IN THE SUPREME COURT OF FLORIDA

ENOCH D. HALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC17-1355

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Appellant, or by proper name, e.g., "Hall." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are italicized; other emphases are contained within the original quotations.

STATEMENT OF CASE AND FACTS

Appellant, Enoch Hall, was convicted in the 2008 first-degree murder of Officer Donna Fitzgerald, whose body was found in the paint room at Tomoka Correctional Institute (TCI). *Hall v. State*, 107 So. 3d 262, 267 (Fla. 2012). The facts are as follows:

> Hall was an inmate at TCI, who worked as a welder in the Prison Rehabilitative Industries and Diversified Enterprises, Inc. (PRIDE) compound, where inmates work refurbishing vehicles. Sergeant Suzanne Webster was working as the TCI control room supervisor, where she was responsible for getting a count from all areas of the prison as to the number of inmates in each area. When Webster had not heard from Fitzgerald, who was working in the PRIDE compound that night, Webster radioed Officer Chad Weber, who went to the PRIDE facility with Sergeant Bruce MacNeil to search for Fitzgerald. Weber saw Hall run through an open door on the other end of one of the PRIDE buildings and Weber and MacNeil pursued Hall. Weber caught up to Hall, who repeatedly stated "I freaked out. I snapped. I killed her." Hall responded to Weber's commands and placed his hands on the wall and was handcuffed. Weber took possession of the PRIDE keys that Hall had in his hands. Officer Chad Birch shouted from inside the building, "Officer down!" and Hall remained outside with other officers while Captain Shannon Wiggins and Officers

> Weber and MacNeil entered the building and located Fitzgerald's body. Fitzgerald's body was found lying face down on top of a cart in the paint room. The upper part of her body was wrapped in gray wool blankets, and the bottom half of her body came over the back of the cart, with her pants and underwear pulled down to her knees. Inside a bucket of water that was on the floor next to Fitzgerald's legs was Hall's bloody T-shirt. Hall was escorted to the medical facility (MTC) of the prison by Officers Brian Dickerson and Gary Schweit. Several officers took turns watching Hall while he sat in the MTC. Hall was later escorted to a conference room to talk with investigators from the Florida Department of Law Enforcement (FDLE) and then to a cell. Hall gave three statements to FDLE agents throughout the night regarding the events of the murder.

Id. at 267-9 (footnotes committed).

During the penalty phase, witnesses for the defense included pharmacologist Dr. Daniel Buffington, who testified that, among other possible side effects, both Ibuprofen and Tegretol have the capacity to alter someone's behavior. *Id*. at 270. The State called Dr. Wade Myers on rebuttal, who testified that most people who take an overdose of Ibuprofen do not have any side effects and the remaining people typically complain of nausea, and that Tegretol has an anti-aggression component to it, and, in his opinion, it "would be very unlikely" to cause aggression—"You're going to get the opposite effect." *Id*. The jury returned a recommendation of death by a unanimous vote. *Id*.

In support of the defense's contention that Hall should receive the emotionally and mentally disturbed statutory mitigator, Dr. Harry Krop testified for the defense

during the *Spencer*[1] hearing that Hall had a cognitive disorder, not otherwise specified, coercive paraphilia disorder-multiple sexual offender, and an alcohol substance abuse disorder. *Id*. Krop testified that Hall had a serious emotional disorder at the time of the offense and that Hall's ingestion of Tegretol could bring out his underlying psychological traits. *Id*.

The State offered rebuttal testimony from Dr. William Riebsame, a forensic psychologist and professor of psychology, and Dr. Jeffery Danziger, a board certified forensic psychiatrist. *Id*. Riebsame testified that the results of the tests administered to Hall by Krop were questionable, because Krop failed to test for malingering. *Id*.

