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 INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This Second Supplemental Brief is being filed in accordance with the Court's Order of November 4, 2016. The following symbols will be used to designate references to the record in this appeal:

"V. R." – volume and page number of record on direct appeal to this Court;

"V. PCR." – volume and page number of record on appeal to this Court following the rule 3.851 motion;

All other references will be self-explanatory.

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INTRODUCTION

In his first supplemental brief following the decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), Mr. Knight presented the Court with the following hypothetical scenario: that the jury, at his guilt phase, was told multiple times in jury instructions and admonitions from the court that its role in making the necessary factual findings underlying its verdict was merely "advisory" and that its role was, when all was said and done, to merely "advise and recommend" to the trial court by only a majority vote that the trial court find Mr. Knight guilty. In other words, Mr. Knight analogized the jury's role at the guilt phase to what its role actually was, prior to *Hurst v. Florida*, at his penalty phase. Mr. Knight queried whether this type of process would satisfy the Sixth Amendment. The answer, of course, is obvious. It would not.

But now we know that there *is* equivalence between the Sixth Amendment verdict the jury reaches at a guilt phase of a capital trial and at the type of verdict the jury must render at the penalty phase. We know this because this Court said so in *Hurst v. State*, 2016 WL 6036978 at *10 (Fla. Oct. 14, 2016): "[J]ust as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements of that must be found unanimously by the jury." *See also id.* ("This recommendation is

tantamount to the jury's verdict in the sentencing phase of trial; and historically, and under explicit Florida law, jury verdicts are required to be unanimous"). Yet, in Mr. Knight's case, there is one manifestly significant difference between his jury's role at the guilt phase and at the penalty phase: what it was instructed about its role and thus what it understood its role to be.

At his penalty phase, his jury rendered "only an advisory verdict without specifying the factual basis of its recommendation." *Hurst*, 2016 WL 6036978 at *8. But, under the Sixth Amendment, in order to make an advisory verdict meaningful for any real purpose,[1] such as assessing the harmful nature of the Sixth Amendment error here, the jurors, as this Court acknowledged, must be "conscious of the gravity of their task" at arriving at findings necessary for the imposition of the death penalty because, after all, "[i]n a capital case, the gravity of the proceeding ***and the concomitant juror responsibility*** weigh even more heavily" than in a regular criminal case. *Hurst*, 2016 WL 6036978 at *18 (emphasis added). *See also id*. (noting importance of a "meaningful jury deliberation on all the facts concerning aggravating factors and mitigating circumstances, and on the ultimate finding of whether death has been proven to be the appropriate penalty in any individual case").

[1] Mr. Knight uses the phrase "real purpose" because, as the Supreme Court explained, the "jury's mere recommendation is not enough" to supplant actual fact findings under the Sixth Amendment. *Hurst*, 136 S. Ct. at 619.

The recent decisions by this Court in *Hurst v. State*, 2016 WL 6036978 (Fla. Oct. 14, 2016), *Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016), and *Walls v. State*, 2016 WL 6137287 (Fla. Oct. 20, 2016), all serve not only to establish that Sixth Amendment error occurred at Mr. Knight's penalty phase, but that the State will be unable to establish, beyond a reasonable doubt, that the error was harmless. Thus, Mr. Knight is entitled to a resentencing.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

A. Pretrial motions.

In addition to the pretrial motions attacking the constitutionality of Florida's death penalty scheme that were detailed in Mr. Knight's first supplemental brief, some additional matters were litigated and are pertinent to the specific issues addressed in this second supplemental brief.

1. Requested instructions on jury's ability to dispense mercy.

Mr. Knight's counsel requested several special instructions relating to the jury's ability to extend mercy to Mr. Knight notwithstanding any "findings" it may have made with regard to the aggravating circumstances, their sufficiency, and whether the aggravating circumstances outweighed the mitigating circumstances. One special instruction provided, *inter alia*, "In no event does the law require a recommendation of the death penalty" (V50/710). Another instruction would have told the jury that "You are never under a duty to impose death unless you conclude as a matter of your own independent moral judgment that death is the only appropriate penalty" (V 63/1025). Yet another instruction would have told the jury that "If you see fit, and regardless of your other findings on the other issues I have set out for you, you are free to afford RICHARD KNIGHT mercy in these proceedings and recommend a sentence of life imprisonment without parole (V63 /1041). The defense also requested a special verdict form (V 63/1026). All of these

requests were objected to by the State and ultimately denied by the trial court. The jurors were never informed of their ability to dispense mercy to Mr. Knight irrespective of their ultimate advisory recommendation.

