Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DALE GLENN MIDDLETON,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Capital Case

1. Where a Florida jury gave an advisory recommendation without making the findings required by the Sixth and Fourteenth Amendments and Hurst v. Florida, 136 S. Ct. 616 (2016) -- (1) is the error automatically harmless because the advisory recommendation was unanimous and (2) was the jury's recommendation a verdict in order to conduct a valid harmless error analysis?

2. Whether the death-sentencing procedures used in this case failed to comply with the Eighth and Fourteenth Amendments where the jury was advised repeatedly by the court that its recommendation would be non-binding?

3. Whether the state court violated the Sixth, Eighth and Fourteenth Amendments by giving the jury an instruction that relieved the prosecution of its burden of proving that petitioner had a careful plan or prearranged design to commit murder before the crime began in order for the jury to apply the cold, calculated and premeditated aggravating circumstance when rendering an advisory sentence of death?

4. Where the appellate court held it was error for the sentencer to find one or more of the aggravating circumstances, are the Eighth and Fourteenth Amendments violated by automatically holding the error harmless because the

sentencer indicated that it would still impose the death penalty if valid aggravating circumstances remained?

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITES

PAGE

Cases

Statutes

Constitutional Provisions

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Petitioner, Dale Glenn Middleton, urges this Court to issue its writ of certiorari in this matter, on review of the judgment of the Supreme Court of Florida for First Degree Murder (for which he was sentenced to death).

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is Middleton v. State, 220 So.3rd 1157 (Fla. 2017). The opinion is a revised opinion set out in Appendix A. The order denying rehearing is not yet in the official reporter, but may be found at Middleton v. State, 2017 WL 2374697 (Fla. June 1, 2017) and is set out in Appendix B.

STATEMENT OF JURISDICTION

The state supreme court originally entered its decision on October 22, 2015. Petitioner filed a motion for rehearing which the state supreme court denied. After the decision of Hurst v. Florida, 136 S.Ct. 616 (2016) the state supreme court withdrew its order denying the motion for rehearing and entered a decision on March 9, 2017. Petitioner filed a timely motion for rehearing which the state supreme court denied with a dissenting opinion on June 1, 2017.

The state supreme court issued its revised decision and a denial of rehearing. (Appendix A and B). Justice Thomas granted an extension of time to file a petition for writ of certiorari to October 29, 2017 (see Application No. 17A189).

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). Petitioner asserts that the proceedings in the state court violated the right to trial

by jury, and the right to constitutionally adequate and individualized death sentencing procedures in death-sentencing proceedings, guaranteed by the Sixth and Eighth, and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VIII to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV, Section 1, to the Constitution of the United States:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of the laws.

Section 921.141, Florida Statutes (2009):

> (2) ADVISORY SENTENCE BY THE JURY. - After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated [below];

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. - Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated [below]; and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supplied by specific written findings of fact based upon the [statutory aggravating and mitigating] circumstances and upon the records of the trial and the sentencing proceedings.

STATEMENT OF THE CASE

Dale Glenn Middleton was charged in Florida with burglary, dealing in stolen property, and the first- degree murder of Roberta Christiansen. He went to trial, and was convicted and ultimately sentenced to death, in 2014. The following summary of facts are in the Florida Supreme Court opinion in this case at Appendix A.

On July 27, 2009 Middleton visited his neighbor Roberta Christensen at her trailer home. It was suspected that Middleton may have seen some money in the residence at that time. The next day Middleton and Steve Britnell drove around looking for drugs. They found methamphetamine which they shared. They separated. Middleton went to Christensen's trailer. He asked Christensen for money. She refused and tried to push him out of the trailer. Middleton killed her with a knife he had in his possession. Middleton took a television from the residence which he sold.

Middleton was found guilty of burglary, dealing in stolen property, and first-degree murder.

A penalty phase was held. Middleton presented mitigation that included, but was not limited to, --below average or borderline intelligence (IQ of 83), history of alcohol and drug abuse, chronic neglect as a child and no adult role model as a child. This mitigation was found by the trial court. There was other substantial mitigation presented by the defense.

The trial judge specifically told the jury that punishment was his responsibility and the jury's recommendation was advisory and was not binding. Appendix C at pages 2-3. The instruction to the jury also emphasized the term recommendation 23 times and the term advisory/advice 15 times Appendix C. The trial court closed its instruction to the jury by telling it to now retire to consider its

recommendation Appendix C. The emphasis of the advisory nature of the recommendation was repeated in giving the same instructions to the jury in writing.