The trial court found five aggravators: (1) previously convicted of a felony and under sentence of imprisonment; (2) previously convicted of another capital felony or of a felony involving the use or threat of violence to the person—(3) committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; (4) especially heinous, atrocious or cruel; (5) cold, calculated, and premeditated; (6) the victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties, which was merged with aggravator number 3 as listed above. *Id*. at 270-1. In mitigation,

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[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

the sentencing court found no statutory mitigators and eight non-statutory mitigating circumstances. *Id*. at 271. The trial court concluded that the aggravating circumstances far outweighed the mitigation and gave great weight to the jury's unanimous recommendation of death before sentencing Hall to death. *Id*.

This Court upheld the conviction and sentence on direct appeal. *Id*. at 281. Hall's case became final on October 7, 2013, when the United States Supreme Court denied Hall's petition for writ of certiorari. *Hall v. Florida*, 134 S. Ct. 203, 187 L. Ed. 2d 137 (2013). Hall's first motion for postconviction relief was denied the trial court July 8, 2015, which was affirmed by this Court on February 9, 2017. *Hall v. State*, 212 So. 3d 1001, 1014, 1036 (Fla. 2017). This Court also denied Hall's petition for a writ of habeas corpus. *Id*. at 1036.

On January 5, 2017, Hall filed a Successive Motion to Vacate Death Sentence, citing the rulings in *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) and *Perry v. State*, 41 Fla. L. Weekly S449, 2016 WL 6036982 (Fla. Oct. 14, 2016). (R42-67).

On May 17, 2017, the trial court denied the successive motion, citing this Court's ruling in the initial postconviction motion that any *Hurst* error with regard to Hall's sentence, which was based upon a unanimous recommendation of death, is harmless beyond a reasonable doubt. (R154-55).

SUMMARY OF THE ARGUMENT

Any *Hurst* error is harmless because the jury unanimously recommended that

the Appellant be sentenced to death. The trial court properly denied Hall's successive postconviction motion.

STANDARD OF REVIEW

The trial court's denial of Hall's successive motion to vacate the death penalty is ultimately a legal question subject to de novo review. The factual findings made by the trial court should be accepted where supported by substantial, competent evidence to guide the de novo review. *Jackson v. State*, 64 So. 3d 90, 92 (Fla. 2011).

1. THE TRIAL COURT PROPERLY RULED IN DENYING HALL'S CLAIM THAT HIS DEATH SENTENCE IS UNCONSTITUTIONAL UNDER *HURST*.

The Appellant argues that this Court should not have ruled that a *Hurst* error is subject to a harmless error analysis. (*I.B.* at 5). Hall also argues that if such an analysis is applied, a *Hurst* error would not be harmless because the jury made an advisory recommendation of death and did not make any determinations of fact. (*I.B.* at 6).

This argument is without merit. In *Hurst v. State*, this Court correctly determined that a *Hurst* error was not structural incapable of a harmless error review. *Hurst*, 202 So. 3d at 67. Furthermore, "[w]here the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence." *Id*. at 68, citing *Zack v. State*, 753 So. 2d 9, 20 (Fla. 2000).

This Court applied this analogy in *Davis v. State*, 207 So. 3d 142 (Fla. 2016), where the jury unanimously recommended a death sentence for the murder of two people in Polk County. *Id*. at 146, 156. The Court found that Davis's unanimous jury recommendations of death "allow us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." *Id*. at 174.

In Hall's initial postconviction motion, this Court cited the holding in *Davis* in denying *Hurst* relief.

> However, as in *Davis*, we conclude that this is one of those rare cases in which the *Hurst* error was harmless beyond a reasonable doubt. We initially must emphasize the unanimous jury recommendation of death in this case. This unanimous recommendation lays a foundation for us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors. The instructions that were given informed the jury that it needed to determine whether sufficient aggravators existed and whether any aggravation outweighed the mitigation before it could recommend a sentence of death.

Hall, 212 So. 3d at 1034 (emphasis in original).

This Court went on to note that "even though it was instructed that it was not required to recommend death even if the aggravators outweighed the mitigators, the jury did in fact recommend death unanimously." *Id*. at 1035.

