IN THE SUPREME COURT OF FLORIDA

PAUL GLEN EVERETT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC17-1863
L.T. NO. 2001-CF-2956
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant, Paul Glen Everett, was convicted of first-degree murder, burglary of a dwelling with a battery, and sexual battery involving serious physical force. Everett v. State, 893 So.2d 1278 (Fla. 2004) (Everett). Following the penalty phase, the jury came back with a unanimous recommendation for death. Id. at 1280.[1] The judgment and sentence became final upon denial of certiorari by the United States Supreme Court on April 18, 2005. Everett v. Florida, 125 S.Ct. 1865 (2005) (Everett II); Fla. R. Crim. P. 3.851(d)(1)(B) (A judgment and sentence become final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."). This Court affirmed the denial of Appellant's postconviction motion, as well as a writ of habeas corpus. Everett v. State, 54 So.3d 464 (Fla. 2010) (Everett III).

On December 6, 2017, this Court issued an order for Appellant to show cause as to "why the trial 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)." On January 16, 2018, Appellant

[1] The jury found three aggravating factors: "(1) appellant was a convicted felon under a sentence of imprisonment at the time of the murder; (2) he committed the murder while engaged in the commission of a sexual battery or a burglary; and (3) the murder was especially heinous, atrocious, or cruel." Everett, 893 So.2d at 1280.

filed his "Initial Brief of Appellant." (Initial Brief). This is the Appellee's reply to Appellant's Response.

OBJECTION TO ORAL ARGUMENT

Appellee objects to Appellant's request for oral argument. In the briefing schedule, this Court ordered the parties to respond to a limited issue that has been decided by this Court in other cases. As such, oral argument would not serve any purpose other than to delay the proceedings.

SUMMARY OF THE ARGUMENT

The lower court properly denied Appellant's successive motion for postconviction relief. Appellant has failed to show cause as to why his case should be excluded from this Court's precedent in Hurst, Davis, and Mosley. Because the jury unanimously recommended death in Appellant's case, any Hurst error is harmless beyond a reasonable doubt.

ARGUMENT

Appellant devotes two pages of his pleading to the meritless argument that it is unconstitutional for this Court to impose a page limitation on his response.[2] The placement of reasonable page limitations is necessary to improve the ability of this Court to issue rulings in a more timely and efficient fashion. See Henry v. State, 937 So.2d 563, 575-76 (Fla. 2006), quoting Basse v. State,

[2] This Court granted Appellant 10 additional pages and the initial brief was 30 pages.

740 So.2d 518 (Fla. 1999). There is no federal or state constitutional violation in this Court's placing a reasonable page limitation on the pleadings in this case. See Pennsylvania v. Finley, 481 U.S. 551, 555-57 (1987) (finding no federal constitutional right to postconviction relief); Evitts v. Lucey, 469 U.S. 387, 393 (1985) (entitlements only apply to first appeal as a matter of right). Appellant's arguments that this Court's procedure violates federal or state constitutional provisions is without merit and devoid of any supporting caselaw.

Further, contrary to Appellant's argument, Appellant is being given a case-by-case determination, and his right to appeal is not unfairly curtailed by the outcome of Davis or any other capital defendant. Since Appellant has not pointed to any specific fact that distinguishes his case from Davis and Mosley, this precedent applies to Appellant. Instead, Appellant argues that the truncated briefing schedule interferes with his ability to re-raise arguments such as the due process and Strickland v. Washington, 466 U.S. 668 (1984), claims that were raised and previously rejected by this Court in 2010. Everett III, 54 So.3d at 485. However, Hurst is not a vehicle through which a defendant receives an opportunity to re-litigate settled appellate claims.

Appellant claims that he is entitled to a new penalty phase pursuant to Hurst v. Florida and Hurst. Appellant is not entitled to relief because the unanimous death recommendation from the jury,

combined with proper jury instructions and the overwhelming evidence supporting the aggravators in his case, renders any Hurst error harmless. Appellant's claim is without merit and the trial court's ruling should be affirmed because the court properly found that any error was harmless given the jury's unanimous recommendation for death.

