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 REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

NADA M. CAREY
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 606-1000

ATTORNEY FOR APPELLANT
FLA. BAR NO. 0648825

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SUPPLEMENTAL REPLY BRIEF OF APPELLANT

ARGUMENT

ISSUE

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).

The state argues that under the Eighth Amendment, just one aggravating circumstance, or "narrower," is required to increase a penalty to death, and that Ring v. Arizona, 536 U. S. 584 (2002), and Hurst hold only that this "one narrower" must be found by a jury under the Sixth Amendment. Supplemental Answer Brief at 4, 7, 9-12. "Additional aggravating circumstances do not increase the penalty. So, it is only one aggravating circumstance that the jury must find." Id. at 7.

The state has conflated what is required under the Eighth Amendment and what is required under the Sixth Amendment.[1] The

[1] The state has also misrepresented/misread appellant's argument in stating on page 11 that "opposing counsel insists

Supreme Court addressed Eighth Amendment requirements in Tuilaepa v. California, 512 U. S. 967 (1994), and Lowenfield v. Phelps, 485 U.S. 1126 (1988), holding in those cases that a death sentencing scheme passes constitutional muster under the Eighth Amendment so long as it requires at least one aggravator, or "narrowing" circumstance, to impose death. The requirement that at least one aggravator be found thus sets the floor for the narrowing function required in order for a death penalty scheme to be constitutional under the Eighth Amendment.

Whether a particular statute has adequately narrowed the class of death-eligible defendants under the Eighth Amendment has nothing to do, however, with whether a particular statute meets the requirements of the Sixth Amendment under Ring. In Ring, the question before the Court was whether Arizona's death sentencing statute ran afoul of the Sixth Amendment under the Apprendi rule by making an increase in a defendant's punishment--from life to death--contingent on a finding of fact by the judge, rather than a jury. In applying Apprendi v. New Jersey, 530 U. S. 466 (2000), to capital sentencing in Ring, the Supreme Court looked at the Arizona statute, as construed by the Arizona Supreme Court, to determine what findings "'exposed Ring to a greater

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that one aggravating circumstance is not sufficient to satisfy Furman v. Georgia, 408 U.S. 238 (1972)." Appellant discussed Furman only in the context of the applicability of section 775.082(2), and never stated that Furman requires more than one aggravator to satisfy the Eighth Amendment.

punishment than that authorized by the jury's guilty verdict.'" 536 U.S. at 604 (quoting Apprendi, 530 U.S. at 494). As the Supreme Court explained, citing Arizona's death penalty statute, "in Arizona, a death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt.' 200 Ariz. At 279, 25 P. 3d at 1151 (citing s. 13-703)." Ring, 536 U.S. at 597. By the express terms of its death penalty statute, then, in Arizona, one aggravator made the difference between life and death. Not so in Florida, as the Supreme Court in Hurst recognized. Under Florida's statute, death may not legally be imposed unless the court finds "'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 U.S. at 622.

The state's argument ignores that Florida is a weighing state. As the Eleventh Circuit explained in a federal habeas decision in a Florida capital case, "a weighing state is one in which the legislative narrowing of death-eligible defendants and the individualized sentencing determination are collapsed into a single step and based on an evaluation of the same sentencing factors," while in a nonweighing state, "eligibility and the actual sentence are determined separately." See Jennings v. McDonough, 490 F.3d 1230, 1249 n.14 (11th Cir. 2007); see also

Woldt v. People, 64 P.3d 256, 263 (2003)(in a weighing state, the trier of fact must weigh all the aggravating factors found to exist against the mitigating evidence to determine if the defendant is eligible for death). Under the Arizona statute under review in Ring, then, the finding of one aggravating factor did automatically make the defendant eligible for death. Under the Florida statute under review in Hurst, however, a defendant could not be sentenced to death until the sentencer (the judge) found that "sufficient aggravating circumstances" existed and that the "aggravating circumstances [were] not outweighed by the mitigating circumstances." Absent these findings, the sentence for first-degree murder in Florida was life in prison. For example, if a judge in Florida found one aggravating circumstance existed but did not also find that the aggravating circumstance was sufficient to impose death and not outweighed by the mitigating circumstances, death would not be a possible penalty.

