IN THE SUPREME COURT OF FLORIDA

DALE GLENN MIDDLETON, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. SC12-2469

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT
IN LIGHT OF HURST V. FLORIDA

On appeal from the Circuit Court of the Nineteenth Judicial Circuit, In and For Okeechobee County, Florida [Criminal Division]

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SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

In the trial court Mr. Middleton filed and argued motions challenging the constitutionality of Florida's capital sentencing scheme under *Ring v. Arizona*, 536 U.S. 584 (2002). R271-278, 293-296, T135-136,138. The trial court ruled it was bound by the Florida Supreme Court and denied the motions T136-137, 138, R411, 409.

At the penalty phase, after less than an hour of deliberation, the jury "advised and recommended" the death penalty T2804, R1068.

On appeal, Mr. Middleton raised the Sixth Amendment based challenge to Florida's capital sentencing scheme in light of *Ring*.

On October 22, 2015, this Court affirmed on the Sixth Amendment issue holding that *Ring* did not apply in Florida based on prior holdings of this Court.

On November 6, 2015 Mr. Middleton filed a motion for rehearing on this and other issues.

While the motion for rehearing was pending -- on January 12, 2016 the United States Supreme Court issued the decision *Hurst v. Florida*, 136 S.Ct. 616 (2016).

On January 13, 2016 this Court denied Appellant's motion for rehearing.

On January 21, 2016 Mr. Middleton filed a motion to stay mandate and relinquish jurisdiction for imposition of a life sentence or alternatively for further briefing in light of Hurst v. Florida.

On February 12, 2016 this Court denied the relinquishment request, but ordered further briefing in light of *Hurst v. Florida*.

SUPPLEMENTAL SUMMARY OF THE ARGUMENT

Florida's death penalty sentencing scheme was declared unconstitutional in *Hurst v. Florida*, 136 S.Ct. 616 (2016) because the statute did not require the jury to make the findings required to impose the maximum sentence --"... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances" beyond a reasonable doubt.

In this case the jury rendered an advisory recommendation but did not make the required findings beyond a reasonable doubt.

A finding of a single aggravating circumstance does not satisfy the required findings – no matter how one labels the findings or required findings.

By comparing the facts in this case to a very similar case in which a jury rendered a life recommendation -- *Perry v. State*, 522 So.2d 817, 821 (Fla. 1988) —the *Hurst* violation cannot be considered harmless.

A *Hurst* violation cannot be shown to be harmless by speculation.

The remedy in this case is to vacate the death sentence and remand for imposition of a life sentence.

Since there is no constitutional death penalty sentencing scheme in Florida, there is not valid statute under which to retain or impose a death sentence.

The death penalty sentencing scheme declared unconstitutional by the United States Supreme Court can only be rewritten by the Legislature.

Also, under Section 775.082(2) the remedy is imposition of a life sentence.

Mr. Middleton's death sentence must be vacated and a life sentence imposed.

ARGUMENT

IN LIGHT OF HURST V. FLORIDA MR. MIDDLETON"S SENTENCE OF DEATH MUST BE VACATED AND HE MUST BE SENTENCED TO LIFE IN PRISON

In *Hurst v. Florida*, 136 S.Ct. 616 (2016) the United States Supreme Court was not merely holding that Mr. Hurst's capital sentence was unconstitutional as applied -- it held that Florida's capital sentencing scheme was unconstitutional.

It has been claimed that in recommending a death sentence the jury necessarily found "... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." However, the United States Supreme Court rejected such a claim by the State in *Hurst*. The State claimed the jury findings were sufficient, but the Court held the jury failed to specifically find and weigh the aggravating and mitigating circumstances as required and that the jury's actions during its **recommendation**

process did not satisfy the Sixth Amendment:

The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. §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**." §921.141(3); see *Steele*, 921 So. 2d, at 546. "[T]he jury's function under the Florida death penalty statute is advisory only."*Spaziano* v. *State*, 433 So. 2d 508, 512 (Fla. 1983). **The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires**.

136 S.Ct. at 622 (emphasis added).

Because in Mr. Middleton's case the jury did not find "sufficient aggravating circumstance" and "insufficient mitigating circumstances to outweigh the aggravating circumstances" beyond a reasonable doubt, his death sentence must be vacated.

