IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

CASE NO. SC17-707
Lower Tribunal No.
1992CF003708
DEATH PENALTY CASE

GERALD DELANE MURRAY,

Appellee/Cross-Appellant.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT/CROSS-APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee/Cross-Appellant, Gerald Delane Murray, was originally convicted in 1994 of the 1990 first-degree murder, burglary with assault, and sexual battery of Alice Vest. Murray v. State, 692 So.2d 157 (Fla. 1997). The jury recommended death by a vote of 11-1. Murray v. State, 838 So.2d 1073, 1075 (Fla. 2002).[1] This Court reversed the convictions and sentence finding that the trial court's qualification of the expert witness who testified regarding DNA evidence was erroneous. Murray, 692 So.2d at 164.

Thereafter, Murray was retried three more times. The 1998 trial was declared a mistrial due to a hung jury. Murray v. State, 3 So.3d 1108, 1112 (2009). Murray was convicted again in 1999, and sentenced to death with a jury recommendation of 12-0. Murray v. State, 838 So.2d at 1077.[2] This Court reversed the 1999 conviction due to a "unique combination of errors and problems which occurred in the [DNA] tests and the lack of documentation." Id. at 1081.

At the fourth trial in 2003, Murray was again convicted of murder, burglary with assault, and sexual battery and sentenced to

[1] At the 1991 trial, four aggravating factors, including convictions for three prior violent felonies, were found by the trial court and Murray waived mitigation. Murray, 838 So.2d at 1077.

[2] The four aggravating factors were convictions for three prior violent felonies, contemporaneous felonies, crime committed for financial gain, and was especially heinous, atrocious and cruel (HAC) and Murray waived mitigation. Murray, 3 So.3d at 1114.

death after the jury recommended the death penalty 11-1. Murray, 3 So.3d at 1112, 1114. This Court recited the facts as follows:

> The evidence presented at the fourth trial revealed that on September 15, 1990, the victim, Alice Vest, arrived home around 11:30 p.m. after having dinner with a friend. When her friend called the next morning on September 16, however, Ms. Vest did not answer the phone. Concerned, the friend called one of Ms. Vest's neighbors and asked him to check on her. The neighbor went to Ms. Vest's home and observed that one of her window screens was out of the window and that her screen door was propped open. Her phone lines had been cut. After telling his wife to call 911, the neighbor and another man looked inside the home and discovered Ms. Vest's body draped off of her bed with her head on the floor.
>
> According to the medical examiner's testimony, the cause of death was strangulation with multiple stab wounds as a contributing factor. Ms. Vest was also badly beaten with a metal bar, a candlestick holder, and a broken bottle that left bruising around her neck, breasts, and knees. She also had a black eye, a broken jaw, multiple contusions, and at least twenty-four stab wounds over her face, neck, upper and lower back, abdomen and thigh. Most of the stab wounds were knife wounds, but some were consistent with infliction by a pair of scissors found near her body. Ms. Vest had been strangled with a web belt and two electrical cords. She was also both vaginally and anally raped.
>
> According to James Fisher, earlier on September 15, 1990, Murray, Steve Taylor, and Fisher played pool together after which, at around 11:50 p.m., Fisher dropped Murray and

Taylor off at a corner less than a mile from Murray's home. Fisher then went home and went to bed.

Juanita White, who lived approximately two miles from the victim's house, testified that, around 12:40 a.m., she saw Murray and Taylor in her barn and watched the men run away after she sent her dog to attack them. Murray's brother further testified that both Taylor and Murray left town the next day.

Evidence recovered from the scene of the crime included six footprints, five from a Britannia shoe, which Taylor was known to wear, and one that was unidentified. No fingerprints were recovered from the scene that could be tied to either Taylor or Murray. Semen was found inside the victim but the results were inconclusive. Semen was also discovered on a blouse and on a comforter and was found to be the same blood type as Taylor but not Murray. None of the blood spatters at the scene could be tied to either Taylor or Murray. But pubic hairs recovered from the victim's body and from a nightgown were found to have the same microscopic characteristics as Murray's pubic hair, but not Taylor's. Jewelry stolen from the victim's home was linked to both Taylor and Murray.

Additional evidence presented at trial revealed that approximately six months after his indictment for the murder of Alice Vest, Murray escaped from prison. One of his co-escapees, Anthony Smith, testified that, while out, Murray told him about his role in Vest's murder. According to Smith, Murray said that on the night of the murder Taylor came over to his house and wanted to go out. Murray initially refused, but Taylor was eventually able to change his mind after the two drank

> some beer. Thereafter, Taylor convinced Murray to break into a house. Together, the pair broke into what Murray thought was an unoccupied residence. When Murray discovered the owner was home, he wanted to leave, but Taylor grabbed the female occupant, handed Murray a knife, and sexually assaulted her. Afterwards, Murray had the victim perform oral sex on him. Murray then wandered through the house looking for things to steal. He returned to the bedroom five or ten minutes later and discovered that Taylor had stabbed the victim about fifteen or sixteen times but she was not dead. Murray and Taylor then secured some sort of cord and, together, they choked the woman to death. After they killed her, they took whatever was valuable and left. Approximately seven months after his escape, Murray was captured in Las Vegas, Nevada.

Id. at 1112-14. Further,

> [t]he following evidence presented at trial is consistent with Murray's guilt: (1) the testimony of a jailhouse informant (Smith) detailing Murray's confession; (2) the evidence collected from the scene and the testimony of the medical examiner which, together, confirmed the details of the crime as Murray related them to Smith; (3) the testimony of several witnesses who placed Murray with Taylor in the vicinity of the crime near the time the crime was committed; (4) testimony describing the presence of two different shoe prints as well as multiple weapons, implying that more than one person committed this crime; (5) the implication of consciousness of guilt since Murray left town the next day and later escaped from incarceration; (6) evidence connecting Murray and Taylor to Ms. Vest's stolen jewelry; (7) the incriminating statements Murray made to Detective O'Steen; and (8) the presence of pubic hair recovered from Ms. Vest's body and nightgown which was found to have the same

> microscopic characteristics as Murray's known pubic hair. Based on all of the above, we find the evidence sufficient to support a first-degree murder conviction.

