IN THE SUPREME COURT OF FLORIDA

LEO LOUIS KACZMAR,

Appellant,

v. **CASE NO. SC13-2247**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, FLORIDA

SUPPLEMENTAL BRIEF OF APPELLANT

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SUPPLEMENTAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

After the briefs were filed in this case, the United States Supreme Court issued its opinion in Hurst v. Florida, 136 S. Ct. 616 (2016), holding Florida's death penalty scheme unconstitutional under the Sixth Amendment. Kaczmar raised this issue in his Initial Brief under Ring v. Arizona, 536 U.S. 584 (2002). Kaczmar now presents this supplemental brief to address the issue anew in light of Hurst.

ARGUMENT

ISSUE PRESENTED

KACZMAR'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE SIXTH AMENDMENT AND MUST BE VACATED UNDER HURST V. FLORIDA, 136 S. Ct. 616 (2016).

Kaczmar's death sentence was imposed under the sentencing statute held unconstitutional in Hurst v. Florida, 136 S. Ct. 616 (2016). Under that statute, no jury found all the facts necessary to impose Kaczmar's death sentence. Kaczmar's death sentence thus was imposed in violation of his Sixth Amendment right to trial by jury. This defect is structural and not amenable to harmless error analysis. Kaczmar's death sentence must be vacated and remanded for imposition of a life sentence.

Hurst v. Florida

In Hurst, the United States Supreme Court held Florida's capital sentencing scheme unconstitutional because the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. at 619. As the Court explained, this holding followed from its decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002). In Apprendi, the Court held that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury. 530 U.S. at 494. In Ring, the Court held that Arizona's capital sentencing statute violated the

Apprendi rule because it "allowed a judge to find the facts necessary to sentence a defendant to death." Hurst, 136 S. Ct. at 621. Under Arizona's law, a defendant convicted of first-degree murder could not be sentenced to death unless further findings were made by a judge, specifically, at least one aggravating circumstance. Because the finding of an aggravating circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict, Ring's death sentence violated "his right to have a jury find the facts behind his punishment." Id.

The Court concluded that Hurst's death sentence also violated the Sixth Amendment. The Court noted that under Florida's scheme, a person convicted of a capital felony shall be punished by death only if an additional sentencing proceeding "results in findings by the court that such person shall be punished by death." s. 775.082(1), Fla. Stat. (2010). Otherwise, such person shall be punished by life without parole. Although the jury renders an advisory recommendation--without specifying the factual basis for its recommendation--the court, after weighing aggravating and mitigating circumstances, imposes sentence, and if the court imposes death, it must "set forth in writing its findings upon which the sentence of death is based." s. 921.141(3). Id. at 620. Thus, Florida, like Arizona, "does not require the jury to make the critical findings necessary to

impose the death penalty." Id. at 622.

Florida's sentencing statute requires more than the finding of a single aggravating factor to impose death, however:

> [T]he 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. s. 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." s. 921.141(3).

Hurst, 136 S. Ct. at 622. The "critical findings necessary to impose the death penalty" in Florida, then--which must be found by jury--are whether "sufficient aggravating circumstances exist" and whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Id.

Kaczmar's Case

The trial judge sentenced Kaczmar to death for first-degree murder, finding two aggravating factors: (1) Kaczmar was previously convicted of another felony involving the use or threat of violence to the person; (2) the capital felony was especially heinous, atrocious, or cruel. The judge described the particular facts he believed established each of the aggravating factors. The judge further found that the aggravating circumstances outweighed the mitigating circumstances. The jury, after being instructed as to its advisory role, returned an advisory recommendation of death by a vote of 12 to 0. As with Hurst, a trial judge increased Kaczmar's authorized punishment

based on his own fact finding. Kaczmar's death sentence was thus imposed in violation of the Sixth Amendment.

The Constitutional Defect Identified in Hurst is Structural and Not Amenable to Harmless Error Analysis.