Finding of at least one aggravating circumstance by the jury does not satisfy the findings required for the enhanced penalty of death

A jury finding of "one or more aggravating circumstances" does not satisfy a required finding of "sufficient aggravating circumstances." The Legislature specifically used the word "sufficient" and not the term "one or more aggravating circumstances" in relating what had to be found to sentence to death. The Legislature could have used the language "one or more aggravating circumstances" as it did in another portion of the statute. See Section 921.141 (7) Fla. Stat. (victim impact

evidence may be introduced where there is evidence of "one or more aggravating circumstances") –but it did not. Also, a finding of "one or more aggravating circumstances" does no satisfy the required finding that there are "insufficient mitigating circumstances to outweigh the aggravating circumstances."

It does not matter what label is used to enhance the maximum penalty – it still must be found by the jury

The two things required to impose a death sentence –(sufficient aggravators and that the mitigation not outweigh the aggravation)—at times have been labeled non-facts or selection criteria in order to claim a jury finding of them is not required under *Hurst* and *Ring*. However, as explained by Justice Scalia labeling does not matter-- "[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives— **whether the statute calls them elements of the offense, sentencing factors, or Mary Jane** — must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 610 (Justice Scalia concurring)(emphasis added).

How is, or can, a harmless error analysis done for this type of case?

The lack of jury findings as to aggravating and mitigating circumstances

Reconstructing what a jury would actually find in terms of aggravating and mitigating circumstances is best suited for a clairvoyant with multiple personalities.

The dynamics of 12 individuals deliberating back and forth as to what aggravators exist and what weight to give them really can't be reproduced without jury findings.

Discerning what jurors would find, as opposed to reviewing a trial court's order, is not a mere matter of determining whether there is substantial competent evidence to support an aggravator. The jury may reject an aggravator even where there is substantial competent evidence to support it.

A juror may have reasonable doubt as to certain facts or concerns regarding credibility. For example, while there may be evidence legally capable of supporting HAC, jurors, individually or collectively, could have differing views as to whether HAC was proven beyond a reasonable doubt. The definition of HAC – heinous, atrocious or cruel – could cause more uncertainty. Without a jury finding how does one know how any juror reacted to this terminology. The further definitions like "wicked" certainly don't help. Different people react differently to words like heinous, cruel, wicked etc.

The weight a juror would give to HAC is even more unpredictable. This Court has even noted from a legal perspective not all HAC circumstances are of the same weight. See *Perry v. State,* 522 So.2d 817, 821 (Fla. 1988) (affirming the trial court's finding of HAC, but stating, "there are undoubtedly killings more outrageous, wicked and vile than that shown here" and concluding HAC aggravator in *Perry* was not of the same quality as the HAC aggravator in other

cases). See also *Scott v. State*, 66 So.3d 923, 935 (Fla. 2011) (PVF not as serious as a PVF (occurring at a time separate from the murder) as in other cases).

Imagine or speculate what differing thoughts jurors may have as to weight.

Mitigating evidence presents an even greater problem without findings. Mitigation by its very nature is not as defined as is aggravation. It is impossible to determine what jurors found as mitigation and what weight was given to the mitigation. Florida's catchall mitigator allows the jury to consider anything regarding the circumstances of the offense or in the defendant's background. How can this be assessed without findings? Review of mitigation listed in a trial judge's sentencing order is feasible because it is listed and weighed – and the judge is not required to consider mitigation that has not been proposed by the defense. *Campbell v. State*, 571 So.2d 415 (Fla. 1990). **But the jury has no restrictions on consideration of mitigating evidence**. A review of how a jury would find and weigh mitigation would minimally involve a complete review of the record and then a look inside the jurors' brains.

As explained later in this brief, there may be a method of showing a *Hurst* violation is **not** harmless, but the same method does not work for showing the error was harmless.

Appellate court findings

The appellate court could act as a mind reader. The appellate court could try

to place itself in the jury's shoes and determine how the jury would have evaluated the evidence. This would involve either mindreading or making findings as a substitute for the jury. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply reweighing the evidence. *State v. DiGuilio,* 491 So.2d 1129, 1139 (Fla. 1986).

It also would be odd because under *Hurst* a trial judge's (who was present at the trial and penalty phase to consider credibility of witnesses) findings cannot substitute for jury findings. How can an appellate court, even one more step removed, substitute its findings for the jury's (lack of) findings?

