APPENDIX

Supreme Court of Florida

No. SC13-2247

LEO LOUIS KACZMAR, III,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[January 31, 2017]

PER CURIAM.

Leo Louis Kaczmar, III, appeals his sentence of death imposed after a new penalty phase proceeding. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the following reasons, we affirm Kaczmar's sentence of death.

STATEMENT OF THE CASE AND FACTS

We previously set forth the relevant facts in Kaczmar v. State, 104 So. 3d 990, 995-98 (Fla. 2012). Kaczmar was convicted for first-degree murder, attempted sexual battery, and arson. During Kaczmar's first penalty phase, the

parties stipulated that Kaczmar had been previously convicted of a robbery. Id. at 997. The State presented a victim impact statement from Ruiz's brother. Id. The defense presented testimony from Kaczmar's family and friends that depicted Kaczmar as a good person who had a troubled upbringing due to his father's abuse. Dr. Miguel Mandoki, a child psychiatrist, testified that Kaczmar was traumatized as a child by his father's alcoholism and his own chronic drug abuse. Id. Dr. Mandoki also testified that although he believed Kaczmar to be competent during trial, he did not think Kaczmar knew what he was doing on the night of the murder and did not know right from wrong. Id. At the end of the penalty phase, the jury recommended a sentence of death by a vote of eleven to one. Id.

During the first Spencer[1] hearing, neither the State nor the defense presented testimony. Id. at 998. In the trial court's sentencing order, the court found four statutory aggravating factors.[2] Id. The trial court also found fourteen mitigating

---

1. Spencer v. State, 615 So. 2d 688 (Fla. 1993).

2. The trial court found the following aggravating circumstances: (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or felony probation; (2) the capital felony was committed while Kaczmar was engaged in the commission of or an attempt to commit a sexual battery; (3) the capital felony was especially HAC; and (4) the crime was committed in a cold, calculated, and premeditated (CCP) manner, without any pretense of moral or legal justification.

factors.[3] The trial court concluded that the aggravating circumstances outweighed the mitigation and imposed a sentence of death. Id.

Kaczmar raised nine issues on direct appeal.[4] Id. We affirmed Kaczmar's convictions, held that the trial court erred in finding the CCP and committed during

---

3. The fourteen mitigating factors were: (1) Kaczmar was raised by an alcoholic father; (2) Kaczmar was raised by a physically and emotionally abusive father; (3) Kaczmar was emotionally traumatized as a child when he witnessed his grandfather's drowning and his mother's shooting of his father; (4) Kaczmar had been taught to lie in court; (5) Kaczmar lacked a normal mother-son bonding and relationship; (6) Kaczmar is kind to animals; (7) Kaczmar is a loyal friend; (8) Kaczmar is a good, reliable business partner; (9) Kaczmar had a loving relationship with his aunt, Cathy Casleton; (10) Kaczmar was protective of younger family members; (11) Kaczmar suffered long-term effects of illegal drug use; (12) Kaczmar was impaired by his use of illegal drugs on the evening of the murder; (13) Kaczmar suffered from an absence of professional mental health counseling and treatment; and (14) Kaczmar showed respectful behavior in court.

4. The nine issues were: (1) whether the trial court properly denied the motion for judgment of acquittal regarding attempted sexual battery; (2) whether the trial court abused its discretion by allowing the State to call the defendant's wife to testify regarding a plan to fabricate evidence; (3) whether the trial court committed fundamental error by not sua sponte giving a special jury instruction on the heat of passion defense; (4) whether the trial court abused its discretion in limiting closing arguments by preventing defense counsel from reading language of opinions to the jury; (5) whether the trial court properly denied the motion in limine to require the State not to edit the defendant's exculpatory statements from the recordings of the undercover meetings; (6) whether the trial court erred in finding the cold, calculated, and premeditated aggravator; (7) whether the trial court properly denied the motion for judgment of acquittal regarding premeditated murder; (8) whether the trial court properly denied the motion for judgment of acquittal regarding arson; and (9) whether Florida's death penalty statute violates the Sixth Amendment right to a jury trial.

the course of attempted sexual battery aggravators, which was not harmless beyond a reasonable doubt, and therefore remanded for a new penalty phase. Id. at 1008.

On August 8, 2013, the trial court held a Koon[5] hearing, at which Kaczmar waived his right to present mitigation against his counsel's advice, including the presentation of any live mitigation witnesses or the testimony of the mitigation witnesses from the first penalty phase read into the record. During the second penalty phase proceeding, held on August 19-20, 2013, the prosecutor gave an opening statement in which he sought to prove two aggravating circumstances: (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or felony probation; and (2) the capital felony was especially heinous, atrocious, or cruel (HAC). The prosecutor and the defense stipulated to the identity of the victim and Kaczmar's 2002 conviction for the prior violent felony of robbery. The State presented the live testimony of the medical examiner, Dr. Jesse Giles, and prior sworn testimony of nine additional witnesses.

The trial court conducted another waiver colloquy during the second penalty phase proceeding. Kaczmar again refused to present mitigation; however, he agreed to his counsel's reading to the jury a stipulation regarding his age at the

---

5. Koon v. Dugger, 619 So. 2d 246 (Fla. 1993).

time of the murder. The trial court noted that Kaczmar waived most mitigation but intended to present the stipulation and argue mitigation presented during the guilt phase. Thus, the defense counsel presented before the jury the stipulation that Kaczmar was twenty-four years old on the date of the murder. Thereafter, the defense rested, and the jury unanimously recommended the death sentence.

On August 20, 2013, the trial court conducted a Spencer hearing. The State did not present any additional evidence, and Kaczmar admitted into evidence the transcripts of testimony from six mitigating witnesses who testified during the first penalty phase proceeding, including the testimony of Dr. Mandoki. Both parties submitted to the trial court sentencing memoranda.

In its sentencing order, the trial court found two statutory aggravating circumstances: (1) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; and (2) the capital felony was especially HAC. The trial court considered three statutory mitigating circumstances[6] and found that none had been proven, and therefore gave them no weight. The trial court also discussed twenty nonstatutory mitigating

---

6. The statutory mitigating circumstances considered were: (1) the capital felony for which the defendant was to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance; (2) the capacity of the defendant to appreciate the criminality of the conduct or to conform his conduct to the requirements of the law was substantially impaired; and (3) the defendant's age at the time of the crime.

circumstances[7] and gave fifteen of them slight weight. The trial court found that the aggravating circumstances far outweighed the mitigating circumstances in this case. In the sentencing order, the trial court noted that it was "required to give great weight to the jury's recommendation" and fully agreed with the "jury's assessment of the aggravating circumstances."

