CAPITAL CASE

No. ______________________________

IN THE

Supreme Court of the United States

WILLIE SETH CRAIN, JR.

Petitioner,

v.

STATE OF FLORIDA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX

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<u>**INDEX TO APPENDICES**</u>

Appendix A: The opinion of the Circuit Court in and for Hillsborough County, Florida denying Mr. Crain's successive motion for relief under Florida Rule Crim. Pro. 3.851 (Unreported) (June 15, 2017).

Appendix B: The opinion of the Florida Supreme Court affirming the denial of postconviction relief on April 5, 2018 in *Crain v. State,* 246 So.3d 206 (Fla. 2018).

Appendix C: Penalty Phase Advisory Sentence of the Circuit Court in and for Hillsborough County, Florida filed September 17, 1999.

Appendix D: Appellant's Brief filed in *Crain v. State*, SC17-1475, September 6, 2017.

Appendix E: Appellant's Motion for Rehearing in *Crain v. State*, SC17-1475, April 19, 2018.

APPENDIX

A

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA **CASE NO.: 98-CF-017084**

v.

WILLIE SETH CRAIN, **DIVISION: J**
Defendant.
______________________/

FILED
2017 JUN 15 AM 11: 1
CLERK OF COUNTY COURT
HILLSBOROUGH COUNTY,
TAMPA TRAFFIC

ORDER DENYING SUCCESSIVE MOTION TO VACATE DEATH SENTENCE

THIS MATTER is before the Court on Defendant's Successive Motion to Vacate Death Sentence filed, through counsel, on January 10, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. On January 24, 2017, the State filed an Unopposed Motion for Extension of Time. On February 2, 2017, the Court granted the State's motion for thirty days. On February 24, 2017, the State filed the State's Response to Successive Rule 3.851 Motion For Post-Conviction Relief.

On March 23, 2017, the Court held a case management conference. After considering Defendant's motion, the State's response, counsels' arguments presented during the March 23, 2017, case management conference, the court file, and the record, the Court finds as follows:

On September 13, 1999, a jury found Defendant guilty of first-degree murder (count one) and kidnapping (count two). On September 17, 1999, the jury unanimously recommended a sentence of death by a vote of twelve to zero on the first-degree murder count. On November 19, 1999, the trial court imposed a death sentence on the first-degree murder count. The Florida Supreme Court affirmed Defendant's convictions and sentences. *See Crain v. State*, 894 So. 2d 59 (Fla. 2004), *cert. denied*, 546 U.S. 829 (2005). Defendant filed a motion for rehearing. On January 25, 2005, the Florida Supreme Court denied Defendant's motion for rehearing, and the

mandate issued on February 10, 2005. On April 25, 2005, Defendant filed a petition for writ of certiorari in the United Stated States Supreme Court. On October 3, 2005, the United States Supreme Court denied Defendant's petition for writ of certiorari. Therefore, on October 3, 2005, Defendant's convictions and sentences became final.

Defendant subsequently filed a motion for postconviction relief. The postconviction court denied the motion for postconviction relief. The Florida Supreme Court affirmed the denial and denied Defendant's motion for rehearing on January 20, 2012. *See Crain v. State*, 78 So. 3d 1025 (Fla. 2011).

In this Successive Motion, Defendant asserts various claims in light of the United States Supreme Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Florida Supreme Court's decisions in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) and *Perry v. State*, 210 So. 3d 630 (Fla. 2016). Defendant requests that the Court vacate his death sentence and grant a new penalty phase on his first-degree murder conviction.

CLAIM I

IN LIGHT OF *HURST*, DEFENDANT'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In claim I, Defendant asserts his death sentence is unconstitutional and in violation of the Sixth Amendment pursuant to *Hurst v. Florida* and *Hurst v. State*. Defendant asserts the Florida Supreme Court held in *Hurst v. State* that *Hurst v. Florida* means "that before the trial judge may consider imposing a death sentence, the jury in a capital case 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). Defendant asserts the Sixth Amendment error under *Hurst v. Florida* cannot be proven by the State to be harmless beyond a reasonable doubt in Defendant's case. Defendant asserts although his death recommendation was unanimous, even a unanimous death recommendation would not mandate a finding of harmless error, as that is only one of several inquiries that juries must make under *Hurst v. Florida.*

Defendant asserts the only document the jury returned was an advisory recommendation that a death sentence should be imposed. Defendant asserts Defendant's penalty phase jury did not return a verdict making any findings of fact, so there is no way of knowing what aggravators, if any, the jurors unanimously found were proven beyond a reasonable doubt, if the jurors unanimously found the aggravators sufficient for death, or if the jurors unanimously found that the aggravating circumstances outweighed the mitigating circumstances. Defendant asserts his advisory panel deliberated for less than two hours regarding their recommendation, thereby suggesting they did not engage in the careful weighing of the three aggravators and plethora of mitigating circumstances they were asked to consider. Defendant further asserts the Florida Supreme Court found that competent, substantial evidence did not exist to support the jury's verdict of kidnapping with intent to commit homicide. Therefore, Defendant asserts it was inappropriate for the Court to weigh this aggravator, which was given "great weight" against Defendant's mitigators.

Defendant asserts in the wake of *Hurst v. Florida* and the resulting new Florida law, the jury under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), must be correctly instructed regarding its sentencing responsibility. Defendant asserts this means that post-*Hurst* individual jurors must know that each will bear the responsibility for a death sentencing resulting in a defendant's

execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. He asserts jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. He alleges his jury was not told that each individual juror carried responsibility for whether a death sentence was authorized or a life sentence was mandated. He alleges the chances that at least one juror would not join a death recommendation if a resentencing were now conducted is highly likely given that proper *Caldwell* instructions would be required.

Moreover, he alleges while the sentencing judge downplayed the significance of the mitigating circumstances by giving them only "some weight" or "modest weight," the jurors under *Hurst* would have been free to conclude that the defense had established the existence of mitigating factors which were presented in his case and given them greater weight. He alleges in *Hurst v. State,* the Florida Supreme Court stated that error under *Hurst v. Florida* "is harmless only if there is no reasonable probability that the error contributed to the sentence." He asserts the harmless error test is to be rigorously applied and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, he asserts the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to his death sentence in this case.

He asserts the *Hurst* error in his case warrants relief. He asserts the State simply cannot show the error to be harmless beyond a reasonable doubt that no properly instructed juror would have refused to vote in favor of a death recommendation. He asserts unless it is proven beyond a reasonable doubt that no juror would have voted for a life sentence and through such a vote

mandated that he receive a life sentence, his sentence must be vacated and a new penalty phase ordered.

In its response, the State, relying on *Mosley*,[1] asserts the Florida Supreme Court held that *Hurst v. Florida* could be applied retroactively to cases that were not final when the *Ring* opinion issued in 2002. The State asserts Defendant's death sentence became final after *Ring v. Arizona*[2] was decided and therefore, *Hurst* could be retroactively applied to Defendant's case. However, the State asserts Defendant is only entitled to relief if the *Hurst* error was not harmless beyond a reasonable doubt.

The State asserts under the facts of this case, any *Hurst* error was harmless and Defendant's motion should be denied. Specifically, the State asserts *Hurst* does not undermine Defendant's death sentence because he has qualifying prior violent felony convictions and the jury's death recommendation was unanimous. The State asserts it is clear that no rational juror would have failed to find all three aggravators that the trial court found in imposing a death sentence in this case. The State asserts Defendant's death sentence was supported by three aggravating factors found by the trial court, including the murder was committed during the commission of a felony (kidnapping), he was convicted of prior violent felonies (five counts of sexual battery and one count of aggravated child abuse), and the victim was under the age of twelve. The State asserts each of the aggravators were given great weight by the trial court. The State asserts the evidence clearly established that the victim was taken from the bed by Defendant where she lay next to her sleeping mother, the victim was unquestionably seven years old, and it is uncontested that Defendant had prior violent felony convictions. The State asserts since the aggravators supporting Defendant's death sentence were supported either by prior convictions, contemporaneous

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[1] *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016).

[2] *Ring v. Arizona*, 497 U.S. 639, 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990).

convictions, or on uncontroverted facts, no rational juror would have failed to find any of the aggravators supporting Defendant's death sentence in this case.

The State asserts balanced against this strong aggravation was the hardly compelling nonstatutory mitigation. The State asserts the non-statutory mitigators the trial court found were (1) nonstatutory mental health impairment (some weight); (2) mental problems exacerbated by the use of alcohol and drugs, both legal and illegal (some weight); (3) he was an uncured pedophile (some weight); (4) he had a history of abuse and an unstable home life (modest weight); (5) he was deprived of the educational benefits and social learning that one would normally obtain from public education (modest weight); (6) he had a history of hard, productive work (some weight); (7) he had a good prison record (modest weight); and (8) he had the capacity to form living relationships (modest weight). The State asserts the trial court did not find the statutory mental mitigators urged by the defense, including that the murder was committed while he was under the influence of extreme mental or emotional disturbance.

The State asserts the jury's death recommendation was unanimous in this case. The State, relying on *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), *King v. State,* 211 So. 3d 866, 892 (Fla. 2017), *Knight v. State,* --- So. 3d ----, 2017 WL 411329 (Fla. Jan. 31, 2017), and *Kaczmar v. State,* --- So. 3d ----, 2017 WL 410214 (Fla. Jan. 31, 2017), asserts the Florida Supreme Court has issued four opinions upholding death sentences where the jury recommendations were unanimous. The State asserts in comparison to the aggravation, the jury and trial court clearly found the aggravation to far outweigh the mitigation. Therefore, the State asserts a unanimous jury in this case did make the assessment that he should forfeit his life for his kidnapping and murder of the victim and any *Hurst* error was clearly harmless in this case.

After reviewing the allegations, the State's response, the court file, and the record, the Court finds it is undisputed that the Defendant is entitled to retroactive application of *Hurst* because the Defendant's judgment and sentence became final on October 3, 2005, after the *Ring* opinion issued on June 24, 2002. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016).

The Court finds Defendant qualifies for resentencing relief unless the *Hurst* error was harmless beyond a reasonable doubt. *See Hurst*, 202 So.3d at 67 (recognizing that a *Hurs*t error is capable of harmless error review); *Hurst v. Florida*, 136 S. Ct. at 624 (remanding to the trial court to determine whether the error was harmless). The Court finds this Court can conduct a harmless error review of the record without the need for an evidentiary hearing.

The Florida Supreme Court has explained the appropriate standard for a harmless error review as follows:

> Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. *See, e.g., Zack v. State*, 753 So.2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," [*State v.*] *DiGuilio*, 491 So.2d [1129,] 1137 [Fla. 1986], and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a *Hurst* error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate: The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. *DiGuilio*, 491 So.2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." Id. *Hurst*, 202 So.3d at 68.

Mosley v. State, 209 So. 3d 1248, 1283-1284 (Fla. 2016).

The Court finds, "[i]n the penalty phase, the jury unanimously recommended the death sentence. The trial court found three aggravators: (1) prior violent felonies (great weight), (2)

the murder was committed during the course of a kidnapping (great weight), and (3) the victim was under the age of twelve (great weight). The court found no statututory mitigators and eight nonstatutory mitigators, and imposed the death sentence." *Crain v. State,* 894 So. 2d 59, 67 (Fla. 2004) (footnote omitted). The Court finds "[t]he nonstatutory mitigators the trial court found were: (1) nonstatutory mental health impairment (some weight); (2) mental problems exacerbated by the use of alcohol and drugs, both legal and illegal (some weight); (3) Crain was an uncured pedophile (some weight); (4) Crain had a history of abuse and an unstable home life (modest weight); (5) Crain was deprived of the educational benefits and social learning that one would normally obtain from public education (modest weight); (6) Crain had a history of hard, productive work (some weight); (7) Crain had a good prison record (modest weight); and (8) Crain had the capacity to form loving relationships (modest weight)." *Id. at* 67 n. 9.