The state's position that a single aggravator made a defendant eligible for death in Florida cannot be reconciled with this Court's interpretations of Florida's capital sentencing statute or the plain language of Hurst: "[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(2)(1)(emphasis added)." Hurst, 136 S. Ct. at 622. The Supreme Court in Hurst recognized that

Florida's sentencing statute, as interpreted by this Court, requires more than the finding of a single aggravating factor to make a defendant eligible for death:

> 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. 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).

136 S. Ct. at 622. The "critical [factual] findings necessary to impose the death penalty" in Florida, then are whether "sufficient aggravating circumstances exist" and whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Id. Without such findings, the penalty of death may not be imposed in Florida. See, e.g., Bottoson v. Moore, 833 So. 2d 693, 719-23, 725 (Fla. 2002)(Pariente, J., concurring in result only)("[T]he maximum penalty of death can be imposed only with the additional factual finding that aggravating factors outweigh mitigating factors").

The state also argues that the Sixth Amendment does not mandate that a jury perform the statutorily-required weighing function, Supp. Ans. Br. at 5-9, because the determination of whether the mitigating circumstances outweigh the aggravating circumstances is not an Apprendi-like element of the offense. Id. 14-15.

Contrary to the state's assertion on page 5, appellant has not argued that the Sixth Amendment in the abstract requires a jury to find mitigating circumstances and to make the weighing determination. Appellant's position, rather, is that under Florida's now-defunct statute, as described and interpreted by this Court, weighing was required before a death sentence could be imposed. As discussed above, in order to determine whether any defendant is eligible for death, the trial judge was required to determine whether sufficient aggravating circumstances existed that were not outweighed by mitigating circumstances. Further, whether weighing is labeled factfinding, or something else, determining the existence of and weighing the mitigating circumstances necessarily requires factfinding, often based on credibility assessments, and whether the aggravating factors are sufficient and not outweighed by the mitigation cannot be determined without determining the existence of mitigating factors. Under Florida's old statute, it was not one aggravator (or even a combination of aggravators) that determined death eligibility, but also the factfinding inherent in determining whether the aggravators found to exist were not outweighed by the mitigators found to exist. For this reason, Ring requires that the weighing under Florida's statute must be done by a jury.

On this issue--whether Ring requires the jury to determine the outcome of the weighing process--decisions from other state

supreme courts are instructive. The better reasoned decisions, such as those from Colorado, Arizona, and Missouri, conclude that this determination must indeed be made by the jury. See Woldt v. People, 64 P.3d 256, 265 (Colo. 2003); State v. Ring, 65 P.3d 915, 946 (Ariz. 2003); State v. Whitfield, 107 S.W.3d 253, 261 (Mo. 2003). Idaho arrived at the same result by statutory amendment. See State v. Lovelace, 90 P.3d 298, 301 (Idaho 2004).

While Maryland (which has since abolished its death penalty) and Nevada have expressed the view that the requirements of Ring do not apply to the weighing process based on the assumption that "weighing is not fact-finding," see Nunnery v. State, 263 P.3d 235, 251 (Nev. 2011); see also Oken v. State, 835 A.2d 1105, 1121-22 (Md. 2003)(Ring and Apprendi "do not apply to the weighing of aggravators and mitigators because ... that issue is not one that involves fact-finding,"), their logic, if any, does not apply in Florida. Under Florida's statute, one cannot weigh the mitigating factors against the aggravating factors without first determining whether mitigating factors exist. And in Florida, whether a mitigating factor exists clearly involves factfinding. See, e.g., Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997)("whether a mitigating circumstance has been established by the evidence in a given case is a question of fact"). Thus, even if weighing is not factfinding, weighing unarguably cannot be done without factfinding. Consider, for example, two of the most

compelling Florida mitigators, "extreme mental or emotional disturbance" and "impaired capacity." Whether these mitigators are found is always important, often outcome-determinative, see, e.g., Delgado v. State, 162 So. 3d 971 (Fla. 2015); Santos v. State, 629 So. 2d 838 (Fla. 1994), and generally depends on whether the state or the defense experts are found more credible. Under Florida's old statute, the judge made written findings and imposed the sentence. The judge determined the credibility of the conflicting experts (as well as the credibility of lay witnesses concerning the defendant's life history), and if the judge found the state's experts more credible than the defense experts, the judge would so state in the written findings. If the judge found the mental mitigators were not established and accorded them no weight, the judge's findings would be upheld on appeal as a proper exercise of discretion. See, e.g, Hobart v. State, 175 So. 3d 191, 202 (Fla. 2015); Ault v. State, 53 So. 2d 175, 188 (Fla. 2010). However, 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); see also Holsworth v. State, 522 So. 2d 248, 354 (Fla. 1988). As Justice Kogan pointed out in another life override case in which the majority affirmed the death sentence:

> The flaw in [the majority's] reasoning is the mistaken premise that it 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 of view 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.

Thompson v. State, 553 So. 2d 153, 158-59 (Fla. 1989)(concurring in part and dissenting in part). Justice Kogan's reasoning underscores the factfinding nature of the weighing function and why, under Hurst, weighing is one of "the critical findings necessary to impose the death sentence," and therefore within the jury's province.

The state also argues that Hurst does not apply to the present case because one of the aggravating circumstances the judge found was the prior robbery, which satisfies Apprendi's Sixth Amendment requirement. Supplemental Answer Br. at 15-16. As discussed above, the state's position that one aggravator is all that's needed to impose death under Florida's statute cannot be squared with the plain language of the statute or with Hurst. The state's reliance on this Court's previous cases rejecting Ring claims where the prior violent felony aggravator was present is misplaced, as those cases are no longer good law.

The state further argues that if there was a Sixth Amendment violation in this case, the error is subject to harmless error analysis under Neder v. United States, 527 U.S. 1 (1999), and

Washington v. Recuenco, 548 U.S. 212 (2006), and the error here was harmless because any rational juror would have found the especially heinous, atrocious, or cruel aggravating circumstance (EHAC). Supplemental Answer Br. at 17-18.

Turning first to whether a Hurst defect is amenable to harmless error analysis, a death sentence based on no jury verdict whatsoever is controlled by the logic of Sullivan v. Louisiana, 508 U.S. 275 (1993), not Neder and Recuenco. If the state's position--that jury factfinding is only required as to a single aggravator--were correct, then Neder might apply if that aggravator was uncontested or incontestable. But, as discussed above and in Appellant's Supplemental Brief, in a weighing state like Florida, Hurst requires jury findings as to each aggravator relied on by the state, as well as findings as to whether the aggravators are sufficient to warrant death and not outweighed by the mitigators. This being the case, a death sentence imposed without any of the required jury findings is not comparable to a jury instruction that omits an uncontested or incontestable element of an offense, as in Neder, or an uncontested or incontestable noncapital sentence enhancement factor, as in Recuenco. Instead, the rationale of Sullivan controls, as discussed and explained in Appellant's Supplemental Brief at 5-9. As there noted, in the absence of a jury verdict, a reviewing court cannot measure the effect of the constitutional error; it

can only substitute itself for the jury and speculate as to what findings a reasonable jury would have made. To affirm a death sentence in this manner would be tantamount to a prohibited directed verdict of death. Sullivan.

What other states did post-Ring is instructive. After their death penalty schemes were invalidated in 2002, the state supreme courts of Arizona and Idaho addressed the harmless error question. In State v. Lovelace, 90 P.3d 298 (Idaho 2004), the Idaho Supreme Court analyzed the question under both Neder and Sullivan, not finding them inconsistent. The court concluded that if a given element of an offense, or an aggravating factor, "was uncontested and supported by overwhelming evidence," the failure to submit that element or aggravating to the jury could properly be found harmless under Neder. See 90 P.3d at 304. The Idaho court found, however, that the "murder committed in the perpetration of a kidnapping" aggravator was not uncontested in that case, and the "utter disregard for human life" and "propensity" aggravators even less so. Therefore, as in Sullivan, there was no jury verdict within the meaning of the Sixth Amendment and no constitutionally cognizable finding to review. Quoting Justice Scalia, 508 U.S. at 279-80, the Idaho Supreme Court concluded that "'the illogic of harmless error review'" under these circumstances was obvious because it would require the appellate court to hypothesize a verdict that was

never in fact rendered. Lovelace, 90 P.3d at 304-05.

