In the Supreme Court of Florida

LEO LOUIS KACZMAR III,

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 ANSWER BRIEF OF APPELLEE

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INTRODUCTION

This is the direct appeal from a resentencing in a capital case. Briefing was completed and the oral argument was held on September 1, 2015. Kaczmar raised a Sixth Amendment right-to-a-jury-trial claim based on *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), as ISSUE VI in the initial brief. On February 25, 2016, Kaczmar, represented by the Assistant Public Defender Nada Carey, filed a motion to permit supplemental briefing on the issue of the impact of the United States Supreme Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (Jan. 12, 2016), on his right-to-a-jury-trial claim. This Court granted the motion and ordered supplemental briefing on the *Hurst* issue. This is the State's supplemental answer brief.

SUMMARY OF THE ARGUMENT

Kaczmar asserts his Sixth Amendment rights-to-a-jury-trial established in *Hurst v. Florida*, 136 S.Ct. 616 (Jan. 12, 2016), was violated. It was not. Opposing counsel reads *Hurst* as requiring the jury find all of the aggravators, all of the mitigators and doing the weighing as well. *Hurst* only requires one aggravating circumstance be found by the jury. Mitigators are not elements of capital murder. They are facts proven by the defense, not the prosecutorn and at a lower standard of proof than elements. And weighing is not a fact. Furthermore, *Hurst* does not apply at all due to the presence of the recidivist aggravators of a prior violent felony. Moreover, any error in the trial court finding the HAC aggravator was harmless. Even if this Court finds harmful

error, the proper remedy is a remand for a third penalty phase, not a life sentence.

ARGUMENT

SUPPLEMENTAL ISSUE I

WHETHER THE SIXTH AMENDMENT RIGHT-TO-A-JURY-TRIAL PROVISION WAS VIOLATED IN A CASE WITH A RECIDIVIST AGGRAVATING CIRCUMSTANCE? (Restated)

Kaczmar asserts his Sixth Amendment right-to-a-jury-trial established in *Hurst v. Florida*, 136 S.Ct. 616 (Jan. 12, 2016), was violated. It was not.

Standard of review

The standard of review is *de novo*. Constitutional challenges to statutes are reviewed *de novo*. *Miller v. State*, 42 So.3d 204, 215 (Fla. 2010)(stating "[w]e review a trial court's ruling on the constitutionality of a Florida statute *de novo*" regarding a Sixth Amendment challenge to Florida's death penalty scheme pursuant to *Apprendi* and *Ring*).

Merits

In *Hurst v. Florida*, 136 S.Ct. 616 (Jan. 12, 2016), the United States Supreme Court declared that certain aspects of Florida's death penalty statute, which allowed "the judge alone to find the existence of an aggravating circumstance" violate the Sixth Amendment right-to-a-jury-trial. The *Hurst* Court found Florida's death penalty statute unconstitutional because, under Florida law, a "jury's mere recommendation is not enough." *Hurst*, 136 S. Ct. at

619. The Court noted that, under Florida law, although the judge must give the jury recommendation great weight, the sentencing order must "reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors." *Id.* at 620.

The *Hurst* Court first explained that the Sixth Amendment and due process "requires that each ***element*** of a crime be proved to a jury beyond a reasonable doubt." *Hurst*, 136 S.Ct. at 621 quoting *Alleyne v. United States*, 570 U.S. –, –, 133 S.Ct. 2151, 2156, 186 L.Ed.2d 314 (2013)(emphasis added). The Court then discussed *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), noting its holding "any fact that exposes 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." *Id.* at 621 (emphasis added). The *Hurst* Court then noted its application of *Apprendi* in numerous contexts, including capital punishment with *Ring v. Arizona*, 536 U.S. 584, 608, n. 6, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The Court noted it had concluded in *Ring* that "the required finding of an aggravated circumstance exposed *Ring* to a ***greater punishment*** than that authorized by the jury's guilty verdict." *Id.* at 621 (emphasis added). Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment. *Id.*

And then the Court concluded this analysis applied equally to Florida. *Id.* at 621-622. The Court observed "the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. "As with *Ring*, a judge increased Hurst's authorized punishment based on her own

factfinding." *Id.* at 622. The problem the Court identified was the "central and singular role the judge plays under Florida law" because under Florida's statute a defendant was not "eligible for death" until there were "findings ***by the court***." Id. at 622 (emphasis in original). The trial court alone made the factual findings. *Id.* at 622 (emphasis in original). The "jury's function under the Florida death penalty statute was advisory only."

