

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-1750
LOWER TRIBUNAL NUMBER NO. 43-1982-CF-352B

ALFONSO CAVE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court, Nineteenth
Judicial Circuit, in and for Martin County, Florida

Honorable Circuit Judge Elizabeth Metzger

ANSWER BRIEF OF APPELLEE

ASHLEY MOODY
Attorney General
Tallahassee, Florida
Lisa-Marie Lerner
Assistant Attorney General
Florida Bar No.: 698271
1515 N. Flagler Dr.; Ste. 900
West Palm Beach, FL 33401
Telephone (561) 837-5000
Facsimile (561) 837-5108
Lisamarie.lerner@myfloridalegal.com
Counsel for Appellee

RECEIVED, 01/23/2019 05:33:25 PM, Clerk, Supreme Court

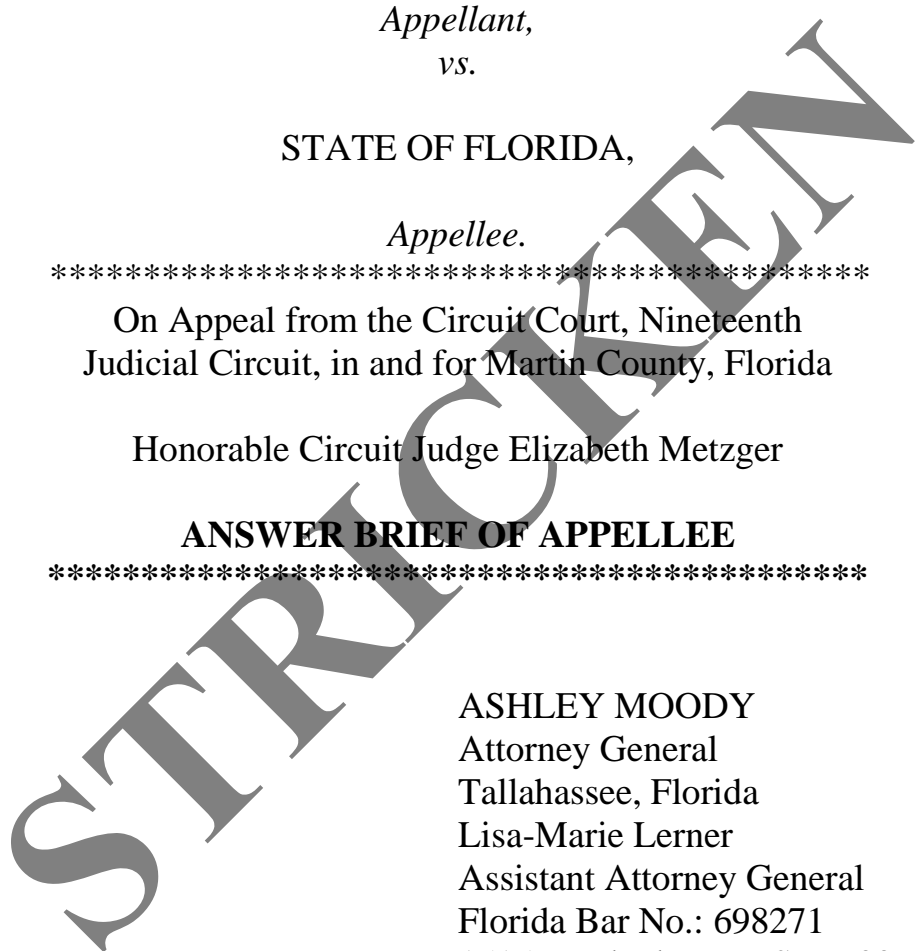


TABLE OF CONTENTS

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

PRELIMINARY STATEMENT1

STATEMENT OF THE FACTS1

STATEMENT OF THE CASE.....2

SUMMARY OF THE ARGUMENTS6

STANDARD OF REVIEW6

ARGUMENT

ISSUE I: THIS COURT SHOULD DENY RELIEF AND APPLY THE PROCEDURAL BAR SINCE CAVE IS PRECLUDED FROM FILING THE POST-CONVICTION MOTION BASED UPON THE TIME BAR TO FILING AN INTELLECTUALLY DISABILITY CLAIM.7

ISSUE II: THIS COURT BASED THE RETROACTIVE APPLICATION FOUND *HURST V. STATE* RETROACTIVE UNDER STATE LAW GROUNDS AND ALSO SET THE RETROACTIVITY BOUNDARIES IN ACCORDANCE WITH THAT LAW NOT REACHING FEDERAL CONSTITUTIONAL LAW.....38

CONCLUSION.....5

CERTIFICATE OF SERVICE55

CERTIFICATE OF COMPLIANCE AND AS TO FONT55

TABLE OF AUTHORITIES

STRICKEN

FACTS AND PROCEDURAL HISTORY

Cave was convicted in 1982 of the first-degree murder, robbery with a firearm, and kidnaping of Frances Julia Slater and sentenced to death, in accordance with the jury's recommendation (7-5 jury vote). *Cave v. State*, 476 So. 2d 180 (Fla.1985), cert. denied, 476 U.S. 1178(1986). The facts surrounding the murder were set forth by the Florida Supreme Court ("FSC") as follows:

Cave and three accomplices left Ft. Pierce, Florida, on the evening of April 26, 1982, and drove to Stuart, Florida. They arrived in Stuart at approximately 11 p.m. that evening. The driver, and owner of the car in which all four rode, was John Earl Bush. The other two Accomplices were J.B. ("Pig") Parker and Terry Wayne Johnson ("Bo Gator"). At approximately 3 a.m. on the following morning, the four men drove to a convenience store in Stuart. Cave and two of the men entered the store where Cave held a hand gun on the youthful female clerk and demanded the store's cash. The clerk surrendered the cash, whereupon she was taken from the store and placed in the back seat of the car. The men drove her to a rural area approximately thirteen miles away where she was removed from the car by the four men. After leaving the car, one of the men stabbed the victim and, when she fell, another fired a single lethal shot into the back of her head. The men then departed the scene but were stopped approximately an hour later enroute back to Ft. Pierce by police officers because of a defective taillight. They were released at that time but later apprehended when the car and its occupants were linked to the convenience store crime.

Cave v. State, 476 So. 2d at 183.

Cave challenged his convictions and sentences on direct appeal but the FSC affirmed Cave's convictions and sentences. *Cave v. State*, 476 So. 2d 180 (Fla.1985), cert. denied, 476 U.S. 1178(1986). On December 19, 1985, Cave filed

a Petition for Writ of Certiorari in the United States Supreme Court which that Court denied on June 9, 1986. *Cave v. Florida*, 476 U.S. 1178 (1986).

In December 1987, Cave was afforded a clemency hearing. Thereafter, on April 27, 1988, Governor Martinez signed a death warrant and Cave's execution was set for July 7, 1988. In response to the warrant, Cave filed a motion for post-conviction relief in state court, pursuant to Florida Rule of Criminal Procedure 3.850. The trial court denied relief, finding that eleven of the claims were procedurally barred and all were without merit. The FSC affirmed the denial of the post-conviction motion. *Cave v. State*, 529 So. 2d 293 (Fla. 1988).

Cave filed a petition for habeas corpus relief in the Federal District Court alleging ineffective assistance of trial counsel. The federal district court applied *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), and held that counsel's guilt-phase performance was deficient but not prejudicial. However, the Court held that counsel's failure to present any evidence at the penalty phase was both deficient and prejudicial. *Cave v. Singletary*, 971 F.2d 1513, 1518-19 (11th Cir. 1992). Accordingly, Cave's sentence was vacated and remanded for a new sentencing proceeding. The United States Court of Appeals for the Eleventh Circuit affirmed the District Court's reversal. *Cave*, 971 F.2d at 1513.

A new sentencing phase was held in 1993, at the conclusion of which Cave was again sentenced to death, based upon the jury's recommendation (jury vote of

10-2). Cave appealed and the FSC vacated the death sentence, finding that the trial court had erroneously conducted a full evidentiary hearing on the factual allegations contained in Cave's motion to disqualify the judge. *Cave v. State*, 660 So. 2d 705 (Fla. 1995). Cave had a third sentencing trial which took place in 1996. He was again sentenced to death based upon the jury's death recommendation (jury vote of 11-1).¹ Cave again appealed but the FSC affirmed Cave's death sentence. *Cave v. State*, 727 So. 2d 227 (Fla. 1998). In so doing, the Court rejected Cave's claim that his death sentence was unconstitutional under *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676 (1987), and *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982), and rejected his claim that his death sentence was disproportionate. The FSC noted that "even though Cave was not the shooter, he was a ringleader and 'exercised a leadership role throughout' the criminal episode." *Cave*, 727 So. 2d at 229. n8. Cave filed a writ of certiorari which was denied. *Cave v. Florida*, 529 U.S. 841 (1999).

¹ The trial court found four aggravators: (1) felony-murder; (2) HAC; (3) CCP; and (4) avoid arrest. The Court found one statutory mitigator--that Cave did not have a significant history of prior criminal activity--and eight non-statutory mitigators: (1) Cave was remorseful; (2) Cave was not the shooter; (3) Cave once saved someone's life; (4) Cave was under the influence of alcohol or marijuana at the time of the crimes; (5) Cave was a good son, neighbor, worker, and father; (6) Cave's only son died as a result of a criminal act; (7) Cave has improved himself in prison; and (8) Cave confessed to his role in the crimes.

Thereafter, in September 2000, Cave filed a motion for post-conviction relief in state court and a supplemental motion, but failed raise a claim that he was intellectually disabled (“ID”).² Cave was granted an evidentiary hearing on all but the *Apprendi* claim. After the evidentiary hearing, the circuit court denied relief on November 18, 2002. Cave appealed to the FSC, which affirmed the denial of Cave’s post-conviction motion. *Cave v. State*, 899 So. 2d 1042 (Fla. 2005).

Cave filed his federal habeas petition on April 29, 2005, which the district court denied on September 28, 2009. That court then granted Cave’s request for a Certificate of Appealability on three of the issues. The Circuit Court granted an expanded certificate on the remaining issues on January 28, 2010. On April 12, 2011, the Eleventh Circuit Court of Appeals affirmed the district court’s denial of relief. *Cave v. Sec’y for Dept. Off Corr.*, 638 F.3d 739 (11th Cir. 2011). Cave then filed a petition for a writ of certiorari to the United States Supreme Court which the court denied. *Cave v. Tucker*, 132 S.Ct. 473 (2011).