The Court acknowledges that on direct appeal, the Florida Supreme Court reversed the judgment of guilt of kidnapping and directed the trial court on remand to enter judgment for false imprisonment. *See Crain,* 894 So. 2d at 76. The Court finds the reduction of the kidnapping conviction to false imprisonment eliminates the aggravator that the murder was committed while Defendant was engaged in an enumerated felony because false imprisonment is not an enumerated felony under section 921.141(5)(d), Florida Statutes. *See* § 921.141(5)(d), Fla. Stat. (1997). However, the Court finds two aggravators: (1) prior violent felonies (great weight) and (2) the victim was under the age of twelve (great weight) still remain. *See Hildwin v. State,* 84 So. 3d 180, 190 (Fla. 2011) (noting "[t]he HAC and prior violent felony aggravators have been described as especially weighty or serious aggravators set out in the sentencing scheme").

The Court finds prior to opening statements during the penalty phase, the Court advised the jury as follows:

> Members of the jury, the defendant has been found guilty of Murder in the First Degree. The punishment for this crime is either death or life imprisonment.
>
> The final decision as to what punishment shall be imposed, rests solely with the Judge of this court; however, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.
>
> The State and the defendant will now present evidence relative to the nature of the crime and the character of the defendant.
>
> You are instructed that this evidence, when considered with the evidence you've already heard, is presented in order that you might determine, first, whether sufficient aggravating circumstances exists that would justify the imposition of the death penalty; and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating evidence, if any.
>
> At the conclusion of the taking of the evidence and after argument of Counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

(*See* ROA pps. 3275-3276).

The Court finds during opening statement of the penalty phase, Assistant State Attorney Jay Pruner stated the following:

> You will also be able to consider as aggravating circumstances the age of Amanda Victoria Brown at the time of her death.
>
> As you will recall, the evidence indicated that she was seven and an aggravating circumstance, if you find that it has been proved beyond a reasonable doubt, is that the victim of the capital felony, the murder, was a person less than 12 years of age.

See ROA p. 3279. The Court finds during opening statement of the penalty phase, Defendant's trial counsel Mr. Charles Traina stated the following:

> The prosecutors have a responsibility to try to introduce to you aggravating circumstances that might make this particular situation one that justifies the imposition of the death penalty.

> And it's my responsibility to introduce to you testimony, evidence that would be mitigating in nature, reasons why you might be able to take into consideration a recommendation of life imprisonment, as opposed to the death penalty.

See ROA p. 3282.

> You've already been told that the Court is gonna assign great weight to any recommendation that you make. So as I said earlier, all of us here have a grave responsibility to do the best we can to follow the law, to consider all that is there to consider, to be considered.

(*See* ROA p. 3289).

The Court finds during closing arguments of the penalty phase, Assistant State Attorney Chris Moody stated, "[t]he aggravating factors that the State has submitted proof on, and I submit they have been proven beyond a reasonable doubt, are three." *See* ROA p. 3599. The Court finds during closing arguments of the penalty phase, Mr. Charles Traina stated the following:

> The State has presented three aggravating circumstances for your consideration. They must prove those the Judge will tell you this, I think she already actually read an instruction to you of this nature that they must prove those aggravating circumstances beyond a reasonable doubt.
>
> Certainly if you, after having listened to the testimony last week about the underlying facts of this case, have been convinced that there was a kidnapping then - - and convinced beyond a reasonable doubt like you declared last week or this past Monday with your verdict then that aggravating circumstance would be, um, one that you can consider in terms of weighing.
>
> Um, certainly, if you consider that Amanda Brown was seven years old, which seems to be pretty obvious from every source that we've had; if you believe that beyond a reasonable doubt, then that is another aggravating circumstance that you could consider in terms of weighing what you hear in the last day or two.
>
> Um, and to the extent that you accept, by virtue of testimony that came to us yesterday I believe, that the previous, um, victims that testified before you were victims of offenses that involved force or threat of force or violence, if you're convinced of that beyond a

> reasonable doubt, then that would be an aggravating circumstance you could consider and weigh.

See ROA pps. 3605-3607.

> So if you are reasonably convinced of the mitigation circumstances, which the defense showed to you in the last couple days, and I will go over them in just a second, but if you are reasonably convinced of the mitigating circumstances, then you are allowed to consider those mitigating circumstances in your attempt to weigh what - - what you've seen and come up with a - - a decision as to your recommendation.

See ROA p. 3608.

> And when you decide what your decision's [sic] gonna be, when you make your recommendation, I'm asking you to recommend that he remain in prison for life.

See ROA pps. 3658-3659.

The Court finds that prior to the jury deliberating during the penalty phase, the judge instructed the jury as follows:

> Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of Murder in the First Degree.
>
> As you have been told, the final decision as to what punishment shall be imposed, is my responsibility. However, your advisory sentence as to what sentence should be imposed on the defendant, is entitled by law and will be given great weight by this Court in determining what sentence to impose in this case.
>
> It is only under rare circumstances that this Court could impose a sentence other than what you recommend. It is your duty to follow the law that I will now give you, and render to me an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty; or whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant, and evidence that has been presented to you in these

> proceedings.

See ROA pps. 3660-3661.

> ...The State may not rely upon a single aspect of the offense to establish more than one aggravating circumstance.
>
> Therefore, if you find that two or more of the aggravating circumstances are proven beyond a reasonable doubt by a single aspect of the offense, you are to consider that as supporting only one aggravating circumstance.
>
> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment.

See ROA pps. 3662-3663.

> A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.
>
> The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law.
>
> You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.
>
> ...
>
> Your recommendation to the Court must be based only on the aggravating circumstances and the mitigating circumstances about which I have instructed you.
>
> In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous. The fact that the determination of whether you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the - - excuse me - - without due regard to the gravity of these proceedings.
>
> Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

> If a majority of the jury determines that Wille Seth Crain should be sentenced to death, your advisory sentence will be: "A majority of the jury, by a vote of whatever the vote is, advise and recommend to the Court that it impose the death penalty upon Willie Seth Crain."
>
> On the other hand, if by six or more votes the jury determines that Willie Seth Crain should not be sentenced to death, your advisory sentence will be: "The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Willie Seth Crain without the possibility of parole."

See ROA pps. 3664-3667.

Based on the record, the Court finds beyond a reasonable doubt that any *Hurst* error was harmless. Specifically, the Court finds although the jury was informed that it was not required to recommend death unanimously, and despite the mitigation presented, the jury still unanimously recommended that Defendant be sentenced to death for the murder of the victim. The Court finds this was a highly aggravated case, the jury was instructed that the aggravators must be established beyond a reasonable doubt, the evidence supporting the aggravators for prior violent felony convictions and the victim being less than twelve years of age were significant and uncontested, there was no statutory mitigation, the nonstatutory mitigation was minimal, the jury was not required to recommend death if the aggravators did not justify the death penalty, and the jury recommendation was unanimous. *See Davis v. State*, 207 So. 3d 142, 173-175 (Fla. 2016).

The Court further finds the unanimous recommendation was precisely what the Florida Supreme Court determined in *Hurst* to be constitutionally necessary to impose a sentence of death. Consequently, the Court finds there is no reasonable possibility that *Hurst* error affected the sentence in this case. The Court finds Defendant is not entitled to the vacation of his death sentence or a new penalty phase. **As such, no relief is warranted upon claim I.**

CLAIM II

UNDER *HURST V. STATE*, DEFENDANT'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In claim II, Defendant asserts his death sentence was not the product of unanimous jury findings or a unanimous jury verdict. He asserts his sentence was the product of an arbitrary and capricious system that did not afford him the rights that the Eighth Amendment guarantees. He asserts the Florida Supreme Court in *Hurst v. State*, held the Eighth Amendment requires jury unanimity in recommending a death sentence and the jury must be informed of its right to recommend a life sentence even if it unanimously makes the necessary factual findings. Defendant asserts what constitutes cruel and unusual punishment under the Eighth Amendment turns upon considerations of the evolving standards of decency that mark the progress of a maturing society. Defendant asserts that according to *Hurst v. State*, the evolving standards of decency reflected in a national consensus that a defendant could only be given a death sentence when a penalty phase jury has voted unanimously in favor of the imposition of death. He asserts as a result, those defendants who have had one or more jurors vote in favor of a life sentence are not eligible to receive a death sentence. He asserts this class of defendants cannot be executed under the Eighth Amendment.

Defendant asserts he is within this protected class because he did not receive the benefit of a penalty phase jury verdict. He asserts his case was only heard by an advisory panel and the verdict was rendered by a judge. He asserts under the Eighth Amendment, his execution would constitute cruel and unusual punishment and his death sentence must be vacated and a life sentence imposed, or at the very least, a new penalty phase ordered.

After reviewing the allegations, the State's response, and all relevant case law, the Court finds *Hurst v. Florida* did not address the Eighth Amendment. The Court finds there is no Florida State Supreme Court or United States Supreme Court precedent this Court must follow asserting that the Eighth Amendment does or does not require unanimity in jury capital sentencing recommendations. **As such, no relief is warranted upon claim II.**

CLAIM III

THIS COURT SHOULD VACATE MR. CRAIN'S DEATH SENTENCE BECAUSE THE FACT-FINDING THAT SUBJECTED HIM TO A DEATH SENTENCE WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

In claim III, Defendant asserts *Hurst v. Florida* mandates that the State prove each element beyond a reasonable doubt. He asserts he was denied a jury trial on the elements that subjected him to the death penalty. Therefore, he asserts he was denied his right to proof beyond a reasonable doubt. He asserts this Court should vacate his death sentence and order a new penalty phase.

In its response, the State, relying on *Lukehart v. State,* 70 So. 3d 503, 523 (Fla. 2011), asserts this claim should have been raised on direct appeal rather than in a successive postconviction motion and therefore, is procedurally barred. The State, relying on rule 3.850(d)(2), further asserts his delayed filing of this claim also renders it time-barred. The State also asserts it lacks merit.

Specifically, the State, relying on *Smith v. State,* 170 So. 3d 745, 760 (Fla. 2015), asserts the State bears the burden to prove each aggravating circumstance beyond a reasonable doubt. The State asserts the jury in Defendant's case was instructed that the aggravating circumstance they may consider must be proven beyond a reasonable doubt. The State asserts the jury was unequivocally instructed regrading Defendant's right to proof beyond a reasonable doubt on the

aggravation that subjected him to the death penalty. The State asserts the jury instructions used in this case confirm that the jury applied the proper standards and therefore, this claim lacks merit.

After reviewing the allegations, the State's response, the court file, and the record, the Court finds this claim should have been raised, if at all, on direct appeal of the judgment and sentences. Therefore, the Court finds it is procedurally barred in this rule 3.850 motion. The Court further finds the jury was instructed that it must find each aggravating circumstance was proven beyond a reasonable doubt. *See* ROA 3662-3663. **As such, no relief is warranted upon claim III.**

CLAIM IV

IN LIGHT OF *HURST, PERRY V. STATE,* AND *HURST V. STATE,* DEFENDANT'S DEATH SENTENCE VIOLATES THE FLORIDA CONSTITUTION, INCLUDING ARTICLE I, SECTIONS 15 AND 16, AS WELL AS FLORIDA'S HISTORY OF REQUIRING A UNANIMOUS JURY VERDICT.

In claim IV, Defendant asserts because the State proceeded against him under an unconstitutional system, the State never presented the aggravating factors of elements for the grand jury to consider in determining whether to indict him. He asserts a proper indictment would require that the grand jury find that there were sufficient aggravating factors. He asserts he was denied his right to a proper grand jury indictment. He further asserts he was never formally informed of the full "nature and cause of the accusation" because the aggravating factors were not found by the grand jury and contained in the indictment. Therefore, he asserts this Court should vacate his death sentence and order a new penalty phase.