2. Requested instructions to ensure jurors' sense of responsibility was not diminished in violation of the Eighth Amendment and *Caldwell v. Mississippi*.

Mr. Knight's counsel also, in various pretrial motions, challenged the constitutionality of Florida's death penalty statute because it allowed the jurors to return a mere "advisory" recommendation. For example, in an omnibus motion entitled "Motion to Declare the Florida Death Penalty Statute Unconstitutional Based Upon the Clear Mandate of the United States Supreme Court Decision of *Ring v. Arizona*," Mr. Knight's counsel leveled a series of constitutional attacks on the capital sentencing statute, including one based on the advisory role of the jury. He noted that the Sixth Amendment cannot be satisfied "by a jury which is told that '[f]inal decision as to what punishment shall be imposed rests ***solely with the judge*** . . . however, the law requires that you, the jury, render to the court an ***advisory sentence*** as to what punishment should be imposed . . .' or 'it is now your duty to ***advise*** the court as to what punishment should be imposed upon the defendant for [his][her] crime of Murder in the First Degree. . . . ***the final decision as to what punishment shall be imposed is the responsibility of the judge.***"' (V62/819-20) (emphasis in original). Mr. Knight noted that this Court had upheld

these instruction as consistent with *Caldwell v. Mississippi*, 472 U.S. 320 (1985), because, at the time, a Florida penalty phase jury was not the ultimate decision-maker at the sentencing phase (V62/819 n.19). And Mr. Knight's jury, over his objections, was repeatedly told and instructed that its role was merely advisory and that it was required only to provide the court with an "advisory opinion" or "recommendation." *See, e.g.* V15/1488-89; V55/1145-46; 1149; 1153; 1154; 1155.

B. Objection to, argument regarding, and court's ultimate rejection of avoiding arrest/witness elimination aggravating circumstance.

Prior to the penalty phase, Mr. Knight objected to the State being allowed to argue, and the jury being instructed on, the avoiding arrest/witness elimination aggravating circumstance[2] but the State convinced the trial court to instruct the jury on this aggravator:

> We object to number two, avoid arrest aggravator. It's almost never the case where one can be convicted of avoid arrest aggravator, where it can be proven the avoid arrest aggravator, where the victim is not a police officer.
>
> That's the classic avoid arrest aggravator. There certainly are other avoid arrest aggravators, aggravating circumstances in situations. This, however, is not one of them.
>
> In order for the jury to find that, it would have to be based on pure and utter speculation that the motive to kill Hanessia Mullings was to eliminate her as a witness.
>
> Of course, it's possible that that could have been a motive, there's no substantive evidence that's been presented to the Court nor

[2] *See* §921.141(5)(e).

could there be to establish that's the motive. It would be pure utter speculation and theory to present this aggravator to the jury, so we object on that ground.

THE COURT: It almost doesn't jive with the other theories.

MR. TONY LOE [ASA] May I be heard?

THE COURT: Sure.

MR. TONY LOE: With respect to – there's been no evidence that his was in the commission of any other forcible felony. No sexual assault, no burglary, no arson. We'll stipulate, no other felonies.

So therefore, she's four years old. If it were a stranger, the ability of a four year old to identify a stranger, who's done something terrible, such as a burglary or murder of her mother, that four year old child would be virtually unable to ever identify the attacker, except that the attacker has lived in her residence for a period of at least six months.

What motivation would an individual, any individual, have to kill a four year old? And that' one of the reasons why this is such a difficult case. Because we're at a loss, as a society, as to why anyone would kill a child.

The only reason to kill the child would be to eliminate her from being able to tell someone else what happened to her mommy. There's no other reason. And that's why the State felt that it was a viable and well-founded aggravator with respect to Hanessia Mullings' death.

THE COURT: Anything else on that Mr. Halpern?

MR. HALPERN: The only thing I would ask, and it occurs to me that it's never been proven who of the two was killed first, so again they are speculating on that possibility. It could have been the child was killed first. We don't know. It's all speculation.

> THE COURT: I think it was Hanessia who died first. She bled to death.
>
> MR. HALPERN: With regard to the aggravating circumstance
>
> THE COURT: With regard to the aggravating circumstances, I think Mr. Loe's argument is well taken.
>
> MR. HALPERN: Note the defense's objection.

(V50/691-694).

