IN THE SUPREME COURT OF FLORIDA

PAUL B. JOHNSON,

Appellant,

v. **Case No. SC14-1175**
Death Penalty Case

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE ADDRESSING HURST V. FLORIDA

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SUMMARY OF THE ARGUMENT

Johnson is not entitled to any relief due to the United States Supreme Court opinion in Hurst v. Florida, ___ U.S. ___, 136 S. Ct. 616 (2016) because his guilt phase jury found him guilty of multiple prior violent felonies. There was no Sixth Amendment error in the imposition of Johnson's death sentences, since a jury undeniably found the facts necessary to enhance his sentence to death.

Johnson's reliance on Section 775.082(2), Florida Statutes, as requiring imposition of life sentences for his murder convictions is misplaced. That statute provides only that life sentences would be imposed if the death penalty itself has been ruled unconstitutional. A plain reading of the statute does not support Johnson's strained interpretation for this case. The United States Supreme Court has not held that death as a penalty violates the Eighth Amendment, but has only stricken Florida's current statutory procedures for implementation. Accordingly, Section 775.082(2) is not applicable.

Johnson's claim of structural error which can never be harmless is easily refuted by United States Supreme Court case law. In this case, any potential Sixth Amendment error would be harmless beyond any reasonable doubt, given the unanimous jury

convictions supporting the prior violent felony aggravating factor. Accordingly, Johnson's death sentences must be affirmed.

ISSUE

BECAUSE JOHNSON HAS MULTIPLE CONVICTIONS FOR PRIOR VIOLENT FELONIES, THE UNITED STATES SUPREME COURT OPINION IN HURST V. FLORIDA DOES NOT APPLY

Johnson has filed a Supplemental Brief asserting that his death sentences should be stricken, and he should be resentenced to life in prison, due to the recent opinion in Hurst v. Florida, 136 S. Ct. 616 (2016). For the following reasons, Johnson's argument must be rejected, and the death sentences imposed in this case must be affirmed.

Johnson asserts that Florida's law is facially invalid because Hurst requires that a jury enter specific, written factual findings to support the imposition of any death sentence. Johnson submits that Hurst determined that eligibility for the death penalty does not occur in Florida until the judge makes the ultimate determination that sufficient aggravating factors outweigh the mitigating factors to justify a sentence of death. Johnson also asserts that because Hurst concluded that the statute is facially invalid, he is entitled to be resentenced to life in accordance with Section 775.082(2), Florida Statutes, because the death penalty statute cannot be severed or re-written so as to render it constitutional.

Putting aside Johnson's unsupported implication that Hurst has now recognized a right to jury sentencing, it is clear that Hurst did not determine capital sentencing to be unconstitutional; Hurst only invalidated Florida's procedures for implementation, finding that they facially could result in a Sixth Amendment violation if the judge makes factual findings which are not supported by a jury verdict. Therefore, Section 775.082(2) does not apply, by its own terms. That section provides that life sentences *without parole*[1] are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional," and was enacted following Furman v. Georgia, 408 U.S. 238 (1972), in order to fully protect society in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional, such as thereafter occurred in Coker v. Georgia, 433 U.S. 584 (1977), where the United States Supreme Court held that capital punishment was not available for the capital felony of raping an adult woman.

Although Johnson suggests that this Court used similar language to require the commutation of all death sentences to life following Furman in Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972) (Supplemental Brief, p. 25), Johnson is misreading and oversimplifying the Donaldson decision. Donaldson is not a case of

[1] Inmates convicted of capital crimes were otherwise eligible for parole pursuant to Section 947.16(1), Florida Statutes.

statutory construction, but one of jurisdiction. Based on our state constitution in 1972, which vested jurisdiction of capital cases in circuit courts rather than the criminal courts of record, Donaldson held that circuit courts no longer maintained jurisdiction over capital cases since there was no longer a valid capital sentencing statute to apply; no "capital" cases existed, since the definition of capital referred to those cases where capital punishment was an optional penalty. Donaldson observes the new statute (§ 775.082(2)) was conditioned on the invalidation of the death penalty, but clarifies, "[t]his provision is not before us for review and we touch on it only because of its materiality in considering the entire matter." Donaldson, 265 So. 2d at 505.

