IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-175

FRED ANDERSON JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF FIFTH JUDICIAL CIRCUIT IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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FACTS AND PROCEDURAL HISTORY

The facts underlying Anderson's conviction and death sentence are outlined by this Court in *Anderson v. State*, 863 So. 2d 169 (Fla. 2003).

The jury found Anderson guilty of grand theft, armed robbery, attempted first-degree murder, and first-degree murder, and unanimously recommended a death sentence by a 12-0 vote. *Id*. at 175. The trial court found four aggravating factors: 1) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, given great weight; 2) the murder was committed for pecuniary gain, given moderate weight; 3) the murder was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation, given little weight; and 4) that Anderson was convicted of a previous violent felony, which was given great weight. *Id*. at 175, n. 5. The trial court followed the jury's recommendation and sentenced Anderson to death. *Id*. at 175. On appeal, this Court affirmed the convictions and sentence of death. *Id*. at 189. The United States Supreme Court denied Anderson's petition for writ of certiorari on March 22, 2004. *Anderson v. Florida*, 541 U.S. 940 (2004).

Following several failed postconviction and habeas motions, Anderson filed this successive motion to for postconviction relief. In his motion, Anderson raised the following claims: 1) his death sentence violated *Hurst v. Florida,* 136 S. Ct. 616

(2016); 2) his death sentence violated *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) under the Eighth Amendment; and 3) that he is entitled to a new postconviction proceeding. An evidentiary hearing was held on July 28, 2017.

Testimony from the Evidentiary Hearing

William Stone, Esq.

William Stone retired from the practice of law in 2011. (PCR, V1, R1545).[1] He was formerly employed by the Public Defender's Office, and had practiced law for more than forty years. (PCR, V1, R1545, 1553).

Mr. Stone testified that the *Hurst* decisions changed Florida law, because "unanimity is the big word." (PCR, V1, R1546). According to Mr. Stone, his trial tactics would have differed. (PCR, V1, R1547). He would have aggressively argued to the jurors their independent role and the significance of each vote. (PCR, V1, R1547-48). He also would have argued the importance of the individual vote during voir dire. (PCR, V1, R1548-49). Additionally, Mr. Stone testified that he would have developed more mitigation evidence relating to Anderson's mother and his probation officers. (PCR, V1, R1550-51)

However, Mr. Stone admitted that in capital cases, he would not "put all his eggs in one basket," but would instead try to find as many jurors as he could that

[1] Cites to the postconviction record are PCR, V_, R_. Cites to the direct appeal record are DAR, V_, R_.

would vote for a life sentence. (PCR, V1, R1554-55) He also admitted that nothing prevented him from aggressively arguing to the jurors their role in the sentencing process, or the importance of their individual vote. (PCR, V1, R1559)

Terence Lenamon, Esq.

Mr. Lenamon has practiced law since 1993, and specializes in capital litigation. (PCR, V1, R1571). Mr. Lenamon was contacted by Anderson's counsel, and was asked to review the jury instructions as well as Mr. Anderson's successive postconviction motion. (PCR, V1, R1578).

Mr. Lenamon stated that before the *Hurst* decisions were rendered, attorneys had to try to get six jurors to recommend a life sentence, but post-*Hurst*, attorneys only have to focus on getting one juror to vote for a life sentence. (PCR, V1, R1579-80). He also stated that it would affect how attorneys pick juries. (PCR, V1, R1583-84).

However, Mr. Lenamon admitted that he had no knowledge of how harmless error is decided. (PCR, V1, R1592) He further stated that nothing prevented a defense lawyer from emphasizing the importance of an individual opinion to a juror prior to the *Hurst* decisions. (PCR, V1, R1595). He also had no knowledge as to how harmless error is analyzed. (PCR, V1, R1594-95) Mr. Lenamon also acknowledged that there is no case from the Florida Supreme Court that grants *Hurst* relief to defendants whose death recommendation was unanimous. (PCR, V1, R1595).

The judge denied postconviction relief. (PCR, V1, R1429-36; R1489-97).

