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IN THE SUPREME COURT OF FLORIDA

JAMES E. HITCHCOCK,

Appellant,

v.

Case No. SC17-445

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS.. i

TABLE OF AUTHORITIES... ii

PRELIMINARY STATEMENT.. 1

STATEMENT OF THE CASE AND FACTS................................ 1

SUMMARY OF ARGUMENT.. 5

ARGUMENT... 8

I & II. APPELLANT IS NOT ENTITLED TO RETROACTIVE APPLICATION OF *HURST V. FLORIDA* OR *HURST V. STATE* AND EVEN IF *HURST* APPLIED RETROACTIVELY, APPELLANT WOULD NOT BE ENTITLED TO RELIEF BECAUSE ANY SENTENCING ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT. 8

III. APPELLANT WAS NOT DENIED HIS RIGHT TO A JURY TRIAL ON THE ELEMENTS THAT SUBJECTED HIM TO THE DEATH PENALTY. 37

IV. APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT BECAUSE THE HOLDINGS IN *HURST V. FLORIDA*, 136 S. CT. 616 (2016) AND *HURST V. STATE*, 202 SO. 3D 40 (FLA. 2016) DID NOT IMPLICATE THE EIGHTH AMENDMENT. 42

V. APPELLANT'S CLAIM THAT THE FACTFINDING THAT SUBJECTED HIM TO THE DEATH PENALTY WAS NOT PROVEN BEYOND A REASONABLE DOUBT IS MERITLESS. 47

VI. APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE THE FLORIDA CONSTITUTION BECAUSE THE NEW CONSTITUTIONAL RULES ARE NOT RETROACTIVE TO APPELLANT'S CASE AND THE AGGRAVATING CIRCUMSTANCES WERE NOT REQUIRED TO BE ALLEGED IN THE INDICTMENT. 51

VII. APPELLANT IS NOT ENTITLED TO A NEW POSTCONVICTION PROCEEDING BECAUSE NEITHER *HURST V. FLORIDA* OR *HURST V. STATE* OPERATE TO BREATHE NEW LIFE INTO CLAIMS WHICH HAVE BEEN PREVIOUSLY LITIGATED AND DISPOSED. 53

CONCLUSION... 56

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE.............. 56

CERTIFICATE OF COMPLIANCE...................................... 57

TABLE OF AUTHORITIES

Cases

Abdullah v. United States,
240 F.3d 683 (8th Cir. 2001)....................................9
Abrams v. State,
971 So. 2d 1033 (Fla. 4th DCA 2008)............................48
Alleyne v. United States,
133 S. Ct. 2151 (2013)..10
Almendarez-Torres v. United States,
523 U.S. 224 (1998)...52
Apprendi v. New Jersey,
530 U.S. 466 (2000)..9, 49
Asay v. State,
210 So. 3d 1 (Fla. 2016).....................................Passim
Belcher v. State,
851 So. 2d 678 (Fla. 2003)......................................35
Caldwell v. Mississippi,
472 U.S. 320 (1985)..45, 54
Davis v. State,
148 So. 3d 1261 (Fla. 2014).....................................33
DeStefano v. Woods,
392 U.S. 631 (1968)...27
Ellerbee v. State,
87 So. 3d 730 (Fla. 2012).......................................39
Espinosa v. Florida,
505 U.S. 1079 (1992)...3, 33
Franklin v. State,
209 So. 3d 1241 (Fla. 2016).....................................54
Gorby v. State,
819 So. 2d 664 (Fla. 2002)...................................45, 55
Henry v. State,
134 So. 3d 938 (Fla. 2014)......................................44
Hildwin v. State,
141 So. 3d 1178 (Fla. 2014).....................................36
Hitchcock v. Dugger,
481 U.S. 393, (1987)...2

Hitchcock v. Florida,
505 U.S. 1215 (1992)....................................3
Hitchcock v. Sec'y, Florida Dept. of Corr.,
745 F.3d 476 (11th Cir. 2014)...........................4
Hitchcock v. State,
413 So. 2d 741 (Fla. 1982)..............................2
Hitchcock v. State,
432 So. 2d 42 (Fla. 1983)...............................2
Hitchcock v. State,
614 So. 2d 483 (Fla. 1993)..............................3
Hitchcock v. State,
673 So. 2d 859 (Fla. 1996)..............................3
Hitchcock v. State,
755 So. 2d 638 (Fla. 2000)..........................3, 34
Hitchcock v. State,
866 So. 2d 23 (Fla. 2004)............................3, 4
Hughes v. State,
901 So. 2d 837 (Fla. 2005).............................27
Hughes v. United States,
770 F.3d 814 (9th Cir. 2014)...........................10
Hurst v. Florida,
136 S. Ct. 616 (2016)..............................Passim
Hurst v. State,
147 So. 3d 435 (Fla. 2014)...................23, 28, 29
Hurst v. State,
202 So. 3d 40 (FLA. 2016)..........................Passim
Hurtado v. People of the State of Cal.,
110 U.S. 516 (1884)....................................52
In re Anderson,
396 F.3d 1336 (11th Cir. 2005).........................10
In re Winship,
397 U.S. 358 (1970)....................................47
Ivan V. v. City of New York,
407 U.S. 203 (1972)................................18, 47
Jackson v. State,
213 So. 3d 754 (Fla. 2017).............................48

Jeanty v. Warden, FCI-Miami,
757 F.3d 1283 (11th Cir. 2014)................................27
Johnson v. State,
904 So. 2d 400 (Fla. 2005)................................10, 28
Johnson v. United States,
135 S. Ct. 2551 (2015)..15
Johnston v. Singletary,
640 So. 2d 1102 (Fla. 1994)...................................33
Jones v. State,
998 So. 2d 573 (Fla. 2008)....................................41
Kilgore v. State,
55 So. 3d 487 (Fla. 2010).....................................21
Lincoln v. State,
978 So. 2d 246 (Fla. 5th DCA 2008)............................49
Linkletter v. Walker,
381 U.S. 618 (1965)...22
Lukehart v. State,
70 So. 3d 503 (Fla. 2011).....................................37
McCoy v. United States,
266 F.3d 1245 (11th Cir. 2001)................................27
McWatters v. State,
36 So. 3d 613 (Fla. 2010)......................................8
Middleton v. State,
2017 WL 930925 (Fla. Mar. 9, 2017)............................32
Miller v. Alabama,
567 U.S. 460 (2012)...14
Monlyn v. State,
705 So. 2d 1 (Fla. 1997)......................................33
Montgomery v. Louisiana,
136 S. Ct. 718 (2016)................................12, 14, 15
Mosley v. State,
209 So. 3d 1248 (Fla. 2016)...............................Passim
Neder v. United States,
527 U.S. 1 (1999)...32
Okafor v. State,
2017 WL 2481266 (Fla. June 8, 2017)...........................31

Pham v. State,
70 So. 3d 485 (Fla. 2011)....................................52
Plott v. State,
148 So. 3d 90 (Fla. 2014)....................................50
Powell v. Delaware,
153 A. 3d 69 (Del. 2016).................................19, 20
Proffitt v. Florida,
428 U.S. 242 (1976)..26
Rauf v. State,
145 A. 3d 430 (Del. 2016)....................................19
Reynolds v. State,
934 So. 2d 1128 (Fla. 2006)..................................33
Rhoades v. State,
233 P. 3d 61 (2010)..27
Ring v. Arizona,
536 U.S. 584 (2002)......................................9, 10
Rogers v. State,
957 So. 2d 538 (Fla. 2007)...................................52
Romano v. Oklahoma,
512 U.S. 1 (1994)..45
Sattazahn v. Pennsylvania,
537 U.S. 101 (2003)..40
Schriro v. Summerlin,
542 U.S. 348 (2004)......................................Passim
Simmons v. State,
207 So. 3d 860 (Fla. 2016)...................................32
Simpson v. United States,
721 F.3d 875 (7th Cir. 2013)..................................9
Smith v. State,
170 So. 3d 745 (Fla. 2015)...................................38
Spaziano v. Florida,
468 U.S. 447 (1984)..................................26, 42, 43
State v. Belton,
74 N.E. 3d 319...39
State v. Gales,
658 N. W. 2d 604 (2003)......................................40

