IN THE SUPREME COURT OF FLORIDA

WILLIE JAMES HODGES
Appellant,

v.

CASE NO. SC14-878
Lower ct. 2003-CF-005683

STATE OF FLORIDA
Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY
STATE OF FLORIDA

SUPPLEMENTAL REPLY BRIEF OF THE APPELLANT

ROBERT A. NORGARD
Counsel for Appellant

For the Firm
Norgard, Norgard & Chastang
P.O. Box 811
Bartow, FL 33831
(863)533-8556
Fax (863)533-1334
Norgardlaw@verizon.net

Fla. Bar No. 322059

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Mr. Hodges will respond to the arguments presented by the State in the Supplemental Answer Brief. Mr. Hodges will continue to rely on the arguments and citations of authority contained in the Supplemental Brief.

ARGUMENT

ISSUE I

THE DEATH SENTENCE IN THIS CASE IS UNCONSITUTIONAL AND REQUIRES THE IMPOSITION OF A LIFE SENTENCE

A. **Retroactivity of *Hurst* to this case.**

Mr. Hodges is entitled to retroactive application of *Hurst* to his case. *Hurst v. Florida*, 136 U.S. 616 (2016) establishes the arguments made by Mr. Hodges' trial attorneys, his direct appeal attorney, and postconviction counsel were correct in both this Court and the lower court, that Florida's capital sentencing scheme was unconstitutional.

Hurst made clear a jury must make the factual findings that there are "sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances" and without a jury determination of these operable findings, a sentence of death is unconstitutional. *Hurst* makes it clear that the findings of fact by a jury are what make a Florida defendant death eligible, thus forming part of the definition of the crime of capital murder in

Florida. Mr. Hodges' did not have these operable jury findings of fact. *Hurst* must be found to apply retroactively under Florida law as it states unequivocally that "[w]e hold [Florida's] sentencing scheme unconstitutional." *Hurst v. Florida*, 136 S.Ct. at 619.

The governing standard for retroactivity in Florida is *Witt v. State*, 387 So.2d 922, 931 (Fla. 1980). The *Witt* test is distinct and not impacted by the federal retroactivity test established in *Teague v. Lane*, 489 U.S. 288, 307(1989). This Court has recognized the distinction and found no difficulties separating the two. *See*, *Falcon v. State*, 162 So.3d 954, 955-956 (Fla. 2015). The federal retroactivity test was designed with "[c]omity interests and respect for state autotomy in mind." *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004). As the State recognizes, the federal test was never intended to prohibit a state from granting broader retroactivity when reviewing its own state convictions- a practice traditionally done in Florida.

Hurst meets the *Witt* test. *Hurst* satisfies the first two *Witt* retroactivity factors because (1) it is a decision of the United States Supreme Court and (2) its holding- that the Sixth Amendment forbids a capital sentencing scheme that requires judges, as opposed to juries, to conduct the fact-finings that subject a defendant to a death sentence. The only question is whether the third factor is established- whether *Hurst*

"constitutes a development of fundamental significance." *See, Witt*, 387 So. 2d at 931.

Witt provides guidance on how to make this determination. In determining whether a Supreme Court decision "constitutes a development of fundamental significance," this Court explained "[a]lthough specific determinations regarding the significance of various legal developments must be made on a case-by-case basis, history show that most major constitutional changes are likely to fall within two broad categories." *Witt*, 387 So. 3d at 929. The first category of fundamentally significant decisions includes "those changes in law 'which place beyond the authority of the state the power to regulate certain conduct and impose certain penalties.'" *Falcon*, 162 So.3d at 961 (quoting *Witt*, 387 So. 2d at 929). The second category includes "those changes in the law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of the United States Supreme Court's decision in *Stovall v. Denno*, 388 U.S. 293 (1967) and *Linkletter v. Walker*, 381 U.S. 618 (1965)." *Falcon*, 162 So.3d at 961 (quoting *Witt*, 387 So.2d at 929). The three-fold analysis under *Stovall* and *Linkletter* includes an analysis of [a] the purpose to be served by the new rule, [b] the extent of reliance on the old rule, and [c] the effect on the administration of justice of a retroactive application of the new rule. As of 2015 this Court has

indicated it approves of the *Stovall/Linkletter* factors and those factors guide the analysis of whether a new Supreme Court rule "constitutes a development of fundamental significance." *See, Falcon*, 162 So.3d at 981.

