IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-876

TERRANCE TYRONE PHILLIPS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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

A. WHAT IS ERROR UNDER HURST V. FLORIDA?

The State throughout its Supplemental Answer Brief refuses to acknowledge or address the actual holding in Hurst v. Florida, 136 S.Ct. 616, 619 (2016)(emphasis added):

> We hold this sentencing scheme unconstitutional. **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.

By beginning this paragraph with the phrase, "We hold", the United States Supreme Court has clearly told us all that this paragraph is what the Hurst decision holds that the Sixth Amendment requires.

The State in its Supplemental Answer Brief never addresses this holding that "[t]he Sixth Amendment requires a jury ... to find each fact necessary to impose a sentence of death." Id. The State simply pretends that Hurst does not hold that "a jury ... [is required] to find each fact necessary to impose a sentence of death."

Instead of addressing the paragraph of Hurst that begins with "[w]e hold," the State latches on to a sentence near the end of the opinion and quotes a portion of it sheared of its context:

> In Hurst, the United States Supreme Court held that

> Florida's death penalty scheme **is unconstitutional under the Sixth Amendment to the extent** that it "require[s] the judge alone to find the existence of an aggravating circumstance." Hurst, 136 S.Ct. at 624.

(Supp AB at 8) (emphasis added). The State's claim that Hurst only holds that Florida's statute is unconstitutional "**to the extent** that it 'require[s] the judge alone to find the existence of an aggravating circumstance'" is simply not a fair reading of Hurst (emphasis added).[1] The rest of the Hurst opinion would have to be ignored, particularly the stated holding: "We hold this sentencing scheme unconstitutional. **The Sixth Amendment requires a jury**, not a judge, **to find each fact necessary to impose a sentence of death**." Hurst, 136 S. Ct. at 619(emphasis added).

The paragraph from which the State lifted the quoted language to which the State seeks to reduce the opinion provides in full:

> The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

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[1]Nowhere in the governing statute is it written that the finding of one aggravating circumstance authorizes the imposition of a death sentence. Not only is it not there, the prosecutors of this State have lobbied the Florida Legislature to change the statute to insert language currently not there to indicate that the finding of one aggravator authorizes a death sentence. The push to change the statute clearly demonstrates that currently the governing statute does not authorize a death sentence upon the finding of one aggravating circumstance.

Hurst, 136 S. Ct. at 624. This paragraph makes clear that the Sixth Amendment was violated because Hurst's death sentence was not based upon a jury's verdict, but instead upon a judge's factfinding. The portion of one sentence in the paragraph that the State seeks to treat as the sum total of the opinion merely identifies the most minimal fact that the statute requires the judge alone to find. However after finding an aggravating circumstance, the statute as the opinion sets out, requires that before a death sentence may be imposed, the judge must find as a matter of fact: 1) that sufficient aggravating circumstances exist, and 2) that insufficient mitigating circumstances exist to outweigh the aggravating circumstance

Indeed, this is clearly spelled out earlier in the Hurst opinion when the Supreme Court identified the factfinding that Florida law required be made by the judge instead of the jury. The Hurst opinion quoted the statutorily defined facts that a judge must find before a death sentence can 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).

Id. at 622 (emphasis added) (citations omitted).[2] As discussed in Hurst, the Florida statute at issue identified "the facts" that must be found before a death sentence may be imposed and those "facts" are "**[t]hat sufficient aggravating circumstances exist**" and "**[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.**" § 921.141(3), Fla. Stat. (Emphasis added). Nowhere in the Supplemental Answer Brief does the State address the statute quoted in Hurst as identifying the facts that a judge must find in order to impose a death sentence. Nowhere does the State address the "facts" that the statute requires to be found, i.e. "**[t]hat sufficient aggravating circumstances exist**" and "**[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.**" (Emphasis added).[3]

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[2]The sentence with which this quote begins is an apt description of the State's position in its Supplemental Answer Brief: "The State fails to appreciate the central and singular role the judge plays under Florida law."

