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IN THE SUPREME COURT OF FLORIDA

JOHN LOVEMAN REESE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC18-815
Lower Tribunal No.
1992CF4174
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

> The evidence presented at trial reveals that Reese dated Jackie Grier on and off for seven years; the victim had been Grier's best friend for approximately two and a half years. Reese was extremely possessive and disliked Austin because of the amount of time Grier spent with her. Grier and Austin had begun making trips to Georgia where, unknown to Reese, both had met new boyfriends. They returned from the last of these trips on Monday, January 27, 1992. On Wednesday of the same week, Grier was concerned because she could not reach Austin by phone, and she and a neighbor went to Austin's house and entered through the unlocked back door. They found Austin lying face down in the bedroom, covered with a sheet. She had been strangled with an electrical extension cord that was doubled and wrapped around her neck twice with the ends pulled through the loop.
>
> Reese was questioned by police after his palm print was found on Austin's waterbed. He confessed to breaking into her home around noon on Tuesday, January 28. He said he waited for her to return home because he wanted to talk to her about Grier, but when he saw Austin coming home from work around four o'clock he got scared and hid in a closet. Reese said that after Austin went to sleep on the sofa, he came out of the closet but panicked when she started to move. He grabbed her around the neck from behind and dragged her into the bedroom. He raped her, then strangled her with the extension cord. He was arrested after his confession.

Reese v. State, 694 So. 2d 678, 680 (Fla. 1997). Appellant was convicted of first-degree murder, sexual battery, and burglary and was sentenced to death in accordance with the jury's eight-to-four recommendation. Id. The jury was instructed that "[e]ach aggravating circumstance must be established beyond a reasonable doubt before it may be considered" and that they should not arrive at a sentenced too "hastily or without due regard to the gravity of these proceedings" because "a human life is at stake. . . ."

(Record at 1486-87). The judge found three aggravators: cold, calculated, and premeditated (CCP); heinous, atrocious, or cruel (HAC); and committed in the course of a sexual battery and a burglary and "one nonstatutory mitigator—no significant criminal history—but found that the mitigator, along with other proposed nonstatutory mitigation, was of minimal or no value." Id. This Court affirmed the conviction but remanded for "entry of a new sentencing order expressly weighing all mitigating evidence presented." Id. at 685.

After the circuit court judge entered a new sentencing order, Appellant appealed and this Court again reversed and remanded for a new sentencing order. Reese v. State, 728 So. 2d 727, 728 (Fla. 1999). The circuit court judge held a new sentencing hearing, again sentenced the Appellant to death, and this Court affirmed. Reese v. State, 768 So. 2d 1057, 1060 (Fla. 2000).

> The court found three aggravators: (1) the homicide was committed during a burglary and sexual battery; (2) the homicide was heinous, atrocious, or cruel (HAC); and (3) the homicide was committed in a cold, calculated, and premeditated manner (CCP). The court found no statutory mitigators. The court found seven nonstatutory mitigators: (1) good jail record (minimal weight); (2) positive character traits (minimal weight); (3) defendant's support of Jackie Grier and her children (very little weight); (4) his possessive relationship with Jackie Grier (minimal weight); (5) emotional immaturity (little weight); (6) possible use of drugs and alcohol around the time of the murder (little weight); and (7) lack of a significant criminal record (very slight weight). The court rejected the following nonstatutory mitigators: (1) defendant's adaptability to prison life; (2) childhood trauma other than the death

> of his mother; (3) emotional or mental impairment at the time of the murder; and (4) use of crack cocaine at the time of the murder.

Id. at 1058.

On March 5, 2001, the United States Supreme Court denied Appellant's petition for a writ of certiorari and his judgment and sentence became final. Reese v. Florida, 532 U.S. 910 (2001); Florida Rules of Criminal Procedure (Fla. R. Crim. P.) 3.851(d)(1)(B) (A judgment and sentence become final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.").

