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 **SECOND SUPPLEMENTAL** INITIAL BRIEF

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

By: NANCY RYAN,
Florida Bar No. 765910
ASSISTANT PUBLIC DEFENDER
444 Seabreeze Blvd., Suite 210
Daytona Beach, Florida 32118
Phone: 386/254-3758
ryan.nancy@pd7.org

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

STATEMENT OF THE CASE AND FACTS

INTERROGATORY VERDICT - AGGRAVATORS

In 2012 this court, responding to a collateral attack on Appellant's death sentence, reversed and remanded for a new penalty phase. Simmons v. State, 105 So. 3rd 475 (Fla. 2012). At that second penalty phase below, the jury returned an interrogatory verdict finding unanimously that each of three aggravating factors had been proved beyond a reasonable doubt, i.e., presence of a prior violent felony conviction; presence of a contemporaneous conviction for kidnapping, sexual battery, or both; and the EHAC factor. (X 1969)

PROOF IN MITIGATION AT PENALTY PHASE

As noted in earlier briefing, at the second penalty phase the defense proved up an early-childhood incident of asphyxia which was followed by a visible change in mental acuity. (LIII 371-75; XVII 576; XX 1058-60; see XXI 1380-81; XXVII 1063) The State's penalty-phase experts testified that it is not possible to directly correlate brain injury with destructive behavior. (XIX 914-16, 934; XXI 1275-79) Multiple defense experts testified to the contrary. Neuropsychiatrist Dr. Joseph Wu testified that hypoxic damage is irreversible, and that the brains of people who have the kind of damage Appellant sustained have trouble gauging a proportional response to provocation. (XVIII 780-81) Neuropsychologist Dr. Frank Wood agreed that the

brain damage Appellant suffered makes him unable to control his impulses. (XVIII 620-21) Psychologist Dr. Eric Mings gave his opinion that brain damage caused by the suffocation incident caused Appellant to be disinhibited and emotionally unstable in adult life. (XVII 561, 563-64)

PENALTY PHASE INSTRUCTIONS

The jury was instructed, in accordance with Florida's standard jury instructions, as follows:

> You must...render an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist.

(XXII 1451)

> The State has the burden to prove each aggravating circumstance beyond a reasonable doubt.

(XXII 1456)

> Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the mitigating circumstances outweigh the aggravating circumstances.

(XXII 1458)

> In these proceedings is it not necessary that the advisory sentence of the jury be unanimous.

(XXII 1462)

INTERROGATORY VERDICT - MITIGATION

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; it found by a count of 0-12 that neither factor was shown. (XXII 1459, 1475-76) The jury split 6-6 on the question whether non-statutory mitigation was shown, and recommended a death sentence by a count of 8-4. (XXII 1476)

THE RESENTENCING ORDER APPEALED FROM

In his resentencing order, Judge Briggs noted he had independently weighed the evidence. (XI 2203) He further noted, twice, that this court has held that expert testimony offered in mitigation may be rejected by the sentencing court if that evidence cannot be reconciled with the other evidence in the case. (XI 2212-13, 2217) The judge found that intellectual disability in childhood, brain damage, low IQ, learning disabilities, and ADHD were all proved, and that each deserved moderate weight. (XI 2219-21, 2222, 2224, 2230) However, he found that no direct link was shown between Appellant's brain damage and the charged offenses. (XI 2215-17, 2219-20) 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)

The resentencing order further states that "[t]he fact that Defendant had a difficult childhood and that domestic violence, substance abuse, and other criminal behavior were present throughout his life is well established...the Court assigns it slight weight." (XI 2227) Further, the court found that Appellant is a loving father and maintains a relationship with his daughter, and gave that factor slight weight. (XI 2229-30) The judge concluded that in this case the aggravating factors outweigh the mitigating circumstances. (XI 2241)

THIS APPEAL

Appellant now seeks reversal of the resentencing order described above. Before oral argument, after the federal Supreme Court decided Hurst v. Florida, 136 S. Ct. 616 (2016), this court permitted abbreviated supplemental briefing. In that briefing, and at argument, Appellant took the position that the error identified in Hurst v. Florida can never be deemed harmless. After this court held that the Hurst error is in fact subject to harmless-error analysis, this court granted Appellant's motion to address whether the record of this case supports a harmless-error finding. In the

earlier supplemental briefing, Appellant also argued that the then-standard jury instructions read in this case ran afoul of Caldwell v. Mississippi, 472 U.S. 320 (1985). Appellant maintains that the Caldwell error supports reversal in this case.

