IN THE SUPREME COURT OF FLORIDA

TIFFANY ANN COLE

Appellant,

v. CASE NO. SC13-2245

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

SUPPLEMENTAL BRIEF OF THE APPELLEE ON *HURST V. FLORIDA* ISSUE

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PRELIMINARY STATEMENT

References to the appellant will be to "Cole" or "Appellant". References to the appellee will be to the "State" or "Appellee".

The State relies on its previously filed Answer Brief for all argument made with regard to other claims raised. Further, the State relies on the Statement of the Case and Facts in its Answer Brief for a more comprehensive presentation of the case and facts.

STATEMENT OF THE CASE AND FACTS

Tiffany Ann Cole and three other co-defendants were prosecuted for the first-degree murders of James and Carol Sumner, a retired elderly couple living in Jacksonville, Florida. Cole and her codefendants entered the Sumners' home, bound them and then kidnapped them by stuffing James and Carol Sumner into the trunk of their Lincoln Town Car. They were driven to an isolated, wooded area in southern Georgia and buried alive in a grave, dug days before the planned murders. Thereafter, the defendants, including Cole, withdrew and spent a significant sum of money drawn from the Sumners' bank account, using the victims' ATM card, with the numbers acquired at the grave site from the tortured victims before they were buried alive.

At Cole's trial, the evidence showed that codefendant Jackson and Tiffany Cole planned and participated, with Alan Wade and Bruce Nixon, in robbing, kidnapping and murdering Carol and James Sumner. The jury found Cole guilty of two counts of first-degree murder, two counts of robbery and two counts of kidnapping. Following the penalty phase of the trial, the jury recommended imposition of the death penalty by a vote of 9-3 for each murder.

In sentencing Cole to death for these murders, the trial court found seven (7) aggravators to exist beyond a reasonable doubt. Specifically, the trial court found, as applicable to both murders: (1) Cole was previously convicted of another capital felony, based on the contemporaneous first-degree murders of the victims; (2) the murders were committed in the course of kidnappings; (3) the capital felonies were especially heinous, atrocious, or cruel (HAC);[1] (4) the capital felonies were committed in a cold, calculated, and premeditated manner

[1] The Court struck the HAC aggravator because "The only evidence indicating the manner of death contemplated by Cole and her codefendants was Nixon's testimony that Jackson stated that Jackson would kill the victims at the grave site by lethal injection. The evidence shows that Cole was never near the victims during the crimes and that she was not at the grave site when her codefendants buried the victims alive. We conclude that the trial court erred in instructing the jury on and in finding HAC because there is no competent, substantial evidence to support a finding that Cole either directed her codefendants to bury the victims alive or knew that her codefendants would kill the victims by burying them alive." *Cole*, 36 So.3d at 609.

(CCP); (5) the capital felonies were committed for financial gain; (6) the capital felonies were committed to avoid or prevent a lawful arrest, and (7) the victims were particularly vulnerable due to advanced age or disability.

> In mitigation, the trial court found and weighed four (4) statutory mitigators - and a number of non-statutory mitigators. The trial court assigned "some weight" to both the "no significant history of prior criminal activity" mitigating factor and the age at the time of the crime mitigating factor (Cole was twenty-three years old). With respect to the minor participant mitigating factor, the trial court's order states, "While this defendant might not have turned the spade onto the Sumners, this Court cannot say that her participation was relatively minor. Accordingly, this matter is afforded little weight." With respect to the "substantial domination" mitigating factor, after noting that there was "some evidence of this mitigator in the record"-i.e., the defendant's own testimony-the trial court concluded that "given the totality of the circumstances, the Court cannot afford this matter much weight." The trial court stated that "the evidence tends to indicate that [Cole] knew exactly what she was doing and participated without hesitation."
>
> The trial court grouped the numerous nonstatutory mitigating factors into six categories. The six categories include: (1) Cole had minimal involvement in the criminal activity (some weight); (2) Cole had psychological circumstances that included lack of self-confidence, low self-esteem, and feelings of inadequacy (little weight); (3) Cole had been a model prisoner (some weight); (4) Cole's family history included growing up without a father, being raised by a working mother, caring for her brothers and terminally ill father, being a victim of domestic violence, having the capacity to form loving relationships, and having the love and support of her family (some weight); (5) Cole had substance abuse problems (little weight); and (6) Cole was of good character (some weight).

