

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-263

RODNEY TYRONE LOWE

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

.....

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL
CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA,
(CRIMINAL DIVISION)

.....

SECOND SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
Attorney General
Tallahassee, FL

Leslie T. Campbell
Assistant Attorney General
Florida Bar No.: 0066631
1515 N. Flagler Dr.; Ste. 900
West Palm Beach, FL 33401
Telephone (561) 837-5000
Facsimile (561) 837-5108
E-mail:

Leslie.Campbell@MyFloridaLegal.com

Secondary E-mail:

CapApp@MyFloridaLegal.com

Counsel for Appellee

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF CITATIONS..... ii

PRELIMINARY STATEMENT..... 1

STATEMENT OF THE CASE AND FACTS..... 1

SUMMARY OF THE ARGUMENT..... 3

ARGUMENT.....4

SECOND SUPPLEMENTAL ISSUE 1

HURST V. FLORIDA DOES NOT ENTITLE LOWE TO RESENTENCING OR A
LIFE SENTENCE (restated).....4

A. STANDARD OF REVIEW.....5

B. PRESERVATION.....5

C. ANALYSIS.....5

1. LOWE’S SENTENCING IS HARMLESS BEYOND A REASONABLE DOUBT.5

2. CALDWELL V. MISSISSIPPI.....8

3.THE RECORD SUPPORTS A FINDING OF HARMLESS ERROR;
A REMAND FOR FURTHER EVIDENTIRY DEVELOPMENT IS
INAPPROPRIATE.....12

4. SECTION 775.082(2), FLORIDA STATUTES DOES NOT MANDATE
LOWE RECEIVE A SENTENCE OF LIFE WITHOUT THE POSSIBILITY
OF PAROLE FOR 25 YEARS.....11