After reviewing the allegations, the State's response, the court file, and the record, the Court finds this claim is beyond the scope of *Hurst* relief. **As such, no relief is warranted upon claim IV.**

CLAIM V

THE DECISIONS IN *HURST V. STATE* AND *PERRY V. STATE* ARE NEW LAW THAT WOULD GOVERN AT A RESENTENCING AND MUST BE PART OF THE SECOND PRONG ANALYSIS OF MR. CRAIN'S PREVIOUSLY PRESENTED NEWLY DISCOVERED EVIDENCE CLAIM AND *STRICKLAND* CLAIMS. THE NEW LAW, DUE PROCESS PRINCIPLES, AND THE EIGHTH AMENDMENT ALL REQUIRE THIS COURT TO REVISIT MR. CRAIN'S PREVIOUSLY PRESENTED CLAIMS AND DETERMINE WHETHER THE EVIDENCE PRESENTED TO SUPPORT EACH CLAIM AND ALL THE OTHER ADMISSIBLE EVIDENCE AT A FUTURE RESENTENCING WOULD PROBABLY RESULT IN A LIFE SENTENCE IN LIGHT OF THE NEW LAW THAT WOULD GOVERN AT A RESENTENCING.

In claim V, Defendant asserts on March 7,2016, Chapter 2016-13 was signed into law by Governor Scott. He asserts it substantially revised Florida's capital sentencing statute and constitutes new law in rule 3.851 proceedings. He asserts its adoption was intended to cure the constitutional defect in Florida's capital sentencing scheme identified in *Hurst v. Florida.* He asserts the revised capital sentencing statute would apply at a resentencing and would require that the jury unanimously determine that sufficient aggravating factors existed to justify a defendant's sentence and unanimously determine that the aggravators outweigh the mitigating factors. He asserts it would also require the jury to unanimously recommend a death sentence before the sentencing judge would be authorized to impose a death sentence. He asserts one single juror voting in favor of a life sentence would require the imposition of a life sentence.

Defendant asserts this new Florida law did not exist when he previously presented his newly discovered evidence and *Strickland* claims. He asserts he could not present his claim set forth herein because the new law that would govern any resentencing ordered in his case was previously unavailable. He asserts a previous rejection of a death sentenced defendant's *Strickland*

claims and newly discovered evidence claims should be re-evaluated in light of the new requirement that juries must unanimously make the necessary findings of fact and return a unanimous death recommendation before a death sentence is even a sentencing option. He asserts if newly discovered evidence and/or *Strickland* claims would have enhanced his case for a life sentence, it is likely that he can meet his burden to show the outcome at a resentencing would probably be different. Therefore, he asserts this Court must revisit and re-evaluate the rejection of all his previously presented newly discovered evidence claims and *Strickland* claims in light of the new Florida law which would govern at a resentencing.

Defendant asserts that at his penalty phase proceeding, no juror voted in favor of a life sentence. He asserts in light of the important information that a jury was never able to consider and weigh in his case, it is apparent the outcome would probably be different and he would likely receive a binding life recommendation from the jury. He asserts this Court should vacate his death sentence and order a new penalty phase.

In its response, the State asserts this claim should be dismissed as insufficiently pled because Defendant makes no effort to explain which claims he is referring to. The State further asserts this claim lacks merit because neither *Hurst* nor *Perry* operate to breathe new life into previously denied claims. The State asserts there is no authority for the type of plenary review Defendant is seeking. The State asserts the *Hurst* error is a trial error to be measured for harmlessness against the trial record. The State asserts under the proper harmless error standard, the *Hurst* error was clearly harmless in this case. The State also asserts Defendant cannot mix and match his guilt phase claims with his penalty phase claims as *Hurst* does not resurrect his previously denied claims because it is not a claim of newly discovered evidence.

After reviewing the allegations, the State's response, the court file, and the record, the Court finds this claim is beyond the scope of *Hurst* relief. **As such, no relief is warranted upon claim V.**

It is therefore **ORDERED AND ADJUDGED** that claims I through V of Defendant's Successive Motion to Vacate Death Sentence are hereby **DENIED.**

Defendant has thirty (30) days from the date of this Final Order within which to appeal. However, a timely-filed motion for rehearing shall toll the finality of this Order.

DONE AND ORDERED in Chambers in Hillsborough County, Florida this 14th day of June, 2017.

MICHELLE SISCO, Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to Ann Marie Mirialakis, Assistant Capital Collateral Regional Counsel - Middle Region, Ali A. Shakoor, Assistant Capital Collateral Regional Counsel - Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, by regular U.S. Mail; to Scott A. Browne, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, by regular U.S. Mail; and to Jay Pruner, Assistant State Attorney, Office of the State Attorney, 419 North Pierce Street, Tamp, FL 33602, by U.S. mail, on this 15th day of June, 2017.

DEPUTY CLERK

APPENDIX

B

246 So.3d 206
Supreme Court of Florida.

Willie Seth CRAIN, Jr., Appellant,
v.
STATE of Florida, Appellee.

No. SC17–1475
|
[April 5, 2018]

Synopsis
Background: Defendant convicted of first-degree murder and kidnapping with intent to commit homicide appealed denial, by the Circuit Court, Hillsborough County, Michelle Sisco, J., of his successive motion for postconviction relief.

[Holding:] The Supreme Court held that jury's unanimous recommendation of death sentence rendered harmless its error, in failing to make correct determination as to sufficiency of the evidence to support defendant's conviction for kidnapping.

Affirmed.

Canady and Polston, JJ., concurred in result.

West Headnotes (1)

[1] **Sentencing and Punishment**
Killing while committing other offense or in course of criminal conduct
Sentencing and Punishment
Harmless and reversible error

Aggravating factor of kidnapping with intent to inflict bodily harm was valid factor for jury's consideration in recommending death sentence for defendant convicted of first-degree murder and kidnapping with intent to commit homicide, despite fact that kidnapping conviction was reversed on appeal, and thus jury's unanimous recommendation of death sentence rendered harmless its error, in failing to make correct determination as to sufficiency of the evidence to support defendant's conviction for kidnapping; kidnapping with intent to inflict bodily harm was underlying aggravating factor for defendant's murder conviction. Fla. Stat. Ann. § 921.141(5)(d).

Cases that cite this headnote

***207** An Appeal from the Circuit Court in and for Hillsborough County, Michelle Sisco, Judge—Case No. 291998CF017084000AHC

Attorneys and Law Firms

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Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Scott A. Browne, Senior Assistant Attorney General, Tampa, Florida, for Appellee

Opinion

PER CURIAM.

Willie Seth Crain, Jr., appeals the postconviction court's denial of his successive motion for postconviction relief. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. Crain's motion sought relief based on the United States Supreme Court's decision in *Hurst v. Florida*, ––– U.S. ––––, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and this Court's opinions in *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), *cert. denied*, ––– U.S. ––––, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017), and *Perry v. State*, 210 So.3d 630 (Fla. 2016). For the reasons fully explained below, we affirm the postconviction court's denial of relief.

BACKGROUND

In 1999, a jury convicted Crain of first-degree murder and

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kidnapping with intent to commit or facilitate the commission of a homicide. *Crain v. State*, 894 So.2d 59, 62 (Fla. 2004), *cert. denied*, 546 U.S. 829, 126 S.Ct. 47, 163 L.Ed.2d 79 (2005). On direct appeal, this Court explained the facts underlying Crain's crimes:

> Willie Seth Crain, a then fifty-two-year-old Hillsborough County fisherman and crabber, was charged with the September 1998 kidnapping and first-degree murder of seven-year-old Amanda Brown. At the time, Amanda was three feet, ten inches tall and weighed approximately forty-five pounds.
>
> ....
>
> [On the night of the crimes,] Crain mentioned that he had a large videotape collection and invited [the victim's mother,] Hartman and Amanda to his trailer to watch a movie. Amanda asked if he had "Titanic," which she stated was her favorite movie. Crain stated that he did have "Titanic" and Amanda pleaded with ***208** her mother to allow them to watch the movie. Hartman was initially reluctant because it was a school night, but she finally agreed. Crain drove Hartman and Amanda approximately one mile to his trailer in his white pickup truck.
>
> ....
>
> At [one] point in the evening, Hartman asked Crain if he had any medication for pain. Crain offered her Elavil and Valium.... Hartman elected to take five, five-milligram Valium tablets. Crain took one Valium tablet.
>
> Eventually, Hartman decided that it was time to leave. Crain drove Hartman and Amanda back to their residence and accompanied them inside....
>
> According to Hartman, she told Crain, who appeared to be intoxicated at that time, that he could lie down and sober up but she was going to bed. The time was approximately 2:30 a.m. Within five minutes of Hartman going to bed, Crain entered Hartman's bedroom and lay down on the bed with Hartman and Amanda. Hartman testified that she neither invited Crain to lie in her bed nor asked him to leave. Crain was fully clothed and Amanda was wearing a nightgown. Amanda was lying between Hartman and Crain.
>
> Penny Probst, a neighbor of Hartman, testified that at approximately 12 midnight on September 10–11, 1998, she saw a white truck parked immediately behind Hartman's car in Hartman's driveway. In the early morning hours of September 11, Probst observed the truck parked at the side of Hartman's residence with lights on and the engine running. Probst heard the truck leave after about five minutes.
>
> Hartman slept soundly through the night. When she woke in her bed alone the next morning, she discovered that Amanda was missing. Hartman testified her alarm clock read 6:12 a.m. when she awoke. Hartman immediately called Crain on his cell phone. At that time, he was at the Courtney Campbell boat ramp in Hillsborough County loading his boat. He told Hartman he did not know where Amanda was. Hartman then called the police and reported Amanda's disappearance.

Id. at 62–64 (footnotes omitted).

Following the jury's unanimous recommendation for death, the trial court sentenced Crain to death, finding three aggravating factors and assigning each the noted weight: "(1) prior violent felonies (great weight), (2) the murder was committed during the course of a kidnapping (great weight), and (3) the victim was under the age of twelve (great weight)." *Id.* at 67. The trial court "found no statutory mitigators and eight nonstatutory" mitigating circumstances. *Id.*

On direct appeal in 2004, this Court affirmed Crain's first-degree murder conviction, finding sufficient evidence "to establish first-degree felony murder based on kidnapping with the intent to inflict bodily harm." *Id.* at 73. As to Crain's kidnapping conviction, this Court concluded that "competent, substantial evidence [did] not exist to support the jury verdict of kidnapping with intent to commit homicide." *Id.* at 76. Therefore, this Court "reverse[d] the judgment of guilt of kidnapping and direct[ed] the trial court on remand to enter judgment for false imprisonment, and to resentence Crain accordingly." *Id.* Crain's sentence of death became final in 2005.

In 2011, this Court explained its holding on direct appeal with respect to Crain's kidnapping conviction:

> In contrast to the jury instruction on count I, which related to the murder charge and instructed the jury on alternative ***209** theories of kidnapping, on count II, the jury was not instructed on the unpled alternative of kidnapping with intent to inflict body [sic] harm. Thus, on appeal, when examining whether the evidence was legally sufficient to support a separate conviction for kidnapping as charged in count II of the

> indictment, this Court concluded that competent, substantial evidence did not exist to support the jury verdict of kidnapping *with the intent to commit homicide*. As to count I, however, we held that there was sufficient evidence to support a felony murder conviction under the alternative theory of kidnapping *with the intent to inflict bodily harm*.

Crain v. State, 78 So.3d 1025, 1032 n.3 (Fla. 2011) (citations omitted).

ANALYSIS

In this case, Crain argues that, despite this Court consistently holding that *Hurst* errors are harmless in cases where the jury unanimously recommended death, his case is different because: (1) the kidnapping aggravating factor was invalidated; (2) there was no finding that the murder was heinous, atrocious, or cruel (HAC) or cold, calculated, and premeditated (CCP); (3) the jury was given inaccurate instructions regarding its sentencing responsibility;[1] and (4) the jury was not instructed on mercy. As we explain below, we reject Crain's arguments and conclude that the *Hurst* error in Crain's case was harmless beyond a reasonable doubt.