Id. at 1125. Additionally, the DNA evidence which caused the reversals of the first conviction in 1994 and the third conviction in 1999, was properly admitted in this trial. Id. at 1115-17.

At sentencing, the jury was instructed that

> it will be your duty to advise the Court as to what punishment should be imposed. . . . You must follow the law that I will now give you and render an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, or whether sufficient aggravating circumstances exist that would outweigh mitigating circumstances that you found to exist.

(Trial Record (R.) at 1534-35). Further, the jury was instructed that "regardless of your findings with respect to aggravating and mitigating circumstances you are never required to recommend a sentence of death." (R. at 1544). The jury was instructed on four aggravating factors, and the trial court found all four aggravating factors as follows:

> (1) Murray was previously convicted of three felonies involving violence (great weight); (2) he was engaged in a burglary and/or sexual battery at the time of the commission of the murder (immense weight); (3) the crime was committed for financial gain (some weight); and (4) the crime was especially heinous, atrocious and cruel (great weight).

Murray, 3 So.3d at 1114; see also (R. at 1536-38). "[P]ursuant to Murray's instructions, the defense did not introduce any mitigation evidence." Murray, 3 So.3d at 1114; see also (R. at 1435-37). However, the jury was instructed to consider the following mitigating circumstances:

> 1. The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance;
>
> 2. The defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor;
>
> 3. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
>
> 4. Any other aspect of the defendant's character or record, and any other circumstance of the offense.

(R. at 1538-39).[3] Finally, the judge instructed the jury that "[i]n these proceedings it is not necessary that the advisory

[3] Even though Murray refused to present mitigation, this Court has stated:

> we expect and encourage trial courts to consider mitigating evidence, even when the defendant refuses to present mitigating evidence. We have repeatedly emphasized the duty of the trial court to consider *all* mitigating evidence "contained anywhere in the record, to the extent it is believable and uncontroverted."

Muhammad v. State, 782 So.2d 343, 363 (Fla. 2001) (emphasis in original), quoting Farr v. State, 621 So.2d 1368, 1369 (Fla. 1993).

sentence of the jury be unanimous. . . . I would remind you that it takes at least seven individuals," or a majority to recommend death. (R. at 1545-46). After instructions on sentencing, the jury was excused to deliberate at 12:30. (R. at 1548). At 12:50, the jury returned with an 11-1 recommendation for death. (R. at 1549-50).

This Court affirmed the conviction and sentence of death on direct appeal. Murray, 3 So.3d at 1126. Murray filed a petition for writ of certiorari in the United States Supreme Court, which was denied. Murray v. Florida, 558 U.S. 949 (2009).

Subsequently, Murray filed numerous motions for post-conviction relief in circuit court. Ultimately, in April 2017, the circuit court issued an "Order Granting in Part and Denying in Part Defendant's Fifth Amended Motion to Vacate Judgments of Conviction and Sentence Under Rule(s) 3.850/3.851" (Order). The Order "denies all of Defendant's claims as they relate to his first-degree murder convictions and grants Defendant a new penalty phase pursuant to Hurst v. Florida and Hurst v. State." (Order at 93). The State now appeals the granted relief.

SUMMARY OF THE ARGUMENT

There is no Hurst v. Florida error as to the first three aggravating factors because they are supported by prior convictions or contemporaneous jury findings and there is no reversible Hurst v. State error as to the fourth aggravating factor

because it was proven beyond a reasonable doubt. The first aggravating factor, that Murray was previously convicted of three felonies involving violence, was supported by prior convictions. The second and third aggravating factors, that Murray was engaged in a burglary and/or sexual battery at the time of the commission of the murder and the crime was committed for financial gain, were supported by the contemporaneous jury findings of guilt for the burglary and sexual battery. Based on the facts in this case, a rational jury would have found the fourth aggravating factor, HAC, unanimously beyond a reasonable doubt if they were properly instructed. There is no reversible error with regard to the aggravating factors in this case.

There is no Hurst v. State error related to mitigation, weighing, and sufficiency of the aggravating evidence because Murray waived mitigation. Murray waived and did not present any mitigation. The absence of the presentation of mitigation eliminated the requirement that the jury weigh the mitigation against the aggravation. Because there was no error regarding the aggravating factors and there was no mitigation to weigh the aggravating factors against, the evidence was sufficient to warrant a sentence of death and there was no error.

Any remaining Hurst v. State error is harmless beyond a reasonable doubt. Had the jury been instructed that in order to impose a sentence of death, unanimity was required, under the facts

and circumstances of this case, a rational jury would have unanimously recommended death. Additionally, Murray's case is distinguishable from the 11-1 cases for which this Court has found Hurst error not harmless beyond a reasonable doubt. Any error was harmless beyond a reasonable doubt.

Because any Hurst v. State error was harmless beyond a reasonable doubt, Murray is not entitled to a new penalty phase and his convictions and sentence should be affirmed. Hurst v. Florida, 136 S. Ct. 616 (2016); Hurst v. State, 202 So.3d 40 (Fla. 2016).

STANDARD OF REVIEW

The circuit court's legal conclusions are reviewed de novo. Franqui v. State, 59 So.3d 82, 92 (Fla. 2011).