The focus and primary impact of the Donaldson decision was on those cases which were pending for prosecution at the time Furman was released. Donaldson does not purport to resolve issues with regard to pipeline cases pending before the Court on direct appeal, or to cases that were already final at the time Furman was decided. This Court's determination to remand all pending death penalty cases for imposition of life sentences in light of Furman is discussed in Anderson v. State, 267 So. 2d 8 (Fla. 1972), a case which explains that, following Furman, the Attorney General filed a motion requesting that this Court relinquish jurisdiction to the respective circuit courts for resentencing to life, taking

the position that the death sentences that were imposed were illegal sentences. There is no legal reasoning or analysis to explain why commutation of 40 sentences was required, but it is interesting to observe that this was before the time that either this Court or the United States Supreme Court had determined the current rules for retroactivity, as Teague v. Lane, 489 U.S. 288 (1989), and Witt v. State, 387 So. 2d 922 (1980), were both decided later.

At any rate, there are several cogent reasons for this Court to reject the blanket approach of commuting all capital sentences currently pending before this Court on direct appeal such as followed the Furman decision. Furman was a decision that invalidated all death penalty statutes in the country, with the United States Supreme Court offering nine separate opinions that left many courts "not yet certain what rule of law, if any, was announced." Donaldson, 265 So. 2d at 506 (Roberts, C.J., concurring specially). The Court held that the death penalty as imposed for murder and for rape constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The various separate opinions provided little guidance on what procedures might be necessary in order to satisfy the constitutional issues, and whether a constitutional scheme would be possible.

Hurst, on the other hand, is a specific ruling to extend the Sixth Amendment protections first identified in Ring to Florida cases. Johnson contends that the United States Supreme Court has determined that a defendant is not eligible for the death penalty under our sentencing scheme until the trial court enters written findings, concluding that sufficient aggravating circumstances outweigh the mitigating circumstances that apply (Supplemental Brief, p. 9). While the language quoted in Johnson's brief seems to support the position that the Hurst Court has misinterpreted Florida's law as to eligibility, other language in the opinion appears to limit the required jury factfinding to the existence of one aggravating factor. For example, it is telling that Hurst does not expressly disturb Proffitt v. Florida, 428 U.S. 242 (1976), and only explicitly overrules Spaziano v. Florida, 468 U.S. 447 (1984) and Hildwin v. Florida, 490 U.S. 638 (1989), "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of the jury's factfinding, that is necessary for imposition of the death penalty." Hurst, 136 S. Ct at 624.

By equating Hurst with Furman, Johnson reads Hurst far too broadly. Unlike Johnson, Hurst had no prior violent felony convictions. See Hurst v. State, 819 So. 2d 689 (Fla. 2002), footnote 3. Following release of the Hurst opinion, the United States Supreme Court denied certiorari review of two direct appeal

decisions, leaving intact this Court's denial of any Sixth Amendment error; both cases had sentences supported by prior violent felony convictions. See Fletcher v. State, 168 So. 3d 186 (Fla. 2015), cert. denied, 2016 WL 280859 (Jan. 25, 2016); Smith v. State, 170 So. 3d 745 (Fla. 2015), cert. denied, 2016 WL 280862 (Jan. 25, 2016). After Furman, there were no existing capital cases left intact. After Hurst, the United States Supreme Court has provided no express reason to disturb any capital sentence supported by prior convictions. The remedy for death row prisoners provided by Furman has not been extended to current death row inmates by Hurst, nor does it apply to pipeline defendants whose death sentences are supported by a prior violent felony conviction.

Johnson's interpretation of Hurst improperly conflates a jury determination of facts necessary to impose a sentence of death with proportionality; the former, addressed in Hurst, determines the range of the permissible sentence. The latter addresses propriety and fairness of a death sentence, and has nothing to with the factual determinations necessary to support a death sentence. See, e.g., Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). "It is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital

cases. It is not a comparison between the number of aggravating and mitigating circumstances."

