Filing # 58957246 E-Filed 07/13/2017 11:01:49 AM

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-711

LENARD JAMES PHILMORE
Appellant,
v.
STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR MARTIN COUNTY, STATE OF FLORIDA

REPLY TO ANSWER BRIEF OF APPELLEE

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RECEIVED, 07/13/2017 11:03:26 AM, Clerk, Supreme Court

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PRELIMINARY STATEMENT

This pleading addresses arguments from Mr. Philmore's Initial Brief. As to all other claims and arguments not mentioned in this pleading, Mr. Philmore relies on the Initial Brief. Reference to the trial transcript will be: (FSC ROA Vol. ___p.#). The post-conviction record shall be referenced as: (PCR Vol. ___p.#).

ISSUE 1: MR. PHILMORE'S JURY FAILED TO MAKE THE FACTUAL FINDINGS NECESSARY TO SATISFY THE REQUIREMENT THAT JUORS WEIGH THE AGGRAVATING FACTORS AGAINST ANY MITIGATION.

Hurst v. Florida, 136 S. Ct. 606 (2016), is properly interpreted as requiring the jury to weigh the aggravating and mitigating factors, and find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors to justify an imposition of the death penalty.

In its Answer Brief, the State argues, "*Hurst*, properly understood, only requires the jury to find the aggravating circumstances; it does not require the jury to find "sufficient" aggravators or mitigation or weighing." This argument runs directly afoul of this Court's holding in *Hurst v. State*, 202 So.3d 40 (2016), interpreting *Hurst v. Florida:*

> [W]e hold that in addition to unanimously finding the existence of any aggravating factor, *the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death*

> *may be considered by the judge*. This holding is founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven; and it gives effect to our precedent that the 'final decision in the weighing process must be supported by 'sufficient competent evidence in the record.'" (emphasis added).

Id. at 54-55. The legal basis for the State's contention that the jury is not required to find sufficient aggravators or subject those aggravators to a weighing process is nonexistent. This Court made clear in its holding in *Hurst* that weighing the aggravating factors against the mitigating factors is constitutionally required.

Prior to *Hurst*, it was statutorily required that the aggravating factors outweigh the mitigating circumstances but the weighing was consigned to the trial judge. *See Hurst*, 202 So.3d at 53; *see also* § 921.141(3), Fla. Stat. (2016). Thus, the State's argument that *Hurst* only requires the jury find aggravating circumstances and that it does not require the jury find either the sufficiency of those aggravators or weighing of those aggravators against any mitigation is contrary to current Florida law.

Because Mr. Philmore's penalty phase jury did not return a verdict making any findings of fact, there is no way of knowing what aggravators, if any, jurors unanimously found proven beyond a reasonable doubt and if the jurors unanimously found the aggravating circumstances outweigh the mitigating circumstances. Contrary to the State's contention, the weighing of aggravating and mitigating

factors is expressly required by this Court and the Sixth Amendment.

It is unclear what proposition this argument supports for the State, however, to the extent that it lends itself to the State proving that they met their burden to show that any error in Mr. Philmore's case is harmless or that Mr. Philmore did not suffer a violation under *Hurst* because jurors failed to weigh these factors – it is without merit. The jury's failure to unanimously find all the facts necessary for imposition of the death sentence violated Mr. Philmore's rights under the United State Constitution and the corresponding provisions of the Florida Constitution. Therefore, this Court should vacate Mr. Philmore's sentence and allow a jury to determine whether the factual circumstances justify imposition of the death sentence.

ISSUE 2: THE STATE ATTEMPTS TO USE THE RATIONAL JUROR TEST TO DERTERMINE HARMLESS ERROR IS NOT IN LINE WITH THE PRECEDENT OF THIS COURT AND IT FAILS TO TAKE INTO ACCOUNT THE GRAVITY OF THE CONSTITUTIONAL HARM.

The State argued that the proper harmless error analysis is the rational juror test found in *Neder v. United States*, 527 U.S. 1, 18-19 (1999). The rational juror test requires that it be shown by clear and convincing evidence that no reasonable juror would have concluded the aggravating circumstances outweigh the mitigating circumstances. *See Jenkins v. Hutton*, 137 S. Ct. 1769, 1772-73.

The rational juror test was used in *Jenkins v. Hutton*, to determining whether an aggravating factor is struck and it must be determined whether the death penalty is still appropriate. The State relies on that case to support their proposition that this be the harmless error standing in Mr. Philmore's case.

