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IN THE SUPREME COURT OF FLORIDA

MICHAEL L. KING,

Appellant,

v.

CASE NO. SC14-1949
L.T. No. 58-2008-CF-001087

STATE OF FLORIDA,

Appellee.

______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR SARASOTA COUNTY, FLORIDA

SUPPLEMENTAL BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

ISSUE 2

HURST V. FLORIDA HAS NO APPLICATION THIS CASE BECAUSE IT WAS FINAL ON DIRECT REVIEW WHEN HURST WAS DECIDED AND IN ANY CASE, THERE IS NO ERROR WHERE THE JURY NECESSARILY FOUND THAT KING WAS ELIGIBLE FOR THE DEATH PENALTY BY ITS GUILT PHASE FINDINGS.

CONCLUSION 25

CERTIFICATE OF SERVICE 25

CERTIFICATE OF FONT COMPLIANCE 25

TABLE OF AUTHORITIES

Federal Cases

Alleyne v. United States,
133 S. Ct. 2151 (2013) 7, 22, 23

Almendarez-Torres v. United States,
523 U.S. 224 (1998) 22

Apprendi v. New Jersey,
530 U.S. 466 (2000) 7, 10, 12

Atkins v. Virginia,
536 U.S. 304 (2002) 9

Blakely v. Washington,
542 U.S. 296 (2004) 19

Butler v. McKellar,
494 U.S. 407 (1990) 9

Butterworth v. United States,
775 F.3d 459 (1st Cir. 2015),
cert. denied, 135 S. Ct. 1517 (2015) 15

Calderon v. Thompson,
523 U.S. 538 (1998) 14

Coker v. Georgia,
433 U.S. 584 (1977) 3

Crayton v. United States,
799 F.3d 623 (7th Cir. 2015) 11

DeStefano v. Woods,
392 U.S. 631 (1968) 10

Duncan v. Louisiana,
391 U.S. 145 (1968) 10

Furman v. Georgia,
408 U.S. 238 (1972) 3, 4, 5

Griffith v. Kentucky,
479 U.S. 314 (1987) 8

Hildwin v. Florida,
490 U.S. 638 (1989) 7

Hurst v. Florida,
___ S. Ct. ___, 2016 WL 112683 (Jan. 12, 2016)...................................... passim

Jeanty v. Warden, FCI-Miami,
757 F.3d 1283 (11th Cir. 2014)...18

Kansas v. Carr,
2016 WL 228342 (Jan. 20, 2016)..8

McCoy v. United States,
266 F.3d 1245 (11th Cir. 2001)...10

Montgomery v. Louisiana,
___ S. Ct. ___, 2016 WL 280758 (Jan. 25, 2016)..18

Penry v. Lynaugh,
492 U.S. 302 (1989) 9

Ring v. Arizona,
536 U.S. 584 (2002) .... passim

Saffle v. Parks,
494 U.S. 484 (1990) 9

Schriro v. Summerlin,
542 U.S. 348 (2004) 9, 10, 12

Teague v. Lane,
489 U.S. 288 (1989) 5, 9

United States v. O'Brien,
560 U.S. 218 (2010) 8

Varela v. United States,
400 F.3d 864 (11th Cir. 2005) 11

Washington v. Recuenco,
548 U.S. 212 (2006) 19

Whorton v. Bockting,
549 U.S. 406 (2007) 10

Witt v. State,
387 So. 2d 922 (1980) 5, 11

State Cases

Anderson v. State,
267 So. 2d 8 (Fla. 1972) 4

Ault v. State,
53 So. 3d 175 (Fla. 2010) 20

Bevel v. State,
983 So. 2d 505 (Fla. 2008) 24

Chandler v. Crosby,
916 So. 2d 728 (Fla. 2005) 17

Colwell v. State,
118 Nev. 807, 59 P.3d 463 (2002),
cert. denied, 540 U.S. 981 (2003)....................14

Donaldson v. Sack,
265 So. 2d 499 (Fla. 1972) 3, 4, 5

Ellerbee v. State,
87 So. 3d 730 (Fla. 2012) 21, 24

Ex parte Waldrop,
859 So. 2d 1181 (Ala. 2002) 21

Falcon v. State,
162 So. 3d 954 (Fla. 2015) 17, 19

Hughes v. State,
901 So. 2d 837 (Fla. 2005) 17

Hurst v. State,
147 So. 3d 435 (Fla. 2014) 20

Johnson v. State,
904 So. 2d 400 (Fla. 2005) 11, 12, 13, 14

King v. State,
89 So. 3d 209, 212-22 (Fla. 2012)...1

Neal v. State,
80 A.3d 935 (Del. 2013)...22

Rhoades v. State,
149 Idaho 130, 233 P.3d 61 (2010),
cert. denied, 562 U.S. 1258 (2011)..13

Rigterink v. State,
66 So. 3d 866 (Fla. 2011) 15

Spaziano v. State,
433 So. 2d 508, 512 (Fla. 1983) 7

State v. Johnson,
122 So. 3d 856 (Fla. 2013) 11, 12

State v. Statewright,
300 So. 2d 674 (Fla. 1974) 17

State v. Steele,
921 So. 2d 538 (Fla. 2005) 20

State v. Towery,
204 Ariz. 386, 64 P.3d 828 (2003),
cert. dismissed, 539 U.S. 986 (2003) 13

