IN THE SUPREME COURT OF FLORIDA

FRANK A. WALLS,

Appellant,

v.

STATE OF FLORIDA

Appellee.

Case No.: **SC15-1449**

L.T. No. 1987-CF-856
*** CAPITAL CASE ***

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, OKALOOSA COUNTY, FLORIDA
HON. WILLIAM F. STONE, CIRCUIT JUDGE

SUPPLEMENTAL BRIEF CONCERNING *HURST v. FLORIDA* AND MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IN LIGHT OF *HURST v. FLORIDA*

Appellant, **FRANK A. WALLS**, by and through undersigned counsel respectfully requests that this Court accept his Supplemental Brief in *Hurst v. Florida* and in support submits:

The United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016) has had important ramifications in Florida. This Court stayed the first post-*Hurst* execution of Cary Michael Lambrix, scheduled post-*Hurst*, and has scheduled oral argument in the second post-*Hurst* death warrant case, Mark Asay. This Court also ordered supplemental briefing related to the *Hurst* decision in over 20 pending post-conviction and direct appeals.

In accord with this Court's post-*Hurst* practice, Appellant files this supplemental brief in light of *Hurst v. Florida*, and urges that the Court accept the brief and consider the points and arguments it presents for the Court's consideration.

PRELIMINARY STATEMENT

Appellant Frank A. Walls, through counsel, concurs with a*micus curiae* that the circuit court's denial of relief on Appellant Walls's *Hall* claim is inconsistent with controlling decisions of this Court and the United State Supreme Court, and that the circuit court erred in denying Appellant an evidentiary hearing pursuant to *Hall*. Appellant adopts the points and arguments made by *amicus curiae*.

Appellant's Initial Brief argued that the judgment of the circuit court should be reversed and the matter remanded for an evidentiary hearing and a full analysis post-*Hall*. Also, a Notice is being filed by Appellant with respect to the controlling post-*Hall* decisions of this Court and the United States Supreme Court (issued after the Initial Brief was filed). Appellant agrees with *amicus curiae*'s argument that the circuit court's denial of Appellant's intellectual disability claim is in conflict with this Court's controlling decisions in *Oats v. State*, 181 So. 3d 457 (Fla. 2016) and *Cardona v. State*, 2016 WL 636048 (Fla. Feb. 18, 2016), as well as the Supreme Court's decisions in *Brumfield v. Cain*, 135 S. Ct. 2269 (2015) and *Hall v. Florida*, 134 S. Ct. 1986 (2014).

Appellant also concurs with a*micus curiae* that he should be permitted to return to the circuit court to seek relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), consistent with this Court's retroactivity precedents. Appellant's *Hurst* claim should not be subjected to harmless error analysis because the Sixth Amendment error

identified in *Hurst* is structural. However, if the Court concludes that Appellant's *Hurst* claim should be subjected to harmlessness review, this Court should not perform that review in the first instance. The trial court that reviews Appellant's claim should evaluate harmlessness following fact-finding proceedings to determine the *Hurst* error's impact on the defense presentation, jury deliberations, and sentencing outcome.

Appellant recognizes that in over 20 cases, this Court has now ordered supplemental briefing under *Hurst*, usually shortly before oral argument, and regardless of the procedural posture of the case. The oral argument herein is scheduled for March 8, 2016. Especially in light of those orders, and given the fact that Appellant Walls previously raised a *Hurst* type claim, Appellant's counsel files this supplement brief bringing his *Hurst* claim to the Court's attention. Appellant should be granted relief under *Hurst.* Much of the argument in this supplement is adopted from the a*micus curiae* brief.

With the consent of undersigned counsel for Appellant, and consent of the Appellant himself, oral argument will be presented by Billy H. Nolas, Chief of the Capital Habeas Unit, Federal Defender Office, who was appointed recently by the Federal District Court and who has submitted the a*micus curiae* Brief.

ARGUMENT

I. Remand is Appropriate in Light of *Hurst*

Appellant's case should be remanded to the trial court so that he may plead a claim for sentencing relief under *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016), either in a new post-conviction petition or by amending the petition filed in the current proceeding. In *Hurst*, the Supreme Court struck down as unconstitutional the statutory provisions under which Appellant was sentenced to death, Fla. Stat. §§ 921.141(2) and (3), which provided that a judge, as opposed to a jury, must conduct the fact-finding of aggravating circumstances necessary to impose the death penalty. The Supreme Court confirmed that *Ring v. Arizona*, 536 U.S. 585 (2002) applied to Florida, and held juries must conduct all fact-finding necessary to impose the death penalty. *See Hurst*, 136 S. Ct. at 616.

