IN THE SUPREME COURT OF FLORIDA

CASE NOS.: SC14-1967 AND SC15-767

LANCELOT URILEY ARMSTRONG, APPELLANT

VS.

STATE OF FLORIDA, APPELLEE

LANCELOT URILEY ARMSTRONG, PETITIONER

VS.

JULIE L. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, RESPONDENT

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Lancelot Uriley Armstrong, will be noted as "Armstrong" and Florida, will be "State". Reference to the records will be:

Original direct appeal - "1994-ROA;"
First postconviction relief appeal "1-PCR;"
Re-sentencing direct appeal - "RS-ROA;" and
Postconviction appellate record - "2-PCR"
Supplemental records will be identified with an "S"

STATEMENT OF THE CASE AND FACTS

The State will rely on its Statement of the Case and Facts included with its Answer Brief and reiterates the following. Armstrong was convicted of first-degree murder of Sheriff Deputy John Greeney, attempted first-degree murder of Deputy Robert Sallustio, and armed robbery. (RS-ROA.1 1-2). Armstrong's convictions and death sentence were affirmed. *Armstrong v. State*, 642 So.2d 730 (Fla. 1994), however, following his postconviction litigation, he was granted a new sentencing. *Armstrong v. State*, 862 So.2d 705, 715 (Fla. 2003).

On resentencing, his jury recommended death and the judge imposed a death sentence based on three aggravators,[1] no statutory mitigators, and five non-statutory mitigators. (RS-ROA.2 448; RS-ROA.5 758-95). *Armstrong v. State*, 73 So.3d 155 (Fla. 2011), *cert. denied*, 132 S.Ct. 2741 (June 11, 2012).

Armstrong's postconviction appeal and habeas petition are

[1] Prior violent felony, during the course of a felony, and Victim was a law enforcement officer.

pending following the November 3, 2015, oral argument. On January 12, 2016, the United States Supreme Court issued *Hurst v. Florida*, 136 S.Ct. 616 (2016) and this Court granted the request for supplemental briefing.

SUMMARY OF THE ARGUMENT

Supplemental Issue I - Armstrong is not entitled to relief under *Hurst* as it is not retroactive under *Witt v. State*, 387 So.2d 922, 925 (1980), the constitutional infirmity is not structural, and he has prior and contemporaneous felony convictions which had rendered him death eligible and his sentencing proper under *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Ring v. Arizona*, 536 U.S. 584, 598 n.4 (2002); *Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (2013).

ARGUMENT

SUPPLEMENTAL ISSUE I

HURST IS NOT RETROACTIVE AND THE PRIOR VIOLENT FELONY AND DURING THE COURSE OF A FELONY AGGRAVATORS WERE FOUND RENDERING ARMSTRONG'S SENTENCING CONSTITUTIONALLY PROPER (restated)

Armstrong asserts *Hurst* rendered Florida's capital sentencing unconstitutional his sentence violates Hurst as his jury did not make the necessary findings. He also claims *Hurst* is retroactive under *Witt v. State*, 387 So.2d 922, 925 (1980), that retroactive application and the imposition of a life sentence is required under *Furman v. Georgia*, 408 U.S. 238

(1972) and §775.082(2), Fla. Stat. He claims the aggravators found cannot save the death sentence. The State disagrees.

A. STANDARD OF REVIEW - The standard of review for a purely legal claim raising a Sixth Amendment claim is *de novo*. *Cf. Plott v. State*, 148 So. 3d 90, 93 (Fla. 2014)

B. HURST IS NOT RETROACTIVE – *Hurst* is based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) where the Supreme Court held a defendant is entitled to a jury determination of any fact designed to increase the maximum punishment allowed by a statute. *Id.* In *Ring v. Arizona*, 536 U.S. 584 (2002), the Court extended *Apprendi* to capital cases. In *Hurst*, the Court stated: "Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts necessary to sentence a defendant to death." *Hurst*, 136 S.Ct. at 621. "Specifically, a judge could sentence [defendant] to death only after independently finding at least one aggravating circumstance." *Id.* Because it was a judge, not jury, who did fact-finding to enhance the penalty, Ring's death sentence "violated his right to have a jury find the facts behind his punishment." *Id.* The Supreme Court found a Florida capital jury's role was viewed as advisory and held Florida's capital sentencing structure violated *Ring* as it required a judge to conduct the fact-finding necessary to enhance the sentence by alone finding "the existence of an aggravating circumstance".