The only communication by the jury as to the death sentence was a 12-0 advisory recommendation for death.

Other than giving its advisory recommendation the jury was not asked for other determinations during the penalty phase.

The trial court issued a sentencing order in which it recited it had independently evaluated and weighed the aggravating and mitigating circumstances. The trial court entered an order finding four aggravating circumstances – CCP (killing was cold calculated and premeditated), killing was to avoid arrest, felony murder, and HAC (the killing was heinous atrocious and cruel). The trial court both found and rejected mitigation proposed by the defense. The trial court also declared any error of evaluating aggravating circumstances would be harmless as long as one aggravating circumstance remained.

An appeal was taken to the Florida Supreme Court. The state supreme court originally entered its decision on October 22, 2015. Middleton raised numerous issues including that the Eighth Amendment was violated by jury instructions which diminished jurors ultimate responsibility in the determination of death citing to Caldwell v. Mississippi, 472 U.S. 320 (1985), the Sixth Amendment was violated where the jury did not make the findings required for the death penalty

citing to Ring v. Arizona, 536 U.S. 584 (2002), and the Sixth Amendment was violated by not adequately instructing the jury on CCP, the trial court improperly relied on aggravating circumstances, along with a number of other issues.

The Florida Supreme Court originally entered its decision on October 22, 2015. The court affirmed Middleton's convictions and sentences. The court did not address the issue regarding instructions which diminished jurors ultimate responsibility in the determination of death (Caldwell v. Mississippi), The court held the Sixth Amendment was not violated where the jury did not make the findings required for the death penalty. The court also rejected the argument that the Sixth Amendment was violated by giving an inadequate instruction on CCP:

> Middleton claims that the CCP aggravator is unconstitutionally vague and overbroad, is incapable of a constitutionally narrow construction and has been and is being applied in an arbitrary and inconsistent manner. He also claims that the standard jury instruction administered in this case did not require that the State prove beyond a reasonable doubt an intent to kill **before the crime began**, and is therefore unconstitutional.We deny relief as this Court has on numerous occasions upheld the constitutionality of this aggravating factor and the standard **jury instruction against similar claims**. See, e.g., McWatters v. State, 36 So.3d 613, 643 (Fla. 2010); Donaldson v. State, 722 So.2d 177 (Fla. 1998); Hunter v. State, 660 So.2d 244 (Fla. 1995).

Appendix A at page 59, 220 So.3d at 1183 (emphasis added).

The court did hold that the trial court erred in finding the CCP and avoid arrest aggravating circumstances but relied on the trial court's declaration that any

error of evaluating aggravating circumstances would be harmless as long as one aggravating circumstance remained.

Middleton filed a motion for rehearing on a number of issues, including the Sixth and Eighth Amendment issues, and to the harmless error analysis by the court. The court denied the motion for rehearing.

After the decision of Hurst v. Florida, 136 S.Ct. 616 (2016) the Florida supreme court withdrew its order denying the motion for rehearing and entered a revised decision on March 9, 2017. The court's revised decision remained the same with two exceptions: (1) that the court recognized the Sixth Amendment violation that the jury did not make the required findings and (2) a concurring opinion was omitted. The court held the Sixth Amendment error to be harmless because the jury was unanimous in not making the findings.

Petitioner filed a timely motion for rehearing as to the harmless error analysis and as to the court not addressing the Eighth Amendment violation by jury instructions which diminished juror's ultimate responsibility in the determination of death.

The Florida Supreme Court denied the motion for rehearing with a dissenting opinion on June 1, 2017. On June 1, 2017 the court also reissued its prior decision to include the previous excluded concurring opinion.

REASONS FOR GRANTING THE WRIT

POINT ONE

AN AUTOMATIC OR PER SE HARMLESS TEST BASED ON A JURY'S ADVISORY RECOMMENDATION VIOLATES THE SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS AND THE JURY'S ADVISORY RECOMMENDATION IS NOT A VERDICT UPON WHICH TO CONDUCT A VALID HARMLESS ERROR ANALYSIS.

