IN THE SUPREME COURT OF FLORIDA

JASON DIRK WALTON,

Appellant,

v.

STATE OF FLORIDA

Appellee.
_____/

CASE NO. SC16-448
L.T. No. CRC83-630 CFANO

DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows:

Citations to Walton's first direct appeal record will be designated as "R1 --";

Citations to Walton's resentencing record will be designated as "R2 --";

Citations to Walton's 1991 postconviction record will be designated as "PCR --";

Citations to Walton's 2001 successive postconviction record will be designated as "PCR2 --";

Citations to Walton's 2007 successive postconviction record will be designated as "PCR3 --";

Citations to Walton's 2015 successive postconviction record will be designated as "PCR4 --";

Citations to Walton's 2017 successive postconviction supplemental record will be designated as "PCR5 --."

STATEMENT REGARDING ORAL ARGUMENT

The State respectfully submits that oral argument is not necessary on the appeal from the denial of Walton's successive motion to vacate. The claims raised in this successive motion for postconviction relief were denied as untimely and/or meritless as a matter of established Florida law. Accordingly, argument will not materially aid the decisional process.

STATEMENT OF THE CASE AND FACTS

Defendant, Jason D. Walton, was charged with three counts of first-degree murder that occurred during a robbery and burglary in 1982. In addition to Walton, three others were involved with the crimes: Jeffrey McCoy, Terry Van Royal, Jr., and Richard Cooper. McCoy pled guilty to three counts of first-degree murder and agreed to testify against the others in exchange for life imprisonment. Walton v. State, 547 So. 2d 622, 623 (Fla. 1989). The two codefendants Van Royal and Cooper were convicted of these murders and initially sentenced to death, but subsequent legal challenges resulted in both men being resentenced to life.

Walton was convicted and sentenced to death on all three counts. The Florida Supreme Court affirmed Walton's convictions on direct appeal but remanded the case for resentencing. See Walton v. State, 481 So. 2d 1197, 1200 (Fla. 1985).

The facts at the resentencing proceedings revealed the following:

> . . . an eight-year-old boy summoned the police to a home, and, upon arrival, the police found three dead men lying face down on the living room floor, their wrists bound with duct tape. The boy was unharmed but had been bound and locked in the bathroom during the commission of the crimes. Each of the victims had been shot from a distance of three to six feet, and shotgun wounds were the sole causes of death. At the time of Walton's arrest, he was living with the ex-wife of one

of the victims, who was also the mother of the eight-year-old boy. The boy was present at the time of Walton's arrest.

The state presented Walton's confession to the jury. There, he admitted being present at the time of the homicides, denied any part in the shootings, and stated that he, Richard Cooper, and Terry Van Royal, Jr., went to the residence to rob the victims because he had heard that one of them had a lot of money and cocaine. Further, Walton indicated that they entered the residence, with each carrying a gun. All three victims were brought into the living room, the young boy was placed in the bathroom, and the apartment was searched for drugs and money. Afterwards, Walton stated that he turned on the television full blast to prevent the neighbors from hearing the victims scream and that he heard shotgun blasts as he left. Later, he acknowledged that his younger brother, Jeffrey McCoy, also participated in the robbery.

The state introduced a taped statement given by Jeffrey McCoy. McCoy stated that the plan to rob the victims had first been discussed about two weeks prior to the incident; that Walton had complained that one of the victims had stolen some marijuana from his trailer; that Walton believed the victims had a great deal of money and cocaine; that the four carefully devised a plan concerning the robbery, making sure that the child was placed in the bathroom so he would not witness the robbery and that it took place on a rainy night to prevent tire tracks from being left behind. He testified that the participants decided to bring weapons, but stated that the purpose of the weapons was to scare the victims, preventing resistance to the robbery. To his knowledge, no plan to shoot anyone existed. McCoy testified that Walton and the others entered the house and gathered each of the victims into the living room and, at Cooper's direction, McCoy taped the victims' wrists behind their backs. McCoy then left the house to start the car and wait. Upon starting the car, he heard a series of shots. After returning to the car, Cooper gestured to McCoy that the victims were dead.

> Another state witness testified that Walton was experiencing problems in his relationship with the ex-wife of one of the victims and that Walton had once said that "the only way he could get [the victim] off his back was to waste him."

Walton v. State, 547 So. 2d 622, 623-24 (Fla. 1989).

Walton's second death sentence, imposed following his resentencing trial, was affirmed on appeal. See Walton, 547 So. 2d at 623, 626.

Following being resentenced, Walton sought postconviction relief. His initial motion, as well as his two successive Rule 3.851 motions, were all affirmed by the Florida Supreme Court. Walton v. State, 847 So. 2d 438 (Fla. 2003); Walton v. State, 3 So. 3d 1000 (Fla. 2009), Walton v. State, 77 So. 3d 639 (Fla. 2011).

In his third successive motion, Walton alleged that his sentence was disproportionate after co-defendant Cooper was resentenced to life, and that newly discovered evidence in mitigation warranted resentencing. Following an evidentiary hearing, the trial court denied relief in its order rendered December 28, 2015. Walton filed a motion in this Court seeking relinquishment of his appellate case to permit him to re-argue his claims in circuit court.

