IN THE SUPREME COURT OF FLORIDA

DONTAE MORRIS,	:	
Petitioner,	:	
vs.	:	Case No. SC14-1317
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

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

INITIAL SUPPLEMENTAL CAPITAL BRIEF OF APPELLANT ADDRESSING *HURST V. FLORIDA*

HOWARD L. "REX" DIMMIG, II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

CYNTHIA J. DODGE
Assistant Public Defender
FLORIDA BAR NUMBER 0345172

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200
appealfilings@pd10.org
mlinton@pd10.org
cdodge@pd10.org

ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Appellant was convicted of the first-degree murders of Officers David Curtis and Jeffrey Kocab with a firearm and sentenced to death for both offenses.

On June 13, 2013, Appellant filed a motion to declare Florida's capital sentencing statute unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under Art. I, §§ 2, 9, 15(a), 16, 17, and 22 of the Florida Constitution. (5:929-48) Appellant specifically argued Florida's death penalty was unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002). Id. The court denied the motion by written order filed on October 4, 2013. (6:R1105-1106)

The penalty phase was held on November 19, 2013, (Vols. 33-34), during which he court instructed the jury:

> Members of the jury, it is now your duty to advise the Court as to the punishment that should be imposed upon Dontae R. Morris for the crime of first-degree murder as to each count. You must follow the law that I will now give you and render an advisory sentence as to each count based on your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist.

(34:R2664)

Three aggravating circumstances were presented to the jury: 1) the existence of a previous conviction of another capital

felony or a felony involving the use or threat of use of force to the person; 2) that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape; 3) that the victim in the capital felony was a law enforcement officer engaged in the performance of his official duties. (34:T2670-72) The jury recommended a sentence of death for both murders by a vote of 12 to 0. (8:R1504-1506; 34:T2689-90)

Mr. Morris presented mental mitigation evidence at a Spencer hearing on March 13-14, 2014. (36:T2715-47) Dr. Valerie McClain who testified that Mr. Morris' intellectual functioning was in the borderline to low range. (36:T2724-31) The State presented Dr. Emily Lazarou, who opined that Mr. Morris' I.Q. was between 100 and 110. (37:T2783)

The court found that the State proved the three aggravating circumstances beyond a reasonable doubt, but refused to consider the aggravator that the capital felony was committed for the purpose of avoiding arrest because it was based on the same evidence and merged with the aggravating circumstance that the victims were law enforcement officers. (9:R1605-1607) The court accorded the two remaining aggravators "great weight." Id. The court also accorded the jury recommendation "great weight." (9:R1607) The court found twenty-two mitigating circumstances were proven by a preponderance of evidence. (9:T1610-19)

SUMMARY OF THE ARGUMENT

In Hurst, the Supreme Court declared that the process employed by the State of Florida to determine death eligibility is unconstitutional. In response to Furman v. Georgia, Florida law requires detailed written findings of fact of both aggravating and mitigating circumstances, along with a specific finding of fact that there are "insufficient mitigating circumstances to outweigh the aggravating circumstances." Because, under Hurst and Ring, those factual findings are necessary in order for a defendant to be death eligible, they must be found by a jury and not by a judge.

Florida's death penalty statutes are facially unconstitutional for the same reasons that Florida's death penalty was unconstitutional in Furman – because the process did not comply with constitutional requirements. Therefore, section 775.082(2) applies, and Appellant must be resentenced to life imprisonment.

This Court should not apply a "per se" harmlessness rule because the existence of a prior violent felony/capital felony aggravator does not mandate a death sentence under either the statutes or case law. The error is "structural error" because factfinding is vested in the wrong entity. Therefore, there is nothing upon which a harmless error analysis can be conducted.

ARGUMENT

ISSUE

THE DECISION OF THE SUPREME COURT IN HURST DECLARING FLORIDA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL MANDATES THAT APPELLANT'S SENTENCE BE COMMUTED TO LIFE IMPRISONMENT.