As discussed above, the constitutional defect in Kaczmar's death sentence is that the judge, rather than a unanimous jury, determined "the facts necessary for imposition of death," that is, "that sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

This defect is structural and not subject to harmless error review because the absence of a jury determination of elements of an offense is a "defect affecting the framework within which the trial proceeds," see Arizona v. Fulminante, 499 U.S. 279, 310 (1986), rather than an error that occurs "during the presentation of the case to the jury, and which may therefore be quantitatively assessed." See id. at 307-08. The Hurst defect is structural because it deprives defendants of a "basic protectio[n] without which a [capital] trial cannot reliably serve its function." Sullivan v. Louisiana, 508 U.S. 275, 281 (1993). The structural nature of a Hurst defect is further underscored by what Justice Scalia called the "illogic of harmless-error review." See Sullivan, 508 U.S. at 280. Because Florida's statute is defective in that it does not allow for a jury verdict on the necessary elements for a death sentence to be

imposed, "the entire premise of [harmless error] review is simply absent." See id. Harmless error analysis requires the reviewing court to determine "not whether, in a trial that occurred without the error, a [jury fact-finding of sufficient aggravating circumstances] would have been rendered, but whether the [death sentence] actually rendered in trial was surely unattributable to the error." Id. Because there are no jury findings on the requisite aggravating circumstances, it is not possible to review whether such findings would have occurred absent the Hurst error. In such cases:

> 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 [of the aggravating circumstances] beyond a reasonable doubt-not that the jury's actual finding of guilty [of the aggravators] beyond a reasonable doubt *would surely not have been different* absent the constitutional error. This is not enough. 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 [of the aggravators].

Sullivan, 508 U.S. at 280. For this Court "to hypothesize a [jury's finding of aggravating circumstances] that was never rendered--no matter how inescapable the findings to support the verdict might be--would violate the jury-trial guarantee." See id. at 279.

Justice Anstead summed up the harmless-error barrier best in his concurrence in Bottoson v. Moore, 833 So. 2d 693, 708 (Fla.

2002)(Anstead, J., concurring), abrogated by Hurst:

> [C]ompared to our ability to review the actual findings of fact made by the trial judge, there could hardly be any meaningful appellate review of a Florida jury's advisory recommendation to a trial judge since that review would rest on sheer speculation as to the basis of the recommendation, whether considering the jury collectively or the jurors individually. In other words, from a jury's bare advisory recommendation, it would be impossible to tell which, if any, aggravating circumstances a jury or any individual juror may have determined existed. And, of course, a "recommendation" is hardly a finding at all.

See also Combs v. State, 525 So. 2d 853, 859 (Fla. 1988)(Shaw, J., specially concurring)("the sentencing judge can only speculate as to what factors the jury found in making its recommendation"); Johnson v. State, 53 So. 3d 1003, 1007-08 (Fla. 2010)(dispensing with harmless error analysis based on "sheer speculation"), as revised on denial of rehearing (Fla. 2011).

Hurst error simply cannot be quantified or assessed because the record is silent as to what any particular juror, much less a unanimous jury, actually found.

In the present case, for example, the jury was instructed on two aggravating circumstances. While the Court could conclude that the jury unanimously found the prior violent felony aggravator based on the parties' stipulation regarding Kaczmar's conviction of robbery at age 17, it is impossible to tell whether any particular juror, much less a unanimous jury, found the EHAC aggravating factor. Likewise, while the 12-0 recommendation indicates all the jurors found the mitigation did not outweigh

the aggravation (no mitigation was presented to the jury), there is no way of knowing which combination of the aggravating factors any particular juror found sufficient to impose death, much less whether a unanimous jury found the same combination of aggravating factors sufficient to impose death. It is possible that not even six jurors relied on the same combination of aggravating circumstances, even though all twelve recommended a death sentence. This scenario, as well as many others, would not satisfy the Sixth Amendment because, as Hurst has now made clear, the Sixth Amendment requires a unanimous jury to find beyond a reasonable doubt "each fact necessary to impose the sentence of death."