Relinquishment lasting through January 13, 2017 was granted and Walton ultimately filed his amended fourth successive

postconviction motion on October 20, 2016, based on a new claim under Brady v. Maryland, 373 U.S. 83 (1983). The circuit court directed supplemental briefing based on the Florida Supreme Court's decisions in Asay v. State, 210 So. 3d 1 (Fla. 2016) and Mosley v. State, 209 So. 3d 1248 (Fla. 2016). On January 13, 2017, the circuit court entered its order denying relief, after which the relinquishment period ended.

This Court entered an order of relinquishment on February 10, 2017 authorizing the lower court to consider Walton's rehearing motion, but denied Walton's January 9 request for permission to file additional claims. Walton nevertheless filed his final successive motion to vacate in the trial court on February 19, 2017 which contained, for the first time, a claim alleging an Eighth Amendment violation arising out of the "partial retroactivity" rulings rendered by this Court in Asay and Mosely (PCR5 p. 3147-4246). The trial court denied rehearing (PCR5 p. 3253) and also entered an order dismissing Walton's February 19 filing because it lacked jurisdiction to rule on anything other than Walton's motion for rehearing (PCR5 p. 3251).

This appeal follows.

SUMMARY OF THE ARGUMENT

Issue One: The lower court correctly denied Walton's successive postconviction motions. The new facts identified by Walton would not have resulted in a life sentence on retrial, and recent changes in the law are not retroactive to him. Further, Walton's claim that recent changes in the law must be considered as part of the cumulative analysis mandated under Swafford would effectively vitiate current retroactivity rules, and was properly rejected below.

Issue Two: Walton's "evolving standards of decency" argument alleging an Eighth Amendment violation was correctly dismissed by the lower court as premature because recent changes in the law do not apply to Walton. On the merits, U.S. Supreme Court precedent confirms that Florida's earlier procedure that placed responsibility for sentencing on the trial judge does not violate the Eighth Amendment.

Issue Three: The lower court properly denied Walton's claim that his death sentence violates the Florida Constitution. This Court's decision in Asay precludes relief because Walton's death sentence became final prior to Ring.

Issue Four: This claim was not properly presented below and is not preserved for appellate review. Even if preserved, however, the trial court would have been obligated to dismiss

it, as the law Walton claims entitles him to relief does not apply to him. Moreover, he fails to establish that this Court's retroactivity analysis in Asay was arbitrary and capricious in violation of the Eighth Amendment.

ARGUMENT

ISSUE I

WALTON'S CLAIM THAT "CUMULATIVE ANALYSIS" PURSUANT TO SWAFFORD V. STATE AND HILDWIN V. STATE MANDATES RELIEF IS WITHOUT MERIT AND THE LOWER COURT SHOULD BE AFFIRMED.

The instant appeal follows the trial court's denial of Walton's third and fourth successive Rule 3.851 motions. In his third motion, Walton sought postconviction relief after his co-defendant, Cooper, was resentenced to life. The lower court, in its order rendered December 28, 2015, found that Walton's death sentence was not disproportionate in comparison with the life sentences of his less culpable co-defendants, nor would alleged newly discovered mitigation evidence likely result in a life sentence if he were given a new penalty phase.

Review of the lower court's order resolving the third successive postconviction motion was interrupted by Walton's motion seeking relinquishment following the United States Supreme Court's decision in Hurst[1] and the subsequent statutory and decisional changes in Florida law that followed. The lower court summarily dismissed Walton's subsequent motion (his fourth) because, it concluded, none of the recent changes in the law applied to him. The instant appeal encompasses the lower

[1] Hurst v. Florida, 136 S. Ct. 616 (2016).

court's orders resolving both the third and fourth successive postconviction motions.

On review, Walton contends that the lower court erred by refusing to apply new and non-retroactive changes in the law. In his view, consideration of recent changes in the law is a necessary part of the cumulative analysis required under Hildwin v. State, 141 So. 3d 1178 (Fla. 2014) and Swafford v. State, 125 So. 3d 760 (Fla. 2013). In addition, Walton asserts that he is entitled to re-sentencing as a matter of fundamental fairness, and he vaguely suggests that the Eighth Amendment entitles him to relief. The State will address Walton's Eighth Amendment claims in the context of Issue Two, however, where the argument is more fully developed. In any event, none of Walton's arguments merit relief.

Initially, Rule 3.851(d) places strict limitations on successive postconviction motions. Walton's postconviction challenge was rejected by the lower court for two reasons; first, because the newly discovered facts would not have resulted in a different sentencing outcome, and second, he failed to establish existence of a retroactive fundamental constitutional right. The lower court's ruling was clearly correct, and Walton is not entitled to relief.

Walton first contends that a "proper" Swafford/Hildwin cumulative analysis requires consideration of all changes in the law that might apply if a new trial were granted. Walton's position, however, would effectively eviscerate Witt[2] as well as all retroactivity requirements in the context of successive postconviction challenges. Indeed, incorporating new, non-retroactive law into the Swafford/Hildwin cumulative analysis (as Walton prefers) would result in elimination of retroactivity as a concept and fundamentally alter the procedural requirements of Jones v. State, 591 So. 2d 911 (Fla. 1991).

