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IN THE SUPREME COURT OF FLORIDA

WAYNE C. DOTY,

Appellant,

vs. CASE NO. SC18-973

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR BRADFORD COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY 1

I. Fundamental Error Occurred When the Court Failed to Instruct the Jury to Determine Beyond a Reasonable Doubt that the Aggravating Factors Were Sufficient to Justify Death and that the Aggravating Factors Outweighed the Mitigating Circumstances Because Those Determinations Are Required to Impose a Death Sentence for Capital Murder. 1

Fundamental Error was Not Waived. 1

Whether an Aggravator is Proved is Only One of Several Jury Findings Required Before a Defendant Can Be Sentenced to Death. 5

II. The Trial Court Erred in Refusing to Consider the Defense Request for a Non-Binding Sentencing Recommendation, Which Was Within the Court's Discretion. 11

CONCLUSION 14

CERTIFICATES OF SERVICE AND FONT SIZE 14

TABLE OF AUTHORITIES

Cases

Alleyne v. United States,133 S. Ct. 2151 (2013).....10

Armstrong v. State, 579 So. 2d 734 (Fla. 1991).....2–3

Hurst v. Florida, 131 S. Ct. 616 (2016).....passim

Hurst v. State, 202 So. 3d 40 (Fla. 2016) 9

Knight v. State, 43 Fla. L. Weekly D404,
2018 WL 944663 (Fla. 1st DCA Feb. 19, 2018),
review granted, 2018 WL 3097727 (Fla. June 25, 2018).....4

Major League Baseball v. Morsani, 790 So. 2d 1071 (Fla. 2001) 2

Oliver v. State, 162 So. 3d 162 (Fla. 1st DCA 2015) 3

In re Standard Criminal Jury Instructions in Capital Cases,
244 So. 3d 172 (Fla. 2018).....3–4

In re Standard Criminal Jury Instructions in Capital Cases,
214 So. 3d 1236 (Fla. 2017).....4

Perry v. State, 210 So. 3d 610 (Fla. 2016).....9

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

State v. Collins, 985 So. 2d 985 (Fla. 2008) 1

State v. Mason, 108 N.E.3d 56 (Ohio 2018),
cert. denied, 139 S. Ct. 456 (2018).....5–9

State v. Spencer, 216 So. 3d 481 (Fla. 2017) 3

Statutes

Section 921.141, Florida Statutes (2018).....5, 6, 8

ARGUMENT IN REPLY

I. Fundamental Error Occurred When the Court Failed to Instruct the Jury to Determine Beyond a Reasonable Doubt that the Aggravating Factors Were Sufficient to Justify Death and that the Aggravating Factors Outweighed the Mitigating Circumstances Because Those Determinations Are Required to Impose a Death Sentence for Capital Murder.

Fundamental Error was Not Waived.

Mr. Doty acknowledged in the Initial Brief that this issue would have to be reviewed for fundamental error, because he did not object to the instructions on the burden of proof at his second penalty phase trial. The State's assertion that he waived this issue at trial because of issues that were raised during his prior post-conviction proceedings is incorrect, for two reasons. One, it is well established that a resentencing proceeding is a new proceeding, in which the court proceeds de novo. *E.g.*, *State v. Collins*, 985 So. 2d 985, 989 (Fla. 2008). Evidence introduced in the previous proceeding must be re-introduced; evidence that was not challenged in the previous proceeding may be challenged, or new evidence even presented, by both sides. *Id.* (citations omitted). It is inconsistent with the principle that resentencing is "an entirely new proceeding," *id.* (citation omitted), to attempt to bar an argument merely because it might have been presented during post-conviction proceedings. Second, Mr. Doty did not raise this specific issue during post-conviction proceedings, and neither did post-conviction counsel. A post-

conviction motion (R. 738-68) requested relief on seven grounds, the first of which was "Mr. Doty's death sentence was obtained unconstitutionally in light of *Hurst v. Florida*, in violation of his rights to due process and equal protection under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution." (R. 742.) This ground for relief asserted that Mr. Doty had been deprived of his right to a unanimous jury finding on the imposition of the death penalty. (R. 742-54.) In addition, post-conviction counsel filed a Memorandum of Law Regarding *Hurst v. Florida*, specifically discussing the applicability of *Hurst* to Mr. Doty's case and whether he could waive *Hurst* relief — i.e., the right to a unanimous jury. (R. 439-51.) Although unanimity and the burden of proof are related concepts, as discussed in Mr. Doty's Initial Brief, pursuing *Hurst* relief should not be construed as a waiver of the argument that, in a post-*Hurst* sentencing proceeding, the jury should be instructed that certain sentencing considerations are functionally elements and must be proved beyond a reasonable doubt.

