IN THE SUPREME COURT OF FLORIDA

PAUL B. JOHNSON, :

Appellant, :

vs. : Case No. SC14-1175

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

INITIAL SUPPLEMENTAL BRIEF OF APPELLANT ADDRESSING HURST V. FLORIDA

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STATEMENT OF THE CASE AND FACTS - Johnson's extensive arguments regarding the unconstitutionality of Florida's death penalty scheme were presented to the trial court and denied after a pretrial hearing (2/297-317; 3/447-54, 459,462). After a penalty-only trial, the jury, by a vote of 11-1, recommended a death sentence on each count (5/910,918,927; 26/2167-70).

SUMMARY OF ARGUMENT - The constitutionally invalid provisions of Florida's death penalty statute are inextricably intertwined with the remainder of the statute. Without those provisions there is no mechanism for anyone - - judge or jury - - to determine who gets life and who gets death. The constitutional defects cannot be remedied without rewriting the statute, which is not a judicial function. Therefore the invalid portions are not severable and the entire law is unconstitutional.

In Florida - - a weighing state - - the Hurst decision requires, at minimum, jury findings as to each aggravating factor relied on by the state to support a death sentence, as well as a jury finding that the aggravating factors are sufficient to justify a death sentence, and jury determination of whether a death sentence should be imposed. An advisory recommendation of death is insufficient. The jury's verdict as to each of its findings (including any verdict that a death sentence should be imposed, since the weighing process necessarily involves factfinding) must be unanimous under state law because - - as Justice Anstead and Justice Shaw pointed out in separate concurring opinions in Bottoson v. Moore, 833 So.2d 693,709-10,714 (Fla.2002), "Florida has long required unanimous jury verdicts in

all criminal cases, including capital cases" (Justice Anstead, citing Fla.R.Crim.P.3.440), and "[The] requirement of unanimity has been an inviolate tenet of Florida jurisprudence since the State was created" (Justice Shaw). Moreover, the United States Supreme Court has never approved the use of nonunanimous verdicts (as contrasted with the advisory recommendations which have up to now been the practice in Florida, Delaware and Alabama) in capital cases, and Johnson submits that adopting such a procedure would violate the Sixth, Eighth, and Fourteenth Amendments.

Finally, Johnson's death sentence, imposed under an unconstitutional statute which affected the entire framework of his penalty trial, and where the necessary factfinding was done by the wrong entity, cannot be harmless and was not harmless.

Issue VI - FLORIDA'S CAPITAL SENTENCING SCHEME IS CONSTITUTIONALLY INVALID [ADDRESSING THE IMPACT OF HURST V. FLORIDA]

A. Hurst Declared Florida's Capital Sentencing Scheme Unconstitutional, and the Invalid Provisions [Florida Statutes §921.141(2) and (3)] are not Severable

The advisory role of the jury - - resulting in a mere recommendation of death or life imprisonment by majority vote, with no verdict and no specific findings - - and the factfinding role of the trial judge are so interwoven into Florida's death penalty scheme which was held unconstitutional in Hurst v. Florida, 136 S.Ct. 616 (2016) that the invalid provisions cannot be severed. Therefore, unless and until the Florida legislature enacts a new death penalty statute, Florida has no death penalty at the

present time.

The United States Supreme Court, by an 8-1 vote in Hurst, clearly and unequivocally held that Florida's death penalty scheme is unconstitutional. "We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough". 136 S.Ct. at 619, see also 622. Even the lone dissenter, Justice Alito, characterized the Court's decision as "striking down Florida's capital sentencing system". 136 S.Ct. at 625.

During oral argument on February 2, 2016 in Richard Knight v. State, SC14-1775 and SC14-1233, appellate counsel for the state suggested that the constitutionally invalid portions of the statute, specifically subsections (2) and (3) of §921.141, could be "severed", leaving the remainder intact, and that therefore the death penalty continues to be viable in Florida after Hurst and until such time as the legislature writes and enacts a replacement statute.

That contention sinks like a stone under established Florida law, which recognizes that "if the valid portion of the law would be rendered incomplete, of if severance would cause results unanticipated by the legislature, there can be no severance of the invalid parts; the entire law must be declared unconstitutional." Eastern Air Lines Inc. v. Department of Revenue, 455 So.2d 311,317 (Fla.1984)(emphasis supplied). A court cannot "exercise the legislative function of rewriting the statute . . . ." Florida Horsemen Benevolent and Protective Association v. Rudder, 738

So.2d 449,452(Fla. 1st DCA 1999); see, generally Ex Parte Levinson, 274 S.W. 2d 76,78 (Tex.Crim.1955)(severance can only be accomplished when - - after the unconstitutional part is stricken - - the remainder is complete in itself; "the courts must not enter the field of legislation and write, rewrite, change, or add to a law." Moreover, when the constitutional and unconstitutional provisions of a statute are inextricably intertwined the invalid portions cannot be severed. Allen v. Butterworth, 756 So.2d 52,64 (Fla.2000).