Hurst, 136 S.Ct. at 620-21. In so doing, it overruled *Spaziano v. Florida,* 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989). *Hurst*, 136 S.Ct. at 624.

When a constitutional rule is announced, its requirements apply to those cases on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). Once a case is final, application of a new rule of constitutional criminal procedure is limited.[2] Such new rules will apply retroactively only if they fit within one of two narrow exceptions.[3] *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). The Supreme Court determined *Ring* was not retroactive as it was a procedural, not a substantive change; *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." *Summerlin*, 542 U.S. at 349, 352-53.

> The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce

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[2] Armstrong raised *Ring* claims on direct appeal and in his state habeas. This renders the claim procedurally barred. *Rodriguez v. State*, 919 So.2d 1252, 1281 n.16 (Fla. 2005); *Hardwick v. Dugger*, 648 So.2d 100, 105 (Fla. 1994). While *Hurst* is constitutional in nature, it is not retroactive and cannot revive barred claims.

[3] Those are: (1) 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) procedural rule constituting a watershed rule of criminal procedure implicating fundamental fairness and accuracy of criminal proceedings. *Teague v. Lane*, 498 U.S. 288, 310–13 (1989).

> the Sixth Amendment's guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.

Summerlin, 542 U.S. at 358.[4] *Ring* did not create a new right. That right was created by the Sixth Amendment guaranteeing the right to a jury trial.[5] *Ring* merely created a new procedural rule. Under *Teague*, a new rule generally applies only to cases on direct review. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (*Crawford v. Washington*, 541 U.S. 36 (2004) not retroactive).

Given *Ring* is not retroactive, it follows *Hurst* cannot be

[4] There can be no question Florida relied in good faith upon prior decisions of this Court and the Supreme Court which upheld Florida's capital sentencing. *See Rigterink v. State*, 66 So.3d 866, 895-96 (Fla. 2011) (noting rejection of *Ring* claim in more than 50 cases). Since *Ring*, some 14 years passed without the Supreme Court accepting a case, until *Hurst*, challenging Florida's capital sentencing statute under *Ring*. While the Supreme Court ultimately expanded *Ring* to invalidate Florida's capital sentencing procedure, there were significant differences between the Arizona and Florida statutes that rendered such an expansion far less than certain/inevitable. *See Hurst*, 136 S.Ct. at 625 (Alito, Justice, dissenting) (observing unlike Arizona, in Florida "the jury plays a critically important role" and the Court's "decision in *Ring* did not decide whether this procedure violate[d] the Sixth Amendment").

[5] The right to a jury trial was extended to the States in *Duncan v. Louisiana*, 391 U.S. 145 (1968) and the Court declined to find retroactivity. *DeStefano v. Woods*, 392 U.S. 631 (1968) *Apprendi,* 530 U.S. at 494 merely extended the right to the sentencing phases when an increase in possible punishment was sought.

retroactive[6] as it is not only an expansion of *Ring* to Florida, but in deciding *Hurst*, the Supreme Court overruled decades old precedent (*Spaziano* and *Hildwin*) which had found Florida's capital sentencing constitutional. *Hurst*, 136 S.Ct. at 623-24. Like *Ring*, *Hurst* is a new procedural rule, not dictated by *Ring* as prior Supreme Court precedent was overruled. *Bockting*, provides *Crawford* was a new rule because it was not "dictated" by prior precedent, but overruled *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The announcement of a new rule, where prior precedent is overruled, runs from the date of the new case; here, from January 12, 2016 for *Hurst*. *Hurst* will not apply to any case final before January 12, 2016. Armstrong's case was final on June 11, 2012, with the denial of certiorari. *Armstrong*, 132 S.Ct. at 2741.

In *Johnson v. State*, 904 So.2d 400, 411-12 (Fla. 2005) this Court decided *Ring* was not retroactively under *Witt v. State*, 387 So.2d 922 (Fla. 1980)[7] specifically noting the severe and

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[6] *Hurst* is based on an entire line of jurisprudence, none of which has been held retroactive. *See DeStefano,* 392 U.S. at 631; *McCoy v. United States*, 266 F.3d 1245, 1255-59 (11th Cir. 2001) (*Apprendi* not retroactive); *Varela v. United States*, 400 F.3d 864, 866-67 (11th Cir. 2005) (explaining decisions such as *Ring*, *Blakely*, and *Booker* applying *Apprendi*'s "prototypical procedural rule" are not retroactive); *Crayton v. United States*, 799 F.3d 623, 624-25 (7th Cir. 2015) *cert. denied*, 136 S. Ct. 424 (2015) (*Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013), which extended *Apprendi* did not apply retroactively).

