IN THE SUPREME COURT OF FLORIDA

RAY LAMAR JOHNSTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC17-1678
L.T. No. 97-CF-013379
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

Ray Lamar Johnston was convicted by a jury for the 1997 kidnapping, rape and murder of Leanne Coryell and sentenced to death. Johnston v. State, 841 So. 2d 349 (Fla. 2002). The trial court's denial of Johnston's Rule 3.851 post-conviction motion was affirmed. Johnston v. State, 63 So. 3d 730 (Fla. 2011).

Johnston appeals the denial of his successive motion for post-conviction relief and raises two grounds on appeal- first, that his death sentence violated Caldwell v. Mississippi, 472 U.S. 320 (1985) and second, that he was entitled to relief based upon Hurst v. State, 202 So. 3d 40 (Fla. 2016) (Hurst). In support of the Caldwell claim Johnston sought the assistance of an expert. The trial court, however, granted the State's motion to strike him after a proffer revealed that the proposed expert's expertise amounted to being able to read English, and that his "analysis" consisted of doing little more than marking whatever passages of the trial transcript that, in his view, offended the requirements of Caldwell.

The trial court ultimately entered an order denying all relief. Following the filing of a notice of appeal, this Court directed 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, 202 So. 3d 40 (Fla. 2016), cert.

denied, 137 S. Ct. 2161 (2017), Davis v. State, 207 So. 3d 142 (Fla. 2016), and Mosley v. State, 209 So. 3d 1248 (Fla. 2016)."

SUMMARY OF THE ARGUMENT

The lower court properly denied Johnston's successive motion for post-conviction relief. This Court has previously held that no Caldwell violation occurs where the trial court, as it did here, employed the standard jury instructions. The lower court also acted within its discretion in striking Johnston's proposed "expert." As for Johnston's second claim, the record conclusively establishes that any Hurst error was harmless beyond a reasonable doubt. The aggravators were supported by prior or contemporaneous convictions 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 Johnston'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).

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY FOUND THAT NO CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985) VIOLATION OCCURRED AS JURY INSTRUCTIONS GIVEN IN JOHNSTON'S CASE WERE A CORRECT STATEMENT OF THE LAW.

Johnston first complains that the trial court improperly struck his expert witness. As noted by the court below, however, Dr. Moore's "expertise" consisted of an ability to read the English language, and his report was merely a compilation of whatever portions of the trial transcript that the expert felt violated Caldwell v. Mississippi, 472 U.S. 320 (1985). As a result, the trial court concluded that Dr. Moore's "analysis" was unnecessary, as "it is the Court's duty to review the record and draw appropriate conclusions based on the arguments and the law." (ROA p. 486). The trial court correctly struck Dr. Moore because the defense failed to establish that the type of analysis he sought to advance was "sufficiently established to have gained general acceptance in the particular field in which it belongs." Ramirez v. State, 651 So. 2d 1164, 1167 (Fla. 1995). In short, identifying record pages where the alleged violations occurred required no particular expertise, and the trial court acted within its discretion in deciding not to make

use of Dr. Moore's assistance.

On the merits, the trial court found no grounds for granting relief. To establish a Caldwell violation, a defendant must show that the jury instructions improperly described the role assigned to the jury by local law. Romano v. Oklahoma, 512 U.S. 1, 9 (1994). References and descriptions that accurately characterize the jury's and judge's sentencing roles under Florida law do not violate Caldwell. Florida's jury instructions correctly explained to the jury the state of the law in effect at the time of Johnston's trial; consequently, no Caldwell error occurred here.[1]

This Court has repeatedly rejected Caldwell challenges where the standard jury instructions, which referred to the jury's vote in the penalty phase as being "advisory" and a "recommendation," were employed. See, e.g., Dufour v. State, 905 So. 2d 42, 67 (Fla. 2005), and Davis v. Singletary, 119 F.3d 1471, 1481-85 (11th Cir. 1997).

Moreover, in Hall v. State, 212 So. 3d 1001 (Fla. 2017), this Court recently affirmed 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.

[1] The State notes, in addition, that Caldwell does not apply retroactively. Sawyer v. Smith, 497 U.S. 227 (1990).

