

No. SC17-1071

IN THE
Supreme Court of Florida

NORMAN M. GRIM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

**RENEWED REQUESTS FOR FULL BRIEFING
AND ORAL ARGUMENT.....1**

ARGUMENT.....1

I. The State is correct that *Hurst* is retroactive and that the circuit court’s summary harmless-error ruling should be reviewed de novo.....1

II. The State does not dispute that a jury “waiver” analysis under *Mullens* does not apply here.....2

III. The State mischaracterizes harmless-error analysis in this case as a “pure legal issue,” rather than a mixed question of law and fact that requires further evidentiary development.....3

IV. The State’s arguments for affirming the circuit court’s harmless-error ruling based on certain aggravators found by the trial judge ignore the plain language of *Hurst v. Florida* and have been rejected by this Court.....6

V. The State’s remaining arguments for affirming the circuit court’s harmless-error ruling based on the unanimous jury recommendation cannot be squared with state or federal law.....7

CONCLUSION.....10

RENEWED REQUESTS FOR FULL BRIEFING AND ORAL ARGUMENT

Appellant respectfully renews his requests to allow oral argument pursuant to Fla. R. App. P. 9.320, and for the opportunity to file a full, untruncated brief pursuant to the standard Florida Rules of Appellate Procedure. This appeal presents important issues of first impression regarding whether a hearing should be held when a defendant proceeding under Rule 3.851 proffers evidence to the circuit court rebutting the State's position that the *Hurst* error at his sentencing was harmless beyond a reasonable doubt. These issues are more important and complex than the State's answer brief suggests, and would be aided by full briefing and argument.

ARGUMENT

I. The State is correct that *Hurst* is retroactive and that the circuit court's summary harmless-error ruling should be reviewed de novo

The State's brief acknowledges that the *Hurst* decisions apply retroactively to Appellant. *See* Answer Br. at 6 n.4. As the State correctly recognizes, the *Hurst* decisions are retroactive under Florida law because Appellant's death sentence became final in 2003, after *Ring v. Arizona*, 536 U.S. 584 (2002). *See Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016).¹ The State agrees with Appellant and the

¹ In addition, as Appellant argued in the circuit court and his initial brief, the *Hurst* decisions are retroactive as a matter of federal law. *See* Defendant's Memorandum of Law at 12-13 (Santa Rosa Cty., No. 1998-CF-000510, filed Nov. 11, 2016) (discussing federal cases, including *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016) (holding that federal law requires states to apply substantive rules retroactively)). The State's brief fails to address federal retroactivity.

circuit court that the only issue in this *Hurst* case is whether relief is precluded by the “harmless error” doctrine. The State correctly notes that the harmless-error test asks whether there is “no reasonable probability that the error contributed to the sentence.” Answer Br. at 6 (citing *Hurst v. State*, 202 So. 3d 40, 68 (Fla. 2016)).

The State is also correct that this Court should conduct de novo review of the circuit court’s summary harmless-error ruling. Answer Br. at 5 (citing *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009)); *see also Jackson v. Dugger*, 931 F.2d 712, 717 (11th Cir. 1991) (“Harmless error is a mixed question of law and fact subject to de novo review”). And, as the State recognizes, this Court should accept Appellant’s factual allegations as true to the extent they are not refuted by the record, and the circuit court should not be affirmed unless the record conclusively establishes that no relief is available. *See* Answer Br. at 5 (citing *Walton*, 3 So. 3d at 1005).

II. The State does not dispute that a jury “waiver” analysis under *Mullens* does not apply here

The State does not dispute that, although Appellant instructed his counsel not to present mitigation, this fact alone does not foreclose *Hurst* relief under this Court’s jury “waiver” cases, such as *Mullens v. State*, 197 So. 3d 16 (Fla. 2016). Those waiver cases do not apply here because Appellant (1) did not waive his right to jury fact-finding regarding two required elements—the applicable aggravators and the “sufficiency” of the aggravators for the death penalty; and (2) did not waive his right to a jury recommendation following the penalty phase. As the circuit court

found, and the State’s brief reflects, this is not a jury-waiver *Hurst* case, given that “a jury did in fact consider what sentence should be imposed.” Order at 7.

III. The State mischaracterizes harmless-error analysis in this case as a “pure legal issue,” rather than a mixed question of law and fact that requires further evidentiary development

The State mischaracterizes harmless-error analysis in this case as a “pure legal issue” that involves no factual inquiry beyond the existing record. Answer Br. at 7. Fundamentally, the State fails to recognize that harmless-error analysis of constitutional errors is not simply a matter of law, but a mixed question of law and fact. *See State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986); *see also Jackson*, 931 F.2d at 717 (“Harmless error is a mixed question of law and fact subject to de novo review”); *Grizzell v. Wainwright*, 692 F.2d 722, 725 (11th Cir. 1982) (collecting cases analyzing harmless error as mixed question of law and fact). Even the standard of proof for harmless error—beyond a reasonable doubt—is commonly understood as a factual, rather than a legal, standard. A proper harmless-error analysis requires an examination of the entire record, “including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.” *DiGuilio*, 491 So. 2d at 1135. But this Court has also recognized that the existing record may not always be sufficient to allow a meaningful harmless-error analysis.