ARGUMENT

In Hurst v. Florida, the United States Supreme Court declared the portion of Florida's capital sentencing scheme requiring the judge, rather than a jury, to find each fact necessary to impose a sentence of death unconstitutional in light of Ring.[4] Hurst, 136 S. Ct. at 619; Ring v. Arizona, 536 U.S. 584 (2002). Because "a judge increased Hurst's authorized punishment based on her own factfindng" from life without parole to death, the Court held that

[4] Murray's judgment and sentence became final after Ring, and the parties do not dispute that this Court has applied Hurst retroactively to post-Ring cases. See Mosley v. State, 209 So.3d 1248 (Fla. 2016).

the sentence of death violated the Sixth Amendment. Hurst, 136 S. Ct. at 620, 622. In Ring, the Court held that the jury was required to find at least one aggravating factor necessary for imposition of the death penalty in order to comply with the Sixth Amendment. Ring, 536 U.S. at 609. In extending Ring to Hurst, the Court held that the Florida Statute violated the Sixth Amendment specifically because it "required the judge alone to find the existence of an aggravating circumstance." Hurst, 136 S. Ct. at 624.

On remand, this Court interpreted Hurst v. Florida, the Florida Constitution, and Florida jurisprudence as requiring, before the imposition of the death penalty, that a jury

> unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Hurst, 202 So.3d at 57. In addition to the unanimity requirement stemming from the Sixth Amendment as explained by Hurst v. Florida, this Court also held that unanimity "serves th[e] narrowing function required by the Eighth Amendment" to ensure that death is not "arbitrarily imposed, but . . . reserved only for defendants convicted of the most aggravated and least mitigated murders." Id. at 60.

As this Court has recognized, Hurst error is subject to harmless error review. Hurst, 202 So.3d at 68. Such "error is harmless only if there is no reasonable possibility that the error contributed to the sentence." Id.; citing Zack v. State, 753 So.2d 9, 20 (Fla. 2000); see also State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986). The harmless error test in DiGuilio is derived from Chapman. Chapman v. California, 386 U.S. 18, 24 (1967).

> In the context of a Hurst v. Florida error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the] death sentence in [a] case.

Hurst, 202 So.3d at 68. Further, "[w]here the jury has not been instructed to find an element of the offense, the test for harmless error asks whether it is clear beyond a reasonable doubt that a rational jury would have found the element of the offense." Jones v. State, 212 So.3d 321, 344 (Fla. 2017); citing Neder v. United States, 527 U.S. 1, 18 (1999). When assessing harmless error pursuant to the requirements of Hurst v. State, "it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances" in order to find Hurst error was harmless beyond a reasonable doubt. Davis v. State, 207 So.3d 142, 174 (Fla. 2016).

Although this Court has described the harmless-error test in terms of what a rational jury would find, this Court has, instead, applied the test in a black-and-white manner, finding harmless error only in cases involving unanimous jury recommendations and finding harmful error in cases that had non-unanimous jury recommendations. In cases with non-unanimous recommendations, this Court has determined that the non-unanimous jury recommendation made it "impossible" to conclude that the Hurst error was harmless. See, e.g., Hojan v. State, 212 So.3d 982, 1000 (Fla. 2017) ("Given the jury vote of nine to three to recommend a sentence of death, it is impossible for this Court to conclude that the Hurst error in this case was harmless beyond a reasonable doubt."). The Court has further explained that "any attempt to determine what findings were made by the jurors who voted for life and the jurors who voted for death would amount to speculation and cannot rise to the level of proof beyond a reasonable doubt." Hertz v. Jones, 218 So.3d 428, 432 (Fla. 2017).

Being bound by this Court's precedent, the lower court in this case only looked to the non-unanimous jury recommendation to conclude that the Hurst error was harmful. The State respectfully submits that the lower court, and this Court, have misapplied the harmless-error test outlined in Jones and Davis regarding what a "rational jury" "would have unanimously found." A correct analysis should include a review of what a properly-instructed, rational

jury would do, rather than what the actual jury panel did in this case, as the jury was never instructed that a unanimous recommendation was necessary.

The Supreme Court of the United States has recently agreed with this interpretation of the reasonable-jury standard in Hutton. Jenkins v. Hutton, 137 S. Ct. 1769 (2017). Hutton involved a defaulted federal due process claim regarding the trial court's failure to instruct the jury that when weighing the aggravating and mitigating factors, they could only consider the two aggravators that they had found during the guilt phase.

The Sixth Circuit determined that it could review the defaulted federal claim to avoid a fundamental miscarriage of justice. Jenkins, 137 S. Ct. at 1771. It reasoned that a "petitioner may obtain review of a defaulted claim upon 'show[ing] by clear and convincing evidence that, but for a constitutional error, no reasonable jury would have found [him] eligible for the death penalty under the applicable state law.'" Id., quoting Sawyer v. Whitley, 505 U.S. 333, 336 (1992).

The United States Supreme Court found that the Sixth Circuit erred in reaching the merits of Hutton's claim. Hutton, 137 S. Ct. at 1772. The Court further explained that if the trial court's error in instructing the jury during the penalty phase could provide a basis for excusing the procedural default in Hutton's case, the relevant question would be, "[w]hether, given *proper*

instructions about the two aggravating circumstances, a reasonable jury could have decided that those aggravating circumstances outweighed the mitigating circumstances." Id. (emphasis in original). Instead, the Sixth Circuit had considered "whether the alleged error might have affected the jury's verdict, not whether a properly instructed jury could have recommended death." Id. The Court concluded that neither Hutton nor the Sixth Circuit has shown that, if properly instructed, "no reasonable jury would have concluded that the aggravating circumstances in Hutton's case outweighed the mitigating circumstances." Id., quoting Sawyer, 505 U.S. at 336. As Hutton demonstrates, merely relying on whether the jury verdict was unanimous or non-unanimous is an insufficient harmlessness analysis.