The Court then overruled *Spaziano v. Florida*, 468 U.S. 447, 457-465, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989). The *Hurst* Court concluded that those cases' conclusion that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury, "was wrong, and irreconcilable with *Apprendi*." *Id.* at 623. The Court rejected a stare decisis argument because "in the *Apprendi* context, we have found that stare decisis does not compel adherence to a decision whose underpinnings have been eroded by subsequent developments of constitutional law." *Id.* at 623-624.

The *Hurst* Court concluded the Sixth Amendment right-to-a-jury-trial provision required Florida to base a "death sentence on a jury's verdict, not a judge's factfinding." *Id.* at 624. "Florida's sentencing scheme, which required the judge alone to find the existence of ***an*** aggravating circumstance, is therefore unconstitutional." *Hurst*, 136 S.Ct. at 624 (emphasis added).

In constitutional terms, the basic holding of *Ring* was that the one narrower required by the Eighth Amendment must be found by the jury under the Sixth Amendment. The basic holding of *Hurst* was

that the jury's finding of that one narrower must be explicit and specific and those jury findings are binding on the judge.[1]

***Apprendi*, *Ring*, and *Alleyne* and increases in the penalty**

Opposing counsel asserts that *Hurst* requires not only that all aggravating circumstances be found by the jury but mitigating circumstances be found as well and then the jury must weigh those circumstances to determine if aggravating circumstances outweigh mitigating circumstances. She argues that under Florida's current death penalty statute, aggravators, mitigators, and weighing are the facts that are necessary to impose a death sentence and therefore, under *Hurst*, they must all be found by the jury. Basically, opposing counsel reads *Hurst* as requiring jury sentencing. It does not.

Hurst is an extension of *Ring* to Florida and *Ring* was based on *Apprendi*. Because the *Hurst* Court's logic was based on *Apprendi*, which was repeatedly cited in the *Hurst* opinion, a discussion of *Apprendi* and its progeny is in order to understand the scope of the *Hurst* decision. The holding in *Apprendi* was that any fact, other than the fact of a prior conviction, that "increases the penalty for a crime" beyond the prescribed statutory maximum must be

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[1] It is not just the finding of no aggravating circumstances that is binding on the judge. The judge is bound by the jury's finding that a particular aggravator was not proven as well. The rationale of *Watts* regarding the lower standard of proof at sentencing does not apply to capital sentencing because capital sentencing involves the higher standard of proof of beyond a reasonable doubt. *United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997)(allowing acquitted conduct to be considered at the preponderance standard of proof). So, if a jury finds that a particular aggravating circumstance was not proven, the judge may not find that same aggravating circumstance.

submitted to a jury, and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-63 (emphasis added). As the *Ring* Court itself explained, because aggravating circumstances "operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609, 122 S.Ct. at 2443 (citation omitted).

The *Hurst* court also repeatedly cited *Alleyne v. United States*, – U.S. –, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), which held any facts that increase the mandatory minimum sentence for an offense must be submitted to the jury and found beyond a reasonable doubt. The Court explained that "any fact that, by law, increases the penalty for a crime is an element that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 133 S. Ct. at 2155. "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense." *Alleyne*, 133 S.Ct. at 2158 (citing *United States v. O'Brien*, 560 U.S. 218, 130 S.Ct. 2169, 176 L.Ed.2d 979 (2010)). The *Alleyne* Court explained it was not only facts that increase the ceiling, but also facts that increase the floor that "alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment" and therefore, facts that increase the mandatory minimum sentence are "elements and must be submitted to the jury and found beyond a reasonable doubt." *Id.* The *Alleyne* Court explained that juries must find any facts that increase either the statutory maximum or minimum because "the Sixth

Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty." *Alleyne*, 133 S.Ct. 2151, 2161, n.2 (emphasis in original). The *Alleyne* Court further explained, "this is distinct from factfinding used to guide judicial discretion in selecting a punishment within limits fixed by law." *Id*. "While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing." *Alleyne*, 133 S.Ct. at 2161, n.2.[2] It is only facts that increase or aggravate the penalty that are treated as elements that must be found by the jury.

