IN THE SUPREME COURT OF FLORIDA

DONALD OTIS WILLIAMS,

Appellant,

v. **Case No. SC14-814**
Lower Tribunal No. 11-CF-000105-X-04
STATE OF FLORIDA, **Death Penalty Case**

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

C. SUZANNE BECHARD
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0147745
Office of the Attorney General
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com
carlasuzanne.bechard@myfloridalegal.com

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

STATEMENT OF THE CASE AND FACTS

The State reiterates and incorporates its Statement of the Case and Facts from the Answer Brief and Supplemental Answer Brief, with the following additions pertinent to the issue on which this Court ordered additional supplemental briefing.

Appellant's jury convicted him of the kidnapping, robbery, and murder of 81-year-old Janet Patrick. (V9/1781-83). Prior to trial, Appellant filed motions challenging Florida's capital sentencing scheme based on Ring v. Arizona, 536 U.S. 584 (2002) (V1/174-89); moved for an order striking any reference to the jury's role being merely advisory under Caldwell v. Mississippi, 472 U.S. 320 (1985), and Ring (V2/254-56); and moved for a unanimous jury recommendation and special verdict forms. (V1/170-73; V2/260). A special interrogatory verdict form was used, but the court denied Appellant's motions to bar the death penalty, to strike reference to the jury's advisory rule, and to require unanimity. (V11/2101-02, 2108-10).

After hearing all of the evidence, the jury returned an interrogatory verdict indicating unanimous findings that four aggravating factors were established beyond a reasonable doubt: (1) Appellant was on felony probation at the time of the murder; (2) Appellant had a prior violent felony conviction; (3) the murder was committed while Appellant was engaged in the

commission of a kidnapping; and (4) the victim was particularly vulnerable due to advanced age or disability. The jury voted nine-to-three that the murder was committed for pecuniary gain. (V10/1830). The jury unanimously agreed that no statutory or nonstatutory mitigating circumstances had been established. (V10/1831). The court followed the jury's nine-to-three recommendation and sentenced Appellant to death. (V20/2464-65).

SUMMARY OF 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 6036978 (Fla. Oct. 14, 2016). Any Hurst error is harmless beyond a reasonable doubt. The jury **unanimously** found the existence of four aggravating factors: (1) Appellant was on felony probation at the time of the murder; (2) Appellant had a prior violent felony conviction; (3) the murder was committed while Appellant was engaged in the commission of a kidnapping; and (4) the victim was particularly vulnerable due to advanced age or disability. And the jury **unanimously** found that no mitigating circumstances had been proven. Thus, the jury necessarily concluded that the aggravating factors outweighed the mitigating circumstances. Under the circumstances of this

case, had the jury been instructed under the law as interpreted by this Court in Hurst v. State, there is no doubt the jury would have rendered a unanimous recommendation for death.

ARGUMENT

SECOND SUPPLEMENTAL BRIEFING ISSUE

ANY ERROR UNDER HURST V. FLORIDA, 136 S. CT. 616 (2016), AND HURST V. STATE, 2016 WL 6036978 (FLA. OCT. 14, 2016), IS HARMLESS BEYOND A REASONABLE DOUBT. (RESTATED)

In his initial brief, Appellant claimed entitlement to relief based on Ring v. Arizona, 536 U.S. 584 (2002). During the pendency of his direct appeal, the United States Supreme Court in Hurst v. Florida, 136 S. Ct. 616 (2016), extended the holding in Ring to Florida's death penalty scheme, ruling that Florida's death penalty scheme is unconstitutional under the Sixth Amendment to the extent that it "require[s] the judge alone to find the existence of an aggravating circumstance." Hurst, 136 S. Ct. at 624. The Court noted that the jury's advisory recommendation could not serve as the necessary factual finding required by Ring. Id. at 622. In reversing Hurst's sentence, the Court did not address the State's argument that any error was harmless, but remanded the case to this Court to conduct such an analysis. Id. at 624.

On remand, this Court in Hurst v. State, expanded the holding in Hurst v. Florida based on its interpretation of state and federal law to hold that:

> [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. This Court further found that the constitutional error found in Hurst v. Florida was capable of harmless error review under Florida law. Id. at *22-23.