This Court has held Hurst error to be harmless beyond a reasonable doubt in 14 cases.[5] In each of these cases, the jury

[5] See Bevel v. State, 221 So.3d 1168, 1175 (Fla. 2017); Cozzie v. State, No. SC13-2393, 2017 WL 1954976, *13 (Fla. May 11, 2017); Guardado v. Jones, No. SC17-389, 2017 WL 1954984, *2 (Fla. May 11, 2017); Morris v. State, 219 So.3d 33, 46 (Fla. 2017); Tundidor v. State, 221 So.3d 587, 605 (Fla. 2017); Oliver v. State, 214 So.3d 606, 617-18 (Fla. 2017); Middleton v. State, 220 So.3d 1152, 1185 (Fla. 2017); Jones v. State, 212 So.3d 321, 343-44 (Fla. 2017); Truehill v. State, 211 So.3d 930, 956-57 (Fla. 2017); Hall v. State, 212 So.3d 1001, 1034-36 (Fla. 2017); Kaczmar v. State, No. SC13-2247, 2017 WL 410214 (Fla. Jan. 31, 2017); Knight v. State, 225 So.3d 661, 682-83 (Fla. 2017); King v. State, 211 So.3d 866, 890-93 (Fla. 2017); Davis v. State, 207 So.3d 142, 175 (Fla. 2016).

unanimously recommended the death penalty.[6] This Court has routinely concluded that the "unanimous recommendation begins 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." King v. State, 211 So.3d 866, 890 (Fla. 2017).

This Court has mentioned several other factors as persuasive in determining harmlessness. These factors include: whether any aggravating factors were struck during appellate review, Bevel v. State, 221 So.3d 1168, 1175 (Fla. 2017); the "extreme aggravation . . . both HAC and during the commission of a burglary . . . [which] are among the most serious aggravating factors," Middleton v. State, 220 So.3d 1152, 1185 (Fla. 2017); the prior violent felonies as well as the medical examiner's testimony in support of HAC and cold, calculated, and premeditated (CCP), Jones, 212 So.3d at 344; the fact that the defendant did not contest any of the aggravating factors as improper, Truehill v. State, 211 So.3d 930, 957 (Fla. 2017); three of the four aggravators (two previous convictions and one contemporaneous conviction) "were without and beyond dispute," Hall v. State, 212 So.3d 1001, 1035, fn. 13 (Fla.

[6] The two unanimous cases where the sentence was reversed was done so on proportionality and ineffective assistance of counsel grounds. See Wood v. State, 209 So.3d 1217, 1226, 1238 (Fla. 2017) (vacating the sentence because "his death sentence is disproportionate when [CCP and avoid arrest] aggravating factors are struck"); Bevel, 221 So.3d at 1182 (Fla. 2017) (vacating the 12-0 death sentence due to ineffective assistance of counsel).

2017); the egregious facts and aggravators of prior violent felony and HAC, being two of the weightiest, Kaczmar v. State, No. SC13-2247, 2017 WL 410214, *4 (Fla. Jan. 31, 2017); Knight v. State, 225 So.3d 661, 683 (Fla. 2017).

Though finding Hurst error harmless beyond a reasonable doubt is a rare occurrence, it should not be limited to those cases in which the jury recommendation was unanimous. Unanimity certainly helps in the harmlessness determination, as this Court has recognized. However, it is not the only factor to consider, nor is it the sole deciding factor.

This Court has similarly held all non-unanimous post-Ring jury recommendations, approximately 55 cases, as not harmless beyond a reasonable doubt. Starting with Hurst v. State, this Court has held the error not harmless for a variety of reasons. In applying the harmless error test from Chapman and DiGuilio, this Court engaged in the following detailed examination and analysis of the effect of the erroneous instructions and their influence on the jury verdict. See DiGuilio, 491 So.2d at 1135.

> [A]fter a detailed review of the evidence presented as proof of the aggravating factors and evidence of substantial mitigation, we are not so sanguine as to conclude that Hurst's jury would without doubt have found both aggravating factors—and, as importantly, that the jury would have found the aggravators sufficient to impose death and that the aggravating factors outweighed the mitigation. The jury recommended death by only a seven to five vote, a bare majority.

> Because 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 may 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. Nevertheless, the fact that only seven jurors recommended death strongly suggests to the contrary.

Hurst, 202 So.3d at 68. Such detailed analysis should be performed in every case irrespective of the jury's numerical vote.

In performing this detailed harmlessness analysis for this case, it is obvious that Murray's case is significantly distinguishable from Hurst. First, in Murray, the vote was 11-1, a much more confident majority which indicates that a rational jury would have made the required findings if properly instructed. Second, three of Murray's four aggravators were proven unanimously, as supported by the prior convictions and the contemporaneous jury findings. Further, a rational jury would have found unanimously, based on the facts in this case, that the fourth aggravating factor was proven beyond a reasonable doubt if they had been so instructed. Third, unlike the significant mitigation in Hurst, Murray waived mitigation, and thus no mitigation was presented to the jury. Fourth, because Murray waived mitigation, the jury had nothing to weigh against the aggravation. Finally, it is known that a rational jury could have

unanimously recommended death in Murray's case because a jury previously unanimously recommended death.

Though this Court has yet to find any non-unanimous cases harmless beyond a reasonable doubt, under the right circumstances, such a finding is viable. The facts of Murray's case are such that the State can prove such harmlessness. Even though the jury recommendation was not unanimous, the Hurst error is harmless beyond a reasonable doubt in Murray's case.

ISSUE I: THERE IS NO HURST V. FLORIDA ERROR AS TO THE FIRST THREE AGGRAVATING FACTORS BECAUSE THEY ARE SUPPORTED BY PRIOR CONVICTIONS OR CONTEMPORANEOUS JURY FINDINGS AND THERE IS NO REVERSIBLE HURST V. STATE ERROR AS TO THE FOURTH AGGRAVATING FACTOR BECAUSE IT WAS PROVEN BEYOND A REASONABLE DOUBT

A rational jury would have found the aggravating factors in Murray's case if properly instructed, thus there was no reversible error under Hurst v. Florida and Hurst v. State. The four aggravating factors in Murray's case were: (1) three prior felony convictions of crimes of violence; (2) contemporaneous felonies of burglary and sexual battery; (3) the murder was committed for financial gain; and (4) HAC. Murray, 3 So.3d at 1114.

