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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-1475

WILLIE SETH CRAIN, JR.
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FL
Lower Tribunal No. 291998CF017084000AHC

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OTHER AUTHORITIES vii

REQUEST FOR ORAL ARGUMENT 1

JURISDICTINAL STATEMENT 1

PRELIMINARY STATEMENT ABOUT THE RECORD 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 3

STANDARD OF REVIEW 4

ARGUMENT 1 - IN LIGHT OF *HURST I* AND *II,* DEFENDANT'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDEMENTS OF THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION……..5

A. Contemporaneous Felony Aggravator ………………………………9

B. No HAC or CCP Aggravators ………………………………………13

C. *Caldwell v. Mississippi*…………………………………………...16

D. Mercy Recommendation Instruction………………………………..18

ARGUMENT 2 - UNDER *HURST II*, DEFENDANT'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION 19

ARGUMENT 3 - THIS COURT SHOULD VACATE MR. CRAIN'S DEATH SENTENCE BECAUSE THE FACT-FINDING THAT SUBJECTED HIM TO A DEATH SENTENCE WAS NOT PROVEN BEYOND A REASONABLE DOUBT IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND

FOURTNEENTH AMENDMENTS TO THE U.S. CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION 20

ARGUMENT 4 - IN LIGHT OF *HURST, PERRY V. STATE* AND *HURST II*, DEFENDANT'S DEATH SENTENCE VIOLATES THE FLORIDA CONSTITUTION, INCLUDING ARTICLE I, SECTIONS 15 AND 16, AS WELL AS FLORIDA'S HISTORY OF REQUIRING A UNANIMOUS JURY VERDICT 21

CONCLUSION 23

CERTIFICATE OF SERVICE 25

CERTIFICATE OF COMPLIANCE 26

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey,
530 U.S. 466, 490 (2000)..21
Arizona v. Fulminante,
499 U.S. 279, 310 (1991)..6
Ault v. State, 213 So. 3d. 670, 680 (Fla. 2017)...13
Bevel v. State,
---So.3d---, 2017 WL 2590702, at *6 (Fla. June 15, 2017)................................12
Brecht v. Abrahamson,
507 U.S. 619, 630 (1993)..6
Caldwell v. Mississippi,
472 U.S. 320 (1985)...16
Calloway v. State,
210 So.3d 1160, 1200 (Fla. 2017) 13
Clemons v. Mississippi, 494 U.S. 738, 753 (1990)..8
Cole v. State,
-- So.3d --, 2017 WL2806992, at *10 (Fla. June 29, 2017) 11
Cozzie v. State,
--- So.3d ---, 2017 WL 1954976 (Fla. May 11, 2017)...14
Crain v. State,
78 So. 3d 1025 (Fla. 2011) 3
Crain v. State,
894 So. 2d 59 (Fla. 2004) 2
Crain v. State,
894 So.2d 59, 76 (Fla 2004) 9
Cunningham v. California,
549 U.S. 270, 273 (2007)..21
Davis v. State,
207 So. 3d 142 (Fla. 2016) 14
Davis v. State,
207 So. 3d 142, 175 (Fla. 2016) 8,12
Guardado v. State,
No. SC17-389 (Fla. May 11, 2017) 14
Hall v. State,
212 So.3d 1001 (Fla. 2017) 14

Hojan v. State,
212 So.3d. 982 (Fla. 2017) 10
Hurst v. Florida,
136 S. Ct. 616 (2016)..3
Hurst v. State,
202 So. 3d 40 (Fla. 2016) 3
In re Winship,
397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970)..21
Jones v. State,
212 So.3d 321 (Fla. 2017) 14
Jones v. United States,
526 U.S. 227, 232, 119 S. Ct. 1215, 1219 (1999) 23
Kaczmar v. State,
--So. 3d--, 2017 WL 410214 (Fla. Jan. 31, 2017) 14
King v. State,
211 So. 3d 866, 890 (Fla. 2017) 8
King v. State,
211 So.3d 866 (Fla. 2017) .... ……10, 14
Knight v. State,
--So. 3d--, 2017 WL 411329 (Fla. Jan. 31, 2017) 14
Mann v. Dugger,
844 F.2d 1446, 1454-55 (11th Cir. 1988)..17
McGirth v. State,
209 So.3d 1146, 1164 (Fla. 2017) 13
Middleton v. State,
-- So.3d --, 2017 WL 2374697 (Fla. June 1, 2017) 11
Middleton v. State,
--- So.3d --, 2017 WL 930925 (Fla. March 9, 2017)..14
Mosely v. State,
209 So.3d 1248, 1275 (Fla. 2016) 4
Mosley v. State,
209 So.3d 1248, 1284 (Fla. 2016) 12
Neder v. United States,
527 U.S 1, 25 (1999)..6
Oliver v. State,
214 So.3d 606 (Fla. 2017) 14

