IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-263

RODNEY TYRONE LOWE

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA, (CRIMINAL DIVISION)

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Rodney Tyrone Lowe, Defendant below, will be referred to as "Lowe" and Appellee, State of Florida, will be referred to as "State". Reference to the records follows:

> "1ROA" – Original Direct Appeal case SC60-77972 *Lowe v. State*, 650 So.2d 969 (Fla. 1994), *certiorari was denied*, *Lowe v. Florida*, 516 U.S. 887 (1995);
> "1PCR" – Postconviction record case number SC05-2333 *See Lowe v. State*, 2 So.3d 21, 46 (Fla. 2008) ("*Lowe II*") (remanding for a new sentencing);
> "R-RS" for instant record and "T-RS" instant transcripts for Direct Appeal from resentencing.

STATEMENT OF THE CASEAND FACTS

The State relies on the procedural history set out in its Answer Brief and adds the following relevant to the issue raised in Lowe's Supplemental Brief. Before commencement of the new penalty phase, Lowe filed a Motion to Bar Imposition of Death Penalty on Grounds that Florida's Capital Sentencing Procedure is Unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). (R-RS.2 176-83, 296-312). He challenged the constitutionality of several aggravators: (1) under sentence of imprisonment; (2) prior violent felony; (3) in the course of a felony; and (4) pecuniary gain. (R-RS.2 228-43). During the September 22, 2011 charge conference, Lowe agreed there was evidence supporting the five aggravators sought. (T-RS.20 2419-20)[1]

[1] Lowe raised two objections to the aggravators, one applicable here, namely, that the prior violent felony and on community control aggravators constituted improper doubling (T-RS.20 2420-

In closing Lowe agreed four aggravators were uncontested:

> Now let's get to the meat of this case, aggravators and mitigators. One, it was committed by a person previously convicted of a felony and on community control.
>
> We know that. We're not contesting that.
>
> But please remember that as Mr. Crosby testified – he was the elderly gentleman who testified that he was the victim, there was no attempt to hurt him. The weapon used was some sort of plastic.
>
> . . . But Rodney pled guilty to robbery and burglary. . . . So we're not contesting that.
>
> That is also the prior conviction for a crime of violence. The reason he was on community control was because of this crime of violence.
>
> The third one is the capital felony was committed while engaged in an attempt to commit a robbery. That's a given. That's a given.
>
> We told you in jury selection that they had to have a least one aggravator or they wouldn't be here asking for the death penalty. That's it, because of the type of crime. Because of the attempt to commit a robbery and someone died, boom, under Florida law that's automatically an aggravator.
>
> There was . . . capital felony was committed for pecuniary gain. Well, it was committed during the attempted commission of a robbery, a robbery by definition is there was an attempt to get money or something.
>
> . . . and judge Pegg will tell you . . . The State may not rely upon a single aspect of the offense to establish more than one aggravating circumstance.
>
> Let me suggest to you that during the commission of a robbery and pecuniary gain are the same thing and you should not treat them separately.

(T-RS.21 2522-24)

Judge Pegg instructed the jury on the respective burdens of proof for aggravation and mitigation and that at least one

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21, 2427-28) In Issue 2 on direct appeal, Lowe notes "improper doubling" in the heading (IB 47), but made no argument on this point, rendering the issues waived. *Duest v. Dugger*, 555 So.2d 849, 852 (Fla. 1990)

aggravator had to be proven before considering death as a possible penalty. (T-RS.21 2538-39, 2542-44) Continuing:

> If after weighing the aggravating and mitigating circumstances you determine that at least one aggravating circumstance is found to exist, and the mitigating circumstances do not outweigh the aggravating circumstances, or the absence of mitigating factors but the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather that a sentence of life in prison without the possibility of parole for twenty-five years. (T-RS.21 2544-45)

The jury unanimously recommended death. (R-RS.3 426; T-RS.21 2557-58). On the day of the *Spencer v. State*, 615 So.2d 688 (Fla. 1993) hearing, Lowe filed a list of proposed mitigation, but opted not to present evidence. (R-RS.3 435-38; T-RS.22 2566; S-RS.2 172). In his sentencing memorandum (R-RS.3 447-62), he conceded proof of: (1) prior violent felony; (2) during the course of a felony, and (3) on community control aggravators, but contested the weight to be assigned. (R-RS.3 453-54) Lowe was sentenced to death[2] (R-RS.3 507-28; T-RS.22 2575-77) and on September 1, 2015, oral argument was held.