In *Sullivan v. Louisiana,* 508 U.S. 276 (1993) a defective reasonable doubt instruction could not be harmless error because there was no valid jury verdict. There was no valid jury verdict upon which a harmless error analysis could be based on. In a nutshell, Justice Scalia explained, "[a] reviewing court can only engage in pure speculation – its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judges the defendant guilty.'" *Sullivan,* at 281.

Trial court findings

Of course, the trial court's findings cannot substitute for the lack of jury findings – that is what *Hurst* is all about. In fact, a trial court's findings have been recognized as not reflecting jury findings because they are intended to be independent of the jury findings. See *Blackwelder v. State,* 851 So.2d 650, 653 (Fla. 2003) ("[W]e remind

judges of their duty to independently weigh aggravating and mitigating circumstances. A sentencing order should reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors and the weight each should receive."); *Carr v. State*, 156 So.3d 1052, 1068 (Fla. 2015) ("[T]he detailed findings in the trial court's sentencing order plainly show that the trial court . . . reached an independent judgment regarding the appropriate sentence.").

Advisory recommendation

As explained in *Hurst*, a jury's advisory recommendation cannot be used to meet the requirements of the Sixth Amendment.

In a superficial way a jury's 12-0 **advisory recommendation** appears important –but it is not – particularly when one considers (1) the difference between an advisory recommendation and a binding finding and (2) because the required findings -- of "sufficient aggravating circumstances" and the absence of "sufficient mitigating circumstances to outweigh the aggravating circumstances"—were not made beyond a reasonable doubt.

It would be very dangerous to use a jury's advisory recommendation to determine harmless error. Where a jury is told that the responsibility regarding sentencing lies with the judge, there are "specific reasons to fear substantial unreliability as well as bias in favor of death sentences." *Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S.Ct. 2633, 86 L.Ed. 2d 231 (1985).

In Mr. Middleton's case the jury deliberated for less than one hour which could suggest that the jury did not engage in the careful finding and weighing of the aggravating circumstances and numerous mitigating circumstances.

The instructions minimized the jury's role and relieved them of the weight that sentencing another human being to death would place on one's conscience. See *Caldwell*, 472 U.S. at 333 ("the uncorrected suggestion that the responsibility for any ultimate determination of death will rest on others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role"). The jury may have decided to "'send a message' of extreme disapproval for the defendant's acts" even if it was unconvinced that death was the appropriate punishment, with the belief that if they were wrong and advised death when the sentence should be life, the judge would correct their mistake and spare his life. See *Caldwell*, 472 U.S. at 331.

The jury finding of burglary during the capital felony does not make the error harmless

The one jury finding that can be legitimately used is the jury finding that the felony of burglary occurred during the capital felony. While this may be sufficient to claim harmless error due to a *Ring* violation in Arizona (where the statute only required a finding of one aggravating circumstance) – we are in Florida and not in Arizona.[1] In this case the jury never made the required findings -- "sufficient

[1] Unlike the error identified in *Ring*, the failure of the jury to find at least one

aggravating circumstances" and "insufficient mitigating circumstances to outweigh the aggravating circumstances" even in an advisory fashion let alone beyond a reasonable doubt as required.

Also, the mere finding of the single aggravating circumstance has been recognized in many instances not appropriate for the death penalty. Thus, a jury may **not** have considered the single aggravating circumstance "sufficient." In fact, the death penalty has not been upheld in Florida when felony-murder is the only aggravator. See *Jones v. State*, 705 So.2d 1364 (Fla. 1998); *Williams v. State*, 707 So.2d 683 (Fla. 1998).

In numerous cases where this Court reversed a death sentence because only one valid aggravator was present, there were 19 cases in which the one valid aggravator present was either the prior violent felony aggravator or the in the course of a felony aggravator. See *Chaky v. State*, 651 So.2d 1169 (Fla. 1995) (prior conviction); *White v. State*, 616 So.2d 21 (Fla. 1993) (prior conviction); *Jorgenson v. State*, 714 So.2d 423 (Fla. 1998) (prior conviction); *Woods v. State*, 733 So.2d 980 (Fla. 1999) (prior conviction); *Knowles v. State*, 632 So.2d 62 (Fla. 1993) (prior conviction); *Besaraba v. State*, 656 So.2d 441 (Fla. 1995) (prior conviction); *Almeida v. State*, 748 So.2d 922 (Fla. 1999) (prior conviction); *Green v. State*, 975

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aggravating circumstance the error identified in *Hurst* cannot be similarly quantified or assessed – the jury must find "sufficient aggravating circumstances" and "insufficient mitigating circumstances to outweigh the aggravating circumstances."