Orange County v. Williams,
702 So.2d 1245 (Fla. 1997) 1
Perry v. State,
210 So. 3d 630 (Fla. 2016) 16
Perry v. State,
210 So.3d 630, 640 (Fla. 2016) 18
Ring v. Arizona,
536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) 4
Simmons v. State,
207 So.3d 860, 867 (Fla. 2016) 13
Sochor v. Florida,
504 U.S. 527, 540 (1992) 8
Sochor v. State,
883 So. 2d 766, 771-72 (Fla. 2004) 5
State v. DiGuilio,
491 So.2d 1129, 1139 (Fla. 1986) 10
Stephens v. State,
748 So.2d 1028, 1032 (Fla. 2000) 5
Sullivan v. Louisiana,
508 U.S. 275, 278 (1993)..21
Truehill v. State,
211 So.3d 930 (Fla. 2017) 14
Truehill v. State,
211 So.3d 930, 956 (Fla. 2017) 10
Tundidor v. State,
--- So.3d ---, 2017 WL 1506854 (Fla. April 27, 2017)..14
U.S. v. Booker,
543 U.S. 220, 244 (2005)..21
Williams v. State,
209 So.3d 543, 567 (Fla. 2017) 13
Wood v. State, 209 So.3d 1217, 1233 (Fla. 2017)
209 So.3d 1217, 1233 (Fla. 2017)..11
Wood v. State,
209 So.3d 1217, 1234 (Fla. 2017) 10

Other Authorities

Rules

Fla. Const. art. V, § 3(b)(1)...1
Fla. R. App. P. 9.320...1
Fla. R. App. P. 9.320..1
Fla. R. Crim. P. 3.851 4

REQUEST FOR ORAL ARGUMENT

Undersigned counsel for the Appellant respectfully requests the opportunity to present oral argument pursuant to Fla. R. App. P. 9.320. This is a capital case, the resolution of the issues presented will determine whether Willie Seth Crain, Jr. will live or die, and a complete understanding of the complex factual, legal and procedural history of this case is critical to the proper disposition of this appeal.

JURISDICTIONAL STATEMENT

This is a timely appeal from the trial court's final order denying a successive motion for postconviction relief from a judgment and sentence of death. This Court has plenary jurisdiction over death penalty cases. Fla. Const. art. V, § 3(b)(1); *Orange County v. Williams*, 702 So.2d 1245 (Fla. 1997).

PRELIMINARY STATEMENT ABOUT THE RECORD

References to the record on direct appeal are designated "R" followed by the page number. References to the postconviction record are designated "PCR" followed by the page number. References to the successive postconviction record are designated "SPCR" followed by the page number. All references to volumes are designated as "V" followed by the volume number.

STATEMENT OF PROCEDURAL HISTORY AND FACTS

On October 14, 1998, Crain was charged by indictment with First-Degree Murder and Kidnapping with Intent to Commit Homicide of Amanda Brown. The indictment did not include aggravators the State intended to prove at sentencing in seeking the death penalty. Crain was tried in the Thirteenth Judicial Circuit in Hillsborough County, Case Number 98-17084CFAWS before Barbara Fleischer, Circuit Court Judge. Trial commenced on August 30, 1999, and Crain was found guilty as charged. The advisory panel recommended a death sentence for by a vote of twelve to zero. The advisory panel's recommendation contained no verdict or fact-finding.

The judge imposed a death sentence on November 19, 1999. As the sole fact-finder, the Court found aggravating and mitigating factors and weighed them without the benefit of individual factual determination by a jury. The judgment and sentence in this case was affirmed on appeal by this Court on October 28, 2004. *Crain v. State*, 894 So. 2d 59 (Fla. 2004). However, this Court reversed the judgment of guilt of kidnapping and directed the trial court on remand to enter a judgment for false imprisonment. *Id*. at 76.