While awaiting a decision, on January 12, 2016, the United

[2] The court found aggravators: (1) under sentence of imprisonment (community control); (2) prior violent felony; (3A) during course of felony merged with (3B) pecuniary gain; and (4) avoid arrest; the statutory age mitigator; and non-statutory mitigators: (1) good behavior while in confinement; (2) family relationships; (3) creative ability; (4) maturity; (5) religious faith; (6) work ethic; (7) extra-curricular sporting activities; (8) Lowe is emotionally supportive of his sister; (9) low risk of future danger; and (10) good courtroom behavior.

States Supreme Court issued its opinion in *Hurst v. Florida*, 136 S.Ct. 616 (2016). Lowe requested leave to file a supplemental brief and this Court permitted supplemental briefing.

SUMMARY OF THE ARGUMENT

Supplemental Issue 1 – Lowe is not entitled to relief under *Hurst* as the constitutional infirmity is not structural in nature and a harmless error analysis shows that three aggravators, conceded by Lowe, are supported by prior plea/jury verdicts and the death recommendation was unanimous. *Hurst* did not call into question *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Section 775.082(2), Florida Statutes does not provide for the blanket imposition of life sentences as *Hurst* did not find the death penalty unconstitutional; only the procedure Florida employed violated the Sixth Amendment.

ARGUMENT

SUPPLEMENTAL ISSUE 1

HURST V. FLORIDA DOES NOT ENTITLE LOWE TO RESENTENCING OR A LIFE SENTENCE (restated)

Lowe asserts *Hurst* applies to his case and requires he be granted a life sentence. He maintains that *Ring* applies to Florida's capital sentencing scheme and his death sentence violates the Sixth Amendment of the United States Constitution. It is his position that such an error is structural and the error is not harmless. Finally, he argues that §775.082(2),

Fla. Stat. (1990) requires his sentence be life without the possibility of parole for 25 years. The State disagrees.

A. STANDARD OF REVIEW – Statutory interpretation is a purely legal matter subject to *de novo* review. *Kephart v. Hadi*, 932 So.2d 1086, 1089 (Fla. 2006).

B. PRESERVATION - Lowe challenged the validity of Florida's death penalty procedures in light of *Ring* below, but not in his initial brief, thus, he has waived the issue. *Beasley v. State*, 18 So. 3d 473, 481 (Fla. 2009); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). This Court has held that deficient jury factfinding under the Sixth Amendment is not fundamental error. *Pena v. State*, 901 So. 2d 781, 783 (Fla. 2005). The claim should be rejected as barred. However, to the extent Issue 17[3] may be read as a *Ring* claim, the State addresses the merits.

C. ANALYSIS – Lowe's claims of structural, harmful error, and reliance on 775.082(2), Fla. Stat. to maintain his sentence be reduced to life without the possibility of parole for 25 years are refuted by *Hurst* and a proper reading of §775.082(2). Lowe received a unanimous jury recommendation of death where three of the aggravators rested on prior felonies and a recidivist aggravator none of which were called into question by *Hurst* or *Ring*. Moreover, Lowe's expansive reading of §775.082(2)

[3] In Issue 17 here, Lowe recognized the holding in *State v. Steele*, 921 So.2d 538 (Fla. 2005), but claimed it was error to deny his request for special jury instruction/verdict.

should be rejected as the death penalty has not been constitutionally prohibited as a possible punishment by *Hurst*. As such, §775.082(2) does not mandate a blanket commutation of death sentences. This Court should affirm Lowe's death sentence.

1. *HURST* DID NOT FIND STRUCTURAL ERROR.

Lowe recognizes that the United States Supreme Court remanded for consideration of whether Hurst error if found was harmless. Yet, he suggests *Hurst* is structural error which never can be harmless as his jury did not find unanimously the applicable aggravators, mitigators, and their relative weights beyond a reasonable doubt, thus, he was not found to be death eligible. (IB at 3-4). Lowe's argument fails.

Hurst has not disturbed the "prior conviction" exception to the Sixth Amendment findings required by Ring and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Ring* recognizes the distinction of an enhanced sentence supported by a prior conviction. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (permitting judge impose higher sentence based on prior conviction); *Ring*, 536 U.S. at 598 n.4 (*Ring* does not challenge *Almendarez-Torres*, "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"); *Alleyne v. United States*, 133 S.Ct. 2151, 2160 n.1 (2013) (affirming *Almendarez-Torres* provides valid exception for prior conviction). Lowe has prior violent felony

convictions, was on community control[4] when he committed the murder, and had the contemporaneous robbery conviction, all of which rendered him death-eligible. As the prior and contemporaneous convictions rested upon a plea/unanimous jury verdict, no Sixth Amendment error is shown. Moreover, Lowe's jury was able to reach the conclusion death was the appropriate sentence unanimously. By voting 12-0 for death, the jury necessarily found, consistent with their instructions (T-RS.21 2542, 2544-45), sufficient aggravation existed to justify recommending death, and the aggravation outweighed mitigation.

