IN THE SUPREME COURT OF FLORIDA

ERIC LEE SIMMONS,

Appellant,

vs.

CASE NO. SC14-2314

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT,
FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY

APPELLANT'S **SUPPLEMENTAL** INITIAL BRIEF

JAMES S. PURDY
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STATEMENT OF THE CASE AND FACTS

As noted in the initial brief, when this case returned to the trial court for resentencing the defense moved for an order striking any reference to the jury's role being merely advisory, citing Caldwell v. Mississippi, 472 U.S. 320 (1985) and Ring v. Arizona, 536 U.S. 584 (2002). (II 371-73) The defense also moved to bar reimposition of a death sentence because Florida's capital sentencing scheme violates the federal Sixth Amendment on the basis set out in Ring. (II 393-405) The trial court denied the requested relief. (III 465-66; L 2770, 2777-78)

At the outset and the close of its opening statement to the jurors, counsel for the State emphasized the advisory nature of the recommendation the jurors would make. (LII 17-18, 32)

JURY INSTRUCTIONS

The standard jury instructions the jury heard began as follows:

> THE COURT: It is now your duty to advise the court as to the punishment that should be imposed upon the defendant for the crime of first-degree murder. You must follow the law that will now be given to you and render an advisory sentence.... As you've been told, the final decision as to which punishment shall be imposed is the responsibility of the judge. In this case, as the trial judge, that responsibility will fall on me. However, the law requires you to render an advisory sentence as to which punishment should be imposed, life imprisonment without the possibility of parole or the death penalty. Al-

> though the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given great weight and deference by the court in determining which punishment to impose.

(XXII 1451-52; X 1958) The standard instructions go on to refer 21 additional times to a recommended sentence (XXII 1454, 1455, 1456, 1458, 1460, 1461, 1462, 1463; X 1961, 1962, 1965), and seven additional times to an advisory sentence. (XXII 1452, 1456, 1458, 1462; X 1958, 1962, 1963, 1965, 1966) Those references included the closing words of the standard instructions, i.e.,

> THE COURT: You should take sufficient time to fairly discuss the evidence and arrive at a well-reasoned recommendation. You will now retire to consider your recommendation as to the penalty to be imposed upon the defendant.

(XXII 1463; X 1966) After the instructions, the judge explained the verdict form, again referring in the process to the "advisory sentence" and "advisory verdict" to be returned. (XXII 1467)

The jurors were instructed on three aggravating factors, i.e. presence of a prior violent felony conviction; presence of a contemporaneous conviction for kidnapping, sexual battery, or both; and the EHAC factor. (XXII 1457)

DELIBERATIONS AND VERDICT

The jurors deliberated some two and a half hours, and returned verdicts finding by a count of 12-0 that each of those aggravating factors was present. (XXII 1473, 1475) The jury was also instructed on the statutory mitigating factors of inability to conform one's conduct to law, and presence of severe emotional or mental impairment, and found by a count of 0-12 that neither had been shown. (XXII 1459, 1475-76) The jury split 6-6 on the question whether any non-statutory mitigating factors were shown, and recommended a death sentence by a count of 8-4. (XXII 1476)

THE SENTENCING ORDER

In its sentencing order, the court recited it had independently weighed the evidence. (XI 2203) The court found the same three aggravating factors the jury found, assigned Appellant's prior conviction for aggravated assault moderate weight, and assigned the two remaining aggravators great weight. (XI 2207-12) The court made the following findings:

- The testimony of the medical examiner who performed the autopsy was more credible than the testimony of the retired pathologist who testified for the defense. The court adopted the medical examiner's view that the anal battery took place while the victim was still conscious. (XI 2210-12)

- The prior violent aggravated assault proved below was "based on a life-threatening crime involving direct contact with a human victim." (XI 2208)
- No direct link was shown between the defendant's brain damage and the charged offenses. (XI 2215-17, 2219-20)
- The defendant was able to conform his actions to the requirements of law on the night of the incident. (XI 2218)

The court concluded that the aggravating circumstances, particularly the EHAC factor, far outweigh the mitigating circumstances in this case. (XI 2241) The judge assigned non-statutory mitigation as a whole moderate weight. (XI 2230) Specifically, he found that intellectual disability in childhood, brain damage, low IQ, learning disabilities, and ADHD were all present and that each deserved moderate weight. (XI 2219-21, 2222, 2224, 2230) The court acknowledged that

> [m]ental health mitigation evidence is considered among the weightiest; however, the weight attributed to this factor is lessened somewhat due to the lack of evidence on direct causation between the brain damage and behavioral malfunction as it relates to the homicide.