Kaczmar appealed the trial court's sentencing order to this Court raising six claims.[8]

---

7. The nonstatutory mitigating circumstances considered were: (1) the defendant was raised by an alcoholic father—slight weight; (2) the defendant was raised by a physically and emotionally abusive father—slight weight; (3) as a child, the defendant was emotionally traumatized when he witnessed his grandfather drown and his mother shoot his father—slight weight; (4) the defendant was taught to lie in court—slight weight; (5) the defendant lacked a normal mother-son bonding and relationship—slight weight; (6) the effect of the defendant's adult prison sentence while still a juvenile—no weight; (7) the defendant lacked adult male mentors during his crucial pre-teen and teenage years—no weight; (8) the defendant was emotionally torn by extremes of parental abuse and parental overindulgence—no weight; (9) the defendant is kind to animals—slight weight; (10) the defendant is a loyal friend—slight weight; (11) the defendant was a good, reliable business partner—slight weight; (12) the defendant is a good prison inmate—no weight; (13) the defendant has a loving relationship with his aunt—slight weight; (14) the defendant was protective of younger family members—slight weight; (15) the defendant suffers long term effects of illegal drug use—slight weight; (16) the defendant was impaired by illegal drugs on the evening of the murder—slight weight; (17) the defendant did not receive professional mental health counseling and treatment—slight weight; (18) the defendant was respectful in court—slight weight; (19) cosuspect Christopher Ryan Modlin received a disparate sentence—no weight; and (20) the defendant is a loving father—slight weight.

8. Kaczmar raised the following claims on direct appeal: (1) the trial court erred in assigning great weight to the jury's death sentence recommendation; (2)

DISCUSSION

Kaczmar first argues that his death sentence violates Hurst v. Florida, 136 S. Ct. 616 (2016). We agree but find the error harmless.

In Hurst v. Florida, the United States Supreme Court held that Florida's capital sentencing scheme is unconstitutional because "[t]he 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." 136 S. Ct. at 619. In Hurst v. State, 202 So. 3d 40, 54 (Fla. 2016), this Court held that "in addition to finding the existence of any aggravating factor unanimously, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge." Id. We further held that a unanimous jury recommendation is required before the trial court may impose a sentence of death. Id. We also concluded that a Hurst error is capable of harmless error review. Id. at 68.

---

the trial court improperly interfered with the jury's function by dismissing juror questions as "not relevant"; (3) the prosecutor engaged in impermissible closing argument; (4) the trial court erred in failing to find and give weight to the mitigating circumstance that Kaczmar was abused; (5) Kaczmar's death sentence is disproportionate; and (6) the death penalty was improperly imposed because Florida's death penalty statute is unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002).

Kaczmar was sentenced to death under the procedure that the United States Supreme Court invalidated in Hurst v. Florida. "When the [United States] Supreme Court announces 'a new rule for the conduct of criminal prosecutions,' the rule must be applied to 'all cases, state or federal, pending on direct review or not yet final.' " State v. Fleming, 61 So. 3d 399, 403 (Fla. 2011) (quoting Griffith v. Kentucky, 479 U.S. 314, 328 (1987)). Because Kaczmar's case was pending on direct appeal when Hurst v. Florida issued, the United States Supreme Court's decision applies to him. See Davis v. State, 41 Fla. L. Weekly S528 (Fla. Nov. 10, 2016).

We must next address whether that error was harmless beyond a reasonable doubt. We conclude that the error was harmless. As this Court explained in Hurst:

> The harmless error test, as set forth in Chapman [v. California, 386 U.S. 18 (1967),] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

Hurst, 202 So. 3d at 68 (quoting State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986)). The Court further discussed the lens through which harmless error should be evaluated:

> Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. State, 753 So. 2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error

> test is to be rigorously applied," DiGuilio, 491 So. 2d at 1137, and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a Hurst error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate,
>
> > The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.
>
> DiGuilio, 491 So. 2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." Id.

Id. at 68. Regarding the right to a jury trial, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors and that the aggravating factors outweighed the mitigating circumstances.

In this case, we find the Hurst v. Florida violation to be harmless beyond a reasonable doubt. We recently decided a similar case, in which that defendant's jury, like Kaczmar's jury, unanimously recommended a death sentence. Davis, 41 Fla. L. Weekly at S528. In Davis, we held that the Hurst v. Florida error was harmless: "With regard to Davis's sentences, we emphasize the unanimous jury recommendations of death. These recommendations allow us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there

were sufficient aggravators to outweigh the mitigating factors." Id. at S539. Kaczmar's jury likewise recommended a death sentence by a unanimous twelve-to-zero vote. Kaczmar's jury received the same standard criminal jury instruction we cited in Davis, ensuring that the jury "determine[d] whether sufficient aggravators existed and whether the aggravation outweighed the mitigation before it . . . recommend[ed] a sentence of death." Id. (citing Fla. Std. Jury Instr. Crim. 7.11). As with the jury in Davis, Kaczmar's "jury was presented with evidence of mitigating circumstances and was properly informed that it may consider mitigating circumstances that are proven by the greater weight of the evidence." Id. (citing Fla. Std. Jury Instr. Crim. 7.11). As in Davis, Kaczmar's "jury was not informed that the finding that sufficient aggravating circumstances outweighed the mitigating circumstances must be unanimous, and even though it was instructed that it was not required to recommend death even if the aggravators outweighed the mitigators, the jury did in fact recommend death unanimously." Id. (citing Fla. Std. Jury Instr. Crim. 7.11). Given that Kaczmar's jury received the same critical instructions as Davis's jury, we are confident beyond a reasonable doubt that here, as in Davis, "the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendations." Id. Finally, as in Davis, "the egregious facts of this case" provide "[f]urther support[] [for] our conclusion that any Hurst v. Florida error here was harmless." Id. at S540. Kaczmar stabbed

a woman approximately ninety-three times after she refused to have sex with him, burned down his own house to cover up the murder, and attempted to recruit an undercover police officer to frame his friend for the murder. See Kaczmar, 104 So. 3d at 996-97. The sentencing court found two aggravating factors: that Kaczmar had previously been convicted of a violent felony and that the murder was especially heinous, atrocious, or cruel (HAC). See § 921.141(5)(b), (h) (2009). "And this Court has indicated that the prior violent felony and HAC aggravators are 'two of the most weighty in Florida's sentencing calculus.' " Partin v. State, 82 So. 3d 31, 46 (Fla. 2011) (quoting Sireci v. Moore, 825 So. 2d 882, 887 (Fla. 2002)).

Accordingly, we hold that the Hurst v. Florida violation was harmless beyond a reasonable doubt. See Davis, 41 Fla. L. Weekly at S540. What we said in Davis is equally true in this case:

> Here, the jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. In fact, although the jury was informed that it was not required to recommend death unanimously, and despite the mitigation presented, the jury still unanimously recommended that [the defendant] be sentenced to death . . . . The unanimous recommendations here are precisely what we determined in Hurst v. State to be constitutionally necessary to impose a sentence of death.

Id. As in Davis, the Hurst v. Florida violation in Kaczmar's case does not entitle him to a new penalty phase.

