IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-2469

DALE GLENN MIDDLETON

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

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

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

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

"ROA" – Direct Appeal case SC12-2469, Middleton v. State, October 22, 2015 --- So.3d ---- 2015 WL 6387760;
"T" for the transcripts for Direct Appeal.

STATEMENT OF THE CASE

The State relies on the procedural history set out in its Answer Brief and adds the following relevant to the issue raised in Middleton's Supplemental Brief. Before commencement of the trial, Middleton filed a Motion to Bar Imposition of Death Penalty on Grounds that Florida's Capital Sentencing Procedure is Unconstitutional under Ring v. Arizona. ROA 1:271-288.

SUMMARY OF THE ARGUMENT

Middleton is not entitled to relief under Hurst as the constitutional infirmity is not structural in nature and a harmless error analysis shows that at least one of the aggravators is supported by the jury verdicts and the death recommendation was unanimous. Properly read, Hurst only requires a death sentence be based on a jury finding of a single aggravator, which Defendant's sentence is. 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

DEFENDANT IS NOT ENTITLED TO RELIEF BASED ON HURST.

Middleton asserts Hurst v. Florida, 136 S. Ct. 616 (2016) 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. He avers that this is true because Hurst allegedly requires that the jury make findings that sufficient aggravators exist to justify a death sentence and that insufficient mitigation exists to outweigh the aggravators. Acknowledging that the jury unanimously voted for the imposition of the death penalty in this case, he contends that he is nonetheless entitled to relief because the fact that the judge wrote a sentencing order in imposing his death sentence is allegedly a structural error and the fact that the jury was told its decision on whether death would be imposed is advisory rendered the jury's decision meaningless. 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.

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).

ANALYSIS - Latching onto language from Hurst regarding what findings are made in a sentencing order, Defendant argues that Hurst held that a jury must find that there is "sufficient aggravation" and that there is "insufficient mitigation" before a death sentence can be imposed without violating the Sixth Amendment.[1] However, in relying on this language, Defendant ignores that construing that language as the holding of Hurst is inconsistent with the language in which the Court itself described the holding of Hurst and the legal precedent on which Hurst was decided and would result in the Court deciding an issue in contravention to the principles of federalism embodied in the Constitution.

In section II of the opinion in Hurst, the Court held that Florida's capital sentencing statute was unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002). Hurst, 136 S. Ct. at 621-22. In doing so, it recognized that Ring had arisen from its prior decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). Id. at 621.

[1] Defendant also seems to suggest that the findings on these issues must be unanimous on both the ultimate issue of whether the aggravators are "sufficient" and whether the mitigation is "insufficient" as well as the individual determinations of which aggravators the jury found. However, the word "unanimous" does not appear in the Hurst decision at all; much less does Hurst suggest that a jury must be unanimous in the way the jury reached its decision on such issues. This is true despite the fact that Hurst's main arguments before the Court were that the Sixth Amendment required jury unanimity in the manner Defendant claims. Brief of Petitioner, Hurst v. Florida, 136 S. Ct 616 (2016)(No. 14-7505). However, it is hardly surprising as the Court has held that the Sixth Amendment does not require unanimous jury verdicts at all, Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972), and that it would not require a jury to be unanimous about the manner in which it determined that elements were satisfied even if it did. Schad v. Arizona, 501 U.S. 624 (1991).

It acknowledged that its holding in Apprendi was based on a determination 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." Hurst, 136 S. Ct. at 621 (quoting Apprendi, 530 U.S. at 591). It admitted that its determination in Ring that Apprendi rendered Arizona's capital sentencing scheme unconstitutional was based on the realization that "'the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.'" Hurst, 136 S. Ct. at 621 (quoting Ring, 536 U.S. at 604). Moreover, at the conclusion of the opinion when it summarized its holding, the Court again limited its holding to the "existence of an aggravating circumstance." Hurst, 136 S. Ct. at 624. Thus, through the portions of the opinion in which the Court reached and stated its holding, the Court focused on only the finding of an aggravating circumstance necessary to make a defendant eligible for a death sentence. In contrast, the language on which Defendant relies comes not from the section II of the opinion or the conclusion where the Court stated its holding but from section III of the opinion in which the Court was merely explaining why it was rejecting the arguments the State had presented. Id. at 622. Given the inconsistency between the language on which Defendant relies and the language in which the Court actually articulated its holding and the fact that the language is not from the portions of the opinion in which the holding was reached

and enunciated, Defendant's suggestion that this language constitutes the holding of Hurst should be rejected.

