

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-841

Lower Court Case No.: 1991-CF-0606A

ROBIN LEE ARCHER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA**

ANSWER BRIEF OF THE APPELLEE

ASHLEY MOODY
ATTORNEY GENERAL

JANINE D. ROBINSON
Assistant Attorney General
Florida Bar No. 865966
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Telephone: (850) 414-3606
Facsimile: (850) 487-0997
capapp@myfloridalegal.com
Janine.Robinson@myfloridalegal.com
COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Appellant Robin Lee Archer is referred to as “Appellant” or “Archer.” The State of Florida is referred to as “State.” The postconviction record on appeal is designated as “R” and page number. Appellant’s initial brief is designated as “IB” and page number.

The State requests this Court take judicial notice of the following official court records: 1) Archer’s successive Petition for Writ of Habeas Corpus filed with the Clerk of the Supreme Court on November 22, 2016, *Robin Lee Archer v. Jones*, Florida Supreme Court Case No. SC16-2111. Citations to this Court record are designated as “Habeas Petition” and page number; 2) Records filed with the Clerk of Courts in the *State of Florida v. Clifford E. Barth*, Case No. 1991-CF-606C, First Judicial Circuit, Escambia County, Florida, in accordance with Florida Statutes section 90.202(6). Citations to these court records are designated by document title, filing date and docket number for reference; 3) Records filed with the Clerk of the Supreme Court of Florida in *Owen v. State*, Florida Supreme Court Case No. SC18-810; and 4) Records filed with the Clerk of the Supreme Court of Florida in *Reed v. Florida*, Supreme Court Case No. SC19-714.

STATEMENT OF THE CASE, FACTS AND PROCEDURAL HISTORY

Robin Lee Archer was convicted of first-degree murder, armed robbery and grand theft and sentenced to death on September 20, 1991. This is an appeal from

the lower court's denial of Appellant's (1) Successive Rule 3.851 Motion for Postconviction Relief in Light of *Hurst v. Florida* and *Hurst v. State*, filed on January 6, 2017; and (2) Amended Successive Rule 3.851 Motion to Vacate Judgment and/or Sentence of Death, filed on October 13, 2018. The facts of the case are restated in this Court's direct appeal opinion, *Archer v. State*, 613 So. 2d 446 (Fla. 1993), but are summarized as follows:

Appellant was fired from Trout Auto Parts in March 1990, where the victim, Billy Coker, was employed as a clerk. *Archer*, 613 So. 2d at 447. The following January 1991, Appellant convinced his 17-year-old cousin, Pat Bonifay, to kill Mr. Coker because he blamed the clerk for firing him. *Id.* At trial, Bonifay testified that Appellant told him to rob the store in order to hide the motive for the killing and to wear a ski mask and gloves. *Id.* Appellant also told Bonifay the location of the store's cash box and emergency exit. *Id.*

The handgun used in the murder was borrowed from a friend who gave the gun to Archer, to give to Bonifay. *Archer*, 613 So. 2d at 447. Bonifay talked two friends into helping him and the trio went to the parts store on Friday night, January 24, 1991, but Bonifay could not go through with the murder and they left the store.¹ *Id.* The next day, Archer "got after" Bonifay for not killing the clerk and the trio

¹ In addition to Bonifay, Archer's co-defendants were Clifford Barth and Eddie Fordham.

went back to the store that night. *Id.* Bonifay shot the clerk and he and one of his friends crawled into the store through the night parts window. *Id.* After opening the cash boxes, Bonifay shot the clerk in the head twice as he lay on the floor begging for his life. *Id.*

Archer later refused to pay Bonifay because he killed the wrong clerk. *Archer*, 613 So. 2d at 447. Bonifay confessed to several people, one of whom informed the authorities, resulting in the arrest of Archer, Bonifay and Bonifay's two friends. *Id.* The defendants were tried separately. *Id.*

Archer was convicted of first-degree murder and the trial court followed the jury's recommended death sentence, imposed in September 1991. On direct appeal, Appellant challenged the court's penalty-phase jury instruction on the heinous, atrocious, or cruel aggravator ("HAC"). *Archer*, 613 So. 2d at 447-48. This Court upheld Appellant's conviction, but vacated the death sentence and remanded for a new penalty phase because the trial court improperly instructed the jury on the HAC aggravator. *Id.*

Following the new penalty phase, the jury again recommended a death sentence by a seven-to-five vote. *Archer v. State*, 673 So. 2d 17, 18 (Fla. 1996). The trial judge again followed the jury's recommendation and sentenced Archer to death,

finding the aggravating factors outweighed the mitigating circumstances. *Id.*² Archer's death sentence following resentencing was affirmed on direct appeal and became final on October 7, 1996, when the United States Supreme Court denied certiorari. *Archer v. Florida*, 519 U.S. 876 (1996).

Postconviction Procedural History

Archer moved to vacate his sentence on September 19, 1997, pursuant to Florida Rule of Criminal Procedure 3.850, amended the motion twice and raised 21 claims for relief.³ *Archer v. State*, 934 So. 2d 1187 (Fla. 2006). Following a two-

² Two aggravating circumstances were found: the capital felony was committed while Archer was engaged in or was an accomplice to the commission of a robbery; and the capital felony was committed in a cold, calculated and premeditated manner ("CCP"). *Archer*, 673 So. 2d at 18, n. 1. One statutory mitigating circumstance was found, that Archer had no significant history of prior criminal conduct. *Id.* at 18, n. 2. The court also found one nonstatutory mitigating circumstance, that Archer had been a good family member to his grandmother. *Id.*