After this Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016) the Florida Supreme Court found there was Sixth Amendment error because the jury failed to make the findings required for a death sentence:

> On remand from the United States Supreme Court, we determined that "before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." Hurst v. State, 202 So.3d 40, 53 (Fla. 2016).

Appendix A at 62-63, 220 So.3d at 1184.

However, the Florida Supreme Court held the Sixth Amendment error to be harmless where the jury's advisory recommendation is unanimous:

> We emphasize the unanimous jury recommendation of

> death in this case. This unanimous recommendation allows us to determine that, beyond a reasonable doubt, a rational jury would have unanimously found that sufficient aggravating factors outweighed the mitigation.

Appendix A at 64, 220 So.3d at 1184-85.

The Florida Supreme Court's use of a unanimity test to determine harmless error is improper for several reasons.

First, the Florida Supreme Court's harmless error test ignores the nature of advisory recommendations. Second, the Florida Supreme Court has effectively adopted an automatic or per se harmless error rule, a rule which violates the Eighth Amendment's requirement for individual treatment and assessment in death cases. Finally, the Florida Supreme Court's analysis ignores that there is no valid verdict upon which harmless error analysis can be applied.

First, as this Court explained in Hurst an advisory recommendation is merely advisory and not a substitute for the necessary fact finding:

> The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. §775.082(1) (emphasis added). The trial court *alone* must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." §921.141(3); see *Steele*, 921 So. 2d, at 546. **"[T]he jury's function under the Florida death penalty statute is advisory only."***Spaziano* v. *State*, 433 So. 2d 508, 512 (Fla. 1983).

> **The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.**

136 S.Ct. at 622 (emphasis added).

Likewise, an advisory recommendation hardly reflects fact finding so as **automatically** conclude that the failure to make the required fact finding is harmless. Where a jury is informed that its recommendation is merely advisory and not binding there is a danger of diminished responsibility by the jury. There is a danger jurors will make symbolic gestures (sending a message against killing) rather than diligently weighing in on the circumstances of the case and the defendant's background – after all, the actual sentencer would have that responsibility. Using a jury's advisory recommendation as a determinative litmus test for harmless error is improper.

Even where the error of diminishing responsibility was by argument, rather than by instruction, in Caldwell v. Mississippi, 472 U.S. 320 (I985), the error was not harmless even where the jury's verdict for death was 12-0.

Second, use of an automatic or per se harmless error test in a capital case violates the Eighth Amendment's requirement for individual treatment in death penalty cases. The Florida Supreme Court through its reasoning in this case, and rulings in other cases, has made it clear that it has adopted a "per se" harmless error test in capital cases. In other words, the Florida Supreme Court has ruled that,

whenever the jury unanimously recommended death, any Hurst error is harmless as a matter of law regardless of the other facts in this case. As the Florida Supreme Court stated in this case:

> Unanimous recommendation allows us to determine that, beyond a reasonable doubt, a rational jury would have unanimously found that sufficient aggravating factors outweighed the mitigation.

Appendix A at 63, 220 So.3d at 1184-1185.

Furthermore, the Florida Supreme Court has uniformly applied the unanimity test in deciding whether *Hurst* error is harmless. In every single case where there is a unanimous jury recommendation the error has been found harmless for that reason. Guardado v. Jones, 2017 WL 201954984 (Fla. May 11, 2017); Cozzie v. State, 2017 WL 1954976 (Fla. May 11, 2017); Morris v. State, 2017 WL 1506853 (Fla. April 27, 2017); Tundidor v. State, 2017 WL 1506854 (Fla. April 27, 2017); Oliver v. State, 214 So. 3rd 606 (Fla. April 6, 2017); Jones v. State, 212 So.3rd 321 (Fla. March 2, 2017); Hall v. State, 212 So.2d 1001 (Fla. February 9, 2017); Kaczmar v. State, 2017 WL 410214 (Fla. January 31, 2017); Knight v. State, 2017 WL 411329 (Fla. January 31, 2017); King v. State, 211 So 3rd 866 (Fla. January 26, 2017); Davis v. State, 207 So.3rd 142 (Fla. November I 0, 2016).

Also, in every case where there is a non-unanimous jury recommendation the error has always not been deemed harmless and the court has reversed for a new

penalty phase. See e.g Glover v. State, 2017 WL 4053879 (Fla. Sept. 14, 2017) ("we have consistently held that Hurst error is not harmless in cases where the jury makes a non-unanimous recommendation of death").