This Court's proportionality review has existed separate and apart from any Federal constitutional requirement and is not addressed or even implicated by Hurst. Indeed, the United States Supreme Court has held that proportionality review is not required for a capital sentencing scheme to be deemed constitutional. Pulley v. Harris, 465 U.S. 37, 44-45 (1984). As was argued in the State's Answer Brief, the facts of Johnson's case easily survive proportionality review; further, as will be argued *infra*, the fact that Johnson's guilt phase jury found him guilty of multiple contemporaneous violent felonies excludes him from any possible benefit afforded by Hurst.

Johnson's claim that the trial court had no authority to weigh the relative merits of the aggravators and mitigators presented in his case is inconsistent with the recent United States Supreme Court decision in Kansas v. Carr, 136 S. Ct. 633 (2016), decided just over a week after Hurst. In Hurst, the United States Supreme Court acknowledged that the holding of Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), concerned the factual findings necessary to make a defendant eligible for a sentence that was greater than that authorized by the jury's verdict.

In Apprendi, the United States Supreme Court examined whether the Sixth Amendment required a jury finding of a fact necessary to the imposition of a sentence that exceeded the statutory maximum for the offense of which he was convicted. The Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. At the time, the Court rejected the assertion that this holding would invalidate state capital sentence schemes based on the belief that once a jury had found a defendant guilty of a capital offense, the statutory maximum for the crime was death. Id. at 497 & n.21. Thus, the Court's focus was on facts that made a defendant eligible for a sentence and not *all* findings that influenced the selection of a sentence.

Two years later, the Court addressed the implications of Apprendi for Arizona's capital sentence scheme based on the Arizona Supreme Court's holding that the United States Supreme Court had misunderstood how Arizona's capital sentence scheme worked and that an Arizona defendant was not eligible for a death sentence until an aggravator was found at the penalty phase. Ring, 584 U.S. at 595-96. Because Arizona had no jury involved in the penalty phase at all, the Court determined that Arizona's capital sentencing scheme was unconstitutional "to the extent that it

allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Id. at 609. However, the Court did not alter the fact that the focus of this type of Sixth Amendment claim was on eligibility, not selection. In fact, the Court expressly noted that the claim being presented in that case was limited to an eligibility finding. Id. at 597 & n.4.

While the Court has altered the portion of the holding of Apprendi to cover findings that increase the sentencing range to which a defendant is exposed even if they did not change the statutory maximum, it has not changed the focus from findings that authorize a defendant to receive a sentencing enhancement. Alleyne v. United States, 133 S. Ct. 2151, 2155, 2158 (2013) (applying Apprendi to factual findings necessary to impose a minimum mandatory term); Southern Union Co. v. United States, 132 S. Ct. 2344 (2012) (applying Apprendi to factual findings that increased the amount of a criminal fine); Cunningham v. California, 549 U.S. 270 (2007) (applying Apprendi to factual findings necessary to increase a sentence to an "upper limit" sentence); Blakely v. Washington, 542 U.S. 296, 303-05 (2004) (applying Apprendi to factual finding necessary to impose a sentence above the "standard" sentencing range even though the sentence was below the statutory maximum).

In fact, the Court recently reaffirmed that the Sixth Amendment right underlying Ring and Apprendi did not apply to factual findings made in selecting a sentence for a defendant after the defendant has been found eligible to receive a sentence within a particular range. Alleyne, 133 S. Ct. at 2161 n.2 ("Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty. Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.' Williams v. New York, 337 U.S. 241, 246, 69 S. Ct. 1079 (1949). While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing."); see also United States v. O'Brien, 560 U.S. 218, 224 (2010) (recognizing that Apprendi does not apply to sentencing factors that merely guide sentencing discretion without increasing the applicable range of punishment to which a defendant is eligible).

Moreover, in Kansas v. Carr, 136 S. Ct. 633 (2016), the Court discussed the distinct determinations of eligibility and selection under a capital sentencing scheme. In doing so, the Court stated that an eligibility determination was limited to findings related

to aggravating circumstances and that determinations regarding whether mitigating circumstances existed and the weighing process were selection determinations. In fact, the Court stated that such determinations were not factual findings at all. Instead, the Court termed the determinations regarding the existence of mitigating circumstances as "judgment call[s]" and weighing determinations "question[s] of mercy." Id. Specifically, the Court stated:

> Approaching the question in the abstract, and without reference to our capital-sentencing case law, we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination (**the so-called "selection phase" of a capital-sentencing proceeding**). It is possible to do so for the aggravating-factor determination **(the so-called "eligibility phase")**, because that is a purely factual determination. The facts justifying death set forth in the Kansas statute either did or did not exist—and one can require the finding that they did exist to be made beyond a reasonable doubt. Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it. It would be possible, of course, to instruct the jury that the facts establishing mitigating circumstances need only be proved by a preponderance, leaving the judgment whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof. If we were to hold that the Constitution requires the mitigating-factor determination to be divided into its factual component and its judgmental component, and the former to be accorded a burden-of-proof instruction, we

> doubt whether that would produce anything but jury confusion. In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.
>
> Kansas v. Carr, 136 S. Ct. 633, 642 (2016) (emphasis added)

Thus, Carr addresses and resolves Johnson's argument that weighing must be left to the jury because it is indistinguishable from the fact-finding process itself. They are not the same. Especially under the facts of Johnson's case, where there is a jury finding of a prior violent felony rendering him eligible for a death sentence, the Florida law which required the sentencing judge to weigh aggravators against mitigators before imposing sentence is not implicated by Hurst.

In Florida, enhancement to include the possibility of a death sentence is authorized once the existence of one aggravating factor has been established. State v. Steele, 921 So. 2d 538, 543 (Fla. 2005) ("To obtain a death sentence, the State *must* prove beyond a reasonable doubt at least one aggravating circumstance"). Death is presumptively the appropriate sentence. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). As sentencing enhancement is a matter of state law, this Court's determination controls. Ring, 536 U.S. at 603 ("the Arizona court's construction of the State's own law is authoritative").

Accordingly, Johnson's argument that Hurst requires juries to find as a matter of fact that there are sufficient aggravating circumstances to outweigh the applicable mitigating circumstances is without merit. Hurst specifies that constitutional error occurs when a trial judge "alone" finds the existence of "an aggravating circumstance." Hurst, at 622. This Sixth Amendment error is necessarily one that can be avoided or prevented with the requirement of specific jury findings to support enhancement. While Johnson argues at length that this Court cannot re-write or sever the substantive statute, he misses the point that Hurst is a procedural ruling, and therefore a remedy is within the scope of ameliorative measures available to this Court.

Because the death penalty has not been constitutionally prohibited as a possible punishment in Hurst, Section 775.082(2) does not mandate a blanket commutation of death sentences as Johnson requests. This is especially true in light of this Court's inherent authority to fashion remedies "when confronted with new constitutional problems to which the Legislature has not yet responded." Galindez v. State, 955 So. 2d 517, 527 (Fla. 2007) (Cantero, J., concurring). See also In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So. 2d 1130, 1133 (Fla. 1990) (acknowledging "the inherent power of courts ... to afford us the remedy necessary for the protection

of rights of indigent defendants," but warning that courts may not "ignore the existing statutory mechanism"). This Court has recognized that where a portion of a statute is deemed unconstitutional, the remainder may be salvaged. The essential test for doing so is to determine whether the "bad features" can be separated out without offending legislative intent. See Cramp v. Board of Public Instruction, 137 So. 2d 828, 830 (Fla. 1962).

As pointed out by Appellant, Hurst affects the procedural portions of section 921.142 (Supplemental Brief, p. 4). This Court has the inherent authority to fashion a procedure that is both constitutional and consistent with the legislature's intent. See also Waldrup v. Dugger, 562 So. 2d 687, 693 (Fla. 1990) (holding that amendment to prison gain time statute could be excised out without destroying legislative intent). While a court certainly cannot re-write a substantive statute in order to render it constitutional, there is no impediment to a court salvaging a condemned statute through the adoption of procedural rules that satisfy any constitutional deficits that have been found.