§921.141(2) provides for an advisory sentence by the jury, and subsection (3) provides that "[n]otwithstanding the recommendation of a majority of the jury" the trial court shall enter a sentence of life imprisonment or death, and if a death sentence is imposed the trial judge shall make the written findings of fact as to the aggravating and mitigating circumstances "upon which the sentence of death is based." The jury's advisory role and the judge's factfinding role cannot be "severed" from the statute; their respective functions can only be addressed by rewriting the statute (which the legislature, after fourteen years of inaction, is now hard at work trying to do). Without subsections (2) and (3) there is no procedure in §921.141 for determining who is sentenced to death and who is sentenced to life imprisonment; there is merely a seemingly random list of aggravating and mitigating factors with no direction as to how to apply them or who shall apply them. Without the unconstitutional provisions the remainder of the statute is incomplete and incoherent.

Two recent Pennsylvania decisions aptly illustrate how the

jury's advisory role and the judge's factfinding role are interwoven into §921.141. In Commonwealth v. Hopkins, 117 A.3d 247 (Pa.2015), a statute requiring imposition of an increased mandatory minimum sentence if certain controlled substance crimes occurred within 1000 feet of a school was found unconstitutional under Alleyne v. United States, 133 S.Ct.2151 (2013), because the statute mandated that the enhanced sentencing factor be determined by the trial judge at sentencing rather than by a jury verdict. The commonwealth's "core position" was that only certain limited procedural provisions of the statute run afoul of Alleyne, and that these were severable and the substantive provisions remained viable. Hopkins, 117 A.3d at 252. The commonwealth's "severability" argument was soundly rejected in Hopkins, at 252-62, for the reasons explained Commonwealth v. Newman, 99 A.3d 86, 101-02 (Pa.Super. 2014)(emphasis supplied):

> We find that Subsections (a) and (c) of Section 9712.1 are essentially and inseparably connected. Following Alleyne, Subsection (a) must be regarded as the elements of the aggravated crime of possessing a firearm while trafficking drugs. If Subsection (a) is the predicate arm of Section 9712.1, then Subsection (c) is the "enforcement" arm. Without Subsection (c), there is no mechanism in place to determine whether the predicate of Subsection (a) has been met.

Similarly, without its unconstitutional provisions, Florida's death penalty statute contains no mechanism for determining who lives and who dies. Those provisions are integral to the former statutory scheme, and cannot be severed from it; the entire law is unconstitutional.

B. In a Weighing State such as Florida, the Sixth Amendment Requires Jury Findings to Establish (1) the Existence of Each Aggravating Factor Presented by the State; (2) that the Aggravating Factors are Sufficient to Justify a Death Sentence; and (3) that the Aggravating Factors are not Outweighed by the Mitigating Factors

"States employ one of two methods to determine which defendants are eligible for the death penalty, weighing and nonweighing." Woldt v. People, 64 P.3d 256,263 (Colo.2003). Examples of nonweighing states are Georgia, Virginia, and (before it abolished its death penalty) Connecticut. Examples of weighing states include Mississippi, Ohio, and Florida. See e.g. Parker v. Dugger, 498 U.S. 308,318 (1991)("As noted, Florida is a weighing State; the death penalty may be imposed only where specified aggravating circumstances outweigh all mitigating circumstances"); see also Kearse v. State, 662 So.2d 677,686 (Fla.1995).

As has been recognized, the term "nonweighing" is something of a misnomer because even in those states the trier of fact does weigh aggravators against mitigators. One critical difference is that in nonweighing systems there are essentially two sets of aggravating factors; there is a narrower list to establish death-eligibility, and after the jury has made such a finding it may then "consider aggravating factors different from, or in addition to, the eligibility factors." Wilson v. Mitchell, 498 F.3d 491,505 (6th Cir. 2007); see Brown v. Sanders, 546 U.S. 212,216-20 (2006). Only in nonweighing systems does the finding of one or more aggravating factors automatically make the defendant eligible for a death sentence (although he or she may or may not ultimately be selected for a death sentence), while in weighing states - - in

contrast - - the trier of fact must weigh the aggravating factors against all of the mitigating factors to make a death-eligibility determination. See Woldt, 64 P.3d at 263-64.

