IN THE SUPREME COURT OF FLORIDA

DANE PATRICK ABDOOL,

Appellant,

v.

CASE NOS.: SC14-582 & SC14-2039
L.T. No.: 48-2006-CF-2848-O

STATE OF FLORIDA/
JULIE L. JONES, ETC.,

Appellee/Respondents.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

SUPPLEMENTAL BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

SCOTT A. BROWNE
Senior Assistant Attorney General
Florida Bar No. 0802743
Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
scott.browne@myfloridalegal.com
E-service: capapp@myfloridalegal.com

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

This Court's direct appeal opinion in Abdool v. State, 53 So. 3d 208, 214 (Fla. 2010), recites the facts of Abdool's conviction for the first degree premeditated murder of the victim, Amelia Sookdeo, who was burned to death. Following a 10-2 jury recommendation, the trial court sentenced Abdool to death.

SUMMARY OF THE ARGUMENT

Hurst v. Florida, ___ U.S. ___, 136 S. Ct. 616 (2016) is not retroactive and has no application to this post-conviction case. This Court, like others to consider the retroactivity of Ring v. Arizona, 536 U.S. 584 (2002), has uniformly found that it is not retroactive. There is no reason in law or logic for this Court to find that Hurst, unlike Ring, announced a new rule of sufficient magnitude to mandate retroactive application. In addition, any Hurst error would be harmless where no rational fact finder would fail to find the HAC and CCP aggravators in this case. Accordingly, Abdool is not entitled to any relief from this Court.

ARGUMENT

ISSUE

HURST V. FLORIDA IS NOT RETROACTIVE AND ANY HURST ERROR WOULD BE HARMLESS UNDER THE FACTS OF THIS CASE.

In this supplemental brief, Appellant asserts that Hurst v. Florida, 136 S. Ct. 616 (2016) entitles him to a life sentence or a resentencing. Neither contention has any merit.

A. *Hurst* does not entitle Abdool to a life sentence.

Abdool first argues that Hurst entitles him to a life sentence. However, Hurst did not determine capital punishment to be unconstitutional. Therefore, Section 775.082(2), Fla. Stat. does not apply, by its own terms. That section provides that life sentences without parole are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional," and was enacted following Furman v. Georgia, 408 U.S. 238 (1972), in order to fully protect society in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional. This provision for example applied in Coker v. Georgia, 433 U.S. 584 (1977), where the United States Supreme Court held that capital punishment was not available for the capital felony of raping an adult woman.

Abdool initially repeats some interesting 'facts' about death sentences and surmises that simply being in Florida enhances "his exposure to an arbitrarily

applied death sentence[]…" (Appellant's Supp. Brief at 7). The death penalty, however, was not arbitrarily applied in this case, or to other murderers in Florida. Abdool's exposure to the death penalty was not arbitrary, or mere happenstance. Abdool chose to murder his seventeen year old former girlfriend, Amelia, who had become inconvenient to his life, by binding her with duct tape, driving her to a remote location, dousing her with gasoline, and setting her on fire. Amelia suffered a horrible and torturous death. Abdool was tried, convicted, and sentenced in accordance with long standing state and federal constitutional law. The recent Supreme Court decision in Hurst overturning some of that precedent does not render his death sentence either unfair or unreliable.

Significantly, this Court has decided that Ring does not apply retroactively in Florida. In Johnson v. State, 904 So. 2d 400, 412 (Fla. 2005), this Court comprehensively applied the Witt[1] factors to determine that Ring was not subject to retroactive application. This Court concluded:

> We conclude that the three Witt factors, separately and together, weigh against the retroactive application of *Ring* in Florida. To apply *Ring* retroactively "would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state ... beyond any tolerable limit." *Witt*, 387 So. 2d at 929-30. Our analysis reveals that *Ring*, although an important development in criminal procedure, is not a "jurisprudential upheaval" of "sufficient magnitude to

[1] Witt v. State, 387 So. 2d 922 (1980).

> necessitate retroactive application." *Id*. at 929. We therefore hold that *Ring* does not apply retroactively in Florida and affirm the denial of Johnson's request for collateral relief under *Ring*.

