**IN THE SUPREME COURT OF FLORIDA**

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**CASE NO. SC17-1863**

**LOWER COURT CASE NO. 01 CF 002956**

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**PAUL GLEN EVERETT,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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**ON APPEAL FROM THE CIRCUIT COURT**
**OF THE FOURTEENTH JUDICIAL CIRCUIT,**
**IN AND FOR BAY COUNTY, STATE OF FLORIDA**

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# REPLY BRIEF OF APPELLANT

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## ARGUMENT IN REPLY

### A. Introduction

The State's Answer Brief fails to include any delineation of Mr. Everett's issues and appears to ignore much of the legal authority and argument presented in the Initial Brief. And, the State's imprecision infects even the most basic level of representations. For example, in the "Statement of the Case and Facts", the State indicated that the "jury **found** three aggravating factors". See Answer Brief at 1, n.1 (emphasis added) (hereinafter "AB at __"). But of course, under the unconstitutional sentencing scheme that Florida employed for decades, the jury made no findings as to which aggravators had been established; that was the trial court's responsibility. The jury was simply *instructed* as to the aggravators that the trial court determined the jury could consider, but contrary to the State's assertion, made no findings about which had been established. Indeed, in Mr. Everett's case, he contested the aggravating factors. Thus, the State's assertion is false.

Another example is that the State objects to oral argument, arguing that the issues presented have been decided by this Court. See AB at 2. However, proper analysis of the prejudice from a constitutional violation requires conscientious consideration of the effect of the error in the context of the individual case. Thus, oral argument would be more than appropriate and beneficial in Mr. Everett's case. The issues in Mr. Everett's case do not, as the State, contends fall into a "one size fits all" framework. This Court should permit Mr. Everett an opportunity to present his specific facts and arguments to the Court.

Lacking the required candor to the Court, the State also contends that the law of the case doctrine precludes Mr. Everett relief because a previous Ring v. Arizona, 536 U.S. 584 (2002), claim was raised and rejected. See AB at 4. However, this Court's decision in Hurst v. State, 202 So. 3d 40 (Fla. 2016), and Mosley v. State, 209 So. 3d 1248 (Fla. 2016), are directly contrary to such an argument.

Mr. Everett will address other faulty and imprecise submissions in the course of his arguments.

**B. Argument I**

The State ignores both the legal and factual bases of Mr. Everett's argument that this Court adhere to the Florida Rules of Appellate Procedure. Indeed, the State characterizes Mr. Everett's argument as a complaint about the page limitation. See AB at 2, n.2. That is simply not the case.

Mr. Everett has a substantive right to appeal the denial of his Rule 3.851 motion which challenged the constitutionality of his death sentence. Contrary to the State's misunderstanding of the law, that right is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Evitts v. Lucey, 469 U.S. 387, 393 (1985); Lane v. Brown, 372 U.S. 477, 484-85 (1963) The State refuses to acknowledge Evitts and Lane.

Further, equally ignored by the State is the principle that individualized review of all death sentences is required by the Florida Constitution. That individualized review is necessary to insure Florida's capital sentencing scheme complies with the Eighth Amendment. See Proffitt v. Florida, 428 U.S. 242, 258 (1976). Individualized review is as necessary as individualized sentencing in a capital case. See Mosley v. State, 209 So. 3d

1248, 1282 (Fla. 2016)("In this case, where the rule announced is of such fundamental importance, the interests of fairness and **'cur[ing] individual injustice'** compel retroactive application of *Hurst* despite the impact it will have on the administration of justice.")(emphasis added).

**C. Argument II**

The State argues that Mr. Everett has not pointed to any particular fact to distinguish his case from Davis v. State, 207 So. 3d 142, 175 (Fla. 2016), and Mosley v. State, 209 So. 3d 1248, 1280 (Fla. 2016). See AB at 3-4. However, in his Initial Brief, Mr. Everett clearly distinguished his case from that of Davis'. See IB at 8-15. Specifically, Mr. Everett set forth the critical distinction in the instructions provided to the jury, as well as the facts and aggravators that distinguish the two cases. Id. However, the State makes no mention of these distinctions, or this Court's decision in Wood v. State, 209 So. 3d 1217, 1234 (Fla. 2017).

Rather, the State urges this Court to preclude relief based on the singular factor of the jury's unanimous death *recommendation*, even going so far as to truncate the holding in Davis in which this Court relied on the specific instructions in Davis' case as well as the "egregious" facts: "Davis set 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." Davis, 207 So. 3d at 175. See AB at 4-6 Further, this Court noted that the six aggravators that had been found by the trial court were found as to both victims and was significant and essentially uncontroverted. Id.

The U.S. Supreme Court has held that a review of defective

instructions to the jury "'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Estelle v. McGuire, 502 U.S. 62, 10 72 (1991)(quotation omitted). And, review of the entire record is particularly essential when assessing, based only on a sentencer's undisclosed findings, the impact of capital sentencing error. See Parker v. Dugger, 498 U.S. 308, 320, 321, 323 (1991)(ordering the state court to reconsider a death sentence "in light of the entire record" where trial judge did not specify the nonstatutory mitigation found although much was presented, and this Court, in striking two aggravators, did not independently reweigh the aggravating and mitigating factors, but affirmed "in reliance on some other nonexistent findings.").

