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IN THE SUPREME COURT OF FLORIDA

TAVARES J. WRIGHT,

Appellant,

v.

CASE NO. SC13-1213
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_________________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

SECOND SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

After Appellant was convicted by a jury of all seven counts in the indictment (carjacking, two counts of kidnapping, two counts of robbery with a firearm, and two counts of first degree premeditated murder),[1] he elected to waive the jury recommendation of a sentence. The trial court thereafter conducted a penalty phase/Spencer hearing and sentenced Appellant to death. The court gave "great weight" to three aggravating factors: (1) the murders were committed in a cold, calculated, and premeditated manner, (2) the murders were committed to avoid arrest, and (3) Appellant had previously been convicted of another capital felony and numerous other violent felonies.[2] (DAR V6:963-83, V15:2558-61). As to mitigation, the court found and gave "some weight" to the statutory mitigators that the capital felony was committed while Wright was under the influence of extreme mental or emotional disturbance; that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; and Wright's age was nineteen at the time of the crimes. The trial court also considered and weighed numerous non-statutory mitigating circumstances. (DAR V6:972-79).

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[1] This Court recited the relevant factual background in its opinion on direct appeal. See Wright v. State, 19 So. 3d 277 (Fla. 2009).

[2] The court found a fourth aggravating factor, pecuniary gain, but gave it no independent weight. (DAR V6:966).

Appellant's case is currently pending before this Court following the lower court's orders denying his motion for postconviction relief and renewed motion to bar the imposition of the death penalty based on his alleged intellectual disability. Following the United States Supreme Court's recent opinion in Hurst v. Florida, ___ U.S. ____, 136 S. Ct. 616 (2016), this Court issued an order requiring supplemental briefing.

SUMMARY OF THE ARGUMENT

Hurst is not retroactive and has no application to this postconviction case; especially given Wright's waiver of a jury recommendation. In addition, Wright was eligible for a death sentence given his prior convictions and the jury's guilt phase findings that Wright had committed the contemporaneous offenses of murder, kidnapping, and robbery with a firearm. Finally, even if applicable, any Hurst error would be harmless under the facts of this case.

ARGUMENT

HURST HAS NO APPLICATION TO THIS CASE BECAUSE WRIGHT WAIVED THE JURY PENALTY PHASE. ADDITIONALLY WRIGHT'S CASE WAS FINAL ON DIRECT REVIEW WHEN HURST WAS DECIDED AND THERE IS NO ERROR WHERE WRIGHT HAS PRIOR CONVICTIONS AND THE JURY NECESSARILY FOUND THAT WRIGHT WAS ELIGIBLE FOR THE DEATH PENALTY BY ITS GUILT PHASE FINDINGS.

In this supplemental brief, Appellant asserts that Hurst v. Florida, 136 S. Ct.

616 (2016), entitles him to a life sentence or a resentencing. Neither contention has any merit.

A. Hurst is inapplicable as Wright waived his right to a jury recommendation.

Following the jury's guilty verdicts, defense counsel informed the court that, after much discussion with their client, Wright strategically wished to waive the jury's recommendation because he preferred that the court sentence him. (DAR V33:5046-53). After a lengthy colloquy with Wright, the court found that Wright freely, voluntarily, and knowingly waived the jury penalty phase. (DAR V33:5082-99). During this colloquy, both Wright's attorneys and his investigator acknowledged that Wright is "articulate, bright, [and] aware of what's going on in his reasoning;" a conclusion which contradicts Wright's claim of intellectual disability. (DAR V33:5092-94). This Court subsequently confirmed Wright's knowing, intelligent and voluntary waiver when rejecting Wright's claim that the trial court erred in denying his motion to declare Florida's capital sentencing scheme unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). See Wright, 19 So. 3d at 297-98 (noting that Wright made a strategic decision and "chose the trial court to be the finder of fact because it was his view that the trial court would be more likely to dispassionately consider the aggravating and mitigating circumstances in light of any emotional impact the collateral-crime evidence may

have had on the guilt-phase jury").

