IN THE SUPREME COURT OF FLORIDA

CHARLES GROVER BRANT,

Appellant,

v. **Case No. SC14-787**
L.T. No. 04-CF-12631
STATE OF FLORIDA, **DEATH PENALTY CASE**

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

CHRISTINA ZUCCARO
Florida Bar No. 71300
Office of the Attorney General
3507 E. Frontage Rd., Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com [*and*]
christina.zuccaro@myfloridalegal.com

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State reiterates and incorporates its Statement of the Case and Facts from the Answer Brief, with the following additions pertinent to the issue on which this Court ordered supplemental briefing.

Brant knowingly and intelligently entered into an open guilty plea to first-degree murder as well as sexual battery, kidnapping, grand theft, and burglary with assault or battery. *Brant v. State*, 21 So. 3d 1276, 1288-89 (Fla. 2009). Brant then waived his right to a penalty-phase jury. The trial court engaged in a lengthy colloquy with Brant in which it explained what the waiver meant and it also confirmed that it was Brant's intention to waive his penalty phase jury. (DAR V7/5-15). The trial court accepted Brant's waiver, and conducted a penalty phase hearing.

The court ultimately sentenced Brant to death. In doing so, it gave "great weight" to the aggravating factors that the capital felony was especially heinous, atrocious, cruel (HAC), and the capital felony was committed during the course of a sexual battery. The court considered and weighed both statutory and non-statutory mitigation, according either "little weight" or "moderate weight" to all the mitigation presented. In addition to sentencing Brant to death for first-degree murder,

the court also imposed concurrent life sentences for sexual battery, kidnapping, and burglary of a dwelling with assault or battery, as well as a five-year sentence for grand theft of a motor vehicle. (DAR V5/701-741).

This Court affirmed Brant's conviction and sentence on direct appeal. Appellant's case is currently pending before this Court following the lower court's order denying postconviction relief. Briefing was completed and oral arguments were conducted on September 3, 2015. This supplemental answer brief is being filed pursuant to this Court's order dated February 15, 2016.

SUMMARY OF THE ARGUMENT

Hurst v. Florida, 136 S. Ct. 616 (2016) is not retroactive and has no application to this postconviction case, especially given Brant's waiver of a jury recommendation. In addition, Brant was eligible for a death sentence due to his contemporaneous felony convictions. Brant knowingly and intelligently pleaded guilty to sexual battery, kidnapping, and burglary with assault or battery, and the sexual battery conviction was used as an aggravating factor in support of Brant's death sentence. Even if *Hurst* were applicable to Brant's case, any *Hurst* error would be harmless under the facts of this case.

ARGUMENT

SUPPLEMENTAL BRIEFING ISSUE

APPELLANT'S CLAIM THAT HE IS ENTITLED TO RELIEF BASED ON *HURST V. FLORIDA*, ___ U.S. ____, 136 S. Ct. 616 (2016), IS WITHOUT MERIT. *HURST* HAS NO APPLICATION TO THIS CASE BECAUSE BRANT WAIVED THE JURY PENALTY PHASE.

In his supplemental brief, Brant asserts that *Hurst v. Florida*, 136 S. Ct. 616 (2016), entitles him to a life sentence or a resentencing. Brant's contentions are incorrect and without merit for numerous reasons.

First, Brant waived his right to a jury recommendation. In *Hurst*, the Court held that Florida's capital sentencing statute was unconstitutional in light of *Ring v. Arizona*, 536 U.S. 584 (2002), because it required the judge to conduct the fact-finding necessary to enhance a defendant's sentence. *Hurst*, 136 S. Ct. at 621-22. In doing so, it recognized that *Ring* had arisen from its prior decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Id.* at 621. The Court acknowledged that its holding in *Apprendi* was based on a determination that "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Hurst*, 136 S. Ct. at 621 (quoting *Apprendi*, 530 U.S. at 591). Brant's case does not implicate any

such concerns about the jury's verdict, because Brant waived his penalty phase jury.

In *Bryant v. State*, 901 So. 2d 810, 822 (Fla. 2005), the defendant argued that his sentence and conviction were unconstitutional under *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002), and he was entitled to a new penalty phase in order for the jury to determine whether aggravating factors exist. The lower court found this claim to be legally insufficient because Bryant had waived his penalty phase jury, and this Court agreed with the lower court's ruling. *Id.* As this Court pointed out, Bryant could not make a *Ring* challenge when he knowingly, intelligently, and voluntarily waived his penalty phase jury. *Id*.