State v. Johnson,
122 So. 3d 856 (Fla. 2013)....................................27
State v. Owens,
848 So. 2d 1199 (Fla. 1st DCA 2003)...........................49
State v. Towery,
64 P. 3d 828 (2003)...28
Steinhorst v. State,
412 So. 2d 332 (Fla. 1982).....................................8
Stovall v. Denno,
388 U.S. 293 (1967)...22
Teague v. Lane,
489 U.S. 288 (1989).................................10, 11, 12
United States v. Fields,
483 F.3d 313 (5th Cir. 2007)..................................39
United States v. Fields,
516 F.3d 923 (10th Cir. 2008).................................39
United States v. Gabrion,
719 F.3d 511 (6th Cir. 2013)..................................39
United States v. Mitchell,
502 F.3d 931 (9th Cir. 2007)..................................39
United States v. Purkey,
428 F.3d 738 (8th Cir. 2005)..................................39
United States v. Sampson,
486 F.3d 13 (1st Cir. 2007)...................................39
Urbin v. State,
714 So. 2d 411 (Fla. 1998)....................................17
Varela v. United States,
400 F.3d 864 (11th Cir. 2005).................................27
Vining v. State,
827 So. 2d 201 (Fla. 2002)....................................51
Walker v. United States,
810 F.3d 568 (8th Cir. 2016)...............................9, 10
Welch v. United States,
136 S. Ct. 1257 (2016).....................................15, 16
Williams v. State,
209 So. 3d 543 (Fla. 2017)....................................32

Witt v. State,
387 So. 2d 922 (Fla. 1980)................................11, 21

Constitutional Provisions

Florida Constitution Article. I, § 17............................44

Statutes

Florida State Stat. § 921.001....................................48

Florida State Stat. § 921.002....................................48

Florida State Stat. § 921.141....................................22

Rules

Fla. R. Crim. P. 3.851(d)(2).....................................37

PRELIMINARY STATEMENT

This brief will address Issues I and II together. The State's Answer Brief will address Issue II first, as the matter presented is a procedural hurdle that Appellant must clear before he can establish any entitlement to the relief claimed in Issue I.

STATEMENT OF THE CASE AND FACTS

Facts of the Direct Appeal Case

In Appellant's direct appeal case, this Court summarized the facts of the case as follows:

> Unemployed, ill, and with no place to live, Hitchcock moved in with his brother Richard and Richard's family two to three weeks before the murder. On the evening of the murder, appellant watched television with Richard and his family until around 11:00 p. m. He then left the house and went into Winter Garden where he spent several hours drinking beer and smoking marijuana with friends.
>
> According to a statement Hitchcock made after his arrest, he returned around 2:30 a. m. and entered the house through a dining room window. He went into the victim's bedroom and had sexual intercourse with her. Afterwards, she said that she was hurt and was going to tell her mother. When she started to yell because he would not let her leave the bedroom, Hitchcock choked her and carried her outside. The girl still refused to be quiet so appellant choked and beat her until she was quiet and pushed her body into some bushes. He then returned to the house, showered, and went to bed.
>
> At trial Hitchcock repudiated his prior statement. He testified that the victim let him into the house and consented to having intercourse. Following this activity, his brother Richard entered the bedroom, dragged the girl outside, and began choking her. She

> was dead by the time appellant got Richard away from her. When Richard told him that he hadn't meant to kill her, Hitchcock told him to go back inside and that he, the appellant, would cover up for his brother. According to Hitchcock, he gave his prior statement only because he was trying to protect Richard.

Hitchcock v. State, 413 So. 2d 741, 743 (Fla. 1982). In a one-count indictment, Appellant was charged with premeditated murder. *Id*. The jury convicted Appellant of first-degree murder, and recommended that Appellant be sentenced to death. *Id*. The trial court followed the jury's recommendation, and sentenced Appellant to death. *Id*. On Appeal, the Florida Supreme Court affirmed the death sentence. *Id*.

Postconviction Proceedings

Appellant sought postconviction relief in the trial court, and the trial court denied Appellant's motion. *Hitchcock v. State,* 432 So. 2d 42, 43 (Fla. 1983). This Court affirmed the denial of Appellant's motion for postconviction relief. *Id*. at 44. In subsequent federal habeas corpus proceedings, the United States Supreme Court granted certiorari and vacated Appellant's death sentence because the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances. *Hitchcock v. Dugger,* 481 U.S. 393, (1987). On remand, the jury again recommended the death penalty, which the trial judge subsequently imposed. This Court affirmed the sentence. *Hitchcock v. State,* 578 So. 2d 685

(Fla. 1990) (*Hitchcock III*), *cert. denied,* 502 U.S. 912 (1991).

On rehearing, the United States Supreme Court granted certiorari and remanded for reconsideration in light of *Espinosa v. Florida,* 505 U.S. 1079 (1992). *See Hitchcock v. Florida,* 505 U.S. 1215 (1992). Subsequently, this Court vacated Appellant's death sentence and directed the trial court to empanel a jury and conduct a new penalty proceeding within ninety days. *Hitchcock v. State,* 614 So. 2d 483 (Fla. 1993) (*Hitchcock IV*). In Appellant's second resentencing proceeding, the jury again recommended the death penalty, which the trial judge subsequently imposed. This Court again remanded for resentencing because evidence portraying Appellant as a pedophile was erroneously made a feature of his resentencing proceeding. *Hitchcock v. State,* 673 So. 2d 859 (Fla. 1996) (*Hitchcock V*).

Appellant's third resentencing proceeding began on September 9, 1996, and concluded with the jury's recommendation of the death penalty by a 10-2 vote. *Hitchcock v. State*, 755 So. 2d 638, 640-41 (Fla. 2000). (*Hitchcock VI*). This Court affirmed the sentence of death. *Id.* at 646. The United States Supreme Court denied Appellant's petition for writ of certiorari on December 4, 2000. *Hitchcock v. Florida*, 531 U.S. 1040 (2000).

This Court next addressed this case in 2004, when it affirmed the denial of Appellant's motion for post-conviction DNA testing. *Hitchcock v. State*, 866 So. 2d 23, 24–25 (Fla.

2004) (*Hitchcock VII*). Appellant later filed a petition for habeas corpus, which was denied. *Hitchcock v. State*, 991 So. 2d 337, (Fla. 2008) (*Hitchcock VIII*).

Appellant then filed a federal habeas corpus petition, which was denied on September 20, 2012, and subsequently affirmed by the Eleventh Circuit Court of Appeals. *Hitchcock v. Sec'y, Florida Dept. of Corr.*, 745 F.3d 476 (11th Cir. 2014), *cert. denied, Hitchcock v. Crews*, 135 S. Ct. 779 (2014).

On January 6, 2017, Appellant filed a successive motion to vacate.[1] (R: 123-62) A case management conference was held on February 7, 2017. (R: 234-49) On February 17, 2017, the trial court entered an order denying Appellant's successive motion, and ruled that Appellant was not entitled to relief based on this Court's decision in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *reh'g denied*, SC16-102, 2017 WL 431741 (Fla. Feb. 1, 2017). (R: 221-24) Appellant filed a timely notice of appeal on March 14, 2017. (R: 225-26)

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[1] Cites to the records are as follows: "PP4" will designate the fourth penalty phase/resentencing record, followed by the volume number and the page number. "R" will designate the current record on appeal followed by the page number. "IB" will designate Appellant's Initial Brief in this appeal, followed by any appropriate page number. Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are italicized; other emphases are contained within the original quotations.

SUMMARY OF ARGUMENT

ISSUES I & II: Appellant's argument that he is entitled to retroactive application of *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), under both the federal and state retroactivity standards, was not preserved for appellate review. Even if the arguments were preserved, *Hurst v. Florida* and *Hurst v. State* should not be applied retroactively. The rules were procedural in nature only, and a new penalty phase proceeding for sentences which have been long-final would greatly negatively impact trial courts across the state, and there is no evidence to suggest that a judge's factfinding was any less accurate than that of a jury. Accordingly, this Court should continue to deny retroactive application of *Hurst v. Florida* to Appellant and all capital defendants similarly situated. Furthermore, even if *Hurst v. Florida* were retroactive, Appellant is not entitled to relief because any sentencing error was harmless beyond a reasonable doubt.

ISSUE III: Appellant's claim that he was denied the right to a jury trial on the elements that subjected him to the death penalty is meritless. The argument is procedurally-barred, because it could have been raised on direct appeal. Even if the argument were not procedurally-barred, the jury was properly instructed on the law in effect at the time of his trial.

