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 **SECOND SUPPLEMENTAL** INITIAL BRIEF

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

CHARGES AND VERDICTS IN GUILT PHASE

As noted in the initial brief, Appellant was charged with kidnapping, robbery, and first-degree murder, either premeditated or while engaged in a kidnapping, robbery, or both. (II 392) The jury returned verdicts of guilty as charged on all three counts, specifying that the murder was felony-murder premised on "kidnapping, robbery, or both." (IX 1781-83)

INTERROGATORY VERDICT - AGGRAVATORS

At the penalty phase below, the jury returned an interrogatory verdict finding unanimously that each of four aggravating factors had been proved beyond a reasonable doubt, i.e., the defendant was on felony probation; he had a prior violent felony conviction; he had a contemporaneous conviction for kidnapping; and the victim was especially vulnerable due to age. (X 1830) The jury returned an additional verdict finding 9 to 3 that a fifth aggravating factor that had also been instructed on was present, i.e., that the victim was killed for pecuniary gain. (X 1830; see X 1824-25)

PROOF IN SUPPORT OF PECUNIARY GAIN AGGRAVATOR

The State showed that the victim disappeared after a trip to Publix, and that the defendant was found living in her car some five days later while in possession

of her credit cards. (XIX 379-85, 445-51) No proof was introduced suggesting that the cards had been used. The defendant offered the cards to a friend at one point during the five-day interval, and was sufficiently flush with cash at the time to treat the friend to Kentucky Fried Chicken and beer. (XIX 497-510) The proof further showed the defendant had been homeless before the victim's disappearance. (XXII 848-55, 873)

EXPERT OPINIONS REGARDING MENTAL HEALTH

At the guilt phase, lay witnesses established that the defendant over the years has behaved erratically, gone long periods without sleep, and appeared to experience seizures and hallucinations. (XXIII 1047-57, 1068-69; XXIV 1142-45, 1161-64) Psychiatrist Dr. Alan Berns testified that he had diagnosed the defendant with bipolar affective disorder and post-traumatic stress syndrome, and specified that those conditions can cause hallucinations and flashbacks. (XXIV 1189, 1193, 1201-02; X 1923) Psychologist Dr. Steven Gold testified similarly. (XXIV 1263, 1269-75; X 1922-23) Dr. Ava Land testified for the State that she disagreed as to both diagnoses. (XXVII 1764-71, 1787-90) Dr. Rafael Perez, the treating psychiatrist at the Lake County Jail, gave his opinion that the defendant was malingering. (X 1926)

At the penalty phase Drs. Gold and Berns, and a third defense expert, Dr. Eric Mings, testified that the defendant's chronic mental illnesses could have contributed to loss of impulse control. Drs. Gold, Berns and Mings all concluded that the defendant's capacity to conform his conduct to the requirements of law was affected adversely. (X 1922-25; XXIX 2276-77; XXX 2321, 2329-31, 2351-52)

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.

(X 1823)

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

(X 1824)

> 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.

(X 1825)

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

(X 1827)

INTERROGATORY VERDICT - MITIGATION

The jury was instructed on the statutory mitigating factors of inability to conform conduct to law, and presence of severe emotional or mental disturbance.

(X 1826) The jury was presented with a verdict form that set out the following:

MITIGATING FACTORS AS TO COUNT III

> Check all appropriate:
>
> ____ 1. A majority of the jury, by a vote of ___ to ___, finds the following mitigating circumstance has been established by the greater weight of the evidence: The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> ____ 2. A majority of the jury, by a vote of ___ to ___, finds the following mitigating circumstance has been established by the greater weight of the evidence: The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.
>
> ____ 3. A majority of the jury, by a vote of ___ to ___, finds the following mitigating circumstance has been established by the greater weight of the evidence: The existence of any other factors in the defendant's character, background, or life, or the circumstances of the offense that would mitigate against the imposition of the death penalty.

