IN THE SUPREME COURT OF FLORIDA

TIMOTHY LEE HURST,

Appellant,

v. **CASE NO. SC12-1947**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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SUPPLEMENTAL REPLY BRIEF OF APPELLANT

ARGUMENT

The contention that Hurst v. Florida, 136 S. Ct. 136 (2016), requires a jury finding of only one aggravating circumstance to cure the Sixth Amendment defect permeates all of the state's positions. See, e.g., Supplemental Answer Brief at 1, 4, 5, 6, 8, 9, 10, 11. This position confuses what is required for a sentencing scheme to be constitutional under the Eighth Amendment with what is required under the Sixth Amendment. A single aggravating factor is required under the Eighth Amendment to narrow the class of cases that can even be considered for a possible death sentence. See Tuileapa v. California, 512 U.S. 967 (1994); Lowenfield v. Phelps, 485 U.S. 1126 (1988). Under the Sixth Amendment, however, the requirements are different depending on the statutory requirements needed for imposition of

a death sentence. See Ring v. Arizona, 536 U.S. 584, 597 (2002) (In determining what findings exposed Ring to greater punishment than that authorized by guilty verdict, Court looked to Arizona's death penalty statute, which provided that "a death sentence may not legally be imposed...unless at least one aggravating factor is found to exist beyond a reasonable doubt.") In Florida, the statute required that there could be no death sentence imposed unless the factual findings were made that there were sufficient aggravating circumstances not outweighed by the mitigation. s. 921.141(3), Fla. Stat. Recognizing this statutory requirement in Hurst, the United States Supreme Court declared Florida's procedure unconstitutional under the Sixth Amendment because the law required only the judge, not the jury, to make these factual findings. Id. at 622 (2016).

ISSUE I
THIS COURT SHOULD REMAND HURST'S CASE FOR IMPOSITION OF A LIFE SENTENCE PURSUANT TO SECTION 775.082(2), FLORIDA STATUTES.

In his Initial Supplemental Brief, Hurst said that under the rules of statutory construction, section 775.082(2) applies to his situation, and under that statute this Court must remand his case for imposition of a life sentence.

On page 2 of its Supplemental Answer Brief, the state argues that section 775.082(2) does not apply here because "Hurst did not determine capital sentencing to be unconstitutional; Hurst only invalidated Florida's procedures for implementation of a

death sentence," and the term "death penalty" in section 775.082 refers only to the elimination of capital punishment as whole, such as when the United States Supreme Court subsequently held the death penalty unconstitutional for rape. Id.

For this Court, however, the punishment of death and the statute implementing that punishment are the state's "death penalty." Justice Pariente, in her concurring opinion in Bottoson v. Moore, 833 So. 2d 693, 719-20 (Fla. 2002), noted the symbiotic interrelation between the definition of first-degree murder and the procedure for imposing a death sentence authorized by that definition:

> In Florida, section 782.04(1)(a) defines first-degree murder as a capital felony and section 782.04(1)(b) provides that the procedure in section 921.141 shall be followed to determine a sentence of death or life imprisonment. . . . Florida's death statute explicitly cross-references the statutory provisions of section 921.141, which requires additional findings by a judge, not by a jury, as the precondition for imposition of the death penalty.

Furthermore, the entire statute need not be found unconstitutional for section 775.082(2) to apply. In Furman v. Georgia, 408 U.S. 308 (1972), as here, the entire death penalty was not held unconstitutional, merely the process for selecting those who will be subject to that penalty. As this Court said in Donaldson v. Sack, 265 So. 2d 499, 502-03 (Fla. 1972), "[t]he elimination of the death penalty from the statute does not of course destroy the entire statute...the remaining consistent

portions shall be held constitutional if there is any reasonable basis for doing so and of course this clearly exists in these circumstances." The Court then held that the remaining viable penalty of life imprisonment was "consistent with the Legislature's express intent" as provided in section 775.082(2). Id. at 503; see also Anderson v. State, 267 So. 2d 8, 9 (Fla. 1972) (applying same reasoning to pending cases).

On pages 5-6, the state tries to distinguish Woldt v. People, 64 P.3d 256, 259 (Colo. 2003), which found Colorado's version of section 775.082(2) applicable, as being somehow different from Florida's. It fails, as the words used may be a bit different, but certainly the meaning of the Colorado law is the same as Florida's.

This Court should, therefore, find that section 775.082(2) applies in this case and remand for imposition of a life sentence.

ISSUE II
HURST'S SENTENCE MUST BE VACATED BECAUSE THE SIXTH AMENDMENT VIOLATION CANNOT BE DEEMED HARMLESS.