³ Archer raised the following original postconviction claims: (1) the State knowingly presented false testimony of Patrick Bonifay; (2) the State withheld material evidence, including (a) evidence of other robberies committed by Bonifay, Barth and Wynn, (b) Barth's testimony at Bonifay's trial, (c) a polygraph report of Daniel Wells, (d) the criminal history of Daniel Webber, and (e) handwritten notes from a police interview with Daniel Wells; (3) defense counsel was ineffective for failing to investigate and present impeachment material; (4) defense counsel was ineffective for failing to seek a change of venue due to prejudicial pretrial publicity; (5) newly discovered evidence proved Archer's innocence, including Bonifay's admission to a prison inmate that he framed Archer, testimony by Eddie Fordham exculpating Archer and suggesting prosecutorial misconduct, and Bonifay's recantation; (6) defense counsel was ineffective during voir dire; (7) defense counsel was ineffective for failing to present mental health mitigation; (8) Archer is innocent of first-degree murder; (9) Archer is innocent of the death penalty; (10) the penalty-phase jury instructions improperly shifted the burden to Archer; (11) the trial court erroneously instructed the jury to decide whether an expert witness was qualified to testify; (12) the jury received inadequate guidance on aggravating factors; (13) Archer's death sentence is unconstitutionally predicated on an automatic aggravating factor, and defense counsel was ineffective to the extent that he failed to preserve this claim; (14) the trial court improperly diluted the jury's sense of responsibility, and defense counsel was ineffective to the extent that he failed to preserve this claim; (15) the rule prohibiting counsel from interviewing jurors is

day evidentiary hearing in 2002, the trial court denied relief on all claims on February 25, 2004. Archer appealed the denial of his initial postconviction motion, raised claims of newly discovered evidence, *Giglio* and *Brady* violations and petitioned this Court for a writ of habeas corpus.⁴ This Court affirmed the trial court's denial of postconviction relief and denied Archer's petition for writ of habeas corpus. *Archer*, 934 So. 2d at 1206-07.

In 2006, Archer filed an amended petition for writ of habeas corpus in the United States District Court, Northern District of Florida, which denied relief. *See Archer v. McDonough*, No. 3:06-CV-00312-RS, 2008 WL 616115 (N.D. Fla. Mar. 3, 2008). Certiorari to the United States Court of Appeals for the Eleventh Circuit was also denied. *Archer v. McNeil*, 558 U.S. 836 (2009).

On November 30, 2010, Archer's registry counsel, Martin McClain, filed a successive motion for postconviction relief under Florida Rule of Criminal Procedure 3.851 raising the same *Brady* claim previously litigated and denied by this

unconstitutional; (16) the jury was improperly instructed on the unconstitutionally vague CCP aggravating factor; (17) Florida's capital sentencing statute is unconstitutional on its face and as applied to Archer, and defense counsel was ineffective to the extent that he failed to preserve this claim; (18) cumulative error deprived Archer of a fundamentally fair trial; (19) Archer is insane; (20) the trial court improperly admitted inflammatory photographs of the victim's body, and defense counsel was ineffective to the extent that he failed to preserve this claim; and (21) the Florida statute providing a choice between electrocution and lethal injection is unconstitutional. *Archer*, 934 So. 2d at 1192, n. 3.

⁴ *Giglio v. United States*, 405 U.S. 150 (1972), and *Brady v. Maryland*, 373 U.S. 83 (1963).

Court.⁵ Three amended postconviction motions were filed on February 3, 2011, April 25, 2011, and July 15, 2011, and included the *Brady* claim, as well as a constitutional challenge to Florida's lethal injection protocol. The trial court summarily denied the successive motion on October 7, 2011.

During this time, registry counsel also filed a motion to compel the State of Florida to allow preservation of critical evidence of the execution of Manuel Valle and videotape the execution on August 29, 2011. The trial court denied the motion to videotape the execution via order of September 2, 2011. Archer appealed both motions and this Court affirmed their denial in its March 7, 2013, unpublished opinion. *See Archer v. State*, Florida Supreme Court Case No. SC11-2234.

Archer filed amended successive postconviction motions on June 6, 2013 and July 25, 2013, alleging newly discovered evidence. The claim was summarily denied by the trial court on August 27, 2013 and this Court affirmed denial of relief. *Archer v. State*, 151 So. 3d 1223 (Fla. 2014).

Hurst v. Florida and Hurst v. State Claims

On November 22, 2016, Billy H. Nolas, Chief, Capital Habeas Unit, Office of the Federal Public Defender, filed a successive petition for writ of habeas corpus on Archer's behalf raising claims under *Hurst v. Florida*, 136 S. Ct. 616 (2016) and

⁵ Appellant argued that *Porter v. McCollum*, 558 U.S. 30 (2009), an ineffective assistance of counsel case, extended to *Brady*.

Hurst v. State, 202 So. 3d 40 (Fla. 2016).⁶ Archer challenged the constitutionality of his death sentence arguing that the 1) *Hurst* decisions enumerated factual findings required to be found beyond a reasonable doubt by the jury, creating the crime of “capital first degree murder”; and 2) he was entitled to retroactive application under both analyses in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and *Teague v. Lane*, 489 U.S. 288 (1989). See Habeas Petition at 12-13 and 14, et seq.

While Archer’s extraordinary writ was pending in this Court, Mr. Nolas filed a successive Rule 3.851 motion in the trial court on January 6, 2017. R. 50-75. This successive postconviction motion raised the same *Hurst* claims as those in the habeas petition. Accordingly, the State moved to dismiss the successive motion. R. 77-83. Archer moved to hold the circuit court proceedings in abeyance pending this Court’s disposition of the habeas petition. R. 93-94.

This Court denied Appellant’s successive habeas petition on retroactivity grounds stating,

Robin Lee Archer is a prisoner under sentence of death whose death sentence became final in 1996. . . . We hereby deny Archer’s petition pursuant to our holding in *Asay v. State*, that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to capital defendants whose death sentences were final when *Ring v. Arizona*, 536 U.S. 584 (2002), was decided.

⁶ Appellant’s legal representation also included pro bono counsel William Van Norwick, Jr., Cindy A. Laquidara and Carrie Ann Wozniak of Akerman LLP.