[7] In *Witt*, this Court explained that a new rule of constitutional procedure will not apply to final convictions unless the change:

unsettling impact retroactive application would have on our justice system with nearly 400 death sentenced inmates:

> …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…

The Arizona Supreme Court reached the same conclusion after *Ring*. *See State v. Towery*, 204 Ariz. 386, 393-94, 64 P.3d 828, 835-36 (2003) ("[c]onducting 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 duty to protect victims' rights under State Constitution).

Armstrong claims it would be unfair not to give *Hurst*[8]

"(a) Emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Witt*, 387 So.2d at 931. The opinion notes that a "development of fundamental significance" falls within two categories, either "changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" or "those changes of law which are of sufficient magnitude to necessitate retroactive application. ..." *Id*. at 929.

[8] Hurst obtained a retrial of his 1998 conviction due to ineffective assistance of counsel, and thus, benefits from the

retroactive application and points to *Roy v. Wainwright*, 151 So.2d 825, 826 (Fla. 1963) and *Falcon v. State*, 162 So.3d 954 (Fla. 2015). However, they do not further his position. While *Roy* was addressing *Gideon v. Wainwright*, 372 U.S. 335 (1963), it does not mandate retroactive application here. *Gideon*,[9] is one of the few examples of a "watershed" procedural rule under the Sixth Amendment supporting retroactive application. Such is not the case with Hurst as both *Apprendi* and *Ring* have been determined not to be retroactive. *Falcon*, unlike *Hurst*, is addressed to the Eighth Amendment, not a Sixth Amendment procedural issue. *Falcon* is on a different footing than *Hurst* and its procedural rule. The fact one constitutional announcement is retroactive and another is not, does not render

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expansion of *Ring* whereas Armstrong's resentencing was final some four years before *Hurst*.

[9] Fundamental fairness is not implicated as one can envision a system of "ordered liberty" where elements of a crime are proven to a judge, not to the jury. *United States v. Shunk,* 113 F.3d 31, 37 (5th Cir. 1997). An example of a new "watershed" procedural rule is the right to counsel established in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). *See Saffle v. Parks*, 494 U.S. 484, 495 (1990)(*Gideon* is retroactive; it seriously increases accuracy of conviction). The exception to nonretroactivity for procedural rules is limited to a small core of rules which seriously enhance accuracy. *Graham v. Collins*, 506 U.S. 461, 478 (1993). A trial conducted with a procedural error "may still be accurate" and for that 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;" generally, procedural rules are not retroactive. *Montgomery v. Louisiana*, 136 S.Ct. 718, 730 (2016).

the decision unfair, but balances the need for finality[10] This Court's analysis in *Johnson* is on point and it dealt with the Sixth Amendment jury trial right and *Ring*, not the Eighth Amendment, as in *Falcon*. *Johnson* controls and Armstrong offers no compelling justification for revisiting *Johnson*. Assuming, a new *Witt* analysis would be appropriate, all of the same factors apply with equal force to hold *Hurst* not retroactive. Such an application would be highly deleterious to finality and unsettle reasonable expectations for justice by Florida citizens and victims' families.

In *Butterworth v. United States*, 775 F.3d 459, 467-68 (1st Cir. 2015), *cert. denied*, 135 S. Ct. 1517 (2015), the Court rejected an attempt to justify retroactive application of *Alleyne v. United States*, 133 S.Ct. 2151 (2013) based on *Apprendi* hindsight noting neither the Supreme Court, nor any other federal court, had found a new procedural rule not

[10] As noted in *Calderon v. Thompson*, 523 U.S. 538, 556 (1998):

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

retroactive under the watershed exception only later to change its mind after "the law's intervening evolution." There is no reason for this Court to depart from its prior determination *Ring* is not retroactive. Such a departure would represent a clear break from precedent. *See Chandler v. Crosby*, 916 So.2d 728 (Fla. 2005) (*Witt* weighs against retroactive application of *Crawford* and noting "new rule does not present a more compelling objective that outweighs the importance of finality."); *Hughes v. State*, 901 So.2d 837, 838 (Fla. 2005) (*Apprendi* not retroactive); *State v. Statewright*, 300 So.2d 674 (Fla. 1974) (*Miranda v. Arizona*, 384 U.S. 436 (1966) not retroactive).