Where the existing record is insufficient to determine whether a constitutional error was harmless beyond a reasonable doubt, this Court has found that further factual development is warranted. *See, e.g., Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991) (ordering a hearing based on a defendant’s proffer that was “sufficient to negate the conclusion that the *Hitchcock* [*v. Dugger*, 481 U.S. 393 (1987)] error was harmless.”); *see also Smith v. Singletary*, 61 F.3d 815, 817 (11th Cir. 1995) (considering impact of penalty-phase evidence that could have been presented and granting relief due to the effect of the unconstitutional error on defense counsel).

The State fails to recognize that harmless-error analysis of *Hurst* claims like Appellant’s implicates facts that may not be available in the existing record. The State acknowledges that “[t]he key question in evaluating harmless error is whether there is a reasonable possibility that the error affected the verdict,” Answer Br. at 8, but does not consider the possible ways that a penalty phase could unfold differently where the parties and counsel are aware that the jury, rather than the judge, will conduct fact-finding on the required elements for a death sentence. Appellant’s defense counsel, for instance, may have conducted his questioning of prospective jurors differently had he known that only one juror needed to be convinced, as to only one of the required elements, in order to avoid a death sentence. Counsel’s approach to the evidence presented at the penalty phase also may have been different had the jury been required to unanimously find that each specific aggravating factor

had been proven beyond a reasonable doubt. Indeed, in a constitutional proceeding, counsel may have diminished or eliminated some aggravators. Counsel also could have provided Appellant with different advice and perhaps changed his mind regarding the presentation of mitigation. As Appellant argued in the circuit court and his initial brief, these are factual matters that are not part of the existing record and warrant further development to allow for an informed harmless-error analysis.²

Appellant's proffer is the circuit court was sufficient to grant a hearing. As explained in his initial brief, Appellant proffered substantial evidence in the circuit court indicating that that (1) the aggravators were not challenged by his penalty-phase counsel because of counsel's practice, a pre-*Hurst* practice followed by Florida lawyers at that time; (2) in a constitutional proceeding without *Hurst* error, Appellant's counsel could have—and a reasonable counsel would have—presented evidence of the sort proffered in the circuit court to diminish the weight and sufficiency of the aggravation in the mind of at least one juror; and (3) the result of the penalty phase would have been different. In support of his proffer, Appellant provided the circuit court with records and declarations from prior counsel, a

² To the extent the State argues that Appellant is exceeding the scope of harmless-error review by arguing that a change in defense counsel's approach would by itself render the *Hurst* error harmless, *see* Answer Br. at 8, the State is missing the point. Appellant proffered evidence that his entire penalty phase would have been *different* without the constitutional error. A hearing is necessary to allow Appellant to present his evidence, and allow an informed determination of how the proceeding would have differed and whether the outcome would have been the same beyond any doubt.

psychological expert, and witnesses.³ Without a hearing on Appellant’s evidence, the circuit court should not have found Appellant’s *Hurst* error harmless beyond a reasonable doubt. Therefore, remanding for such a hearing is the appropriate course.

IV. The State’s arguments for affirming the circuit court’s harmless-error ruling based on certain aggravators found by the trial judge ignore the plain language of *Hurst v. Florida* and have been rejected by this Court

The State’s arguments for affirming the circuit court’s ruling based on what the State says are “uncontestable” aggravators found by the trial judge—those based on prior and contemporaneous felony convictions, *see* Answer Br. at 10-11—ignore the plain language of *Hurst v. Florida* and have been rejected by this Court. The United States Supreme Court recognized in *Hurst v. Florida* that Florida’s scheme requires determination of “whether *sufficient* aggravating circumstances existed to justify imposition of the death penalty.” *Hurst v. Florida*, 136 S. Ct. at 619 (emphasis added); *see also id.* at 622 (“The trial court *alone* must find “the facts . . . [t]hat sufficient aggravating circumstances exist” and “[t]hat there are insufficient mitigating circumstances to outweigh aggravating circumstances.”) (quoting Fla. Stat. § 921.141(3)). The sufficiency requirement means there can be no prior or contemporaneous conviction aggravator exemption to *Hurst*, as the State asserts.

³ Notably, the State’s brief fails to specifically discuss any of Appellant’s proffered evidence or explain why the evidence is insufficient to create an inference that, without the *Hurst* error, the penalty phase would have been different in ways that create a reasonable probability of a different result.