[3]In its Supplemental Answer Brief, the State simply responds to this statutory language by saying: "Appellant's argument that Hurst requires juries to find as a matter of fact that there are sufficient aggravating circumstances to outweigh the applicable mitigating circumstances is without merit." (Supp AB at 10). In all the briefing that has been filed with this Court since Hurst issued, to counsel's knowledge this is the most that the State has said about the statutory language requiring a judge to find as a matter of fact that sufficient aggravating circumstances exist before he or she is authorized to impose a death sentence. The flaw in the State's argument is its failure to cite or reference Florida's statute, which does not authorize a death sentence based upon one aggravating circumstance.

Instead of addressing the actual holding in Hurst and instead of looking to what statutorily defined facts must be found before a death sentence is authorized, the State chooses instead to cite to opinions from this Court which misunderstood Ring v. Arizona, 536 U.S. 584 (2002):

> In Florida, a defendant is eligible for a capital sentence if at least one aggravating factor applied to the case. See Ault v. State, 53 So. 3d 175, 205 (Fla. 2010), cert. denied, 132 S.Ct. 224 (Oct. 3, 2011) (No. 10-11173); Zommer v. State, 31 So. 3d 733, 752-54 (Fla. 2010), cert. denied, 562 U.S. 878 (Oct. 4, 2010) (No. 09-11400).

(Supp AB at 9).[4]

This Court in addressing Ring claims erroneously believed that the holding in Ring was that the Sixth Amendment merely

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[4]In one of the cases cited by the State, Ault v. State, 53 So. 3d 175, 205 (Fla. 2010), this Court cited the language in Ring without reference to the fact that Florida statutes identified factual determinations necessary for death eligibility that were different from the factual determination required for death eligibility under Arizona law. As such, this Court did not address the statutory language set forth in the Florida statutes, nor the language appearing in the standard jury instructions. While seeming to adopt the Ring description of Arizona law as mandated by the Sixth Amendment and thus the law in Florida, this Court struck a discordant note when it relied on Bottoson v. Moore to maintain that Florida's statutory scheme was constitutional. Ault, 53 So. 3d at 206 ("Further, we note that we have repeatedly rejected constitutional challenges to Florida's death penalty under Ring. See e.g. Jones, 845 So. 2d at 74 (rejecting claim that Florida's death penalty is unconstitutional under Ring); see also Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) (noting that the United States Supreme Court did not direct this Court to reconsider the defendant's death sentence in light of Ring); King v. Moore, 831 So. 2d 143 (Fla. 2002) (same)."). The only support for the State's argument that merely the presence of one aggravator renders a defendant death eligible are decisions where this Court misconstrued Ring.

required a jury to find the existence of an aggravating circumstance. However as Hurst makes clear, the Sixth Amendment requires the jury to determine all facts statutorily required to be found before a death sentence is authorized. Under Arizona substantive law, a death sentence was authorized upon the finding of one aggravating circumstance. This Court's Ring decisions failed to address the Sixth Amendment requirement specifically set forth in Hurst that "each fact necessary to impose sentence of death" must be found by a jury. 136 S. Ct. at 619.

Hurst "requires a jury, not a judge, to find each fact necessary to impose a sentence of death." Id. Ignoring the holding in Hurst and the statutory requirement that there must be a factual determination that "sufficient aggravating circumstances exist," the State claims that Hurst does not apply here because this case involves contemporaneous convictions:

> The jury unanimously found Appellant guilty of the contemporaneous first-degree murders, armed burglary, conspiracy to commit armed robbery, and attempted armed robbery, making him independently eligible for a death sentence under Florida law.

(AB at 9). However the jury did not return a unanimous verdict finding as a matter of fact that sufficient aggravating circumstances existed to justify the imposition of a death sentence or that insufficient mitigating circumstances existed to outweigh the aggravating circumstances.

The State refuses to recognize that the decision in Hurst

was broader than Ring because the Supreme Court in Hurst addressed Florida's statute and its statutorily defined facts necessary for the imposition of a death sentence, not Arizona's statutory scheme that authorized a death sentence upon the finding of one aggravator. Ignoring the broad sweep of Hurst, the State asserts in its brief:

> In Hurst, the United States Supreme Court specifically extended the Sixth Amendment protections first identified in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002) to Florida cases. Hurst, 136 U.S. at 622.