A. Appellant Preserved a *Hurst* Claim

Appellant, like a*micus curiae*, does not believe that "preservation" of *Hurst* claims is required, just as this Court did not require "preservation" for petitioners who were retroactively afforded the benefit of *Hitchcock*. *See, e.g., Hall v. State*, 541 So. 2d (Fla. 1989); *Meeks v. Dugger*, 576 So. 2d 713 (Fla. 1991); *see also Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987).

However, assuming such a requirement, Appellant Walls has preserved a claim for *Hurst* relief. In his 2006 state habeas proceeding, Appellant argued that

Florida's capital sentencing scheme was unconstitutional in light of *Ring*. This Court denied relief, citing its decision in *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005), which held that *Ring* was not retroactive because it did not apply in Florida. *See Walls*, 926 So. 2d. 1156, 1174 (Fla. 2006). The Court's alternative ruling is discussed later in section "D."

In *Hurst*, the Supreme Court confirmed the validity of what Appellant had argued to this Court, that "Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*." *Hurst*, 136 S. Ct. at 621. *Hurst* also overruled the basis for this Court's decision in *Johnson* that *Ring* did not apply in Florida, upon which this Court relied in rejecting Appellant's *Ring* claim. In *Johnson*, this Court held that *Ring* was inapplicable in Florida because the Supreme Court previously had approved of Florida's capital sentencing scheme in *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984). But now, in *Hurst*, the Supreme Court expressly overruled *Hildwin* and *Spaziano*. *See Hurst*, 136 S. Ct. at 616.

Fundamental fairness requires that Appellant be given an opportunity to return to the trial court seek relief under *Hurst*. To the extent that preservation is a component of a successful *Hurst* claim, which it should not be, Appellant is in better compliance than other death-sentenced defendants. The case this Court relied upon in rejecting his claim, *Johnson*, is no longer good law. This Appellant urges that this

Court should remand so that Appellant may file an amended motion, or a new motion, for post-conviction relief from his death sentence based on *Hurst*.

B. *Hurst* Applies to Appellant

This Court should reject any suggestion that Appellant cannot pursue *Hurst* relief on the ground that his sentence became "final" before *Hurst* issued. *Hurst* is retroactive to defendants like Appellant under Florida's retroactivity test. This Court established that retroactivity test more than 30 years ago in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and has applied it ever since. Under *Witt*, this Court applies new Supreme Court decisions favorable to criminal defendants retroactively when those decisions (1) emanate from the United States Supreme Court, (2) are constitutional in nature, and (3) constitute "a development of fundamental significance." *Falcon v. State*, 162 So. 3d 954, 960 (Fla. 2015) (citing *Witt*, 387 So. 2d at 931). *Hurst* satisfies all three *Witt* factors.

As to the first *Witt* factor, *Hurst* is a decision of the United States Supreme Court. As to the second factor, *Hurst*'s holding is constitutional in nature: the Sixth Amendment forbids a capital sentencing scheme that requires judges, as opposed to juries, to conduct the fact-finding that subjects a defendant to a death sentence. *Hurst* also satisfies the third *Witt* factor because it "constitutes a development of fundamental significance," *i.e.*, it is a change in the law which is "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test

of the United States Supreme Court's decisions 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) (internal brackets omitted). Retroactivity would ensure that the Sixth Amendment rights of individuals like Appellant are protected, and is in keeping with this Court's understanding 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 (quoting *Witt*, 387 So. 2d at 929). As the Capital Habeas Unit *amicus curiae* filings have noted in *Lambrix*, *Asay*, and Appellant Walls's cases, applying *Hurst* to prisoners like Appellant would not have a substantially injurious effect on the administration of justice, as the number of potential *Hurst* claimants is both finite and manageable.

This Court should also reject any suggestion that Appellant cannot pursue *Hurst* relief on the ground that his sentence became final before *Ring* issued. *Witt* itself does not recognize the concept of partial retroactivity, and this Court has never held that a new Supreme Court decision is retroactive but then refused to allow some individuals to benefit because they were sentenced before some earlier predicate Supreme Court decision. *See Falcon v. State*, 162 So. 3d 954 (Fla. 2015).

Similarly, in the context of capital punishment, this Court rejected the dubious "partial retroactivity" approach after the decision in *Hitchcock v. Dugger*, 481 U.S.