Crain filed his Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.851 on September 8, 2006. Crain raised nine claims. The postconviction court denied all nine claims on September 10, 2009. Crain

appealed the denial of his post-conviction motion to this Court raising Claims 1, 3, 4, 8 and 9 of the Motion for Postconviction Relief. This Court affirmed the denial of Crain's Rule 3.851 Motion claims. *Crain v. State*, 78 So. 3d 1025 (Fla. 2011).

On January 5, 2017, Crain filed a successive Rule 3.851 motion seeking relief pursuant to *Hurst v. Florida* [1]*(Hurst I)*, *Hurst v. State* [2]*(Hurst II)*, and their progeny. On March 23, 2017, the trial court heard oral arguments and on June 15, 2017, denied the motion. In so ruling, the trial court's opinion failed to address several issues raised in Crain's Successive Motion to Vacate Death Sentence and/or argued during the case management conference on March 23, 2017. Crain filed a Motion for Rehearing on June 28, 2017, which was also denied on July 12, 2017, without specifically addressing the issues pointed out in the Motion for Rehearing. This timely appeal follows.

SUMMARY OF THE ARGUMENT

Mr. Crain was sentenced to die under an unconstitutional death penalty scheme. The United States Supreme Court, in *Hurst v. Florida*, declared Florida's death penalty system unconstitutional. Based on *Hurst I* and *II*, and its progeny, and the implications arising therefrom, Mr. Crain's death sentence violates the United States Constitution and the Florida Constitution. Because Mr. Crain was

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[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016).
[2] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

sentenced without a jury determining beyond a reasonable doubt the essential elements that purportedly justify his death sentence, both the United States and Florida Constitutions mandate that his sentence be vacated.

Specifically, Mr. Crain's sentence violates the Fifth, Sixth, Eighth and Fourteenth Amendments of both the United States Constitution, and the corresponding provisions of the Florida Constitutions. The error is not harmless. Mr. Crain must be resentenced by a properly instructed jury that unanimously finds the aggravating circumstances of Mr. Crain's crime, and finds that they outweigh his mitigating circumstances beyond a reasonable doubt. If their unanimous verdict is to sentence him to death, they must do so with a full understanding of the weight of their responsibility. Any other outcome constitutes an arbitrary application of the law and is unconstitutional.

STANDARD OF REVIEW

This is an appeal from a successive motion filed under Fla. R. Crim. P. 3.851, Collateral Relief after Death Sentence Has Been Imposed and Affirmed on Direct Appeal. Mr. Crain is entitled to retroactive application of *Hurst*, in accordance with *Mosely v. State*, 209 So.3d 1248, 1275 (Fla. 2016), as his sentence was final after *Ring*[3] and he raised a *Ring* claim on direct appeal. The standard of

[3] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

review is *de novo*. *Stephens v. State*, 748 So.2d 1028, 1032 (Fla. 2000). This Court employs a mixed standard of review, deferring to the factual findings of the circuit court that are supported by competent, substantial evidence, but *de novo* review of legal conclusions. *See, Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

ARGUMENT 1

IN LIGHT OF *HURST I* AND *II,* DEFENDANT'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDEMENTS OF THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The Sixth Amendment right enunciated in *Hurst v. Florida,* and found applicable to Florida's capital sentencing scheme, guarantees that all facts that are statutorily necessary before a judge is authorized to impose a sentence of death are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial**.** *Hurst v. Florida* found Florida's sentencing scheme unconstitutional because "Florida does not require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these facts." *Id.* at 622. On remand, this Court held in *Hurst v. State* that *Hurst v. Florida* means "that before 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*, at 57.

In *Hurst v. Florida*, the United States Supreme Court did not rule that harmless error review actually applies to *Hurst* claims, observing that it "normally leaves it to the state courts to consider whether an error is harmless." 136 S. Ct. at 624 (citing *Neder v. United States*, 527 U.S 1, 25 (1999). This Court should have concluded that *Hurst* errors are not capable of harmless error review. That is because the Sixth Amendment error identified in *Hurst* – divesting the capital jury of its constitutional fact-finding role at the penalty phase- represents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). *Hurst* errors are structural because they "infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993). In other words, *Hurst* errors "deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist. *Neder*, 527 U.S. at 1.

Even if the *Hurst* error in Mr. Crain's case is capable of harmless error review, the Sixth Amendment error under *Hurst v. Florida* cannot be proven by the State to be harmless beyond a reasonable doubt in Mr. Crain's case. Although Mr.