The law of the case doctrine applies to Appellant. As this Court has explained the doctrine of the law of the case: "all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts." State v. Owen, 696 So.2d 715, 720 (Fla. 1997). This doctrine is used "to promote finality and efficiency in the judicial process and prevent relitigation of the same issue in a case." Id. In this case, Appellant has previously raised a claim under Ring, which this Court rejected. Everett III, 54 So.3d at 485-86.

In order to be harmless error, there must be no reasonable probability that the Hurst error contributed to Appellant's death sentence. In Davis, 207 So.3d at 174, this Court found that when the jury unanimously recommends a death sentence, their unanimous 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." In the instant case, the jury unanimously recommended that death was the

appropriate sentence, and such a recommendation is "precisely what [this Court] determined in Hurst to be constitutionally necessary to impose a sentence of death." Id. at 175.

A proper harmless error analysis inquires whether the record demonstrates beyond a reasonable doubt that the jury would have unanimously recommended death had it been instructed in accordance with Hurst. See Hurst, 202 So.3d at 68 (analyzing whether the jury's failure to unanimously find all the facts necessary for imposition of the death penalty contributed to Hurst's death sentence); see also Galindez v. State, 955 So.2d 517, 523 (Fla. 2007) (explaining that the harmless error analysis for a violation of Apprendi v. New Jersey, 530 U.S. 466 (2000), is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found penetration when there was a failure to have the jury make the victim injury finding regarding penetration).

Any Hurst error in Appellant's case is clearly harmless because the jury in his case voted unanimously to impose the death penalty. 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, 228 So.3d 1 (Fla. 2017); Knight v. State, 225 So.3d 661 (Fla. 2017); Truehill v. State, 211 So.3d 930 (Fla. 2017), cert. denied, Truehill v. Florida, 138 S.Ct. 3 (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); Tunidor v. State, 221 So.3d 587 (Fla. 2017); Morris v. State, 219 So.3d 33 (Fla. 2017); Guardado IV; Cozzie v. State, 225 So.3d 717 (Fla. 2017). In light of this Court's decisive precedent, the jury's unanimous death recommendation in this case renders any Hurst error harmless.

Florida's death penalty statute, Fla. Stat. § 921.141, was amended after, and in comport with, the decisions in Hurst v. Florida and Hurst v. State. Neither Hurst nor the new statute create a new crime with new elements. Further, the guilt of defendants who were granted a new penalty phase in accordance with Hurst is not being relitigated.

In general, there is a presumption against retroactive application of statutes absent an express statement of legislative intent. Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc., 67 So.3d 187, 195 (Fla. 2011). There is no express statement that the legislature intended that chapter 2017-1 be applied retroactively, and thus this presumption cannot be rebutted. See also Senate Bill Analysis and Fiscal Impact Statement, SB 280, Feb. 21, 2017, at 6-7 (noting that this Court's retroactive application to post-Ring decisions will "significantly increase both the workload and associated costs of public defender offices for several years to come"). Further,

> no U.S. Supreme Court decision holds that the failure of a state legislature to make revisions in a capital sentencing statute retroactively applicable to all of those who have been sentenced to death before the effective date of the new statute violates the Equal Protection Clause, the Due Process Clause, or the Eighth Amendment.

Lambrix v. Sec'y, Dep't of Corr., 872 F.3d 1170, 1183 (11th Cir. 2017).

Since the legislature did not express an intent for the statute to be retroactive, it is not retroactive to cases which were final prior to enactment of the new statute. Appellant's judgment became final in 2005. Thus, the 2017 enactment of changes to the capital sentencing statute is not applicable to Appellant.