Additionally, this Court has consistently held that *Hurst v. Florida* does not apply retroactively to defendants whose death sentence was final prior to the *Ring* decision. Accordingly, Appellant's argument is without merit and must be denied.

ISSUE IV: Appellant is not entitled to any Eighth Amendment relief. *Hurst v. Florida* was decided based on the Sixth Amendment, not the Eighth Amendment. The Florida Constitution contains a conformity clause requiring this Court to interpret the Eighth Amendment consistently with the decisions rendered by the United States Supreme Court. Accordingly, because *Hurst v. Florida* did not contain any Eighth Amendment holdings, this Court cannot afford Appellant any Eighth Amendment relief.

ISSUE V: Appellant's argument that his death sentence should be vacated because the factfinding that subjected him to the death penalty was not proven beyond a reasonable, is meritless, as the jury was in fact instructed that the aggravating factors had to be established beyond a reasonable doubt. Further, *Hurst v. Florida* does not apply retroactively to Appellant's case, and therefore his argument is barred and without merit.

ISSUE VI: For the reasons argued in Issue I & II, Appellant's death sentence does not violate the Florida Constitution. Also, both this Court and the United States Supreme Court have long held that the State is not required to

allege aggravating factors in an indictment. As *Hurst v. Florida* did not convert the aggravators into elements that must be alleged in the indictment and is not retroactive to Appellant's case, this claim must be denied.

ISSUE VII: Appellant is not entitled to a new postconviction proceeding. *Hurst v. Florida* does not operate as a means to breathe new life into old issues previously addressed and disposed of on direct appeal and prior postconviction motions. Furthermore, there is no basis in the rules of procedure or any case law that authorizes a new postconviction proceeding based on a *Hurst v. Florida* claim. This is particularly so, as *Hurst v. Florida* does not apply to Appellant's case. Accordingly, Appellant is not entitled to relief.

ARGUMENT

I & II. APPELLANT IS NOT ENTITLED TO RETROACTIVE APPLICATION OF *HURST V. FLORIDA* OR *HURST V. STATE* AND EVEN IF *HURST* APPLIED RETROACTIVELY, APPELLANT WOULD NOT BE ENTITLED TO RELIEF BECAUSE ANY SENTENCING ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Appellant's case was final on December 4, 2000. This Court has clearly stated that *Hurst v Florida* and *Hurst v. State* do not apply to cases that were final before Ring issued in 2002. Moreover, both this Court and the United States Supreme Court have recognized that *Hurst* error can be harmless. Accordingly, any claim that Appellant should be entitled to *Hurst* relief should be denied.

A. Retroactivity

Before reaching any question as to whether the issue is harmless, Appellant must show that *Hurst* is applicable to his case. It is not. Even if these arguments were preserved for appellate review, **which they were not,**[2] Appellant would still not

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[2] Appellant's argument was not preserved for appellate review, because it was not presented to the trial court below for its consideration. The law is well settled that **"in order 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) (emphasis added); *see also McWatters v. State*, 36 So. 3d 613, 639 (Fla. 2010) (holding that defendant's legal argument was not preserved for appellate review, because the specific argument on appeal was not presented to the trial court below for its consideration). Here, Appellant did broadly argue below, that his death sentence violates both the federal

be entitled to relief from this Court because his case was final before 2002.

As an initial matter, while Appellant is asking this Court to reconsider its prior holding on retroactivity, 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*. Florida is an outlier for giving **any** retroactive effect to an *Apprendi*/[3]*Ring*[4] based error.[5] Neither the United States

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and state constitutions, and that the new rules should be applied to his case. However, Appellant did not specifically argue that he was entitled to relief under the federal retroactivity standard. Neither did Appellant specifically argue that he was entitled to relief under Florida's retroactivity standard. Further, Appellant did not argue below that the law of the case doctrine is inapplicable in his case. Accordingly, this entire issue was not preserved for appellate review, because these arguments were not the basis of the motion below, and were not presented to the trial court for its consideration.

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

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

[5] 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*

Constitution nor the Florida constitution mandate retroactive application of *Hurst*.

1. Appellant is not entitled to relief under Federal law, because the United States Supreme Court has repeatedly held that *Ring* did not apply retroactively.

Appellant contends that he is entitled to retroactive application of the new constitutional rules under federal law. However, Appellant is incorrect.

First, it is important to note that Florida does not follow the federal retroactivity standard. *See Asay*, 210 So. 3d at 15 ("this Court announced in *Johnson*[6] that despite the federal courts' use of *Teague v. Lane*, 489 U.S. 288 (1989), to determine

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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.

[6] *Johnson v. State*, 904 So. 2d 400 (Fla. 2005).

retroactivity, this Court would 'continue to apply our longstanding *Witt*[7] analysis . . . .")

Second, even if Florida did follow the federal retroactivity standard, Appellant would still not be entitled to relief. In promulgating the rule for the retroactivity analysis, the Supreme Court was first careful to note that,

> [a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions 'shows only that 'conventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should have *none*.

Teague v. Lane, 489 U.S. 288, 309 (1989). Thus, the standard adopted by the Court was as follows: the general rule was that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 310. The Court did go on to give two exceptions to this general rule. The first exception is that "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe . . . .'" *Id.* at 311. (Citations omitted). The second exception is "that the procedure at issue must implicate the fundamental

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

fairness of the trial." *Id.* at 312.

As part of the retroactivity analysis in *Teague*, the Supreme Court distinguished a substantive rule from a procedural rule. The Court stated that "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Id.* at 353. Restated, "[s]ubstantive rules, then, set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016). However, "[p]rocedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'" *Id.* at 730. The distinction between substantive rules and procedural rules is critical, because substantive rules apply retroactively regardless of when a conviction became final, while procedural rules do not. *Id.* at 729.

Applying the rules above, the United States Supreme Court 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.") The Supreme Court held that *Ring* did not apply retroactively because *Ring* did not alter the range of conduct Arizona law subjected to the death penalty. *Summerlin*, 542 U.S. at 353. Instead, *Ring* merely "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment. Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules . . . ." *Id.* As *Hurst v. Florida* is merely an extension of *Ring*, it also follows that *Hurst v. Florida* is also a procedural rule.

Moreover, *Hurst v. State* is also procedural in nature only, because the rules in *Hurst v. State* did not alter the range of conduct Florida law subjected to the death penalty. In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Court extended its holding in *Ring* to Florida's death penalty procedures, holding that Florida's death penalty statute violated the Sixth Amendment because it allowed a judge to make the necessary findings to render a death penalty. See *Id.* at 624 (finding Florida's

sentencing scheme, which required the judge alone to *find the existence of an aggravating circumstance*, unconstitutional). Upon remand for a consideration of harmless error, this Court expanded that holding to require that, in addition to finding the aggravating circumstances, the jury must "unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 57.

Accordingly, after the issuance of *Hurst v. State*, defendants were still subject to the death penalty. The rules in *Hurst v. State* merely altered the methods for determining whether a defendant's conduct is punishable by death, requiring the jury to make certain factual determinations. Rephrased, *Hurst v. State* merely transferred decision-making authority from the judge to the jury. Thus, because *Hurst v. State* is procedural in nature only, under the federal standard, *Hurst v. State* would not be subject to retroactive application. Accordingly, Appellant's argument is without merit.

Appellant's reliance on *Montgomery* is misguided. There, Louisiana held that the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which held that a juvenile could not be sentenced to mandatory life in prison without parole, did not apply retroactively. *Montgomery*, 136 S. Ct. at 727. The

Supreme Court reversed Louisiana's holding, because *Miller* was a substantive rule. *See Id*. at 734 ("*Miller* announced a substantive rule of constitutional law.") The rule was substantive, because it placed a punishment beyond the State's power to impose. Rephrased, *Miller* prevented the State from imposing a mandatory life sentence on juveniles. *Id*. Therefore, because *Miller* was a substantive rule, *Miller* applied retroactively regardless as to when a defendant's conviction became final. *Id*.

Here, however, *Hurst v. State* was not a substantive rule, because it did not place the death penalty beyond Florida's power to impose. Instead, *Hurst v. State* merely regulated the manner of determining a defendant's sentence. Accordingly, Appellant's reliance on *Montgomery* is misplaced.

