IN THE SUPREME COURT OF FLORIDA

JOEL DALE WRIGHT,
Appellant,
v. **Case No.: SC19-2123**

STATE OF FLORIDA,
Appellee.
_____/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR PUTNAM COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

ASHLEY MOODY
ATTORNEY GENERAL
s/DORIS MEACHAM
DORIS MEACHAM
ASSISTANT ATTORNEY GENERAL
Fla. Bar #63265
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457
doris.meacham@myfloridalegal.com
CapApp@myfloridalegal.com

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

RULES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Joel Dale Wright's ("Wright") motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.851. This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Wright". Appellee, the State of Florida, was the prosecution below. This brief will refer to Appellee as such, the prosecution, or the State. Appellant's defense attorneys at trial will be referred to by proper name and title or "trial counsel."

Citation to the direct appeal record will be cited as DAR, V_, R_. Citations to the postconviction appeal record will be V_, R_.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

The State defers to this Court's judgment as to whether oral argument is necessary in this case.

STATEMENT OF THE CASE AND FACTS

As authorized by Florida Rule of Appellate Procedure 9.210(c), the State submits its rendition of the case and facts. In its direct appeal decision affirming Wright's convictions and death sentence, this Court summarized the facts of the case in the following way:

> The facts reflect that the body of a 75–year–old woman was found in the bedroom of her home on February 6, 1983. The victim was discovered by her brother, who testified that he became concerned when she failed to respond to his knock on the door. Finding all the

doors to her home locked, he entered through an open window at the rear of the house and subsequently found her body. Medical testimony established that the victim died between the evening of February 5 and the morning of February 6 as a result of multiple stab wounds to the neck and face, and that a vaginal laceration could have contributed to the victim's death.

The state's primary witness, Charles Westberry, testified that shortly after daylight on the morning of February 6, appellant came to Westberry's trailer and confessed to him that he had killed the victim; that appellant told him he entered the victim's house through a back window to take money from her purse and, as appellant wiped his fingerprints off the purse, he saw the victim in the hallway and cut her throat; and that appellant stated he killed the victim because she recognized him and he did not want to go back to prison. Westberry further stated that appellant counted out approximately $290 he said he had taken from the victim's home and that appellant asked Westberry to tell the police that appellant had spent the night of February 5 at Westberry's trailer. When Westberry related appellant's confession to his wife several weeks later, she notified the police. The record also reflects that a sheriff's department fingerprint analyst identified a fingerprint taken from a portable stove located in the victim's bedroom as belonging to appellant, and that, over appellant's objection, the court instructed the jury on the *Williams* [FN2] rule and permitted Paul House to testify for the state that approximately one month before the murder, he and appellant had entered the victim's home through the same window that was found open by the victim's brother, and had stolen money.

> [FN2] In *Williams v. State*, 110 So. 2d 654 (Fla.1959), *cert. denied*, 361 U.S. 847, 80 S. Ct. 102, 4 L.Ed.2d 86 (1959), the court held that evidence of another crime is admissible when relevant to prove a material issue, unless it is relevant only to show bad character or propensity.

In his defense, appellant denied involvement in the murder and introduced testimony that, between 5:00 and 6:00 p.m. on February 5, a friend had dropped him off at his parents' home, which neighbored the victim's, and that he left at 8:00 p.m. to attend a party at his

employer's house. Testifying in his own behalf, appellant stated that he returned to his parents' home, where he resided, at approximately 1:00 a.m. on February 6, but was unable to get into the house because his parents had locked him out. Appellant testified that he then walked by way of Highway 19 to Westberry's trailer, where he spent the night. Appellant also presented a witness who testified that, late in the night of February 5 and early in the morning of February 6, he had seen a group of three men whom he did not recognize in the general vicinity of the victim's home.

After the close of the evidence but prior to final arguments, appellant proffered the newly discovered testimony of Kathy Waters, who had listened to portions of the trial testimony, followed newspaper accounts of the trial, and discussed testimony with various persons attending the trial. Her proffered testimony revealed that, shortly after midnight on February 6, she had observed a person, who may have been similar in appearance to appellant, walking along Highway 19, and had also seen three persons, whom she did not recognize, congregated in the general vicinity of the victim's house. The trial court denied appellant's motion to re-open the case, noting that the rule of sequestration is rendered "meaningless" when a witness is permitted "to testify in support of one side or the other, almost as if that testimony were tailor-made," after the witness has conferred with numerous people concerning the case. The jury found appellant guilty as charged.