Additionally, the language is actually inconsistent with the precedent on which the Court actually relied. In Apprendi, the Court examined whether the Sixth Amendment required a jury finding regarding a fact that made a defendant eligible for a sentence that exceeded the statutory maximum for the offense of which he was convicted. It held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. At the time, it rejected the assertion that this holding would invalidate state capital sentencing schemes based on the belief that once a jury had found a defendant guilty of a capital offense, the statutory maximum for the crime was death. Id. at 497 & n.21. Thus, the Court's focus was on facts that made a defendant eligible for a sentence and not all findings that influenced the selection of a sentence.

Two years later, the Court addressed the implications of Apprendi for Arizona's capital sentencing scheme based on the Arizona Supreme Court's holding that the Court had misunderstood how Arizona's capital sentence scheme work and that a death sentence was not authorized until an aggravator was found at the penalty phase. Ring, 584 U.S. at 595-96. Because Arizona had no jury involved

in the penalty phase at all, it determined that Arizona's capital sentencing scheme was unconstitutional "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Id. at 609. However, it did not alter the fact that the focus of this type of Sixth Amendment claim was findings needed to increase the maximum sentence; not facts that merely influenced the sentence selected. In fact, it expressly noted that the claim being presented in that case was limited to the finding of an aggravator. Id. at 597 & n.4.

While the Court has altered the portion of the holding of Apprendi to cover findings that increased the sentencing range to which a defendant is exposed even if they did not change the statutory maximum, it has not changed the focus from findings that made a defendant eligible for a sentence. Alleyne v. United States, 133 S. Ct. 2151, 2155, 2158 (2013)(applying Apprendi to factual findings necessary to impose a minimum mandatory term); Southern Union Co. v. United States, 132 S. Ct. 2344 (2012)(applying Apprendi to factual findings that increased the amount of a criminal fine); Cunningham v. California, 549 U.S. 270 (2007)(applying Apprendi to factual findings necessary to increase a sentence to an "upper limit" sentence); Blakely v. Washington, 542 U.S. 296, 303-05 (2004)(applying Apprendi to factual finding necessary to impose a sentence above the "standard" sentencing range even though the sentence was below the statutory

maximum). In fact, this Court recently reaffirmed that the Sixth Amendment right underlying Ring and Apprendi did not apply to factual findings made in selecting a sentence for a defendant after a finding had been made that authorized the defendant to receive a sentence within a particular range. Alleyne, 133 S. Ct. at 2161 n.2 ("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, 246, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949). 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."); *see also* United States v. O'Brien, 560 U.S. 218, 224 (2010)(recognizing that Apprendi does not apply to sentencing factors that merely guide sentencing discretion without increasing the applicable range of punishment to which a defendant is eligible). Given this continued focus on those findings that authorize a greater sentence, Defendant's suggestion that Hurst somehow required jury findings about mitigation should be rejected.

Additionally, it should be remembered that a week after the Court issued its decision in Hurst, the Court issued a decision in Kansas v. Carr, 136 S. Ct. 633

(2016). There, the Court discussed the distinct determinations of eligibility and selection under capital sentencing scheme. In doing so, it stated that an eligibility determination was limited to findings related to aggravating circumstances and that determinations regarding whether mitigating circumstances existed and the weighing process were selection determinations. In fact, it stated that such determinations were not factual findings at all. Id. Instead, it termed the determinations regarding the existence of mitigating circumstances as "judgment call[s]" and weighing determinations "question[s] of mercy." Id. While it has been suggested that Carr's statements about eligibility should be ignore because findings regarding mitigation are not required by Kansas law, this is untrue. Kansas's death penalty statute expressly requires that a decision regarding whether a death sentence should be imposed be based on a determination that "one or more of the aggravating circumstances enumerated in K.S.A. 21-6624, and amendments thereto, exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist." Kan. Stat. Ann. § 21-6617. Given Carr and the focus of Apprendi based claims on eligibility, Defendant's suggestion that Hurst required jury findings on issues regarding mitigation and weighing should be rejected.