Because the determination of what constitutes "sufficient" aggravating circumstances" to impose a sentence of death is highly subjective, vastly different from the objective, discrete elements at issue in Ring, and because the jury renders only a general advisory verdict, it is impossible to deduce what the advisory jury might have found. As Judge O.H. Eaton elaborated:

> The role of the jury during the penalty phase under the Florida penalty scheme has always been confusing. The jury makes no findings of fact as to the existence of aggravating or mitigating circumstances, nor what weight should be given to them, when making its sentencing recommendation. The jury is not required to unanimously find a particular aggravating circumstance exists beyond a reasonable doubt. It makes the recommendation by majority vote, and it is possible that none of the jurors agreed that a particular aggravating circumstance submitted to them was proven beyond a reasonable doubt. The jury recommendation

> does not contain any interrogatories setting forth which aggravating factors were found, and by what vote; how the jury weighed the various aggravating and mitigating circumstances; and, of course, no one will even know if one, more than one, any, or all the jurors agreed on any of the aggravating and mitigating circumstances.

Aguirre-Jarquin v. State, 9 So. 3d 593, 611 (Fla. 2009)(Pariente, J., specially concurring)(quoting Judge Eaton's sentencing order).

Accordingly, because the jury's advisory verdict is devoid of evidence of the jury's fact finding, the constitutional error identified in Hurst is structural, precluding harmless-error review and requiring that Kaczmar's death sentence be vacated.

The Caldwell v. Mississippi Problem

Even if harmless-error analysis could be applied to a Hurst defect, the Court can place little or no weight on the jury's advisory recommendation, given that Kaczmar's jury was instructed dozens of times that its recommendation was advisory only, thus diminishing its responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). In Caldwell, where the prosecutor told the jury that its sentencing decision was automatically reviewed by the state supreme court, the United States Supreme Court vacated Caldwell's sentence, holding that "it is constitutionally impermissible [under the Eighth Amendment] 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 the defendant's death rests

elsewhere." 472 U.S. at 328-29. That a jury's role has been diminished by the judge, rather then counsel, weighs even more heavily in favor of reversal. See Boyde v. California, 494 U.S. 370, 384 (1990)(argument of counsel is "likely viewed as the statements of advocates," as distinct from jury instructions, which are "viewed as definitive and binding statements of law"); Bollenbach v. United States, 326 U.S. 607, 612 (1946)("The influence of the trial judge on the jury is necessarily and properly of great weight...Particularly in a criminal trial, the judge's last word is apt to be the decisive word").

Indeed, following Ring, members of this Court observed that Florida's instructions minimizing the advisory role of the jury might be unconstitutional. In Combs, 525 So. 2d at 856-57, this Court rejected a Caldwell claim because, unlike the prosecutor's misleading argument in Caldwell, the challenged Florida jury instruction accurately reflected the jury's advisory role. But in so doing, the Court acknowledged that if the jury's verdict were not merely advisory, the Court "would necessarily have to find that [Florida's] standard jury instructions, as they have existed since 1976, violate the dictates of Caldwell," thereby requiring "resentencing proceedings for virtually every individual sentenced to death in this state since 1976." Id. at 858 (internal quotations omitted).

In the present case, the jurors were told again and again,

by both the judge and the prosecutor, that their role was only advisory--a recommendation. The effect of this instruction, though it accurately identified the role of the jury under Florida law, was to undermine the reliability of the jury's deliberative process, thereby presenting an additional barrier to reading anything into the jury's recommendation. The reasoning in Caldwell is straightforward and applies with equal force to the defect identified in Hurst. As the Court observed, it "has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State." Caldwell, 472 U.S. at 329. Where the jury is improperly told that it may shift responsibility to another entity--here, the trial judge[1]--there are "specific reasons to fear substantial unreliability as well as bias in favor of death sentences." Id. at 330. Several of those reasons are relevant here. First, jurors instructed that their role is only advisory might choose to "send a message" of disapproval by recommending a death sentence, even when they have not made the requisite findings of fact to expose the defendant to such a sentence, id. at 331, their consciences relieved by the assurances made by the court and the prosecutor that the judge is the ultimate sentencer. Second, informing jurors that

[1] See Fla. Std. Jury Inst. 7.11(2)("As you have been told, the final decision as to which punishment shall be imposed is the responsibility of the trial judge...as the trial judge, that responsibility will fall on me.")

responsibility for fact finding will lie with the trial judge "presents an intolerable danger that the jury will in fact choose to minimize the importance of its role. Indeed, one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of [judicial] review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in." Id. at 333 (because jurors in capital cases find themselves swimming in very uncomfortable waters and are given substantial discretion to determine whether another should die, a minimizing role is "highly attractive").