On January 12, 2016, the United States Supreme Court decided in Hurst v. Florida, ___ U.S. ___, 2016 WL 112683 (January 12, 2016) (Case No. 14-7505), by an eight to one vote, that Florida's capital sentencing scheme is unconstitutional because the Sixth Amendment requires Florida to base a death sentence on a jury verdict, and not an advisory recommendation. Hurst requires the jury, and not the judge, "to find each fact necessary to impose a sentence of death." Hurst, 2016 WL 112683 at *3. The Court held that "a jury's mere recommendation is not enough." Id. Hurst holds that "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." Hurst, 2016 WL 112683 at *9.

In this case, the court clearly instructed the jury that its role was strictly advisory. The court also told the jury that the final decision as to which punishment shall be imposed was "a responsibility of the judge." Pursuant to those instructions, the jury issued a non-binding recommendation which contained no special verdict identifying any single aggravating or mitigating circumstance found. Instead, it was the trial judge, and not the

jury, who made the findings necessary under Florida law to sentence Appellant to death.

I. Florida's death penalty statute is unconstitutional on its face; therefore, section 775.082(2) requires that Appellant be resentenced to life imprisonment.

A. In light of Hurst, section 921.141, Florida Statutes, is unconstitutional on its face; this Court cannot re-interpret the unambiguous requirement of fact-finding by the judge.

Just as Furman v. Georgia, 408 U.S. 238 (1972), rendered Florida's death penalty scheme facially unconstitutional, Hurst rendered sections 921.141 and 775.082(1)(a) facially unconstitutional.

A conviction for first-degree murder does not make a defendant death eligible in Florida; findings by the judge on all of the criteria in section 921.141(3) make a defendant "death eligible." See Hurst, 2016 WL 112683 at *6 (stating that "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").

In Ring v. Arizona, 536 U.S. 584 (2002), the Court stated: "Capital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Id. at 589. "[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives

— whether the statute calls them elements of the offense, sentencing factors, or Mary Jane — must be found by the jury beyond a reasonable doubt." Ring, 536 U.S. at 610 (Justice Scalia concurring). Therefore, under Ring the entire process outlined in section 921.141(3) is a "factual" determination essential to the imposition of the maximum sentence.

In Hurst the Court specifically noted that in Florida a defendant does not become "death eligible" until the required findings are complete. In rejecting the State's argument that the death sentence should be affirmed because the jury's death recommendation necessarily included a finding of at least one aggravating circumstance that would make Hurst death eligible, Hurst explained:

> 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).

Hurst, 2016 WL 112683 at *6 (citation omitted).

Before a defendant is death eligible, the legislature requires specific and detailed factual findings regarding both aggravating and mitigating factors, and a separate factual finding regarding whether the mitigators outweigh the aggravators. Section 921.141(3) states, "but if the court imposes a sentence of death,

it shall set forth in writing its **findings** upon which the sentence of death is based ***as to the facts***: (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances . . . ."[1] (Emphasis added.) In other words, the Legislature has determined that the weighing process itself is a "fact" to be determined by the judge.

Other states have interpreted the weighing required by their statutes to constitute an eligibility "fact" which the jury must find under the Sixth Amendment. See Woldt v. People, 64 P.3d 256, 265 (Colo. 2003); State v. Whitfield, 107 S.W.3d 253, 261-63 (Mo. 2003); State v. Rizzo, 833 A.2d 363, 409-410 (Conn. 2003).[2]

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[1] Specifically, in this case, the trial judge found that "sufficient aggravating circumstances proved beyond a reasonable doubt exist to support and warrant the recommendations of and imposition of the death sentence" and concluded that "the mitigating circumstances established by the preponderance of the evidence do not outweigh the aggravating circumstances proved beyond a reasonable doubt." (9:R1621; 39:T2840)

[2]In contrast, in Nunnery v. State, 263 P.3d 235, 250-54 (Nev. 2011), the Nevada Supreme Court found that under its death penalty statute, the weighing determination was not one of fact because the statute required the verdict merely to "state" that there are "no mitigating circumstances sufficient to outweigh the aggravating circumstance[s]." See id. at 252 (referencing NRS 175.554 and NRS 200.030(4)(a)).