This Court specifically noted the severe and unsettling impact that retroactive application would have on our justice system [with nearly 400 death sentenced prisoners]. Johnson, 904 So. 2d at 411-12.[2] Appellant's invitation for this Court to revisit its decision is unpersuasive. He asserts that the decision need not be disruptive as this Court can simply reduce the nearly 400 death sentences to life in prison. However, there is no support for this novel proposition. Neither the federal nor Florida constitutions justify or authorize this Court to take such action. And, such a decision ignores the considerable interests of the citizens of this State

[2] This Court's decision in State v. Johnson, 122 So. 3d 856, 865-66 (Fla. 2013), similarly holding that one of Apprendi's many permutations was not retroactive, is also instructive. In finding Blakely v. Washington, 542 U.S. 296 (2004) was not retroactive, this Court stated, in part:

> Retroactive application of the rule announced in *Blakely* would require review of the records of numerous cases, first to determine whether *Blakely* error occurred, then whether such error was preserved, and finally, whether the error was harmless. In those cases where a claim for postconviction relief survives such review, juries would likely have to be empaneled to hear evidence and determine sentence enhancements. All told, this would be a time-consuming undertaking that would significantly strain our scarce court resources. Even if the retroactive application extended only to cases finalized in the interval between the issuance of *Apprendi* and *Blakely*, the disruption would be significant. Accordingly, this factor also weighs against applying *Blakely* retroactively.

and, in particular, victims' family members upon whom the emotional toll of such an action cannot be measured.

At any rate, there are several cogent reasons for this Court to reject the blanket approach of commuting all capital sentences currently pending before this Court on direct appeal such as followed the Furman decision. Furman was a decision that invalidated all death penalty statutes in the country, with the United States Supreme Court offering nine separate opinions that left many courts "not yet certain what rule of law, if any, was announced." Donaldson v. Sack, 265 So. 2d 499, 506 (Fla. 1972) (Roberts, C.J., concurring specially). The Court held that the death penalty, as imposed for murder and for rape, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The various separate opinions provided little guidance on what procedures might be necessary in order to satisfy the constitutional issues, and whether a constitutional scheme would be possible. The situation following Furman simply has no application to the limited procedural ruling issued by the Supreme Court in Hurst. This Court should decline Abdool's invitation to simply commute his sentence. Sentence commutation is the prerogative of the executive branch, not the judicial branch.

B. *Hurst* is not retroactive.

Abdool's case became final on October 3, 2011, when the Supreme Court

denied certiorari. Consequently, Hurst can have no application to this case until and unless either this Court or the Supreme Court determines that it should apply retroactively. Hurst is not retroactive. Consequently, Abdool is not entitled to any relief from this Court.

Both the United States Supreme Court and this Court have held that Ring, the precursor to Hurst, was not retroactive because it was a new procedural rule that did not materially increase accuracy of the underlying result. Moreover, the United States Supreme Court has held the first case applying the Sixth Amendment right-to-a-jury-trial provision to the states was not retroactive. If the seminal case is not retroactive, then its progeny is not either.

In Hurst, the Court held that Florida's capital sentencing structure violated Ring v. Arizona, 536 U.S. 584 (2002), because it required a judge to conduct the fact-finding necessary to enhance a defendant's sentence. Hurst, 136 S. Ct. at 621-22. In arriving at its decision, the Court looked directly to Florida's sentencing statute, finding that it does not "make a defendant eligible for death until 'findings *by the court* that such a person shall be punished by death.'" Id. at 622 (citing Fla. Stat. § 775.082(1) (emphasis in opinion). Also, under Spaziano v. State, 433 So. 2d 508, 512 (Fla. 1983), the jury's role in sentencing a defendant to capital punishment was viewed as advisory. Spaziano, 433 So. 2d at 512. Thus, the Supreme Court held Florida's capital sentencing structure, "which required the

judge alone to find the existence of an aggravating circumstance", violated its decision in Ring, and overruled the prior decisions of Spaziano v. State and Hildwin v. Florida, 490 U.S. 638 (1989). Hurst, at 622-24.

The Supreme Court recently reaffirmed that the Sixth Amendment right underlying Ring and Apprendi v. New Jersey, 530 U.S. 466 (2000) did not apply to factual findings made in selecting a sentence for a defendant after the defendant has been found eligible to receive a sentence within a particular range. Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 2161 n.2 (2013) ("Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty. Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.' Williams v. New York, 337 U.S. 241, 246, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing."); see also United States v. O'Brien, 560 U.S. 218, 224 (2010)(recognizing that Apprendi does not apply to sentencing factors that merely guide sentencing discretion without increasing the applicable range of punishment to which a defendant is eligible).