Hurst does not provide for retroactive application.[11] This is noteworthy given *Teague's* stance that "'whether a decision [announcing new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision'" and a general acceptance that "...new rules generally should not be applied retroactively to cases on collateral review." *Teague*, 498 U.S. at 300-05. Given that the Supreme Court and this Court have held *Ring* is not retroactive, *Hurst* is not retroactive.

C. §775.082(2), FLA. STAT. IS NOT IMPLICATED - Armstrong

[11] Following oral arguments in *Hurst*, the Court denied a stay of execution in *Jerry Correll v. Florida*, 2015 WL 6111441 (Oct. 29, 2015). Correll had applied for the stay based on the pending decision in *Hurst;* yet in an 8 – 1 vote the Court denied the stay. It may be assumed the Court would have granted a stay if it had intended a retroactive application of *Hurst*.

suggests §775.082(2) requires he receive a life sentence given *Hurst*. Below, Armstrong had relied on *Donaldson v. Sack*, 265 So.2d 499 (Fla. 1972), to argue for a life sentence (Brief at 3). Neither *Donaldson* nor §775.082(2) are implicated by *Hurst* as *Hurst* did not find "capital punishment" unconstitutional; it only invalidated procedure[12] thus, §775.082(2) does not apply.[13]

Donaldson is not a statutory construction case, but one of jurisdiction.[14] The focus/impact of *Donaldson* was on cases which

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[12] Reading *Hurst* as only requiring jury factfinding as to death eligibility, but not sentence selection is consistent with prior Supreme Court cases, as well as *Kansas v. Carr*, 136 S.Ct. 633 (2016), decided a week after *Hurst*. In *Hurst*, the Court acknowledged *Apprendi*, and *Ring*, concerned the factual findings necessary to make a defendant eligible for a sentence greater than that authorized by the jury's verdict. *See Alleyne v. United States*, 133 S.Ct. 2151, 2155-61 n.2 (2013) (applying *Apprendi;* "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...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."); *United States v. O'Brien*, 560 U.S. 218, 224 (2010) (*Apprendi* does not apply to sentencing factors that merely guide sentencing discretion without increasing punishment range).

[13] That section provides life sentences are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional," as enacted following *Furman*, to protect society in the event capital punishment as a whole were deemed unconstitutional. *Coker v. Georgia*, 433 U.S. 584 (1977)

[14] Based on the 1972 Florida constitution, *Donaldson* held circuit courts no longer had jurisdiction over capital cases as there was no longer a valid; no capital cases existed, as the definition of capital referred to those cases where capital

were ***pending for prosecution*** when *Furman* issued, not pipeline cases pending on direct appeal, or those already final. This Court's determination to remand all pending death cases for imposition of life sentences was discussed in *Anderson v. State*, 267 So.2d 8 (Fla. 1972) where it explained the Attorney General had moved to relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position those death sentences were illegal. This Court did not elucidate why commutation of 40 sentences was required, but it is interesting this predated *Teague, Witt*, and there rules for retroactivity. Other differences between *Furman* and *Hurst* bode against blanket commutation of death sentences to life including that *Furman* was a decision invalidating ***all*** death sentences while *Hurst* is a specific ruling extending Sixth Amendment protections first noted in *Ring* to Florida cases and remanding for harmless error. It is telling *Hurst* does not disturb *Proffitt v. Florida*, 428 U.S. 242 (1976), only explicitly overruling *Spaziano* and *Hildwin*, "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of the jury's factfinding, that is necessary for imposition of the death penalty."

Armstrong reads *Hurst* too broadly when equating it with

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punishment was an optional penalty. *This Court* observed the new statute (§775.082(2)) was conditioned on invalidation of the death penalty, but clarified, "[t]his provision is not before us for review and we touch on it only because of its materiality in considering the entire matter." *Donaldson*, 265 So. 2d at 505.

Furman. Unlike Armstrong's situation, Hurst did not have a prior or contemporaneous conviction. After *Furman*, no existing capital cases remained intact. Yet after *Hurst*, the Supreme Court denied certiorari on two direct appeal decisions[15] leaving intact this Court's denial of Sixth Amendment error. *Hurst* provides no express reason to disturb sentencs supported by a prior violent or contemporaneous felony conviction.

D. EVEN IF *HURST* WERE TO APPLY, ANY ERROR IS HARMLESS – Hurst and Armstrong are in distinctly different postures; Hurst does not have a prior violent or contemporaneous conviction.[16] This Court has been consistent in finding deficient jury fact finding, under the Sixth Amendment, can be and often is harmless.[17] *Galindez v. State*, 955 So. 2d 517, 521-23 (Fla.

