

**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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**SECOND SUPPLEMENTAL REPLY BRIEF OF APPELLANT**

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## TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
<b>Reply Argument</b>	
<b>Supplemental Issue 1.</b>	1
<i>Hurst</i> requires relief to be granted; the state cannot prove the error is harmless beyond a reasonable doubt.	
<b>2. CALDWELL V. MISSISSIPPI.</b>	2
<b>Supplemental Issue 2.</b>	2
Proportionality of the death sentence	
Conclusion	3
Certificate of Service	4
Certificate of Compliance	5

## TABLE OF AUTHORITIES

<b>CASES</b>	<b>PAGES</b>
<i>Brown v. State</i> , 143 So.3d 392, 406–07 (Fla.2014)	3
<i>Caldwell v. Mississippi</i> , 472 U.S. 320, 329-30 (1985)	2
<i>Davis v. State</i> , ___ So. 3d ___, 2016 WL 6649941 (Fla. Nov. 10, 2016)	1
<i>Franklin v. State</i> , No. SC13–1632,-- So. 3d --, 2016 WL 6901498 (Fla. Nov. 23, 2016)	1
<i>Hurst v. Florida</i> , 136 S.Ct. 616 (Jan. 12, 2016)	1,2
<i>Hurst v. State</i> , ___ So. 3d ___, 2016 WL 6036978 (Fla. Oct. 14, 2016)	1, 2
<i>McCloud v. State</i> , SC12-2103, --- So.3d ----2016 WL 6804875 (Fla. Nov. 17, 2016)	3
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002)	1
<i>Shere v. Moore</i> , 830 So.2d 56, 62 (Fla.2002)	3
<b>Constitutions</b>	
Sixth, Eighth and Fourteenth Amendments, U.S. Constitution	3
Article 1, sections 9, 16 and 17, Florida Constitution	3

## **Reply Argument.**

### **Supplemental Issue 1. *Hurst* requires relief to be granted; the state cannot prove the error is harmless beyond a reasonable doubt.**

Reproducing page after page of the decision in *Davis v. State*, \_\_\_ So. 3d \_\_\_, 2016 WL 6649941 (Fla. Nov. 10, 2016) supposedly in support of its point, the state contends no relief can be granted due to the prior violent and contemporaneous felony aggravators. *2d Supp. AB* at 5-9 & n. 3. Appellant addressed this issue in the first initial supplemental briefing at 5. This Court has recently rejected the state’s argument in *Franklin v. State*, No. SC13–1632,-- So. 3d --, 2016 WL 6901498, slip op. at 6 (Fla. Nov. 23, 2016)( “We also reject the State’s contention that Franklin’s prior convictions for other violent felonies insulate Franklin’s death sentence from *Ring* and *Hurst v. Florida*. *See id.* at —, at S438.”).

Next, the state contends Mr. Lowe’s case is “on all-fours with *Davis*,” *2d Supp AB* at 10, a surprising statement refuted by even a cursory reading of the horrifying facts of that case. Its next argument that trial counsel conceded some aggravators so the *Hurst* error is harmless, *2d Supp AB* at 10-11, is refuted by a reading of *Hurst* itself, which rejects that proposition, as discussed in the *First Supplemental Initial Brief* at pages 5-7. Its argument the avoid arrest aggravator should be considered because of *Davis*, *2d Supp AB at 11*, completely ignores the lack of factfinding by the jury.

## **2. CALDWELL V. MISSISSIPPI.**

Under this heading the state lists the decisions upholding Florida's standard jury instructions in capital cases against *Caldwell* challenges, *2d Supp AB* at 12-13, thus answering an issue not raised. Mr. Lowe's jury was never told its verdict would be the final life or death decision; instead, it was repeatedly told it was only making an advisory recommendation. As briefed extensively in the Second Supplemental Initial Brief at pages 12-15, because of these instructions, 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). 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.

### **Supplemental Issue 2, proportionality of the death sentence.**

The state does not respond to most of appellant's argument, and makes a new argument death is the proportionate sentence in this case. *2d Supp AB* at 13-15. In so doing, it neglects to mention the supplemental authority decided and filed the same day as the Second Initial Supplemental Brief, *McCloud v. State*, SC12-2103, --- So.3d ----2016 WL 6804875 (Fla. Nov. 17, 2016). In *McCloud*, this Court now holds: "We recognize that this Court has generally held that the relative culpability of a codefendant is implicated "only when the codefendant has been found guilty of the same degree of murder." *Shere v. Moore*, 830 So.2d 56, 62 (Fla.2002); *accord Brown v. State*, 143 So.3d 392, 406-07 (Fla.2014); *Wade*, 41 So.3d at 868. We now reject this limitation, because we do not see the utility in a blanket rule prohibiting a relative culpability analysis when a codefendant is convicted or pleads guilty to a different degree of murder than the primary defendant." *Id.*, *slip op.* at 16.

This change in law requires this Court find Mr. Lowe's death sentence disproportionate or order a new trial ordered because, among other reasons already briefed at Points 6 and 16 of the Initial Brief, two other participants were not even charged in the 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,

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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](mailto:capapp@myfloridalegal.com) this 15<sup>th</sup> day of December, 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/\_\_\_\_\_

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