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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-303

DANIEL OWEN CONAHAN, JR.

Appellant,
v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR CHARLOTTE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The State has conceded that *Hurst v. Florida*, 136 S. Ct. 616 (2016), is retroactive as to Mr. Conahan. Answer at 10. However, this Court has also held that when a jury, like the jury in Mr. Conahan's case, makes a unanimous 12 to 0 death recommendation, *Hurst* relief will not issue:

> Even though the jury was not informed that the finding that sufficient aggravating circumstances outweighed the mitigating circumstances must be unanimous, and even though it was instructed that it was not required to recommend death even if the aggravators outweighed the mitigators, the jury did, in fact, unanimously recommend death.

Davis v. State, 207 So. 3d 142, 174-75 (Fla. 2016). In Mr. Conahan's case his jury was not informed that any of their decisions had to be unanimous and there were no unanimity instructions of any kind. There was no "mercy" instruction or instruction that mercy was available even if the aggravating factors outweighed the mitigating factors. The instructions to Mr. Conahan's jury highlighted the advisory nature of the jury's task and the lack of any requirement for unanimity about any of the factors or elements being considered by the jurors:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole. Should you find sufficient aggravating circumstances do exist it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

***

> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give the evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.
>
> ***
>
> You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based on these considerations. In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous.
>
> ***
>
> Before you ballot, you should carefully weigh, sift and consider the evidence and all of it realizing that human life is at stake and bring to bear your best judgment in reaching your advisory sentence.

(R. 2638-41). The State relies on this Court's decision in *Davis v. State* in support of its position that any error is harmless, pointing to the holding that when a jury unanimously recommends a death sentence, as the jury did in Mr. Conahan's case, that unanimous recommendation then "allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." *Id.* at 174. Although this is this Court's position, it violates Due Process.

The Answer Brief argues that any *Hurst* error was harmless beyond a reasonable doubt. The State claims that "not only did the jury unanimously

recommend the death penalty, the jury also unanimously found the prior violent felony aggravating circumstances based on their verdicts for each of the contemporaneous murders." Answer Brief at 10. This argument is curiously misplaced, as Mr. Conahan was never charged with or convicted of any other murders, contemporaneous or otherwise.

The State's conclusion that "there is no question that the error was harmless beyond a reasonable doubt," is therefore based on shifting sand and a complete misrepresentation of the facts of the case. Likewise, the State's position is that given their unanimous recommendation of death, the jury must have agreed unanimously on all three of the aggravating factors that the State argued: HAC, CCP and murder during the course of a kidnapping, factors that the trial court later found in its sentencing order. Answer Brief at 11. The State's conjecture that "[t]he jury in this case unanimously agreed that [these] three aggravating factors were present" (Answer Brief at 12-13) is the type of "pure speculation" that the State accuses Mr. Conahan of.

The State chose not to respond to any of the argument in the Initial Brief concerning the new statute despite the self-evident linkage to the harmless error argument. In *Hurst v. State*, this Court discussed the Sixth and Eighth Amendments, the Florida Constitution and § 921.141 Fla. Stat. The discussion of statutory construction is relevant, where this Court stated:

> before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.

Hurst v. State, 202 So. 3d 40, 53 (Fla. 2016) (emphasis added). This Court went on to explain that because the statutorily defined facts were necessary to increase the range of punishment to include death, proving them was necessary "to essentially convict a defendant of capital murder." *Id*. at 53-54.

Florida's substantive law thus identifies the elements that separate first-degree murder from capital first-degree murder. To be convicted of capital first-degree murder (a jury's death verdict) the elements must be found in addition to the elements of first-degree murder. Thus, a conviction of capital murder without a unanimous jury's findings that the State also proved those additional elements beyond a reasonable doubt, violates the Due Process Clause, including for those death sentences with 12 to 0 death recommendations like Mr. Conahan's that became final after June 24, 2002. Without a constitutional conviction of capital first-degree murder, Mr. Conahan's death sentence is illegal because it is in excess of the statutory maximum for a conviction of first-degree murder. Contrary to the State's assertion that "Appellant has failed to demonstrate any basis for this Court to recede from [its] precedent," Mr. Conahan's arguments in his Initial Brief and herein conclusively demonstrate that he is entitled to relief. Answer at 11.

Under the governing substantive law at the time of the Montgomery homicide, Mr. Conahan was not convicted of capital first-degree murder because the necessary elements set forth in *Hurst v. State* and confirmed by the revised statute in Chapter 2017-1 were not found to have been proven beyond a reasonable doubt by a unanimous jury. As Mr. Conahan noted in his Initial Brief, the elements of capital first-degree murder have always existed since the enactment of Florida's death penalty statute. Initial Brief at 14-15. What those elements are was merely clarified in *Hurst* and confirmed through the codification of Chapter 2017-1. Retroactivity is not at issue because there is no new interpretation to apply retroactively. Mr. Conahan was never convicted beyond a reasonable doubt of all the elements of capital first-degree murder. Without a capital conviction there can be no capital sentence. Due Process demands that Mr. Conahan's illegal sentence be overturned.

Respectfully Submitted,

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CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been electronically filed through the Florida State Courts e-filing portal and thus served to: Timothy Freeland, *Timothy.Freeland@myfloridalegal.com*; Capital Appeals Intake Box, *capapp@myfloridalegal.com* on this 8th day of May 2018.

I FURTHER CERTIFY that this **REPLY BRIEF** was typed using Times New Roman 14 Point font.

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