During its closing argument at the penalty phase, the State highlighted the avoid arrest aggravating circumstance and noted that it increased the number of aggravating circumstances applicable to Hanessia's death. *See* V55/1105 (emphasis added) ("[t]here will be *four aggravators* with respect to Hanessia's death and two aggravators you'll be instructed about regarding Odessia's death"); *id*. (emphasis added) ("With respect to Hanessia, there are *four aggravators* that the State's presented to you, and we'd ask you to consider"). The State then implored the jury not only to find that the avoid arrest aggravator applied to Hanessia's death but that the avoid arrest aggravator proved Mr. Knight's motive for killing Hanessia and *that was why Hanessia was dead*:

> And four. Was her death so that Mr. Knight could escape being found out? Was it to avoid arrest? Was it in layman's terms the elimination of all witnesses?
>
> Mr. Halpern stood before you when he did in his opening statement and he said I'll explain to you why this happened, because

when I believe – I'm paraphrasing somewhat but it's pretty close to exactly what he said.

The question that has got to be on all your minds is why did this happen?

* * *

The reason for Hanessia's death, the only reason a four year old child would be killed, would be because she's the only one that can identify the man who lived in her home for the last six months. ***That's why she's dead. There is no other reason. None whatsoever.***

* * *

The last aggravator. The motive behind killing little four year old Hanessia, so there wouldn't be a witness to the murder of the mother. ***That's the only reason that little girl's dead, because she could have identified the man that lived with her for six months.***

(V55/1107-07, 1124) (emphasis added).

The defense penalty phase closing contested the applicability and weight of the State's case for aggravation. Specifically as to the avoid arrest aggravator, the defense argued:

And finally, this—as as Mr. Loe placed it—the witness elimination factor. The avoid arrest factor.

You'll hear normally that this factor is reserved for the killing of a police officer. That's when it's normally applied. And it can only be applied if you find beyond and to the exclusion of every reasonable doubt that the primary motivating factor, the sole basis for that killing, was to avoid arrest.

And what evidence do they put before you? They put before you Mr. Loe's speculation, that that must be the reason why. Because why else do you kill a child? Because she recognized him—would recognize him.

> Is there any shred of evidence to back up the speculation of the State, that that's the sole primary motivating factor behind her tragic death?
>
> No, there isn't. And just like we don't speculate or guess as to whether someone is guilty or innocent in a trial, and if you have a doubt as to that issue, you return a verdict of not guilty, so too we apply that same law when we are considering whether or not an aggravating factor has even been established.
>
> This one clearly has not been. To find it would require you to exercise pure and utter speculation. And we don't send people to the death chamber based on speculation.

(V55/1132-33).

Despite there having been no evidence presented by the State at the penalty phase to support the avoid arrest/witness elimination aggravator, the trial court allowed the State to present it to the jury, thus skewing the jury's consideration of the case in aggravation. But when it came time for the court to make its findings of fact, this factor was ***rejected***:

> **2. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.**
>
> The State argued that the Defendant killed four year old Hanessia so that she would stop screaming while he was stabbing Odessia and to eliminate her as a witness to the murder of her mother which occurred in her presence. The State concluded that the dominant motive for the murder of Hanessia Mullings was the elimination of her as a witness for the purpose of avoiding or preventing the Defendant's lawful arrest.
>
> Based on the evidence presented, this Court is unable to find that this aggravating factor has been proven beyond a reasonable

> doubt. Thus, this factor will not be considered by this Court in its determination of the Defendant's sentence.

(V61/621) (emphasis in original).

SUMMARY OF THE ARGUMENTS

The Supreme Court's decision in *Hurst v. Florida,* 136 S. Ct. 616 (2016), is fully retroactive, although Mr. Knight would unquestionably receive the benefit of its holding because he objected at trial and raised the issue on appeal. *See James v. State*, 615 So. 2d 668 (Fla. 1993). This Court's decisions in *Hurst v. State*, 2016 WL 6036978 (Fla. Oct. 14, 2016), and *Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016), serve only to further establish *Hurst v. Florida*'s retroactivity.

That there is Sixth Amendment error in Mr. Knight's case is not in question. Mr. Knight submits that, under a proper harmless error test, the State is unable to demonstrate in his case that the error was harmless beyond a reasonable doubt despite the fact that the jurors returned an "advisory recommendation" to the court by a 12-0 vote that *the court* sentence Mr. Knight to the death penalty.

ARGUMENTS AND AUTHORITIES

A. Introduction.

On October 14, 2016, this Court issued its decision in *Hurst v. State*, 2016 WL 6036978 (Fla. Oct. 14, 2016), and addressed the Sixth **and** Eighth Amendment implications of *Hurst v. Florida* following the remand from the Supreme Court. In *Hurst v. State*, the Court examined the federal precedent leading up to the *Hurst v.*

Florida decision, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), as well as the longstanding deeply entrenched Florida law regarding the right to unanimous jury trials in criminal cases, and held 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*, 2016 WL 6036978 at *10. 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 *10, *15. *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 v. State*, 2016 WL 6036978 at *15.

