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IN THE SUPREME COURT OF FLORIDA

TIMOTHY LEE HURST,

Appellant,

v. **CASE NO.: SC12-1947**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
ASSISTANT PUBLIC DEFENDER
FLA. BAR NO. 201170

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLA. BAR NO. 271543

LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 606-1000

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

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PRELIMINARY STATEMENT

Appellant, Timothy Lee Hurst, relies on the initial brief to reply to the State's answer brief with the following additions:

ISSUE I

A DEATH SENTENCE IS NOT PROPORTIONATELY WARRANTED BECAUSE THIS COURT HAS REDUCED DEATH SENTENCES TO LIFE IN PRISON IN SIMILAR CASES INVOLVING EQUALLY OR MORE CULPABLE DEFENDANTS.

Hurst's case involves two aggravators (HAC and during the course of a robbery), two statutory mitigators of age and no criminal history, and significant non-statutory mental mitigation of intellectual disability, and a pervasively damaged brain that affected his judgment and impulse control. The State's proportionality argument relies on several cases, but these cases have few significant similarities and are distinguishable.

1. Butler v. State, 842 So. 2d 817, 823 (Fla. 2003). The defendant in Butler stabbed and strangled his former girlfriend. The jury, by a vote of 11-1, recommended death, and the court imposed death, finding in aggravation the murder was HAC. The court specifically rejected the statutory mitigators, and found as nonstatutory mitigation that Butler had a long-term drug problem. This mitigation distinguishes this case from Hurst's. Unlike Butler, Hurst has defining brain damage, significant mental impairments, possible Fetal Alcohol Syndrome, poor judgment, and impulsive problems. Additionally, Hurst has statutory mitigators of no significant criminal history and his age.

2. Douglas v. State, 878 So. 2d 1246 (Fla. 2004). Douglas sexually battered and beat the victim to death by hitting her 24 to 27 times. The jury recommended death by a vote of 11-1, and the

judge imposed it, finding he committed the murder during the course of the sexual battery, and that the homicide was especially heinous, atrocious, or cruel. Significantly, the only statutory mitigator found was Douglas's lack of a criminal record, but the court minimized the weight, noting that Douglas had extensive experience with illegal drugs for which he was not arrested. Several nonstatutory mitigators, included a close knit, religious family; abuse by his father; and other mitigation that had no particular significance to reducing Douglas's moral culpability for the murder. *Ibid*. at 1263. In contrast, Hurst has significant statutory and nonstatutory mitigation. The court in this case found the statutory mitigators of age and no significant prior criminal history, both of which it gave moderate weight (3 R 579, 582-83). Additionally there is also relevant mitigation that Hurst has limited intellectual capacity, suffered from Fetal Alcohol Syndrome, and had widespread abnormalities in his brain, "including the frontal lobe area, which is crucial to judgment and impulse control." (3 R 583-85)

3. Mansfield v. State, 758 So. 2d 636 (Fla. 2000). Mansfield strangled and beat his victim to death while trying to commit sexual battery. The jury unanimously recommended death, and the court imposed that sentence finding that he committed the murder during an attempted sexual battery and it was especially heinous, atrocious, or cruel. In mitigation, the court rejected the

statutory mitigator of no significant criminal history, and gave Mansfield's intoxication on the night of the murder only little weight. This Court, in affirming the death sentence, considered the nonstatutory mitigation, including some evidence of brain damage from alcohol and head trauma, as "slight." *Id.* at 647 This contrasts with the significant mitigation in Hurst's case.

4. Johnson v. State, 660 So. 2d 637 (Fla. 1995). Johnson's case involved the stabbing and beating murder of a 73-year-old woman. Johnson had also murdered another woman barely two weeks earlier, for which he was also convicted and sentenced to death. Johnson v. State, 660 So. 2d 648 (Fla. 1995). The jury in the first case, the one which the State relies on, recommended death by a vote of 8-4. The trial court imposed death finding in aggravation a conviction for a prior violent felony, murder for pecuniary gain, and HAC. In mitigation, the court found Johnson's age, his lack of a prior criminal history and nonstatutory mitigators. Unlike Hurst, there was no evidence Johnson suffered brain damage, or any mental disabilities of any significance. Moreover, Johnson's second murder is a major distinguishing factor.