Florida's credentials as a weighing state were established as early as 1972 when Florida Statutes, §921.141 was enacted, and 1973 when that statute was first construed by this Court in State v. Dixon, 283 So.2d 1 (Fla.1973). There, this court recognized that "the Legislature has chosen to reserve [the death penalty's] application to only the most aggravated and least mitigated of most serious crimes." 283 So.2d at 7. While under certain circumstances a single aggravator may be enough to make a homicide one of the "most aggravated", this outcome is relatively rare. As a general rule, this Court does not uphold a death sentence supported by a single aggravator unless it is an especially egregious one under the facts of the case, or unless the mitigating evidence is insubstantial. See, e.g. Yacob v. State, 136 So.3d 539,551 (Fla.2014); Nibert v. State, 574 So.2d 1059,1063 (Fla.1990). In Scott v. State, 66 So.3d 923,934-39 (Fla.2011) - - which this Court described as "not a case with substantial mitigation" - - the Court nevertheless found that the two aggravating factors which were properly found to exist (commission of homicide during an attempted armed robbery; and a contemporaneous conviction of a violent felony, consisting of an aggravated battery of a second individual which "involved a limited threat of violence and no permanent injury") were insufficient to justify a death sentence.

While these and many other "single aggravator" (or insuffi-

cient aggravators) reversals came as a result of this Court's proportionality review, they are based on the Court's accurate understanding of the legislative intent of §921.141, as well as the language of that death penalty statute itself. As the Court recognized in Jones v State, 705 So.2d 1364,1366 (Fla.1998), "[t]he people of Florida have designated the death penalty as an appropriate sanction for certain crimes, and in order to ensure its continued viability under our state and federal constitutions" the legislature has chosen to reserve its application to the most aggravated and unmitigated homicides. For that reason, the Court would uphold death sentences supported by a single aggravator only when the mitigation was insubstantial; "[t]o rule otherwise . . . would put Florida's entire capital sentencing scheme at risk." 705 So.2d at 1366. [See also Urbin v. State, 714 So.2d 411,416 (Fla.1998)].

Therefore, the argument which the state has been making in various briefs and oral arguments since Florida's death penalty procedure was declared unconstitutional on January 12, 2016, that an express or implicit finding by the jury of a single aggravator is either (1) sufficient to comply with Hurst's Sixth Amendment holding, or (2) renders any Hurst error harmless, is flat wrong. While it is certainly true that a death sentence can never be imposed or upheld in the absence of any aggravating factors [see, e.g., Banda v. State, 536 So.2d 221,225 (Fla.1988)], the converse is not true; a single aggravator is not automatically (or even usually) sufficient to make a defendant death eligible.

As the United States Supreme Court aptly observed in Hurst:

> The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death." Fla.Stat.§775.082(1) (emphasis added). The trial court alone must find "the facts...[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." §921.141(3); see Steele, 921 So.2d, at 546. "[T]he jury's function under the Florida death penalty statute is advisory only." Spaziano v. State, 433 So.2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring requires.

136 S.Ct at 622 (emphasis in opinion).

[See the post-Ring, pre-Hurst opinion in Troy v. State, 948 So.2d 635,648 (Fla.2006) emphasizing that in Florida "[i]t is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed].

By its express terms, §921.141 requires first the jury (before reaching its majority advisory recommendation) and the trial judge (before making written findings of fact and imposing a death or life sentence based on those findings) to determine whether sufficient aggravating circumstances exist, and whether or not the mitigating circumstances are sufficient to outweigh them. In a weighing state such as Florida it is the totality of the aggravators - - not the mere existence of one of them - - that matters in determining death-eligibility. Moreover, just as with the aggravators, determining the existence of and weighing the mitigating circumstances necessarily requires factfinding, largely based on credibility assessments. Since the Sixth Amendment

requires Florida to base any death sentence "on a jury's verdict, not a judge's factfinding" [Hurst, 136 S.Ct. at 624], and since in Florida it is not one aggravator (or even all the aggravators) alone which determines death-eligibility, it follows that the factfinding inherent in determining the existence of mitigators and weighing them against the aggravators must likewise be done by the jury.

State supreme courts have expressed conflicting viewpoints about whether Ring v. Arizona, 536 U.S. 584 (2002), requires the jury to determine the outcome of the weighing process. The better reasoned decisions, such as those from Colorado, Arizona, and Missouri, conclude that this determination must indeed be made by the jury. Woldt v. People, 64 P.3d 256,265 (Colo.2003); State v. Ring, 65 P.3d 915,946 (Ariz.2003); State v. Whitfield, 107 S.W.3d 253,261 (Mo.2003). Idaho, for example, arrived at the same result by statutory amendment. See State v. Lovelace, 90 P.3d 298,301 (Idaho 2004).

