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

REPLY TO ANSWER BRIEF OF APPELLEE

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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. All references to volumes are designated as "V" followed by the volume number. References to the successive postconviction record are designated "SPCR" followed by the page number. References to the State's Answer Brief are designated as "AB" followed by the page number of the brief. References to the Appellant's Initial Brief are designated as "IB" followed by the page number of the brief.

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REPLY TO STATE'S ANSWER

ARGUMENT I - In light of *Hurst I*[1] and *Hurst II*[2], Defendant's death sentence violates the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution, and the corresponding provisions of the Florida Constitution.

The Appellee argues that simply because the advisory panel's death sentence recommendation was unanimous, that no additional inquiries need to be made in a harmless error analysis. This is incorrect and objectively an unreasonable application of law, as well as an unreasonable application of the facts. Just because this Court has consistently denied most *Hurst* claims where there was a unanimous jury recommendation, does not mean that this Court has ceased to perform a thoughtful analysis on a case-by-case basis. Mr. Crain has demonstrated in his initial brief why his case is exceptional. The stricken Kidnapping charge, lack of HAC and/or CCP aggravators, no mercy instruction, along with a jury instruction that shifted the jurors' responsibility, all set Mr. Crain's case apart from other cases denied relief. The conclusory nature of the harmless error analysis the Appellee is urging this Court to use would be wholly unreasonable under the circumstances of this particular case.

A. Contemporaneous Felony Aggravator Stricken

The Appellee's argument seems to promote the idea that there was a

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

contemporaneous felony aggravator despite the fact that this Court reduced Mr. Crain's kidnapping conviction to false imprisonment, a charge that cannot be used as a felony aggravator. However, in FN 6 of Appellee's brief, the State admits:

> 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.

AB 8. Also relegated to a footnote, the Appellee's brief concedes that the postconviction court found the reduction of the kidnapping conviction eliminated the enumerated contemporaneous felony aggravator. AB 9 and FN7

The State further argues that even if this aggravator is stricken, the error was harmless, and notes the postconviction court concluded the same. *See,* AB 9, citing the postconviction court's Order at 8. The lower court's finding is based on the fact that two aggravators of great weight remain. SPCR 216 The postconviction court did not perform a harmless error analysis based on how the inclusion of this aggravator affected the jury. Since the jury in Mr. Crain's case made no findings of fact, it is mere speculation what weight they gave the

kidnapping aggravator. Analyzed from the perspective of its effect on the jury, it is uncertain what a jury's verdict would be without this aggravator, therefore the State cannot meet its heavy burden that the *Hurst* error was harmless.

B. No HAC or CCP Aggravators

The Appellee has misinterpreted Mr. Crain's argument on appeal as *requiring* that a death sentence be supported by either the CCP (cold, calculated and premeditated) aggravator or HAC (heinous, atrocious and cruel) aggravator. AB 9 What Mr. Crain actually argued on appeal is that the egregious facts that the State focuses on to support Mr. Crain's death sentence concern Mr. Crain's prior felony convictions. There are no facts to support how or if a murder occurred. Two of the weightiest aggravators are not present in this case. Without the contemporaneous felony aggravator, *and* with no HAC or CCP, it becomes very speculative to say what weight a properly instructed jury would have given the remaining aggravators. The State's argument that the aggravation was substantial because of his prior convictions, fails to address the fact that Mr. Crain has mitigation of the same quality, that he was a victim of sexual abuse as a child. Unlike the cases cited by the State where this Court has relied on the unanimous recommendation to deny relief, Mr. Crain has unique circumstances which would require a different outcome.

C. Mercy Recommendation Instruction

Recently, one juror in Miami voted for mercy, despite a unanimous finding that the aggravators outweighed the mitigators. The life of two-time convicted killer, Kendrick Silver, was spared. *State v. Silver*, Case No. F0930889A, (Fla. 11th Cir. Aug. 21, 2017). The power and significance of the mercy vote should not be underestimated. As Appellee's brief demonstrates in FN 9, where the penalty phase jury instructions are quoted, the mercy instruction is woefully absent. AB 12

D. *Caldwell v. Mississippi*[3]

The Appellee argues that this Court has rejected a *Caldwell* argument, citing *Hall*.[4] AB 11-12 In Mr. Hall's original post-conviction appeal cited by the State, the State's argument omits the fact that *Hall* did not raise a *Caldwell* claim directly. Rather, in his state petition for writ of habeas corpus, Mr. Hall raised the issue, "*Appellate counsel was ineffective for failing to challenge* the fact that Mr. Hall's jury was unconstitutionally instructed by the Court that its role was merely 'advisory.'" (R3583-3584, Vol. 35)" Emphasis added. This Court addressed only that issue, as stated. In the *Hall* opinion, this Court cited post-*Caldwell*/pre-*Hurst* Florida law to show that this Court has denied *Caldwell* claims in the past:

> 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

[3] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).
[4] *Hall v. State*, 212 So. 3d 1001 (Fla. 2017).

> 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. *Card v. State*, 803 So.2d 613, 628 (Fla. 2001); …
> *Dufour*, 905 So.2d at 67.

Hall, at 1032-1033. In conclusion, this Court found:

> "If a legal issue `would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." Id. at 71 (quoting *Rutherford*, 774 So.2d at 643). Due to the clear and extensive case law that establishes that claims challenging the constitutionality of the standard jury instructions, as they apply to the jury's advisory role, are entirely without merit, we conclude that appellate counsel was not ineffective for failing to raise this meritless claim and thus deny Hall relief on this claim.