Likewise, Appellant's reliance on *Welch v. United States*, 136 S. Ct. 1257 (2016), is also misplaced. There, the issue was whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), which found that a federal criminal statute was void for vagueness, was a substantive rule subject to retroactive application. *Welch*, 136 S. Ct. 1261. The Court concluded that *Johnson* was a substantive rule, because *Johnson* "changed the substantive reach of the Armed Career Criminal Act, altering 'the range of conduct or the class of persons that the [Act] punishes.'" *Id*. at 1265.

The Court further reasoned that after *Johnson*, "the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison." *Id.* More notably, the Court stated, "***Johnson* had nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced under the Armed Career Criminal Act. It did not, for example, 'allocate decision-making authority' between judge and jury**." (citations omitted) (emphasis added). Thus, because *Johnson* was substantive in nature, *Johnson* applied retroactively. *Id.* at 1268.

Again, *Hurst v. State* merely allocated decision-making authority from a judge to the jury. Unlike *Welch*, after *Hurst v. State*, a defendant is still subject to the death penalty. Additionally, unlike *Welch*, *Hurst v. State* did not alter the range of conduct or class of persons subject to the rules. Hence, *Welch* is distinguishable and therefore does not apply.

Although Appellant attempts to distinguish *Ring* on the grounds that Florida's death sentencing scheme was vastly different from Arizona's sentencing scheme, the United States Supreme Court found otherwise. *See Hurst v. Florida*, 136 S. Ct. at 622 ("[a]lthough Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial . . . .") Hence, as there was no material distinction between Arizona's death sentencing scheme

and Florida's death sentencing scheme, *Ring* is wholly analogous and applicable in this case.

Additionally, Appellant's argument that the new rules place defendants who did not have a jury trial on the elements that subjected him or her to the death penalty beyond the State's power to punish, also fails. Appellant's argument is based upon this Court's language in *Hurst v. State*, that the new rules would narrow the class of individuals subjected to the death penalty to the most aggravated and least mitigated murders. However, even before *Hurst v. State*, this Court had long held that "a reviewing court must never lose sight of the fact that the death penalty has long been reserved for only the most aggravated and least mitigated of first-degree murders." *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998). Thus, the new rules did not change this Court's long-standing rule that the death penalty could only be imposed for the most aggravated and the least mitigated of murders, and therefore the rules did not alter the class of persons that could be subjected to the death penalty. More importantly, in making this argument, Appellant misconstrues the standard for determining whether a rule is substantive or procedural. **A substantive rule prohibits the State from seeking a certain punishment, or bars a certain punishment in its entirety**, as reflected in *Montgomery*. Here, the rules in *Hurst v. State* did not prevent the State from

seeking the death penalty. Neither did the rules outlaw the death penalty in its entirety. Instead, the rules merely altered the methods of determining a defendant's sentence, as reflected in *Ring*. Accordingly, Appellant's argument fails.

Moreover, Appellant's argument that this Court's requirement of proof beyond a reasonable doubt in *Hurst v. State*, proves that the new rules are substantive in nature, is greatly misguided. In making this argument, Appellant relies on *Ivan V. v. City of New York*, 407 U.S. 203 (1972), where the Supreme Court held that the new rule requiring proof beyond a reasonable doubt was to be applied retroactively. *Id.* at 204-05. Appellant's argument fails, however, because **Florida always required that the facts subjecting a defendant to the death penalty be proven beyond a reasonable doubt**. The new rules merely allocated the decision-making from the judge to the jury, and did not in any way affect or change the burden of proof. *See Hurst v. State*, 202 So. 3d at 53 ("before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances. **These same requirements existed in Florida law when Hurst was sentenced in 2012—although they were consigned to the trial judge to make**.") (Emphasis added). Hence,

because the proof beyond a reasonable doubt standard was always the rule in Florida, and the rules merely changed the party making the factual determinations, the new rules in *Hurst v. State* are procedural, and not substantive in nature.

Appellant's reliance on *Powell v. Delaware*, 153 A. 3d 69 (Del. 2016) is also greatly misguided. In relying on *Powell*, Appellant ignores why the court determined that *Hurst v. Florida* was retroactive in Delaware. At issue in *Powell*, was whether *Rauf v. State*, 145 A. 3d 430 (Del. 2016),[8] applied retroactively. *Id*. at 70. The court in Powell held *Hurst v. Florida* retroactive, **because *Hurst v. Florida* changed the burden of proof in Delaware**. In fact, the court in *Powell* distinguished *Ring* and *Hurst v. Florida* on this very point. In holding that *Rauf* applied retroactively, the court distinguished *Hurst v. Florida* because the Florida death penalty statute already required proof beyond a reasonable doubt, whereas Delaware did not, and instead used a lower standard. *See Id*. at 74 ("unlike *Rauf*, neither *Ring* nor *Hurst* involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof. This significant distinction in *Ring* and *Hurst* is

[8] The Court in *Rauf* held that Delaware's death penalty statute was unconstitutional in light of *Hurst v. Florida*, because the statute allowed for the death penalty to be imposed based upon a judge's factfinding. *Rauf*, 145 A. 3d at 145.

fatal to the State's reliance upon *Summerlin* and is dispositive of why the *Rauf* holding fits within *Teague's* second exception to nonretroactivity.”) As part of its reasoning, the court even quoted this Court’s opinion in *Hurst v. State*, where this Court stated,

> [t]hus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors *proven beyond a reasonable doubt*, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances. *These same requirements existed* in *Florida law when Hurst was sentenced in 2012*—although they were consigned to the trial judge to make.

Powell, 153 A. 3d at 74 (*quoting Hurst v. State*, 202 So. 3d at 53) (emphasis in the original). Therefore, the Court concluded that based on *Ivan V.*, which held that changes in the burden of proof must be applied retroactively, *Rauf* applied retroactively. *Powell*, 153 A. 3d at 76. Here, as previously argued, Florida’s death penalty already required that the facts subjecting a defendant to the death penalty be proven beyond a reasonable doubt. Thus, the change in the rules for capital sentencing had nothing to do with the burden of proof. Accordingly, because Florida’s death penalty statute did not change the burden of proof and Florida already required proof beyond a reasonable doubt, Appellant’s reliance on *Powell* is greatly misplaced.

Additionally, although Appellant also alleges that partial retroactivity violates the Due Process and Equal Protection

Clause, Appellant did not fully brief this specific argument regarding the alleged constitutional deformity, and the argument is completely conclusory. Hence, the argument is waived for appellate review. *See Kilgore v. State*, 55 So. 3d 487, 511 (Fla. 2010) (holding that conclusory statements waives the issue for appellate review). Accordingly, Appellant is not entitled to relief.

2. Appellant is not entitled to relief under State law.

Appellant also contends that he is entitled to relief under Florida's retroactivity analysis. However, this argument also fails.

First, in support of his argument, Appellant relies extensively on this Court's opinion in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). However, *Mosely* is distinguishable, because unlike Mosley, Appellant's death sentence was final prior to *Ring*. *See Asay*, 210 So. 3d at 22. Additionally, unlike Mosley, Appellant did not raise a *Ring*-like claim while at the trial level. Thus, contrary to his assertion, Appellant did not raise a *Ring*-like claim at his first opportunity. Hence, Appellant's subsequent *Ring* claim in his postconviction setting was not preserved.

Second, this Court's retroactivity analysis and reasoning in *Mosley* is inapplicable to Appellant's case. In deciding issues of retroactivity, Florida uses the following test

pursuant to *Witt v. State*, 387 So. 2d 922 (Fla. 1980):

> Under *Witt* a change in the law does not apply retroactively "unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." To be a "development of fundamental significance," the change in law must "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties," or, alternatively, be "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall*[9] and *Linkletter*."[10] The *Stovall/Linkletter* test requires courts to analyze three factors: (a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice.

Asay, 210 So. 3d at 16-17. (internal Citations omitted).

Here, Appellant contends that this Court erred in holding that the reliance and the effect on the administration of justice weighted against retroactive application. In support of this argument, Appellant points to the failure of the legislature to amend Section 921.141, Florida Statutes, even though other states had amended their death penalty statutes. However, it is important to note that after the *Ring* decision in 2002, the United States Supreme Court repeatedly denied petitions for writ of certiorari, even though capital defendants raised *Ring* claims. Thus, based on the repeated rejection and denials of petitions for writ of certiorari over a fourteen-year

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[9] *Stovall v. Denno*, 388 U.S. 293 (1967).

