

IN THE SUPREME COURT OF FLORIDA

ERIC LEE SIMMONS,

Appellant,

v.

CASE NO. SC14-2314

DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.

\_\_\_\_\_ /

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

SECOND SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI  
ATTORNEY GENERAL

STEPHEN D. AKE  
ASSISTANT ATTORNEY GENERAL  
Florida Bar No. 14087  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013  
Telephone: (813) 287-7910  
Facsimile: (813) 281-5501  
E-mail: capapp@myfloridalegal.com  
[and] stephen.ake@myfloridalegal.com

COUNSEL FOR APPELLEE

RECEIVED, 11/22/2016 11:28:31 AM, Clerk, Supreme Court

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

PRELIMINARY STATEMENT..... 1

STATEMENT OF THE CASE AND FACTS..... 1

SUMMARY OF THE ARGUMENT..... 2

ARGUMENT..... 3

    ANY HURST ERROR IN THIS CASE IS HARMLESS BEYOND A  
    REASONABLE DOUBT AS ANY RATIONAL JURY WOULD HAVE  
    UNANIMOUSLY FOUND THAT THE THREE AGGRAVATING  
    CIRCUMSTANCES OUTWEIGHED THE NONSTATUTORY MITIGATION  
    AND WERE SUFFICIENT FOR THE IMPOSITION OF DEATH..... 3

CONCLUSION..... 8

CERTIFICATE OF SERVICE..... 8

CERTIFICATE OF FONT COMPLIANCE..... 8

**TABLE OF AUTHORITIES**

**Cases**

Apprendi v. New Jersey,  
530 U.S. 466 (2000) ..... 3

Chapman v. California,  
386 U.S. 18 (1967) ..... 4

Hurst v. Florida,  
\_\_ U.S. \_\_, 136 S. Ct. 616 (2016) ..... 2, 3

Hurst v. State,  
\_\_ So. 3d \_\_\_\_, 2016 WL 6036978 (Fla. Oct. 14, 2016) ... passim

Johnson v. State,  
969 So. 2d 938 (Fla. 2007) ..... 6

Larkins v. State,  
739 So. 2d 90 (Fla. 1999) ..... 6

Ring v. Arizona,  
536 U.S. 584 (2002) ..... 3

**PRELIMINARY STATEMENT**

Following this Court's decision in Hurst v. State, \_\_\_ So. 3d \_\_\_, 2016 WL 6036978 (Fla. Oct. 14, 2016), Appellant sought and obtained permission from this Court to file a second supplemental brief addressing the impact of this Court's Hurst decision to his case. Appellee files this Second Supplemental Answer Brief in response to this Court's order of November 2, 2016.

**STATEMENT OF THE CASE AND FACTS**

Appellee will rely on the Statements of the Case and Facts contained in its Answer Brief and Supplemental Answer Brief previously filed in this case, but would briefly note that in Appellant's second supplemental brief filed with this Court, counsel claims that "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." Appellant's Second Supplemental Brief at 1. While Appellant certainly argued to the jury that this had been established as mitigation,<sup>1</sup> the special interrogatory verdict form indicates that the jury unanimously rejected the two proffered statutory mental

---

<sup>1</sup> The State introduced substantial rebuttal expert testimony which established that Simmons' PET scan results failed to show any abnormalities.

mitigators and six of the jurors specifically found that absolutely **no** mitigation had been established by the greater weight of the evidence. The other six jurors found that Appellant had established non-statutory mitigation of "any other factors in the defendant's character, background or life, or the circumstances of the offense," and these factors *may* have included Appellant's alleged brain damage and cognitive impairments. (DAR V10:1970-73).

**SUMMARY OF THE ARGUMENT**

Appellant is entitled to no relief based on the United States Supreme Court's opinion in Hurst v. Florida, \_\_ U.S. \_\_, 136 S. Ct. 616 (2016), or this Court's decision in Hurst v. State, \_\_ So. 3d \_\_, 2016 WL 603 6978 (Fla. Oct. 14, 2016). Any Hurst error in this case is harmless as it is clear beyond a reasonable doubt on this record that, had the jury been instructed under the law as recently interpreted by this Court, the jury would have unanimously found that the three aggravating factors outweighed the nonstatutory mitigation and that the three aggravators were sufficient to impose death.

ARGUMENT

ANY HURST ERROR IN THIS CASE IS HARMLESS BEYOND A REASONABLE DOUBT AS ANY RATIONAL JURY WOULD HAVE UNANIMOUSLY FOUND THAT THE THREE AGGRAVATING CIRCUMSTANCES OUTWEIGHED THE NONSTATUTORY MITIGATION AND WERE SUFFICIENT FOR THE IMPOSITION OF DEATH.