The circuit court denied Appellant's motion for post-conviction relief, which was affirmed by this Court. Reese v. State, 14 So. 3d 913, 920 (Fla. 2009). In post-conviction, Appellant alleged his "trial counsel was ineffective for failing to present certain mental health mitigation evidence in the penalty phase." Id. at 916-17. This Court provided an extensive analysis of this claim. Id. at 916-19. The Court concluded that "although appellant presented evidence of frontal lobe dysfunction that was not presented at the penalty phase, this evidence is insufficient to undermine our confidence in the outcome." Id. at 919.

Appellant also argued that he was ineligible for the death penalty under Atkins, which this Court rejected. Reese, 14 So. 3d at 920; Atkins v. Virginia, 536 U.S. 304 (2002).

> [T]estimony at the postconviction hearing indicating that appellant was under a severe emotional disturbance or, as he calls it, a "temporary mental illness," at the time of the crime is not entitled to the same consideration as mental retardation.

Reese, 14 So. 3d at 920 (citing Lawrence v. State, 969 So. 2d 294, 300 n.9 (Fla. 2007); Connor v. State, 979 So. 2d 852, 867 (Fla. 2007)). The Court also rejected Appellant's claim that his sentence was in violation of Ring because his sentence became final pre-Ring and Ring does not apply retroactively. Reese, 14 So. 3d at 920; Ring v. Arizona, 536 U.S. 584 (2002).

Appellant filed a writ of habeas corpus in federal court, which was denied. Reese v. Sec'y, Fla. Dep't of Corr., 675 F.3d 1277, 1293 (11th Cir. 2012), cert. denied, Reese v. Tucker, 568 U.S. 905 (2012). Appellant "alleged that, during the sentencing stage of his trial, the prosecutor had improperly appealed to the jury to recommend a death sentence, and had denied him due process of law." Id. at 1286.

In Hurst v. Florida, the United States Supreme Court held that Florida's capital sentencing scheme was unconstitutional pursuant to Ring's determination that the Sixth Amendment requires a jury to find the existence of an aggravating circumstance which qualifies a defendant for a sentence of death. Hurst v. Florida, 136 S. Ct. 616 (2016). On remand in Hurst v. State, this Court held that in capital cases, the jury must unanimously and expressly find that the aggravating factors were proven beyond a reasonable

doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death. Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, Florida v. Hurst, 137 S. Ct. 2161 (2017).

In Mosley, this Court held that Hurst applies retroactively to cases which became final after the decision was issued in Ring on June 24, 2002. Mosley v. State, 209 So. 3d 1248, 1283 (Fla. 2016). On the same day in Asay, this Court held that Hurst does not apply retroactively to cases which became final prior to Ring. Asay v. State, 210 So. 3d 1, 22 (Fla. 2016), cert. denied, Asay v. Florida, 138 S. Ct. 41 (2017).

Shortly after the Hurst decisions, Appellant filed a successive post-conviction motion, raising a claim asserting that he should be entitled to relief pursuant to Hurst. Additionally, Appellant raised an Atkins claim, which was withdrawn, and a newly discovered evidence claim, which the post-conviction court dismissed as unripe. The post-conviction court summarily denied the Hurst claim and Appellant appealed. This is the State's Answer.

SUMMARY OF THE ARGUMENT

Hurst is Not Retroactive to Appellant Because His Judgment and Sentence Became Final in 2001. Since Hurst is not retroactive to cases, like Appellant's, which were final prior to Ring, the post-conviction court properly denied this claim and this Court should affirm.

Appellant's Organic Brain Damage Claim is Unripe, as Appellant Admits, and Should be Denied. Appellant admits his claim that "new forensic brain scanning technologies will reveal additional mental health mitigation" without anything to support this assertion is unripe. Appellant also agrees that the post-conviction court's dismissal was warranted. Thus, this claim should be denied.

STANDARD OF REVIEW

Summary denial by the post-conviction court is reviewed de novo. Suggs v. State, 238 So. 3d 699, 709 (Fla. 2017) (citing Hunter v. State, 29 So. 3d 256, 261 (Fla. 2008)).

ARGUMENT

ISSUE I: Hurst is Not Retroactive to Appellant Because His Judgment and Sentence Became Final in 2001.