Although the Appellant argues that this Court has speculated that juries conducted fact finding when they unanimously recommended death (*I.B.* at 9), Hall has not provided any legal support as to why this Court should not continue to

follow its holding in *Davis* and find that any *Hurst* error was harmless.

a. CCP aggravator stricken

In the direct appeal, this Court held that the CCP aggravator was not proven. *Hall*, 107 So. 3d at 278. The Appellant argues that without the benefit of briefing on *Hurst* and its progeny, this Court ruled against Hall on his postconviction appeal without explicitly addressing the effect of the stricken aggravator, CCP, on a harmless error analysis pursuant to *Hurst*. (*I.B.* at 9).

However, this argument is flawed because even though this Court did not specifically state that the CCP aggravator was not proven, this Court noted that four aggravators were found, which was one less aggravator than that which was found by the trial court.

> Further supporting our conclusion that any *Hurst* error here was harmless are the egregious facts of this case—Hall, who was already imprisoned for four different rapes, hid from a corrections officer while armed with a shank, stabbed her twenty-two times when she found him, cracking multiple ribs and puncturing her heart, and then moved her body to a different location, bent her over a paint cart, and pulled down her pants and underwear. The evidence in support of the four aggravating circumstances[13] found as to CO Fitzgerald's death was significant and essentially uncontroverted. Three of the four aggravators were without and beyond dispute.

Id. at 1035 (emphasis in the original).

In footnote 13, the four aggravators were identified. Thus, this Court did not consider the stricken CCP aggravator in finding that the *Hurst* error was harmless.

The Appellant's argument that the striking of the CCP aggravator distinguishes

this case from other cases involving unanimous jury recommendations is meritless. Hall relies heavily upon *Wood v. State*, 209 So. 3d 1217 (Fl. 2017), which is distinguishable because this Court struck two of the three aggravators found by the trial court, leaving only one valid aggravator. *Id*. at 1234. This Court stated that it could not conclude that the sole aggravator was sufficient to impose death and that it could outweigh the mitigating factors. *Id*.

In contrast, the elimination of the CCP aggravator here leaves four other aggravators for the jury to have considered in determining whether death was appropriate. Furthermore, the aggravators were significant. "Qualitatively, prior violent felony and HAC are among the weightiest aggravators set out in the statutory sentencing scheme." *Hodges v. State*, 55 So. 3d 515, 542 (Fla. 2010).

This Court has found a *Hurst* error to be harmless in other cases in which an aggravator was stricken. In *Middleton v. State*, 220 So. 3d 1152 (Fla. 2017), the CCP and avoid arrest aggravators were determined to have not been proven, leaving the HAC and during the commission of a burglary aggravators supported by competent, substantial evidence. *Id*. at 1185. This Court noted the seriousness of those aggravators and held that any *Hurst* error was harmless. *Id*., *reh'g denied*, 2017 WL2374697 (Fla. June 1, 2017).

A similar ruling was made in *Cozzie v. State*, 2017 WL 1954976, at *9 (Fla. May 11, 2017), *reh'g denied*, 2017 WL 3751293 (Fla. Aug. 31, 2017). In *Cozzie*,

this Court stated that even if the avoid arrest aggravator were stricken, the unanimous death recommendation would still remain, along with the aggravators of CCP, HAC, and in the course of a felony, which are among the weightiest aggravators in our capital sentencing scheme and were assigned great weight by the trial court. This Court held that "any possible error was harmless because there was not a reasonable possibility that [Cozzie] would have received a life sentence without the trial court finding of the [avoid arrest] aggravator." *Id*. at 7.

The majority of the cases relied upon by the Appellant involve jury recommendations for death that were non-unanimous. Yet, the Hall jury unanimously found that death was the appropriate sentence, as any reasonable jury would have considering the viciousness of the crime. As with *Davis*, the State has sustained its burden of demonstrating that any *Hurst* error was harmless beyond a reasonable doubt.

b. Mental health mitigation presented to the judge, not the jury.