Further, Defendant's claim regarding the holding of Hurst should be rejected because such a holding would conflict with the principle of federalism underlying

our Constitution. The Court has recognized that federal courts, including it, are bound by state court interpretations of state law except when the interpretation was an "obvious subterfuge to evade consideration of a federal issue." Mullaney v. Wilbur, 421 U.S. 684, 691 & n.11 (1975). It has recognized that how a capital sentencing statute functions to make a defendant eligible for the death penalty is an issue of state law. Zant v. Stephens, 462 U.S. 862, 870-73 (1983). Thus, the United States Supreme Court was bound, as a matter of constitutional federalism, by this Court's interpretation of what facts had to be found for a defendant to be eligible for the death penalty unless it could be shown that this Court's interpretation was an obvious attempt to avoid a finding of a Sixth Amendment violation.[2]

However, no such showing can be made. Well before any of the Apprendi-based decisions existed, this Court had held not only is a death sentence authorized once a single aggravating circumstance is found but also that death is the presumptive proper sentence once any aggravator is found. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). After Ring, this Court adhered to the interpretation that a death sentence was authorized if an aggravator was found. State v. Steele, 921 So. 2d 538, 545 (Fla. 2005). Since this Court's decision regarding eligibility was not an

[2] In fact, such a reading of Hurst is consistent with the fact that the United States Supreme Court denied certiorari in two Florida cases where the defendants were death-eligible based on a jury finding from the guilt phase or a prior violent felony. 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).

obvious attempt to avoid the Sixth Amendment issue, it was binding on the Court. Since Defendant's claim regarding the language in Hurst would have the United States Supreme Court overruling this Court on an issue of state law, it should be rejected. Instead, consistent with the language that Hurst itself uses in discussing its holding, the precedent on which Hurst is based and this Court's binding interpretation regarding what facts must be found for a death sentence to be authorized, the actual holding of Hurst is properly understood as finding a Sixth Amendment violation when a judge writes a sentencing order if the order is not based on a jury finding of an aggravator necessary to make a defendant eligible for a death sentence.

Further, while Defendant cites to Arizona v. Fulminante, 499 U.S. 279 (1986), and Sullivan v. Louisiana, 508 U.S. 275 (1993), to argue that the error in having a judge write a sentencing order is structural error, neither of those cases so hold and the binding precedent from both the United States Supreme Court and this Court hold to the contrary. Neither Fulminante or Sullivan concerned an error in allegedly not have a jury make a finding regarding whether an element of a crime had been proven beyond a reasonable doubt. Instead, the error in Fulminante was the admission of a coerced confession, and the Court actually determined that such an error was subject to harmless error analysis. Fulminante, 499 U.S. at 306-12. In Sullivan, 508 U.S. at 277-82, the issue was whether the giving of a constitutionally

defective jury instruction on reasonable doubt was structural error, which the Court found was correct. Thus, neither of these cases even address the issue of whether a failure to obtain a jury finding on an element is structural error.

Moreover, the Court has addressed that exact issue of whether the type of error at issue here is structural error and rejected the assertion. In Neder v. United States, 527 U.S. 1, 6 (1999), the trial court had instructed the jury that it was not to consider the issue of whether a false statement was material in determining whether a defendant was guilty of committing tax fraud based on having made the false statements because materiality was an issue of law to be decided by the Court. While the case was on appeal, the Court determined that the materiality of a false statement was an element of such an offense that had to be determined by a jury. Id. at 6-7. However, the Court rejected the argument that complete failure to submit an element of a crime to the jury at all was not structural error and was subject to a harmless error analysis. Id. at 8-15. In doing so, it determined that allowing a harmless error analysis was not inconsistent with the holding of Sullivan because the failure to obtain a jury verdict on a single element did not vitiate all of the jury findings like the defective reasonable doubt instruction. Id. at 10-11. It also rejected the defendant's attempt to rely on the very language from Sullivan on which Defendant relies here, finding that the broad language was

contrary to binding precedent at the time it was issues and did not expressly the appropriate standard to determine whether an error was structural. Id. at 11-12.