This Court's precedent is abundantly clear that Hurst does not apply retroactively to cases which became final prior to Ring. See, e.g., Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), cert. denied, Hitchcock v. Florida, 138 S. Ct. 513 (2017); Lambrix v. State, 227 So. 3d 112, 113 (Fla. 2017), cert. denied, Lambrix v.

Florida, 138 S. Ct. 312 (2017); Hannon v. State, 228 So. 3d 505, 513 (Fla. 2017), cert. denied, Hannon v. Florida, 138 S. Ct. 441 (2017); Branch v. State, 234 So. 3d 548, 549 (Fla. 2018), cert. denied, Branch v. Florida, 138 S. Ct. 1164 (2018); Cole v. State, 234 So. 3d 644, 645 (Fla. 2018), cert. denied, Cole v. Florida, no. 17-8540, 2018 WL 1876873 (June 18, 2018); Jones v. State, 234 So. 3d 545 (Fla. 2018), cert. denied, Jones v. Florida, no. 17-8652, 2018 WL 1993786 (June 25, 2018). Since Appellant's case became final pre-Ring on March 5, 2001, this claim should be denied.

This Court first analyzed the retroactive application of Hurst in Mosley and Asay. Mosley, 209 So. 3d at 1276-83; Asay, 210 So. 3d at 15-22. In Mosley, the this Court held that Hurst is retroactive to cases which became final after the June 24, 2002, decision in Ring. Mosley, 209 So. 3d at 1283. In determining whether Hurst should be retroactively applied to Mosley, this Court conducted a Witt analysis, the state based test for retroactivity. Witt v. State, 387 So. 2d 922, 926 (Fla. 1980) (determining whether a new rule should be applied retroactively by analyzing the purpose of the new rule, extent of reliance on the old rule, and the effect of retroactive application on the administration of justice) (citing Stovall v. Denno, 388 U.S. 293, 297 (1967); Linkletter v. Walker, 381 U.S. 618 (1965)). Since "finality of state convictions is a state interest, not a federal one," states are permitted to implement standards for retroactivity that grant "relief to a

broader class of individuals than is required by Teague," which provides the federal test for retroactivity. Danforth v. Minnesota, 552 U.S. 264, 280-81 (2008) (emphasis in original); Teague v. Lane, 489 U.S. 288 (1989); see also Johnson v. New Jersey, 384 U.S. 719, 733 (1966) ("Of course, States are still entirely free to effectuate under their own law stricter standards than we have laid down and to apply those standards in a broader range of cases than is required by this [Court]."). As Ring, and by extension Hurst, has been held not to be retroactive under federal law, Florida has implemented a test which provides relief to a broader class of individuals in applying Witt instead of Teague for determining the retroactivity of Hurst. See Schriro v. Summerlin, 542 U.S. 348, 258 (2004) (holding that "Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review"); Lambrix v. Sec'y, Fla. Dep't of Corr., 872 F.3d 1170, 1182-83 (11th Cir. 2017), cert. denied, Lambrix v. Jones, 138 S. Ct. 312 (2017) (noting that "[n]o U.S. Supreme Court decision holds that its Hurst decision is retroactively applicable").

This Court determined that all three Witt factors weighed in favor of retroactive application of Hurst to cases which became final post-Ring. Mosley, 209 So. 3d at 1276-83. This Court concluded that "defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by Ring should

not be penalized for the United States Supreme Court's delay in explicitly making this determination."[1] Id. at 1283. Thus, this Court held Hurst to be retroactive to Mosley, whose case became final in 2009, which is post-Ring. Id.

Conversely, applying the Witt analysis in Asay, the this Court held that Hurst is not retroactive to any case in which the death sentence was final pre-Ring. Mosley, 209 So. 3d at 1283. The Court specifically noted that Witt "provides more expansive retroactivity standards than those adopted in Teague." Asay, 210 So. 3d at 15 (emphasis in original) (quoting Johnson, 904 So. 2d at 409). However, this Court determined that prongs two and three of the Witt test, reliance on the old rule and effect on the administration of justice, weighed heavily against the retroactive application of Hurst to pre-Ring cases. Asay, 210 So. 2d at 20-22. As related to the reliance on the old rule, this Court noted

> the State of Florida in prosecuting these crimes, and the families of the victims, had extensively relied on the constitutionality of Florida's death penalty scheme based on the decisions of the United States Supreme Court. This factor weighs heavily against retroactive application of Hurst v. Florida to this pre-Ring case.

