

**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

---

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

---

**INITIAL SECOND SUPPLEMENTAL BRIEF OF APPELLANT**

Antony P. Ryan  
Regional Counsel  
Office of Criminal Conflict and Civil  
Regional Counsel, Fourth District

Steven H. Malone  
Special Assistant Regional Counsel  
Florida Bar No. 305545  
401 S. Dixie Highway  
Suite 200  
West Palm Beach, FL 33401  
Telephone: (561) 837-5156  
Facsimile: (561) 837-5423  
Email: [RC4AppellateFilings@rc-4.com](mailto:RC4AppellateFilings@rc-4.com)  
and [stevenhmalone@bellsouth.net](mailto:stevenhmalone@bellsouth.net)

RECEIVED, 11/17/2016 01:23:26 PM, Clerk, Supreme Court

## TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
Statement of Case and Facts	1
Summary of the Argument	5
Argument	6
<b>Standard of review.</b>	6
<b>Point 1. <i>Hurst</i> requires relief to be granted.</b>	6
<b>A. <i>Hurst</i> applies to this direct appeal.</b>	6
<b>B. This Court’s decision in <i>Hurst v. State</i>.</b>	6
<b>C. Appellant’s entitlement to <i>Hurst</i> relief is not barred by the advisory jury’s unanimous recommendation to impose the death penalty.</b>	9
<b>D. The jury unanimously recommended the death penalty, but did not expressly render unanimous fact-finding on any of the elements necessary for imposition of the death penalty, as required by the <i>Hurst</i> decisions.</b>	10
<b>E. The jury believed its verdict was advisory and the ultimate responsibility for finding the facts necessary for imposition of the death penalty rested with the judge.</b>	12
<b>F. Absent the <i>Hurst</i> error the judge could have determined, based on the jury’s findings of fact instead of his own findings a death sentence was inappropriate.</b>	15
<b>G. The sentencing court’s mostly copied and inconsistent findings in imposing death prevent this Court from finding <i>Hurst</i> error harmless.</b>	16

H. The *Hurst* error is harmful under the analysis in *Davis*. 17

**I. Should this Court not determine the *Hurst* error harmful based on the present record, remand for an evidentiary hearing is necessary to establish how the statutory scheme by which appellant’s death recommendation was obtained, including jury selection and evidence regarding the weight of the aggravating factors, would have been different without the *Hurst* error. 18**

**Point 2.**

**This Court’s harmless error and proportionality analyses on other points raised on appeal must accommodate the *Hurst* requirements, requiring reversal. 19**

Conclusion 21

Certificate of Service 22

Certificate of Compliance 22

## TABLE OF AUTHORITIES

<b>CASES</b>	<b>PAGES</b>
<i>Caldwell v. Mississippi</i> , 472 U.S. 320, 329-30 (1985)	13
<i>Brooks v. State</i> , 762 So.2d 879, 902 (Fla. 2000)	8
<i>Davis v. State</i> , ___ So. 3d ___, 2016 WL 6649941 (Fla. Nov. 10, 2016)	<i>passim</i>
<i>Hurst v. Florida</i> , 136 S.Ct. 616 (Jan. 12, 2016)	2, 6
<i>Hurst v. State</i> , ___ So. 3d ___, 2016 WL 6036978 (Fla. Oct. 14, 2016)	<i>passim</i>
<i>Jackson v. State</i> , 64 So. 3d 90, 92 (Fla. 2011)	6
<i>Lowe v. State</i> , 650 So.2d 969 (Fla.1994)	1
<i>Lowe v. State</i> , 2 So. 3d 21 (Fla. 2009)	1
<i>Mahn v. State</i> , 714 So.2d 391, 398 (Fla.1998)	19
<i>Perry v. State</i> , __ So. 3d ___, 2016 WL 6036982 (Fla. Oct. 14, 2016)	2,
<i>Preston v. State</i> , 564 So.2d 120, 123 (Fla.1990)	19
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002)	1
<i>Snelgrove v. State</i> , 921 So.2d 560 (Fla. 2006)	19
<i>State v. DiGuilio</i> , 491 So.2d 1129, 1137 (Fla.1986)	17
<i>State v. Fleming</i> , 61 So. 3d 399, 407 (Fla. 2011)	6
<i>State v. Steele</i> , 921 So.2d 538 (Fla. 2005)	1
<i>Wheeler v. State</i> , 344 So.2d 244, 245 (Fla.1977)	6
	2
<b>Constitutions</b>	
Sixth, Eighth and Fourteenth Amendments, U.S. Constitution	<i>passim</i>

