IN THE SUPREME COURT OF FLORIDA

WILLIE SETH CRAIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC17-1475
L.T. No. 98-17084 CFAWS
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant, Willie Seth Crain, was convicted of the first-degree murder and kidnapping of seven-year-old Amanda Brown. At the conclusion of the penalty phase, the jury unanimously recommended the death sentence. The trial court found three aggravators, all of which were given great weight: (1) prior violent felonies; (2) the murder was committed during the course of a kidnapping and (3) the victim was under the age of twelve. The court found no statutory mitigators and eight nonstatutory mitigators[1], and imposed the death sentence. Crain v. State, 894 So. 2d 59, 66-67 (Fla. 2004), cert. denied, 546 U.S. 829 (2005).

On appeal, this Court affirmed a conviction for first degree murder but reduced the kidnapping with the intent to commit murder charge to false imprisonment. The Court found the sentence proportionate and affirmed the sentence of death. Crain v. State, 894 So. 2d 59, 78 (Fla. 2004), cert. denied, 546 U.S. 829 (2005).

On or about September 8, 2006, Crain filed a Motion to

[1] (1) nonstatutory mental health impairment (some weight); (2) mental problems exacerbated by the use of alcohol and drugs, both legal and illegal (some weight); (3) Crain was an uncured pedophile (some weight); (4) Crain had a history of abuse and an unstable home life (modest weight); (5) Crain was deprived of the educational benefits and social learning that one would normally obtain from public education (modest weight); (6) Crain had a history of hard, productive work (some weight); (7) Crain had a good prison record (modest weight); and (8) Crain had the capacity to form loving relationships (modest weight).

Vacate Judgment of Conviction and Sentence pursuant to Fla. R. Crim. P. 3.851, raising nine claims for relief. (PCR V2, 229-95). Following an evidentiary hearing, the Honorable Anthony K. Black issued an Order on September 10, 2009 denying Crain's post-conviction motion.[2] (PCR V5, 903-51). This Court entered its opinion affirming the denial of post-conviction relief on October 13, 2011. Crain v. State, 78 So. 3d 1025 (Fla. 2011).

Crain filed a successive motion for post-conviction relief on January 5, 2017 seeking relief from his sentence based upon Hurst v. State. After reviewing the State's response and conducting a case management conference, the trial court issued an order on June 14, 2017, denying Crain's motion based on a finding that any Hurst error was harmless beyond a reasonable doubt. Following the filing of a notice of appeal, this Court issued an order directing the parties to "file briefs addressing why the lower court's order should not be affirmed based on this Court's precedent in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, No. 16-998 (U.S. May 22, 2017), Davis v. State, 207 So. 3d 142 (Fla. 2016), and Mosley v. State, 209 So. 3d 1248 (Fla. 2016)."

[2] Crain, through counsel, filed a Petition for Writ of Habeas Corpus in the Middle District of Florida on February 15, 2012. The State has filed a response and the district court has stayed the case pending final resolution of Crain's state court proceedings.

SUMMARY OF THE ARGUMENT

The lower court properly denied Crain's successive motion for post-conviction relief. The record conclusively establishes that any Hurst[3] error was harmless beyond a reasonable doubt. The aggravators were either supported by prior or contemporaneous convictions or uncontestable [victim was less than twelve years of age] and the jury unanimously recommended the death penalty. As this Court has made clear, the jury's unanimous recommendation is "precisely what [this Court] determined in Hurst to be constitutionally necessary to impose a sentence of death." Davis v. State, 207 So. 3d 142, 175 (Fla. 2016).

STANDARD OF REVIEW

The trial court's summary denial of Crain's successive motion for post-conviction relief is reviewed by this Court *de novo*, accepting the defendant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively establishes that the defendant is entitled to no relief. Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009).

[3] Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017).

ARGUMENT

ISSUES I-IV

THE LOWER COURT PROPERLY DENIED CRAIN'S CLAIM THAT HIS DEATH SENTENCE WAS UNCONSTITUTIONAL UNDER THE SIXTH AND EIGHTH AMENDMENTS AND HURST V. FLORIDA, 136 S. CT. 616 (2016).

