IN THE SUPREME COURT OF FLORIDA

TERENCE TOBIAS OLIVER,

Appellant,

v. CASE NO. SC12-1350

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT,
EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, FLORIDA

APPELLANT'S SUPPLEMENTAL INITIAL BRIEF IN LIGHT OF HURST v. FLORIDA

JAMES S. PURDY,
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SEVENTH JUDICIAL CIRCUIT

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DEATH PENALTY MOTIONS AND ORDERS

As noted in the initial brief, Appellant moved in the trial court for relief based on *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and *Ring v. Arizona*, 536 U.S. 584 (2002). (III 401-02, 405-06; IV 525-30; XX 2429-33) Specifically, the defense sought an order striking from the standard jury instructions any reference to the jury's role being "advisory" or a "recommendation." (III 401-02) The defense further sought an order requiring the jury to make factual findings as to all aggravating and mitigating factors it found to exist. (III 405-06) The defense also sought an order precluding consideration of the death penalty because Florida's capital sentencing scheme violated *Ring*. (IV 525-30; XX 2429-33) The State took the position in the trial court that "[t]his case is not a *Ring* case" in that the jury had found the defendant guilty of a burglary that occurred contemporaneously with the charged murders. (XX 2433) The defense motions were denied. (IV 628; XX 2433)

JURY INSTRUCTIONS

The standard jury instructions the jury heard began as follows:

> THE COURT: It is now your duty to advise the court as to the punishment that should be imposed upon the defendant for the crime of first-degree murder. You must

> follow the law that will now be given to you and render an advisory sentence.... As you've been told, the final decision as to which punishment shall be imposed is the responsibility of the judge. In this case, as the trial judge, that responsibility will fall on me. However, the law requires you to render an advisory sentence as to which punishment should be imposed, life imprisonment without the possibility of parole or the death penalty. Although the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given great weight and deference by the court in determining which punishment to impose.

(V 841; XX 2583-84) The standard instructions go on to refer 21 additional times to a recommended sentence, and seven additional times to an advisory sentence. (V 841-48, XX 2584-97) Those references included the closing words of the standard instructions, i.e.,

> THE COURT: You should take sufficient time to fairly discuss the evidence and arrive at a well-reasoned recommendation. You will now retire to consider your recommendation as to the penalty to be imposed upon the defendant.

(V 848; XX 2597; XXI 2617) The jury deliberated for 35 minutes, then returned an advisory sentence of death as to each of the two victims, both reflecting that the jury had voted in favor of death by a count of 12 to 0. (V 849-50, 860)

THE SENTENCING ORDER

In its sentencing order, the court recited it had independently weighed the

evidence. (VI 935) The court found as to both murders that the defendant had committed a prior violent felony and had committed a contemporaneous burglary. (VI 935-36, 941-42) The court further found that each murder had been committed to avoid arrest, and that each was cold, calculated, and premeditated. (VI 936-41, 942-49) The court assigned great weight to each of those aggravating factors. (V 952)

The court further found that the defense had failed to prove the statutory mitigating factor that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. (VI 950) The court found some nonstatutory mitigation, which it accorded little or "some" weight. (VI 950-51) The court concluded as to each murder that sufficient aggravating circumstances were shown to support giving of the death penalty, and that the aggravating circumstances outweigh the mitigating circumstances (VI 952-53)

SUMMARY OF THE ARGUMENT

Appellant sought jury instructions which did not characterize the jury's role as advisory, but that relief was denied. The jury recommended death by a 12-0 vote. That recommendation was irretrievably tainted by the standard instructions, which minimized the jury's responsibility. Further, the jury made no express findings, and thus the court, and not the jury, made all findings necessary to imposition of the death sentence in this case. In any event, Section 775.082(2), Florida Statutes, mandates commutation to a life sentence where, as here, the United States Supreme Court holds Florida's death-penalty scheme unconstitutional.

ARGUMENT

THE DEATH SENTENCE APPEALED FROM WAS IMPOSED IN VIOLATION OF HURST v. FLORIDA.

Standard of review. Review of a purely legal question is *de novo.* Jackson v. State, 64 So. 3rd 90, 92 (Fla. 2011).

Argument. Appellant was sentenced to death as to each of two victims, after the trial court found that four weighty aggravating factors were shown as to each murder. The court further made its own findings as to mitigation, and found that the aggravating factors far outweighed the showing in mitigation. The United States Supreme Court has since held Florida's death-sentencing scheme unconstitutional to the extent it calls for the court, rather than the jury, to make those factual findings which are necessary for imposition of the death penalty. *Hurst v. Florida*, 136 S. Ct. 616 (2016). The Court in *Hurst* left it to this court to determine whether and when the error in imposing a death sentence under the invalidated scheme could be deemed harmless. *Hurst* at 624. In this brief, Appellant will argue that harmless-error analysis is precluded by Section 775.082(2), Florida Statutes, and by the fact the jury was instructed that its verdict would be nothing more than advisory.