SECOND SUPPLEMENTAL ISSUE 2

LOWE’S DEATH SENTENCE IS PROPORTIONAL (restated).....4

A. STANDARD OF REVIEW.....5

B. PRESERVATION.....5

CONCLUSION.....15

CERTIFICATE OF SERVICE.....15
CERTIFICATE OF FONT.....15

TABLE OF AUTHORITIES

Cases

Alleyne v. United States, 133 S.Ct. 2151 (2013)..... 6, 12

Almendarez-Torres v. United States, 523 U.S. 224 (1998)..... 4, 6

Anderson v. State, 267 So.2d 8 (Fla. 1972)..... 14

Apprendi v. New Jersey, 530 U.S. 466 (2000)..... 6

Ault v. State, 53 So.3d 175 (Fla. 2010)..... 10

Beasley v. State, 18 So. 3d 473 (Fla. 2009)..... 5

Bevel v. State, 983 So.2d 505 (Fla. 2008)..... 11

Bryant v. State, 785 So.2d 422 (Fla. 20)..... 15

Coker v. Georgia, 433 U.S. 584 (1977)..... 13

Donaldson v. Sack, 265 So.2d 499 (Fla. 1972)..... 11, 13, 14

Duest v. Dugger, 555 So.2d 849 (Fla. 1990)..... 2, 5

Fletcher v. State, 168 So.3d 186 (Fla. 2015)..... 7, 15

Furman v. Georgia, 408 U.S. 238 (1972)..... 12, 13, 14

Galindez v. State, 955 So. 2d 517 (Fla. 2007)..... 8

Greer v. Miller, 483 U.S. 756 (1987)..... 9

Hildwin v. Florida, 490 U.S. 638 (1989)..... 14

Hodges v. State, 55 So.3d 515 (Fla. 2010)..... 7

Hurst v. Florida, 136 S.Ct. 616 (2016)..... 4, 8, 10, 11

Johnson v. State, 994 So.2d 960 (Fla. 2008)..... 8

Kansas v. Carr, 2016 WL 228342 (Jan. 20, 2016)..... 12, 15

Kephart v. Hadi, 932 So.2d 1086 (Fla. 2006)..... 5

Larkin v. State, 147 So.3d 452 (Fla. 2014)..... 11

<i>Lowe v. State</i> , 2 So.3d 21 (Fla. 2008).....	1
<i>Lowe v. State</i> , 650 So.2d 969 (Fla. 1994).....	1,15
<i>Lowenfield v. Phelps</i> , 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988)	10
<i>Melton v. State</i> , 638 So.2d 927 (Fla. 1994)	15
<i>Neder v. United States</i> , 527 U.S. 1 (1999).....	7, 8
<i>Pena v. State</i> , 901 So. 2d 781 (Fla. 2005).....	5, 8
<i>Pope v. State</i> , 679 So.2d 710 (Fla. 1996)	15
<i>Proffitt v. Florida</i> , 428 U.S. 242 (1976).....	14
<i>Ringv. Arizona</i> , 536 U.S. 584 (2002).....	passsim
<i>Smith v. State</i> , 170 So.3d 745 (Fla. 2015).....	15
<i>Spaziano v. Florida</i> , 468 U.S. 447 (1984).....	14
<i>Spencer v. State</i> , 615 So.2d 688 (Fla. 1993).....	3
<i>State v. Dixon</i> , 283 So.2d 1 (Fla. 1973).....	10
<i>State v. Steele</i> , 921 So.2d 538 (Fla. 2005).....	5, 10
<i>Stephens v. State</i> , 975 So.2d 405 (Fla. 2007).....	9
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993).....	8
<i>Teague v. Lane</i> , 489 U.S. 288 (1989).....	14
<i>Tuilaepa v. California</i> , 512 U.S. 967 (1994).....	10
<i>United States v. O'Brien</i> , 560 U.S. 218 (2010).....	12
<i>United States v. Olano</i> , 507 U.S. 725 (1993).....	9
<i>Washington v. Recuenco</i> , 548 U.S. 212 (2006).....	8
<i>Williams v. New York</i> , 337 U.S. 241.....	12
<i>Witt v. State</i> , 387 So. 2d 922 (1980).....	14

Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235
(1983) 10

Zommer v. State, 31 So.3d 733 (Fla. 2010)..... 10

Statutes

Section 775.082(2), Florida Statutes..... passim

Rules

Fla. R. App. P. 9.210(a)(2)..... 16

PRELIMINARY STATEMENT

Appellant, Rodney Tyrone Lowe, Defendant below, will be referred to as "Lowe" and Appellee, State of Florida, will be referred to as "State". Lowe's Initial Second Supplemental Brief will be identified as ("SS-IB"). Reference to the records are:

"1ROA" - Original Direct Appeal case SC60-77972 *Lowe v. State*, 650 So.2d 969 (Fla. 1994), *certiorari was denied*, *Lowe v. Florida*, 516 U.S. 887 (1995);

"1PCR" - Postconviction record case number SC05-2333 See *Lowe v. State*, 2 So.3d 21, 46 (Fla. 2008) ("*Lowe II*") (remanding for a new sentencing);

"R-RS" for instant record and "T-RS" instant transcripts for Direct Appeal from resentencing.

STATEMENT OF THE CASE AND FACTS

The State relies on the procedural history set out in its Answer Brief and reiterates the facts included with its Supplemental Answer Brief. Before commencement of the new penalty phase, Lowe filed a Motion to Bar Imposition of Death Penalty on Grounds that Florida's Capital Sentencing Procedure is Unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). (R-RS.2 176-83, 296-312). He challenged the constitutionality of several aggravators: (1) under sentence of imprisonment; (2) prior violent felony; (3) in the course of a felony; and (4) pecuniary gain. (R-RS.2 228-43). During the September 22, 2011 charge conference, Lowe agreed there was evidence supporting the

five aggravators sought. (T-RS.20 2419-20)¹

In closing Lowe agreed four aggravators were uncontested: (1) prior violent felony; (2) on community control from the prior violent felonies; (3) murder during the course of a felony (robbery); and (4) pecuniary gain (to be merged with robbery. (T-RS.21 2522-24). Judge Pegg instructed the jury on the respective burdens of proof for aggravation and mitigation and that at least one aggravator had to be proven before considering death as a possible penalty. (T-RS.21 2538-39, 2542-44). Continuing, the trial court instructed:

If after weighing the aggravating and mitigating circumstances you determine that at least one aggravating circumstance is found to exist, and the mitigating circumstances do not outweigh the aggravating circumstances, or the absence of mitigating factors but 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 for twenty-five years. (T-RS.21 2544-45)

The jury unanimously recommended death. (R-RS.3 426; T-RS.21 2557-58).