Moreover, in Kansas v. Carr, ___ U.S. ___, 136 S. Ct. 633, 642 (2016), the Court discussed the distinct determinations of eligibility and selection under Kansas' capital sentencing scheme. In doing so, the Court stated that an eligibility determination was limited to findings related to aggravating circumstances and that determinations regarding whether mitigating circumstances existed and the weighing process were selection determinations. In fact, the Court stated that such determinations were not factual findings at all. Id. Instead, the Court termed the determinations regarding the existence of mitigating circumstances as "judgment call[s]" and weighing determinations "question[s] of mercy." Id.

Abdool appears to argue that Hurst created a new substantive rule**,** not a new procedural rule, or, that it created some new fundamental or structural error that is not subject to a harmless error analysis. Neither contention has any merit.

In Schriro v. Summerlin, 542 U.S. 348, 351 (2004), the Supreme Court directly addressed whether its decision in Ring v. Arizona was retroactive. The Court held the decision in Ring was **procedural** and non-retroactive. Id. at 353. This was because Ring only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." Id. The Court concluded its opinion stating: "The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth

Amendment's guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review." Summerlin, 542 U.S. at 358. See Whorton v. Bockting, 549 U.S. 406, 416 (2007) (holding Crawford v. Washington, 541 U.S. 36 (2004) was not retroactive under Teague and relying extensively on the analysis of Summerlin).

Ring did not create a new constitutional right. That right was created by the Sixth Amendment guaranteeing the right to a jury trial.[3] If Ring was not retroactive, then Hurst cannot be retroactive as Hurst is merely an application of Ring to Florida. In fact, the decision in Hurst is based on an entire line of jurisprudence which courts have almost universally held to not have retroactive application. See DeStefano v. Woods, 392 U.S. 631 (1968) (*per curiam*) (holding the Court's decision in Duncan v. Louisiana, which guaranteed the right to a jury

[3] The right to a jury trial was extended to the States in Duncan v. Louisiana, 391 U.S. 145 (1968). But, in DeStefano v. Woods, 392 U.S. 631 (1968) (*per curiam*), the Court declined to apply the holding of Duncan retroactively. Apprendi merely extended the right to a jury trial to the sentencing phase, when the State sought to increase the maximum possible punishment. Apprendi, 530 U.S. at 494.

trial to the States was not retroactive); McCoy v. United States, 266 F.3d 1245, 1255, 1259 (11th Cir. 2001) (holding Apprendi not retroactive under Teague, and acknowledging that every federal circuit to consider the issue reached the same conclusion); Varela v. United States, 400 F.3d 864, 866–67 (11th Cir. 2005) (explaining that Supreme Court decisions, such as Ring, Blakely, and Booker, applying Apprendi's "prototypical procedural rule" in various contexts are not retroactive); Crayton v. United States, 799 F.3d 623, 624-25 (7th Cir.), cert. denied, ___ U.S. ___, 136 S. Ct. 424 (2015) (holding that Alleyne v. United States, 570 U.S. ___, ___, 133 S. Ct. 2151, 2156 (2013), which extended Apprendi from maximum to minimum sentences, did not, like Apprendi or Ring, apply retroactively); State v. Johnson, 122 So. 3d 856, 865-66 (Fla. 2013) (holding Blakely not retroactive in Florida).

A significant judicial consensus has determined that a Ring error does not fundamentally undermine the fairness or integrity of capital sentencing proceedings. Notably, the Supreme Court came to the non-retroactivity conclusion following Ring even though the Arizona statute at issue, unlike Florida, had no jury participation in the finding of an aggravating circumstance or the actual sentencing determination itself. Summerlin, 542 U.S. 348, 358. Indeed, state and

federal courts have uniformly held that Ring is not retroactive.[4] See State v. Towery, 204 Ariz. 386, 393-94, 64 P.3d 828, 835-36 (Az.), cert. dismissed, 539 U.S. 986 (2003). ("Conducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice" and would be inconstant with the Court's duty to protect victim's rights under the Arizona Constitution); Rhoades v. State, 149 Idaho 130, 139-40, 233 P.3d 61, 70-71 (Id. 2010), cert. denied, 562 U.S. 1258 (2011) (holding that Ring is not retroactive after conducting its own independent Teague analysis and observing, as the Supreme Court did in Summerlin, that there is debate as to whether juries or judges are the better fact-finders and that it could not say "confidently" that judicial factfinding "seriously diminishes accuracy."); Colwell v. State, 118 Nev. 807, 821-22, 59 P.3d 463, 473 (Nev. 2002), cert. denied, 540 U.S. 981 (2003) **(**applying Teague to find that Ring announced a new