Other state courts, including Maryland (which has since abolished its death penalty) and Nevada, have expressed the view that the requirements of Ring do not apply to the weighing process. Oken v. State, 835 A.2d 1105,1121-22 (Md.2003); Nunnery v. State, 263 P.3d 235,250-53 (Nev.2011). However, these conclusions are premised on the assumption that "Weighing is not fact-finding." Nunnery, 263 P.3d at 251. See Oken, 835 A.2d 1121-22 (stating that Ring and Apprendi[1] "[do] not apply to the weighing of aggravators and mitigators because . . . that issue is not one

[1] Apprendi v. New Jersey, 530 U.S. 466 (2000).

that involves fact-finding"; rather, the weighing process "is purely a judgmental one.")

Whether Nunnery's and Oken's pronouncements that the weighing process does not involve factfinding is correct or incorrect under those states' present or former death penalty law is beyond the scope and page limits of this brief, but their logic, if any, clearly doesn't apply in Florida. One cannot weigh the mitigating factors against the aggravating factors without first determining whether mitigating factors exist, and what they are. In other words, while (arguably) weighing might not be factfinding, weighing (inarguably) cannot be done without factfinding.

For one obvious example, two of the most compelling Florida mitigators are those relating to the defendant's mental condition at the time of the crime; "extreme mental or emotional disturbance" and "impaired capacity." Whether these mental mitigators are found or not found is always important - - and often outcome-determinative - - as to whether a death sentence is imposed or upheld. See, e.g. Delgado v. State, 162 So.3d 971 (Fla.2015); Santos v. State, 629 So.2d 838 (Fla.1994). Typically, the question of whether these mitigators have been established gives rise to a "battle of experts". Dr. Jekyll may testify for the defense that the defendant was paranoid and delusional, that he was exhibiting bizarre thoughts and behavior, and that (in the doctor's professional opinion) he was under extreme mental or emotional disturbance and his ability to control his impulses was severely impaired. Dr. Zhivago may testify for the state that the defendant is a manipulative, sociopathic malingerer, that the

crime was committed in a methodical manner inconsistent with impairment of mental or emotional faculties, and that (in the doctor's professional opinion) neither "mental mitigator" existed.

What happens then? Under the unconstitutional system where the jury made no findings and returned only an advisory recommendation with no unanimity requirement, and the judge then made the written findings, weighed them, and imposed the sentence, here's what often happened. The judge would determine the credibility of the conflicting experts (as well as the credibility of any lay witnesses concerning the defendant's life history and behavior), and if he found the state's expert more credible than the defendant's expert, he would so state in his written findings. If he then found that the mental mitigators were not established and accorded them no weight in the weighing process (or found, based on his credibility assessment, that they were entitled to little weight), the judge's finding would be upheld on appeal as a proper exercise of his discretion. See, e.g. Hobart v. State, 175 So.3d 191,202 (Fla.2015); Kocaker v. State, 119 So.3d 1214,1229-31 (Fla.2013); Ault v. State, 53 So.2d 175,188 (Fla.2010); Patton v. State, 878 So.2d 368,391 (Fla.2004); Lynch v. State, 841 So.2d 362,374 (Fla.2003); Zack v. State, 753 So.2d 9,19 (Fla.2000); Knight v. State, 746 So.2d 423,436 (Fla.1998).

As this Court has observed (in the context of a life override) "[a]lthough a trial judge may not believe the evidence presented in mitigation or find it persuasive, others may." Stevens v. State, 552 So.2d 1082,1086 (Fla.1989); see also Holsworth v. State, 522 So.2d 348,354 (Fla.1988). As Justice Kogan,

concurring in part and dissenting in part in Thompson v. State, 553 So.2d 153,158-59 (Fla.1989)(in which the majority affirmed a death sentence imposed via a life override), pointed out:

> The flaw in [the majority's] reasoning is the mistaken premise that it is the judge's role to assess credibility. Although the judge issues "findings of fact" when he or she imposes the death penalty, the jury is still the primary finder of fact. Thus, it is beyond question that it is within the province of the jury to assess the credibility of witnesses and determine from that point whether the death penalty is appropriate. If the jury believes the evidence of Thompson's impaired capacity, then the trial court, as well as this Court, is bound by that finding. The fact that the trial judge does not believe the witness is utterly irrelevant.

Hurst proves the correctness of Justice Kogan's position. Can it be seriously asserted after Ring, and especially after Hurst, that the Sixth Amendment allows a trial judge to impose a death sentence based on a credibility assessment different from the jury's? Weighing cannot be done without prior or concurrent factfinding, and that is the jury's province.