Further, we now know that in death penalty trial where the jury was instructed in accordance with Hurst v. State, that already, 5 capital juries unanimously made all of the requisite findings for the defendant to be sentenced to death, but ultimately chose to impose a life sentence. See State v. Bannister, http://www.ocala.com/news/20170426/quadruple-murder-trial-set-to-start-in-August; State v. Thompson, http://www.pnj.com/story/news/crime/2017/12/07/guilty-verdict-reached-gruesome-murder-milton-couple/931654001/; State v. Gaskey, http://www.chipleypaper.com/news/20170701/gaskey-gets-life-without-parole-in-ponce-deleon-murders; State v. Clark, http://www.palmbeachpost.com/news/crime--law/jury-votes-for-life-prison-for-man-convicted-1987-mur der/1XA264655ZOhrMc7CSlveM/; State v. Thomason, http://www.nwfdailynews.com/news/20170611/jury-gives-thomason-life-sentence. The special verdicts in these cases

elucidate that the jury, when charged with the sentencing responsibility that the Sixth and Eighth Amendments require, in cases certainly more aggravated and often less mitigated than Mr. Everett's, do return life verdicts.

Certainly, these recent special verdicts make clear that a court cannot consider Hurst error harmless per se based solely on an "essentially meaningless" advisory recommendation that makes no mention of any of the required findings, from a jury that is told that the sentencing responsibility lies elsewhere.

**D. Argument III**

As to Mr. Everett's third argument, the State posits that: "Neither Hurst nor the new statute create a new crime with new elements." See AB at 6-7. Mr. Everett completely agrees with the State. Indeed, Mr. Everett's argument is that in Hurst v. State, this Court identified the facts or elements necessary to increase the authorized punishment to the death penalty and that is clearly a matter of substantive law. "[A]ny 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." Alleyne v. United States, 133 S. Ct. 2151, 2160 (2013). "Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment." Id. at 2161. A court decision identifying the elements of a statutorily defined criminal offense constitutes substantive law that dates back to the enactment of the statute. Bousley v. United States, 523 U.S. 614, 625 (1998)(Stevens, J., concurring in part and dissenting in part)("This case does not raise any question concerning the possible retroactive application of a new rule of law, cf. Teague

v. Lane, 489 U.S. 288 (1989), because our decision in Bailey v. United States, 516 U.S. 137 (1995), did not change the law. It merely explained what § 924(c) had meant ever since the statute was enacted. The fact that a number of Courts of Appeals had construed the statute differently is of no greater legal significance than the fact that 42 U.S.C. § 1981 had been consistently misconstrued prior to our decision in Patterson v. McLean Credit Union, 491 U.S. 164 (1989).”). “A judicial construction of a statute is an authoritative statement of what the statute meant **before as well as after the decision** of the case giving rise to that construction.” Rivers v. Roadway Exp., Inc., 511 U.S. 298, 312-13 (1994) (emphasis added).

Hurst v. State, 202 So. 3d 40 (Fla. 2016), has generally been cited for its ruling pursuant to the Florida Constitution and the Eighth Amendment that a “death recommendation” must be returned by a unanimous jury in order to authorize the imposition of a death sentence.[1] But, there is another aspect to Hurst v. State that has received little attention, i.e. the judicial construction of § 921.141, Fla. Stat. As explained in Hurst v. State, this Court held that the statutorily defined facts necessary to increase the range of punishment to include death were elements to be proven by the State **“to essentially convict a defendant of capital murder**.” Id. at 53-54 (emphasis added). The elements of capital first degree murder include: 1) the presence

[1]In Hitchcock v. State, 226 So. 3d 216, 217 (Fla. 2017), this Court addressed the constitutional ruling of Hurst v. State requiring a “death recommendation” to be returned by a unanimous jury and indicated that it would not be applied in cases in which the death sentence became final prior to June 24, 2002. However, it is not that aspect of Hurst v. State on which Mr. Everett relies in his appeal.

of aggravating factors as statutorily defined, 2) a finding of fact that sufficient aggravating factors exist to justify a death sentence, and 3) a finding that the aggravating factors outweigh any mitigating factors. See Id. at 53 ("As the Supreme Court long ago recognized in Parker v. Dugger, 498 U.S. 308 (1991), under Florida law, 'The death penalty may be imposed only where **sufficient aggravating circumstances** exist that **outweigh** mitigating circumstances.' Id. at 313 (emphasis added)(quoting § 921.141(3), Fla. Stat. (1985)).").

Further on March 13, 2017, the Florida Legislature confirmed this Court's statutory construction when Chapter 2017-1 of the Laws of Florida was enacted.

Under Fiore v. White, 531 U.S. 225 (2001), the elements of capital first degree murder identified in Hurst v. State and confirmed in Chapter 2017-1 as substantive law date to the statutory enactment. See State v. Dixon, 283 So. 2d 1 (Fla. 1973). Respondent simply ignores Mr. Everett's argument, this Court's decision in Hurst v. State and the U.S. Supreme Court's decision in Fiore v. White.