Contrary to Johnson's argument, the practice in other states does not suggest that commutation of all non-final death sentences in Florida is necessary under Hurst. Appellant's reliance on the Colorado Supreme Court's decision to remand two pending pipeline cases for imposition of life sentences without parole under a

similar Colorado statute is misplaced. First of all, the Colorado statute at issue is not identical to the Florida statute, as it is not triggered by a finding that "the death penalty" is unconstitutional, but specifies that, in the event the death penalty "as provided for in this section," is found to be unconstitutional, life sentences are mandated. Woldt v. People, 64 P.3d 256, 259 (Colo. 2003). In addition, the Colorado Supreme Court was following its own death penalty jurisprudence and interpreting a Colorado death sentencing statute which initially required jury sentencing. Colorado amended its law in 1995 following Walton v. Arizona, 497 U.S. 639 (1990) to employ a three-judge panel to make both enhancement and selection determinations, but then returned to pure jury sentencing in 2003 following Ring. Defendants Woldt and Martinez were found eligible and sentenced by three-judge panels following the 1995 amendment, and the Colorado Supreme Court held that their sentences violated the Sixth Amendment. The impact of that conclusion, with the resulting remand for imposition of life sentences, was based on rules of statutory construction that required the Court to decide between two competing and conflicting statutes.

In Arizona, the Arizona Supreme Court rejected blanket commutation, finding that the unconstitutional portion of the statute could be severed to preserve pending death cases. State v.

Pandeli, 161 P.3d 557 (Ariz. 2007). This is the approach this Court should take. This Court has repeatedly recognized its obligation to uphold any portion of the statute, to the extent there is a reasonable basis for doing so, based on the rule favoring validity. Donaldson, 265 So. 2d at 501, 502-03; Driver v. Van Cott, 257 So. 2d 541 (Fla. 1972); Davis v. State, 146 So. 2d 892 (Fla. 1962).

There is no reading of Hurst which suggests that a Sixth Amendment violation necessarily occurs in every case when the statute is followed. In considering whether a new sentencing proceeding may be required by Hurst in a pending pipeline case, this Court needs to determine whether Sixth Amendment error occurred on the facts of that particular case; that is, whether a jury factfinding to support enhancement is available in the record, such as a prior or contemporaneous conviction. There is no need to re-write the statute or sever the offending portion permitting judicial factfinding, since the Sixth Amendment may have been satisfied on the facts of a particular case. If there was a Sixth Amendment violation, the question shifts to the impact of that error, and whether any prejudice to the defendant may have occurred. With this approach, this Court is respecting those death sentences which can be salvaged upon finding that any potential constitutional error was harmless, while protecting the Sixth

Amendment rights of all defendants. Accordingly, this Court should reject Johnson's plea to remand this case for entry of a sentence of life imprisonment pursuant to Section 775.082(2), Florida Statutes.

Johnson claims that Sixth Amendment error occurred in his case, and alleges that such error is necessarily "structural," and not amenable to a harmless error analysis, due to the flawed statutory scheme placing the obligation for factfinding with the judge rather than the jury. He argues that his death sentences are unconstitutional, but to his credit acknowledges that the jury's factfinding as to a single aggravator may be sufficient (Supplemental Brief p. 18). On the facts of this case, jury factfinding for Johnson's sentencing enhancement and even for his selection for the death penalty is well established in the record.

First, the prior conviction exception to the Sixth Amendment findings required by Apprendi and Ring has not been disturbed in Hurst. Ring itself recognizes the critical distinction of an enhanced sentence supported by a prior conviction. See Almendarez-Torres v. United States, 523 U.S. 224 (1998) (permitting judge to impose higher sentence based on prior conviction); Ring, 536 U.S. at 598 n.4 (noting Ring does not challenge Almendarez-Torres, "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence");

Alleyne v. United States, 133 S. Ct. 2151, 2160 n.1 (2013) (affirming Almendarez-Torres provides valid exception for prior convictions). As Johnson had multiple contemporaneous murder and violent felony convictions which authorized imposition of a death sentence, all established through unanimous jury verdicts, no Sixth Amendment error has been shown in this case.[2]

Even if further jury findings were required for sentencing, or for all of the relevant facts to support the imposition of a death sentence as argued by Johnson, any error was harmless. The trial judge in this case found the prior conviction aggravating factor which is supported by the unanimous jury verdicts from 1988. The remaining aggravators applied were: avoid arrest (no weight given), the murder of William Evans occurred while committing arson or kidnapping (no weight given), one of the victims was a law enforcement officer (extreme great weight), and CCP (only as to victims Evans and Beasley, assigned very great weight). As has been argued previously, Florida law requires the sentencing judge to impose sentence and requires that the judge weigh the aggravators and mitigators before doing so. It is significant here that Johnson advanced no argument below contesting the fact that T.A. Burnham was a law enforcement

[2] Johnson was found guilty in his 1988 guilt phase trial of three counts of capital murder, two counts of attempted first degree murder, two counts of robbery with a firearm, one count of kidnapping, and one count of arson (R. 993-1004).

officer, but did argue in opposition to the CCP aggravator. As the sentencing enhancement applied in Johnson's case was established by the jury's unanimous prior violent felony verdicts, the trial judge here properly followed state law.