[4] The lone and now questionable outlier is Missouri. In a decision issued before the Supreme Court issued its opinion on retroactivity in Summerlin the Missouri Supreme Court applied Ring retroactively to those few cases where the jury had deadlocked on a verdict and therefore the judge made all the requisite findings and sentenced the defendant to death. In doing so, the court noted that it would have minimal impact in Missouri as the court had identified only **five** such cases. State v. Whitfield, 107 S.W.3d 253, 268-69 (Mo. 2003). C.f. State ex rel. Taylor v. Steele, 341 S.W.3d 634, 652 (Mo. 2011) (noting that subsequently the Supreme Court and federal courts subsequently held Ring not retroactive "[a]nd in light of Whitfield's limited retroactively holding, this Court is not compelled to go further than the United States Supreme Court to provide Sixth Amendment jury sentencing to Taylor.").

procedural rule that would not be subject to retroactive application).[5]

Appellant posits the novel but plainly meritless argument that the Supreme Court in Hurst decided its decision would be applied retroactivity by mentioning *stare decisis* in its opinion overruling its prior precedent. (Appellant's Supp. Brief at 14). *Stare decisis* is a separate legal concept and is unrelated to the retroactivity analysis. By its own terms, a decision which announces a new constitutional rule generally involves overturning prior precedent. By Abdool's logic, any case that involves overturning past precedent would necessarily be retroactive. Not surprisingly, Abdool cites no precedent to support his theory. It is plainly meritless. See generally Tyler v. Cain, 533 U.S. 656, 663 (2001) ("The new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court. . . The only way the Supreme Court can, by itself, 'lay out and construct' a

[5] In Colwell, 59 P.3d at 473 the Nevada Supreme Court explained:

> . . .[W]e believe it is clear that *Ring* is based simply on the Sixth Amendment right to a jury trial, not on a perceived need to enhance accuracy in capital sentencings, and does not throw into doubt the accuracy of death sentences handed down by three-judge panels in this state. We conclude therefore that the likelihood of an accurate sentence was not seriously diminished simply because a three-judge panel, rather than a jury, found the aggravating circumstances that supported Colwell's death sentence.
>
> We conclude that retroactive application of *Ring* on collateral review is not warranted.

rule's retroactive effect, or 'cause' that effect 'to exist, occur, or appear,' is through a holding.").

Stare decisis does apply to this case. However, it is this Court's decision in Johnson holding that Ring is not retroactive that is due substantial deference. Appellant offers no compelling justification for revisiting this Court's decision in Johnson. See generally Wilkerson v. Whitley, 28 F.3d 498, 508 (5th Cir. 1994) ("In other words, where a determination of retroactivity has been made for a particular new rule, *stare decisis* prohibits revisiting the question with new retroactivity principles."). Assuming any new Witt analysis would be appropriate, all of the same factors apply with equal force to hold that Hurst is not retroactive. Such an application would be greatly deleterious to finality and unsettle the reasonable expectations for justice by Florida's citizens and, in particular, countless numbers of victims' family members.[6] There is no reason for this Court

[6] As noted by the Supreme Court Calderon v. Thompson, 523 U.S. 538, 556 (1998) the concept of finality is of vital importance to our system of justice. The Court stated, in part:

> Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. *See generally Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," *Herrera v. Collins*, 506 U.S. 390, 421, 113 S.Ct. 853, 871, 122 L.Ed.2d 203 (1993) (O'CONNOR, J., concurring), an interest shared by the State and the victims of crime alike.

to depart from its prior determination that Ring does not apply retroactively to cases that are final on direct appeal.[7] Such a decision would represent a clear break from this Court's precedent which has not found decisions from the United States Supreme Court providing new developments in constitutional law retroactive. See e.g. Chandler v. Crosby, 916 So. 2d 728, 731 (Fla. 2005) (holding that all three factors in the "Witt analysis weigh against the retroactive application of Crawford[]" and noting that the "new rule does not present a more compelling objective that outweighs the importance of finality.") (citing State v. Glenn, 558 So. 2d 4, 7 (Fla. 1990)); Hughes v. State, 901 So. 2d 837, 838 (Fla. 2005) (holding Apprendi v. New Jersey, is not retroactive); State v. Statewright, 300 So. 2d 674 (Fla. 1974) (declining to retroactively apply Miranda v. Arizona, 384 U.S. 436 (1966)).