In addition, the Court acknowledged that a Florida penalty phase jury has always had—and continues to have—the right to "grant mercy in a capital cases" even if "it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances." *Hurst,* 2016 WL 6036978 at *12, *13 (citing *Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000)). *See also id.* at *17 n.18 ("even if the jurors unanimously find that sufficient aggravators were proven

beyond a reasonable doubt, and that the aggravators outweigh the mitigating circumstances, the jurors are never required to recommend death."). The Court in *Perry* made a similar observation that "[i]t has long been true that a juror is not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances." *Perry*, 2016 WL 6036982 at *7 (citing *Cox v. State*, 819 So. 2d 705, 717 (Fla. 2002)).

B. Retroactivity.

Hurst v. Florida is undoubtedly a "development of fundamental significance" within the meaning of *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980), and fairness dictates that *Hurst v. Florida* be given full retroactive effect. *See Falcon v. State*, 162 So. 3d 954, 962 (Fla. 2015); *Walls v. State*, 2016 WL 6137287 (Fla. Oct. 20, 2016); *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016). *See also James v. State*, 615 So. 2d 668 (Fla. 1993).[3] A "sweeping change of law" of "fundamental significance" constituting a "jurisprudential upheaval" will qualify under *Witt*, *see Mitchell v. Moore*, 786 So. 2d 521, 529 (Fla. 2001) (brackets omitted) (citation

[3] As noted in his earlier supplemental briefing and herein, Mr. Knight did preserve his Sixth Amendment challenges to Florida's capital sentencing statute on appeal. But to be sure, Mr. Knight's position is that *Hurst* is fully retroactive notwithstanding prior preservation of the issue on direct appeal. *See Atwell v. State*, 197 So. 3d 1040, 1042 (Fla. 2016) (noting "patent unfairness" of treating similar defendants differently "based solely on when their cases were decided") (citing *Falcon v. State*, 162 So. 3d 954, 962 (Fla. 2015)). A declaration of retroactivity means that a defendant need not have previously raised the issue now deemed meritorious by a subsequent decision; that is the whole point of retroactivity. *See, e.g. Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987).

omitted), and *Hurst v. Florida*, perhaps more so than virtually any other case decided since *Furman v. Georgia*, 408 U.S. 238 (1972), satisfies this standard. Indeed, *Hurst v. Florida* "places beyond the State of Florida the power to impose a certain sentence[,]" *i.e.* a sentence imposed where the jury has recommended a life sentence. *Walls,* 2016 WL 6137287 at *6. In such circumstances, a new case is a "development of fundamental significance" under *Witt* and thus retroactive. *Id*. Moreover, it would be a "manifest injustice" to allow Mr. Knight's death sentences to stand when the statute under which he was sentenced has been ruled unconstitutional; a "manifest injustice" is an "exception to the law of the case doctrine." *Walls*, 2016 WL 6137287 at *7 (Pariente, J., concurring).

This Court's recent decision in *Hurst v. State* only reinforces the necessity of retroactive application of *Hurst v. Florida*. There is no question that *Hurst v. Florida* is a case emanating from the United States Supreme Court and its ruling was constitutional in nature. *Witt*, 387 So. 2d at 931. The only remaining question is whether *Hurst v. Florida* "constitutes a development of fundamental significance" and thus warrants retroactive application. *Id*. And *Hurst v. State* in large part answers that question.

"Developments of fundamental significance are likely to fall within one of two categories: changes of law that either 'place beyond the authority of the state the power to regulate certain conduct or impose certain penalties' or are 'of

sufficient magnitude to necessitate retroactive application' under the test set forth in *Stovall v. Denno*, 388 U.S. 293, 297 (1967), and *Linkletter v. Walker,* 381 U.S. 618, 636 (1965)." *Walls*, 2016 WL 6137287 at *5. There can be no question that *Hurst v. Florida* satisfies both parts of the *Stovall/Linkletter* analysis. Moreover, it is certainly a case of sufficient magnitude to warrant retroactive application because it upended the law in existence since 1972 with regard to our understanding of the jury's role in capital sentencing in Florida: "Since 1972, until the Supreme Court's ruling in *Hurst v. Florida*, it has been the Florida judge who ultimately makes his or her own determination of the existence of the aggravating factors, the evidence of mitigation, and the weight to be given each in the sentencing decision before a sentence of death could be imposed." *Hurst v. State* at *13. In fact, the Court explained in *Hurst v. State* that *Hurst v. Florida* restored the jury's prominent and dispositive role in early capital cases in Florida to "control[] which defendants would receive death" by rendering unanimous verdicts. *Hurst*, 2106 WL 6036978 at *11, *12.

