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IN THE SUPREME COURT OF FLORIDA

ERIC LEE SIMMONS,

Appellant,

v.

CASE NO. SC14-2314
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_________________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Prior to his resentencing proceeding, Simmons' defense counsel filed motions challenging Florida's capital sentencing scheme based on Ring v. Arizona, 536 U.S. 584 (2002) (V2:393-405), moved for an order striking any reference to the jury's role being merely advisory under Caldwell v. Mississippi, 472 U.S. 320 (1985), and Ring (V2:371-73), and moved for a unanimous jury recommendation and special interrogatory verdict forms. (V2:312-16, 332-36). The court granted Simmons' request for a special interrogatory verdict form, but denied his motions to bar the death penalty, to strike any reference to the jury's advisory role, and to require jury unanimity. (V3:465-66). After hearing all of the evidence, the jury returned an interrogatory verdict indicating a unanimous finding that each of the three aggravating factors were established beyond a reasonable doubt: (1) Simmons has previously been convicted of a felony involving the threat of violence (aggravated assault on a law enforcement officer); (2) the murder was committed while Simmons was engaged in the commission of a sexual battery, kidnapping, or both;[1] and (3) the murder was especially heinous, atrocious, or cruel.

---

[1] At the guilt phase conducted in 2003, Simmons was convicted of the kidnapping, sexual battery, and first degree murder of victim Deborah Tressler.

(V10:1969-73). The jury unanimously rejected the two statutory mental mitigators, and by a vote of 6-6, were split on the question of whether nonstatutory mitigation had been established. (V10:1970-72). Ultimately, the jury recommended a death sentence by a vote of 8-4. (V10:1973). The court followed the jury’s recommendation and sentenced Simmons to death.

SUMMARY OF THE ARGUMENT

Simmons is not entitled to any relief based on the United States Supreme Court's opinion in Hurst v. Florida, ___ U.S. ___, 2016 WL 112683 (Jan. 12, 2016), as there is no Sixth Amendment violation in this case since the facts necessary to establish his eligibility for capital punishment were found by a jury, and no additional judicial factfinding occurred. Simmons has previously been convicted of a violent felony and a prior jury found that he committed the instant murder during the commission of a sexual battery, kidnapping, or both. Additionally, at the instant resentencing proceeding, the jury utilized a special interrogatory verdict form and unanimously made these same factual findings and also unanimously found that the murder was especially heinous, atrocious, or cruel. Thus, because the judge did not make the factual findings necessary to make Simmons eligible for the death penalty, no Sixth Amendment error occurred and Hurst is inapplicable. Even if this Court were to apply Hurst, it is clear that any constitutional error is harmless beyond a reasonable doubt given the jury's unanimous factual findings.

Additionally, Appellant's reliance on Section 775.082(2), Florida Statutes, as requiring imposition of a life sentence is misplaced. That statute provides only that a life sentence would

be imposed if the death penalty itself has been ruled unconstitutional. A plain reading of the statute does not support Simmons' strained interpretation for this case. The United States Supreme Court has not held that death as a penalty violates the Eighth Amendment, but has only stricken Florida's current procedures for implementation. Accordingly, Section 775.082(2) is not applicable.

Finally, Appellant has failed to preserve any argument for review regarding the standard jury instructions utilized in this case since he failed to raise this issue in his Initial Brief. Even if preserved, Simmons has not established that he is entitled to any relief based on Hurst given the court's use of instructions informing the jury that their recommendation is advisory.

ARGUMENT

SUPPLEMENTAL BRIEFING - ISSUE VI (RESTATED)

APPELLANT'S CLAIM THAT HE IS ENTITLED TO RELIEF BASED ON HURST V. FLORIDA, ___ U.S. ____, 2016 WL 112683 (JAN. 12, 2016), IS WITHOUT MERIT.