Article 1, sections 9, 16 and 17, Florida Constitution

*passim*

## **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 form did not require the jurors to unanimously find any, or the same, aggravating circumstance beyond a reasonable doubt, its weighing decisions nor any other findings. T2532-2551. This Court had previously rejected the argument such unanimous findings were required, *see State v. Steele*, 921

So.2d 538 (Fla. 2005), but the Court abrogated *Steele* and other cases and found Florida's death penalty scheme unconstitutional in *Hurst v. Florida*, 136 S.Ct. 616 (Jan. 12, 2016). This Court permitted supplemental briefing on *Hurst* and briefs were filed. After its recent decisions on remand in *Hurst v. State*, \_\_\_ So. 3d \_\_\_, 2016 WL 6036978 (Fla. Oct. 14, 2016), and in *Perry v. State*, \_\_\_ So. 3d \_\_\_, 2016 WL 6036982 (Fla. Oct. 14, 2016), but before its decision in *Davis v. State*, \_\_\_ So. 3d \_\_\_, 2016 WL 6649941 (Fla. Nov. 10, 2016) the appellant sought and was granted this additional supplemental briefing on the effect of those cases.

### **Pertinent Facts.**

The facts from the penalty phase are set forth in the Initial Brief. *See IB*, pp. 1-34. After the advisory death recommendation, the court found four aggravators, three of which are challenged in the Initial Brief. *See IB* Point 3, pp. 39-47.

Neither the cold calculated and premeditated or heinous, atrocious and cruel aggravators were found here. Mr. Lowe's youth at the time of the crime (20 years and one month of age), his difficult childhood, rehabilitation, lack of future dangerousness and other mitigation are described in detail in the Initial Brief. *See Statement of Facts*, pp 20-34 & Point 16, **proportionality**, pp. 90-99.

The jury in this case was repeatedly told it was only to render an advisory recommendation or sentence, and that the judge would decide whether the death sentence should be imposed. Prior to *voir dire*, the trial court instructed the panels:

The final decision as to which punishment shall be imposed rests with me. However, the law requires that you, the jury, render to the Court an **advisory sentence** as to which punishment should be imposed upon the Defendant.

However, under the law I'm required to give your **recommendations** great weight.

V 4, T198-99. (emphasis supplied). And: "After your deliberations you will return an **advisory sentence** as to what punishment should be imposed upon the Defendant." V. 4, T200. (e.s.). The Court continued, "This portion of the trial is known as the voir dire examination. This is the only opportunity that I or the attorneys will be permitted to question you about your ability to fairly and impartially render an **advisory** sentence." V 4, T201 (e.s.). And finally, "In other words, you must be willing and be bound by your oath as a juror to obey the laws of the State of Florida in making your **recommendation**. V 4, T 203.(e.s.). These instructions were repeated by the Court to each of the panels of prospective jurors. V7, T554-55 (same).

After the jury was selected and sworn, it was similarly instructed:

The punishment for this crime is either death or life imprisonment, requiring the Defendant to serve no less than 25 years before becoming eligible for parole. The **final decision** as to which punishment shall be imposed rests with me. However, the law requires that you the jury render to the Court an **advisory sentence** as to which punishment should be imposed upon the Defendant. However, under the law, I'm required to give your **recommendation** great weight. (e.s.).

V13, T1314. The Court continued, “After your deliberation you'll return an **advisory** sentence as to what punishment should be imposed upon the Defendant.” T1315-16. (e.s.).

Final instructions after closing arguments repeated the same theme, as the jury was told by the Court again: “The **final decision** as to which punishment shall be imposed rests with me. However, the law requires that you, the jury, render to the Court an **advisory sentence** as to which punishment should be imposed upon the Defendant.” V 21, T2533 (e.s.). “You must follow the law that will now be given to you in rendering an **advisory sentence**,” T2534 (e.s.). Continuing:

In this case as the trial judge **that responsibility will fall on me**, however, the law requires that you render an advisory sentence as to which punishment should be imposed, life imprisonment without the possibility of parole for a period of twenty-five years, or the death penalty.