So.2d 1081 (Fla. 2008) (prior conviction); *Proffitt v. State*, 510 So.2d 896 (Fla. 1987) (felony murder); *Lloyd v. State*, 524 So.2d 396 (Fla. 1988) (felony murder); *McKinney v. State*, 579 So.2d 80 (Fla. 1991) (felony murder); *Sinclair v. State*, 657 So.2d 1138 (Fla. 1995) (felony murder); *Thompson v. State*, 647 So.2d 824 (Fla. 1994) (felony murder); *Rembert v. State*, 445 So.2d 337 (Fla. 1984) (felony murder); *Caruthers v. State*, 465 So.2d 496 (Fla. 1985) (felony murder); *Menendez v. State*, 419 So.2d 312 (Fla. 1982) (felony murder); *Yacob v. State*, 136 So.3d 539 (Fla. 2014) (felony murder and pecuniary gain merged); *Jones v. State*, 705 So.2d 1364 (Fla. 1998) (felony murder and pecuniary gain merged); *Jones v. State*, 963 So.2d 180 (Fla. 2007) (felony murder and pecuniary gain merged); *Songer v. State*, 544 So.2d 1010 (Fla. 1989) (under sentence); *DeAngelo v. State*, 616 So.2d 440 (Fla. 1993) (CCP); *Offord v. State*, 959 So.2d 187 (Fla. 2007) (HAC); *Smalley v. State*, 546 So.2d 720 (Fla. 1989) (HAC); *Ross v. State*, 474 So.2d 1170 (Fla. 1985) (HAC); *Nibert v. State*, 574 So.2d 1059 (Fla. 1990) (HAC); *Williams v. State*, 707 So.2d 683 (Fla. 1998) (pecuniary gain); *Clark v. State*, 609 So.2d 513 (Fla. 1992) (pecuniary gain); *Williams v. State*, 37 So.3d 187 (Fla. 2010) (avoid arrest); *Hardy v. State*, 716 So.2d 761 (Fla. 1998) (victim was law enforcement).

This Court has recognized that juries can perceive differently than judges. In *Jenkins v. State*, 692 So.2d 893, 895 (Fla. 1997), this Court reversed a judicial override of a jury's life recommendation because "the jury could have concluded that

[the prior conviction aggravating] circumstance was entitled to little weight." This Court found that this possibility gave the jury's life recommendation a reasonable basis and precluded an override of the jury's finding. Thus, the "element" at issue in Florida can only be determined by the individual and collective assessment, by twelve jurors, of what constitutes "sufficiency" in the death-penalty context. This sort of determination is, of course, highly subjective, and vastly different from the kind of objective, discrete element at issue cases such as in *Ring.*

What a properly instructed jury as to its responsibility would find in this case is not sufficiently known to find the error harmless beyond a reasonable doubt

In this case the jury was instructed on a number of aggravating circumstances including – CCP, avoid arrest, HAC, during the course of a felony (burglary). Because of the lack of jury findings it is not known if the jury would find HAC, CCP, and avoid arrest beyond a reasonable doubt. It is not known in this case if the jury would find these aggravators sufficient or that the mitigation did not outweigh them. As has been explained it is impossible to deduce what an advisory jury might have been found:

> The role of the jury during the penalty phase under the Florida death 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 ever know if one, more than one, any, or all of the jurors agreed on any of the aggravating and mitigating cirumstances**.

Aguirre-Jarquin v. State, 9 So.3d 593, 611 (Fla. 2009) (Pariente, J., specially concurring) (quoting Judge Eaton's sentencing order)(emphasis added).

Mitigation was present but there are no findings or evaluation of the mitigation by the jury

In this case there was significant **proposed** mitigation found by the trial court and which the jury could have relied and given significant weight --Below average or borderline intelligence **(**IQ of 83), History of alcohol and drug abuse **(**drinking at the age of 7 T2382 --drug abuse also began at an early age T2069, 2382) Chronic neglect as a child and no adult role model as a child **(**see *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 (1982), "a relevant mitigation factor of great weight". 102 S.Ct. at 877). There was also significant mitigation the jury could have found that was rejected, or not considered, by the trial court.