Obviously, given Wright's knowing and intelligent waiver of the jury penalty phase, he cannot now legitimately claim that his Sixth Amendment rights were violated pursuant to Hurst. See Wright, 19 So. 3d at 298 ("Wright's strategic decision to present the penalty phase of the case to the trial court instead of a jury constitutes a knowing, intelligent, and voluntary waiver and a conscious abandonment of any Ring-based challenges to the constitutionality of Florida's capital-sentencing scheme."); see also Missouri v. Nunley, 341 S.W.3d 611, 620-21 (Mo. 2011) (defendant's Sixth Amendment right to have a jury find an aggravating circumstance not violated when he waived jury sentencing) (and cases cited therein), cert. denied, 132 S. Ct. 1096 (2012).

B. Hurst does not entitle Wright to a life sentence.

Wright posits an interesting, but plainly meritless argument that Hurst entitles him to a life sentence. However, Hurst did not determine capital punishment to be unconstitutional; Hurst only invalidated Florida's procedures for implementation, finding that they could result in a Sixth Amendment violation if the judge makes factual findings which are not supported by a jury verdict. Therefore, Section 775.082(2), Fla. Stat. does not apply, by its own terms. That section provides that life sentences without parole are mandated "[i]n the event the

death penalty in a capital felony is held to be unconstitutional," and was enacted following Furman v. Georgia, 408 U.S. 238 (1972), in order to fully protect society in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional. This provision for example applied in Coker v. Georgia, 433 U.S. 584 (1977), where the United States Supreme Court held that capital punishment was not available for the capital felony of raping an adult woman.

Although Wright suggests that this Court used similar language to require the commutation of all death sentences to life following Furman in Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972), Wright is misreading and oversimplifying the Donaldson decision. Donaldson is not a case of statutory construction, but one of jurisdiction. Based on our state constitution in 1972, which vested jurisdiction of capital cases in circuit courts rather than the criminal courts of record, Donaldson held that circuit courts no longer maintained jurisdiction over capital cases since there was no longer a valid capital sentencing statute to apply. Donaldson observed the new statute (§ 775.082(2)) was conditioned on the invalidation of the death penalty, but clarifies, "[t]his provision is not before us for review and we touch on it only because of its materiality in considering the entire matter." Id. at 505.

The focus and primary impact of the Donaldson decision was on those cases which were pending for prosecution at the time Furman was released. Donaldson

does not purport to resolve issues with regard to pipeline cases pending before the Court on appeal, or to cases that were already final at the time Furman was decided. This Court's determination to remand all pending death penalty cases for imposition of life sentences in light of Furman is discussed in Anderson v. State, 267 So. 2d 8 (Fla. 1972), a case which explains that, following Furman, the Attorney General filed a motion requesting that this Court relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position that the death sentences that were imposed were illegal sentences. There is no legal reasoning or analysis to explain why commutation of 40 sentences was required, but it is interesting to observe that this was before the time that either this Court or the United States Supreme Court had determined the current rules for retroactivity, such as Teague v. Lane, 489 U.S. 288 (1989), and Witt v. State, 387 So. 2d 922 (1980), were both decided later.

At any rate, there are several cogent reasons for this Court to reject the blanket approach of commuting all capital sentences currently pending before this Court such as followed the Furman decision. Furman was a decision that invalidated all death penalty statutes in the country, with the United States Supreme Court offering nine separate opinions that left many courts "not yet certain what rule of law, if any, was announced." Donaldson, 265 So. 2d at 506

(Roberts, C.J., concurring specially). The Furman Court held that the death penalty, as imposed for murder and for rape, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The various separate opinions provided little guidance on what procedures might be necessary in order to satisfy the constitutional issues, and whether a constitutional scheme would be possible. The situation following Furman simply has no application to the limited procedural ruling issued by the Supreme Court in Hurst.