Finally, even if a jury must ultimately find that death is the appropriate sentence, Johnson's jury was able to reach that conclusion. By voting 11-1 to recommend the death sentence, a majority of the jury necessarily had to find, consistent with their instructions, that the applicable aggravating factors outweighed the mitigation which existed.

Even if some Sixth Amendment violation could be discerned on these facts, United States Supreme Court case law clearly demonstrates that it was harmless beyond any reasonable doubt. Johnson's claim of structural error is refuted by Neder v. United States, 527 U.S. 1 (1999), where the Court rejected the argument that a conviction returned after one element of the offense was mistakenly not submitted to the jury for consideration presented a case of structural error. Neder explains why Johnson's reliance on Sullivan v. Louisiana, 508 U.S. 275 (1993), is misplaced. Although Sullivan found that constitutional error which prevented a jury from returning a "complete verdict" could not be harmless, the Court reviewed the relevant decisions in Neder and determined that

reversal was not required where the evidence of the omitted element was overwhelming and uncontested. Neder, 527 U.S. at 19.

The determination that deficient factfinding under the Sixth Amendment can be harmless is cemented by Washington v. Recuenco, 548 U.S. 212 (2006), where the United States Supreme Court reversed a Washington state court holding that error under Blakely v. Washington, 542 U.S. 296 (2004), was structural in nature and could never be harmless. Blakely is an Apprendi/Ring decision which requires jury factfinding where a sentence is to be enhanced due to the defendant's use of a firearm. Of course, the United States Supreme Court remanded Hurst itself to this Court for determination of harmlessness, noting that "[t]his Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here." Hurst, 136 S. Ct at 624.

This Court has been consistent in finding that deficient jury factfinding, in violation of the Sixth Amendment, can be and often is harmless beyond any reasonable doubt. Galindez v. State, 955 So. 2d 517, 521-23 (Fla. 2007); Johnson v. State, 994 So. 2d 960, 964-65 (Fla. 2008); see Pena v. State, 901 So. 2d 781, 783 (Fla. 2005) (failure to instruct jury on age requirement was not fundamental error).

In this case, Johnson killed three people, one of them a law enforcement officer. Evidence adduced below showed that Johnson deliberately set out on a robbery spree to get money for more drugs. His first victim, Mr. Evans the cab driver, was shot in the eye at point blank range, execution-style after he robbed and kidnapped him; Johnson hid Evans' cab in an orange grove and set it on fire. Mr. Beasley was robbed and killed after Johnson asked him for help and persuaded Beasley to drive to a remote area. Officer Burnham was killed when he responded to the report of Beasley's robbery. Johnson was convicted of these offenses in 1988, and this Court affirmed those convictions. Johnson v. State, 608 So. 2d 4 (Fla. 1992).

These facts overwhelmingly demand imposition of the death penalty in this case. No reasonable factfinder could disagree with the weighing decision eloquently outlined in the trial court's sentencing order. No possible constitutional error prejudiced Johnson on these facts. Accordingly, his death sentences should be upheld.

CONCLUSION

WHEREFORE, the State requests that this Honorable Court affirm the judgments and sentences imposed below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of February, 2016, I electronically filed the foregoing with the Clerk of the Court by using the E-filing Portal which will send a notice of electronic filing to the following: Steven L. Bolotin and John C. Fisher, Assistant Public Defenders, Office of the Public Defender, Tenth Judicial Circuit, Post Office Box 9000-Drawer PD, Bartow, Florida 33831-9000, **appealfilings@pd10.org**, **sbolotin@pd10.org**, [and] **mlinton@pd10.org**.

/s/ Timothy A. Freeland
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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Timothy A. Freeland
COUNSEL FOR APPELLEE