**Although the recommendation of the jury as to the penalty is advisory in nature, it is not binding.** The jury **recommendation** must be given great and deference by the court in determining which punishment to impose.

Your **advisory sentence** should be based upon the evidence of aggravating and mitigating circumstances that have been presented to you in these proceedings.

T2534 (e.s.). The advisory nature of the jury’s recommended sentence was repeated during the instruction on reasonable doubt, T2539, weighing, T2542, no requirement of unanimity and weighing and sifting before balloting, T2546, as well

as four times again in the explanation of the verdict form, which included the phrase “advisory recommendation.” T2546-47.

After final instructions, the Jury left the courtroom at 11:45 a.m. T2551. The instructions were not yet finalized, but were eventually sent back, and as counsel went over exhibits, lunch menus were provided to the jury. T2551-54. The Court was in recess until 1:52 p.m., when the jury returned with its death recommendation. T2555.

### **Summary of the Argument.**

**Point 1.** The *Hurst* decisions require this Court to vacate the death sentence and remand for a new penalty phase. The unanimous death recommendation should not foreclose a finding of harmfulness for several reasons, including the completely different designation of the jury’s role as advisory only in this pre-*Hurst* trial. This Court cannot call the *Hurst* error harmless here if to do so it would partially rely upon the sentencing court’s findings, as in this case the trial judge virtually copied the state’s sentencing memorandum as to aggravation and made inconsistent and improper findings as to mitigation. If this Court cannot now find the *Hurst* error harmful, it should remand for an evidentiary hearing on the difference *Hurst* would make in a constitutional penalty trial in this case as compared to the one conducted under the unconstitutional advisory jury scheme.

**Point 2.** For all jury related issues raised in this appeal, this Court’s harmless error analysis must be accommodated to the *Hurst* requirements. Similarly, this Court’s proportionality review must accommodate *Hurst*, and this Court should not consider in its equation, at least, the fact-based aggravator not found by the jury.

**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).

**Point 1. *Hurst* requires relief to be granted.**

**A. *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); *Wheeler v. State*, 344 So.2d 244, 245 (Fla.1977). This Court recently applied *Hurst* to *Davis* on direct appeal.

**B. This Court’s decision in *Hurst v. State***

This Court’s decision in *Hurst v. State* expanded the constitutional requirements set forth by the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016). In *Hurst*, the United States Supreme Court invalidated Florida’s capital sentencing scheme, which provided a defendant may be sentenced to death after (1) a majority of an advisory jury recommends the death penalty, without finding any facts or specifying the basis for the recommendation; and (2)

notwithstanding the recommendation of a majority of the advisory jury, the judge finds as facts that (a) specific aggravating factors exist, (b) they are sufficient to impose the death penalty, and (c) they are not outweighed by the mitigating factors. 136 S. Ct. at 620-21. The United States Supreme Court explained the Florida scheme violated the Sixth Amendment because it “does not require the *jury* to make critical findings necessary to impose the death penalty.” *Id.* at 622 (emphasis added).

In October of this year, in *Hurst v. State*, this Court announced that, in addition to the federal constitutional requirements set forth by the United States Supreme Court in *Hurst*, the Florida Constitution and the Eighth Amendment require capital defendants be afforded additional protections. *Hurst v. State*, 2016 WL 6036978, at \*13. First, this Court ruled the Eighth Amendment’s evolving standards of decency require *unanimous* jury fact-finding, beyond a reasonable doubt, as to the existence of each aggravating factor, the sufficiency of the aggravating factors to impose a death sentence, and whether the aggravating factors outweigh the mitigating factors. *Id.* at \*15-16. The jury must “expressly” conduct such fact-finding before the death penalty may be imposed. *Id.* at 13.

Second, this Court held any claims brought by Florida prisoners under *Hurst* must be subjected to individualized harmless error review, and that such review places the burden on the State to prove, beyond a reasonable doubt, and not based

on speculation, that the *Hurst* error did not affect the imposition of a death sentence. *Id.* at \*23.

This Court analyzed the facts of *Hurst* to determine whether the state had proven the constitutional violation harmless beyond a reasonable doubt. It ruled it had not: “after a detailed review of the evidence presented as proof of the aggravating factors and evidence of substantial mitigation, we are not so sanguine as to conclude that Hurst’s jury would without doubt have found both aggravating factors—and, as importantly, that the jury would have found the aggravators sufficient to impose death and that the aggravating factors outweighed the mitigation.” *Id.* at \*24 (emphasis added).