On October 20, 2017 Cave filed a successive motion for post-conviction relief based on *Hall v. Florida*, 572 U.S. 701 (2014) and *Hurst v. Florida*, 136

² He did file a claim alleging ineffective assistance of counsel which included the claim that counsel failed to introduce substantial evidence of mitigating circumstances such as that he had a low IQ, that his functioning abilities were severely hindered by years of drug and alcohol abuse, and that due to low intelligence he was incapable of planning, organizing, and carrying out the criminal episode.

S.Ct. 616 (2016), claiming that he sought relief within the required time period. The State filed a motion to strike for being over-long and the post-conviction court struck the brief. Cave filed an amended and shortened brief on January 25, 2018. The State responded. Cave then filed a motion to amend based on his *Hurst* claim involving *Fiore v. White*, 531 U.S. 225 (2001). The State filed its amended response. The post-conviction court requested further briefing by the State addressing *Walls v. State*, 213 So 3d 340 (Fla. 2016). The post-conviction court denied the motion by incorporating the State's responses in finding that both grounds were procedurally barred, time-barred, and *Hurst* is not retroactive to Cave. Cave filed a timely appeal which is now before this Court.

SUMMARY OF THE ARGUMENT

Issue I. Cave is procedurally barred from raising a claim based on *Hall v. Florida*, 134 S.Ct. 1986 (2014) since he is time barred from raising such a claim which then makes any successive post-conviction 3.851 motion based on such a *Hall* claim procedurally barred under Florida statutes.

Issue II. The United States Supreme Court has not held *Atkins v. Virginia*, 536 U.S. 304 (2002), *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), or *Hurst v. Florida*, 136 S.Ct. 616 (2016) retroactive so there and the changes to the law are procedural in nature which do not mandate retroactive application of that law under its jurisprudence. This Court's determination that state law necessitates

retroactive application of the law to certain cases final before *Ring* but not to other cases, based on state law, does not reach federal constitutional issues.

STANDARD OF REVIEW

This Court reviews any summarily denied claims *de novo*. *Howell v. State*, 109 So. 3d 763, 777 (Fla. 2013).

A reviewing court uses the following case law to determine whether or not the defendant is entitled to relief on his claims. Under rule 3.851(e)(2) a post-conviction relief motion is successive "if a state court has previously ruled on a post-conviction motion challenging the same judgment and sentence." A defendant is not to file a successive motion for post-conviction relief unless he alleges: (1) newly discovered evidence or (2) the recognition of a new constitutional right by the United States or Florida Supreme Courts which has been made retroactive to cases that have become final. *See Knight v. State*, 784 So.2d 396, 400 (Fla. 2001); *Pope v. State*, 702 So.2d 221, 223 (Fla. 1997); *Zeigler v. State*, 632 So.2d 48 (Fla. 1993). Within 30 days of the filing of the State's response to a successive motion, this Court is to hold a case management conference under rule 3.851(f)(5)(B) and "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing." If an evidentiary hearing is necessary, rule 3.851(f)(5)(B) provides it must be held within 60 days, but for good cause shown an extension for 90 days may be ordered.

"Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." *Muhammad v. State*, 603 So.2d 488, 489 (Fla. 1992). It is inappropriate to use a different argument, such as ineffective assistance of counsel, to re-litigate the same issue. *Medina v. State*, 573 So.2d 293, 295 (Fla. 1990). Barred claims may be denied without an evidentiary hearing or the attachment of records. *Muhammad*, 603 So.2d at 489. All other claims may be summarily denied "when the motion and the record conclusively demonstrate that the movant is entitled to no relief." *Kennedy v. State*, 547 So.2d 912, 913 (Fla. 1989).

When summarily denying non-barred claims, the court must conclude the claim is factually or legally insufficient on its face or "state its rationale in its decision." *Anderson v. State*, 627 So.2d 1170, 1171 (Fla. 1993). Conclusory allegations are legally insufficient and may be denied summarily. *Ragsdale v. State*, 720 So.2d 203, 207 (Fla. 1998).

ARGUMENT

ISSUE I

THIS COURT SHOULD DENY RELIEF AND APPLY THE PROCEDURAL BAR SINCE CAVE IS PRECLUDED FROM FILING THE POST-CONVICTION MOTION BASED UPON THE TIME BAR TO FILING AN INTELLECTUALLY DISABILITY CLAIM.

Cave argues that he is entitled to relief under *Atkins*, *Hall*, and *Moore v. Texas*, 137 S. Ct. 1039 (2017) and contends that in *Moore* the United States Supreme Court substantially expanded *Hall*.³ He also argues that Florida law precluded him from raising an Intellectual Disability (“ID”) claim and that all three decisions should be retroactively applied to him. The State disagrees and the post-conviction court properly found the claim procedurally barred.