In Nunnery, the court was faced with the issue of whether the Sixth Amendment and Ring required that the jury be instructed that the aggravators had to outweigh the mitigators "beyond a reasonable doubt." It was not determining the issue before this Court. Nunnery held that the actual weighing function of the jury was not a fact-finding function, and therefore, not subject to beyond a reasonable doubt standard under the Sixth Amendment. In coming to that decision, the court specifically noted that Nevada law required the finding of "at least one" aggravating circumstance. Id. at 251. In addition, the court concluded that

Florida law also specifically requires factual findings regarding mitigating circumstances: "In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written ***findings of fact*** based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings." § 921.141(3), Fla. Stat. (emphasis added). (Subsection (6), referenced in subsection (3), refers to "mitigating circumstances." See § 921.141(6).) Section 775.082(1)(a), also requires findings of fact on all three criteria because it states "a person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 **results in findings** by the court that such person shall be punished by death . . . ." (Emphasis added.)

In other words, it is the combined "critical findings" of section 921.141(3) that are necessary in order to make a defendant death eligible -- the existence of one or more aggravating factors cannot make a defendant death eligible.[3] See Hurst, 2016 WL 112683

(..continued)
verdicts regarding mitigators were required by law because they were "factual determinations." Id. (clarifying and overruling Johnson v. State, 59 P.3d 450 (Nev. 2002)). Furthermore, in Nunnery, unlike in this case, there was a unanimous jury verdict finding that six aggravating circumstances were proven. In addition one of more jurors found that 11 mitigating circumstances existed.

[3] Maryland has found that the weighing process is not one of fact requiring that the jury find "beyond a reasonable doubt" that the aggravation outweighs the mitigating factors. See Oken v. State, 835, A.2d 1105 (Md. Ct. App. 2003). However, in Maryland, if the jury fails to find "one or more aggravating circumstances exist,"

at *5 ("Like Arizona at the time of Ring, Florida does not require the jury to make the **critical findings** necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3)."). (Emphasis added).

In Hurst, the Supreme Court found this sentencing scheme to be unconstitutional. See Hurst at *3 ("We hold this sentencing scheme unconstitutional."). It did not find that the sentencing scheme was unconstitutional "as applied" to Hurst. Although jury sentencing is not constitutionally required (see Proffitt v. Florida, 428 U.S. 242, 252 (1976)), because the jury recommendation in this case contains none of the required fact-finding underpinning the judge's sentence, Appellant's death sentence under 921.141 is unconstitutional.

B. The statute is unconstitutional on its face; this Court cannot excise the unconstitutional part of the statute or re-write the statute to make it constitutional.

The unconstitutional part of the statute cannot be severed from Florida's death penalty statute without rendering the statute meaningless. If the roles of the judge and the advisory

(..continued)
the process stops, the defendant is not death eligible, and no mitigation is presented or considered. See id. at 1117 (citing Maryland Code, Art. 27 § 413). In addition, the state's first-degree murder statute encompassed death as a penalty. Therefore, the weighing process could not possibly result in a sentence that exceeds that provided for the crime. It should also be noted that Maryland requires unanimous written jury findings as to both aggravating and mitigating circumstances, and a unanimous finding that the aggravation outweighs the mitigation.

jury are eliminated from sections 921.141(2) and (3), the statute would contain nothing but a meaningless list of aggravating and mitigating circumstances and a requirement of a penalty phase with no purpose.

Also, this Court cannot re-write an unambiguous statute to make it constitutional. See Richardson v. Richardson, 766 So. 2d 1036, 1040-41 (Fla. 2000); State v. Egan, 287 So. 2d 1, 7 (Fla. 1973) ("Under our constitutional system of government, however, courts cannot legislate."); State v. Cronin, 774 So. 2d 871, 875-75 (Fla. 1st DCA 2000), *approved*, 801 So. 2d 94 (Fla. 2001) (declining the State's invitation to re-write § 817.234(8) to include an intent to defraud as an element); Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) ("[C]ourts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." (quoting American Bankers Life Assurance Company of Florida v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968))).