Archer v. Jones, 2017 WL 1034409, *1 (Fla. Mar. 17, 2017) (citations omitted).⁷ As this Court's order denying Archer's *Hurst* claim rendered his successive Rule 3.851 motion moot, the State filed a notice of the Florida Supreme Court order with the circuit court and moved to dismiss the still-pending motion. R. 95-99. In its motion to dismiss, the State pointed out that the capital defense bar is raising *Hurst* claims in both its habeas petition in the Florida Supreme Court, as well as its successive 3.851 postconviction motion in the trial court. R. 97. The trial court then ordered Archer to show cause why the pending successive postconviction motion on *Hurst* claims should not be dismissed as moot in light of this Court's denial of the habeas petition.⁸ R. 102.

A status conference was held on August 30, 2018, in part, to clarify and determine who served as Archer's legal counsel because several attorneys entered appearances and were filing multiple motions in different courts. R. 474-86. The trial court determined that Michael Reiter and Mr. McClain served as Appellant's registry counsel in this case and that Mr. Nolas and the Federal Capital Habeas Unit

⁷ Registry counsel McClain sought rehearing on April 18, 2017, which the Court stayed on June 29, 2017, pending the disposition of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S. Ct. 513 (2017). Following *Hitchcock*'s disposition and the parties' responses to this Court's order to show cause, Appellant's motion for rehearing was denied. *Archer v. Jones*, 2018 WL 500330 (Fla. Jan. 22, 2018).

⁸ A second order to show cause was filed on April 27, 2018, due to the question of who actually represented Appellant. R. 493-502.

could not represent Appellant on the *Hurst* claims in the circuit court. R. 493-502. The trial court also granted Appellant leave to again amend his pending postconviction motion. R. 484-85, 493-502.

On October 31, 2018, Archer's registry counsel Reiter and McClain filed an amended successive Rule 3.851 motion. R. 505-30. Archer again raised *Hurst* claims arguing that *Hurst v. State* announced a substantive law shift entitling him to retroactive application and amended Florida Statute section 921.141 identified "elements of the new offense of capital murder," which must be proven beyond a reasonable doubt. R. 505-28. The amended successive postconviction motion also included a newly discovered evidence claim, that his co-defendant Clifford Barth was released on parole. R. 528-29.

The trial court conducted a case management conference or *Huff* hearing on the January 6, 2017 and October 31, 2018 postconviction motions.⁹ R. 572-618. The trial court summarily denied all claims finding: (1) Archer's claim in the January 6, 2017 successive motion that his death sentence violated the Sixth and Eighth Amendments because *Hurst v. Florida* and *Hurst v. State* should be applied retroactively was procedurally barred by this Court's decision in *Archer v. Jones*. Archer's argument that the pre-*Ring* retroactivity analysis is unconstitutional was

⁹ *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

also rejected, based on *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017). R. 628-29; (2) the argument that *Hurst v. State* announced a substantive law change codified in Florida Statutes section 921.141 and created the new offense of “capital murder” did not entitle him to relief in accordance with this Court’s recent opinion in *Foster v. State*, 258 So. 3d 1248 (Fla. 2018). R. 629-30; and (3) the newly discovered evidence claim was based upon incorrect factual assertions regarding Archer’s co-defendant’s juvenile resentencing, he is not entitled to a relative culpability analysis and it would not have resulted in a lesser sentence. R. 630-33. Archer now appeals.

OBJECTION TO ORAL ARGUMENT

The State objects to Appellant’s request for oral argument as the *Hurst*-related issues and arguments made have previously been considered and well-decided by this Court. No new or novel arguments are offered. As such, oral argument would not serve a meaningful purpose, but would only further delay these proceedings.

STANDARD OF REVIEW

Summary denial of claims by the postconviction court is reviewed *de novo*. *Suggs v. State*, 238 So. 3d 699, 703 (Fla. 2017) (citing *Hunter v. State*, 29 So. 3d 256, 261 (Fla. 2008)).

SUMMARY OF ARGUMENT

ISSUE I: Appellant’s argument that *Hurst v. State* created a substantive change in Florida law and enumerated elements of a “greater offense” and “higher degree of murder” restates that presented in his 2016 Habeas Petition. IB 44-45. He also re-argues that the purported substantive change in the law should be applied to him retroactively. IB 51-58. These re-packaged claims and arguments are procedurally barred by *res judicata* as previously raised in his petition for habeas corpus and rejected by this Court in *Archer*, 2017 WL 1034409.

Should the merits be reached, no relief should be afforded because this Court has already determined that *Hurst* does not represent a substantive change in the law. Archer’s arguments are unpersuasive, not new or novel so as to provide this Court with any compelling reason to depart from now settled precedent. Therefore, the claim should again be rejected.

ISSUE II: This issue also presents a restatement of Archer’s claims previously made in his Habeas Petition. Again, Archer argues retroactivity in light of both *Witt* and *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 138 S. Ct. 41 (2017), and asks this Court to “revisit its *Witt v. State* retroactivity analysis.” IB 62-64, 68. This claim for relief is also procedurally barred, as it too was argued in Archer’s 2016 habeas petition. Even if the claim was not barred by the law-of-the-case doctrine, it warrants rejection because under existing law and this Court’s well-

established precedent, *Hurst v. State* does not apply retroactively as Appellant's death sentence became final in 1996, prior to *Ring's* 2002 decision.

ISSUE III: Archer's claim that his co-defendant's release from prison is newly discovered evidence, likely to lead to a lesser sentence should a retrial occur, is meritless. Archer's co-defendant Clifford Barth was a juvenile at the time of the murder in 1991, but was subsequently re-sentenced following developments in the law. This legal resentencing did not constitute newly discovered evidence and Archer is not entitled to relief.

ARGUMENT

ISSUE I: APPELLANT'S CLAIM FOR *HURST* RELIEF IS BARRED BY THE LAW-OF-THE-CASE DOCTRINE AND IS OTHERWISE MERITLESS AS *HURST* DID NOT REPRESENT A SUBSTANTIVE CHANGE IN THE LAW.