Atkins v. Virginia, 536 U.S. 304 (2002), holding it is unconstitutional to execute a mentally retarded (now intellectually disabled) person, was issued on June 20, 2002, several months before Cave's initial post-conviction relief motion was denied by the trial court. This Court did not set out the bright-line IQ cutoff for ID claims until April 12, 2007, when it issued its decision in *Cherry v. State*, 959 So.2d 702 (Fla. 2007). It was not until May 27, 2014 that *Hall v. Florida*, 134 S.Ct. 1986 (2014) was issued, holding that Florida's interpretation of its statute setting a bright-line cut off for IQ when defining ID was unconstitutional and may result in a violation of *Atkins*. The essence of *Hall* is that the standard error of measurement ("SEM") (which was noted as +/- five points) for attained Wechsler Intelligence Scale for Adults ("WAIS") IQ scores must be taken into account. Where the attained IQ score falls between 71 and 75, the inmate must be provided an

³ Contrary to Cave's assertion, the State does not concede that his *Hall* claim is at all meritorious or retroactively applies to him simply because the State addresses whether such a claim is timely. (IB11-12).

opportunity to present evidence on the remaining two prongs of an ID analysis. *Moore* then applied *Hall* to Texas, saying that *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004) and the Texas procedures used, violated the standards laid down in *Hall. Moore*, 137 S. Ct. at 1052.

As a result of *Atkins*, this Court promulgated Rule 3.203 in Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure, 875 So.2d 563 (Fla. 2004). Rule 3.203(d)(4)(E)-(F), as originally adopted, specifically provided that prisoners whose cases were in various post-conviction procedural postures could file a successive motion for collateral relief in state court to assert an *Atkins* claim:

(E) If a death sentenced prisoner has filed a motion for postconviction relief and that motion has been ruled on by the circuit court and an appeal is pending on or before October 1, 2004, the prisoner may file a motion in the supreme court to relinquish jurisdiction to the circuit court for a determination of mental retardation within **60 days from October 1, 2004**. The motion to relinquish jurisdiction shall contain a copy of the motion to establish mental retardation as a bar to execution, which shall be raised as a successive rule 3.851 motion, and shall contain a certificate by appellate counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is mentally retarded.

(F) If a death sentenced prisoner has filed a motion for postconviction relief, the motion has been ruled on by the circuit court, and that ruling is final on or before October 1, 2004, the prisoner may raise a claim under this rule in a **successive rule 3.851 motion filed within 60 days after October 1, 2004**. The circuit court may reduce this time period and expedite the proceedings if the circuit court determines that such action is necessary.

Id. at 571 (emphasis added). Fatal to Cave's instant motion, he did not avail himself of Rule 3.203.

A post-conviction claim cannot be raised in a successive Rule 3.851 motion where the basis for raising the claim was available at the time an earlier motion for post-conviction relief was pending. *See Johnson v. Singletary*, 647 So. 2d 106 (Fla. 1994). Cave filed two separate post-conviction motions under Fla. R. Crim. P. 3.850 or 3.851. Rule 3.851(d)(2), thus requiring a threshold showing that the instant claim is either based on newly discovered evidence or the development of a new fundamental right that has been held to be retroactive to cases on collateral review.

On June 20, 2002, *Atkins* first recognized the unconstitutionality of executing an ID person. Even though Cave's post-conviction relief motion was pending in the trial court, he did not seek relief within one year of *Atkins*. At that time, this Court had yet to promulgate Rule 3.203 Fla. R. Crim P.⁴ or identify the bright-line cutoff announced in 2007 in *Cherry*, 959 So. 2d at 713. That did not occur until April 12, 2007. *Hall* came out on May 27, 2014. As seen from the procedural history set out above, Cave waited until October of 2017 before he filed an ID motion. Not only did he fail to file a motion for post-conviction relief within

⁴ Added May 20, 2004, effective October 1, 2004. *See Amendment to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure*, 875 So.2d 563 (Fla. 2004).

one year of either *Atkins* or by November 30, 2004 under the announced re-vision of the Rule, or within one year of *Hall*, rendering the instant motion time barred, but he may not use *Cherry* as a basis for such a failure, nor may he use *Moore* since it simply applied *Hall* to *Texas*. (“[I]n line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual’s IQ score, adjusted for the test’s standard error, falls within the clinically established range for intellectual-functioning deficits.” *Moore*, 137 S. Ct. at 1050 (citations, quotations omitted, emphasis added). Finally

This Court has ruled on this very issue in *Blanco v. State*, 249 So. 3d 536, 536-37 (Fla. 2018); *Rodriguez v. State*, 650 F. 3d 616 (Mem) (Fla. 2016). *Blanco* and *Rodriguez*, like *Cave*, failed to file a post-conviction motion on a claim of intellectual disability within the one-year limitation after *Atkins* was released. This Court upheld the lower court’s determination that *Rodriguez* could not rely on *Cherry* to excuse the time-bar since he had never raised the intellectual disability claim after *Atkins*, which was required under Rule 3.203, to have been completed by November 30, 2004. In this motion under consideration, *Cave* is attempting to shield his procedural default with the same argument, saying that *Cherry* somehow blocked him from any attempt to raise such a claim until *Hall* was released. However, *Moore* did not expand *Hall* but only applied its holdings to Texas law. *Cave* simply failed to file an intellectual disability claim after *Atkins* and further

failed to file a claim within one year after *Hall*, belying his contention that the *Cherry* bright-line cutoff was the reason he had not done so. Critical to this Court's *Blanco* and *Rodriguez* decisions was the fact that the capital defendants' post-conviction litigation was pending when Rule 3.203 was promulgated, yet **they**, like Cave, did not file an *Atkins* claim, or in Cave's situation did not amend his pending motion. It was not until *Hall* was decided that Blanco and Rodriguez filed successive motions. As noted above, Cave missed even that deadline.