In his second claim, Kaczmar contends that the trial court violated this Court's holding in Muhammad v. State, 782 So. 2d 343 (Fla. 2001), and therefore the Eighth Amendment to the United States Constitution when the trial court gave great weight to the recommendation of Kaczmar's penalty phase jury despite the fact that no mitigating evidence was presented to the jury. We disagree.

In Muhammad, even though the defendant discharged his penalty phase counsel and did not present any mitigating evidence to the jury during the penalty phase, the trial court nevertheless instructed the penalty phase jury by stating that "[y]our advisory sentence as to what sentence should be imposed on this Defendant is entitled by Law and will be given great weight by this Court in determining what sentence to impose in this case." Id. at 361, 363 n.9. Afterward, the jury returned a recommended sentence of death. At the sentencing hearing, the trial court considered mitigating circumstances that were not presented to the jury, imposed a death sentence, and indicated in the sentencing order that "[t]his Court must give great weight to the jury's sentencing recommendation." Id. at 362. On direct appeal, this Court reversed for a new penalty phase and found that "the trial court erred when it gave great weight to the jury's recommendation in light of Muhammad's refusal to present mitigating evidence and the failure of the trial court to provide for an alternative means for the jury to be advised of available mitigating evidence." Id. at 361-62.

Here, the trial court considered Kaczmar's age at the time of the murder, a statutory mitigating circumstance, and found that it was not proven and thereby gave it no weight. Thereafter, the trial court concluded in its sentencing order as follows:

> This Court has carefully considered and weighed the aggravating and mitigating circumstances found in this case. Understanding that this is not an arithmetic comparison, but one which requires qualitative analysis, this Court has assigned an appropriate weight to each aggravating circumstance and each mitigating circumstance in this Order. On balance, the aggravating circumstances in this case far outweigh the mitigating circumstances. The jury was fully justified in its twelve to zero recommendation that the death penalty be imposed upon Defendant for Ms. Ruiz's murder. This Court is required to give great weight to the jury's recommendation and fully agrees with the jury's assessment of the aggravating circumstances presented. Defendant waived mitigation before the jury. The prior testimony of the former mitigation witnesses, however, was submitted to this Court. After considering the mitigating circumstances presented, this Court finds that the ultimate penalty that this Court can impose in this case should be imposed.

(Footnote omitted.)

The sentencing order here is similar to the one in Grim v. State, 841 So. 2d 455 (Fla. 2003). Even though Grim waived his right to present mitigation and the jury returned a recommendation of death, the Grim trial court stated in its sentencing order that it gave the jury's recommendation great weight. Id. We recognized that the Grim trial court's sentencing order was distinguishable from the sentencing order in Muhammad. Id. at 461. The Grim trial court acknowledged in its sentencing order, unlike the Muhammad trial court, that the

penalty phase jury did not have the benefit of hearing mitigation. As such, the Grim trial court independently weighed the aggravating and mitigating circumstances and duly considered the jury's recommendation. Id. We therefore found that Muhammad was distinguishable and concluded that the trial court in Grim properly sentenced Grim despite the lack of mitigation presented for the jury's consideration in the penalty phase. Id.

Similarly, the trial judge here stated in his sentencing order that he agreed "with the jury's assessment of the aggravating circumstances presented," acknowledged that Kaczmar "waived mitigation before the jury," "carefully considered and weighed the aggravating and mitigating circumstances," and thereafter concluded that death was the appropriate sentence after acknowledging that he stated that he was required to give great weight to the jury's recommendation. See Brooks v. State, 918 So. 2d 181, 210 (Fla. 2005) ("Indeed, the length, thoroughness, and tone of the sentencing order strongly imply that the trial judge's sentencing determination is based on the weighing of the aggravating and mitigating factors and on the jury's recommendation."), receded from on other grounds by, State v. Sturdivant, 94 So. 3d 434 (Fla. 2012). In addition, unlike Muhammad, the trial court did not instruct the jury that its sentencing recommendation would be given great weight. Muhammad, 782 So. 2d at 363, n.9. Nor did the trial court specifically warn Kaczmar during the Koon hearing

that he, as the sentencing judge, must give great weight to the jury's recommendation. Grim, 841 So. 2d at 461. Therefore, we likewise find this case distinguishable from Muhammad and conclude that the trial court properly sentenced Kaczmar notwithstanding the lack of mitigation presented for the jury's consideration. See Grim, 841 So. 2d at 461. Accordingly, we deny relief with regard to this claim.

In his third claim, Kaczmar argues that the trial judge improperly interfered with the jury's decision-making and usurped the jury's function when, in response to questions the jury posed during its deliberations, the judge stated to the jury "not relevant." We disagree.

Absent a contemporaneous objection, an appellate court reviews a trial court's improper comment for fundamental error. Bell v. State, 108 So. 3d 639, 650 (Fla. 2013). "Fundamental error is error that 'reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.' " Carr v. State, 156 So. 3d 1052, 1062-63 (Fla. 2015) (quoting Archer v. State, 934 So. 2d 1187, 1205 (Fla. 2006)).

Here, defense counsel failed to contemporaneously object to the trial court's response to the jury. As such, defense counsel failed to preserve this issue for appellate review. See Braddy v. State, 111 So. 3d 810, 855 (Fla. 2012) ("[T]o meet the objectives of any contemporaneous objection rule, an objection must be

sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." (quoting Castor v. State, 365 So. 2d 701, 703 (Fla. 1978))). Furthermore, we find that there is no fundamental error—no error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. See Bell, 108 So. 3d at 650. Accordingly, Kaczmar is not entitled to relief concerning this claim.

With regard to his fourth claim, Kaczmar asserts that the trial court erred in failing to grant a mistrial when the prosecutor engaged in impermissible closing argument when he referred to the defense's mitigating evidence regarding the defendant's age as "excuses." We disagree.

"As a general rule, the failure to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review." Card v. State, 803 So. 2d 613, 622 (Fla. 2001). For those prosecutorial comments to which a defendant fails to contemporaneously object at trial but raises on appeal, we apply fundamental error review. Braddy, 111 So. 3d at 837) (citing Brooks v. State, 762 So. 2d 879, 899 (Fla. 2000)). Such a review includes two factors: (1) whether the improper statement was repeated; and (2) whether the jury was provided with an accurate statement of law after the improper comment was made. See Poole v. State, 151 So. 3d 402, 415 (Fla. 2014).

We have " 'long recognized that a prosecutor cannot improperly denigrate mitigation during a closing argument.' " Franqui v. State, 59 So. 3d 82, 98 (Fla. 2011) (quoting Williamson v. State, 994 So. 2d 1000, 1014 (Fla. 2008)); see Brooks, 762 So. 2d at 904.

Here, the prosecutor made the following comment during his closing argument:

> Mitigators. I know the defense has indicated to you that they're going to argue some mitigators to you. The only evidence they presented is [the defendant] was 24 at the time, just a few days shy of being 25 at the time. That's the evidence they presented to you.
>
> Now they may make arguments and ask you to speculate about some other things, you know, create some excuses or mitigation as I would call them for his actions, but at the end of the day that's your call. You determine whether those mitigators are present in the evidence I presented and you determine if they are present what weight to give them and at the end of the day you determine how they weigh out with the aggravators that have been presented in this case.