The changes to Florida's death penalty statute were made in the aftermath of Hurst and implement the changes from Hurst. The changes include requiring a unanimous jury vote for a recommendation of death instead of a majority vote, requiring specific findings from the jury regarding the existence and sufficiency of the aggravation and the weighing of aggravation against mitigation, and disallowing judicial override of a jury's recommendation of life. As discussed above, these are procedural changes not substantive ones.

These changes to the sentencing procedure did not create a new offense as Appellant argues. (Initial Brief at 15). The class of persons who are death eligible and the range of conduct which causes those defendants to be death eligible did not change. The

aggravating factors necessary to qualify a defendant as eligible for the death penalty were not changed. In fact, the specific aggravators used in Appellant's case had been in place since at least 1987. The only changes made were the requirement of specific jury findings of unanimity for the existence and sufficiency of the aggravating factors and that they outweigh mitigation, and for a death recommendation.

Appellant also argues that the jury was not instructed on the need to find three of the four elements of capital first-degree murder beyond a reasonable doubt. Fla. Stat. § 921.141(2)(a) (2017) ("the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor . . ."). [3] The standard of proof for guilt has long been proof beyond a reasonable doubt, and certainly was at Appellant's trial. See Miles v. United States, 103 U.S. 304, 312 (1880). Similarly, the standard of proof for proving aggravating factors was beyond a reasonable doubt at Appellant's trial. See Floyd v. State, 497 So.2d 1211, 1214-15 (Fla. 1986); Zeigler v. State, 580 So.2d 127, 129 (Fla. 1991); Finney v. State, 660 So.2d 674, 680 (Fla. 1995). Thus, all elements which required findings

[3] For a jury to recommend a sentence of death, the statute requires that they unanimously find at least one aggravating factor was proven beyond a reasonable doubt, unanimously determine sufficient aggravating factors exist, and unanimously find that they outweigh the mitigating circumstances. Fla. Stat. § 921.141(2)(B)(2) (2017). However, the statute does not require the unanimous finding of sufficient aggravation and the unanimous finding that aggravation outweighs the mitigation to be beyond a reasonable doubt.

beyond a reasonable doubt were in fact found beyond a reasonable doubt at Appellant's trial.

Similarly, the requirement that aggravators be sufficient and outweigh mitigation has long been a requirement of Florida law. "The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances." Parker v. Dugger, 498 U.S. 308, 313 (1991); citing Fla. Stat. § 921.141(3) (1985). The 2017 change to the statute merely requires that the jury make these findings unanimously in order for the defendant to be eligible to receive a death sentence.

Appellant's jury did not make findings as to whether they unanimously determined that the aggravating factors were proven, unanimously found the aggravators to be sufficient for death, and unanimously found the aggravators outweighed the mitigating factors. This does not negate that the jury found that the elements of first-degree murder were proven beyond a reasonable doubt. Thomas v. State, 693 So.2d 951 (Fla. 1997).

Since there was not a failure to instruct the jury on the beyond a reasonable doubt standard, Hurst error is not structural as Appellant appears to argue. (Initial Brief at 19). In fact, the Supreme Court recognized that Hurst error can be analyzed for harmlessness and this Court explicitly stated that Hurst error "is not structural error incapable of harmless error review." Hurst,

136 S.Ct. at 624; Hurst, 202 So.3d at 67. Both holdings refute Appellant's argument that there was structural error in his case.

Additionally, Appellant's argument that those defendants who were granted a new penalty phase in light of Hurst essentially causes the guilt phase to be reopened is also misplaced. (Initial Brief at 8). Defendants who receive a new penalty phase remain guilty of first-degree murder, which is a death eligible offense. The new penalty phase will only determine whether their sentence will again be death based on a unanimous jury recommendation after unanimous findings on the existence of aggravation, the sufficiency of aggravation, and whether the aggravation outweighs the mitigation, or instead life imprisonment. Fla. Stat. § 921.141(2) (2017).