State v. Whitfield,
107 S.W.3d 253 (Mo. 2003)...13

Taylor v. Steele,
341 S.W.3d 634 (Mo. 2011) 13

Zebroski v. State,
822 A.2d 1038 (Del.),
cert. denied, 540 U.S. 933 (2003) 22

Zommer v. State,
31 So. 3d 733 (Fla. 2010) 20

Other Authorities

§ 775.082(2), Fla. Stat. 3, 4

§ 921.141(5)(b), Fla. Stat. 23

Fla. R. Crim. P. 3.851(d)(2) 6

STATEMENT OF THE CASE AND FACTS

This Court's direct appeal opinion in King v. State, 89 So. 3d 209, 212-22 (Fla. 2012), recites the facts of King's convictions for the kidnapping, sexual battery, and murder of the victim, Denise Lee, a young married mother of two young children. Following a unanimous jury recommendation, the trial court sentenced King to death. On direct appeal, this Court provided the following summary of the aggravators found by the trial court:

> On December 4, 2009, the trial judge sentenced King to death for the murder of Denise Lee. In pronouncing King's sentence, the trial court determined that the State had proven beyond a reasonable doubt the existence of four statutory aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel (HAC), *see* § 921.141(5)(h), Fla. Stat. (2007) (great weight) [fn6]; (2) the murder was cold, calculated, and premeditated (CCP), *see* § 921.141(5)(i), Fla. Stat. (2007) (great weight); (3) the murder was committed for the purpose of avoiding lawful arrest, *see* § 921.141(5)(e), Fla. Stat. (2007) (great weight); and (4) the murder was committed while King was engaged in the commission of a sexual battery or kidnapping, *see* § 921.141(5)(d), Fla. Stat. (2007) (moderate weight).
>
> fn6. With regard to this aggravator, the trial court stated:
>
> It is most extraordinary and extremely rare that one can actually hear [the] emotions in the voice of an innocent victim, who is doomed to be murdered.... [T]he 911 recording of the victim[ ] tragically reveals her fear, mental state, her terror and her emotional strain. One need only listen to portions of this call to comprehend her mental state.
>
> The trial court also expressed in a footnote, "The court acknowledges that although it quotes from the 911 call, it cannot, by any means, convey the fear and terror clearly heard in Denise Lee's voice in that recording."

Appellant's notice of appeal to this Court was filed September 19, 2014.

Briefing has been completed and oral argument is scheduled for February 4, 2016. On January 12, 2016, the Supreme Court decided Hurst v. Florida, ___ S. Ct. ___, 2016 WL 112683 (January 12, 2016). This Court issued an order on January 19, 2016, directing the parties to brief the impact, if any upon the pending appeal in this post-conviction case.

SUMMARY OF THE ARGUMENT

Hurst v. Florida is not retroactive and has no application to this post-conviction case. In addition, the jury necessarily found King eligible for a death sentence by their guilt phase findings that King had committed the separate offenses of sexual battery and kidnapping. Finally, the jury recommendation in this case was unanimous, and any Hurst error would be harmless under the facts of this case.

ARGUMENT

ISSUE

HURST V. FLORIDA HAS NO APPLICATION THIS CASE BECAUSE IT WAS FINAL ON DIRECT REVIEW WHEN HURST WAS DECIDED AND IN ANY CASE, THERE IS NO ERROR WHERE THE JURY NECESSARILY FOUND THAT KING WAS ELIGIBLE FOR THE DEATH PENALTY BY ITS GUILT PHASE FINDINGS.

In this supplemental brief, Appellant asserts that Hurst v. Florida, ___ S. Ct. ___, 2016 WL 112683 (January 12, 2016) entitles him to a life sentence or a

resentencing. Neither contention has any merit.

A. *Hurst* does not entitle King to a life sentence.

King first 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 King 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), King 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."

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 appropriate rules for retroactivity, such as Teague v. Lane, 489 U.S. 288 (1989), and Witt v. State, 387 So. 2d 922 (1980).

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 on direct appeal 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 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.

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

King's case was final on direct appeal on October 15, 2012, when the

Supreme Court denied certiorari. 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.[1] Hurst is not retroactive. Consequently, King, 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.

Appellant misquotes Hurst when he states, that "the Court held that '[t]he Sixth Amendment requires a jury, not a judge, to impose a sentence of death. A jury's mere recommendation is not enough.'" (Appellant's Suppl. Brief at 2) (purporting to quote Hurst at 3)). The Court did not state that the Sixth Amendment requires a "jury," not a judge to impose a sentence of death. 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, 2016 WL 112683, *5–6. 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 *6 (citing Fla. Stat. § 775.082(1)

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[1] Any successive motion could only be considered timely by the post-conviction court if King 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).

(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. State of Florida, and Hildwin v. Florida, 490 U.S. 638 (1989). Hurst, 2016 WL 112683, *6–9.