Moreover, a party does not waive a fundamental error argument when there is no showing that the party made "a voluntary and intentional relinquishment of a known right." *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 n.12 (Fla. 2001). In a criminal case, this can occur when defense counsel affirmatively requests or agrees to an erroneous instruction. *Armstrong v. State*, 579 So. 2d 734,

735 (Fla. 1991); *see also, e.g., Oliver v. State*, 162 So. 3d 162, 163 (Fla. 1st DCA 2015) ("at the charge conference, Appellant's counsel affirmatively requested and specifically agreed to the applicable parts of the justifiable use of deadly force instructions that were to be included, thereby waiving any claim of fundamental error in the instructions."). As noted in the Answer Brief, merely agreeing to the State's proposed instructions does not constitute waiver of fundamental error review. *See* Answer Brief at 18, citing *State v. Spencer*, 216 So. 3d 481 (Fla. 2017) (finding fundamental error where the jury was instructed on manslaughter without being instructed on justifiable and excusable homicide). Affirmatively agreeing to an incomplete instruction requires, logically, that the omission be recognized at the time of the agreement. *See, e.g., id.* at 487-88 (noting defense counsel in *Spencer* did not refer to the omitted portions of the instructions). Here, the record shows that the pertinent portions of the jury instructions and verdict form were reviewed with Mr. Doty, and that he simply agreed to what appeared to be "standard" language for those instructions. (R. 2274-75, 2278-79.)

It is also worth noting that Mr. Doty's second penalty phase trial took place in February 2018, when this Court was still considering the adoption of jury instructions to reflect the amendments to section 921.141, Florida Statutes, required to comply with *Hurst v. Florida*, 131 S. Ct. 616 (2016) regarding the requirement of jury unanimity in capital cases. *See In re Standard Criminal Jury*

Instructions in Capital Cases, 244 So. 3d 172 (Fla. 2018) (adopting new penalty phase instructions on May 24, 2018). At the time of Mr. Doty's trial, the available "standard" instructions were interim instructions. *See In re Standard Criminal Jury Instructions in Capital Cases*, 214 So. 3d 1236 (Fla. 2017).[1]

Finally, Appellant's guilty plea to the underlying crime of first-degree murder does not preclude fundamental error in the imposition of a death sentence. That argument might be well founded if Mr. Doty were challenging an omission in the jury instructions for the substantive crime of first-degree murder. However, at issue in this direct appeal are the "functional elements" which must be found by a unanimous jury before a death sentence can be considered pursuant to *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)) and *Hurst v. Florida*, 136 S. Ct. 616 (2016). Errors or omissions in the jury instructions bearing directly on these "functional elements" are fundamental because they go to the heart of what the jury had to consider to authorize the trial court to impose a death sentence.

[1] While the Court did not change the text of the instructions Appellant now challenges, the fact that the instructions were under review removes this situation from the type of situation described in *Knight v. State*, 43 Fla. L. Weekly D404, 2018 WL 944663 (Fla. 1st DCA Feb. 19, 2018), *review granted*, 2018 WL 3097727 (Fla. June 25, 2018). In *Knight*, one of the reasons the First District gave for finding fundamental error had been waived was that the applicable law was well settled. The same is not true here.

Whether an Aggravator is Proved is Only One of Several Jury Findings Required Before a Defendant Can Be Sentenced to Death.

Under the provisions of the current version of section 921.141, Florida Statutes, the existence of at least one aggravating factor is not the only finding delegated to the jury before a sentence of death can be imposed. The jury must determine not only that one or more aggravating factors exist, but also that the aggravating factor or factors are sufficient to justify imposing death, and that they outweigh any mitigating evidence. *See* § 921.141(2), Fla. Stat. (2018). Only after a unanimous jury has made each of these determinations does the trial court have discretion to impose the death penalty or, alternatively, to impose a term of life in prison. *Id.* at (3)(a)2.

Florida's unique sentencing scheme must be carefully compared with those of other jurisdictions to determine whether decisions from those jurisdictions are pertinent to the issue of the burden of proof used when sentencing Florida defendants to death. For example, the Answer Brief cites *State v. Mason*, 108 N.E.3d 56 (Ohio), *cert. denied*, 139 S. Ct. 456 (2018), for the proposition that the overwhelming majority of courts have held that proof beyond a reasonable doubt is constitutionally required only for the defendant's underlying offense and the existence of aggravating factors. *See* Answer Brief at 21-22. This general

proposition does not adequately take into account the features of the sentencing scheme the Florida Legislature created in section 921.141, Florida Statutes.