Walton contends that his newly discovered facts (the life sentence recently imposed in co-defendant Cooper's case), when considered in combination with recent changes in the law, mandate relief. Under Jones, the trial court is required to weigh the newly discovered evidence along with the evidence used at trial; in reaching its decision, the court must assess "whether such evidence, *had it been introduced at the trial*, would have probably resulted in an acquittal." Id. at 916 (emphasis supplied). Clearly, the focus under Jones is what the jury that heard the original trial would have done. Accordingly, the correct analysis is whether the defendant's newly discovered

[2] Witt v. State, 387 So. 2d 922, 929 (Fla. 1980).

facts, when viewed through the lens of the defendant's jury, *under the correct law in effect at the time of the defendant's trial*, would have produced an acquittal.

This analysis is consistent with the former rule applying to writs of error coram nobis, which required the reviewing court to assess whether the newly discovered facts, had they been known to the trial court, would have conclusively prevented entry of judgment. Hallman v. State, 371 So. 2d 482 (Fla. 1979). While Jones held that Hallman was too strict in terms of requiring conclusive proof, the court retained the backward-looking focus. This view is consistent with maintaining finality of judgment. See Witt at 929-930. Walton effectively is asking this Court to create a new rule applicable solely to successive postconviction claims which would treat all new changes in the law as facts, thereby rendering them retroactive. There is no legal support for this novel assertion.

The lower court correctly rejected Walton's argument. Summary dismissal is proper in the absence of a showing that the legal rule in question applies to the defendant. Waterhouse v. State, 82 So. 3d 84, 97 (Fla. 2012). Indeed, if Walton's position were correct, all subsequent statutory changes become

retroactive once argued in a successive postconviction motion.[3] Worse, Walton's proposed procedure would unnecessarily and improperly cast doubt on the integrity of the original trial proceeding and unfairly invade the State's legitimate interest in maintaining finality of judgment. Witt at 929.

As for Walton's claim that fundamental fairness entitles him to relief, there is no basis for this Court to grant relief. The lower court correctly followed this Court's precedent in finding that Walton's sentencing procedure was constitutional at the time, and there is nothing unfair about the process employed (PCR5 p. 2958). While Walton contends that new penalty phase procedures (requiring unanimous findings by the penalty phase jury) render the outcome more reliable, there remains persistent debate on this point. Indeed, this Court expressly stated that applying Hurst retroactively would "consume immense judicial resources without any corresponding benefit to the accuracy or reliability of penalty phase proceedings." Asay at 21. And, as the U.S. Supreme Court has pointed out in the context of

[3] See, e.g., Regan v. State, 787 So. 2d 265 (Fla. 1st DCA 2001) (Statutory or decisional changes in the law are not newly discovered "facts;" treating them as such "will remove any need to perform a Witt analysis." Id. at 267). Moreover, neither a statutory change nor decisional law are "facts" for the purpose of assessing timeliness in a postconviction motion. See e.g., Coppola v. State, 938 So. 2d 507, 510 (Fla. 2006).

assessing fundamental fairness in sentencing procedures, it makes no difference whether or not we believe that jury fact-finding is more accurate: "Rather, the question is whether judicial fact-finding so seriously diminishes accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." Schriro v. Summerlin, 542 U.S. 348, 355 (2004) (internal citations removed). Because Florida's pre-Hurst sentencing procedure was reasonably reliable, Walton has not established that failure to apply subsequent changes in the law to his case rendered his death sentence fundamentally unfair.

By the same token, it is also appropriate to consider the *unfairness* that an unnecessary re-sentencing proceeding would impose on the innocent victims of Walton's crimes. The emotional toll inflicted upon victims' family members, witnesses, and others who would be personally impacted by another sentencing proceeding simply cannot be calculated. The lower court's decision should be affirmed.

ISSUE II

WALTON HAS NO EIGHTH AMENDMENT RIGHT TO RESENTENCING UNDER THE FACTS OF THIS CASE.

Walton next contends that his death sentence violates the Eighth Amendment because his sentence is contrary to evolving standards of decency (IB: 59); he also asserts (in Issue IV) that his sentence is arbitrary and capricious[4] (IB: 70). Both arguments fail.

First of all, the trial court correctly dismissed this claim based on its conclusion that Walton failed to meet the procedural requirements under Rule 3.851. As this is a purely legal argument, Walton is not entitled to relief in the absence of a determination that the rule in question applies to him. Significantly, Walton cites no precedent to support such a claim. The trial court therefore had no alternative but to dismiss this claim as premature.

Even on the merits, Walton's claim lacks merit. The United States Supreme Court's decision in Hurst v. Florida was decided entirely on Sixth Amendment grounds. While this Court included dicta regarding the Eighth Amendment in Hurst v. State, 202 So. 3d 40 (Fla. 2016), its decision was at bottom an application of

[4] As will be argued subsequently, Issue IV was not preserved below.

the Sixth Amendment right to jury fact-finding. Because the Florida Constitution requires this Court to interpret the Eighth Amendment in conformity with the decisions of the United States Supreme Court, it is plain that any reference to the Eighth Amendment in Hurst v. State is necessarily limited in effect. It is important to remember that the United States Supreme Court has held (see Spaziano v. Florida, 468 U.S. 447 (1984)) that jury sentencing is not required in capital cases; this Court cannot overrule the surviving precedent of the United States Supreme Court.