Crain's death recommendation was unanimous, even a unanimous death recommendation would not mandate a finding of harmless error, as that is only one of several inquiries that juries must make under *Hurst v. Florida*. The only document returned by the jury was an advisory recommendation that a death sentence should be imposed. Mr. Crain's penalty phase advisory panel did not return a verdict making any findings of fact, so we have no way of knowing what aggravators, if any, the jurors unanimously found were proven beyond a reasonable doubt, if the jurors unanimously found the aggravators sufficient for death, or if the jurors unanimously found that the aggravating circumstances outweighed the mitigating circumstances. In *Hurst v. Florida*, the Supreme Court found:

> Florida concedes that *Ring* required a jury to find every fact necessary to render Hurst eligible for the death penalty. But Florida argues that when Hurst's sentencing jury recommended a death sentence, it "necessarily included a finding of an aggravating circumstance."… The State fails to appreciate the central and singular role the judge plays under Florida law….<u>The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires</u>. *Id*. at 622. (Emphasis added).

In *Hurst v. State*, this Court quoted the Supreme Court, "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme … is therefore unconstitutional." This Court went on to note, "In reaching these conclusions, the <u>Supreme Court flatly rejected the State's contention</u> that although '*Ring* required a jury to find every fact necessary

to render Hurst eligible for a death penalty,' the jury's recommended sentence in Hurst's case necessarily included such findings. *Id*. at 622." *Hurst II*, at 53. (Emphasis added.) Nevertheless, this Court's subsequent opinions contradict its opinion in *Hurst II* and the Supreme Court's holding in *Hurst I,* which this Court quoted, by finding in *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), "Here, the jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations."

It is established law that a harmless error analysis must be performed on a case-by-case basis, and there is no one-size fits all analysis; rather there must be a "detailed explanation based on the record" supporting a finding of harmless error. *See Clemons v. Mississippi*, 494 U.S. 738, 753 (1990). *Accord, Sochor v. Florida*, 504 U.S. 527, 540 (1992). As to *Hurst I* error, "the burden is on the State, as beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the defendant]'s death sentence in this case." *Hurst II,* at 68. In *King v. State*, this Court emphasized that a unanimous recommendation was not dispositive, but rather "*begins a foundation* for us to conclude beyond a reasonable doubt" that the *Hurst* error was harmless.[4] (Emphasis added) In *Hurst II* at 68, this Court explained the standard by which the unconstitutional sentencing error

[4] *King v. State*, 211 So. 3d 866, 890 (Fla. 2017).

found in *Hurst* should be evaluated to determine if the error was harmless. This Court stated in part:

> … the [sentencing] error is harmless only if there is no reasonable possibility that the error contributed to the sentence. *See*, e.g., *Zack v. State*, 753 So. 2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," [State v.] *DiGuilio*, 491 So. 2d [1129,] 1137 [Fla. 1986], and the State bears an <u>extremely heavy burden</u> in cases involving constitutional error. (Emphasis added)

Under this Court's jurisprudence since *Hurst II*, this Court has repeatedly inferred from the jury's unanimous recommendation that the jury must have conducted unanimous fact-finding - within the meaning of the Sixth Amendment - as to each of the requirements for death sentence under Florida law. This inference has led this Court to engage in speculation as to what the jury actually found.

A. Contemporaneous Felony Aggravator

On direct appeal, this Court reversed the judgment of guilt of kidnapping and directed the trial court on remand to enter a judgment for false imprisonment.[5] The trial court acknowledged in its Order denying Mr. Crain relief on his successive 3.8651 motion, "… the reduction of the kidnapping conviction to false imprisonment eliminates the aggravator that the murder was committed while Defendant was engaged in an enumerated felony." SPCR216 The trial court had

[5] *Crain v. State*, 894 So.2d 59, 76 (Fla 2004).

given this aggravator "great weight," yet it was inappropriate to weigh this aggravator against Crain's mitigators. V2/R312 If you remove an aggravator that was given great weight, it is mere speculation whether the remaining aggravators still outweigh the mitigators.

In *Hojan v. State,*[6] this Court, citing *DiGuilio*[7]:

> Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

Considering the lack of proof to support an aggravator given great weight, the State cannot meet its burden to prove that the *Hurst* error was harmless beyond a reasonable doubt.