The Supreme Court recently reaffirmed that the Sixth Amendment right underlying Ring and Apprendi v. New Jersey, 530 U.S. 466 (2000) did not apply to factual findings made in selecting a sentence for a defendant after the defendant has been found eligible to receive a sentence within a particular range. Alleyne v. United States, 133 S. Ct. 2151, 2161 n.2 (2013) ("Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty. Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.' Williams v. New York, 337 U.S. 241, 246, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth

Amendment does not govern that element of sentencing."); see also United States v. O'Brien, 560 U.S. 218, 224 (2010)(recognizing that Apprendi does not apply to sentencing factors that merely guide sentencing discretion without increasing the applicable range of punishment to which a defendant is eligible).

Moreover, in Kansas v. Carr, 2016 WL 228342, at *8 (Jan. 20, 2016), the Court discussed the distinct determinations of eligibility and selection under Kansas' capital sentencing scheme. In doing so, the Court stated that an eligibility determination was limited to findings related to aggravating circumstances and that determinations regarding whether mitigating circumstances existed and the weighing process were selection determinations. In fact, the Court stated that such determinations were not factual findings at all. Id. Instead, the Court termed the determinations regarding the existence of mitigating circumstances as "judgment call[s]" and weighing determinations "question[s] of mercy." Id.

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

King 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 Schriro v. Summerlin, the Supreme 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 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

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[2] 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)).

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. 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 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.[3] 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

[3] 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) (*per curiam*), the Court declined to apply the holding of Duncan retroactively. Apprendi 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.

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).

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.[4] Appellant's invitation for this Court to revisit this Court's 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

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[4] 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.

the emotional toll of such an action cannot be measured.

State and federal courts have uniformly held that Ring is not retroactive.[5] See State v. Towery, 204 Ariz. 386, 393-94, 64 P.3d 828, 835-36 (2003), cert. dismissed, 539 U.S. 986 (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), cert. denied, 562 U.S. 1258 (2011) (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

[5] 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 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 subsequently 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.").

(2002), cert. denied, 540 U.S. 981 (2003) (applying Teague to find that Ring announced a new procedural rule that would not be subject to retroactive application).[6]

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.[7]

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[6] 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 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.

[7] 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

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 e.g. 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 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 at 9-10 (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. 2015), cert. denied, 135 S. Ct. 1517 (2015), the First Circuit Court of Appeals rejected a defendant's attempt to justify retroactive application of Alleyne [holding that facts justifying

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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.

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. 2519.6 (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.[8] 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 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 v. New Jersey, 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 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

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[8] 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.").

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.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, ___ S. Ct. ___, 2016 WL 280758, at *8 (Jan. 25, 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 v. Arizona does not apply retroactively, Hurst should not 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.

C. The qualifying contemporaneous felonies of kidnapping and sexual battery preclude finding a 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 of the Supreme Court's remand in Hurst so that the Florida Supreme Court could assess harmlessness. The 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, 2016 WL 112683 at *8. 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 King of kidnapping and sexual battery. Hurst was in a distinctly different position from King. 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 v. Arizona, 536 U.S. 584 (2002), 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. 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 King's case, a unanimous jury convicted him of sexual

battery and kidnapping, and based on these convictions, he was indisputably eligible for his death sentence.[9] 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 qualfying 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

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[9] The jury recommended the death penalty by 12-0 for the murder of Denise Lee.

> 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.),[10] cert. denied, 540 U.S. 933 (2003) (finding Ring 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)).

King was unquestionably eligible for the death penalty based upon the jury's factual finding.[11] The trial judge was able to utilize this aggravator, necessarily found by the jury, in sentencing King. Since King did not challenge application of

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

[11] Any argument that a jury had to find each and every aggravator is without merit. Once the jury found one aggravator, King 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.

this aggravator on appeal, the issue is foreclosed in this case.[12]

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 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 [sexual battery and kidnapping] was not disturbed by Hurst.

Although this Court need not address the additional aggravating circumstances found in this case [King is eligible for a capital sentence with one], there is no conceivable argument that the jury would not have found the existence of the CCP, HAC, and avoid arrest aggravators applicable in this case. The murder of Denise Lee and her prolonged ordeal and terror that preceded her murder, recounted partially in a chilling 911 call, is unquestionably heinous, atrocious and cruel. The facts of this case reveal that King committed a methodical crime, not the

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[12] § 921.141(5)(b) ("The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person").

least bit impulsive, from targeting the victim, to the extended period of control and domination he exercised, to the planning for her demise and his attempt to cover up his crimes. See V11, 2053-57 (discussing the CCP and Avoiding Arrest aggravators) (Appendix, Sentencing Order). 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 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."). See Appendix, Sentencing Order.

Finally, the jury's death recommendation was unanimous in this case [each juror necessarily found an aggravating circumstance], another factor which places it outside of those cases for which Ring might conceivably apply. See Bevel v. State, 983 So. 2d 505, 526 (Fla. 2008) (noting that "we have previously rejected Apprendi/Ring claims in other direct appeals involving unanimous death recommendations.") (citing Crain v. State, 894 So. 2d 59, 78 (Fla. 2004)).

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

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the denial of post-conviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 2016, I electronically filed the foregoing with the Clerk of the Florida Supreme Court by using the e-portal filing system which will send a notice of electronic filing to the following: Maria C. Perinetti (**perinetti@ccmr.state.fl.us)** and Raheela Ahmed (**ahmed@ccmr.state.fl.us**), Assistants CCRC, Law Office of the Capital Collateral Regional Counsel - Middle Region, 12973 N. Telecom Parkway, Temple Terrace, Florida 33637-0907.