The sentencing scheme at issue in *Mason*, as outlined in that decision and quoted below, had some subtle but critical differences from the Florida sentencing scheme. At the same time, it had some interesting similarities that support Mr. Doty's position regarding the requirement of proof beyond a reasonable doubt:

> First, to face the possibility of a death sentence, a defendant must be charged in an indictment with aggravated murder and at least one specification of an aggravating circumstance. […]
>
> Second, the jury verdict must state that the defendant is found guilty of aggravated murder and must state separately that he is guilty of at least one charged specification. The state must prove guilt of the principal charge and of any specification beyond a reasonable doubt. […]
>
> Third, once the jury finds the defendant guilty of aggravated murder and at least one specification, he will be sentenced either to death or to life imprisonment. R.C. 2929.03(C)(2). When the defendant is tried by a jury, the penalty "shall be determined [b]y the trial jury and the trial judge."
>
> Fourth, in the sentencing phase, the court and trial jury shall consider (1) any presentence-investigation or mental-examination report (if the defendant requested an investigation or examination), (2) the trial evidence relevant to the aggravating circumstances the offender was found guilty of committing and relevant to mitigating factors, (3) additional testimony and evidence relevant to the nature and circumstances of the aggravating circumstances and any mitigating factors, (4)

> any statement of the offender, and (5) the arguments of counsel. In this proceeding, the state must prove beyond a reasonable doubt that "the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death."
>
> Fifth, the jury finds and then recommends the sentence: "If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender." But "[a]bsent such a finding" by the jury, the jury shall recommend one of the life sentences set forth in R.C. 2929.03(D)(2), and the trial court "shall impose the [life] sentence recommended." Also, if the jury fails to reach a verdict unanimously recommending a sentence, the trial court must impose a life sentence.
>
> Sixth, if the trial jury recommends a death sentence, and if "the court finds, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors, [the court] shall impose sentence of death on the offender." Then, the court must state in a separate opinion "the reasons why the aggravating circumstances were sufficient to outweigh the mitigating factors."

Mason, 108 N.E.3d at 59–60 (internal citations omitted).

The defendant in *Mason* challenged the "weighing" process in the fourth step described above, arguing that the jury's role was improperly minimized. *See id.* at 63. The Supreme Court of Ohio reviewed the Ohio sentencing statute in light of *Hurst v. Florida*, explaining that it required "critical jury findings" that had not been required in the Florida statute invalidated in *Hurst*:

> When an Ohio capital defendant elects to be tried by a jury, the jury decides whether the offender is guilty beyond a reasonable doubt of aggravated murder and—unlike the juries in *Ring* and *Hurst*—the aggravating-circumstance specifications for which the offender was indicted. R.C. 2929.03(B). Then the jury—again unlike in *Ring* and *Hurst*—must "unanimously find[ ], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors." R.C. 2929.03(D)(2). An Ohio jury recommends a death sentence only after it makes this finding. *Id.* And without that recommendation by the jury, the trial court may not impose the death sentence.
>
> Ohio law requires the critical jury findings that were not required by the laws at issue in *Ring* and *Hurst*. *See* R.C. 2929.03(C)(2). Ohio's death-penalty scheme, therefore, does not violate the Sixth Amendment.

Id. at 62.

The court then analyzed the challenged provisions, and held they created a system in which the judge and jury together determined the applicable sentence after the defendant had been found to be eligible for the death penalty. *Id.* at 64-65.

The Ohio provisions are distinct from Florida's, therefore, because in Florida the discretionary portion of sentencing does not begin until *after* the jury has made the findings that one or more aggravating factors exist, the aggravating factor or factors are sufficient to justify imposing death, and the aggravating factor or factors outweigh any mitigating evidence. *See* § 921.141(2), Fla. Stat. (2018).

Following the reasoning of the Ohio Supreme Court in *Mason*, those findings are "fact-finding" or "eligibility" determinations under Florida law rather than discretionary sentencing determinations. Interestingly, moreover, the Ohio statute specifies that those determinations require proof beyond a reasonable doubt, even though they are not purely factual. *Mason*, 108 N.E.3d at 59-60, 62.

Appellant acknowledges the volume of precedent from other jurisdictions addressing the burden of proof in capital cases, but returning to the language of the Florida sentencing statute and this Court's precedent is a more straightforward way to resolve the issue in this case. This Court held in *Hurst v. State*, 202 So. 3d 40, 54 (Fla. 2016) that the findings were "elements that must be found unanimously by a jury." The Court then reiterated in *Perry v. State*, 210 So. 3d 610, 633 (Fla. 2016), that "the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury."

