IN THE SUPREME COURT OF FLORIDA
Case Nos. SC14-1775 & SC15-1233

RICHARD KNIGHT,
Appellant,
v.

STATE OF FLORIDA,
Appellee.

RICHARD KNIGHT,
Petitioner,

v.

JULIE L. JONES, ETC.,
Respondents.

SECOND SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The State's Second Supplemental Answer Brief (SSAB) is notable for what it fails to address much less dispute. In fact, much of the brief is a verbatim repetition of arguments that the State raised in its first Supplemental Answer Brief, which was filed before this Court's decisions in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and *Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016). Most of the State's arguments are therefore obsolete and are thus not based on the current state of Florida law. To the extent that the State attempts to argue that the error present in Mr. Knight's case is harmless beyond a reasonable doubt, its arguments are not based on an accurate reading of the record in this case under the legal standards attendant to conducting a proper harmless error. Mr. Knight is therefore entitled to relief.

A. *Hurst v. State* and Retroactivity under *Witt.*

In his second supplemental brief, Mr. Knight argued that this Court's decision in *Hurst v. State* has now made it clear that "the jury—not the judge—must be the finder of every fact, and thus every element necessary for the imposition of the death penalty." *Hurst*, 202 So. 3d at 53. These facts include "the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." *Id*. Moreover, the Court held that under

the Sixth Amendment, all the statutory elements "must be found unanimously by the jury." *Id*. at 53-54. *Accord Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016). And it determined that, under the Eighth Amendment and its "evolving standards" test, juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment. *Hurst,* 202 So. 3d at 59-60.

The State's arguments, however, are frozen in time. The State completely fails to acknowledge *Hurst v. State*'s holding, preferring to repeat verbatim its arguments from its first supplemental brief and argue that all *Hurst v. Florida* required was "the judge alone" to find "an aggravating circumstance" (SSAB at 4). 136 S. Ct. 616 (2016).This argument is not only *not* based on the actual holding by the Supreme Court in *Hurst v. Florida* but it was expressly repudiated by this Court in *Hurst v. State*:

> Accordingly, ***we reject the State's argument that Hurst v. Florida only requires that the jury unanimously find the existence of one aggravating factor and nothing more.*** The Supreme Court in *Hurst v. Florida* made clear that the jury must find 'each fact necessary to impose a sentence of death,' 136 S. Ct. at 619, 'any fact that expose[s] the defendant to a greater punishment,' *id.* at 621, 'the facts necessary to sentence a defendant to death,' *id*., 'the facts behind' the punishment, *id*., and 'the *critical findings* necessary to impose the death penalty,' *id.* at 622 (emphasis added). Florida law has long required findings beyond the existence of a single aggravator before the sentence of death may be recommended or imposed. *See* § 921.141(3), Fla. Stat. (2012).

Hurst, 202 So. 3d at 53 n.7 (emphasis added).

Because it fails to acknowledge *Hurst v. State*'s actual holding and instead relies on a misreading of *Hurst v. Florida*, the State's retroactivity argument is girded on a rotten foundation. Indeed, the State merely regurgitates its earlier arguments that *Hurst v. Florida* is not retroactive under the federal standard set forth in *Teague v. Lane*, 498 U.S. 288 (1989) (SSAB at 4-9). But this is not Florida's retroactivity test, as this Court made clear just recently in *Walls v. State*, 2016 WL 6137287 (Fla. Oct. 20, 2016) (determining retroactivity of *Hall v. Florida*[1] under Florida's retroactivity test set forth in *Witt v. State*[2]). *See also Falcon v. State*, 162 So. 3d 954, 960 (Fla. 2015) (holding that *Miller v. Alabama*, 132 S. Ct. 2455 (2012), was to be applied retroactively under the *Witt* test).

As for attempting to argue that *Witt* is not satisfied, all the State argues is that this Court should stand by its earlier decision in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005), where this Court held that *Ring v. Arizona,* 536 U.S. 584 (2002) did not apply retroactively in Florida. But *Ring* is not *Hurst v. Florida. Ring* did not overrule seminal precedential cases relied on by this Court for decades in order to reject Sixth and Eighth Amendment challenges to Florida's capital sentencing statute. *Hurst v. Florida* did, as this Court recognized in *Hurst v. State*: "In *Hurst v.*

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[1] 134 S. Ct. 1986 (2014).

[2] 387 So. 2d 922 (Fla. 1980).