Here, the Appellant argues that consideration must be given to how trial counsel would have tried the case differently under *Hurst v. Florida* and the resulting new Florida law. (*I.B.* at 13). This subclaim is simply an attempt by Hall to ask this Court to reconsider the same facts alleged in his previously-filed postconviction motion, which was denied. As a result, this subclaim is procedurally barred.

However, even if this subclaim is considered, it fails. A claim that counsel would have acted differently is a prototypical ineffectiveness claim. Claims made pursuant to *Strickland v. Washington*, 466 U.S.668 (1984) are analyzed under the law in effect at the time of trial, not even at the time of the postconviction proceedings. *Id*. at 689 (stating courts are to evaluate ineffectiveness claims "from counsel's perspective at the time" of trial); *Harrington v. Richter*, 562 U.S. 86, 89 (2011) (relying on hindsight to cast doubt on a trial that took place over 15 years ago is precisely what *Strickland* seeks to prevent). As the Florida Supreme Court has stated, trial counsel is not required to anticipate changes in the law to be effective, much less anticipate changes in the law that occur years later. *Lebron v. State*, 135 So. 3d 1040, 1054 (Fla. 2014) ("This Court has consistently held that trial counsel cannot be held ineffective for failing to anticipate changes in the law"). *Strickland* does not permit claims of ineffectiveness premised on changes in the law.

c. *Caldwell v. Mississippi*

The Appellant argues that the jury was incorrectly instructed as to its sentencing responsibility – that Hall could be sentenced to death regardless of the jury's responsibility. (*I.B.* at 17). Hall argues that the instructions was in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

However, this Court addressed this issue in the denial of Hall's Petition for

Writ of Habeas Corpus, which included an argument that the instructions to the jury were unconstitutionally diluted its sense of responsibility in determining the proper sentence. *Hall*, 212 So. 3d at 1032.

> With regard to challenges to the standard jury instructions in death penalty cases, this Court has repeatedly held that
>
> > challenges to "the standard jury instructions that refer to the jury as advisory and that refer to the jury's verdict as a recommendation violate *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)" are without merit.

Hall, 212 So. 3d at 1032-3 (citing *Dufour v. State*, 905 So.2d 42, 67 (Fla. 2005)).

No *Caldwell* error occurred. The trial court correctly denied each of Hall's claims and subclaims in Issue 1.

2. THE TRIAL COURT CORRECTLY RULED THAT HALL'S DEATH SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The Appellant argues that his sentence was not the product of unanimous jury findings or the benefit of a penalty phase jury verdict. (*I.B.* at 19). In *Hurst*, this Court held that under the Eighth Amendment to the United States Constitution, the jury's recommended sentence of death must be unanimous in order for the trial court to impose a sentence of death. *Id*. at 59. Since the *Hurst* ruling, this Court has held in countless cases that *Hurst* is satisfied when the jury unanimously recommends a death sentence.

In *Davis*, this Court found that Davis' unanimous jury recommendations of

death "allow us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." *Davis*, 207 So. 3d at 174. This Court has followed this precedence in *Truehill v. State*, 211 So. 3d 930, 956 (Fla. 2017); *King v. State*, 211 So. 3d 866, 891 (Fla. 2017); *Knight v. State*, 2017 WL 411329, *14 (Fla. Jan. 31, 2017); *Kaczmar v. State*, 2017 WL 410214, *4 (Fla. Jan. 31, 2017); and *Middleton*, 220 So. 3d at 1184-5.

This Court made a similar finding in its ruling on Hall's initial postconviction motion, concluding "that the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendation." *Hall*, 212 So. 3d at 1035. Hall has not presented any legal basis for why this Court should deviate from its precedence in *Davis*.