SUMMARY OF ARGUMENT

The record shows noncompliance with Hurst v. Florida, in that the jury did not make all of the findings necessary to allow imposition of the death penalty. The record does not support the conclusion that the error was harmless.

In Hurst v. State, this court held that a 7-5 death recommendation suggested doubt that Hurst's jury, if correctly instructed, would have made all of the findings essential to imposition of the death penalty both unanimously and beyond a reasonable doubt. The 8-4 split in this case raises the same concern.

The State must show in these cases that *no rational jury* would determine that the nonstatutory mitigating circumstances were such as to call for leniency. The State cannot make that showing in this case, where extensive and compelling mitigation was proved.

The then-standard jury instructions read below repetitively emphasized for the jury that its recommendation to the court would not be binding. As argued in earlier supplemental briefing, those instructions run afoul of the rule announced in Caldwell v. Mississippi, 472 U.S. 320 (1985), and independently warrant relief.

This court should vacate the death sentence reimposed below, and either hold on proportionality grounds that life in prison is the appropriate sentence or remand for further lawful proceedings.

ARGUMENT

THE SIXTH AMENDMENT ERROR IDENTIFIED IN HURST v. FLORIDA CANNOT REASONABLY BE DEEMED HARMLESS ON THIS RECORD.

Standard of review. "The harmless error test...places the burden on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict." Hurst v. State, 2016 WL 6036978 *23, *quoting* State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). Where an error concerns sentencing, it is harmless only if there is no reasonable possibility that the error contributed to the sentence. Hurst at *23. The harmless error test "is to be rigorously applied...and the State bears an extremely heavy burden in cases involving constitutional error." Id.

One aspect of the State's burden, where the Sixth Amendment error identified in Hurst v. Florida, 136 S. Ct. 616 (2016) has taken place, is to show that "no rational jury, as the trier of fact, would determine that the mitigation was sufficiently substantial to call for a life sentence." Hurst at *24.

Argument. The record shows noncompliance with Hurst v. Florida, in that the jury did not make all of the findings necessary to allow imposition of the death penalty. The record does not support the conclusion that the error was harmless beyond a reasonable doubt.

The State, in its supplemental brief filed in this case in January, 2016, argued that juries in capital cases need find only that a single qualifying aggravating factor was proved beyond a reasonable doubt. (Supplemental answer brief at 12-17) It argued that the interrogatory verdict that was returned below, finding the presence of three aggravating factors, established there had been no Hurst error, or else that any such error was harmless beyond a reasonable doubt. (Supplemental answer brief at 17) The former position is untenable in light of this court's holding on remand in Hurst, that "in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation." Hurst v. State, 2016 WL 6036978 *10 (Fla. 2016) (emphasis in original).

The State's harmless-error position is similarly untenable. This court held that it could not be sure Hurst's jury would have found the aggravators it found in that case, *if* it had been clearly instructed that it must, unanimously and beyond a reasonable doubt, find them both present. Hurst at *24. This court went on to write that *as importantly,* it could not be sure that Hurst's jury would have found those aggravators sufficient to impose death, or that it would have found that those aggravators outweighed the proof in mitigation. Hurst at *24. This court pointed to

the 7-5 split in the Hurst jury's death recommendation as fostering a doubt that his jury would have made the latter essential findings. Id. In this case, the jury recommended death 8 to 4, after finding 6 to 6 that nonstatutory mitigation was proved. As in Hurst, those numbers on their own create doubt that if correctly instructed, the jury would have found - unanimously - both that the aggravation was sufficient to warrant death and that the aggravation outweighed the mitigation.

