IN THE SUPREME COURT OF FLORIDA

KENNETH JACKSON,	:	
Appellant,	:	
vs.	:	Case No. SC13-1232
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL SUPPLEMENTAL BRIEF OF APPELLANT ADDRESSING HURST V. FLORIDA

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TOPICAL INDEX TO BRIEF

PAGE NO.

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3
ISSUE 3
THE DECISION OF THE UNITED STATES SUPREME COURT IN HURST V. FLORIDA DECLARING FLORIDA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL IS APPLICABLE TO MR. JACKSON. IMPOSITION OF DEATH UNDER FLORIDA'S UNCONSTITUTIONAL STATUTE IS NOT HARMLESS ERROR AND THE ONLY LEGAL REMEDY IS TO REDUCE THE SENTENCE TO LIFE IMPRISONMENT. 3

CONCLUSION 25

CERTIFICATE OF SERVICE 25

TABLE OF CITATIONS

	PAGE NO.
Federal Cases	
Alleyne v. United States, 133 S.Ct. 2151 (2013)	6, 7
Andres v. United States, 333 U.S. 740 (1948)	14
Apodaca v. Oregon, 406 U.S. 404 (1972)	12, 13
Arizona v. Fulminante, 499 U.S. 279 (1991)	17
Bollenbach v. United States, 326 U.S. 607, 66 S.Ct.402, 90 L.Ed. 350 (1946)	16
Burch v. Louisiana, 441 U.S. 130 (1979)	13
Caldwell v. Mississippi, 472 U.S. 320 (1985)	19
Chapman v. California, 386 U.S. 18 (1967)	19, 20
Furman v. Georgia, 408 U.S. 238 (1972)	passim
Hurst v. Florida, 136 S. Ct. 616 (2016)	passim
Johnson v. Louisiana, 406 U.S. 356 (1972)	12, 13
Neder v. United States, 527 U.S. 1 (1999)	14, 15
Parker v. Dugger, 498 U.S. 308 (1991)	8
Rose v. Clark, 478 U.S. 570 (1986)	17

Sullivan v. Louisiana,
508 U.S. 275 (1993) passim

Sumner v. Shuman,
483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987) 13

United States v. Scalzitti,
578 F.2d 507 (3d Cir. 1978) 14

Yates v. Evatt,
500 U.S. 391, 111 S.Ct.1994, 114 L.Ed.2d 432(1991) 16

State Cases

Allen v. Butterworth,
756 So. 2d 52 (Fla. 2000) 5

Anderson v. State,
267 So.2d 8 (Fla.1972) 21

Bottoson v. Moore,
833 So.2d 693 (Fla.2002) 12

ContractPoint Florida Parks,
LLC v. State, 958 So. 2d 1035 (Fla. 1st DCA 2007) 24

Donaldson v. Sack,
265 So.2d 499 (Fla.1972) 20, 21, 23, 24

Dunn v. State,
182 So. 803 (Fla. 1938) 10

Eastern Air LinesInc. v. Department of Revenue,
455 So. 2d 311 (Fla. 1984) 5

Ex Parte Levinson,
274 S. W. 2d 76 (Tex. Crim. 1955) 5

Jones v. State,
92 So.2d 261 (Fla.1956) 11, 12

Kasischke v. State,
991 So.2d 803 (Fla.2008) 23

Kearse v. State,
662 So.2d 677 (Fla.1995) 8

Murray v. State,
937 So.2d 277 (Fla.4th DCA 2006) 18

Perez v. State,
545 So.2d 157 (Fla.1989) 21

Provenzano v. Moore,
744 So. 2d 413 (Fla. 1999) 21

Reino v. State,
352 So.2d 853 (Fla.1977) 21

Smith v. State,
598 So. 2d 1063 (Fla. 1962) 4

Spaziano v. State,
433 So.2d 508 (Fla.1983) 9

State v. Daniels,
542 A.2d 306 (Conn. 1988) 13

State v. DiGuilio,
491 So.2d 1129 (Fla.1986) 19, 20

State v. Dixon,
283 So.2d 1 (Fla.1973) 22

State v. Steele,
921 So.2d 538 (Fla.2005) 11

State v. Webb,
398 So. 2d 820 (Fla. 1981) 24

Stevens v. State,
552 So.2d 1082 (Fla.1989) 10

Thompson v. State,
553 So.2d 153 (Fla.1989) 10

Wallace v. State,
860 So.2d 494 (Fla.4th DCA 2003) 23

Woldt v. People,
64 P.3d 256 (Colo. 2003) 8, 18

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts are set forth in the initial brief. Facts pertinent to this supplemental brief are: After penalty phase, the jury was instructed on three aggravating factors: 1)—during the course of a felony, 2)"heinous, atrocious or cruel," and 3)"cold, calculated, and premeditated." (78/5589-91) The trial judge did not find the "cold, calculated, and premeditated, aggravating factor. (17/3042) The jury by a vote of eleven to one advised and recommended that the court impose death. (78/5602)

