IN THE SUPREME COURT OF FLORIDA

NORMAN BLAKE McKENZIE

Appellant,

vs. CASE NUMBER: SC20-243

STATE OF FLORIDA

Appellee.
_____/

On appeal from the Circuit Court of the
Seventh Judicial Circuit,
In and For St. Johns County, Florida

REPLY BRIEF OF APPELLANT

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ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR INTERROGATORY PENALTY PHASE VERDICT IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH CONSITUTIONAL AMENDMENTS?

As to this issue, the Appellee's entire argument boils down to its Answer Brief at page 9:

> The jury must find the existence of the *fact* that at least one aggravating factor existed; however, nothing in the applicable statute, the standard jury instructions, or the standard verdict form requires the jury to write out word for word the facts or reasoning for which they relied upon in finding that an aggravator was found beyond a reasonable doubt. Under *State v. Poole*, 297 So.3d 487 (Fla. 2020) because a unanimous jury finding in Appellant's case establishes the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, there is no *Hurst* error.

Their argument above was also in existence before *Hurst v. Florida*. 135 S.Ct. 616 (2016) was decided against that process. The ruling in *Poole* is irrelevant in this case for two reasons: This case was tried before Poole came out, and second, Courts do not write laws, the Legislature does. Section 921.141 and the United States Supreme Court's rulings apply here.

The jury selection for the new penalty phase began on August 26, 2019 (TT1). At that time Florida Statutes, Section 921.141 (2017) applied. The relevant sections read as follows:

> (2) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY — This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.

(a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).

(b) The jury shall return **findings** identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:

1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.

2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:

a. Whether sufficient aggravating factors exist.

b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.

c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

(c) If a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of

death. If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

(3) IMPOSITION OF SENTENCE OF LIFE IMPRISONMENT OR DEATH —

(a) If the jury has recommended a sentence of:

1. Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.

2. Death, the court, **after considering each aggravating factor** found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury.

(b) If the defendant waived his or her right to a sentencing proceeding by a jury, the court, after considering all aggravating factors and mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may impose a sentence of death only if the court finds that at least one aggravating factor has been proven to exist beyond a reasonable doubt.

(4) ORDER OF THE COURT IN SUPPORT OF SENTENCE OF DEATH — In each case in which the court imposes a sentence of death, the court shall, considering the records of the trial and the sentencing proceedings, enter a **written order addressing the aggravating factors set forth in subsection (6) found to exist,**

> **the mitigating circumstances in subsection (7) reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty,** and whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence. If the court does not issue its order requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose a sentence of life imprisonment without the possibility of parole in accordance with s. 775.082. (Emphasis added).

Appellant would reiterate the holding in *Hurst v. Florida*, 135 S.Ct. 616 (2016):

> Florida concedes that *Ring* required a jury to **find every fact necessary** to render Hurst eligible for the death penalty. But Florida argues that when Hurst's sentencing jury recommended a death sentence, it "necessarily included a finding of an aggravating circumstance." Brief for Respondent 44. The State contends that this finding qualified Hurst for the death penalty under Florida law, thus satisfying *Ring*. "[T]he additional requirement that a judge *also* find an aggravator," Florida concludes, "only provides the defendant additional protection." Brief for Respondent 22.
>
> The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until **"findings *by the court* that such person shall be punished by death."** Fla. Stat. § 775.082(1) (emphasis added). **The trial court *alone* must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are**

> **insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3)** ; see *Steele,* 921 So.2d, at 546. "[T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State,* 433 So.2d 508, 512 (Fla. 1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires. (Emphasis added.) *Id. at 622.*
>
> * * *
>
> 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*. 136 S.Ct. at 623.

It remains clear that Florida Statute 941.121 still violates *Hurst v. Florida*'s holding and considers the jury's findings as advisory only and the Judge must still find the aggravators exist before the death penalty may be ordered. Based upon the opinion above, it is necessary for the jury to indicate what facts they relied upon in finding what aggravators they had found beyond a reasonable doubt and what facts they relied upon in finding mitigators they found.

Otherwise, the Judge's order pursuant to Section 941.121(4) remains the basis for which a defendant is sentenced to death and not the jury's fact finding. Under Florida Law there may be facts that a judge may find in support of an aggravating and mitigating circumstance that are different than facts found by a

jury. In which case, it would make the Jury's findings superfluous, not to mention in violation of *Hurst v. Florida*.

The only way to have sufficient appellate review in contemplation of Constitutional Rights, is to have the Jury and not the Judge reflect the specific factual findings they relied upon for aggravating and mitigating circumstances.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO STRIKE STATE'S AMENDED NOTICE OF AGGRAVATING CIRCUMSTNACES IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION?