A rational jury would find that the first aggravating factor, three prior violent felony convictions, was proven unanimously beyond a reasonable doubt, because this finding had already occurred prior to Murray's murder trial. In order to find someone guilty of a crime, a jury must find unanimously that the State

proved the crime beyond a reasonable doubt. Prior convictions have already been subjected to both the unanimity and the beyond a reasonable doubt standards. "[O]ne narrow exception to the Sixth Amendment requirement that a jury must find any fact that increases the maximum sentence: the fact of a prior conviction, as established in Almendarez-Torres."[7] Jackson v. State, 213 So.3d 754, 787 (Fla. 2017), citing Almendarez-Torres v. United States, 523 U.S. 224 (1998); see also Durousseau v. State, 218 So.3d 405, 414-15 (Fla. 2017)("the aggravating circumstance of a prior violent felony was found unanimously by virtue of Durousseau's previous murder convictions . . ."). Thus, Murray's three prior violent felony convictions, the basis for aggravating factor one, were supported by prior convictions.

In Murray's trial, this jury unanimously found Murray guilty beyond a reasonable doubt of the contemporaneous burglary and sexual battery of his murder victim. The contemporaneous burglary and sexual battery were the basis for aggravating factor two. The contemporaneous burglary was the basis for aggravating factor three, that the crime was committed for financial gain. This Court concluded in Jackson that "the jury in this case was not required to find the existence of the aggravating circumstance that Jackson

[7] This Court recognized that Almendarez-Torres was questioned by Alleyne but not expressly overruled and thus remains valid precedent. Jackson v. State, 213 So.3d 754, 787 (Fla. 2017); Alleyne v. United States, 133 S. Ct. 2151, 2160, fn. 1 (2013).

committed the murder during the course of sexual battery because he had already been convicted of sexual battery at the time he was sentenced." Jackson, 213 So.3d at 788. Thus, aggravating factors two and three in Murray's case were found unanimously by a jury beyond a reasonable doubt.

A rational jury would have unanimously found that aggravating factor four, HAC, was proven beyond a reasonable doubt. Both HAC and CCP are aggravating circumstances that stem from the facts of a case that are used to prove the underlying first-degree murder. Typically, neither are directly supported by prior convictions nor contemporaneous jury findings unless there are interrogatory jury findings. In Jones, the three aggravating factors were prior violent felony, HAC, and CCP. Jones, 212 So.3d at 344. This Court found

> [b]ased on the evidence presented at trial through [the medical examiner's] testimony and the certified copies of Jones's prior violent felony convictions, we are convinced beyond a reasonable doubt that no rational jury would have failed to unanimously find that all three aggravating circumstances were proven beyond a reasonable doubt.

Id. Here, like in Jones, HAC was also proven with the medical examiner's testimony, specifically

> the cause of death was strangulation with multiple stab wounds as a contributing factor. Ms. Vest was also badly beaten with a metal bar, a candlestick holder, and a broken bottle that left bruising around her neck, breasts, and knees. She also had a black eye, a broken

> jaw, multiple contusions, and at least twenty-four stab wounds over her face, neck, upper and lower back, abdomen and thigh. Most of the stab wounds were knife wounds, but some were consistent with infliction by a pair of scissors found near her body. Ms. Vest had been strangled with a web belt and two electrical cords. She was also both vaginally and anally raped.

Murray, 3 So.3d at 1113. Under the facts and circumstances of this case, as in Jones, this Court can be convinced that HAC was also proven beyond a reasonable doubt.

In contrast to both this case and Jones, the trial court in Jackson instructed the jury on both HAC and CCP. Jackson, 213 So.3d at 788-89. Jackson contested the HAC aggravating circumstance both at trial and on appeal. Id. Without deciding whether HAC was properly found by the trial court, this Court "conclude[d] that the judicial finding of this contested aggravating circumstance—which is by nature a fact-intensive inquiry—was not harmless beyond a reasonable doubt." Id. Additionally, the trial court instructed the jury on CCP but ultimately found that the State failed to prove CCP beyond a reasonable doubt. Id. Unlike Jackson, Murray failed to contest HAC, CCP was not considered, and the jury was not instructed on an aggravator that the court later found was not proven beyond a reasonable doubt. Thus, Murray is comparable to Jones and distinguishable from Jackson.

Further supporting that a rational jury would find that HAC was proven beyond a reasonable doubt in Murray's case, is the fact that Murray did not contest HAC as an aggravating factor on appeal. This Court has found that a defendant's failure to contest the aggravating factors on appeal is persuasive in determining whether Hurst error was harmless beyond a reasonable doubt. See Truehill, 211 So.3d at 957. Murray did not contest any of the aggravating factors on appeal. Murray, 3 So.3d at 1114.

A rational jury would find that these aggravating circumstances are sufficient to warrant a death sentence in Murray's case. "Qualitatively, prior violent felony and HAC are among the weightiest aggravators set out in the statutory sentencing scheme." Hodges v. State, 55 So.3d 515, 542 (Fla. 2010). Further, this Court performed a proportionality review during Murray's direct appeal. Murray, 3 So.3d at 1125-26. This Court held:

> The circumstances in the instant case reveal murder by strangulation preceded by beating, stabbing, burglary, and sexual battery. The crime was committed for financial gain and [HAC].

Id. In comparing Murray's case to three other cases with similar facts, this Court found the death sentence to be proportionate. Id.; see Johnston v. State, 841 So.2d 349 (Fla. 2002); Mansfield v. State, 758 So.2d 636 (Fla. 2000); Taylor v. State, 630 So.2d 1038 (Fla. 1993). Thus, this Court can be confident that the

aggravating factors in Murray's case were sufficient to warrant a death sentence.