Prior to his jury resentencing proceeding, Appellant filed motions challenging Florida's capital sentencing scheme based on Ring v. Arizona, 536 U.S. 584 (2002) (V2:393-405), moved for an order striking any reference to the jury's role being merely advisory under Ring and Caldwell v. Mississippi, 472 U.S. 320 (1985) (V2:371-73), and moved for a unanimous jury recommendation and special interrogatory verdict forms. (V2:312-16, 332-36). The court granted Simmons' request for an interrogatory jury verdict form, but denied the other motions. Subsequently, the jury returned a unanimous verdict finding three aggravating factors had been established beyond a reasonable doubt and rejecting the two statutory mental mitigating circumstances. By a vote of 6-6, the jury split on the question of whether Simmons had established any nonstatutory mitigation. (V10:1969-73). The trial court followed the jury's recommendation and sentenced Simmons to death.

On appeal, Simmons argued in Claim VI of his Initial Brief that he was entitled to relief based on Ring, and because the United States Supreme Court had granted certiorari in Hurst, he

requested that this Court hold the proceedings in abeyance until the Supreme Court issued its opinion. On January 12, 2016, the United States Supreme Court issued its opinion in Hurst V. Florida, ___ U.S. ____, 2016 WL 112683 (Jan. 12, 2016), which found that Florida's death penalty statute violated the Sixth Amendment in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring, because Florida's statute "does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" Hurst, 2016 WL 112683 at *5-6 (citing § 775.082(1), Fla. Stat.). The Court noted that the jury's advisory recommendation could not serve as the necessary factual finding required by Ring. Id. In reversing Hurst's sentence, the Supreme Court did not address the State's argument that any error was harmless, but remanded the case to this Court to conduct such an analysis. Id. at *8-9. Appellant now argues in his supplemental brief that this Court cannot analyze his case under the harmless error standard and, pursuant to Florida Statutes, section 775.082(2), this Court must commute Simmons' sentence to life in prison. Appellant's argument is without merit and the State submits that he is not entitled to any relief based on Hurst.

Contrary to Simmons' position, Florida Statutes, section 775.082(2) does not require that his sentence be commuted to

life in prison. Putting aside Simmons' unsupported assertion that Hurst now requires jury sentencing, it is clear that Hurst did not determine capital sentencing to be unconstitutional; Hurst only invalidated Florida's procedures for implementation of such a sentence, finding that Florida's procedures could result in a Sixth Amendment violation if the judge makes factual findings which are not supported by a jury verdict. Therefore, by its own express terms, section 775.082(2) does not apply. Section 775.082(2) provides that life sentences *without parole*[2] are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional," and was enacted following Furman v. Georgia, 408 U.S. 308 (1972), in order to fully protect society in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional, such as thereafter occurred in Coker v. Georgia, 433 U.S. 584 (1977), where the United States Supreme Court held that capital punishment was not available for the capital felony of raping an adult woman.

Although Simmons suggests that this Court used similar language to require the commutation of all death sentences to life following Furman in Donaldson v. Sack, 265 So. 2d 499 (Fla.

[2] Inmates convicted of capital crimes were otherwise eligible for parole pursuant to Section 947.16(1), Florida Statutes.

1972), Simmons is misreading and oversimplifying this Court's Donaldson decision. 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. Id. at 505. This Court observed that the new section (§ 775.082(2)) was conditioned on the invalidation of the death penalty, but clarified that "[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 primary impact of the Donaldson decision was on those cases which were pending for prosecution at the time Furman was released. Donaldson does not purport to resolve issues with regard to pipeline cases pending before the Court on appeal, or to cases that were already final at the time Furman was decided. This Court's determination to remand all pending death penalty cases for imposition of life sentences in light of Furman is discussed in Anderson v. State, 267 So. 2d 8 (Fla.

1972), a case which explains that, following Furman, the Attorney General filed a motion requesting that this Court relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position that the death sentences that were imposed were illegal sentences. There is no legal reasoning or analysis to explain why commutation of 40 sentences was required, but it is interesting to observe that this was before the time that either this Court or the United States Supreme Court had determined the current rules for retroactivity, as Teague v. Lane, 489 U.S. 288 (1989), and Witt v. State, 387 So. 2d 922 (1980), were both decided later.