Finally, there is no newly discovered evidence to allow Cave to overcome the time-bar; he relies on a 1988 IQ test and admits that he has not been tested in over twenty years. This claim is procedurally barred by his failure to meet the multiple time-bars set out in the relevant cases and rules and should be denied. This Court should affirm the denial of relief as procedurally barred.

ISSUE II

THIS COURT BASED THE RETROACTIVE APPLICATION FOUND *HURST V. STATE* RETROACTIVE UNDER STATE LAW GROUNDS AND ALSO SET THE RETROACTIVITY BOUNDARIES IN ACCORDANCE WITH THAT LAW NOT REACHING FEDERAL CONSTITUTIONAL LAW.

Cave next argues that his death sentence is unconstitutional under *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). He contends that those decisions should be retroactively applied to him on the basis of equal protection, due process, and to avoid the arbitrary and capricious application

of the death penalty. He, in essence, argues that since his codefendant Parker was given a new penalty phase, he should be given one as well, claiming the fact that his case was final well before *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002) is an “arbitrary” reason to deny relief.

In *Hurst v. Florida*, 136 S.Ct. 616 (2016), the Supreme Court held that the jury must find the aggravators that make the defendant eligible for the death sentence. *Id.* at 622. The Court expressly recognized that the error in allowing a sentencing judge to find the existence of aggravating factors, independent of a jury's fact-finding, is subject to harmless error review. Holding with tradition though, the Court remanded *Hurst* back to this Court for a harmless error analysis. *Id.* at 624.

The *Hurst v. Florida* decision emanated from the earlier Supreme Court decision in *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). In *Apprendi*, the Supreme Court held that a defendant is entitled to a jury determination of any fact designed to increase the maximum punishment allowed by a statute, but specifically exempted capital sentencing. *Id.* Subsequently, in *Ring v. Arizona*, the Court extended its holding in *Apprendi* to capital cases. *Ring*, 536 U.S. at 589. "Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts necessary to sentence a defendant to death." *Hurst v. Florida*, 136 S.Ct. at 621. "Specifically, a judge could sentence [a defendant] to

death only after independently finding at least one aggravating circumstance." *Id.* Because it was the judge, and not a jury, which conducted the fact-finding to enhance the penalty, "Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment." *Id.*

In *Hurst v. Florida*, the Court held that Florida's capital sentencing structure violated *Ring* because it required a judge to conduct the fact-finding necessary to enhance a defendant's sentence. *Hurst v. Florida*, 136 S.Ct. at 621-622. 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 portions of its prior decisions of *Spaziano* and *Hildwin v. Florida*, 490 U.S. 638 (1989). *Hurst v. Florida*, 136 S.Ct. at 622-625.

When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. The Supreme Court has held that new

rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004).

In *Schriro v. Summerlin*, the Court directly addressed whether its decision in *Ring v. Arizona* was retroactive. *Summerlin*, 542 U.S. at 349. 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 by 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.

Ring did not create a new constitutional right. That right was created by the Sixth Amendment guaranteeing the right to a jury trial. If *Ring* was not retroactive, then *Hurst v. Florida* cannot be retroactive since that case is merely an application of *Ring* to Florida. In fact, the decision in *Hurst v. Florida* is based on an entire

line of jurisprudence, none of which has ever been held to be retroactive. *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 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. 2015) cert. denied, 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). Since the Supreme Court has expressly found that *Ring* was not retroactive, *Hurst v. Florida*, which applied *Ring* to invalidate Florida's statute, is also not retroactive under federal law.

Upon remand, this Court had to interpret and apply the *Hurst v. Florida* decision to the facts in that case. However, this Court did not limit its review to the question of whether the error under the Sixth Amendment was harmless as identified by the Supreme Court. Instead, this Court concluded that the *state*

constitutional right to a jury trial mandates that a defendant's right to unanimous jury findings regarding the elements of a criminal offense applies not only to the existence of an aggravating factor but also to whether the aggravating factors are sufficient and are not outweighed by mitigating circumstances. Using that starting point, this Court found such a *Hurst* error was not harmless.