This issue distinguishes Crain's case from other cases involving a unanimous death recommendation, where this Court found the *Hurst* error was harmless. In both *Truehill*[8] and *King*[9], the Court noted that these defendants did not challenge the finding on any of the aggravators. In *Wood*[10], the Court indicated that a *Hurst* error in a unanimous-recommendation case would—if the case were

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[6] *Hojan v. State*, 212 So.3d. 982 (Fla. 2017).
[7] *State v. DiGuilio*, 491 So.2d 1129, 1139 (Fla. 1986).
[8] *Truehill v. State*, 211 So.3d 930, 956 (Fla. 2017), "Further supporting that any *Hurst* error was harmless here, Truehill has not contested any of the aggravating factors as improper in the case at hand—Truehill's direct appeal."
[9] *King v. State*, 211 So.3d 866 (Fla. 2017), "…we further note that when King first appealed his sentence to this Court, he did not challenge the finding of any aggravating circumstances found below."
[10] *Wood v. State*, 209 So.3d 1217, 1234 (Fla. 2017).

not already being remanded for imposition a life sentence on proportionality grounds—require a remand for a new penalty phase because the jury had been instructed to consider inappropriate aggravators:

> In this case, the jury was instructed on both aggravating factors that we have determined were not supported by competent, substantial evidence. This alone would require a finding that the error was not harmless beyond a reasonable doubt. We note that our conclusion in this regard is also consistent with our pre-*Hurst* precedent in *Kaczmar v. State*, 104 So.3d 990, 1008 (Fla. 2012), where we held that, upon striking the CCP and felony-murder aggravating factors so that only one valid aggravating factor remained, such error was not harmless beyond a reasonable doubt. Post–*Hurst*, this conclusion is even more compelling. (Emphasis added.)

Justice Pariente comments on this concept further in her dissent in *Middleton,*[11] "I now realize, as pointed out by Middleton in his motion for rehearing, that *reversal is compelled* because this Court struck two of the four aggravating factors on appeal and, therefore, the error, post-*Hurst*, cannot be considered harmless beyond a reasonable doubt." (Emphasis added) This point was made again in Justice Pariente's concurring opinion in *Cole,*[12] "Also, this Court struck the HAC aggravating factor on direct appeal, which must be considered in determining 'the effect of any error on the jury's findings' after *Hurst*. *Wood v. State*, 209 So.3d 1217, 1233 (Fla. 2017); *see* majority op. at ——."

Viewing this concept conversely, in *Bevel*'s majority opinion from June 15,

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[11] *Middleton v. State*, -- So.3d --, 2017 WL 2374697 (Fla. June 1, 2017).
[12] *Cole v. State*, -- So.3d --, 2017 WL2806992, at *10 (Fla. June 29, 2017).

2017[13], this Court held, "In this case, where no aggravating factors have been struck, "we can conclude that the jury unanimously made the requisite factual findings" before it unanimously recommended that Bevel be sentenced to death for the murder of Sims, and we therefore deny relief under *Hurst* for that sentence; (citing *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016)." Mr. Crain's kidnapping aggravator must be struck, so the same conclusion cannot be drawn.

Mr. Crain's direct appeal pre-dated *Hurst*, therefore this Court did not perform a harmless error analysis based on how the inclusion of the kidnapping aggravator affected the jury. The Court in *Wood*, at 1233, was mindful that in determining harmless error, "Our inquiry post-*Hurst* must necessarily be the effect of any error on the jury's findings, rather than whether beyond a reasonable doubt the trial judge would have still imposed death. *See Hurs*t, 202 So.3d at 68." Since the jury in Mr. Crain's case made no findings of fact, it is mere speculation what weight they gave the Kidnapping aggravator. As this Court cautioned in *Hurst v. State*, engaging in speculation about the jury's fact-finding "would be contrary to our clear precedent governing harmless error review." 202 So. 3d at 69; S*ee also, Mosley v. State*, 209 So.3d 1248, 1284 (Fla. 2016). The precedent this Court established in declining to speculate about the jury's fact-finding in *Hurst v. State*, even though that case involved a non-unanimous jury recommendation, applies

[13] *Bevel v. State*, ---So.3d---, 2017 WL 2590702, at *6 (Fla. June 15, 2017).

equally to Mr. Crain where we must guess whether the loss of an aggravator of "great weight" would have tipped the scales in Mr. Crain's favor. This Court has repeatedly cautioned the trial courts against engaging in speculation in several non-unanimous cases.[14] In *McGirth*, only 1 juror voted for life, but it was inappropriate to speculate why.[15] Likewise, it is inappropriate to make any assumptions about what a jury would do if they knew the kidnapping aggravator should not have been submitted to them due to lack of legally sufficient evidence to support a conviction. It is impossible to know how this aggravator figured into their weighing process when they recommended the death sentence for Mr. Crain, and therefore not possible for the State to meet their burden of proof that the error was harmless. This Court cannot look to the unanimous recommendation alone, because that recommendation included an aggravator, of great weight, that should not have been considered.