C. Hurst is not retroactive and therefore remand to the trial court to consider a motion based upon Hurst would be futile.

Wright's case was final on December 23, 2009, ninety days following this Court's issuance of its mandate affirming Wright's judgment and sentence. Consequently, Hurst can have no application to this case until and unless either this Court or the Supreme Court determines that it should apply retroactively.[3] Hurst is not retroactive. Consequently, Wright, who was tried, convicted, and sentenced in accordance with Florida law and federal law at the time of his trial, is not entitled to any relief.

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[3] Any successive motion could only be considered timely by the postconviction court if Wright met the requirements of Rule 3.851(d) which provides an exception for claims that are based on newly discovered evidence or a newly recognized constitutional right that has been held to apply retroactively. Fla. R. Crim. P. 3.851(d)(2)(A) & (B).

In Hurst, the Court held that Florida's capital sentencing structure violated Ring v. Arizona, 536 U.S. 584 (2002), because it required a judge to conduct the fact-finding necessary to enhance a defendant's sentence. Hurst, 136 S. Ct. at 621-22. In arriving at its decision, the Court looked directly to Florida's sentencing statute, finding that it does not "make a defendant eligible for death until 'findings *by the court* that such a person shall be punished by death.'" Id. at 622 (citing Fla. Stat. § 775.082(1)) (emphasis in opinion). 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 the prior decisions of Spaziano v. Florida, and Hildwin v. Florida, 490 U.S. 638 (1989). Hurst, 136 S. Ct. at 622-24.

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.[4] Schriro v. Summerlin, 542 U.S. 348, 351 (2004).

Wright appears to argue that Hurst created a new substantive rule, not a new procedural rule, or, that it created some new fundamental or structural error that is not subject to a harmless error analysis. Neither contention has any merit.

In Summerlin, the Supreme Court directly addressed whether its decision in Ring 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 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

[4] Those exceptions are: (1) a substantive rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or if it prohibits a certain category of punishment for a class of defendants because of their status or offense"; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. Teague v. Lane, 498 U.S. 288, 310–13 (1989); Penry v. Lynaugh, 492 U.S. 302 (1989) (abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002)); Butler v. McKellar, 494 U.S. 407 (1990); Saffle v. Parks, 494 U.S. 484 (1990).

indefinitely in hopes that we will one day have a change of heart. Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review." Summerlin, 542 U.S. at 358; see also Whorton v. Bockting, 549 U.S. 406, 416 (2007) (holding Crawford v. Washington, 541 U.S. 36 (2004) was not retroactive and relying extensively on the analysis of Summerlin).

Ring did not create a new constitutional right. That right was created by the Sixth Amendment guaranteeing the right to a jury trial.[5] If Ring was not retroactive, then Hurst cannot be retroactive as Hurst is merely an application of Ring to Florida. In fact, the decision in Hurst is based on an entire line of jurisprudence which courts have almost universally held to not have retroactive application. See DeStefano v. Woods, 392 U.S. 631 (1968) (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)

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[5] The right to a jury trial was extended to the States in Duncan v. Louisiana, 391 U.S. 145 (1968). But, in DeStefano v. Woods, 392 U.S. 631 (1968), the Court declined to apply the holding of Duncan retroactively. Apprendi v. New Jersey, 530 U.S. 466 (2000), merely extended the right to a jury trial to the sentencing phase, when the State sought to increase the maximum possible punishment. Apprendi, 530 U.S. at 494.

(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) (holding that Alleyne v. United States, 133 S. Ct. 2151, 2156 (2013), which extended Apprendi from maximum to minimum sentences, did not, like Apprendi or Ring, apply retroactively); State v. Johnson, 122 So. 3d 856, 865-66 (Fla. 2013) (holding Blakely not retroactive in Florida).