Appellant claims entitlement to retroactive relief under *Hurst v. State*. IB 41, et seq. However, this claim was raised and litigated in his Habeas Petition and is therefore barred by the law-of-the-case doctrine. *See Fla. Dept. of Transp. v. Juliano*, 801 So. 2d 101, 107 (Fla. 2001). *See also Marek v. State*, 8 So. 3d 1123, 1129 (Fla. 2009) (holding appellant's argument on appeal from denial of successive postconviction motion is procedurally barred because it was previously litigated). The March 17, 2017 order denying habeas relief and retroactivity under *Hurst* provided in its entirety:

Robin Lee Archer is a prisoner under sentence of death whose death sentence became final in 1996. *See Archer v. State*, 673 So. 2d 17 (Fla. 1996), *cert. denied*, 519 U.S. 876 (1996). Following the United States Supreme Court’s decision in *Hurst v. Florida* and this Court’s decision in *Hurst v. State*, Archer filed a successive petition for a writ of habeas corpus wherein he challenges the validity of his death sentence. We hereby deny Archer’s petition pursuant to our holding in *Asay v. State*, that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to capital defendants whose death sentences were final when *Ring v. Arizona* was decided.

Archer, 2017 WL 1034409 at *1 (SC16-2111) (citations omitted). Appellant sought rehearing and after extended briefing in response to its order to show cause, rehearing was denied on January 22, 2018. *Archer v. Jones*, 2018 WL 500330 (Jan. 22, 2018) (SC16-2111).

Appellant’s registry counsel even accepted this Court’s disposition of the *Hurst* claims during the November 26, 2018 case management conference. The trial court asked Mr. McClain whether he adopted Mr. Nolas’ *Hurst* arguments presented in the January 6, 2017 postconviction motion. R. 574-75. In response, Mr. McClain unequivocally stated,

As to the claim that is in the January 6th, 2017, 3.851, I cannot dispute that the decision in *Archer v. Jones* pretty much covers it. As I said, in this reply file [sic] I’m not waiving it, I’m not abandoning it, but I recognize — and Ms. Millsap’s argument . . . that as to that claim, the ruling in *Archer v. Jones* is from the Florida Supreme Court and I recognize Your Honor that you are kind of bound to follow what the U.S. Supreme Court [sic] says.

R. 575-76. The trial court confirmed, “so you’re not going to pursue this today and

you are conceding that *Archer v. Jones* controls it,” to which Mr. McClain responded, he was not waiving the claim and that “the Florida Supreme Court was wrong, but I recognize you’re bound by the Florida Supreme Court.” R. 575-76. Because *Archer v. Jones* established the law-of-the case on the merits and this Court’s disposition on Appellant’s *Hurst* claim is final, the trial court properly denied the postconviction claim as procedurally barred and any restatement of the same should be rejected. R. 627-29.

Despite registry counsel’s acknowledgement that Archer’s Habeas Petition *Hurst* claim was rejected, he nevertheless re-packaged it in his October 31, 2018 amended successive postconviction, the denial of which is before this Court. On appeal he argues: (1) *Hurst v. State* announced a substantive law shift, entitling him to the retroactive application; and (2) Florida’s amended statute section 921.141 identified “elements of a higher degree of murder” and “greater offense” which must be proven beyond a reasonable doubt. IB 43-45.

Archer previously raised these arguments in support of the retroactivity claim. His Habeas Petition argued that *Hurst* required two facts (sufficient aggravating circumstances and whether mitigating factors outweighed the aggravating circumstances) be established in order for the death sentence to be imposed. Habeas Petition at 12. These factual findings, Archer purported, “separate first degree [sic] murder from *capital first degree* [sic] *murder*. . . . As elements of a criminal offense

which serve to increase [Archer's] sentence from life to death, these facts must be found by a jury to have been proven beyond a reasonable doubt.” *Id.* (emphasis added). Thus, *Hurst* required “that a jury find the *elements of capital first degree murder. . . .*” *Id.* at 13. The Habeas Petition even included the Teague analysis, which is repeated in this appeal. *See* Habeas Petition at 21.

A. *Hurst v. State* Did Not Create a Substantive Change in the Law.

Should this Court consider this restated argument, it is meritless and has been consistently rejected based upon well-established precedent and should be rejected once again. The questions of whether Florida's revised capital sentencing scheme created a new substantive offense of “capital first-degree murder” and whether sufficiency and weighing are functional equivalents of elements that must be found beyond a reasonable doubt, have been soundly answered. Neither this Court, nor the United States Supreme Court has ever treated such findings as elements of a new crime that must be proven beyond a reasonable doubt.

First, changes in Florida death penalty statute following *Hurst v. Florida* were procedural in nature and did not affect the substantive crime charged, which was based upon a defendant's conduct. *See Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (determining that *Ring* was a procedural rule and did not establish a substantive constitutional change in the law, altering “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”). Since the Supreme Court held that *Ring* did not create a substantive constitutional rule and *Hurst v. Florida* is simply an extension of *Ring* to Florida’s sentencing scheme, *Hurst v. Florida* is likewise procedural in nature.

Appellant references *Perry v. State*, 210 So. 3d 630 (Fla. 2016), to argue that sufficiency and weighing are elements of capital murder that must be found for a defendant to be eligible for the death penalty. *See* IB 46. He points to an excerpt in which this Court stated that “the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury.” *Perry*, 210 So. 3d at 633. Those findings specifically include, unanimity of sufficient aggravating factors to warrant a sentence of death and that the aggravating factors outweigh the mitigating circumstances....” *Id.* at 640; IB 46.