On January 29, 2016 this Court directed supplemental briefing to address the application of Hurst v. Florida, 136 S. Ct. 616 (Jan 12. 2016), to the instant case.

SUMMARY OF THE ARGUMENT

In Hurst, the Supreme Court declared that Florida's capital sentencing scheme violates the Sixth Amendment right to a jury trial and is unconstitutional. Current Florida law requires a judge to make specific written findings of fact of both aggravating and mitigating circumstances, along with specific findings of fact that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. Absent these findings, a life sentence must be imposed. Therefore,

Florida's death penalty statute requires more than a single aggravating circumstance be found before imposition of a death sentence. Hurst invalidates Florida's sentencing scheme and requires a jury rather than a judge to make the critical findings necessary to impose the death penalty.

The constitutionally invalid portions of Florida's death penalty statute are inextricably intertwined with the remainder of the statute. The invalid portions of the statute cannot be removed because there would be no mechanism left to determine who gets life and who gets death. The constitutional defects cannot be corrected without rewriting the statute which can only be done by the legislature. The invalid portions of Florida's sentencing scheme are not severable, and the entire law is unconstitutional.

The death penalty is applied differently in weighing and non-weighing states. Florida is a weighing state because the statute requires that a judge, before imposing death, specifically find sufficient aggravators and mitigators and that the mitigators do not outweigh the aggravators. Hurst found Florida's statute unconstitutional because a judge rather than a jury made these findings, and a jury's advisory recommendation is insufficient to comply with the Sixth Amendment. Since Hurst requires a jury verdict rather than a recommendation, the jury's death verdict must be unanimous under Florida law and the United States Constitution. The United States Supreme Court has never approved the use of non-unanimous verdicts, as opposed to advisory

recommendations, in capital cases. Florida's weighing statute can't be cured by a jury finding one aggravator that would make a defendant eligible for death in a non-weighing state.

Jackson's death sentence, imposed under an unconstitutional statute which affected the entire framework of the penalty trial cannot be harmless error. Where the necessary fact-finding was done by the wrong entity, the judge instead of the jury, there is structural error. No jury verdict was ever rendered upon which a harmless error analysis may be applied. The jury's 11-1 advisory recommendation was not a verdict and violates Caldwell v. Mississippi, because the jury was advised that the responsibility for which punishment to impose rests with the 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.

ARGUMENT

ISSUE

THE DECISION OF THE UNITED STATES SUPREME COURT IN HURST V. FLORIDA DECLARING FLORIDA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL IS APPLICABLE TO MR. JACKSON. IMPOSITION OF DEATH UNDER FLORIDA'S UNCONSTITUTIONAL STATUTE IS NOT HARMLESS ERROR AND THE ONLY LEGAL REMEDY IS TO REDUCE THE SENTENCE TO LIFE IMPRISONMENT.

On January 12, 2016, the United States Supreme Court decided in Hurst v. Florida, 136 S.Ct. 616 (2016), by an eight to one vote, that Florida's capital sentencing scheme is unconstitutional. Without the need to address retroactivity, we know that the holding in Hurst applies to Mr. Jackson's case because his case is not yet final. All of the United States Supreme Court's decisions applying or announcing rules of criminal law must be applied retrospectively to all cases that are pending on direct review or are not yet final. Smith v. State, 598 So. 2d 1063, 1065 (Fla. 1962). Jackson's case is not yet final and is scheduled for oral argument on March 10, 2016.

A. The Invalid Provisions of Florida's Capital Sentencing Scheme [Florida Statutes section 921.141(2) and (3)] are not Severable from the Rest of the Statute.

The advisory role of the jury and the fact-finding role of the trial judge are so interwoven into Florida's death penalty scheme that the invalid provisions cannot be severed. Florida's death penalty scheme was found unconstitutional on January 12, 2016. Hurst v. Florida, 136 S.Ct 616 (2016). Therefore, until the Florida legislature enacts a new death penalty statute, which is not constitutionally infirm, Florida has no death penalty statute at the present time.