[10] *Linkletter v. Walker*, 381 U.S. 618 (1965).

period, the legislature had every right to believe that Florida's death sentencing scheme was not unconstitutional, notwithstanding *Ring*. Notably, after *Ring*, this Court also rejected arguments that Florida's death penalty violated the Sixth Amendment based on *Ring*. *See e.g., Hurst v. State*, 147 So. 3d 435, 446 (Fla. 2014) ("we rejected claims that *Ring* applied to Florida's capital sentencing scheme.") Thus, both this Court and the legislature had every reason to believe that Florida's death penalty was, in fact, constitutional. *See Asay*, 210 So. 3d at 19 ("this Court and the State of Florida had every reason to believe that its capital sentencing scheme was constitutionally sound.")

Appellant's contention that that the effect on the administration of justice based on full retroactivity would not place any more burden on the system, is, respectfully, misguided. As this Court stated in *Asay*,

> [r]esentencing hearings necessitated by retroactive application of *Ring* would be problematic. For prosecutors and defense attorneys to reassemble witnesses and evidence literally decades after an earlier conviction would be extremely difficult. We fear that any new penalty phase proceedings would actually be less complete and therefore less (not more) accurate than the proceedings they would replace.
>
> Granting collateral relief ... would have a strong impact upon the administration of justice. Courts would be forced to reexamine previously final and fully adjudicated cases. Moreover, courts would be faced in many cases with the problem of making difficult and time-consuming factual determinations based on stale records.

Asay, 210 So. 3d at 21. (Citations omitted).

In fact, *any* retroactive application of *Hurst* places an undue burden on the administration of justice, as can be seen by the way this Court, our circuit and district courts, as well as the federal courts have been inundated with applications for relief. This matter is burdening the system and is unfair to the State and the victims, who have a right to faith in finality. Death isn't *so* "different" that the usual rules related to retroactivity should not apply.

Additionally, Appellant's argument that the impact on the system pales in comparison to the importance of the rights at issue, also fails. The United States Supreme Court stated that, while the right to a jury trial generally tends to prevent arbitrariness, "[w]e would not assert ... that every criminal trial-or any particular trial-held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." *Summerlin*, 542 U.S. at 357. (Citations omitted). Further, [t]he values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." *Id*. (Citations omitted). Hence, while the right to a jury trial is important, even the United States Supreme Court has recognized that the right is not so fundamental even in capital cases to

require a retrial of all defendants previously convicted under a framework that was constitutional at the time of the defendant's conviction. Accordingly, Appellant's argument is misguided.

Appellant's reliance on Justice Pariente's dissenting opinions is misplaced. Denying retroactive relief to Appellant and similarly situated individuals, is not unconstitutional. As with any newly enacted rule, there are always individuals who will not receive the benefit of the new rule. However, just because an individual does not receive the benefit of the new rule does not mean that the individual is deprived of constitutional rights. This is particularly so, **as defendants who were sentenced under Florida's death penalty in effect prior to *Ring*, were not sentenced under an unconstitutional framework.**

Moreover, as the United States Supreme Court observed, "for every argument why juries are more accurate factfinders, there is another why they are less accurate. The Ninth Circuit dissent noted several, including juries' tendency to become confused over legal standards and to be influenced by emotion or philosophical predisposition." *Summerlin*, 542 U.S. at 356. The Court went even further and stated that "judicial sentencing may yield more consistent results because of judges' greater experience." *Id*. Thus, notwithstanding the right to a jury trial, there is no evidence to suggest that a jury's factfinding is any more reliable than a judge's factfinding.

Furthermore, Appellant's Eighth Amendment argument must fail. *Hurst v. Florida* involved a Sixth Amendment issue, not an Eighth Amendment issue. Because Florida has a conformity clause in its constitution, this Court cannot craft an Eighth Amendment holding that is inconsistent with the United States Supreme Court's decisions regarding the Eighth Amendment. The surviving precedent under *Spaziano v. Florida*, 468 U.S. 447 (1984) reveals that there is no Eighth Amendment requirement for jury sentencing in capital cases. *See Spaziano*, 468 U.S. at 462-63 ("the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge."); *see also Proffitt v. Florida*, 428 U.S. 242, 252 (1976) ("[t]his court has pointed out that jury sentencing in a capital case can perform an important societal function . . . but it has never suggested that jury sentencing is constitutionally required.") Thus, as there is no Eighth Amendment requirement for jury sentencing, Appellant is not entitled to relief under the Eighth Amendment. Additionally, although Appellant contends that there was no difference between his case and Mosely's case, this assertion is incorrect. First, Mosley raised *Ring* claims at the trial level, whereas Appellant did not. Most importantly, Mosely was sentenced under an unconstitutional framework, whereas Appellant was not. Accordingly, for the aforementioned reasons, Appellant is not

entitled to relief.

The decision in *Hurst v. Florida* is based on an entire line of jurisprudence which courts have almost universally held to not have retroactive application. *See DeStefano v. Woods*, 392 U.S. 631 (1968) (*per curiam*) (holding the Court's decision in *Duncan v. Louisiana*, which guaranteed the right to a jury trial to the States was not retroactive); *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); *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); *State v. Johnson*, 122 So. 3d 856, 865-66 (Fla. 2013) (holding *Blakely* not retroactive in Florida).[11] *See also Rhoades v. State*, 233 P. 3d

[11] The Eleventh Circuit Court of Appeals has determined that if a lead case is not retroactive, neither is its progeny. In *Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014), the court reiterated its view that *Apprendi's* rule does not apply retroactively on collateral review, and if the rule is not retroactive on collateral review then neither is a decision applying its rules. This has also been the prior practice of the Florida Supreme Court which has determined that *Apprendi* and its progeny were not to be applied retroactively in Florida. *See Hughes v. State*, 901 So. 2d 837, 844 (Fla. 2005) (holding that *Apprendi* is not retroactive and noting that "neither the accuracy of convictions nor of sentences imposed and final

61, 70-71 (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 factfinding "seriously diminishes accuracy."); *State v. Towery*, 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 the Court's duty to protect victims' rights under the Arizona Constitution). Appellant's fairness argument rings hollow against the interests of the State, which prosecuted Appellant in good faith under the law existing at the time of his trial, the concept of finality, and the interests of the victims' family members.

Appellant claims that fairness and uniformity require that *Hurst* be retroactively applied to all cases. Fairness and uniformity require no such thing. Appellant cannot establish that his sentencing procedure was less accurate than future sentencing procedures employing the new standards announced in *Hurst v. State*. Just like *Ring* did not enhance the fairness or efficiency of death penalty procedures, neither does *Hurst*.

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before *Apprendi* issued is seriously impugned.")

Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005). As the United States Supreme Court has explained, "for every argument why juries are more accurate factfinders, there is another why they are less accurate." *Summerlin*, 542 U.S. at 356. Because the accuracy of Appellant's death sentence is not at issue, fairness does not demand retroactive application of *Hurst v. State*.

As to uniformity, Appellant appears to suggest that any new development in the law should be applied to all cases. Inherent in the concept of non-retroactivity is that some defendants will get the benefit of a new development, while other defendants will not. Drawing a line between newer cases that will receive a benefit and older, final cases that will not receive a benefit is part of the landscape of retroactivity analysis. If it were not this way, cases would never get resolved. With every new development in the law, capital defendants would get a new trial or a new penalty phase. Given that litigation in capital cases can span decades, there would never be finality.

Appellant points to other cases in which laws have been held wholly retroactive in support of his case against partial retroactivity. Just because some cases have been held completely retroactive does not mean that all cases should be so. This Court has mandated that *Hurst* be retroactive only to cases not final when *Ring* was decided and that holding should be affirmed.

3. Appellant has not shown manifest injustice to overcome

the now settled precedent of this Court.

Appellant contends that the denial of relief pursuant to *Hurst v. Florida* and *Ring* constitutes manifest injustice, and therefore the general rule of the law of the case doctrine does not apply. The State respectfully disagrees.

As previously argued, *Hurst* does not apply retroactively to Appellant's case, based on this Court's decision in *Asay*.