The *Hurst v. State* decision also acknowledged the added reliability to the system resulting from requiring unanimous jury factfinding and unanimity in the jury's death recommendation, as well as "significant benefits that will further the administration of justice." *Id*. at *14. These are also factors that further favor full retroactivity of *Hurst v. Florida*. For example, the Court, citing to a Ninth Circuit

Court of Appeals decision authored by Supreme Court Justice Kennedy while sitting as a judge on the Ninth Circuit, noted the "salutatory benefits of the unanimity requirement on jury deliberations." *Id*. (citing *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978). The Court also found embraced the empirical research that jurors act more thoroughly and with the requisite gravity to their task when they are required to reach a unanimous verdict, thus "help[ing] to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty." *Hurst,* 2016 WL 6036978 at *14.

Retroactivity would also ensure that *all* defendants' Sixth and Eighth Amendment rights are protected, and is in conformity with the Court's understanding that "[c]onsiderations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases." *Falcon*, 162 So. 3d at 962 (internal quote omitted).

C. Harmless Error Analysis.

In *Hurst v. State*, this Court held that Sixth Amendment error resulting from *Hurst v. Florida* would be subject to a strict harmless error test, one in which "the State bears an extremely heavy burden" of proving beyond a reasonable doubt that "the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [Mr. Knight's] death sentence[s] in this case."

Hurst, 2016 WL 6036978 at *23. In other words, the State must prove beyond a reasonable doubt that the jury's failure to unanimously find not only the existence of each aggravating factor, that the aggravating factors are sufficient, and that the aggravating factors outweigh the mitigating circumstances; in order to conduct a proper harmless error analysis, this Court must also determine whether the State has proven beyond a reasonable doubt that no properly-instructed juror would have exercised his or her right to dispense mercy to Mr. Knight by voting for a life sentence even having made all of the prior factual determinations.

This last factor (the mercy vote) is of critical importance because, as this Court acknowledged in both *Hurst v. State* and *Perry v. State*, each Florida juror in a capital case has the "right to recommend a sentence of life even if [he or she] finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances." *Hurst*, 2016 WL 6036978 at *13 (citing *Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000)). This is to allow jurors in capital cases to "`exercise[e] reasoned judgment'" in his or her vote as to a recommended sentence. *Hurst*, 2016 WL 6036978 at *13 (citing *Henyard v. State*, 689 So. 2d 239, 249 (Fla. 1996) (quoting *Alvord v. State*, 322 So. 2d 533, 540 (Fla. 1975)).[4] *Accord Perry*, 6036982 at *7-8 ("It has long been true that a juror is not

[4] This principle is not applicable only to Florida cases; as this Court noted in *Henyard*, the Supreme Court as far back as 1974 held that any capital jury can *constitutionally* dispense mercy in a capital case that might otherwise warrant

required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances.").

In the following section of this Brief, Mr. Knight will set forth a number of factors that preclude the State from being able to establish harmless error beyond a reasonable doubt. These factors include (1) the jury was repeatedly instructed that its role was merely advisory and that it was simply to return a "recommendation" that the court would later consider; (2) the jury was never told or instructed that it could dispense mercy to Mr. Knight and vote for a life sentence irrespective of whether it "found" sufficient aggravation to outweigh the mitigation, or that it was neither compelled nor required to return a death recommendation; (3) the jury was given an instruction on (and the State argued the applicability of and made a feature of during closing argument) the avoid arrest/witness elimination aggravating circumstance despite the fact that the court later found it inapplicable; (4) the applicability of the heinous, atrocious, or cruel aggravating circumstance was hotly contested by the defense; in fact the applicability and weight of the other aggravators were also contested by the defense; and (5) the lack of any objective evidence that there was a meaningful deliberation when the jury "deliberated" in this double murder case for approximately 49 minutes where extensive evidence

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imposition of the death penalty. *Henyard*, 689 So. 2d at 249 (citing *Gregg v. Georgia*, 428 U.S. 153, 203 (1976)).

had been presented spanning several days over the course of three months[5] for approximately 49 minutes (10 of which were spent gathering exhibits).