Significantly, this Court has already decided that Ring does not apply retroactively in Florida. In Johnson v. State, 904 So. 2d 400, 412 (Fla. 2005), this Court comprehensively applied the Witt factors to determine that Ring was not subject to retroactive application. This Court concluded:

> We conclude that the three Witt factors, separately and together, weigh against the retroactive application of Ring in Florida. To apply Ring retroactively "would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state ... beyond any tolerable limit." Witt, 387 So. 2d at 929-30. Our analysis reveals that Ring, although an important development in criminal procedure, is not a "jurisprudential upheaval" of "sufficient magnitude to necessitate retroactive application." Id. at 929. We therefore hold that Ring does not apply retroactively in Florida and affirm the denial of Johnson's request for collateral relief under Ring.

This Court specifically noted the severe and unsettling impact that retroactive application would have on our justice system [with nearly 400 death sentenced

prisoners]. Johnson, 904 So. 2d at 411-12.[6] Appellant's invitation for this Court to revisit this Court's Johnson decision is unpersuasive. He asserts that the decision need not be disruptive as this Court can simply reduce the nearly 400 death sentences to life in prison. However, there is no support for this novel proposition. Neither the federal nor Florida constitutions justify or authorize this Court to take such action. And, such a decision ignores the considerable interests of the citizens of this State and, in particular, victims' family members upon whom the emotional toll of such an action cannot be measured.

State and federal courts have uniformly held that Ring is not retroactive.[7]

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[6] This Court's decision in State v. Johnson, 122 So. 3d at 865-66, similarly holding that one of Apprendi's many permutations was not retroactive, is also instructive. In finding Blakely was not retroactive, this Court stated, in part:

> Retroactive application of the rule announced in Blakely would require review of the records of numerous cases, first to determine whether Blakely error occurred, then whether such error was preserved, and finally, whether the error was harmless. In those cases where a claim for postconviction relief survives such review, juries would likely have to be empaneled to hear evidence and determine sentence enhancements. All told, this would be a time-consuming undertaking that would significantly strain our scarce court resources. Even if the retroactive application extended only to cases finalized in the interval between the issuance of Apprendi and Blakely, the disruption would be significant. Accordingly, this factor also weighs against applying Blakely retroactively.

[7] In a decision issued before the Supreme Court issued its opinion on retroactivity in Summerlin, the Missouri Supreme Court applied Ring retroactively to those few cases where the jury had deadlocked on a verdict and therefore the judge made all the requisite findings and sentenced the defendant to death. In doing so, the court

See State v. Towery, 204 Ariz. 386, 393-94, 64 P.3d 828, 835-36 (2003) ("Conducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice" and would be inconstant with the court's duty to protect victim's rights under the Arizona Constitution); Rhoades v. State, 149 Idaho 130, 139-40, 233 P.3d 61, 70-71 (2010) (holding that Ring is not retroactive after conducting its own independent Teague analysis and observing, as the Supreme Court did in Summerlin, that there is debate as to whether juries or judges are the better fact-finders and that it could not say "confidently" that judicial factfinding "seriously diminishes accuracy."); Colwell v. State, 118 Nev. 807, 821-22, 59 P.3d 463, 473 (2002) (applying Teague to find that Ring announced a new procedural rule that would not be subject to retroactive application).[8]

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noted that it would have minimal impact in Missouri as the court had identified only **five** such cases. State v. Whitfield, 107 S.W.3d 253, 268-69 (Mo. 2003). C.f. State ex rel. Taylor v. Steele, 341 S.W.3d 634, 652 (Mo. 2011) (noting that subsequently the Supreme Court and federal courts held Ring not retroactive "[a]nd in light of Whitfield's limited retroactively holding, this Court is not compelled to go further than the United States Supreme Court to provide Sixth Amendment jury sentencing to Taylor.").