In Richardson, this Court held that the unambiguous language of § 61.13(7) could not be rendered constitutional by severing portions thereof or by applying a narrowing construction. This Court decided that the intent of the Legislature could not be accomplished by severing out the portion of the statute that gave grandparents an equal footing in custody matters when it was in

the best interests of the child. This Court also held that it could not apply a "narrowing construction" to salvage the validity of the statute because the "clear provisions" of the statute "violated a substantive constitutional right." See id. at 1042. This Court noted that a "narrowing construction" was usually limited to statutes which were overbroad. This Court refused to re-write the statute. See id.

By contrast, in Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990) (cited in Richardson), an amendment to the prison gain time statute could be excised out without destroying the intent of the Legislature. In Waldrup, the Court reiterated the test for severability from Cramp v. Board of Public Instruction, 137 So. 2d 828 (Fla. 1962):

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provision, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Id. at 693 (quoting Cramp, 137 So. 2d at 830).

In light of Hurst, it is clear that 921.141 is unconstitutional on its face. With regard to the Cramp criteria, the unconstitutional provisions cannot be separated from the statute, because without the judge as the finder of fact, there

is no jury finding of fact – only a jury recommendation. Second, the Legislature clearly intended detailed written findings of fact regarding both aggravators and mitigators with written details regarding the weighing process. See State v. Dixon, 283 So. 2d 1, 8 (1973), *superseded by statute on other grounds, as stated in* State v. Dene, 533 So. 2d 265, 267 (Fla. 1988) (stating: "The most important safeguard presented in Fla. Stat. s 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed;" and, "The fourth step required by Fla. Stat. s 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court."). Therefore, with regard to the second prong, the Legislative purpose cannot be accomplished in this case if the jury's bald recommendation is substituted for the judge's sentencing order.

With regard to the third Cramp criterion, the "good and bad" features of this statute are inseparable because the jury makes a recommendation that is incorporated into the final factfinding, but is not binding on the judge. For that reason, the third Waldrup criteria cannot be met. Fourth, as explained above, an act complete in itself does not remain after the invalid provisions are stricken.

C. Section 775.082(2), Florida Statutes, requires that Appellant be resentenced to life imprisonment.

In Donaldson v. Sack, 265 So. 2d 499, 505 (Fla. 1972), the Court determined that the 1971 Florida death penalty statutes were unconstitutional because they were inconsistent with the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972). Section 921.141 was enacted in December of 1972 (Ch. 72-724, Laws of Florida) in response to Furman. See Proffitt, 428 U.S. at 247-48 ("In response to Furman v. Georgia, . . . Florida adopted a new capital-sentencing procedure, patterned in large part on the Model Penal Code.").

In Furman the Supreme Court held only that the imposition of the death penalty in the three cases before it was cruel and unusual punishment in violation of the Eighth Amendment, it did not abolish the death penalty. See Dixon, 283 So. 2d at 7 (upholding the constitutionality of § 921.141 and stating that it was not "the mere presence of discretion" but "rather, the quality of discretion and the manner in which it was applied that dictated the rule of law which constitutes Furman v. Georgia"). See also Breedlove v. State, 413 So. 2d 1, 9 (Fla. 1982) ("Both the United States Supreme Court and this Court have found that the death penalty is not per se violative of either the federal or state constitution.") (footnotes omitted).

In other words, it was the ***process*** for imposing the death penalty that rendered Florida's death penalty unconstitutional in Donaldson. Therefore, because Florida's death penalty process has

been declared unconstitutional in Hurst, the statute is unconstitutional for the same reasons as in Donaldson.

Section 775.082(2) provides:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

In Donaldson, this Court interpreted language identical to that contained in section 775.082(2) to require the commutation of all death sentences to life imprisonment.