(Supp AB at 8). But, Hurst did more than simply extend Ring. In response to the State's argument that the jury verdict necessarily included a finding of one aggravating circumstance, the Supreme Court referred to the governing Florida statutes, noting that more was required:

> Florida concedes that Ring required a jury to find every fact necessary to render Hurst eligible for the death penalty. But Florida argues that when Hurst's sentencing jury recommended a death sentence, it "necessarily included a finding of an aggravating circumstance." Brief for Respondent 44. The State contends that this finding qualified Hurst for the death penalty under Florida law, thus satisfying Ring. "[T]he additional requirement that a judge also find an aggravator," Florida concludes, "only provides the defendant additional protection." Brief for Respondent 22.
>
> **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.**"

Hurst, 136 S. Ct. at 622 (emphasis added).

The Supreme Court made clear that because Florida's statute required more facts to be found than Arizona law required, the Sixth Amendment required a Florida jury to find those additional facts that were not required under the Arizona statutory scheme at issue in Ring. Hurst, 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.**") (emphasis added). Hurst did not merely extend Ring to Florida; it made clear that each fact necessary to impose a death sentence under Florida law had to be found by a jury pursuant to the Sixth Amendment.[5] Because in Florida sufficient aggravating circumstances must be found to exist, one aggravator by itself is not necessarily enough without more. The jury must determine under Hurst if the aggravating circumstances are sufficient.[6]

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[5]"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.

[6]As support for its argument, the State relies on the fact that the U.S. Supreme Court recently denied certiorari review without dissent in two pipeline cases involving recidivist aggravators after Hurst (Supp AB at 7). The State's reliance on denials of certiorari review as having precedential value is ridiculous. After Ring issued, certiorari review was denied in cases involving Linroy Bottoson and Amos King. From those denials

We also know that Hurst is broader than Ring because in Hurst the U.S. Supreme Court expressly overturned Hildwin v. Florida, 490 U.S. 638 (1989), and Spaziano v. Florida, 468 U.S. 447 (1984). The State's effort to minimize Hurst is a repeat of the State's tactic after Ring. The State was wrong in its minimalist approach to Ring, and its effort to once again sell a narrow misreading of Hurst is equally misguided.

Mr. Phillips' jury did not return a unanimous finding of the statutorily defined facts: 1) the existence of sufficient aggravating circumstances, and 2) the absence of sufficient mitigating circumstances that outweigh any aggravating circumstances. Because the jury did not find the facts statutorily required to authorize a death sentence, Mr. Phillips' sentences of death stand in violation of Hurst.

B. WHAT DOES SECTION 775.082(2), FLA. STAT., MEAN?

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of review, this Court erroneously concluded that Ring and Apprendi had no applicability to Florida's capital sentencing scheme. In the 13 some years between Ring and Hurst, there were probably one hundred denials of certiorari review of Florida death sentences raising Ring/Apprendi challenges to Florida's capital sentencing scheme. Those denials of certiorari review meant absolutely nothing as to whether Florida's capital sentencing statute was constitutional when the U.S. Supreme Court granted review in Hurst.

The denial of a petition for writ of certiorari by the U.S. Supreme Court "**imports no expression of opinion upon the merits of the case, as the bar has been told many times.**" United States v. Carver, 260 U.S. 482, 490 (1923); Atlantic Coast Line R. Co. v. Powe, 283 U.S. 401, 403, 404 (1931); W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co., 82 F.2d 94, 96 (6th Cir. 1936) (emphasis added).

In address § 775.082(2), the State asserts:

> Section 775.082(2) provides that life sentences without parole are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional," and was enacted following Furman v. Georgia, 408 U.S. 238 (1972), in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional.