Id. at 20. As related to the effect on the administration of justice, this Court noted that resentencing is expensive and time

[1] Under this rationale, it would not make sense to only grant relief to those who continued to raise Ring in the 14 years between Ring and Hurst as this would encourage the filing of frivolous claims in the hope that subsequent vindication could provide a basis of relief for a future change in the law. Nor should a defendant who failed to raise a claim that appeared to be well settled against him/her be punished for not raising what he/she believed to be a frivolous claim.

consuming and that the interests of finality weighed heavily against retroactive application. Id. at 21-22. Thus, Hurst is not retroactive to Asay since the judgment and sentence became final in 1991, pre-Ring. Id. at 8, 20.

Since Asay, this Court has continued to apply Hurst retroactively to all post-Ring cases and declined to apply Hurst retroactively to all pre-Ring cases. This distinction between cases which were final pre-Ring versus cases which were final post-Ring is neither arbitrary nor capricious.

In the traditional sense, new rules are applied retroactively only to cases which are not yet final and are still in the direct appeal pipeline. See Griffith v. Kentucky, 479 U.S. 314, 328 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"); Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992) (applying Griffith to Florida defendants); Penry v. Lynaugh, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context). Under this "pipeline" concept, Hurst would only apply to the cases which were not yet final on the date of the decision in Hurst. This type of traditional retroactivity "can depend on a score of random factors having nothing to do with the offender or the offense," such as trial scheduling, docketing on

appeal, etc. (Brief at 12). Even under the "pipeline" concept, cases whose direct appeal was decided on the same day might have their judgment and sentence become final on either side of the line for retroactivity, such as Appellant's example of Bowles and Card. Bowles v. State, 804 So. 2d 1173 (Fla. 2001); Card v. State, 803 So. 2d 613 (Fla. 2001).[2] Additionally, under the "pipeline" concept, "old" cases where the judgment and/or sentence has been overturned will receive the benefit of new law as they are no longer final.[3] The United States Supreme Court recognizes this type of traditional retroactivity as proper and not violative of the Eighth or Fourteenth Amendment.

The only difference between this more traditional type of retroactivity and the retroactivity implemented by this Court is that it stems from the date of the decision in Ring rather than from the date of the decision in Hurst. In moving the line of

[2] Though both Bowles and Card were decided on October 11, 2001, in Bowles, the rehearing was denied and the Mandate was issued January 10, 2002, but in Card, the rehearing was denied and the Mandate was issued December 20, 2001.

[3] Appellant uses the example of Johnson and Calloway. Although Johnson originally became final February 21, 1984, subsequent litigation led to a new trial being granted in 1987 and the death sentences being vacated in 2010. Johnson v. Florida, 465 U.S. 1051 (1984); Johnson v. Wainwright, 498 So. 2d 938, 939 (Fla. 1986); Johnson v. State, 44 So. 3d 51, 74 (Fla. 2010). After a new penalty phase in 2013, Johnson's case was pending direct appeal when Hurst was decided. Johnson v. State, 205 So. 3d 1285 (Fla. 2016). As such, though Johnson's crime occurred in the 1980s, he receives the benefit of Hurst because his judgment and sentence were not final pre-Hurst. Similarly, in Calloway, although the crime occurred in 1997, the trial was not completed until 2009 and Appellant's judgment and sentence were not final when Hurst was issued. Calloway v. State, 210 So. 3d 1160, 1200 (Fla. 2017). These two scenarios would both receive the benefit of Hurst under the "pipeline" concept.

retroactive application back to Ring,[4] this Court reasoned that since Florida's death penalty sentencing scheme should have been recognized as unconstitutional upon the issuance of the decision in Ring, defendants should not be penalized for time that it took for this determination to be made official in Hurst. Certainly, this Court has demonstrated "some ground of difference that rationally explains the different treatment" between pre-Ring and post-Ring cases. Eisenstadt v. Baird, 405 U.S. 438, 447 (1972); see also Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (To satisfy the requirements of the Fourteenth Amendment, "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."). Unquestionably, extending relief to more individuals,[5] defendants who would not receive the benefit of a new rule because their cases were already final when Hurst was decided, does not violate the Eighth or Fourteenth Amendment.[6] Thus, just like the more traditional

[4] Though Apprendi served as a precursor to Ring, the United States Supreme Court distinguished capital cases from its holding in Apprendi and thus Ring is the appropriate demarcation for retroactive application to capital cases. Asay, 210 So. 3d at 19; Apprendi v. New Jersey, 530 U.S. 466, 496 (2000).

