IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

APPELLANT,

v. **CASE NO. SC17-1542**
LOWER TRIBUNAL NO. 2004-CF-2129
JOSEPH P. SMITH, **DEATH PENALTY CASE**

APPELLEE.
_____/

APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE

Appellant, the State of Florida, by and through the undersigned counsel, submits this response to this Court's order dated September 19, 2017, to show cause why the lower court's order should not be affirmed based on this Court's precedent in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *Davis v. State,* 207 So. 3d 142 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). Appellant respectfully submits that the harmless-error analysis described in *Davis* and *Mosley* has not been correctly applied, and, consequently, the lower court's order should be reversed.

STATEMENT OF THE CASE AND FACTS

This case involves the death sentence of Appellee, Joseph Smith, for his brutal murder of an eleven-year-old female with the initials C.B. Smith abducted C.B. when she was walking home from a friend's home around 6:15 p.m. on February 1, 2004. *Smith v. State*, 28 So. 3d 838, 844 (Fla. 2009). His abduction was

"literally caught on tape," as a motion-activated video surveillance from a carwash captured Smith taking C.B. by the arm and leading her away from the carwash at approximately 6:21 p.m. *Id.* at 845.

C.B.'s body was found four days later in a wooded field behind a church. *Id.* at 847. She was naked from the waist down, except for a sock on her right foot. *Id.* at 847. A deep ligature mark was visible on her neck that was consistent with Smith using a shoelace to strangle her. *Id.* at 847, 849. The medical examiner testified during trial that C.B. died due to strangulation. *Id.* at 850.

There were also ligature marks on her wrists indicating she had been bound. *Id.* at 850. The medical examiner opined that she was sexually battered while she was alive. Smith had also admitted that he had "rough sex" with the child before strangling her. *Id.* at 848. Moreover, Smith's semen was found on the back of C.B.'s shirt, and the likelihood of another DNA profile matching the semen sample was 1 in 32 quintillion. *Id.* at 850. In addition to convicting Smith of first-degree murder, the jury also unanimously found Smith guilty of sexual battery of a child less than twelve years of age and kidnapping.

Evidence of Smith being on drug offender probation at the time of the murder was admitted into evidence during the penalty phase. *Id.* at 851. The medical examiner also testified that he

believed C.B. was conscious when the ligature was applied to her throat because she had no other injury that would have produced unconsciousness. *Id.* at 851.

After hearing all the evidence of aggravation and mitigation, the jury recommended death by a ten-to-two vote. *Id.* at 851. The trial judge followed the jury's recommendation and sentenced Smith to death. *Id.* The court determined that the State had proven, beyond a reasonable doubt, the existence of six aggravating circumstances: (1) Smith committed the felony while he was on probation ("moderate weight"); (2) the murder was committed while Smith was engaged in the commission of a sexual battery or kidnapping ("significant weight"); (3) the murder was committed for the purpose of avoiding lawful arrest ("great weight"); (4) the murder was especially heinous, atrocious or cruel (HAC) ("great weight"); (5) the murder was cold, calculated, and premediated (CCP) ("great weight"); and (6) the victim was under twelve years of age ("great weight").

The trial court did not find any statutory mitigating circumstances, but it found the following thirteen non-statutory mitigating circumstances: (1) Smith had a long and well-documented history of mental illness ("moderate weight"); (2) he had a long and well-documented history of drug abuse ("moderate weight"); (3) Smith suffered from longstanding severe pain from back injuries that contributed to his addiction ("little

weight"); (4) Smith repeatedly sought help for his problems ("little weight"); (5) he was repeatedly denied treatment or he received inadequate treatment ("little weight"); (6) Smith had many positive qualities ("moderate weight"); (7) he provided information that led to the resolution of the case ("very little weight"); (8) his family assisted law enforcement with his knowledge and cooperation ("slight weight"); (9) he demonstrated spiritual growth ("slight weight"); (10) he had maintained gainful employment ("slight weight"); (11) he was a loving father ("moderate weight"); (12) he had remorse ("little weight"); and (13) he was amenable to rehabilitation and a productive life in prison ("little weight"). *Smith*, 28 So. 3d at 852-53.

The court determined that the aggravating circumstances far outweighed the mitigating circumstances. *Id.* at 853. The court also found that each of the other aggravating factors (with the exception of the felony probation aggravator), standing alone, would have been sufficient to outweigh the mitigation submitted in Smith's case. *Id.*

Smith challenged his convictions and sentences on direct appeal, and among other issues, he raised a claim pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002). This Court deemed Smith's claim meritless. *Smith*, 28 So. 3d at 873. The Court's opinion noted that the jury convicted Smith of sexual battery upon a

child less than twelve years of age and kidnapping. *Id.* "Since the jury determined beyond a reasonable doubt that Smith committed these crimes, Smith's *Ring* challenge is without merit[.]" *Id.* at 874. Smith also challenged the CCP aggravator, which this Court struck. *Id.* at 868. The court ultimately affirmed all of Smith's convictions and sentences. *Id.* at 878.