(XI 2220)

SUMMARY OF ARGUMENT

Appellant sought jury instructions which did not characterize the jury's role as advisory, but that relief was denied. The jury found 12-0 that three aggravating factors were shown, and recommended death by an 8-4 vote. That recommendation, and those findings, were irretrievably tainted by the standard instructions, which minimized the jury's responsibility. In any event, Section 775.082(2), Florida Statutes, mandates commutation to a life sentence where, as here, the United States Supreme Court holds Florida's death-penalty scheme unconstitutional.

ARGUMENT

THE DEATH SENTENCE APPEALED FROM WAS IMPOSED IN VIOLATION OF HURST v. FLORIDA.

Standard of review. Review of a purely legal question is *de novo.* Jackson v. State, 64 So. 3rd 90, 92 (Fla. 2011).

Argument. Appellant was resentenced to death after a unanimous jury found, in a special interrogatory verdict, that each of three aggravating factors was proved. Those aggravating factors were that the murder was especially heinous, atrocious, and cruel; that it was committed in the course of a kidnapping; and that the defendant had been convicted of a prior violent felony. The jury split 6-6 on whether non-statutory mitigation was present, and recommended death by a count of 8-4. The court found that the same three aggravating factors were present, made its own findings as to mitigation, and found that the aggravating factors far outweighed the showing in mitigation. The United States Supreme Court has since held Florida's death-sentencing scheme unconstitutional to the extent it calls for the court, rather than the jury, to make those factual findings which are necessary for imposition of the death penalty. Hurst v. Florida, 2016 WL 112683 (2016). The Court in Hurst left it to this court to determine whether and when the error in imposing a death sentence under the invalidated scheme could be deemed harm-

less. 2016 WL 112683 at *8. In this brief, Appellant will argue that harmless-error analysis is precluded by Section 775.082(2), Florida Statutes, and by the fact the jury was instructed that its verdict would be nothing more than advisory.

SECTION 775.082, F.S.

Section 775.082(2), Florida Statutes, provides:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

After the United States Supreme Court issued its decision in Furman v. Georgia, 408 U.S. 308 (1972), but while rehearing was pending in that case, this court addressed the law now codified as Section 775.082(2) in Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972). In that case this court said:

> We have given general consideration to any effect upon the current legislative enactment to commute present death sentences to become effective October 1, 1972. The statute was conditioned upon the very holding which now has come to pass by the U.S. Supreme Court in invalidating the death penalty *as now legislated*. It is worded to apply to those persons already convicted without recommendation of mercy and under sentence of death.

265 So. 2d at 505 (emphasis added). Subsequently, after the rehearing petition was disposed of in Furman, this court, citing Donaldson v. Sack, determined that it should commute to life all the death sentences imposed under the scheme held to be unconstitutional in Furman. Anderson v. State, 267 So. 2d 8, 9-10 (Fla. 1972).

Anderson should be applied here. Furman was a 5-4 decision, with five separate opinions issued by the Justices in the majority. As the dissenting Justices noted, the narrowest of the majority's opinions were authored by Justices Stewart and White. 408 U.S. at 375 (Burger, C.J., dissenting.) "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Ventura v. State, 2 So. 3rd 194, 200 (Fla. 2009), *citing* Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976). In Furman, Justices Stewart and White joined the majority based on their belief that the death penalty was at that time enforced "wantonly" and "freakishly" against "a capriciously selected random handful," 408 U.S. at 309-10 (Stewart, J., concurring), on each occasion by a jury acting "in its own discretion ... no matter what the circumstances." 408 U.S. at 314 (White, J., concurring.) The gravamen of Furman was thus that untrammeled decision-making in capital sentencing had the effect of violating the Eighth Amendment.

The holding of Hurst is that Florida's death-penalty scheme has the effect of violating the Sixth Amendment guarantee of trial by jury, in that juries' discretion - guided though it is by post-Furman statutes setting out permissible aggravating factors - is usurped by judges' having the final say in finding the facts that underly a death sentence. In both Furman and Hurst, the Court struck down a death-penalty scheme because of a serious defect in the process whereby those who will suffer the penalty are chosen. In both situations, the existing death penalty was held by the Court to be unconstitutional as currently legislated. In Anderson this court effectively held that the law now codified as Section 775.082(2) dictated how to deal with death sentences handed down under the pre-Furman scheme, since the Legislature had made it clear what its preference would be in the event the scheme was ruled unconstitutional as currently legislated. This court should follow the precedent it set in Anderson and commute Appellant's sentence to life in prison.

