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** REPLY BRIEF

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

As noted in Appellant's second supplementary initial brief, the jury was presented with a verdict form that set out the following. Emphasis is added here:

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; emphasis added)

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. (X 1831)

SUMMARY OF ARGUMENT

The State asserts that the record shows the jury "**unanimously** found that no mitigating factors had been established." The verdict form does not support that assertion, which is the linchpin of the State's harmless-error analysis. The State has failed to show the Hurst[1] error in this case should be deemed harmless.

[1] Hurst v. State, 2016 WL 6036978 (Fla. 2016)

ARGUMENT

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

The State asserts that the record shows the jury "**unanimously** found that no mitigating factors had been established." (Second Supplemental Answer Brief at 7) (emphasis in original) It explains that

> 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.

(Second Supplemental Answer Brief at 6) As noted above at page one, the jury was directed by the plain language of the verdict form *only* to check boxes on the "mitigating factors" page if *a majority* of jurors found a mitigating circumstance present. As was also noted above at page one, the jury was orally instructed by the court, in response to its question, that it was *only* to check boxes on that page of the verdict form if a *majority* of jurors found a mitigator present.

The State's syllogism is this:

> A majority of jurors did not find any mitigator present.
> Therefore, no juror found any mitigator present.

The fallacy in the State's reasoning is apparent after minimal scrutiny. As argued

in Appellant's second supplemental initial brief, the verdict form used in this case leaves open "the possibility that the jury voted 6 to 6 as to the existence of two statutory and numerous nonstatutory mitigators." Another possible interpretation of the form is that the jury voted three to nine that one or more of the mitigating circumstances had been proved. Or four to eight, or five to seven, or two to ten, or one to eleven.

This court must reject the State's harmless-error reasoning, since it is based in a patently indefensible reading of the verdict form. Since the State has failed to meet its burden of showing beyond a reasonable doubt that the Hurst error was harmless, this court must reverse the sentence appealed from.

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 Reply Brief has been electronically delivered to Assistant Attorney General C. Suzanne Bechard, at capapp@myfloridalegal.com, and mailed to Appellant this 22nd 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.

Nancy Ryan

Nancy Ryan