C. To Support a Death Sentence, the Required Findings of (1) Each Aggravator; (2) that the Aggravators are Sufficient; and (3) that there are Insufficient Mitigating Factors to Outweigh the Aggravators Must be Unanimous

In asserting the harmfulness of Johnson's having been sentenced to death under the unconstitutional scheme (assuming arguendo that Hurst error is even susceptible to harmless error analysis, see Part D, infra), it is important to consider that the jury's recommendations that Johnson be sentenced to death were nonunanimous (11-1). Hurst makes it crystal clear that Florida must base any death sentence "on a jury's verdict, not a judge's factfinding" (136 S.Ct. at 624) and an "advisory recom-

mendation" will not suffice. (Id., at 622). While this Court, both prior to Ring and, later, in the mistaken belief that Ring did not apply in Florida, had approved bare majority "advisory recommendations" - - a position which all seven members were beginning to reassess by the time of State v. Steele, 921 So.2d 538,548-50,553 (Fla.2005) - - Florida law has never permitted nonunanimous jury verdicts. As Justice Anstead recognized in 2002:

> Of course, Florida has long required unanimous verdicts in all criminal cases including capital cases. Florida Rule of Criminal Procedure 3.440 states that no jury verdict may be rendered unless all jurors agree. Furthermore, in Jones v. State, 92 So.2d 261 (Fla.1956), this Court held that any interference with the right to a unanimous verdict denies the defendant a fair trial. However, in Florida, the jury's advisory recommendation in a capital case is not statutorily required to be by unanimous vote. The jury's advisory recommendation may be by mere majority vote. This would appear to constitute another visible constitutional flaw in Florida's scheme when the Sixth Amendment right to a jury trial is applied as it was in Apprendi and Ring.

Bottoson v. Moore, 833 So.2d 693,710 (Fla.2002)(Anstead, C.J., concurring in result only)

And as Justice Shaw wrote in the same case:

> Before jurors can return a guilty verdict, they must unanimously agree that each element of the charged offense has been established beyond a reasonable doubt. This requirement of unanimity has been an inviolate tenet of Florida jurisprudence since the State was created.

Bottoson v. Moore, 833 So.2d at 714 (Shaw, J., concurring in result only)(footnote omitted).

A defendant's right to a unanimous jury verdict is protected by the Florida Constitution. See Jones v. State, 92 So.2d 261 (Fla.1956). Moreover, the United States Supreme Court has never approved a less-than-unanimous verdict in a capital case. Loui-

siana and Oregon are presently the only states which allow a felony conviction based on a nonunanimous jury verdict. See State v. Webb, 133 So.2d 258,285 (La.App.2014). [Delaware's and Alabama's nonunanimous death penalty recommendations are, like Florida's, advisory[2] and are likewise unconstitutional under Hurst.] In 1972, in the companion cases of Johnson v. Louisiana, 406 U.S. 356 (1972) and Apodaca v. Oregon, 406 U.S. 404 (1972) the Supreme Court, in 5-4 decisions, concluded that the Louisiana statute which allowed a 9-3 verdict in non-capital cases [see Johnson, 406 U.S. at 357, n.1] and the Oregon statute which allowed a 10-2 verdict in non-capital cases [see Apodaca, 406 U.S. at 406, n.1] did not violate constitutional requirements. 44 years later, Louisiana and Oregon are still the outliers. See Burch v. Louisiana, 441 U.S. 130,138 (1979)("[the] near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not").

Regardless of whether or not the U.S. Supreme Court would decide Johnson and Apodaca the same way today, those decisions are obviously not controlling and shed little light on whether the Sixth, Eighth, and Fourteenth Amendments require unanimity in capital guilt and penalty decisions. The importance of unanimity as a safeguard of reliability was recognized by the Supreme Court of Connecticut in State v. Daniels, 542 A.2d 306,314-15 (Conn.1988)(quoted with approval by this Court in State v.

[2] See, e.g., Ploof v. State, 75 A.3d 840,858 (Del.2013); Ex Parte Stephens, 982 So.2d 1148,1149,1151 (Ala.2006).