In his Supplemental Initial Brief, Hurst argued that this Court cannot find the errors identified by the United States Supreme Court in Florida's death penalty scheme harmless. In its Supplemental Answer Brief, the state has failed to address the significant, key parts of the Hurst decision, under which the errors cannot be harmless.

On page 8 of the Supplemental Answer Brief, the state says:

> Although Sullivan [v. Louisana, 508 U.S. 275 (1993)] 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.

However true that may be, the error identified in Hurst falls under the influence of Sullivan v. Louisiana, 508 U.S. 275 (1993), because the jury never returned a constitutionally binding verdict. As the Court recognized in Hurst, under Florida law, 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.'" 136 S. Ct. at 622 (emphasis in opinion). The Court also had to overrule Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989), which had held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Hildwin, 490 U.S. at 640-41.

Hence, Hurst's death sentence was based on no jury verdict whatsoever, and the logic of Sullivan, not Neder v. United States, 527 U.S. 1 (1999), or Washington v. Recuenco, 548 U.S. 212 (2006), controls.

If the state's position--that jury factfinding is only required as to a single aggravator--were correct, then Neder

might apply if that aggravator was uncontested or incontestable. Florida, however, is a weighing state, a fact the State has ignored. "[A] weighing state is one in which the legislative narrowing of death-eligible defendants and the individualized sentencing determination are collapsed into a single step and based on an evaluation of the same sentencing factors," while in a nonweighing state, "eligibility and the actual sentence are determined separately." See Jennings v. McDonough, 490 F.3d 1230, 1249 n.14 (11th Cir. 2007)(a federal habeas decision in a Florida capital case); see also Woldt, 64 P.3d 256 at 263 (in a weighing state, the trier of fact must weigh all the aggravating factors found to exist against the mitigating evidence to determine if the defendant is eligible for death).

In a weighing state like Florida, Hurst requires jury findings as to each aggravator relied on by the state, as well as findings as to whether the aggravators are sufficient to warrant death and not outweighed by the mitigators. This being the case, a death sentence imposed without any of the required jury findings is not comparable to a jury instruction that omits an uncontested or incontestable element of an offense, as in Neder, or an uncontested or incontestable noncapital sentence enhancement factor, as in Recuenco. Instead, the rationale of Sullivan controls, as

discussed and explained in the Supplemental Initial Brief at 12-15. As there noted, 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 as to 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.

What other states did post-Ring is instructive. After their death penalty schemes were invalidated in 2002, the state supreme courts of Arizona and Idaho addressed the harmless error question. In State v. Lovelace, 90 P.3d 298 (Idaho 2004), the Idaho Supreme Court analyzed the question under both Neder and Sullivan, not finding them inconsistent. The court concluded that 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 aggravator to the jury could properly be found harmless under Neder. See 90 P.3d at 304. The Idaho court found, however, that the "murder committed in the perpetration of a kidnapping" aggravator was not uncontested in that case, 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. Quoting Justice Scalia, 508 U.S. at 279-80, the Idaho Supreme Court concluded that "'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.

While Arizona did not find Ring error to be structural, its harmless error review was rigorous. Moreover, 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. The Arizona court concluded that "[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); see also State v. Armstrong, 93 P.3d 1076, 1081 (Ariz. 2004). Thus, 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; Armstrong, 93 P.3d at 1081-82; see also State v. Dann, 79 P.3d 58, 61 (Ariz. 2003)(although judge's finding of "multiple murders" aggravator was harmless, reversal nevertheless required because a reasonable jury could have reached a different conclusion regarding the existence and significance of the mitigating circumstances).

On pages 15-16 of its brief, the State argues the error was harmless because the jury was told their recommendation, though merely advisory, had to be given great weight. The state made the same argument before the United States Supreme Court in this case, and that Court rejected it. "A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." Hurst, 136 S. Ct. at 622 (quoting Walton v. Arizona, 497 U.S. 639, 648 (1990)).

For the reasons presented here and in the Supplemental Initial Brief, the structural errors committed in this case cannot be deemed harmless beyond all reasonable doubts.

ISSUE III
THIS COURT CANNOT REMAND FOR A RESENTENING PHASE USING THE REMAINS OF THE UNCONSTITUTIONAL SENTENCING LAW BECAUSE THE UNCONSTITUTIONAL PORTIONS ARE NOT SEVERABLE.

In its Supplemental Answer Brief, the State combined Issues III and IV, and in that section, raised arguments only

as to Issue IV. Hurst takes this as a concession to the points he raised in Issue III.

ISSUE IV
HOUSE BILL 7101 CANNOT BE APPLIED RETROACTIVELY TO HURST'S CASE.