In Washington v. Recuenco, 548 U.S. 212, 215 (2006), the Court considered whether errors based on the Apprendi line of cases was a structural error. In rejected the assertion, it found that Neder controlled the issue and that such error were subject to harmless error review. Id. at 218-22. Consistent with this approach, this Court has held that the failure to obtain a jury finding on an Apprendi type error is subject to a harmless error analysis. Galindez v. State, 955 So. 2d 517, 521-23 (Fla. 2007). In fact, in Galindez, the Court expressly noted that it had applied a harmless error analysis to the failure to have a jury decide an element of an offense. Id. at 522. As Defendant admits, the error found in this case was an Apprendi-type error. Since both this Court and the United States Supreme Court have held that this type of error is such to a harmless error analysis, Defendant's reliance on dicta from Fulminante and Sullivan to argue that the alleged error in this case was structural should be rejected.

Given the actual holding of Hurst, any error here is clearly harmless. During the guilt phase, the jury found Defendant guilty of burglary in addition to murder. (ROA6/1056-58) As a result, Defendant could not even legally challenge the application of the during the course of a felony aggravator at the penalty phase. Way v. State, 760 So. 2d 903, 917 (Fla. 2000). Defense counsel also conceded the

HAC aggravator in his closing argument. (ROA 25:2778) Moreover, in its sentencing order, the trial court expressly relied on the jury's guilt phase verdict in finding the during the course of a felony aggravator. Since the jury did determine Defendant was eligible for a death sentence and the judge relied on that finding to sentence Defendant, any error in the fact that the judge wrote a sentencing order is harmless. Moreover, since the eligibility determination was made by a guilt phase verdict, Defendant's suggestion that it was tainted by the jury being informed at the penalty phase that its sentencing recommendation was merely a recommendation does not change that result.

Moreover, Middleton's jury was able to reach the conclusion death was the appropriate sentence unanimously. By voting 12-0 to recommend death, the jury necessarily found, consistent with their instructions, the existence of at least one aggravator, sufficient aggravation existed to justify recommending death, and the aggravation outweighed mitigation. 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 Larkin v. State, 147 So.3d 452, 466 (Fla. 2014), cert. denied, 135 S. Ct. 2310 (2015) ("We have consistently rejected Ring claims in cases such as this one,

where the jury recommended a sentence of death by a unanimous vote."); Bevel v. State, 983 So.2d 505, 526 (Fla. 2008). Upon the evidence and closing arguments, and the jury's unanimous recommendation any error is harmless beyond a reasonable doubt.

Finally, Defendant's suggestion that §775.082(2), Fla. Stat. mandates that he receive an immediate life sentence should be rejected. Under the plain language of that provision provides, it is only applicable when the death penalty is declared unconstitutional. Here, as is evident from the fact that the Court has rejected the assertion that the type of error that occurs in Apprendi-based claims is a structural error, the error found here was merely a trial error in the manner in which the decision to impose the death penalty was made. In fact, as the Court itself has recognized, this type of change in law does not even "alter the range of conduct [] subjected to the death penalty." Schriro v. Summerlin, 542 U.S. 348, 353 (2004). Instead, it merely requires a procedural change regarding the identity of the fact finder regarding those facts necessary to make a defendant eligible for the death penalty. Id. at 353-54. Given these circumstances, Hurst did not hold that the death penalty was unconstitutional; it merely found a flaw in the manner in which the decision to impose the death penalty was made. Thus, by its own terms, §775.082(2), Fla. Stat. does not apply.

Defendant's citation to Donaldson v. Sack, 265 So. 2d 499 (1972), does not compel a different result. While Defendant references language from Donaldson as if it held that §775.082(2), Fla. Stat. applied to anyone sentenced to death, he ignores that the very next section of that opinion was "[t]his provision is not before us for review." Donaldson, 265 So. 2d at 505. Instead, the issue actually decided in Donaldson was whether circuit courts continued to have jurisdiction over cases that had been described as capital once Furman v. Georgia, 408 U.S. 238 (1972), was decided. Id. at 501-02. Moreover, this Court's decision that they did not was based on the conclusion that a case could not be deemed a capital case unless death was a possible sentence. Id. at 501-02. However, since that time, this Court has recognized that a crime may be classified as a capital crime even if a death sentence is not possible. Rusaw v. State, 451 So. 2d 469 (Fla. 1984). Thus, Donaldson does not support Defendant's assertion that the type of trial error found in Hurst makes §775.082(2) applicable.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm Defendant's convictions and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been electronically furnished to Jeffrey L. Anderson, Esq. Office of the Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, FL 33401 on March 7, 2016.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately on September 3, 2013.

/s/Lisa-Marie Lerner
LISA-MARIE LERNER