If instructed properly, a rational jury would have unanimously found the existence of the aggravating factors beyond a reasonable doubt in Murray's case. Aggravating factor one, three prior violent felonies, were supported by prior convictions. Aggravating factors two and three, were supported by the contemporaneous felonies for which this jury in this trial unanimously found Murray guilty beyond a reasonable doubt. The facts in this case supporting aggravating factor four, HAC, were such that a rational jury would have found its existence unanimously and beyond a reasonable doubt. Thus, because three aggravating factors were supported by prior convictions or supported by contemporaneous jury findings, there is no Hurst v. Florida error. Because a rational jury would have unanimously found the fourth aggravating factor beyond a reasonable doubt if so instructed, there is no reversible Hurst v. State error.[8]

[8] The State acknowledges that this Court has rejected the argument that prior convictions and contemporaneous jury findings insulate a case from Hurst error. See Franklin v. State, 209 So.3d 1241 (Fla. 2016). However, the State maintains that the existence of prior convictions or contemporaneous jury findings to support the aggravators in a case should be an extremely weighty consideration in this Court's harmless error analysis.

ISSUE II: THERE IS NO HURST V. STATE ERROR RELATED TO MITIGATION AND WEIGHING BECAUSE MURRAY WAIVED MITIGATION

Because Murray waived the presentation of mitigation evidence, there was no Hurst v. State error related to mitigation. Further, the waiving of mitigation necessarily eliminates the need to weigh mitigation against the aggravation. Because the weighing of mitigation was eliminated, there was no Hurst v. State error related to weighing.

Murray knowingly and voluntarily waived the presentation of mitigating evidence at his trial and as a result, no mitigation evidence was presented. Murray, 3 So.3d at 1114. Similar to Murray, Jones also waived mitigation. As this Court said in Jones, a defendant "cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence." Jones, 212 So.3d at 343, fn. 3, quoting Mullens v. State, 197 So.3d 16, 40 (Fla. 2016), cert. denied, 137 S. Ct. 672 (2017); see also Kaczmar, 2017 WL 410214 at *5-6. As discussed above, this Court found the Hurst error in Jones to be harmless beyond a reasonable doubt.

It appears from this Court's precedent that the greatest impediment for the State in proving that Hurst error is harmless beyond a reasonable doubt in non-unanimous cases is showing that the jury unanimously found that the aggravation outweighed the

mitigation. As this Court has repeatedly examined regarding non-unanimous cases,

> [t]he most that can be gleaned from the jury's recommendation is that one juror concluded that sufficient aggravation, if it existed, did not outweigh the mitigation presented. This nonunanimous advisory recommendation cannot be overlooked in our harmless error analysis. The fact that a single juror in this case apparently concluded that the aggravation was not sufficient to outweigh the mitigation is itself evidence of reasonable doubt that a different result might have occurred but for the Hurst v. Florida error.

Jackson, 213 So.3d at 787; see also Williams v. State, 209 So.3d 543, 567 (Fla. 2017); Simmons v. State, 207 So.3d 860, 865-67 (Fla. 2016); Kopsho v. State, 209 So.3d 568, 570 (Fla. 2017); Armstrong v. State, 211 So.3d 864, 867 (Fla. 2017).

In Murray's case, weighing is not a concern. Three of the four aggravators were supported by prior convictions and contemporaneous jury findings. Two of the four aggravators, prior violent felonies and HAC, are considered two of the weightiest aggravating factors. See Kaczmar, 2017 WL 410214, *4; Knight, 225 So.3d at 683. This Court determined that the death sentence was proportionate in this case. Under these facts and in conjunction with Murray's waiver of mitigation, this Court can be confident beyond a reasonable doubt that a rational jury that was properly instructed would have found unanimously and beyond a reasonable

doubt that the significant aggravating factors outweighed an absence of mitigation.

Murray presented no mitigation evidence. The aggravating factors certainly outweighed no mitigation. Since a rational jury, if properly instructed, would have found unanimously beyond a reasonable doubt that the aggravating factors outweighed no mitigation, there was no Hurst v. State error related to mitigation or weighing.

ISSUE III: ANY REMAINING HURST V. STATE ERROR IS HARMLESS BEYOND A REASONABLE DOUBT

Though the jury in Murray's case recommended death by a vote of 11-1, any remaining Hurst error is harmless beyond a reasonable doubt. The State can demonstrate such harmlessness because: (1) three of the four aggravating factors were supported by prior convictions or contemporaneous jury findings; (2) a rational jury would have found the final aggravating factor, HAC, unanimously beyond a reasonable doubt; (3) Murray did not contest the aggravating factors as improper; (4) a rational jury would have found the aggravating factors were sufficient to impose the death penalty; (5) Murray waived mitigation; (6) the waiving of mitigation eliminated the weighing requirement; (7) a rational jury would have unanimously recommended death if they had been instructed that unanimity was required; and (8) Murray's case is

distinguishable from the 11-1 cases for which this Court has found Hurst error not harmless beyond a reasonable doubt.

In determining what a rational jury would have found, this Court has demonstrated a reluctance to speculate as to why a recommendation was not unanimous.

> Without written findings, any attempt to discern what mitigation the four jurors who recommended against death relied on, what aggravating factors, if any, were found unanimously to be sufficient to impose a sentence of death, and why the jury gave such disparate recommendations in this case would be mere speculation.

Mosley v. State, 209 So.3d 1248, 1284 (Fla. 2016); see also Ault v. State, 213 So.3d 670, 680 (Fla. 2017)("any attempt to discern what jurors would have done if properly instructed under Hurst is purely speculative"). In Murray's case, there are two factors that significantly reduce the speculation as to why one juror voted for life: (1) a jury previously unanimously recommended a death sentence for Murray; and (2) deliberation on the sentence lasted less than 30 minutes.