After Ring, in Woldt, 64 P.3d 256, the Colorado Supreme Court conceded that Colorado's death penalty was unconstitutional on its face because the fact-finding required in the first three steps of its death penalty statute were performed by a three-judge panel. In step one, the panel was required to find at least one statutory aggravating factor. In step two, the panel decided if evidence of mitigating factors existed, and in step three, panel decided whether the mitigating factors outweighed the aggravating factors. (In the fourth step, the panel determined whether the defendant should be sentenced to death.) "Under this sentencing system, steps one, two, and three were prerequisites to a finding by the three-judge panel that a defendant was

eligible for death." Woldt at 265. Those three steps are analogous to Florida's determination of death eligibility. Just as in Woldt, Florida's determination of death eligibility is unconstitutional on its face.

Colorado had a statute similar to Florida's section 775.082(2), which provided:

> In the event the death penalty as provided for in this section is held to be unconstitutional by the Colorado supreme court or the United States supreme court, a person convicted of a crime punishable by death under the laws of this state shall be punished by life imprisonment. In such circumstance, the court which previously sentenced a person to death shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment.

See Woldt, 64 P.3d at 259. Colorado decided that, in light of the statute, the court was required to remand the cases to the trial court for the imposition of a sentence of life without parole.[4]

Because section 921.141 cannot be "saved," the statute is unconstitutional on its face and this Court has no alternative but to apply the unambiguous language of section 775.082(2) and remand Appellant's case to the trial court for a life sentence.

[4] In State v. Pandeli, 161 P.3d 557 (Ariz. 2007), the Arizona Supreme Court held that a similar statute did not require the court to reduce the sentence to life imprisonment on the grounds that the unconstitutional portion of the sentence could be "severed" from the statute. See id. at 573. However, the jury's advisory role and the judge's factfinding role as mandated by section 921.141, Florida Statutes, (found facially unconstitutional in Hurst) are so interwoven in the statute that severance would result in an incomplete and incoherent statute. See Allen v. Butterworth, 756 So. 2d 52, 64-65 (Fla. 2000).

II. A "per se" harmlessness rule is not appropriate in light of the specific legislative requirements of section 921.141, and because the error is "structural" as opposed to "trial error."

A. Aside from the fact that the statute is unconstitutional, this Court should not determine that the error was harmless based solely on the prior violent felony/capital felony aggravator.

Logically, there is no reason to perform a harmless error analysis because this is "structural error", and there is no appropriate factfinding upon which to perform harmless-error review. (See below). Nevertheless, there is nothing in section 921.141 that suggests that a single aggravating circumstance makes a defendant eligible for the death penalty. In fact, Florida law requires a finding of the existence of "sufficient aggravating circumstances," not the existence of one aggravating circumstance. That requirement implies that even in the fact-finding process regarding the aggravating circumstances the fact-finder's discretion is required, and the finding of one aggravator is not determinative of the finding required by section 921.141(3)(a).

Ring did not confront the issue of a prior violent felony aggravator because the issue was not presented to the Court. See Ring, 536 U.S. at 597 n.4. Hurst did not carve out an exception for cases with such an aggravator, nor did Hurst state that Florida's death penalty statute was unconstitutional "as applied" to Hurst's facts. Therefore, in light of Hurst, this Court should not affirm the death sentences in this case based solely on the

existence of a prior violent or contemporaneous capital felony as suggested by Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003) (finding that "the prior violent felony aggravator alone clearly satisfies the mandates of the United States and Florida Constitutions").

Furthermore, Florida is a "weighing state," see Lambrix v. Florida, 520 U.S. 518, 521 (1997). In Woldt, 64 P.3d 256, 263-64, the Colorado Supreme Court explained that after the trier of fact finds at least one aggravating factor in the guilt or penalty phase, "[i]n a weighing state, the trier of fact must weigh the aggravating factors against all the mitigating evidence to determine if the defendant is eligible for death." Id. at 263. Whereas, in a "non-weighing" state, "the finding of one or more aggravating factors automatically makes the defendant eligible for death." Id. See also Brown v. Sanders, 546 U.S. 212 (2006) (discussing "weighing" and "non-weighing" states and holding that because California is a "non-weighing" state, finding two of four aggravating circumstances invalid was harmless).