Cole v. State, 36 So.3d 597, 606 (Fla. 2010).

The trial judge found the aggravators far outweighed the mitigators and sentenced Cole to death for both murders. On appeal, Cole raised two guilt phase claims, *Cole v. State*, 36 So.3d at 603, 606-607 (Fla. 2010), and four penalty phase issues, including a *Ring* issue. In affirming the convictions and sentences, the Court, as to the penalty phase, found, under prevailing case law, that: "Finally, Cole argues that Florida's death penalty scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court has, however, repeatedly rejected claims based on *Ring* where the prior-violent-felony aggravator is present. Cole's case involves this aggravator. See *Jackson*, 18 So.3d at 1025 n. 6 (rejecting Cole's co-defendant Jackson's *Ring* argument because Jackson had a prior violent felony conviction - the contemporaneous murders of Mr. and Mrs. Sumner); *Frances v. State*, 970 So.2d 806, 822-23 (Fla.2007) (rejecting *Ring* argument when the death sentence was supported by prior-violent-felony aggravating factor based on contemporaneous murder convictions), *cert. denied*, 553 U.S. 1039, 128 S.Ct. 2441, 171 L.Ed.2d 241 (2008)." *Cole*, 36 So.3d at 611.

Cole filed her petition for writ of certiorari in the United States Supreme Court asserting that relief should be

granted in light of *Ring*. Certiorari was denied in *Cole v. Florida*, 562 U.S. 940 (2010).

Cole filed a timely motion for post-conviction relief in September 2011, and an amended motion in March 2012. She did not raise a Ring issue. The trial court denied all relief on October 17, 2013, finding that Cole's trial counsels did not render ineffective assistance of counsel on any pre-trial claims, during trial claims or penalty phase claims. That court likewise found no cumulative error.

On appeal from the denial of post-conviction relief, Cole raised no *Ring* issue.

ARGUMENT

Summary of the Argument

Hurst v. Florida, ___ U.S. ___, 136 S.Ct. 616 (2016), is not retroactive and has no application to this post-conviction case. This Court, like others to consider the retroactivity of *Ring v. Arizona*, 536 U.S. 584 (2002), has uniformly found that it is not retroactive. There is no reason in law or logic for this Court to find that *Hurst*, unlike *Ring*, announced a new rule of sufficient magnitude to mandate retroactive application. This is particularly true in light of the United States Supreme Court's clear pronouncements providing that the **only** way a case is held to be retroactive is if the construction of a new rule is affirmatively done so by the Court. *See Tyler v. Cain*, 533

U.S. 656, 663 (2001) ("We thus conclude that a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive.").

There is nothing in *Hurst* that states the United States Supreme Court so held. Indeed, if anything, the Court has rejected all invitations to do so, including the most recent plea by Ronald Bert Smith, an Alabama death row inmate who raised the retroactivity issue under *Hurst*, in his failed attempt to stop his execution December 8, 2016. *Smith v. Alabama*, cert. denied December 8, 2016, Case number ----. Smith, like Cole, argued that Hurst should be applied retroactively to cases which long ago became final. In fact, Cole's direct appeal became final with the denial of certiorari review in *Cole v. Florida*, 562 U.S. 940 (2010).

ISSUE I

***Ring* Issue**

In Cole's supplemental brief regarding *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 41 Fla.L.Weekly S431 (Fla. 2016), she raises four sub-issues as to her assertion that remand is appropriate in light of *Hurst*. Specifically, whether: a) Cole preserved a *Hurst/Ring* claim; b) *Hurst* applies to Cole; c) Cole wins under harmless error, and d) whether there is no automatic aggravating circumstance in Florida.

Each subsection must be rejected because the decisional law is clear that *Hurst* is nothing more than a refinement of *Ring*, and *Apprendi*, and as such, procedural in nature and not retroactive. Moreover, any argument otherwise must also be rejected because this case compels a finding of harmless error regarding any *Hurst* error. See, Justice Alito's dissent in *Hurst,* observing that "In light of this evidence, it defies belief to suggest that the jury would not have found the existence of either aggravating factor if its finding was binding. More than 17 years have passed since Cynthia Harrison was brutally murdered. In the *627 interest of bringing this protracted litigation to a close, I would rule on the issue of harmless error and would affirm the decision of the Florida Supreme Court." *Hurst*, 136 S.Ct. at 626-627 (Justice Alito, dissent.).