In Hurst v. Florida, 136 S. Ct. 616 (2016), the United States Supreme Court declared the portion of Florida's capital sentencing scheme requiring the judge, rather than a jury, to find each fact necessary to impose a sentence of death unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002).[4] On remand, this Court interpreted this holding as requiring that jury to make numerous factual findings prior to the court imposing a death sentence: the jury "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, 202 So. 3d 40, 57 (Fla. 2016). However, any Hurst error is subject to harmless error review, and this Court has stated that "the error is harmless only if there is no reasonable

[4] Crain's judgment and sentence became final after Ring, and the parties did not dispute below that this Court has applied Hurst retroactively to post-Ring cases. See Mosley v. State, 209 So. 3d 1248 (Fla. 2016).

possibility that the error contributed to the sentence." Id. at 68.

The post-conviction court below reached the conclusion that the error was harmless in this case. The court's order provided in part:

> Based on the record, the Court finds beyond a reasonable doubt that any *Hurst* error was harmless. Specifically, the Court finds although the jury was informed that it was not required to recommend death unanimously, and despite the mitigation presented, the jury still unanimously recommended that Defendant be sentenced to death for the murder of the victim. The Court finds this was a highly aggravated case, the jury was instructed that the aggravators must be established beyond a reasonable doubt, the evidence supporting the aggravators for prior violent felony convictions and the victim being less than twelve years of age were significant and uncontested, there was no statutory mitigation, the nonstatutory mitigation was minimal, the jury was not required to recommend death if the aggravators did not justify the death penalty, and the jury recommendation was unanimous. *See Davis v. State*, 207 So. 3d 142, 173-175 (Fla. 2016).
>
> The Court further finds the unanimous recommendation was precisely what the Florida Supreme Court determined in *Hurst* to be constitutionally necessary to impose a sentence of death. Consequently, the Court finds there is no reasonable possibility that *Hurst* error affected the sentence in this case. The Court finds Defendant is not entitled to the vacation of his death sentence or a new penalty phase. **As such, no relief is warranted upon claim I.**

(R. 221).

It is clear that no rational juror would have failed to find all three aggravators that the trial court found in

imposing a death sentence in this case. "Crain's death sentence was supported by three aggravating factors found by the trial court: the murder was committed during the commission of a felony (kidnapping), the defendant was convicted of prior violent felonies (sexual battery and aggravated child abuse), and the victim was under the age of twelve." Crain, 894 So. 2d at 76. Each of these aggravators were given great weight by the trial court. The evidence clearly established that Amanda was taken from the bed by Crain where she lay next to her sleeping mother, she was unquestionably seven years old [victim under the age of 12] and it is uncontested that Crain had prior violent felony convictions. The Supreme Court has recognized the critical distinction of an enhanced sentence supported by a prior conviction. See Almendarez-Torres v. United States, 523 U.S. 224 (1998) (permitting judge to impose higher sentence based on prior conviction); Ring, 536 U.S. at 598 n.4 (noting Ring does not challenge Almendarez-Torres, "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"); Alleyne v. United States, 133 S. Ct. 2151, 2160 n.1 (2013) (affirming Almendarez-Torres provides valid exception for prior convictions). Since the aggravators supporting Crain's death sentence were either

supported by prior convictions[5], contemporaneous convictions or on uncontroverted facts, no rational juror would have failed to find any of the aggravators supporting Crain's death sentence in this case.

Crain argues that the contemporaneous felony aggravator was improperly found and weighed in this case and that therefore the jury's recommendation was somehow tainted by consideration of an improper aggravator. (Appellant's Brief at 13). Crain's argument is inaccurate. On direct appeal, this Court found the evidence sufficient to support felony murder with the underlying felony of kidnapping with the intent to commit bodily injury. Since the State in this case charged Crain specifically with kidnapping

[5] While recognizing this Court's precedent to the contrary, the State continues to maintain that there was no Sixth Amendment error in this case. Crain entered the penalty phase death eligible. See e.g. State v. Belton, 149 Ohio St.3d 165, 176, 74 N.E.3d 319, 337 (2016-Ohio-1581) (observing that "Federal and state courts have upheld laws similar to Ohio's, explaining that if a defendant has already been found to be death-penalty eligible, then subsequent weighing processes for sentencing purposes do not implicate Apprendi and Ring []" and that "[w]eighing is not a fact-finding process subject to the Sixth Amendment[.]"); see In re Bohannon, 222 So. 3d 525, 532-33 (Ala. 2016) (noting that "Hurst does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment" and that [. . .] "Hurst focuses on the jury's factual finding of the existence of an aggravating circumstance to make a defendant death-eligible[.]"). See also Crain, 894 So. 2d at 78 (in rejecting a Ring/Apprendi claim on direct appeal this Court noted "[w]e have also denied relief in direct appeals where, as in this case, the trial judge has found the aggravating factor of previous conviction of a violent felony.") (citations omitted).

