

No. 17-6735

IN THE SUPREME COURT OF THE UNITED STATES

---

---

RANDY W. TUNDIDOR, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

---

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

---

**APPENDIX TO REPLY BRIEF FOR THE PETITIONER**

---

---

CAROL STAFFORD HAUGHWOUT  
*Public Defender*

GARY LEE CALDWELL  
*Assistant Public Defender  
Counsel of Record*

*Office of the Public Defender  
Fifteenth Judicial Circuit of Florida  
421 Third Street  
West Palm Beach, Florida 33401  
(561)355-7600; (561) 624-6560  
appeals@pd15.state.fl.us  
gcaldwel@pd15.state.fl.us*

## TABLE OF CONTENTS

1a: Pages 92-94 of Initial Brief in state supreme court.

4a: Pages 9-11 of motion for rehearing in state supreme court.

tional because it does not provide for how many votes are necessary to find any particular aggravating circumstances.

Since the jury is instructed on several aggravators, jurors can return a death verdict without even a majority of them finding any one aggravating circumstance. This situation is contrary to the constitutional requirement of definiteness in sentencing determinations and the general due process requirement that verdicts in capital cases be rendered by a unanimous jury in capital cases under the state and federal constitutions.

As jurors could reasonably construe the law as authorizing a death verdict where not even a majority of them agree as to any one aggravating circumstance, Florida's death penalty statute is unconstitutional for failure to channel the sentencer's discretion as required by the state and federal constitutions.

D. The role of the jury is systematically diminished by repeated instructions that its penalty decision is "advisory." These instructions violate the Cruel and Unusual Punishment Clauses of the state and federal constitutions because these instructions "minimize the jury's sense of responsibility for determining the appropriateness of death." *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985); see also *Romano v. Oklahoma*, 512 U.S. 1, 8 (1994). "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining

the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-329.

Florida juries are instructed (and Appellant's jury was instructed) that its sentencing verdict is purely advisory and that responsibility for determining whether the defendant should be sentenced to death rests with the trial court. Before the jurors retire to deliberate, the trial court tells them that theirs is "an advisory sentence," and "not binding" so that, although their recommendation "must be given great weight," "the decision as to which punishment shall be imposed is the responsibility of the judge." Jurors are never instructed that their recommendation is necessary to authorize the court to impose the death sentence, or that their finding of sufficient aggravators and insufficient mitigation to outweigh them is necessary for the imposition of a capital sentence.

Only the jury can "express the conscience of the community." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). Relegating the jury to an advisory role, Florida law cuts the link between capital sentencing decisions and society's moral judgment.

E. Under the statute, juries are told that their role is merely advisory; that they need only find undifferentiated "sufficient aggravating circumstances" without discussing or agreeing on which of Florida's 16 disparate aggravators exists; that they can recommend death even if a majority of jurors rejects

various aggravators; and that they can return a verdict and go home as soon as a bare majority votes for death. As a consequence, the jury's functioning is so crippled as to eviscerate the essence of trial by jury under the Jury and Due Process Clauses of the state and federal constitutions. *Burch v. Louisiana*, 441 U.S. 130 (1979).

F. In view of the foregoing, Appellant's sentence denied his rights under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions, and it must be vacated. Art. I, §§ 9, 16 and 17, Fla. Const; Amends. VI, VIII and XIV, U.S. Const. Under the Separation of Powers provision of our constitution, the Judicial branch must take the statute as it is and rule on its constitutionality. Art. II, § 3, Fla. Const. As the present statute is unconstitutional, Appellant's sentence under it is illegal and unconstitutional.

Because the jury did not make the statutory findings required for a death sentence, it did not find all of the elements of capital first degree murder. The case should be remanded for imposition of a life imprisonment.

XIII. THE DUAL CONVICTIONS FOR ATTEMPTED MURDER AND ATTEMPTED FELONY MURDER VIOLATE DOUBLE JEOPARDY. TWO OF THE CONVICTIONS MUST BE VACATED. THEIR USE AT SENTENCING REQUIRES RESENTENCING.

Counts II and III alleged attempted first degree murder of the murder victim's wife and son respectively, and Counts IV and

At bar, regardless whether the motion was filed in November or in December, there were still not going to be any proceedings in the case for a considerable period of time.

Notably, the facts supporting the motion were indisputable, and the state could claim no prejudice due to the timing of the motion.

At bar, there is no reason for a mechanistic application of the 10-day rule where its purposes were met.

*D. Harmless error regarding the sentence.*

The slip opinion finds the *Hurst* error harmless because the jury “returned a unanimous recommendation for a sentence of death.” Slip op. 37-38.

Looking at the result does not take away from the prejudice arising from the fact that the result was reached through an unconstitutional process.

1. The judge instructed the jury that its recommendation was “advisory” and not binding on the court, and that “the final decision as to which punishment shall be imposed is the responsibility of the Judge.” R25 4193.

This instruction detracted from the jurors' appropriate awareness of their truly awesome responsibility of a death verdict. It diminished their responsibility for their decision.

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the prosecutor told the jury that their penalty verdict was not final because it would be reviewed by the state supreme court. The jury then rendered a unanimous death verdict.

The Supreme Court held that the prosecutor's remarks required reversal because they lessened the jury's sense of responsibility for their decision:

This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its "truly awesome responsibility." In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. 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. The sentence of death must therefore be vacated. Accordingly, the judgment is reversed to the extent that it sustains the imposition of the death penalty, and the case is remanded for further proceedings.

*Id.* at 341. See also *Pait v. State*, 112 So. 2d 380 (Fla. 1959) (reversing murder conviction on where prosecutor told jury without objection that defendant had right to appeal).

So the fact that the advisory recommendation was unanimous is of no consequence since it was the product of an unconstitutional procedure that diminished the jurors' individual responsibility for their decision.

2. The jury was instructed that a life recommendation needed at least six votes. R25 4204.

Given this instruction, any minority juror wavering as to his or her vote would see that a vote for life would be pointless. A majority could render a valid advisory death recommendation without the juror's vote.

Such a juror would not have the sense of responsibility that would come with knowing that his or her vote alone could require a life sentence.

Under the unconstitutional statute before *Hurst*, each undecided vote became less and less important as a majority formed for death. But under the new statute, as the majority for death grows, each undecided vote becomes more important.