a.) Cole preserved a *Hurst/Ring* claim

Cole argues that her *Hurst/Ring* claim was preserved because it was raised on direct appeal. However, Cole did not raise any *Ring* claim in her Rule 3.851 in 2011 or 2012. Nor is a *Ring* claim an issue on appeal before this court in her currently pending appeal. Therefore, Cole is procedurally barred in raising this claim for post-conviction review.

b.) *Hurst* does not apply to Cole

Cole contends that, under *Witt v. State*, 387 So.2d 922 (Fla. 1980) (*Witt*), she is entitled to relief based upon the "notion" that "*Hurst* is more robust than *Ring*," therefore neither the state or federal courts are barred from finding *Hurst* retroactive to her case. Cole is wrong.

First, Cole is not entitled to relief under *Hurst* because her jury made unanimous guilt phase findings convicting her of the 2005 first-degree murders of James and Carol Sumner, guilty of the kidnapping of James and Carol Sumner and guilty of the robbery of James and Carol Sumner. All of which satisfy *Hurst*. Cole entered the penalty phase with contemporaneous murder convictions and multiple qualifying felony convictions, which supported Cole's eligibility for the death penalty and supported the jury's 9-3 death recommendations on both murder counts.

Because *Hurst* **only** invalidated Florida's procedures for implementation of a death sentence, finding that they facially could result in a Sixth Amendment violation if the judge makes factual findings which are not supported by a jury's finding of an aggravating factor, it did not invalidate the entire statute.

Second, and in compliance with *Hurst*, there are jury findings in this case. As part of its guilt phase verdict, the jury unanimously found Cole guilty of the contemporaneous murders, as well as qualifying other felonies. *Cole v. State*,

36 So.3d 597 (Fla. 2010). Contrary to Cole's arguments, her death sentences were based on the jury's fact-findings.

Third, Cole came to the penalty phase with contemporaneous murders and felony convictions; as such, she was, and is, exempted from any *Hurst* infirmity.

Hurst is ultimately the product of *Apprendi*, which provides that any fact, "other than the fact of a prior conviction," that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. The exception for prior convictions in *Apprendi* was based on the recidivist exception established in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The *Almendarez-Torres* exception means that any recidivist aggravators may still be found by the judge alone in the wake of *Hurst*. Unlike Cole's case, Hurst's case **did not involve any recidivist aggravators**. Further, the United States Supreme Court, in *Hurst*, did not overrule *Almendarez-Torres*; thus *Almendarez-Torres* is still good law in the wake of *Apprendi* and **all** its progeny, including *Hurst*. Note: *United States v. Nagy*, 760 F.3d 485, 488 (6th Cir. 2014), *cert. denied*, 135 S.Ct. 1009 (2015) (stating that *Alleyne* leaves "no doubt" that *Almendarez-Torres* is still good law); *United States v. King*, 751 F.3d 1268, 1280 (11th Cir. 2014) ("We have explained that the Supreme Court's holding in *Almendarez-Torres* was left

undisturbed by *Apprendi*, *Blakely*, and *Booker*," citing *United States v. Shelton*, 400 F.3d 1325, 1329 (11th Cir. 2005)), *cert. denied*, 135 S.Ct. 389 (2014).

While this Court has repeatedly rejected *Ring* claims where the prior violent felony aggravator is present, *Hall v. State*, 107 So.3d 262, 280 (Fla. 2012) ("This Court has held that *Ring* does not apply to cases where the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is applicable," citing *Victorino v. State*, 23 So.3d 87, 107-08 (Fla. 2009)); *Evans v. State*, 975 So.2d 1035, 1052-53 (Fla. 2007) (rejecting a *Ring* claim where the prior violent felony aggravator was present, citing *Duest v. State*, 855 So.2d 33, 49 (Fla. 2003)); *Johnson v. State*, 104 So.3d 1010, 1028 (Fla. 2012) (stating that the Florida Supreme Court has repeatedly rejected *Ring* claims where the prior violent felony aggravator has been found); *Hodges v. State*, 55 So.2d 515, 540 (Fla. 2010) ("This Court has repeatedly held that *Ring* does not apply to cases where the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is applicable."), **this Court totally ignored the controlling precedent in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), by rejecting, in *Franklin v. State*, ___ So.3d ___, 2016 WL 6901498 (Fla. Nov. 23, 2016),** "the State's contention that Franklin's prior convictions for other violent felonies

insulates Franklin's death sentence from *Ring* and *Hurst v. Florida*. *See id* at S438."