B. No HAC or CCP Aggravators

The trial court's opinion failed to address arguments made during the case management conference which called that court's attention to cases decided by this

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[14] *Simmons v. State*, 207 So.3d 860, 867 (Fla. 2016); *Williams v. State*, 209 So.3d 543, 567 (Fla. 2017); *Calloway v. State*, 210 So.3d 1160, 1200 (Fla. 2017); *Ault v. State*, 213 So. 3d. 670, 680 (Fla. 2017); *McGirth v. State*, 209 So.3d 1146, 1164 (Fla. 2017).

[15] *Id*.

Court since Mr. Crain's successive motion was filed. Overwhelmingly, the cases denying relief since *Hurst v. State*, where the advisory recommendation was unanimous, have involved murders committed with (HAC) heinous, atrocious and cruel and/or CCP (cold, calculated and premeditated) aggravators.[16] Cases decided by this Court since Mr. Crain's case management conference have continued this trend. [17] Hence, the thirteen cases cited below in footnotes 12 and 13 distinguish this case from the State's argument that no rational jury would have rendered a verdict other than death, after considering the egregious facts of those case.

In sharp contrast to those cases, Mr. Crain's aggravators do not include HAC or CCP. V2/R310-312 In fact, Justice Wells recognized the finding by the trial judge in her Sentencing Order, "There's no way to know exactly what happened to Amanda Brown, [the victim]." *Crain v. State*, 894 So.2d at 88; and ROA 311. Therefore, the egregious facts that the State focuses on in its Response in this case

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[16] *Davis v. State*, 207 So. 3d 142 (Fla. 2016); *Hall v. State*, 212 So.3d 1001 (Fla. 2017); *Kaczmar v. State*, --So. 3d--, 2017 WL 410214 (Fla. Jan. 31, 2017); *Knight v. State*, --So. 3d--, 2017 WL 411329 (Fla. Jan. 31, 2017); *King v. State*, 211 So.3d 866 (Fla. 2017); *Truehill v. State*, 211 So.3d 930 (Fla. 2017); *Jones v. State*, 212 So.3d 321 (Fla. 2017); *Middleton v. State*, --- So.3d --, 2017 WL 930925 (Fla. March 9, 2017) – Revised Opinion June 1, 2017.

[17] *Oliver v. State*, 214 So.3d 606 (Fla. 2017); *Tundidor v. State*, --- So.3d ---, 2017 WL 1506854 (Fla. April 27, 2017); *Cozzie v. State*, --- So.3d ---, 2017 WL 1954976 (Fla. May 11, 2017); *Guardado v. State*, No. SC17-389 (Fla. May 11, 2017).

are facts concerning Mr. Crain's prior felonies. SPCR200-202 Since there are no facts to support how or if a murder occurred, the State detailed Mr. Crain's history as a sexual abuser, instead. This amounts to arguing, in essence, that Mr. Crain should be killed for offenses which do not actually carry death as a possible penalty.

Equally as troubling is the trial court's reliance on the judge's findings as to what weight should be given the aggravators and mitigators, since it is unconstitutional for the judge, rather than the jury, to make that determination. SPCR216, 221 The trial court gave Mr. Crain's convictions for sexual abuse "great weight," while only meriting his suffering as a victim of sexual abuse "modest weight." Despite the same crimes being committed against Crain, the trial court found in its Sentencing Order:

> As related by Dr. Berland, the Defendant's childhood was clearly unstable and devoid of any substantial love or nurturing. The Court believes that the Defendant was both neglected and abandoned by his mother, and was physically, as well as sexually, abused by her. / He did not fare much better in the care of others as he moved between parents and other relatives. / The Court is reasonably convinced that the Defendant has a history of abuse and an unstable home life, and has given this mitigator modest weight. (V2/R316-317) (Emphasis added).