Smith's motion for rehearing was denied February 18, 2010. The mandate was issued March 8, 2010. Smith filed a petition for writ of certiorari to the United States Supreme Court, which was denied June 28, 2011. *Smith v. Florida*, 564 U.S. 1052 (2011).

Smith subsequently filed a motion for postconviction relief raising numerous challenges, including a *Ring* challenge. The postconviction court summarily denied all of Smith's claims. *Smith v. State*, 151 So. 3d 1177, 1181 (Fla. 2014). Smith appealed to this Court, and this Court affirmed the denial of postconviction relief. *Id.* at 1184. With regard to the *Ring* claim, this Court again explained that the trial court found as an aggravating circumstance that the murder was committed during the course of a sexual battery and kidnapping, and a unanimous jury verdict was returned for both of those charges. *Id.* at 1182.

Smith also has a case in the United States District Court for the Middle District of Florida, which has been stayed pending outcome of this appeal.

The instant case involves Smith's successive motion for postconviction relief pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The postconviction court granted Smith relief, finding that *Hurst* retroactively applied to his sentence, and the *Hurst* error was not harmless. The court specifically noted that this Court has consistently and repeatedly held, "that in cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless." This appeal follows.

SUMMARY OF THE ARGUMENT

A proper harmless-error analysis looks at whether a properly-instructed, rational jury would have unanimously recommended death, not whether the actual jury recommendation in the case was unanimous. The *Hurst* error in this case was harmless beyond a reasonable doubt, and the lower court's order should be reversed.

LEGAL ARGUMENT

"In the context of a sentencing error, the relevant question is whether 'there is [a] reasonable possibility that the error contributed to the sentence.'" *Johnson v. State*, 205 So. 3d 1285, 1290 (Fla. 2016) (quoting *Zack v. State*, 753 So. 2d 9, 20 (Fla. 2000)). In analyzing a *Hurst* error, this Court has explained that "it must be clear beyond a reasonable doubt that a **rational jury** would have unanimously found all facts necessary to impose death and that death was the appropriate sentence."

Mosley v. State, 209 So. 3d 1248, 1284 (Fla. 2016) (emphasis added); *see also Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016) (explaining that it "be clear beyond a reasonable doubt that a **rational jury** would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances.") (emphasis added).

Although this Court has described the harmless-error test in terms of what a rational jury would find, this Court has, instead, applied the test in a black-and-white manner, finding harmless error only in cases involving unanimous jury recommendations and finding harmful error in cases that had non-unanimous jury recommendations. In cases with non-unanimous recommendations, this Court has determined that the non-unanimous jury recommendation made it "impossible" to conclude that the *Hurst* error was harmless. *See, e.g. Hojan v. State*, 212 So. 3d 982, 1000 (Fla. 2017) ("Given the jury vote of nine to three to recommend a sentence of death, it is impossible for this Court to conclude that the *Hurst* error in this case was harmless beyond a reasonable doubt."). The Court has further explained that "any attempt to determine what findings were made by the jurors who voted for life and the jurors who voted for death would amount to speculation and cannot rise to the level of proof beyond a reasonable doubt." *Hertz v. Jones*, 218 So. 3d 428, 432 (Fla. 2017).

Being bound by this Court's precedent, the lower court in this case only looked to the non-unanimous jury recommendation to conclude that the *Hurst* error was harmful. The State respectfully submits that the lower court, and this Court, have misapplied the harmless-error test outlined in *Mosley* and *Davis* regarding what a "rational jury" "would have unanimously found." A correct analysis should include a review of what a properly-instructed, rational jury would do, rather than what the actual jury panel did in this case, as the jury was never instructed that a unanimous recommendation was necessary.

The Supreme Court of the United States has recently agreed with this interpretation of the reasonable-jury standard in *Jenkins v. Hutton*, 137 S. Ct. 1769 (2017). *Jenkins v. Hutton* involved a defaulted federal due process claim regarding the trial court's failure to instruct the jury that when weighing the aggravating and mitigating factors, they could only consider the two aggravators that they had found during the guilt phase.