The United States Supreme Court has denied certiorari review in at least three Florida pipeline cases after *Hurst*, all of which involved recidivist aggravators (*Smith v. Florida*, 170 So.3d 745 (Fla. 2015), *cert. denied*, (U.S. Jan. 25, 2016) (No. 15-6430) (prior violent felony aggravator); *Fletcher v. Florida*, 168 So.3d 186 (Fla. 2015), *cert. denied*, (U.S. Jan. 25, 2016) (No. 15-6075) (under-the-sentence-of-imprisonment aggravator); and *Hobart v. State*, 175 So.3d 191 (Fla. 2015), *cert. denied*, (U.S. Mar. 21, 2016) (No. 15-7476) (prior violent felony and during-the-commission-of-a-robbery aggravators), supporting the State's position that such prior or, in this case, contemporaneous qualifying felony convictions, necessarily removes a capital defendant from the proscriptions of *Ring*.

Fourth, *Hurst* is not retroactive to cases already final on direct review. *Schriro v. Summerlin*, 542 U.S. 348 (2004). Cole's case became final on October 4, 2010, when the United States Supreme Court denied certiorari review on the heels of the *Ring* decision. *Cole v. Florida*, 562 U.S. 940 (2010). *Summerlin* is controlling because the *Hurst* decision resulted in a new rule of procedure, which altered only who decides whether any aggravators exist, thus altering only the fact-finding procedure

(not a new substantive rule, neither *Apprendi* nor *Ring,* have been held to be retroactive by the United States Supreme Court).

> *Ring's* holding is properly classified as procedural. *Ring* held that 'a sentencing judge, sitting without a jury, [may not] find an aggravating circumstance necessary for imposition of the death penalty.' This holding did not alter the range of conduct Arizona law subjected to the death penalty. It could not have; it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize. Instead, *Ring* 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. Rules that allocate decision-making authority in this fashion are prototypical procedural rules, a conclusion we have reached in numerous other contexts.

Summerlin, 542 U.S. at 353 (internal citations omitted). *See Turner v. Crosby*, 339 F.3d 1247, 1283 (11th Cir. 2003) (concluding that retroactivity analysis of *Apprendi* applies equally to *Ring*, and that under the *Teague* doctrine, *Ring* does not apply retroactively to Turner's death sentence); *see also Welch v. United States*, 136 S.Ct. 1257 (2016) (holding that new constitutional rules of criminal procedure generally do not apply retroactively to cases on collateral review). *Ring* was an extension of *Apprendi*. Because *Apprendi* was a procedural rule, it axiomatically follows that *Ring*, and now *Hurst*, is also a procedural rule. *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (holding *Crawford v. Washington*, 541 U.S. 36 (2004), was

not retroactive under *Teague* 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. 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) (*per curiam*) (holding the Court's decision in *Duncan v. Louisiana*, which guaranteed the right to a jury trial to the States, was not retroactive); *McCoy v. United States*, 266 F.3d 1245, 1255, 1259 (11th Cir. 2001) (holding *Apprendi* not retroactive under *Teague*, and acknowledging that every federal circuit to consider the issue reached the same conclusion); *Varela v. United States*, 400 F.3d 864, 866-67 (11th Cir. 2005) (explaining that Supreme Court decisions, such as *Ring*, *Blakely*, and *Booker*, applying *Apprendi's* "prototypical procedural rule" in various contexts are not retroactive); *Crayton v. United States*, 799 F.3d 623, 624-25 (7th Cir. 2015), *cert. denied*, 136 S.Ct. 424 (2015) (holding that *Alleyne v. United States*, 570 U.S. ___, ___, 133 S.Ct. 2151, 2156 (2013), which extended *Apprendi* from maximum to minimum sentences, did not, like *Apprendi* or *Ring*, apply retroactively); *State v.*

Johnson, 122 So.3d 856, 865-66 (Fla. 2013) (holding *Blakely* not retroactive 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. The Court concluded: "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.'", *quoting Witt v. State*, 387 So.2d 922, 929-30 (Fla. 1980).

