IN THE SUPREME COURT OF FLORIDA

TERENCE OLIVER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-1350

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR BREVARD COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The State of Florida files this Supplemental Answer Brief in response to this Court's order of November 2, 2016.

STATEMENT OF CASE AND FACTS

The State reiterates and incorporates its Statement of the Case and Facts as recounted in its *Answer Brief*.

On January 12, 2016, the Supreme Court ruled in *Hurst v. Florida*, 136 S. Ct. 616 (2016), that Florida's death penalty sentencing scheme, which required the Judge alone to find the existence of an aggravating circumstance, is unconstitutional.

On February 12, 2016, this Court ordered supplemental briefing based on *Hurst v. Florida*. Oliver's *Supplemental Initial Brief* was filed on February 26, 2016. The State's *Supplemental Answer Brief* was filed on March 7, 2016. Oliver's *Supplemental Reply Brief* was filed on March 9, 2016. This Court also accepted an *Amended Amici Curiae Brief* filed on Oliver's behalf on May 3, 2016.

On October 27, 2016, Oliver filed a motion for additional briefing based on *Hurst v. State*, __ So. 3d __, 2016 WL 6649941 (Fla. Oct. 14, 2016) which this Court granted on November 2, 2016. Oliver's *Supplemental* Initial Brief was filed on November 17, 2016. This *Supplemental Answer* Brief follows.

ARGUMENT

ISSUE I: ANY SENTENCING ERROR UNDER *HURST* COULD ONLY BE HARMLESS UNDER THESE FACTS WHERE THE JURY RETURNED TWO UNANIMOUS SENTENCES OF DEATH, AND ONLY AVOID ARREST AND CCP WERE NOT SPECIFICALLY PROVEN OR FOUND BY THE JURY AND THE EVIDENCE OF AVOID ARREST AND CCP ARE BOTH SO CLEAR AS TO BE INCONTROVERTABLE (RESTATED).

Appellant argues that Oliver's case should be remanded for a new sentencing phase because he was sentenced to death in noncompliance with *Hurst v. Florida*,[1] in that the jury did not make all of the findings necessary to allow imposition of the death penalty. He further argues that the record does not support the conclusion that the sentencing error was harmless beyond a reasonable doubt. Specifically, Appellant asserts that the State cannot show that no reasonable jury could find the State failed to prove that Oliver murdered Andrea Richardson and Krystal Pinson in a cold, calculated, and premeditated manner. These arguments are without merit.[2]

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[1] Appellant conflates two distinct arguments stating, "[t]his failure violates the rule in *Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016), which requires the jury to make unanimous findings." However, the State is responding to the *Hurst* argument for which additional briefing was granted, and because *Hurst* addressed the old statute, under which Oliver was sentenced, and is therefore the relevant analysis here. *Perry*, on the other hand, contemplates pending prosecutions under an entirely new, statute enacted by the legislature (House Bill 7101) and signed by the Governor on March 7, 2016.

[2] Notably, Appellant did not raise the issue in his *Initial Brief* that the trial court erroneously applied the avoid arrest aggravator, but did raise the issue as to the application of the CCP aggravator.

Where the alleged error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. *Hurst v. State*, 2016 WL 6649941, at *23 (citing *Zack v. State*, 753 So. 2d 9, 20 (Fla. 2000)). "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 v. State*, __ So. 3d __, 2016 WL 6649941, *29 (Fla. Nov. 10, 2016).

Primarily, Appellant's argument that this case is similar to *Hurst* is incorrect. Hurst was sentenced to death by a bare majority of 7-5; had no prior felony convictions; was not on felony probation; and did not murder two people. Conversely, both of Oliver's death sentences were unanimous. Contrary to Appellant's assertion that this "Court cannot determine which sentence the jury would have recommended if it had been instructed to return unanimous findings as well as a unanimous verdict," this Court, like in *Davis v. State*, 2016 WL 6649941, at *29 (Fla. Nov. 10, 2016), can very clearly determine that any *Hurst* error would be harmless as the jury unanimously found – twice – that the aggravating factors outweighed the mitigating circumstances and twice determined that death was the appropriate punishment. In *Davis*, this Court stated:

> 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.
>
> …
>
> 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.

Davis v. State, 2016 WL 6649941, at *29.

Moreover, here, like in *Davis*, Appellant murdered two victims, and the evidence in support of the four aggravating circumstances found as to both victims was significant and essentially uncontroverted. In the sentencing order, the trial court found the following aggravating factors for both victims.