At any rate, there are several cogent reasons for this Court to reject the blanket approach of commuting all capital sentences currently pending before this Court on direct appeal such as was done following the Furman decision. Furman was a decision that invalidated all death penalty statutes in the country, with the United States Supreme Court offering nine separate opinions that left many courts "not yet certain what rule of law, if any, was announced." Donaldson, 265 So. 2d at 506 (Roberts, C.J., concurring specially). The Furman Court held that the death penalty as imposed for murder and for rape constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States

Constitution. The various separate opinions provided little guidance on what procedures might be necessary in order to satisfy the constitutional issues, and whether a constitutional scheme would be possible.

Hurst, on the other hand, is a specific ruling to extend the Sixth Amendment protections first identified in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), to Florida's capital sentencing scheme. By equating Hurst with Furman, Simmons reads Hurst far too broadly. As we know, Timothy Hurst did not have a prior conviction. Following release of the Hurst opinion, the United States Supreme Court denied certiorari review of two direct appeal decisions, leaving intact this Court's denial of any Sixth Amendment error; both cases had sentences 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). After Furman, there were no existing capital cases left intact. After Hurst, the United States Supreme Court has provided no express reason to disturb any capital sentences supported by prior convictions. The remedy for death row prisoners provided by Furman had not been extended to current death row inmates by Hurst.

In order to fully understand the decision by the United States Supreme Court in Hurst, one must first go back to the Court's decision in Apprendi. 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. The Court 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 (emphasis added). At the time, the Court 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, in Ring v. Arizona, 536 U.S. 584 (2002), the Court extended its holding in Apprendi to capital cases stating that "capital defendants, no less that noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their

maximum punishment." Ring, 536 U.S. at 589. Because Arizona had no jury involved in the penalty phase at all, the Supreme Court determined that Arizona's capital sentencing scheme violated the Sixth Amendment "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, the Court did not alter the fact that the focus of this type of Sixth Amendment claim was on eligibility; not selection. In fact, the Court expressly noted that the claim being presented in Ring was limited to an eligibility finding. Id. at 597 & n.4.

In Florida, eligibility is determined by the existence of one aggravating factor. State v. Steele, 921 So. 2d 538, 543 (Fla. 2005) ("To obtain a death sentence, the State must prove beyond a reasonable doubt at least one aggravating circumstance"). Death is presumptively the appropriate sentence. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). As eligibility is a matter of state law, this Court's determination controls. Ring, 536 U.S. at 603 ("the Arizona court's construction of the State's own law is authoritative").

While the Supreme Court has altered the portion of the holding of Apprendi to cover findings that increase 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, the 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 the defendant has been found eligible 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).

Moreover, in Kansas v. Carr, ___ U.S. ____, 2016 WL 228342 at *8 (Jan. 20, 2016), decided only a week after Hurst, the Court discussed the distinct determinations of eligibility and selection under capital sentencing schemes. In doing so, the Court 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, the Court stated that such determinations were not factual findings at all. Instead, the Court termed the determinations regarding the existence of mitigating circumstances as "judgment call[s]" and weighing determinations "question[s] of mercy." Id.

Accordingly, Simmons' argument that Hurst requires juries to find as a matter of fact that there are sufficient aggravating circumstances to outweigh the applicable mitigating circumstances is without merit. In Hurst, the Court applied Apprendi and Ring to Florida's capital sentencing scheme and found that it was an unconstitutional violation of the Sixth Amendment for the trial judge, independent of the jury, to make the factual finding of an aggravating factor necessary to make a defendant eligible for the death penalty. Hurst, 2016 WL 112683 at *9. Hurst specifies that constitutional error occurs when a trial judge "alone" finds the existence of "an aggravating circumstance." Hurst, 2016 WL 112683 at *9.