(Supp AB at 11).[7] In Hurst, the U.S. Supreme Court declared Florida's capital sentencing scheme unconstitutional because the statutorily defined facts necessary to authorize the imposition of a death sentence are not found by a jury under the governing statute. That means it is unconstitutional to impose a sentence of death upon capital defendants convicted of first degree murder because there is no provision for a jury to render a unanimous verdict finding the facts necessary for the enhanced crime necessary to authorize a death sentence. Death sentences on first degree murder convictions, statutorily listed as capital felonies, are unconstitutional under Hurst. A death sentence upon a mere first degree murder convictions has been ruled to be unconstitutional, or in the words of the § 775.082(2), "the death penalty in a capital felony [specifically first degree murder]

[7]The State erroneously asserts: "There is no reading of Hurst which suggests that a Sixth Amendment violation necessarily occurs in every case." (Supp AB 15). In fact, a reading of the Hurst opinion reveals that a death sentence upon the conviction of first degree murder is unconstitutional because the statute does not require a jury to find the statutorily defined facts the presence of which are necessary to authorize the imposition of a death sentence. This means a conviction of the enhanced crime was not returned in any case.

[wa]s held to be unconstitutional" in Hurst.[8]

On its face, the statutory language applies to the circumstances presented in Mr. Phillips' case.

C. WHAT ABOUT DOUBLE JEOPARDY PRINCIPLES?

The State's argument as to the applicability of double jeopardy is relegated to a footnote in which it asserts:

> Double jeopardy only prohibits a new penalty phase when a defendant was originally acquitted of death. Satazahn v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732 (2003).

(Supp AB at 15 n.1). In Satazahn, a life sentence was imposed after the jury at sentencing deadlocked. When Satazahn got his conviction thrown out, he was retried and the jury unanimously imposed a death sentence. Thus at Satazahn's first trial the jury was asked to find all of the facts necessary to impose a sentence of death in conformity with the Sixth Amendment. As to those facts necessary for the imposition of a death sentence, the first jury hung; it did not acquit. It is in that context that the U.S. Supreme Court ruled that an acquittal by the jury of those facts necessary for the imposition of a death sentence was required.

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[8]The State's only real argument to the contrary rests upon its misreading of Hurst as only requiring the jury to find one aggravating circumstance (Supp AB at 13) ("The holding in Hurst limited the required jury factfinding to the existence of one aggravating factor. See Hurst, 136 S.Ct. at 624 ("Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is ... unconstitutional.")). However as explained supra, Hurst in fact held: "**The Sixth Amendment requires a jury**, not a judge, **to find each fact necessary to impose a sentence of death**." Hurst, 136 S.Ct. at 620 (emphasis added).

That is not what occurred here.

Pursuant to the statutory scheme in place at the time, the Sixth Amendment requires that Phillips be sentenced to life because his jury did not convict him of first degree and the additional elements necessary to authorize a death sentence. The important question resolved by Hurst was what facts are elements under Florida law that must be established to render a capital defendant eligible for a death sentence. Because Phillips has not been convicted by a jury of first degree murder and the additional facts or elements necessary to authorize a sentence of death, life sentences are the only sentences that can be imposed for his two first degree murder convictions.

D. IS AN UNDERSTANDING OF WHAT IS HURST ERROR NECESSARY BEFORE CONSIDERATION IS GIVEN TO WHETHER THE ERROR IS HARMLESS?

The entirety of the State's harmless error analysis rests on its contention that Hurst only requires a jury to find one aggravating circumstance.[9] However, Hurst requires "**a jury**, not a judge, **to find each fact necessary to impose a sentence of death.**" Hurst, 136 S.Ct. at 619 (emphasis added). As discussed in Hurst, the Florida statute at issue identified "the facts" that must be found before a death sentence may be imposed and those "facts" are "**[t]hat sufficient aggravating circumstances exist**"

[9]After claiming that there was no Hurst error because allegedly Hurst only requires the jury to find one aggravator, the State argues the error was harmless because Hurst only requires the jury to find one aggravator. It's the same argument.

and "**[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.**" § 921.141(3). Hurst, 136 S.Ct. at 622 (emphasis added). Mr. Phillips' jury did not return a unanimous verdict finding the statutorily defined facts. Instead, the jury returned a mere recommendation for the imposition of a death sentence by a vote of 8-4.[10]

While Mr. Phillips continues to rely on his arguments in his Supplemental Initial Brief that Hurst error is structural and can never be harmless, the State cannot prove that the error was harmless beyond a reasonable doubt in Mr. Phillips' case.[11]

ARGUMENT VI

UNDER HALL V. FLORIDA, PHILLIPS WAS DEPRIVED OF "A FAIR OPPORTUNITY TO SHOW THAT THE CONSTITUTION PROHIBIT[ED] [HIS] EXECUTION" DUE TO HIS INTELLECTUAL DISABILITY,

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[10]The jury was instructed that its verdict was a recommendation, and that its role at the penalty phase was advisory. The jury was advised that the responsibility for the imposition of a death sentence rested with the judge. At no time was the jury informed that any of its findings needed to be found unanimously, nor that any of its findings would be binding. As a result, the jury's recommendation cannot be treated as something binding and more than advisory without violating Caldwell v. Mississippi, 472 U.S. 320 (1985).