Steele, 921 So.2d at 549.) Daniels held that jury verdicts in the penalty phase of a capital case must comport with the guidelines that govern the validity of jury verdicts generally, including the requirement of unanimity. Rejecting the state's argument to the contrary, the court wrote:

> Two principal reasons compel us to disagree with the state. We first are persuaded that the functions performed by guilt and penalty phase juries are sufficiently similar so as to warrant the application of the unanimous verdict rule to the latter. Each jury receives evidence at an adversarial hearing where the chief engine of truth-seeking, the power to cross-examine witnesses, is fully present. At the close of the evidence, each jury is instructed on the law by the court. Finally, in returning a verdict, each jury has the power to "acquit": in the guilt phase, of criminal liability, and in the penalty phase, of the death sentence.
>
> Second, we perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps assure the reliability of the ultimate verdict. A. Spinella, Connecticut Criminal Procedure (1985) pp. 690-92. The "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate"; Sumner v. Shuman, 483 U.S. 66,107 S.Ct. 2716,2720, 97 L.Ed.2d 56 (1987); convinces us that jury unanimity is an especially important safeguard at a capital sentencing hearing. In its death penalty decisions since the mid-1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. Beck v. Alabama, 447 U.S. 625,637-39, 100 S.Ct. 2382,2388-90, 65 L.Ed.2d 392 (1980); Lockett v. Ohio, 438 U.S. 586,604-05, 98 S.Ct. 2954,2964-65, 57 L.Ed.2d 973 (1978); Gardner v. Florida, 430 U.S. 349,359-60, 97 S.Ct. 1197-1205, 51 L.Ed.2d 393 (1977); Woodson v. North Carolina, supra, 428 So.2d at 304-306, 96 S.Ct. at 2990-91. These cases stand for the general proposition that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision.

Unlike the historical accident of jury size, the requirement of unanimity "relates directly [to] the deliberative function of

the jury". United States v. Scalzitti, 578 F.2d 507,512 (3d Cir.1978); see McKoy v. North Carolina, 494 U.S. 433,452 (1990) (Kennedy, J., concurring)(jury unanimity "is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community"); State v. McCarver, 462 S.E.2d 25,39 (N.C.1995)("[t]houghtful and full deliberation in an effort to achieve unanimity has only a salutary effect on our judicial system: [i]t tends to prevent arbitrary and capricious sentence recommendations").[3]

D. (1) A Death Sentence Imposed under the Unconstitutional Death Penalty Scheme is Structural Error which is Not Susceptible to Harmless Error Review, and (2) Especially where, as here, the Jury's Advisory Recommendation was Nonunanimous, the Resulting Death Sentence Cannot be Found Harmless beyond a Reasonable Doubt under the DiGuilio and Chapman Standards

The question of whether a death sentence imposed under the constitutionally invalid Florida scheme is structural error which is not susceptible to harmless error review depends on whether a death sentence based on no jury verdict whatsoever is controlled by the reasoning of Sullivan v. Louisiana, 508 U.S. 275 (1993),

[3] To the extent that the state may complain that the unanimity requirement would permit a rogue juror or nullifier to block a death sentence based on his or her inability to follow the law, Johnson would note that (1) this speculative risk is inherent in any kind of jury trial, and (2) the risk is actually reduced in capital cases by the "death-qualification" process, which enables the state to strike for cause any juror whose opposition to the death penalty would impair his or her ability to fairly consider both the death and life imprisonment options [see e.g. Wainwright v. Witt, 469 U.S. 412 (1985); Rodgers v. State, 948 So.2d 655,662 (Fla.2006)], and to peremptorily strike jurors whom the state believes are "weak" on the death penalty [see Poole v. State, 151 So.3d 402,410-413 (Fla.2014)].

or whether it is more like Neder v. United States, 527 U.S. 1 (1999) and Washington v. Recuenco, 548 U.S. 212 (2006). If the position asserted by the state in the first round of Hurst oral arguments in February 2016 - - that jury factfinding is only required as to a single aggravator - - were correct, then Neder and Recuenco would seem to apply if that aggravator was uncontested or uncontestable. But, as Johnson has shown in Part B, Hurst (in a weighing state like Florida) requires jury findings as to each aggravator relied on by the state, as well as the sufficiency of the aggravators to warrant a death sentence, and the weighing of the aggravators against the mitigating circumstances. That being the case, a death sentence imposed without any of the required jury findings is in no way comparable to a jury instruction which omits an uncontested or uncontestable element of an offense [Neder] or an uncontested or uncontestable noncapital sentence enhancement factor [Recuenco]. Instead, the rationale of Sullivan controls.