SUMMARY OF THE ARGUMENT

The lower court properly denied Anderson's successive motion for postconviction relief. There is no Sixth Amendment *Hurst* error because the aggravators were either supported by prior or contemporaneous convictions or otherwise uncontestable. Further, the jury unanimously recommended the death penalty. As this Court has made clear, the jury's unanimous recommendation is "precisely what [this Court] determined in *Hurst* to be constitutionally necessary to impose a sentence of death." *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016). Therefore, the record conclusively establishes that any *Hurst*[2] error was harmless beyond a reasonable doubt. Finally, any new proportionality review is unnecessary, and this Court has already upheld Anderson's sentence even after receiving additional mitigating factors in postconviction appeals.

STANDARD OF REVIEW

The postconviction court's denial of Anderson's successive motion for postconviction relief is reviewed by this Court *de novo*, accepting the defendant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively establishes that the defendant is entitled to no relief. *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009).

[2] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017).

ARGUMENT

ISSUE I: ANY HURST V. FLORIDA, 136 S. CT. 616 (2016) ERROR WAS HARMLESS IN LIGHT OF THE UNANIMOUS DEATH RECOMMENDATION IN THIS HEAVILY AGGRAVATED CASE.

Anderson asserts that he is entitled to relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (hereinafter "*Hurst II*"). However, the jury unanimously found the existence of the prior violent felony conviction due to the contemporaneous verdicts. Therefore, there was no error as identified by the United States Supreme Court in *Hurst v. Florida*.[3] *See State v. Mason*, 2018 WL 1872180, *5, 6 (Oh. Apr. 18, 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principal offense

[3]While the State recognizes this Court's precedent to the contrary, *see McGirth v. State*, 209 So. 3d 1146, 1164 (Fla. 2017), the findings this Court required following remand in *Hurst* involving the weighing and selection of the Defendant's sentence are not required by the Sixth Amendment. *See Alleyne v. United States*, 570 U.S. 99, 115-16 (2013) (the Court explained that "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime."). *See also Jenkins v. Hutton*, 582 U.S. ___, 137 S. Ct. 1769 (2017) (confirming the constitutionality of an Ohio death sentence based on a jury's guilt-phase determination of facts); *Waldrop v. Comm'r, Alabama Dep't of Corr.*, 15-10881, 2017 WL 4271115, at *20 (11th Cir. Sept. 26, 2017) (unpublished) (In rejecting a *Hurst* claim the Court explained: "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict. *See* § 13A-5-45(e).").

and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citations omitted). Additionally, any error as described by this Court in *Hurst II* was harmless beyond a reasonable doubt.

In *Hurst v. Florida*, relying on *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court stated the facts necessary to make a defendant eligible for the death penalty must be found by a jury. In *Hurst II*, this Court expanded the United States Supreme Court's *Hurst* decision and held that a jury in a capital case must unanimously find several things: any applicable aggravating factors, that those factors are sufficient to impose death, that they outweigh any mitigating circumstances; and the jury must recommend death unanimously. *Hurst*, 202 So. 3d at 57. Neither *Hurst* nor *Hurst II* addressed the issue of whether the new constitutional rules were retroactive in application.

However, this Court held that *Hurst* is retroactive to cases that were final after the *Ring* opinion was issued on June 24, 2002, which is the case for Anderson. *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016).

Still, Anderson is entitled to relief only if the alleged *Hurst* error was not harmless beyond a reasonable doubt. *See Hurst*, 202 So. 3d at 67 (recognizing that a *Hurst* error is capable of harmless error review); and *Hurst*, 136 S. Ct. at 624 (remanding to the state court to determine whether the error was harmless). While

Anderson claims that the State cannot show beyond a reasonable doubt that the *Hurst* error was harmless, it is not the State's burden to prove. Unlike a direct appeal, the State has no burden of proving harmless error in postconviction proceedings. *See Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000) (explaining that in order to obtain postconviction relief, "[t]he defendant bears the burden of establishing a prima facie case based upon a legally valid claim."); *see also Ives v. State*, 993 So. 2d 117, 121 (Fla. 4th DCA 2008) (observing that the burden is generally on the State to prove harmlessness on direct appeal, but rests with the defendant to prove prejudice in postconviction). Thus, it is Anderson's burden to meet, and he has failed to do so in this case.