Even if some Sixth Amendment violation could be discerned, United States Supreme Court precedent demonstrates it was harmless beyond a reasonable doubt. Lowe's claim of structural error is refuted by *Neder v. United States*, 527 U.S. 1 (1999),

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[4] While *Hurst* was being considered, this Court reasoned:

> We have previously held that *Ring* does not apply when the aggravating circumstance that the defendant committed the murder while under a sentence of imprisonment is applicable. *See Hodges v. State*, 55 So.3d 515, 540 (Fla. 2010). We acknowledge that the United States Supreme Court has granted certiorari to review our decision in *Hurst v. State*. . . . Unlike this case, however, *Hurst* did not involve the under-sentence-of-imprisonment aggravator, which this Court's precedent clearly establishes does not implicate *Ring*. Accordingly, until the Supreme Court issues a contrary decision, Fletcher's claim is without merit under established Florida precedent.

Fletcher v. State, 168 So.3d 186, 219-20 (Fla. 2015) *cert. denied*, 84 USLW 3415 (U.S. 2016). Nothing in *Hurst* undercuts this rationale.

where the Court rejected the argument that a conviction returned after one element of the offense was mistakenly not submitted to the jury for consideration presented a case of structural error. *Neder* explains why reliance on *Sullivan v. Louisiana*, 508 U.S. 275 (1993), is misplaced. Although *Sullivan* found constitutional error which prevented a jury from returning a "complete verdict" could not be harmless, it reviewed *Neder* and determined that reversal was not required where the evidence of the omitted element was overwhelming and uncontested. *Neder*, 527 U.S. at 19.

The determination that deficient factfinding under the Sixth Amendment can be harmless is cemented by *Washington v. Recuenco*, 548 U.S. 212 (2006), where the Supreme Court reversed the state holding that error under *Blakely v. Washington*, 542 U.S. 296 (2004), was structural in nature and could never be harmless. *Blakely* is an *Apprendi*/*Ring* decision which requires jury factfinding where a sentence is to be enhanced due to the use of a firearm. Also, support comes from *Hurst* where it was remanded for harmless error analysis. *Hurst*, 136 S.Ct. at 624.

2. ANY *HURST* ERROR IS HARMLESS BEYOND A REASONABLE DOUBT.

This Court has been consistent in finding that deficient jury factfinding, under the Sixth Amendment, can be and often is harmless. *Galindez v. State*, 955 So. 2d 517, 521-23 (Fla. 2007); *Johnson v. State*, 994 So.2d 960, 964-65 (Fla. 2008); *Pena v. State*, 901 So. 2d 781, 783 (Fla. 2005). However here, not only

did Lowe have a prior violent felony aggravator based on the 1987 felonies, he was on community control for that case, when he committed the robbery during the this murder. Furthermore, he told the jury he was not contesting[5] the aggravators except for the "avoid arrest" aggravator. In his sentencing memorandum, Lowe admitted those aggravators were proven and were not being contested except as to weight. (R-RS.3 453-54; T-RS.21 2522-24) All of three aggravators fall under the exceptions recognized in *Almendarez-Torres*. Likewise, his reference to the discussion in *Hurst* of concessions to facts not found by a jury or admitted in a plea and referencing *Blakely* and *Apprendi* does not further his position. Here, there was a prior plea/adjudication and jury verdict as well as verbal and written concession to the capital

[5] Contrary to his suggestion otherwise and reliance on *Stephens v. State*, 975 So.2d 405, 417 (Fla. 2007), Lowe conceded to the jury and trial court that the "under sentence of imprisonment," "prior violent felony," and "during the course of a felony" aggravators were proven. (T-RS.21 2522-24). Lowe informed the jury with respect to: (1) "under sentence of imprisonment" – "We're not contesting that;" (2) "prior violent felony" – "So we're not contesting that" "this crime of violence;" and (3) "during the course of a felony" – "That's a given. That's a given" (T-RS.21 2522-24). Also, Lowe conceded to the jury the "pecuniary gain" aggravator: "a robbery by definition is there was an attempt to get money or something." In his sentencing memorandum, he asserted "pecuniary gain" should not be found based on improper doubling. However, the jury was instructed on doubling and the trial court merged the "during the course of a felony" and "pecuniary gain" aggravators. Juries are presumed to follow the court's instructions. *United States v. Olano*, 507 U.S. 725, 740 (1993)(finding there is a presumption, absent contrary evidence, jurors follow court's instructions); *Greer v. Miller*, 483 U.S. 756, 766, n. 8 (1987)

jury and sentencing judge which was not the case in *Hurst*. Upon the evidence and closing arguments, and the jury's unanimous recommendation any error is harmless beyond a reasonable doubt.