393 (1987), which held that trial courts in capital cases are prohibited from instructing juries to consider only statutorily enumerated mitigating circumstances. *See, e.g.*, *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987); *Riley v. Wainwright*, 517 So. 2d 656, 660 (1987). The Court permitted all impacted individuals to seek *Hitchcock* relief by filing a post-conviction motion in the trial court. The Court did not truncate the retroactivity of *Hitchcock* by limiting it to those whose death sentences were "finalized" after *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), or *Skipper v. South Carolina*, 471 U.S. 1 (1986), upon which *Hitchcock* relied. The concept of "partial retroactivity" is recognized as uncommon and has been criticized as antithetical to basic notions of fairness. Appellant should not be denied access to *Hurst* relief on the ground that his sentence became final before *Ring*.

C. If Harmless Error Review Applies, it Should Be Initially Undertaken in Trial Court Proceedings

The *Hurst* violation in Appellant's sentencing should not be subjected to harmless error analysis. The *Hurst* error in Appellant's sentencing—stripping the capital jury of its constitutional fact-finding role at the penalty phase—was a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Indeed, the *Hurst* error "infected the entire trial process" in Appellant's case, and deprived Appellant "of basic protections without which a [death penalty] trial cannot reliably

serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist, *Neder v. United States*, 527 U.S. 1, 8 (1999).

To the extent that the *Hurst* error in Appellant's sentencing is reviewed for harmlessness, this Court should not perform that analysis in the first instance. The trial court should review Appellant's *Hurst* claim first and evaluate harmlessness based on the facts of his case. Indeed, in a recent filing in *Lambrix*, the State agreed that harmless error analysis rests on the facts of each case. *See Lambrix v. State*, No. SC16-56, State's Response to Petitioner's Second Motion to Supplement Reply (filed Feb. 9. 2016) at 10. Because harmlessness analysis will require fact-finding as to the impact of the *Hurst* error on Appellant's sentencing, this Court should permit a trial court to make those findings.

D. There are No "Automatic" Aggravating Circumstances in Florida

In a previous opinion in Appellant Walls's cases, this Court stated, in dicta, that relief could be denied under *Ring*, because an aggravating circumstance found by the trial judge was a prior violent felony conviction. *Walls*, 926 So.2d at 1174-75. As *amicus curiae* has explained, such a view is not viable in Florida post-*Hurst*, because there are no "automatic" aggravators that can always be deemed "sufficient" for death eligibility in Florida. Trial court proceedings are appropriate in Appellant's case even though one of the six aggravating factors found by his trial judge was a prior violent felony conviction. Although *Ring* referred to an exception

allowing Arizona judges, instead of juries, to find the fact of a prior conviction, Florida death penalty law, unlike the Arizona law at issue in *Ring*, required not only that one or more aggravating factors be found to impose a death sentence, but also the factual determinations that "*sufficient* aggravating circumstances exist" to impose a death sentence, and that "there are *insufficient* mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3) (emphasis added). The Florida system under which Appellant was sentenced is qualitatively different than the Arizona system at issue in *Ring*.

In the context of Florida's capital sentencing structure, this Court cannot determine, without first remanding for trial court proceedings, whether a jury in a hypothetical capital sentencing proceeding that complied with *Hurst* would have made the same "sufficiency" findings as the trial judge.

In addition, this Court, like all appellate courts, is ill-equipped to determine how much influence the trial judge's role as the "sufficiency" fact-finder had on defense counsel's presentation or the jury's deliberations in Appellant's case. *See Hall*, 541 So. 2d at 1128 (explaining that "[a]ppellate courts are reviewing, not fact-finding courts . . . ."). As this Court has recognized in the context of *Hitchcock*, such harmless error determinations should be made first by trial courts following an evidentiary hearing. *See, e.g.*, *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991); *Hall v. State*, 541 So. 2d at 1125. Accordingly, this Court should remand so that

Appellant may file a motion or amended motion for post-conviction relief from his death sentence based on *Hurst*. To the extent that harmless error review is applicable at all, the trial court should hold fact-finding proceedings to determine the *Hurst* error's impact on the defense presentation, jury deliberations, and sentencing outcome in Appellant's case. And the trial court should also evaluate harmless, if at all, as compared to a new sentencing statute, which has not yet issued.

CONCLUSION

For the foregoing reasons, Appellant Walls, under *Hurst*, should be given the opportunity to present his *Hurst* issue to the circuit court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by email to the Office of the Attorney General at *Charmaine.Millsaps@myfloridalegal.com*, *Sandra.Jaggard@myfloridalegal.com*, and to Billy H. Nolas, Chief, Capital Habeas Unit, Office of the Federal Defender for the Northern District of Florida, *billy_nolas@fd.org* on February 25, 2016.

/s/ Baya Harrison, III
Baya Harrison, III, Esq.

CERTIFICATE OF COMPLIANCE

I HERBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Baya Harrison, III
Baya Harrison, III, Esq.