The State overlooks an important distinction; an aggravating factor that is struck for insufficient evidence is not the same as a *Hurst* error. *Hurst* errors are constitutional violations that occur, in large part, because a defendant is sentenced to death by a judge rather than jury. Thus, the Supreme Court's use of the rational juror test in *Jenkins* to analyze whether the death penalty was justified after one of the defendant's aggravating factors was found unsupported by sufficient evidence is not relevant to the *Hurst* issue.

Rather, as this Court noted in *Davis v. State*, 207 So.3d 142 (Fla. 2016), harmless error must be proven beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors. The heightened burden of proof alone is evidence of the difference between the two circumstances; clear and convincing evidence may be appropriate for striking an aggravating factor for insufficient evidence and determining whether the death penalty remains appropriately imposed, but not for a wholly unconstitutional death sentencing scheme to which Mr. Philmore was

sentenced under. Thus, the State's argument is without merit.

Under the proper harmless error analysis, the "extremely heavy burden" remains on the State to prove the Hurst error is harmless beyond a reasonable doubt. *See Hurst*, 207 So.3 d at 174. A finding of harmless error remains rare. *King v. State*, 211 So. 3d 866, 892-893. The State failed to meet this extremely high burden in showing that the "advisory" verdict given to the judge by the jury did not contribute to Mr. Philmore's death sentence.

ISSUE 3: THIS COURT PROPERLY RECOGNIZED THE EIGHTH AMENDMENT PROTECTS AGAINST HURST VIOLATIONS.

The State makes the contention that this Court improperly read Eighth Amendment protection into jury unanimity jurisprudence. The State cites *Spaziano v. Florida*, 468 U.S. 447 (1984), to support the proposition that the Eighth Amendment does not require jury unanimity and that any reference of the Eighth Amendment in *Hurst v. State* was dicta and not in conformity with the decision of the Supreme Court.

The Supreme Court in *Hurst v. Florida*, expressly overruled *Spaziano v. Florida* to the extent that it concluded the Sixth Amendment does not require jurors to making specific findings authorizing the death sentence. *See Hurst* at 623. The Court explained that "[t]ime and subsequent cases have washed away the logic of

Spaziano and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Id*.

However, it is important to look at the language of *Spaziano v. Florida*, 468 U.S. 447, 464.

> *In light of the facts that the Sixth Amendment does not require jury sentencing*, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional [under the Eighth Amendment]. (emphasis added)

Id. Thus, because the *Hurst* cases found that the Sixth Amendment does in fact require jury sentencing, the analysis fundamentally shifts regarding the Eighth Amendment implications. The State's reliance on the Court's statement that *Spaziano* was overruled "only to the extent that it allows a sentencing judge to find an aggravating circumstance independent of a jury's fact-finding," does not support the State's contention.

Rather, the rationale for the *Spaziano* Court's decision not to find Eighth Amendment protection for jury unanimity was because of the absence of Sixth Amendment protection for jury unanimity. Because of Hurst, the basis of their rationale is no more and *Spaziano's* Eighth Amendment precedent on this issue has been overruled.

Therefore, the Eighth Amendment requires that where discretion is afforded a sentencing body on a matter as grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. *See Gregg v. Georgia*, 96 S. Ct. 2909, 2932 (1976).

The instruction given to jurors on their advisory role in the process was not suitably directed to minimize the risk of arbitrary and capricious action. Rather, the instructions provided to jurors in this case ran afoul of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). *Caldwell* requires that a capital sentencing jury "recognize the gravity of its tasks and proceeds with the appropriate awareness of this 'truly awesome responsibility."

In the context of the evolving standards of decency under the Eighth Amendment and its protection of defendants like Mr. Philmore, it is imperative that *Caldwell* and all other Eighth Amendment implications be considered by this Court. Mr. Philmore may only be sentenced to death by a properly instructed penalty phase jury that unanimously votes for death. The improper instruction had an effect on the reliability of the verdict, and the *Caldwell* error in this case renders the *Hurst* violation in Mr. Philmore's case not harmless.

CONCLUSION

Wherefore, in light of the facts and arguments presented in this Reply and the facts and arguments presented in the appellant's Initial Brief, Mr. Philmore hereby moves this Honorable Court to:

1. Vacate the convictions and sentence of death.
2. Order a remand for a new trial and/or penalty phase proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished to the clerk of court through the E-Portal and by email to Leslie T. Campbell, Assistant Attorney General Leslie.Campbell@myfloridalegal.com and CapApp@MyFloridaLegal.com and U.S. Mail to Lenard James Philmore, DOC#550026, Union Correctional Institution, 7819 N.W. 228TH Street, Raiford, Florida 32026-1000 on this 12th day of July, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief was generated in Times New Roman 14-point font pursuant to Fla. R. App. P. 9.210.

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