While Arizona did not find Ring error to be structural, its harmless error review was rigorous. Moreover, the Arizona court recognized that its analysis must focus not only on the factfinding as to aggravating circumstances but also on the mitigation factfinding and the weighing decision. The Arizona court concluded that "[b]ecause a trier of fact must determine whether mitigating circumstances call for leniency, we will affirm a capital sentence [on harmless error review] only if we conclude, beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." State v. Ring, 65 P.3d 915, 946 (Ariz. 2003); see also State v. Armstrong, 93 P.3d 1076, 1081 (Ariz. 2004). Thus, where the reviewing court cannot determine beyond a reasonable doubt that the jury could not have reached a different conclusion regarding the existence, significance, or weight of the mitigating circumstances, the Sixth Amendment error is not harmless and reversal of the death sentence is required. State v. Ring, 65 P.3d at 946; Armstrong, 93 P.3d at 1081-82; see also State v. Dann, 79 P.3d 58, 61 (Ariz. 2003)(although judge's finding of "multiple murders" aggravator was harmless, reversal nevertheless required because a reasonable jury could have reached a different conclusion regarding the existence and significance of the mitigating circumstances).

In the present case, the state argues that any error was harmless because "any rational jury would have found the EHAC aggravator." Supp. Ans. Br. at 17-18. Under federal and state harmless error standards, see Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), for a Hurst error to be harmless, the state must prove beyond a reasonable doubt that the absence of the jury findings required by Hurst did not contribute to the death sentence (imposed here by the judge). Kaczmar's death sentence was imposed based on the trial judge's findings that two aggravating circumstances existed, the prior robbery and EHAC, and that these aggravators were not outweighed by the mitigation and thus sufficient to warrant death. But, this Court cannot conclude beyond a reasonable doubt that the jury found the EHAC aggravator, particularly given that Florida has zero history of jury findings as to EHAC or any other aggravating circumstances. While the evidence may be sufficient to support a finding of EHAC, it is not clear at all, and certainly not clear beyond a reasonable doubt, that the jury found this aggravator. The jury was instructed that "heinous" means extremely wicked or shockingly evil, that "atrocious" means outrageously wicked and vile, and that "cruel" means designed to inflict a high degree of pain with utter indifference to, or even, enjoyment of, the suffering of others. See Fla. Stand. Jury Inst. 7.11; R6:1088. The jury was

further instructed that "the kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim." Id.

Here, Kaczmar stabbed Ruiz to death during a confrontation in their kitchen after a night of heavy drug use by Kaczmar. According to a state witness, Kaczmar was paranoid and delusional to the extent that he was seeing things that weren't there. After rejecting Kaczmar's advances, Ruiz had armed herself with a knife. The number of blows indicate this was a frenzied attack, born of sudden rage, which is consistent with state witness testimony that Kaczmar snapped when he got cut while attempting to take the knife from Ruiz. Given the instruction that EHAC applies to crimes accompanied by "additional acts" that show the crime was unnecessarily torturous, and that cruel means "designed" to inflict a high degree of pain, and the undisputed evidence that the attack was neither planned nor accompanied by additional acts beyond the blows that caused death, it cannot be said beyond a reasonable doubt that a unanimous jury found the EHAC aggravating circumstance. Given that the jury heard nothing in mitigation, the 12 to 0 jury recommendation is reasonably attributable to the absence of mitigation, not to its findings on the aggravating factors. Thus, while the death sentence imposed by the judge was based on its finding of two aggravators, the

jury may well have found only one aggravator, the robbery aggravator. The Hurst defect--the absence of jury findings as to the aggravating circumstances--cannot be deemed harmless.

Last, the state argues that the remedy is a new penalty phase under the new statute because: 1) Anderson v. State, 267 So. 3d 8 (Fla. 1972), doesn't apply because the state conceded error in Anderson, and 2) under Dobbert v. Florida, 432 U.S. 282 (1977), there are no ex post facto concerns with resentencing Kaczmar under the new statute.