Moreover, the U.S. Supreme Court has held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of **every fact** necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). See Patterson v. New York, 432 U.S. 197, 215 (1977)("a State must prove every ingredient of an offense beyond a reasonable doubt, and [ ] it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"); Sandstrom v. Montana, 442 U.S. 510, 524 (1979)(since the jury may have read

the instruction as relieving the State of proving an element beyond a reasonable doubt, defendant was denied "his right to the due process of law").

Despite this clear law, the State maintains that: "all elements which required findings beyond a reasonable doubt were in fact found beyond a reasonable doubt at Appellant's trial." See AB 8-9. However, the sufficiency of the aggravators and whether they outweigh the mitigators were both identified in Hurst v. State as elements necessary "**to essentially convict a defendant of capital murder.**" Hurst v. State, at 53-54 (emphasis added). In Mr. Everett's case neither was found to have been proven beyond a reasonable doubt.

"[B]efore a sentence of death may be considered by the trial court in Florida, the jury must find 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." Hurst v. State, 202 So. 3d at 53. All these elements must be found "for the jury to essentially **convict a defendant of capital murder.**" Id. at 5354. Thus, it is clear that Mr. Everett's jury did not make the required findings to convict him of capital murder.

**E. Argument IV**

The State argues that Caldwell v. Mississippi, 472 U.S. 320 (1985), is of no consequence in Mr. Everett's case because the jury heard accurate instructions. See AB at 15. To state that the jury was instructed properly because even under Hurst v. State the judge may override the death sentence and impose life, misses the point. See AB at 15. Rather, in the wake of Hurst v. Florida and the resulting new Florida law, a jury's unanimous death

recommendation is necessary in order to authorize the imposition of a death sentence. After Hurst v. Florida, the jury's penalty phase verdict is not advisory. The jury does bear responsibility for a resulting death sentence. Each juror has the power to exercise mercy and require the imposition of a life sentence. Accordingly, the jury must be correctly instructed as to its sentencing responsibility under Caldwell v. Mississippi, 472 U.S. 320 (1985).

Mr. Everett's jury was led to believe that its role was diminished when the court instructed it that the jury's role was advisory and that the judge would ultimately determine the sentence. In Pope v. Wainwright, this Court acknowledged that such comments and instructions relieves the jury's anxiety when faced with the responsibility that the jury was deciding to take a defendant's life. 496 So. 2d 798, 805 (Fla. 1986):

> In the instant case, petitioner argues that repeated reference by the trial judge and prosecutor to the advisory nature of the jury's recommendation overly trivialized the jury's role and encouraged them to recommend death. We cannot agree. We find nothing erroneous about informing the jury of the limits of its sentencing responsibility, as long as the significance of its recommendation is adequately stressed. **It would be unreasonable to prohibit the trial court or the state from attempting to relieve some of the anxiety felt by the jurors impaneled in a first-degree murder trial. We perceive no eighth amendment requirement that a jury whose role is to advise the trial court on the appropriate sentence should be made to feel it bears the same degree of responsibility as that borne by a 'true sentencing jury.'** Informing a jury of its advisory function does not unreasonably diminish the jury's sense of responsibility. Certainly the reliability of the jury's recommendation is in no way undermined by such non-misleading and accurate information. Further,, if such information should lead the jury to 'shift its sense of responsibility' to the trial court, the trial court, unlike an appellate court, is well-suited to make the initial determination of the appropriateness of the death sentence.

Id. (citations omitted)(emphasis added). This Court's

acknowledgment surely supports Mr. Everett's position in relation to the Caldwell error in his case which causes the State to be unable to meet its burden to show that the Hurst v. Florida and Hurst v. State violations were harmless.

**F. Argument V**

As to Argument V, the State argues that Chapter 2017-1 is not retroactive. See Reply at 6-7. When there is a change in statutory law, there is a presumption that any substantive change only applies prospectively. On the other hand, remedial statutes, which are statutes designed to fix a statutory defect, may apply retrospectively. Whenever a new statute purports to remedy a statutory defect by establishing a substantive right or imposing a new legal burden, that "fix" does not qualify as remedial legislation which is presumptively applied in pending case. Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994)("we have never classified a statute that accomplishes a remedial purpose by creating substantive new rights or imposing new legal burdens as the type of 'remedial' legislation that should be presumptively applied in pending cases.").

However, Chapter 2017-1 does impose a new legal burden on the State when granting a defendant convicted of first degree murder the right to a life sentence unless the State convinces a jury to unanimously recommend a death sentence. The changes made by Chapter 2017-1 are substantive in nature. And, the changes made in Chapter 2017-1 were intended to apply retrospectively, meaning the intent was to apply the new statute to capital offenses that occurred prior to the statute's effective date.

**CONCLUSION**

Mr. Everett again urges this Court to grant him relief.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by electronic mail to Lisa Hopkins, Assistant Attorney General, on this 31st day of January, 2018.

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**CERTIFICATION OF TYPE SIZE AND STYLE**

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