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IN THE SUPREME COURT OF FLORIDA

ERIC LEE SIMMONS,

Appellant,

vs.

CASE NO. SC14-2314

STATE OF FLORIDA,

Appellee.

_______________________________/

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

APPELLANT'S **SUPPLEMENTAL** REPLY BRIEF

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SUMMARY OF ARGUMENT

The State argues that Section 775.082(2), Florida Statutes, does not apply here, since in Hurst v. Florida the Supreme Court did not declare the *practice* of capital sentencing unconstitutional. This court in 1973 construed the statute as mandating relief from death sentences where, as here, Florida's death penalty is declared unconstitutional *as legislated*.

The State argues that the Sixth Amendment does not impose any limits on capital sentencing where the defendant has a conviction for a prior violent felony, or was convicted of a violent felony contemporaneously with the murder, or where the jury made findings that at least one statutory aggravator is present. Its position is founded on the assumption that Florida, like some other jurisdictions, presents a capital jury with a distinct "eligibility phase" and "selection phase." The State's theory is not borne out by Florida's legislation, jury instructions, or caselaw.

This case would be most quickly and easily resolved by reversing on one of the bases argued in the earlier briefing. If this court does reach issues created by Hurst, Appellant requests this court to permit comprehensive briefing once a dispositive question or questions is identified.

ARGUMENT

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

SECTION 775.082(2), F.S.

The State argues that Section 775.082(2) of the Florida Statutes does not apply here, since in Hurst v. Florida, 2016 WL 112683 (2016), the Supreme Court did not declare the *practice* of capital sentencing unconstitutional, but instead held only that Florida's death-penalty procedures run afoul of the Sixth Amendment. (Supplemental Brief ("SB") at 6-7) The State's position is based on its reading of the statutory subsection at issue, which by its terms is activated "[i]n 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." Section 775.082(2), Fla. Stat. Without citation, the State announces that after Furman v. Georgia, 408 U.S. 308 (1972), was decided, the law which became that statute "was enacted...in order to fully protect society in the event that capital punishment *as a whole* for capital felonies were to be deemed unconstitutional." (SB at 7; emphasis added) This court, however, differently construed the language "in the event the death penalty in a capital felony is held to be unconstitutional" in Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972). In that case, this court noted the legislative language

at issue "was conditioned upon the very holding which now has come to pass [in Furman], invalidating the death penalty *as now legislated."* 265 So. 2d at 505 (emphasis added).

Appellant maintains his view that Hurst, as did Furman, invalidates Florida's death penalty as currently legislated, and that the relief this court granted in Anderson v. State, 267 So. 2d 8 (Fla. 1972), should again be granted. If this court proposes to revisit the statutory construction announced in Donaldson v. Sack and applied in Anderson, Appellant asks that this court permit further briefing so that the parties can appropriately research and analyze the history of the law that became Section 775.082(2).[1]

PRIOR AND CONTEMPORANEOUS CONVICTIONS

The State argues that Sixth Amendment interests are not implicated in any Florida capital case where the defendant has a conviction for a prior violent felony, or was convicted of a violent felony contemporaneously with the murder. (SB at 15) It reasons that in Apprendi v. New Jersey, 520 U.S. 466 (2000), the Court excluded the existence of a prior conviction from those facts which a jury, as distinct from the sentencing judge, must make in support of an enhanced

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[1] As the court knows, the supplemental briefing in this matter was prepared in a short time frame.

sentence. (SB at 11) The State further posits that the only actual fact needed in Florida to make a defendant eligible for the death penalty is the existence of a single aggravating factor, and that all other findings made in a capital case are in fact global judgments rather than fact-based findings governed by Apprendi. (SB 12) In reaching that position, the State relies on language from the Court's recent decision in Kansas v. Carr, 2016 WL 228342 (2016). (SB 14)

In Carr, the Court referred to the "eligibility phase" and the "selection phase" featured in the Kansas death-sentencing scheme. In State v. Gleason, 329 P. 3rd 1102 (Kansas 2014), the decision overturned in Carr, the Kansas Supreme Court explained that juries in that state must find beyond a reasonable doubt (a) that the charged aggravating circumstances exist, and (b) that their existence is not outweighed by any mitigating circumstances. 329 P. 3rd at 1141. Here, the State of Florida observes that in that scheme there is a clear dichotomy between an initial factual "eligibility" finding (one aggravator exists) and a further, less specific finding "selecting" the defendant for the death penalty, and it extrapolates that such a dichotomy must exist in Florida as well. However, Florida's capital sentencing statute does not fit that mold. Instead, Section 921.141, Florida Statutes, dictates that the required findings are "that *sufficient* aggravating circumstances exist," and that there are insufficient mitigating circumstances to

outweigh them. 921.141(3) (emphasis added). Thus Florida intertwines the factual findings it requires to support a death penalty with the "judgment calls" that decision requires.

