IN THE SUPREME COURT OF FLORIDA

NO. SC16-399

MATTHEW L. CAYLOR,

Petitioner,

v.

JULIE L. JONES,

Secretary, Florida Department of Corrections,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

MICHAEL P. REITER
4 Mulligan Court
Ocala, FL 34472
(813) 391-5025
Fla. Bar #0320234

COUNSEL FOR PETITIONER

ISSUE I

BECAUSE FLORIDA'S DEATH PENALTY WAS HELD UNCONSTITUTIONAL BY THE SUPREME COURT OF THE UNITED STATES IN HURST V. FLORIDA, SECTION 775.082(2) OF THE FLORIDA STATUTES REQUIRES THAT ALL PERSONS PREVIOUSLY SENTENCED TO DEATH FOR A CAPITAL FELONY BE BROUGHT BEFORE THE SENTENCING COURT FOR RESENTENCING TO LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE.

Petitioner appreciates the history lesson from Respondent regarding Section 775.082. Simply put however, *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and *Hurst v. Florida*, 136 S.Ct. 616 (2016) found the statutory scheme for the death penalty unconstitutional. *Furman* found the statutory scheme unconstitutional pursuant to the Eighth Amendment, while the court in *Hurst* found the statutory scheme unconstitutional pursuant to the Sixth Amendment. Neither court found the death penalty unconstitutional per se.

This Court in *State v. Dixon*, 283 So.2d 1 (Fla. 1973) interpreted the finding in *Furman* as follows:

> The Supreme Court of the United States in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and subsequent decisions struck down the previously existing death provisions of the several states with the possible exception 'of a very few mandatory statutes' (See 408 U.S. 417, n. 2, 92 S.Ct. 2818), by holding:
>
> '(T)he imposition and carrying out of the death penalty In (these cases) constitute cruel and unusual punishment in violation Of the Eighth and

> Fourteenth Amendments.' (Emphasis supplied) (pp. 239--240, 92 S.Ct. p. 2727)
>
> This is the only controlling law which *Furman v. Georgia*, Supra, provides, as no more specific statement of the law could garner a majority of the members of the high court. It is not in the province of this Court to attempt to predict the future holdings of the Supreme Court of the United States and to attempt to weigh the laws of the State of Florida in light of the separate opinions of the five justices who constituted the majority in *Furman v. Georgia*, Supra.
>
> Two points can, however, be gleaned from a careful reading of the nine separate opinions constituting *Furman v. Georgia*, Supra. First, the opinion does not abolish capital punishment, as only two justices--Mr. Justice Brennan and Mr. Justice Marshall--adopted that extreme position. The second point is a corollary to the first, and one easily drawn. The mere presence of discretion in the sentencing procedure cannot render the procedure violative of *Furman v. Georgia*, Supra; it was, rather, the quality of discretion and the manner in which it was applied that dictated the rule of law which constitutes *Furman v. Georgia*, Supra.

As a result of the holding in *Furman*, all death penalties in Florida were reduced to life imprisonment. The same result should be applied here as a result of the holding in *Hurst*. As to the rest of this argument, Petitioner will rely upon his initial petition.

ISSUE II

MR. CAYLOR WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE JURY VERDICT AT THE SENTENCING PHASE OF HIS TRIAL WAS NOT UNANIMOUS AND THE JURY'S SENSE OF RESPONSIBILITY WAS DILUTED BECAUSE OF INADEQUATE JURY INSTRUCTIONS.

Retroactivity – Petitioner will rely upon his initial Petition on this issue.

Aggravators - At page 29 of its response, Respondent argues: "But, even if *Hurst* did apply to petitioner, petitioner's argument still fails because he was convicted of two other violent felonies by the same jury and he had a prior felony conviction at the time of his death sentence." However, that argument only applies to a strict *Ring* claim. It does not comport with the findings in *Hurst*. On direct appeal this Court held the same conclusion as Respondent as it was applied by *Ring*. *Caylor v. State*, 78 So.3d 482, 500 (Fla. 2012).

There is no evidence in the record that a majority of the jury found all the aggravators were proven beyond a reasonable doubt; therefore, it cannot be shown, as announced in Hurst that a finding by the jury, not the judge, that *sufficient aggravating circumstances existed* to justify imposing the death penalty. There is no way of

knowing if the jury's recommendation relied entirely on the HAC aggravator and not on the other two aggravators.

At page 31 of the Response, Respondent cites to Zommer v. State, 31 So.3d 733, 754 (Fla. 2010) as follows:

> this Court interpreted the term 'sufficient aggravating circumstances' in Florida's capital sentencing scheme to mean one or more such circumstances)(emphasis in original). Additional aggravating circumstances do not increase the penalty. So, it is only one aggravating circumstances that the jury must find. Death is presumptively the appropriate sentence. *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973).

The problem with that argument is that it only applies on a given day in a given case.

First, the United States Supreme Court found Florida's death penalty scheme constitutional partly because "evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'" *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Well we know that this Court does not reweigh aggravators and mitigators. Gill v. State, 14 So.3d 946, 964 (Fla. 2009).

Second, Respondent suggests that a finding of one aggravating circumstances, not outweighed by any mitigating circumstances, death is the presumptive sentence. We know

that isn't true. The instructions given to the jury specifically states they never have to recommend death.

> The sentence that you recommend must **be** based upon the facts as you find them from the evidence and the law. If, after weighing the aggravating and mitigating circumstances, you determine that at least one aggravating circumstance is found to exist and that the mitigating circumstances do not outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole. **Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death.** (Emphasis added).

Additionally, it may be true that one listed aggravator makes a defendant eligible to received death, one aggravator does not necessarily make death the presumptive sentence. Williams v. State 37 So.3d 187 (Fla.2010). In addition, this Court has continuously indicated it is not the quantitative aggravators, but the quality of them.

> This analysis "is not a comparison between the number of aggravating and mitigating circumstances." ***Id.*** It "entails a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. Offord v. State, 959 So.2d 187, 191 (Fla.2007).

Finally, Respondent would point out that while this Court in Dixon suggests that the listed aggravators may be

sufficient, the statute requires the jury to determine if the aggravators are sufficient to justify a death recommendation.

ISSUE III

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE BY FAILING TO RAISE AND ARGUE THAT THE APPELANT WAS DENIED DUE PROCESS BY NOT RECEIVING A COMPETENT MENTAL HEALTH EVALUATION PRUSUEANT TO *AKE*?

At page 35 of Respondent's response it is stated that this claim has no merit because: "Petitioner was provided a psychologist who evaluated him for competency and sanity before his trial which is all *Ake* requires." Apparently, respondent concedes that Petitioner did not have the benefit of mitigation evaluation, which was continually supported in the evidentiary hearing record, as well as the record on appeal as shown in the initial petition.

Petitioner disagrees that *Ake* only requires competency and sanity evaluation. This court in *Schwab v. State*, 814 So.2d 402 (2002), interpreted the requirement in Ake:

> *Ake* requires that a defendant have access to a "competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake,* 470 U.S. at 83, 105 S.Ct. 1087.

Mitigation is part of the defense. Inasmuch as Caylor was not provided with a mental health evaluation, he was

denied the benefit of Ake, and appellate counsel was ineffective in failing to raise the issue.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing initial brief has been electronically delivered to Assistant State Attorney Robert Morris at: Robert.morris@myfloridalegal.com, and mailed to Matthew Caylor, Q23494, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026-1000, this 22nd day of July, 2016.

_/s/Michael P. Reiter_____
Michael P. Reiter

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 Courier New 12-point font.

__/s/Michael P. Reiter_____
Michael P. Reiter