Even if it were the State's burden to prove, Anderson would not be entitled to relief because any *Hurst* error was harmless. The harmless error test is derived from the United States Supreme Court decision in *Chapman v. California*, 386 U.S. 18 (1967). In *Chapman*, the Court said that the test is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id*. at 24. Rephrased, in subsequent cases, the United States Supreme Court stated that "the question [is] whether the jury verdict would have been the same absent the error." *Neder v. United States*, 527 U.S. 1, 19 (1999). Thus, after a thorough examination of the record, if the court can conclude beyond a reasonable

doubt that a rational jury would have found the defendant guilty, then the error is harmless. *Id*. at 19-20.

This Court has consistently held that in cases such as Anderson's, where the jury unanimously recommends a death sentence, any *Hurst* error is harmless beyond a reasonable doubt. *See Kaczmar v. State*, 228 So.3d 1, 8 (Fla. 2017) (holding that the defendant was not entitled to a new penalty phase under *Hurst* because the jury unanimously recommended a death sentence); *Knight v. State*, 225 So. 3d 661, 682 (Fla. 2017) (holding that although *Hurst* applied retroactively to Knight, because the jury unanimously recommended a death sentence, Knight was not entitled to a new penalty phase); *King v. State*, 211 So. 3d 866, 890 (Fla. 2017) (holding that any *Hurst* error was harmless beyond a reasonable doubt in light of the jury's unanimous recommendation of a death sentence).

For example, in *Hall v. State*, 212 So. 3d 1001, 1012 (Fla. 2017), the jury unanimously recommended that Hall be sentenced to death for the murder of a corrections officer. Due to the unanimous recommendation, this Court stated, "[t]his unanimous recommendation lays a foundation for us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." *Id*. at 1034. This Court reasoned that the instructions given to the jury informed them that it needed to determine whether sufficient aggravators existed and whether any aggravation

outweighed the mitigation before it could recommend death. *Id*. This Court further reasoned that "[e]ven though the jury was … instructed that it was not required to recommend death even if the aggravators outweighed the mitigators, the jury did in fact recommend death unanimously." *Id*. at 1035. This Court also reasoned that the evidence in the case supported the aggravating factors found by the trial court. *Id*. Thus, this Court concluded that any *Hurst* error in regard to Hall's sentence, which was based on a unanimous recommendation, was harmless beyond a reasonable doubt, and that Hall was not entitled to a new penalty phase proceeding. *Id*.

Like *Hall*, the jury's unanimous recommendation in Anderson's case lays the foundation to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors. Like *Hall*, the jury was instructed that each aggravating circumstance had to be established beyond a reasonable doubt before it could recommend death. (DAR, V5, R771). Like *Hall*, the jury still unanimously recommended a death sentence. (DAR, V5, R773).

Additionally, this Court has already held that evidence in Anderson's case supported the aggravating circumstances found by the trial court. *Anderson*, 863 So. 2d 169 (Fla. 2003). The trial court found four aggravating circumstances, *supra*. Two of the aggravators are automatic. It is uncontroverted that Anderson was on community control at the time of the murder. *Id*. at 173. Also, the previous violent

felony aggravator was based on his contemporaneous attempted murder of the other teller, which the same jury had found him guilty of beyond a reasonable doubt. *Id*. at 176 n. 5. The other two aggravators were supported by ample evidence as outlined by this Court in Anderson's direct appeal. *See Anderson*, 863 So. 2d at 177-78.

Thus, like *Hall*, *Knight*, *King*, and *Kaczmar*, any *Hurst* error in regard to Anderson's sentence, which was based on a unanimous recommendation, is harmless beyond a reasonable doubt, and therefore Anderson is not entitled to a new penalty phase. This Court should affirm the denial of postconviction relief.