Florida's standard jury instructions do not, any more clearly than the statute, set out a dichotomy between an initial factual finding governed by Apprendi and a later global determination which is not so governed. First the instructions tell the jurors they are to advise the court of their ultimate recommendation based on their determinations about *sufficient* aggravating circumstances and whether they are outweighed; then the instructions set out general rules for weighing the evidence and general rules for deliberation; then they instruct that at least one aggravating circumstance must be proven beyond a reasonable doubt; then they return to the duty to find *sufficient* aggravators; then they instruct on mitigation, pointing out the lesser burden of proof on the defense; then they instruct on victim impact; then they again return to the duty to find at least one aggravator that is in the jurors' minds *sufficient*. Fla. Std. Jury Instr. (Crim.) 7.11, West's Florida Criminal Laws and Rules (2015) at J-72 to J-77.

The State relies on State v. Dixon, 283 So. 2d 1 (Fla. 1973), where this court stated that death is presumed the appropriate sentence where at least one aggravating factor is found. 283 So. 2d at 9. As Justice Pariente has pointed out,

that statement of law is inconsistent with more recent authority, which holds that the jury is never compelled or required to return a recommendation of death. Zommer v. State, 31 So. 3rd 733, 756 (Fla. 2010) (Pariente, J., specially concurring), *citing* the standard jury instructions approved in 2009 and State v. Steele, 921 So. 2d 538, 543 (Fla. 2005). Apprendi and its progeny, including Hurst, therefore govern the findings that the Court in Hurst pointed out must be made in Florida, *i.e.*, "that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Hurst at *6, citing Section 921.141(3), Florida Statutes.

THE JURY'S FINDINGS

The State also argues that the fact the jury found aggravating factors in this case shows that Hurst has no effect here. (SB 17) This position, again, depends on its assumptions that the Florida Legislature clearly says that the only finding a capital jury must make is that a single aggravating circumstance exists, and that the Sixth Amendment therefore does not apply to any remaining findings or weighings during the process. Appellant again disagrees that this assumption is borne out by Florida's capital sentencing statute and instructions.

STRUCTURAL ERROR

The State rejects Appellant's "structural error" argument, arguing that even if the Sixth Amendment applies in this case it was no more than harmless error that the trial court, not the jury, made the findings in support of the death penalty. (SB 19-21) It relies on Neder v. United States, 527 U.S. 1 (1999) and on Florida cases that apply Neder, specifically Johnson v. State, 994 So. 2d 960 (Fla. 2008), and Galindez v. State, 955 So. 2d 517 (Fla. 2007). Neder held that omission from jury instructions of a single element of a single crime could sensibly be analyzed for harmless error, based on the strength of the proof supporting that element and the resulting likelihood the verdict was in fact affected by the Sixth Amendment lapse. Galindez applies Neder in the sentencing-scoresheet context; there this court held that points for sexual penetration were properly assessed despite no jury involvement in finding penetration, given the young victim's pregnant status. This court reached a similar result in Johnson, a felony DUI case where the court bifurcated the trial then dismissed the jury before considering the defendant's prior record. This court held that harmless error analysis could, and should, be applied although the defendant had not waived a jury trial, since he did not contest the contents of his driving record, which warranted a misdemeanor-to-felony enhancement. Appellant maintains his position that there was structural error in

this case, based on the limited factfinding done by the jury.

The State's final assertion is that no *reasonable* factfinder could disagree with the trial court's weighing process. (SB 22) Here the actual jurors' ability to thoroughly weigh the mitigating evidence was curtailed when the court excluded a clear explanation of the raw IQ scores they heard. In addition, any and all weighing may well have been curtailed when the court ran afoul of Caldwell v. Mississippi, 472 U.S. 320 (1985), by minimizing the jury's role in accordance with the standard jury instructions. As to Caldwell, the State asserts that in Hurst the Supreme Court did not address Florida's standard instructions and that Combs v. State, 525 So. 2d 853 (Fla. 1988) is therefore still good law. Appellant maintains his position that Combs has clearly been overtaken by events.[2]

Whether or not this court agrees with the positions Appellant has taken in this supplemental briefing, this case would be correctly and expeditiously resolved by reversing his death sentence on proportionality grounds, or on the basis of the other issues identified earlier in the case. If this court does reach issues created by

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[2] The State points out that Appellant, in his initial supplemental brief, did not clearly argue that reading the standard instructions in this case amounted to a violation of the Eighth Amendment. Appellant would have done so had the supplemental briefing schedule been less abbreviated, and asks this court for the opportunity to fully brief that Eighth Amendment issue if disposition of this appeal turns on that question.

the Hurst decision, Appellant requests this court to consider permitting more comprehensive briefing once a dispositive question or questions is identified.

CONCLUSION

Appellant has shown that this court should vacate his death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing supplemental reply brief has been electronically delivered to Assistant Attorney General Stephen Ake, at capapp@myfloridalegal.com, and mailed to Appellant this 29th day of January, 2016.

CERTIFICATE OF COMPLIANCE

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

Nancy Ryan
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