This Court also recognized the difficulty of determining whether the reasonable doubt standard had been satisfied as to each of the required findings of fact, emphasizing (1) “we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt,” (2) “[w]e cannot determine how many jurors have found the aggravation sufficient for death,” and (3) “[w]e cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.” *Id.* This Court further emphasized “we do not intend to diminish or impair *the jury’s right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating*

circumstances.” *Id.* at \*13 (emphasis added) (citing *Brooks v. State*, 762 So.2d 879, 902 (Fla. 2000)). Additionally, even if the jury does unanimously find each required element and recommends the death penalty, there is no impact from *Hurst v. State* on “the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life.” *Id.*

**C. Appellant’s entitlement to *Hurst* relief is not barred by the advisory jury’s unanimous recommendation to impose the death penalty.**

*Hurst* relief is available to Mr. Lowe even though his advisory penalty phase jury unanimously recommended the court impose the death penalty. The unanimous jury recommendation is analyzed within the context of the harmless error doctrine. As this Court explained in *Hurst v. State*, claims under *Hurst* must be subjected to individualized harmless error review, and such review places the burden on the State to prove beyond a reasonable doubt, and not based on pure speculation, the *Hurst* error did not affect the imposition of a death sentence. *Hurst*, 2016 WL 6036978, at \*23. In other words, in order for a *Hurst* error to be harmless, this Court held, there must be “no reasonable probability that the error contributed to the sentence.” *Id.*

In *Davis v. State* though, this Court found the error harmless in a case in which the jury unanimously recommended two death sentences. However, it

restricted its harmless error calculus to a single segment of what the jury is now required to find to its ultimate sentencing decision, holding,

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*.

*Davis*, slip op. at 29. (e.s.). Peering through these restricted lenses, this Court determined *Davis*'s *Hurst* error was harmless based on the unanimous recommendations of death for two murders. Appellant contends the analysis of the harm of *Hurst* error in *Davis* is itself in error. For the reasons set forth below, this Court should reconsider here its *Davis* determination that all unanimous recommendations under Florida's unconstitutional death-sentencing scheme render *Hurst* error harmless, and further find the *Hurst* error harmful in Mr. Lowe's case.

**D. The jury unanimously recommended the death penalty, but did not expressly render unanimous fact-finding on any of the elements necessary for imposition of the death penalty, as required by the *Hurst* decisions.**

The unanimous jury recommendation does not establish beyond a reasonable doubt the *Hurst* error did not contribute to Mr. Lowe's death sentence because, though his jury unanimously recommended the death penalty to the court, the jury did not expressly render unanimous fact-finding on any of the elements necessary for the imposition of the death penalty, as required by the *Hurst* decisions. *See Hurst v. State*, 2016 WL 6036978, at \*15-16 (requiring express,

unanimous jury fact-finding beyond a reasonable doubt as to the existence of each aggravating factor, the sufficiency of the aggravating factors to impose a death sentence, and whether the aggravating factors outweigh the mitigating factors). *Id.* at \*15-16. The jury's penalty-phase verdict of Mr. Lowe stated only: "A majority of the jury by a vote of twelve to zero recommend to the Court that it impose the death penalty upon the Defendant." V21, T2557-58. The jury made *no* express findings of fact, let alone unanimous findings, regarding the aggravating factors, the sufficiency of the aggravating factors, or the weight of the aggravating factors relative to the mitigating factors. The jury was tasked only with voting whether to recommend a death sentence, and did not specify the basis for the recommendation.

There is no way to know based on the present record whether in a constitutional proceeding consistent with *Hurst*, appellant's jury would have expressly and unanimously found the aggravating factors, expressly and unanimously determined the aggravating factors were sufficient to impose the death penalty, and expressly and unanimously found the aggravating factors outweighed the mitigating factors. And the State cannot show beyond a reasonable doubt Mr. Lowe's jury, had it been constitutionally required to make the unanimous fact-finding mandated by the *Hurst* decisions, would have expressly and unanimously found the same aggravating factors, determined that the

aggravating factors were sufficient, and concluded the aggravating factors outweighed the mitigating factors. Moreover, as this Court made clear in *Hurst v. State*, even if the jury found all of those facts and the death penalty was authorized, the jury could have nonetheless recommended a life sentence. See 2016 WL 6036978, at \*13 (“we do not intend to diminish or impair the jury’s right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.”).

