IN THE SUPREME COURT OF FLORIDA

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

SUPPLEMENTAL REPLY 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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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

Appellee makes three basic claims: (1) *Hurst v. Florida*, 136 S.Ct. 616 (2016) and Florida Statutes merely require a jury finding of a single aggravating circumstance; (2) any violation of *Hurst* was harmless error; and (3) there is no remedy for a Sixth Amendment violation. These claims will be discussed below.

Florida requires more than a finding of a single aggravating circumstance and Hurst requires a jury finding on what is required to impose a death sentence- "The State fails to appreciate the central and singular role the judge plays under Florida law"

Hopefully it is now well-settled that under the Sixth Amendment the jury must make all the findings that are required to impose the maximum sentence.

The real question is whether the maximum sentence of death can be imposed in Florida with a mere finding of a single aggravating circumstance. The Florida Legislature has made it clear there must be more findings than a single aggravator – there must be findings "... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." The Florida Legislature could have used the language that death may be imposed if "one or more aggravating circumstances" are found -- 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**. A finding of “one or more aggravating circumstances” does not satisfy the required finding that there are “sufficient” aggravators and “insufficient mitigating circumstances to outweigh the aggravating circumstances” needed to impose a death sentence.

Appellee relies on *Kansas v. Carr*, 136 S.Ct 633 (2016) to claim that in Florida only a single aggravator is required to impose a sentence of death. However, the Kansas statute in *Carr* provided for jury findings and jury weighing of aggravating and mitigating circumstances. Also, *Carr* did not involve a Sixth Amendment issue – it only involved an issue as to whether an instruction was required under the Eighth Amendment. *Carr* does not define Florida law nor does it address the *Hurst* issue as to what is required under the Sixth Amendment.

Appellee labels the findings of “sufficient aggravating circumstances" and “insufficient mitigating circumstances to outweigh the aggravating circumstances" as **sentencing or selection factors** that are required to be found to impose death. 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).

Appellee's claim that only a finding of a single aggravating circumstance is required is without merit.

The Hurst error was not harmless in this case

Appellee has not disputed pages 5-17 of Appellant's brief explaining; how the lack of jury findings in this case was not harmless; how it is not possible to conduct an analysis to show that the error is harmless; and neither trial court findings nor the jury's advisory recommendation logically can be used to find *Hurst* errors harmless.

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. As explained in Appellant's brief these aggravators were challenged, and even if found by the jury it is not known what weight the jury would give to them. Further, it is not known if the jury would find these aggravators **sufficient** or that the **mitigation did not outweigh them**.

Instead of addressing the issue, Appellee repeatedly, like a broken record, claims a harmless error analysis can be easily performed on the jury's failure to find at least **one aggravating circumstance**. Appellee essentially is conceding that a proper harmless error analysis cannot be performed on the lack of jury findings on

whether there are “sufficient aggravating circumstances" and “insufficient mitigating circumstances to outweigh the aggravating circumstances."

In claiming a harmless error analysis can be performed on the jury’s failure to find at least **one aggravating circumstance,** Appellee relies on cases such as *Neder v. United States*, 5627 U.S. 1 (1999), *Washington v. Rencueno*, 548 U.S. 212 (2006); *Galindez v. State*, 995 So.2d 517 (Fla. 2007). However, these cases involve the failure to find an objective and discrete element and do not involve the failure to make findings that are more subjective and involve weighing. A death sentence imposed without any findings is not comparable to a jury instruction which omits an uncontested or uncontestable element to a noncapital offense.

Instead, *Sullivan v. Louisiana*, 508 U.S. 275 (1993) is more appropriate. In *Sullivan* the court found an erroneous jury instruction concerning proof of guilt beyond a reasonable doubt is not subject to a harmless-error analysis as there was a likelihood that a jury does not believe that it must find proof beyond a reasonable doubt. In this case the jury would not believe it must make the findings as is required by the Sixth Amendment similar in *Sullivan.* 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. There is the same speculation evaluating a *Hurst* violation.

Remedy

Appellee has not disputed pages 20 and 21 of Appellant's brief explaining, that a remand for a life sentence is appropriate. Thus, remand for a life sentence is required. An alternative reason for a life sentence is section 775.082(2). 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. 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 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 10th day of March, 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
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