This was Murray's fourth trial. Three trials resulted in death sentences with a jury recommendation of 11-1 for the first trial, 12-0 for the third trial, and 11-1 for the final trial. The third trial was remanded by this Court because of problems with the DNA evidence. In the fourth trial, those problems were resolved prior to trial and the DNA evidence was properly admitted.

The third trial demonstrated that a rational jury that heard the evidence in Murray's case could unanimously recommend a death sentence. Since a rational jury already unanimously recommended a death sentence for Murray, after hearing evidence of the same four aggravating factors and having no mitigation presented by the defense, this Court can hold that the Hurst error was harmless beyond a reasonable doubt like it has done with all other cases in which the jury unanimously recommended death.

As was proper under the law at the time of Murray's final trial, the jury was instructed that a simple majority would be sufficient for a recommendation of death. (R. at 1545-46). "[J]uries not required to reach unanimity tend to take less time deliberating and cease deliberating when the required majority vote is achieved rather than attempting to obtain a full consensus." Hurst, 202 So.3d at 58; citing Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 Harv. L. Rev. 1261, 1272-73 (2000). In Murray's case, the jury deliberated for less than 30 minutes. This short deliberation indicates the jury merely determined there was a majority and voted immediately. "Another study disclosed that capital jurors work especially hard to evaluate the evidence and reach a unanimous verdict where they can find agreement." Hurst, 202 So.3d at 58; citing Scott E. Sundby, War & Peace in the Jury Room: How Capital Juries Reach Unanimity, 62 Hastings L.J. 103 (2010). Given this research, the less than

30-minute deliberation, the 11-1 vote, and the previous unanimous verdict, this Court can be confident that a rational jury would have unanimously recommended death had they been instructed that unanimity was required.

Murray's case is distinguishable from the other non-unanimous cases where this Court did not find the Hurst error harmless beyond a reasonable doubt. Of the post-Ring non-unanimous cases reviewed, this Court has considered harmlessness in 11 cases where the jury recommended death by a vote of a 11-1.[9] In none of these cases has this Court found that the Hurst error was harmless beyond a reasonable doubt.

In Johnson, this Court stated that

> [o]n this record, with a non-unanimous jury recommendation and a substantial volume of mitigation evidence, we simply cannot conclude, beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency.

Johnson v. State, 205 So.3d 1285, 1290 (Fla. 2016) (internal citation and punctuation omitted). Since Murray did not present mitigation, the same concern is not present in this case.

[9] See Johnson v. State, 205 So.3d 1285 (Fla. 2016); McGrith v. State, 209 So.3d 1146 (Fla. 2017); Brooks v. Jones, No. SC16-532, 2017 WL 944235 (Fla. Mar. 10, 2017); Jackson, 213 So.3d at 787; Orme v. State, 214 So.3d 1269 (Fla. 2017); Card v. Jones, 219 So.3d 47 (Fla. 2017); Pasha v. State, 225 So.3d 688 (Fla. 2017); Okafor v. State, 225 So.3d 768 (Fla. 2017); Braddy v. State, 219 So.3d 803 (Fla. 2017); Bailey v. Jones, 225 So.3d 776 (Fla. 2017); Dennis v. State, No. SC16-1581, 2017 WL 2888700 (Fla. Jul. 7, 2017).

In McGrith, this Court stated, "there is no way of knowing . . . if any aggravators that were unanimously found were also unanimously found to be sufficient to qualify for the death penalty." McGrith v. State, 209 So.3d 1146, 1164 (Fla. 2017). Further, McGrith's mitigation evidence was given significant weight by the court, including that the defendant was only 18 years old. Id. This Court concluded that "there is no way to know whether the jury unanimously found that any mitigation established during the penalty phase was outweighed by the aggravation." Id. In Murray's case, these concerns are not present. Three of the four aggravating factors were supported by prior convictions and contemporaneous jury verdicts. Combined with the fact that Murray declined to present mitigation, there is no concern that the aggravation did not outweigh the mitigation.

This Court did not write an opinion in support of the granting of the petition for writ of habeas corpus in Brooks. Brooks v. Jones, No. SC16-532, 2017 WL 944235, *1 (Fla. Mar. 10, 2017). In Brooks, the jury recommended death 11-1 for one murder and 9-3 for the second murder. Brooks v. State, 918 So.2d 181 (Fla. 2005). Like Murray, Brooks waived mitigation, but there are still significant distinctions. In Brooks, not only was HAC an aggravating factor, but CCP was as well. Id. It is unknown if the jury unanimously found HAC and CCP beyond a reasonable doubt as aggravating factors as the jury instructions at the time of

this trial did not require such findings. Id. Further, on appeal, Brooks contested, and this Court agreed, that the trial court erred in using the contemporaneous felony of aggravated child abuse as an aggravator. Id. at 197-200. Murray did not challenge any aggravating factors on appeal, and only HAC, not CCP, was used as an aggravator in Murray's case. Murray, 3 So.3d at 1114. Instead of the two aggravating factors that were not directly supported by prior convictions or jury findings in Brooks, in Murray's case, there was only HAC.

This Court concluded in Jackson that the "most that can be gleaned from the jury's recommendation is that one juror concluded that sufficient aggravation, if it existed, did not outweigh the mitigation presented." Jackson, 213 So.3d at 787. The State merely presented a victim impact statement during the penalty phase to support both HAC and CCP, whereas Jackson presented significant mitigation, including low IQ and scoring a rare 10/10 on the Adverse Childhood Experiences Test. Id. at 766-68. In Jackson, both HAC and CCP were not supported by prior convictions or jury findings. Since Murray waived mitigation and CCP was not one of the aggravating factors presented to the jury, Murray's case is distinguishable.