On remand from the United States Supreme Court in *Hurst v. Florida*, this Court held in *Hurst*:

> [A]ll 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, then finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

202 So.3d at 44. *Hurst* applies retroactively to Crain's sentence of death, which became final in 2005. *See Mosley v. State*, 209 So.3d 1248, 1283 (Fla. 2016).

This Court also determined that *Hurst* errors are subject to harmless error review. 202 So.3d at 67. In *Davis v. State*, 207 So.3d 142 (Fla. 2016), this Court explained that "it must 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." *Id.* at 174. In *Davis*, emphasizing the jury's unanimous recommendation for death, this Court concluded that the *Hurst* error was harmless beyond a reasonable doubt, explaining:

> Even though the jury was not informed that the finding that sufficient aggravating circumstances outweighed the mitigating circumstances must be unanimous, and even though it was instructed ***210** that it was not required to recommend death even if the aggravators outweighed the mitigators, the jury did, in fact, unanimously recommend death. From these instructions, we can conclude that the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendations.

Id. at 174–75 (citation omitted). Since *Davis*, this Court has held in several cases that the jury's unanimous recommendation for death rendered the *Hurst* error harmless beyond a reasonable doubt.[2]

The kidnapping aggravating factor in Crain's case remains valid because kidnapping with the intent to inflict bodily harm underlies Crain's first-degree felony murder

conviction. *See* § 921.141(5)(d), Fla. Stat. (1997) (including "any: ... kidnapping"). Therefore, the jury properly considered this aggravating factor in making its sentencing recommendation. *See Davis*, 207 So.3d at 175. Thus, the jury's unanimous recommendation for death renders the *Hurst* error harmless beyond a reasonable doubt.

Finally, we have previously rejected Crain's other claims that the jury's unanimous recommendation for death is unreliable and the *Hurst* error is, therefore, not harmless beyond a reasonable doubt. *See, e.g.*, *Reynolds v. State*, No. SC17–793 (Fla. Apr. 5, 2018) (denying *Caldwell* claim); *Morris v. State*, 219 So.3d 33 (Fla.) (no CCP or HAC aggravating factor), *cert. denied*, ––– U.S. ––––, 138 S.Ct. 452, 199 L.Ed.2d 334 (2017). Thus, this Court can rely on the jury's unanimous recommendation for death to conclude that the *Hurst* error in Crain's case was harmless beyond a reasonable doubt.

CONCLUSION

Based on the jury's unanimous recommendation for death, we conclude that the *Hurst* error in Crain's case is harmless beyond a reasonable doubt. Accordingly, we affirm the postconviction court's order denying his successive motion for postconviction relief.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, and LAWSON, JJ., concur.

CANADY and POLSTON, JJ., concur in result.

All Citations

246 So.3d 206, 43 Fla. L. Weekly S161

Footnotes

1 *See Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

2 *See, e.g.*, *Guardado v. Jones*, 226 So.3d 213 (Fla. 2017), *cert. denied*, ––– U.S. ––––, 138 S.Ct. 1131, 200 L.Ed.3d 729 (2018); *Middleton v. State*, 220 So.3d 1152 (Fla. 2017), *cert. denied*, ––– U.S. ––––, 138 S.Ct. 829, 200 L.Ed.2d 326 (2018); *Jones v. State*, 212 So.3d 321 (Fla.), *cert. denied*, ––– U.S. ––––, 138 S.Ct. 175, 199 L.Ed.2d 103 (2017); *Hall v. State*, 212 So.3d 1001 (Fla. 2017); *Knight v. State*, 225 So.3d 661 (Fla. 2017), *cert. denied*, No. 17-7099, ––– U.S. ––––, 138 S.Ct. 1285, 200 L.Ed.2d 477, 2018 WL 1369193 (U.S. Mar. 19, 2018); *Kaczmar v. State*, 228 So.3d 1 (Fla. 2017), *petition for cert. filed*, No. 17–8148 (U.S. Mar. 14, 2018).

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APPENDIX

C

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY
CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA CASE NO.: 98-17084

VS. DIVISION: G

WILLIE SETH CRAIN

FILED
SEP 17 1999
RICHARD AKE, CLERK

ADVISORY SENTENCE

A majority of the Jury, by a vote of 12 to Ø, advise and recommend to the Court that it impose the death penalty upon Willie Seth Crain.

DATED at Tampa, Hillsborough County, Florida, this 17th day of September, 1999.

Sharon L. Cardone
Foreperson of the Jury

APPENDIX

D

Filing # 61369023 E-Filed 09/06/2017 11:35:29 AM

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-1475

WILLIE SETH CRAIN, JR.
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FL
Lower Tribunal No. 291998CF017084000AHC

INITIAL BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OTHER AUTHORITIES vii

REQUEST FOR ORAL ARGUMENT 1

JURISDICTINAL STATEMENT 1

PRELIMINARY STATEMENT ABOUT THE RECORD 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 3

STANDARD OF REVIEW 4

ARGUMENT 1 - IN LIGHT OF *HURST I* AND *II,* DEFENDANT'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDEMENTS OF THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION……..5

A. Contemporaneous Felony Aggravator ………………………………9

B. No HAC or CCP Aggravators ………………………………………13

C. *Caldwell v. Mississippi*……………………………………………...16

D. Mercy Recommendation Instruction………………………………..18

ARGUMENT 2 - UNDER *HURST II*, DEFENDANT'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION 19

ARGUMENT 3 - THIS COURT SHOULD VACATE MR. CRAIN'S DEATH SENTENCE BECAUSE THE FACT-FINDING THAT SUBJECTED HIM TO A DEATH SENTENCE WAS NOT PROVEN BEYOND A REASONABLE DOUBT IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND

FOURTNEENTH AMENDMENTS TO THE U.S. CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION 20

ARGUMENT 4 - IN LIGHT OF *HURST, PERRY V. STATE* AND *HURST II*, DEFENDANT'S DEATH SENTENCE VIOLATES THE FLORIDA CONSTITUTION, INCLUDING ARTICLE I, SECTIONS 15 AND 16, AS WELL AS FLORIDA'S HISTORY OF REQUIRING A UNANIMOUS JURY VERDICT 21

CONCLUSION..23

CERTIFICATE OF SERVICE 25

CERTIFICATE OF COMPLIANCE..26

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey,
530 U.S. 466, 490 (2000)........21
Arizona v. Fulminante,
499 U.S. 279, 310 (1991)........6
Ault v. State, 213 So. 3d. 670, 680 (Fla. 2017)........13
Bevel v. State,
---So.3d---, 2017 WL 2590702, at *6 (Fla. June 15, 2017)........12
Brecht v. Abrahamson,
507 U.S. 619, 630 (1993)........6
Caldwell v. Mississippi,
472 U.S. 320 (1985)........16
Calloway v. State,
210 So.3d 1160, 1200 (Fla. 2017)........13
Clemons v. Mississippi, 494 U.S. 738, 753 (1990)........8
Cole v. State,
-- So.3d --, 2017 WL2806992, at *10 (Fla. June 29, 2017)........11
Cozzie v. State,
--- So.3d ---, 2017 WL 1954976 (Fla. May 11, 2017)........14
Crain v. State,
78 So. 3d 1025 (Fla. 2011)........3
Crain v. State,
894 So. 2d 59 (Fla. 2004)........2
Crain v. State,
894 So.2d 59, 76 (Fla 2004)........9
Cunningham v. California,
549 U.S. 270, 273 (2007)........21
Davis v. State,
207 So. 3d 142 (Fla. 2016)........14
Davis v. State,
207 So. 3d 142, 175 (Fla. 2016)........8,12
Guardado v. State,
No. SC17-389 (Fla. May 11, 2017)........14
Hall v. State,
212 So.3d 1001 (Fla. 2017)........14

Hojan v. State,
212 So.3d. 982 (Fla. 2017) 10
Hurst v. Florida,
136 S. Ct. 616 (2016)..3
Hurst v. State,
202 So. 3d 40 (Fla. 2016) 3
In re Winship,
397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970)....................................21
Jones v. State,
212 So.3d 321 (Fla. 2017) 14
Jones v. United States,
526 U.S. 227, 232, 119 S. Ct. 1215, 1219 (1999) 23
Kaczmar v. State,
--So. 3d--, 2017 WL 410214 (Fla. Jan. 31, 2017) 14
King v. State,
211 So. 3d 866, 890 (Fla. 2017) 8
King v. State,
211 So.3d 866 (Fla. 2017) .... ……10, 14
Knight v. State,
--So. 3d--, 2017 WL 411329 (Fla. Jan. 31, 2017) 14
Mann v. Dugger,
844 F.2d 1446, 1454-55 (11th Cir. 1988)...17
McGirth v. State,
209 So.3d 1146, 1164 (Fla. 2017) 13
Middleton v. State,
-- So.3d --, 2017 WL 2374697 (Fla. June 1, 2017) 11
Middleton v. State,
--- So.3d --, 2017 WL 930925 (Fla. March 9, 2017)................................14
Mosely v. State,
209 So.3d 1248, 1275 (Fla. 2016) 4
Mosley v. State,
209 So.3d 1248, 1284 (Fla. 2016) 12
Neder v. United States,
527 U.S 1, 25 (1999)...6
Oliver v. State,
214 So.3d 606 (Fla. 2017) 14

Orange County v. Williams,
702 So.2d 1245 (Fla. 1997) 1
Perry v. State,
210 So. 3d 630 (Fla. 2016) 16
Perry v. State,
210 So.3d 630, 640 (Fla. 2016) 18
Ring v. Arizona,
536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) 4
Simmons v. State,
207 So.3d 860, 867 (Fla. 2016) 13
Sochor v. Florida,
504 U.S. 527, 540 (1992) ……………………………………………8
Sochor v. State,
883 So. 2d 766, 771-72 (Fla. 2004) 5
State v. DiGuilio,
491 So.2d 1129, 1139 (Fla. 1986) 10
Stephens v. State,
748 So.2d 1028, 1032 (Fla. 2000) 5
Sullivan v. Louisiana,
508 U.S. 275, 278 (1993)...21
Truehill v. State,
211 So.3d 930 (Fla. 2017) 14
Truehill v. State,
211 So.3d 930, 956 (Fla. 2017) 10
Tundidor v. State,
--- So.3d ---, 2017 WL 1506854 (Fla. April 27, 2017)......................................14
U.S. v. Booker,
543 U.S. 220, 244 (2005)...21
Williams v. State,
209 So.3d 543, 567 (Fla. 2017) 13
Wood v. State, 209 So.3d 1217, 1233 (Fla. 2017)
209 So.3d 1217, 1233 (Fla. 2017)...11
Wood v. State,
209 So.3d 1217, 1234 (Fla. 2017) 10

Other Authorities

Rules

Fla. Const. art. V, § 3(b)(1)....1
Fla. R. App. P. 9.320....1
Fla. R. App. P. 9.320.....1
Fla. R. Crim. P. 3.851 4

REQUEST FOR ORAL ARGUMENT

Undersigned counsel for the Appellant respectfully requests the opportunity to present oral argument pursuant to Fla. R. App. P. 9.320. This is a capital case, the resolution of the issues presented will determine whether Willie Seth Crain, Jr. will live or die, and a complete understanding of the complex factual, legal and procedural history of this case is critical to the proper disposition of this appeal.

JURISDICTIONAL STATEMENT

This is a timely appeal from the trial court's final order denying a successive motion for postconviction relief from a judgment and sentence of death. This Court has plenary jurisdiction over death penalty cases. Fla. Const. art. V, § 3(b)(1); *Orange County v. Williams*, 702 So.2d 1245 (Fla. 1997).