[11]The State's harmless error argument is entirely dependent on its assertion that Hurst merely requires a jury to find one aggravating circumstance. It makes no argument that if a jury must find the statutorily defined facts necessary to authorize a death sentence under Hurst, that the error was harmless beyond a reasonable doubt. The reason for this is obvious. If a jury finding of the existence of sufficient aggravating circumstances and/or a finding of insufficient mitigating circumstances that outweigh the aggravating circumstances is required, the State has no basis to even make a halfhearted argument that the error was harmless beyond a reasonable doubt in Mr. Phillips' case.

AND BECAUSE HE IS INTELLECTUALLY DISABLED PHILLIPS IS NOT ELIGIBLE TO RECEIVE A DEATH SENTENCE.

As to Argument VI, the State asserts in the caption to its responsive argument that "Appellant is not intellectually disabled." (Supp AB at 18). However, there has not been a determination of Mr. Phillips' intellectual disability under the governing standards set forth in Hall v. Florida, 134 S. Ct. 1986 (2014).[12]

The State then, inconsistent with its assertion that Mr. Phillips is not intellectually disabled, observes that "Appellant failed to raise a claim of intellectual disability under Rule 3.203, which would have provided him with the opportunity to fully present his claim." (Supp AB at 18). This observation is in fact correct; and, it is the whole point of Argument VI. Because of this Court's unconstitutional ruling in Cherry v. State, 959 So. 2d 702 (Fla. 2007), Mr. Phillips and his mental health expert were not given notice of what the Eighth Amendment definition of intellectual disability was. And that is what the State just does not understand regarding Argument VI. Mr. Phillips did not have reasonable notice of what constitutes intellectual disability and did not have an opportunity to be meaningfully heard on the

[12]The State is clearly unfamiliar with the Flynn effect that requires downward adjustment in IQ scores depending upon when the IQ test instrument was administered in relation to when the test was normed. Under the standards in the profession, Mr. Phillips' IQ score of 76 would in fact be adjusted downward under 75.

issue. See Huff v. State, 622 So. 2d at 983 ("'The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered.' Scull v. State, 569 So.2d 1251, 1252 (Fla.1990). We find that Huff was denied due process of law because the court did not give him a reasonable opportunity to be heard.").[13]

The Court in Hurst held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." Id. at 619. Thus under Florida statutory law, a defendant convicted of first degree murder is eligible for a death sentence only if he is not intellectually disabled. Thus under the logic of Hurst, a finding that a defendant is not intellectual disability is a fact that must be found by a jury.[14]

CONCLUSION

Mr. Phillips' death sentences cannot stand.

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[13]The State clearly does not understand Mr. Phillips' reliance on Oats v. State, 181 So. 3d 457, 460 (Fla. 2015). While Oats did raise an intellectual disability claim, this Court found that the resolution of the claim could not stand because the experts and the circuit court had evaluated the claim under the erroneous pre-Hall standards. See Cardona v. State, 2016 WL 636048 (Feb. 18, 2016). The experts and courts were misled in Oats and Cardona by pre-Hall law to such an extent that a do-over is required; the same opportunity for a do-over should be afforded to Mr. Phillips.

[14]The State relies upon Walker v. True, 399 F.3d 315, 326 (4th Cir. 2005). However, Mr. Phillips submits that the decision in Walker is inconsistent with Hurst, and that Hurst controls. As was noted in Hurst, Florida statutes are the authority as to "the facts" that must be found before a death sentence may be imposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Reply Brief has been furnished by electronic service to Berdene Beckles, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on this 26th 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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