[8] In Colwell, 59 P.3d 463, 473 the Nevada Supreme Court explained:

> [W]e believe it is clear that Ring is based simply on the Sixth Amendment right to a jury trial, not on a perceived need to enhance accuracy in capital sentencings, and does not throw into doubt the accuracy of death sentences handed down by three-judge panels in this state. We conclude therefore that the likelihood of an accurate sentence was not seriously diminished simply because a three-judge

Appellant can offer no compelling justification for revisiting this Court's decision in Johnson. Assuming, any new Witt analysis would be appropriate, all of the same factors apply with equal force to hold that Hurst is not retroactive. Such an application would be greatly deleterious to finality and unsettle the reasonable expectations for justice by Florida's citizens and, in particular, countless numbers of victims' family members.[9]

There can be no credible argument that Florida failed to apply Ring in bad faith. The State certainly relied in good faith upon prior decisions of this Court and prior decisions of the Supreme Court which had upheld Florida's capital sentencing statute. See Rigterink v. State, 66 So. 3d 866, 895-96 (Fla. 2011) (noting that "[i]n over fifty cases since Ring's release, this Court has rejected

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> panel, rather than a jury, found the aggravating circumstances that supported Colwell's death sentence. We conclude that retroactive application of Ring on collateral review is not warranted.

[9] As noted by the Supreme Court Calderon v. Thompson, 523 U.S. 538, 556 (1998) the concept of finality is of vital importance to our system of justice. The Court stated, in part:

> Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. See generally Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," Herrera v. Collins, 506 U.S. 390, 421, 113 S. Ct. 853, 871, 122 L. Ed. 2d 203 (1993) (O'Connor, J., concurring), an interest shared by the State and the victims of crime alike.

similar Ring claims.”). Indeed, since Ring was decided, more than a decade passed without the Supreme Court accepting a case challenging Florida’s capital sentencing statute in light of Ring, until Hurst. While the Supreme Court ultimately extended Ring to invalidate Florida’s capital sentencing procedure, there were significant differences between the Arizona and Florida statutes that rendered such an extension far less than certain or inevitable. See Hurst, 136 S. Ct. at 624-26 (Alito, Justice, dissenting) (observing that unlike Arizona, “[u]nder the Florida system, the jury plays a critically important role and that the Court’s “decision in Ring did not decide whether this procedure violate[d] the Sixth Amendment . . .”). In Butterworth v. United States, 775 F.3d 459, 467-68 (1st Cir.), cert. denied, 135 S. Ct. 1517 (2015) (footnote omitted), the First Circuit Court of Appeals rejected a defendant’s attempt to justify retroactive application of Alleyne [holding that facts justifying minimum mandatory sentence must be found by a jury] based upon Apprendi hindsight:

> This twist on Butterworth’s argument is unpersuasive. We are unaware of any instance in which the Supreme Court (or any federal court) decided that a particular procedural protection is not retroactively applicable under the watershed exception, and then changed its mind years later due to the law’s intervening evolution. It is not difficult to imagine why that is so: Judicial interpretation of the Constitution, by its nature, builds on itself. The exercise of seeking out the first domino to fall, in hindsight, would make the retroactivity determination of any given new rule interminable. So the fact that Apprendi was cited by subsequent cases extending the jury trial guarantee and heightened burden of proof to mandatory state

> sentencing guidelines, Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), federal sentencing guidelines, Booker, 543 U.S. at 244–45, 125 S. Ct. 738, and the death penalty, Ring v. Arizona, 536 U.S. 584, 589, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), does not a watershed moment make of Apprendi itself. Put differently, when a non-retroactive new constitutional rule is later cited in cases that create more new rules, that first new rule does not then automatically qualify as retroactive under Teague.
>
> We note, too, that the most relevant guidance the Supreme Court has provided on retroactivity points squarely against the conclusion Butterworth wants us to reach. In Schriro v. Summerlin, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004), the Court declined to make retroactive a new rule prohibiting judges from determining the presence or absence of factors implicating the death penalty, finding "it implausible that judicial factfinding so seriously diminishe[s] accuracy as to produce an impermissibly large risk of injustice." Id. at 355-56, 124 S. Ct. 2519. (alteration in original) (internal quotation marks omitted). Schriro only cuts Alleyne's potential retroactivity approximately in half, since it did not implicate the burden of proof. But Schriro takes us in the opposite direction of a retreat from Sepulveda which, just like the question facing us here, implicated both the beyond a reasonable doubt and jury trial protections.

