether those specific aggravators justified imposition of the death penalty

The trial court sentenced Banks to death for the murder of Volum based on three aggravating circumstances: (1) prior felony convictions (two robberies, and aggravated batter, and an attempted murder), (2) the murder was HAC, and (3) the murder was CCP. (6 R 994-98.) Banks' jury during the penalty phase was instructed as to each of those aggravators, plus the additional aggravator of pecuniary gain (which the trial court itself later found was not proved beyond a reasonable doubt). However, because the jury was not given a special verdict form as to each aggravator, we have no idea which aggravators the jury found had been proven, or what number of jurors agreed as to each aggravator. (14 R 961.)

Hurst finds that it is error for the trial court to consider any aggravator that was not specifically found by the jury beyond a reasonable doubt. Hurst, 136 S. Ct. at 624 (“Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's fact finding, that is necessary for imposition of the death penalty.”). Further, Florida law requires that every element of a crime must be found unanimously by a jury, and

Hurst declares that the finding of specific aggravators are elements of capital murder in Florida. See Fla. R. Crim. P. 3.440; Bottoson v. Moore, 833 So. 2d 693, 715 (Fla. 2002) (Shaw, J., concurring) (The requirement that Florida juries find elements unanimously has been an “inviolable tenet of Florida jurisprudence since the State was created.”); see generally Lambrix Habeas Reply at 35-43.

Thus, if the State cannot show that there is no reasonable possibility that the jury in Banks’ case did not unanimously find all three of the aggravating circumstances found by the trial judge, then the Hurst error in this case cannot be found harmless. The State cannot show that here.

While a jury by necessity concluded that the prior violent felony convictions were proven, it is entirely possible that the jury found that neither the HAC nor the CCP aggravators had been proven beyond a reasonable doubt.

As to HAC, the major issue was the fact that there appears to have been a second perpetrator in this homicide, based on the fact that a bloody fingerprint belonging to neither Banks nor Volum was found at the scene, and that a passenger was scene in the vehicle of the person who attempted to use Volum’s ATM card around 2:40 a.m. on the night of the homicide. As stated by the trial court in its sentencing order, “The HAC aggravator applies only to torturous murders that evince extreme and outrageous depravity, as exemplified either by the desire to inflict a high degree of pain, or utter indifference or enjoyment of the suffering of

another,” and the “crime must be conscienceless or pitiless and unnecessarily torturous to the victim,” citing Kearse v. State, 662 So. 2d 677 (Fla. 1985) and Hartley v. State, 686 So. 2d 1316 (Fla. 1996). (6 R 994-98.) Although the jury made a specific finding during the penalty phase that Banks played a “significant role” in the murder (5 R 848), it is reasonably possible that the jury did not unanimously find that the State proved that Banks’ role, vis-à-vis the other participant, was primary enough to justify a finding of HAC.

Further, as to CCP, the facts supporting this aggravator rested largely on the testimony of Banks’ former girlfriend Sudie Johnson, who was admittedly biased against Banks, due to the fact that she discovered Banks was sexually involved with the victim. It is altogether reasonably possible that the jury did not unanimously find this aggravator either, particularly when considering that the death recommendation itself was not unanimous.

Thus, had each individual juror been limited to considering only the aggravators that had been unanimously found by the entire jury, there is a reasonable possibility that four more jurors would have found that the aggravators were not sufficient to justify the death penalty. Harmless error cannot be shown as to this aspect of the Hurst error as to the jury’s recommendation.

Further, there is a reasonable possibility that this aspect of the Hurst error also infected the judge’s sentencing decision. Despite not knowing whether the

jury unanimously found that CCP and HAC had been proven beyond a reasonable doubt, the trial court made those findings on its own and proceeded to sentence Banks to death. Given that the State cannot show that there is no reasonable possibility that Hurst's problems with Florida's statutory scheme did not contribute to the trial court's findings of HAC and CCP, to both of which the trial court assigned "very great weight" and "great weight" respectively, the error cannot be deemed harmless. Banks, 46 So. 3d at 1000.