Hurst, does not meet Florida's *Witt* three prong analysis. While the first two prongs of *Witt* are satisfied; that is, *Hurst* is a decision, which emanates from the United States Supreme Court; and (2) is constitutional in nature, the third prong cannot be met. *Hurst does not constitute a development of fundamental significance.* *Hurst* does not prohibit the government from criminalizing certain conduct or imposing certain penalties. It is procedural in nature - it does not alter the range of conduct or class of persons the law punishes; it does not change the elements of the offense of murder punishable by death; and does not greatly enhance the fairness or accuracy of death penalty proceedings. Moreover, this Court has recently affirmed that penalty-phase jury findings of fact are "waivable." *See Mullens v. State*, 197 So.3d 16 (Fla. 2016),

and *Davis v. State*, ___ So.3d ___, SC13-1 (Fla. Nov. 10, 2016). If the procedure can be waived and the resulting sentence, based on judicial fact-finding, is still deemed fair and reliable, *Hurst* cannot be a substantive change to the law. Instead, like *Ring* and *Apprendi*, *Hurst* is a prototypical procedural decision. *Hurst* should suffer the same fate.

To the extent that Cole relies on *Falcon v. State*, 162 So.3d 954, 961 (Fla. 2015), that reliance is misplaced. In *Falcon*, the Court held that the Supreme Court, in *Miller v. Alabama*, ___ U.S. ___, 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 United States 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.19 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, ___ U.S. ___, 136 S.Ct. 718, 729-30 (2016).

Since both this Court and the Supreme Court have held that *Ring* announced a new procedural rule, not a substantive rule, *Falcon* has no application to this case.

Cole further asserts that his jury was instructed improperly in that its penalty phase verdict was merely a "recommendation," citing *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The Court made clear, in *Coday v. State*, 946 So.2d 988, 995 (Fla. 2006), that "[i]ssues pertaining to jury instructions

are not preserved for appellate review unless a specific objection has been voiced at trial." *Overton v. State*, 801 So.2d 877, 901 (Fla. 2001); *see also State v. Delva*, 575 So.2d 643, 644 (Fla. 1991) (holding that instructions are subject to the contemporaneous objection rule and, absent an objection at trial, can be raised on appeal only if fundamental error occurred).

Lack of preservation aside, this claim fails on the merits. *Simmons v. State*, 105 So.3d 475, 512 (Fla. 2012). *Caldwell* held that it is unconstitutional "to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29. Specifically, *Caldwell* condemned a prosecutor's argument — rather than a court instruction — that misled the jury as to its responsibility in sentencing. The Florida Supreme Court has consistently rejected *Caldwell* challenges to Florida's standard jury instructions, claiming that the word "advisory" unconstitutionally diminishes the jury's sense of responsibility. *Smith v. State*, 151 So.3d 1177 (Fla. 2014).

Regarding instructing the jury on its advisory role in recommending a sentence, the Florida Supreme Court maintained, in *Snelgrove v. State*, 107 So.3d 242, 255 (Fla. 2012), *as revised on denial of reh'g* (Jan. 31, 2013), that jury

instructions that track the standard, approved jury instructions and adequately address the role of the penalty phase jury are proper, citing *Phillips v. State*, 39 So.3d 296, 304 (Fla. 2010), which held:

> This Court has repeatedly rejected claims that the standard jury instructions impermissibly shift the burden to the defense to prove that death is not the appropriate sentence or that these instructions unconstitutionally denigrate the role of the jury in violation of *Caldwell v. Mississippi* [, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)]." *Chavez v. State,* 12 So. 3d 199, 214 (Fla. 2009) (citing *Taylor v. State,* 937 So. 2d 590, 599 (Fla. 2006)) (citing *Elledge v. State,* 911 So. 2d 57, 79 (Fla. 2005); *Mansfield v. State,* 911 So. 2d 1160, 1180 (Fla. 2005); *Sweet v. Moore,* 822 So. 2d 1269, 1274 (Fla. 2002)). As this Court has stated, "[T]he standard jury instructions fully advise the jury of the importance of its role, correctly state the law, and do not denigrate the role of the jury." *Reese v. State,* 14 So. 3d 913, 920 (Fla. 2009) (quoting *Barnhill v. State,* 971 So. 2d 106, 117 (Fla. 2007).

