

**IN THE SUPREME COURT OF FLORIDA**

**RICHARD BARRY RANDOLPH,**

**Appellant,**

**Case No. SC20-287**

**v.**

**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**

**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**

RECEIVED, 06/15/2020 10:26:32 AM, Clerk, Supreme Court

## TABLE OF CONTENTS

### Contents

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT .....	1
RESPONSE TO REQUEST FOR ORAL ARGUMENT.....	1
STATEMENT OF THE CASE AND FACTS .....	1
STANDARD OF REVIEW .....	9
SUMMARY OF THE ARGUMENT .....	9
ARGUMENT I.....	10
ARGUMENT II .....	18
ARGUMENT III .....	22
CONCLUSION.....	25
CERTIFICATE OF SERVICE .....	26
CERTIFICATE OF COMPLIANCE.....	26

## TABLE OF AUTHORITIES

### Cases

<i>Aguirre-Jarquin v. State</i> 9 So.3d 593 (Fla. 2009) . . . . .	18
<i>Alleyne v. United States</i> 570 U.S. 99 (2013) . . . . .	13
<i>Apprendi v. New Jersey</i> 530 U.S. 466 (2000) . . . . .	10
<i>Asay v. State</i> 210 So.3d 1 (Fla. 2016) . . . . .	13, 14
<i>Asay v. State</i> 224 So.3d 695 (Fla. 2017) . . . . .	19
<i>Bousley v. United States</i> 523 U.S. 614 (1998) . . . . .	17
<i>Butler v. McKellar</i> 494 U.S. 407 (1990) . . . . .	17
<i>Correll v. State</i> 184 So.3d 478 (Fla. 2015) . . . . .	25
<i>Crayton v. United States</i> 799 F.3d 623 (7th Cir. 2015) <i>cert. denied</i> , 136 S. Ct. 424 (2015) . . . . .	12
<i>DeStefano v. Woods</i> 392 U.S. 631 (1968) . . . . .	12
<i>Finney v. State</i> 660 So. 2d 674 (Fla. 1995) . . . . .	18
<i>Fla. Ins. Guar. Ass’n, Inc. v. Devon Neighborhood Ass’n, Inc.</i> 67 So.3d 187 (Fla. 2011) . . . . .	18
<i>Floyd v. State</i> 497 So. 2d 1211 (Fla. 1986) . . . . .	17, 18
<i>Griffith v. Kentucky</i> 479 U.S. 314 (1987) . . . . .	11
<i>Harris v. Alabama</i> 513 U.S. 504 (1995) . . . . .	21, 22
<i>Hildwin v. Florida</i> 490 U.S. 638 (1989) . . . . .	11
<i>Hodges v. State</i> 885 So. 2d 338 . . . . .	25

<i>Hunter v. State</i>	
175 So.3d 699 (Fla. 2015) . . . . .	25
<i>Hurst v. Florida</i>	
136 S. Ct. 616 (2016) . . . . .	Passim
<i>Hurst v. State</i>	
202 So.3d 40 (Fla. 2016) . . . . .	Passim
<i>Kimbrough v. State</i>	
125 So.3d 752 (Fla. 2013), cert. denied, 134 S. Ct. 632 (2013) . . . . .	25
<i>Lambrix v. Secretary, Dep’t of Corr.</i>	
872 F.3d 1170 (11th Cir. 2017) . . . . .	19
<i>Mann v. State</i>	
112 So.3d 1158 (Fla. 2013) . . . . .	25
<i>McCoy v. United States</i>	
266 F.3d 1245 (11th Cir. 2001) . . . . .	12
<i>McKinney v. Arizona</i>	
140 S. Ct. 702 (2020) . . . . .	20, 22, 23
<i>McLean v. State</i>	
147 So.3d 504 (Fla. 2014) . . . . .	25
<i>Miranda v. Arizona</i>	
384 U.S. 436 (1966) . . . . .	3
<i>Mosley v. State</i>	
209 So.3d 12 (Fla. 2016) . . . . .	19
<i>Parker v. State</i>	
873 So. 2d 270 (Fla. 2004) . . . . .	18
<i>Porter v. McCollum</i>	
130 S. Ct. 447 (2009) . . . . .	7
<i>Randolph v. Crosby</i>	
861 So. 2d 430 (Fla. 2003) . . . . .	6
<i>Randolph v. Florida</i>	
498 U.S. 992 (1990) . . . . .	5
<i>Randolph v. McNeil</i>	
131 S. Ct. 506 (2010) . . . . .	6
<i>Randolph v. McNeil</i>	
590 F. 3d 1273 (11th Cir. 2009) . . . . .	6
<i>Randolph v. State</i>	
562 So. 2d 331 (Fla. 1990) . . . . .	5, 22