Perry was unclear in explaining that the only finding the jury must make for a defendant to be *eligible* for the death penalty is whether a qualifying aggravator has been proven and such a finding must be proven beyond a reasonable doubt. The additional findings that must be made are steps in a process to determine whether death is appropriate, rather than qualifying determinations.¹⁰

¹⁰ While Appellant argues that the trial court’s weighing procedure is an element of “capital first-degree murder,” the State contends that weighing itself was never a part of the Sixth Amendment right to a jury trial addressed by the United States Supreme Court in *Hurst*. *See, e.g., Hurst v. State*, 202 So. 3d at 81-82 (Canady, J., dissenting). The Court’s decision in *Hurst* was a narrow

This concept is reflected in this Court’s determination in *Perry* that the burden of proof remains the same following *Hurst*. *See Perry*, 210 So. 3d at 638 (“We reject *Perry*’s argument that the burden of proof is inverted. The burden of proof is not inverted—the State still must prove the requisite facts beyond a reasonable doubt to establish the same elements as were previously required under the prior statute.”).

This Court fully clarified its intent regarding requisite findings in the standard jury instructions for capital sentencing proceedings. Following the instruction on finding whether aggravators are proven, the instruction reads,

If, however, you unanimously find that [one or more] of [the] aggravating factor[s] [has] [have] been proven beyond a reasonable doubt, *then the defendant is eligible for the death penalty*, and you must make additional findings to determine whether the appropriate sentence to be imposed is life imprisonment without the possibility of parole or death.

Fla. Std. Jury Instr. (Crim.) 7.11 (emphasis added). Following the standard

one and extended only to the findings necessary to render a defendant “eligible” for a death sentence. *Hurst v. Florida*, 136 S. Ct. at 624 (“Florida’s sentencing scheme, which required the judge alone to find the existence of ***an aggravating circumstance***, is therefore unconstitutional.”) (emphasis added). The overwhelming weight of subsequent precedent from other courts applying *Hurst* does not support this Court’s expansive interpretation. *See State v. Lotter*, 917 N.W.2d 850, 864 (Neb. 2018) (“The plain language of *Hurst* reveals no holding that a jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances.”); *State v. Goff*, 154 Ohio St. 3d 218, 225 (Ohio 2018) (rejecting the defendant’s argument that “for Sixth Amendment purposes, the weighing of aggravating circumstances and mitigating factors is itself a factual finding necessary to impose a death sentence”). *See also Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 378-79 (2010) (“Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law’s coherence and curtail the precedent’s disruptive effects.”).

instruction’s full explanation of how to make findings in mitigation, the instruction then explains the weighing process the jurors must conduct. The instructions explain that weighing is not a mechanical process and “[t]he law contemplates that different factors or circumstances may be given different weight or values by different jurors.” Fla. Std. Jury Instr. (Crim.) 7.11. These instructions fully illuminate the issue and demonstrate that the only determination the jury must make for the defendant to be eligible for the death penalty is whether a qualifying aggravator has been proven. All other determinations that the jury makes are steps in the process for determining whether the death penalty is appropriate.

This Court’s holding and supporting discussion in *Foster*, 258 So. 3d 1248, as well as its most recent opinion in *Rogers v. State*, 2019 WL 4197021 (Fla. Sept. 5, 2019) dispose of Archer’s claim. In the context of a bid for retroactive application of *Hurst* to a pre-*Ring* death sentence and in its due process analysis, the *Foster* Court held that the defendant’s argument regarding “the elements of ‘capital first-degree murder’” had no merit. *Id.* at 1251.

Under Florida’s statutory and procedural capital scheme, in order for a defendant to be sentenced to death, a jury must:

- (1)unanimously find at least one aggravating factor beyond a reasonable doubt;
- (2) identify all aggravating factors that it unanimously finds beyond a reasonable doubt;
- (3) unanimously determine whether sufficient aggravating factors exist to impose a sentence of death;
- (4) determine whether any mitigating circumstances

exist and unanimously determine whether the aggravating factors outweigh those mitigating circumstances; and (5) unanimously determine that the defendant should be sentenced to death.

Foster, 258 So. 3d at 1251. Continuing with its analysis, the Court specifically observed,

under Florida law, there is no crime expressly termed “capital first-degree murder.” Florida law prohibits first-degree murder, which is, by definition, a capital crime. . . . [I]t is not the *Hurst* findings that establish first-degree murder . . . [r]ather, in Florida, first-degree murder is, by its very definition, a capital felony.

Id. at 1251-52. The *Foster* Court recognized that *Hurst* penalty phase findings are not elements of “capital first-degree murder,” but rather, are findings required to impose the death penalty which are separate and distinct from a criminal conviction for first-degree murder. *Id.* at 1252. If a jury makes these findings, it does so only *after* a unanimous conviction of the capital crime of first-degree murder, delineated in section 782.04, Florida Statutes. *Id.* The *Foster* Court held that because the crime for which he was convicted, first-degree murder, is defined by Florida Statutes, *Foster*’s trial satisfied due process. The conviction stands alone, regardless of whether the death penalty was imposed or not. *Id.* A separate penalty phase to determine punishment and sentence is required upon conviction. Conviction of the substantive crime must occur before and independently of the penalty phase findings required by *Hurst*. *Id.*

Appellant’s argument also fails in light of *Rivera v. State*, 260 So. 3d 920 (Fla.

2018). Following summary denial of his postconviction claim, the appellant in *Rivera* “attempt[ed] to circumvent” this Court’s retroactivity decision of *Hurst* “by dubbing the death penalty statute as substantive, rather than procedural.” *Id.* at 927. Relying on *Foster*, the *Rivera* Court held that *Hurst* penalty phase findings are not elements of the capital felony of first-degree murder. *Id.* (citing *Foster*).

This Court’s opinion in *Rogers* issued one day ago, shed light on and clarified the issue of whether the sufficiency of aggravators and the weighing process are elements of a death penalty eligible crime. In *Perry*, the majority held,

To the extent that in *Perry*, we suggested that *Hurst v. State* held that the sufficiency and weight of the aggravating factors and the final recommendation of death are elements that must be determined by the jury beyond a reasonable doubt, we mischaracterized *Hurst v. State*, which did not require that these determinations be made beyond a reasonable doubt. Since *Perry*, in *In re Standard Criminal Jury Instructions in Capital Cases* and *Foster*, we have implicitly receded from its mischaracterization of *Hurst v. State*. ***We now do so explicitly. Thus, these determinations are not subject to the beyond a reasonable doubt standard of proof***, and the trial court did not err in instructing the jury.

