IN THE SUPREME COURT OF FLORIDA

DONALD OTIS WILLIAMS,

Appellant,

vs.

CASE NO. SC14-814

STATE OF FLORIDA,

Appellee.

_____/

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

APPELLANT'S SUPPLEMENTAL INITIAL BRIEF IN LIGHT OF HURST v. FLORIDA

JAMES S. PURDY
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SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

As noted in the initial brief, the defense moved below to bar imposition of a death sentence because Florida's capital sentencing scheme violates the federal Sixth Amendment on the basis set out in *Ring v. Arizona*, 536 U.S. 584 (2002). (I 170, 174) The defense further moved for written findings by the jury, and for jury instructions and argument which did not minimize the jury's role as "advisory." (II 252, 254) The trial court denied the requested relief. (XI 2101, 2102, 2109; X 1912)

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 have been told, the final decision as to which punishment shall be imposed is my responsibility. 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. Although 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.

(XXX 2451-52; X 1823) The standard instructions go on to refer 21 additional

times to a recommended sentence and seven additional times to an advisory sentence. (XXX 2452-59, 2461; X 1822-28) Those references included the closing words the jury heard i.e.,

> THE COURT: You will now retire to consider your recommendation as to the penalty to be imposed upon the defendant.

(XXX 2461; X 1828)

The jurors were instructed on five aggravating factors, i.e. presence of a prior violent felony conviction; presence of a contemporaneous conviction for kidnapping; the crime was committed while the defendant was on felony probation; the crime was committed for pecuniary gain; and the victim was especially vulnerable due to age. (XXX 2543-54; X 1824-25)

DELIBERATIONS AND VERDICT

The jury found by a count of 12-0 that four of those aggravating factors were present; they split 9-3 on whether the crime was committed for pecuniary gain. (X 1830, 1912) The jury was also instructed on the two mental-health-related statutory mitigating factors, and in "catchall" form as to the nonstatutory mitigating factors the defense had proven, and was told to fill out the mitigation page of the verdict form only if a majority found mitigation present. (XXX 2455-56, 2463-64) The jury returned a blank form as to mitigation (X 1831) and recommended a

death sentence by a count of 9-3. (XXX 2465; X 1829, 1912)

THE SENTENCING ORDER

In its sentencing order, the court recited it had independently weighed the evidence. (X 1913) The court found the same five aggravating factors the jury found, assigned pecuniary gain some weight, and assigned the remaining aggravators great weight. (X 1918-21) The court found that the defense proved the defendant's capacity to conform his conduct to law was substantially impaired, but did not prove he acted under the influence of extreme mental and emotional disturbance. (X 1922-30) The court did not set out what weight it gave the statutory mitigating factor it found. (X 1929, 1940) The judge further found that the defense showed several non-statutory mitigating circumstances, but gave each of them "some weight," "little weight," or "slight weight." (X 1930-39) The court concluded that the aggravating circumstances far outweigh the mitigating circumstances in this case. (X 1940)

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 four aggravating factors were shown, found 9-3 that a fifth aggravating factor was shown, and recommended death by a 9-3 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 sentenced to death after a unanimous jury found, in a special interrogatory verdict, that each of four aggravating factors was proved. Those aggravating factors were that the murder was committed while Appellant was on felony probation; that it was committed in the course of a kidnapping; that the defendant had been convicted of a prior violent felony; and that the victim was especially vulnerable due to age. The jury split 9-3 on whether the additional aggravator of pecuniary gain was present, rejected all the proffered mitigation, and recommended death by a count of 9-3. The court found that the same five 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*, 136 S. Ct. 616 (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 harmless. *Hurst*, at 624. 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. 238, 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.

Donaldson, 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. *Furman*, 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," *id*., at 309-10 (Stewart, J., concurring), on each occasion by a jury acting "in its own discretion ... no matter what the circumstances." *Id*., 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 underlie 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." *Bottoson*, 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." *Caldwell*, 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.

STRUCTURAL AND HARMLESS ERROR

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. *Sullivan*, 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*, at 622. 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 9-3 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.