Furthermore, and notably, the United States Supreme Court **did not find** that manifest injustice or fundamental fairness warranted retroactive application of *Ring*, upon which *Hurst v. Florida* and *Hurst v. State* is based. In fact, the Court found the opposite and stated, "[t]he values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." *Summerlin*, 542 U.S. at 357. Further, "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 . . . ." *Id*. at 358. This is particularly so, as this Court has already stated, that defendants like Appellant, whose sentence was final prior to *Ring*, were not sentenced under an unconstitutional framework. *Mosley*, 209 So. 3d at 1280. Accordingly, Appellant's argument is

without merit, and therefore he is not entitled to relief.

In sum, neither the state nor federal retroactivity standards warrant retroactive application of *Hurst v. Florida* and *Hurst v. State*. *Ring* was a procedural rule, and since *Hurst v. Florida* and *Hurst v. State* are extensions of *Ring*, they are also procedural only, and therefore not subject to retroactive application. Furthermore, as there is no evidence to suggest that a jury's factfinding is any more reliable than a judge's factfinding, and given the substantial negative impact on judicial administration across the state, if the new rules apply retroactively to all defendants, this Court should continue to deny retroactive application to defendants whose sentence was final prior to *Ring*.

B. <u>HARMLESS ERROR</u>

Furthermore, even if the harmless error test did apply to Appellant's case, any *Hurst* error would be 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 recommendation, the State respectfully suggests that this Court's repeated rejection of harmless error as requiring this Court to overrule *Hurst*[12] and to speculate what

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[12] *Okafor v. State*, SC15-2136, 2017 WL 2481266, at *6 (Fla. June 8, 2017), Lawson, J., concurring ("[a]t this point, *Hurst* is the

jurors would do,[13] misconstrues the nature of harmless error review and the State's arguments. The State is only asking this Court to review the less-than-unanimous recommendations in accordance with *Hurst*[14] and to start that analysis with 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).

A proper harmless error analysis looks to the "rational" jury and evaluates the facts of the case based on what the court *knows* 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.

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law in Florida—whether I agree with it or not—and issues governed by our Hurst precedent will continue to be decided by our Court in pending death penalty proceedings for at least several more months.")

[13] E.g., *Hurst v. State*, 202 So. 3d at 69 ("[w]e decline to speculate as to why seven jurors in this case recommended death and why five jurors were persuaded that death was not the appropriate penalty."); *Williams v. State*, 209 So. 3d 543, 567 (Fla. 2017)("[w]e cannot speculate why these three jurors did not find that sufficient aggravating factors existed to impose death."); *Simmons v. State*, 207 So. 3d 860, 867 (Fla. 2016)("[w]e decline to speculate as to the reasons why four jurors voted for life in this case.")

[14] Additionally, this Court appears to suggest that to find a less than unanimous recommendation as harmless would require the Court to overrule *Hurst v. State*. It does not. *Hurst v. State* explicitly states that the error that occurred in Hurst's sentencing proceeding, in which the judge rather than the jury made all the necessary findings to impose a death sentence, is not structural error incapable of harmless error review. *Id.* at 67-68 ("[h]aving concluded that *Hurst v. Florida* error is capable of harmless error review, we must now conduct a harmless error analysis under Florida law.")

This is identical to the analysis this Court has used 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*[15] line of cases is also instructive on the application of harmless error when this Court must determine whether a rational jury—when properly instructed-would have

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

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, to find the existence of aggravating factors. This Court should continue to look to "the circumstances of this case" to determine whether a rational factfinder would have imposed a sentence of death.

Here, the facts showed that Appellant went into the victim's bedroom and had sexual intercourse with her. Afterwards, when the victim started to yell because he would not let her leave the bedroom, Appellant choked the victim and carried her outside. When the victim still refused to be quiet, Appellant choked and beat her, and placed her body in the bushes.

The jury recommended the death penalty by a vote of ten to

two. The trial court found four aggravating factors: "(1) the crime was committed by a person under sentence of imprisonment (parole); (2) the crime was committed during commission of the felony of sexual battery; (3) the crime was committed for the purpose of avoiding arrest; and (4) the crime was especially heinous, atrocious, or cruel (HAC)." *Hitchcock*, 755 So. 2d at 640. As for mitigation, the only statutory mitigation was that Appellant was twenty years-old at the time of the offense, and several nonstatutory mitigating factors. *Id*.

Applying *Neder*, any *Hurst* error was harmless beyond a reasonable doubt. Based on the extensive aggravation presented and the lack of substantial mitigation, a rational jury, properly instructed, 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 still not be entitled to relief.

Moreover, two of the aggravators (under sentence of imprisonment and in the course of a felony) take this case outside the ambit of a *Ring*/*Hurst* type case. *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 course of a felony supported by separate guilty verdict exempting the sentence from holding in *Ring*). Given that *Hurst*

is an application of *Ring* to Florida, and this Court has found contemporaneous and prior violent felony convictions remove a case from the scope of *Ring*, it should also follow that Appellant’s prior and contemporaneous felony convictions remove his case from the scope of *Hurst*. *Hurst v. Florida* did not expand the holding in *Ring*. In fact, the United States Supreme Court denied petitions based on *Ring* for years until a “pure” *Ring* case came along – that is, one that did not involve a known juror finding such as a prior or contemporaneous felony conviction.

Appellant’s claim that the judicial considerations of newly discovered evidence should apply to his case is also meritless, and Appellant’s reliance on *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014) is greatly misguided. *Hildwin* requires a cumulative analysis of all the evidence when a claim of newly discovered evidence is being raised, but a *Hurst* claim is not a claim of newly discovered evidence. Also, *Hildwin* concerns the treatment of evidence, not pure legal issues, which is what a *Hurst* claim is. *Hildwin* cannot be read as resurrecting previously denied legal claims. No view of the scope of the holdings of either *Hurst v. Florida* or *Hurst v. State*, supports this claim. Accordingly, Appellant is not entitled to relief.

In sum, Appellant’s argument that the State cannot show that any *Hurst v. State* error in his case was harmless, is

meritless. This Court has repeatedly held that defendants like Appellant, whose death sentence were final prior *Ring*, do not receive *Hurst* relief. Accordingly, as *Hurst* does not apply to Appellant's case, the harmless error analysis contained therein likewise does not apply to Appellant's case. *Asay*, 210 So. 3d at 22 ("[a]fter weighing all three of the above factors, we conclude that *Hurst* should not be applied retroactively to Asay's case, in which the death sentence became final before the issuance of *Ring*.") However, even if *Hurst* did apply to Appellant's case, any error was harmless beyond a reasonable doubt. Accordingly, Appellant is not entitled to any relief.

III. APPELLANT WAS NOT DENIED HIS RIGHT TO A JURY TRIAL ON THE ELEMENTS THAT SUBJECTED HIM TO THE DEATH PENALTY.

Appellant next generally argues that he was denied a jury trial on the elements that subjected him to the death penalty. To the extent that he is attempting to raise a separate claim under issue III of his brief, this claim should have been raised on direct appeal rather than in a successive postconviction motion. Consequently, this claim is 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 this claim does not rest on a new constitutional rule that has been held retroactive by either this Court or the Supreme Court, it must be denied.

In addition to being procedurally barred and untimely, this claim is also without merit. It is unclear what separate claim Appellant is attempting to make under Issue III when he generally states that he was denied his right to a jury trial. Regardless, 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 bore the burden "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 circumstances they may consider must be proven beyond a reasonable doubt. (PP4, V7: 368). 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. (PP4, V7: 367-69) Consequently, the jury was unequivocally instructed as to Hitchcock'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. In addition, the judge found the existence of all four aggravators, two of which were directly based upon the jury verdict, beyond a reasonable doubt.

Appellant fails to understand that the Sixth Amendment

right to a jury trial does not mandate the jury issue a verdict or even a recommendation as to the appropriate sentence. Trial judges traditionally impose a defendant's sentence within the range authorized by the legislature as supported by either a guilty plea or a jury verdict. *Ring*/*Hurst*/*Apprendi* 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, once the jury finds an aggravator, or an aggravator is necessarily found in the jury verdict, the constitutional requirement of Hurst/Ring 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* and its progeny.[16] *See State v. Belton*, 74 N.E. 3d 319, 337 ("[f]ederal

[16] The First, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits

and state courts have upheld laws similar to Ohio's, explaining that if a defendant 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

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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).