[5] Approximately 150 defendants whose convictions became final post-Ring are being re-sentenced pursuant to Hurst. Death Penalty Information Center, Florida Death-Penalty Appeals Decided in Light of Hurst, available at https://deathpenaltyinfo.org/node/6790 (last visited Aug. 7, 2018).

[6] Regarding the argument that juries are "increasingly unlikely to impose death sentences," Appellant fails to acknowledge two recent cases which are in direct

application of retroactivity, the Ring based cutoff for the retroactive application of Hurst is not in violation of the Eighth or Fourteenth Amendment.

In addition to arguing for retroactive application of Hurst to his case, Appellant argues that "especially in these 'older cases,' the advisory jury scheme invalidated by Hurst implicated systematic violations of Caldwell." (Brief at 20); Caldwell v. Mississippi, 472 U.S. 320 (1985). Because this is a post-conviction case, this Court would first need to address and resolve the issue of retroactivity before even reaching the merits of Appellant's jury instruction claims. Aside from the separate question of the retroactivity, it is clear that there was not a Caldwell violation as Appellant's jury was properly instructed under local law and the instructions did not diminish the jury's sense of responsibility.

This Court has repeatedly rejected challenges to the standard jury instructions in death penalty cases pursuant to Caldwell. Hall v. State, 212 So. 3d 1001, 1032-33 (Fla. 2017). These claims are rejected because the jury was properly instructed on its role as defined by local law. Further, the seriousness of the jury's

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contradiction to its assertion. In Deviney, the original jury recommended death 8-4 after being instructed pre-Hurst. Deviney v. State, 213 So. 3d 794, 795 (2017). Deviney was granted a new penalty phase and the post-Hurst jury made a unanimous jury recommendation of death. Deviney v. State, case no. SC17-2231. Similarly, in Bright, the pre-Hurst jury recommended death 8-4. State v. Bright, 200 So. 3d 710, 720 (2016). Bright was granted a new penalty phase and the post-Hurst jury made a unanimous jury recommendation of death. Bright v. State, case no. SC17-2244. In both of these cases, the jury went from being barely over the majority required to being unanimous when instructed that unanimity was required.

role is no way diminished by these instructions. Thus, there was no Caldwell violation in this case and Appellant's claim is meritless.

"To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407 (1989); see also Romano v. Oklahoma, 512 U.S. 1, 9 (1994). In Caldwell, the prosecutor made "focused, unambiguous, and strong" remarks which misled the jury into believing the responsibility for sentencing lay elsewhere. Caldwell, 472 U.S. at 340. The comments included "your decision is not the final decision" and "[y]our job is reviewable" and that defense was "insinuating that your decision is the final decision." Id. at 325-26.

The United States Supreme Court "has repeatedly said that under the Eighth Amendment, 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" Caldwell, 472 U.S. at 329 (quoting California v. Ramos, 463 U.S. 992, 998-99 (1983)). The problem with the argument made by the prosecutor in Caldwell was that it presented "an intolerable danger that the jury will in fact choose to minimize the importance of its role" and thus be in contravention of the requirements of the Eighth Amendment. Id. at 333. However, "'the infirmity identified in Caldwell is simply absent' in a case where 'the jury was not

affirmatively misled regarding its role in the sentencing process.'" Davis v. Singletary, 119 F.3d 1471, 1482 (11th Cir. 1997) (quoting Romano, 512 U.S. at 9).