On the day of the *Spencer v. State*, 615 So.2d 688 (Fla. 1993) hearing, Lowe filed a list of proposed mitigation, but

¹ Lowe raised two objections to the aggravators, one applicable here, namely, that the prior violent felony and on community control aggravators constituted improper doubling (T-RS.20 2420-21, 2427-28) In Issue 2 on direct appeal, Lowe notes "improper doubling" in the heading (IB 47), but made no argument on this point, rendering the issues waived. *Duest v. Dugger*, 555 So.2d 849, 852 (Fla. 1990)

opted not to present evidence. (R-RS.3 435-38; T-RS.22 2566; S-RS.2 172). In Lowe's sentencing memorandum (R-RS.3 447-62), he conceded proof of: (1) prior violent felony; (2) during the course of a felony, and (3) on community control aggravators, but contested the weight to be assigned. (R-RS.3 453-54). Lowe was sentenced to death² (R-RS.3 507-28; T-RS.22 2575-77) and on September 1, 2015, oral argument was held.

Although Lowe was permitted to file a supplemental following *Hurst v. Florida*, 136 S.Ct. 616 (2016), he has been given another opportunity to file a supplemental brief following *Hurst v. State*, --- So.3d ---, 2016 WL 6036978 (Fla. Oct. 14, 2016). The State's second supplemental answer follows.

SUMMARY OF THE ARGUMENT

Supplemental Issue 1 - Under *Davis v. State*, --- So.3d ---, 2016 WL 6649941 (Fla. Nov. 10, 2016), the State has carried its burden of proving that any *Hurst v. Florida* error is harmless beyond a reasonable doubt.

² The court found aggravators: (1) under sentence of imprisonment (community control); (2) prior violent felony; (3A) during course of felony merged with (3B) pecuniary gain; and (4) avoid arrest; the statutory age mitigator; and non-statutory mitigators: (1) good behavior while in confinement; (2) family relationships; (3) creative ability; (4) maturity; (5) religious faith; (6) work ethic; (7) extra-curricular sporting activities; (8) Lowe is emotionally supportive of his sister; (9) low risk of future danger; and (10) good courtroom behavior.

ARGUMENT

SUPPLEMENTAL ISSUE 1

***HURST V. FLORIDA DOES NOT ENTITLE LOWE TO RESENTENCING
OR A LIFE SENTENCE (restated)***

Lowe asserts *Hurst v. Florida* and *Hurst v. State* require he be granted a life sentence. He argues that this Court's harmless error analysis in *Davis* should be reconsidered (SS-IB 9-10), that the jury's lack of identified unanimous findings of aggravation is fatal to a harmless error review (SS-IB 10-12), and that harmless error should not be found here on proportionality grounds, (SS-IB 17-18) He also points to *Caldwell v. Mississippi*, 472 U.S. 320 (1985) to suggest that the jury's recommendation may have been different had they been required to make findings of fact supporting the ultimate sentencing recommendation. Lowe suggests that had the jury made factual findings, the judge could have used those findings to impose a life sentence, instead of agreeing with the State's position as set forth in its memorandum. (SS-IB 15). As a final sub-issue, Lowe suggests that an evidentiary hearing is necessary to determine how defense counsel may have approached the jury selection and attempted to diminish the aggravation the State offered. The State disagrees. Harmless error beyond a reasonable doubt has been shown on this record. Further evidentiary development is unnecessary and improper.

A. STANDARD OF REVIEW - Statutory interpretation is a purely legal matter subject to *de novo* review. *Kephart v. Hadi*, 932 So.2d 1086, 1089 (Fla. 2006).

B. PRESERVATION - The State reasserts its preservation argument raised in its supplemental brief.

C. ANALYSIS - Lowe received a unanimous jury recommendation of death where four aggravators, merged to three, rested on prior felonies and a recidivist aggravator none of which were called into question by *Hurst v. Florida* or *Hurst v. State*.³ In fact, Lowe agreed to the existence of these aggravators. The jury was given the standard jury instructions and such support a finding that the lack of now required factual findings are harmless beyond a reasonable doubt under *Davis*. This Court should affirm Lowe's death sentence.