We conclude that the prosecutor's characterization of the mitigating evidence regarding Kaczmar's age at the time of the crime was improper. See Oyola v. State, 158 So. 3d 504, 512 (Fla. 2015) (citing Delhall v. State, 95 So. 3d 134, 167-68 (Fla. 2012) ("Prosecutors who claim in closing statements that defendants' mitigating evidence are 'excuses,' 'make-believe,' 'flimsy,' or 'phantom' have been rebuked by this Court.")). However, the comment does not rise to the level of fundamental error.

Here, the prosecutor called the mitigating evidence—the stipulation of the defendant's age at the time of the crime—"excuses" only once, and after making the statement, the prosecutor encouraged the jury to weigh the aggravators and the mitigators in order to recommend an advisory sentence. Also, the trial court read the standard jury instructions, which included an accurate statement of the law with regard to mitigation. See Poole, 151 So. 3d at 415. We therefore find that the prosecutor's statement here did not rise to the level of fundamental error. See Mendoza v. State, 964 So. 2d 121, 133 (Fla. 2007). Accordingly, Kaczmar is not entitled to relief with regard to this claim.

In his fifth claim, Kaczmar contends that the trial court erred in failing to find the nonstatutory mitigating circumstance that he was emotionally torn by extremes of parental abuse and parental overindulgence. Specifically, Kaczmar argues that the trial court erred in failing to find this mitigator on the ground that Dr. Miguel Mandoki's testimony, which was transcribed and submitted to the trial court only during the second Spencer hearing, linked Kaczmar's inability to know right from wrong to the crimes even though there is no requirement that mitigation have a nexus to the offenses. We agree but conclude that the error is harmless.

We require a trial court to enter a written sentencing order that "expressly evaluat[es]" the defendant's proposed mitigation. Campbell v. State, 571 So. 2d

415, 419 (Fla. 1990), receded from on other grounds by, Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000). Since Campbell was decided, we have held:

> Where it is clear that the trial court has considered all evidence presented in support of a mitigating factor, the court's decision as to whether that circumstance is established will be reviewed only for abuse of discretion. . . . The weight assigned to an established mitigating circumstance is also reviewed for abuse of discretion.
>
> When a trial court fails to detail its findings, however, this Court is "deprive[d] . . . of the opportunity for meaningful review." In such circumstances, this Court has vacated the defendant's death sentence and remanded to the trial court with instructions to issue a new sentencing order. However, a trial court's findings on mitigation are also subject to review for harmless error, and this Court will not overturn a capital appellant's sentence if it determines that an error was harmless beyond a reasonable doubt.

Ault v. State, 53 So. 3d 175, 186-87 (Fla. 2010) (citations omitted).

In its sentencing order, the trial court here made the following finding with regard to mitigating evidence that it considered:

> Tammy Evans, Martha Moody and Katherine Casleton testified that Defendant's father would alternate between beating Defendant and overindulging him. Defendant, however, failed to present evidence of how this upbringing impacted his ability to know right from wrong or inhibited his ability to be a law-abiding member of society. This Court finds this mitigating circumstance was not proven and gives it no weight in determining the appropriate sentence for Defendant.

In its finding, the trial court specifically stated that the defendant "failed to present evidence of how this upbringing impacted his ability to know right from wrong or inhibited his ability to be a law-abiding member of society." However, the record

indicated that Dr. Miguel Mandoki, the defense's expert witness, testified to such evidence during the original penalty phase proceeding.

We find that the trial court failed to expressly evaluate Dr. Mandoki's testimony regarding Kaczmar's emotional state of being torn by extremes of parental abuse and parental overindulgence when it made no reference in the sentencing order to Dr. Mandoki's testimony. See Deparvine v. State, 995 So. 2d 351, 380 (Fla. 2008). The trial court had prior notice that Dr. Mandoki's testimony was going to be offered as mitigating evidence because defense counsel filed a sentencing memorandum during the first Spencer hearing that described Dr. Mandoki's explanation of "how such parental erratic behavior deprives a child of the normal, positive and negative reinforcements needed to learn and grow into a mature and responsible adult." Even though defense counsel incorporated that sentencing memorandum as its sentencing memorandum for the second Spencer hearing, the trial court failed to mention in its sentencing order Dr. Mandoki's professional opinion regarding Kaczmar's emotional state or his inability to know right from wrong due to the extremes of being physically beaten and overindulged as a child. See id.

Furthermore, the only mitigating evidence that the trial court here considered in its sentencing order concerning the mitigator was the testimony of Tammy Evans, Martha Moody, and Katherine Casleton. None of these witnesses testified

about how the abuse and overindulgence affected Kaczmar emotionally. A "sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." Harris v. State, 843 So. 2d 856, 869 (Fla. 2003) (quoting Campbell, 571 So. 2d at 419)). Because the trial court failed to address Dr. Mandoki's testimony in the sentencing order with regard to this particular nonstatutory mitigator, we find that the trial court erred in not giving it more express consideration "pursuant to this Court's mandate to expressly evaluate each mitigating circumstance." Deparvine, 995 So. 2d at 381. We therefore conclude that the trial court abused its discretion when it found that the mitigator was unproven. See Merck v. State, 763 So. 2d 295, 297-99 (Fla. 2000); Reese v. State, 694 So. 2d 678, 684 (Fla. 1997).

However, the trial court's error in not treating Dr. Mandoki's testimony in greater detail in its sentencing order is harmless. See Thomas v. State, 693 So. 2d 951, 953 (Fla. 1997). In this context, we set the following parameters for evaluating harmless error:

> The question is whether there is a reasonable possibility that the error contributed to the sentence. See State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). Reversal is permitted only if the excluded mitigating factors reasonably could have resulted in a lesser sentence. If there is no likelihood of a different sentence, then the error must be

deemed harmless. See Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987).

Ault, 53 So. 3d at 195.

Here, the trial court found two aggravating circumstances—HAC and prior violent felony, which we have said are among the weightiest of aggravators, and gave both of them "great weight." See Miller v. State, 161 So. 3d 354, 374 (Fla. 2015); Matthews v. State, 124 So. 3d 811, 818 (Fla. 2013). The trial court found that none of the statutory mitigating circumstances were proven and thereby gave them no weight. Out of the remaining nineteen nonstatutory mitigators, the trial court found that fifteen were established and gave them slight weight, and the remaining four were not proven and thereby given no weight.

Even if the trial court found that the nonstatutory mitigator regarding Kaczmar's emotional state of being torn between parental abuse and overindulgence was established and given greater weight than any other mitigator it found, there is no reasonable doubt that had the trial court noted in its sentencing order Dr. Mandoki's testimony, the court still would have imposed the death penalty due to the extensive aggravating circumstances in this case. See Ault, 53 So. 3d at 195-96; Singleton v. State, 783 So. 2d 970, 977 (Fla. 2001). Accordingly, Kaczmar is not entitled to relief concerning this claim.