The United States Supreme Court, by an 8-1 vote in Hurst, clearly 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." Id. at 619.

The invalid portions of Florida's death penalty statute, specifically subsections (2) and (3) of section 921.141, cannot be severed in an attempt to save the remainder of the statute. Florida law recognizes that "if the valid portion of the law would be rendered incomplete, or 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). 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." When the constitutional and unconstitutional provisions of a statute are inextricably intertwined the remaining sections cannot be separated from the unconstitutional sections. Allen v. Butterworth, 756 So. 2d 52, 64 (Fla. 2000).

Section 921.141(2) provides for an advisory sentence by the jury, and subsection (3) states: **"Findings in support of the sentence of death.**-Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating

and mitigating circumstances, shall enter a sentence of life imprisonment or death, 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:" The judge must determine if sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. The jury's advisory role and judge's fact finding role cannot be severed from the statute; the judge's and jury's functions can only be changed by rewriting the statute, which only the legislature may do. Without subsections (2) and (3) there is no procedure in section 921.141 for determining who is sentenced to death and who is sentenced to life imprisonment. There is only a list of aggravating and mitigating circumstances 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 does not provide for imposition of the death penalty.

Two recent Pennsylvania decisions illustrate how the jury's advisory role and the judge's fact-finding role are interwoven into section 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.2d at 252. The commonwealth's "severability" argument was rejected in Hopkins, at 252-62, as it had been in Commonwealth v. Newman, 99 A.3d 86, 101-02 (Pa.Super. 2014):

> 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 the unconstitutional provisions, Florida's death penalty statute contains no mechanism for determining who receives the death penalty. Subsections (2) and (3) are integral to the statutory scheme, and cannot be severed from it; the entire statute, section 921.141, is unconstitutional.

B. In a Weighing State such as Florida, the Sixth Amendment as 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). Florida is a weighing state. 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).

Only in nonweighing states does the finding of one or more aggravating factors automatically make the defendant eligible for a death sentence, while in weighing states it is possible that a single aggravator may be enough to make a homicide one of the "most aggravated", that is only part of the equation. More factual findings, made by the judge, are required to raise the maximum penalty from life imprisonment to death.

The argument which the state has been making in various briefs and oral arguments since Florida's death penalty scheme 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 incorrect. The fact that existence of at least one aggravator is necessary to make a defendant death-eligible is only part of the equation. There must also be factual findings of sufficient aggravating circumstances that are not outweighed by mitigating circumstances in order to raise the level of punishment from life imprisonment to death.

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

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 if a life sentence can be increased to death. Moreover, just as with the aggravators, determining the existence of and weighing the mitigating circumstances necessarily requires factfinding and credibility determinations. 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 623. Since in Florida it is not one aggravator (or even all the aggravators) alone which determines if death is a possible penalty, it follows that the factfinding inherent in the finding of mitigators and weighing them against the aggravators must be done by the jury.

Hurst protects a defendant's Sixth Amendment right to a jury trial by requiring a jury and not a judge to make the findings

necessary for imposition of the death penalty. As with all jury verdicts, although a judge may disagree with a jury finding, the judge must follow the verdict unless it is altered for the benefit of a defendant. If there is not legally sufficient evidence to support a verdict for the State, it is the judge's duty to direct a verdict for the defendant. Dunn v. State, 182 So. 803, 805 (Fla. 1938). However, a directed verdict for the State does not exist.

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). 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 this 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. After Ring, and especially after Hurst, the Sixth Amendment does not allow 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.

As argued in Part D infra, Hurst error is not subject to harmless error analysis. Even if Hurst error was subject to harmless error analysis, it is not harmless error in Jackson's case where the jury's advisory recommendations were non-unanimous (11-1).

Hurst makes it abundantly clear that Florida must base any death sentence "on a jury's verdict, not a judge's factfinding" Hurst, 136 S.Ct at 624, and an "advisory recommendation" will not suffice. (Id. at 622). While this Court, both prior to Ring and, later, under the assumption 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 non-unanimous jury verdicts as opposed to recommendations. 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. Louisiana and Oregon are presently the only states which allow a felony conviction based on a non-unanimous jury verdict. See State v. Webb, 133 So.3d 258, 285 (La.App.2014). 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 U.S. 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. Forty four 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) in holding that the unanimous jury rule be applied not only to guilt phase, but also to penalty phase in a capital case. Daniels was quoted with approval by this Court in State v. Steele, 921 So.2d at 549

> [W]e 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. 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. 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). Unanimity in a jury verdict is required in criminal cases as to guilt and punishment. Requiring a unanimous jury verdict for the death penalty is more in agreement with a general humanitarian purpose and the history of the Anglo-American jury system. Andres v. U.S. 333 U.S. 740, 749 (1948). When seeking the death penalty anything less than a unanimous verdict would result in an unconstitutional sentence.