In Spaziano, the United States Supreme Court held that Florida's sentencing procedure, which placed responsibility for imposing a sentence of death on the trial judge, did not violate the Eighth Amendment. Spaziano at 463-64 (1984), overruled in part, Hurst v. Florida, 136 S. Ct. 616 (2016). In deciding Hurst v. Florida, the United States Supreme Court analyzed the case exclusively on Sixth Amendment grounds; no Eighth Amendment implications were discussed. See Hurst v. Florida, at 624. Significantly, this Court in Asay v. State, 210 So. 3d 1, 7 (Fla. 2016) recognized that the United States Supreme Court did not address whether Florida's sentencing scheme violated the Eighth Amendment. The Supreme Court's limitation of Spaziano addressed only the Sixth Amendment aspects- specifically,

Spaziano was overruled "only to the extent that it allows a sentencing judge to find an aggravating circumstance independent of a jury's fact-finding. Hurst v. Florida, 136 S. Ct. at 618. There is no dispute, therefore, that the Supreme Court in Hurst did not consider, or even address, the Eighth Amendment in its decision to correct Florida's sentencing procedure.

It is true that this Court included the Eighth Amendment as a reason for warranting unanimous jury recommendations in its Hurst v. State decision. See Hurst, 202 So. 3d at 59. Respectfully, however, this Court cannot overrule the United States Supreme Court's surviving precedent in Spaziano without violating the Florida Constitution, which requires state courts to interpret Florida's prohibition on cruel and unusual punishments in conformity with the United States Supreme Court's Eighth Amendment jurisprudence.[5] Given that the United States Supreme Court case has never held that the Eighth Amendment requires the jury's sentencing recommendation to be unanimous,

[5] See Art. I, § 17, Fla. Const. ("[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution"); Henry v. State, 134 So. 3d 938, 947 (Fla. 2014) (noting that under Article I, section 17 of the Florida Constitution, Florida courts are "bound by the precedent of the United States Supreme Court" regarding Eighth Amendment claims).

both this Court's Eighth Amendment holding and Appellant's Eighth Amendment argument are, respectfully, incorrect.

Finally, this Court has already determined that its holding in Hurst v. State is not retroactive to cases like Walton's which were final prior to the decision in Ring[6]. Asay, 210 So. 3d at 7-14. His contention that Florida law demonstrates an evolving standard of decency in favor of unanimous jury sentencing recommendations fails, as this Court's decision to limit application of Hurst only to those defendants whose cases became final after issuance of Ring demonstrates. Accordingly, Walton is entitled to no relief.

[6] Ring v. Arizona, 536 U.S. 584 (2002).

ISSUE III

WALTON'S PENALTY PHASE JURY MADE SUFFICIENT FINDINGS OF FACT UNDER THE LAW TO SUPPORT A SENTENCE OF DEATH UNDER THE FLORIDA CONSTITUTION.

Appellant next alleges a violation of the Florida Constitution because his penalty phase jury did not vote unanimously in favor of death.[7] This claim should have been raised on direct appeal rather than in a successive postconviction motion and is therefore procedurally barred from review. Lukehart v. State, 70 So. 3d 503, 523 (Fla. 2011). In addition, his delayed filing of this claim also renders it time-barred. Fla. R. Crim. P. 3.851(d)(2). As with the previous issue, this claim does not rest on a new constitutional rule that has been held retroactive by either this Court or the Supreme Court, and the lower court correctly denied relief.

In addition to being procedurally barred and untimely, this claim lacks merit. Appellant received both a trial and a penalty phase before a jury in accordance with the law in effect at the time of his trial. The State carried its burden requiring it to prove each aggravating circumstance beyond a reasonable doubt. Smith v. State, 170 So. 3d 745, 760 (Fla. 2015). The jury in Appellant's case was instructed that the aggravating

[7] Walton's penalty phase jury voted 9 to 3 in favor of death.

circumstances they may consider must be proven beyond a reasonable doubt. (R2 p. 113). The jury was further told that they must decide whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances outweigh any aggravating circumstances found to have been proven beyond a reasonable doubt. (R2 p. 113) Consequently, the jury was unequivocally instructed as to the defendant's right to proof beyond a reasonable doubt on the aggravation that subjected him to the death penalty. The jury instructions used in this case confirm that the jury applied the proper standard.