However, because Hurst did not find that the death penalty was constitutionally prohibited, section 775.082(2) does not mandate a commutation of Simmons' death sentence. Moreover, as will be shown below, the Sixth Amendment error identified in Hurst is not implicated when a defendant has a prior conviction, as in the instant case. Furthermore, the constitutional error is one which can be avoided or prevented with the requirement of specific jury findings to support the eligibility determination; as was done in this case.

Here, there is no Sixth Amendment violation as recognized in Hurst as Simmons was eligible for the death penalty at the

outset of the instant resentencing proceedings based on his prior and contemporaneous convictions. See generally Almendarez-Torres v. United States, 523 U.S. 224 (1998) (holding that the fact of a prior conviction may be found by the judge even if it increases the statutory maximum sentence); Ring, 536 U.S. at 598 n.4 (noting 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, 133 S. Ct. at 2160 n.1 (affirming Almendarez-Torres provides valid exception for prior convictions); see also Fletcher v. State, 168 So. 3d 186 (Fla. 2015), cert. denied, No. 15-6075 (Jan. 25, 2016) (post-Hurst denial of certiorari where defendant had prior felony conviction and was under a sentence of imprisonment, and the murder was committed during the course of a robbery); Smith v. State, 170 So.3d 745 (Fla. 2015), cert. denied, No. 15-6430 (Jan. 25, 2016) (post-Hurst denial of certiorari review where defendant had a prior violent felony conviction, was on felony probation, and the murder was committed during the course of a burglary).

It is undisputed that Simmons was convicted in 1996 of aggravated assault on a law enforcement officer; a prior felony involving the threat of violence to some person. See § 921.141(5)(b), Fla. Stat. Additionally, in 2003, a jury

unanimously convicted Appellant in the instant case of the kidnapping, sexual battery, and first degree murder of victim Deborah Tressler, thus making the factual determination that the murder was committed while Simmons was engaged in the commission of, or an attempt to commit, sexual battery or kidnapping, or both. See § 921.141(5)(d), Fla. Stat.; Simmons v. State, 934 So. 2d 1100 (Fla. 2006), cert. denied, 549 U.S. 1209 (2007). As Simmons has both a prior violent felony conviction and contemporaneous felony convictions which rendered him eligible for the death penalty, no Sixth Amendment error has been shown in this case.

Although Hurst is not implicated based on Simmons' prior and contemporaneous convictions, any potential Sixth Amendment issue was avoided in this case given the usage of special interrogatory jury verdict forms. Here, the jury unanimously found the existence of each of the three aggravating circumstances, and the judge did not make any additional factfinding regarding aggravation. Finally, even if there were some Sixth Amendment violation, United States Supreme Court case law clearly demonstrates that it was harmless beyond any reasonable doubt.

Simmons argues that the error in this case is "structural" and not subject to harmless error analysis because the jury was

repeatedly told that their recommendation was advisory. Simmons claims that the jury instructions repeatedly diminished the jury's sense of responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985), and erroneously asserts that Hurst requires the jury to make the selection determination as to the appropriate sentence. As previously argued, Hurst does not require jury sentencing, but rather only requires that the jury make the factual determination that an aggravating factor exists making the defendant eligible for the death penalty. Hurst did not expressly disturb Proffitt v. Florida, 428 U.S. 242 (1976), and only explicitly overruled 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 necessary for imposition of the death penalty." Hurst, 2016 WL 112683 at *8.

To the extent that Simmons' challenges the constitutionality of the jury instructions in his supplemental brief, such an argument has not been preserved for appellate review. Although there was a motion filed in the lower court challenging the validity of Florida's standard jury instructions based on Caldwell and Ring, the denial of that motion was not presented as an issue in Simmons' Initial Brief. See Beasley v.