The State cannot show beyond a reasonable doubt that, had the jury been properly apprised of its role and been required to conduct the penalty phase fact-finding, at least one juror would have decided not to recommend a death sentence even after finding the requirements for imposing the death penalty satisfied. The error therefore cannot be considered harmless.

**E. The jury believed its verdict was advisory and the ultimate responsibility for finding the facts necessary for imposition of the death penalty rested with the judge.**

In *Davis*, this Court did not consider the impact of the jury’s knowledge of its advisory role in its harmless error analysis. The unanimous jury recommendation here does not establish beyond a reasonable doubt the *Hurst* error did not contribute to Mr. Lowe’s death sentence because the jury believed its verdict was advisory and that the ultimate responsibility for finding the facts

necessary for imposition of the death penalty, and that ultimate decision rested with the judge. As set forth in the statement of case and facts above, Mr. Lowe's jury was inundated with instructions and comments of counsel repeatedly telling them their sentence was only advisory, a recommendation, and the court had the final say. V 4, T198-99, 200, 201, 203; V7, T554-55; V13, T1314, 1315-16; V 21, T2533, 2534, T2539, 2542, 2546-47. Though the trial was lengthy, the advisory jury returned its recommended sentence about two hours after retiring, including a wait for the written instructions and exhibits to be sent back and time devoted to ordering and eating lunch. TT2551-55. Such a hasty decision does not bear the hallmark of a jury realizing its recommendation to send Mr. Lowe to his death would in the end be the final one. Its decision would have required far more thought and gravity had the jury been required to make the now-required factual findings. It is probable had the jury been required to do so, at least one juror would have come to a different conclusion. How can this Court know otherwise?

The state cannot carry its burden of proving beyond a reasonable doubt every juror would have made the same unanimous death recommendation absent the *Hurst* error because the jury's recommendation was inextricably linked with the jury's knowledge its role was only advisory. *See Caldwell v. Mississippi*, 472 U.S. 320, 329-30 (1985) (vacating death sentence based upon unanimous jury verdict, and recognizing significant impact of a jury's belief the ultimate

responsibility for determining whether a defendant will be sentenced to death lies elsewhere).

There is a reasonable probability the jury's consideration of the penalty phase evidence, and vote as to whether to recommend the death penalty, would have been different had it been required to make the findings of facts on each of the required elements for a death sentence, as *Hurst* now requires, rather than simply rendering a broad, general advisory recommendation to the court. This is not a novel concept in death penalty jurisprudence. In *Caldwell*, the Court held a capital sentence is invalid where it is imposed even by a unanimous jury after the jury has been told the ultimate responsibility for determining the propriety of the sentence rested elsewhere and not with them. *Id.* at 328-29. Indeed, the Court "has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its truly awesome responsibility." *Id.* at 341 (internal quotation marks omitted). Here, this Court cannot be certain, to the exclusion of all reasonable doubt, the jury would have made the same *unanimous* recommendation without the *Hurst* error in this case, and the error cannot be harmless.

In order to show harmless error, the State must demonstrate there is no reasonable probability Mr. Lowe would not have *received a death sentence* but for the *Hurst* error. Thus, it would still be insufficient for harmless error purposes if

the state could somehow prove the jury would have rendered the same advisory *recommendation* to the court absent the *Hurst* error. As explained above, as well as in this Court's decision in *Hurst v. State*, but for the *Hurst* error, the jury would have been required to make unanimous findings of fact regarding each aggravating factor, the sufficiency of the aggravating factors to impose the death penalty, and the weight of the aggravating factors relative to the mitigating factors. The State's inability in light of *Caldwell* to even show that the jury would have inevitably made the same recommendation only highlights that appellant's unanimous jury recommendation cannot be shown beyond a reasonable doubt to have had no impact on his sentence. And, as noted above, a jury properly advised of its role could have found the requirements for imposing the death penalty satisfied, but nonetheless recommended a life sentence. *Hurst v. State*, 2016 WL 6036978, at \*13 ("we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.").