In Appellant's case, the jury was not affirmatively misled. The jury was instructed of its role as assigned by local law. Davis, 119 F.3d at 1482; see Truehill v. Florida, 138 S. Ct. 3 (2017); Middleton v. Florida, 138 S. Ct. 829 (2018); Guardado v. Jones, 138 S. Ct. 1131 (2018); Kaczmar v. Florida, 138 S. Ct. 1973 (2018). The jury was told that its role was advisory in nature. (Record at 1486-87). Since under Florida law, the judge remains the final sentencing authority, a jury's recommendation of death is in fact "advisory." Thus, characterizing the jury's recommendation as "advisory" is an accurate description of the role assigned to the jury by Florida law. Additionally, Appellant's jury was specifically instructed about the "gravity" of its decision and that "human life is at stake." (Record at 1487). There was no diminishment of the jury's sense of responsibility in recommending a death sentence in Appellant's case. Thus, there was no Caldwell violation in Appellant's case.

Additionally, this Court has explicitly rejected Caldwell attacks on Florida's standard penalty phase jury instructions in the wake of Hurst. See Reynolds v. State, no. SC17-793, 2018 WL 1633075 (Fla. Apr. 5, 2018); Johnson v. State, no. SC17-1678, 2018 WL 1633043 (Fla. Apr. 5, 2018) (citing Reynolds in rejecting

Caldwell claim). This Court pointed out the absurdity of the "Hurst-induced Caldwell" claims:

> as the argument goes, even pre-Ring juries were being misled as to their responsibility in sentencing notwithstanding the fact that such a responsibility did not exist then and does not exist retroactively. This is the exact unwieldiness of Caldwell that Romano averts. Either juries were being misled or they were not. We conclude that they were not.

Reynolds, 2018 WL 1633075 at *12.

Further, the United States Supreme Court has never held that the Eighth Amendment requires the jury to impose a death sentence. Proffitt v. Florida, 428 U.S. 242, 252 (1976). While a plurality of the Court acknowledged "jury sentencing in a capital case can perform an important societal function," the United States Supreme Court "has never suggested that jury sentencing is constitutionally required" in such cases. Id. The Eighth Amendment requires capital punishment to be limited "to those who commit a 'narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" Roper v. Simmons, 543 U.S. 551, 568 (2005) (quoting Atkins, 536 U.S. at 319). As such, the Eighth Amendment requires the death penalty to be limited to a specific category of crimes and "[s]tates must give narrow and precise definition to the aggravating factors that can result in a capital sentence." Roper, 543 U.S. at 568. In finding Florida's death penalty unconstitutional, the United States Supreme Court did not invalidate Florida's statutory scheme based on Eighth Amendment

narrowing concerns. Implicit in the holding of Hurst v. Florida was that Florida's statutory scheme sufficiently narrowed and was in compliance with the Eighth Amendment. The Eighth Amendment does not require that a jury be the final sentencing authority. Appellant's argument that his Eighth Amendment rights were violated by his jury's advisory recommendation is not supported by United States Supreme Court precedent.

Appellant's jury was properly instructed of its role under Florida law. The instructions in Appellant's case in no way diminished the jury's actual responsibilities in the sentencing process. Because Appellant's jury was properly instructed of its role in sentencing according to Florida law, the jury instructions in Appellant's case did not violate Caldwell.

Appellant also argues that Hurst provided a substantive change in the law and thus should be afforded full retroactive application under federal law pursuant to Montgomery. (Brief at 22); Montgomery v. Louisiana, 136 S. Ct. 718 (2016). However, Hurst, like Ring, was a procedural change, not substantive one. See Summerlin, 542 U.S. at 358 ("Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review."). Thus, like Ring, Hurst is not retroactive under federal law.[7] See

[7] Aside from the question of retroactivity, there is no underlying federal constitutional error. Hurst v. Florida did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. Appellant became eligible for a death sentence by virtue of his contemporaneous felonies, sexual

Lambrix, 872 F.3d at 1182 ("No U.S. Supreme Court decision holds that its Hurst decision is retroactively applicable."); see also Ybarra v. Filson, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (holding that "Hurst does not apply retroactively to cases on collateral review"); In re Coley, 871 F.3d 455, 457 (6th Cir. 2017) (noting that the Unied States Supreme Court had not made Hurst retroactive to cases on collateral review); In re Jones, 847 F.3d 1293, 1295 (10th Cir. 2017) ("the Supreme Court has not held that Hurst announced a substantive rule").