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 'error' and what took a case out from under the *Ring*/*Apprendi* rubric was not disturbed by the Supreme Court's ruling in Hurst.

In any case, Appellant's death sentence became final on December 4, 2000, when the United States Supreme Court denied his petition for writ of certiorari. This Court has consistently held that *Hurst v. Florida* does not apply retroactively to defendants whose death sentence were final prior to the *Ring* decision. Because Appellant's death sentence was final prior to *Ring*, *Hurst* does not apply and thus Appellant was not denied his right to a jury trial on the elements that subjected him to the death penalty.

Notably, although Appellant argues extensively in his Initial Brief that he is 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.”) Hence, as Appellant’s death sentence was final long before the issuance of the *Ring* decision, he would still not be entitled to relief, because *Ring* would not have applied retroactively to his case. Accordingly, Appellant is not entitled to any relief.

IV. APPELLANT’S DEATH SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT BECAUSE THE HOLDINGS IN *HURST V. FLORIDA*, 136 S. CT. 616 (2016) AND *HURST V. STATE*, 202 SO. 3D 40 (FLA. 2016) DID NOT IMPLICATE THE EIGHTH AMENDMENT.

Appellant contends that his death sentence violates the Eighth Amendment, because his sentence is contrary to evolving standards of decency, and is also arbitrary and capricious. (IB: 41) However, Appellant’s argument fails. *Hurst v. Florida* was decided based on the Sixth Amendment. Furthermore, although this Court included dicta regarding the Eighth Amendment in *Hurst v. State*, the ultimate holding was based on the Sixth Amendment. Further, the Florida Constitution contains a conformity clause requiring this Court to interpret the Eighth Amendment in

conformity with the decisions of the United States Supreme Court. Thus, because the United States Supreme Court has held that jury sentencing in not required in capital cases, this Court cannot overrule the surviving precedent of the United States Supreme Court.

In *Spaziano v. Florida*, 468 U.S. 447 (1984), the United States Supreme Court held that the Eighth Amendment is not violated in a capital case when the ultimate responsibility of imposing death rests with the judge. *Spaziano v. Florida*, 468 U.S. 447, 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 only on Sixth Amendment grounds, and based its holding on the Sixth Amendment, not the Eighth Amendment. *See Hurst v. Florida*, 136 S. Ct. at 624 ("[t]he Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."); *see also Asay*, 210 So. 3d at 7 (noting that the United States Supreme Court "did not address whether Florida's sentencing scheme violated the Eighth Amendment"). *Hurst v. Florida* overruled *Spaziano* **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.

Appellant is correct in his assertion that this Court included the Eighth Amendment as a reason for warranting unanimous jury recommendations in its *Hurst v. State* decision. See *Hurst v. State*, 202 So. 3d at 59 (“we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment. Although the United States Supreme Court has not ruled on whether unanimity is required in the jury's advisory verdict in capital cases, the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death.”) Respectfully, however, this Court cannot overrule the United States Supreme Court’s surviving precedent in *Spaziano*. Furthermore, Florida has a conformity clause in its state constitution that 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. 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). Hence, given that there is no United States Supreme Court case holding that the Eighth Amendment requires the jury's final recommendation to be unanimous, both this Court's Eighth Amendment holding and Appellant's Eighth Amendment argument are, respectfully, incorrect.

Nevertheless, this Court's Eighth Amendment holding in *Hurst v. State* was held not to be retroactive to cases which were final prior to the decision in *Ring*. *Asay*, 210 So. 3d at 7-14. Accordingly, as Appellant's sentence was final prior to the *Ring* decision, his claim that he is entitled to relief under the Eighth Amendment is without merit.

Furthermore, Appellant's *Caldwell v. Mississippi*, 472 U.S. 320 (1985) claim is also without merit. First, any complaint about an alleged *Caldwell* violation at this point is untimely and procedurally barred from consideration, because the claim could have been raised on direct appeal, and thus is not appropriate for a postconviction motion. *See Gorby,* 819 So. 2d 664, 674 n. 8 (Fla. 2002) (holding that claims that could have been, or were raised on direct appeal, are procedurally barred from being raised in a postconviction motion.) Thus, the State

contends that because the claim was not appropriate for Appellant's successive postconviction motion, it likewise cannot be reviewed on appeal from the denial of Appellant's successive postconviction motion.

Second, to establish constitutional error under *Caldwell*, a defendant must show that the comments or instructions to the jury "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). Appellant's jury was properly instructed on its role based upon the law existing at the time of his trial. The suggestion that the jury should have been instructed in accordance with a constitutional change which occurred long after his trial is unavailing. This is particularly so, as this Court has held that defendants like Appellant whose death sentence was final prior to the issuance of *Ring*, were not sentenced under an unconstitutional death sentencing scheme. *See Mosley*, 209 So. 3d at 1280 (stating that "Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002.") Thus, contrary to Appellant's contention, his jury was not instructed on its role in an unconstitutional death penalty scheme. Accordingly, Appellant's argument necessarily fails.

In sum, Appellant is not entitled to relief under the Eighth Amendment. *Hurst v. Florida* was decided based on the Sixth Amendment, not the Eighth Amendment. While this Court

included an Eighth Amendment holding in its *Hurst v. State* decision, the Florida Constitution has a conformity requirement, requiring this Court to interpret the Eighth Amendment consistent with the decisions from the United States Supreme Court. Because the United States Supreme Court has never held that the Eighth Amendment requires a unanimous jury verdict, this Court cannot afford Appellant any Eighth Amendment relief. Accordingly, Appellant's argument fails, and he is not entitled to relief.

V. APPELLANT'S CLAIM THAT THE FACTFINDING THAT SUBJECTED HIM TO THE DEATH PENALTY WAS NOT PROVEN BEYOND A REASONABLE DOUBT IS MERITLESS.

Appellant contends that the factfinding that subjected him to the death penalty was not proven beyond a reasonable doubt. Relying on *In re Winship*, 397 U.S. 358 (1970), Appellant suggests that refusing to apply the unanimity requirement set forth in *Hurst v. State* would amount to a denial of due process. This claim is barred and without merit.

In *Winship*, the Court held, "the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id*. at 364. The Court then extended that holding to juveniles charged with crimes. *Id.* at 368. The rule announced in *Winship* was given retroactive effect because it was to "overcome an aspect of the criminal trial that

substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts." *Ivan V. v. City of New York*, 407 U.S. 203, 204-05 (1972). A *Winship* violation calls into question the defendant's actual guilt or innocence because every fact necessary to constitute the crime was not proven beyond a reasonable doubt, which would likely require vacating the conviction and sentence and remanding for a new trial. *Winship*, 397 U.S. at 364.

By contrast, it is clear that a *Hurst* error does not rise to the level of substantially impairing the truth-finding function of the criminal trial because such a violation requires remand for resentencing, not a new trial or vacation of the conviction. *See, e.g., Jackson v. State*, 213 So. 3d 754 (Fla. 2017) (affirming defendant's convictions on direct appeal but remanding for a new penalty phase where "Jackson's death sentence was based not upon factual findings by a jury of his peers as required by the Sixth Amendment, but upon a nonunanimous recommendation of the jury.")

Moreover, adopting Appellant's reading of *Hurst* would upend sentencing law in general, far beyond death penalty cases. Once a Florida jury renders a valid verdict, another act on the part of the judge is a necessary aspect of the appropriate sentence. This is true of every crime. The jury renders a verdict, and then the judge decides, from options created by the legislature,

what the appropriate sentence should be. In reaching that ultimate conclusion, a trial judge may need to make several subordinate decisions-e.g., the defendant's prior criminal history,[17] his remorse (or lack thereof),[18] whether a departure sentence is appropriate under the circumstances.[19] With the exception of certain statutes that call for minimum mandatory sentences, we have a system that affords much discretion to the sentencing judge. Sometimes a judge must explain how he or she exercised that discretion, but there is always some judgment the judge must make about which sentence to impose, whether or not it is explained.

Adopting Appellant's reading of *Hurst* would imply that jury sentencing would be constitutionally compelled, and not just in capital cases. The logic of *Apprendi v. New Jersey*, 530 U.S. 466 (2002), from which the holdings in *Ring* and *Hurst v. Florida* are derived, is not confined to capital cases, so that if whatever must be decided by any participant in the system in order to impose a particular sentence is an "element," that question

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[17] *Abrams v. State*, 971 So. 2d 1033, 1035 (Fla. 4th DCA 2008) ("[t]he existence of prior convictions has long been taken into consideration by sentencing judges.") (citing § 921.001, Florida Statutes (sentencing guidelines); and § 921.002, Florida Statutes (criminal punishment code)).