Justice Scalia's opinion for a unanimous Court in Sullivan begins from the premise that when the defendant has a Sixth Amendment right to a jury trial, the trial judge "may not direct a verdict for the State, no matter how overwhelming the evidence." 508 U.S. at 277. Recognizing that under the Chapman standard[4] most constitutional errors can be evaluated for possible harmlessness in terms of their effect on the factfinding process, Justice Scalia noted that there are other kinds of errors (including the constitutionally deficient reasonable doubt

[4] Chapman v. California, 386 U.S. 18 (1967).

instruction given in Sullivan) which by their nature are simply not amenable to harmless error analysis:

> Chapman itself suggests the answer. Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. See Chapman, supra, 386 U.S.,at 24,87 S.Ct.,at 828 (analyzing effect of error on "verdict obtained"). Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." Yates v. Evatt, 500 U.S. 391,404, 111 S.Ct.1994,1983, 114 L.Ed.2d 432(1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered - no matter how inescapable the findings to support that verdict might be - would violate the jury trial guarantee. [Citations omitted].
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> Once the proper role of an appellate court engaged in the Chapman inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of Chapman review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the questions whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt-not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough. See Yates, supra, 500 U.S., at 413-414, 111 S.Ct., at 1989 (SCALIA. J., concurring in part and concurring in judgment). The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. See Bollenbach v. United States, 326 U.S. 607,614 66 S.Ct.402,405,90 L.Ed. 350 (1946).

Sullivan v. Louisiana, 508 U.S. at 279-80 (emphasis in opinion).

As was stated in Arizona v. Fulminante, 499 U.S. 279,307-08 (1991), the common thread which connects the many cases in which constitutional error can properly be evaluated for harmlessness "is that each involved 'trial error' - error which occurred during the presentation of the case to the jury, and which therefore may be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Structural error, in contrast, is error which affects "the framework in which the trial proceeds." Fulminante, 499 U.S. at 310; see Sullivan, 508 U.S. at 281. In Sullivan, "the instructional error consist[ed] of a misdescription of the burden of proof, which vitiates all the jury's findings. A reviewing court can only engage in pure speculation - its view of what a reasonable jury would have done. And when it does that 'the wrong entity judge[s] the defendant guilty.'" 508 U.S. at 281, quoting Rose v. Clark, 478 U.S. 570,578 (1986).

The Sullivan opinion concludes with the recognition that denial of the right to a jury verdict beyond a reasonable doubt

> is certainly an error of the former sort, the jury guarantee being a "basic protectio[n]" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function, Rose, supra, 478 U.A. at 577, 106 S.Ct., at 3105. The right to trial by jury reflects, we have said, "a profound judgment about the way in which law should be enforced and justice administered." Duncan v. Louisiana, 391 U.S., at 155,88 S.Ct., at 1451. The deprivation of that right,

> with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

508 U.S. at 282.

Under the Hurst analysis, a death sentence based on no jury verdict whatsoever, but only a (nonunanimous) "advisory recommendation" - - with all of the required findings of fact having been made by the judge - - is a constitutional error (or more accurately a combination of errors) which affected the framework of the penalty trial and resulted in the critical factual determinations being made by the wrong entity. [See also State v. Waine, 122 A.3d 294,300-01 (Md.2015)(dealing with an "advisory-only" jury instruction); United States v. Ramirez-Castillo, 748 F.3d 205,217 (4th Cir.2014); and Murray v. State, 937 So.2d 277,281-82 (Fla.4th DCA 2006), each finding structural error under the Sullivan v. Louisiana "wrong entity" analysis].

In the absence of a jury verdict, a reviewing court cannot measure the effect of the constitutional error; it can only substitute itself for the jury and speculate what findings a reasonable jury would have made. To affirm a death sentence in this manner would be tantamount to a prohibited directed verdict of death. Sullivan. See also Woldt v. People, supra, 64 P.3d at 269-70 (recognizing that it is inappropriate for a reviewing court to assume a factfinding role).

After Ring invalidated their death penalty schemes in 2002, the state supreme courts of Arizona and Idaho grappled with the possible application of the harmless error doctrine. The Idaho Supreme Court analyzed the question under both Neder and Sullivan

(and did not find them inconsistent). If a given element of an offense, or an aggravating factor, "was uncontested and supported by overwhelming evidence" the failure to submit that element or aggravating factor to the jury could properly be found to be harmless under Neder. State v. Lovelace, 90 P.3d 298,304 (Idaho 2004)(emphasis supplied). However, the Idaho court found that the "murder committed in the perpetration of a kidnapping" aggravator in that case was not uncontested, and the "utter disregard for human life" and "propensity" aggravators even less so. Therefore, as in Sullivan, there was no jury verdict within the meaning of the Sixth Amendment and no constitutionally cognizable finding to review. As stated by Justice Scalia, 508 U.S. at 279-80, "the illogic of harmless error review" under these circumstances was obvious because it would require the appellate court to hypothesize a verdict that was never in fact rendered. Lovelace, 90 P.3d at 304-05.

Arizona, on the other hand, did not find Ring error to be structural, but its harmless error review was rigorous. The Arizona court recognized that its analysis must focus not only on the factfinding as to aggravating circumstances but also on the mitigation factfinding and the weighing decision; and therefore "[b]ecause a trier of fact must determine whether mitigating circumstances call for leniency, we will affirm a capital sentence [on harmless error review] only if we conclude, beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." State v. Ring, 65 P.3d 915,946 (Ariz.