The Sixth Circuit had determined that it could review the defaulted federal claim to avoid a fundamental miscarriage of justice. *Jenkins v. Hutton*, 137 S. Ct. at 1771. It reasoned that petitioner may obtain review of a defaulted claim upon showing by clear and convincing evidence that, but for a constitutional error, **no reasonable jury** would have found him eligible for the death penalty under applicable state law. *Id.*

The Supreme Court of the United States found that the Sixth Circuit erred in reaching the merits of Hutton's claim. *Id.* at 1772. The Court further explained that if the trial court's error in instructing the jury during the penalty phase could provide a basis for excusing the procedural default in Hutton's case, the relevant question would be, **"Whether, given proper instructions about the two aggravating circumstances, a reasonable jury could have decided that those aggravating circumstances outweighed the mitigating circumstances."** *Id.* (emphasis added). Instead, the Sixth Circuit had considered "whether the alleged error might have affected the jury's verdict, **not whether a properly instructed jury could have recommended death**." *Id.* (emphasis added). The Court concluded that neither Hutton nor the Sixth Circuit has shown that, if properly instructed, no reasonable jury would have concluded that the aggravating circumstances in Hutton's case outweighed the mitigating circumstances. *Id.*

A harmless-error test that looks at what a properly-instructed jury would have done is not a foreign concept to this Court. In *Galindez v. State*, 955 So. 2d 517, 523 (Fla. 2007), this Court used a harmless-error analysis for an *Apprendi v. New Jersey*, 530 U.S. 466 (2000), violation to determine whether the record demonstrated beyond a reasonable doubt that a rational

jury would have found penetration when the jury never made a finding as to victim injury points for penetration.

The Court also employed a similar harmless-error analysis when determining whether an erroneous jury instruction pursuant to *Espinosa v. Florida*, 505 U.S. 1079 (1992), affected defendants' death sentences. In *Dougan v. Singletary*, 644 So. 2d 484, 485-86 (Fla. 1994), this Court analyzed the facts surrounding the murder and determined that "the jury could not have been misled by the inadequate instruction because the crime was especially, heinous, atrocious, or cruel under any standard." Similarly, in *Davis v. State*, 620 So. 2d 152 (Fla. 1993), this Court explained that the facts "are so indicative of the aggravating factor" that "we are convinced […] that there is no reasonable possibility that the faulty instruction contributed to the sentence." It concluded that "under any instruction," the jury would have recommended the same sentence. *Id.*

Thus, as in *Jenkins*, the proper consideration is not "whether the alleged error might have affected the jury's verdict," but, rather, "**whether a properly instructed jury could have recommended death**." *Id.* (emphasis added). Here, it was erroneous to conclude that a rational jury would not recommended death merely because the jury in this case did not do so. The jury was instructed that a mere majority was all that was

required to recommend a sentence of death. Therefore, the jury believed that at least seven jurors had to agree to a death sentence for the panel to make a recommendation of death. By providing their ten-to-two recommendation, the jury was doing more than what they believed to be necessary to recommend that Smith be sentenced to death.

A rational jury certainly would have unanimously recommended death had it been instructed that a unanimous recommendation was required. Smith did what nearly every parent fears most; he grabbed young C.B. and kidnapped her while she was walking home from a friend's house. "The image of [Smith] taking her by the arm and leading her away will, no doubt, forever be etched in our minds." *Smith*, 28 So. 3d at 876. Smith then sexually battered and horrifically murdered the young victim. This was a highly aggravated case and the mitigation was minimal, at best, in comparison to the very weighty aggravation.

Notably, the jury found Smith guilty of sexual battery upon a child less than twelve years of age and kidnapping. The jury's unanimous verdicts of guilt for sexual battery and kidnapping directly established the aggravating circumstance that Smith committed the murder while engaged in the commission of a sexual

battery or kidnapping.[1] Therefore, the jury was not required to find the existence of that aggravating circumstance during the penalty phase. *See Jackson v. State*, 213 So. 3d 754, 788 (Fla. 2017) ("the jury in this case was not required to find the existence of the aggravating circumstance that Jackson committed the murder during the course of sexual battery because he had already been convicted of sexual battery at the time he was sentenced."); s*ee also King v. State*, 211 So. 3d 866, n.7 (Fla. 2017); and *Kopsho v. State*, 209 So. 3d 568 (Fla. 2017).

In addition, the sexual battery conviction satisfied the aggravating factor that the victim was under twelve years of age, because the jury found Smith guilty of sexual battery upon a child under twelve. *Cf*. *DeLaFe v. State*, 124 So. 3d 293, 294–95 (Fla. 1st DCA 2013) (finding that, where the defendant was sentenced for attempted sexual battery upon a child under twelve, the jury would have found that the victim was particularly vulnerable because of her age).