The State's position is that the Sixth Amendment requires nothing more than jury fact-finding sufficient to support the resulting sentence; it does not mandate any specific jury verdict or recommendation as a pre-requisite to a given sentence. Trial judges were expressly authorized under Florida law to impose a defendant's sentence within the range established by the legislature as supported by either a guilty plea or a jury verdict. The Ring/Hurst line of cases did not fundamentally alter this calculus. The fault with Florida's statute was a limited one -- Florida had effectively created an aggravated form of murder dependent upon the jury finding of one or more aggravators. However, as the State has consistently

maintained, once the jury finds an aggravator the Sixth Amendment constitutional requirement is satisfied. This rationale is in accordance with this Court's previous understanding of Ring. See Ellerbee v. State, 87 So. 3d 730, 747 (Fla. 2012) ("[t]his Court has consistently held that a defendant is not entitled to relief under Ring if he is convicted of murder committed during the commission of a felony, or otherwise where the jury of necessity has unanimously made the findings of fact that support an aggravator.") (citations omitted). The overwhelming weight of precedent from different jurisdictions has rejected the notion that the weighing process and its result are a "fact" subject to Apprendi[8] and its progeny.[9] See State v. Belton, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, 337 ("[f]ederal and state courts have upheld laws similar to Ohio's, explaining that if a defendant

[8] Apprendi v. New Jersey, 530 U.S. 466 (2000).

[9] The First, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits have rejected the argument that Apprendi and its progeny require a capital jury to find beyond a reasonable doubt that aggravating factors outweigh mitigating factors or that such a 'fact' needs to be alleged in an indictment. See United States v. Fields, 516 F.3d 923, 950 (10th Cir. 2008); United States v. Mitchell, 502 F.3d 931, 993-94 (9th Cir. 2007); United States v. Sampson, 486 F.3d 13, 31 (1st Cir. 2007), United States v. Fields, 483 F.3d 313, 345-46 (5th Cir. 2007); United States v. Purkey, 428 F.3d 738, 748 (8th Cir. 2005); United States v. Gabrion, 719 F.3d 511, 532-33 (6th Cir. 2013).

has already been found to be death-penalty eligible, then subsequent weighing processes for sentencing purposes do not implicate Apprendi and Ring. Weighing is not a fact-finding process subject to the Sixth Amendment, because "[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination.") (quoting State v. Gales, 658 N.W.2d 604 (2003)).

The jury's determination concerning the relative weight of the factors it uses in determining an appropriate sentence, however it is characterized, does not increase the penalty. A defendant becomes eligible for a sentence of death if the jury finds beyond a reasonable doubt that he acted with requisite intent and that at least one statutory aggravating factor exists. Once the jury finds the defendant death-eligible, it weighs the aggravating factors against the mitigating factors to select the appropriate sentence. See Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003) (murder conviction "exposes a defendant to a maximum penalty of life imprisonment" while a finding of aggravating circumstances "increases the maximum permissible sentence to death"). This Court's prior understanding of Ring, and the requisite jury fact-finding that complied with both Ring and Apprendi, was not disturbed by the Supreme Court's ruling in

Hurst v. Florida.

Significantly, the United States Supreme Court, in Jenkins v. Hutton, 2017 WL 2621321, 582 U.S. ____ (June 19, 2017), recently confirmed the constitutionality of an Ohio death sentence based on a jury's guilt-phase determination of facts. In Jenkins the lower court[10] ordered a new sentencing trial because, in that court's view, the penalty phase jury failed to make the necessary factual findings to support a death sentence. However, because the necessary aggravating factors were established beyond a reasonable doubt by the jury during the guilt phase, the Supreme Court reversed and reinstated the death sentence. Like Florida, a single aggravating factor under Ohio law is sufficient to render a capital defendant death eligible. Because the requisite aggravators were established during the guilt phase, Jenkins entered the penalty phase with eligibility for a death sentence firmly established beyond a reasonable doubt. The Supreme Court held that the federal habeas court erred in concluding that inadequate factual findings invalidated his death sentence.[11]

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[10] The lower court decision is found at Hutton v. Mitchell, 839 F.3d 486 (6th Cir. 2016).

[11] The State recognizes that Walton's sentencing court did not rely upon his prior violent felony convictions in the selection process; however, there is no dispute that a PRV aggravator

The Supreme Court's decision in Jenkins is valuable in interpreting the Court's intent in Hurst v. Florida, which, incidentally, made no mention of weighing aggravators and mitigators. Indeed, the Supreme Court has held that the sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." Zant v. Stephens, 426 U.S. 862, 875 (1983); see Tuilaepa v. California, 512 U.S. 967, 979–80 (1994). In Zant, the Court explained that "specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." Id. at 875 n.13; see Franklin v. Lynaugh, 487 U.S. 164, 179 (1988) ("[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.").[12]

Notably, although Appellant argues extensively that he is

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would be available if Walton were re-sentenced, based on his guilt-phase jury's verdicts in this triple homicide. Any constitutional error is therefore harmless.

[12] It is of some historical significance that Walton and others perceive jury sentencing as being the "gold standard" of reliability. The United States Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972) struck down capital sentencing statutes in Georgia and other states that relied upon jury sentencing because it found the procedure arbitrary and in violation of the Eighth Amendment.

entitled to relief based on Ring, it is important to note that both this Court and the United States Supreme Court have held that Ring did not apply retroactively. See Summerlin, 542 U.S. at 358 ("[t]he 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."); Jones v. State, 998 So. 2d 573, 589 (Fla. 2008) ("[w]e have held, however, that Ring does not apply retroactively.") See Lambrix v. Sec'y, Florida Dept. of Corr., 851 F.3d 1158, 1165 n.2 (11th Cir. 2017) (explaining that "under federal law Hurst, like Ring, is not retroactively applicable on collateral review")(citing Summerlin). More to the point, this Court in Asay expressly excluded retroactive application of Hurst to any case that was final on issuance of Ring.