CALDWELL V. MISSISSIPPI

In the alternative, this court should hold that Hurst mandates reversal of the death sentence in any case where, as here, Florida's standard penalty-phase jury instructions were read. Those instructions refer on over two dozen occasions to the advisory nature of the jury's upcoming sentencing recommendation, and thus

clearly and repeatedly diminish the jury's sense of responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). This court's holding to the contrary in Combs v. State, 525 So. 2d 853 (Fla. 1988), has clearly been overtaken by the events of 2016. Just after Ring v. Arizona, 536 U.S. 584 (2002), was decided, Justices Pariente and Lewis, concurring in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), presciently noted that Florida's penalty-phase instructions will need to be reevaluated, since they "emphasize the jury's advisory role." 833 So. 2d at 723 (Pariente, J., concurring). Accord id. at 731 (Lewis, J., concurring). After Hurst, it cannot seriously be asserted that the standard instructions read in this case do not run afoul of Caldwell.

In Caldwell, counsel for the State argued to the jury that its capital sentencing decision was automatically reviewable by the state supreme court. The United States Supreme Court vacated Caldwell's sentence, firmly holding "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29. That a jury has heard its role diminished by the court, rather than counsel, weighs even more heavily in favor of reversal. The argument of counsel is "likely viewed as the statements of advocates," as distinct from jury instructions, which are

"viewed as definitive and binding statements of the law." Boyde v. California, 494 U.S. 370, 384 (1990). "The influence of the trial judge on the jury is necessarily and properly of great weight, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." Bollenbach v. United States, 326 U.S. 607, 612 (1946). As noted above, "the last word" in Florida's standard instructions is an exhortation to carefully consider the jury's sentencing recommendation.

The Supreme Court holds that certain categories of error are "structural" and accordingly not subject to harmless-error analysis. E.g., Sullivan v. Louisiana, 508 U.S. 275 (1993). This court engages in similar analysis, in cases addressing "*per se* reversibility." See Johnson v. State, 53 So. 3rd 1003, 1007 (Fla. 2010). This court reverses *per se* when the appellate court "would have to engage in pure speculation in order to attempt to determine the potential effect of the error on the jury," as when a jury was not instructed on a lesser included offense one step from the charged offense, or when a jury receives extraneous information during deliberations. Id. at 1008. In Johnson, this court held it could not, without speculating, ascertain the effect of a pre-emptive jury instruction stating that no testimony could be read back. As this court has since clarified, similar speculation is not called for where a court declines to read back *specific testimony*. Cf. Hazuri

v. State, 91 So. 3rd 836, 846-47 (Fla. 2012) with State v. Barrow, 91 So. 3rd 826, 835 (Fla. 2012). Harmless error analysis is both practical and appropriate in the latter situation. Hazuri at 847.

In Sullivan v. Louisiana, the Supreme Court applied its "structural error" rule where the jury was misinstructed as to the essence of the reasonable doubt standard. In that circumstance, per the Court, the jury's findings are vitiated altogether, and thus "there has been no jury verdict within the meaning of the Sixth Amendment" to which harmless-error analysis could be applied. 508 U.S. at 280. As this court did in Hazuri and Barrow, the Supreme Court in Sullivan distinguished less-comprehensive errors, holding that where an impermissible instruction affects a single element of a single offense the appellate court may well, as a practical matter, be able to determine whether the verdict was likely attributable to the error.

The error in this case - instructing the jury at length that its contribution to the proceedings would be merely advisory - is analogous to the errors committed in Sullivan and Johnson. After Hurst, it is for the jury in capital cases to determine not only whether aggravating factors are present, but also whether the showing in mitigation outweighs the aggravating factors. Hurst, 2016 WL 112683 at *6. This court would have to speculate to conclude that every juror in this case would have

voted the same way, not only as to individual aggravators but as to their 8-4 death recommendation, had it been conveyed to them that those decisions were theirs and theirs alone. Since this court does not permit itself such speculation, see Johnson, *per se* reversal is in order.

CONCLUSION

Appellant has shown that this court must vacate his death sentence, since the fact-finding mandated by Hurst v. Florida was made by a jury that was advised its decision would not be dispositive. Further, Section 775.082(2), Florida Statutes, mandates commutation of the death sentence imposed below to life.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing supplemental initial brief has been electronically delivered to Assistant Attorney General Stephen Ake, at capapp@myfloridalegal.com, this 25th day of January, 2016.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.

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