In Hurst v. Florida, 136 S. Ct. 616, 619 (2016), the United States Supreme Court found Florida's death penalty statute violated the Sixth Amendment in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), because Florida's statute failed to require the jury to make a finding as to "each fact necessary to impose a sentence of death." The Supreme Court remanded Hurst's case to this Court to determine whether the constitutional error was harmless. Id. at 624.

On remand, this Court expanded the Supreme Court's holding based on its interpretation of state and federal law and stated:

[B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Hurst v. State, 2016 WL 6036978 at \*13. Because the jury in Hurst's case had not unanimously made these findings, this Court conducted harmless error analysis under Florida law.

Following the harmless error standard set forth by the United States Supreme Court in Chapman v. California, 386 U.S. 18 (1967), this Court stated that the harmless error test placed the burden on the state to prove beyond a reasonable doubt that "the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence." Hurst v. State, 2016 WL 6036978 at 23. In Hurst's case, given the lack of an interrogatory jury verdict form and the seven to four bare majority vote for death, this Court concluded that it could not determine without a doubt that the jury would not have found both aggravating factors, or that the jury would have unanimously found that the aggravators outweighed the mitigators and were sufficient to impose death. Id. at 23-25.

In contrast to Hurst's case where this Court was unsure whether the jury would have unanimously found the existence of either aggravating circumstance, Hurst, 2016 WL 6036978 at \*24, it is clear from the interrogatory jury verdict form utilized in Simmons' case that the jury *unanimously* found the existence of each of the three aggravating factors: (1) Appellant was previously convicted of a felony involving the threat of violence to a person; (2) the murder was committed while Appellant was engaged in the commission of a sexual battery,

kidnapping, or both; and (3) the murder was especially heinous, atrocious, or cruel.

This Court's Hurst decision is further distinguishable from the instant case because Hurst's case involved "extensive and compelling" mitigation. Hurst, 2016 WL 6036978 at \*24. This Court noted that due to the lack of an interrogatory jury verdict, "we cannot say with any certainty how the jury viewed that mitigation." Id. In the instant case, however, the interrogatory verdict reflects that the jury did not find Simmons' mitigation "extensive and compelling." Here, the jury *unanimously* rejected the two statutory mental mitigators that Simmons' was "under the influence of extreme mental or emotional disturbance" or that his capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired." Furthermore, half of the jurors found that Appellant failed to establish any mitigation by the greater weight of the evidence. Although six jurors found that the "catch-all" nonstatutory mitigator involving the defendant's character, background, and circumstances of the offense had been established, and four jurors did not vote for death, the State submits that had the jury been instructed under the law as recently interpreted by this Court, the jury would have unanimously found that the three substantial aggravating



factors outweighed the nonstatutory mitigation and that the three aggravating circumstances were sufficient to impose death.

In this case, the jury unanimously found that Simmons committed the murder of Deborah Tressler during the commission of a kidnapping and sexual battery, and did so in an especially heinous, atrocious or cruel manner.<sup>2</sup> This Court has noted that HAC is one "of the most serious aggravators set out in the statutory sentencing scheme," Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999), and a murder committed during the commission of a kidnapping and sexual battery is also often given significant weight by this Court. See Johnson v. State, 969 So. 2d 938 (Fla. 2007) (noting that the "murder in the course of a felony" aggravator was qualitatively significant because it rested on two grave violent crimes, sexual battery and kidnapping). By special interrogatory verdict, the jury indicated that only six of the twelve jurors found any mitigation; namely the "catch-all" nonstatutory mitigator that *may* have included any number of Simmons' proffered mitigators. However, the jury ultimately recommended a sentence of death by a vote of eight to four after having been instructed that their verdict need not be unanimous. The State submits that had the jury been instructed that they

---

<sup>2</sup> The jury also unanimously found that Simmons had a prior felony conviction involving the use of threat of violence.

must unanimously find that the aggravating circumstances outweighed the mitigation and that the aggravators were sufficient to impose death, any rational jury would have done so on this record. Accordingly, the State urges this Court to find the error harmless and affirm Simmons' death sentence.

**CONCLUSION**

In conclusion, Appellee respectfully requests that this Honorable Court affirm Appellant's sentence of death.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 22nd day of November, 2016, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: **Nancy Ryan**, Assistant Public Defender, Public Defender's Office, Seventh Judicial Circuit, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118, [[ryan.nancy@pd7.org](mailto:ryan.nancy@pd7.org)].

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

PAMELA JO BONDI  
ATTORNEY GENERAL

/s/ Stephen D. Ake  
STEPHEN D. AKE  
ASSISTANT ATTORNEY GENERAL  
Florida Bar No. 14087  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013  
Telephone: (813) 287-7910  
E-mail: [capapp@myfloridalegal.com](mailto:capapp@myfloridalegal.com)  
[and] [stephen.ake@myfloridalegal.com](mailto:stephen.ake@myfloridalegal.com)

COUNSEL FOR APPELLEE