Appellant's death sentence was final years before the issuance of Ring. Despite his claim that this Court must grant

relief because the State Constitution mandates a unanimous verdict, he nevertheless fails to establish entitlement to relief. Because this Court has determined that Ring does not apply retroactively to his case, the lower court should be affirmed.

ISSUE IV

WALTON'S CLAIM THAT PARTIAL RETROACTIVITY VIOLATES THE EIGHTH AMENDMENT IS NOT PRESERVED FOR REVIEW.

Appellant's final argument was not properly presented to the trial court below for its consideration. Included belatedly in an amended pleading that was not filed until after the relinquishment period had expired, the trial court dismissed this claim because it lacked jurisdiction to rule. Dismissal is an appropriate remedy when a court lacks jurisdiction. Tompkins v. State, 894 So. 2d 857 (Fla. 2005), and the lower court's application of the procedural bar was indisputably correct.[13]

The law is well settled that for an argument to be cognizable on appeal, "it must be the specific contention asserted as legal ground for the objection, exception, or motion below." Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982); see also McWatters v. State, 36 So. 3d 613, 639 (Fla. 2010) (holding that defendant's legal argument was not preserved for

[13] Oddly, Walton initially filed a brief far in excess of the page limits which included this unpreserved and meritless claim. After this Court directed him to file a brief that complied with the rules, Walton filed an amended brief that, once again, includes the same unpreserved and meritless claim. At approximately the same time, Walton filed a Habeas Petition containing an argument he had removed from the brief in the instant appeal, in an apparent effort to do an "end run" around the page limitations. Walton's Habeas petition, Case Number SC17-1083, remains pending.

appellate review, because the specific argument on appeal was not presented to the trial court below for its consideration).

Even if it had been properly presented and preserved, Walton is still not entitled to relief for the same reason his other constitutional claims fail. The strict limitations inherent in successive Rule 3.851 motions precludes relief as to purely legal claims in the absence of a retroactivity determination. The lower court expressly found that Walton "falls within the group not entitled to retroactive application" of Hurst v. Florida (PCR5 p. 2958). Had Walton properly presented this claim, therefore, the trial court would have been obligated to dismiss it as untimely.

Even on the merits, however, this Court should deny relief. Appellant first contends that this Court's decision in Asay, which precluded Hurst relief to cases that were final when Ring was decided, renders his death sentence unreliable because he did not enjoy the benefit of a unanimous jury sentencing recommendation. He further asserts that the resulting unreliability, coupled with what he views as an arbitrary retroactivity analysis, violates the Eighth Amendment. Neither of these arguments merits relief, however.

First of all, as has previously been argued in the context of Walton's first issue, there is nothing inherently unreliable

about judicial factual determinations. Indeed, the constitutional right to trial by jury derives from the Magna Carta, was originally intended as a bulwark against governmental oppression, and a significant part of the jury's responsibility is to ensure the fairness of the resulting process, rather than reliability of verdict. See Duncan v. Louisiana, 391 U.S. 145, 155-156 (1968); Singer v. United States, 380 U.S. 24, 35 (1965). Significantly, even after the Supreme Court applied the Sixth Amendment right to jury trial to the states, the right was not granted retroactively as there was no question that the respective outcomes in criminal cases tried before the court were reliable. Destefano v. Woods, 392 U.S. 631 (1968).

Accordingly, the State rejects Walton's claim that a penalty phase jury's sentencing recommendation is *more* reliable than if he were sentenced solely by a judge. In advancing this argument, the State is not denigrating Walton's fundamental assertion that reliability is the desired outcome; we merely challenge his claim that the former sentencing procedure was unreliable, or that any Florida death sentence is inherently unreliable merely because the former procedure was employed.

First of all, the United States Supreme Court has made clear that a defendant has not established entitlement to relief merely because his penalty phase proceedings were less than

perfect. An Eighth Amendment violation is subject to harmless error analysis. Zant v. Stevens, 462 U.S. 862, 885 (1983) (error in penalty phase instructions subject to harmless error analysis, although "careful scrutiny" is employed). Clearly, Walton has no constitutional right to perfection, and the Supreme Court has opined that even in capital cases, some degree of imprecision is permitted. See, e.g., Schriro v. Summerlin, 542 at 356 (relief only warranted where the use of a particular factfinder "so seriously diminishes accuracy that there is an impermissibly large risk of punishing conduct the law does not reach," (internal citations removed)). While Walton never explains exactly what a "reliable" penalty phase trial might be or how we can know when one has occurred, we presume he means an outcome that is reasonably consistent in comparison with other similar cases. But even Walton must recognize how unlikely he is to have had a perfect trial, free of error at any time, or that such a result is necessarily to be obtained through the use of jury penalty phase factfinders. To the contrary, if consistency is the goal, the Supreme Court has opined that *judicial* sentencing may yield more consistent results, perhaps because of judges' greater experience with analogous cases. Proffitt v. Florida, 428 U.S. 242, 252 (1976). It is not a foregone conclusion, therefore, that Walton's sentence was unreliable

merely because the sentencing procedure in effect at the time permitted the trial judge to make certain findings of fact. Walton certainly has not established that his proceedings were so unreliable that he was punished for conduct the law does not reach.