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

A Florida death sentence, imposed under the constitutionally invalid Florida scheme, is structural error which is not susceptible to harmless error review. A Florida death sentence, based on no jury verdict whatsoever, is controlled by the reasoning of Sullivan v. Louisiana, 508 U.S. 275 (1993), rather than Neder v. United States, 527 U.S. 1 (1999). 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 might apply if that aggravator was uncontested or uncontestable. But, as Jackson has shown in Part B infra, 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, and the weighing of the aggravators against the mitigating circumstances to warrant a death sentence. That being the case, a death sentence imposed without any of the required jury findings is in no way comparable to Neder, where a jury instruction omitted an uncontested element of an offense, and 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. Noting that under the Chapman v. California, 386 U.S. 18 (1967) standard, most constitutional errors can be evaluated for possible harmlessness in terms of their effect on the factfinding process, there are other kinds of errors (such as the constitutionally deficient reasonable doubt 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].

. . . . . .

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." Id. at 310. 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.S. 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 281, 82.

Under the Hurst analysis, a death sentence based on no jury verdict whatsoever, but only a (non-unanimous) "advisory recommendation" and factual findings 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 Murray v. State, 937 So.2d 277, 281-82 (Fla.4th DCA 2006), 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).

Therefore, in the instant case, if Jackson'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. Even if harmless error review is attempted, Jackson'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 Jackson's death sentence imposed by the judge, based on factual findings made solely by the judge.

This is especially true in light of the fact that the jury's advisory recommendation was non-unanimous. [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 non-unanimous vote leaves us with only speculation as to which aggravators and mitigators were found and why one juror voted for life. There is not a valid verdict upon which to apply a harmless error analysis. The eleven-to-one advisory recommendation was not unanimous and cannot be treated as a verdict. Because the jury was instructed they were to return an advisory recommendation and that the responsibility for which punishment to impose rests with the judge, the jury's advisory recommendation was not a verdict and violates Caldwell v. Mississippi, 472 U.S. 320, 328, 29 (1985). (It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of a

defendant's death rests elsewhere.)

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 - Jackson 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 or all of the other jurors. In any event, whether under Sullivan or under Chapman and DiGuilio, Jackson's death sentence cannot be upheld on a harmless error theory.

E. Florida Statutes Section 775.082(2) Mandates the Imposition of a Sentence of Life Imprisonment

Just as in 1972, when a previous version 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 section 775.082(2) sets forth the maximum (and mandatory) sentence which must now be imposed. Jackson, previously sentenced to death under Florida's unconstitutional capital sentencing scheme, must be sentenced to life imprisonment.

The United States Supreme Court, by an 8-1 vote in Hurst, clearly and unequivocally held Florida's death penalty scheme

unconstitutional. Section 775.082(2), enacted by the Florida legislature in March 1972 in anticipation of the Furman decision, provides that "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, a person who has been convicted of a capital felony shall be punished by life imprisonment." See Reino v. State, 352 So.2d 853, 860 (Fla.1977), receded from in part on other grounds in Perez v. State, 545 So.2d 157, 158 (Fla.1989). That is exactly what happened after Furman and Donaldson. See Anderson v. State, 267 So.2d 8 (Fla.1972)(lists of defendants at 10). In fact, it was the position of the Attorney General that the numerous death sentences were illegal and the defendants should be resentenced to life imprisonment. Anderson, 267 So.2d at 9.

The only change in section 775.082(2) is the 1998 amendment which provides that no sentence of death shall be reduced to life if a "method of execution" is declared unconstitutional. See, Provenzano v. Moore, 744 So. 2d 413, 438, 39 (Fla. 1999). The argument that section 775.082(2) only applies if the death penalty has been declared unconstitutional per se, but does not apply when it is the statute which has been declared unconstitutional is incorrect. Furman didn't declare "the death penalty" unconstitutional any more than Hurst did; if it did, we wouldn't be here arguing any of this. Furman (or, more accurately Donaldson v. Sack) and Hurst each found Florida's death penalty

scheme to be unconstitutional.