Appellant, in the penalty phase, presented the testimony of members of his family relating to his character and upbringing, as well as a nine-year-old psychological report which indicated that at that time appellant was depressed, emotionally immature, and had difficulty controlling his impulses. [FN3] By a nine-to-three vote, the jury recommended that appellant receive the death sentence.

[FN3] At the penalty phase, the State did not call any witnesses. However, the prosecutor presented evidence that, on September 30, 1981, Petitioner was charged with committing a burglary of a dwelling on September 20, 1981. The prosecutor also presented evidence that Petitioner pled guilty to the lesser offense of burglary to a structure and was sentenced to three years of probation on April 29, 1982. Additionally, the prosecutor presented evidence that on August

> 1, 1974, Petitioner was found to be a delinquent child and committed to the Division of Youth Services based upon a charge that he stole a motor vehicle on April 25, 1974. Finally, the prosecutor presented evidence that on March 4, 1975, Petitioner was found to be a delinquent child and committed to the Division of Youth Services based upon a charge that he stole $44.00 from his mother on February 2, 1975. Ex. A–17 at 2965–71; Ex. A–5 at 833–38. ....
>
> In imposing the death sentence, the trial judge found the following four aggravating circumstances: (1) the murder took place after the defendant committed rape and burglary; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (3) the murder was especially heinous, atrocious, and cruel; (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial court found no mitigating circumstances.

Wright v. State, 473 So. 2d 1277, 1278–79 (Fla. 1985).

The conviction and death sentence were confirmed on direct appeal. *Id*. at 1282. The United States Supreme Court denied certiorari review on January 21, 1986. *Wright v. Florida*, 474 U.S. 1094 (1986).

Wright subsequently sought postconviction relief and filed a motion to vacate his death sentence, raising eighteen claims. *Wright v. State*, 581 So. 2d 882 (Fla. 1991). The trial court summarily denied the motion, but on appeal, this Court reversed and remanded for an evidentiary hearing on Wright's claim that the public defender's service as a special deputy affected his attorney's ability to provide effective assistance. *Id.* at 887. On the same day, this Court authorized the circuit court to consolidate other cases with the similar conflict claims. *Id*. at 886.

On remand for the evidentiary hearing, Wright amended his motion for postconviction relief and added a claim that he was entitled to relief under *Ring v. Arizona*, 536 U.S. 584 (2002). *Wright v. State*, 857 So. 2d 861, 865 (Fla. 2003). After an evidentiary hearing, the trial court denied Wright relief. *Id*. On appeal, this Court affirmed the trial court's order denying Wright relief, simultaneously denied Wright's petition for habeas corpus, and expressly found that *Ring* did not apply to Wright. *Id.* at 877-78. Wright petitioned the United States Supreme Court for certiorari review. Certiorari review was denied. *Wright v. Crosby*, 541 U.S. 961 (2004).

Wright filed another motion for postconviction relief, claiming newly discovered evidence, which was denied by the trial court. *Wright v. State*, 995 So. 2d 324, 326 (Fla. 2008). The Florida Supreme Court affirmed the trial court's order denying Wright's motion for postconviction relief. *Id.* at 328. Wright filed a petition for habeas corpus in the United States District Court, and the Court denied the petition. *Wright v. Secretary*, *Florida Dept. of Corrections*, No. 3:09-cv-99-J-32JBT, 2013 WL 1137478 at *33 (M.D. Fla. Mar. 19, 2013). Wright appealed the denial of the petition, and the United States Court of Appeals for the Eleventh Circuit affirmed the district court's order. *Wright v. Secretary*, *Florida Dept. of Corrections*, 761 F. 3d 1256, 1285 (11th Cir. 2014). Wright appealed to the United

States Supreme Court, and the Court denied relief. *Wright v. Jones*, 135 S. Ct. 2380 (2015).

On January 12, 2017, Wright filed his Second Successive 3.851 Motion to Vacate arising from the change in Florida law that followed in the wake of *Hurst v. Florida*. (Vol. 1, R42). On March 3, 2017, the State filed its response to the motion. (Vol. 1, R127). Wright amended his motion on May 16, 2017. (Vol. 1, R 162). The State filed its response on June 2, 2017. (Vol. 1 R267) On August 24, 2017, a Case Management Conference was held before Judge Clyde E. Wolfe. (Vol. 1, R464).