The jury may have given the mitigation much more weight than the trial court did – especially where the trial court had a bias against psychology and psychiatry. In addition there was mitigation which was not found by the trial court that could have been found by the jury. The *Hurst* violation cannot be shown to be harmless where there was mitigation but no information indicating how a properly instructed jury on its responsibility would view the mitigation.

Aggravating circumstances (including legally inapplicable ones) were proposed to the jury, but there are no findings or evaluation of them

Also, due to the lack of jury findings it is not known if the jury considered the aggravating circumstances proposed or how it evaluated the ones it should not have. The jury was instructed on the CCP and avoid arrest. The trial judge relied on the CCP and avoid arrest, but **this court struck CCP and avoid arrest**.

The lack of a jury finding cannot be harmless in this case. Although the trial court found HAC, it is unknown whether a properly instructed jury as to its responsibility would find HAC. Even if it did, it is unknown how much weight the jury gave it or how it was weighed against the mitigation. See *Perry v. State*, 522 So.2d 817, 821 (Fla. 1988) (affirming the trial court's finding of HAC, but stating, "there are undoubtedly killings more outrageous, wicked and vile than that shown here" and concluding HAC aggravator in *Perry* was not of the same quality as the HAC aggravator in other cases).

Even with mindreading and speculation it is not conceivable that the *Hurst* violation would be harmless in this case.

Comparison to another case shows that one cannot say beyond a reasonable doubt that the Hurst violation is harmless

One cannot compare this case to a case involving a death recommendation to conclude that a *Hurst* violation is harmless. However, it may be possible to compare this case to a life recommendation case to conclude that a *Hurst* violation is

harmless. The difference is because the jury's role in the recommendation cases is advisory. The danger is that where the jury's responsibility is diminished the jury may send a message of disapproval by recommending death knowing its recommendation is not the final say. Thus, a death recommendation by a jury is not indicative of what a properly instructed jury may find.

The same danger does not occur with a recommendation of life. A recommendation of life is not done to send a message of approval and is more likely to have been the process of appropriate fact finding. Comparing Mr. Middleton's case to a very similar life recommendation case illustrates why the Hurst violation is not harmless in this case.

In *Perry v. State*, 522 So.2d 817 (Fla. 1988) Mr. Perry's sentence was ultimately reduced to life in prison under *Tedder* due to a jury recommendation of life.

If a jury could recommend life in *Perry* – it cannot be said beyond a reasonable doubt that a fully and properly instructed jury as to their non-advisory role would have found beyond a reasonable doubt that (1) the aggravators sufficient and (2) the mitigation did not outweigh the aggravation.

The factual circumstances of the instant case and *Perry* are very similar. In both cases the defendants went to the victim's house to commit a robbery and the victim was killed by stabbing (HAC in both cases) – during a demand or request for

money which was denied. In both cases the CCP and avoid arrest aggravators were eliminated by this Court and the felony murder and HAC aggravators remained. The HAC in *Perry* was more egregious than in this case. Appellant had a pecuniary gain aggravator merge with the felony murder aggravator for his taking of a TV. In *Perry* the pecuniary gain aggravator was not formally found but all the basis for pecuniary gain were present -- Perry was guilty of felony murder based on a robbery. A more detailed comparison of the cases is done in Mr. Middleton's Initial Brief (Pages 24-25,37-38, 44) and Reply Brief (Pages 3,7,14,15).

In both *Perry* and in this case statutory mitigating circumstances were rejected by the trial court. The remaining mitigation was actually stronger in this case. In *Perry* the mitigation was that Perry was good to his family; helpful around the home; ambitious and motivated but life had gone downhill; had psychological stress; and was 21 years old. 522 So.2d at 821. As noted above, the mitigation in this case was much stronger.

Where a jury recommended a life sentence in a very similar situation as in this case – the *Hurst* violation cannot be deemed harmless.

Again, while it may be possible to perform an analysis showing a *Hurst* violation is **not** harmless -- it is impossible to conduct a harmless error analysis to show that an error is harmless. This difference is significant. The burden is on the beneficiary of the error to prove the error harmless beyond a reasonable

doubt – there is no burden to show the error was not harmless. Thus, a burden exists that cannot be met.