This use of an automatic or per se harmless error test in a death penalty case violates the Eighth Amendment. This is because the Eighth Amendment requires individual treatment necessary for a reliable sentencing. See Clemmons v. Mississippi, 499 U.S. 738 (1990) (after jury partially relied on invalid aggravating circumstance it would violate Eighth Amendment to automatically find the error harmless based on the existence of a remaining aggravating circumstance and not giving the defendant the individual and reliable sentencing treatment based on the total circumstances including the background of the defendant); Caldwell, 472 U.S. at 323 (noting the "Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment **in a specific case**'" (emphasis added) (quoting Woodson v. Norht Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); Parker v. Dugger, 498 U.S. 308 (1991) (Eighth Amendment violated where the Florida supreme court, after striking two aggravators, affirmed arbitrarily based on trial court finding which may or may not have been made –the court relied on "nonexistent findings" –"it did not come to its own independent factual conclusion, and it did not rely on what the trial judge actually found" to hold the error was harmless – "This affirmance was invalid because it deprived

Parker of the individualized treatment to which he is entitled under the Constitution").

Likewise, here the harmless error was based on non-existent findings and use of the automatic formula – no reversal whenever there is a unanimous recommendation for death -- to find harmless error deprived Middleton of the individualized treatment to which he was entitled under the Constitution.

The problems with the Florida Supreme Court's automatic or per se harmless error test are evident in this case. As explained below in Point III, the jury was not adequately instructed on the CCP aggravator – because they were never instructed that that the defendant planned or prearranged to commit murder **before the crime began**. The Florida Supreme Court expressly held that the CCP aggravator could not validly be applied because Middleton's intent to kill came **after the crime began**. Appendix A at 32-33. 220 So.3d at 1171. Perhaps if the jury had been properly instructed on this aggravator, their advisory recommendation would have been different. But Florida's per se harmless error test unconstitutionally obviates any need for this sort of individualized inquiry based on the facts of this particular case. As the facts of this case show, the jury's advisory recommendation is not a valid measure for determining whether the error of not making the required findings was harmless.

The Florida supreme court's creation of an automatic or per se test may have been a method of avoiding trying to act as a mind reader as to what a jury would have thought. But if so, then the Florida Supreme Court's reasoning conflicts with Hurst. Uunder *Hurst* a trial judge's (who was present at the trial and penalty phase to consider credibility of witnesses) findings cannot substitute for jury findings. How can an appellate court, even more removed than the trial judge, substitute its findings for the jury's (lack of) findings?

Third, the Florida Supreme Court's application of harmless error in this case was invalid because there was no valid jury verdict upon which such an analysis could be based. As this Court explained in the context of a defective reasonable doubt instruction in Sullivan v. Louisiana, 508 U.S. 276 (1993):

> Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. ... The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt...[t]hat is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action...it requires an actual jury finding of guilty.

Sullivan v. Louisiana, 508 U.S. at 279-80 (cites and punctuation omitted; emphasis in original.)

In a nutshell, 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.

Because there should not be an automatic test in order to determine harmless error and because there was no valid jury verdict upon which a harmless error analysis could be based, this Court should accept this case for review, and reverse the Florida Supreme Court's decision affirming Petitioner's death sentence.

POINT TWO

THE DEATH-SENTENCING PROCEDURES USED IN THIS CASE FAILED TO COMPLY WITH THE EIGHTH AND FOURTEENTH AMENDMENTS WHERE THE JURY WAS ADVISED REPEATEDLY BY THE COURT THAT ITS RECOMMENDATION WOULD BE NON-BINDING.

The trial judge was indisputably the finder of fact in Florida's pre-*Hurst* sentencing scheme. See Section 921.141(2) and (3), Florida Statutes. As part of that scheme, it was made abundantly clear to the jury its role was limited to making an advisory recommendation of death or life in prison. Not only did this scheme violate the Sixth Amendment (as recognized in Hurst) but it also violated the Eighth Amendment as explained in Caldwell v. Mississippi, 472 U.S. 320 (1985).

In this case, the trial judge specifically told the jury that punishment was the court's responsibility and the jury's recommendation was advisory and was not binding Appendix C at pages 2-3. The instruction to the jury also emphasized the

term recommendation 23 times and the term advisory/advice 15 times. Appendix C. The trial court closed its instruction to the jury by telling it to now retire to consider its recommendation Appendix C. The emphasis of the advisory nature of the recommendation was repeated in giving the same instructions to the jury in writing. The instructions impermissibly diminished the jurors' sense of responsibility.