State, 18 So. 3d 473, 481 (Fla. 2009) (finding waiver as to issues not fully presented in appellate brief); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) (noting even conclusory reference to issue on appeal, without further elucidation, will result in waiver). Even if this Court considers the issue, the jury instructions informing the jury that their selection recommendation was advisory has not been found unconstitutional under Hurst. Hurst, 2016 WL 112683 at *8 (overruling Spaziano and Hildwin "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of the jury's factfinding, that is necessary for imposition of the death penalty"); Combs v. State, 525 So. 2d 853 (Fla. 1988) (noting that there is no Caldwell error in Florida because, as recognized in Spaziano v. Florida, 468 U.S. 447 (1984), the trial judge is the sentencer in Florida – not the jury).

Finally, even if this Court were to find any constitutional error in the instant case, the State submits that any error was harmless and does not entitle Simmons to relief. The law is well settled that, even when there is constitutional error, the court may conduct harmless error analysis. See generally Chapman v. California, 386 U.S. 18, 20-22 (1967) (rejecting argument that all federal constitutional errors must be deemed harmful, but rather, adopting rule that "before a federal constitutional

error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"); Arizona v. Fulminante, 499 U.S. 279, 306-08 (1991) (applying harmless error analysis to "trial error" when defendant's confession was improperly admitted); Neder v. United States, 527 U.S. 1, 8 (1999) (holding that erroneous jury instructions which omit an element of the offense is subject to harmless error analysis). Neder explains why Simmons' reliance on Sullivan v. Louisiana, 508 U.S. 275 (1993), is misplaced. Although Sullivan found that constitutional error which prevented a jury from returning a "complete verdict" could not be harmless, the Court reviewed the relevant decisions in 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 further cemented by Washington v. Recuenco, 548 U.S. 212 (2006), where the United States Supreme Court reversed a Washington state court 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 defendant's use of a firearm. Of course, the United States Supreme Court remanded

Hurst itself to this Court for determination of harmlessness, noting that "[t]his Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here." Hurst, 2016 WL 112683 at *8.

This Court has been consistent in finding that deficient jury factfinding, in violation of the Sixth Amendment, can be and often is harmless beyond any reasonable doubt. Galindez v. State, 955 So. 2d 517, 521-23 (Fla. 2007); Johnson v. State, 994 So. 2d 960, 964-65 (Fla. 2008); see Pena v. State, 901 So. 2d 781, 783 (Fla. 2005) (failure to instruct jury on age requirement was not fundamental error).

In this case, as previously discussed, there can be no doubt that Simmons was eligible for the death penalty based on his prior and contemporaneous convictions. Additionally, the jury in this resentencing proceeding unanimously found the existence of three aggravating factors beyond a reasonable doubt: (1) prior violent felony conviction; (2) murder committed during a kidnapping, sexual battery, or both; and (3) the murder was especially heinous, atrocious, or cruel. The trial court did not make any additional factfinding as to the aggravating factors when sentencing Appellant to death, but relied on the jury's unanimous finding that each of these aggravators had been established beyond a reasonable doubt. As Justice Alito noted in

his dissenting opinion in Hurst when applying harmless error review, "it defies belief to suggest that the jury would not have found the existence of . . . [the] aggravating factor[s] if its finding was binding." Hurst, 2016 WL 112683 at *11 (J. Alito, dissenting). Similarly, in this case, it defies logic to suggest that the jury would not have unanimously found these aggravating factors based on the brutal facts of this murder had they been instructed that their finding was binding. See Simmons, 934 So. 2d at 1122 (upholding the HAC aggravator based on the victim's visual display of terror during her kidnapping and the numerous defensive and horrific wounds suffered during the sexual battery and murder). Accordingly, this Court should find any error harmless beyond a reasonable doubt.

Simmons has offered nothing to overcome the overwhelming facts, universally supported by the jury's verdict, which demand imposition of the death penalty in this case. No reasonable factfinder could disagree with the weighing decision eloquently outlined in the trial court's sentencing order. No possible constitutional error prejudiced Simmons on these facts. Accordingly, his death sentence should be upheld.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm Appellant's sentence of death.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 2016, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: **Nancy Ryan**, Assistant Public Defender, Public Defender's Office, Seventh Judicial Circuit, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118, [**ryan.nancy@pd7.org**]

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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