Contrary to the State's position, *Hurst* is well within the second category of fundamentally significant decisions described in *Witt*. As to the first *Stovall/Linkletter* factor, the primary purpose of *Hurst* is to protect a capital defendant's inaliable Sixth Amendment right to a jury determination of any fact that exposes them to a death sentence, a punishment not authorized by a conviction of first degree murder alone. As to the second *Stovall/Linkletter* factor, the number of cases is finite, easily determinable, and certainly just as manageable, *if not more so*, than the cases at issue in *Falcon*.

The first two *Stovall/Linkletter* considerations indicate *Hurst's* purpose would be "advanced by making the rule retroactive," *Linkletter*, 381 U.S. at 637, by ensuring all capital defendants' Sixth Amendment rights are protected, regardless of whether their sentences became final after *Hurst's* publication. Retroactive application of *Hurst* would not be futile or produce undesirable results. *Hurst's* purpose to ensure that death sentences are reached as the result of a constitutional proceeding, is advanced by extending the protection to all capital prisoners. It is further in accord

with the idea that "death is a different kind of punishment from any other that may be imposed in this country" and "it is of vital importance.. that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 357-8 (1977).

Retroactive application of *Hurst* would not have the injurious effect on the administration of justice as the State claims. Rather, it would "promote the integrity of the judicial process." *Id.* In *Linkletter*, the Court found the retroactive application of *Mapp v. Ohio*, 367 U.S. 643 (1961) would tax the administration of justice to the "utmost" because it would require applying the exclusionary rule to innumerable cases and pieces of evidence. Here, by contrast, the retroactive application of *Hurst* would be finite in scope, limited to a specific number of current Florida death row inmates.

This Court has recognized in the retroactivity context that "[c]onsiderations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases." *Falcon*, 162 So.3d at 962.

This Court has determined that decisions similar to *Hurst* have "constituted development[s] of fundamental significance"

that warranted retroactive application. In *Witt* itself this Court recognized the retroactivity of the ruling in *Gideon v. Wainwright*, 372 U.S. 335 (1963). The question of who decides whether a death sentence can be imposed is as important as who has the right to legal counsel.

Hurst is a death penalty decision. This Court has found retroactive the Supreme Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), which found unconstitutional a jury instruction limiting a capital jury's ability to consider mitigating circumstances following the United States Supreme Court decision in *Lockett v. Ohio*, 438 U.S. 586 (1978), which held the Eighth Amendment prohibits the sentence from refusing to consider or being precluded from considering mitigating evidence. Applying the principles of *Witt*, this court ruled *Hitchcock* was a fundamental change in the law that had to be applied retroactively. *See, Riley v. Wainwright*, 517 So.2d 656, 660 (Fla. 1987); *Hall v. State*, 541 So.2d 1125 (Fla. 1989); *Meeks v. Dugger*, 576 So.2d 715 (1991).

Hurst is about aggravation. This Court has found retroactive the Supreme Court's decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992), which held HAC, without a clarifying instruction, was impermissibly vague under the Eighth Amendment. *See*, *James v. State*, 615 So.2d 688, 669 (Fla. 1993); *Jackson v.*

State, 648 So.2d 85, 90 (Fla. 1994). *Hurst* is equally significant.

Under the *Witt* test, *Hurst* is no less fundamentally significant than *Hitchcock* or *Espinosa*. *Hurst* changes the nature of the penalty phase far beyond that of *Hitchcock* or *Espinosa*. *Hurst* shifted the authority to the jury to engage in fact-finding as to death eligibility from the judge, implicating not only the difference between judge and jury sentencing, but also in the strategy an manner by which capital defense lawyers will approach the penalty phase.