Rogers, 2019 WL 4197021 at *7. (emphasis added) (citation omitted). Although the issue on appeal in *Rogers* focused on the jury instruction given, this Court’s clarification applies nonetheless.

Finally, Appellant’s reliance on *Card v. Jones*, 219 So. 3d 47 (Fla. 2017), is misplaced and misleading. In short, Card committed his homicide in 1981, years before Appellant was convicted, but was granted *Hurst* relief. Appellant contends

that “the ruling in *Card v. Jones* means the statutory construction adopted in *Hurst v. State* was Florida’s substantive criminal law at the time of the offense in *Card* (June 1981).” IB 60. However, Appellant blatantly ignores the procedural history of Card’s case and asks this Court to do the same in order to advance and validate his argument and analysis.

Card received a new penalty phase hearing in the late 1990s, after his original death sentence was vacated pursuant to postconviction proceedings. *Card v. State*, 652 So. 2d 344 (Fla. 1995) and *Card v. State*, 803 So. 2d 613 (Fla. 2001). Card was resentenced on June 28, 2002 and his new death sentence was affirmed, but did not become final until *after* the United States Supreme Court issued its opinion in *Ring*. Thus, this Court found that *Hurst* applied retroactively to Card. *Card*, 219 So. 3d at 48. The date of Card’s homicide and the circumstances resulting in his *Hurst* relief had nothing to do with what the “substantive law” was at the time of his crime in 1981. Instead, Card was the beneficiary of a timely re-sentencing which pushed the finality of his death sentence past the date of *Ring*.

Appellant argues that “[t]he law that is governing Card’s sentence for a 1981 crime must be applied equally and govern Archer’s sentence for a 1991 crime, otherwise the Due Process and Equal Protection Clauses of the Fourteenth Amendment are violated.” IB 62. However, this is nothing more than a creative reiteration of *Hurst* retroactivity and the faulty analysis has no merit.

ISSUE II: APPELLANT’S *HURST* RETROACTIVITY CLAIM IS BARRED BY THE LAW-OF-THE-CASE DOCTRINE AND IS OTHERWISE MERITLESS AS HIS CONVICTION BECAME FINAL PRE-RING.

Appellant presents another claim for entitlement to retroactive *Hurst v. State* relief. This argument is merely another restatement of that made in his successive Habeas Petition and which was rejected by this Court. IB 62. The re-packaged argument is made under the guise that this Court should revisit and reconsider the retroactivity analysis in *Asay* and *Hitchcock* and whether “finality should yield to fairness” in the *Hurst* context. IB 63, 68. In so doing, his argument does not support a valid issue in this appeal and does not challenge the validity or soundness of the trial court’s summary denial. Instead, he has taken up issues currently pending in this Court on other cases. To the extent that a claim is stated, it too is procedurally barred as discussed in Issue I, *supra*. See *Fla. Dept. of Transp.* and *Marek*. However, should the merits be reached, no new or novel argument has been offered to justify rejection of this Court’s well-settled retroactivity precedent and the trial court’s summary denial should be affirmed.

Under this Court’s controlling precedent in *Asay* and *Hitchcock*, *Hurst* does not apply retroactively to Archer or any capital defendant whose convictions and sentences were final before *Ring*. Thus far, this Court has refused to extend *Hurst v. Florida* and *Hurst v. State* to those categorical cases based on *Hitchcock*, 226 So. 3d at 217 (stating “We have consistently applied our decision in *Asay*, denying the

retroactive application of *Hurst v. State*.”). *See also Rivera*, 260 So. 3d at 927; *Rodriguez v. State*, 219 So. 3d 751, 760 (Fla. 2017) (holding *Hurst* could not be applied retroactively to those cases final on direct appeal before *Ring* was decided where intellectual disability claim was also raised); *Cole v. State*, 234 So. 3d 644 (Fla. 2018); *Beasley v. State*, 234 So. 3d 553 (Fla. 2018); *Willacy v. State*, 238 So. 3d 100 (Fla. 2018), *cert. denied*, *Willacy v. Florida*, 139 S. Ct. 191 (2018); *Zack v. State*, 228 So. 3d 41, 48 (Fla. 2017) (denying *Hurst* claim where intellectual disability was raised); *Long v. State*, 235 So. 3d 293 (Fla. 2018); *Foster*, 258 So. 3d at 1251; and *Reese v. State*, 261 So. 3d 1246, 1247 (Fla. 2019).

As this Court observed when it denied relief requested in his Habeas Petition, Appellant’s death sentence became final in 1996 when the United States Supreme Court denied certiorari. Therefore, *Asay* and *Hitchcock* foreclosed relief in Appellant’s case. Any reiteration of that claim is not only procedurally barred, it is meritless.

Appellant’s restated argument adds a plea for this Court to “revisit *Witt*,” but it does not entitle him to relief and fails. As mentioned in Appellant’s Initial Brief, the State also points out that other capital cases pending before this Court have been fully briefed why it should recede from its current precedent of *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) and *Witt*. *See Owen v. State* (SC18-810) (the State argued the retroactivity analysis of *Mosley* and *James v. State*, 615 So. 2d 668 (Fla. 1993),

should be overruled and that the federal test for retroactivity in *Teague*, 489 U.S. 288, should replace the *Witt/Linkletter v. Walker*, 381 U.S. 618 (1965) retroactivity test); and *Reed v. State* (SC19-714).¹¹