SECTION 775.082, F.S.

Section 775.082(2), Florida Statutes, provides:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

After the United States Supreme Court issued its decision in *Furman v. Georgia,* 408 U.S. 308 (1972), but while rehearing was pending in that case, this court addressed the law now codified as Section 775.082(2) in *Donaldson v. Sack*, 265 So. 2d 499 (Fla. 1972). In that case this court said:

> We have given general consideration to any effect upon the current legislative enactment to commute present death sentences to become effective October 1, 1972. The statute was conditioned upon the very holding which now has come to pass by the U.S. Supreme Court in invalidating the death penalty *as now legislated*. It is worded to apply to those persons already convicted without recommendation of mercy and under sentence of death.

265 So. 2d at 505 (emphasis added). Subsequently, after the rehearing petition was disposed of in *Furman*, this court, citing *Donaldson v. Sack*, determined that it should commute to life all the death sentences imposed under the scheme held to be unconstitutional in *Furman*. *Anderson v. State*, 267 So. 2d 8, 9-10 (Fla. 1972).

Anderson should be applied here. *Furman* was a 5-4 decision, with five separate opinions issued by the Justices in the majority. As the dissenting Justices noted, the narrowest of the majority's opinions were authored by Justices Stewart and White. 408 U.S. at 375 (Burger, C.J., dissenting.) "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Ventura v. State*, 2 So. 3rd 194, 200 (Fla. 2009), *citing* *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976). In *Furman*, Justices Stewart and White joined the majority based on their belief that the death penalty was at that time enforced "wantonly" and "freakishly" against "a capriciously selected random handful," *Furman* at 309-10 (Stewart, J., concurring), on each occasion by a jury acting "in its own discretion ... no matter what the circumstances." *Furman* at 314 (White, J., concurring.) The gravamen of *Furman* was thus that untrammeled decision-making in capital sentencing had the effect of violating the Eighth Amendment.

The holding of *Hurst* is that Florida's death-penalty scheme has the effect of violating the Sixth Amendment guarantee of trial by jury, in that juries' discretion - guided though it is by post-*Furman* statutes setting out permissible aggravating factors - is usurped by judges' having the final say in finding the facts that underly

a death sentence. In both *Furman* and *Hurst*, the Court struck down a death-penalty scheme because of a serious defect in the process whereby those who will suffer the penalty are chosen. In both situations, the existing death penalty was held by the Court to be unconstitutional as currently legislated. In *Anderson* this court effectively held that the law now codified as Section 775.082(2) dictated how to deal with death sentences handed down under the pre-*Furman* scheme, since the Legislature had made it clear what its preference would be in the event the scheme was ruled unconstitutional as currently legislated. This court should follow the precedent it set in *Anderson* and commute Appellant's sentence to life in prison.

CALDWELL V. MISSISSIPPI

In the alternative, this court should hold that *Hurst* mandates reversal of the death sentence in any case where, as here, Florida's standard penalty-phase jury instructions were read. Those instructions refer on over two dozen occasions to the advisory nature of the jury's upcoming sentencing recommendation, and thus clearly and repeatedly diminish the jury's sense of responsibility in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This court's holding to the contrary in *Combs v. State*, 525 So. 2d 853 (Fla. 1988), has clearly been overtaken by the events of 2016. Just after *Ring v. Arizona*, 536 U.S. 584 (2002), was decided, Justices Pariente and Lewis, concurring in *Bottoson v. Moore*, 833 So. 2d 693 (Fla.

2002), presciently noted that Florida's penalty-phase instructions will need to be reevaluated, since they "emphasize the jury's advisory role." *Bottoson* at 723 (Pariente, J., concurring). *Accord id.* at 731 (Lewis, J., concurring). After *Hurst*, it cannot seriously be asserted that the standard instructions read in this case do not run afoul of *Caldwell*.

In *Caldwell*, counsel for the State argued to the jury that its capital sentencing decision was automatically reviewable by the state supreme court. The United States Supreme Court vacated Caldwell's sentence, firmly holding "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell* at 328-29. That a jury has heard its role diminished by the court, rather than counsel, weighs even more heavily in favor of reversal. The argument of counsel is "likely viewed as the statements of advocates," as distinct from jury instructions, which are "viewed as definitive and binding statements of the law." *Boyde v. California*, 494 U.S. 370, 384 (1990). "The influence of the trial judge on the jury is necessarily and properly of great weight, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946). As noted above, "the last

word" in Florida's standard instructions is an exhortation to carefully consider the jury's sentencing recommendation.