There is no reason for this Court to depart from its prior determination that Ring does not apply retroactively to cases that are final on direct appeal.[10] Such a decision would represent a clear break from this Court's precedent which has not found decisions from the United States Supreme Court providing new developments in constitutional law retroactive. See e.g., Chandler v. Crosby, 916

[10] See also Washington v. State, 907 So. 2d 512, 516 (Fla. 2005) (Lewis, Justice, concurring) ("The interpretations of the concepts discussed in Apprendi and Ring by the United States Supreme Court drive my consideration that Ring cannot be classified as being of fundamental significance or of significant magnitude to cause retroactive application.").

So. 2d 728, 731 (Fla. 2005) (holding that all three factors in the "Witt analysis weigh against the retroactive application of Crawford[]" and noting that the "new rule does not present a more compelling objective that outweighs the importance of finality") (citing State v. Glenn, 558 So. 2d 4, 7 (Fla. 1990)); Hughes v. State, 901 So. 2d 837, 838 (Fla. 2005) (holding Apprendi is not retroactive); State v. Statewright, 300 So. 2d 674 (Fla. 1974) (declining to retroactively apply Miranda v. Arizona, 384 U.S. 436 (1966)).

This Court's decision in Falcon v. State, 162 So. 3d 954, 961 (Fla. 2015), provides no support for retroactive application in this case. In Falcon, this Court held that the Supreme Court in Miller v. Alabama, 132 S. Ct. 2455 (2012), announced a new substantive rule to bar mandatory life sentences without the possibility of parole for all juveniles. This Court had little difficulty determining that such a decision effectively places beyond the power of the State the power to punish certain offenders. Subsequently, the Supreme Court decided that Miller announced a new substantive rule that was retroactive. The fact the ruling was described as substantive, not procedural, was critical to the retroactivity analysis. The Court explained:

> Substantive rules, then, set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful. Procedural

> rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating "the manner of determining the defendant's culpability." Schriro, 542 U.S., at 353; Teague, supra, at 313. Those rules "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." Schriro, supra, at 352. Even where procedural error has infected a trial, the resulting conviction or sentence may still be accurate; and, by extension, the defendant's continued confinement may still be lawful. For this reason, a trial conducted under a procedure found to be unconstitutional in a later case does not, as a general matter, have the automatic consequence of invalidating a defendant's conviction or sentence.
>
> The same possibility of a valid result does not exist where a substantive rule has eliminated a State's power to proscribe the defendant's conduct or impose a given punishment. "[E]ven the use of impeccable factfinding procedures could not legitimate a verdict" where "the conduct being penalized is constitutionally immune from punishment." United States v. United States Coin & Currency, 401 U.S. 715, 724, 91 S. Ct. 1041, 28 L. Ed. 2d 434 (1971). Nor could the use of flawless sentencing procedures legitimate a punishment where the Constitution immunizes the defendant from the sentence imposed. "No circumstances call more for the invocation of a rule of complete retroactivity." Ibid.

Montgomery v. Louisiana, 136 S. Ct. 718, 729-30 (2016). Since both this Court and the Supreme Court has held that Ring announced a new procedural rule, not a substantive rule, Falcon has no application to this case.

In conclusion, since both the Supreme Court and this Court have held that Ring does not apply retroactively, Hurst should not be applied retroactively in Florida. See Jeanty v. Warden, FCI-Miami, 757 F.3d 1283, 1285 (11th Cir. 2014) (observing "if Apprendi's rule is not retroactive on collateral review, then neither

is a decision applying its rule") (citing In re Anderson, 396 F.3d 1336, 1340 (11th Cir. 2005)). Appellant is not entitled to relief.