The points the state raises on this issue, that HB 7101 inures to Hurst's benefit, and that it's application to Hurst would not, in any event, violate federal and state ex post facto provisions, are adequately covered in Hurst's Supplemental Initial Brief, and the Amicus Brief of the Florida Center for Capital Representation.

In addition, Hurst points out that HB7101 presents no unequivocal expression that the Legislature intended the law to be applied retroactively. This does not mean the Legislature did not know how to draft such language because in other bills enacted in the 2016 legislative session, it certainly had done so. For example, Chapter 2016-219, which is "An act relating to unclaimed property; amending s. 717.107 F.S.," provides:

> Section 2. The amendments made by this act are remedial in nature and apply retroactively. Fines, penalties, or additional interest, pursuant to chapter 717, Florida Statutes, may not be imposed due to the failure to report and remit an unclaimed life or an endowment insurance policy, a retained asset account, or an annuity contract with a death benefit if any unclaimed life or endowment insurance policy, retained asset account, or annuity contract proceeds are reported and remitted to the Department of Financial Services on or before May 1, 2021.

Section 3. This act shall take effect upon becoming a law.

There is no similar retroactivity language in HB 7101, which simply says that the law, "shall take effect upon becoming a law." HB 7101, section 7. The presumption that laws apply prospectively, Bates v. State, 750 So. 2d 6, 10 (Fla. 1999), controls because prospective application of HB7101 most faithfully adheres to the principle of the separation of powers regarding criminal sentencing, including the Legislature's important role in establishing the appropriate sentence for a criminal offense. See Smith v. State, 537 So. 2d 982, 986-87 (Fla. 1989); Roberts v. State, 559 So. 2d 289, 291 (Fla. 2nd DCA 1990).

ISSUE V
HB 7101 PRESENTS A NUMBER OF CONSTITUTIONAL FLAWS IN ITS APPLICATION ON REMAND.

On pages 27-30, the state presents several objections to the problems Hurst noted in the Supplemental Initial Brief. Hurst will not respond specifically to the state's observations because there remain significant constitutional problems with HB 7101 for which he has neither the time nor space to fully develop and which are not yet ripe for review. As such, his responses to this issue should not preclude him from raising other arguments that may later arise. See Supplemental Initial Brief at 23.

Hurst will clarify, however, several of the points made

in his Initial Supplemental Brief.

The new statute provides for the same qualifying facts for imposition of a death sentence as the previous unconstitutional law. Like the previous statute, the new statute fails to provide for jury findings of these essential facts.

House Bill 7101, Section 921.141(2), provides for a jury recommendation based on whether sufficient aggravating factors exist and whether these factors outweigh the mitigating circumstances. However, there is no requirement for the jury to make factual findings on this determination. This is essentially the same advisory sentence requirement as the previous death penalty law. Although the new statute in section 921.141(2) provides for the jury to find the existing aggravating circumstances by a unanimous vote, this finding requirement does not go far enough. There is no finding requirement on the qualifying fact of whether these aggravating circumstances are sufficient and not outweighed by the mitigation. A non-unanimous jury recommendation based on these considerations is not a jury finding satisfying the Sixth Amendment.

Like the previous unconstitutional law, House Bill 7101, sections 921.141(3) and (4) provide that the judge may impose a death sentence after receiving a jury's recommendation of a

death sentence. If the judge imposes death, a written order is required with the factual findings to support the death sentence. Pursuant to the new statute, Section 921.141(4), the judge's order is to specifically include findings on ".... whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors outweigh the mitigating circumstances...." Just as in the previous death penalty statute, the new statute, again, has the judge as the sentencer and the only fact-finder of the essential qualifying facts to impose death on the defendant.

In addition, Hurst notes that if HB 7101 applies retroactively, significant Double Jeopardy and collateral estoppel issues arise, specifically as to the significance of the 7-5 death recommendation on any new sentencing proceeding. Bullington v. Missouri, 451 U.S. 430 (1981) ("Because the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial."); Wright v. State, 586 So. 2d 1024, 1032 (Fla. 1991)("Under well-settled Florida law, we have held that life imprisonment is the only proper and lawful sentence in a death case when the jury reasonably chooses not to recommend a death sentence.")

CONCLUSION

Based on the arguments presented here and in the Supplemental Initial Brief, Timothy Hurst, respectfully asks this Honorable Court to remand his case to the trial court with instructions that it sentence him to life in prison without the possibility of parole

CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a copy of the foregoing has been furnished electronically to Carine Mitz, Assistant Attorney General, Capital Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, at Capapp@myfloridalegal.com as agreed by the parties, and to appellant, Timothy Hurst, #124669, UCI, 7819 N.W. 228th St., Raiford, FL 32026, on this 14th day of April, 2016.

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

Respectfully submitted,

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