(X 1831) During deliberations, the jury foreman asked, regarding that form, "do

we only fill out a line if it's a majority?" (XXX 2463) With the parties' agreement, the court answered "That's correct." (XXX 2463-64) The foreman signed the form set out above with none of the boxes checked, and on a separate form the jury recommended a death sentence by a count of 9-3. (X 1831, 1829)

THE SENTENCING ORDER APPEALED FROM

In his sentencing order, Judge Nacke noted he had independently weighed the evidence. (X 1913) He gave "some weight" to the pecuniary gain aggravator, and great weight to each of the four aggravators found unanimously by the jury. (X 1918-21)

Based on opinion testimony by the defense experts, the court found that the statutory mitigating factor "Defendant's capacity to conform his conduct to the requirements of law" had been proved by the greater weight of the evidence, but did not set out what weight, if any, he gave that factor. (X 1922-29) The court found the defendant to be a less than credible witness, and concluded that it would find no mitigating circumstance that depended on his self-report. (X 1929-30, 1933) Specifically, the court rejected both the statutory mitigator "Defendant committed the crime while under the influence of extreme mental and emotional disturbance," and the nonstatutory mitigating circumstance that the defendant reported being sexually abused as a child. (X 1929-30, 1933) As to other non-

statutory mitigating circumstances, the court gave "some weight" to alcohol and drug abuse, childhood physical and emotional abuse, past head injuries, and the defendant's habit of helping others (X 1932, 1935, 1937, 1939), and "slight weight" to the defendant's Marine Corps service and to his having been a good father and a hard worker. (X 1931, 1939) The judge concluded that in this case the aggravating factors outweigh the mitigating circumstances. (X 1940)

THIS APPEAL

Before oral argument in this case, 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 unanimously 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 9-3 split in this case raises the same concern.

The record shows that the jury found 9 to 3 that one of the aggravating factors - that the murder was committed for pecuniary gain - had been proved. The jury was not instructed not to weigh that non-unanimous finding.

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

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 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 February, 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 10-11) It argued that the interrogatory verdict that was returned below, unanimously finding the presence of four 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. Here it is known that the jury *expressly declined to find unanimously* that the "pecuniary gain" aggravating factor was proved. The jury in this case was instructed that it must find aggravating factors beyond a reasonable doubt, but it was never instructed that it must do

so unanimously in order to weigh them. Since the jury was never instructed that it could not take the "pecuniary gain" aggravator into account, this court cannot know whether the jurors, like the trial court, assigned that factor weight, or how much weight they assigned it. Accordingly the State cannot meet its burden of showing beyond a reasonable doubt that the Hurst error was harmless.

In Hurst this court went on to write that it could not be sure that Hurst's jury would have unanimously made the other findings essential to a death sentence, i.e., whether the aggravators it found were sufficient to impose death, or whether 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 9 to 3. The jury did not check any boxes on the interrogatory devoted to mitigation, after the foreman ascertained that if no majority were found no box was to be checked, thus leaving open the possibility that the jury voted 6 to 6 as to the existence of two statutory and numerous nonstatutory mitigators. As in Hurst, the numbers on their own create significant doubt that if correctly instructed, the jury would have found - unanimously and beyond a reasonable doubt - 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. Hurst at *24.

The Arizona Supreme Court applied the "no rational jury" test in State v. Jones, 205 Ariz. 445, 72 P. 3rd 1264 (Ariz. 2003). The holding in Jones was that since the trial judge had rejected both expert and lay mitigation testimony based on credibility determinations, the supreme court could not say beyond a reasonable doubt that a rational jury would necessarily have likewise concluded that neither the statutory nor nonstatutory mitigation in question had been proved. Here the judge rejected both statutory and nonstatutory mitigation based on his finding that the defendant is not a reliable source of information. This court, like the Arizona Supreme Court in Jones, cannot say beyond a reasonable doubt that no rational jury would have made a different credibility call.

The judge also gave "slight" weight to the defendant's Marine Corps service and to his having been a good father and a hard worker, and "some" weight to the physical and emotional abuse he experienced in childhood, his past head injuries, his alcohol and drug abuse, and his habit of helping others. 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; *accord* State v. Cañez, 205 Ariz. 620, 74 P. 3rd 932, 937 (Ariz. 2003), and State v. Finch, 205 Ariz. 170, 68 P. 3rd 123, 126 (Ariz. 2003).

A rational factfinder, if correctly instructed, could readily have determined in this case that the expert opinion testimony, combined with the rest of the proof offered in mitigation, was such as to warrant leniency. Indeed, three members of the actual jury expressed that view, after getting to know the defendant well during the six days he represented himself. On this unusual record, the State cannot show beyond a reasonable doubt that the absence of crucial jury-made findings should be deemed harmless.

CONCLUSION

Appellant has shown that this court must vacate the resentencing order appealed from, and remand for further proceedings authorized by law.

Respectfully submitted,

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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 C. Suzanne Bechard, at capapp@myfloridalegal.com, and mailed to the Appellant on this 18th 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
Nancy Ryan