2003); State v. Armstrong, 93 P.3d 1076,1081 (Ariz.2004). Where the reviewing court cannot determine beyond a reasonable doubt that the jury could not have reached a different conclusion regarding the existence, significance, or weight of the mitigating circumstances the Sixth Amendment error is not harmless and reversal of the death sentence is required. State v. Ring, 65 P.3d at 946; State v. Armstrong, 93 P.3d at 1081-82. See State v. Dann, 79 P.3d 58,61 (Ariz.2003) and State v. Dann, 207 P.3d 604,610 (Ariz.2009)(although the judge's finding of the "multiple murders" aggravator was harmless, reversal was nevertheless required "because a reasonable jury could have reached a different conclusion regarding the significance of the mitigating circumstances").

Therefore, in the instant case, if Johnson's death sentence imposed in violation of Sixth Amendment requirements is viewed as structural error under the Sullivan analysis then harmless error review cannot even be attempted. On the other hand, even if this Court concludes, based on Neder and Recuenco, that harmless error review can be undertaken, Johnson's death sentence cannot be upheld under the federal constitutional standard of Chapman v. California, 386 U.S. 18 (1967) and the Florida standard of State v. DiGuilio, 491 So.2d 1129 (Fla.1986). The state cannot show beyond a reasonable doubt that the absence of the jury findings required by Hurst did not contribute to Johnson's death sentence imposed by the judge, based on findings made solely by the judge.

This is especially true in light of the fact that the jury's advisory recommendation was nonunanimous. [See Part C, supra].

That indicates that at least one juror in this trial likely believed that the mitigating circumstances outweighed the aggravating circumstances. The nonunanimous vote is also consistent with the possibility that that juror may have believed the two aggravators in the Burnham homicide (neither of which were HAC or CCP) were insufficient to justify a death sentence. It is also consistent with the possibility that that juror (potentially along with other jurors) may have believed that the contested (see 26/2101-2104) "cold, calculated, and premeditated" aggravator (which the trial judge found applicable to the Evans and Beasley homicides) was not proven beyond a reasonable doubt. It is also consistent with the possibility that that juror (potentially along with other jurors) may have reached a different conclusion than the judge did with regard to the significance and weight of the mental mitigators and the drug intoxication evidence.

If the jury had been charged with making unanimous findings (as required by the combination of Hurst with existing Florida law regarding unanimous verdicts, as well as - - Johnson asserts - - Sixth and Eighth Amendment unanimity requirements in death penalty cases), it is impossible to do more than speculate what would have occurred, since when jurors are divided the unanimity requirement necessitates further deliberations (as opposed to a one-ballot straw vote). Maybe the majority of the jurors would have persuaded the one dissenter, or maybe he or she would have persuaded some of them. The state will likely speculate that the one voter for life was a rogue or a nullifier, but it is more

likely that he or she was a principled juror who simply evaluated the aggravating and mitigating evidence differently than the other jurors.

In any event, whether under Sullivan or under Chapman and DiGuilio, Paul Johnson's death sentence cannot be upheld on a harmless error theory.

E. Florida Statutes, §775.082(2) Mandates that Johnson be Resentenced to Life Imprisonment

Just as in 1972, when a previous incarnation of Florida's death penalty scheme was declared unconstitutional after Furman v. Georgia 408 U.S. 238 (1972) by Donaldson v. Sack, 265 So.2d 499 (Fla.1972), Florida Statutes §775.082(2) sets forth the maximum (and mandatory) sentence which must now be imposed - life imprisonment. In contrast to the Attorney General's position after Furman[5], the state's current interpretation of §775.082(2) - - that it only applies when the death penalty has been declared per se unconstitutional - - is wrong, since Furman didn't declare "the death penalty" unconstitutional any more than Hurst did. See State v. Dixon, 283 So.2d 1,6 (Fla.1973). See also Woldt v. People, 64 P.3d 256,258-59,262-72 (Colo.2003)(imposing life sentences based on a similar statutory "saving clause").

CONCLUSION - Johnson respectfully requests that this Court reverse his death sentences.

[5] See Anderson v. State, 267 So.2d 8 (Fla.1972); In re Baker, 267 So.2d 331 (Fla.1972).

CERTIFICATE OF SERVICE

I certify that a copy has been emailed to Assistant Attorney General Timothy Freeland, Office of the Attorney General, at capapp@myfloridalegal.com, on this 9th day of February, 2016.

Respectfully submitted,

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