**F. Absent the *Hurst* error the judge could have determined, based on the jury's findings of fact instead of his own findings a death sentence was inappropriate.**

As described in the Initial Brief, the sentencing judge in Mr. Lowe's case copied the state's sentencing memorandum in finding aggravators and made inconsistent and improper findings as to mitigation. *See IB Point 1*, pp. 36-39;

Point 3, pp. 48-53. Mr. Lowe’s unanimous jury recommendation does not establish beyond a reasonable doubt the *Hurst* error did not contribute to his death sentence because the State cannot prove beyond a reasonable doubt the trial court would have still imposed a death sentence had the jury, not the judge, conducted the fact-finding on the aggravating circumstances, their sufficiency, and their weight. And as this Court held in *Hurst v. State*, even if the jury does unanimously make those findings in support of a death sentence, there is no impact on “the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life.” *Id.*

Here, in sentencing Mr. Low to death under a pre-*Hurst* scheme, the judge based his decision on the state’s memorandum regarding the aggravating factors, their sufficiency, and their weight, in the absence of any jury findings. Had the jury been required to make those findings of fact, the judge’s decision could well have been different. It could have been different even without that defalcation. For example, the jury’s fact-finding in a hypothetical proceeding that complied with *Hurst* may have yielded different or a lesser number of aggravators than the judge’s fact-finding did in the *Hurst*-error-infected proceeding. In other words, it cannot be determined beyond a reasonable doubt from the present record that the judge would have exercised his discretion in the same way if bound by the *jury*’s fact-finding.

**G. The sentencing court’s mostly copied and inconsistent findings in imposing death prevent this Court from finding *Hurst* error harmless.**

As described in detail in Points 1 and 3 of the Initial Brief, in its death sentencing order the court copied almost all of what the state proposed in aggravation verbatim, and otherwise made wholly inconsistent findings. Appellant has briefed these issues as bases for reversal, including their effect on this Court’s ability to conduct a proper proportionality review. *See* Points 1, 3 & 16, *IB*. In *Davis*, this Court buttresses its harmless error determination based on that sentencing court’s findings in aggravation and mitigation. *Slip op.* at 29. But in this case, this Court cannot rely on what is in reality the prosecutor’s portion of the sentencing order, or the illogical mitigation findings here to make such a determination. The state cannot meet its burden of proving harmless error.

**H. The *Hurst* error is harmful under the analysis in *Davis*.**

Should this Court reject the arguments made above, and also conclude the sentencing order in this case is a sufficient basis upon which to determine the harm of the *Hurst* error, it should still find the *Hurst* error harmful. “[T]he harmless error test is to be rigorously applied,’ [*State v.*] *DiGuilio*, 491 So.2d [1129,] 1137 [Fla.1986], and the State bears an extremely heavy burden in cases involving constitutional error.” *Davis*, slip op. at 29 (*quoting Hurst v. State*). *Davis* is an “egregious” case in which two victims were burned alive, a third person also

murdered, there were eight aggravating factors and two death sentences. In contrast, the crime for which Mr. Lowe was convicted involved a single shooting in the course of an attempted robbery, and four aggravators “found” by the sentencing judge, but none of which are nearly as weighty as HAC or CCP. The mitigation in Mr. Lowe’s case is substantial, including Mr. Lowe’s youth at the time of the crime (20 years and one month of age), difficult childhood, rehabilitation, lack of future dangerousness and other mitigation as described in the Initial Brief.

**I. Should this Court not determine the *Hurst* error harmful based on the present record, remand for an evidentiary hearing is necessary to establish how the statutory scheme by which appellant’s death recommendation was obtained, including jury selection and evidence regarding the weight of the aggravating factors, would have been different without the *Hurst* error**

This Court did not consider the necessity of a remand for an evidentiary hearing in *Davis*. If it does not reverse the death sentence based on the present record, it should order a remand and evidentiary hearing because the current one is insufficient to determine what impact the *Hurst* error had on the appellant’s advisory jury’s unanimous recommendation. As this Court made clear in *Hurst v. State*, this Court should not base its harmlessness determination on speculation. At an evidentiary hearing, the State would be required to prove the harmlessness of the *Hurst* error in this case beyond a reasonable doubt. *See Hurst*, 2016 WL 6036978, at \*23.