Anderson also argues that his *Hurst* claim must be combined with his previously rejected ineffective assistance of counsel claims. There is no legal support for this position. Neither *Hurst* nor *Perry v. State*, 210 So. 3d 630 (Fla. 2016), operate to breathe new life into previously denied claims.

There is no authority for such a plenary review as Anderson seeks here. The *Hurst* error is a trial error to be measured for harmlessness against the trial record. As argued above, under the proper harmless error standard, the *Hurst* error was clearly harmless in this case. If the *Hurst* error was harmless on the face of the record, Anderson is entitled to no relief, much less new postconviction proceedings to explore claims that were disposed of long ago. Anderson cannot mix and match his guilt-phase claims with his penalty-phase claims based on *Hurst*, or any other case law for that matter.

ISSUE II: ANDERSON IS NOT ENTITLED TO RELIEF UNDER THE EIGHTH AMENDMENT

Anderson claims that under *Hurst*, he is entitled to relief under the Eighth Amendment pursuant to *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

This claim is without merit. In order to establish constitutional error under *Caldwell*, a defendant must show that the comments or instructions to the jury "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). Anderson's jury was properly instructed on its role based upon the law existing at the time of his trial. The suggestion that the jury should have been instructed in accordance with a constitutional change which occurred long after his trial is unavailing under this Court's established precedent. *See Reynolds v. State*, 43 Fla. L. Weekly S163 (Fla. Apr. 5, 2018) ("Therefore, a *Caldwell* claim based on the rights announced in *Hurst* and *Hurst v. Florida* cannot be used to retroactively invalidate the jury instructions that were proper at the time under Florida law.") (citing *Romano*, 512 U.S. at 9, 114 S.Ct. 2004 and *Caldwell*, 472 U.S. at 342–43, 105 S.Ct. 2633 (O'Connor, J., concurring in part)).

Additionally, Anderson's *Caldwell* claim is based on pure speculation. Nothing in the record establishes that the jury's responsibility in rendering a death recommendation was diminished. This is particularly so, as the jury was instructed: "Your advisory sentence is required by law, and will be given great weight by this court in determining what sentence to impose. It is only under rare circumstances

that this court could impose a sentence other than what you recommend." (DAR, V5, R769). The jury was also instructed, "[b]efore you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence." (DAR, V5, R772). Thus, given the language in the instructions, it is clear that the jury understood the magnitude of its recommendation, and that its recommendation would be given great weight by the trial court.

Additionally, although Anderson also contends that each juror was not advised of its authority to dispense mercy, this argument is also meritless. As indicated in the jury instructions, Anderson's jury was instructed, "[i]f you find the aggravating circumstances do not justify the death penalty, your advisory sentence must be one of life imprisonment without possibility of parole." (DAR, V5, R771). The jury was also instructed that the advisory sentence did not have to be unanimous. (DAR, V5, R772). Thus, the instructions did allow for each individual juror to "dispense mercy" and recommend life if they desired to do so. Even now, post-*Hurst*, under Florida law, the trial judge imposes the sentence. Consequently, the court's instruction informing the jury that it was making a recommendation as to Anderson's sentence does not constitute a *Caldwell* violation.

ISSUE III: ANDERSON IS NOT ENTITLED TO RELIEF UNDER A PROPORTIONALITY ARGUMENT BECAUSE THIS COURT HAS ALREADY FOUND HIS SENTENCE TO BE PROPORTIONAL

Anderson's final argument is that the Court should revisit its proportionality review of Anderson's case post-*Hurst*. In doing so, Anderson encourages the Court to reexamine issues that have been dealt with on both the state and federal level.