The State finds fault with undersigned counsel's failure to say why *Johnson v. State*, 904 So. 2d 400 (Fla. 2005) is no longer good law. *Johnson* is no longer good law because *Johnson* espoused a view of *Ring v. Arizona*, 536 U.S. 584 (2002) that has now been repudiated by the Supreme Court and also because there is no longer any need to analogize the law at issue in *Ring* to Florida's law. *Hurst* addressed Florida's law directly. Moreover, *Johnson* cited this Court's decisions in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), which relied on Supreme Court decisions in *Hildwin v. Florida*, 490 U.S. 638 (1989) and *Spaziano v. Florida*, 468 U.S. 447 (1984). *Hurst* ***explicitly overruled*** *Hildwin* and *Spaziano*, leaving *Johnson* with no legs to stand on.

Hurst, perhaps more so than virtually any case since *Furman v. Georgia*, 408 U.S. 238 (1972), is a change in the law of

fundamental significance. On the basis of *Furman* this Court ordered life sentences imposed on all capital defendants who had been under a sentence of death. *Anderson v. State*, 267 So.2d 8,9-10 (Fla. 1972). There was no question, no statutory interpretation, no retroactivity analysis, no harmless error analysis, no recalcitrance, and no attempts to save prior death sentences. The same is warranted here.

B. Statutory Bar to the Imposition of a Death Sentence

Mr. Hodges maintains a life sentence must be imposed under Section 775.082(2). Mr. Hodges argued that the clear and unambiguous language of the statute warrants such a result, and even if the rules of statutory construction were applied, the same conclusion would be reached. Section 775.082(2) is a stand-alone statute that establishes the remedy in exactly the scenario this Court now faces. Any individual previously sentenced to death for an offense occurring when section 775.082(2) was in effect must be resentenced to life in prison. That includes Mr. Hodges.

This is a criminal statute. The rule of lenity requires criminal statutes be strictly construed in favor of the accused. Section 775.021(1); *Reino v. State*, 352 So.2d 853, 860 (Fla. 1977).

C. Harmless Error Analysis

The error in this case is not harmless. The State argues there is no error because two of the aggravating circumstances in this case were recidivist. This argument ignores the fact that in Florida *sufficient* aggravating factors must be found to exist, one is not enough. The jury must determine under *Hurst* if the aggravating factors are sufficient.

The State's reliance on *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998). This was a case that involved a federal statute in a non-capital case. Nevertheless, the State argues, based on the exception, this Court has repeated observed that *Ring* did not apply to cases involving recidivist aggravators. However, these statements regarding *Ring* were based on the narrow holding in *Ring* addressing Arizona's capital sentencing scheme. *Hurst* is more expansive. The only decision the State has cited for this erroneous proposition that a single aggravator renders a defendant death eligible are cases in which *Ring* was misconstrued.

A recidivist aggravator alone is not enough to sustain a death sentence and the existence of one does not cure *Hurst* error. Florida requires a finding of sufficiency of the aggravator, not just existence. This means there must be a case specific assessment of the facts of the prior crime of violence and a determination as to whether the facts of the prior crime of violence in conjunction with the factual basis for any other

aggravating circumstance present in the case are sufficient to justify the imposition of a death sentence. That must be done by a jury. The State's argument is contrary to *Hurst* and to Florida statutes.

Mr. Hodges will rely on the arguments in the Supplemental Brief addressing structural error.

D. Lack of Unanimity Results in Cruel and Unusual Punishment

The State did not address this claim. Mr. Hodges will rely on the arguments set forth in the Supplemental Initial Brief.

CONCLUSION

Based on the arguments and citations of law and other authorities, Mr. Hodges respectfully requests this Court reversed the sentence of death and in conformity with the laws of Florida, remand for the imposition of a life sentence.

Respectfully submitted,

/s/Robert A. Norgard
ROBERT A. NORGARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the forgoing Supplemental Reply Brief was served via the e-portal to Charmaine Millsaps, capapp@myfloridalegal.com and Charmaine.millspas@myfloridalegal.com this **29th** day of March, 2016.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style font used in the preparation of this Supplemental Reply Brief is Courier New 12-point in compliance with Fla. R. App. P. 9.210.

/s/Robert A. Norgard
ROBERT A. NORGARD
For the Firm
Norgard, Norgard and Chastang
P.O. Box 811
Bartow, FL 33831
863-533-8556
Fax 863-533-1334
Norgardlaw@verizon.net

Fla. Bar No. 322059