with the intent to commit or facilitate a homicide, and the jury convicted Crain of this offense, this Court on appeal reduced that charge to false imprisonment. Nonetheless, nothing in this Court's opinion negates the fact that Crain kidnapped Amanda – and indeed, the felony murder conviction was affirmed on that basis. The jury findings specifically reflect that the jury found Crain guilty of kidnapping with the intent to facilitate or commit a homicide. Thus, the trial court's finding of a contemporaneous felony conviction for kidnapping is clearly supported by the jury's verdict in this case.[6]

Regardless, given the unanimous recommendation and the weighty remaining aggravators, any Hurst error would remain

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[6] On direct appeal, this Court did not decide whether or not kidnapping was an improper aggravator; it simply assumed so, and found any such error harmless. This Court stated:

> Crain asserts that the trial court erred in relying on the aggravator of murder in the course of a felony under section 921.141(5)(d), Florida Statutes (1997), because the evidence of the crime of kidnapping is legally insufficient. Assuming without deciding that Crain is correct in light of this Court's reduction of the separate kidnapping conviction to false imprisonment, we conclude that any error in finding the "murder in the course of a felony" aggravator is harmless beyond a reasonable doubt.

Crain, 894 So. 2d at 77.

harmless without the contemporaneous felony.[7] This was the conclusion reached by the post-conviction court below. Appellant has offered no persuasive reasons to overrule the post-conviction court on this point.

Contrary to Crain's argument on appeal, this Court has not required that a death sentence be supported by either the cold, calculated and premeditated or the heinous, atrocious and cruel aggravator before finding Hurst error harmless. (Appellant's Brief at 13-15). Rather, this Court's focus in its harmless error analysis has been on the actual jury recommendation.[8] In Davis, 207 So. 3d at 174, this Court found that when the jury unanimously recommends a death sentence, their unanimous

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[7] The post-conviction court below found the reduction of the kidnapping conviction to false imprisonment eliminated the enumerated contemporaneous felony aggravator. (R. 216, Order at p. 8). The State respectfully disagrees with the post-conviction court's elimination of this aggravator, but certainly agrees with the court's ultimate conclusion that any Hurst error was harmless.

[8] If the focus of this Court's harmless error analysis rested upon the absence or presence of the HAC or CCP aggravators it logically follows that this Court would have affirmed as harmless Hurst error involving less than unanimous recommendations with the presence of those aggravators. It has not. See e.g. Gregory v. State, ___ So. 3d ___, 2017 WL 3764559, at *13 (Fla. Aug. 31, 2017) (Hurst error not harmless in light of 7-5 jury recommendation [CCP found by the trial court]); Hurst v. State, 202 So. 3d 40, 69 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017) (despite the finding of HAC by the trial court for a brutal murder, this Court declined "to speculate as to why seven jurors in this case recommended death and why five jurors were persuaded that death was not the appropriate penalty").

recommendation "allow[s] 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." This Court has consistently followed Davis and found harmless error in cases involving unanimous recommendations. See King v. State, 211 So. 3d 866 (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); Truehill v. State, 211 So. 3d 930 (Fla. 2017); Hall v. State, 212 So. 3d 1001 (Fla. 2017); Jones v. State, 212 So. 3d 321 (Fla. 2017); Middleton v. State, 220 So. 3d 1152 (Fla. 2017); Oliver v. State, 214 So. 3d 606 (Fla. 2017); Tundidor v. State, 221 So. 3d 587 (Fla. 2017); Morris v. State, 219 So. 3d 33 (Fla. 2017); Guardado v. Jones, ___ So. 3d ____, 2017 WL 1954984 (Fla. May 11, 2017); Cozzie v. State, ___ So. 3d ____, 2017 WL 1954976 (Fla. May 11, 2017). As Appellant has failed to demonstrate any basis for this Court to recede from this precedent, the State urges this Court to affirm the trial court's denial of his Hurst claim.