The only facts in Florida's death penalty statute that actually increase the penalty to death are aggravating circumstances. Not all facts have become elements under *Apprendi* and *Hurst*. Rather, the concept of sentencing factors still remains valid after *Apprendi*. Judges may still find facts just, as they do with Florida's criminal punishment Code, provided those facts do not increase or aggravate the penalty. Any fact that does not increase or aggravate the penalty, may still be found by the judge alone. Additional aggravating circumstances do not increase the penalty. So, it is only one aggravating circumstances that the jury must find.

But even assuming all aggravating circumstances must be found by the jury (except recidivist aggravators that have already been found by a prior jury), it is only aggravating circumstances, not

[2] These statements in part III-B of the *Alleyne* opinion were the majority opinion. Justice Thomas wrote and was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

mitigating circumstances, that must be found by the jury. Mitigating circumstances do not "increase" the punishment, in the *Apprendi* Court's words. Mitigating circumstances do not "aggravate" the penalty, in the *Alleyne* Court's words. Rather, mitigating circumstances, if found, decrease the penalty. *United States v. O'Brien*, 560 U.S. 218, 224, 130 S.Ct. 2169, 2174, 176 L.Ed.2d 979 (2010)(distinguishing elements that must be found by a jury from sentencing factors that may be found by a judge because sentencing factors guide the judge's sentencing discretion without increasing the maximum sentence). Mitigators are the opposite of elements of the crime of capital murder. Nor do mitigators have to be found beyond a reasonable doubt, unlike elements or aggravators.[3] If this Court insists on treating mitigators as though they are aggravators, then mitigators would have to be found beyond a reasonable doubt too. But even increasing the standard of proof would not work because it would still be the wrong party proving the fact. Elements are facts the State must prove but it is the defense that proves mitigators. Prosecutors do not prove mitigators, they attempt to negate them. Mitigators simply are not elements. Mitigating circumstances do not have to be submitted to the jury and proven beyond a reasonable doubt. Mitigators are not

[3] *Williams v. State*, 37 So. 3d 187, 194-95 (Fla. 2010)(stating that the State has the burden to prove beyond a reasonable doubt each and every aggravating circumstance); *Aguirre-Jarquin v. State*, 9 So. 3d 593, 607 (Fla. 2009)(explaining that the State must prove the existence of an aggravator beyond a reasonable doubt citing *Parker v. State*, 873 So.2d 270, 286 (Fla. 2004)); *Diaz v. State*, 132 So. 3d 93, 117 (Fla. 2013)(explaining that mitigating factors be established by the greater weight of the evidence citing *Mansfield v. State*, 758 So.2d 636, 646 (Fla. 2000)).

elements of the crime of capital murder. *Hurst* did not mandate that mitigation be found by the jury.

And if the mitigators do not have to be found by the jury, obviously, the jury is not required to weigh that which they are not required to find at all. Furthermore, weighing is not even a fact. Rather, weighing is mostly "a question of mercy." *Kansas v. Carr*, 136 S.Ct. 633 (2016)(noting that aggravating factors are "purely factual determination" but, in contrast, whether mitigation exists is "largely a judgment call (or perhaps a value call)" and the ultimate question whether mitigating circumstances outweigh aggravating circumstances is "mostly a question of mercy."). Under *Apprendi* and its progeny, only facts that increase the sentence must be found by the jury, which in capital cases, are aggravating circumstances only. Under *Hurst*, only aggravators, not mitigators, and certainly not weighing, must be found by the jury.

While opposing counsel repeatedly quotes *Apprendi* and its holding that any fact that increases the penalty must be submitted to a jury and proven beyond a reasonable doubt, she does not explain how mitigating circumstances can possibly increase the penalty or become elements. Nor does she explain how the beyond a reasonable doubt part of *Apprendi* could possibly apply to mitigation or weighing.