5. Blackwood v. State, 777 So. 2d 399 (Fla. 2000). The 37 year old defendant strangled (manually and with a wire) a former girlfriend. He also forced a bar of soap into her throat and suffocated her as she struggled for her life. The jury recommended death by a vote of 9-3, and the court imposed death, finding the

HAC aggravator justified a death sentence. In mitigation, the court found eight nonstatutory mitigators. Contrary to the mitigation presented in Blackwood, Hurst's mitigation includes two statutory mitigators given moderate weight, and several nonstatutory mitigators that significantly mitigate Hurst's penalty. Of note, only four members of this Court affirmed the death sentence in Blackwood, and in light of this Court's other decisions the question of the legitimacy of a death sentence with only one aggravator and significant mitigation remains. See, Bevel v. State, 983 So. 2d 505, 524 (Fla. 2008); Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

6. Hoskins v. State, 965 So. 2d 1 (Fla. 2007). Hoskins broke into the house of an 80-year-old woman, sexually battered and kidnapped her, and then beat and strangled her. Her hands were tied behind her back and her body buried near where Hoskins lived. The jury recommended death by a vote of 11-1. The trial judge imposed death, finding in aggravation that the murder was committed during the course of a robbery, kidnapping, or sexual battery, that it was done to prevent a lawful arrest, and it was especially heinous, atrocious, or cruel. Hoskins' age was the only statutory mitigator, but the court considered Hoskins' low IQ and mental functioning, as well as 14 other nonstatutory mitigating factors. This Court approved the death sentence because of the other felonies (the burglary, robbery, kidnapping, and sexual battery)

that were part of the murder scenario. In this case, Hurst has no similar violent crime spree, and there is evidence of Hurst's severe mental impairments and impulse control that directly impacted the murder in this case.

7. Archer v. State 673 So. 2d 17 (Fla. 1996). Robin Archer had one of his friends, Patrick Bonifay, rob one of the clerks at the auto-parts store where he worked. Before Bonifay shot the victim, the victim begged for his life. This Court rejected the HAC aggravator as it applied to Archer, but affirmed the trial court's finding that the murder was cold, calculated and premeditated. Archer did have the mitigator of no significant prior criminal history. However, unlike Hurst, Archer was not intellectually retarded, brain damaged, or particularly young.

8. Ault v. State, 53 So. 3d 175 (Fla. 2010). The State relies on this case to show that brain damage and having a low IQ does not prevent imposition of a death sentence. However, that conclusion must be viewed in light of the facts in Ault. The defendant kidnapped two young girls, 7 and 11 years old, raped both of them, and then killed them 18 hours apart. He was convicted of two counts of first degree murder, two counts of capital sexual battery, two counts of kidnapping, and two counts of aggravated child abuse. In sentencing Ault to death:

> ...the trial judge found six aggravating circumstances applicable to both murders: (1) Ault was previously convicted of a felony and placed on community control (significant weight); (2) Ault

> was previously convicted of another capital felony or of a felony involving the use or threat of violence to another person (great weight); (3) the capital felony was committed while Ault was engaged in the commission of or an attempt to commit the crimes of sexual battery, aggravated child abuse, and kidnapping (great weight); (4) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest (significant weight); (5) the victim of the crime was a person less than twelve years of age; (6) the capital felony was especially heinous, atrocious, or cruel (HAC) (maximum weight).

Id. at 185-86. (Footnote omitted.)

The court found none of the statutory mitigators, and three nonstatutory mitigators: (1) Ault was raised in a dysfunctional family (little weight); (2) he was not adequately supervised by the Department of Corrections (little weight); (3) he told a victim of a prior sexual assault to call the police and that what he did was wrong (some weight). This Court said the trial should have considered as mitigation Ault's low IQ, acceptance of responsibility, remorse, and pedophilia. A death sentence was approved on the strength of the aggravation.

Ault has major distinctions from this case. First, in Ault, the court correctly found six aggravators, and unlike in the instant case, the trial court assigned "maximum weight" to HAC. The court concluded the aggravation overwhelmed the mitigation. The trial court in this case gave HAC great, not maximum, weight, and it made no further finding that it was of such aggravating significance that it overwhelmed the mitigation Hurst presented.

Second, Ault not only killed two people, he sexually battered and murdered two young children, ages 7 and 11. He also waited and killed them 18 hours apart. Third, Ault had a full scale IQ of 80, while below normal (normal being an IQ of 85-115), his intelligence level was certainly higher than Hurst's IQ of 69. Fourth, Ault was 30 years old at the time of his offenses, married, working, and a father. His age, as the trial court and this Court agreed, did not have a mitigating impact. Hurst's age of 19 established a statutory mitigator.

9. Baker v. State 71 So. 3d 802 (Fla. 2011). Baker is factually different from what happened in this case, and the aggravation is not comparable. This Court summarized the facts in Baker:

> Here, we are confronted with a case in which the appellant forced his way into the victim's home, shot the victim in the head, assaulted the victim's mother and son, and then held the family at gunpoint for several hours while he and his girlfriend searched the house for valuables. The appellant next kidnapped the victim, stealing her car and holding her against her will for several more hours while he attempted to purchase drugs and steal money from her bank account. Finally, he drove the victim to a wooded area where, the evidence demonstrated, he killed her execution-style by shooting her in the forehead at close range.