This Court found that the *Hurst* error was not retroactive to those defendants whose cases were final before *Ring. Asay v. State*, 210 So. 3d 1 (Fla. 2016). As this Court is well aware, exclusive appellate jurisdiction of cases where the death penalty has been imposed lies with it. Also, it is well settled that a decision by this Court is binding on lower tribunals. This Court has stated that "[t]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court." *Stanfill v. State*, 384 So.2d 141, 143 (Fla. 1980). The Fourth District Court of Appeals has recognized this, stating: "[t]he District Courts of Appeal are required to follow Supreme Court decisions. As an adjunct to this rule it is logical and necessary in order to preserve stability and predictability in the law that, likewise, trial courts be required to follow the holdings of higher courts...." *State v. Hayes*, 333 So.2d 51, 53 (Fla. 4th DCA 1976) (footnote and citations omitted). See *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973) (reiterating that trial court is bound by this Court's decisions "just as the District Courts of Appeal follow controlling precedents set by the Florida Supreme Court"); *State v.*

Washington, 114 So. 3d 182, 185 (Fla. 3d DCA 2012) (opining "[w]hile a lower court is free to disagree and to express its disagreement with an appellate court ruling, it is duty-bound to follow it"). The *Asay* decision is binding on lower courts and is dispositive of the *Hurst* claim.

Cave attempts to circumvent the clear ruling of this Court in *Asay* by claiming that *Hurst* and revised §921.141 establish elements of the greater offense of capital first degree murder and therefore he is on death row without ever having been convicted of that greater offense. This is incorrect. See *Rodriquez v. State*, 2018 WL 6539831 (December 13, 2018).

Hurst does not support a conclusion that aggravating factors are elements of a greater offense of capital murder; the FSC said: "the Supreme Court's decision in *Hurst v. Florida* requires that all the **critical findings** necessary before the trial court may consider imposing a **sentence** of death must be found unanimously by the jury." *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016) (emphasis added). The FSC said that the required fact-finding was equivalent to an element of an offense, both of which a jury must determine unanimously. The Court then went on to use the Supreme Court decision in conjunction with its own precedent regarding juror unanimity as to elements of a criminal offense to hold that aggravators must be found unanimously. Additionally, the Court specifically held that the required penalty phase fact-finding included not only that the aggravators are proven

beyond a reasonable doubt, but also whether the aggravating factors are sufficient to impose death and whether they outweigh the mitigating circumstances. To impose a death penalty, a jury must find those three facts, each of which the Court likened to an “element.” In its analysis, the court repeatedly made the analogy, and, hence, the distinction between, an element and a required penalty phase fact-finding, using phrases like: “just as elements of a crime” (p.53); “these findings occupy a position **on par with** elements of a greater offense” (p.57) (emphasis added); and using quotation marks around the word “elements” (p.57). The fact that the court analogized critical factual finding with an element did not turn an aggravator into an actual element. Statutory elements are what provide notice to citizens defining a criminal offense, thus, they cannot be re-defined based on the nature of the case at issue, which is what occurs given each defendant’s various aggravators and mitigators. Labeling sentencing factors as “elements” of a new crime called capital murder is a misperception and not supported by *Hurst v. Florida, Hurst v. State*, or any Sixth Amendment case.

Cave asserts that the United States Supreme Court’s finding in *Alleyne v. United States*, 133 S.Ct. 2151 (2013), supports that the facts necessary to increase the authorized punishment to include death convert into elements of a new or separate offense. *Alleyne* does no such thing. *Alleyne* held that any facts that increase the mandatory minimum sentence for an offense must be submitted to the

jury and found beyond a reasonable doubt 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.” *Alleyne*, 133 S. Ct. at 2151, 2155, 2161 n.2. The *Alleyne* Court explained, “this is distinct from factfinding used to guide judicial discretion in selecting a punishment within limits fixed by law.” *Id.* “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.” *Id.* at 2161, n.2. Again, the generic use of the word “element” in those discussions does not turn a jury’s factual finding into an element of the offense itself. In a first-degree murder charge, the elements include that a person is dead and a criminal cause of death.

The United States Supreme Court recognized this distinction in *Ring* when it stated that *aggravators* “operate as the *functional equivalent of an element* of a greater offense.” *Ring*, 536 U.S. at 609 (emphasis added). *Ring* did not elevate the statutory aggravating circumstances into actual elements of a crime, nor did it create a new crime (*Schriro v. Summerlin*, 542 U.S. 348, 354-55 (2004)), nor does the current Florida statute convert the sentencing factors into elements of the crime. This Court cannot enact or amend state statutes; only the state legislature has that authority. In fact, this was made clear in *Victorino v. State*, 241 So. 3d 48, 50 (Fla. 2018), where the FSC ruled that Florida’s new sentencing law, “neither

alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable.”

To support his claim, Cave cites to *Fiore v. White*, 531 U.S. 225 (2001). In that case, Fiore and his co-defendant, Scarpone, were convicted of operating a hazardous waste facility without a permit because, although they had a permit, the State of PA argued that they deviated so dramatically from the permit’s terms that they violated the law. The PA Supreme Court declined to review Fiore’s conviction, but later reversed Scarpone’s conviction, finding that, although the statute prohibited someone from operating a facility without a permit, one who merely deviates from a permit’s terms cannot be ‘a person without a permit.’