<i>Randolph v. State</i>	
853 So. 2d 1051 (Fla. 2003) . . . . .	5, 6
<i>Ring v. Arizona</i>	
536 U.S. 584 (2002) . . . . .	6, 10, 11, 22
<i>Rodriquez v. State</i>	
260 So.3d 146 (Fla. 2018) . . . . .	13
<i>Rose v. State</i>	
985 So. 2d 500 (Fla. 2008) . . . . .	9
<i>Schriro v. Summerlin</i>	
542 U.S. 348 (2004) . . . . .	11, 12, 17
<i>Sears v. Upton</i>	
130 S. Ct. 3259 (2010) . . . . .	7
<i>Smith v. State</i>	
--- So3d ---, 2020 WL 1057243 (Fla. Mar. 5, 2020) . . . . .	23
<i>Spaziano v. Florida</i>	
468 U.S. 447 (1984) . . . . .	20
<i>Spaziano v. State</i>	
433 So. 2d 508 (Fla. 1983) . . . . .	11
<i>State v. Poole</i>	
292 So.3d 694 (Fla. 2020) . . . . .	Passim
<i>State v. Wood</i>	
580 S.W.3d 566 (Mo. 2019) . . . . .	24
<i>Strickland v. Washington</i>	
466 U.S. 668 (1984) . . . . .	7
<i>Tuilaepa v. California</i>	
512 U.S. 967 (1994) . . . . .	24
<i>Varela v. United States</i>	
400 F.3d 864 (11th Cir. 2005) . . . . .	12
<i>Victorino v. State</i>	
241 So.3d 48 (Fla. 2018) . . . . .	15
<i>Williams v. State</i>	
37 So.3d 187 (Fla. 2010) . . . . .	18
<i>Zeigler v. State</i>	
580 So. 2d 127 (Fla. 1991) . . . . .	18

**Statutes**

18 U.S.C. § 924(c)(1) . . . . . 17  
Florida State Stat. § 782.04 (2018) . . . . . 15, 16  
Florida State Stat. § 921.141 (2017) . . . . . 9, 14  
Florida State Stat. § 921.141(1) . . . . . 16  
Florida State Stat. § 921.141(5)(d) (1987) . . . . . 5  
Florida State Stat. § 921.141(5)(e) (1987) . . . . . 5  
Florida State Stat. § 921.141(5)(f) (1987) . . . . . 5  
Florida State Stat. § 921.141(5)(h) (1987) . . . . . 5  
Florida State Stat. § 921.141(2) (2018) . . . . . 15  
Fla. Std. J. Inst. (Crim.) 7.11 . . . . . 17

**Rules**

Fla. R. Crim. P. 3.112(b) . . . . . 16  
Fla. R. Crim. P. 3.851 . . . . . 1  
Fla. R. App. P. 9.210(c) . . . . . 1

## **PRELIMINARY STATEMENT**

This is an appeal of the circuit court’s denial of Richard Barry Randolph’s (“Randolph”) 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., “Randolph”. 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 or not 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 Randolph’s convictions and death sentence, this Court summarized the facts of the case in the following way:

Minnie Ruth McCollum managed a Handy–Way store in Palatka, and Randolph was a former employee of the same store. Shortly after 7 a.m. on August 15, 1988, Terry Sorrell, a regular customer, and Dorothy and Deborah Patilla, custodians of the store, observed Randolph, wearing a Handy–Way smock, locking the front door. When the Patillas inquired about Mrs. McCollum's whereabouts and why the store was locked, Randolph told them that Mrs. McCollum's

car had broken down and that she had taken his car. He indicated that he had repaired her car and was leaving to pick her up. Randolph then drove away in Mrs. McCollum's car.

The women tried the door and, finding it locked, peered in through the window. They saw that the security camera in the ceiling was pulled down; wires were coming out of the trash can, which had been tipped over; the area behind the counter was in disarray; and the door to the back room, normally kept open, was almost completely closed. Thinking that something was awry, they called the sheriff's office.

After breaking into the store, a deputy found Mrs. McCollum lying on her back, naked from the waist down, with blood coming out of the back of her head and neck. She was breathing and moaning slightly. The deputy also observed a knife beside her head. Paramedics transported Mrs. McCollum to the hospital.