Id. at 304 (quoting *Reese v. State*, 14 So.3d 913, 920 (Fla. 2009)). In *Rigterink v. State*, 66 So.3d 866, 897 (Fla. 2011), the Court held:

> Given this Court's prior rulings in this area, instructing the jury in accordance with Florida's standard penalty-phase instructions did not result in error and, consequently, this claim is without merit. This Court has consistently rejected similar claims. *See, e.g., Mansfield*, 911 So. 2d at 1180; *Sochor*, 619 So. 2d at 291; *Turner*, 614 So. 2d at 1079. Informing the jury that its recommended sentence is "advisory" is a correct statement of Florida law and does not violate *Caldwell*. *See, e.g., Combs v. State*, 525 So. 2d 853, 855–58 (Fla. 1988).

Id. at 897. *Accord Brown v. State*, 126 So.3d 211, 221 (Fla. 2013), *reh'g denied* (Nov. 13, 2013), *cert. denied*, 134 S.Ct. 2141, 188 L.Ed.2d 1130 (2014); *Patrick v. State*, 104 So.3d 1046, 1064 (Fla. 2012).

Cole is not entitled to relief because the jury was properly instructed. Instructing the jury that its sentencing recommendation was advisory and that the judge would be the ultimate sentence, was an accurate statement of Florida law at the time Cole was convicted and sentenced. The Court has consistently held that the standard penalty phase jury instructions fully advised the jury of the importance of its role, correctly stated the law, did not denigrate the role of the jury, and did not violate *Caldwell*. *See Jones v. State/McNeil*, 998 So.2d 573, 590 (Fla. 2008); *Brown v. State*, 721 So.2d 274, 283 (Fla. 1998); *Perez v. State*, 919 So.2d 347, 368 (Fla. 2005); *Card v. State*, 803 So.2d 613, 628 (Fla. 2001); *Sochor v. State*, 619 So.2d 285, 291 (Fla. 1993); *Combs v. State*, 525 So.2d 853 (Fla. 1988).

c.) Cole does not win under harmless error

The State does not concede that *Hurst* applies to Cole's case, but in an abundance of caution, submits that any error in the penalty phase proceedings was harmless error. Violations of the right-to-a-jury-trial are subject to harmless error. *See Hurst*, 136 S.Ct. at 624 ("This Court normally leaves it to the

state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here."); *see also Washington v. Recuenco*, 548 U.S. 212, 222, 126 S.Ct. 2546, 2553 (2006) (relying on *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827 (1999), and holding that the "failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error"); *Galindez v. State*, 955 So.2d 517, 524 (Fla. 2007) (holding harmless error analysis applies to *Apprendi* and *Blakely* error). Cole's jury heard the facts of the two murders she committed during the guilt phase; after finding her guilty of the murders and the other qualifying felonies, the jury heard the penalty phase presentation. There is no doubt. Based on the evidence, the jury's 9-3 recommendation making Cole death eligible should not be reversed and remanded for a new sentencing simply because of the jury's recommendation. *Kansas v. Carr*, 136 S.Ct. 633 (1016).

The Supreme Court remanded *Hurst,* in material part, to allow this Court to assess harmlessness. The Supreme 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. Clearly, any error contrary to Cole's position is harmless error herein.

That this type of error can be harmless is confirmed 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 fact-finding where a sentence is to be enhanced due to the defendant's use of a firearm. Consistent with this approach, this Court has held that the failure to obtain a jury finding on an *Apprendi* type error is subject to a harmless error analysis. *Galindez v. State*, 955 So.2d 517, 521-23 (Fla. 2007). In fact, in *Galindez*, the Court expressly noted that it had applied a harmless error analysis to the failure to have a jury decide an element of an offense. *Id.* at 522. Thus, it is clear that *Hurst* error is subject to a harmlessness analysis.

Because *Hurst* is not retroactive, *Hurst,* has no application to this post-conviction case.[2] This Court, like others who have

[2] Cole became eligible for the death penalty upon her conviction for first-degree murder, and the jury determined that the appropriate sentence was death upon consideration of sentencing selection factors. Three of Cole's aggravators (second murder, robbery and kidnapping) were due to prior violent or contemporaneous felony convictions. *Ring* does not alter the express exemption outlined in *Apprendi*, 530 U.S. at 490, that "other than the fact of a ***prior conviction***, any fact that

endeavored to consider the retroactivity of *Ring*, has uniformly found that it is not retroactive. There is no reason in law or logic for this Court to find that *Hurst*, unlike *Ring*, announced a new rule of sufficient magnitude to mandate retroactive application. Indeed, in this case "any" *Hurst* error is harmless because no rational fact-finder would not find that the aggravators in this case are sufficient for death and that the aggravators outweigh the mitigators, thus supporting a death recommendation.

d.) There is no automatic aggravating circumstance in Florida.