Eighth Amendment and one narrower

Constitutionally, just one aggravating circumstance is required to increase the penalty to death. *Tuilaepa v. California*, 512 U.S. 967, 971-72, 114 S.Ct. 2630, 2634, 129 L.Ed.2d 750

(1994)(explaining that to "render a defendant eligible for the death penalty ... the trier of fact must convict the defendant of murder and find one aggravating circumstance (or its equivalent) at either the guilt or penalty phase" citing *Lowenfield v. Phelps*, 484 U.S. 231, 244-246, 108 S.Ct. 546, 554-555, 98 L.Ed.2d 568 (1988), and *Zant v. Stephens*, 462 U.S. 862, 878, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235 (1983)). In *Tuilaepa*, the High Court is not reading the California statute and saying what California law is regarding how many aggravating circumstances are required. They are reading the Eighth Amendment and saying only one narrower is required. That is clear from the actual language and what they cite as support for the statement: "To render a defendant eligible for the death penalty in a homicide case, ***we*** have indicated that the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase." The Court used the word "we," not the California courts or the California statute. And then they cited *Lowenfield*, a Louisiana case, and *Zant*, a Georgia case, in support of that statement. The Court would not have cited a Louisiana case and a Georgia case in support of a statement regarding a California statute. The *Tuilaepa* Court is saying the Eighth Amendment only requires one narrower, which in most states, including Florida are aggravators. Most state's death penalty statute refer to one aggravator because that is what the Eighth Amendment requires, not the other way round. The minimum number of narrowers or aggravators required is a constitutional matter and that number is one.

Opposing counsel insists that one aggravating circumstance is not sufficient to satisfy *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). But the United States Supreme Court in *Lowenfield* and *Tuilaepa* disagreed. And *Lowenfield* was a one aggravator case that was challenged on Eighth Amendment grounds because the sole aggravating circumstance was also an element of the crime. That was the exact issue in *Lowenfield*.[4] The Eighth Amendment only requires one narrower, which, in most states, including Florida, means one aggravating circumstance.

And while the minimum number of narrowers required is a matter of Eighth Amendment law, this Court has also noted that only one aggravator is required. *Ault v. State*, 53 So.3d 175, 205 (Fla.

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[4] Lowenfield had been convicted of three counts of murder under a statute that required the jury to find that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person. The only aggravating circumstance found by the jury was that "the offender knowingly created a risk of death or great bodily harm to more than one person". The statute and the aggravating circumstance were interpreted in a parallel fashion under state law. Lowenfield argued that because the sole aggravating circumstance found by the jury at the sentencing phase was identical to an element of the capital crime of which he was convicted, "this overlap left the jury at the sentencing phase free merely to repeat one of its findings in the guilt phase, and thus not to narrow further in the sentencing phase the class of death-eligible murderers." *Lowenfield*, 484 U.S. at 241. The Court explained that petitioner's assertion that the parallel nature of these provisions requires that his sentences be set aside rested "on a mistaken premise as to the necessary role of aggravating circumstances." *Lowenfield*, 484 U.S. at 244. The Supreme Court noted that the use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion and explained that this narrowing function may be performed by jury at either the sentencing phase of the trial or the guilt phase. Since the narrowing occurred at the guilt phase, "the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm." *Lowenfield*, 484 U.S. at 246.

2010)(stating that "to return an advisory sentence in favor of death a majority of the jury must find beyond a reasonable doubt the existence of at least one aggravating circumstance listed in the capital sentencing statute."). Indeed, this Court has interpreted the phase "sufficient" aggravators in Florida's death penalty statute as meaning one aggravator. *Zommer v. State*, 31 So.3d 733, 754 (Fla. 2010)(noting that, in *State v. Dixon*, 283 So.2d 1 (Fla. 1973), "this Court interpreted the term 'sufficient aggravating circumstances' in Florida's capital sentencing scheme to mean *one* or more such circumstances)(emphasis in original); *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973)("When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances."). Only one narrower is required under the Eighth Amendment.[5]

Under Florida's new death penalty statute, all aggravating circumstances must be found by the jury. And, of course, the State will have to comply with the new statute, as well as the Eighth Amendment, and submit all aggravating circumstances to the jury and the judge will be bound by those findings. But the Eighth Amendment only requires one aggravator.

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[5] Under Florida's Constitution, Florida courts are required to interpret the State's cruel and unusual punishment provision in conformity with the United States Supreme Court's Eighth Amendment jurisprudence. Art. I, § 17, Fla. Const.; *Henry v. State*, 134 So.3d 938, 947 (Fla. 2014)(noting that, under Article I, section 17 of the Florida Constitution, Florida courts are "bound by the precedent of the United States Supreme Court" regarding Eighth Amendment claims). While other state Supreme Courts could, as a matter of state constitutional law, require more than one aggravator, this Court may not.