PRELIMINARY STATEMENT ABOUT THE RECORD

References to the record on direct appeal are designated "R" followed by the page number. References to the postconviction record are designated "PCR" followed by the page number. References to the successive postconviction record are designated "SPCR" followed by the page number. All references to volumes are designated as "V" followed by the volume number.

STATEMENT OF PROCEDURAL HISTORY AND FACTS

On October 14, 1998, Crain was charged by indictment with First-Degree Murder and Kidnapping with Intent to Commit Homicide of Amanda Brown. The indictment did not include aggravators the State intended to prove at sentencing in seeking the death penalty. Crain was tried in the Thirteenth Judicial Circuit in Hillsborough County, Case Number 98-17084CFAWS before Barbara Fleischer, Circuit Court Judge. Trial commenced on August 30, 1999, and Crain was found guilty as charged. The advisory panel recommended a death sentence for by a vote of twelve to zero. The advisory panel's recommendation contained no verdict or fact-finding.

The judge imposed a death sentence on November 19, 1999. As the sole fact-finder, the Court found aggravating and mitigating factors and weighed them without the benefit of individual factual determination by a jury. The judgment and sentence in this case was affirmed on appeal by this Court on October 28, 2004. *Crain v. State*, 894 So. 2d 59 (Fla. 2004). However, this Court reversed the judgment of guilt of kidnapping and directed the trial court on remand to enter a judgment for false imprisonment. *Id*. at 76.

Crain filed his Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.851 on September 8, 2006. Crain raised nine claims. The postconviction court denied all nine claims on September 10, 2009. Crain

appealed the denial of his post-conviction motion to this Court raising Claims 1, 3, 4, 8 and 9 of the Motion for Postconviction Relief. This Court affirmed the denial of Crain's Rule 3.851 Motion claims. *Crain v. State*, 78 So. 3d 1025 (Fla. 2011).

On January 5, 2017, Crain filed a successive Rule 3.851 motion seeking relief pursuant to *Hurst v. Florida* [1]*(Hurst I)*, *Hurst v. State* [2]*(Hurst II)*, and their progeny. On March 23, 2017, the trial court heard oral arguments and on June 15, 2017, denied the motion. In so ruling, the trial court's opinion failed to address several issues raised in Crain's Successive Motion to Vacate Death Sentence and/or argued during the case management conference on March 23, 2017. Crain filed a Motion for Rehearing on June 28, 2017, which was also denied on July 12, 2017, without specifically addressing the issues pointed out in the Motion for Rehearing. This timely appeal follows.

SUMMARY OF THE ARGUMENT

Mr. Crain was sentenced to die under an unconstitutional death penalty scheme. The United States Supreme Court, in *Hurst v. Florida*, declared Florida's death penalty system unconstitutional. Based on *Hurst I* and *II*, and its progeny, and the implications arising therefrom, Mr. Crain's death sentence violates the United States Constitution and the Florida Constitution. Because Mr. Crain was

[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016).
[2] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

sentenced without a jury determining beyond a reasonable doubt the essential elements that purportedly justify his death sentence, both the United States and Florida Constitutions mandate that his sentence be vacated.

Specifically, Mr. Crain's sentence violates the Fifth, Sixth, Eighth and Fourteenth Amendments of both the United States Constitution, and the corresponding provisions of the Florida Constitutions. The error is not harmless. Mr. Crain must be resentenced by a properly instructed jury that unanimously finds the aggravating circumstances of Mr. Crain's crime, and finds that they outweigh his mitigating circumstances beyond a reasonable doubt. If their unanimous verdict is to sentence him to death, they must do so with a full understanding of the weight of their responsibility. Any other outcome constitutes an arbitrary application of the law and is unconstitutional.

<u>STANDARD OF REVIEW</u>

This is an appeal from a successive motion filed under Fla. R. Crim. P. 3.851, Collateral Relief after Death Sentence Has Been Imposed and Affirmed on Direct Appeal. Mr. Crain is entitled to retroactive application of *Hurst*, in accordance with *Mosely v. State*, 209 So.3d 1248, 1275 (Fla. 2016), as his sentence was final after *Ring*[3] and he raised a *Ring* claim on direct appeal. The standard of

[3] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

review is *de novo*. *Stephens v. State*, 748 So.2d 1028, 1032 (Fla. 2000). This Court employs a mixed standard of review, deferring to the factual findings of the circuit court that are supported by competent, substantial evidence, but *de novo* review of legal conclusions. *See, Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

ARGUMENT 1

IN LIGHT OF *HURST I* AND *II,* DEFENDANT'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDEMENTS OF THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The Sixth Amendment right enunciated in *Hurst v. Florida,* and found applicable to Florida's capital sentencing scheme, guarantees that all facts that are statutorily necessary before a judge is authorized to impose a sentence of death are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial**.** *Hurst v. Florida* found Florida's sentencing scheme unconstitutional because "Florida does not require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these facts." *Id.* at 622. On remand, this Court held in *Hurst v. State* that *Hurst v. Florida* means "that before the trial judge may consider imposing a sentence of death, the jury in a capital case 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*, at 57.

In *Hurst v. Florida*, the United States Supreme Court did not rule that harmless error review actually applies to *Hurst* claims, observing that it "normally leaves it to the state courts to consider whether an error is harmless." 136 S. Ct. at 624 (citing *Neder v. United States*, 527 U.S 1, 25 (1999). This Court should have concluded that *Hurst* errors are not capable of harmless error review. That is because the Sixth Amendment error identified in *Hurst* – divesting the capital jury of its constitutional fact-finding role at the penalty phase- represents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). *Hurst* errors are structural because they "infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993). In other words, *Hurst* errors "deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist. *Neder*, 527 U.S. at 1.

Even if the *Hurst* error in Mr. Crain's case is capable of harmless error review, the Sixth Amendment error under *Hurst v. Florida* cannot be proven by the State to be harmless beyond a reasonable doubt in Mr. Crain's case. Although Mr.

Crain's death recommendation was unanimous, even a unanimous death recommendation would not mandate a finding of harmless error, as that is only one of several inquiries that juries must make under *Hurst v. Florida*. The only document returned by the jury was an advisory recommendation that a death sentence should be imposed. Mr. Crain's penalty phase advisory panel did not return a verdict making any findings of fact, so we have no way of knowing what aggravators, if any, the jurors unanimously found were proven beyond a reasonable doubt, if the jurors unanimously found the aggravators sufficient for death, or if the jurors unanimously found that the aggravating circumstances outweighed the mitigating circumstances. In *Hurst v. Florida*, the Supreme Court found:

> 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."… The State fails to appreciate the central and singular role the judge plays under Florida law….<u>The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires</u>. *Id*. at 622. (Emphasis added).

In *Hurst v. State*, this Court quoted the Supreme Court, "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme … is therefore unconstitutional." This Court went on to note, "In reaching these conclusions, the <u>Supreme Court flatly rejected the State's contention</u> that although '*Ring* required a jury to find every fact necessary

to render Hurst eligible for a death penalty,' the jury's recommended sentence in Hurst's case necessarily included such findings. *Id*. at 622." *Hurst II*, at 53. (Emphasis added.) Nevertheless, this Court's subsequent opinions contradict its opinion in *Hurst II* and the Supreme Court's holding in *Hurst I,* which this Court quoted, by finding in *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), "Here, the jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations."

It is established law that a harmless error analysis must be performed on a case-by-case basis, and there is no one-size fits all analysis; rather there must be a "detailed explanation based on the record" supporting a finding of harmless error. *See Clemons v. Mississippi*, 494 U.S. 738, 753 (1990). *Accord, Sochor v. Florida*, 504 U.S. 527, 540 (1992). As to *Hurst I* error, "the burden is on the State, as beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the defendant]'s death sentence in this case." *Hurst II,* at 68. In *King v. State*, this Court emphasized that a unanimous recommendation was not dispositive, but rather "*begins a foundation* for us to conclude beyond a reasonable doubt" that the *Hurst* error was harmless.[4] (Emphasis added) In *Hurst II* at 68, this Court explained the standard by which the unconstitutional sentencing error

[4] *King v. State*, 211 So. 3d 866, 890 (Fla. 2017).

found in *Hurst* should be evaluated to determine if the error was harmless. This Court stated in part:

> … the [sentencing] error is harmless only if there is no reasonable possibility that the error contributed to the sentence. *See*, e.g., *Zack v. State*, 753 So. 2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," [State v.] *DiGuilio*, 491 So. 2d [1129,] 1137 [Fla. 1986], and the State bears an extremely heavy burden in cases involving constitutional error. (Emphasis added)

Under this Court's jurisprudence since *Hurst II*, this Court has repeatedly inferred from the jury's unanimous recommendation that the jury must have conducted unanimous fact-finding - within the meaning of the Sixth Amendment - as to each of the requirements for death sentence under Florida law. This inference has led this Court to engage in speculation as to what the jury actually found.

A. Contemporaneous Felony Aggravator

On direct appeal, this Court reversed the judgment of guilt of kidnapping and directed the trial court on remand to enter a judgment for false imprisonment.[5] The trial court acknowledged in its Order denying Mr. Crain relief on his successive 3.8651 motion, "… the reduction of the kidnapping conviction to false imprisonment eliminates the aggravator that the murder was committed while Defendant was engaged in an enumerated felony." SPCR216 The trial court had

[5] *Crain v. State*, 894 So.2d 59, 76 (Fla 2004).

given this aggravator "great weight," yet it was inappropriate to weigh this aggravator against Crain's mitigators. V2/R312 If you remove an aggravator that was given great weight, it is mere speculation whether the remaining aggravators still outweigh the mitigators.

In *Hojan v. State,*[6] this Court, citing *DiGuilio*[7]:

> Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

Considering the lack of proof to support an aggravator given great weight, the State cannot meet its burden to prove that the *Hurst* error was harmless beyond a reasonable doubt.

This issue distinguishes Crain's case from other cases involving a unanimous death recommendation, where this Court found the *Hurst* error was harmless. In both *Truehill*[8] and *King*[9], the Court noted that these defendants did not challenge the finding on any of the aggravators. In *Wood*[10], the Court indicated that a *Hurst* error in a unanimous-recommendation case would—if the case were

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[6] *Hojan v. State*, 212 So.3d. 982 (Fla. 2017).
[7] *State v. DiGuilio*, 491 So.2d 1129, 1139 (Fla. 1986).
[8] *Truehill v. State*, 211 So.3d 930, 956 (Fla. 2017), "Further supporting that any *Hurst* error was harmless here, Truehill has not contested any of the aggravating factors as improper in the case at hand—Truehill's direct appeal."
[9] *King v. State*, 211 So.3d 866 (Fla. 2017), "…we further note that when King first appealed his sentence to this Court, he did not challenge the finding of any aggravating circumstances found below."
[10] *Wood v. State*, 209 So.3d 1217, 1234 (Fla. 2017).

not already being remanded for imposition a life sentence on proportionality grounds—require a remand for a new penalty phase because the jury had been instructed to consider inappropriate aggravators:

> In this case, the jury was instructed on both aggravating factors that we have determined were not supported by competent, substantial evidence. This alone would require a finding that the error was not harmless beyond a reasonable doubt. We note that our conclusion in this regard is also consistent with our pre-*Hurst* precedent in *Kaczmar v. State*, 104 So.3d 990, 1008 (Fla. 2012), where we held that, upon striking the CCP and felony-murder aggravating factors so that only one valid aggravating factor remained, such error was not harmless beyond a reasonable doubt. Post–*Hurst*, this conclusion is even more compelling. (Emphasis added.)

Justice Pariente comments on this concept further in her dissent in *Middleton,*[11] "I now realize, as pointed out by Middleton in his motion for rehearing, that *reversal is compelled* because this Court struck two of the four aggravating factors on appeal and, therefore, the error, post-*Hurst*, cannot be considered harmless beyond a reasonable doubt." (Emphasis added) This point was made again in Justice Pariente's concurring opinion in *Cole,*[12] "Also, this Court struck the HAC aggravating factor on direct appeal, which must be considered in determining 'the effect of any error on the jury's findings' after *Hurst*. *Wood v. State*, 209 So.3d 1217, 1233 (Fla. 2017); *see* majority op. at ——."