The aggravation presented in this case was substantial and certainly supports the jury's unanimous recommendation. Contrary to Crain's argument, he is not being put to death for his prior offenses, but his prior offenses are highly relevant to assess

the appropriate punishment for murdering seven year old Amanda Brown. The prior convictions involve Crain sexually abusing, physically assaulting, and terrorizing young girls. In affirming Crain's death sentence on direct appeal for proportionality, this Court recognized the particular "magnitude" of the prior violent felony conviction aggravator in this case:

> During the penalty phase in this case, the State submitted copies of judgments and sentences for five counts of sexual battery and one count of aggravated child abuse. The State also offered the testimony of three child victims of Crain's previous sexual assaults. The three female victims all testified that Crain began abusing them when they were between the ages of seven and nine years of age. One of the victims endured Crain's repetitive abuse on a monthly basis for five years. The victims also testified that Crain threatened them with extensive bodily harm or death should they reveal his abuse to anyone. Thus, as we found in *Lukehart*, the prior felony aggravator is an exceptionally weighty aggravating factor under the circumstances of the present case, and as we concluded in *Stephens*, Crain's history of victimization of children similar in age to the victim in this case increases the magnitude of the prior violent felony aggravator.

Crain, 894 So. 2d at 77–78.

Likewise, this Court should reject Appellant's argument that the Hurst error cannot be harmless because the jury's role was allegedly improperly described in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). In order to establish constitutional error under Caldwell, a defendant must show that the comments or instructions to the jury "improperly described

the role assigned to the jury by local law." Romano v. Oklahoma, 512 U.S. 1, 9 (1994). In the instant case, the jury was properly instructed on its role based upon the law existing at the time of Crain's trial. It would have been impossible for the jury to have been instructed in accordance with any constitutional changes in the law that occurred after the trial.[9] In Hall v. State, 212 So. 3d 1001 (Fla. 2017), this Court recently affirmed

[9] The instructions in this case emphasized the weight to be given the jury recommendation. As the post-conviction court noted (quoting the instructions):

> Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of Murder in the First Degree.
>
> As you have been told, the final decision as to what punishment shall be imposed, is my responsibility. However, your advisory sentence as to what sentence should be imposed on the defendant, is entitled by law and will be given great weight by this Court in determining what sentence to impose in this case.
>
> It is only under rare circumstances that this Court could impose a sentence other than what you recommend. It is your duty to follow the law that I will now give you, 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.
>
> Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant, and evidence that has been presented to you in these proceedings.

See ROA pps. 3660-3661.

(R. 219-20, Order at pp. 11-12).

a defendant's death sentence based on a unanimous recommendation and rejected his challenge to Florida's jury instructions based on Caldwell. Id. at 1032-36 (noting that this Court has repeatedly rejected challenges to Florida's standard jury instructions based on Caldwell).

It is well established that the harmless error test applies to constitutional error, and this Court has consistently found that a jury's unanimous death recommendation satisfies the harmless error standard as it establishes, beyond a reasonable doubt, that the jury unanimously made the requisite factual findings. See Jones, 212 So. 3d at 343 (noting that the jury's factual findings that the aggravating circumstances were sufficient to impose death and outweighed the mitigation was inherent in the jury's unanimous recommendation); King, 211 So. 3d at 889-93; Truehill, 211 So. 3d at 955-57. See Lebron v. State, 135 So. 3d 1040, 1054 (Fla. 2014). Accordingly, the State satisfied its burden of establishing that the Hurst error was harmless beyond a reasonable doubt in Crain's case.

In conclusion, the trial court specifically instructed the jury that their advisory recommendation did not have to be unanimous, but the jury unanimously found that death was the appropriate sentence. As this Court has noted, it is "inherent" in this recommendation that the jury determined that the

aggravating circumstances were sufficient to impose death and that the aggravators outweighed the mitigation. Jones v. State, 212 So. 3d 321, 343 (Fla. 2017). Thus, even if there was any constitutional error in this case, the error was harmless beyond a reasonable doubt. Accordingly, this Court should affirm the court's ruling denying Crain any relief based on Hurst.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 18th day of September, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Ann Marie Mirialakis and Ali A. Shakoor, Assistants CCRC, Law Office of the Capital Collateral Regional Counsel - Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907, **mirialakis@ccmr.state.fl.us**, **shakoor@ccmr.state.fl.us**, and **support@ccmr.state.fl.us**.

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).

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