Finally, the State cannot rely on the prior violent felony conviction to survive harmless error analysis here. Hurst has made it clear that the jury must make all of the critical findings under Florida's statute to make a defendant eligible for capital punishment, not merely the finding that a single aggravator exists. And we have *no idea* whether or not a unanimous jury or even a single member of the jury found HAC and CCP beyond a reasonable doubt, which is constitutionally required before the trial judge could have even considered those two factors. Clear error occurred and prejudiced Banks here.

B. The judge rather than the jury was required to make the critical finding that the mitigators were insufficient to outweigh the aggravators

The failure of the jury to make specific findings as to which aggravators it found also compromised its finding as to whether the mitigating factors were "insufficient" to outweigh the aggravating factors. Based on the jury instructions,

the jury had to answer two questions prior to deciding on his/her vote as to life or death: (1) did sufficient aggravating circumstances exist to justify a death sentence, and (2) did insufficient mitigating circumstances exist to outweigh the aggravating circumstances. However, each juror performed those two analyses **individually**. In addition to the prior violent felony, HAC, and CCP, the jury was also instructed on pecuniary gain, an aggravator which the trial judge later found that the State failed to prove. Considering only the three aggravators that were subject to factual dispute (HAC, CCP, and pecuniary gain), there are eight different possible outcomes that each juror that voted to recommend death might have drawn as to which combination of those three aggravators had been proven. This means that it is possible that no more than two jurors were in agreement on which of the aggravators had been proven, and which aggravators were or were not “sufficient” to warrant a death penalty. When it came to answering the question of whether the mitigating circumstances outweighed the aggravating circumstances,¹² there is no reason to believe that each of the jurors were using the same aggravators as the others in that weighing process, which is constitutionally problematic under Hurst. It is deeply troubling that some jurors may have been weighing the mitigation

¹² The trial court found the following mitigation: (1) low IQ (very little weight); (2) a deficit in Banks’ brain—mild to moderate frontal lobe impairment (moderate weight); (3) anti-social traits (little weight); (4) Banks was not the only participant in the murder (not proven, no weight); (5) Banks had a difficult youth (little weight). (6 R 999-1000.)

presented on Banks' behalf against aggravators that others jurors decided were not proven beyond a reasonable doubt or, even if proven, were insufficient to warrant death.

Further, this was a 10-2 vote recommending death, and not a unanimous recommendation. Had the individual jurors and the trial court been properly restricted to conducting the weighing of mitigators with only the aggravators that were unanimously found by the entire jury, there is a reasonable possibility both that the jury's recommendation and the trial court's sentence would have been different.

C. The jury was told that its recommendation was only advisory

The final, weighty, consideration is that the jury was instructed that its recommendation would only be advisory, so it did not feel the full burden of its decision in recommending death for Banks, which Hurst found to be a critical flaw in Florida's death penalty scheme. Thus, the jury instructions in this case also violated the Eighth Amendment, as set forth in Caldwell v. Mississippi, 472 U.S. 320, 341 (1985) ("This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort

had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.”).

Had Banks’ jurors been aware that, without a recommendation of death, the trial judge must sentence Banks to life in prison, there is a reasonable likelihood that they would have been more hesitant to cast votes for death. See generally Lambrix FACDL Amicus at 13-21 (This *amicus* also cites to several scholarly articles that provide a compelling analysis of the negative psychological impact of a jury being told that its decision is only advisory.).