The State argues that this Court should hold that neither *Hurst v. Florida* nor *Hurst v. State* apply retroactively to any case made final before 2016 under the *Teague* analysis. See *Knight v. Florida Dep't of Corr.*, 18-13390, 2019 WL 4126482, at *8 (11th Cir. Aug. 30, 2019) (concluding that *Hurst*, like *Ring*, announced a new procedural rule that is not retroactive under *Teague*). *Teague*, therefore, should be adopted in place of the outmoded state test of *Witt* and which has been adopted by the vast majority of states. See e.g., *Thiersaint v. Comm'r of Corr.*, 111 A.3d 829, 840, 841 & n.11 (Conn. 2015) (adopting *Teague* formally as the state test for retroactivity in the wake of the United States Supreme Court's decision in *Danforth v. Minnesota*, 552 U.S. 264 (2008), clarifying that states may have more liberal tests for retroactivity and noting that 33 other states and the District of Columbia likewise apply *Teague* in deciding state law claims); *Danforth v. State*, 761 N.W.2d 493, 498 (Minn. 2009) (adopting *Teague* as the state test of retroactivity

¹¹ Coincidentally, registry counsel McClain presented the same “devaluation of finality” argument in *Reed*, nearly word for word. See Appellant's Response to Order to Show Cause, May 29, 2019 (Florida Supreme Court Case No. SC19-714).

on remand from the United States Supreme Court's decision in *Danforth* based on finality concerns).

In his concurring opinion in *Windom v. State*, 886 So. 2d 915 (Fla. 2004), Justice Cantero listed the other state supreme courts that had not adopted *Teague* at the time of his opinion as being Alabama, Alaska, Michigan, Missouri, South Dakota, Utah, Wyoming, and also stated that Tennessee did not follow *Teague* as to state law decisions. *Id.* at 943, n. 29. Since then, three of those states have adopted *Teague*. The Alabama Supreme Court has since adopted *Teague*. *Ex parte Williams*, 183 So. 3d 220, 224 & n. 2 (Ala. 2015) (stating that Alabama has adopted *Teague* citing *Ex parte Harris*, 947 So. 2d 1139, 1143-47 (Ala. 2005), and rejecting an argument based on *Danforth* that the state should adopt a more liberal state retroactivity test), *cert. granted, judgment vacated on other grounds, Williams v. Alabama*, 136 S. Ct. 1365 (2016). Wyoming now follows *Teague* for federal law cases. *State v. Mares*, 335 P.3d 487, 501-04 (Wyo. 2014). Tennessee now follows *Teague* including in state law cases. *Bush v. State*, 428 S.W.3d 1, 19-20 (Tenn. 2014) (noting that the Tennessee legislature by enacting the Post-Conviction Procedure Act, Tenn. Code Ann. § 40-30-122, had abrogated the prior state test for retroactivity and had adopted *Teague* for all types of cases). The trend of state courts adopting *Teague* has continued even in the wake of *Danforth*.

Appellant presumes from the briefing in *Owen* and *Reed*, as well as this Court's May 10, 2019 order denying Robert Long's requested stay of execution (*Long v. State*, SC19-726) that it considers "finality in 2019 is not nearly as important as this Court thought in 2016 when it issued *Asay v. State*." IB 65, 67. However, this Court has not addressed finality or the fundamental flaw in *Witt* which does not give finality its paramount place in retroactivity analysis. Regardless of which retroactivity test is applied, under the present law, Archer is still not entitled to *Hurst* relief.

ISSUE III: CO-DEFENDANT CLIFFORD BARTH'S JUVENILE RESENTENCING DID NOT CONSTITUTE NEWLY DISCOVERED EVIDENCE, RENDERING THE CLAIM MERITLESS.

Appellant claims that his co-defendant Clifford Barth's ("Barth") prison release constitutes newly discovered evidence not previously available. IB 70, 73. He argues that this event should be cumulatively evaluated with "favorable evidence" developed in postconviction and would "very likely" lead to a less severe sentence in a new trial. *Id.* This claim is meritless because Archer fails to satisfy the test for relief of newly discovered evidence. Therefore, the claim should be rejected and the trial court's summary denial should be affirmed.

As stated in the direct appeal opinion on Appellant's resentencing, two prongs must be satisfied to obtain relief on a newly discovered evidence claim. *Archer*, 934 So. 2d at 1193. First, the evidence must have been unknown at the time of trial and

neither the defendant, nor his trial counsel could have discovered it through due diligence. Second, “the newly discovered evidence should be of such a nature that it would probably produce an acquittal on retrial.” *Id.* The second prong is satisfied if it “weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability.” *Melton v. State*, 193 So. 3d 881, 884-85 (Fla. 2016), quoting *Jones v. State*, 709 So. 2d 512, 526 (Fla. 1998).

Barth was 17 years old at the time of the January 1991 murder and under the existing law, was eligible to receive the death penalty. *See* Motion for Juvenile Re-Sentencing and/or Judicial Review, May 8, 2017, Docket No. 241. In August 1991, Barth entered a negotiated plea agreement to first-degree murder to avoid the death penalty. *See* written plea agreement, September 18, 1991, Docket No. 150. Under the plea, Barth was sentenced to life imprisonment without the possibility of parole for 25 years. *See* Judgment and Sentence, September 18, 1991, Docket No. 149.

Following *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012), which held that the Eighth Amendment “forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders,” Florida enacted Florida Statute sections 775.082(1)(b)(2), 921.1401 (sentencing of life imprisonment for persons under 18 years of age) and 921.1402(2)(c) (entitling juveniles to sentencing review) and made retroactive by *State v. Horsley*, 160 So. 3d 393 (Fla. 2015) and *Falcon v. State*, 162 So. 3d 954 (Fla. 2015). After being incarcerated over 25 years, Barth

moved for juvenile resentencing under these authorities on May 8, 2017. *See* Motion for Juvenile Re-Sentencing, May 8, 2017, Docket No. 241.

Circuit Court Judge W. Joel Boles granted Barth's request for juvenile resentencing on first-degree murder in a detailed order which also vacated and set aside the original sentence. *See* Order Granting Juvenile Resentencing on Count One, et seq., September 14, 2017, Docket No. 264. Judge Boles found that Barth's sentence for first-degree murder was unconstitutional and he was entitled to juvenile resentencing, citing *Miller, Horsley, Falcon and Atwell v. State*, 197 So. 3d 1040 (Fla. 2016). *Id.* at 2. The new sentence of 26 years of incarceration with credit for time served followed by life-time probation was agreed upon between Barth and the State of Florida. *Id.* Determining that Barth's resentencing was proper after reviewing the record, the trial court made the factual findings that Barth "did not kill, actually kill, intend to kill or attempt to kill the victim," and he is appropriately resentenced pursuant to section 775.082(1)(b)(2), Florida Statutes." *Id.* at 3.