Viewing this concept conversely, in *Bevel*'s majority opinion from June 15,

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[11] *Middleton v. State*, -- So.3d --, 2017 WL 2374697 (Fla. June 1, 2017).
[12] *Cole v. State*, -- So.3d --, 2017 WL2806992, at *10 (Fla. June 29, 2017).

2017[13], this Court held, "In this case, where no aggravating factors have been struck, "we can conclude that the jury unanimously made the requisite factual findings" before it unanimously recommended that Bevel be sentenced to death for the murder of Sims, and we therefore deny relief under *Hurst* for that sentence; (citing *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016)." Mr. Crain's kidnapping aggravator must be struck, so the same conclusion cannot be drawn.

Mr. Crain's direct appeal pre-dated *Hurst*, therefore this Court did not perform a harmless error analysis based on how the inclusion of the kidnapping aggravator affected the jury. The Court in *Wood*, at 1233, was mindful that in determining harmless error, "Our inquiry post-*Hurst* must necessarily be the effect of any error on the jury's findings, rather than whether beyond a reasonable doubt the trial judge would have still imposed death. *See Hurs*t, 202 So.3d at 68." Since the jury in Mr. Crain's case made no findings of fact, it is mere speculation what weight they gave the Kidnapping aggravator. As this Court cautioned in *Hurst v. State*, engaging in speculation about the jury's fact-finding "would be contrary to our clear precedent governing harmless error review." 202 So. 3d at 69; S*ee also, Mosley v. State*, 209 So.3d 1248, 1284 (Fla. 2016). The precedent this Court established in declining to speculate about the jury's fact-finding in *Hurst v. State*, even though that case involved a non-unanimous jury recommendation, applies

[13]*Bevel v. State*, ---So.3d---, 2017 WL 2590702, at *6 (Fla. June 15, 2017).

equally to Mr. Crain where we must guess whether the loss of an aggravator of "great weight" would have tipped the scales in Mr. Crain's favor. This Court has repeatedly cautioned the trial courts against engaging in speculation in several non-unanimous cases.[14] In *McGirth*, only 1 juror voted for life, but it was inappropriate to speculate why.[15] Likewise, it is inappropriate to make any assumptions about what a jury would do if they knew the kidnapping aggravator should not have been submitted to them due to lack of legally sufficient evidence to support a conviction. It is impossible to know how this aggravator figured into their weighing process when they recommended the death sentence for Mr. Crain, and therefore not possible for the State to meet their burden of proof that the error was harmless. This Court cannot look to the unanimous recommendation alone, because that recommendation included an aggravator, of great weight, that should not have been considered.

B. No HAC or CCP Aggravators

The trial court's opinion failed to address arguments made during the case management conference which called that court's attention to cases decided by this

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[14] *Simmons v. State*, 207 So.3d 860, 867 (Fla. 2016); *Williams v. State*, 209 So.3d 543, 567 (Fla. 2017); *Calloway v. State*, 210 So.3d 1160, 1200 (Fla. 2017); *Ault v. State*, 213 So. 3d. 670, 680 (Fla. 2017); *McGirth v. State*, 209 So.3d 1146, 1164 (Fla. 2017).

[15] *Id.*

Court since Mr. Crain's successive motion was filed. Overwhelmingly, the cases denying relief since *Hurst v. State*, where the advisory recommendation was unanimous, have involved murders committed with (HAC) heinous, atrocious and cruel and/or CCP (cold, calculated and premeditated) aggravators.[16] Cases decided by this Court since Mr. Crain's case management conference have continued this trend. [17] Hence, the thirteen cases cited below in footnotes 12 and 13 distinguish this case from the State's argument that no rational jury would have rendered a verdict other than death, after considering the egregious facts of those case.

In sharp contrast to those cases, Mr. Crain's aggravators do not include HAC or CCP. V2/R310-312 In fact, Justice Wells recognized the finding by the trial judge in her Sentencing Order, "There's no way to know exactly what happened to Amanda Brown, [the victim]." *Crain v. State*, 894 So.2d at 88; and ROA 311. Therefore, the egregious facts that the State focuses on in its Response in this case

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[16] *Davis v. State*, 207 So. 3d 142 (Fla. 2016); *Hall v. State*, 212 So.3d 1001 (Fla. 2017); *Kaczmar v. State*, --So. 3d--, 2017 WL 410214 (Fla. Jan. 31, 2017); *Knight v. State*, --So. 3d--, 2017 WL 411329 (Fla. Jan. 31, 2017); *King v. State*, 211 So.3d 866 (Fla. 2017); *Truehill v. State*, 211 So.3d 930 (Fla. 2017); *Jones v. State*, 212 So.3d 321 (Fla. 2017); *Middleton v. State*, --- So.3d --, 2017 WL 930925 (Fla. March 9, 2017) – Revised Opinion June 1, 2017.

[17] *Oliver v. State*, 214 So.3d 606 (Fla. 2017); *Tundidor v. State*, --- So.3d ---, 2017 WL 1506854 (Fla. April 27, 2017); *Cozzie v. State*, --- So.3d ---, 2017 WL 1954976 (Fla. May 11, 2017); *Guardado v. State*, No. SC17-389 (Fla. May 11, 2017).

are facts concerning Mr. Crain's prior felonies. SPCR200-202 Since there are no facts to support how or if a murder occurred, the State detailed Mr. Crain's history as a sexual abuser, instead. This amounts to arguing, in essence, that Mr. Crain should be killed for offenses which do not actually carry death as a possible penalty.

Equally as troubling is the trial court's reliance on the judge's findings as to what weight should be given the aggravators and mitigators, since it is unconstitutional for the judge, rather than the jury, to make that determination. SPCR216, 221 The trial court gave Mr. Crain's convictions for sexual abuse "great weight," while only meriting his suffering as a victim of sexual abuse "modest weight." Despite the same crimes being committed against Crain, the trial court found in its Sentencing Order:

> As related by Dr. Berland, the Defendant's childhood was clearly unstable and devoid of any substantial love or nurturing. The Court believes that the Defendant was both neglected and abandoned by his mother, and was physically, as well as sexually, abused by her. / He did not fare much better in the care of others as he moved between parents and other relatives. / The Court is reasonably convinced that the Defendant has a history of abuse and an unstable home life, and has given this mitigator modest weight. (V2/R316-317) (Emphasis added).

In its postconviction appeal opinion, this Court recognized that Dr. Cunningham and Dr. Berland provided information of Mr. Crain's "substantial physical, sexual and emotional abuse during childhood, witnessing of disturbing

sex, and lack of education and social training."[18] (Emphasis added). Nevertheless, the crimes against Mr. Crain, who was also a child victim, have been downplayed and given much less significance than the behavior he learned as a child, sadly continuing the cycle of abuse. While the trial court formed the opinion that the aggravators outweighed the mitigators, it is speculation what weight a properly instructed jury would have given these aggravators.

C. *Caldwell v. Mississippi*

Additionally, in the wake of *Hurst v. Florida* and the resulting new Florida law, the jury under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), must be correctly instructed as to its sentencing responsibility. This means that post-*Hurst* the individual jurors must know that each will bear the responsibility for a death sentencing resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. *See Perry v. State.*[19] As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. Otherwise, "a real danger exists that a resulting death sentence will be based at least in part on the determination of a decision maker that has been misled as to the

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[18] *Crain v. State*, 78 So.3d at 1043.
[19] *Perry v. State,* 210 So. 3d 630 (Fla. 2016).

nature of its responsibility." *Mann v. Dugger*, 844 F.2d 1446, 1454-55 (11th Cir. 1988).

In Mr. Crain's case, the trial court instructed jurors, "…the final decision as to what punishment shall be imposed, is my responsibility." V24/R3660 This shifted the onus of responsibility and the gravity of whether Mr. Crain was sentenced to death to the judge. The chances that at least one juror would not join a death recommendation if a resentencing were now conducted is highly likely given that proper *Caldwell* instructions would be required.

Mr. Crain has not litigated a *Caldwell* claim directly, since the *Hurst* rulings. Now, in light of *Hurst I* and *II* and *In Re: Standard Criminal Jury Instructions in Capital Cases*, SC17-583 (Fla. April 13, 2017), the issue of whether Mr. Crain's penalty phase jury instructions violated his constitutional rights warrants closer scrutiny and the precedent established in *Caldwell* should be re-considered. Indeed, because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulting death sentence to be vacated. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.").

D. Mercy Recommendation Instruction

Mr. Crain's jury was not told that they were not required to recommend death, even if the aggravators outweighed the mitigators. The trial court's Order did not address this fact in its harmless error analysis. However, cases decided by this Court since Mr. Crain's successive motion was filed have noted that the jury was given a mercy instruction.[20] Mr. Crain's advisory panel was told:

> It is your duty to follow the law…, and render to me an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty; or whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. (V24/R3661)
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>
> Your recommendation to the Court must be based only on the aggravating circumstances and the mitigating circumstances about which I have instructed you. (V24/R3665) (Emphasis added)

The advisory panel was never told that regardless of their findings with respect to aggravating and mitigating circumstance, they are never compelled nor required to recommend a sentence of death. This Court emphasized in *Perry*[21] the importance of the mercy recommendation:

> It has long been true that a juror is not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances. *See*, e.g., *Cox v. State*, 819 So.

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[20] *Hall v. State*, 212 So.3d 1001 (Fla. 2017); *Middleton v. State*, --- So.3d --, 2017 WL 930925 (Fla. March 9, 2017); *Truehill v. State,* 211 So.3d 930 (Fla. 2017).

[21] *Perry v. State*, 210 So.3d 630, 640 (Fla. 2016).

> 2d 705, 717 (Fla. 2002) ('[W]e have declared many times that 'a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors.'(Citation omitted)
>
> -----------------------------
>
> This final jury recommendation, apart from the findings that sufficient aggravating factors exist and that the aggravating factors outweigh the mitigating circumstances, has sometimes been referred to as the "mercy" recommendation. *See, e.g., Alvord v. State,* 322 So.2d 533, 540 (Fla.1975), *receded from on other grounds, Caso v. State,* 524 So.2d 422 (Fla.1988) (explaining that the jury and judge may exercise mercy in their recommendation even if the factual situations may warrant capital punishment).

Failure of the trial court to give the Mr. Crain's advisory panel this instruction, creates further uncertainty as to the reliability of the advisory panel's death recommendation.

ARGUMENT 2

UNDER *HURST II*, DEFENDANT'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In *Hurst II*, at 59-60, this Court held:

> In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to trial by jury, we conclude that juror unanimity in any recommended *verdict* resulting in a death sentence is required under the Eighth Amendment. (Emphasis added)….The foundational precept is the principle that death is different. This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders. Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously

imposed. (FNs omitted) … If death is to be imposed, unanimous jury sentencing recommendations, *when made in conjunction with the other critical findings unanimously found by the jury*, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process. (Emphasis added)

Mr. Crain's sentence was not the product of unanimous jury findings, nor did he receive the benefit of a penalty phase jury verdict. His case was only heard by an advisory panel and the verdict was rendered by a judge. His sentence was the product of an arbitrary and capricious system that did not afford him the rights that the Eighth Amendment guarantees. Under the Eighth Amendment, his execution would thus constitute cruel and unusual punishment. His death sentence should be vacated and a new penalty phase proceeding ordered.

ARGUMENT 3

THIS COURT SHOULD VACATE MR. CRAIN'S DEATH SENTENCE BECAUSE THE FACT-FINDING THAT SUBJECTED HIM TO A DEATH SENTENCE WAS NOT PROVEN BEYOND A REASONABLE DOUBT IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In *In re Winship* the United States Supreme Court held that the elements necessary to adjudicate a juvenile and subject him or her to sentencing under the juvenile system required each fact necessary be proved beyond a reasonable doubt. The Court made clear, "Lest there remain any doubt about the constitutional stature

of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970).[22] Under the Due Process Clause, it is the state, and the state alone, which must prove each element beyond a reasonable doubt and has the burden of persuasion.