1. The 12-0 recommendations by the advisory jury are meaningless for harmless error purposes in Mr. Knight's case.

Mr. Knight is aware that this Court recently has found *Hurst* error harmless in a case where the jury recommended the death penalty by a 12-0 vote. *See Davis v. State*, 2016 WL 6649941 at *29-30 (Fla. Nov. 10, 2016) (finding error harmless where jury recommended death by 12-0 vote, case involved six aggravating circumstances, and jury was told, *inter alia*, that "[r]egardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death"). However, a harmless error analysis must be performed on a case-by-case basis and there is no magic formula or a one-size-fits all analysis for constitutional harmless error; rather, there must be a "detailed explanation based on the record" supporting a finding of harmlessness beyond a reasonable doubt. *See Clemons v. Mississippi*, 494 U.S. 738, 753 (1990). *Accord Sochor v. Florida*, 504 U.S. 527, 540 (1992). In Mr. Knight's case, neither the record nor the law supports any finding that the State can establish the error harmless beyond a reasonable doubt.

[5] The penalty phase testimony commenced on May 22 and 23, 2006, but then was continued until July 24, 2006. Lay and expert mental health testimony was presented.

First, the record unquestionably bears out in Mr. Knight's case, as it did in *Hurst v. State*, that "[b]ecause there was no interrogatory verdict[6], we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances." *Hurst*, 6036978 at *24. But in *Davis*, this Court "speculate[d] as to what factors the jury found in making its recommendation[,]" *Combs v. State*, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., concurring), and ultimately performed its own factfinding and weighing in order to conclude that "a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigators." *Davis*, 2016 WL 6649941 at *29. Mr. Knight respectfully disagrees that this Court can supplant what is otherwise a legally meaningless recommendation by an advisory jury, *Hurst,* 136 S. Ct. at 622 (Sixth Amendment cannot be satisfied by merely treating "an advisory recommendation by the jury as the necessary factfinding"), into findings that must constitutionally be made by the jury in a capital penalty phase. To hold otherwise would not only supplant the jury's factfinding role but would also run afoul of the fact that this Court does "not

[6] Mr. Knight's counsel at trial requested a special penalty phase interrogatory verdict but the request was denied (V63/1026).

reweigh the aggravating and mitigating factors." *Merck v. State*, 975 So. 2d 1054, 1065 (Fla. 2007).[7]

Second, what was not addressed in *Davis* was the fact that jurors in Florida capital cases (and the jurors in Mr. Knight's case were no exception) are instructed on a myriad of occasions, especially right before they begin deliberating, that their role was merely advisory and that their responsibility is solely to render an advisory recommendation for the judge to consider. In order to treat a jury's advisory recommendation (especially one by a 12-0 vote), the jury must be correctly instructed as to its sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This means that post-*Hurst* the individual jurors must know that each will bear the responsibility for a death sentence resulting in a

[7] By way of analogy is the Court's practice of addressing error under *Campbell v. State*, 571 So. 2d 415 (Fla. 1990). When this Court has found fault with trial court sentencing orders that fail to adequately address aggravators and mitigators and the weights assigned to each, this Court has not simply supplanted its own findings in order to sustain the death sentence. Irrespective of the jury recommendation vote, the Court, when faced with *Campbell* errors, vacates the death sentence and reverses for a new sentencing order compliant with *Campbell* and the requirements of the constitution. *See, e.g. Woodel v. State*, 804 So. 2d 316 (Fla. 2001) (reversing in light of *Campbell* where jury returned 9-3 and 12-0 death recommendations because sentencing order "fails to expressly determine whether these mitigators are truly mitigating, fails to assign weights to the aggravators and mitigators, fails to undertake a relative weighing process of the aggravators vis-à-vis the mitigators, and fails to provide a detailed explanation of the result of the weighing process"); *Jackson v. State*, 704 So. 2d 500 (Fla. 1997) (reversing in light of *Campbell* where jury returned 12-0 death recommendation because sentencing order failed to meaningfully address aggravation and mitigation, thus depriving Court of a "thoughtful and comprehensive analysis").

defendant's execution since each juror possesses the power to require the imposition of a life sentence by simply voting against a death recommendation.[8] As explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. "In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences where there are state-induced suggestions that the sentencing jury may shift its responsibility to an appellate court." *Caldwell*, 472 U.S. at 330. Indeed, because the jury's sense of responsibility was improperly diminished in *Caldwell,* the Supreme Court held that the jury's ***unanimous verdict*** imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires"). In Mr. Knight's case, it is likely (or the State cannot prove otherwise beyond a reasonable doubt) that at least one juror would not have joined a death recommendation given proper *Caldwell*-compliant instructions.

Third, the jury in Mr. Knight's case was never told or instructed that it could recommend a sentence of life as an expression of mercy or that it was neither

[8] However, as explained later, the jurors in Mr. Knight's case were *not* so instructed.

compelled nor required to vote for death even if it determined that there were sufficient aggravating circumstances that outweighed the mitigating circumstances.[9] As this Court observed in *Hurst v. State* and in *Perry*, each Florida juror in a capital case has the "right to recommend a sentence of life even if [he or she] finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances." *Hurst*, 2016 WL 6036978 at *13 (citation omitted). *Accord Perry*, 6036982 at *7-8 ("It has long been true that a juror is not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances.").