Constitution versus the statute

Opposing counsel is confusing the constitutional requirements with the statutory requirements. While Florida's statute requires the jury find aggravators, mitigators, and then engaging in weighing, the constitution does not. And while a trial court must follow both the constitution and the statute, a proper reading of *Hurst* requires that they remain separate concepts.

The United States Supreme Court does not interpret state statutes. *Smiley v. Kansas*, 196 U.S. 447, 455, 25 S.Ct. 289 (1905)(stating that it "is well settled" that the interpretation of a state statute by the highest court of the state is "conclusive"); *Walker v. State Harbor Com'rs*, 84 U.S. 648, 651 (1873)(explaining that in the construction of the statutes of a State, the United States Supreme Court follows the interpretation of the highest court of the State which is "accepted as the true interpretation, whatever may be our opinion of its original soundness."). *Hurst* is a constitutional decision, not an interpretation of Florida's death penalty statute, just as *Tuilaepa* was not an interpretation of California's statute and *Lowenfield* was not an interpretation of Louisiana's statute. The Court only reads the respective state's statute to determine what facts increase the penalty to death. The Court is reading for narrowers, which in most states, including Florida, are the aggravators.

While opposing counsel quotes the current death penalty statute as the basis for her claim that all facts must be determined by the jury, sentencing statutes often contain procedural requirements and

additional facts that do not ***increase*** or ***aggravate*** the penalty. Because those facts do not increase or aggravate the penalty, those facts remain sentencing factors that may be determined by the judge alone. An example of that would be that statutory requirement that the judge enter a written order within 30 days of sentencing the defendant to death but no one would seriously contend that a written order is an element of capital murder. § 921.141(3), Fla. Stat. (2015)(providing: "If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.). None of the additional steps, such as the determination of mitigation, increase the penalty, so they are all sentencing factors, not elements, and they do not have to be found by the jury.

Opposing counsel relying on the language of the old statute, states that "sufficient" aggravating circumstances must be found by the jury. But "sufficient" is an adjective meaning enough, not a fact or a number. This Court must have an actual number of aggravating circumstances for Eighth Amendment narrowing purposes, not merely a general adjective, such as "sufficient." Moreover, the actual statutory language is: "(a) that sufficient aggravating circumstances exist as enumerated in subsection (5) and (b) there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3), Fla. Stat. (2015). It is clear that this means weighing. If the jury does not have to find mitigators at all, then, as a matter of logic, the jury cannot do weighing because it cannot take the next step of weighing without

having found mitigation first. This statutorily required weighing is a sentencing factor that may be found by the judge alone, it is not an element of the crime of capital murder that must be found by the jury.

Recidivist aggravators

Hurst does not apply to this particular case. One of the aggravating circumstances was the prior violent felony aggravator. Kaczmar had previously been convicted of robbery. This aggravator is not required to be found by the jury. There is an exception to *Hurst* for recidivist aggravators. The United States Supreme Court exempted prior convictions from the holding of *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), explaining that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The exception for prior convictions in *Apprendi* was based on the recidivist exception established in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).

That same logic, based on the exception for prior convictions, remains valid and applies in the wake of *Hurst*. *Hurst* did not involve any recidivist aggravators. And the *Hurst* Court did not overrule *Almendarez-Torres*. *Almendarez-Torres* was not cited or discussed by the *Hurst* Court. The prior conviction exception was not at issue in *Hurst*. *Almendarez-Torres* is still good law in the wake of *Apprendi* and all its progeny including *Hurst*. *Pham v. State*, 70 So.3d 485, 496 (Fla. 2011)(explaining that the express

exceptions to *Apprendi* that were unaltered by *Ring*); *United States v. Nagy*, 760 F.3d 485, 488 (6th Cir. 2014)(stating that *Alleyne* leaves "no doubt" that *Almendarez-Torres* still good law), *cert. denied*, 135 S. Ct. 1009 (2015); *United States v. King*, 751 F.3d 1268, 1280 (11th Cir. 2014)("We have explained that the Supreme Court's holding in *Almendarez-Torres* was left undisturbed by *Apprendi*, *Blakely*, and *Booker* citing *United States v. Shelton*, 400 F.3d 1325, 1329 (11th Cir. 2005)), *cert. denied*, 135 S.Ct. 389 (2014). The *Almendarez-Torres* exception survived *Apprendi*, *Ring*, and *Hurst*.

