IN THE SUPREME COURT OF FLORIDA

TERENCE TOBIAS OLIVER,

Appellant,

v. CASE NO. SC12-1350

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT,
EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, FLORIDA

APPELLANT'S SUPPLEMENTAL REPLY BRIEF IN LIGHT OF HURST v. FLORIDA

JAMES S. PURDY,
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SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF THE ARGUMENT

The State argues that in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Supreme Court specified that the harmless error doctrine should be applied. What the Supreme Court said was that it had not reached the harmless error question, and that it was remanding for that question to be considered in the first instance by the State court. The Supreme Court has remanded for harmless-error consideration both in cases where it holds harmless-error analysis is appropriate, and in cases where it notes the lower courts have not yet addressed whether harmless-error analysis is appropriate. Here, as noted above, the Court stated expressly that it had not reached the question.

The State also argues, in effect, that this court can easily make up for the jury's role being diminished by substituting its judgment for the jury's as to whether aggravating and mitigating factors were compellingly shown. As noted in *Hurst*, the State cannot now treat the advisory recommendation by the jury as the necessary factual findings.

ARGUMENT

IN REPLY: THE DEATH SENTENCE APPEALED FROM WAS IMPOSED IN VIOLATION OF HURST v. FLORIDA.

The State argues that in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Supreme Court "specified that the harmless error doctrine should be applied to any death sentence that was imposed in violation of *Ring*[1] or *Hurst* and remanded *Hurst* to Florida so this analysis could be done." (Answer brief at 6) What the Supreme Court stated was that it was not reaching the harmless error question, and that it was remanding for that question to be considered in the first instance by the State courts. *Hurst* at 624. (See answer brief at 6-7.) The Supreme Court habitually does not decide questions which were not considered by the courts where the matter originated. *See Lilly v. Virginia*, 527 U.S. 116, 148 (1999) (Rehnquist, C.J., concurring). The Court has remanded for harmless-error consideration both in cases where it holds harmless-error analysis is appropriate, *see McFadden v. United States*, 135 S. Ct. 2298 (2015), and in cases where it notes the lower courts have not yet addressed whether harmless-error analysis is appropriate, *see Tuggle v. Netherland*, 516 U.S. 10, 14 (1995). Here, as noted above, the Court stated expressly that it had not reached the question. *Hurst* at 624.

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[1] *Ring v. Arizona*, 536 U.S. 584 (2002).

The State also argues "this Court's holding in *Combs v. State*, 525 So. 2d 853 (Fla. 1988), remains valid law which clearly supports denial of Defendant's *Caldwell*[2] claim." While *Hurst* does not expressly declare Florida's standard jury instructions unconstitutional, it cannot seriously be advanced that *Hurst* and *Caldwell*, read together, do not sound a death knell for those instructions. The State's position, in effect, is that this court can easily make up for the jury's role being diminished by substituting its judgment for the jury's as to whether aggravating and mitigating factors were compellingly shown. (Answer brief at 11-13) As noted in *Hurst*, "[t]he State fails to appreciate the central and singular role the judge plays under Florida law.... The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst* at 622.

[2] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

CONCLUSION

Appellant has shown that this court should vacate the death sentence appealed from, and remand for a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing supplemental reply brief has been electronically delivered to Assistant Attorney General James D. Riecks, at capapp@myfloridalegal.com, and mailed to Appellant this 9th day of March, 2016.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.

Nancy Ryan

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