The Court of Appeals reviewing Fiori’s federal habeas petition incorrectly believed that the PA Supreme Court had announced a new rule in Scarpone’s case and the ruling was, therefore, inapplicable to Fiore. *Id.* Upon review, the United States Supreme Court requested that the Pennsylvania Supreme Court (“PA”) explain whether the *Scarpone* case created a new law. The PA court replied that the decision in Scarpone’s case did not announce a new law, but merely clarified the law. The U.S. Supreme Court ruled that because Scarpone’s case did not create a new law, it did not present an issue of retroactivity; instead, the issue was whether Fiore could be convicted for conduct that PA’s criminal statute did not prohibit. Ultimately, the Court ruled that Fiore’s conviction was a violation of due

process because failure to possess a permit is a basic element of the crime, and the state could not prove this element as Fiore had the appropriate permit (he just deviated from it). *Id.* at 228-229. *Fiore* is clearly inapplicable to the case at bar where all of the elements of the offense have been proven.

Cave asserts that fundamental fairness requires that he be granted a new sentencing proceeding since his codefendant, Parker, was granted one. Fairness requires no such thing. Cave's case was final prior to *Ring*. Parker's was final after *Ring*. Therefore, the two are not similarly situated for purposes of this analysis. In *Asay*, this Court stated:

Disparate treatment of similarly situated defendants is a violation of equal protection. However, *Asay* does not demonstrate how he was treated differently from similarly situated defendants... Thus, we find that *Asay* is not entitled to relief on this claim.

Asay, 210 So. 3d at 25, 26 (citations omitted). Just as in *Asay*, Defendant has not been treated any differently than similarly situated defendants (that being defendants whose death sentences were final before *Ring*). Thus, the same result is mandated; Defendant's argument on this point must fail.

Further, Cave obfuscates the fundamental fairness argument by combining it with the argument that applies when a less culpable codefendant receives death and a more culpable codefendant receives life. That is not what occurred here. Codefendant Parker was merely granted a re-sentencing proceeding. What his sentence will be is currently not known. Moreover, there has never been a finding

that Cave was less culpable. In fact, he was described by this Court as follows: “even though Cave was not the shooter, he was a *ringleader and exercised a leadership role throughout the criminal episode.*” *Cave*, 727 So. 2d 227 (Fla. 1998). Therefore, not only does Cave’s argument fail under a fundamental fairness analysis, it too would fail if he made a relative culpability claim.

Cave asserts that *Hurst* should be retroactively applied to him under *Witt*, but this Court has already specifically determined in *Asay*, after analyzing *Witt*, that *Hurst* would not be applied retroactively to cases which were final prior to the issuance of *Ring*. Cave then goes on to argue that even if *Witt* does not provide him relief, that retroactivity would be mandated under the United States Constitution as all substantive constitutional rules must be applied retroactively. This argument has also already been specifically rejected. In *Jackson v. State*, 213 So. 3d 754 (Fla. 2017), the Florida Supreme Court discussed 2016-13, the predecessor of the current law, and its increase in the number of jurors necessary to recommend the death penalty, and specifically stated that **the change was procedural, not substantive**, and noted that, but for requiring a unanimous jury vote, the change could be applied to *pending prosecutions*. *Evans v. State*, 213 So. 3d 856, 3 (Fla. 2017), citing the holding in *Perry v. State*, 210 So. 3d 630 (Fla. 2016). Therefore, it follows that Chapter 2017-1, which followed *Hurst v. State* and is found in the

revised §921.141, is also merely a *procedural change* and is applicable only to pending prosecutions.

Defendants are simply not entitled to a new penalty phase every time there is a change in the sentencing statute. *See also Asay v. State*, 224 So.3d 695, 703 (Fla. 2017) (rejecting claim that chapter 2017-1 “creates a substantive right to a life sentence unless a jury unanimously recommends otherwise”). In *Asay* and *Mosley v. State*, 209 So.3d 12 38 (Fla. 2016), this Court determined which cases were to receive the benefit of *Hurst*. This Court has consistently precluded *Hurst* from being applied retroactively to capital defendants, like Cave, whose sentences were final pre-*Ring*. This court is bound by that precedent. There is nothing in *Hurst*, or its progeny, to indicate that Florida’s new sentencing scheme creates a greater offense of capital murder.

Furthermore, any *Hurst* error in Cave’s case would be harmless. A harmless error analysis would review the case from an objection standpoint to assess what a rational jury would have done based on the information contained in the record. *See Hall v. State*, 212 So.3d 1001, 1035 (Fla. 2017) (“[I]t must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances.”); *Mosley*, 209 So.3d at 1284 (referencing the “rational jury” standard); see also *Plott v. State*, 165 So.3d 33,35 (Fla. 2nd DCA 2015) (deciding

whether the record demonstrates that a rational jury would have found the offense one of violence and committed in a manner that was HAC).

In applying the rational jury standard, it should not matter whether the jury in this case unanimously recommended a sentence of death. Instead, this court should evaluate what a rational jury, properly instructed in accordance with *Hurst v. State*, would have done. The inquiry is based on an objective measurement of reasonableness rather than on what the jury did or did not do in this case. *Lindsay v. State*, 1 So.3d 270, 272-73 (Fla. 1st DCA 2009) (applying the reasonable jury standard to determine whether the jury would have found that the defendant was in actual possession); Cf. *Ross v. State*, 45 So.3d 403, 415 (Fla. 2010) (explaining that the determination of whether a person was in custody depends on "how a reasonable person in the suspect's situation would have perceived his circumstances."); *Diaz v. State*, 14 So.3d 1156, 1158 (Fla. 4th DCA 2009) (where the "putting in fear" element of a robbery is determined by whether a reasonable person under the circumstances would be in fear, not whether the victim was actually in fear); *Magnotti v. State*, 842 So2d 963, 965 (Fla. 4th DCA 2003) (finding that if circumstances of a robbery were such to induce fear in the mind of a reasonable person, the victim may be found to be in fear, and actual fear suffered by the victim need not be proven).