The State has argued, in other cases in this procedural posture, that Sixth Amendment interests are not implicated in any Florida capital case where the defendant has a conviction for a prior violent felony, or was convicted of a violent felony contemporaneously with the murder. It reasons that in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court excluded the existence of a prior conviction from those facts which a jury, as distinct from the sentencing judge, must make in support of an enhanced sentence. The State further posits that the only actual fact needed in Florida to make a defendant eligible for the death penalty is the existence of a single aggravating factor, and that all other findings made in a capital case are in fact global judgments rather than fact-based findings governed by *Apprendi*. In reaching that position, the State has relied on language from the Court's recent decision in *Kansas v. Carr*, 2016 WL 228342 (2016).

In *Carr*, the Court referred to the "eligibility phase" and the "selection phase" featured in the Kansas death-sentencing scheme. In *State v. Gleason*, 329

P. 3rd 1102 (Kansas 2014), the decision overturned in *Carr*, the Kansas Supreme Court explained that juries in that state must find beyond a reasonable doubt (a) that the charged aggravating circumstances exist, and (b) that their existence is not outweighed by any mitigating circumstances. *Gleason*, at 1141. In that scheme there is a clear dichotomy between an initial factual "eligibility" finding (one aggravator exists) and a further, less specific finding "selecting" the defendant for the death penalty, and the State extrapolates that such a dichotomy must exist in Florida as well. However, Florida's capital sentencing statute does not fit that mold. Instead, Section 921.141, Florida Statutes, dictates that the required findings are "that *sufficient* aggravating circumstances exist," and that there are insufficient mitigating circumstances to outweigh them. 921.141(3) (emphasis added). Thus Florida intertwines the factual findings it requires to support a death penalty with the "judgment calls" that decision requires.

Florida's standard jury instructions do not, any more clearly than the statute, set out a dichotomy between an initial factual finding governed by *Apprendi* and a later global determination which is not so governed. First the instructions tell the jurors they are to advise the court of their ultimate recommendation based on their determinations about *sufficient* aggravating circumstances and whether they are outweighed; then the instructions set out general rules for weighing the evidence

and general rules for deliberation; then they instruct that at least one aggravating circumstance must be proven beyond a reasonable doubt; then they return to the duty to find *sufficient* aggravators; then they instruct on mitigation, pointing out the lesser burden of proof on the defense; then they instruct on victim impact; then they again return to the duty to find at least one aggravator that is in the jurors' minds *sufficient*. Fla. Std. Jury Instr. (Crim.) 7.11, West's Florida Criminal Laws and Rules (2015) at J-72 to J-77.

The State has further relied on *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), where this court stated that death is presumed the appropriate sentence where at least one aggravating factor is found. *Dixon*, at 9. As Justice Pariente has pointed out, that statement of law is inconsistent with more recent authority, which holds that the jury is never compelled or required to return a recommendation of death. *Zommer v. State*, 31 So. 3rd 733, 756 (Pariente, J., specially concurring), *citing* the standard jury instructions approved in 2009 and *State v. Steele*, 921 So. 2d 538, 543 (Fla. 2005). *Apprendi* and its progeny, including *Hurst*, therefore govern the findings that the Court in *Hurst* pointed out must be made in Florida, *i.e.*, "that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Hurst* at *6, citing Section 921.141(3), Florida Statutes.

THE JURY'S FINDINGS

The State has argued, in a case before this court on similar facts, that the fact the jury found aggravating factors shows that any *Hurst* error is harmless. This position, again, depends on the assumptions that the Florida Legislature clearly says that the only finding a capital jury must make is that a single aggravating circumstance exists, and that the Sixth Amendment therefore does not apply to any remaining findings or weighings . Appellant again disagrees that this assumption is borne out by Florida's capital sentencing statute and instructions.

UNANIMITY

Further, the various opinions in *Ring v. Arizona*, *supra*, assume that a unanimous jury is the jury guaranteed by the Sixth Amendment. The Supreme Court did not address that aspect of *Ring* in *Hurst*; Appellant's position is that a unanimous jury is contemplated by the Supreme Court in death sentencing proceedings. A new sentencing phase must be ordered in this case to satisfy the Eighth Amendment interest implicated by the *Caldwell v. Mississippi* error identified above, as well as the Sixth Amendment interests addressed in *Ring* and in *Hurst*.

CONCLUSION

In addition to the relief sought in the earlier briefing in this case, Appellant has here shown that this court must vacate Appellant's death sentence and either remand for imposition of a life sentence (if the statutory remedy briefed above is approved by this court) or remand for a new penalty phase.

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 Suzanne Bechard, at capapp@myfloridalegal.com, and mailed to the Appellant on this 11th day of February, 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.

Nancy Ryan

Nancy Ryan