This Court has repeatedly rejected *Ring* claims where the prior violent felony aggravator is present. *Hall v. State*, 107 So.3d 262, 280 (Fla. 2012)("This Court has held that *Ring* does not apply to cases where the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is applicable" citing *Victorino v. State*, 23 So.3d 87, 107–08 (Fla. 2009)); *Evans v. State*, 975 So.2d 1035, 1052-1053 (Fla. 2007)(rejecting a *Ring* claim where the prior violent felony aggravator was present citing *Duest v. State*, 855 So.2d 33, 49 (Fla. 2003)); *Johnson v. State*, 104 So.3d 1010, 1028 (Fla. 2012)(stating that the Florida Supreme Court has repeatedly rejected *Ring* claims where the prior violent felony aggravator has been found); *Hodges v. State*, 55 So. 3d 515, 540 (Fla. 2010)("This Court has repeatedly held that *Ring* does not apply to cases where the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is applicable.").

Furthermore, Kaczmar stipulated to the prior violent felony. (T. Vol. V 814-816). A stipulation waives any right to a jury trial regarding that element. *Blakely v. Washington*, 542 U.S. 296, 310, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)(stating that the State is free, under *Apprendi*, to seek judicial sentence enhancements so long as the defendant stipulates to the relevant facts). Even if the *Almendarez-Torres* exception did not exist, there would be no *Hurst* error in this case. Kaczmar waived his *Hurst* rights when he admitted the one narrower constitutionally required to sentence him to death under the Eighth Amendment. Kaczmar has no right to a jury trial left. Basically, Kaczmar stipulated that he was eligible for the death penalty. There was no violation of the Sixth Amendment right-to-a-jury-trial provision.

Harmless error

Furthermore, as the State argued in its original answer brief, any error was harmless. If even there had been a violation of the Sixth Amendment right-to-a-jury-trial, violations of the right to a jury trial, including *Ring* and *Hurst* claims, are subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)(finding that error in the judge determining the issue of materiality rather than properly submitting the materiality issue to the jury was harmless). Both the United States Supreme Court and this Court have held that violations of the right-to-a-jury-trial are not structural error. *Washington v. Recuenco*, 548 U.S. 212, 222, 126 S.Ct. 2546, 2553, 165 L.Ed.2d 466 (2006)(relying on *Neder v. United States*, 527 U.S.

1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), and holding that the "failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error"); *Galindez v. State*, 955 So.2d 517, 524 (Fla. 2007)(holding harmless error analysis applies to *Apprendi* and *Blakely* error).

Opposing counsel's reliance on *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), is misplaced. *Sullivan* concerned an flaw in the reasonable-doubt jury instruction which was structural error, not subject to harmless error review. *Sullivan* is simply not on point but both *Recuenco* and *Galindez* are directly on point. Moreover, the United States Supreme Court has itself rejected the analogy to *Sullivan* regarding this type of error. *Neder*, 527 U.S. at 11-13, 119 S.Ct. at 1834-35. As the *Neder* Court observed, explaining the difference and why an omission of an element of the crime was subject to harmless error, a flawed beyond-a-reasonable-doubt instruction has the effect of vitiating "all the jury's findings" but, "in contrast," an omission of an element does not have the effect of vitiating "***all*** the jury's findings." *Neder*, 527 U.S. at 11, 119 S.Ct. at 1834 (emphasis in original).