This Court has consistently rejected these chapter 2017-1 and Eighth Amendment claims. The same argument was made in Hannon and this Court stated

> Hannon contends that he raises novel chapter 2017–1, Laws of Florida, and Eighth Amendment challenges and that we have not addressed those issues; yet, Hannon is mistaken because we have expressly rejected these claims. Lambrix [v. State, 227 So.3d 112, 113 (Fla. 2017)] (rejecting chapter 2017–1 and Eighth Amendment claims under Hurst); Asay [v. State (Asay VI), 224 So.3d 695, 702–03 (Fla. 2017)] (rejecting chapter 2017–1 and Eighth Amendment claims as "not novel and [] previously rejected by this Court"); Hitchcock[, 226 So.3d at 217] (denying Hurst relief despite the fact that Hitchcock raised Eighth Amendment claims). Hannon chooses to ignore our precedent because he disagrees with the retroactivity cutoff that we set in Asay V, however, that decision is final and has been impliedly

> approved by the United States Supreme Court, which denied certiorari review. See Asay v. Florida, [138 S.Ct. 41 (2017)]. Clearly, Hannon is not entitled to Hurst relief, thus, there is no Hurst error to review for harmless error.

Hannon v. State, 228 So.3d 505, 513 (Fla. 2017). Asay VI, as well as other cases, also specifically rejected the claim that chapter 2017-1 "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise." Asay VI, 224 So.3d at 703. Further, the Eleventh Circuit also rejected the argument that the non-retroactivity "of the new statute violates the Equal Protection Clause, the Due Process Clause, or the Eighth Amendment" stating "the Florida court's rejection of Lambrix's constitutional-statutory claim was not contrary to, or an unreasonable application of, the holding of a Supreme Court decision." Lambrix, 872 F.3d at 1183; see also Dobbert v. Florida, 432 U.S. 282, 301 (1977). The Eleventh Circuit recounts that in the wake of Furman, Dobbert made an Equal Protection claim similar to Appellant's. Lambrix, 872 F.3d at 1183; Furman v. Georgia, 408 U.S. 238 (1972). Dobbert's claim was based on the two-category division of pre-Furman cases, those who had not yet been tried and those whose cases were final. Dobbert, 432 U.S. at 288, 301. The United States Supreme Court held that Dobbert was not "similarly situated to those whose sentences were commuted. He was neither tried nor sentenced prior to Furman, as were they." Id. As was true with Dobbert, Appellant is not similarly situated to those

who are receiving a new sentencing phase pursuant to Hurst as his judgment was final pre-Ring.

Nor are there any ex post facto concerns with the enactment of the new statute as Appellant appears to argue. (Initial Brief at 46-49). "It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law" for the defendant. Dobbert, 432 U.S. at 294. Here, like in Dobbert, "[t]he crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute." Id., quoting Hopt v. Utah, 110 U.S. 574, 589-90 (1884). The change in the statute provides capital defendants with more judicial protection, not less. The new statute requires a unanimous jury vote for a recommendation of death as opposed to the majority recommendation required by the old statute. The new statute also requires specific unanimous findings from the jury regarding the sufficiency of the aggravating circumstances and weighing of the aggravation versus the mitigation, which the old statute did not require. The new statute also no longer permits judicial overrides. These changes make it more difficult for the State to obtain a death sentence, which favors the defendant. Thus, "the new statute [does] not work an onerous application of an ex post facto change in the law" and is not violative of the clause. Dobbert, 432 U.S. at 294, 296.

This Court has consistently held that the 2017 revision to the capital sentencing statute does not apply to cases that were final before its enactment, and Appellant's case is no exception. The procedural changes of Hurst and to § 921.141 (2017) in no way invalidate or alter Appellant's final judgment and sentence.