In its postconviction appeal opinion, this Court recognized that Dr. Cunningham and Dr. Berland provided information of Mr. Crain's "substantial physical, sexual and emotional abuse during childhood, witnessing of disturbing

sex, and lack of education and social training."[18] (Emphasis added). Nevertheless, the crimes against Mr. Crain, who was also a child victim, have been downplayed and given much less significance than the behavior he learned as a child, sadly continuing the cycle of abuse. While the trial court formed the opinion that the aggravators outweighed the mitigators, it is speculation what weight a properly instructed jury would have given these aggravators.

C. *Caldwell v. Mississippi*

Additionally, in the wake of *Hurst v. Florida* and the resulting new Florida law, the jury under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), must be correctly instructed as to its sentencing responsibility. This means that post-*Hurst* the individual jurors must know that each will bear the responsibility for a death sentencing resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. *See Perry v. State.*[19] As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. Otherwise, "a real danger exists that a resulting death sentence will be based at least in part on the determination of a decision maker that has been misled as to the

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[18] *Crain v. State*, 78 So.3d at 1043.
[19] *Perry v. State,* 210 So. 3d 630 (Fla. 2016).

nature of its responsibility." *Mann v. Dugger*, 844 F.2d 1446, 1454-55 (11th Cir. 1988).

In Mr. Crain's case, the trial court instructed jurors, "…the final decision as to what punishment shall be imposed, is my responsibility." V24/R3660 This shifted the onus of responsibility and the gravity of whether Mr. Crain was sentenced to death to the judge. The chances that at least one juror would not join a death recommendation if a resentencing were now conducted is highly likely given that proper *Caldwell* instructions would be required.

Mr. Crain has not litigated a *Caldwell* claim directly, since the *Hurst* rulings. Now, in light of *Hurst I* and *II* and *In Re: Standard Criminal Jury Instructions in Capital Cases*, SC17-583 (Fla. April 13, 2017), the issue of whether Mr. Crain's penalty phase jury instructions violated his constitutional rights warrants closer scrutiny and the precedent established in *Caldwell* should be re-considered. Indeed, because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulting death sentence to be vacated. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.").

D. Mercy Recommendation Instruction

Mr. Crain's jury was not told that they were not required to recommend death, even if the aggravators outweighed the mitigators. The trial court's Order did not address this fact in its harmless error analysis. However, cases decided by this Court since Mr. Crain's successive motion was filed have noted that the jury was given a mercy instruction.[20] Mr. Crain's advisory panel was told:

> It is your duty to follow the law…, and render to me 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 to outweigh any aggravating circumstances found to exist. (V24/R3661)
>
> ---------------------------
>
> Your recommendation to the Court must be based only on the aggravating circumstances and the mitigating circumstances about which I have instructed you. (V24/R3665) (Emphasis added)

The advisory panel was never told that regardless of their findings with respect to aggravating and mitigating circumstance, they are never compelled nor required to recommend a sentence of death. This Court emphasized in *Perry*[21] the importance of the mercy recommendation:

> It has long been true that a juror is not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances. *See*, e.g., *Cox v. State*, 819 So.

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[20] *Hall v. State*, 212 So.3d 1001 (Fla. 2017); *Middleton v. State*, --- So.3d --, 2017 WL 930925 (Fla. March 9, 2017); *Truehill v. State,* 211 So.3d 930 (Fla. 2017).

[21] *Perry v. State*, 210 So.3d 630, 640 (Fla. 2016).

2d 705, 717 (Fla. 2002) ('[W]e have declared many times that 'a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors.'(Citation omitted)

This final jury recommendation, apart from the findings that sufficient aggravating factors exist and that the aggravating factors outweigh the mitigating circumstances, has sometimes been referred to as the "mercy" recommendation. *See, e.g., Alvord v. State,* 322 So.2d 533, 540 (Fla.1975), *receded from on other grounds, Caso v. State,* 524 So.2d 422 (Fla.1988) (explaining that the jury and judge may exercise mercy in their recommendation even if the factual situations may warrant capital punishment).

Failure of the trial court to give the Mr. Crain's advisory panel this instruction, creates further uncertainty as to the reliability of the advisory panel's death recommendation.

ARGUMENT 2

UNDER *HURST II*, DEFENDANT'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In *Hurst II*, at 59-60, this Court held:

In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to trial by jury, we conclude that juror unanimity in any recommended *verdict* resulting in a death sentence is required under the Eighth Amendment. (Emphasis added)….The foundational precept is the principle that death is different. This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders. Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously

> imposed. (FNs omitted) … If death is to be imposed, unanimous jury sentencing recommendations, *when made in conjunction with the other critical findings unanimously found by the jury*, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process. (Emphasis added)

Mr. Crain's sentence was not the product of unanimous jury findings, nor did he receive the benefit of a penalty phase jury verdict. His case was only heard by an advisory panel and the verdict was rendered by a judge. His sentence was the product of an arbitrary and capricious system that did not afford him the rights that the Eighth Amendment guarantees. Under the Eighth Amendment, his execution would thus constitute cruel and unusual punishment. His death sentence should be vacated and a new penalty phase proceeding ordered.