In this case, Cave was convicted of kidnapping and robbery with a firearm, in addition to first-degree murder. Prior to the ruling in *Hurst v. State*, *Ring* was satisfied in cases where aggravating factors were established by prior and contemporaneous felonies. This Court stated that a death sentence is supported by the prior and contemporaneous felonies. *Miller v. State*, 42 So.3d 204, 218-219. *See Belcher v. State*, 851 So.2d 678, 685 (Fla. 2003) (concluding that prior violent felony and murder-during-a-felony aggravators exempted the sentence from the holding in *Ring*); *see also Poole v. State*, 997 So.2d 382, 396 (Fla. 2008); *Guardado v. State*, 965 So.2d 108 Fla. 2007); *Smith v. State*, 866 So.2d 51, 68 (Fla. 2004).

The jury's unanimous verdict finding Cave guilty of the contemporaneous felonies of kidnapping and robbery establishes the aggravating circumstances of during the commission of a kidnapping and for pecuniary gain. In fact, it would have been irrational for a jury to find Cave guilty of kidnapping and robbery, but not find he committed the murder during those crimes and for pecuniary gain. *See Rouse v. State*, 965 So.2d 201, 203 (Fla. 5th DCA 2007) (where jury failed to make a finding on victim injury points, but the verdict demonstrated beyond a reasonable doubt that the jury concluded the defendant had injured the victim, resulting in the victim's death); *See Copeland v. State*, 457 So.2d 1013, 1019 (Fla. 1984) (where FSC found the pecuniary gain aggravator was applicable where the murder was

committed after the defendant robbed the store and abducted the clerk). A rational jury would have unanimously found both aggravating circumstances.

Given the events that led to the murder, a rational jury would also have unanimously found that the felony was committed to avoid arrest. During the robbery, none of the defendants tried to hide their identity. Slater could identify all of them. The sole motive in killing Slater was to eliminate her as a witness, as Bush had announced. She was not shot accidentally, nor during an escape attempt. *See Hertz v. State*, 803 So.2d 629, 648-649 (Fla. 2001) (avoid arrest aggravator proper when the defendants expressed an apprehension about being arrested and were not prevented from leaving the premises); *Preston v. State*, 607 So.2d 404, 409 (Fla. 1992) (avoid arrest aggravator applies where a victim is abducted from the scene of a crime, transported to a different location, and killed).

In addition, this murder was especially heinous, atrocious, and cruel. See *Hall*, 212 So.3d at 1035 (where egregious facts of the case support the finding of harmless error). Slater was taken from the store and driven to a remote location. She was frightened and repeatedly asked what they were going to do with her. Hair follicles found in the vehicle indicate that her hair was pulled off her scalp. The medical examiner testified that the initial stab wound, while not fatal, would have been painful. The trajectory of the bullet indicated that Slater fell to her knees and was shot in the back of her head. The medical examiner also testified that she

emptied her bladder before death, which is consistent with fear or pain from being stabbed.

Furthermore, there is ample evidence to support a cold, calculated, and premeditated finding. Cave and his codefendants cased the store hours before the robbery. They armed themselves, removed Slater from the store, and drove to an isolated location where Parker shot Slater execution style. There was no evidence that the murder occurred suddenly, because of a struggle, or in a rash or spontaneous way. Their actions were planned and deliberate.

Given the evidence in this case, a reasonable jury would have unanimously found all the aggravating factors if it had been properly instructed, would have found that the aggravating factors outweighed the mitigation presented, and that they were sufficient to impose a death sentence. Accordingly, this Court should deny the claim and relief..

CONCLUSION

WHEREFORE, based on the foregoing, the State respectfully requests this Honorable Court to deny relief on Cave's 3.851, 3.800(a), and 3.203 motions.

Respectfully submitted,

ANGELA MOODY
ATTORNEY GENERAL

/s/ Lisa-Marie Lerner

/s/ Lisa-Marie Lerner
LISA-MARIE LERNER

Assistant Attorney General
Florida Bar No.: 698271
1515 N. Flagler Dr. 9th Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5108
COUNSEL FOR APPELLEE

STRICKEN

CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief is submitted by Appellee using Times New Roman, 14-point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellee, pursuant to Florida Rules of Appellate Procedure Rule 9.210(a)(2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically served on Rick A. Sichta at rick@sichtalaw.com, Joe Hamrick at joseph.s.hamrick@gmail.com, Ryan Butler at rbutler@sao18.org, and Sharon Robson at RobsonS@circuit19.org on this 23rd day of January 2019.

/s/ Lisa Marie Lerner

Lisa-Marie Lerner

LISA-MARIE LERNER