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).

Respectfully submitted,

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APPENDIX

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

CASE NO.:2008-CF-0936 NC
/2008-CF-1087 NC

FILED FOR RECORD
2009 DEC -4 PM 3:44
KAREN E. RUSHING
CLERK OF CIRCUIT COURT
SARASOTA COUNTY, FL

MICHAEL KING,
Defendant,
_______________________________/

SENTENCING ORDER

On August 28, 2009, the defendant, Michael King, was found guilty by a jury for the crimes of murder in the first degree, kidnapping with the intent to commit or facilitate the commission of a felony, and sexual battery, by the threat to use force likely to cause serious personal injury.

On September 04, 2009, the same jury, by a vote of twelve (12) to zero (0), recommended that the court sentence the defendant to death for the murder of Denise Amber Lee.

The court has considered all the evidence introduced during the course of the trial and the penalty phase proceedings, and the evidence presented at the *Spencer*[1] hearing held on October 28, 2009.

After consulting with his attorneys, the defendant chose not to make a statement at the *Spencer* hearing.

Furthermore, the court has considered the sentencing memoranda submitted by the parties.

The court, aware of the duty and responsibility to give individual consideration of aggravating and mitigating circumstances, now finds as follows:

[1] *See Spencer v. State*, 615 So. 2d 688, 690-691(Fla. 1993).

AGGRAVATING FACTORS

The state presented evidence and argued the existence of four statutory aggravating circumstances to the jury and this court and the court addresses each of them. Neither the jury nor the court considered any other aggravating circumstances.

1. The capital felony was especially heinous, atrocious or cruel.[2]

In order for a crime to be especially heinous, atrocious or cruel, it must be both conscienceless or pitiless and unnecessarily tortuous to the victim.[3] Generally, this circumstance does not apply to shooting deaths that are instantaneous or nearly so.[4] But fear, emotional strain, and terror of the victim during the events leading up to the murder may allow an otherwise quick death to become especially heinous, atrocious or cruel.[5] When considering this aggravating factor, the court should focus on the victim's perception of the circumstances, as opposed to those of the perpetrator.[6] In determining the victim's mental state, a common-sense inference as to the victim's mental state may be inferred from the circumstances.[7]

The evidence established that Denise Amber Lee was abducted from her home in North Port, Florida by the defendant, who was a complete stranger to her. She was abducted between the hours of 1:00 p.m. and 2:00 p.m. on January 17, 2008. At that time, the defendant was seen by the victim's next-door neighbor driving "very slowly" through the neighborhood, "back and forth" approximately four or five times. The neighbor found this so suspicious that she went outside, where she saw the defendant, who was driving a green Camaro automobile, drive into the victim's driveway.

Denise Lee was subsequently abducted from her home by the defendant, leaving in the home her two children, ages 6 months and 2 years of age, together in a crib. The

[2] § 921.141(5)(h), Fla. Stat.
[3] *See Richardson v. State*, 604 So. 2d 1107 (Fla. 1992); *Nelson v. State*, 748 So. 2d 237 (Fla. 1999).
[4] *See Kearse v. State*, 662 So. 2d 677 (Fla. 1995).
[5] *See Lynch v. State*, 841 So. 2d 362 (Fla. 2003); *Chavez v. State*, 832 So. 2d 730 (Fla. 2002); *Banks v. State*, 700 So. 2d 363 (Fla. 1997); *Preston v. State*, 607 So. 2d 404 (Fla. 1992); *Swafford v. State*, 533 So. 2d 270 (Fla. 1988); *Parker v. State*, 476 So. 2d 134 (Fla. 1985); and *Lightbourne v. State*, 438 So. 2d 380 (Fla. 1983).
[6] *See Richardson v. State*, 604 So. 2d 1107 (Fla. 1992); *Nelson v. State*, 748 So. 2d 237 (Fla. 1999).
[7] *See Kearse v. State*, 662 So. 2d 677 (Fla. 1995).

defendant drove her to his home, a few miles away. At his home, with Denise Lee bound with duct tape, the defendant sexually battered and restrained her over the course of several hours. The medical examiner found "insertion trauma" injuries to her vagina and anus, bruising of her wrists, arms, face, thigh and other areas of her body. Denise Lee was 5 feet, 2 inches tall, and weighed 109 pounds.

After completing these brutal acts, the defendant continued his abduction of Denise Lee. The defendant drove her to the home of his cousin Harold Muxlow, who lived a few miles away. The defendant arrived between 5:30 and 6:00p.m. While Denise Lee remained in the car, the defendant left his car and obtained from Muxlow a shovel, a flashlight, and a gas can. After Muxlow gave these items to the defendant, Muxlow heard Denise Lee call out, "call the cops." Muxlow saw the defendant enter the car from the passenger side of the car, climbing over the console, and pushing Denise Lee's head down in the back seat. The defendant, continuing his abduction, drove away from Muxlow's home.