(noting that this Court has repeatedly rejected challenges to Florida's standard jury instructions based on Caldwell). Despite Johnston's argument to the contrary, the trial court was bound by this Court's ruling in Hall, and Appellant has shown no compelling reason why this Court should revisit that ruling.

The trial court correctly instructed the jury that their advisory recommendation did not have to be unanimous, yet Johnston's 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 lower court's ruling denying Johnston relief based on Caldwell.

ISSUE II

THE LOWER COURT PROPERLY DENIED JOHNSTON'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).[2] 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 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, as follows:

> "On this record, the Court finds beyond a reasonable doubt that any Hurst error was harmless. The Court finds that this was a highly aggravated case where the aggravators significantly outweighed the mitigators, that the jury was instructed the aggravators must be established beyond a reasonable doubt, that the jury was not required to recommend death if the aggravators outweighed the mitigators, and that the jury recommendation was unanimous. Further, the Court finds

[2] Johnston'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).

> that the evidence supporting the previous violent felonies both due to the contemporaneous felonies of sexual assault, kidnapping, and burglary of a conveyance with an assault or battery, and due to the Defendant's prior violent felony convictions for brutal acts of violence against women, which involved the same modus operandi as was present in the instant case, outweigh both the statutory and non-statutory mitigation that was presented on Defendant's behalf. See Davis v. State, 207 So. 3d 142, 173-175 (Fla. 2016). Additionally, the Court finds that the evidence presented proving that the murders were especially heinous, atrocious, or cruel showed that the murder was clearly committed in a way unnecessarily tortuous to the victim, thereby further outweighing any mitigation presented on Defendant's behalf. Id. Finally, the Court finds that do date, the Florida Supreme Court has not found Hurst error harmful in any unanimous jury cases. Consequently, the Court concludes that there is no reasonable possibility that Hurst error affected the sentence in this case. **As such, no relief is warranted upon claim one**."

(ROA pp 669-670, emphasis in original).

It is clear that no rational juror would have failed to find the aggravators used in imposing a death sentence in this case. Johnston's death sentence was supported by the following four aggravating factors: (1) the defendant was convicted of prior violent felonies, (2) the murder was committed during the commission of a felony (sexual battery and kidnapping), (3) the murder was committed for pecuniary gain, and (4) it was especially heinous, atrocious, or cruel. Johnston, 841 So. 2d 349 at n. 3. The evidence clearly established that Johnston kidnapped his victim from the apartment complex where she lived. He drove her to a nearby church parking lot where he beat,

raped, and ultimately strangled her to death. Johnston testified and admitted to killing the victim although his account of how and where the homicide took place differed from what the physical evidence indicated. Johnston, 841 So. 2d at 354-355.[3]

In addition to the murder conviction, Johnston's jury also found him guilty of kidnapping, robbery, sexual battery, and burglary of a conveyance with assault. Johnston, 841 So. 2d at 353. 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). Under the facts of this case, no rational juror would have failed to find any of the aggravators supporting Johnston's death sentence in this case; this is particularly true in light of the fact that the

[3] This Court noted, for example, that the deceased victim's hand still clutched strands of grass (Johnston, 841 So. 2d at 352), which would appear to be in direct conflict with Johnston's claim that he killed her in the paved apartment parking lot rather than on the lawn outside the church property where the victim's body was eventually discovered.

contemporaneous violent felony convictions were factual determinations made by the same jury that ultimately unanimously recommended his death sentence.[4]

This Court has consistently followed Davis v. State and found harmless error in cases involving unanimous recommendations. See King v. State, 211 So. 3d 866 (Fla. 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); Cozzie v. State, 225 So. 3d 717, 733 (Fla. 2017). As Appellant has failed to demonstrate any basis for this Court to recede from this precedent, the State urges this Court to affirm.

[4] While recognizing this Court's precedent to the contrary, the State continues to maintain that there was no Sixth Amendment error in this case. Johnston 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) and In re Bohannon, 222 So. 3d 525, 532-33 (Ala. 2016).

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 14th day of December, 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: James Driscoll, Jr., David Dixon Hendry, Gregory W. Brown, Assistants CCRC-Middle, Office of the Capital Collateral Regional Counsel-Middle, 12973 No. Telecom Parkway, Temple Terrace, Florida 33637, **driscoll@ccmr.state.fl.us**, **hendry@ccmr.state.fl.us**, **brown@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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