In short, denigrating the role of the jury is likely to have an adverse consequence on the reliability of the jury's deliberative process and, thus, its recommendation. A reviewing court therefore cannot assume that the recommendation actually reflects factual findings of any one juror, let alone all of them collectively. Accordingly, this Court cannot give any weight to the jury's unanimous recommendation, which in addition to violating the Sixth Amendment, carries with it none of the hallmarks of reliability required under the Eighth Amendment.

Remand for a Life Sentence is Required Under section 775.082(2), Florida Statutes.

Section 775.082(2), Florida Statues, 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).

After the United States Supreme Court ruled that Florida's capital sentencing scheme was unconstitutional in Furman v. Georgia, 408 U.S. 308 (1972), but while a petition for rehearing was pending, this Court addressed the provision now identified as section 775.082(2) and said:

> We have given general consideration to any effect upon the current legislative enactment to commute present death sentences to become effective October 1, 1972. The statute was conditioned upon the very holding which has now come to pass by the U.S. Supreme Court in invalidating the death penalty as now legislated. It is worded to apply to those persons already convicted without recommendation of mercy and under sentence of death.

Donaldson v. Sack, 265 So. 2d 499, 505 (Fla. 1972).

Subsequently, after the petition for rehearing in Furman was denied, this Court, citing Donaldson, determined that it should impose life sentences in all the cases in which death sentences had been imposed under the capital sentencing scheme held unconstitutional in Furman. Anderson v. State, 267 So. 2d 8, 9-10 (Fla. 1972); see also Walker v. State, 296 So. 2d 27, 30 (Fla. 1974)(legislature intended in section 775.082(2) to require life imprisonment in the event Florida's death penalty was declared unconstitutional).

In Furman, the narrowest of the majority's opinions were

authored by Justices Stewart and White. 408 U.S. at 375 (Burger, C.J., dissenting). "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Ventura v. State, 2 So. 3d 194, 206 (Fla. 2009), citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976). Justices Stewart and White joined the majority in Furman based on their belief that the death penalty was enforced "wantonly" and "freakishly" against "a capriciously selected random handful," 408 U.S. at 309-10 (Stewart, J., concurring), on each occasion by a jury acting "in its discretion...no matter what the circumstances." 408 U.S. at 314 (White, J., concurring). The gravamen of Furman was that unguided decision-making in capital sentencing violated the Eighth Amendment.

In Hurst, the Court held that Florida's capital sentencing scheme violates the Sixth Amendment guarantee of trial by jury, in that the jury's discretion, though guided by post-Furman statutes setting out permissible aggravating factors, is usurped by judges having the final say in finding the facts underlying a death sentence. As in Furman, the Court in Hurst struck down a capital sentencing scheme because of a serious defect in the process by which those who will suffer the death penalty are selected. In both situations, the existing death penalty was

held unconstitutional. In Anderson, this Court held the law now codified as section 775.082(2) dictated how to deal with death sentences imposed under the pre-Furman scheme, since the Legislature made it clear what its preference would be in the event the scheme was ruled unconstitutional as currently legislated. This Court should follow the precedent set in Anderson.

Accordingly, this Court should vacate Kaczmar's death sentence and remand his case for the imposition of a life sentence.

CONCLUSION

For the reasons presented in this brief and the Initial and Reply Briefs, appellant respectfully asks this Court to remand his case for a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished electronically to Charmaine Millsaps, Assistant Attorney General, Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, at Crimapptlh@myfloridalegal.com as agreed by the parties, and by U.S. Mail toLeo Kaczmar, #J20499, U.C.I., 7819 NW 228th St., Raiford, FL, 32026, on this date, February 25, 2016.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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