There can be no credible argument that Florida failed to apply Ring in bad faith. The State certainly relied in good faith upon prior decisions of this Court and prior decisions of the Supreme Court which had upheld Florida's capital sentencing statute. See e.g. Rigterink v. State, 66 So. 3d 866, 895-96 (Fla. 2011)

[7] See also Washington v. State, 907 So. 2d 512, 516 (Fla. 2005) (Lewis, Justice, concurring) ("The interpretations of the concepts discussed in Apprendi and Ring by the United States Supreme Court drive my consideration that Ring cannot be classified as being of fundamental significance or of significant magnitude to cause retroactive application.").

(noting that "[i]n over fifty cases since Ring's release, this Court has rejected similar Ring claims."). Indeed, since Ring was decided, more than a decade passed without the Supreme Court accepting a case challenging Florida's capital sentencing statute in light of Ring, until Hurst. While the Supreme Court ultimately extended Ring to invalidate Florida's capital sentencing procedure, there were significant differences between the Arizona and Florida statutes that rendered such an extension far less than certain or inevitable. See Hurst at 624-25 (Alito, Justice, dissenting) (observing that unlike Arizona, "[u]nder the Florida system, the jury plays a critically important role" and that the Court's "decision in Ring did not decide whether this procedure violate[d] the Sixth Amendment . . ."). In Butterworth v. United States, 775 F.3d 459, 467-68 (1st Cir.), cert. denied, 135 S. Ct. 1517 (2015), the First Circuit Court of Appeals rejected a defendant's attempt to justify retroactive application of Alleyne [holding that facts justifying minimum mandatory sentence must be found by a jury] based upon Apprendi hindsight:

> This twist on Butterworth's argument is unpersuasive. We are unaware of any instance in which the Supreme Court (or any federal court) decided that a particular procedural protection is not retroactively applicable under the watershed exception, and then changed its mind years later due to the law's intervening evolution. It is not difficult to imagine why that is so: Judicial interpretation of the Constitution, by its nature, builds on itself. The exercise of seeking out the first domino to fall, in hindsight, would make the retroactivity determination of any given new rule interminable. So the fact that *Apprendi* was cited by subsequent cases extending the jury trial guarantee and heightened burden of proof to mandatory state

> sentencing guidelines, *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), federal sentencing guidelines, *Booker*, 543 U.S. at 244-45, 125 S.Ct. 738, and the death penalty, *Ring v. Arizona*, 536 U.S. 584, 589, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), does not a watershed moment make of *Apprendi* itself. Put differently, when a non-retroactive new constitutional rule is later cited in cases that create more new rules, that first new rule does not then automatically qualify as retroactive under *Teague*.

Appellant's reliance upon Falcon v. State, 162 So. 3d 954, 961 (Fla. 2015) is misplaced. In Falcon this Court held that the Supreme Court in Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455 (2012) announced a new substantive rule to bar mandatory life sentences without the possibility of parole for all juveniles. This Court had little difficulty determining that such a decision effectively places beyond the power of the State the power to punish certain offenders. Subsequently, the Supreme Court decided that Miller announced a new substantive rule that was retroactive. The fact the ruling was described as substantive, not procedural, was critical to the retroactivity analysis. The Court explained:

> Substantive rules, then, set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful. Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating "the manner of determining the defendant's culpability." *Schriro*, 542 U.S., at 353; *Teague, supra*, at 313. Those rules "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Schriro, supra*, at 352. Even where procedural error has infected a trial, the resulting conviction or sentence may still be accurate; and,

> by extension, the defendant's continued confinement may still be lawful. For this reason, a trial conducted under a procedure found to be unconstitutional in a later case does not, as a general matter, have the automatic consequence of invalidating a defendant's conviction or sentence.19 The same possibility of a valid result does not exist where a substantive rule has eliminated a State's power to proscribe the defendant's conduct or impose a given punishment. "[E]ven the use of impeccable factfinding procedures could not legitimate a verdict" where "the conduct being penalized is constitutionally immune from punishment." *United States v. United States Coin & Currency*, 401 U.S. 715, 724, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971). Nor could the use of flawless sentencing procedures legitimate a punishment where the Constitution immunizes the defendant from the sentence imposed. "No circumstances call more for the invocation of a rule of complete retroactivity." *Ibid*.