In Caldwell v. Mississippi, 472 U.S. 320 (1985), this Court discussed the problems with informing the jury of the limits of their role in the death penalty context. In that case, the jury heard through argument by counsel for the State that its capital sentencing decision would be reviewed by the state's supreme court. The jury's verdict for death was 12-0.

This Court reversed the death sentence explaining -- "[i]n the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences where there are state-induced suggestions that the sentencing jury may shift its responsibility to an appellate court." Caldwell, 472 U.S. at 330.

Indeed, because the jury's sense of responsibility was improperly diminished in Caldwell, this Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. Caldwell, 472 U.S. at 341 ("Because we cannot say that this

effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires").This Court vacated Caldwell's sentence, firmly holding "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29. Three dissenting Justices agreed in principle, taking exception only to the majority's characterization of the prosecutor's argument. Id. at 343-50 (Rehnquist, J., dissenting).

Here, as in Caldwell, the jury was repeatedly told "that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id.at 328-29. Specifically, the jury was repeatedly told that it was the court that would ultimately determine the propriety of the death sentence and that the jury's role was merely advisory. Under Caldwell's reasoning, Middleton's death sentence violates the Eighth Amendment.

The fact that the jury heard about its diminished role from a court, rather than counsel, weighs even more heavily in favor of a new sentencing proceeding. The argument of counsel is "likely viewed as the statements of advocates," as distinct from jury instructions, which are "viewed as definitive and binding statements of the law." Boyde v. California, 494 U.S. 370, 384 (1990). "The influence of the trial judge on the jury is necessarily and properly of great weight,

and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." Boilenbach v. United States, 326 U.S. 607, 612 (1946).

Unanimity does not cure an instruction which diminishes jury responsibility. In Caldwell the diminishment of the jury's responsibility was not made harmless by the jury's 12-0 vote for death. In other words, unless the jury is fully and adequately instructed as to its responsibility, the jury's unanimity will not decide the validity of the death sentence.

Any reviewing court can do no more than speculate that all the jurors would have voted in the State's favor, as to all necessary factors and as to the final recommendation, had it been conveyed to them that those decisions were theirs and theirs alone. Caldwell's holding is that the verdict in that case "does not meet the standard of reliability that the Eighth Amendment requires." 472 U.S. at 341.

The instructions minimized the jury's role and relieved them of the weight that sentencing another human being to death would place on one's conscience. See Caldwell, 472 U.S. at 333 ("the uncorrected suggestion that the responsibility for any ultimate determination of death will rest on others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role").

The jury may have decided to "'send a message' of extreme disapproval for the defendant's acts" even if it was unconvinced that death was the appropriate

punishment, with the belief that if they were wrong and advised death when the sentence should be life, the judge would correct their mistake and spare his life. See Caldwell, 472 U.S. at 331.

Here the reviewing court held that the jury's recommendation obviated the need for any of the Hurst findings to be made. For this to be true, the recommendation must indeed bear significant indicia of reliability, which are not present on this record. Caldwell, read with Hurst, warrants further briefing of this matter in this Court.

POINT THREE

THE STATE COURT VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY GIVING THE JURY AN INSTRUCTION THAT RELIEVED THE PROSECUTION OF ITS BURDEN OF PROVING THAT PETITIONER HAD A CAREFUL PLAN OR PREARRANGED DESIGN TO COMMIT MURDER BEFORE THE CRIME BEGAN IN ORDER FOR THE JURY TO APPLY THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WHEN RENDERING AN ADVISORY SENTENCE OF DEATH.

The Florida Supreme Court rejected Middleton's argument that the instruction on the aggravating circumstance "cold, calculated, and premeditated"

(CCP) was unconstitutional. It did so on the ground that the Court had "on numerous occasions upheld the constitutionality of this aggravating factor and the standard jury instruction against similar claims." Appendix A at page 60, 220 So.3d at 1183. The Florida Supreme Court's ruling was in error because Florida's standard jury instruction relieves the prosecution from the burden of proving the CCP aggravator beyond a reasonable doubt.