Here, like Bryant, Brant also knowingly, intelligently, and voluntarily waived the penalty phase jury. After the court adjudicated Brant guilty of all counts charged in the indictment, Brant advised the trial court that he wished to waive his right to a penalty phase jury advisory sentence. (DAR V7/2, 8). The attorneys had already begun jury selection; however, Brant decided that he wanted to proceed before the judge. (DAR V7/2-8). The trial court thoroughly explained Brant's rights to him and inquired to be certain that Brant's

waiver was knowing and voluntary. The court explained, in relevant part:

> [A]s you saw in the last two days the efforts that everybody went through to try to seat a jury of 12 people to hear evidence in aggravation that the State would present and evidence in mitigation that your lawyers would present.
>
> And as I know, your lawyers have told you under the law, what would happen if those 12 jurors after they hear that evidence would get some instructions from [sic] me. Then they'd go back and deliberate then they would come back with some recommendation.
>
> […]
>
> So as a practical matter, if that jury recommended life rather than death, I mean, it's highly, highly remote that this Court would or could impose a death sentence. And it's highly likely that if I were to do so, that that sentence would be reversed on appeal if I impose the death sentences.
>
> But if we do impanel a jury, as you heard me say many times yesterday to the panel, if they gave – if they came back with a recommendation of death, then it would fall upon me to really reweigh and reconsider all the evidence, that is, the aggravation and mitigation.
>
> And one of the factors I'd have to consider is their recommendation that is the jury's recommendation. And the law provides that I would have to give that great weight. And of course, I would. […]
>
> Now, your lawyers I know told you, and the statute provides that at this stage of the proceedings, if you want it, I must impose a jury to hear all what I just described. […]
>
> Now your lawyers tell me that last night your feeling was that you wanted a jury, but just this morning I think now you've told them you've changed your mind

> and you want to do it without a jury. Can you tell me in your own words that it is what you want to do, how you want to proceed from this
>
> THE DEFENDANT: I want your recommendation.
>
> THE COURT: I'm sorry?
>
> THE DEFENDANT: I just – I don't want a jury.
>
> THE COURT: You do not want a jury? You're absolutely certain of that?
>
> THE DEFENDANT: Yes.

(DAR V7/5-8).

Brant again affirmed that he was absolutely certain of his decision. (DAR V7/13). He did not have any questions for the judge, his lawyers or the prosecutor. (DAR V7/13). Brant's counsel informed the court that he did not have any doubt that Brant was capable and competent to make the decision to waive the jury. (DAR V7/10). The court continued a lengthy colloquy with Brant in order to determine whether he freely, voluntarily, and knowingly waived the jury penalty phase, and the court ultimately accepted Brant's waiver. (DAR V7/10-15).

Given Brant's knowing and intelligent waiver of the jury penalty phase, he cannot now legitimately claim that his Sixth Amendment rights were violated pursuant to *Hurst*. *See Bryant*, 901 So. 2d at 822; *Lynch v. State*, 841 So. 2d 362, 366 n. 1 (Fla. 2003) (explaining that the defendant could not present a

claim attacking the constitutionality of Florida's death penalty scheme under *Ring* when he requested, and was granted, a penalty phase without a jury); *see also Missouri v. Nunley*, 341 S.W.3d 611, 620-21 (Mo. 2011) (defendant's Sixth Amendment right to have a jury find an aggravating circumstance not violated when he waived jury sentencing) (and cases cited therein). Accordingly, *Hurst* does not apply to his case.

Even if Brant had not waived his penalty phase jury, he still would not be entitled to a life sentence under the *Hurst* decision. *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) of Florida Statutes does not apply. 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 Brant 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), Brant 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 that the new statute (§ 775.082(2)) was conditioned on the invalidation of the death penalty, but clarifies, "[t]his provision is not before us for review and we touch on it only because of its materiality in considering the entire matter." *Id.* at 505.