ARGUMENT 3

THIS COURT SHOULD VACATE MR. CRAIN'S DEATH SENTENCE BECAUSE THE FACT-FINDING THAT SUBJECTED HIM TO A DEATH SENTENCE WAS NOT PROVEN BEYOND A REASONABLE DOUBT IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In *In re Winship* the United States Supreme Court held that the elements necessary to adjudicate a juvenile and subject him or her to sentencing under the juvenile system required each fact necessary be proved beyond a reasonable doubt. The Court made clear, "Lest there remain any doubt about the constitutional stature

of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970).[22] Under the Due Process Clause, it is the state, and the state alone, which must prove each element beyond a reasonable doubt and has the burden of persuasion.

The jury trial that *Hurst v. Florida* mandates that the State prove each element beyond a reasonable doubt. Mr. Crain was denied a jury trial on the elements that subjected him to the death penalty. It necessarily follows that he was denied his right to proof beyond a reasonable doubt. Therefore, Mr. Crain's sentence violates the Due Process Clause of the Fifth and Fourteenth Amendments of United States Constitution, and the corresponding provisions of the Florida Constitution. This Court should vacate his death sentence and a new penalty phase proceeding should be ordered.

ARGUMENT 4

IN LIGHT OF *HURST, PERRY V. STATE* AND *HURST II*, DEFENDANT'S DEATH SENTENCE VIOLATES THE FLORIDA CONSTITUTION, INCLUDING ARTICLE I, SECTIONS 15 AND 16, AS WELL AS FLORIDA'S HISTORY OF REQUIRING A UNANIMOUS JURY VERDICT.

[22] See also, *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *U.S. v. Booker*, 543 U.S. 220, 244 (2005); *Cunningham v. California*, 549 U.S. 270, 273 (2007).

On remand this Court applied the Supreme Court's decision in *Hurst I* in light of the Florida Constitution and held:

> As we will explain, we hold 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. We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

Hurst II, at 44.

Mr. Crain has a number of rights under the Florida Constitution that are at least coterminous with the United States Constitution, and possibly more extensive. This Court should also vacate Mr. Crain's death sentence based on the Florida Constitution. Article I, Section 15(a) provides:

> (a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

Article I, Section 16(a) provides in relevant part:

> (a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges . . .

In *Hurst*, the United States Supreme Court applied *Ring* to Florida's system and held that a jury must find any fact that subjects an individual to a greater penalty. Prior to *Apprendi, Ring,* and *Hurst I*, the United States Supreme Court addressed a similar question in a federal prosecution and held that: "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt" *Jones v. United States*, 526 U.S. 227, 232, 119 S. Ct. 1215, 1219 (1999). Because the State proceeded against Mr. Crain under an unconstitutional system, the State never presented the aggravating factors of elements for the Grand Jury to consider in determining whether to indict Mr. Crain.

In addition to United States Constitution's requirement that Mr. Crain's death sentence be vacated, this Court should also vacate Mr. Crain's death sentence because his death sentence was obtained in violation of the Florida Constitution.

CONCLUSION

Based on the foregoing claims, viewed individually and cumulatively, Mr. Crain’s death sentence is unconstitutional. He prays this Court vacate the trial court’s Order denying relief for his Rule 3.851 motion, enter an Order vacating his

death sentence and order a new penalty phase proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CEERTIFY that on September 6, 2017, I electronically filed the forgoing Brief with the Clerk of the Florida Supreme Court by using Florida Courts e-portal filing system which will send a notice of electronic filing to the following: Scott A. Browne, Assistant Attorney General, Scott.Browne@myfloridalegal.com and CapApp@myflordialegal.com; Jay Pruner, Assistant State Attorney for the Thirteenth Judicial Circuit, MailProcessingStaff@sao13th.com. I further certify that I mailed the forgoing document to Willie Crain, DOC#096344, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Initial Brief was generated in Times New Roman 14-point font pursuant to Fla. R. App. P. 9.210.

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