Dr. Kirby Bland, a general surgeon, testified that Mrs. McCollum arrived at the emergency room comatose, and with her head massively beaten and contused. She had multiple skin breaks and skin lacerations about the scalp, face, and neck and her left jawbone was fractured. Dr. Bland indicated that Mrs. McCollum had knife lacerations to the left side of her neck that caused a hematoma around the heart. There was also a stab wound in the area of the left eye. Dr. Albert Rhoten, Jr., a neurologist, testified that in twenty years of neurosurgical practice he had not seen brain swelling so diffuse, and he likened it to someone who had been ejected out of a car or thrown from a motorcycle and received multiple hits on the head. Mrs. McCollum died at the hospital six days after the assault.

After leaving the Handy-Way, Randolph drove Mrs. McCollum's car to the home of Norma Janene Betts, Randolph's girlfriend and mother of their daughter. She testified that he admitted robbing the Handy-Way store and attacking Mrs. McCollum. He told her that he was going to Jacksonville to borrow money from the manager of a Sav-A-Lot [sic] grocery store and cash in lottery tickets. He promised to return to take Betts and their daughter to North Carolina.

Betts also testified that while they lived in North Carolina Randolph was a "nice young man" and was employed. After they moved to

Palatka, he began socializing with the wrong crowd, became addicted to crack cocaine, and changed altogether. On the morning of the incident, she testified, Randolph did not appear to be under the influence of crack cocaine, but she did not know whether he had taken any cocaine between 11 p.m. the night before and 6 a.m. the morning of the incident.

Randolph was arrested in Jacksonville at a Sav-A-Lot [sic] store, while waiting for the manager to advance him some money. After waiving his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), Randolph gave a statement to two Putnam County detectives. Detective William Hord testified that Randolph had said he had ridden his bicycle to the Handy-Way store with a toy gun, which he hid behind the store. He said he knew the routine at the store, having worked there, and knew there should be approximately \$1,000 in the safe. He planned to enter the store unseen, open the safe, remove the money, and leave while the manager was outside checking the gas pumps. However, the manager returned and saw him. He rushed her, she panicked, and a struggle ensued. Randolph indicated that she was “a lot tougher than he had expected,” but that finally he forced her into the back room where he hit her with his hands and fists until she “quieted down.”

Randolph tried unsuccessfully to open the store safe. When Mrs. McCollum started moving again, he approached her. He said that she pulled the draw string out of his hooded sweat shirt, which he then wrapped around her neck until she stopped struggling. Randolph then found a slip of paper with the combination of the safe. Unsuccessful in opening it, he took the store's lottery tickets.

At this point, the victim started screaming. Randolph again struck her until “she hushed.” Because she continued to make noises, Randolph grabbed a small knife and stabbed her. He again grabbed the string and “tried to cut her wind.” To make it appear as if “a maniac” had committed the crime, Randolph said he then raped her. He put on a Handy-Way uniform, grabbed the store video camera out of its mount and put it into the garbage. He took Mrs. McCollum's keys and locked the store before leaving in her car.

On the way to Jacksonville, Randolph stopped at several convenience stores where he cashed in winning lottery tickets and discarded the losing tickets, and at a McDonald's where he disposed of his bloodstained clothing and shoes. The sheriff's detectives recovered the lottery tickets and articles of clothing when they returned to Putnam County with Randolph.

During the penalty phase, the state called the medical examiner, who testified that Mrs. McCollum died as the result of severe brain injury. He also described the extensive bruises to Mrs. McCollum depicted by a series of photographs.

Randolph presented the testimony of Dr. Harry Krop, a psychologist who examined Randolph. He opined that none of the statutory mitigating circumstances existed, although several nonstatutory circumstances most likely contributed to the offense. He testified that Randolph, who was adopted when he was five months old, had problems getting along with people in school, and his behavior problems caused him to be referred to psychotherapy for a year in the third grade. His mother was emotionally unstable and was hospitalized for psychiatric reasons on a number of occasions, and his father was physically abusive, and administered discipline by tying him and beating him with his hands, a broomstick, and a belt.

Despite his emotional deficiencies, Randolph graduated from high school. He received an honorable discharge from the Army; however, he started using drugs during his service, including marijuana and cocaine. In 1984 he began using highly-addictive crack cocaine. Dr. Krop testified that, unlike alcohol intoxication, crack cocaine's effects are not readily apparent from merely looking at a person. When someone regularly uses crack cocaine, the effects of the drug stay in the blood; one's personality and behavior are affected, not necessarily by an immediate ingestion of the drug, but rather by its use over time. He believed that Randolph's abnormal personality was greatly influenced by his drug addiction at the time of the offense.

