**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

**RODNEY TYRONE LOWE,**
Appellant,

**v.**

**STATE OF FLORIDA**
Appellee.

FL Supreme Court Case No. SC12-263

L.T. Case No. 311990CF658A

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

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# INITIAL SUPPLEMENTAL BRIEF OF APELLANT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Statutes**

**Statement of the Case and Facts.**

Rodney Lowe was convicted of first degree murder and attempted robbery and sentenced to death followed by a 15 year consecutive sentence. His convictions and sentences were affirmed by this Court in *Lowe v. State*, 650 So.2d 969 (Fla.1994). A Rule 3.851 motion was granted in part because trial counsel provided ineffective representation, prejudicial only at penalty phase; this Court affirmed that order in *Lowe v. State*, 2 So. 3d 21 (Fla. 2009). At the new penalty phase, the jury unanimously recommended death, T2555, and the trial court imposed the death sentence. R507.

Appeal was taken, and the case was briefed and argued before this Court. In Point 17 appellant argued the jury's verdict did not authorize a death sentence under the Sixth, Eighth and Fourteenth Amendments. At trial the defense had challenged the constitutionality of the statute and sought special instructions and verdict forms under *Ring v. Arizona*, 536 U.S. 584 (2002), to require the jury to separately and unanimously find each aggravator beyond a reasonable doubt. R176-78; 265-71; 296-318. The trial court denied counsel's request. T2552. The instructions and verdict did not require the jurors to unanimously find the same aggravating circumstance beyond a reasonable doubt, and neither its weighing decisions nor any other findings were included on the verdict form. T2532-2551. This Court had previously rejected the argument made here, *State v. Steele*, 921

So.2d 538 (Fla. 2005), but on January 12, 2016, the Court abrogated *Steele* and other cases and found Florida's death penalty scheme unconstitutional, in *Hurst v. Florida*, - U.S -,136 S.Ct. 616 (Jan. 12, 2016). This Court permitted supplemental briefing on *Hurst.*

**Summary of the Argument.**

The *Hurst* decision requires this Court to vacate the death sentence and impose a life sentence with parole eligibility after 25 years.

**Argument.**

**Standard of review.**

Application of *Hurst* is a purely legal question subject to review *de novo*. *Jackson v. State*, 64 So. 3d 90, 92 (Fla. 2011).

***Hurst* applies to this direct appeal.**

This is a direct appeal from a resentencing proceeding, so *Hurst* applies. *State v. Fleming*, 61 So. 3d 399, 407 (Fla. 2011)("because resentencing is *de novo*, the decisional law in effect at the time of the resentencing or before any direct appeal from the proceeding is final applies. *See Wheeler v. State*, 344 So.2d 244, 245 (Fla.1977) ("The decisional law in effect at the time an appeal is decided governs the issues raised on appeal, even where there has been a change of law since the time of trial.")).

***Hurst* requires relief to be granted.**

The Sixth and Fourteenth Amendments require "each element of a crime must be proved to a jury beyond a reasonable doubt." *Hurst* at 621. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held "any fact that 'exposes the defendant to a greater punishment than that authorized by the jury's verdict is an 'element' that must be submitted to the jury." *Ibid*. In *Ring,* the Court applied *Apprendi* to an Arizona statute that permitted a person convicted of first degree murder to be sentenced to death if only a judge found an aggravating circumstance, and held "Ring's death sentence therefore violated his right to have a jury find the facts behind his judgment." *Hurst*, 136 S. Ct. at 621. In *Hurst,* the Court wrote "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's[,]" and "[i]n light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment." 136 S. Ct. at 621-22. So does Mr. Lowe's.

**The error is structural and no harmless error analysis can be applied.**

The *Hurst* court declined to address the harmfulness of the error, adhering to its practice of leaving that issue "to state courts to consider whether an error is harmless." *Id*. at 624. This Court should not apply a harmless error analysis at all; it should find the error structural and vacate the death sentence. The Court found Florida's death sentencing statute violates the Sixth Amendment because "[t]he 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.'" *Hurst*, 136 S.Ct. at 622 (*quoting* § 921.141(3), *Fla. Stat*.). The Sixth Amendment, as now applied to Florida, requires both the facts *and* weight of aggravating circumstances relative to mitigation to be found unanimously by the jury beyond a reasonable doubt, because it is only those jury-found facts which can make a defendant guilty of an offense eligible for the death penalty.

The extent of the harm from the *Hurst* Sixth Amendment violation at Mr. Lowe's trial cannot be accurately assessed by this Court. It is a profound defect infecting the way the entire trial was conducted. As explained by former Justice Scalia:

> In *Fulminante*, we distinguished between, on the one hand, "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," 499 U.S., at 309, 111 S. Ct., at 1265, and, on the other hand, trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented," id., at 307–308, 111 S.Ct., at 1252, 1264.

*Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

There is no way of knowing what aggravation any juror actually considered and found, the weight assigned, what if any aggravation outweighed mitigation and how many votes there were for each. These are profound issues this Court already touched upon in *State v. Steele*, 921 So. 2d 538, 547 (Fla. 2005) ("Moreover, any special verdict on aggravators would have to be accompanied by clear instructions

on how these changes affect the jury's role in rendering its advisory sentence and the trial court's role in determining whether to impose a sentence of death."). *See also, Aguirre-Jarquin v. State,* 9 So. 3d 593, 611 (Fla. 2009) (Pariente, J., specially concurring) (quoting sentencing order of Judge Eaton).