The Florida Legislature has created a sentencing system in which a defendant cannot be sentenced to death before the jury makes these findings, thus conferring upon the trial court the discretion to choose between life and death in the ultimate sentence. The legislature could have created a different system in response to *Hurst*, but it created a system in which the jury makes a series of determinations before the trial court can exercise its own sentencing discretion, including the determinations that aggravating factors are sufficient to justify death

and that the aggravating factors outweigh any mitigation. Those determinations, therefore, are part and parcel of what makes a particular homicide in Florida punishable by death; they increase the available sentencing range for an underlying crime. Under *Alleyne v. United States*, 133 S. Ct. 2151, 2162-63 (2013) (holding a "fact" that produced a higher sentencing range had to be submitted to the jury and found beyond a reasonable doubt), the jury's findings must be made unanimously and based on proof beyond a reasonable doubt.

II. The Trial Court Erred in Refusing to Consider the Defense Request for a Non-Binding Sentencing Recommendation, Which Was Within the Court's Discretion.

Mr. Doty requested that the trial court include in its sentencing order "a specific recommendation that Defendant be transferred to the death row unit at Union Correctional Institution." (R. 1314-20.) Mr. Doty's request was not an order removing him from Florida State Prison; the request was made with the recognition of the limits of the court's discretion.

The request alleged that Jeffrey McClellan, assistant warden at Florida State Prison, had been the Chief Classification Officer and Duty Warden of Florida State Prison, and that "[t]hroughout the pendency of this case…Mr. McClellan continually impeded upon Defendant's due process rights by refusing to turn over requested records of the Defendant, his co-defendant and the victim." (R. 1314.) The request also alleged that Mr. McClellan had been hostile to Mr. Doty on specific occasions, and that he had impeded Mr. Doty's access to various discovery materials, forcing Mr. Doty to file numerous motions to compel. (R. 1315-16.) The request gave a specific example of Mr. McClellan refusing to allow an investigator to deliver potential mitigation evidence to Mr. Doty. (R. 1315-16.)

The request also identified other inmates who were similarly situated to Mr. Doty in terms of their offenses, but who were allowed contact visitation and recreation privileges that have consistently been denied to Mr. Doty since 2013,

and who were not housed in the facilities where their most recent offenses occurred. (R. 1317-18.) In advance of his sentencing hearing on May 15, 2018, Mr. Doty filed motions to transport two prisoners, Michael Bargo and Joseph Jordan, to testify at the hearing. (R. 1374-78.)

In response, the Department of Corrections conceded that the trial court could enter an order containing a nonbinding recommendation — which is what Mr. Doty requested. DOC asserted the trial court lacked jurisdiction to require DOC to house or otherwise treat Mr. Doty in a particular manner. (R. 1368-73.) The response ignored the fact that Mr. Doty's request was for a recommendation, not a binding order.

The request for a sentencing recommendation provided specific examples of Mr. Doty being singled out by Florida State Prison officials, as well as specific examples of Mr. Doty's attempts to use existing grievance procedures. (R. 1318-19.) These attempts were ignored. (R. 1318-19.) In addition to filing his written request, Mr. Doty summarized the history of his attempts to invoke grievance procedures for the trial court at his sentencing hearing on May 15. (R. 1673-74.)

At the May 15 hearing Mr. Doty again requested that he be allowed to call the two witnesses he had identified who would corroborate his concerns about his treatment and safety at Florida State Prison. (R. 1679.) The trial court responded "You've made the record. Thank you, Mr. Doty." (R. 1680.) The trial court order

denying Mr. Doty's request for a sentencing recommendation did not acknowledge Mr. Doty's attempts to use internal grievance procedures (R. 1316-17, 1319), but simply said that if Mr. Doty "believes he is being singled out by Florida State Prison officials," he should exhaust his administrative remedies and file a petition for extraordinary relief. (R. 1417.)

The trial court could not properly exercise its discretion without hearing the evidence Mr. Doty wanted to present regarding the disparate treatment he has experienced at Florida State Prison and the availability of a remedy — albeit one within the ultimate control of DOC, not the trial court — that could increase his safety and address his concerns about being singled out at Florida State Prison. Mr. Doty respectfully requests that, should this Court be unable to find an abuse of discretion on the present record, the Court remand his case for a full evidentiary hearing on his request at which he will be able to call witnesses and present evidence in support of the non-binding recommendation that he be moved from Florida State Prison to Union Correctional Institution.

CONCLUSION

For the reasons stated above and in his Initial Brief, Mr. Doty requests a new penalty phase trial at which the jury will be correctly instructed on the burden of proof applicable to all critical findings. In the alternative, he requests that the trial court be directed to reconsider his motion for a non-binding sentencing recommendation.

CERTIFICATES OF SERVICE AND FONT SIZE

I certify that a copy of the foregoing has been furnished electronically via the Florida Courts e-filing portal to Jennifer A. Donahue, Assistant Attorney General, Capital Appeals Division, on March 4, 2019. I certify that this brief has been prepared using Times New Roman 14-point font.

Respectfully submitted,

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