The focus and primary impact of the *Donaldson* decision was on those cases which were pending for prosecution at the time *Furman* was released. *Donaldson* does not purport to resolve issues with regard to pipeline cases pending before the Court on appeal, or to cases that were already final at the time *Furman* was decided. This Court's determination to remand all pending

death penalty cases for imposition of life sentences in light of *Furman* is discussed in *Anderson v. State*, 267 So. 2d 8 (Fla. 1972), a case which explains that, following *Furman*, the Attorney General filed a motion requesting that this Court relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position that the death sentences that were imposed were illegal sentences. There is no legal reasoning or analysis to explain why commutation of 40 sentences was required, but it is interesting to observe that this was before the time that either this Court or the United States Supreme Court had determined the current rules for retroactivity, such as *Teague v. Lane*, 489 U.S. 288 (1989), and *Witt v. State*, 387 So. 2d 922 (Fla. 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. *Furman* was a decision that invalidated all death penalty statutes in the country, with the United States Supreme Court offering nine separate opinions that left many courts "not yet certain what rule of law, if any, was announced." *Donaldson*, 265 So. 2d at 506 (Roberts, C.J., concurring specially). The *Furman* Court held that the death penalty, as imposed for murder and for rape, constituted cruel and unusual punishment in violation of the

Eighth and Fourteenth Amendments to the United States Constitution. The various separate opinions provided little guidance on what procedures might be necessary in order to satisfy the constitutional issues, and whether a constitutional scheme would be possible. The situation following *Furman* simply has no application to the limited procedural ruling issued by the Supreme Court in *Hurst*.

Moreover, *Hurst* is not retroactive. Brant's case was final on December 4, 2009. Brant was tried, convicted, and sentenced in accordance with Florida law and federal law at the time of his trial, and he is not entitled to any relief. *Hurst* can have no application to this case until and unless either this Court or the Supreme Court determines that it should apply retroactively.

When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. The Supreme Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004).

In *Summerlin*, the Supreme Court directly addressed whether its decision in *Ring* was retroactive. *Id.* at 349. The Court held the decision in *Ring* was procedural and non-retroactive. *Id.* at 353. This was because *Ring* only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." *Id.* The Court concluded its opinion stating: "The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Summerlin*, 542 U.S. at 358; *see also Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (holding *Crawford v. Washington*, 541 U.S. 36 (2004) was not retroactive and relying extensively on the analysis of *Summerlin*).

Ring did not create a new constitutional right. That right was created by the Sixth Amendment guaranteeing the right to a

jury trial. If *Ring* was not retroactive, then *Hurst* cannot be retroactive as *Hurst* is merely an application of *Ring* to Florida. In fact, the decision in *Hurst* is based on an entire line of jurisprudence which courts have almost universally held to not have retroactive application. *See DeStefano v. Woods*, 392 U.S. 631 (1968) (holding the Court's decision in *Duncan v. Louisiana*, which guaranteed the right to a jury trial to the States was not retroactive); *McCoy v. United States*, 266 F.3d 1245, 1255, 1259 (11th Cir. 2001) (holding *Apprendi* not retroactive under *Teague*, and acknowledging that every federal circuit to consider the issue reached the same conclusion); *Varela v. United States*, 400 F.3d 864, 866–67 (11th Cir. 2005) (explaining that Supreme Court decisions, such as *Ring*, *Blakely*, and *Booker*, applying *Apprendi's* "prototypical procedural rule" in various contexts are not retroactive); *Crayton v. United States*, 799 F.3d 623, 624-25 (7th Cir. 2015) (holding that *Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013), which extended *Apprendi* from maximum to minimum sentences, did not, like *Apprendi* or *Ring*, apply retroactively); *State v. Johnson*, 122 So. 3d 856, 865-66 (Fla. 2013) (holding *Blakely* not retroactive in Florida).

Significantly, this Court has already decided that *Ring* does not apply retroactively in Florida. In *Johnson v. State*,

904 So. 2d 400, 412 (Fla. 2005), this Court comprehensively applied the *Witt* factors to determine that *Ring* was not subject to retroactive application. This Court concluded:

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

Id. 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. Appellant's invitation for this Court to revisit this Court's *Johnson* decision is unpersuasive. He asserts that the decision need not be disruptive as this Court can simply reduce the nearly 400 death sentences to life in prison. However, there is no support for this novel proposition. Neither the federal nor Florida constitutions justify or authorize this Court to take such action. And, such a decision ignores the considerable interests of the citizens of this State

and, in particular, victims' family members upon whom the emotional toll of such an action cannot be measured.

State and federal courts have uniformly held that *Ring* is not retroactive. *See State v. Towery, 204 Ariz.* 386, 393-94, 64 P.3d 828, 835-36 (Ariz. 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 inconsistent 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 (Idaho 2010) (holding that *Ring* is not retroactive after conducting its own independent *Teague* analysis and observing, as the Supreme Court did in *Summerlin*, that there is debate as to whether juries or judges are the better fact-finders and that it could not say "confidently" that judicial fact-finding "seriously diminishes accuracy."); *Colwell v. State*, 118 Nev. 807, 821-22, 59 P.3d 463, 473 (Nev. 2002) (applying *Teague* to find that *Ring* announced a new procedural rule that would not be subject to retroactive application).