The state's argument that Anderson doesn't apply because the state conceded error dodges the real question, whether section 775.082(2) applies to Kaczmar. In addition to the arguments made in his Supplemental Brief, Kaczmar would point out that of the five western states whose death penalty schemes were expressly declared unconstitutional by Ring in 2002, two of them, Colorado and Arizona, had "savings clauses" substantially similar to Florida's section 775.082(2). The Supreme Court of Colorado held that it applied to individuals previously sentenced to death under the unconstitutional statute, and that they must be resentenced to life imprisonment rather than be exposed to new death penalty resentencing trials under the newly enacted statute. Woldt v. People, 64 P.3d 256, 258-59, 262-72 (Colo. 2003). While the Supreme Court of Arizona reached a contrary conclusion in State v. Pandell, 161 P.3d 557, 573-74 (Ariz.

2007), the Arizona court's conclusion was based on a theory of severability, which this Court, under well-established Florida law, cannot adopt.[2]

The Colorado Supreme Court's decision in Woldt was complicated by the fact that the Colorado legislature had enacted two conflicting statutes: one statute required the imposition of a life sentence in the event the death penalty statute was found unconstitutional (the mandatory provision), while the other granted the court discretion to affirm the death sentences or

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[2]Under established Florida law, "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). Moreover, when the constitutional and unconstitutional provisions of a statute are inextricably intertwined, the invalid portions cannot be severed. 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) provides that "[n]otwithstanding the recommendation of a majority of the jury," the trial court shall enter a sentence of life imprisonment or death, and if a death sentence is imposed, the trial judge shall make the written findings of fact as to the aggravating and mitigating circumstances "upon which the sentence of death is based." The jury's advisory role and the judge's factfinding role cannot be "severed" from the statute. Rather, the jury's and judge's respective functions can be addressed only by rewriting the statute (which the legislature has now done). 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 merely a list of aggravating and mitigating circumstances with no direction as to how to apply them or who shall apply them. Without its unconstitutional provisions, Florida's death penalty statute contains no mechanism for determining who lives and who dies. Those provisions are integral to the former statutory scheme, and cannot be severed from it; the entire law is unconstitutional.

order new penalty phase trials (the discretionary provision). 64 P.3d at 267. Using principles of statutory construction, the court in Woldt held the mandatory provision must prevail. Id. at 269. In addition, the court concluded that affirming the death sentences on a quasi-"harmless error" theory, based on whether the juries implicitly found the aggravators that had been found by the three-judge panels, would place the appellate court in an impermissible factfinding role. Id. at 269-70. The court also concluded that returning the cases to the trial court for new jury penalty trials would raise serious ex post facto questions since, inter alia, "the mandatory provision ... dictates life imprisonment as the remedy for this constitutional violation." Id. at 270-72.

The Colorado Supreme Court in Woldt recognized that Dobbert does not control the remedy for defendants who have been sentenced under an unconstitutional statute. 64 P.3d at 271-72 & n. 21. Dobbert's situation was different from Woldt's because Dobbert was neither tried nor sentenced under an unconstitutional statute, and was thus not eligible for relief under Colorado's savings clause that dictated life imprisonment as the remedy in the event the death penalty was held unconstitutional. Application of the discretionary option thus "would extinguish the benefits to Woldt [] of this statutory right to life imprisonment." Id.

The same analysis applies here. Kaczmar, unlike Dobbert,

was sentenced under an unconstitutional statute, and under the plain language of 775.082(2) has a right to be sentenced to life imprisonment, which raises a different ex post facto problem[3] than that addressed in Dobbert. Resentencing Kaczmar under the newly-enacted statute would extinguish the benefit to him of his statutory right to life imprisonment.

[3]See Art. X, s. 9, Fla. Const.

CONCLUSION

For the reasons presented in this brief, the Supplemental Brief, and the Initial and Reply Briefs on the Merits, 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 by electronic mail to Charmaine Millsaps, Assistant Attorney General, Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, at Capapp@myfloridalegal.com as agreed by the parties, and by U.S. Mail to Leo Louis Kaczmar, #J20499, Florida State Prison, 7819 NW 228th St., Raiford, FL, 32026, on this 21st day of March, 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,

/s/ Nada M. Carey
NADA M. CAREY
Assistant Public Defender
Florida Bar No. 0648825
Leon Co. Courthouse, #401
301 South Monroe Street
Tallahassee, Florida 32301
Nada.Carey@flpd2.com
(850) 606-1000
ATTORNEY FOR APPELLANT