At some point Denise Lee was able to obtain the defendant's cell phone, quite possibly while the defendant was talking outside his car to Muxlow. At 6:14 p.m., while the defendant was driving, Denise Lee was able to use his cell phone to call the 911 operator without the knowledge of the defendant. The 911 call will be discussed in more detail below.

Furthermore, while the defendant drove, the kidnapping continued. With Denise Lee in the back seat, two people, Shawn Johnson and Jane Kowalski, each while driving down Highway 41, saw Denise Lee in the backseat of defendant's car screaming for help. Ms. Kowalski called the 911 operator to report what she saw. She told the 911 operator that she heard loud, "horrific" and "terrified" screaming coming from the defendant's car. She saw what appeared to be a child screaming and "banging on the window" from the backseat. The defendant intentionally evaded Ms. Kowalski by slowing down and then turning left onto another road, Toledo Blade Boulevard. After turning onto Toledo Blade Boulevard, the defendant drove to a remote, secluded area.

As to the aggravating factor of especially heinous, atrocious or cruel, the Florida Supreme Court has stated the following:

In numerous cases the Court has held that this aggravating factor could be supported by evidence of actions of the offender preceding the actual killing, including forcible abduction, transportation away from possible sources of assistance and detection, and sexual abuse. In Parker v. State, 476 So. 2d 134, 139 (Fla. 1985), we quoted the statement in Adams v. State, 412 So. 2d 850, 857 . . . that 'fear and emotional strain preceding a victim's almost instantaneous death may be considered as contributing to the heinous nature of the capital felony.' Moreover, the victim's mental state may be evaluated for purposes of such determination in accordance with common-sense inference from the circumstances. Preston v. State, 444 So. 2d 939, 946 (Fla. 1984) ("victim must have felt terror and fear as these events unfolded").[8]

Did Denise Lee feel terror or fear as these events unfolded, or fear and emotional strain preceding her almost instantaneous death? This court, in the calm reflection of the moment, and by the written words of this sentencing order, detached and objective, can find beyond all reasonable doubt that such terror, fear and emotional strain existed in the mind of Denise Amber Lee prior to her murder. Any words by this court, however, are not capable of truly expressing the reality of such terror.

It is most extraordinary and extremely rare that one can actually hear such emotions in the voice of an innocent victim, who is doomed to be murdered. State's exhibit number 102, the 911 recording of the victim, tragically reveals her fear, mental state, her terror and her emotional strain. One need only listen to portions of this call to comprehend her mental state:

Defendant: Why'd you do that?

Denise Lee: I'm sorry. I just want to see my family.

Denise Lee: I just want to see my family again. Please.

Denise Lee: Oh please, I just want to see my family again. Let me go.

[8] *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988) (citations omitted).

Denise Lee:	Please let me go. Please let me go. I just want to see my family again.
Defendant:	No "_________" problem. (note: The court has deleted the actual word used. The recording contains this word).
Denise Lee:	I'm sorry.
Defendant:	I was gonna let you go and then you go "_______" around. (again the court deletes the actual word used. The recording contains this word).
Denise Lee:	I'm sorry. Please let me go.
Denise Lee:	Please let me go, please. Please, Oh God, please.
Denise Lee:	Please let me go. Help me. I don't know.
Defendant:	Calm down.
Denise Lee:	Please let me go.
Denise Lee:	I'm married to a beautiful husband and I just want to see my kids again.
Denise Lee:	Please God .... Please protect me.
Defendant:	What did you do with my cell phone?
Denise Lee:	I don't know where your phone is, I'm sorry.

Denise Lee: I don't have your phone. Please God.

Denise Lee: I don't have it. Sorry,

Denise Lee: I don't, I don't have it. I'm sorry. I don't know where your phone is. I'm sorry.

Denise Lee: I don't know where it is. Maybe if I could see I could help you find it.

Denise Lee: No please . . . . Oh God, help me.

Denise Lee: I don't know. Please just take me to my house. Can you take me home? On Latour, please.

Defendant: Give me the phone.

Denise Lee: Are you going to let me out now?

Defendant: As soon as I get the phone.

Denise Lee: Help me.[9]

The call abruptly ended. The defendant took the cell phone away from Denise Lee and broke it apart. To further indicate the fear Denise Lee surely felt, she removed a ring she always wore and left it in the back seat as a clear marker of her presence in the car. The defendant drove the green Camaro to a deserted area, down a barricaded road not

[9] The court acknowledges that although it quotes from the 911 call, it cannot, by any means, convey the fear and terror clearly heard in Denise Lee's voice in that recording.

accessible to regular automobile traffic. He took her out of the car, into a wooded area and murdered her by shooting her above the right eye.

The defendant's words and actions reveal a crime that was conscienceless, pitiless, and unnecessarily tortuous with an utter indifference to Denise Lee's suffering. His telling her that he would let her go as soon as she gave him the cell phone was a lie, knowing full well that he was going to take her to a secluded area and murder her.

The court finds this aggravating circumstance has been established beyond a reasonable doubt and gives it great weight.