In his postconviction motion, Archer claimed "Barth has been released on parole." R. 528. As discussed above and correctly observed in the trial court's order, Appellant's characterization was factually incorrect. *See* R. 630. Further, Appellant abjectly fails to address the factual nature and objective basis of Barth's resentencing procedural history discussed above. Clearly, Barth's juvenile resentencing was achieved as a matter of law, prompted by the United States Supreme Court's 2005

determination that juveniles were not eligible for the death penalty, Florida's revised juvenile sentencing statutes and its retroactive application.

This Court has clearly held that the relative culpability analysis and review that Archer seeks is not proper and cannot be performed. *See Jefferies v. State*, 222 So. 3d 538 (Fla. 2017). The *Jefferies* Court held that such a review cannot be performed if a co-defendant is ineligible because of age or when the co-defendant pleads guilty and receives a lesser sentence. *Jefferies*, 222 So. 3d at 547 (citing *Farina v. State*, 801 So. 2d 44, 56 (Fla. 2001) and *Krawczuk v. State*, 92 So. 3d 195, 207 (Fla. 2012)). Barth's resentencing meets both circumstances in *Jefferies*. Moreover, no amount of diligence by counsel would have discovered a future juvenile resentencing prompted by a change in the law.

The trial court summarily denied this claim finding that although Barth's juvenile resentencing satisfied the first prong of the newly discovered evidence test, it did not satisfy the second prong. R. 632. In its order, the trial court stated,

the Defendant is incorrect in his factual assertions. According to the record, Mr. Barth was not paroled, but instead received a juvenile resentencing because of his age at the time of the offense. . . . [T]his Court find's Defendant's argument unpersuasive that Mr. Barth's juvenile resentencing now creates a situation of "materially inaccurate information" having been presented to the jury.

R. 630-31. The circuit court documents cited above bear this out.

Instead of satisfying the objective test for newly discovered evidence,

Appellant steers the Court to a “forward looking” focus and analysis of cumulative evidence in the event of a retrial. Appellant’s primary reliance on *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014), is inapplicable to the specific circumstances in his case and utterly fails to support his argument. This Court vacated Hildwin’s first-degree murder conviction and death sentence, remanding for a new trial, based on newly discovered “scientific evidence [which] completely discredits the scientific evidence that the State relied upon at trial.” *Id.* at 1180. In reversing the trial court’s denial of Hildwin’s postconviction motion this Court held,

In light of the evidence presented at trial, and considering the cumulative effect of all evidence that has been developed through Hildwin’s postconviction proceedings, we conclude that the totality of the evidence is of “such nature that it would probably produce an acquittal on retrial” because the newly discovered DNA evidence “weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability.”

Id. at 1181 (citations omitted). *Hildwin*’s cumulative analysis discussion is premised upon actual and bonafide newly discovered evidence. Contrary to a co-defendant’s resentencing on legal grounds, there is no doubt that scientific DNA evidence not available at trial and discovered in postconviction rises to the level of newly discovered evidence.

There is no evidence or argument to support any probability that Barth’s juvenile resentencing would result in Archer’s acquittal, should a retrial be granted. Appellant does no more than speculate that “if a resentencing were to be ordered, it

is an almost absolute certainty that [he] would receive a less severe sentence” because of Barth’s juvenile resentencing. IB 73.

Appellant uses this claim as an unpermitted means to revisit the merits of the trial and the trial testimony of another juvenile co-defendant, Patrick Bonifay. IB 73-74. Archer’s original postconviction motion included a claim of newly discovered evidence regarding Bonifay’s recantation of his trial testimony. *Archer*, 934 So. 2d at 1193. This Court rejected the claim holding in part that competent, substantial evidence supported the trial court’s rejection of Bonifay’s recanted testimony and was inconsistent with other witnesses. *Id.* at 1198. Notably, the trial court’s sole reference to Bonifay in its order states that in the wake of the United States Supreme Court’s decision in *Roper v. Simmons*, 543 U.S. 551 (2005), “his death sentence is reduced to life in prison.” R. 632.

Moreover, Appellant is not entitled to a relative culpability analysis based on cumulative evidence. Because Barth’s judicial resentencing does not constitute newly discovered evidence, his claim for “cumulative evaluation” of evidence is rendered moot and this claim should be denied in its entirety.

CONCLUSION

Appellant’s *Hurst* claims are barred by the law of the case doctrine, are otherwise meritless and he is not entitled to retroactive relief. Also meritless is the Appellant’s newly discovered evidence claim. Therefore, Appellee, the State of

Florida, respectfully urges this Court to affirm the trial court's summary denial of Appellant's successive postconviction motions.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ Janine D. Robinson

JANINE D. ROBINSON
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 865966
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Telephone: (850) 414-3606
Facsimile: (850) 487-0997
capapp@myfloridalegal.com
Janine.Robinson@myfloridalegal.com
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Martin McClain, Esquire, McClain & McDermott, P.A., Counsel for Appellant, Robin Lee Archer, via the Florida Courts E-Filing Portal at martymcclain@comcast.net, this 6th day of September, 2019.

ASHLEY MOODY
ATTORNEY GENERAL

/s/ Janine D. Robinson
JANINE D. ROBINSON
ASSISTANT ATTORNEY GENERAL
COUNSEL FOR APPELLEE

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 Rule 9.100, Florida Rules of Appellate Procedure.

ASHLEY MOODY
ATTORNEY GENERAL

/s/ Janine D. Robinson
JANINE D. ROBINSON
ASSISTANT ATTORNEY GENERAL
COUNSEL FOR APPELLEE