Florida, like every other state which chose to do so, was free after Furman to rewrite its death penalty statute, and it promptly did so. In State v. Dixon, 283 So.2d 1 (Fla.1973), the decision in which this Court approved the legislature's new statute, this Court emphasized that the actual one-paragraph per curiam holding and the only controlling law in Furman was that the death penalty could not constitutionally be imposed or carried out in the three cases (two from Georgia, one from Texas) before it.

> Two points can, however, be gleaned from a careful reading of the nine separate opinions constituting Furman v. Georgia, Supra. First, the opinion does not abolish capital punishment, as only two justices- Mr. Justice Brennan and Mr. Justice Marshall-adopted that extreme position. The second point is a corollary to the first, and one easily drawn. The mere presence of discretion in the sentencing procedure cannot render the procedure violative of Furman v. Georgia, Supra; it was, rather, the quality of discretion and the manner in which it was applied that dictated the rule of law which constitutes Furman v. Georgia, Supra.

Dixon, 283 So.2d at 6 (emphasis supplied).

So what is the purported distinction between Furman and Hurst for purposes of applying the mandate of section 775.082(2)? Is it that one found that Florida's old death penalty procedure violated the Eighth Amendment while the other found that Florida's current death penalty procedure violates the Sixth Amendment? Section 775.082(2) makes no such distinction.

Jackson does not concede that there is any ambiguity in whether section 775.082(2) applies when the death penalty statute

is declared unconstitutional or whether the death penalty is per se unconstitutional - - nobody seemed to perceive any ambiguity after Furman and Donaldson. But even assuming arguendo that section 775.082(2) were subject to each of these interpretations, it is a basic rule of construction under Florida law that any ambiguity in a penal statute must be construed in the manner most favorable to the defendant; not in the manner most favorable to the state. This principle has been codified in Fla. Stat. section 775.021(1). "The Legislature committed itself to the 'Rule of Lenity' in the construction of criminal statutes." Wallace v. State, 860 So.2d 494, 497 (Fla.4th DCA 2003) A court must apply any reasonable construction of a penal statute favorable to the accused. Id. at 497-98. The rule of lenity which is not just an interpretive tool, but a statutory directive plainly applies to sentencing statutes as well as statutes defining crimes. Kasischke v. State, 991 So.2d 803, 814 (Fla.2008).

If the legislature has previously enacted a clear statute which it doesn't like (or, as in the instant situation, one which it no longer likes), it can amend it prospectively. If the legislature has enacted an ambiguous statute which, under the rule of lenity, has been interpreted in a way it doesn't like, it can amend the statute prospectively. What the state must not be permitted to do is rely successfully on an interpretation (i.e., that section 775.082(2) only applies if the death penalty is found to be per se unconstitutional) which nobody thought the statute

meant when it was enacted and first applied more than four decades ago. If the legislature had a problem with the way section 775.082(2) was applied after Furman and Donaldson, it could have (prospectively) repealed or amended it upon its adoption of the newly enacted 1972 death penalty statute, or at any time thereafter for more than 43 years.

Moreover, if the legislature believed that section 775.082(2) only applied if the death penalty were to be declared unconstitutional per se, it would have had no reason to insert the 1998 exception that no death sentence shall be reduced to life imprisonment if the "method of execution" is held to be unconstitutional. It is axiomatic that courts will not interpret a statute in a manner which would lead to an absurd result. ContractPoint Florida Parks, LLC v. State, 958 So. 2d 1035, 1037 (Fla. 1st DCA 2007); State v. Webb, 398 So. 2d 820, 824 (Fla. 1981). If 775.082(2) only applies if the death penalty itself was abolished, the amendment addressing "method of execution" would be absurd because there could never be a situation to which the amendment would ever apply. The only logical interpretation is that 775.082(2) applies not only if the entire death penalty is declared unconstitutional, but also if the death penalty scheme is declared unconstitutional, as was done in Furman and Hurst. However, the legislature chose to make no changes to section 775.082(2) other than that regarding the "method of execution." Thus, section 775.082(2) applies here where Jackson was sentenced

under Florida's unconstitutional death penalty scheme, and Mr. Jackson must be given a life sentence.

CONCLUSION

Based on these arguments and those asserted in his initial and reply briefs, Jackson respectfully requests this Court to reverse his death sentence and grant a new trial, or remand for imposition of a life sentence.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this 10th day of February, 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,

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