2. **The capital felony was committed in a cold, calculated and premeditated manner, and without any pretense of moral or legal justification.**[10]

The aggravating circumstance of cold, calculated and premeditated focuses on the manner in which the homicide was committed, and it may be established by the totality of the circumstances.[11]

"Cold" means "calm, cool reflection, and not an act prompted by emotional frenzy, panic or a fit of rage."[12] "Calculated" means the defendant had a "careful plan or prearranged design to commit the murder." "Premeditated" is more than that required to prove first-degree, premeditated murder. It is "heightened premeditation."[13] "Pretense of moral or legal justification" means "any claim of justification or excuse (such as self-defense) that, though insufficient to reduce the degree of homicide, nevertheless rebuts the

[10] § 921.141(5)(i), Fla. Stat.
[11] *Jackson v. State*, 648 So. 2d 85, 87 (Fla. 1994).
[12] *Jackson v. State*, 648 So. 2d at 89-90.
[13] *Jackson v. State*, 648 So. 2d at 88.

otherwise cold and calculating nature of the homicide."[14] The focus here is on the manner of the killing and this aggravating circumstance can be indicated by circumstances showing such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course.[15]

After kidnapping Denise Lee from her home, taking her to his home and raping her, the defendant spoke to his friend, Tennille Camp, on the phone. She testified that "he sounded real normal." Subsequently, the defendant continued the abduction by putting Denise Lee into his car and driving to the home of his cousin, Harold Muxlow. At Muxlow's residence, with Denise Lee inside the vehicle, the defendant, while "chatting normally," obtained a shovel, a flashlight, and a gas can. This occurred between 5:30 p.m. and 6:00 p.m. on January 17th, a time when darkness would soon be arriving. Clearly, it was at this moment, if not earlier, by obtaining these items, the defendant had decided not only to murder Denise Lee, but also the manner in which he would dispose of her body. The defendant had arrived at the home of Denise Lee, at the time of the original abduction, possessing the firearm that would eventually be used to take her life. Now, his plan, a carefully thought out plan, formed in a calm, cool reflective state of mind, and not under the influence of any drugs or alcohol would reach its sinister conclusion.

After leaving Muxlow's home, the defendant continued driving to the secluded area, evading those motorists (see Ms. Kowalski, above) who were suspicious. His vehicle, in essence, became a hearse, carrying its victim to the intended gravesite. He eventually drove to the road which was barricaded and not open to regular vehicular traffic. He took Denise Lee from his car, away from the roadway, and with the firearm he had with him

[14] *Christian v. State*, 550 So. 2d 450, 451-452 (Fla. 1989).
[15] *Bell v. State*, 699 So. 2d 674, 678 (Fla. 1997).

during the course of the kidnapping and rape, the defendant shot her above her right eye, killing her. He then used the borrowed shovel to bury her in a hole 4 feet in depth. The borrowed flashlight was most probably used to assist in the burial, as darkness had, by now, fallen.[16]

If the defendant's intent was to kidnap and sexually batter Denise Lee, he would have done so and then released her. He had ample opportunity to release her at any time during her abduction and sexual battery, and countless opportunities over the course of several hours to choose life over death. Instead, he chose to obtain the materials necessary to carry out his choice of death over life.

This court finds that this aggravating factor has been established beyond a reasonable doubt and assigns it great weight.

3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.[17]

To prove this aggravating circumstance when the victim is not a law enforcement officer, it must be shown beyond a reasonable doubt that the sole or dominant motive for the murder was the elimination of a witness.[18] This factor focuses on the motive for the murder, and it may be proved "by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes."[19]

[16] The defendant was stopped on I-75 while driving in his car not far from the scene, by Florida Highway Patrol Trooper Pope at approximately 9:15 p.m. The shovel was found inside his car.
[17] § 921.141(5)(e), Fla. Stat.
[18] *See Hertz v. State*, 803 So. 2d 629, 648 (Fla. 2001); *Connor v. State*, 803 So. 2d 598, 610 (Fla. 2001); *Wike v. State*, 698 So. 2d 817 (Fla. 1997).
[19] *See Farina v. State*, 801 So. 2d 44, 54 (Fla. 2001); *Jones v. State*, 748 So. 2d 1012, 1027 (Fla. 1999).

As found above, after the defendant had raped Denise Lee, terrorizing her over the course of several hours, he had a choice. It became his defining moment: either to set her free and risk getting caught, as she clearly would have been able to identify him, or to murder her and escape detection and arrest. Upon his obtaining the shovel and flashlight, the die was cast. At this moment, it is clear that the defendant had no intention of releasing her. He was determined to murder her and use the shovel to bury her so that she would not be found. While in the car, she pleaded to be set free, and was bound with duct tape over her eyes so that she was unable to see (based on the statement from the 911 recording: "Maybe, if I could see, I could help you find it").

By taking her to the secluded wooded area, to a road barricaded and not accessible to traffic, he was determined that his crime would never be discovered.

There is no other motive for the murder. The defendant did not steal any of her valuables, either from her home or from her person. After shooting her, he took the time to dig a hole four feet deep and place her lifeless body inside. He then covered her body with the dirt, and placed foliage over the gravesite, making it nearly impossible to be discovered. He then covered drops of blood with sand, and disposed of Denise Lee's clothes at a separate location near the grave site, where he took the time to bury her bra and shirt. The only purpose to be served by these acts was to prevent her discovery by anyone. Two days later, upon a careful and methodical digging into the ground by law enforcement, at a depth of 3 feet 3 inches the shoulder of Denise Lee was discovered under the earth (she had been found in the gravesite in a crouched, sitting, fetal-like position). The total depth of the burial site was 4 feet, 1 inch.