1) The Defendant has previously been convicted of another capital felony or a felony involving the use or threat of violence to the person: a 1995 robbery with a firearm/deadly weapon; a 2002 resisting arrest with violence; and the contemporaneous first degree murders of Pinson and Richardson. (Great Weight);

2) The capital felony was committed while the Defendant was engaged in a burglary. (Great Weight);

3) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. (Great Weight); and

4) The murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (Great Weight).

The trial court found that the greater weight of the evidence established the following non-statutory mitigation and accorded each factor its corresponding weight.

1) The Defendant completed high school. (No Weight);

2) The Defendant attempted to further his education by attending Le Cordon Bleu Culinary Academy. (Little Weight);

3) The Defendant attempted to further his education by attending Daytona State College. (Little Weight);

4) The Defendant grew up in a household with both parents present. (Some Weight); and

5) The Defendant grew up attending church regularly and continued to attend as an adult; he sang gospel songs, played Christian music, and had been a drummer in a Christian band. (Some Weight).

On June 15, 2012, the Court followed the jury's recommendation and imposed two death sentences for the two murders. (V2, R297-316; V6, R934-955).

The only aggravators not admitted or specifically found by the jury are CCP and avoid arrest. However, based on the record before this Court, it is clear beyond a reasonable doubt that any reasonable jury would have also unanimously found that Oliver murdered Krystal Pinson and Andrea Richardson in a cold, calculated,

and premeditated manner. This Court has established a four-part test to determine whether the CCP aggravating factor is justified: (1) the killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); and (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and (3) the defendant must have exhibited heightened premeditation (premeditated); and (4) there must have been no pretense of moral or legal justification. *Evans v. State*, 800 So. 2d 182, 192 (Fla. 2001) (quoting *Jackson v. State*, 648 So.2d 85, 89 (Fla.1994)). Further, this Court has noted that "[t]he facts supporting CCP must focus on the manner in which the crime was executed, e.g., advance procurement of weapon, lack of provocation, killing carried out as a matter of course." *Salazar v. State*, 991 So. 2d 364, 374–75 (Fla. 2008) (citing *Looney v. State*, 803 So. 2d 656, 678 (Fla. 2001); *Rodriguez v. State*, 753 So. 2d 29, 48 (Fla. 2000)). The facts of this case, as recounted throughout this sentencing order, clearly show that Defendant had a premeditated design to kill the victim. The evidence leaves no doubt that the heightened premeditation required for CCP was also established.

In its sentencing order, the trial court found that Oliver made a threat against Krystal Pinson that he asked Leander Watkins to communicate to her, and Oliver was seen in Titusville near the scene of the crime by various witnesses wearing a wig to disguise his appearance. Oliver told Sheena Camiscioli that Krystal Pinson

"was on a lot of his paperwork" indicating that she had been communicating with law enforcement, he was tired of her calling the police on him. He entered Andrea Richardson's residence with a fully loaded semi-automatic pistol at 2:00 AM in the morning after walking along a secluded path from a hidden motor vehicle. Oliver executed Pinson while she tried to crawl under a bed, and Richardson as he attempted to flee, half-clothed, from the residence, posing no threat to Oliver. Oliver stated he took the time to open dresser drawers to make it appear that the house had been searched, he admitted his thinking was to make it look as though Richardson was the victim of a drug-related crime. (V6, R936-41; 947-49).

As to the avoid arrest aggravator, the evidence presented contradicts the Appellant's theory that Oliver merely "panicked." (*Supp. IB* at 8). For example, Oliver admitted that, although he was bald, he wore braid and dread wigs during this time period. (V17, R1976, 1988, 1989). He admitted that he was driving a different car no one would have recognized. (V17, R1987-88; V18, R2065). Oliver told Sheena Camiscioli that "he had to shoot Drell [Andrea "Drell" Richardson] because he was there and he was running out of the back door" to escape. (V16, R1676, 1687).

