

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-824**

QUAWN M. FRANKLIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT OF FIFTH JUDICIAL
CIRCUIT 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. Franklin relies on the merits of his Initial Brief.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING FRANKLIN’S CLAIM THAT HIS DEATH SENTENCE IS UNCONSTITUTIONAL UNDER *HURST V. FLORIDA*.

The Appellee argues that the jury’s unanimous death recommendation and the special interrogatory verdict form conclusively establish that any *Hurst* error in this case was harmless beyond a reasonable doubt. This is incorrect and objectively an unreasonable application of law, as well as an objectively unreasonable determination of the facts. Franklin’s jury made only a *recommendation* to impose the death penalty and a unanimous finding regarding four aggravating factors, without making any findings of fact as to sufficiency of aggravating circumstances and the relative weight of aggravating and mitigating circumstances.

In *Hurst v. State*¹, this Court held that, under *Hurst v. Florida*² and the Sixth and Eighth Amendments, Florida juries must render unanimous fact-finding, under a beyond-a-reasonable-doubt standard, as to: (1) the aggravating factors; (2) whether those specific aggravators are together “sufficient” to impose the death penalty; and

¹ *Hurst v. State*, 202 So.3d 40 (Fla. 2016).

² *Hurst v. Florida*, 136 S. Ct. 616 (2016).

(3) whether those specific aggravators together outweigh the mitigation. *Hurst v. State*, 202 So. 3d at 53-59. The Court also clarified that the jury’s unanimous findings on the necessary elements must precede the jury’s vote to make an overall recommendation for death. *Id.* at 57 (“[B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must 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.”).

Thus, even in cases like Franklin’s where the jury unanimously *recommended* death and found four aggravating circumstances, a reviewing court cannot know whether the jury in fact unanimously found—or a hypothetical jury in a constitutional proceeding would have unanimously found—all the other requisite elements for a death sentence. There remains a reasonable probability that individual jurors, or sub-groups of jurors, based their overall recommendation for death on a different underlying calculus. Certain jurors may not have agreed that a specific set of aggravating factors considered by other jurors was sufficient for the death penalty or outweighed the mitigation. Accordingly, it cannot be said that all

jurors agreed as to each of the necessary findings for the imposition of the death penalty under Florida law³.

Moreover, the Court cannot be certain that Franklin's jury would have declined to exercise its discretion to recommend a life sentence after itself making the findings of fact on the other required elements, as it would have been entitled to do under Florida law. *See Fla. Stat. § 921.141(3)(2)* (revised Florida capital sentence statute providing that, even if the jury recommends death, "the court, after considering each aggravating factor found by the jury and all the mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury."). In the harmless error context, it cannot be assumed that the jury's exercise of its discretion to recommend a life sentence would have been the same in a post-*Hurst* proceeding.

Further, unlike as the Appellee suggests, a harmless error analysis must be

³ Justice Quince correctly noted this fatal problem with the majority's reasoning in her dissent in previous cases. *See Guardado v. State*, 2017 WL 1954984, at *2 (Quince, J., dissenting) ("I cannot agree with the majority's finding that the *Hurst* error was harmless beyond a reasonable doubt. As I've stated previously, [b]ecause *Hurst* requires a jury, not a judge, to find each fact necessary to impose a sentence of death, the error cannot be harmless where such a factual determination was not made.") (internal quotations omitted); *see also Hall v. State*, 212 So.3d 1001, 1036–37 (Fla. 2017) (Quince, J., concurring in part and dissenting in part); *Truehill v. State*, 211 So.3d 930, 961 (Fla. 2017) (Quince, J., concurring in part and dissenting in part).

performed on a case-by-case basis. Harmless error analysis goes beyond simply checking for a unanimous recommendation. 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). 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.” 202 So.3d at 68. “[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).

This Court has indicated that a unanimous recommendation is not by itself dispositive of the harmless error analysis. In *King v. State*, the Court emphasized that the unanimous recommendation was not dispositive, but rather “*begins a foundation* for us to conclude beyond a reasonable doubt” that the *Hurst* error was harmless. *King v. State*, 211 So. 3d 866, 890 (Fla. 2017) (emphasis added). Most recently, in *Jones v. State*, the Court explained that the instructions to the jury, in combination with the unanimous recommendation, allowed the Court to conclude that three of the required elements for a death sentence had been satisfied—sufficiency of the aggravation, weight of the aggravation relative to the mitigation, and the unanimous recommendation—but that an individualized examination of the

specific aggravators found by the judge was still necessary to determine whether “the remaining element: that the jury unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt”—was satisfied. *Jones v. State*, 212 So.3d 321, 333-34 (Fla. 2017) (internal quotes omitted). This Court has made clear that in some unanimous-recommendation cases, the *Hurst* error may not be harmless. Franklin’s case is such a case.