But for the intensive search, and the assistance of a search and rescue canine, the body of Denise Lee may never have been discovered, clearly evincing the desire by the defendant to conceal his murder in order to prevent any apprehension.

The court finds this aggravating factor has been established beyond a reasonable doubt and gives it great weight.

4. The capital felony was committed while the defendant was engaged in the commission of the crime of kidnapping or sexual battery.[20]

This aggravating circumstance invokes the "felony-murder"rule. As stated above, the evidence established that the defendant abducted Denise Lee from her residence, leaving in the home her two children, ages 6 months and 2 years of age. She was abducted between the hours of 1:00 p.m. and 2:00 p.m. and forcibly taken in the defendant's car to his home a few miles away. At his home, she was brutally raped by the defendant. She was confined in his home for approximately three or four hours. The medical examiner testified that she suffered injuries to her vaginal area and anus, caused by forcible insertion trauma. The kidnapping was intended to facilitate the sexual battery, which occurred in the defendant's home.

The defendant then continued the kidnapping by taking her in his car to his cousin's home between 5:30 and 6:00 pm, obtaining the shovel, flashlight and gas can. From there, he continued with his abduction, taking her to the secluded location a few miles away. Again, this kidnapping facilitated his murdering her, burying her body, covering the body in the grave, and disposing of the murder weapon.

[20] § 921.141(5)(d), Fla. Stat.

The evidence establishes beyond every reasonable doubt that Denise Lee was sexually battered and murdered while the defendant was engaged in the commission of the kidnapping.

The court finds this aggravating circumstance has been proven beyond a reasonable doubt. Since the felony-murder rule provides an alternative theory to first-degree murder by premeditation, this aggravator is given moderate weight.

MITIGATING FACTORS

The defendant has cited numerous mitigating circumstances, both statutory and non-statutory, and the court addresses each of them. The court is bound by the requirement that a sentencing court must expressly evaluate in its written order each mitigating circumstance, both statutory and non-statutory, proposed by the defendant to determine whether it is supported and established by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature.[21] This review and independent consideration must address each proposed mitigator separately. Each of the mitigating circumstances raised by the defendant is addressed below.

A. STATUTORY MITIGATING CIRCUMSTANCES

1. 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.[22]

The defense presented the testimony of Dr. Joseph C. Wu, M.D., the clinical director of the Brain Imaging Center, University of California-Irvine. Dr. Wu met with the defendant

[21] *See Campbell v. State*, 571 So. 2d 415 (Fla. 1990).
[22] *See* § 921.141(6)(f), Fla. Stat.

once and conducted a P.E.T. scan on him in August 2008 at the National P.E.T. Scan Center, in Pinellas County, Florida.

According to Dr. Wu, the defendant suffered a head injury at approximately age six from a snow sledding accident while living in Michigan with his family. He testified that as a result of the accident, the defendant suffered an injury to the frontal lobe of his brain. In his opinion, the P.E.T. scan results were compatible with significant brain injury. In Dr. Wu's opinion, the defendant's ability to conform his conduct to the requirements of the law was substantially impaired.

Dr. Wu based his opinion on facts received from the defendant's family, school records, the report of Dr. Visser, a psychologist who performed tests for verbal and performance I.Q. scores in June 2009, and the results of the P.E.T. scan. Significantly, however, there were no hospital or medical records from the accident for his review, and, other than the P.E.T. scan, Dr. Wu never personally performed any neuropsychological testing or evaluation of the defendant.

In rebuttal, the State presented the testimony of Dr. Gamache, a forensic psychologist. Dr. Gamache met with the defendant on two occasions (April 2, 2009 and August 31, 2009). Based upon the evaluations performed on the defendant, Dr. Gamache testified that, in his opinion, the capacity of the defendant to conform his conduct to the requirements of the law was not substantially impaired.

Although the expert witnesses disagree as to whether this statutory mitigating factor has been established, the court is reasonably convinced that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired. Due to the conflicting opinions of the expert witnesses for the defense and prosecution, the court gives this mitigating circumstance moderate weight.

2. **The age of the defendant at the time of the crime.**[23]

The defendant was born on May 4, 1971. These crimes occurred on January 17, 2008. At the time he committed the murder of Denise Lee, the defendant was thirty-six (36) years of age.

The court accepts this mitigating factor as established, but gives it little weight.

B. NON-STATUTORY MITIGATING CIRCUMSTANCES

Michael King suffered a head injury in 1978.

As found above, the evidence indicated that the defendant received a head injury from a snow sledding accident at the age of six years. This evidence was presented through the testimony of his family. However, no hospital or any medical records were presented to indicate the severity of the accident.

The court finds this mitigating factor has been established and gives it moderate weight.

The P.E.T. scan of Michael King's brain resulted in abnormal findings in the frontal lobe demonstrating a brain injury that causes bizarre behavior, paranoia, lack of impulse control, aggression, impaired cognition, and risk taking all of which may be episodic in nature.