To the extent Appellant also attempts to improperly raise an entirely new claim that the trial court improperly allowed the jury to be instructed on aggravators subsequently not found by the jury, including HAC as to Pinson, this

new claim comes almost three years after the *Initial Brief*, and is inappropriate and insufficiently briefed in this limited supplemental briefing granted only on the applicability of *Hurst.*[3] Contrary to Appellant's position, the evidence presented at trial clearly supports the instruction on the HAC aggravator to the jury. *Kopsho v. State*, 84 So. 3d 204, 219 (Fla. 2012). While "[g]enerally, shooting deaths do not qualify as HAC because they are instantaneous, or nearly so ... unless the shooting is accompanied by additional acts resulting in mental or physical torture to the victim," Krystal Pinson was shot eight (8) times while she attempted to hide under the bed. The evidence was clear that she did not die or lose consciousness immediately, and that the wounds Oliver inflicted upon her would have caused her to suffer mentally and physically. *See Allred v. State*, 55 So. 3d 1267, 1280 (Fla. 2010); *Wuornos v. State*, 644 So. 2d 1000, 1007 (Fla. 1994); *Walls v. State*, 641 So. 2d 381 (Fla. 1994). The trial court discussed these additional factors present in this case supporting HAC in the sentencing order:

> The cause of death of Krystal Pinson was multiple gunshot wounds to the torso and extremities. Although she had several wounds to her upper torso, there was extensive bleeding which would indicate that the victim remained alive for quite some time after the wounds. She

[3] See Appellant's motion filed October 27, 2016, ("Comes now the Appellant, and moves this Court for an order allowing the parties to **further brief the applicability of *Hurst v. Florida*, 136 S. Ct. 616 (2016), to this case** …) (emphasis added) and this Court's subsequent Order dated November 2, 2016, granting Appellant's motion. *See also, Duckett v. State*, 918 So. 2d 224, 238 (Fla. 2005) ("By relinquishing jurisdiction, we did not intend to give Duckett the opportunity to assert new claims.")

> was obviously shot while on the bed yet her body was found on the floor next to the bed. The killer and the victim were obviously moving around the room as evidenced by the location of the projectiles, location of the spent cartridges, angle of bullet pathways through the victim's body, and the variation in distances of the shots as evidenced by the stipple patterns. Many of the victim's wounds had stippling or powder bums. This would indicate that the shots were fired at close range. The multiple gunshot wounds entering the body from various angles would suggest that the victim was consciously attempting to escape or avoid the shots. The multiple shots at close range would indicate lack of conscience and lack of pity and an intent to torture. The most serious wound would be the shot numbered 3. Because it was described as having a tight stipple pattern, it would appear unlikely that it was the first wound inflicted. This would further lead to the conclusion that the Defendant lacked conscience or pity, and was intent on inflicting maximum damage up close and personal. The only conclusion that should be reached from the physical evidence is that the death of Krystal Pinson did not result quickly. There is credible competent substantial evidence to support the common sense conclusion that the victim suffered fear, emotional strain, and terror as she was moving about the bedroom trying to avoid her ultimate death from the shots being fired at her by the Defendant as she tried to escape.

(V6, R946). Ultimately, even though the aggravating factor was not found, the trial court did not err in instructing the jury on HAC was there was substantial evidence to support it, and neither *Hurst* nor *Perry* entitle Oliver to relief.

In comparison to the aggravation found, Appellant's mitigation was so tenuous; any rational factfinder would have determined that the aggravating factors outweighed the mitigating factors. The trial court found no statutory mitigation and only five (5) non-statutory mitigating factors were proven. (V6, R949-51). While Appellant presented evidence of his intact family, religious upbringing, and desire

to continue his education, this evidence was not compelling and only garnered "some" or "little" weight. The evidence presented at trial showed that Oliver made a conscious decision to murder Krystal Pinson and Andrea Richardson to prevent them from being witnesses against him. Thus, it is clear beyond a reasonable doubt that a rational jury would have – and did – unanimously find that there were sufficient aggravating factors to outweigh the minimal mitigating circumstances. Appellant asks, "[h]ow can a conviction based upon the jury's failure to find the necessary elements needed to justify a death sentence ever be harmless when the statute involved is subsequently declared to be unconstitutional?" *(Supp. IB* at 6). This Court answered this question in *Davis* when it reasoned, "[f]rom these [standard jury] instructions, we can conclude that the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendations. *Davis v. State*, 2016 WL 6649941, at *29. Any *Hurst v. Florida* error, like in *Davis*, was harmless because there is no reasonable possibility that the error would have affected the unanimous sentence recommendation.