Appellant argues in his second supplemental brief that the Hurst error in his case was not harmless. "Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence." Hurst v. State, 2016 WL 6036978 at *23. Quoting State v. Diguilio, 491 So. 2d 1129, 1139 (Fla. 1986), this Court reiterated that the focus of the harmless error test "is on the effect of the error on the trier-of-fact." Id.

In Hurst, this Court found that the defendant's death sentence was not harmless error under the circumstances of that case. Hurst is readily distinguishable from the instant matter.

In aggravation, the trial court in Hurst found that "the murder was committed while Hurst was engaged in the commission of a robbery, although he was not charged with robbery and the judge found that the murder was especially heinous, atrocious, or cruel." Id. at *4. However, this Court emphasized that the "mitigation was extensive and compelling." Id. at *24. This Court noted:

> Hurst was slow mentally while growing up and did poorly in school. He had difficulty caring for himself and performing normal daily activities. Experts presented evidence of brain abnormalities in multiple areas of his brain. Hurst's IQ testing showed scores dipping into the intellectually disabled range, although he had scored higher on occasion. Because we do not have an interrogatory verdict commemorating the findings of the jury, we cannot say with any certainty how the jury viewed that mitigation, although we do know that the jury recommended death by only a bare majority. The trial judge found that Hurst's young chronological age of 19, and his even younger mental age, at the time of the murder was mitigating. The judge also found that Hurst had significant mitigation including low IQ and likely brain abnormalities due to fetal alcohol syndrome.

Id. at *24-25.

By contrast, in this case, the jury **unanimously** found the existence of the following **four aggravators**: (1) Appellant was on felony probation at the time of the murder; (2) Appellant had a prior violent felony conviction; (3) the murder was committed while Appellant was engaged in the commission of a kidnapping; and (4) the victim was particularly vulnerable due to advanced

age or disability. The jury voted nine-to-three that the murder was committed for pecuniary gain.

As to mitigating factors, the jury was given a special verdict form that told them to "check all appropriate." None of the mitigating factors were checked off as being "appropriate;" therefore, none were voted on. The foreperson signed and dated the form. The only possible interpretation of this form is that the jurors all agreed that no mitigation had been established.

With Hurst v. State's emphasis on jury findings concerning mitigation, the finding by the jury that no mitigation existed is the only finding that matters to this Court's harmless error analysis in this case. In any event, the trial court found that Appellant's capacity to conform his conduct to the requirements of the law was substantially impaired; however, it determined that Appellant had not proven that he committed the crime while under the influence of extreme mental and emotional disturbance where evidence of the mitigating circumstance was based solely on Appellant's truthfulness. The trial court gave only some to slight weight to the remaining mitigating circumstances. Thus, even taking the trial court's findings as to mitigation into consideration, the mitigation in this case was not "extensive and compelling." Hurst v. State, 2016 WL 6036978 at *24.

In sum, the jury **unanimously** found the existence of four aggravating circumstances, and it **unanimously** found that no mitigating factors had been established. The jury recommended death by a vote of nine-to-three. However, under the circumstances of this case, and given the unanimous findings as to aggravation and the unanimous agreement as to the lack of mitigation, had the jury been instructed under the law as interpreted by this Court in Hurst v. State, there is no doubt it would have rendered a unanimous recommendation for death.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the judgment and sentence imposed on Appellant Donald Otis Williams.

Respectfully submitted and certified,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ C. Suzanne Bechard
C. SUZANNE BECHARD
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0147745
Office of the Attorney General
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com
carlasuzanne.bechard@myfloridalegal.com

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 21, 2016, I electronically filed the foregoing with the Clerk of the Court by using the e-portal filing system which will send a notice of electronic filing to the following: **Nancy Ryan**, Assistant Public Defender, Office of the Public Defender, 444 Seabreeze Boulevard, Suite 210, Daytona Beach, Florida 32118, **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).

/s/ C. Suzanne Bechard
COUNSEL FOR APPELLEE