Dr. Wu testified that as a result of the P.E.T. scan of Michael King, in his opinion, frontal lobe injury was sustained from the snow sledding accident. In his opinion, bizarre behavior, paranoia, lack of impulse control, aggression, impaired cognition, and risk-taking may occur as a result. He testified that any of these behaviors may occur but are not a "certainty" to occur.

[23] *See* § 921.141(6)(g), Fla. Stat.

Dr. Gamache disputed Dr. Wu's findings regarding the symptoms that may occur but did agree that difficulty in regulating impulse control, mood regulation, and impaired cognition may occur as a result of any frontal lobe damage.

The court finds this mitigating factor as established and gives it moderate weight.

Michael King has an I.Q. in the borderline range that is between mentally retarded and low average.

Dr. Visser, a licensed psychologist, performed I.Q. testing on the defendant in June 2009. He testified that a normal I.Q. range lies between 85 and 115, a low-average I.Q. range between 80 and 90, borderline range of intellectual functioning between 70 and 85, and mental retardation being below 70.

As a result of the I.Q. tests, the defendant's performance score was 85 and his verbal score was 71. Dr. Visser testified that the defendant's full-scale I.Q. score was 76, this being within the borderline range of intellectual functioning. Dr. Visser stated that he was aware of previous I.Q. scores of the defendant from the years 1984 and 1979. In 1984, at the age of 13 years, the defendant's full scale I.Q. score was 82. In 1979, at the age of 8 years, the defendant's full scale score was 85. These scores speak for themselves.

The court finds this mitigating factor as established. However, standing alone, and without real connection between this mitigator and the murder, the court accords this factor moderate weight.

Michael King had to repeat grades in school, and his formal education consisted of special education classes and classes for learning disabled students.

The court considers this mitigating factor to have been established and gives it little weight.

In December 2007 and January 2008, Michael King was depressed and despondent, and attempted to address several personal and financial setbacks that included but were not limited to his unemployment, his impending bankruptcy, the impending foreclosure on his home, his marriage having abruptly ended, and his girlfriend recently ending her relationship with him.

The defendant presented evidence related to this mitigator. Specifically, the evidence shows that in January 2008, the defendant was under considerable stress and had just returned to Florida from Michigan. The defendant left Florida for Michigan in November 2007 after he learned his house would be foreclosed upon, and his girlfriend broke up with him. While he was in Michigan, he tried to find employment, was depressed, and suffered from headaches. He left his son in Michigan, and returned to Florida four days before the murder in an attempt to find work. However, the evidence also shows that on January 17, 2008, the day of the murder, Tennille Camp, Robert Salvador, and Harold Muxlow all testified that he seemed normal.

As to the consideration of his marriage having abruptly ended, the records of his dissolution of marriage reveal that the marriage was dissolved on October 26, 2001, more than seven years before the murder.

Although the court finds this mitigating factor to have been established, it is given little weight.

Michael King has a history of non-violence.

The court finds this mitigating factor to have been established and accords it moderate weight.

Other factors

The court further finds that the following non-statutory mitigating factors have also been established and accords the weight to be given each mitigating factor as addressed below:

Michael King has been a cooperative inmate and has not received any disciplinary reports while he has been incarcerated in the Sarasota County Jail from January 17, 2008 until present. The court accords this factor some weight.

Michael King has never abused drugs or alcohol. The court accords this factor some weight.

Michael King has a thirteen year old son whom he helped raise and for whom he cares. The court accords this factor little weight.

Michael King is a good father. The court accords this factor little weight.

Michael King was a devoted boyfriend. The court accords this factor little weight.

Michael King was a good worker. The court accords this factor little weight.

Michael King has a close relationship with friends and family. The court accords this factor little weight.

CONCLUSION

The court has reviewed and weighed all of the aggravating and mitigating circumstances.. Having done so, the court finds that the aggravating circumstances substantially outweigh the mitigating circumstances for the murder of Denise Amber Lee.

Accordingly,

IT IS THE JUDGMENT OF THIS COURT:

1. For the crime of kidnapping, with the intent to commit or facilitate the commission of a felony, the defendant is sentenced to the maximum sentence of life imprisonment in the Florida Department of Corrections;

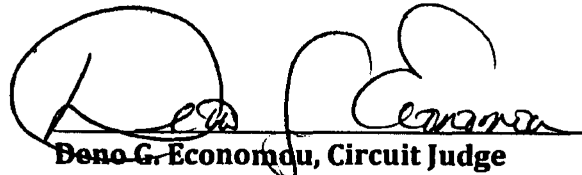
2. For the crime of sexual battery, by the threat to use force likely to cause serious personal injury, the defendant is sentenced to the maximum sentence of thirty years (30 years) in the Florida Department of Corrections;

3. For the murder of Denise Amber Lee, the defendant is sentenced to be put to death in the manner prescribed by law;

4. The sentences are to run concurrent with each other, and the defendant is entitled to credit for all time served.

IT IS FURTHER ORDERED that the defendant be transported to the Florida Department of Corrections to be securely held until this sentence of death is carried out as prescribed by law.

DONE AND ORDERED in Sarasota, Sarasota County, Florida, and this 4th day of December 2009.



Deno G. Economou, Circuit Judge

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