[18] *Lincoln v. State*, 978 So. 2d 246 (Fla. 5th DCA 2008).

[19] *State v. Owens*, 848 So. 2d 1199 (Fla. 1st DCA 2003).

would require a jury verdict. Certainly, that cannot be what the Supreme Court intended in *Hurst v. Florida*. Justice Breyer in his concurrence adhered to his view that the Eighth Amendment requires jury sentencing in capital cases. *Hurst v. Florida*, 136 S. Ct. at 624. That view, however, did not gain a single concurring vote.

Admittedly, it has now been established that aggravating circumstances necessary for the imposition of the death penalty are necessary findings that must be made by a jury, just as any sentencing enhancement would. *Plott v. State*, 148 So. 3d 90 (Fla. 2014). However, while aggravating factors have been referred to by the courts as "elements," aggravating factors they are merely the "functional equivalent of an element." *See Summerlin,* 542 U.S. at 354 (noting that *Ring* did not alter the range of conduct punishable by death, and rejecting the contention that *Ring* "reposition[ed] Arizona's aggravating factors as elements of the separate offense of capital murder . . . .")

Moreover, it is important to note that Appellant's jury was specifically instructed that it had to find that the aggravating circumstances were proven beyond a reasonable doubt before rendering its verdict. Specifically, the jury was instructed that "[e]ach aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in

arriving at your decision." (PP4, V7: 368)

Accordingly, even if this claim was not barred, Appellant is not entitled to any relief on this claim.

VI. APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE THE FLORIDA CONSTITUTION BECAUSE THE NEW CONSTITUTIONAL RULES ARE NOT RETROACTIVE TO APPELLANT'S CASE AND THE AGGRAVATING CIRCUMSTANCES WERE NOT REQUIRED TO BE ALLEGED IN THE INDICTMENT.

Appellant argues that his death sentence violates the Florida Constitution. He also argues that the aggravating factors the State sought to use for the imposition of the death penalty were required to be alleged in the indictment. However, Appellant is incorrect.

First, as argued above under Issues I and II, the new constitutional rules do not apply retroactively to Appellant's case. Also, Florida's death sentencing scheme was held to be unconstitutional only since the rendering of the *Ring* decision in 2002, and not before that time. Appellant's death sentence was finalized in 2000. Accordingly, Appellant's claim of entitlement to relief based on the Florida Constitution must fail.

Second, Appellant also contends that he was denied his right to a proper grand jury indictment that contained the aggravating factors. He further argues that he was never formally informed of the full nature and cause of the accusations against him. However, this claim is procedurally

barred. *See Vining v. State*, 827 So. 2d 201, 213-14 (Fla. 2002) (because a challenge to the indictment could and should have been specifically objected to or pursued on appeal, it is procedurally barred).

Furthermore, even if this Court should desire to address the merits of this claim, Appellant would still not be entitled to relief. Both this Court and the United States Supreme Court have long rejected the argument that aggravating circumstances must be alleged in the indictment. *See, e.g., Pham v. State*, 70 So. 3d 485, 496 (Fla. 2011); *Rogers v. State*, 957 So. 2d 538, 554 (Fla. 2007). *See also Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) ("[a]n indictment must set forth each element of the crime that it charges. **But it need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime**." (Emphasis added); *Hurtado v. People of the State of Cal.*, 110 U.S. 516, 517-18 (1884) (finding that a capital defendant had no due process right to be indicted by a grand jury because an indictment is "merely a preliminary proceeding, and can result in no final judgment"). Notably, since the *Hurst v. State* opinion was entered, this Court has not vacated any death sentence based on the absence of aggravating factors being listed in the indictment.

Even if an allegedly incomplete indictment could somehow be attributed to a *Hurst* error, the harmless error standard would

still be applicable. *Mosley*, 209 So. 3d at 1282. Appellant has completely failed to show why an alleged error in the indictment would warrant resentencing in this case. Appellant cannot establish that the absence of the aggravating factors listed in the indictment impacted his sentence of death.

In sum, Appellant's death sentence does not violate the Florida Constitution, because he was not sentenced to death under an unconstitutional framework. Additionally, his argument that the State was required to list the aggravating factors in the indictment is without merit, as both this Court and the United States Supreme Court have held that aggravating factors are not required to be alleged in the indictment. Accordingly, Appellant's argument is without merit and he is not entitled to relief.

VII. APPELLANT IS NOT ENTITLED TO A NEW POSTCONVICTION PROCEEDING BECAUSE NEITHER *HURST V. FLORIDA* OR *HURST V. STATE* OPERATE TO BREATHE NEW LIFE INTO CLAIMS WHICH HAVE BEEN PREVIOUSLY LITIGATED AND DISPOSED.

Appellant argues that *Hurst v. Florida* and *Hurst v. State* require that his previous postconviction claims must be reheard under a new constitutional framework. (IB: 56) However, Appellant is incorrect. There is no language in *Hurst v. Florida* or *Hurst v. State* that operates to give new life to Appellant's previously litigated postconviction claims.

1. <u>The fact that Appellant may have previously raised a *Ring* claim does not entitled him to a new postconviction</u>

proceeding.

Appellant argues that he is entitled to a new postconviction proceeding because he raised a *Ring* claim in his previous habeas corpus petition. (IB: 57) However, Appellant is incorrect.

As previously stated, the Florida Supreme Court has determined that *Hurst v. Florida* does not apply retroactively to defendants like Appellant, whose sentence were final prior to the issuance of the *Ring* decision in 2002. Appellant provides no authority at all for his wholesale rejection of any concept of finality, nor does he explain why a decision that is not retroactively available to him provides a basis for re-opening a proceeding which was already finalized. The rules do not authorize this Court to revisit an identical factual claim merely because of a subsequent, non-retroactive change in the law, or to contemplate a resentencing when Appellant's sentence was finalized prior to *Ring*. Nor does Appellant provide any explanation as to how *Ring* impacts his previously litigated and disposed claims. Additionally, it is important to note that Hurst was not given a new postconviction proceeding. It does not appear that any other death row inmates have been given an opportunity for a new postconviction proceeding following a purported *Hurst* error. *See e.g., Mosley*; *Franklin v. State*, 209 So. 3d 1241 (Fla. 2016). Thus, Appellant's argument that *Ring*

entitles him to a new postconviction proceeding is without merit and should be denied.

2. Appellant's *Caldwell v. Mississippi,* 472 U.S. 320 (1985), claim is procedurally-barred.

Appellant further argues issues with the jury instructions that were given during the penalty phase proceeding. However, Appellant's claim is procedurally-barred, and even if it were not procedurally-barred, Appellant would still not be entitled to relief.

First, as previously argued, any complaint about an alleged *Caldwell* violation at this point is untimely and procedurally barred from consideration, because the claim could have been raised on direct appeal, and thus is not appropriate for a postconviction motion. *See Gorby,* 819 So. 2d at 674 n. 8 (holding that claims that could have been, or were raised on direct appeal, are procedurally barred from being raised in a postconviction motion.)

Second, for the reasons argued in Issue IV, Appellant's *Caldwell* claim is without merit and must be denied.

In sum, Appellant is not entitled to a new postconviction proceeding. There is no language in the *Hurst v. Florida* decision or the *Hurst v. State* decision that operates to breathe new life into Appellant's previously litigated and disposed claims, particularly as *Hurst v. Florida* and *Hurst v. State* is

not retroactive to Appellant's case. Accordingly, Appellant is not entitled to relief.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the trial court's order denying Appellant's successive 3.851 motion for postconviction relief.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by electronic mail to James Driscoll Esq., driscoll@ccmr.state.fl.us, David Hendry Esq., hendry@ccmr.state.fl.us, Gregory Brown Esq., brown@ccmr.state.fl.us, and support@ccmr.state.fl.us, CCRC-Middle, 12973 N. Telecom Parkway, Temple Terrace, FL 33637 on June 12, 2017.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was printed in Courier New 12 point and thereby satisfies the font requirements of Florida Rule of Appellate Procedure 9.210.

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