3. SPECIFIC FINDING ON RELATIVE WEIGHING OF AGGRAVATION AND MITIGATION IS NOT REQUIRED BY *HURST*.

Hurst limits the Sixth Amendment infirmity to the fact that Florida's statute allowed "a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Hurst*, 136 S. Ct. at 624. Under *Hurst*, the jury's factfinding does not require it to make findings as to weights assigned and its weighing analysis.[6] However, here the unanimous jury was given

[6] In Florida, eligibility is determined by the existence of at least one aggravating factor. *State v. Steele*, 921 So. 2d 538, 543 (Fla. 2005) (announcing, "[t]o obtain a death sentence, the State must prove beyond a reasonable doubt at least one aggravating circumstance"). *See also, Ault v. State*, 53 So.3d 175, 205 (Fla. 2010)(stating "to return an advisory sentence in favor of death a majority of the jury must find beyond a reasonable doubt the existence of at least one aggravating circumstance listed in the capital sentencing statute."); *Zommer v. State*, 31 So.3d 733, 754 (Fla. 2010)(noting that, in *State v. Dixon*, 283 So.2d 1 (Fla. 1973), "this Court interpreted the term 'sufficient aggravating circumstances' in Florida's capital sentencing scheme to mean one or more such circumstances). Such meets constitutional muster. *See Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994) (stating "[t]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 244–246, 108 S.Ct. 546, 554–555, 98 L.Ed.2d 568 (1988); *Zant v. Stephens*, 462 U.S. 862, 878, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235 (1983)."") Death is presumptively the appropriate sentence. *State v. Dixon*, 283 So.

all the mitigation the defense presented, none was held back for the *Spencer* hearing, and the unanimous verdict of the jury was that at least one aggravator existed and mitigation did not outweigh the aggravation. The unanimous jury was instructed on the finding of aggravation, mitigation, and weighing of those factors to determine the appropriate sentence. As such, this Court should find beyond a reasonable doubt that the lack of specific findings is harmless. Moreover, this Court has consistently rejected Ring challenges where the jury recommended death unanimously. See We have consistently rejected Ring claims in cases such as this one, where the jury recommended a sentence of death by a unanimous vote. *See Larkin v. State*, 147 So.3d 452, 466 (Fla. 2014), *cert. denied*, 135 S. Ct. 2310 (2015); *Bevel v. State*, 983 So.2d 505, 526 (Fla. 2008).

4. SECTION 775.082(2), FLORIDA STATUTES DOES NOT MANDATE LOWE RECEIVE A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR 25 YEARS.

Pointing to *Donaldson v. Sack*, 265 So.2d 499 (Fla. 1972), Lowe asserts *Hurst* held Florida's capital sentencing facially invalid, thus, entitling him to a life sentence under

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2d 1, 9 (Fla. 1973). As eligibility is a matter of state law, this Court's determination controls. *Ring*, 536 U.S. at 603 (recognizing "Arizona court's construction of the State's own law is authoritative"). Hence, Lowe's suggestion *Hurst* requires juries to find there are sufficient aggravating circumstances to outweigh the mitigating circumstances is without merit. *Hurst* specifies that constitutional error occurs when a trial judge "alone" finds the existence of "an aggravating circumstance." *Hurst*, 136 S.Ct. at 624.

§775.082(2) as was done when *Furman v. Georgia*, 408 U.S. 308 (1972) issued. *Hurst* does not hold as Lowe suggests and he misreads and oversimplifies *Donaldson*.

Hurst did not determine capital sentencing to be unconstitutional; *Hurst* only invalidated Florida's procedures for implementation of a death sentence, finding the procedures might result in a Sixth Amendment violation if the judge makes factual findings which are not supported by a jury verdict.[7] Hence, §775.082(2) does not apply, by its own terms. That section provides that life sentences are mandated "[i]n the event the death penalty in a capital felony is held to be