Montgomery v. Louisiana, ___ U.S. ___, 136 S. Ct. 718, 729-30 (2016). Since both this Court and the Supreme Court has held that Ring announced a new procedural rule, not a substantive rule, Falcon has no application to this case.

Since Ring v. Arizona does not apply retroactively, Hurst does not apply retroactively in Florida. See Jeanty v. Warden, FCI-Miami, 757 F.3d 1283, 1285 (11th Cir. 2014) (observing "if Apprendi's rule is not retroactive on collateral review, then neither is a decision applying its rule") (citing In re Anderson, 396 F.3d 1336, 1340 (11th Cir. 2005)). Appellant is not entitled to relief.

C. Any error was harmless under the facts of this case.

Appellant takes the position that Hurst error "can never be harmless." (Appellant's Supp. Brief at 21). That position is quite curious given the fact the

Supreme Court remanded Hurst so that this Court could assess harmlessness.[8] The Court stated:

> Finally, we do not reach the State's assertion that any error was harmless. *See Neder v. United States*, 527 U.S. 1, 18-19 (1999) (holding that the failure to submit an uncontested element of an offense to a jury may be harmless). This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here. *See Ring*, 536 U.S. at 609 n.7."

Hurst, 136 S. Ct. at 624. It seems clear that any error, contrary to Appellant's position, is subject to harmless error review.

That this type of error can be harmless is confirmed by Washington v. Recuenco, 548 U.S. 212 (2006), where the United States Supreme Court reversed a Washington state court holding that error under Blakely v. Washington, 542 U.S. 296 (2004), was structural in nature and could never be harmless. Blakely is an Apprendi/Ring decision which requires jury factfinding where a sentence is to be enhanced due to the defendant's use of a firearm. Consistent with this approach, this Court has held that the failure to obtain a jury finding on an Apprendi type error is subject to a harmless error analysis. Galindez v. State, 955 So. 2d 517, 521-

[8] The State during oral argument did not concede that Abdool would be entitled to relief if Hurst was decided adversely to the State. The assistant attorney general simply recognized that this was a rare true Ring case wherein no jury findings were necessarily included in the jury's guilt phase verdict and where no prior violent felony exists.

23 (Fla. 2007). In fact, in Galindez, the Court expressly noted that it had applied a harmless error analysis to the failure to have a jury decide an element of an offense. Id. at 522. Thus, it is clear that Hurst error is subject to a harmlessness analysis.

Hurst was convicted of first-degree murder, and did not have a prior criminal history or a contemporaneous felony conviction with the murder. Hurst v. State, 147 So. 3d 435, 440-41 (Fla. 2014). Accordingly, Hurst presented the United States Supreme Court with a 'pure' claim under Ring v. Arizona, 536 U.S. 584 (2002), where the jury neither gave a unanimous recommendation nor were any of the established aggravating circumstances identifiable as having come from a jury verdict. Hurst, 147 So. 3d at 445-47. In that respect, Abdool's case also presents this Court with a true Hurst/Ring claim. It does not, however, aside from the question of retroactivity, mandate any relief.

Hurst does not hold there is a constitutional right to any jury sentencing. In Florida, a defendant is eligible for a capital sentence if at least one aggravating factor applied to the case. See Ault v. State, 53 So. 3d 175, 205 (Fla. 2010); Zommer v. State, 31 So. 3d 733, 752-54 (Fla. 2010); State v. Steele, 921 So. 2d 538, 540 (Fla. 2005).[9] See also Tuilaepa v. California, 512 U.S. 967, 971-72 (1994)

[9] Essentially, Hurst found that Florida had made a death sentence a form of aggravated murder requiring a jury finding of at least one aggravating

("To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase.") (citations omitted). In this case, no rational fact-finder would have failed to find the murder was either heinous, atrocious and cruel (HAC), or, cold, calculated and premedicated (CCP).