As to mitigation, in Hurst this court adopted the "rigorous" harmless-error analysis the Arizona Supreme Court applied after Ring v. Arizona, 536 U.S. 534 (2002), was decided. Here, as in Arizona, the State must show that *no rational jury* would determine that the mitigating circumstances were sufficiently substantial as to call for leniency. State v. Nordstrom, 206 Ariz. 242, 77 P. 3rd 40 (Ariz. 2003), is among the cases decided after Ring: there the trial judge rejected expert testimony to the effect that alcohol and drug abuse could have tended to cause the violent crime in question. The supreme court held it could not say beyond a reasonable doubt that Nordstrom's jury would have weighed that expert testimony just as the judge did. State v. Hoskins, 204 Ariz. 572, 65 P. 3rd 953 (Ariz. 2003) is similar to Nordstrom; in Hoskins the trial court rejected a psychologist's testimony that bipolar disorder could have contributed to the defendant's conduct, and the supreme court found the Ring error harmful in that a jury might have assessed that testimony differently.

In State v. Dann, 206 Ariz. 371, 79 P. 3rd 58 (Ariz. 2003), as in this case, the trial court found that substance abuse and psychiatric issues had been proved, but had no nexus with the murder. The Arizona Supreme Court noted that the evidence had been in conflict, and held that it could not conclude

- that a jury would not have found additional mitigating factors,
- that a jury would not have differently weighed the factors it found, and
- that a jury would not have then found the mitigation sufficiently substantial to call for leniency.

79 P. 3rd at 61.

Here the defense called multiple expert witnesses, all of whom testified that well-documented brain damage could have caused loss of impulse control in this case, where the victim was beaten and stabbed to death despite no known prior difficulties with the defendant. After twice noting that he could disregard expert testimony he could not reconcile with other proof, Judge Briggs gave the brain damage-related testimony only moderate weight, since he perceived no direct nexus between it and the crime. The Arizona Supreme Court has noted that whether a nexus exists between mitigation and murder is a question of fact that requires judging the credibility and weight of the mitigation evidence. State v. Cropper, 206 Ariz. 153, 76 P. 3rd 424, 429 (Ariz. 2003). That court, if it followed its decisions in Cropper, Dann, Nordstrom and

Hoskins, would not find the Ring/Hurst error harmless in this case.

Here, the judge also gave slight weight to much of the evidence of nonstatutory mitigating circumstances. State v. Armstrong, 208 Ariz. 360, 93 P. 3rd 1076 (2004), is similar: Armstrong's judge found that seven of nineteen proposed non-statutory mitigating circumstances were present, but accorded them "minimal" weight and determined they were insufficient to call for leniency. 93 P. 3rd at 1081. The Arizona Supreme Court held that "we cannot conclude beyond a reasonable doubt that no rational jury would find otherwise...we cannot say that a jury would not have found additional mitigating factors or weighed differently the mitigating factors that were found." Id. at 1081-82. Here the nonstatutory mitigation given slight weight included the defendant's difficult childhood, and his maintaining a relationship as a loving father during his years in prison.

This court in Hurst, in holding the Sixth Amendment error was not harmless, itself weighed the mitigating evidence in that case and characterized it as "extensive and compelling." Hurst v. State, 2016 WL 6036978 *24 (Fla. 2016). As Appellant argued in his initial brief in this case, in support of reversal on proportionality grounds, the proof of mitigation adduced in this case is of a kind this court has in the past found compelling.

For the foregoing reasons, the State cannot show beyond a reasonable doubt

that the absence of crucial jury-made findings should be deemed harmless in this case.

CONCLUSION

Appellant has shown that this court must vacate the resentencing order appealed from, and either impose a life sentence on proportionality grounds or remand for further proceedings authorized by law.

Respectfully submitted,

JAMES S. PURDY,
PUBLIC DEFENDER

s/ Nancy Ryan

By: NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 765910
444 Seabreeze Blvd., Suite 210
Daytona Beach, Florida 32118
Phone: 386/254-3758
ryan.nancy@pd7.org

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Second Supplemental Initial Brief has been electronically delivered to Assistant Attorney General Stephen Ake, at capapp@myfloridalegal.com, and mailed to the Appellant on this 17th day of November, 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.

s/ Nancy Ryan
By: NANCY RYAN