1. DAVIS SUPPORTS THAT LOWE'S SENTENCING IS HARMLESS BEYOND A REASONABLE DOUBT.

³ Neither *Hurst v. Florida* or *Hurst v. State* has not disturbed the "prior conviction" exception to the Sixth Amendment findings required by *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Ring* recognizes the distinction of an enhanced sentence supported by a prior conviction. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (permitting judge impose higher sentence based on prior conviction); *Ring*, 536 U.S. at 598 n.4 (*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 v. United States*, 133 S.Ct. 2151, 2160 n.1 (2013) (affirming *Almendarez-Torres* provides valid exception for prior conviction). Lowe has prior violent felony convictions, was on community control when he committed the murder, and had the contemporaneous robbery conviction.

Lowe's prior and contemporaneous convictions rested upon a plea/unanimous jury verdict and his jury was able to reach the conclusion death was the appropriate sentence unanimously. By voting 12-0 for death, the jury necessarily found, consistent with their instructions (T-RS.21 2542, 2544-45), sufficient aggravation existed to justify recommending death, that the aggravation outweighed mitigation, and that death was the proper sentence. In *Davis*, a post-*Hurst v. State* case, this Court reiterated the application of the rigorous harmless error test of *State v. DiGuilio*, 491 So.2d 1129, 1137 (Fla. 1986) applicable to review of sentencing errors and reasoned:

. . . As applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances.

With regard to *Davis*'s sentences, we **emphasize the unanimous jury recommendations** of death. These recommendations allow us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors. The **instructions that were given** informed the jury that it needed to determine whether sufficient aggravators existed and whether the aggravation outweighed the mitigation before it could recommend a sentence of death. See Fla. Std. Jury Instr. (Crim.) 7.11 ("If ... you determine that no aggravating circumstances are found to exist, or that the mitigating circumstances outweigh the aggravating circumstances, or,

in the absence of mitigating factors, that the aggravating factors alone are not sufficient, you must recommend imposition of a sentence of life in prison without the possibility of parole rather than a sentence of death."). The jury was presented with evidence of mitigating circumstances and was properly informed that it may consider mitigating circumstances that are proven by the greater weight of the evidence. See *id.* ("If you determine by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence to be imposed.").

Even though the jury was not informed that the finding that sufficient aggravating circumstances outweighed the mitigating circumstances must be unanimous, and even though it was instructed that it was not required to recommend death even if the aggravators outweighed the mitigators, the jury did, in fact, unanimously recommend death. See *id.* ("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."). ***From these instructions, we can conclude that the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendations.*** Further supporting our conclusion that any *Hurst v. Florida* error here was harmless are the egregious facts of

this case-*Davis* set two women on fire, one of whom was pregnant, during an armed robbery, and shot in the face a Good Samaritan who was responding to the scene. The evidence in support of the six aggravating circumstances found as to both victims was significant and essentially uncontroverted.

We conclude that the State can sustain its burden of demonstrating that any *Hurst v. Florida* error was harmless beyond a reasonable doubt. Here, the jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. In fact, although the jury was informed that it was not required to recommend death unanimously, and despite the mitigation presented, the jury still unanimously recommended that *Davis* be sentenced to death for the murders of *Bustamante* and *Luciano*. The unanimous recommendations here are precisely what we determined in *Hurst* to be constitutionally necessary to impose a sentence of death. Accordingly, *Davis* is not entitled to a new penalty phase.

Davis, 2016 WL 6649941, at *28-30 (footnotes omitted, emphasis supplied).

Lowe's jury was instructed consistent with the instructions given in *Davis*. The jury was instructed its recommendation must be given great weight, it had to determine that at least one aggravator was proven beyond a reasonable doubt to even consider death as a possible penalty, to determine whether sufficient aggravators exist to justify the death penalty, whether the mitigation outweighs the aggravation if aggravation found (TR-S.21 2533-34). The jury also was instructed a mitigator:

need only be proved by a greater weight of the evidence, which means evidence that more likely than not tends to prove the existence of the mitigating circumstance.

If you term (sic) that by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence to be imposed.

(TR-S.21 2543)

The jury was instructed further that:

If after weighing the aggravating and mitigating circumstances you determine that at least one aggravating circumstance is found to exist, and the mitigating circumstances do not outweigh the aggravating circumstances, or the absence of mitigating factor^{2544-45s} but the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life³ in prison without the possibility of parole for twenty-five years.

Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death.

If on the other hand . . . you determine that no aggravating circumstances are found to exist, or that the mitigating circumstances outweigh the aggravating circumstances, or in the absence of mitigating factors but the aggravating factors alone are not sufficient, you must recommend the imposition of life imprisonment without the possibility of parole for twenty-five years, rather than a sentence of death.