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[1] It continues to be the Appellant's position that the contemporaneous crime found by the jury in this case satisfies the requirement of *Hurst v. Florida*, 136 S. Ct. 616 (2016). *See Waldrop v. Comm'r Alabama Dept. of Corr*., 15-10881, 2017 WL 4271115, at *20 (11th Cir. Sept. 27, 2017) (in rejecting a *Hurst* claim, the court explained, "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict.").

Moreover, the felony probation aggravator was uncontested and Smith essentially stipulated to this aggravating circumstance. Smith admitted to having been previously convicted of drug offenses. (DAR V47/5193). Smith also admitted to having been on probation. (DAR V47/5213-14). During Smith's penalty phase, he called correctional senior probation officer Lisa Atkins. (DAR V47/5212). Atkins testified that she was Smith's probation officer, and he had been on probation for possession of cocaine. (DAR V47/5213-14). Atkins informed the jury that Smith had been sentenced to probation on March 6, 2003, and the probation entailed one year of drug offender probation followed by two years of "regular" probation. (DAR V47/5213-14). Given that Smith's murder of C.B. occurred on February 1, 2004, Smith essentially conceded that he was on probation at the time of the murder. During closing argument, Smith's attorney confirmed this by advising the jury, "The fact that Joe was convicted of a felony and was on felony probation, that has been proven." (DAR V51/5924). Accordingly, the "in the course of" and the "vulnerable victim" aggravators were satisfied by a unanimous jury conviction during the guilt phase of trial, and the "felony probation" aggravating circumstance was established and uncontroverted.

Furthermore, any rational jury would have unanimously found the HAC aggravating circumstance given Smith's horrific acts in

effectuating the murder. Smith grabbed the young victim and took her to a secluded area where no one could help her. The victim was "subjected to demeaning and cruel acts including the binding of her hands, the removal of her clothes and being forced to engage in various sex acts by a man nearly four times her age and double her size." *Smith*, 28 So. 3d at 876. "At eleven years of age, there is no doubt that she was aware of her dire predicament and that she had little, if any, hope of survival." *Id.*

"Any hope of survival [she] may have clung to faded once the Defendant placed the ligature around her neck." *Id.* While conscious, C.B. was unable to fight back. "Perhaps worst of all, [she] knew she was going to die." *Id.* Smith used the ligature to strangle C.B. until she stopped breathing. The victim endured "unspeakable terror and physical suffering" at Smith's hands. *Id.* Without a doubt, this murder was especially heinous, atrocious, and cruel.

A rational jury would have also unanimously found the avoid arrest aggravator. As evidenced by the surveillance video, Smith was not wearing a mask or disguise when he took C.B. His mechanic's uniform had his name on it. If Smith would have sexually battered the victim and let her go, he would have risked being identified. Smith murdered C.B. to avoid being arrested for his kidnapping and sexual battery of her.

A detailed review of the evidence of aggravation and mitigation yields the undeniable conclusion that a rational, properly-instructed jury would, without a doubt, unanimously find the aggravation sufficient for death and unanimously find that the aggravating factors outweigh the mitigation. As the lower court acknowledged, nearly any of the aggravating factors, standing alone, would have been sufficient to outweigh the mitigation presented in this case. *Smith*, 28 So. 3d at 852-53.

The lower court should have analyzed the instant case and asked what a properly-instructed jury would have done, rather than just looking at whether the final recommendation was unanimous. Under the facts of this case, any rational jury would unanimously recommend death if instructed that their unanimous recommendation was required for Smith to be sentenced to death. Accordingly, this Court should find the *Hurst* error in Smith's case harmless.

CONCLUSION

Appellant respectfully requests that this Honorable Court reverse the lower court's order vacating Smith's death sentence and granting a new, penalty-phase trial. Appellant further requests that this Court apply the harmless-error test that looks at what a rational and properly-instructed jury in each case would do, rather than merely looking at whether the final recommendation was unanimous.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of October, 2017, I electronically filed the foregoing with the Clerk of the Court by using the e-portal filing system which will send a notice of electronic filing to the following: Office of the Public Defender, Twelfth Judicial Circuit, 2071 Ringling Boulevard, Suite # 5, Sarasota, Florida 34237, **lwise@scgov.net**; and to Craig Schaeffer, Assistant State Attorney, Office of the State Attorney, Sarasota Criminal Justice Building, 2071 Ringling Boulevard, Suite 400, Sarasota, Florida 34237-7000, **cschaeff@scgov.net** and **saorounds@scgov.net**.

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