At page 16 of Appellee's Answer Brief they rely upon *Landgraf v. USI Film Products*, 511 U.S. 244, 275, n.29 (1994) for the proposition that it is the procedural law that exists at the time of that stage of the trial that governs how that stage is conducted. Appellee misstates that Court's holding. While it is true that some cases are governed by statutes and rules in place at the time of the incident, it is not true in all cases. The Court in Landgraf stated:

> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, see *Republic Nat. Bank of Miami v. United States*, 506 U.S. 80, 100, 113 S.Ct. 554, 565–566, 121 L.Ed.2d 474 (1992)(THOMAS, J., concurring in part and concurring in judgment), or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end

> of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. *Landgraf at 269.*
>
> * * *

What the Court actually said at page 275 in Landgraf is as follows:

> Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. For example, in *Ex parte Collett,* 337 U.S. 55, 71, 69 S.Ct. 944, 952–953, 93 L.Ed. 1207 (1949), we held that 28 U.S.C. § 1404(a) governed the transfer of an action instituted prior to that statute's enactment. We noted the diminished reliance interests in matters of procedure. 337 U.S., at 71, 69 S.Ct., at 952–953.28 Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive. Cf. *McBurney v. Carson,* 99 U.S. 567, 569, 25 L.Ed. 378 (1879)

Counsel could not find the language cited in Appellee's Answer Brief referring to n29 as "…it is the procedural law that exists at the time of that stage of the trial that governs how that stage is conducted." Perhaps under signed counsel just missed finding that passage.

In either case, when Mr. McKenzie's sentence was vacated, it was as if he was never sentenced to death. When the case came back to the Trial Court the new rule was in effect. Appellee contends that the State was not required to even list aggravators under the old rule, but did so as a courtesy and to avoid a due process claim (AB 20). If the new rule did not

apply, why would the State be concerned about a due process claim?

It is conceivable that the State does not seek the death sentence for every case sent back for resentencing. The Court's discussion suggests in *Landgraf* that retroactivity of rules and statutes may have placed an unsuspected burden upon the state with the new rule. However, that burden might have been considered by this Court by adding the phrase in the rule 3.181: The court may allow the prosecutor to amend the notice upon a showing of good cause.

The Appellee argues that when the prosecutor listed the aggravating factors "out of courtesy," he could have accomplished the same courtesy by asking the Trial Court to allow the amendment due to good cause. Appellant contends the new rule did apply, notwithstanding the completion of the arraignment, because the penalty phase was new; the State took it upon themselves to list the aggravators, not once, but twice.

The Appellee contends Mr. McKenzie suffered no prejudice (AB 21) because the information was presented at the original trial. Appellee is incorrect. The State did not seek HAC in the first trial, nor did they list HAC in their notice to seek the death penalty filed on August 28, 2017 (R252-253). Basically, McKenzie had relied upon the State seeking the same aggravators they sought in the first trial. It is also impossible to know

what facts they relied on when finding HAC, or what weight they placed upon it. It also should be noted that during the first trial the jury recommended death 11 to 1, without the aggravator of HAC.

The Trial Court erred by not granting McKenzie's Motion to Strike the Amended Notice to Seek the Death Penalty which included the aggravator of HAC.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO ALLOW VICTIM IMPACT EVIDENCE BEFORE THE JUDGE ALONE IN VIOLATION OF APPELLANT'S FOURTH, FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSITUTION?

McKenzie will rely upon his initial brief as his argument for Issue II. However, it should be pointed out that Appellant at page 27 of its answer brief has taken liberty in paraphrasing the United States Supreme Court's statement in *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)(Courts have always taken into consideration the harm done by the defendant in imposing sentence, and the evidence adduced in this case was illustrative of the harm caused by Payne's double murder.)

Appellee incorrectly asserts to the Court's statement that the Jury is included its statement. While the Court in *Payne* had permitted the jury to hear impact evidence about the harm that was caused by the murder, it specifically indicated that certain prejudicial evidence would not be allowed.

In effect, Appellant contends this is what happened: Although the instructions specifically say that the jury cannot consider the impact evidence as aggravators, the connotation implies that the jury *can* use that evidence to recommend death. This kind of underlying inference is prejudicial and should not be allowed.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE AGGRAVATING FACTORS WERE SUFFICIENT TO SUPPORT THE DEATH PENALTY WHEN THE JURY DID NOT FIND THE AGGRAVATORS WERE SUFFICIENT BEYOND A REASONABLE DOUBT, AND THE JURY WAS NOT INSTRUCTED ON WHAT CONSTITUTES SUFFICIENT IN ORDER TO SUPPORT THE DEATH PENALTY IN VIOLATION OF McKENZIE'S FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSITUTION?

McKenzie will rely upon his initial brief's arguments in support of this issue.