Secondly, quantifying reliability would seem to be an impossible task. This is particularly true given the fact that the ultimate determination turns on the comparative weight of aggravators and mitigators- a process that of necessity invites considerations of mercy. As the Supreme Court noted recently, "In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve." Kansas v. Carr, 136 S. Ct. 633 (2016). Imposing a fair sentence is not a strictly logical process, in other words, and what one reasonable juror deems worthy of mercy might be rejected by an equally reasonable juror sitting in the opposite chair. There is no quantifiable way for us to look at a jury's decision which, in effect, amounts to an aggregation of judgment calls by individual jurors, and assess its relative level of reliability. Certainly, other than speculation, Walton has neither identified nor established *any* particular lack of reliability in the proceedings used to impose his death sentence.

Next, Walton boldly asks this Court to reconsider its prior holding on retroactivity. However, if reconsideration of this Court's recent Hurst retroactivity precedent is warranted at all, the more persuasive argument lies heavily against providing any retroactive effect to Hurst. It is significant that Florida is an outlier for giving any retroactive effect to an Apprendi/Ring based error.[14] Neither the United States nor the Florida Constitutions mandate retroactive application of Hurst.

Walton contends, however, that this Court's retroactivity analysis itself violates the Eighth Amendment. This claim fails

[14] As recently explained by the Eight Circuit in Walker v. United States, 810 F.3d 568, 575 (8th Cir. 2016), the consensus of judicial opinion flies squarely in the face of giving any retroactive effect to an Apprendi based error. Apprendi's rule "recharacterizing certain facts as offense elements that were previously thought to be sentencing factors" does not lay "anywhere near that central core of fundamental rules that are absolutely necessary to insure a fair trial." The court observed: '[T]he Supreme Court has not made Apprendi retroactive to cases on collateral review' Abdullah v. United States, 240 F.3d 683, 687 (8th Cir. 2001), and has 'decided that other rules based on Apprendi do not apply retroactively on collateral review,' Simpson v. United States, 721 F.3d 875, 876 (7th Cir. 2013) (citing Schriro v. Summerlin, 542 U.S. 348, 349-58] (2004)), in which the Supreme Court determined the extension of Apprendi to judicial factfinding in Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002), did not apply retroactively). The circuit courts have repeatedly followed suit. See, e.g., Olvera, 775 F.3d at 731 & n. 16; In re Anderson, 396 F.3d 1336, 1339–40 (11th Cir. 2005). In concluding Alleyne v. United States, 133 S. Ct. 2151 (2013)] does not apply retroactively, the circuit courts have reasoned, '[i]f Apprendi ... does not apply retroactively, then a case extending Apprendi should not apply retroactively.' Hughes v. United States, 770 F.3d 814, 818 (9th Cir. 2014)]. Walker, 810 F.3d at 575.

primarily because Walton advances nothing substantive in terms of argument. He cryptically avers that this Court "failed to honor the binary nature" of Witt and just as enigmatically contends that the retroactivity analysis was infirm. This Court's analysis, however, is a matter of record and the State declines to speculate as to the meaning of Walton's unexplained challenge.[15] His disagreement with the result fails to establish an Eighth Amendment violation, or that this Court's conclusions were necessarily arbitrary and capricious.

Indeed, while the State maintains its position that Hurst v. State was wrongly decided, this Court's retroactivity analysis in Asay limiting application of Hurst v. State to defendants whose cases were final prior to Ring clearly comports with the Eighth Amendment. Accordingly, no relief is warranted.

HARMLESS ERROR

Finally, even if an Eighth Amendment violation did exist, any error is harmless beyond a reasonable doubt. While the State recognizes that this Court has consistently held that Hurst error is not harmless where there is less than a unanimous

[15] Walton also suggests that only two of this Court's justices affirmatively supported partial retroactivity without identifying which two. The published decision in Asay affirmatively establishes that the Court's decision, while divided, was supported by a majority of the court. Only Justices Lewis, Perry and Pariente dissented.

recommendation, the State respectfully suggests that this Court's application of harmless error in the context of Hurst v. State applies the wrong test and misconstrues the nature of harmless error review and the State's arguments.

The State has maintained that a proper harmless analysis applies the rational juror test. Neder v. United States, 527 U.S. 1, 18-19 (1999); Mosley v. State, 209 So. 3d 1248, 1284 (Fla. 2016). In other words, we should assess the facts of the case and determine what a rational jury would have done with those facts; it does not look at what the jury in the instant case did or did not do. The Supreme Court in Jenkins recently applied the same rational jury test. The lower court's harmless error analysis addressed whether the defendant's penalty phase jury might have relied on an invalid aggravator after it was improperly instructed. This was the wrong test, the Court said. Instead, the lower court should have considered:

> Whether, given *proper* instructions about the two aggravating circumstances, a reasonable jury could have decided that those aggravating circumstances outweighed the mitigating circumstances. . . .
>
> The court, in other words, considered whether the alleged error might have affected the jury's verdict, not whether a properly instructed jury could have recommended death. . . . .
>
> Neither Hutton nor the Sixth Circuit has shown by clear and convincing evidence that —if properly instructed—

> no reasonable juror would have concluded that the aggravating circumstances in Hutton's case outweigh the mitigating circumstances.