This Court concluded in Orme that the error was not harmless beyond a reasonable doubt because "it is impossible for this Court to determine which, if any, of the aggravators the jury would have

found unanimously if properly instructed" and if "there were sufficient aggravating factors to outweigh the mitigating circumstances." Orme v. State, 214 So.3d 1269, 1274 (Fla. 2017). Orme presented mitigation at trial including an extensive history of substance abuse and other mental health issues. Orme v. State, 25 So.3d 536, 543 (Fla. 2009). Orme also challenged the aggravating factors and the trial judge's limitation of presentation of mitigation on appeal. Orme, 214 So.3d at 1271-72; Orme, 25 So.3d at 542-43, 548. Additionally, though Orme's final conviction had a jury recommendation of 11-1, his original conviction had a jury recommendation of death 7-5. Orme v. State, 677 So.2d 258, 261 (Fla. 1996); see Orme v. State, 896 So.2d 725, 740 (Fla. 2005) (reversing and remanding in part "based on a finding of ineffective assistance of counsel during the penalty phase for failing to investigate and present Orme's bipolar disorder diagnosis"). In Murray's prior trials, the jury recommended death 11-1 and 12-0. Murray did not present mitigation and did not challenge the aggravating factors on appeal.

In Card, this Court stated that it "has no way of knowing if the jury unanimously found each aggravating factor, whether the aggravating factors were sufficient to impose a death sentence, or whether the aggravating factors outweighed the mitigating circumstances." Card v. Jones, 219 So.3d 47, 48 (Fla. 2017). Card presented mitigation at trial and this Court found error with the

trial court's treatment of the mitigation. Card v. State, 803 So.2d 613, 626-27 (Fla. 2001). Card also challenged the aggravating factors on appeal. Id. at 613, 618-19, fn. 3. Additionally, this Court found that specific testimony "exceeded the proper bounds of victim impact evidence," though the issue was not preserved for review. Id. at 627-28. In contrast, Murray presented no mitigation, did not challenge the aggravating factors, and this Court did not find any errors with victim impact testimony.

In Pasha, this Court mentioned only the non-unanimous jury recommendation in finding that the error was not harmless. Pasha v. State, 225 So.3d 688, 717 (Fla. 2017). Pasha presented mitigation evidence, and on direct appeal, challenged the aggravating circumstances which included both HAC and CCP. Id. at 698-99, fns. 5-6. Both HAC and CCP were not supported by prior convictions or jury findings. Murray did not present mitigation, did not challenge the aggravating circumstances, and did not have CCP as an aggravating circumstance in his case.

In Okafor, this Court again relied on the non-unanimous jury recommendation alone to find that the error was not harmless, stating: "To find the error harmless in this case, we would be required to speculate why one juror was persuaded that death was not the appropriate penalty." Okafor v. State, 225 So.3d 768, 775 (Fla. 2017). Okafor presented mitigation evidence including a

difficult childhood during which he was physically, emotionally, and sexually abused. Id. at 772, fn. 5. Additionally, both HAC and CCP were aggravating circumstances in Okafor's case, neither of which were directly supported by prior convictions or jury findings. Murray did not present mitigation and CCP was not an aggravating factor in his case.

In Braddy, this Court again relied on the non-unanimous jury recommendation alone in finding the Hurst error was not harmless beyond a reasonable doubt. Braddy v. State, 219 So.3d 803, 826-27 (Fla. 2017). Mitigation was presented to the jury, the substance of which was listed in his sentencing memorandum which included 67 non-statutory mitigating factors. Id. at 814. Braddy also challenged the aggravating factors on appeal. Id. at 814-15. Murray waived all mitigation and failed to challenge the aggravating factors on appeal.

In Bailey, this Court found:

> While the two aggravators in this case are such that no reasonable juror would have failed to find their existence, based on the jury's eleven-to-one recommendation for a sentence of death, we cannot determine that the jury unanimously found that the aggravating factors were sufficient to impose a sentence of death. Nor can we "determine that the jury unanimously found that the aggravators outweighed the mitigation."

Bailey v. Jones, 225 So.3d 776, 777 (Fla. 2017), quoting Kopsho, 209 So.3d at 570. Bailey presented mitigating evidence of brain

damage, Post Traumatic Stress Disorder, substance abuse, and personality disorders. Bailey v. State, 998 So.2d 545, 550 (Fla. 2008). Baily challenged proportionality on appeal, arguing that "the aggravators and mitigators" when weighed cause his death sentence to be disproportionate. Id. at 552. Again, Murray presented no mitigation and did not challenge the proportionality on review, though this Court independently reviewed the proportionality.

In Dennis, this Court vacated the sentence and remanded for a new penalty phase pursuant to Hurst, but did not further explain the rationale. Dennis v. State, No. SC16-1581, 2017 WL 2888700, *1 (Fla. Jul. 7, 2017). However, HAC and CCP were both aggravating factors, both of which Dennis challenged on appeal. Dennis v. State, 817 So.2d 741, 750, 764 (Fla. 2002). Both HAC and CCP were not supported by prior convictions or jury findings. Dennis also presented mitigation evidence and Dennis challenged the proportionality of the death sentence in his case. Id. Murray's case did not include CCP, Murray did not challenge the aggravating factors on appeal, did not present mitigation, and he did not challenge proportionality, though this Court independently reviewed proportionality.

Each of the 11-1 verdicts that this Court has found were not harmless beyond a reasonable doubt can be distinguished from Murray's case. Further, because the State has satisfied its burden

of establishing that any Hurst error was harmless beyond a reasonable doubt, this Court should affirm Murray's death sentence.

CONCLUSION

In conclusion, Appellant/Cross-Appellee respectfully requests that this Honorable Court vacate the portion of the post-conviction court's Order granting Murray a new penalty phase. Because the State has demonstrated that any Hurst error in this case was harmless beyond a reasonable doubt, this Court should affirm Murray's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 3rd day of November, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Joe Hamrick, Esq., at joe@sichtalaw.com, Attorney for Appellee/Cross-Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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