First, as to HAC, this is not a close question. Seventeen year old Amelia was bound with duct tape, doused in gasoline, and, set on fire. The medical examiner testified that she had soot in her lungs and was breathing and alive at the time she was set on fire. Amelia would have felt pain and sufering from seconds to minutes before losing unconsciousness, as her skin burned down to the level of nerve cells and her lungs inhaled hot gasses. (TR V13/862-64). In his statement, Abdool told Detective Gammill that after the gas ignited, Amelia was screaming and running around. Amelia ran into the front fender of Abdool's car. (TR V11/559). Under

---

circumstance. Once one aggravating circumstance is found, the Sixth Amendment is satisfied. In Alleyne, 133 S. Ct. at 2162-63, the Court explained that "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime." As noted, only one aggravating factor is necessary to support the higher range penalty--death. Finding additional aggravators does not expose the defendant to any higher or additional penalty.

these facts, no rational juror would fail to find this murder was HAC.[10]

Although perhaps a closer question, no rational juror would fail to find this murder was also CCP. On direct appeal, this Court had little trouble determining that competent, substantial evidence supported the trial court's conclusion that this murder was CCP. In Abdool, 53 So. 3d 223 this Court held:

> Likewise, the circumstances in the instant case include all the hallmarks of CCP-Abdool spoke of killing Amelia several months before the murder; he stopped and purchased the murder weapons just prior to driving her out to a remote area; he then fought with her, wrapped her in tape, and doused her with gasoline, all before he lit her aflame. Stated otherwise, Abdool planned and prepared for his actions and then "carried out [the killing of Amelia] as a matter of course." *See Franklin*, 965 So. 2d at 98. Accordingly, we hold that there was competent substantial evidence to support the CCP aggravating circumstance.

This was not an emotional or quick and impulsive decision of Abdool's to murder Amelia. The State presented evidence that Abdool told at least one person he wanted to kill Amelia and attempted to enlist the aid of two others to kill Amelia and get rid of her body. Additionally, Abdool bought the murder weapons within two hours of the murder, including gas, the gas can, and the duct tape. Abdool brought the last weapon, a BIC lighter, with him. Evidence that Abdool expressed a desire to kill Amelia, solicited others to help get rid of Amelia and

[10] While defense counsel certainly did not concede application of this aggravator, defense counsel wisely did not spend any significant time contesting it in her penalty phase closing argument. (TR 16/1275-76).

purchased the tools he used to kill Amelia provide overwhelming evidnece that Abdool coldly contemplated this murder.

After driving Amelia to a remote location, Adool put on his gloves and took the gas can, something Abdool had purchased less than two hours before the murder, from his car. Evidence at the scene showed that, before he poured out the contents of the gas can onto Amelia's body, Abdool separated the spout from the container so that the gas would flow easily and quickly onto Amelia's torso, hands and face. Finally, Abdool lit the BIC lighter that he had brought to the scene and held the heat source inches, if not in contact, with Amelia's body.[11] Under these facts, Abdool clearly displayed the planning and reflection required to support the CCP aggrvator.

The failure of the jury to specifically find CCP and HAC as aggrvating factors was harmless under these facts. Abdool is not entitled to relief based upon Hurst.

[11] Duct tape, a melted plastic gas can, and a black gas cap/spout were found at the murder scene. Abdool bought a gas can and a roll of duct tape at a 7-11 convenience store at 12:44 a.m., February 25, 2006. (TR V9/338; TR V11/556; TR V17/48). Abdool also bought some gas. (TR V10/558). Abdool admitted that he bought the duct tape on the night he killed Amelia and that he wrapped Amelia with the duct tape found at the scene. (TR V10/530, 556).

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the denial of post-conviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of March, 2016, I electronically filed the foregoing with the Clerk of the Florida Supreme Court by using the e-portal filing system which will send a notice of electronic filing to the following: Marie E. DeLiberato (**deliberato@ccmr.state.fl.us)** and Julissa R. Fontán (**fontan@ccmr.state.fl.us)**, Assistants CCRC, Law Office of the Capital Collateral Regional Counsel - Middle Region, 12973 N. Telecom Parkway, Temple Terrace, Florida 33637-0907.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Scott A. Browne

SCOTT A. BROWNE
Senior Assistant Attorney General
Florida Bar No. 0802743
Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
scott.browne@myfloridalegal.com
E-service: capapp@myfloridalegal.com

COUNSEL FOR APPELLEE