One can't speculate or hypothesize findings. Without findings one cannot tell what aggravators the jury found and whether the jury found them to be sufficient. Without findings one does not know what mitigation was found and if it outweighed the aggravation.

It could be argued that where the jury had reached a certain guilt verdict (such as felony murder or a contemporaneous prior violent felony) and the defense did not propose mitigation any *Hurst* violation would be harmless. But even this scenario does not show beyond a reasonable doubt that the violation was harmless. A jury may find mitigation in the evidence even where it was not proposed or argued.

Hurst violations are not subject to a harmless error analysis

As previously mentioned a review of the violation would be an exercise of pure speculation.

Justice Anstead noted this in his concurrence in *Bottoson*:

[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.

Bottoson v. Moore, 833 So.2d 693, 708 (Fla. 2002) (Anstead, J., concurring)(emphasis added). 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 application based on "sheer speculation"), as revised on denial of reh'g (Fla. 2011).

A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). *Hurst* violations are structural because they "infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993).

In *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) the U.S. Supreme Court found that an erroneous jury instruction concerning proof of guilt beyond a reasonable doubt standard is not subject to a harmless-error analysis. 508 U.S. at 281-82. Where there is a reasonable likelihood that a jury does not believe that it must find proof beyond a reasonable doubt to find the defendant guilty, the erroneous instruction is a structural error that may not be cured through a harmless error analysis. Id. In this case the jury would not believe it must make the findings as is required by the Sixth Amendment similar in *Sullivan* where the jury did not believe it had to find guilt beyond a reasonable doubt. It is a structural error.

In holding the error to be structural Justice Scalia explained, "[a] reviewing court can only engage in pure speculation – its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judges the defendant guilty.'" *Sullivan*, at 281. As previously noted, the same pure speculation is present in evaluating a *Hurst* violation.

Remedy

Life because there is no constitutional death sentencing scheme in Florida

Since there is no constitutional death penalty statute – there is no valid statute at this time under which to impose the death penalty. The remedy is life in prison.

In *State v. Whalen*, 269 So.2d 678, 679 (Fla. 1972), during the time between Furman and the legislature's enactment of new capital sentencing statutes, this Court, held that "at the present time capital punishment may not be imposed" and therefore "there are currently no capital offenses in the State of Florida."

Like in *Furman v. Georgia*, 408 U.S. 238 (1972), *Hurst* invalidated under the United States Constitution the statutory scheme by which Florida sentences a person to death, creating a situation in which, until constitutional provisions are enacted, capital punishment cannot be imposed. According to this Court in *Whalen*, "if there is no capital offense, there can be no capital penalty." Id. Like *Furman*, *Hurst*

removed capital offenses, however temporarily, from Florida law. Mr. Middleton's death sentence must be vacated.

The death penalty statute cannot be rewritten by this court to remand for a new sentencing

One hypothetical remedy is to remand to the lower court for a new sentencing hearing with directions that the jury make the required findings under *Hurst* – but this is not a proper remedy.

There is no present statute complying with *Hurst* from which this Court can direct the lower court to comply with.

Without such a statute, such a remand could end up as a jury sentencing or as redefining the substance of the present sentencing scheme. The redefinition is the function of the legislature and not a job of the court.

The sentencing was unconstitutional on its face and not as applied. It was not a procedure which a court can rewrite.

Courts lack the institutional authority to change a death penalty statute through interpretation, because such action would circumvent the legislative branch's lawmaking authority. See Fla. const. art. II, § 3; Fla. const. art. V, § 2a.

Just as a statute purporting to modify or create a procedural rule is constitutionally invalid, a judicial attempt at modifying, creating, or otherwise

rewriting a substantive statutory right is constitutionally invalid. See Fla. Const. Art. II, § 3; Fla. const. art. V, § 2a.

A law is substantive if it "creates, defines, and regulates rights, or that part of the law which courts are established to administer." *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So.2d 730, 732 (Fla. 1991). "It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property." Id. "[W]here a statute has some substantive aspects, but the procedural requirements of the statute conflict with or interfere with the procedural mechanisms of the court system, those requirements are unconstitutional." *Massey v. David*, 979 So.2d 931, 937 (Fla. 2008).