Florida, the Supreme Court overruled its earlier decisions in *Hildwin* [*v. Florida,* 490 U.S. 638 (1989)] and *Spaziano* [*v. Florida*, 468 U.S. 447 (1984)], which 'summarized earlier precedent to conclude that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by a jury.'" *Hurst*, 202 So. 3d at 47 n.3 (citations omitted). This Court in *Hurst v. State* also recognized that *Hurst v. Florida* required the abrogation of a number of this Court's cases, including the seminal case of *Tedder v. State*, 322 So. 2d 908 (Fla. 1975). *Hurst*, 202 So. 3d at 44. This Court acknowledged that *Tedder* was one of those cases "upon which this Court has [] relied on in the past to uphold Florida's capital sentencing statute." *Id*. The substantive and substantial upheaval in Florida's capital sentencing jurisprudence that has occurred in the wake of *Hurst v. Florida* cannot be overstated and is further evidence mandating full retroactivity.[3]

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[3] Despite acknowledging that Mr. Knight preserved at trial and on appeal his relevant challenges to Florida's capital sentencing scheme, the State's brief is silent on Mr. Knight's argument that he is entitled to *Hurst v. Florida*'s holding under *James v. State*, 615 So. 2d 668 (Fla. 1993). The State's persistent and deafening silence in its written submissions on *James*'s applicability to Mr. Knight must be taken as a concession that Mr. Knight is entitled to the benefit of *Hurst v. Florida* under *James*.

B. Harmless Error.

Not surprisingly, the State's argument for harmless error in Mr. Knight's case relies heavily on the analysis undertaken by this Court in *Davis v. State*, 2016 WL 6649941 (Fla. Nov. 10, 2016). However, it admits that the *Davis* analysis is not entirely applicable to Mr. Knight's case given that the jury in Mr. Knight's case was only instructed "consistent with *most of* the instructions given in *Davis*" (SSAB at 12) (emphasis added). Of course, as explained below, the instructions given in *Davis* but not given in Mr. Knight's case, along with the qualitative differences in the two cases and the aggravating circumstances found by the court in each case, are critical in terms of assessing whether the State can meet its "extremely heavy burden" of establishing harmlessness beyond a reasonable doubt. *Hurst*, 202 So. 3d at 68.

It is true, as the State notes, that Mr. Knight's jury was instructed that it was to consider whether an aggravating circumstance had been proven, that sufficient aggravators existed to justify the death penalty, and whether the mitigating circumstances outweighed the aggravating circumstances (SSAB at 12). But the State ignores what the jurors *were not told.* Critical to the harmless error analysis in Mr. Knight's case is the fact that the *jury* was *not* instructed that it could recommend a life sentence as an expression of mercy or that individual jurors were neither required nor compelled to vote for a death sentence even if there were

sufficient aggravating factors that outweighed the mitigating factors.[4] This critical instruction was not given in Mr. Knight's case but *was* given in *Davis*, a factor which this Court found important enough, along with the number of aggravating factors based on "significant" and "essentially uncontroverted" evidence, to sustain a finding of harmlessness beyond a reasonable doubt. *Davis*, 2016 WL 6649941 at *29-30 (noting that jury instructed that "it was not required to recommend death even if the aggravators outweighed the mitigators"). The State barely mentions the lack of this critical instruction except to make the rather incredible argument that "the *judge* knew that a death sentence did not have to be imposed even though a jury had recommended one" (SSAB at 13) (emphasis added). That the *judge* knew she did not have to impose a death sentence is not the issue but certainly if it was important enough for the judge to know, the jury should also have been told. The *jury did not know* that a death sentence did not have to be imposed because it was neither required nor compelled to vote for death. *That* is the critical element missing in Mr. Knight's case that dispositively distinguishes his case from *Davis*.

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[4] Several requests for such an instruction were made by defense counsel prior to the penalty phase but, as the State candidly admits, the court refused to so instruct the jury (SSAB at 2) ("The court denied the proposed instruction as it did with other requested instructions to tell the jury they could use mercy to recommend a life sentence and that a death sentence was never required under the law").

Moreover, *Davis* involved a much more premeditated and highly aggravated case involving the setting of 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.[5] There were *six* aggravating factors found by the trial court in *Davis* as to victim Luciano, and an additional aggravator (for a total of seven) for victim Bustamonte. *Davis*, 2016 WL 6649941 at *11. And, in contrast to *Davis*, Mr. Knight's counsel, as the State concedes, contested the evidence of the aggravators argued by the State as well as their relative weight, including the HAC factor (SSAB at 15) ("the defense did contest the HAC aggravator for both killings"). That evidence might support the HAC factor is not a proper harmless-error analysis; harmless-error review is neither a sufficiency of the evidence review "nor a device for the appellate court to substitute itself for the trier-of-fact by simply reweighing the evidence." *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986). The State's argument that the facts support a finding of HAC also overlooks that it is the *sufficiency* of the aggravation when weighed against the mitigation that the jury must also exclusively find under *Hurst*. *See Hallman v. State*, 560 So. 2d 223, 227 (Fla. 1990) ("the jury may well have decided that, although four aggravating factors were proved, some were entitled to little weight"). Here, the

[5] Davis was convicted of six counts: two counts of first-degree murder, one count of attempted first-degree murder, armed robbery, and first-degree arson. *Davis*. 2016 WL 6649941 at *10.

jury made no findings whatsoever of the critical facts necessary for the imposition of the death penalty.