In aggravation the trial court found: (1) the crime was committed during a home invasion robbery or kidnapping; (2) pecuniary gain (great weight)(unnecessarily merged with the kidnapping/robbery) (3) the capital felony was HAC (great weight); and (4) the capital felony was committed in a cold, calculated and

premeditated manner without any pretense of moral or legal justification (great weight). As statutory mitigation, the court found: (1) the defendant was under extreme mental or emotional disturbance (some weight); and (2) age of the defendant (twenty years old) (some weight). As nonstatutory mitigation, the court found: (1) the defendant suffers from brain damage, low intellectual functioning, drug abuse and that those factors are compounded by each other (some weight); (2) the defendant was born into an abusive household and was neglected as a child (some weight); (3) the defendant is remorseful (little weight); (4) the defendant was well behaved and displayed appropriate demeanor during all court proceedings (little weight); and (5) the defendant's confession and cooperation with police (some weight).

Baker is a far more aggravated case that Hurst's. Especially noteworthy, the Baker court found, not only HAC, but the CCP aggravator as well. The additional serious aggravator and the extreme facts of that case, readily distinguish the case from Hurst's case.

10. Geralds v. State, 674 So. 296 (Fla. 1996). The sentencing jury unanimously recommended the court impose a death sentence on Geralds. In sentencing Geralds to death, the trial court found in aggravation that he had committed a robbery/burglary during the murder, the murder was HAC and CCP. Geralds' age of 22 was found mitigating, but the court gave it little weight. Mitigation

included that Geralds loved his daughter, came from a divorced family, was not loved by his mother, and he had antisocial behavior and bipolar manic personality. In light of the HAC and CCP aggravators, which this court said were "substantial"; the mitigation, which the trial court had given very little weight; and the unanimous death recommendation, this Court found death proportionately warranted. In contrast, the Hurst jury recommended death by only the slightest of majorities, 7-5, the court did not find the CCP aggravator, and the mitigation was more substantial. Geralds has no controlling significance to this case.

11. Lawrence v. State, 846 So. 2d 440 (Fla. 2003). Lawrence had prior convictions for first degree murder and attempted first degree murder, which the court used to aggravate his latest murder. The court also found the CCP aggravator applied to the cold blooded killing he and his co-defendant Jeremiah, Rogers, perpetrated on a woman with whom he had just had sex. Neither of those aggravating factors are present in Hurst's case. Moreover, the brain damage Hurst suffered particularly mitigated the murder in his case. In Lawrence, the defendant's brain trauma did not prevent him from coldly and with calculation and a heightened premeditation kill his victim.

12. Orme v. State, 677 So. 2d 258 (Fla. 1996). Orme strangled a former girlfriend while he was addicted to and intoxicated with cocaine. He had no significant intellectual

impairments, as does Hurst, but the trial court found both statutory mental mitigators. Also, Orme was not 19 years old with an effective age of 12 or 13, as the court found in this case (3 R 582). There was no evidence that Orme had any sort of brain damage that impacted his judgment or impulsiveness. Interestingly, and in contrast to Hurst's situation, the court found Orme could hold down a job, and was able to drive a car. Hurst, of course, had a job, but he kept it because his parents had to constantly wake him up to go to work. Similarly, he could drive a car, but he terrorized his mother when she rode with him.

13. Sliney v. State, 699 So. 662 (Fla. 1997). Sliney beat the victim with a hammer and stabbed him during the course of a robbery. Justifying a sentence of death, the trial court found he had committed the murder during the course of a robbery and to avoid arrest. It found Sliney's age of 19 and his lack of significant criminal history as statutory mitigation, and his politeness, his being a good neighbor, and other nonstatutory mitigation. Except for Sliney's lack of a criminal record, the trial court gave the mitigation little weight. This Court noted the crime was particularly brutal when approving the death sentence. There was no evidence Sliney had any mental problems, and that distinction separates the case from Hurst's.

14. Bates v. State, 750 So. 2d 6 (Fla. 1999). Bates beat, strangled, stabbed and attempted to sexually batter an office

worker who had apparently surprised him when he broke into the office. He was convicted of the murder, kidnaping, attempted sexual battery, and robbery, and the jury, by a vote of 9-3, recommended death. In aggravation, the court found Bates had committed the murder during the course of the kidnaping and attempted sexual battery; for pecuniary gain; and the murder was HAC. In mitigation, the court found the statutory mitigators of age(24), and no significant prior criminal history. As nonstatutory mitigation, the court found Bates had some emotional distress, some inability to conform his conduct to the requirements of the law, low average IQ, service in the military, his love for his children, and being a good employee. Bates had significantly more aggravation than Hurst and significanly less mitigation. For example, the trial court in Bates found the same statutory mitigation as in this case, but where Bates was 24, Hurst was 19 chronologically and effectively age 12 or 13- years- old (3 R 582). Bates had a low average IQ, but Hurst's was 69, or even as high as 76-78, which is significantly lower than a low average IQ. Additionally, Hurst had brain damage and suffered from Fetal Alcohol Syndrome.