Thus, given that all three of the types of Hurst error distorted Banks’ sentencing proceedings, it would be impossible to conclude that the error was harmless beyond a reasonable doubt. Banks’ jury, which was told that its recommendation would be only advisory (an accurate statement of Florida’s unconstitutional law at the time), failed to make specific findings as to which aggravators had been proven beyond a reasonable doubt, and that problem infected every further analysis that the jury and the judge conducted in this case. When the jury only deliberated in this capital case for 55 minutes, it seems highly likely that it did in fact not feel the moral weight of the decision facing them, as they were instructed that the ultimate decision rested with the trial court in a way that Hurst found to be a shirking of the jury’s duty under the Sixth Amendment. (5 R 846-47 (the clerk’s memorandum shows that the jury was only out from 1:00 – 1:55

p.m.).)

IV. Remedy for the *Hurst* error in Banks' case

A. F.S. 775.082(2)

This Court does not need to consider retroactivity or harmless error if it follows the clear path set forth by the Florida legislature, which was passed in 1972 in anticipation of Furman:

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 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).

Fla. Stat. § 775.082(2).

Hurst does nothing short of declare Florida's death penalty scheme unconstitutional, placing this Court in a similar position to the position it was placed in after the Supreme Court found inadequate safeguards in place in the state statutory schemes in Furman. See Donaldson v. Sack, 265 So. 2d 499, 505 (Fla. 1972).

Thus, this Court should find that Hurst triggers the provision of 775.082(2), which requires that all existing death sentences be commuted to life sentences, as was done after Furman in every murder case at every stage of the litigation process. See Donaldson, 265 So. 2d 499; Anderson v. State, 267 So. 2d 8 (Fla. 1972); Adderly v. Adderly v. Wainwright, 58 F.R.D. 389 (M.D. Fla. 1972); In re

Baker, 267 So. 2d 331 (Fla. 1972). There is no legal or prudential reason to do otherwise after Hurst. See generally Lambrix Habeas Reply at 67-70 (discussion of the prudential reasons and the interests of judicial economy in automatically commuting 390 death sentences to life sentences, rather than holding a new sentencing hearing in each case); see also Anderson, 267 So. 2d at 10-11.

B. Successive Rule 3.851 Motion

If this Court finds that F.S. 775.082(2) does not require Banks' death sentence to automatically and permanently be converted to a life sentence, Banks alternatively requests a finding that Hurst is retroactive in Banks' case, and relinquish jurisdiction to the trial court so Banks can file a successive Rule 3.851(d)(2)(B) claim based upon Hurst. See Chandler v. Crosby, 916 So. 2d 728 (Fla. 2005) (Anstead, concurring) (discussing the desirability of ruling on the retroactivity of Crawford v. Washington in a habeas corpus petition).

Allowing this claim to be fully litigated before the trial court is essential for numerous legal and prudential reasons, and this was the approach wisely taken by this Court in Hall v. State, 941 So. 2d 1125 (1989) (requiring that 3.850 motions be filed in the trial court to allege Hitchcock claims), and Falcon v. State, 162 So. 3d 954 (Fla. 2015) (requiring that 3.850 motions be filed in the trial court to allege Miller v. Alabama claims). Further, the text of Rule 3.851(d)(2)(B) is clearly designed for exactly this type of scenario. Finally, there are numerous evidentiary

findings that would need to be made as to any harmless error analysis, such as how the Hurst changes to Florida's capital sentencing scheme would affect defense trial strategy. See generally Lambrix Habeas Reply at 34-53, 83-86.

CONCLUSION

The foregoing sets forth Banks' analysis as to how Hurst would apply to his case. However, if this Court grants Banks' well-founded appeal requesting a new trial, the Hurst analysis becomes unnecessary here.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the instant brief has been served to the Office of the Attorney General via e-mail at capapp@myfloridalegal.com and SAO4DuvalCriminal@coj.net this 26th day of April, 2016.

/s/ Rick Sichta
A T T O R N E Y

CERTIFICATE OF COMPLIANCE AS TO FONT

I **HEREBY CERTIFY** that this brief is submitted by Appellant, using Times New Roman, 14-point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure Rule 9.210(a)(2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

/s/ Rick Sichta
A T T O R N E Y