In support of his argument that Hurst was a substantive rather than a procedural change, Appellant analogizes Hurst to Miller. (Brief at 22); Miller v. Alabama, 567 U.S. 460 (2012). Appellant argues that like Miller, Hurst "conflates a procedural requirement necessary to implement a substantive guarantee with a rule that

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battery and burglary, and his prior violent felony conviction. See Jackson v. State, 213 So. 3d 754, 787 (Fla. 2017) (citing Almendarez-Torres v. United States, 523 U.S. 224 (1998)). The unanimous jury verdict establishing his guilt for sexual battery and burglary, aggravators under well-established Florida law, are clearly sufficient to meet the Sixth Amendment's fact-finding requirement. See Jenkins v. Hutton, 137 S. Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty); Kansas v. Carr, 136 S. Ct. 633, 642 (2016) (rejecting a claim that the Constitution requires a burden of proof on whether or not mitigating circumstances outweigh aggravating circumstances, noting that such a question is "mostly a question of mercy"). See also State v. Mason, 2018 WL 1872180, *5-6 (Ohio Apr. 18, 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment."); United States v. Sampson, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."). As Petitioner does not allege a failure of the jury to find at least one aggravating factor beyond a reasonable doubt, he does not raise a federal question.

'regulate[s] only the manner of determining the defendant's culpability.'" Montgomery, 136 S. Ct. at 734-35, quoting Summerlin, 542 U.S. at 353 (emphasis in original). But the United States Supreme Court found Miller to be a substantive change because "it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status' — that is juvenile offenders . . ." and Miller to be retroactive because "the vast majority of juvenile offenders — '"faces a punishment that the law cannot impose upon him."'" Montgomery, 136 S. Ct. at 734 (quoting Penry, 492 U.S. at 330; Summerlin, 542 U.S. at 352). However, Hurst is distinguishable from Miller.

Unlike Miller, Hurst is procedural. In Hurst the same class of defendants committing the same range of conduct face the same punishment. Further, unlike the now unavailable penalty in Miller, the death penalty can still be imposed under the law after Hurst. Instead, Hurst, like Ring, merely "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." Summerlin, 542 U.S. at 353. Thus, Hurst is a procedural change and not retroactive under federal law.

Appellant next relies on Welch to argue that the Eighth Amendment unanimity requirement announced in Hurst v. State was a substantive change and is retroactive under federal law. (Brief

at 24); Welch v. United States, 136 S. Ct. 1257 (2016). Welch does not distinguish itself from Summerlin, but instead quotes Summerlin to describe the distinctions between a substantive and a procedural change. Id. at 1265. In Welch, the United States Supreme Court found that striking down the residual clause of the Armed Career Criminal Act in Johnson caused a substantive change because "the same person engaging in the same conduct is no longer subject to the Act." Id.; Johnson v. United States, 135 S. Ct. 2551 (2015). However, Hurst is distinguishable from Welch.

Unlike Welch, after Hurst, Florida's death penalty sentencing scheme still applies to the same persons engaging in the same conduct. In Hurst v. State, this Court explained that the "requirement that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment even more significantly, and expresses the values of the community as they currently relate to imposition of death as a penalty." Hurst, 202 So. 3d at 60. Again, this is an alteration in the procedure necessary to obtain a death sentence. Neither the range of conduct nor the class of persons has been altered. The only change is the manner of determining a defendant's sentence. Thus, Ring and Hurst announced a procedural change, not a substantive one.

Additionally, the United States Supreme Court "has not ruled on whether unanimity is required" in capital cases. Hurst, 202 So.

3d at 59; see also Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972). As the Court noted, "holding that because [a State] has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as [the United States Supreme] Court's making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive." Summerlin, 542 U.S. at 354 (emphasis in original). Thus, Hurst v. State's requirement that the jury make specific factual findings before the imposition of the death penalty is procedural.