Dr. Krop further testified that Randolph regretted what had happened; he was ashamed and embarrassed that he had lost control, and was remorseful about what he had done. The psychologist believed that Randolph had nothing against Mrs. McCollum, that he fully intended

only to enter the store and steal the money while she was outside, but that things happened that caused him to panic. He concluded that Randolph's criminal behavior was influenced by his drug addiction.

The jury found Randolph guilty of first-degree murder, armed robbery, sexual battery with force likely to cause serious personal injury or with a deadly weapon, and grand theft of a motor vehicle. FN2 The jury recommended the death penalty by a vote of eight to four. The judge accepted the jury recommendation and imposed the death penalty, finding four aggravating circumstances, FN3 no statutory mitigating circumstances, and two nonstatutory mitigating circumstances. FN4

FN2. The trial court imposed a sentence of nine years' incarceration on the armed robbery count, and twenty-seven years' incarceration on the sexual battery count, to run concurrent with the sexual battery term. No sentence was imposed on the conviction for grand theft.

FN3. Murder during commission or flight after commission of a sexual battery, section 921.141(5)(d), Florida Statutes (1987); murder committed to avoid or prevent lawful arrest, section 921.141(5)(e), Florida Statutes (1987); murder committed for pecuniary gain, section 921.141(5)(f), Florida Statutes (1987); murder especially heinous, atrocious, or cruel, section 921.141(5)(h), Florida Statutes (1987).

FN4. Randolph possesses an atypical personality disorder and expressed shame and remorse for his conduct

*Randolph v. State*, 562 So. 2d 331, 332–34 (Fla. 1990).

The conviction and death sentence were confirmed on direct appeal. *Id.* at 39. The case became final on November 26, 1990, when the Supreme Court of the United States denied the Defendant's petition for writ of certiorari. *Randolph v. Florida*, 498 U.S. 992, 111 S. Ct. 538 (1990).

Randolph filed a motion to vacate judgments of conviction and sentence, which was amended several times. *Randolph v. State*, 853 So. 2d 1051, 1055 (Fla.

2003). The Defendant presented a total of 21 claims, although the trial court granted an evidentiary hearing on only one claim after denying relief on the others. That evidentiary hearing was held on April 24, 1998, and thereafter the trial court issued an order denying relief on claim twenty. *Id.* This Court affirmed the denial on April 24, 2003 and denied the Defendant's petition for writ of habeas corpus. *Id.* at 1069.

In 2003, Randolph also filed a petition with the Florida Supreme Court raising a claim pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002), which was also denied in an unpublished opinion. *Randolph v. Crosby*, 861 So. 2d 430 (Fla. 2003).

Randolph subsequently sought federal habeas relief with the United States District Court for the Middle District of Florida, which denied the petition. *Randolph v. McNeil*, 590 F. 3d 1273, 1275 (11th Cir. 2009). The United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of Randolph's petition. Randolph then filed a petition for writ of certiorari in the United States Supreme Court. Certiorari review was denied on November 1, 2010. *Randolph v. McNeil*, 131 S. Ct. 506 (2010).

On November 23, 2010, Randolph filed a successive motion for post-conviction relief. In its denial of the successive postconviction motion, the trial judge held:

After a review of the Motions, the Defendant's file, and arguments from both parties at the hearing, the Court agrees with the AGO / State that the Defendant's most recent Motion is untimely, successive, procedurally barred, and fails to present any new fundamental grounds or constitutional right that has been held to apply retroactively.

At the hearing, the Attorney representing the Defendant cited *Porter v. McCollum*, 130 S. Ct. 447 (2009) arguing that *Porter* represents "a fundamental repudiation of the Florida Supreme Court's reliance on *Strickland v. Washington*, 466 U.S. 668 (1984) jurisprudence and as such *Porter* constitutes a change in law which renders the Defendant's claim cognizable in the pending Post Conviction proceedings arguing retroactivity.

In order for a reversal to occur, the Defendant can show new evidence, or retroactivity (which is the argument here), or a *Brady* or *Giglio* claim. The AGO / State argued at the hearing that *Porter* just showed a misapplication of *Strickland* in a scenario related to in that case. As noted above, in order to reverse, a retroactive change in law must be shown. In *Porter*, Counsel was found to be deficient. No deficiency was found in the case at bar. The AGO / State argued at the hearing that nowhere in the *Porter* decision, did the U.S. Supreme Court indicate or imply that *Porter* represents a repudiation of *Strickland* jurisprudence or that *Porter* establishes a new fundamental right of retroactivity. After a review, the Court agrees.