Due to Judge Wolfe's illness and passing the case remained dormant until the matter was reassigned to the Honorable Raul Zambrano. (Vol. 1, R357). Judge Zambrano granted Wright leave to file a supplement to the amended Rule 3.851 motion on January 25, 2019. (Vol. 1, R555). The supplement was filed on March 1, 2019. (Vol. 1, R558). The State filed its response on March 20, 2019. (Vol. 1, R 578). A second case management hearing was conducted on July 12, 2019. (Vol. 1, R759).

The circuit court entered an order denying Wright's 3.851 motion on October 8, 2019. (Vol. 1, R647). Wright filed a motion for rehearing on October 25, 2019. (Vol. 1, R662). It was denied on November 5, 2019. (Vol. 1, R698). This appeal follows.

STANDARD OF REVIEW

This appeal arises from the denial of a successive postconviction motion. A summary denial of a 3.851 motion is a pure question of law and is subject to *de novo* review by this Court. *See e.g. Rose v. State,* 985 So. 2d 500, 505 (Fla. 2008).

SUMMARY OF THE ARGUMENT

Florida's death penalty statute, Fla. Stat. § 921.141 (2017), was amended after, and in comport with, the decisions in *Hurst v. Florida,* 136 S. Ct. 616 (2016) and *Hurst v. State,* 202 So.3d 40 (Fla. 2016). Neither *Hurst* nor the new statute create a new crime with new elements. Wright's attempt to avoid this Court's retroactivity ruling by asserting a substantive statutory right under the new statute is patently without merit. The postconviction court correctly denied Wright's claims presented in the successive postconviction motion. As Wright's sentence was final in 1986, he is foreclosed from receiving *Hurst* relief.[1]

ARGUMENT I

THE STATUTORY CONSTRUCTION IN *HURST II* DOES NOT CONSTITUTE SUBSTANTIVE LAW.

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

[1] In *State v. Poole,* 292 So.3d 694 (Fla. 2020), this Court receded from its prior decision in *Hurst v. State*, 202 So.3d 40 (Fla. 2016).

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. *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 621-22. 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 622-25.

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. *Summerlin*, 542 U.S. at 358.

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. 99 (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 also 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). The *Asay* decision is binding on lower courts and is dispositive of the *Hurst* claim.

Nevertheless, Wright 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*, 260 So.3d 146 (Fla. 2018).

Hurst reflected a change in this state's decisional law, and, in *Asay*, this Court concluded "that *Hurst* should not be applied retroactively to [a] case, in which the death sentence became final before the issuance of *Ring*." *Asay,* 210 So.3d at 22. However, Wright, whose sentence became final in 1986, asserts that a defendant who is convicted of first-degree murder has a substantive right to a life sentence unless a unanimous jury finds beyond a reasonable doubt all of the elements of "capital first-degree murder"—which Wright defines as "murder plus the elements the jury is required to find unanimously under revised § 921.141, Fla.

Stat."

Under Florida's revised capital sentencing statute, and consistent with *Hurst*, in order for a defendant to be sentenced to death, the 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. *See Hurst*, 202 So.3d at 57; § 921.141(2), Fla. Stat. (2018); ch. 2017-1, Laws of Fla. If the jury makes these findings, it only does so after a jury has unanimously convicted the defendant of the capital crime of first-degree murder that is delineated in section 782.04, Florida Statutes (2018).

Florida's new capital sentencing scheme, neither alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable. *Victorino v. State*, 241 So.3d 48 (Fla. 2018). These changes to the sentencing procedure did not create a new offense. The class of persons who are death eligible and the range of conduct which causes those defendants to be death eligible did not change. The aggravating factors necessary to qualify a defendant as eligible for the death penalty were not changed. In fact, the specific aggravators used in Wright's case had been in place for decades. The only changes made for a death recommendation were the requirement of specific jury findings of unanimity for the existence and sufficiency of the aggravating factors and that they

outweigh mitigation.

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. Rather, in Florida, first-degree murder is, by its very definition, a capital felony. Florida's substantive statute on murder, codified at section 782.04, Florida Statutes, provides as follows:

> 782.04 Murder.—
> (1)(a) The unlawful killing of a human being:
>
> 1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;
>
> 2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any: [enumerated felonies a.-s.] or
>
> 3. Which resulted from the unlawful distribution by a person 18 years of age or older of any of the following substances, or mixture containing any of the following substances, when such substance or mixture is proven to be the proximate cause of the death of the user: [enumerated controlled substances a.-i.] is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

Thus, the crime of first-degree murder, of which Wright was convicted, is defined in section 782.04 as a capital felony—this is regardless of whether the death penalty is ultimately imposed. Moreover, section 921.141(1), "Separate Proceedings on Issue of Penalty," begins as follows: "Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 775.082." Further, Florida Rule of Criminal Procedure 3.112(b) defines a capital trial as "any first-degree

murder case in which the State has not formally waived the death penalty on the record."