The State also argues that the jury was told of the "seriousness" of its task in rendering an advisory recommendation to the court and thus this does not undermine any reliance on its ultimate 12-0 recommendations to the court that it impose the death penalty on Mr. Knight (SSAB at 13-15). That this Court previously rejected claims based on *Caldwell v. Mississippi*, 472 U.S. 320 (1985), is not the point given the present posture of Mr. Knight's case and the status of the law now. In order to rely on an advisory verdict to establish harmless error, jurors must be "conscious of the gravity of their task" at arriving at findings necessary for the imposition of the death penalty because "[i]n a capital case, the gravity of the proceeding ***and the concomitant juror responsibility*** weigh even more heavily." *Hurst*, 202 So. 3d at 63 (emphasis added). This means that, post-*Hurst*, the individual jurors must know that each will bear the responsibility for a death sentence resulting in the defendant's execution because each juror possesses the power to require the imposition of a life sentence by voting against a death recommendation. *See Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016). It also means that jurors must be instructed that they can individually vote for mercy or at least be instructed that they are neither required nor compelled to vote for a death sentence. But in Mr. Knight's case the jury was not told this and it was

actually told the opposite: that Mr. Knight could be sentenced to death regardless of the recommendation, thus relieving the jurors of individual responsibility. This further precludes the State from establishing harmlessness beyond a reasonable doubt in this case.

The State also essentially ignores the fact that an extra "thumb" was placed on "death's side of the scale" in this case when the State argued, and the jury was instructed on, the avoiding arrest aggravator later not found by the trial judge. *See Stringer v. Black*, 503 U.S. 222, 232 (1992). Thus, Mr. Knight's jury was not only mislead about its sentencing responsibility and the gravity of its task; its recommendations were skewed in favor of death based on the argument and instruction on an inapplicable aggravating circumstance. Alone and in conjunction with the other factors that undermine any reliance on the jury vote here, this Court may not assume it would have made no difference that the jury was instructed on an invalid aggravating circumstance.

The State also fails to contemplate that, prior to Mr. Knight's penalty phase, defense counsel filed a motion to permit argument and testimony at the penalty phase concerning reasonable doubt as to the proof of aggravating circumstances (V60/403-05). In the motion, Mr. Knight argued, in part:

> 4. In order to counter the allegations that the State has proven prior violent felony, heinous, atrocious and cruel, during the commission of the felony of child abuse aggravator, and victim under the age of twelve aggravator, it is urged that the

> Court permit counsel to present further evidence and to argue to the jury that the State has failed to meet its burden to establish beyond a reasonable doubt that these aggravating factors exist as to the Defendant. Although it may be argued that the Defendant was a principle in these acts, the jury may well find, consistent with *Edmond/Tyson* that the Defendant's actions are not sufficiently culpable to merit the imposition of death if the jury were to have a reasonable doubt as to whether or not the Defendant was the actual perpetrator of all of the criminal conduct for which he was convicted.
>
> 5. It is understood that the Appellate Courts have consistently refused Defendant's request to argue residual or lingering doubt as a mitigating factor per se.[] This mitigating factor of residual doubt is requested in this case in the interest of fairness. However, the evidence of a second culprit is not offered in this case to establish merely lingering doubt as a mitigating factor. Rather, it is being offered to counter the proof that the Defendant is guilty of all of the aggravating facts which the State will be offering.

(*Id*.) (footnote omitted). This motion, too, was denied (V60/423). Prior to closing argument at the penalty phase, Mr. Knight renewed his motion, noting that the State had brought into the courtroom "all of the evidence that was submitted at trial" to presumably use "to argue various aggravating factors" (V55/1101). Defense counsel reminded the court that he wanted to also argue to the jury and present evidence that would have negated some of the aggravating circumstances "such as contemporaneous [capital felony conviction] . . . [and] victim under the age of twelve" (*Id*. at 1102). Defense counsel argued that it would be unfair to deprive Mr. Knight of the ability to argue that these aggravators were not established, or were due lesser weight, but the court refused to alter its prior ruling

prohibiting the defense from arguing these points (*Id*. at 1102). This fact, too, must be considered in assessing the harm to Mr. Knight because it further undermines reliance on the jury's 12-0 recommendations where the defense attempted to present evidence and argument to counter the existence and weight of the aggravating circumstances.

Finally, the State's attempt to argue that the contemporaneous conviction aggravating circumstance somehow insulates Mr. Knight's case from *Hurst v. Florida* or satisfies its burden to show harmlessness beyond a reasonable doubt has been rejected by this Court. *See Franklin v. State*, 2016 WL 6901498 at *6 (Fla. Nov. 23, 2016) (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*"). *Johnson v. State*, 2016 WL 7013856 at *3 (Fla. Dec. 1, 2016) (same). The Court granted relief in *Johnson* despite the fact that it was a case which "obviously include[d] substantial aggravation." But in light of the mitigation, as well as the non-unanimous recommendation, the Court could not conclude "beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *Id*. (quoting *State v. Ring*, 65 P.3d 915, 946 (Ariz. 2003)).

Under these cases, and for the reasons set forth herein and in Mr. Knight's other written submissions, Mr. Knight submits that the State cannot meet its

extremely heavy burden of establishing harmlessness beyond a reasonable doubt, and a new sentencing proceeding must be granted.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on this 14th day of December, 2016, and opposing counsel will be served on this date. Counsel further certifies that this brief is typed in Times New Roman 14-point font.

/s/ Todd G. Scher
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