As the decision in *Hurst* has made the determination that sufficient aggravating circumstances exist a substantive element of capital murder, there can be no doubt that defining the substantive element of capital first degree murder is a matter of substantive law. A redefinition of the elements of capital first degree murder by a court would usurp legislative power and violate the constitutionally mandated separation of powers doctrine.

The unconstitutional part of the statute cannot be severed from Florida's death penalty statute without rendering the statute meaningless. If the roles of the judge and the advisory jury are eliminated from sections 921.141(2) and (3), the statute

would contain nothing but a meaningless list of aggravating and mitigating circumstances and a requirement of a penalty phase with no purpose.

Also, this Court cannot re-write an unambiguous statute to make it constitutional. See *Richardson v. Richardson*, 766 So.2d 1036, 1040-41 (Fla. 2000); *State v. Egan*, 287 So.2d 1, 7 (Fla. 1973) ("Under our constitutional system of government, however, courts cannot legislate."); *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984) ("[C]ourts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." (quoting *American Bankers Life Assurance Company of Florida v. Williams*, 212 So.2d 777, 778 (Fla. 1st DCA 1968))).

775.082(2)

Section 775.082(2), Florida Statutes, requires that Appellant be resentenced to life imprisonment :

> 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). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

Under this statutory provision a life sentence is required in this case. Although sections 921.141(2) and (3) have been invalidated by *Hurst*, section 775.082(2) **is a standalone statute** that establishes the remedy in exactly the scenario the Court now faces. See 775.082(2) ("In the event the death penalty in a capital felony is held to be unconstitutional . . . persons previously sentenced to death shall be resentenced to life without parole"). Thus, any individual previously sentenced to death for an offense occurring when section 775.082(2) was in effect must be resentenced pursuant to that statute.

In *Donaldson v. Sack*, 265 So.2d 499, 505 (Fla. 1972), the Court determined that the 1971 Florida death penalty statutes were unconstitutional because they were inconsistent with the Supreme Court's decision in *Furman v. Geor*gia, 408 U.S. 238 (1972). Section 921.141 was enacted in December of 1972 (Ch. 72-724, Laws of Florida) in response to Furman. See *Proffitt*, 428 U.S. at 247-48 ("In response to Furman v. Georgia, . . . Florida adopted a new capital-sentencing procedure, patterned in large part on the Model Penal Code.").

In *Furman* the Supreme Court held only that the imposition of the death penalty in the three cases before it was cruel and unusual punishment in violation of the Eighth Amendment, it did not abolish the death penalty.

In *Donaldson*, this Court interpreted language identical to that contained in section 775.082(2) to require the commutation of all death sentences to life

imprisonment. *Hurst v. Florida*, 136 S.Ct. 616, 2016 WL 112683 (2016), renders section 921.141 facially invalid just as *Furman* rendered Florida's death penalty facially invalid in 1972; therefore, section 775.082(2) applies, and Appellant's sentences must be reduced to life imprisonment.

Section 775.082(2) makes no distinction between a ruling invalidating Florida's death penalty scheme on Eighth Amendment grounds and a ruling invalidating the scheme on Sixth Amendment grounds.

It cannot be legitimately claimed that this Court should not apply section 775.082(2) because the death penalty itself has not been declared unconstitutional. The death penalty itself was not abolished in 1972. That was not the standard for application of the statute in 1972.

Moreover, it is clear that 775.082(2) applies to multiple situations where the death penalty scheme has been declared unconstitutional. Section 775.082(2) even provides that if the death penalty is declared unconstitutional due to the method of execution – the sentence of death shall not be reduced to life. Thus, other forms of declaring Florida's death penalty scheme unconstitutional (again other than method of execution) is intended to result in a reduction of the sentence to life.

CONCLUSION

Based on the foregoing Mr. Middleton requests this Court to vacate his death sentence and to remand for imposition of a life sentence.

CERTIFICATE OF SERVICE

I certify that a copy of this Supplemental Initial Brief has been electronically filed with the Florida Supreme Court and furnished to Lisa Marie Lerner, Assistant Attorney General, by E-mail to capapp@myfloridalegal.com this 26th day of February, 2016.

/s/Jeffrey L. Anderson
Of Counsel

CERTIFICATE OF FONT

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with a Fla. R. App. P. 9.210(a)(2).

/s/Jeffrey L. Anderson
Jeffrey L. Anderson
Assistant Public Defender