These statutes and the rule of procedure illustrate that the penalty phase findings are not elements of the capital felony of first-degree murder. Rather, they are findings required of a jury: (1) before the court can impose the death penalty for first-degree murder, and (2) only after a conviction or adjudication of guilt for first-degree murder has occurred. Thus, Wright's jury did find all of the elements necessary to convict him of the capital felony of first-degree murder—during the guilt phase. The conviction for first-degree murder must occur before and independently of the penalty-phase findings required by *Hurst* and its related legislative enactments.

Wright's reliance on *Bousley v. United States,* 523 U.S. 614 (1998) in furtherance of this proposition is misplaced. There, the Supreme Court "decid[ed] the meaning of a criminal statute enacted by Congress." *Id*. at 620. Concluding that a *Teague* analysis was not necessary under that circumstance, the Court held that an individual who pled guilty to violating 18 U.S.C. § 924(c)(1), based upon the prior interpretation of "using" a firearm is entitled to have the conviction set aside if he or she was actually innocent of the crime as it was subsequently defined by this Court. *Id*. Instead, *Hurst*, like *Ring*, merely "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." *Schriro* v. *Summerlin*, 542 U.S. 348, 353 (2004). *Hurst* did not announce a substantive change in the law and is not retroactive under federal law.

If a rule of law is not new, there is no retroactivity analysis required. *Butler v. McKellar*, 494 U.S. 407, 412 (1990) (defining a "new rule" for purpose of retroactivity as one that "breaks new ground or imposes a new obligation," such as a decision that explicitly overrules an earlier holding). Florida's standard of proof for aggravating circumstances is not new. *See* Fla. Std. J. Inst. (Crim.) 7.11; *Floyd v. State*, 497 So. 2d 1211, 1214-15 (Fla. 1986); *Zeigler v. State*, 580 So. 2d 127, 129 (Fla. 1991); *Finney v. State*, 660 So. 2d 674, 680 (Fla. 1995). Florida law has required that the State prove aggravators at the beyond-a-reasonable-doubt standard of proof for over three decades. *Williams v. State*, 37 So.3d 187, 194-95 (Fla. 2010) (stating that the State has the burden to prove beyond a reasonable doubt each and every aggravating circumstance); *Aguirre-Jarquin v. State*, 9 So.3d 593, 607 (Fla. 2009) (explaining that the State must prove the existence of an aggravator beyond a reasonable doubt citing *Parker v. State*, 873 So. 2d 270, 286 (Fla. 2004)); *cf*. *Floyd v. State*, 497 So. 2d 1211, 1214 (Fla. 1986) (striking an aggravator that was not proven "beyond a reasonable doubt").

ARGUMENT II

STATE v. POOLE

The revision to Florida's death penalty statute in 2017 was made in the aftermath of *Hurst* and implements the changes from *Hurst*. In general, there is a presumption against retroactive application of statutes absent an express statement

of legislative intent. *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc*., 67 So.3d 187, 195 (Fla. 2011). There is no express statement that the legislature intended that chapter 2017-1 be applied retroactively, and thus this presumption cannot be rebutted. *See also* Senate Bill Analysis and Fiscal Impact Statement, SB 280, Feb. 21, 2017, at 6-7 (noting that this Court's retroactive application to post-*Ring* decisions will "significantly increase both the workload and associated costs of public defender offices for several years to come"). Further, as the Eleventh Circuit Court of Appeals noted in *Lambrix v. Secretary, Dep't of Corr*., 872 F.3d 1170, 1183 (11th Cir. 2017):

> [N]o U.S. Supreme Court decision holds that the failure of a state legislature to make revisions in a capital sentencing statute retroactively applicable to all of those who have been sentenced to death before the effective date of the new statute violates the Equal Protection Clause, the Due Process Clause, or the Eighth Amendment.

Since the legislature did not express an intent for the statute to be retroactive, it is not retroactive to cases which were final prior to enactment of the new statute. Wright's judgment became final in 1986 and he has not received a new guilt or penalty phase since that time. Thus, the 2017 enactment of changes to the capital sentencing statute would not be applicable to Wright's case unless he were to receive a new guilt and/or penalty phase.