Because Florida is a "weighing state," if any aggravating factor has found to be invalid (because it has not been specifically found by a jury), a re-weighing of the remaining aggravators and mitigators is required because the impermissible aggravator potentially acted as a "thumb on the scales" during the original weighing. See Sochor v. Florida, 504 U.S. 527, 532 (1992). See also Oken, 835 A.2d at 1123. Therefore, in Florida

the fact of a prior violent felony conviction or a contemporaneous capital conviction cannot automatically compel a death sentence. And, a re-weighing would be impossible for the Court, because Hurst assumes that, under Florida law, mitigating circumstances also require specific jury findings, which were not made in this case.[5]

Nevertheless, this Court has determined that the presence of a single aggravating circumstance does not require or indicate a death sentence. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999) (stating that "death is not indicated in a single-aggravator case where there is substantial mitigation"). This Court has also consistently held that a death sentence is never required. See Cox v. State, 819 So. 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."). See also Fla. Std. Jury Instr. 7.11 ("Regardless of your findings in this respect, you are neither compelled nor required to recommend a sentence of death.").

In his opinion concurring in part and dissenting in part in Duest v. State, 855 So. 2d 33 (Fla. 2003), Justice Anstead disagreed with the Court's "per se harmlessness rule" as to

[5] Because the defendant in Ring did not argue that Arizona's sentencing scheme required the jury to make a factual finding as to mitigating factors, the Supreme Court declined to address the Sixth Amendment issue regarding mitigating circumstances. See Ring, 536 U.S. at 597, n.4.

Apprendi[6] and Ring claims in cases that involve the existence of the prior violent aggravating circumstance. Justice Anstead reasoned that findings regarding second and subsequent aggravating factors, as well as findings regarding mitigating factors and the weighing process, had to be determined by the jury because such findings were an "integral part of Florida's capital sentencing scheme." See id. at 56. Justice Anstead pointed out that on remand from the Supreme Court, the Arizona Supreme Court in State v. Ring, 65 P.3d 915, 942-42 (Ariz. 2003), arrived at the same conclusion based on similar requirements in its state statute.

In this case, the analysis is complicated be the fact the court and the jury did not consider the same factors. In this case the jury was instructed that it could consider whether the murders were committed "for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." (34:T2671) The court did not consider that aggravator, but it gave "great weight" to a jury recommendation that did. Also, the jury did not hear Appellant's mental mitigation at the Spencer hearing. For these reasons, this Court cannot speculate as to what effect the elimination of the law enforcement aggravator, which was not found by the jury and is not exempt from an Apprendi analysis would have had on either factfinder.

B. The error in this case cannot be harmless because there is no jury verdict for the required findings - only a jury recommendation of death; therefore, the constitutional error is "a structural defect in the constitution of the trial mechanism."

The error in this case cannot be subject to harmless error analysis because the error is "a structural defect in the constitution of the trial mechanism" as opposed to a "trial error" made during the presentation of the case to the jury. See Sullivan v. Louisiana, 508 U.S. 275, 281 (1993). Because the process underlying the judge's sentence is fundamentally flawed, and because there are no valid findings of fact to use to conduct a harmless error analysis, this is not a simple matter of the court's failure to submit an element of the offense to the jury. See Neder v. United States, 527 U.S. 1 (1999) (holding that the failure to submit an uncontested element of an offense to a jury may be harmless).

Under Florida law, the jury does not impose a death sentence. Hurst specifically notes that although the jury made an "advisory" recommendation of death, that recommendation is not the equivalent of a specific finding.

> Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues

(..continued)

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

than does a trial judge in Arizona."