There are no findings in this jury's general verdict recommending death and thus no basis to undertake a harmful error analysis. The use of instructions and argument describing the jury's then-advisory role was ubiquitous in this trial, and is now improper under the Eighth Amendment and *Caldwell v. Mississippi,* 472 U.S. 320 (1985). There is no way for this Court to determine how the jury would have voted differently had they not been instructed their recommendation was just advisory. The error is structural, and the death sentence must be vacated.

**The *Hurst* Error is not Harmless.**

**"Contemporaneous" conviction.**

A prior jury, not this one, unanimously found Mr. Lowe guilty of the "contemporaneous" attempted robbery, so *Jackson v. State*, 127 So. 3d 447, 475 (Fla. 2013), should not apply. In any event, whether Mr. Lowe's "contemporaneous" conviction was a "sufficient aggravating circumstance," *Sec.* 921.141(2)(a), *Fla. Stat.*, to authorize death was a decision the jury had to make unanimously, and it did not make that decision here.

**Purported concession to aggravators.**

The state has argued lack of objection to some of the challenged aggravators, and is likely to raise the same argument in opposition to *Hurst* relief. At the charge conference the defense agreed there had been "some evidence" of the five aggravators sought by the state, T2419, and "concede[d] proof" of an aggravator, R455, but not that it was lawfully applied. *See Stephens v. State*, 975 So.2d 405, 417 (Fla.2007)(no concession by defense). A similar argument was raised and rejected in *Hurst* by this reasoning:

> Florida launches its second salvo at Hurst himself, arguing that he admitted in various contexts that an aggravating circumstance existed. Even if Ring normally requires a jury to hear all facts necessary to sentence a defendant to death, Florida argues, "Ring does not require jury findings on facts defendants have admitted." Brief for Respondent 41. Florida cites our decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), in which we stated that under *Apprendi*, *623 a judge may impose any sentence authorized "on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S., at 303, 124 S.Ct. 2531 (emphasis deleted). In light of Blakely, Florida points to various instances in which Hurst's counsel allegedly admitted the existence of a robbery. Florida contends that these "admissions" made Hurst eligible for the death penalty. Brief for Respondent 42–44.
>
> *Blakely*, however, was a decision applying *Apprendi* to facts admitted in a guilty plea, in which the defendant necessarily waived his right to a jury trial. See 542 U.S., at 310–312, 124 S.Ct. 2531. Florida has not explained how Hurst's alleged admissions accomplished a similar waiver. Florida's argument is also meritless on its own terms. Hurst never admitted to either aggravating circumstance alleged by the State. At most, his counsel simply refrained from challenging the aggravating circumstances in parts of his appellate briefs. See, e.g., Initial Brief for Appellant in No. SC12–1947 (Fla.), p. 24 ("not challeng[ing] the trial court's findings" but arguing that death was nevertheless a disproportionate punishment).

*Hurst*, 622-623. Similarly, there is no admission to aggravators here.

**Extensive Mitigation.**

This is a case with substantial mitigation, as set forth in appellant's Initial and Reply Briefs, but that would have been for the jury to weigh, had it been provided a special verdict form. The general verdict precludes this Court from knowing the jury's actual findings, also precluding a *Hurst* harmlessness determination.

**Section 775.082(2), *Florida Statutes* (1990), requires Mr. Lowe be sentenced to life with the possibility of parole after 25 years.**

In 1990, the year of the murder for which Mr. Lowe was convicted, the applicable statute provided as follows:

> **775.082. Penalties**
>
> (1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in §§ 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.
>
> (2) In 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, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

The statute has subsequently been amended to account for the 1994 change to life without parole. 1994 *Fla. Sess. Law Serv*. Ch. 94-228 (S.B. 158). Nonetheless, the capital sentencing law in effect at the time of the crime is the one that applies. *See Bates v. State*, 750 So. 2d 6, 10 (Fla.1999).

This Court has held Section 775.082(2), *F.S*., to be mandatory. After the decision in *Furman v. Georgia*, 408 U.S. 308 (1972), but while rehearing was pending, this Court addressed the law since codified as Section 775.082(2) in *Donaldson v. Sack*, 265 So. 2d 499 (Fla. 1972), saying:

> We have given general consideration to any effect upon the current legislative enactment to commute present death sentences to become effective October 1, 1972. The statute was conditioned upon the very holding which now has come to pass by the U.S. Supreme Court in invalidating the death penalty as now legislated. It is worded to apply to those persons already convicted without recommendation of mercy and under sentence of death.

265 So. 2d at 505 (emphasis added). After rehearing was denied in *Furman*, this Court, citing *Donaldson v. Sack*, determined that it should commute to life all the death sentences imposed under the Florida scheme. *Anderson v. State*, 267 So. 2d 8, 9-10 (Fla. 1972).

In *Hurst*, the Court found "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional[,]" *Id.* at 624, so section 775.082(2), *Fla. Stat.* (1990), applies

with full force and requires reduction of Mr. Lowe's sentence to life with parole eligibility after 25 years.

**Conclusion.**

Neither the jury recommendation nor the judge's sentencing order authorizes the death penalty in this case under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, or article I, sections 9, 16, and 17 of the Florida Constitution.

Wherefore, appellant requests vacation of the sentence of death and imposition of a life sentence with the possibility of parole after twenty five years.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify a true and correct copy of the foregoing has been furnished electronically to Leslie T. Campbell, Assistant Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401, at capapp@myfloridalegal.com this 15th day of February, 2016.

_____/s/_____
Steven H. Malone

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing Initial Brief of Appellant complies with the font requirements of Rules 9.100(l) & 9.210(a)(2), *Fla.R.App.P.*, in that is computer-generated submitted in Times New Roman 14-Point.

_____/s/_____

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