Under the federal law, violations of the right-to-jury-trial are subject to harmless error. Washington v. Recuenco, 548 U.S. 212, 222 (2006) (relying on Neder v. United States, 527 U.S. 1, 8 (1999), and holding that the "failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error"); Galindez 955 So.2d at 524 (holding harmless error analysis applies to Apprendi and Blakley v. Washington, 542 U.S. 296 (2004), errors).[4] In Appellant's case, the evidence was overwhelming. In addition to being connected to the murder by DNA evidence, Appellant, after being read his rights under Miranda v. Arizona, 384 U.S. 436 (1966), invoked his right to counsel, but then waived his rights and requested to speak with Sergeant Tilley. Everett, 893 So.2d at 1283.

Harmless error is an appellate concept. Hurst errors are **not** structural as both the United States Supreme Court and this Court

[4] The concurrence in Galindez also observed that this Court has the inherent authority to fashion remedies for constitutional problems, such as Hurst. Galindez, 955 So.2d at 527 (Cantero, J., concurring) (stating that when "confronted with new constitutional problems to which the Legislature has not yet responded, we have the inherent authority to fashion remedies." Citing In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So.2d 1130, 1133 (Fla. 1990)).

have already held in the context of Apprendi. Appellant ignores both the United States Supreme Court's holding to the contrary in Recuenco, and this Court's holding to the contrary in Galindez in his arguments.

Furthermore, Appellant's logic applies to every other type of error and it would be the end of harmless error doctrine. Goodwin v. State, 751 So.2d 537, 539-41 (Fla. 1999) (explaining that before the doctrine, appellate courts routinely reversed convictions for almost every error committed during trial, with appellate courts being described as "impregnable citadels of technicality," and resulting in harmless error statutes being enacted). The harmless error doctrine, by its very nature, requires an appellate court to "guess" what the jury would have done. Roger J. Traynor, The Riddle of Harmless Error (1970). Florida has a harmless error statute that requires appellate courts to affirm, if possible. § 924.33, Fla. Stat. (2017) (no judgment shall be reversed unless the appellate court is of the opinion, "that error was committed that injuriously affected the substantial rights of the appellant"). Appellant is really arguing for a presumption of harmfulness in violation of the statute. This Court can, and should, conduct harmless error analysis in Hurst cases, as it has done for numerous other errors in the penalty phase in hundreds of capital cases, including for the improper finding of an aggravator, throughout the years.

Appellant also argues that since the jury only recommended the imposition of the death penalty, there is a "Caldwell issue." See Caldwell v. Mississippi, 472 U.S. 320 (1985). This Court has repeatedly rejected challenges to the standard jury instructions in death penalty cases pursuant to Caldwell. Hall, 212 So.3d at 1032-33. "To establish a Caldwell violation, a defendant must necessarily show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407 (1989); see also Romano v. Oklahoma, 512 U.S. 1, 9 (1994). Thus, references and descriptions that accurately characterize the jury's and judge's sentencing roles under Florida law do not violate Caldwell. Even under the current death penalty statute, the jury's final unanimous recommendation of death is still an "advisory" verdict, as the judge is free to disagree with the jury's recommendation of death and sentence a defendant to a life sentence. After such a decision is made, under double jeopardy principles, a defendant "can no longer be put in jeopardy of receiving the death penalty." Williams v. State, 595 So.2d 936, 938 (Fla. 1992). The judge remains the final sentencing authority in Florida and a jury's recommendation of death remains "advisory." Thus, characterizing the jury as "advisory" is an accurate description of the role assigned to the jury by Florida law and there is no Caldwell violation.

CONCLUSION

As Appellant has failed to demonstrate any basis for this Court to recede from this precedent, Appellee urges this Court to affirm the trial court's denial of Appellant's Hurst claims. As a matter of law, Appellant is not entitled to Hurst relief, and Appellee respectfully requests that this Honorable Court affirm the postconviction court's order denying Appellant relief under Hurst.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 23rd day of January, 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: Linda Mcdermott at lindammcdermott@msn.com, Attorney for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the 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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