Lastly, Appellant argues that Hurst "addressed the proof-beyond-a-reasonable-doubt standard," which causes a substantive change and that makes Hurst retroactive under federal law. (Brief at 20). However, Hurst did not address the proof-beyond-a-reasonable-doubt standard. The standard of proof for proving aggravating factors in Florida has been beyond a reasonable doubt long before Hurst was decided. See Fla. Std. J. Inst. (Crim.) 7.11; Floyd v. State, 497 So. 2d 1211, 1214-15 (Fla. 1986); Zeigler v. State, 580 So. 2d 127, 129 (Fla. 1991); Finney v. State, 660 So. 2d 674, 680 (Fla. 1995).

As related to the finding that aggravation is sufficient, Hurst did not ascribe a standard of proof. Hurst, 202 So. 3d at 54. The Eighth Amendment requires that "States must give narrow and precise definition to the aggravating factors that can result

in a capital sentence." Simmons, 543 U.S. at 568. The State of Florida has a list of sixteen aggravating factors enumerated in the statute. Fla. Stat. § 921.141(6). These aggravating factors have been deemed sufficient to impose the death penalty by virtue of their inclusion in the statute. Any one of these aggravating factors is sufficient to cause a defendant to be eligible to receive a sentence of death. Thus, if one of these enumerated aggravating factors has been proven beyond a reasonable doubt, any Eighth Amendment concerns have been satisfied. However, the weight that a juror gives to the aggravator based on the evidence is not something that can be defined by a beyond-a-reasonable-doubt standard.

As related to the finding that the aggravation outweighs the mitigation, Hurst did not ascribe a standard of proof. Hurst, 202 So. 3d at 54. The United States Supreme Court has specifically held that the beyond-a-reasonable-doubt standard for finding that the aggravation outweighs mitigation is not required under federal law. See Kansas v. Marsh, 548 U.S. 163, 164 (2006) ("Weighing is not an end, but a means to reaching a decision."); Tuilaepa v. California, 512 U.S. 967, 979 (1994) ("A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision."); Kansas v. Carr, 136 S. Ct. 633, 642 (2016) ("[T]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality

of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt.”). The weight that a juror gives to the aggravation as compared to the weight given to mitigation is also not something that can be defined by a beyond-a-reasonable-doubt standard.

In support of his argument that Hurst should be retroactive under the federal Teague standard as a substantive change because it “addressed the proof-beyond-a-reasonable-doubt standard,” Appellant relies upon Ivan V. (Brief at 23); Ivan V. v. City of New York, 407 U.S. 203, 205 (1972). However, Hurst is distinguishable because it did not address the proof-beyond-a-reasonable-doubt standard.

In Ivan V., the holding of In re Winship which required that the proof-beyond-a-reasonable-doubt standard be afforded to juveniles was given full retroactive effect. Ivan V., 407 U.S. at 203-04; In re Winship, 397 U.S. 358 (1970). As previously discussed, Hurst did not alter the burden of proof as aggravating circumstances have long been required to be proven beyond a reasonable doubt in Florida. Thus, Ivan V. is not analogous to Hurst.

This Court’s determination of the retroactive application of Hurst under a Witt analysis is based on adequate and independent state grounds and is not violative of federal law. Hurst did not

announce a substantive change in the law and is not retroactive under federal law. Thus, there is no violation of the Supremacy Clause.

Because Appellant's case became final pre-Ring, Hurst does not apply retroactively to his case. Thus, this Court should affirm the post-conviction court's summary denial of this claim.

ISSUE II: Appellant's Organic Brain Damage Claim is Unripe, as Appellant Admits, and Should be Denied.

Appellant admits his claim that "new forensic brain scanning technologies will reveal additional mental health mitigation" without anything to support this assertion is unripe. (Initial Brief at 33-34). Appellant also agrees that the post-conviction court's dismissal was warranted. (Initial Brief at 34). Thus, this claim should be denied.

CONCLUSION

WHEREFORE, this Court should affirm the denial of Appellant's post-conviction motion and affirm the conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 8th day of August, 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to Christopher Anderson, Esq., chrisaab1@gmail.com, Attorney for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Jennifer A. Donahue
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