Therefore, first, it is clear that Rule 3.851 (d) (1) bars a Post-Conviction Motion filed more than one year after Judgment and Sentence are filed. The Court finds the Defendant's Judgment and Sentence became final in 1990 making the Defendant's latest Motion untimely by more than 20 years.

Second, as noted above, the Court agrees that the Defendant's claim that *Porter v. McCollum*, 130 S. Ct. 447 (2009), and *Sears v. Upton*, 130 S. Ct. 3259 (2010), somehow altered the requirement that deference be given to state factual findings, has no legal basis.

Third, the Defendant's Ineffective Assistance claims have been previously denied, are successive, and thus procedurally barred.

(V 1, R143-44).

The second successive Rule 3.851 motion at issue herein was filed on January 10, 2017. (V 1, R43-86). Randolph raised three separate claims of relief pursuant to *Hurst v. State*, 202 So.3d 40 (Fla. 2016). (V 1, R43-86). The State filed its response on February 8, 2017. (V 1, R100-17). Randolph amended his motion with one additional claim on May 12, 2017. (V 1, R119-37). Claim IV alleged the Due Process Clause of the Fourteenth Amendment requires the retroactive application of Ch. 2017-1, Laws of Fla. (2017). The State filed its response on June 1, 2017. (V 1, R138-44).

A case management conference was conducted on September 22, 2017, before the Honorable Clyde Wolfe. (V 1, R307-32). Due to Judge Wolfe's illness and passing the case remained dormant until the matter was reassigned to the Honorable Raul Zambrano. (V 1, R295, 302). Judge Zambrano granted Mr. Randolph leave to file a supplement to the amended Rule 3.851 motion on February 28, 2019. (V 1, R336-50). The amendment contained one additional claim for relief. Claim V alleged that Randolph's sentence violates the Due Process Clause and the Eighth and Fourteenth Amendments because death is only authorized under Florida law if the jury finds the necessary elements required to convict of the greater offense of capital murder. The State filed its response on March 20, 2019. (V 1, R354-66). A second case management hearing was

conducted before another judge, the Honorable Howard McGillin, on September 12, 2019. (V 1, R 532-53).

The circuit court entered an order denying Randolph's 3.851 motion on December 31, 2019. (V 1, R 460-70). Randolph filed a motion for rehearing on January 14, 2020. (V 1, R 471-86). It was denied on January 21, 2020. (V 1, R487). 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. Randolph'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 Randolph's

claims presented in the successive postconviction motion. As Randolph's sentence was final in 1990, he is foreclosed from receiving *Hurst* relief.<sup>1</sup>

### **ARGUMENT I:**

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. *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

---

<sup>1</sup> 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).

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, Randolph 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 Rodriguez 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, Randolph, whose sentence became final in 1990, 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 Randolph defines as “murder plus the elements the jury is required to find unanimously under revised § 921.141, Fla. Stat.”

Randolph contends that a conviction for “capital first-degree murder” requires not only the statutorily defined elements of first-degree murder, but the specific unanimous penalty phase findings set forth in *Hurst*; section 921.141, Florida Statutes, which was revised to incorporate the *Hurst* requirements; and chapter 2017-1, Laws of Florida, which amended section 921.141 to require that a jury’s recommendation of death be unanimous. Randolph asserts that he was not convicted of all of the elements of “capital first-degree murder” and that his due process and Eighth Amendment rights were violated as a result.

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 Randolph'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 Randolph 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, Randolph’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.

Randolph’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:**

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. Randolph’s judgment became final in 1990 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 Randolph’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 Randolph, 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*,<sup>2</sup> 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 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

---

<sup>2</sup> 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”).

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*, Randolph’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. *Randolph v. State*, 562 So. 2d 331 (Fla. 1990). To use the terminology of *Poole*, Randolph'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.

### **ARGUMENT III:**

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*, --- So3d ---, 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 Randolph'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 Randolph'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

COUNSEL FOR APPELLEE

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: Rachel L. Day, Assistant Capital Collateral Regional Counsel, [dayr@ccsr.state.fl.us](mailto:dayr@ccsr.state.fl.us), and Marta Jaszczolt, Staff Attorney, [jaszczoltm@ccsr.state.fl.us](mailto:jaszczoltm@ccsr.state.fl.us), Office of the Capital Collateral Regional Counsel - South, 110 SE 6th St. Suite 701, Fort Lauderdale, FL 33301, on this 15th day of June, 2020.

**CERTIFICATE OF COMPLIANCE**

This brief is typed in Times New Roman 14 point.

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