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 Wright, whose sentences were final pre-*Ring*. There is nothing in *Hurst*, or its progeny, to indicate that Florida's new sentencing scheme creates a greater offense of capital murder.

What is more, this Court recently receded from *Hurst v. State* and clarified that *Hurst v. Florida* only requires that "a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *State v. Poole*, 292 So.3d 694, 697 (Fla. 2020); *McKinney v. Arizona*, [2] 140 S. Ct. 702, 705 (2020).

With regard to the additional *Hurst v. State* requirements, the Court clarified that any aggravator is sufficient to impose death; therefore, no additional sufficiency determination is required. *See Poole*, 292 So.3d at 709:

> [O]ur Court was wrong in *Hurst v. State* when it held that the existence of an aggravator and the sufficiency of an aggravator are two separate findings, each of which the jury must find unanimously. Under longstanding Florida law, there is only one eligibility finding

[2] Notably, the Court also held that *Hurst v. Florida*, like *Ring* before it, is not retroactive. *McKinney*, 140 S. Ct. 702, 708 (2020) ("*Ring* and *Hurst* do not apply retroactively on collateral review").

> required: the existence of one or more statutory aggravating circumstances.

Finally, with regard to the additional *Hurst v. State* requirement of a unanimous jury recommendation, the Court held:

> [W]e further erred in *Hurst v. State* when we held that the Eighth Amendment requires a unanimous jury recommendation of death. The Supreme Court rejected that exact argument in *Spaziano v. Florida*, 468 U.S. 447 (1984). *See Spaziano*, 468 U.S. at 465; *see also Harris v. Alabama*, 513 U.S. 504, 515 (1995) ("The Constitution permits the trial judge, acting alone, to impose a capital sentence."). We are bound by Supreme Court precedents that construe the United States Constitution.

Poole, 292 So.3d at 711.

And with regard to the second and third additional requirements specifically, (weighing and recommendation, respectively), this Court expressly stated that "Neither *Hurst v. Florida*, nor the Sixth or Eighth Amendment, nor the Florida Constitution mandates that the jury make the section 941.121(3)(b) [weighing] selection finding or that the jury recommend a sentence of death." *Poole*, 292 So.3d at 709; *see also id.* at 721 ("There is no basis in state or federal law for treating as elements the additional unanimous jury findings and recommendation that we mandated in *Hurst v. State*.").

Additionally, the Court clarified that weighing aggravating circumstances and mitigating factors "is not a 'fact' that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Poole*, 292 So.3d at

710. Accordingly, that determination need not be made by a jury because the Eighth Amendment does not require jury sentencing in capital cases. *Id*. at 715, citing *Hurst v. Florida*, 136 S. Ct. at 621.

In applying the decision to the facts of this case, it is clear there was no underlying constitutional error. In this case, like *Poole*, Wright's jury made the required finding of an aggravating (or "eligibility") factor (a prior violent felony based on the contemporaneous conviction in that the murder was committed in the course of a sexual battery), and that is all that either the United States or Florida Constitutions require. This Court upheld those aggravators on direct review. *Wright v. State,* 473 So. 2d 1277, 1278–79 (Fla. 1985). To use the terminology of *Poole*, Wright's eligibility for a death sentence was established and all constitutional requirements are satisfied.

The right to a jury trial under the Sixth Amendment and its corresponding provision in the Florida constitution has been limited to just that, the trial, not sentencing. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed.") (emphasis in original); *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding that the Constitution does not prohibit the trial judge from "impos[ing] a capital sentence"). No case from the Supreme Court has mandated jury sentencing in a capital case,

and such a holding would require reading a mandate into the Constitution that is simply not there.

Respondent attacks this Court's decision in *Poole* as somehow unconstitutional. But as the United States Supreme Court's recent decision in *McKinney* indicates, this Court correctly struck down the unconstitutional requirements imposed by *Hurst v. State*. *See McKinney v. Arizona*, 140 S. Ct. 702, 705 (2020) ("In short, *Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances"). Moreover, Respondent's arguments that *Poole* was wrongly decided, have already been rejected when this Court denied *Poole's* motion for rehearing and extended the holding in *Poole* to cases involving prior violent felony convictions. *See State v. Poole*, 292 So.3d 694, 714 (Fla. 2020), *reh'g denied*, *clarification granted* (holding that contemporaneous violent felony convictions "satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt."); *see also Smith v. State*, --- So.3d ---, 2020 WL 1057243, at *6 (Fla. Mar. 5, 2020) ("The existence of previous violent felonies was an aggravating circumstance that rendered Smith eligible for the death penalty and satisfied the mandates of the United States and Florida Constitutions").