(TR-S.21 2533-34, 2538-39)

Lowe points to this Court's comment that the "egregious" facts in *Davis* are further support of a harmless error finding as a way to distinguish the cases. However, this Court's ultimate holding was based on the instructions given and the unanimous recommendation rendered. *Davis*, at 30. As such, Lowe's case is on all-fours with *Davis*. Here, Lowe not only had a prior violent felony aggravator based on the 1987 felonies, he was on community control for that case, when he committed the robbery during this murder. Equally important, Lowe agreed that the prior violent felony, under sentence of imprisonment (on parole), and the during the course of a felony/pecuniary gain were all established and he was not contesting⁴ the aggravators except for the "avoid arrest" aggravator. In his sentencing

⁴ Lowe conceded to the jury and trial court that the "under sentence of imprisonment," "prior violent felony," and "during the course of a felony" aggravators were proven. (T-RS.21 2522-24). Lowe informed the jury with respect to: (1) "under sentence of imprisonment" - "We're not contesting that;" (2) "prior violent felony" - "So we're not contesting that" "this crime of violence;" and (3) "during the course of a felony" - "That's a given. That's a given" (T-RS.21 2522-24). Also, Lowe conceded to the jury the "pecuniary gain" aggravator: "a robbery by definition is there was an attempt to get money or something." In his sentencing memorandum, he asserted "pecuniary gain" should not be found based on improper doubling. However, the jury was instructed on doubling and the trial court merged the "during the course of a felony" and "pecuniary gain" aggravators. Juries are presumed to follow the court's instructions. *United States v. Olano*, 507 U.S. 725, 740 (1993) (finding there is a presumption, absent contrary evidence, jurors follow court's instructions); *Greer v. Miller*, 483 U.S. 756, 766, n. 8 (1987)

memorandum, Lowe admitted those aggravators were proven and were not being contested except as to weight. (R-RS.3 453-54; T-RS.21 2522-24). All of three aggravators fall under the exceptions recognized in *Almendarez-Torres*. (see footnote 3, *supra*). Harmless error has been proven beyond a reasonable doubt by the State based on the unanimous finding of the jury after receiving the instruction given.

However, under *Davis* the avoid arrest aggravator should also be included as part of the sentencing proportionality and harmless error analysis as the focus is on the three requisite findings of the jury. Those requisite findings, as identified in *Davis*, are: 1) whether sufficient aggravation existed and whether those aggravators outweighed the mitigators were established before a death sentence could be recommended; 2) whether the jury was informed it may consider mitigation proven by the greater weight of the evidence; and 3) that the jury was informed that even if sufficient aggravating circumstances outweigh the mitigating circumstances, it was not required to recommend death. As noted above, the jury was instructed properly, thus, under *Davis*, the avoid arrest aggravator may be used in the sentencing calculus and proportionality analysis. This Court should find that any claimed *Hurst* error is harmless beyond a reasonable doubt in light of the jury findings inherent in the verdict as well as including the avoid arrest aggravator

included in the penalty phase.

2. CALDWELL V. MISSISSIPPI.

Lowé suggests that the jury instruction that its recommendation was advisory precludes a finding of harmless error. After *Apprendi* and *Ring*, this Court continued to find that Florida's jury instructions regarding advisory sentences were consistent with the United States Constitution. In *Smith v. State*, 151 So. 3d 1177, 1182 (Fla. 2014), *reh'g denied* (Nov. 26, 2014) this Court noted its repeated rejection of *Caldwell* challenges to the current standard jury instructions citing *Rigterink v. State*, 66 So.3d 866, 897 (Fla. 2011) and *Globe v. State*, 877 So.2d 663, 673-74 (Fla. 2004). While this Court declined to address *Caldwell* in *McCloud v. State*, SC12-2103, 2016 WL 6804875, at *10 (Fla. Nov. 17, 2016) in light of the new sentencing order, *Caldwell* should give this Court no pause here. As in *Davis*, the jury spoke as one recommending unanimously that death is the appropriate sentence. It was offered the option of not recommending death even if the aggravation outweighed the mitigation, yet the jury still recommended death knowing its recommendation would be given great weight. Given this Court's determination that the jury's sentencing role was not constitutionally deficient under the standard instructions and Lowé's jury recommended death unanimously, *Caldwell* does not undercut the sentence in this case.