With regard to his sixth claim, Kaczmar argues that his death sentence is disproportionate. We disagree and find that Kaczmar's death sentence is proportionate.

We must conduct a comprehensive review of each death sentence to determine if the murder falls within the category of both the most aggravated and the least mitigated murders in order to ensure uniformity in the application of the death sentence. See Anderson v. State, 841 So. 2d 390, 408 (Fla. 2003). "We consider the totality of the circumstances of the case and compare the case to other capital cases." Williams v. State, 37 So. 3d 187, 205 (Fla. 2010) (citing Offord v. State, 959 So. 2d 187, 191 (Fla. 2007)). This analysis does not involve a quantitative comparison between the number of aggravating and mitigating factors; it requires a qualitative review of the underlying basis for each aggravating factor and mitigating factor. Id. Additionally, the prior violent felony aggravator and HAC are qualitatively among the weightiest aggravating circumstances. See Kocaker v. State, 119 So. 3d 1214, 1232 (Fla. 2013); Hodges v. State, 55 So. 3d 515, 542 (Fla. 2010).

Under the totality of the circumstances, Kaczmar's sentence is proportionate in relation to other death sentences that we have upheld. See, e.g., Gosciminski v. State, 132 So. 3d 678 (Fla. 2013), cert. denied, 135 S. Ct. 57 (2014) (death sentence was proportionate where the victim was stabbed and bludgeoned to death;

the trial court found three statutory aggravators, including HAC, few nonstatutory mitigators, and no statutory mitigators); Pham v. State, 70 So. 3d 485 (Fla. 2011) (death sentence was proportionate in a stabbing murder where the jury recommended death by a vote of ten to two, and the trial court found several aggravators, including the prior violent felony aggravator and HAC, statutory mitigation, and little nonstatutory mitigation); Banks v. State, 46 So. 3d 989 (Fla. 2010) (death sentence proportionate in a stabbing murder where the jury recommended death by a ten-to-two vote, and the trial court found three aggravators: prior violent felony, HAC, and CCP; and five mitigating circumstances: low IQ, brain deficit, antisocial personality traits, not the only participant, and difficult youth); Merck v. State, 975 So. 2d 1054 (Fla. 2007) (death sentence proportionate for stabbing murder where trial court found prior violent felony and HAC aggravators, statutory age mitigator, and several nonstatutory mitigators, including a difficult family background, alcohol use the night of the murder, and a capacity to form positive relationships); Reynolds v. State, 934 So. 2d 1128 (Fla. 2006) (death sentence was proportionate where one the victims was stabbed multiple times and beaten; and the prior violent felony aggravator, HAC, two additional aggravators, and no statutory mitigators were found); Singleton, 783 So. 2d 970 (death sentence proportionate for stabbing murder where trial court found prior violent felony and HAC aggravators as well

as substantial mitigation, including extreme mental or emotional disturbance, impaired capacity to appreciate criminality of conduct or to conform conduct to requirements of law, and that defendant was under influence of alcohol and possibly medication at time of offense).

Here, the jury unanimously recommended the death penalty. The trial court considered the following statutory aggravating factors and gave both great weight: (1) Kaczmar was previously convicted of another felony involving the use or threat of violence to the person; and (2) Kaczmar committed the murder in an especially heinous, atrocious, or cruel fashion. In mitigation, the trial court found no statutory mitigating circumstances had been established; however, it considered twenty nonstatutory mitigating circumstances, gave fifteen of them slight weight, and the remaining five no weight. We find that this case meets the criteria of being aggravated with little mitigation. Thus, the death sentence is proportionate. Accordingly, Kaczmar is not entitled to relief with regard to this claim.

CONCLUSION

Based on the foregoing analysis, we affirm Kaczmar's sentence of death.

It is so ordered.

LABARGA, C.J., and LEWIS, J., concur.
CANADY and POLSTON, JJ., concur in result.
PARIENTE, J., concurs in part and dissents in part with an opinion, in which QUINCE, J., concurs.
PERRY, Senior Justice, dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PARIENTE, J., concurring in part and dissenting in part.

I concur in part and dissent in part because, although I would affirm the conviction, I do not find the Hurst error to be harmless beyond a reasonable doubt. Hurst v. State, 202 So. 3d 40 (Fla. 2016). Therefore, I would reverse for a new penalty phase. Id. Even though the jury unanimously recommended death in Kaczmar's case, the jury did not hear mitigation other than the defendant's stipulated age of 24. Instead, the mitigation was presented to the trial judge outside the presence of the jury. In fact, the trial court acknowledged that the jury did not have the benefit of the mitigation evidence that was presented to the judge alone, which included transcripts of six mitigation witnesses who testified during Kaczmar's first penalty phase proceeding.

In Kaczmar's first penalty phase, which we reversed for other reasons, the jury heard testimony regarding four aggravating factors coupled with mitigating circumstances. Specifically, during Kaczmar's first penalty phase, the jury was presented with the following mitigation:

> The defense presented testimony from Kaczmar's family and friends depicting Kaczmar as a good person and respected business partner who had a troubled upbringing due to his father's abuse. Dr. Miguel, a child psychiatrist, testified on behalf of the defense that Kaczmar was traumatized as a child by his father's alcoholism and his own chronic drug abuse. Dr. Miguel also testified that although he believed Kaczmar to be competent during trial, he did not think

> Kaczmar knew what he was doing on the night of the murder and did not know right from wrong.

Kaczmar v. State, 104 So. 3d 990, 997 (Fla. 2012). After considering all the evidence, the first jury did not unanimously recommend that death was the appropriate sentence. Id.

Our opinion in Hurst clearly changed the dynamics between the judge and jury in Florida capital sentencing. Pertinent to this case, this Court's decision in Hurst changed the calculus for waiving the presentation of some or all of the mitigating evidence to a jury. Moreover, Kaczmar did not waive a penalty phase jury altogether, as some other defendants have who were not afforded Hurst relief. See Mullens v. State, 197 So. 3d 16 (Fla. 2016) (finding that Hurst is not applicable to defendants who waived the right to a penalty phase jury), cert. denied, No. 16-6773 (U.S. Jan. 9, 2017).

This case in particular is distinguishable from other cases where this Court found the Hurst error harmless beyond a reasonable doubt based on a unanimous recommendation of death from the jury because the jury heard only a small portion of the mitigating evidence. See Davis v. State, 41 Fla. L. Weekly S528 (Fla. Nov. 10, 2016). Under Hurst, this Court cannot substitute its judgment for that of the jury and, therefore, cannot determine what weight the additional mitigation would have been assigned if it had been presented to the penalty phase jury. Nor can we speculate on the effect that the additional mitigation, if presented to the jury, would

have had on the jury's recommendation in Kaczmar's penalty phase. We do know, however, that the jury for Kaczmar's first penalty phase heard the exact same mitigating evidence that was presented only to the judge during Kaczmar's second penalty phase and did not unanimously recommend death. In Hurst, we emphasized the importance of unanimity in jury decisions, stating: "If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process." 202 So. 3d at 60. Therefore, I would grant Kaczmar relief under Hurst in this case.