This Court has repeatedly rejected the State’s argument that a *Hurst* error is rendered harmless where the trial judge found aggravators based on contemporaneous or prior felony convictions, and has granted *Hurst* relief despite the presence of such aggravators. *See, e.g., Bailey v. Jones*, SC17-433, 2017 WL 2874121, at *1-2 (Fla. July 27, 2017); *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting “the State’s contention that Franklin’s prior convictions for other violent felonies insulate Franklin’s death sentence from *Ring* and *Hurst v. Florida*.”); *McGirth v. State*, 209 So. 3d 1146, 1150 (Fla. 2017) (contemporaneous felony aggravator); *Mosley*, 209 So. 3d. at 1256 (same); *Armstrong v. State*, 211 So. 3d 864, 864-65 (Fla. 2017) (prior violent felony aggravator); *Calloway v. State*, 210 So. 3d 1160, 1176 (Fla. 2017) (same); *Simmons v. State*, 207 So. 3d 860, 861 (Fla. 2016) (same); *Williams v. State*, 209 So. 3d 543, 554 (Fla. 2017) (prior violent felony and contemporaneous felony aggravators).⁴

V. The State’s remaining arguments for affirming the circuit court’s harmless-error ruling based on the unanimous jury recommendation cannot be squared with state or federal law

The State’s remaining arguments for affirming the circuit court’s harmless-error ruling based on the jury’s unanimous recommendation cannot be squared with

⁴ In addition, as this Court is aware, the United States Supreme Court recently denied a writ of certiorari in *Florida v. Hurst*, No. 16-998 (U.S. May 22, 2017), where the State raised the same arguments regarding prior and contemporaneous felony aggravators that it raises here.

state and federal law. *See* Answer Br. at 11-15. Contrary to the State’s assertions, *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), should not foreclose *Hurst* relief in every case where the advisory jury renders a unanimous recommendation. The State draws an untenable inference from the unanimous jury *recommendation* in Appellant’s case that the same jury would have unanimously found that each of the required *elements* for a death sentence were satisfied in a constitutional proceeding without the *Hurst* error. Even setting aside mitigation, this Court held in *Hurst v. State* that the jury must render unanimous fact-finding, under a beyond-a-reasonable-doubt standard, as to (1) which aggravating factors were proven, and (2) whether those aggravators were “sufficient” to impose the death penalty. 202 So. 3d at 53-59. Those findings of fact must precede the jury’s vote as to whether to recommend a death sentence. *See id.* at 57. Even though the jury unanimously *recommended* death in Appellant’s case, the State fails to persuasively explain how it can infer from that recommendation that “there is no question” the jury would have unanimously found the other preceding elements satisfied without the *Hurst* error.

The State misunderstands the importance of *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), in this context. *See* Answer Br. at 12-13. Appellant is not challenging jury instructions under *Caldwell*. Rather, the principles articulated in *Caldwell* inform the harmless-error analysis of his *Hurst* claim because they highlight the uncertainty of what the jury would have decided if it was tasked with

making the findings of fact required to impose a death sentence. In *Caldwell*, the Supreme Court highlighted that a jury's understanding of its role in death sentencing impacts its ultimate decision-making. That is why the Court held that "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 sentence lies elsewhere." *Caldwell*, 472 U.S. at 328-29, 341. Here, Appellant's jury was informed of its diminished "advisory" role. It was with that knowledge in mind that the jurors rendered a unanimous recommendation to impose the death penalty. The State fails to recognize that, given the jury's belief that it was not ultimately responsible for the imposition of Appellant's death sentence, this Court cannot even be certain, to the exclusion of all reasonable doubt, that the jury would have made the same unanimous *recommendation* without the *Hurst* error. In light of the principles articulated in *Caldwell*, this Court therefore also cannot be certain that the jury would have unanimously found all of the other required elements satisfied.

The State also misunderstands Appellant's argument regarding the impermissibility of relying on a jury recommendation that does not comport with constitutional requirements. *See Answer Br. at 13* ("Appellant appears to argue that harmless error review cannot be applied to *Hurst* error because the verdicts in such cases are not constitutionally valid."). Appellant does not assert here that harmless

error review cannot be applied to *Hurst* error. Appellant's argument is that an advisory jury's unanimous recommendation cannot serve as the basis for deeming a *Hurst* error harmless because that jury recommendation was not grounded in the beyond-a-reasonable-doubt standard and does not comport with the constitutional definition of a jury verdict. Under *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993), before a reviewing court may apply harmless error analysis, there must be a valid jury verdict, grounded in the proof-beyond-a-reasonable-doubt standard. Reliance on Appellant's advisory jury's unanimous recommendation in denying *Hurst* relief as harmless would violate the Sixth Amendment under *Sullivan*.⁵

CONCLUSION

For the reasons above and in Appellant's initial brief in response to this Court's July 19, 2017 order, Appellant respectfully asks this Court to vacate the circuit court's order and remand for an evidentiary hearing on harmless error or allow a new penalty phase proceeding. Appellant also requests the opportunity for full briefing under the ordinary appellate rules and for oral argument.

⁵ In addition, the Fourteenth Amendment requires that the State must prove each criminal element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). Any reliance on the jury recommendation requires its underpinnings to be made beyond a reasonable doubt. Because Florida's pre-*Hurst* jury determinations, including the advisory recommendation in Appellant's case, did not incorporate the beyond-a-reasonable-doubt standard, reliance on them violates due process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2017, the foregoing was electronically served via the e-portal to Assistant Attorney General Lisa A. Hopkins at lisa.hopkins@myfloridalegal.com and capapp@myfloridalegal.com, and Harry Brody at barbara.sincerelyyours@gmail.com.

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