The Supreme Court holds that certain categories of error are "structural" and accordingly not subject to harmless-error analysis. *E.g.*, *Sullivan v. Louisiana*, 508 U.S. 275 (1993). This court engages in similar analysis, in cases addressing "*per se* reversibility." *See Johnson v. State*, 53 So. 3rd 1003, 1007 (Fla. 2010). This court reverses *per se* when the appellate court "would have to engage in pure speculation in order to attempt to determine the potential effect of the error on the jury," as when a jury was not instructed on a lesser included offense one step from the charged offense, or when a jury receives extraneous information during deliberations. *Johnson* at 1008. In *Johnson*, this court held it could not, without speculating, ascertain the effect of a pre-emptive jury instruction stating that no testimony could be read back. As this court has since clarified, similar speculation is not called for where a court declines to read back *specific testimony*. *Cf*. *Hazuri v. State*, 91 So. 3rd 836, 846-47 (Fla. 2012) with *State v. Barrow*, 91 So. 3rd 826, 835 (Fla. 2012). Harmless error analysis is both practical and appropriate in the latter situation. *Hazuri* at 847.

In *Sullivan v. Louisiana*, the Supreme Court applied its "structural error" rule where the jury was misinstructed as to the essence of the reasonable doubt

standard. In that circumstance, per the Court, the jury's findings are vitiated altogether, and thus "there has been no jury verdict within the meaning of the Sixth Amendment" to which harmless-error analysis could be applied. *Sullivan* at 280. As this court did in *Hazuri* and *Barrow*, the Supreme Court in *Sullivan* distinguished less-comprehensive errors, holding that where an impermissible instruction affects a single element of a single offense the appellate court may well, as a practical matter, be able to determine whether the verdict was likely attributable to the error.

The error in this case - instructing the jury at length that its contribution to the proceedings would be merely advisory - is analogous to the errors committed in *Sullivan* and *Johnson*. After *Hurst,* it is for the jury in capital cases to determine not only whether aggravating factors are present, but also whether the showing in mitigation outweighs the aggravating factors. *Hurst* at 622. This court would have to speculate to conclude that every juror in this case would have voted the same way as to whether death was the appropriate sentence, had it been conveyed to them that that decision was theirs and theirs alone. Since this court does not permit itself such speculation, *see Johnson*, *per se* reversal is in order.

The State took the position in the trial court that Sixth Amendment interests are not implicated in any Florida capital case where the defendant was convicted of

a violent felony contemporaneously with the murder. The State has further posited that the only fact needed in Florida to make a defendant eligible for the death penalty is the existence of a single aggravating factor. However, in *Hurst,* the Supreme Court effectively held that the jury must find that *sufficient* facts exist to warrant imposition of the death penalty, and that the showing in mitigation was not outweighed by the showing in aggravation - findings that were made by the court, and not the jury, in this case.

The State has argued in similar cases that it is well within this court's power to craft a procedural remedy for the constitutional problem identified in *Hurst*, because the unconstitutional subsections of Section 921.141 of the Statutes, *i.e.*, subsections 2 and 3, can be severed and discarded, and pipeline cases can then be examined solely for whether they comply with the State's proposed analysis, *i.e.*, solely to determine whether an aggravating factor of the prior-felony or contemporaneous-felony type appears from the record. The State, however, does not grapple with the fact that subsections 2 and 3 of the capital sentencing statute are at its very heart. For severance of an unconstitutional statutory provision to be a valid option, "an act complete in itself" must survive the process,. *E.g.*, *Schmitt v. State*, 590 So. 2d 404, 415 (Fla. 1991).

The State may note that the Court in *Hurst* did not declare Florida's standard

jury instructions for use in capital cases unconstitutional. While this is true, *Hurst* and *Caldwell v. Mississippi*, 472 U.S. 320 (1985), read together with the standard instructions read in this case, inescapably lead to the conclusion that constitutional errors infect the current proceedings to the extent that a new penalty phase cannot be avoided in this case.

CONCLUSION

Appellant has shown that this court should vacate the death sentence appealed from, and remand for a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing supplemental reply brief has been electronically delivered to Assistant Attorney General Suzanne Bechard, at capapp@myfloridalegal.com, and mailed to Appellant this 26th day of February, 2016.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.

Nancy Ryan

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