IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 18-175

FRED ANDERSON, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Any claims not argued are not waived and Mr. Anderson relies on the merits of his Initial Brief.

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ARGUMENT

MR. ANDERSON'S DEATH SENTENCE STANDS IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND IN VIOLATION OF *HURST V. FLORIDA*, 136 S. Ct. 616 (2016), AND ITS PROGENY. FURTHER, THE ERROR IS NOT HARMLESS.

A. Mr. Anderson's death sentence stands in violation of the Sixth Amendment and the error is not harmless.

In its Answer Brief, the State incorrectly states the harmless error standard and continues to erroneously assert that the burden is not theirs to carry. (Answer Brief, p. 6-7). While Mr. Anderson does not concede that the *Hurst* error in his case should even be subject to harmless error review, this Court has made it clear that the burden lies on the State.

In *Hurst v. State*, this Court stated that error under *Hurst v. Florida* "is harmless only if there is no reasonable possibility that the error contributed to the sentence." *Hurst v. State*, 202 So. 3d 40, 68 (Fla. 2016). "[T]he harmless error test is to be rigorously applied, and *the State* bears an extremely heavy burden in cases involving constitutional error." *Id*. (internal citations and quotation marks omitted)(emphasis added). The State must show beyond a reasonable doubt that the jury's failure to unanimously find not only the existence of each aggravating factor, that the aggravating factors are sufficient, and that the aggravating factors outweigh the mitigating circumstances had no effect on the death recommendations. The State must also show beyond a reasonable doubt that no properly instructed juror would

have dispensed mercy to Mr. Anderson by voting for a life sentence. The State cannot meet this burden in Mr. Anderson's case. A harmless error analysis must be performed on a case-by-case basis, and there is no one-size fits all analysis; rather there must be a "detailed explanation based on the record" supporting a finding of harmless error. *See Clemons v. Mississippi*, 494 U.S. 738, 753 (1990). *Accord Sochor v. Florida*, 504 U.S. 527, 540 (1992).

The State's essential argument is that because the jury's death sentence recommendation was unanimous, this Court's harmless error analysis begins and ends there. This is incorrect and an unreasonable application of both state and federal law, as well as an unreasonable determination of the facts. Mr. Anderson's jury made only a *recommendation* to impose the death penalty, without making any findings of fact as to any of the elements required for a death sentence under Florida law. The verdict form did not contain any findings of fact or specify the basis for the jury's recommendation, despite trial counsel's request for a special verdict form. All that is reflected on the form is the jury's final recommendation. It is purely speculative to assume that the jury unanimously found any of the aggravators, as they could have been split in any number of ways, some jurors finding some aggravators and not others, and vice versa. This Court only knows for certain that the final recommendation was unanimous, and has no additional information on how the jury arrived at their advisory sentence. This does not satisfy *Hurst v. Florida* or

Hurst v. State.

The State relies heavily on the fact that two of Mr. Anderson's aggravators were "automatic" in that one was that he was on community control and the other was based on a contemporaneous felony. (Answer Brief, p. 10). The State neglects to mention the scores of cases where this Court has granted *Hurst* relief even where the aggravators were "automatic." As noted in the Initial Brief, Florida law requires fact-finding as to both the existence of aggravators *and* the "sufficiency" of the particular aggravators to warrant imposition of the death penalty. There is no way to conclude whether the jury would have made the same sufficiency determination as the judge. *See, e.g., Franklin v. State,* 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst.*").

As this Court pointed out in *Hurst v. State*, "[b]ecause there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances." 202 So. 3d at 69.

There is no discernible difference between the jury findings (or lack thereof) in Mr. Anderson's case and the jury findings (or lack thereof) in any of the scores of

cases in which this Court has found the *Hurst* error not to be harmless.

This Court has no clearer a picture of what Mr. Anderson's jury based its recommendation upon than the thought processes of a jury that returned a generalized non-unanimous recommendation for death. Failure to grant Mr. Anderson relief, while granting relief to similarly situated defendants, violates Mr. Anderson's equal protection rights under the Fourteenth Amendment to the United State's Constitution (e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against the arbitrary infliction of the death penalty under the Eighth Amendment. (*Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam)). The State wholly failed to address Mr. Anderson's Equal Protection argument.

Further, the State failed to address Mr. Anderson's arguments that a post-*Hurst* jury must now complete a multi-step process and that cases that have been tried post-*Hurst* under the current scheme provide further support that the error in Mr. Anderson's case is not harmless. The State mischaracterizes this argument solely as one of proportionality, which will be discussed further below. While Mr. Anderson did argue that this Court should revisit its proportionality review, he made a separate and distinct argument that when assessing harmless error, it is also proper for this Court to consider actual real-world outcomes in the post-*Hurst* landscape. *See*

Reynolds v. State, -- So. 3d -- 2018 WL 1633075 at * 12, n. 21 (Fla. Apr. 5, 2018) (using the fact that a jury unanimously issued a death verdict in a *Hurst* resentencing in order to justify a denial of relief). These cases offer further support that the State has failed to meet its heavy burden in Mr. Anderson's case that the Sixth Amendment error was harmless.