I also believe that it was error for the trial judge to give great weight to the jury recommendation, which was bereft of any meaningful presentation of mitigation. See Muhammad v. State, 782 So. 2d 343, 361-62 (Fla. 2001). In my view, there is a critical distinction between this case and Boyd v. State, 910 So. 2d 167 (Fla. 2005), and McCray v. State, 71 So. 3d 848 (Fla. 2011), where we concluded that the trial court did not err in giving the jury's recommendation great weight because the procedural safeguards of Muhammad were inapplicable because the defense at least presented some mitigation. Kaczmar's stipulation of his age at the time of the crime is not equivalent to the limited mitigation presented by Boyd, 910 So. 2d at 188-89, or McCray, 71 So. 3d at 879-80. Neither in Boyd,

910 So. 2d at 188, nor in McCray, 71 So. 3d at 879-80, did the defendant completely waive the right to present mitigation as Kaczmar did. Accordingly, the procedural safeguards announced by this Court in Muhammad apply to this case and this case should also be remanded on that basis for a new penalty phase.

For all these reasons I would affirm the conviction but remand for a new penalty phase.

QUINCE, J., concurs.

PERRY, Senior Justice, dissenting.

I cannot agree with the majority's finding that the Hurst v. Florida, 136 S. Ct. 616 (2016), error was harmless beyond a reasonable doubt simply because the jury recommendation for death was unanimous and the sentencing judge found weighty aggravating circumstances. See majority op. at 12. To the extent that I would not find the error harmless, I dissent.

In Hurst v. State, 202 So. 3d 40, 69 (Fla. 2016), we declined to speculate why the jurors voted the way they did; yet, because here the jury vote was unanimous, the majority is comfortable substituting its weighing of the evidence to determine which aggravators each of the jurors found. Even though the jury unanimously recommended the death penalty, whether the jury unanimously found either aggravating factors remains unknown.

In Hurst, we held that for a defendant to be eligible for a death sentence, a jury must unanimously find the existence of each aggravating factor, that the aggravating factors are sufficient, and that the aggravating factors outweigh the mitigating circumstances. Id. at 53. Additionally, we held that the jury's death sentence recommendation must be unanimous. Id. While I agreed in Hurst that Hurst v. Florida, 136 S. Ct. 616 (2016), errors are subject to harmless error review, see Hurst, 202 So. 3d at 40, I believe the majority's conclusion that the error was harmless beyond a reasonable doubt in this case is mistaken.

The jury was presented with evidence to support and instructed on two aggravating circumstances: (1) that Kaczmar was previously convicted of robbery, a violent felony; and (2) that the capital felony was especially heinous, atrocious, or cruel (HAC). The prior violent felony was established by a stipulation between Kaczmar and the State, while the primary evidence supporting the HAC aggravator was the number and nature of the multiple stab wounds found in the victim's body. The HAC aggravating circumstance required factual findings that under Hurst must now be considered and weighed by a jury. The majority concludes that the error is harmless because no reasonable jury would have failed to find the aggravating factors given the evidence. However, we simply cannot assume that every juror found HAC beyond a reasonable doubt, much less that every juror agreed that either HAC or prior violent felony alone, or both aggravating factors

together, were sufficient to impose a death sentence. This is especially true here, where the State introduced no evidence concerning the details of Kaczmar's prior conviction for robbery.

The majority's reweighing of the evidence to support its conclusion is not an appropriate harmless error review. The harmless error review is not a sufficiency of the evidence test, and the majority's analysis should instead focus on the effect of the error on the trier of fact. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). By concluding that both aggravators were unanimously found by the jury, the majority is engaging in the exact type of conduct the United States Supreme Court cautioned against in Hurst v. Florida. See Hurst v. Florida, 136 S. Ct. at 622.

Because the harmless error review is neither a sufficiency of the evidence review "nor a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence," see State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986), I cannot conclude beyond a reasonable doubt that the error here was harmless.

An Appeal from the Circuit Court in and for Clay County,
William Arthur Wilkes, Judge - Case No. 102009CF000233000AMX

Clinton Andrew Thomas, Public Defender, and Nada Margaret Carey, Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Charmaine Millsaps, Assistant Attorney General, Tallahassee, Florida,

for Appellee

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
CLAY COUNTY, FLORIDA

CASE NO.: 10-2009-CF-233-AXXX-MA

DIVISION: A

STATE OF FLORIDA,
Petitioner,
vs.

LEO KACZMAR,
Defendant.
_____/

ORDER ON DEATH PENALTY MOTIONS

This matter came before this Court on the sixty (60) Death Penalty Motions. A Hearing was held on the Motions on August 6, 2010. Present at the hearing were the Defendant Leo Kaczmar, Defense Counsel Francis Jerome Shea and Christopher Anderson, and Assistant State Attorney James Colaw.

As stated on the record, this Court ruled on the Motions as follows:

1. Defendant's Motion to Adopt Proposed Jury Questionnaire, filed 11/4/09.

   RESERVE RULING.

2. Defendant's Motion to Preclude Death Qualifications of Jurors in the Innocence or Guilt Phase of the Trial and to Utilize a Bifurcated Jury, if a Penalty Phase is Necessary, filed 11/4/09.

   RESERVE RULING.

3. Defendant's Motion for Individual and Sequestered Voir Dire, for Evidentiary Hearing and to Tax Costs, filed 11/4/09.

   RESERVE RULING.

4. Defendant's Motion to Prohibit the Prosecutor from Using Peremptory Challenges to Strike Jurors who are Death Scrupled but are not Excludable for Cause and Motion for Appropriate Relief, filed 11/4/09.

RESERVE RULING.

5. Defendant's Motion to Declare Florida Rule of Criminal Procedure 3.202 Unconstitutional and to Strike State's Notice of it's Intent to Seek the Death Penalty and State's Pleadings Intended to Force the Defendant to Disclose the Particulars of his Intended, Mental Health Mitigation, filed 11/4/09.

DENIED.

6. Defendant's Motion to Declare Florida Statute 921.141(5)(h), Regarding the "Especially Heinous, Atrocious, or Cruel" Aggravating Circumstances to be Unconstitutional, filed 11/4/09.

DENIED.

7. Defendant's Motion to Compel State to Disclose the Aggravating Circumstances it Intends to Rely on, filed 11/4/09.

MOOT.

8. Defendant's Motion to Declare 782.04 and 921.141 Unconstitutional Because of Treatment of Mitigating Circumstances, filed 11/4/09.

DENIED.

9. Defendant's Motion to Declare Florida Statute 921.141 Unconstitutional as Applied Because of Arbitrariness in Jury Overrides and Sentencing, filed 11/4/09.