Furthermore, the Appellee misapprehends Franklin’s argument regarding how trial counsel would have acted had there been a *Hurst*-complaint statutory sentencing scheme. The Appellee believes and argues that this is an attempt to claim ineffective assistance of counsel. That is not Franklin’s argument. Evidence of what trial counsel would have done differently goes to the heart of the harmless error analysis and provides evidence of how the error in this case is not harmless.

II. FRANKLIN’S DEATH SENTENCE DOES VIOLATE THE EIGHTH AMENDMENT, CONTRARY TO APPELLEE’S ASSERTION.

The Appellee argues that Franklin did not establish a constitutional error in his sentence under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This is incorrect. Pursuant to *Caldwell*, the jury must know and appreciate the significance of its verdict:

In a capital case, the gravity of the proceeding and the concomitant juror responsibility weigh even more heavily, and it can be presumed that the penalty phase jurors will take special care to understand and follow the law.

Id. at 63. Indeed, under *Caldwell*, a unanimous jury verdict in favor of a death sentence violates the Eighth Amendment if the jury was not correctly instructed as to its sentencing responsibility. Jurors must feel the weight of their sentencing responsibility; they must know that if the defendant is ultimately executed it will be because no juror exercised his or her power to preclude a death sentence. This was not the case in Franklin’s trial. The jury was instructed that its penalty phase verdict was merely an advisory recommendation. R11/1124. Justice Pariente noted that “[t]he role of the jury during the penalty phase under the Florida death penalty scheme has always been confusing,” and, “absent a recommendation for life, the jury recommendation is essentially meaningless to the trial judge.” *In re Standard Jury Instructions*, 22 So.3d 17, 19 (Fla. 2009). The jury in Franklin’s case was misled as to its role and responsibility as the decision maker.

The circumstances under which Franklin’s jury returned its 12-0 death recommendations show that it cannot now be viewed as a valid unanimous verdict or that the *Hurst* error was harmless without violating the Eighth Amendment. The advisory recommendation simply “does not meet the standard of reliability that the Eighth Amendment requires.” *Caldwell*, 472 U.S. at 341. “[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentence who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death sentence lies elsewhere.” *Id.* at 328-29. It is clear on the face

of the record that the jury was told that it did not have the ultimate responsibility for the determination of Franklin's sentence.

This Court cannot rely on the jury's death recommendations in Franklin's case as showing either that he was not deprived of his Eighth Amendment right to require a unanimous jury's death recommendations or that the violation of the right was harmless. To do so would violate the Eighth Amendment because the advisory verdict was not returned in proceedings compliant with the Eighth Amendment. *Caldwell*, 472 U.S. at 332 ("The death sentence that would emerge from such a sentencing proceeding would simply not represent a decision that the State had demonstrated the appropriateness of the defendant's death.").

In *Hurst v. Florida*, the United States Supreme Court warned against using what was an advisory verdict to conclude that the findings necessary to authorize the imposition 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*⁴ requires.

Hurst v. Florida, 136 S. Ct. at 622. This holds true, even if the recommendation from the jury was a unanimous one. In light of the jury's belief that it was not ultimately responsible for Franklin's death sentence, the conclusory nature of the

⁴ *Ring v. Arizona*, 536 U.S. 584 (2002).

harmless error analysis the Appellee is urging this Court to use, would be wholly unreasonable under the circumstances of this particular case. Here, in light of the impact of the “advisory” instructions to the jury, this Court cannot even be certain that the jury would have made the same unanimous *recommendation* without the *Hurst* error. Given the principles articulated in *Caldwell*, this Court also cannot be sure that the jury would have found all of the other elements for a death sentence satisfied. And, critically, the Court cannot be sure that Petitioner would have received a death sentence. *See Rose v. Clark*, 478 U.S. 570, 578 (1986) (recognizing that an “error is harmless if, beyond a reasonable doubt, it did not contribute to the verdict obtained”) (emphasis in original) (internal quotation marks and citation omitted).

CONCLUSION

Based on the forgoing, the lower court improperly denied Franklin relief on his successive 3.851 motion. This Court should order that his sentences 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 copy of the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this 24th day of July, 2017.

WE HEREBY FURTHER CERTIFY that a true copy of the foregoing was served via electronic mail to **Stephen D. Ake**, Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013, at stephen.ake@myfloridalegal.com and capapp@myfloridalegal.com on this 24th day of July, 2017.

We HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed to QUAWN M. FRANKLIN, DOC #268130, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083, on this 24th day of July, 2017.

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We hereby certify that a true copy of the foregoing Initial Brief of Appellant was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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