Hurst's case is not among the most aggravated and least mitigated cases this Court has reviewed, and a death sentence is disproportionate. This Court should remand this case for a life sentence.

ISSUE II

THE COURT ERRED IN DENYING HURST'S MOTION FOR AN EVIDENTIARY HEARING TO DETERMINE WHETHER HE WAS MENTALLY RETARDED, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

First, on page 75 of the answer brief, the State asserts this issue is procedurally barred. The State argues that the claim could have been raised in the prior post conviction proceeding Additionally, the State argues that Hurst's request for a hearing prior to the penalty phase was untimely.

This Court's ruling in State v. Fleming, 61 So. 3d 399, 406 -409 (Fla. 2011), specifically addresses the State's argument:

> First, this Court has long held that where a sentence has been reversed or vacated, the resentencings in all criminal proceedings, *including death penalty cases*, are de novo in nature. . . . This means that when a defendant is resentenced, "the full panoply of due process considerations attach." . . .
>
> Because the resentencing is de novo, *we have held that both parties may present new evidence bearing on the sentence*. . . . See Mann v. State, 453 So. 2d 784, 786 (Fla.1984) (rejecting appellant's argument that the state was not permitted to present new evidence at his resentencing and stating that "[o]ur remand directed a new sentencing proceeding, not just a reweighing" at which "both sides may, if they choose, present additional evidence")
>
> The trial court has discretion at resentencing—within certain constitutional confines—to impose sentence using available factors not previously considered.

(Citations omitted, emphasis supplied.) Contrary to the State's position, Hurst could present his claim of mental retardation at the resentencing.

Second, the State argues that this Court's decision in Kilgore

v. State, 55 So. 3d 487, 510-511 (Fla. 2010), controls the outcome. As presented on pages 41-47 of his initial brief, Hurst argued that this Court's reasoning in Kilgore, that only the trial judge and not the jury determines mental retardation, is flawed. Arbalaez v. State, 898 So. 2d 25 (Fla. 2005), the case on which Kilgore and subsequent cases relied to justify the conclusion that he cannot "feed *Atkins* through *Ring*" incorrectly stated its holding.

> Of course, this Court did say "Arbelaez has no right under *Ring* and *Atkins* to a jury determination of whether he is mentally retarded." But the logic of that sentence does not follow from the language immediately preceding it because that was not the focus of the defendant's claim or this Court's discussion of it. Perhaps a more accurate sentence would have been, "Neither Arbelaez, nor any defendant facing a death sentence, has a right under *Ring* and *Atkins* to a jury determination of whether he is not mentally retarded." That captures the gist of the defendant's argument and this Court's rejection of it.

(Initial Brief at p. 44)

Hurst recognizes the importance of *stare decisis*, but when a decision has proven unworkable it should be reversed. As shown in the initial brief, the holding of Kilgore has met that standard because it is simply inconsistent for the sentencing judge to be able to determine whether a defendant is mentally retarded as a bar to execution, but the jury, the co-sentencer, can only treat it as a mitigating factor. Not only has Kilgore produced the situation here, it has forced on the judge and jury to an illegal situation--that the co-sentencer, the jury, can consider mental retardation as only mitigation and not a bar to execution.

Third, the State also asserts any error in not allowing the jury to consider the defendant's mental retardation as a bar to execution is harmless error. This error could never be harmless, since it pertains to the very core of sentencing structure and the defendant's right to have a jury's involvement in deciding his fate. A judge's mistaken ruling that deprived the defendant of his jury trial rights in the death sentencing process goes to the foundation of the case. Such an error could never be harmless.

CONCLUSION

For the reasons presented the initial brief and this reply brief, Timothy Lee Hurst asks this Court to reverse his death sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Stephen White, Assistant Attorney General, Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, at Capapp@myfloridalegal.com as agreed by the parties, and to appellant, Timothy Hurst, #124669, U.C.I., 7819 N.W. 228th St., Raiford, FL 32026, on this 12th day of July, 2013.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

/s/ W. C. McLain
W. C. McLAIN
Assistant Public Defender
Florida Bar No. 201170
Leon Co. Courthouse, #401
301 South Monroe Street
Tallahassee, Florida 32301
Bill.McLain@flpd2.com
(850) 606-1000

/s/ David A. Davis
Assistant Public Defender
Florida Bar No. 271543

ATTORNEYS FOR APPELLANT