DENIED.

10. Defendant's Motion to Declare the "Felony Murder" Aggravating Circumstance of 921.141(5)(d) to be Unconstitutional, filed 11/4/09.

DENIED.

11. Defendant's Motion to Preclude Statements Referring to "Non-Statutory, Catch-all Mitigation" as such, filed 11/4/09.

GRANTED.

12. Defendant's Motion to Prohibit Statements Diminishing Jurors' Sense of their Sentencing Responsibility, filed on 11/4/09.

DENIED.

13. Defendant's Motion to Declare the "Pecuniary Gain" Aggravating Circumstances of 921.141(5)(f), and the Standard Jury Instructions Related to it Unconstitutional, filed on 11/4/09.

DENIED.

14. Defendant's Motion for a Court Order Compelling the State to Disclose and Serve Written Statement of Particulars Indicating all Aggravating Circumstances which it Intends to Rely Upon in the Penalty Phase, filed on 11/4/09.

DENIED.

15. Defendant's Motion to Require Proffer and to Limit Admissibility of "Victim Impact" Evidence, filed 11/4/09.

RESERVE RULING.

16. Defendant's "Apprendi-Type" Motion to (1) Dismiss the Indictment, and (2) Require Special Jury Verdict Forms, and (3) Require Specific Jury Findings on Sentencing Issues, filed 11/4/09.

DENIED.

17. Defendant's Motion to Declare Unconstitutional the Miscellaneous Aggravating Circumstances of 921.141(5)(a), (b), (e) and (g), and to the Related, Standard Jury Instructions, filed 11/4/09.

DENIED.

18. Defendant's Motion to Declare Florida's Death Sentencing Scheme Unconstitutional and to Preclude the Possibility of a Death Sentence Due to Inadequate Jury Guidance in Finding and Weighing Aggravating and Mitigating Circumstances, filed 11/4/09.

MOOT.

19. Defendant's Motion to Require State Disclosure and Jury Findings and Special Verdicts Regarding "Premeditated" versus "Felony First Degree Murder", filed 11/4/09.

RESERVE RULING.

20. Defendant's Motion to Declare "Felony Murder" Aggravating Circumstance of 921.141(5)(d) and the Jury Instruction Describing it to be Unconstitutional, filed 11/4/09.

DENIED.

21. Defendant's Motion for Order Declaring the "Cold, Calculated and Premeditated" Aggravating Circumstance and the Standard Jury Instruction Describing it to be Unconstitutional, filed 11/4/09.

DENIED.

22. Defendant's Motion to Declare the "Great Risk of Death to Many" Aggravating Circumstance of 921.141(5)(c), and the Standard Jury Instruction Describing it to be Unconstitutional, filed 11/4/09.

WITHDRAWN.

23. Defendant's Motion to Declare Florida's Death-Sentencing Scheme, Statute 921.141, Unconstitutional Due to Improper Appellate Review, filed 11/4/09.

DENIED.

24. Defendant's Motion to Allow Defense Counsel to Argue "Residual Doubt," filed 11/4/09.

RESERVE RULING.

25. Defendant's Motion to Prevent Misleading Prosecutorial Remarks and Faulty Jury Instruction concerning the "Reflection" Aspect of "Premeditation, filed 11/4/09.

DENIED.

26. Defendant's Motion to Suppress (A) Surreptitiously Monitored and Recorded Jail Conversations and (B) All Communications Between Defendant and his Wife, filed 7/28/10.

DENIED.

27. Defendant's Request for Judicial Notice of and Notice of Filing Fifty Page Jail Inmate Handbook, filed 7/28/10.

GRANTED.

28. Defendant's Motion in Limine to Exclude Evidence of "Other Bad Acts", filed 7/28/10.

RESERVE RULING, as to paragraphs 1, 2, 3.
GRANTED, as to paragraphs 4, 5, 6, 7.
DENIED, as to paragraphs 8, 9.

29. Defendant's First Motion in Limine, filed 6/22/09.

GRANTED.

30. Defendant's Second Motion in Limine, filed 6/22/09.

GRANTED.

31. Defendant's Third Motion in Limine, filed 6/22/09.

RESERVE RULING.

32. Defendant's Fourth Motion in Limine, filed 6/22/09.

RESERVE RULING.

33. Defendant's Fifth Motion in Limine, filed 6/22/09.

GRANTED.

34. Defendant's Sixth Motion in Limine, filed 6/22/09.

GRANTED.

35. Defendant's Seventh Motion in Limine, filed 6/22/09.

GRANTED.

36. Defendant's Eighth Motion in Limine, filed 6/23/09.

GRANTED.

37. Defendant's Ninth Motion in Limine, filed 6/23/09.

WITHDRAWN.

38. Defendant's Tenth Motion in Limine, filed 12/16/09.

GRANTED.

39. Defendant's Eleventh Motion in Limine, filed 7/26/10.

DENIED.

40. Defendant's Twelfth Motion in Limine, filed 7/26/10.

GRANTED.

41. Defendant's Thirteenth Motion in Limine, filed 7/26/10.

GRANTED.

42. Defendant's Fourteenth Motion in Limine, filed 7/26/10.

DENIED.

43. Defendant's Fifteenth Motion in Limine, filed 7/26/10.

DENIED.

44. Defendant's Motion to Dismiss Count 3- Attempted Sexual Battery, filed 9/23/09.

DENIED.

45. Defendant's Motion to Suppress (Socks; Photographs), filed 5/17/10.

DENIED.

46. Defendant's Motion for Grand Jury Testimony, filed 4/7/10.

MOOT.

47. State's Motion in Limine #1 (Specific Circumstances of William Filancia's Charges Pending Sentencing), filed 7/15/10.

GRANTED.

48. States's Motion in Limine #2 (Specific Circumstances of State's Witnesses Charges/ Convictions), filed 7/26/10.

GRANTED.

49. State's Motion in Limine #3 (Exculpatory Statements of Defendant), filed 7/26/10.

RESERVE RULING.

50. State's Motion in Limine #4 (Diminished Capacity Evidence/ Argument), filed 8/3/10.

GRANTED.

51. State's Motion in Limine #5 (Evidence related to Chris Dyal), filed 8/3/10.

GRANTED.

52. State's Motion in Limine #6 (Evidence related to Tanner Woods), filed 8/3/10.

RESERVE RULING.

53. State's Motion in Limine #7 (Defendant's Remorse to Filancia), filed 8/3/10.

RESERVE RULING.

54. State's Motion in Limine #8 (Crack-house/ Drug house), filed 8/3/10.

RESERVE RULING.

55. State's Motion in Limine #9 (Evidence related to the Real Carlos), filed 8/3/10.

RESERVE RULING.

56. State's Motion in Limine #10 (Evidence related to Keith Healy and Darrell Thornton), filed 8/4/10.

GRANTED.

57. State's Motion for Special Jury Instruction, filed 8/3/10.

RESERVE RULING.