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.

There can be no credible argument that Florida failed to apply *Ring* in bad faith. The State certainly relied in good faith upon prior decisions of this Court and prior decisions of the Supreme Court which had upheld Florida's capital sentencing statute. *See Rigterink v. State*, 66 So. 3d 866, 895-96 (Fla. 2011) (noting that "[i]n over fifty cases since *Ring's* release, this Court has rejected similar *Ring* claims."). Indeed, since *Ring* was decided, more than a decade passed without the Supreme Court accepting a case challenging Florida's capital sentencing statute in light of *Ring*, until *Hurst*. While the Supreme Court ultimately extended *Ring* to invalidate Florida's capital sentencing procedure, there were significant differences between the Arizona and Florida statutes that rendered such an extension far less than certain or inevitable. *See Hurst*, 136 S. Ct. at 624-26 (Alito, Justice, dissenting) (observing that unlike Arizona, "[u]nder the Florida system, the jury plays a critically important role and that the Court's "decision in *Ring* did not decide whether this procedure violate[d] the Sixth Amendment . . .").

In *Butterworth v. United States*, 775 F.3d 459, 467-68 (1st Cir. 2015), the First Circuit Court of Appeals rejected a defendant's attempt to justify retroactive application of *Alleyne v. United States*, 133 S. Ct. 2151 (2013) [holding that facts justifying minimum mandatory sentence must be found by a jury] based upon *Apprendi* hindsight:

> This twist on Butterworth's argument is unpersuasive. We are unaware of any instance in which the Supreme Court (or any federal court) decided that a particular procedural protection is not retroactively applicable under the watershed exception, and then changed its mind years later due to the law's intervening evolution. It is not difficult to imagine why that is so: Judicial interpretation of the Constitution, by its nature, builds on itself. The exercise of seeking out the first domino to fall, in hindsight, would make the retroactivity determination of any given new rule interminable. So the fact that *Apprendi* was cited by subsequent cases extending the jury trial guarantee and heightened burden of proof to mandatory state sentencing guidelines, *Blakely v. Washington*, 542 U.S. 296, 303 (2004), federal sentencing guidelines, *Booker*, 543 U.S. at 244–45, and the death penalty, *Ring v. Arizona*, 536 U.S. 584, 589 (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*, 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. (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.

Butterworth v. United States, 775 F.3d 459, 467-468 (1st Cir. 2015)

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. 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* is not retroactive); *State v. Statewright*, 300 So. 2d 674 (Fla. 1974) (declining to retroactively apply *Miranda v. Arizona*, 384 U.S. 436 (1966)).

Furthermore, this Court's decision in *Falcon v. State*, 162 So. 3d 954, 961 (Fla. 2015), provides no support for retroactive

application in this case. In *Falcon*, this Court held that the Supreme Court in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), announced a new substantive rule to bar mandatory life sentences without the possibility of parole for all juveniles. This Court had little difficulty determining that such a decision effectively places beyond the power of the State to punish certain offenders. Subsequently, the Supreme Court decided that *Miller* announced a new substantive rule that was retroactive. The fact that 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." *Summerlin*, 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." *Summerlin*, *supra*, at 352. Even where procedural error has infected a trial, the resulting conviction or sentence may still be accurate; and, by extension, the defendant's continued confinement may still be lawful. For this reason, a trial conducted under a procedure found to be unconstitutional in a later case does not, as a general matter, have the automatic consequence of invalidating a defendant's conviction or sentence.

> The same possibility of a valid result does not exist where a substantive rule has eliminated a State's power to proscribe the defendant's conduct or impose a given punishment. "[E]ven the use of impeccable fact finding 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 (1971). Nor could the use of flawless sentencing procedures legitimate a punishment where the Constitution immunizes the defendant from the sentence imposed. "No circumstances call more for the invocation of a rule of complete retroactivity." *Ibid*.

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

Both the Supreme Court and this Court have held that *Ring* does not apply retroactively; therefore, *Hurst* should not be applied retroactively in Florida. *See Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014) (observing "if *Apprendi*'s rule is not retroactive on collateral review, then neither is a decision applying its rule") (citing *In re Anderson*, 396 F.3d 1336, 1340 (11th Cir. 2005)).