D. The qualifying contemporaneous felonies of murder, kidnapping and robbery preclude finding reversible error in this case.

Appellant takes the position that any Hurst type error is structural and not subject to harmless error review. That position is quite curious given the fact the Supreme Court remanded Hurst so that this Court could assess harmlessness. The Hurst Court stated:

> Finally, we do not reach the State's assertion that any error was harmless. See Neder v. United States, 527 U.S. 1, 18-19 (1999) (holding that the failure to submit an uncontested element of an offense to a jury may be harmless). This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here. See Ring, 536 U.S. at 609 n.7."

Hurst, 136 S. Ct. at 624. It seems clear that any error, contrary to Appellant's position, is subject to harmless error review. The determination that deficient factfinding under the Sixth Amendment can be harmless is cemented by Washington v. Recuenco, 548 U.S. 212 (2006), where the United States Supreme Court reversed a Washington state court holding that error under Blakely v. Washington, 542 U.S. 296 (2004), was structural in nature and could never be harmless. Blakely is an Apprendi/Ring decision which requires jury factfinding where a sentence is to be enhanced due to the defendant's use of a firearm.

Putting aside the notion of harmlessness, in this case the jury convicted Wright of a contemporaneous murder, and two counts of kidnapping and armed robbery. Hurst was in a distinctly different position from Wright. Hurst was convicted of first-degree murder, and did not have a prior criminal history or a contemporaneous felony conviction with the murder. Hurst v. State, 147 So. 3d 435, 440-41 (Fla. 2014). Accordingly, Hurst presented the United States Supreme Court with a 'pure' claim under Ring, where the jury neither gave a unanimous recommendation nor were any of the established aggravating circumstances identifiable as having come from a jury verdict. Hurst, 147 So. 3d at 445–47.

Hurst does not hold there is a constitutional right to any jury sentencing. In Florida, a defendant is eligible for a capital sentence if at least one aggravating factor applied to the case, and Hurst has not altered the validity of these holdings. See Ault v. State, 53 So. 3d 175, 205 (Fla. 2010); Zommer v. State, 31 So. 3d 733, 752-54 (Fla. 2010); State v. Steele, 921 So. 2d 538, 540 (Fla. 2005). In Wright's case, a unanimous jury convicted him of a contemporaneous murder, two counts of kidnapping and armed robbery, and based on these convictions, he was indisputably eligible for his death sentence. Thus, his eligibility for a death sentence is supported by unanimous jury findings unlike Hurst.

This Court has consistently rejected Ring claims where the defendant is

convicted of a qualifying contemporaneous felony. As explained in Ellerbee v. State, 87 So. 3d 730, 747 (Fla. 2012):

> Here, the jury found Ellerbee "Guilty of First Degree Murder as charged in the indictment," and guilty of the contemporaneous burglary, "as charged in the indictment," and that "[i]n the course of the burglary," Ellerbee committed a battery while armed with a firearm. These findings, made by the jury, meet the requirements of the aggravators in section 921.141(5)(d) & (f).

In Ex parte Waldrop, 859 So. 2d 1181, 1188 (Ala. 2002), the Alabama Supreme Court employed a similar analysis to find the guilt phase finding of a murder in the course of a specified felony sufficient to satisfy Ring. The court stated:

> Because the jury convicted Waldrop of two counts of murder during a robbery in the first degree, a violation of Ala. Code 1975, § 13A-5-40(a)(2), the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala. Code 1975, § 13A-5-49(4), was "proven beyond a reasonable doubt." Ala. Code 1975, § 13A-5-45(e); Ala. Code 1975, § 13A-5-50. Only one aggravating circumstance must exist in order to impose a sentence of death. Ala. Code 1975, § 13A-5-45(f). Thus, in Waldrop's case, the jury, and not the trial judge, determined the existence of the "aggravating circumstance necessary for imposition of the death penalty." Ring, 536 U.S. at 609, 122 S. Ct. at 2443. Therefore, the findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty. This is all Ring and Apprendi require.