Id. This holding only addresses whether appellate counsel was ineffective for failing to raise a claim that the Florida Supreme Court has denied in the past. However, this Court has yet to speak to the issue of how the rulings in *Hurst I* and *II* impact Florida's death penalty jury instructions, and what effect the pre-*Hurst* instructions had on an improperly instructed jury.

In the past, this Court has reasoned that the United States Supreme Court has accepted Florida's jury role as advisory, therefore the instructions are merely a reflection of law set out in Florida Statute 921.141 (1985). *See*, *Combs v. State*, 525 So. 2d 853, 857 (Fla. 1988), citing to *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). The Court in *Combs* went on to point out:

> A simple reading of section 921.141, Florida Statutes (1985), explains why the prosecutor and defense counsel stated to the jury that its role was to render an advisory sentence. That statute provides in part:

> (2) ADVISORY SENTENCE BY THE JURY. — After hearing all the evidence, the jury shall deliberate and render *an advisory sentence to the court*, based upon the following matters:
>
> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. — Notwithstanding the recommendation of a majority of the jury, *the court*, after weighing the aggravating and mitigating circumstances, *shall enter a sentence* of life imprisonment or death... .

Id. (emphasis added). Clearly, under our process, the court is the final decision-maker and the sentencer — not the jury.

Id. This reasoning has not been valid, since the Supreme Court rendered its opinion in *Apprendi*[5] and *Ring*[6]. Last year, the Supreme Court reiterated its position concerning the jury's role in *Hurst I*, ruling that Florida's death penalty statute is unconstitutional. The Supreme Court found:

> [T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983).
>
> ---
>
> We now expressly overrule *Spaziano* and *Hildwin* in relevant part.
>
> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S., at 640-641, 109 S.Ct. 2055. Their conclusion was wrong, and irreconcilable with *Apprendi*. Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre-*Apprendi* decision — *Walton*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 — could not "survive the reasoning of *Apprendi*." 536 U.S., at 603, 122 S.Ct. 2428.

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[5] *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).
[6] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

Hurst I, at 622-623. In overruling *Spaziano,* the foundation for this Court's reasoning that Florida's death penalty instructions do not violate *Caldwell* is not supported, and has not been supported since the Supreme Court rendered its decisions in *Apprendi* and *Ring* over fifteen years ago. Therefore, this *Caldwell* violation dates back to *Apprendi/Ring*, at the very least. Similarly, this Court has recognized that since *Ring*, Florida's death sentencing statute is a violation of the Sixth Amendment. *See, Mosley v. State,* 209 So.3d 1248 (Fla. 2016).

The jury's belief that it was not ultimately responsible for Mr. Crain's death sentence is a violation of the principles annunciated in *Caldwell*. Here, in light of the impact of the "advisory" instructions to the jury, this Court cannot even be certain that the jury would have made the same unanimous *recommendation* without the *Caldwell* error. And, critically, the Court cannot be sure that Mr. Crain would have received a death sentence.[7]

In the wake of *Hurst I* and *II,* this Court completely revamped Florida's death penalty jury instructions, notably removing the word "advisory recommendation" and replacing it with "verdict." *See, In Re: Standard Criminal Jury Instructions in Capital Cases,* SC17-583 (Fla. April 13, 2017). Therefore, in

[7] *See also, Rose v. Clark*, 478 U.S. 570, 578 (1986) (recognizing that an "error is harmless if, beyond a reasonable doubt, it did not *contribute to the verdict* obtained.") (Internal quotation marks and citation omitted).

light of the fact that this Court took steps to amend the death penalty jury instructions so that they conform to United States Supreme Court law, this Court must also address the fact that Mr. Crain's jury's instructions prejudiced his case and the reasonable probability that the *Caldwell* error could have contributed to his death sentence.

Finally, it is important to note that *Caldwell* represents an Eighth Amendment violation:

> On reaching the merits, we conclude 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 rests elsewhere.
>
> ---
>
> Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with — and indeed as indispensable to — the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina, supra,* at 305 (plurality opinion). See also *Eddings* v. *Oklahoma, supra*; *Lockett* v. *Ohio, supra*.

Caldwell, at 329-330. Therefore, since the Supreme Court considers a *Caldwell* violation an Eighth Amendment violation, it is tantamount to cruel and unusual punishment. The State cannot establish that such an error is harmless.

ARGUEMNT 2 – Under *Hurst II*, Defendant's death sentence violates the Eighth Amendment of the U.S. Constitution, and the corresponding provisions of the Florida Constitution.

The State contends that *Hurst* is satisfied when the jury unanimously recommends a death sentence. AB 13. The Appellee's brief cites *Davis*[8], as well as the following cases to support this proposition:

> *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).

AB 10 However, none of these cases have been considered from the perspective that the *Hurst II* error in those defendants' cases is a violation of the Eighth Amendment. This Court has only reached its conclusions based on a harmless error analysis pursuant to a violation of the Sixth Amendment.

According to *Hurst II*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a *properly instructed* penalty-phase *jury* has voted unanimously in favor of the imposition of death, *after* unanimously finding and weighing the aggravators and the mitigators *properly* before them.[9] To do otherwise is a violation of the Eighth

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[8] *Davis v. State*, 207 So. 3d 142 (Fla. 2016);

[9] *Hurst II*, at 60-61. *See also, Burch v. Louisiana*, 441 U.S. 130, 138 (1979). (The US Supreme Court has explained that the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.")

Amendment.

CONCLUSION

Wherefore, for all the reasons stated above and in his initial brief, Mr. Crain prays this Court order that his death sentence be vacated.

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CERTIFICATE OF SERVICE

I HEREBY CEERTIFY that on September 20, 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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