3. THE TRIAL COURT PROPERLY RULED THAT HALL'S DUE PROCESS RIGHTS WERE NOT VIOLATED.

The Appellant argues that he was denied a jury trial on the elements that subjected him to the death penalty and was denied his right to proof beyond a reasonable doubt. (*I.B.* at 20-1). Hall argues that his due process rights of the Fifth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution were violated. (*I.B.* at 21).

This claim has no merit. A jury heard testimonial evidence of aggravating and mitigating circumstances during the penalty phase of Hall's trial. The jury

considered the evidence that was presented, deliberated and unanimously recommended that Hall be sentenced to death.

The case law Hall cites in support of this claim, *In re Winship*, 397 U.S. 358 (1970), focuses on the requirement that a conviction for a crime be proven beyond a reasonable doubt. The case does not focus on sentencing. Nevertheless, Hall's argument that the jury did not perform the finding of facts necessary to recommend a death sentence was argued in Issue1. Thus, Issue 3 is redundant and the trial court correctly denied the claim.

4. THE TRIAL COURT CORRECTLY RULED THAT HALL'S DEATH SENTENCE DOES NOT VIOLATE THE FLORIDA CONSTITUTION.

In this claim, Defendant challenges his indictment. Hall was indicted by a grand jury for first-degree murder. He argues, however, that his death sentence should be vacated because the State never presented the aggravating factors in the indictment. (*I.B.* at 23).

Aggravating factors are not elements of a crime that must be included within an indictment. The Florida Supreme Court has stated that, "the Supreme Court's decision in *Hurst v. Florida* requires that all the **critical findings** necessary before the trial court may consider imposing a **sentence** of death must be found unanimously by the jury." *Hurst*, 202 So. 3d at 44 (emphasis added). The Florida Supreme Court explained that the required fact-finding was equivalent to an

element of an offense, both of which a jury must determine unanimously.

In its analysis, the court repeatedly made the analogy, and, hence, the distinction between, an element and a required penalty phase fact-finding, using phrases like: "just as elements of a crime" (*Id.* at 53); "these findings occupy a position on par with elements of a greater offense" (*Id.* at 57) (emphasis added); and using quotation marks around the word "elements." (*Id.* at 57). The fact that the court analogized a critical factual finding with an element did not turn the aggravator into an actual element of the crime.

In addition, the Florida Supreme Court has long rejected the argument that aggravating circumstances must be alleged in the indictment. "An indictment that charges first-degree murder immediately places a defendant on notice that he or she is charged with a capital felony punishable as provided by the statute." *Miller v. State*, 42 So. 3d 204, 215 (Fla. 2010) (citing *Sireci v. State*, 399 So. 2d 964, 970 (Fla. 1981), overruled on other grounds by *Pope v. State*, 441 So. 2d 1073, 1077-8 (Fla. 1983)). This Court held in *Miller* that the indictment is not required to express specific statutory language because the statute affords sufficient notice to satisfy due process.

Hall, like Miller, was adequately placed on notice of the specific crime with which he was charged and the findings specified in section 921.141(3). This is even more true in Hall's case since he immediately confessed to killing Ofc.

Fitzgerald and never contested his guilt, merely his motivation for doing so. Moreover, there is nothing in the record to indicate nor does Hall claim he was misled as to his charges, or that he was actually prejudiced in the preparation of his defense. The trial court properly denied this claim.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the trial court's ruling.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 15, 2017, a true and correct copy of the above has been furnished by e-mail/e-portal to: the Ann Marie Mirialakis, Assistant CCRC-Middle, mirialakis@ccmr.state.fl.us and Ali Shakoor, Assistant CCRC-Middle, Shakoor@ccmr.state.fl.us; 12973 N Telecom Parkway, Temple Terrace, FL 33637, the attorneys for the Defendant; and Office of the State Attorney, Rosemary Calhoun, Assistant State Attorney, CalhounR@sao7.org, 251 North Ridgewood Avenue, Daytona Beach, Fla. 32114.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted,
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