Cole acknowledges that there exists contemporaneous violent felonies that support her eligibility for the death sentences imposed for the murders of the Sumners. She suggests that because in *Hurst*, the court noted that not only must a qualifying aggravator be found by the jury, but under the Florida Statute, the jury is required to determine that "sufficient aggravating circumstances exist" to impose death and

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increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." (*emphasis added*). *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (noting prior conviction properly used by judge alone to enhance defendant's statutorily authorized punishment). As a result, even if *Ring*/*Hurst* error were found to apply, *Ring's* requirements were met through the contemporaneous murder, robberies, and the kidnappings which resulted in the prior violent felony and felony murder aggravators. Cole is unable to show a Sixth Amendment violation.

there are insufficient mitigating circumstances to outweigh the aggravating circumstances. Cole is wrong.

In Florida, a defendant is eligible for a capital sentence if at least one aggravating factor applied to the case. *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). *See also Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994) ("To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase.") (*citations omitted*).

In Cole's case the aggravating and mitigating circumstances were:

> In sentencing Cole, the trial court found seven aggravating factors applicable to both murders: (1) Cole was previously convicted of another capital felony, based on the contemporaneous first-degree murders of the victims; (2) the murders were committed in the course of kidnappings; (3) the capital felonies were especially heinous, atrocious, or cruel (HAC); (4) the capital felonies were committed in a cold, calculated, and premeditated manner (CCP); (5) the capital felonies were committed for financial gain; (6) the capital felonies were committed to avoid or prevent a lawful arrest; and (7) the victims were particularly vulnerable due to advanced age or disability.
>
> The trial court also found statutory and nonstatutory mitigating factors. The trial court assigned "some weight" to both the "no significant history of prior criminal activity" mitigating factor and the age at

> the time of the crime mitigating factor (Cole was twenty-three years old). With respect to the minor participant mitigating factor, the trial court's order states, "While this defendant might not have turned the spade onto the Sumners, this Court cannot say that her participation was relatively minor. Accordingly, this matter is afforded little weight." With respect to the "substantial domination" mitigating factor, after noting that there was "some evidence of this mitigator in the record"-i.e., the defendant's own testimony-the trial court concluded that "given the totality of the circumstances, the Court cannot afford this matter much weight." The trial court stated that "the evidence tends to indicate that [Cole] knew exactly what she was doing and participated without hesitation."
>
> The trial court grouped the numerous nonstatutory mitigating factors into six categories.
>
> The six categories include: (1) Cole had minimal involvement in the criminal activity (some weight); (2) Cole had psychological circumstances that included lack of self-confidence, low self-esteem, and feelings of inadequacy (little weight); (3) Cole had been a model prisoner (some weight); (4) Cole's family history included growing up without a father, being raised by a working mother, caring for her brothers and terminally ill father, being a victim of domestic violence, having the capacity to form loving relationships, and having the love and support of her family (some weight); (5) Cole had substance abuse problems (little weight); and (6) Cole was of good character (some weight).
>
> Ultimately, the trial court concluded that "the aggravating circumstances far outweigh[ed] the mitigating circumstances."

Cole v. State, 36 So.3d at 606.

There is no constitutional violation regarding the use of the same facts to support a conviction and thereafter also use said facts as the basis for an otherwise, valid, aggravating

circumstance, *Lowenfield v. Phelps*, 484 U.S. 231 (1988), and *Rogers v. State*, 957 So.2d 538,554 (Fla. 2007). The jury found Cole guilty of the contemporaneous murders and other qualifying felonies at the guilt phase. The jury was also instructed that these offenses could be considered as aggravators for assessing whether the sufficient aggravators existed and that the aggravators outweighed the mitigators. In this case there can be no rational finding other than the jury's recommendation was sound and justified based upon the fact presented.

CONCLUSION

Based upon the foregoing, the State requests this Court affirm the trial court's denial of post-conviction relief and, deny any *Hurst/Ring* claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email via the eportal to Wayne F. Henderson, 222 San Marco Avenue, Suite B, Saint Augustine, Florida 32084-2723, hoteon@gmail.com, this 12th day of December 2016.

/s/ Carolyn M. Snurkowski
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

/s/ Carolyn M. Snurkowski
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