Furthermore, the judge knew that a death sentence did not have to be imposed even though a jury had recommended one. Such an override was always an option. Lowe has not explained why the trial court would have made a different decision had it received the factual findings of the jury supporting its sentencing decision of death.

3. THE RECORD SUPPORTS A FINDING OF HARMLESS ERROR: A REMAND FOR FURTHER EVIDENTIARY DEVELOPMENT IS INAPPROPRIATE

Lowe asks this Court to remand his case for further evidentiary development to determine whether his counsel may have represented him differently had *Hurst v. Florida* been the law at the time of trial. This is a direct appeal and the legal issue before this Court is one of harmless error. The actions of counsel are not at issue. This is a legal issue to be resolved based on the instant record. An evidentiary hearing would be inappropriate at this juncture given the procedural posture of the case. This Court did not require additional evidentiary development when considering the same issue in *Davis* and should decline the request Lowe has made here.

SUPPLEMENTAL ISSUE 2

LOWE'S DEATH SENTENCE IS PROPORTIONAL

Lowe suggests that his alleged *Hurst*-error impacts this Court's proportionality evaluation. The jury unanimously recommended death and the court's findings are supported by

competent, substantial evidence as set forth in the State's answer brief. Even without consideration of the avoid arrest aggravator, the sentence is proportional.

A. STANDARD OF REVIEW - Proportionality review is to consider the totality of the circumstances in a case compared with other capital cases. *Urbini v. State*, 714 So.2d 411 (Fla. 1998). It is not a comparison between the number of aggravators and mitigators, but is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." *Porter v. State*, 564 So.2d 1060, 1064 (Fla. 1990).

B. ANALYSIS - Even if this Court excludes the avoid arrest aggravator from consideration, Lowe conceded the prior violent felony, under sentence of imprisonment and during the course of a felony aggravators. This Court has upheld death sentences as proportional under similar factors. See *Melton v. State*, 638 So.2d 927, 930 (Fla. 1994) (holding sentence proportional where two aggravating factors of murder committed for pecuniary gain and prior violent felony outweighed some non-statutory mitigation); *Mendoza v. State*, 700 So.2d 670, 679 (Fla. 1997) (finding sentence proportional and rejecting a "robbery gone awry" argument where the trial court found two aggravators: a prior violent felony—armed robbery in connection with a separate case—and commission during a robbery); *Lowe v.*

State, 650 So.2d 969, 696 (Fla. 1994) (affirming sentence based on two aggravators and similar mitigation).

However, the additional support for proportionality is based on the inclusion of the avoid arrest aggravator. *Davis* provides for use of fact based aggravators in post-*Hurst* analysis and the State relies on the proportionality analysis included in its prior briefing. *Bryant v. State*, 785 So.2d 422, 437 (Fla. 2001) (holding death sentence in armed robbery and murder was proportional where three aggravators outweighed one nonstatutory mitigator); *Pope v. State*, 679 So.2d 710, 716 (Fla. 1996) (holding sentence proportional in robbery-homicide where two aggravators, pecuniary gain and prior violent felony, outweighed two statutory and several non-statutory mitigators); *Melton v. State*, 638 So.2d 927, 930 (Fla. 1994) (holding sentence proportional where two aggravating factors of murder committed for pecuniary gain and prior violent felony outweighed some non-statutory mitigation); *Lowe I*, 650 So.2s at 696 (affirming sentence based on two aggravators and similar mitigation).

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm *Lowe's* death sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail through the e-portal to: Steven H. Malone, Esq., Office of the Criminal Conflict and Civil Regional Counsel, Fourth District at RC4AppellateFilings@rc-4.com and stevenhmalone@bellsouth.net this 28th day of November, 2016.

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,

PAMELA JO BONDI
ATTORNEY GENERAL

___/S/ Leslie T. Campbell____
LESLIE T. CAMPBELL
Assistant Attorney General
Florida Bar No. 0066631
1515 N. Flagler Dr.; Ste. 900
Telephone: (561) 837-5000
Facsimile: (561) 837-5108
E-mail:
Leslie.Campbell@MyFloridaLegal.com
Secondary E-mail:
CapApp@MyFloridaLegal.com

COUNSEL FOR APPELLEE