The jury trial that *Hurst v. Florida* mandates that the State prove each element beyond a reasonable doubt. Mr. Crain was denied a jury trial on the elements that subjected him to the death penalty. It necessarily follows that he was denied his right to proof beyond a reasonable doubt. Therefore, Mr. Crain's sentence violates the Due Process Clause of the Fifth and Fourteenth Amendments of United States Constitution, and the corresponding provisions of the Florida Constitution. This Court should vacate his death sentence and a new penalty phase proceeding should be ordered.

ARGUMENT 4

IN LIGHT OF *HURST, PERRY V. STATE* AND *HURST II*, DEFENDANT'S DEATH SENTENCE VIOLATES THE FLORIDA CONSTITUTION, INCLUDING ARTICLE I, SECTIONS 15 AND 16, AS WELL AS FLORIDA'S HISTORY OF REQUIRING A UNANIMOUS JURY VERDICT.

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[22] See also, *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *U.S. v. Booker*, 543 U.S. 220, 244 (2005); *Cunningham v. California*, 549 U.S. 270, 273 (2007).

On remand this Court applied the Supreme Court's decision in *Hurst I* in light of the Florida Constitution and 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. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

Hurst II, at 44.

Mr. Crain has a number of rights under the Florida Constitution that are at least coterminous with the United States Constitution, and possibly more extensive. This Court should also vacate Mr. Crain's death sentence based on the Florida Constitution. Article I, Section 15(a) provides:

> (a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

Article I, Section 16(a) provides in relevant part:

> (a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges . . .

In *Hurst*, the United States Supreme Court applied *Ring* to Florida's system and held that a jury must find any fact that subjects an individual to a greater penalty. Prior to *Apprendi, Ring,* and *Hurst I*, the United States Supreme Court addressed a similar question in a federal prosecution and held that: "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt" *Jones v. United States*, 526 U.S. 227, 232, 119 S. Ct. 1215, 1219 (1999). Because the State proceeded against Mr. Crain under an unconstitutional system, the State never presented the aggravating factors of elements for the Grand Jury to consider in determining whether to indict Mr. Crain.

In addition to United States Constitution's requirement that Mr. Crain's death sentence be vacated, this Court should also vacate Mr. Crain's death sentence because his death sentence was obtained in violation of the Florida Constitution.

CONCLUSION

Based on the foregoing claims, viewed individually and cumulatively, Mr. Crain's death sentence is unconstitutional. He prays this Court vacate the trial court's Order denying relief for his Rule 3.851 motion, enter an Order vacating his

death sentence and order a new penalty phase proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CEERTIFY that on September 6, 2017, I electronically filed the forgoing Brief with the Clerk of the Florida Supreme Court by using Florida Courts e-portal filing system which will send a notice of electronic filing to the following: Scott A. Browne, Assistant Attorney General, Scott.Browne@myfloridalegal.com and CapApp@myflordialegal.com; Jay Pruner, Assistant State Attorney for the Thirteenth Judicial Circuit, MailProcessingStaff@sao13th.com. I further certify that I mailed the forgoing document to Willie Crain, DOC#096344, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

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CERTIFICATE OF COMPLIANCE

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

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APPENDIX

E

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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-1475
Lower Tribunal No. 98-17084CFAWS

WILLIE SETH CRAIN, JR.,
Appellant,
v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
HILLSBOROUGH COUNTY, FLORIDA

APPELLANT'S MOTION FOR REHEARING

COMES NOW the Appellant, WILLIE SETH CRAIN, JR. by and through undersigned counsel, pursuant to Fla. R. App. P. 9.330, and respectfully moves this Court to reconsider its opinion of April 5, 2018 affirming the circuit court's denial of his successive motion for post-conviction. By this motion, the Appellant submits that the Court has overlooked and/or misapprehended points of law and facts critical to the resolution of the claims presented in his appeal and discussed below. All claims for relief previously presented to the Court are specifically argued again, no

claim previously raised is hereby abandoned.

Relevant Procedural History

On direct appeal from Mr. Crain's murder trial, this Court found:

> The indictment on which Crain was tried and convicted charged him in count I with the premeditated murder of Amanda Brown between September 10 and 11, 1998. Count II of the indictment charged Crain with kidnapping Amanda on the same dates "with the intent to commit or facilitate the commission of a felony, to wit, homicide" in violation of section 787.01(1)(a)(2), Florida Statutes (1997). The kidnapping statute found in section 787.01, Florida Statutes (1997), defines the offense in pertinent part as follows:
>
>> (1)(a) The term "kidnapping" means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to:
>>
>> 1. Hold for ransom or reward or as a shield or hostage.
>>
>> 2. Commit or facilitate commission of any felony.
>>
>> 3. Inflict bodily harm upon or to terrorize the victim or another person.
>>
>> 4. Interfere with the performance of any governmental or political function.
>
> The trial court instructed the jury on first-degree felony murder in count I as follows:
>
>> Before you can find the defendant guilty of First Degree Felony Murder, the State must prove the following three elements beyond a reasonable doubt:
>>
>> One, that Amanda Victoria Brown is dead; two, that the death occurred as a consequence of and while Willie Seth Crain was engaged in the commission of Kidnapping; three, that Willie Seth Crain was the person who actually killed Amanda Victoria Brown.

> "Kidnapping" is the forcible or secret confinement, abduction or imprisonment of another, against that person's will and without lawful authority.
>
> *The Kidnapping must be done with the intent to commit or facilitate the commission of homicide or to inflict bodily harm upon the victim.*

> (Emphasis added.) On the separate kidnapping charge in count II, the court gave the following instruction:
>
> > Before you can find the defendant guilty of Kidnapping, the State must prove the following three elements beyond a reasonable doubt:
> > One, that Willie Seth Crain forcibly, secretly or by threat confined, abducted or imprisoned Amanda Victoria Brown, a child under the age of 13 years, against her will; two, that Willie Seth Crain had no lawful authority; three, that Willie Seth Crain acted with the *intent to commit or facilitate the commission of homicide.*
>
> (Emphasis added.) Thus, while the trial court instructed the jury only on the intent to commit or facilitate the commission of homicide under section 787.01(1)(a)(2) as to the kidnapping charge in count II, the trial court instructed the jury that it could find Crain guilty of felony murder based on kidnapping in count I if it found that he abducted Amanda with *either* the intent to commit or facilitate the commission of homicide *or* the intent to inflict bodily harm upon her under section 787.01(1)(a)(3).

Crain v. State, 894 So.2d 59, 67-68 (Fla. 2004). The trial court also instructed the jury that Mr. Crain could be convicted of first degree murder two ways, "One is known as Premeditated Murder and the other is known as Felony Murder." ROA V2/R240

In 1999, a jury convicted Crain of first-degree murder and kidnapping with intent to commit or facilitate the commission of a homicide. *Id. at* 62, *cert. denied*, 546 U.S. 829 (2005). The jury made no finding of whether Mr. Crain was convicted

of Premeditated First Degree Murder or First Degree Felony Murder. The Verdict Form only indicated that the "defendant is guilty of Murder in the First Degree, as charged." ROA V2/R259 The Verdict Form also indicated that the "defendant is guilty of Kidnapping, as charged." *Id*.

Following the jury's advisory recommendation for death, the trial court sentenced Crain to death, finding three aggravating factors and assigning each the noted weight: "(1) prior violent felonies, (2) the murder was committed during the course of a kidnapping, and (3) the victim was under the age of twelve." *Id.* at 67. In the Sentencing Order, the trial court found, "There is no way to know what happened to Amanda Brown." ROA V2/R311

The Jury made no findings of fact as to the Aggravators submitted to them for consideration. The Advisory Sentence merely read, "The majority of the Jury, by a vote of 12 to 0, advise and recommend to the Court that it impose the death penalty upon Willie Seth Crain." ROA V2/R267

In denying Mr. Crain's successive post-conviction appeal and finding that any *Hurst*[1] error was harmless, this Court found:

> The kidnapping aggravating factor in Crain's case remains valid because kidnapping with the intent to inflict bodily harm underlies Crain's first-degree felony murder conviction. *See* § 921.141(5)(d), Fla. Stat. (1997) (including "any: . . . kidnapping"). Therefore, the jury properly considered this aggravating factor in making its sentencing recommendation. *See Davis*, 207

[1] *Hurst v. Florida*, 136 S.Ct. 616 (2016).

> So. 3d at 175. Thus, the jury's unanimous recommendation for death renders the *Hurst* error harmless beyond a reasonable doubt.

GROUNDS FOR RELIEF

A. Kidnapping Aggravator

In finding that the murder conviction included "any: … kidnapping," this Court failed to consider and analyze several important facts:

1) There is no way to know if the murder conviction was based on a finding by the jury that Mr. Crain committed kidnapping with intent to inflict bodily harm. The Verdict Form does not indicate which theory of murder they convicted Mr. Crain under, Premeditated Murder or Felony Murder. Therefore, it is unknown from the Verdict Form what intent was found (i.e. intent to commit homicide or intent to inflict bodily harm.) This point was already made by Justice Lewis on direct appeal:

> Also, as a result of the use of a general jury verdict form, it is impossible to ascertain whether the jury found Crain guilty of premeditated murder or felony murder. Further, as it is impossible to know if Crain was convicted of felony murder, it is not known whether the jury determined that Crain had committed a kidnapping with intent to commit a homicide or intent to inflict bodily harm.

Crain v. State, 894 So.2d at 82. Justice Lewis further points out an important consideration made in the State's brief:

> However, as the State noted in its brief, the jury's erroneous determination of guilt as to the charge of kidnapping with intent to commit a homicide strongly suggests that if the jury found Crain was guilty of felony murder, the

> underlying felony upon which the jury relied was kidnapping with intent to commit a homicide. [FN 25]

Id. According to this Court's opinion on direct appeal, the evidence does not support a finding of kidnapping with intent to commit a homicide. *Id*. at 76. Therefore, count II was reduced from Kidnapping to False Imprisonment.

2) Where the evidence presented by the State was not enough to support premeditation to commit homicide, neither does it support an **intent** to commit bodily harm. In holding that there was not competent, substantial evidence of a specific intent to kill this Court found:

> To support its theory that the murder was committed with premeditation, the State also relies on evidence that Crain left his truck running outside Hartman's trailer on the night of Amanda's disappearance, exhibited unusual behavior the next morning, and attempted to conceal his crime. These facts evince a plan to remove Amanda from her mother's residence and to eliminate all evidence of her presence at his residence, but do not support an inference that Crain's intent at any specific point in time was to kill her. *See generally* *Norton v. State,* 709 So.2d 87, 93 (Fla.1997) ("Efforts to conceal evidence of premeditated murder are as likely to be as consistent with efforts to avoid prosecution for any unlawful killing."); *Hoefert v. State,* 617 So.2d 1046, 1049 (Fla.1993); *see also* *Smith v. State,* 568 So.2d 965, 968 (Fla. 1st DCA 1990).
>
> **The impossibility of better reconstructing the circumstances of Amanda's death** leaves us unable to conclude that the State presented legally sufficient evidence of a specific intent to kill. Therefore, we conclude that competent, substantial evidence does not exist to support the jury verdict of kidnapping with intent to commit homicide.