This Court first reviewed Anderson's case for proportionality, as it does on all death penalty cases, on his direct appeal, finding:

> [T]he facts of this case are similar to other cases with comparable aggravation and mitigation where defendants have received the death sentence. *See, e.g.*, *Philmore v. State*, 820 So. 2d 919, 925 (Fla. 2002) (affirming death sentence where trial court found five aggravating circumstances including prior violent felony, CCP, and pecuniary gain and eight nonstatutory mitigating circumstances); *Hurst v. State*, 819 So. 2d 689, 701–02 (Fla. 2002) (affirming death sentence where defendant had robbed fast food store and two aggravators outweighed mitigation); *Franqui v. State*, 804 So. 2d 1185, 1198 (Fla. 2001) (affirming death sentence where defendant murdered a law enforcement officer during a bank robbery and trial court found three aggravators: pecuniary gain, prior violent felony, and avoid arrest and minor nonstatutory mitigation); *Farina*, 801 So. 2d at 56 (holding death penalty was proportionate where defendant was a major participant in an armed robbery, had cold, calculated, and premeditated plan to eliminate any witnesses, but did not have a significant prior criminal history); *Jennings v. State*, 718 So. 2d 144, 154 (Fla. 1998) (finding death sentence proportionate where murders were cold, calculated, and premeditated and committed during armed robbery to avoid arrest, but defendant had no significant history of prior criminal activity). Accordingly, we find that death is a proportionate penalty in this case.

Anderson, 863 at 188-89.

Anderson points to mitigation found after his direct appeal was denied—but this, too, has already been addressed by this Court. In *Anderson v. State*, 18 So. 3d 501 (2009), the Court reviewed the very mitigation Anderson brings up again on this

successive appeal. In that case, Anderson was alleging his trial counsel was ineffective for not discovering and presenting mitigating evidence that Anderson was sexually abused as a child. *Id*. at 508. The Court found that his trial counsel was not ineffective, primarily because Anderson did not disclose the abuse to his attorneys even when given multiple opportunities. *Id*. at 510. However, even if trial counsel had been deficient, the Court held that Anderson still had not satisfied the prejudice prong of *Strickland*. *Id*.

This holding, by necessity, means that the Court already re-weighed the proportionality of Anderson's sentence with the additional mitigation evidence in mind. To show prejudice, Anderson had to show that but for counsel's deficiency, there was a reasonable probability the outcome would have been different. *Strickland*, 466 U.S. at 694. In finding that there was no prejudice, the Court found that even with the additional mitigation, Anderson still would have received the death penalty and that it was still proportionate. In reaching this decision, the Court pointed out that two of the aggravators, CCP and prior violent felony, are among the weightiest of aggravators. 18 So. 3d at 510. The Court also noted that he orchestrated a complex plan, including a false story for his presence at the bank, procurement of two guns, and multiple deceptions. *Id*. at 510-11. Notably, the Court concluded, "Even if trial counsel were deficient in failing to present evidence of Anderson's childhood sexual abuse in mitigation, our confidence in Anderson's death sentence

would not be undermined." *Id*. at 511. This holding was affirmed by two federal courts. *See Anderson v. Sec'y, Fla. Dep't of Corr.*, 2011 WL 2784192 (M.D. Fla. July 15, 2011); *Anderson v. Secretary*, 752 F.3d 881 (11th Cir. 2014). A new proportionality review is not only unnecessary, nor supported by any case law, as it has also already been done.

Finally, Anderson's emphasis on cases where defendants were not given the death penalty is misguided. Outside of codefendants, this Court does not compare cases where a defendant was sentenced to death with cases where the defendant was sentenced to life; instead, the comparison is solely with other defendants who received the death penalty. *See Anderson v. State*, 863 at 187–88 (Fla. 2003). These unrelated defendants and their distinct crimes have no bearing on the proportionality of Anderson's sentence. His sentence has been reviewed and has been determined to be proportionate. This Court should affirm the denial of postconviction relief.

CONCLUSION

Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 3, 2018, a true and correct copy of the foregoing has been furnished by email to Maria E. DeLiberato, Assistant Capital Collateral Regional Counsel-Middle, 12973 N. Telecom Parkway, Temple Terrace,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.100(*l*).

Respectfully submitted,

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