[7] A reading of *Hurst* as only requiring jury factfinding as to death eligibility, but not sentence selection is consistent with prior United States Supreme Court cases underlying the decision, as well as *Kansas v. Carr*, 2016 WL 228342 (Jan. 20, 2016), decided just a week after Hurst. In *Hurst*, the Supreme Court acknowledged *Apprendi*, and *Ring*, concerned the factual findings necessary to make a defendant eligible for a sentence that was greater than that authorized by the jury's verdict. *See Alleyne v. United States*, 133 S. Ct. 2151, 2155, 2158, 2161 n.2 (2013) (applying *Apprendi* to factual findings necessary to impose a minimum mandatory term and stating "Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty. Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.' *Williams v. New York*, 337 U.S. 241 . . . While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing."); *United States v. O'Brien*, 560 U.S. 218, 224 (2010) (recognizing *Apprendi* does not apply to sentencing factors that merely guide sentencing discretion without increasing applicable range of punishment to which defendant is eligible).

unconstitutional," as was enacted following *Furman v. Georgia*, 408 U.S. 238 (1972), in order to fully protect society in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional. *See Coker v. Georgia*, 433 U.S. 584 (1977) (holding capital punishment was not available for the capital felony of raping an adult woman).

Donaldson is not a case of statutory construction, but one of jurisdiction. Based on our state constitution in 1972, which vested jurisdiction of capital cases in circuit courts rather than the criminal courts of record, *Donaldson* held that circuit courts no longer maintained jurisdiction over capital cases since there was no longer a valid capital sentencing statute to apply; no "capital" cases existed, since the definition of capital referred to those cases where capital punishment was an optional penalty. *Donaldson* observed the new statute (§775.082(2)) was conditioned on the invalidation of the death penalty, but clarified, "[t]his provision is not before us for review and we touch on it only because of its materiality in considering the entire matter." *Donaldson*, 265 So. 2d at 505.

The focus and impact of *Donaldson* was on those cases which were ***pending for prosecution*** at the time *Furman* was released, not pipeline cases pending on direct appeal, or those already final. This Court's determination to remand all pending death penalty cases for imposition of life sentences in light of

Furman was discussed in *Anderson v. State*, 267 So.2d 8 (Fla. 1972). *Anderson* explained that the Attorney General, following *Furman*, moved this Court to relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position those death sentences were illegal. This Court did not elucidate why commutation of 40 sentences was required, but it is interesting to observe that this was before the time that either this or the United States Supreme Court had determined the rules for retroactivity, later announced in *Teague v. Lane*, 489 U.S. 288 (1989), and *Witt v. State*, 387 So. 2d 922 (1980).

Other differences between *Furman* and *Hurst* which bode against blanket commutation of death sentences to life includes that *Furman*[8] was a decision invalidating ***all*** death sentences for murder and rape while *Hurst* is a specific ruling to extend Sixth Amendment protections first identified in *Ring* to Florida cases and remands for a harmless error analysis. It is telling that *Hurst* does not disturb *Proffitt v. Florida*, 428 U.S. 242 (1976), and only explicitly overrules *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989), "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of the jury's factfinding, that is

[8] *Furman* found the death penalty for murder and rape cruel and unusual punishment under the Eighth Amendment and invalidated all death penalty statutes, but left many courts uncertain "what rule of law, if any, was announced." *Donaldson*, 265 So.2d at 506 (Roberts, C.J., concurring specially).

necessary for imposition of the death penalty."

Lowe reads *Hurst* too broadly when equating it with Furman. Unlike Lowe's situation, Timothy Hurst did not have a prior conviction. Following release of *Hurst*, the Supreme Court denied certiorari on two direct appeal decisions[9] leaving intact this Court's denial of Sixth Amendment error. After *Furman*, there were no existing capital cases left intact. *Hurst* provides no express reason to disturb any capital sentence supported by a prior conviction. The remedy provided by *Furman* has not been extended to current death row inmates by *Hurst*.

In *Kansas v. Carr*, 2016 WL 228342, at *8 (Jan. 20, 2016), the Court discussed the distinct determinations of eligibility and selection under a capital sentencing. The Court found an eligibility determination was limited to findings related to aggravators and determinations regarding mitigation existence and weighing were selection determinations. The Court stated such determinations were not factual findings, but were "judgment call[s]" and "question[s] of mercy." *Id*.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm Lowe's death sentence.

[9] Both were supported by prior violent felony convictions. *See Fletcher v. State*, 168 So.3d 186 (Fla. 2015), *cert. denied*, 2016 WL 280859 (Jan. 25, 2016); *Smith v. State*, 170 So.3d 745 (Fla. 2015), *cert. denied*, 2016 WL 280862 (Jan. 25, 2016)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail through the e-portal to: Steven H. Malone, Esq., Office of the Criminal Conflict and Civil Regional Counsel, Fourth District at RC4AppellateFilings@rc-4.com and stevenhmalone@bellsouth.net this 3th day of March, 2016.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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