In a criminal case, the court may not give jury instructions that relieve the prosecution of its burden of proving the elements of the offense:

> The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. Jury instructions relieving States of this burden violate a defendant's due process rights. Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases.

Carella v. California, 491 U.S. 263, 265 (1989) (citations omitted).

Florida's jury instruction on the CCP aggravator violates this due process principle. In a Florida capital case, the jury must decide whether there are "sufficient aggravating circumstances" to support a death sentence and then must decide whether the mitigating circumstances outweigh those aggravating circumstances. §921.141(2)(a), Fla.Stat. (2009). Section 921.141(5) lists the available aggravating circumstances, including the "cold, calculated, and premeditated" (CCP) circumstance:

> (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

It is clearly settled law in Florida that, for this aggravator to apply, the evidence must prove beyond a reasonable doubt that the defendant planned or prearranged to commit murder *before* the crime began. Thompson v. State, 565 So.2d 1311, 1318 (Fla. 1990) (emphasis added). As the Florida Supreme Court ruled in this case, the CCP aggravator cannot apply when the defendant's intent to kill arises after the crime begins. Appendix A at 32-33, 220 So.3d at 1171; see also Rogers v. State, 511 So.2d 526, 533 (Fla. 1987); Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988); McKinney v. State, 579 So.2d 80, 85 (Fla.1991) ("the evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit murder before the crime began"); Power v. State, 605 So. 2d 856, 864 (Fla. 1992) (Power raped schoolgirl, then stabbed her and let her bleed to death over 10 to 20 minutes -- CCP struck because state showed "a plan to rape" but did not show prior intent to kill); Wyatt v. State, 641 So. 2d 1336, 1340-41 (Fla. 1994) (escaped convicts entered and robbed pizzeria then methodically killed three employees during 20 minute ordeal; CCP struck under Rogers); Thompson v. State, 619 So. 2d 261, 266 (Fla. 1993) (defendant methodically tortured woman to death; CCP struck because state did not show that he "planned or prearranged to commit the murder prior to the commencement of the conduct that led to the death

of the victim").

The standard CCP jury instruction, which was given in this case, relieves the State of the duty to show the intent to kill arose before the crime began. The jury was instructed in this case as follows:

> Number five, the capital felony was a homicide and was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. "Cold" means the murder was the product of calm and cool reflection. "***Calculated" means having a careful plan or prearranged design to commit murder***. A killing is premeditated if it occurs after the Defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix an exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the Defendant. The premeditated intent to kill must be formed before the killing. However, in order for this aggravating circumstance to apply, a heightened level of premeditation demonstrated by a substantial period of reflection is required. A pretense of moral or legal justification is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated or premeditated nature of the murder.

Appendix D (emphasis added). Because this instruction did not tell the jury that it had to find a careful plan or prearranged design to commit murder "before the crime began," a fact which the jury was required to find under Florida case law, it relieved the State from the burden of proving its sentencing case beyond a reasonable doubt, and thus violated due process.

The fact that this instruction involves an aggravating circumstance in a capital sentencing proceeding, rather than an element of a non-capital crime, makes

no defense. This Court has held that sentencing decisions in capital cases must comply with due process. See Witherspoon v. Illinois, 391 U.S. 510 (1968) (Sixth and Fourteenth Amendments violated by imposition of death sentence by jury from which veniremen were excluded because of general objections to death penalty without more); Simmons v. South Carolina, 512 U.S. 154 (1994) (where state raised issue of defendant's future dangerousness at capital sentencing, Due Process Clause required that defendant be allowed to inform jury that he would have no possibility of parole); Maynard v. Cartwright, 486 U.S. 356 (1988) (Eighth Amendment violated by jury instruction that did not give sufficient guidance in application of heinousness aggravating circumstance); Espinosa v. Florida, 505 U.S. 1079 (1992) (since Florida has split sentencing process between jury and judge, Maynard applies to Florida capital jury instructions). Furthermore, this Court has held that the existence of aggravating circumstances is an element that must be submitted to the jury and found beyond a reasonable doubt. Hurst v. Florida, 136 S.Ct. 616, 621-22 (2016); Ring v. Arizona, 536 U.S. 584, 609 (2002). The failure to properly instruction the jury that they needed to find beyond a reasonable doubt that Middleton formed an intent to kill prior to committing the crime violated due process by eliminating one of the elements the State needed to prove in order to obtain a death penalty.