An evidentiary hearing is necessary to establish, for instance, how defense counsel's approach to jury selection and to diminishing the weight of the aggravating factors at the penalty phase would have been different in a hypothetical penalty phase comporting with the constitutional principles announced in the *Hurst* decisions.

As explained above, for *Hurst* error to be harmless, this Court holds the burden is on the State to establish there is "no reasonable probability that the error contributed to the sentence." *Hurst*, 2016 WL 6036978, at \*23. Without an evidentiary hearing, this Court would be constrained to conduct harmless error review based on its own or the parties' speculation, which this Court has made clear is not permissible. *Id.* at \*3.

**Point 2.**

**This Court's harmless error and proportionality analyses on other points raised on appeal must accommodate the *Hurst* requirements, requiring reversal.**

Appellant has raised a number of errors in the Initial Brief in addition to the *Hurst* error. In the Pre-*Hurst* world, as part of its harmless error analysis of death-sentencing errors of any sort, this Court considered the spread of the jury vote. For instance, in *Snelgrove v. State*, 921 So.2d 560 (Fla. 2006), this Court described its reliance on the vote count in the context of the impropriety of a general recommendation of death for more than one murder:

Lastly, juries sometimes recommend the death penalty for multiple murders by a different vote on each count. The vote breakdown can be a useful consideration in determining whether error during the penalty phase is harmful and therefore reversible. *See Mahn v. State*, 714 So.2d 391, 398 (Fla.1998) (noting that death recommendation was by eight-to-four vote in holding error in finding cold, calculated, and premeditated aggravator was not harmless); *Preston v. State*, 564 So.2d 120, 123 (Fla.1990) (observing that jury recommended death by one-vote margin in reversing death sentence after prior conviction relied upon for aggravating factor was vacated). With no count-by-count vote breakdown, this aspect of our analysis is impossible.

*Snelgrove*, 921 So. 2d at 571. After *Hurst*, to find any sentencing error harmless, this Court must find beyond a reasonable doubt that absent the error not even one juror would possibly have voted for a life sentence by either finding the aggravators sufficient to justify a death sentence, by finding the aggravators do not outweigh the mitigators, or by deciding to be merciful. This harmless analysis must be applied to all of Mr. Lowe's claims, in particular those occurring at the jury trial portion of the penalty phase. *See IB* Points 6-15, pp. 58-90, and **cumulative error** at page 100.

*Hurst* likewise affects this Court's proportionality analysis here, which was argued in the Initial Brief at Point 16, pages 90-99. In light of the *Hurst* decisions, the lack of a jury finding as to the aggravators requires this Court to find death a disproportionate sentence, because it cannot constitutionally rely on any of the aggravators found by the sentencing court. This Court may determine even without a jury finding it can rely on the "automatic aggravators" of prior violent felony, a

murder committed while on felony community control, and contemporaneous violent felony (attempted robbery), found by the trial court, R509-11, R508-09 & 511-12. If this Court does so determine it can rely on those three aggravators, it yet cannot consistent with the Sixth and Eighth Amendments rely on the remaining aggravator of avoid arrest in determining proportionality, R513-18, as that is a classic fact-based aggravator and lacks a jury finding. In this case, the trial court gave all of the aggravators, including avoid arrest, great weight. Without avoid arrest and its associated factual bases, the remaining aggravation when put up against the mitigation require a finding death is disproportionate in this case.

**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 remand for a new penalty phase trial, or reduction of the death sentence to life with the possibility of parole after 25 years.

Respectfully Submitted,

Antony P. Ryan, Regional Counsel  
Office of Criminal Conflict and Civil  
Regional Counsel, Fourth District

401 S. Dixie Highway  
Second Floor  
West Palm Beach, FL 33401  
Telephone: (561) 837-5156  
Facsimile: (561) 837-5423

\_\_\_\_\_/s/\_\_\_\_\_  
Steven H. Malone  
Special Assistant Regional Counsel  
Florida Bar Number: 305545  
[stevenhmalone@bellsouth.net](mailto:stevenhmalone@bellsouth.net)

### **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](mailto:capapp@myfloridalegal.com) this 17<sup>th</sup> day of November, 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(1) & 9.210(a)(2), *Fla.R.App.P.*, in that is computer-generated submitted in Times New Roman 14-Point.

\_\_\_\_\_/s/\_\_\_\_\_

—