Id. at 76. (Emphasis added.) As Judge Fleischer found in her Sentencing Order, "There is no way to know what happened to Amanda Brown." ROA V2/R311 This Court may conclude that Amanda Brown is dead. This Court may reason that if she

is dead, then Mr. Crain had something to do with her death, but it is not possible to know if Mr. Crain **intended** to commit bodily harm. As this Court pointed out on direct appeal citing *Keith v. State*,[2] "the 'gist of the offense' [of kidnapping] is the felonious act of a confinement or abduction with a **specific intent**." (Emphasis added.) It is also within the realm of possibilities, which create a reasonable doubt as to intent, that her death was the result of an accident, where after Mr. Crain may have panicked and removed evidence of her presence at his residence. Therefore, neither definition of kidnapping was supported by substantial, competent evidence where both definitions require the State to prove specific intent to do harm.

3) Mr. Crain's penalty phase trial is devoid of any findings of fact by a jury. The jury merely rendered an advisory recommendation as to the sentence without indicating which aggravators were found. The State has the burden to prove each aggravator beyond a reasonable doubt. The State has not met that burden.

4) The issue of erroneously relying on the Kidnapping aggravator was raised on direct appeal. This Court declined to render an opinion:

> In his fourth issue, Crain asserts that the trial court erred in relying on the aggravator of murder in the course of a felony under section 921.141(5)(d), Florida Statutes (1997), because the evidence of the crime of kidnapping is legally insufficient. Assuming without deciding that Crain is correct in light of this Court's reduction of the separate kidnapping conviction to false imprisonment, we conclude that any error in finding the "murder in the course of a felony" aggravator is harmless beyond a reasonable doubt.

[2] *Keith v. State*, 120 Fla. 847, 163 So. 136, 138-139 (1935).

> Moreover, we conclude that any error in finding the aggravator of murder in the course of a felony does not affect our proportionality review based on the weight of the two remaining valid aggravators under the circumstances of this case.

Id. at 77. This Court found, **based on the trial court's findings** and weight given to each aggravator and mitigator, that the inclusion of the Kidnapping aggravator would have been a harmless error. However, it is not possible to know what weight the jury would have given to each aggravator and mitigator had they been allowed to act in their constitutional capacity as trier-of-fact.

The trial court gave Mr. Crain's convictions for sexual abuse "great weight," while only meriting his suffering as a victim of sexual abuse "modest weight." Where the trial court found that the same crimes committed by Mr. Crain had also been committed against Mr. Crain as a child, that the evidence of abuse was credible and this Court recognized that information of Mr. Crain's physical, sexual and emotional abuse as a child was "substantial," it is speculative to assume the jury would have given his sexual abuse mitigators less weight than his sexual abuse aggravators.

In *Hurst*, this Court explained its standard for harmless error review:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is **not a device for the appellate court to substitute itself for the**

> **trier-of-fact by simply weighing the evidence**. The focus is on the effect of the error on the trier-of-fact.
>
> "The question is whether there is a reasonable possibility that the error affected the [sentence]." (Emphasis added.)

202 So. 3d at 68 (citations omitted) (alteration in original) (quoting *State v. DiGuilio*, 491 So. 2d 1129, 1137-38 (Fla. 1986)). If the significance of erroneously including Kidnapping as an aggravator is reviewed in light of *Hurst* and the requirement that the jury rather than the judge must make the factual determinations, then it is mere speculation how this error affected the jury's recommendation. After *Hurst*, erroneously relying on the Kidnapping aggravator cannot now be found to be harmless error.

B. *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

In denying Mr. Crain's *Caldwell* claim, this Court cited *Reynolds v. State*, No. SC17-793 (Fla. Apr. 5, 2018) (denying *Caldwell* claim). *Crain*, at *7. The majority's opinion in *Reynolds* focuses on whether jury instructions which existed pre-*Hurst* can be found to be in violation of *Caldwell*. *Reynolds*, at*28. This Court reasons that if the instructions were based on the law as it stood at the time they were given, then the instructions properly described the jury's role at that time.[3] However,

[3] This Court focuses its analysis of the *Caldwell* issue in terms of whether the jury was **misled as to its role** in the sentencing process, citing *Romano v. Oklahoma*, 512 US 1 (1994) and *Davis v. Singletary*, 119 F.3d 1471 (11th Cir. 1997). *Reynolds*, at 23.

the impact of *Caldwell* does not end there. While it may be true that the instructions accurately reflected Florida's death sentencing scheme as it existed at that time, it must be considered that Florida's death sentencing scheme was unconstitutional at that time, because that scheme violated the precepts annunciated by the United States Supreme Court's opinion in *Ring*.[4] Therefore, it is not enough to ask did the instructions reflect the sentencing scheme at that time and the role described for the jury therein. In conducting a harmless error analysis of the *Hurst* error, where Florida had unconstitutionally shifted the responsibility of determining a defendant's death eligibility to a judge, this Court must also ask if the jury's understanding of its role had an effect on its deliberation and non-binding recommendation. This Court noted in *Reynolds*:

> We stated much of the same in *Grossman v. State*, 525 So. 2d 833 (Fla. 1988), *receded from on other grounds by Franqui v. State*, 699 So. 2d 1312, 1319-20 (Fla. 1997), and there specifically rejected the argument that *Tedder* created a rule where "the weight given to the jury's advisory recommendation [wa]s so heavy as to make it the de facto sentence." *Id.* at 840. (Emphasis added)

Id., at *21. The issue raised in *Tedder*[5] concerned a trial court's override of a jury's life recommendation. It then stands to reason, if the instruction telling the jury that their recommendation should be given "great weight" is still not enough to make it a verdict for life, we cannot now say that the jury being told that their

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[4] *Ring v. Arizona*, 536 U.S. 584 (2002).
[5] *Tedder v. State*, 322 So.2d 908 (Fla. 1975).

recommendation should be given great weight is enough to consider it a verdict for death.

Again, this is not an issue of whether the trial court should have or could have given a different instruction to the jury at the penalty phase. Of course, the instruction would reflect the law at that time. However, in determining if the *Hurst* error was harmless, we must ask if we may rely on the panel's non-binding recommendation. We must look at that recommendation through the lens of *Caldwell,* and realize it is not reliable enough to treat it as a verdict.

This Court pointed out that *Caldwell* involved the jury believing that an appellate court could adjust an incorrect result, whereas *Reynolds* and others raising *Caldwell* in the wake of *Hurst* deal with the jury being told the trial court has the ultimate responsibility to determine if a defendant can be sentenced to death. This Court found, "Calling the recommendations "advisory" and the trial court as the final sentencer is certainly less problematic than the references to appellate review in *Caldwell*, *Blackwell*, and *Pait* because, unlike appellate courts, trial courts are positioned to make factual findings, which they do every day" *Reynolds*, at *30. This is not a meaningful distinction and the rationale ignores the underlying issue the Supreme Court had with the prosecutor's comments in *Caldwell*, "[they] led [the jury] to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Caldwell,* at 329. While the jury's role

may have been advisory under the law at the time that Mr. Crain was sentenced, after *Hurst*, the Supreme Court has ruled that such a sentencing scheme was unconstitutional under *Ring*. *See, Hurst v. Florida*, at 621. The advisory nature of the panel's role carries less weight than a binding verdict. This distinction must be part of a *Hurst* harmless error analysis, which test the State would fail under the precedent established in *Caldwell*.

This Court also raised the issue in *Reynolds* whether a *Caldwell* analysis would open the door to full retroactivity of *Hurst*, as opposed to retroactivity only going back to the holding in *Ring*. If the jury instruction alone were being considered, then this would likely be the result. However, the analysis begins with a case being qualified for *Hurst* relief (i.e. a post-*Ring* case) and then being analyzed for harmless error. If **in the context of a harmless error analysis,** we ask whether the *Hurst* error diminished the jury's role, as that role was described in *Ring*, then retroactivity preceding *Ring* would not be implicated. *See*, *Ring*, at 609.

This Court further pointed out in *Reynolds* that the Eighth Amendment findings it made in *Hurst v. State* concerned the requirement of unanimous jury verdicts and did not focus on the jury's understanding of its responsibility. *Reynolds*, at *32. Nevertheless, *Caldwell* has been found to also be a violation of the Eighth Amendment. *Caldwell*, at 329-330. One need not rely on the Eighth Amendment findings in *Hurst v. State* to argue that a jury's sense of responsibility being

diminished is unconstitutional. Accordingly, the *Hurst* error in Mr. Crain's case should not be considered a harmless error where the Supreme Court has ruled that only juries may make findings of fact and their sense of responsibility for that duty should not be diminished.

C. Failure to Give the Mercy Recommendation Instruction

This Court relied on its holding in *Davis v. State*, 207 So.3d 142 (Fla. 2016) as the foundation of its analysis that a unanimous recommendation for death will pass the harmless error test:

> Even though the jury was not informed that the finding that sufficient aggravating circumstances outweighed the mitigating circumstances must be unanimous, and **even though it was instructed that it was not required to recommend death even if the aggravators outweighed the mitigators**, the jury did, in fact, unanimously recommend death. From these instructions, we can conclude that the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendations.
> *Davis*, at 174-175. (Emphasis added.)

Crain, at *6.

The *Davis* citation includes the fact that the *Davis* advisory panel was given the mercy instruction. However, the trial court's failure to give the jury the "mercy instruction" to Mr. Crain's advisory panel is another point of law and fact critical to the resolution of Mr. Crain's claims presented in his appeal that this Court did not specifically address. Mr. Crain argued that the advisory panel was never told that regardless of their findings with respect to aggravating and mitigating circumstance, they are never compelled nor required to recommend a sentence of death. Instead,

Mr. Crain's advisory panel was told:

> It your duty to follow the law…, and render to me an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty; or whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. (V24/R3661)
>
> ---------------------------------
>
> Your recommendation to the Court must be based only on the aggravating circumstances and the mitigating circumstances about which I have instructed you. (R3665)

In the *Crain* opinion, this Court cited to *Reynolds v. State*, No SC17-793 (Fla. Apr. 5, 2018), a case decided the same day as Mr. Crain's. The citation to *Reynolds* was only in reference to "denying *Caldwell* claim." *Crain*, at *7. However, *Reynold*s also addressed the lack of a mercy instruction. In *Reynolds*, this Court found, "... the failure to give a mercy instruction alone does not *necessarily* make a *Hurst* error harmful." *Reynolds,* at *10. (Emphasis added.) Crain argues that even if standing alone the lack of a mercy instruction is not automatically harmful, it should be considered as part of a harmless error analysis.

The impact of this instruction missing from the instructions to Mr. Crain's jury should have been considered as part of the totality of the circumstances. Where there are no CCP and HAC aggravators, where the sexual abuse aggravator is virtually identical to the sexual abuse mitigator, where a kidnapping aggravator was erroneously included for the jury's consideration, the absence of the mercy instruction may well have tipped the scales against Mr. Crain.

CONCLUSION

While Mr. Crain was convicted of murder under an instruction that included a choice of either premeditated murder or felony murder, it is not known which theory the jury relied upon in finding him guilty. Therefore it is not possible to know which kidnapping definition the jury was relying upon during the penalty phase. It then follows that it is not possible to conclude that the kidnapping aggravator was properly factored into the jury's death recommendation. Finally, both kidnapping definitions (intent to commit homicide or intent to inflict bodily harm) are specific intent crimes. Neither intent was proven by the State. With the removal of the kidnapping aggravator, the *Hurst* error cannot be harmless, especially where the jury's sense of responsibility was diminished and they were not told they are never compelled nor required to recommend a sentence of death.

Mr. Crain is asking this Court to reconsider its decision and overturn the trial court's order denying Mr. Crain's successive post-conviction motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CEERTIFY that on April 19, 2018, I electronically filed the forgoing Motion for Rehearing with the Clerk of the Florida Supreme Court by using Florida Courts e-portal filing system which will send a notice of electronic filing to the following: Scott A. Browne, Assistant Attorney General, Scott.Browne@myfloridalegal.com and CapApp@myfloridalegal.com; Jay Pruner, Assistant State Attorney for the Thirteenth Judicial Circuit, MailProcessingStaff@sao13th.com. I further certify that I mailed the forgoing document to Willie Crain, DOC#096344, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

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