Although the failure to properly instruct the jury on the CCP error is an

independent constitutional violation, this error further explains why the Hurst error discussed in Part I is not harmless. When unanimously recommending death, the jury may have relied on the CCP aggravating circumstance. As the Florida Supreme Court held in this case, the jury could not validly have relied on such a circumstance. We do not know if the jury would have recommended death absent the CCP aggravating circumstance, and thus the errors in this case were not harmless.

POINT FOUR

THE APPELLATE COURT HELD IT WAS ERROR FOR THE SENTENCER TO FIND ONE OR MORE OF THE AGGRAVATING CIRCUMSTANCES -- THE EIGHTH AND FOURTEENTH AMENDMENTS WAS VIOLATED BY AUTOMATICALLY HOLDING THE ERROR HARMLESS BECAUSE THE SENTENCER INDICATED THAT IT WOULD STILL IMPOSE THE DEATH PENALTY IF VALID AGGRAVATING CIRCUMSTANCES REMAINED.

The trial court entered an order finding four aggravating circumstances – CCP (killing was cold calculated and premeditated), killing was to avoid arrest, felony murder, and HAC (the killing was heinous atrocious and cruel).

The trial court also indicated any error of evaluating aggravating circumstances would be harmless as long as one aggravating circumstance remained.

The Florida Supreme Court held that it was error to find the CCP and avoid arrest aggravating circumstances. The court, however, ruled the error was harmless because of the trial court's declaration that any error of evaluating aggravating circumstances would be harmless as long as at least one aggravating circumstance remained.

The harmless error test used by the Florida Supreme Court constitutes an automatic test (harmless if trial court indicates would impose death if there is at least one aggravating circumstance) and deprived Middleton of the individualized treatment to which he was entitled under the Constitution as more thoroughly discussed in Point I.

The use of an automatic or per se harmless error test in a death penalty case has been recognized as a violation of the Eighth Amendment which requires individual treatment necessary for a reliable sentencing.

In Clemmons v. Mississippi, 494 U.S. 738 (1990) after the jury partially relied on an invalid aggravating circumstance, this Court found it would violate the Eighth Amendment to automatically find the error harmless based on the existence of a remaining aggravating circumstance and in failing to give the defendant the individual and reliable sentencing treatment based on the total circumstances including his background.

Likewise in this case it violates the Eighth Amendment to automatically find the error harmless based on the trial court's declaration that the existence of a remaining aggravating circumstance makes the error harmless. Such a test fails to give the defendant the individual and reliable sentencing treatment based on the total circumstances including his background. See also Parker v. Dugger, 498 U.S. 308 (1991) (Eighth Amendment violated where the Florida supreme court, after striking two aggravators, affirmed arbitrarily based on trial court finding and where reviewing court "did not come to its own independent factual conclusion, and it did not rely on what the trial judge actually found" to hold the error was harmless – "This affirmance was invalid because it deprived Parker of the individualized treatment to which he is entitled under the Constitution").

Likewise, here the harmless error was based on non-existent findings and use of the automatic formula to find harmless error deprived Middleton of the individualized treatment to which he was entitled under the Constitution.

In addition, the trial court's declaration as to harmless error due to one remaining aggravator is merely boilerplate language to avoid reversal rather than a studied harmless error analysis required for a harmless error analysis in a death penalty case. For example, no death penalty has been upheld in Florida based on the sole existence of the felony murder aggravating circumstance. See e.g. Sinclair v. State, 657 So.2d 1138, 1142-43 (Fla. 1995) (death sentence disproportionate

based on felony-murder aggravating factor when the mitigation found was that defendant cooperated with law enforcement, had a dull normal intelligence, and was raised without a father figure); McKinney v. State, 579 So.2d 80, 85 (Fla. 1991) (finding the death sentence disproportionate when only felony-murder aggravator was present and mitigation existed).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to order full briefing on the questions raised herein.

Respectfully Submitted,

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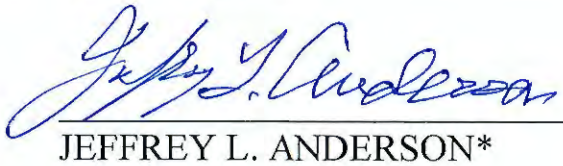
Public Defender



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