58. State's Motion for Special Jury Instruction #2, filed 8/3/10.

RESERVE RULING.

59. Defendant's Sixteenth Motion in Limine, filed 8/6/10.

GRANTED.

60. Defendant's Seventeenth Motion in Limine, filed 8/6/10.

RESERVE RULING.

DONE AND ORDERED in Chambers at Green Cove Springs, Clay County, Florida, this 9th day of Aug, 2010.

CIRCUIT COURT JUDGE

Copies to:

James Colaw, Esq.
Office of the State Attorney

Francis Jerome Shea, Esq.
Attorney for the Defendant
1916 Atlantic Blvd.
Jacksonville, FL 32207-3406

Christopher J. Anderson, Esq.
Attorney for the Defendant
645 Mayport Rd. Suite 4-G
Atlantic Beach, FL 32233-3400

Case No.: 10-2009-CF-233-AXXX-MA

/amm

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
CLAY COUNTY, FLORIDA

CASE NO.: 10-2009-CF-233-AXXX-MA

DIVISION: A

STATE OF FLORIDA,
Petitioner,
vs.

LEO LOUIS KACZMAR, III,
Defendant.
_____/

FILED
2013 OCT 11 A 9:33

ORDER ON DEFENDANT'S RENEWAL OF ALL DEATH CASE MOTIONS

This matter comes before the Court upon Defendant's "Notice of Renewal of all Defendant's Special Death Case Motions," filed on August 5, 2013.

Having reviewed the previously filed motions, this Court hereby renews all prior rulings on Defendant's death case motions.

DONE AND ORDERED in Open Court at Green Cove Springs, Clay County, Florida, this 11th day of October, 2013.

WILLIAM A. WILKES
CIRCUIT COURT JUDGE

Copies to:

James Colaw, Esq.
James Boyle, Esq.
Office of the State Attorney
rosp@coj.net

Francis Jerome Shea, Esq.
Attorney for Defendant
1916 Atlantic Blvd.
Jacksonville, FL 32207
leglebegle@aol.com

Christopher J. Anderson, Esq.
Attorney for Defendant
645 Mayport Road, Suite 4-G
Atlantic Beach, FL 32233
daab1@clearwire.net

Case No.: 10-2009-CF-233-AXXX-MA
/kkm

Supreme Court of Florida

THURSDAY, OCTOBER 19, 2017

CASE NO.: SC13-2247
Lower Tribunal No(s).:
102009CF000233000AMX

LEO LOUIS KACZMAR, III vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's motion for rehearing is hereby denied without prejudice to raise, in a separate habeas corpus proceeding alleging ineffective assistance of appellate counsel, the trial court's error in disclosing appellant's prior death sentence for the crime at issue to the venire, which appellate counsel raised for the first time on rehearing.

LABARGA, C.J., and LEWIS, CANADY, and POLSTON, JJ., concur.
PARIENTE, J., dissents with an opinion.
QUINCE, J., dissents with an opinion, in which PARIENTE, J., concurs.
LAWSON, J., did not participate.

PARIENTE, J., dissenting.

I dissent from the denial of rehearing. First, I would grant rehearing for the reasons stated in my original concurring in part and dissenting in part opinion as to why Kaczmar should be granted a new penalty phase in light of Hurst v. Florida (Hurst v. Florida), 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla.

2016), cert. denied, 137 S. Ct. 2161 (2017). See Kaczmar v. State, 42 Fla. L. Weekly S127, 2017 WL 410214, at *10-11 (Fla. Jan. 31, 2017) (Pariente, J., concurring in part and dissenting in part). Second, I would grant rehearing, rather than requiring Kaczmar to file a separate habeas petition, because the trial court's improper comments to the jury about Kaczmar's prior death sentence, which appear on the face of the record, warrant reversal based on our precedent in Hitchcock v. State, 673 So. 2d 859, 863 (Fla. 1996).

In Hitchcock, this Court cautioned trial courts against "mentioning the defendant's prior [death] sentence" in cases remanded for a new penalty phase. Id. The Hitchcock Court explained that "[n]o other instruction" but the following should be given when a death sentence is reversed and the case is remanded for a new penalty phase:

> An appellate court has reviewed and affirmed the defendant's conviction for the murder of [the victim]. However, the appellate court sent the case back to this court with instructions that the defendant is to have a new trial at this time to decide what sentence should be imposed.

Id.

Nevertheless, the trial court in this case addressed the venire, in pertinent part, as follows:

> THE COURT: Be seated, please. All right. Good morning, ladies and gentlemen. My name is William Wilkes, and I'm the Judge that will be handling this case.
>
> This case has a little history to it so let me explain your duty today. It's different than most trials we ever have.
>
> The defendant was found guilty of murder in the first degree on 8/12/2010, sentenced on 11/5/10 to life—to death in this case. Anyway, the Supreme Court always reviews any type of death case so the case went to the state Supreme Court, Florida State Supreme Court. They affirmed his conviction, that is they confirmed his conviction for the first degree murder. However, the Supreme Court sent the case back here with instructions that the defendant is to have a new trial to decide what sentence should be imposed.

I realize that my colleagues have denied rehearing without prejudice to filing a separate habeas petition alleging ineffective assistance of appellate counsel because this issue, constituting clear reversible error, was not raised on direct appeal and only first raised in the motion for rehearing. Not raising this issue on appeal, in my view, constitutes ineffective assistance of appellate counsel that is apparent on the face of the record. See, e.g., Sims v. State, 998 So. 2d 494, 502 (Fla. 2008); Mansfield v. State, 758 So. 2d 636, 642 (Fla. 2000). Rather than require a separate habeas petition, I would request a response from the State and then determine if there is any reason that relief in the form of a new sentencing proceeding is not warranted.

Additionally, these clear errors only strengthen the conclusion in my original concurring in part and dissenting in part opinion in regard to the Hurst error in this case. See Kaczmar, 2017 WL 410214, at *10-11 (Pariente, J., concurring in part and dissenting in part). The trial court's error of informing the jury about Kaczmar's prior death sentence further compounds the prejudice to Kaczmar, rendering the jury's unanimous recommendation for death unreliable. For these reasons, I dissent from the denial of the motion for rehearing.

QUINCE, J., dissenting.

I would grant rehearing based on the fact that the jury was told that the defendant had previously been sentenced to death. It would be more efficient to grant rehearing to resolve the issue, than to require the filing of a new habeas petition.

PARIENTE, J., concurs.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

so

Served:

CHARMAINE M. MILLSAPS
RICHARD M BRACEY III
HON. TARA S. GREEN, CLERK
STEPHEN M. NELSON
HON. MARK H. MAHON, CHIEF JUDGE
HON. WILLIAM ARTHUR WILKES, JUDGE

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

LEO LOUIS KACZMAR,

Appellant,

v. CASE NO. SC13-2247

STATE OF FLORIDA,

Appellee.
_____/

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,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

/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