While the Court in *Hurst* pointed to a jury instruction that would have so informed the jurors, *Hurst*, 2016 WL 6036978 at *13, this jury instruction was not adopted until 2009, well after Mr. Knight's 2006 trial, and was not provided to Mr. Knight's jurors. The adoption of this jury instruction was prompted by the American Bar Association [ABA] Report on Florida's death penalty, which specifically noted serious concerns with capital jurors' understanding of their role at the penalty phase despite the putative clarity of the jury instructions:

> And second, in the latter portion of the instruction, we have authorized an amendment stating that the jury is "neither compelled nor required to recommend death," even where the aggravating circumstances outweigh the mitigating circumstances. This amendment is consistent with our state and federal case law in this

[9] Although, as noted earlier in this brief, Mr. Knight's counsel made several requests for "mercy" instructions. All the requests were denied.

> area. See *Cox v. State*, 819 So.2d 705, 717 (Fla. 2002) ("[W]e have declared many times that 'a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors' ") (quoting *Henyard v. State*, 689 So.2d 239, 249-50 (Fla. 1996); *see also Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (plurality (explaining that a jury can constitutionally dispense mercy in cases deserving of the death penalty). We note that this amended language is less stringent than the proposal, which provides: "Regardless of your findings with respect to aggravating and mitigating circumstances you are never required to recommend a sentence of death."
>
> These amendments are intended to address the ABA's finding that a substantial percentage of Florida's capital jurors (over thirty-six percent of those interviewed) believed that they were required to recommend death if they found the defendant's conduct to be "heinous, vile or depraved," or (over twenty-five percent of those interviewed) if they found the defendant to be "a future danger to society." ABA Report at vi. The ABA report also concludes as follows: Approximately forty-eight percent of capital jurors believed that mitigating circumstances had to be proved beyond a reasonable doubt, thirty-five percent of jurors did not know that any mitigating evidence could be taken into consideration, and fourteen percent of jurors believed that only the enumerated mitigating circumstances could be considered. *Id* at 304. Because of the critical role that aggravators and mitigators play in the weighing process, these areas of confusion are a cause for concern. We are hopeful, however, that the re-ordering of these instructions, the definitions of key terms that have been added, and the amended explanatory language, including the discussion of burdens of proof, will assist jurors in understanding their role in the capital sentencing process and will eliminate juror confusion in this area.

In re Standard Jury Instructions in Criminal Cases, 22 So. 3d 17 (Fla. 2009).

Thus, not only were Mr. Knight's jurors not properly informed of their actual responsibility in violation of *Caldwell* but they were not told that they could exercise mercy by not joining in a death recommendation irrespective of their

views on the aggravation and mitigation. This significant fact further distinguishes Mr. Knight's case from *Davis*, where the Court placed great significance to the fact that Davis's jury was, in fact, instructed that "it was not required to recommend death even if the aggravators outweighed the mitigators" and that it nonetheless returned unanimous death recommendations. *Davis*, 2016 WL 6649941 at *29. Mr. Knight submits that the State cannot establish beyond a reasonable doubt that at least one juror, properly instructed, might have decided to dispense mercy to Mr. Knight.

Fourth, the jury's 12-0 recommendations in Mr. Knight's case were skewed by the trial court's ruling allowing the State to argue the applicability of the avoid arrest/witness elimination aggravating circumstance. The State pressed this aggravator heavily during its closing argument, going so far as to contend that the only reason Hanessia Mullings was dead was because Mr. Knight killed her in order to eliminate her as a witness (V55/1106-07). This was a powerful emotional argument that also provided the State with a putative motive for Hanessia's death; in the words of the prosecutor, "[t]hat's why she's dead. There is no other reason. None whatsoever" (V55/1107). However, despite the fact that the court allowed the State to argue the avoid arrest/witness elimination factor, the court later found it not to apply in Mr. Knight's case (V61/621).

Thus, the jury here was not only mislead about its sentencing responsibility

in violation of *Caldwell.* Not only was it not instructed that it could dispense mercy irrespective of the aggravation and mitigation. Its recommendation was further skewed in favor of death by consideration of an inapplicable aggravating factor; in other words there was another "thumb" on "death's side of the scale." *Stringer v. Black,* 503 U.S. 222, 232 (1992). 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. This is one more factor that precludes the State from establishing harmlessness beyond a reasonable doubt in Mr. Knight's case.