Hurst at *5 (citing Walton v. Arizona, 497 U.S. 639, 648 (1990)). Hurst also cites this Court's decision in State v. Steele, 921 So. 2d 538, 546 (Fla. 2005), in which this Court noted, "[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely."

In Hurst, the Court explained why the jury's recommendation cannot substitute for the fact-finding and weighing process conducted by the judge:

> 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.

Hurst at *6.

In Sullivan v. Louisiana, the Supreme Court, in a unanimous opinion authored by Justice Scalia, held that a defective reasonable-doubt instruction could not be harmless error because, in essence, there was "no jury verdict of guilty-beyond-a-

reasonable-doubt," thereby denying Sullivan his Sixth Amendment right to a jury trial.

In Sullivan, there was circumstantial evidence that Sullivan and another perpetrator committed an armed robbery at a bar and that Sullivan was the man who actually murdered the victim. At trial, Sullivan's counsel argued that there was reasonable doubt as to as to both the identity of the murderer and his intent. See id. at 276. The trial judge gave an instruction on reasonable doubt that was "essentially identical" to the one held unconstitutional in Cage v. Louisiana, 498 U.S. 39 (1990). On direct appeal, the Supreme Court of Louisiana held that the error was harmless beyond a reasonable doubt, but remanded for a new sentencing phase for other reasons.

In Sullivan, the Court reasoned that the Sixth Amendment required a jury verdict as to every element, and the Fifth Amendment required a finding of guilty beyond a reasonable doubt. The Court determined that the harmless error standard of Chapman v. California, 386 U.S. 18 (1967), did not apply because that standard recognizes that "certain constitutional errors, no less than other errors, may have been 'harmless' in terms of their effect on the factfinding process at trial." Id. at 279 (citing Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).

The Court found harmless error analysis illogical when applied to Sullivan's trial, writing: "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." Id. at 271 (citing Chapman, 386 U.S. at 24). Justice Scalia concluded that the defective instruction was the equivalent of having no jury verdict of guilt beyond a reasonable doubt whatsoever:

> 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. See Rose v. Clark, 478 U.S. 570, 578, 106 S.Ct. 3101, 3105, 92 L.Ed.2d 460 (1986); id., at 593, 106 S.Ct., at 3114 (BLACKMUN, J., dissenting); Pope v. Illinois, 481 U.S. 497, 509–510, 107 S.Ct. 1918, 1926, 95 L.Ed.2d 439 (1987) (STEVENS, J., dissenting).

Id. at 279-80.

The Court explained that when there is, in effect, no verdict, there can be no subject (verdict) upon which a harmless-error analysis can take place:

> 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 question 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.

Id. at 280.

This case is as compelling as Sullivan because, as explained above, the findings required by Florida law were made by the wrong factfinder. If this Court were to determine that the error was harmless beyond a reasonable doubt, it would be substituting its decision for jury findings that were never made. As explained by Justice Scalia, "[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 judges the defendant guilty.'" Sullivan, at 281 (citing Rose, 478 U.S. at 578). The court wrote:

> Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort, the jury guarantee being a "basic protection" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. [ ] The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

Id. at 281-82 (citations omitted). For the same reasons, denial of an actual jury verdict finding both the aggravating and mitigating circumstances, and a verdict reflecting the weighing of the same, is a structural error that cannot be deemed harmless.

For these reasons, a harmless error analysis should not be conducted.

CONCLUSION

In light of the foregoing, Appellant respectfully requests that this Court vacate his death sentences and remand the case to the trial court for re-sentencing to life imprisonment.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Attorney General's Office at capappTPA@myfloridalegal.com, through the Court's portal, on this 25th day of January, 2016.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

/S/ CYNTHIA J. DODGE

CYNTHIA J. DODGE
Assistant Public Defender
Florida Bar Number 0345172
P. O. Box 9000 - Drawer PD
Bartow, FL 33831
appealfilings@pd10.org
cdodge@pd10.state.org
mlinton@pd10.org

HOWARD L. "REX" DIMMIG, II
Public Defender
Tenth Judicial Circuit
(863) 534-4200

CJD