ISSUE V

WHETHER THE STATUTORY CONSTRUCTION IN *HURST II* CONSTITUTES SUBSTANTIVE LAW AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT LAW, REQUIRES THAT THIS SUBSTANTIVE LAW GOVERN THE LAW THAT EXISTED AT THE TIME OF MR. McKENZIE'S NEW PENALTY PHASE TRIAL?

If Appellee's argument and this Court's holding in *State v. Poole,* 297 So.3d 487 (Fla. 2020) is now the law, then McKenzie contends the Court is rewriting the law and not interpreting it.

The Court in *Hurst v. State*; 202 So.3d 40, 44 (Fla. 2016), specifically held:

> As we will explain, we hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, **the finding that the aggravating factors are sufficient**, and the finding that the aggravating factors outweigh the mitigating circumstances. (Emphasis added).

Section 921.141(2), Florida Statutes (2019) sets out the specific factual findings required before a death sentence must be considered and found by the jury in *Hurst*, above:

If the jury:

> […] 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all the following:
>
> a. Whether sufficient aggravating factors exist.
>
> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
>
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without parole or to death.

There can be no logical rational argument to suggest that "sufficient aggravator" refers to the numerical aggravator rather than the qualitative aspect of the aggravators. This

Court in *Hurst* and the clear language of the statue sets out that one aggravator makes the Defendant eligible. To suggest that sufficient aggravators mean at least one aggravator when that same phrase is spelled out specifically in Subsection 2, is stretching the application of the English language.

A more likely approach to interpreting the language of "sufficient aggravators" is what this court has done many times over the years: it has given different weights to different aggravators. In some cases, this Court has found that there are technical aggravators, and that other aggravators carry less weight than other aggravators.

Porter v. State, 788 So.2d 917,935(Fla.2001), Anstead concurring. (… record that demonstrates a trial court finding that two of the State's **aggravators** were "technical," a Supreme Court finding that the most substantial **aggravator** (HAC) was improperly found, and the strong opinions of two justices that a death sentence was not warranted even without any mitigation.)

Lowe v. State, 259 So.3d 33, 67 (Fla. 2018):

> And in balancing the two aggravators, one of which was "**not strong**," against the mitigators, this Court vacated the death sentence while noting that it was a "close question." *Id.* Lowe's case involves aggravation that is **more substantial** and mitigation that is less **weighty**. We similarly find *Ballard v. State*, 66 So.3d 912 (Fla. 2011), to be Distinguishable. *Ballard* was a single **aggravator** case (CCP) with several statutory mitigators and numerous nonstatutory mitigators. *Id.* at 916 n.1. Lowe's case involves several aggravators assigned **great weight**. (Emphasis added).

Wood v. State, 209 So.3d 1217,1236 (Fla. 2017("accorded great weight to the single, merged **aggravator** of murder in the course of a robbery/pecuniary gain," an aggravating factor that we explained "is not typically considered especially **weighty**."); *Walker v. State*, 957 So.2d 560, 584 (Fla. 2007)(The three **weighty aggravators**, which were established beyond a reasonable doubt,…); *Lukehart v. State,* 776 So.2d 906, 926 (Fla. 2000)(Thus, Lukehart's prior felony **aggravator** is an exceptionally **weighty** aggravating factor under the circumstances of the present case.)

As a result, the Legislature nonetheless requires a jury to find that an aggravator is sufficient, notwithstanding that one aggravator makes a defendant eligible for death. That did not happen here, and this case should be remanded for a new penalty phase.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN DENYING MR. McKENZIE'S MOTION TO FIND SECTION 921.141, FLORIDA STATUTES, AS UNCONSTITUTIONAL BECAUSE THE "PRIOR VIOLENT FELONY" AGGRAVATOR IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD?

While McKenzie concedes this Court has ruled against this argument in the past, McKenzie raised it here for the Court to reconsider the issue and preserve it for potential future changes in the law.

Inasmuch as Appellee's answer brief adds little more facts, case law, or argument, Appellant will rely upon the Initial Brief.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authorities, the Appellant respectfully asks this Court to reverse the judgment and death sentence and remand for a new penalty phase trial.

CERTIFICATES OF SERVICE AND FONT SIZE

I certify that a copy of the foregoing has been furnished electronically via the Florida Courts e-filing portal to Doris Meacham, doris.meacham@myfloridalegal.com and capapp@myfloridalegal.com Capital Appeals Division,444 Seabreeze Blvd., Suite 500, Daytona Beach, FL 32118 on December 21, 2020. I certify that this brief has been prepared using Courier New 12-point font.

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Pursuant to Rules 2.515 and 2.516, Rules of Judicial Administration undersigned designates the following as the attorney's e-mail addresses:

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