See also Zebroski v. State, 822 A.2d 1038, 1051 (Del. 2003)[11] (finding Ring

[11] Negative treatment on other grounds, Neal v. State, 80 A.3d 935, 951 (Del. 2013).

satisfied because the jury convicted the defendant of an enumerated felony murder under Delaware's statute and concluding that "once a jury finds unanimously and beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance, the defendant becomes death eligible and Ring's constitutional requirement of jury fact-finding is satisfied") (citing Brice v. State, 815 A.2d 314, 318 (Del. 2003)).

Wright was unquestionably eligible for the death penalty based upon the jury's factual findings.[12] The trial judge was able to utilize this aggravator, necessarily found by the jury, in sentencing Wright. Furthermore, Wright had six *other* prior violent felony convictions which the court considered when finding this aggravator. Since Wright did not challenge application of this aggravator on appeal, the issue is foreclosed in this case.

The Supreme Court itself has recognized the critical distinction of an enhanced sentence supported by a prior conviction. See Almendarez-Torres v. United States, 523 U.S. 224 (1998) (permitting judge to impose higher sentence

[12] Any argument that a jury had to find each and every aggravator is without merit. Once the jury found one aggravator, Wright became eligible for the higher range penalty---death. In Alleyne, 133 S. Ct. at 2162-63, the Court explained that "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime." As noted, in Florida, only one aggravating factor is necessary to support the higher range penalty--death. Finding additional aggravators does not expose the defendant to any higher or additional penalty.

based on prior conviction); Ring, 536 U.S. at 598 n.4 (noting Ring does not challenge Almendarez-Torres, "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"); Alleyne, 133 S. Ct. at 2160 n.1 (affirming Almendarez-Torres provides valid exception for prior convictions). Consequently, this Court's well established precedent that any Ring claim is harmless in the face of contemporaneous qualifying felony convictions [murder, kidnapping and armed robbery] was not disturbed by Hurst.

Although this Court need not address the additional aggravating circumstances found in this case [Wright is eligible for a capital sentence with one], there is no conceivable argument that a rational factfinder would not have found the existence of the CCP and avoid arrest aggravators applicable in this case.[13] The facts of this case clearly reveal that Wright committed the murders of David Green and James Felker in a cold, calculated, and premeditated manner. See Wright, 19 So. 3d at 298-302 (discussing the CCP and avoiding arrest aggravators). As such, this too, would be grounds to find any Ring error harmless in this case. See Ellerbe, 87 So. 3d at 747 ("It is perhaps also worthy of noting that here, there was simply no issue of fact as to whether Ellerbee was on felony probation at the time of the murder. This fact was conceded and furthermore

[13] As this Court noted, Wright conceded the State had established beyond a reasonable doubt the existence of the avoid arrest aggravator. Wright, 19 So. 3d at 301-02.

proven by uncontroverted competent, substantial evidence sufficient to prevent a rational fact finder from reaching a contrary finding - making the aggravator in section 921.141(5)(a) applicable as a matter of law.").

For all of the foregoing reasons, this Court should affirm the denial of post-conviction relief entered below.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's denial of Appellant's motion for postconviction relief and his renewed motion for determination of intellectual disability.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of February, 2016, I electronically filed the foregoing with the Clerk of the Court by using the E-Portal Filing System which will send a notice of electronic filing to the following: **Maria Christine Perinetti**, Assistant CCRC-M, Office of the Capital Collateral Regional Counsel, Middle Region, 12973 N. Telecom Parkway, Temple Terrace, Florida 33637-0907, **perinetti@ccmr.state.fl.us**.

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 Fla. R. App. P. 9.210(a)(2).

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