With its decision in *Poole,* the Florida Supreme Court determined that it had erred in *Hurst* in several ways, including by holding that the "Eighth Amendment

requires a unanimous jury recommendation of death." *Poole*, 292 So.3d 694 at 711. In reaching this conclusion, the Court outlined Florida's historical capital sentencing law, as well as, "the principles underlying the [U.S.] Supreme Court's capital punishment cases" and noted, "Those cases 'address two different aspects of the capital decision-making process: the eligibility decision and the selection decision.'" *Id.* at 707 (quoting *Tuilaepa v. California,* 512 U.S. 967, 971 (1994)). While the eligibility decision narrows the class of those who commit murder to persons eligible for a more severe sentence, the selection decision encompasses a determination whether a person eligible for the death penalty should receive such a sentence. *Poole,* 292 So.3d 694 at 707. After analyzing the distinctions between those two decisions, the *Poole* opinion unambiguously announced:

> This Court clearly erred in *Hurst* v. *State* by requiring that the jury make any finding beyond the section 921.141(3)(a) eligibility finding of one or more statutory aggravating circumstances. Neither *Hurst* v. *Florida,* nor the Sixth or Eighth Amendment, nor the Florida Constitution, mandates that the jury make the section 941.121(3)(b) selection finding or that the jury recommend a sentence of death.

Poole, 292 So.3d 694 at 709. Rather, the Florida Supreme Court concluded, "The section 921.141(3)(b) selection finding is *not a fact."' Id.* (emphasis added). The Court explained its rationale: "A subjective determination like the one that section 921.141(3)(b) calls for cannot be analogized to an element of a crime; it does not lend itself to being objectively verifiable. Instead, it is a 'discretionary judgment call that neither the state nor federal constitution entrusts exclusively to the jury.'"

Id. at 709-10 (*quoting State v. Wood,* 580 S.W.3d 566, 585 (Mo. 2019)). Thus, in partially, but significantly, receding from *Hurst* v. *State, Poole* unequivocally states that the jury is constitutionally required to make only one finding: "the existence of one or more statutory aggravating circumstances." *Poole,* 292 So.3d 694 at 709.

Contrary to Wright's arguments, the Florida Supreme Court has repeatedly upheld Florida's death penalty statutes against claims that the death sentence is arbitrarily and capriciously imposed. *See, e.g., Hodges v. State,* 885 So. 2d 338, 359 & n. 9 and 10 (Fla. 2004) (noting that the defendant's claim that "the death penalty statute is unconstitutional because it fails to prevent the arbitrary and capricious imposition of the death penalty, violates due process, and constitutes cruel and unusual punishment," has "consistently been determined to lack merit"). The Florida Supreme Court has also repeatedly rejected similar "cruel and unusual punishment" claims "that Florida's death penalty system is not in accord with evolving standards of decency." *Correll v. State,* 184 So.3d 478, 485 (Fla. 2015); *see Hunter v. State,* 175 So.3d 699, 710 (Fla. 2015); *McLean v. State,* 147 So.3d 504, 514 (Fla. 2014); *Kimbrough v. State,* 125 So.3d 752, 53-54 (Fla. 2013), *cert. denied,* 134 S. Ct. 632 (2013); *Mann v. State,* 112 So.3d 1158, 1162 (Fla. 2013).

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, the State of Florida, respectfully urges this Court to affirm the trial court's denial of Wright's Successive Postconviction Motion.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

s/DORIS MEACHAM
DORIS MEACHAM
ASSISTANT ATTORNEY GENERAL
Fla. Bar #63265
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457
doris.meacham@myfloridalegal.com
CapApp@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 25th day of June 2020, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Martin J. McClain, Special Assistant CCRC-South, martymcclain@comcast.net, and Vincent M. D'Agostino, Esq., Staff Attorney CCRC-South, dagostinov@ccsr.state.fl.us, ccrcpleadings@ccsr.state.fl.us, CCRC-South,110 SE

6th St., Suite 701, Fort Lauderdale, FL 33301.

s/DORIS MEACHAM
DORIS MEACHAM
ASSISTANT ATTORNEY GENERAL
Fla. Bar #63265

CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point.

s/DORIS MEACHAM
DORIS MEACHAM
ASSISTANT ATTORNEY GENERAL
Fla. Bar #63265