Lastly, Brant's qualifying contemporaneous felonies preclude finding reversible error in this case. Appellant takes the position that any *Hurst* type error is structural and not subject to harmless error review. That position is quite curious

given the fact that the Supreme Court remanded *Hurst* so that this Court could assess harmlessness. The *Hurst* Court stated:

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

Hurst, 136 S. Ct. at 624. It seems clear that any error, contrary to Appellant's position, is subject to harmless error review. The determination that deficient fact-finding 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 fact-finding where a sentence is to be enhanced due to the defendant's use of a firearm.

In addition to pleading guilty to first-degree murder, Brant pled guilty to sexual battery, kidnapping, and burglary with assault or battery. The sexual battery was used as an aggravating factor for Brant's death sentence, and the trial court gave it "great weight." Brant is in an entirely different position from Hurst, as Hurst was convicted of first-degree

murder and he did not have any prior criminal history or contemporaneous felony convictions. *Hurst*, 147 So. 3d at 440-41 (Fla. 2014). Here, Brant pled guilty to first-degree murder along with contemporaneous felonies, and then he waived his right to a penalty-phase jury. On the other hand, Hurst presented the United States Supreme Court with a 'pure' claim under *Ring*, where the jury neither gave a unanimous recommendation nor were any of the established aggravating circumstances identifiable as having come from a jury verdict. *Hurst*, 147 So. 3d at 445-47.

In Florida, a defendant is eligible for a capital sentence if at least one aggravating factor applied to the case, and *Hurst* has not altered the validity of these holdings. *See Ault v. State*, 53 So. 3d 175, 205 (Fla. 2010); *Zommer v. State*, 31 So. 3d 733, 752-54 (Fla. 2010); *State v. Steele*, 921 So. 2d 538, 540 (Fla. 2005). Brant was indisputably eligible for his death sentence when he voluntarily pled guilty to the sexual battery that was used as aggravation in this case.

Moreover, interpreting the *Hurst* holding in the manner suggested by Brant would conflict with the principle of federalism underlying our Constitution. The Court has long recognized that federal courts are bound by state court interpretations of state law except when the interpretation was

an "obvious subterfuge to evade consideration of a federal issue." *Mullaney v. Wilbur*, 421 U.S. 684, 691 & n.11 (1975). It has acknowledged that how a capital sentencing statute functions to make a defendant eligible for the death penalty is an issue of state law. *Zant v. Stephens*, 462 U.S. 862, 870-73 (1983). Thus, the United States Supreme Court was bound, as a matter of constitutional federalism, by this Court's interpretation of what facts had to be found for a defendant to be eligible for the death penalty unless it could be shown that this Court's interpretation was an obvious attempt to avoid a finding of a Sixth Amendment violation.

However, no such showing can be made. Well before any of the *Apprendi*-based decisions existed, this Court had held not only is a death sentence authorized once a single aggravating circumstance is found but also that death is the presumptive proper sentence once any aggravator is found. *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973). After *Ring*, this Court adhered to the interpretation that a death sentence was authorized if an aggravator was found. *State v. Steele*, 921 So. 2d 538, 545 (Fla. 2005). Since this Court's decision regarding eligibility was not an obvious attempt to avoid the Sixth Amendment issue, it was binding on the Court. Since Appellant's claim regarding the language in *Hurst* would have the United States Supreme Court

overruling this Court on an issue of state law, it should be rejected.

Significantly, this Court has consistently rejected *Ring* claims where the defendant is convicted of a qualifying contemporaneous felony. As explained in *Ellerbee v. State*, 87 So. 3d 730, 747 (Fla. 2012):

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

See also Zebroski v. State, 822 A.2d 1038, 1051 (Del. 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)).

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 was not disturbed by *Hurst*.

For all of the forgoing reasons, this Court should affirm the denial of postconviction relief entered below.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm Appellant's convictions and sentence of death.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of March, 2016, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: **Marie-Louise Samuels Parmer**, Esquire, The Samuels Parmer Law Firm, P.A., Post Office Box 18988, Tampa, Florida 33679, [**Marie@samuelsparmerlaw.com**]

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,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Christina Zuccaro

CHRISTINA ZUCCARO
Florida Bar No. 71300
Office of the Attorney General
3507 E. Frontage Rd., Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com [*and*]
christina.zuccaro@myfloridalegal.com

COUNSEL FOR APPELLEE