Fifth, the remaining aggravating factors were all contested by the defense, particularly the heinousness factor. Defense counsel argued, based on medical testimony, that "there was a high degree of emotional anxiety related to this attack" and that Dr. Davis, the medical examiner, "seems to be indicating to you that although something went horribly wrong, no question there, but that this crime was committed in a rage state by somebody who had a really difficult time controlling his behavior" (V55/1141-42). Defense counsel also argued that the contemporaneous murder aggravator and the fact that Hanessia Mullings was under the age of 12 were not sufficient in this case because they fail "to narrow down to the very core those persons who must die for their crimes" and that "most homicides are accompanied by a corresponding rime. And if you think about it, the

State would have you put to death anyone who takes the life of a child. And that certainly is not what the law says" (V55/1131-32).

These are certainly arguments that a reasonable rational juror could have accepted and, in the prior capital sentencing scheme, would have provided for a reasonable basis for the jury to recommend a life sentence. *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"). Given this extra thumb on death's side of the scale, coupled with the other problems previously identified with the jury's "recommendation," Mr. Knight submits that this additional factor further precludes it from being able to establish harmlessness beyond a reasonable doubt even in light of the 12-0 recommendations.

Sixth, Mr. Knight submits that the jurors' diminished sense of responsibility is directly borne out in the length of the penalty phase deliberations. Mr. Knight's jury is reported to have left the courtroom at 3:50 PM (V55/1158). Between 3:50 and 4:00 PM, the attorneys and court gathered the exhibits to provide to the jurors (V55/1162-63). At 4:49 PM, the jurors announced they had reached advisory recommendations (V55/1163). Given the complicated and contested facts which purported to establish the HAC factor, not to mention the extensive mitigation presented by the defense (including mental health expert testimony), such a short deliberation is hardly reflective of a jury that felt the weight of its responsibility as

Caldwell mandates it must. The short deliberation reflects at best a head count and a straw poll without any meaningful consideration of the existence of the aggravators beyond a reasonable doubt, sufficiency of the aggravators, or the mitigation. We do know that the short deliberation was not taken up with any discussion of extending mercy to Mr. Knight as the jurors were never told they had such a right.

2. Mr. Knight's Case is Not the Most Aggravated of Capital Cases.

Although undeniably tragic (as all of these cases are), Mr. Knight's case is not one of the most aggravated death penalty cases. Two aggravating circumstances were found by the court as to the death of Odessia Stephens: the contemporaneous murder of Hanessia Mullings and HAC. Three aggravating circumstances were found by the court as to the death of Hanessia Mullings: the contemporaneous murder of Odessia Stephens, that the victim was under the age of 12, and HAC. All of these aggravators (and their relative weight) were contested by the defense at the penalty phase; none was conceded at least in terms of the weight afforded to each. There was also mitigation presented to the jury, some of which was found by the trial court[10] and some of which was not in light of information presented by the State to the court at the *Spencer* hearing (Supp. Direct Appeal ROA, V31/310-320). But the jury was not given this information despite

[10] The trial court found eight nonstatutory mitigating circumstances. *Knight v. State*, 76 So. 3d 879, 884 (Fla. 2011).

its clear role as the sole determiner of the facts.

In light of *Hurst v. Florida* and *Hurst v. State*, Mr. Knight further submits that the Court must revisit its prior determination that his sentences are proportional. *Knight v. State*, 76 So. 3d 879, 889-90 (Fla. 2011). Because the jury never made any factual determination of the existence of any aggravating circumstance, it would be impossible for this Court to engage in a meaningful proportionality analysis, especially given that the only non-"status" aggravator was HAC. HAC was not found by the jury but rather by the judge alone. If the HAC factor were to be taken out of consideration, the remaining factors would not support a finding of proportionality under the facts of this case.

D. Conclusion.

The singular and combined circumstances set out above unquestionably establish that the State cannot, in Mr. Knight's case, establish harmlessness beyond a reasonable doubt notwithstanding the jury's 12-0 death recommendations. For this Court to speculate about what a jury, properly instructed about its actual role in the sentencing phase and about its right to dispense mercy irrespective of the aggravators and mitigators, and not provided with an additional thumb on death's side of the scale by an invalid aggravating circumstance, would be highly improper. The State in this case simply cannot establish harmlessness beyond a reasonable doubt and Mr. Knight is entitled to a resentencing.

CONCLUSION

Based on the foregoing arguments, Mr. Knight submits that the Court should vacate his unconstitutional sentences of death, and/or grant any other relief as deemed just and proper by the Court.

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 29th day of November, 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.

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