B. Mr. Anderson's death sentence stands in violation of the Eighth Amendment and the error is not harmless.

The State misapprehends the nature of Mr. Anderson's Eighth Amendment argument and in doing so, employs circular logic. The State asserts that Mr. Anderson's *Caldwell*[1] claim is based on speculation (Answer Brief, p. 11) because the jury was told that their verdict was merely advisory. This is precisely the nature of the alleged *Caldwell* error now in light of *Hurst*. The crux of the State's argument is that because the jury was properly instructed as to its role at the time of trial, albeit under an unconstitutional scheme, there can be no error. This argument must fail -- properly instructing a jury on an unconstitutional law, is unconstitutional.

In order to treat a jury's advisory recommendation as binding, the jury must be correctly instructed as to its sentencing responsibility under *Caldwell*. This means that post-*Hurst* the individual jurors must know that the each will bear the responsibility for a death sentence resulting in a defendant's execution since each

[1] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. Thus, "the jury instructions in [Anderson's] case[s] impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory." *Truehill v. Florida*, 138 S. Ct. 3, 3 (2017) (Sotomayor, J., dissenting).

The issue is not whether Mr. Anderson's jury was properly instructed at the time of his capital trial, but instead, whether today the State and this Court can now treat those advisory recommendations as mandatory and binding, when the jury was explicitly (and unconstitutionally) instructed otherwise. The United States Supreme Court, in *Hurst v. Florida*, warned against that very thing. The Court cautioned against using what was an advisory recommendation to conclude that the findings necessary to authorize the imposition of a death sentence had been made by the jury:

> "[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.

Hurst, 136 S. Ct. at 622. An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation, the juror's inability to be merciful based upon sympathy, and what aggravating factors could be found and weighed in the sentencing calculus) cannot be used as a substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004

(1983) ("Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed.").

Because there was no special verdict form utilized in Mr. Anderson's case, all this Court can do is speculate that all of his jurors found all the necessary factors in order to impose death, since the only thing before this Court is a generalized verdict form. Mr. Anderson was denied his right to a jury finding of fact. Whether that error is harmless cannot be decided based on reference to an advisory panel which made no such findings of fact and which, beyond the mere recommendation, shows no unanimity on any particular aggravating factor. The advisory panel was instructed that the responsibility for determining the appropriateness lied with the trial court, and such reliance violates the Eighth Amendment based on *Caldwell*.

The circumstances under which Mr. Anderson's jury returned its 12-0 death recommendation shows that it cannot now be viewed as a valid unanimous verdict or that the *Hurst* error was harmless without violating the Eighth Amendment.

C. <u>This Court must revisit its proportionality review, comparing Mr. Anderson's case to the first degree murder cases that have been tried post-*Hurst*.</u>

The State asserts that because this Court denied Mr. Anderson's prior *Strickland*[2] claims, a renewed proportionality review has already been completed. (Answer Brief, p. 13-15). This novel argument improperly mixes legal standards and amounts to a misapprehension of Mr. Anderson's claim. Further, this Court denied Mr. Anderson's *Strickland* claims primarily on deficiency grounds. *See Anderson v. State*, 18 So.3d. 501 (Fla. 2009). To the extent that this Court did address prejudice, this Court's analysis was incorrect under clearly established federal law because it considered his claims in a piecemeal fashion instead of the cumulative review that *Strickland* and its progeny require. *See Anderson v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 881, 910-11 (11th Cir. 2014) (Martin, J., concurring) ("I do not share the Majority's confidence that the Florida Supreme Court reasonably applied the prejudice prong from S*trickland* within the meaning of 28 U.S.C. § 2254(d)(1). In particular, I have serious concerns about whether the Florida Supreme Court reweighed the totality of mitigating evidence against all the aggravating evidence, old and new….A proper reweighing of the evidence should have included both the positive character evidence presented at trial, as well as the sexual abuse and mental health evidence presented during the state postconviction proceedings.") (internal citations and quotations omitted).

The denial of Mr. Anderson's prior *Strickland* claims is not a bar to this Court

[2]*Strickland v. Washington*, 466 U.S. 668 (1984).

conducting a new proportionality review. Allowing Mr. Anderson's death sentence to stand without revaluating proportionality denies Mr. Anderson Due Process and Equal Protection under the Fourteenth Amendment, and amounts to a violation of the Eighth Amendment. Mr. Anderson was sentenced to death under an unconstitutional death penalty scheme, by a jury who was poisoned by extensive and racially tinged pre-trial publicity, and who was uninformed as to substantial mitigation due to ineffective assistance of counsel.

Taking into account all of the factors, coupled with the lack of a specialized verdict form and zero factual findings made by his jury, Mr. Anderson's case is far from the most aggravated and least mitigated of "similarly situated individuals." As is made clear by many post-*Hurst* capital trials, some in the very same circuit as Mr. Anderson, had his capital trial taken place today under *Hurst*-compliant instructions, at least one juror would have voted for life. This Court should consider this evidence not only from a harmless error perspective, but also as a basis to find that Mr. Anderson's death sentence is no longer proportional.

CONCLUSION

The lower court improperly denied Mr. Anderson relief on his successive 3.851 motion. This Court should order that his sentence be vacated and remand the case for a new penalty phase, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

WE hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Patrick Bobek, patrick.bobek@myfloridalegal.com and capapp@myfloridalegal.com, on this 10th day of May, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Brief of Appellant, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210**.**

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