Furthermore, *Ring* errors are of greater magnitude than *Hurst* errors. While the Arizona Supreme Court rarely found *Ring* errors to be harmless in any particular case, that was due to the magnitude of the error. Arizona's death penalty statute, which was at issue in *Ring*, was judge-only capital sentencing. Florida's death penalty statute, in contrast, as the *Ring* Court itself noted, is a hybrid system involving both a judge and a jury. *Ring*, 536

U.S. at 608, n.6, 122 S.Ct. at 2442, n.6 (noting that Arizona, like Colorado, Idaho, Montana and Nebraska, "commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges" and noting that four States, Alabama, Delaware, Florida and Indiana, "have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations."). Florida's scheme is judge-plus-jury sentencing, not judge-only sentencing. In the Arizona cases, there was no jury but in Florida there was a jury. This is not a case where there was no jury at all. Indeed, Kaczmar's resentencing jury recommended death by a vote of 12 to 0. While the jury participation was less than the law currently requires under *Hurst*, there was jury participation. Any error is even more harmless when there was a jury. Any error was harmless in light of this unanimous jury recommendation.

The trial court found two aggravating circumstances: 1) previously convicted of a violent felony based on a prior robbery conviction, and 2) heinous, atrocious, or cruel. (T. Vol. III 533-537). The prior violent felony aggravating circumstances does not have to be found by the jury under the existing caselaw as explained above. And any rational jury would have found the HAC aggravator in a case where the victim was stabbed 93 times and who had numerous defensive wounds and whose throat was slit.[6] If the

[6] The rational jury test is the harmless error test the Court employed in *Neder* which dealt with this exact type of error. The Court stated that the harmless-error inquiry is whether it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Neder, 527 U.S. at 18, 119 S.Ct. at 1838. The *Neder* Court then explained to "set a

jury had been given a special verdict form asking them to find the HAC aggravator, they would have found the HAC aggravator unanimously. Any error was harmless.[7]

Remedy

Even if the right-to-a-jury-trial was violated and the error was not harmless, the appropriate remedy is a new penalty phase using the new statute, not a life sentence. Any capital murder committed before the enactment of the new death penalty statute may be tried under the new statute without *ex post facto* concerns under the United States Supreme Court precedent of *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977).

Kaczmar asserts that he is entitled to a life sentence. But *Dobbert* also makes it clear that such a defendant cannot claim he is automatically entitled to a life sentence because the statute in effect at the time of his first sentencing was held unconstitutional. Basically, the High Court rejected Kaczmar's argument decades ago in *Dobbert*. *Knapp v. Cardwell*, 667 F.2d 1253, 1262-63 (9th Cir. 1982)(describing the facts, arguments made, and holding of, *Dobbert*). Indeed, federal courts have rejected any *ex*

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barrier so high that it could never be surmounted would justify the very criticism that spawned the harmless-error doctrine in the first place: 'Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.'" *Id*. quoting R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50 (1970).

[7] Kaczmar improperly raises a *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), claim in the supplemental brief. Because no *Caldwell* claim was raised in the initial brief, the State declines to address the issue. *Caldwell* is not part of a proper harmless error analysis.

post facto violation attack on applying a new statute when Delaware changed its statute in the wake of *Ring* based on the holding in *Dobbert*. *See Hameen v. State of Delaware*, 212 F.3d 226 (3d Cir. 2000). If this Court finds a harmful violation of *Hurst*, the proper remedy is a remand for a third penalty phase.

Opposing counsel's reliance on *Anderson v. State*, 267 So.2d 8 (Fla. 1972), is misplaced. In *Anderson*, the State (improperly) conceded error. Indeed, the State filed the 3.800(a) motion in *Anderson*. There is no such concession in this case. More importantly, the *Dobbert* Court specifically rejected an equal protection challenge based on *Anderson*. *Dobbert*, 432 U.S. at 301, 97 S.Ct. at 2302.[8] It is *Dobbert*, not *Anderson*, that is on point.

The *Hurst* claim should be denied.

[8] Nor are any double jeopardy concerns present regarding resentencings that bridge the old and new death penalty statutes. Double jeopardy only prohibits a new penalty phase when a defendant was originally acquitted of death. There must be an acquittal to invoke the protection of the double jeopardy clause, which would, in the capital context, mean a finding of no aggravating circumstances. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). There was no acquittal at the first penalty phase because the jury recommended death under the then control statute. A defendant who was originally sentenced to death based on a jury recommendation of death can have no valid double jeopardy claim regardless of the change in the statute from 7-to-5 to 10-to-2 because he was not acquitted of anything.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via the e-portal to Assistant Public Defender Nada M. Carey, 301 South Monroe Street Suite 401, Tallahassee, FL 32301 this 10th day of March, 2016.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.