ISSUE II: THE DEATH PENALTY IS APPROPRIATE IN THIS CASE

Appellant argues that, "in *Perry v. State*, 2016 WL 6036982 (October 14, 2016), this Court construed Sec. 921.1414, Fla. Stat. in order to conform it to the requirements laid down by the United States Supreme Court and this Court and to breathe life into an otherwise unconstitutional statute." (*Supp. IB* at 13). However,

Perry involved a pending prosecution where the death penalty was being sought during the enactment of the new law, and not, as here, a case in which the defendant was previously sentenced to death under the statute subsequently found unconstitutional. *Perry* answered the question, "whether the newly enacted death penalty law, passed after the United States Supreme Court held a portion of Florida's capital sentencing scheme unconstitutional in *Hurst v. Florida*, ––U.S. ––, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016) ('*Hurst v. Florida'*), may be constitutionally applied to pending prosecutions for capital offenses that occurred prior to the new law's effective date" by finding, that the death penalty itself was not declared unconstitutional. *Perry* (citing *Hurst*).

In *Perry*, this Court held, "[t]herefore, we answer the second certified question in the negative, holding that the Act cannot be applied constitutionally to pending prosecutions because the Act does not require unanimity in the jury's final recommendation as to whether the defendant should be sentenced to death. *Perry v. State*, 2016 WL 6036982, at *1. This case is a "pipeline" case—that is, a case in which this Court has not yet issued a mandate on direct appeal – therefore the defendant "is entitled to the benefit of the controlling law in [*Hurst*] in effect at the time of appeal". *Castano v. State*, 119 So. 3d 1208, 1210–11 (Fla. 2012) (Pariente, J concurrence); *See Mitchell v. Moore*, 786 So. 2d 521, 529 (Fla. 2001) ("Normally, a new rule which is not a fundamental change in the law, but merely

an evolutionary refinement is generally applied prospectively to most cases, retrospectively to certain nonfinal cases ('pipeline' cases), but never to final cases.). However, while the State agrees with Appellant's argument as to the distinct provinces of the legislators and the courts in each's function to respectively enact and interpret legislation, it simply does not follow that Oliver is entitled to a life sentence under any legal theory.

In *Perry*, this Court rendered the following analysis:

> This Court has an obligation to construe a statute in a way that preserves its constitutionality. *See State v. Harris*, 356 So. 2d 315, 316–17 (Fla. 1978) (construing section 812.021(3), in a constitutional manner where the statute was procedurally flawed); *see also Fla. Dep't of Children & Families v. F.L.*, 880 So. 2d 602, 609 (Fla. 2004) (stating that the Court has an obligation to construe a statute in a way that preserves its constitutionality). It is this Court's duty to "save Florida statutes from the constitutional dustbin whenever possible." *Doe v. Mortham*, 708 So. 2d 929, 934 (Fla. 1998). This Court is bound to "resolve all doubts as to the validity of the statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with legislative intent." *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 207 (Fla. 2007) (citation omitted). However, this Court may only do so, if "to do so does not effectively rewrite the enactment." *State v. Stalder*, 630 So. 2d 1072, 1076 (Fla. 1994) (quoting *Firestone v. News–Press Publ'g Co.*, 538 So. 2d 457, 459–60 (Fla. 1989)).

Perry, at *6.

Consistent with this Court's decision in *Hurst*, this Court construed section 921.141(2)(b) 2. to require the penalty phase jury to "unanimously find beyond a reasonable doubt that each aggravating factor exists, that sufficient aggravating

factors exist to impose death, and that they outweigh the mitigating circumstances found to exist." *Perry*, at *7. Accordingly, under the same theory this Court employed in *Davis*, "[e]ven 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;" so "[f]rom these instructions, we can conclude that the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendations." *Davis*, at *29. Oliver was sentenced under a statute which only required a bare majority vote for death, and yet the jury recommended death unanimously on both counts. He is not entitled to relief.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentence of death.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Supplemental Answer Brief has been electronically served via the E-Portal to: Nancy Ryan, Assistant Public Defender, ryan.nancy@pd7.org; and O.H. Eaton, Jr., Assistant Public Defender, Eaton.oscar@pd7.org, 444 Seabreeze Blvd., Suite 210, Daytona Beach, FL 32118 on November 28, 2016.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Timers New Roman 14 point font.

Respectfully submitted and certified,

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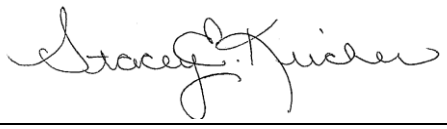
/s/ 

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