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[15] Both were supported by prior violent felony convictions. *Fletcher v. State*, 168 So.3d 186 (Fla. 2015), *cert. denied*, 2016 WL 280859 (Jan. 25, 2016); *Smith v. State*, 170 So.3d 745 (Fla. 2015), *cert. denied*, 2016 WL 280862 (Jan. 25, 2016). In *Carr*, 136 S.Ct. at 647-49, the Court discussed the distinct factors of eligibility and selection under capital sentencing. It found an eligibility determination was limited to findings related to aggravators. Those of mitigation and weighing were selection determinations, noting such were not factual findings, but were "judgment call[s]" and "question[s] of mercy." *Id*.

[16] *Hurst v. State*, 147 So.3d 435, 440–41 (Fla. 2014). Hurst presented the Court with a pure *Ring* claim; one not supported by a unanimous recommendation or an enumerated aggravator arising from a jury verdict. *Hurst*, 147 So.3d at 445–47.

[17] *Hurst* did not find structural error, but permited application of harmless error. In *Neder v. U.S.*, 527 U.S. 1 (1999), the Court rejected the argument that a conviction returned after one element of the offense mistakenly was not submitted to the jury presented a structural error case. *Neder* explains why reliance on *Sullivan v. Louisiana*, 508 U.S. 275 (1993), is misplaced.

2007); *Johnson v. State*, 994 So.2d 960, 964-65 (Fla. 2008). *Hurst* does not hold there is a constitutional right to jury sentencing. In Florida, a defendant is death eligible if at least one aggravating factor applies.[18] Here, Armstrong was convicted of a prior armed robbery as well as the contemporaneous convictions of attempted first-degree murder of Deputy Sallustio and based on these convictions, he was eligible for a death sentence and the penalty phase jury recommended

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Although *Sullivan* found constitutional error which prevented a jury from returning a "complete verdict" could not be harmless, it reviewed *Neder* and determined reversal was not required where evidence of the omitted element was overwhelming and uncontested. *Neder*, 527 U.S. at 19. The determination that deficient Sixth Amendment factfinding can be harmless is set by *Washington v. Recuenco*, 548 U.S. 212 (2006), where the Supreme Court reversed the state holding *Blakely v. Washington*, 542 U.S. 296 (2004) error, was structural and could never be harmless.

[18] In Florida, eligibility is determined by the existence of at least one aggravating factor. *State v. Steele*, 921 So. 2d 538, 543 (Fla. 2005) ("[t]o obtain a death sentence, the State must prove beyond a reasonable doubt at least one aggravating circumstance"); *Zommer v. State*, 31 So.3d 733, 754 (Fla. 2010)(*State v. Dixon*, 283 So.2d 1 (Fla. 1973), held "sufficient aggravating circumstances" to mean one or more such circumstance); *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994) ("[t]o 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") citing *Lowenfield v. Phelps*, 484 U.S. 231, 244-246 (1988). Presumptively, death is the appropriate sentence. *Dixon*, 283 So.2d at 9. As eligibility is a matter of state law, this Court's determination controls. *Ring*, 536 U.S. at 603 (noting Arizona construction of its law is authoritative). The suggestion *Hurst* requires juries to find there are sufficient aggravators to outweigh mitigators is without merit. *Hurst* specifies constitutional error occurs when a judge alone finds the existence of an aggravator. *Hurst*, 136 S.Ct. at 624.

death. Armstrong's eligibility for a death sentence, unlike Hurst's, is supported by unanimous jury findings.

This Court has upheld death sentences where a prior violent or contemporaneous felony exists. *Jones v. State*, 855 So.2d 611, 619 (Fla. 2003). The *Hurst* remand permitted a harmless error analysis, thus, this Court should follow those cases where such aggravators were proven. Any argument that a jury must find every aggravator is without merit. Once the jury found one aggravator, Armstrong became death eligible. *Alleyne,* 133 S.Ct. at 2162-63 ("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." Only one aggravator is necessary to support a death penalty; finding others does not expose defendants to higher penalties.

The Supreme Court recognized the critical distinction of an enhanced sentence supported by a prior conviction in *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; *Alleyne*, 133 S.Ct. at 2160 n.1. *Hurst* did not disturb settled precedent that a *Ring* claim is harmless in the face of a qualifying felony conviction.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of postconviction relief sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished by electronic mail through the e-portal to: Rachel L. Day, Esq., at dayr@ccsr.state.fl.us and Nicole M. Noel, Esq. at noeln@ccsr.state.fl.us on March 11, 2016.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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