Jenkins, at *5 (emphasis in the original).

In the instant case, if this Court applied the correct harmless error test as identified by Jenkins, it would ask whether a properly instructed jury would have determined that the death penalty was the appropriate sentence. The answer, given the extensive aggravation and absence of mitigation established in Walton's penalty phase trial, is plainly in the affirmative.

The rational juror test has been used by this Court for decades when it strikes an aggravator and makes an evaluation concerning whether the death penalty is still appropriate. See, e.g., Middleton v. State, SC12-2469, 2017 WL 930925, at *13 (Fla. Mar. 9, 2017), reh'g denied, SC12-2469, 2017 WL 2374697 (Fla. June 1, 2017) (affirming sentence after striking the avoid arrest and CCP aggravators where two weighty aggravators (HAC and PVF) remained unanimous death-recommendation case); Davis v. State, 148 So. 3d 1261, 1279-80 (Fla. 2014) (holding that even though the avoid arrest aggravator was stricken, any error was harmless because "even after the exclusion of this aggravator, the trial court assigned great weight to the remaining five aggravators, did not find any statutory mitigation, and gave

varying amounts of weight to six nonstatutory mitigating circumstances"); Reynolds v. State, 934 So. 2d 1128, 1158 (Fla. 2006) (holding that even if the trial court erred in finding the avoid arrest aggravator, "the error would be harmless because we can state beyond a reasonable doubt that any error in this regard did not affect the result in this case.")

The Espinosa[16] line of cases is also instructive on the application of harmless error when this Court must determine whether a properly instructed rational jury would have imposed death. Johnston v. Singletary, 640 So. 2d 1102, 1104–05 (Fla. 1994) (explaining that the "jury would have found Johnston's brutal stabbing and strangulation of the eighty-four-year-old victim, who undoubtedly suffered great terror and pain before she died, heinous, atrocious, or cruel, even with the limiting instruction."); Monlyn v. State, 705 So. 2d 1, 5–6 (Fla. 1997) ("[t]his Court has held that a CCP aggravator can stand where the facts of the case establish that the killing was CCP under any definition, even though the CCP instruction given to the jury was unconstitutionally vague.")

The analysis should not change simply because it is now the sole responsibility of the jury, as opposed to the trial judge,

[16] Espinosa v. Florida, 505 U.S. 1079 (1992).

to find the existence of aggravating factors. This Court should continue to look to the circumstances of each individual case to determine whether a rational factfinder would have imposed a sentence of death. Here, the facts showed that Appellant and his co-defendants entered a residence in the middle of the night, tied the three victims with duct tape and shot each one, sequentially, in the back of the head. The last two victims clearly knew what was about to happen and were aware of impending death.

The jury recommended the death penalty by a vote of 9 to 3. The trial court found four aggravating factors: (1) the murders were committed during the commission of a robbery and burglary; (2) the murders were committed in an especially heinous, atrocious, or cruel fashion; (3) the murders were committed in a cold, calculated, and premeditated manner; and (4) the murders were committed for the purpose of avoiding a lawful arrest. The court found no mitigating factors. Walton v. State, 547 So. 2d 622, 624 (Fla. 1989).[17]

[17] Moreover, if Walton were resentenced, an additional aggravator, that he is convicted of a prior violent felony, would apply. The State has consistently maintained that a guilt phase jury's factual findings as to this aggravator is sufficient to satisfy Ring and Apprendi. See e.g., Belcher v. State, 851 So. 2d 678, 685 (Fla. 2003) (concluding that aggravators of prior violent felony conviction and murder in the

Applying Neder, any Hurst error was harmless beyond a reasonable doubt. Based on the extensive aggravation presented and the lack of any mitigation, a properly instructed rational jury would have determined that the aggravating factors outweighed the mitigating factors, that the aggravating factors were sufficient, and that death was the appropriate sentence. Accordingly, Appellant would not be entitled to relief as any possible error was harmless.

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course of a felony supported by separate guilty verdict exempting the sentence from holding in Ring).

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, State of Florida, respectfully urges this Court to

Respectfully submitted,

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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).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of June, 2017, I electronically filed the foregoing with the Clerk of the Court by using the e-portal system which will send a notice of electronic filing to the following: Martin J. McClain, Special CCRC-S and Bryan Martinez, Staff Attorney, Capital Collateral Regional Counsel-South, 1 E. Broward Boulevard, Suite 444, Ft. Lauderdale, Florida 33301, **martymcclain@earthlink.net**, **martinezb@ccsr.state.fl.us**, **bryanmartinez.ccrc@gmail.com** [and] **ccrcpleadings@ccsr.state.fl.us**.

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